

In the Supreme Court of Nevada

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Elizabeth A. Brown
Clerk of Supreme Court

BLACKSTAR ENTERPRISES GROUP,
INC.,

Appellant,

vs.

GS CAPITAL PARTNERS LLC,

Respondent.

**RESPONDENT GS CAPITAL
PARTNERS, LLC'S
OPPOSITION TO MOTION
FOR STAY PENDING APPEAL**

Respondent GS Capital Partner, LLC ("GS Capital") opposes Appellant Blackstar Enterprises Group, Inc.'s ("Blackstar") Motion to Stay the injunction order of the district court ("Order") (Dkt. No. 26) pending the outcome of the subject appeal. NRAP 8(c) weighs decidedly against a stay because the object of Blackstar's appeal will not be defeated if a stay is denied, Blackstar cannot show any irreparable harm absent a stay, significant harm would result to GS Capital if a stay is granted, and there is a high likelihood that Blackstar will be unsuccessful in its appeal.

I. BACKGROUND

In trying to create a false sense of urgency to obtain the extraordinary remedy of an indefinite stay of the Order, Blackstar misstates nearly every aspect of this case.

First, Blackstar mischaracterizes the nature of the parties' underlying convertible loan transaction. The Note (defined below) includes a "conversion option" (akin to

a stock option) that allowed GS Capital to convert the debt into shares of Blackstar's publicly traded stock. Blackstar was required to establish a reserve of its shares ("Stock Reserve") earmarked for GS Capital to receive upon exercising its conversion rights. Thus, contrary to Blackstar's contention, the Stock Reserve was not "collateral" pledged as "security," but was a separate bargained-for right under the Note—a GS Capital "option" to convert debt to stock. Because of a dramatic increase in Blackstar's stock price, the "conversion option" here became "in the money" and profitable. Naturally, GS Capital sought to exercise its conversion rights to receive shares of Blackstar stock—the benefit of its bargain. Blackstar refused. Then, after several weeks—during which GS Capital would have received about 257 million shares through conversions—Blackstar attempted to pay off the Note and thereby argue that, *retroactively*, GS Capital's conversion rights are thereby extinguished. GS Capital argued this absurd result would be similar to a stock option seller unilaterally returning the option's purchase price in an effort to rescind the option purchase because the option was now "in the money" and costly to the seller. The lower court correctly agreed with GS Capital and required Blackstar to reserve the contractually-mandated shares.

Second, Blackstar shockingly omits that it contractually agreed that GS Capital is entitled to injunctive relief and specific performance in the event of a breach, on which the Order correctly relied. Blackstar also omits that the Note, as amended—

under which GS Capital sued—provided for exclusive Nevada jurisdiction.

Third, Blackstar incorrectly states that absent a stay the Order’s harmful implications are “permanent.” If this court overturns the Order, GS Capital can purchase the 257 million shares in the open market (in which there are currently over 1.5 trillion Blackstar shares trading) and return them to Blackstar. Indeed, granting a stay would cause irreparable harm to GS Capital: if the Order is affirmed and the stay prevents GS Capital from timely exercising its conversion rights, it is highly unlikely that GS Capital would receive the benefit of its bargain.

a. RELEVANT FACTS

On October 11, 2021, the parties entered into a Securities Purchase Agreement (“SPA”) and Convertible Redeemable Promissory Note (“Note”). *See* Piekarski Decl., Exs. “1” and “2”, Ex. A to Opp. to MTD (Dkt. No. 48). Originally, the SPA and Note provided for New York jurisdiction. *See* SPA, Section 5(a); Note, Section 15. However, on October 20, 2021, the parties amended the Note’s governing jurisdiction and venue provisions such that both parties “*consent[ed] to exclusive jurisdiction and venue in the courts of the State of Nevada.*” First Amendment to Convertible Promissory Note (“Amendment”), Piekarski Decl., **Ex. “3”**.

The Note included a “conversion option” that allowed GS Capital to convert the debt into shares of Blackstar’s publicly traded stock. In support thereof, the Note required Blackstar to establish a Stock Reserve in the amount of “four times the

number of shares required if the note would be fully converted.” *See* Note, Section 12, **Exhibit “1”** to the Piekarski Decl. The Note also permitted GS Capital to “reasonably request increases from time to time to reserve such amounts” to ensure the Stock Reserve contained the required number of shares.

On November 2, 2023, GS Capital demanded that Blackstar increase the Stock Reserve by at least 700,000,000 shares, based on the remaining balance of the Note. *See* Omnibus Declaration of Gabe Sayegh, ¶ 8, Exhibit “F” to GS Capital’s Reply to its Injunction Motion (Dkt. No. 19). That same day, GS Capital submitted paperwork to exercise its conversion rights for 62,084,333 shares of Blackstar stock—the maximum amount allowed under the Note’s “equity blocker” prohibiting more than 4.99% ownership at any given time (“Nov. 2 Conversion”). *Id.* ¶ 9. Blackstar simply refused to comply with both requests.

