

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

FILED  
2010 SEP 14 PM 3:01  
CLERK US DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
BY           
DEPUTY

DELIVERANCE POKER, LLC,  
Plaintiff,

vs.

TILTWARE, LLC AND  
MICHAEL MIZRACHI,  
Defendants.

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10-CV-664-JRN

**ORDER DENYING PLAINTIFF'S MOTION FOR TRO**

Before the Court in the above-entitled and styled cause of action is Plaintiff, Deliverance Poker, LLC's ("Plaintiff") Amended Memorandum in Support of Motion for Temporary Restraining Order. (Clerk's Dkt. # 8). After reviewing Plaintiff's pleadings, the Court again finds that Plaintiff has failed to satisfy the four-part test necessary for the entry of an *ex parte* Temporary Restraining Order. Accordingly, the Court finds that Plaintiff's Motion for Temporary Restraining Order is **DENIED**.

**Factual Background**

In its pleadings, Plaintiff contends that it entered into a sponsorship contract with Michael Mizrachi ("Defendant"). *See* Pl.'s Mem. in Supp. of Mot. for TRO at ¶ 4. According to Plaintiff, the contract required Defendant to exclusively wear Plaintiff's memorabilia and promote Plaintiff's brand. *See id.* Recently, Defendant entered into a separate sponsorship contract with Plaintiff's competitor, Tiltware, LLC, and began to promote the Tiltware brand. *See id.* at ¶ 5. Defendant's promotion of the Tiltware brand, according to Plaintiff, is a breach of the contract Defendant originally entered with Plaintiff. *See id.*

On September 7, 2010, Plaintiff filed its first Motion for Temporary Restraining Order seeking to prevent Defendant from promoting the Tiltware Brand. *See id.* at ¶ 6; (Clerk's Dkt. # 3). This Court denied Plaintiff's first Motion for Temporary Restraining Order because Plaintiff did not include the relevant contract, and thus failed to establish that there is a "substantial likelihood" that it will prevail on the merits. *See* Order Den. Pl.'s Mot. for TRO at 2. Three days later, Plaintiff filed a second Motion for Temporary Restraining Order, this time including the relevant contract. *See* Pl.'s Am. Mem. in Supp. of Mot. for TRO; (Clerk's Dkt. #8). After reviewing Plaintiff's amended pleadings, the Court again finds that Plaintiff has failed to satisfy the four-part test necessary for the entry of an *ex parte* Temporary Restraining Order.

#### Analysis

As an initial matter, even with the additional support attached to Plaintiff's amended pleadings, this Court is still not convinced there is "substantial likelihood" that Plaintiff will prevail on the merits. In its pleadings, Plaintiff attaches the relevant contract. And in the contract, the "Effective Date" takes place "immediately upon the closing by Deliverance of an offering of debt or equity interests in Deliverance which raises no less than One Million Dollars." *See* Pl.'s Am. Mem. in Supp. of Mot. for TRO at Ex. B, ¶ 1. But there is no indication anywhere in Plaintiff's pleadings that the "Effective Date" has taken place. Additionally, under Paragraph 5(c), the contract "will automatically terminate if the Effective Date has not occurred on or before August 24, 2009." *See id.* at ¶ 5(c). While it may be implied that the "Effective Date" has taken place, this Court is hesitant to enter an *ex parte* TRO based on implications alone.

Even assuming that Plaintiff's pleadings show a "substantial likelihood" of success on the merits, this is not enough, because the Court finds that Plaintiff fails to establish a "substantial

threat of irreparable injury.” It is well settled amongst district courts in the Fifth Circuit that:

The movant for a temporary restraining order must establish the following four factors: (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; and (4) that the grant of an injunction will not disserve the public interest.<sup>1</sup>

If a movant fails to establish any single factor, a TRO cannot be properly granted.<sup>2</sup> Thus,

because Plaintiff has not persuaded this Court that Defendant’s conduct will inflict an irreparable injury, Plaintiff’s Motion for TRO is denied.<sup>3</sup>

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<sup>1</sup> See *Suver v. Pratt*, No. C-10-99, 2010 WL 1371552, at \*1, n.1 (S.D. Tex. Apr. 6, 2010) (citation omitted); see also *Hernandez v. Texas*, No. 09-cv-55, 2010 WL 769487, at \*1 (E.D. Tex. Mar. 4, 2010) (citation omitted); *Rotella v. Mid-Continent Cas. Co.*, No. 08-cv-0486, 2009 WL 1287834, at \*2 (N.D. Tex. May 8, 2009) (citation omitted).

It should also be noted that the requirements for temporary restraining orders and permanent injunctions, as well as the burden of proof, are treated identically in the Fifth Circuit. See *Brooks v. Wells Fargo Home Mortg.*, No. 3-04-CV-1686-B, 2004 WL 1800750, at \*1 (N.D. Tex. Aug. 11, 2004) (“An application for temporary restraining order is governed by the same factors as an application for preliminary injunction.”) (citing *Hunt v. Bankers Trust Co.*, 646 F. Supp. 59, 62 n.1 (N.D. Tex.1986)). Accordingly, this Court bases its decision on case law discussing both TROs and preliminary injunctions. See *Shirley v. Sheriff, Henderson County*, No. 10-cv-348, 2010 WL 3504224, at \*1 (E.D. Tex. Aug. 16, 2010) (applying the “burden or persuasion” requirement to both temporary restraining orders and preliminary injunctions); *Smith v. Tarrant County College Dist.*, 670 F. Supp. 2d 534, 537 (N.D. Tex. 2009) (ruling on a motion for temporary restraining order, but citing Fifth Circuit case law reviewing preliminary injunctions) (citations omitted); *Amir-Sharif v. Howell*, No. 06-cv-1901, 2007 WL 1200057, at \*1 (N.D. Tex. Apr. 20, 2007) (discussing the application of the four-factor test required for a “temporary restraining order or preliminary injunction”).

