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OPINION, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (JANUARY 29, 2024)

NOT RECOMMENDED FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL H. PONDER,

Plaintiff-Appellant,

v.

HANS-PETER WILD,

Defendant-Appellee.

Case No. 23-5620

On Appeal from the United States District Court for the Eastern District of Kentucky

Before: SILER, MATHIS, and BLOOMEKATZ, Circuit Judges.

OPINION

MATHIS, Circuit Judge. Michael Ponder filed suit to enforce an alleged contract between himself and Hans-Peter Wild, who Ponder claims promised to pay him $3 million if he sold Wild's company for a "premium price." The district court granted summary judgment to Wild. Because the supposed terms of this

agreement were too indefinite to form a contract, we affirm.

I.

Wild is the former majority shareholder and chairman of the board of directors of the Swiss company WILD Flavors GmbH ("Wild Flavors"). Ponder became Wild Flavors's CEO on May 1, 2011. Ponder and Wild served in their respective roles until Wild Flavors was sold.

In 2013, Ponder and Wild met at Wild's condo in northern Kentucky. Wild had recently learned that the German government suspected him of tax evasion, and he feared he would be arrested if he traveled to Germany. This development convinced Wild that he needed to sell Wild Flavors to protect his business interests. So Wild told Ponder that if Ponder could "get a premium for the company," Wild would "pay [Ponder] a premium over and above" his existing CEO salary and bonuses. R. 132-2, PageID 3086. Wild later reiterated this promise when he and Ponder had dinner at Wild's house in Zug, Switzerland, telling Ponder "I will pay you 3 million dollars" if Ponder sold the company for a premium price. *Id.* at 3106. Ponder testified that Wild "was expecting" the sale to fetch between $1.5 and $2 billion. R. 144-4, PageID 4335.

On October 1, 2014, the Chicago-based food company Archer Daniels Midland purchased Wild Flavors for $3 billion. Ponder assisted with the sales process, giving management presentations and discussing the deal with potential buyers' executives. He was also instrumental in closing the sale; Ponder persuaded Wild to accept Archer Daniels Midland's offer when Wild tried to hold out for more money. Ponder and the

rest of Wild Flavors's management team received large contractual bonuses for the successful sale; Ponder's bonus totaled $9 million. But Wild never paid Ponder the additional $3 million for helping to sell Wild Flavors.

In 2019, Ponder sued Wild in state court for breach of an oral contract, and Wild removed the case to federal court. After about three years of discovery, Wild moved for summary judgment on Ponder's sole claim. In April 2023, the district court granted summary judgment to Wild. After the district court denied Ponder's motion to alter the judgment, Ponder timely appealed.

II.

We review a district court's grant of summary judgment de novo. See *Puskas v. Delaware Cnty.*, 56 F.4th 1088, 1093 (6th Cir. 2023). Summary judgment is appropriate where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Hrdlicka v. Gen. Motors, LLC*, 63 F.4th 555, 566 (6th Cir. 2023).We review a district all evidence and draw all reasonable inferences in a light most favorable to the nonmoving party. *See Palma v. Johns*, 27 F.4th 419, 427 (6th Cir. 2022).

Subject-matter jurisdiction in this case is based on diversity of citizenship and, therefore, we apply the substantive law of the forum state. *Kepley v. Lanz*, 715 F.3d 969, 972 (6th Cir. 2013). Here, the parties agree that Kentucky law applies.

III.

Ponder brings a breach-of-contract claim against Wild. Under Kentucky law, the elements of a claim for breach of contract are "1) existence of a contract; 2) breach of that contract; and 3) damages flowing from the breach of contract." *Metro Louisville/Jefferson Cnty. Gov. v. Abma*, 326 S.W.3d 1, 8 (Ky. Ct. App. 2009). "[A]n enforceable contract must contain definite and certain terms setting forth promises of performance to be rendered by each party." *Kovacs v. Freeman*, 957 S.W.2d 251, 254 (Ky. 1997) (citing *Fisher v. Long*, 172 S.W.2d 545 (Ky. 1943)). If any "essential term" is indefinite or "yet to be agreed on, there is no contract." *Brooks v. Smith*, 269 S.W.2d 259, 260 (Ky. 1954). "[I]t is essential that the contract [] be specific and the certainty required must extend to all particulars essential to the enforcement of the contract," including what a party must do to receive payment. *Warren v. Cary-Glendon Coal Co.*, 230 S.W.2d 638, 640 (Ky. 1950).

Viewing the evidence in the light most favorable to Ponder, as we must, Wild promised to pay $3 million to Ponder if Ponder secured a "premium price" for the sale of Wild Flavors. Ponder believed that Wild expected to sell Wild Flavors for $1.5 billion to $2 billion.

No one disputes that "premium price" is an essential term of Ponder and Wild's agreement. Nonetheless, "premium price" is not a "definite and certain" term in these circumstances. *Kovacs*, 957 S.W.2d at 254. Nothing in the record shows that the parties agreed on how to quantify "premium price," making it unclear exactly what sales price Ponder had

to obtain for Wild Flavors to receive his bonus. Ponder suggests that a "premium price" was any amount over $2 billion, Wild's expected sales price. But there is no evidence in the record that Wild expected this price other than Ponder's personal speculation. And no record evidence indicates that Wild considered a "premium price" to be any price above his expectations. Moreover, the dictionary definition of "premium" is "a sum over and above a regular price." *Premium*, MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com/dictionary/premium (last visited Dec. 8, 2023). Ponder never specifies the regular price of Wild Flavors, nor does he argue that there was an understood method for determining that price. Without record evidence suggesting that the parties had a mutual understanding of the regular price or the expected price, there is no way to ascertain the premium price. This lack of specificity on what Ponder had to do to trigger Wild's performance dooms his claim. *See Warren*, 230 S.W.2d at 640.

Ponder resists this conclusion and argues that summary judgment is inappropriate because "[t]he question of the existence of a contract is a question of fact for the jury to answer." *Audiovox Corp. v. Moody*, 737 S.W.2d 468, 471 (Ky. Ct. App. 1987). That is correct to the extent that the facts supporting or opposing contract formation are disputed. But whether the facts, even construed in Ponder's favor, demonstrate that Ponder and Wild formed a legally binding contract is a question of law for the court to resolve. *Univ. of Ky. v. Regard*, 670 S.W.3d 903, 911 (Ky. 2023). In determining whether parties have formed a contract, courts consider whether the parties' purported agreement contains "[t]he essential elements of a valid contract"—offer and acceptance, complete and definite

terms, and consideration. *Britt v. Univ. of Louisville*, 628 S.W.3d 1, 5 (Ky. 2021). We are not deciding whether Wild actually offered to pay $3 million to Ponder to secure a premium sales price. A jury would determine whether Wild and Ponder's conversations happened as Ponder claims they did. *Cf. Hartford Accident & Indem. Co. v. Middlesboro–LaFollette Bus Line, Inc.*, 357 S.W.2d 671, 673 (Ky. 1962) ("[W]here parties differ as to the terms of an express contract and there is evidence . . . to support the claim of each of them, it is for the jury to determine what the contract term in question is."). A jury would not, however, decide the legal question of whether the terms of Wild and Ponder's agreement were complete and definite enough to form a valid contract. *See Versailles Farm Home & Garden, LLC v. Haynes*, 647 S.W.3d 205, 209 (Ky. 2022) (holding that the "issue of contract formation" should be decided as a matter of law when "the relevant facts are undisputed").

Because we hold that the terms of the parties' agreement were too indefinite to form a contract, we need not decide whether the agreement also lacked consideration.

IV.

For these reasons, we AFFIRM the district court's judgment.

JUDGMENT, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (JANUARY 29, 2024)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL H. PONDER,

Plaintiff-Appellant,

v.

HANS-PETER WILD,

Defendant-Appellee.

No. 23-5620

On Appeal from the United States District Court for the Eastern District of Kentucky at Covington.

Before: SILER, MATHIS, and BLOOMEKATZ, Circuit Judges.

JUDGMENT

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Clerk

MEMORANDUM OPINION AND ORDER, U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (JUNE 28, 2023)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY NORTHERN DIVISION AT COVINGTON

MICHAEL H. PONDER,

Plaintiff,

v.

HANS-PETER WILD,

Defendant.

Civil Action No. 2:19-CV-166 (WOB-CJS)

Before: William O. BERTELSMAN, United States District Judge

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Plaintiff's Motion to Alter or Amend the Judgment pursuant to Federal Rule of Civil Procedure 59(e). (Doc. 144). Defendant opposes the Motion. (Doc. 145). The Court has carefully reviewed this matter and, being advised, will deny Plaintiff's Motion.

