IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FLETCHER INTERNATIONAL, LTD., Plaintiff, v. ION GEOPHYSICAL CORPORATION, f/k/a INPUT/OUTPUT, INC. and ION INTERNATIONAL S.àr.l., Defendants.	)))))))))))	Civil Action No. 5109-CS

MEMORANDUM OPINION

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STRINE, Chancellor.

I. Introduction

In a prior decision in this case, this court, per Vice Chancellor Parsons, held that it was likely that the issuance of a note by a subsidiary of the defendant, ION Geophysical Corporation, which was formerly known as Input/Output ("ION"), in connection with a $40 million bridge financing that was a minor portion of a much larger transaction, violated the right of the plaintiff, Fletcher International, Limited ("Fletcher") to consent to the note issuance.[1] Nevertheless, this court declined to grant a preliminary injunction because the balance of the equities weighed against granting an injunction and because damages could be an adequate remedy.[2] In a later opinion, Vice Chancellor Parsons granted Fletcher's motion for partial summary judgment, holding that the note issued by the ION subsidiary was a security and that the issuance of that note without Fletcher's consent violated Fletcher's contractual right to consent to such issuances.[3] This is the post-trial opinion in the case, in which the court determines Fletcher's damages based on its admittedly imperfect attempt to discern how a hypothetical negotiation would have occurred between ION and Fletcher over the consent.

In the fall of 2009, ION needed a transaction that would provide it with liquidity and enable it to continue operating and avoid bankruptcy. To alleviate its financial woes,

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[1] *Fletcher Int'l, Ltd. v. ION Geophysical Corp.* (*Fletcher I*), 2010 WL 1223782, at *4-5 (Del. Ch. Mar. 24, 2010).
[2] *Id*.
[3] *Fletcher Int'l., Ltd. v. ION Geophysical Corp.* (*Fletcher II*), 2010 WL 2173838, at *1 (Del. Ch. May 28, 2010).

ION reached an agreement to contribute its land equipment business to a newly formed joint venture with BGP Inc. ("BGP"), a Chinese state-owned enterprise. This was a strategically important investment for the Chinese government and its state-owned bank, the Bank of China, stepped in to help BGP secure the deal. As part of that help, the Bank of China provided ION with $40 million in bridge financing to give ION a cushion to ensure that it could operate through the closing of that transaction (collectively, the joint venture and the bridge financing are referred to as the "BGP Transaction"). ION already had a credit facility in place under which it borrowed money on a revolving basis from a consortium of banks (the "Existing Lenders"), so the Bank of China provided the bridge financing by entering into the existing credit facility. In connection with the bridge financing, ION International S.ár.l. ("ION S.ár.l."), an ION subsidiary, issued a $10 million convertible promissory note to the Bank of China without obtaining Fletcher's consent. The *only* consent right Fletcher had over the deal was over the $40 million bridge loan. The much larger overall BGP Transaction, in which BGP contributed between $195 million and $245 million in consideration to ION, was one that Fletcher had no right to veto.

During the two day trial, the parties attempted to quantify the damages that Fletcher is entitled to by presenting evidence to determine what Fletcher would have received in exchange for its consent in a hypothetical negotiation that occurred before the announcement of the BGP Transaction. Fletcher attempted to portray itself as a tough negotiator willing to blow up the entire BGP Transaction unless it received changes to its

Preferred Stock that were valued at $78 million in exchange for its consent to a $40 million bridge financing, even though the BGP Transaction was expected to create value for all of ION's stakeholders, including Fletcher. Fletcher insisted that, because ION was a weak negotiator that had no other options, ION would have given in to anything Fletcher demanded in order to save the BGP Transaction. Thus it would have given $78 million to be able to receive a $40 million short-term loan.

This two-dimensional depiction of the hypothetical negotiation ignores the fact that BGP and the Existing Lenders — both of which had substantially more negotiating leverage than Fletcher did — would have been involved in any negotiation for Fletcher's consent. As a practical matter, BGP would have needed to agree to proceed with any consent payment to Fletcher and the Existing Lenders would have had the right to consent to the modifications to Fletcher's preferred stock that Fletcher says it would have demanded. The demands Fletcher says it would have made were ones that had costs to both BGP and the Existing Lenders and neither would have agreed to Fletcher's outrageous demands. In other words, ION could not have unilaterally given Fletcher what it wanted because Fletcher's demands would have come at the expense of ION's other constituencies, in particular BGP. Fletcher's version of the hypothetical negotiation also ignores the fact that ION, with the help of BGP and the Existing Lenders, could have structured the transaction to avoid implicating Fletcher's consent right. In fact, Fletcher's cartoonish portrayal of its own negotiation position is so extreme in contrast to its comparatively weak actual bargaining position, that ION argued that it would simply have worked with the Existing lenders and BGP to structure the deal around Fletcher's consent. Nevertheless, because Fletcher's consent right was violated, the court assumes that Fletcher would have acted with at least bare rationality in the bargaining process and consented in exchange for a very generous consent fee akin to a bank consent fee.

That is, although the court concludes that Fletcher would not have been able to use its consent right to extract the king's ransom that it apparently believes it was entitled to, Fletcher would have been able obtain valuable consideration from ION in exchange for its consent. The best measure of the consent fee that Fletcher could have extracted comes from a comparison to the consent fees that ION paid to the Existing Lenders to obtain their approval for the BGP Transaction.

II. Factual and Procedural Background

A. Fletcher's Investment in ION

ION is a Delaware corporation headquartered in Houston, Texas that provides technology-focused services and equipment to the global energy industry, particularly to exploration and production clients in the oil industry. ION's stock is listed on the New York Stock Exchange ("NYSE"). ION S.ár.l. is a wholly-owned subsidiary of ION, incorporated in Luxemburg.

On February 15, 2005, ION, seeking a "patient" and "supportive" investor,[4] entered into an Agreement with Fletcher, a hedge fund organized in Bermuda, that portrayed itself as having those characteristics. Under that agreement, Fletcher paid $30

[4] Trial Tr. vol. 1, 72:17-19 (Benson).

million to purchase 30,000 shares of Series D-1 Cumulative Convertible Preferred Stock of ION at a price of $1,000 per share and received the right to purchase up to 40,000 additional shares of ION at the same price and on similar terms and conditions.[5] Fletcher exercised its right to purchase additional shares under the agreement in 2007 and 2008 by purchasing 5,000 shares of Series D-2 Cumulative Convertible Preferred Stock and 35,000 shares of Series D-3 Cumulative Convertible Preferred Stock, respectively (the Series D-1, Series D-2, and Series D-3 Cumulative Convertible Preferred Stock are collectively referred to as the "Preferred Stock").[6] Each of the three series of Preferred Stock was governed by a Certificate of Rights and Preferences with substantially similar terms that included a provision giving Fletcher the right to consent to the issuance of any security issued by a wholly-owned subsidiary of ION.[7]

Fletcher portrayed itself as a "passive and supportive partner" and claimed that its "fundamental investment principle [was] to facilitate management's efforts to enhance equity value through a significantly improved capital structure."[8] According to Fletcher's marketing materials "[t]his [principle] allows management to focus on the

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[5] JX 1 (Agreement Between Input/Output, Inc. and Fletcher Int'l Ltd. (Purchase Agreement) (Feb. 15, 2005)).
[6] *Fletcher II*, 2010 WL 2173838, at *1.
[7] JX 2 (Certificate of Rights and Preferences of Series D-1 Cumulative Preferred Stock of Input/Output, Inc. (Feb. 16, 2005)); JX 6 (Certificate of Rights and Preferences of Series D-2 Cumulative Preferred Stock of Input/Output, Inc. (Dec. 7, 2007)); JX 8 (Certificate of Rights and Preferences of Series D-2 Cumulative Preferred Stock of ION Geophysical Corp. (Feb. 20, 2008)).
[8] JX 53 (PowerPoint presentation of Fletcher Asset Management).

implementation of its business plan."[9] Fletcher's marketing materials also stated that Fletcher had an "uncompromising commitment to enter into only those transactions that [would] create value for all parties to the transactions," including the companies it invested in, which it referred to as its "corporate partners."[10]

Fletcher's investment in ION was essential to Fletcher's own survival, which was unusual even for an aggressive hedge fund. As of December 31, 2008, the Preferred Stock made up 43.25% of Fletcher's investment portfolio.[11] By December 31, 2009, the Preferred Stock made up 65.68% of Fletcher's investment portfolio.[12] Thus, Fletcher had staked its future on ION and taken a large, non-diversified risk by placing nearly two-thirds of its assets in a single investment — an investment that came with no control rights or board seats.

B. <u>ION's Financial Performance Declines And Its Relationship With Fletcher Sours</u>

On July 3, 2008, ION and ION S.ár.l. entered into a new $100 million credit facility with the Existing Lenders (the "Credit Facility") that leveraged both ION's domestic and international assets.[13] That Credit Facility replaced ION's old $75 million credit facility that had leveraged only the domestic assets.[14] HSBC Bank USA ("HSBC")

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[9] *Id.*
[10] *Id.*
[11] JX 99 at 6 (Financial Statements and Report of Independent Certified Public Accountants – Fletcher Int'l, Ltd. (Dec. 31, 2008)); Trial Tr. vol. 1, 63-64 (Benson).
[12] JX 378 (Fletcher Int'l, Ltd. Financial Statements as of December 31, 2009); Trial Tr. vol. 1, 62-63 (Benson).
[13] JX 15 (ION's Amended and Restated Credit Agreement (July 3, 2008)); Trial Tr. vol. 2, 435-36 (Hanson).
[14] *Id.*

acted as the lead bank in the Credit Facility.[15] No more than $75 million could be borrowed under the Credit Facility at the domestic level by ION and no more than $60 million could be borrowed at the foreign level by ION S.ár.l., meaning that if ION wanted to borrow the maximum amount under the Credit Facility, the borrowing had to be split between the domestic parent, ION, and the foreign subsidiary, ION S.ár.l. (the "Split Requirement").[16] A waiver of the Split Requirement required unanimous approval from the Existing Lenders.[17] Although the Split Requirement limited the amount that could be drawn down by either the domestic parent or foreign subsidiary, the Credit Facility was cross-collateralized so that all of the assets of ION and ION S.ár.l. secured both the foreign and domestic notes.[18] The Credit Facility also included a $50 million accordion feature so that it could be expanded to a $150 million revolving facility.[19]

In addition to provisions that governed the functioning of the Credit Facility, the Credit Agreement contained a litany of restrictive covenants that prohibited ION from engaging in activities such as making any dividend payments that were not specifically exempted under the Credit Agreement,[20] exceeding a specified leverage ratio,[21] and

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[15] *Id.*
[16] JX 15 at 26; Trial Tr. vol. 2, 437-38 (Hanson). For tax reasons, ION generally drew down as much as possible from the domestic side of the facility, and ION only drew down the foreign side of its facility when it needed to borrow more than $75 million at any given time. In other words, if ION needed the full $100 million drawn down, its general practice would have been to draw down $75 million from the domestic side of the facility and $25 million from the foreign side. Trial Tr. vol. 2, 437-38 (Hanson).
[17] JX 15 at 5 (ION's Amended and Restated Credit Agreement (July 3, 2008)) (defining Collateral to include the property of both ION and ION S.ár.l.); Trial Tr. vol. 1, 330-36 (Fowler).
[18] JX 15 at 44-45.
[19] *Id.* at 44; Trial Tr. vol. 2, 436:21-23 (Hanson).

maintaining a certain net worth.[22] If ION failed to comply with any of the restrictive covenants in the Credit Agreement, the Existing Lenders could declare a default, which would result in, among other things, the entire amount of the loans outstanding under the Credit Facility becoming immediately due.[23] The power to declare a default gave the Existing Lenders substantial influence over ION.

