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

TILTWARE, LLC'S REPLY REGARDING EXPEDITED MOTION TO CONTINUE TRIAL DATE AND DISCOVERY CUTOFF OR BIFURCATE OR SEVER (CLERK DOCKET NO. 67)

INTRODUCTION

The bottom line is that unless this motion is granted, the previously dismissed Defendant Tiltware, LLC ("Tiltware") will be forced to the April 25, 2011 trial a little more than three months after its first appearance on January 10, 2011, and with only about ten weeks in which to conduct discovery in a case where plaintiff Deliverance Poker, LLC ("Deliverance Poker") has just served an expert report alleging damages of $3,275,037. The unfairness, lack of due process and prejudice to Tiltware is obvious. The Motion should be granted, and (a) the discovery cutoff and trial should be continued for about six months, or (b) the case should be bifurcated or severed as to Tiltware.

ARGUMENT

Deliverance Poker's opposition is devoted to arguing that it technically complied with Federal Rule of Civil Procedure 26(a) by holding the required Rule 26(f) meeting of counsel in a telephone call on December 16, 2010 before Tiltware even appeared in this action. This position was news to Tiltware since although Tiltware's Los Angeles counsel, Ian Imrich, did in fact

listen in on that call, he was obviously in no position, just a few days after Tiltware was served through the Texas Secretary of State, to make litigation decisions or discovery plans or even to meaningfully participate on the Rule 26 subject matters.

A. The Undisputed Facts Favor A Continuance Of The April 25, 2011 Trial Date And Discovery Cutoff

Deliverance Poker's opposition notably does not dispute the following irrefutable facts:

1. Deliverance Poker originally named Tiltware as a defendant in this case, but for its own strategic reasons decided not to serve Tiltware with the complaint, it's TRO application or the motion for a preliminary injunction. Deliverance Poker then, for its own strategic reasons, voluntarily dismissed Tiltware on October 8, 2010, thereby leading Tiltware to believe that it was no longer going to be involved in this case.

2. Deliverance Poker then abruptly changed strategies (and counsel) and decided to make a motion for leave to file a Second Amended Complaint to add Tiltware back as a defendant. After failing to serve and then dismissing Tiltware, thereby keeping Tiltware out of this case and discovery for about three months, Deliverance Poker stated that "The claims against Tiltware are based on virtually the identical facts as the claims against Mizrachi [and] permitting Deliverance Poker to amend its complaint to add the claims against Tiltware instead of requiring Deliverance Poker to assert its claims [against Tiltware] in a separate proceeding, will certainly promote 'the just, speedy, and inexpensive determination' of Deliverance Poker's claims." *See* Deliverance Poker's Partially Unopposed Motion for Leave to Amend at ¶ 8 (Clerk Docket No. 29).

Deliverance Poker offers no explanation why it took a 180-degree turn three months after filing the Complaint, during which time Tiltware could have been preparing for trial and engaging in discovery, to bring this fairly obvious position to the attention of the Court.

Deliverance Poker acknowledges that it only served Tiltware with the summons and complaint, through the Texas Secretary of State no less, on December 8, 2010 and thus Tiltware did not, and reasonably could not, meaningfully comment on such short notice and participate in preparing the Submissions Proposed Scheduling Orders Pursuant To Local Rule CV-16 (Clerk Docket No. 35), which was filed on December 10, 2010. Therefore, the Court issued its December 13, 2010 Scheduling Order without considering the newly named defendant Tiltware's position.

The pleadings are to date still not settled. Tiltware contends that there is no diversity of citizenship, and its motion to dismiss for lack of subject matter jurisdiction is pending. Tiltware has also filed a motion to dismiss the fifth count for interference with prospective economic advantage. Finally, considering the motions to dismiss, Tiltware has not yet answered the Third Amended Complaint or filed any counterclaims.

