

ZEITLIN & ZEITLIN, P.C.
50 COURT STREET, SUITE 506
BROOKLYN, NEW YORK 11201
(718) 596-6815

Attorneys *pro hac vice* for Defendant, William Lee Childs, Jr.

-----		X	
LYNNE MITCHNICK,		:	
		:	SUPERIOR COURT OF NEW
		:	JERSEY
	Plaintiff,	:	LAW DIVISION
		:	HUDSON COUNTY
	-against-	:	
		:	Docket No. HUD-L-4742-12
WILLIAM LEE CHILDS, JR.		:	
		:	Civil Action
	Defendant.	:	
		:	CERTIFICATION OF
		:	COUNSEL IN SUPPORT OF
		:	MOTION FOR
		:	RECONSIDERATION
-----		X	

DAVID A. ZEITLIN, ESQ., an attorney duly admitted to practice law in the State of

New York, hereby certifies as follows:

1. I am an associate of the law firm of Zeitlin & Zeitlin, P.C., attorneys *pro hac vice* for the Defendant, William Lee Childs, Jr. Trial attorney of record for the Defendant is Melvin R. Solomon of the law firm of Parkesian & Solomon, P.C.
2. In my capacity as attorney for the Defendant herein, I am familiar with the facts as set forth in this Certification.
3. I submit this Certification in support of the instant Motion for Reconsideration of that portion of the Court's December 4, 2013 Order which granted Plaintiff's motion for summary judgment on Defendant's defense of illegality.

SUMMARY OF THE FACTS

4. Plaintiff, an interested investor, and Defendant, a professional poker player, entered into an agreement pursuant to which Defendant played poker with Plaintiff's funds. On

or about September 13, 2008, the parties executed a signed document setting forth the terms of their agreement (the "Backing Agreement"). Defendant initially played only live poker tournaments (a legal activity) with Plaintiff's funds, but later played both live poker tournaments and online poker tournaments (an illegal activity) using Plaintiff's funds with Plaintiff's knowledge and consent.

5. On October 2, 2012, Plaintiff filed the instant lawsuit, alleging that Defendant breached the Backing Agreement. Upon completion of Discovery, on or about October 3, 2013, Plaintiff moved for summary judgment on the issue of liability, and on Defendant's affirmative defenses of illegality and waiver. Defendant cross-moved for summary judgment on November 7, 2013.

6. Plaintiff's theory on the legality of the Backing Agreement is that the Backing Agreement expressly excludes online poker and that the online poker played by the Defendant with Plaintiff's funds was done pursuant to a separate contractual arrangement, or pursuant to an extra-contractual arrangement. *See* Plaintiff's letter brief dated October 2, 2013 at p. 8; Plaintiff's Reply Brief dated November 18, 2013 at p. 9.

7. Defendant's theory is that the parties modified the Backing Agreement to include online poker, rendering it unenforceable. *See* Defendant's Memorandum of Law dated November 7, 2013 at p. 13; Defendant's Reply Brief dated November 18, 2013 at p. 4.

THE COURT'S DECEMBER 4, 2013 ORDER

8. By Order dated December 4, 2013, this Court decided the parties' cross-motions for summary judgment, setting forth its findings in a letter bearing the same date. Said Order is attached hereto as Exhibit A. The Court's letter is attached hereto as Exhibit B.

9. Of relevance here is that portion of the Order that granted Plaintiff summary judgment against Defendant's affirmative defense of illegality. Finding that the Backing Agreement contains a "clear and unambiguous" provision limiting its scope to live poker tournaments, the Court ruled that the Backing Agreement is enforceable as written. Exhibit B at pp. 2, 4.

10. Then, citing *Maseef v. Cord, Inc.*, 90 N.J. Super 135, 143 (App. Div. 1966), the Court further noted that even had the Backing Agreement encompassed online poker, the legal portions of the contract are severable from the illegal portions of the contract, as Plaintiff claimed at oral argument that although the parties' finances relating to live and online poker had been commingled, these figures could be parsed. Exhibit B at p. 4.

