

Seeking Amicus Curiae Concerning Convertible Promissory Notes

November 28, 2023 – A Nevada court recently issued a legal ruling that could have serious implications for investors holding convertible promissory notes. The ruling is in the process of being appealed, which will give investors, industry trade groups, and others potentially affected by the ruling an opportunity to seek to weigh in with an *amicus curiae* brief.

What Are Convertible Promissory Notes?

Prior to the development of SAFEs (Simple Agreements for Future Equity), convertible promissory notes were one of the most common forms of investment vehicles in early-stage startup companies. Although structured as loans with an annual interest rate, convertible promissory notes were designed to allow investors to convert their principal and accrued interest into equity of the startup company under certain circumstances, including, typically, at the time of the first priced-equity financing round (*e.g.*, a sale of Series A Preferred Stock) or at the convertible noteholder’s discretion. It is believed that many investors, including venture capital firms, continue to hold convertible promissory notes while they await a potential conversion into equity.

What Did the Nevada Court Rule?

In a dispute involving a convertible promissory note, a Nevada court recently ruled that the investor’s right to convert the note into equity expired upon the note’s “maturity date.” Typically the maturity date falls one to two years after the investment is made and often well before a conversion event occurs. The Nevada court further ruled that, after the maturity date had passed, the startup company could force the investor to accept a repayment of the principal and accrued interest on the note, thereby terminating the investment relationship and any right to equity conversion. Prior to this ruling, it was believed investors’ conversion rights survived the maturity date.

Although the court’s ruling addressed only the convertible note at issue in that lawsuit, convertible promissory notes typically follow a standard format. Consequently, the court’s ruling may implicate other convertible notes to the extent other courts are to rely on this ruling, or to the extent startups that previously issued convertible notes seek to repay their investors with principal and accrued interest without investor demand and before a conversion or liquidity event. The ruling could have adverse implications for investors holding convertible promissory notes that are past their maturity dates because, under the Nevada court’s ruling, these investors could be repaid the principal and accrued interest on their notes, even over their objections, and have their rights to convert their notes to equity terminated. For these reasons, investors and industry trade groups may wish to sign onto an amicus brief to be submitted to the Nevada state appellate court asking that the ruling be reversed.

What are amicus curiae briefs and why are they important?

Latin for “friend of the court,” an *amicus curiae* seeks permission from an appellate court to weigh in on certain matters pending before the court. An *amicus curiae* can be a person, an entity such as a trade association, or a group of people or entities (such as investors). The amicus curiae is not

a party to the case; instead, it typically provides the court with information concerning the ramifications of a ruling in the case on the industry that is potentially affected by the court's ruling, and explains the practical consequences of the court's decision. An amicus brief details the authors' expertise and concerns regarding the court's ruling. If the court grants the authors permission to file an amicus brief, the court can take into consideration their arguments along with the arguments made by the parties directly involved in the case.

If you, or someone you know, may be interested in submitting or co-signing an amicus brief to the court on this issue, please contact Stephen Warren at stephen.warren@hklaw.com or Michael Gropper at michael.gropper@hklaw.com. A copy of the Nevada court's ruling is attached to this letter. Below, you will find a synopsis of the ruling.

Synopsis of Nevada Court's Ruling

In November 2012, investor Denis Grosz entered into a Note Purchase Agreement (the "NPA") and Convertible Promissory Note (the "Convertible Note") with Toptal, LLC ("Toptal"). Pursuant to the terms of the NPA and Convertible Note, Mr. Grosz provided Toptal with \$1 million of funding when the company was in its infancy.

Most of the relevant terms of the Convertible Note and NPA are standard provisions in these types of documents.

The Convertible Note states that, "[u]nless earlier converted into Conversion Shares pursuant to Section 2.2 of that certain Note Purchase Agreement dated November __, 2012 among the Company and the Lender (the "Purchase Agreement"), the principal and accrued interest shall be due and payable by the Company on demand by the Lender at any time after the Maturity Date." The NPA defines the "Maturity Date" as May 14, 2014.

Section 2.2 of the NPA is titled "Right to Convert Note" and sets forth two mechanisms by which the Convertible Note could be converted into equity of Toptal.

First, Section 2.2(a) provides that "[t]he principal and unpaid accrued interest of the Note will be automatically converted into Conversion Shares upon the closing of the Next Equity Financing." The NPA defines "Next Equity Financing" as, generally speaking, the next sale by Toptal of its equity securities from which Toptal received gross proceeds of not less than \$2 million.

