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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CYCALONA GOWEN,
Plaintiff,
v.

TILTWARE LLC, FULL TILT POKER, POCKET KINGS LIMITED, POCKET KINGS CONSULTING, LIMITED, KOLYMA CORPORATION, TILTPROOF, INC., RAYMOND BITAR, an individual, HOWARD LEDERER, an individual, ANDREW BLOCH, an individual, PHILLIP IVEY, an individual, CHRISTOPHER FERGUSON, an individual, JOHN JUANDA, an individual, PHILLIP GORDON, an individual, ERICK LINDGREN, an individual, ERIK SEIDEL, an individual, JENNIFER HARMAN-TRANIELLO, an individual, MICHAEL MATUSOW, an individual, ALLEN CUNNINGHAM, an individual, GUS HANSEN, an individual, AND PATRIK ANTONIUS, an individual,

Defendants.

CASE NO. 2:08-CV-01581-RCJ-RJJ

REPLY IN SUPPORT OF PLAINTIFF'S EX PARTE APPLICATION FOR ORDER SHORTENING TIME FOR HEARING ON PLAINTIFF'S MOTION FOR EXPEDITED DISCOVERY

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A. DEFENDANTS' LENGTHY ANALYSIS OF PLAINTIFF'S ALLEGED FAILURE TO ABIDE BY THE LOCAL RULES OF CIVIL PROCEDURE SHOULD BE DISREGARDED IN ITS ENTIRETY BECAUSE PLAINTIFF COMPLIED WITH ALL REQUIREMENTS SET FORTH IN THE LOCAL RULES.

Defendants' Opposition spends considerable time on Plaintiff's alleged failure to abide by Local Rule 7.5 regarding *ex parte* motions. In the first sentence of Plaintiff's Motion, it states that the Plaintiff was applying *ex parte* for an Order Shortening Time, pursuant to Local Rules 6-1 and 6-2. Defendants, however, ignore these rules entirely.

Local Rule 6-1(a) states: "Every motion requesting continuance, extension of time, or order shortening time shall be "Filed" by the clerk and processed as an expedited matter. *Ex parte* motions and stipulations shall be governed by LR 6-2." Plaintiff followed the requirements set forth in LR 6-2 by attaching the appropriate order. Defendants fail to note that the Court reviewed Plaintiff's *Ex Parte* Application and, after finding good cause, signed the Order Shortening Time. (Document #60) After the Order Shortening Time was granted, the Motion was electronically served on the Defendants.

Defendants also fail to note that only the Application for the Order Shortening Time was filed on an *ex parte* basis. Plaintiff's Motion was not "filed under cover of darkness in an attempt to deprive Defendants of the opportunity to be heard," as Defendants claim. *See* Opposition, 6:18-19. The *Application* was filed on an *ex parte* basis and the *Motion* was served on Defendants after being processed in an expedited manner, as LR 6-1 requires. Defendants received the Motion via electronic service on the same day it was filed. To allege that Plaintiff intended to file a secret motion without notice to the other parties is disingenuous and mischaracterizes Plaintiff's filing.

Any argument that Plaintiff failed to abide by LR 7-5 should therefore be disregarded. Since Plaintiff's *Motion* was not filed on an *ex parte* basis and Defendants were served on the same day, Defendants' argument is without merit.

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B. PLAINTIFF'S NEED FOR EXPEDITED DISCOVERY OUTWEIGHS ANY PREJUDICE TO THE DEFENDANTS; AND DEFENDANTS' OPPOSITION MISSTATES THE LEGAL STANDARD REQUIRED ON MOTIONS FOR EXPEDITED DISCOVERY.

Fed. R. Civ. P. 26(d)(1) states: "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except … by court order." Fed. R. Civ. P. 30(a)(2)(iii) provides that a party must obtain leave of the court before taking a deposition "before the time specified in 26(d)." Plaintiff has good cause for requesting that this Court order limited discovery prior to the 26(f) conference.

