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

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CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY
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Deliverance Poker, LLC,
Plaintiff,

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v.

Civil Action No. 10-CV-664-JRN

Tiltware, LLC and
Michael Mizrachi,
Defendants.

PLAINTIFF'S AMENDED MEMORANDUM IN SUPPORT OF
MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiff asks the court to grant a motion for a temporary restraining order against Defendant Michael Mizrachi.

A. Introduction

1. Plaintiff is Deliverance Poker, LLC; Defendants are Tiltware, LLC and Michael Mizrachi.
2. Plaintiff sued Defendants for breach of contract and tortious interference with existing contract. A copy of the original complaint is attached as Exhibit "A".
3. Plaintiff alleges that Plaintiff and Defendant Mizrachi executed a written contract on or about July 12, 2009 ["Deliverance Contract"] (Exhibit "B").
4. Said contract provided that Plaintiff would 1) pay Defendant Mizrachi \$150,000, 2) provide a membership interest of 1.75% in Plaintiff's corporation, and 3) advance expenses related to poker tournaments in which Defendant Mizrachi would participate. *Id.*, at ¶ 7.
5. Said contract further provided that Defendant Mizrachi would compete in tournaments, make personal appearances to promote Plaintiff's website, exclusively wear memorabilia promoting Plaintiff's website, and give interviews. *Id.*, at ¶ 3.
6. Defendant Mizrachi honored the Deliverance Contract until approximately July 2010. During this time, he played in numerous tournaments on behalf of Plaintiff. During these tournaments, he wore hats and other items that prominently featured Plaintiff's name and logo. Affidavit of Carlos Benavides III, Exhibit "C", at ¶ 8.
7. Defendant Mizrachi subsequently began promoting Full Tilt Poker. This second contract essentially replaced Plaintiff as Defendant Mizrachi's official sponsor. This sponsorship of Full Tilt Poker constitutes a breach of ¶ 3 (c) of the contract between

Plaintiff and Defendant Mizrachi. *Id.*, at ¶ 3 (c). This breach has resulted in damages to Plaintiff. Exhibit “C”, at ¶ 9.

B. Argument

8. In order to acquire a Temporary Restraining Order, Plaintiff must demonstrate:

- 1) A substantial likelihood of success on the merits;
- 2) A substantial threat of irreparable injury if the injunction is not issued;
- 3) That the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted;
- 4) That the grant of an injunction will not disserve the public interest.

Suver v. Pratt, No. C-10-99, 2010 WL 1371552, *1, n.1 (S.D.Tex. Apr. 6, 2010) (citation omitted).

9. Plaintiff can satisfy each of these elements.

- 1) THERE IS A SUBSTANTIAL LIKELIHOOD OF PLAINTIFF’S SUCCESS ON THE MERITS

10. In order to prevail on its breach of contract action against Defendant Mizrachi, Plaintiff must demonstrate a) that there is a valid, enforceable contract, b) that Plaintiff is a proper party to sue for breach of contract, c) that the Plaintiff performed its contractual obligations, d) that the Defendant breached the contract, and e) the Defendant’s breach caused Plaintiff injury. *City of The Colony v. North Tex. Mun. Water Dist.*, 272 S.W.3d 699, 739 (Tex.App.—Fort Worth 2008, pet. filed 3-4-09); *Mandell v. Hamman Oil & Ref. Co.*, 822 S.W.2d 153, 161 (Tex.App.—Houston [1st Dist.] 1991, writ denied).

11. Plaintiff had a valid and enforceable contract with Defendant Mizrachi. (See Exhibit “B”). There are no known factors that would make this contract invalid or non-enforceable. (Exhibit “C”, ¶ 11).

12. Plaintiff is a proper party to sue for breach of the contract in this matter. The contract in question clearly establishes that it is entered into between “Deliverance Poker, LLC, a Texas limited liability company...and Michael Mizrachi”. Exhibit B., at p. 1.

