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, Defendant	§ § §	

PLAINTIFF'S RESPONSE TO
DEFENDANT TILTWARE, LLC'S RULE 12(b)(6) MOTION TO DISMISS

Plaintiff Deliverance Poker, LLC ("Deliverance Poker") files this response to Defendant Tiltware, LLC's Rule 12(b)(6) Motion.

I. Introduction:

By leave of Court, Plaintiff filed its Third Amended Complaint on January 17, 2011. Defendant Tiltware, LLC filed its 12(b)(6) motion on February 28, 2011, outside the time limit allowed by Rule 15(a)(3) of the Federal Rules of Civil Procedure.

Defendant Tiltware, LLC had filed its Answer to Plaintiff's Second Amended Complaint on January 10, 2011.

In its Motion, Tiltware challenges Count 5 of Plaintiff's Third Amended Complaint (TAC) alleging that Plaintiffs fail to state a claim upon which relief can be granted in regards to its tortious interference with prospective business relations claim. Tiltware claims that Plaintiff fails to identify any independent tortious conducted committed by Tiltware in the process of interfering with the Plaintiff's prospective business relations with Defendant Mizrachi.

II. Standard for Ruling on the Motion:

Motions to dismiss for failure to state a claim are viewed with disfavor and seldom granted. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). In reviewing a 12(b)(6) motion, the Court must view the complaint in the light most favorable to the Plaintiff, accepting all factual allegations as true. *Id.* Factual allegations must be enough to raise a right to relief above the speculative level. *Bell Atlantic Corp. v. Twombly* 550 U.S. 544, 555, 127 S.Ct. 1955, 1965 (2007)(discussing the standard to assert a restraint of trade provision in the Sherman Act). The requirement of plausibility, however, does not impose a probability requirement. *Id.* at 556. "We do not require heightened fact pleading of specifics, but only enough facts to state a claim of relief that is plausible on its face." *Id. a*t 570 (explaining that the decision in *Twombly* does not conflict with *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 508, 122 S.Ct. 992 (2002) (holding that there is no heightened pleading requirement in a discrimination case)). "A pleading that states a claim for relief must contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8, Fed. R. of Civ. P. *Twombly* does not require more than Rule 8.

III. Choice of Law Issues:

Tiltware overlooks the issue of what law to apply. In Texas,[1] "[a] choice of law provision in a contract that applies only to the interpretation and enforcement of the contract does not govern tort claims." *Red Roof Inns, Inc. v. Murat Holdings, LLC*, 223 S.W.3d 676, 684 (Tex. App.—2007, rev. denied) (citing *Stier v. Reading & Bates Corp.*, 992 S.W.2d 423, 433 (Tex. 1999)). Texas courts apply the "most significant relationship" test to determine what law applies. *See Hughes v. Wagner*, 18 S.W.3d 202, 205 (Tex. 2000); *Red Roof Inns, Inc.*, 223

[1] Federal courts exercising its diversity jurisdiction apply the substantive law of the state, including its choice-of-law jurisprudence. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 745, 100 S.Ct. 1978 (1980); *Calixto v. Watson Bowman Acme Corp.*, 637 F.Supp.2d 1064, 1066 (S.D. Fla. 2009).

S.W.3d at 684. In applying this test, Texas courts have applied the factors set forth in § 145 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). *See Red Roof Inns, Inc.*, 223 S.W.3d at 684-85. Those factors include:

> (a) the place where the injury occurred;
>
> (b) the place where the conduct causing the injury occurred;
>
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and
>
> (d) the place where the relationship, if any, between the parties is centered.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971). The Restatement provides commentary in which it attempts quantify the relevant weight that should be given to each factor. The injury suffered in an unfair business practice such as that engaged in by Tiltware is often widespread, as in this case. Therefore, the courts generally look to the location where the defendant's conduct occurred. *See Calixto*, 647 F.Supp.2d at 1066.

The injury to Deliverance Poker occurred worldwide—or, at least, all parts of the world in which the ESPN telecast of the World Series of Poker was (and continues to be) broadcast. Tiltware's conduct causing the injury occurred in Nevada. Deliverance Poker's principal place of business is in Texas, Mizrachi resides in Florida, and Tiltware's principal place of business is in California. Deliverance Poker and Tiltware do not share any business relationship, but Deliverance Poker and Mizrachi enjoyed a significant relationship centered in Texas.

On balance, it appears that Nevada law may well apply to Deliverance Poker's causes of action for tortious interference with prospective business relations. However, Deliverance Poker has satisfied its obligation to plead sufficient facts to state a claim for tortious interference with prospective business relations under either Nevada law or Texas law.