Second, Section 2.2(b) of the NPA provides Mr. Grosz with an optional conversion right, which states: "[a]t any time on or after the fifteenth (15th) day prior to the Maturity Date, if the Next Equity Financing has not occurred by that time, the Note, at Lender's election by written notice to the Company, will be converted into Common Stock of the Company such that the Lender receives shares constituting 8.333% of the Fully-Diluted Equity Securities of the Company following such conversion."

The May 14, 2014 Maturity Date on the Convertible Note passed, and Mr. Grosz left his Convertible Note outstanding while awaiting a conversion to equity. Toptal, however, became a successful company and never took on additional equity financing that might have triggered the Next Equity Financing provision requiring conversion of the note to equity. On March 26, 2020,

Toptal sent Mr. Grosz a letter attempting to repay the principal and interest on his Convertible Note and terminate his rights to convert his note to equity. Mr. Grosz rejected Toptal's offer and, instead, requested that Toptal convert his Convertible Note to equity under his optional conversion provision in Section 2.2(b) of the NPA.

Mr. Grosz and Toptal filed claims against each other under the Convertible Note and NPA. Toptal argued that the Convertible Note became due and payable on the Maturity Date, even without a demand for repayment by Mr. Grosz, and that all potential conversion rights associated with the Convertible Note expired on the Maturity Date. Mr. Grosz disputed Toptal's interpretation and argued that the Maturity Date was simply the date on which an investor could, if he or she chose to do so, demand repayment of the Convertible Note, but the investor alone decided whether or when to demand repayment, because the investor could also decide to leave the Convertible Note outstanding and await a conversion to equity. Mr. Grosz relied upon the language of the Convertible Note stating that "the principal and accrued interest shall be due and payable by the Company on demand by the Lender at any time after the Maturity Date." He also relied upon a prior decision from a federal court in California analyzing nearly identical terms in a convertible promissory note. The federal court ruled that the convertible note in that case (i) was not "due and payable" until the investor demanded repayment after the maturity date, and (ii) the startup was prohibited from repaying the principal and interest on the note until the investor demanded repayment after the maturity date or consented to the repayment. *Vigdor v. Super Lucky Casino*, No. 16-cv-05326-HSG, 2018 WL 6069944, at *4 (N.D. Cal. Nov. 20, 2018). Therefore, Mr. Grosz argued, without a "demand by the Lender at any time after the Maturity Date," the Convertible Note was not due and payable and, instead, remained outstanding and could be converted to equity.

The Nevada court rejected Mr. Grosz's interpretation and agreed with Toptal's interpretation of the Convertible Note and NPA. The court ruled that "principal and accrued interest were due and payable any time after the May 14, 2014 Maturity Date" even without a demand by Mr. Grosz. The court ruled that, under California law, a note that is "payable on demand" is payable immediately upon the maturity date and demand need not be made for the repayment obligation to trigger. Therefore, the court held that Toptal did not breach the Convertible Note or NPA by attempting to repay Mr. Grosz after the Maturity Date, even though Mr. Grosz had not demanded repayment on his Convertible Note (and, in fact, objected to Toptal's repayment, because he did not want to be repaid).

The court ruled that "the terms of the NPA and Note, as well as settled California law, establish that Mr. Grosz's Note became due and payable on the [May 14, 2014] Maturity Date and that Toptal was within its rights to return an amount equal to Mr. Grosz's principal and accrued interest in March 2020." The Nevada court's ruling appears to be directly contrary to the prior federal decision in *Vigdor*, discussed above.

As to Mr. Grosz's optional conversion election, the court ruled that Section 2.2(b) of the NPA did not grant Mr. Grosz a perpetual option to elect to convert his Convertible Note to equity in Toptal. Instead, although the language of Section 2.2(b) provides that the election could be exercised "[a]t any time on or after the fifteenth (15th) day prior to the Maturity Date," the court ruled that Section 2.2(b) merely provided Mr. Grosz with a 15-day window, prior to the May 14, 2014 Maturity Date,

within which he must have decided whether to elect to convert his Convertible Note. The court ruled that this interpretation was consistent with “the meaning of the term ‘Maturity Date.’” Because Mr. Grosz did not make an election to convert his Convertible Note to equity prior to the Maturity Date, the court ruled that Toptal did not breach the Convertible Note or NPA by refusing Mr. Grosz’s optional conversion election in 2020.

The practical effect of the Nevada court’s ruling is that, on or at any time after the maturity date of a convertible promissory note, the note issuer (*e.g.*, a startup company that issued convertible promissory notes to early stage investors) may elect, in its sole discretion, to repay its noteholders the principal and accrued interest under their notes, regardless of whether the noteholders would prefer a conversion to equity. In addition, all conversion rights that exist under the note will be deemed to have expired at the maturity date.

