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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CYCALONA GOWEN,

Plaintiff,

vs.

TILTWARE, LLC, FULL TILT POKER, POCKET KINGS LTD., 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 PATRICK ANTONIOUS, an individual,

Defendants.

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

OPPOSITION TO PLAINTIFF'S *EX PARTE* MOTION FOR EXPEDITED DISCOVERY

COME NOW Defendants Tiltware, LLC ("Tiltware"), Raymond Bitar, Howard Lederer, Andrew Bloch, Phillip Ivey, Christopher Ferguson, John Juanda, Phillip Gordon, Erick Lindgren, Erik Seidel, Jennifer Harman-Traniello, Michael Matusow, Allen Cunningham, Gus Hansen and Patrick Antonious (the "Individual Defendants") by and through their counsel of record from the law firm of OLSON, CANNON, GORMLEY & DESRUISSEAUX oppose Plaintiff's motion for expedited discovery [#58] filed *ex parte* without notice on January 29, 2009.

This opposition is based on the accompanying memorandum of points and authorities, the Amended Complaint and other documents filed in this action, and such other argument and evidence which may be presented at the hearing on this motion.

DATED: February 9, 2009

OLSON, CANNON, GORMLEY & DESRUISSEAUX

By: _____

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Cycalona Gowen ("Plaintiff") wants prematurely to depose two individual defendants in this case for 2 days each, and obtain unspecified documents that she hopes will support her $40 million oral contract claim (a) before having to oppose Defendants' yet to be filed second motion to dismiss, (b) before the parties have any realistic idea of the scope of the issues to be litigated in this case, (c) before the parties conduct their Rule 26(f) conference, and (d) before she provides her initial disclosures to support her claims.

Plaintiff secretly filed her *ex parte* motion for expedited discovery without meeting and conferring with Defendants, without giving them *ex parte* notice, and without serving them with the motion papers - all calculated to deprive Defendants of the opportunity to respond. As such, Plaintiff's motion violates Local Rule 7.5, was filed in bad faith, and should be denied on that basis alone.

Plaintiff's motion also fails to identify a single legitimate and compelling reason justifying expedited discovery. She speculates that defendants are diverting assets to foreign companies but offers no evidence, no facts or details, and no documents to show that any of the defendants are transferring assets in order to avoid a potential judgment or that any of the defendants are incapable of satisfying a judgment. In fact, she alleges in the Amended Complaint that the corporate defendants are worth "in excess of" $4 billion. Am. Complaint ¶ 83. Based on Plaintiff's own allegations, Defendants have more than enough assets to satisfy a potential judgment in this case.

Plaintiff also contends that she needs expedited discovery in order to determine whether to seek provisional relief. However, if Plaintiff had any evidence of potential irreparable harm, she would have moved for a preliminary injunction already. Plaintiff's own motion confirms that she is on a fishing expedition. At page 9 of her motion, she claims that she "must depose Bitar and Ferguson in as short a time as possible in order to determine what the past actions and intentions, which have been secret, were, and to

learn if they have further plans to harm Plaintiff, so that Plaintiff can protect herself from these and other predatory actions which are and will be detrimental to Plaintiff." A plaintiff is not entitled to embark on such a broad fishing expedition even during the normal course of discovery, much less on an expedited basis before the issues in the case have even crystallized.

The expedited discovery sought by Plaintiff would also impose an unfair burden on Defendants. They would have to incur the substantial expense and inconvenience associated with early depositions when the claims asserted by Plaintiff may not even survive a motion to dismiss. They would be required to prepare witnesses on potentially moot issues. They also would be forced to make witnesses available before having a full opportunity to gather facts, review Plaintiff's initial disclosures or propound written discovery. The fishing expedition sought by Plaintiff simply does not justify the severe burden on Defendants. Her *ex parte* motion for expedited discovery should be denied.

II. STATEMENT OF FACTS

A. Plaintiff Filed This Lawsuit For $40 Million Based On An Alleged Oral Agreement That Supposedly Took Place Five Years Ago.