Defendants' Opposition proffers a legal standard that is inaccurate and inapplicable to the relief requested in Plaintiff's Motion. While Defendants go to great lengths to factually differentiate *Semitool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273, 277 (N.D. Cal. 2002), from this matter, the holding in that case should be followed. Plaintiff's Motion correctly relied on the Court's rationale in *Semitool*; however, Defendants attempt to distinguish this case in Footnote 6 of their Opposition. While the causes of action and facts differ, the standard set forth by the court is applicable in this matter.

Defendants' Opposition states, "[b]oth *Yokohama* and *Semitool* cited to, but did not expressly adopt, a four-factor test to assess the competing equities enunciated in *Notaro v. Koch,* 95 F.R.D. 403 (S.D. N.Y. 1982)." (See Defendants' Opposition at p. 8:15-17) This statement is extremely misleading because the Opposition fails to state that the *Yokohama* and *Semitool* courts both specifically rejected the four-factor test from *Notaro*.

In *Semitool*, the Court opined at length regarding the appropriate standard in determining requests for expedited discovery. First, the Court rejected the four-factor test from *Notaro*. *Id.* at 275. Specifically, the Court stated:

> The timing of discovery prescribed by Rule 26(d) focuses not on protecting the unwary and unrepresented defendant, but rather on orderly case management. The *Notaro* factors would not accommodate expedited discovery in circumstances even where such discovery would facilitate case management and expedite the case with little or not burden to the defendant simply because the plaintiff would not suffer "irreparable injury." Such a result is inconsistent not only with Rule 26(d), which requires the Court to consider, *inter alia,* "the interests of justice," but also the overarching mandate of Rule 1 which requires that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." It also unduly circumscribes the wide discretion normally accorded the trial court in managing discovery.

Id. at 276.

Contrary to the *Notaro* factors, the *Semitool* Court adopted a "good cause" standard for evaluating a request for expedited discovery. *Id.* at 276. The Court specifically held that, "[g]ood cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *Id.*

Defendants' Opposition recognizes that the *Semitool* Court adopted a good cause standard.[1] (See Defendants' Opposition at p. 8:5-8) The Opposition then goes on to state that in order to demonstrate good cause, "[t]he moving party must first exercise diligent efforts to obtain the information sought before placing the burden on the responding party." Citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). In *Johnson,* the Court's good cause analysis was specific to Fed. R. Civ. P. 16(b). There, the Court examined whether a scheduling order should be amended. This step is neither referenced nor adopted by the *Semitool* Court and should not be utilized in this Court's analysis.

[1] Event though Defendants recognize that *Semitool* adopted a good cause standard, their Opposition is replete with references to the out-dated and rejected *Notaro* four-factor test.

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Defendants' Opposition repeatedly attempts to craft a piecemeal standard for determining whether expedited discovery should be granted; however, these attempts are without merit and should be disregarded. Even with the expended effort to rewrite the appropriate standard, the Opposition fails to simply examine the evidence using the *Semitool* protocol, which is a simple balancing test, weighing the prejudice to the responding party against the need for expedited discovery in consideration of the administration of justice. *Semitool* at 276.

C. PLAINTIFF HAS DEMONSTRATED A NEED FOR EXPEDITED DISCOVERY.

Defendants' Opposition alleges that Plaintiff has failed to show the need for expedited discovery, principally because she failed to demonstrate that she will suffer *"irreparable injury."* (See Defendants' Opposition at p. 8:27-9:1) Through their references to irreparable injury, Defendants are again mistakenly attempting to apply the *Notaro* factors, rather than the test set forth in *Semitool*. Clearly, Defendants' application of the *Notaro* factos should be disregarded. Plaintiff's initial moving papers have already articulated very specific reasons why expedited discovery is needed.

1. Defendants' Recent Dilatory Discovery Tactics And Misrepresentations To This Court Illustrate Plaintiff's Need For Expedited Discovery.