Amicus Procedures

A potential amicus seeking to file a brief with the Nevada appellate court must first obtain the parties’ consent or file a motion seeking leave from the court to file an amicus brief. Nev. R. App. P. 29(a). A motion for leave to file an amicus brief must be accompanied by the proposed brief and state: (1) the movant's interest; and (2) the reasons why an amicus brief is desirable. Nev. R. App. P. 29(c). An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than seven days after the brief of the party being supported is filed. Nev. R. App. P. 29(f).

As set forth above, the appeal has not yet been docketed and, therefore, no deadlines are currently in place governing the submission of amicus briefs or motions seeking permission to file them. However, it is anticipated that the appeal will be filed in January, 2024 and the Opening Brief by Mr. Grosz will be filed approximately 120 days after the date on which the appeal is docketed in the appellate court. Nev. R. App. P. 31(a)(1). As set forth above, an amicus supporting reversal of the trial court’s ruling, must file its motion and proposed brief within seven days of the Opening Brief filed by Mr. Grosz.

The Parties, their Counsel, and Case Information

The parties in the case are Denis Grosz, Mechanism Ventures, LLC, Toptal, LLC, and Taso Du Val. Mr. Grosz and Mechanism Ventures, LLC are represented by Stephen Warren, Michael Gropper, Tracy Quinn, and Michael Decembrino from Holland & Knight LLP, and Brian Irvine and John Desmond from Dickinson Wright.

Toptal and Mr. Du Val are represented by Andrew Clubok, Kevin McDonough, and Megan Behrman from Latham & Watkins LLP; Kent Robison and Hannah Winston from Robison, Sharp Sullivan, and Brust; and Adam Hosmer-Henner from McDonald Carano.

The trial court, from which the appeal will be taken, is *Toptal, LLC et al. v. Denis Grosz, et al.*, CV20-00555, in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

TOPTAL, LLC, a Delaware limited liability
company,

Plaintiff,

vs.

DENIS GROSZ, an individual, and
MECHANISM VENTURES, LLC, a
Delaware limited liability company,

Defendants.

DENIS GROSZ, an individual,

Counterclaimant,

vs.

TOPTAL, LLC, a Delaware limited liability
company, and TASSO DU VAL, an individual,

Counterdefendants.

CASE NO.: CV20-00555

DEPT. NO.: B15

ORDER GRANTING, IN PART,
TOPTAL, LLC'S MOTION FOR
SUMMARY JUDGMENT

1 This matter comes before the Court on Toptal, LLC's ("Toptal") Motion for Summary
2 Judgment ("Motion"). In the Motion, Toptal argues that Denis Grosz ("Mr. Grosz") cannot prove
3 that Toptal (a) breached the Note Purchase Agreement (the "NPA"), convertible promissory note
4 (the "Note"), or (b) the Advisor Agreement entered into by the parties on November 14, 2012¹;
5 that Mr. Grosz's declaratory judgment counterclaims are superfluous; and that Mr. Grosz's
6 counterclaims are barred by the statutes of limitations. The Court has considered the parties'
7 motion papers, the arguments by the parties on September 29, 2023, and October 9, 2023, and the
8 supplemental briefing submitted by the parties on October 4, 2023. The Court finds that there are
9 no material disputed questions of fact with respect to part (a) of Toptal's Motion - whether Toptal
10 breached the Note Purchase Agreement (the "NPA") and convertible promissory note (the
11 "NOTE") and hereby grants that part of Toptal's Motion. Given this determination, it is not
12 necessary for the Court to address whether Count I of Mr. Grosz's counterclaims are barred by the
13 statute of limitations. California Code Section 360 cannot extend the 15 day period to elect the
14 conversion even under Grosz's reading of the statute to extend the statute of limitations period for
15 contracts.²

16 As to Mr. Grosz's counterclaim for breach of the Advisor Agreement, Toptal argues that
17 Mr. Grosz cannot show breach of contract because Mr. Grosz has not submitted evidence of
18 damages. Grosz rests his damage model on the testimony of expert Gregory Nachtwey. The Court
19 will defer ruling on this counterclaim until after the hearing on the Motion in Limine concerning
20 the admissibility of Mr. Nachtwey's opinions.

21 **FACTS AND PROCEDURAL HISTORY**³

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23 ¹ There are no fully executed copies of these agreements in the Record. The Court has reviewed a copy of
24 the NPA and the Advisor Agreement containing Taso Du Val's ("Mr. Du Val") signature on behalf of
25 Toptal, but those agreements are missing Mr. Grosz's signature. The Court has not received an executed
copy of the Note. However, the Court does not address whether the lack of signatures by all parties renders
the Agreements unenforceable, because Count I of Mr. Grosz's counterclaims fails as a matter of law in
any event.