The financial problems ION faced in 2009 had their origins in a prior transaction. In early 2008, ION's management began considering a strategic transaction with ARAM Systems Ltd. and Canadian Seismic Rentals Inc. (collectively "ARAM"). The transaction was expected to increase ION's footprint in certain international markets and solidify ION's position in the industry.[24] On July 8, 2008, ION executed a share purchase agreement with ARAM under which ION agreed to purchase ARAM from its stockholders in exchange for a total of $350 million (Canadian).[25] ION financed the ARAM transaction through the combination of an equity issuance to the ARAM stockholders, a $125 million Term A Facility, a $41 million short-term bridge loan from its investment bank, Jefferies, LLC ("Jefferies"), that was set to mature on December 31, 2008, and $45 million in short-term notes issued to the ARAM stockholders that matured

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[20] JX 15 at 65-66.
[21] *Id.* at 68.
[22] *Id.* at 68.
[23] *Id.* at 68-70.
[24] Trial Tr. vol. 2, 439 (Hanson).
[25] JX 21 (Share Purchase Agreement between ION Geophysical Corp., ARAM Sys., Ltd., Canadian Seismic Rentals Inc., and Sellers (July 8, 2008)).

on December 31, 2008.[26] The $45 million short-term notes were issued by Nova Scotia Co. ("Nova Scotia"), a wholly-owned subsidiary of ION.[27] To obtain the interim financing that was provided by the Term A Facility, ION had to secure approval from the Existing Lenders for, among other things, a waiver to the Split Requirement.[28] The Existing Lenders unanimously agreed to waive the Split Requirement to facilitate the ARAM transaction, and the First Amendment to the Credit Facility was entered into on September 17, 2008.[29]

ION planned to replace the interim financing structure that it used to close the ARAM transaction by issuing a bond in the public market.[30] To protect itself in the event that the public bond offering failed, ION had obtained a backstop commitment from Jefferies to provide ION with a $150 million loan.[31] Unfortunately, the ARAM transaction closed on September 18, 2008, mere days after the collapse of Lehman Brothers and in the midst of a severe financial crisis. Because of the financial crisis, ION was unable to raise the money needed to replace the interim financing through a public bond offering, and Jefferies was either unwilling or unable to provide the backstop financing that it had agreed to provide.[32] ION managed its cash and made the required payment on its revolving loan, but with the capital markets frozen, it was forced to enter

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[26] Trial Tr. vol. 2, 441-42 (Hanson).
[27] JX 38 (ION Form 8-K (September 17, 2008)).
[28] Trial Tr. vol. 2, 442:6-9 (Hanson).
[29] JX 46 at 7 (1st Amendment to Amended and Restated Credit Agreement (Sept. 17, 2008)); Trial Tr. vol. 2, 443:5-8 (Hanson).
[30] Trial Tr. vol. 2, 440: 4-9 (Hanson).
[31] *Id.* at 444:8-15.
[32] *Id.* at 447-48.

into a new $40 million twelve-month loan with Jefferies at an interest rate that ION's then-CFO Brian Hanson described as "egregious."[33]

Although the ARAM transaction had been expected to create value for ION, the transaction's inauspicious closing date left ION with a highly leveraged balance sheet and put strain on the company at a time when the recession resulting from the financial crisis was reducing demand for ION's products and services. By the end of 2008, the financial performance of ION "really started to decline. . . . And 2009 saw a series of successive declines in financial performance . . ."[34] At trial, Hanson testified that "it felt like we were chasing a ball down the hill. And we consistently were forecasting our business and missing the reforecast because it was falling off sharper than we thought it would."[35] When asked what happened to ION's stock price during that period, Hanson testified that "it was completely under pressure . . . it was trading more as an option whether or not we were going to survive."[36]

On top of its growing financial problems, ION's managers also had to deal with discontent from their purportedly patient and supportive investor, Fletcher. On January 23, 2009, Fletcher's then-attorneys informed ION that Fletcher believed that the notes issued by Nova Scotia in connection with the ARAM transaction violated Fletcher's contractual right to consent to the issuance of a security by any ION subsidiary and

[33] *Id.* at 449-50.
[34] *Id.* at 454:1-2.
[35] *Id.* at 454:5-8.
[36] *Id.* at 454:16-19.

"demand[ed] that ION take immediate action to rectify its violation and remedy the harm to Fletcher."[37] On January 30, 2009, ION responded through its own counsel and stated that it believed that the notes issued by Nova Scotia did not violate Fletcher's consent right.[38] Even though ION disagreed with Fletcher's assertion that its consent right had been violated, ION attempted to assuage Fletcher's concerns and eliminate the problem by assigning the note to itself.[39]

But ION's efforts to appease Fletcher were unsuccessful. On March 31, 2009, Fletcher made a demand for inspection of records under § 220 of the Delaware General Corporation Law for the purpose of, among other things, investigating potential violations of its rights as a holder of the Preferred Stock.[40] ION rejected Fletcher's demand, and Fletcher filed suit in this court to enforce its right to inspect ION's books and records.[41]

Fletcher's accusations and its request to inspect ION's records were not the only challenges ION's management had to deal with in the Spring of 2009. By April 2009, the Existing Lenders were worried about ION's declining financial performance and its lack of liquidity.[42] In response to the Existing Lenders' concerns, ION began to search for

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[37] JX 75 (Letter from Skadden to ION and ION's Counsel at Mayer Brown (Jan. 23, 2009)).
[38] JX 78 (Letter from Beck, Redden & Secrest to [Skadden], responding to Jan. 23, 2009 letter (Jan. 30, 2009)).
[39] *See id.*; Trial Tr. vol. 2, 640-41 (Roland) (describing Fletcher's position as "confusing"); Trial Tr. vol. 2, 517:15-19 (Hanson) ("We disagreed . . . that we had violated Fletcher's consent right . . . we tried to just mitigate it by resolving it.").
[40] Compl. ¶ 34; Trial Tr. vol. 2, 641:13-15 (Roland).
[41] *Supra* note 40.
[42] *See* JX 95 (Email from HSBC to ION (Apr. 6, 2011)) (expressing concern related to, among

transactions that would improve its liquidity. In June 2009, ION sold around $40 million of equity in a private placement and used the proceeds to pay off the Jefferies loan.[43] ION also obtained secured equipment financing worth $20 million, which it used for working capital.[44] The Credit Facility was also amended on June 1, 2009 (the "Fifth Amendment") to give ION permission to do the secured financing, relax the covenants that ION's financial forecasts indicated it would soon violate, and increase the pricing of the debt by, among other things, increasing the rates on the revolving loans.[45] If the Existing Lenders had not relaxed the covenants through the Fifth Amendment, ION would have violated the covenants in the Credit Facility, giving the Existing Lenders the right to declare a default. In connection with the Fifth Amendment, which required majority approval of the banks in the Credit Facility, ION paid a fee to the Existing Lenders of around $3.6 million, or 75 basis points on the amount of the loan outstanding at that time.[46] Although ION was able to obtain approval from the banks for the Fifth Amendment in June 2009, ION's relationship with the Existing Lenders was deteriorating and ION had been designated as an "exit name" by at least one of the Existing Lenders.[47]

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other things, the downgrade of ION's credit by Moody's, the large amount of debt with a rapidly approaching maturity date and no payoff source, and the possibility that ION would breach financial covenants in its credit agreement).

[43] Trial Tr. vol. 2, 458-59 (Hanson).

[44] JX 116 (ION Form 8-K (July 1, 2009)); Trial Tr. vol. 2, 458 (Hanson).

[45] Trial Tr. vol. 2, 459-60 (Hanson); JX 106 (5th Amendment to Amended and Restated Credit Agreement (June 1, 2009)).

[46] Trial Tr. vol. 2, 462 (Hanson).

[47] *Id.* at 461-62.

In Hanson's words, the transactions in June 2009 "gave [ION] breathing room" but they did not solve ION's liquidity issues and ION recognized that it could "burn through [its] cash by the end of the year."[48] By July 2009, ION was focused on finding a longer term solution to its liquidity problems. ION began to consider entering into some type of strategic transaction with BGP after BGP's chairman reached out to ION to discuss the possibility of the two companies engaging in a Joint Venture.

C. <u>The BGP Transaction</u>

BGP is a wholly-owned subsidiary of China National Petroleum Corporation ("China National Petroleum"), which is a large oil company owned by the Chinese government. BGP was a long-time client of ION's, and the two companies had previously considered entering into a strategic transaction. In 2006, ION approached BGP about the possibility of the two companies engaging in a joint venture.[49] Although ION and BGP did not form a joint venture in 2006 because BGP did not have the ability to enter into joint ventures with foreign companies at that time, BGP remained a major client of ION's.[50] In 2007 and 2008, they formed a "technology alliance" and BGP was an early adopter of technology developed by ION.[51] When BGP approached ION in 2009 and proposed a possible joint venture, ION viewed the proposed transaction as both

[48] *Id.* at 463:13-24.
[49] *Id.* at 465.
[50] *Id.*
[51] *Id.* at 466.

a solution to its liquidity problems and a strategic opportunity that could lead to long-term growth.[52]

The negotiations with BGP regarding the transaction began in late July 2009, when Jay Lapeyre, the chairman of ION's board of directors, met with Wang Tiejun, the President of BGP, to discuss the transaction. Lapeyre reported that "[o]verall [it was a] good initial meeting."[53] On July 31, 2009, ION's CEO, Bob Peebler, emailed Wang to inform him that ION's board had directed him to proceed with exploring a strategic joint venture between the two companies.[54]

In early August, Hanson traveled to China to meet with representatives from BGP regarding the joint venture. Back in the United States, ION's lenders and Fletcher were still concerned with ION's projections for the remainder of 2009. After looking at the projections, Benson "shift[ed] [his] opinion about ION's near-term solvency from thinking it is likely solvent to think[ing] it may not be solvent."[55] On August 12, 2009, Steven Larsen, ION's contact at HSBC, emailed Hanson to express his concerns over the company's projections and the possibility that ION would need another amendment to the Credit Facility to avoid breaching the newly-relaxed covenants during the third quarter.

The major points of the deal were negotiated extensively during August and September. ION opened the negotiations by proposing that the two companies enter into

[52] *Id.* at 466-67; JX 122 (Email from Hanson to Jay Lapeyre (July 21, 2009)) (analyzing advantages to a strategic transaction with BGP).
[53] JX 126 (Email chain between Peebler and Hanson (July 23, 2009)).
[54] JX 133 (Email from Peebler to Wang (July 31, 2009)).
[55] JX 140 (Email exchange between Kell Benson, Buddy Fletcher, and Denis Kiely (Aug. 8, 2009)).

a joint venture that centered around technology. Under the initial proposal, ION would have owned 70% of the joint venture and BGP would have owned the remaining 30%.[56] When Peebler and Hanson presented their proposal to Wang in China in early August, Wang informed them that their proposal was not what he had envisioned, that any transaction between the two companies would have to involve ION putting all of its land equipment business into the joint venture, and that BGP would have to have a controlling interest in the joint venture.[57] BGP explained that, because of the precedent-setting nature of the transaction, it would be very difficult for BGP to enter into any joint venture if it was not at least a 51% owner.[58] BGP also made it clear at this early stage in the negotiations that, in addition to control of the joint venture, it wanted a substantial equity stake in ION.[59]

BGP considered this to be a precedent-setting transaction because it was one of the first situations in which a Chinese state-owned enterprise was given permission to enter into a strategic joint venture with an American company. This joint venture was also in the energy technology industry, which has economic importance to both China and the United States. As shall be seen, because BGP is an instrumentality of the Chinese government and its entry into the United States market was important to the Chinese government, BGP had the financing support of the Bank of China, a state-owned bank.

[56] Trial Tr. vol. 2, 577:16-20 (Peebler).
[57] *Id.* at 578.
[58] *Id.* at 578-79; JX 143 (Email between Peebler and Jay Lapeyre (Aug. 13, 2009)); JX 147 (Email from Peebler (Aug. 17, 2009)) (noting that a majority interest in the joint venture was a "condition of doing a deal" for BGP).
[59] Trial Tr. vol. 2, 580 (Peebler).

When ION realized that it would have to give in to BGP's demand that it control the joint venture for the transaction to go forward, ION agreed to take the minority position in the joint venture but insisted in exchange that BGP set aside its demand for an equity stake in ION itself.[60] Although BGP purported to agree during the first round of negotiations that it would not insist on owning a large chunk of ION equity, in fact, BGP never stopped pushing for it. At the banquet following the first round of negotiations, on the very day that BGP had "agreed" to a transaction structure in which it would not receive any ION equity, Peebler was seated next to a top executive at China National Petroleum who spent the dinner explaining to Peebler all of the reasons that it would be good for ION if BGP owned ION equity.[61]

On August 13, 2009, when Peebler boarded his plane after the meetings in China, he believed that they had agreed to a deal in which BGP would take a majority ownership interest in the joint venture but would not own any of ION's equity.[62] But by the time he landed in Texas, BGP was already renegotiating the deal in an effort to obtain a major equity stake in ION.[63] The week after Peebler returned, the BGP team arrived in Houston to continue to flesh out the terms of the deal. It became clear during these meetings that any final transaction would have to be approved not only by BGP, but also by both its

[60] *Id.* at 580-81.
[61] *Id.* at 582.
[62] JX 143.
[63] JX 154 (Email from Peebler (Aug. 15, 2009)).

parent, China National Petroleum, and the Chinese Government.[64] While in Houston, BGP insisted on receiving an ownership interest in ION.[65] By the time the meetings in Houston ended on August 24, 2009, ION had agreed to consider allowing BGP to purchase up to 19.99% of ION's common stock as a part of the deal.[66] This was the maximum amount of stock ION could issue without having to hold a stockholder vote.[67]

A mere four days after ION agreed to consider allowing BGP to take a large equity position in ION, BGP sent ION a draft term sheet that contemplated BGP receiving not only a 19.99% equity interest, but also anti-dilution protection that would give BGP the right to subscribe to any future issuance of ION common stock in order to maintain that 19.99% interest.[68] Although this request for anti-dilution protection would become one of the most heavily negotiated points of the deal, the negotiations were put on hold when Peebler made a diplomatic mistake that offended the executives at BGP and China National Petroleum and almost cost ION the deal.