IV. Nevada Law:

Under Nevada law, the elements for tortious interference with prospective business relations are as follows: "(1) a prospective contractual relationship between the plaintiff and a third party; (2) the defendant's knowledge of this prospective relationship; (3) the intent to harm the plaintiff by preventing the relationship; (4) the absence of privilege or justification by the defendant; and (5) actual harm to the plaintiff as a result of defendant's conduct." *Consol. Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 971 P.2d 1251, 1255 (Nev. 1998) (per curiam). The sole basis of Tiltware's motion to dismiss for failure to state a claim is that Deliverance Poker failed to adequately plead an independent tort. As is clear under Nevada law, an independent tort is not an element of a claim for tortious interference with prospective business relations. Thus, Deliverance Poker cannot have failed to state a cause of action for failure to state an independent tort, although as set out in the following section, it does this as well. Moreover, as set out in Deliverance Poker's pleadings, each of the foregoing elements have been pleaded.

V. Texas Law:

To state a claim of tortious interference with a prospective business relations[2] under Texas law, a plaintiff must allege facts to show "(1) a 'reasonable probability' that the plaintiff would have entered into a contractual relationship; (2) the defendant acted maliciously by intentionally preventing the relationship from occurring with the purpose of harming the plaintiff; (3) defendant lacked privilege or justification; (4) the plaintiff was harmed by the interference; and (5) the defendant's conduct was independently tortuous or unlawful." *Amazon Tours v. Quest Global Angling*, 2004 WL 1788078 at *3 (N.D. Tex. 2004) (not reported), citing

[2] Plaintiff has alleged tortious interference with contract and has alleged tortious interference with prospective business relations in the alternative.

Wal-Mart Stores, Inc. v. Sturges, 52 S.W. 3d 711 (Tex. 2001). As noted, Tiltware's only challenge is that Plaintiff has not pled sufficient facts to satisfy the fifth element.

The Texas Free Enterprise and Antitrust Act of 1983, Tex. Bus. & Comm. Code, Chap. 15, § 15.05 makes "[e]very contract, combination, or conspiracy in restraint of trade or commerce unlawful." Tex. Bus. & Comm. Code § 15.05(a). Further, it is unlawful "for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce." Tex. Bus. & Com. Code, § 15.05(b). To prevail on a claim of attempted monopolization, a plaintiff must establish predatory or anticompetitive conduct with a specific intent to monopolize and a dangerous probability of achieving monopoly power. *Texas Disposal Systems Landfill, Inc. v. Waste Management Holdings, Inc.*, 219 S.W. 3d 563 (Tex. App.—Austin 2007, rev. denied). Additionally, Texas applies negligence *per se* for violations of statutes designed to prevent injury to a class of persons to which the injured party belongs. *Nixon v Mr. Property Management Co., Inc.*, 690 S.W. 2d 546, 549 (Tex. 1985) (finding negligence as a matter of law where apartment owner violated a statute requiring certain safety precautions in apartment buildings and holding that the ordinance was designed to prevent injury to the general public).

Deliverance Poker's TAC alleges, in pertinent part:

1. In 2007, Carlos Y. Benavides, III ("Benavides") began developing the concept for an online poker website that would compete with two well-known sites, Full Tilt Poker, which is the brand name for Tiltware, and Poker Stars. ¶ 9, TAC.
2. Benavides realized he needed a poker celebrity to endorse Deliverance Poker in order to attract people to the website and investors in the business. ¶ 10, TAC.

3. Benavides believed this form of advertisement was essential to the success of Deliverance Poker. ¶ 10, TAC.

4. The entire marketing of Deliverance Poker, both to investors and the public in general, was built around Mizrachi. ¶ 15, TAC.

5. Mizrachi began wearing the Deliverance Poker gear, in particular, the caps and shirts with the logos and name of Deliverance Poker prominently displayed, at poker tournaments and other public appearances. ¶ 15, TAC.

6. Mizrachi gave an interview with Ante Up magazine. In this interview, Mizrachi actively promoted Deliverance Poker, at one point stating, "Deliverance has a great logo and I think we have a legit (sic) shot. . . . The four [Mizrachi] brothers have joined together and I think it will be a great site. It's gonna take a long time, but if there's time and great marketing strategy I think we have a legitimate shot at competing with the other sites." ¶ 19, TAC.

7. It was also in July 2010 that Deliverance Poker planned the "soft launch" of its website, which is essentially a testing phase to make sure the website functioned properly. Deliverance Poker had planned the "hard launch" (meaning the fully operational launch) of the website for September 7, 2010, during the European WSOP. ¶ 22, TAC.