26 ² Toptal's other arguments that Mr. Grosz's remaining counterclaims are untimely is addressed in a
separate order.

27 ³ The facts set forth in this Order are the facts "viewed in the light most favorable to the non-movant," Mr.
28 Grosz. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729 (2005) ("[W]hen reviewing a motion for summary

1 In 2010, Mr. Du Val founded Toptal, a single-member LLC. Mr. Du Val is and always has
2 been the CEO and sole member of Toptal. Mr. Grosz provided Toptal \$1 million pursuant to the
3 NPA on November 14, 2012, and, in exchange, Toptal issued him the Note. As part of that
4 transaction, the parties also entered into an Advisor Agreement on the same day, pursuant to which
5 Mr. Grosz agreed to advise the company in exchange for the opportunity to purchase 1.5% equity
6 in Toptal subject to certain conditions that have not occurred to this day.

7 Mr. Grosz asserts that Toptal breached the NPA and Note by (i) failing to convert to a C-
8 corporation and give him equity upon his written election on November 24, 2015, and/or (ii)
9 attempting to repay his principal and accrued interest on the Note in March 2020.

10 Several provisions of the NPA and Note are relevant to the Motion. First, the Note states
11 that “[u]nless earlier converted into Conversion Shares pursuant to Section 2.2 of that certain Note
12 Purchase Agreement dated November __, 2012 among the Company and the Lender (the ‘Purchase
13 Agreement’), the principal and accrued interest shall be due and payable by the Company on
14 demand by the Lender at any time after the Maturity Date.” The Note contains a provision
15 expressly waiving presentment and demand. The NPA defines the “Maturity Date” as “May 14,
16 2014.”

17 Second, Section 2.2 of the NPA is titled, “Right to Convert Note.” Section 2.2(a) provides
18 that “[t]he principal and unpaid accrued interest of the Note will be automatically converted into
19 Conversion Shares upon the closing of the Next Equity Financing. . . .” A Next Equity Financing
20 (a defined term in the NPA) did not take place prior to the Maturity Date and has not taken place
21 to this day. Section 2.2(b) of the NPA states: “Optional Conversion. At any time on or after the
22 fifteenth (15th) day prior to the Maturity Date, if the Next Equity Financing has not occurred by
23 that time, the Note, at Lender’s election by written notice to the Company, will be converted into
24 Common Stock of the Company such that the Lender receives shares constituting 8.333% of the
25 Fully-Diluted Equity Securities of the Company following such conversion.”

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27 judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most
28 favorable to the nonmoving party.”); *Chavez v. Sievers*, 118 Nev. 288, 293 (2002); *see also Wishengrad v.*
Carrington Mortg. Servs., 139 Nev. Adv. Op. 13 (2023).

1 The parties dispute whether Section 2.2(b) provides Mr. Grosz with a 15-day window
2 before the Maturity Date in which to make an election to convert his Note to equity. For its part,
3 Toptal argues that Mr. Grosz’s ability to make an election under Section 2.2(b) ended on the
4 Maturity Date. On the other hand, Mr. Grosz argues that Section 2.2(b) allows him to elect to
5 convert his Note starting 15 days prior to the Maturity Date and continuing forever into the future.
6 The parties agree that Mr. Grosz did not make an election under Section 2.2(b) prior to the Maturity
7 Date.

8 The parties also dispute the meaning of Section 2.2(c) of the NPA, which states: “Company
9 Conversion Prior to Note Conversion. For clarification, the Company agrees to complete a
10 Company Conversion prior to any conversion of the Note pursuant to this Section 2.2.” Mr. Grosz
11 claims that this provision, read in connection with Section 2.2(b), grants him the power to force
12 Toptal to complete a Company Conversion. In other words, Mr. Grosz claims that once he makes
13 an election under Section 2.2(b), Toptal must convert from an LLC to a C-corporation under
14 Section 2.2(c) so that it can issue Mr. Grosz equity. Toptal disagrees that Section 2.2(c) grants
15 Mr. Grosz the power to force Toptal to change its corporate form.

16 The NPA also contains a section titled “Events of Default,” which provides that “[t]he
17 following events shall be considered Events of Default with respect to the Note following, and
18 only upon, the declaration of default by the Note holder under Section 7.2:

19 (a) The Company shall default in the payment of any part of the principal or unpaid
20 accrued interest on the Note for more than thirty (30) days after the Maturity Date
21 or at a date fixed by acceleration or otherwise; . . .

