COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. MASSACHUSETTS GAMING COMMISSION

In the Matter of:	)
Penn Sports Interactive, LLC Noncompliance Incident	)

DECISION

This matter came before the Massachusetts Gaming Commission (hereinafter, "Commission") for a determination as to whether Category 3 Sports Wagering Operator Penn Sports Interactive, LLC's (hereinafter "PSI") actions violated G.L. c. 23N, § 4(c); 205 CMR 256.01(1); 205 CMR 256.02(1); and 205 CMR 256.04(1), (6)(a), (6)(c), and 6(d). The Barstool Sports, Inc.[1] mobile and web-based application is alleged to have offered a promotion captioned "Big Cat's Can't Lose Parlay," promoting four NCAA college basketball games played on March 10, 2023 ("noncompliance incident"). Further, Mr. David Portnoy also shared his bet slip on the Barstool application indicating that he wagered $13,458.70 on the parlay. This decision results from the adjudicatory proceeding conducted by the Commission on June 7, 2023, via remote collaboration technology. At the direction of the Chair, the entire Commission presided over the matter. For the reasons set forth below, the Commission finds that PSI violated G.L. c. 23N, § 4(c) and 205 CMR 256.04(6)(c). As a result, the Commission hereby issues a $25,000 fine on PSI.

I. Background

On Saturday, March 12, 2023, (two days after mobile sports wagering launched in Massachusetts) the IEB was alerted to a promotion on the Barstool Sports, Inc. mobile and web-based application offering a promotion captioned "Big Cat's Can't Lose Parlay." "Big Cat" refers to Mr. Dan Katz, the host of a Barstool Sports podcast. The parlay promoted four NCAA college basketball games, all of which were played on March 10, 2023. The IEB also reviewed documentation showing that Mr. David Portnoy shared his bet slip on the Barstool app (via X – formerly Twitter) indicating that he wagered $13,458.70 on the parlay.

The "Big Cat's Can't Lose Parlay" wager was a regularly featured wager on the Barstool app. Also on March 12, 2023, Chris Soriano, Vice President and Chief Compliance Officer for Penn Entertainment, Inc., contacted the IEB Director and proactively acknowledged the "Can't Lose Parlay" promotion. Mr. Soriano made himself available to discuss. The IEB reviewed the recently promulgated governing regulatory structure.

[1] At the time of the incident, PSI's sports wagering platform in Massachusetts was branded as the Barstool Sportsbook pursuant to a partnership between Penn Entertainment (PSI's parent company) and Barstool Sports.

In a telephone discussion with the IEB on March 13, 2023, Mr. Soriano confirmed that the parlay was over and was not being offered any longer. The Licensee also informed the IEB that it would voluntarily refrain from promoting any "Can't Lose" wagers in the Commonwealth pending the Commission's consideration of this matter.

After learning of this promotion, the IEB conducted a review of the noncompliance incident and issued a Sports Wagering Incident Review Report dated March 14, 2023, which was provided to the Commission and the Commission subsequently initiated this adjudicatory proceeding pursuant to G.L. c. 23N, §§ 4, 16 and 205 CMR 232.

A copy of the Report was provided to PSI along with a notice of this adjudicatory proceeding. Zachary Mercer, Enforcement Counsel of the IEB, appeared and testified credibly at the hearing on behalf of the IEB. Chris Soriano, Vice President and Chief Compliance Officer of Penn Entertainment, Inc. and Erich Schaeffer, Chief Operating Officer, Voluble Insights[2] ("Voluble") also testified extensively and were found to be credible. Additional documentary evidence was introduced and reviewed as part of the hearing including a declaration by Chris Soriano (with attachments) and a declaration by Erich Schaeffer (with attachments).

The Soriano declaration noted that the "Can't Lose Parlay" ("CLP") was allowed and offered in 15 other jurisdictions prior to 2023 with no records of consumer complaints. Soriano reported that in February 2021 the National Council on Problem Gaming ("NCPG") filed a complaint with the American Gaming Association ("AGA") concerning a January 2021 CLP alleging that the CLP violated the AGA's Responsible Marketing Code for Sports Wagering. Specifically, the NCPG alleged that the CLP violated section 3 of the code which states that "No message should suggest that social, financial or personal success is guaranteed." Barstool Sportsbook provided a response to the complaint to the AGA and the AGA forwarded the response to the NCPG. Soriano also represented to the AGA via email that the CLP was no longer being offered as of February 2021. The NCPG did not pursue further process with the AGA and the complaint was closed. Although the CLP was halted as of February 2021, it was subsequently reintroduced by PSI in numerous jurisdictions, including Massachusetts.

