

STRUMWASSER & WOOCHELLP

ATTORNEYS AT LAW

1250 SIXTH STREET, SUITE 205
SANTA MONICA, CALIFORNIA 90401

MICHAEL J. STRUMWASSER
BRYCE A. GEE
BEVERLY GROSSMAN PALMER
DALE K. LARSON
CAROLINE C. CHIAPPETTI
JULIA G. MICHEL †
SALVADOR E. PÉREZ

† Also admitted to practice in Washington

TELEPHONE: (310) 576-1233
FACSIMILE: (310) 319-0156
WWW.STRUMWOOCHELLP.COM

FREDRIC D. WOOCHELLP
ANDREA SHERIDAN ORDIN
SENIOR COUNSEL

February 14, 2024

By Email to: Karim.Kentfield@doj.ca.gov

Karim J. Kentfield
Deputy Attorney General
Office of the Attorney General
Opinion Unit, California Dept. of Justice
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

Re: Opinion Request No. 23-1001

Dear Mr. Kentfield:

On behalf of SidePrize LLC, a Georgia-based limited liability company that operates online daily fantasy sports games as “PrizePicks” (“PrizePicks”), we submit the following comments regarding pending Opinion Request No. 23-1001. That request asks: “Does California law prohibit the offering and operation of daily fantasy sports betting platforms with players physically located within the State of California, regardless of whether the operators and associated technology are located within or outside of the State?”

The short answer to the question is “No.” As is set forth in greater detail below, and as State Senator Wilk’s letter requesting the Attorney General’s Opinion recognizes, under California law, no one may operate a “game of chance” without legislative authorization or without the required federal, state, or local licenses. Daily fantasy sports (DFS) contests are not “games of chance,” however, and California law therefore does not prohibit the offering and operation of DFS online platforms to contestants within the state.

I. Background

Fantasy sports have been a popular form of entertainment for over sixty years, dating back to the 1960’s when friends and social acquaintances would gather to select virtual “teams” composed of real-life players, would track their performance during the course of a season based on a predetermined set of statistics, and would reward the contestants whose fantasy team scored the most points with a prize funded by the pooled entry fees submitted by each contestant. With the advent of the internet in the 1990’s, fantasy sports leagues became more sophisticated and prolific, as well as commercialized; third party services created online platforms to establish fantasy leagues in various sports, providing and maintaining the required statistical information, collecting entry fees from participants, and paying the league’s winners.

The first online daily fantasy sports contests were launched in 2007, following the enactment of the Unlawful Internet Gambling Enforcement Act (“UIGEA”), which laid out the conditions and criteria for fantasy sports contests to be exempt from federal prohibitions against online gambling. Over the ensuing years, online daily fantasy sports operations have flourished, with some operators now even partnering with U.S. professional sports leagues to promote and finance their contests. The North American fantasy sports market is estimated to be \$13.21 billion in 2024; California’s share of that market is approximately \$1 billion per year. That market is estimated to double by 2029. DFS contests comprise approximately \$2 billion per year and are the fastest growing segment of the fantasy sports industry.¹

PrizePicks began offering its online DFS contests in California in 2018 and currently operates in a total of 33 states, including the District of Columbia and Canada. Eleven states explicitly authorize (and, in some instances, license and regulate) PrizePicks’ contests; in the remaining states (as in California), PrizePicks’ contests are not subject to express licensure requirements.

The formats for online DFS contests vary widely across (and even within) different DFS platforms, but the common feature is that contestants pick a roster of professional athletes and use their knowledge and research skills to make predictions on how their team members will perform against one or more statistical benchmarks. Given the diversity of games and rules governing the different DFS formats, we believe that it is difficult, if not impossible, to provide an analysis and answer to Senator Wilk’s Opinion request that would be universally applicable to all DFS contests. Senator Wilk’s request raises a mixed question of law and fact. As the analysis herein will demonstrate, the legality of particular fantasy sports contests does not hinge on unsettled questions of law — there can be no reasonable dispute that “contests of skill” are legal and permissible in California — but rather on the factual question of whether skill is the predominant factor that determines the outcome of a particular contest.² We will therefore focus specifically in our comments on the contests offered by PrizePicks, based upon the established rules and procedures for those contests.

Contestants on PrizePicks use their skills to draft a roster comprising between two and six athletes who participate in real-world sporting events, with the contestant strategically predicting

¹ <https://www.mordorintelligence.com/industry-reports/north-america-fantasy-sports-market>

² For similar reasons, because the legality of any particular fantasy sports contest depends upon the resolution of this factual question by a court based upon an evidentiary record, it is doubtful that Senator Wilk’s inquiry involves a “question of law” under Government Code section 12519’s criteria for issuance of an Attorney General Opinion. (See *Williams v. Justice Court, Oroville Judicial Dist., Butte County* (1964) 230 Cal.App.2d 87, 97 [“**The issue of gambling versus skill is largely factual.** As to some games and devices the question cannot be resolved without a hearing and evidence. . . . Which of the two crucial elements, chance or skill, plays the predominant role may turn on subtle variations in design and operating characteristics. The judgment can be reached only by considering evidence.” (emphasis added)].)

whether each athlete on the roster will exceed or not exceed a certain number in a specific statistical category (“more or less”). Every entry must include athletes from at least two different real-life teams, and contestants may not use the same athlete in multiple predictions in the same entry; for example, a contestant cannot play an entry predicting that a single basketball player will have more than 20.5 points and less than 6.5 rebounds in the same game. Winning or losing on the PrizePicks platform therefore cannot be based on the outcome of a single sporting event or the performance of any individual athlete. The maximum number of predictions that can be joined in a single entry varies by state, but no contest offered by PrizePicks allows for more than six predictions per entry. The contestant pays an entry fee, which is correlated to the size of the prize based on the success of the athletes in their roster and the accuracy of their statistical predictions.

PrizePicks does not offer modified auction drafts, “snake drafts,” or “straight drafts” for player selection. Instead, PrizePicks offers an open draft format with no salary cap; all participants have an equal opportunity to choose the same athletes and create the same rosters. Compared to the snake draft and straight draft formats, this open draft format makes PrizePicks’ contests more skillful than other forms of fantasy sports because the contestant’s selection is not affected by the random chance of where they land in the draft order. Rather, the PrizePicks draft format forces participants to exercise their requisite skills and knowledge in order to win, both by selecting the athletes on whom the contestants believe they possess the most data and information, and by determining whether the selected athlete will perform better or worse than the fantasy point or accumulated statistics predicted totals. Thus, two contestants may draft the same athletes to their rosters, yet depending on each person’s determination as to whether the drafted athletes’ final fantasy point/accumulated statistical totals will be more or less than the projected statistical outcomes, the participants may have completely different contest outcomes. In theory, all contest participants can win, or all contest participants can lose; the number of winners is not fixed because the winning outcomes are determined by each contestant’s projections for their selected roster of athletes relative to each athlete’s projected fantasy point/single-statistic total. Contest results and winners are therefore based on the skill and accuracy of each participant’s analysis and skills in forecasting the performance of each athlete selected on each person’s roster.

PrizePicks offers what they call “Power Play” and “Flex Play” contests. In Power Play, a contestant may choose between two and four predictions, and every prediction must come true for the contestant to receive a payout. The amount of the payout depends on whether the contestant makes two (prize is 3x entry fee), three (prize is 5x entry fee), or four (prize is 10x entry fee) predictions. By contrast, in Flex Play, the contestant may choose between three and six predictions, and they will receive a prize even if one or two (depending on the number of athletes in a roster) of the predictions proves incorrect; the payout for a flex play entry depends on how many total predictions are made and how many are accurate. Unlike typical fantasy sports contests, participants use their knowledge, expertise, and acquired statistical analysis skills to pit their fantasy lineups against projected fantasy sports point or single-statistic totals rather than against the fantasy lineups of fellow participants. Typical fantasy contest formats like head-to-head, “50/50 contests,” and winner-take-all would appear to be more susceptible to randomness and chance by adding another factor into the equation for winning — i.e., the number and skill levels of the other contest participants — that is outside the control of the contestant. PrizePicks

contestants instead know exactly what they can win prior to entering the contest, and whether they win is entirely based on the application of their own skill, knowledge, expertise, and analysis, not on the selections of random other players. Moreover, the value of the prize they receive is fixed and is not determined by the number of other participants.

The design of PrizePicks thus minimizes the role of chance and the effect of any one game or contest. Contestants are not allowed to make predictions about the outcome of any one sporting or e-gaming event; every entry must include players from at least two different teams and even different sports. Individual sports have additional rules, as well, to ensure that entries do not turn on the outcome of a real-world sporting event or contest; for example, in baseball, a contestant may not select a pitcher and an opposing batter in the same entry. In addition, subject to the Company's "reboot" policy, a prediction can be removed if a player is injured, ejected, does not play due to a coach's decision, or otherwise plays a smaller role in a game than initially predicted; in this manner, the outcome is less likely to be affected by a "chance" factor such as an injury or game cancellation, as might occur in other fantasy sports games.

II. PrizePicks' Daily Fantasy Sports Contests Are Games of Skill That Do Not Constitute Unlawful "Gambling" Under California Law

California law (and the law of most other states) identifies three different types of prohibited "gambling" activities: lotteries, gaming, and betting. (See, e.g., *Western Telcon, Inc. v. California State Lottery* (1996) 13 Cal.4th 475, 484 ("*Western Telcon*") ["The three key forms of gambling are gaming, lotteries and betting."] [citation omitted]; *People v. Postma* (1945) 69 Cal.App.2d Supp. 814, 819 ["Gaming, betting and lotteries are separate and distinct things in law and fact, and have been recognized consistently as calling for different treatment and varying penalties."].) The common element in all of these "gambling" activities, however — and what makes them unlawful in certain circumstances — is that the outcomes are determined by hazard or chance, not predominantly by skill. (See, e.g., *Knowles v. O'Connor* (1968) 266 Cal.App.2d 31, 33 ["Games of skill do not fall within the prohibition of the state gaming laws."]; see generally 38 C.J.S., Gaming, § 1, p. 35 ["Games of skill are usually lawful, while gambling by any species of games of chance is generally considered unlawful."]; 24 Am. Jur., § 18, p. 410 ["A 'game of chance' is said to be such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, and adroitness have no office at all, or are thwarted by chance."].) "Chance" means that winning and losing depend on luck and fortune rather than, or at least more than, judgment and skill." (*Hotel Employees & Restaurant Employees Int'l Union v. Davis* (1999) 21 Cal.4th 585, 592 ("*HERE*").)³

In determining whether a given activity constitutes a game of skill or chance, California follows the "majority" test, which looks to whether chance or skill is the *predominant* factor in

³ Notably, this was the universal understanding under the common law of the meaning of "gambling" at the time California first became a state in 1849. (See, e.g., *State v. Gupton* (N.C. 1848) 30 N.C. 271, 275 [reversing defendant's gambling conviction because ten pins "is not a game of chance, but of skill"].)

determining the outcome of the game. (*Finster v. Keller* (1971) 18 Cal.App.3d 836, 844; accord, *Bell Gardens Bicycle Club v. Department of Justice* (1995) 36 Cal.App.4th 717, 748 [“The ‘domination’ standard is a well-settled test in California.”]; see also *White v. Cuomo* (2022) 38 N.Y.3d 209, 223 [“New York courts have historically applied the dominating element standard to determine whether a particular activity constituted a ‘game of chance’—reflecting a shared understanding that ‘gambling’ encompasses those games dominated by chance, not skill.”].) As the California Supreme Court summarized in *In re Allen* (1962) 59 Cal.2d 5, 6:

“The term ‘game of chance’ has an accepted meaning established by numerous adjudications. Although different language is used in some of the cases in defining the term, the definitions are substantially the same. It is the character of the game rather than a particular player’s skill or lack of it that determines whether the game is one of chance or skill. The test is not whether the game contains an element of chance or an element of skill but *which of them is the dominating factor in determining the result of the game.*” [Citations omitted; emphasis added.]

