

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

GEEKSPHONE SA,

Petitioner,

-against-

SILENT CIRCLE LLC and
SILENT CIRCLE INC.,

Respondents.

Index No. _____

**PETITION FOR ATTACHMENT
AND TEMPORARY
RESTRAINING ORDER IN AID OF
FOREIGN ARBITRATION
PURSUANT TO CPLR § 7502(c)**

COMES NOW, Petitioner Geeksphone SA (“**Geeksphone**” or “**Petitioner**”), by and through its attorneys, Holland & Knight LLP, petitions the Court for the issuance of an order to show cause why an order of attachment¹ in aid of foreign arbitration proceedings to be commenced in Switzerland (the “**Swiss Arbitration**”), pursuant to New York Civil Practice Law and Rules (“**CPLR**”) § 7502(c), should not be issued against Respondents Silent Circle LLC and Silent Circle Inc. (collectively, “**Respondents**” or the “**Silent Circle Companies**”) based on Respondents’ breach of a \$5 million promissory note executed by Silent Circle LLC, guaranteed by Silent Circle Inc., and issued in favor of Geeksphone, for the reasons set forth in this Petition; the Memorandum of Law; the Affidavit of Rodrigo Silva Ramos Pidal, sworn to on June 23, 2016 (“**Pidal Aff.**”); the Affidavit of Louis Burrus, sworn to on June 24, 2016 (“**Burrus Aff.**”); the Affirmation of Warren E. Gluck, sworn to on June 24, 2016 (“**Gluck Aff.**”); and the exhibits attached thereto; submitted contemporaneously with this Petition.

Geeksphone respectfully alleges as follows:

¹ Substantially in the form of the proposed order of attachment attached hereto as Exhibit 1.

INTRODUCTION

1. This Petition seeks an attachment on notice and an interim *ex parte* temporary restraining order (“**TRO**”) from the day of the application until the petition for an attachment in aid of the Swiss Arbitration, pursuant CPLR § 7502(c) order is heard, based on Defendants’ breach of a \$5,000,000 promissory note executed by Silent Circle LLC, guaranteed by Silent Circle Inc. and issued in favor of Geeksphone (the “**Promissory Note**”).

2. The terms of the “absolute and unconditional” Promissory Note mandated that the Defendants pay the full \$5,000,000 by April 30, 2016 and also specified that the Defendants’ obligations thereunder were “not subject to any defense, set-off, counterclaim, rescission, recoupment or adjustment whatsoever.”

3. Despite due demand by Geeksphone, the entire \$5,000,000 remains due and owing, and the Defendants have refused to satisfy their obligations.

4. In correspondence with the Plaintiff, the Defendants have (i) repeatedly admitted and acknowledged serious financial difficulties that allegedly prevent them from satisfying their obligations under the Promissory Note, and (ii) appear to be in the process of moving assets and operations from the Silent Circle Companies to other, newly created and affiliated Silent Circle entities in Switzerland. The Defendants and their new Swiss affiliates are moving their assets and operations into Switzerland, in a region famed for banking secrecy laws, and have the capability and apparent desire to wire transfer any and all funds located in New York at a moment’s notice.

5. Accordingly, absent the requested relief, any arbitral award issued in Geeksphone’s favor in the Swiss Arbitration may be rendered ineffectual.

6. The Petition also requests that the Court issue an *ex parte* temporary restraining order in aid of the Swiss Arbitration, pursuant to CPLR § 7502(c) and CPLR § 6210, not exceeding 14 days in duration unless otherwise agreed by the Court or the parties, prohibiting the Silent Circle, JPMorgan Chase Bank, Bank of America N.A., credit card processing entities, merchant credit card banks, VISA, MASTER CARD and AMERICAN EXPRESS, and any other person or entity upon whom the restraining order is served (“**Garnishees**”), from disposing of, selling, transferring, encumbering, removing, paying over, conveying or otherwise interfering with Silent Circle Companies’ property, debts, accounts, receivables, rights of payment, or tangible or intangible assets of any kind until a hearing is held concerning Geeksphone’s petition for an order of attachment on notice.

THE PARTIES

7. Petitioner/Plaintiff Geeksphone² is a limited company organized and existing under the laws of Spain that was established in 2009 in Madrid, where it operates. Geeksphone’s core business consists of designing and developing smartphone devices, having been pioneers in the launch of Android and Firefox OS operating system devices.