On January 29, 2009, Plaintiff filed the *Ex Parte* Application for an Order Shortening Time to hear this Motion for Expedited Discovery. (See Declaration of James A. Kohl, Esq. ¶ 2, attached hereto) On the same day, the Court filed and served an Order unsealing the Motion and setting an expedited briefing schedule. Kohl, ¶ 3. The Motion was served on the parties *on the same day* -- January 29, 2009. (See Docket #60, which shows that the Motion was served after the Order was signed)

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On February 3, 2009, Plaintiff's counsel contacted Defendants' counsel regarding scheduling the 26(f) conference. Kohl, ¶ 5. On February 4, 2009, *nearly one week after service of the Motion*, counsel for the parties spoke and set the 26(f) conference for February 11, 2009. Kohl, ¶¶ 7-8.

Defendants now state in Footnote 4 of their Opposition, "[d]efendants had also initially agreed in good faith to hold the Rule 26(f) meeting on February 11, 2009 (not knowing about this secret motion for expedited discovery)." Plaintiff is utterly perplexed at this assertion, because it is nothing short of fiction. The Motion was electronically served on all parties on January 29, 2009. Several days had passed between service of the Motion and setting the 26(f) conference. It is preposterous that Defendants now suggest that the Motion was a "secret" on February 4, 2009 and that Plaintiff's counsel somehow duped Defendants into setting the 26(f) conference. It is alarming that Defendants would attempt to assert to this Court that they had no knowledge of the Motion when the docket speaks for itself. Defendants' mischaracterization of their reason for failing to participate in the 26(f) conference, which was set a week after the Motion was served, is an example of the dilatory discovery tactics that Plaintiff is attempting to avoid by expediting two depositions.

Defendants' conduct simply underscores why Plaintiff's Motion should be granted.

2. Whether Defendants Intend To File A Second Motion To Dismiss Does Not Impact The Need For Expedited Discovery.

Defendants also attempt to persuade this Court to deny Plaintiff's Motion by arguing that they intend to file a second Motion to Dismiss and that this Motion would impact Rule 26 issues. (See Defendants' Opposition at Footnote 4) A pending motion may be a factor in the Court's decision to expedite discovery, but it does not automatically guarantee a stay.

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OMG Fidelity, Inc. v. Sirius Technologies, Inc., 239 F.R.D. 300, 304 (N.D. N.Y. 2006). In the present case, Defendants' have not filed another Motion to Dismiss; yet Defendants still want the Court to consider this possibility as a determining factor.

As stated in Plaintiff's Motion, one reason why she is requesting expedited discovery is to discern the relationship between the individuals and the companies involved in this litigation. It may be necessary to add unnamed parties. If it is also revealed that certain individual Defendants are not involved in the claims, Plaintiff will obviously have to consider dismissing those parties without expending judicial resources and attorneys' fees on a costly round of motion practice. Therefore, issues which may be raised in Defendants' as-yet unfilled Motion to Dismiss may be alleviated by simply holding the depositions requested in Plaintiff's Motion.

3. Plaintiff Has Demonstrated Good Cause For Expedited Discovery.

As Plaintiff outlined in her Motion, there is a need to expedite discovery to allow for the depositions of Raymond Bitar and Christopher Ferguson. The depositions of these two individuals are required because of their intimate knowledge of the formations, affiliations, ownership interests, lists of officers and directors and finances of the Companies. By simply completing these depositions on an expedited basis, Plaintiff will be able to add indispensable parties or add new claims without waiting months and subsequently wasting resources on motion practice.

Defendants' past actions indicate that they may be transferring assets to overseas subsidiaries. Plaintiff has been denied any access to the books and records of the Companies. Additional corporations were formed only after Plaintiff made her initial demand and it is believed that these corporations were formed to shift assets and attempt to shield other

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defendants from liability. The expedited depositions will help advance this suit by identifying all defendants (and potentially identifying defendants who may be dismissed), as well as preserving funds and assets that are crucial to proving liability and damages.

In addition, due to the secrecy by which Defendants' have formed and run the companies, expedited discovery is warranted to determine whether or not Defendants are storing documents and how they are being stored. It is also necessary to confirm Bitar and Ferguson's respective statuses within the foreign corporations so that these defendants may be served in an efficient manner.