22 (d) The Company shall fail to observe or perform any other obligation to be
23 observed or performed by it under this Agreement or the Note, within 30 days after
24 written notice from the Note holder to perform or observe the obligation.”

25 Section 7.2 of the NPA states: “Remedies. Upon the occurrence of an Event of Default
26 under Section 7.1 hereof, only at the option and upon the declaration of the holder of the Note, the
27 entire unpaid principal and accrued and unpaid interest on the Note shall, without presentment,
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1 demand, protest, or notice of any kind, all of which are hereby expressly waived, be forthwith due
2 and payable, and such holder may, immediately and without expiration of any period of grace,
3 enforce payment of all amounts due and owing under the Note and exercise any and all other
4 remedies granted to it at law, in equity or otherwise.”

5 It is undisputed that Toptal did not convert to a C-corporation before the May 14, 2014,
6 Maturity Date or pay any outstanding principal and interest to Mr. Grosz within 30 days after the
7 Maturity Date.

8 DISCUSSION

9 “A party may move for summary judgment, identifying each claim or defense—or
10 the part of each claim or defense—on which summary judgment is sought.” NRCP 56(a). “The
11 court shall grant summary judgment if the movant shows that there is no genuine dispute as to any
12 material fact and the movant is entitled to judgment as a matter of law.” *Id.* “A factual dispute is
13 genuine when the evidence is such that a rational trier of fact could return a verdict for the
14 nonmoving party.” *Wood v. Safeway, Inc.*, 121 Nev. 724, 731 (2005). “[T]he pleadings and other
15 proof must be construed in a light most favorable to the nonmoving party.” *Id.* The parties agree
16 that California law governs the contracts at issue in this case. The Court finds that there are no
17 genuine disputes as to any material fact and grants summary judgment, in part, for Toptal, on
18 Count I of Mr. Grosz’s counterclaim.

19 **I. Mr. Grosz Cannot Prove Breach Of Contract**

20 “[I]n the absence of ambiguity or other factual complexities,” none of which is present
21 here, “contract interpretation presents a question of law that [] district court[s] may decide on
22 summary judgment.” *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309 (2013); *see also State*
23 *Dep’t of Transp. V. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 133 Nev. 549, 553-55 (2017)
24 (reversing denial of summary judgment on breach of contract and the implied covenant of good
25 faith and fair dealing claims because “[n]othing in the four corners of the [] agreement prohibited”
26 defendant’s conduct). If a provision at issue in the contract is “not . . . reasonably subject to the
27 construction for which [the nonmoving party] contends,” summary judgment is warranted in favor
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1 of the moving party. *Parman v. Petricciani*, 70 Nev. 427, 430-32 (1954), *abrogated on other*
2 *grounds by Wood*, 121 Nev. at 724.

3 **A. Toptal Did Not Breach The NPA Or Note By Refusing To Convert The Note**
4 **To Equity In 2015**

5 The Court also finds that Mr. Grosz's theory that Toptal breached by failing to perform in
6 response to Mr. Grosz's election to convert his Note to equity in 2015 cannot withstand summary
7 judgment.

8 *First*, the Court finds that Section 2.2(b) of the NPA does not grant Mr. Grosz a perpetual
9 option to elect to convert his Note to equity. *See Shaver v. Clanton*, 26 Cal. App. 4th 568, 578
10 (1994) (Crosby, J., concurring) ("options in perpetuity [are] about as common as polar bear
11 sightings in Death Valley"). Section 2.2(b) states: "At any time on or after the fifteenth (15th) day
12 prior to the Maturity Date, if the Next Equity Financing has not occurred by that time, the Note, at
13 Lender's election by written notice to the Company, will be converted" The plain meaning
14 of this language creates a start date for the election period commencing "At any time on or after
15 the fifteenth (15th) day prior to the Maturity Date" and ending on the Maturity Date. Construing
16 that provision to give Mr. Grosz a 15-day window ending on the Maturity Date during which he
17 must decide whether to elect to convert is consistent with other contractual provisions, California
18 law, and the meaning of the term "Maturity Date." *See* Cal. Civ. Code § 1641 ("The whole of a
19 contract is to be taken together, so as to give effect to every part, if reasonably practicable, each
20 clause helping to interpret the other.").

21 The Court recognizes that unless a contract "unequivocally demonstrate[s] the parties'
22 intent" to grant a perpetual option, a contract should not be read to bind the parties forever. *See*
23 *Ginsberg v. Gamson*, 205 Cal. App. 4th 873, 893 (2012). There is no such "unequivocal" language
24 here. *Cf. Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 79 (1996)
25 (finding that the word "hereafter" "cannot reasonably be read as referring to any time in the
26 indefinite future"); *McManigal v. Hiatt*, 240 Iowa 541, 546 (1949) (phrases like "hereafter"
27 "indicate[] direction in time rather than duration" and are "not [] synonym[s] for 'forever'").

