

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 THIRD AMENDED COMPLAINT

Plaintiff Deliverance Poker, LLC complains of Michael Mizrachi and Tiltware, LLC and for causes of action shows the Court the following:

A. Parties

1. Plaintiff Deliverance Poker, LLC (“Deliverance Poker”) is a limited liability company organized under the laws of the State of Texas.

2. Defendant Michael Mizrachi (“Mizrachi”), an individual who resides in the State of Florida, has been served with process and has appeared in this action. Further service of process is not necessary.

3. Tiltware, LLC (“Tiltware”) is a limited liability company organized under the laws of the State of California. Tiltware has appeared in this action, so further service of process is not necessary.

B. Jurisdiction

4. The Court has jurisdiction over this lawsuit under 28 U.S.C. § 1332(a)(1) because Deliverance Poker and defendants Mizrachi and Tiltware are citizens of different states and the amount in controversy exceeds \$75,000.00, excluding interests and costs. For purposes of

diversity jurisdiction, Deliverance Poker is considered a citizen of Texas because it is organized under the laws of the State of Texas and has its principal place of business in Texas. As noted above, Mizrachi is domiciled in Florida and is therefore considered a citizen of that state. Tiltware is considered a citizen of California because it is organized under the laws of the State of California and has its principal place of business in California.

C. Venue

5. Venue is proper in the Western District of Texas, Austin Division, under 28 U.S.C. § 1391, because a substantial part of the events or omissions giving rise to Deliverance Poker's claims occurred in this judicial district.

6. Deliverance Poker and Mizrachi included a forum selection clause in the contract that is the subject of this lawsuit that establishes jurisdiction and venue in the Western District of Texas, Austin Division. The parties' forum selection clause also supports venue in this judicial district.

D. Conditions Precedent

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

E. Facts

8. Mizrachi is a professional poker player who plays in poker tournaments worldwide and is a celebrity among poker players. Mizrachi calls himself "The Grinder" for his steady, consistent style of play. Two well-known magazines among poker players, CardPlayer and Ante Up, have provided extensive profiles of his rapid rise to stardom in the poker world. Mizrachi also has his own website in which he provides personal information as well as a history of his poker successes. CardPlayer magazine named Mizrachi Player of the Year for 2006, and Ante Up named Mizrachi Player of the Year for 2010. Mizrachi has

won or placed high in poker tournaments throughout the world, winning millions of dollars, as catalogued on his website and the articles written about him. More recently, Mizrachi won the \$50,000 Players Championship at the 2010 World Series of Poker (“WSOP”) for which he collected approximately \$1.6 million in winnings. Mizrachi was also one of nine players remaining in the Main Event of the WSOP, which began with more than 7,300 players. Mizrachi eventually finished in fifth place in the Main Event, winning \$2,332,992. The Main Event at the WSOP is considered the most prestigious poker tournament worldwide.

9. In 2007, Carlos Y. Benavides, III (“Benavides”) began developing the concept for an online poker website that would compete with two well-known sites, Full Tilt Poker, which is the brand name for Tiltware, and Poker Stars. Benavides called his concept, “Deliverance Poker,” and began developing the logos and branding for the new site and filed trademarks on a number of these. In November 2008, Benavides caused Deliverance Poker, LLC to be organized under the laws of the State of Texas. Benavides also began exploring options for obtaining software that would be necessary to operate such a website for Deliverance Poker. Benavides quickly discovered that such software could cost \$2,000,000 to \$5,000,000 or more. Benavides began negotiating for the purchase of the necessary software.

10. Benavides realized he needed a poker celebrity to endorse Deliverance Poker in order to attract people to the website and investors in the business. Benavides believed the person chosen to endorse Deliverance Poker also needed to have the ability to effectively compete in poker tournaments to gain attention for the new venture. Benavides believed this form of advertisement was essential to the success of Deliverance Poker.

