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	§ § §	

PLAINTIFF'S RESPONSE TO EXPEDITED MOTION TO CONTINUE TRIAL DATE AND DISCOVERY CUTOFF OR BIFURCATE OR SEVER CLAIMS AGAINST TILTWARE

Plaintiff Deliverance Poker, LLC ("Deliverance Poker") files this response to Defendant Tiltware, LLC's Expedited Motion to Continue Trial Date and Discovery Cutoff or Bifurcate or Sever Claims Against Tiltware ("Motion to Continue Trial Date").

A. Tiltware was provided ample opportunity to participate in the scheduling order.

1. This suit was filed on September 7, 2010, and counsel for Tiltware, LLC ("Tiltware") has known about this matter since at least September 15, 2010. *See* Email from I. Imrich to W. Demond, dated September 15, 2010, Exhibit D to Advisory to the Court (Dkt. #20).

2. On October 8, 2010, Plaintiff voluntarily dismissed Tiltware. *See* Notice of Voluntary Dismissal without Prejudice (Dkt. #14).

3. On December 7, 2010, the Court granted Plaintiff leave to amend its complaint to add Tiltware as a defendant. *See* Order Granting Plaintiff's Motion to File

Second Amended Complaint (Dkt. #31). The following morning, December 8, 2010, counsel for Plaintiff provided counsel for Tiltware the orders entered in the case and requested that counsel for Tiltware accept service of process.[1] Counsel for Plaintiff also noted the time constraints of the case.

> Given the relatively short period the parties [have] to submit a proposed scheduling order and the short period of time the parties have to prepare for trial, I write to invite you to participate in the process. Doing so, I believe, will allow all of the parties (including Tiltware) the full measure of time to prepare for trial.

Email from J. Jacks to I. Imrich, dated December 8, 2010 (highlights added), attached as Exhibit A. Later in the day on December 8, 2010, counsel for Plaintiff sent to counsel for Tiltware the proposed scheduling order prepared by Plaintiff and again invited input from Tiltware. *See* Email from J. Jacks to I. Imrich, dated December 8, 2010 (highlight added), attached as Exhibit B. If Tiltware did not have any input on the proposed scheduling order, it was by its own choosing.

B. <u>Tiltware fully participated in a Rule 26(f) conference and Deliverance Poker has provided its initial disclosures as required by Rule 26(a)(1)</u>.

4. Counsel for Tiltware and Michael Mizrachi ("Mizrachi") participated in a conference call on December 16, 2010, regarding discovery and other matters under Federal Rule of Civil Procedure 26(f) and appeared to have reached an agreement to work diligently to get the discovery needed.[2] *See* Email from J. Jacks to I. Imrich, dated

[1] Plaintiff requested a summons issue for Tiltware and had it served with process on the afternoon of December 8, 2010, after not receiving a response to the earlier request. *See* Summons/Return of Service (Dkt. #34).

[2] Interestingly, during this telephone conference, counsel for Tiltware let it be known that it had counterclaims or third-party claims that it intended to assert. Tiltware has never attempted to assert a counterclaim or third-party claim as suggested. *See* Motion to Continue Trial Date at 5.

December 16, 2010, attached as Exhibit C ("Thank you for participating in the conference call today. It seems to me that we're all on the same page as far as getting the discovery everyone needs in a timely manner.").

5. Notwithstanding counsel for Tiltware conferring with counsel for the other parties regarding the matters set forth in Rule 26(f), it appears to take the position that this conference did not count because it had not filed an answer. Rule 26(f), however, does not require that a party have filed an answer before the conference can be held. Instead, it requires only that "the parties confer as soon as practicable." Fed. R. Civ. P. 26(f)(1) (Conference Timing). *See also* Local Rule CV-16(c) (all parties expected to participate in preparation of scheduling order unless not yet served with process). Given the history of the case up to December 16, 2010, it was proper for the parties to confer.

6. On December 13, 2010, Deliverance Poker served its Initial Disclosures on Mizrachi and Tiltware—specifically, on counsel for Mizrachi and Tiltware, John P. Henry and Ian Imrich. Deliverance Poker identified the witnesses and documents that it "may use to support its claims or defenses," as well as the damages sought for each cause of action against Mizrachi *and Tiltware*. *See* Fed. R. Civ. P. 26(a)(1). The damages sought against Tiltware for tortious interference with contract and tortious interference with prospective business relations were identified in these initial disclosures and included "the value of the advertising lost due to Michael Mizrachi's failure to honor the Promotional Representation Agreement," the precise basis on which Gary Wilcox, Ph.D.

calculated the loss to Deliverance Poker.[3] Deliverance Poker has also provided Tiltware and Mizrachi with all of the material required by Rule 26(a)(2)(B), including a written report, exhibits summarizing Dr. Wilcox's calculations, and all underlying data to support his opinions.

