

STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF MONROE

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FUSION TELECOMMUNICATIONS  
INTERNATIONAL, INC.,

Plaintiff,

v.

DECISION AND ORDER

Index #2005/02737

CELTEL CONGO, SA, CITIGROUP, INC.,  
CITIBANK CONGO, DRC and JP MORGAN  
CHASE BANK, N.A.,

Defendant.

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Plaintiff, Fusion Telecommunications International, Inc., has moved for an order pursuant to CPLR 6301 forbidding, restraining and enjoining JPMorgan Chase Bank, NA ("Chase"), during the pendency of this action, from honoring Citibank's presentation of the line of credit (LOC No. T-246011). Additionally, an order was signed on March 15, 2005 by Justice VanStrydonck temporarily restraining Chase from the same. Thereafter, the parties contacted the court to adjourn the motion to provide plaintiff with an opportunity to add Citibank Congo as a party to this action. The initial complaint named Celtel and Chase as defendants but did not name Citigroup or Citibank Congo. The original motion was withdrawn, and plaintiff submitted an amended order on May 11, 2005, also signed by Justice VanStrydonck, which contained the same TRO. After several

additional adjournments and extensions of the TRO, the motion is on papers and returnable 11-9-05.

Prior to March 3, 2004, Fusion and another entity, Exodus Corp. SPRL, engaged in negotiations with Celtel to purchase telecommunications services. Before it would enter into an agreement with Fusion, Celtel required Fusion to apply for a letter of credit ("LOC") to ensure Fusion's ability to pay for the proposed services. Fusion applied for a letter of credit with Chase on March 3, 2004 in the amount of \$25,000, listing Citibank Congo, DRB as the beneficiary. On March 11, 2004, Citibank issued a Garantie D'Offre ("the Guaranty") listing Celtel as the beneficiary for the demand of Exodus. It is alleged that the LOC with Chase was to secure Citibank's guaranty to Celtel Congo on Fusion's behalf. See Piccola Affidavit, ¶3. On March 2, 2005, Celtel sought to enforce the Guaranty and sent notice to Citibank.

Shortly after receiving notice from Celtel, Citibank presented the LOC to Chase for payment in the amount of \$25,000. On March 8, 2005, Chase advised Fusion that it was going to honor the presentation of the LOC. Fusion has commenced the instant action alleging: (1) conversion by Chase and (2) misrepresentation and fraud by Celtel.

## DECISION

"A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor." Doe v. Axelrod, 73 N.Y. 2d 748, 750 (1988) (citation omitted); see also Aetna Insur. Co. v. Capasso, 75 N.Y.2d 860, 862 (1990) (citation omitted).

### Likelihood of Success

"To establish a likelihood of success on the merits, the movant must show its right to a preliminary injunction is plain on the facts of the case." Wyler v. Wyler, 5 Misc.3d 1031 (S.Ct. Nassau Cty. 2004). Here, Plaintiff must establish that Chase is not obligated to pay on the LOC to establish a likelihood of success.

An issuer of a letter of credit must honor properly presented drafts regardless of any disputes as to the performance of the separate underlying contracts which may form part of the same commercial transaction. See Gillman C. Chase Manhattan Bank, N.A., 73 N.Y.2d 1, 13-14 (1988). A letter of credit is an independent agreement by the issuing bank to make payment, and can be used as security for the payment of money in commercial transactions. See Mennen v. J.P. Morgan & Co., Inc., 91 N.Y.2d

13, 20 (1987); First Commercial Bank v. Gotham, 64 N.Y.2d 287, 294 (1985); Black's Law Dictionary, 6<sup>th</sup> ed., 903-04 (1990).

The fundamental principle governing these transactions is the doctrine of independent contracts. It provides that the issuing bank's obligation to honor drafts drawn on a letter of credit by the beneficiary is separate and independent from any obligation of its customer to the beneficiary under the sale of goods contract and separate as well from any obligation of the issuer to its customer under the agreement.

First Commercial Bank, 64 N.Y.2d at 294. The issuer of a letter of credit, therefore, has no obligation "to resolve disputes or questions of fact concerning the underlying transaction." Id. Consequently, Chase alleges that it is not its duty (nor is it even consistent with its abilities) to determine the existence of a possible fraud. When it is presented with the proper documentation, Chase alleges that it is required to make the necessary payments under the LOC.

