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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 MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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Defendant William Lee Childs, Jr., by his attorney *pro hac vice* David A. Zeitlin, Esq., respectfully submits this memorandum of law in support of his motion, pursuant to Rule 4:46 of the New Jersey Rules Governing Civil Practice, for an order granting summary judgment in his favor and dismissing the Complaint of Plaintiff Lynne Mitchnick in its entirety on the grounds that there is no genuine issue to be tried and that Plaintiff's purported claims have no merit. In the alternative, Defendant requests that the Court deny Plaintiff's motion for partial summary judgment on the grounds that genuine issues of material fact remain to be determined.

PRELIMINARY STATEMENT

This is a case in which Plaintiff, an interested investor, and Defendant, a professional poker player, intended to enter into a gambling contract pursuant to which Defendant would play poker with Plaintiff's funds (hereinafter, the "Backing Agreement"). Unfortunately for Plaintiff, the freedom to contract is not absolute, and the inartful document she drafted and convinced Defendant to sign suffers from a number of infirmities, including, *inter alia*, its directive that Defendant participate in illegal activities, its reliance on a mutual mistake of fact, and its use of a stipulated damages provision that is strictly punitive. Further, Plaintiff's behavior under the Backing Agreement breached the implied covenant of good faith and fair dealing, and implicated the doctrines of waiver, estoppel, laches and unclean hands. As such, based on the laws of all applicable jurisdictions, and on the undisputed facts underlying this dispute, the instant action must be dismissed.

STATEMENT OF UNDISPUTED FACTS

The facts necessary for the determination of this motion are set forth in the accompanying Defendant's Statement of Material Facts Not in Dispute (hereinafter "Def. Stat."); the Affidavit of William Lee Childs, Jr., sworn to November 2, 2013 ("Childs Aff."); the Expert's Affidavit of Eric Haber, sworn to November 1, 2013 ("Haber Aff."); the Non-Party Affidavit of Matthew S.

Savage, ("Savage Aff."), sworn to October 18, 2013; and the Certification of Defendant's Counsel *pro hac vice*, David Zeitlin, Esq., dated November 6, 2013 ("Def. Counsel Cert.") and the Exhibits annexed thereto. Those facts are summarized here for the Court's convenience.

Parties

Plaintiff Lynne Mitchnick (hereinafter "Plaintiff" or "Ms. Mitchnick") is an individual residing in Las Vegas, Nevada. Def. Stat. ¶1.

Defendant William Lee Childs, Jr. (hereinafter "Defendant" or "Mr. Childs") is an individual residing in Charles Town, West Virginia. Def. Stat. ¶2. Mr. Childs resided in the state of Virginia when the Backing Agreement was formed, while he was performing under the Backing Agreement, and at all other times relevant to this lawsuit. Def. Stat. ¶2. At all times relevant to this dispute, Defendant was a professional tournament poker player. Def. Stat. ¶2. In that capacity, during the relevant time periods, Mr. Childs earned his living partially by traveling the poker tournament "circuit," participating in live poker tournaments, and partially by playing online poker tournaments, mostly from his home. Childs Aff. at ¶8; Haber Aff. at ¶¶9-13, 39.

Background

The parties met in the summer of 2008 in Las Vegas, Nevada, while attending a poker training program, and soon began discussing the possibility of Plaintiff financing Defendant's poker play. Def. Stat. ¶¶3-4. Shortly thereafter, the parties commenced negotiations via email, and ultimately signed the Backing Agreement, which was drafted by Plaintiff. Def. Stat. ¶¶5, 9. Execution of the Backing Agreement also took place via email. Def. Stat. ¶10. Neither party was represented by counsel during negotiations or execution of the Backing Agreement. Def. Stat. ¶7. The Backing Agreement was the first long-term poker staking arrangement Plaintiff had entered into and was Defendant's first written business contract of any kind. Def. Stat. ¶14.

The Backing Agreement offered Defendant protection from the risk of insolvency and

offered Plaintiff a "venture capital" opportunity. Def. Stat. ¶11. The Backing Agreement provides that in exchange for Plaintiff's funding, Defendant's will share his profits from poker tournaments on 50/50 basis, after "makeup"[1] is reduced to zero. Def. Stat. ¶16. The Backing Agreement contains a section entitled "Scope," which indicates that Defendant is permitted to play in certain venues, including "home games" and "tournaments not hosted by a casino." Def. Stat. ¶15. The Backing Agreement also contains a section entitled "Player Responsibilities," which purports to require, *inter alia*, that Defendant perform certain administrative tasks. Def. Stat. ¶18. Another section of the Backing Agreement, entitled "Termination of Agreement by Backer," purportedly allows the backer to collect "all makeup" in the event of "any breach" by the player. Def. Counsel Cert. Exhibit 5.

In August 2009, Defendant, who had previously been playing online poker tournaments with his own funds, reached an agreement with Plaintiff whereby she would begin funding his online poker tournament play. Def. Stat. ¶21. Soon thereafter, Plaintiff provided Defendant with $40,000 in online poker seed money, and the Defendant commenced playing online tournament poker under the Backing Agreement's terms and conditions. Def. Stat. ¶21. All told, Defendant, from his home in Virginia, played more tournaments, and more hours, under the Backing Agreement online than he did live. Def. Stat. ¶21. Defendant's most profitable win under the Backing Agreement took place on or about November 30, 2010. On that date, Defendant was a participant in an online tournament in which he won over $144,000. Def. Stat. ¶29. This win reduced makeup to zero and allowed the parties to enjoy a profit split of $45,227 each. Def. Stat.

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[1] Makeup is an accounting figure used in poker staking agreements. Understanding how it functions is crucial to this dispute and is discussed in greater detail in Section V, *infra*. Defendant's expert witness Eric Haber has submitted an affidavit partially for the purpose of familiarizing the Court with the concept of makeup. *See* Haber Aff. at ¶¶20-30.

¶29.

During the roughly four years that the parties operated under the Backing Agreement, the parties' makeup figure fluctuated wildly as Defendant's fortunes at poker ebbed and flowed. On the date their business relationship ended, the parties' makeup figure was $40,319, and the Plaintiff had profited over $17,000. Def. Stat. ¶¶33, 49.

During the roughly four-year term of the Backing Agreement, Plaintiff alleges that administrative breaches by Defendant took place intermittently. Def. Stat. ¶¶35-37. Despite allegedly taking note of these administrative beaches, Plaintiff never (i) informed Defendant that she believed these alleged breaches had triggered her right to terminate the Backing Agreement for cause, or (ii) threatened termination if his administrative skills did not improve. Def. Stat. ¶45-46. On or about February 2012, Plaintiff unilaterally decided that she planned to terminate the Backing Agreement and demand damages in the form of the entire makeup figure, but intentionally withheld this information from Defendant. Def. Stat. ¶47. Uninformed of this crucial fact, Defendant proceeded to play the most important tournaments of his annual schedule under the terms and conditions of the Backing Agreement. Def. Stat. ¶48. Plaintiff sent a termination letter on or about July 30, 2012. Def. Stat. ¶49.

