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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Re: *Fletcher Int'l, Ltd. v. ION Geophysical Corp.*
Civil Action No. 5109-VCP

Dear Counsel:

I write in connection with the motion of Plaintiff, Fletcher International, Ltd. ("Fletcher"),[1] for partial summary judgment. By this motion, Fletcher seeks, among other things, a declaration that under Section 5(b)(ii) of the Certificates of Rights and Preferences for Series D-1, D-2, and D-3 Preferred Stock (the "Certificates"), Fletcher has the right to consent to the issuance of any security by a subsidiary of ION

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[1] Fletcher, a Bermuda corporation, is the beneficial owner of (a) 30,000 shares of Series D-1 Cumulative Convertible Preferred Stock, (b) 5,000 shares of Series D-2 Cumulative Convertible Preferred Stock, and (c) 35,000 Series D-3 Cumulative Convertible Preferred Stock of Defendant ION Geophysical Corporation.

Geophysical Corporation ("ION"). Fletcher further asks this Court to declare that ION's issuance, through its wholly-owned subsidiary ION International S.àr.l ("ION S.àr.l"), of a convertible promissory note in the amount of $24 million (the "ION S.àr.l Note") violated these rights because ION did not first obtain Fletcher's consent.

Importantly, through this motion for partial summary judgment, Fletcher also urges the Court to (1) declare the ION S.àr.l Note invalid and unenforceable because Fletcher has not consented to its issuance, (2) require ION to return the funds borrowed under that Note, and (3) forbid ION from drawing down any more funds under the Note without first obtaining Fletcher's approval. The remedial component of that relief, however, soon may be rendered impractical because several transactions relating to the ION S.àr.l Note "are set to close in Beijing, China on March 25, 2010."[2] Accordingly, in reviewing Fletcher's pending motion, I have considered first the time-sensitive issue of whether ION should be ordered to return immediately the funds borrowed under the ION S.àr.l Note and enjoined from borrowing any further under that Note without Fletcher's consent. This letter opinion addresses those two issues.

After reviewing the Certificates and considering the written submissions and arguments of the parties, I find that Fletcher has shown, at least marginally, a reasonable probability of success on its claim that the consent rights contained in the Certificates are

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[2] *See* Defs.' Letter to the Court, filed Mar. 4, 2010.

valid and binding on ION and that Fletcher, therefore, has the right to be given the opportunity to consent to the issuance of any security by a subsidiary of ION. The record also supports a preliminary finding that ION likely breached Fletcher's consent rights under the Certificates by issuing the ION S.àr.l Note.[3]

A finding that ION violated Fletcher's rights by issuing that Note, however, would not necessarily require invalidation of the ION S.àr.l Note or the equivalent of a mandatory injunction, *i.e.*, that ION return the funds borrowed under the Note. Indeed, on the record presently before me, Fletcher has not made a strong showing that the harm it suffered is irreparable because, even if Fletcher's consent rights have been violated, quantifying the resulting monetary damage from such a violation may be difficult, but not beyond the ken of the Court. Additionally, I find that the balance of equities weighs in favor of Defendants because, at least preliminarily, Defendants have shown that any potential difficulty on the part of Fletcher in seeking damages for violation of its voting rights is outweighed by the likely harm to ION if Fletcher's requested relief is granted.

Therefore, I deny Fletcher's motion for partial summary judgment insofar as it could be construed as a request for a preliminary injunction effectively invalidating

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[3] The relevant case law appears to support the conclusion that a convertible promissory note is a "security" as that term is used in the Certificates. As a preliminary matter, therefore, I find that Fletcher likely will succeed in proving that the ION S.àr.l Note is a security. Additionally, neither party contests that ION S.àr.l is a subsidiary of ION.

ION's issuance of the ION S.àr.l Note or requiring that ION repay funds borrowed under that Note. In all other respects, Fletcher's motion remains under advisement.

