

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

DELIVERANCE POKER, LLC
Plaintiff

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vs.

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

MICHAEL MIZRACHI and
TILTWARE, LLC
Defendants

**SUPPLEMENT TO REPLY IN SUPPORT OF EXPEDITED MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION¹**

Defendant Tiltware, LLC (“Tiltware”) files this Supplement to Reply in Support of Expedited Motion to Dismiss for Lack of Subject Matter Jurisdiction and respectfully shows as follows:

INTRODUCTION

On March 10, 2011, the Court filed its Order (Clerk Docket No. 76) (the “Order”) instructing the parties to provide evidence that indicates whether Michael Mizrachi is or is not a member of Deliverance Poker, LLC (“Deliverance”). The Order stated that “[s]imilar to limited partnerships and other incorporated associations or entities, ‘the citizenship of a LLC is determined by the citizenship of all of its members.’” Order at 2 (citing *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008)).

The Plaintiff has the burden to show that this Court properly has subject matter jurisdiction. And, as discussed below, the underlying documents regarding Mizrachi’s membership interests are ambiguous at best.

¹ Per Local Rule CV-7(e), this supplement is filed within the 11-day deadline for reply briefs.

Even if the Court finds that the Plaintiff can meet its burden based on whatever documents it produces, this Court should nonetheless find that, like with limited liability companies (“LLC”), a holder of a membership interest in an LLC should qualify for diversity purposes the same as a holder of membership status under Texas law.

ARGUMENT

I. Plaintiff Has the Burden To Clearly Plead Jurisdictional Facts So The Court Can Evaluate Diversity, And Its Failure To Do So Justifies Dismissal.

Plaintiff has not clearly pled whether Mizrachi is a “Member” or merely holds a “membership interest” in the Third Amended Complaint -- the fourth iteration of the Complaint. Considering this ambiguity, and that Plaintiff has never maintained that Mizrachi was not an actual member of Deliverance, and that the documents evidencing Mizrachi’s membership status are ambiguous at best, this Court should find that diversity does not exist.

A. The Following Documents Suggest Mizrachi Was A Member

1. Deliverance Poker, LLC Company Agreement

The definition of “Membership Interest” on page 2 is: “the percentage of ownership of a *Member* of the Company at any particular time.”² This language suggests that an owner of a “membership interest” is a “member.”

2. Promotional Representation Agreement

Paragraph 7 of the Agreement provides in relevant part: “Deliverance agrees to pay the Representative [Mizrachi] on the Effective Date (a) *a membership interest in Deliverance equal to one and three-quarters percent (1.75%)* as of the Effective Date” (Emphasis added.)

Plaintiff obviously alleges the Agreement was effective as of the date the lawsuit was filed, or

² Similarly, Tex. Business Organizations Code § 1.002(54) provides: “‘Membership interest’ means a *member’s* interest in an entity. With respect to a limited liability company, the term includes a *member’s* share of profits and losses or similar items and the right to receive distributions, but does not include a member’s right to participate in management.” (Emphasis added.)

there would be no case.

Carlos Benavides III, as “Manager,” signed the Agreement for Plaintiff, which effectively made Mizrachi a Member.

3. Third Amended Complaint.

Paragraph ¶ 13 states: “At this time [July 12, 2009], Deliverance Poker paid to Mizrachi \$60,000 of the \$150,000 to which he was entitled under the contract *and conveyed to Mizrachi the 1.75% interest* to which he was also entitled under the contract.” (Clerk Docket No. 48 (emphasis added)).

Plaintiff never made a distinction between “membership interest” and actually being a “member” in the Promotional Representation Agreement, its pleadings, or otherwise, nor did it make any such argument in opposition to Tiltware’s motion to dismiss. Instead, Plaintiff conceded that there is no diversity, and therefore (improperly) requested the dismissal of Mizrachi alone.

