

resident of the State of Virginia. (*See* Transcript of Defendant's Deposition (hereinafter "Childs Dep.") attached to Def. Counsel Cert., at p. 7, lines 13-15; Childs Aff. at ¶¶2-3.)

3. Plaintiff and Defendant met in Las Vegas, Nevada in the summer of 2008. (Mitchnick Dep. at p. 7, lines 9-11; Childs Dep. at p. 8, lines 10-17.)

4. In the summer of 2008, Plaintiff and Defendant began to discuss the possibility of entering into a poker staking arrangement. (Childs Dep. at p. 8, line 20 through p. 9, line 10.)

5. Plaintiff created an initial draft of a written poker staking agreement from scratch, without the use of a sample or template. (Mitchnick Dep. at p. 20, line 21 through p. 21, line 12.)

6. After creating it, Plaintiff showed the proposed staking agreement to two attorneys, Steven Kaman and Jason Gross. (*See* Def. Counsel Cert. as Exhibit 1, emails between Plaintiff and attorneys) Mr. Gross advised Plaintiff that the proposed staking agreement "may not be legally enforceable." (Def. Counsel Cert. Exhibit 1; Mitchnick Dep. at p. 69, line 24 through p. 70, line 14.)

7. Neither party ultimately retained an attorney to assist in the preparation of the parties' staking agreement. (Mitchnick Dep. at p. 68 lines 21-23, Childs Dep. at p. 12, lines 4-6, p. 13, lines 6-11.)

8. Nicholas Brancato, who had previously been Plaintiff's poker coach, acted as an advisor to both parties with respect to the proposed backing agreement. (Childs Dep. at 12-13, 17-19. *See also* Def. Counsel Cert. Exhibit 2, emails between Mr. Brancato and the parties.) Mr. Brancato has been named by Plaintiff as an expert witness in this lawsuit. (*See* Def. Counsel Cert. as Exhibit 3, Plaintiff's Answers to Defendant's Interrogatories, dated February 5, 2013 at p. 5; Mitchnick Dep. at p. 12, lines 3-7.)

9. The parties' negotiations over the proposed backing agreement took place mostly by email. (*See* Def. Counsel Cert. Exhibit 4, copies of said emails; Childs Dep. at p. 13, lines 18-25.) Defendant was in the Commonwealth of Virginia when sending and receiving the majority of these emails. (Childs Aff. at ¶4.)

10. A document entitled "Player (Lee Childs)/Backer (Lynne Mitchnick) Agreement" (hereinafter, the "Backing Agreement") was signed by both parties on or about September 13, 2008. (*See* Def. Counsel Cert. Exhibit 5.) The Backing Agreement was exchanged, signed and countersigned by email. (Childs Aff. at ¶5.) Defendant was located in Virginia when he signed the Backing Agreement. (Childs Aff. at ¶5.)

11. The Backing Agreement gave Plaintiff access to Defendant's profitability at tournament poker. (*See* the Affidavit of Expert Witness Eric Haber, dated November 1, 2013 (hereinafter, "Haber Aff."), attached to Def. Counsel Cert, at ¶18.) The Backing Agreement also set forth rules under which Defendant was to enter poker tournaments using Plaintiff's money. (Mitchnick Dep. at p. 13, lines 1-4, Mitchnick Dep. at p. 22, lines 5-8.) The Backing Agreement was viewed by Plaintiff as an opportunity to profit (Mitchnick Dep. at p. 16, lines 21-25), or a "venture capital" opportunity. (Mitchnick Dep. at p. 22, lines 9-18, p. 75, lines 9-14.)

12. The purpose of the Backing Agreement, from Defendant's perspective, was to enable him to enter high stakes poker tournaments and to eliminate the risk of financial ruin. (Childs Aff. at ¶6; Haber Aff. ¶18.)

13. "Makeup" is an accounting figure integral to tournament poker staking relationships and is defined as the amount a poker player must earn to bring cash flows into balance. (Haber Aff. at ¶¶27, 29.) Makeup can, and often does, accrue despite the player and staker achieving an overall profit. (Haber Aff. at ¶29.) Makeup is not debt. (Mitchnick Dep at p. 78 lines 9-15; Haber Aff. at ¶29.)

