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13
14 UNITED STATES DISTRICT COURT
15 DISTRICT OF NEVADA

16 CYCALONA GOWEN,

17 Plaintiff,

18 vs.

19 TILTWARE, LLC, FULL TILT POKER,
20 POCKET KINGS LTD., KOLYMA
CORPORATION, RAYMOND BITAR, an
21 individual, HOWARD LEDERER, an
individual, ANDREW BLOCH, an
22 individual, PHILLIP IVEY, an individual,
CHRISTOPHER FERGUSON, an individual,
23 JOHN JUANDA, an individual, PHILLIP
GORDON, an individual, ERICK
24 LINDGREN, an individual, ERIK SEIDEL,
an individual, JENNIFER
25 HARMAN-TRANIELLO, an individual,
MICHAEL MATUSOW, an individual,
26 ALLEN CUNNINGHAM, an individual,
GUS HANSEN, an individual, and PATRICK
27 ANTONIOUS, an individual,

28 Defendants.

CASE NO. 2:08-CV-01581-RCJ-RJJ

**OPPOSITION TO PLAINTIFF'S
MOTION FOR RECONSIDERATION OF
ORDER DENYING AS MOOT
MOTIONS # 79, 80 & 82**

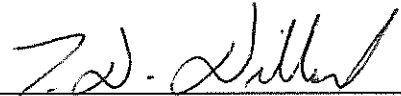
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1 COME NOW, Defendants Tiltware, LLC ("Tiltware"), Raymond Bitar, Howard Lederer,
2 Andrew Bloch, Phillip Ivey, Christopher Ferguson, John Juanda, Phillip Gordon, Erick Lindgren,
3 Erik Seidel, Jennifer Harman-Traniello, Michael Matusow, Allen Cunningham, Gus Hansen and
4 Patrick Antonious, by and through their attorneys of record of the law firms of OLSON,
5 CANNON, GORMLEY & DESRUISSEAU and GREENBERG TRAURIG, LLP and submit
6 this opposition to Plaintiff's motion [#101] entitled "Plaintiff's Motion for Order Shortening
7 Time on Motion for Reconsideration of Order Denying as Moot [79] Motion to Compel
8 Discovery; Denying as Moot [80]; Motion for Sanctions Re Discovery; and, Denying as Moot
9 [82] Motion for Protective Order Based on a Ruling by the Court at the Hearing Held 4/27/2009,
10 Granting Defendants' Motion to Dismiss."


11 This Opposition is based on the accompanying memorandum of points and authorities,
12 the complaint and other pleadings filed in this action, and such other argument and evidence
13 which may be presented at the hearing on this motion.

14 DATED this 18 day of May, 2009.

15 OLSON, CANNON, GORMLEY
16 & DESRUISSEAU

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On April 27, 2009, the Honorable Judge Robert C. Jones heard oral arguments on Defendants’ motion to dismiss Plaintiff’s First Amended Complaint (“FAC”). (Transcript of 04/27/09 Hearing, attached as Exhibit “A”). The Court unequivocally indicated he was going to grant the motion to dismiss but did give Plaintiff limited leave to amend and file a Second Amended Complaint (“SAC”). The Court further stated that the dismissal of at least twelve of the fourteen Defendants would be with prejudice, or without leave to amend. *Id.* at pp. 6-8, 11, 14. Judge Jones explained he would issue a written order and he would grant the motion to dismiss the entire FAC, but give leave to amend with respect only to Tiltware, Raymond Bitar and Howard Lederer. *Id.* at 15. The Court, in doing so, did caution Plaintiff’s counsel that in their third attempt to state a claim for relief that they must allege specific facts to overcome the defense of the statute of frauds and to comply with the heightened pleading requirement for fraud and/or intentional misrepresentation. *Id.* at 8-9, 10-12.