Peebler had become frustrated with the slow progress on the deal and on September 1, 2009, he emailed his counterpart at BGP and wrote that "it appears that

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[64] *See* JX 152 (Email from Peebler (Aug. 15, 2009)) ("Since my last communications we had a two day meeting in Houston with BGP/[China National Petroleum] representatives. What is clear is we are in a multi-layered negotiation with BGP, [China National Petroleum], and the Chinese Government, and even though we can make quick decisions 'on the ground,' everything they do has to go up to the higher authorities as part of the process. This creates time lags and frustration, and often what seems to be mixed messages.").
[65] Trial Tr. vol. 2, 584 (Peebler).
[66] JX 150 (Internal ION email (Aug. 24, 2009)).
[67] Trial Tr. vol. 2, 583-84 (Peebler) (noting that the companies settled on 19.99% because issuing additional shares would open the transaction up to a shareholder vote, which they felt like was a "can of worms").
[68] JX 153 (Email attaching draft term sheet (Aug. 28, 2009)).

BGP is attempting to put further financial stress on [ION]" by delaying payments on some receivables that Peebler believed were owed to the company.[69] At trial, he testified that he "was starting to feel like [BGP was] really gaming us on those receivables and they [were] just holding that back to put stress on the company."[70] That email was also forwarded to top executives at China National Petroleum.[71] BGP and China National Petroleum viewed this as an allegation that they had done something unethical, and Peebler testified that in the following days he "actually thought [ION] had lost the deal."[72] After ION's Chinese bankers coached Peebler on exactly what to say that would enable the executives at BGP and China National Petroleum to save face and still continue to negotiate with ION, Peebler apologized profusely and told them that he had been lied to and given bad information.[73] Peebler's apology was successful and negotiations continued.[74]

By this point, ION needed a solution to its financial woes and it had very little leverage with either BGP or the Existing Lenders.[75] BGP continued to push for better

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[69] JX 166 (Email from Peebler (Sept. 1, 2009)).
[70] Trial Tr. vol. 2, 586 (Peebler).
[71] *Id.* at 587.
[72] *Id.* at 587:17-19.
[73] *Id.* at 587; JX 168.
[74] Trial Tr. vol. 2, 587 (Peebler); JX 173 (Email from Peebler forwarding BGP's response to ION's apology (Sept. 5, 2009) (forwarding an email in which Guo wrote "[w]e accept your apology . . . . The problem with the recent emails is that they have offended [China National Petroleum] and I am personally under pressure. Dr. Yu is beginning to question BGP on the suitability of ION as a long term partner . . .").
[75] JX 210 (Internal ION email chain regarding negotiation strategy (Sept. 22, 2009)) ("I suggest we think about what few levers we have left."); JX 204 (Email from Hanson to Peebler regarding strategy for the Existing Lenders (Sept. 17, 2009)) ("One of the difficulties in our next 12 week

deal terms throughout September. With the companies in agreement that BGP would receive a 19.99% equity interest in ION as part of the deal, BGP turned its attention to obtaining anti-dilution protection for its equity interest.

As Hanson prepared to meet with BGP in Beijing in mid-September, Peebler advised him not to let the "discussion get tied back to the anti-dilution ask [BGP had] in [its] term sheet" and stated "[w]e've got to get that one put to bed early."[76] ION pushed back against BGP's continued press for anti-dilution protection because they felt that "BGP need[ed] to have skin in the game like all shareholders."[77] But BGP continued to insert anti-dilution protections into the draft term sheets that it circulated throughout September.[78] In response to one of these term draft term sheets, Lapeyre sent an email to executives at BGP expressing his "disappointment" that the draft term sheet included several provisions, including anti-dilution protection for BGP, that were unacceptable to ION's board.[79]

Eventually, the parties agreed that BGP would receive anti-dilution protection from issuances of additional equity, but that did not extend to any dilution that would occur if Fletcher exercised its right to convert its Preferred Stock into ION common stock

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cash flow projections is that we assume BGP pays us. If they don't, we turn negative. As such I have been giving some thought to the bank group strategy. Under this scenario we need to preserve cash but have their support so we don't go sideways on reps for the transaction."); JX 213 (Email from Peebler regarding the draft term sheet (Sept. 22, 2011)) ("This is an example where the [sic] ask for one thing, we counter, and they then counter with something worse than the original offer.").

[76] JX 198 (Internal ION email chain regarding term sheet discussions (Sept. 15, 2009)).

[77] JX 208 (Email from Hanson to Peebler (Sept. 18, 2009)).

[78] JX 209 (Internal ION email attaching revised term sheet (Sept 21, 2009)).

[79] JX 211 (Email exchange regarding term sheet (Sept. 21, 2009)).

under the Certificates of Rights and Preferences then in place.[80] Although BGP continued to push for anti-dilution rights that would protect them if Fletcher converted its Preferred Stock, ION consistently refused to give in because BGP was already aware of Fletcher's currently existing Preferred Stock and the potential for dilution that it posed.[81] In the end, BGP accepted this and received anti-dilution protection that did not apply if Fletcher converted its already existing Preferred Stock under the terms of the Certificates of Rights and Preferences.

As September drew to a close, BGP and ION had agreed on the structure of the joint venture, but it was evident that it would take months to get final regulatory approvals for the transaction.[82] The BGP Transaction provided a long-term solution to the problems that ION faced, but both BGP and ION were concerned that ION did not have sufficient cash to meet its obligations during the months between the announcement of the term sheet and the closing of the transaction. Therefore, the concept of BGP arranging for some type of bridge financing began to emerge.[83] During the last two weeks of September, BGP and ION tried to figure out the best way for BGP to inject capital into ION. Several ideas were floated — including a proposal under which BGP

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[80] Trial Tr. vol. 2, 622:18-24 (Peebler).
[81] Trial Tr. vol. 2, 654 (Roland).
[82] Because the transaction involved a large investment by a Chinese state-owned enterprise into an American company in the oil and natural gas industry, the parties were particularly concerned that it could take a long time to get approval from the Committee on Foreign Investment in the United States (CFIUS). Trial Tr. vol. 2, 486:6-11 (Hanson). In addition to CFIUS approval, BGP and ION had to get international antitrust approvals and approvals from the Chinese government. *Id.*
[83] *Id.* at 475:6-11.

would have just purchased equity from ION, which was ultimately abandoned because of the regulatory approvals that would be required — and BGP ultimately decided to pair with the Bank of China and arrange for bridge financing to be provided through ION's Credit Facility.[84] Although the Bank of China, as a state-owned bank, was not in the regular business of providing financing to small public companies in the United States, this was not a deal where it viewed itself as acting as a provider of financing to ION. Rather, the Bank of China was acting as a strategic financial arm of the Chinese government by seeking to facilitate another state-owned enterprise's entry into a precedentially-important joint venture in the United States. The Bank of China agreed to provide the bridge financing not for business or commercial reasons of its own, but because of the strategic importance of the transaction to BGP, China National Petroleum, and the Chinese government.[85] ION believed that it only needed $20 million in bridge financing to get to closing, but BGP initially wanted to provide ION with $65 million.[86] BGP wanted to make sure that there was no possible scenario under which the amount of bridge financing provided would be insufficient to see ION through closing.[87]

BGP and the Bank of China initially proposed to amend the Credit Facility to enable the provision of bridge financing through a separate tranche of lending that would

[84] *Id.* at 477-78.
[85] Trial Tr. vol. 1, 137-38 & 174-75 (Fowler).
[86] Trial Tr. vol. 2, 487 (Hanson).
[87] *Id.*; JX 220 (Internal ION email chain (Sept. 26, 2009)).

be added to the existing Credit Facility.[88] That separate tranche proposal was ultimately abandoned because it would have required the unanimous approval of the Existing Lenders, and HSBC did not believe that it had enough support from the other banks to accommodate a proposal for a separate tranche that would have had a shorter commitment period and maturity date.[89] Thus, the solution was to take a proposal to the Existing Lenders that would allow the Bank of China to enter into the Credit Facility on equal terms with the existing lenders. ION planned to issue two promissory notes (one from ION and one from ION S.ár.l.) that were convertible to ION common stock (collectively, the "Convertible Promissory Notes") to the Bank of China under the Credit Facility. The conversion rates on the Convertible Promissory Notes were set so that they would convert into an amount of stock equal to the amount outstanding. Under an agreement entered into on October 23, 2009, the Bank of China and BGP agreed that BGP would purchase the Bank of China's rights under the notes and that the Bank of China would assign all of its rights under the notes to BGP.[90] The purpose of the convertibility feature was that, at closing, BGP could simply convert the Convertible Promissory Notes into ION common stock, thereby extinguishing them and eliminating the need to pay cash at closing.[91] In addition to the Convertible Promissory Notes, ION would give BGP a warrant that was equivalent in value to the convertible notes. If the

[88] JX 238 (Email chain regarding discussions with HSBC (Oct. 2, 2009)).
[89] *Id.*
[90] JX 357 (Participation Agreement Between Bank of China and BGP (Oct. 23, 2009)).
[91] Post-Trial Oral Arg. Tr. 113.

transaction did not close, BGP would be able to sell the warrant to recapture the cash it had put into the bridge loan.[92]

ION and its advisors viewed it as very unlikely that ION could secure unanimous approval from the Existing Lenders to add additional debt to the Credit Facility beyond the $40 million that could be added through the Credit Facility's accordion feature.[93] The Existing Lenders felt that such an increase in borrowing under the Credit Facility would "have the effect of diluting the lenders' collateral coverage beyond the extent previously approved."[94] The Existing Lenders were also strongly inclined against waiving the requirement under the Credit Facility that all lenders be pro rata in order to let the bridge financing provided by the Bank of China mature before the rest of the Credit Facility or to be paid earlier.[95] Generally, the Existing Lenders were unwilling to permit the Bank of China to enter the Credit Facility and lend money to ION on better terms than the terms that the Existing Lenders had under the Credit Facility.

Therefore, ION, BGP, and the Bank of China agreed that the easiest way to provide the bridge financing was to amend the Credit Facility so that the Bank of China could be a lender in the Credit Facility under the same terms and conditions as the

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[92] Trial Tr. vol. 2, 483-44 (Hanson).
[93] JX 259 (Email Chain discussing the need for approval from the Existing Lenders (Oct. 6, 2009)). Although the record does not clearly indicate why only $40 million was available to be added through the accordion feature when it was initially set up to allow up to an additional $50 million to be added to the Credit Facility, presumably ION had exercised the accordion feature once before and added $10 million to the Credit Facility, meaning that only $40 million was left available.
[94] JX 261 (Internal ION email chain (Oct. 6, 2009)).
[95] *Id.*

Existing Lenders and then to exercise the accordion feature of the Credit Facility so that the Bank of China could provide ION with the $40 million of bridge financing. Although ION still felt that it only needed $20 million, and BGP still would have preferred to provide more, the companies settled on $40 million because it was the most that could be provided under the Credit Facility's accordion feature.[96] ION needed a majority of the Existing Lenders to agree to amend the Credit Facility to allow the proposal to proceed.

By mid-October, BGP and ION had agreed on the structure of the bridge financing. ION's management team next turned its attention to making sure the Existing Lenders understood how delicate ION's financial situation was and that, under the deal with BGP, the Existing Lenders would be paid back in full at closing.[97] The BGP Transaction was the best chance that the Existing Lenders had to be repaid and, if the transaction closed, they would be able to end their lending relationship with ION entirely, which is what they most desired. After a brief phone conversation, HSBC agreed to support the deal negotiated between BGP and ION and to take it to the Existing Lenders.[98] HSBC proposed an amendment to the Credit Facility that would enable the

[96] Trial Tr. vol. 2, 487 (Hanson).
[97] JX 307 (Internal ION email chain regarding phone call with Existing Lenders (Oct. 15, 2009)) ("[W]e are prepared at the appropriate point to meet with HSBC and other banks that makes sense to make sure that they get a loud and clear message from management and the board that 1.) the option on the table is the only option to keep ION out of bankruptcy, 2.) we are at a decision point b a week from Friday due to our cash situation and stress on our suppliers/etc, and 3.) The company strongly recommends that they go with the Term Sheet as proposed as it seems inconceivable to us that the banks would force the company into bankruptcy when they have a deal that has the best chance of . . . paying them back 100% . . . ").
[98] Trial Tr. vol. 2, 481:14-482:6 (Hanson) ("[T]he conversation I had with a counterpart at HSBC was a very short one. It was a call that probably lasted an hour and we walked through the

Bank of China to enter the Credit Facility and provide ION with the bridge financing and, after discussing the transaction with ION's management on October 14, 2009, the Existing Lenders were all supportive of the proposed amendment.[99] The Sixth Amendment to the Credit Facility (the "Sixth Amendment"), which permitted the bridge financing to proceed, was unanimously approved on October 22, 2009 and executed on October 23, 2009.[100] In exchange for their approval of the Sixth Amendment, the Existing Lenders received a consent fee of 25 basis points over the amount of the loan outstanding.[101]

After securing the approval of the Existing Lenders, BGP and ION prepared to proceed with a public announcement of the term sheet. At 10:26 p.m. on October 22, 2009, the day before the deal was to be announced and the term sheet signed, BGP's attorney emailed David Roland, ION's General Counsel, with several changes to the documents for the bridge financing. Negotiations continued throughout the night, and the final term sheet was agreed to less than three hours before the deal was to be

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proposed transaction. . . . the way I described it to him was, 'this is a take-it-or-leave-it deal and it's not one we are going to negotiate.' I said 'If you're not going to take this deal, you can send in your workout teams. [Peebler] and I will hand you the keys and we are going to the beach because we have done the best we can do at this point.' . . . He went back and actually had a conversation internally; came back to me within a half hour called me and said 'HSBC will support the deal and will bring it to the bank group.'").