Plaintiff Cycalona Gowen ("Gowen" or "Plaintiff") claims she is a professional poker player and a 1% shareholder in Defendant Tiltware LLC, and any of its parent, subsidiary or affiliated companies.[1] Amended Complaint [#56] ¶ 28. Plaintiff alleges that Defendant Tiltware LLC ("Tiltware") is a limited liability company organized and existing under the laws of the State of California. Am. Complaint, ¶ 3. Plaintiff alleges that Tiltware was incorporated in 2003. Am. Complaint, ¶ 29. According to Plaintiff, Tiltware is a software and licensing company which develops and provides software, development and consulting services to "FTP" or Full Tilt Poker. Am. Complaint, ¶ 30. Plaintiff claims that the principal business involved is the operation of an internet site

[1]Among these "Companies," Plaintiff lists "FTP" or "Full Tilt Poker" which, however, is not a separate legal entity but a well-known brand name in the poker world.

designed for online poker which offers games for players located world-wide wagering either play or real money. Plaintiff's claim of ownership in Tiltware and its affiliated companies is premised solely on an alleged oral agreement that she claims was entered into almost five years ago. Am. Complaint, ¶¶ 61-72.

According to the Amended Complaint, thirteen of the other individual defendants are professional poker players and allegedly directors and shareholders/members of Tiltware and certain affiliated companies. The individual defendants include Howard Lederer, Andrew Bloch, Phillip Ivey, Christopher Ferguson, John Juanda, Phillip Gordon, Erick Lindgren, Erik Seidel, Jennifer Harman-Traniello, Michael Matusow, Allen Cunningham, Gus Hansen and Patrick Antonious.[2] Am. Complaint, ¶ 38-50.

Plaintiff contends that she was not adequately paid for services she allegedly provided from 2004 to 2008. Am. Complaint ¶ 74. She claims a 1% ownership interest in the companies at issue which according to her totals "no less than $40,000,000." Complaint, ¶ 83, 93. Plaintiff's claims for relief include the following: (1) breach of contract against all Defendants; (2) breach of fiduciary duty against all individual defendants; (3) breach of the implied covenant of good faith and fair dealing against all Defendants; (4) fraud (intentional misrepresentations) against all Defendants; (5) accounting against all Defendants; (6) promissory estoppel against all Defendants; (7) specific performance against all Defendants; (8) declaratory relief; (9) misappropriation of the right of publicity under NRS 597.770 to 597.810 against all Defendants; (10)

[2] Tiltware and the Individual Defendants voluntarily accepted service of process of the original complaint. Tiltware does not believe plaintiff has served the named foreign entities Pocket Kings Ltd. and the newly added Pocket Kings Consulting, Limited (allegedly Ireland corporations), Tiltproof, Inc. (allegedly a Canadian corporation), or Kolyma Corporations (allegedly an Aruba corporation).

unjust enrichment against all Defendants; (11) quantum meruit against all Defendants; and (12) negligent misrepresentations against all Defendants.[3]

B. Plaintiff Wants To Conduct Discovery Before She Has To Oppose Defendants' Soon To Be Filed Second Motion To Dismiss And Before She Has To Provide Her Rule 26(f) Initial Disclosures.

Plaintiff filed her original Complaint premised on diversity grounds on November 14, 2008. [#1]. Defendants moved to dismiss the Complaint for failure to state a claim for relief pursuant to Federal Rule of Civil Procedure 12(b)(6) and for lack of particularity pursuant to Rule 9(c) on January 6, 2009 [#55]. Recognizing the obvious defects in her Complaint, Plaintiff did not oppose the motion to dismiss but filed an Amended Complaint instead. Plaintiff filed her Amended Complaint on January 22, 2009 [#56] without leave of court or an agreement from Defendants. Rather than move to strike the improperly filed document, Defendants consented to the filing of the Amended Complaint so that Plaintiff could be compliant with Federal Rule of Civil Procedure 15. Defendants did not know at the time that Plaintiff also had filed a secret motion for expedited discovery.[4]

Plaintiff filed her *ex parte* motion for expedited discovery under seal and without meeting and conferring with Defendants, giving them notice of the motion, or serving them with a copy of the papers. Because Plaintiff has no evidence to support her $40 million belated oral contract claim, she is attempting to hasten the advancement of this case so that she might obtain information from Defendants before having to show her cards at the time that initial disclosures are exchanged. Plaintiff wants to depose two

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[3] The first five claims for relief were alleged in the original complaint. After reviewing Tiltware's original motion to dismiss, plaintiff filed an amended complaint without leave of court and added the last seven claims.

