UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Wild Hockey Club, LP,

Plaintiff,

v.

Emil Interactive Games, LLC; Full Boat, LLC; and Ronald M. Doumani,

Defendants.

Case No. 16-cv-1545 (WMW/TNL)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND DENYING PLAINTIFF'S MOTION FOR SANCTIONS

This matter is before the Court on Defendants' motion to dismiss Plaintiff Minnesota Wild Hockey Club, LP's ("Minnesota Wild") complaint for failure to state a claim for which relief can be granted. Fed. R. Civ. P. 12(b)(6). In addition, Minnesota Wild has moved for Defendants to be sanctioned for making factual contentions without any evidentiary support. For the reasons addressed below, the Court grants in part and denies in part Defendants' motion to dismiss and denies Minnesota Wild's motion for sanctions.

BACKGROUND[1]

On September 4, 2015, Minnesota Wild, a limited partnership organized under the laws of the State of Minnesota, and Defendant Emil Interactive Games, LLC ("Emil

[1] The facts contained in this background section are taken from the allegations in Minnesota Wild's complaint, which the Court must accept as true for the purpose of the pending motion to dismiss. *See Blankenship v. USA Truck, Inc.*, 601 F.3d 852, 853 (8th Cir. 2010).

Interactive"), a limited liability company organized under the laws of the State of Nevada, entered into a sponsorship agreement ("Agreement"). Pursuant to the Agreement, Minnesota Wild provided advertising and other related benefits to Emil Interactive and permitted Emil Interactive to use the name and logo of the Minnesota Wild hockey franchise in Emil Interactive's marketing and advertising. Emil Interactive, in turn, agreed to pay Minnesota Wild monthly payments from October 15, 2015, through June 30, 2016, for a total of $1,104,636. Emil Interactive also agreed to pay late charges and interest at a monthly rate of 1.5 percent.

Eight months later, Minnesota Wild commenced this action in Ramsey County District Court against Emil Interactive; Defendant Full Boat, LLC ("Full Boat"), a limited liability company organized under the laws of the State of Nevada and listed with the Nevada Secretary of State as the manager of Emil Interactive; and Defendant Ronald M. Doumani ("Doumani"), a resident of the State of Nevada and the president of Emil Interactive Doumani (collectively, "Defendants"). Minnesota Wild's complaint alleges breach of contract, account stated, and unjust enrichment. Specifically, the complaint alleges that Emil Interactive failed to make the monthly payments required under the Agreement. The complaint also alleges that, because Emil Interactive was dissolved on October 16, 2015, Emil Interactive is not in good standing and, therefore, the Agreement is enforceable against Full Boat and Doumani.

Having removed this case to this Court under diversity jurisdiction, Defendants now move to dismiss Minnesota Wild's complaint for failure to state a claim. Defendants argue that Minnesota Wild has failed to state claims for breach of contract,

account stated, unjust enrichment, and piercing the corporate veil to hold Full Boat and Doumani liable. Defendants' motion to dismiss primarily argues that the Agreement is void because Emil Interactive's online daily fantasy sports ("DFS") business is illegal in Minnesota.

Minnesota Wild, in turn, seeks sanctions against Defendants, Fed. R. Civ. P. 11, for moving to dismiss for improper purposes and misstating the law and the facts. Minnesota Wild seeks, as a sanction, the denial of Defendants' motion to dismiss and an order requiring Defendants to pay Minnesota Wild's attorneys' fees and costs incurred both in responding to Defendants' motion to dismiss and bringing its motion for sanctions.

ANALYSIS

Federal Rule of Civil Procedure 12(b)(6) provides that a complaint must be dismissed if it fails to state a claim on which relief can be granted. To survive a Rule 12(b)(6) motion, the complaint must allege sufficient facts such that, when accepted as true, a facially plausible claim to relief is stated. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When determining whether the complaint states such a claim, a district court must accept as true all of the factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. *Blankenship v. USA Truck, Inc.*, 601 F.3d 852, 853 (8th Cir. 2010). The factual allegations need not be detailed, but they must be sufficient to "raise a right to relief above the speculative level" and "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). "[T]he factual allegations may be circumstantial and need only be enough to nudge the claim

across the line from conceivable to plausible." *McDonough v. Anoka Cty.*, 799 F.3d 931, 945 (8th Cir. 2015) (internal quotation marks omitted). A plaintiff may rely on a "reasonable expectation that discovery will reveal evidence" of the alleged activity. *Twombly*, 550 U.S. at 556. But a plaintiff must do more than offer "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Id.* at 555. Legal conclusions that are couched as factual allegations may be disregarded by the district court. *See Iqbal*, 556 U.S. at 678-79.

