IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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| ION GEOPHYSICAL CORPORATION, | ) | |
| | ) | |
| Plaintiff and | ) | |
| Counterclaim Defendant, | ) | |
| | ) | |
| v. | ) | Civil Action No. 5050-VCP |
| | ) | |
| FLETCHER INTERNATIONAL, LTD., | ) | |
| | ) | |
| Defendant and | ) | |
| Counterclaim Plaintiff. | ) | |

**OPINION**

Submitted: July 29, 2010
Decided: November 5, 2010

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**PARSONS, Vice Chancellor.**

Plaintiff, ION Geophysical Corp. ("ION"), brings this declaratory judgment action against Defendant, Fletcher International, Ltd. ("Fletcher"), to determine its rights and obligations under a preferred stock purchase agreement under which Fletcher may, in certain circumstances, convert its preferred shares into ION common shares. ION seeks a declaration that a notice provision found in § 6(b) of the agreement, which enables Fletcher to increase, within limits, the total number of ION common shares into which it may convert its preferred shares, permits Fletcher to issue only one such notice. Fletcher contends that the notice provision permits Fletcher to issue multiple notices and also counterclaims for reimbursement and indemnification under §§ 16 and 17 of the agreement, respectively, for its reasonable legal fees and expenses associated with this suit.

The parties have cross-moved for summary judgment based on their respective constructions of § 6(b). For the reasons discussed in this Opinion, I hold that Fletcher's interpretation is correct and that it may issue one or more notices as defined in § 6(b). But, because Fletcher has not shown that ION breached or failed to perform its obligations under the agreement it is not entitled to either reimbursement or indemnification for its reasonable legal fees and expenses under §§ 16 and 17 of the agreement.

## I. BACKGROUND

### A. The Parties

Plaintiff, ION, formerly known as Input/Output, Inc., is a Delaware corporation with its principal place of business in Houston, Texas.[1] ION is in the business of technology-focused seismic solutions.

Defendant, Fletcher, is a company organized under the laws of Bermuda and holds 30,000 shares of ION's Series D-1 Cumulative Convertible Preferred Stock ("Series D-1 Stock"), 5,000 shares of ION's Series D-2 Cumulative Convertible Preferred Stock ("Series D-2 Stock"), and 35,000 shares of ION's Series D-3 Cumulative Convertible Preferred Stock ("Series D-3 Stock").[2]

### B. Facts

The facts of this case are relatively few. On February 15, 2005, ION and Fletcher executed a stock purchase agreement (the "Agreement") pursuant to which Fletcher purchased a number of ION's Series D-1 Stock.[3] The parties agreed to memorialize their relationship and their respective rights and obligations in the Agreement, as well as a contemporaneous Certificate of Rights and Preferences of Series D-1 Cumulative

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1 Pl.'s Verified Compl. for a Decl. J. (the "Complaint") ¶¶ 1-2.

2 Def.'s Answer, Affirmative Defenses and Verified Countercl. to Verified Compl. (the "Answer") ¶¶ 1-2.

3 Aff. of Brian G. Lenhard ("Lenhard Aff.") Ex. B, the Agreement.

Convertible Preferred Stock of Input/Output, Inc. (the "Certificate"), which was filed with the Delaware Secretary of State.[4]

### 1. The Agreement

Under the Agreement, Fletcher agreed to purchase 30,000 shares of ION's Series D-1 Stock at a price of $1,000 per share and received the right to purchase up to an additional 40,000 shares of Series D Stock at the same price and on the same conditions, for a total potential investment of $70 million.[5] Fletcher exercised this right in 2007 and 2008 by purchasing 5,000 shares of Series D-2 Stock and 35,000 shares of Series D-3 Stock, respectively.[6] In doing so, Fletcher made the full $70 million investment contemplated by the Agreement.

The Agreement provides two ways for Fletcher to obtain liquidity for its investment in ION preferred stock, which unlike ION common stock, is not publicly traded. First, Fletcher had the right to cause ION to redeem its Series D Stock.[7] But,

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4 Neither party filed a copy of the Certificate for any of the relevant series of preferred stock. But, because the parties do not dispute the language contained in the Certificates, I take judicial notice of the Series D-1 Certificate as contained in Ex. 3.1 of ION's Form 8-K filed on February 17, 2005. *See id*. at Ann. A (the "Certificate"), *available at* http://www.sec.gov/Archives/edgar/data/866609/000095012905001409/h22590exv3w1.htm; *see also* Del. R. Evid. 201; *Solomon v. Armstrong*, 747 A.2d 1098, 1133 (Del. Ch. 1999) (explaining that it is well settled under Delaware law that where certain facts are not in dispute, a court may take judicial notice of facts publicly available in filings with the SEC), *aff'd*, 746 A.2d 277 (Del. 2000).

5 *See generally* Agreement at 1.

6 Compl. ¶ 4; Ans. ¶ 4.

7 Agreement § 6(a)(i).

under certain conditions, ION could terminate Fletcher's right to redeem its Series D Stock pursuant to the Agreement's minimum price provision. Section 6(a)(i) provides that if a 20-day volume-weighted average trading price per share of ION's common stock falls below $4.4517 (the "Minimum Price"), ION must deliver a notice to Fletcher (the "Minimum Price Notice") and may elect to reset the conversion price of the Series D Stock to the Minimum Price and terminate Fletcher's right to redeem its shares of such stock.[8]

The second method by which Fletcher may increase its liquidity under the Agreement is to convert its Series D Stock into ION common stock.[9] Fletcher's

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[8] Section 6(a)(i) states, in pertinent part: "(i) If the 20-Day Average Price (as defined in the Certificate of Rights and Preferences) is less than the Minimum Price (as defined below) on any date after and excluding August 12, 2005, then (A) the Company shall provide Fletcher within two (2) Business Days with a written notice that either (1)(a) the Company shall satisfy all its future redemption obligations in a combination of Common Stock and cash, or solely in cash, as elected by the Company in such notice . . . or (2) that the Conversion Prices on all Preferred Shares and Additional Preferred Shares shall thereafter be equal to the Minimum Price and all Conversion Prices of future Additional Preferred Shares to be issued shall thereafter be equal to the Minimum Price, and upon delivery of such notice such Conversion Prices shall thereafter be equal to the Minimum Price and Fletcher shall have no further right to cause the redemption of its Preferred Shares or Additional Preferred Shares thereafter, and (B) the Company shall pay all dividends in cash and not by the issuance of Common Stock (an "Issuance Blockage"). . . . Notwithstanding the foregoing, in no event shall the total number of shares of Common Stock issued or issuable hereunder exceed fifteen million, seven hundred twenty-four thousand, three hundred and six (15,724,306) shares . . . and if such number of shares has been issued, then the Company . . . shall satisfy all unsatisfied redemption obligations solely in cash." The product of the Minimum Price and the Maximum Number of allowable shares of ION common stock (15,724,306) is approximately $70 million.

[9] Agreement §§ 6(a) & (b).

conversion rights are subject to a Maximum Number provision that effectively caps the number of common shares Fletcher may receive as of a particular date.[10] Pursuant to the Agreement, the initial Maximum Number was 7,669,434, but § 6(b) establishes Fletcher's right, upon the occurrence of certain events, to increase the Maximum Number by giving 65 days notice (a "65-Day Notice") of the increase to ION.[11] Under no circumstances, however, was Fletcher entitled to receive from ION more than a total of 15,724,306 shares of ION common stock.[12] In particular, § 6(b) of the Agreement provides as follows:

> (b) The aggregate number of shares of Common Stock issued, as of a particular date, upon conversion or redemption of, or as dividends paid on the Series D Preferred Shares owned by Fletcher and issuable pursuant to this Agreement shall not exceed the Maximum Number as of that date. The "Maximum Number" shall initially equal seven million, six hundred sixty-nine thousand, four hundred thirty-four (7,669,434), or, in the event of a Change of Control, shall equal nine and three-fourths percent (9.75%) of the outstanding common stock of the Acquiring Person as of immediately after the consummation of the Change of Control, and may be increased upon expiration of a 65-Day Notice period (the "Notice Period") after Fletcher delivers a notice (a "65-Day Notice") to the Company designating a greater Maximum Number. A 65-Day Notice may be given at any time. From time to time following the Notice Period, Common Stock may be issued to Fletcher for any quantity of Common Stock, such that the aggregate number of shares of

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10 *Id*. § 6(b).

11 *Id*.

12 *Id*. § 6(a)(i).

> Common Stock issued hereunder is less than or equal to the Maximum Number.[13]

In addition to liquidity provisions, the Agreement also specifies the parties' rights and obligations in terms of indemnification and reimbursement. Fletcher has the right, for example, to be reimbursed for reasonable out-of-pocket expenses if ION fails to deliver common shares to Fletcher upon conversion of its Series D Stock in accordance with the Agreement.[14] Section 16(a) provides:

> Non-Performance. (a) If the Company, at any time, shall fail to deliver the Investment Securities to Fletcher required to be delivered pursuant to this Agreement, in accordance with the terms and conditions of this Agreement, the Certificate of Rights and Preferences and the Subsequent Certificates of Rights and Preferences, for any reason other than the failure of any condition precedent to the Company's obligations hereunder or the failure by Fletcher to comply with its obligations hereunder, then the Company shall (without limitation to Fletcher's other remedies at law or in equity): (i) indemnify and hold Fletcher harmless against any loss, claim or damage (including without limitation, incidental and consequential damages) arising from or as a result of such failure by the Company; and (ii) reimburse Fletcher for all of its reasonable out-of-pocket expenses, including fees and disbursements of its counsel, incurred by Fletcher in connection with this Agreement and the transactions contemplated herein and therein.[15]

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13 *Id*. § 6(b).

14 Agreement § 16(a).

15 *Id*.

Under § 1(d) of the Agreement, "Investment Securities" includes Fletcher's Series D Stock and ION common shares.[16]

Furthermore, the Agreement also gives Fletcher the right to be indemnified for its costs and expenses incurred in investigating or defending breaches or nonperformance of the Agreement by ION.[17] Section 17(a)(iii) states:

> Indemnification. (a) Indemnification of Fletcher. The Company hereby agrees to indemnify Fletcher and each of its officers, directors, employees, consultants, agents, attorneys, accountants and affiliates and each Person that controls (within the meaning of Section 20 of the Exchange Act) any of the foregoing Persons (each a "Fletcher Indemnified Party") against any claim, demand, action, liability, damages, loss, cost or expense (including, without limitation, reasonable legal fees and expenses incurred by such Fletcher Indemnified Party in investigating or defending any such proceeding) (all of the foregoing, including associated costs and expenses being referred to herein as a "Proceeding"), that it may incur in connection with any of the transactions contemplated hereby arising out of or based upon: . . . (iii) any breach or non-performance by the Company of any of its covenants, agreements or obligations under this Agreement, the Certificate of Rights and Preferences and the Subsequent Certificates of Rights and Preferences . . . .[18]

**2. The Notices**

In November 2008, the 20-day volume-weighted average trading price per share of ION's common stock on the NYSE for the previous 20 trading days fell to less than the Minimum Price. Accordingly, ION delivered to Fletcher on November 28, 2008 a

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16 *Id*. § 1(d).

