

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

FILED

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CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS

DELIVERANCE POKER, LLC,
Plaintiff,

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BY _____ OS
DEPUTY

v.

10-CV-664-JRN

TILTWARE, LLC AND
MICHAEL MIZRACHI,
Defendants.

ORDER

On March 7, 2011, Defendant Mizrachi filed an Expedited Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(h)(3) for Lack of Subject Matter Jurisdiction. (Clerk's Dkt. #61). In its Motion, Defendant Mizrachi alleges that this court does not have jurisdiction because the parties lack complete diversity as required for diversity jurisdiction. (Clerk's Dkt. #61). Defendant Mizrachi asserts that Mizrachi is a member of Plaintiff LLC, which would destroy complete diversity.

Because the issue in the Motion "is the court's jurisdiction—its very power to hear the case— . . . the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.1981) (quoting *Mortensen v. First Fed. Savings and Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977)). In order to resolve disputes regarding jurisdiction, the court may make factual findings which are decisive of jurisdiction. *Id.* The court, therefore, "is not limited to an inquiry into undisputed facts. It may hear conflicting written and oral evidence and decide for itself the factual issues which determine jurisdiction." *Id.*

In this case, to determine whether complete diversity exists, the Court must determine whether Defendant Mizrachi is a member of Plaintiff LLC. Similar to limited partnerships and other unincorporated associations or entities, "the citizenship of a LLC is determined by the citizenship of all of its members." *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008). Thus, if Mizrachi is a member of the Plaintiff LLC, there is not complete diversity, and this Court lacks jurisdiction. However, if Mizrachi is not a member of Plaintiff LLC, this Court has subject matter jurisdiction over the case.

Here is the problem, under Texas law an assignment of membership *interest* in an LLC does not necessarily entitle the assignee to become a *member* of the company. Tex. Bus. Org. Code § 101.108(b)(2)(B). An assignee may become a member of an LLC upon the approval of all of the LLC's members. Tex. Bus. Org. Code § 101.109(b). Defendant Mizrachi's argument conflates the assignment of a membership interest with membership. It may well be that Mizrachi is a member of Deliverance. But the Court needs factual evidence that he is a member rather than just an interest holder.

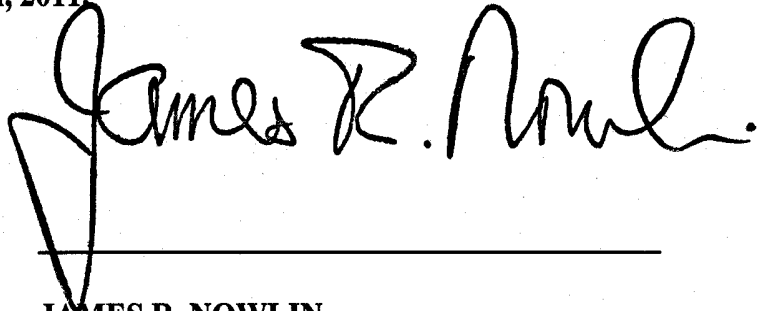
IT IS THEREFORE ORDERED that both Parties provide the Court with Plaintiff LLC's Articles of Formation or other evidence that indicates whether Mizrachi is or is not a member of Plaintiff LLC.

IT IS FURTHER ORDERED that the above documents must be filed by Friday, March 11, 2011 at 2 p.m.

THE PARTIES ARE HEREBY ADMONISHED that **SANCTIONS** will be imposed for any frivolous filings.

10-CV-664-JRN

SIGNED this 10th day of March, 2011

A handwritten signature in black ink that reads "James R. Nowlin." The signature is written in a cursive style with a large, stylized initial "J" that loops down and back up to the start of the name.

JAMES R. NOWLIN

UNITED STATES DISTRICT JUDGE