Federal Gaming Law

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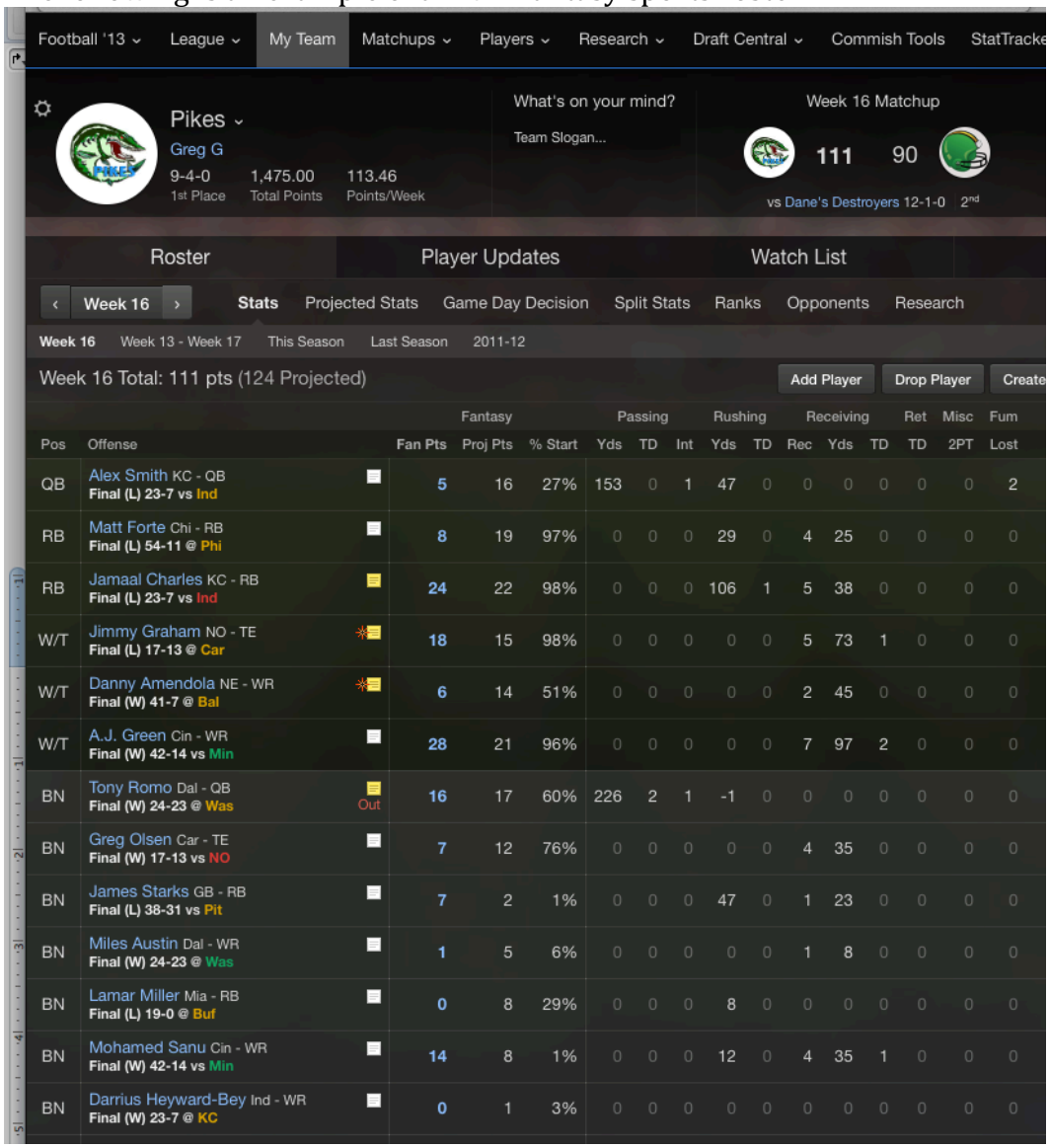
FANTASY SPORTS

Background

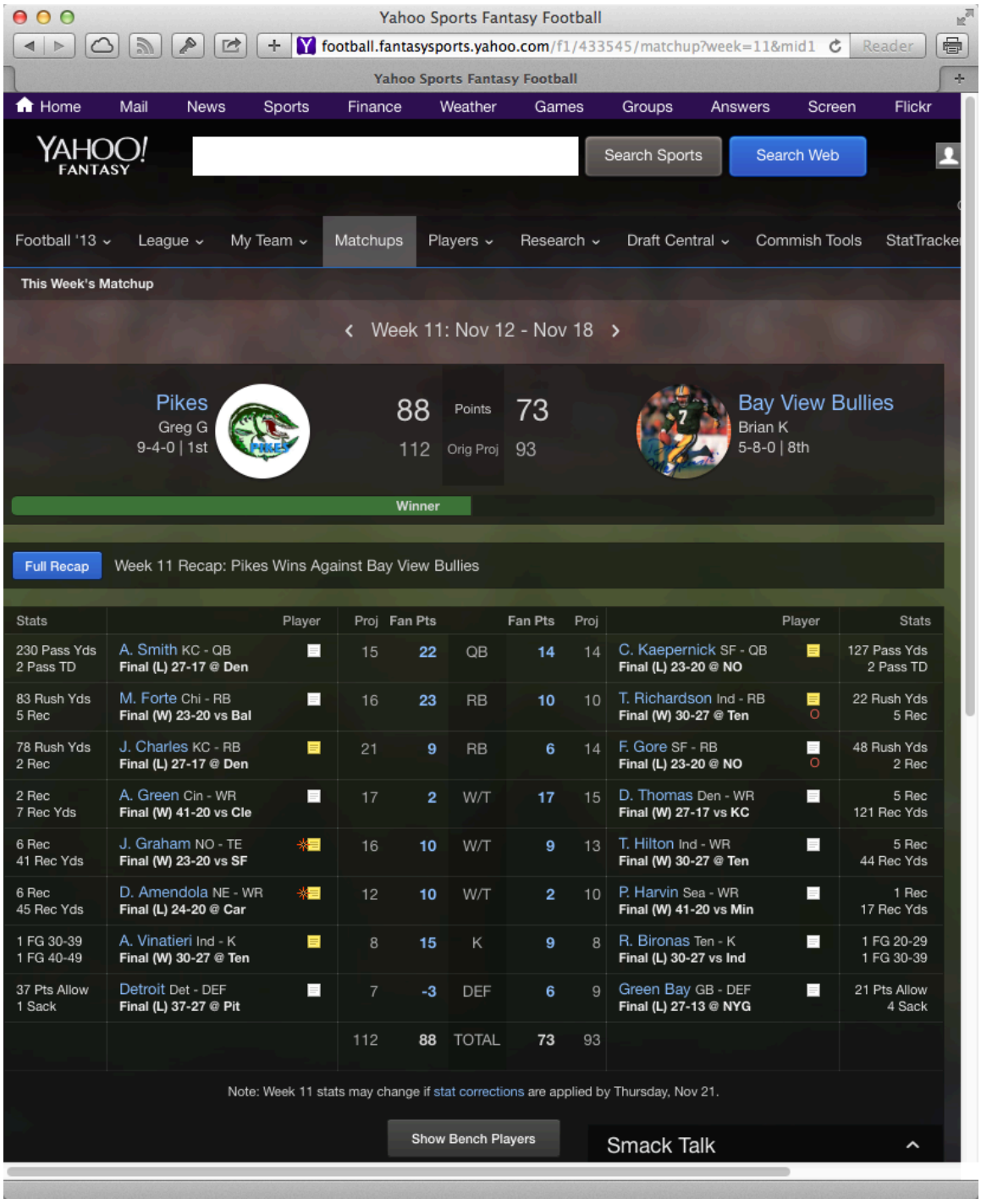
Fantasy sports are essentially games where players build a roster of athletes from a particular professional or amateur sports league and competitions are decided based on the statistics of the performance of players' rosters.

The following is an example of an NFL fantasy sports roster:

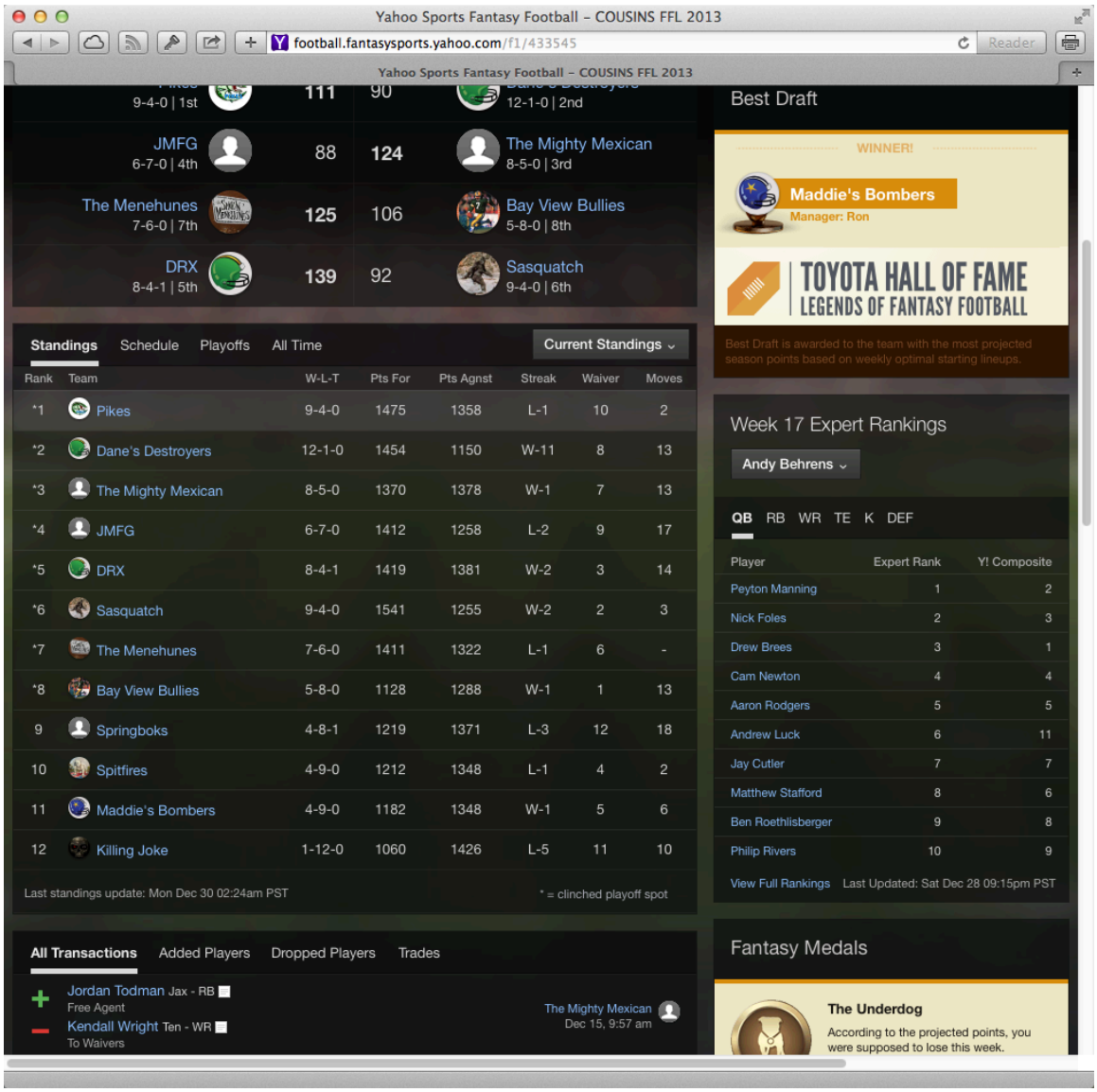


Note that the roster is comprised of positions that relate to professional football player positions. In the example there is one quarterback, two running backs, three receivers, a kicker and a team defense.

The following examples show how the competition among players occurs based on the statistics generated by the



Over the course of a season, players change their rosters by substituting players, trading players and adding players to their roster. The following example shows a screen shot standings and most recent transactions for a league:



Fantasy Sports and Statutes

The Unlawful Internet Gambling Enforcement Act:

The Unlawful Internet Gambling Enforcement Act exempted from the definition of a bet or wager, transactions related to fantasy sports contests with certain characteristics.