[99] JX 319 (Email between Hanson and Peebler regarding the Sixth Amendment (Oct. 21, 2009)) ("Good news, all banks are supportive so far.").

[100] JX 336 (6th Amendment to Amended and Restated Credit Agreement (Oct. 23, 2009)); JX 340.

[101] JX 351 (Fee Letter – Sixth Amendment to Credit Agreement between ION Geophysical Corp. and HSBC Bank USA, N.A. (fully executed) (Oct. 23, 2009)).

announced.[102] As the negotiations drew to a close Peebler emailed his counterpart at BGP and said, "We are done!! No more changes please."[103]

On October 23, 2009, ION announced that it had entered into a binding term sheet with BGP that set forth the principal terms for a proposed joint venture between the two companies, entered into the Sixth Amendment, and issued the Convertible Promissory Notes evidencing the bridge loan from the Bank of China.[104] Under the Convertible Promissory Notes, ION, at BGP's insistence, borrowed the full $40 million ($30 million at the parent level and $10 million at the international subsidiary) shortly after the close of the transaction. Although ION accepted the full $40 million in bridge financing that BGP insisted upon, it still believed that it only needed $20 million and, therefore, repaid $20 million the next day (including the $10 million that ION S.ár.l. borrowed), leaving it in a position with net $20 million borrowed.[105] Although all of the $10 million that ION S.ár.l. borrowed was repaid the next day, the ION S.ár.l. Note was not extinguished because the $10 million repayment was distributed on a pro rata basis among BGP and the Existing Lenders.[106]

The announcement of the term sheet had an immediate positive effect on ION's stock price and on Fletcher's investment in ION. Internally, Fletcher circulated an email that noted that ION's stock price increased by as much as 47% following the

[102] JX 339 (Email chain between Yeliang Guo and Peebler (Oct. 23, 2009)).
[103] *Id.*
[104] JX 352 (ION Form 8-K (Oct. 23, 2009)).
[105] Trial Tr. vol. 2, 645 (Roland).
[106] *Id.* at 648.

announcement of the term sheet.[107] Then *Fletcher began buying more ION securities*.[108] In the world of lucre, greenbacks mean more than words, of course. In the case of Fletcher, its view that the BGP Transaction was positive for ION's equity value was made plain by its actions. Fletcher began to buy *more* ION stock.

D. Fletcher Sues ION

On November 25, 2009, a little over one month after the announcement of the BGP Transaction, Fletcher, then represented by Skadden and Proskauer Rose, LLP, filed a complaint in this court seeking, among other things, a declaration that its right to consent to any issuance of a security by ION S.ár.l. had been violated, an injunction of the BGP Transaction until ION had provided Fletcher with all material information regarding the transaction and obtained Fletcher's consent, and an award of damages.[109] Despite the fact that Fletcher had been circulating articles internally that noted the increase in ION's stock price and buying more ION securities, that original complaint included statements such as "it appears that ION has sold off a substantial part of its business at fire sale prices at the bottom of a near collapse of the land equipment business"[110] and "[b]ased on the little information disclosed to date, the terms of the BGP Transactions appear highly unfavorable."[111] In the complaint, Fletcher even stated that ensuring that it had the opportunity to exercise its consent right would "not only protect

[107] *See* JX 360 (Internal Fletcher email chain (Oct. 26, 2009)) (showing that employees of Fletcher internally circulated an email that attached an article describing the increase in ION's stock price following the announcement of the term sheet)
[108] *See* JX 361 (Internal Fletcher email chain (Oct. 26, 2009)) (discussing trades in ION securities Fletcher executed following the announcement of the term sheet).

Fletcher, but may protect all stockholders from another disastrous investment by ION and its directors."[112]

On December 23, 2009, Fletcher moved for partial summary judgment "ask[ing] the Court to declare that ION breached its obligations under its Certificate of Incorporation by permitting the issuance of the ION S.àr.1 Note 'without first obtaining a meaningful and informed vote of approval by Fletcher'" and "that the Note is ineffective and unenforceable unless and until ION provides Fletcher with facts concerning the BGP Transactions and obtains Fletcher's consent to the issuance of the ION S.ar.l Note after providing Fletcher a reasonable time to consider that issuance."[113] Because of the exigent time pressures, Vice Chancellor Parsons treated the motion for summary judgment as a more provisional request for a preliminary injunction, noting that because Fletcher was asking the court to invalidate the issuance of the ION S.àr.1 Note and to require that ION repay any funds borrowed under that note, Fletcher was effectively seeking a preliminary injunction.[114] Oral Argument on Fletcher's motion was held on January 19, 2010. On March 24, 2010, the day before the BGP Transaction was scheduled to close, Vice Chancellor Parsons issued a decision finding that although Fletcher had a reasonable likelihood of success on its claim that ION had violated its contractual right to consent,

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[109] Verified Compl., Request for Relief.
[110] Compl. at ¶ 53.
[111] Compl. at ¶ 52.
[112] Compl. at ¶ 54.
[113] *Fletcher I*, 2010 WL 1223782, at *2.
[114] *Id.* at *3.

the balance of the equities weighed against granting injunctive relief.[115] Vice Chancellor Parsons listed three reasons for his decision not to grant injunctive relief: (1) an injunction could have prevented the BGP Transaction from closing and caused ION to default on its debt obligations; (2) Fletcher was unlikely to suffer irreparable harm in the absence of an injunction, because the court could ascertain its damages in the future by determining the amount Fletcher would have received in a hypothetical negotiation for its consent; and (3) "Fletcher did not pursue its purported consent rights with the degree of alacrity that the Court would expect in the context of an effort to interfere with a transaction of the size and importance to ION of the imminent BGP Transactions."[116] Vice Chancellor Parsons, therefore, denied Fletcher's motion for summary judgment "insofar as it could be construed as a request for a preliminary injunction effectively invalidating ION's issuance of the ION S.àr.l. Note or requiring that ION repay funds borrowed under that Note."[117]

The next day, on March 25, 2010, the BGP Transaction closed. As part of the closing, BGP acquired 23.8 million shares of ION common stock by converting the principal balance of the Convertible Promissory Notes, which the Bank of China had assigned to BGP, thereby extinguishing the ION S.àr.l. Note. ION also entered into a

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[115] *Id.*

[116] *Id.* at *4-5. This well-supported finding is consistent with the facts in the record that demonstrate that Fletcher waited an entire month after the announcement of the transaction to file a complaint and an additional month after the complaint was filed to seek the requested equitable relief. Fletcher's lack of speed directly contradicts its attempts at trial to portray itself as having timely sought to enforce its consent right from the very beginning.

[117] *Id.* at *2.

new credit agreement with China Merchants Bank Co. Ltd. (hereinafter "China Merchants Bank") on terms and conditions that were substantially improved from its earlier Credit Facility, and it repaid all of its outstanding loans under the Credit Facility. The BGP Transaction reduced ION's total overall debt from over $240 million to only $106 million, all of which was in the form of a term loan under the new credit facility with China Merchants Bank.[118]

Contrary to Fletcher's assertions in its original complaint, Fletcher actually believed that the BGP Transaction was value-enhancing for Fletcher, ION, and ION's common stockholders.[119] So did the stock market. ION's stock price recovered from its pre-BGP Transaction low of $0.83 in March 2009 to over $8.00 by the end of 2010.[120] This increase in value was particularly important for Fletcher, which was carrying its investment in ION on its books for far more than its market value before the announcement of the BGP Transaction.[121] Had the BGP Transaction failed to close, and

[118] Def.'s Opening Pre-Trial Br. at 22-23.
[119] *Id.* at 23.
[120] *Id.*
[121] JX 437 (Spreadsheet reflecting Fletcher preferred stock valuation attached to Fletcher's Responses and Objections to Defendants' Second Set of Interrogatories (Sept. 9, 2011)) (noting that throughout the fall of 2009 Fletcher valued its preferred stock for more than $110 million). According to the defendants' uncontested arithmetic, Fletcher could only have converted its Preferred Stock into approximately $53 million of ION common stock before the announcement of the merger. It is curious why Fletcher valued its Preferred Stock so much above fair market value, but what is not clouded from clarity is the reality that a complete loss of its ION Investment through an ION bankruptcy — and the subsequent write down of its assets by $110 million — would have been devastating for Fletcher, while the increase in value of the Preferred Stock following the BGP Transaction was very beneficial for Fletcher.

ION been forced to file for bankruptcy, it is likely that Fletcher would have lost its entire investment in ION.[122]

On May 28, 2010, Vice Chancellor Parsons issued an opinion addressing the issues on which he had reserved judgment in *Fletcher I* and granted Fletcher's motion for summary judgment in part (*Fletcher II*), holding that Fletcher had a right to consent to any issuance of a security by an ION subsidiary, that the ION S.àr.l. Note was a security, and that ION had violated Fletcher's consent right when the ION S.àr.l. Note was issued without Fletcher's consent.[123] The Vice Chancellor's determination that the ION S.àr.l. Note was a security was based on the fact that the note was convertible. As the Vice Chancellor acknowledged, and as Fletcher admitted, "certain classes of notes are not securities."[124] Nonetheless, the Vice Chancellor concluded that the ION S.àr.l. Note was a security because it was "a debt instrument convertible into equity securities."[125] On December 1, 2010, Vice Chancellor Parsons recused himself because of developments unrelated to his own actions and beyond his control, and the case was reassigned.

Fletcher then began concentrating on obtaining damages for the bypass of its consent rights as to both the ARAM transaction and the BGP Transaction. Fletcher made plain that it viewed itself as having claims for big dollars — dollars larger, in the case of

[122] Although Fletcher's Preferred Stock would have put it ahead of ION's common stockholders in a distribution of assets in a bankruptcy proceeding, Fletcher still would have been behind the Existing Lenders, who were senior secured lenders. Given that over half of Fletcher's assets were invested in ION Preferred Stock, an ION bankruptcy could have led to Fletcher's insolvency.
[123] *Fletcher II*, 2010 WL 2173838, at *5-6.
[124] *Id.* at *5.
[125] *Id.*

the BGP deal, than the $40 million bridge loan that Vice Chancellor Parsons held triggered its consent right.

On June 29, 2012, after more than two years of litigation and after all of the pre-trial discovery had been completed and all of the expert reports filed, Fletcher filed a voluntary petition for bankruptcy under Chapter 11 of the United States Bankruptcy Code.[126] The bankruptcy trustee elected to hire new counsel to litigate the claims in this case in early 2013. Shortly after they were retained, Fletcher's new counsel attempted to introduce new damages theories and new expert reports. That request was denied by this court on March 8, 2013.[127]

Although the report filed by Fletcher's expert, Peter Fowler,[128] had been floating around for years, it was not until Fletcher filed its opening pre-trial brief on July 3, 2013, that it specifically quantified its damages and disclosed for the first time that it was seeking total damages of over $78 million.[129] Fletcher also attempted an end-run around this court's denial of its request to introduce new expert reports by introducing a comparable transactions analysis and a highest intermediate price analysis — neither of

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[126] Letter to the Court of Chancery from Counsel for Fletcher, advising the Court of Fletcher's filing of a voluntary petition for relief under Chapter 11 in the U.S. Bankruptcy Court for S.D.N.Y. (July 12, 2012).
[127] Order Denying Fletcher's Motion for Leave to File Narrowed Expert Reports (Mar. 8, 2013).
[128] Everyone has a bad day; that comes with being human. For reasons that the trial record reflects, Fowler's testimony in this case fell into that category. Put succinctly, his expert report failed to take into account important factors and his trial testimony was inconsistent, lacked credibility, and involved unfairness to the defendants. It is therefore deserving of, and given, little or no weight.
[129] Pl.'s Opening Pre-Trial Br. at 48-50.

which had been disclosed in discovery — in its opening pre-trial brief.[130] ION moved to strike these new analyses, and this court granted that request on July 31, 2013 because Fletcher's violations of its discovery obligations and attempts to circumvent the prior rulings of this court were unfair and prejudicial to ION. [131]

E. Trial

The sole issue left for determination is the amount of damages that Fletcher is entitled to as a result of the breach of its contractual right to consent to the issuance of any security by an ION subsidiary. In accordance with Vice Chancellor Parsons's letter opinion issued on March 24, 2010 — which held that Fletcher would not be irreparably injured by the denial of its request for an injunction because "Fletcher could still pursue its claim for money damages" and that the court could resolve that issue by "determining the amount Fletcher would have received in a hypothetical negotiation regarding its asserted right to consent to the ION S.àr.1 Note, before it issued[,]"[132] — the parties constructed competing versions of the hypothetical negotiation. The parties have made the already challenging task of attempting to construct a hypothetical negotiation even more difficult by presenting cartoonish versions of the hypothetical negotiation. Those competing versions of the hypothetical negotiation are described below.

