IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DELIVERANCE POKER, LLC,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 1:10-CV-00664-JRN
	§	
MICHAEL MIZRACHI and TILTWARE, LLC,	§	
	§	
	§	
Defendants.	§	

NOTICE OF MOTION AND MOTION BY DEFENDANT TILTWARE, LLC TO DISMISS CAUSE OF ACTION FOR FAILURE TO STATE A CLAIM PURSUANT TO RULE 12(b)(6)

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that Defendant Tiltware, LLC will and hereby does move the Court for an order dismissing Count 5, tortious interference with prospective business relations, of Plaintiff's Third Amended Complaint (the "TAC"). This motion is brought pursuant to F.R.C.P. Rule 12(b)(6) on the ground that Count 5 of the TAC fails to state a claim upon which relief can be granted because it fails to identify any independently tortious conduct committed by Tiltware. This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities filed herewith, the pleadings and papers on file herein, and upon such other matters as may be presented to the Court at the time of the hearing.

Respectfully submitted,

The Law Offices of John Henry, P.C.

By: /s/ John P. Henry

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CERTIFICATE OF SERVI CE

I hereby certify that on the 28th day of February, 2011, I caused the foregoing document to be delivered via facsimile and via ECF to the following parties, through their attorney of record:

/s/ John P. Henry
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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT TILTWARE'S MOTION TO DISMISS

I. INTRODUCTION

With this fourth version of the Complaint, Plaintiff attempts to change it ever evolving theory of its case yet again. Aside from whether doing so is commensurate with the precepts of Rule 11 of the Federal Rules of Civil Procedure, Plaintiff's Fifth Count brought against this moving defendant is fatally defective as a matter of law and cannot be cured.

II. STATEMENT OF FACTS

The chronological history of the case is well-known to this Honorable Court. [1]

III. LEGAL STANDARD

In order to survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 127 S.Ct. 1955, 1974 (2007). Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact). Id. at 1965.

When evaluating a motion to dismiss, courts must construe the complaint in the light most favorable to the plaintiff, but they should ignore "[c]onclusory allegations," which "are insufficient to preclude dismissal." *Howard v. Am. Online, Inc.,* 208 F.3d 741, 750 (9th Cir. 2000). Rule 8(a)(2) requires a plaintiff to allege facts, which, if true, would "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007).

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[1] . In its Third Amended Complaint ("TAC"), Plaintiff curiously adds another new theory of liability. See, for example, paragraph 44 of the TAC which states in conclusory fashion that: "Mizrachi's relationship with Deliverance Poker was tortuous because it was done for the purpose of undermining Deliverance Poker's ability to conduct business and to eliminate a potential business competitor. Tiltware's conduct was without privilege or justification. Tiltware's interference with Deliverance Poker's relationship with Mizrachi caused Deliverance Poker injury as set forth above."

"[O]nly a complaint that states a *plausible* claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 129 S.Ct 1937, 1950 (2009) (quoting *Twombly*, 550 U.S. at 556) (emphasis added). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949 (citing *Twombly,* 550 U.S. at 556). "Rule 8 … does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id*. at 1950 (citing *Twombly*, 550 U.S. at 556). "The plausibility standard 'asks for more than a sheer possibility that a defendant has acted unlawfully.'" *Id.* at 1949. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557 (internal citations omitted)).

IV. ARGUMENT

A. Count 5 of the TAC Should be Dismissed Because it Fails to Identify an Actionable Tort Committed by Tiltware.

In Texas, a plaintiff must show an independent tort in order to state a claim for tortious interference with prospective relations. Merely competitive or sharp business conduct does not support an interference claim. Count 5 of the TAC is predicated on the notion that "if Mizrachi did not have an enforceable agreement to promote Deliverance Poker, Deliverance Poker had a prospective contractual relationship with Mizrachi of which Tiltware was aware" and that "Tiltware's conduct was also tortious because it was done for the improper purpose of eliminating a potential competitor." (TAC ¶ 24). However, for all its blustering, Count 5 fails to specify what "recognized tort duty" Tiltware has violated and thus should be dismissed.

B. Texas Law Requires that Plaintiff Show Conduct That is "Independently Tortious or Unlawful" to Support an Interference Claim

In Wal-Mart Stores, Inc. v. Sturges, the Texas Supreme Court concluded that "to establish liability for interference with a prospective contractual or business relation the plaintiff must prove that it was harmed by the defendant's conduct that was either independently tortious or unlawful. By 'independently tortious' we mean conduct that would violate some other recognized tort duty." Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 713 (Tex. 2001).

