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LYNNE MITCHNICK,

Plaintiff,

vs.

WILLIAM LEE CHILDS,

Defendant

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
HUDSON COUNTY**

DOCKET NO: HUD-L-4742-12

Civil Action

**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**

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On the brief

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PRELIMINARY STATEMENT

Please accept this brief in further support of the Plaintiff's motion for partial summary judgment pursuant on liability as to her affirmative claims and for total summary judgment as to the affirmative defenses of waiver and illegality raised by the defendant, William Lee Childs Jr. (hereinafter "Defendant"), in his answer, and in opposition to the cross-motion for summary judgment filed by the Defendant.

The arguments offered by the Defendant in opposition to the Plaintiff's motion and in support of his cross-motion are that (a) Virginia law, which prohibits contracts relating to gambling, applies to the present case; (b) that the contract between the parties covers allegedly illegal activities and is thus void due to illegality; (c) that the Defendant's admitted breaches are not material; (d) that the Plaintiff breached the implied covenant of good faith and fair dealing between the parties; and (e) that the damages clause in the subject agreement is an unenforceable penalty provision. As will be demonstrated herein, these arguments all fail because they are not supported by either the facts of the present case or the applicable law.

First, Virginia law does not apply to this case because it is New Jersey, or possibly Nevada, which has the most significant contacts with the subject contract. Second, the subject contract does not pertain to any illegal activities, whether on-line poker or otherwise. Third, the Defendant's breaches were both chronic and serious enough to be material under New Jersey law. Fourth, the Defendant never alleged a breach of the implied covenant of good faith and fair dealing between the parties in any pleading, and in any event failed to produce any evidence of the requisite intent on the part of the Plaintiff. Finally, the damages provision in the subject contract does nothing more than compensate the Plaintiff for her approximate actual damages

caused by the breach. For all of the reasons set forth herein, Plaintiff's motion should be granted in its entirety, and the Defendant's cross-motion should be denied in its entirety.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff relies upon the Statement of Material Facts Not in Dispute submitted in support of the original motion (hereinafter "Pla. Stat."). A review of the statement of facts submitted by the Defendant reveals several issues that need to be identified and addressed.

First, the Defendant attempts to mischaracterize the language of the September 13, 2008 written contract between the parties (hereinafter the "Backing Agreement") which forms the sole basis for the present action. The Backing Agreement did not cover monies advanced by the Plaintiff to the Defendant for on-line play. The first section of the first paragraph of the Backing Agreement entitled "Scope" expressly limits the scope of the Backing Agreement of live tournaments, and excludes as exceptions "home games, tournaments not hosted by a casino, charity events, and daily tournaments with a buyin less that \$200". This limits the types of events for which monies could be advanced under the Backing Agreement to in-person casino tournaments, not on-line play, home games, or the like. To make the issue even more clear, the third section of the first paragraph of the Backing Agreement entitled "Scope" expressly excludes on-line play. The parties did negotiate a second, separate agreement intended to govern financing for on-line play that the Plaintiff prepared, but the parties never executed it. Thus, while the Plaintiff did advance monies to the Defendant for on-line play in anticipation of this separate agreement, such monies are not governed by the Backing Agreement, and not the subject of the Plaintiff's complaint. The Defendant has never filed any affirmative claims seeking enforcement or interpretation of this separate agreement, so any issues relating to this

separate agreement, including monies exchanged as part of this separate agreement, are simply not before this Court and are thus irrelevant to the present action as a matter of law.