8. Respondent/Defendant Silent Circle LLC, upon information and belief, is a limited liability company organized and existing under the laws of Nevis. It maintains its registered office in Charlestown, Main Street, Box 11, Nevis. Silent Circle LLC has generally acted from and utilized the following address for formal correspondence in relation to its agreements with Geeksphone: 174 Waterfront Street, Suite 500, National Harbor, MD 20745.

9. Respondent/Defendant Silent Circle Inc., upon information and belief, is a Delaware corporation and a wholly owned subsidiary of Silent Circle LLC. It maintains a

² Geeksphone SL has been renamed Geeksphone SA.

registered office at 2711 Centerville Road, Suite 400, Wilmington, DE 19808. Upon information and belief, Silent Circle Inc. shares the same board members and operating address as Silent Circle LLC, and similarly acts from the same office space in Maryland. Silent Circle Inc. was the main operating company for the Silent Circle Companies in charge of developing and selling Silent Circle LLC's encrypted communications offering.

10. However, a significant portion of the Silent Circle Companies' operations and assets are being moved to Switzerland. Moreover, the Silent Circle Companies appear to have created two Swiss companies styled Silent Circle SA and Silent Circle Technologies S.à r.l. These companies have their registered office at 12, rue François-Peyrot, 1218 Le Grand-Saconnex, 3rd Floor, Geneva, Switzerland.

JURISDICTION AND VENUE

11. This Court has jurisdiction over this Petition for an order of attachment and TRO in aid of the Swiss Arbitration pursuant to CPLR § 7502(c).

12. Defendants have property in New York the possession of Garnishees subject to jurisdiction in New York that can be attached for security purposes.

13. This Court has *in personam* and *quasi in rem* jurisdiction over the Defendants.

14. Silent Circle LLC performed its obligations under the Share Purchase Agreement (defined below) by making payments from New York using a New York bank account.

15. Silent Circle Inc. registered to do business with the New York Secretary of State in 2013 and is listed as an active entity as of the date of the filing of this Petition.³ It also maintains a registered agent for service of process at National Registered Agents, Inc., 111 8th Avenue, 13th Floor, New York, NY 10011.

³ Silent Circle Inc. appears to be registered in New York under its former name, Silent Circle LLC.

16. Venue is proper pursuant to CPLR § 7502(a)(ii).

FACTUAL BACKGROUND

The Joint Venture Agreement and Silent Circle Inc.'s Control

17. On December 5, 2013, Geeksphone and Silent Circle Inc. entered into a shareholder and joint venture agreement (the “**Joint Venture Agreement**”). The Joint Venture Agreement was the shared ownership of a Swiss company, formerly registered under the name of SGP Technologies SA (“**SGP**”) and now known as Blackphone SA.

18. SGP’s core business consists in developing, producing and selling electronic devices such as mobile phones, tablets or other means of secure communications. SGP is registered in Geneva, Switzerland.

19. Geeksphone and Silent Circle Inc. each owned 50%, or 5,000,000 shares, in SGP.

20. The primary goal of the parties was to develop and sell Blackphone devices, which were then a new product.

21. To this end, Silent Circle Inc. and Geeksphone were to provide for their know-how and in their respective areas of expertise. Silent Circle Inc.’s area of expertise was secure mobile communications and Geeksphone’s was smartphone design, manufacturing and software and hardware integration.

22. Although the Joint Venture Agreement provided for a joint ownership of SGP, Silent Circle Inc. maintained sole management and control over SGP, appointing all key managers and, despite Geeksphone’s repeated disagreement, creating a disproportionate cost structure. As a result, Silent Circle Inc. was actively involved and had pertinent knowledge of the course of actions in running SGP.

23. Following disputes between Silent Circle Inc. and Geeksphone as to the development of SGP, the parties sought a solution to settle and terminate the joint venture.