Procedural History

Plaintiff commenced the instant action on October 3, 2012, when the Law Firm of Steven Robert Lehr, P.C. filed a Summons and Complaint (the "Complaint"). Certification of Plaintiff's Counsel in Support of Motion for Summary Judgment ("Pla. Cert.") Exhibit B. The Complaint states causes of action for breach of contract, unjust enrichment, and conversion. *Id.* Defendant retained trial attorney of record Melvin R. Solomon, Esq. of Parkesian & Solomon on or about November 5, 2012, who submitted an Answer with Affirmative Defenses, including, *inter alia*, waiver, estoppel, laches, unclean hands, substantial compliance, illegality, plaintiff's breach, and

failure to mitigate damages on November 27, 2012. Pla. Cert. Exhibit C. Zeitlin & Zeitlin, P.C. was admitted to represent Defendant *pro hac vice* on May 24, 2013.

The time for discovery concluded on or about September 26, 2013. On or about October 3, 2013, Plaintiff moved for partial summary judgment. Defendant now opposes that motion and cross-moves for summary judgment.

ARGUMENT

Summary judgment must be entered if "the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment as a matter of law." R. 4:46-2(c).

In determining whether summary judgment should be granted, the court must view the evidence in a "light most favorable to the non-moving party," *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 523 (1995), and "accord him [or her] the benefit of all legitimate inferences that can be drawn therefrom.'" *Id.* at 535. If it is found that "one party should prevail as a matter of law, the trial court should not hesitate to grant summary judgment." *Id.* at 540; *Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A.*, 189 N.J. 436, 445-46 (2007). On the other hand, the Court "should deny a summary judgment motion where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" *Brill, supra* at 529.

Brill instructs courts "not to refrain from granting summary judgment when the proper circumstances present themselves," *Id.* at 541, and the ruling in *Brill* has the effect of affording "protection. . . against groundless claims or frivolous defenses, not only to save antagonists the expense of protracted litigation but also to reserve judicial manpower and facilities to cases

which meritoriously command attention." *Id.* at 541-42, *citing Robbins v. Jersey City*, 23 N.J. 229, 240-41 (1957).

This memorandum argues *in favor of* summary judgment for Defendant. It shows that nothing in the evidentiary record, even when inferences are made in favor of Plaintiff, establishes a *prima facie* case for breach of contract. In the alternative, this memorandum *opposes* Plaintiff's motion for summary judgment, as it outlines a record of admissible evidence establishing that one or more genuine issues of material fact exist.

I. THE LAWS OF THE COMMONWEALTH OF VIRGINIA CONTROL THIS DISPUTE

Despite the diverse domiciles of the parties herein and the absence of a governing law provision in the Backing Agreement, Plaintiff's motion papers do not include a choice of law discussion. Plaintiff apparently presumes that because her lawsuit was filed in New Jersey, the state laws of New Jersey automatically control in this matter. This presumption is incorrect. In fact, the laws of the Commonwealth of Virginia govern this dispute.

As this case was filed in New Jersey, the Court should apply the choice of law standards used by New Jersey courts. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Gantes v. Kason Corp.*, 145 N.J. 478, 484 (1996). For choice of law determinations in contract actions, New Jersey applies a "most significant connections" analysis, *State Farm Mut. Auto Ins. Co. v. Estate of Simmons*, 84 N.J. 28, 36-37 (1980), and uses guidelines that mirror those found in the Restatement (Second) of Conflicts of Laws § 188 (1971), which reads as follows:

1. The rights and duties of the parties with respect to an issue in a contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in Section 6.
2. In the absence of an effective choice of law by the parties, the contact to be taken into account in applying the principles of Section 6 to determine the law applicable to an issue include:
    a. the place of contracting;

b. the place of negotiation of the contract;
c. the place of performance;
d. the location of the subject matter of the contract; and
e. the domicile, residence, nationality, place of incorporation and place of business of the parties.

3. If the place of negotiating the contract and the place of performance are the same state, the local law of this state will usually be applied, except as otherwise provided in Sections 189-199 and 203.

Id. See also, Gilbert Spruance Co. v. Pennsylvania Mfrs. Ass'n Ins. Co., 134 N.J. 96, 103 (1993), *Keil v. Nat'l Westminster Bank, Inc.*, 311 N.J. Super. 473, 485 (App. Div. 1998).

Restatement (Second) of Conflicts of Laws (1971) §6, entitled "Choice-of-Law Principles" gives general guidance in applying §188 and provides, in relevant part:

> [T]he factors relevant to the choice of the applicable rule of law include: (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied.

Id. See also Keil, supra at 485.

In this instance, the Backing Agreement was executed electronically (Def. Stat. ¶10), so the *lex loci contractus* is difficult to ascertain. Mr. Childs' signature was put to paper in the Commonwealth of Virginia. Def. Stat ¶10. Ms. Mitchnick's location at the time she signed the Backing Agreement is absent from the evidentiary record in this matter. Even if the Court operates under the presumption that Ms. Mitchnik was in New Jersey, Virginia's connection to the location of contracting (Restatement § 188(2)(a)) is at least as strong as New Jersey's connection.

Negotiation of the Backing Agreement took place mostly over email. Def. Stat. ¶9. Mr. Childs was located in Virginia when communicating with Plaintiff regarding the proposed backing agreement. Def. Stat. ¶9. Ms. Mitchnick's location during these negotiations is again

absent from the evidentiary record. Still, with respect to the execution and negotiation of the Backing Agreement (Restatement § 188(2)(b)), Virginia has, at minimum, a connection equaling New Jersey's connection. As for the domicile and residence of the parties (Restatement § 188(2)(e)), that too features, at a minimum, a split between Virginia and New Jersey, as, at all relevant times, Defendant was domiciled in Virginia.

The dominant place of performance of the Backing Agreement (Restatement § 188(2)(c)) was Virginia. As discussed in detail in Section III-C, *infra*, by mutual consent of the parties, the Backing Agreement was modified to include online poker, and Mr. Childs proceeded to play a tremendous amount of online poker from his home in accordance with the terms of the Backing Agreement. Def. Stat. ¶23. Mr. Childs traveled to various jurisdictions to play live tournament poker, including Nevada, Florida, Connecticut, Mississippi, Pennsylvania West Virginia, and New Jersey. Childs Aff. ¶8. However, he played more hours of poker in Virginia than in any other jurisdiction and generated more profit playing poker in Virginia than in any other jurisdiction. Def. Stat. ¶¶24, 29. New Jersey's connection as a place of performance is limited to a limited number of live poker tournaments Defendant played in Atlantic City, New Jersey.

