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IN THE CHANCERY COURT OF THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT
IN NASHVILLE

TENNESSEE ACTION 24/7, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO. _____**
	)	
SUSAN LANIGAN,	)	
WILLIAM CARVER,	)	
PEARL SHAW,	)	
ELEANOR YOAKUM,	)	
JOHN CROSSLIN,	)	
CHRIS PATTERSON, in their official	)	
capacities as members of the	)	
Board of Directors of the Tennessee	)	
Education Lottery Corporation,	)	
REBECCA HARGROVE, in her	)	
official capacity as President and CEO	)	
of the Tennessee Education Lottery	)	
Corporation, and the	)	
TENNESSEE EDUCATION LOTTERY	)	
CORPORATION,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY INJUNCTION

Plaintiff Tennessee Action 24/7, LLC ("Action") submits this memorandum in support of its Emergency Motion for Temporary Injunction and Expedited Proceedings to require Defendant Tennessee Education Lottery Corporation ("TEL"), and the members of TEL's board of directors, Defendants Susan Lanigan, William Carver, Pearl Shaw, Eleanor Yoakum, John Crosslin, Chris Patterson, and TEL's CEO Rebecca Hargrove (collectively, "Defendants"), to immediately reinstate Action's license.

Action operates an online sports betting book whereby Tennessee residents can legally wager money on sporting events. Earlier this month, Action detected suspicious activity associated with a limited number of its player accounts, which predominantly occurred between March 9 and 12, 2021. The bulk of this suspicious activity took place during overnight hours and was detected the next morning. In response, Action took immediate countermeasures, including: suspending the accounts at issue and blocking their ability to deposit or withdraw funds or place wagers; committing to twenty-four-hour, seven-days-a-week monitoring to catch any overnight activity faster; and requesting that Action's third-party vendors implement added safety measures to prevent future recurrence, some of which have already been implemented. As a result, the suspicious activities largely stopped after March 12 (with the exception of a single account on March 16). In short, Action promptly identified and addressed the issues.

On March 17, Action sent twenty-three incident reports related to the suspicious activities to a TEL Sports Gaming Investigator, with the intention of asking whether Action or TEL was the appropriate party to reach out to the Tennessee Bureau of Investigations. Rather than contacting Action to discuss, the Investigator, by his own admission, on March 18 reviewed only three or four of the incident reports. Then, based on what he has called a "guess" about the total scope and magnitude of the suspicious activity, the Investigator leapt to the conclusion that the suspicious activity was much broader in scope than it really was, and informed TEL's General Counsel, CEO, and Chair of TEL's board of directors (the "Board") of that hasty conclusion.

Later that same day (March 18), the Chair of TEL's Board, based on the knee-jerk conclusions of the Investigator, informed Action that its license was suspended ***immediately*** without notice or the opportunity for a hearing. Even though under TEL's own statute and regulations a suspension can be made only by the Board or the Board's Sports Wagering

Committee, the Chair made this decision alone without convening the Board or the Sports Wagering Committee. Even worse, this suspension occurred late in the afternoon on the first day of the single largest sports betting event of the year—the National Collegiate Athletic Association's ("NCAA") "March Madness" basketball tournament.

On the morning of March 19, Action called TEL's General Counsel to explain that TEL had imposed the purported suspension in violation of the procedures laid out in TEL's statute and regulations. Several hours later, the Board convened a hastily arranged and haphazard special meeting to "ratify" this improper suspension, during which members of the Board were driving in their cars, unclear on what they were voting on, and had not received or reviewed materials that Action had submitted. At the end of this meeting, the Board arrived at what its General Counsel stated was a "final decision" of the Board to ***indefinitely*** suspend Action's license until Action demonstrates compliance with unspecified standards. Action and its outside counsel listened to the meeting and, prior to the meeting, had asked TEL's General Counsel for permission to speak, but—despite requests by some Board members to hear from Action—the Board did not allow Action to present the actual facts.

TEL's unlawful indefinite suspension of Action's license has caused and is causing Action immediate and irreparable harm. Each second that Action is unable to accept wagers on the March Madness tournament, it loses customers and potential customers and irreparably damages Action's reputation. TEL's decision threatens Action's very ongoing viability as a business. Accordingly, Action has been forced to seek injunctive relief as set forth below.

FACTS AND BACKGROUND

The Sports Gaming Act and TEL's Regulations

On November 1, 2020, Tennessee residents first became able to place legal on-line sports wagers in Tennessee under the Tennessee Sports Gaming Act, Tenn. Code Ann. §§ 4-5-301 to 4-51-330 (the "Act"). (Verified Compl. ¶ 27). The Act charges TEL and its Board with enforcing the Act's provisions and supervising compliance with laws and rules relating to the regulation and control of wagering on sporting events in Tennessee. Tenn. Code Ann. §§ 4-51-306(a); 4-51-317(a), (c), (d); 4-51-326(b). (The "TEL Regulations" are attached as **Exhibit A** to Action's Verified Complaint).