31 U.S.C. 5362. Definitions In this subchapter:

(1) Bet or wager.--The term "bet or wager"--

(A) means the 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 chance**, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome;

(B) includes the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance);

(C) includes any scheme of a type described in section 3702 of title 28;

(D) includes any instructions or information pertaining to the establishment or movement of funds by the bettor or customer in, to, or from an account with the business of betting or wagering; and

(E) does not include--

(i) any activity governed by the securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 for the purchase or sale of securities (as that term is defined in section 3(a)(10) of that Act);

(ii) any transaction conducted on or subject to the rules of a registered entity or exempt board of trade under the Commodity Exchange Act;

(iii) any over-the-counter derivative instrument;

(iv) any other transaction that--

(I) is excluded or exempt from regulation under the Commodity Exchange Act; or

(II) is exempt from State gaming or bucket shop laws under section 12(e) of the Commodity Exchange Act or section 28(a) of the Securities Exchange Act of 1934;

(v) any contract of indemnity or guarantee;

(vi) any contract for insurance;

(vii) any deposit or other transaction with an insured depository institution;

(viii) participation in any game or contest in which participants do not stake or risk anything of value other than--

(I) personal efforts of the participants in playing the game or contest or obtaining access to the Internet; or

(II) points or credits that the sponsor of the game or contest provides to participants free of charge and that can be used or redeemed only for participation in games or contests offered by the sponsor; or

(ix) 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.

Montana Statutes

23-5-801. Fantasy sports leagues defined. As used in this part, a "fantasy sports league" means a gambling activity conducted in the following manner:

(1) A fantasy sports league consists of a limited number of persons or groups of persons who pay an entrance fee for membership in the league. The entrance fee may include an administrative fee.

(2) Each league member creates a fictitious team composed of athletes from a given professional sport, such as baseball, basketball, or football. Player selection is conducted through random drawings or a bidding process.

(3) After the initial teams are selected, interim replacement of players may occur by trade or purchase. A specific fee, which may not exceed the total entrance fee, is charged for each transaction.

(4) A method, as defined by league rules, is devised to permit each team to compete against other teams in the league. Points are awarded to a team according to the performance of individual players or teams or both during a designated time period.

(5) A member may be eligible to receive a payout based on the number of points accumulated. Payouts, which may be in the form of cash or prizes, are awarded according to league rules.

(6) Rules governing the conduct of the fantasy sports league must be provided in writing to each member.

23-5-802. Fantasy sports leagues authorized. It is lawful to conduct or participate in a fantasy sports league.

23-5-805. Payouts -- administrative fees charged by commercial establishments. (1) The total value of payouts to all league members must equal the amount collected for entrance, administrative, and transactions fees, minus payment for administrative expenses.

(2) If a commercial establishment charges an administrative fee for conducting a fantasy sports league, the fee for each participant may not be more than 15% of the amount charged as a participant's entrance fee.

23-5-806. Sports betting prohibited -- applicability. Sections 23-5-801, 23-5-802, and 23-5-805 do not:

(1) authorize betting or wagering on the outcome of an individual sports event; or

(2) apply to gambling activities governed under chapter 4 or chapter 5, part 2 or 5, of this title.

Attorney General Opinions

Arizona

Office of the Attorney General
State of Arizona

I98-002 (R97-009)
January 21, 1998

Howard Adams
Director
Arizona Department of Liquor License and Control
800 West Washington, Fifth Floor
Phoenix, Arizona 85007

Dear Director Adams:

You have requested an opinion to guide the Arizona Department of Liquor Licenses and Control ("Liquor Department") in determining whether various forms of gambling can be conducted legally on the premises of an establishment licensed by Arizona to manufacture, distribute, or sell spirituous liquor. Your focus is the legality of sports pools (such as football, basketball, and fantasy football games), other games of chance (such as card and dice games), and games of skill (such as pool, darts, and intellectual and video games). We conclude that it is unlawful for a liquor licensee to knowingly permit sports pools and other games of chance that involve a wager to be conducted on Arizona liquor-licensed premises. Games of skill such as pool, darts, and intellectual and video games may be conducted legally on licensed premises, but only if they meet the statutory definition for amusement gambling.

Background

The Liquor Department has the authority to regulate and license the manufacture, sale, and distribution of spirituous liquor in this State. See generally Arizona Revised Statutes Annotated ("A.R.S."), Title 4. The Liquor Department helps enforce Arizona's gambling statutes because it is unlawful for a liquor licensee to knowingly

permit unlawful gambling on its premises. A.R.S. § 4-244(27). Accordingly, you have asked us to opine about the lawfulness of the following types of gambling activity on liquor-licensed premises:

. Sports pool contest. A chart is prepared that consists of a predetermined number of squares arranged in a grid format. A specific chart is used for each sporting event. Participants purchase one or more of the squares for a specified amount of money. The participants can win all or a portion of the pooled money if their square is successful in the competition.

. Fantasy football contest. A participant purchases an ideal team roster. The roster consists of players selected by the participant for the purpose of competing in the contest. To trade players, participants generally must pay an additional cost. Based upon the performance of the participant's team during the season, relative to the other participants' teams, he or she has an opportunity to win either a portion of the pooled money or a prize.

. Cards and dice games. A participant wagers money for the opportunity to gain something of value (usually, but not limited to, money). Examples of such games are poker, blackjack, and craps.

. Games of skill (such as pool, darts, or intellectual games). The participants bet amongst themselves, and the winner of the competition receives the amount wagered.

. Video games. A participant pays a fee to play an electronic game, where there is no payoff other than the satisfaction of getting the highest score or winning a replay.

Analysis

In Ariz. Att'y Gen. Op. I97-010, we set forth the basic framework for analyzing whether gambling activity is legal in Arizona. The determination involves two separate inquiries: whether the conduct constitutes "gambling" and, if so, whether that form of "gambling" is otherwise lawful under one of the six statutory exclusions in A.R.S. § 13-3302.

A. The Three Required Elements of "Gambling" Conduct

The first question is whether the specific conduct is gambling under Arizona law. To qualify as gambling, three elements must be present: (i) an act of risking or giving something of value, (ii) for the opportunity to obtain a benefit, and (iii) from a game or contest of chance or skill or a future contingent event. See A.R.S. § 13-3301(3). Therefore, it is necessary to analyze each type of conduct listed in your inquiry to determine if each satisfies the three elements of gambling.

1. Risking or Giving Something of Value

If the participant risks something with an economic, monetary, or exchange value (such as money wagered or used to operate or participate in a game or contest), then the first element is satisfied. A.R.S. § 13-3301(3). However, if no money or

nothing of value is required to participate, then the conduct is not gambling. For the purposes of this analysis, we will assume that money has been wagered in each type of conduct in your inquiry, so that each type satisfies the first element of gambling.

2. The Opportunity to Gain or Benefit

The second element of gambling requires a determination of whether the participant is entitled to receive anything of value or advantage as a result of playing the game or contest. In the case of sports pools and fantasy football contests, the participant purchases a chance to win all or a percentage of the entire amount wagered. Similarly, in card and dice games, the participant plays for a chance to win something of value (usually money). Moreover, in the pool, dart, or intellectual games, the winner is entitled to receive all or part of the amount wagered. In the case of playing video games where there is no payoff other than the satisfaction of getting the highest score or winning a replay, the satisfaction of getting the high score alone fails to meet the requirements of the second element. However, when the opportunity to receive a free replay is offered, the second element is satisfied. Therefore, the second element of gambling is satisfied in your examples, provided that the participants are playing in order to win something of value.

3. A Game of Chance, Skill or Contingency

The third element requires that the games or contests to be of chance, skill, or contingent upon future events. All of your examples satisfy the final element of gambling.

B. Legally Permissible Gambling

Because A.R.S. § 4-244(27) makes it unlawful for a licensee or employee to knowingly permit unlawful gambling on the premises, the Liquor Department must determine whether the gambling is unlawful. As set forth in more detail in Ariz. Att'y Gen. Op. I97-010, all gambling is illegal in Arizona unless it falls within a statutory exclusion. There are six statutory exclusions to the general ban on gambling. See A.R.S. § 13-3302. The three that would most likely arise for the Liquor Department to consider are the "amusement," "regulated," and "social" gambling exclusions.

1. The "Amusement Gambling" Exclusion

Conduct constitutes "amusement gambling" if the conduct involves a device, game, or contest that is played for entertainment and if it satisfies all four elements in A.R.S. § 13-3301(1) (reproduced in Appendix A hereto).

Sports pools, including football pools, basketball pools, and similar games involving a wager on the outcome of a game, fail to satisfy the "amusement gambling" exclusion. Subsection (a) of A.R.S. § 13-3301 requires the player or players to

actively participate in the game or contest or with the device before the exclusion applies. Because participants in sports pools do not actually play the game, they cannot meet this requirement. Additionally, subsection (c) prohibits offering prizes to separate a player from his or her money, yet a strong argument can be made that the prizes in pools are offered as a lure to separate the players from their money. See Ariz. Att'y Gen. Op. I97-010 at 3-5. Therefore, sports pools do not qualify for the amusement gambling exclusion.

Fantasy football pools also fail to qualify as amusement gambling. The individuals wagering are not the football players performing in the game, therefore subsection (a) is not satisfied. The outcome is in the control of the actual football teams, not the individuals making the wager, so it fails to satisfy subsection (b). Most fantasy football tournaments offer prizes, some ranging from million dollar purses to Super Bowl packages, so any offering of prizes violates subsection (c). Additionally, none of the subparts of subsection (d) would appear to apply. For example, the companies and individuals that organize and tabulate the calculations generally derive a fee for their service, thus transgressing subsection (d)(ii). Therefore, fantasy football does not satisfy every required element of amusement gambling exclusion.

Games of chance (such as cards or dice) that involve a wager also fail to comply with the amusement gambling exclusion. Although card and dice games arguably satisfy subsections (a) and (b), the existence of a cash pool would be a prize offered as a lure to separate the players from their money, thus violating subsection (c). This conduct also fails to fall within one of the four categories of subsection (d), because card or dice games fail to qualify as an athletic event. Therefore, traditional card and dice games played for money or items of value do not qualify for the amusement gambling exclusion. See Ariz. Att'y Gen. Op. I97-010.

Games of skill (such as pool, darts, or intellectual games) that involve a wager theoretically could fall within the amusement gambling exclusion, depending upon the particular circumstances. To so qualify, the players must actively participate, no other persons may control the outcome, and prizes may not be offered as a lure to separate the players from their money. In applying the ordinary meaning of the word "athletic" to subsection (d)(ii), we conclude that a game of pool or darts could be an "athletic event" as an "athlete" is "one who is reasonably skilled in physical exercises, sports, or games." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 138 (1978). Therefore, it is conceivable that individuals could legally wager on their own game of pool or darts provided that they meet all of the elements of the amusement exclusion. However, we caution that the factual circumstances must be scrutinized closely to ensure total compliance with all the required elements. For example, the overriding condition for the "amusement gambling" exclusion to apply is that the "device, game or contest [is] played for entertainment," not gambling purposes. See A.R.S. § 13-3301(1) (emphasis added). Moreover, if prizes (monetary or otherwise) are offered as a lure to separate the players from their money, it would violate subsection (c). No person other than the players may derive a profit or even a chance of a profit from the money paid to

gamble. Given the Legislature's directive that Arizona's Anti-Gambling Act "be liberally construed to effectuate its penal and remedial purposes," 1987 Ariz. Sess. Laws ch. 71 § 1, the Liquor Department should carefully examine all facts surrounding activity allegedly conducted as "amusement gambling" on the premises of liquor licensees.

Intellectual games could satisfy subsections (a), (b), and (c), and fall within subsection (d)(iii) as an intellectual contest or event, provided that the money paid to gamble is part of an established purchase price for a product. In order to qualify, however, such intellectual contests must be registered in advance with the Attorney General. A.R.S. § 13-3311. Generally, bar games requiring a wager will not constitute amusement gambling because the prize is offered as a lure to separate players from their money.

Playing a video game is not gambling if there is no payoff other than the satisfaction of getting the highest score, or if money is not required to play the game. A video game is gambling when the player has the opportunity to receive a free replay; however, the amusement gambling exclusion applies if no benefit or prize is given to the player(s) other than an immediate and unrecorded right to replay which is not exchangeable for value. A.R.S. § 13- 3301(1)(d)(i). However, an attempt to offer anything of value as a prize or for a replay credit takes the gambling conduct outside the scope of the exclusion and results in illegal gambling.