The harm imposed by Blackstar’s breach was then compounded on November 7, 2023, November 10, 2023, and November 16, 2023 (the “Subsequent Conversions”), on which dates GS Capital would have converted and sold additional shares. The Note afforded GS Capital conversion rights to 257,701,499 shares from November 2, 2023, to November 16, 2023. *See* Reply to Injunction Motion (Dkt. No. 19), 6:4-13; *see also* Decl. of Gabe Sayegh at ¶¶ 9-15.

On November 7, 2023, GS Capital filed its Complaint and a motion for a temporary restraining order, preliminary injunction and specific performance to

enforce Blackstar’s compliance with the terms of the Note (“Injunction Motion”).

During the Injunction Motion briefing, Blackstar tried to retroactively cure its breach (and resulting damages) by wiring an incorrect sum of funds to GS Capital, despite GS Capital’s protests, then using that wire to argue that the Note was *retroactively* fully paid off and the Complaint and Injunction Motion were thus moot. After entertaining oral argument and allowing both parties to submit supplemental briefing on the issue, the district court entered its Order granting GS Capital’s Injunction Motion on December 18, 2023, holding, *inter alia*, that Blackstar’s wire could not retroactively cure its purposeful breach. Importantly, in all the briefing and oral argument on the Injunction Motion, Blackstar did not once raise any objection to the district court’s jurisdiction.

Dissatisfied with the Order, Blackstar moved for reconsideration on December 29, 2023 (“Reconsideration Motion”), arguing that the district court had committed “clear error” and asserting, for the first time, the exact jurisdictional argument that serves as the basis for its Motion to Stay—that the SPA’s jurisdiction provision somehow dictates jurisdiction for a breach of the Note. *See* Reconsideration Motion, Section III.C.1. The Court correctly rejected this argument and denied Blackstar’s Reconsideration Motion on January 16, 2024. *See* Order Denying Blackstar’s Motion for Reconsideration. Despite rejecting the Reconsideration Motion on the merits, the district court stayed the Order until this

Court could determine whether a stay pending appeal is appropriate. *Id.*

Blackstar now seeks a stay of the Order despite providing no credible argument as to why the same should be reversed. Blackstar's Motion should be denied and the district court's stay should be terminated in the event the stay, which terminates on February 15, 2024, is still in effect at the time of this Court's ruling.

II. ARGUMENTS / LEGAL ANALYSIS

The NRAP 8(c) factors weigh decidedly against granting Blackstar's request to stay the Order pending appeal. The district court was correct in its analysis of the parties' respective rights and ultimate decision. For these reasons, this Court should deny Blackstar's stay request.

A. Blackstar is Highly Unlikely to Succeed on the Merits of Its Appeal.

Blackstar makes identical arguments as those made and denied in its Reconsideration Motion, and which fail for the following reasons.¹ First, Blackstar waived its right to raise a jurisdictional defense by failing to assert it in the parties' preliminary injunction briefing and oral argument. *Aerodynamics Inc. v. Caesars Ent. Operating Co., Inc.*, No. 215CV01344JADPAL, 2017 WL 1100901, at *3 (D. Nev. Mar. 21, 2017) (defendant's failure to raise jurisdiction objection in its opposition to plaintiff's motion for TRO and preliminary injunction constituted

¹ As Blackstar simply repeats the same arguments in its prior briefing, the parties' briefing pursuant to Blackstar's Motion for Reconsideration and Motion to Dismiss are worthy of review to understand the significant likelihood that Blackstar's appeal will fail on the merits and the district court's exhaustive analysis of the same. (Dkt. Nos. 34, 36, 38, 39, 42, 48).

waiver of the same despite defendant's later raising it in its first responsive pleading.). Further, even if Blackstar had timely asserted this defense, the district court had appropriate jurisdiction over the matter, because the amended Note—the contract breached by Blackstar—contains a Nevada jurisdiction provision.

Second, the district court held that Blackstar's act of wiring payment *after* its breach of the Note cannot retroactively cure Blackstar's breach or unwind GS Capital's "conversion option" and related injunction rights that arose immediately upon Blackstar's breach. The district court correctly found that Blackstar could not retroactively cure its purposeful breach and determined GS Capital's remedies for that breach (*i.e.*, the Nov. 2 and Subsequent Conversions).

