IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

MEMORANDUM OPINION

Date Submitted: March 16, 2011
Date Decided: March 29, 2011

Edward P. Welch, Esquire, Paul J. Lockwood, Esquire, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Wilmington, Delaware, *Attorneys for Plaintiff.*

Kenneth J. Nachbar, Esquire, R. Judson Scaggs, Jr., Esquire, Leslie A. Polizoti, Esquire, Albert J. Carroll, Esquire, MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware, *Attorneys for Defendants.*

STRINE, Vice Chancellor.

I. Introduction

A preferred stockholder bargained for the right to consent to any issuance or sale of stock by a subsidiary of the parent corporation in which the preferred stockholder owns shares. The parent corporation reached an agreement with a strategic partner on a joint venture, formed a wholly owned subsidiary to that end, and then sold stock of that subsidiary directly from itself, the parent, to the partner. The parent did not seek the consent of the preferred stockholder.

The preferred stockholder has filed a claim alleging that the sale of subsidiary stock from the parent to the strategic partner was subject to its consent. The reason is that the transaction, in the preferred stockholder's view, is economically identical to a sale of stock by the subsidiary of its own stock to the strategic partner. The preferred stockholder alleges that the parent structured the transaction in this manner to escape the preferred stockholder's consent rights and that the parent's action therefore violated contractual duties owed to it.

But the contractual right of the preferred stockholder is clear and unambiguous, and only extends to issuances or sales of stock by the subsidiary to third parties other than the parent. The preferred stockholder could have, but did not, bargain for broader rights prohibiting the parent from selling shares of its subsidiaries that it owned to third parties without first obtaining the preferred stockholder's consent. Under our law, a court will not, by judicial action, broaden the rights obtained by a preferred stockholder at the bargaining table. The preferred stockholder's claim seeks to have the court do just that, by extending its consent right to all situations that have the same economic substance as a

sale of stock by the subsidiary. That is not the job of a court. When sophisticated parties in commerce strike a clear bargain, they must live with its terms. In this opinion, therefore, I grant the motion to dismiss this claim of the preferred stockholder.

II. Factual Background

The following facts are drawn from the complaint, its attached exhibits, and the documents it incorporates by reference.

The plaintiff preferred stockholder, Fletcher International Limited, is a corporation organized under the laws of Bermuda and is the record owner of all the Series D preferred stock in the defendant parent corporation, ION Geophysical Corporation, a Delaware corporation that provides advanced seismic data acquisition equipment, as well as seismic software, planning, processing and interpretation services to the global energy industry.[1]

The rights and preferences of Fletcher's Series D preferred stock are governed by a Certificate of Rights and Preferences (the "Certificate"), contained as part of ION's certificate of incorporation.[2] Section 5 of the Certificate addresses the voting rights of the holders of Series D preferred stock. Section 5(A) provides that "[e]ach share of [Series D preferred stock] shall entitle the holder thereof to the voting rights specified in

[1] Compl. ¶ 8.

[2] Although Fletcher owns three different classes of Series D preferred stock (D-1, D-2, and D-3), the rights at issue for each of the three classes are governed by identical language. *See* Compl. ¶¶ 25-29; Ex. B, C, D. Thus, although in reality the rights at issue are governed by three separate certificates, for the sake of simplicity, I refer to them as one "Certificate."

Section 5(B) *and no other voting rights except as required by law*."[3] Section 5(B)(ii) of the Certificate grants Fletcher certain consent rights with respect to the issuance or sale of securities by any of ION's subsidiaries. In pertinent part, § 5(B)(ii) provides:

> (B) The consent of the Holders of at least a Majority of the [Series D preferred stock] . . . shall be necessary to: . . .
>
> (ii) permit *any Subsidiary* of [ION] to issue or sell, or obligate itself to issue or sell, *except to [ION]* or any wholly owned Subsidiary, any security of such Subsidiaries . . . .[4]

The dispute between Fletcher and ION has its origins in a 2010 transaction in which ION and non-party BGP Inc., China National Petroleum Corporation ("China National") formed a joint venture. Thus, some background to that transaction is in order.