The minutes of the proceeding indicated the Court “will issue its written decision GRANTING the [# 72] Motion to Dismiss, and allowing amendment as to certain of the parties.” Based on the ruling of the Court on the motion to dismiss, Magistrate Judge Robert J. Johnston, on April 28, 2009, denied as moot two pending discovery motions both involving the issue of whether the Rule 26(f) conference and subsequent discovery should proceed before a ruling is made on the motion to dismiss. [#100]. Defendants maintained in their motion for protective order that discovery should be stayed until the District Court decided the pending motion to dismiss the FAC. Plaintiff conversely moved to compel Defendants participation in discovery before the a decision was made on the motion to dismiss after Magistrate Judge Johnston denied their motion to conduct expedited discovery [#78].

Unrelenting on her desire to conduct discovery before filing a valid claim, Plaintiff immediately moved for reconsideration on the order denying their motion to compel and for sanctions as moot. Plaintiff does so contending an answer should be filed to a portion of the FAC and discovery should proceed even before Judge Jones’ issues his written order which will

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1 dismiss the FAC with leave to amend and file a Second Amended Complaint ("SAC"). [#101 pg.
2 2, lines 20-21]. Plaintiff's justification for taking this very irregular procedural approach is
3 solely based on her view that Defendants' motion to dismiss did not address each of her causes of
4 action in her complaint. Specifically, Plaintiff states her "claims" against Tiltware for accounting
5 and quantum meruit are still viable notwithstanding the clear picture Judge Jones painted for the
6 parties at the hearing of the scope of his forthcoming written order of dismissal.

7 Defendants pleadings [#72 (the motion) & #87 (the reply)] make clear that all of
8 Plaintiff's independent causes of action were subject to dismissal. More importantly, the order of
9 the Court as indicated by Judge Jones at the hearing WILL dismiss the FAC entirely but with
10 limited leave to amend. It is clear Plaintiff is simply attempting again to obtain discovery even
11 before she has to file a SAC so that she might develop some facts to try and support a viable
12 cause of action. To justify this end, Plaintiff has misconstrued the scope of the pleadings on file
13 and deliberately turned a deaf ear to Judge Jones' ruling from the bench just to try and dodge
14 Rule 11's requirement to in good faith have knowledge of facts before filing suit. Plaintiff's
15 motion for reconsideration (like her FAC) is without any colorable basis and must be denied.
16 Magistrate Judge Johnston properly decided the discovery motions pending before him upon
17 receipt of the minute order from Defendants' motion to dismiss.

18 II. LEGAL ARGUMENT

19 There is No Basis to Warrant Reconsideration of Magistrate Judge Johnston's Order 20 Denying as Moot the Discovery Motions Because the District Court 21 Dismissed the Entire First Amended Complaint

22 The term "Motion for Reconsideration" is not mentioned in the Federal Rules of Civil
23 Procedure. A type of reconsideration is seemingly permitted (in some circumstances) in Federal
24 practice pursuant to Fed.R.Civ.P. 59(e) or Rule 60(b)(6). See Fuller v. M.G. Jewelry, 950 F.2d
25 1437, 1442 (9th Cir. 1991). However, to avoid being frivolous, such a motion must provide a
26 valid ground for reconsideration. See NGIC Indemnity Corp. v. Weisman, 803 F.2d 500, 505 (9th
27 Cir. 1986). A motion for reconsideration must do two things: "First, it must demonstrate some
28 reason why the Court should reconsider its prior decision. Second, it must set forth facts or law
of a strongly convincing nature to induce the Court to reverse its prior decision." Great Hawaiian

1 Financial Corp. v. Aiu, 116 F.R.D. 612, 616 (D. Hawaii 1987). There are just three grounds
 2 justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of
 3 new evidence; and (3) the need to correct a clear error or prevent manifest injustice. See School
 4 District No. IJ, Multnomah County v. Acands, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

5 In requesting reconsideration, Plaintiff does not rely upon a change in law or newly
 6 discovered evidence. Rather Plaintiff's motion is predicated upon nothing more than her own
 7 factual opinion that she has two causes of action that withstood Defendants' motion and the
 8 Court's order. The April 27, 2009 hearing transcript provides no support for this contention.
 9 (Exhibit "A"). Plaintiff in fact made no argument to Judge Jones indicating that any portion of
 10 the FAC was outside of the motion to dismiss. In addition to being contradicted by the record,
 11 Plaintiff's argument is contrary to well established law as well.