24. After lengthy discussions and negotiations, on December 26, 2014, Silent Circle Inc. signed an agreement to purchase a 1.5% stake in SGP from Geeksphone to secure control of board (the “**Stock Purchase Agreement**”). The total consideration to be paid was \$750,000 paid in cash (the “**Reservation Premium**”), plus the liquidated value in cash of 1% of the shares of Silent Circle LLC at the same valuation achieved in Silent Circle LLC’s equity round (taking place at the time) with a minimum value of \$3,830,000. Therefore, the total consideration of the 1.5% stake in SGP was a minimum of \$4,580,000.

25. The Reservation Premium was paid as agreed on January 15, 2015, however, shortly after Silent Circle Inc. established control over SGP’s board of directors, it was deemed insufficient by Silent Circle Inc., so new negotiations were initiated and settlement completed.

The Share Purchase Agreement and Silent Circle LLC’s use of a N.Y. Bank Account

26. Following a second negotiation round, a new agreement and settlement was reached whereby Silent Circle LLC agreed to purchase Geeksphone’s entire 50% stake in SGP (the 5,000,000 shares owned by Geeksphone) (the “**Share Purchase Agreement**”). As part of the Share Purchase Agreement, the Stock Purchase Agreement was rescinded.

27. Geeksphone only agreed to sign the Share Purchase Agreement after Silent Circle Inc. assumed and unconditionally guaranteed the obligations of certain provisions.

28. Prior to executing the Share Purchase Agreement, Silent Circle Inc. had been the majority shareholder of SGP and in control its board of directors and day-to-day management. It also had unlimited access to information to be able to conduct an effective due diligence of SGP. Upon information and belief, Silent Circle Inc. had performed a detailed due diligence on SGP as

part of their own fund raising exercise that took place immediately prior the acquisition of Geeksphone's shares in SGP. The Share Purchase Agreement was formalized and signed as of February 26, 2015.

29. The initial price for the purchase of Geeksphone's 5,000,000 SGP shares was \$32,750,000. After some debates over the guarantees to be supplied in relation with an installment payment, Geeksphone accepted another price reduction of \$2,000,000. The final amount of \$30,750,000 was to be paid as follows:

- o \$750,000 paid as the Reservation Premium (paid in January 2015);
- o \$25,000,000 to be paid immediately once the Share Purchase Agreement was signed; and
- o \$5,000,000 to be paid by April 30, 2016 and secured by the Promissory Note.

30. To remit the immediate \$25,000,000 payment, Silent Circle LLC used a bank account at JPMorgan Chase Bank in New York that, upon information and belief, maintained and still maintains considerable assets.

31. Silent Circle LLC and Silent Circle Inc. maintain other assets in New York. These include bank accounts at various financial institutions, as well as merchant accounts of the type utilized to deposit credit card payments.

32. In a considerable concession, Geeksphone agreed to transfer the ownership over all the SGP shares even though it would not receive the full purchase price immediately.

33. In return, Geeksphone required that the Silent Circle Companies provide guarantees in relation to payment of the remaining tranche of the purchase price. As previously mentioned, the parties were highly divided on this topic. Geeksphone suggested all sorts of guarantees, such as a bank guarantee, an escrow account or some form of collateral.

34. For instance, Geeksphone expressly asked for a third party guarantee to be provided by Silent Circle LLC's main shareholders, which are based in the United States. Silent Circle LLC refused all proposals made by Geeksphone, but agreed to sign a senior unsecured Promissory Note that was also guaranteed by Silent Circle Inc., which proposal Geeksphone accepted.

The Silent Circle Companies Execute a \$5 Million Promissory Note

35. Silent Circle LLC signed and executed the \$5,000,000 Promissory Note on February 26, 2015. Silent Circle LLC expressly accepted that its obligation to make the \$5,000,000 payment was "absolute and unconditional." This action arises from the breach of that Promissory note.

36. The full \$5,000,000 provided by the Promissory Note was due on April 30, 2016.

37. In the Promissory Note, Silent Circle LLC waived, *inter alia*, all defenses and counterclaims to making the \$5,000,000 payment:

The obligations of Silent Circle to make the payments provided for in this Note are absolute and unconditional and not subject to any defense, set-off, counterclaim, rescission, recoupment or adjustment whatsoever.

Promissory Note, p. 6.