On October 23, 2009, ION and China National announced in a press release that the two companies had entered into a binding Term Sheet that set forth the principal terms of the contemplated joint venture.[5] The Term Sheet contemplated that ION would form a wholly owned subsidiary to later become, upon the execution of a to-be-negotiated "Definitive Transaction Document," the joint venture entity.[6] The Term Sheet

---

[3] Compl. Ex. B ("Certificate of Rights and Preferences of Series D-1 Cumulative Convertible Preferred Stock of Input/Output, Inc." (February 16, 2005)) ("Certificate") § 5(A) (italicized emphasis added). ION was formerly known as Input/Output, Inc.

[4] *Id.* § 5(B)(ii) (emphasis added).

[5] Compl. ¶ 38; Compl. Ex. E (ION's Form 8-K (filed October 23, 2009)), F (ION's Form 8-K (filed October 27, 2009)).

[6] Fletcher's Letter to the Court of March 16, 2011 Ex. A ("Project PingPong Term Sheet" (October 23, 2009)) ("Term Sheet") at 9 Art. 2.1. Admittedly, there exists an internal conflict within the Term Sheet. Article 2.1 on page 9 provides that "[ION] and/or [China National] shall establish one or more wholly-owned subsidiaries in legal form . . . ." But Article 3.1(a) on page 13 of the Term Sheet implies that it would be ION who would create the subsidiary. That article provides that upon the closing of the joint venture transactions, "[China National] shall purchase, and [ION] shall sell, 51% of the equity interests in Holdco," the wholly owned subsidiary contemplated under the Term Sheet. What is important is that at the time the Term Sheet was

further stipulated that upon closing of the Definitive Transaction Document, the ownership of the joint venture entity's equity would be 51% China National and 49% ION.[7]

Sometime in early 2010, but before March 24, 2010, ION formed the defendant INOVA Geophysical Equipment Limited, a wholly owned subsidiary of ION created for the purpose of becoming the joint venture entity. The joint venture was accomplished on March 24, 2010, when ION, China National, and INOVA entered into a Definitive Transaction Document — the so-called Share Purchase Agreement — under which *ION, who at the time of the Agreement owned 100% of INOVA's outstanding stock*,[8] delivered certain INOVA stock directly to China National. That transfer was carried out in accordance with § 2.2 of the Share Purchase Agreement, which provided in pertinent part that:

> Upon satisfaction of the terms and subject to the conditions set forth in this Share Purchase Agreement . . . the Parties agree that at Closing [ION] shall sell, assign, transfer, convey and deliver, to [China National], and [China National] shall purchase . . . , fifty-one percent (51%) of [INOVA's stock].[9]

Thus, after the closing of the Share Purchase Agreement and the delivery of that stock from ION to China National, China National owned 51% of INOVA and ION retained ownership of 49% of INOVA's issued and outstanding stock.[10]

---

executed, neither China National nor ION had created the wholly owned subsidiary that would later become the joint venture entity.

[7] Term Sheet at 14 Art. 3.2.

[8] Def. Op. Br. Ex. B ("Share Purchase Agreement by and among ION Geophysical Corporation, INOVA Geophysical Equipment Limited, and BGP Inc., China National Petroleum Corporation" (March 24, 2010)) ("Share Purchase Agreement") §§ 2.2, 4.1(b); Compl. ¶ 42.

[9] Share Purchase Agreement § 2.2.

[10] Compl. ¶¶ 42-43; Share Purchase Agreement § 2.2.

Fletcher filed its original complaint in this court a year and a half ago, alleging breaches of contract and violations of fiduciary duty on the part of ION's directors for other aspects of their conduct leading up to the formation of the joint venture between ION and China National. Vice Chancellor Parsons issued two rulings in which he declined to preliminarily enjoin a certain issuance of securities by a different ION subsidiary,[11] and granted partial summary judgment in favor of Fletcher on its requested declaration of the rights it possesses under § 5(B)(ii).[12] Material for purposes of this opinion, however, is that the Vice Chancellor held, under the unambiguous language contained in § 5(B)(ii) of the Certificate, that "Fletcher [has] a contractual right to consent to the issuance of any security . . . by a subsidiary of ION."[13]

Since that ruling, Fletcher has amended its complaint, adding INOVA as a defendant and asserting the two new claims now under consideration. In Count VI, Fletcher alleges that ION breached § 5(B)(ii) of the Certificate by permitting its then-wholly owned subsidiary, INOVA, to sell or issue securities to China National without first obtaining Fletcher's consent.[14] Count VII is complementary and alleges that INOVA tortiously interfered with Fletcher's § 5(B)(ii) contractual right.[15]

