

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

ALAN HOROWITCH,)	
)	
Plaintiff,)	
)	CASE NO. 6:06-cv-1703-ORL-19JGG
v.)	
)	
DIAMOND AIRCRAFT INDUSTRIES, INC., a foreign corporation,)	
)	
Defendant.)	
)	

**PLAINTIFF HOROWITCH’S MOTION TO COMPEL
AND MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO COMPEL, AND
REQUEST FOR EXPEDITED BRIEFING**

Plaintiff Horowitch (“Plaintiff”), pursuant to Rules 26, 33, 34 and 37 of the Federal Rules of Civil Procedure, and pursuant to local rules 3.01 and 3.04, files his motion to compel the production of documents and to compel complete answers to the Interrogatories served on Defendant Diamond Industries, Inc. (“Diamond”).

Plaintiff has made a good faith effort to resolve the problems associated with Diamond’s lack of responsiveness to discovery. Attached hereto at Exhibit A is the Certificate of Conference with Opposing Counsel.

I. INTRODUCTION

Diamond’s responses to Plaintiff’s request for production and interrogatories demonstrate a classic effort to stonewall the Plaintiff in his legitimate pursuit of reasonable, clear, and perfectly relevant discovery. As examples of Diamond’s utter lack of responsiveness, Diamond refuses even to identify the drafter of the contract at issue (the “Contract”) in response to an interrogatory seeking that information (Interrogatory No. 2) or to produce documents related to

“the drafting of the Contract, the form of the Contract, and the enforceability of the Contract.” (Request for Production No. 10). Such discovery requests are so commonplace and generally understood as relevant in a breach of contract action that to object to a full and complete response can only suggest either (1) a lack of good faith, or (2) a fundamental lack of appreciation for the discovery requirements of the American legal system (which admittedly sometimes occurs with foreign litigants such as the Defendant here). Whatever the cause or explanation for the Defendant’s stonewalling, it must be remedied.

Rule 26 of the Federal Rules of Civil Procedure specifically provides that:

Parties may obtain discovery regarding *any matter, not privileged, that is relevant to the claim or defense of any party*, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Fed. R. Civ. P. 26 (emphasis added). The discovery that Plaintiff seeks includes documents, information and evidence that is reasonably and rationally related to his claims and Diamond’s defenses, and is designed to lead to the discovery of admissible evidence. Specifically, all of Plaintiff’s discovery requests seek information concerning:

- The Contract at issue in this matter;
- The circumstances surrounding the preparation, negotiation, and execution of the Contract at issue;
- The breach of the Contract at issue;
- Diamond’s bad faith in breaching the Contract at issue; and
- Diamond’s practice of engaging in unfair trade practices.

There is not a single discovery request that is mentioned in this motion that does not directly bear upon the core topics listed above, each of which, without question is relevant to the Plaintiff’s claims for breach of contract, breach of the covenant of good faith and fair dealing,

and unfair trade practices.¹ Accordingly, Plaintiff respectfully requests that this Court grant this motion to compel.

II. STATEMENT OF FACTS

In 2003, Diamond joined the world of single engine jet manufacturers and announced its plan to build the D-Jet. [See Proposed Amended Complaint (“Complaint”) at ¶ 11]. Diamond advertised repeatedly that the projected price of the D-Jet would be “well under US \$1 Million.” [Complaint at ¶ 13]. Diamond developed a manner of rewarding individuals who already owned Diamond aircrafts, or who had a different Diamond aircraft on order: those individuals could execute a contract for the D-Jet, provide Diamond with a \$20,000 deposit, and Diamond would reward them by giving them “production slot priority” with regard to the D-Jet (i.e. one of the first manufactured D-Jets). [Complaint at ¶ 15]. The Plaintiff was one of these individuals.

On or about March 16 or 17, 2003, the Plaintiff executed the D-Jet order form that called for a purchase price of \$850,000 and provided Diamond with a deposit of \$20,000. [Complaint at ¶ 22 and 23]. After taking over a year to consider and evaluate Plaintiff’s offer, on June 14, 2004, Diamond formally accepted the Plaintiff’s offer and executed the Contract, thereby creating a binding legal agreement between the Plaintiff and Diamond for the fourth D-Jet to be manufactured and sold by Diamond for a total of \$850,000. [Complaint ¶¶ 24, 25]. Once executed, the Terms and Conditions of the Contract applied to the sale of the aircraft. [Complaint ¶ 22]. The Terms and Conditions of the Contract do not contain any provision that permits Diamond to increase thereafter the price of the aircraft. [Complaint ¶ 27].