“Whether a particular game is one of skill or chance is largely a factual issue.” (*Knowles v. O’Connor* (1968) 266 Cal.App.2d 31, 33; accord, *Williams v. Justice Court, Oroville Judicial Dist., Butte County* (1964) 230 Cal.App.2d 87, 97 [“The issue of gambling versus skill is largely factual. As to some games and devices the question cannot be resolved without a hearing and evidence. . . . Which of the two crucial elements, chance or skill, plays the predominant role may turn on subtle variations in design and operating characteristics. The judgment can be reached only by considering evidence.”].)⁴ Moreover, in making this factual determination, courts frequently rely upon expert testimony. (See, e.g., *White v. Cuomo*, 38 N.Y.3d at pp. 223-224 [upholding Legislature’s determination that DFS contests are a game of skill, not chance — and therefore not “gambling” prohibited by the state Constitution — based on an expert’s statistical analytic report demonstrating that DFS games “have an inherent and vast character of skill where chance is overwhelmingly immaterial in the probability of winning” and winning a prize in such contests “strongly depends more on skill than on chance”]; *O’Brien v. Scott* (N.J. Super. Ct. 1952) 20 N.J. Super. 132, 139-142 [ruling that “Skilo” was predominantly a game of skill rather than chance, and thus not a “gambling game,” based upon statistical study conducted by Princeton

⁴ As noted above, because the question of whether a particular contest is a game of skill or chance is a factual inquiry that depends upon the specific characteristics of the contest in question, and because there are so many different variations of online daily fantasy sports contests as offered and played in California, it is simply not possible to provide a definitive answer to Senator Wilk’s question that would necessarily apply to all DFS platforms and contests. For this reason, if the Attorney General determines that Senator Wilk’s question satisfies the criteria of Government Code section 12519, the Opinion may wish to set forth the factors that should be considered in analyzing whether California law prohibits the offering of online DFS contests without reaching any conclusions regarding the legality of any specific contests, which is a determination that should be reserved for a trier of fact in a judicial setting in which experts can be heard and cross-examined about their conclusions.

mathematics professor showing that expert players were substantially better than novices or average players].)

The DFS contests offered by PrizePicks have specifically been designed to be — and statistical studies conducted by world-renowned statisticians have confirmed that they indeed are — games in which skill predominates over chance. In order to succeed, contestants must consider and absorb a great deal of information and data, including individual player statistics, trends based on recent performance, historical success against and match-ups with particular opponents, coaching styles, offensive and defensive strategies, home and away differences, and even anticipated weather conditions. Contestants must keep up to date with athletes’ health and injury status, their playing time, and any other events that might impact the value of any given player and how they will perform in the day’s games. This knowledge and judgment are then brought to bear in choosing the contestant’s roster of player-athletes, in selecting which statistical benchmarks to measure their performance against, and in predicting whether the athletes will or will not achieve those targets. Being able to assimilate and make use of all of these data and the multiple variables involved is truly an act of judgment and skill. And because these decisions must be made on a daily basis, DFS contests arguably require even more skill and judgment than traditional, season-long sports fantasy games.

In fact, there is an established, billion-dollar industry of newsletters, websites, blogs, TV shows, and online forums devoted to tracking statistical data, discussing different strategies, and offering expert advice on how contestants can improve their skills and performance in DFS contests. To paraphrase the Supreme Court in *In re Allen*: “The existence of such a large amount of literature designed to increase the player’s skill is a persuasive indication that [DFS] is not predominantly a game of chance.” (59 Cal.2d at p. 7.)

Statistical studies have likewise confirmed that skill predominates over chance in DFS contests. In addition to the statistical analysis referenced by the New York Court of Appeals in *White v. Cuomo* showing that skilled players achieve significantly more success in DFS contests (38 N.Y.3d at p. 223), the Illinois Supreme Court cited at least three recent, peer-reviewed studies establishing that DFS contests “are predominately determined by the skill of the participants in using their knowledge of statistics and the relevant sport to select a fantasy team that will outperform the opponent.” (*Dew-Becker v. Wu* (2020) 178 N.E.3d 1034, 1040 [citations omitted].) “Indeed,” the court observed, “the fact that DFS contests are predominately skill-based is . . . widely recognized.” (*Id.* at pp. 1040-1041.)

With specific reference to the DFS contests offered by PrizePicks, expert statistician Zvi Gilula — a professor of statistics with a Ph.D. degree from Hebrew University who is an elected fellow of the Royal Statistical Society and the American Statistical Association, and is currently a visiting Professor at the Chicago Booth School of Business — recently conducted an empirical analysis under the same standards used in *White v. Cuomo* of PrizePicks’ player data to determine whether the contests were primarily games of skill or chance.⁵ It is important to note that Professor

⁵ A copy of Professor Gilula’s study is attached hereto as Exhibit A.

Gilula is the same expert retained and cited by FanDuel and DraftKings in support of their positions in the *White v. Cuomo* matter.⁶

As in the other studies cited above, Professor Gilula concluded that the data unquestionably support the finding that PrizePicks is a game of skill – and in fact, in many ways, is *more skillful* than the versions of DFS currently offered by FanDuel and DraftKings in California. In order to conduct his analysis, Professor Gilula reviewed PrizePicks’ data files for each unique user whose account was at least four months old and who played at least one of PrizePicks’ seven game modes from January 1, 2019 through mid-June 2023; for each user, the data included statistics on total games played, total wins, and total losses, from which Professor Gilula calculated a “win ratio,” which he defined as “the number of games won per number of games played.” After refining the data set to eliminate outlier users (in terms of the number of games played), Professor Gilula then focused on the subset of “high performers” who exhibited an outstanding number of repeated wins, finding that the number of “high performers” was so great, and their win rate was so much greater than that of the typical user, that it was statistically very unlikely to be attributed to chance. Professor Gilula concluded that for all seven versions of the PrizePicks games, “[c]hance is IMMATERIAL to the likelihood of long-term competitive success. Instead, skill predominantly determines the likelihood of success in the game.” As Professor Gilula summarized his findings:

“[F]or all subsets of typical users, it is demonstrated that the reported exceptional performance of so many repeated wins is strongly unlikely to be attributed to chance. We see strong evidence to an inherent character of the games. All seven games covered by this report are games where skill can be exercised in a manner that leaves almost no detectible room for chance. This is the same kind of inherent character I have found in many Sport Fantasy games, such as DraftKings, Skillz, to name a few, as well as in many simple internet games and top skill games such as Chess, Bridge, Backgammon etc.”

Of critical importance, the game operator’s role in establishing the statistical measures for each athlete in the contest plays no role in how much skill a contestant must demonstrate to win a cash prize. In fact, as Gilula would testify, when top skill games like chess, bridge, and backgammon are played against a computer, and not other competitors, the level of skill required to prevail often increases, not decreases. The same is true for DFS. It explains why all of the other submissions to the Attorney General’s Office that argue that “pick ‘em” contests are games of chance did so without offering any evidentiary basis or statistical analysis that would diminish or rebut Gilula’s conclusions. Quite simply, whether “pick ‘em” contests are games of skill or chance is a factual question, and there is not a single study that any party has submitted or identified that concludes

⁶ <https://www.gibsondunn.com/wp-content/uploads/2022/03/White-v.-Cuomo-Amicus-Brief.pdf> at 11. It is impossible to now reconcile how FanDuel and DraftKings could reasonably assert that the New York Court of Appeals should rely on the Gilula analysis under the predominant factor test in *White v. Cuomo*, but that somehow the California Attorney General should disregard Gilula’s analysis here under the same legal standard.

that chance is the dominating factor in these contests or would otherwise cast doubt on Gilula's scientific methods or his conclusion that, in fact, in DFS "pick'em" contests "chance is immaterial" to a contestant's success.

Finally, and perhaps most importantly, DFS contests have repeatedly been found to constitute lawful games of skill, not chance, by courts that have addressed the issue and analyzed the empirical evidentiary record. While no court in California has yet been called upon to resolve this question, the highest courts of both New York and Illinois, as noted above, have ruled that the "factual determination that [DFS] contests are a game of 'skill,' not of 'chance'— and therefore are not 'gambling' — has resounding support." (*White v. Cuomo*, 38 N.Y.3d at p. 223 [citation omitted]; accord, *Dew-Becker*, 178 N.E.3d at pp. 1040-1041; see also *Olson v. Major League Baseball* (2nd Cir. 2022) 29 F.4th 59, 73-74 ["The skill in participating in an MLB DFS contest lies not in any assurances of on-field performance, but rather in choosing a lineup based on considerations of the innumerable, widely-known variables that could impact player performance, such as weather, injuries, umpiring, cheating, and many more."]; *Humphrey v. Viacom, Inc.* (D. New Jersey 2007) 2007 WL 1797648, *1 ["Fantasy sports leagues allow fans to use their knowledge of players, statistics and strategy to manage their own virtual team based upon the actual performance of professional athletes through a full season of competition."]) Several Attorney General opinions from other states have also concluded that online fantasy sports contests are lawful games of skill, not chance. (See, e.g., The Honorable William P. Cole III (W.Va. A.G, 2016) 2016 WL 3857081, *2 ["We conclude that West Virginia does not prohibit the offering of or participation in fantasy sports games, as they are defined in Senate Bill 529. We read state law to prohibit only betting upon games decided at least predominantly by chance. Fantasy sports games, as defined in the Senate Bill, are not so decided. Rather, they are determined predominantly by skill, knowledge, and athletic performance."]; R.I. Op. Att'y Gen. at p. 2 (Feb. 4, 2016), available at <<https://perma.cc/3KAB-EE2S>> ["Applying the 'dominant factor' standard, I do not believe that daily fantasy sports constitute a 'game of chance' and therefore, daily fantasy sports games do not constitute a lottery under Rhode Island law."]; Kan. Atty. Gen. Op. No. 2015-9 (Kan. A.G. 2015), 2015 WL 1923114 ["If fantasy sports leagues fall within the definition provided in 2015 Senate Substitute for HB 2155, then fantasy sports leagues are games of skill and therefore are not lotteries."])⁷ In none of these opinions was the role of the "operator" and/or the parameters set by the operator for the contest a dispositive (or even a relevant) factor to whether a contestant's success was determined by skill or chance.

⁷ As the West Virginia Attorney General Opinion noted, in those states in which the Attorneys General had reached a contrary conclusion, the governing state law did not use the "dominant factor" test for distinguishing between games of skill and games of chance, instead prohibiting games with *any* element of chance or where chance plays more than a nominal role. (2016 WL 3857081, *8-9; see also *Dew-Becker v. Wu*, 178 N.E.3d at p. 1041 [rejecting reliance on Attorney General opinions from Illinois and Texas because they did not have the benefit of the more recent research that has established the predominance of skill in DFS contests and employed the "any chance" test, not the predominate factor test].)

In sum, because PrizePicks' DFS contests are predominantly "games of skill" and not games of chance, they do not constitute unlawful "gambling" under California law.

III. No Constitutional Provision or Statute Prohibits the Offering and Operation of Daily Fantasy Sports Platforms and Contests in California

As the Supreme Court explained in *In re Hubbard* (1964) 62 Cal.2d 119, *overruled on other grounds* in *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63, fn. 6, California law "do[es] not prohibit all forms of gambling." (*Id.* at p. 125.) Rather, the general law consists of a series of prohibitory enactments covering many, but not all, aspects of gambling. "There are any number of other forms of gambling which the general laws do not regulate or prohibit." (*Ibid.*)

There are two constitutional provisions and three statutory prohibitions that provide the respective legal frameworks and grounds for prohibiting the three different forms of gambling in California: lotteries, gaming, and betting. (See *Western Telcon*, 13 Cal.4th at p. 484.) None of them, however, applies to PrizePicks' DFS platform or prohibits PrizePicks from continuing to offer its DFS contests within the state of California. We identify and examine each in turn.

A. PrizePicks' DFS Contests Do Not Constitute a Prohibited "Lottery"

Since California's admission to the union in 1849, the state Constitution has prohibited lotteries. The Constitution currently provides: "The Legislature has no power to authorize lotteries and shall prohibit the sale of lottery tickets in the State." (Cal.Const., art. IV, § 19, subd. (a).) In compliance with this constitutional mandate, the Legislature has prohibited lotteries by statute. Part 1, title 9, chapter 9 of the Penal Code addresses lotteries. Penal Code section 319, unchanged since its enactment in 1872, defines a "lottery" as "any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, . . . whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known." Penal Code section 320 provides that "[e]very person who contrives, prepares, sets up, proposes, or draws any lottery, is guilty of a misdemeanor."

A lottery therefore requires "three elements: '(1) a prize; (2) distributed by chance; and (3) consideration.'" (*Western Telcon*, 13 Cal.4th at p. 484 [quoting *California Gasoline Retailers v. Regal Petroleum Corp.* (1958) 50 Cal.2d 844, 851].) As the Supreme Court summarized in *HERE*: "'Consideration' is the fee (in the form of money or anything else of value) that a participant pays the operator for entrance. 'Chance' means that winning and losing depend on luck and fortune rather than, or at least more than, judgment and skill. 'Prize' encompasses property that the operator offers to distribute to one or more winning participants and not to keep for himself." (21 Cal.4th at p. 592 [citations omitted].) In particular, "[t]here must be an understanding, agreement or expectation the distribution will be determined by chance." (*Finster*, 18 Cal.App.3d at p. 843.)

PrizePicks' DFS contests are not prohibited lotteries because, as explained in the previous part, they are games of skill, not games of chance, so this fundamental element of a lottery is manifestly missing.