ION and INOVA move to dismiss Counts VI and VII under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, arguing that under the clear

[11] *Fletcher Int'l, Ltd. v. ION Geophysical Corp.*, 2010 WL 1223782 (Del. Ch. Mar. 24, 2010).
[12] *Fletcher Int'l, Ltd. v. ION Geophysical Corp.*, 2010 WL 2173838 (Del. Ch. May 28, 2010).
[13] *Id.* at *1. On February 24, 2011, the case was reassigned to me.
[14] Compl. ¶¶ 41, 93.
[15] Compl. ¶ 100.

terms of § 5(B)(ii), Fletcher has no right to consent to the sale of INOVA securities owned by ION to China National.[16]

III. Legal Analysis

A. Standard Of Review

In addressing ION's motion to dismiss, I apply the familiar Rule 12(b)(6) standard.[17] Under that standard, I must accept all well-pled allegations in the complaint as true, and further draw all reasonable factual inferences in Fletcher's favor.[18] In that regard, ION concedes that for purposes of its motion I may accept as true the complaint's

---

[16] Ct. Ch. Rule 12(b)(6).

[17] *Id.* Initially, Fletcher argued that because ION, in supporting its motion to dismiss, attached to its papers and relied on a document extrinsic to the complaint, namely the Share Purchase Agreement, ION's motion should be converted to a motion for summary judgment. This, Fletcher urged, would allow it time to conduct discovery to support its contention, to be discussed below, that the Share Purchase Agreement signified the culmination of a sale of stock by INOVA to China National that had been agreed upon in advance of the execution of the Share Purchase Agreement. At oral argument, however, Fletcher clarified its position and said it was not disputing the propriety of this court's consideration of the plain and unambiguous terms of the Share Purchase Agreement on this motion to dismiss. Tr. at 33-34 (Counsel for Fletcher). I therefore need not grapple with whether ION's motion should be converted to one for summary judgment, but note that even were I so required, I would decline to do so. To my mind, the Share Purchase Agreement is plainly a document incorporated by reference in Fletcher's complaint. Admittedly, Fletcher does not refer to the express terms of the Share Purchase Agreement. Instead, what it does is characterize the Share Purchase Agreement by reference to portions of ION's Form 8-K in which the terms of the Share Purchase Agreement are described. *See* Compl. ¶¶ 42 ("On March 25, 2010, [ION] issued a Form 8-K . . . that describes a Share Purchase Agreement . . . ."); 43 ("Specifically, the Form 8-K states that 'At the closing of the Share Purchase Agreement, [China National] will acquire a 51% equity interest in INOVA . . . .'"); 47 (same). As this court has held in similar circumstances, a plaintiff may not reference certain documents outside the complaint and at the same time prevent the court from considering those documents' actual terms. *See Midland Food Servs., LLC v. Castle Hill Holdings V, LLC*, 792 A.2d 920, 925 n.5 (Del. Ch. 1999) (citing *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995)); *see also In re Tyson Foods, Inc.*, 2007 WL 2351071, at *2 (Del. Ch. Aug. 15, 2007). Thus, consideration of the unambiguous terms of the Share Purchase Agreement in ruling on ION's motion to dismiss is appropriate.

[18] *In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (citing *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001)); *Orman v. Cullman*, 794 A.2d 5, 15 (Del. Ch. 2002).

allegation that ION intentionally chose to structure the Share Purchase Agreement in a way that avoided triggering Fletcher's consent rights.[19] But it argues, with merit, that I may nevertheless dismiss the complaint if the unambiguous terms of the Certificate governing Fletcher's consent rights do not restrict ION from having pursued the joint venture transaction in the manner it did.[20]

B. Counts VI And VII Are Dismissed Because The Consent Rights In § 5(B)(ii) Are Inapplicable To Sales Of INOVA's Stock Owned By ION

Fletcher's argument in opposition to ION's motion to dismiss, although expertly advanced, is meandering in the sense that it is selectively formal and deconstructive in its logical approach. Fletcher begins by contending that before INOVA was even created and its shares were issued to ION, and before ION and China National executed the Share Purchase Agreement, ION and China National entered into a separate binding contract, namely the Term Sheet, which required that upon China National's meeting certain contractual conditions, China National would own 51% of INOVA's stock. In other words, Fletcher argues that before INOVA even existed it was a foregone conclusion that upon INOVA's creation, China National would be its 51% owner. By so doing, says Fletcher, ION breached § 5(B)(ii) because ION allegedly "permitt[ed]" INOVA to "sell

[19] Compl. ¶ 4.

