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8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA

10 CYCALONA GOWEN,
11 Plaintiff,

12 vs.

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

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

**DEFENDANTS' MOTION TO DISMISS
COMPLAINT UNDER FRCP RULE
12(b)(6) FOR FAILURE TO STATE A
CLAIM FOR RELIEF AND UNDER
FRCP RULE 9(c) FOR LACK OF
PARTICULARITY**

23 COME NOW Defendants Tiltware, LLC ("Tiltware"), Raymond Bitar, Howard Lederer,
24 Andrew Bloch, Phillip Ivey, Christopher Ferguson, John Juanda, Phillip Gordon, Erick Lindgren,
25 Erik Seidel, Jennifer Harman-Traniello, Michael Matusow, Allen Cunningham, Gus Hansen and
26 Patrick Antonious (the "Individual Defendants") by and through their counsel of record from the
27 law firms of OLSON, CANNON, GORMLEY & DESRUISSEAU and GREENBERG
28 TRAURIG, LLP and move to dismiss under Fed.R.Civ.P., Rule 12(b)(6), and Rule 9(c) plaintiff
Cycalona Gowen's Complaint for: 1. Breach of Contract; 2. Breach of Fiduciary Duty; 3. Breach

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of the Covenant of Good Faith and Fair Dealing; 4. Unjust Enrichment; and 5. Fraud.

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

DATED this 6 day of January, 2009.

OLSON, CANNON, GORMLEY
& DESRUISSEAUX

By 

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Plaintiff Cycalona Gowen, a self-described celebrity poker player, has launched a typhoon
4 of litigation, particularly against 13 of her fellow professional tournament poker players,
5 claiming she was promised a 1% ownership interest in Tiltware, LLC and the Full Tilt Poker
6 brand name and website. Ms. Gowen may, or may not, be able to make a claim for breach of an
7 oral contract, but she certainly does not have a shotgun claim for fraud against her thirteen fellow
8 poker pros, or a "minority oppression," or breach of fiduciary duty claim against the individual
9 defendants.

10 The Court should dismiss Ms. Gowen's complaint, or at the very least order her to
11 significantly clean up her almost random claims against the multiple defendants. In particular,
12 the Court, unless Ms. Gown makes an offer of proof sufficient to satisfy this Court, should
13 dismiss the thirteen individual defendants -- who she indiscriminately sued individually due to
14 Ms. Gowen's apparent litigation "strategy," their notoriety in the poker world, and Ms. Gowen's
15 thirst for publicity -- with prejudice.

16 **THE PARTIES**

17 **A. Plaintiff Cycalona Gowen.**

18 Plaintiff Cycalona Gowen ("Gowen" or "Plaintiff") claims she is a 1% shareholder in
19 defendant Tiltware LLC, and any of its parent, subsidiary or affiliated companies. Complaint, ¶
20 26. Among these "Companies," plaintiff lists "FTP" or "Full Tilt Poker" which, however, is not a
21 separate legal entity but a well-known brand name in the poker world.¹

22 **B. Defendant Tiltware, LLC.**

23 Defendant Tiltware LLC ("Tiltware") is a limited liability company organized and
24 existing under the laws of the State of California. Complaint, ¶ 3. Tiltware was incorporated in
25 2003. Complaint, ¶ 27.

26 Tiltware is a software and licensing company which develops and provides software,
27

28 ¹ Ms. Gowen has apparently not served two other foreign defendants Pocket Kings Ltd. of
Ireland and Kolyma Corporation of Aruba, neither of which is appearing by this motion.

1 development and consulting services to "FTP" or Full Tilt Poker. Complaint, ¶ 28.

2 **3. Defendant Raymond Bitar.**

3 Defendant Raymond Bitar is one of Tiltware's original "managers/members." Complaint,
4 ¶ 3. Mr. Bitar is also the chief executive officer, chief financial officer, a director and a
5 shareholder of Tiltware, as well as allegedly the other "closely affiliated" Companies.
6 Complaint, ¶ 32, 33.

