

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

DELIVERANCE POKER, LLC,

Plaintiff,

vs.

MICHAEL MIZRACHI,

Defendant.

§
§
§
§
§
§
§
§
§

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

PLAINTIFF’S FIRST AMENDED COMPLAINT

A. Parties

1. Plaintiff, Deliverance Poker, LLC (“Deliverance”), is a corporation that is organized under the laws of and has its principal place of business in the State of Texas.

2. Defendant, Michael Mizrachi (“Mizrachi”), is an individual and a citizen of the State of Florida. He can be served with process at 12879 SW 51st Street, Miramar, Florida 33027-5807. He has already filed an answer.

B. Jurisdiction

3. The court has jurisdiction over this lawsuit under 28 U.S.C. §1332(a) (1) because the Plaintiff and Defendant are citizens of different states and the amount in controversy exceeds \$75,000.00, excluding interest and costs.

4. The court has supplemental jurisdiction over Plaintiff’s requests for a preliminary injunction against Defendant under 28 U.S.C. §1367 because Plaintiff’s claims are so related to the claims within the court’s original jurisdiction that they form part of the same case or controversy under Article 3 of the U.S. Constitution. More specifically, Plaintiff’s request for a preliminary injunction against Defendant is directly and inextricably related to the other cause of

action (breach of contract) over which this Court has original jurisdiction.

C. Venue

5. Venue is proper in the Western District of Texas, Austin Division, pursuant to 28 U.S.C. Section 1391 because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.

6. Additionally, venue is proper in the Western District of Texas because the suit includes a claim for breach of a contract and the contract includes a valid and binding forum selection clause establishing jurisdiction and venue in this District.

D. Conditions Precedent

7. All conditions precedent have been performed or have occurred.

E. Facts

8. Defendant is a professional poker player. Defendant has been recognized for his exceptional and unique knowledge, skill and talent for playing poker.¹ Defendant's website—www.michaelmizrachi.com—lists his numerous achievements as a professional poker player.² For example, in 2006, CardPlayer magazine named Defendant its Player of the Year.³ Defendant has also been nicknamed “The Grinder” for his solid, consistent style of play that has earned him great success as a professional poker player. More recently, in the summer of 2010, at the World Series of Poker (“WSOP”), Defendant had even more success. He won the WSOP \$50,000 Player's Championship.⁴ Even more impressive, Defendant is one of nine players out of

¹ <http://www.michaelmizrachi.com> (attached pages from Defendant's website demonstrate Defendant's unique talent and marketing potential).

² *Id.*

³ <http://www.cardplayer.com/press/34-card-player-magazine-crowns-michael-the-grinder-mizrachi-as-2006-player-of-the-year>; <http://www.michaelmizrachi.com> (attached pages from Defendant's website demonstrate Defendant's unique talent and marketing potential).

⁴ The “50,000” refers to the amount of the “buy-in” or fee to enter the tournament. Obviously, the reward for winning such an event is many multiples of the buy-in.

more than 7,300 entrants to advance to the final table of the WSOP “Main Event,” commonly considered the most prestigious title of all poker tournaments.⁵ Defendant’s success in the WSOP and other tournaments guarantees that he will be seen on television worldwide. In fact, ESPN regularly runs replays of the earlier rounds of the WSOP Main Event, which can be seen several times each week. Defendant’s talent and celebrity status among poker players makes him a highly attractive person for marketing purposes.

9. Defendant has not always been so successful. In early 2009, Defendant was having significant financial problems. Plaintiff and Defendant executed a written contract on or about July 12, 2009 (“Deliverance Contract”). A true and correct copy of the Deliverance Contract is attached hereto as Exhibit A and incorporated by reference as if quoted verbatim herein. Said contract provided that Plaintiff would 1) pay Defendant Mizrachi \$150,000.00, 2) provide a membership interest of 1.75% in Plaintiff’s corporation, and 3) advance up to \$155,000 in expenses for Defendant and his brothers (Robert, Eric and Daniel) related to poker tournaments in which Defendant would participate. Said contract further provided that Defendant Mizrachi would compete in tournaments, make personal appearances to promote Plaintiff’s website, exclusively wear memorabilia promoting Plaintiff’s website, and give interviews supporting Plaintiff. In addition, Defendant agreed to pay to Plaintiff 25% of his winnings that, in the aggregate, exceeded \$1,000,000. Plaintiff paid, and Defendant willingly accepted, the \$150,000 in cash. Furthermore, Plaintiff accepted the assignment of 1.75% interest in the company. Throughout 2009, Plaintiff paid, and Defendant willingly accepted, payment of his expenses in

⁵ The WSOP Main Event costs \$10,000 to enter, which means the tournament has in excess of \$73,000,000 in prize money to pay. The winner will receive approximately \$9,000,000. Being one of the final nine players guarantees that Defendant will win, at a minimum, in excess of \$800,000. The tournament began in June 2010 and the field of players is narrowed over several days to the final nine players. The tournament is then recessed until November—this year, November 6 and 8, 2010—for the conclusion, which will be televised live on ESPN.

connection with playing in poker tournaments.