I. PROCEDURAL AND FACTUAL BACKGROUND

On November 25, 2009, Fletcher filed a Complaint against ION, ION S.àr.l, and members of ION's Board of Directors, James M. Lapeyre, Bruce S. Appelbaum, Theodore H. Elliott, Jr., Franklin Myers, S. James Nelson, Jr., Robert P. Peebler, John Seitz, G. Thomas Marsh, and Nicholas G. Vlahakis (collectively, the "Defendant Directors").[4] On January 14, 2010, Fletcher moved for leave to amend the Complaint, which I granted on March 23.[5]

The Complaint alleges eight counts against ION, ION S.àr.l, and the Defendant Directors, including claims for breaches of contract and fiduciary duty,[6] arising from

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[4] ION is a technology-focused seismic solutions company organized in Delaware. It provides advanced seismic data acquisition equipment, seismic software and seismic planning, processing, and interpretations services to the global energy industry. ION S.àr.l is a Luxembourg private company.

[5] The Verified Amended Complaint (the "Complaint") is, thus, the operative complaint in this action. Though the amendments to the original complaint were made after Fletcher moved for partial summary judgment, the claims upon which the motion focuses, Counts I and II, were not affected.

[6] Specifically, the Complaint seeks declarative, injunctive, and monetary relief for ION's breach of its Certificate of Incorporation (Count I), Defendant Directors' breach of their fiduciary duties (Count II), ION S.àr.l's aiding and abetting Defendant Directors' breach of fiduciary duties (Count III), ION S.àr.l's tortious interference with ION's Certificate of Incorporation (Count IV), ION's tortious interference with Fletcher's contractual or prospective business relations (Count

ION's issuance of the ION S.àr.l Note and the ARAM transaction.[7] The issuance of the ION S.àr.l Note was one of several transactions intended to lead, ultimately, to the formation of a joint venture between ION and BGP, Inc. (the "BGP Transactions").[8] Fletcher claims that, by allowing its subsidiary to issue that Note without first obtaining Fletcher's consent, ION breached an express provision of the Certificates. Section 5(b)(ii) of the Certificates provides, in pertinent part, that:

> The Holders shall have the following voting rights . . . The consent of Holders of at least a Majority of the Series [D-1, D-2, and D-3] Preferred Stock, voting separately as a single class with one vote per share, in person or by proxy, either in writing without a meeting or at an annual or a special meeting of such Holders called for the purpose, shall be necessary to:

V), ION's breach of its Certificate of Incorporation regarding the ARAM transaction (Count VI), Director Defendants' breach of fiduciary duty regarding the ARAM transaction (Count VII), and ION's breach of contract requiring indemnification (Count VIII).

7 As Fletcher's motion for partial summary judgment does not implicate any facts relating to the ARAM transaction, I do not address those issues here.

8 As noted on page 2, "[t]he BGP Transactions are set to close in Beijing, China on March 25, 2010."

The joint venture resulting from the BGP Transactions appears to provide ION with $175 million from BGP. In return, BGP will receive a 51 percent interest in the joint venture and an interest of approximately 16.66 percent in ION. Prior to the joint venture closing, ION also was to receive up to $40 million of bridge financing arranged by BGP, up to $24 million of which is represented by the ION S.àr.l Note. *See* Defs.' Response to Pl.'s Motion for Expedited Proceeding Ex. E.

> . . . **permit any Subsidiary of the Company to issue or sell, or obligate itself to issue or sell, except to the Company or any wholly owned Subsidiary, any security of such Subsidiaries**.[9]

On October 23, 2009, ION issued a press release announcing, among other things, that in connection with the BGP Transactions, ION issued two convertible promissory notes, including the ION S.àr.l Note, under its amended credit facility.[10] The ION S.àr.l Note is convertible voluntarily into shares of ION common stock upon receipt of certain government approvals of the BGP Transactions. Additionally, after the BGP Transactions close, all then-outstanding principal amounts under the ION S.àr.l Note will automatically be converted into shares of ION common stock unless BGP elects otherwise.[11]

On December 23, 2009, Fletcher moved for partial summary judgment on Counts I and II of the Complaint. Through this motion, Fletcher essentially asks the Court to declare that ION breached its obligations under its Certificate of Incorporation by permitting issuance of the ION S.àr.l Note "without first obtaining a meaningful and informed vote of approval by Fletcher." Fletcher also seeks a declaration that the Note is

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9 Pl.'s Opening Br. in Supp. of its Mot. for Partial Summ. Judgment ("POB") Ex. A § 5(B)(ii) (emphasis added). Similarly, I refer to Defendants' Answering Brief for this motion as "DAB."