[20] Claims that necessitate the interpretation of an unambiguous contract give rise to pure questions of law. *O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 286 (Del. 2001). Thus, a dispositive ruling on the merits on a motion to dismiss is appropriate in such a case. *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006).

and obligate itself to sell securities equaling 51% of its equity to [China National]" without first obtaining Fletcher's consent.[21] In this sense, Fletcher is deconstructive.

But Fletcher admitted at oral argument that if INOVA were created with an initial capitalization of 49% of its stock owned by ION and 51% owned by China National, INOVA would never have been a "Subsidiary" of ION and therefore Fletcher would not have had any consent rights whatsoever because § 5(B)(ii) expressly limits Fletcher's consent rights to transactions involving ION's "Subsidiaries."[22] Fletcher was thus forced to respond with yet another critical admission, one that permeates both its complaint and its answering brief, namely that INOVA was in fact, and as a formal matter, a wholly owned subsidiary of ION and that ION owned 100% of INOVA's outstanding stock from the moment ION formed INOVA up until the point in time that ION, in accordance with the Share Purchase Agreement, transferred 51% of the INOVA stock that it owned to China National.[23]

From that formal premise — that until the Share Purchase Agreement closed INOVA was a wholly owned subsidiary of ION — Fletcher's argument takes yet another deconstructive U-turn. Instead of arguing that INOVA directly sold its own stock to China National, a counterfactual argument that is squarely refuted by the plain terms of

---

[21] Pl. Ans. Br. at 6 (quoting Certificate § 5(B)(ii)); Compl. ¶ 41.
[22] *Compare* Certificate § 2 ("Subsidiary" of [ION] means (i) a corporation, *a majority of whose stock with voting power*, under ordinary circumstances, to elect directors *is at the time of determination, directly or indirectly, owned by [ION]* or by one or more Subsidiaries of [ION] . . . .") (italicized emphasis added) *with* Certificate § 5(B)(ii).
[23] Tr. at 25, 29, 42, 44 (Counsel for Fletcher); Compl. ¶¶ 3, 11, 41; Pl. Ans. Br. at 2, 4, 6, 12, 14, 19.

the Share Purchase Agreement and by Fletcher's own admissions,[24] Fletcher argues that although formally speaking, the sale of INOVA stock was from ION to China National, the economic *substance* of the entire joint venture transaction, including the Term Sheet, was a sale by INOVA of INOVA stock to China National. In other words, Fletcher wishes to have the benefits of respecting the formal way ION and China National actually structured the Share Purchase Agreement — so as to ensure that INOVA is a subsidiary of ION — but then Fletcher wants to eschew formalism when addressing the reality that China National received its INOVA stock from ION, not INOVA.

Fletcher attempts to accomplish this selective deconstruction of formalism by advocating for a sweeping definition of the term "sale" as contemplated by § 5(B)(ii) which requires Fletcher's consent whenever ION "permit[s] any Subsidiary of [ION] to issue or sell, or obligate itself to issue or sell, except to [ION] . . . any security of such Subsidiary."[25] Fletcher says that the overarching agreement between China National and ION, as evidenced by the Term Sheet which in Fletcher's view compelled ION to deliver to China National 51% of INOVA's outstanding stock upon China National satisfying certain conditions, is enough to constitute an obligation on the part of INOVA to "sell" INOVA stock to China National. Indeed, argues Fletcher, "[w]hen INOVA issued its securities to ION, all three [parties to the Share Purchase Agreement], INOVA, ION and [China National], understood that ION *could not have retained the securities* it received

[24] Share Purchase Agreement §§ 2.2; 4.1(b) ("[ION] is the sole beneficial owner and holder of, and has good and valid title to, all of the Equity Interest representing one hundred percent (100%) of the interest in the issued and outstanding registered capital of [INOVA].").
[25] Certificate § 5(B)(ii).

from INOVA as ION was contractually obligated to deliver those securities to [China National] pursuant to [the] binding [T]erm [S]heet."[26] On a motion to dismiss, where a plaintiff is entitled to all favorable factual inferences, claims Fletcher, the court must blind itself to the Share Purchase Agreement's plain terms that show that ION, the 100% owner of INOVA's outstanding stock, transferred a portion of that stock directly to China National, and in essence treat that Agreement as the culmination of a single "sale" by INOVA of INOVA stock to China National.