Under the Act, the Board may investigate and conduct a hearing with respect to a licensee "upon information and belief that the licensee has violated this part, or upon the receipt of a credible complaint from any person that a licensee has violated this part." Tenn. Code Ann. § 4-51-326(a). Only the Board may suspend or revoke a licensee's license, which it may do only if it "determines that a licensee has violated any provision of this part or rule of the board." *Id.* § 4-51-326(b)(1). The Act does not provide any other authority pursuant to which the Board may investigate a licensee or suspend a license.

Nevertheless, the Board itself promulgated a rule that authorized its Sports Wagering Committee to suspend or revoke a license not only "for any of the reasons set forth in the Sports Gaming Act or the Rules" but also any time "in the discretion of the Sports Wagering Committee, revocation, suspension or nonrenewal of any License [or] Registration … is in the best interests of the TEL, its Board, or the public policy or welfare of the State of Tennessee… ." TEL Regulation 15.2.3(A)-(B). The Board further promulgated a rule allowing the Sports Wagering Committee or its "designee" to suspend a license under undefined "exigent circumstances" without prior notice and without any enumeration or description of the bases for such an action. TEL Regulation 15.2.3(B).

Action 24/7's Licensure and Suspension

On October 31, 2020, Action was licensed to operate a sports wagering book in Tennessee. Action is one of only of six licensed sports books in Tennessee. (Verified Compl. ¶ 33). While the other licensed sports books are large, national players such as FanDuel and DraftKings, Action is based in Tennessee and conducts sports wagering operations only in Tennessee. (Verified Compl. ¶ 34).

Action's customers maintain online accounts in which they can deposit funds to be used in sports wagering. Debit cards are one permitted source of fund deposits (credit cards are not accepted). (Verified Compl. ¶ 35). Prior to obtaining its license, Action drafted and implemented internal controls to help it ensure security within its systems. (Verified Compl. ¶ 36).

As part of its internal controls, on the morning of March 9, 2021, Action staff detected suspicious activity on four customer accounts, including multiple deposit attempts on multiple cards, some of which failed and some of which were successful. (Verified Compl. ¶ 40). Action undertook an investigation into this third-party malfeasance and promptly geolocated all four suspicious accounts to the Memphis area. (Verified Compl. ¶ 38). The bulk of the suspicious transactions discovered on March 9 were made late at night—between approximately 11:00 PM on March 8 and 1:00 AM on March 9. (Verified Compl. ¶ 39).

Within approximately an hour of Action's discovery of these transactions, on the morning of March 9, Action suspended account access to the four accounts so that funds could no longer be deposited or withdrawn from the accounts, and the accounts could not engage in betting activity. (Verified Compl. ¶ 40). Action also immediately contacted Global Payments (the ACH payment vendor that manages withdrawals from Action's customer accounts) and instructing it to freeze withdrawals from the four suspicious accounts. (Verified Compl. ¶ 41).

Action likewise promptly attempted to contact PaySafe—the online payment gateway that customers use to deposit funds to their Action accounts—but despite multiple calls to PaySafe, Action did not receive a return call from PaySafe until the next day. (Verified Compl. ¶ 42).

On March 10, Action was able to speak to PaySafe and instructed PaySafe to block all cards that had been used by the account holders. (Verified Compl. ¶ 43). As an additional safety measure, Action also asked PaySafe to limit consecutive deposits on the same credit card to two per hour, such that a third attempt on the same card would inactivate the card for 60 minutes or until Action notified PaySafe to clear the card.[1] (Verified Compl. ¶ 43). Also on March 10, Action identified twelve additional accounts created with similar geolocation registration patterns or attempted behavior as the original four suspicious accounts. (Verified Compl. ¶ 44). Action promptly suspended these new accounts, prohibiting them from depositing or withdrawing funds or engage in betting activities. (Verified Compl. ¶ 44).

On March 11, to respond to this additional fraudulent activity by third parties, Action reached out to PaySafe again and requested that PaySafe limit all deposit attempts to a single customer account to two per hour, even if different cards were used in the attempts.[2] (Verified Compl. ¶ 45). That same day, Action noted three more accounts created with similar geolocation registration patterns or attempted behavior, and promptly suspended those accounts as well. (Verified Compl. ¶ 46).

No additional suspect activity occurred between March 12 and March 15, though on March 16, Action noted one additional account created with similar geolocation registration patterns or attempted behavior, and the account was immediately suspended. (Verified Compl. ¶ 47-48). No deposits or withdrawals occurred prior to the suspension. (Verified Compl. ¶ 48).

[1] This additional safety measure was implemented by PaySafe on March 12.
[2] PaySafe is in the process of implementing this additional safety measure.

All told, from March 9 to March 16, twenty-three accounts were created which Action deemed potentially suspicious, based on either unusual consecutive game activity, multiple card use in a short period of time, or by being similarly geolocated to those with multiple card use. (Verified Compl. ¶ 49). The large bulk of these accounts were created on March 9 and 10. The total amount of successful deposits into these suspicious accounts was $37,362, of which only $22,661 was actually withdrawn. (Verified Compl. ¶ 49). Action was able to prevent the remaining $14,710 from being withdrawn and it is still in Action's possession. (Verified Compl. ¶ 49).

On March 17, Action contacted to TEL Sports Gaming Investigator Danny DiRienzo to provide information on the recent suspicious activity, and to ask for advice on whether it would be appropriate for Action to go directly to the Tennessee Bureau of Investigations with this information, or whether TEL would do it instead. (Verified Compl. ¶ 51). Action provided Mr. Dirienzo a zip file containing 23 incident reports related to the suspicious activities. (Verified Compl. ¶ 51).

