

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

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

**DEFENDANT TILTWARE, LLC’S MOTION FOR  
PROTECTIVE ORDER PRECLUDING A DEPOSITION UNDER FED. R. CIV. P. 30(B)**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

1. Please take notice that on March 8, 2011, or as soon thereafter as the matter may be heard in this Court, Defendant Tiltware, LLC (“Tiltware”) will and hereby does move for a Protective Order pursuant to Fed. R. Civ. P. 26(c) precluding a deposition pursuant to Fed. R. Civ. P. 30 or otherwise by Plaintiff Deliverance Poker, LLC (“Deliverance”) of Chris Porter (“Porter”).
2. Defendant’s motion is based on this notice of motion and motion and all other pleadings and matters of record in this case.
3. Pursuant to Fed. R. Civ. P. 26(c)(1), Tiltware certifies that on March 4, 2011, counsel for Defendant conferred in good faith with Plaintiff’s counsel in an effort to resolve the dispute without Court action, but was unable to reach agreement.

**PRELIMINARY STATEMENT**

4. The underlying action in this case is a breach of contract claim by Deliverance against Defendants Michael Mizrachi and Tiltware.

5. Counsel for Tiltware conducted a conference call with counsel for Plaintiff on March 4, 2011. During the call, counsel for Tiltware informed Plaintiff's attorneys that:
- a. There is no diversity of citizenship sufficient to confer jurisdiction upon this Court.
  - b. Counsel for Plaintiff has not provided disclosure responses to Tiltware as required by the Fed. R. Civ. P.; and
  - c. Porter is not an employee of Tiltware, but rather is an independent contractor.
  - d. *Plaintiff's First Amended Notice of Intention to Take the Oral Deposition of Chris Porter* was served on Tiltware by Deliverance on March 3, 2011. The notice purports to set the deposition of Porter for March 9, 2011, in Austin, Texas. Porter resides in Los Angeles, California. Counsel for Tiltware notified counsel for Deliverance that Porter could not attend the deposition on the stated date and time, and more importantly, that Porter was not an employee or agent of Tiltware, and therefore it was not within the subpoena power conferred upon Deliverance by the Fed. R. Civ. P. to require Porter to come to Texas to attend a deposition.
  - e. Tiltware objected to the deposition of Porter based upon the foregoing reasons.
6. Tiltware's motion for protective order precluding the deposition of Porter should be granted. Plaintiff's claims against Mizrachi and Tiltware should be dismissed pursuant to Tiltware's motion to dismiss. Plaintiff's attorneys could not provide any substantive response to Tiltware's position that there is no diversity jurisdiction to allow prosecution of this lawsuit.
7. Tiltware has agreed to work with Deliverance to facilitate the deposition of Porter at a mutually agreeable time and location within the current discovery deadlines, should this Court not grant Tiltware's motion to dismiss the case for lack of jurisdiction.

8. Deliverance's first amended notice of deposition of Porter, a non-party resident of Los Angeles, California, is not reasonable where it sets a date for the deposition a mere six days after the date of notice, and in Austin, Texas.

### **LEGAL STANDARD**

9. Under Rule 26(c)(1), any person from whom discovery is sought may move for a protective order in the Court where the action is pending. On such motion, the Court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including ... forbidding the disclosure or discovery." Fed. R. Civ. P. 26(c).

### **ARGUMENT**

10. The Court should grant Tiltware's motion for protective order for several reasons.

11. First, this Court should first address Tiltware's motion to dismiss all causes of action because there is no diversity of citizenship. Plaintiff provided no facts or law to contest Tiltware's assertion during the conference call addressing this issue. It would be extremely inefficient for both this Court and the parties to require Porter to give a deposition in the final days before this Court dismissed the lawsuit.

12. Further, counsel for Tiltware objected to the deposition of Porter because Plaintiff failed to provide disclosure responses to Tiltware as required by the Fed. R. Civ. P.

13. Tiltware has agreed to facilitate the deposition of Porter at a mutually agreeable time and location within the prescribed discovery period, but after the aforementioned jurisdictional and procedural issues have been resolved. Plaintiff refused.

14. Thus, there is good cause for a protective order when it will subject a party, here Porter, to "undue burden or expense." Fed. R. Civ. P. 26(c).

**PRAYER**

15. For the foregoing reasons, Tiltware requests that the Court grant its motion for a protective order preventing Plaintiff from taking the deposition of Porter on March 9, 2011.

Respectfully Submitted,

/s/ John P. Henry

John P. Henry

The Law Offices of John Henry, P.C.

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**ATTORNEYS FOR**

**DEFENDANT TILTWARE, LLC**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 8<sup>th</sup> day of March, 2011, I caused the foregoing document to be delivered via ECF or facsimile to the following parties, through their attorney of record:

/s/ John P. Henry \_\_\_\_\_  
John P. Henry

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