7 **4. The Other Thirteen Defendant Poker Professionals.**

8 Thirteen of the other individual defendants are professional poker players, peers so to
9 speak of Ms. Gowen's, and allegedly directors and shareholders/members of Tiltware and
10 purportedly the other Companies: Howard Lederer, Andrew Bloch, Phillip Ivey, Christopher
11 Ferguson, John Juanda, Phillip Gordon, Erick Lindgren, Erik Seidel, Jennifer Harman-Traniello,
12 Michael Matusow, Allen Cunningham, Gus Hansen and Patrick Antonious (the "Full Tilt
13 Players".)² Complaint, ¶ 34-46.³

14 **I.**

15 **PLAINTIFF'S FIRST CLAIM FOR RELIEF FOR BREACH OF CONTRACT SHOULD**
16 **BE DISMISSED AS TO ALL DEFENDANTS, AND CERTAINLY AS TO THE**
17 **INDIVIDUAL "FULL TILT POKER" TEAM -- NONE OF WHICH MADE A**
18 **CONTRACT WITH MS. GOWEN.**

19 Ms. Gowen's first claim for relief for breach of contract should be dismissed. The breach
20 of contract claim, as plead in the complaint is, to put it mildly, fairly simple.

21 In the "Allegations Common To All Causes Of Action" in the Complaint, Ms. Gowen
22 first alleges:

23 "57. Because Plaintiff was a well-known professional poker player, in
24 April 2004, Bitar offered Plaintiff a 1% ownership interest in FTP and Tiltware in
25 exchange for Plaintiff to become a celebrity representative for FTP
26 ("Agreement").

27 ² Defense counsel accepted service of process on Tiltware and other thirteen Individual
28 Defendants.

³ Ms. Gowen's allegation that all of the other individual defendants are allegedly shareholders
of Tiltware is erroneous.

1 58. Plaintiff accepted Bitar's offer to become a 1% owner of Tiltware and
2 FTP, and became part of what FTP called "Team Full Tilt" which consisted of
3 Defendants Lederer, Bloch, Ivey, Ferguson, Juanda, Gordon, Lindgren and Seidel,
4 who all had ownership interests in Tiltware and FTP."

5 In the body of her "first cause of action," Ms. Gowen incorporates by reference
6 paragraphs 57 and 58, and then essentially repeats:

7 "79. In April 2004, the parties entered into the Agreement, wherein
8 Plaintiff was given a 1% ownership interest in the Companies in exchange for
9 Plaintiff for [sic] representing the FTP Brand as a celebrity poker player.

10 80. Defendants breached the Agreement with Plaintiff by failing and
11 refusing to perform in good faith their promise to pay Plaintiff for work
12 performed."

13 Plaintiff contends that she was not properly paid for her services from 2004 to 2008, and
14 she estimates that the value of Tiltware and the other "Companies" is in excess of
15 \$4,000,000,000.⁴ Therefore, Ms. Gowen's claim for a 1% ownership interest totals "no less than
16 \$40,000,000." Complaint, ¶¶ 73, 83.

17 Plaintiff's complaint and claim for breach of contract, however, suffers from some
18 fundamental pleading deficiencies. One, plaintiff has not even alleged whether the contract is
19 supposedly oral or written or implied-in-fact (or Tiltware might as well say now, "made-up").
20 Two, the "terms" of the agreement, to put it mildly, are alleged rather sparsely, and indeed appear
21 illusory. Even under the liberal federal court "notice pleading" standards, the Court should
22 dismiss plaintiff's current bare-bones complaint and require Ms. Gowen to file a more
23 informative pleading that complies with simple due process requirements when a person is suing
24 18 separate defendants.

25 In any event, and assuming that the Court allows Ms. Gowen leave to file an amended
26 complaint against at least Tiltware, Ms. Gowen's claim is unalterably exactly that -- a contract

27 _____
28 ⁴ The Court should not regard this as a typo: Ms. Gowen claims literally ¶¶ 73 that she values
Tiltware at \$4 billion.

