10-7-2020

J.P. CAREY ENTERPRISES AMENDED ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Kelly Lee Ellerbee
Fulton County Superior Court, Judge

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

J.P. CAREY ENTERPRISES, INC., Plaintiff, v. CUENTAS, INC., f/k/a NEXT GROUP HOLDINGS, INC., Defendant.	CIVIL ACTION FILE NO. 2018CV314324 Business Case Div. 3

AMENDED ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The Court hereby amends the Order on Cross Motions for Summary Judgment, entered October 1, 2020, solely for the purpose of providing a complete version of the Court's ruling as the order originally entered was inadvertently missing a page. See O.C.G.A. § 9-11-60(g).

This dispute involving a convertible promissory and the enforceability of its default remedies comes before the Court on Plaintiff's Motion for Summary Judgment, filed January 24, 2020 ("Plaintiff's Motion") and Defendant Cuentas's Motion for Summary Judgment, filed January 24, 2020 ("Defendant's Motion"). A hearing on Plaintiff's Motion and Defendant's Motion was held on September 30, 2020. Having reviewed the record and considered the arguments and submissions

of counsel, the Court enters the following order.

1. STANDARD OF REVIEW

"Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Gervin v. Retail Prop. Tr., 354 Ga. App. 11, 11 (2020) citing Edwards v. Moore, 351 Ga. App. 147 (2019). "In an action on a promissory note, a claimant may establish a prima facie right to judgment as a matter of law by producing the promissory note and showing that it was executed. On a motion for summary judgment, the burden then shifts to the obligor to establish an affirmative defense to the claim." (Citation omitted.) 280 Partners, LLC v. Bank of N. Georgia, 352 Ga. App. 605, 608 (2019); see generally Pure Hospitality Sols., Inc. v. Canouse, 347 Ga. App. 592 (2018) (convertible note allowing the holder to convert its debt into equity of the obligor described as a as a promissory note).

2. FINDINGS OF FACT

2.1. Convertible Nature of Note

The key facts regarding the note and its execution are undisputed. On January 2, 2017, Next Group Holdings, Inc. ("Next Group Holdings"), predecessor of Defendant Cuentas, Inc. (hereinafter collectively, "Cuentas"), entered into a convertible promissory note with Plaintiff J.P. Carey Enterprises, Inc. ("JPC") in which Cuentas agreed to pay JPC the principal amount of $70,000.00 ("Note").

(Defendant's SUMF, ¶ 1, Ex. 2-Note; Plaintiff's Resp. SUMF ¶1.)[1] Interest accrued on the Note's outstanding principal at 8% per annum, and the Note matured in seven months, on August 2, 2017. (Id., p. 1; § 4(b).) The Note was entered as part of a deal to resolve a $66,000.00 Florida judgment lien entered against Cuentas. (Id., §1; Plaintiff's SUMF, ¶ 2, Ex. C; Defendant's Resp. SUMF, ¶ 2). The parties expressly agreed the Note would be governed by Georgia law. (Note, §14.)

The Note was convertible in that it allowed JPC to transform any outstanding debt owed into an equity interest of Cuentas. Specifically, it allowed JPC the option, "at any time, to convert all or any amount of the principal face amount of [the] Note then outstanding into shares of [Cuentas's] common stock . . . ." (Id., §4(a).) The Note established a procedure and a price formula for any such conversion. (Id.) JPC would initiate the transfer by providing notice to Cuentas or its designated transfer agent ("Notice of Conversion"). (Id.) The conversion price would equal 50% of the lowest trading price for Cuentas's common stock for twenty prior trading days including the day on which the Notice of Conversion was received, with a floor of $0.02 per share ("Standard Conversion Formula"). (Id.) Cuentas or its transfer agent was to deliver the converted shares to JPC within three business days of receiving a Notice of Conversion. (Id.)

[1] A copy of the Note is attached to Defendant's SUMF as Ex. 2. Hereinafter, record citations will refer simply to the Note.

Interest accrued on the principal balance was also subject to conversion ("Interest Shares").

> [JPC] may, at any time, send in a Notice of Conversion to [Cuentas] for Interest Shares based on the formula provided [for conversions of principal]. The dollar amount converted into Interest Shares shall be all or a portion of the accrued interest calculated on the unpaid principal balance of this Note to the date of such notice.

(Id., §4(b).)

