STATE OF NORTH CAROLINA BUNCOMBE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 22 CVS 1524
DANIEL J. LARIMER, Plaintiff, v. EARTH FARE 2020, INC., Defendant.	**ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

THIS MATTER comes before the Court on Plaintiff's Motion for Preliminary Injunction ("Motion" or "Motion for Preliminary Injunction," ECF No. 4.1).

The Court, having considered the Motion, the briefs and other submissions of the parties, the arguments of counsel, and all applicable matters of record, **CONCLUDES**, in its discretion, that the Motion for Preliminary Injunction should be **GRANTED** for the reasons set forth below.

FINDINGS OF FACT

1. The Court's factual findings are made solely for purposes of deciding the present Motion and are not binding in any subsequent proceedings in this action. *See Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75 (2005) (cleaned up) ("It is well settled that findings of fact made during a preliminary injunction proceeding are not binding upon a court at trial on the merits.").

2. The origins of this case date back to August 2020, when Dennis Hulsing, together with other investors, began purchasing assets related to the "Earth Fare" brand of retail stores from Earth Fare, Inc., a debtor in United States Bankruptcy Court. (Verified Complaint, ECF No. 3, at ¶ 5.) Hulsing began an effort to raise

capital for the new entity Earth Fare 2020, Inc. ("Earth Fare"), the Defendant in this case. (*Id*.)

3. Hulsing approached Daniel J. Larimer ("Plaintiff" or "Larimer") for the purpose of raising capital. (*Id*. at ¶ 6.) Larimer made a number of contributions of capital to Earth Fare totaling several million dollars. (*Id*. at ¶¶ 6–9.)

4. On or about 25 March 2021, Larimer, Earth Fare, and various other investors subsequently entered into a Convertible Note Purchase Agreement ("the Agreement"). (*Id*. at ¶ 10.) In conjunction with the Agreement, several individuals, including Larimer, purchased convertible notes from Earth Fare. (*Id*. at ¶ 11; Hulsing Affidavit, ECF No. 11, at ¶ 27.) Specifically, Larimer purchased "Convertible Note Series Nos. 2021-A-1, 2021-A-2, 2021-A-3, 2021-A-4, and 2020-A-5 [sic] . . . totaling $26,391,780.82" (the "Larimer Notes"). (ECF No. 3, at ¶ 11.)

5. The terms of the Larimer Notes state, in relevant part, as follows:

> **2. CONVERSION AND REPAYMENT**
>
> **(a) Conversion at Holder's Option.** During the period beginning on March 1, 2022, and continuing until the Maturity Date, upon three (3) days' written notice to the Company by the Holder, the Holder may convert all or a portion of this Note into that number of shares of Common Stock of the Company equal to the aggregate outstanding principal and interest divided by Ten Dollars and Zero Cents ($10.00) per share.
>
> **(b) Conversion at Company's Option**. At any time during the term of this Note and continuing until the Maturity Date, upon thirty (30) days' written notice to the Holder by the Company, the Company may cause this Note to convert into that number of shares of Common Stock of the Company equal to the aggregate outstanding principal and interest divided by Five Dollars and Ninety Cents ($5.90) per share.

. . .

> **(d) Conversion for Event of Default**. At any time during the terms of this [sic] and continuing until the Maturity Date, in the event of any Event of Default pursuant to Section 4 of this Note, the Holder may convert all or a portion of this Note into that number of shares of Common Stock of the Company equal to the aggregate outstanding principal and interest divided by Five Dollars and Ninety Cents ($5.90) per share.

(*E.g.,* ECF No. 3 Ex. B, at p. 114.)

6. The Larimer Notes also contain the following provision:

> **4. EVENTS OF DEFAULT**
>
> **(a)** If there shall be any Event of Default (as defined below) hereunder, at the option of the Holder, the Holder may elect to (i) convert all or a portion of this Note pursuant to Section 2(d) above; or (ii) accelerate this Note such that all principal and unpaid accrued interest shall become immediately due and payable. The occurrence of any one or more of the following events shall constitute an **"Event of Default"**:
>
> > **(i)** The Company fails to pay timely any of the principal amount due under this Note on the date the same becomes due and payable or any unpaid accrued interest or other amounts due under this Note on the date the same becomes due and payable; . . .

