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	§ § §	

REPLY IN SUPPORT OF EXPEDITED MOTION TO DISMISS AND OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS NON-DIVERSE PARTY[1]

PLAINTIFF CONCEDES THERE IS NO SUBJECT MATTER JURISDICTION.

As set forth in Tiltware's motion, the Court lacks subject matter jurisdiction because, according to Plaintiff, Plaintiff is a limited liability company whose members include Mizrachi, and an LLC 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). Plaintiff now concedes this point. *See* Opp. at p. 1. Therefore, the Court should dismiss the case forthwith. Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

THE COURT SHOULD DENY THE MOTION TO DISMISS MIZRACHI ONLY.

Instead of re-filing this case in state court, Plaintiff wants to dismiss Mizrachi only -- without prejudice -- and proceed to trial, on April 25, 2011 no less, against the recently added defendant Tiltware alone. That would be trial by ambush. As explained in Tiltware's pending expedited motion to continue trial and discovery deadlines, the previously dismissed Tiltware was just recently re-added to the case in a Third Amended Complaint ("TAC") adding new facts

[1] Local Rule CV-7(d) allows 10 pages for oppositions to motions.

and theories of recovery previously not alleged[2], and had not even appeared when the Court issued its current Scheduling Order, which sets imminent discovery and other deadlines and a trial next month.

A. Plaintiff Is Judicially Estopped From Reversing Its Position Because It Already Successfully Argued That The Claims Against Tiltware And Mizrachi Are Virtually Identical And That A Single Trial Is The Appropriate Procedure.

The Court should reject Plaintiff's proposed sleight of hand tactic for several legal and common sense reasons. First and foremost, Plaintiff is judicially estopped from its current reversal of positions because it successfully argued just three months ago in its motion to file a Second Amended Complaint to add back the previously dismissed Tiltware:

> 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.* ... Permitting Deliverance Poker to amend its complaint to add the claim against Tiltware ***instead of requiring Deliverance Poker to assert its claim [against Tiltware] in a separate proceeding, will certainly promote "the just, speedy, and inexpensive determination" of Deliverance Poker's claims.***

See Plaintiff's Partially Unopposed Motion for Leave to Amend Complaint at ¶ 8, ECF No. 29 (emphasis added).

Plaintiff made that statement in support of its motion to have the previously dismissed Tiltware re-joined as a defendant, and the motion was granted. Therefore, Plaintiff is judicially estopped from now reversing field 180 degrees to seek two trials, the first against Tiltware in this federal court, because Plaintiff just now realized that there is no diversity of citizenship. "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that

[2] Tiltware has not answered the Plaintiff's defective TAC and has filed a motion to dismiss the same.

position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *DeRosa v. Nat'l. Envelope Corp.*, 595 F.3d 99, 103 (2nd Cir. 2010).

B. Mizrachi -- The Party Accused Of The Underlying Breach -- Is Both Necessary And Indispensable.

The Fed. R. Civ. P. Rule 19(a) factors support a finding that Mizrachi is a required and indispensable party:

> (1) *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: ...
>
> (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 the interest; or*
>
> *(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.*

Fed. R. Civ. P. 19(a) (emphasis added).

Similarly, Rule 19(b) provides in relevant part:

> (b) *When Joinder Is Not Feasible.* If a person who is required to be joined if feasible cannot be joined, the court must determine whether, 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*; ...
>
> (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) (emphasis added).

1. **A Judgment Rendered In Mizrachi's Absence Will Likely Prejudice Mizrachi, Tiltware And Even The Court.**

Here, in order to prove its interference with contract claim against Tiltware, Plaintiff must prove "(1) the existence of a contract subject to interference; (2) a willful and intentional act of interference; (3) the act was a proximate cause of the plaintiff's damages; and (4) actual damage or loss." *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996). The first key issue in this case is whether the Promotional Representation Agreement between Plaintiff and Mizrachi ever became "effective" under Section 1, which provides: "This Agreement shall be effective immediately upon the closing by Deliverance of an offering of debt or equity interests in Deliverance which raises no less than One Million Dollars (the 'Effective Date')." *See* Grotzinger Dec., Ex. A. Plaintiff claims that its acquisition of certain software fulfilled this condition precedent, and Mizrachi is disputing whether that software is valued properly at $1,000,000 or more, and whether the contract is even "effective" with respect to Mizrachi.

The determination of this issue between Plaintiff and Mizrachi is obviously a precondition to any potential interference claim against Tiltware. Therefore, Plaintiff's proposal that it be allowed to dismiss Mizrachi, and not litigate with Mizrachi directly this precondition of proving that its contract was effective and breached by Mizrachi, yet proceed against Tiltware on the interference claims, is both legally and practically improper and indeed absurd.

In these circumstances, Mizrachi, Tiltware and the courts themselves would all be materially prejudiced if the Court dismisses Mizrachi and proceeds to trial against Tiltware only. Mizrachi's defenses in the inevitable -- and in Plaintiff's own words, "virtually identical" -- state court trial would likely be materially affected and compromised by trial of the interference claims against Tiltware first. "Potential prejudice to an absent party is a critical consideration in

determination of whether that party must be regarded as indispensable under Fed. R. Civ. P. 19(b)." *Video Towne, Inc. v. RB-3 Assocs.*, 125 F.R.D. 457, 460 (1988).