To facilitate a conversion, Cuentas was to appoint a transfer agent and provide it with "irrevocable" instructions to reserve at least 10,000,000 shares of its common stock ("Share Reserve"). (Id., §12.) Cuentas was further required to "reserve a minimum of four times the amount of shares required if the [Note] would be fully converted." (Id.) In the event of a conversion, Cuentas was 'to pay all transfer agent costs associated with the issuing and delivering the share certificates to [JPC]. If such amounts are to be paid by [JPC], it may deduct such amounts from the Conversion Price." (Id.)

2.2 Events of Default and Remedies under the Note

The Note outlined a number of events triggering a default, including the general failure to abide by any of its terms or provisions. (Id., § 8.) The failure to timely (within three business days) provide JPC with common stock after receiving a Notice of Conversion was expressly deemed an event of default. (Id., §8 (k).)

The Note details a host of remedies for Cuentas's breach. Generally, unless

an event of default is cured within five days, JPC could "consider this Note immediately due and payable" and pursue any of its available remedies. (Id., § 8.) Upon an event of default, interest began to accrue at "24% per annum or . . . at the highest rate of interest permitted by law" ("Default Interest"). (Id.) An event of default altered all three elements of the Standard Conversion Formula – increasing the conversion discount from 50% to 60%, extending the lookback period for a low share price from twenty to twenty-five days and eliminating the $0.02 price per share floor ("Default Conversion Formula"). (Id., § 4(a).) An event of default also triggered Cuentas's obligation to pay JPC its attorney's fees and other costs of collection. (Id., § 8.)

The Note outlines two specific remedies should Cuentas breach the obligation to timely deliver stock in response to a Notice of Conversion. First, for a late delivery, the Note expressly imposed a "penalty" of $250 per day beginning on the fourth day after a Notice of Conversion was delivered to Cuentas and increasing to $500 per day beginning on the tenth day ("Failure to Deliver Daily Penalty"). (Id.) Second, the Note provides a "Make-Whole for Failure to Deliver Loss" remedy ("Make Whole Remedy") providing:

> [a]t [JPC]'s election, if [Cuentas] fails for any reason to deliver to [JPC] the conversion shares by the by the [sic] 3rd business day following the delivery of a Notice of Conversion to [Cuentas] and if [JPC] incurs a Failure to Deliver Loss, then at any time [JPC] may provide [Cuentas] written notice indicating the amounts payable to [JPC] in respect of the Failure to Deliver Loss and [Cuentas] must make [JPC] whole as follows:

> Failure to Deliver Loss = [(High trade price at any time on or after the day of exercise) x (Number of conversion shares)].
>
> [Cuentas] must pay the Failure to Deliver Loss by cash payment, and any such cash payment must be made by the third business day from the time of [JPC]'s written notice to [Cuentas].

(Id.)

Approximately one week after the Note was executed, JPC and its lawyer received a letter whereby Cuentas appointed its transfer agent and established a share reserve of 3,500,000 shares. (Defendant's Resp. to Plaintiff's SUMF, Ex. 6A, pp. 171-172, Ex. 14). JPC never objected that Cuentas had not complied with its Share Reserve requirements under the Note. (Id.)

The Note contains a non-waiver clause stating that none of its terms "may be amended, waived, discharged or terminated other than by written instrument signed" by both parties. (Note, § 10). Another provision allowed JPC to enforce any of its remedies unless it had provided a written waiver of a default. (Id., § 8).

2.3 JPC's Efforts at Conversion

On April 13, 2017, JPC delivered a Notice of Conversion to Cuentas's transfer agent seeking to convert $71,549.59 of the Note into 3,577,480 shares of Cuentas's common stock, the entire amount due and owing under the Note: $70,000.00 in principal and $1,549.59 in interest at the non-default rate of 8%, using the Standard Conversion Formula of $0.02 per share. (Plaintiff's SUMF, ¶¶ 31 and 32, Ex. L and

N;[2] Defendant's Resp. SUMF, ¶¶ 31 and 32.) The interest was calculated beginning from issuance of the Note until the April 13, 2017 Notice of Conversion. (Id., Ex. N). This effort at conversion triggered an e-mail exchange between the transfer agent, JPC, and Cuentas that continued over several weeks until the conversion was completed in early July 2017. (Id., Ex. M).

On April 17, 2017, the transfer agent replied to JPC, requesting a $250.00 conversion fee. (Plaintiff's SUMF, ¶ 36, Ex. M at p. C_0326; Defendant's Resp. SUMF, ¶ 36.) JPC responded it would need to recalculate the conversion notice to account for the fee which it would then charge back to Cuentas. (Plaintiff's SUMF, ¶ 37, Ex. M at p. C_0334; Defendant's Resp. SUMF, ¶37.) The transfer agent also informed JPC that it was only holding 3,500,000 million shares in the Share Reserve and inquired whether JPC wanted to submit a revised conversion form for that number of shares or ask the transfer agent to request consent from Cuentas to issue an additional 77,480 shares. (Id. at p. C_0328.)