Mr. DiRienzo did not open any of the files until the next day, March 18, when he reviewed "three or four" of the twenty-three accounts that Action had sent him. (Verified Compl. ¶ 52).

Nonetheless, based on reviewing these few documents, Mr. DiRienzo apparently leapt to the conclusion that dozens of stolen cards were used in the transactions at issue and that hundreds of thousands of dollars in losses were involved. (Verified Compl. ¶ 54). As shown by the documents provided by Action to Mr. Dirienzo, his estimate was wildly inaccurate. (Verified Compl. ¶ 55). There were approximately 50 cards at issue, and the total amount of deposits that

may be fraudulent totaled approximately $37,362, of which only $22,661 was successfully withdrawn. (Verified Compl. ¶ 55).

Sometime later on March 18, Mr. DiRienzo reported his erroneous conclusions to TEL's CEO, Chair of the Board, and General Counsel. (Verified Compl. ¶ 56). This group then decided to suspend Action's license immediately without convening the full Board or the Sports Wagering Committee—even though only the full Board or its Sports Wagering Committee may suspend a license. [3] (Verified Compl. ¶ 61). *See* Tenn. Code Ann. § 4-51-326(b)(1) TEL's General Counsel called Action late that afternoon to inform it that its license was suspended effective immediately. (Verified Compl. ¶ 62). Mr. DiRienzo also sent an email to Action at 4:45 PM on March 18 stating that Action's license was suspended "until such time as Action 24/7 has provided documentation to the TEL sufficient to demonstrate that the minimum internal control standards have been met." (Verified Compl. ¶ 64). The suspension meant that Action was forced to cease operations immediately, as it is technologically impossible for Action to operate once TEL pulls the plug. (Verified Compl. ¶ 65). Action was not provided with notice or opportunity for a hearing before it was forced to suspend operations. (Verified Compl. ¶ 66). That evening, Action's outside counsel sent two emails informing TEL that the purported license suspension was illegal, unwarranted, and was catastrophic to Action's business since it was issued on the even of March madness.. (Verified Compl. ¶ 66-67). In those emails, Action's counsel requested to have a phone call to discuss lifting the suspension and reinstating the license. (Verified Compl. ¶ 67); **Exhibit C.**

Action did not receive a response until the morning of March 19, when Action's outside counsel spoke with TEL's General Counsel and requested immediate reinstatement of the license

[3] The suspension on March 18 was the day before the largest sports betting event of the year, the NCAA March Madness Basketball Tournament, was set to begin.

because the suspension was improper and unlawful. (Verified Compl. ¶ 67). TEL's General Counsel admitted that the decision was made by the Board Chair alone, not by either the full Board or by the Sports Wagering Committee, in plain contravention of the Act and the Board's own regulations. *See* (Verified Compl. ¶ 68). Hours later, at 12:40 PM Central Time on March 19, Action received notice that a special meeting of the Sports Wagering Committee of TEL's Board had just been scheduled for 2:00 PM Central Time that day—just over an hour later. (Verified Compl. ¶ 68). The notice did not explain the nature of or reason for the meeting. *See* (Verified Compl. ¶ 68). Despite this incredibly short notice, Action was able to submit to TEL's legal counsel materials in support of its position in advance of the meeting—namely, a two-page timeline of the incidents and Action's successful detection of them, Action's steps to stop debit card fraud, subsequent corrective and preventative measures taken by Action, along with a two-page Declaration of Tina Hodges, Action's President, verifying the timeline and establishing the additional preventative measures taken by Action. (Verified Compl. ¶ 69); **Exhibits D, E.**

The March 19 Board Meeting

Shortly before the March 19 Board meeting began, Action's outside counsel sent a request to TEL's General Counsel requesting the opportunity to address the Board on Action's behalf. TEL's General Counsel responded, that the Board was not required to provide "an opportunity to address the Board without their request," and that "[t]he Board's practice has been to not allow public comment unless they have questions." (Verified Compl. ¶ 70). **Exhibit F**. The special hearing commenced at 2:00 PM Central Time, with TEL's full Board participating. (Verified Compl. ¶ 71).

From the audio record, it is clear that the meeting was disorganized and the Board members were not all present throughout. *See* (Verified Compl. ¶ 71). Several Board members

stated that they were driving in their cars during the meeting. (Verified Compl. ¶ 73). They were not in agreement as to whether Action's counsel should be heard, and some had not received or reviewed the written materials provided by Action. (Verified Compl. ¶ 72-73). When one board member attempted to make the blanket statement that "anything [the board does] is in contemplation of hearing [Action's] response," another stated that she had not received either the emails that Action's outside counsel had sent the night before or the declaration of Tina Hodges that Action had submitted before the hearing. (Verified Compl. ¶ 73). Another Board member who was driving in his car stated that he had been unable to review Ms. Hodges' declaration. *See* (Verified Compl. ¶ 72-73.) At one point during this discussion, an unidentified voice can be heard on the audio recording of the meeting stating, "I think it's time to go get drunk."[4]

The meeting began with Mr. DiRienzo speaking at length regarding his erroneous conclusion on the adequacy of Action's internal controls, reviewing three or four files. (Verified Compl. ¶ 74). Multiple Board members raised the possibility of allowing Action or its counsel to speak in its defense, but, ultimately, Action was not allowed to say a word, even though TEL's General Counsel acknowledged during the meeting that Action and its attorneys were available and ready to address the Board and that the normal process for appeals is a hearing with evidence from each side. (Verified Compl. ¶ 78).