Moreover, litigating the underlying premise of this case -- *i.e.*, whether Mizrachi entered into and breached a valid and effective contract -- in Mizrachi's absence also would severely prejudice Tiltware. The two courts and two juries at two trials will likely hear materially different percipient witnesses and expert testimony. Mizrachi, his voluntary witnesses beyond the subpoena power of the court, and his experts might appear in the state court trial against Mizrachi, but not in this Court where Tiltware would be the only defendant. Similarly, the Tiltware witnesses may not appear at the trial against Mizrachi in state court. The risk of inconsistent verdicts and judgments is severe. In addition, Plaintiff might prevail here (which Tiltware believes would be error), but then fail to prove in a later trial against Mizrachi that the contract was valid, effective and breached, in which case Tiltware should have prevailed in the first trial. *Cf. Kermanshah v. Kermanshah*, 2010 U.S. Dist. LEXIS 45896 *15 ("Where, as here, the Court would have to resolve the underlying breach of contract claim in order to adjudicate the tort claims, the derivative claims must be dismissed if the indispensable party to the breach of contract claim cannot be joined.").

Finally, the prejudice to the parties is not the only consideration. Judicial economy also obviously weighs heavily against two trials -- even if one is in federal court and the other in state court. "The interests that are being furthered here are not only those of the parties, but also those of the public to avoid repeating lawsuits on the same essential subject matter." Notes to 1966 Amendment to Fed. R. Civ. P., Rule 19.

2. A Judgment Rendered In Mizrachi's Absence Will Not Be Adequate.

A judgment rendered in Mizrachi's absence also would certainly not be adequate under Fed. R. Civ. P., Rule 19(b)(3). Plaintiff will then sue Mizrachi in state court for breach of the same underlying contract, and if Mizrachi proves that the $1,000,000 precondition was not met, or proves that, even if the contract was in effect, he did not breach it, then any judgment rendered in this case in favor of Plaintiff would be inconsistent and subject to collateral attack.

In addition, if Mizrachi loses in state court, he could by way of a cross-complaint or subsequent action seek indemnity or contribution from Tiltware. There are both specific contractual and equitable indemnity and contribution claims between Mizrachi and Tiltware that will arise in both the federal and inevitable state court actions, or perhaps even a third action after the two judgments are determined. *See* Terms and Conditions for 2010 WSOP Main Event between Mizrachi and Tiltware, ¶ 6; Grotzinger Dec., Ex. B. It makes no legal or practical sense to allow two trials of the same facts and claims, as Plaintiff conceded when it served Plaintiff's own interests to add Tiltware as a defendant in this action.

3. Plaintiff Certainly Has An Adequate Remedy If This Action Is Dismissed.

If the court dismisses this action, Plaintiff obviously has adequate and complete remedies in state court where it can litigate its claims against both Mizrachi and Tiltware in one action with one jury and one judgment.

C. The Court Should Exercise Its Discretion *Not* To Dismiss Mizrachi (But Dismiss The Entire Case) For Practical Reasons Even If He Is Not Indispensable.

The "district court generally has discretion to determine whether to allow dropping of parties" to preserve diversity, and should not do so where one party is so intertwined with the case that his (or its) dismissal would be impractical. *Fritz v. American Home Shield Corp.*, 751 F.2d 1152, 1154 (11th Cir. 1985). In *Fritz*, the Plaintiff sued three companies, including "AHS

of Florida," for breach of contract, and the case was dismissed because AHS of Florida destroyed diversity. Even though the District Court did *not* determine that AHS of Florida was indispensable, the Court of Appeals affirmed the dismissal because it made no sense to proceed without AHS of Florida in that case:

> The propriety of this decision is buttressed by our conclusion that this lawsuit should probably not proceed in federal court without AHS of Florida. ... Although the contract in question was between plaintiff and AHSC, plaintiff's complaint alleged that *AHS of Florida was part of AHSC's overall plan to market home warranty plans in Florida, and that the contract and plan arose out of a series of common transactions and occurrences. Plaintiff's unflagging efforts to keep AHS of Florida in this litigation indicate that he perceived that a judgment against only the other corporate defendants would prejudice his interests.*

Id. at 1155 (emphasis added).

Similarly, here, Mizrachi is obviously at the crux of this case -- *i.e.*, whether he entered into and breached a valid contract with Plaintiff. It makes no sense to have two separate trials -- one against Mizrachi and one against Tiltware -- in these circumstances. Even Plaintiff admits that its case against Mizrachi is inextricably intertwined with its derivative interference claim against Tiltware -- indeed they are "virtually the identical facts [and] claims" -- and that a single trial "*...will certainly promote 'the just, speedy, and inexpensive determination" of Deliverance Poker's claims.*" ECF No. 29, ¶ 8 (emphasis added). And, like the plaintiff in *Fritz*, Plaintiff here made "unflagging efforts to keep [Mizrachi] in this litigation ...." 751 F.2d 1155. Mizrachi has been the one constant defendant, while Plaintiff initially named, then dropped, then re-added Tiltware (to Tiltware's great prejudice as explained in its motion to continue trial, etc.).

D. Fed. R. Civ. P. 21 Only Allows The Dismissal Of Parties On Just Terms.

Rule 21 provides that "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party." Dropping the primary defendant in this case -- whose alleged breach of contract is the very premise of Plaintiff's interference claims against Tiltware -- at the last minute, and where Tiltware had not even appeared when the tight Scheduling Order was issued, would be far from "just" to say the least. Conspicuously, Plaintiff cannot cite a single case supporting dismissal of one party in circumstances anywhere near this prejudicial for the proposed remaining defendant.

CONCLUSION

The Court should grant Tiltware's Motion to Dismiss this case for lack of subject matter jurisdiction, and deny Plaintiff's belated attempt to preserve diversity of citizenship by dismissing Mizrachi only and without prejudice. Otherwise, there will inevitably be two trials of the "identical" action, and possibly conflicting verdicts. Moreover, the April 25, 2011 trial of this case will be premature and materially prejudicial to the just added defendant Tiltware.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th 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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