B. Plaintiff’s Has Not Met Its Burden To Clearly Plead Facts Underlying Subject Matter Jurisdiction

If these facts and allegations are not enough for the Court to rule on subject matter jurisdiction, then Plaintiff has failed to carry its burden to clearly plead such facts, and the case -- now on its Third Amended Complaint -- should be dismissed as a result. “It is certainly time that complaints such as the present one should trigger an automatic dismissal when counsel for a plaintiff in a diversity action *clearly fails to carry the plaintiff’s burden of establishing subject matter jurisdiction where any party (on either side of the ‘v.’ sign) is a limited liability company.*” *Tilkin & Cagen, Inc. v. United Metal Receptacle Corp.*, 2008 U.S. Dist. LEXIS 44114, *2 (emphasis added). Similarly, in *Allstate Ins. Co. v. Santa Ana LLC*, 2008 U.S. Dist. LEXIS 48629, *3, the Court dismissed the case where:

The Complaint lacks an allegation regarding the citizenship of all members of Defendant Santa Ana LLC, *which is necessary to complete the requisite allegations for diversity*. Therefore, because Plaintiff has failed to allege properly the citizenship of Defendant Santa Ana LLC, it has failed to allege the diversity of citizenship for all of the named Parties and *has not met the initial burden of establishing this Court's jurisdiction over the above-styled cause.*")

Id. at *3 (emphasis added).

II. In Any Event, Mizrachi's Alleged Economic Interest In Plaintiff -- However Characterized -- Should Destroy Diversity.

The law is clear that the Fifth Circuit, as well as other courts, treat the citizenship of LLC's like LLP's. *See, e.g., Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008); *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). .

The Supreme Court has held that limited partners in a partnership share citizenship with the partnership, despite their lack of control or liability over partnership affairs. *See Carden v. Arkoma Associates*, 494 U.S. 185 (1990). Of course, the law that LLCs' citizenship is based on that of its members derives from the parallel rule applicable to partnerships. *See Greenville Imaging, LLC v. Washington Hosp. Corp.*, 326 Fed. Appx. 797, 798 (5th Cir. 2009) ("We requested of the parties information and further briefing on this point in light of our holding in *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077 (5th Cir. 2008), in which we held ... that 'like

limited partnerships and other unincorporated associations or entities, the citizenship of a LLC is determined by the citizenship of all of its members.”).

Moreover, as suggested by Justice Scalia in *Carden*, Courts should not accept diversity jurisdiction if the law does not clearly provide it:

The 50 States have created, and will continue to create, a wide assortment of artificial entities possessing different powers and characteristics, and composed of various classes of members with varying degrees of interest and control. Which of them is entitled to be considered a “citizen” for diversity purposes, and which of their members’ citizenship is to be consulted, are questions more readily resolved by legislative prescription than by legal reasoning, and *questions whose complexity is particularly unwelcome at the threshold stage of determining whether a court has jurisdiction.*

494 U.S. at 197 (remanding for dismissal based on lack of diversity, emphasis added); *see also Meredith v. Goin*, No. 10-536, 2010 U.S. Dist. LEXIS 87918, at *5 (Aug. 25, 2010 W.D.Ky.) (analogizing LLC case to *Carden* and holding that “ownership of a *limited investment interest, without the right to manage the general affairs of a partnership, is sufficient that the citizenship of the limited partner is attributed to the entity.*”) *Id.* at *5-6 (emphasis added).

Research has revealed no Fifth Circuit case stating that diversity is preserved where a party on one side merely owns a “membership interest” in an LLC on the other side, as opposed to the party actually being a “member” in the LLC. Nor has Plaintiff made any such argument. And the distinction -- which is made in the Texas Business Organizations Code for reasons relating to the rights and duties of economic interest holders in LLCs -- should not apply when assessing diversity for the very same reasons it does not hold water in the LLP context..

Here, similar to the LLP context discussed by the Supreme Court, at the very least, Mizrachi -- according to Plaintiff -- had an investment interest in Plaintiff. Therefore, there is no clear legal basis to keep this case based on diversity of citizenship, and such basis is required for courts to do so. *Carden*, 494 U.S. at 197

CONCLUSION

Accordingly, as pled by Plaintiff, there does not appear to be subject matter jurisdiction over this case (or at least Plaintiff has not met its burden to plead enough facts establishing subject matter jurisdiction).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th 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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