Ordinarily, a Rule 12(b)(6) motion must be treated as a motion for summary judgment when matters outside the pleadings are presented to and considered by the district court. *See* Fed. R. Civ. P. 12(d). However, the district court may consider exhibits attached to the complaint and documents that are necessarily embraced by the complaint without converting the motion into one for summary judgment. *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 697 n.4 (8th Cir. 2003). Because the disputed contract here is attached to and necessarily embraced by Minnesota Wild's complaint, the Court will address Emil Interactive's motion as a Rule 12(b)(6) motion to dismiss.

I. Minnesota Wild's Breach-of-Contract Claim

Defendants argue that Minnesota Wild has failed to state a claim for breach of contract. The parties' Agreement provides that it is governed by, and should be construed in accordance with, the laws of the State of Minnesota. To plead a breach-of-contract claim under Minnesota law, the plaintiff must allege that (1) an agreement was formed, (2) the plaintiff performed any conditions precedent to the plaintiff's demand of

performance by the defendant, and (3) the defendant breached the contract. *See Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co.*, 848 N.W.2d 539, 543 (Minn. 2014).

Minnesota Wild's complaint alleges that Minnesota Wild entered the Agreement with Emil Interactive, Minnesota Wild performed under the Agreement by providing advertising and other benefits to Emil Interactive, and Emil Interactive breached the Agreement by failing to pay the amounts due under the Agreement. Defendants do not dispute the sufficiency of any of these allegations. Rather, Defendants assert that the Agreement is void because Emil Interactive's online DFS business is illegal under Minnesota law.

A. Alleged Illegality of the Agreement

In Minnesota, a claim of illegality must be pleaded as an affirmative defense. Minn. R. Civ. P. 8.03; *St. Cloud Aviation, Inc. v. Pulos*, 375 N.W.2d 543, 545 (Minn. Ct. App. 1985). Because an affirmative defense must be pleaded *and proved*, a "defendant does not render a complaint defective by pleading an affirmative defense." *Jessie v. Potter*, 516 F.3d 709, 713 n.2 (8th Cir. 2008) (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)). Rather, dismissal for failure to state a claim based on an affirmative defense is appropriate only if the defense is established on the face of the complaint. *Id.*; *accord Story v. Foote*, 782 F.3d 968, 975 (8th Cir. 2015) (Bye, J., concurring in part and dissenting in part). This means that "the district court is limited to the materials properly before it on a motion to dismiss, which may include public records and materials embraced by the complaint." *Noble Sys. Corp. v. Alorica Cent., LLC*, 543 F.3d 978, 983

(8th Cir. 2008). A district court may infer that a defense applies despite a plaintiff's "artful avoidance of mentioning the facts giving rise to the defense." *Id.*

Courts in this district have denied motions to dismiss that are based solely on a defendant's affirmative defense. For example, in *United States v. Xcel Energy, Inc.*, the plaintiff brought a claim for civil penalties pursuant to a federal statute, and the defendants moved to dismiss on the ground that the penalty did not apply under the circumstances. 759 F. Supp. 2d 1106, 1118 (D. Minn. 2010). The district court observed that affirmative defenses generally are not a basis for a motion to dismiss, and "may only serve as a basis for a motion to dismiss where the complaint *clearly* shows the existence [of] a defense." *Id.* (emphasis in original) (alteration in original) (internal quotation marks omitted). In denying the defendants' motion to dismiss, the district court concluded that "[d]etermining whether to assess such a penalty is a factually intensive analysis that requires more record development." *Id.*; *see also Stephenson v. Deutsche Bank AG*, 282 F. Supp. 2d 1032, 1065 (D. Minn. 2003) (denying motion to dismiss based on an affirmative defense because "an affirmative defense . . . must be *proved* by the party asserting the [defense]" (emphasis in original)).

