IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

DELIVERANCE POKER, LLC, Plaintiff, vs. MICHAEL MIZRACHI and TILTWARE, LLC, Defendants.	CIVIL ACTION NO. 1:10-CV-00664-JRN

EXPEDITED MOTION TO CONTINUE TRIAL DATE AND DISCOVERY CUTOFF OR BIFURCATE OR SEVER CLAIMS AGAINST TILTWARE

Defendant Tiltware, LLC ("Tiltware"), which did not first appear in this action until January 10, 2011, and which has a Rule 12(b)(6) Motion to Dismiss pending, hereby requests that the Court (1) continue the current April 25, 2011 trial date, and the March 25, 2011 discovery cutoff and related deadlines, and/or (2) bifurcate or sever this action with respect to the newly named Tiltware.[1]

I. STATEMENT OF FACTS

Plaintiff Deliverance Poker, LLC ("Deliverance") filed its original complaint in this action on September 7, 2010. ECF No. 1. Deliverance alleged breach of contract against Defendant Michael Mizrachi ("Mizrachi"), and tortious interference with the same contract against Tiltware.

[1] Tiltware is also filing an expedited motion to dismiss this action on the grounds that there is no subject matter jurisdiction, *i.e.*, both Deliverance Poker and Mizrachi are citizens of Florida and, therefore, there is no diversity of citizenship. If granted, this motion is, of course, moot. On March 4, 2011, Tiltware's attorneys telephoned Deliverance Poker's counsel and discussed, and asked Plaintiff to agree to, continuance of the discovery cutoff and trial, as well as the diversity of citizenship and jurisdiction issues. Deliverance would not agree to continue the discovery cutoff or trial date.

A. Tiltware Was Never Served With The Original Complaint Or Deliverance's Applications For A TRO Or Preliminary Injunction.

Deliverance never served the original complaint on Tiltware. On the same day Deliverance filed its complaint, September 7, 2010, Deliverance filed an application for a temporary restraining order and a preliminary injunction seeking to prohibit Mizrachi from endorsing Tiltware's Full Tilt Poker brand with respect to upcoming poker tournaments. ECF Nos. 2, 3. The Court denied the TRO application the next day, September 8, 2010. ECF No. 6.

B. Deliverance Poker Then Voluntarily Dismissed Tiltware.

On October 8, 2010, Deliverance, having never served Tiltware, filed a Notice of Voluntary Dismissal By Deliverance Poker, LLC without prejudice as to Tiltware only. ECF No. 14. Having already denied the TRO, the Court on October 12, 2010 issued an order that Deliverance (a) provide both Mizrachi and Tiltware with notice of the preliminary injunction hearing, and (b) file a proof of service on or before October 19, 2010. ECF No. 17. Deliverance, of course, did not give any such notice to Tiltware because Deliverance had already voluntarily dismissed Tiltware.

On October 18, 2010, Deliverance filed its First Amended Complaint against Mizrachi only, *i.e.*, Tiltware was no longer named as a defendant. ECF No. 21.

On November 29, 2010, Deliverance filed a Motion for Leave to File Plaintiff's Second Amended Complaint. ECF No. 29. Deliverance, of course, did not serve the motion on Tiltware since it was not a party to the action. In its proposed Second Amended Complaint, however, Deliverance sought leave to add the previously dismissed Tiltware back into this case.

On December 7, 2010, the Court granted Deliverance's motion, and the Second Amended Complaint was filed that same day. ECF No. 32. On December 8, 2010, Deliverance finally caused a summons to be issued as to Tiltware. ECF No. 33, 34.

C. **The Court Issued Its Operative December 13, 2010 Scheduling Order Setting The March 25, 2011 Discovery Cutoff And April 25, 2011 Trial Date Before Tiltware Had Even Appeared In This Action.**

On December 10, 2010, Deliverance and Mizrachi filed the Parties' Submissions of Proposed Scheduling Orders Pursuant to Local Rule CV-16. ECF No. 35. At Paragraph 4 of the Parties' Submissions, Deliverance and Mizrachi informed the Court:

> Defendant Tiltware, LLC ("Tiltware") was served on December 8, 2010, by service on the Texas Secretary of State, the day after the Court permitted filing to allow Tiltware to be joined as a party. On December 8, 2010, counsel for Deliverance Poker, by e-mail, sent Mr. Imrich, the attorney for Tiltware, a draft of its proposed scheduling order and invited his input on same. Mr. Imrich indicated that he could not participate in a proposed scheduling order, but did voice concern that the deadlines proposed by Deliverance Poker were too short.