38. At Geeksphone's demand, Silent Circle Inc. guaranteed the Promissory Note:

The obligations under this Note are irrevocably and unconditionally guaranteed by Silent Circle, Inc., a Delaware corporation (the "**Guarantor**"), irrespective of the validity and the effects of this Note, and waiving all rights of objection and defence which may arise from this Note, upon first demand of Geeksphone, to pay to Geeksphone each and every sum which is at any time now and hereafter due and payable by Silent Circle upon the occurrence of an Event of Default under or pursuant to this Note.

Promissory Note, p. 1.

39. Messrs. Michael Janke and Matt Neiderman (“**Neiderman**”) signed the Promissory Note on behalf of Silent Circle LLC (as promisor) and Silent Circle Inc. (as guarantor).

40. As a consequence, each Silent Circle Company was fully liable under the Promissory Note upon first demand of Geeksphone upon any breach (an “**Event of Default**”).

41. It was agreed that the Promissory Note shall represent under Swiss law an “acknowledgment of debt” from Silent Circle LLC and Silent Circle Inc. Promissory Note, p. 6.

42. The terms of the Promissory Note define an Event of Default particularly as a payment default, which has happened here:

(a) The occurrence of any of the following events shall constitute an event of default (an “**Event of Default**”):

(i) a default in the payment of the principal or interest on this Note, when and as the same shall become due and payable (a “**Payment Default**”).

Promissory Note, p. 4.

43. The consequences of an Event of Default include that:

(i) the loan amount shall begin to accrue interest until rate of twelve percent (12%) per annum, and that such interest shall continue to accrue until the entire \$5 million debt is satisfied, as well as other fees and costs have been paid in full;

(ii) the Silent Circle Companies shall be liable for and shall pay to Geeksphone all reasonable fees and costs, including attorneys’ fees, incurred in connection with enforcing its rights hereunder in connection with an occurrence of an Event of Default by Silent Circle LLC; and

(iii) so long as any amount remains unpaid on the Promissory Note, Silent Circle LLC shall provide Geeksphone with financial information regarding Silent Circle LLC and each of its subsidiaries.

Promissory Note, p. 5.

44. The Silent Circle Companies agreed that, upon any payment or distribution of the assets of Silent Circle LLC to creditors upon dissolution, total or partial liquidation, reorganization, or similar proceeding relating to Silent Circle LLC, that Geeksphone would be entitled to receive payment in full with priority over junior debtholders. The Silent Circle Companies also agreed that, unless the prior written consent of Geeksphone is obtained, Silent Circle LLC shall not make an assignment for the benefit of its creditors, propose a compromise or arrangement to its creditors, or take any action to have a receiver appointed with respect to any part of its assets.

45. The Promissory Note is governed by the laws of Delaware, but contains a clause requiring the parties to submit any dispute, controversy, or claim arising out of or in connection with the Promissory Note to arbitration in accordance with the Swiss Rule of International Arbitration of the Swiss Chambers of Commerce, with a seat in Geneva. Promissory Note, p. 5.

Silent Circle LLC Admits and Acknowledges Serious Financial Problems

46. On March 21, 2016, Neiderman sent a letter on the letterhead of Silent Circle SA (notably not Silent Circle LLC or Silent Circle Inc.) “underlying the need” to restructure its debt obligations (“**March 21 Letter**”).

47. The March 21 Letter states that certain distribution agreements between Silent Circle LLC and third parties resulted in significant losses for Silent Circle LLC:

“In the weeks and months following the end of the joint venture [and execution of the Share Purchase Agreement and Promissory Note] and consolidation of operations of Silent Circle, the Silent Circle management team began ... [to] conduct due diligence into the partners with whom the Blackphone sales team had entered into large, exclusive distribution agreements. Silent Circle became concerned when BigOn failed for several months to put in place the letter of credit

it had committed to establish ... We eventually determined that BigOn ... had no ability to purchase devices or serve as a distributor and never did so.”

March 21 Letter, pp. 1-2.

48. Silent Circle LLC claimed similar issues with business partners such as Sumion, as the company had “likewise failed to purchase any devices.” It also noted that while counterparties Telcel/American Movil had initially agreed to purchase 100,000 Blackphone devices, it had instead only purchased 6,000.

March 21 Letter, p. 2.