12 First, Plaintiff does not have an independent cause of action for an accounting because
 13 one does not exist under the law. Thus, accounting (like a request for a constructive trust or
 14 rescission) is a remedy derivative from another viable cause of action. Accounting, in other
 15 words, is not an independent cause of action standing alone. See Tradewinds Escrow, Inc. v.
 16 Truck Ins. Exchange, 97 Cal.App.4th 704, 714 n.7, 118 Cal.Rptr.2d 561 (2002)("We point out
 17 the claims for constructive trust and accounting are remedies, and are based upon the underlying
 18 . . . claims.")(citing Michaelian v. State Comp. Ins. Fund, 50 Cal.App.4th 1093, 1114, 58
 19 Cal.Rptr.2d 133 (1996)); see also McCormick v. Fund Am. Cos., Inc., 26 F.3d 869 (9th Cir.
 20 1994)(dismissing rescission claim where underlying claims dismissed). The accounting remedy
 21 thus fails as a matter of law with the dismissal of all other independent causes of action.

22 Defendants additionally argued in their pleadings that the accounting claim failed to state
 23 a claim for relief because she contended her other claims for relief have an adequate remedy at
 24 law for damages. [#87 pg. 14]. An accounting is an extraordinary remedy available only when
 25 other legal remedies are inadequate. See Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478, 82 S.Ct.
 26 894 (1962); see also Border State Bank, N.A. v. Agcountry Farm Credit Services, FLCA, 535
 27 F.3d 779, 784-85 (8th Cir. 2009). An accounting is not available as a substitute for damages
 28 where there is an adequate remedy at law. Consequently, unless Plaintiff dramatically changes

1 her claims for relief in her SAC, Plaintiff will not have a remedy for accounting in her SAC
2 either.

3 Second, Plaintiff is flat wrong that Defendants did not move to dismiss her quantum
4 meruit claim against Tiltware. As explained in Defendants' opening and reply briefs in support
5 of their motion to dismiss, Plaintiff did not properly plead a quantum meruit claim. Although she
6 alleges that she "performed the work required under the Agreement," nowhere in her pleading
7 does she ever specify what work she was required, or had agreed, to perform. The motion to
8 dismiss generally attacked the sufficiency of the factual allegations in support of all the claims
9 for relief as being indefinite and illusory. [#72 pp. 5-9]. Also, in response to Plaintiff's position
10 that quantum meruit was immune from dismissal, Defendants' reply brief [#87] specifically
11 addressed the pleading infirmities of Plaintiff's claim for quantum meruit as to all Defendants.

12 In any event, Plaintiff has not adequately alleged an unjust enrichment claim.
13 "Unjust enrichment is the unjust retention of money or property of another
14 against the fundamental principles of justice or equity and good conscience."
15 [Citation omitted.] This court has observed that the essential elements of 'unjust
16 enrichment' are a benefit conferred on the defendant by the plaintiff, appreciation
17 by the defendant of such benefit, and acceptance and retention by the defendant of
18 such benefit.'" *Topaz Mutual Co., Inc. v. Marsh*, 108 Nev. 845, 856, 839 P.2d
19 606, 613 (1992). Here, Plaintiff has not alleged that any of the Defendants
20 unjustly retained money or property belonging to her. She alleges that she
21 "performed the work required under the Agreement" (FAC, ¶ 181) but never
22 specifies what her obligations were under the agreement. She has not adequately
23 alleged that she provided any benefits to Defendants.

24 [# 87 pp. 17-18].