On April 27, 2017, JPC sent an updated Notice of Conversion that accounted for the transfer agent's fee as well as additional interest that had accrued since the April 13, 2017 Notice of Conversion. (Plaintiff's SUMF, ¶ 38, Ex M at p. C_0334; Ex. O; Defendant's Resp. SUMF, ¶ 38.) It sought to convert $72,014.38 into 3,600,720 shares of Cuentas's common stock, again using the Note's Standard

[2] See also Defendant's SUMF, ¶ 5, Ex. 3 and 4; Plaintiff's Resp. SUMF, ¶ 5.

Conversion Formula and its 8% non-default interest rate. (Plaintiff's SUMF, ¶¶ 38 and 39, Ex. O and P; Defendant's Resp. ¶¶ 38 and 39.) Specifically, it sought to convert: $70,000.00 in outstanding principal, $1,764.38 in accrued interest for the entire span of the Note, and the $250.00 transfer fee. (Id., Ex. O at p. C_1999). On April 27, 2017, May 3, 2017, May 5, 2017 and June 29, 2017, the transfer agent reminded JPC only 3,500,000 shares were held in the Share Reserve and asked JPC if it would accept that number of shares or request authorization for Cuentas to issue an additional 100,720 shares or increase the Share Reserve. (Plaintiff's SUMF ¶¶ 40-44, Ex. M at pp. C_0337; C_0343; Defendant's Resp. SUMF, ¶¶ 40-44.)

On June 29, 2017, JPC requested the available shares stating, "I will deal [with] rest and opinion later" and the transfer agent requested JPC provide a revised Notice of Conversion. (Plaintiff's SUMF, ¶ 46; Ex. R at p. C_1891 and Ex. M at pp. C_0344-C_0345; Defendant's Resp. SUMF, ¶ 46.) However, the next day, on June 30, 2017, before receiving a revised notice, the transfer agent expressly asked Cuentas for authorization to issue additional shares. (Plaintiff's SUMF, ¶ 47, Ex. M and Ex. S at p. C_0347; Defendant's Resp. SUMF, ¶ 47.) JPC joined in the request, reminding Cuentas the Note called for 10,000,000 shares to be placed in the Share Reserve, and asking Cuentas "to authorize the issuance" of the additional shares. (Id. at p. C_0348.) The JPC representative stated, "[i]f this is not agreeable I am still demanding that at a minimum the 3.5 [million] shares be sent immediately." (Id.)

On July 1, 2017, Cuentas authorized issuance of the remaining 100,720 shares necessary to comply with JPC's April 27, 2017 Notice of Conversion. (Id. at p. C_0355.) (Id.) JPC was informed and its agent indicated his thanks. (Id.) All 3,600,720 shares were received by JPC by July 5, 2017. (Plaintiff's SUMF, ¶ 48; Defendant's Resp. SUMF, ¶ 48; Defendant's SUMF, ¶ 6, Ex. 5; Plaintiff's Resp. SUMF, ¶ 6.) JPC subsequently sold those shares for $89,263.32. (Defendant's SUMF, ¶ 9, Ex. 6, pp. 142-144, Ex. 7; Plaintiff's Resp. SUMF, ¶9.)

Cuentas does not concede it breached the Note. (Brief in Support of Defendant's Motion, n. 1.) However, this Court finds no dispute that a breach occurred due to the failure of Cuentas to maintain the required Share Reserve or to timely respond to JPC's Notice of Conversion.

On December 1, 2017, approximately five months after the aforementioned conversion was completed, JPC made a demand upon Cuentas for "penalties due" pursuant to the Note based upon Cuentas's breaches. (Defendant's SUMF, Ex. 6 at p. 211-215; Ex. 10.) The demand calculated amounts purportedly owed under the Default Conversion Formula, Failure to Deliver Daily Penalty, and Make Whole Remedy, applying Default Interest to each category, resulting in a total "penalty" figure of $305,368.63. (Id., Ex. 10 at p. C_1959.)