49. As a result, according to the March 21 Letter:

“Because of the resources devoted to [the Telcel/American Movil] market, including hiring employees in the region and spending for inventory and marketing for the anticipated sell-through, the relationship thus far has resulted in significant financial losses or Silent Circle. While Silent Circle remains hopeful that the relationship will prove to be profitable, it will take much more time and investment to see a return on the investment in that relationship.”

March 21 Letter, p. 2 (emphasis added).

50. As a result of the failure of these agreements, Silent Circle LLC admitted that “[i]n short, the hardware business has proved to be a significant financial drain for Silent Circle” and that Silent Circle LLC had borrowed money.

March 21 Letter, p. 2 (emphasis added).

51. Silent Circle LLC goes on to note that it was attempting to raise “additional operating capital so that it can ... absorb the losses from the hardware operations.”

March 21 Letter, pp. 2-3.

52. According to Silent Circle LLC, a potential major investor emerged in February 2016 who offered to invest \$20 million, but he required Silent Circle LLC to: (1) have a path to cash-flow break even in the next four quarters; and (2) that its balance sheet be free from secured

debt. The result was that Silent Circle LLC failed to raise an additional \$20,000,000, which Neiderman claimed would be used to repay its debt.

53. Silent Circle LLC states that this failure to raise additional equity capital caused it to “revise[] its business plan to dramatically cut costs and focus on its software business.” Such cost cutting would force Silent Circle LLC to terminate “dozens of employees and otherwise [reduce] its operating costs by around 50%.” Silent Circle LLC also claimed that dire consequences for its continuing operations were imminent:

“if Silent Circle cannot secure the conversion or disposition of its remaining debt, it will not meet the conditions for closing and will therefore be forced to wind down its business and seek bankruptcy protection.”

March 21 Letter, p. 3 (emphasis added).

54. Accordingly, Silent Circle LLC began to negotiate with its lenders to convert its debt into equity. As part of this restructuring and in order to allow it operate for the next 8 to 10 months, it attempted to negotiate with Geeksphone as a senior lender under the Promissory Note. In those exchanges, Silent Circle LLC never challenged the existence of the remaining principle of the debt owed under the Promissory Note.

55. Geeksphone rejected Silent Circle LLC’s proposals to restructure the Promissory Note, including one that would have had it replace the outstanding debt with an unsecured loan that wouldn’t be paid until June 2017, and has demanded immediate payment as per its terms.

The Silent Circle Companies Default on the Promissory Note

56. Full payment under the Promissory Note was due April 30, 2016, but has not been received despite due demand. Accordingly, both Defendants are in breach of and have defaulted under the Promissory Note.

57. They are liable to Geeksphone in the amount of \$5,000,000, together with interest accruing at 12% per annum, as well as costs, arbitrator's fees and attorneys' fees.

58. On May 4, 2016, Geeksphone's Swiss counsel and Chairman emailed Silent Circle LLC separately to formally request the payment of \$5,000,000 from the Silent Circle Companies in accordance with the terms of the Promissory Note.

59. In response to these emails, Silent Circle SA sent a letter on May 10, 2016 (again, curiously not on the letterhead of Silent Circle LLC or Silent Circle Inc.) stating that it would not be making the \$5,000,000 payment (the "**May 10 Letter**").

60. In the May 10 Letter, Silent Circle SA attempted to justify non-payment under the Promissory Note based upon alleged violations of the pre-existing Joint Venture Agreement between Geeksphone and Silent Circle LLC. For instance, Neiderman alleges that at the time the Joint Venture Agreement was signed, Geeksphone was insolvent.

61. None of these allegations, which Geeksphone entirely disputes, has an impact on Defendants obligations to pay to Geeksphone \$5,000,000 under the Promissory Note. A theoretical violation of an obligation under the Joint Venture Agreement cannot be a valid opposition as a defense against the payment obligation under the Promissory Note. Geeksphone is not aware of any counterclaims by Defendants, and the Promissory Note expressly excludes counterclaims as a defense to payment in any event.

The Swiss Arbitration

62. Geeksphone intends to commence the Swiss Arbitration against the Defendants for breach of the Promissory Note roughly simultaneously with this action.

63. It is difficult to estimate the overall length of the arbitration proceedings initiated by Geeksphone, as it will depend from the complexity of the dispute, as well as the cooperation (or lack thereof) of the Defendants.

