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MEMORANDUM

To: Michigan Joint Committee on Administrative Rules

CC: Michigan Gaming Control Board; Office of the Governor

From: Joshua R. Diamond, Esq.[1]

Date: April 20, 2023

Re: Fantasy Contest Rules

I have been asked by PrizePicks to review the Michigan Gaming Control Board's ("MGCB") proposed Fantasy Contest Rules. Specifically, this memorandum focuses upon the MGCB's recent decision to seek additional language to proposed Rule 432.531(3)(b) that prohibits fantasy contests utilizing "proposition selection."

Based on the MGCB's stated purpose for this proposed rule, it would effectively prevent current fantasy sports operators from offering their existing contests within the State as they have lawfully done since 2019. For the reasons set forth in more detail below, this proposed regulation raises significant constitutional and statutory questions about its legality. The MGCB's decision to single out certain fantasy contests for elimination is inconsistent with the clear language of the statute authorizing these fantasy contests. It is also an example of arbitrary rule making that primarily benefits the existing duopoly in sports gaming maintained by

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[1] . Joshua R. Diamond is the former Deputy Attorney General for the State of Vermont (2017-2022). During his tenure, Mr. Diamond had responsibility for overseeing the various divisions of the Vermont Attorney General's Office including the Consumer Protection Division. His responsibilities also included implementation of the Attorney General's strategic goals related to consumer protection and other initiatives. Vermont implemented its fantasy contest statute, which also focuses upon knowledge and skill of sports data, performance, and statistics, similar to Michigan's statute, effective January 1, 2018. 9 V.S.A. § 4185 *et seq*.

FanDuel and DraftKings to concentrate their hold on the marketplace and potentially harm consumers.[2]

I. Background.

Michigan's Fantasy Contests Consumer Protection Act became effective on December 20, 2019. MCL § 432.501 et seq. It expressly authorizes fantasy sports. The relevant portion of the statute reads as follows:

> *"(iv) Each winning outcome reflects the <u>relative knowledge and skill of the fantasy contest players</u> and are determined by the aggregated statistical results of the performance of multiple individual athletes selected by the fantasy contest player to form the fantasy contest team, whose individual performances in the fantasy contest directly correspond with the actual performance of those athletes in the athletic event in which those individual athletes participated."*

MCL § 432.502(d)(iv)(emphasis added).

Michigan's law, like many other state fantasy contest statutes adopted across the country, is modeled on the federal law known as the Unlawful Internet Gambling Enforcement Act ("UIGEA"). See 31 U.S.C. § 5362(1)(E)(ix). The UIGEA exempts fantasy sports contests from the federal definitions of "bet" and "wager." Like the Michigan law, the UIGEA is perfectly clear allowing for fantasy contests where the outcome is determined by the "relative skill and knowledge" of the contest participants. *See Id.*

In spite of that clear language, PrizePicks' competitors, DraftKings and FanDuel, are asking the MGCB to import new restrictions inconsistent with the plain language of both the Michigan and federal laws. They want to effectively restrict fantasy sports so that each winning outcome reflects the knowledge and skill of the fantasy contest players <u>relative to other fantasy contest players</u>.

Yet even this alternative interpretation does not exist in the governing statute or in the proposed changes to the fantasy contest rules defining a "fantasy contest." Rather, it is the result of the MGCB's interpretation of the following edits to the proposed rules:

> "Unless otherwise approved by the board, a fantasy contest operator or licensed management company may not offer or allow any of the following: (b) **Proposition selection** or fantasy contests that have the effect of mimicking proposition selection." Rule 432.531.(3)(b).

[2] Based on published February, 2023 MGCB revenue numbers, FanDuel and DraftKings accounted for 71% of total sports gaming revenue in the State of Michigan.

Proposition selection is defined as:

> "a fantasy contest player choosing whether an identified instance or statistical achievement will occur, will be achieved, or will be surpassed." Rule 432.511 (ee).