17 *Id*. § 17(a)(iii).

18 *Id*.

Minimum Price Notice pursuant to § 6(a)(i)(A) of the Agreement, indicating that ION had reduced the conversion price for the Series D Stock to the Minimum Price and terminated Fletcher's redemption rights pursuant to § 6(a)(i)(A)(2).[19] As a result of the Minimum Price Notice, Fletcher lost the right to require that ION redeem its shares of Series D Stock, but retained the right to receive preferred dividends on those shares in cash and to convert them into ION common stock.[20]

On that same day, Fletcher delivered to ION pursuant to §6(b) of the Agreement a 65-Day Notice (the "First 65-Day Notice"), increasing the Maximum Number from 7,669,434 to 9,669,434 shares—at which number Fletcher's potential beneficial ownership of ION common shares would be just below 10%.[21] As a result of this notice, Fletcher had the right to elect to convert its shares of Series D Stock into a maximum of 9,669,434 ION common shares, beginning 65 days after the date it gave notice. As of the time ION filed this suit, Fletcher had not converted any of its Series D Stock into ION common shares.[22]

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19 Pl.'s Op. Br. ("POB") Ex. C. Similarly, I refer herein to Defendant's Opening Brief, Defendant's Answering Brief, and Plaintiff's Answering Brief on their cross motions for summary judgment as "DOB," "DAB," and "PAB," respectively.

20 *See* Agreement § 6(a)(i).

21 POB Ex. D.

22 See POB 7. While the pending cross motions for summary judgment were being briefed, however, Fletcher allegedly opted to convert part of its Series D Stock into 9,659,231 shares of ION common stock. See PAB 9 n.5. These facts do not appear to be disputed, but they were never formally proved by competent and admissible evidence.

Then, on September 15, 2009, Fletcher delivered to ION a second 65-Day Notice (the "Second 65-Day Notice") in which it purported to increase the Maximum Number from 9,669,434 to 11,669,434 shares.[23] Fletcher alleges that because ION issued additional shares of common stock after Fletcher sent its First 65-Day Notice, the new Maximum Number of 11,669,434 shares would have placed Fletcher's beneficial ownership of ION common stock at just below 10%.[24] ION received Fletcher's Second 65-Day Notice, but indicated that it would not honor that Notice.[25]

### C. Procedural History

On November 6, 2009, ION filed its Verified Complaint against Fletcher seeking a declaration that Fletcher's Second 65-Day Notice is invalid under the Agreement. Fletcher filed its Answer and Counterclaim against ION on February 5, 2010, which denied that Fletcher was entitled to issue only one 65-Day Notice and asserted three counterclaims seeking: (1) specific performance; (2) reimbursement under § 16 of the Agreement for reasonable fees and expenses it would incur in disputing ION's refusal to honor the Second 65-Day Notice; and (3) indemnification under § 17 for the same fees and expenses. On February 16, 2010, ION filed its Response to the Verified Counterclaim. Thereafter, the parties filed and briefed cross motions for summary

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23 POB Ex. E.

24 DOB 11.

25 *See* POB Ex. F.

judgment. I heard argument on these cross motions on May 24, 2010, after which the parties filed several rounds of supplemental submissions.

### D. Parties' Contentions

ION claims, among other things, that the plain language of the Agreement gives Fletcher the right to issue to ION one and only one 65-Day Notice in order to designate a larger Maximum Number of ION common shares Fletcher may receive upon converting its Series D Stock.[26] It argues that Fletcher's Second 65-Day Notice is invalid and of no force or effect. As such, ION denies that it has any obligation to issue to Fletcher up to two million additional common shares as specified in Fletcher's Second 65-Day Notice.

For its part, Fletcher argues that the plain language of the Agreement shows that Fletcher has the right to issue multiple 65-Day Notices, if it chooses, to increase the Maximum Number to as high as 15,724,306 shares of ION common stock.[27] Moreover, Fletcher argues that the structure of the Agreement confirms that the parties intended to enable Fletcher to send multiple 65-Day Notices. Specifically, it contends that § 6(b) was intended as a mechanism to allow Fletcher to liquidate its Series D Stock investment without triggering disgorgement liability under § 16(b) of the Securities Exchange Act of 1934 (the "1934 Act").[28] In addition, Fletcher has asserted counterclaims against ION for breach of the Agreement based on ION's refusal to honor Fletcher's Second 65-Day

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[26] Compl. ¶ 16; POB 9.

[27] DOB 16.

[28] DOB 21-24.

Notice.[29] Fletcher further claims that ION's alleged breach of § 6(b) also triggered ION's obligations to reimburse and indemnify Fletcher under §§ 16 and 17 of the Agreement, respectively, for the costs and expenses arising from this action to enforce Fletcher's purported rights.[30]

## II. ANALYSIS

### A. Standard for Cross Motions for Summary Judgment

"Summary judgment is granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[31] Under Court of Chancery Rule 56(h), **"**[w]here the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions." That is the situation here. Therefore, the general standard of drawing inferences in the light most favorable to the nonmoving party does not apply.[32]

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29 Answer ¶¶ 38-40.

30 DOB 24-27.

31 *Twin Bridges L.P. v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).

32 *See, e.g., Farmers for Fairness v. Kent Cty.*, 940 A.2d 947, 954-55 (Del. Ch. 2008) (citing *Am. Legacy Found. v. Lorillard Tobacco Co.*, 886 A.2d 1, 18 (Del. Ch. 2005)); *Draper*, 2007 WL 2744609, at *8.

The mere fact that there are cross motions for summary judgment does not preclude the existence of factual issues[33] and summary judgment will be denied when the legal question presented needs to be assessed in the "more highly textured factual setting of a trial."[34] The court "maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application."[35]

Moreover, in the context of a dispute over contract interpretation, summary judgment may be appropriate because such interpretation is generally a question of law.[36] The cross motions presently before me turn on the interpretation of a single stock purchase agreement. Accordingly, I treat the pending motions as submissions for judgment on the merits under Rule 56(h).

**B. Is Fletcher Entitled to Issue Multiple 65-Day Notices Under the Agreement?**

Because the Agreement provides that it is governed by the laws of New York, I begin my analysis with a brief exposition of principles of New York contract

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33 *Jacobs v. City of Wilm.*, 2002 WL 27817, at *3 (Del. Ch. Jan. 3, 2002).

34 *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)).

35 *Tunnell v. Stokley*, 2006 WL 452780, at *2 (Del. Ch. Feb. 15, 2006) (quoting *Cooke v. Oolie*, 2000 WL 710199, at *11 (Del. Ch. May 24, 2000)).

36 *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *2 (Del. Ch. Nov. 8, 2007) (citing *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *9 (Del. Ch. May 2, 2007)); *see also AHS N.M. Hldgs., Inc. v. Healthsource, Inc.*, 2007 WL 431051, at *3 (Del. Ch. Feb. 2, 2007).

interpretation. Next, I examine the plain language of § 6(b), alone and in relation to other sections of the Agreement, to determine whether the section is ambiguous as to whether Fletcher is entitled to deliver to ION multiple 65-Day Notices. For the reasons stated herein, I conclude that the plain language of § 6(b) is unambiguous and that the only reasonable interpretation is that Fletcher is entitled to issue to ION *one or more* 65-Day Notices. Finally, even if § 6(b) is considered ambiguous and I look to extrinsic evidence regarding the parties' intent in drafting it, my interpretation of the Agreement would be the same. In that regard, I note that the primary extrinsic evidence presented by the parties relates to the interrelation of the language of § 6(b) with § 16(b) of the 1934 Act. To the extent it is relevant, this evidence supports construing the Agreement to permit Fletcher to issue to ION more than one 65-Day Notice. Indeed, nothing about such evidence indicates § 6(b) reasonably could be construed as permitting only one such Notice.

### 1. Applicable principles of contract interpretation

Pursuant to § 20(c) of the Agreement, the substantive laws of New York govern the interpretation of the provisions at issue in this litigation.[37] New York law requires that agreements be construed in accordance with the parties' intent.[38] A contract also

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[37] Agreement § 20(c). I also note that § 20(d) provides that, because both parties' counsel played a substantial role in drafting the Agreement, a court faced with issues of interpretation should not apply a rule of construction to the effect that any ambiguities are to be resolved against the drafter. *Id*. § 20(d).

[38] *See, e.g.*, *Greenfield v. Philles Records, Inc.*, 780 N.E.2d 166, 170-71 (N.Y. 2002) (noting that the best evidence of what the parties intend is what they say in their

should be interpreted in a manner that ascribes meaning to all of its provisions so as not to render a provision superfluous.[39] Thus, where a written agreement is complete, clear, and unambiguous on its face, it must be enforced according to the plain meaning of its terms.[40] Under New York law, as in Delaware, "[t]he construction and interpretation of an unambiguous written contract is an issue of law within the province of the court."[41]

Extrinsic evidence of the parties' intent may be considered only if the contract is ambiguous.[42] That is, a court first must decide whether a contract is unambiguous as a matter of law, and, if it so finds, it must restrict its analysis to the four corners of the document.[43] Clear contractual language does not become ambiguous, however, simply because the parties to the litigation put forth different interpretations of it.[44] Rather, a

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writing); *Law Debenture Trust Co. of N.Y. v. Petrohawk Energy Corp.*, 2007 WL 2248150, at *5 (Del. Ch. Aug. 1, 2007) (citing *Reiss v. Fin. Performance Corp.*, 715 N.Y.S.2d 29, 34 (N.Y. App. Div. 2000)), *aff'd*, 947 A.2d 1121 (Del. 2008).

39 *See, e.g.*, *Minerals Tech., Inc. v. Omya AG*, 406 F. Supp. 2d 335, 337 (S.D.N.Y. 2005); *God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assocs., LLP*, 845 N.E.2d 1265, 1267 (N.Y. 2006).

40 *See, e.g.*, *Greenfield*, 780 N.E.2d at 170-71; *R/S Assocs. v. N.Y. Job Dev. Auth.*, 771 N.E.2d 240, 242 (N.Y. 2002).

41 *Petrohawk Energy Corp.*, 2007 WL 2248150, at *5.