2.4 The Lawsuit

JPC filed a lawsuit against Next Group Holdings in Florida, seeking to collect

on the default provisions of the Note, but that action was voluntarily dismissed on October 18, 2018. (Defendant's Mot. to Strike, Ex. 1; Plaintiff's Resp. to Mot. to Strike, p. 2.) The Note contains a forum selection clause consenting to the exclusive jurisdiction of state or federal courts sitting in Fulton County Georgia. (Note, § 14). JPC filed its original Verified Complaint against Next Group Holdings in this Court on December 14, 2018, asserting a claim for breach of contract, an alternative claim for specific performance, and two claims seeking to recover attorney's fees. JPC's complaint sought liquidated damages in excess of $1.1 million including recovery under the Default Conversion Formula, Failure to Deliver Daily Penalty, and the Make Whole Remedy as well as Default Interest. (Verified Complaint, ¶ 33.) On May 14, 2019, Plaintiff's Amended Verified Complaint was filed. It was substantially similar to the initial Complaint but named Cuentas, Inc., New Group Holdings' successor, as Defendant. On January 15, 2020, JPC filed a Notice of Amendment to Plaintiff's Amended Verified Complaint, withdrawing all allegations seeking to recover the Failure to Deliver Daily Penalty. The one-page amendment also changed the amount of Plaintiff's damages from a specified sum to "an amount to be proven at trial, but not less than one million dollars."

At the conclusion of discovery, the parties filed the cross motions for summary judgment now before the Court. JPC seeks to enforce the Note and now asserts the amount of its liquidated damages exceeds $54 million. (Plaintiff's Mot.,

pp. 16-17.) Cuentas argues the Note's Default Conversion Formula, Make Whole Remedy and Default Interest constitute impermissible penalties and are thus unenforceable. (Defendant's Mot., p. 1; Defendant's Resp. to Plaintiff's Mot., pp. 10-12.) Alternatively, Cuentas contends JPC waived any of these remedies by seeking and obtaining Cuentas's performance under the non-default provisions of the Note after learning of Cuentas's default. (Defendant's Mot., p. 16; Defendant's Resp. to Plaintiff's Mot., pp. 2-10.)

3. ANALYSIS

3.1 Standards Governing the Review of Liquidated Damage Contract Provisions

Pursuant to O.C.G.A. § 13-6-7, "[i]f the parties agree in their contract what the damages for a breach shall be, they are said to be liquidated and, unless the agreement violates some principle of law, the parties are bound thereby." However, as case law provides, this statute will not serve to enforce a penalty camouflaged as a liquidated damage provision. A contract term "that is intended to deter breaches of the contract by imposing a penalty for a breach that is not a reasonable pre-estimation of damages is unenforceable under Georgia law." West Asset Mgmt., Inc. v. NW Parkway, LLC, 336 Ga. App. 775, 784 (2016) citing Southeastern Land Fund, Inc. v. Real Estate World, Inc., 237 Ga. 227, 230 (1976). Georgia has established a three-part test for analyzing whether a liquidated damages provision should be considered an unenforceable penalty: (1) the injury caused by the breach

must be difficult or impossible of accurate estimation; (2) the parties must intend to provide for damages rather than for a penalty; and (3) the sum stipulated must be a reasonable pre-estimate of the probable loss. Id.

The burden of proving a liquidated damages clause is an unenforceable penalty rests upon the party who defaults on the agreement. West Asset Mgmt. at 784-785. The defaulting party carries this burden by demonstrating a failure in any one of the three factors. Caincare, Inc. v. Ellison, 272 Ga. App. 190, 192 (2005). "The enforceability of a liquidated damages provision in a contract is a question of law for the court which necessarily requires the resolution of questions of fact." Id. (citation omitted.) "In cases of doubt, the courts favor the construction of a contract which holds the stipulated sum to be a penalty, and limits the recovery to the amount of damages actually shown, rather than a liquidation of the damages." West Asset Mgmt. at 785 (citation and punctuation omitted.)

3.2 Application of Georgia's Three-Part Test to the Make Whole Remedy and Default Conversion Formula

Initially, the Court considers the enforceability of the Note's Default Conversion Formula and the Make Whole Remedy.

The first factor of Georgia's three-part analysis requires the Court to consider whether the damages caused by the breach are difficult or impossible to estimate. Longstanding Georgia law holds damages owed for the contractual failure to deliver stock is the difference between the purchase price and the "actual market value of

the stock at the time when delivery should have been made . . ." Brandt v. Buckley, 27 Ga. App. 515, 519 (1921). Brandt further asserts, "[t]he claim of the buyer for damages for the failure of the seller to make delivery is ordinarily a claim for *unliquidated* damages . . ." Id. (emphasis added.)