¹ Plaintiff has recently filed a motion to amend his complaint to include the additional claim of unfair trade practices.

On August 31, 2006, Diamond sent Plaintiff a letter informing Plaintiff that Diamond refused to honor the Contract and provide Plaintiff a D-Jet in the fourth production slot for \$850,000. Instead, Diamond contended that Plaintiff's only option was to sign a new contract for a D-Jet for the price of \$1,380,000. [Complaint ¶ 30].

The Plaintiff brought this action against Diamond after Diamond refused to honor the Contract, asserting claims for specific performance based upon breach of contract, and in the alternative, damages based upon breach of contract and breach of the covenant of good faith and fair dealing. Plaintiff has filed a motion seeking leave to file an amended complaint, asserting an additional claim for unfair trade practices.

III. THE DISCOVERY DIAMOND SHOULD BE COMPELLED TO PRODUCE

Diamond has either flatly refused to respond to, or provided wholly insufficient responses to, a variety of Plaintiff's requests for production and interrogatories. Diamond should be compelled to produce its responsive documents and information responsive to these discovery requests. These specific discovery requests are listed below.

a. Interrogatory No. 2.

Diamond has flatly refused to provide any information actually responsive to Interrogatory 2 which simply asks for the identity of those who drafted the form Contract, and instead has only provided the names of three individuals that participated in filling in the blanks on and execution of the form Contract with Plaintiff. Interrogatory No. 2 and Diamond's response is as follows:

Plaintiff's Interrogatory No. 2: Please identify each individual who participated in the drafting of the form contract that was utilized by Dr. Horowitch and Diamond to

memorialize their agreement regarding the purchase of the Aircraft and describe the nature of each individuals participation in the drafting of that form contract.²

Diamond's Response: Diamond Aircraft incorporates by reference each of the General Objections. Diamond Aircraft objects to Interrogatory No. 2 because it is overly broad and seeks discovery of information not relevant to the claim or defense of any party, unless a court of law declares that the contract in dispute is ambiguous. Diamond Aircraft further objects to the Interrogatory to the extent it mischaracterizes the Contract as a purchase agreement instead of as an order agreement for a position reservation. Subject to and without waiver of the foregoing objections, Diamond Aircraft responds as follows: 1. Cathy Wood: Secretarial; 2. Jeff Owen: Amendment of standard order form to order agreement form for position reservation; and 3. Peter Maurer: Final approval of order agreement form with limited specifications and subject to price changes.³

This request is relevant to Plaintiff's claims in this matter and also reasonably calculated to lead to admissible evidence about the experience and expertise of those who drafted the Contract, whether they had prior industry experience, and whether the Contract and its terms should therefore be interpreted in light of industry parlance, trade practice, and custom. Diamond's contention that because the Court has not determined the Contract is ambiguous, parol evidence may not be sought in discovery is not a permissible or appropriate objection. First, the information sought is not parol evidence as Interrogatory No. 2 does not seek information about prior written or oral communications. Madsen, Sapp, Mena, Rodriguez & Co., P.A. v. Palm Beach Polo Holdings, Inc., 899 So.2d 435, 436 (Fla. App. 4 Dist. 2005) ("The parol evidence rule provides that a contemporaneous oral agreement may not be used to vary the terms of a written agreement unless there is ambiguity as to the meaning of the contract."). Moreover, even if this interrogatory did request parol evidence, the issue of whether the contract is unambiguous has not yet been determined by the Court and will likely not be determined until

² The Plaintiff's Requests for Production and Interrogatories are attached hereto at Exhibit B.

³ Diamond's Responses to the Plaintiff's Requests for Production and Interrogatories are attached hereto at Exhibit C.

later in the litigation. See e.g., City of Tampa v. Ezell, 902 So.2d 912, 914 (Fla. App. 2 Dist. 2005) (“The interpretation of a contract is a question of law . . .”).

Additionally, in construing the Contract under Florida law,⁴ courts will look to the conditions and circumstances surrounding the transaction in addition to the words of the Contract itself. City of Tampa, 902 So.2d at 912 (“In construing a contract, the intent of the parties should be determined from the words of the contract as a whole. The court also should consider the conditions and circumstances surrounding the parties and the objects to be obtained in executing the contract.”) (citing Florida Power Corp. v. City of Tallahassee, 154 Fla. 638, 643-644, 18 So.2d 671, 674 (Fla. 1944) (holding that the courts’ established rules to be observed in the construction of contracts include to consider the “effect that the conditions and circumstances surrounding the parties and the object or objects to be obtained when executing the contract”)). See also In re Chisari, 183 B.R. 963, 967 (Bkrtcy. M.D. Fla.,1995) (“courts in Florida are required to ‘place themselves, as near as possible, in the exact position of the parties to the instrument, when executed, so as to determine the intention of the parties, objects to be accomplished, obligations created, time of performance, duration, consideration, mutuality and other essential features.’”) (quoting Florida Power Corp., 154 Fla. at 643-44. Certainly the information sought in this Interrogatory bears on the conditions and circumstances surrounding the Contract at issue and is thus discoverable.