64. That being said, pursuant to the Swiss Chambers Arbitration Institutions case statistics, the average duration of arbitration proceedings under the Swiss Rules is eleven months.

65. Geeksphone's Swiss counsel estimates that arbitrators' fees and costs in this arbitration will be \$250,000 and attorneys' fees in connection with this arbitration will be \$500,000.

ATTACHMENT IS WARRANTED

I. DEFENDANTS' PROPERTY MAY BE ATTACHED IN AID OF ARBITRATION

66. “[A] creditor can attach assets in New York, for security purposes, in anticipation of an award that will be rendered in an arbitration proceeding in a foreign county, where there is no connection to New York by way of subject matter or personal jurisdiction.” *Sojitz Corp. v. Prithvi Info. Sols. Ltd.*, 82 A.D.3d 89, 90 (1st Dep’t 2011).

67. Accordingly, the presence of Defendants' property in this jurisdiction, to wit, held by JPMorgan Chase Bank, Bank of America N.A., credit card processing entities, merchant credit card banks, VISA, MASTER CARD and AMERICAN EXPRESS, and other Garnishees, by itself, provides this Court with jurisdiction to attach that property for security purposes under CPLR § 7502(c).

68. In any event, it is also likely that this Court has *in personam* jurisdiction over Silent Circle Inc. by virtue of its registration to do business as a foreign corporation with New York's Secretary of State, and over Silent Circle LLC because it performed its obligations under

the Share Purchase Agreement by making payments from New York using a New York bank account at JPMorgan Chase Bank.

II. GEEKSPHONE HAS ESTABLISHED THE GROUNDS FOR ATTACHMENT UNDER CPLR § 7502(c) AND FOR AN INTERIM TRO UNDER § 6210

69. CPLR § 7502(c) allows for attachment in aid of a foreign arbitration if an “award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.”

70. New York courts may issue attachments in aid of all arbitrations including those involving foreign parties or in which the arbitration is conducted outside of New York.

A. Geeksphone has Established the Grounds for An Attachment In Aid of Arbitration

71. In light of the clear statutory language and most recent First Department analysis, it is sufficient to show that the award to which Geeksphone may be entitled in the Swiss Arbitration may be rendered ineffectual in the absence of an attachment. Geeksphone clearly satisfies that standard. Moreover, although not necessary, this application also satisfies each of the requirements for an attachment under CPLR § 6212. Geeksphone has included two affidavits and supporting evidence that demonstrate a cause of action, there is a (significant) probability that Geeksphone will succeed on the merits in relation to its claim against Defendants for non-payment of the Promissory Note. The amount demanded exceeds all known counterclaims known to Geeksphone, and finally, Geeksphone will furnish a bond in an amount to be directed by this Court when the attachment order is granted after notice is provided. *See* CPLR § 6212(a)-(b).

B. Petitioner has Demonstrated a Probability of Success on the Merits

72. By the clear and unambiguous language of the Promissory Note, the Defendants have defaulted on the note. The full \$5,000,000 was due by April 30, 2016 and remains unpaid. Thus, there is no question that Defendants defaulted.

C. Absent the Provisional Relief, the Attachment May Be Rendered Ineffectual

73. Defendants have admitted and acknowledged serious financial difficulties and have they are openly transferring assets, personnel, and operations out of the United States to newly formed companies in Switzerland, non-signatories to the Promissory Note, which may render any award against them ineffectual.

74. As to the financial difficulty point, as discussed in greater detail in the supporting documents, Silent Circle has admitted that three major distributorship agreements have been unsuccessful and instead, became a “financial drain” on the company and it has been forced to terminate dozens of employees, reduce operating costs and raise additional operating capital simply to “absorb the losses.” At the same time, Silent Circle’s other lenders refused to convert which they claim was required in order for Silent Circle to receive a significant capital injection. Moreover, Silent Circle has stated that unless there is new capital, it might “be forced to cease operations and wind down its business and seek bankruptcy protection.”

75. As to the nebulous structuring and (re)structuring of the myriad Silent Circle related entities, Silent Circle has openly admitted transferring assets and operations to Switzerland, and Petitioner has learned that in conjunction with the same, Silent Circle created new Swiss that are not signatories to the Promissory Note.