(*E.g., id*. at pp. 117–18.)

7. The Larimer Notes provide that "[n]o payments shall be required until March 30, 2022," and that they will begin on that date in a series of twenty-seven "fully amortized quarterly payments, due on March 30, June 30, September 30, and December 31 of each calendar year until the Maturity Date." (*E.g., id*. at p. 113.) The Maturity Date is identified as 31 December 2028. (*E.g., id*.)

8. At a 1 March 2022 meeting, Hulsing informed all of the noteholders present that the Company's intent was to convert the Notes to Earth Fare stock pursuant to the company's conversion rights. (ECF No. 11, at ¶¶ 31–32.) Larimer was the only noteholder who was not in attendance or represented at that meeting. (*Id*. at ¶ 32.)

9. Earth Fare failed to make its first payment—which, as noted above, was due on 30 March 2022—on the Larimer Notes. The failure to make this payment constituted an Event of Default based on the above-quoted default provisions of the Larimer Notes. (ECF No. 3, at ¶ 17.)

10. On 6 April 2022, "Larimer caused an affiliated entity, DJ-MT LLC ('DJ-MT') to exercise its option to purchase real property of several entities owned by Hulsing in exchange for Larimer's assignment of certain Larimer Notes to Hulsing[.]" (*Id*. at ¶ 18.) Larimer retained three of the five notes, 2021-A-2, 2021-A-4, and 2021-A-5 ("the Remaining Notes"). (*Id*.) These Remaining Notes are the notes relevant to the present lawsuit.

11. By letter dated 7 April 2022, Larimer notified Earth Fare of the default and stated that he was exercising his option to "accelerate all principal and unpaid interest due under the Remaining Notes, making such principal and unpaid accrued interest immediately due and payable." (*Id*. at ¶ 19.)

12. On 12 April 2022, Earth Fare's Board of Directors held a meeting during which Hulsing attempted to convince the Board to automatically convert all of the outstanding notes into common stock of Earth Fare and made a motion that such a

plan be effectuated. (*Id*. at ¶¶ 21–22.) Larimer stated his objection to Hulsing's motion and unsuccessfully requested that the Board table the matter until more information could be obtained about the legal repercussions of such a mandatory conversion. (*Id*. at ¶¶ 21–23.)

13. A vote was called by Hulsing on his original motion, which passed over Larimer's objection. (*Id*. at ¶ 24.) Earth Fare's counsel was instructed to "draft the required notices for consideration at a future Board meeting." (*Id*.)

14. On 28 April 2022, Larimer received a notification via electronic mail from Earth Fare informing him that his Remaining Notes would be converted into common stock of the company. (*Id*. at ¶ 26.) The notification stated that the conversion would become effective on 28 May 2022. (*Id*.)

15. On the following day, Larimer initiated this action by filing a complaint in Buncombe County Superior Court, naming Earth Fare as the sole Defendant. (*Id*. at ¶¶ 1–2.)

16. In the Complaint, Larimer asserted the following claims: (1) a request for a declaratory judgment that Earth Fare is not entitled to convert the Remaining Notes to Earth Fare common stock; (2) a claim for breach of contract; and (3) a request that Earth Fare be enjoined from going forward with the proposed conversion. (*Id*. at ¶¶ 29–48.)

17. Larimer also filed a Motion for Temporary Restraining Order and Preliminary Injunction on that same date. (ECF No. 4.1.)

18. On 2 May 2022, the parties appeared in Buncombe County Superior Court for a hearing. (ECF No. 9, at p. 1.) No temporary restraining order was issued, but the parties entered into a joint stipulation in which Earth Fare agreed that it will "not require Larimer to surrender the Remaining Notes before May 28, 2022." (*Id.*)

19. This case was designated a mandatory complex business case and assigned to the undersigned on 2 May 2022. (ECF Nos. 1, 2.)

20. The Motion for Preliminary Injunction came before the Court for a hearing on 25 May 2022. The motion is now ripe for decision.