I. Factual and Procedural Background

Because the Court recited a detailed version of the facts in its prior Memorandum Opinion and Order, (Doc. 141), only a brief summary of the background of this case is necessary here. Plaintiff Michael Ponder was the CEO of WILD Flavors GmbH ("WILD Flavors"). (Doc. 7-1 ¶ 10). Defendant Dr. Hans-Peter Wild was the majority shareholder of WILD Flavors and served as the Chairman of its Board of Directors, making him Ponder's direct supervisor. (Doc. 130-5 at 2; Doc. 132 at 1).

Ponder alleges that, in November 2013, Wild told him:

> We have to sell the company. Sell the company. I will pay you 3 million dollars. I will make sure that the promises that I've made to pay you the 3 million dollars in the past, I will make sure it is done. But you need to sell the company. You need the premium. You need to get—protect my assets or protect [me] . . .

(Doc. 132 at 1–2; Doc. 132-2, Ponder Dep. at 99:12–18). Lezlie Gunn testified that she was present for that alleged conversation and that Wild did promise Ponder a personal bonus of $3 million in connection with the sale of the company. (Doc. 132-3, Gunn 6/8/21 Dep. at 124:3–8).

On October 1, 2014, WILD flavors sold for over $3 billion, which was, according to Ponder, at least $1 billion over Wild's asking price. (Doc. 7-1 ¶ 18; Doc. 132 at 2). Shortly thereafter, Ponder alleged that Wild refused to wire him the $3 million he was owed. (Doc. 7-1 ¶ 32).

Accordingly, Ponder filed the instant case against Wild claiming breach of contract. (*Id.* ¶¶ 35–39). After the close of discovery, Wild filed a motion for summary judgment on the merits of Ponder's claim. (Doc. 130). This Court granted that motion, finding that Ponder could not demonstrate the existence of an enforceable contract with definite and certain terms and that the alleged contract lacked consideration. (Doc. 141 at 22–33). The Court then entered a corresponding judgment in Wild's favor. (Doc. 142).

II. Analysis

"Under Rule 59, a court may alter the judgment based on: '(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice.'" *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010) (quoting *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005)). A district court generally "has considerable discretion" to decide whether to grant a Rule 59 motion. *Id.* (citing *Morse v. McWhorter*, 290 F.3d 795, 799 (6th Cir. 2002)).

"Rule 59(e) allows for reconsideration; it does not permit parties to effectively 're-argue a case.'" *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008) (quoting *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998)). "Rule 59 motions are 'extraordinary . . . and seldom granted'. . . ." *Mischler v. Stevens*, No. 7:13-CV-8, 2014 WL 5107477, at *1 (E.D. Ky. Sept. 29, 2014) (quoting *Mitchell v. Citizens Bank*, No. 3:10-00569, 2011 WL 247421, at *1 (M.D. Tenn. Jan. 26, 2011)).

Rule 59(e) is not a vehicle to relitigate previously considered issues, to submit evidence which could

have been submitted previously in the exercise of reasonable diligence, or to attempt to obtain reversal of a judgment by offering arguments that were previously presented. *Id.* (citing *Gilley v. Eli Lilly & Co.*, 2014 WL 619583, at *2 (E.D. Tenn. Feb. 18, 2014)).

"The clear error of law standard under Rule 59(e) is exceptionally high, requiring the movant to 'establish not only that the errors were made, but that these errors were so egregious that an appellate court would not affirm the judgment.'" *Grace v. Kentucky*, No. 5:20-CV-00036-TBR, 2021 WL 5702436, at *2 (W.D. Ky. Dec. 1, 2021), *aff'd*, No. 22-5019, 2022 WL 18145564 (6th Cir. Nov. 22, 2022) (quoting *Salinas v. Hart*, No. CV 15-167-HRW, 2020 WL 1560061, at *3 (E.D. Ky. Apr. 1, 2020)).

To constitute "newly discovered evidence," the evidence must have been previously unavailable. *Leisure Caviar*, 616 F.3d at 614 (citing *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999)). To establish "manifest injustice," a movant must show that there is "a fundamental flaw in the court's decision that without correction would lead to a result that is both inequitable and not in line with applicable policy." *Hazelrigg v. Kentucky*, No. 5:13-CV-148-JMH, 2013 WL 3568305, at *1–2 (E.D. Ky. July 11, 2013) (internal citation omitted). This standard presents "a high hurdle." *Westerfield v. United States*, 366 F. App'x 614, 620 (6th Cir. 2010).

A. Terms of the Contract

First, Ponder argues that the Court "inadvertently" failed to consider Gunn's testimony in making the determination that the terms of the alleged contract were indefinite and uncertain. (Doc. 144 at

2). However, the Court did consider the testimony from Gunn's deposition on June 8, 2021. (*See* Doc. 141 at 3) (citing Doc. 131-3, Gunn 6/8/21 Dep. at 123:6–10, 123:25–124:8).

During that deposition, Gunn testified to the same alleged contract as Ponder: that Wild promised to pay Ponder $3 million if Ponder "g[o]t a premium price" for the business. (Doc. 144-1, Gunn 6/8/21 Dep. at 121:2–9, 124:4–6). Although Gunn testified that "everyone knows" Wild did not expect "more than 1.2, maximum 1.5 billion," she did not testify during that deposition that Ponder and Wild ever discussed what sale price equated to "a premium price." (*See id.* at 122:1–4).

Accordingly, as discussed at length in the Court's prior Memorandum Opinion and Order, Gunn and Ponder's unsupported assumptions regarding an essential term cannot support a finding of enforceability under the applicable "clear and convincing evidence" standard. *See Auto Channel, Inc. v. Speedvision Network, LLC*, 144 F. Supp. 2d 784, 791 (W.D. Ky. 2001) (citing *Indus. Equip. Co. v. Emerson Elec. Co.*, 554 F.2d 276, 288 (6th Cir. 1977)).

Ponder now introduces, for the first time, additional testimony offered by Gunn during a deposition on August 25, 2022. (Doc. 144 at 2–3; Doc. 144-2, Gunn 8/25/22 Dep.). On that day, Gunn did testify that Ponder asked Wild, "What do you expect?" and Wild responded that he expected $1.2 or $1.5 billion from the sale. (Doc. 144-2, Gunn 8/25/22 Dep. at 290:6–9).

However, Ponder has not established or even argued that the transcript of Gunn's second deposition, which was prepared on September 12, 2022, (*see id.* at

422), was unavailable to him when he filed his response to Wild's motion over five months later on February 16, 2023, (Doc. 132), or that it could not have been submitted then for some other reason, despite the exercise of reasonable diligence. Therefore, that testimony is not "newly discovered evidence," and the Court will not consider it. *See Engler*, 146 F.3d at 374 (finding that an argument that a party could have but did not raise before the district court's initial ruling was barred in the context of a Rule 59(e) motion).

The Court also previously considered Ponder's deposition testimony, which referenced his subjective belief that $1.5 to $2 billion would constitute a "premium price," and the 2016 email chain between Ponder and Wild, which does not reference any prior agreement as to what specific sale price Ponder needed to secure in order to meet his obligations under the alleged contract. (*See* Doc. 141 at 26–28). Ponder may not attempt to relitigate whether that evidence establishes an agreement with definite and certain terms by raising the same arguments the Court already considered and found to be lacking.

Further, Ponder's argument that "[t]he Court inadvertently determined that the 'when' term of the contract was not certain" misapprehends the Court's reasoning. (*See* Doc. 144 at 5). The Court did not find that the contract failed because it lacked a specified time for performance, but rather held that the alleged contract did not provide when Wild's obligation to pay Ponder would be triggered. (Doc. 141 at 27). In other words, it failed to adequately define what sale price Ponder needed to obtain in order to earn the bonus.

In some cases, whether a contract exists turns on questions of fact that must be decided by a jury. *See*

Audiovox Corp. v. Moody, 737 S.W.2d 468, 471 (Ky. Ct. App. 1987). However, when "subordinate factual determinations" are undisputed, whether a contract exists is a question of law. *Indus. Equip.*, 554 F.2d at 284; *see also Hickey v. Glass*, 149 S.W.2d 535, 536 (Ky. Ct. App. 1941) (finding that whether a contract was formed was a question of fact, but whether that alleged contract, if formed, could be enforced was a question of law).

Here, although Wild disputes that he made the alleged promise, the Court assumed that Ponder and Gunn's testimony regarding Wild's statements was true, as it must in the context of Wild's motion for summary judgment. *See Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 992 (6th Cir. 1997) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)) ("In determining whether there exists a genuine issue of material fact, the court must resolve all ambiguities and draw all factual inferences in favor of the non-moving party."). Accordingly, just as in *Industrial Equipment* and *Hickey*, the Court found that, even if the facts were as Ponder had argued them to be and the alleged promise had been made, no enforceable contract existed.

As the Court previously held, Ponder has failed to point to evidence from which a reasonable jury could conclude that the parties agreed on definite and certain terms regarding the parameters of each party's performance. Accordingly, under Kentucky law, this renders the alleged contract unenforceable. *See Kovacs v. Freeman*, 957 S.W.2d 251, 254 (Ky. 1997) (citing *Fisher v. Long*, 172 S.W.2d 545 (Ky. 1943)). Thus, there are no issues of fact that require submission to a jury because the Court found that

Ponder's claim fails on the legal issue of enforceability.