Here, when the facts alleged in the complaint are accepted as true and all reasonable inferences are viewed in the light most favorable to Minnesota Wild, the alleged illegality of the Agreement is not clearly established on the face of the complaint. Several reasons support this conclusion. First, nothing in the complaint or the Agreement suggests, let alone conclusively establishes, that online DFS activities constitute illegal gambling under Minnesota law. The parties have not cited, and this Court's research has

not produced, any Minnesota legal authority addressing whether online DFS activities are unlawful in Minnesota. Moreover, any undertaking to determine whether the circumstances here rendered the Agreement void would involve a fact-intensive analysis that requires additional development of the record. In that regard, the circumstances presented in *Xcel Energy* and *Stephenson* are similar to those presented here.

Second, even if Emil Interactive's online DFS activities constitute illegal gambling under Minnesota law, the Agreement pertains to sponsorship and advertising, *not gambling*. Nothing in the complaint or the materials necessarily embraced by the complaint suggests either that the advertising or related benefits described in the Agreement are illegal or that Emil Interactive would be subject to criminal liability for paying Minnesota Wild for the advertising benefits it allegedly received. In short, the legality of online DFS activities in Minnesota is not relevant to this dispute. A sponsorship agreement—not online DFS—is at issue here.[2]

Third, under Minnesota law, a contract that involves a violation of state law is not necessarily void. "Not every illegal contract must be voided in order to protect public policy." *Isles Wellness, Inc. v. Progressive N. Ins. Co.*, 725 N.W.2d 90, 92 (Minn. 2006). Rather, Minnesota courts "examine each contract to determine whether the illegality has so tainted the transaction that enforcing the contract would be contrary to public policy." *Id.* at 93. In *Isles Wellness*, the plaintiff clinics, having acquired insurance claims assigned to them by their patients, sought to enforce those insurance claims against the

[2] To the extent that Defendants argue that *advertising* online DFS is itself illegal in Minnesota, it is premature to resolve that affirmative defense on the current record.

defendant insurers. *Id.* at 91-92. The defendants argued that the contracts were illegal, against public policy and void. *Id.* at 92. The plaintiffs countered that Minnesota law permits courts to uphold contracts made in violation of the law on fairness grounds. *Id.* at 93-94. The *Isles Wellness* court agreed, observing that "Minnesota law *permits* voiding contracts if they are in violation of public policy, but it does not *require* such an action." *Id.* at 94 (emphasis added). The court held that it "will not void a contract unless it is established that the [plaintiff's] actions show a knowing and intentional failure to abide by state and local law." *Id.* at 95. The *Isles Wellness* court also observed that determining whether to void a contract based on illegality requires analyzing the underlying public policy and examining the contract in the context of the specific facts of the case. *Id.* at 94. Assuming—without deciding here—that online DFS activities are unlawful in Minnesota, determining whether Defendants' affirmative defense of illegality voids the parties' Agreement in this case requires additional development of the record.

For these reasons, the Court denies Defendants' motion to dismiss based on alleged illegality.

B. The Agreement's Termination Provision

Although Defendants primarily rely on their illegality theory, they briefly cite the following termination provision in the Agreement:

> [Emil Interactive] shall have the right to terminate this Agreement upon written notice in the event either the [National Hockey League] and/or the State of Minnesota rule that [Emil Interactive's] primary business activities are illegal or prevented by Rule or Law.

For the reasons explained above in Part I.A., Defendants' affirmative defense of illegality is not clearly established on the face of the complaint, or by any documents necessarily embraced by the complaint, such that it can form the basis for dismissal under Rule 12(b)(6). Moreover, no aspect of the record demonstrates that the Agreement's termination provision has been triggered or that Emil Interactive exercised its right to terminate the Agreement by providing written notice to Minnesota Wild. Therefore, to the extent that Defendants' motion to dismiss relies on the termination provision in the Agreement, the Court denies Defendants' motion.

II. Minnesota Wild's Claim for Account Stated

Defendants next argue that Minnesota Wild has failed to state a claim for account stated. "An account stated is a manifestation of assent by a debtor and creditor to a stated sum as an accurate computation of an amount due the creditor." *Mountain Peaks Fin. Servs., Inc. v. Roth-Steffen*, 778 N.W.2d 380, 387 (Minn. Ct. App. 2010) (internal quotation marks omitted). "To establish and recover on an account stated, the claimant must show (1) a prior relationship as debtor and creditor, (2) . . . mutual assent between the parties as to the correct balance of the account, and (3) a promise by the debtor to pay the balance of the account." *Id.*; *accord Meagher v. Kavli*, 88 N.W.2d 871, 879 (Minn. 1958). "For the doctrine of account stated to apply, both parties must have mutually examined each other's claims and reached a mutual agreement as to the correctness of the balance." *Toyota-Lift of Minn., Inc. v. Am. Warehouse Sys., LLC*, 868 N.W.2d 689, 698 (Minn. Ct. App. 2015).