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1 The Court finds that Mr. Grosz has presented no record evidence showing that the parties
2 intended for this provision of the contract to grant him a conversion remedy that extended beyond
3 the Maturity Date. See *Applied Equip. Corp. v. Litton Saudia Arabia Ltd.*, 7 Cal. 4th 503, 517
4 (1994) (“it is appropriate to enforce only such obligations as each party voluntarily assumed”);
5 *Nissho of Cal., Inc. v. Bond Safeguard Ins. Co.*, 220 Cal. App. 4th 974, 983 (2013) (in interpreting
6 contracts, courts “seek to discover the intent of the parties, primarily by examining the words the
7 parties have chosen”). The Court is unaware of any logical reason why Mr. Grosz’s option to elect
8 conversion would open 15 days prior to the Maturity Date if it did not close on the Maturity Date.

9 It is undisputed that Mr. Grosz did not make an election to convert his Note prior to the
10 Maturity Date. Therefore, Toptal’s refusal to perform in response to Mr. Grosz’s November 24,
11 2015, or 2020 election (made after both parties filed lawsuits against each other) was not a breach.

12 *Second*, while the Court need not reach this issue given that Mr. Grosz made his election
13 well outside of the time to do so, the Court finds that the NPA does not grant Mr. Grosz the ability
14 to force Toptal to change its corporate form in response to his election. Mr. Grosz only points to
15 Section 2.2(c), a one-sentence provision that states: “For clarification, the Company agrees to
16 complete a Company Conversion prior to any conversion of the Note pursuant to this Section 2.2.”
17 Nothing in the plain language of Section 2.2(c) provides Mr. Grosz with the power to decide when
18 and if Toptal will change its corporate form and complete a Company Conversion. Section 2.2(c)
19 itself does not refer to Section 2.2(b) but instead contains a reference to all of Section 2.2, a
20 reference that encompasses the separate “conversion trigger” of a Next Equity Financing contained
21 in Section 2.2(a)—thereby indicating that Section 2.2(b) does not operate as, and was not inserted
22 to be, an enabling provision of Section 2.2(b) but rather a clarifying, sequencing provision.
23 Moreover, the Court finds that it would be unreasonable to interpret the agreement in a way that
24 would allow a lender of matured debt the perpetual right to force a company to undertake a
25 complete corporate restructuring. See Cal. Civ. Code § 1639 (“When a contract is reduced to
26 writing, the intention of the parties is to be ascertained from the writing alone, if possible”);
27 Cal. Civ. Code § 1643 (“A contract must receive such an interpretation as will make it . . .
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1 reasonable”). Contracts must be read so as not to produce “absurd results.” *Am. Multi-cinema,*
2 *Inc. v. Manteca Lifestyle Ctr., LLC*, 2023 WL 3775333, at *14 (E.D. Cal. June 2, 2023). The Court
3 finds that Mr. Grosz’s interpretation that he, as a single lender with a convertible promissory note,
4 could force Toptal to undergo a complete corporate restructuring at his whim and continuing
5 perpetually into the future would produce an absurd result. *See Shrem v. Sw. Airlines Co.*, 2017
6 WL 1478624, at *2 (N.D. Cal. Apr. 25, 2017), *aff’d*, 747 F. Appx. 629 (9th Cir. 2019) (dismissing
7 case where plaintiff’s “interpretation would contradict the plain language of the contract” and
8 “subject [d]efendant to potentially limitless, unspecified obligations”).

9 Section 2.2(c) does not say anything about granting Mr. Grosz the power to force Toptal
10 to change its corporate form in order to effectuate any election he makes. The Court agrees with
11 Toptal that if the parties intended to endow Mr. Grosz with such power, the contract would have
12 clearly so stated. It does not. The parties agree that Mr. Grosz inserted Sections 2.2(b) and 2.2(c)
13 into the NPA. Therefore, any ambiguities arising out of these sections must be resolved against
14 him. *Mayhew v. Benninghoff*, 53 Cal. App. 4th 1365, 1370 (1997). The Court finds that these
15 provisions are unambiguous; however, to the extent there is any ambiguity, the Court construes
16 that ambiguity against Mr. Grosz as the drafter.