13. This contract is signed on behalf of Deliverance Poker by Carlos Benavides III, the manager thereof. *Id.*, at p. 6.

14. The Deliverance Poker, LLC that signed the contract in question is the same Deliverance Poker, LLC that is Plaintiff in this suit. Exhibit “C”, ¶ 4. Further, the affiant in Exhibit C is the same Carlos Benavides III that signed the contract in question on behalf of Deliverance Poker, LLC. *Id.*, at ¶ 3.

15. Plaintiff complied with all the terms of the contract. (See Exhibit “C”). More

specifically, Plaintiff provided Defendant Mizrachi with a membership interest in Deliverance equal to one and three-quarters percent (1.75%) and One Hundred Fifty Thousand Dollars (\$150,000.00). *Id.*, at ¶ 13.

16. Defendant Mizrachi breached his contract with Plaintiff. More specifically, Defendant has breached the terms of his contract that require him to “Exclusively wear Site logoed shirts and caps during all Tournaments and Public Appearances (*Id.*, at ¶ 3 (c)). Evidence of this breach can be found in Exhibit “C”.
17. Given the fact that Plaintiff has demonstrated each of the elements necessary in order to prevail on its breach of contract claim, it has demonstrated that there is a substantial likelihood of success on the merits.

2) THERE IS A SUBSTANTIAL THREAT OF IRREPARABLE INJURY TO THE PLAINTIFF IF THE INJUNCTION IS NOT ISSUED.

18. Plaintiff will suffer imminent and irreparable injury if Defendant Mizrachi is not immediately restrained from promoting Plaintiff’s competitor.
19. Plaintiff requires an injunction preventing Defendant Mizrachi from promoting Plaintiff’s competitor so that Plaintiff may 1) receive the benefit of its bargain and 2) receive televised exposure via Defendant Mizrachi’s advancement within the World Series of Poker tournament. Further, Plaintiff requires an injunction so that Plaintiff’s competitor will no longer be promoted; this promotion is directly detrimental to Plaintiff’s interests. Fed. R. Civ. P. 65(b)(1); *see Sampson v. Murray*, 415 U.S. 61, 88-89 & n.59 (1974) (Exhibit “C”, ¶ 16).
20. Plaintiff’s injury will result from Defendant Mizrachi’s promotion of Full Tilt Poker, a competing company in the same (or in a materially similar) industry. *Id.*, at ¶ 17. This injury is imminent insofar as Defendant Mizrachi has already begun publicly participating in tournaments in which he has sponsored Full Tilt Poker. *Id.* This sponsorship is irreparable insofar as Plaintiff is not receiving the benefit of its bargain, to wit: the televised advertisement of Deliverance Poker by Defendant Mizrachi. *Id.* Additionally and/or alternatively, it is irreparable because the benefit that is being accrued by Full Tilt Poker to Plaintiff’s detriment cannot be recouped by Plaintiff. *Id.* Additionally and/or alternatively, the damages incurred as a result of Defendant Mizrachi’s conduct cannot be accurately measured and/or the Plaintiff cannot be adequately compensated in damages for Defendant Mizrachi’s conduct. *Id.*
21. There is no adequate remedy at law if Defendant Mizrachi is not enjoined from continuing to promote a competing company in violation of his contractual obligations. In other words, Plaintiff cannot acquire additional advertisements from Defendant Mizrachi that will reach an international audience in the event that he is not enjoined from promoting a competing company. Further, Plaintiff cannot undo the harm inflicted by Defendant Mizrachi’s advertisement of a competing company.

3) THE THREATENED INJURY TO PLAINTIFF IF THE INJUNCTION IS DENIED OUTWEIGHS ANY HARM THAT WILL RESULT IF THE INJUNCTION IS GRANTED.