Defendants' sole basis for seeking dismissal of Minnesota Wild's account-stated claim appears to be Defendants' contention that the Agreement is illegal. But for the reasons addressed above in Part I, Defendants have not demonstrated that dismissal is appropriate based on its illegality theory. And when accepting as true all facts alleged in the complaint, Minnesota Wild has sufficiently pleaded each element of an account-stated claim.

First, a claim for account stated requires "a prior relationship as debtor and creditor." *Mountain Peaks*, 778 N.W.2d at 387. The complaint sufficiently pleads this element by alleging that the parties "entered into the Agreement for services to be provided by [Minnesota Wild] to and/or on behalf of Defendants for a fee."

Second, "a showing of mutual assent between the parties as to the correct balance of the account" is required. *Id.* When a party retains a statement of account rendered by the other party "for an unreasonably long time" without objection, "a manifestation of assent" exists. *Am. Druggists Ins. v. Thompson Lumber Co.*, 349 N.W.2d 569, 573 (Minn. Ct. App. 1984). The complaint sufficiently pleads this element by alleging that Minnesota Wild "submitted invoices and/or statements of account to Defendants, which reflected the amounts due and owing for the services provided. Said invoices and/or statements of account were received by Defendants and retained by Defendants without objection being made to any item thereof within a reasonable period of time."

Third, a claim for account stated requires "a promise by the debtor to pay the balance of the account." *Mountain Peaks*, 778 N.W.2d at 387. When a debtor retains an invoice for more than a reasonable period of time without objecting, Minnesota law

implies a promise to pay the balance owed. *See Meagher*, 88 N.W.2d at 879; *Am. Druggists*, 349 N.W.2d at 573. The complaint alleges that, by entering into the Agreement, Defendants promised to pay Minnesota Wild the balances outlined in the Agreement, and acquiesced by retaining Minnesota Wild's invoices without objecting within a reasonable time. This allegation is sufficient to state the third element of an account-stated claim.

Aside from contending that the Agreement is void, Defendants have not challenged the sufficiency of any of the foregoing allegations in their motion to dismiss. Accordingly, the Court denies Defendants' motion to dismiss Minnesota Wild's account-stated claim.

III. Minnesota Wild's Claim for Unjust Enrichment

Defendants next argue that Minnesota Wild has failed to state a claim for unjust enrichment. To state a claim for unjust enrichment under Minnesota law, the plaintiff must allege that a party knowingly received something of value to which that party was not entitled under circumstances such that retaining the benefit would be unjust. *Bank of Montreal v. Avalon Capital Grp., Inc.*, 743 F. Supp. 2d 1021, 1032 (D. Minn. 2010). Defendants' sole basis for seeking dismissal of Minnesota Wild's unjust-enrichment claim is their contention that "[t]he existence of an express contract precludes recovery under the theories of quasi-contract, unjust enrichment, or quantum meruit."

The Federal Rules of Civil Procedure expressly permit a party to plead alternative or inconsistent claims or defenses. Fed. R. Civ. P. 8(d)(2)-(3). For this reason, courts routinely decline to dismiss an unjust-enrichment claim when pled in the alternative. *See,*

e.g., *United States v. R.J. Zavoral & Sons, Inc.*, 894 F. Supp. 2d 1118, 1127 (D. Minn. 2012) (concluding that plaintiff "may maintain this [unjust-enrichment] claim as [an] alternative claim for relief under Rule 8 of the Federal Rules of Civil Procedure"); *Cummins Law Office, P.A. v. Norman Graphic Printing Co.*, 826 F. Supp. 2d 1127, 1130 (D. Minn. 2011) (observing that courts "routinely permit the assertion of contract and quasi-contract claims together" and declining to dismiss plaintiff's unjust-enrichment claim on that basis).[3] Thus, Minnesota Wild is permitted to plead unjust enrichment in the alternative.