Notably, Investigator DiRienzo did not tell the Board about Action's commitment to expand its live monitoring from business hours to twenty-four-hour, seven-days-a-week account monitoring, as set forth in Tina Hodges' declaration. (Verified Compl. ¶ 79). Had TEL and the Board taken the opportunity to discuss the situation with Action, or allowed Action's legal

[4] Meeting Recording at 48:50, available at: https://tnlottery.com/wp-content/uploads/2021/03/TNLottery_EmergencySportsWageringCommitteeMeeting_2021-03-19.mp3.

counsel to participate during the meeting, they would have understood that there was no emergency, no continuing danger, and no "exigent circumstances" justifying the most extreme step of suspending Action's license indefinitely without a hearing. (Verified Compl. ¶ 79). Mr. DiRienzo also did not inform the Board that, since the implementation of the corrective measures by Action, there had been no further successful suspected player debit card fraud.[5]

Based almost exclusively on Mr. DiRienzo's statements, the Board approved a motion to "ratify" the Chair's illegal, unilateral decision from the day before to suspend Action's license without notice, a hearing, or an opportunity to rebut Mr. DiRienzo's statements. (Verified Compl. ¶ 83). The Board did not ever identify any provision in the Act or the rules that permitted them to do so. *See* (Verified Compl. ¶ 83). By this point, Action had already been unable to accept wagers for almost a full twenty-four hours, including the first full day of the March Madness tournament. *See* (Verified Compl. ¶ 83). At least one Board member stated that she was unsure of what they were voting on shortly before the vote was made. (Verified Compl. ¶ 83).

The Board next considered whether to continue Action's suspension or whether to reinstate its license pending an investigation, despite the fact that another Board member asked whether the Board could hear from Action's counsel and stated that she had not received the email Action's counsel sent the night before. (Verified Compl. ¶ 84-85). Board member William

[5] Mr. DiRienzo also faulted Action for not identifying that debit card holders' names were different from the names on players' accounts. However Action only has the information entered by the player, ***which does not include the card holder's name***, and that is standard in the financial services industry. The player could enter his name, the actual name (if different) that appears on the card, or any other name, and Action would have reason to know. Accordingly, Mr. DiRienzo's statements show that he lacks sufficient understanding of such transactions and has unreasonable expectations regarding the level of diligence expected of Action and the other licensees in combating player debit card fraud. Beacuse Action was not allowed to provide explanation of these matters meant that Mr. DiRienzo's assumptions were the only evidence presented to the Board.

Carver introduced a motion that, due to alleged "exigent circumstances", the "temporary" suspension of Action's license would be continued ***indefinitely*** until such time as Action was able to prove to the Board's satisfaction that adequate internal controls were in place. (Verified Compl. ¶ 87). No proof of exigent circumstances was presented at the meeting, and the information provided by Action prior to the meeting clearly showed that there was no ongoing debit card fraud or other exigent circumstances sufficient to justify suspending Action's license. *See* (Verified Compl. ¶ 79, 87, 91). The Board did not explain what specific internal controls of Action were inadequate or what controls would be considered adequate to allow reinstatement of Action's license. *See* (Verified Compl. ¶ 89-90). The Board also stated that the duty of determining whether Action had met the unspecified requirements would be delegated to TEL staff including Mr. DiRienzo, with a right of "appeal" to the Board if Action and the TEL staff disagreed. *See* (Verified Compl. ¶ 91).

The *entire TEL Board* voted on Mr. Carver's motion. (Verified Compl. ¶ 93). The Board lacked clear understanding of their statutory mandate and admitted that they were not operating within the framework of their own established rules. (Verified Compl. ¶ 89). They were similarly confused by what measures, if any, Action could take to have its license reinstated under this erroneous ruling. *See* (Verified Compl. ¶ 91). There was vague reference to Action being required to provide the verification of a "third party", but that third party was never named, nor were any specifics provided as to what information that third party would provide. (Verified Compl. ¶ 89). Mr. DiRienzo expressly refused to propose a timeline for reinstatement when asked by a Board member what would be appropriate. (Verified Compl. ¶ 90).

When asked whether Action could appeal, the Board's General Counsel initially responded that she did not know the rules surrounding appeals of suspensions undertaken under

exigent circumstances, but that she assumed there was some right of appeal. (Verified Compl. ¶ 91). The Board found her response humorous, with one member complimenting her by saying "that was a nice circle to dance around." (Verified Compl. ¶ 91). Before the vote, the Board's General Counsel stated that because the full Board was voting, this vote was a "final decision" of the Board and then Action would "have a right to appeal any decision of the full board." Tenn. Code Ann. § 4-51-328 ("Appealing final actions of the Board"). (Verified Compl. ¶ 92). Meeting Recording at 1:08:43–1:09:17. The full Board then approved Mr. Carver's motion. (Verified Compl. ¶ 93). Although the Board ultimately stated that six members voted in favor and one abstained, there was some confusion during the meeting as to whether all members had in fact voted. (Verified Compl. ¶ 93).