B. Consideration

The Court also found that Ponder's breach of contract claim failed because it lacked consideration. (Doc. 141 at 29). Ponder now argues that the Court mischaracterized the law and caused manifest injustice because it failed to conclude that the testimony of Mark Greenberg, Wild's expert, was evidence from which a reasonable jury could find that Ponder provided consideration for the alleged contract. (Doc. 144 at 6–7).

Although the Court did reference Ponder's then-pending motion to exclude Greenberg's testimony in its analysis, the Court did not base its decision on the fact that Ponder had filed such a motion. (*See* Doc. 141 at 31–32). Rather, the Court agreed with a point that Ponder made in his motion: Greenberg's testimony regarding CEOs' duties in other companies cannot establish what Ponder's specific responsibilities were as the CEO of WILD Flavors. (*See id.*). That Ponder may now wish to retract that argument does not alter the Court's finding that the language in Ponder's employment contract and his own testimony establish that he was already contractually obligated to participate in the business activities of WILD Flavors, which include discussing the business with potential buyers. (*See id.* at 30–33).

The Court did not find that Greenberg's testimony was improper under the Federal Rules of Evidence, but rather concluded that Greenberg's generalizations did not overcome other, more specific evidence to create a genuine issue of material fact. Ponder may not relitigate this issue under Rule 59(e). *See Jones v.*

Nat. Essentials, Inc., 740 F. App'x 489, 495 (6th Cir. 2018) (internal citation omitted) ("Rule 59(e) does not exist to provide an unhappy litigant an opportunity to relitigate issues the court has already considered and rejected.").

The Court did not make a clear error of law and Ponder has failed to point to any fundamental flaws in the Court's reasoning that would surmount the "high hurdle" presented by the manifest injustice standard. Because Ponder has also failed to offer any newly discovered evidence or argue that there has been an intervening change in controlling law, his Motion to Alter or Amend the Judgment Pursuant to Rule 59(e) will be denied.

Conclusion

Therefore, for the reasons stated above, IT IS ORDERED that Plaintiff's Motion to Alter or Amend the Judgment (Doc. 144) be, and is hereby, DENIED.

This 28th day of June 2023.

Signed by:

/s/ William O. Bertelsman
United States District Judge

MEMORANDUM OPINION AND ORDER, U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (APRIL 24, 2023)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY NORTHERN DIVISION AT COVINGTON

MICHAEL H. PONDER,

Plaintiff,

v.

HANS-PETER WILD,

Defendant.

Civil Action No. 2:19-CV-166 (WOB-CJS)

Before: William O. BERTELSMAN, United States District Judge

MEMORANDUM OPINION AND ORDER

This is a diversity action brought by Michael Ponder against Hans-Peter Wild for breach of contract stemming from the sale of a company in 2014. Currently before the Court are Plaintiff's Motion to Exclude the Testimony of Defendant's Expert, (Doc. 128), Defendant's Motion for Summary Judgment for

Lack of Personal Jurisdiction, (Doc. 129), and Defendant's Motion for Summary Judgment as to Plaintiff's Breach of Contract Claim, (Doc. 130).

The Court has carefully reviewed this matter and, being advised, now issues the following Memorandum Opinion and Order.

I. Factual and Procedural Background

A. Plaintiff's Employment

In 1998, Plaintiff Michael Ponder ("Ponder") was hired as President of North American Operations of Wild Flavors, Inc. ("WFI"), a Delaware corporation that owned and operated facilities in various locations throughout the world including in Erlanger, Kentucky. (Doc. 7-1 ¶ 6; Doc. 129-2, Wild Aff. ¶¶ 7-8). In 2005, Wild Affiliated Holdings, Inc. ("WAH") was organized in Nevada and the outstanding shares in WFI were transferred to it. (Doc. 129-2, Wild Aff. ¶ 8). Ponder was then named President and CEO of WAH. (Doc. 7-1 ¶ 7; Doc. 129 at 2). In 2010, a third corporation, WILD Flavors, was organized in Switzerland. (Doc. 129 at 2; Doc. 129-2, Wild Aff. ¶ 9). The outstanding shares in WAH were transferred to WILD Flavors and, thus, Ponder became President and CEO of WILD Flavors. (Doc. 7-1 ¶ 10; Doc. 129 at 2-3; Doc. 129-2, Wild Aff. ¶ 9).

While Ponder alleges that he lived in Kentucky for a substantial portion of each year in order to work at WILD Flavor's facility in Erlanger, he was undisputedly a legal resident of Nevada at all relevant points. (Doc. 129 at 9; Doc. 131 at 13).

Defendant Dr. Hans-Peter Wild ("Wild"), a resident of Switzerland, owned 65% of the shares of WILD Flavors, and KKR Columba Four S.à.r.l. ("KKR") owned the remaining 35%. (Doc. 129 at 3; Doc. 129-2, Wild Aff. ¶¶ 3, 5; Doc. 132 at 1). Wild also served as Chairman of the Board of Directors of WILD Flavors and directly supervised Ponder. (Doc. 7-1 ¶ 6; Doc. 129 at 3; Doc. 129-5 at 2; Doc. 132 at 1).

B. The Alleged Contract

In 2013, Wild and KKR began efforts to sell WILD Flavors. (Doc. 129 at 3; Doc. 129-2, Wild Aff. ¶ 10). As part of these efforts, Ponder alleges that, in November 2013, Wild told him

> We have to sell the company. Sell the company. I will pay you 3 million dollars. I will make sure that the promises that I've made to pay you the 3 million dollars in the past, I will make sure it is done. But you need to sell the company. You need the premium. You need to get—protect my assets or protect [me] . . .

(Doc. 131 at 2-3; Doc. 131-2, Ponder Dep. at 99:12-18).

While Ponder's Complaint reflects that Wild's alleged promise was made during a dinner at Wild's house in Switzerland, (Doc. 7-1 ¶ 14), Ponder testified that the promise was originally made while Wild was "curled up on the sofa" in his Kentucky condo and merely reiterated in a "more formal statement" in Switzerland, (Doc. 131-2, Ponder Dep. at 99:10-21). Lezlie Gunn ("Gunn") testified that she was present in Kentucky for the alleged meeting between Ponder and Wild and that Wild did promise Ponder a personal

bonus of $3 million in connection with the sale of the company. (Doc. 131-3, Gunn Dep. at 123:6-10, 123:25-124:8).

On October 1, 2014, all of the issued and outstanding shares in WILD Flavors were sold to Archer Daniels Midland Company ("ADM") for over $3 billion, which was, according to Ponder, at least $1 billion over Wild's asking price. (Doc. 7-1 ¶ 18; Doc. 129 at 3). When Ponder then requested specific wiring instructions for the $3 million payment, Wild declined to pay. (Doc. 7-1 ¶ 32). However, Ponder did receive a bonus of approximately $9 million under a company-wide exit bonus program for managers. (Doc. 129-3, Ponder Dep. at 106:19-23; Doc. 130 at 4).

C. Procedural History

The Court has previously observed that Wild and Ponder, in addition to witness Gunn, have a history of contentious litigation in both this Court and others around the world. (Doc. 103 at 3). Specifically regarding this claim, Ponder previously filed two complaints in the District of Nevada and both were dismissed for lack of personal jurisdiction over Wild. (Doc. 129 at 3-4). Ponder filed the instant case in Kenton County Circuit Court, alleging one count against Wild: breach of contract. (Doc. 7-1). On November 19, 2019, Wild removed the case to this Court on the basis of diversity of citizenship. (Doc. 7).

Thereafter, Wild filed a motion to dismiss for lack of personal jurisdiction and forum non conveniens. (Doc. 9). On June 10, 2020, the Court held an oral argument on the motion and denied it, finding that Wild is subject to personal jurisdiction in this Court under the "transacting business" prong of Kentucky's

long-arm statute. (Doc. 26 at 1). After several protracted discovery disputes, discovery closed in this matter on January 7, 2023. (Doc. 127 at 2).

At the close of summary judgment briefing, this Court ordered the parties to engage in settlement negotiations and to subsequently file a status report detailing the outcome of those negotiations. (Doc. 137 at 1). On April 20, 2023, the parties reported that they had not reached a settlement and that Wild does not believe that further settlement conferences or court-ordered mediation would be productive. (Doc. 140 at 1).

