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LYNNE MITCHNICK, Plaintiff, -against- WILLIAM LEE CHILDS, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION HUDSON COUNTY Docket No. HUD-L-4742-12 Civil Action

DEFENDANT WILLIAM LEE CHILDS, JR.'S BRIEF IN REPLY TO THE OPPOSITION FILED BY PLAINTIFF TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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I. Defendant Has Provided Sufficient Notice of All Defenses

Plaintiff claims that because the applicability of Virginia law and the defenses of illegality, mutual mistake of fact, and Plaintiff's breach of the implied covenant of good faith and fair dealing have never appeared in any pleadings, they cannot now be considered by the Court. *See* Plaintiff's Brief in Reply to the Opposition Filed by the Defendant to Plaintiff's Motion for Summary Judgment and in Opposition to the Cross-Motion Filed by the Defendant for Summary Judgment (hereinafter "Plaintiff's Reply Brief") at pp. 5, 11, 13. This assertion is based on misstatements of procedural facts. First, Defendant, in his Answer to Complaint and Affirmative Defenses (hereinafter, "Answer"), expressly reserved the right to raise additional defenses as they became available in this matter. *See* Certification of Plaintiff's Counsel (hereinafter "Pla. Counsel Cert." Exhibit C at p. 4. Second, Plaintiff has in fact been given proper notice of each claim:

a. Choice of Law

In Defendant's Responses to Plaintiff's Interrogatories (hereinafter "Responses to Interrogatories"), Virginia Statute §11-14 is specifically referenced, as is the fact that the contract dated September 13, 2008 (hereinafter the "Backing Agreement") has no choice of law provision. *See* Pla. Counsel Cert. Exhibit E at pp. 5-6.

b. Illegality

Illegality is raised in the Answer as Affirmative Defense number 13. Pla. Counsel Cert. Exhibit C at pp. 3-4.

c. Mutual Mistake of Fact

In the Responses to Interrogatories, the defense of mutual mistake of fact was in fact referred to as the defense of "Impossibility/Impracticability." *See* Pla. Counsel Cert. Exhibit E. at p. 8. This mislabeling was benign; only the timing of the event which makes contract performance impossible differentiates the doctrine of mutual mistake of fact from the doctrine of impossibility/impracticability. *See* Restatement (Second) of Contracts §§251, 265 (1981). This defense was also explored in Plaintiff's Deposition. *See* Deposition Transcript of the Plaintiff (hereinafter "Mitchnick Dep."), at p. 115, line 8 though p. 116 line 16.

d. Plaintiff's Breach of the Implied Covenant of Good Faith and Fair Dealing

The defense of Plaintiff's breach was raised as Affirmative Defense number 15 in the Answer. *See* Pla. Counsel Cert. Exhibit C at p. 4. The strength of this defense, which concerns a duty present in every contract, became more apparent at Plaintiff's deposition, where it was discussed at length. *See* Mitchnick Dep. at p. 84, line 20 through p. 100, line 9.

II. Plaintiff Mischaracterizes The Expressly Set Forth Scope of the Backing Agreement

In an effort to establish that the Backing Agreement does not authorize illegal activity, Plaintiff grossly misinterprets the "Scope" section of the Backing Agreement. The first clause in the "Scope" section thereof reads as follows:

> Scope: Buyins for all live tournaments that have a minimum buyin of $200 and maximum buyin of $10k per tournament, with the condition that a minimum of 90% will have a buyin of $5,000 or less ... Exceptions = home games/tournaments not hosted by a casino, charity events and daily tournaments with a buyin less than $200.

Pla. Counsel Cert. Exhibit A at p.1.

Although this section was poorly drafted, its purpose is nevertheless clear: under the terms of the Backing Agreement, Defendant is expressly permitted to play in the following categories of poker tournaments: (i) live tournaments with buyins between $200 and $10,000, and (ii) home games/tournaments not hosted by a casino with buyins of *any* amount (not restricted to the $200 minimum), and (iii) charity events with buyins of *any* amount (not restricted to the $200 minimum), and (iv) a specific type of low-buyin, casino-hosted tournament, called a "daily tournament" (or "daily"), which often features buyins of less than $200 (and is a type of tournament Defendant in fact played under the Backing Agreement). *Id.* Contrary to Plaintiff's misinterpretation, the exceptions clause in this section is not *denying* Defendant permission to play in the listed types of events, it is *expressly permitting* Defendant to play in them—the Backing Agreement's "$200 to $10,000" restriction is lifted for such events.