25 In sum, the District Court's decision dismissing the FAC indeed made the pending
26 discovery motions moot. Defendants moved to dismiss all independent causes of action and the
27 District Court indicated that the pending written order will do exactly that. Until Plaintiff has
28 filed a Second Amended Complaint containing the specific allegations the Court stated she
would need to withstand dismissal with prejudice, discovery is not ripe and the discovery
motions were moot. Plaintiff has abjectly failed to demonstrate that the order is clearly erroneous
or contrary to law. The magistrate judge order in fact was properly decided.

29 **III. CONCLUSION**

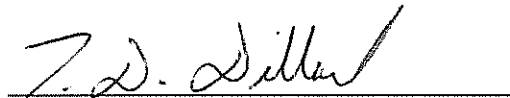
30 In accordance with the foregoing, Plaintiff has failed to offer any justification of the order
denying as moot the discovery motions because of the impending order dismissing entirely the

1 First Amended Complaint. Plaintiff's terse motion has not even tried to argue that Magistrate
2 Judge Johnston's order is clearly erroneous or one causing manifest injustice. The District Court
3 has indicated Plaintiff will be given leave to file a Second Amended Complaint and Defendants
4 Tiltware, Bitar and Lederer will have to respond either with an answer or another Rule 12
5 motion. In light of Judge Jones' decision at the hearing, the law of the case is that there no longer
6 exists any valid claim for relief. This includes Plaintiff's self-labeled claims for accounting and
7 quantum meruit in the FAC. As such, Magistrate Judge Johnston's order denying the discovery
8 motions as moot is not only on solid grounds with the Federal Rules of Civil Procedure but an
9 equitable and practical decision as well. Plaintiff can commence discovery after she has filed her
10 SAC and has stated a tenable claim for relief and not before.

11
12 DATED this 18 day of May, 2009.

13 OLSON, CANNON, GORMLEY
& DESRUISSEAUX

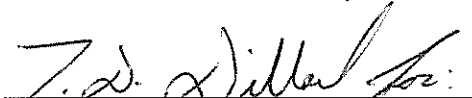
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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that on the 18 day of May, 2009, I served the above

OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER

DENYING AS MOOT MOTIONS # 79, 80 & 82 through the CM/ECF system of the United

States District Court for the District of Nevada (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

James A. Kohl, Esq.
Shelley Lanzkowsky, Esq.
Robert L. Rosenthal, Esq.
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EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
LAS VEGAS DIVISION

CYCALONA GOWEN,)	CASE NO: 2:08-CV-1581-RCJ-RJJ
)	
Plaintiff,)	CIVIL
)	
vs.)	Las Vegas, Nevada
)	
TILTWARE, LLC., ET AL.,)	Monday, April 27, 2009
)	
Defendants.)	(10:34 a.m. to 10:50 a.m.)

HEARING RE: MOTION TO DISMISS (72)

BEFORE THE HONORABLE ROBERT C. JONES,
UNITED STATES DISTRICT JUDGE

Appearances: See next page

Court Recorder: Araceli Bareng

Courtroom Administrator: Kerri Goetsch

Transcribed by: Exceptional Reporting Services, Inc.
14493 S. Padre Island Drive
Suite A-400
Corpus Christi, TX 78418-5940
361 949-2988

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

APPEARANCES FOR:

Plaintiff: ROBERT L. ROSENTHAL, ESQ.
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Las Vegas, NV 89169

Defendants: THOMAS D. DILLARD, ESQ.
Olson Cannon, et al.
9950 West Cheyenne Avenue
Las Vegas, NV 89129

WALTER R. CANNON, ESQ.
Rawlings Olson Cannon, et al.
9950 West Cheyenne Avenue
Las Vegas, NV 89129

1 Las Vegas, Nevada; Monday, April 27, 2009; 10:34 a.m.

2 (Call to Order)

