WALLACH LEGAL, LLC

Statement to the Public Safety and Security Committee

March 3, 2020

Witness: Daniel Wallach

Good afternoon, Chairman Verrengia, Chairman Bradley and members of the Committee:

Thank you for giving me an opportunity to testify today. My name is Daniel Wallach, and I am the founder of Wallach Legal LLC, a law firm focused primarily on sports wagering and gaming law. I am also the Co-Founding Director of the University of New Hampshire School of Law's Sports Wagering and Integrity Program, the nation's first law school certificate program dedicated to the legal and regulatory aspects of sport wagering. I am also a member of the International Masters of Gaming Law, an invitation-only organization for attorneys who have distinguished themselves through demonstrated performance and publishing in gaming law, significant gaming clientele and substantial participation in the gaming industry.

I am here to address the following question: Is sports betting a "*video facsimile or other commercial casino game*"? This question takes on added importance in Connecticut because of various written agreements that the State has entered into with two Connecticut Tribes: the Mashantucket Pequot Tribe and Mohegan Tribe of Indians. One of these agreements is Memoranda of Understanding (MOU), which relates to the state-tribal gambling compact that each Tribe has entered into with the State. Under these compacts, the Tribes are required to pay the state a portion of their gross gaming revenues from the operation of video facsimile games on their reservations. But the MOUs provide that the Tribes are relieved of this obligation if Connecticut law is changed to permit "*video facsimiles or other commercial casino games*."

So, what would happen if the State of Connecticut were to pass a law authorizing sports wagering? Well, the Tribes would argue that sports wagering is a "commercial casino game," thereby giving them the right under their MOUs to cease making payments to the State.

Based on my extensive research of federal and state law (including Connecticut law), and after taking into consideration the contractual language and definitions contained in the Compacts and MOUs, it is my firm belief that sports betting is not a "commercial casino game."

There are a number of compelling reasons that support this conclusion.

A. Casino games are considered games of chance, whereas wagering on sporting events requires a substantial amount of skill to be successful

As a preliminary matter, the word "commercial casino games" does not exist in a vacuum. It is a subset of the phrase "video facsimiles or *other* commercial casino games." The key word here is "*other*." The placement of word "other" before "commercial casino games" – and immediately after "video facsimiles" –indicates that there is a relationship between commercial casino games and video facsimiles – namely, that commercial casino games are similar to video facsimiles. Or at least they are part of the same category or species of gambling.

This is where basic rules of contract interpretation come into play.

Under the associated-words canon (*noscitur a sociis*), "associated words" bear on one another's meaning. Or, as the U.S. Supreme Court has put it, "a word is known by the company it keeps." This principle is also recognized under Connecticut, where the state supreme court has declared that where a contract provision contains two or more words grouped together, you can ascertain a particular word's relationship to the associated words and phrases to determine its meaning under the doctrine of noscitur a sociis [i.e., a word is known by the company it keeps]. *See McCoy v. Comm'r of Pub. Safety*, 300 Conn. 144, 159, 12 A.3d 948, 957 (2011); *Cantonbury Heights Condo. Ass'n, Inc. v. Local Land Dev., LLC*, 273 Conn. 724, 740–41, 873 A.2d 898, 907–08 (2005); *Connecticut Nat. Bank v. Giacomi*, 242 Conn. 17, 33, 699 A.2d 101, 112 (1997)

So, while the phrase "commercial casino games" is not defined in either of the compacts, the term "video facsimile" is expressly defined. Under the compacts, "video facsimile" is defined as a mechanical or electronic **game of chance**. *See* Mashantucket Compact, §§ 2(cc); Mohegan Compact §§ 2(cc). Moreover, both compacts authorize the tribes to conduct "video facsimiles" of the following "games of chance" on their reservations: blackjack, poker, dice, and roulette.

Since "video facsimile" is expressly defined as a "game of chance" under the compacts, the phrase "*other* commercial casino games" must necessarily refer to "games of chance" as well, especially given the placement of the word "other" before "commercial casino games."

But you don't even need to employ the associated words canon to find that "commercial casino games" are games of chance. That's what they are – there should not be any real dispute over that. There are a number of cases and other legal authorities recognizing that casino games are predominantly **games of chance**. *See Nez Pierce Trice*, 125 Idaho 37, 42, 867 P.2d 911, 916 (1993) (referring to blackjack, craps, roulette, poker, baccarat, keno and slot machines); *Score Family Fun Ctr., Inc. v. City of San Diego*, 225 Cal. App. 3d 1217, 1223 (Ct. App. 1990); *Mashantucket Pequot Tribe v. State of Conn.*, 913 F.2d 1024, 1032 (2d Cir. 1990) (referring to "casino-type games of chance."); *Top Flight Entm't, Ltd. v. Schuette*, 729 F.3d 623, 627 (6th Cir. 2013) (noting that "games of chance" are customarily associated with a gambling casino.").