The LOC that is the subject of this dispute is attached to the Complaint as Exhibit A and sets forth that the beneficiary is Citibank, the applicant is Fusion, and states "in view of this standby letter of credit issued in your favor, and per our customer's request, please issue your guarantee in favor of Celtel Congo" and quotes the language of the Guaranty:

WE (CITIBANK CONGO) HEREBY UNDERTAKE TO ESTABLISH OUR GUARANTEE IN THE AMOUNT OF USD 25,000.00, AND TO PAY CELTEL CONGO IN AN IRREVOCABLE MANNER AGAINST ITS FIRST WRITTEN DEMAND, WITHOUT EXCEPTION OR OBLIGATION FROM

ANY CONTRACT BY A LETTER SIGNED BY AN  
AUTHORIZED REPRESENTATIVE OF CELTEL CONGO,  
STATING THAT THE AMOUNT IS DUE AND TOTAL  
OF..... WITH PRINCIPAL, INTEREST AND FEE  
INCLUDED AND THAT NOTIFICATION HAS BEEN  
FORWARDED TO EXODUS CORPORATION SPRL, THAT  
THE LETTER OF CREDIT WILL BE CASHED AFTER 7  
DAYS FROM THE DATE OF THE LAST INVOICE.  
(Original guaranty in french)

As Celtel Congo now seeks to enforce the Guaranty, Citibank has demanded payment on the LOC by Chase. As Chase is obligated to honor properly presented drafts, it is legally obligated to honor a complying drawing on the LOC. As Chase alleges in the Affidavit of Ms. Piccola, "Chase's obligation to pay is fixed upon presentment of the drafts and the documents specified in the LOC." Id. at ¶4. Fusion's papers fail to establish a likelihood of success on the merits. The documents before the Court indicate that Chase will be obligated to make payment on the LOC when such payment is demanded by Citibank. Chase is not entitled to withhold payment due to Fusion's allegation of fraud.

Moreover, New York's UCC 5-109 states that in order to be entitled to an injunction as to the presentation of a line of credit, a court must find several things, including that "the applicant is more likely than not to succeed under its claim of forgery or material fraud...." Likewise, "[r]ights and obligations of an issue to a beneficiary... under a letter of credit are independent of the existence, performance, or non-performance of a contract or arrangement out of which the letter

of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary." "A cause of action for fraud may arise when one misrepresents a material fact, knowing it is false, which another relied on to its injury... A false statement of intention is sufficient to support an action for fraud, even where that statement relates to an agreement between the parties." Graubard Mollen Dannett & Horowitz v. Moskovitz, 86 N.Y.2d 112, 122 (1995) (citations omitted).

Moreover, the court notes that the amended complaint does not contain any allegations that Citibank Congo participated in or was in any way aware of the allegedly fraudulent presentment of the Guarantee. The allegations of the amended complaint belie any fraudulent conduct on the part of Citibank Congo, as the amended complaint alleges that Celtel committed the fraud in presenting the Guarantee to Citibank Congo. Here, Fusion's papers have failed to establish a likelihood of success that it will succeed on a fraud cause of action.

#### Irreparable Injury

Unless the plaintiff clearly demonstrates a necessity and urgency for relief in advance of a trial including the sustaining in the meantime of irreparable injury, the injunctive remedy will be withheld pending the trial (citations omitted)." Merola v. Telonis, 127 A.D.2d 1007 (4th Dept. 1987). Plaintiff is not

entitled to a preliminary injunction where irreparable harm is not sufficiently shown. See Id. at 1007; Grogan v. Saint Bonaventure University, 91 A.D.2d 855 (4th Dept. 1982); Baran v. Otterbein, 84 A.D.2d 928 (4th dept. 1981). Here, Plaintiff's complaint seeks monetary damages, and thus concedes in its own complaint that it can be made whole by an award of money damages. See Ashok v. Batra, 170 A.D.2d 436 (2<sup>nd</sup> Dep't 1991). Fusion has not established irreparable injury if an injunction is not issued.

#### Balancing of Equities

"[T]he 'balancing of the equities' usually simply requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief." Ma v. Lien, 198 A.D.2d 186,186-87 (1st Dept. 1993), *lv to app dismissed* 83 N.Y.2d 847 (1994). Here, as monetary damages will make Plaintiff whole in the event it is ultimately successful, it will not be prejudiced by denying the request for a preliminary injunction.

**CONCLUSION**

Fusion's motion for a preliminary injunction is denied. The temporary restraining order is vacated.

SO ORDERED

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KENNETH R. FISHER  
JUSTICE SUPREME COURT

DATED: November \_\_\_, 2005  
Rochester, New York