

John Jacks

From: GrotzingerJ@GTLAW.com
Sent: Tuesday, March 08, 2011 12:54 PM
To: John Jacks; BelfieldG@GTLAW.com
Cc: jhenry@jhenrylaw.com; ian@ijilaw.com; Doug Becker; besseltepeg@gtlaw.com; swicka@gtlaw.com
Subject: RE: Response to TILTWARE MOTION TO DISMISS

John -- that doesn't solve the problem under controlling Supreme Court precedent, because Mizrachi -- the party you accuse of breaching a contract as a result of Tiltware's alleged interference -- obviously is indispensable. Where there is no diversity at the time of filing, the Court only has discretion to allow the dismissal of "a *dispensable* nondiverse party" *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 572-73 (2004) (emphasis added).

There is no better example of an indispensable party than Mizrachi in this case. You want to keep suing Tiltware for allegedly interfering with a contract between your client and Mizrachi. Naturally, Mizrachi must remain a party in order for us to litigate the very premise of your theory -- *i.e.*, the existence of any contractual obligations with which Tiltware allegedly interfered. See, *e.g.*, *Kermanshah v. Kermanshah*, 2010 U.S. Dist. LEXIS 45896 *15 ("Where, as here, the Court would have to resolve the underlying breach of contract claim in order to adjudicate the tort claims, the derivative claims must be dismissed if the indispensable party to the breach of contract claim cannot be joined.").

Now that you concede that there was no diversity at the time of filing, please confirm that you will promptly submit a notice of non-opposition. If you file an opposition to our motion or response in which you request the dismissal of Mr. Mizrachi, please include a copy of this e-mail.

From: John Jacks [mailto:John.Jacks@graybecker.com]
Sent: Tuesday, March 08, 2011 9:34 AM
To: Grotzinger, Jordan (Shld-LA-LT); Belfield, George (Shld-LA-LT)
Cc: jhenry@jhenrylaw.com; ian@ijilaw.com; Doug Becker
Subject: Response to TILTWARE MOTION TO DISMISS

Jordan and George,

In response to the 12(h)(3) motion to dismiss, we are going to ask the court to dismiss Michael Mizrachi in order to preserve subject matter jurisdiction. Under the Local Rules we are required to confer with you to see if Deliverance Poker's motion to dismiss Mizrachi. I know you are eager for a ruling on your motion, so as soon as I hear back from you whether you oppose our motion, we'll file our response.

Sincerely,

John

John Jacks

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