II. Analysis

A. Personal Jurisdiction

Ordinarily, a plaintiff must prove that a court has personal jurisdiction over the defendant by a preponderance of the evidence. *Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1272 (6th Cir. 1998) (citing *Serras v. First Tenn. Bank Nat'l Ass'n*, 875 F.2d 1212, 1214 (6th Cir. 1989)). However, where, as here, the court has not held an evidentiary hearing on the jurisdictional question,[1] the plaintiff need only make a prima facie showing of jurisdiction. *See id.* (citing *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996)). This standard applies even if discovery has been completed and submitted to the court. *See id.*; *see also Lightyear Commc'ns, Inc. v. Xtrasource, Inc.*, No. 3:02-CV-687-H, 2004 WL 594998, at *1-2 (W.D. Ky. Feb. 4, 2004).[2]

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[1] Neither party requested an evidentiary hearing.

[2] Wild argues that, because the case is at the summary judgment stage rather than the motion to dismiss stage, Ponder's burden

Further, a court must not weigh the controverting assertions of the party seeking dismissal when determining whether it has personal jurisdiction over that party. *Dean*, 134 F.3d at 1272 (citing *CompuServe*, 89 F.3d at 1262); *Theunissen v. Matthews*, 935 F.2d 1454, 1458-59 (6th Cir. 1991). Accordingly, the court must construe the facts in the light most favorable to the nonmoving party. *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 887 (6th Cir. 2002) (citing *Serras*, 875 F.2d at 1214).

"A federal court sitting in diversity must apply the law of the forum state to determine whether it may exercise jurisdiction over the person of a nonresident defendant." *Theunissen*, 935 F.2d at 1459 (internal citations omitted). In Kentucky, the personal jurisdiction analysis has two steps. *Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51, 57 (Ky. 2011). First, a court must determine whether the defendant's conduct fits into one of the enumerated categories in Kentucky's long-arm statute, K.R.S. § 454.210, and, if so, whether the cause of action arises from that conduct. *Id.* Second, the court must decide whether exercising personal jurisdiction would offend the defendant's federal due process rights. *Id.*

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rises from a prima facie showing to a showing by a preponderance of the evidence. (Doc. 129 at 6-7; Doc. 135 at 2-3). However, he has not cited binding case law that stands for this proposition. The higher burden Wild references would apply, however, if he renewed his personal jurisdiction argument at trial. *See Serras*, 875 F.2d at 1214 (opining that the preponderance of the evidence standard applies if the court holds an evidentiary hearing or hears evidence on personal jurisdiction at trial).

i. Kentucky's Long-Arm Statute

Here, Ponder argues that Wild's conduct fits into the "[t]ransacting any business in this Commonwealth" category and thus satisfies K.R.S. § 454.210(2)(a)(1). (Doc. 131 at 5-6).[3] Because there has been little state case law interpreting the meaning of "transacting any business," federal courts have adopted several different interpretations. *Est. of Gibson ex rel. Shadd v. Daimler N. Am. Corp.*, No. 2:19-00095 (WOB-CJS), 2022 WL 16703129, at *5 (E.D. Ky. Nov. 3, 2022) (citing *Hall v. Rag-O-Rama, LLC*, 359 F. Supp. 3d 499, 505 (E.D. Ky. 2019)).

However, only one of those approaches comports with the Court's duty to apply Kentucky law when analyzing personal jurisdiction in a diversity case. *See id.* Accordingly, the relevant question is "whether there was 'a course of direct, affirmative actions within a forum that result in or solicit a business transaction.'" *Id.* (quoting *Mod. Holdings, LLC v. Corning, Inc.*, No. 13-CV-405, 2015 WL 1481443, at *6 (E.D. Ky. Mar. 31, 2015)).

Although this Court previously determined that Wild's conduct satisfied the "transacting any business" standard, it relied on a factual allegation that the title to company-owned property in Kentucky was changed when ADM purchased WILD Flavors. (Doc. 29, Tr. at

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[3] Ponder briefly argues that Wild's conduct fits into the second category of the long-arm statute, for contracting to supply services or goods in Kentucky, but notes that this argument is "more of a stretch" and thus focuses his attention on the "transacting any business" prong. (Doc. 131 at 5). Accordingly, the Court will also focus on the "transacting any business" category.

6:4-9, 8:1-14, 14:24-25). However, after discovery, the parties agree that the transaction at issue was a stock sale, meaning that only ownership of shares, not direct ownership of any real property, was altered. (Doc. 129 at 6; Doc. 131 at 2). Nonetheless, the Court concludes that its prior finding of personal jurisdiction over Wild is supported by other sufficient evidence.

Ponder's Complaint alleges that the contract at issue was formed during a dinner at Wild's house in Switzerland, (Doc. 7-1 ¶ 14), but Ponder later testified that the promise was originally made while Wild was "curled up on the sofa" in his Kentucky condo and merely reiterated in a "more formal statement" in Switzerland, (Doc. 131-2, Ponder Dep. at 99:10-21). Wild argues that the Court may not properly rely on this portion of Ponder's deposition testimony because it is contradicted by other portions of his testimony from the same deposition and his testimony in connection with other lawsuits. (Doc. 135 at 5-7). Indeed, the Sixth Circuit has held that "a plaintiff's internally contradictory testimony cannot, by itself, create a genuine dispute of material fact." *Bush v. Compass Grp. USA, Inc.*, 683 F. App'x 440, 449 (6th Cir. 2017) (collecting cases).

However, Ponder's testimony in this matter does not directly contradict either itself or his Verified Complaint. Ponder testified that when Wild made the alleged promise in Kentucky, he also stated, "I will make sure that the promises that I've made to pay you the 3 million dollars in the past, I will make sure it is done." (Doc. 131-2, Ponder Dep. at 99:10-16). Thus, it is not directly contradictory for him to testify that the first promise Wild made to pay him $3 million was while they were in Switzerland because he also testified

that the most recent promise, which included and referenced the others, was made in Kentucky. (Doc. 135-1, Ponder Dep. at 250:10-11, 250:20-25).[4] Further, Ponder's testimony clarified that his Complaint referenced the reiteration of the Kentucky promise when the parties were again in Switzerland.

Ponder's testimony that the alleged agreement occurred in Kentucky is also corroborated by the testimony of Gunn, a third party to this action. (*See* Doc. 131-3, Gunn Dep. at 123:6-10, 123:25-124:8). Additionally, Wild does not dispute that he sometimes stayed in the Kentucky condo where Ponder and Gunn claim the promise was made. (*See* Doc. 135 at 9-10). Nancy Zeilman ("Zeilman"), Ponder's Executive Assistant, also confirmed that Wild "was present in the Erlanger, Kentucky facility and conducted business there." (Doc. 131-4, Zeilman Aff. ¶ 7). Because, as discussed above, the Court must construe the facts in the light most favorable to Ponder, it must proceed as if Wild made the promise on which Ponder's suit is based while both parties were in Kentucky, not Switzerland.

The "key inquiry" for analyzing personal jurisdiction focuses on the activities of the defendant, not the activities of the plaintiff. *Churchill Downs, Inc. v. NLR Ent., LLC*, No. 3:14-CV-166-H, 2014 WL 2200674, at *6 (W.D. Ky. May 27, 2014) (citing *Spectrum Scan, Inc. v. AGM CA*, No. 3:07-CV-72-H, 2007 WL 2258860, at *3 (W.D. Ky. Aug. 2, 2007)).

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[4] Wild also notes that Ponder testified that the initial promise was made in Switzerland in another action, but provides no context for the relevant issues in that case or Ponder's testimony in connection with it. (*See* Doc. 135 at 6; Doc. 135-2, Ponder Dep. in 2:16-CV-02925-JCM-GWF at 326:21-327:25).

Accordingly, a court in this District found that, where the defendant communicated and negotiated with the Kentucky-based plaintiff via phone calls and emails, made payments to the plaintiff in Kentucky, and the plaintiff performed its contractual obligations in Kentucky, the defendant's contacts were insufficient to amount to "transacting any business" because the defendant "lack[ed] any other appreciable contacts with Kentucky." *Net Clicks, LLC v. LKQ Corp.*, No. 21-143-DLB-CJS, 2022 WL 3654860, at *5 (E.D. Ky. Aug. 24, 2022) (internal citations omitted). However, the same court found that, where the defendant business recruited and hired the plaintiff as an employee in Kentucky and maintained an active business relationship with her in Kentucky, the defendant had transacted business in Kentucky. *Hall*, 359 F. Supp. 3d at 506.

Here, the Court, construing the facts in the light most favorable to Ponder, finds that Wild solicited Ponder's services to sell his shares in a company with Kentucky-based assets while both men were physically present in Kentucky. Additionally, Zeilman testified that Ponder spent around half of his time working out of his Kentucky office and performed many of the tasks related to the sale of WILD Flavors while in Kentucky. (Doc. 131-4, Zeilman Aff. ¶¶ 3-4, 6).

The fact that Ponder performed some of his obligations under the alleged contract in Kentucky does not, alone, give this Court jurisdiction over Wild but, just as in *Hall*, here, Wild entered into a transaction for Ponder's services knowing, as his direct supervisor, that Ponder spent a significant portion of his time working out of his Kentucky office. Thus, personal jurisdiction over Wild is not based merely on

his ownership of shares in a company that, through its subsidiaries, owned a facility in Kentucky, but rather is based on the alleged promise he personally made in Kentucky to an individual who he knew worked out of a Kentucky office in order to sell his shares in a company that owned, among other assets, a facility in Kentucky.