[4] Defendants 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). Defendants, however, are now postponing that Rule 26(f) conference until the Court rules on this discovery motion. Defendants also intend to file a second Rule 12(b)(6) motion to dismiss the still defective First Amended Complaint, and the ruling on that motion may also obviously materially affect the Rule 26 issues.

individual Defendants for more than seven hours each but has presented no legitimate basis for such an extraordinary deviation from the normal discovery process. Plaintiff is seeking discovery before she has to oppose Defendants' motion to dismiss the recently filed First Amended Complaint or identify a single witness or document to support her claims.

In an attempt to manufacture a basis for expedited discovery, Plaintiff states in her motion without any supporting evidence that "Pocket Kings and Consulting were formed by Defendants in order to divert or conceal the Companies' assets . . . ." (#55, pg. 7, lines 25-26). The sole basis for this claim comes from a single sentence in Plaintiff's affidavit that is devoid of any facts or narrative detail.[5] Plaintiff simply states: "I believe that Pocket Kings was formed by Defendants in order to divert and/or conceal FTP and its affiliates' assets." (Affidavit ¶ 13). Plaintiff's speculation alone does not justify departing from the discovery process contemplated by Federal Rule of Civil Procedure 26.

III. LEGAL ARGUMENT

A. Plaintiff Failed to Follow Local Rules and Exercise Good Faith Efforts to Obtain a Stipulation Before Secretly Seeking Judicial Intervention.

Plaintiff's motion for expedited discovery filed on an *ex parte* basis and only later served pursuant to Court Order is procedurally defective and should be denied. Local Rule 7.5 mandates that all *ex parte* motions shall contain a statement of good cause why other parties were not noticed and shall set forth good faith efforts to obtain a stipulation before seeking relief from the court. Plaintiff's motion failed to comply with either of those requirements and should be denied.

Local Rule 7.5 (entitled *Ex Parte* Motions) states:

[5] Tiltware objects to Ms. Gowen's declaration because on its face, at ¶ 5, 6, and 12 to 22, e.g., "I believe…" the declaration lacks foundation, is speculative, conclusory and/or hearsay, and Ms. Gowen lacks the required personal knowledge to make such a declaration.

(a) All *ex parte* motions, applications or requests shall contain a statement showing good cause why the matter was submitted to the court without notice to all parties.

(b) All *ex parte* matters shall state the efforts made to obtain a stipulation and why a stipulation was not obtained.

Motions filed without notice (the hallmark of due process) are subject to strict scrutiny. Indeed, "*ex parte* motions are rarely justified." Yokohama Tire Corp. v. Dealers Tire Supply, Inc., 202 F.R.D. 612, 613 (D. Ariz. 2001) (*citing* Mission Power Engineering Company v. Continental Casualty Company, 883 F.Supp. 488, 490 (C.D. Cal. 1995)). "To be justified, the evidence must show that the moving party's cause will be irreparably prejudiced if the underlying motion is heard according to regular noticed procedures." Yokohama, 202 F.R.D. at 613. The moving party also must establish that it is without fault in creating the circumstances giving rise to the purported exigent circumstances or that the circumstances were created due to excusable neglect. Id.

Plaintiff makes no attempt in her motion to explain why it was filed without giving Defendants notice as required by Local Rule 7-5(a). Plaintiff offers only baseless speculation as to why the motion needs to be heard on an expedited basis and provides no explanation at all as to why the motion was filed under cover of darkness in an attempt to deprive Defendants of the opportunity to be heard. The *ex parte* motion is deficient under subsection (a) of Local Rule 7-5.

The motion also fails to comply with subsection (b) of Local Rule 7-5. Plaintiff's motion does not indicate what efforts were undertaken by her to obtain the information sought before filing the motion. The type of efforts required before seeking judicial intervention in the similar context of a motion to compel was substantively addressed by Magistrate Judge Robert J. Johnston in Shuffle Master, Inc. v. Progressive Games, Inc., 170 F.R.D. 166 (D. Nev. 1996). In Shuffle Master, the movant sought additional responses to written discovery through placement of one telephone call and four facsimiles to opposing counsel to resolve the dispute before filing a motion to compel. In

denying the motion to compel for failure to comply with Rule 37's "good faith" requirement, the court stated:

> A party bringing a motion . . . must include with the motion a *certification* that the movant has in *good faith conferred* or attempted to confer with the nonresponsive party. Hence, two components are necessary to constitute a facially valid motion to compel. First is the actual *certification* document. The certification must accurately and specifically convey to the court who, where, how, and when the respective parties attempted to personally resolve the . . . dispute. Second is the *performance*, which also has two elements. The moving party performs, according to the federal rule, by certifying that he or she has (1) in good faith (2) conferred or attempted to confer.