3 THE COURT: Thank you. We're getting close. Thank
4 you for your patience bearing with us. *Gowen versus Tiltware.*

5 MR. CANNON: Good morning, your Honor, Walter Cannon
6 on behalf of the defendants.

7 MR. ROSENTHAL: Good morning, your Honor, Robert
8 Rosenthal on behalf of plaintiff.

9 THE COURT: Let me catch up with you here. My
10 inclination here is to grant the motions to dismiss across the
11 board. The question, really, for us is how much of this should
12 I allow with respect to which causes of action and which
13 defendants should I allow amendment? That's the real question.
14 So, focus on that. Of course, address the merits, as well, of
15 the motions to dismiss, but I've got your pleadings on that and
16 in light of the fact that we have still counsel to go --
17 distance to go -- before evening fall --

18 MR. CANNON: Very briefly, your Honor?

19 THE COURT: Please.

20 MR. CANNON: We believe if you are going to allow an
21 amendment, it should only be to Tiltware, the limited liability
22 corporation. Clearly, as you know --

23 THE COURT: Not the individuals, unless he can show
24 something that ties them in.

25 MR. CANNON: He's had two shots already and he hasn't

1 shown anything.

2 **THE COURT:** I'll let him respond to that.

3 **MR. CANNON:** I've got six individual defendants that
4 are not connected to this at all, as you know by the pleadings.
5 There's no allegations against --

6 **THE COURT:** They're not parties to the agreement, but
7 the allegation is that they, or some of them, were present at
8 the second meeting.

9 **MR. CANNON:** Well, yeah, but Mr. Ivey, for example --
10 just as an example, Mr. Ivey -- it was his room, but there's no
11 allegation he was there. We don't know what happened in the
12 second meeting except that they allegedly --

13 **THE COURT:** Okay.

14 **MR. CANNON:** -- ratified.

15 **THE COURT:** I'll let him respond to that.

16 **MR. CANNON:** Except that they allegedly ratified and,
17 as you're aware from the California statutes that we cited to
18 you --

19 **THE COURT:** I'll ask him specifically does he -- if I
20 allow him to amend, does he have anything to assert that ties
21 them in individually.

22 **MR. CANNON:** Exactly. So, our position is as far as
23 allowing an amendment, it would be the third time. They have
24 not given us the specifics of the contract -- of this alleged
25 contract -- yet. And if you do allow an amendment, it should

1 only go to Tiltware.

2 THE COURT: Okay.

3 MR. CANNON: It should not go to the individuals.

4 THE COURT: All right.

5 MR. CANNON: And if you'd like me to address anything
6 more specifically, I'd be more than happy to do that.

7 THE COURT: You'll have a chance to reply.

8 MR. CANNON: Thank you.

9 THE COURT: Well, the real one is the individuals,
10 counsel, and then the second one will be with respect to
11 Tiltware. But -- that is, the specifics of the contract.

12 As to the individuals, if I allow you to amend, what
13 are you going to -- do you have anything to amend to tie them
14 in? You haven't alleged so far that they're parties to the
15 contract. You've just simply alleged that they ratified the
16 action of Mr. -- what is it?

17 MR. ROSENTHAL: Bitar.

18 THE COURT: Bitar on behalf of Tiltware. But that
19 doesn't make them liable. If they're saying, "We also
20 contract," that makes them liable. We also instruct -- what is
21 it again?

22 MR. ROSENTHAL: Bitar.

23 THE COURT: Bitar. "We also instruct Mr. Bitar to
24 make misrepresentations to you." That, of course, alleges
25 personal liability, just like you said in your pleading. If

1 they are engaged in the fraud, even as limited liability
2 people, they potentially can be sucked in to liability.

3 Are you going to allege that, though? Are you going
4 to allege, number one, that they are parties to the contract?

5 **MR. ROSENTHAL:** Yes, your Honor.

6 **THE COURT:** You're going to allege they're parties to
7 the contract?

8 **MR. ROSENTHAL:** It's our --

9 **THE COURT:** Under Rule 11, sir?