The MGCB has indicated that the purpose of this rule is to prohibit any type of fantasy contest where a contestant is competing against a third-party operator, regardless of the level of knowledge and skill utilized by that contestant to win or lose the offered prize. It is intended to prohibit the majority of existing contests offered in Michigan today where contest players select a fictional roster of athletes and the statistical outcomes of those athletes in real-world sporting events. Only those contests where players compete against one another, which not coincidentally happen to be the contests offered by market leaders DraftKings and FanDuel, would be allowed under the MGCB's interpretation of these new rules. Such limitations were knowingly rejected by the Legislature at the time of the law's enactment. *See* Attached Exhibit A, correspondence from Senator Curtis Hertel, Jr.

This new limitation, prohibiting "proposition selection," is also not found in the language of the Fantasy Contests Consumer Protection Act or any other Michigan law. There are no Michigan court decisions interpreting the "fantasy contest" definition to include the superfluous "proposition selection" language. In fact, the vast majority of states that have adopted fantasy sports statutes have no limitation based upon "proposition selection" and instead focus upon the relative knowledge and skill of game participants.[3]

It is noted that the proponents of the new regulatory change had a hand in lobbying on behalf of the same, clear statutory language that they are seeking to change. *See* David Eggert, *Michigan bills would regulate daily fantasy sports*, Associated Press, October 21, 2017 ("The bills are backed by Boston-based DraftKings and New York-based FanDuel, whose joint lobbyist testified at a recent Senate hearing in favor of the bill"). In his testimony, the FanDuel/DraftKings lobbyist distinguished fantasy sports from sports betting – not because participants must compete against each other – but because "sports betting is based more on the outcome of games and less so on individual statistics." *Id.* Certainly, if these proponents had wanted to limit "proposition selection" they had an opportunity to advocate for this limitation. However, they

[3] . *See e.g.,* Ind. Code Ann. § 4-33-24-9(2) ("All winning outcomes reflect the relative knowledge and skill of the game participants and are determined predominantly by accumulated statistical results of the performance of individuals…"); 4 Pa.C.S. § 302 ("All winning outcomes reflect the relative knowledge and skill of participants and are determined by accumulated statistical results of the performance of individuals, including athletes in the case of sports events."); Colo. Rev. Stat. § 44-30-1603(4)(b) ("All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of athletes in sporting events."); Ariz. Rev. Stat. § 5-1201(6)(d) ("Each winning outcome reflects the relative knowledge and skill of the fantasy sports contest players…").

did not. The proponents now seek to circumvent the legislative process through this rulemaking procedure.

II. Legal Standards.

Administrative agencies are creations of the Legislature, and their powers are limited to those delegated to them. *Fellows v. Michigan Commission For The Blind*, 854 N.W.2d 482, 487 (Mich. App. 2014). This limitation of authority is derived from the long-recognized separation of powers doctrine, which is a cornerstone to our democracy. *See Herrick Dist. Library v. Library of Michigan*, 810 N.W.2d 571, 581 (Mich. App. 2011). As such, the authority granted to administrative agencies, which are derived from statute, "…must include standards that check the exercise of the delegated authority from the legislature." *Pharmaceutical Research Manufacturers of America v. Department of Community Health*, 657 N.W.2d 152, 166 (Mich. App. 2003).

Consistent with this limiting principle, Michigan courts review agency rulemaking authority narrowly. "It is well settled that 'a statute that grants power to an administrative agency must be strictly construed and the administrative authority drawn from such statute must be granted plainly, because doubtful power does not exist.'" *Michigan Farm Bureau v. Department of Environmental Quality*, 807 N.W.2d 866, 883 (Mich. App. 2011)(*quoting In re: Procedure and Format for Filing Tariffs Under the Mich. Telecom. Act*, 210 Mich. App. 533, 539 (1995)).

Courts will have the final say whether a rule is a valid delegation from the Legislature. Unlike the federal courts, there is no "*Chevron*" deference to the agency's interpretation. "Indeed, an administrative agency's interpretation 'is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue.'" *Id.*, at 883-884 (citation omitted). When an agency's decision "'is in violation of statute or constitution [or] in excess of the statutory authority or jurisdiction of the agency, [the agency's] decision is not authorized by law and must be set aside.'" *Fellows* 854 N.W.2d at 482, 487 (Mich. App. 2014)(citation omitted).