Diamond’s objection essentially boils down to an objection that Diamond believes such evidence will not be admissible at trial. That objection fails for two reasons. First, the scope of discovery allowed by the Federal Rules specifically excludes such an objection. Rule 26 of the Federal Rules of Civil Procedure specifically provides that “relevant information need not be

admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” FED. R. CIV. P. 26. Second, it is more than likely that information about the identity of the drafters of the Contract and their industry experience will be relevant to the interpretation of the Contract as well as whether those individuals were participants in the unfair trade practices alleged by Plaintiff in his proposed amended complaint. FLA. STAT. § 501.204 (“Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”). Surely the identity of those allegedly engaged in the unfair practices at issue is a relevant area of inquiry.

b. Interrogatory No. 4.

Interrogatory No. 4 simply asks Diamond to describe communications between Diamond and Plaintiff regarding the transaction at issue in this case.

Plaintiff’s Interrogatory No. 4: Please describe all conversations or communications between Diamond employees, agents or representatives on the one hand, and Dr. Horowitch on the other hand, regarding the Aircraft, including but not limited to: a) The negotiation with Dr. Horowitch regarding the Aircraft or the Contract. b) The price for the Aircraft which was the subject of the Contract, c) Dr. Horowitch’s deposit for the Aircraft, and d) The dispute that is the subject of this Litigation.

Diamond’s Response: Diamond Aircraft incorporates by reference each of the General Objections. Diamond Aircraft objects to Interrogatory No. 4 to the extent it calls for the disclosure of information protected from disclosure by the attorney-client privilege or work product doctrine. Diamond Aircraft also refers Plaintiff to documents produced in connection with Defendant’s Rule 26(a)(1) Initial Disclosures. Subject to and without waiving the foregoing objections, Diamond Aircraft responds as follows: a) John Gauche was involved in discussions surrounding transfer of DA-42 order to D-Jet order; b) the price was pro forma for all order reservations; c) Documents produced in connection with Defendant’s Rule 26(a)(1) Initial Disclosures indicate that Plaintiff knew how deposit would be made and when received; d) Peter Maurer’s notes of conversations with Plaintiff were disclosed in connection with Defendant’s Rule 26(a)(1) Initial Disclosures. At the Aircraft Owners and Pilots Association (“AOPA”) Expo, Plaintiff told Mr. Maurer that the D-Jet was beautiful and that it was worth more

⁴ The Contract at issue in this matter provide that Florida substantive law applies to the Plaintiff’s claims.

than \$850,000. Plaintiff also told Mr. Maurer that he might have been open to a more moderate price adjustment.

Instead of actually describing the conversations that occurred between Diamond and Plaintiff, Diamond has simply provided cryptic responses such as “John Gauche was involved in discussions surrounding transfer of DA-42 to D-Jet order.” This certainly does not meet Diamond’s obligation to “describe” these conversations. Moreover, Diamond’s cryptic response that “The price was pro forma for all order reservations” simply is not responsive and does not make sense. Is Diamond stating that a conversation occurred on this subject? Or just stating this position?

Plaintiff is entitled to a full and complete response to this Interrogatory.

c. Interrogatory Nos. 5 and 7 and Request for Production Nos. 7 and 8.

In these Interrogatories and Requests, Plaintiff seeks information about other prospective purchasers of Diamond’s D-Jet who were treated similarly to Plaintiff. In each response, Diamond objected to producing any information whatsoever about these other purchasers.

Plaintiff’s Interrogatory No. 5: Please describe all of Diamond’s internal conversations or communications regarding: a) The negotiation with Dr. Horowitch regarding the Aircraft or the Contract, b) The price for the Aircraft which was the subject of the Contract, c) Dr. Horowitch’s deposit for the Aircraft, d) The dispute that is the subject of this Litigation, and e) Any other individual or entity who placed a deposit with Diamond for a Single Engine Jet Aircraft who was later informed the base price for the Aircraft would be in excess of \$850,000.

