

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

DELIVERANCE POKER, LLC,

Plaintiff,

v.

MICHAEL MIZRACHI,

Defendant.

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

**PLAINTIFF’S PARTIALLY UNOPPOSED MOTION FOR LEAVE TO
AMEND COMPLAINT AND MEMORANDUM IN SUPPORT**

Plaintiff Deliverance Poker, LLC (“Deliverance Poker”) requests leave of court to amend its First Amended Complaint.

A. Introduction

1. Deliverance Poker sued Defendant Michael Mizrachi (“Mizrachi”) and Tiltware, LLC (“Tiltware”) on September 7, 2010, seeking, among other things, a temporary restraining order and a preliminary injunction in order to restrain an ongoing violation of a personal services contract. The Court denied the application for temporary restraining order on September 9, 2010, as well as an amended application for temporary restraining order on September 14, 2010.

2. On September 29, 2010, Mizrachi filed his Original Answer. On October 8, 2010, Deliverance Poker voluntarily dismissed without prejudice Tiltware prior to Tiltware being served with process or an answer or other pleading being filed by Tiltware.

3. The Court subsequently rescheduled the hearing on Deliverance Poker’s application for preliminary injunction for November 9, 2010, after counsel failed to timely provide notice of an earlier hearing date. Deliverance Poker withdrew its application for

preliminary injunction when a hearing could not be scheduled at a time that would prevent additional harm to Deliverance Poker.

4. Counsel for Deliverance Poker and counsel for Mizrachi conferred today regarding scheduling and other matters in accordance with the Federal Rules of Civil Procedure. Mizrachi is not opposed to Deliverance Poker's request to amend its complaint in order to add Tiltware as a defendant. Mizrachi opposes the request of Deliverance Poker to amend its complaint as the amendments affect Mizrachi, but only due to the uncertainty of discovery and other scheduling deadlines caused by uncertainty as to whether Tiltware will be added as a defendant.¹

5. This case is not set the case for trial, and the parties have today filed a Joint Motion for Leave to Submit Proposed Scheduling Order Required by Local Rule CV-16(c). Other than submitting the initial disclosures, which are due shortly, there are no other pending deadlines or other matters scheduled such as hearings or depositions.

B. Argument & Authorities

5. Deliverance Poker seeks to amend its complaint a second time in order to add Tiltware as a defendant and to refine the factual allegations contained in Plaintiff's First Amended Original Complaint. As to adding Tiltware as a defendant, research reveals that the Court has personal jurisdiction over this California limited liability company due to Tiltware's operation of a highly interactive website in the State of Texas. *E.g., Mink v. AAAA Development, LLC*, 190 F.3d 333 (5th Cir. 1999) (noting personal jurisdiction proper "where a defendant clearly does business over the Internet by entering into contracts with residents of other states which 'involve the knowing and repeated transmission of computer files over the Internet . . .'"

¹ The undersigned provided a copy of the proposed Plaintiff's Second Amended Complaint approximately one week ago.

(quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D. Pa. 1997); *The Kelly Law Firm, P.C. v. An Attorney for You*, 679 F.Supp.2d 755, 764 (S.D. Tex. 2009).² In addition, further investigation has revealed that the factual allegations should be refined.

6. Federal Rule of Civil Procedure 15(a) provides, among other things that “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.” The Supreme Court has noted that a court should grant leave to file an amended pleading unless the opposing party can show prejudice, bad faith, or undue delay. *See Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962). *See also Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 597 (5th Cir. 1981). In addition, in deciding whether to grant leave to amend, the Fifth Circuit Court of Appeals has held that the district court should consider judicial economy and the most expedient way to dispose of the litigation. *See Dussouy*, 660 F.2d at 598. Leave to amend is appropriate where a party may file a new or separate action to assert the additional claim and is in keeping with the directive of Federal Rule of Civil Procedure 1 that the Rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” *See also Dussouy*, 660 F.2d at 600.

7. In this case, Deliverance Poker seeks to amend its complaint in order to add Tiltware as a defendant. Mizrachi does not oppose the addition of Tiltware as a defendant, but does oppose the motion to amend the complaint as to him, but only due to the uncertainty of whether Tiltware will be a party to this case and concomitant involvement of Tiltware. The amendment is being requested early in the case so as not prejudice any party or cause undue

² Tiltware’s continued and knowing contacts with Texas residents allow them to play online poker on its website. This is the type of “highly interactive” website that has been held to provide general personal jurisdiction over the company hosting the website. *See Uebler v. Boss Media, AB*, 363 F.Supp.2d 499, 505-06 (E.D. N.Y. 2005) (holding personal jurisdiction over defendant proper because defendant hosted “highly interactive website because its primary function is to allow the customer to gamble over the internet.”).

delay. Deliverance Poker does not seek to amend its complaint for any improper motives, but only so that all claims against Mizrachi and Tiltware may be resolved expeditiously and efficiently as possible.

8. The claims against Tiltware are based on virtually the identical facts as the claims against Mizrachi. Indeed, Deliverance Poker claims Mizrachi breached a personal services contract. Deliverance Poker's claim against Tiltware is that it tortiously interfered with that same personal services contract by inducing Mizrachi to breach the contract. A substantial majority of the same facts relevant to the claim against Mizrachi will also be relevant to the claim against Tiltware. Permitting Deliverance Poker to amend its complaint to add the claim against Tiltware, instead of requiring Deliverance Poker to assert its claim in a separate proceeding, will certainly promote "the just, speedy, and inexpensive determination" of Deliverance Poker's claims. *See* Fed. R. Civ. P. 1; *Dussouy*, 660 F.2d at 600.

9. Allowing Deliverance Poker to amend at this stage of the proceeding, prior to any discovery taking place and prior to the setting of a trial date, will not cause undue delay or otherwise prejudice Tiltware.

10. Attached is Plaintiff's Second Amended Complaint that it will file upon leave being granted by the Court. Deliverance Poker will take prompt action to ensure that Tiltware receives prompt service of process.

For the foregoing, Plaintiff Deliverance Poker, LLC requests the Court to grant leave for it to file Plaintiff's Second Amended Complaint.

Respectfully submitted,

By: /s/ Douglas M. Becker

Douglas M. Becker

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COUNSEL FOR PLAINTIFF

DELIVERANCE POKER, LLC

CERTIFICATE OF CONFERENCE

I certify that on Monday, November 29, 2010, I conferred with John P. Henry, counsel for Defendant Michael Mizrachi, and he informed me that he does not oppose this motion to the extent leave is sought to add Tiltware, LLC as a defendant, but does oppose this motion as to the amendments affecting Defendant Michael Mizrachi, but only due to the uncertainty of discovery and other scheduling deadlines caused by uncertainty as to whether Tiltware, LLC.

/s/ John D. Jacks

John D. Jacks

CERTIFICATE OF SERVICE

I certify that on November 29, 2010, I caused Plaintiff's Motion for Leave to Amend and Memorandum In Support to be electronically filed 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/ John D. Jacks

John D. Jacks