On December 13, 2010, obviously without Tiltware's input, the Court issued its Scheduling Order. ECF No. 36. Tiltware, of course, had not yet appeared in this action and the Scheduling Order thus should not apply to the newly named defendant Tiltware. If the Scheduling Order does apply to Tiltware, it sets manifestly unreasonable and in some instances impossible deadlines for Tiltware. The Scheduling Order set, among other items, the following deadlines:

January 18, 2011. Last day to file all motions to amend or supplement pleadings and all motions to join additional parties.

March 1, 2011. Last day for plaintiff to serve its designation of potential witnesses, testifying experts, proposed exhibits, and the materials required by FRCP Rule 26(a)(2)(B).

March 8, 2011. Last day for defendants to designate rebuttal expert witnesses and serve the materials required under FRCP Rule 26(a)(2)(B).

March 8, 2011. Last day for defendants to file a motion objecting to Plaintiff's expert's proposed testimony under Federal Rules of Evidence 702 (unless the expert's deposition is taken).

March 15, 2011. Last day for defendants to file and serve designations of potential witnesses, testifying experts, proposed exhibits, and materials required by FRCP 26(a)(2)(B).

March 25, 2011. Discovery cutoff (*i.e.* only ten weeks after Tiltware first appeared on January 10, 2011).

March 28, 2011. Last day to file all dispositive motions.

April 21, 2011. Final Pretrial Conference.

April 25, 2011. Trial.

Tiltware, of course, did not have any input with respect to this December 13, 2010 Scheduling Order because Tiltware had only been served through the Texas Secretary of State with the Second Amended Complaint a few days earlier, and had not yet obtained Texas counsel or appeared.

D. The Pleadings Are Still Not Yet Settled: Tiltware Filed A Rule 12(b)(6) Motion To Dismiss And Has Not Yet Answered The Third Amended Complaint Or Had The Opportunity To File Any Counterclaims.

On January 10, 2011, Tiltware first appeared by filing its Answer to the Second Amended Complaint. ECF No. 42. Deliverance, however, was apparently still not satisfied with its pleadings, and on January 17, 2011 filed yet another motion to amend its complaint. ECF No. 43. On February 10, 2011, the Court granted the motion, and plaintiff's Third Amended Complaint was filed. ECF No. 47.

On February 28, 2011, Tiltware responded to the Third Amended Complaint by filing its Motion to Dismiss Under Rule 12(b)(6). ECF No. 55. Tiltware's motion to dismiss is still

pending, and Tiltware has not filed an answer or any counterclaims with respect to the now operative Third Amended Complaint.

E. Deliverance Has Not Even Made Its FRCP Rule 26(a) Initial Disclosures To Tiltware, The Rule 26(f) Early Meeting Of Counsel Has Not Occurred, And Tiltware Is Not Even Authorized To Begin Discovery, Never Mind Comply With A March 25, 2011 Discovery Cutoff.

On February 22, 2011, Tiltware complied with FRCP Rule 26(a) and served Defendant Tiltware, LLC's Initial Disclosures. However, plaintiff Deliverance Poker has not yet reciprocated, and has not served Tiltware with its FRCP Rule 26(a) Initial Disclosures with respect to its two claims plead against Tiltware only, and not plead against Mizrachi, *i.e.*, Count 4 -- Tortious Interference With Existing Contract, and Count 5 -- Tortious Interference With Prospective Business Relations. In other words, Deliverance has not even complied with its fundamental initial disclosure obligations under FRCP Rule 26(a) with respect to the newly named defendant Tiltware.

Deliverance and Tiltware have also not held the FRCP Rule 26(f) meeting of counsel, and under FRCP Rule 26(d)(1) Tiltware is not yet even authorized to begin discovery, never mind comply with the March 25, 2011 discovery deadline. Deliverance and Tiltware have not discussed or agreed on a proposed discovery plan under FRCP Rule 26(f)(2). Out of an abundance of caution, Tiltware served basic interrogatories and document requests upon Deliverance, but those responses are not yet due.

In these circumstances, it would be highly prejudicial to force Tiltware to trial less than 3 months after it initially appeared in this action -- and while its motion to dismiss is still pending, and before it can even answer or file any counterclaims. Moreover, Tiltware has obviously not had ample time and due process to conduct any, never mind sufficient, discovery in this action.

II. TILTWARE WILL BE HIGHLY PREJUDICED AND DEPRIVED OF ITS DISCOVERY AND DUE PROCESS RIGHTS IF FORCED TO TRIAL ON APRIL 25.

All in all, this litigation to date has been an ambush with respect to Tiltware. Deliverance first sued, but failed to serve Tiltware, and then voluntarily dismissed Tiltware when its TRO was denied and it decided to abandon its application for a preliminary injunction. Deliverance even filed a First Amended Complaint that did not name Tiltware.