10. The Deliverance Contract included a clause that stipulated that it would be effective upon the closing by Deliverance of an offering of debt or equity interests in Deliverance which raised no less than One Million Dollars [“Effective Date”]. The Deliverance Contract was set to terminate if the Effective Date was not triggered by August 24, 2009. On July 24, 2009, Plaintiff entered into a contract with Sabre, LLC, wherein Sabre invested \$1,200,000 into Deliverance Poker, LLC, in the form of software necessary for Plaintiff’s business in exchange for 8% of the company’s stock.⁶ This transaction satisfies the Effective Date clause and therefore, the Effective Date of the Deliverance Contract was triggered on July 24, 2009.

11. Furthermore, investors invested in Deliverance due to 1) Defendant’s unique and special talents that they knew would likely garner a lot of attention for the business and 2) Plaintiff’s ongoing contractual relationship therewith. Defendant knew or should have known that Plaintiff would use Defendant to attract investors to its company and to build up its website.

12. Defendant honored the Deliverance Contract until approximately July 2010. During this time, he played in over 20 tournaments on behalf of Plaintiff. During these tournaments, he wore hats and other items that prominently featured Plaintiff’s name and logo. Defendant also willingly accepted the benefits under the contract—the \$150,000, the interest in Deliverance, LLC, and the expenses for poker tournaments for Defendant and brothers.

13. As noted above, Defendant had great success in the summer 2010 at the WSOP and garnered much attention for himself. In or around July 2010, Defendant telephoned Carlos Benavides, III, the managing member of Deliverance, LLC, and informed him of his intention to breach his contract with Plaintiff—that is, Defendant recognized he was under contract with

⁶ Each percentage in Deliverance Poker, LLC is valued at and sold for \$150,000. Sabre actually contributed the software in exchange for payment of \$400,000 and an 8% interest in Deliverance, LLC.

Plaintiff as the purpose for the phone call was to attempt to be released from the contract—and enter into a contract with Tiltware. Tiltware is an established competitor of Plaintiff. It is apparent that Defendant did, in fact, enter into a contract with Tiltware as he can routinely be seen on ESPN replays of the 2010 WSOP in which Defendant is wearing the garb of Tiltware, commonly known as Full Tilt Poker. In other words, Defendant replaced Plaintiff as his sponsor with Full Tilt Poker and is now advertising for Full Tilt Poker.

14. Furthermore, as noted above, Defendant is one of nine of more than 7,300 entrants that has advanced to the Final Table at the World Series of Poker, which will be televised live on ESPN on November 6th and 8th, 2010. The Final Table is arguably the most publicized annual event in the world of professional poker. It is only because of Defendant's exceptional and unique talent that he has made this achievement. Tiltware obviously recognizes the unique opportunity to advertise its business as it has induced Defendant into breaching his contract with Plaintiff so that Defendant can advertise its business during this premier event. The loss of the exceptional and unique talents of Defendant, coupled with his success at this premier event, will cause Plaintiff irreparable harm if not enjoined.

F. Breach of Contract

15. The foregoing paragraphs are incorporated herein as if quoted verbatim.

16. The Deliverance Contract provided specific obligations that would be performed by both Plaintiff and Defendant. Plaintiff has performed its obligations under the contract. To the extent Defendant argues that Plaintiff failed to perform its obligation to cause the Deliverance Contract to become effective, Defendant 1) has waived the time requirements by accepting the benefits of the contract and recognizing the contract by performing under it for approximately one year; 2) ratified the existence of the Deliverance Contract by accepting the benefits thereunder and

recognizing the contract by performing under it for approximately one year; and 3) must be estopped from claiming the non-existence of the Deliverance Contract by accepting the benefits thereunder and recognizing the contract by performing under it and encouraging the investment in Plaintiff based on his agreement to provide his services to Plaintiff.

17. Defendant, however, has not performed his contractual obligations. Specifically, Defendant has failed to honor the provision that he would “(e)xclusively wear site logoed shirts and caps during all Tournaments and Public Appearances.” Defendant’s nonperformance is a breach of the parties’ contract.

18. Additionally, Defendant has breached the provision granting Plaintiff the exclusive right to Defendant’s name, voice, and likeness.

19. Plaintiff has incurred unliquidated damages in excess of \$75,000.00 as a result of Defendant’s nonperformance and breaches of contract.

G. Damages

20. As a direct and proximate result of Defendant’s conduct, Plaintiff suffered injuries and damages including but not limited to lost earnings, lost profits, and loss of earning capacity.

H. Attorney Fees & Costs

21. Plaintiff is entitled to an award of attorney fees and costs under Texas Civil Practice and Remedies Code §38.001.

Prayer

WHEREFORE, for these reasons, Plaintiff asks for judgment against Defendant for the following:

1. Actual damages;

2. A temporary injunction and Permanent Injunction (requested in a separate application);
3. Prejudgment and postjudgment interest;
4. Reasonable attorney fees;
5. Costs of suit; and
6. All other relief the court deems appropriate.

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
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