The subject matter of the Backing Agreement was Defendant himself. By Plaintiff's own admission, the Backing Agreement was an investment contract (Def. Stat. ¶¶24, 29), and the entity in which she invested was the poker playing skills of Mr. Childs. Def. Stat. ¶11. Since Defendant was a resident of the Commonwealth of Virginia at all relevant times (Def. Stat. ¶2), the subject matter of the Backing Agreement (Restatement §188(2)(d)) was in Virginia.

Section 6 of the Restatement of Conflicts of Laws features general guidelines meant to augment §188 analyses. One such guideline is especially pertinent here: the consideration of the relevant policies of other interested states under Restatement §6(c). In applying Restatement

§6(c), New Jersey courts examine whether application of the other state's law would advance the policy that state's law was intended to promote. *General Ceramics v. Firemen's Fund Ins. Co's.*, 66 F.3d 647, 656 (3d Cir. 1995). Here, the Court is faced with the Commonwealth of Virginia's pronounced public stance against gambling, designed to protect its citizens from what its legislature clearly views as a vice. As amplified in Section II below, "Virginia's statutes reflect an unambiguous hostility to gambling," (*Rahmani v. Resorts Int'l Hotel, Inc.*, 20 F.Supp.2d 932, 936 (E.D. Va. 1998)), a hostility that "could scarcely be more forcefully expressed." *Coghill v. Boardwalk Regency Corp.*, 240 Va. 230, 232 (1990).

By contrast, New Jersey's stance on gambling is more permissive, but New Jersey has no countervailing interest in serving as safe haven for gamblers. As this case pertains to a contract entered into in Virginia by a resident of Virginia, the topic of which was an investment located in Virginia, the performance of which took place predominantly in Virginia, Defendant submits that principles of comity require that the Court give deferential weight to Virginia's clearly defined policy of protecting its citizens from contracts like the Backing Agreement.

Based on the forgoing, the state with the most significant connection to the parties is Virginia. Summary judgment should be granted to Defendant on this issue.

II. DEFENDANT SHOULD BE GRANTED SUMMARY JUDGMENT BECAUSE THE BACKING AGREEMENT IS VOID UNDER VIRGINIA STATE LAW

By Plaintiff's own admission, the Backing Agreement involved the provision of funds to Defendant for the purpose of playing poker (Def. Stat. ¶11), thus making it a gambling contract. Such contracts are void per Code of Virginia Titles §11-14, which states:

> Except as otherwise provided in this section, all wagers, conveyances, assurances, and all contracts and securities whereof the whole or any part of the consideration is money or other valuable things won, laid, or bet, at any game, horse race, sport or pastime, and all contracts to repay any money knowingly lent at the time and place of such game, race, sport or pastime, to any person for the purpose of so

> gaming, betting or wagering, or to repay any money so lent to any person who shall, at such time and place, so pay, bet or wager, shall be utterly void.

Id.

This statute, which obviously encompasses the game of poker,[2] has repeatedly been held by the Virginia Supreme Court to be an unequivocal ban on gambling contracts. *See Hughes v. Cole*, 251 Va. 3, 14-15 (1996); *Coghill, supra*; *Kennedy v. Annandale Boys Club, Inc.*, 221 Va. 504 (1980). Notably, each of the forgoing three cases involved contracts pertaining to *legal* gambling activity. In *Hughes*, an oral contract to split legally obtained Virginia State lottery proceeds was deemed unenforceable. In *Coghill*, the Virginia Supreme Court noted that gambling debts incurred by plaintiff in a New Jersey casino could not be enforced in a Virginia cause of action. And in *Kennedy*, it was held that the court had no jurisdiction over the parties' dispute over a $6,000 charity prize won in a legally operated bingo parlor. As stated in the *Hughes* decision, "[w]hile . . . no criminal sanctions can be imposed upon those who either conduct or play the game, it nevertheless did not render valid and enforceable the contract between the operators of the game and those who play. The statute is couched in plain, unambiguous, and strict language. A gaming contract in Virginia is held to be a contract that is utterly void. A void contract is a complete nullity, one that has no legal force or binding effect." *Hughes, supra* at 15.

Defendant does not concede, as contended by Plaintiff, that the Backing Agreement incorporates only legal activity (*see* Section III below). However, if Virginia law is applicable, the Court need not reach that issue. The Backing Agreement is a gambling contract, and a

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[2] Poker is defined as "any of several card games in which a player bets that the value of his or her hand is greater than that of the hands held by others. . ." *"poker," Merriam-webster.com.* Merriam-Webster, 2013. 30 October 2013.

gambling contract has no force or effect in Virginia. There is no set of facts or circumstances that can prevent dismissal of this lawsuit if Virginia law is applicable. Accordingly, Defendant requests that the Court grant summary judgment and dismiss the Complaint.

The remainder of this memorandum presumes—but in no way concedes—that the laws of the State of New Jersey are applicable to this dispute. Even if the Court reaches that determination in its choice of law analysis, the Backing Agreement remains unenforceable.

III. DEFENDANT SHOULD BE GRANTED SUMMARY JUDGMENT BECAUSE THE BACKING AGREEMENT REQUIRES ILLEGAL ACTIVITY AND IS THEREFORE UNENFORCEABLE

A. New Jersey Laws on Gambling

It is axiomatic that in any United States jurisdiction, "no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act." *Higgins v. McCrea*, 116 U.S. 671, 686 (1886). The Backing Agreement—in both its express terms and as modified by the parties—condones illegal acts.

Article IV, Section VII-2 of the New Jersey State Constitution provides that for a form of gambling to be legal in New Jersey, the state legislature must explicitly authorize it. *Id.* At the time the parties executed the Backing Agreement, the State Constitution enumerated which forms of gambling, if authorized by the Legislature, would be permissible. These were:

A. Certain forms of bingo;
B. Certain raffles;
C. The state lottery;
D. Certain games played in Atlantic City casinos (also thoroughly regulated by New Jersey's Casino Control Act, N.J.S.A. 5:12-1 et. seq.); and
E. Wagering on horse races from certain locales.

New Jersey Const. Art. IV §VII A-E. Meanwhile, N.J.S.A. 2A:40-1 states that "[a]ll wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance,

casualty or unknown or contingent event, shall be unlawful." *Id.* Like the previously cited Virginia statute, this obviously encompasses poker.