17 Moreover, Mr. Grosz’s argument that Section 2.2(c) grants him the unfettered power to
18 force Toptal to undergo a corporate restructuring at his election ignores other critical provisions of
19 the NPA and Note, which, when read together with Mr. Grosz’s interpretation, introduce
20 unnecessary ambiguities that must be avoided. For example, the Note’s express terms provide
21 only that it can convert into “Conversion Shares,” which the NPA defines as “Equity Securities
22 issued in the Next Equity Financing.” The Next Equity Financing is a separate “conversion
23 trigger” in Section 2.2(a) of the NPA, and it is undisputed that Mr. Grosz does not have the power
24 to force Toptal to undertake a Next Equity Financing. Other provisions of the NPA, such as
25 Section 2.2(e), also state that conversion “may be made contingent upon the closing of the Next
26 Equity Financing,” introducing more ambiguities around Mr. Grosz’s interpretation that Section
27 2.2(c) requires conversion upon his election under Section 2.2(b) and if Toptal had not undergone
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1 a Next Equity Financing. The Court declines to interpret the NPA and Note in such a way as to
2 create unnecessary ambiguities.

3 **B. Repaying Matured Debt Is Not A Breach**

4 The Court agrees with Toptal’s interpretation that based on the unambiguous language of
5 the Note and the NPA, principal and accrued interest were due and payable any time after the May
6 14, 2014, Maturity Date. The Note itself states that “Unless earlier converted into Conversion
7 Shares pursuant to Section 2.2 of [the NPA] . . . the principal and accrued interest shall be due and
8 payable by the Company on demand by the Lender at any time after the Maturity Date.” Consistent
9 with that provision, the NPA provides that Mr. Grosz could have sued Toptal for principal and
10 interest after the Maturity Date without first demanding payment before suing, as Mr. Grosz has
11 admitted in briefs filed with the Court. *E.g.*, Grosz’s Reply in Supp. of Mot. to Dismiss at 5 n.3.
12 Toptal thus did not breach by attempting to pay Mr. Grosz an amount equal to the principal and
13 accrued interest on March 26, 2020, nearly six years after the Note’s Maturity Date.

14 The Note’s use of the phrase “on demand by the Lender” does not change this conclusion.
15 California courts have held for over 150 years that a “note payable on demand[] is payable
16 immediately, and demand need not be made.” *E.g.*, *Bell v. Sackett*, 38 Cal. 407, 407 (1869); *see*
17 *also Miguel v. Miguel*, 184 Cal. 311, 314 (1920) (“That a cause of action for money payable on
18 demand accrues with the inception of the obligation and without the necessity for any demand
19 hardly requires the citation of authority.”).⁴ Mr. Grosz does not cite any authority—binding or
20 persuasive—to the contrary.⁵ Thus, Toptal did not breach by attempting to repay after the Maturity
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22 ⁴ The Court disagrees with Mr. Grosz’s argument that cases interpreting the phrase “on demand” in
23 promissory notes are irrelevant because his Note is “a modern convertible promissory note.” It is neither
24 uncommon nor inappropriate to review case law from the past. In any event, as Toptal observes, California
25 courts acknowledge that convertible debt instruments have long been issued in the United States, including
its initial industrial expansion and the building of railroads, *see Kessler v. Gen. Cable Corp.*, 92 Cal. App.
3d 531, 537-39 (1979), and the California case law interpreting the “on demand” language in convertible
notes is as recent as 2019, *see t’Bear v. Forman*, 359 F. Supp. 3d 882 (N.D. Cal. 2019).

26 ⁵ Mr. Grosz cites to the unpublished decision in *Vigdor v. Super Lucky Casino, Inc.*, 2018 WL 6069944
27 (N.D. Cal. Nov. 20, 2018), but that case did not overturn a century and a half of California case law
28 interpreting “on demand” contracts. *Vigdor* did not address the interpretation of the words “on demand” or
“maturity date” under California law (and the briefing in that case shows that none of the cases cited above
were brought to the *Vigdor* court’s attention by either side). Further, the *Vigdor* note purchase agreement

1 Date even though Mr. Grosz had not made a demand. *See Rottman v. Hevener*, 54 Cal. App. 485,
2 488-89 (1921) (applying “the well-settled principle that an obligation for the payment of money
3 on demand is due immediately, no actual demand is necessary,” and an “express waiver” of
4 demand “is equivalent to a contract that the debt shall be payable without any previous demand”).