During testimony at the hearing, Mr. Soriano further explained that when a complaint is made through the AGA Code Compliance Review Board the company against whom the complaint is made can provide a response and if the complainant is still dissatisfied, they can ask for a full review and written disposition. Mr. Soriano acknowledged that the AGA Code Compliance Board did not rule on the complaint as the complainant did not seek a written disposition after receiving Barstool's response.

Mr. Schaeffer's testimony and declaration explained the work done by Voluble in gathering representative social media tweets of people recognizing the CLP as a joke/satire. Mr. Schaeffer testified that he was unaware of the total number of individuals that had participated in the CLP and could not say what proportion of those tweeting on social media were of the entire group of bettors. Mr. Schaeffer also acknowledged that Voluble was not asked to search for tweets of individuals disappointed with the results of the CLP or those who did not understand that the

[2] Voluble is a consulting firm specializing in analyzing social media and other forms of online media.

CLP was a joke and thus could not extrapolate to the overall pool of bettors to determine how many understood the CLP to be a joke.

Pursuant to a request by the Commission during the hearing, PSI provided additional information afterwards that disclosed that there were 1,160 Massachusetts CLP bets on March 10, 2023. Those bets represented a handle of $18,468 with an average bet of $16.

II. Exhibits

The exhibits identified below were admitted into evidence at the proceeding without objection. The Commission considered all exhibits, in conjunction with witness testimony, in reaching the final decision.

Exhibit 1: Investigations and Enforcement Bureau Sports Wagering Incident Review Report, dated March 14, 2023, including Addendum

Exhibit 2: Notice of June 7, 2023, Hearing

Exhibit 3: Declaration of Christopher Soriano, Esq., dated May 23, 2023

Exhibit 4: Exhibit A to Soriano Declaration

Exhibit 5: Exhibit B to Soriano Declaration

Exhibit 6: Exhibit C to Soriano Declaration

Exhibit 7: Exhibit D to Soriano Declaration

Exhibit 8: Declaration of Erich Schaeffer, dated May 25, 2023[3]

Exhibit 9: Appendix A to Schaeffer Declaration

Exhibit 10: Appendix C to Schaeffer Declaration

Exhibit 11: Appendix D to Schaeffer Declaration (file folder)

At the request of the Commission, PSI also provided responses to specific questions related to the facts of the noncompliance incident after the hearing.

III. Analysis

The defenses raised by PSI in this matter focus on the assertion that no reasonable consumer would understand the CLP to be a risk-free bet and further that the advertising of the CLP was

[3] Appendix B to the Declaration of Erich Schaeffer is part of Exhibit 8 and not a separate exhibit.

protected commercial speech under the First Amendment and Article 16 of the Massachusetts Declaration of Rights. The Commission addresses each of these arguments in turn.

"Reasonable Consumer" Defense

The Commission's regulations, 205 CMR 256.04(6)(c) and (d), protect consumers from advertisements that "[i]mply or promote Sports Wagering as free of risk in general or in connection with a particular promotion or Sports Wagering offer," or "[d]escribe Sports Wagering as 'free,' 'cost free,' or 'free of risk' if the player needs to incur any loss or risk their own money . . . ." These regulations protect consumers not only from being misled into placing particular wagers by those wagers being described as risk free, but from downloading a new application or becoming interested in sports wagering after seeing an advertisement that understates the risks involved. If a consumer sees an advertisement describing a particular bet as risk free—such as an advertisement for something called a "Can't Lose Parlay"—downloads the relevant mobile application, realizes that bet was not literally risk free, and places a bet anyway, the advertisement still induced the consumer to place a sports wager that the consumer would not otherwise have placed.