The Irreparable Harm to Action's Business

This alleged suspension came on the afternoon before the first day of the NCAA's annual March Madness basketball tournament—the event that draws the largest amount of sports betting activity of the year. (Verified Compl. ¶ 110). Action is not able to simply turn its system back on and begin accepting wagers. (Verified Compl. ¶ 65). From the moment Action's license was unlawfully suspended on the afternoon of March 18, TEL immediately made it technologically impossible for Action to continue operating. *See* (Verified Compl. ¶ 65). TEL has been unable from that moment on to accept wagers, and has already lost any proceeds it would have made from the entire first two rounds of the March Madness tournament. *See* (Verified Compl. ¶ 66).

The sports wagering industry has been in existence in Tennessee only since November. (Verified Compl. ¶ 66). Action's inability to accept wagers during one the biggest sporting events of the year means that its customers and potential customers have already placed wagers with the other online platforms, and will continue to do so. (Verified Compl. ¶ 66). Once those

customers have become accustomed to wagering through other companies, they are unlikely to return to Action when its license is eventually reinstated. (Verified Compl. ¶ 66). All of these issues have caused, and are continuing to cause, immediate and irreparable harm to Action's goodwill and reputation. (Verified Compl. ¶ 66). The purported suspension of Action's license thus has already had, and will continue to have, catastrophic effects on Action's ability to continue as a business. *See* (Verified Compl. ¶ 66).

LEGAL ANALYSIS

Under Rule 65.04 of the Tennessee Rules of Civil Procedure:

> A temporary injunction may be granted during the pendency of an action if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.

Tenn. R. Civ. Proc. 65.04(2).

Tennessee courts have generally relied on four factors determine whether injunctive relief is appropriate: (1) the likelihood of success on the merits; (2) the likelihood of irreparable harm that could result in the absence of injunctive relief; (3) the relative harm that would result to each party as a result of the disposition of the request for injunction; and (4) the impact on the public interest. *See, e.g., Gentry v. McCain*, 329 S.W.3d 786, 793 (Tenn. Ct. App. 2010); *see also S. Cent. R.R. Auth. v. Harakas*, 44 S.W.3d 912, 919 n.6 (Tenn. Ct. App. 2000) (citing Banks and Entman, TENNESSEE CIVIL PROCEDURE § 4-3(1) (1999)). These four factors are elements to be balanced collectively, rather than prerequisites that must be met individually. *See Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1995). As demonstrated below, all four factors favor granting the relief Action seeks in this matter.

A. Action Has a Substantial Likelihood of Success on the Merits on its Claims.

Action was utterly deprived of any process when its license was unlawfully taken, and the self-described "final decision" of the Board was arrived at in contravention of fact, statute and rule. Accordingly, Action is highly likely to succeed on both its statutory appeal of the decision and its due process claims.

1. Action Is Likely To Succeed on Its Appeal Under Tenn. Code Ann. § 4-51-328

Pursuant to Tenn. Code Ann. § 4-51-328(a), any person aggrieved by a "final action" by the Board "may appeal that decision to the chancery court of Davidson County." Based upon the record of the proceedings before the board, this Court may reverse the decision of the Board if it finds the decision to be "(1) Clearly erroneous; (2) Arbitrary and capricious; (3) Procured by fraud; (4) A result of substantial misconduct by the board; or (5) Contrary to the United States Constitution, the Constitution of Tennessee, or [the Act]." Tenn. Code Ann. § 4-51-328(b). The Board's final decision here is clearly erroneous, arbitrary and capricious, and contrary to the U.S. and Tennessee constitutions and the Act, and it should be overturned.

The Board's decision was clearly erroneous because it plainly lacked a factual basis in the record before the Board. The Board had available to it the twenty-three incident reports that Action submitted, the declaration of Tina Hodges, the detailed timeline of the suspicious activity that Action submitted, and emails from Action's outside counsel outlining the relevant facts and law. Yet the Board discussed none of this information at the hearing, choosing to rely instead almost exclusively on the opinions of Mr. DiRienzo, who admitted he had reviewed only three or four of the twenty-three incident reports that Action sent. Indeed, it is apparent that many Board members reviewed little to none of the information submitted by Action. The Board ignored evidence in the record showing that the suspicious transactions at issue were concentrated on March 9 and 10, had essentially been stopped after that, had resulted in only $22,661 in

fraudulent funds actually being withdrawn, and that Action had adopted robust remedial measures by suspending all affected accounts, implementing twenty-four-hour, seven-days-a-week monitoring, and contacting PaySafe to implement additional robust protections. Instead, the Court relied on Mr. DiRienzo's truncated review of a handful of records and his admitted guesswork to determine that "exigent circumstances" required the suspension of Action's license on the eve of March Madness without an opportunity to be heard.