III. AN *EX PARTE* TEMPORARY RESTRAINING ORDER SHOULD ISSUE PURSUANT TO CPLR § 6210

76. CPLR § 6210, which governs orders of attachment on notice, expressly provides for a TRO preserving the status quo prior to the attachment hearing. CPLR § 6210.

77. Here, this *ex parte* TRO is requested for two reasons.

78. First, Defendants, after acknowledging the debt due, appear to have fabricated reasons to avoid payment that frankly do not even make sense in the context of a promissory note, expressly stated payment will not be forthcoming, and are simultaneously and are openly engaging in a tactic of shifting assets from signatories to the Promissory Note to non-signatories.

79. Second, Defendants, as well as their new Swiss affiliates, are foreign entities, doing business in a region famed for banking secrecy (Switzerland), and have the capability to wire transfer all funds located in New York at the push of a button.

80. Accordingly, pursuant to N.Y.C.R.R. § 202.7(f), there is reason to believe that notifying Defendants of this Petition and the TRO sought will result in Defendants' intentional removal of assets from this jurisdiction.

81. As discussed above, there is also a very strong probability of success on the merits of Petitioner's claim and CPLR § 6210 itself acknowledges the serious risk of dissipation associated with impending attachment orders, which is why it expressly provides for the issuance of a "pre-attachment" TRO in precisely these circumstances.

IV. REQUEST TO FIX BOND AT APPROXIMATELY \$10,000

82. If the Court grants this Petition and ultimately orders an attachment in aid of arbitration, Geeksphone respectfully requests that the Court set the statutorily required bond in at approximately \$10,000. CPLR § 6212(b) requires that on motion for an order of an attachment,

the “plaintiff shall give an undertaking in a total amount fixed by the court, but not less than five hundred dollars” CPLR § 6212(b).

83. The Bond requested is believed to be reasonable under the circumstances and tracks bond amounts issued in analogous cases. Moreover, any surety ordered may be increased or reduced at the Court’s discretion as matters develop.

V. SUBSTITUTED SERVICE MAY BE NECESSARY TO PROVIDE DEFENDANTS WITH SUFFICIENT AND TIMELY NOTICE

84. Substituted service of this Petition, and orders in connection therewith may be necessary to provide Defendants with sufficient and timely notice to prepare for the attachment hearing. While Silent Circle Inc. may be served via hand through its registered agent in New York, and Silent Circle LLC may similarly be served via courier in Nevis under the relevant rules, Geeksphone also proposes to send papers to the Silent Circle address established in the Promissory Note, and to email copies of the application to Silent Circle’s known email address that was used in relation the to the Promissory Note communications described and/or attached to this application.

WHEREFORE, Geeksphone respectfully requests that this Court issue:

- i) an order to show cause as to why an order of attachment⁴ in aid of the Swiss Arbitration pursuant to CPLR § 7502(c), in the amount of \$6,300,000⁵ should not

⁴ Substantially in the form of the proposed order of attachment attached to the Memorandum of Law as Exhibit A.

⁵ \$5,000,000 in principal, \$750,000 in arbitral costs and attorneys’ fees, and \$550,000 in interest accruing since the Defendants’ default on April 30, 2016, and the approximately 11 months it is estimated to complete the arbitration.

be issued against the Silent Circle Companies based on Defendants' breach of the \$5 million Promissory Note;

(ii) an *ex parte* temporary restraining order in aid of the Swiss Arbitration, pursuant to CPLR § 7502(c) and CPLR § 6210, not exceeding 14 days in duration unless otherwise agreed by the Court or the parties, prohibiting the Silent Circle Companies and the Garnishees and any other person or entity upon whom the restraining order is served, from disposing of, selling, transferring, encumbering, removing, paying over, conveying or otherwise interfering with Silent Circle Companies' property, debts, accounts, receivables, rights of payment, or tangible or intangible assets of any kind until a hearing is held concerning Geeksphone's petition for an order of attachment on notice; and

(iii) any other relief that the Court deems just and proper.

Dated: New York, New York
June 21, 2016

HOLLAND & KNIGHT LLP

By:  _____

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EXHIBIT A – PROPOSED ORDER

At IAS Part __ of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse, 60 Centre Street, New York, New York 10007 the ____ day of June, 2016.