2. The "Regulated Gambling" Exclusion

"Regulated gambling" is defined as gambling that, among other things, is "operated and controlled in accordance with a statute, rule or order of this state or the United States." A.R.S. § 13-3301(5)(a). Legalized wagering on horse and dog races (A.R.S. § 5-112), the Arizona Lottery (A.R.S. § 5- 504), and bingo (A.R.S. § 5-401) would constitute regulated gambling. None of the five types of conduct that you described meets the requirements of regulated gambling.

3. The "Social Gambling" Exclusion

If specific conduct qualifies as gambling, that conduct may nonetheless come within the "social gambling" exclusion. See A.R.S. § 13-3301(6). However, gambling conducted on a licensee's premises would fail to satisfy the "social gambling" exclusion's prohibition against another person (here, the licensee) receiving any benefit, directly or indirectly, from the gambling activity, including without limitation, benefit of proprietorship, management, or unequal advantage or odds in a series of gambles. A.R.S. § 13-3301(6)(b). Consequently, even if a licensee does not receive any percentage or portion of the direct gamble, the licensee clearly receives benefits from the gambling activity because patrons have the added incentive to frequent the establishment in order to gamble. See Ariz. Att'y Gen. Ops. I97-010 and I91-024 (card games and the "shake-a-shift" game constitute illegal gambling). Therefore, all of your examples fail to qualify as social gambling, if the

conduct occurs on licensed premises. Indirect benefit (increased patronage and business) is present even if the licensee neither receives a percentage of the money wagered nor participates or supplies equipment for the games.

Conclusion

Sports pools, fantasy football, and card and dice games involving a wager are gambling under Arizona law. These types of games or contests fail to qualify under the amusement, regulated, or social gambling exclusions when they are conducted on liquor-licensed premises. Therefore, sports pools, fantasy football, and card and dice games are unlawful on the licensed premises. Games of skill such as pool, darts, and intellectual and video games as described in your request letter may be legally permissible, but only if they strictly meet all of the required elements of the "amusement gambling" exclusion in A.R.S. § 13-3301(1).

Sincerely,

Grant Woods

Attorney General

ATTACHMENT

APPENDIX A

A.R.S. § 13-3301(1)

1. "Amusement gambling" means gambling involving a device, game or contest played for entertainment if all of the following apply:

(a) The player or players actively participate in the game or contest or with the device.

(b) The outcome is not in the control to any material degree of any person other than the player or players.

(c) The prizes are not offered as a lure to separate the player or players from their money.

(d) Any of the following:

(i) No benefit is given to the player or players other than an immediate and unrecorded right to replay which is not exchangeable for value.

(ii) The gambling is an athletic event and no person other than the player or players derives a profit or chance of a profit from the money paid to gamble by the player or players.

(iii) The gambling is an intellectual contest or event, the money paid to gamble is part of an established purchase price for a product, no increment has been added to the price in connection with the gambling event and no drawing or lottery is held to determine the winner or winners.

(iv) Skill and not chance is clearly the predominant factor in the game and the odds of winning the game based upon chance cannot be altered, provided the game complies with any licensing or regulatory requirements by the jurisdiction in which it is operated, no benefit for a single win is given to the player or players other than a merchandise prize which has a wholesale fair market value of less than four dollars or coupons which are redeemable only at the place of play and only for a merchandise prize which has a fair market value of less than four dollars and, regardless of the number of wins, no aggregate of coupons may be redeemed for a merchandise prize with a wholesale fair market value of greater than thirty-five dollars.

Ariz. Op. Atty. Gen. No. I98-002, 1998 WL 48550 (Ariz.A.G.)

Florida

Number: AGO 91-03

Date: January 8, 1991

Subject: Gambling / Fantasy Sports League

The Honorable Lawson Lamar

State Attorney

RE: GAMBLING-participation in fantasy sports league violation of state gambling laws. s. 849.14, F.S.

QUESTION:

Does participation in a fantasy sports league whereby contestants pay a fee for the opportunity to select actual professional sports players to make up a fantasy team whose actual performance statistics result in cash payments to the contestants with the best fantasy team violate Florida's gambling laws?

SUMMARY:

Section 849.14, F.S., prohibits the operation of and participation in a fantasy sports league whereby contestants pay an entry fee for the opportunity to select actual professional sports players to make up a fantasy team whose actual performance statistics result in cash payments from the contestants' entry fees to the contestant with the best fantasy team.

You ask whether the formation of a fantasy football league by a group of football fans in which contestants pay $100 for the right to "manage" one of eight teams violates the state's gambling laws. You state that these teams are created by contestants by "drafting" plays from all current eligible National Football League (NFL) members. Thus, these fantasy teams consist of members of various NFL teams.

According to your letter, each week the performance statistics of the players in actual NFL games are evaluated and combined with the statistics of the other players on the fantasy team to determine the winner of the fantasy game and their ranking or standing in the fantasy league. No games are actually played by the fantasy teams; however, all results depend upon performance in actual NFL games. Following completion of the season, the proceeds are distributed according to the performance of the fantasy team.[1]

You state that fantasy baseball leagues, in which professional baseball players and their performance statistics are used in similar contests, are conducted in a similar manner.

Florida's gambling laws, generally codified in Ch. 849, F.S., primarily concern games of chance rather than contests of skill. For example, lotteries, consisting of a prize awarded by chance for consideration,[2] are generally prohibited by s. 849.09, F.S.

Contests in which the skill of the contestant predominates over the element of chance, such as in certain sports contests, do not constitute prohibited lotteries.[3] This office has previously recognized that golf or bowling tournaments are predominately contests of skill.[4] Similarly, football and baseball games would appear to be predominately contests of skill even though an element of chance may also be involved. It might well be argued that skill is involved in the selection of a successful fantasy team by requiring knowledge of the varying abilities and skills of the professional football players who will be selected to make up the fantasy team.

Section 849.14, F.S., however, provides in part:

"Whoever stakes, bets or wagers any money or other thing of value upon the result of any trial or contest of skill, speed or power or endurance of man or beast . . . or whoever knowingly becomes the custodian or depositary of any money or other thing of value so staked, bet, or wagered upon any such result . . . shall be guilty of a misdemeanor."

The statute thus prohibits stakes, bets or wagers on the results of any contests of skill. In an early decision on

the state's gambling laws, The Supreme Court of Florida found a violation of law in both games of chance and contests of skill where wages, bets or money were at stake, regardless of "whether the parties betting be the actors in the event upon which their wager is laid or not . . ."[5]

The courts, however, have distinguished between a "purse, prize or premium" and a "stake, bet or wager." In *Pompano Horse Club v. State*,[6] The Supreme Court of Florida stated:

"[I]n the former the donor or person offering the [prize or purse] has no chance of gaining back the thing offered but, if he abides by his offer, he must lose it, whereas in the latter each party interested therein has a chance of gain and suffers a risk of loss."

This distinction was reaffirmed by the Court in *Creash v. State*,[7] which stated:

"In gamblers' lingo, 'stake, bet or wager' are synonymous and refer to the money or other thing of value put up by the parties thereto with the understanding that one or the other gets the whole for nothing but on the turn of a car, the result of a race, or some trick of magic. A 'purse, prize, or premium' has a broader significance. *If offered by one (who in no way competes for it) to the successful contestant in a fete of mental or physical skill, it is not generally condemned as gambling*, while if contested for in a game of. . . . chance, it is so considered. . . *It is* also *banned as gambling if created . . .by . . . contributing to a fund from which the 'purse, prize, or premium' contested for is paid*, and wherein the winner gains, and the other contestants lose all." (e.s.)

According to your letter, the contestants pay $100 for the right to participate in the fantasy games by managing one of eight teams. The $800 in proceeds from the entry fees are use to make up the prizes. Such moneys, therefore, clearly appear to qualify as a "stake, bet or wager" as defined by the courts.[8] Moreover, such moneys have been staked, wagered or bet on the result of a contest of skill. While the skill of the individual contestant picking the members of the fantasy team is involved, the prizes are paid to the contestants based upon the performance of the individual professional football players in actual games.

Accordingly, I am of the opinion that the operation of a fantasy sports league such as described in your letter would violate s. 849.14, F.S.

Sincerely,

Robert A. Butterworth

Attorney General

RAB/tjw

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[1] According to your letter, the entry fees are distributed as follows: "Regular season games (64 games at $9 per win) $576 Second round play-off games (4 games at $10 per win) 40 Conference champions (2 at $25 per win) 50 Super Bowl champion 50 Super Bowl runner-up 24 Leading individual scorer 10 Leading scoring team 10 Longest touchdown run 10 Longest touchdown pass thrown 10 Longest touchdown pass reception 10 Longest field goal 10"

[2] *See, Little River Theater Corporation v. State ex rel. Hodge*, 185 So. 855 (Fla., 1939), discussing the elements of a lottery.

[3] *See, e.g.*, AGO's 90-35 and 55-189.

[4] *See*, AGO 66-41.

[5] *McBride v. State*, 22 So. 711, 713 (Fla. 1897).

[6] 111 So. 801, 813 (Fla. 1927).

[7] 179 So. 149, 152 (Fla. 1938).

[8] *Compare*, AGO 90-58 in which this office concluded that a contest of skill where the contestant pays an entry fee, *which does not make up the prize*, for the opportunity to win a valuable prize by the exercise of skill, does not violate the gambling laws of this state.

DAILY FANTASY SPORTS

Daily fantasy sports are like other fantasy sports contests; however, instead of testing the “skill” of participants in managing a team over the course of a season, it tests the “skills” of the participants in picking a line-up of performers that are determined in one game rotation of a particular sport.

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

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ADAM PAUL LAXALT
Attorney General

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Assistant Attorney General
NICHOLAS A. TRUTANICH
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MEMORANDUM

Date: October 16, 2015

To: A.G. Burnett, Chairman, Nevada Gaming Control Board; Terry Johnson, Member, Nevada Gaming Control Board; Shawn Reid, Member, Nevada Gaming Control Board

From: J. Brin Gibson, Bureau Chief of Gaming and Government Affairs
Ketan D. Bhirud, Head of Complex Litigation

Subject: Legality of Daily Fantasy Sports Under Nevada Law

You have requested that our Office research the legality of daily fantasy sports under the Nevada Gaming Control Act and Nevada Gaming Commission Regulations.

Pursuant to NRS 463.0199, the Office of the Nevada Attorney General serves as legal counsel to the Nevada Gaming Control Board and the Nevada Gaming Commission. In particular, the Gaming Division within the Office of the Nevada Attorney General provides legal advice to both regulatory agencies upon request. This memorandum was drafted in response to such a request made by the Nevada Gaming Control Board and is strictly a legal analysis. In developing this analysis, our division has expressly rejected any consideration regarding claims of a double standard for daily fantasy sports as measured against the regulation of traditional sports wagering, the popularity of daily fantasy sports, the general demand for daily fantasy sports products, or the existence or potential for partnerships between daily fantasy sports operators and important industries. Furthermore, while this Office recognizes that there are strong voices on both sides of the policy debate surrounding daily fantasy sports, our goal, above all, is to provide legal advice that shows complete fidelity to the law. We believe this opinion accomplishes that purpose.

QUESTION

Do daily fantasy sports constitute gambling games, sports pools, and/or lotteries under the Nevada Gaming Control Act and Gaming Commission Regulations?

SHORT ANSWER

In short, daily fantasy sports constitute sports pools and gambling games. They may also constitute lotteries, depending on the test applied by the Nevada Supreme Court. As a result, pay-to-play daily fantasy sports cannot be offered in Nevada without licensure.[1]

ANALYSIS

I. Background

A. General Description of Fantasy Sports

Fantasy sports are games where the participants, as "owners," assemble "simulated teams" with rosters and/or lineups of actual players of a professional sport. These games are generally played over the Internet using computer or mobile software applications. Fantasy sports cover a number of actual professional sports leagues, including the NFL, the MLB, the NBA, the NHL, the MLS, NASCAR, as well as college sports such as NCAA football and basketball.