Unlike in *Net Clicks*, Wild did not communicate with Ponder remotely, but was physically located in Kentucky when he made the alleged promise because he, like Ponder, was working out of WILD Flavors's Kentucky facility. Thus, contrary to Wild's argument, this is not a case in which Wild's only contact with Kentucky was a single contract that contemplated no future consequences in the state. (*See* Doc. 135 at 7-8). Instead, Wild, while in Kentucky in connection with the business of WILD Flavors, asked Ponder to sell the company and thereby caused the Kentucky facility, in addition to other company assets, to come under the control of a new owner.

Although Wild points out that his obligation under the alleged contract, to wire the $3 million to Ponder, was not set to be performed in Kentucky, (Doc. 129 at 13), this is not a dispositive factor in light of the evidence of Wild's other contacts with Kentucky. Further, the cases Wild cites in support of his argument are distinguishable, as none of the defendants in those cases formed or negotiated the contracts at issue while physically located in Kentucky.[5] Therefore,

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[5] *See Valvoline, LLC v. Harding Racing, LLC*, No. 5:20-CV-00168-GFVT, 2021 WL 356895, at *4-5 (E.D. Ky. Feb. 2, 2021) (finding that the court did not have personal jurisdiction over a defendant who had no employees or physical locations in Kentucky and the contract at issue was negotiated in Indiana);

Wild's conduct fits within the "transacting any business" category of Kentucky's long-arm statute, as he exhibited "a course of direct, affirmative actions within [Kentucky] that result[ed] in [and] solicit[ed] a business transaction." *See Mod. Holdings*, 2015 WL 1481443, at *6.[6]

Further, Ponder's claim "arises from" the business Wild transacted in Kentucky. The Kentucky Supreme

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CSX Transp., Inc. v. S. Coal & Land Co., Inc., No. 3:19-CV-00056-GFVT, 2020 WL 2772074, at *4 (E.D. Ky. May 27, 2020) (finding a lack of personal jurisdiction over a defendant who did not enter into or negotiate a transaction in Kentucky but rather acted from its office in Alabama); *Pharmerica Corp. v. Advanced HCS LLC*, No. 3:15-CV-213-DJH, 2017 WL 903462, at *8-9 (W.D. Ky. Mar. 7, 2017) (finding a lack of personal jurisdiction where the defendant had no physical presence in Kentucky, a meeting regarding the agreement at issue took place in New York, and the defendants corresponded with the plaintiff's employees in Kentucky via email and letters); *Gentry v. Mead*, No. 16- 100-DLB-CJS, 2016 WL 6871252, at *3 (E.D. Ky. Nov. 21, 2016) (finding that the court did not have personal jurisdiction over a defendant who never traveled to Kentucky and executed a contract with a Kentucky-based plaintiff elsewhere); *Philmo, Inc. v. Checker Food Holding Co.*, No. 1:15-CV-00098-JHM, 2016 WL 1092862, at *3 (W.D. Ky. Mar. 21, 2016) (finding a lack of personal jurisdiction where the defendants did not seek out business in Kentucky and never sent representatives to Kentucky or held meetings in Kentucky during the parties' contractual relationship); *McDermott v. Johnston L. Off., P.C.*, No. 1:15-CV-00095-GNS, 2016 WL 1090624, at *3 (W.D. Ky. Mar. 18, 2016) (finding a lack of personal jurisdiction where the plaintiff did not assert that the defendants visited her in Kentucky in connection with their contract for legal services in another state).

[6] While Wild's alleged conduct is sufficient to satisfy the "transacting any business" prong of Kentucky's long-arm statute, this conclusion does not require a finding that he formed a valid and enforceable contract with Ponder. The parties' arguments regarding Ponder's breach of contract claim are addressed separately below.

Court has held that this requirement is satisfied if the plaintiff's "cause of action . . . originated from, or came into being, as a result of [the defendant's] 'transacting business' . . . in Kentucky." *Caesars*, 336 S.W.3d at 58. Thus, jurisdiction may be properly exercised "[i]f there is a reasonable and direct nexus between the wrongful acts alleged in the complaint and the statutory predicate for long-arm jurisdiction. . . . " *Id.* at 59.

Here, Ponder is suing for breach of the alleged contract Wild formed with him in Kentucky. Thus, there is "a reasonable and direct nexus" between Ponder's claim that Wild failed to fulfill his contractual obligations and the business Wild transacted in Kentucky by promising to fulfill those obligations.

The Court finds that Ponder has made a prima facie showing that Kentucky's long-arm statute is satisfied.

ii. Federal Due Process

Next, the Court must turn to whether personal jurisdiction over Wild is permitted under federal due process. There are two types of personal jurisdiction a court may find under a federal due process analysis: general and specific. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021) (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

a. General Jurisdiction

Courts "may exercise general jurisdiction only when a defendant is 'essentially at home' in the State." *Id.* (quoting *Goodyear*, 564 U.S. at 919). In "the 'paradigm' case, an individual is subject to general

jurisdiction in [their] place of domicile." *Id.* (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014)). A person's domicile is the place where they have "a true, fixed home and principal establishment, and to which, whenever that person is absent from the jurisdiction, he or she has the intention of returning. . . . " 13E Charles Alan Wright & Arthur Miller, *Fed. Prac. & Proc. Juris.* § 3612 (3d ed. 2021).

Here, Ponder argues that this Court has general jurisdiction over Wild based on his frequent visits to Kentucky, his office in Kentucky, and his condo in Kentucky,[7] among other contacts. (Doc. 131 at 9). However, Wild is undisputedly a citizen and resident of Switzerland and has been at all relevant points.

Further, this Court has previously found, in another case, that it did not have general jurisdiction over Wild because his Kentucky condo was not a place he ever intended to stay in primarily and indefinitely as if it were his "home" and his business activities in connection with WILD Flavors were not sufficient to render him personally "at home" in Kentucky. *See Gunn v. Wild*, No. 2:20-CV-150 (WOB), 2021 WL 5853586, at *3 (E.D. Ky. Dec. 9, 2021), *aff'd*, No. 22-5015, 2022 WL 18401276 (6th Cir. Sept. 13, 2022), *cert. denied*, No. 22-477, 2023 WL 350016 (U.S. Jan. 23, 2023). Accordingly, the Court sees no reason to disturb its prior ruling and finds that it lacks general jurisdiction over Wild.

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[7] Wild disputes that he ever owned the Kentucky condo. (Doc. 135 at 10).

b. Specific Jurisdiction

For a court to exercise specific jurisdiction, a three-part test must be satisfied: (1) the defendant must purposefully avail himself of the privilege of acting in the forum state; (2) the cause of action must arise from the defendant's activities in the forum state; and (3) the defendant's conduct in the forum state must be substantial enough to make the exercise of jurisdiction over the defendant reasonable. *Air Prods. & Controls, Inc. v. Safetech Int'l, Inc.*, 503 F.3d 544, 550 (6th Cir. 2007) (citing *S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968)).

As to the first part, "[t]he purposeful availment requirement 'ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts.'" *Hall*, 359 F. Supp. 3d at 508 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). "Purposeful availment is present when a defendant creates a 'substantial connection' with the forum state such that he 'should reasonably anticipate being haled into court there.'" *Id.* (quoting *Burger King*, 471 U.S. at 474-75).

Although entering into a contract with a party based in the forum state is not enough alone to automatically establish purposeful availment, purposeful availment may be found based on the presence of additional factors including prior negotiations, contemplated future consequences, the terms of the contract, and the parties' actual course of dealing. *Air Prods.*, 503 F.3d at 551 (citing *Burger King*, 471 U.S. at 478-79).

Here, as discussed above, the Court must construe the facts in the light most favorable to Ponder and it

thereby finds that Wild solicited a business transaction with Ponder while physically located in Kentucky in order to sell his shares in a business with assets in Kentucky. Just as in *Hall*, where the purposeful availment prong was satisfied when the parties entered into a long-term business relationship pursuant to which the plaintiff performed a significant amount of work in Kentucky, here, Wild and Ponder entered into a business relationship that lasted nearly a year, pursuant to which Ponder performed a significant amount of work from his Kentucky office. *See* 359 F. Supp. 3d at 510. Further, Wild initiated the formation of this business relationship in Kentucky by making the initial promise to Ponder, which also weighs in favor of purposeful availment. *See id.*; *Air Prods.*, 503 F.3d at 551-52.