Id. at 170 (emphasis in original).

In this case, Plaintiff made no reasonable effort to obtain any information from Defendants prior to filing the motion on January 29, 2009. Plaintiff states that she tried to obtain information before she filed suit (as she is required to do pursuant to her Rule 11 pre-filing obligations) but cannot specify a single detail as to how she did so. More importantly, Plaintiff's counsel did not bother to contact Defendants after the litigation commenced to even identify what information was needed and determine whether it was available to them by other means. Plaintiff has not "personally engage[d] in two-way communication with [Defendants] to meaningfully discuss . . . [the matter] in a genuine effort to avoid judicial intervention." Id. at 171. In fact, Plaintiff deliberately chose not to meet and confer with Defendants and surreptitiously filed her *ex parte* motion so that Defendants would not have an opportunity to respond. Plaintiff's motion to compel expedited discovery should be denied because it disregarded the Local Rules and was filed in bad faith.

B. Plaintiff Failed to Demonstrate Good Cause to Warrant Expedited Discovery Prior to the Parties' Rule 26(f) Conference And Exchange Of Initial Disclosures.

Plaintiff has failed to make the requisite showing of good cause to justify expedited discovery. She has not stated a legitimate immediate need for the discovery sought and expedited discovery under these circumstances would severely prejudice Defendants. As a general rule, expedited discovery is disfavored. Federal Rule of Civil

Procedure 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 in a proceeding exempted from initial disclosures under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order."

Two district court cases in the Ninth Circuit address the standard for granting expedited discovery. The district courts in Yokohama Tire Corp., supra, and in Semitool v. Tokyo Electron America, Inc., 208 F.R.D. 273, 275 (N.D. Cal. 2002) exercised a "good cause" standard in determining whether expedited discovery was warranted. The moving party must first exercise diligent efforts to obtain the information sought before placing the burden on the responding party. See Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). If the moving party exercises due diligence but is unable to obtain the necessary information, then the pertinent inquiry is whether "the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." Semitool, 208 F.R.D. at 276.

Both Yokohama and Semitool cited to, but did not expressly adopt, a four-factor test used to assess the competing equities enunciated in Notaro v. Koch, 95 F.R.D. 403 (S.D.N.Y. 1982). These four factors are: (1) irreparable injury; (2) some probability of success on the merits; (3) some connection between expedited discovery and avoidance of irreparable injury; and (4) some evidence that injury will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted. Id. at 405.

Plaintiff's motion fails to meet either the "good cause" standard or the four factor test set forth in Notaro. All of the reasons provided by Plaintiff for why she needs expedited discovery are unpersuasive and clearly pretextual.

1. Plaintiff Has Not Identified A Compelling Need For Expedited Discovery.

Plaintiff has not shown a compelling need for expedited discovery nor has she explained why the passage of even a short time would cause her to suffer irreparable

injury. Plaintiff asserts that she needs discovery regarding the corporate structure of two named corporate defendants called Pocket Kings, Limited ("Pocket Kings") and Pocket Kings Consulting ("Consulting") that she claims are incorporated in Ireland. Plaintiff speculates self-servingly that these corporations were created expressly with her in mind for the purpose of "divert[ing] corporate assets to a foreign location to avoid paying [Plaintiff] her ownership in the Companies." (Motion, pg. 9, lines 5-6). Notwithstanding her baseless accusations, Plaintiff has offered no facts to support her claim that Pocket Kings and Consulting were created for the purpose of diverting assets from the United States. Even if Plaintiff's allegations regarding the incorporation of Pocket Kings and Consulting in Ireland were true, the mere creation of a foreign subsidiary does not lead to the conclusion that a company is attempting to dissipate assets. Moreover, she has presented not a shred of evidence that any of the Defendants have transferred or intend to transfer assets in order to avoid a judgment. Indeed, Plaintiff has not even suggested, much less offered any evidence to show, that any of the Defendants are incapable of satisfying a potential judgment in this case. To the contrary, she alleges that Tiltware is valued at over $4 billion. Am. Complaint, ¶ 83.