Fantasy sports can be divided into two types: (1) traditional fantasy sports, which track player performance over the majority of a season, and (2) daily fantasy sports, which track player performance over a single game. The owners of these simulated teams compete against one another based on the statistical performance of actual players in actual games. The actual players' performance in specific sporting events is converted into "fantasy points" such that each actual player is assigned a specific score. An owner will then receive a total score that is determined by compiling the individual scores of each player in the owner's lineup. Thus, although the owners select lineups, once the lineup has been selected—at least in the context of daily fantasy sports—the owners have basically no ability to control the outcome of the

[1] This conclusion—that daily fantasy sports are gambling—is consistent with how operators of certain daily fantasy sports describe themselves. For example, Jason Robins (the owner, co-founder, and CEO of DraftKings) stated that the concept for DraftKings.com was "almost identical to a casino." Mr. Robins made these comments on Reddit.com, which is an entertainment, social networking, and news website where registered community members can submit content, such as text posts or direct links, making it essentially an online bulletin board system. The website contains a section titled "/r/IAma," which generally translates to "ask me anything." On the thread that he started, Mr. Robins engages in an online discussion about how he and two friends started DraftKings, Inc. *See* https://www.reddit.com/r/IAmA/comments/x5zrn/we_quit_our_jobs_to_pursue_a_dream_of_starting_a/. Similarly, DraftKings' has applied for and received licenses to operate in the United Kingdom. http://www.prnewswire.com/news-releases/draftkings-announces-international-expansion-300129047.html . Although there is no question that the gambling laws of the United Kingdom and Nevada are fundamentally different, it is still noteworthy that the licenses in question are for "pool betting" and "gambling software," and that DraftKings does not include either of those terms in its press release. Instead, DraftKings simply states that "the company has been granted a license to operate in the United Kingdom," without identifying the licenses at issue. It appears that DraftKings recognizes the appearance of inconsistency between its position that it should be unregulated in the United States and its decision to submit to gaming regulation in the United Kingdom.

simulated games.[2] Specifically, the owners of the simulated teams have no ability to control how many points their simulated teams receive from an actual player's performance. The actual players in the actual games control their own performance. As a result, after an owner places a bet and sets a final lineup, the owner has no ability to influence the outcome of a simulated game. At that point, the owner waits to see what happens based upon the performance of the actual players selected.

B. Player Selection

The three most common methods of player selection in fantasy sports are (1) a snake draft; (2) an auction draft; and (3) a salary-cap draft.[3] In a snake draft, owners take turns drafting actual players for their simulated teams. In an auction draft, each owner has a maximum budget to use to bid for players. Competing owners, however, cannot select the same actual players for their simulated teams as other owners. Daily fantasy sports do not generally utilize a snake draft or an auction draft.

In a salary-cap draft, just like in an auction draft, each owner has a maximum budget. Unlike in an auction draft, however, the owners do not bid against each other. Instead, each actual player has a set fantasy salary. Although (with a few exceptions)[4] the owners can select any actual player for their teams, the owners cannot exceed their maximum budget. In this format, generally speaking, competing owners can select the same actual players for their simulated teams as other owners.

C. Types of Simulated Games

Although there are many different types of simulated games offered across the different daily fantasy websites, the simulated games can generally be divided into (1) head-to-head; and (2) tournaments.

In head-to-head simulated games, one owner competes against another owner. The owner with the highest total score will win the entire payout pool.

Tournaments are simulated games that involve more than two owners. Although there are theoretically many different kinds of tournaments, the most common are (1) 50/50; (2) double-up; (3) triple-up/quadruple-up/quintuple-up/etc.; and (4) top-X.

Although 50/50 and double-up simulated games are very similar (and some sites use the terms interchangeably), they are not necessarily identical. In a traditional 50/50 simulated game, an owner's goal is to end up in the top half of total scores. Owners who finish in the top half will equally split the payout pool. As a result, half the owners will lose their entry fee and half the owners will win. The winning owners, however, will not actually "double" their entry fee because the site operator will take a "rake"[5] from every owner who participates. For example,

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[2] Given that lineups on some sites do not "lock" until the start of each individual game, the owners have until the tipoff of each individual game to set each particular lineup spot.

[3] Because it is not relevant to daily fantasy sports, dynasty and keeper league options are not discussed.

[4] For example, most sites require owners to select actual players from at least three different actual teams.

[5] A rake is a fee taken by an operator of a game.

in a 100 person, 50/50 simulated game with a $10 entry fee, the 50 highest scoring owners would receive $18, the 50 lowest scoring owners would receive $0, and the site operator would receive $100 as a rake. By contrast, in a double-up simulated game, the site operator might allow 110 owners into the simulated game, while only paying the owners with the top 50 scores. In that scenario, an owner finishing in the top 50 scores would receive $20, an owner finishing in the bottom 60 scores would receive $0, and the operator would take a $100 rake.

Triple-up, quadruple-up, and quintuple-up simulated games are similar to double-up simulated games, except that instead of the opportunity to double their money, the owners have the opportunity to triple, quadruple, or quintuple their money. For example, in a triple-up league, the top third splits the payout pool; in a quadruple-up league, the top fourth splits the payout pool; and in a quintuple-up league, the top fifth of the league splits the payout pool. Similar to a double-up simulated game, site operators generally will pay less than one-third, one-fourth, or one-fifth of the total wagers placed, respectively.

In a top-X simulated game, which can consist of up to thousands of owners, the owners finishing with a total score in the top-X (top 1, top 2, top 3, etc.) will split the payout pool (either evenly or with progressively more based on how high they finish). For example, in a 100 person, top 3 simulated game with a $10 entry fee, the first place finisher might receive $500, the second place finisher might receive $300, the third place finisher might receive $100, and the operator would take a $100 rake.

D. Guaranteed and Non-Guaranteed Simulated Games

Daily fantasy sports operators often offer both simulated games that are guaranteed and simulated games that are non-guaranteed. If a simulated game is guaranteed, the winners will be paid out regardless of how many owners enter the simulated game. If a simulated game is non-guaranteed, the simulated game will be cancelled unless a certain number of owners participate. If a non-guaranteed simulated game is cancelled, the entry fees will be fully refunded.

II. Preliminary Discussion

A. Determinations of Skill Versus Chance Under Nevada Law

In the context of addressing the legality of fantasy sports, the question of whether skill or chance is involved is often deemed important. However, under Title 41 of the Nevada Revised Statutes, the determination of whether an activity involves skill, chance, or some combination of the two, is relevant only when analyzing lotteries. By contrast, the determination of whether an activity constitutes a gambling game or a sports pool under Nevada law does not require analysis of the level of skill involved. This distinction was made crystal clear by the passage of Senate Bill (SB) 9 during the 2015 Nevada Legislative Session, which distinguishes between games of skill, games of chance, and hybrid games of both skill and chance, while recognizing that all three are gambling games.

1. Lottery

Nevada Revised Statute 462.105(1) defines "lottery" as follows:

> 1. Except as otherwise provided in subsection 2, "lottery" means 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 that property, or a portion of it, or for any share or interest in that property upon any agreement, understanding or expectation that it is to be distributed or disposed of **by lot or chance**, whether called a lottery, raffle or gift enterprise, or by whatever name it may be known.[6]

Accordingly, there are three essential elements for a lottery: (1) prize; (2) chance; and (3) consideration. If any one of these elements is missing, the activity does not qualify as a lottery.

The case of *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85 (1961) provides some guidance as to when the element of chance would be satisfied. *Gibson* involved an "offer to pay $5,000 to any person who, having paid 50 cents for the opportunity of attempting to do so, shot a hole in one on its golf course."[7] In that case, where the central question was whether the transaction involved gambling, the Nevada Supreme Court concluded—using a definition of "wager" that is different than what is in our statutes today—that a gaming transaction was not present. After doing so, the Court, in *dicta*, provided a test for determining whether a game is one of chance or skill: "The test of the character of a game is not whether it contains an element of chance or an element of skill, but which is the dominating element."[8] This test is commonly known as the "dominant factor test."

Assuming the Nevada Supreme Court were to apply the same test that it outlined in *dicta* in *Gibson*, a game where skill is the dominant factor would not constitute a lottery. That being said, *Gibson* involved a situation where the alleged gamblers ***directly controlled*** the outcome of the event. They were the participants in the underlying sporting event. By contrast, in daily fantasy sports, the outcome of any simulated game is determined by third parties—the actual players on actual teams and not by the owners, regardless of their skill in choosing lineups and assessing various other factors that may contribute to the outcome of the simulated game. As a result, it is unclear whether a determination of skill versus chance is necessary in determining whether daily fantasy sports are lotteries.

2. Senate Bill 9

Senate Bill 9, which was passed during the 2015 Nevada Legislative Session, explicitly authorizes the Nevada Gaming Commission to adopt regulations, applicable to gaming devices, that "define and differentiate between the requirements for and the outcomes of a game of skill, a game of chance and a hybrid game." Senate Bill 9 further provides definitions for a "game of skill"[9] and a "hybrid game."

Importantly, Senate Bill 9 does not comment on or address whether games of skill fall within the Gaming Control Act. Rather, it starts from the premise that they do. To the extent

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[6] (Emphasis added).
[7] *Gibson*, 77 Nev. at 27, 359 P.2d at 86.
[8] *Id.* at 30, 359 P.2d at 87.
[9] "Game of skill" for the purposes of Senate Bill 9 is defined as "a game in which the skill of the player, rather than chance, is the dominant factor in affecting the outcome of the game as determined over a period of continuous play." With this definition, the Nevada Legislature has arguably codified the "dominant factor test" as articulated in *Gibson*, although, as noted, such a test will have limited applicability in the context of the Gaming Control Act.

there was any doubt whether Nevada regulators had jurisdiction over gambling games that incorporate skill in determining their outcome, Senate Bill 9 extinguishes that doubt.

3. Gambling Games and Sports Pools

Despite the foregoing, arguments have been made that games of skill, where skill is the dominant factor, are outside of the jurisdiction of the Nevada Gaming Control Board and Commission. These arguments, however, ignore Nevada's statutory requirements.

Nevada Revised Statute 463.160 makes it unlawful for any person to deal, operate, carry on, conduct, maintain or expose for play in Nevada any gambling game without first obtaining a gaming license. "Gambling game" is defined in NRS 463.0152 as:

> [A]ny game played with cards, dice, equipment ***or any*** mechanical, electromechanical or ***electronic device*** or machine for money, property, checks, credit or any representative of value, including, ***without limiting the generality of the foregoing***, faro, monte, roulette, keno, bingo, fan-tan, twenty-one, blackjack, seven-and-a-half, big injun, klondike, craps, poker, chuck-a-luck, Chinese chuck-a-luck (dai shu), wheel of fortune, chemin de fer, baccarat, pai gow, beat the banker, panguingui, slot machine, ***any banking or percentage game*** or any other game or device approved by the Commission, but does not include games played with cards in private homes or residences in which no person makes money for operating the game, except as a player, or games operated by charitable or educational organizations which are approved by the Board pursuant to the provisions of NRS 463.409.[10]

In essence, under NRS 463.160, a gambling game is (1) any game played with cards, dice, equipment or any device or machine for any representative of value;[11] (2) any banking game; (3) any percentage game; or (4) any other game or device approved by the Nevada Gaming Commission. This broad definition makes no distinction between games of skill and games of chance. Therefore, while a determination that an activity is a game of skill is relevant to determining whether that activity is a lottery, it is not relevant to determining whether that activity constitutes a gambling game. Similarly, NRS 463.0193, which defines a "sports pool" as "the business of accepting wagers on sporting events or other events by any system or method of wagering," makes no distinction between games of skill and games of chance. Indeed, it has long been noted that there is a strong element of skill involved in sports wagering.

It is important to note that while Nevada gaming regulators clearly have authority to regulate games of skill, the present analysis does not concede the argument that daily fantasy sports are predominately skill-based. As Dr. Timothy Fong, Associate Clinical Professor of Psychiatry and Biobehavioral Sciences at the David Geffen School of Medicine at UCLA and Executive Director of the UCLA Gambling Studies Program, states in regards to fantasy football:

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[10] (Emphasis added.)

[11] The Gaming Control Act defines a "representative of value" as "any instrumentality used by a patron in a game whether or not the instrumentality may be redeemed for cash." NRS 463.01862.

> Very simply, it's gambling, [it's putting] money on an event with a certain outcome in the hopes of winning more money. To call it anything else is really just not accurate. That link hasn't really been made by the players and the public—that what I'm doing is no different than playing blackjack or craps or betting on sports in Vegas casinos.[12]

The debate about whether daily fantasy sports are predominately driven by skill or chance is not settled. Nonetheless, the distinction between skill and chance is of limited significance under Title 41 of the Nevada Gaming Control Act, other than when analyzing lotteries.