Deliverance Poker does not seriously dispute Tiltware's position with respect to the number of depositions, third-party document requests and other discovery that needs to be done to properly prepare this case for trial. Moving Papers: 8-9. Indeed, Deliverance Poker itself wants to take depositions and the parties have tentatively agreed to about a dozen depositions over the next several weeks in Austin, San Antonio, Los Angeles or Las Vegas, Seattle and Florida.

B. Deliverance Poker's Recent Expert Damages Report and the Fact that a Critical Witness that Must be Deposed is in Canada Where Service of a Subpoena will Take Some Time also Weigh in Favor of a Continuance

Deliverance Poker's litigation strategy is obviously to ambush and force Tiltware to an early trial -- only 3 months after it first appeared -- without ample time or due process to conduct discovery. This tactic is driven home by Deliverance Poker's position in its opposition regarding its alleged compliance, before Tiltware even appeared, with its FRCP Rule 26(f) Initial

Disclosure obligations. Additionally, Tiltware has now served an expert's report for $3,275,000 of damages under the novel "brand placement value" theory. This is not the type of expert damages report that can be readily anticipated or quickly evaluated. Tiltware could not have reasonably anticipated this creative "brand placement value" measure of damages, or retained in advance an expert on such a narrow and unanticipated damages theory. Moreover, Tiltware's rebuttal expert will also need a reasonable amount of time to evaluate and prepare a written report. Thus, the short two-week deadline under the current Scheduling Order is impractical, unfair and highly prejudicial on this material $3,275,000 damages issue.

Another serious problem, besides the dozen agreed depositions, is that a subpoena for documents and a deposition of a key witness must be served in Canada through the Hague Convention which is a time-consuming process. On February 14, 2011, a little over four weeks after Tiltware first appeared, the deposition of Maurice Mills was taken in Las Vegas. Mr. Mills is the principal of Saber Asset Management which contributed the poker gaming software to Deliverance Poker, which, according to Deliverance Poker, purportedly fulfilled the $1,000,000 third-party debt or equity investment precondition to making the personal services contract with Mizrachi "effective." Mr. Mills, however, testified that he did not have any knowledge regarding the technical aspects or value of the computer software, but that a third party, Las Vegas From Home.com ("LVFH") had developed and supplied the software to Saber.

LVFH, however, is located in the Vancouver, Canada area. Therefore, this critical deposition and document production in Canada will have to be accomplished via the Hague Convention and will take as much as four months or more.

Further, on March 14, 2010, Deliverance Poker, apparently anticipating the evidence and proof problems due to LVFH being located in Canada, served Plaintiff's Second Supplemental

Disclosures which identified the three new key witnesses from the Denim Group, Aaron Copeland, Stuart Caitlin, and Efrén Salvidor, as "[i]ndividuals with knowledge of the evaluation of Real Deck software [*i.e.*, the same Sabre/LVFH/Real Deck software]." These recently identified witnesses apparently traveled to Canada in 2009 or 2010 where they examined and tested Deliverance Poker's/Sabre's/LVFM's poker gaming software, and Deliverance Poker apparently intends to use their testimony in lieu of, or to backstop, the critical LVFH evidence neither side has thus far been able to obtain from Canada through the time-consuming Hague Convention protocol.

The recently raised novel "brand placement value" damages theory and the importance of the depositions of the Canada based LVFH exacerbates the material prejudice to the very recently added Tiltware and solidifies the need to continue the trial and discovery cutoff.

C. Alternatively, this Action should be Bifurcated or Severed as to Tiltware

Finally, Deliverance Poker offered no argument or facts in the Response as to why in these circumstances, if the Court wants to proceed to trial on April 25, 2011 against the original defendant, Michael Mizrachi, that this case should not be bifurcated or severed as to Tiltware. Indeed, if Mizrachi wins, and the contract was either never "effective" or not breached by Mizrachi, then there are no contractual interference claims against Tiltware and a trial could be unnecessary.

CONCLUSION

Tiltware respectfully requests that discovery and the trial in this action be put back on a level playing field. The Court should continue the trial and discovery cutoff for about six months. Alternatively, the Court should bifurcate trial or severe Tiltware.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on the 16th 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:

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