B. PrizePicks' DFS Contests Do Not Constitute Prohibited "Gaming"

The second distinct category of prohibited gambling under California law is "gaming." Article IV, section 19, subdivision (e), of the California Constitution, added in 1984 at the same time the State Lottery was authorized, declares: "The Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey." As the Court explained in *HERE*: "From all that appears, section 19(e) was designed to proscribe casinos—specifically, "casinos of the type currently operating in Nevada and New Jersey"—by *constitutional* force, preventing any future legislative authorization of such casinos without constitutional amendment." (21 Cal.4th at p. 585 [emphasis in original]; accord, *id.* at pp. 605-606 ["the available legislative history suggests section 19(e) was designed, precisely, to elevate statutory prohibitions on a set of gambling activities to a constitutional level"].)

The "statutory prohibitions" that were constitutionalized by the adoption of article IV, section 19(e), are those found in chapter 10 of part 1 of title 9 of the Penal Code (entitled "Gaming"), which was also part of the original 1872 Penal Code. (See *Western Telcon*, 13 Cal.4th at p. 482.) Specifically, Penal Code section 330 both defines and specifies the punishment for illegal gaming. Section 330 specifies a number of illegal games by name ("faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fan-tan, seven-and-a-half, twenty-one, hokey-pokey") and also forbids "any banking or percentage game played with cards, dice, or any device . . ." Anyone who conducts, plays, or bets at any of the prohibited games for money or other representation of value commits the misdemeanor of illegal gaming.⁸ Penal Code sections 330a and 330b, in turn, prohibit slot machines, the other predominant form of "casino-style" gaming in California. (See *HERE*, 21 Cal.4th at p. 593 ["Since 1911, section 330a of the Penal Code has prohibited all slot machines; section 330b of the same code, enacted in 1950, has redoubled the prohibition."].) The Supreme Court has referred to these provisions collectively as comprising California's statutory

⁸ Section 330 provides, in its entirety:

"Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fan-tan, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value, and every person who plays or bets at or against any of those prohibited games, is guilty of a misdemeanor, and shall be punishable by a fine not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six months, or by both the fine and imprisonment."

prohibitions against “casino-style” gaming. (*United Auburn Indian Community of Auburn Rancheria v. Newsom* (2020) 10 Cal.5th 538, 562.)

PrizePicks’ DFS contests violate neither article IV, section 19(e), nor Penal Code sections 330, 330a, and 330b for two separate reasons: First, these sections prohibit only games of *chance*, not games of skill; and second, DFS contests are not in any event “casino games,” “slot machines,” or “banking or percentage games played with card, dice, or any device.”

With respect to the first issue, the only gambling activities that were permitted and that occurred in casinos operating in Nevada and New Jersey in 1984 were games of chance, such as slot machines, blackjack, craps, roulette, and baccarat.⁹ This remains the case today. (See, e.g., *In re Marriage of Shelton* (1981) 118 Cal.App.3d 811, 816, fn. 3 [“We take judicial notice that the gambling offered at the casinos at Lake Tahoe consists primarily of ‘games of chance’ insofar as the law is concerned, i.e., games which by definition are contests in which chance predominates over skill.”]; *Score Family Fun Center, Inc. v. County of San Diego* (1990) 225 Cal.App.3d 1217, 1223 [“[W]e note that there are a number of cases holding poker and other casino games are predominantly games of chance particularly when played against a machine.”] [citations omitted].)

The games listed in Penal Code section 330 are likewise all casino-type games of chance. (See, e.g., *Oliver v. County of Los Angeles* (1998) 66 Cal.App.4th 1397, 1404 [“the common thread among the games specifically listed in section 330 at the time of its enactment was that they were casino games”] [citation omitted]; *Western Telcon*, 13 Cal.4th at p. 487 [“In both lotteries and banking games each of the participants may win or lose money depending on a chance outcome.”]; *Sullivan v. Fox* (1987) 189 Cal.App.3d 673, 679 [“We construe the language in section 330 referring to percentage games as encompassing any game of chance from which the house collects money calculated as a portion of wagers made or sums won in play, exclusive of charges or fees for use of space and facilities.”].) The statutory references to “slot machines” and “devices” also relate only to games of chance. (See, e.g., Penal Code, § 330b, subd. (f) [explicitly exempting machines or devices that are “predominantly games of skill” from the definition of “slot machine or device”]; *People v. Mason* (1968) 261 Cal.App.2d 348, 352 [“state legislation relating to slot machines or game devices specifically excepts pinball machines which are predominantly games of skill”].) As the court held in *Ex parte Williams* (1906) 7 Cal.Unrep. 301, 305: “The very language of the statute [Penal Code section 330] itself shows that the gambling which the Legislature was attempting to prohibit was that sort of gambling usually carried on at a fixed place of business, where those seeking to play at games of chance could come, and where money is the thing usually wagered.” Thus, because DFS contests are not “games of chance,” they are not encompassed within either article IV, section 19(e), or Penal Code sections 330, 330a, or 330b.

Similarly, DFS contests are neither one of the games specifically identified and prohibited in Penal Code section 330 (i.e., faro, monte, roulette, etc.), nor are they a “banking or percentage

⁹In *HERE*, the Court held that the phrase “casinos of the type *currently* operating in Nevada and New Jersey” should be interpreted to mean “operating in 1984.” (21 Cal.4th at p. 604.)

game *played with cards, dice, or any device.*”¹⁰ DFS contests are obviously not played with cards or dice. Nor are they played with any “device.”

Although Penal Code section 330 itself contains no definition of the term “device,” surrounding provisions of the Penal Code addressing the same subject matter define the comparable term “gambling device” to mean any instrument or machine that is intended for the purpose of gambling and “affects the result of the wager by determining win or loss,” such as with cards, dice, a roulette wheel, or a slot machine. (See Penal Code, § 337t, subd. (f) [“‘Gambling game device’ means any equipment or mechanical, electromechanical, or electronic contrivance, component or machine used remotely or directly in connection with gaming or any game which affects the result of a wager by determining win or loss. The term includes ... [a] slot machine.”].) In light of the context in which it is used and the associated words appearing directly alongside it (i.e., “cards” and “dice”), the term “device” as used in Penal Code section 330 must necessarily be referring to a “gambling device” that itself “determin[es] win or loss,” such as in the case of a slot machine. This is the definition that has generally been accepted in the case law. (See, e.g., *Ex Parte Williams* (1932) 127 Cal.App. 424, 427 [“A ‘device or apparatus for gambling’ is a device or apparatus designed for carrying on the actual gambling—for determining whether the player is to win or lose, like the wheel of fortune in its manifold modifications, and contrivances of that sort.”] [citation omitted]; *Walker v. Meehan* (1987) 194 Cal.App.3d 1290, 1298 [“the parimutuel machine itself was not a ‘device’ used in the conduct of a banking or percentage game because the machine itself did not determine the outcome of the wager”].)

The term “device” in Penal Code section 330 therefore logically excludes software that is merely used to communicate and process daily fantasy sports picks, such as PrizePicks’ online platform, but which does not itself mechanically or electronically determine who should win or lose. One could communicate or record a pick in person without using any “device” or “thing” other than a paper and pencil; that a pick may instead be communicated over a smartphone or through a computer website does not transform such items into “gambling devices,” as they obviously play no role in determining or affecting the outcome of the contest. (Cf. *Plotnick v. Pennsylvania Pub. Util. Comm’n* (Pa. Super. Ct. 1941) 18 A.2d 542, 552 [“a telephone or telegraph appliance used to receive and furnish information, even in connection with a pool-selling or book-making establishment,” does not constitute a “gambling machine or device”].) Accordingly, several courts have explicitly rejected the argument that games or contests played via online platforms or software can be deemed to be “slot machines or devices” within the meaning of the

¹⁰ It should go without saying that DFS contests are not “casinos” of the type operating in Nevada and New Jersey in 1984 in violation of article IV, section 19(e). “[A] casino of ‘the type ... operating in Nevada and New Jersey’ may be understood, with reasonable specificity, as one or more buildings, rooms, or facilities, whether separate or connected, that offer gambling activities including those statutorily prohibited in California, especially banked table games and slot machines.” (*HERE*, 21 Cal.4th at p. 605.) DFS contests do not take place within the four walls of a “casino,” or within any other building. In any event, section 19(e) is not self-executing. (Cf. *California Gasoline Retailers*, 50 Cal.2d at p. 848 [parallel provision of section 19 declaring that “[t]he Legislature has no power to authorize, and shall prohibit the sale of lottery tickets” is not self-executing, but requires the enactment of implementing legislation].)

California Penal Code. (See, e.g., *Mason v. Machine Zone, Inc.* (D. Md. 2015) 140 F.Supp.3d 457, 462-463 [casino function within mobile video game is not a “slot machine or device” within the meaning of Penal Code section 330b, noting that “the most natural reading of the phrase . . . calls to mind a piece of equipment, just as the phrase ‘slot machine’ calls to mind a physical terminal with movable parts and flashing lights”]; *Mai v. Supercell Oy* (N.D. Cal. 2021) 2021 WL 4267487, *4-5 [online game software downloaded onto a mobile phone, tablet, or computer is not a “machine, apparatus, or device” under Penal Code § 330b].)

In sum, no amount of Procrustean interpretation can fit PrizePicks’ DFS contests within the category of “gambling” prohibited by either article IV, section 19(e), or Penal Code sections 330, 330a, and 330b.

C. PrizePicks’ DFS Contests Do Not Involve Prohibited “Bets” or “Wagers”

The third and final type of prohibited gambling under California law is “betting.” Here, too, PrizePicks’ DFS contests are not among the activities proscribed by or intended to be prohibited by the applicable statute, Penal Code section 337a. As its title suggests, the intended focus of section 337a, which was enacted in 1909 and has essentially been unchanged since then, was to prohibit bookmaking — in particular, bookmaking on horse races. (See, e.g., *People v. Jerman* (1946) 29 Cal.2d 189, 195 [“By subdivisions 2 and 4 of this statute, the Legislature has defined as a crime either the occupying of a room with paraphernalia for the purpose of recording or registering a bet upon a horse race, or of recording or registering such a bet.”]). To that end, the statute provides in pertinent part:

“(a) Except as provided in Section 336.9, every person who engages in one of the following offenses, shall be punished for a first offense by imprisonment in a county jail for a period of not more than one year or in the state prison, or by a fine not to exceed five thousand dollars (\$5,000), or by both imprisonment and fine:

(1) Pool selling or bookmaking, with or without writing, at any time or place.

...

(4) Whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of person or animal, or between persons, animals, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever.

...

(6) Lays, makes, offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, of any trial, or purported trial,

or contest, or purported contest, of skill, speed or power of endurance of person or animal, or between persons, animals, or mechanical apparatus.”

For several reasons, Penal Code section 337a does not prohibit PrizePicks’ DFS contests. First and foremost, as discussed in greater detail above (see Part II, *supra*), for any activity to constitute unlawful “gambling” in California, the outcome must be determined by hazard or chance, not predominantly by skill. (See, e.g., *Knowles v. O’Connor* (1968) 266 Cal.App.2d 31, 33 [“Games of skill do not fall within the prohibition of the state gaming laws.”].) Thus, as with the other two types of “gambling” activities, it is not *all* bets or wagers that are illegal under California law, but only those whose outcomes are not predominantly determined by skill. (See, e.g., *Western Telcon*, 13 Cal.4th at p. 485 [“the case hinges on the distinction between a prize, which is distributed to one or more of the contestants in a lottery, and a wager that is won or lost in bilateral betting *on a game of chance*”] [emphasis added].) Because the outcomes of DFS contests are predominantly determined by the contestants’ skill, they do not constitute *unlawful* “betting” or “gambling.” (See *Dew-Becker v. Wu*, 178 N.E.3d at p. 1041 [“Because the outcomes of head-to-head DFS contests are predominately skill based, we conclude that plaintiff was not engaged in “gambling” with defendant”].)¹¹

Second, and equally important, PrizePicks’ DFS contests do not fall within the literal terms of Penal Code section 337f. As set forth immediately above, section 337f’s various subdivisions only prohibit bets or wagers “*upon the result . . . of any contest . . . of skill, speed or power of endurance of person or animal, or between persons, animals, or mechanical apparatus.*” This language certainly prohibits direct betting on “the result” of any NFL or MLB game or other sporting contest. (See 80 Ops. Cal. Atty. Gen. 98, *1 (1997) [“It is evident that section 337a prohibits the placing of bets by anyone in California on any of the enumerated contests or events.”].) But as detailed above, that is *not* what DFS contests involve. Contestants do not place bets on the results of any football or baseball games, or of any other contests between persons or animals. Rather, they compete for prizes that are awarded based upon their own skill in choosing a roster of individual athletes from different teams (and even different sports), and then predicting how those athletes will perform across multiple events against selected statistical targets generated largely by a computer algorithm. PrizePicks’ DFS contests simply do not fall within the category of unlawful activities prohibited by the plain language of section 337a.