B. UIGEA Did Not Legalize Fantasy Sports

As this Memorandum is written solely to analyze daily fantasy sports under Nevada law, it takes no position on the legality of daily fantasy sports under federal laws, such as the Professional and Amateur Sports Protection Act of 1992.[13] That being said, a point of clarification is in order because there are some operators and commentators who have taken the position that the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA")[14] legalized fantasy sports within the United States. Given the explicit language of UIGEA, that position is simply untenable, and often at odds with what those same operators and commentators have said in the past.

Specifically, in its first section under the subheading "Rule of construction," UIGEA states: "No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States."[15] Thus, it is clear that UIGEA neither made legal nor illegal any form of gambling within the United States. UIGEA simply provides "[n]ew mechanisms ***for enforcing*** gambling laws on the Internet," which Congress deemed necessary as it believed "traditional law enforcement mechanisms [were] often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders."[16] This conclusion is consistent with those of prominent commentators, including one of the leading attorneys representing daily fantasy sports operators, who stated, "The exemption in UIGEA for fantasy sports does not mean that fantasy sports are lawful, only that fantasy sports are not criminalized under UIGEA."[17]

Former Representative Jim Leach, the congressman who drafted UIGEA, when asked whether the 2006 legislation makes daily fantasy sports operations legal, responded, "[t]he only unique basis provided fantasy sports by UIGEA is its exemption from one law enforcement mechanism where the burden for compliance has been placed on private sector financial

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[12] Ramon Ramirez, *The Dark Secret About Fantasy Football No One Is Talking About*, THE KERNAL (August 30, 2015), *at* http://kernelmag.dailydot.com/issue-sections/features-issue-sections/14172/is-fantasy-football-addictive/ (internal commentary omitted).

[13] PL 102–559, October 28, 1992, 106 Stat 4227.

[14] 31 U.S.C.A. §§ 5361-5367.

[15] 31 U.S.C.A. § 5361(b).

[16] 31 U.S.C.A. § 5361 (a)(4) (emphasis added).

[17] Anthony N. Cabot & Louis V. Csoka, Fantasy Sports: One Form of Mainstream Wagering in the United States, 40 J. Marshall L. Rev. 1195, 1201 (2007).

firms."[18] He continued, "[b]ut it is sheer chutzpah for a fantasy sports company to cite the law as a legal basis for existing. Quite precisely, UIGEA does not exempt fantasy sports companies from any other obligation to any other law." He concluded, "There is no credible way fantasy sports betting can be described as not gambling . . . [o]nly a sophist can make such a claim."[19]

In short, UIEGA is irrelevant to determining the legality of daily fantasy sports under Nevada law.

III. Analysis of the Legality of Daily Fantasy Sports Under Nevada Law

A. Daily Fantasy Sports Are "Sports Pools" Under NRS 463.0193

Nevada Revised Statute 463.0193 defines a "sports pool" as "the business of accepting wagers on sporting events or other events by any system or method of wagering." In order to determine if daily fantasy sports operators are operating a sports pool, one must determine (1) whether a wager is present; (2) whether the wagering is done on sporting events or other events by any system or method of wagering; and (3) whether daily fantasy sports operators are in "the business" of accepting wagers.

Daily fantasy sports meet all of these requirements and, thus, constitute "sports pools" under Nevada law. This conclusion is consistent with the views of one of the leading attorneys representing daily fantasy sports operators, who stated that "fantasy sports" was "a significant evolution in the realm of sports betting."[20]

1. Wagers on Sporting Events or Other Events by Any System or Method of Wagering

a. Wagers

i. Wagers Are Present in Daily Fantasy Sports

Nevada Revised Statute 463.01962 defines a "wager" as "a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain."[21]

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[18] Tim Dahlberg, *"Former congressman says DFS is "cauldron of daily betting," at* http://cdcgamingreports.com/former-congressman-says-dfs-is-cauldron-of-daily-betting/.

[19] *Id.*

[20] Anthony N. Cabot & Louis V. Csoka, The Games People Play: Is It Time for A New Legal Approach to Prize Games?, 4 Nev. L.J. 197, 215 (2004).

[21] *See* Bo J. Bernhard & Vincent H. Eade, *Gambling in a Fantasy World: An Exploratory Study of Rotisserie Baseball Games*, 9 UNLV GAMING RESEARCH & REVIEW JOURNAL 29 (2004) (In his exploratory review of fantasy baseball, Dr. Bo Bernhard, Executive Director of the International Gaming Institute and Professor at the William F. Harrah College of Hotel Administration, concluded that, "[i]f we broadly define gambling as an activity that risks something of value . . . on an event whose outcome is uncertain [essentially Nevada's definition of "wager"] (such as the whims of a professional baseball season), fantasy baseball clearly qualifies.").

Although its holding came prior to the enactment of NRS 463.10962—and, thus, may no longer be applicable—the Nevada Supreme Court stated in *State v. GNLV Corporation*,[22] that:

> a "wager" exists when two or more contracting parties have mutual rights in respect to the money wagered and each of the parties necessarily risks something, and has a chance to make something upon the happening or not happening of an uncertain event. A prize differs from a wager in that the person offering the prize must permanently relinquish the prize upon performance of a specified act. In a wager, each party has a chance of gain and takes a risk of loss.[23]

With some exceptions, the daily fantasy sports owners pay money to play the simulated games and compete with each other based on their total scores.[24] If an owner wins, the owner gets money back. If an owner loses, the owner loses the bet made. When owners play against each other, some will win and some will lose. Thus, because owners risk money on an occurrence for which the outcome is uncertain, wagers are present.[25]

This determination is consistent with how certain daily fantasy sports operators describe themselves. For example, in the online discussion described above, the DraftKings CEO states "You are ***playing against other players***, we simply act as the 'points tally' and 'money distributor.'"[26] The DraftKings CEO also states that DraftKings' "concept is a mashup between poker and fantasy sports. Basically, you pick a team, ***deposit your wager***, and if your team wins,

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[22] *State v. GNLV Corp.*, 108 Nev. 456, 834 P.2d 411 (1992). *GNLV* was a case where GNLV Corp. dba The Golden Nugget Hotel and Casino (the "Golden Nugget") ran a program known as the "24 Karat Club." The "24 Karat Club" was a program in which enrolled patrons automatically received a fifty-cent ticket each time the last dollar of a total of $75.00 was placed in certain designated slot machines. After the patron wagered the 75th dollar, the slot machine dispensed a ticket worth fifty cents toward the purchase of a "gold certificate. Gold certificates could be redeemed for gaming tokens, cash, room rental, food, beverages or merchandise. The slot machines dispensed the fifty-cent tickets ***irrespective of gains or losses resulting from the play involved*** in each $75.00 increment. On that record, the Nevada Supreme Court held that because the Golden Nugget's distribution of the tickets was required by the contract between the Golden Nugget and its "24 Karat Club" members, it was not dependent upon the result of a legitimate wager. As a preliminary matter, *GNLV* was decided before the enactment of NRS 463.01962 (the statute defining the term "wager"). More importantly, in *GNLV*, the patrons were neither competing against one another for the tickets nor receiving tickets based upon the outcome of an uncertain event. By contrast, in daily fantasy sports, the owners are competing against one another. As a result, each owner has a risk of loss depending on the outcome of their simulated team's performance. Thus, although the Nevada Supreme Court found that wagers were not present in *GNLV*, wagers are present in daily fantasy sports regardless of whether one uses the new statutory definition of wager or applies the holding in *GNLV*.

[23] *Id.* at 458, 834 P.2d at 413 (1992) (internal citations omitted).

[24] Generally speaking, daily fantasy sports operators all offer pay-to-play games. Some, however, also offer free-to-play games.

[25] 463.0152.

[26] *See* https://www.reddit.com/r/IAmA/comments/x5zrn/we_quit_our_jobs_to_pursue_a_dream_of_starting_a/ (emphasis added).

you get the pot."[27] Additionally, the DraftKings CEO repeatedly refers to the payments on his sites as "wagers" and "bets," and the activity as "betting."[28]

Similarly, the DraftKings website uses the following image on its website for its pages for fantasy football, weekly fantasy football, fantasy college football, weekly fantasy college football, weekly fantasy golf, daily fantasy basketball, fantasy college basketball, weekly fantasy basketball, weekly fantasy college basketball, and weekly fantasy hockey:[29]

That image is identified on each of those webpages, through alternative text ("alt text")[30] with a phrase that includes the word "betting" (i.e., "fantasy golf betting," "weekly fantasy basketball betting," "weekly fantasy hockey betting," "weekly fantasy football betting," "weekly fantasy college football betting," "weekly fantasy college basketball betting," "Fantasy College Football Betting," "daily fantasy basketball betting," and "Fantasy College Basketball Betting"). Although it is unclear why this image is identified using the alt text "betting,"—whether it is because these sites are trying to draw Internet search traffic from gamblers, because "betting" is how the sites internally discuss their product, or for some other reason—it appears that although the sites' representatives publicly state that they do not believe daily fantasy sports involve "wagers" or "bets," they do use the terms "betting" and "wagering" when they are not dealing with law enforcement agencies.

ii. *Las Vegas Hacienda, Inc. v. Gibson* Is Inapposite

There have been some who suggest that wagers are not present in daily fantasy sports because of the Nevada Supreme Court's 1961 decision in *Las Vegas Hacienda, Inc. v. Gibson*.[31] Those people are mistaken. To begin with, *Gibson* was decided several years before the gaming statutes at issue in this Memorandum were enacted. Because of that, the Court did not have the

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[27] *Id.* (emphasis added).
[28] *Id.*
[29] *See e.g.*, https://www.draftkings.com/fantasy-football , https://www.draftkings.com/weekly-fantasy-golf , and https://www.draftkings.com/daily-fantasy-basketball .
[30] Alt text (alternative text) is a word or phrase that can be inserted as an attribute in an HTML (Hypertext Markup Language) document to tell website viewers the nature or contents of an image. The alt text appears in a blank box that would normally contain the image.
[31] 77 Nev. 25, 26, 359 P.2d 85, 86 (1961).

benefit of those statutes in making its determination. As a result, *Gibson* applies a common law understanding of "wager" and "gambling" that differs from our current statutory framework.

Gibson involved a golf course that offered to pay $5,000 to any person who shot a hole-in-one after paying 50 cents for the opportunity to attempt to do so. From the record, it is unclear whether (1) the patron paid 50 cents for the opportunity to play a round of golf and, incidentally, would be awarded a prize if he or she sank a hole-in-one; or (2) the patron paid the 50 cents solely for the opportunity to try and shoot a hole-in-one. Regardless, a patron eventually shot a hole-in-one and the golf course refused to pay, arguing that a person cannot sue for recovery of money won in gambling. The Court held for the patron by determining the debt was a contractual debt rather than a gambling debt. As part of its analysis, the Court distinguished between "prizes" and "wagers." In doing so, the Court stated:

> A prize or premium differs from a wager in that in the former, the person offering the same has no chance of gaining back the thing offered, but, if he abides by his offer, he must lose; whereas in the latter, each party interested therein has a chance of gain and takes a risk of loss. . . . In a wager or a bet, there must be two parties, and it is known, before the chance or uncertain event upon which it is laid or accomplished, who are the parties who must either lose or win. In a premium or reward there is but one party until the act or thing or purpose for which it is offered has been accomplished. A premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event. In a premium it is known who is to give before the event; in a wager it is not known until after the event. The two need not be confounded.[32]

Even applying these outdated elements from *Gibson*, wagers are present in daily fantasy sports. Assuming that in a wager, "each party interested therein has a chance of gain and takes a risk of loss" and "there must be [at least] two parties . . . who must either lose or win," daily fantasy sports involve wagers because owners in daily fantasy sports all have a chance of gain and take a risk of loss based upon who wins and who loses. Additionally, even accepting that a prize "is a reward or recompense for some act done" and a wager "is a stake upon an uncertain event," does not change the conclusion. In the case of daily fantasy sports, the primary "act" at issue is that of choosing a lineup. The completion of this "act" will not, in itself, result in any prize. The payouts in daily fantasy sports are not awarded to owners who simply set a lineup, they are awarded to the owners whose lineups receive the highest total score (which is dependent upon the *uncertain* outcomes associated with sporting events). Accordingly, even applying *Gibson*, wagers are present in daily fantasy sports.