Because Defendants have not advanced a valid basis to dismiss Minnesota Wild's unjust-enrichment claim, their motion on that basis is denied.

IV. Minnesota Wild's Veil-Piercing Claims Against Full Boat and Doumani

Defendants next argue that Minnesota Wild has failed to state claims against Full Boat and Doumani. Minnesota Wild's complaint alleges that the Agreement is enforceable against Full Boat, which is Emil Interactive's manager, and Doumani, who is Full Boat's president and a signatory to the Agreement, because Emil Interactive is not in good standing. In short, Minnesota Wild seeks to hold Full Boat and Doumani liable by piercing the corporate veil of Emil Interactive.

A. Legal Background

"The practice of piercing the corporate veil is generally a creditor's remedy used to reach an individual who has used a corporation as an instrument to defraud creditors."

[3] Notably, Defendants themselves have advanced inconsistent theories of defense by arguing both that the Agreement is void as illegal and that the existence of the Agreement precludes recovery under a theory of unjust enrichment.

Roepke v. W. Nat'l Mut. Ins. Co., 302 N.W.2d 350, 352 (Minn. 1981). Minnesota applies a two-part test to determine whether to pierce the corporate veil:

> The first prong focuses on the shareholder's relationship to the corporation. Factors that are significant to the assessment of this relationship include whether there is insufficient capitalization for purposes of [the] corporate undertaking, a failure to observe corporate formalities, nonpayment of dividends, insolvency of [the] debtor corporation at [the] time of [the] transaction in question, siphoning of funds by [a] dominant shareholder, nonfunctioning of other officers and directors, absence of corporate records, and existence of the corporation as merely a facade for individual dealings. The second prong requires showing that piercing the corporate veil is necessary to avoid injustice or fundamental unfairness.

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)). In *Barton*, the Minnesota Supreme Court held that a plaintiff need only allege facts sufficient to "give notice" to defendants of the plaintiffs' "intention to pierce the corporate veil," and that the plaintiffs "are not required to address the factors enumerated in either prong of the *Victoria Elevator* test in their complaint." *Id.* at 749-50.

Matters removed to federal court, however, are governed by the *federal* pleading standard when determining whether a complaint states a claim. *Karnatcheva v. JPMorgan Chase Bank, N.A.*, 704 F.3d 545, 548 (8th Cir. 2013); *see also* Fed. R. Civ. P. 8, 81(c)(1). The Supreme Court of the United States has described the federal pleading standard as follows:

> 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. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer

> possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Iqbal, 556 U.S. at 678 (internal quotation marks omitted) (citing *Twombly*, 550 U.S. at 570, 556-57). In articulating this standard, the Court rejected the notion that "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of [undisclosed] facts to support recovery." *Twombly*, 550 U.S. at 561 (internal quotation marks omitted). Notably, the Minnesota Supreme Court has expressly declined to adopt the *Twombly* "plausibility" standard in Minnesota state court proceedings, reasoning that the federal pleading standard after *Twombly* differs from Minnesota's pleading standard because it "requires factual enhancement" and "raises the bar for claimants." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 605 (Minn. 2014) (internal quotation marks omitted).

This Court has not identified any case that has directly addressed whether Minnesota's *Barton* standard for determining whether a plaintiff has stated a claim for piercing the corporate veil is sufficient in federal courts under the pleading standard articulated in *Twombly*. In some post-*Twombly* cases, courts in this district have relied on *Barton* to deny motions to dismiss for failure to state a claim for piercing the corporate veil. *E.g.*, *Damon v. Groteboer*, No. 10-92, 2011 WL 886132, at *6 (D. Minn. Mar. 14, 2011) ("In order to survive a Motion to Dismiss, the [plaintiffs] are not required to plead the factors that are set out in *Victoria Elevator* . . . they merely have to provide the Defendants with notice as to the theory on which they plan to proceed, and of their intent to pierce the corporate veil." (internal quotation marks omitted)); *Murrin v. Fischer*, No.

07-CV-1295, 2008 WL 540857, at *22 (D. Minn. Feb. 25, 2008) (same). The courts in *Damon* and *Murrin* observed that a plaintiff need not plead *any* of the *Victoria Elevator* factors. Nonetheless, the plaintiffs in *Damon* and *Murrin* had set forth some facts relating to the *Victoria Elevator* factors.