Plaintiff also argues that she needs expedited discovery in order to determine whether to seek provisional relief. Plaintiff's own argument demonstrates the frivolousness of her position. If she had any facts to support a showing of irreparable harm, she would have moved for a preliminary injunction. The discovery she seeks on an *ex parte* expedited basis is simply a fishing expedition designed to avoid both plaintiff's pleading requirements (defendants intend to file a second motion to dismiss the First Amended Complaint) and the Rule 26 disclosure obligations before initiating discovery.

Courts regularly reject similar requests for expedited discovery where the plaintiff fails to demonstrate a compelling need. For example, in Qwest Communications Int'l v. Worldquest Networks, Inc., 213 F.R.D. 418, 419-20 (D. Colo. 2003), a trademark infringement case, the court rejected plaintiff's argument that it needed expedited

discovery in order to determine whether to move for preliminary injunction. The court noted that the plaintiff, like Ms. Gowen here, did not even ask for provisional relief in its complaint. Similarly, in Dimension Data North America, Inc. v. Netstar-1, Inc., 226 F.R.D. 528, 531-32 (E.D. N.C. 2005), which involved claims of trade secret misappropriation, the court rejected the plaintiff's argument that it needed expedited discovery in order to determine whether a preliminary injunction was needed. According to the court, "plaintiff's motion for expedited discovery is not reasonably timed, where, as here, plaintiff has not yet filed a temporary restraining order or a motion for preliminary injunction, setting out in detail the areas in which discovery is necessary in advance of a determination of preliminary injunctive relief." Id. The court also concluded that "plaintiff has not made an adequate showing that it will be irreparably harmed by delaying the broad-based discovery requested until after the initial conference between the parties pursuant to Rule 26, or at least until a preliminary injunction determination is pending before the court." Id. at 532. Like the plaintiff in Dimension, Ms. Gowen has not shown that she will be irreparably harmed if she has to wait routinely until after the Rule 26(f) conference to commence discovery.

Renaud v. Gillick, No. C06-1304RSL, 2007 WL 98465 at *1-3 (W.D. Wash. Jan. 8, 2007), cited by Plaintiff, does not support her position. In that case, plaintiffs alleged that they had been defrauded by defendant when they wired money to defendant's bank account but did not receive the promised stock shares in return. Defendant informed plaintiffs that defendant had transferred the funds to three separate bank accounts. Plaintiffs provided evidence of outstanding judgments against the defendant involving similar fraudulent transactions. The court, therefore, permitted plaintiffs to issue subpoenas to third party banks in order to locate their funds. Unlike in Renaud, Plaintiff here has not paid any money to Defendants that she is trying to trace and recover. More importantly, unlike the plaintiffs in Renaud, she has not offered any evidence that there

are similar outstanding judgments against Defendants or that Defendants are judgment proof. Renaud, therefore, is not on point.[6]

Plaintiff also contends that she needs expedited discovery in order to determine if additional defendants should be joined. She claims that "[w]aiting to add additional defendants will result in counsel for the new defendants asking to amend the scheduling order that will be in place." (Motion, pg. 13, lines 1-2.) This argument is patently frivolous for several reasons. First, Plaintiff's novel argument would eviscerate the purpose of Rule 26(d)(1) because it would allow any plaintiff to seek expedited discovery based on the pretext of needing to identify additional defendants. Second, no scheduling order has been issued yet because the parties have not even conducted their Rule 26(f) conference. Third, the parties' proposed pretrial schedule and the Court's scheduling order will provide an orderly process for discovery and the possible joinder of additional parties.

Plaintiff further contends that she needs "to discovery [sic] at the outset whether or not Defendants are storing documents, including electronically-stored information, which could be deleted or otherwise lost before the regular discovery process commences."

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[6] Semitool, Inc. v. Tokyo Electron America, Inc., 208 F.R.D. 273, 276-77 (N.D. Cal. 2002), cited by Plaintiff, is also not on point. Semitool involved claims of patent infringement. The court in that case found that there was good cause for granting limited expedited discovery because plaintiff needed certain technical specifications and schematics in order to determine whether the accused product infringed plaintiff's other patents. Plaintiff needed this information in order to prepare its infringement disclosures under the expedited procedures of the Northern District of California's Patent Local Rules. The court in Semitool also noted that the defendant had been on notice for a year that plaintiff was seeking this information. The facts in Semitool are unique to patent infringement claims. Unlike the plaintiff in Semitool, Plaintiff here has not demonstrated any compelling need for expedited discovery.