Second, the Defendant is alleging that the parties agreed to modify the Backing Agreement to encompass the Defendant's online poker play (See Defendant's Brief, at page 8). This statement is patently false, as demonstrated by both the Pla. Stat. at ¶ 2, and by the Defendant's own Statement of Material Facts Not in Dispute (hereinafter "Def. Stat.") at ¶ 22, where both parties acknowledge that a subsequent written agreement was never executed. It is undisputed that the parties discussed a proposed second agreement covering on-line play, that the Plaintiff prepared a draft of a proposed second agreement, and that the parties never executed any such agreement. While the Plaintiff did advance monies to the Defendant for on-line play in anticipation of a second agreement being executed, the fact remains that no such monies were advanced pursuant to the terms of the Backing Agreement, but solely in anticipation of the separate online agreement between the parties. The terms of the Backing Agreement clearly and unequivocally exclude on-line play, and there was never any written agreement between the parties modifying the scope of the Backing Agreement as required under the terms of the Backing Agreement itself (see last paragraph of first section entitled "Scope). Accordingly, the monies advanced pursuant to the Backing Agreement were solely for the lawful tournament play provided for therein.

Lastly, the Defendant is attempting to introduce as evidence an affidavit from Eric Haber, an individual identified as the Defendant's expert witness. This document was never identified or produced during discovery, despite specific discovery demands for same (See interrogatory 7, page 11, and interrogatory 45, page 24 in Plaintiff's interrogatories to Defendant, attached to the Certification of Counsel in Support of Motion for Summary Judgment as Exhibit D; see

Defendant's responses to interrogatories 7 and 45, at pages 4 and 14 respectively, of the Defendant's Answers to Interrogatories, attached to the Certification of Counsel in Support of Motion for Summary Judgment as Exhibit E.) Moreover, the Defendant never made any motion pursuant to R. 4:24-1(c) to reopen discovery in order to have this document and the information contained therein properly before this Court for purposes of this motion. The Defendant did produce a report from Mr. Haber during discovery, but that has not been provided to this Court. It is black letter law in the State of New Jersey that information requested but never produced during discovery can and should be barred from the factual record of a matter of law unless the party seeking to introduce same demonstrates "exceptional circumstances". See Smith v. Schalk, 360 N.J. Super. 337, 345, 823 A.2d 65, 71 (App. Div. 2003), Zadigan v. Cole, 369 N.J. Super. 123, 132-33, 848 A.2d 73, 78-79 (Ch. Div. 2004). There has been no such showing in this case, so Mr. Haber's affidavit should be barred as a matter of law.

LEGAL ARGUMENT

A. Virginia law does not apply to the Backing Agreement.

The Plaintiff's first argument in support of his cross-motion for summary judgment is that Virginia law applies to this case, and because Virginia law deems contracts such as the Backing Agreement to be unlawful, this Court must dismiss the Plaintiff's complaint as a matter of law. The alleged factual basis for this argument is the fact that the Plaintiff engaged in a number of on-line poker tournaments from his home in Virginia during the term of the Backing Agreement, which in turn provides Virginia with the closest relationship to this dispute and thus the strongest basis for application of its law. The Defendant's argument is simply not supported by either the facts of this case or the applicable law, and should thus be rejected in its entirety.

As a preliminary matter, this argument should be rejected by the Court as a matter of law because the Defendant never presented this defense in his answer and affirmative defenses, or in any other pleading prior to the motion. The Defendant made a generalized and inaccurate allegation in his affirmative defense number 13 that any agreement between the parties relating to on-line gambling was unlawful and therefore unenforceable under New Jersey and/or Federal law, but the Defendant never made a claim in any pleading that Virginia substantive law should apply to the present case. It is well-settled under New Jersey law that a party is limited at trial to introducing evidence only as to those issues that were raised in that party's pleadings or that were set forth in a pretrial order. See Rothman Realty Corp. v. Bereck, 73 N.J. 590, 598, 376 A.2d 902, 906 (N.J. 1977), citing Jardine Estates v. Koppel, 24 N.J. 536, 542, 133 A.2d 1 (1957); Terminal Enterprises, Inc. v. Jersey City, 54 N.J. 568, 577-578, 258 A.2d 361, 367 (N.J. 1969); Medivox Productions, Inc. v. Hoffmann-LaRoche, Inc., 107 N.J.Super. 47, 74, 256 A.2d 803 (Law.Div.1969); Ippolito v. Mayor of City of Hoboken, 60 N.J.Super. 477, 490, 159 A.2d 425, 432 (App. Div. 1960).