CONCLUSIONS OF LAW

21. "The purpose of a preliminary injunction is ordinarily to preserve the status quo[.]" *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400 (1983) (quoting *State v. School*, 299 N.C. 351, 357–58 (1980)). When seeking a preliminary injunction, the moving party must show (i) a "likelihood of success on the merits" and (ii) that the moving party is "likely to sustain irreparable loss unless the injunction is issued, or[,]" that an injunction "is necessary for the protection of [the moving party's] rights during the course of litigation." *Id.* at 401 (quoting *Investors, Inc. v. Berry*, 293 N.C. 688, 701 (1977)); *see also* N.C. R. Civ. P. 65; N.C.G.S. § 1-485.

22. The issuance of a preliminary injunction "is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities[,]" *id.* at 400 (quoting *State v. School*, 299 N.C. at 357–58), but it cannot be issued "unless the movant carries the burden of persuasion as to each of these prerequisites[,]" *Air*

Cleaning Equip., Inc. v. Clemens, 2016 NCBC LEXIS 199, at *17 (N.C. Super. Ct. Apr. 29, 2016) (citation omitted).

23. To prove irreparable loss or injury,

> it is not essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law.

A.E.P. Indus., Inc., 308 N.C. at 407 (cleaned up).

A. Likelihood of Success on the Merits

24. The Court will first analyze the issue of whether Plaintiff has shown a likelihood of success on the merits of its declaratory judgment claim in which it seeks a ruling that Defendant is not permitted to convert the Remaining Notes into Earth Fare stock.

25. This Court has previously articulated the following principles to be applied by a court when interpretating a contract:

> Contract construction seeks to determine the intent of the parties when the contract was issued by deriving intent from the language in the contract. The language in the contract should be given its natural and ordinary meaning, and harmoniously construed to give every word and every provision effect. Construction of a contact is a matter of law for the court if the language of the contract is plain and unambiguous.

Computer Design & Integration, LLC v. Brown, 2016 NCBC LEXIS 96, at *9 (N.C. Super Ct. Dec. 6, 2016) (cleaned up).

26. Earth Fare contends that the Remaining Notes expressly give it the right to convert the Notes "*at any time*" prior to the stated Maturity Date and that

the unambiguous meaning of these words is that Earth Fare's conversion right is unaffected by its default under the Remaining Notes. Plaintiff, conversely, argues that Earth Fare's broad right to convert the Remaining Notes is qualified by the inclusion of the provision expressly dealing with an Event of Default. Plaintiff asserts that a default by Earth Fare cuts off its automatic right of conversion and triggers the ability of the Noteholder to seek one of two remedies set out in Section 4(a)—(1) an acceleration of the Note such that all principal and accrued interest becomes immediately due and payable; or (2) conversion of either all or a portion of the Note.

27. The Court has carefully considered the parties' respective arguments on this issue and concludes that Plaintiff has demonstrated that it is likely to prevail on its declaratory judgment claim.

28. The Court is guided by the familiar rule that "when general terms and specific statements are included in the same contract and there is a conflict, the general terms should give way to the specifics." *Insight Health Corp. v. Marquis Diagnostic Imaging of N.C., LLC*, 2016 NCBC LEXIS 77, at *16 (N.C. Super Ct. Oct. 7, 2016) (cleaned up). Here, it is undisputed that Earth Fare's notice of conversion was sent to Larimer after the default had already occurred. The Court finds that there is a conflict between (1) the open-ended right of conversion given to Earth Fare in Section 2(b) of the Remaining Notes that contains no express limits other than that the right be exercised by the Maturity Date and that Noteholders be given thirty days written notice of the conversion; and (2) the right of a Noteholder contained in Section 4(a) of the Note upon an Event of Default by Earth Fare to choose between the

alternative remedies of accelerating the Note or having the Note converted into stock. If, as Earth Fare argues, a Noteholder's choice of acceleration as a remedy under Section 4(a) can be thwarted by Earth Fare's invocation of its general right of conversion under Section 2(b), then the stated right of a Noteholder to seek acceleration—indeed, the entire notion that the Noteholder (as opposed to Earth Fare) is entitled to a choice of remedy in the event of Earth Fare's default—would be rendered illusory. The Court believes that Plaintiff has shown in support of its Motion that the better interpretation of the Note is that Earth Fare's *general* right of conversion at its own option under Section 2(b) is qualified by the *specific* default procedure set out in Section 4(a).