7. Tiltware filed its answer on January 10, 2011.[4] *See* Defendant Tiltware, LLC's Answer to Plaintiff's Second Amended Complaint (Dkt. #42). John Henry, Mizrachi's attorney of record, filed the answer on behalf of Tiltware, and he remains Tiltware's attorney of record. Subsequently, on February 11, 2011, Ian Imrich and Aimee Lane entered an appearance on behalf of Tiltware. Each attorney for Tiltware has been in possession of Deliverance Poker's initial disclosures since December 13, 2010. In light of the fact that Ian Imrich and John Henry are the attorneys of record for Tiltware, Tiltware's claim cannot be true that it "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." *See* Motion to Continue Trial Date at 7.[5]

8. Tiltware complained *for the first time on Friday, March 4, 2011*, that the parties had not conducted the conference required of Rule 26(f) and that Deliverance

[3] Dr. Wilcox identifies the form of lost advertising as "brand placement value," which simply refers to product placement with the use of celebrity poker players wearing logos or patches of the endorsed product or service. Dr. Wilcox's calculation is the cost of equivalent advertising—or, as stated in Tiltware's disclosure of damges caused by the conduct of Tiltware, "the value of the advertising lost due to Michael Mizrachi's failure to honor the Promotional Representation Agreement."

[4] Counsel for Tiltware initially agreed that its answer was due on December 29, 2010—21 days after service on December 8, 2010—but later disputed that service was properly affected. Rather than litigate over whether service was proper, Plaintiff agreed with Tiltware on an answer date of January 10, 2010.

[5] Deliverance Poker did identify its counsel as experts, but only as to attorney fees sought in this case. Initially, Deliverance Poker does not seek attorney fees against Tiltware. As to the fees claimed against Mizrachi, Deliverance Poker would submit those in accordance with Rule 54(d)(2), so discovery would not be relevant.

Poker had failed to make its initial disclosures *to Tiltware*.[6] Notably, on February 22, 2011, Tiltware filed responses to Deliverance Poker's First Set of Interrogatories to Tiltware, First Request for Production to Tiltware, and Second Request for Production to Tiltware,[7] which included a series of objections to every single discovery request. The one objection Tiltware *did not* raise was that it had not been provided with Deliverance Poker's initial disclosures or that the discovery requests were premature because Rule 26(f) conference had not occurred.

9. When Tiltware failed to timely provide its initial disclosures, counsel for Deliverance Poker repeatedly sought to confer with counsel for Tiltware prior to filing a motion to compel as required under the Federal Rules of Civil Procedure as well as the Local Rules. *See* Plaintiff's Motion to Compel Discovery Responses and Memorandum in Support, pages 4 – 6 (Dkt. #44). Not only did Tiltware not raise the issue that disclosures were premature because the parties had not conferred as required by Rule 26(f), it hardly responded at all.[8] Despite the filing of the motion to compel, Tiltware continued to fail to respond to Deliverance Poker's request that it provide its initial

[6] During this conference, new counsel for Tiltware asked about Deliverance Poker's initial disclosures *to Tiltware*, and counsel for Deliverance Poker directed new counsel to the initial disclosures previously provided by Deliverance Poker. For reasons that are not clear, new counsel maintains Deliverance Poker's earlier disclosures do not count.

[7] These objections are the subject of Plaintiff's Second Motion to Compel.

[8] Counsel for Deliverance Poker sought to confer with counsel for Tiltware as follows: (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). Counsel for Deliverance Poker received only one email, which was attached to the motion to compel as Exhibit G (Dkt. #44).

disclosures, much less complain that there had not been the Rule 26(f) conference.[9] *See* Plaintiff's Supplemental Motion to Compel Discovery Responses (Dkt. #53).

10. On February 18, 2011, this Court sanctioned Tiltware for failing to provide its initial disclosures and Mizrachi for failing to provide complete discovery responses and, generally, for stalling on the discovery process. *See* Order, dated February 18, 2011 (Dkt. #54) (sanctioning Defendants $1,500.00 for "an apparent stalling pattern [Defendants] have adopted up to this point in the litigation"). Again, Tiltware did not complain that it should not have been sanctioned because the Rule 26(f) conference had not occurred or that Deliverance Poker had failed to provide its initial disclosures or that such disclosures were inadequate.

C. <u>Defendants have had time, and continue to have time, to conduct necessary discovery</u>.

11. Tiltware has had time to conduct discovery in this case but, for reasons that are not clear, has chosen not to pursue such discovery. Instead, as the Court previously found, Tiltware and Mizrachi have engaged in "an apparent stalling pattern." *See* Order (Dkt. #54).

12. At the request of counsel for Defendants, Plaintiff has repeatedly rescheduled the depositions of Carlos Benavides, III, and Mizrachi.[10] Counsel for Tiltware has further taken the position that its representative involved in negotiating the

[9] Counsel for Deliverance Poker continued, without success, to attempt to resolve the discovery responses and, in particular, the lack of Tiltware's Initial Disclosures, on the following dates: (a) January 27, 2011, (b) February 1, 2011, (c) February 4, 2011, February 10, 2011, February 11, 2011, and February 15, 2011. *See* Plaintiff's Supplemental Motion to Compel.

