

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 SECOND MOTION TO COMPEL DISCOVERY RESPONSES
AND MEMORANDUM IN SUPPORT**

Plaintiff Deliverance Poker, LLC (“Deliverance Poker”) files this second motion to compel discovery responses and memorandum in support. Plaintiff requests the Court to order Defendant Tiltware, LLC (“Tiltware”) to withdraw its unwarranted objections and provide complete, non-evasive responses to (a) Plaintiff’s First Set of Interrogatories, (b) Plaintiff’s First Request for Production of Documents, and (c) Plaintiff’s Second Request for Production of Documents (collectively, “Plaintiff’s written discovery”). Deliverance Poker also seeks an order requiring Defendants Mizrachi and Tiltware to comply with the Court’s order dated February 18, 2011.

A. Introduction

1. On February 22, 2011, Tiltware submitted responses to Plaintiff’s written discovery in which Tiltware objected to every single discovery request, including the definitions in the discovery requests that track the language of Local Rule CV-26(b) and the interrogatories that track those specifically permitted without objection by Local Rule CV-33(b)(1), (4), and (5). Tiltware begins its response to each set of discovery requests by setting out two pages of objections and then incorporates those objections into the response to each discovery request.

Tiltware provides additional objections to individual discovery requests.¹ Each discovery request for which an answer is provided is made “Subject to the General Objections . . .”

Attached to this motion are the following:

- a. Plaintiff’s First Set of Interrogatories to Tiltware (Exhibit A);
- b. Plaintiff’s First Request for Production to Tiltware (Exhibit B);
- c. Plaintiff’s Second Request for Production to Tiltware (Exhibit C);
- d. Defendant Tiltware’s Responses to Plaintiff’s First Set of Interrogatories (Exhibit D);
- e. Defendant Tiltware’s Responses to Plaintiff’s First Request for Production (Exhibit E); and
- f. Defendant Tiltware Responses to Plaintiff’s Second Request for Production (Exhibit F).

2. On February 18, 2011, the Court entered an order directing Mizrachi to fully respond to prior requests and that Tiltware provide its initial disclosures. The Court further ordered Defendants to pay \$1,500.00 to Plaintiff to reimburse it for attorney fees it incurred. In response to the Court’s order, counsel for Mizrachi sent an email in which he claims not to know the answers to the discovery requests. *See* Email from J. Henry to J. Jacks, dated March 2, 2011, attached and incorporated as Exhibit G. In particular, Mizrachi states that his agent, Chris Torina has information on what he wore for part of the period requested and that he does not know how much he has been paid by Tiltware to where its Full Tilt Poker logos, the subjects of parts (b) and (c) of Interrogatory No. 3 and Interrogatory No. 4.² Defendants have also not paid the

¹ Tiltware did not object that any of the discovery requests seeks confidential or proprietary information. Even if this were a concern, the Court has entered a Protective Order in this case to protect such information from disclosure.

² There had apparently been some confusion over the actual entity with which Mizrachi contracted to wear the Full Tilt Logos, but Tiltware has now acknowledged that it is the correct entity. Mizrachi also apparently takes issue with the wording of Interrogatory No. 4 in that it requests the amount paid by “Tiltware to wear its logos,” whereas Mizrachi states that he wore “Full Tilt Poker logos.” There should not be any confusion that the interrogatory seeks

\$1,500.00 ordered by the Court. Plaintiff has repeatedly requested payment of the sanction, but all requests have been ignored. *See* Letter from J. Jacks to J. Henry and I. Imrich, dated February 23, 2011, attached and incorporated by reference as Exhibit H; Email from J. Jacks to J. Henry and I. Imrich, dated March 2, 2011, attached and incorporated by reference as Exhibit I; Email from J. Jacks to J. Henry, I. Imrich, *et al.*, dated March 8, 2011, attached and incorporated by reference as Exhibit M.

B. Efforts to Resolve Deficient Discovery Responses

3. On February 23, 2011, counsel for Plaintiff wrote to counsel for Defendants regarding the unwarranted objections. *See* Letter from J. Jacks to J. Henry and I. Imrich, dated February 23, 2011 (Exhibit H). Counsel conferred by teleconference on February 28, 2011, but no progress was made resolving the discovery objections and counsel for Plaintiff assumed that Tiltware rejected all such efforts. Nonetheless, prior to Plaintiff filing this motion to compel, counsel for Plaintiff invited counsel for Tiltware to confer again on March 1, 2011. *See* Email from J. Jacks to J. Henry and I. Imrich, dated March 2, 2011 (Exhibit I).