14. Plaintiff had previously been involved in a number of “business endeavors” (Mitchnick Dep. at p. 66, lines 16-18), but her experience in poker staking was limited. (Mitchnick Dep. at p. 17, line 20 through p. 18, lines 1-25.) The Backing Agreement was the first long-term poker staking agreement which Plaintiff had entered (Mitchnick Dep. at p. 18, lines 20-25). Plaintiff believed it was the first business contract Mr. Childs had ever signed. (Mitchnick Dep. at p. 15, lines 18-21.) It was in fact the first business contract Mr. Childs had ever signed. (Childs Aff. at ¶7.)

15. In the section entitled “Scope,” The Backing Agreement expressly includes “home games” and “tournaments not hosted by a casino” as activities in which Defendant would engage. (Def. Counsel Cert. Exhibit 5 at p. 1.) Also in that section, it states that “[o]nline tournaments are excluded from the initial agreement, but open to discussion later.” (Def. Counsel Cert. Exhibit 5 at p. 1.) The Backing Agreement has no choice of law provision.

16. In the section entitled “Player/Backer Share of Cashes,” The Backing Agreement provides that profit earned by Mr. Childs while playing poker will be used first to satisfy makeup. The parties would then split the remaining profit on a 50/50 basis. (Def. Counsel Cert. Exhibit 5 at p. 1; Haber Aff. at ¶40; Mitchnick Dep. at p. 13, lines 8-18.)

17. Pursuant to the terms of the Backing Agreement, Plaintiff and Defendant opened a joint checking account at Wachovia Bank. (Childs Dep. at p. 19, lines 8-15, Def. Counsel Cert. Exhibit 5 at p. 1.) The parties used this account and the funds therein to conduct their business under the Backing Agreement. (Childs Dep. at p. 19, lines 16-25.)

18. In the section entitled “Player Responsibilities,” the Backing Agreement purports to require that Defendant perform certain administrative tasks. (Def. Counsel Cert. Exhibit 5 at p. 2.)

19. Defendant played two tournaments with Plaintiff's funds before the Backing Agreement was signed. (*See* Def. Counsel Cert. Exhibit 6, a spreadsheet created by Defendant entitled "Backing Through Feb 1, 2009" at p. 1.) Defendant commenced playing poker with Plaintiff's funds, pursuant to the terms of the signed Backing Agreement, in September 2008. (Def. Counsel Cert. Exhibit 6 at p. 1.)

20. On or about December 8, 2008, Defendant won \$17,630 in a live poker tournament at Harrah's casino in Atlantic City. Shortly thereafter, the parties elected to execute their first profit split, with the Plaintiff and Defendant receiving \$4,871 apiece. (*See* Def. Counsel Cert. Exhibit 7, a chart created by Plaintiff and produced in discovery entitled "Monies Paid by Defendant to Plaintiff Under Terms of Backing Agreements" at p. 1.)

21. In or about August 2009, the parties agreed that Defendant would commence playing online poker with Plaintiff's funds. (Childs Dep. at p. 31, line 23 through p. 32, line 12.) Plaintiff provided the initial funding to Defendant for Defendant's online poker play, in the amount of \$40,000, in August and September 2009. (Mitchnick Dep. at p. 45, line 20 through p. 48, line 15; Childs Dep. at p. 35, line 12 through p. 36, line 10; Def. Counsel Cert. Exhibit 8, a chart created by Plaintiff and produced in discovery entitled "Monies Paid by Plaintiff to Defendant Under Terms of Backing Agreements" at p. 2.)

22. In or about the fall of 2009, the parties attempted to modify in writing the Backing Agreement to include online poker. The terms of the parties' drafted but unexecuted online poker agreement are substantially the same as the terms of the Backing Agreement. (*See* Def. Counsel Cert. Exhibit 9, the parties' unexecuted online backing agreement; Childs Dep. at p. 29, lines 17-22; Mitchnick Dep at p. 26, line 21 through p. 27, line 10.)