<sup>2</sup>See *Davis v. Epps*, No. 08-cv-85, 2008 WL 5642493, at \*1 (N.D. Miss. Dec. 3, 2008) (noting that each prong of the four-part test “must be met before the court can grant such a drastic remedy as a temporary restraining order . . .”).

<sup>3</sup> See *Shirley*, 2010 WL 3504224, at \*1 (noting that movant must “clearly carry the burden of persuasion on any of the four prerequisites required to establish the need for a temporary restraining order or preliminary injunction.”).

The concept of “irreparable injury” does not lend itself to a precise definition.<sup>4</sup> Typically, a case-by-case analysis is required.<sup>5</sup> But to the extent that a general rule can be formulated, that rule is: monetary damages alone are not enough to establish an irreparable injury.<sup>6</sup> Of course, as is the case for most rules, there is an exception. And here, an exception arises when monetary damages are especially difficult to calculate.<sup>7</sup>

In spite of its efforts, Plaintiff fails to persuade this Court that its case falls into the exception. Simply stating, in a conclusory fashion, that Plaintiff is not receiving the benefit of its bargain, and the damages cannot be accurately measured, does not pass muster.<sup>8</sup> See Pl.’s Am.

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<sup>4</sup>See *Morgan v. Fletcher*, 518 F.2d 236, 239 (5th Cir. 1975) (citing *Sampson v. Murray*, 415 U.S. 61, 94 (1974)).

<sup>5</sup>See *id.*

<sup>6</sup>See *Sampson*, 415 U.S. at 90 (noting that “[m]ere injuries, however substantial, in terms of money, time and energy . . . are not enough.”); *DFW Metro Line Serv. v. Sw. Bell*, 901 F.2d 1267, 1269 (5th Cir. 1990); *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989); *Johnson Controls, Inc. v. Guidry*, 2010 WL 2773234, at \*12 (W.D. La. July 12, 2010); *Peavey Electronics Corp. v. Pinske*, No. 10-cv-69, 2010 WL 2243562, at \*5 (S.D. Miss. June 1, 2010) (citation omitted).

<sup>7</sup> See *Miss. Power & Light Co. v. United Gas Pipeline Co.*, 760 F.2d 618, n.12 (5th Cir. 1985) (citing *State of Texas v. Seatrains Int’l, S.A.*, 518, F.2d 175, 179 (5th Cir. 1975)).

<sup>8</sup> “Conclusory allegations are not sufficient to support a claim for injunctive relief[.]. . . [r]ather, strict proof of each element is required before a preliminary injunction may issue.” *Brooks v. Wells Fargo Home Mortg.*, No. 3-04-CV-1686-B, 2004 WL 1800750, at \*1 (N.D. Tex. Aug. 11, 2004) (citations omitted); see also *Lakedreams v. Taylor*, 932 F.2d 1103, 1107 (5th Cir. 1991) (conclusory allegation of irreparable harm does not entitle movant to injunctive relief); *Cnty. of El Paso v. Chertoff*, No. EP-08-CA-196-FM, 2008 WL 4372693, at \*10 (W.D. Tex. Aug. 29, 2008) (“Plaintiffs’ allegations of harm are conclusory and thus insufficient to establish a concrete or irreparable harm.”); *Henry v. Baker*, NO. 3:00-CV-2046-G, 2001 WL 1112441, at \*2 (N.D. Tex. Sept. 13, 2001) (“The court does not issue a TRO or an injunction on unsubstantiated fears of irreparable injury.”) (order adopting magistrate judge’s findings); *Hunt v. Bankers Trust Co.*, 646 F. Supp. 59, 63 (N.D. Tex. 1986) (conjecture in affidavit concerning irreparable injury is insufficient).

Mem. in Supp. of Mot. for TRO at ¶ 20. Plaintiff is required, by the local rules, to cite specific authority supporting its motion.<sup>9</sup> And Plaintiff fails to cite either binding or persuasive authority to support its argument that Defendant's breach cannot be reasonably measured. Furthermore, this Court is not aware of Fifth Circuit case law that clearly supports Plaintiff's argument. Without relevant authority, this Court is unwilling to impose a remedy as extraordinary and drastic as an *ex parte* Temporary Restraining Order.

**IT IS THEREFORE ORDERED** that Plaintiff's Motion for Temporary Restraining Order is **DENIED**.

**IT IS FURTHER ORDERED** that Plaintiff shall not file any amended memoranda in support of additional Temporary Restraining Orders regarding this same matter.

Signed this 14<sup>th</sup> day of September, 2010.



**JAMES R. NOWLIN**

**UNITED STATES DISTRICT JUDGE**

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Additionally, a remedy for Defendant's material breach is provided for in the sponsorship contract the two Parties entered into. Paragraph 7 of the contract states, "[Defendant] shall forfeit the Representation Fee in the event that (a) Deliverance terminates this Agreement for cause . . .[.]" See Pl.'s Am. Mem. in Supp. of Mot. for TRO at Exhibit B, ¶¶ 3, 5, 7.

<sup>9</sup> W.D. Tex. Civ. R. Local Rule (1)(CV-7)(c) ("The specific legal authorities supporting any motion shall be cited in the motion . . .").