8. The Main Event of the WSOP, which is a $10,000 buy-in, no-limit tournament, began on July 5, 2010. As noted above, this is considered the premier event in all of poker tournaments. Mizrachi began having success right away. On or about the fourth day of the Main Event, Benavides noticed that Mizrachi was not wearing the Deliverance Poker gear, which Benavides thought was odd because

Mizrachi had been wearing Deliverance Poker's gear throughout the tournament to this point. ¶ 23, TAC.

9. Representatives from Tiltware, upon seeing Mizrachi's success and with full knowledge that Mizrachi was under contract with Deliverance Poker to promote its website, intentionally, willfully, and maliciously interfered with the contract between Mizrachi and Deliverance Poker. ¶ 24, TAC.

10. Tiltware, aware that Deliverance Poker would present unwanted competition upon its entering the marketplace, particularly with a well-known sponsor such as Mizrachi, undermined that relationship by offering a contract to Mizrachi that would require Mizrachi to promote Full Tilt Poker to the exclusion of Deliverance Poker. The contract with which Tiltware enticed Mizrachi to breach his contract with Deliverance Poker paid substantially more in the near term than Mizrachi's contract with Deliverance Poker. ¶ 24, TAC.

11. Tiltware's conduct was also tortious because it was done for the improper purpose of eliminating a potential competitor in its field of business. ¶ 24, TAC.

12. Mizrachi . . . by sa[id] that he had been offered a deal by Full Tilt Poker, *i.e.*, meaning Tiltware, the actual company, and he explained the offer, which was essentially a graduated offer depending on how long Mizrachi continued to progress in the Main Event. ¶ 25, TAC.

13. Benavides told Mizrachi that he had an agreement with Deliverance Poker and that it would be devastating to Deliverance Poker if Mizrachi started promoting Tiltware in violation of the agreement. ¶ 25, TAC.

14. The entire marketing strategy of Deliverance Poker had been built around Mizrachi, so after his defection to begin promoting Full Tilt Poker, Deliverance Poker and Sabre lost its potential investors. As a result, Sabre refused to go forward with the launch of the website, and Benavides also could no longer effectively seek additional investors in Deliverance Poker. Tiltware's strategy of undermining the ability of Deliverance Poker to compete with it had worked. ¶ 27, TAC.

15. Tiltware's actions in interfering with Deliverance Poker's relationship with Mizrachi was done without privilege or justification. ¶ 43, TAC.

Deliverance Poker has pled sufficient facts to state a plausible claim under Texas law that Defendant Tiltware acted in a manner designed to monopolize or attempt to monopolize the online poker market, and, therefore, Plaintiff has sufficiently pled facts to support element 5 of a tortious interference with prospective business relations. *Twombly*, 550 U.S. at 570.

VI. Request to Amend:

If the Court determines to grant Defendant's Motion, Plaintiff requests that the Court grant Plaintiff's Second Motion to Compel Discovery Responses directed at Tiltware and allow it the opportunity to amend its Complaint after it has received Tiltware's responses and had the opportunity to take Defendant Mizrachi's deposition. A district court should "freely give leave" to amend a complaint "when justice so requires." Fed.R.Civ.P. 15(a)(2). The standard articulated in Rule 15 favors granting leave to amend. *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 367 (5th Cir. 2001).

In this instance, Defendants have avoided discovery, which has directly thwarted Plaintiff's ability to allege necessary facts peculiarly in the control of the Defendants. Plaintiff

has been diligent in attempting to take Mizrachi's deposition, but has been unable to schedule it.[3] The opportunity to amend should generally be allowed unless there are specific facts that would justify dismissal without leave to amend. *U.S. ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 271 (5th Cir. 2010). In our situation, the facts showing Defendants' resistance to discovery should argue for granting leave to amend.

VII. Conclusion and Prayer:

The Court should deny Defendant Tiltware's Motion to Dismiss Cause of Action for Failure to State a Claim Pursuant to Rule 12(b)(6). Alternatively, the Court should grant Plaintiff's Second Motion to Compel Discovery Responses from Tiltware and order the deposition of Defendant Mizrachi and allow Plaintiff ten (10) days after discovery from Tiltware is received and Mizrachi's deposition is taken to amend their complaint. Plaintiff prays that the Court grant the relief set forth above and for all other relief to which it has shown itself entitled.

Respectfully submitted,

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[3] Counsel for Plaintiff has attempted to schedule depositions of the parties every week beginning on February 14, 2011, but each time counsel for Defendants has requested that they be put off and, in some cases, refused to provide any available dates.

CERTIFICATE OF SERVICE

I certify that on 3/11/2011, I caused Plaintiff's Response to Defendant Tiltware, LLC's Rule 12(b)(6) Motion to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following counsel for Defendants Michael Mizrachi and Tiltware, LLC:

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