Further, the Board's decision was arbitrary and capricious. A decision by a government instrumentality is "arbitrary or capricious when there is no substantial and material evidence supporting the decision." *See StarLink Logistics Inc. v. ACC, LLC*, 494 S.W.3d 659, 690 (Tenn. 2016). A decision *with* evidentiary support can still be arbitrary or capricious "if it amounts to a clear error in judgment" or "if it is not based on any course of reasoning or exercise of judgment, or . . . disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion.'" *Id*. at 669–70 (emphasis added). "Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures," and failure to do so shows that a decision was arbitrary and capricious. *See, e.g., Norman v. U.S. Dep't of Lab.*, 2015 WL 4771443, at *4 (E.D. Tenn. Aug. 12, 2015).

Governmental agencies "are bound to follow their own regulations," *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 546 (6th Cir. 2004), and where, as here, a governmental *instrumentality* is authorized to create its own regulations, it must follow them. A court must not allow the state (as TEL is for these purposes) "the ability [to] violate [a] regulation with impunity and render the protections promised therein illusory." *Id*. at 546. Where an administrator deviates from procedure without explanation, the ruling should be overturned. *See id.* (holding that "[a]lthough

substantial evidence otherwise supports the decision of the commissioner in this case, reversal is required because the agency failed to follow its own procedural regulation, and that regulation was intended to protect applicants like [plaintiff].")

In this case, the Board utterly failed to follow its own regulations, and, indeed, appeared to be unsure what level of process its regulations required. It failed to take into account any of the evidence Action attempted to present, disregarding the only relevant evidence, and, instead, relied on the suppositions and wild guesses of its investigator who provided them in lieu of review and analysis of the information Action had provided. The Board's determination that "exigent circumstances" existed was arbitrary and capricious where Action had (1) addressed and preempted further malfeasance by third parties attempting to use its site and (2) had no such incident after it fortified its already compliant processes and procedures and required the same of its vendors. No reasonable person in possession of the relevant facts and evidence would make this determination, nor would such a person determine that Action's license should be suspended.

The Board's decision was also arbitrary and capricious because it failed to consider relevant and important factors. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that an administrative decision may be arbitrary and capricious if it is not "based on a consideration of the relevant factors"). Crucially, some members of the Board stated that they had not received or had not had a chance to review the materials submitted by Action in advance of the hearing, which set forth the actual amount of fraudulent deposits and withdrawals at issue and Action's remedial measures adopted in response. And none of the Board members discussed Action's evidence at the hearing (or

allowed Action to explain its content). The Board instead relied almost entirely on Mr. DiRienzo's statements, which either omitted or distorted these key facts.

Further, the Board's final decision *substantively* violated the Tennessee and United States Constitutions (as discussed below), as well as the Act and TEL's Rules. The Act allows the suspension of a license ***only*** by the Board when, after notice and a hearing, it "determines that a licensee has violated any provision of this part or rule of the board." Tenn. Code Ann. § 4-51-326(b)(1). Here, the Board made no such determination, nor did it provide notice and a hearing. Because these requirements conflict with the Board's self-created standards in its regulations, the statutory requirements control. TEL Regulation 15.1.1. The Board made no finding that Action violated a statute or Rule, and, therefore, the final decision contravenes the Act's substantive provisions. Even considering the Board's regulations allowing for "exigent circumstances" and suspension any time the Sports Wagering Committee determines suspension "is in the best interests of the TEL, its Board, or the public policy or welfare of the State of Tennessee," *see* TEL Regulation 15.2.3, suspension is *not* necessary due to exigent circumstances *or* in the best interests of the public and thus this final decision is contrary to those regulations as well, both procedurally and substantively.

2. Action Is Likely To Succeed On Its Due Process Claims

Action is also highly likely to succeed on its Due Process claims. "The Due Process Clause of the Fourteenth Amendment and Tenn. Const. art. I, § 8 provide similar procedural protections and guarantees." *Howell v. Metro. Sexually Oriented Bus. Licensing Bd.*, 466 S.W.3d 88, 102-103 (Tenn. Ct. App. 2014) (citations omitted). "Both provisions provide procedural protections for property and liberty interests against arbitrary governmental interference," by "guard[ing] against unfair or mistaken deprivations of property interests" *Id*. at 103. TEL is a governmental instrumentality and it has undeniably and arbitrarily deprived Action of its single

most valuable property—its license. That TEL's actions violated Action's due process rights is irrefutable and inexcusable.

To show a due process violation, Action must show three things: (1) Defendants' action is state action; (2) Action had a property interest; and (3) Defendants deprived Action of that property interest without due process of law. Action is likely to show all three of these things.

a. TEL's Actions Are State Actions

TEL was created by statute for the purpose of governing private conduct in Tennessee. It is a public corporation and state instrumentality. *Armstrong v. Tennessee Educ. Lottery Corp.*, 219 F. Supp. 3d 708, 712 (M.D. Tenn. 2016). State action exists where there is a "close nexus between the State and the challenged action" such that allegedly private behavior may be "fairly treated as that of the state itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)**.** TEL has been delegated the traditionally public function of enforcing State law/regulation by the Tennessee State Legislature, so its actions are state actions. *West v. Atkins*, 487 U.S. 42, 43 (1988). "The fact that the government delegates some portion of [its] power to private litigants does not change the governmental nation of the power exercised." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1991). There can be little doubt that TEL's decision here—to suspend a license granted under state statutory authority—is the action of the state.