Diamond’s Response: Diamond Aircraft objects to Interrogatory No. 5 to the extent that it seeks information relating to internal conversations or communications regarding “the dispute that is the subject of this litigation” and to the extent that the Request seeks information that is protected from discovery pursuant to the attorney-client privilege or work product doctrine. Diamond Aircraft further objects to Interrogatory No. 5 to the extent that it seeks information regarding “any other individual or entity who placed a deposit with Diamond for a Single Engine jet Aircraft who was later informed the base price for the Aircraft would be in excess of \$850,000,” on grounds that such information is not relevant or reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections,

Diamond Aircraft responds as follows: a) Diamond Aircraft refers Plaintiff to documents produced in connection with Defendant's Rule 26(a)(1) Initial Disclosures; b) Diamond Aircraft refers Plaintiff to documents produced in connection with Defendant's Rule 26(a)(1) Initial Disclosures; c) Diamond Aircraft refers Plaintiff to documents produced in connection with Defendant's Rule 26(a)(1) Initial Disclosures; d) No communications other than conversations protected from disclosure by the attorney-client or work product doctrine; e) Diamond Aircraft objects to Interrogatory 5(e) on grounds that said Interrogatory is not relevant or reasonably calculated to lead to the discovery of admissible evidence.

Plaintiff's Interrogatory No. 7: Please identify any and all individuals or entities who provided Diamond with deposit(s) for a Diamond Single Engine Jet Aircraft(s) and who were later informed that the base price of the Aircraft would be in excess of \$850,000.

Diamond's Response: Diamond Aircraft objects to Interrogatory No. 7 on the grounds that the Interrogatory is overly broad, unduly burdensome, and not relevant or reasonably calculated to lead to the discovery of admissible evidence.

Plaintiff's Request for Production No. 7: All documents provided to prospective buyers of the Diamond Single Engine Jet Aircraft regarding any price changes from the beginning of its offering for sale to date.

Diamond's Response: Diamond Aircraft incorporates by reference each of the General Objections. Diamond Aircraft objects to Request No. 7 to the extent it seeks documents that are not relevant or reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and without waiving them, Diamond Aircraft incorporates by reference its response to *Request No. 6 of Plaintiff's First Request to Produce to Defendant*. (*Diamond's Response to Request No. 6, which asks for marketing material regarding the D-Jet provides 'Diamond Aircraft incorporates by reference each of the General Objections. Diamond Aircraft objects to Request No. 6 on grounds that it is vague and seeks documents that are not relevant to any claim or defense of any party. Subject to and without waiver of the foregoing objections, Diamond Aircraft refers Plaintiff to the documents it produced in connection with Defendant's Rule 26(a)(1) Initial Discovery Disclosures.'*)

Plaintiff's Request for Production No. 8: Documents sufficient to identify each individual or entity that placed a deposit with Diamond for a Diamond Single Engine Jet Aircraft.

Diamond's Response: Diamond Aircraft objects to Request No. 8 on grounds that the Request is overly broad, unduly burdensome, and not relevant or reasonably calculated to lead to the discovery of admissible evidence.

In these Interrogatories and Requests, Diamond objects that it has no obligation to respond because it does not have to produce evidence of similar transactions or contracts that Diamond has entered into with other customers for a D-Jet for \$850,000 and that Diamond subsequently refused to honor.

With respect to the identify of other purchasers, Diamond specifically argues that such information “is not relevant or reasonably calculated to lead to the discovery of admissible evidence.” Particularly where, as here, there is a sharp dispute over a fundamental term of the Contract, the price, where certain claims rest on whether Diamond breached the covenant of good faith and fair dealing, and whether Diamond has engaged in a deceptive trade practice, the identity of other witnesses who may have had experiences similar to that of Plaintiff is plainly relevant to Plaintiff’s claims. Moreover, once the identity of those witnesses is obtained, they may be able to provide Plaintiff with further relevant evidence that might well be admissible. For instance, these individuals may well have information relevant to the interpretation of the Contract since they executed the exact same form contract after discussions with the defendant. To the extent that Diamond made admissions or misrepresentations to these individuals consistent with those made to the Plaintiff both before and after the Contract was signed, Plaintiff is entitled to discover that evidence in support of its claims.

Additionally, the similar transactions that Diamond was pursuing at the time Diamond entered the Contract certainly bears on the conditions and circumstances surrounding the Contract and are thus discoverable. See e.g., City of Tampa, 902 So.2d at 914, Florida Power Corp., 154 Fla. at 643-44, In re Chisari, 183 B.R. at 967.