Michigan Courts apply a three-part test to determine the validity of a rule. The elements are: (1) whether the rule is within the matter covered by the enabling statute; (2) whether the rule complies with the underlying intent; or (3) whether it is either arbitrary or capricious. *Insurance Inst. of Michigan v. Commissioner Financial & Ins. Svcs.*, 785 N.W.2d 67, 74 (Mich. 2010)(*citing Chesapeake & Ohio R. Co. v. Pub. Serv. Comm*, 228 N.W.2d 843 (Mich. 1975)).

Prohibiting fantasy games involving "proposition selection" is inconsistent with the Legislature's intent under the Fantasy Contests Consumer Protection Act.

Furthermore, its inclusion in the current draft regulation is an arbitrary exercise of agency power to limit competition and effectively harm consumers.

III. The Categorical Prohibition Against Proposition Selection And Requiring Head-To-Head Contests Violates Michigan Law.

The proposed regulation will not withstand judicial scrutiny because it exceeds the scope of authority under the Fantasy Contests Consumer Protection Act, it is inconsistent with legislature's intent, and it is arbitrary and capricious.

A. The MCGB's Prohibition of "Proposition Selection" Is Beyond The Scope Of The Enabling Statute.

The Michigan Supreme Court's seminal decision on the first prong, whether the agency has authority under the enabling statute to make a rule prohibiting proposition selection, is *Insurance Institute of Michigan v. Commissioner Financial & Insurance Svcs.*, 785 N.W.2d 67 (2010).

In this case, the Michigan Supreme Court invalidated an agency regulation promulgated by the Office of Financial & Insurance Services to prohibit use of credit scores when offering insurance premium discounts. The Insurance Institute successfully argued that the rule exceeded the agency's enabling statute because it was inconsistent with the underlying statute that allowed premium discounts that correlate to expected losses or expenses. *Id.*, at 79-82. "The Commissioner exceeded her authority by enacting a total ban on a practice that the Insurance Code Permits."

Similar to the reasons in *Insurance Institute of Michigan*, MGCB's efforts to categorically prohibit "proposition selection" contests will face reversal by the courts. The Fantasy Contests Consumer Protection Act does not require only contests where the outcome is based upon the results of other fantasy contest players. The authorizing statute permits fantasy games that reflect relative knowledge and skill. MCL § 432.502(d)(iv). Such relative knowledge and skill can be applied to the fantasy player's assessments of each athlete's statistical output in a given sporting event. There is no express language or other indication of legislative intent to support the limitations created by the "proposition selection" exclusion. There is no categorical ban prohibiting someone utilizing relative knowledge and skill to predict performance against an identified instance or statistical achievement. *See* Proposed Rule 432.511(ee); *Infra.*, subsection B below.

B. <u>The Rule Does Not Comport With Legislative Intent</u>.

An agency's interpretation of the statute it administers cannot conflict with the intent of the legislature. *Brightmore Gardens, LLC v. Marijuana Regulatory Agency*, 975 N.W.2d 52, 60 (Mich. App. 2021). Matters of statutory construction begin with the examination of the statute's language. *Id.*, at 62. "[I]f the language is unambiguous, we will conclude the Legislature intended the clearly expressed meaning and enforce the statute as written." *Id.*, at 63. Administrative bodies like the MGCB may not read words into a statute that do not exist. *See McCormick v. Carrier*, 795 N.W.2d 517, 527, fn 11 (Mich. 2010)("Accordingly, the Court of Appeals decisions that have gone beyond the plain language of the statute and imposed an extra-textual 'objectively manifested injury' requirement, in clear contravention of Legislative intent, are overruled…'"). An examination of the unambiguous language of the Fantasy Contests Consumer Protection Act does not support limitations for "proposition selection."

Critical to the analysis here is the word "relative" in the definition of fantasy contest.