PRESENT: Hon. _____
Justice of the Supreme Court

GEEKSPHONE SA

Petitioner,

-against-

SILENT CIRCLE LLC
SILENT CIRCLE INC.

Respondents.

Index No. _____

**ORDER OF ATTACHMENT IN AID OF
FOREIGN ARBITRATION PURSUANT
TO CPLR § 7502(c)**

TO THE SHERRIFF OF ANY COUNTY OF THE STATE OF NEW YORK OR OF THE CITY OF NEW YORK:

WHEREAS an application has been made pursuant to New York Civil Practice Law and Rules (“CPLR”) § 7502(c) by Petitioner Geeksphone SA (“**Petitioner**” or “**Geeksphone**”) for an order of attachment in aid of a foreign arbitration proceedings to be commenced in Switzerland (the “**Swiss Arbitration**”), in the amount of \$ 6,300,000¹, against Respondents Silent Circle LLC and Silent Circle Inc. (collectively, “**Respondents**” or “**Silent Circle Companies**”); and

¹ \$5,000,000 in principal, \$750,000 in arbitrators’ fees and attorneys’ fees and \$550,000 in interest accruing since the Respondents’ default on April 30, 2016, through the approximately 11 months it is expected to complete the arbitration.

WHEREAS an Order to Show Cause and Temporary Restraining Order in Aid of Foreign Arbitration Pursuant to CPLR § 7502(c) was issued pursuant to CPLR § 7502(c) and served on Defendants on June ____, 2016, providing notice of a hearing to be held on July ____, 2016; and

WHEREAS it is satisfactorily appearing to the Court that the Plaintiff is entitled to an order of attachment against the property, debts, accounts, receivables, rights of payment, or tangible or intangible assets of any kind of the Silent Circle Companies because the grounds for attachment set forth in CPLR § 7502(c) have been satisfied; it is hereby

ORDERED that an Order of Attachment is hereby granted as to the property, debts, accounts, receivables, rights of payment, or tangible or intangible assets of any kind of the Silent Circle Companies; and it is further

ORDERED that the amount to be secured by the Order of Attachment, including interest, arbitrators' fees and attorneys' fees shall be \$6,300,000; and it is further

ORDERED that Geeksphone must post a bond of \$_____ within _____ business days of this Order of Attachment, to serve as security for costs and damages, including reasonable attorneys' fees, that the Defendants may sustain because of the attachment if the Defendants recover judgment or it is finally decided that the Geeksphone was not entitled to the attachment; and it is further

ORDERED that the Sheriff of the City of New York or any County in the State of New York, attach property of the Silent Circle Companies within this jurisdiction, at any time before final award in the Swiss Arbitration, by levy upon any interest of the Silent Circle Companies in property, accounts, receivables, rights of payment, or tangible or intangible assets of any kind, including but not limited to such property or assets of the Silent Circle Companies in the possession, custody or control of garnishees located in New York, including but not limited to

Silent Circle, JPMorgan Chase Bank, Bank of America N.A., credit card processing entities, merchant credit card banks, VISA, MASTER CARD and AMERICAN EXPRESS, and any other person or entity upon whom the Order of Attachment is served (“**Garnishees**”), or upon any debt owed to the Silent Circle Companies as will satisfy the aforesaid sum of \$6,300,000, to answer any award that may be obtained against the Silent Circle Companies in the Swiss Arbitration, and that he proceed herein in the manner and make his return within the time prescribed by law; and it is further

ORDERED that the Sheriff shall refrain from taking any property levied upon into his actual custody pending further action of this Court; and it is further

ORDERED that within ten days after service upon each Garnishee of this Order of Attachment, each Garnishee shall serve a statement in accordance with CPLR § 6219 specifying all debts of the Garnishee to the Defendants, when the debts are due, all property in possession or custody of the Garnishee in which Defendants have an interest, and the amounts and value of the debts and property specified; and it is further

ORDERED that notice of this Order of Attachment shall be given by Geeksphone to any parties upon whom the previous Order to Show Cause and Temporary Restraining Order in Aid of Foreign Arbitration Pursuant to CPLR § 7502(c), dated June ____, 2016, was served, and any other parties as the Court may direct.

Dated: New York, New York
June ____, 2016

SO ORDERED

J.S.C.