

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

DELIVERANCE POKER, LLC	§	
Plaintiff	§	
	§	
vs.	§	CIVIL ACTION NO. 1:10-CV-00664-JAN
	§	
MICHAEL MIZRAHI and	§	
TILTWARE, LLC	§	
Defendants	§	

**EXPEDITED MOTION TO DISMISS PURSUANT TO
FED. R. CIV. P. 12(h)(3) FOR LACK OF SUBJECT MATTER JURISDICTION**

Defendant Tiltware, LLC (“Tiltware”) files this Expedited Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(h)(3) for Lack of Subject Matter Jurisdiction and would respectfully show as follows:

INTRODUCTION

This Court lacks subject matter jurisdiction and therefore must dismiss this action. The Plaintiff is a limited liability company (“LLC”) whose members include Defendant Michael Mizrahi (“Mizrahi”). Plaintiff states these facts in its pleadings. In this Circuit -- and in every other circuit that has addressed the issue -- an LLC, unlike a corporation, is a citizen of every state in which any of its members are citizens. *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1079-80 (5th Cir. 2008). Therefore, complete diversity -- Plaintiff’s alleged basis for subject matter jurisdiction -- is lacking.

The issue of lack of subject matter jurisdiction is never waived and can be raised at any time, even on appeal. Indeed, the Court must address the issue, if apparent, *sua sponte*.

Based on the foregoing, the Court should dismiss this entire action forthwith.

REASONS FOR EXPEDITED REQUEST

Tiltware is associating new counsel, Greenberg Traurig, LLP with this motion. On Friday, March 4, 2011, Greenberg Traurig's George Belfield and Jordan Grotzinger and current counsel John Henry telephoned Plaintiff's counsel Douglas Becker and John Jacks and discussed the diversity of jurisdiction issues that are the subject of this motion, and asked Plaintiff's counsel to consider the jurisdiction issue over the weekend and stipulate to dismiss this case. A few hours later on March 4, 2011, Tiltware also e-mailed Plaintiff's counsel a draft of this motion. As of this writing, Tiltware has not heard back from Plaintiff's counsel. Grotzinger Dec., ¶ 2.

On December 13, 2010, the Court issued a Scheduling Order in this action -- before Tiltware had even appeared -- and set trial for April 25, 2011, and the discovery cutoff for March 25, 2011. Tiltware has a 12(b)(6) motion to dismiss on file, and has not yet answered the Third Amended Complaint. Needless to say, Plaintiff is pressing forward with depositions and other discovery, so Tiltware requests that this jurisdictional motion be heard on an expedited basis. In an abundance of caution, Tiltware will also file shortly on an expedited basis Defendant Tiltware, LLC's Motion To Continue Trial Date And Discovery Cutoff Or Sever Claims Against Tiltware. Obviously, the ruling on this motion to dismiss for lack of subject matter jurisdiction could moot that motion, and therefore Tiltware requests that this motion be decided forthwith. Grotzinger Dec., ¶ 3.

STATEMENT OF RELEVANT FACTS

Plaintiff filed this action on September 7, 2010, naming Tiltware and Mizrachi, an individual, as defendants. ECF No. 1 (Complaint). Plaintiff alleges diversity jurisdiction under 28 U.S.C. § 1332(a)(1). *Id.* at ¶ 4.

Plaintiff's operative Complaint is its Third Amended Complaint ("TAC"), and the parties are the same (although Plaintiff voluntarily dismissed Tiltware on October 8, 2010, but then added Tiltware back as a defendant on December 7, 2010). ECF No. 48 (TAC).

Both Plaintiff and Tiltware are LLCs. *Id.* at ¶¶ 1, 3. Plaintiff alleges that Mizrachi is a citizen of Florida. ECF No. 1 (Complaint) at ¶ 2. However, as to Plaintiff and Tiltware, Plaintiff only alleges the state of the LLCs' organization. As discussed below, unlike when corporations are defendants, an LLC's state of organization is irrelevant for diversity purposes. Rather, only the citizenship of the LLC's *members* counts.

Finally, Plaintiff alleges that, as of the filing of the action, Defendant Mizrachi owned a membership interest in Plaintiff. ECF No. 48 (TAC) at ¶ 13 ("At this time [July 13, 2009], [Plaintiff] ... conveyed to Mizrachi the 1.75% interest [in Plaintiff] to which he was also entitled under the contract."); ECF No. 1 (Complaint) at ¶¶ 10, 14 ("Plaintiff has performed its obligations under the contract").¹

DISCUSSION

A. The Court Must Dismiss An Action Over Which It Lacks Subject Matter Jurisdiction.

Federal Rule of Civil Procedure 12(h)(3) provides: "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."