Wal-Mart involved two parties competing over development rights to a single parcel of land, Tract 2, which was bank-owned. Wal-Mart owned the lot adjacent to Tract 2 and controlled the rights to develop Tract 2 pursuant to two recorded instruments, each entitled "Easements with Covenants and Restrictions Affecting Land" ("ECRs"). Unaware of Wal-Mart's plans to expand onto Tract 2, the plaintiffs sought to entice a grocery store company to develop a new store on the parcel. To that end, plaintiffs entered into a contract with the bank to purchase Tract 2 in hopes of leasing the property to the grocery store company. Ultimately, Wal-Mart denied the plaintiffs' request for a modification of the ECR and informed the grocery store company that, instead, Wal-Mart intended to acquire Tract 2 and to expand onto that site. In response, "[t]he plaintiffs sued Wal-Mart for tortiously interfering with their prospective lease with [the grocery store company] and for breaching the 1982/1988 ECRs by unreasonably refusing to approve the requested site plan modification." Id. at 714.

The Court observed that "we must understand what kind of conduct is legally harmful and constitutes tortious interference. Whenever two competitors vie for the same business advantage, as Wal-Mart and Sturges did over the acquisition of Tract 2, one's success over the other can almost always be said to harm the other." Id. at 715. Further examining the contours of the doctrine of tortious interference with prospective relations, the Court explained that "a

plaintiff could recover for tortious interference by showing an illegal boycott, although a plaintiff could not recover against a defendant whose persuasion of others not to deal with the plaintiff was lawful. Conduct that is merely "sharp" or unfair is not actionable and cannot be the basis for an action for tortious interference with prospective relations, and we disapprove of cases that suggest the contrary." Id. at 726. The Texas Supreme Court held that there was no evidence to support plaintiffs' interference claim, explaining that the "record contains no evidence to indicate that Wal-Mart intended the plaintiffs any harm other than what they would necessarily suffer by Wal-Mart's successful acquisition of Tract 2, which they were both pursuing, by entirely lawful means." Id. at 728.

C. Count 5 Fails to Identify Any Independently Tortious or Unlawful Conduct by Tiltware

Like Wal-Mart, Tiltware was vying for Mizrachi's endorsement by entirely lawful means. The fact that Plaintiff may have suffered harm as a result of Mizrachi's ultimate choice does not mean that Tiltware violated a recognized tort duty. Further, at the time that Tiltware entered into an agreement with Mizrachi, it was informed and believed that no agreement existed between Mizrachi and Plaintiff. Thus, Tiltware did not believe that it was doing anything more than fairly seeking an endorsement deal with Mizrachi.

Plaintiff added language to the TAC arguing that Tiltware's conduct was tortious because "it was done for the purpose of undermining Deliverance Poker's ability to conduct business and to eliminate a potential business competitor." (TAC ¶ 43). However, Plaintiff's mere assertion that Tiltware's conduct was tortious is insufficient: in support of its interference claim, Plaintiff must identify a tort duty that Tiltware violated. Plaintiff has failed to do so.

In fact, even though this is Plaintiff's second attempt at stating an interference claim against Tiltware, it has still failed to identify an independent tort that would support this cause of

action.[2] That is, if there were no contract between Mizrachi and Plaintiff, and Plaintiff and Tiltware were both vying for Mizrachi's "endorsement," then what tort would be committed if Tiltware were the one to secure the endorsement instead of Plaintiff? Plaintiff apparently argues that the "independently tortious" conduct here was Tiltware's effort to harm a nascent competitor. However, Tiltware's conduct in trying to secure Mizrachi's endorsement is not independently tortious – it constitutes typical business competition: at most "sharp" as described by the Wal-Mart court above, but certainly not unlawful. After all, business competitors are always trying to out-do one another and not all competitive conduct rises to the level of a tort.

V. CONCLUSION.

For the reasons set forth above, the Court should dismiss Plaintiffs' Fifth Count in the Third Amended Complaint in its entirety and with prejudice.

Respectfully submitted,

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[2] Plaintiff first stated its cause of action for "tortious interference with prospective business relations" against Tiltware in its Second Amended Complaint.