b.The License Is A Protected Property Interest

A license or permit to engage in an activity subject to State regulation creates a property right that is protected by due process. *Howell*, 466 S.W.3d at 104 ("There is no dispute in this case that Ms. Howell, as the licensee for the Club, had a protected interest in maintaining the license. Accordingly, an effort by the government to suspend or revoke the license must conform with due process."). Where the revocation of a license is subject to limitation by law, there is a

protectable property interest in that license. *Utd. Pet Supply, Inc. v. City of Chattanooga*, 921 F. Supp. 2d 835, 847 (E.D. Tenn. 2013). That interest is exceedingly valuable, because revocation of a license "precludes the licensee from operating the business … even a temporary suspension or revocation will have substantial consequences for a licensee." *Lee v. City of Newport*, 947 F.2d 945 (6th Cir. 1991). In short, "[a] professional license, issued by a State, which can be suspended or revoked only upon a showing of cause is a constitutionally protectable property interest because the holder of the license has a clear expectation that he or she will be able to continue to hold the license absent proof of culpable conduct." *Martin v. Sizemore*, 78 S.W.3d 249, 262-63 (Tenn. Ct. App. 2001) (citations omitted).

c. TEL Improperly Deprived Action of Its License Without a Pre-Deprivation Hearing

"Generally, the process that is due before a property deprivation includes prior notice and an opportunity for a pre-deprivation hearing." *Warren v. City of Athens, Ohio*, 411 F.3d 697, 708 (6th Cir. 2005). In true emergency circumstances (which do not exist here), due process does not require a pre-deprivation hearing only if state law provides an adequate post-deprivation remedy and pre-deprivation notice is impossible to give. *See Harris v. City of Akron*, 20 F.3d 1396, 1400 (6th Cir. 1994). However, pre-deprivation notice and hearing were not impossible to give here: there was sufficient time to provide a hearing—indeed the Board convened for the May 19 meeting, which could have been a hearing if Action were simply given the opportunity to speak. It would have been exceptionally easy for Defendants to let Action speak at the meeting before it deprived Action of its property, as both Action and its counsel were already listening to the meeting by phone and had asked beforehand to be allowed to inform the Board of Action's position.

"Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334–35, 96 S. Ct. 893, 902–03, 47 L. Ed. 2d 18 (1976). To determine whether administrative procedures are constitutionally sufficient requires analysis of the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
>
> *Id*.

The private interest here is Action's entire business: it is Action itself. The risk of erroneous action through the Board's procedures cannot be overstated. Through the utilization of the "exigent circumstances" and the "best interests" standard, the Board, or its Sports Wagering Committee, can essentially suspend any licensee's license for any reason it deems fit without notice or hearing. Further, if the March 19 meeting is the "hearing" that is anticipated by the Regulations, as appears to be the case, there is no method for the Board to consider the evidence provided by the licensee itself. The process itself virtually ensures error. Additional safeguards, including (1) requiring the Board to make a finding that the licensee has violated the Act or a regulation to suspend its license; (2) requiring notice and a hearing in all cases in which the licensee can present documents and testimony; and (3) requiring the Board to issue written decisions that provide notice of the law violated and concrete steps that must be taken to have the license reinstated, would greatly mitigate the risk of such error. Implementing these safeguards would provide a very minimal additional cost to the TEL. Indeed, it could preempt the need for lawsuits like this one, which will surely proliferate if the Board continues to refuse to hear licensees prior to suspending their licenses.

Further, the risk of erroneous deprivation caused by not allowing Action to be heard at this particular hearing was exceptionally high. The Board based its decision on the reed-thin evidence of Mr. DiRienzo's testimony, which was in turn based on simply reviewing three or four files and then speculating about the overall scope and magnitude of the suspicious activities. If Action had been allowed to speak, Action could have corrected Mr. DiRienzo's mistaken assumptions and set the record before the Board straight.

Further, post-deprivation process will not be adequate here to remedy Action's irreparable injuries. *See Matthews*, 424 U.S. at 333 ("A claim to a pre-deprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a post deprivation hearing."). Full post-deprivation relief certainly cannot be obtained here. The first NCAA tournament open for mobile sports betting in the history of Tennessee began on the day that the Board revoked 24/7's license. The damage in lost customers and lost customer goodwill cannot be calculated or repaired after the fact. In addition, there *is* no post-deprivation remedy for the action that took place, because, according to the Board, it constitutes a "final decision."[6] Indeed, the Board knew that Action's counsel was present on the March 19 call yet refused to provide them with an unmuted line to present Plaintiff's position.