1 claim between Ms. Gowen and Tiltware alone. None of the other thirteen individual defendants
2 are parties to that alleged agreement. The other thirteen defendants are indeed alleged to be
3 nothing more than co-members or shareholders of Tiltware and, as such, cannot be liable as a
4 matter of law for breach of a contract that Tiltware, not the individuals, allegedly entered into and
5 allegedly breached. The thirteen individual defendants should all be dismissed -- and with
6 prejudice, unless Ms. Gowen makes an offer of proof satisfactory to the Court to grant her leave
7 to amend against the individual defendants.

8 II.

9 **PLAINTIFF'S SECOND CLAIM FOR RELIEF FOR "BREACH OF FIDUCIARY 10 DUTY -- MINORITY OPPRESSION ACTION" SHOULD BE DISMISSED.**

11 Plaintiff's second claim for relief is labeled "Breach Of Fiduciary Duty (Against All
12 Individual Defendants - Minority Oppression Action)." This claim should be dismissed for three
13 fundamental reasons. One, plaintiff seeks to present a rather novel legal theory, contrary to
14 well-established corporate law, that according to plaintiff there are no protections for an entity
15 doing business as a corporation or limited liability company because all shareholders or members
16 purportedly owe a fiduciary duty to the other shareholders or members, including an affirmative
17 duty of full disclosure.⁵

18 Second, the thirteen individual defendants appear to again be included in this breach of
19 fiduciary duty claim for tactical reasons unrelated to their alleged conduct vis-à-vis Ms. Gowen.
20 In short, there was no fiduciary relationship, and there is no breach of any fiduciary duty alleged
21 in the complaint.

22 Third, and in any event, Ms. Gowen has certainly not made her breach of fiduciary duty
23 claims with the required specificity or particularity against any of the individual defendants --
24 even giving plaintiff the benefit of the doubt under the broad notice pleading rules. The second

25
26 ⁵ Defendants acknowledge that there are certainly some circumstances where majority
27 shareholders owe minority shareholders obligations to treat them fairly and not "squeeze" them
28 out. See Giles v. Gen Motors Acceptance Corp., 494 F.3d 865, 880-81 (9th Cir. 2007)
(applying Nevada law); Clark v. Lubritz, 113 Nev. 1089, 944 P.2d 861, 866-67 (1997). Ms.
Gowen, however, has barely pled a breach of contract claim, and certainly not any facts to
support a "Minority Oppression Action."

1 claim for relief should be dismissed, and unless a sufficient offer of proof is made, it should also
2 be dismissed with prejudice.

3 **III.**

4 **PLAINTIFF'S THIRD CAUSE OF ACTION FOR BREACH OF THE COVENANT OF**
5 **GOOD FAITH AND FAIR DEALING SHOULD BE DISMISSED.**

6 Since the thirteen individual defendants should not be parties to the contract claims, they
7 should obviously also not be part of, and dismissed from, the bad faith claim.

8 The rightfully ever-shrinking tort for breach of the implied covenant of good faith and fair
9 dealing usually requires a special element, in addition to a garden variety breach contract claim,
10 e.g., some tortuous reliance, intolerable misconduct, or breach of a fiduciary duty.

11 Extra-contractual tort liability and tort remedies are limited to "rare and exceptional cases."

12 Great American Insurance Co. v. General Builders, Inc., 113 Nev. 346, 934 P.2d 257, 263

13 (1997). The Nevada Supreme Court has pointed out that contractual bad faith claims are limited
14 to situations where "the party is in the superior and trusted position," and has engaged in

15 "grievous and perfidious misconduct." K Mart Corp. v. Ponsock, 103 Nev. 39, 49, 732 P.2d

16 1364, 1371 (1987). This requirement of a special relationship between the tortfeasor and the tort

17 victim, coupled with egregious misconduct, generally limits these type of non-contractual "bad
18 faith" tort claims to special relationships like employment, bailment, insurance, or partnership
19 agreements.