ARGUMENT

11. A motion for reconsideration "shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred." *R.* 4:49-2.

12. Summary judgment motions are decided in accordance with *Brill v. Guardian Life Insurance Co. of America*, 142 N.J. 520, 523 (1995). Thus, the pertinent determination is whether, when facts are viewed most favorably to the non-moving party, a genuine issue of material fact remains to be settled. *Id.* at 540. Defendant respectfully contends that the Court misapplied this standard with respect to his affirmative defense of illegality.

The Court's Determination that the Backing Agreement Contains a "Clear and Unambiguous" Clause Excluding Online Poker Was Erroneous

13. Contract interpretation, including an inquiry as to whether a clause is ambiguous or not, is a question of law. *See, e.g., Selective Insurance Co. of America v. Hudson East Pain*

Mgmt., 210 N.J. 597, 605 (2012). Here, the relevant clause in the Backing Agreement reads as follows: “Online tournaments are excluded from the initial agreement, but open to discussion later.” Exhibit 5 to Defendant’s Opposition and Cross-Motion at p. 1.

14. The Plaintiff argued that this clause constitutes an outright exclusion of online tournaments, thus preventing that activity from being considered in this lawsuit. *See* Plaintiff’s letter brief dated October 2, 2013 at p. 8; Plaintiff’s Reply Brief dated November 18, 2013 at p. 9. Defendant, on the other hand, argued that this clause permits a future modification of the Backing Agreement to include online poker, and that the parties’ agreement was, in fact, subsequently amended to include online poker. *See* Defendant’s Memorandum of Law dated November 7, 2013 at p. 13; Defendant’s Reply Brief dated November 18, 2013 at p. 4. The Court adopted Plaintiff’s view.

15. Plain language in a contract “must be interpreted ‘in accord with justice and common sense.’” *Sons of Thunder, Inc. v. Borden, Inc.*, 285 N.J. Super. 27, 47 (App. Div. 1995), *quoting Krosnowski v. Krosnowski*, 22 N.J. 376, 387 (1956).

16. Defendant respectfully contends that the Court erred in its application of this standard when it found that the clause “*Online tournaments are excluded from the initial agreement, but open to discussion later*” forms a “clear and unambiguous” exclusion of online poker. More specifically, the Court failed to give any force or effect to either the word “initial” or to the clause “but open to discussion later.”

17. The parties’ use of the word “initial” indicates that the Backing Agreement might precede another agreement relating to online poker—possibly a modified version of the same agreement or possibly a second, separate agreement. The parties’ use of the clause “but open to discussion later” also foretells something similar: that the parties were willing to modify the

Backing Agreement in the future to include online poker, or perhaps to enter into a separate agreement that includes online poker. Had the parties wished to effectuate an outright and permanent exclusion of online poker from the Backing Agreement, it stands to reason that they would not have included the words “initial” or “but open to discussion later” at all—“online poker is excluded from the agreement” alone would have sufficed. The Court’s December 4, 2013 ruling renders these words superfluous, in contravention of the rule that all contractual language should be given its common sense meaning. *See Sons of Thunder, supra* at 47.

18. The Court has acknowledged that the Backing Agreement mentions online poker (Exhibit B at p. 2), but seems to hold that its reference thereto merely portends the possibility of future arrangement relating to online poker rather than the possibility of a modification. However, as stated above, the clause is capable of being reasonably interpreted in more than one way, thus making it ambiguous. *See, e.g., Nester v. O’Donnell*, 301 N.J. Super. 198, 210 (App. Div. 1997). In general, contractual ambiguities are resolved against the party who drafted the agreement. *See, e.g., In re Miller*, 90 N.J. 210, 221 (1982); *Sons of Thunder, supra* at 48. Here, Plaintiff drafted the backing agreement.