In other cases, courts in this district have denied motions to dismiss veil-piercing theories without citing *Barton*, but by observing that "the veil-piercing inquiry is a factual inquiry that is not amenable to resolution on a motion to dismiss." *In re Nat'l Arbitration Forum Trade Practices Litig.*, 704 F. Supp. 2d 832, 840 (D. Minn. 2010); *accord Graffiti Entm't, Inc. v. Speed Commerce Inc.*, No. 14-752, 2014 WL 5795477, at *10 (D. Minn. Nov. 6, 2014) (observing that, due to "the complexity these claims present, it is too early to dismiss [plaintiff's] alter ego claim"); *Blackwater Techs., Inc. v. Synesi Grp., Inc.*, No. 06-1273, 2008 WL 141781, at *5 (D. Minn. Jan. 14, 2008) (observing that, "under the liberal notice pleading standard of the Federal Rules of Civil Procedure, the Amended Complaint adequately puts the Individual Defendants on notice that [plaintiff] seeks to pierce the corporate veil"). But in these decisions, the plaintiffs alleged at least one of the *Victoria Elevator* factors, even if the courts' holdings suggest that such allegations were not necessary.[4]

[4] In *National Arbitration*, the complaint alleged that the defendants participated in and directed the corrupt scheme outlined in the complaint. 704 F. Supp. 2d at 839-40. In *Graffiti*, the plaintiff alleged facts pertaining to the disregard of corporate formalities and insufficient funding. 2014 WL 5795477, at *10. And in *Blackwater*, the plaintiff alleged that the defendants used the corporate form to perpetrate a fraud against particular third parties. 2008 WL 141781, at *5.

Other courts in this district have suggested that a plaintiff must make basic allegations as to one or more of the *Victoria Elevator* factors. *See, e.g.*, *C.H. Robinson Worldwide, Inc. v. U.S. Sand, LLC*, No. 13-1274, 2014 WL 67957, at *9 (D. Minn. Jan. 8, 2014) (concluding that the complaint sufficiently alleged facts pertaining to two *Victoria Elevator* factors: siphoning funds for personal use and the existence of the corporation as a mere façade); *MacDonald v. Summit Orthopedics, Ltd.*, 681 F. Supp. 2d 1019, 1026 (D. Minn. 2010) (denying motion to dismiss when the complaint included allegations pertaining to siphoned funds, exacerbation of the corporation's insolvency, and self-dealing).

Finally, some courts in this district have *granted* motions to dismiss for failure to state a claim based on a lack of factual allegations in support of the *Victoria Elevator* factors. *E.g.*, *Ness v. Gurstel Chargo, P.A.*, 933 F. Supp. 2d 1156, 1166 (D. Minn. 2013) (dismissing complaint because it failed to "make any factual allegations about the existence of factors under the first [*Victoria Elevator*] prong that would support an alter-ego claim"); *Johnson v. Evangelical Lutheran Church in Am.*, No. 11-23, 2011 WL 2970962, at *6-7 (D. Minn. July 22, 2011) (dismissing veil-piercing claim because the first *Victoria Elevator* prong was not supported by any factual allegations, and instead relied on one conclusory allegation of undercapitalization).

In light of these divergent decisions, this Court must determine whether the federal pleading standard requires more than Minnesota's *Barton* pleading standard when a litigant seeks to pierce the corporate veil. The federal pleading standard "is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has

acted unlawfully." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). As such, the "complaint must contain sufficient factual matter" to allow the district court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The *Barton* standard, by contrast, requires no facts whatsoever—only "notice" to the defendant of the plaintiff's "intention to pierce the corporate veil." 558 N.W.2d at 749-50. The *Barton* court expressly recognized that a "conclusory claim to pierce the corporate veil is sufficient to support a claim" and that plaintiffs "are not required to address the factors enumerated in either prong of the *Victoria Elevator* test in their complaint." *Id.* at 750. In doing so, the *Barton* court specifically relied on Minnesota's liberal notice-pleading standard, observing that "the pleading of broad general statements that may be conclusory is permitted" and that "[t]he primary function of notice pleading is to give the adverse party fair notice of the theory on which the claim for relief is based." *Id.* at 749. And, as addressed above, the Minnesota Supreme Court recently explained that the pleading standard in Minnesota state court proceedings is less stringent than the federal pleading standard as the latter "requires factual enhancement" and "raises the bar for claimants." *Walsh*, 851 N.W.2d at 605 (internal quotation marks omitted).