20 Here, if Ms. Gowen has a contract claim for 1% of the ownership or stock of Tiltware
21 (which she values at no less than \$40 million), it seems that her remedy, assuming she prevails,
22 will be quite adequate. There are no special circumstances or special relationship to turn this
23 commercial contract dispute into a tort action. The bad faith claim should also be dismissed.

24 **IV.**

25 **PLAINTIFF'S FOURTH CLAIM FOR RELIEF FOR UNJUST ENRICHMENT**
26 **DUPLICATES THE BREACH OF CONTRACT CLAIM AND SHOULD BE**
27 **DISMISSED.**

28 Ms. Gowen again indiscriminately pleads her fourth claim for relief for unjust enrichment
against "All Defendants." For that reason alone, it should be dismissed as to "All Defendants"
including the thirteen individual poker pro defendants she strategically decided to sue.

1 In addition, an action based on the theory of unjust enrichment or quasi-contract is not
2 available when there is an express, written contract, because no agreement can be implied when
3 there is already an alleged express agreement. Leasepartners Corp. v. Robert L. Brooks Trust
4 Dated November 12, 1975, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997) (citing Lipshie v. Tracy
5 Investment Co., 93 Nev. 370, 379, 566 P.2d 819, 824 (1977) ("To permit recovery by
6 quasi-contract where a written agreement exists would constitute a subversion of contractual
7 principles.") The Nevada Supreme Court has observed that the essential elements for unjust
8 enrichment "are a benefit conferred on the defendant by the plaintiff, appreciation by the
9 defendant of such benefit, and acceptance and attention by the defendant of such benefit." Union
10 America Mtg. v. McDonald, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981). None of these
11 elements are properly alleged here.

12 Ms. Gowen certainly cannot state a claim for unjust enrichment or quasi-contract against
13 the thirteen individual defendants and they should be dismissed with prejudice. Ms. Gowen is
14 suing Tiltware for breach of an allegedly express oral contract, which sounds at this point more
15 like a relatively simple contract or employment dispute with Tiltware and its CEO Raymond
16 Bitar, so her unjust enrichment claim should also be dismissed.

17 V.

18 **PLAINTIFF'S FIFTH CLAIM FOR RELIEF FOR "FRAUD-INTENTIONAL**
19 **MISREPRESENTATION" SHOULD ALSO BE DISMISSED.**

20 Plaintiff's fraud claim is particularly ambiguous and apparently two-fold. First, she
21 alleges that Tiltware's CEO Raymond Bitar in April 2004 contacted her at her home in Texas and
22 offered a 1% ownership interest in exchange for her agreeing to represent the Full Tilt Poker
23 brand. Complaint, ¶ 108. Mr. Bitar engaged in a single conversation with plaintiff more
24 generally described at ¶ 109-112 of the complaint. It is difficult to determine how any of those
25 conversations amount to intentional misrepresentations or fraud.

26 According to Ms. Gowen, Mr. Bitar told her that he wanted her to play in an upcoming
27 World Series of Poker Event and represent the Full Tilt Poker brand -- and she apparently did so.
28 Ms. Gowen, according to her complaint, also asked Mr. Bitar to prepare a written contract
"memorializing" the alleged oral agreement regarding plaintiff's 1% ownership interest -- which

1 Mr. Bitar tellingly did not do. The parties thus apparently have a commercial dispute regarding
2 whether there was an oral contract and, if so, its terms, and whether Tiltware (or perhaps Ms.
3 Gowen) breached the contract. This is not a fraud case; it is a breach of contract case.

4 Second, plaintiff contends that she attended a meeting one month later in May 2004 with
5 at least some, i.e., a "majority," of the thirteen individual defendants in attendance. According to
6 the complaint, Defendant Howard Lederer conducted the meeting and explained that ownership
7 interests were not only in Full Tilt Poker, but also in Tiltware which was exclusively providing
8 the software to Full Tilt Poker at a high licensing fee. Complaint, ¶ 113-114.

9 According to Ms. Gowen, these alleged statements by Mr. Lederer somehow also
10 constitute an intentional misrepresentation and fraud. She further alleges at ¶ 123 in a totally
11 conclusory manner that each of the statements set forth in paragraphs 107 through 114 were
12 "false," because Tiltware and each and every of the thirteen individual defendants -- only one of
13 which, Mr. Lederer, apparently even spoke at the meeting -- had no intention at the time in May
14 2004 of giving Plaintiff a 1% ownership interest in the "Companies" as allegedly agreed upon by
15 Mr. Bitar, not Mr. Lederer, a month earlier in April in 2004.

16 Defendants, and particularly the thirteen individual defendants, not surprisingly do not
17 believe that plaintiff has fulfilled her pleading obligations under Federal Rules of Civil Procedure
18 Rule 9(b) that fraud "shall be stated with particularity." The individual defendants do not, and
19 cannot, know the alleged facts and reasons that they have been sued by Ms. Gowen for fraud or
20 any kind of disloyalty or breach of fiduciary duty.

21 Ms. Gowen's shotgun pleading against Tiltware, and each of the thirteen individual
22 defendants, is a classic example of why the Ninth Circuit, and all federal courts, require a
23 heightened pleading standard for fraud, i.e., the alleged perpetrator of the forever defamatory
24 "fraud" allegation is entitled to know "the who, what, where, when, and how" of the alleged
25 fraud, so that defendants who are sued for fraud are given appropriate notice of their particular
26 alleged misconduct so they can defend against the charge, and not just deny that they have done
27 anything wrong. Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1106 (9th Cir. 2003).

28 FRCP Rule 9(c) requires the allegation of specific facts concerning the alleged fraud.

1 These particular facts include the time, place, persons, the specific alleged mis-statements, and an
2 explanation as to how the alleged statements were false or misleading. In re GlenFed, Inc. Sec.
3 Litig. 42 F. 3rd 1541, 1545 (9th Cir. 1994 (en banc)).

4 In other words, "the plaintiff must set forth more than the neutral facts necessary to
5 identify the transaction. The plaintiff must set forth what is false about a statement, and why it is
6 false." Vess, supra, 317 F.3d at 1107. "Fraud" is an easily stated allegation, but certainly never
7 to be treated lightly, and not indiscriminately alleged to join thirteen individual defendants into a
8 corporate breach of contract action.

9 Here, only Tiltware and its CEO Mr. Bitar can possibly know from the complaint that
10 Ms. Gowen contends that Mr. Bitar entered into an oral, never documented, agreement that she
11 would become a 1% owner of Tiltware. The other defendants, however, have no way of knowing
12 or understanding from Ms. Gowen's shotgun complaint how her apparently relatively simple
13 breach of oral contract claim has morphed into claims for fraud, breach of fiduciary duty, and
14 unjust enrichment against them as individuals with potential tort and punitive damages
15 implications.

16 The court should dismiss the fraud claims against all of the defendants, and require Ms.
17 Gowen to state her fraud (and other claims) with sufficient particularity so that each of the 18
18 individually named defendants can understand and appropriately test Ms. Gowen's commercial
19 claims at the pleading stage.

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CONCLUSION

The Court should grant this motion to dismiss, and order Ms. Gowen to file a pleading sufficiently particular to put the appropriate defendants, including the thirteen "celebrity" poker professional defendants she has tactically chosen to sue, on notice individually of her multiple "fraud" and other claims. Indeed, the thirteen individual defendants should as a matter of law be dismissed with prejudice unless Ms. Gowen provides a sufficient offer of proof to this Court that she can state a claim for relief against the individuals. This is plainly a disputed breach of "oral" contract case between business people, and not a fraud, fiduciary duty or tort claim against individual defendants.

DATED this 6 day of January, 2009.

OLSON, CANNON, GORMLEY
& DESRUISSEAUX

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that on the 6 day of January, 2009, I served the above

DEFENDANTS' MOTION TO DISMISS COMPLAINT UNDER FRCP RULE 12(b)(6)
FOR FAILURE TO STATE A CLAIM FOR RELIEF AND UNDER FRCP RULE 9(c)
FOR LACK OF PARTICULARITY 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:

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