10 *See* POB Exs. G, H.

11 *See* POB Ex. I.

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.àr.l Note after providing Fletcher a reasonable time to consider that issuance.

On January 19, 2010, I heard argument on Fletcher's motion to determine (1) whether ION breached Fletcher's contractual consent rights and, if so, (2) whether ION should be forced to return funds borrowed under the ION S.àr.l Note until it remedies that breach by providing Fletcher the opportunity to give its informed consent to the issuance of the ION S.àr.l Note.

For purposes of determining whether any equitable relief should be given preliminarily before the BGP Transactions close, I limit my review to the second of those issues. Further, because I find that the balance of the equities in the circumstances of this case weighs strongly in favor of Defendants, I deny Fletcher's motion for partial summary judgment insofar as it seeks to require the return of the funds borrowed under the ION S.àr.l Note based on the alleged invalidity of that Note.[12]

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[12] I do so because, even if ION breached Fletcher's contractual rights by allowing ION S.àr.l to issue securities without Fletcher's consent, the balance of harms in this case weighs in favor of Defendants.

II. ANALYSIS

A. Standard for a Preliminary Injunction

Fletcher moved for partial summary judgment on Counts I and II of its Complaint. The standard for summary judgment is well-known.[13] Even though Fletcher's motion also seeks a final judicial declaration as to whether the Certificates grant consent rights and whether the ION S.àr.l Note is a security, I presently am concerned only with the preliminary or mandatory injunctive relief sought by Fletcher that could affect the March 25, 2010 closing of the BGP Transactions. Because Fletcher asks this Court to invalidate ION's issuance, through its subsidiary, of the ION S.àr.l Note and require that ION repay any funds borrowed under that Note, it effectively seeks a form of mandatory or preliminary injunction. Therefore, I will examine that portion of Fletcher's motion under the standard for a preliminary injunction.

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[13] *See, e.g.*, *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)); *Haft v. Haft*, 671 A.2d 413, 419 (Del. Ch. 1995) ("[S]ummary judgment is appropriately granted even where 'colorable . . . or [in]significantly probative [evidence]' is present in the record, if no reasonable trier of fact could find for the [nonmovant] on that evidence."); *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977); *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987) (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948)).

This Court has broad discretion to grant or deny a preliminary injunction.[14] Such a motion may be granted where the movants demonstrate: (1) a reasonable probability of success on the merits at a final hearing, (2) an imminent threat of irreparable injury, and (3) a balance of the equities that tips in favor of issuance of the requested relief.[15] A preliminary injunction is not granted lightly, however, and "[t]he moving party bears a considerable burden in establishing each of these necessary elements."[16] Nevertheless, "[w]hile some showing is required as to each element, there is no steadfast formula for the relative weight" each of these three factors deserves.[17] Accordingly, "a strong demonstration as to one element may serve to overcome a marginal demonstration of another."[18]

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[14] *Data Gen. Corp. v. Digital Computer Controls, Inc.*, 297 A.2d 437, 439 (Del. 1972) (citing *Richard Paul, Inc. v. Union Improvement Co.*, 91 A.2d 49 (Del. 1952)).

[15] *Nutzz.com v. Vertrue, Inc.*, 2005 WL 1653974, at *6 (Del. Ch. July 6, 2005) (internal citations omitted); *Concord Steel, Inc. v. Wilm. Steel Processing Co.*, 2008 WL 902406, at *3 (Del. Ch. Apr. 3, 2008).