Assuming this Court finds some basis for allowing this improperly-raised argument to be heard, the Defendant is still unable to demonstrate that it is supported by either facts of this case or the applicable law. The Backing Agreement does not have a so-called "choice of law" provision, which requires this Court to apply New Jersey's choice of law rules for contract actions, which have been summarized as follows:

Unless the parties to a contract express a different intent, the law of the state which has the most significant contacts with a contract and the parties to that contract will be applied in determining its validity or interpretation. *State Farm Mutual Automobile Ins. Co. v. Simmons Estate*, 84 N.J. 28, 34-36, 417 A.2d 488 (1980); *Winer Motors, Inc. v. Jaguar Rover Triumph, Inc.*, 208 N.J.Super. 666, 672-673, 506 A.2d 817 (App.Div.1986); see also *Restatement, Conflicts 2d*, § 188 at 575 (1971).

McCabe v. Great Pac. Century Corp., 222 N.J. Super. 397, 399-400, 537 A.2d 303, 304-05 (App. Div. 1988).

In contract actions, New Jersey follows the Restatement (Second) of Conflict of Laws § 188 (1971) to resolve the “most significant contacts” questions. State Farm Mutual Auto. Ins. Co. v. Estate of Simmons, 84 N.J. 28, 34, 417 A.2d 488 (1980), which states:

(1) The rights and duties of the parties with respect to an issue in 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 § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 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.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

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

State Farm Mutual Auto. Ins. Co. v. Estate of Simmons, 84 N.J. 28, 34, 417 A.2d 488 (1980), citing to Restatement (Second) of Conflict of Laws, § 188 (1971).

A review of the facts of this case under the standards of §188 of the Second Restatement demonstrates that New Jersey or Nevada are the states with the most significant contacts, not Virginia. First, the contract was prepared by the Plaintiff while she resided in the State of New

Jersey, so §188(2)(a) favors application of New Jersey law. Second, the contract was signed by both parties in the State of New Jersey, so §188(2)(b) favors application of New Jersey law.

Third, the large majority of the in-person casino tournaments which are the sole subject of the Backing Agreement were played in either Atlantic City, New Jersey, or Las Vegas, Nevada, with none being played in the State of Virginia. Moreover, as demonstrated by the documents attached to the certifications submitted by the parties as part of the present motion, it is undisputed that the total amount of money advanced for online play pursuant to the separate agreement that the parties were considering totaled approximately \$122,983.00, representing a mere 18.8% of the approximately \$654,377.43 invested under the Backing Agreement. Thus, under any metric, the vast majority of performance under the Backing Agreement related to in-person casino tournaments in New Jersey or Las Vegas. The Defendant counters these undisputed facts by arguing that he allegedly played numerous on-line tournaments from his home in Virginia, but this allegation is rendered wholly irrelevant by the fact that the Backing Agreement expressly excludes on-line play from its terms, and the parties never executed the separate agreement relating to on-line play that the Plaintiff had prepared, and by the fact that the total value of on-line play was miniscule compared to the value of the in-person tournaments which were the sole focus of the Backing Agreement. Accordingly, §188(2)(c) favors application of New Jersey or Nevada law.

Fourth, the location of the subject matter of the Backing Agreement is the location of the casinos where the Defendant played in the in-person tournaments covered by the Backing Agreement. It is undisputed that the vast majority of these tournaments were played in Atlantic City, New Jersey, or Las Vegas, Nevada, with none being played in the State of Virginia. Accordingly, §188(2)(d) favors application of New Jersey or Nevada law.

The fifth and final element of §188(2)(e) favors no jurisdiction. The Plaintiff resided in the State of New Jersey at the time the parties negotiated and executed the contract, while the Defendant resided in Virginia. Neither state has any advantage under this element, so §188(2)(e) favors no state.