Moreover, the Court stated that its holding was based upon the absence of a statute providing otherwise.[33] Every statute addressed in this Memorandum was enacted after *Gibson* was decided. That distinction is important to remember, because a strict application of *Gibson* in the modern day could lead to the absurd result of removing large categories of gambling from the

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[32] *Id.* at 28-29, 359 P.2d at 86-87.

[33] *Id.* at 27, 359 P.2d at 86 ("It is generally held, in the absence of a prohibitory statute, that the offer of a prize to a contestant therefor who performs a specified act is not invalid as being a gambling transaction."). Additionally, NRS 463.01962, which defines a "wager" was added to the Nevada Revised Statutes in 1997. As a result, any cases, including *Gibson*, that defined the term "wager" prior to 1997 are no longer mandatory or persuasive.

control of the Nevada Gaming Control Board and Commission and, moreover, could render null a number of Nevada gaming statutes and regulations that take precedence over common law.

b. <u>On Sporting Events or Other Events by Any System or Method of Wagering</u>

Although it seems obvious that the wagers in question are being placed on sporting events, some discussion of this element is necessary as certain commentators have suggested that because the wagers at issue are not being placed upon the *outcome* of a particular sporting event, the wagers do not fall within the requirement that they be placed on sporting events or other events. That interpretation not only belies common sense, but is also contradicted by an analysis of the Gaming Control Act and Regulations.

To begin with, that interpretation is inconsistent with Nevada's historic understanding of sports pools. For example, Nevada has been regulating "proposition bets" or "prop bets" for decades.[34] A prop bet is a wager on the occurrence or non-occurrence of some event during the course of a sporting event. Examples of prop bets include whether a particular quarterback will pass for more or less than 300 yards, whether a particular basketball player will score more or less than 25 points, and whether a particular pitcher will pitch more or less than 10 strikeouts. Through the use of "parlay cards," the State has also regulated combinations of prop bets. Specifically, Regulation 22.090(1) states: "As used in this section, 'parlay card wager' means a wager on ***the outcome of*** a series of 3 or more games, matches, or similar sports events ***or on a series of 3 or more contingencies incident*** to particular games, matches or similar sports events."[35] As a result, it is clear that Nevada intended to regulate wagers on both (1) the outcomes of particular sporting events; and (2) contingencies incident to particular sporting events.

Notably, NRS 463.0193, which defines "sports pool," not only fails to use the word "outcome," but instead specifically broadens its definition by adding the words "by any system or method of wagering." This is in contrast to the definition of "pari-mutuel system of wagering," which only includes wagers on "the ***outcome*** of a race or sporting event."[36] As a result, the Nevada Legislature has, in some places, distinguished between betting on the outcome of particular sporting event and simply betting generally on the sporting event "by any system of method of wagering."[37] The logical, and likely only, conclusion is that Nevada's regulation of sports pools includes (1) wagering on the outcome of particular sporting events; (2) wagering on any activity that takes place during particular sporting events; and (3) wagering on combinations of the outcomes of and/or activities that take place during particular sporting events.

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[34] *See, e.g.*, Nev. Gaming Comm'n Reg. 22.060(4).
[35] Nev. Gaming Comm'n Reg. 22.090(1) (emphasis added).
[36] NRS 464.005(5) (emphasis added).
[37] It should be noted, however, that although the absence of the term "outcome" within the definition of "sports pool" precludes a conclusion that the definition only prohibits wagering on the final score of sporting events, the inverse is not necessarily true. Even if the definition of "sports pool" had included the word outcome, one could find that "outcome" includes contingencies incident to particular sporting events.

2. Business of Accepting Wagers

If it is accepted that the daily fantasy sports operators are "accepting wagers on sporting events or other events by any system or method of wagering," there seems to be no dispute that they are in the business of doing so.[38] With perhaps some limited exceptions, the daily fantasy sports operators are not operating their sites solely for recreation or amusement; they are operating the sites as businesses to make money.

B. Daily Fantasy Sports Are "Gambling Games"

There are, generally speaking, four types of gambling games outlined in NRS 463.0152: (1) games played with cards, dice, equipment or any device or machine for any representative of value; (2) banking games; (3) percentage games; and (4) other games or devices approved by the Nevada Gaming Commission.[39] These four categories are not necessarily mutually exclusive.

1. Daily Fantasy Sports Are Games Played with Cards, Dice, Equipment, Devices or Machines for Any Representative of Value

The first type of gambling game included in NRS 463.0152's definition has two elements. First, it must be a "game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine." Second it must be played "for money, property, checks, credit or any representative of value." Daily fantasy sports meet both these elements and, as a result, constitute gambling games.

a. Game Played with Cards, Dice, Equipment, Device, or Machine

Although the term "electronic device" is not defined by the Gaming Control Act, other Nevada statutes have defined a computer to be an electronic device.[40] That definition is consistent with the general understanding of what an electronic device is. As a result, daily fantasy sports, which cannot possibly be played except online using computers and/or mobile phones, meet the first element requiring that the activity be a "game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine."

b. Played for Money or Any Representative of Value

The Gaming Control Act defines a "representative of value" as "any instrumentality used by a patron in a game whether or not the instrumentality may be redeemed for cash."[41] With some exceptions, the daily fantasy sports owners pay money to play the simulated games and compete with each other based on their total scores.[42] If an owner wins, the owner gets money back. Thus, daily fantasy sports meet the second requirement that the activity in question must be played "for money, property, checks, credit or any representative of value."

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[38] NRS 463.0193.
[39] NRS 463.0152.
[40] *See* NRS 205.4735 and 360B.410.
[41] NRS 463.01862.
[42] Generally speaking, daily fantasy sports operators all offer pay-to-play games. Some, however, also offer free-to-play games.

2. Daily Fantasy Sports Are Probably Not Banking Games

Nevada Revised Statute 463.01365 defines a "banking game" as "any ***gambling game*** in which players compete against the licensed gaming establishment,[43] rather than against one another."[44] Nevada Revised Statute 463.0152 defines a "gambling game" to include "any ***banking game***."[45] As a result, these definitions are circular and there is ambiguity as to what the statutes mean. It is worth noting that Black's Law Dictionary defines a "banking game" as a "gambling arrangement in which the house (i.e., the bank) accepts bets from all players and then pays out winning bets and takes other bettors' losses."[46]

A logical reconciliation of these statutes (and the traditional definition of "banking game") is to define a banking game as a game in which (1) participants compete against the operator of the game (rather than the other participants) using representatives of value; and (2) calculation of the payout to any given participant is, generally speaking, not based upon the representatives of value used by any other participants.[47] That interpretation is consistent with the Nevada Supreme Court's statement that craps, roulette, and black jack are examples of banking games.[48]

Generally speaking, daily fantasy sports operators do not directly wager against the owners. Instead, the owners wager against each other by placing a bet and competing for the highest scores, with the operator paying out to the highest scorers. If that is true, in those circumstances, daily fantasy sports do not constitute banking games as the payouts to each owner are directly related to the payouts to other owners based upon other owners' simulated teams' performances. That being said, if a particular operator were to allow owners to wager directly against the operator, then that particular simulated game would be a banking game.

3. Daily Fantasy Sports Are Percentage Games

The third type of gambling game included in NRS 463.0152's definition is a percentage game, which has two elements. First, it must be a game "where patrons wager against each

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[43] Although this statute could arguably be read to exclude from its definition any games offered by a non-licensee, that interpretation would lead to an absurd result. The Nevada Legislature could not possibly have intended to only restrict the type of games offered by licensees, leaving the rest of the public free to offer banking games. Additionally, given that the term "banking game" appears twice in the definitions of NRS 463, and only once has this limiting language, there is additional reason to reject that interpretation.

[44] (Emphasis added.)

[45] (Emphasis added.)

[46] BANKING GAME, Black's Law Dictionary (10th ed. 2014).

[47] We can imagine situations in which various banking games might have some sort of cumulative payout. For example, an establishment might offer blackjack but (directly or indirectly) take some percentage of each hand played and place it into a cumulative payout pool that is awarded to one or more participants based upon the occurrence of some event. That tying of some wagers with the operator to wagers with other players would not remove the game from what is contemplated by the definition of "banking game."

[48] *Hughes Props., Inc. v. State*, 100 Nev. 295, 297, 680 P.2d 970, 971 (1984).

other."[49] Second, "the house takes a percentage of each wager as a 'rake-off.'"[50] Daily fantasy sports meet both these elements and, as a result, constitute gambling games.

a. Patrons Wager Against Each Other

The Gaming Control Act defines a "wager" as "a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain."[51] As was explained in Section III.A.1.a above, because the daily fantasy sports owners pay money to play the simulated games and receive money based upon which of them has the highest total scores, the owners risk money on an occurrence for which the outcome is uncertain. As a result, wagers are present and daily fantasy sports meet the requirement that "wagers" be present.

b. The House Takes a Percentage of Each Wager as a "Rake-off"

Although the specifics of how each rake is calculated differs and the rake may be a flat fee (and, as a result, the actual percentage taken in any given simulated game would vary depending upon the number of owners) the daily fantasy sports operators all make their profit by directly or indirectly taking some percentage of the wagers in each simulated game.

This conclusion is also consistent with how certain daily fantasy sports operators describe themselves. For example, in the online discussion described above, the DraftKings CEO explains that "In our case, you win the total wager amount of all the people who had teams in that contest. If there were 10 people and each put in $10 dollars, you'd win $100 (***minus 10% which goes to us***)."[52]

4. Daily Fantasy Sports Have Not Been Approved by the Commission

As the Nevada Gaming Commission has not approved daily fantasy sports, analysis of these types of gambling games is unnecessary. Daily fantasy sports are not games or devices approved by the Nevada Gaming Commission.

C. Some Daily Fantasy Sports Could Be Considered Lotteries Depending on How a Court Resolves the Question of Whose Skill Is at Issue and the Amount of Skill Involved in the Particular Simulated Game at Issue

If, for some reason, daily fantasy sports are not otherwise determined to be gambling games or sports pools, they could constitute lotteries, which—with limited charitable exceptions—are prohibited by Article IV, Section 24 of the Nevada Constitution. A lottery is a scheme for the disposal of property ***by chance***, among persons who have paid consideration, for the chance of obtaining all or a portion of said property.[53] Essentially, a lottery involves the common law elements of gambling: (1) prize; (2) chance; and (3) consideration. Because all of

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[49] *Id.* ("Percentage games are poker, panguingui and similar games where patrons wager against each other and the house takes a percentage of each wager as a 'rake-off.'").

[50] *Id.*

[51] NRS 463.01962.

[52] *See* https://www.reddit.com/r/IAmA/comments/x5zrn/we_quit_our_jobs_to_pursue_a_dream_of_starting_a/ (emphasis added).

[53] NRS 462.105.

the daily fantasy sports at issue involve consideration to play and a prize, the sole issue is whether a particular simulated game is determined predominantly by skill or by chance.[54]

As a preliminary matter, there may not need to be a determination of skill. As skill is generally understood when analyzing a lottery, the skill at issue is the skill of the individuals determining the actual outcome of the event. With daily fantasy sports, although the owners select a lineup for their simulated team, the owners have no ability to control how many points their simulated teams receive from an actual player's performance. The actual players in the actual games control their own performance. As a result, after an owner places a bet and sets a final lineup, the owner simply waits to see what happens based upon the performance of the actual players involved. Given that the owners' skills do not determine the outcome of the simulated games, there may be no skill involved as that term is traditionally understood in the context of lotteries. If that is the case, then daily fantasy sports constitute lotteries and are prohibited in Nevada.

If a court rejects that interpretation and decides to analyze the skill of the owners in picking their lineups, then an analysis of whether a particular simulated game is determined predominantly by skill or chance is required. There are some daily fantasy sports in which the element of chance clearly predominates. These include simulated games in which the owners are assigned a random slate of players for their virtual teams. As there is no skill involved in these games, they would be considered unlawful lotteries. By contrast, the vast majority of daily fantasy sports require some level of skill on the part of the owners. Because the level of skill involved is a question of fact, each individual simulated game must be examined by a finder of fact, who will determine this issue on a case-by-case basis.

CONCLUSION

Upon extensive review of pay-to-play daily fantasy sports, we conclude that they constitute sports pools under NRS 463.0193 and gambling games under NRS 463.0152. Daily fantasy sports may also constitute illegal lotteries under NRS 462.105(1) depending on the legal question of whose skill is being assessed and the factual question of whether skill or chance is dominant. If the skill being assessed is that of the actual players rather than that of the fantasy sports team owners, then daily fantasy sports constitute illegal lotteries. If the skill being assessed is that of the owners, then there is a factual question as to whether the skill in selecting lineups predominates over chance.

