

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

**DELIVERANCE POKER, LLC,**

**Plaintiff,**

vs.

**TILTWARE, LLC AND  
MICHAEL MIZRACHI,**

**Defendants.**

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

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

**PLAINTIFF’S FIRST MOTION FOR LEAVE TO AMEND AND  
FILE FIRST AMENDED COMPLAINT AND BRIEF IN SUPPORT**

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Deliverance Poker, LLC (“Plaintiff” or “Deliverance”), hereby submits *Plaintiff’s First Motion for Leave to Amend and File First Amended Complaint and Brief in Support* and would respectfully show this Court as follows:

**I. PROCEDURAL BACKGROUND**

1. Deliverance originally filed this suit on September 7, 2010 to redress breach of contract and tortious interference with existing contract per diversity jurisdiction.
2. On September 29, 2010, Defendant Michael Mizrachi [“Mizrachi”] served his Answer on Deliverance.
3. On October 8, 2010, Plaintiff filed its Notice of Voluntary Dismissal Without Prejudice as to Defendant Tiltware, LLC [“Tiltware”].

## II. SUMMARY OF AMENDMENT

4. Plaintiff seeks leave to amend to remove Tiltware as a named Defendant herein (Tiltware has already been removed as a party by virtue of Plaintiff's Notice of Voluntary Dismissal Without Prejudice) and correspondingly remove all related causes of actions thereto. A true and correct copy of the proposed *Plaintiff's First Amended Complaint* is attached hereto as Exhibit A.

5. Furthermore, Mizrachi has conducted himself as if the Deliverance Contract were in full force and effect for approximately one year by 1) accepting the benefits associated therewith (i.e. \$150,000 in cash, a 1.75% interest in Deliverance Poker, LLC, and expenses up to \$155,000) and 2) honoring his obligations under the contract (by playing in poker tournaments and wearing Plaintiff's logos on his clothes). However, Defendant Mizrachi's Answer for the first time asserts that the Deliverance Contract never became effective and was therefore terminated.

6. Accordingly, Plaintiff, in its First Amended Complaint, pleads additional facts specifically addressing the Effective Date. Plaintiff specifically alleges that it fully satisfied all requirements for rendering the Deliverance Contract effective; however in the unlikely event it were found that Plaintiff did not strictly comply with the requirements for rendering the contract effective, Plaintiff includes the additional/alternative theories for enforcing the contract (namely, waiver, ratification, and estoppel). Defendant 1) has waived any claim that he might have had that the contract never became effective by accepting the benefits under the contract and honoring the contract for approximately one year; 2) has ratified the existence of the contract; and 3) deliberately, and with full knowledge, induced others to rely on the existence of the contract and therefore must be estopped from claiming otherwise.

### III. GROUNDS FOR MOTION

5. FED. R. CIV. P. 15(a) provides, in part:

“[A] party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within twenty (20) days after it is served. Otherwise, a party may amend the party’s pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.”

6. The grant or denial of leave to amend is within the discretion of the trial court (*Foman v. Davis*, 371 U.S. 178, 182 (1962)); however, such discretion is limited by Rule 15(a), in that it indicates that “leave shall be freely given when justice so requires.” FED. R. CIV. P. 15(a); *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 597 (5<sup>th</sup> Cir. 1981). Rule 15(a) complements the underlying policies of the Federal Rules in that pleadings are only a means to facilitate a decision on the merits rather than on mere technicalities. *See Foman*, 371 U.S. at 182; *Dussouy*, 660 F.2d at 598; CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1473. Rule 15(a) provides for a liberal amendment policy which is limited by consideration of judicial economy and fairness to the non-movant. *Nance v. Gulf Oil Corp.*, 817 F. 2d 1176, 1180 (5<sup>th</sup> Cir. 1987).

7. Unless there is a substantial reason to deny leave to amend, the discretion of the trial court is not broad enough to permit denial. *Dussouy*, 660 F.2d at 598. Factors which may justify denial of a motion for leave to amend include “undue delay, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party, and futility of amendment.” *Foman*, 371 U.S. at 182. A trial court may also consider judicial economy and the most expedient way to dispose of the merits of the litigation when considering a motion for leave to amend. *Dussouy*, 660 F.2d at 598.

In the absence of any reasons which might justify denial of a motion for leave to amend, leave to amend should be freely given. *Foman*, 371 U.S. at 182.

8. A motion for leave to amend can be made at any stage of litigation, and if no prejudice is found, leave will normally be granted. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1484. In fact, leave to amend has been granted at some of the latest stages of litigation, including post-discovery, post-pretrial conferences, at a hearing on a motion to dismiss, at a hearing on a motion for summary judgment, after a motion to dismiss has been granted, when the case is on the trial calendar and a hearing is already set, at the beginning, end, and/or close of trial, after entry of judgment, and even on appeal. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1488 and cases cited therein at n.3-12.