Taken as a whole, the overwhelming weight of the §188 weights clearly in favor of New Jersey law, with a possible claim by Nevada law. Virginia has no contacts in regard to the Backing Agreement, because the Backing Agreement expressly excludes the alleged on-line play which the Defendant engaged in while residing in Virginia which forms the basis for the Defendant's entire choice of law argument. As both New Jersey law and Nevada law are in accord as to the legality and enforceability of contracts for financing for casino gambling (see Gottlob v. Lopez, 205 N.J. Super. 417, 420, 501 A.2d 176, 178 (App. Div. 1985); Sigel v. McEvoy, 101 Nev. 623, 626, 707 P.2d 1145, 1147 (1985)) this Court may apply New Jersey law without running afoul of any policy interest that Nevada law may have in relation to the Backing Agreement.

B. The Backing Agreement is not unlawful.

The Defendant's primary argument in opposition to the Plaintiff's motion and in support of his cross-motion is that the Backing Agreement is void because its subject matter is illegal, and is thus unenforceable. As demonstrated herein above, Virginia law does not apply to this case, so any prohibitions which Virginia law may or may not impose upon such contracts is irrelevant. It is undisputed that the law of the two states with arguable contacts with this case, New Jersey and Nevada, both expressly recognize the validity and enforceability of agreements like the Backing Agreement. See Gottlob v. Lopez, 205 N.J. Super. 417, 420, 501 A.2d 176, 178 (App. Div. 1985); Sigel v. McEvoy, 101 Nev. 623, 626, 707 P.2d 1145, 1147 (1985).

The Defendant next argues that the Backing Agreement should nonetheless be deemed void for illegality because the Defendant engaged in home games and/or online play using funds provided by the Plaintiff, and that this activity, which was expressly excluded from the terms of the Backing Agreement, somehow renders it unlawful. This argument is simply not supported by either the facts of this case or the relevant law.

In terms of the allegations relating to home play, it is clear from the plain language of the Backing Agreement that home games are an exception that is specifically excluded from the scope of the Backing Agreement. Moreover, it is undisputed that the Plaintiff never advanced any monies to the Defendant for home games, so no unlawful activity could have occurred.

In terms of the allegations relating to on-line play, it is undisputed that the Backing Agreement expressly excluded on-line play. It is also undisputed that, while the parties discussed entering into a separate agreement for on-line play, and that the Plaintiff advanced monies to the Defendant in anticipation of this separate agreement, the parties never executed any such agreement, nor otherwise modified the Backing Agreement in writing to include on-line play or home games. Consequently, any funds advanced by the Plaintiff to the Defendant for on-line play are simply not relevant to any issue before the Court in the present action, whether on-line play is or was unlawful at any relevant time. The sole activity governed by the express terms of the Backing Agreement was in-person poker tournaments at lawful casinos, which is fully compliant with New Jersey and Nevada law. See Gottlob v. Lopez, 205 N.J. Super. 417, 420, 501 A.2d 176, 178 (App. Div. 1985); Sigel v. McEvoy, 101 Nev. 623, 626, 707 P.2d 1145, 1147 (1985).

Finally, the act of advancing monies for lawful casino gambling is not prohibited by any Federal law. Plaintiff is not seeking to recover any monies advanced for on-line play, as her

complaint is limited solely to enforcement of her rights under the Backing Agreement, which by its express terms excludes on-line play and relates to lawful casino gambling only. Federal courts have expressly held that the act of advancing credit for lawful gambling activities is not a violation of Federal law. See In re MasterCard Int'l Inc., Internet Gambling Litig., 132 F. Supp. 2d 468, 482 (E.D. La. 2001) aff'd sub nom. In re MasterCard Int'l Inc., 313 F.3d 257 (5th Cir. 2002).