Based upon the unique nature of a convertible note, JPC argues the unpredictability of the market for Cuentas stock renders an estimation of damages impossible. (Plaintiff's Resp. to Defendant's Mot., pp. 7-8.) Specifically, it contends, "the volatility of [Cuentas's] stock price is the very reason the Note required [Cuentas] to promptly satisfy a conversion request; any significant delay in honoring [JPC's] request would subject [JPC] to unpredictable future market gyrations." (Id. at p. 9; see also Canouse Aff., ¶¶ 47, 55, 61). Georgia courts have not specifically addressed whether the damages for breach of a convertible note for failure to timely deliver the stock are difficult or impossible to accurately estimate.[3] However, the issue has been the subject of several recent federal court decisions applying New York law.

Like, Georgia, New York will enforce liquidated damage provisions so long as they do not constitute a penalty. It employs a two-part test for making the analysis, and the first element of its test -- whether actual damages are difficult to

[3] In Pure Hospitality Sols. at 595-598, the Georgia Court of Appeals considered whether damages sought under a convertible note were liquidated for purposes of default judgment under O.C.G.A. § 9-11-55(a). It did not address any aspect of O.C.G.A. § 13-6-7 or the three-part Georgia analysis of how an enforceable liquidated damage provision differs from an unenforceable penalty.

determine – is similar to the first element of Georgia's test. LG Capital Funding, LLC v. CardioGenics Holdings, Inc., No. 16-CV-1215, 2018 WL 1521861, at *7 (E.D. N.Y. Feb. 2, 2018), Report and Recommendation adopted, 2018 WL 2057141, at *3 (E.D. N.Y. Mar. 8, 2018) rev'd on other grounds, 787 F. App'x 2 (2d Cir. 2019); LG Capital Funding, LLC v. Accelera Innovations, Inc., No. 17-CV-1460, 2018 WL 5456670, at *9 (E.D. N.Y. August 13, 2018); LG Capital Funding, LLC v 5Barz Int'l., Inc., 307 F. Supp. 3d 84, 101 (2018); Union Capital, LLC v. Vape Holdings, Inc., No. 16 Civ. 1343, 2017 WL 1406278, at *7 (S.D. N.Y. March 31, 2017). Like Georgia, New York law considers this element based on the time the contract was executed, not when it was breached. Compare Turner v. Atlanta Girls' School, Inc., 288 Ga. App. 115, 116-117 (2007) (difficulty of estimating damages must exist at the time the contract was made, not at its breach) with LG Capital v. CardioGenics, at *10 ("in determining whether liquidated damages are available, the Court must examine the provision as of its date, not the breach"). Each of the aforementioned New York cases considered "make whole" provisions in convertible notes, similar to the one at issue here, and each rejected the claim that the damages were not easily ascertainable.[4]

[4] LG Capital Funding v. CardioGenics at *7-9; LG Capital Funding v. Accelera Innovations, at *12; LG Capital Funding v. 5Barz Int'l. at 103; Union Capital at *7.

Like the plaintiff in LG Capital Funding v. CardioGenics, JPC argues the actual damages for the failure to convert were difficult to ascertain because all of the pertinent factors were unknown at the time the Note was issued – when the conversion would occur, the amount of the conversion and/or the trading price of the stock. (Plaintiff's Resp. to Defendant's Mot., p. 7.) However, the New York court determined all of these factors simply suggest the amount of damages could vary widely, not that the damages were difficult to ascertain. Because "the quantum is unknown does not make the damages difficult to determine." Id. at *8 (punctuation omitted.) As noted in LG Capital Funding v. Accelera Innovations, "[d]etermining the damages in the event of a failure to deliver converted shares was no more complicated or ephemeral than the method of calculating the conversion in the first place." Id. at *12. Likewise, in Georgia, the measure of damages incurred because of Cuentas's failure to timely comply with the Notice of Conversion is readily ascertainable as outlined in Brandt. Brandt at 519. Applying this same reasoning, the Court finds both the Make Whole Remedy Default Conversion Formula do not comport with the first element of the Georgia test.

Under the second element of the Georgia test, an enforceable liquidated damage provision must be intended to assess damages and not inflict a penalty. "[Georgia] ascertain[s] the intent of the parties by first looking to the language of the contract. Although the words used by the parties are not conclusive, they are a

significant factor in determining the parties' intent." West Asset Mgmt. at 785 (citations omitted.) Unlike the Failure to Deliver Daily Penalty, which was expressly described as a penalty, the Note is silent as to the intent of the Make Whole Remedy or the Default Conversion Formula, not indicating whether they were intended as liquidated damages or penalties.