11. In the spring of 2009, Benavides was introduced to Mizrachi and his brothers, Robert, Eric, and Daniel in Las Vegas, Nevada. Benavides already knew of Mizrachi from Mizrachi's many appearances on television in various poker tournaments and knew that Mizrachi had the exceptional and unique ability, skill, and knowledge to be one of the elite in the world of poker tournaments. Benavides also knew that Mizrachi was known by a nickname, "The Grinder" for his steady, consistent style of play, and that Mizrachi had made an extraordinary showing in 2005 WSOP by placing in seven different events. Benavides was familiar with Mizrachi's wins or high finishes in a number of well-known events attended by many of the top poker professionals. For example, Mizrachi had won the 2005 LA Poker Classic sponsored by the World Poker Tour, finished second in the Gold Strike World Poker Open in Tunica, won the 2006 Borgatta Winter Poker Open, as well as many others. Benavides knew that Mizrachi had been named Player of the Year in 2006 by CardPlayer magazine. In addition, Benavides believed Mizrachi projected a charismatic, confident image that would make him a great asset in marketing Deliverance Poker.

12. At the time that Benavides met with Mizrachi in the spring of 2009, Mizrachi was in need of money, as (a) he had not been having the success he had enjoyed in earlier times and (b) the Internal Revenue Service was seeking to collect several hundred thousand dollars from him in back taxes. Benavides explained his concept for Deliverance Poker to Mizrachi and his brothers, and they were all very eager to participate in the venture. Mizrachi stood to earn not only a significant amount of money just for agreeing to the deal, but also an interest in the company that could be worth a huge amount of money, if successful.

13. A contract was proposed, called, "Promotional Representation Agreement," and Mizrachi was permitted to review and obtain advice on the contract. On July 12, 2009, Mizrachi

signed the contract that is the subject of this lawsuit. The contract was executed by Benavides, on behalf of Deliverance Poker, on July 13, 2009. At this time, Deliverance Poker paid to Mizrachi \$60,000 of the \$150,000 to which he was entitled under the contract and conveyed to Mizrachi the 1.75% interest to which he was also entitled under the contract. Mizrachi gladly accepted the \$60,000 and did not raise any questions as to whether the contract had become “effective” under its terms. Importantly, Mizrachi was entitled to payment of the \$150,000 and conveyance of the 1.75% interest in Deliverance Poker only upon the Promotional Representation Agreement becoming effective under its terms.

14. Shortly after executing the contract with Mizrachi, and largely because Mizrachi had agreed to promote Deliverance Poker, Deliverance Poker was able to enter into a contract with Sabre Asset Management, S.A. (“Sabre”) for the software necessary to operate the website. In particular, on July 24, 2009, Sabre agreed to contribute the software necessary for the website in exchange for the payment of \$400,000 and an 8% equity interest in Deliverance Poker. The software was valued at more than \$1,000,000 as the interests in Deliverance Poker were valued at \$150,000 per percentage interest.

15. Benavides spoke frequently with Mizrachi about the progress of the business, and Benavides specifically told Mizrachi of the value of the software contributed by Sabre and the specifics of the agreement with Sabre. Benavides further informed Mizrachi of his efforts to promote Deliverance Poker around both Mizrachi’s name and his success as a poker professional and, in fact, the entire marketing of Deliverance Poker, both to investors and the public in general, was built around Mizrachi. Mizrachi did not (a) raise any objection whatsoever that the contribution of the software by Sabre did not render the contract with him effective or (b) raise any concerns that the contract was not effective. Mizrachi also did not have any objection to

building the Deliverance Poker brand around his name. Mizrachi began wearing the Deliverance Poker gear, in particular, the caps and shirts with the logos and name of Deliverance Poker prominently displayed, at poker tournaments and other public appearances. As part of the services Mizrachi provided under the Promotional Representation Agreement, Mizrachi allowed himself to be photographed and interviewed for use by Deliverance Poker in promoting the company.

16. Approximately three months after Mizrachi signed the agreement with Deliverance Poker, Deliverance Poker paid Mizrachi another \$30,000 toward the \$150,000 to which he was entitled under the contract. Again, Mizrachi gladly accepted the \$30,000 and did not register any complaint that the contract was not effective. Mizrachi continued wearing the Deliverance Poker gear as previously described.