The Defendant's citation to the Unlawful Internet Gambling Enforcement Act (hereinafter the "UIGEA"), codified at 31 U.S.C. §5361 *et seq*, is inapposite to the present case for two reasons. First, since the Backing Agreement excluded on-line play, and the Backing Agreement is the sole basis for the present action, the issue of the legality or illegality of on-line poker playing is irrelevant, since any such activity by the Defendant, whether using money provided by the Plaintiff or not, falls outside the scope of the Backing Agreement. Indeed, this is the very reason why the parties discussed a separate financing agreement for on-line play. Secondly, the UIGEA by its very terms applies only to a person engaged in the business of betting or wagering from accepting bets or wagers from another person. By its terms, the UIGEA simply bars the internet sites upon which such play occurred from accepting bets and bar banks from processing same. There is no Federal criminalization of playing on-line poker, or loaning money to an individual on-line player, in the UIGEA, or any other Federal law.

C. The Defendant materially breached the Backing Agreement.

As set forth in the Plaintiff's original motion papers, the Defendant admitted to breaching multiple material elements of the Backing Agreement. The Defendant's opposition to this argument is to claim that one or more of the subject provisions were the result of mutual mistake; that the parties engaged in a course of dealing which created a new agreement; and/or that the

contract". See Ingrassia Const. Co., Inc. v. Vernon Twp. Bd. of Educ., 345 N.J. Super. 130, 136-37, 784 A.2d 73, 77-78 (App. Div. 2001), citing Medivox Prod., Inc. v. Hoffmann-LaRoche, Inc., 107 N.J. Super. 47, 58-59, 256 A.2d 803 (Law Div. 1969). Materiality for purposes of an actionable breach is defined as follows:

Where a contract calls for a series of acts over a long term, a material breach may arise upon a single occurrence or consistent recurrences which tend to "defeat the purpose of the contract." [citation omitted] In applying the test of materiality to such contracts a court should evaluate "the ratio quantitatively which the breach bears to the contract as a whole, and secondly the degree of probability or improbability that such a breach will be repeated." [citation omitted]

Magnet Res., Inc. v. Summit MRI, Inc., 318 N.J. Super. 275, 286, 723 A.2d 976, 981 (App. Div. 1998), quoting Medivox Productions, Inc. v. Hoffmann-La Roche, Inc., 107 N.J. Super. 47, 59, 256 A.2d 803 (Law Div. 1969).

In the present case, the repeated, chronic nature of the Defendant's admitted breaches speak directly to both the quantitative frequency of the breaches and the demonstrated probability of the Defendant repeating the breach. As set forth in the Plaintiff's original motion papers, the specific provisions of the Backing Agreement which the Defendant admits to breaching go directly to the Plaintiff's ability to manage her investment and timely receive the monies due to her under the agreement. The timely provision of information by the Defendant, and the timely receipt of monies by the Plaintiff, are the essence and the purpose of the Backing Agreement, and the Defendant's admitted failures to do so constitute a clear and material breach thereof. Regardless of the spin that the Defendant now tries to impute to his testimony as to his chronic breaches of the contract, the testimony is clear and unambiguous.

Finally, in regard to the issue of timely providing tournament schedules, the Defendant fails to apprise the Court of the undisputed fact that the parties themselves agreed to a three (3) month time period to replace the six (6) month period provided for in the original contract, and

that the Defendant still failed to comply, as per his own testimony. It is this omission which allows the Defendant to make an impossibility of performance argument.

D. Defendant is not entitled to an award of summary judgment based upon a claim of breach of the covenant of good faith and fair dealing.