Finally, N.J.S.A. 2A:40-3 states as follows:

> All promises, agreements, notes, bills, bonds, contracts, judgments, mortgages, leases or other securities or conveyances which shall be made, given, entered into or executed by any person, the whole or part of the consideration of which is for any money, property or thing in action whatsoever laid, won or bet in violation of section 2A:40-1 of this title, or for reimbursing or repaying any money knowingly lent or advanced to help or facilitate such violation, shall be utterly void and of no effect.

Id. This statute is analogous to Virginia Code §11-14. Its express aim is to void gambling contracts, but in contrast to Virginia's outright prohibition of gambling contracts, New Jersey requires that the underlying gambling activity be illegal for a contract to be voided.

B. <u>The Backing Agreement Calls for Defendant to Play in Privately Held Poker Games, Which Are Illegal Under New Jersey State Law</u>

Read in conjunction, Article IV, Section 7 of the New Jersey Constitution and N.J.S.A. sections 2A:40-1 and 2A:40-3 form New Jersey law, voiding any contract pertaining to forms of gambling not explicitly deemed legal by the state legislature. Thus, neither live poker games played outside the confines of a casino, nor poker games taking place online can be the subject of a valid contract in New Jersey. The Backing Agreement provides that Mr. Childs partake in those precise activities. Def. Stat. ¶15.

In the first section of the Backing Agreement entitled "Scope," it states that all of Mr. Childs' buyins shall exceed $200 with the exception of "home games/tournaments not hosted by a casino." *Id.;* Def. Counsel Cert Exhibit 5 at p. 1. The parties thus clearly contemplated, and expressly set forth in the Backing Agreement, that Mr. Childs would play in home games and

tournaments taking place outside of casinos.[3] This language voids the Backing Agreement under New Jersey state law.

C. Plaintiff and Defendant Modified the Backing Agreement to Include Online Poker, Which is Illegal Under Federal and New Jersey State Law

The "Scope" section of the Backing Agreement leaves the door open for modification, stating that online poker tournaments are "excluded from the initial agreement, but open to discussion later." Def. Counsel Cert. Exhibit 5 at p. 1. The parties' course of conduct unmistakably indicates that discussions regarding online poker did in fact take place, and that online poker ultimately became included, and in fact integral, to the parties' agreement; online poker tournaments were their biggest source of profits. "[P]arties to an existing contract may, by mutual assent, modify it. . . Such modification can be proved by an explicit agreement to modify or . . . by the actions and conduct of the parties so long as the intention to modify is mutual and clear." *County of Morris v. Fauver*, 153 N.J. 80, 103 (1998), *citing Bohlinger v. Ward & Co.*, 34 N.J. Super. 583, 587 (App. Div. 1955). The presence of a clause requiring that contract modifications be in writing does not bar modification by other methods; a writing requirement "may be expressly or impliedly waived by the clear conduct or agreement of the parties." *Home Owners Constr. Co. v. Borough of Glen Rock*, 34 N.J. 305, 316 (1961).

In this instance, there is overwhelming and uncontroverted evidence that the parties modified the Backing Agreement to include online poker. The following is a list of just a few of the parties' online-poker-related endeavors:

- The provision by Plaintiff to Defendant of $40,000 as online poker seed money in or about August and September 2009. Def. Stat. ¶21.

[3] This language in the Backing Agreement is likely the reason that Jason Gross, an attorney Plaintiff consulted with after she drafted the Backing Agreement, informed her that it was probably not enforceable. Def. Stat. ¶6.

- An attempted written amendment of the Backing Agreement to encompass online poker. Def. Stat. ¶22.
- The repeated and consistent movement of funds to and from poker websites through bank wires and the exchange of cash with individuals for player-to-player online transfers; Def. Stat. ¶25.
- Defendant playing well over one thousand hours of online poker using Plaintiff's money, encompassing over 4,000 poker tournaments. Def. Stat. ¶23.
- Beginning in or about September 2010, the combining of the parties' live and online makeup, i.e., the tracking of Defendant's live and online poker results using a single numerical figure. Def Stat. ¶27.
- Defendant winning $144,512.29 in an online poker tournament on or about November 21, 2010, the proceeds of which were subsequently applied to the combined live and online makeup figure and then distributed on a 50/50 basis to Plaintiff and Defendant in the amount of $45,227.23 each, pursuant to the terms of the Backing Agreement. Def. Stat. ¶29.

The Backing Agreement was clearly modified to include online poker.

Despite years of complicity with and profit from Defendant's online poker play, Plaintiff now makes efforts to distance herself from it. The reasons are obvious: First, by virtue of its omission from the New Jersey statutes discussed above, online poker, like other private unregulated poker games, was illegal in New Jersey at all relevant times. Second, The Unlawful Internet Gambling Enforcement Act ("UIGEA"), passed by Congress in 2006, criminalizes the receipt or transfer of funds earmarked for online gambling by any person engaged in the business of betting or wagering. *See* 31 U.S.C. § 5361-5367. As discussed in the preceding two paragraphs, Plaintiff and Defendant, who were in business together, systematically moved funds to and from online poker accounts, using their Wachovia checking account as a conduit, by methods including bank wires and the payment and receipt of cash to individuals in exchange for player-to-player online transfers. Def. Stat. ¶25. These activities violated the UIGEA.[4]

[4] Another Federal statute possibly violated by the parties' online poker activities is the Federal Wire Act, 18 U.S.C. § 1084.

After almost two years, Plaintiff's continuous investment in Defendant's online poker play came to a sudden halt on April 15, 2011. On that date, the Department of Justice issued indictments against multiple online poker operators pursuant to the UIGEA and seized certain websites, including Pokerstars and Full Tilt Poker, the primary websites on which the parties had been gambling. Def. Stat. ¶29. The Federal Government's message, vis-à-vis this lawsuit, could not have been clearer: what Plaintiff and Defendant were doing violated federal law. This Court should not enforce the Backing Agreement's terms under such circumstances.

Defendant's illegality defense is not precluded by the holding in *Gottlob v. Lopez*, 205 N.J. Super 417 (App. Div. 1985), *cert. denied*, 104 N.J. 373 (1986), a case cited by Plaintiff in her brief. Defendant's illegality defense is predicated on the fact that the Backing Agreement dictates that Defendant will play in poker games taking place outside of the regulated confines of a land-based casino. In fact, Judge Coleman made this very distinction in the *Gottlob* opinion, stating that the Appellate Division "agree[s] with the trial judge that N.J.S.A. 2A:40-3 renders unenforceable . . . loans which are made for the purposes of facilitating gambling prohibited by N.J.S.A. 2A:40-1." *Gottlob, supra* at 421. Unfortunately for Plaintiff, the Backing Agreement does just that.