10 **MR. ROSENTHAL:** Yes. It certainly -- under Rule 11,
11 as an officer of the Court, it's my understanding that --

12 **THE COURT:** Do you have a tape recording of the
13 conversations?

14 **MR. ROSENTHAL:** No, I do not.

15 **THE COURT:** Well, what are you going to allege? At
16 the second meeting, the April meeting -- "By the way, we're all
17 parties to the same contract." Are you going to allege that?
18 That was said? That statement was made?

19 **MR. ROSENTHAL:** No, I don't believe that they were
20 all parties to the same contract, but they all had similar
21 agreements and when they met at the Golden Nugget in Phil
22 Ivey's room --

23 **THE COURT:** So, how does that make them personally
24 liable if they ratify Mr. Bitar's actions on behalf of
25 Tiltware? How does that make them liable?

1 **MR. ROSENTHAL:** Because they believed that under the
2 case law we've cited --

3 **THE COURT:** Piercing the veil?

4 **MR. ROSENTHAL:** That an owner who actively
5 participates or who votes for the commission of the tort then
6 becomes personally liable for that breach of contract.

7 **THE COURT:** Denied, sir. No right to amend with
8 respect to the individuals. Do you have anything else to add
9 with respect to the individuals? Anything that you would
10 allege that pulls them in, makes them personally liable?

11 **MR. ROSENTHAL:** I believe that they actively -- I
12 believe in our first amended complaint, we have alleged that
13 they actively participated in this scheme to deprive plaintiff
14 of her ownership interest and I believe that makes them
15 personally liable --

16 **THE COURT:** Okay.

17 **MR. ROSENTHAL:** -- for breach of fiduciary duty of
18 the claims.

19 **THE COURT:** That one's dismissed with prejudice. No
20 right to amend.

21 Let's pass on, then, to Tiltware.

22 **MR. ROSENTHAL:** With respect to breach of contract,
23 your Honor?

24 **THE COURT:** With respect to all of it. All of it.

25 **MR. ROSENTHAL:** And if we discover down the road that

1 individuals took particular actions?

2 **THE COURT:** Bring on a motion. You bet. In other
3 words, if you get a statement in discovery they were at the
4 meeting and they said, "Gosh, Mr. Bitar, Gowen has stepped out
5 of the room for a moment, we want you to mislead her. We want
6 you to pull her along. None of us intend for Tiltware to keep
7 the contract," or, "We want you to know that we want you to
8 represent to her that we all have the same contract, but really
9 we're excluding her," file your motion to amend and pull such a
10 person in. But what I hear you telling me right here and what
11 I read in the pleadings is you've got nothing so far beyond
12 discovery, which hasn't yet been conducted, to tell me that
13 they're personally liable.

14 So, I'm going to grant the motion with respect to
15 them without the right to amend.

16 **MR. ROSENTHAL:** Okay.

17 **THE COURT:** Tiltware. Specifics of the contract.
18 The problem with your complaint, you don't have a requirement,
19 of course, to plead like under Rule 9, but to avoid a motion to
20 dismiss on the pleadings, you do.

21 If what you're alleging is a contract that violates
22 the statute of frauds, then I have to grant his motion to
23 dismiss subject to your right to amend. And that's what you've
24 done. You haven't told me in the complaint whether you're
25 alleging a contract that can and should and must have been

1 performed in one year or five years or just at the first
2 tournament of poker.

3 In other words, if this oral contract was, "You will
4 represent us at the first tournament of poker, period, and you
5 get your one percent," then there's no problem with the statute
6 of frauds as far as performance. There is potentially a
7 problem if what the agreement is, "I get one percent in
8 perpetuity of everything -- every spin-off, every new idea,
9 everything that this Tiltware has, every affiliate that's
10 formed three years later than the agreement," there's a
11 potential problem with the statute of frauds.

12 So, the problem with your complaint and I do need to
13 give you the right to amend, is you haven't alleged specifics
14 enough for me to judge that it does not violate the statute of
15 frauds. Do you understand?

