

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

DELIVERANCE POKER, LLC,

§

Plaintiff,

§

§

v.

§

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

§

MICHAEL MIZRACHI and  
TILTWARE, LLC,

§

§

§

Defendants.

§

§

**PLAINTIFF’S MOTION FOR LEAVE TO AMEND  
SECOND AMENDED COMPLAINT AND MEMORANDUM IN SUPPORT**

Plaintiff Deliverance Poker, LLC (“Deliverance Poker”) requests leave of court to amend its Second 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. On November 29, 2010, Plaintiff filed its Partially Unopposed Motion for Leave to Amend Complaint, which was granted on December 7, 2010. Plaintiff sought to amend its First Amended Complaint in order to add Defendant Tiltware, LLC (“Tiltware”) and to refine its factual allegations.

5. On December 8, 2010, Plaintiff took appropriate steps to have Tiltware served with process. Counsel for Mizrachi filed an answer on behalf of Tiltware on January 11, 2011, raising approximately 23 affirmative defenses. *See* Defendant Tiltware, LLC’s Original Answer to Plaintiff’s Second Amended Complaint (Dkt. #42) (“Tiltware’s Answer”). Despite the fact that Tiltware only recently filed an answer in this case, it has been kept fully apprised of developments in this case since it was filed.<sup>1</sup>

6. The Court has set a deadline for filing motions for leave to amend or supplement pleadings on or before January 18, 2011, so this motion is timely. This case is set for trial on April 25, 2011. However, other than Plaintiff and Mizrachi exchanging initial disclosures and Plaintiff sending written discovery to Mizrachi, no other discovery has been conducted.

#### B. Argument & Authorities

7. Deliverance Poker seeks to amend its complaint a third time in order to attempt to address some of the affirmative defenses raised in Tiltware’s Answer and to add a claim for exemplary damages against Tiltware. Although asserted in a conclusory manner, Tiltware

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<sup>1</sup> For example, prior counsel for Plaintiff exchanged several emails concerning the lawsuit while seeking preliminary injunctive relief early in the case. *See* Advisory to the Court (Dkt. #20). *See also* Motion to Accelerate Hearing Date on Application for Preliminary Injunction (Dkt. #22); Plaintiff’s Request to Cancel Hearing on Application for Preliminary Injunction (Dkt. #24). Plaintiff’s counsel also engaged in significant telephone conference with Mr. Imrich and counsel for Defendants on December 16, 2010, to discuss scheduling.

asserts as one of its 23 affirmative defenses that Plaintiff has failed to assert any claim upon which relief can be granted. Plaintiff disagrees with Tiltware's assertion, but seeks to amend to add further factual allegations to address any possible deficiency there might be. In addition, Tiltware's conduct warrants exemplary damages and Plaintiff seeks to amend in order to seek such damages.

8. 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 (5<sup>th</sup> Cir. 1981).

9. Defendants cannot show prejudice, bad faith, or undue delay due in connection with Deliverance Poker's request to amend its complaint. This motion for leave to amend is filed within the deadline imposed by the Court's scheduling order. Moreover, the claims and issues in this case have been essentially the same since it was filed—the breach of the agreement between Mizrachi and Deliverance Poker and the tortious interference claim against Tiltware based on their involvement in enticing Mizrachi to breach his agreement. The addition of a claim for exemplary damages cannot be said to be a surprise to Defendants or in any way impair Tiltware's ability to defend against the claims in this suit. As noted, Tiltware filed its answer only on January 11, 2011, and it raised the issue of exemplary damages in one of its affirmative defenses. *See Tiltware's Answer* at 8 (par. 45(w)). In addition, the claim for exemplary damages is based on the same conduct on which Deliverance Poker has based its claims since this suit was

initially filed. Finally, we are still very early in the discovery process, so amendments cannot be said to cause any delay at all, much less undue delay, or prejudice to Defendants.

10. Attached is Plaintiff's Third Amended Complaint that it will file upon leave being granted by the Court.

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

Respectfully submitted,

By: /s/ Douglas M. Becker

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**COUNSEL FOR PLAINTIFF**

**DELIVERANCE POKER, LLC**

**CERTIFICATE OF CONFERENCE**

I certify that on Friday, January 14, 2011, I attempted to confer with counsel for Defendants by telephone and email and again on Monday, January 17, 2011, by telephone and letter, but counsel for Defendants has not responded to these inquiries and I have therefore not been able to determine whether Defendants oppose this motion or not. I will assume Defendants are opposed to this motion.

/s/ John D. Jacks

John D. Jacks

**CERTIFICATE OF SERVICE**

I certify that on January 17, 2011, I caused Plaintiff's Motion for Leave to Amend Second Amended Complaint 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 Defendants:

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