Fletcher's argument fails. In Delaware, a preferred stockholder's rights "are contractual in nature."[27] Where the language governing the preferred stockholder's rights is "clear and unambiguous, it must be given its plain meaning."[28] Furthermore, such rights "are to be strictly construed and must be expressly contained in the relevant certificates."[29]

Section 5(B)(ii) provides Fletcher with a narrow and unambiguous right to consent to sales and issuances *by an ION subsidiary of an ION subsidiary's own stock to third parties*.[30] But, § 5(B)(ii) expressly permits an ION subsidiary, such as INOVA, to sell or

[26] Pl. Ans. Br. at 10 (emphasis in original).
[27] *In re Appraisal of Metromedia Int'l Group, Inc.*, 971 A.2d 893, 899 (Del. Ch. 2009) (citing *Matulich v. Aegis Commc'ns Group, Inc.*, 942 A.2d 596, 600 (Del. 2008)).
[28] *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 906 A.2d 114, 120 (Del. 2006) (citing *Northwestern Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996)).
[29] *Waggoner v. Laster*, 581 A.2d 1127, 1134 (Del. 1990). *See also Baron v. Allied Artists Pictures Corp.*, 337 A.2d 653, 657 (Del. Ch. 1975).
[30] *Accord Fletcher Int'l, Ltd. v. ION Geophysical Corp.*, 2010 WL 2173838, at *1 (Del. Ch. May 28, 2010).

issue its shares directly to ION without first obtaining Fletcher's consent.[31] And nothing in § 5(B)(ii) or otherwise gives Fletcher a right to consent to sales of an ION subsidiary's stock owned by ION to a third party. Finally, § 5(A) expressly states that the only rights Fletcher has with respect to its preferred stock are contained in § 5(B).

In light of the foregoing, the fundamental problem with Fletcher's position is that Fletcher admitted numerous times that it was ION that sold INOVA stock that it owned to China National, not INOVA,[32] and further that no action on the part of INOVA was required when ION transferred 51% of INOVA's issued and outstanding stock to China National upon the closing of the Share Purchase Agreement.[33] Indeed, as Fletcher further admitted at oral argument, INOVA's only issuance of stock was directly to ION, the entity that continued to be the 100% owner of INOVA when the Share Purchase Agreement was executed and ION delivered 51% of the INOVA stock to China National.[34] As ION correctly points out, nothing in § 5(B)(ii) or otherwise gives Fletcher consent rights over INOVA's issuance of its stock to ION.[35] The same is true of ION's transfer of its INOVA stock to China National.

Moreover, I note that Fletcher's reliance on the Term Sheet for its argument that even before INOVA was formed ION permitted INOVA to obligate itself to sell 51% of

---

[31] Certificate § 5(B)(ii) ("The consent of [Fletcher] shall be necessary to . . . permit any Subsidiary of [ION] to issue or sell, or obligate itself to issue or sell, *except to [ION]* or any wholly owned Subsidiary, any security of such Subsidiaries . . . .") (emphasis added).
[32] Tr. at 25, 29, 42, 44 (Counsel for Fletcher); Compl. ¶ 42 ("To accomplish the transactions, INOVA issued securities to ION for the express purpose of ION redelivering securities equaling 51% of the equity to [China National]."); *see also* Pl. Ans. Br. at 2, 4, 6, 10, 12, 14.
[33] Tr. at 27 (Counsel for Fletcher).
[34] Tr. at 25, 29, 42, 44 (Counsel for Fletcher); Compl. ¶ 42; Pl. Ans. Br. at 2, 4, 6, 19, 12, 14.
[35] In fact, it expressly permits such issuances. Certificate § 5(B)(ii).