Throughout the foregoing analysis, the holdings and dicta of the *Gibson* and *GNLV* cases are distinguished from the facts, law, and context of the current matter. It is particularly noteworthy that both of these gaming cases were decided before the definition of "wager" was codified in NRS 463.01962. *Gibson*, in particular, was decided in 1961, at the most nascent stage of the Nevada Gaming Control Act and before the passage of the statutes at issue. As a result, the *Gibson* court had to rely upon traditional common law principles of gambling rather than our current statutory and regulatory framework. Consequently, the *Gibson* decision must be considered not against the backdrop of 2015, but within the historical milieu of 1961.

In summary, pay-to-play daily fantasy sports constitute sports pools and gambling games under Nevada law. They may also constitute lotteries, depending on the test applied by the

[54] *Gibson*, 77 Nev. at 30, 359 P.2d at 87.

Nevada Supreme Court. As a result, daily fantasy sports cannot be offered in Nevada without licensure.

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 19, 2016

The Honorable Myra Crownover
Chair, Committee on Public Health
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78711-2910

Opinion No. KP-0057

Re: The legality of fantasy sports leagues under Texas law (RQ-0071-KP)

Dear Representative Crownover:

You ask for an opinion on two questions involving fantasy sports leagues.[1] Specifically, you ask whether

1. [d]aily fantasy sports leagues such as DraftKings.com and FanDuel.com are permissible under Texas law, and

2. [whether i]t is legal to participate in fantasy sports leagues where the house does not take a "rake" and the participants only wager amongst themselves.

Request Letter at 1.

I. Factual Background

To begin, a brief description of what we understand you to mean by "fantasy sports leagues" is necessary.[2] Fantasy sports leagues allow individuals to simulate being a sports team owner or manager. Generally, an individual assembles a team, or lineup, often under a salary limit or budget, comprising actual players from the various teams in the particular sports league, i.e., National Football League, National Basketball League, or National Hockey League. Points are

[1]*See* Letter from Honorable Myra Crownover, Chair, House Comm. on Pub. Health, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (received Nov. 12, 2015), https://www.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs ("Request Letter").

[2]The forthcoming description of fantasy sports play is compiled generally from the October 16, 2015, Memorandum from the Nevada Attorney General's Office, to which you refer, concerning the legality of daily fantasy sports. *See generally* Memorandum from J. Brin Gibson, Bureau Chief of Gaming & Gov't Affairs & Ketan D. Bhirud, Head of Complex Litig., Nev. Att'y Gen., to A.G. Burnett, Chairman Nev. Gaming Control Bd. & Nev. Gaming Control Bd. Members Terry Johnson & Shawn Reid (Oct. 16, 2015), http://gaming.nv.gov/modules/showdocument.aspx?documentid=10487 ("Nev. Att'y Gen. Memo").

garnered for the individual's "team" based on the actual game performance of the selected players, and scoring is based on the selected player's performance in the game where actual performance statistics or measures are converted into fantasy points. Each participant "owner" competes against other owners in the fantasy league. In a traditional fantasy sports league, play takes place over the course of an entire sports season, tracking the performance of selected players for the duration of the season. In contrast, in daily fantasy sports leagues, play tracks players' performances in single games on a weekly basis. With respect to both types of fantasy games, once a participant selects his or her players as the team or "lineup," they have no control over the players' performance in the actual game or the outcome of the actual game. The participant waits for the outcome, and his or her point levels are determined by the performance of the players on game day. Individuals pay a fee to participate in a league, which fees fund the pot of money used to pay out to the participants as their earned points direct. In play on the Internet sites for DraftKings and FanDuel, a portion (ranging from 6% to 14%) of the fees collected are not paid out to the participants but are retained by the gaming site. The "commissioner" running a traditional fantasy sports league may or may not retain a portion of participants' entry fees.

Turning to the law, article III, section 47(a) of the Texas Constitution provides, "[t]he Legislature shall pass laws prohibiting lotteries and gift enterprises in this State," subject to certain exceptions.[3] In accordance with article III, section 47(a), the Legislature has prohibited a variety of gambling activities through chapter 47 of the Penal Code.[4] In Texas, a person commits a criminal offense if the person "makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest."[5] The answer to your first question turns on whether participants make a bet. Under chapter 47, a "bet" means "an agreement to win or lose something of value solely or partially by chance."[6] And a bet specifically excludes "an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest[.]"[7] Lastly, it is a defense to prosecution if, among other things, "no person received any economic benefit other than personal winnings,"[8] which cannot be true if the house takes a "rake."

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[3]TEX. CONST. art. III, § 47(a); *see City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 701 (Tex. 1936) (articulating as elements necessary to constitute a lottery (1) the offering of a prize, (2) by chance, and (3) the giving of consideration for an opportunity to win the prize).

[4]*See* TEX. PENAL CODE §§ 47.01–.10; *see also Owens v. State*, 19 S.W.3d 480, 483 (Tex. App.—Amarillo 2000, no pet.) (recognizing the Legislature's adoption of chapter 47 pursuant to article III, section 47).

[5]TEX. PENAL CODE § 47.02(a)(1).

[6]*Id.* § 47.01(1).

[7]*Id.* § 47.01(1)(B).

[8]*Id.* § 47.02(b)(2).

II. Standard of Review

These questions require us to examine competing statutory provisions. The courts have developed time-honored canons for reconciling tension within a statute. According to the United States Supreme Court,

> canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.[9]

This cardinal canon is best implemented by examining the plain contextual meaning of a statute—not by improperly removing a snippet from the statutory context.[10] A court "must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous."[11]

In the attorney general opinion process, we cannot resolve factual issues.[12] But we can assume facts if requested, as you have here.[13]

III. Analysis

A. Paid Daily Fantasy Sports

Your first question is whether paid daily fantasy sports leagues constitute illegal gambling. Answering your question requires determining whether paid daily fantasy leagues constitute betting on the performance of a participant in a game (thus constituting illegal gambling) or instead are, in and of themselves, bona fide contests for the determination of skill (thus constituting no bet and no illegal gambling). Paid daily fantasy league participants are wagering on "the performance of a participant in a game or contest."[14] If that act constitutes a bet under the statute, then the

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[9]*Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citations omitted).

[10]*See Cascos v. Tarrant Cty. Democratic Party*, No. 14-0470, 2015 WL 6558390, at *5 (Tex. Oct. 30, 2015) (reversing a court of appeals when its opinion "improperly takes a snippet of language out of its statutory context"); *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d 686, 701 (Tex. 2015) ("Proper construction requires reading the statute as a whole rather than interpreting provisions in isolation.").

[11]*See Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008).

[12]Tex. Att'y Gen. Op. No. KP-0046 (2015) at 4 (noting that attorney general opinions do not resolve disputed fact questions).

[13]*See* Request Letter 1 ("Please assume the following facts, as more fully explained in an October 16, 2015 memo from the Nevada attorney general's office to the Nevada Gaming Control Board.").

[14]TEX. PENAL CODE § 47.02(a)(1).

activity is illegal gambling. Participants in a daily fantasy sports league pay a fee to participate,[15] only a portion of which is included in the pot of funds that are paid out to the winning "owners." By proffering this fee, players agree to win or lose something of value—a portion of the pot.[16] The dispositive question then is whether the win or loss is determined solely or partially by chance. Proponents of daily fantasy sports games argue that skill is required to predict which players will have the best performance for their position in any particular game.[17] This may well be true. However, Texas law does not require that skill predominate. Instead, chapter 47 requires only a partial chance for there to be a bet.[18] Texas courts have confirmed this plain language in the statute.[19] And this office has previously concluded that "the plain language of section 47.01(1) . . . renders irrelevant the matter of whether poker is predominantly a game of chance or skill. . . . If an element of chance is involved in a particular game, it is embraced within the definition of 'bet.'"[20]

It is beyond reasonable dispute that daily fantasy leagues involve an element of chance regarding how a selected player will perform on game day. The participant's skill in selecting a particular player for his team has no impact on the performance of the player or the outcome of the game. In any given week:

- a selected player may become injured or be ejected and not play in all or a portion of the game—such as an injury to a third-string quarterback causing a team to rotate

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[15]We understand that some daily fantasy sports contests charge no fee to participate and pay nothing to the winners. Brief from James Ho, Gibson Dunn, to Honorable Ken Paxton at 2, 8, 9 (Dec. 21, 2015) ("GibsonDunn Brief") (on file with the Op. Comm.). Participation in such contests involves no consideration and no bet, and as a result cannot constitute illegal gambling in Texas. *See City of Wink*, 100 S.W.2d at 701.

[16]TEX. PENAL CODE § 47.01(9) (defining a "thing of value" to generally mean "any benefit").

[17]*See* GibsonDunn Brief at 18–25; Brief from Reid Wittliff, ZwillGen, to Honorable Ken Paxton at 6–7 (Dec. 18, 2015) ("ZwillGen Brief") (on file with the Op. Comm.).

[18]*See* TEX. PENAL CODE § 47.01(1) (a "bet" means "an agreement to win or lose something of value solely or partially by chance").

[19]*See Odle v. State*, 139 S.W.2d 595, 597 (Tex. Crim. App. 1940) ("The legal meaning of the term 'bet' is the mutual agreement and tender of a gift of something valuable, which is to belong to one of the contending parties, according to the result of the trial of chance or skill, or both combined." (quoting *Melton v. State*, 124 S.W. 910, 911 (Tex. Crim. App. 1910), *Mayo v. State*, 82 S.W. 515, 516 (Tex. Crim. App. 1904), and Words and Phrases, Second Series, Vol. 1, p. 433); *State v. Gambling Device*, 859 S.W.2d 519, 523 (Tex. App.—Houston [1st Dist.] 1993, writ denied) ("[I]t is the incorporation of chance that is the essential element of a gambling device, not the incorporation of a particular proportion of chance and skill.").

[20]Tex. Att'y Gen. Op. No. GA-0335 (2005) at 3–4.

three different players at quarterback in one half[21] or a batter charging the mound after getting hit by a pitch and getting corrected and then ejected;[22]

- a selected player may perform well or perform poorly against the opponent that week, perhaps due to weather conditions—such as a defensive tackle diving on a football after a blocked field goal attempt, only to allow the other team to recover the ball and score the game-winning touchdown;[23]

- a selected player's performance may be impacted by the state of the game equipment (say, the underinflation of a football or the presence of cork inside a baseball bat)[24] or facilities (such as the air conditioning system in a basketball arena failing, causing the star player for a team aptly named "Heat" to suffer temperature induced legs cramps and be carried off the court);[25] and

- a selected player's performance may be impacted by a call of refereeing officials—such as a catch that all individuals not wearing stripes believe to constitute a touchdown being ruled an incompletion with instant replay.[26]

The list goes on. All of these random circumstances, especially if they occur after the participants' selections are locked in, amount to chance and do not involve any skill on the part of the participant. Chance happens, especially on game day. "That's why they play the game."[27] Based

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[21]John Werner, *Everybody hurts: Another QB injured, Bears stumble in home finale, 23-17*, WACO TRIB., (Dec. 6, 2015), http://www.wacotrib.com/sports/baylor/football/everybody-hurts-another-qb-injured-bears-stumble-in-home-finale/article_4e581922-a55e-5289-a7c7-dfa43ca15a5a.html.

[22]*See* Thomas Neumann, *Nolan Ryan-Robin Ventura fight anniversary—13 things you should know*, ESPN.com, (Aug. 4, 2015), http://espn.go.com/mlb/story/_/id/13375928/nolan-ryan-robin-ventura-fight-anniversary-13-things-know.

[23]Daniel Hajek, *Cowboys' Leon Lett On 'One Of The Worst Days Of My NFL Career,'* NAT'L PUB. RADIO, (Nov. 27, 2015), http://www.npr.org/2015/11/27/457565031/cowboys-leon-lett-on-one-of-the-worst-days-of-my-nfl-career.

[24]Ian Rapoport, *More details on the investigation of Patriots' deflated footballs*, NFL.com, (Feb. 1, 2015), http://www.nfl.com/news/story/0ap3000000466783/article/more-details-on-the-investigation-of-patriots-deflated-footballs; Rick Weinberg, *Sammy Sosa gets caught with corked bat*, ESPN.com, (Aug. 4, 2004), http://www.espn.go.com/espn/espn25/story?page=moments/33.