4. This time, counsel for Plaintiff understood that Tiltware would withdraw its “General Objections” and assert objections where appropriate. Counsel for Plaintiff further understood that Tiltware would amend its responses to Interrogatory Nos. 5 and 20 of Plaintiff’s First Set of Interrogatories. Other than these corrections, it was understood that Tiltware would adhere to its previously asserted objections. Counsel for Plaintiff requested that counsel for Tiltware acknowledge its position in an email or other writing so that there was no misunderstanding, but nothing has been received. *See* Email from J. Jacks to I. Imrich, dated March 2, 2011, attached and incorporated as Exhibit J; Email from J. Jacks to I. Imrich, dated

to have Mizrachi state how much he was paid by Tiltware to wear its logos, “its logos” obviously meaning the logos that state “Full Tilt Poker,” which is the brand name for Tiltware.

March 2, 2011 (5:09 p.m.), attached and incorporated by reference as Exhibit K; Email from J. Jacks to I. Imrich, dated March 4, 2011, attached and incorporated by reference as Exhibit L; Email from J. Jacks to J. Henry, I. Imrich, *et al.*, dated March 8, 2011 (Exhibit M). Since counsel for Tiltware has refused to acknowledge the agreements he reached on the discovery issues, it is unclear whether we, in fact, have an agreement, and as of now Tiltware has refused to state in writing that it withdraws its general objections.

5. Despite Tiltware's objections to every single discovery request, it did agree to produce some documents. Plaintiff has repeatedly requested to be provided with those documents, but thus far Tiltware has not produced the documents it did agree to produce. *See* Email from J. Jacks to J. Henry, dated March 1, 2011 (Exhibit I, second page); Email from J. Jacks to I. Imrich, *et al.*, dated March 2, 2011 (Exhibit K); Email from J. Jacks to J. Henry, I. Imrich, *et al.*, dated March 8, 2011 (Exhibit M).

C. Motion to Compel Discovery Responses

6. Federal Rule of Civil Procedure 37 authorizes the Court to enter orders as necessary or just to comply with the discovery process and for failing to comply with a prior discovery order.

7. Discovery may be obtained about any matter that is not privileged and that is relevant to the subject matter of the case. Fed. R. Civ. P. 26(b)(1). Further, information is discoverable if it appears "reasonably calculated to lead to the discovery of admissible evidence." *Id.* Rather than seek to address one-by-one all of Tiltware's objections, Plaintiff will address the general areas of discovery sought to which Tiltware objects.

8. Tiltware’s General Objections.³ As noted, Tiltware incorporated two pages of boilerplate objection to every single discovery request. For example, Tiltware objects to the “Interrogatories and Definitions” because they might seek privileged information, or seek information not in Tiltware’s control, or assume facts not in evidence. As an initial matter, the definitions are taken from Local Rule CV-26(b), which are not generally objectionable. The first three interrogatories are also taken from Local Rule CV-33(b) and are therefore not objectionable absent a showing of exceptional circumstances. Tiltware has not demonstrated any exceptional circumstance in this case to warrant objecting to any discovery request. Moreover, it is not obvious that any discovery request seeks privileged information or information not in the possession, custody, or control of Tiltware—in which case Tiltware would not be responsible for producing the document anyway—and it is only through some strained reading of the discovery requests that Tiltware could make such a claim.

9. By signing the responses, counsel for Tiltware is certifying that each of the objections is “warranted by existing law or a nonfrivolous argument for extending, modifying, or reversing law, or for establishing new law.” Fed. R. Civ. P. 26(g)(1)(B)(ii). Tiltware’s wholesale objections fail to satisfy this test. The primary concern of Plaintiff is that Tiltware may not be fully answering the discovery requests because each response is “Subject to the General Objections” If Tiltware fails to fully respond to a discovery request, it can always claim that it objected to the request and had no obligation to provide the missing information. In other words, Tiltware can always withhold requested information based on its unwarranted objection, unless the objections are resolved.