42 *Greenfield*, 780 N.E.2d at 170-71.

43 *R/S Assocs.*, 771 N.E.2d at 242-43 (extrinsic evidence is generally inadmissible to add to, vary, or create an ambiguity in a written agreement); *see also Master-Built Const. Co. v. Thorne*, 802 N.Y.S.2d 713, 714 (N.Y. App. Div. 2005).

44 *See Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 869 N.Y.S.2d 511, 517 (N.Y. App. Div. 2008), *aff'd*, 13 N.Y.3d 398, 920 N.E.2d 359 (N.Y. 2009).

contract is ambiguous "where its terms suggest more than one meaning when viewed objectively by a reasonably knowledgeable person who has examined the context of the entire integrated agreement."[45] Conversely, a contract is unambiguous "if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.'"[46] Thus, if an agreement is reasonably susceptible on its face of only one meaning, a court is not free to reshape the contract to fit its personal notions of fairness and equity.[47]

In determining whether a contract is ambiguous, New York courts give words and phrases employed in the contract their plain and commonly-accepted meaning.[48] But, particular words and phrases should not be considered as if isolated from the context of the whole agreement; rather, the court should interpret challenged provisions in light of the obligation as a whole.[49] With these principles in mind, I turn to the Agreement.

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45 *See, e.g.*, *Minerals Techs., Inc.*, 406 F. Supp. 2d at 337 (citing *Scholastic, Inc. v. Harris*, 259 F.3d 73, 82 (2d Cir. 2001)); *Riverside S. Planning Corp.*, 869 N.Y.S.2d at 516 (noting that a contract is ambiguous "if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings").

46 *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569-70, 780 N.E.2d 166, 170-71 (N.Y. 2002).

47 *Id.*

48 *Law Debenture Trust Co. of N.Y. v. Petrohawk Energy Corp.*, 2007 WL 2248150, at *6 (Del. Ch. Aug. 1, 2007) (citing *Kass v. Kass*, 91 N.Y.2d 554, 566-67 (N.Y. 1998)), *aff'd*, 947 A.2d 1121 (Del. 2008).

49 *See id.*

### 2. Is the Agreement ambiguous?

#### a. Is the plain language of § 6(b) ambiguous?

ION contends that the only reasonable reading of the plain language of § 6(b) contemplates Fletcher's delivery of only a single 65-Day Notice because it refers to "a notice" and "the notice period" in the singular.[50] Fletcher counters that the parties use of the indefinite article "a" in § 6(b) indicates that the only reasonable reading of the section is that Fletcher is entitled to send one or more 65-Day Notices to ION.[51] I agree with Fletcher and find that: (1) ION's construction is not reasonable and (2) the plain language of § 6(b) unambiguously indicates that the parties intended that Fletcher could issue one or more 65-Day Notices under the Agreement.

An "article" is "any of a small set of words or affixes (as *a*, *an*, and *the*) used with nouns to limit or give definiteness to the application."[52] An article is typically "definite" if it provides distinct and certain limits to the noun it precedes.[53] The definite article "the" is generally used "as a function word to indicate that a following noun or noun equivalent is definite or has been previously specified by context or by circumstance."[54]

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50 POB 10.

51 DOB 16-20.

52 WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY ("WEBSTER'S") 105 (9th ed. 1987). It is common practice for New York courts to refer to a dictionary to determine the plain and ordinary meaning of words to a contract. *Mazzola v. Suffolk*, 533 N.Y.S.2d 297, 297 (N.Y. App. Div. 1988).

53 WEBSTER'S 334.

54 *Id*. at 1222.

Similarly, "the" may be used to indicate that a following noun or noun equivalent is "unique or a particular member of its class."[55]

By contrast, an article is typically "indefinite" where it does not designate an identified or immediately identifiable person or thing or fails to give exact limits to the noun it modifies.[56] The word "a" is an indefinite article used as a function word before singular nouns when the referent is unspecified.[57] "A" also can be used to mean "any."[58] In both instances, the indefinite article "a" precedes a singular noun, but does not necessarily limit the frequency or duration of that noun.

Section 6(b) uses the indefinite article "a" to modify the noun "65-Day Notice" and both definite and indefinite articles to modify the noun "Notice Period." The section states in relevant part:

> The "Maximum Number" shall initially equal seven million, six hundred sixty-nine thousand, four hundred thirty-four (7,669,434) . . . and may be increased upon expiration of *a 65-Day Notice period* (*the* "Notice Period") after Fletcher delivers *a notice* (*a* "65-Day Notice") to the Company designating a greater Maximum Number. *A 65-Day Notice* may be given *at any time*. From time to time following *the Notice Period*, Common Stock may be issued to Fletcher for any quantity of Common Stock, such that the aggregate

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55 *Id*.

56 *Id*. at 612.

57 *Id*. at 43; *see also Margan v. Niles*, 250 F. Supp. 2d 63, 70 (N.D.N.Y.) (The word "a" is an indefinite article and means "not any particular or certain one of a class or group.").

58 WEBSTER'S 43.

> number of shares of Common Stock issued hereunder is less than or equal to the Maximum Number.[59]

ION argues that this section uses the indefinite article "a" because, until Fletcher issues its allegedly lone allowable 65-Day Notice, the Agreement must refer to an unspecified item.[60] As such, it contends that "the" and "a" are both singular because the Agreement refers to "a notice" in the singular.

As used in § 6(b), however, the indefinite article "a" places no limitation on the number of 65-Day Notices that may be issued. An example using numbers close to those involved here may help elucidate this issue. Section 6(b) sets the Maximum Number initially at approximately 7.7 million shares. If Fletcher delivered a 65-Day Notice on Day 1 calling for an increase in the Maximum Number to 9.7 million, the latter number would become the Maximum Number on or about Day 66 and thereafter ION could issue common stock to Fletcher for any quantity of such stock up to an aggregate of 9.7 million shares. If on Day 101, Fletcher delivered a second 65-Day Notice to ION specifying an increase in the Maximum Number to 11.7 million, then, according to Fletcher's interpretation, the maximum aggregate number of shares that could be issued to it through day 160, for example, still would be 9.7 million, but as of Day 166, the end of the second Notice Period, that number would increase to 11.7 million. In contrast, under ION's interpretation the Maximum Number would be fixed permanently at 9.7 million.

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59 Agreement § 6(b) (italicized emphasis added).

60 PAB 2.

Fletcher further contends that even after it sent its Second 65-Day Notice, it could send one or more additional 65-Day Notices to raise the Maximum Number to the approximately 15.7 million maximum established in Section 6(a)(i) of the Agreement. Notably, under Fletcher's interpretation, one could determine *the* Maximum Number on any particular date and the dates of *the* governing Notice Period.

ION cites a string of non-New York cases for the proposition that "a" can refer to a single event or item despite the use of an indefinite article.[61] These cases do support the proposition that, in some cases, "a" *can* refer to a single event or item. The determination as to whether an indefinite article in a particular agreement is singular or plural, however, depends more on context than the laws of grammar. In *People v. Booker*, for example, the Court of Appeals of Michigan interpreted a Michigan statute that stated that "[a] defendant who allegedly has committed a crime . . . shall be given *a* polygraph examination . . . if [he] requests it," to mandate that a criminal defendant could receive

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[61] PAB 3-4; *see, e.g.*, *United States v. Hughley*, 2005 WL 1202515, at *4 (E.D. Tenn. May 19, 2005) ("In the present case, the term 'a' means one."); *People v. Booker*, 2009 WL 2382466, at *5 (Mich. Ct. App. Aug. 4, 2009), *appeal denied*, 778 N.W.2d 221 (Mich. 2010); *Arnold v. Hoffer*, 94 Conn. App. 53, 58-59 (Conn. App. Ct. 2006) (interpreting "a detached dwelling house" in a restrictive covenant to impose a limitation on both the type and the number of houses that can be constructed on certain property); *Farrington's Owners' Ass'n v. Conway Lake Resorts, Inc.*, 878 A.2d 504, 508 (Me. 2005) (noting that one of two reasonable interpretations of "a dock" is a single dock); *Holladay Duplex Mgmt. Co. v. Howells*, 47 P.3d 104, 106 (Utah 2002); *Pleasants Invs. Ltd. P'rship v. Dep't of Assessments & Taxation*, 786 A.2d 13, 19-20 (Md. Ct. Spec. App. 2001) ("'a' in the context in which it is used means a single development plan").

one and only one polygraph test upon request.[62] The court in *Booker* acknowledged that a singular term may be extended to include its plural meaning, but held in that case that a defendant could not obtain multiple polygraph tests upon a single request because it would be inconsistent with the Legislature's intent.[63] Similarly, the Court of Appeals of Utah in *Howells* held in the context of interpreting a restrictive covenant that the use of the word "a," the use of the singular "house," and the underlying purpose of the covenant (to restrict construction and preserve the residential character of the development) indicated that the phrase "a one family dwelling house" meant one single family home.[64] In arriving at its decision, however, the court acknowledged that the indefinite article "a" does not always mean one.[65]

Consistent with the cases from outside of New York cited by ION, New York courts recognize that the determination as to the function of an indefinite article, particularly whether it denotes a singular or plural term, must be made in regard to the context in which it is used.[66] Other jurisdictions similarly have concluded that indefinite

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62 *Booker*, 2009 WL 2382466, at *5 (emphasis added).

63 *See id*.

64 *See* 47 P.3d at 107.

65 *See id*. (citing *Pleasants Invs. Ltd. P'rship,* 786 A.2d at 20 (relying on context to conclude that the word "a" means one)).

66 *See, e.g.*, *Lewis v. Spies*, 350 N.Y.S.2d 14, 17 (N.Y. App. Div. 1973) ("The indefinite article 'a' is not necessarily a singular term. It is often used to mean 'any' rather than 'one' . . . . As used in context, it could arguably have either of these meanings."); *Cook v. Carmen S. Pariso, Inc.*, 734 N.Y.S.2d 753, 757-58 (N.Y. App. Div. 2001) (citations omitted) ("'a' generally is not to be read in the

articles take their meaning from the context in which they are used.[67] Yet, it is axiomatic in New York that contracts should be interpreted to give words and phrases used in them their plain and ordinary meaning.[68] While context is certainly important, case law in New York and other jurisdictions indicates that the ordinary usage of the indefinite article "a" most often is understood to be plural.[69] The Court in *Cook v. Carmen S. Pariso, Inc.*,

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singular sense unless such an intention is clearly conveyed by the language and structure of the statute").