Despite ample good cause, Defendants Opposition argues that Plaintiff's Motion is nothing more than a fishing expedition. Defendants fall back on their position that *Notaro* dictates that there has to be an evaluation of the likelihood that Plaintiff will prevail on her claims. As was discussed above, *Notaro* was firmly rejected by the Ninth Circuit courts.

Under *Semitool*, Plaintiff has satisfied the good cause standard for expedited discovery, which, in consideration of the administration of justice, outweighs the prejudice to Defendants.

4. Defendants Will Not Be Prejudiced If Plaintiff's Motion Is Granted.

Since Plaintiff has demonstrated her need for expedited discovery, the potential for prejudice to Defendants must be weighed. Defendants claim that taking two depositions "would impose a heavy burden on Defendants." (See Defendants' Opposition at p. 13:2-3) Defendants cite travel schedules, expense and the potential involvement of trade secrets as part of the prejudice. Defendants also refer to the discovery sought by Plaintiff as "vague." (See Defendants' Opposition at p. 13:22)

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Defendants never acknowledge that Plaintiff's Motion specifically limits the discovery to "the corporate structure of the Companies, which have been in place for years," which is far from vague. (See Plaintiff's Motion at p. 14:1) Defendants are not being asked to prepare their entire case at this early stage of the litigation. On the contrary, Plaintiff has asked that only two out of nineteen defendants be deposed in an expedited manner to aid in the administration of justice.

Because of the limited scope of the depositions, the burden and costs to the Defendants are not excessive. Defendants are already on notice of the litigation and are represented by counsel. The prejudice outlined by Defendants is minimal in comparison to the need shown by the Plaintiff.

C. CONCLUSION

Because the potential prejudice suffered by Defendants is far outweighed by the Plaintiff's need for expedited discovery, Plaintiff respectfully requests that her Motion for Expedited Discovery be granted.

Dated: February 13, 2009

HOWARD & HOWARD

By: _____

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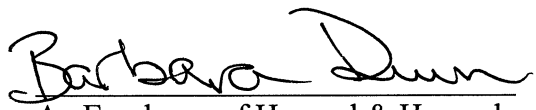
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of January, 2009, I served the above **FIRST AMENDED COMPLAINT** through the CM/ECF system of the United States District Court for the District of Nevada (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

Thomas D. Dillard, Jr., Esq.
Walter R. Cannon, Esq.
OLSON, CANNON, GORMLEY & DESRUISSEAUX
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
Attorneys for Defendants, Tiltware, LLC and the Individual Defendants



An Employee of Howard & Howard

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DECLARATION OF JAMES A. KOHL, ESQ.

I, James A. Kohl, declare:

1. I am over eighteen years of age, I am a Member of Howard & Howard Attorneys PLLC, I am licensed to practice law in all courts of the State of Nevada, I am one of the attorneys representing Plaintiffs, and I have personal knowledge of the facts set forth herein and am competent to testify to the same.

2. On Thursday January 29, 2009 Plaintiff filed an Ex Parte application for an order shortening time to hear her Motion for Expedited Discovery (#58).

3. On Thursday January 29, 2009 the Court filed and served an Order (#60) unsealing the Motion for Expedited Discovery and setting a briefing schedule.

4. The Order was served on all parties to this suit via email at the email addresses they provided to the Court.

5. On Wednesday February 3, 2009 I called Tom Dillard to discuss holding a 26(f) conference.

6. Mr. Dillard was out of the office on February 3, 2009, but he returned my phone call on February 4, 2009.

7. On Thursday February 4, 2009 during our phone conversation we set the 26(f) conference for Wednesday February 11, 2009.

8. Thursday February 4, 2009 was one week after the date that the Court noticed all parties of the Motion for Expedited Discovery.

9. In the opposition brief Mr. Dillard claims that the defendants he represents were not coming to the 26(f) conference because he did not know about the Motion to Expedite, even though he agreed to the 26(f) conference one week after the Court noticed the parties.

I declare under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

Dated this 12 day of February, 2009

James A. Kohl, Esq.