17. In the fall of 2009, Bobby Wallace of Wallace International, a New York based company, proposed a deal that would have paid Deliverance Poker approximately \$1,000,000, but it would have required Deliverance Poker to abandon its agreement with Mizrachi and his brothers and work with a different concept for Deliverance Poker. Benavides refused to do so because Deliverance Poker had an agreement with Mizrachi, and Benavides intended to honor the agreement. Benavides actually informed Mizrachi of this offer. Mizrachi did not disagree that he had an agreement with Deliverance Poker, nor did Mizrachi tell Benavides that he should accept the other offer made by Bobby Wallace.

18. During this period of time, Deliverance Poker was working with Boss Creative, Inc. and Sabre to create the website, continuing to develop the brand through Mizrachi and his brothers, and planning for the launch of the website. Mizrachi continued wearing the Deliverance Poker gear as required under the Promotional Representation Agreement.

19. In June and July 2010, Mizrachi began competing at various events at the WSOP. Mizrachi won the \$50,000 Players Championship in early July 2010, which paid him approximately \$1.6 million. The next day, Mizrachi gave an interview with Ante Up magazine. In this interview, Mizrachi actively promoted Deliverance Poker, at one point stating, “Deliverance has a great logo and I think we have a legit (sic) shot. . . . The four [Mizrachi] brothers have joined together and I think it will be a great site. It’s gonna take a long time, but if there’s time and great marketing strategy I think we have a legitimate shot at competing with the other sites.”

20. In July 2010, Deliverance Poker paid to Mizrachi the remaining \$60,000 owed under the contract. Mizrachi again willingly accepted the money without mentioning, much less complaining, that the contract was not effective.

21. During the 2010 WSOP, Mizrachi had great success and became even more popular in the poker world. Benavides was delighted because Mizrachi’s success and popularity was exactly what Benavides had hoped would happen and he believed that the investment in Mizrachi would pay huge dividends in promoting Deliverance Poker.

22. It was also in July 2010 that Deliverance Poker planned the “soft launch” of its website, which is essentially a testing phase to make sure the website functioned properly. Deliverance Poker had planned the “hard launch” (meaning the fully operational launch) of the website for September 7, 2010, during the European WSOP. Benavides kept Mizrachi fully informed of the progress, testing dates, and plans to fully open the Deliverance Poker website on September 7, 2010. Mizrachi voiced no problems with the plans or his willingness to continue promoting Deliverance Poker as he had been doing since July 2009.

23. The Main Event of the WSOP, which is a \$10,000 buy-in, no-limit tournament, began on July 5, 2010. As noted above, this is considered the premier event in all of poker tournaments. Mizrachi began having success right away. On or about the fourth day of the Main Event, Benavides noticed that Mizrachi was not wearing the Deliverance Poker gear, which Benavides thought was odd because Mizrachi had been wearing Deliverance Poker's gear throughout the tournament to this point.

24. Representatives from Tiltware, upon seeing Mizrachi's success and with full knowledge that Mizrachi was under contract with Deliverance Poker to promote its website, intentionally, willfully, and maliciously interfered with the contract between Mizrachi and Deliverance Poker. Tiltware, aware that Deliverance Poker would present unwanted competition upon its entering the marketplace, particularly with a well-known sponsor such as Mizrachi, undermined that relationship by offering a contract to Mizrachi that would require Mizrachi to promote Full Tilt Poker to the exclusion of Deliverance Poker. The contract with which Tiltware enticed Mizrachi to breach his contract with Deliverance Poker paid substantially more in the near term than Mizrachi's contract with Deliverance Poker. Tiltware's conduct was tortious because it intentionally sought to have Mizrachi breach his contract with Deliverance Poker, and Tiltware's contract made it impossible for Mizrachi to fulfill his obligations under the contract with Deliverance Poker. Tiltware's conduct was also tortious because it was done for the improper purpose of eliminating a potential competitor in its field of business.