A Genuine Issue of Fact Remains Regarding The Parties’ Intent to Modify the Backing Agreement

19. Even if the Backing Agreement had expressly and clearly excluded online poker, this does not eliminate the possibility of a future modification, and the Court remained obliged to address Defendant’s contention that a contractual modification in fact took place. This can only be accomplished by conducting an inquiry into the *intent* of the parties. *See, e.g., DeAngelis v. Rose*, 320 N.J. Super 263, 280 (App. Div. 1999).

20. Deigning the intent of the parties is a fact-specific inquiry, requiring consideration of the parties’ conduct as well as any extrinsic evidence. *Conway v. 287 Corp. Center Assocs.*,

187 N.J. 259, 270 (2006); *Sons of Thunder*, *supra* at 47. Indeed, New Jersey courts have long held that in cases involving questions of intent, summary judgment is generally inappropriate. *See, e.g., L.P. v. First Fidelity Bank*, 305 N.J. Super 510, 527, (App. Div. 1997), *cert. denied*, 153 N.J. 50 (1998); *J. Josephson, Inc. v. Crum & Forster Ins. Co.*, 293 N.J. Super 170, 200 (App. Div. 1996).

21. Here, Defendant adduced ample facts showing that the parties' intent was to modify the Backing Agreement to include online poker. That evidence includes, *inter alia*, the parties' decision to track live and online tournament results using a single numerical figure and the distribution of online winnings pursuant to the terms dictated by the Backing Agreement. Defendant's Memorandum of Law at pp. 13-14. Defendant respectfully contends that these facts alone are enough to defeat summary judgment pursuant to the *Brill* standard.

22. Further evidence suggesting that the Backing Agreement was indeed modified to include online poker is the "Amended Live Tournament Agreement," attached hereto as Exhibit C. This document, drafted by Plaintiff after Defendant began to play online poker using Plaintiff's funds, was designed to replace the Backing Agreement.

23. The Amended Live Tournament Agreement contains mostly the same language as the Backing Agreement, with certain additions and modifications, including six (6) references to online poker, as follows:

- a. At the top of page 1, the caption "Amended October 2009 When Online Agreement Was Instituted" appears. Exhibit C at p. 1.
- b. In the "Scope" section, the agreement states that "... live and online tournaments will be treated as a single backing relationship with a combined makeup pool." *Id.*
- c. In the "Bank Account/Transfer of Funds" section, "funds... transferred between Lee and Lynne's accounts on a designated poker site" is listed as

a permissible method of payment of winnings from Defendant to Plaintiff.
Id.

- d. In the “Bank Account/Transfer of Funds” section, “online backing as per our online backing agreement” is listed as a permissible purpose for use of the parties’ joint checking account. *Id.*
- e. In the “Player/Backer Share of Cashes” section, the following clause, incorporating the online agreement by reference, appears: “As of our agreement for online tournament backing (October 2009), online tournament play also contributes to live tournament makeup. See our online agreement for details.” Exhibit C at p. 2.
- f. In the “Player Responsibilities” section, depositing funds into an online poker account belonging to Plaintiff is again listed as a permissible way to transfer winnings. *Id.*

24. Although the Amended Live Tournament Agreement was never executed, it is probative in establishing the parties’ *intent* to modify the original Backing Agreement to include online poker. Had the parties intended for the Backing Agreement to completely exclude online poker, they would not have later deemed changes to it necessary, especially not changes explicitly mentioning online poker. Defendant respectfully contends that this document alone is enough to defeat summary judgment on the issue of illegality.

**There is a Genuine Issue of Fact Regarding the Severability
of the Legal and Illegal Portions of the Backing Agreement**

25. The Defendant has asserted that the parties have commingled financial data (Defendant’s Memorandum of Law at pp. 13-14), and that a portion of the contractual damages demanded by Plaintiff are comprised of online poker results. Defendant’s Reply Brief at p. 5. This issue was also explored at length during oral argument of the summary judgment motion.