Looking outside the Note, the Court finds no evidence the parties intended these remedies to function as liquidated damages in the sense contemplated by O.C.G.A. § 13-6-7 and corresponding Georgia law. Further, JPC's December 1, 2017 demand letter, and the subsequent deposition testimony of its 30(b)(6) representative, who actively negotiated the Note, clearly and expressly reflect JPC always envisioned these remedies as penalties. (Canouse Aff., ¶¶ 124-140; Defendant's SUMF, Ex. 6 at pp. 122-125; 211-215; Ex. 10) As its corporate representative testified,

> JPC: [t]he penalties are specifically [in the Note] to encourage [Cuentas] to act responsibly . . . .
>
> Q: The penalties are there to make sure the company pays. Right?
>
> JPC: To make sure they do what they agreed to do.

(Id., Ex. 6, p. 123.)

The Court finds the Make Whole Remedy and Default Conversion Formula were intended to penalize Cuentas for breaching the Note.

Furthermore, the third element of the Georgia test requires the Court to consider whether a liquidated damage provision is a reasonable pre-estimate of the loss. Although worded differently this element is substantially similar to the second element of the New York test, which considers whether the liquidated damages are disproportionate to the potential loss. LG Capital Funding v. CardioGenics, at *7. The similarity of these two elements is reflected in LG Capital Funding v. Accelera Innovations which, in discussing New York's proportionality analysis, explained, "[a]n enforceable liquidated damages clause is an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement." Id. at *12 (punctuation omitted) citing Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc., 41 N.Y.2d 420, 424 (N.Y. 1977).

With regard to the Make Whole Remedy, the Court is again persuaded by the reasoning employed in the line of New York cases as to why the third element of the Georgia test has not been met. Union Capital at *7. The Make Whole Remedy gives JPC total control over if and when to exercise the remedy and provides JPC with the highest market price on any date subsequent to the failure to convert. Thus, the Make Whole Remedy is "designed to provide [JPC] with a guaranteed higher cash payout than a true make-whole measure, which would focus only on [JPC's] loss as a result of [Cuentas's] failure to abide by the terms of its bargain . . . [T]he so called

'Make-Whole' provision of the Note is nothing of the sort and is instead an unenforceable penalty." Id.

Additionally, the Court finds the Default Conversion Formula -- which adds ten percent to the conversion discount price, and five days to the lookback period, and eliminates the share price floor -- does not reflect a reasonable pre-estimate of JPC's damages based upon Cuentas's failure to timely convert. As to this element, "the touchstone question is whether the parties employed a reasonable method under the circumstances to arrive at a sum that reasonably approximates the probable loss." Mariner Health Care Mgmt. Co. v. Sovereign Healthcare, LLC, 306 Ga. App. 873, 876 (2010) (citation and punctuation omitted.)

JPC asserts the Default Conversion Formula only imposes "modest adjustments" to the Standard Conversion Formula, concluding "[t]his is reasonable given the additional risk to which an event of default leaves a convertible note holder exposed." (Plaintiff's Resp. to Defendant's Mot., pp. 14-15; Canouse Aff., ¶¶ 136-137; 158-159, and 176-178.) JPC also argues these types of adjustments comport with industry standards. (Plaintiff's Resp. to Defendant's Mot., p. 12; Canouse Aff., ¶¶ 65-68.) JPC's arguments miss the point of Mariner. The question posed by the third element is not to determine whether there was a reasonable purpose for the Default Conversion Formula but whether "the parties employed a reasonable method" for estimating the loss when arriving at the Default Conversion Formula.

Mariner, at 876. In Mariner, specific evidence reflected that the lost profits allowed in the subject liquidated damages provision very closely mirrored actual profit margin in the contract, thus supporting the determination that the method for approximating the probable loss was reasonable. Id. In this case, as in Daniels v. Johnson, 191 Ga. App. 70, 72 (1989) (citations omitted), the liquidated damages provision is unenforceable because, "[i]t is clear that the parties did not make a bona fide effort to liquidate in advance and agree upon the sum which should represent the damages which would be actually sustained in the event of a breach."

For these reasons, the Court finds the Note's Make Whole Remedy and Default Conversion Formula are unenforceable.