10. Tiltware’s Responses to First Request for Production.

³ As noted, counsel for Tiltware orally agreed to delete these objections, but thus far has not done so, nor has he acknowledged his agreement. Plaintiff is entitled to a prompt resolution of this issue and despite its best efforts has not been able to accomplish that. Therefore, these objections are being addressed here.

a. Request No. 1: This request seeks the agreements Tiltware had with any poker player at the 2010 World Series of Poker (“WSOP”). Tiltware, in addition to its “General Objections,” objects that these contracts are all irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff has alleged that Tiltware’s conduct was tortious, in part, because Tiltware sought to eliminate Plaintiff as a potential competitor in the business of online gambling. This evidence is relevant to Tiltware’s marketing strategy to keep, or enhance, its market share⁴ in the online gambling business.⁵ In addition, the amounts paid to poker players to wear Full Tilt logos, as compared to Mizrachi, may show Tiltware’s determination to get Mizrachi under contract and prevent Plaintiff from coming into the market.⁶ Finally, the amounts paid by Tiltware may be relevant to the damages sought by Plaintiff in this case by, at least, showing the value Tiltware was willing to pay players to wear its logos.

b. Request No. 8: Plaintiff also requested the personnel file of Porter (excluding information relevant to tax and health care matters). Tiltware, in addition to its “General Objections,” objected that the information was irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Tiltware also objected that the request seeks information protected by the right of privacy. At this point, Plaintiff knows only that Porter was Tiltware’s agent in negotiating with Mizrachi. Plaintiff does not know Porter’s job duties and

⁴ Maurice Mills testified in a deposition in Las Vegas on February 17, 2011, that even less than 1% of the market for online poker players worldwide could generate in the tens of millions of dollars per year, providing plenty of incentive for Tiltware to engage in tortious conduct to protect its market share.

⁵ Interestingly, counsel for Tiltware represented that Tiltware had seven of the nine players at the final table of the Main Event of the WSOP under contract. If true—and there is no reason at this time to think it is not true—then this supports Plaintiff’s contention of the predatory nature of Tiltware’s conduct. In this regard, it is important to know that while Tiltware sought to have all of the final nine players under contract, *only three could actually wear the Full Tilt logos*. See Rule 50(B) of the 2010 World Series of Poker® Official Tournament Rules, copy attached as Exhibit N. There is no reason to contract will *all* of the players except to attempt to foreclose the ability of competitors to advertise.

⁶ Importantly, Tiltware accepts players playing for money in the United States and other places where it is of questionable legality. Plaintiff’s software was specifically designed to prohibit players from accessing its gambling site where it might be illegal. Players from the United States were to be excluded. Plaintiff, however, was to be a direct competitor in those places where online gambling is legal.

responsibilities, how he was paid or what incentives he was given for signing poker players, or even Porter's job title.⁷ This information is all relevant to—or reasonably calculated to lead to the discovery of admissible evidence of—the reasons Tiltware aggressively pursued Mizrachi, such as its marketing strategy and strategies for keeping, or enhancing, its market share of the online gambling business. In addition, given Tiltware's refusal to produce Porter for a deposition, claiming he is not under its control, or provide an address to serve a subpoena, this information because more important for Plaintiff. As for the "right-of-privacy" claim, Plaintiff has specifically excluded tax considerations and health information. Beyond these areas, Plaintiff is unaware of any other right of privacy that would prevent Tiltware from producing the requested documents.

c. Request Nos. 23, 24, and 25: Plaintiff seeks to discover the net worth of Tiltware and its revenue from its website. Tiltware, in addition to its "General Objections," objected on grounds of relevance. Plaintiff seeks exemplary damages against Tiltware, and the net worth of a defendant is one factor the jury can consider in assessing exemplary damages. The net worth of Tiltware is therefore relevant and discoverable. *See Lunsford v. Morris*, 746 S.W.2d 471, 473 (Tex.1988). In addition, the amount of annual revenue from Tiltware's website is relevant to demonstrate motive for interfering with Plaintiff's contract with Mizrachi. For example, Maurice Mills testified that even a small percentage of the online gambling business would generate tens of millions of dollars. If Tiltware's revenues are comparable, this could certainly provide an incentive not only to interfere with Plaintiff's agreement with Mizrach, but also to try to prevent Plaintiff from even entering the market.

11. Tiltware's Responses to Second Request for Production.

⁷ This information was requested in Interrogatory No. 5, but not provided.

a. Request Nos. 3 through 7 and 9 through 32. These requests all pertain to Tiltware's marketing strategies. Tiltware, in addition to its "General Objections," objects that these all seek information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. As set forth above, Plaintiff alleges that Tiltware deliberately interfered with its contract with Mizrachi in order to eliminate a potential competitor. Documents concerning Tiltware's marketing strategy, advertising budget, analysis of its website traffic, and analysis of its market share of the online gambling business are directly relevant to these issues and are discoverable.