Third, Blackstar was well aware from the first pleading that GS Capital was requesting injunctive relief and specific performance for GS Capital's reservation and conversion rights under the Note. Indeed, both GS Capital's Injunction Motion and Complaint requested that Blackstar be compelled to replenish the Stock Reserve with sufficient shares for GS Capital to exercise its conversion rights, as well as enjoining Blackstar from interfering with GS Capital's conversions. Thus, Blackstar's argument that it was not on notice of the requested relief and, therefore, not given an opportunity to respond is simply incorrect and belied by the record.

Fourth, the Note's provisions ensure that the requested relief will not violate federal security law. Specifically, the Note precludes GS Capital from owning more

than 4.99% of Blackstar's stock for the sole purpose of compliance with federal securities laws. Relatedly, Blackstar misstates the Order, which did not require Blackstar to *transfer 20% of its stock to GS Capital*; rather, the Order required Blackstar to transfer shares into the Stock Reserve, which are merely earmarked for, but not owned by, GS Capital.

Finally, the SPA and Note required that injunctive relief and specific performance be granted in the event of Blackstar's breach. *See* SPA, p. 11, Section 5(L), Exhibit "1" to Decl. Sayegh. Blackstar has never argued that it did not breach the Note. Consequently, the district court simply enforced GS Capital's bargained-for remedy. *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005) ("The court has no authority to alter the terms of an unambiguous contract."); *Matter of Part 60 Put-Back Litig.*, 165 N.E.3d 180, 186 (2020) (internal citations omitted) (holding the parties' contract as written is enforceable, including the remedies provision). Even if Blackstar had not previously consented to this remedy, specific performance was appropriate here, given Blackstar's imminent insolvency and the extreme volatility of its shares.

B. The Object of The Appeal Will Not Be Defeated if a Stay is denied.

Blackstar argues that the object of its appeal will be defeated because GS Capital will sell the 257 million Blackstar shares it receives. However, if Blackstar's appeal is granted, GS Capital could simply be required to return the 257 million Blackstar

shares by purchasing them in the open market and returning them to Blackstar. There are currently over 1.5 trillion Blackstar shares trading in the public market, more than sufficient for GS Capital to purchase 257 million.

In fact, prior to Blackstar's appeal, GS Capital had already converted and received 124,107,666 shares of Blackstar stock consistent with the Order. This, apparently, did not defeat the object of Blackstar's appeal. Consequently, Blackstar cannot articulate how permitting GS Capital to complete the remaining conversions ordered by the district court (such that the value of the shares is preserved as explained more fully below) somehow frustrates the object of its appeal merely because more shares will be converted.

C. Blackstar Will Suffer No Irreparable Harm if a Stay is Denied.

Blackstar does not even attempt to argue, let alone establish with any evidence, that it will suffer irreparable harm if a stay is denied. Further, as mentioned, any "harm" resulting from GS Capital's sale of Blackstar stock could be remedied through the return of shares and/or compensatory damages. *Cnty. Mgmt. v. Gilmore*, 131 Nev. 347, 353, 351 P.3d 720, 723 (2015) ("Irreparable harm is an injury for which compensatory damage is an inadequate remedy.") (internal quotations and citations omitted).

D. GS Capital Would Suffer Substantial Harm.

On the other hand, GS Capital has suffered and will continue to suffer substantial,

irreparable harm if a stay is granted. Blackstar is currently on the brink of insolvency. *See* Blackstar’s 10-Q, Exhibit “11” to Sayegh Decl. Due to its precarious financial position, its stock price is extremely volatile. In fact, in the short time since the Order was entered, Blackstar’s stock has fallen approximately 72%, resulting in significant, irreparable damages to GS Capital during the district court’s stay. Further, Blackstar’s stock price has historically been much lower than the November 2023 price surge, and the recent precipitous decline indicates a clear reversion to the historical mean, which would represent an additional 80% drop from current levels.² A stay from this Court would only serve to compound the irreparable harm that has already occurred as the value of Blackstar’s stock becomes more tenuous with each day a stay is in place.

CONCLUSION

For the foregoing reasons, Blackstar’s Motion for Stay should be denied and the stay on the district court’s order lifted.

² <https://finance.yahoo.com/quote/BEGI/history/>. This Court may take judicial notice pursuant to Chapter 47 of the Nevada Revised Statutes under the Nevada Rules of Evidence. *See* NEV. REV. STAT. §§ 47.130-.170; *see also* *Brelia v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993) (allowing Nevada courts to take judicial notice of matters of public record); *FGA, Inc. v. Giglio*, 128 Nev. 271, 286, 278 P.3d 490, 500 (2012) (same).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed and served the **RESPONDENT GS CAPITAL PARTNERS, LLC'S OPPOSITION TO MOTION FOR STAY PENDING APPEAL** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System on the below listed date:

DATED: January 30, 2024

/s/ Annette Jaramillo
An Employee of Lewis Roca Rothgerber Christie LLP