Indeed, PrizePicks’ DFS contests were carefully designed in order *not* to constitute illegal “bets” or “wagers” under federal or state laws. As mentioned above, in 2006, Congress enacted UIGEA (31 U.S.C. § 5361 et seq.) in order to curb unlawful internet gambling. UIGEA prohibits a person engaged in the business of “betting or wagering” from knowingly accepting monies in connection with the participation of another person in unlawful internet gambling. (*Id.*, § 5363.) UIGEA generally defines the term “bet or wager” to mean “staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to

¹¹ Cf. *Bell Gardens Bicycle Club*, 36 Cal.App.4th at pp. 743-744 (distinguishing between a “regular” poker game, which is legal because winning is based on a combination of chance and skill, and unlawful “jackpot” poker, in which the pot is distributed by chance and does not predominantly implicate a player’s skill).

chance.” (*Id.*, § 5362(1)(A).) But UIGEA expressly *excludes* from the definition of “bet or wager” participation in fantasy or simulation sports games or contests like those offered by PrizePicks and other DFS platforms.¹² Specifically, UIGEA provides that the term “bet or wager” does *not* include:

“participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in section 3701 of title 28) and that meets the following conditions:

(I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.

(II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.

(III) No winning outcome is based--

(aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or

(bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.” (*Id.*, § 5362(1)(E)(ix).)

UIGEA’s definition of “bet or wager” thus reflects Congress’s recognition of the clear difference between direct betting on real-life sporting events and participating in fantasy sports contests, including the chance vs. skill distinction that underlies that difference. UIGEA’s definition is also consistent with other federal laws’ definitions of “bet or wager,” which uniformly incorporate the element of chance. (See, e.g., *U.S. v. Bergland* (E.D. Wis. 1962) 209 F. Supp. 547, 548, *rev’d on other grounds*, 318 F.2d 159 (7th Cir. 1963) [“It is beyond question, and counsel for the United States so concedes, that an indispensable element of ‘betting,’ ‘wagering,’ or ‘gambling’ is the element of risk or chance. Every federal statute involving gambling offenses requires this element.”]; *U.S. v. Ross* (S.D.N.Y. 1999) 1999 WL 782749, *7 [same]; see also 18

¹² James Cole served as the Deputy Attorney General of the United States from January 2011 to January 2015 in the Obama administration with primary responsibility for enforcement of various federal criminal laws, including UIGEA and the Wire Act. Cole concluded that “PrizePicks is a game of skill, not a game of chance” and that “PrizePicks fall comfortably within UIGEA’s fantasy sports exception.” A copy of Cole’s analysis of PrizePicks’ full compliance with federal laws is available upon request.

U.S.C. §§ 1301-1308 [prohibiting various activities relating to the promotion of a “lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance”]; 15 U.S.C. §§ 1171-1177 [defining “gambling device” as machine that delivers money or property “as the result of the application of an element of chance”].)

Although federal law is not controlling on the meaning of “bet or wager” under Penal Code section 337f, “[i]t would be chaotic to attribute different meanings to words depending upon which legislative body uses them.” (*Knowles v. O’Connor* (1968) 266 Cal.App.2d 31, 34.) Moreover, section 337f was enacted in 1909, long before the advent of the internet and the development of fantasy sports; UIGEA, by contrast, is a recent statute that addresses the unique attributes and characteristics of fantasy sports contests, and explicitly distinguishes them from traditional “bets or wagers” on real-life sporting events. Courts in California should therefore be guided by and follow the federal interpretation of “bets or wagers” under modern-day UIGEA when construing the same terms in century-old section 337f. (See *Humphrey v. Viacom, Inc.*, 2007 WL 1797648, at *11 [dismissing challenge to pay-for-play online fantasy sports leagues under New Jersey’s anti-gambling statute based on conclusion that UIGEA confirmed that entry fees were not illegal “bets or wagers,” explaining: “This Court will not deviate from this analysis, nor should it extend the coverage of a 200–year old statute to an activity far removed from the traditional gaming it was never intended to cover.”].)

In addition, it must be remembered that section 337f is a penal statute, and it therefore must be interpreted strictly and narrowly. “[P]enal statutes must be construed to reach no further than their words; no person can be made subject to them by implication.” (*Ex Parte Twing* (1922) 188 Cal. 261, 265; accord, *People v. Forbes* (1996) 42 Cal.App.4th 599, 603-604 [“It is the policy of this state to construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit; just as in the case of a question of fact, the defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language used in the statute.”].) Furthermore, “[t]he words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted.” (*People v. Fowler* (1938) 32 Cal.App.Supp.2d 737, 746.) “It is a fundamental rule that a statute should be construed in the light of the history of the times and the conditions which prompted its enactment.” (*Kelly v. Kane* (1939) 34 Cal.App.2d 588, 591.) The application of all of these canons of statutory interpretation leads to the same conclusion here: The words of Penal Code section 337f must not be stretched and expanded to apply to skill-based daily *fantasy* sports contests that were not in existence at the time of its enactment, and the statute must instead be narrowly construed to prohibit only the bookmaking activities and off-track betting on *real-world* sporting events that it was intended to address.

There is a final reason why Penal Code section 337f does not prohibit DFS contests. As a number of courts have concluded, the payments contestants make in order to participate in fantasy contests are not “bets or wagers,” but are instead “entry fees” paid for the right to compete for the contests’ prizes. As the district court explained in *Humphrey*, 2007 WL 1797648, at *8: “Courts have distinguished between bona fide entry fees and bets or wagers, holding that entry fees do not constitute bets or wagers where they are paid unconditionally for the privilege of participating in a contest” The court noted that “it would be ‘patently absurd’ to hold that ‘the combination

of an entry fee and a prize equals gambling,’ because if that were the case, countless contests engaged in every day would be unlawful gambling, including ‘golf tournaments, bridge tournaments, local and state rodeos or fair contests, ... literary or essay competitions, ... livestock, poultry and produce exhibitions, track meets, spelling bees, beauty contests and the like,’ and contest participants and sponsors could all be subject to criminal liability.” (*Id.* at *7 [quoting *State v. American Holiday Ass’n* (Ariz. 1986) 727 P.2d 807, 809 (“*American Holiday*”); accord, *White v. Cuomo*, 38 N.Y.3d at p. 225 [“[W]e have long distinguished the ‘bets and wagers’ of gambling activities from lawful contests that award prizes to competitors—contests integral to the fabric of American social life, spanning the range from spelling bees to golf tournaments to televised game shows.”].)

An important distinction here is that when contestants participate in one of PrizePicks’ DFS contests, they are not “betting” on the outcome of any sporting event between *other* persons or animals, but are instead paying an entry fee to enter a competition whose outcome is determined *by their own skills* in how well they can choose a roster and predict how their fantasy team will perform against the selected single-statistic targets. When someone pays a fee to enter a trivia contest in which they can win certain prizes based on the number of questions they are able to correctly answer, that is not considered to be an unlawful “bet” between the contestant and the operator of the contest or offeror of the prizes. So too here, the entry fees that contestants pay to compete in DFS contests are not unlawful “bets or wagers.” Participants are told in advance what the prizes are for the number of correct selections each contestant makes, and PrizePicks pays out those prizes to every winning contestant based on *each contestant’s own performance* and without regard to the number of contestants or the amount of entry fees received. (Cf. *Faircloth v. Central Florida Fair, Inc.* (Fla. Ct. App. 1967) 202 So.2d 608, 609 [recognizing the distinction between “‘wagering’ on the results of ball games, races, prize fights and the like as opposed to ‘playing’ games of skill for prizes,” noting that if the latter were considered to be wagers, then “we would have to find all contests of skill or ability in which there is an entry fee and prizes to be gambling,” including dog shows, beauty contests, musical competitions, and essay contests].)

As noted above, PrizePicks has carefully structured its DFS contests to comply with the conditions established in UIGEA for exclusion from the definition of “bet or wager”: No contestant’s fantasy roster may consist solely of members of an actual sports team; all prizes are established and made known to the participants in advance of the contest, and their value is not determined by the number of participants or the amount of fees paid by those participants; all winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individual athletes in multiple real-world sporting events; and no winning outcome is based either on the score, point-spread, or the performances of any single real-world team or any combination of such teams, or solely on any single performance of an individual athlete in any single real-world sporting event. (See 31 U.S.C. § 5362(1)(E)(ix).) Significantly, when these conditions are satisfied, federal law treats the payments as “entry fees” rather than gambling “bets.” As former U.S. DAG James Coles concluded, PrizePicks’ contests “comfortably” satisfy these conditions.¹³

¹³ See fn. 12.

One of the common misstatements by other submissions is the failure to identify for the Attorney General’s Office the critical legal and factual distinctions between “bets” or “wagers” and “entry fees.” They are not the same legally or factually and courts, too, have routinely recognized those distinctions. As mentioned above, the U.S. District Court in *Humphrey* held “as a matter of law” that the entry fees paid for the fantasy sports leagues at issue in that case were not “bets” or “wagers.” (2007 WL 1797648, at *9.) The New York Court of Appeals reached the same conclusion in *White v. Cuomo*, based upon the “distinction between a permissible competition where a contestant pays an entry fee to a nonparticipant in order to compete for a prize that is fixed without regard to the sum of the entry fees, and gambling—where the stake is contributed by the participants alone, and the successful contestant is to have the fund thus created.” (38 N.Y.3d at pp. 225-226 [citation omitted].) The court noted that the element of “*gain and loss between the parties by betting*” is “notably lacking when entrance fees are fixed, and predetermined prizes are awarded by a neutral party whose monetary stake is limited to the payment of the prize.” (*Id.* at p. 226 [emphasis in original].)

The opinions in both *Humphrey* and *White v. Cuomo* cited the Arizona Supreme Court’s decision in *American Holiday*, which held that the fees contestants paid to enter word puzzle contests for a chance at winning various prizes were not unlawful “bet[s] on the result of any game of skill or chance” under Arizona law. (727 P.2d at p. 808.) Under the rules of that contest, as with PrizePicks’ DFS contests, “[c]ontest prizes are not contingent on the number of players entering each game,” and “American assumes the risk that it will lose money if entrance fees are insufficient to cover prize costs.” (*Ibid.*) Echoing the Florida court’s conclusion in *Faircloth* that the statutory prohibition against “betting” on games of skill was not intended to proscribe paying a fee to *play* a game of skill, the Arizona Supreme Court cautioned that “an entrance fee does not suddenly become a bet if a prize is awarded.” (*Id.* at p. 809.) In the court’s view, the significant factors distinguishing the “entry fee” here from a “wager” included that (1) “[t]he prize offered is paid only to participants and the participants themselves determine the outcome”; (2) “such contests do not involve bets between participants in a contest”; and (3) “the amount of the prizes to be awarded is known from the start and does not depend on the bookies’ ‘odds’ or the number or amount of entry fees actually received.” (*Ibid.*)¹⁴

The factors relied upon in the above cases are the same essential features that make the fees that contestants pay in order to play in PrizePicks’ DFS contests and gain access to the platform’s services bona fide “entry fees” and not “bets or wagers”: The entry fees are fixed, and once paid, unconditionally become the property of PrizePicks rather than being held as a “stake” for a wager; the prizes are predetermined, are communicated to contestants before the contest begins, and never change throughout the course of the contest; the prizes are awarded based upon

¹⁴ Other judicial decisions distinguishing between entry fees and wagers on a similar basis, and cited in *American Holiday*, include *People v. Fallon* (1897) 152 N.Y. 12, 46 N.E. 296 [entrance fees paid by horse owners to racing association to compete for prizes of a predetermined sum, unrelated to the amount of entry fees received, were not illegal wagers]; and *Las Vegas Hacienda, Inc. v. Gibson* (1961) 77 Nev. 25, 359 P.2d 85 [golf course owner’s offer to pay \$5,000 to anyone shooting a hole-in-one in exchange for 50-cent fee was not an illegal wager where the prize was not specifically made up of the entrance fees].

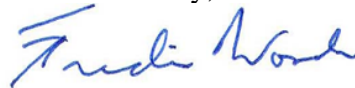
Re: Opinion Request No. 23-1001
February 14, 2024
Page 19

the contestants' own skill in choosing the members of their fantasy "team" and predicting their team's collective performance against selected single-statistic benchmarks; PrizePicks' monetary stake is limited to paying the predetermined prizes; and the amount of the prizes awarded is not dependent upon either the number of contestants or the amount of entry fees they pay. As the court concluded in *American Holiday*, rejecting the argument that a contest with these attributes constituted illegal gambling: "Paying an entrance fee in order to participate in a game of skill, or mixed skill and chance, in the hope of winning prize money guaranteed by some sponsor to successful participants, is a traditional part of American social life." (727 P.2d at 812.)