INOVA's stock to China National is misplaced. As an initial matter, at the time that the Term Sheet was executed, INOVA did not even exist. But even more fundamental is that Fletcher argues that it was ION that was contractually obligated under the Term Sheet to deliver 51% of INOVA's securities to China National.[36] That is, Fletcher admits that under the plain terms of the Term Sheet, ION would be the one doing the selling of the to-be-formed subsidiary's stock.[37]

The inconsistency of Fletcher's approach to formalism also bears repeated mention. If, as Fletcher selectively wishes, one deconstructs the way in which ION and China National structured the consummation of their joint venture, one should do so consistently. But if in a consistently applied deconstructive view, INOVA was always from its creation to be an entity owned 51% by China National and only 49% owned by ION, then INOVA was never an ION subsidiary. In that scenario, as Fletcher admitted, Fletcher would be without consent rights. Therefore, Fletcher instead invites this court to selectively pick out only the formal aspect of the joint venture transaction that is favorable to its position — i.e., the creation of INOVA as an ION subsidiary — but then ignore the undisputed fact that China National got its INOVA stock from ION, the parent, and not from INOVA, the subsidiary. I decline to embrace that invitation to employ inconsistent reasoning and instead confine my analysis to the plain and unambiguous terms of the Certificate governing Fletcher's consent rights and the Share Purchase Agreement consummating the joint venture as structured by ION and China National.

[36] Pl. Ans. Br. at 10.
[37] Term Sheet at 13 Art. 3.1(a).

On that note, I return to Fletcher's own characterization of the transaction between ION and China National necessary to form the joint venture which supports my decision to grant ION's motion to dismiss: "*[i]nstead* of INOVA directly issuing [51% of INOVA's stock] to [China National], *which would have undoubtedly triggered Fletcher's [consent] rights*, ION and INOVA sought to avoid Fletcher's [consent] rights by issuing those shares first to ION, which then resold them to [China National]."[38] That is, the structure that ION and China National chose was one where ION was the entity that sold INOVA's stock to China National. In such a situation, the plain language of § 5(B)(ii) grants Fletcher no rights. In that regard, I note that in light of the clear and unambiguous language in § 5(B)(ii) and the law in Delaware, it is immaterial whether ION, in structuring the Share Purchase Agreement, purposefully chose a transaction structure that did not trigger Fletcher's consent rights.[39] Fletcher, a sophisticated contracting party,

[38] Pl. Ans. Br. at 2 (emphasis added).

[39] *See In re Sunstates Corp. S'holder Litig.*, 788 A.2d 530, 531-32 (Del. Ch. 2001) (stating that although a parent corporation may have structured a transaction in such a way as to avoid certain contractual limitations contained in the certificate of incorporation, the court would not alter the clear language found in the certificate to extend those limitations to a situation where the language clearly did not apply); *Amazon, Inc. v. Hoffman*, 2009 WL 2031789, at *4 n.21 (Del. Ch. June 30, 2009) (noting that the plaintiff could not have brought an express breach of contract claim where the defendant issued stock at a price above a contractually negotiated floor price that would have triggered certain anti-dilution rights contained in the preferred stock purchase agreement because the clear and unambiguous language of that agreement afforded no such rights at the price the stock was in fact sold); *Benchmark Capital Partners IV, L.P. v. Vague*, 2002 WL 1732423, at *8-10 (Del. Ch. July 15, 2002) (declining to issue a preliminary injunction to block the consummation of a merger that would have the effect of contravening the preferred stockholders' rights contained in the certificate of incorporation because the certificate of rights did not clearly express a right to a preferred stockholder class vote on a merger despite the fact that the certificate did afford preferred stockholders a class vote on any corporate action that would "[m]aterially adversely change the rights, preferences and privileges" of the preferred stockholders and the defendant corporation intentionally entered the merger agreement in order to bypass the preferred stockholders' rights that would have been triggered by an amendment to

could have bargained for the right it now in effect claims, namely a veto right over ION's dealing in an ION subsidiary's stock.[40] It did not, and this court is not empowered to rewrite an unambiguous contract in order to have it meet Fletcher's current business interests.[41] Accordingly, Count VI is dismissed.[42]