Months later, Deliverance changed its mind, and made a motion to file a Second Amended Complaint, add Tiltware back as a defendant, and finally served Tiltware. Deliverance since that time, however, has totally failed to comply with its Rule 26(a) Initial Disclosure and other obligations, and has sandbagged Tiltware with respect to witnesses, documents, the nature, amounts and computations of its alleged damages, and other issues.

Forcing Tiltware to trial on April 25, 2011 in these circumstances would be seriously prejudicial and an extreme hardship for Tiltware, and a violation of Tiltware's fundamental discovery and due process rights. Belfield Dec., ¶¶ 1-9. Tiltware requests that the Court continue the trial, order Deliverance to make the required complete and accurate Rule 26 initial disclosures, and modify the Scheduling Order to give Tiltware ample time, *e.g.*, an additional six months, to conduct discovery, retain and prepare experts, and prepare for trial.

A. Tiltware Has Been Highly Prejudiced By Deliverance's Failure To Comply With FRCP Rule 26(a) And Disclose The Nature And Computation Of Its Alleged Damages.

Deliverance has also not complied with FRCP Rule 26(a)(1)(A)(iii) and provided to the defendants "a computation of each category of damages claimed by the disclosing party" -- or the required supporting documents. Belfield Dec., ¶ 6.

Tiltware was, therefore, obviously quite surprised when it received Deliverance's March 1, 2011 expert report with a $3,275,037 "brand placement value" damages opinion. Since

Deliverance had not yet complied with FRCP Rule 26(a)(1)(A)(iii), Tiltware had no idea that Deliverance was claiming such a novel category of "brand placement value" damages as a result of Mizrachi allegedly failing to wear Deliverance's logos during the September to December 2010 ESPN broadcasts of the 2010 WSOP tournament — when Tiltware had already been dismissed from, and was no longer a party to, this action. The two weeks allowed under the current Scheduling Order is certainly not sufficient time (particularly for new counsel) to evaluate the new damages theory and expert report, retain a rebuttal damages expert, and give the expert sufficient time to evaluate Deliverance's expert's opinions, the facts of the case, and research and prepare his or her own opinion. Belfield Dec., ¶ 7.

B. Tiltware Has Been Highly Prejudiced By Deliverance's Failure To Disclose Both Its Percipient And Expert Witnesses.

Since Deliverance never served its required Rule 26(a) Initial Disclosures, Tiltware first saw a list of Deliverance's witnesses in this action on March 1, 2011, when Tiltware was served with Plaintiff's Designation Of Potential Witnesses, Testifying Experts, And Proposed Exhibits. Belfield Dec., Ex. A. Deliverance's fact witnesses include: Carlos Y. Benavides, III, Michael Mizrachi, Maurice Mills, Christopher Cosenzo, Peter Beshay, Reynaldo Jay Perales, and Chris Porter. Only Maurice Mills has been deposed to date. Belfield Dec., ¶¶ 7-8.

Deliverance also identified for the first time six expert witnesses: Carlos Y. Benavides, III, Maurice Mills (also will now have to be deposed again regarding his expert opinions), Gary Wilcox, Ph.D., Reynaldo Jay Perales, Douglas M. Becker and John D. Jacks (apparently regarding a claim for attorneys' fees, the nature, amount and supporting documents of which have also never been disclosed). Belfield Dec., ¶ 9, Ex. B.

Tiltware also intends, and is entitled, to take critical third party depositions of the following witnesses, who almost all reside outside of Texas, and will need to be subpoenaed through other federal district courts:

(a) Sabre Asset Management S.A. ("Saber") is a Panamanian entity which allegedly made the critical $1,000,000 equity or debt contribution to Deliverance without which the "Promotional Representative Agreement" between Deliverance and Mizrachi did not become "effective." Belfield Dec., ¶ 10(a). If the contract underlying this lawsuit is not "effective" under Section One, then there is no contract, and (a) no breach of contract claim against Mizrachi, and (b) no interference with contract or economic relations claims against Tiltware.

(b) Las Vegas From Home ("LVFH") (or its related company Real Deck) which Maurice Mills testified owns the poker software that Sabre contributed to Deliverance Poker that it contends is worth over $1 million thereby causing the contract on which this entire action is based allegedly to become "effective." The nature and value of that software is a critical issue in this case, and Deliverance has not produced any documents evidencing Deliverance's rights derived from Saber, LVHM, or the related company Real Deck. See "Promotional Representative Agreement," ¶ 1; Belfield Dec., Ex. C. LVFH is based in Vancouver, British Columbia. Based upon the deposition testimony of Maurice Mills, it is not clear where Real Deck is based. It may be based in Kent, Washington, Las Vegas, Nevada, New York, New York, or Panama. Belfield Dec., ¶ 10(b).