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[130] *Id.* at 33-35.

[131] Telephonic Rulings of the Court on Defendants' Motion to Strike, Plaintiff's Motion in Limine, and Pretrial Conference (July 31, 2013).

[132] *Fletcher I*, 2010 WL 1223782, at *2.

i. Fletcher's Damages Theories And Its Version Of The Hypothetical Negotiation

Fletcher's version of the hypothetical negotiation pits Fletcher and its eponymous then-CEO Alphonse "Buddy" Fletcher ("Buddy Fletcher"), a tough negotiator ready to use his consent right to extract as much value as possible, against ION, a weak and hapless negotiator that was desperate and would have done anything to close the BGP Transaction. Although Buddy Fletcher never appeared at trial, how he would have behaved during the hypothetical negotiation was discussed extensively. In Fletcher's own version, Buddy Fletcher was portrayed as an exceedingly self-confident and opportunistic individual who believed that he could extract almost two dollars of value from ION and BGP for every dollar of bridge financing over which he had a consent right by refusing to grant his consent unless his demands were met.

Thus, as its core theory of damages at trial, Fletcher contended that it would have demanded and received several changes to the terms of its Preferred Stock in exchange for its consent to the issuance of the ION S.àr.1 Note. According to Fletcher's Vice Chairman, Kell Benson, Fletcher concluded shortly after the announcement of the BGP Transaction that its consent right had been violated and, from the very beginning, was focused on obtaining changes to its conversion price and the interest rate on its Preferred Stock in exchange for its consent.[133] In his expert report, Fowler concluded that Fletcher would have asked for three changes to the terms of its Preferred Stock in the hypothetical negotiation: (1) an increase in the dividend rate of 250 to 350 basis points, (2) a decrease

[133] Trial Tr. vol. 1, 29 (Benson).

in the conversion price from $4.45 to $2.80, and (3) a reinstatement of Fletcher's redemption right without a Minimum Price Provision.[134] Fletcher valued these changes at $78 million as of the time of the hypothetical negotiation.[135] That fact bears repetition: Fletcher was asking for $78 million in exchange for its consent to a bridge financing that totaled only $40 million. In other words, the consent fee Fletcher believes it was entitled to was almost double the size of the transaction to which Fletcher was being asked to consent.

At trial, Fletcher's advocates and expert witness premised its case on this extreme position. Fletcher told this court that Buddy Fletcher would not have consented to the BGP Transaction without receiving consideration greater in value than the bridge financing itself. Even more, Buddy Fletcher was portrayed as a person willing to bring it all down on his own head — and the heads of the Fletcher investors of which he was a fiduciary.[136] Fletcher maintained this portrayal of Buddy Fletcher throughout its pre-trial

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[134] JX 455 at 14-15 (Expert Report of Peter A. Fowler (Nov. 10, 2011)).
[135] Pl.'s Opening Pre-Trial Br. at 48-50.
[136] JX 447 at 28 (Deposition Minuscript of Alphonse Fletcher (Oct. 4, 2011)) ("The less risky instrument's terms, having just been negotiated by the company, should be a good benchmark for pricing the company's securities. And so the higher risk instrument owned by Fletcher should have higher amounts of income and/or lower conversion prices than the less risky instrument that is being inserted in front of it, only with Fletcher's consent."); *Id.* at 27 (explaining his position that if Fletcher believed it was entitled to $30 million in exchange for its consent, there were no circumstances under which it would have agreed to consent for less than $30 million, even if the company had alternatives that it could have pursued that would have avoided the need for Fletcher's consent that would have cost only $1 million); Trial Tr. vol. 1, 33:14-19 (Benson) (testifying that Fletcher only would have consented if it received the compensation it considered "fair"); *Id.* at 77-80 (testifying that if ION had threatened not to pay the consent fee Fletcher claims it would have demanded, to forego the BGP Transaction, and file for bankruptcy, Fletcher would have been willing to call ION's bluff).

briefing and at trial even though: (1) Buddy Fletcher's own actions revealed that he thought the BGP deal was great for ION and thus Fletcher; (2) an ION bankruptcy would have ruined Fletcher itself; and (3) Fletcher only had consent rights over a $40 million bridge financing. This approach to the litigation appears to have been shaped by Buddy Fletcher, Benson, and Fletcher's advisors before the bankruptcy. Because the bankruptcy occurred after this litigation had already proceeded through discovery and the expert reports had been filed, Fletcher was held to the case that it had already put together and not permitted to make up a new one at ION's expense. For reasons that were not explained, the bankruptcy trustee, who controlled the litigation, and new counsel did not present Buddy Fletcher as a witness at trial. There was, therefore, no basis for the court to hear directly from him about the way that he was portrayed by Fletcher's advisors in its briefs and expert reports.

Fletcher assumed that in the hypothetical negotiation for its consent, "[it] would essentially be re-underwriting or re-evaluating its investment in [the] negotiation."[137] But this was a false premise because Fletcher had no right to exit its investment, no put option through which it could require ION to repurchase its Preferred Stock if it refused to consent, and, unlike the Existing Lenders, had no right to declare a default. Consistent with the false belief that Fletcher would essentially be reevaluating its investment in ION even though Fletcher was not actually bringing any new capital to the table or giving

[137] JX 455 at 7 (Expert Report of Peter A. Fowler (Nov. 10, 2011)); *see also* Trial Tr. vol. 1, 29-30 (Benson) (explaining that Fletcher would have asked for these changes to its preferred stock because similar terms had been granted to BGP).

anything of value to ION other than its consent, Fowler selected these three demands because they were on par with the terms of the ION S.ár.l. Note, which was being issued in exchange for the bridge financing.[138] Importantly, Fletcher viewed its consent right over the issuance of the ION S.àr.1 Note as applying to the entire BGP Transaction, which was valued in the hundreds of millions of dollars, not only to the $40 million bridge financing that the ION S.àr.1 Note was issued in connection with.[139]

The hypothetical negotiation that Fletcher believes would have happened is misleadingly simple: ION and Fletcher would have been the only parties involved in the negotiation, and ION would have been so desperate to close the BGP Transaction that it would have simply acceded to all of Fletcher's demands. In other words, under Fletcher's version of the hypothetical consent negotiation, Fletcher would have requested the three changes to its Preferred Stock listed above and ION would have, immediately and without consulting BGP or the Existing Lenders, granted those requests in exchange for Fletcher's consent.[140] This hypothetical negotiation is premised on two key assumptions: that neither BGP nor the Existing Lenders would have objected to the changes to Fletcher's Preferred Stock and that ION had no viable alternatives.

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[138] JX 455 at 14-15 (Expert Report of Peter A. Fowler (Nov. 10, 2011)) ("Given that the ION S.ár.l. note had a $2.80 conversion price, that is a ready benchmark for the adjustment of Fletcher's conversion price. . . . The proposed dividend rate is reasonable because it is only slightly higher than the floating rate on the ION S.ár.l. note.").

[139] Post-Trial Oral Arg. Tr., 57:6-9 (reiterating Fletcher's position that the consent right was over the entire BGP Transaction, not only the $40 million bridge financing).

[140] *Id.*

In his expert report and at trial, Fowler took the position that Fletcher had "significant leverage" because ION did not have a realistic alternative to the BGP Transaction.[141] Fletcher has argued that ION's only options were to complete the BGP Transaction or to file for bankruptcy, and that because its consent was necessary for the BGP Transaction to proceed, it could have withheld that consent to extract tremendous value. Fowler's conclusion that ION had no alternatives to the BGP Transaction was largely premised on his opinion that the Existing Lenders never would have agreed to any amendment to the Credit Agreement that required unanimous approval of the Existing Lenders.[142] Fowler's opinion appears to have been based entirely on the emails between HSBC and ION indicating that HSBC did not believe that there was support from the Existing Lenders to unanimously approve a specific proposal that would have put the Bank of China on better terms than the Existing Lenders.[143] And, consistent with his view that Fletcher's consent right extended to the entire BGP Transaction instead of only to the bridge financing, Fowler ruled out the possibility of completing another private placement or other capital raise because it would not have "given [ION] a strategic partner like the BGP Transaction."[144]

Fowler also opined that the fact that Fletcher's investment in ION made up almost two-thirds of its investment portfolio would not have been material to Fletcher and that,

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[141] Trial Tr. vol. 1, 230-31 (Fowler).
[142] Trial Tr. vol. 2, 408:10-13 (Fowler).
[143] *Id.*
[144] *Id.* at 390

because Fletcher would not have believed ION if it had threatened to pursue bankruptcy instead of making a consent payment to Fletcher, Fletcher would have held fast to its demands and ultimately received everything that it asked for.[145] In other words, Fowler's entire report was premised on the notion that Fletcher was willing to strap a bomb onto its chest and blow up the entire BGP deal, force ION into bankruptcy, and decimate its own investment portfolio if it was not paid a ransom in exchange for its consent to a transaction that was already expected to create substantial value for it. Benson's testimony supported this depiction of Fletcher when he testified that, if in the hypothetical negotiation ION had threatened bankruptcy, Fletcher would have been willing to call ION's bluff.[146]

After it became evident at trial that Fowler's two-dimensional depiction of the hypothetical negotiation for Fletcher's consent was unrealistic because it assumed that the negotiation occurred in a vacuum between ION and Fletcher and that no other parties would have been involved, Fletcher attempted to argue that neither the Existing Lenders nor BGP would have cared if ION agreed to give tens of millions of dollars in value to Fletcher in exchange for its consent. Fowler conceded that as a practical matter, BGP would find out about any negotiation with Fletcher for its consent and need to approve the concessions as they came in material part at BGP's expense, but he contended that BGP would not have objected to the changes to Fletcher's Preferred Stock that Fletcher

[145] *Id.* at 233-34 & 156:3-8.
[146] Trial Tr. vol. 1, 80 (Benson).

would have asked for.[147] Fowler's position that BGP would have been indifferent to these changes in Fletcher's Preferred Stock was premised on his opinion that BGP's primary objective was getting access to ION's land assets through the joint venture and that the equity investment in ION was only a secondary concern.[148]

Fowler's opinion thus ignored several key facts. First, BGP had been insistent on a substantial equity stake and accompanying anti-dilution protection. Although BGP had begrudgingly agreed to let itself be diluted if Fletcher, which had existing contractual rights, converted its Preferred Stock under the existing Certificates of Rights and Preferences, the negotiation history reveals that BGP's equity stake and its protection of that stake from dilution were both very important to BGP. Fletcher's hypothetical demands were critically different from the existing Certificates of Rights and Preferences and would have subjected BGP to additional dilution because of a consent payment to Fletcher.

Fowler also erroneously premised his report on the presumption that ION would not have been required to obtain the consent of the Existing Lenders to make the changes Fletcher would have requested to its Preferred Stock. But that position is directly contradicted by the language of the Credit Agreement. Section 6.07 of the Credit Agreement prohibited ION from agreeing to make any "Restricted Payments" that were

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[147] Trial Tr. vol. 2, 156-57 (Fowler).

[148] *Id.* at 157:13-17 ("Primary objective was getting access to the intellectual property that ION had and getting that in the [joint venture] and getting control of the [joint venture]. Secondary objective was an investment in – in ION itself."); *Id.* at 157-60 (describing Fowler's position that BGP would not have been concerned with the changes to Fletcher's Preferred Stock because its primary strategic objective still would have been met).

not specifically exempted from the prohibition.[149] The Credit Agreement defined a Restricted Payment as "any dividend or other distribution . . . with respect to any Equity Interests in [ION] . . ."[150] This means that, unless a specific exemption was found in the Credit Agreement, ION was prohibited from agreeing to make any dividend payments absent an amendment to the Credit Agreement. Excepted from this prohibition on the payment of dividends by Section 6.07(d) are "all dividends, redemptions, or distributions . . . in respect of [ION's] Convertible Preferred Stock."[151] The Credit Agreement defines "Convertible Preferred Stock" to mean the "Existing Convertible Preferred Stock,"[152] which is in turn defined as:

> those certain (1) Series D-1 Cumulative Convertible Preferred Stock issued pursuant to the terms of the Certificates of Rights and Preferences of Series D-1 Cumulative Convertible Preferred Stock dated February 16, 2005, (ii) Series D-2 Cumulative Convertible Preferred Stock issued pursuant to the terms of the Certificate of Rights and Preferences of Series D-2 Cumulative Convertible Preferred Stock dated December 6, 2007, (iii) Series D-3 Cumulative Convertible Preferred Stock issued pursuant to the terms of the Certificate of Rights and Preferences of Series D-3 Cumulative Convertible Preferred Stock dated effective as of February 21, 2008 and (iv) shares issued in accordance with the terms of Section 1(c) of that certain Agreement dated as of February 15, 2005 between [ION] and [Fletcher].[153]

It was this provision in the Credit Agreement that enabled ION to make dividend payments to Fletcher, even though ION was generally prohibited from making dividend payments by the terms of the Credit Agreement. The exception for dividend payments to

[149] JX 15 (ION's Amended and Restated Credit Agreement (July 3, 2008)).
[150] *Id.* at 22.
[151] *Id.* at 65.
[152] *Id.* at 8.
[153] *Id.* at 10.