In short, the fact that the deception may have dissipated by the time the consumer placed the wager—or even that the consumer placed a different wager altogether—does not change the fact that the deception caused the consumer to wager. *Cf.* 940 CMR 3.02(2) ("Even though the true facts are subsequently made known to the buyer, the law is violated if the first contact or interview is secured by deception."). In that sense, 205 CMR 256.04(6)(c) and (d) work in concert with 205 CMR 256.04(1), which protects consumers from any advertising that "would reasonably be expected to confuse or mislead patrons in order to induce them to engage in Sports Wagering," 205 CMR 256.03(3), which requires all advertisements to "clearly convey the material conditions under which Sports Wagering is being offered . . . to assist patrons in understanding the odds of winning," and 205 CMR 256.06(a) and (b), which forbid glamorizing irresponsible or excessive participation in Sports Wagering.[4]

With that understanding of the design and purpose of the relevant regulatory provisions in mind, we turn to the application of these regulations to the CLP. As summarized above, the facts surrounding the Parlay are as follows:

PSI argues that despite the clear language describing it as a surefire proposition, the CLP must be viewed "through the eyes of a reasonable consumer" and "in context." This is true in principle, but as explained below the context in which the CLP was presented only amplified its potential to mislead. "[A]n advertisement is deceptive when it has the capacity to mislead consumers, *acting reasonably under the circumstances*, to act differently from the way they otherwise would have acted (i.e., to entice a reasonable consumer to purchase the product)." (emphasis added). *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 396 (2004). But an advertiser can also deceive "by failing to disclose to a buyer a fact that might have influenced the buyer to refrain from the purchase." *Greenery Rehab. Grp. v. Antaramian*, 36 Mass. App. Ct. 73, 78 (1994).

When it is "self-evident" that reasonable consumers would be deceived, extrinsic evidence of deception is not required. *Commonwealth v. AmCan Enters.*, 47 Mass. App. Ct. 330, 336 (1999).

[4] As far as promotions are concerned, they also work in concert with 205 CMR 256.04(5) and 205 CMR 247.09 which require advertisers to disclose all material terms of a given promotion on the face of the advertisement.

See Fanning v. Federal Trade Comm'n, 821 F.3d 164, 173 (1st Cir. 2016) (affirming FTC's application of presumption that "claims pertaining to a central characteristic of the product" are material). It is self-evident that all else being equal, reasonable consumers will be more likely to place bets with higher expected value than bets with lower expected value, and therefore self-evident that describing a bet in a manner that would lead a reasonable person to overestimate the bet's expected value is deceptive.

With that in mind, we turn to the reasonable Massachusetts consumer circa March 10, 2023. At the time, mobile sports wagering was new in Massachusetts. While some consumers had participated in sports wagering elsewhere, many had not. A reasonable consumer could have taken something called "Big Cat's Can't Lose Parlay," especially with no disclaimers to mitigate its name, at face value. At a minimum, even a consumer who understood that the CLP was not guaranteed to win could reasonably have expected it to offer higher-than-usual expected value on a longshot parlay.[5] Particularly given the difficulties inherent in estimating compound probabilities, reasonable Massachusetts consumers could hardly have been expected to compute the expected value for themselves prior to clicking on the link that would direct them to download the Barstool Sportsbook application and make a bet.

Furthermore, in March 2023, advertising across every medium in the Commonwealth was replete with promotions of hundreds or even thousands of dollars of "bonus" funds as a reward for betting. Many such promotions all but guaranteed winning, including offers that paid out if either team in a basketball game scored at least one basket. A reasonable consumer could easily have taken something called a "Can't Lose Parlay" to be a similar "risk-free" promotional offer. Thus, a reasonable Massachusetts consumer who would not otherwise have downloaded an application and placed a bet may have been induced to do so by advertising for a "Can't Lose Parlay."

PSI's contrary arguments do not persuade us otherwise. First, PSI claims the CLP was "obviously satirical," because Dan Katz—to whom the CLP refers—is a "notoriously bad bettor" and this fact is well known to the listeners of his podcasts. PSI Prehearing Br. at 5, 8. However, a reasonable Massachusetts consumer could (and likely would) discover the CLP, and Mr. Portnoy's $13,000 wager on the CLP, on social media or on an application without ever encountering "Katz's comedic persona." *Id.* at 5. Although in many contexts consumers do bear a responsibility to educate themselves, sports bettors should not be required to follow a podcast or become intimately familiar with particular sports betting personalities and their inside jokes in order to understand the wagers they are placing. They should be entitled to rely on the context within which the CLP is presented to them. Here that context was limited to the descriptor "Can't Lose" and a wager of $13,000 by Mr. Portnoy; without more, the advertisement was deceptive.