[16] *La. Mun. Police Emps.' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1185 (Del. Ch. 2007) (internal citations omitted).

[17] *Alpha Builders, Inc. v. Sullivan*, 2004 WL 2694917, at *3 (Del. Ch. Nov. 5, 2004).

[18] *Id.* (citing *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998)).

I also note that "preliminary injunctive relief should not be granted if the injury may be adequately compensated for after a full trial on the merits, either by an award of damages or by some form of final equitable relief." *Id.* at *11. The

With this standard in mind, I examine each of the three factors to determine whether Fletcher's request for injunctive relief should be granted.

B. Reasonable Likelihood of Success on the Merits

From a review of the Certificates and the relevant case law, it appears, at least preliminarily, that ION did breach Fletcher's contractual rights by issuing the ION S.àr.l Note without Fletcher's consent. The Certificates state that Fletcher's consent must be obtained before the issuance of "any security" by one of ION's subsidiaries. Neither party disputes that ION S.àr.l is a subsidiary of ION. The parties do contest, however, whether the ION S.àr.l Note is a "security." Because, at least in a general sense, an instrument that is convertible into a security is itself considered to be a security,[19] Fletcher has made a seemingly sound argument that a convertible promissory note like the ION S.àr.l Note fits within the ambit of a "security" as that term is used in the Certificates. ION has countered, however, with a couple of arguments that at least

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injury "must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice." *State v. Del. St. Educ. Ass'n*, 326 A.2d 868, 875 (Del. Ch. 1974).

[19] *See, e.g.*, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975); *United States v. Nacchio*, 573 F.3d 1062, 1065 n.2 (10th Cir. 2009); *Fry v. UAL Corp.*, 84 F.3d 936, 938 (7th Cir. 1996); *S.E.C. v. Am. Commodity Exch.*, 546 F.2d 1361, 1366 (10th Cir. 1976).

colorably support the opposite conclusion.[20] I am not prepared to make a definitive ruling on that issue at this point.

Nevertheless, I find that Fletcher has demonstrated, at least marginally, a reasonable likelihood of success on the merits of its claim that ION violated Fletcher's voting rights by issuing a security through its subsidiary without first obtaining Fletcher's consent. Accordingly, I next address whether Fletcher has met the other requirements for preliminary injunctive relief in the circumstances of this case.

C. Imminent Threat of Irreparable Injury

Fletcher asserts that denial of voting rights constitutes irreparable harm because, in such a case, damages are typically not a sufficient remedy.[21] To constitute irreparable injury, "[i]t is not necessary that the injury be beyond the possibility of repair by money compensation"; instead, the injury must "be of such a nature that no fair and reasonable

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[20] Specifically, Defendants contend that, under the *Reves* test, the ION S.àr.l Note is not a security because of the commercial context in which the Note was issued. *Reves v. Ernst & Young*, 494 U.S. 56, 63 n.2 (1990). Defendants also argue that, even if the convertibility feature of the Note would bring it within the definition of a security, the Note is convertible into shares of ION, not ION S.àr.l common stock; thus, because Fletcher only has the right to vote on the issuance of securities of ION subsidiaries—not ION itself—Defendants deny that Fletcher's voting rights have been violated. Fletcher responds that the fact that the ION S.àr.l Note is convertible into ION common stock does not make it an ION security because the option to purchase stock (of any company) is a security of the entity issuing the option.

[21] *Telecom-SNI Investors, L.L.C. v. Sorrento Networks, Inc.*, 2001 WL 1117505, at *9 (Del. Ch. Sept. 7, 2001), *aff'd mem.*, 790 A.2d 477 (Del. 2002).

redress may be had in a court of law and . . . to refuse the injunction would be a denial of justice."[22] It follows, though, that if a Court may remedy an injury by an award of damages or the later shaping of equitable relief, a showing of irreparable injury has not been made.[23]

In this case, even if Fletcher ultimately proves ION's violation of its contractually bargained for consent rights, I do not consider an award of damages or other equitable remedy beyond the scope of this Court's power.[24] Thus, Fletcher has made only a slight showing that it may suffer irreparable injury if its request for injunctive relief is not granted.

