

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DELIVERANCE POKER, LLC,
Plaintiff,

v.

MICHAEL MIZRACHI and
TILTWARE, LLC,
Defendant

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CIVIL ACTION NO. 1:10-CV-00664-JRN

**PLAINTIFF’S MOTION TO COMPEL DISCOVERY RESPONSES
AND MEMORANDUM IN SUPPORT**

Plaintiff Deliverance Poker, LLC (“Deliverance Poker”) files this motion to compel and memorandum in support. Plaintiff requests the Court to order (a) Defendant Tiltware, LLC (“Tiltware”) to provide initial disclosures under Federal Rule of Civil Procedure 26(a)(1)(A); (b) Defendant Michael Mizrachi (“Mizrachi”) to supplement his initial disclosures; (c) Mizrachi to produce the documents responsive to Plaintiff’s Request for Production; and (d) Mizrachi to provide complete answers to Plaintiff’s First Set of Interrogatories.

A. Introduction

1. Deliverance Poker filed this suit on September 7, 2010. Mizrachi filed his answer on September 29, 2010. Tiltware filed its answer on January 10, 2011.¹ Mizrachi and Tiltware are represented by the same attorney in this suit.

2. On November 29, 2010, counsel for Mizrachi and counsel for Deliverance Poker conferred on scheduling and discovery issues as required by Federal Rules of Civil Procedure 16 and 26(f) and the Local Rules. On December 13, 2010, Deliverance Poker and Mizrachi

¹ Tiltware was named in the original pleading filed on September 7, 2010, but was later voluntarily dismissed on October 8, 2010. On December 7, 2010, the Court granted Deliverance Poker’s leave to amend its complaint in order to add Tiltware as a party, and Deliverance Poker’s Second Amended Complaint was filed on the same day.

submitted their respective disclosures under Federal Rule of Civil Procedure 26(a)(1)(A). Attached and incorporated by reference as Exhibit A is Defendant Michael Mizrachi's Rule 26(a) Initial Disclosures.

3. On December 7, 2010, the Court granted Deliverance Poker's motion for leave to amend its complaint to add Tiltware as a defendant in this suit. After the Court granted Deliverance Poker's motion for leave to amend, counsel for Deliverance Poker has served corporate counsel with every submission to the Court, as well as discovery response and request.

4. On December 8, 2010, counsel for Deliverance Poker contacted corporate counsel for Tiltware and invited his input on a proposed scheduling order, even though his client had not made an appearance. On December 16, 2010, counsel for Deliverance Poker participated in a conference call with counsel for Mizrachi and corporate counsel for Tiltware discussing scheduling and discovery issues.

5. On December 13, 2010, Deliverance Poker served Mizrachi with Plaintiff's First Set of Interrogatories and Plaintiff's First Request for Production.

6. On January 10, 2011, Tiltware filed its answer. The same attorney representing Mizrachi filed the answer on behalf of Tiltware.

7. On January 17, 2011, Mizrachi answered Plaintiff's First Set of Interrogatories and Plaintiff's First Request for Production. Attached and incorporated by reference as Exhibit B is Defendant Michael Mizrachi's Responses to Plaintiff's First Set of Interrogatories. Attached and incorporated by reference as Exhibit C is Defendant Michael Mizrachi's Responses to Plaintiff's First Request for Production.

8. This case is set for trial on April 25, 2011.

B. Deficiencies in Discovery Responses

9. Tiltware has failed to make the disclosures required under Federal Rule of Civil Procedure 26(a)(1)(A).

10. Mizrachi has failed to provide complete initial disclosures. This lawsuit concerns Tiltware's tortious interference with contract by causing Mizrachi to fail to honor his obligations under his contract with Deliverance Poker. Mizrachi acknowledges that he contracted with Tiltware while under contract with Deliverance Poker. *See* Defendant Michael Mizrachi's Original Answer, par. 9 (Dkt. #12). However, he has failed to list a single person with Tiltware with whom he dealt during these critical events. He has also failed to list a single person knowledgeable about his agreement with Tiltware. Clearly, these are people "likely to have discoverable information that the disclosing party may use to support its claims or defenses," which Mizrachi is required to disclose.