This case is unlike *Gunn v. Wild*, in which this Court found that Wild did not purposefully avail himself of Kentucky law by executing a contract in Switzerland where there was no indication that the contract would be fulfilled in or for someone in Kentucky. *See* 2021 WL 5853586, at *4. Instead, here Wild did purposefully avail himself of Kentucky law by entering into an alleged transaction in Kentucky in order to facilitate the sale of WILD Flavors, which owned assets in Kentucky, with the knowledge that Ponder would perform at least some of his services in furtherance of that transaction from his Kentucky office.

Second, to satisfy the "arising from" prong of the specific jurisdiction test, "the plaintiff must demonstrate a causal nexus between the defendant's contacts with the forum state and the plaintiff's alleged cause of action." *Beydoun v. Wataniya Rests. Holding, Q.S.C.*, 768 F.3d 499, 506-07 (6th Cir. 2014) (citing

Burger King, 471 U.S. at 474). This requirement "is satisfied when the operative facts of the controversy arise from the defendant's contacts with the state." *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 723 (6th Cir. 2000) (citing *S. Mach. Co.*, 401 F.2d at 384). "[T]he plaintiff's cause of action must be proximately caused by the defendant's contacts with the forum state." *Beydoun*, 768 F.3d at 507-08.

"However, [t]he arising out of standard is a lenient one." *Hall*, 359 F. Supp. 3d at 512 (internal citation and quotation marks omitted). As discussed above, Ponder's claim that Wild breached his contractual obligation to pay him $3 million was proximately caused by the promise Wild allegedly made in Kentucky to pay that sum. Thus, this "lenient" standard is satisfied.

Under the third prong, "the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable." *S. Mach. Co.*, 401 F.3d at 381 (footnote omitted). "[A]n inference of reasonableness arises where the first two criteria are met and . . . 'only the unusual case will not meet this third criterion.'" *Theunissen*, 935 F.2d at 1461 (quoting *Am. Greetings Corp. v. Cohn*, 839 F.2d 1164, 1170 (6th Cir. 1988)). In determining whether exercising jurisdiction is reasonable, courts should consider factors including: (1) the burden on the defendant; (2) the interest of the forum state; (3) the plaintiff's interest in obtaining relief; and (4) other states' interest in securing the most efficient resolution of the controversy. *Air Prods.*, 503 F.3d at 554-55 (citing *Intera Corp. v. Henderson*, 428 F.3d 605, 618 (6th Cir. 2005)).

Although Wild is a resident of Switzerland, this is not dispositive, as the Sixth Circuit has "upheld specific jurisdiction in cases where doing so forced the defendant to travel." *Youn v. Track, Inc.*, 324 F.3d 409, 420 (6th Cir. 2003) (collecting cases). Even though "'great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field,'" jurisdiction can still be reasonable over a party who resides outside the United States particularly where, as here, the parties have already conducted discovery across borders and the relevant witnesses speak English. *See Fortis Corp. Ins. v. Viken Ship Mgmt.*, 450 F.3d 214, 223 (6th Cir. 2006) (quoting *City of Monroe Emps. Ret. Sys. v. Bridgestone*, 399 F.3d 651, 666 (6th Cir. 2005)).

While Ponder is also not a resident of Kentucky, Wild's argument that "Kentucky has no interest" in this lawsuit is based on flawed reasoning. (*See* Doc. 129 at 17). Unlike in the case upon which Wild relies, *Conn v. Zakharov*, where Ohio had no interest in a contract that was not negotiated in Ohio, agreed to in Ohio, or intended to be performed in Ohio, *see* 667 F.3d 705, 720 (6th Cir. 2012), here, the Court must proceed as if Wild made an offer in Kentucky that was accepted by Ponder in Kentucky for work that was to be performed, at least in part, from Ponder's office at WILD Flavors's Kentucky facility. Additionally, the alleged agreement contemplated that the ownership of WILD Flavors and thus, the operator of the Kentucky facility, would be altered. Accordingly, Kentucky does have an interest in the resolution of this dispute. Further, it is undisputed that Kentucky law should be applied to Ponder's breach of contract claim. (*See* Doc. 130 at 7).

As to the third factor, Ponder has an interest in obtaining convenient and effective relief. Although it is not clear that a suit in this forum is Ponder's *only* means to obtain relief,[8] Ponder's two prior actions regarding this alleged contract in Nevada were dismissed for lack of personal jurisdiction. (*See* Doc. 129 at 2). Thus, it would be inconvenient for Ponder to litigate this matter in a state other than Nevada or Kentucky, where he lacks significant connections, or outside the United States. *See Stockton Mortg. Corp. v. Bland*, No. 3:22-CV-00036-GFVT, 2022 WL 3437227, at *7 (E.D. Ky. Aug. 16, 2022) (citing *Mesa Indus., Inc. v. Charter Indus. Supply, Inc.*, No. 1:22-CV-160, 2022 WL 3082031, at *14 (S.D. Ohio Aug. 3, 2022)) (finding that, while the plaintiff could likely reach all of the defendants in another forum, it would be inconvenient for the plaintiff to be forced to litigate its case in another state).

While Wild has argued that Ponder may seek relief against him in Switzerland, (Doc. 129 at 18), he has offered no evidence or argument to support the proposition that Switzerland's interest in the dispute is greater than Kentucky's. *See Stockton Mortg. Corp.*, 2022 WL 3437227, at *7 (finding that a defendant's residence outside of the forum state was not enough to show that another forum had a greater interest in

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[8] Wild cites *Conn v. Zakharov*, 667 F.3d at 720-21, for the proposition that "[a] plaintiff's interest weighs in favor of reasonableness if the location of the lawsuit is his '*only* means for obtaining relief.'" (Doc. 129 at 17-18). However, that case merely held that the plaintiff's interest is "particularly keen" where the suit is his only means for obtaining relief, not that a plaintiff's interest does not weigh in favor of reasonableness at all if he may obtain relief via another method. *See Conn*, 667 F.3d at 720-21 (citing *Fortis Corp.*, 450 F.3d at 223).

the case). Therefore, this is not the "unusual case" where the exercise of personal jurisdiction would be unreasonable. *See Theunissen*, 935 F.2d at 1461. All three parts of the test for specific jurisdiction are satisfied here.

Accordingly, Ponder has put forth sufficient facts to make a prima facie showing that both Kentucky's long-arm statute and federal due process are satisfied. The Court finds that it may exercise personal jurisdiction over Wild and will deny his Motion for Summary Judgment on that ground.

B. Breach of Contract

Next, the Court must turn to Wild's Motion for Summary Judgment on the merits of Ponder's breach of contract claim.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).[9] "In determining whether there exists a genuine issue of material fact, the court must resolve all ambiguities and draw all factual inferences in favor of the non-moving party." *See Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 992 (6th Cir. 1997) (citing *Anderson v.*

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[9] Although Ponder cites the Kentucky standard for summary judgment, (Doc. 132 at 2), the Court must apply the federal standard under Federal Rule of Civil Procedure 56, even in a diversity case such as this one. *See Wayne Cnty. Hosp., Inc. v. Jakobson*, 943 F. Supp. 2d 725, 730 (E.D. Ky. 2013) (citing *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 165 (6th Cir. 1993)).

Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)). Summary judgment is inappropriate if the evidence would permit a reasonable jury to return a verdict for the non-moving party. *Id.*

Under Kentucky law, the elements of a breach of contract claim are that: (1) the parties made a valid contract; (2) the contract was breached; (3) the claimant performed under the contract; and (4) the claimant suffered damages as a result of the breach. *Valley-Scapes, Inc. v. Divisions, Inc.*, No. 2:21-CV-061 (WOB-CJS), 2022 WL 16824716, at *4 (E.D. Ky. Nov. 8, 2022) (citing *Webster & Assocs., Inc. v. EagleBurgmann KY, Inc.*, No. 12-206-WOB-JGW, 2013 WL 6210263, at *5 (E.D. Ky. Nov. 27, 2013)). "[A] valid oral contract, like a written contract, requires 'offer and acceptance, full and complete terms, and consideration.'" *Lore, LLC v. Moonbow Invs., LLC*, No. 2012-CA-001305-MR, 2014 WL 507382, at *6 (Ky. Ct. App. Feb. 7, 2014) (quoting *Coleman v. Bee Line Courier Serv., Inc.*, 284 S.W.3d 123, 125 (Ky. 2009)).

Whether a contract exists and, if so, how it should be constructed are questions of law. *Indus. Equip. Co. v. Emerson Elec. Co.*, 554 F.2d 276, 284 (6th Cir. 1977); *see also Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC*, 540 S.W.3d 770, 783 (Ky. 2017) ("[T]he interpretation of a contract is a legal issue for the court's consideration, not the jury's."). However, if a contract does exist, the issue of whether it was breached and by whom is typically a question of fact for the jury. *See Schmidt v. Schmidt*, 343 S.W.2d 817, 819 (Ky. 1961).