---

the certificate of incorporation under 8 *Del. C.* § 242(b)(2)); *see also Aspen Advisors LLC v. United Artists Theatre Co.*, 843 A.2d 697, 707 (Del. Ch. 2004), *aff'd*, 861 A.2d 1251 (Del. 2004) ("By specific words, the parties . . . identified particular transactions that would provide [the plaintiffs certain rights]. Similarly, the parties also (by omission) defined the freedom of action other parties to those contracts . . . had to engage in transactions without triggering rights of that nature."). The fact that ION, rather than causing INOVA to sell its stock directly to [China National], chose to consummate the joint venture through an arrangement whereby INOVA first issued its stock to ION which then, under the Share Purchase Agreement, sold the INOVA stock to China National, is immaterial. That is, the fact that one deal structure would have triggered Fletcher's consent rights, and the deal structure in the Share Purchase Agreement did not, does not have any bearing on the propriety of the Share Purchase Agreement or the fact that under that Agreement, Fletcher's consent rights did not apply. This conclusion, for contract law purposes, is analogous to results worked by the "doctrine of independent legal significance" in cases involving similar statutory arguments made under the DGCL. *In re Sunstates*, 788 A.2d at 536 (citing *Rothschild Int'l Corp. v. Liggett Group Inc.*, 474 A.2d 133, 136 (Del. 1984)); *see also Rothschild Int'l Corp. v. Liggett Group Inc.*, 474 A.2d 133, 136 (Del. 1984) (quoting *Orzeck v. Englehart*, 195 A.2d 375, 378 (Del. 1963)) ("'[A]ction taken under one section of [the DGCL] is legally independent, and its validity is not dependent upon, nor to be tested by the requirements of other unrelated sections under which the same final result might be attained by different means.'").

[40] For instance, § 5(B)(ii) might have said something along these lines: "The consent of the Holders of at least a Majority of the [Series D preferred stock] shall be necessary to permit ION, ION's affiliates, or any of ION's Subsidiaries to sell, issue, or obligate itself to sell or issue, any Security of ION's Subsidiaries."

[41] *See, e.g., Aspen Advisors*, 843 A.2d at 707 ("When . . . the relevant contracts expressly grant the plaintiffs certain rights in the event of particular transactions . . . the court cannot read the contracts as also including . . . additional unspecified rights in the event that other transactions are undertaken. To do so would be to grant the plaintiffs, by judicial fiat, contractual protections that they failed to secure for themselves at the bargaining table."); *BASF Corp v. POSM II Props. P'ship, L.P.*, 2009 WL 522721, at *6 (Del. Ch. Mar. 3, 2009) ("Delaware law does not invest judicial officers with the power to creatively rewrite unambiguous contracts . . . [to suit the aggrieved party's] business interests.").

[42] I note that Fletcher attempted to raise a claim for breach of the implied covenant of good faith and fair dealing in its answering brief, despite the fact that such a claim appears nowhere in any of Fletcher's complaints, including the operative verified second amended complaint. As ION properly points out, raising such a claim for the first time in a brief is impermissible and precludes consideration of it by this court. *Orman v. Cullman*, 794 A.2d 5, 28 n.59 (Del. Ch.

This brings me to Count VII of the complaint, for tortious interference with § 5(B)(ii) of the Certificate. In order to state a claim for tortious interference, a plaintiff must allege adequately a claim for an underlying breach of a contractual obligation.[43] Thus, where the claim for the underlying breach of contract has been dismissed, a claim for tortious interference with the same contract must also be dismissed.[44] Accordingly, because I have dismissed Count VI for an express breach of § 5(B)(ii), I also dismiss Count VII.

IV. Conclusion

For the foregoing reasons, the motion to dismiss is GRANTED. IT IS SO ORDERED.

2002). In any event, even were I to consider Fletcher's claim for breach of the implied covenant, it would fail to survive the motion to dismiss. Where, as here, a contract expressly and unambiguously sets forth the rights and preferences attendant to the holding of preferred stock, the implied covenant of good faith and fair dealing may not be used to create new rights, even where the defendant's conduct was motivated by a desire to circumvent express rights. *Amazon*, 2009 WL 2031789, at *4 (dismissing the plaintiff's claim for breach of the implied covenant of good faith and fair dealing where the contract "expressly and clearly define[d] [the plaintiff's] rights with respect to [the topic at issue]."); *In re Sunstates*, 788 A.2d at 535 (rejecting preferred stockholders' claim for breach of the implied covenant of good faith and fair dealing based on conduct allegedly undertaken in order to circumvent the contractual rights of the preferred stockholders because "the law of this State has clearly stated for many decades that special rights or preferences of preferred stock must be expressed clearly and that nothing will be presumed in their favor.") (internal citations omitted).

[43] *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1036 (Del. Ch. 2006).

[44] *Id.*