67 *See, e.g.*, *Savin Rock Arcade, Inc. v. Fitzpatrick*, 160 F. Supp. 775, 776 (D. Conn. 1958) ("the indefinite article 'a' is not always synonymous with 'one', (sic) the meaning of the word must be determined from the context."); *Evans v. State*, 914 A.2d 25, 75 (Md. 2006) ("The articles 'a' or 'an' . . . do not . . . necessarily imply the singular, but generally take their meaning in that regard from the context in which they are used."); *Maupin v. Sidiropolis*, 600 S.E.2d 204, 209 (W. Va. 2004) ("[t]he indefinite article 'a' may some times mean one, where only one is intended, or it may mean one of a number, depending upon the context.").

68 *See, e.g.*, *Tanner v. Adams*, 602 N.Y.S.2d 710, 711 (N.Y. App. Div. 1993); *Mazzola v. Suffolk*, 533 N.Y.S.2d 297, 297 (N.Y. App. Div. 1988).

69 *See, e.g.*, *Renz v. Grey Adver., Inc.*, 135 F.3d 217, 222 (2d Cir. 1997) ("the use of the indefinite article "a" implies that the modified noun is but one of several of that kind."); *Application of Hotel St. George Corp.*, 207 N.Y.S.2d 529, 531 (N.Y. Sup. Ct. 1960) ("The article 'a' is generally not used in the singular sense unless such an intention is clear from the language of the statute."); *see also Stephan v. Pa. Gen. Ins. Co.*, 621 A.2d 258, 261 (Conn. 1993) ("As a definite article, the word 'the' refers to a specific object whereas the indefinite articles 'a' and 'an' refer to unlimited objects."); *Allstate Ins. Co. v. Foster*, 693 F. Supp. 886, 889 (D. Nev. 1988) ("'A' or 'an' is an indefinite article often used in the sense of 'any' and applied to more than one individual object; whereas 'the' is an article which particularizes the subject spoken of.").

The preference for construing "a" to mean "one or more" is even stronger in the context of patent law. *Touchtunes Music Corp. v. Rowe Int'l Corp.*, 2010 WL 2926215, at *7 (S.D.N.Y. July 22, 2010) (citing *Baldwin Graphic Sys., Inc. v. Siebert, Inc.*, 512 F.3d 1338, 1342 (Fed. Cir. 2008) ("[t]his court has repeatedly emphasized that an indefinite article 'a' or 'an' in patent parlance carries the

for example, explained that "courts that have considered the issue have held that the usual and ordinary meaning of 'a' is not 'one and only one,' but rather 'any number of' or 'at least one'—not 'one and no more,' but rather 'one or more.'"[70] Therefore, I conclude that under New York law the article "a" generally should be read in the plural sense unless the context clearly indicates otherwise.[71] With this backdrop in mind, I turn to the four sentences that comprise § 6(b) in the Agreement.

The language in § 6(b) supports Fletcher's contention that the parties intended "a" to have its usual and ordinary plural meaning. The second sentence of § 6(b) states: "*The* 'Maximum Number' . . . may be increased upon expiration of *a* 65-Day Notice Period . . . after Fletcher delivers *a* [65-Day Notice]." The use of the definite article "the" to modify "Maximum Number," which implies that at any one point in time there can only be one Maximum Number, stands in stark contrast to the use of the indefinite article "a" later in the same sentence to modify two defined nouns: "a 65-day notice

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meaning of 'one or more' in open-ended claims containing the transitional phrase 'comprising.' . . . That 'a' or 'an' can mean 'one or more' is best described as a rule, rather than merely as a presumption or even a convention. The exceptions to this rule are extremely limited: a patentee must 'evince[ ] a clear intent' to limit 'a' or 'an' to 'one.'")).

[70] *Cook*, 734 N.Y.S.2d at 757 (citations omitted).

[71] *See id*. at 757-58. In *Cook*, the court faced the statutory construction issue of whether the petitioners' property, which contained two single family residences, was "real property improved . . . with a single family dwelling" under Lien Law § 17. *Id*. at 754-55. Based, in part, on the ordinary meaning of the article "a" and other pertinent provisions of the Lien Law, the court concluded that the property was improved with a single family dwelling, meaning at least one such dwelling. *See id*. at 757-59.

period" and "a notice." If ION's assessment of the parties' intent were correct, the sentence should read: "The 'Maximum Number" . . . may be increased upon expiration of *the* 65-Day Notice Period . . . after Fletcher delivers *the* [65-Day Notice]." Indeed, placing the article "the" in front of a word connotes the singularity of the word, whereas using "a" implies that the modified noun is but one of several of that kind.[72] I consider it unreasonable to infer that the parties intended "a 65-Day Notice Period" and "a 65-Day Notice" to be singular terms limited to one instance each when they used the definite article "the" to particularize the one and only "Maximum Number" in the very same sentence. This conclusion is buttressed by § 20(k)'s prescriptions as to construction of the Agreement. Section 20(k) states that "except as otherwise expressly provided or unless the context otherwise requires: (i) the terms defined in this Agreement have the meanings assigned to them in this Agreement and include the plural as well as the singular . . . ."[73] Furthermore, nothing in the language of § 6(b) or its context clearly indicates to the contrary—*i.e.*, that "a" should be construed to mean one and only one.

I also find unpersuasive ION's argument that the fact that the indefinite article "a" precedes a *singular* noun when the referent is unspecified supports construing § 6(b) as contemplating only one 65-Day Notice.[74] There is an important distinction between the singular form of a noun and the frequency with which that singular noun occurs. Just

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72 *SEC v. KPMG LLP*, 412 F. Supp. 2d 349, 387-88 (S.D.N.Y. 2006).

73 Agreement § 20(k).

74 PAB 2.

because a noun is in its singular form does not mean it is limited to occurring just once. The court in *People v. Booker* recognized this principle when it explained that a statute permitting a defendant to request "a polygraph test" could be read as "indicating that *every time* 'a' request is made, 'a polygraph' examination should be given."[75] It explained that this reading would be consistent with the "use of the indefinite article, i.e., a single request does not lead to multiple examinations, but each request results in an examination."[76] The same principle applies here. As denoted by the use of the indefinite article "a" followed by singular nouns, the second sentence of § 6(b) permits Fletcher to issue only one 65-Day Notice at a time, which in turn triggers a single 65-Day Notice Period. Nothing in § 6(b), however, precludes Fletcher from issuing multiple 65-Day Notices consistent with the plain and ordinary meaning of "a." The use of the indefinite article "a" in the second sentence of § 6(b), especially in contrast to the use of the definite article "the" in the same sentence, supports the interpretation that Fletcher was not limited to issuing a single 65-Day Notice.

Ignoring the contrasting use of articles in the second sentence of § 6(b), ION focuses instead on the use of the definite article "the" in the fourth sentence.[77] This

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75 *See People v. Booker*, 2009 WL 2382466, at *5 (Mich. Ct. App. Aug. 4, 2009).

76 *Id*. In *Booker*, the court held that for policy reasons "a" should be read in the singular because, among other things, permitting a defendant to have the opportunity to take polygraph tests ad infinitum would be against the clear intention and policy basis of the relevant statute. *See id*. at *5-6.

77 POB 10; PAB 3.

sentence states that "[f]rom time to time following *the* Notice Period, Common Stock may be issued to Fletcher . . . ."[78] ION seizes upon this use of "the" to argue that the parties intended for there to be only one Notice Period and, hence, only one 65-Day Notice. Considering § 6(b) in its entirety, however, shows the flaws in this argument. While the definite article "the" reflects the singular nature of a specific "Notice Period," this sentence must be read in conjunction with the second sentence of § 6(b) in which "a" Notice Period is defined. The parties used the definite article "the" in the fourth sentence to signify that once *a* 65-Day Notice is issued, a particular Notice Period of 65 days in length begins to run. Upon the expiration of that Notice Period, the Maximum Number specified in the related 65-Day Notice will control. That is, the fourth sentence describes what happens *once a 65-Day Notice is issued*; it does not prescribe how many such notices may be issued. Thus, the use of the definite article "the" in the last sentence of § 6(b) does not reflect any intent, let alone a clear intent, to preclude the possibility that Fletcher could deliver to ION more than one 65-Day Notice under the Agreement.

Finally, I turn to the vigorously contested third sentence in § 6(b), which states that "[*a*] 65 Day Notice may be given *at any time*."[79] Fletcher argues that the phrase "at any time" indicates that it could issue multiple 65-Day Notices because if it could not deliver such a Notice after a previous Notice has been delivered, then it would not be able

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[78] Agreement § 6(b) (emphasis added).

[79] *Id*. § 6(b) (emphasis added).

to deliver a 65-Day Notice "at any time."[80] ION, on the other hand, contends that the language "at any time" refers to the absence of any limit on when a 65-Day Notice may be issued, and not to how many such notices may be issued.[81]

I agree with ION that the phrase "at any time" relates to when Fletcher could issue a 65-Day Notice. The Court in *BCBSD, Inc. v Denn*, for example, explained that the term "whenever," which it equated with the phrase "at any time," means "at whatever *time*" or "on whatever occasion."[82] Giving the phrase "at any time" its plain and ordinary meaning of "at whatever time," I find nothing in that phrase that supports construing § 6(b), as ION urges, to forbid Fletcher from issuing more than one 65-Day Notice. Indeed, if Fletcher was limited to issuing only one 65-Day Notice, it arguably could not issue a 65-Day Notice at whatever time or any time as § 6(b) requires.

"A contract should be construed so as to give full meaning and effect to all of its provisions."[83] One reasonably could argue that to give full effect to the phrase "at any time" Fletcher must be able to issue a 65-Day Notice whenever it chooses, including after having issued a prior 65-Day Notice. The Court in *BCBSD* recognized this very principle

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80 DOB 6.

81 POB 11. ION also emphasizes that the parties used language different from and in addition to "at any time" in other areas of the Agreement to express an intent to allow for multiple actions. PAB 5. I address that argument *infra* Part II.B.2.b.

82 *See BCBSD, Inc. v. Denn*, 2008 WL 1838462, at *5 (Del. Super. Ct. Apr. 22, 2008) (citing Webster's New World Dictionary of The American Language 1664 (College Ed. 1966)).

83 *See Fifth Ave. Exec. Staffing v. Virtual Cmtys., Inc.*, 2002 WL 398512, at *1 (N.Y. Sup. Ct. Feb. 28, 2002) (per curiam).

in interpreting a statute that gave the Commissioner of the Department of Insurance the authority to issue a notice of hearing *whenever* he has reason to believe that a party has engaged in an unfair method of competition or a deceptive practice.[84] In equating the term "whenever" with "at any time," the court held that based on the plain meaning of the statute, the Commissioner may issue notice at any time, including after a previous notice was issued to the same recipient for the same operative conduct.[85] The court's reasoning in *BCBSD*, therefore, supports the proposition that a party is not free to take an action at any time if it is prohibited from doing so after the first instance of taking such action.