"In Kentucky, Plaintiffs must show that an actual agreement existed between the parties with clear and convincing evidence." *Auto Channel, Inc. v. Speedvision*

Network, LLC, 144 F. Supp. 2d 784, 790 (W.D. Ky. 2001) (citing *Indus. Equip. Co.*, 554 F.2d at 288); *see also Plante v. Seanor*, No. 5:17-CV-150-REW-EBA, 2018 WL 5730160, at *8 (E.D. Ky. Nov. 2, 2018). "'[W]here the nonmoving party faces a heightened burden of proof, such as clear and convincing evidence, he must show in opposition to the motion for summary judgment that he can produce evidence which, if believed, will meet the higher standard.'" *Bowers v. State Farm Ins. Co.*, No. 3:09-CV-290, 2011 WL 1362168, at *2 (W.D. Ky. Apr. 11, 2011) (quoting *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 944 (6th Cir. 1990), *overruled in part on other grounds*, *Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 217 n.4 (6th Cir. 1992)).

"The Kentucky Supreme Court has described clear and convincing evidence as 'substantially more persuasive than a preponderance of evidence, but not beyond a reasonable doubt.'" *Plante*, 2018 WL 5730160, at *8 n.10 (quoting *Fitch v. Burns*, 782 S.W.2d 618, 622 (Ky. 1989)). "[T]he evidence must not be vague, ambiguous, or contradictory, and must come from a credible source." *Wehr Constructors, Inc. v. Steel Fabricators, Inc.*, 769 S.W.2d 51, 54 (Ky. Ct. App. 1988).

Here, Wild argues that Ponder's breach of contract claim fails because he cannot demonstrate, by clear and convincing evidence, that a valid oral contract exists because (1) the terms of the alleged contract are indefinite and uncertain and (2) Ponder did not provide consideration. (Doc. 130 at 8-15). Each argument is addressed below.

i. Indefinite and Uncertain Terms

"Under Kentucky law, an enforceable contract must contain definite and certain terms setting forth promises of performance to be rendered by each party." *Kovacs v. Freeman*, 957 S.W.2d 251, 254 (Ky. 1997) (citing *Fisher v. Long*, 172 S.W.2d 545 (Ky. 1943)). "While the agreement need not cover every conceivable term of the relationship, it must set forth the 'essential terms' of the deal." *Auto Channel*, 144 F. Supp. 2d at 790 (citing *Brooks v. Smith*, 269 S.W.2d 259, 260 (Ky. 1954)).

"Terms are material that define agreement particulars and performance parameters." *First Tech. Cap., Inc. v. JPMorgan Chase Bank, N.A.*, 53 F. Supp. 3d 972, 985 (E.D. Ky. 2014) (citing *C.A.F. & Assocs., LLC v. Portage, Inc.*, 913 F. Supp. 2d 333, 343 (W.D. Ky. 2012)); *see also Warren v. Cary-Glendon Coal Co.*, 230 S.W.2d 638, 640 (Ky. 1950) ("[I]t is essential that the contract itself be specific and the certainty required must extend to all particulars essential to the enforcement of the contract, such as the subject matter and purpose of the contract, the parties, the consideration, the time and place of performance, terms of payment and duration of the contract.").

Here, Ponder argues that Wild orally promised to pay him $3 million "for selling Wild Flavors for a premium price." (Doc. 132 at 3; Doc. 132-2, Ponder Dep. at 99:12-18). Ponder testified that the parties only had a "general discussion" with respect to what he would have to do to earn the payout, but that he understood that Wild "wanted a premium above what he was expecting on the business, and he wanted [Ponder] to protect his interests." (Doc. 132-2, Ponder Dep. at 110:20-111:2).

However, Ponder admitted that he and Wild did not "get into the details" of Ponder's expected performance and that it was only his "guess" that Wild was expecting to receive around $1.5 to $2 billion for WILD Flavors. (*Id.* at 111:5-7, 111:13). Ponder testified that he and Wild "never discussed" the exact sale price that would trigger the promised bonus or "the parameters around" Ponder's obligations under the contract. (*Id.* at 112:11-14). Thus, by Ponder's own admission, the parties did not form an agreement as to the parameters of Ponder's performance and established no dividing line between a sale constituting performance, such that Wild would be obligated to pay the $3 million, and one constituting nonperformance, such that Wild's obligation was not triggered.

In *Plante v. Seanor*, which Ponder cites in support of his argument that the terms of the alleged contract were sufficiently complete and definite, (Doc. 132 at 6-7), the evidence clearly and convincingly established that the plaintiff agreed to advance legal fees and expenses in exchange for repayment of 50% of such costs out of the defendant's recovery, and, accordingly, the defendant's subsequent recovery triggered his duty to repay. *See* 2018 WL 5730160, at *8-9. Thus, the court held that the parties' "agreement established the what (fees and costs), when (upon [the defendant's] recovery), and how (repayment measured as 50% of all expenses)." *Id.* at *8.

Here, even if the Court could find that "the what" and "the how" are established by the parties' purported agreement, "upon the sale of WILD Flavors for a premium price" is not a certain and definite "when" term on these facts. There is nothing in the record that would enable a jury to find that the sale of WILD

Flavors in 2014 triggered Wild's duty to pay Ponder $3 million because there is no evidence that specifically establishes the parameters of Ponder's performance, which is an essential term of any contract. *See, e.g.*, *First Tech. Cap., Inc.*, 53 F. Supp. 3d at 985-86 (finding a contract unenforceable for failing to define a material term that was a precondition of one party's performance); *Quadrille Bus. Sys. v. Ky. Cattlemen's Ass'n, Inc.*, 242 S.W.3d 359, 364 (Ky. Ct. App. 2007) (finding a contract unenforceable where it failed to include terms as to when and how payments would be made and what the specific responsibilities of the parties were).

The fact that Ponder emailed Wild regarding the alleged agreement nearly two years after the sale of the company in August 2016, (*see* Doc. 130-10), does not provide evidence that the parties agreed to the parameters of his performance prior to the sale. In that email, Ponder describes the final sale price as "the top dollar for the business," (*see id.* at 9-10), but neither Ponder nor Wild make any reference in that email chain to a prior agreement as to the specific sale price Ponder needed to secure to earn the $3 million bonus.[10] Accordingly, Ponder's unilateral characterization of the sale price as sufficient in 2016 cannot

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[10] Ponder's email provides that Wild "promised a special three million dollar bonus to [him] regardless of the results of the sale payout." (Doc. 130-10 at 10). However, Ponder clarified in his Response to Defendant's Motion for Summary Judgment that he used "sale payout" to refer to the company-wide management bonus he received, not the sale price ADM paid for WILD Flavors. (Doc. 132 at 5). Thus, Ponder does not argue that Wild promised to pay him the $3 million bonus if WILD Flavors sold for any price, but rather consistently contends that the promise was conditioned on the business being sold for a "premium price."

illustrate the parties' agreement to parameters prior to the 2014 sale.

Further, Ponder's "guess" that a sale price above $1.5 to $2 billion would constitute a "premium" is insufficient to show that he could prove the existence of a contract under his heightened burden of proof because a plaintiff's "attempts to infer [essential] terms based on unsupported assumptions cannot rise to the level of clarity necessary to support a finding of contract by clear and convincing evidence." *See Auto Channel*, 144 F. Supp. 2d at 791 (citing *Indus. Equip. Co.*, 554 F.2d at 288). Accordingly, Ponder's breach of contract claim fails because he cannot demonstrate the existence of an enforceable contract with definite and certain terms.[11]

ii. Lack of Consideration

Although Ponder's claim fails as a matter of law because the alleged contract lacks definite and certain terms, even if this Court found otherwise, Ponder's claim independently fails because the alleged contract also lacks consideration. In Kentucky, "it is a fundamental tenet of contract law that an agreement that lacks in consideration or that is based solely on past consideration is unenforceable as a matter of

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(*Id.* at 4-5).

[11] The Court need not address Wild's argument that Ponder's testimony cannot constitute clear and convincing evidence of a contract because it is inconsistent with respect to when and where the alleged contract was formed and its existence is contradicted by a waiver he executed in connection with the Management Bonus Program. (Doc. 130 at 9-10). Even if the Court construes the terms of the agreement as Ponder has argued them to be, they are nonetheless indefinite and uncertain.

law." *Taylor v. Univ. of the Cumberlands*, No. 6:16-CV-00109-GFVT, 2018 WL 4286180, at *4 (E.D. Ky. Sept. 7, 2018 (citing *Sawyer v. Mills*, 295 S.W.3d 79, 86-87 (Ky. 2009); *Greenup v. Wilhoite*, 279 S.W. 665, 666 (Ky. 1926)).

Thus, "generally, a promise to perform something that the promissor was already bound to do cannot constitute new and valuable consideration necessary to form a contract." *Sara v. Saint Joseph Healthcare Sys., Inc.*, 480 S.W.3d 286, 290 (Ky. Ct. App. 2015); *see also Fidelity-Phenix Fire Ins. Co. v. Duvall*, 106 S.W.2d 991, 997 (Ky. 1937) (finding that there was no valid consideration where the plaintiff agreed to do something he was already legally obligated to do pursuant to an existing contract). This is true even if the existing contract is with a third party. *See Moore v. Kuster*, 37 S.W.2d 863, 865 (Ky. 1931) (internal citations omitted).