Having determined these two remedial provisions are unenforceable, the Court has considered JPC's request that, pursuant to the Note, "such provision[s] shall be adjusted rather than voided, if possible, so that [they are] enforceable to the maximum extent possible." (Note § 9; Plaintiff's Resp. to Defendant's Mot., pp. 16-17.) Assuming without deciding that Georgia empowers a court to modify the unenforceable provisions of a written contract, based upon the facts of this case, the Court does not find any modification could breathe life into either of these remedies. As outlined in the analysis of the first element of Georgia's test, the damages caused by failure to deliver stock are easily measured and are not a proper subject for liquidated damages provision. Further, as to the second element, the Court cannot

ignore these two provisions were intended as penalties and while the Court may have the ability to modify contract language, there is no way it can modify a party's intent. Finally, Georgia law clearly provides that if a liquidated damages provision is unenforceable, recovery is limited to "the amounts of damages actually shown." West Asset Mgmt. at 785. Accordingly, the Court finds it is not "possible" to alter these liquidated damage provisions in a way as to make them enforceable. (Note, § 9.)[5]

3.3 Default Interest

3.3.1 Default Interest is Not a Species of Liquidated Damages

Cuentas makes little effort to independently consider the Note's Default Interest provision in its three-part liquidated damages analysis, and the Court is not convinced the Note's allowance for Default Interest is properly analyzed as a liquidated damages provision. Under Georgia law, parties are able to contract as to their interest rate so long as the rate is not usurious. In pertinent part, O.C.G.A. § 7-4-2(a)(1)(A) provides: "*[n]otwithstanding the provisions of other laws to the contrary*, except Code Section 7-4-18 [criminal penalty for excessive interest

[5] The Court is mindful that convertible notes may be considered an innovative way of financing early-stage companies that can be inherently risky but occasionally very lucrative for investors. (Coyle Aff., ¶ 3; Canouse Aff., ¶¶ 21-46). Georgia's law of liquidated damages does not specifically contemplate these types of contracts, and it is not within the Court's purview to determine whether these types of contracts may be desirable or manipulate longstanding law so as to accommodate this form of contract. The decision about whether these types of contracts should be encouraged and, if so, how the law should be crafted to address their unique damage issues, are questions to be answered by the Georgia Assembly. See generally Commonwealth Inv. Co. v. Frye, 219 Ga. 498, 499 (1963) ("the legislature, and not the courts, are empowered by the Constitution to decide public policy, and to implement that policy by enacting laws; and the courts are bound to follow such laws if constitutional.")

statute], *the parties may establish by written contract any rate of interest*, expressed in simple interest terms as of the date of the evidence of the indebtedness . . . ." (Emphasis supplied.)[6] As a provision of Georgia law "contrary" to O.C.G.A. § 7-4-2(a)(1)(A), the Court finds the liquidated damages analysis implicated by O.C.G.A. §13-6-7 does not apply to the Note's Default Interest provision.

The Court finds support for this conclusion in MMA Capital Corp. v. ALR Oglethorpe, LLC, 336 Ga. App. 360 (2016). In MMA Capital, the Georgia Court of Appeals determined that a default interest rate was not a penalty under O.C.G.A. §13-6-7. While it outlined the three-part test for evaluating a liquidated damages provision, it did not perform an analysis of the three factors. Instead, it only considered the more general question posed by the liquidated damages analysis of whether the default interest provision could be considered a penalty, determining it was not and noting it had found no prior authority on the question. Id. at 363-364. It reasoned, "[w]e have previously affirmed summary judgments to lenders even when the post-default interest rate was substantially higher than the pre-default rate" specifically citing Dawson Pointe, LLC v. Sun Trust Bank, 312 Ga. App. 338 (2011) where it had upheld a judgment granting post-default interest at 18% over the prime rate while the pre-default interest rate was only .25% over prime. Id. at 364.

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[6] Here, the Note expressly provides that if the Default Interest rate "is usurious or not permitted by current law, then [Default Interest shall accrue] at the highest rate of interest permitted by law." (Note, §8.) Here, Cuentas has not argued the Default Interest rate is usurious.

The Court finds the Note's provision for Default Interest complies with Georgia law permitting parties to contract on an interest rate and does not constitute an unenforceable penalty.

3.3.2 Calculation of Potential Default Interest Damages and Cuentas's Allegations of Waiver

First, the Court considers what Default Interest damages JPC might recover. As outlined above, while establishing the same process for each, the Note considered the conversion of principal and interest as separate concerns. The Note permits interest, and by extension Default Interest, to accrue solely on the outstanding principal. (Note, p. 1; § 4(b).) Specifically, the Note provides, "[t]he dollar amount converted into Interest Shares shall be all or a portion of the accrued interest calculated on the unpaid principal balance of this Note to the date of such notice." (Id., § 4(b).) The April 27, 2017 Notice of Conversion converted the entire principal balance $70,000.00. Thus, as JPC recognizes, interest ceased accruing as of April 27, 2017.[7] (Plaintiff's Br. in Support of Mot., pp. 13-14.)