In any case and more importantly, however, the term "at any time" provides no help to ION in meeting its burden to demonstrate that the parties clearly intended "a 65-Day Notice" in § 6(b) to mean one and only one such Notice. As discussed earlier, the second sentence of § 6(b) uses the indefinite article "a" to establish that Fletcher may issue multiple single 65-Day Notices. The third sentence begins with that same indefinite article to signify that, concerning its option to issue a 65-Day Notice (*i.e.*, one or more 65-Day Notices), Fletcher may do so at whatever time it chooses based on the phrase "at any time." Even adopting ION's argument that "at any time" refers only to *when* Fletcher may issue a 65-Day Notice, reading § 6(b) as a whole and in accordance with the third sentence's use of the indefinite article "a," the third sentence merely states that there is no time limit on when Fletcher may issue each of its 65-Day Notices. The third

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84 *See BCBSD, Inc.*, 2008 WL 1838462, at *5.

85 *See id.*

sentence imposes no substantive limitation on the number of such Notices that Fletcher can issue. Thus, taking § 6(b) as a whole, the phrase "at any time" does not limit Fletcher to a single issuance of a 65-Day Notice, but rather indicates the permissible time frame for delivering each of its 65-Day Notices.

**b. Is the plain language of § 6(b) ambiguous in light of other sections of the Agreement?**

ION further contends that language in other sections of the Agreement demonstrates that when the parties intended to cover more than one action, event, or notice, they included language clearly indicating that fact.[86] For example, ION cites § 1(c) of the Agreement regarding Fletcher's right to purchase additional shares of ION preferred stock, which explicitly recognizes Fletcher's right to give "one or more" Stock Purchase Notices to ION. ION notes that § 1(c) uses (1) plural words, (2) the phrase "from time to time" rather than "at any time," and (3) the word "each" rather than "a" or "the" to make clear that the parties recognized that more than one event, action, or occurrence may take place. ION also points to a number of provisions in the Certificate for the same proposition. Specifically, ION relies on Certificate § 6(A)(i), which states that "[s]hares of Series D-1 . . . are convertible at the option of the holder thereof at any time, from time to time, in whole or in part . . . ," as support for their argument that the phrase "at any time," standing alone, does not suggest that Fletcher could issue more than

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[86] POB 12.

one 65-Day Notice and that when the parties intended to encompass multiple occurrences, they used other language to indicate that intent.[87]

The differences in the language used in these other sections compared to § 6(b) of the Agreement, however, do not warrant a finding that § 6(b) is ambiguous. Indeed, other provisions in the Agreement and the Certificate make similar use of the indefinite article "a" to indicate multiple events or occurrences.[88] Turning to § 1(c), this provision specifies Fletcher's rights with respect to its acquisition of additional preferred shares. In relevant part, it states that "Fletcher shall have the rights . . . specified in this Agreement and in *a* certificate of rights and preferences for each such series of Additional Preferred Shares (*each*, *a* 'Subsequent Certificate of Rights and Preferences" and *collectively*, *the* 'Subsequent Certificates of Rights and Preferences')."[89] This provision, by its use of contrasting definite and indefinite articles, demonstrates that the parties understood the indefinite article "a" to allow for multiple instances or events. While § 1(c), unlike § 6(b), uses terms like "each" and "from time to time " to indicate the possibility of more

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87 PAB 6; *see also* Certificate § 6(A)(i). It is permissible to consider the Certificate alongside the Agreement because New York courts follow the rule that "agreements executed at substantially the same time and related to the same subject matter are regarded as contemporaneous writings and must be read together as one" for the purposes of construing terms in one of the writings. *See Flemington Nat'l Bank & Trust Co. v. Domler Leasing Corp.*, 65 A.D.2d 29, 32 (N.Y. App. Div. 1978), *aff'd*, 397 N.E.2d 393 (N.Y. 1979).

88 ION cites a number of sections in the Certificate for the proposition that the parties used language other than "at any time" to express an intent to allow multiple notices or actions. PAB 7 and 8 n.4.

89 Agreement § 1(c) (emphasis added).

than one occurrence, the Agreement's use of those words is entirely consistent with the parties' repeated use of the indefinite article "a" when they intended a plural meaning to attach to a noun in the Agreement.[90] Consistent with the usage in § 6(b), the parties used the indefinite article "a" in § 1(c) to signify that there could be multiple subsequent Certificates regarding the ION preferred stock in issue, but used the definite article "the" to establish that there is but a single set of such preferred shares subject to each Certificate.

The use of terms like "each" and "from time to time" may make clearer the parties' intent to attribute a plural meaning to the nouns those terms modify, but other provisions in the Agreement and the Certificate demonstrate that use of such terms is neither a necessary nor exclusive way to attribute plural meaning to nouns in the Agreement. For example, the first sentence in § 5(a) describes a circumstance when ION must file "*a* Registration Statement," but later sentences in the section show that the parties envisioned that ION might need to file later registration statements after filing the initial statement.[91] Yet, despite discussing multiple registration statements, § 5(a) does not contain the terms "each" or "from time to time." Similarly, § 5(d) stipulates that ION

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90 *See, e.g.*, Agreement § 5(b) ("*Each* Common Share is *a* "Covered Security") (emphasis added); § 5(f) ("*each a* 'Blackout Period'"); § 9(l) (*each*, *a* 'Rights Agreement'") (emphasis added). *See also* Certificate § 3(A) ("*each* such date being herein referred to as *a* 'Dividend Payment Date'") (emphasis added); *id.* ("*each* quarterly period . . . shall hereinafter be referred to as *a* 'Dividend Period'") (emphasis added).

91 Agreement § 5(a).

must send to Fletcher upon the latter's request "a reasonable number of copies of *a* supplement or *an* amendment of any Prospectus as may be necessary . . . pursuant to *the* Registration Statement."[92] Here, the use of the indefinite articles "a" and "an" show that the parties envisioned the possibility that ION might need to file multiple supplements or amendments to their prospectus, even though they did not use terms like "each" or "from time to time." Likewise, § 9(i) stipulates that ION might need to send "a[n Increase N]otice" to Fletcher regarding an increase of 250,000 or more in the number of shares of ION common stock outstanding even though ION may have sent a prior Increase Notice to Fletcher regarding previous increases in ION common stock. While this provision clearly contemplates multiple "Increase Notices," it does not use terms like "each" or "from time to time." Finally, § 2 of the Certificate defines "Effective Election Notice" as "*an* Election Notice . . . which shall, after expiration of such forty-five (45) Business Day period, supersede *any prior* Election Notice."[93] Again, the Certificate clearly contemplates multiple Election Notices but does not employ terms such as "each" or "from time to time" to denote this.

Thus, ION's reliance on other provisions in the Agreement and the Certificate to support its position that the parties intended the indefinite article "a" in § 6(b) of the Agreement to mean there could be one and only one 65-Day Notice is unavailing. While the phrase "from time to time" and the word "each" are used in some provisions to

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92 *Id*. § 5(d).

93 Certificate § 2 (emphasis added).

indicate the possibility of multiple occurrences, elsewhere in the Agreement the parties used other language, including contrasting articles, to achieve the same purpose. Giving effect to the plain meaning of the indefinite article "a" in § 6(b) does not render the terms "each" and "from time to time" in other sections meaningless or mere surplusage because all of these terms can be used to achieve the same goal of indicating the potential for multiple occurrences or events.[94] Likewise, I find that none of the other provisions in the Agreement or the Certificate clearly indicates that the article "a" in § 6(b) should not be read in its usual, plural sense. Therefore, I hold that the only reasonable interpretation of § 6(b) is that it envisions one or more 65-Day Notices and that the other language in the Agreement does not render § 6(b) ambiguous in that regard.[95]

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[94] *See Helmsley-Spear, Inc. v. N.Y. Blood Ctr., Inc.*, 687 N.Y.S.2d 353, 357 (N.Y. App. Div. 1999) ("Courts should construe a contract so as to give meaning to all of its language and avoid an interpretation that effectively renders meaningless a part of the contract.").

[95] In reaching this conclusion, I reject as unpersuasive ION's contention that construing § 6(b) to allow multiple 65-Day Notices would lead to absurd results. ION first argues that Fletcher could inundate ION with endless and overlapping 65-Day Notices requiring it to make frequent disclosures in Form 8-Ks and incur other administrative burdens. But, this is pure speculation, especially given the fact that Fletcher has issued just two 65-Day Notices to ION since the Agreement was signed in 2005. Moreover, as Fletcher correctly points out, even if Fletcher wished to harass ION in this way, ION likely could protect itself by invoking the implied covenant of good faith and fair dealing, which applies to the performance of all contracts under New York law. *Manhattan Motorcars, Inc. v. Automobili Lamborghini, S.p.A.*, 244 F.R.D. 204, 214 (S.D.N.Y. 2007). The covenant encompasses any promises which a reasonable party to the contract would be justified in understanding were included. *See id*.

Second, ION asserts that if Fletcher were to issue endless and overlapping 65-Day Notices, which seems unlikely based on the evidence of record, "ION would face

### 3. Even if § 6(b) is ambiguous, the relevant extrinsic evidence supports adopting Fletcher's construction

Even if, contrary to the conclusion discussed above, I found the disputed language in § 6(b) to be ambiguous and considered extrinsic evidence,[96] I still would construe that section to afford Fletcher the right to send one or more 65-Day Notices.

The primary extrinsic evidence submitted by the parties was addressed in letters to the Court discussing the alleged purpose and function of § 6(b) in relation to § 16(b) of the 1934 Act. Fletcher argues that § 6(b) is a type of "conversion cap," discussed *infra*, which strongly supports its contention that it can issue multiple 65-Day Notices under the

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a regulatory and financial reporting nightmare and its investors and financial analysts would inevitably become hopelessly confused and incapable of valuing ION shares in the stock market." POB 13. This is an obvious overstatement, however. ION asserts that analysts typically add the Maximum Number to the number of outstanding common shares to calculate the fully diluted number of shares of ION common stock. The conversion system envisioned by § 6(b) provided analysts with all of the relevant information they would need to perform such a calculation, including that: (1) the initial Maximum Number was 7,669,434; (2) the highest value that number could reach was 15,724,306; (3) Fletcher could increase, but not decrease, the Maximum Number between those two points; and (4) it had to do so by issuing one or more 65-Day Notices to apprise ION and, hence, the investing public of the increase. In that context, it is highly unlikely that ION's investors or analysts would be either "hopelessly confused" or "incapable of valuing ION's shares." Thus, ION has not shown that Fletcher's ability to issue multiple 65-Day Notices under § 6(b) would lead to absurd results.