It is undisputed that, at all relevant times, Ponder was subject to an employment contract as CEO of WILD Flavors. (Doc. 130 at 13-15; Doc. 130-5 at 2; Doc. 132 at 7-8). That contract provided that Ponder "shall be responsible for all Business Activities of [WILD Flavors] and its affiliated companies the 'Business.' The tasks and responsibilities are those generally related to the Business." (Doc. 130-5 at 2). The employment contract also noted that Ponder's "direct superior" was WILD Flavors's Chairman, Wild. (*Id.*; Doc. 132-2, Ponder Dep. at 219:18-20).

Although Ponder argues that his employment contract did not obligate him to participate in the sale of the company, (Doc. 132 at 7), the Court finds otherwise. Ponder testified that, in furtherance of the sale, he attended meetings, assisted with presentations

regarding the company, gave plant tours, answered questions, and described various aspects of the business, including its assets, marketing, and profits, to potential buyers. (Doc. 132-2, Ponder Dep. at 92:23-93:22). Ponder contends that he was not required to perform "any task" Wild requested as his supervisor, (Doc. 132 at 7-8), and that point may be correct, but the tasks he testified to performing in connection with the sale fall under his responsibility for "all Business Activities" of the company because participating in meetings, presentations, and discussions with potential buyers regarding various aspects of WILD Flavors are activities "generally related" to the business. (*See* Doc. 130-5 at 2).

This is particularly true given that Ponder testified that nothing "[came] to mind" when asked what types of tasks fell outside his responsibility under his employment contract. (Doc. 132-2, Ponder Dep. at 219:4-10).[12] Ponder also noted that while he was the CEO of WILD Flavors, he worked on job-related tasks twenty-four hours a day and seven days a week, keeping his focus "completely on the business

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12 12 Ponder's exact testimony was:

> Q: I mean, that first sentence is pretty broad when it talks about 'all business activities of the employer and its affiliated companies.' Was there anything that in your view fell outside of your purview under this employment contract? In other words, anything where you would say 'That's not my job'?
>
> A: Not that comes to mind.

(Doc. 132-2, Ponder Dep. at 219:4-10).

of [WILD Flavors's] entities." (*Id.* at 57:2-10, 57:15-19).

Although Ponder attempts to argue that Wild's expert, Mark A. Greenberg ("Greenberg"), has opined that it "is not the norm" for a non-shareholder CEO like Ponder to lead a sale transaction, (Doc. 132 at 8), that argument is not well-taken given Ponder's pending Motion to Exclude Greenberg's Testimony. (*See* Doc. 128). In that Motion, Ponder argues that Greenberg's "experience does not provide a basis to state what happened in this situation" and stating what is "unlikely" and "'generally' not done" constitutes "merely guessing" based on what other companies have done. (*Id.* at 6-7). Ponder goes on to contend that "[j]ust because a CEO is 'generally not charged with leading the sale transactions' does not have any iota of bearing as to what happened in the sale of *this* Company." (*Id.* at 8).

Ponder may not persuasively argue in one motion that Greenberg's general industry experience sufficiently draws the boundaries of Ponder's specific responsibilities while simultaneously arguing in another that Greenberg's general industry experience is not relevant to the specific facts of this case. Accordingly, the Court finds that Greenberg's opinion about the typical responsibilities of CEOs of other companies does not overcome Ponder's testimony regarding his actual responsibilities under his employment contract.[13]

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[13] The Court need not address Wild's argument that Greenberg's statements are inadmissible hearsay, (Doc. 136 at 13-14), in light of the fact that his opinions do not persuasively support Ponder's argument in any event.

Thus, Ponder's alleged oral contract with Wild lacks consideration because his employment contract already obligated him to participate in the business activities of WILD Flavors, including activities related to its sale. Accordingly, his breach of contract claim fails as a matter of law.

C. Plaintiff's Motion to Exclude the Testimony of Defendant's Expert

Because the Court concludes that Ponder's sole claim fails on grounds unrelated to Greenberg's opinions,[14] Ponder's Motion to Exclude Greenberg's Testimony will be denied as moot.

III. Conclusion

Therefore, for the reasons stated above, IT IS ORDERED that:

(1) Plaintiff's Motion to Exclude the Testimony of Defendant's Expert (Doc. 128) be, and is hereby, DENIED AS MOOT;

(2) Defendant's Motion for Summary Judgment for Lack of Personal Jurisdiction (Doc. 129) be, and is hereby, DENIED;

(3) Defendant's Motion for Summary Judgment as to Plaintiff's Breach of Contract Claim (Doc. 130) be, and is hereby, GRANTED;

(4) A separate judgment shall enter concurrently herewith.

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[14] Wild does not cite Greenberg's opinions in support of either of his Motions for Summary Judgment.

This 24th day of April 2023.

Signed by:

/s/ William O. Bertelsman
United States District Judge

JUDGMENT, U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (APRIL 24, 2023)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY NORTHERN DIVISION AT COVINGTON

MICHAEL H. PONDER,

Plaintiff,

v.

HANS-PETER WILD,

Defendant.

Civil Action No. 2:19-CV-166 (WOB-CJS)

Before: William O. BERTELSMAN, United States District Judge

JUDGMENT

Pursuant to the Memorandum Opinion and Order entered in this matter, (Doc. 141),

It is hereby ORDERED and ADJUDGED that judgment is ENTERED IN DEFENDANT'S FAVOR.

This action is DISMISSED and STRICKEN from the Court's docket.

This 24th day of April 2023.

Signed By:

/s/ William O. Bertelsman
United States District Judge

**DEPOSITION OF MICHAEL H. PONDER,
RELEVANT EXCERPT
(NOVEMBER 11, 2020)**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY,
NORTHERN DIVISION

MICHAEL H. PONDER, an individual, *Plaintiff,*

v.

HANS-PETER WILD, an individual, *Defendant.*

Case No. 2:19 cv-00166 WOB-CJS

VIDEOTAPED VIDEOCONFERENCE DEPOSITION
OF MICHAEL H. PONDER

Las Vegas, Nevada

Wednesday, November 11, 2020

Q. In a lot of your filings you describe this as a promise, that he promised to pay you 3 million dollars. Do you believe Dr. Wild promised to pay you 3 million dollars if he exceeded the amount he expected to receive?

A [Michael Ponder]. What did I just say? Are you dense? Yes. If he exceeded the amount that he thought it was going to get, which I said was 1 and a half to 2 billion, I would expect him to honor his word. He did not do that. …

DEPOSITION OF MICHAEL H. PONDER
(DECEMBER 3, 2020)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY,
NORTHERN DIVISION

MICHAEL H. PONDER, an individual, *Plaintiff,*

v.

HANS-PETER WILD, an individual, *Defendant.*

Case No. 2:19 cv-00166 WOB-CJS

VIDEOTAPED VIDEOCONFERENCE DEPOSITION
OF MICHAEL H. PONDER

Las Vegas, Nevada

Thursday, December 3, 2020

Q. And remind me from your testimony regarding this agreement with Dr. Wild. What was the price point at which you needed to get a sale to qualify for this 3 million dollar bonus?

A. [Michael Ponder] He was expecting the sale in the range of 1 and a half to 2 billion, as best I recall.

**DEPOSITION OF LEZLIE GUNN,
RELEVANT EXCERPT
(AUGUST 25, 2022)**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY,
NORTHERN DIVISION

MICHAEL H. PONDER, an individual, *Plaintiff,*

v.

HANS-PETER WILD, an individual, *Defendant.*

Case No. 2:19 cv-00166 WOB-CJS

VIDEOTAPED VIDEOCONFERENCE DEPOSITION OF
LEZLIE GUNN

Las Vegas, Nevada

Thursday, August 25, 2022

A. [Lezlie Gunn] And so that doctor is what prevented him from getting arrested. And he was very, very sick that day. He was too sick to die. He was curled up on the couch, and he called Mr. Ponder from the office to come meet him at the condominium because he was too sick to go in. And the three of us were on the sofa in Kentucky and he said that he wanted to reinstate the same $3 million bonus he had promised him for the past five years except this time he wanted a premium

price. "I know you can deliver it, Mr. Ponder. You always deliver." And he also wanted protection from KKR. He needed a lot of protection. So he said, "You go and you sell it. You get me a premium price."

And he — Ponder asked him, "What do you expect," and he said, "at least a million — a billion 2. Please get me a billion 5 if you can," and then Ponder more than doubled it.

So that was the new contract. It was done when he was curled up in a ball on the couch. He had all one billion percent confidence in Ponder. He always came through for him. Ponder put — always put Peter Wild first above everyone else. And they — he needed some comfort and he stayed there. They had some private conversations.