b. Request for Production No. 8: Plaintiff seeks an organizational chart of Tiltware, and Tiltware, in addition to its "General Objections," claims that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff is entitled to discover Tiltware and its related entities. As shown through Mizrachi's discovery responses, even he could not determine with whom he contracted. Moreover, counsel for Tiltware claims that Mizrachi had one single contract with Mizrachi for him to wear Full Tilt Poker gear during the Main Event of the WSOP, but it is believed that Tiltware or a related entity continues to contract with Mizrachi. For example, Mizrachi is listed as a "Full Tilt Pro" on both its "free" website and the website allowing for online gambling, and Mizrachi continues to show himself on his personal website wearing the Full Tilt Poker logos. This information could lead to the discovery of other benefits Mizrachi received by abandoning his contract with Plaintiff and endorsing Full Tilt Poker, which is potentially relevant to the damages suffered by Plaintiff.

12. Tiltware's Interrogatory Responses. As an initial matter, Tiltware has not verified its interrogatory answers as required by Rule 33(b)(3) of the Federal Rules of Civil Procedure.

a. Interrogatory No. 5: Plaintiff seeks the identity and role of each person associated with Tiltware who involved in the negotiation of the agreement with Mizrachi and the details of the transaction and the role each such person played. Tiltware asserts its “General Objections” and then states that Chris Porter was the sole person who had anything to do with the contract with Mizrachi. From the response, it is unclear what Porter’s job duties are or what the details of the transaction are or who authorized Porter to seek to contract with Mizrachi or anyone else. This answer is incomplete.

b. Interrogatory No. 20: Plaintiff seeks the identity of everyone who answered, supplied information, or assisted in any way in answering the interrogatories. Tiltware, after asserting its “General Objections,” identifies only its attorneys. It is unclear how the attorneys learned that Porter was the only one involved in the negotiations with Mizrachi, but it would seem that Porter would at least be a person who assisted with the responses to the interrogatories. This response appears deliberately evasive in order to prevent any inquiry into what efforts were made to provide information relevant to the discovery responses.

D. Failure to Comply with Court’s Discovery Order

13. As set forth above, Mizrachi and Tiltware have failed to fully comply with the Court’s discovery order entered on February 18, 2011. At a minimum, Defendants have not paid the \$1,500.00 ordered by the Court, but it appears that Mizrachi has also not made adequate effort to fully respond as ordered. Federal Rule of Civil Procedure 37(b) provides a list of possible measures the Court is entitled to take to ensure compliance with prior orders and prevent future abuses. Plaintiff seeks an appropriate sanction to end the discovery abuses in this case, so that Plaintiff can reasonably prepare for the trial scheduled for April 25, 2011.⁸

⁸ Plaintiff notes that the Scheduling Order entered by the Court in this case requires Plaintiff to designate potential witnesses, testifying experts, and proposed exhibits. Plaintiff’s ability to comply with the Court’s Scheduling Order

For the foregoing reasons, Plaintiff requests that the Court order Defendants to withdraw all objections and provide complete, non-evasive responses and documents responsive to Plaintiff's discovery requests. Plaintiff further requests the Court to enter an appropriate order to secure Defendants' compliance with the Court's prior discovery order.

Respectfully submitted,

By: /s/ Douglas M. Becker
Douglas M. Becker
Texas State Bar No. 02012900
John D. Jacks
Texas State Bar No. 00785986
GRAY & BECKER, P.C.
900 West Avenue
Austin, Texas 78701
Telephone: (512) 482-0061
Facsimile: (512) 482-0924
COUNSEL FOR PLAINTIFF
DELIVERANCE POKER, LLC

CERTIFICATE OF CONFERENCE

Douglas M. Becker and I conferred unsuccessfully with Ian Imrich and John P. Henry, counsel for Defendants, on February 28, 2011, after they had reviewed my February 23, 2011 letter (Exhibit H). Mr. Becker and I conferred again with Ian Imrich on March 1, 2011, and believed some discovery objections had been resolved. Despite repeated requests to confirm our agreement or simply to amend the discovery responses to reflect the agreement, Tiltware has not done so. Counsel for Plaintiff has also repeatedly requested that Defendants pay the \$1,500.00 ordered by the Court on February 18, 2011, but Defendants have not even acknowledged the sanction, much less informed us if and when it might be paid.

/s/ John D. Jacks
John D. Jacks

is significantly impaired due to the failure of Defendants to cooperate in discovery. In fact, Defendants have not even provided the documents Tiltware agreed to produce.

CERTIFICATE OF SERVICE

I certify that on 3/9/2011, I caused Plaintiff's Second 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 Mizrahi 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