So, why is this so important? There are several fundamental –and dispositive -- distinctions between commercial casino games and sports betting. First, unlike casino games, where the outcomes are decided predominantly by chance (such as by the draw of a card, a roll of the dice, or a random number generator), **wagering on sporting events is widely considered to be a *contest of skill*, requiring substantial skill and knowledge to succeed**. As New York's Attorney General put it, sports betting involves "*substantial" (not slight skill)*," including "the exercise of a bettor's judgment in trying to . . . figure out the point spreads." *See* 1984 N.Y. Op. Atty. Gen., Opinion 84-F1, at pp. 1, 8 & 10 (N.Y.A.G. 1984), available at 1984 WL 186643 (emphasis added).

The question of whether skill or chance predominates in sports betting has been the subject of a number of attorney general opinions in other states which (just like Connecticut)[1] apply the "dominant factor" test for assessing whether a particular game is properly viewed as a "game of chance" or a "contest of skill." The attorney generals in each of those states had no troubling concluding that sports betting was a contest of skill under the dominant factor test.

For example, in a 1991 advisory opinion, West Virginia's attorney general concluded that "the amount of skill involved in sports betting places this form of gambling outside the parameters of a lottery." W. Va. Op. Atty. Gen. (W.Va.A.G.), 1991 WL 628003, at *5 (Jan. 8, 1991). As the West Virginia Attorney General observed, "[b]etting on sports activities is usually performed by those who either have or think they have a degree of knowledge about the game in question. Those who bet on sports usually take into consideration past records, who has the home field advantage, and a myriad of other factors that may influence the outcome of the event." *Id.* Furthermore, statistics and other materials pertinent to sporting events are readily available for those who wish to study them and then place an informed bet using reason and judgment." *Id.* at *5-6. Drawing upon this array of information, "[t]he person making the bet is utilizing his knowledge about the sporting activity in order to enhance his chance of winning." *Id.* at *6. The use of such knowledge, the attorney general declared, "is the employment of skill."

Michigan's attorney general reached the same conclusion, opining that "*correctly predicting the outcome of sporting events does not constitute a 'lottery*.'" Mich. Op. Atty Gen. 367, 1990 WL 525920, at *1 (Aug. 17, 1990) (emphasis added). He noted that the Michigan Supreme Court "has consistently held that, because sports wagering activities involve at least some degree of skill on the part of the person placing the wager, such activities do not satisfy the 'chance' element, and, accordingly do not constitute a 'lottery' under Michigan law." *Id*.

In August 2018, Colorado's attorney general issued a formal opinion concluding that sports betting is not a chance-based lottery prohibited by that state's constitution "because participants are able to exercise sufficient skill in selecting their wagers such that chance is not the 'controlling factor' in an award." Colorado Atty. Gen. Op No. 18-02, at pp. 5-6 (August 2, 2018). The Colorado attorney general explained that "sports bettors use skill to choose who they believe will win a sporting event or whether some sub-event will occur (such as a point spread or the outcome of a particular portion of an event). In selecting their bets, today's sports bettors have so much information available to them. This information includes schedules; team records, players' past performance data; past head-to-head data; injury reports; facility conditions; weather conditions; and more." *Id*. at pp. 6-7. The attorney general concluded that "[b]ecause a bettor can exercise skill in reviewing this information and selecting a wager, the element of chance is not the controlling factor in commercial sports betting." *Id.* at p. 7.

In December 2018, Tennessee's attorney general likewise opined that some sports bets, such as "a contest that involves entrants placing bets on the outcome of an individual professional baseball game" would "appear to fall outside the parameters of Tennessee's lottery prohibition," citing the predominance of skill needed to succeed at sports betting. *See* Tenn.

[1] *See Mendelsohn v. Bidcactus, LLC*, 2012 WL 1059702, at *2 (D. Conn. Mar. 28, 2012)

OAG Opinion No. 18-48, at p. 3. (Dec. 14, 2018). The attorney general explained that "persons who bet on such a game have a multitude of available sources of information to aid them in placing informed bets." *Id.* at 4.

Finally, because of the obvious similarity between betting on horse racing and betting on sports, it is helpful to look at various cases involving horse racing. And the outcome is the same. As explained by Tennessee's attorney general:

> Courts have generally reasoned that chance does not control the outcome of horse races because the skill of the jockey and the condition, speed, and endurance of the jockey's horse are all factors that affect the result of the race. Moreover, bettors on horse races have sources of information that they may review before placing their bets. This information includes not only data on the actual race, but also previous records on the past performance of the jockeys and the horses. These sources allow the bettor to exercise his judgment and discretion in determining the horse on which to bet. Thus, courts generally reason that chance does not predominate.