96 *See Weiner v. Anesthesia Assocs. of W. Suffolk, P.C.*, 610 N.Y.S.2d 606, 607 (N.Y. App. Div. 1994) (noting that if a court determines the terms of an agreement are ambiguous, it can look to extrinsic evidence to determine the parties' intent).

Agreement.[97] ION, for its part, asserts that § 6(b) does not operate as a conversion cap, § 6(b) likely would not protect Fletcher from liability under § 16(b) and, in any case, Fletcher does not need more than one 65-Day Notice to avoid § 16(b) liability.[98] Having considered the parties' submissions,[99] I find that they intended § 6(b) to reduce Fletcher's risks of incurring liability and reporting obligations under § 16 of the 1934 Act, which reinforces my previous conclusion that § 6(b) should be construed to authorize multiple 65-Day Notices.

**a. Background on § 16 of the Securities and Exchange Act of 1934**

Under § 16(a) of the 1934 Act, an investor must file certain notices with the SEC within ten days of becoming a beneficial owner of more than 10% of any class of equity security registered under the 1934 Act.[100] These filings often can be a substantial burden in terms of time and associated costs.

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97 Fletcher's Letter to Vice Chancellor Parsons, dated June 18, 2010 (the "Fletcher June 18 Letter") 2. When I heard argument on the parties' cross motions for summary judgment, I instructed the parties to submit supplemental briefing, in the form of letters to the Court, regarding § 16(b) of the 1934 Act and its relation to this litigation. These letters are cited hereinafter with the submitting party's name followed by the month and day of the letter and page number.

98 ION July 2 Letter 1.

99 Because the parties have cross-moved for summary judgment under Rule 56(h) and neither party "presented argument to the Court that there is an issue of fact material to the disposition of either motion," I decide these motions "based on the record submitted with [them]." Ct. Ch. R. 56(h).

100 *See* Thomas Lee Hazen, THE LAW OF SECURITIES REGULATION 699 (4th ed. 2002).

The 1934 Act, however, does not explicitly define the concept of beneficial ownership and, therefore, its scope has been delineated by administrative rulemaking and judicial interpretation.[101] One such administrative rule, promulgated by the SEC under § 16, is Rule 16a-1, which incorporates the definition of beneficial owner found in § 13(d) of the 1934 Act.[102] Rule 13d-3(a), promulgated under § 13(d), defines a beneficial owner of a security as "any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares: (1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or, (2) Investment power which includes the power to dispose, or to direct the disposition of, such security."[103] Notwithstanding this provision, Rule 13d-3(d) states that "[a] person shall be deemed to be the beneficial owner of a security . . . if that person has the right to acquire beneficial ownership of such security, as defined in Rule 13d-3(a) (§ 240.13d-3(a)) within sixty days, including but not limited to any right to acquire: . . . (B) through the conversion of a security."[104] Thus, if a shareholder has the right to convert a

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101 *See id*. at 701.

102 The Rule reads, in relevant part: "(a) The term beneficial owner shall have the following applications: (1) Solely for purposes of determining whether a person is a beneficial owner of more than ten percent of any class of equity securities registered pursuant to section 12 of the Act, the term "beneficial owner" shall mean any person who is deemed a beneficial owner pursuant to section 13(d) of the Act and the rules thereunder . . . ." 17 C.F.R. § 240.16a-1.

103 17 C.F.R. § 240.13d-3(a).

104 17 C.F.R. § 240.13d-3(d)(1)(i); *see also* Hazen, *supra* note 100, at 703 ("In making a determination whether a shareholder is a beneficial owner of 10% or

sufficient number of nonpublicly-traded shares of an issuer within a sixty-day period to acquire greater than 10% ownership of that issuer's publicly-traded shares at any one time, the shareholder will be deemed a beneficial owner of such shares and, therefore, will be subject to § 16(a)'s filing requirements.

In addition, an entity deemed to be a beneficial owner of more than 10% of an issuer's publicly traded shares is subject to the so-called "short swing" trading liability imposed by § 16(b). That section states, in relevant part:

> **Profits from purchase and sale of security within six months** For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) . . . involving any such equity security within any period of less than six months, unless such security . . . was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security . . . purchased or of not repurchasing the security . . . sold for a period exceeding six months.[105]

Under § 16(b), therefore, corporate insiders, including those deemed to be beneficial owners of more than 10% of an issuer's publicly traded shares, may be compelled to disgorge profits earned on purchases and sales of such securities made within six months

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more of a corporation's shares, derivative securities trigger § 16 liability if they are convertible within sixty days.").

[105] 15 U.S.C. § 78(p).

of each other.[106] The purpose of this section is prophylactic: § 16(b) acts to prevent a beneficial owner from unfairly using information he may have obtained by virtue of his relationship to the issuer.[107]

**b. Did the parties intend § 6(b) to reduce Fletcher's exposure to liability under § 16(b) of the 1934 Act?**

Section 16(b) of the 1934 Act is a strict liability provision as it requires disgorgement of insider short swing profits even in the absence of any wrongdoing.[108] As such, investors often deliberately structure stock purchase and sales transactions to avoid the burdens and liabilities of § 16(b). In *Reliance Electric*, the Supreme Court stated that "[l]iability cannot be imposed simply because the investor structured his transaction with the intent of avoiding liability under § 16(b). The question is, rather, whether the method used to 'avoid' liability is one permitted by the statute."[109] Courts routinely have upheld the use of one such method of avoiding § 16(b) liability: the so-called "blocker provision" or "conversion cap."[110]

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106 *See Levy v. Southbrook Int'l Invs., Ltd.*, 263 F.3d 10, 14 (2d Cir. 2001). A corporation may recover profits realized by such insiders from a purchase and sale of its stock within any six-month period, provided that the insider held more than 10% both at the time of the purchase and sale. *See Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 419 (1972).

107 *See* Hazen, *supra* note 100, at 710.

108 *Id*.

109 *Reliance Elec. Co.*, 404 U.S. at 422.

110 *See, e.g., Decker v. Advantage Fund, Ltd.*, 362 F.3d 593, 595 (9th Cir. 2004); *Southbrook Int'l Invs., Ltd.*, 263 F.3d at 17; *Log on Am., Inc. v. Promethean Asset*

A conversion cap in a convertible security operates to prevent the investor from acquiring more than 10% of the issuer's common shares within sixty days and, thereby, triggering §16 of the 1934 Act. Specifically, where a binding conversion cap denies the investor the right to acquire more than 10% of the issuer's outstanding common shares at any one time, the investor is not, merely because he holds some amount of convertible securities, the beneficial owner of more than 10% of the issuer's common shares within the meaning of Rule 13d and, therefore, § 16.[111] Conversion caps often are structured to prohibit an investor from converting preferred stock if such conversion would result in the investor owning more than a specified percentage of the issuer's common stock so as not to trigger § 16(b).[112] Accordingly, an investor holding convertible preferred shares entitling the holder to greater than 10% of the issuer's common shares is forced, by virtue of the conversion cap, to exercise his conversion rights on a serial basis in order to

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*Mgmt., LLC*, 223 F. Supp. 2d 435, 439 (S.D.N.Y. 2000). Hereinafter, I will refer to this type of contractual provision as a "conversion cap."

111 *See Southbrook Int'l Invs., Ltd.*, 263 F.3d at 12; *see also* Q. 105.03, Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting (last update: Nov. 16, 2009), *available at* http://www.sec.gov/divisions/corpfin/guidance/reg13d-interp.htm ("Conversion provisions that limit the ownership of a class of securities must be binding and valid (e.g., provisions that are non-waivable, enforceable, established in the issuer's governing instruments, applicable to affiliates and assigns, etc.) to effectively eliminate the right of the holder of the convertible securities to acquire the underlying shares and, thereby, relieve the holder of a beneficial ownership report filing obligation.").

112 *See* Peter J. & Alan L. Dye, THE SECTION 16 DESKBOOK 137-38 (2010).

liquidate his entire preferred holdings without subjecting himself to disgorgement liability.[113]

Fletcher argues that §6(b) is a conversion cap because it provides a notice method by which Fletcher can increase the Maximum Number of shares into which it could convert its preferred shares of ION at any one time, but still keep that number below the amount which would constitute beneficial ownership of more than 10% of ION's common stock.[114] As such, Fletcher contends that the parties intended § 6(b) to permit serial adjustments to the Maximum Number in light of industry practice and case law interpreting conversion caps.

ION disagrees and offers three colorable reasons why § 6(b) arguably is not a traditional conversion cap. First, it argues that § 6(b)'s notice method does not resemble the fixed percentage conversion limitations found in case law regarding conversion caps.[115] Second, ION argues that unlike traditional conversion caps which allow continuous adjustments that can include decreases in convertible shares, § 6(b) permits Fletcher to issue a 65-Day Notice only to *increase* the Maximum Number.[116] Finally,

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113 *See id.*

114 Fletcher June 18 Letter 6.

115 *See, e.g.*, *Decker v. Advantage Fund, Ltd.*, 362 F.3d 593, 595 (9th Cir. 2004); *Litzler v. CC Invs., L.D.C.*, 362 F.3d 203, 205 (2d Cir. 2004); *Levy v. Southbrook Int'l Invs., Ltd.*, 263 F.3d 10, 17 (2d Cir. 2001); *Log on Am., Inc. v. Promethean Asset Mgmt., LLC*, 223 F. Supp. 2d 435, 439 (S.D.N.Y. 2000); *AJW P'rs LLC v. Itronics Inc.*, 892 N.Y.S.2d 46 (N.Y. App. Div. 2009).

116 ION July 2 Letter 7.

ION asserts that § 6(b) is probably ineffective as a mechanism to protect Fletcher from § 16(b) liability. It argues that § 6(b) is not a real and binding prohibition on Fletcher's beneficial ownership of more than 10% of ION common shares, as is required by case law and the SEC, because Fletcher unilaterally can raise the Maximum Number at any time.[117]

Whether or not § 6(b) represents a valid and enforceable conversion cap for purposes of the federal securities laws, however, is not the focus of this litigation. The pertinent securities laws are relevant only to the extent that they help shed light on what the parties intended when they drafted § 6(b). Having considered the language of § 6(b) in relation to § 16(b) of the 1934 Act, I remain convinced that ION's proposed construction of that section to permit Fletcher to issue only a single 65-Day Notice is unreasonable and, in any event, does not reflect the parties' shared intent.