9. Leave to amend is appropriate where a plaintiff can simply file a new action to assert the requested additional claim; otherwise denial of leave to amend would violate the directive in FED. R. CIV. P. 1 to construe the rules so as to ensure the just, speedy, and inexpensive determination of every action. *See Dussoy*, 660 F.2d at 600. Further, where amendment would do no more than state an alternative theory of recovery, the amendment should be granted. *See Foman*, 371 U.S. at 182. Finally, if the trial court can impose certain conditions in order to protect the party opposing the amendment from any possible prejudice that might result from the amendment, then there is no justifiable reason for not allowing the amendment. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1486.

10. Amendments to pleadings should be liberally allowed in order to the achieve the ends of justice. *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 158 (1964). The underlying policy of FED. R. CIV. P. 15(a) is to freely allow amendments unless the rights of an adverse party would be

unduly prejudiced, and this policy is certainly the strongest where the motion concerned is the party's first motion to amend. *Thompson v. New York Life Ins. Co.*, 644 F.2d 439, 444 (5<sup>th</sup> Cir. 1981) (citations omitted).

11. In this case, granting leave to amend is appropriate because none of the factors which might justify denial of the motion are present. *See Foman*, 371 U.S. at 182 (listing factors). Plaintiff has not exhibited any undue delay, bad faith, or dilatory motive in filing this motion. There has been no repeated failure to cure deficiencies by previously allowed amendments. This is Plaintiff's first motion to amend its complaint. Defendant Mizrachi will not be unduly prejudiced by these amendments. First, this motion is being timely filed before the Court. Second, the parties have not exchanged any discovery and have the entire discovery period remaining.

12. Allowing amendments in this case will promote judicial economy and the underlying purpose of the Federal Rules to promote the just, speedy and inexpensive termination of this action. See FED. R. CIV. P. 1.

#### **IV.CONCLUSION AND PRAYER**

For the above reasons, this Court should grant *Plaintiff's First Motion for Leave to Amend and File First Amended Complaint and Brief in Support* and allow Plaintiff to file its *First Amended Complaint* (a true and correct copy is attached hereto as Exhibit A) with the other papers in this case.

WHEREFORE, Plaintiff respectfully prays that this Court grant *Plaintiff's First Motion for Leave to Amend and File First Amended Complaint and Brief in Support* and allow Plaintiff to file its *First Amended Complaint*.

Respectfully submitted,

By:           /s/ William Pieratt Demond          

**William Pieratt Demond**  
Texas State Bar No. 24058931  
**CONNOR & DEMOND, PLLC**  
701 Brazos Street, Suite 500  
Austin, Texas 78701  
Telephone: (512) 917-2111  
Facsimile: (512) 519-2495  
Email: [william.demond@connordemond.com](mailto:william.demond@connordemond.com)  
**ATTORNEY FOR PLAINTIFF**  
**DELIVERANCE POKER, LLC**

**Richard E. Gray, III**  
Texas State Bar No. 08328300  
**Douglas M. Becker**  
Texas State Bar No. 02012900

**John D. Jacks**  
Texas State Bar No. 00785986  
**GRAY & BECKER, P.C.**  
900 West Avenue  
Austin, Texas 78701  
Telephone: (512) 482-0061  
Facsimile: (512) 482-0924  
**CO-COUNSEL FOR PLAINTIFF**  
**DELIVERANCE POKER, LLC**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 15<sup>th</sup> day of October 2010, I electronically filed the above and foregoing *Plaintiff's First Motion for Leave to Amend and File First Amended Complaint and Brief in Support* with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following counsel for Defendant:

John P. Henry  
The Law Offices of John Henry, P.C.  
P.O. Box 1838  
Round Rock, Texas 78680

          /s/ William Pieratt Demond            
William Pieratt Demond

**CERTIFICATE OF CONFERENCE**

This certifies that undersigned counsel conferred with Counsel for Defendant, Michael Mizrachi, in compliance with Local Rule 7(h). On October 15<sup>th</sup>, William Pieratt Demond, Counsel for Plaintiff, conferred with John P. Henry, Counsel for Defendant, Michael Mizrachi, via telephone regarding *Plaintiff's First Motion for Leave to Amend and File First Amended Complaint and Brief in Support*. Mr. Henry indicated that Defendant does not oppose the relief requested in this Motion.

/s/ William Pieratt Demond

William Pieratt Demond