Id. at pp. 3-4. Drawing a straight line from horse race wagering to sports betting, Tennessee's attorney general reasoned that "[i]n a like manner, the winner of a professional baseball game is primarily determined on the participants' skill. And persons who bet on such a game have a multitude of available sources of information to aid them in placing informed bets." *Id.* at p. 4.

Even betting on dogs – commonly referred to as greyhound racing – entails a significant degree of skill. In a 1971 decision, the Alabama Supreme Court held that betting on the outcome of a dog race "is not determined by chance" and involves "[a] significant degree of skill." *Opinion of the Justices*, 251 So.2d 751, 753 (1971). *See also Scott v. Dunaway*, 228 Ark. 943, 311 S.W.2d 305 (1958) (holding that pari-mutuel betting upon greyhound races "affords an opportunity for exercise of judgment" and is not "completely controlled by chance," and therefore cannot be classified as a lottery and as violative of the state constitutional prohibition against lotteries); Ala. Atty Gen. Op. 2001-1134, at pp. 3-4 (Mar. 13, 2001) (noting that the handicapping information included in a proposed instant racing system "is identical to the handicapping information that was available on the day of the race," and includes "the information necessary for a bettor . . . to exercise 'a significant degree of skill . . . in picking the winning dog.").

What is the common thread between sports betting and wagering on horses and dogs – other than the fact that they require a predominance of skill to be successful? How about the *location* where the underlying competitions take place and the winners decided. These sporting and racing competitions take place – and the outcomes are primarily determined – outside the "four walls" of a casino. By contrast, casino games (such as slot machines, card games, and dice games) are played – and their outcomes are determined – within the "four walls" of a casino.

So, the two critical – and dispositive – distinctions between sports wagering and casino games are that the former are "contests of skill" that are decided external to a casino property, whereas commercial casino games are "games of chance" that occur exclusively within a casino.

B. Federal law distinguishes between sports betting and casino games

Consistent with the above, federal law enforcement authorities have also asserted that wagering on sporting events requires a substantial amount of skill. In a 2012 court filing, the U.S. Department of Justice explained that "[s]ports bettors have every opportunity to employ superior knowledge of the games, the teams and players involved in order to exploit odds that do not reflect the true likelihoods of the possible outcomes." *United States v. Dicristina*, 886 F. Supp. 2d 164, 229 (E.D.N.Y. 2012), *rev'd on other grounds*, 726 F.3d 92 (2d Cir. 2013).

The conclusion that sports wagering does not fall within the definition of commercial casino games is buttressed by federal law. For example, the federal regulations governing gambling on Indian lands – which are part of the Indian Gaming Regulatory Act (IGRA) – treat sports betting as a distinct form of "Class III gaming," mentioning it in a different subsection (25 CFR § 502.4(c)) than casino games, card games, and slot machines (which are part of subsection (a)).[2] Although Mr. Henningsen's written testimony from February 11th points to the fact that sports betting and casino games are both Class III games under IGRA, that does not, *a fortiori*, mean that sports betting is a casino game. To be sure, not every Class III game is a casino game. For example, wagering on horse racing, dog racing, and jai-alai – while designated as Class III gaming under IGRA – are rarely, if ever, found within a casino environment. Likewise, not every casino game is a Class III game. For example, non-house banked card games, such as poker (in which the players play against one another rather than against the house), are designated as Class II gaming under IGRA, and are often found in casinos. Just about every commercial casino has a poker room where players wager against each other rather than against the house.

The clear distinction between sports betting and casino games is also reflected in the federal Wire Act, which prohibits anyone "engaged in the business of betting or wagering" from knowingly utilizing a "wire communication facility" to transmit "bets or wagers" or "information assisting in the placing of bets or wagers on any sporting event" through the channels of interstate or foreign commerce (i.e., which generally means across state lines). *See* 18 U.S.C. § 1084(a). Most courts have held that the Wire Act applies only to betting on sporting events, and does not reach the activity of casino gambling. *See United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014); *In re MasterCard Int'l Inc.,* 313 F.3d 257, 263 (5th Cir.2002).

C. Sports betting is not endemic to a casino environment

There are some who would say that sports betting could still be seen as a "commercial casino game" because in some states, sports betting can only take place in or through licensed

[2] *See* 35 C.F.R. § 502.4 (defining Class III gaming under IGRA as, *inter alia*, "(a) [a]ny house banking game including but not limited to . . . *casino games* such as roulette, craps, and keno" or "(c) [a]ny *sports betting* and parimutuel wagering including but not limited to wagering on horse racing, dog racing or jai alai") (emphasis added)

casinos, pointing to New Jersey's sports wagering law as one example of that. (As a point of clarification, it should be noted that New Jersey also allows sports betting to take place at state-licensed horse racetracks, and through websites affiliated with those racetrack entities).