16 **MR. ROSENTHAL:** I do understand, your Honor.

17 **THE COURT:** So, that's why I have to grant his motion
18 and require that you provide enough specifics of the oral
19 contract -- because you're not alleging any written contract
20 here. You understand you've got an uphill battle?

21 By the way, I was going to ask additional questions.
22 Is there any prohibition in Nevada under statute of frauds or
23 otherwise for oral contracts for -- what's the contract to
24 purchase a security? What's that called?

25 **MR. CANNON:** I don't know, your Honor.

1 **THE COURT:** Okay. You know what I'm talking about?
2 I mean, Nevada governs it -- a contract for the purchase of
3 securities.

4 And, number one, whether that has to be in writing;
5 and number two, whether or not a contract to purchase a
6 security for services -- whether that's permitted and whether
7 that has to be in writing.

8 So, that's an additional statute of frauds question.
9 So, when you're making your amendment, be mindful to amend
10 sufficient to survive any challenge on that basis, so that
11 we're not just back here again.

12 So, you do need to allege enough specifics of the
13 contract, manner of her performance, length of time -- in other
14 words, if she's required to perform for five years, then you've
15 got a statute of frauds limitation and I have to grant his
16 motion with prejudice.

17 The return that they promised, one percent in
18 perpetuity; one percent of everything that exists right now in
19 the way of corporation and affiliates and LLC's; one percent
20 into the future; all spin-offs; everything else, you know,
21 which makes us a little more skeptical, as you can appreciate.
22 But it also raises a statute of frauds problem.

23 So, I am going to grant the motion on that one, but
24 ask you to amend and I'll give you whatever you need -- 15
25 days, 30 days, to amend.

1 MR. ROSENTHAL: Fifteen will be appropriate.

2 THE COURT: Okay. Fifteen days --

3 MR. ROSENTHAL: And that's as against Tiltware with
4 respect to --

5 THE COURT: Right. Now, what other affiliates -- the
6 individuals, I'm dismissing that one with prejudice, of course.
7 You've got the right to later, down the road, to -- right now,
8 as I understand it, you have no evidence. But later, down the
9 road, if you can show, then file your appropriate motion.

10 What other entities do you want the right to amend
11 against?

12 MR. ROSENTHAL: May I ask you -- can I step back for
13 just a second, if I may?

14 THE COURT: You betcha.

15 MR. ROSENTHAL: With respect to Bitar, you're
16 dismissing as against him, as well?

17 THE COURT: No.

18 MR. ROSENTHAL: Okay.

19 THE COURT: It's my understanding of the complaint
20 that you're alleging the misrepresentations fraud was on his
21 part.

22 MR. ROSENTHAL: Absolutely.

23 THE COURT: You understand that it's very hard to
24 make out a case of intent to defraud at the inception of a
25 contract? In other words, "Here's my promise. By the way, I

1 don't intend to perform it."

2 Under Nevada law, that is a cause of action, but by
3 gum, it's very hard to prove it and it's very hard for it to
4 survive summary judgment. You've got to show me -- it's not
5 sufficient to give me proof that they did not, in fact, perform
6 it. It's not enough, according to the Nevada Supreme Court.
7 You must show other extraneous sources that say -- you know,
8 like a side memo, "That sucker, we're not going to perform the
9 contract." Otherwise, you can't survive a motion for summary
10 judgment.

11 So, I will let you amend as to Bitar. That's the
12 fraud that I assume that you're talking about, the
13 misrepresentations that he would have made.

14 **MR. ROSENTHAL:** Right. And the other causes of
15 action, too, against Bitar.

16 **THE COURT:** Yes. But you do need to -- as to Bitar,
17 as well. You do need to give the specifics of the contract.

18 **MR. ROSENTHAL:** Just so I --

19 **THE COURT:** And the express representations that were
20 false and that were made. Okay?