Preliminarily, I note that the parties are in agreement that § 6(b) was drafted to provide protection for Fletcher against liability and reporting obligations under § 16 of the 1934 Act.[118] Thus, whether or not § 6(b) operates as an effective conversion cap, the parties' purpose in agreeing to it was to give Fletcher some measure of protection against inadvertently incurring reporting obligations or liability under § 16(b). Similar to a conversion cap, it arguably could prevent Fletcher from becoming a beneficial owner of 10% or more of ION common stock or, at minimum, allow Fletcher to liquidate its

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117 *Id*. at 5-6.

118 *See* POB 1, 11.

preferred stock by converting to, and then selling, common stock without going above 10% beneficial ownership.

Moreover, ION's arguments concerning the potential inefficacy of § 6(b) as a conversion cap do not make its proposed construction any more reasonable. For example, ION argues that the express language of § 6(b) departs from typical conversion caps as discussed in the cases cited in their briefs in that unlike those caps, § 6(b) permits Fletcher to raise, but not lower, the Maximum Number. In a hypothetical situation where ION decreases the number of outstanding common shares and thereby pushes Fletcher's beneficial ownership above the 10% threshold, § 6(b) might not operate to prevent short-swing liability under § 16(b) from attaching because Fletcher would not be able to decrease the Maximum Number to stay below the 10% threshold. But, the possibility that § 6(b) is an imperfect conversion cap, if it is one at all, does not mean the parties did not intend it to function similarly to a conversion cap.[119]

If Fletcher were able to convert more than 10% of ION's common stock within sixty days, then Fletcher would be considered a beneficial owner of more than 10% of

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[119] By the same reasoning, the other problems ION identified regarding the likely effectiveness of § 6(b) are immaterial for purposes of interpreting that section. Those problems include ION's argument that § 6(b) would "probably not [be] effective to avoid section 16 of the [1934] Act" because the ability to increase the Maximum Number to a figure above 10% beneficial ownership is in Fletcher's complete control. ION July 2 Letter 5. Specifically, ION zeroes in on Fletcher's ability under § 6(b) to unilaterally raise the Maximum Number through the issuance of a 65-Day Notice. It contends that this feature allows Fletcher to surpass 10% beneficial ownership, if it so chooses, and would prevent § 6(b) from being "deemed a valid blocker or cap to prevent liability under Section 16 of the [1934] Act." *Id*. at 6 n.3.

such shares under Rule 13d-3(d)(1)(i) and, thus, could face potential short-swing trading liability under § 16(b) of the 1934 Act. The plain language of § 6(b) suggests that it was intended as a mechanism to avoid such liability. Indeed, the conspicuous choice of a sixty-five day waiting period from the time Fletcher gives notice to the time it may convert its Series D Stock likely is no accident. By requiring a 65-Day Notice Period before Fletcher can take advantage of an increase in the Maximum Number of shares subject to conversion, Fletcher reduces the risk that at any one time it would be deemed the beneficial owner of more than 10% of ION common shares under Rule 13d-3d(1)(i). Because beneficial ownership under that rule is determined at any one time, and not cumulatively,[120] the parties likely intended that Fletcher could convert its Series D Stock in stages over time, such that it would acquire, in the aggregate, more than the 10% threshold.

That the parties negotiated for and agreed upon a mechanism whose plain language indicates that it was intended to function similarly to a conversion cap is additional evidence that the only reasonable reading of § 6(b) is that Fletcher may issue multiple 65-Day Notices. A recognized effect of that type of provision is to force the holder of preferred stock "to exercise its conversion rights on a *serial* basis, selling the stock received upon a partial conversion before converting more of the convertible security in the next step."[121]

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120 *See, e.g.*, *id*. at 16.

121 *See* Romeo & Dye, *supra* note 112, at 137.

ION further argues that, even if the parties intended § 6(b) to act like a conversion cap or, at least, to allow Fletcher to liquidate its preferred stock on a serial basis to avoid the burdens of § 16(b), Fletcher has not provided a legitimate reason why it could not avoid liability under § 16(b) by converting its full preferred stock investment into common stock using a single 65-Day Notice.[122] Seizing upon one hypothetical situation, ION contends that to achieve that objective Fletcher needed only to convert its Series D Stock specified by the initial Maximum Number (7,669,434), sell those shares, and then deliver a single 65-Day Notice raising the Maximum Number to 15,724,306, Fletcher's maximum allowable number of convertible shares under the Agreement.[123] But, just because Fletcher *could* have issued a single 65-Day Notice to accomplish the objectives of a conversion cap does not make it reasonable to read § 6(b) as limiting Fletcher to issuing *only* one 65-Day Notice. Fletcher might have tax or business reasons, for example, for not wanting to convert over seven million shares at an early stage. It also is easy to imagine other business exigencies involving ION or Fletcher that might cause Fletcher to want to increase the Maximum Number gradually over time, beginning with something less than the absolute maximum of approximately 15.7 million shares.

Given the parties' sophisticated understanding of short-swing liability under the federal securities laws and their use of a 65-day delay mechanism, which appears directly

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122 ION July 2 Letter 1, 6-7.

123 *Id*. at Letter 6-7. Implicit in this hypothetical is the assumption that when the initial Maximum Number of approximately 7.7 million shares was in effect 10% beneficial ownership would equate to around 8 million shares.

related to the definition of beneficial ownership under § 16(b) of the 1934 Act, they probably intended § 6(b) to function like a conversion cap in that Fletcher could liquidate its investment on a serial basis without running afoul of § 16(b). Moreover, it is counterintuitive to believe that Fletcher negotiated a provision that effectively would have cut off its ability ultimately to receive the total number of common shares permitted under the Agreement, for which it paid a significant sum, if for any number of rational business reasons it decided to submit a 65-Day Notice to raise the Maximum Number to a level below 15,724,306. Therefore, I find that the proffered extrinsic evidence also supports my conclusion that the only reasonable construction of § 6(b) is that Fletcher may issue one or more 65-Day Notices.[124] Moreover, even if the evidence, including extrinsic evidence, showed that § 6(b) is ambiguous and reasonably could be interpreted to limit Fletcher to only one 65-Day Notice, I find that ION has not demonstrated a clear intent of the parties to adopt that interpretation. Thus, based on the record submitted with the pending cross motions for summary judgment, I hold that § 6(b) authorized Fletcher to issue more than one 65-Day Notice, if it so chooses.

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[124] Fletcher also proffered extrinsic evidence consisting of public statements ION made in certain of ION's SEC filings well after it entered into the Agreement. *See* Fletcher June 18 Letter 8 and Exs. B and C; D.I. 21-25. The parties vigorously dispute the relevance of these statements. Because I have found that the language of § 6(b) unambiguously supports Fletcher's position and, even if it were ambiguous, evidence of that section's relationship to § 16(b) of the 1934 Act supports my conclusion that Fletcher could issue one or more 65-Day Notices, I need not determine whether the cited SEC filings further support Fletcher's position. To the extent ION claims these statements support its proffered construction, I have considered its arguments and found them to be without merit.

### C. Is Fletcher Entitled to Reimbursement and Indemnification from ION Under the Agreement?

Having found that Fletcher is entitled to issue multiple 65-Day Notices under § 6(b) of the Agreement, I now must decide whether Fletcher is entitled to reimbursement or indemnification under Agreement §§ 16 and 17, respectively. For the reasons set forth below, I hold that Fletcher is not entitled either to reimbursement or indemnification for the expenses it incurred, including reasonable attorneys' fees, arising out of ION's challenge to the validity of Fletcher's Second 65-Day Notice.

#### 1. Reimbursement

Fletcher's counterclaim for reimbursement is essentially a claim for attorneys' fees. Delaware follows the American Rule, under which each party must bear its own litigation expenses, including attorneys' fees, absent certain exceptions that warrant a shifting of such fees.[125] One exception to this rule is that a court may award attorneys' fees in cases where the court finds that the losing party brought the action in bad faith or that a party acted in bad faith or vexatiously to increase the costs of the litigation.[126] Another exception is where the parties agree by contract to shift the costs and expenses of litigation.[127]

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125 *FGC Hldgs. Ltd. v. Teltronics, Inc.*, 2007 WL 241384, at *5 (Del. Ch. Jan. 22, 2007).

126 *See, e.g.*, *Openwave Sys. Inc. v. Harbinger Capital P'rs Master Fund I, Ltd.*, 924 A.2d 228, 246 (Del. Ch. 2007); *Cove on Herring Creek Homeowners' Ass'n v. Riggs*, 2005 WL 1252399, at *1 (Del. Ch. May 19, 2005).

127 *Jackson's Ridge Homeowners Ass'n v. May*, 2008 WL 241617, at *1 n.3 (Del. Ch. Jan. 23, 2008).

Here, neither party seriously accuses the other of acting in bad faith, but Fletcher claims that it is entitled to be reimbursed under § 16 of the Agreement for its legal fees and expenses associated with defending this suit. Section 16(a) states, in relevant part, that if ION

> [a]t any time, shall *fail to deliver* the Investment Securities to Fletcher *required to be delivered* pursuant to this Agreement, in accordance with the terms and conditions of this Agreement, the Certificate of Rights and Preferences and the Subsequent Certificates of Rights and Preferences, for any reason other than the failure of any condition precedent to [ION's] obligations hereunder or the failure by Fletcher to comply with its obligations hereunder, then [ION] shall . . . (ii) reimburse Fletcher for all of its reasonable out-of-pocket expenses, including fees and disbursements of its counsel, incurred by Fletcher in connection with this Agreement and the transactions contemplated herein and therein.[128]

Section 1(d) defines Investment Securities to include ION common shares.[129]

As discussed in Part II.B *supra*, § 6(b) permits Fletcher to issue multiple 65-Day Notices, which in turn allows Fletcher to convert additional shares of Series D Stock by virtue of raising the Maximum Number. Thus, shares Fletcher wishes to convert pursuant to § 6(b) are shares "required to be delivered" by ION for the purposes of § 16(a) of the Agreement. It is undisputed that Fletcher sought to increase the Maximum Number for a second time on September 15, 2009 so that it could receive additional shares of common stock beyond the amount permitted by the Maximum Number as

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[128] Agreement § 16(a)(ii) (emphasis added).

[129] *Id.* § 1(d).

initially specified in the Agreement and later increased by the first 65-Day Notice.[130] What is disputed, however, is whether ION's refusal to honor Fletcher's Second 65-Day Notice and institution of this action challenging the validity of that Notice constitute on ION's part a "failure to deliver" common shares to Fletcher that were required to be delivered pursuant to the Agreement, thereby triggering Fletcher's reimbursement rights under § 16(a).