While sports betting can take place inside a casino, it is not endemic to a casino environment. As the legislative history of PASPA makes abundantly clear, sports betting can be offered in a variety of different venues, not just at casinos. The Report of the Senate Judiciary Committee, the primary source of PASPA's legislative history, noted that many states were considering the possibility of offering sports wagering as a lottery game, and as an amenity at horse racetracks and off-track betting parlors – even mentioning the prospect of Florida lawmakers including sports betting in that state's pari-mutuel betting law in the early 1990's.

That observation proved to be quite prescient. In the little over one year that has elapsed since PASPA was declared unconstitutional, a number of states have enacted statutes allowing sports wagering to take place in a wide spectrum of "non-casino" settings, such as at horse racetracks, sports venues, bars and restaurants, as well as over the Internet. For example, New Hampshire and the District of Columbia – which don't even have casinos — will allow sports betting to take place in commercial establishments (such as bars and restaurants), in sports venues, and over the internet. Montana will allow sports betting at bars and restaurants. Illinois will soon have legalized sports betting at professional sports venues (such as Wrigley Field and Soldier Field), at horse racetracks, and over the internet, regardless of any casino affiliation – although casinos will be able to offer it too. And, last year, Tennessee authorized sports wagering to take place exclusively over the internet, with no casino affiliation or partner required.

In fact, there are more states that allow sports betting to take place outside of a casino setting than there are states which confine it to those establishments (or through casino-affiliated websites).

So, in the end, there are three critical factors distinguishing sports betting from a commercial casino game: (1) they are contests of skill, whereas commercial casino games are considered games of chance; (2) they involve contests taking place – and determined – outside of a casino property, whereas commercial casino games are usually confined to the four walls of a casino; and (3) in most states that allow it, sports betting is not restricted to a casino property.

D. The Secretary of Interior has not acknowledged that the Compacts or MOUs would allow the Tribes to operate sports betting under any conditions

Finally, it is noteworthy that the Mohegan Compact and both of the MOUs were entered into while the Professional and Amateur Sports Protection Act ("PASPA") was still in effect. As you may be aware, the U.S. Secretary of the Interior (the "Secretary") must review and approve all state-tribal gambling compacts, and any amendments thereto, before they can take effect. During the time that PASPA was in effect (January 1, 1993 and May 14, 2018), there were a number of compacts that had language allowing a tribe to conduct sports wagering activities, usually subject to the caveat "to the extent permitted by state law" or something to that effect.

I recently searched the compact database on the BIA's website for any references to "sports betting," "sports wagering," and "sports pools" to identify all compacts which authorized that activity. In every instance in which a tribe was authorized to operate sports betting, wagering or pools during the so-called "PASPA era," the Secretary of the Interior expressly acknowledged that fact in the approval letter sent to the tribe, along with an admonition that the tribe could only offer sports betting on tribal land it qualified for one or more of the exceptions from PASPA.

Among the tribes which received these letters containing this express acknowledgement of sports betting as a permitted activity – along with the cautionary statement – are the following:

1. Omaha Tribe of Nebraska
2. Sac & Fox of the Mississippi in lowa
3. Blackfeet Nation (Montana)
4. Northern Cheyenne Tribe (Montana)
5. Sisseton-Wahpeton Sioux Tribe (South Dakota)
6. Muckleshoot lndian Tribe (Washington)
7. Lummi Nation (Washington)
8. Skokomish Indian Tribe (Washington)
9. Pyramid Lake Piute Tribe of Indians (Nevada)
10. Confederated Salish and Kootenai Tribes (Montana)

(The relevant compacts and approval letters are available online at the Bureau of Indian Affairs website: https://www.bia.gov/as-ia/oig/gaming-compacts)

By contrast, the approval letter sent to the Mohegan Tribe[3] does not contain any acknowledgement that its compact would allow sports betting under any specified conditions. While that fact, standing alone, does not negate the possibility that sports betting was a covered game, it does suggest that sports betting was not authorized under that Compact; otherwise, the Secretary would have acknowledged it, as was the case with all the other compacts listed above.

CONCLUSION

Based upon this abundant legal authority – in a number of different contexts and drawing from a wide spectrum of federal and state sources of law – it seems pretty clear to me that sports wagering is not a "commercial casino game" within the context of the MOUs and Compacts.

I appreciate the opportunity to appear here today and welcome any questions that you may have. Thank you again for the opportunity to share my perspectives and insights.

[3] The Mashantucket Compact was approved on May 31, 1991, nearly two years before PASPA was enacted.