

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

DELIVERANCE POKER, LLC,

Plaintiff,

v.

MICHAEL MIZRACHI and
TILTWARE, LLC,

Defendants.

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CIVIL ACTION NO. 1:10-CV-00664-JRN

**PLAINTIFF'S MOTION TO EXCLUDE THE TESTIMONY OF DEFENDANT
TILTWARE, LLC'S EXPERT AND MEMORANDUM IN SUPPORT**

Plaintiff Deliverance Poker, LLC ("Deliverance Poker") requests the Court to exclude the testimony of Robert H. Wolf, the proposed expert of Defendant Tiltware, LLC ("Tiltware").

A. Introduction

1. On March 15, 2011, Tiltware served on Deliverance Poker the report of Robert H. Wolf ("Wolf"), which purports to be a rebuttal of the expert report of Gary Wilcox, Ph.D., the expert retained by Deliverance Poker.

2. Tiltware purports to designate Wolf pursuant to Federal Rule of Civil Procedure 26(a)(2)(B), but it provides only Wolf's report.

3. Tiltware did not disclose the data or other information considered by Wolf. *See* Fed. R. Civ. P. 26(a)(2)(B)(ii). Notably, Wolf purports to rely on a great deal of Tiltware's marketing materials that, among everything else, Tiltware has resisted producing in response to Deliverance Poker's production requests.¹

4. Tiltware did not disclose any exhibits in connection with Wolf's purported

¹ Indeed, to date, Tiltware has not produced a single document in this case even though its responses to Plaintiff's First Request for Production were due on February 22, 2011. Defendant Michael Mizrachi has produced a total of 21 pages.

testimony. *See* Fed. R. Civ. P. 26(a)(2)(B)(iii).

5. Tiltware did not disclose anything at all about Wolf, much less his qualifications to offer the opinions he purports to offer. *See* Fed. R. Civ. P. 26(a)(2)(B)(iii). The most that can be gleaned from Wolf's report is that he believes himself to be a professional in that he begins many statements with "In my professional opinion" Tiltware did not provide even an address or telephone number.

6. Tiltware did not provide a list of any other case in which Wolf has testified in the previous ten years as an expert or a statement that he has not so testified. *See* Fed. R. Civ. P. 26(a)(2)(B)(iv).

7. Tiltware did not disclose what it is paying Wolf for his report and testimony. *See* Fed. R. Civ. P. 26(a)(2)(B)(v).

8. A copy of Tiltware's designation is attached as Exhibit A.

B. Argument

9. ***Wolf is not qualified.*** A court should exclude the testimony of an expert who is not qualified by knowledge, skill, experience, training, or education to render an opinion based on scientific, technical, or other specialized knowledge. Fed. R. Evid. 702. Tiltware does not provide any basis on which to conclude that Wolf has any expertise beyond an ordinary person. Wolf's opinions should be excluded on this basis alone.

10. ***Wolf's opinions are not reliable.*** A court should exclude the testimony of an expert if it is not reliable. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149, 119 S.Ct. 1167, 1175 (1990); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93, 113 S.Ct. 2786, 2796-97 (1993). For the expert's testimony to be reliable, the following requirements must be met: (1) the expert's testimony must be based on sufficient facts or data; (2) the expert's

testimony must be the product of reliable principles and methods; and (3) the expert must apply the principles and methods reliably to the facts of the case. *See* Fed. R. Evid. 702. Wolf fails to offer sufficient facts or data to assess his opinions. Wolf offers no principles or methods by which he arrives at his opinions and, therefore, there is no way to determine whether the bases of his opinions are reliable, much less whether they were properly applied to the facts of this case.

11. *Tiltware failed to disclose information required by Federal Rule of Civil Procedure 26(a)(2)(B).* As set forth above, Tiltware failed to disclose the information required by Federal Rule of Civil Procedure 26(a)(2)(B). Specifically, Tiltware failed to provide: (a) the data or other information Wolf considered in arriving at his opinions; (b) any exhibits to be used by Wolf; (c) Wolf's qualifications; (d) a list of other cases in which Wolf testified as an expert in previous 10 years; and (e) the compensation paid to Wolf for his work in this case. This is an independent basis on which to exclude Wolf's testimony.

For the foregoing reasons, Deliverance Poker requests the Court to exclude the testimony of Tiltware's purported expert, Robert H. Wolf.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on 3/21/2011, I caused Plaintiff's Motion to Exclude the Testimony of Defendant Tiltware, LLC's Expert and Memorandum in Support 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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CIVIL ACTION NO. 1:10-CV-00664-JAN

EXPERT REPORT OF ROBERT H. WOLF

Defendant Tiltware, LLC ("Tiltware") submits the attached report of Robert H. Wolf
pursuant to Fed. R. Civ. P. 26(a)(2)(B).