Defendant claims that there is no question of material fact with respect to whether the Backing Agreement pertains to illegal activity. The Court therefore cannot enforce the Backing Agreement and must dismiss the Complaint herein. In the alternative, Defendant claims that a genuine issue of material fact has been raised with respect to whether the Backing Agreement was modified to include online poker (an illegal activity), thus requiring that the Court deny Plaintiff's motion for partial summary judgment on the proffered affirmative defense of illegality.

IV. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT BECAUSE PLAINTIFF CANNOT ESTABLISH THAT DEFENDANT BREACHED THE BACKING AGREEMENT

A. The Parties Relied on a Mutual Mistake of Fact in the Formation of the Contract

The "Player Responsibilities" section of the Backing Agreement states that Mr. Childs will "[p]repare a schedule of live tournaments that he plans to play six months in advance." Def. Counsel Cert. Exhibit 5 at p. 2. On the date the Backing Agreement was executed, and at all relevant times thereafter, performance of this contract term was impossible. Poker tournament schedules are virtually never circulated six months prior to the event dates. Def. Stat. ¶38.

Annexed to these motion papers is the non-party affidavit of Matthew S. Savage, dated October 18, 2013. Mr. Savage is a professional poker tournament director employed by numerous industry-leading casinos and the head tournament director for the World Poker Tour ("WPT"). Mr. Savage states that he has prepared schedules for hundreds of tournaments, and cannot recall ever issuing a full poker tournament schedule six months prior to an event. Savage Aff. at ¶5.

Additionally, the dates that the World Series of Poker (hereinafter, "WSOP")[5] and the WPT[6] release their annual schedules of tournaments is a matter of public record. Annexed to this motion are the WSOP and WPT press releases in the years relevant to this dispute. Def. Counsel Cert. Exhibit 15. During the approximate 4-year term of the Backing Agreement, there

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[5] The WSOP is the largest live poker series of the calendar year in every respect, including length, size of prize pool, and number of participants. The WSOP runs from Memorial Day Weekend until Mid-July and features well over 100 poker tournaments. Haber Aff. at ¶11. Mr. Childs participated in the WSOP in each year the Backing Agreement was in force. Childs Aff. at ¶8.

[6] The WPT is an international live poker tournament tour offering televised high stakes poker tournaments and is a competitor of the WSOP. Haber Aff. at ¶12. Mr. Childs participated in numerous WPT events in each year under the terms of the Backing Agreement. Childs Aff. at ¶8.

was only year (2010) in which the WSOP tournament schedule was released 6 months in advance, and even then, only the final 16 days of the 50-day event schedule fell within that window. *Id.* at pp. 1-4. The WPT press releases, which include only the dates of "main events" and not the multitude of "preliminary" events that customarily precede the main events, similarly indicate that public notice of a poker tournament six months in advance is rare. *Id.* at pp. 5-15. Almost none of the WPT main events in the relevant time period fit the six-month notice criteria. *Id.*

Although Ms. Mitchnick drafted the six-month notice clause (Def. Stat. ¶5), Defendant is not ascribing to her the intent to mislead.[7] Rather, it seems that the parties' inexperience and lack of research and forethought led to this error in contract construction. Def. Stat. ¶39. The Restatement (Second) of Contracts § 152 (1981) defines a mutual mistake of fact as follows: "Where a mistake of both parties at the time of a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party. . ." *Id.* New Jersey courts follow this rule. *See, e.g., Bonnco Petrol, Inc. v. Epstein*, 115 N.J. 559, 560 A2d 655, 659-60 (1989), *citing* Restatement (Second) of Contracts §152 (1981).

Plaintiff attempts to establish the materiality of tournament scheduling by stating that Defendant's alleged obligation to "keep[]... the Plaintiff informed about the Defendant's . . . plans under the Backing Agreement represent[s] the essence of the agreement between the parties." Plaintiff's Letter Brief at p. 6. If this contract provision was indeed material, then the contract should be voided under New Jersey's mutual mistake doctrine.

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[7] This, of course, would constitute fraud and would invalidate the Backing Agreement.

Mr. Childs, however, as further discussed in Section IV-B below, alleges that this contract clause was *not* material to the agreement he had with Ms. Mitchnick. An examination of New Jersey cases wherein a mutual mistake of fact led to the rescission or a drastic reformation of a contract reveals situations easily distinguishable from the instant matter. *See, e.g., St. Pius X House of Retreats v. Diocese of Camden*, 88 N.J. 571 (1982), (real property actually sold did not match the property parties believed they were buying/selling); *Beachcomber Coins, Inc. v. Boskett*, 166 N.J. Super 442, (N.J. Super. A.D., 1979) (buyer and seller both mistakenly believed alleged rare coin was genuine). In those cases, the mutual mistakes pertained to the heart of the contracts at issue, not to scheduling or other administrative tasks.

In light of Plaintiff and Defendant's four years of uninterrupted and profitable operation under the Backing Agreement, it seems clear that their mutual mistake of fact regarding the availability of poker schedules was not essential to the agreed exchange of performances. The parties' mistake is what *Williston on Contracts* calls a "collateral mistake." That treatise states, in relevant part, that when, despite a mistake of fact, "a transaction is the kind of transaction [the parties] had in mind," the mistake of fact is immaterial. 5 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* §1569 (4th Ed. 1993). Rather than resolve this situation by invalidating the contract or insisting that Defendant perform an impossible contract term, the Court should "consider the parties' practical construction of the contract as evidence of their intention" and remove the six-month scheduling clause from consideration entirely. *Fauver, supra*, 123 N.J. at 103. Defendant asserts that summary judgment is appropriate based on this affirmative defense. In the alternative, Defendant asserts that an issue of fact has been raised with respect to whether a mutual mistake of fact occurred.

B. **Defendant's Alleged Breaches Were Immaterial**

Even if Plaintiff is able to establish that Defendant breached the Backing Agreement, Mr. Childs' breaches were clearly immaterial. Each breach alleged by Plaintiff relates not to Mr. Childs' poker play or profitability, but to his supposed failure to perform an administrative task. Plaintiff does not contend that Mr. Childs defrauded her, stole from her, misappropriated her funds, or intentionally, recklessly or negligently lost her funds playing poker. Def. Stat. ¶40. This dispute is instead about clerical tasks. Such acts simply do not cut to the heart of Ms. Mitchnick and Mr. Childs' arrangement. *See* Haber Aff. at ¶¶52-55.

In an effort to establish materiality, Plaintiff presents only the bald, conclusory statement that "[t]he timely repayment of monies and keeping the Plaintiff informed about the Defendant's performance and plans under the Backing Agreement, represent the essence of the agreement between the parties." Plaintiff's Brief at p. 6. No evidence or case law is proffered to support Plaintiff's conclusion as to what the "essence" of a poker staking agreement truly is.