Second, PSI cites to a report from Voluble Insights showing that bettors who tweet about the Parlay tend to be "in on the joke." PSI Prehearing Br. at 6. That data does not establish that the tweets analyzed are representative of the Massachusetts Parlay bettor pool, and there are reasons to doubt the sample's representativeness. Most importantly, one of the three queries used to collect tweets for analysis searched for tweets referencing Barstool personalities and media.

[5] The fact that Mr. Portnoy shared the CLP along with a relatively large $13,000 wager would only enhance the perception that Barstool Sports, as part of the Operator offering the wager, knew something the average consumer did not, and that the CLP was in fact more likely than not to win.

Analyzing tweets that refer both to the CLP and Barstool, and finding that CLP bettors are familiar with Barstool, is selection bias in action.

Finally, the fact that a slight majority of the players who bet on the CLP as of March 20, 2023, are repeat bettors, and that 90% of those individuals lost their first parlay wager, PSI Prehearing Br. at 6, proves little. Again, it does not address Massachusetts bettors specifically. It also does not show that parlay bettors understand that there is no advantage to the CLP. It could just as easily mean that CLP bettors believe the CLP has higher-than-usual expected value despite being a longshot. Thus, evaluating the CLP in context, we find that a reasonable Massachusetts customer could have been misled, and offering the CLP was unfair and deceptive.

PSI also notes that there can be no "doubt about PSI's good faith in offering the Parlay based on the regulatory history in other jurisdictions, the AGA's disposition of a virtually identical claim, and its knowledge of Katz's comedic persona." PSI Prehearing Br. at 8-9. We acknowledge that PSI did not act in objective bad faith and have accounted for this fact in determining the appropriate discipline.

First Amendment Defenses

We now turn to the question of whether and to what extent the offering of the CLP is protected by the First Amendment. As a threshold matter, PSI's offering of a "Can't Lose" parlay is commercial speech. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). PSI contends that the CLP is protected speech under the First Amendment but devotes almost all of its discussion of First Amendment issues in its brief to arguing that only "inherently or actually misleading speech may be prophylactically banned." PSI Prehearing Br. at 9-11. This argument is beside the point: we are not imposing a prophylactic ban. This enforcement decision is not concerned with what PSI should do in the future with proper disclosures or contextualization. Instead, it is concerned with PSI's failure to provide any appropriate disclosures or context at the particular time that it offered the CLP to Massachusetts customers. *See Kraft, Inc. v. Federal Trade Comm'n*, 970 F.2d 311, 325-26 (7th Cir. 1992) (subject of order to cease and desist deceptive advertising was "free to use any advertisement it chooses, including the [deceptive] ads, so long as it either eliminates the elements . . . contributing to consumer deception or corrects this inaccurate impression by adding prominent, unambiguous disclosures").

PSI is subject to discipline in this instance because it failed to attach adequate disclosures to its potentially misleading commercial speech. The proper First Amendment framework for analyzing penalties for failure to provide such disclosures comes from *Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio*, 471 U.S. 626 (1985). *See Fanning*, 821 F.3d at 175 (applying *Zauderer* test to order to cease and desist advertising in deceptive manner); *Kraft, Inc.*, 970 F.2d at 325-26 (same).[6] *Zauderer* requires (1) a reasonable relationship between the disclosure requirement and the public interest in preventing deception of consumers, and (2) that the disclosures not be "unjustified or unduly burdensome." *Zauderer*, 471 U.S. at 651. *See Pharmaceutical Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 308-09 (1st Cir. 2005); *Massachusetts*

[6] *Zauderer* applies to actually, inherently, and potentially misleading speech. *See International Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 641-42 (6th Cir. 2010) (collecting cases, concluding *Zauderer* applies to speech that is "*potentially* misleading"); *Massachusetts Ass'n of Priv. Career Schs. v. Healey*, 159 F. Supp. 3d 173, 196-97 (D. Mass. 2016).