25. On or about the sixth day of the Main Event, Mizrachi called Benavides around noon, which is right before the WSOP tournament was to resume. Mizrachi started out by saying that he had been offered a deal by Full Tilt Poker, *i.e.*, meaning Tiltware, the actual company, and he explained the offer, which was essentially a graduated offer depending on how long

Mizrachi continued to progress in the Main Event. Benavides understood if Mizrachi made the final table of the Main Event, the deal with Tiltware would be worth approximately \$2,400,000. Mizrachi told Benavides, “My deal with Full Tilt Poker [Tiltware] won’t affect us [Deliverance Poker] because we’ve been getting good press.” Mizrachi fully acknowledged his contract with Deliverance Poker, but he made it clear that he was accepting Tiltware’s offer to promote Full Tilt Poker. Mizrachi said that he intended to go back to promoting Deliverance Poker once his run in the Main Event ended. Mizrachi further offered to pay Deliverance Poker 20% of what Tiltware paid him in order to compensate Deliverance Poker for working for Tiltware. Benavides told Mizrachi that he had an agreement with Deliverance Poker and that it would be devastating to Deliverance Poker if Mizrachi started promoting Tiltware in violation of the agreement. Benavides did not agree to allow Mizrachi to break his contract with Deliverance Poker and told Mizrachi that he did not agree, but Mizrachi made it clear that he was not asking for permission, but instead telling Benavides that he was taking the offer from Tiltware. Mizrachi also said that he would visit Benavides after he finished in the WSOP Main Event.

26. On or about July 17, 2010, the Main Event field was narrowed to nine players out of more than 7,300 entrants, and Mizrachi was one of the remaining nine players. After the field was narrowed to the final nine players, the tournament was recessed until November 6, 2010, in order to promote its broadcast of the tournament final. After the Main Event recessed, Mizrachi drove to Laredo to see Benavides regarding his agreement with Deliverance Poker. At this time, however, Mizrachi no longer planned to go back to promoting Deliverance Poker after the WSOP concluded in November 2010. Mizrachi did not say that he did not have an enforceable contract with Deliverance Poker, but instead threatened Benavides that the lawyers for Tiltware

would find a way for him to get out of his agreement with Deliverance Poker if Deliverance Poker complained.

27. The entire marketing strategy of Deliverance Poker had been built around Mizrachi, so after his defection to begin promoting Full Tilt Poker, Deliverance Poker and Sabre lost its potential investors. As a result, Sabre refused to go forward with the launch of the website, and Benavides also could no longer effectively seek additional investors in Deliverance Poker. Tiltware's strategy of undermining the ability of Deliverance Poker to compete with it had worked.

28. Upon the resumption of the Main Event of the WSOP, Mizrachi continued to wear the Full Tilt Poker logos and promote Full Tilt Poker in violation of his Promotional Representation Agreement with Deliverance Poker. Mizrachi eventually finished in fifth place in the Main Event, receiving \$2,332,992 in winnings.

F. Count 1 – Breach of Contract

29. The foregoing paragraphs are incorporated here by reference.

30. The Promotional Representation Agreement ("Agreement") provided specific obligations that would be performed by both Deliverance Poker and Mizrachi. Deliverance Poker has performed its obligations under the Agreement. To the extent Mizrachi claims that Deliverance Poker failed to perform its obligations under the Agreement, Mizrachi (a) waived any claimed deficiencies by accepting the benefits under the Agreement and by performing under it and inducing Deliverance Poker's reliance upon the Agreement; (b) ratified the existence of the Agreement by accepting the benefits under it and recognizing the Agreement by performing under it and inducing Deliverance Poker's reliance upon the Agreement; and (c) must be estopped from claiming the non-existence of the Agreement by accepting the benefits

under it and recognizing the Agreement and inducing Deliverance Poker's reliance upon the Agreement.

31. Mizrachi has not performed his obligations under the Agreement. Specifically, Mizrachi failed to honor his obligations under the Agreement to "[e]xclusively wear site logoed shirts and caps during all Tournaments and Public Appearances." As set out above, Mizrachi not only failed to honor his obligations under the Agreement, but he actively promoted the direct competitor of Deliverance Poker.

32. Mizrachi also breached the provision granting Deliverance Poker the exclusive right to his name, voice, and likeness.

33. Deliverance Poker has incurred unliquidated damages far in excess of \$75,000.00 as a result of Mizrachi's breach of the Agreement. Deliverance Poker is also entitled to recover its attorney fees for prosecuting this lawsuit.