Comparing the foregoing standards, this Court concludes that the federal pleading standard requires more than Minnesota's *Barton* pleading standard when a plaintiff pursues a veil-piercing claim in federal court. A conclusory claim to pierce the corporate veil without sufficient factual allegations is not sufficient, even if it places the defendant on notice of the plaintiff's intent to pursue a veil-piercing theory.

B. Minnesota Wild's Veil-Piercing Allegations

Addressing the allegations in this case, Emil Interactive argues that the complaint does not allege facts relating to any of the *Victoria Elevator* factors. Minnesota Wild counters that the complaint alleges at least two of the *Victoria Elevator* factors: a failure to observe corporate formalities and the absence of corporate records. Minnesota Wild relies exclusively on the allegations in its complaint that Emil Interactive dissolved on October 16, 2015 and that Emil Interactive, therefore, is not in good standing with the Nevada Secretary of State. But even when accepting these allegations as true, these facts do not raise "more than a sheer possibility" that Emil Interactive either failed to observe corporate formalities or that there is an absence of corporate records. *See Iqbal*, 556 U.S. at 678. Nor do these allegations raise a reasonable inference as to any of the other *Victoria Elevator* factors. Indeed, although these facts may be *consistent* with alter-ego liability, they "stop[ ] short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation marks omitted).

Accordingly, the Court grants, without prejudice, Defendants' motion to dismiss the complaint as it pertains to Full Boat and Doumani under a veil-piercing theory.

V. Minnesota Wild's Motion for Sanctions

Minnesota Wild seeks sanctions against Defendants pursuant to Federal Rule of Civil Procedure 11. Sanctions against Defendants are warranted, Minnesota Wild argues, because Defendants' motion to dismiss (1) pursues frivolous and meritless legal defenses regarding the legality of online DFS, (2) makes factual contentions that lack evidentiary support and (3) was filed for the improper purpose of delaying entry of judgment and

increasing litigation costs. Minnesota Wild urges the Court to deny Defendants' motion to dismiss and order Defendants to pay Minnesota Wild's attorneys' fees and costs incurred both by responding to Defendants' motion to dismiss and bringing the motion for sanctions.

Rule 11 of the Federal Rules of Civil Procedure requires a party to certify, for any pleading or motion, that:

> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Fed. R. Civ. P. 11(b). To fulfill this obligation, Rule 11 requires an appearing party to "conduct a reasonable inquiry of the factual and legal basis for a claim before filing." *Coonts v. Potts*, 316 F.3d 745, 753 (8th Cir. 2003). An attorney is subject to sanctions if a "reasonable and competent" attorney would not believe in the legal merit of the argument. *Id.*

When determining whether Rule 11 sanctions are warranted, a district court must use an objective standard of reasonableness and consider factors such as the alleged wrongdoer's history, the severity of the violation and the degree to which malice or bad

faith contributed to the violation. *See Pope v. Fed. Express Corp.*, 49 F.3d 1327, 1328 (8th Cir. 1995); *Isakson v. First Nat'l Bank, Sioux Falls*, 985 F.2d 984, 986 (8th Cir. 1993). A sanction imposed under Rule 11 "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(4).

A. Defendants' Legal Claims

Minnesota Wild contends that Defendants frivolously argue that online DFS is illegal despite Defendants' knowledge to the contrary. In support of this contention, Minnesota Wild asserts that DFS is legal under federal law. But Defendants do not argue that federal law directly prohibits DFS. Rather, Defendants argue that DFS is illegal under *Minnesota* law.

Defendants rely on Minnesota's general prohibitions against gambling. *See* Minn. Stat. §§ 609.75-.763 (2016). Under Minnesota law, anyone who "makes a bet"[5] is guilty of a misdemeanor, Minn. Stat. § 609.755, and anyone who "receives, records, or forwards bets or offers to bet or, with intent to receive, record, or forward bets or offers to bet, possesses facilities to do so" is guilty of a gross misdemeanor, Minn. Stat. § 609.76, subd. 1(7). It is a felony in Minnesota to engage in "sports bookmaking," which is defined as "the activity of intentionally receiving, recording or forwarding within any 30-day period more than five bets, or offers to bet, that total more than $2,500 on any one or more sporting events." Minn. Stat. § 609.75, subd. 7; Minn. Stat. § 609.76, subd. 2.

