At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 10th day of January, 2020.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

LG CAPITAL FUNDING, LLC, Plaintiff, - against - PLAYERS NETWORK, INC., Defendant.	Index No.: 501117/2015 Motion Seq. # 4 DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	PAPERS NUMBERED
Notice of Motion, Affidavits, Affirmation & Exhibits	1
Plaintiff's Memorandum of Law	2
Affirmation in Opposition & Exhibits	3
Affidavit in Opposition & Exhibits	4
Memorandum of Law in Opposition	5
Plaintiff's Reply Memorandum of Law	6

Upon the foregoing papers Plaintiff, LG CAPITAL FUNDING, LLC (LG), moves this Court for an Order pursuant to CPLR § 3212 granting summary judgment in its favor. LG commenced the instant action on or about January 31, 2015 for 1) a declaratory judgment as to the conversion rate applicable to the purchase of certain stock, 2) reformation of a note, 3) specific performance of a "Securities Purchase Agreement" (SPA) and note, 4) breach of contract, 5) conversion and 6) costs and attorneys' fees.

Background

LG and Defendant, PLAYERS NETWORK, INC. (Players), entered into a SPA and contemporaneously executed a Convertible Redeemable Note on April 11, 2014. By the terms of the agreement, Plaintiff gave $35,000 to Defendant to be repaid in full by April 11, 2015 with

an interest rate of 8%. The note includes a provision permitting LG, at its option and upon demand ".... to convert all or any amount of the principal face amount of the Note then outstanding into shares of"[1] Players' common stock. The Note sets forth the conversion price for each share of common stock in the event that LG decides to exercise this option. On October 24, 2014, LG gave notice to Players that it was exercising this option and set forth the amount of common stock Plaintiff sought. Pursuant to the Note's terms, Players had three days to deliver the shares of stock requested in the Conversion Notice. Players did not deliver the shares of stock and the instant action ensued. Players argues that it could not comply with the conversion notice because the formula used by LG to calculate the value of each share of stock deviated from that set forth in the parties' agreement.

Section # 4 (a) of the note states that the conversion rate is equal to 55% of the average of the lowest closing bid price as reported on the National Quotations Bureau Exchange for the prior twelve trading days including the day upon which a Notice of Conversion is received by Players. LG contends that this provision does not correctly reflect the parties' intention. LG alleges that the parties intended the conversion rate to be equal to **55% of the lowest** closing bid price for twelve days prior..., rather than **55% of the average of the lowest** closing bid price for twelve days prior. LG further contends that the inclusion of the term "average of" was a typographical error. Plaintiff calculated the shares of stock requested in its Conversion Notice by ignoring the term "average of" and took 55% of the lowest closing bid price during the prior twelve days.

[1] ¶4(a) of the Note attached as Exhibit "D" to Affirmation in Support by Joseph Lerman.

In opposition to Plaintiff's motion for summary judgment, Defendant argues that LG's basis for its calculation is illogical as there is only one closing bid price for each day and therefore there can be no average of a single value. Players further argues that the terms "lowest" and "average of" when read together present an ambiguity. However, Players asserts that 1) extrinsic evidence will not resolve the matter and should be precluded and 2) there are several issues of fact requiring a denial of LG's motion. In reply LG argues that 1) the agreement is not ambiguous or, in the alternative, 2) Plaintiff should be permitted to rely upon extrinsic evidence in support of its motion for summary judgment to establish the parties' intention.

Analysis

A contract should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases. ***Consedine v Portville Cent. School Dist., 12 NY3d 286, 293 (2009), citing South Rd. Assoc, LLC v. International Bus. Machs. Corp., 4 N.Y.3d 272, 277 (2005)*** Courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing. ***Id at 293, quoting Reiss v. Financial Performance Corp., 97 N.Y.2d 195, 199 (2001)***. Whether a contract is ambiguous is "an issue of law for the courts to decide." ***Greenfield v Philles Records, 98 NY2d 562, 569 (2002).*** If a contract, when read as a whole, fails to disclose its purpose or when specific language is susceptible of two reasonable interpretations, the courts have found that an ambiguity exists. ***Legum v Russo, 133 AD3d 638, 639-40 (2d Dept 2015), citing Ellington v EMI Music, Inc., 24 NY3d 239, 244 (2014)***. Where a contract is ambiguous, extrinsic evidence may be considered as an aid in construction as long as it does not vary or contradict the writing. ***Schron***

v Troutman Sanders LLP, 20 NY3d 430, 436 (2013); County of Nassau v Tech. Ins. Co., Inc., 174 AD3d 847, 849 (2d Dept 2019); Vivir of LI, Inc. v. Ehrenkranz, 127 AD3d 962, 964 (2d Dept 2015).

LG submits Players' 10-K filing[2] to the Securities and Exchange Commission for the fiscal year ending December 31, 2014 as extrinsic evidence in support of its motion for summary judgment. Contained therein is a chart listing the convertible notes it issued for that year and their terms. All but one of the fifteen convertible notes listed contain similar language for calculating the price of the common stock shares. Except for the subject note, each of the remaining thirteen notes states that the price of the stock shall be equal to a percentage of the average of either the **two** or **three** lowest trading prices for a specified number of days prior to receipt of the Conversion Notice.

While the Court agrees that the language contained in ¶4(a) of the Note in dispute is ambiguous on its face, LG has not submitted any evidence that resolves the ambiguity. The list of other notes given in 2014 clearly indicates that a number was omitted from the phrase "of the average of the lowest". Any number would give meaning and clarity to the aforementioned phrase. The Court finds that the note in dispute is ambiguous and its construction can only be resolved by the trier of fact. ***Five Corners Car Wash, Inc. v Minrod Realty Corp., 134 AD3d 671, 672 (2d Dept 2015).*** Therefore, LG has failed to establish a prima facie case of entitlement to summary judgment as a matter of law. ***Dobbs v North Shore Hematology-Oncology Associates, P.C., 106 AD3d 771 (2d Dept 2013)***. LG's failure to meet its prima facie burden requires the denial of its motion, regardless of the sufficiency of the

[2] Exhibit "G" annexed to Affirmation by Joseph Lerman.

opposing papers. ***TKM Group, Inc. v Indian Harbor Ins. Co., 130 AD3d 606, 606 (2d Dept 2015), citing Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985).*** The parties' remaining contentions are without merit. Accordingly, plaintiff's motion is denied in its entirety.

ENTER,

LOREN BAILY-SCHIFFMAN
JSC

HON. LOREN BAILY-SCHIFFMAN