Defendant submits that the intent of this clause is clear, but even if the Court finds it ambiguous, it must read it in favor of the Defendant in accordance with the basic tenet that ambiguities in a written agreement must be construed against the party who prepared said agreement (here, Plaintiff). *See, e.g., In re Miller*, 90 N.J. 210, 221 (1982); *Liqui-Box Corp. v. Estate of Elkman*, 238 N.J. Super 588, 599 (App. Div. 1990).

III. Defendant's Expert's Affidavit is Admissible

Plaintiff asserts that the Affidavit of Eric Haber, which was submitted as an addendum to the Certification of Counsel in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment (hereinafter "Def. Counsel Cert.") cannot be considered by the Court because discovery was not

reopened pursuant to *R.* 4:24-1(c). Plaintiff's Reply Brief at p. 4. This affidavit in fact complies with New Jersey requirements in all respects.

Mr. Haber was named as Defendant's retained expert witness in Responses to Interrogatories in compliance with *R.* 4:10-2(d)(1). Pla. Counsel Cert. Exhibit E at p. 3. Mr. Haber then prepared an expert's report, which was sent to Plaintiff on or about June 27, 2013 in accordance with *R.* 4:10-2(d)(1) and 4:10-2(e). On or about November 1, 2013, in support of the instant motion, Mr. Haber converted his report to a sworn affidavit so that it would comply with *R.* 4:46-2(a) and (b). Plaintiff suffers no prejudice from the Court's consideration of this valid evidence, the content of which was provided to Plaintiff months ago.

IV. The Parties Modified the Backing Agreement to Include Online Poker

In Plaintiff's Reply Brief, she continues to contort the truth about the parties' involvement with online poker, thus placing herself in the untenable position of pursuing this lawsuit to collect monies she invested in Defendant's online poker play, while disavowing the fact that Defendant played online poker under the Agreement. She certainly cannot have it both ways.

Plaintiff states that the Backing Agreement was never modified, ignoring that modification may be gleaned from the actions and intent of parties (*see, e.g.*, *County of Morris v. Fauver*, 153 N.J. 80, 103 (1998)) and that a requirement that modification be in writing does not foreclose modification by other methods (*Home Owners Constr. Co. v. Borough of Glen Rock*, 34 N.J. 305, 316 (1961). In this instance, the contract itself invites modification by stating that online poker "is open to discussion later." Pla. Counsel Cert. Exhibit A at p. 1.

It is uncontroverted that a large profit split, from which Plaintiff collected almost $50,000, took place on or about November 30, 2012. Those profits, split in accordance with the exact terms of the Backing Agreement, were from an online tournament. It is also indisputable that the damages sought by Plaintiff in this lawsuit are a monetary figure partially comprised of losses sustained through Defendant's online poker play.

The record is filled with evidence showing plans made, funds mixed and records combined, all in an effort to accommodate the pursuit of online poker. This was done under the umbrella of the Backing Agreement, with Plaintiff as an active participant. Plaintiff cannot have it both ways: her attempts to now pick and choose which parts of the parties' partnership formed the basis of this lawsuit, and which were illegal, should be summarily rejected.

V. The Backing Agreement's Damages Clause is a Penalty Provision

In an effort to establish that the Backing Agreement's "makeup as damages" clause is compensatory rather than punitive, Plaintiff defines makeup as money "advanced to Defendant pursuant to the Backing Agreement which has not yet been repaid." Plaintiff's Reply Brief at p. 14. This reference to advanced funds that must be repaid is the functional equivalent of calling makeup debt. As has been established in the evidentiary record, makeup is not debt, nor does this cause of action convert makeup to debt. *See* Mitchnick Dep. at 78, lines 9-15; *see also* the Affidavit of Eric Haber, attached to Def. Counsel Cert., at ¶¶15-30.

By characterizing the parties' makeup figure as a debt that she is "entitled to" (Plaintiff's Reply Brief at p.14), Plaintiff attempts to mislead the Court regarding the nature of her investment in Defendant. Plaintiff assumed the risk that Defendant might

lose her money gambling; she was not guaranteed a positive return on her investment (although she did ultimately profit). Makeup is simply an accounting figure used in poker staking, it is not an reasonable approximation of contractual damages in any sense.

CONCLUSION

For the foregoing reasons, Defendant William Lee Childs, Jr. respectfully requests that his cross-motion for summary judgment be granted in its entirety, and that Plaintiff's motion for summary judgment be denied in its entirety.

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