[5] A "bet" is "a bargain whereby the parties mutually agree to a gain or loss by one to the other of specified money, property or benefit dependent upon chance although the chance is accompanied by some element of skill." Minn. Stat. § 609.75, subd. 2.

In support of its motion for sanctions, Minnesota Wild argues that Minnesota courts have never applied these gambling provisions to DFS. But the absence of legal precedent alone does not render a contention implausible, let alone sanctionable. A court *could* determine that these statutory gambling prohibitions encompass DFS. The language of the above-quoted provisions does not categorically exclude DFS. Minnesota Wild minimizes the relevance of other states' determinations that DFS is illegal in their respective states. Although the decisions of other states have no direct bearing on whether DFS is lawful in Minnesota, those decisions are relevant to determining whether a colorable legal controversy exists as to the legal status of DFS in Minnesota.

This Court need not presently decide whether DFS is unlawful in Minnesota. A legal argument is subject to sanctions only if a "reasonable and competent" attorney would not "believe in the merit of [the] argument." *Coonts*, 316 F.3d at 753 (citation omitted); *see also Black Hills Inst. of Geological Research v. S.D. Sch. of Mines & Tech.*, 12 F.3d 737, 745 (8th Cir. 1993) (reversing imposition of Rule 11 sanctions when relevant law was unclear). Defendants' arguments addressing the legal status of DFS in Minnesota are colorable arguments about an unsettled legal question. Regardless of their ultimate success, Defendants' arguments are not frivolous or "so baseless as to warrant Rule 11 sanctions." *Exec. Air Taxi Corp. v. City of Bismarck*, 518 F.3d 562, 571 (8th Cir. 2008).

B. Defendants' Factual Contentions

Minnesota Wild also seeks sanctions on the ground that Defendants have made factual contentions without any evidentiary support. Minnesota Wild's claim rests on the

absence of evidence that Defendants followed the requisite procedure to terminate the Agreement by written notice. Although the introduction of Defendants' brief cites the Agreement's termination provision, Defendants do not argue that they *invoked* their right to terminate under that provision. Rather, Defendants' arguments addressing the Agreement focus on their contention that the Agreement is void as illegal. Minnesota Wild has not identified any material fact in Defendants' briefing that is false. Because Minnesota Wild has not established that Defendants relied on factual contentions that lack evidentiary support, sanctions are not warranted on this basis.

C. Alleged Improper Purpose

Finally, without any evidentiary support, Minnesota Wild argues that Defendants' motion to dismiss was brought to unnecessarily delay entry of judgment and needlessly increase litigation costs. The Federal Rules of Civil Procedure permit Defendants to bring a motion to dismiss, and a motion to dismiss for failure to state a claim must be brought, if at all, within 21 days after being served with a summons and complaint. Fed. R. Civ. P. 12(a)(1)(A), (b). Although it is not a model of clarity, nothing in Defendants' motion supports a reasonable inference that it was filed for an improper purpose. Indeed, the Court has granted Defendants' motion with respect to Minnesota Wild's veil-piercing claims, and Defendants' theory regarding the legal status of DFS in Minnesota is at least colorable. Moreover, at this relatively early stage of the case, a pattern of delay or needless expense caused by Defendants' conduct cannot be discerned.

Because Minnesota Wild has not established any basis for imposing sanctions against Defendants, its motion for sanctions is denied.

ORDER

Based on the foregoing analysis and all the files, records and proceedings herein, **IT IS HEREBY ORDERED**:

1. Defendants' motion to dismiss for failure to state a claim, (Dkt. 5), is **GRANTED** to the extent that Minnesota Wild's complaint alleges veil-piercing claims against Full Boat, LLC and Ronald M. Doumani, and those claims in Minnesota Wild's complaint are **DISMISSED WITHOUT PREJUDICE**.

2. Defendants' motion to dismiss for failure to state a claim, (Dkt. 5), is **DENIED** in all other respects.

3. Minnesota Wild's motion for sanctions, (Dkt. 19), is **DENIED**.

Dated: December 28, 2016

s/Wilhelmina M. Wright
Wilhelmina M. Wright
United States District Judge