In support of his cross-motion for summary judgment, the Defendant argues that the Plaintiff breached the implied covenant of good faith and fair dealing between the parties. This argument fails as a matter of law for two (2) reasons. First, as with so many of the claims being advanced by the Defendant in his motion papers, the Defendant never raised any claim or defense for breach of the covenant of good faith and fair dealing in any pleading, and is thus barred from raising it now as a matter of law. See Rothman Realty Corp. v. Bereck, 73 N.J. 590, 598, 376 A.2d 902, 906 (N.J. 1977), citing Jardine Estates v. Koppel, 24 N.J. 536, 542, 133 A.2d 1 (1957); Terminal Enterprises, Inc. v. Jersey City, 54 N.J. 568, 577-578, 258 A.2d 361, 367 (N.J. 1969); Medivox Productions, Inc. v. Hoffmann-LaRoche, Inc., 107 N.J.Super. 47, 74, 256 A.2d 803 (Law.Div.1969); Ippolito v. Mayor of City of Hoboken 60 N.J.Super. 477, 490, 159 A.2d 425, 432 (App. Div. 1960).

Second, it is black letter law that "Proof of "bad motive or intention" is vital to an action for breach of the covenant." Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Associates, 182 N.J. 210, 225, 864 A.2d 387, 396 (2005), citing Wilson v. Amerada Hess Corp., 168 N.J. 236, 251, 773 A.2d 1121, 1130 (2001). The Defendant has failed to present this Court with any proof of requisite unlawful intent on the part of the Plaintiff in either performing under the Backing Agreement or terminating the Backing Agreement. The record in this case shows that the Plaintiff was aware of the Defendant's chronic breaches of the contract, tried to be patient and work with the Defendant to address his breaches, and ultimately terminated the contract in accordance with its terms due to the Defendant's continued failure to perform. There

is no proof of intent to injure, defraud, or otherwise prejudice the Defendant on the part of the Plaintiff, and thus to the extent that the Defendant's cross-motion for summary is predicated upon a finding of breach by the Plaintiff of the implied covenant of good faith and fair dealing, it must be denied as a matter of law.

E. The damages clause in the Backing Agreement is not an unenforceable penalty provision.

As a preliminary matter, it is interesting how the Defendant has abandoned the pretense of the applicability of Virginia law in regard to all of his arguments in opposition to the Plaintiff's motion and in support of his cross-motion, including the meritless penalty provision argument addressed herein.

The final paragraph of the last section of the Backing Agreement entitled "Termination of Agreement by Backer" (hereinafter the "Makeup Provision") provides that, in the event that the Plaintiff terminated the Backing Agreement due to the Defendant's breach thereof, the Plaintiff would be entitled to recover "makeup" as defined in the Backing Agreement. The term "makeup" is defined in the Backing Agreement as "all buyins as defined above under "Scope" (i.e.; tournament entry fees, add-ons, rebuys, and prepaid dealer bonuses"). In other words, the Makeup Provision provides that, in the event of a breach by the Defendant, the Plaintiff is entitled to recover all of the unpaid monies that she expended during the term of the Backing Agreement. The Makeup Provision does not entitle the Plaintiff to recover additional monies beyond what she expended and was entitled to receive pursuant to the Backing Agreement. The Makeup Provision simply provides for the return to the Plaintiff of those monies that she advanced to the Defendant pursuant to the Backing Agreement which have not yet been repaid.

Defining "makeup" for purposes of the Backing Agreement is critical because it demonstrates that the Makeup Provision is an enforceable liquidated damages provision, and not

an unenforceable penalty provision, under New Jersey law. The difference between the two terms has been defined by the New Jersey Supreme Court as follows:

Enforceable stipulated damages clauses are referred to as "liquidated damages," while unenforceable provisions are labeled "penalties."

MetLife Capital Fin. Corp. v. Washington Ave. Associates L.P., 159 N.J. 484, 493, 732 A.2d 493, 498 (1999).

As a threshold matter, the burden of proof to invalidate the Makeup Provision rests with the Defendant:

Consistent with the trend toward enforcing stipulated damages clauses, the Appellate Division has recognized that such clauses should be deemed presumptively reasonable and that the party challenging such a clause should bear the burden of proving its unreasonableness.

Wasserman's Inc. v. Twp. of Middletown, 137 N.J. 238, 252, 645 A.2d 100, 108 (1994).