The materiality of a breach is a question of fact. *See, e.g., Magnet Res. Inc. v. Summit MRI, Inc.* 318 N.J. Super 275, 286 (App. Div. 1998). To measure the materiality of a breach, New Jersey courts examine whether the breach tends to defeat the purpose of the subject contract, *Id.*at 286, and whether "one party fail[ed] to perform 'essential obligations under the contract.'" *Chance v. McCann*, 405 N.J. Super 547, 565 (App. Div. 2009), *quoting Medivox Prod., Inc. v. Hoffman-LaRoche, Inc.*, 107 N.J. Super 47, 58-59 (Law Div. 1969); *Neptune Research & Dev., Inc. v. Teknics Indus. Sys., Inc.*, 235 N.J. Super 522, 532 (App. Div. 1989). New Jersey courts apply the Restatement (Second) of Contracts' five factors for assessing materiality, which are:

1. The extent to which the injured party will be deprived of the benefit which he reasonably expected;

2. The extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
3. The extent to which the party failing to perform... will suffer forfeiture;
4. The likelihood that the party failing to perform... will cure his failure, taking account of all the circumstances including any reasonable assurances; and
5. The extent to which the behavior of the party failing to perform... comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241 (1981).

Plaintiff admits that the goal of the Backing Agreement was to profit. Def. Stat. at ¶11. None of Defendant's alleged breaches had any bearing on the parties' profits or losses. Each alleged administrative breach will be addressed individually:

The Failure to Provide Tournament Schedules

As discussed in Section IV-A above, the provision of live tournament poker schedules six months in advance was impossible. This clause appeared in the Backing Agreement due to mutual mistake of fact. Assuming, *arguendo*, that compliance with this provision were possible, it is nevertheless immaterial, as it is unrelated to the goal of the Backing Agreement, i.e., profit. The parties carried on a four year business partnership, during which Defendant played a great number of poker tournaments with Plaintiff's permission, and Plaintiff in fact profited from Defendant's poker play. Def. Stat. ¶33. This was accomplished without the supposedly material benefit of schedules provided six months in advance.

Plaintiff has not alleged that Defendant's failure to provide timely schedules caused the suspension of their staking operation or that it resulted in a compensable loss. In fact, it is difficult to contemplate a scenario in which the provision of schedules six months in advance would have altered the parties' operation at all. Plaintiff has not suffered a deprivation of any sort from this supposed breach.

The Failure to Deposit Monies in the Joint Account or Deliver Cash Within 10 Days

The evidentiary record does not include a single document supporting this allegation. When asked whether he complied with this contract term, at deposition, Defendant replied "I'm not sure," (Childs Dep. at p. 71, lines 21-25) then continued as follows: "Let's see delivered, no, because many times we just kept it on hand . . . I'm traveling from place to place, so I needed the cash on hand." *Id.* at p. 72, lines 2-4. Apparently, Plaintiff believes this constitutes an admission of a breach, but it falls far short of that.

The parties coexisted for four years without having any documented disputes regarding the timeliness of Mr. Childs' provision of winnings to Plaintiff. Money was systematically moved in and out of the parties' joint checking account, and the evidentiary record lacks support for the notion that Plaintiff was displeased with this process. Moreover, Plaintiff admitted at deposition that Mr. Childs did not steal from her or misappropriate her money. Def. Stat. ¶40. Plaintiff has not argued that this alleged breach caused a disruption in the parties' operation or affected her profits under the Backing Agreement. Defendant never breached this clause in the Backing Agreement, and even if did, any such breaches were not material.

The Failure to Provide "Appropriate" Tax Forms by January 31st

As an initial matter, this contract clause is ambiguous. "Appropriate tax form" is not defined anywhere in the Backing Agreement. Defendant is not business-savvy, has no accounting background and was unaware as to which tax forms were being referenced. The parties would have been best served by specifying which documents Plaintiff was to receive. Notwithstanding that problem and the fact that Plaintiff expressly waived this requirement on at least one occasion (*see* section VI-A, *infra*, and Def. Stat. ¶¶41, 43), the provision of tax forms is immaterial. In each of the relevant years, Plaintiff timely filed tax returns—in which her

profits/losses pursuant to the Backing Agreement were duly claimed—without incurring any penalties. Def. Stat. ¶42. When asked to quantify the impact of this alleged breach, Plaintiff cited "a delay in me getting a large refund from the government" (Mitchnick Dep. at p. 83, lines 17-23) and "inconvenience." Mitchnick Dep. at p. 84, lines 1-6. Again, this alleged transgression did not impact the parties' operation whatsoever, Plaintiff was not deprived of any benefits, and there is no compensable loss.

Defendant requests summary judgment on his affirmative defense of immateriality, as there is nothing in the evidentiary record suggesting that the administrative breaches alleged by Plaintiff are essential to Backing Agreement. In the alternative, Defendant requests that Plaintiff's request for summary judgment with respect to this defense be denied, as Defendant has shown that there are factual issues to be resolved on this topic.

V. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON THE BASES OF HIS DEFENSES OF WAIVER, PLAINTIFF'S BREACH, ESTOPPEL, LACHES AND UNCLEAN HANDS

A. Waiver

In Plaintiff's brief in support of her motion for summary judgment, it is stated that Defendant "has failed to come forward with sufficient proof" to support his defense of waiver. However, in response to Plaintiff's interrogatories, Defendant in fact provided copies of emails in which Plaintiff voluntarily and knowingly elected not to enforce the terms of the Backing Agreement. *See* Def. Counsel Cert. Exhibits 41 and 43, emails in which Plaintiff: (i) explicitly instructed Defendant *not* to send her tax documents because they were not necessary, and (ii) elected not to inform Mr. Childs that she believed her right to terminate "for cause" had been triggered, even after *Defendant* suggested they end the partnership. "The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right

and then abandoned it, either by design or indifference." *Knorr v. Smeal*, 178 N.J. 169, 836 A.2d 794, 798 (2003).

Waiver is especially pertinent in this case because Plaintiff has testified that she was aware of Mr. Childs' alleged administrative breaches as they occurred (Def. Stat. at ¶¶35-37) and believed that her right to terminate "for cause" was triggered at the time of Mr. Childs' first alleged breach. Mitchnick Dep. at p. 98, lines 7-11. Plaintiff's inaction, along with her affirmative acts described above, was unequivocal, and indicated her lack of intent to enforce the Backing Agreement's "Player Responsibilities" clause with respect to administrative tasks. She has waived her right to now assert a breach of contract.