26. In its findings of fact, the Court acknowledges this commingling of data relating to legal and illegal activity, but, citing *Naseef v. Cord, supra*, states that New Jersey law allows

for the severance of enforceable portions of a contract from those portions which are illegal. The Court also states as follows: “The plaintiff... claims that the data supporting these records is so specific she can easily extract the data for only the legal casino gambling. Since proving damages is the plaintiff’s burden that issue should remain for trial but it appears that the legal portion is severable.” Exhibit B at p. 4.

27. Defendant respectfully asserts that the above-quoted portion of the Court’s holding contains two judicial errors.

- a. First, in this instance, the severability of legal contractual clauses from illegal contractual clauses is itself an issue of fact. The Court has effectively found, as a matter of law, that Plaintiff’s contention at oral argument that the legal data can be parsed from the illegal data is true and accurate. That contention, however, requires an intensely fact-specific inquiry that has yet to be undertaken. Whether such a task can actually be accomplished is an open question, as evidenced by the Court’s statement that it merely “appears” that severability is possible. *Id.* In accordance with the *Brill* standard, the issue of severability is therefore not ripe for summary judgment in this matter.
- b. Second, the extraction of live poker records from online poker records pertains to more than the issue of damages—this chore also implicates Defendant’s illegality defense. If the two sources of funds cannot be separated, it would logically follow, pursuant to *Naseef*, that the Backing Agreement would be unenforceable. The Court has nonetheless invited Plaintiff to delve into that same data for the limited purpose of establishing

contractual damages. This is manifestly unfair to Defendant, who has cited the inextricability of these numbers as proof of illegality.

28. Furthermore, the Court's ruling that Defendant cannot assert illegality as a defense has broader implications. For instance, one of the breaches Plaintiff alleges is that Defendant failed to provide Plaintiff with "appropriate tax forms." However, Plaintiff's tax returns in the relevant years do not distinguish live from online poker winnings, and therefore declare earnings and losses from Defendant's online poker results. See Exhibit 17 to Defendant's Cross-Motion for Summary Judgment. And in fact, as noted by the Court on page 4 of its findings of fact, Plaintiff has conceded that the only occasion when she needed tax forms from Defendant was in 2010, the one year that Plaintiff profited under the Backing Agreement. This profit was earned solely because Defendant won over \$140,000 in an online poker tournament in November of that year. It logically follows that Defendant had no obligation to provide tax forms even in 2010 since the underlying profit was obtained through illegal activity. As the Court has now ruled that the Backing Agreement, as a matter of law, has nothing to do with online poker, is the Defendant's ability to assert this argument now foreclosed? Counsel respectfully submits that some clarification, at minimum, is necessary.

29. Plaintiff's investment in Defendant's poker play was all-encompassing, fully integrating both live and online poker. Online poker so permeated the overall relationship that both parties made financial decisions (e.g., when to forego live events to play online events, and vice versa) that were predicated on the comprehensive nature of Plaintiff's investment in Defendant's career. The severance of this lawsuit from the parties' involvement with online poker implicates issues relating to both liability and damages. As such, it seems that the Court's

decision to eliminate the affirmative defense of illegality may have narrowed the issues in this lawsuit prematurely. Again, reconsideration or clarification is respectfully urged by Defendant.

30. Based on the foregoing, Defendant requests this Court grant his application for reconsideration and modify its December 4, 2013 Order by reversing that part of said Order granting Plaintiff's summary judgment motion seeking dismissal of Defendant's affirmative defense of illegality.

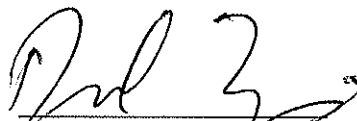
STAY REQUEST

31. Defendant requests a stay of this action pending determination of this motion. Whether the defense of illegality will be litigated at trial will affect trial preparation and strategy. Defendant submits that proper evaluation of the relevant issues before trial is in the best interest of the parties and the Court.

32. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: January 24, 2014

ZEITLIN & ZEITLIN, P.C.



David A. Zeitlin Esq.
Attorneys *pro hac vice* for Defendant
William Lee Childs, Jr.