> *"(iv) Each winning outcome <u>reflects</u> the <u>relative</u> <u>knowledge</u> and skill of the fantasy contest players and are determined by the aggregated statistical results of the performance of multiple individual athletes selected by the fantasy contest player to form the fantasy contest team, whose individual performances in the fantasy contest directly correspond with the actual performance of those athletes in the athletic event in which those individual athletes participated."*

MCL § 432.502(d)(iv).

"Relative" is an adjective that directly modifies the word "knowledge" – it does not modify "players" as the new regulation effectively requires. The Michigan Supreme Court provides simple direction under such circumstances: "Statutory interpretation requires courts to consider the ***<u>placement</u>*** of the critical language in the statutory scheme." *Johnson v. Recca*, 821 N.W.2d 520, 525 (Mich. 2012) (emphasis in original). The use of "relative" to modify "knowledge" and not "players" was purposeful. Accordingly, the Legislature did not intend fantasy contests to depend upon the relative performance of contestants to each other. It depends upon the relative knowledge and skill of each contestant on the outcome of the contest itself – stated otherwise: did the contestant win or lose based upon exercising their knowledge and skill of the athletes, playing conditions, and circumstances of the real-life sporting events.

This is supported by the "common and approved usage" of the term "relative." *See* MCL § 8.3a*; McCormick*, 795 N.W.2d at 525 ("When reviewing a statute, all non-

technical words and phrases shall be construed and understood according to the common and approved usage of the language…and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal.") Webster's Dictionary's primary definition of "relative" is "having relation or connection with." In the "fantasy contest" definition, the participant's "*relative* knowledge and skill" has a "relation" to "each winning outcome," the phrase that immediately precedes it. This makes perfect sense given the DraftKings/FanDuel testimony in favor of the legislation that legalized fantasy contests focused primarily on the fact the fantasy contests are "games of skill." Therefore, each participant's "knowledge and skill" must be related to "each winning outcome" in order to make it a "game of skill." *See Supra.,* AP Story (cited above). The relative performance of other contest players is not a requirement for an approved fantasy contest.

The key statutory language is also essential to distinguish fantasy contests from other forms of gaming, namely sports betting, where the outcomes overwhelmingly rest on the element of chance. In fact, the Fantasy Contests Consumer Protection Act uses the verb "reflect," a word meaning "to bring or cast as a result," to directly connect the phrase "winning outcome" to each player's "relative knowledge." This construction further supports that the Legislature intention to use the most "common and approved" definition of the word "relative" contained in Webster's Dictionary. In other words, a winning outcome is brought about by the skill and knowledge that is connected with the particular player.

The term "relative" can also mean "related in size or degree or other measurable characteristics." See WordNet Dictionary. However, when used in this context, the word "relative" is "usually followed by 'to' as in . . . 'earnings relative to production.'" *Id.* The only way the new regulation's supporters could be grammatically correct is if the language read "knowledge and skill relative **to** other players." That is not how the statute reads. If the Legislature intended for the Fantasy Contests Consumer Protection Act to read that way, it could have done so. The fact that it did not is a clear indicator that the Legislature did not intend for this form or definition of the word "relative" to be used. As such, if adopted, the new regulation would violate clear canons of statutory construction under Michigan law by rearranging and adding language to the Fantasy Contests Consumer Protection Act.

The legislative intent is clear and the plain meaning of the Fantasy Contest Consumer Protection Act should control. The statute does not specify that an outcome has to be against other participants or prohibit proposition selection. The statute also does not require "multiple fantasy contest players" or "head-to-head" requirements. The statute also does not expressly exclude "single-player" fantasy contests or "house games" from the definition of fantasy contest. Any such language would support the competitors' interpretation. Indeed, none of this exists.