B. **Plaintiff's Breach of Implied Covenant Of Good Faith and Fair Dealing**

Plaintiff's intentional misconduct in her relationship with Defendant is well documented and undisputed. Plaintiff believes her right to terminate the Backing Agreement was triggered the moment Mr. Childs committed his first alleged breach, sometime in 2010 or earlier. Mitchnick Dep. at p. 98, lines 7-11. Plaintiff did not exercise her alleged right to terminate. Instead, Plaintiff sat idle as Mr. Childs, according to Plaintiff, breached the contract at least 21 additional times Def. Stat. ¶¶35-37. For almost four years, despite these alleged repeated breaches, Plaintiff never warned Defendant a single time that she was considering the option of terminating the contract. Def. Stat. ¶46. This inaction alone misled Defendant, but Plaintiff's behavior in the late stages of the parties' contractual relationship rose to disturbing levels.

In or about February 2012, Plaintiff unilaterally decided that she was going to terminate the Backing Agreement. Def. Stat. ¶47. Instead of communicating her intention to Defendant, she concealed it from him for five months. *Id.;* Mitchnick Dep. at p. 79, lines 4-8. In the interim, Plaintiff interacted normally with Mr. Childs, indicating that all was well (Def. Stat.

¶48), until sending a termination letter on July 30th, 2012. Def. Stat. ¶50. Indeed, Plaintiff not only admits to her duplicity, but referenced it in her termination letter: "[W]aiting for makeup to be reduced below six figures so it would be at a manageable level for you, is why I continued to back you in 2012 until now." Def. Stat. ¶50, Pla. Cert. Exhibit I. Plaintiff purports that her failure to notify Defendant of her intent to terminate while he continued to play a full schedule of events for her, including the WSOP, was to protect Defendant and to mitigate his damages. Mitchnick Dep. at p. 78, line 5 through p. 79, line 3. This, of course, is nonsensical, as Defendant's makeup figure could easily have increased during those five months.

Plaintiff's silence during this time frame was misleading and, in fact, costly to Mr. Childs. By deliberately hiding her intention to terminate the Backing Agreement while Defendant continued to perform thereunder, Plaintiff committed a blatant breach of the covenant of good faith and fair dealing, a duty which is implied in every contract in New Jersey. *Pickett, supra*, 131 N.J. 457 at 467; *Onderdonk v. Presbyterian Homes*, 85 N.J. 171, 182 (1981); Restatement (Second) of Contracts §205 (1981).

"The party claiming a breach of the covenant of good faith and fair dealing 'must provide evidence sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties.'" *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Assocs.*, 182 N.J. 210, 864 A.2d 387, 396, *quoting* 5 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 1569 (4th Ed. 1993), §63:22. "As a general rule, 'subterfuges and evasions' in the performance of a contract violate the covenant of good faith and fair dealing 'even though the actor believes his conduct to be justified.'" *Brunswick*, 864 A2d. at 398, *quoting* Restatement (Second) of Contracts § 205, cmt. D (1981). That the Backing Agreement grants Plaintiff an

express and unambiguous right to terminate does not negate the duty imposed by the covenant of good faith and fair dealing. *Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396, 423-24 (1997).

By permitting Defendant to continue playing poker for her as an unwitting "lame duck," Plaintiff furtively shifted the financial risk from Plaintiff to Defendant, and prevented Defendant from controlling his own financial affairs, securing a commitment from another backer, and seeking a prompt resolution of her impending breach of contract claim. Mr. Childs would certainly have played the 2012 WSOP, during which he profited, with his own funds -- or another backer's funds -- had he known that Ms. Mitchnick intended to terminate the contract.

Contrary to the core intention of the Backing Agreement, Plaintiff's investment in Mr. Childs from February 2012 through July 2012 was risk-free. If, during that time period, Mr. Childs won money gambling, then Plaintiff profited. If, during that time period, Mr. Childs lost money gambling, then the money was still recoverable by Plaintiff, as her contractual damages figure accrued. Unbeknownst to Defendant, who rightfully presumed he bore no risk, *he was playing poker with his own money*. The benefit of the bargain was lost. This is an egregious breach of the implied covenant of good faith and fair dealing. *See* Haber Aff. at ¶¶58-63.

In *Bak-A-Lum Corp. of America v. Alcoa Bldg. Products, Inc.*, 69 N.J. 123 (1976), the New Jersey Supreme Court considered a situation analogous to the instant dispute. In that case, the parties entered into a contract whereby Bak-A-Lum became the exclusive distributor of one of Alcoa's products. During the contract term, Alcoa secretly decided that it would be terminating the contract yet remained silent while Bak-A-Lum continued to perform. Although Alcoa's behavior was not expressly forbidden by the parties' contract, the trial court, in finding a breach of the implied covenant of good faith and fair dealing, stated that Alcoa's treatment of Bak-A-Lum "besp[oke] a certain hypocrisy as well as ruthlessness on the part of Alcoa towards

its distributor of many years." *Id.* at 128. In affirming, the New Jersey Supreme Court found that Alcoa's "selfish withholding from plaintiff of its intention seriously to impair its distributorship although knowing plaintiff was embarking on an investment substantially predicated upon its continuation constituted a breach of the implied covenant of dealing in good faith. . ." *Id.* at 130.

C. **Estoppel**

For Defendant to establish equitable estoppel, he must show that Plaintiff "engaged in conduct, either intentionally or under circumstances that induced reliance, and that [he] acted or changed [his] position to [his] detriment." *Knorr, supra,* 836 A.2d at 799. *See also Fauver, supra*, 153 N.J. at 104. As detailed in the preceding section, Plaintiff's failure to notify Defendant that he had committed what she believed were over 21 breaches of contract was enough to induce justifiable, detrimental reliance. In addition, beginning in February 2012, Plaintiff proceeded to intentionally withhold vital information that changed the entire nature of the parties' agreement. This induced Defendant to unknowingly and unnecessarily remain in an unfavorable position.

Permitting the Plaintiff to recover damages from Defendant in these circumstances is offensive to concepts of common fairness and morality, and estoppel is therefore appropriate. *See, e.g., Gruber v. Mayor and Township Committee of Raritan*, 39 N.J. 1, 13 (1962). Defendant requests that summary judgment be granted in his favor with respect to this defense.