Fletcher, however, was clearly limited to the terms of the specific existing Certificates of Rights and Preferences that governed Fletcher's Preferred Stock. For ION to increase the dividend payments to Fletcher, as Fletcher and its expert contend ION would have done, ION would have had to get the consent of the Existing Lenders to amend the Credit Agreement to allow the payment of the increased dividends. Fowler's assumption that the Existing Lenders would not have been part of the negotiation for Fletcher's consent was, therefore, incorrect. Not only would the Existing Lenders have been involved in the negotiation, but they would have been required to consent to any increase of Fletcher's dividend.

Fowler's opinion never considered that the demands he contended Fletcher would have been seeking would have required ION to go to BGP and the Existing Lenders and obtain their consent. If ION had gone to BGP and the Existing Lenders with Fletcher's request, they would have asked ION why they should agree to approve changes that would transfer value to a preferred stockholder that nearly doubled the value of the bridge financing the preferred stockholder was being asked to consent to, especially when that preferred stockholder faced catastrophic loss if BGP walked away and the BGP Transaction didn't happen. These were critical real world factors Fowler either chose to ignore or just overlooked.

After it became evident at trial that Fowler's report was based on erroneous and unsupported assumptions, Fletcher completely abandoned its earlier damages theory and, in its post-trial opening brief filed on September 13, 2013, disclosed its new damages theory: that the hypothetical negotiation would have resulted in a decrease of Fletcher's Preferred Stock conversion price from $4.4517 to $4.0867.[154] This new damages theory removed the request for an increase to Fletcher's dividend rate entirely. Presumably Fletcher elected to drop that request because the Credit Agreement would have required the Existing Lenders to consent to any increase in the dividend rate on Fletcher's Preferred Stock. Under this new damages theory, Fletcher contends that it is entitled to damages, before pre-judgment interest, "of no less than $6,235,553" and that the "floor" for damages should be set by the total consent fee ION paid to the Existing Lenders in connection with the Fifth Amendment.[155]

Unlike its shifting damages calculations, Fletcher has maintained consistency on one point: that ION had no options other than to pay the ransom that Fletcher would have demanded in exchange for its consent and that ION would have rolled over and agreed to Fletcher's demands in order to avoid bankruptcy.[156] But Fletcher's version of the hypothetical negotiation — in which Fletcher and ION were the only two parties involved, ION was the only party with anything to lose, and ION was a weak negotiator who either had to declare bankruptcy or agree to pay whatever Fletcher demanded — does not comport with the record.

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[154] Pl.'s Opening Post-Trial Br. at 20.
[155] *Id.*
[156] Pl.'s Answering Pre-Trial Br. at 20-29; Pl.'s Opening Post-Trial Br. at 27-28.

ii. <u>ION's Version Of The Hypothetical Negotiation</u>

By the time of post-trial briefing, ION's patience reserves were understandably depleted. Before it entered bankruptcy, Fletcher aggressively litigated this case and made plain that it thought big, big dollars were owed it for the deprivation of its consent right to the $40 million bridge loan. ION was, of course, forced to spend a great deal of money seeking to rebut the case Fletcher was making. Then Fletcher filed for bankruptcy, causing a delay in the litigation. After that, the bankruptcy trustee entered the litigation with new counsel, and Fletcher tried to fundamentally change its approach. After being denied that chance once after motion practice, Fletcher tried it again in its pre-trial briefing, and ION again had to spend resources to prevent this. At trial, Fletcher presented its long established damages theory, which is that it would accept nothing less than the changes to its Preferred Stock which it valued at $78 million and that anything materially less than this demand would have been rejected. Seizing on Fletcher's own portrayal of itself as prepared to be nihilistic, ION's post-trial briefing took on a cartoonish character of its own, albeit one with more realistic qualities than that drawn by Fletcher.

Building on Fletcher's own case theory, in ION's version of events, Fletcher would have opened the negotiations by requesting the three changes to its Preferred Stock that would have had a present value of around $78 million. ION contends that because neither itself, BGP, or the Existing Lenders would have agreed to those changes, and because Fletcher has maintained that it never would have accepted anything less, ION, BGP, and the Existing Lenders simply would have found a way to structure the transaction so that it did not require Fletcher's consent, thereby obviating the need to make any consent payment to Fletcher. To buttress this position, ION spells out several ways for ION to get bridge financing that would have been far less painful to the most powerful players at the negotiating table, BGP and the Existing Lenders, and to ION — whose common stockholders Fletcher erroneously believes could be trampled upon at will. If Fletcher had acted in the extreme manner it claims it would have, one of these less painful alternatives would have been taken, resulting in nothing for Fletcher.

III. Legal Analysis

A. Expectation Damages

Damages for breach of contract are determined by the reasonable expectations of the parties before the breach occurred.[157] As our Supreme Court has held:

> This principle of expectations damages is measured by the amount of money that would put the promisee in the same position as if the promisor had performed the contract. Expectation damages thus require the breaching promisor to compensate the promisee for the promisee's reasonable expectation of the value of the breach of contract, and, hence, what the promisee lost.[158]

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[157] *Duncan v. TheraTx, Inc.,* 775 A.2d 1019, 1022 (Del. 2001).

[158] *Id.*; *see also Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 146 (Del. 2009) ("Contract damages are designed to place the injured party in an action for breach of contract in the same place as he would have been if the contract had been performed. . . . Expectation damages are measured by the losses caused and gains prevented by the defendant's breach.") (internal citations omitted); RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a ("Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will . . . put him in as good a position as he would have been in had the contract been performed.").

Damages are to be measured as of the time the contract was breached.[159]

To prevail in a claim for damages for breach of contract, a plaintiff "must show both the existence of damages provable to a reasonable certainty, and that these damages flowed from defendant's violation of the contract."[160] In other words, a plaintiff "must show that the injuries suffered are not speculative or uncertain and that the Court may make a reasonable estimate as to an amount of damages"[161]

Consent rights are commonly viewed as protective devices meant to shield the holder of the right against being harmed by a new transaction that is adverse to its interests.[162] Although Benson paid lip-service to this understanding of a consent right when he initially described the consent right that Fletcher possessed over issuances of securities by ION subsidiaries,[163] Fletcher apparently viewed its consent right as an

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[159] *Comrie v. Enterasy Networks, Inc*., 837 A.2d 1, 17 (Del. Ch. 2003).
[160] *LaPoint v. AmerisourceBergen Corp.*, 2007 WL 2565709 at *9 (Del. Ch. Sept. 4, 2007).
[161] *Id.* at *9; *see also Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv. of Cincinnati, Inc.*, 1996 WL 506906 at *20 (Del. Ch. Sept. 3, 1996) ("Damages cannot be speculative or uncertain but must be based on a reasonable estimate.") (internal citations omitted).
[162] *See, e.g.*, *NAMA Holdings, LLC v. Related World Market Center*, 922 A.2d 417, 432 (Del. Ch. 2007) (noting that the plaintiff "presumably insisted upon inclusion" of a consent right "[t]o protect its rights"); *Telcom-SNI Investors, LLC v. Sorrento Networks, Inc*., 2001 WL 1117505, at *6 (Del. Ch. Aug. 29, 2001) ("The apparent intent of the protective provisions is to protect against the issuance of more equity, without the consent of the holders of a majority of the Series A Preferred Stock, that could result in a reduction of their rights through a restructuring of Sorrento's equity."); Richard M. Buxbaum, *Preferred Stock – Law and Draftsmanship*, 42 CAL L. REV. 243, 293-97 (1954) (noting that preferred stockholders often negotiate for provisions that require their approval of certain contemplated transactions and describing those provisions as "protective requirements").
[163] Trial Tr. vol. 1, 21:1-8 (Benson) (describing the purpose of Fletcher's consent right as "to give us some protection from subsidiaries being traded or issuing securities . . . that might increase the risk to Fletcher, this was a way to give us comfort that the company would not do anything through subsidiaries that would harm Fletcher's position.").

opportunity to coerce value from ION, even in circumstances where Fletcher believed that the transaction it was being asked to consent to was highly beneficial to itself as an ION preferred stockholder.[164] In a recent case, *Zimmerman v. Crothall*, a consent holder who, like Fletcher, had shown a breach of its consent rights, learned a lesson about overplaying one's hand.[165] In that case, the court held, after finding repeated violations of a consent right, that a plaintiff was entitled only to nominal damages of $1.00 because the actions taken in violation of the plaintiff's consent right did not harm, and actually benefited the plaintiff.[166] The BGP Transaction benefited Fletcher immensely, and therefore Fletcher suffered no damage as a result of its consummation.

Nonetheless, Fletcher's contractual consent right was violated, it had some leverage in a hypothetical negotiation, and it is entitled to have its *reasonable* expectations honored. But the term "reasonable" is essential to a proper damages analysis. Fletcher's view that its expectation damages should be measured by reference to its fantasy "ask" does not accord with our law, especially because: (1) Fletcher knew the BGP Transaction was good for ION and itself; (2) Fletcher stood to become insolvent itself if the BGP Transaction did not go forward; (3) other parties had far greater leverage

[164] *Id.* at 33-34, 75-77 (explaining that Fletcher viewed its consent right as an opportunity to "obtain value" and would only have consented to the transaction if it received "fair compensation").
[165] 62 A.3d 676 (Del. Ch. 2013).
[166] *Id.* at 713 ("Having concluded that none of the Challenged Transactions has been shown to have been unfair to [the holder of the consent right], however, I find that there are no such damages. The Challenged Transactions provided the Company with crucial capital on fair terms. The dilution [the holder of the consent right suffered] suffered was in exchange for maintaining some value to his investment . . . [I] decline to award any damages beyond nominal damages of $1.").

than Fletcher; (4) Fletcher had consent rights only to an optional part of a much larger transaction; (5) and there were viable ways to structure around Fletcher's consent right.

To determine the amount of damages that Fletcher suffered as a result of the breach of its contractual right to consent to the issuance of any security by ION S.àr.l., the parties have presented evidence to determine what they would have agreed to in a hypothetical negotiation for Fletcher's consent that occurred before the issuance of the ION S.àr.l. Note in the fall of 2009.[167] Fletcher's damages, therefore, are calculated based on the expected outcome of a hypothetical negotiation between these parties before the announcement of the BGP Transaction.

B. <u>The Hypothetical Negotiation For Fletcher's Consent</u>

Determining what Fletcher would have received for its consent to the bridge financing in a hypothetical negotiation is not easy. It is an exercise in counterfactual historical imagination that is, by its very nature, fraught with uncertainty. In general, this is why consent rights cases are better dealt with by injunctive relief if the court can act with alacrity and give the parties a reasonable period to have the negotiation or work around the consent rights. Vice Chancellor Parsons found that was not the situation here.[168] And, as noted, the parties have unnecessarily complicated it still further by presenting simplified caricatures of how they believe the negotiators would have

[167] Pl.'s Opening Pre-Trial Br. at 21-23 (describing the outcome of the hypothetical negotiation constructed by Fowler); Def.'s Opening Pre-Trial Br. at 26-27 (critiquing Fowler's account of the hypothetical negotiation); Pl.'s Opening Post-Trial Br. at 20-24 (describing what it believed to be the "most plausible" outcome of the hypothetical negotiation); Def.'s Opening Post-Trial Br. at 11-14 (describing what ION believes would have happened in a hypothetical negotiation).
[168] *Fletcher I*, 2010 WL 1223782 at *4-5.

behaved. Nonetheless, the court must conjure up the most likely path a hypothetical negotiation would have taken. To do so, it seems important to first explain which parties would have been involved in the hypothetical negotiation and what leverage those parties would have had. After describing the parties that would have been involved in the hypothetical negotiation and considering how much leverage each of them would have had, the court will set forth, using its best effort, how the hypothetical negotiation likely would have ended.

C. Parties In The Hypothetical Negotiation

To determine the outcome of a hypothetical negotiation for Fletcher's consent, the court must consider the relative bargaining power of each of the parties that would be involved in the hypothetical negotiation: Fletcher, ION, the Existing Lenders, and BGP. At trial, Fletcher's attorneys attempted to paint a picture in which Fletcher and ION were the only two parties involved in the hypothetical negotiation. In Fletcher's version of events, it had all of the bargaining power and ION was weak and willing to capitulate to whatever Fletcher demanded, no matter how unreasonable those demands may have been. This simplified picture of the negotiations is unrealistic and does not comport with the record.