(c) Barry Schell (located in Kent, Washington) who is, besides Mills, the only other employee, owner or investor in Real Deck and, according to Mills, the software "genius" behind the poker software contributed by Sabre and/or Real Deck to Deliverance. Belfield Dec., ¶ 10(c).

(d) The Denim Group (a nationwide company) which is the company that purportedly conducted the testing and analysis on the Deliverance/LVFH/Real Deck software source code, executability, hardware, security and payment processing software. This deposition is necessary to test the value and functionality of the poker software that allegedly triggered the effectiveness of the Deliverance contract with Mizrachi. Belfield Dec., ¶ 10(d).

(e) Scott Broderhausen who also vetted the Deliverance/LVFH/Real Deck poker software and has knowledge regarding its functionality and value. Belfield Dec., ¶ 10(e).

(f) Neither Deliverance's principal Carlos Benevides nor Mizrachi has been deposed. Neither deposition should be taken until Deliverance provides its Rule 26(a) Initial Disclosures, and Tiltware gets responses to its written discovery. Belfield Dec., ¶ 10(f).

C. Tiltware Has Now Retained Separate Counsel, And This Is Another Factor Weighing In Favor Of A Continuance.

Finally, as the Court now knows, Tiltware recently retained separate counsel, Greenberg Traurig, LLP. This has been in part necessary due to the conflict of interest for current counsel John Paul Henry in representing both Defendants Mizrachi and Tiltware. Indeed, the July 16, 2010 written agreement between Mr. Mizrachi and Tiltware specifically provides that Mizrachi is obligated to indemnify Tiltware from claims and losses of the kind Deliverance is asserting in this action. Belfield Dec., ¶ 11.

III. ALTERNATIVELY, THE COURT SHOULD BIFURCATE TRIAL OR SEVER TILTWARE AND ALLOW TILTWARE TO CONDUCT DISCOVERY.

In these circumstances, Tiltware requests that if the Court will not continue the discovery cutoff and trial date as to all parties, then the Court should bifurcate the trial or sever Tiltware, and try first the breach of contract and related claims between Deliverance Poker and Mizrachi. FRCP Rule 21 provides in part: "On motion or on its own, the court may at any time, on just

terms, add or drop a party. The court may also sever any claim against a party." FRCP Rule 20(b) provides that a court may bifurcate and order separate trials:

> **Protective Measures.** The court may issue orders -- including an order for separate trials -- to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

If the Court tries the Deliverance Poker/Mizrachi breach of contract claims first, and Mizrachi prevails, and there was no breach of contract, then there is obviously no need for a trial against Tiltware at all because Tiltware is only being sued for tortuous interference with the same contract or prospective economic relations arising out of the alleged contract between Deliverance and Mizrachi. If Mizrachi is not liable to Deliverance, then Tiltware cannot be liable to Deliverance, and trial of those claims is moot and unnecessary. *See Baxter Travenol Labs, Inc. v. LeMay* (S.D. OH 1982) 536 F.Supp. 247, 250 (severance appropriate when first trial will dispose of or simplify issues to be raised in the second trial).

CONCLUSION

The court should continue the scheduled March 25, 2011 discovery cutoff and April 25, 2011 trial and related deadlines so that all parties, but particularly the late added defendant Tiltware, have the proper and adequate time to conduct discovery, retain experts, and engage in the necessary trial preparation. If the Court will not continue the trial, Tiltware will be severely prejudiced and deprived of its due process and discovery rights. In the alternative, the Court can and should bifurcate or sever Deliverance's claims against Tiltware, give Tiltware relief from the Scheduling Order, and try the claims on April 25, 2011 against Mizrachi only.

Respectfully submitted,
GREENBERG TRAURIG, LLP

By: */s/ Paul R. Bessette*

Paul R. Bessette
State Bar No. 02263050
R. Adam Swick
State Bar No. 24051794
300 W. 6th Street, Suite 2020
Austin, TX 78701
Tel: (512) 320-7250
Fax: (512) 320-7210
(bessettep@gtlaw.com)
(swicka@gtlaw.com)

Attorneys for Tiltware, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of March, 2011, a true and correct copy of the foregoing was served upon the following counsel via the Court's CM/ECF system or First Class Mail:

/s/ R. Adam Swick

Douglas M. Becker
Gray & Becker, P.C.
900 West Avenue
Austin, TX 78701
(512) 482.0924
Attorneys for Plaintiff

William Pieratt Demond
Conner & Demond, PLLC
701 Brazos St., Suite 500
Austin, Texas 78701
(512) 917-2111
Attorneys for Plaintiff

John P. Henry
The Law Offices of John Henry, P.C.
407 West Liberty Street
Round Rock, TX 78664
(512) 428.5448
Attorneys for Defendant Michael Mizrachi