Nevertheless, even if the clear and plain meaning of the language is not sufficient

to derive intent, it is also be found in the history of legislative deliberations. *Rouch World, LLC v. Department of Civil Rights*, 510 Mich. 398, 410 (2022). Senator Curtis Hertel, Jr., played a pivotal role in negotiating passage of the Fantasy Contests Consumer Protection Act. On December 16, 2021, Senator Hertel wrote to the MGCB that it was his and the Legislature's intention to leave out "proposition selection" from the legislation. The primary concern for legislators was not mimicking "a wager on the outcome of a sporting match or game." The statute clearly intended to authorize "daily fantasy sports [which] in its essence are a form of gaming based on individual athletes' statistical output in a given contest." *See* attached Exhibit A. Significantly, during deliberations, legislators were aware of Ohio's attempt to limit fantasy sports by prohibiting proposition selection. Senator Hertel opined that the Legislature intentionally omitted this restriction when passing the Fantasy Contests Consumer Protection Act.

The Legislature did not intend to categorically prevent games based upon the instance or statistical achievements of a particular athlete, i.e., proposition selection. It did not require only games that involves winners based upon the relative achievements of other fantasy contest players. Senator Hertel's letter conclusively demonstrates that the MGCB would be exceeding its legislative authority to implement such a requirement when it was intentionally excluded by statute.

C. <u>The Proposed Regulation Is Arbitrary and Capricious Because It Is A Sudden Departure From Accepted Norms That Primarily Benefits PrizePicks' Competitors.</u>

A regulation will not survive judiciary scrutiny if it is arbitrary and capricious. "'Arbitrary means fixed or arrived through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance, and capricious means apt to change suddenly freakish or whimsical.'" *Michigan Farm Bureau,* 807 N.W.2d at 890 (*quoting Nolan v. Dep't. of Licensing & Regulation*, 151 Mich.App. 641, 652 (1986)).

The prohibition on "proposition selection," thereby requiring contests measured against the relative performance of head-to-head contests by various players, is arbitrary and capricious. This regulation would disallow existing contests that have been in place since 2019, and it is a departure from the MGCB's own accepted norms.

MGCB Attorney Charles Negin articulated the accepted norm on April 7, 2022, while discussing earlier drafts of the proposed regulations to be issued under the Fantasy Contests Consumer Protection Act. He wrote, "[t]his subdivision <u>does not prohibit</u> a fantasy contest operator or licensed management company from offering a fantasy contest in which a fantasy contest player selects overs/unders, answers

statistical questions, or competes to achieve or surpass a target statistic, provided that 2 or more fantasy contest players must participate in the fantasy contest." Fantasy operators, including PrizePicks, have relied on that accepted norm in good faith. The proposed regulation and its prohibition on "proposition selection" upends this understanding. And, this sudden change of accepted norms does not appear to be based on a principled adjustment.

The sudden change to prohibit contests involving "proposition selection" appears to serve only one purpose. It serves PrizePicks' competitors to further concentrate their position in the sports gaming marketplace.

The Fantasy Contests Consumer Protection Act has not changed in the years that the fantasy operators have been operating lawfully and paying taxes in Michigan. The only motivation for this recently new language to eliminate "proposition selection" is the success of the fantasy sports industry in the state. It appears that FanDuel and DraftKings are seeking to use the state agency and its administrative authority to shut down their competitors and perpetuate their market share, rather than compete fairly in the free market. To use a state agency in this way is capricious.

Moreover, only consumers will be harmed by the inevitable marketplace concentration that will occur if the "proposition selection" prohibition is adopted. Consumers will be without meaningful choice to play alternative fantasy sports games with a diverse set of game providers. This will only enhance the existing duopoly in a manner that is inconsistent with consumer protection. *See* Julie Brill, *Competition and Consumer Protection: Strange Bedfellows or Best Friends*, American Bar Association at p.6 (2010)("consumer protection and competition principles converge and mutually support each other in the analysis of conduct harmful to consumers.")

V. Conclusion.

The MGCB's efforts to promulgate regulations prohibiting fantasy contests that utilize "proposition selection" will not survive judicial scrutiny. This effort supported by the duopoly of FanDuel and DraftKings is inconsistent with the plain language of the Fantasy Contests Consumer Protection Act. In addition, the marketplace concentration that will likely result from this restriction does not benefit consumers. It limits their choices and ability to participate in a diversity of fantasy contests that require use of their relative knowledge and skill.