11. Mizrachi has failed to permit inspection of the documents it has agreed to produce.

12. Mizrachi has failed to provide complete answers to Interrogatory No. 3. Specifically, Mizrachi has failed to provide the information requested in parts (b) and (c) of that interrogatory.

13. Mizrachi has provided incomplete or misleading answers to Interrogatory Nos. 4 and 6. As noted, Mizrachi admitted in his answer that he did, in fact, contract with Tiltware during the relevant time period. The subject matter of both the Tiltware contract and the Deliverance Poker contract was the wearing of logos promoting these respective companies. Interrogatory No. 4 requests Mizrachi to state what he was paid by Tiltware to wear its logos, and Mizrachi cryptically responded that "Defendant Mizrachi has never been paid by Tiltware to

wear its logos.” Interrogatory No. 6 requests Mizrachi to identify the people with whom he negotiated to wear Tiltware’s logos and state each such person’s role with Tiltware. Mizrachi, again, cryptically responds that “Defendant Mizrachi never negotiated an agreement to wear Tiltware’s logos.”

14. In light of Mizrachi’s answer to the complaint where he admitted he had a contract with Tiltware, there are three ways to interpret his response to Interrogatory Nos. 4 and 6: (a) Mizrachi does not have a contract to where *Tiltware’s* logos, but has a contract to “Full Tilt Poker” logos, which is Tiltware’s company; (b) he was not paid for *wearing logos per se*, but instead his contract is for promoting Full Tilt Poker or some other such service; or (c) he does not have any contract at all with Tiltware, but contracted with some other entity to where the Full Tilt logos. If Mizrachi means either (a) or (b), his answers are disingenuous and evasive. If Mizrachi means (c), then he has filed an untruthful answer and misled Deliverance Poker since his filing of that answer on September 29, 2010 (and has not sought leave to amend his answer). In addition, if Mizrachi is now claiming that he contracted with some entity other than Tiltware, he has provided an evasive and incomplete response to Interrogatory No. 2, which seeks the identity of other persons and entities that might be liable in this case. Mizrachi answered, “None at this time” to Interrogatory No. 2.

C. Efforts to Resolve Deficient Discovery Responses

15. On January 17, 2011, counsel for Deliverance Poker called counsel for Mizrachi and Tiltware (Defendants’ counsel), but had to leave a message. The phone call was not returned. In addition, counsel for Deliverance Poker wrote to Defendants’ counsel pointing out all of the deficiencies set forth above. Counsel for Deliverance Poker received no response to

this correspondence. Attached and incorporated by reference as Exhibit D is the letter from John D. Jacks to John P. Henry, dated January 17, 2011.

16. On January 18, 2011, counsel for Deliverance Poker wrote to Defendants' counsel regarding scheduling of depositions, again asking for a phone call. Attached and incorporated by reference as Exhibit E is the letter from John D. Jacks to John P. Henry, dated January 18, 2011. Counsel for Deliverance Poker did not receive a phone call or any other response.

17. On January 21, 2011, counsel for Deliverance Poker wrote to Defendants' counsel, again seeking a conference call in order to work out the discovery issues. Attached and incorporated by reference as Exhibit F is the letter from John D. Jacks to John P. Henry, dated January 21, 2011.

18. Finally, on January 24, 2011, Defendants' counsel sent an email in which he stated he was going to talk to Ian Imrich, corporate counsel for Tiltware,² proposed deposition dates for Mizrachi and Deliverance Poker's representative, C.Y. Benavides, III, and said he would supplement Mizrachi's discovery responses. Attached and incorporated by reference as Exhibit G is the email from J. Henry to J. Jacks, dated January 24, 2011. Counsel for Mizrachi and Tiltware did not state when documents would be made available for inspection and copying or when or what discovery responses would be amended. Counsel for Deliverance Poker emailed Defendants' counsel regarding the need to discuss these issues. Attached and incorporated by reference as Exhibit H is the email from J. Jacks to J. Henry. When counsel for Deliverance Poker still received no response from Defendants' counsel, counsel for Deliverance Poker wrote again to Defendants' counsel asking for a response to the outstanding discovery issues. Attached

² Counsel for Deliverance Poker also inquired of Defendants' counsel whether Defendants opposed Plaintiff's Motion for Protective Order, because the initial response of Mizrachi was ambiguous and Tiltware, which had not appeared at the time the motion was filed, had never asserted a position as to the request for protective order.

and incorporated by reference as Exhibit I is the letter from John D. Jacks to John P. Henry, dated January 24, 2011. Defendants' counsel has still not responded.