The hypothetical consent negotiation would have occurred just before the announcement of the BGP Transaction in the fall of 2009. For months before the hypothetical consent negotiation, BGP and ION had engaged in numerous rounds of intense and detailed negotiations over the structure of the BGP Transaction and the bridge financing. Contrary to Fletcher's assertions, the record indicates that BGP was concerned not only with the joint venture, but also with the 19.99% equity stake that it was taking in ION. BGP had reiterated the importance of its equity investment at every step in the negotiation and, in addition to negotiating for an equity stake, BGP also took steps to protect its investment from dilution.[169] Although BGP successfully negotiated for limited anti-dilution protection for its equity stake in ION, that did not protect it from dilution related to Fletcher's Preferred Stock *on its existing terms*.[170] But accepting the pre-existing rights of a preferred stockholder like Fletcher is one thing; agreeing to a $78 million package for Fletcher's consent to a $40 million bridge loan — especially when included in that package is a decrease in Fletcher's conversion price, which would increase the dilution BGP would suffer — is entirely different. The notion that ION could have given Fletcher the changes to its Preferred Stock that Fletcher claimed it would have demanded without BGP's consent is inconceivable. BGP was under no duty to do a deal, and it could have walked away from the transaction all together if it were presented with such outrageous demands. BGP would have been involved in any negotiation for Fletcher's consent, especially if the negotiation started out with Fletcher demanding changes to its Preferred Stock that would result in additional dilution to BGP. Thus, any negotiation for Fletcher's consent at that time would have included BGP.

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[169] Trial Tr. vol. 2, 620-22 (Peebler).
[170] *Id.*

Of all of the parties involved in the hypothetical negotiation, BGP had the most leverage. Although Fletcher rightly points out that BGP had certain interests in the transaction and that they wanted the deal to be consummated, BGP also had the least to lose from walking away from the transaction. Even Fletcher's expert, Fowler — who did not take BGP's participation in the negotiation or its substantial leverage into account in his report on the hypothetical negotiation — agreed that, of all the parties involved, BGP had the least to lose if the transaction failed to close.[171] There is nothing in the factual record that supports the proposition that BGP would have been willing to go through with the transaction under the terms suggested by Fletcher, and in fact the opposite is more likely true. The record indicates that this was an important precedent-setting transaction for BGP and for Chinese companies generally. Neither BGP nor its state-owned parent, China National Petroleum, would have been willing to approve a consent payment to Fletcher that made them appear weak or inexperienced. To grant huge concessions to a party like Fletcher, which was a preferred stockholder with no right to exit its investment and which stood to face insolvency if the BGP Transaction did not go through, would have made BGP and China National Petroleum look like amateurs. But BGP, China National Petroleum, the Bank of China, and their sophisticated advisors were not rubes. And, as the principal driver of the structure of the BGP Transaction and the party with the most leverage, BGP could have worked with ION and the Existing Lenders to find a way to structure around Fletcher's consent right. There is simply nothing in the record which

[171] Trial Tr. vol. 1, 151-52 (Fowler).

would support the proposition that BGP would have rolled over and acceded to Fletcher's demands.

The party with the second most leverage would have been the Existing Lenders. Fowler initially took the position that the Existing Lenders would not have had any right to consent to the changes to Fletcher's Preferred Stock that were being requested.[172] But, as was discussed previously, ION would have had to secure the approval of the Existing Lenders to amend the Credit Agreement in order to give in to Fletcher's initial ask, which included an increase in Fletcher's dividend rate.[173] In addition to containing terms which gave the Existing Lenders the right to consent over any increased dividend payment to Fletcher, the Credit Facility also gave the Existing Lenders substantial leverage in negotiations with ION and Fletcher. Without the cash infusion that was provided by BGP and the Bank of China in the bridge financing, Fletcher would have bumped up against the covenants of its Credit Facility, giving the Existing Lenders the power to declare a default.

Although it is clear that the Existing Lenders wanted the BGP Transaction to close and to ensure that they would be fully repaid, they had greater negotiating leverage than either Fletcher or ION, a fact that Fletcher's own expert, Fowler, conceded at trial.[174] The power that the Credit Facility gave the Existing Lenders over ION meant that ION

[172] *Id.* at 303.
[173] *See supra* notes 149-153 and accompanying text (describing the relevant provisions of the Credit Agreement that would have required ION to seek the consent of the Existing Lenders before agreeing to increase Fletcher's dividend rate).
[174] Trial Tr. vol. 1, 152-53 (Fowler).

needed to make sure that the Existing Lenders approved of any deal that was finished. And the Existing Lenders had less to lose than Fletcher if the deal did not close. First of all, the Existing Lenders were the senior secured lenders, meaning that if the BGP Transaction did not close and ION was forced into bankruptcy, they would have been repaid first. Fletcher held only Preferred Stock and likely would have been wiped out by an ION bankruptcy. The Existing Lenders also had less to lose than Fletcher because they were all large commercial banks with diversified loan portfolios. Fletcher, on the other hand, had over half of its portfolio tied up in ION Preferred Stock. Even if the Existing Lenders had not been repaid at all, a consortium of banks writing off a $100 million loan would not have had to fear that the loss would send them into bankruptcy. But if Fletcher had lost its entire investment in ION, Fletcher would likely have been forced into bankruptcy shortly thereafter. The Existing Lenders, who had substantially more leverage than Fletcher and who also had a right to consent to the bridge financing, gave their consent to the transaction in exchange for a payment of only 25 basis points on the amount of the loan outstanding.[175]

The other two parties, Fletcher and ION, had much less leverage than either BGP or the Existing Lenders. Both of them needed the BGP Transaction to close, because without it they were both likely facing bankruptcy. The primary difference between the two is that ION had the Chinese and the Existing Lenders in its corner, and with those

[175] JX 351 (Fee Letter – Sixth Amendment to Credit Agreement between ION Geophysical Corp. and HSBC Bank USA, N.A. (fully executed) (Oct. 23, 2009)).

tough negotiators willing to work to find solutions to avoid paying an exorbitant fee to Fletcher in exchange for its consent to a transaction that would provide it with immense benefit, there is no reason to believe that ION would have rolled over and given in to the crazy man in the corner threatening to blow up the transaction. Fletcher imagined that BGP, the Existing Lenders, and ION were trapped in the locked vault with the crazy man with the bomb, giving the crazy man the opportunity to coerce immense value from them in exchange for not blowing itself up. The problem for Fletcher is that only the crazy man was actually in the bomb-testing vault, in the far corner away from the door; the others were already outside the vault with their hands on the door and just had to push the vault door closed to be safe. The bomber could then detonate if he wished, but he would have been the only one injured.

Even if the court credits Fletcher's theory that ION was a weak negotiator who ordinarily could have been bullied by Fletcher into acceding to Fletcher's demands, the court must deal with the fact that in this instance, ION would have had to go and get the permission of two much larger and stronger bullies before it could give into Fletcher's demands. Even if ION so desperately wanted the BGP Transaction to close that it was willing to agree to changes to Fletcher's Preferred Stock that would transfer tens of millions of dollars in value to Fletcher in order to get the deal done, there is nothing that suggests that BGP or the Existing Lenders were that desperate or that they would have agreed to the changes Fletcher was requesting. This reality also undercuts Fletcher's case theory that the Existing Lenders would not give a unanimous consent if necessary to get the BGP Transaction done. Because the Existing Lenders wanted to get out and because the BGP Transaction promised them not only full repayment but a complete exit in a few months time, had Fletcher made demands that came at the expense of BGP and led BGP to consider walking away, the equation would have been fundamentally changed for the Existing Lenders. If the Existing Lenders found out that a preferred stockholder without a put option or other exit right was seeking $78 million in value for consenting to a $40 million bridge loan, the Existing Lenders would have had every reason to work with ION and BGP to restructure the deal and avoid the consent and give Fletcher no extra consideration at all.

D. The Hypothetical Negotiation And Its Likely Outcome

In its post-trial briefs, Fletcher's new counsel drastically altered its damages case. As noted, throughout discovery and at trial, Fletcher had insisted that it would have sought and obtained economic consideration that was substantial in comparison to the $40 million to which it had consent rights. When Fletcher finally quantified the damages theory in its expert report before trial, the damages it sought amounted to $78 million, or nearly two times the $40 million loan it had a consent right over.

After being denied the chance to file an untimely expert report raising other theories to justify a number of this comparative enormity, Fletcher proceeded to push its $78 million damages theory at trial, and it steadfastly asserted that it would not have consented unless it received something close to that level. After the viability of that theory was undercut at trial, Fletcher's new counsel put forward, for the first time, a more moderate — if still aggressive — position in its post-trial briefs. Under Fletcher's new post-trial damages theory, Fletcher claims that it would have received a decrease in its stock conversion price from $4.4517 to $4.0867, which it valued at $6,236,553. Fletcher also claims that the "floor" on its damages should be set at $3,653,105, or the total amount that Fletcher paid to the Existing Lenders in connection with the Fifth Amendment.[176]

This new position was more measured, but it was not fairly raised nor is it supported by the record. To accept it would require the court to discount all of Fletcher's witness testimony at trial and in depositions, all the previous briefs, and its key expert report. Fletcher itself chose to portray its eponymous leader as willing to bring down Fletcher and its investors in a suicidal grab for ransom from ION and BGP. Although the court will indulge in leniency toward Fletcher because its contract rights were violated and take a less caricatured view of Fletcher than it has drawn of itself, the court cannot assume that Fletcher would have either started or ended negotiations with anything close to its post-trial request of $6,236,553. Rather, the court assumes, as it must, that Fletcher would have come out recklessly over-the-top bold with something like the demand in its expert report. This is charitable to Fletcher. If Fletcher is positing it would have received $78 million, one assumes that its initial demand would have been closer to $100 million in value — two and a half times the $40 million bridge loan over which it had a consent right. For the purposes of this opinion, the court need not assume, though, that Fletcher

[176] Pl.'s Opening Post-Trial Br. at 20.

acted with more audacity than to demand two times the loan to which it was being asked to consent. That is enough to frame what is likely to have happened if, contrary to Fletcher's portrayal, Buddy Fletcher had a basic, residual sense of rationality and a rudimentary regard for his fiduciary duties to his investors. The court credits Buddy Fletcher with these characteristics even though it had no chance to hear Buddy Fletcher's testimony in person, Buddy Fletcher's deposition testimony was consistent with the over the top portrayal of him, and the trial testimony of his subordinate — Benson — was consistent with that extreme posture. Because Fletcher's rights were violated, the court errs on the side of assuming that Buddy Fletcher was a very bold, but ultimately practical hedge fund manager who would, in the end, not be nihilistic and end up with nothing when he had the chance to pocket something tangible.

The court therefore assumes that if ION had approached Fletcher in October 2009 to ask for its consent to issue the ION S.ár.l. Note, before the announcement of the BGP Transaction, Fletcher would have started the negotiations by asking for the changes to the terms of its Preferred Stock that Fletcher has contended it was entitled to. The court assumes that Fletcher would have opened the negotiations by requesting the following three changes to its Preferred Stock: (1) an increase in the dividend rate of 250 to 350 basis points, (2) a decrease in the conversion price from $4.45 to $2.80, and (3) a reinstatement of Fletcher's redemption right without a Minimum Price Provision.[177]

[177] JX 455 at 14-15 (Expert Report of Peter A. Fowler (Nov. 10, 2011)).

ION would have been speechless at Fletcher's audacity. When ION's managers recovered their equilibrium, they would have gone back to ION's legal and financial advisors to discuss this astonishing ask. There is nothing in the record to support the proposition that ION, BGP, and the Existing Lenders would have agreed to the transfer of tens of millions of dollars in value to Fletcher in exchange for its consent, especially when the transaction at issue was expected to *benefit* Fletcher immensely and where Fletcher faced disaster itself if ION went into bankruptcy. Because of the nature and magnitude of the changes that Fletcher sought to its Preferred Stock, ION could not and would not have merely granted Fletcher's request without consulting with and receiving permission from BGP and the Existing Lenders. ION's negotiators may not have been bold, but they were intelligent. Their lack of bravado, moreover, would lead them to realize there was no way to give in to Fletcher without first going to the more powerful players — BGP and the Existing Lenders. The people acting on behalf of BGP and the Existing Lenders were also intelligent business people advised by intelligent legal and financial advisors, and they would have realized that the changes Fletcher was requesting — which Fletcher valued at $78 million — would result in a value transfer that nearly doubled the value of the $40 million bridge financing Fletcher was consenting to. There is nothing in the record that would explain why the intelligent business people at ION, BGP, and the Existing Lenders would have agreed to pay $78 million in exchange for consent to complete a $40 million bridge financing.