Moreover, not only is such information and the related documents relevant to the Plaintiff’s claims, such evidence will more than likely be admissible in a trial of this matter. See

e.g., FLA. STAT. § 90.404 (“Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.”).

Accordingly, Diamond should be compelled to fully respond to the above Requests and Interrogatories.⁵

d. Interrogatory No. 6.

Interrogatory No. 6 asks Diamond about its electronically stored information.

Plaintiff’s Interrogatory No. 6: Please describe the location of all records, electronic or otherwise, regarding the proposed transaction described in the Complaint in this action which began with Dr. Horowitch, on or about March of 2002 to the present day.

Diamond’s Response: Diamond Aircraft objects to the Interrogatory No. 6 to the extent that it requests information relating to the location of “all records, electronic, or otherwise,” on grounds that said Interrogatory exceeds the scope of “electronically stored information,” as defined in Federal Rules of Civil Procedure 26(a)(1) and 34(a) and (b). Subject to and without waiving the foregoing objections, Diamond Aircraft responds as follows: Diamond Aircraft has access to electronically stored information from the address, 1560 Crumlin Sideroad, London, Ontario.

Diamond has responded to Plaintiff’s inquiries about the location of electronically stored information by providing only its business address as the location of all electronically stored information. At this point, the Plaintiff has attempted to obtain information about electronically stored information as contemplated by the Federal Rules of Civil Procedure in a variety of ways. At the parties preliminary planning conference, per Rule 26(f)(3) of the Federal Rules of Civil

⁵ Additionally, with Interrogatory No. 5, Diamond has directed Plaintiff to documents produced in response to Diamond’s initial disclosures. Despite being asked to confirm that it has no additional information in response to these topics, Diamond has not done so. Plaintiff is entitled to a full and complete response to these topics – even if that complete response is simply to confirm that Diamond has no additional information.

Procedure,⁶ the Plaintiff inquired about the location and nature of any electronic documents that Diamond may have that might prove relevant to the dispute. [See Affidavit of Jennifer Dempsey, attached hereto at Exhibit D]. At the conference, Diamond's counsel indicated they would get back to counsel for the Plaintiff. [Id.] Plaintiff has sent a subsequent e-mail on the subject to Diamond's counsel. [Id.] Now, even after an interrogatory has been submitted on the subject, Diamond continues to stonewall and provide a cryptic and totally unhelpful answer to a question that should have been answered at or shortly following the preliminary planning conference. Diamond should be compelled to respond and provide information as to where and what types of electronic documents Diamond has that may be relevant to this dispute in accordance with the recent amendments to the Federal Rules of Civil Procedure.

e. Request for Production No. 6.

Request for Production No. 6 seeks marketing and promotional material related to the D-Jet.

Plaintiff's Request for Production No. 6: Copies of all marketing material, promotional material, or informational material regarding the Diamond Single Engine Jet Aircraft that was created or provided to any customers or potential customers at any time from 2003 to the present.

Diamond's Response: Diamond Aircraft incorporates by reference each of the General Objections. Diamond Aircraft objects to Request No. 6 on grounds that it is vague and seeks documents that are not relevant to any claim or defense of any party. Subject to and without waiver of the foregoing objections, Diamond Aircraft refers Plaintiff to the documents produced in connection with Defendant's Rule 26(a)(1) Initial Discovery Disclosures.

This marketing and promotional material sought is potentially relevant to the interpretation of the Contract and Plaintiff's claims for breach of the covenant of good faith and

⁶ Rule 26(f) of the Federal Rules of Civil Procedure requires parties to discuss issues regarding discoverable information at the preliminary planning conference, including "any issues relating

fair dealing and unfair trade practices. While Diamond produced some limited marketing material in response to Plaintiff's discovery, Diamond objects to producing all such material on the grounds that this request is "vague and seeks documents that are not relevant to any claim or defense of any party." This request is clear, concise, and surely relates to the proper interpretation of the contract and the Plaintiff's claims that Diamond breached the covenant of good faith and fair dealing and that Diamond was engaged in unfair trade practices. Also, the circumstances surrounding the entry into the Contract certainly bear upon Plaintiff's claim for breach of contract. See City of Tampa, 902 So.2d at 914, Florida Power Corp., 154 Fla. at 643-44. Accordingly, Diamond should be compelled to produce all documents in its possession responsive to this Request.

f. Request for Production Nos. 1, 3, 13, 14, 15, and 16.

For the following Requests for Production, Diamond has simply interposed boilerplate objections. There is no basis for the objections to these plainly relevant and appropriate discovery requests. Diamond's objections should be stricken and Diamond should be compelled to produce the information requested.