IV. Conclusion

For all of the reasons discussed above, California law does not prohibit the offering and operation of daily fantasy sports betting platforms with players physically located within the State of California, regardless of whether the operators and associated technology are located within or outside of the State. We thank you for your consideration of our views on this question, and we invite you to contact us if you have any questions or wish to discuss any aspect of this issue further.

Sincerely,



Fredric D. Woocher

EXHIBIT A

DATE: August 4, 2023

EXPERT OPINION BY ZVI GILULA
REGARDING PrizePicks GAMES

I was retained by SIDLEY AUSTIN LLP, via TopFund International, on behalf of SidePrize LLC d/b/a PrizePicks (“the company”), to provide an expert opinion examining 7 competitive fantasy sports games (“the games”) offered to the public by the company via its software. I was asked to answer the following questions:

1. Does chance or a player’s skill determine the likelihood of long-term success in the game?
2. Is chance immaterial to such likelihood?

Based on the detailed analyses reported below, my answer to both underlying questions is:

Chance is IMMATERIAL to the likelihood of long-term competitive success in winning the game for typical competitive users. Instead, skill predominantly determines the likelihood of success in the game.

I. PRELIMINARY CONSIDERATIONS

A detailed description of the games, as provided by the company, is added as a separate document together with this report.

It is apparent that skill, and not mere guessing, is involved in the games. The underlying skills relate to the ability to understand, process and analyze information about the performance of performers in real-world competitions. Such analysis must include the skill of comparing and ranking players, and the use recent past performance as a possible supportive variable.

However, the clear existence of skill does not necessarily mean that chance is not involved in the likelihood of winning a game, and that chance is immaterial. Thus, it is necessary to measure the role of skill vs. chance in the game.

To quantitatively measure the dominance of skill vs. chance among typical competitive users of the game, we must first define what “typical competitive game users” are. These are human users that play a sufficiently large number of competitive matches to allow their performance to be expressed and measured reliably. These users are defined as **the target set** and their performance serves as the benchmark for both measuring and analyzing the role of skill vs. chance and its dominance. As noted below, the target set size must be sufficiently large to allow admissible statistical analysis. Statistical inferential approach is used because the data (described below) constitute SAMPLES from the entire body of users, and inference is needed on whether sample findings can be extended to the entire population of the users of the company’s games above a reasonable doubt.

Once we have defined our set of typical users, we can prove the predominance of skill over chance, if we find that:

- (1) Within this set of “typical users,” there exists a non-negligible subset of individuals that exhibit an outstanding number of **repeated wins** (“high performers”); and
- (2) These high performers perform so much better than the average “typical player” that their exceptional win rate is very unlikely to be attributed to chance.

II. DATA DESCRIPTION

The data I have received from the company was in a form of seven files related to the respective following seven games. Each file contains information about games played by **unique** users:

Power 2 (P2) with 1,316,054 users

Power 3 (P3) with 1,223,036 users

Power 4 (P4) with 1,211,062 users

Flex 3 (F3) with 1,057,267 users

Flex 4 (F4) with 845,640 users

Flex 5 (F5) with 1,196,652 users

Flex 6 (F6) with 1,043,636 users

While within each file all users are unique, it is possible that a user will be reported in more than one of the seven files.

All seven files comprise data on games played during the period January 1st, 2019 through Mid-June 2023. It only includes players who are at least 4 months old in the company's platform.

The information on users' games in all files was:

Total_games – Number of games played that resulted in “win” or “loss.”

Total_wins – Number of games won.

Total_losses – Number of games lost.

Time in the system (in months).

Win ratio (WR = the number of games won per number of games played) was computed by me for all platforms, and was added to the 7 data files.

As seen in the Appendix (Figures 1A to 7A) the distributions of games played for the 7 platforms are very concentrated on the lower end of the scale. This fact poses a methodological challenge for finding and defining typical users playing **enough games** to allow for possible skill to be salient as many users played very few games

In order to be able to study the role of skill vs. chance in the game, and to be able to define the corresponding set of typical users, I decided to trim the 7 sets of data both from below and from above. After careful examination, I used the following conservative criteria to define satisfactory sets of typical users. These are users of all platforms playing at least 20 games and no more than the upper 97.5th percentile of games played in **their original respective sets** (read the maximum number of games played in each platform in Tables 1-7 below in the row named “max”).

Such trimming criteria indeed involve some arbitrariness, but they were obtained after many systematic empirical trials and are typical of what I have successfully used in the past to assess skill versus chance for similar game types. As is reported ahead, such a sets of typical users are

enough to produce significant evidence for the dominance of skill over chance in winning in the game while still representing well the typical users of the game. The trimmed data files accompany this report separately.

The corresponding descriptive statistics of all 7 platform sets of typical users are reported in Tables 1-7

Table 1: flex3

	Games Played	Wins	Losses	WR
min	20	0	2	0
Q ₁	24	12	12	0.4444
median	32	16	16	0.5
Q ₃	48	25	24	0.5610
max	185	114	119	0.9130
Mean	42.07	21.21	20.86	0.5026
sd	28.028	14.712	14.174	0.091
se	0.13556	0.07116	0.06855	0.00044
obs	42747	42747	42747	42747

Table 2: flex4

	Games Played	Wins	Losses	WR
min	20	0	3	0
Q ₁	25	9	16	0.3043
median	35	13	23	0.3571
Q ₃	58	21	37	0.4103
max	237	121	173	0.8696
Mean	49.6	17.86	31.74	0.3585
sd	37.556	14.211	24.153	0.085
se	0.12682	0.04799	0.08156	0.00029
obs	87695	87695	87695	87695

Table 3: flex5

	Games Played	Wins	Losses	WR
min	20	0	0	0
Q ₁	28	6	22	0.1875
median	44	10	34	0.2293
Q ₃	88	21	68	0.2727
max	639	273	534	1
Mean	81.1	19.11	62	0.2306
sd	95.863	23.900	72.698	0.069
se	0.19061	0.04752	0.14455	0.00014
obs	252929	252929	252929	252929

Table 4: flex6

	Games Played	Wins	Losses	WR
min	20	0	3	0
Q ₁	31	4	27	0.1066
median	55	8	48	0.1379
Q ₃	117	17	101	0.1700
max	589	233	536	0.8500
Mean	96.42	13.72	82.7	0.1399
sd	102.005	15.386	87.362	0.054
se	0.16902	0.02549	0.14476	0.00009
obs	364229	364229	364229	364229

Table 5: power2

	Games Played	Wins	Losses	WR
min	20	0	4	0
Q ₁	30	9	21	0.2578
median	52	16	36	0.3000
Q ₃	108	33	75	0.3411
max	708	295	541	0.8261
Mean	94.46	28.75	65.71	0.2998
sd	109.109	34.286	75.480	0.070
se	0.17818	0.05599	0.12326	0.00011
obs	374974	374974	374974	374974

Table 6: power3

	Games Played	Wins	Losses	WR
min	20	0	2	0
Q ₁	26	4	22	0.1212
median	37	6	31	0.1594
Q ₃	61	10	51	0.2000
max	246	67	220	0.9091
Mean	51.54	8.436	43.1	0.1621
sd	39.335	7.223	32.839	0.063
se	0.08291	0.01523	0.06922	0.00013
obs	225062	225062	225062	225062

Table 7: power4

	Games Played	Wins	Losses	WR
min	20	0	9	0
Q ₁	27	2	25	0.05319
median	42	4	39	0.08219
Q ₃	80	7	37	0.10870
max	408	83	393	0.55000
Mean	67.91	5.813	62.1	0.08444
sd	65.178	6.236	59.539	0.045
se	0.13600	0.013013	0.12424	0.00009
obs	229670	229670	229670	229670

The term “obs” indicates the number of unique users in each subset. Q_1 and Q_3 are the lower and the upper quartile, respectively. The term “sd” is the **estimated standard deviation** of the underlying variable. The term “se” is the **estimated standard error** of the mean of the corresponding variable. As observed, “se” is much lower than the mean (as is the case in Tables 1-7). It indicates that the mean of the corresponding variable in the population is quite accurately estimated from the underlying sample.

Figures 1-7 describe graphically the corresponding distributions of games played in all platforms of typical users.

Figure 1:

Histogram of games played - flex3

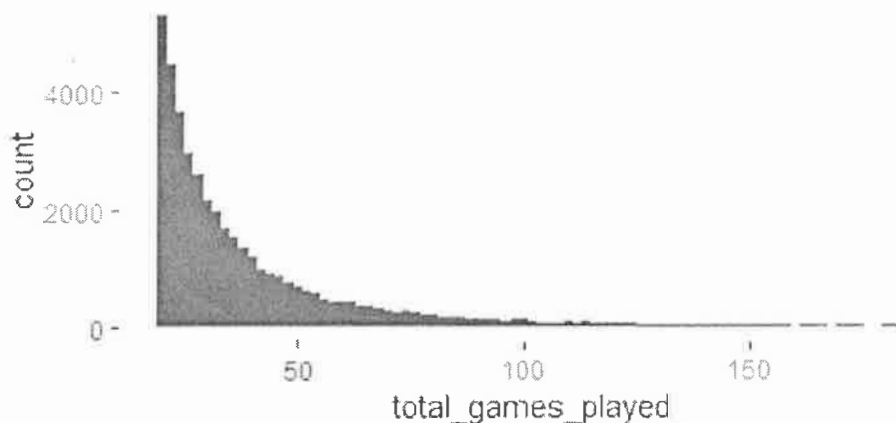


Figure 2:

Histogram of games played - flex4

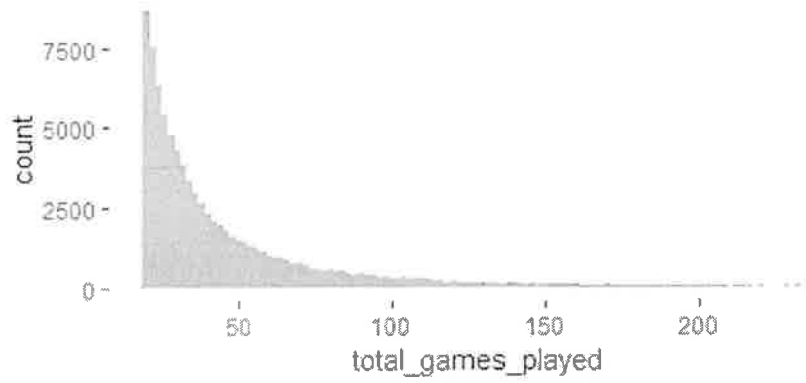


Figure 3:

Histogram of games played - flex5

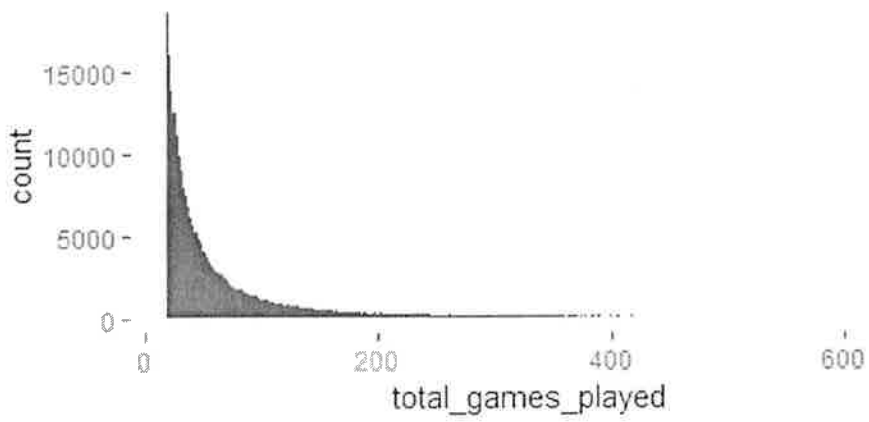


Figure 4:

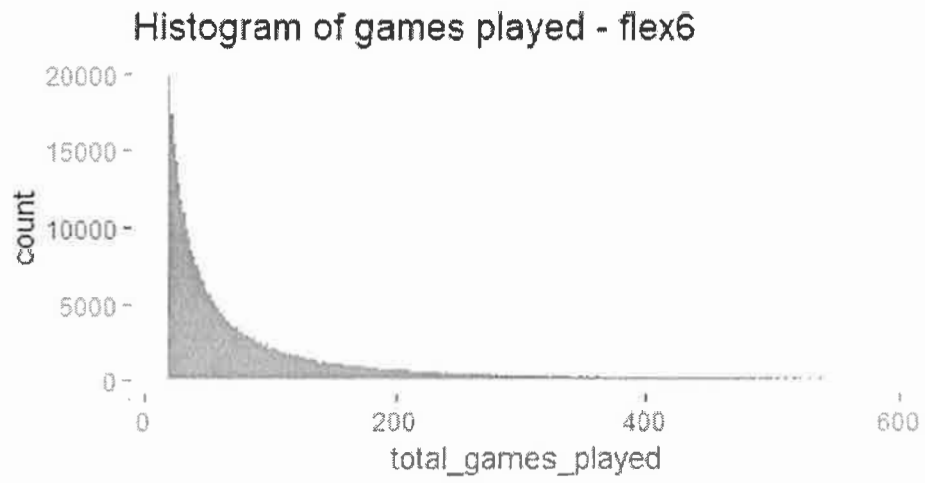


Figure 5:

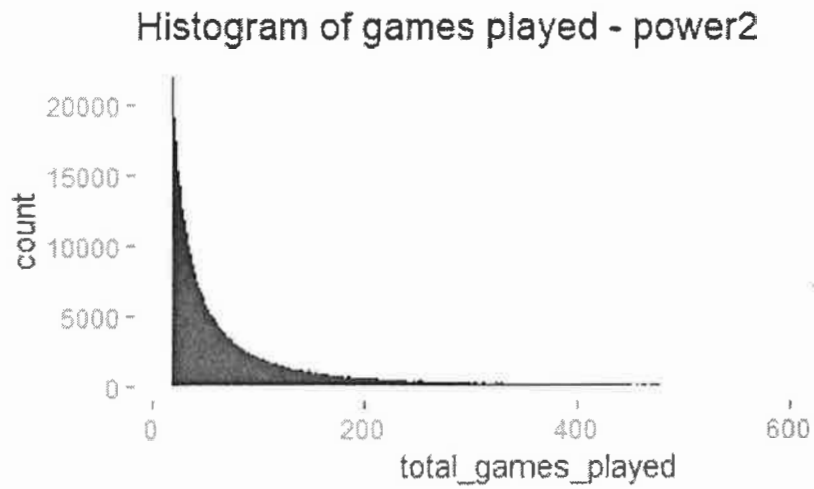


Figure 6:

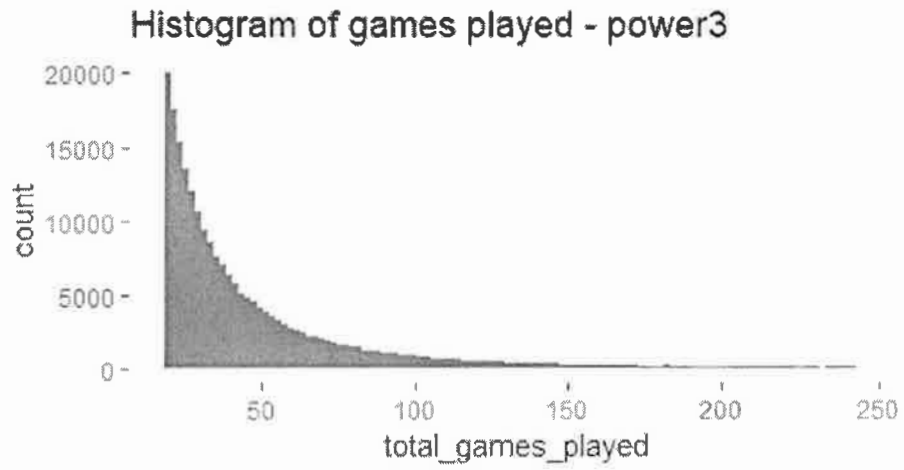
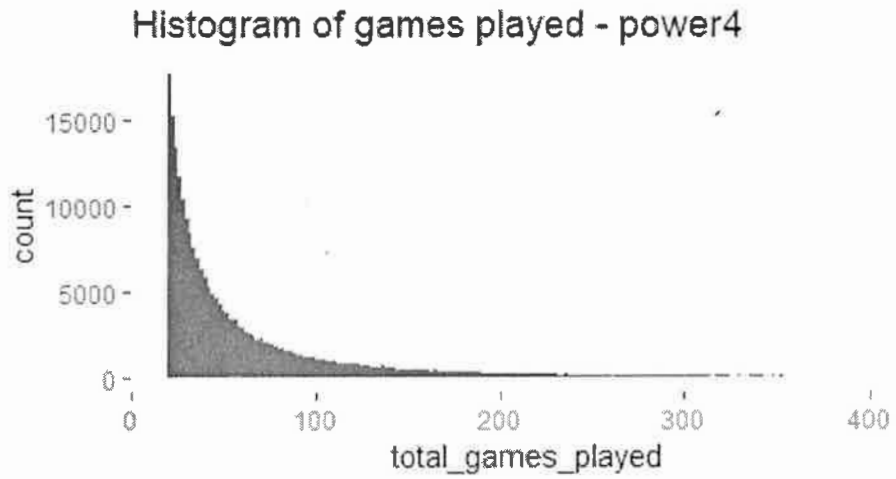


Figure 7:



Figures 8- to 14 exhibits the distributions of **Win Ratio (WR)** in all the seven sets of typical users,

Figure 8:

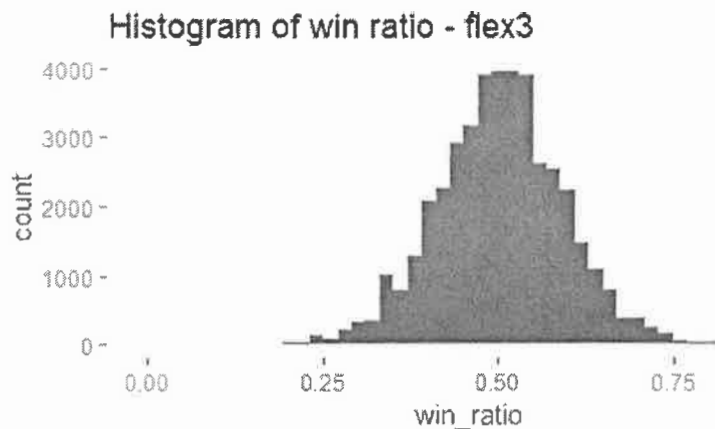


Figure 9:

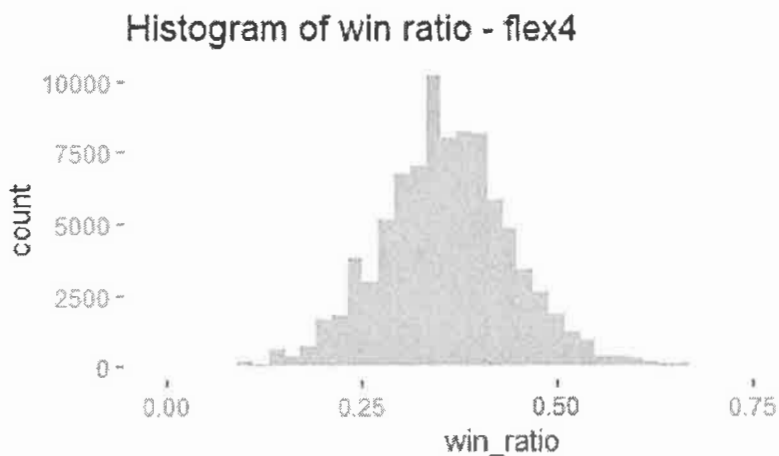


Figure 10 :

Histogram of win ratio - flex5

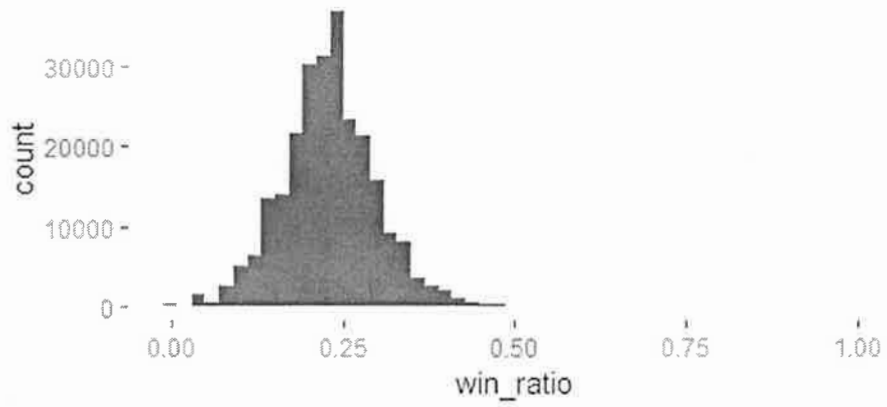


Figure 11:

Histogram of win ratio - flex6

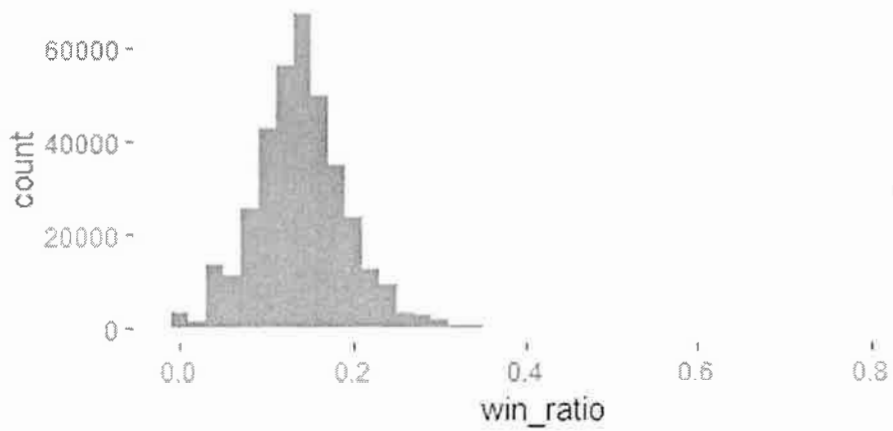


Figure 12:

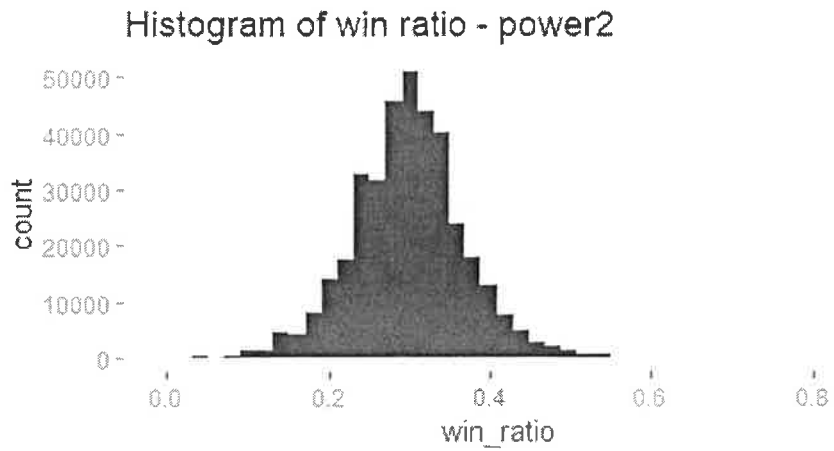


Figure 13:

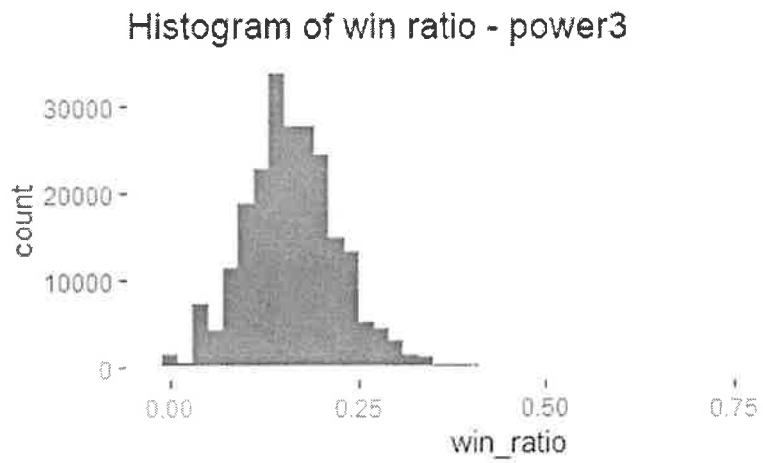
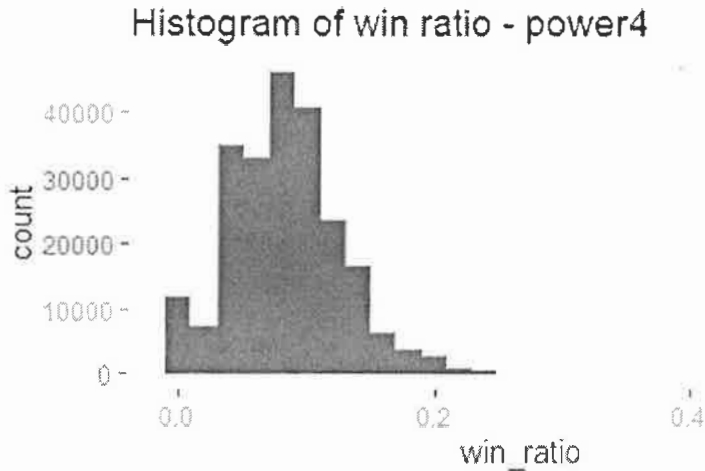


Figure 14:



As can be seen from the above tables and the corresponding figures and by the findings of the analyses described below, the number of typical users is large enough to allow for a powerful statistical inference. The distributions of games played by typical users are now much less concentrated on the lower end. Also, the shape of the distributions of WR in all subsets is now much closer to be bell-shaped compared to the data before trimming. This finding is a helpful for the method reported below on the analysis of skill vs. chance.