Allcare Dental Management, LLC v. Zrinyi, DDS, No. CV-08-407-S-BLW, 2008 WL 4649131 at *1 (D. Idaho Oct. 20, 2008) is similarly inapposite. In that case, the court permitted plaintiff to serve a subpoena on an internet service provider in order to determine the identities of Doe defendants who had posted certain statements on a website. The court reasoned that the litigation could not commence until the identities of the defendants were determined. Here, Plaintiff already has identified and sued 18 defendants and obviously knows from public records where they are located and can be served.

(Motion, pg. 13, lines 19-23.) Every litigant has a duty to preserve relevant information and Plaintiff has made no showing that Defendants have destroyed or intend to destroy evidence. With respect to the preservation of electronic information, Plaintiff does not explain why a simple preservation demand would not suffice. In any event, these issues will be addressed at the Rule 26(f) conference and do not warrant expedited depositions.

Furthermore, in assessing the need for out of the ordinary discovery, it is proper as suggested by the court in Notaro to evaluate the likelihood that Plaintiff will prevail on her claims. The merits of Plaintiff's claims should be evaluated against the burden of forcing out-of-state individuals to sit for depositions in excess of seven hours on subject matter that is not altogether clear from Plaintiff's motion. This onerous request comes from Plaintiff who has not produced a contract, a letter, an e-mail or any documentary evidence whatsoever suggesting she had an oral agreement worth $40 million.

Finally, Plaintiff's motion appears to be calculated more toward having Defendants provide documentary evidence that she hopes will support her case because her initial disclosures will demonstrate that she possesses no supporting evidence at all. Plaintiff's affidavit at paragraph 15 states:

> I believe that the individual Defendants, and in particular, Bitar and Ferguson, are in possession of e-mails, and other written materials which will confirm my own interests and support my claims.

This is of course pure speculation. Even if this assertion were true, this has nothing to do with funds allegedly being diverted to foreign corporations for the purpose of preventing her from recovering monetary damages. There is no connection between seeking liability discovery from these witnesses (which she can do in the regular course of discovery) and her alleged emergency need for early discovery to prevent asset dissipation. Plaintiff has made no showing that there is some connection between the expedited discovery she seeks and the avoidance of irreparable injury. See Notaro, 95 F.R.D. at 405.

2. Expedited Discovery Would Severely Prejudice Defendants.

The immediate discovery sought by Plaintiff would impose a heavy burden on Defendants. Defendants would be required to incur the substantial expense and inconvenience of having to make witnesses available for deposition when they have not yet filed their motion to dismiss the Amended Complaint, and thus do not yet know which claims will survive and what issues should properly be the subject of discovery.

The discovery sought is extremely burdensome because the two people Plaintiff wants to depose are involved in a demanding profession with set schedules and weekly travel. They cannot make themselves available for potentially two days of deposition without considerable notice to accommodate scheduling issues.

It is also unfair to require defendants' counsel to prepare key witnesses for expedited depositions at the outset of the case without having the benefits of a normal fact gathering process and the opportunity to review initial disclosures or engage in written discovery, particularly in a $40 million case involving a number of still unserved foreign corporations and other individual parties.

Moreover, discovery in this case likely will reveal trade secrets or commercially sensitive information. Defendants should not be required to reveal confidential business information until a protective order has been agreed by the parties and signed by the Court. This is another issue that has to be addressed at the Rule 26(f) conference before discovery can take place.

In short, Plaintiff has not demonstrated good cause for departing from the established order and sequence of discovery. The early and vague discovery sought by Plaintiff serves no legitimate purpose, could lead to a waste of time and resources if Defendants' motion to dismiss is granted, and would impose an unfair burden on Defendants.

IV. CONCLUSION

IN ACCORDANCE WITH THE FOREGOING, the Tiltware Defendants urge this Court to deny Plaintiff's motion for normal, already expedient discovery as there is no

colorable basis presented to exempt this case from the expedient, economical and just manner and sequence of discovery provided for by Federal Rule of Civil Procedure 26.

RESPECTFULLY SUBMITTED this 9 day of February, 2009.

OLSON, CANNON, GORMLEY
& DESRUISSEAUX

By: _____

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TABLE OF CONTENTS