

August 29, 2012

**BRIEF: Avent v. Paragon Gaming, LLC: Plaintiffs' Motion for Partial Summary Judgment -- Filed Aug. 29, 2012 -- in the Maricopa County Superior Court of Arizona, citing Bigler & Tillman's Void or Voidable? -- Curing Defects in Stock Issuances Under Delaware Law**

Seth Barrett Tillman

For Opinion See [2013 WL 2283585](#) (Trial Order), [2013 WL 2283606](#) (Trial Order), [2012 WL 8161900](#) (Trial Order), [2012 WL 8161923](#) (Trial Order)

Superior Court of Arizona.  
Maricopa County  
Loretta T. AVENT, et al., Plaintiff,  
v.  
PARAGON GAMING, L.L.C, et al., Defendants.  
No. CV2010017742.  
August 29, 2012.

(Oral Argument Requested)

Motion for Partial Summary Judgment

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(Assigned to the Hon. Arthur Anderson).

Plaintiffs (“Avent and Sigler”) move for partial summary judgment under Ariz. R. Civ. P. 56: 1) to declare that the convertible notes used as the basis to dilute Avent's and Sigler's interests in Paragon Gaming, L.L.C. and Paragon Gaming, Inc. (collectively “Paragon”) were not enforceable, and 2) on Defendants' breaches of fiduciary duties and aiding and abetting breach of fiduciary duty claims. This Motion is supported by a separately filed statement of facts as required by Ariz. R. Civ. P. 56(C)(2).

## I. INTRODUCTION.

Unsuccessful at breaking into Indian gaming, Defendants Bennett and Menke turned to Avent and Sigler. In exchange for an ownership interest they provided their expertise which led to Paragon's initial success. SOF¶¶12. In 2006, Bennett and Menke attempted to buy the interests of all the investors, Avent, and Sigler. SOF¶¶13-24. Unable to reach an agreement with Avent or Sigler, Bennett and Menke conspired to dilute Avent's and Sigler's interest. SOF¶¶136-68. Dilution depended on issuing additional shares of stock to Bennett and Menke.<sup>[FN1]</sup> To do that, Bennett, Menke, and Seay, followed the Conversion and Dilution plan developed by Paragon Inc. Chief Financial Officer Justin Kolb. SOF¶¶29, 31. They aggregated what had been either Bennett's capital contributions

or unsecured non-interest loans, assigned half of them to Menke, recast them as convertible promissory notes, and ratified the notes. Knowing that Paragon could not pay the notes, Bennett and Menke then made demand for immediate payment, which led to the capital call to Avent and Sigler. At its inception, the dilution plan assumed that Avent and Sigler would not have the resources to meet the capital call and Bennett and Menke would then be able to convert the notes to additional shares of stock. Avent and Sigler could not meet the call. SOF Exhibit 15. Paragon Inc. then authorized an additional 1,000,000 shares of stock and issued 200,000 shares of stock each to Bennett and Menke, thus diluting Avent's and Sigler's interest.

FN1. At the time the Defendants devised the dilution plan, there were only 100,000 shares of stock in Paragon, Inc. all of which had been issued. Additional shares were not issued until after Bennett and Menke informed Avent and Sigler of the dilution. SOF¶¶27, 53, 66.

If the convertible notes were not enforceable, Bennett and Menke would not have been able to dilute Avent and Sigler. The convertible notes were not enforceable because: a) the notes were void under Nevada gaming regulations and statutes; b) Seay's ratification of the notes was ineffective; c) the notes were void under the Statute of Frauds; d) no consideration supported changing the loans to convertible securities, and e) the notes were never properly ratified. The ratification of the unenforceable notes and dilution of Avent's and Sigler's interests were breaches of their fiduciary duties in which Bennett, Menke, and Seay aided and abetted one another.

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### **III. DEFENDANTS BREACHED THEIR FIDUCIARY DUTIES.**

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#### ***A. Defendants Acted To The Detriment Of Avent And Sigler.***

As officers and directors of Paragon Inc., members of the Board of Managers of Paragon LLC, and members of the Finance Committee of Paragon LLC, Bennett, Menke, and Seay owed fiduciary duties to Avent and Sigler. Bennett, Menke and Seay were in actual control as one or more of the following: majority shareholders, majority members, managers, President, Board of Directors, Board of Managers, and Finance Committee.

Nevada relies on Delaware law in corporate law issues.<sup>[FN4]</sup> See [Cohen v. Mirage Resorts, Inc.](#), 62 P.3d 720 (Nev. 2003) (reasoning that Nevada courts will look to the jurisprudence of other states when construing Nevada statutes derived from those state's laws); [Brown v. Kinross Gold U.S.A., Inc.](#), 531 F. Supp. 2d 1234, 1245 (D. Nev. 2008) (recognizing that the "Nevada Supreme Court frequently looks to the Delaware Supreme Court and Delaware Courts of Chancery as persuasive authorities on questions of corporation law"); [Hilton Hotels Corp. v. ITT Corp.](#), 978 F. Supp. 1342, 1347 (D. Nev. 1997) (finding Delaware authority persuasive in absence of Nevada law on point).

FN4. In this case, Judge Burke entered orders that Arizona tort law controls, but Nevada corporate law applies to Paragon Inc. and Paragon LLC; which are both Nevada entities.

"Board exercise of statutory discretion is, of course, bounded by judicial glosses as to the exercise of such discretion in conformity with common law fiduciary duties running to stockholders and to the corporation." C.

Stephen Bigler and Seth Barrett Tillman, *Void or Voidable?—Curing Defects in Stock Issuances Under Delaware Law*, THE BUSINESS Lawyer; 63 Bus Law. At 1109, 1113 (Aug. 2008) (citation omitted). Fiduciary duty requires more than conformance to technical or contractual requirements or corporate bylaws. *Id.* (citing Jack B. Jacobs, [\*The Uneasy Truce Between Law and Equity in Modern Business Enterprise Jurisprudence\*, 8 DEL. L. REV. 1, 9 \(2005\)](#)); *see Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 281 (Del. 1977) (finding duty of “complete candor” to minority shareholders requires disclosing all “germane” information, not just technically accurate information because objective is “to prevent insiders from using special knowledge which they may have to their own advantage”). Exercise of power must be fair and equitable to those who are adversely affected. *Id.* Even if compliance sufficed, the Defendants did not comply with Nevada law, Nevada Gaming Commission Regulations or the Operating Agreement. They conspired to adopt the Declaration Affirmation Ratification and Waiver after the ratification because they recognized the ratification did not comply with the contractual requirements of the Operating Agreement. SOP ¶¶74, 76-77, 103-104.

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Dated this 29<sup>th</sup> day of August 2012,

STANLEY L. LERNER, P.C.

LAW OFFICES OF WILLIAM R. HOBSON, P.C.

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