¹ Nothing herein is an admission of Plaintiff's allegations; rather, under the facts pled by Plaintiff, there is no subject matter jurisdiction for the reasons discussed below.

This issue is never waived: “lack of subject matter jurisdiction . . . , unlike their other defenses, may be raised at any time.” *Santos v. Alaska Bar Asso.*, 618 F.2d 575, 577 (9th Cir. 1980). In fact, when the issue is apparent, Courts must address the issue *sua sponte*. *Freeman v. Northwest Acceptance Corp.*, 754 F.2d 553, 555 (5th Cir. 1985).

Plaintiff alleges diversity jurisdiction under 28 U.S.C. § 1332(a)(1). Diversity must exist at the time the lawsuit was filed. *Grupo Dataflux v. Atlas Global Group, LP*, 541 U.S. 567, 571 (2004).

B. The Court Lacks Subject Matter Jurisdiction Here Because Complete Diversity Is Lacking (And Was At The Time Of Filing).

The Supreme Court has established the rule of complete diversity for cases arising under 28 U.S.C. § 1332. *Strawbridge v. Curtiss*, 7 U.S. 267 (1806). Complete diversity “requires that all persons on one side of the controversy be citizens of different states than all persons on the other side.” *McLaughlin v. Mississippi Power Co.*, 376 F.3d 344, 353 (5th Cir 2004), citing *Harrison v. Prather*, 404 F.2d 267, 272 (5th Cir. 1968). That is not the case here, because Mizrachi, a member of Plaintiff, is a citizen of Florida, and therefore Plaintiff (an LLC) is too.

In *Harvey*, the Fifth Circuit ruled in line with every other circuit that has addressed the issue and held that the citizenship of an LLC for diversity purposes is based on the citizenship of all of its members. In that case, the Court addressed whether complete diversity existed where the plaintiffs were Louisiana citizens, and the defendant was a limited partnership with two partners: a corporation and an LLC organized in Louisiana. The corporation was a Nevada corporation with its principal place of business in Texas and was the sole member of the LLC. Because “[t]he citizenship of a limited partnership is based upon the citizenship of each of its partners[,]” and one of the defendant’s partners was an LLC, the Court addressed the issue of the citizenship of LLCs. *Id.* at 1079.

The Fifth Circuit held:

All federal appellate courts that have addressed the issue have reached the same conclusion: like limited partnerships and other unincorporated associations or entities, the citizenship of a LLC is determined by the citizenship of all of its members. *See Pramco, LLC ex rel. CFSC Consortium, LLC v. San Juan Bay Marina, Inc.*, 435 F.3d 51 (1st Cir. 2006); *Handelsman v. Bedford Village Assocs. Ltd. P'ship*, 213 F.3d 48 (2nd Cir. 2000); *Gen. Tech. Applications, Inc. v. Exro Ltda*, 388 F.3d 114 (4th Cir. 2004); *Homfeld II, L.L.C. v. Comair Holdings, Inc.*, 53 Fed.Appx. 731 (6th Cir. 2002); *Wise v. Wachovia Securities, LLC*, 450 F.3d 265 (7th Cir. 2006); *GMAC Commer. Credit LLC v. Dillard Dep't Stores, Inc.*, 357 F.3d 827 (8th Cir. 2004); *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894 (9th Cir. 2006); *Rolling Greens MHP, L.P. v. Comcast SCH Holdings L.L.C.*, 374 F.3d 1020 (11th Cir. 2004). We now join the other circuits in this holding.

542 F.3d 1077, 1079-80.

In finding complete diversity despite the plaintiffs' Louisiana citizenship and the LLC's organization in Louisiana, the Court explained that an LLC's state of organization is irrelevant for diversity purposes:

Supreme Court precedent, case law from other circuits, and the statutory language of both Section 1332 and Louisiana Revised Statutes §12:1301(A)(10) overwhelmingly support the position that a LLC should not be treated as a corporation for purposes of diversity jurisdiction. Rather, the citizenship of a LLC *is determined by the citizenship of all of its members.*

Id. at 1080 (emphasis added).

CONCLUSION

Based on the foregoing, both Plaintiff and Mizrachi are citizens of Florida, because Plaintiff is an LLC and Mizrachi -- a Florida citizen -- is a member of the LLC. Therefore, the Court lacks subject matter jurisdiction and should dismiss this action on an expedited basis.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of March, 2011, a true and correct copy of the foregoing was served upon the following counsel via the Court's CM/ECF system or First Class Mail:

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