21 **MR. ROSENTHAL:** There are also statements within the
22 first amended complaint which deal with defendant Lederer and
23 that he was party with Bitar to those misrepresentations. So,
24 my question for the Court --

25 **THE COURT:** Because he -- let's see. Does he discuss

1 -- he discusses -- he leads the discussion in the April Golden
2 Nugget.

3 MR. ROSENTHAL: Correct.

4 MR. CANNON: That's May 4th, your Honor. The May
5 meeting.

6 THE COURT: The May meeting. And what are you asking
7 now?

8 MR. ROSENTHAL: Whether or not the Court's ruling
9 dismissing defendant's --

10 THE COURT: Is he an officer of Tiltware?

11 MR. ROSENTHAL: It is my understanding that all
12 relevant times he was. I don't believe he --

13 THE COURT: He's not just one of the poker team
14 members?

15 MR. ROSENTHAL: No. And that it's my understanding
16 that he's no longer an officer with the corporation, but at all
17 relevant times stated within the complaint he was. And that he
18 just left.

19 THE COURT: Then I'm granting the motion to dismiss,
20 but I will let you amend as to him. We want specifics. You
21 have to allege, under Rule 9, you know, is he guilty of any of
22 the misrepresentations, the tort?

23 MR. ROSENTHAL: So, my question to the Court was with
24 respect to all of the other claims --

25 THE COURT: I'm going to issue the order here.

1 MR. ROSENTHAL: Okay.

2 THE COURT: So that you've got good clarification,
3 rather than having to ask all these questions.

4 MR. ROSENTHAL: Thank you, your Honor.

5 THE COURT: I'll issue the order. I'm granting the
6 motions. I will allow you to amend, not as to the individuals,
7 but I will allow you to amend as to Tiltware, as to Bitar, and
8 probably as to -- is it Lederer?

9 MR. ROSENTHAL: Yes.

10 THE COURT: Uh-huh.

11 MR. CANNON: Could I be heard on Mr. Lederer?

12 THE COURT: Yes, you can.

13 MR. CANNON: Thank you. The point I think the Court
14 made earlier was the May 4th meeting, the plaintiff did not
15 attend. There's no allegations as to what was said in that
16 particular meeting. Admittedly, Mr. Lederer led the meeting,
17 but they don't know what was said.

18 THE COURT: Doesn't she allege she was at the
19 meeting?

20 MR. CANNON: I don't believe so, no.

21 THE COURT: Okay.

22 MR. CANNON: She isn't there. That was your point
23 and not letting them amend against the individuals.

24 THE COURT: Well, that's part of the point.

25 MR. CANNON: And there's no evidence in this case.

1 **THE COURT:** She was there, wasn't she?

2 **MR. ROSENTHAL:** Yes, your Honor. She was in Phil
3 Ivey's suite at the Nugget.

4 **THE COURT:** No. It's my understanding he alleges she
5 was there.

6 **MR. CANNON:** There's no allegation, though, in this
7 particular complaint as to what Mr. Lederer did or did not do
8 at that particular meeting.

9 **THE COURT:** He must amend to include that. I'm
10 granting your motion to dismiss. He doesn't presently name a
11 cause of action against Lederer.

12 **MR. CANNON:** And it has to be -- if he's going to
13 allege fraud, it has to meet Rule 9.

14 **THE COURT:** Under Rule 9.

15 **MR. CANNON:** All right. Thank you.

16 **THE COURT:** Okay. I'll issue the order and be ready
17 to file the amendment.

18 **MR. CANNON:** Thank you, your Honor.

19 **MR. ROSENTHAL:** Just a brief question. When can we
20 expect to see the order?

21 **THE COURT:** Oh, hopefully, within ten days. It's
22 already in draft form, but we'll see.

23 **MR. ROSENTHAL:** Thank you, your Honor.

24 **THE COURT:** Sometimes it happens; sometimes it
25 doesn't.

(Proceeding was adjourned at 10:50 a.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



April 30, 2009

Signed

Dated

TONI HUDSON, TRANSCRIBER