Respectfully submitted,

GREENBERG TRAURIG, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of March, 2011, a true and correct copy of the foregoing was served upon the following counsel via First Class Mail:

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Statement by Robert H. Wolf
For Submission to Greenberg Traurig Counsel for Defendant Tiltware LLC
Concerning the 2010 WSOP Appearances by Mr. Michael Mizrachi

March 14, 2011

I have been asked by counsel for Defendant Tiltware, LLC to consider the advertising and brand placement value that Plaintiff Deliverance Poker claims is owed to them due to Defendant poker player Michael Mizrachi wearing Full Tilt Poker logos instead of Deliverance Poker logos during the 2010 World Series of Poker (WSOP), including the opinions made by Gary B. Wilcox in this matter.

It is my professional opinion that Deliverance Poker would not have benefited significantly if Mr. Mizrachi had worn Deliverance Poker logos instead of Full Tilt Poker's logos. I also believe that the mathematical approach used by Dr. Wilcox to determine the purported "lost value" of the product placement exposure is both flawed and fallacious. Lastly, and most importantly, I believe that there was no way Deliverance Poker could have benefited in any significant way even if Mr. Mizrachi had worn their logo.

1. *Value to Deliverance Poker*

Product placement, like the wearing of logos, does not work in a vacuum. This marketing technique always works best when it is part of a total integrated marketing plan; this typically includes advertising in a wide spectrum of media, public relations and promotions that are coordinated as key parts of a comprehensive marketing strategy. Dr. Wilcox mentions three brands: Apple, BMW, Anheuser Busch, as examples of companies employing product placement. However, he fails to mention that product placement is only a minor part of the marketing program for these brands. Each spends upward of \$100 million each, on offline and online advertising, along with their product placement efforts.

Full Tilt Poker is the second largest poker brand in the world in terms of commonly used metrics within the virtual online poker card room industry., Also it is arguably the number one brand in terms of brand recognition and image.

It has achieved these levels of success only by spending a high percentage of revenue each year on marketing. Since Full Tilt Poker's real money card room launch in July, 2004, the brand has spent in excess of \$500 million in marketing. In 2010, Full Tilt Poker spent over \$130 million for marketing, including \$13 million alone on ESPN. Most of this latter amount went to advertising on the WSOP coverage. In addition to a fully integrated marketing program around the 2010 WSOP, Full Tilt Poker also utilized a great deal of logo coverage. Of the 7,319 entrants who played in the Main Event, roughly 800 represented Full Tilt Poker. There were 36 hours of total programming around the WSOP. For every hour of programming, Full Tilt Poker had at least 3 of the 9 players at any given table wearing Full Tilt Poker logos. Full Tilt had 7 of the 9 players at the Final Table of the Main Event.

The intended effect of this integrated approach -- paid ads, P.R. promotions, and product placement -- is for viewers to see the many famous Team Full Tilt professionals, less famous professionals, and amateurs, all inter-acting with the brand and wearing Full Tilt Poker logos and think: "Wow, it looks like everyone plays at Full Tilt Poker. I want to join that club." There is no way one professional such as Mr. Mizrahi wearing a logo of a poker site that no one has ever heard of before could generate that same effect.

2. Dr. Wilcox's Mathematical Approach to Determining the Value of Mr. Mizrahi's Exposure is Flawed and Fallacious.

In my professional opinion, determining the value of logo exposure, by dividing the cost of a :30 commercial by 30, to determine a "value per second," is an over-simplification and is seriously flawed. Complete commercials are more than the sum of 30 individual seconds. Commercials can generate awareness, develop brand image, and persuade people to action because their pictures, words, and motion allow for a "depth of sale." It is not possible to have that same effect with simply a logo. Product placement can generate some brand I.D., but it is however, extremely limited in doing much else as a one-off, stand alone marketing technique.

Moreover, a product placement logo on the same professional endorser, shown over and over again has a diminishing value. This is especially true if he is the only professional wearing that logo. After the first few exposures, there is no "news value" in terms of storyline or new faces. This is particularly true of broadcasts like the WSOP, since these shows deliver "frequency," and not "reach."

The same audience tends to watch most of these shows. Based on the above it would be fallacious to believe that each exposure, even if it is prominent, has the same value. Clearly, the initial exposures are worth more, and later exposures are worth far less. Especially when viewed by the same audience.

3. There Was No Way For Deliverance Poker to Benefit Even if a Deliverance Poker logo had been worn by Mr. Mizrachi during the 2010 WSOP Main Event.

Deliverance Poker was not in any position to benefit from logo exposure, even if Mr. Mizrachi wore their logo. There was no live .com or .net poker site where viewers of the WSOP could have signed up with an account. Deliverance Poker was not in business or anywhere near ready for business at the time of the WSOP broadcasts. There is no evidence that Deliverance Poker had any of the requisite resources to get into business within even 6 to 8 months following the 2010 WSOP broadcasts.

Given the competitive poker marketplace and the multi-millions of marketing dollars that the first-tier licensed bigger poker sites expend each month, any residual awareness that might have come from Mr. Mizrachi wearing a Deliverance logo during the WSOP would have been long gone by the time Deliverance actually launched a live poker website for real money play by customers.

/S/ Robert H. Wolf