5 Toptal’s reading that the Note became due and payable on the Maturity Date also is
6 consistent with the meaning of the term “Maturity Date.” As courts have observed, “maturity dates
7 generally rank as among the most staid of contract terms. While one can muster adventurous
8 arguments and debate about all sorts of other terms, what is there to contest about the typical
9 maturity date in a promissory note? Before the date, there is merely an obligation. On or after the
10 date, principal and any interest are owed.” *Fennie v. E-Fuel Corp.*, 2014 WL 1494370, at *1 (N.D.
11 Cal. Apr. 16, 2014). As noted above, Mr. Grosz has admitted that he could have sued Toptal for
12 failure to repay after the Maturity Date without first making a demand, and “[i]t is settled that an
13 obligation ‘matures’ when the holder of the note has a legal right to bring an action to force
14 payment.” *Jessup Farms v. Baldwin*, 33 Cal. 3d 639, 656 (1983).

15 The Court rejects Mr. Grosz’s argument that the Note prohibits Toptal from paying the
16 principal and accrued interest without his consent after the Maturity Date. The provision to which
17 Mr. Grosz points is a prohibition on “prepayment”—not “repayment”—and it simply stands for
18 the uncontested fact that Toptal was prohibited from paying Mr. Grosz the principal and accrued
19 interest prior to when it became due and payable on the Maturity Date.

20 Moreover, Section 7.1(a) of the NPA authorizes Mr. Grosz to declare an event of default
21 and sue Toptal if Toptal defaulted in the payment of any part of the principal and interest more
22 than thirty days after the Maturity Date. Mr. Grosz’s argument that he could block Toptal from
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25 did not provide for default and the ability to sue for repayment if the principal and interest were not repaid
26 within 30 days of the maturity date. Moreover, the *Vigdor* note purchase agreement involved multiple
27 lenders, and the complaining noteholders only had a minority in interest who did not have the contractual
28 ability to act absent the consent and approval of other third parties who represented a majority in interest.
In this case, Mr. Grosz, as the single lender under the NPA, was at all times able to unilaterally act under
his contract with Toptal without recourse to the consent of any third parties. Notably, the *result* in *Vigdor*
was repayment of the principal and interest after the maturity date over the objection of certain noteholders
who preferred to receive equity, just as Mr. Grosz does here.

1 returning the principal and interest on the matured Note by withholding demand but at the same
2 time declare an event of default and sue Toptal for failure to repay introduces an “unnecessary
3 internal inconsistency.” See *Dameron Hosp. Assn v. AAA N. California, Nevada & Utah Ins.*
4 *Exch.*, 229 Cal. App. 4th 549, 568 (2014); *Harrison Ventures, LLC v. Alta Mira Treatment Ctr.,*
5 *LLC*, 2010 WL 19295666, at *4 (N.D. Cal. May 12, 2010). The only reasonable interpretation,
6 then, is that Toptal had an obligation to repay Mr. Grosz after the Maturity Date; otherwise, there
7 would be no rational reason why Mr. Grosz could declare an event of default and sue Toptal for
8 failing to repay thirty days after the Maturity Date. See Cal. Civ. Code § 1641 (“The whole of a
9 contract is to be taken together, so as to give effect to every part, if reasonably practicable, each
10 clause helping to interpret the other.”); *id.* § 1643 (“A contract must receive such an interpretation
11 as will make it . . . reasonable.”); *id.* § 3542 (“Interpretation must be reasonable.”).

12 The Court thus finds that the terms of the NPA and Note, as well as settled California law,
13 establish that Mr. Grosz’s Note became due and payable on the Maturity Date and that Toptal was
14 within its rights to return an amount equal to Mr. Grosz’s principal and accrued interest in March
15 2020. Summary judgment is granted to Toptal on this theory of breach.

16 **CONCLUSION**

17 The Court grants Toptal’s Motion for Summary Judgment, in part, and dismisses Count I
18 of Mr. Grosz’s counterclaim.⁶

19 IT IS SO ORDERED.

20 DATED: October 11, 2023.

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23 _____
24 JAMES W. HARDESTY
25 Senior Justice
26

27 ⁶ For the reasons articulated in this Order the Court finds that Mr. Grosz is not entitled to summary judgment on
28 Count I of his counterclaim, Toptal’s eighth claim for relief or Toptal’s second affirmative defense and Mr. Grosz’s
motion filed August 28, 2023, is denied.

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CERTIFICATE OF ELECTRONIC SERVICE

I certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe that on the 11th October 2023, I electronically filed the foregoing with the Second Judicial District Court's electronic filing system which will send a notice of electronic filing to the following:

- JOHN DESMOND, ESQ.
- KENT ROBISON, ESQ.
- PHILIP MANNELLY, ESQ.
- ADAM HOSMER-HENNER, ESQ.
- HANNAH WINSTON, ESQ.
- BRIAN IRVINE, ESQ.


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