

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

DELIVERANCE POKER, LLC,  
Plaintiff ,

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v.

CIVIL ACTION NO. 1:10-CV-00664-JRN

MICHAEL MIZRACHI and  
TILTWARE, LLC,  
Defendant

**PLAINTIFF’S COMPLIANCE WITH COURT’S ORDER  
TO PROVIDE EVIDENCE AS TO MIZRACHI’S MEMBERSHIP STATUS**

Plaintiff Deliverance Poker, LLC (“Deliverance Poker”) submits the following in compliance with the Court’s order to provide evidence indicating whether Michael Mizrachi (“Mizrachi”) is or is not a member of Deliverance Poker. The evidence demonstrates that Mizrachi is not, and never has been, a member of Deliverance Poker, but instead holds only a membership interest pursuant to his contract with Deliverance Poker.

**A. Evidence of Mizrachi’s Membership Status**

Deliverance Poker attaches the following documents that demonstrate Mizrachi holds only a membership interest:

1. Certificate of Formation of Deliverance Poker, LLC, attached as Exhibit A.
2. Company Agreement of Deliverance Poker, LLC, attached as Exhibit B.
3. Promotional Representation Agreement between Deliverance Poker and Mizrachi, attached as Exhibit C.
4. Declaration Under Penalty of Perjury of Carlos Benavides, III, attached as Exhibit D.

Deliverance Poker attaches the following additional documents that are relevant to membership interests in it generally, but believes the foregoing documents are dispositive of the issue as to whether Mizrachi is a member.

5. Company Formation Questionnaire for MannBenham Fiduciaries Limited, dated September 10, 2009, attached as Exhibit E.
6. Private Placement Memorandum for Deliverance Poker, dated July 1, 2009, attached as Exhibit F.
7. Private Placement Memorandum Supplement for Deliverance Poker, dated August 20, 2009, attached as Exhibit G.

### **B. Summary of Evidence and Authorities**

As set forth in the Court's order, under § 101.109(b) of the Texas Business Organizations Code ("TBOC"), an assignee of a membership interest is entitled to become a member of the limited liability company upon the approval of all members of the LLC. Section 101.052 of the TBOC provides that, with certain exceptions not applicable to becoming a member, a company agreement of an LLC governs over the provisions of the TBOC.

Section 8.04(a) of the Company Agreement of Deliverance Poker addresses the manner in which an assignee of a membership interest may become a member.

Except as set forth in Section 8.01<sup>1</sup>, no Member shall have the right to substitute in such Member's place a purchaser, assignee, transferee, donee, heir, legatee, distribute, or other recipient of all or any portion of the Membership Interest of such Member. Any such purchaser, assignee, transferee, donee, legatee, or other recipient of any interest *shall be admitted to the Company as a substituted Member only with the written consent of a Majority in Interest of all of the Members*, which consent may be granted or withheld in the sole discretion of the Members . . .

Deliverance Poker, Company Agreement, Section 8.04 (italicized emphasis added). "Majority in Interest" is a term defined in Section 1.01 of the Company Agreement as "with respect to any

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<sup>1</sup> Section 8.01 does not appear to provide a manner in which a person may substitute in a Member's place.

referenced group of Members, a combination of any such Members who, in the aggregate, own more than the fifty percent (50%) of the Membership Interests owned by all of such referenced group of Members.”

Section 8.03(b) of the Company Agreement also addresses the effect of the assignment of Membership Interests: “Any Member who assigns all the Membership Interest of such Member in the Company shall cease to be a Member, except that, unless and until a substituted Member has been admitted to the Company, such assigning Member shall retain the statutory rights of the assignor of a Membership Interest under the TBOC.” The TBOC recognizes that a person may be a member without holding any membership interests in the company. *See* Tex. Bus. Org. Code § 101.111(a) (“An assignor of a membership interest in a limited liability company continues to be a member of the company and is entitled to exercise any unassigned rights or powers of a member of the company until the assignee becomes a member.”). *See also* Tex. Bus. Org. Code § 101.109 (Rights & Duties of Assignee of Membership Interest Before Membership).

On July 12 and 13, 2009, Mizrachi and Carlos Benavides, III (“Benavides”), on behalf of Deliverance Poker, signed the Promotional Representation Agreement (“PRA”) at issue in this case. In accordance with the terms of the PRA, Mizrachi was given “a membership interest in Deliverance equal to one and three-quarters percent (1.75%) as of the Effective Date.” PRA, par. 7. Mizrachi, however, did not become a member of Deliverance Poker, nor has anyone else other than Benavides. *See* Declaration Under Penalty of Perjury of Carlos Benavides, III.

Respectfully submitted,

By: /s/ Douglas M. Becker  
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**DELIVERANCE POKER, LLC**

**CERTIFICATE OF SERVICE**

I certify that on 3/11/2011, I caused Plaintiff's Compliance with Court's Order to Provide Evidence as to Mizrachi's Membership Status 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 \_\_\_\_\_