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, Defendant	§ § §	

PLAINTIFF'S RESPONSE TO EXPEDITED MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(h)(3) FOR LACK OF SUBJECT MATTER JURISDICTION AND PLAINTIFF'S MOTION TO DISMISS ANY NON-DIVERSE PARTY UNDER FED. R. CIV. P. 21

Plaintiff Deliverance Poker, LLC ("Deliverance Poker") files this response to Defendant Tiltware, LLC's ("Tiltware's") motion to dismiss under Federal Rule of Civil Procedure 12(h)(3) for lack of subject matter jurisdiction and Plaintiff's motion to dismiss any non-diverse party.

A. Tiltware's Expedited Motion to Dismiss for Lack of Subject Matter Jurisdiction

1. On Friday, March 4, 2011, counsel for Tiltware contacted counsel for Plaintiff with regard to Tiltware's claim that this Court lacks subject matter jurisdiction because there is a lack of complete diversity of the parties required by 28 U.S.C. § 1332(a)(1). In particular, Tiltware argues that, for consideration of diversity of citizenship, Deliverance Poker is considered a citizen of Florida because one of its members and a defendant in this case, namely, Michael Mizrachi ("Mizrachi"), is a citizen of Florida. *See* Expedited Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(h)(3) for Lack of Subject Matter Jurisdiction at 1 (*citing Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1079-80 (5th Cir. 2008)). After careful review, Plaintiff has not discovered authority to support a claim that, for diversity analysis, Deliverance Poker is not considered a citizen of Florida based on the citizenship of one of its members, Mizrachi. If

accurate, this would defeat the requirement of complete diversity for the Court's jurisdiction under 28 U.S.C. § 1332(a)(1).

B. Plaintiff's Motion to Dismiss Any Non-Diverse Party

2. The Court may maintain jurisdiction over this case, even if Tiltware's analysis is correct, by dismissing Mizrachi under Federal Rule of Civil Procedure 21. *See Newman-Green v. Alfonzo-Larrain*, 490 U.S. 826, 830, 109 S.Ct. 2218, 2222 (1989); *Ellison Steel, Inc. v. Greystar Constr., LP*, 199 Fed.Appx. 324, 2006 WL 2381924 (5th Cir. 2006) (unpublished in Federal Reporter); *Ditmar Hospital v. Hartford Ins. Co. of the Midwest*, 239 F.3d 365, 2000 WL 1741580 (5th Cir. 2000) (unpublished).

> By now, 'it is well settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered.'

Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 572-73, 124 S.Ct. 1920, 1925 (2004) (*quoting Newman-Green*, 490 U.S. at 832, 109 S.Ct. at 2222).

3. Subject matter jurisdiction normally depends of facts as they exist at the suit is filed. *See Newman-Green*, 490 U.S. at 830, 109 S.Ct. at 2222 (*citing Smith v. Sperling*, 354 U.S. 91, 93 n.1, 77 S.Ct. 1112, 1113 n.1 (1957)). This general principle, however, is subject to the exception of allowing a district court to dismiss a non-diverse party in order to preserve subject matter jurisdiction. *See Newman-Green*, 490 U.S. at 831-32, 109 S.Ct. at 2222-23. *See also Ellison Steel, Inc.*, 199 Fed.Appx. at 328, 2006 WL 2381924 at *3 ("We note for the district court's benefit that if it finds [defendant] GDC non-diverse, it could cure the jurisdictional defect by dismissing GDC from the action.").

4. Mizrachi is not a necessary party and, therefore, cannot be an indispensible party.[1] In determining whether a party is indispensible, courts engage in a two-step analysis under Federal Rule of Civil Procedure 19. *See Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 8, 111 S.Ct. 315, 316 (1991); *Sorrels Steel Co., Inc. v. Great Southwest Corp.*, 906 F.2d 158, 168 (5th Cir. 1990). Courts must first determine whether a party is "necessary" under Rule 19(a). *See Temple*, 498 U.S. at 8, 111 S.Ct. at 316 (holding analysis under Rule 19(b) unnecessary "because the threshold requirements of Rule 19(a) have not been satisfied."); *Sorrels Steel Co., Inc.*, 906 F.2d at 168 (holding party not "necessary" under Rule 19(a) cannot be indispensible under Rule 19(b)). Only if the court finds a party satisfies the requirements of Rule 19(a) does it analyze whether 19(b) is applicable. *See Temple*, 498 U.S. at 8, 111 S.Ct. at 316; *Sorrels Steel Co., Inc.*, 906 F.2d at 168.