22. The threatened harm to Plaintiff outweighs the harm that a temporary restraining order would inflict on Defendant.
23. More specifically, Plaintiff has expended substantial sums of money in an attempt to develop a viable business in reliance upon its contract with Defendant Mizrachi. Exhibit "C", at ¶ 19.
24. Due to the fact that Defendant Mizrachi is presently promoting a competitor, Plaintiff is incurring irreparable injury. *Id.*, at ¶ 20.
25. In the event that Plaintiff's request for a Temporary Restraining Order and/or Preliminary Injunction is denied, Plaintiff will incur substantial injury. This injury includes (but is not necessarily limited to) the ongoing promotion of a competitor, the inability of Plaintiff to receive the benefit of its bargain, and the inability of Plaintiff to receive international televised exposure. These damages will be limited if Plaintiff is granted a Temporary Restraining Order and/or Preliminary Injunction preventing Defendant Mizrachi from promoting Full Tilt Poker. The only foreseeable harm that will result in the event a Temporary Restraining Order and/or Preliminary Injunction is granted is that Defendant Mizrachi will be prevented from participating in conduct that perpetuates the breach of his contract with Plaintiff. *Id.*, at ¶ 21.
26. As a result, the harm that will accrue in the event that the Temporary Restraining Order and/or Preliminary Injunction is denied outweighs the harm that will result if they are granted.

4) THE GRANT OF AN INJUNCTION WILL NOT DISSERVE THE PUBLIC INTEREST.

27. Issuance of a temporary restraining order would not adversely affect the public interest and/or public policy because this is a private dispute between Plaintiff and Defendant Mizrachi. *Id.*, at ¶ 23.
28. Plaintiff is a private, non-publicly held corporation and Defendant Mizrachi is a private person. *Id.*
29. Given the fact that the public has no discernible interest in this matter, the issuance of a preliminary injunction would not adversely affect the public interest. *Id.*
30. Plaintiff is willing to post a bond in the amount the court deems appropriate. *Id.*, at ¶ 24.

31. The court should enter this temporary restraining order without notice to Defendant because Plaintiff will suffer immediate and irreparable injury, loss, or damage if the order is not granted before Defendant can be heard, and notice would be impractical because the harm is already being suffered. *Id.*, at ¶ 25. *See also* Fed. R. Civ. P. 65(b)(1); *First Tech. Safety Sys. v. Depinet*, 11 F.3d 641, 650 (6th Cir. 1993).
32. Additionally, notice is impractical because Defendant Mizrachi is leaving the country tomorrow, September 11, 2010 for an international poker tournament. Exhibit B, at ¶ 26. It is Plaintiff's belief and understanding that Defendant Mizrachi intends to continue breaching his contract with Plaintiff, thereby continuing to cause Plaintiff injury. *Id.*
33. Plaintiff asks the court to set its request for a preliminary injunction for hearing at the earliest possible time.

C. Conclusion

34. Plaintiff will suffer imminent and irreparable injury if Defendant Mizrachi is not immediately restrained from promoting Plaintiff's competitor.
35. There is no adequate remedy at law if Defendant Mizrachi is not enjoined from continuing to promote a competing company in violation of his contractual obligations, and there is a substantial likelihood that Plaintiff will prevail on the merits. The threatened harm to Plaintiff outweighs the harm that a temporary restraining order would inflict on Defendant. Issuance of a temporary restraining order would not adversely affect the public interest and public policy because this is a private dispute between Plaintiff and Defendant Mizrachi. The harm is already being suffered, and thus the court should grant this motion *ex-parte* to prevent additional imminent harm to Plaintiff. Further, the court should grant an Defendant Mizrachi is leaving for an international poker tournament in which he will foreseeably continue to promote Full Tilt Poker to Plaintiff's detriment.
36. For these reasons, Plaintiff asks the court to issue a temporary restraining order preventing Defendant Mizrachi from promoting Plaintiff's competitor so that Plaintiff may 1) receive the benefit of its bargain and 2) receive televised exposure via Defendant Mizrachi's advancement within (*inter alia*) the World Series of Poker tournament.

Respectfully submitted,

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