Plaintiff's Request for Production No. 1: All documents referring to, relating to, or regarding the purchase, or negotiation for the purchase, of the Diamond Single Engine Jet Aircraft ("Aircraft") by Dr. Horowitch.

Diamond's Response: Diamond Aircraft incorporates by reference each of the General Objections. Subject to and without waiver of the foregoing objections, Diamond Aircraft refers Plaintiff to the documents produced in connection with Defendant's Rule 26(a)(1) Initial Discovery Disclosures.

Plaintiff's Request for Production No. 3: All correspondence and other communications between Diamond and Dr. Horowitch, including but not limited to correspondence and communications regarding the Aircraft, the Contract for the purchase of the Aircraft (attached as Exhibits A & B to the Complaint) (hereinafter referred to as

to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced. . . ."

the “Contract”), the price of the Aircraft, the specifications of the Aircraft, the design of the Aircraft, and/or Dr. Horowitch’s deposit regarding the Aircraft.

Diamond’s Response: Diamond Aircraft incorporates by reference each of the General Objections. Subject to and without waiver of the foregoing objections, Diamond Aircraft refers Plaintiff to the documents produced in connection with Defendant’s Rule 26(a)(1) Initial Discovery Disclosures.

Plaintiff’s Request for Production No. 13: All documents that you believe are related to or support in any way your defenses asserted in this litigation and/or the claims asserted against you

Diamond’s Response: Diamond Aircraft incorporates by reference each of the General Objections. Subject to and without waiver of the foregoing objections, Diamond Aircraft refers Plaintiff to the documents produced in connection with Defendant’s Rule 26(a)(1) Initial Discovery Disclosures.

Plaintiff’s Request for Production No. 14: Any and all documents which support your contention that Plaintiff fails to state a claim upon which relief may be granted.

Diamond’s Response: Diamond Aircraft incorporates by reference each of the General Objections. Subject to and without waiver of the foregoing objections, and without limitation, Diamond Aircraft refers Plaintiff to the document attached to Plaintiff’s Complaint as Exhibit “A” and the documents produced in connection with Defendant’s Rule 26(a)(1) Initial Discovery Disclosures.

Plaintiff’s Request for Production No. 15: Any and all documents which support your contention that Plaintiff waived and released his claims against Diamond except for return of his deposit.

Diamond’s Response: Subject to the General Objections and without waiving them, Diamond Aircraft incorporates by reference its response to Request No. 14 of Plaintiffs’ First Request to Produce to Defendant.

Plaintiff’s Request for Production No. 16: Any and all documents which support your contention that Plaintiff was aware that the design of the Aircraft was not complete and that both the price and specifications of the Aircraft were only “preliminary estimates subject to change.”

Diamond’s Response: Diamond Aircraft incorporates by reference each of the General Objections. Subject to and without waiver of the foregoing objections, Diamond Aircraft refers Plaintiff to the document attached to Plaintiff’s Complaint as Exhibit “A” and the documents produced in connection with Defendant’s Rule 26(a)(1) Initial Discovery Disclosures, specifically Plaintiff’s letter to Kathy Wood of Diamond Aircraft, dated March 14, 2003 in which Plaintiff states, “I require a guarantee of a price reduction to the lowest announced

price if, at any time until my delivery date, a lower price is announced.” See Horowitch Letter, DAI0017. Diamond Aircraft further responds that it will produce non-privileged responsive documents in its possession.

These narrowly tailored Requests seek documents that clearly relate to the claims and defenses of the parties and are likely to lead to the discovery of admissible evidence. As such, Diamond’s objections to providing a full and complete response are inappropriate. In responding to each of these Requests, Diamond incorporates its general objections and then directs Plaintiff to documents produced in response to its initial disclosures. Subsequent to Plaintiff’s good faith letter to Diamond regarding these discovery responses, Diamond produced a few more documents responsive to these requests but has yet to indicate that it has produced all documents called for in the Requests, despite Plaintiff’s requests that it do so.

Diamond should be compelled to fully respond by producing all documents responsive to these Requests or to confirm that they have no additional documents responsive to these requests.

g. Request for Production Nos. 2, 12, and 21.

Each of the following Requests concern documents related to the price of the D-Jet. Request for Production No. 2 seeks all documents relating to Diamond’s decision to raise the base price of the D-Jet. Request No. 12 asks for internal and external Diamond documents regarding the price changes for the Aircraft. Request No. 21 seeks documents sufficient to show modifications made to the Aircraft that caused the base price to change from \$850,000 to \$1,380,000.