D. Balance of the Equities

Nevertheless, despite Fletcher's slight showing of irreparable harm and a reasonable likelihood of success on the merits, I decline to afford Fletcher a preliminary

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22 *State v. Del. State Educ. Ass'n*, 326 A.2d 868, 875 (Del. Ch. 1974); *see also Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1089 (Del. Ch. 2004) (citing *Cantor Fitzgerald*, 724 A.2d at 586 ("Preliminary injunctive relief may be appropriate when plaintiff's damages are difficult or impossible to quantify.")).

23 *See City Capital Assocs. Ltd. P'ship v. Interco Inc.*, 551 A.2d 787, 795 (Del. Ch. 1988).

24 *See infra* Part II.D. I do recognize, however, that, while not impossible, awarding money damages or fashioning other equitable relief to compensate Fletcher for ION's violation of its bargained for consent rights may prove somewhat onerous.

injunction of the character it seeks as to the ION S.àr.l Note because the balance of harms here tips heavily in favor of Defendants.

In terms of balancing the equities, Defendants argue that, under the terms of ION S.àr.l's Amended Credit Facility, if ION were required to pay back the funds borrowed under the ION S.àr.l Note, as Fletcher requests, it also would be required to repay all of ION S.àr.l's indebtedness under the Amended Credit Facility. Although the record is not entirely clear as to the amount of money involved, the ION S.àr.l Note is in the order of $24 million, while the total amount ION owes under the relevant facility is in the range of $140 million.[25] Defendants contend that ION does not have the liquidity to make such a large payment and would face events of default "or even bankruptcy" if forced to do so.[26]

In addition, ION's issuance of the ION S.àr.l Note through its subsidiary ION S.àr.l evidently formed an integral part of the BGP Transactions that are set to close on March 25, 2010. In the Risk Factors section of its most recent Form 10-K, filed on March 1, 2010, ION states that if its proposed joint venture with BGP were not completed, it could result in an event of default that, under ION's existing credit obligations, "would have a material adverse effect on [ION's] operations, financial

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[25] Jan. 19 Tr. 61.

[26] DAB 35.

condition, results of operations and cash flows."[27] The gist of this and other statements in that Form 10-K suggest that if I were to require ION to repay the funds borrowed under the ION S.àr.l Note, it either directly or indirectly could prevent the BGP Transactions from closing, thus forcing ION to suffer significant, adverse financial consequences, including the possibility that it no longer would have sufficient assets to satisfy its debt obligations.[28]

In contrast, the potential harm to Fletcher if an injunction does not issue is likely to be much less serious. Fletcher still could pursue its claim for money damages. Although determining the amount of Fletcher's damages will not be easy, I believe this Court could resolve that issue. One possible approach to damages, discussed in the parties' summary judgment briefs, involves determining the amount Fletcher would have received in a hypothetical negotiation regarding its asserted right to consent to the ION S.ar.l Note, before it issued. The interrelationship between that Note and the anticipated BGP Transactions also would need to be considered. Ultimately, however, Fletcher's rights likely could be vindicated by way of a damages award.

As to the relative equities, I further note that Fletcher did not pursue its purported consent rights with the degree of alacrity that the Court would expect in the context of an

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27 *See* Defs.' Letter to the Court, filed Mar. 4, 2010.

28 *Id*.

effort to interfere with a transaction of the size and importance to ION of the imminent BGP Transactions. This weighs against its claim for injunctive relief.

In sum, I find that the balance of the equities in this case strongly favors denial of the requested injunctive relief.

III. CONCLUSION

For the foregoing reasons, I deny Plaintiff's motion for partial summary judgment insofar as it seeks to require, by way of a preliminary injunction or other equitable remedy, ION's immediate repayment of funds borrowed under the ION S.àr.l Note or otherwise block the closing of the BGP Transactions based on the asserted invalidity of that Note.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor