UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Wild Hockey Club, LP Plaintiff, vs. Emil Interactive Games, LLC, Full Boat, LLC, and Ronald M. Doumani, Defendants.	Case No. 16-CV-01545-WMW-TNL **PLAINTIFF MINNESOTA WILD HOCKEY CLUB, LP'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6)**

Plaintiff Minnesota Wild Hockey Club, LP ("Plaintiff") submits this Response to Defendants Emil Interactive Games, LLC, Full Boat, LLC, and Ronald M. Doumani's (collectively, "Defendants") Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6).

INTRODUCTION

Plaintiff commenced this litigation to enforce a Sponsorship Agreement with Defendants. The Sponsorship Agreement dated September 4, 2015 ("Agreement") requires Defendants' payment for Plaintiff's promotion of the website www.draftops.com. (*See* Doc. 1, Attachment #1 ("Compl.")). When Defendants made none of the required payments under the Agreement, Plaintiff commenced this lawsuit alleging causes of action for breach of contract, account stated, and unjust enrichment.

In response to Plaintiff's simple contractual and equity claims, Defendants have filed a motion to dismiss, making legally and factually inaccurate allegations which contradict not only the parties' contractual relationship, and misrepresents existing state and federal law. Instead of conceding the most-likely explanation—a lack the funds or desire to make the requisite payments—Defendants allege that the Agreement is rendered

void based on the prohibition of Daily Fantasy Sports ("DFS") in Minnesota. (*See* Doc. 5.) Even assuming arguendo the illegality of DFS in Minnesota voided the Agreement, this argument fails for two reasons. First, DFS is not illegal in Minnesota. Second, Defendants did not exercise their contractual termination right. In light of the gross misrepresentations of law and fact, it is clear Defendants brought this motion for an improper purpose.

Defendants' motion to dismiss is premised on factual and legal fiction. When the appropriate standard is applied and Plaintiff's allegations (which Defendants either explicitly or implicitly admit) are accepted as true, the basis for Defendants' motion to dismiss falls apart. Plaintiff has asserted valid claims upon which relief can be granted. Therefore, Defendants' motion should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

The parties entered into the Agreement in September of 2015. (*See* Compl. ¶5.) Defendants were represented by counsel throughout the negotiations. Defendants agreed make payments to Plaintiff based on its sponsorship and advertisement of Draft Ops, Defendants' online DFS game. (*See* Compl., Ex. A.) Due to the possibility that the Minnesota legislature could act to outlaw DFS, Defendants reserved their right:

> [T]o terminate this Agreement upon written notice in the event either the NHL and/or State of Minnesota rule that Sponsor's primary business activities are illegal or prevented by Rule of Law.

(*See id.* at ¶9(d).) This is the only remedy Defendants and Plaintiff negotiated to resolve the potential that the Minnesota Legislature would outlaw DFS. Defendants <u>never</u> terminated the Agreement, and do not assert otherwise in their motion. The parties also agreed to jurisdiction and venue for any legal action in either the federal courts located in the State of Minnesota or in the state courts of the State of Minnesota. (*See id.* at ¶19.)

When Defendants failed to make any of the payments as required under the Agreement, Plaintiff commenced the instant litigation. (*See* Compl., *passim*.) Plaintiff served Defendants with the Complaint captioned in the State of Minnesota's Second Judicial District, Ramsey County. (*See id.*) Defendants then filed a Notice of Removal from Ramsey County on May 25, 2016. (*See* Doc. 1.) One week later, Defendants filed their motion to dismiss in this Court. (*See* Doc. 5.)

In their motion to dismiss, Defendants allege in part (1) that Plaintiff's Complaint should be dismissed as the Agreement is rendered void based on the prohibition of DFS in Minnesota (*see* Doc. 6 at 13); (2) that DFS is illegal pursuant to the federal Illegal Gambling Business Act of 1970 and the Unlawful Internet Gambling Enforcement Act of 2006 (*see id.* at 4-10); (3) that because DFS is illegal in Minnesota, the Agreement's termination clause precludes Plaintiff's claims (*see id.* at 3, 16); and (4) that because, Defendants' view, the Minnesota Legislature has indicated that it believes DFS may be illegal, the Agreement subjects both parties to indictment under the Racketeering Influenced Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* (*See id.* at 19.)

Legality of DFS under Federal and State Law

Defendants request that this Court take judicial notice of the legal status of DFS across multiple states. Moreover, Defendants draw improper inferences with regard to the Minnesota Legislature's lack of action on DFS. Despite Defendants incorrect argument to the contrary, the current state of the law is clear; DFS <u>is legal</u> under federal <u>and</u> Minnesota law.

The federal Unlawful Internet Gambling Enforcement Act of 2006 confirms that DFS leagues such as those operated by Defendants do <u>not</u> constitute gambling as a matter of law. *See* 31 U.S.C. § 5362(1)(E)(ix); s*ee also Humphrey v. Viacom*, No. 06-2768, 2007

U.S. Dist. LEXIS 44679, at *30 (D.N.J. June 20, 2007). In Minnesota, State Representative Joe Atkins introduced H.F. 2426, a bill that would "lightly regulate the activity of online fantasy sports." Defendants allege that this bill makes DFS illegal in Minnesota. (*See* Doc. 6 at 10-11.) But H.F. 2426 never passed the Minnesota Legislature. Furthermore, had H.F. 2426 become law, it would have clarified the already-existing legality of DFS in Minnesota. In sum, the entire premise of Defendants' motion—that the Agreement is void due to illegality—is wrong.

ARGUMENT AND AUTHORITIES

A. Motion to Dismiss Standard

Under the Federal Rules of Civil Procedure, a pleading need only provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *see also Martin v. ReliaStar Life Ins. Co.*, 710 F. Supp.2d 875, 886 (D. Minn. 2010). The United States Supreme Court has affirmed this standard and further clarified that a pleading must have just enough "heft" to ensure that there are facts that support the claim and that such allegations are plausible. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007). A "short and plain statement" must be more than a series of conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2007). "Detailed factual allegations are not required," but the complaint must contain facts with enough specificity "to raise a right to relief above the speculative level." *Id.* (citing *Twombly*, 550 U.S. at 555) (internal citations omitted).

A complaint states a plausible claim for relief if its "factual content . . . allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 550 U.S. at 663. "[I]nferences are to be drawn in favor of the non-moving party." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009). A complaint should be read as a whole, not parsed piece by piece to determine whether each allegation,

in isolation, is plausible. *See id.* at 594; *see also Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 285 (D.C. Cir. 2009) (factual allegations should be "viewed in their totality"). Ultimately, the valuation of a complaint upon a motion to dismiss is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 550 U.S. at 664.

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move the Court to dismiss a claim if, on the pleadings, a party has failed to state a claim upon which relief may be granted. *See MM&S Fin., Inc. v. NASD, Inc.*, 364 F.3d 908, 909-10 (8th Cir. 2004) (explaining standard of review pursuant to Rule 12(b)(6)). In reviewing a motion to dismiss, the Court takes all facts alleged in the complaint to be true:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Thus, although a complaint need not include detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Zutz v. Nelson, 601 F.3d 842, 848 (8th Cir. 2010) (citations omitted).

In deciding a motion to dismiss, the Court considers "the complaint, matters of public record, orders, materials embraced by the complaint, and exhibits attached to the complaint." *PureChoice, Inc. v. Macke*, No. 07-1290, 2007 WL 2023568, at *5 (D. Minn. July 10, 2007) (citing *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999)).

1. DEFENDANTS INTRODUCE FACTS OUTSIDE PLAINTIFF'S COMPLAINT THAT THE COURT SHOULD EXCLUDE FROM CONSIDERATION ON THE INSTANT MOTION

Review of a motion to dismiss looks only to the facts in the plaintiff's complaint—which are accepted as true—and not to facts otherwise introduced, which should be

excluded from consideration. *See Iqbal*, 550 U.S. at 678. If extra-pleadings factual material is presented but not excluded, the Court may review this motion as one for summary judgment. *See* Fed. R. Civ. P. 12(d); *see also Gibb v. Scott*, 958 F.2d 814, 816 (8th Cir. 1992) (quoting *Woods v. Dugan*, 660 F.2d 379, 380 (8th Cir. 1981)). "Most courts . . . view 'matters outside the pleading' as including any written or oral evidence in support of or in opposition to the pleading that provides some substantiation for and does not merely recite what is said in the pleadings." *Id.* (internal citation and quotation omitted). "The Court has complete discretion to determine whether or not to accept material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion." *Stahl v. United States Dept. of Agric.*, 327 F.3d 697, 701 (8th Cir. 2003) (internal quotation and citation omitted).

In addition to misrepresenting Plaintiff's straightforward allegations by suggesting that the Agreement is invalid due to the illegality of DFS, Defendants have also threaded a number of factual contentions outside Plaintiff's complaint into their memorandum. (*See, e.g.,* Doc. 6 at 3.) Defendants cite to the termination clause contained in the Agreement, but they never state that they exercised that right to terminate. (*See id.*) If Defendants believed the NHL or the State of Minnesota had ruled DFS is illegal, they could have and should have provided Plaintiff with written notice.

It should be noted that the existence of the termination clause establishes that Defendants believed DFS was legal when the Agreement was executed. If Defendants genuinely assert that DFS is illegal—and no changes have occurred to the law—Defendants are *per se* acknowledging fraud in the inducement. Defendants' argument references fraud, and then requests affirmative relief on that fact. While the veracity of Defendants' argument will be tested, at this point the only facts at issue are those in Plaintiff's complaint.

2. PLAINTIFF HAS STATED A PLAUSIBLE CLAIM AGAINST DEFENDANTS FOR BREACH OF CONTRACT

To recover on a breach of contract claim under Minnesota law, a plaintiff must demonstrate: (1) a contract was formed; (2) plaintiff performed any conditions precedent; and (3) the defendant breached the contract. *Commercial Assocs., Inc. v. Work Connection, Inc.*, 721 N.W.2d 772, 782 (Minn. Ct. App. 2006). A plaintiff must also allege damages resulting from the breach. *See Gen. Mills Operations, LLC v. Five Star Custom Foods, Ltd.*, 703 F.3d 1104, 1107 (8th Cir. 2013).

Nowhere in Defendants' motion to dismiss do they allege that under Rule 12(b)(6), Plaintiff has not established these elements of breach of contract or that Plaintiff has failed to state a claim upon which relief can be granted. Instead, Defendants argue that *in pari delicto*, the Agreement cannot be enforced. (*See* Doc. 6 at 16-18.)

Defendants' argument with respect to Plaintiff's breach of contract claim is based on the claim that DFS is illegal—which it is not. (*See* Doc. 6 at 13-23.) This argument is both legally and factually flawed. First, the purpose of a motion to dismiss is for the Court to consider all facts alleged in the complaint as true to determine if the complaint states "a claim for relief that is plausible on its face." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). Thus, for the purpose of ruling on this motion to dismiss, the Court must consider as true the fact that the parties entered into the Agreement, and that the Agreement is valid. Defendants' effort to have the Court rule on the legality of DFS (which is not in question) at this stage in litigation is procedurally improper.

Moreover, contrary to Defendants' assertions, Plaintiff's complaint incorporates provisions of the Agreement that both reference the termination clause and convey Defendants' duties to make payments. (*See* Compl., Ex. A.) The Agreement contains a termination clause stating that Defendants have the right "to terminate this Agreement

upon written notice in the event either the NHL and/or State of Minnesota rule that Sponsor's primary business activities are illegal or prevented by Rule of Law." (*See id.* at ¶9(d)) (emphasis added.) Notably lacking is any proof that Defendants cite now to avail themselves of that legal right. Defendants' argument that the Agreement is void because DFS is illegal fails due to the lack of factual proof.

Additionally, Plaintiff specifically referenced the payment schedule attached to the Agreement. (*See* Compl., ¶14.) Plaintiff properly pled that Defendants owe to Plaintiff the payments as detailed in the schedule. The Agreement's terms make it clear that Defendants owe to Plaintiff payments pursuant to the Agreement. (*See* Compl., Ex. A, ¶3.) These payments are the heart of Plaintiff's breach of contract claim. Defendants' entire argument is that they need not make the payments because the Agreement is void. This argument is not only procedurally improper at this stage of the litigation, but is also factually and legally incorrect. Defendants make this argument solely for the purpose of delaying the entry of judgment and increasing the cost of this litigation. This bad faith argument is inappropriate at any stage of litigation, but especially at the motion to dismiss stage.

In sum, Plaintiff has properly pled the elements of breach of contract and Defendants have not offered any viable reasons why the breach of contract claim fails under Rule 12(b)(6). Defendants' motion to dismiss Plaintiff's claim for breach of contract should, therefore, be denied.

3. PLAINTIFF HAS STATED A PLAUSIBLE CLAIM AGAINST DEFENDANTS FOR ACCOUNT STATED

To recover on a claim for account stated under Minnesota law, a plaintiff must demonstrate: (1) a prior debtor-creditor relationship between the parties; (2) mutual assent as to the correct balance owed; and (3) a promise by one of the parties to pay that balance. *Meagher v. Kavli*, 88 N.W.2d 871, 879 (Minn. 1958); *see also* 1 Am. Jur. 2d Accounts and

Accounting 26 (1994). An account stated claim requires an acknowledgment or an acquiescence of an existing condition of liability between two parties. *See Meagher v. Kavli*, 88 N.W.2d 871 (Minn. 1958); *Spalla v. Navarre Corp.*, No. 01-598, 2002 U.S. Dist. LEXIS 15948, at *3 (D. Minn. Aug. 20, 2002) ("An account stated is a stated sum which the debtor has agreed to be an accurate computation of the amount due to the creditor").

Nowhere in Defendants' motion to dismiss do they allege that under Rule 12(b)(6) Plaintiff has not established the elements of account stated. Rather, Defendants argue—as with the breach of contract claim—that DFS is illegal in Minnesota and that the Agreement is therefore invalid. (*See* Doc. 6 at 29-30.) But this argument lacks merit, as it fails to demonstrate how Plaintiff failed "to state a claim upon which relief can be granted," as is required in a motion to dismiss. *See* Fed. R. Civ. P. 12(b)(6).

Here, Plaintiff has demonstrated (1) that the Agreement created a debtor-creditor relationship between the parties. (*See* Compl., ¶26.) Plaintiff has demonstrated (2) that the parties mutually agreed to and executed the Agreement, which states clearly the amount owed and sets forth each payment in detail in the exhibit to the complaint (*see* Compl., ¶27, Ex. B)—and Defendants have acknowledged and acquiesced their execution of the Agreement (and subsequent liability to Plaintiff). (*See* Doc. 6 at 3.) Finally, Plaintiff has demonstrated (3) that pursuant to the Agreement, Defendants promised to pay Plaintiff the balance due. (*See* Compl., ¶¶28-30.) In their motion to dismiss, Defendants do not challenge Plaintiff's pleading of these elements. Because Defendants have not challenged or countered Plaintiff's proper pleading under Rule 12(b)(6), Plaintiff has effectively pled account stated.

Defendants' argument that DFS is illegal in Minnesota is an attempt to avoid payment under the Agreement. As argued here, the state of DFS under Minnesota law is

clear: it is legal. Regardless, Defendants are not entitled to a summary disposition of a defense. A Rule 12 motion to dismiss is the last place this type of analysis should be held.

4. PLAINTIFF HAS STATED A PLAUSIBLE CLAIM AGAINST DEFENDANTS FOR UNJUST ENRICHMENT

To recover on a claim for unjust enrichment, the plaintiff must demonstrate: (1) a benefit is conferred; (2) the defendant appreciates and knowingly accepts the benefit; and (3) the defendant's retention of the benefit under the circumstances would be inequitable. *Acton Constr. Co. v. State*, 383 N.W.2d 416, 417 (Minn. App. 1986). In this case, Plaintiff has demonstrated (1) that a benefit was conferred on Defendants; (2) that Defendants appreciated and knowingly accepted that benefit; and (3) that Defendants' retention of the benefit would be inequitable. (*See* Compl. ¶31-36.)

Defendants argue that Plaintiff's claim for unjust enrichment must be dismissed because "[t]he existence of an express contract precludes recovery under the theories of quasi-contract, unjust enrichment, or quantum meruit." (*See* Doc. 6 at 28) (internal citations omitted.) However, Defendants' argument misses the mark. The Federal Rules of Civil Procedure permit a party to plead alternative theories. *See* Fed. R. Civ. P. 8(d)(2)-(3); *see also Motley v. Homecomings Fin., LLC*, 557 F. Supp.2d 1005, 1014 (D. Minn. 2008); *Superior Edge, Inc. v. Monsanto Co.*, 44 F. Supp.3d 890, 899 (D. Minn. 2014). Moreover, under Minnesota law, a party may pursue these alternative theories until it is conclusively decided "that a valid and enforceable contract exists between the parties which governs the specific dispute before the court." *Spectro Alloys Corp. v. Fire Brick Engineers Co.*, 52 F. Supp.3d 918, 932 (D. Minn. 2014).

A party may simultaneously pursue equitable remedies despite the fact that it is barred from ultimately recovering at both law and equity. *See George v. Uponor Corp.*, 988 F. Supp.2d 1056, 1075 (D. Minn. 2013) (permitting plaintiff to pursue unjust

enrichment theory even though recovery on that theory may later be precluded); *In re Levaquin Prods. Liab. Litig.*, 752 F. Supp.2d 1071, 1081 (D. Minn. 2010) (same). In particular, federal courts "routinely permit the assertion of contract and quasi-contract claims together" as alternative pleadings. *Cummins Law Office, P.A. v. Norman Graphic Printing Co.*, 826 F. Supp.2d. 1127, 1130 (D. Minn. 2011). Parties are entitled to assert equitable claims as alternative theories for recovery until such time as the finder of fact determinatively concludes that a valid and enforceable contract exists between the parties which governs the specific dispute before the court. *P.I.M.L., Inc. v. Fashion Links, LLC*, 428 F. Supp.2d 961, 973 (D. Minn. 2006).

The fact that a plaintiff cannot simultaneously recover damages for both breach of an express contract and unjust enrichment does not preclude that plaintiff from pleading both theories in its complaint. (*See id.*) Defendants point to no authority to the contrary. Indeed, the cases cited by Defendants either involve procedural postures later in the litigation cycle than here—i.e., the pleading stage—or involve relevant factual differences. *See, e.g., Sterling Capital Advisors v. Herzog*, 575 N.W.2d 121 (Minn. Ct. App. 1998) (finding made at summary judgment stage); *Dahl v. Reynolds Tobacco Co.*, 742 N.W.2d 186 (Minn. Ct. App. 2007) (involving preemption by the Federal Cigarette Labeling and Advertising Act); *Kaylor v. Bank of Am., N.A.*, No. 12-1586, 2012 WL 6217443 (D. Minn. Dec. 13, 2012) (no conflict between the parties that the contract was valid). Thus, Defendants' complaint that Plaintiff is "precluded from recovery" is irrelevant at this stage.

Moreover, Defendants' underlying premise that Plaintiff is precluded from recovery undercuts Defendants' overall argument. With respect to the breach of contract claim, Defendants claim that the Agreement is not valid due to illegality. (*See* Doc. 6 at 16.) However, with respect to the unjust enrichment claim, Defendants' claim that Plaintiff is

precluded from recovery *because* of the Agreement, which as a matter of law, Defendants assert as valid for the purposes of defeating Plaintiff's equitable claim. (*See id.* at 28-29.) Defendants acknowledge the Agreement is an "express contract" between the parties. (*See id.*) Plaintiff is allowed at the motion to dismiss stage to plead alternative theories of recovery under Rule 8. This is particularly appropriate if it is not clear if the parties disagree whether a valid contract governs their particular dispute. *See, e.g.*, *European Roasterie, Inc. v. Dale*, No. 10-53, 2010 U.S. Dist. LEXIS 43523, at *11 (D. Minn. May 4, 2010) (citing *Pinnacle Pizza Co. v. Little Caesar Enters., Inc.*, 395 F. Supp.2d 891, 903 (D.S.D. 2005)). For the reasons stated above, Plaintiff is entitled at this stage to plead unjust enrichment.

In sum, Plaintiff's claim for unjust enrichment should not be dismissed as Plaintiff is permitted to plead alternative claims at this stage of litigation. *See, e.g., Spectro*, 52 F. Supp.3d at 932. Defendants' motion to dismiss Plaintiff's claim for unjust enrichment should, therefore, be denied.

5. PLAINTIFF HAS STATED PLAUSIBLE CLAIMS AGAINST DEFENDANTS FULL BOAT, LLC AND RONALD M. DOUMANI

Plaintiff seeks to hold Defendants Full Boat, LLC and Ronald M. Doumani liable for breach of contract, account stated, and unjust enrichment. (*See* Compl., ¶¶ 11-12.) The thrust of this claim is that Defendant Emil Interactive Games, LLC does not exist as a company in good standing in Nevada. Defendants assert that Plaintiff's complaint fails to adequately allege that Full Boat, LLC and Ronald M. Doumani may be held liable for the actions of Emil Interactive Games, LLC. (*See* Doc. 6 at 23.) Not only is Plaintiff's claim properly pled and valid, but Defendants' arguments bolster Plaintiff's claims.

Minnesota uses a two-prong test to determine if the corporate veil is pierced and if a representative can be liable for corporate obligations. The first prong focuses on the

relationship to the corporation and is analyzed according to several factors, including: (1) whether there is insufficient capitalization for purposes of corporate undertaking; (2) a failure to observe corporate formalities; (3) nonpayment of dividends; (4) insolvency of debtor corporation at time of transaction in question; (5) siphoning of funds by dominant shareholder; (6) nonfunctioning of other officers and directors; (7) absence of corporate records; and (8) existence of the corporation as merely a façade for individual dealings. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997) (citing *Victoria Elevator Co. of Minneapolis v. Meriden Grain Co.*, 283 N.W.2d 509, 512 (Minn. 1979)). The second prong requires a showing that piercing the corporate veil is necessary to avoid injustice or fundamental unfairness. *Id.*

At the pleading stage, this Court has permitted claims against individual corporate defendants to proceed when plaintiffs make basic allegations as to one or more of these factors. *See MacDonald v. Summit Orthopedics, Ltd.*, 681 F. Supp.2d 1019, 1026 (D. Minn. 2010) (plaintiff "presented allegations that, if true, would establish the existence of more than one factor under the first prong of the Victoria Elevator test," including that the individual defendants siphoned funds from the corporation, exacerbated its insolvency, "engaged in self dealing by making payments to themselves in preference to the other participants in the Plan"); *see also Bank of Montreal v. Avalon Capital Grp., Inc.*, 743 F. Supp.2d 1021, 1031 (D. Minn. 2010) (denying motion to dismiss because it was "too early in the case to dismiss this claim" where plaintiff alleged that LLC form was abused and was "merely a façade" for individual dealings and that defendant "siphoned funds" out of LLC from which the individual benefited); *Ahlm v. Rooney*, 143 N.W.2d 65, 69 n.1 (Minn. 1966) (noting that, even at summary judgment stage, alter ego claims usually should not be disposed of due to the complex issues involved); *Murrin v. Fischer*, No. 07-1295, 2008

U.S. Dist. LEXIS 13767, at *22 (D. Minn. Feb. 25, 2008) (plaintiffs not required to plead *Victoria Elevator* factors at the motion to dismiss stage—only enough to put defendants on notice of the theory of piercing the corporate veil plaintiffs plan to assert—finding allegations that entities "were entirely controlled" by individual defendant and that entities were used to defraud the plaintiffs were sufficient).

Plaintiff's pleadings are sufficient. Defendants represented to Plaintiff that Defendant Emil Interactive Games, LLC was a Nevada limited liability company. In its complaint, Plaintiff alleges truthfully that "Defendant Interactive Games, a limited liability company, was dissolved with the [Nevada] Secretary of State on October 16, 2015." (*See* Compl., ¶10.) Plaintiff also alleges that "[a]s Defendant Interactive Games is not in good standing [with the Nevada Secretary of State], the Agreement is enforceable against its Manager, Defendant Full Boat." (*See* Compl., ¶11.) Finally, Plaintiff alleges that "[a]s Defendant Interactive Games is not in good standing [with the Nevada Secretary of State], the Agreement is enforceable against its President and signatory to the Agreement, Defendant Doumani." (*See* Compl., ¶12.)

These allegations point to at least two of the *Victoria Elevator* factors: a failure to observe corporate formalities and absence of corporate records. The presence of two factors is sufficient to show that piercing the corporate veil is necessary to avoid injustice or fundamental unfairness. *See MacDonald*, 681 F. Supp.2d at 1026 (plaintiff sufficiently pled alter ego where alleged facts showing two *Victoria Elevator* factors); *see also C.H. Robinson Worldwide, Inc. v. U.S. Sand, LLC*, No. 13-1274, 2014 U.S. Dist. LEXIS 1905, at *26-30 (D. Minn. Jan. 8, 2014). Rule 8 requires merely "a short and plain statement;" therefore, these allegations suffice. Fed. R. Civ. P. 8(a)(2).

Additionally, Defendants' own argument supports piercing the corporate veil. If DFS is illegal and the Agreement is void, Defendants Full Boat, LLC and Ronald M. Doumani had full knowledge of this and were using Defendant Emil Interactive Games, LLC to operate an illegal activity, of which Plaintiff had no knowledge and of which Plaintiff was a victim. Defendants are requesting relief (in the form of relief from a contractual obligation) based on their fraud.

Defendants argue *in pari delicto* that the Agreement is invalid if DFS is illegal in Minnesota. (*See* Doc. 6 at 16-18.) However, if only one party to the contract has knowledge of the alleged illegality, "[a]n innocent plaintiff may recover on an illegal agreement which is not declared void by statute." 14 S. Williston, Contracts § 1631 (3d ed. 1972). DFS has not been declared void by any statute. As a result, even if the Court finds DFS is illegal in Minnesota, Defendants are estopped from asserting the illegality of the bargained-for Agreement and its received promotion and advertising. Plaintiff—as the innocent party—may recover under the Agreement.

Furthermore, even if the Court finds DFS is illegal, Defendants used the corporate form to perpetrate a fraud. In these cases, "courts may disregard the corporate entity and permit plaintiff[] to 'pierce the corporate veil.'" *Integrity Dominion Funds, LLC v. Lazy Deuce Capital Co.*, No. 12-254, 2013 U.S. Dist. LEXIS 97494, at *21 (D. Minn. July 12, 2014) (quoting *Stone v. Jetmar Props., LLC*, 733 N.W.2d 480, 488 (Minn. Ct. App. 2007)). Therefore, reaching these Defendants is necessary in order to avoid injustice or fundamental unfairness caused by Defendants' illegal activity. "[T]hat is precisely when a court should pierce the corporate veil—there is nothing more fundamentally unfair than to allow a person to cloak himself in the legitimacy of the corporate form in order to defraud people and then allow him to raise that corporate form as a shield against any personal

liability for such wrongdoing." *Id.* The Court should deny Defendants' motion to dismiss Defendants Full Boat, LLC and Ronald M. Doumani from the suit.

6. THE COURT SHOULD RIGHTFULLY GRANT SUMMARY JUDGMENT, *SUA SPONTE*, IN FAVOR OF PLAINTIFF ON ITS BREACH OF CONTRACT AND ACCOUNT STATED CLAIMS AGAINST DEFENDANT EMIL INTERACTIVE GAMES, LLC

Federal Rule of Civil Procedure 12(d) states that if extra-pleading materials are presented but not excluded, the Court should consider the motion as one for summary judgment:

> If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Fed. R. Civ. P. 12(d).

The Federal Rules of Civil Procedure permit the Court to grant summary judgment, *sua sponte*, so long as the party against whom the judgment will be entered is provided sufficient notice and an adequate opportunity to demonstrate why summary judgment should not be granted. *Coplin v. Fairfield Public Access Television Committee*, 111 F.3d 1395, 1407 (8th Cir. 1997). The opportunity for the adversely affected party to set forth facts in evidence, showing that summary judgment is not appropriate, need not be separately extended, with respect to each defendant for whom summary judgment is granted, if that party has had the opportunity to address the grounds on which summary judgment would rest. *Id.*

The Eighth Circuit has affirmed this Court's right to grant summary judgment, *sua sponte*. *See Madewell v. Downs*, 68 F.3d 1030, 1049 (8th Cir. 1995); *McNees v. Mountain Home, Ark.*, 993 F.2d 1359, 1361 (8th Cir. 1993); *Chrysler Credit Corp. v. Cathey*, 977

F.2d 447, 449 (8th Cir. 1992). These cases stand for the proposition that, "when summary judgment in favor of a moving party leaves no genuine issue of material fact as to the nonmoving party's right to summary judgment as well, *sua sponte* grant of summary judgment is permissible." *Madewell*, 68 F.3d at 1049.

In this case, as demonstrated above, there exists no genuine dispute of material fact. Defendant Emil Interactive Games, LLC acknowledges it entered into the Agreement. (*See* Doc. 6 at 3.) Plaintiff performed all conditions precedent in the Agreement. (*See* Compl. ¶23.) Defendant acknowledges that under the Agreement, it is responsible for payments to Plaintiff. (*See* Doc. 6 at 3.) Defendant has not made those payments, nor does it dispute the amount of the payments. Instead, Defendant argues incorrectly that the Argument is void because DFS is illegal. As set forth above, this is not a valid argument. Defendant Emil Interactive Games, LLC has offered no other arguments to counter the acknowledged facts established above. As a result, Plaintiff is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *United Steel, Paper & Forestry, Rubber, Mfg., Energy Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. Carlisle Power Transmission Prods.*, 489 F. Supp.2d 924, 931 (D. Minn. 2007). Because Defendant Emil Interactive Games, LLC's motion to dismiss fails, and because there exists no genuine dispute of material fact, the Court should grant summary judgment, *sua sponte*, in favor of Plaintiff on its breach of contract and account stated claims against Defendant Emil Interactive Games, LLC.

CONCLUSION

For all these foregoing reasons, Plaintiff Minnesota Wild Hockey Club, LP respectfully requests the Court deny Defendants Emil Interactive Games, LLC, Full Boat, LLC, and Ronald M. Doumani's Motion to Dismiss and grant Plaintiff summary judgment,

sua sponte, on its breach of contract and account stated claims Defendant Emil Interactive Games, LLC.

Respectfully submitted,

COZEN O'CONNOR

Dated: June 22, 2016

/s/ Steven H. Silton

Steven H. Silton Reg. No. 260769
Armeen F. Mistry Reg. No. 397591
33 South Sixth Street, Suite 4640
Minneapolis, MN 55402
Telephone: 612-260-9000
Fax: 612-260-9080
ssilton@cozen.com
amistry@cozen.com
Attorneys for Plaintiff