29. Such an interpretation constitutes a harmonious construction of *all* of the terms of the Note and takes into account the parties' stated intent that the Noteholder be able to elect its remedy in the case of a default. *See Nat'l Surgery Ctr. Holdings, Inc. v. Surgical Inst. of Viewmont, LLC*, 2016 NCBC LEXIS 41, at *13 (N.C. Super. Ct. May 12, 2016) ("[I]t appears that section 6.6 of the Operating Agreement is the clearest statement of the intent of the contracting parties as it relates to the specific conduct at issue here."). It likewise avoids the odd result of a breaching party being permitted to force the non-breaching party to accept a remedy that it does not want where the remedy the non-breaching party desires instead is expressly provided for in the contract. Therefore, the Court concludes that Plaintiff has satisfied the first prong of the test for issuance of a preliminary injunction.

B. Irreparable Harm/Preservation of Status Quo

30. Having determined that Plaintiff has shown a substantial likelihood of prevailing on the merits, the Court must next determine whether Plaintiff has shown the existence of irreparable harm if a preliminary injunction is denied or that an injunction is necessary to protect Plaintiff's rights during the remainder of this litigation. Once again, the parties disagree.

31. Defendant argues that a preliminary injunction is unnecessary because Plaintiff can be adequately compensated through monetary relief in the event that he is ultimately successful in this action. It further asserts that Plaintiff's transformation from being a creditor of Earth Fare to being a holder of equity in the company will not prejudice his rights in any material way. Plaintiff, conversely, contends that he has no desire to be a shareholder of Earth Fare and instead wishes to remain a creditor of the company. Plaintiff also argues that the default on the Remaining Notes by Earth Fare is an indication of the company's insolvency and asserts that in the event Earth Fare declares bankruptcy he will lose the priority afforded to him based on his status as a creditor in the event that a preliminary injunction is not issued.

32. The Court agrees that Plaintiff has made a sufficient showing under this prong of the preliminary injunction test. The potential prejudice that would accrue to him by virtue of an unwanted change in his status from that of a creditor to that of a holder of equity in Earth Fare necessitates the preservation of the status quo.

Such a change would materially alter the relationship between Plaintiff and Earth Fare.

C. Balancing of the Equities

33. Finally, a balancing of the respective equities likewise supports the entry of a preliminary injunction. As discussed above, Plaintiff will potentially suffer a significant degree of prejudice if injunctive relief is not provided under these circumstances.

34. The Court does not find persuasive the arguments offered by Defendant as to how the granting of Plaintiff's Motion would unfairly prejudice Earth Fare. First, Defendant argues that if an injunction is entered, Plaintiff will seek to collect the full accelerated amount of the Remaining Notes and, as a result, Earth Fare would likely be forced out of business based on its inability to pay the accelerated sum. However, this argument ignores the fact that Plaintiff's Motion does not seek immediate payment of the accelerated Remaining Notes. Rather, Plaintiff seeks only the ability to go forward with the remainder of this litigation without having its status changed from creditor to shareholder. Depending on the ultimate outcome of Plaintiff's breach of contract claim, he may be entitled to an award of the full amount of the accelerated Remaining Notes as a remedy. But the possibility of that scenario does not diminish the propriety of a preliminary injunction under the current circumstances.[1]

[1] The Court observes that acceleration by Noteholders upon the company's default is a possibility that should have been within the contemplation of Earth Fare at all relevant times given that this remedy was clearly set out in Section 4(a) of the Notes.

35. Second, Defendant contends that the Court should not grant a preliminary injunction because the other noteholders are necessary parties who have not been joined in this lawsuit and whose rights would be affected by the issuance of injunctive relief in Plaintiff's favor. Specifically, Defendant argues that pursuant to Section 4.3 of the Agreement "the Company may convert all but not less than all of the then outstanding Convertible Notes held by all of the Noteholders . . . . " (ECF No. 3 Ex. A, at p. 30.) Therefore, Defendant contends, the issuance of a preliminary injunction would prevent Earth Fare not only from converting the Remaining Notes but also from converting the *other* outstanding notes. The Court is unpersuaded by this argument.