That same Notice of Conversion also converted "accrued" interest of $1,764.38 calculated per the non-default rate for the duration of the Note. However, JPC now claims that it is entitled to $5,293.14 of interest on the outstanding principal balance calculated per the Default Interest rate for the same time period because

[7] This is consistent with the general purpose of a convertible note that permits a holder to convert his debt into equity. In this scenario, interest should stop accruing at the time the debt is converted.

Cuentas was in default of its Share Reserve obligations from the time it issued the Note. (Id.) Thus, the question is whether JPC is owed an additional $3,528.76 in Default Interest.

Cuentas contends JPC waived any breach regarding Cuentas's failure to maintain the required Share Reserve by not objecting in early February 2017 when: (1) it was first made aware of the Share Reserve's deficiency, and more importantly, after it indisputably received actual knowledge of Cuentas's breach and (2) it accepted the 3,600,720 shares as full payment. (Resp. to Plaintiff's Motion, pp. 2-8). JPC contends no waiver exists absent a writing as required under the Note. (Reply in Support of Plaintiff's Mot., pp. 6-7; Note, §§ 8 and 10.)

> [W]aiver of a contract provision may be express, or may be inferred from actions, conduct, or a course of dealing. Put another way, waiver of a contract right may result from a party's conduct showing his election between two inconsistent rights. . . [A]ll of the attendant facts, taken together, must amount to an intentional relinquishment of a known right, in order that a waiver may exist. But significantly, when the evidence is in conflict, the issue of waiver must be decided by the jury. Importantly, an anti-waiver provision in a contract can also be waived.

BCM Constr. Grp., LLC v. Williams, 353 Ga. App. 811, 815 (2020) (citations omitted.)

The Court finds clear and unequivocal evidence of an intentional waiver. The Note provides for non-default interest and Default Interest. The two are inconsistent in that, at any point while principal remains outstanding, the holder of the Note is entitled to one or the other, not both. The affidavit of the JCP agent who negotiated

the Note and represented JCP in all aspects of the conversion process indicates he was a sophisticated investor who had a great deal of experience with convertible notes. (Canouse Aff., ¶¶ 7-17.) The lengthy email exchange between him, Cuentas, and the transfer agent demonstrates JPC was specifically made aware of the breach on April 17, 2017; with knowledge of the breach JPC recalculated its conversion amounts to include additional interest that had accrued on the principal balance using the non-default interest rate; JPC expressly brought the breach to Cuentas's attention on June 30, 2017, and, in that very same email, it asked Cuentas to fully honor JPC's April 27, 2017 Notice of Conversion which was calculated using the non-default interest rate.

In light of the foregoing, the Court finds JPC fully converted all interest that had accrued on the Note's outstanding principal using the non-default rate of 8% and intentionally relinquished any right to subsequently seek additional interest on that same outstanding balance during the same time period using the more lucrative Default Interest rate.

3.4 Plaintiff's Other Claims for Relief

Defendant's Motion seeks summary judgment on Plaintiff's alternate claim for specific performance which seeks to compel Cuentas to issue stock shares to JPC. (Brief in Support of Defendant's Mot., pp. 17-18). See generally O.C.G.A. § 23-2-130 ("Specific performance of a contract, if within the power of the party, will be

decreed, generally, whenever the damages recoverable at law would not be an adequate compensation for nonperformance.") The Court agrees the equitable doctrine of specific performance is inapplicable to the present dispute because JPC has an adequate remedy at law. Id. As discussed above in the analysis of liquidated damages, a party is entitled to recover actual damages for the failure to timely deliver stock shares. See Brandt at 519.

Because JPC's substantive claims are subject to summary judgment, its derivative claims for attorney's fees also fail. Oconee Fed. Sav. & Loan Ass'n v. Brown, 351 Ga. App. 561, 576 (2019).

4. CONCLUSION

For all the above-stated reasons, it is hereby ordered that Defendant's Motion is **GRANTED** and Plaintiff's Motion is **DENIED**.

SO ORDERED this 7th day of October, 2020.

/s/ Kelly Lee Ellerbe
JUDGE KELLY LEE ELLERBE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

Electronically served upon registered service contacts through eFileGA

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