G. Count 2 – Promissory Estoppel

34. The factual allegations paragraphs 7 – 28 are incorporated here by reference.

35. In the alternative to Deliverance Poker's breach-of-contract claim, Mizrachi is liable to Deliverance Poker under the doctrine of promissory estoppel. Mizrachi promised Deliverance Poker that he would perform under the Agreement. Deliverance Poker reasonably and substantially relied on the promise to its detriment, and Mizrachi reasonably foresaw that Deliverance Poker would rely on his promise—indeed, Mizrachi actively encouraged such reliance. Injustice can be avoided only by enforcing Mizrachi's promise to Deliverance Poker.

36. Deliverance Poker has incurred unliquidated damages far in excess of \$75,000.00 as a result of Mizrachi's failure to honor his promises as set forth above.

H. Count 3 – Money Had and Received and Unjust Enrichment

37. The factual allegations in paragraphs 7 - 28 are incorporated here by reference.

38. In the alternative to Deliverance Poker's breach-of-contract and promissory estoppels claims, Mizrachi is liable to Deliverance Poker for money had and received and unjust enrichment. Mizrachi obtained a benefit, *i.e.*, \$150,000 and interests in Deliverance Poker, from Deliverance Poker. In equity and good conscience, the benefits received by Mizrachi belong to Deliverance Poker and should be returned. Further, it would constitute an undue advantage for Mizrachi to be allowed to retain these benefits in light of his conduct in inducing Deliverance Poker's reliance on his promises and then actively promoting Deliverance Poker's competitor, effectively destroying Deliverance Poker's chance for success. Deliverance Poker is entitled to restitution in the amount Mizrachi was unjustly enriched and a constructive trust on those proceeds and interests in Deliverance Poker.

I. Count 4 – Tortious Interference with Existing Contract

39. The factual allegations in paragraphs 7 - 28 are incorporated here by reference.

40. Deliverance Poker had a valid and enforceable contract with Mizrachi, the Promotion Representation Agreement. Tiltware, with full knowledge of Mizrachi's contract with Deliverance Poker, willfully, intentionally, and maliciously interfered with this contract, which proximately caused Deliverance Poker injury.

41. Deliverance Poker incurred actually damages far in excess of \$75,000.000 as a result of Tiltware's tortious interference.

42. Deliverance Poker is also entitled to exemplary damages as a result of Tiltware's intentional, willful, and malicious conduct as set forth above.

J. Count 5 – Tortious Interference with Prospective Business Relations

42. The factual allegations in paragraphs 7 - 27 are incorporated here by reference.

43. In the alternative to Deliverance Poker's tortious-interference-with-existing-contract set out in Section H, *supra*, Tiltware is liable to Deliverance Poker for tortiously interfering with prospective business relations. If Mizrachi did not have an enforceable agreement to promote Deliverance Poker, Deliverance Poker had a prospective contractual relationship with Mizrachi of which Tiltware was aware since Mizrachi had been promoting and acting in accordance with the Promotional Representation Agreement for more than one year at the time Tiltware's interference with the relationship. Tiltware interference with Mizrachi's relationship with Deliverance Poker was tortious because it was done for the purpose of undermining Deliverance Poker's ability to conduct business and to eliminate a potential business competitor. Tiltware's conduct was without privilege or justification. Tiltware's interference with Deliverance Poker's relationship with Mizrachi caused Deliverance Poker injury as set forth above.

44. Deliverance Poker incurred actually damages far in excess of \$75,000.000 as a result of Tiltware's tortious interference with prospective business relations.

45. Deliverance Poker is also entitled to exemplary damages as a result of Tiltware's intentional, willful, and malicious conduct as set forth above.

For the foregoing reasons, Deliverance Poker prays for judgment against Mizrachi and Tiltware, jointly and severally, for the following:

- a. Actual damages;
- b. Exemplary damages;
- c. In the alternative, restitution and a constructive trust on the amount

- Mirzrachi was unjustly enriched;
- d. Prejudgment and postjudgment interest;
 - e. Reasonable and necessary attorney fees;
 - f. Costs of suit; and
 - g. All other relief the Court deems appropriate.

Respectfully submitted,

By: /s/ Douglas M. Becker

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CERTIFICATE OF SERVICE

I certify that on 1/17/2011, I caused Plaintiff's Third Amended Complaint 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 Michael Mizrachi and Tiltware, LLC:

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/s/ John D. Jacks

John D. Jacks