23. Between August 2009 and April 15, 2011, Defendant played over one thousand hours of online poker with Plaintiff's funds on Pokerstars.com, FullTilt poker.com and LockPoker.com,

encompassing over 4,000 poker tournaments. (See Def. Counsel Cert. Exhibit 10, summaries of Defendant's online poker play indicating that he played 273 online tournaments from August 2009 through October 2009 and 874 online tournaments from January 2011 through April 2011, and summaries of Defendant's online poker play in the relevant years, published by the website onlinepokerratings.com; Childs Aff. at ¶9.) Defendant was located in the Commonwealth of Virginia when playing the vast majority of these online poker tournaments. (Childs Aff. at ¶9.)

24. Defendant played more hours of tournament poker and more total poker tournaments in Virginia than in any other state. (Childs Aff. at ¶¶9-10.)

25. With Plaintiff's permission, Defendant used various methods to fund his online poker accounts, including bank wires and the provision of cash to third parties in exchange for online money transfers. (Mitchnick Dep. at p. 54, line 14 through p. 55, line 14; Childs Dep., p. 69 lines 14-25; Def. Counsel Cert. Exhibit 7.)

26. On or about November 23, 2009, the parties executed a profit split in the amount of \$2,300 each, resulting from Defendant's online poker play. (Def. Counsel Cert. Exhibit 7 at p. 3.)

27. In or before September 2010, the parties' live and online makeup figures were combined, i.e., the parties began tracking Defendant's live and online poker results using a single numerical figure. (See Def. Counsel Cert. Exhibit 11, a true copy of a reconciliation spreadsheet exchanged by the parties in November of 2010 indicating that live and online makeup had been combined; Mitchnick Dep. at p. 33, line 24 through p. 34, line 23.)

28. On or about February 2, 2010, Defendant won money in a live poker tournament at Borgata Hotel and Casino in Atlantic City. The parties executed a profit split in the amount of \$5,000 each. (Def. Counsel Cert. Exhibit 7 at p. 4.)

29. On or about November 21, 2010, Defendant won \$144,512 in an online poker tournament. (See Def. Counsel Cert. Exhibit 12, a news article from pokernews.com detailing this result.) This win cleared the parties' makeup figure and allowed them to take profit in the amount of \$45,227.23 each. (See Def. Counsel Cert. Exhibit 13, a reconciliation spreadsheet created by Defendant in November of 2010.)

30. On or about April 15, 2011, the Department of Justice issued a criminal indictment against certain online poker operators, including Pokerstars and Full Tilt Poker and seized those companies' websites. (See Def. Counsel Cert. Exhibit 14, a press release from the United States Attorney for the Southern District of New York dated April 15, 2011 announcing the unsealing of that indictment.)

31. On or about April 15, 2011, Pokerstars and Full Tilt Poker ceased offering online poker to customers located in the United States, and all funds belonging to United States players on Pokerstars and Full Tilt Poker were frozen. (Mitchnick Dep. at p. 37, line 23 through p. 38, line 11.) As a result, Defendant stopped playing online poker with Plaintiff's funds. (Mitchnick Dep. p. 37, lines 10-15.)

32. On or about May 2, 2011, Pokerstars returned Defendant's frozen account balance to him, which totaled \$5,776.79. A portion of this money was divided by the parties as profit. (Def. Counsel Cert. Exhibit 7 at p. 4.)

33. Plaintiff's total profit under the Backing Agreement was over \$17,000. (Def. Counsel Cert. Exhibits 7 and 13; Haber Aff. at ¶51.)

34. Throughout the term of the Backing Agreement, the parties' makeup figure fluctuated. Makeup was over \$100,000 at certain times in 2010 (Mitchnick Dep. at p. 81, lines 11-16), roughly \$100,000 on or about January 1, 2012 (Mitchnick Dep. at p. 81, lines 1-5; Childs Dep. at p. 62, lines 9-14), and \$40,319 on July 30, 2012. (See Certification of Plaintiff's Counsel in

Support of Motion for Summary Judgment (“Pla. Counsel Cert.”) Exhibit E, Defendant’s Responses to Plaintiff’s Interrogatories dated April 3, 2013 at pp. 11-12, wherein Defendant concedes that this figure is accurate.)

35. Plaintiff alleges Defendant committed “at least eight to ten” breaches of contract in the calendar year 2010. (Mitchnick Dep. at p. 73, line 23 through p. 74, line 3.)

36. Plaintiff alleges Defendant committed “a minimum of eight to ten” breaches of contract in the calendar year 2011. (Mitchnick Dep. at p. 74, lines 5-11.)