D. **Laches and Unclean Hands**

The equitable doctrines of laches and unclean hands also apply. To establish laches, it must be shown that a party engages in an inexcusable and unexplained delay in exercising a known right, to the prejudice of the other party. *Knorr, supra* at 800. Unclean hands, meanwhile, is invoked as a "denial of relief to a party who is himself guilty of inequitable

conduct in reference to the matter in controversy." *Hageman v. 28 Glen Park Assoc.*, 402 N.J. Super 43, 48 (N.J. Super. Ct. Ch. Div. 2008), *quoting Glasofer Motors v. Osterlund, Inc.*, 180 N.J. Super 6, 13 (App. Div. 1981). Plaintiff's inaction in the face of supposed misconduct by Defendant dates back to at least 2010 (Mitchnick Dep. at p 72, line 22, through p. 73, line 10) and implicates laches. And while the aged doctrine of unclean hands is seldom used, Plaintiff's outright malfeasance during the final five months of the parties' relationship is a textbook example of a situation in which that doctrine applies. Defendant contends that summary judgment is appropriate on each of these two defenses.

Ms. Mitchnick's bad faith actions, to which she candidly admits, warrant that summary judgment be granted in favor of Defendant on the basis of Plaintiff's breach of the implied covenant of good faith, or under Defendant's defenses of estoppel, laches and/or unclean hands.

VI. THE BACKING AGREEMENT'S DAMAGES CLAUSE IS AN UNENFORCEABLE PENALTY CLAUSE

Even if this Court finds that the Backing Agreement is legal and enforceable, and further finds that Defendant has materially breached it, then Plaintiff still has not established a prima facie case for breach of contract due to its unenforceable penalty clause. To establish a *prima facie* case for breach of contract, the non-breaching party must establish (1) contract formation; (2) a breach; and (3) damages which are the "*natural and probable consequences*" of that breach (emphasis added). *Totaro, Duffy, Cannova & Co. v. Lane, Middleton & Co.*, 191 N.J. 1, 13 (2007), *quoting Pickett v. Lloyd's*, 131 N.J. 457, 474 (1993). It is a basic tenet of contract law that damages for a breach be compensatory in nature—that "in an ordinary breach of contract case, the function of damages is simply to make the injured party whole." *Furst v. Einstein Moomjy, Inc.*, 182 N.J. 2 (2004), *quoting Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 16 (1994). The court's "goal is 'to put the injured party in as good a position as . . . if performance has been

rendered.'" *Totoro, supra* at 13, *quoting Donovan v. Bachstadt*, 91 N.J. 434, 444 (1982). The damages clause in the Backing Agreement does not stand up to scrutiny under these standards, as there is no nexus between Defendant's alleged breaches and the recovery commanded by the Backing Agreement.

The section of the Backing Agreement entitled "Termination of Agreement by Backer" states: "If Backer terminates the agreement due to Player violating the agreement in any way, then Player is responsible for paying all makeup as defined in the first bullet under 'Termination of Agreement by Player.'" This is a stipulated damages clause—it attempts to dictate the amount Ms. Mitchnick shall recover in the event of any breach by Mr. Childs. Unfortunately for Plaintiff, these stipulated damages are manifestly a penalty. New Jersey courts do not enforce contractual penalty clauses.

Stipulated damages clauses are subject to heavy scrutiny. "The validity of these 'stipulated damages clauses' has depended on judicial assessment of the clauses as an unenforceable penalty or as an enforceable provision for 'liquidated damage.' *Wasserman's, Inc. v. Township of Middleton*, 137 N.J. 238, 248 (1994). As was stated by the Appellate Division in a seminal ruling on this topic:

> [l]iquidated damages is the sum a party to a contract agrees to pay if he breaks some promise, and which, having been arrived at by a good faith effort to estimate in advance the actual damages that will probably ensue from the breach, is legally recoverable as agreed damages if the breach occurs. A penalty is the sum a party agrees to pay in the event of a breach, but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach.

Westmount Country Club v. Kameny, 82 N.J. Super. 200, 205 (App. Div. 1964).

To properly evaluate whether the Backing Agreement's "recovery of makeup" provision is permissible liquidated damages or an impermissible penalty, it is vital to understand what

makeup is. Defendant respectfully refers the Court to the Expert's Affidavit of Eric Haber at ¶¶15-30 for a thorough discussion of that topic. In short, makeup is the amount a staked poker player must earn to bring cash flows with the backer into balance. Def. Stat. ¶13. In the Backing Agreement, makeup was the amount Mr. Childs was required to earn before the parties could achieve their next profit split. Haber Aff. at ¶40. Thus, as Plaintiff herself conceded, makeup is not debt Def. Stat. ¶13; Mitchnick Dep. at 78, lines 9-15. Makeup fluctuates wildly in relationships like the one memorialized in the Backing Agreement, and the parties herein were no exception: it is undisputed that the parties' makeup figure was over $100,000 at certain points in 2010, was reduced to zero in November of 2010, climbed back to roughly $100,000 before January 1, 2011, and was at $40,319 on July 30, 2012, the date the relationship ended. Def. Stat. ¶¶34, 49.

The parties' makeup figure is not in any sense a "good faith estimate" of the damages that might ensue from a breach of contract by Mr. Childs. There is nothing in the evidentiary record suggesting that the arbitrary sum of $40,319 would make Plaintiff whole for Mr. Childs' alleged administrative breaches. The only logical purpose for the "makeup as damages" clause is to deter Mr. Childs from breaching the agreement. The clause is nothing more than an incentive to perform, and here it results in an unfair windfall for Plaintiff, who actually profited under the Backing Agreement. "Makeup as damages" must be rejected by this Court as an unenforceable penalty clause.

It is instructive to note that New Jersey courts have been more deferential in instances where stipulated damage clauses are the product of negotiation between sophisticated commercial entities. *See Wasserman's*, *supra* at 252, *MetLife Capital Financial Corp. v. Washington Ave. Assocs.*, 159 N.J. 484 (1999). That is obviously not the case here. Indeed, the

Plaintiff and Defendant are individuals who fall on the opposite end of the spectrum. At the date of contract execution, neither Plaintiff nor Defendant had ever entered into a written poker staking contract. Def. Stat. ¶14. They chose not to retain counsel. Def. Stat. ¶7. Plaintiff declined to use a template when drafting the document. Def. Stat. ¶5. The Backing Agreement was the first business contract *of any kind* that Defendant ever signed. Def. Stat. ¶14.

In light of the unenforceability of the Backing Agreement's stipulated damages clause, the Court should grant summary judgment to Defendant on the basis that Plaintiff has failed to establish a *prima facie* case for breach of contract; the Backing Agreement's damages clause is unenforceable and the evidentiary contains nothing connecting Defendant's alleged breaches to calculable damages.

CONCLUSION

For all of the foregoing reasons, Defendant William Lee Childs' motion for an order granting summary judgment in its favor pursuant to R. 4:46 and dismissing the Complaint in its entirety should be granted. In the alternative, Defendant's Plaintiff's motion for partial summary judgment should be denied in its entirety.

Dated: Brooklyn, New York
November 7, 2013

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