36. "A necessary party is one whose presence is required for a complete determination of the claim and is one whose interest is such that no decree can be rendered without affecting the party." *Begley v. Emp't Sec. Com.*, 50 N.C. App. 432, 438 (1981) (cleaned up). In contrast, "[a] proper party is one whose interest may be affected by a decree, but whose presence is not essential in order for the court to adjudicate the rights of others." *Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc.*, 12 N.C. App. 448, 452 (1971) (cleaned up).

37. Defendants have not adequately shown that the other noteholders are necessary parties. While the inability of Earth Fare to convert the Remaining Notes may or may not have some effect on its ability to convert the other outstanding notes, the Court is not convinced based on the existing record that the presence of those other noteholders is necessary for the Court to adjudicate the present Motion. The

dispute that Plaintiff has brought to the Court simply concerns his rights vis-à-vis Earth Fare, and Plaintiff does not seek any ruling from the Court that would require adjudication of the rights of other noteholders.[2]

38. The Court therefore concludes, after a careful balancing of the equities, that Plaintiff has sufficiently shown entitlement to the issuance of a preliminary injunction.

CONCLUSION

THEREFORE, IT IS ORDERED that Plaintiff's Motion for Preliminary Injunction is GRANTED as follows:

1. Defendant Earth Fare 2020, Inc. is IMMEDIATELY ENJOINED and PROHIBITED, directly or indirectly, alone or in concert with others, during the pendency of this lawsuit or until further order of this Court from:
    A. Converting, changing, altering, recharacterizing, reallocating, or attempting to convert, change, alter, recharacterize or reallocate, the Remaining Notes to common stock of the Defendant or taking any actions, steps or procedures to accomplish a mandatory conversion of the Remaining Notes to common stock of the Defendant or changing in any way the character of the Remaining Notes.
    B. Effectuating, causing, authorizing, or approving a Conversion Date in order to convert the Remaining Notes to common stock of the Defendant.

[2] The Court notes that this lawsuit has been pending for almost a month, and none of the other noteholders have sought to intervene in this action.

C. Soliciting, collecting, or rescinding the Remaining Notes.

D. Issuing common stock of the Defendant in exchange for the Remaining Notes.

2. IT IS FURTHER ORDERED that during the pendency of this lawsuit, or until further order of this Court, the 28 May 2022 effective date of the Conversion Notification from Defendant Earth Fare 2020, Inc. is hereby stayed.

3. During the pendency of this lawsuit, or until further order of this Court, Plaintiff Daniel J. Larimer shall not be required to turn over the Remaining Notes to Defendant.[3]

4. If Plaintiff is unable to obtain a judgment of this Court that Defendant does not have the right to convert the Remaining Notes to shares of stock in Defendant, then the conversion shall be calculated at the balance owed to Plaintiff on the portions of the Remaining Notes he owns as of 28 May 2022 and shall specifically not include any interest on the Remaining Notes accruing after 28 May 2022.

5. Pursuant to the provisions of North Carolina Rule of Civil Procedure 65(c), and as a condition of this Order, Plaintiff shall post security in the amount of Ten

[3] Defendant requests that any preliminary injunction entered by the Court state that Defendant may still be authorized to require Plaintiff to turn over Note 2021-A-5 at a future date based on Defendant's representation that for this particular Note, Plaintiff is only the co-owner rather than the sole owner. For this reason, Defendant asserts that if the owner of the remaining interest in the Note requests conversion, Defendant should be permitted to convert the portion owned by that owner and return a replacement Note with identical terms except that the principal balance would reflect the portion owned by Plaintiff. The Court declines to include such language herein because it does not appear that the record in its current state provides full support for Defendant's request. However, Defendant shall be permitted to file a motion to amend this Order and to supplement the record, if necessary.

Thousand Dollars ($10,000.00) in the form of cash, check, surety bond, or other undertaking satisfactory to the Buncombe County Clerk of Superior Court.

6. The terms and conditions of this Order shall be in force and take effect immediately upon Plaintiff's posting of security as provided herein.

SO ORDERED, this the 27th day of May, 2022.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge for
Complex Business Cases