Ass'n of Priv. Career Schs., 159 F. Supp. 3d at 195. Also, the Commonwealth need not supply detailed evidence of actual deception before compelling disclosures that mitigate a "self-evident" risk of deception. *See Zauderer*, 471 U.S. at 652-53 (quoting *Federal Trade Comm'n. v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965)); *Boggs*, 622 F.3d at 642; *Massachusetts Ass'n of Private Career Schs.*, 159 F. Supp. 3d at 200. *Cf. Kraft, Inc.*, 970 F.2d at 317 (applying substantial-evidence standard to FTC order that Kraft cease and desist use of deceptive advertisement because FTC has specialized expertise in deceptive advertising and "determination of whether an ad has a tendency to deceive is an impressionistic one more closely akin to a finding of fact than a conclusion of law").

Zauderer authorizes penalizing PSI for offering the CLP without adequate disclosures for three reasons.

First, adequate disclosures are reasonably related to protecting consumers. If PSI had offered or advertised the CLP with an appropriate accompanying disclosure that informed the public that the CLP did not, in fact, offer a guarantee of a win or comparably better odds, a reasonable consumer would have understood that the CLP offered bettors no special advantage. In addition, an adequate disclosure clarifying that the CLP was not a promotion or a guarantee of success complies with other regulatory requirements that advertisements for promotions disclose on the face of the advertisement the material terms of the promotion. *See* 205 CMR 256.04(5) and 205 CMR 247.09.

Second, such disclosures are not overly burdensome. This kind of disclosure requirement would be consistent with similar disclosure requirements that Sports Wagering Operators must already comply with in Massachusetts and elsewhere. 205 CMR 247.09 (promotion disclosure requirements), 256.04(5) (same), 256.06(2) (responsible gaming messaging requirement). *See* Ohio Admin. Code § 3775-16-08(A)(1) (sports gaming advertisements must clearly convey information to assist patrons in understanding the odds of winning).

Third, as explained above, the risk of deception is self-evident. The CLP was an optimistically titled wager, offered during a period in time when bonus offers flooded all forms of advertising in the Commonwealth, available to consumers with no prior exposure to Barstool Media and limited exposure to sports betting, and whose actual expected value consumers could not calculate.

IV. Conclusion

Consistent with G.L. c. 23N, §16, the Commission is empowered to fine a sports wagering operator for a variety of reasons including regulatory violations and when the operator's business practices are "injurious to the policy objectives" of the Sports Wagering Law. G.L. c. 23N, §4(c) also empowers the Commission to promulgate regulations to specifically address advertisements, marketing and branding that are "deceptive, false, misleading, or untrue, or tends to deceive or create a misleading impression whether directly, or by ambiguity or omission." 205 CMR 256.04(6)(c) and its prohibition on implying or promoting "risk free" sports wagering was one of several such regulations drafted to support the statutory goals.

PSI's promotion of the CLP at the opening of the Massachusetts sports wagering market and its amplification of the promotion via Mr. Portnoy's tweet constitute per se statutory and regulatory violations of both G.L. c. 23N, §4(c) and 205 CMR 256.04(6)(c).

Words matter. Words matter even more in the context of the introduction of regulated sports wagering into a jurisdiction containing a population new to the industry. The statute and regulations cited above were designed to protect the public from deceptive advertising and the Commission considers the CLP misleading. The Commission recognizes PSI's representation that it will never offer the CLP in Massachusetts again and took that into account in its deliberations, ultimately concluding that PSI shall be fined $25,000 for violating G.L. c. 23N, § 4(c) and 205 CMR 256.04(6)(c). Notably, PSI's affirmation to no longer offer this wager mitigated a higher potential fine.

SO ORDERED.

MASSACHUSETTS GAMING COMMISSION

By:

Cathy Judd-Stein, Chair[7]

Bradford R. Hill, Commissioner

Jordan Maynard, Commissioner[8]

Eileen M. O'Brien, Commissioner

Nakisha L. Skinner, Commissioner

DATED: August 27, 2024

[7] Former Chair Judd-Stein oversaw this hearing, participated in deliberations and voted in this matter but has since retired from the Commission.

[8] Subsequent to this hearing and deliberations Commissioner Maynard was appointed Interim Chair of the Commission. To avoid any confusion his title at the time of the hearing is reflected in this decision.