Plaintiff’s Request for Production No. 2: All documents referring to, relating to, or regarding the decision to increase the list or base price of the Aircraft from \$850,000 to \$1,380,000.

Diamond’s Response: Diamond Aircraft incorporates by reference each of the General Objections. Diamond Aircraft objects to Request No. 2 because it is

overly broad, unduly burdensome, and seeks documents that are not relevant to any claim or defense of any party. Diamond Aircraft further objects to Request No. 2 to the extent it calls for the production of documents containing proprietary, confidential, or trade secret information, without agreement upon and entry of a suitable confidentiality order.

Plaintiff's Request for Production No. 12: Any and all documents internal to Diamond or external with third-parties regarding price changes on contracts for the sale of the Diamond Single Engine Jet Aircraft.

Diamond's Response: Diamond Aircraft objects to Request No. 12 to the extent it seeks documents that reflect privileged communications between Diamond Aircraft and its attorneys, Diamond Aircraft further objects on grounds that Request No. 12 is duplicative of Request No. 2 and is not relevant or reasonably calculated to lead to the discovery of admissible evidence. Diamond Aircraft also objects to Request No. 12 to the extent it calls for the production of documents containing proprietary, confidential, or trade secret information, without agreement upon and entry of a suitable confidentiality order.

Plaintiff's Request for Production No. 21: Any and all documents sufficient to show the changes and/or modifications made to the specifications and/or design of the Aircraft that Diamond contends caused the base price to increase from \$850,000 to \$1,380,000.

Diamond's Response: Diamond Aircraft objects to Request No. 21 on grounds that the Request is duplicative of Request Nos. 2 and 12. Diamond further objects on grounds that Request No. 21 is overly broad, unduly burdensome, and not relevant or reasonably calculated to lead to the discovery of admissible evidence. Diamond Aircraft also objects to the extent that Request No. 21 implies that Diamond Aircraft "contends" that the base price of the Aircraft increased due to changes or modifications to the specifications for the Aircraft.

Diamond objects to these Requests on several grounds, including over broadness, burdensomeness, and that these documents do not relate to a claim or defense of either party. Diamond's decision to raise the price of the D-Jet and to breach the Contract bears directly upon Plaintiff's claims for breach of contract, breach of the covenant of good faith and fair dealing, and Diamond's unfair trade practices. Moreover, documents regarding the changes to the specifications of the D-Jet bear directly upon these claims as well.

Diamond claimed in its discovery responses that it also objected to production of documents responsive to Request Nos. 2 and 12 until a suitable confidentiality order was entered.

Plaintiff has provided Diamond with a proposed confidentiality agreement, invited Diamond's comments to that agreement, and further invited Diamond to provide an alternative to that confidentiality agreement if necessary. [See Dempsey Affidavit attached hereto at Exhibit D]. Instead of even considering Plaintiff's confidentiality agreement, Diamond is now just ignoring this aspect of its discovery responses. [Id.]

Diamond should be compelled to produce all non-privileged documents in its possession responsive to Request Nos. 2, 12, and 21. If entry of a confidentiality agreement is a necessary requirement to doing so, Diamond must work towards that end. Plaintiff is willing to cooperate in putting in place the necessary protections for any legally protectable material.

h. Request for Production Nos. 5 and 10.

Diamond's responses to Request Nos. 5 and 10 are perhaps the most frustrating examples of Diamond's stonewalling in this discovery process. Regarding these clear, unambiguous, and narrowly tailored Requests, Diamond objects that they are "so overbroad and vague as not to be susceptible of reasoned interpretation."

Plaintiff's Request for Production No. 5: All documents referring to, relating to, or regarding the letter Diamond sent to Dr. Horowitch on August 31, 2006, a copy of which is attached as Exhibit C to the Complaint.

Diamond's Response: Diamond Aircraft incorporates by reference each of the General Objections. Diamond Aircraft further objects to Request No. 5 on grounds that it is so overbroad and vague as not to be susceptible of reasoned interpretation.

Plaintiff's Request for Production No. 10: All documents referring to, relating to, or regarding the drafting of the Contract, the form of the Contract, and the enforceability of the Contract.

Diamond's Response: Diamond Aircraft objects to Request No. 10 on grounds that it is vague as not to be susceptible of reasoned interpretation. Diamond Aircraft further objects to the extent it seeks documents that constitute or reflect privileged communications between Diamond Aircraft and its attorneys and/or attorney work product.

Regarding Request No. 5, Plaintiff must ask “how could this Request be any clearer?”