III. ANALYTICS: SKILL VS. CHANCE

To be able to compare and determine the predominance of skill vs. chance, we first need to define “high performers.” These are users that show exceptionally high performance compared to typical users in their respective set. The basic measure of performance is the “win ratio” (WR) – the proportion of games won out of games played.

Our goal is to look for the existence of a non-negligible amount users with an exceptionally high WR, and assess the probability of exceeding such WR performance *at random*.

As before, we adopt a quite conservative approach to said probability. After careful examination of the data, I propose to set it at 10^{-6} . Hence, a “high performer” is a player that the probability of exceeding his/her observed performance (WR) *at random* is **1 in 1,000,000 or lower** compared to his/her underlying subset. Such probability is professionally called “**tail probability.**”

While 10^{-6} is an arbitrary upper bound, it is a conservative approach to probability, and is in my experience and opinion sufficient to identify whether chance plays an immaterial role in the outcome of the game.

The results of the analysis reported next indeed testify that the criteria could be safely used in assessing the immateriality of chance in the games.

A. Computing How Exceptional is the Performance of the High Performers

In this section, we compute and compare the tail probability of each user's performance to the typical users in their respective subsets.

Our entire method of computation is proprietary and cannot, therefore, be disclosed for business considerations, save for an explicit order of a relevant court. However, a description is provided henceforth.

To do so, denote the i^{th} user within each subset by the index " i ." Let N_i denote that user's number of games played, and let p_i denote that user's WR. Let P denote the **posterior mean WR** in the subset the underlying typical player belongs to. Relevant considerations of randomness may suggest that $Y(N_i)$ – the number of games won by a random player " i " out of N_i games played by him/her in the respective subsets – is a random variable with a suitable distribution from the exponential family that depends on N_i and on the posterior mean P . Such a family of distributions is well-known and widely used in statistical inference. Among other advantages, such a family allows for the straightforward use of Bayesian estimation with relevant priors (such as Dirichlet's).

The tail probability, Q_i , of exceeding user i 's performance at random is algebraically defined as

$$Q_i = P\{Y(N_i) > N_i \cdot p_i\}.$$

In Table 8, the important statistical findings are reported on the performance of exceptionally successful users followed by an explanation.

Table 8: Results on the performance of exceptional users

	Flex3	Flex4	Flex5	Flex6	Power2	Power3	Power4
Size	42747	87695	252929	364229	374974	225062	229670
P	0.5026	0.3585	0.2306	0.1399	0.2998	0.1621	0.0844
Pmax	1 in a million	1 in a million	1 in a million	1 in a million	1 in a million	1 in a million	1 in a million
EP	3	10	225	265	253	27	48
Exp	0.042747	0.087695	0.252929	0.364229	0.374974	0.225062	0.22967
Odds	70	114	890	728	675	120	209

- Size: Number of typical users in the subset.
- P: Posterior Mean WR of typical users in the subset.
- P_{max}: A proposed threshold of **the largest** tail probability for a performance to be considered EXCEPTIONAL. In other words, users with at most this exceptionally low tail probability are defined as **Exceptional Performers**.
- EP: How many exceptional performers are actually found in the subset given P_{max}.
- Perc: The percentage of exceptional performers out of the typical users.
- Exp: How many exceptional performers are **expected to be found if chance would be material** in the likelihood of winning.
- Odds: The ratio between EP and Exp (EP/Exp).

B. Detailed Explanation of the Findings in Table 8

The sizes of the target subsets of typical users and the number of games played allow for consideration of a low threshold tail probability P_{\max} (10^{-6}). The meaning of an extremely low threshold is that there is an extremely low likelihood for a user to be considered an exceptional performer **due to chance**.

The immateriality of chance can be quantitatively expressed as “odds” as is explained next.

Consider, for instance, column 1 of Table 8. For the flex3 subset, we find (EP=) 3 users that fit the definition of exceptionally high performers.

To appreciate the real magnitude of 3 exceptional users in the realm of chance, we have to compare it to the **expected number of exceptional users in the corresponding set if chance would dominate the likelihood of winning** as indicated in row 5 (Exp). This number, 0.0427, suggests that the expected number of exceptional users if chance were material in the likelihood of winning is much less than one whole user. So, for Flex 3 we observe 3 exceptional users in the subset while we expect only about 0.0427 of exceptional users under material chance.

The odds of $70 = 3/0.0427$ mean that the number of exceptional skillful users **actually found (3)** is 70 times **rarer than the number of such users that would be implied by chance**. This is a very strong probabilistic evidence to the immateriality of chance, and to the strong dominance (salience) of skill over chance, in flex3. Analogous conclusions apply to all other subsets, i.e., flex4, flex5, flex6, power2, power3 and power4.

In my past experience as an expert witness in court on probabilistic evidence, odds of 27 were enough to decide the case and conclude that chance is immaterial.

In summary, for all subsets of typical users, it is demonstrated that the reported exceptional performance of so many repeated wins is strongly unlikely to be attributed to chance. We see strong evidence to an inherent character of the games. All seven games covered by this report are games where skill can be exercised in a manner that leaves almost no detectible room for chance. This is the same kind of inherent character I have found in many Sport Fantasy games, such as DraftKings, Skillz, to name a few, as well as in many simple internet games and top skill games such as Chess, Bridge, Backgammon etc.

IV. CONCLUSION:

Given that high performers exist in the game with a frequency and pattern of winning that exceeds what would be predicted by a chance-based game model, I safely and strongly conclude that the element of chance is IMMATERIAL, and skill predominates, in determining the winner of games between typical users as defined in this document.



TOP FANA
INTERNATIONAL

August 4, 2023

Zvi Gilula

Date

Appendix

Figure 1A:

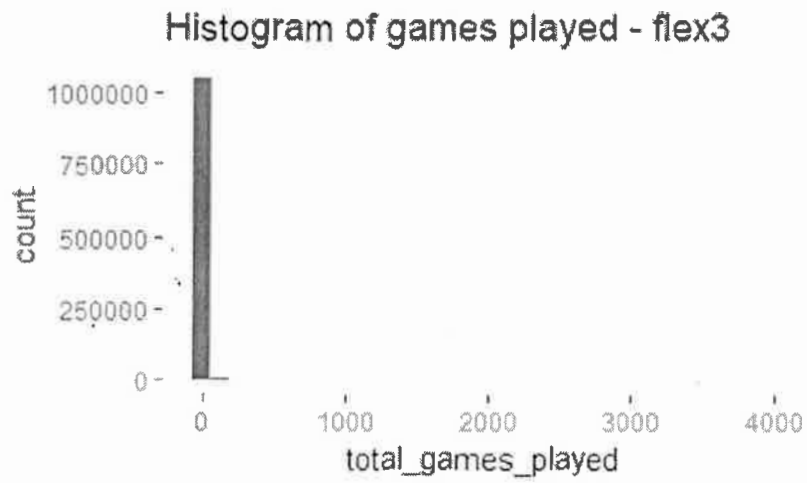


Figure 2A:

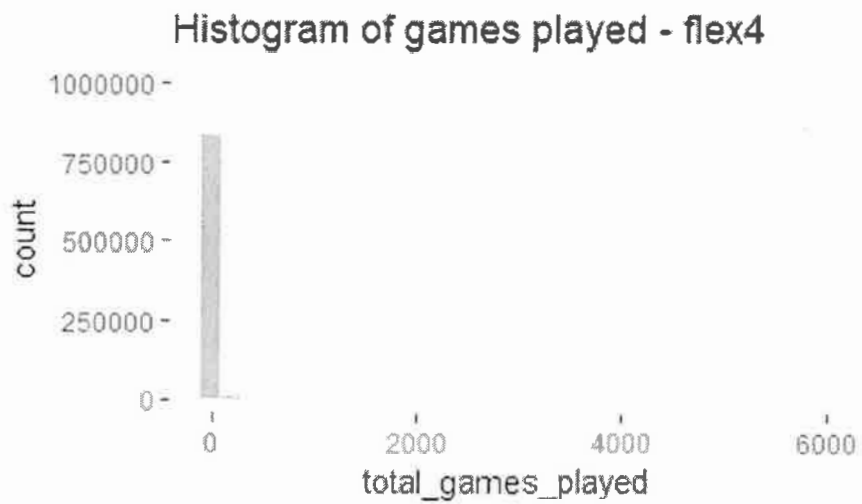


Figure 3A:

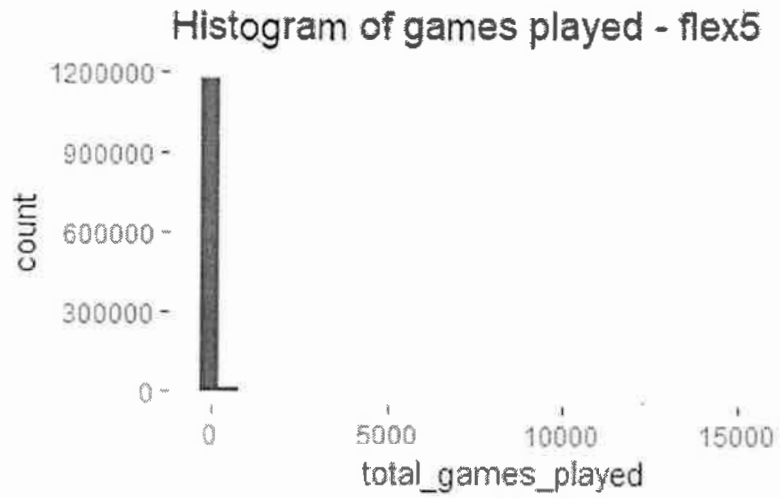


Figure 4A:

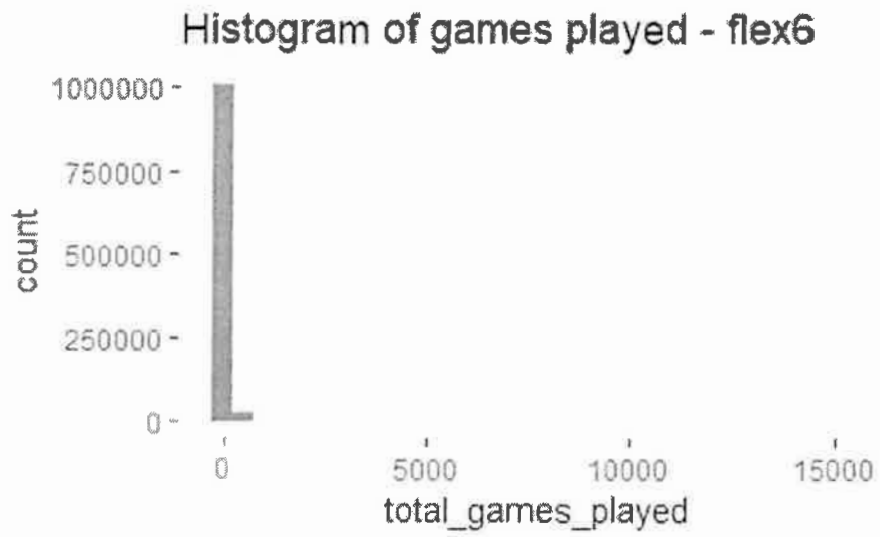


Figure 5A:

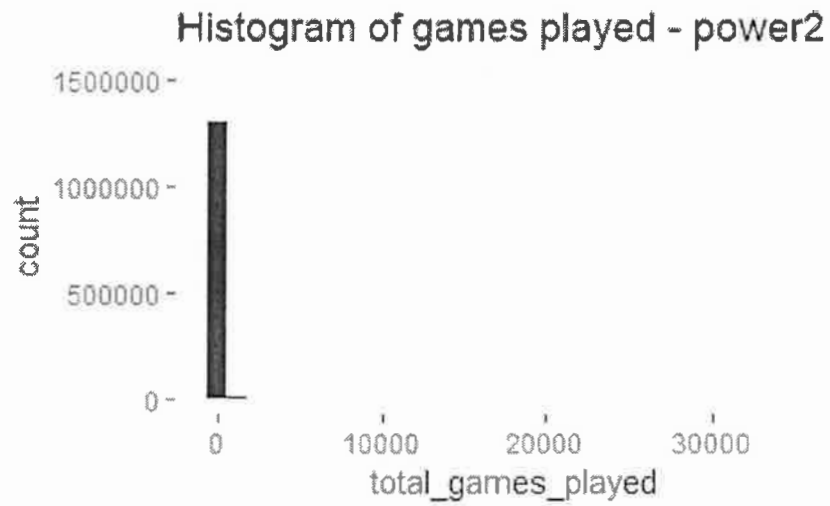


Figure 6A:

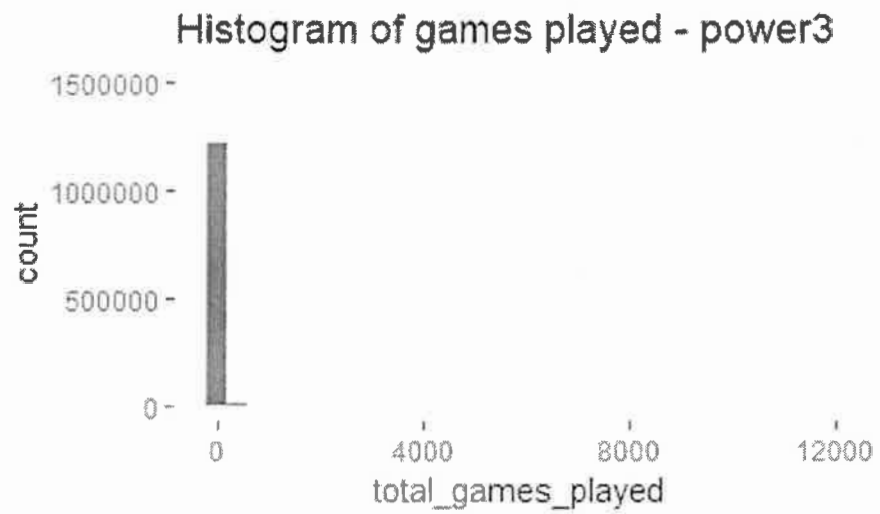


Figure 7A:

Histogram of games played - power4

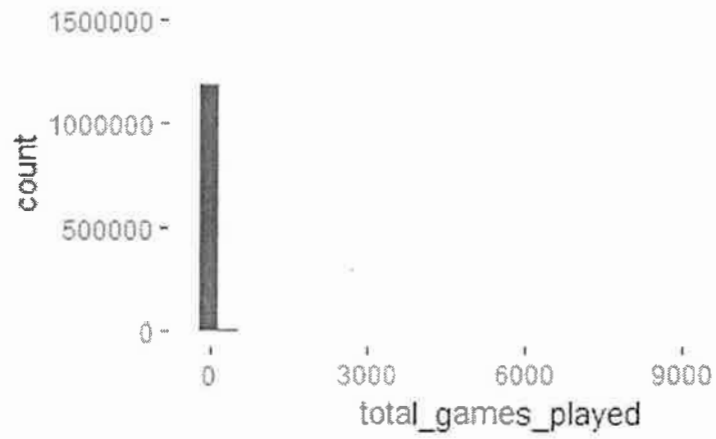


Figure 8A:

Total games played vs lifetime months - flex3
Correlation = 0.135

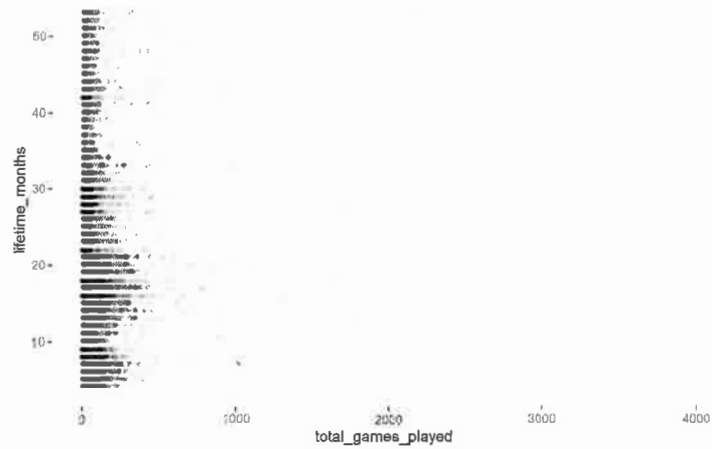


Figure 9A:

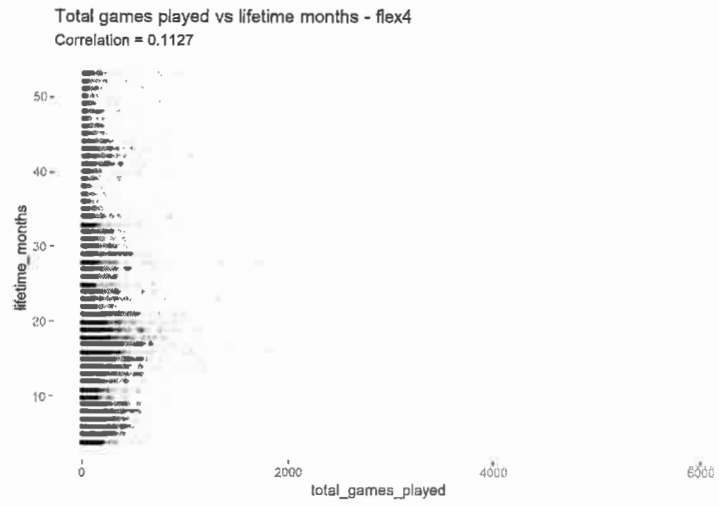


Figure 10A:

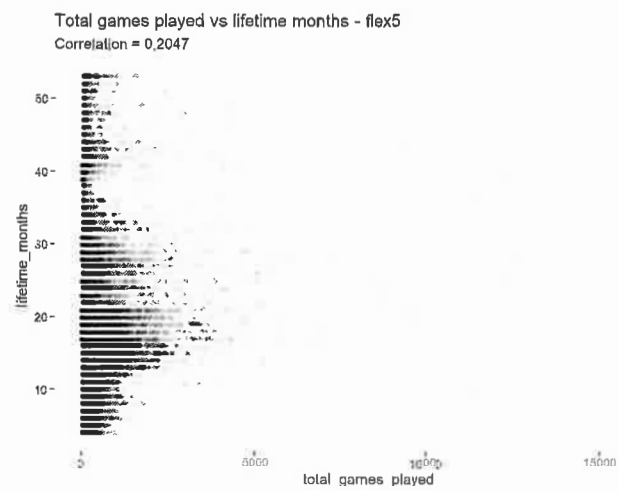


Figure 11A:

Total games played vs lifetime months - flex6
Correlation = 0,1233

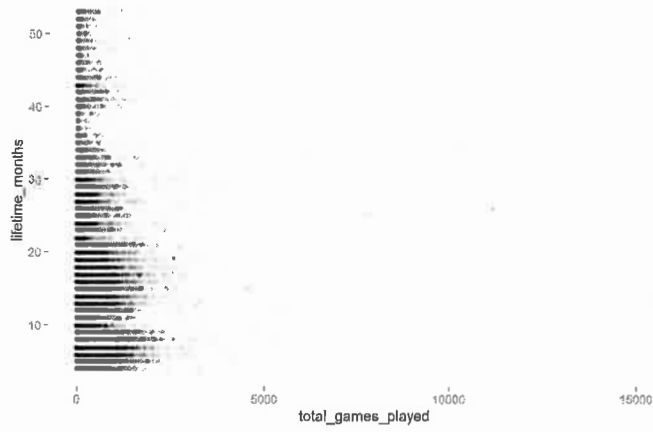


Figure 12A:

Total games played vs lifetime months - power2
Correlation = 0,1041

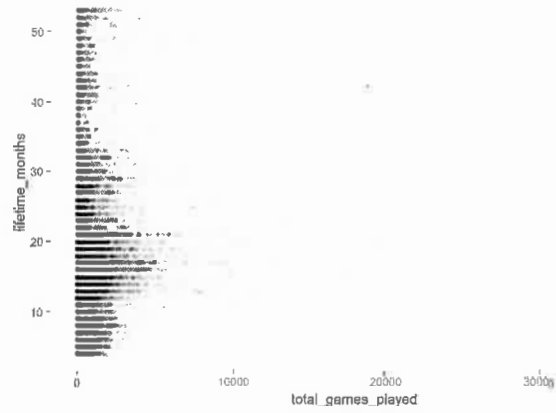


Figure 13A:

Total games played vs lifetime months - power3
Correlation = 0.1475

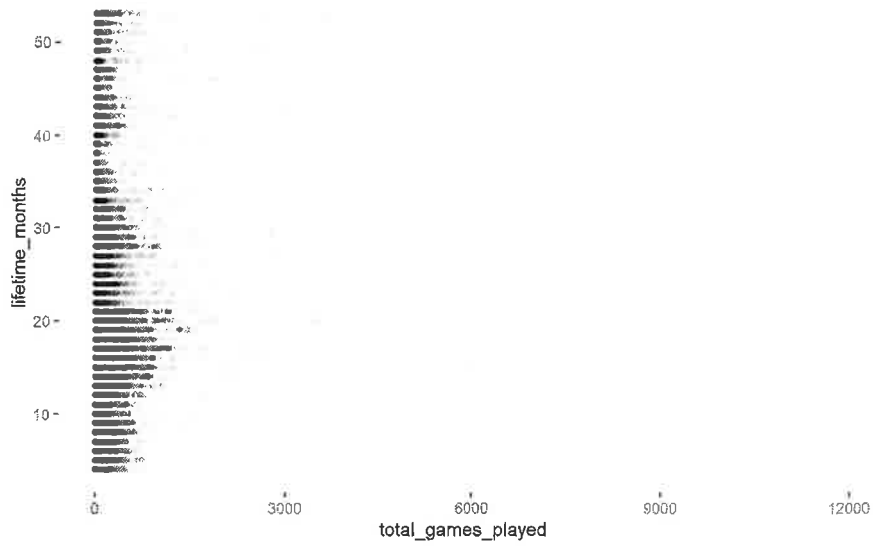
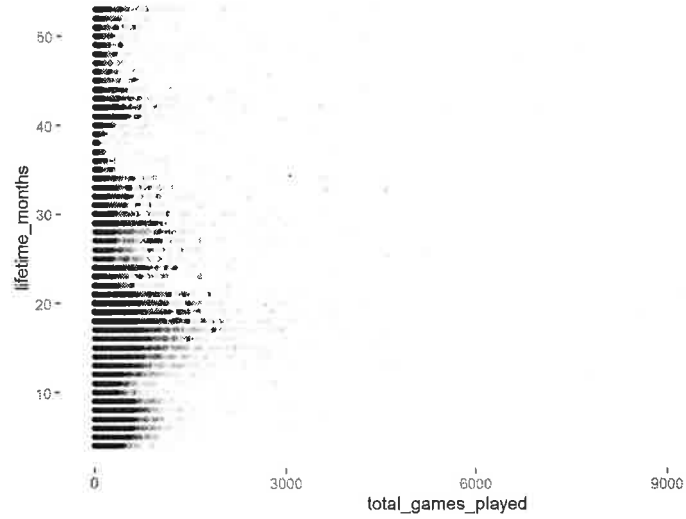


Figure 14A:

Total games played vs lifetime months - power4
Correlation = 0.1303



Expert's Credentials

Zvi Gilula is Professor (Emeritus) and former Chair of the Department of Statistics at the Hebrew University of Jerusalem and is an Adjunct/Visiting Professor of Statistics at the University of Chicago Booth School of Business for the last 38 years.

Zvi Gilula served as an Associate Editor for about 20 years (1986-2006) in JASA-one of the leading impact-factor statistical journals. Zvi Gilula is an Elected Fellow of the Royal Statistical Society, and of the American Statistical Association.

Zvi Gilula acted as a methodological consultant for numerous companies, such as Hoffman LaRoche (Switzerland), Solvay (Germany), Navistar (United States), Midas (United States), Fortelligent (United States), The Morningside Group (China), Agis-Perrigo (Israel, United States), Teva (Israel), Kantar (UK), TNMS (S. Korea), and more.

In addition, Zvi Gilula served as a consultant for Mifal Hapais - Israel's state lottery, and currently serves as a chief methodological consultant, and scientific supervisor for the Television Rating Committee in Israel.

Zvi Gilula has provided over 100 expert opinions to law firms (with some testimonies in courts) on a wide range of subjects such as insurance, medical cases, lottery issues, Tax issues, gaming, gambling, and more.