[10] The parties have agreed almost every week since the week of February 14, 2011, to have the depositions of at least Carlos Benavides, III, and Mizrachi, only to have these depositions put off at the request of Defendants each time.

contract with Mizrachi that is the subject of this suit, Chris Porter ("Porter"), will not be made available for deposition until *after* the Court rules on Defendants' Motion to Dismiss for Failure to State a Claim Pursuant to Rule 12(b)(6) (Dkt. #55).[11] Tiltware identifies Porter in its initial disclosures as a person that "[m]ay be contacted through counsel of record as a party-affiliated witness," but then claims Porter is not subject to the control of Tiltware and therefore cannot produce him for a deposition. Not only has Tiltware refused to make Porter available for deposition, it will not even provide an address where Porter can be served with a subpoena despite repeated requests.

13. Tiltware complains that Plaintiff has not disclosed the identity of persons with knowledge of relevant facts.[12] As an initial matter, Plaintiff has satisfied, and continues to satisfy, its obligation to disclose the identity of those witnesses that "the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment."[13] *See* Fed. R. Civ. P. 26(a)(1)(A)(i). Tiltware did not send out any written discovery requesting such information until February 23, 2011—forty-four days after filing its answer—and Plaintiff will timely answer such discovery requests.[14] Notwithstanding that Deliverance Poker does not have an obligation to provide documents prior to the time for response to Tiltware's request for production, Deliverance Poker will produce to Tiltware and Mizrachi no later than Monday, March

[11] The motion seeks dismissal of one of two claims made against Tiltware.

[12] Deliverance Poker does not read Tiltware's Motion to Continue Trial Date as a motion to compel. If it is intended to be such, Tiltware has failed to comply with its obligations to confer to try to resolve the disagreements as required by Rule 37(a)(1) or Local Rule 10(h).

[13] This is borne out by the fact Plaintiff submitted its list of witnesses and did not list any witness that Tiltware claims was not disclosed.

[14] Mizrachi did not send out any written discovery requests.

14, 2011, documents in the possession of its counsel that would be responsive to Tiltware's request for production.

14. Moreover, the witnesses Tiltware complains were not disclosed have only tangential relationship to this case. The purported relevance of Barry Schnell, a representative from Las Vegas From Home, Scott Broderhausen, a representative from Sabre Asset Management, SA ("Sabre"), and a representative from The Denim Group is that they can speak to the value of the equity contributed by Sabre Asset Management, S.A. Maurice Mills ("Mills"), who is the the representative for Sabre and has been deposed in this case, actually holds the patent for the software that was contributed. Mills was also the person who negotiated with Deliverance Poker and ultimately signed the agreement on behalf of Sabre Asset Management in which Sabre Asset Management contributed the equity to Plaintiff. The witnesses Tiltware seeks to depose—Barry Schnell, a representative from Las Vegas From Home, Scott Broderhausen, and a representative from The Denim Group—might have technical expertise in computer programming not possessed by Mills, but there is no reason to believe that any of these depositions would permit Tiltware (or Mizrachi) to demonstrate the equity contributed by Sabre Asset Management was worth less than the approximate $1.6 million to which both Sabre Asset Management and Plaintiff valued it at the time of the transaction.

15. Tiltware has enlisted the services of additional counsel, but that decision is not a basis to continue the trial setting. The purported "conflict of interest" was something that was known from the inception of the case, but Tiltware has chosen to ignore the issue until now.

16. If Tiltware will diligently cooperate in the discovery process, this case can still be ready for trial as currently scheduled.[15]

For the foregoing reasons, Plaintiff opposes Tiltware's expedited motion to continue trial date and discovery cutoff or bifurcate or sever claims against Tiltware and requests that the Court deny the motion.

Respectfully submitted,

By: /s/ Douglas M. Becker

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[15] Tiltware and Mizrachi also need to cooperate in Deliverance Poker's efforts to comply with the Court's order referring this case to mediation. *See* Order (Dkt. #56). Counsel for Deliverance Poker has attempted on two occasions to enlist the cooperation of counsel for Defendants to schedule mediation, without success. *See* Email from J. Jacks to J. Henry and I. Imrich, dated March 3, 2011, attached as Exhibit D; Email from J. Jacks to J. Henry, et al., dated March 8, 2011 (highlight added), attached as Exhibit E.

CERTIFICATE OF SERVICE

I certify that on 3/9/2011, I caused Plaintiff's Response to Defendant Tiltware, LLC's Expedited Motion to Continue Trial Date and Discovery Cutoff or Bifurcate or Sever Claims Against Tiltware 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:

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