Plaintiff seeks all documents related to the very letter in which Diamond announces to Plaintiff that it is breaching the Contract. Similarly, Regarding Request No. 10, Plaintiff simply requests documents related to the drafting, form and enforceability of the very Contract at issue in Plaintiff’s Complaint. Such documents are entirely relevant to the case at issue, all of Plaintiff’s claims, and presumably Diamond’s defenses.

Diamond should be compelled to produce all documents in its possession responsive to these Requests.

i. Request for Production Nos. 9 and 11.

The documents that Plaintiff seeks in these Requests include documents related to the negotiation of the Contract (RFP No. 9) and Diamond’s decision to accept Plaintiff’s offer or other similar offers (RFP No. 11).

Plaintiff’s Request for Production No. 9: All documents referring to, relating to, or regarding the negotiation of the Contract.

Diamond’s Response: Diamond Aircraft incorporates by reference each of the General Objections. Diamond Aircraft further objects on grounds that Request No. 9 is vague and overbroad. Subject to and without waiver of the foregoing objections, Diamond Aircraft refers Plaintiff to the documents it produced in connection with Defendant’s Rule 26(a)(1) Initial Discovery Disclosures.

Plaintiff’s Request for Production No. 11: All documents referring to, relating to, or regarding the decision of Diamond to accept Dr. Horowitch’s offer to purchase the Aircraft and to accept other similar offers by other purchasers.

Diamond’s Response: Diamond Aircraft objects to Request No. 11 to the extent it seeks documents relating to Diamond Aircraft’s decision to accept similar offers by other purchasers because said Request is not relevant or reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiver of the foregoing objections, Diamond Aircraft refers Plaintiff to the documents it produced in connection with Defendant’s Rule 26(a)(1) Initial Discovery Disclosures.

Without question, these Requests relate to Plaintiff's claims for breach of contract, breach of the covenant of good faith and fair dealing, and unfair trade practices. Rather than respond to these requests, Diamond objects that they are vague, overbroad (RFP No. 9) and not reasonably calculated to lead to the discovery of admissible evidence (RFP No. 11). To the contrary, these requests are clear, narrowly tailored and attempt to gather evidence related to the Plaintiff's claims. Certainly the negotiation of the very Contract that Diamond breached and Diamond's decisions related to that Contract are conditions and circumstances that surround the Contract, and are thus discoverable. See City of Tampa, 902 So.2d at 914 ("In construing a contract, the intent of the parties should be determined from the words of the contract as a whole. The court also should consider the conditions and circumstances surrounding the parties and the objects to be obtained in executing the contract."). Certainly the similar transactions that Diamond was pursuing at the time Diamond entered the Contract at issue bear on the conditions and circumstances surrounding the Contract at issue.

j. A Privilege Log.

If documents are being withheld on the basis of any privilege, a privilege log should be provided to Plaintiff pursuant to Rule 26 of the Federal Rules of Civil Procedure. No such log has been provided by Diamond and, in the absence of such a log, any alleged privileged documents must be produced.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court grant this Motion to Compel and order Diamond to fully respond to Plaintiff's discovery requests as set forth above. Additionally, Plaintiff respectfully requests that the briefing schedule on this Motion to Compel be expedited so that the Plaintiff can pursue the depositions of Diamond representatives as soon as possible.

Dated this 27th day of February, 2007.

/s/ Jennifer B. Dempsey

William V. Custer
Jennifer B. Dempsey
Powell Goldstein, LLP
One Atlantic Center
Fourteenth Floor
1201 West Peachtree Street, NW
Atlanta, GA 30309
(404)572-6600
Fax: (404)572-6999

Marc P. Ossinsky
Ossinsky & Cathcart, P.A.
2699 Lee Road, Suite 101
Winter Park, FL 32789
(407) 629-2484
Fax: (407)62-4429

Attorneys for Plaintiff Alan Horowitch

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

ALAN HOROWITCH,)
)
 Plaintiff,)
)
 v.)
)
 DIAMOND AIRCRAFT INDUSTRIES,)
 INC., a foreign corporation,)
)
 Defendant.)
 _____)

CASE NO. 6:06-cv-1703-ORL-19JGG

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically on the 27th day of February, 2007. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

This 27th day of February, 2007.

/s/ Jennifer B. Dempsey
William V. Custer
Jennifer B. Dempsey
Powell Goldstein, LLP
One Atlantic Center
Fourteenth Floor
1201 West Peachtree Street, NW
Atlanta, GA 30309
(404)572-6600
Fax: (404)572-6999

::ODMA\PCDOCS\ATL\1138361