ION would therefore have responded in due course to Fletcher's demands by explaining the following: (1) the request for an increase in the dividend rate would require the Existing Lenders to approve an amendment to the Credit Facility; and (2) that BGP was very focused on its equity interest in ION and would be unlikely to approve changes to Fletcher's Preferred Stock that would result in dilution. The record indicates that BGP would have been particularly unwilling to give in to Fletcher's demands because one of Fletcher's asks — a reduction in the conversion price of its Preferred Stock — would have resulted in substantial dilution to BGP's equity stake in ION. The importance that BGP placed on its 19.99% equity stake in ION was clear from the extensive negotiations over both how much equity BGP would receive and what the contours of its anti-dilution protections would be. Therefore, there is no reason to believe that BGP would have agreed to the changes Fletcher was requesting to its Preferred Stock. Furthermore, because BGP was taking an equity stake, there was no reason for it to indulge a request by a vulnerable party like BGP for an increase in dividend payments on its Preferred Stock. Those dividend payments would cost ION money, and they would come at the expense of its ability to invest in future projects and at the expense of BGP as a stockholder.

Having thought about it, ION also would have explained to Fletcher that it had alternatives to the issuance of the $10 million ION S.ár.l Note, which was the only part of the BGP Transaction that implicated Fletcher's consent right and which was severable from the larger BGP Transaction. The record indicates that there were at least two viable alternatives ION could have pursued to structure the bridge financing around Fletcher's consent right: (1) the $40 million Convertible Promissory Notes issued by ION and ION S.ár.l could have been made non-convertible, and therefore not a security according to Vice Chancellor Parsons's reasoning in *Fletcher II*; and (2) ION could have obtained a waiver to the Split Requirement, and the entire $40 million in convertible notes could have been issued by ION so that Fletcher did not have the right to consent.

The easiest way that ION could have structured around Fletcher's consent right would have been to remove the convertibility feature on the notes. In *Fletcher II*, which is the law of this case, Vice Chancellor Parsons noted that not all notes are securities,[178] but found that the ION S.ár.l Note was a security — even though it otherwise looked like an ordinary commercial bank loan — because it had a convertibility feature, allowing the loan to be converted into ION equity. Because equity is clearly a security, Vice Chancellor Parsons reasoned that the note, which was designed to convert into equity, was a security.[179] If ION and BGP had agreed to make the notes non-convertible, the notes would not have been securities, obviating the need for Fletcher's consent.

Fletcher took the position in its post-trial briefs and at post-trial oral arguments that the purpose of the convertibility feature was to protect BGP and the Bank of China in the event that the transaction did not close and that they would not have agreed to issue

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[178] *Fletcher II,* 2010 WL 2173838, at *5.
[179] *Id.* ("Fletcher acknowledges that certain classes of notes are not securities, but contends that notes that are convertible into stock unquestionably meet the definition of a 'security'" . . . "[I] hold that, as a debt instrument convertible into equity securities, the ION S.àr.l. Note qualifies as a "security" under Section 5(B)(ii) of the Certificates.").

the notes if they were not convertible.[180] This position is contradicted by the record and makes no economic sense. Even Fowler agreed at trial that the warrants were the mechanism through which BGP and the Bank of China would get their money back from the bridge financing in the event the transaction did not close.[181] If the BGP Transaction had failed to close, BGP and the Bank of China would have been in a much better position holding $40 million in senior secured debt than they would have been holding ION common stock. Holding senior secured debt would have given them the greatest chance of repayment, whereas if they had converted their notes into ION common stock, they would have been last in line if ION had filed for bankruptcy. There is nothing in the record that indicates that BGP and the Bank of China would have been unwilling to structure the notes so that they were not convertible in order to avoid making a $78 million consent payment to Fletcher.

Furthermore, BGP would have been aware that Fletcher's consent was only required because of the $40 million in bridge financing that *BGP insisted* ION take to ensure that ION made it through closing. ION had maintained, throughout the negotiations, that it only needed an additional $20 million to make it to closing. Even more, Fletcher was asking for considerable value that would have come largely out of BGP's own hide. Therefore, BGP and ION could have agreed to reduce the amount of

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[180] Post-Trial Ans. Br. at 15; Post-Trial Oral Arg. Tr., 137-38.
[181] Trial Tr. vol. 1, 131:8-14 (Fowler) (noting that the warrant was exercisable if the deal did not close so that BGP and the Bank of China would have a way to get their money out); *see also* Trial Tr. vol. 2, 483 (Hanson) (explaining that the warrant was the mechanism through which BGP and the Bank of China would get their money out if the transaction did not close).

the bridge financing to $20 million and, as was the case if the full $40 million bridge loan was restructured with no convertibility feature, it was even more likely that the Bank of China would have agreed to lend only the $20 million that ION actually needed without that feature. In this respect, it is important to remember why the Bank of China was even involved in lending to ION. The Bank of China was only involved to facilitate the completion of a precedent-setting investment in America in an important industry sector by its fellow state-owned enterprise, BGP. Given that context, there is no reason to believe that the Bank of China would not have agreed to structure the transaction so that it was not convertible, which would mean no extra credit risk for itself, in order to help BGP get a better deal than would be the case if it gave in to Fletcher's $78 million demands.

The second way that ION could have avoided Fletcher's consent right is to have ION issue the entire $40 million convertible note itself. Fletcher correctly points out that, in order for the entire bridge financing to occur at the parent level, ION would have had to secure a waiver to the Credit Facility's Split Requirement, which required unanimous approval from the Existing Lenders. Fletcher and its expert contended that ION never would have taken this proposal to the Existing Lenders because it required unanimous consent and that the Existing Lenders never would have unanimously consented. This argument is based entirely on emails indicating (1) that HSBC did not believe it would be able to secure unanimous approval from the Existing Lenders for an amendment to the Credit Facility that would add a separate tranche of debt that would have a shorter commitment period and an earlier maturity date than their loans; and (2) that ION did not believe the Existing Lenders would unanimously agree to add more than the $40 million that could be added under the accordion feature of the Credit Facility because doing so would dilute the collateral that secured the loans already outstanding under the Credit Facility. From these emails, Fletcher draws the conclusion that seeking unanimous approval from the Existing Lenders for an amendment to the Credit Facility was some kind of "untouchable 'third rail'" and that BGP and ION would not have requested anything that required unanimous lender approval.[182]

In both of the instances where ION and BGP indicated that they did not want to seek unanimous lender approval, it was for a transaction structure that would have disadvantaged the Existing Lenders. The fact that ION and BGP did not believe they could get unanimous approval from the Existing Lenders for transaction structures that gave the Bank of China better terms than the Existing Lenders or that would dilute the collateral of the Existing Lenders by more than the amount agreed to under the accordion feature does not mean that BGP and ION would have been unwilling to request a waiver of the Split Requirement. Because the Credit Facility was entirely cross-collateralized, there would have been no adverse economic consequences to the banks from a waiver of the Split Requirement.[183] There is nothing in the record that indicates that the Existing

[182] Pl.'s Opening Post-Trial Br. at 8-9.

[183] When pressed at trial, Fowler was unable to come up with any adverse economic consequence or increase in risk that the Existing Lenders would face as a result of a waiver of the Split Requirement. The only reason he could give for why the Existing Lenders would not agree to

Lenders would have been unwilling to work with ION and BGP to structure the bridge financing around Fletcher's consent right if Fletcher was threatening to blow up the entire BGP Transaction and cause immense harm to itself, ION, and the Existing Lenders. Nothing was more likely to galvanize the Existing Lenders to promptly give a unanimous consent than to be told that Fletcher, a mere preferred stockholder, was asking for a ransom to consent to the bridge financing. The Existing Lenders knew ION's straits, knew that Fletcher had a huge equity investment, and knew that Fletcher stood to gain hugely if the BGP deal went through and to suffer hugely if it did not. The BGP Transaction gave the Existing Lenders their most fervent desire: full repayment and an exit from the Credit Facility. The Existing Lenders, therefore, had compelling reasons to work with ION and BGP in denying Fletcher's disproportionately large and greedy request.

There is another reason to believe that ION and BGP could have obtained the unanimous consent of the Existing Lenders to waive the Split requirement. Under Fletcher's theory, it was demanding a concession — an increase to the dividend rate on its Preferred Stock — that would already have required the unanimous consent of the Existing Lenders. If the Existing Lenders were going to have to give a unanimous consent to enable the BGP Transaction to proceed, a waiver of the Split Requirement

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waive the Split Requirement was that the lenders would not all receive pro-rata treatment and that, in his experience, banks have a strong "policy preference" in favor of pro-rata treatment. Trial Tr. vol. 1, 341-46 (Fowler).

would have been much more palatable to them than giving value to Fletcher for acting as a spoiler.

But the fact that BGP, ION, and the Existing Lenders *could* have structured the BGP Transaction to avoid Fletcher's consent right does not mean that they would have done so. To restructure the bridge financing in late October, after the majority of the negotiations had already taken place, the parties likely would have needed to pay hundreds of thousands of dollars to their legal and financial advisors to redraft the documents, which would have wasted everyone's time. They would have also had to spend time with the Existing Lenders, securing consents, depending on the option taken. All else being equal, ION and BGP would have preferred to pay a reasonable consent fee to Fletcher to avoid the complication of having to restructure the bridge financing.

For the reasons previously indicated, the court assumes that when ION responded to Fletcher by pointing out the realities that it was asking for value in excess of the bridge loan, Buddy Fletcher would listen in a gruff way and then consult with his own brain, conscience, and advisors. Fletcher would have to recognize that BGP was highly unlikely to agree to the changes Fletcher requested, that the Existing Lenders would have to give unanimous consent for those changes to proceed, and that ION was inclined to work with BGP and the Existing Lenders so that no consent was needed at all. After a quick "walk around the block" to allow the cold, brisk air of rationality to ease through his respiratory system, Fletcher would have come back with a responsible, aggressive, demand, still displaying some chutzpah, but attractive enough to make ION (and BGP in turn) think it less painful and more efficient than restructuring the bridge financing.[184] For these purposes, Buddy Fletcher, who seems to have face issues of his own, would have demanded three times what the Existing Lenders got for their consent to the Sixth Amendment, or 75 basis points. Buddy Fletcher would have put this forward as his best and final offer and made clear that he would withhold his consent and litigate if he didn't receive a consent fee equal to 75 basis points. Although the reality is that this was still an aggressive ask, ION and BGP would have realized that it was likely cheaper to give in and would have agreed to pay that consent fee.

This outcome is supported by the fact that both Fletcher and ION have agreed that the consent fees that were paid to the Existing Lenders are relevant benchmarks that can be used to determine what a reasonable consent fee would be.[185] The consent fee that the

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[184] Another reality existed that the court could have held against Fletcher, but does not. Fletcher believed that its consent right had been violated in connection with the ARAM Transaction and the record indicates that Fletcher was portraying to its investors an inflated value of its ION investment that could only be justified by a belief that it would obtain relief in court that amounted to tens of millions of dollars. Fletcher's accounting for its investment exceeded ION's market value by a large margin, and that seems to be at least partially attributable to the fact that Fletcher valued its claim for breach of its contractual right to consent to the ARAM Transaction at tens of millions of dollars. If the court were to take that factor into account, the court would not award Fletcher any damages at all. The reason for that is that if Fletcher refused to accept a much more generous consent fee than the Existing Lenders received in a situation when the Existing Lenders had far more leverage, the most likely outcome would have been that ION, BGP, and the Existing Lenders would have restructured the transaction to avoid implicating Fletcher's consent rights. In other words, if Fletcher were to put its overall litigation posture and demands into the equation, it would strengthen the argument made by ION that no consent payment at all would have been made to Fletcher and thus Fletcher suffered no compensable damage.

[185] *See* Def.'s Opening Post-Tr. Br. at 34 ("The best evidence in the record of a reasonable consent fee is the amount that the existing lenders were paid to consent to the Sixth Amendment"); Pl.'s Opening Post-Tr. Br. at 24-27 (explaining that prior bank consent fees paid by ION "set a realistic floor" on damages).

Existing Lenders extracted in association with the Sixth Amendment was 25 basis points over the amount of the loan outstanding, and the consent fee in connection with the Fifth Amendment was 75 basis points. There is little reason to believe that Fletcher, who had less leverage and substantially more to lose than the Existing Lenders, would have been able to extract a consent fee that was materially larger than the one the Existing Lenders were able to obtain for themselves. Because Fletcher's consent would enable BGP and ION to avoid the delay and expense of restructuring the bridge financing, the record supports the conclusion that ION would have granted Buddy Fletcher's ask for a consent fee equal to 75 basis points — the equivalent of the consent fee paid in the summer of 2009 in connection with the Fifth Amendment — over the amount of the transaction that Fletcher was being asked to consent to, which was the $40 million bridge financing.

IV. Conclusion

For all of these reasons, I impose a monetary damage award of $300,000 (.75% x 40,000,000). Because Fletcher has subjected ION to unnecessary prejudice and expense by violating its discovery obligations, attempting to circumvent the rulings of this court, and changing its damages theories, I exercise my discretion to award pre-judgment interest calculated at two-thirds of the statutory rate, compounded on an annual basis. The court will not entertain any further applications for fee-shifting. ION shall submit a conforming final judgment within five days, after giving notice as to form to Fletcher.