To prevail on this issue, the Defendant must present sufficient evidence to the Court that the plain language of the Makeup Provision is unreasonable, in that it fixes a large amount of damages that bears no reasonable relation to the Plaintiff's actual losses:

"[t]he overall single test of validity is whether the [stipulated damage] clause is reasonable under the totality of the circumstances,"

MetLife Capital Fin. Corp. v. Washington Ave. Associates L.P., 159 N.J. at 495, 732 A.2d at 499.

Reasonableness in this context has been further defined as:

"the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach." *Westmount Country Club, supra*, 82 N.J. Super. at 206, 197 A.2d 379; *see also Restatement (Second) of Contracts, supra*, § 356 comment a (stating, "The parties to a contract may effectively provide in advance the damages that are to be payable in the event of breach as long as the provision does not disregard the principle of just compensation."). One injured by a breach of contract is entitled only to just and adequate compensation. *McDaniel Bros. Constr. Co. v. Jordy*, 195 So.2d 922, 925 (Miss. 1967). Thus, the subject cancellation clause is unreasonable if it does more than compensate plaintiffs for their approximate actual damages caused by the breach.

Wasserman's Inc. v. Twp. of Middletown, 137 N.J. at 253, 645 A.2d at 108-09.

Finally, it is well settled under New Jersey law that Courts are directed to “not to rewrite a contract for the parties better than or different from the one they wrote for themselves.” Kieffer v. Best Buy, 205 N.J. 213, 223, 14 A.3d 737, 743 (N.J. 2011). Stated another way:

Equally well-settled is that when the terms of a contract are clear, “it is the function of a court to enforce it as written and not to make a better contract for either of the parties.” Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43, 161 A.2d 717 (1960). Absent ambiguity, the intention of the parties is to be ascertained by the language of the contract. Dontzin v. Myer, 301 N.J. Super. 501, 507, 694 A.2d 264 (App.Div.1997). “If the language is plain and capable of legal construction, the language alone must determine the agreement's force and effect.” FDIC v. Prince George Corp., 58 F.3d 1041, 1046 (4th Cir.1995). See also Royal Ins. Co. v. Rutgers Casualty Ins. Co., 271 N.J. Super. 409, 416, 638 A.2d 924 (App.Div.1994).

CSFB 2001 CP-4 Princeton Park Corporate Ctr., I.L.C. v. SB Rental I. LLC, 410 N.J. Super. 114, 120, 980 A.2d 1, 4 (App. Div. 2009).

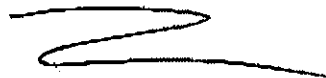
Applying these standards to the case at bar demonstrates that the Makeup Provision is a reasonable, enforceable liquidated damages provision, not an unenforceable penalty provision. The parties negotiated the Backing Agreement, including the Makeup Provision, together. The Defendant's comments and changes were incorporated into the final document that was signed by both parties, and the Defendant was afforded every opportunity to have the document reviewed by counsel if he wished. The Makeup Provision does not seek to award Plaintiff any more than what she would have reasonably expected to receive from tournament earnings over the long term had the contract not been terminated due to the Defendant's chronic material breaches. The Plaintiff receives no windfall, but instead merely recovers the monies that she expended and was entitled to recover. As per the holding in the Wasserman decision, the Makeup Provision does nothing more than compensate the Plaintiff for her approximate actual damages caused by the breach. As such, this Court should find that the Makeup Provision is a

reasonable, enforceable liquidated damages provision as a matter of law, and deny the Defendant's cross-motion for summary judgment in its entirety.

CONCLUSION

For all of the reasons set forth herein, and in the other papers submitted in support of the present motion, Plaintiff Lynne Mitchnick respectfully requests that this Court grant her pending motion in its entirety, deny the Defendant's cross-motion in its entirety, and enter the proposed form of Order submitted previously.

Respectfully Submitted,
STEVEN ROBERT LEHR, P.C.



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For the Firm

Dated: November 18, 2013