E. Argument

19. Federal Rule of Civil Procedure 37(a) provides that a party may apply for an order compelling discovery responses where a party: (a) fails to make a disclosure required by Rule 26(a); (b) fails to answer an interrogatory; or (c) fails to permit inspection. Rule 37(a) further provides: "For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond."

20. Tiltware has wholly failed to provide the initial disclosures required by Rule 26(a) and has failed to respond in any manner to inquiries regarding its failure to respond. Deliverance Poker is entitled to an order compelling Tiltware to provide the disclosures required by Rule 26(a).

21. Mizrachi has provided clearly incomplete disclosures by failing to identify all persons with knowledge of relevant facts. To be sure, in Defendants' counsel's January 24, 2011 email, Mizrachi identified Chris Porter as his sole point of contact "with respect to these matters," but he still does not provide his address and phone number and, given the cryptic responses to interrogatories directed at his contract with Tiltware, is still misleading. Deliverance Poker is entitled to know the identity of all of the people who are likely to have discoverable information along with the subjects of information such people are likely to have. Mizrachi's incomplete disclosure "is to be treated as a failure to disclose." Fed. R. Civ. P. 37(a)(3). Deliverance Poker is entitled to an order compelling complete disclosures.

22. Mizrachi continues to fail to permit inspection and copying of documents he has agreed to produce. Deliverance Poker is entitled to an order compelling Mizrachi to permit inspection and copying of such documents.

23. Mizrachi has provided evasive and incomplete answers to Deliverance Poker's interrogatories. As set forth above, Mizrachi admits in his answer to the lawsuit that he had a contract with Tiltware, but then denies such contract in response to questions concerning the contract. Mizrachi is either being deliberately evasive or his answer to the lawsuit is untruthful. If it is the latter, then Mizrachi is being evasive as to Interrogatory No. 2, which seeks the identity of people or entities that might be liable. Regardless, Defendants' counsel refuses to even discuss the responses, so that counsel for Deliverance Poker can resolve the incomplete and evasive answers. Deliverance Poker is entitled to an order compelling a complete response to Deliverance Poker's interrogatories.

24. Deliverance Poker requests the Court award sanctions for the failure of Tiltware and Mizrachi to properly disclose information required by Rule 26(a) and comply with Deliverance Poker's discovery requests. *See* Fed. R. Civ. P. 37(a)(4)(A). The sanction should include the costs for seeking discovery responses and filing this motion to compel. Attached and incorporated by reference as Exhibit J is the Declaration Under Penalty of Perjury of John D. Jacks.

For the foregoing reasons, Plaintiff Deliverance Poker requests the Court to enter an order compelling Defendants to properly disclose information required under Rule 26(a), provide complete responses to Plaintiff's First Set of Interrogatories, and permit inspection and copying of all documents responsive to Plaintiff's First Request for Production. Plaintiff further requests the Court to award sanctions in the form of attorney's fees as set forth above.

Respectfully submitted,

By: /s/ Douglas M. Becker

Douglas M. Becker

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John D. Jacks

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COUNSEL FOR PLAINTIFF

DELIVERANCE POKER, LLC

CERTIFICATE OF CONFERENCE

I certify that I attempted to confer with Defendants' counsel on the responses to the discovery issues raised in the foregoing Motion to Compel on the following dates: (a) January 17, 2011 (by phone and letter), (b) January 21, 2011 (by phone, letter, and email), (c) January 24, 2011 (by letter), and (d) January 25, 2011 (by phone). As set forth above, the only response I have received is the email dated January 24, 2011, which is attached as Exhibit G. I have not been able to determine Defendants' position with regard to these issues. I will therefore assume Defendants are opposed to this motion.

/s/ John D. Jacks

John D. Jacks

CERTIFICATE OF SERVICE

I certify that on 1/25/2011, I caused Plaintiff's Motion to Compel Discovery Responses to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following counsel for Defendants Michael Mizrachi and Tiltware, LLC:

John P. Henry
The Law Offices of John Henry, P.C.
P.O. Box 1838
Round Rock, Texas 78680

/s/ John D. Jacks

John D. Jacks