37. Plaintiff alleges Defendant committed “a minimum of five to six” breaches of contract in the calendar year 2012. (Mitchnick Dep. at p. 74, lines 12-17.)

38. During the term of the Backing Agreement, the full schedules for all World Series of Poker and full schedules for World Poker Tour events, including preliminary events, were released to the public six months in advance very infrequently. (*See* Def. Counsel Cert. Exhibit 15, a collection of press releases announcing WSOP bracelet events and WPT main events; *see also* the Non-Party Affidavit of Matthew S. Savage, dated October 18, 2013, annexed to Def. Counsel Cert, at ¶5.) The parties nevertheless included in the Backing Agreement a clause requiring Defendant to provide a schedule of tournaments six months in advance. (Def. Counsel Cert. Exhibit 5 at p. 2.)

39. Defendant signed the Backing Agreement despite the presence of this clause because of an oversight and/or because he trusted Nicholas Brancato, who had reviewed the Backing Agreement and indicated to Mr. Childs his approval thereof. (Childs Dep. at p. 70, line 12 through p. 71, line 4.)

40. Plaintiff does not allege that Mr. Childs ever stole or intentionally misappropriated her funds or that he intentionally misreported poker tournament results. (Mitchnick Dep. at p. 120, line 1 through p. 121, line 9.)

41. On or about April 13, 2012, Plaintiff sent Defendant an email informing him that he did not need to send tax documents for 2011 to her. (*See* Def. Counsel Cert. Exhibit 16, copies of said emails.)

42. Plaintiff filed her tax returns without incurring a penalty in all five relevant years. Her profits and losses resulting from the Backing Agreement are represented in each relevant tax return. (*See* Def. Counsel Cert. Exhibit 17, copies of said tax returns.)

43. On or about August 12, 2011, the parties exchanged emails in which Mr. Childs broached the topic of ending the business relationship. In this exchange, Plaintiff did not notify Defendant that she believed her right to terminate the Backing Agreement and to subsequently demand damages had already accrued. (*See* Def. Counsel Cert. Exhibit 18, copies of said emails; Mitchnick Dep. at p. 90, line 21 through p. 93, line 18.) The parties' partnership remained intact.

44. During their relationship, Plaintiff frequently permitted Defendant to play poker tournaments on less than six months' notice. (Mitchnick Dep. at p. 114, lines 11-25.)

45. At no time did Plaintiff ever threaten to terminate the Backing Agreement. (Mitchnick Dep. at p. 84, lines 20-23.)

46. At no time did Plaintiff ever warn Defendant that she was contemplating terminating the Backing Agreement. (Mitchnick Dep. at p. 85, lines 15-18.)

47. In or about February 2012, Plaintiff became "100 percent sure" that she was going to terminate the Backing Agreement for cause. (Mitchnick Dep. at p. 85, line 24 through p. 86, line 3.) She did not inform Mr. Childs of her intentions. (Mitchnick Dep. at p. 86, lines 6-14.)

48. From February 2012 onward, Defendant continued to perform under the Backing Agreement. Plaintiff interacted normally with Defendant until sending him a letter terminating the Backing Agreement on July 30, 2012. On July 14, 2012, she sent him an email, requesting that he provide his upcoming schedule and then accepted said schedule in an email dated July 28,

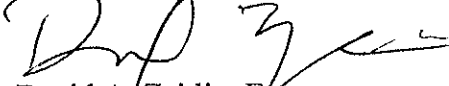
2012. (See Def. Counsel Cert. Exhibit 19, copies of said emails; Mitchnick Dep. at p. 108, line 5 through p. 111, line 2.)

49. Plaintiff issued a termination letter to Defendant on or about July 30, 2012. (See Pla. Counsel Cert. Exhibit I.) At that time, makeup was \$40,319. (Pla. Counsel Cert. Exhibit E at pp. 11-12; Pla. Counsel Cert. Exhibit I.)

50. In her termination letter, Plaintiff states that “waiting for makeup to be reduced to well below six figures so it would be at a manageable level for you is why I continued to back you in 2012 until now.” (Pla. Counsel Cert. Exhibit I; Mitchnick Dep. at p. 96, lines 8-19.)

Dated: Brooklyn, New York
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