B. Action Will Suffer Irreparable Harm if Its License Remains Suspended.

"A plaintiff's harm is irreparable harm if monetary damages cannot be calculated with a reasonable degree of certainty or will not adequately compensate the injured party." *AmeriGas Propane, Inc. v. Crook*, 844 F. Supp. 379, 390 (M.D. Tenn. 1993). In other words, "[i]rreparable

[6] While it is apparent that there is no additional remedy contemplated by the Board, out of an abundance of caution and because Action must try every avenue to end its suspension and save its business, Action has asked the Board for reconsideration of its decision. But there is no indication that the Board will provide any additional remedy as the full Board has already refused to hear Action and has refused to provide Action with guidance regarding how to achieve reinstatement of its license.

injury is defined as an injury that cannot be adequately measured or compensated by money." *Forster v. Schofield*, No. 3:11-0109, 2011 WL 4915804, *6 (M.D. Tenn. Oct. 17, 2011) (*citing* Black's Law Dictionary 789-90 (7th ed. 1999)). The loss of "customer good will and loss of fair competition (competitive losses) amounts to irreparable injury because the damages flowing from such losses are difficult to compute . . . and likely to irreparably harm [a company]." *Lexington-Fayette Urb. Cty. Gov't v. BellSouth Telecommunications, Inc.*, 14 F. App'x 636, 639–40 (6th Cir. 2001).

Once TEL announced the suspension, it immediately made it technologically impossible for Action to continue operating. From that moment, Action has been unable to accept wagers, and has already lost numerous customers from being unable to accept wagers for the entire first two rounds of the March Madness tournament. It will only lose more if it cannot accept wagers for the remaining two weeks of the tournament as well. The sports wagering industry has been in existence in Tennessee only since November. The players in the industry are fiercely competing for market share. Action's inability to accept wagers during one the biggest sporting events of the year means that its customers have already found other companies online that will take their wagers instead, and will continue to do so. Once those customers have become accustomed to wagering through other companies, having already created passwords, input card information and become accustomed to placing wagers on those sites, they are unlikely to return to Action when its license is eventually reinstated. The purported suspension of Action's license thus has already had, and will continue to have, catastrophic effects on Action's ability to continue as a business.

Action has also been unable to refund money to its current customers, further jeopardizing its reputation and its customers' best interests. And multiple news outlets have

already published articles that read as though Action itself committed the fraud that was committed by third parties improperly accessing its site.

"The impending loss or financial ruin of [a movant's] business constitutes irreparable injury." *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1382 (6th Cir. 1995). Where, as here, "the potential economic loss is so great as to threaten the existence of the movant's business," a preliminary injunction is an appropriate and necessary remedy. *Id*. (collecting cases). Indeed, such a loss is the quintessential "irreparable harm" that injunctive relief is intended to forestall. Because monetary damages are insufficient to remedy these harms and because its entire business is being threatened, Action is entitled to injunctive relief to protect against this irreparable injury.

C. The Relative Harm to TEL of Not Obtaining Injunctive Relief Outweighs Any Potential Harm to Defendant

Action has shown TEL that it has robust and effective internal controls in place that detected the suspicious activity, and Action has voluntarily strengthened its internal controls internally and through requests to its vendors in response to the suspicious transactions. Quite simply, there is no harm to TEC. On the other hand, as set forth above, shuttering Action's business will have a catastrophic effect on action as its customers and potential customers develop relationships with other online gambling platforms and may not return to Action.

D. Injunctive Relief Promotes the Public Interest

Finally, the requested injunctive relief promotes the public interest. The Tennessee General Assembly only recently passed the Tennessee Sports Gaming Act in 2019, and it did so to fund public education in the state of Tennessee. *See* Tenn. Code Ann. § 4-51-304(e)(1) (stating that eighty percent of the privilege tax collected by licensees under the Act "must be distributed by the corporation to the state treasurer for deposit into the lottery for education

account created under § 4-51-111"); § 4-51-128 (listing among corporate purposes the "operation of educational programs and purposes" and noting that the corporation's objectives include "raising net lottery proceeds for the benefit of education programs and purposes."). Thus, the public benefits from the continued existence and operation of Action, which helps to fund the state's educational programs. Further, Action is the only locally-owned licensee under the Act, and the public also benefits from being able to choose a locally-owned and operated online sports betting book.

Here the evidence of record more than establishes each factor required for injunctive relief. TEL should not be permitted to indefinitely suspend Action's license, effectively terminating the entry of this new business in what is a nascent industry for Tennessee, without any identification of a statute or law that Action violated and pursuant to a final decision that is clearly erroneous and arbitrary and capricious. Thus, the Court should enter a temporary injunction to require TEL to reinstate Action's license pending a determination from this Court on the merits of that decision.

E. No Bond Should Be Required

While Tenn. R. Civ. P. 65(1) requires a bond to be posted for the issuance of a temporary injunction, the bond need only be an amount appropriate "for the payment of such costs and damages as may be incurred or suffered by any person who is found to have been wrongfully restrained or enjoined." As TEL will not incur any costs as a result of the injunction, Action respectfully submits that no bond is needed here. However, if the court decides to require a bond, the amount should be nominal.

CONCLUSION

Swift injunctive relief is necessary to prevent a manifest injustice to Action. TEL has violated Action's constitutional rights and threatens its very existence with a suspension that is indefinite pursuant to a decision made in defiance of the facts and the law. If Defendants are allowed to continue this indefinite suspension, Action will suffer immediate, irreparable harm including financial ruin. Accordingly, the court should grant a temporary injunction requiring Defendants to immediately reinstate Action's license and notify any third parties as necessary for the operation of Action's platform.

Dated March 22, 2021.

Respectfully submitted,

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I hereby certify that the foregoing was served upon Defendants via email and/or mail this 22nd day of March, 2021, as follows:

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