Fletcher first argues that ION committed an anticipatory repudiation of its obligation to deliver securities to which Fletcher is entitled under the Second 65-Day Notice by filing this declaratory judgment suit.[131] ION denies that the filing of this suit constitutes an anticipatory repudiation because it is a declaratory action seeking to settle the meaning of a contract and ION has not unequivocally stated that it will not perform its promise.[132]

"To support the claim of anticipatory repudiation [under New York law], there must be an unqualified and clear refusal to perform with respect to the entire contract."[133] A repudiation can be either "a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach" or "a voluntary affirmative act which renders the obligor unable or

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130 *See supra* note 23.

131 DAB 9-10.

132 POB 14; PAB 12-13.

133 *O'Connor v. Sleasman*, 830 N.Y.S.2d 377, 379 (N.Y. App. Div. 2007) (internal quotation marks omitted).

apparently unable to perform without such a breach."[134] That is, to find a party has anticipatorily repudiated its obligation under a contract, a court must find that the party issued an unequivocal, definite, and final communication of its intention to forego its required performance.[135]

Here, the evidence does not show that ION made an unequivocal statement that it would not carry out its duties under the Agreement or intends not to conform to this Court's ruling on the proper construction of § 6(b), if the Court rejects ION's position.[136] Moreover, Fletcher did not cite any New York authority for the proposition that filing a declaratory judgment action to interpret a contract automatically constitutes an anticipatory repudiation of a plaintiff's obligations under the contract, and this Court is not aware of any such authority. To the contrary, New York courts have stated that filing a declaratory judgment action to permit a court to interpret disputed terms in a contract is not likely to constitute an anticipatory repudiation except in the case where the claimant "maintains an untenable construction of a contract on a matter of essential substance."[137]

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134 *Norcon Power P'rs, L.P. v. Niagara Mohawk Power Corp.*, 705 N.E.2d 656, 659 (N.Y. 1998).

135 *See, e.g.*, *Alarm Monitoring Corp. v. D'Agostino Supermkts., Inc.*, 875 N.Y.S.2d 818 (N.Y. Sup. Ct. 2008); *O'Connor*, 830 N.Y.S.2d at 379.

136 POB 14-15 ("ION intends to fully perform the terms of the Agreement. . . . ION will, of course, abide by this Court's conclusions.").

137 *See, e.g.*, *O'Connor*, 830 N.Y.S.2d at 379; *IBM Credit Fin. Corp. v. Mazda Motor Mfg. (USA) Corp.*, 647 N.Y.S.2d 322, 329 (N.Y. Sup. Ct. 1996) (citing 22 N.Y. Jur.2d, Contracts § 389, at 299 (1982)), *aff'd*, 665 N.Y.S.2d 645 (N.Y. App. Div. 1997), *aff'd*, 706 N.E.2d 1186 (N.Y. 1998).

While this Court ultimately did not adopt ION's interpretation of § 6(b), I do not find its construction to have been either untenable or frivolous. ION cited relevant precedent for the proposition that "a" is sometimes used as a singular article and also pointed to certain inconsistencies in the Agreement in terms of language used to signify multiple occurrences or events. Although I have concluded that ION's construction is not reasonable in the context of *this* case, its construction of § 6(b) was at least colorable.[138] Therefore, by bringing this declaratory judgment action to determine the meaning of § 6(b), ION has not anticipatorily repudiated its obligations under the Agreement.

I also find unconvincing Fletcher's second argument, namely, that ION failed to deliver the required common shares when it refused to accept Fletcher's Second 65-Day Notice. ION denies that it failed to perform any obligation under the Agreement because its obligation to convert Fletcher's Series D Stock into common shares in excess of the Maximum Number specified in the First 65-Day Notice did not become due when Fletcher issued its Second 65-Day Notice, but, rather, when Fletcher *attempts to convert* its shares covered by such notice.[139] And, as of the date of the parties' answering briefs,

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138 *See IBM Credit Fin. Corp.*, 647 N.Y.S.2d at 329 (noting that a contract construction was untenable when no fair reading of the documents could justify a position which would place one of the parties at the mercy of the other party's financial changes running twenty-three years into the future).

139 PAB 12.

Fletcher had not yet attempted to convert any shares above the number allowed by its First 65-Day Notice.[140]

Implicit in Fletcher's position is the notion that Fletcher does not need to attempt to convert its Series D Stock and request delivery of the corresponding common stock to demonstrate ION's nonperformance. According to Fletcher, ION's mere statement that its Second 65-Day Notice is invalid suffices to establish ION's repudiation. The express terms of § 6(b), however, do not support this construction. The section envisions a two-step process for Fletcher to receive common shares in excess of the initial Maximum Number: first, it must issue a 65-Day Notice to raise the Maximum Number. Then, after the expiration of the 65-Day Notice Period, Fletcher may *request* conversion of additional shares covered by the related notice. Section § 6(b) does not obligate ION to convert all or any part of the shares covered by a 65-Day Notice at the end of the relevant Notice Period; if Fletcher seeks to convert such shares, it needs to make that request to ION.

This two-step process distinguishes this case from Fletcher's primary legal authority for its position, *Hermanowski v. Acton Corp.*[141] The court in *Hermanowski* held

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[140] *See* PAB 9 n.5 (According to ION, "Fletcher only recently opted to convert any of its Preferred Stock into Common Stock. On April 8, 2010, Fletcher converted 8,000 of its shares of Series D-1 Preferred Stock and all of the outstanding 35,000 shares of Series D-3 Preferred Stock into a total of 9,659,231 shares of ION Common Stock."), 12. More importantly, as of the date of this Opinion, Fletcher, which bears the burden of proof, has adduced no evidence that it ever attempted to convert any shares in excess of the Maximum Number specified in its First 65-Day Notice (*i.e.*, 9,669,434).

that a plaintiff could recover damages for a defendant's breach of an option contract as to the entire contract based on the defendant's rejection of the plaintiff's attempt to exercise only 5,000 of the 50,000 shares subject to the option contract at issue.[142] In that case, the plaintiff received as part of his consideration for terminating his employment with the defendant a five-year option to purchase 50,000 shares of the defendant's common stock at $2.00 a share.[143] In response to the plaintiff's attempt to execute the relevant stock option certificate with a proviso that professed to eliminate the certificate's noncancellable term, the defendant sent the plaintiff letters in June 1976 purporting to cancel the plaintiff's option within 30 days.[144] After disputing the defendant's ability to terminate the option, the plaintiff attempted partially to exercise his option in September 1979 by requesting delivery of 5,000 shares and submitting a check for the option price of those shares.[145] After the defendant rejected this request, the plaintiff brought suit. The court found that the defendant's June 1976 letters constituted an anticipatory repudiation because they communicated to the plaintiff the defendant's intention not to perform its obligations under the option contract.[146] As such, the court explained, the

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141 *See Hermanowski v. Acton Corp.*, 580 F. Supp. 140 (E.D.N.Y 1983).

142 *See id*. at 140, 144.

143 *See id*. at 141-42.

144 *See id*. at 142.

145 *See id*.

146 *See Hermanowski*, 580 F. Supp. at 144.

plaintiff was entitled, among other things, to consider the contract breached and claim damages or ignore the repudiation and await time for performance. Having found that the plaintiff rightfully chose the latter, the court held that the defendant anticipatorily breached the entire option contract in September 1979 when it refused to deliver common shares upon the plaintiff's attempt to exercise his rights.[147]

Unlike the defendant in *Hermanowski*, ION's performance never became due because Fletcher never attempted to convert the shares pertaining to the disputed range in the Second 65-Day Notice. When Fletcher issued that Notice, ION became obligated to raise the Maximum Number when the related Notice Period ended. But, unlike the plaintiff in *Hermanowski*, Fletcher did not request conversion of any shares covered by the disputed Second 65-Day Notice. As such, ION's performance did not become due and it did not "fail to deliver" securities to which Fletcher was entitled pursuant to the Agreement.

Thus, I hold that Fletcher has failed to prove that ION failed to perform its obligation "to deliver" to Fletcher securities to which Fletcher is entitled. As a result, Fletcher has no contractual right to be reimbursed under § 16 of the Agreement for its reasonable legal fees and expenses relating to this suit. This does not mean that the parties could not have contracted to shift fees and expenses in a situation such as this, but rather that they did not do so in § 16. That section provides that fees and expenses would

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147 *See id*.

be shifted under the Agreement only upon ION's "failure to deliver" required securities and, as previously explained, ION has not failed to so deliver such securities.[148]

### 2. Indemnification

Section 17(a) of the Agreement mandates, in relevant part, that ION will:

> indemnify Fletcher . . . against any claim, demand, action, liability, damages, loss, cost or expense (including, without limitation, reasonable legal fees and expenses incurred by [Fletcher] in investigating or defending any such proceeding) . . . that it may incur in connection with any of the transactions contemplated hereby arising out of or based upon: . . . (iii) any breach or non-performance by ION of any of its covenants, agreements or obligations under this Agreement, the Certificate of Rights and Preferences and the Subsequent Certificates of Rights and Preferences . . . .[149]

For the reasons set forth *supra* in Parts II.B and II.C.1, I have held that ION did not breach or fail to perform its obligations under § 6(b) because Fletcher never attempted to convert its preferred shares into common shares of ION covered by Fletcher's Second 65-Day Notice and ION's filing of this litigation did not constitute an anticipatory repudiation of the Agreement. Therefore, Fletcher has not shown that it is entitled to be indemnified by ION pursuant to § 17(a)(iii).

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[148] I also note that ION's equitable argument that Fletcher should not be "permitted to use the threat of potential indemnification and reimbursement as leverage to prevent ION from exercising its rights and obtaining the Court's guidance in interpreting the Agreement" is far from compelling. POB 15. Parties often use fee shifting provisions to deter future litigation regarding their respective rights under a contract and thereby avoid the attendant costs and burdens. If the Agreement at issue here contained a provision requiring the loser in an action like this one to pay its adversary's reasonable fees and expenses, I doubt the Agreement would be perceived as inequitable or otherwise unenforceable.

[149] Agreement § 17(a)(iii).

## III. CONCLUSION

For the reasons stated in this Opinion, I hold that Fletcher is entitled to summary judgment in its favor declaring that the plain language, context, and function of § 6(b) of the Agreement unambiguously permits Fletcher to issue multiple 65-Day Notices to ION. I also hold that ION is entitled to summary judgment in its favor as follows: (1) Fletcher is not entitled to be reimbursed for its reasonable legal fees and expenses under § 16(a)(ii) of the Agreement; and (2) Fletcher is not entitled to be indemnified for its fees and expenses related to this suit under § 17(a)(iii) of the Agreement. In all other respects, the cross motions for summary judgment filed by ION and Fletcher, respectively, are denied. Therefore, to the extent indicated in this Opinion, Fletcher's motion for summary judgment is granted in part and denied in part, and ION's cross motion for summary judgment is granted in part and denied in part.

**IT IS SO ORDERED.**