5. Rule 19(a)(1) provides:

> ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect that interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

[1] In response to the attempt to confer by counsel for Deliverance Poker, Tiltware argued that Mizrachi is an indispensible party. At the request of counsel for Tiltware, attached as Exhibit A is the email from Tiltware's counsel.

Fed. R. Civ. P. 19(a)(1). Leaving aside the issue of whether Mizrachi would defeat subject-matter jurisdiction, he does not fall within the definition of Rule 19(a)(1). First, the Court can clearly accord complete relief as between Deliverance Poker and Tiltware. There are no other parties necessary for Deliverance Poker to fully adjudicate its claims against Tiltware. Second, Mizrachi's rights to protect any interest he has will not in the least be impaired. Any judgment entered in this case will not be binding on him. Third, there is no risk that either Deliverance Poker or Tiltware will incur double, multiple, or otherwise inconsistent obligations because of any interest of Mizrachi. As set forth above, the failure to satisfy Rule 19(a) moots any inquiry under Rule 19(b). *See Temple*, 498 U.S. at 8, 111 S.Ct. at 316; *Sorrels Steel Co., Inc.*, 906 F.2d at 168.

6. Assuming, for the sake of argument, that Mizrachi does fall within that class of parties defined by Rule 19(a), Mizrachi does not satisfy the requirements of Rule 19(b), which provides:

> **When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
>
> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;

> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). All but one of the foregoing considerations clearly favors the Court exercising its jurisdiction over this case in the absence of Mizrachi. As set forth above, none of the parties would be in any manner prejudiced by proceeding to trial in the absence of Mizrachi and the relief sought by Deliverance Poker against Tiltware could be adequate. Therefore, the Court would not need to concern itself with lessening or avoiding any such prejudice.[2]

7. The only factor in Rule 19(b) arguably in favor of dismissal whether Deliverance Poker would have an adequate remedy if the action were dismissed. Balanced against this, however, is the fact that Deliverance Poker has expended considerable resources in attempting to comply with the scheduling order in this case and prepare for trial. Likewise, the Court has devoted considerable attention to this case, including several orders upon various motions. Trial is now set for April 25, 2011—forty-eight (48) days away, which is sufficient time for the parties to complete discovery and otherwise prepare for trial, if Tiltware will cease the stalling tactics referenced by the Court in its February 18, 2011, Order (Dkt. #54). Tiltware will not be prejudiced by the absence of Mizrachi as a defendant in this case and should not benefit by its tardiness in raising the current jurisdictional issue.[3]

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[2] Tiltware claims that *Kermanshah v. Kermanshah*, 2010 WL 1904135 (S.D.N.Y. 2010), stands for the proposition that Mizrachi is an indispensible party. *See* Email attached as Exhibit A. *Kermanshah* is not applicable to the facts of this suit. There, the plaintiff sought equitable relief under the contract that was the subject of the suit and the relief sought would have diminished the absent party's interest in the contract. By contrast, regardless of the judgment entered in this case, Mizrachi's rights under neither his agreement with Deliverance Poker nor his agreements with Tiltware will be affected.

[3] Counsel for Tiltware has been aware of this case and the allegations against Tiltware since at least September 15, 2011. *See* Advisory to the Court, Exhibit D (Dkt. #20). Tiltware was subsequently voluntarily dismissed, but the Court granted Plaintiff's Motion for Leave to Amend to add Tiltware as a party on December 7, 2010. Counsel for Deliverance Poker then invited Tiltware's participation in scheduling in two separate emails on December 8, 2010.

For the foregoing reasons, should the Court find that the presence of Mizrachi as a defendant in this case defeats subject matter jurisdiction, Plaintiff requests the Court to dismiss Mizrachi without prejudice and allow Deliverance Poker and Tiltware to proceed to trial as scheduled.

Respectfully submitted,

By: /s/ Douglas M. Becker

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CERTIFICATE OF CONFERENCE

I, John Jacks, attempted to confer with opposing counsel on whether Defendant Tiltware, LLC is opposed to the dismissal of Defendant Michael Mizrachi. Counsel for Tiltware did not explicitly state that he is opposed, but his email makes it apparent that Tiltware is opposed. As requested by counsel for Tiltware, the referenced email is attached as Exhibit A.

/s/ John D. Jacks
John D. Jacks

See Email from J. Jacks to I. Imrich, dated December 8, 2010, attached as Exhibit B; email from J. Jacks to I. Imrich, dated December 8, 2010, attached as Exhibit C.

CERTIFICATE OF SERVICE

I certify that on 3/8/2011, I caused Plaintiff's Response to Expedited Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(h)(3) and Plaintiff's Motion to Dismiss Any Non-Diverse Party Under Fed. R. Civ. P. 21 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:

John P. Henry
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/s/ John D. Jacks
John D. Jacks