[25]Royce Young, *Spurs: AC back up and running*, ESPN.com, (June 6, 2014), http://www.espn.go.com/nba/playoffs/2014/story/_/id/11042810/san-antonio-spurs-say-air-conditioning-their-arena-repaired.

[26]Brandon George, *Was it a catch? Controversial Dez Bryant play reversed*, DALLAS MORNING NEWS, (Jan. 11, 2015), http://www.sportsday.dallasnews.com/dallas-cowboys/cowboysheadlines/2015/01/11/was-it-a-catch-controversial-dez-bryant-play-reversed.

[27]Bud Montet, *Random Shots*, MORNING ADVOC., Dec. 30, 1965, at 2C (attributing quote to University of Kentucky basketball coach Adolph Rupp), *see* THE BIG APPLE, *That's why they play the games* (sports adage), http://www.barrypopik.com/index.php/new_york_city/entry/thats_why_they_play_the_games.

on the facts you ask us to assume, the argument that skill so predominates that chance is minimal is nonetheless an admission that chance is an element and partial chance is involved.[28] Accordingly, odds are favorable that a court would conclude that participation in daily fantasy sports leagues is illegal gambling under section 47.02 of the Penal Code.[29]

Two providers of daily fantasy sports leagues nonetheless contend that participation in such leagues is not gambling because the statutory exception to the definition of "bet" excludes "an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill[.]"[30] Specifically, they contend the element of skill so predominates in daily fantasy sports as to render chance immaterial and that the fantasy league participants are the actual contestants. While Texas courts have yet to address the actual-contestant exclusion from the definition of "bet," this office addressed that matter in 1994. The question presented involved participants paying an entry fee for a chance to win prizes in a contest to forecast the outcome of approximately 150 sporting events, which required "using the skills necessary to analyze relevant data, including, but not limited to, point differentials as published in newspapers of general circulation, weather conditions, injuries or other factors."[31] We noted that the Practice Commentary to the statute indicated the actual-contestant exclusion "is intended to exclude only awards and compensation earned by direct participation in the contest—the pole-vaulter's cup, the pro football player's salary—not the receipt of a wager made on its outcome."[32] We concluded that, although the "exclusion may embrace athletes actually competing in the sporting events you refer to, it does not embrace those who pay entry fees for a chance to win a prize from forecasting the outcome of the events."[33] Moreover, the other types of contests in the actual-contestant exclusion (speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or

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[28]The attorneys general in Nevada and New York have reached the conclusion that there is sufficient chance to violate the "material chance" standard in their state laws. *See* Nev. Att'y Gen. Memo at 9, 15–16; Letter from Kathleen McGee, Chief, New York Attorney General's Internet Bureau, to Jason Robins, CEO, DraftKings, Inc., (Nov. 10, 2015) at 1, http://ag.ny.gov/pdfs/Final_NYAG_DraftKings_Letter_11_10_2015.pdf ("DraftKings' customers are clearly placing bets on events outside of their control or influence, specifically on the real-game performance of professional athletes. Further, each DraftKings wager represents a wager on a 'contest of chance' where winning or losing depends on numerous elements of chance to a 'material degree.'"). *See also New York v. DraftKings, Inc.*, No. 453054-2015, at 7, 10 (N.Y. Sup. Ct. Dec. 11, 2015), *New York v. FanDuel Inc.*, No. 453056-2015, at 7, 10 (N.Y. Sup. Ct. Dec. 11, 2015) (orders determining that the payment of an entry fee to participate in daily fantasy sports is risking a thing of value and, under New York statutes, constitutes illegal gambling and granting preliminary injunction and temporary restraining order against defendant in each action).

[29]Likewise, entities that promote daily fantasy sports league gambling could possibly violate section 47.03 of the Penal Code by operating a gambling place or becoming a custodian of a bet. *See* TEX. PENAL CODE § 47.03(a).

[30]TEX. PENAL CODE § 47.01(1)(B). *See* GibsonDunn Brief at 17; ZwillGen Brief at 4.

[31]Tex. Att'y Gen. Op. No. LO-94-051, at 1.

[32]*Id.* at 2.

[33]*Id.*

aircraft) inform the nature of what the Legislature means with the term "skill."[34] Following this office's 1994 opinion, the Illinois Attorney General recently concluded that Illinois's similar statutory actual-contestant exclusion does not apply to participants of daily fantasy sports leagues.[35]

Subsection 47.01(1)(B), and our interpretation of it, remains unchanged. For example, if a person plays in a golf tournament for an opportunity to win a prize, he or she is within the actual-contestant exclusion to the definition of betting. If instead the person does not play in that tournament but wagers on the performance of an actual contestant, he or she is gambling under Texas law. To read the actual-contestant exception as some suggest would have that exception swallow the rule.[36]

B. Season-Long Fantasy Sports

The same framework applies to traditional fantasy sports leagues, but the outcome may differ depending on whether the house takes a rake. Payment of a fee to participate in the league constitutes an agreement to win or lose something of value, and the outcome depends at least partially on chance, thus involving a bet. However, traditional fantasy sports leagues often differ from daily fantasy sports leagues in that any participation fee is not retained by the "commissioner" of the traditional fantasy sports league and is instead paid out wholly to the participants. And section 47.02 contains a defense to prosecution when "(1) the actor engaged in gambling in a private place; (2) no person received any economic benefit other than personal winnings; and (3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants."[37] Thus, to the extent play in a traditional fantasy sports league satisfies the above three elements, the participants in such league may avail themselves of the defense to prosecution.

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[34]*See Ross v. St. Luke's Episcopal Hosp.*, 462 S.W.3d 496, 504 (Tex. 2015) (applying doctrine of *ejusdem generis* to hold that the a broad term in a list was constrained by the meaning of the remaining, narrower terms).

[35]*See* Ill. Att'y Gen. Op. No. 15-006 (Dec. 23, 2015) at 10–13 (Letter from Honorable Lisa Madigan, Ill. Att'y Gen. to Honorable Elgie R. Sims, Jr. Ill. State Rep., Dist. 34, and Honorable Scott R. Drury, Ill. State Rep., Dist. 58).

[36]*See Long v. Castle Tex. Prod. Ltd. P'ship*, 426 S.W.3d 73, 81 (Tex. 2014) ("[C]ourts are to avoid interpreting a statute in such a way that renders provisions meaningless." (quotation marks omitted) (alteration in original)). One paid daily fantasy sports operator also contends that the payment of entry fees to participate in fantasy leagues are not bets. *See* ZwillGen Brief at 4. The New York court rejected this argument, holding that the entry fees were "something of value" under New York law and thus constituted a bet. *New York v. DraftKings, Inc.*, No. 453054-2015, at 7 (N.Y. Sup. Ct. Dec. 11, 2015), *New York v. FanDuel Inc.*, No. 453056-2015, at 7 (N.Y. Sup. Ct. Dec. 11, 2015). We agree with the New York court that the labelling of the consideration as an entry fee does not transform its character as consideration for the opportunity to win a prize.

[37]TEX. PENAL CODE § 47.02(b); *see* Tex. Att'y Gen. Op. No. GA-0611 (2008) at 5 (acknowledging that the term "and" is usually used in a conjunctive sense).

In present form, which has remained unchanged for purposes of this analysis since its codification in 1973,[38] the Legislature has seen fit to prohibit betting on the performance of individuals in games or contests but to not prohibit actual contestants in contests of skill from receiving compensation or prizes.[39] Under this statutory framework, odds are favorable that a court would conclude that participation in paid daily fantasy sports leagues constitutes illegal gambling, but that participation in traditional fantasy sport leagues that occurs in a private place where no person receives any economic benefit other than personal winnings and the risks of winning or losing are the same for all participants does not involve illegal gambling. It is within the province of the Legislature, and not this office or the courts, to weigh the competing policy concerns necessary to alter this framework to legalize paid daily sports fantasy leagues.

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[38]*See* Act of May 24, 1973, 63d Leg., R.S., ch. 399, Sec. 1, § 47.01–.02, 1973 Tex. Gen. Laws 883, 965–66.

[39]TEX. PENAL CODE §§ 47.01(1)(B), .02(a)(1).

SUMMARY

Under section 47.02 of the Penal Code, a person commits an offense if he or she makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest. Because the outcome of games in daily fantasy sports leagues depends partially on chance, an individual's payment of a fee to participate in such activities is a bet. Accordingly, a court would likely determine that participation in daily fantasy sports leagues is illegal gambling under section 47.02 of the Penal Code.

Though participating in a traditional fantasy sports league is also illegal gambling under section 47.02, participants in such leagues may avail themselves of a statutory defense to prosecution under section 47.02(b) of the Penal Code when play is in a private place, no person receives any economic benefit other than personal winnings, and the risks of winning or losing are the same for all participants.

Very truly yours,

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

BRANTLEY STARR
Deputy Attorney General for Legal Counsel

VIRGINIA K. HOELSCHER
Chair, Opinion Committee

CHARLOTTE M. HARPER
Assistant Attorney General, Opinion Committee

STATE OF MISSISSIPPI

JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

January 29, 2016

Allen Godfrey, Executive Director
Mississippi Gaming Commission
Post Office Box 23577
Jackson, Mississippi 39225-3577

Re: Fantasy Sports Wagering in the state of Mississippi

Dear Mr. Godfrey:

Attorney General Jim Hood has received your request for an opinion and has assigned it to me for research and response.

Issues Presented

I write today to request an Opinion of the Mississippi Attorney General with regard to the legality of fantasy sports wagering pursuant to Mississippi state law.

While the play of fantasy sports has an extensive history, it is only with the proliferation of daily fantasy sports wagering that this issue has become of interest to the gaming industry in Mississippi. Fantasy sports (also known less commonly as rotisserie or roto) are games where participants assemble imaginary or virtual teams of real players participating in sporting events. These teams compete based on the statistical performance of those real players in actual games. These games may take place over a variety of different time periods ranging from one day to an entire season.

This agency has received numerous requests for guidance on fantasy sports wagering both from Mississippi licensed gambling establishments and the general public. The Mississippi Gaming Commission is charged with the regulation of licensed gambling and the enforcement of illegal, unlicensed gaming. Currently, daily and season long fantasy sports games are being offered to Mississippians via computers and mobile devices without regulation. Participants may play for free, but the websites offering the games also allow for wagers and the chance to win cash prizes wherein the website takes a percentage of the total prize. This activity has been banned in an increasing number of jurisdictions.

As such, the Commission requests that the Office of the Attorney General address

whether fantasy sports wagering is legal on a licensed gaming floor and/or outside of licensed gaming floors.

Response

Fantasy sports wagering is illegal in the state of Mississippi under current law both on a licensed gaming floor and outside of a licensed gaming floor. Any change to the law would be a matter within the purview of the Legislature.

Applicable Law and Discussion

I. Is Fantasy Sports Wagering Legal on a Licensed Gaming Floor?

Mississippi Code § 97-33-1 makes gambling illegal in the state of Mississippi, but it does not apply to licensed gaming activities. The Mississippi Gaming Control Act, Miss. Code Sections 75-76-1 et. seq., outline licensed gaming in Mississippi. Miss. Code Section 75-76-33(3)(a) states that:

> Notwithstanding any other provision of law, each licensee shall be required to comply with the following regulations:
>
> (a) No wagering shall be allowed on the outcome of any athletic event, nor on any matter to be determined during an athletic event, nor on the outcome of any event, which does not take place on the premises.

In this instance, a fantasy sports wager is controlled by matters that are determined during an athletic event, and by an event which does not take place on the premises. Specifically, the statistical performance of athletes is determined during an athletic event or events. See *Mississippi Gaming Com'n v. Imperial Palace of Mississippi, Inc.* 751 So.2d 1025 (Miss. 1999) (gambling on a horse race which occurred off premises was illegal).

II. Is Fantasy Sports Wagering Legal off of a Licensed Gaming Floor?

The statute that makes gambling illegal is Miss. Code Section 97-33-1, which states that it is a crime if,

> "any person shall encourage, promote or play at any game, play or amusement, other than a fight or fighting match between dogs, for money or other valuable thing, or shall wager or bet, promote or encourage the wagering or betting of any money or other valuable things, upon any game, play, amusement, cockfight, Indian ball play or duel, other than a fight or fighting match between dogs, or upon the result of any election, event or contingency whatever..."

In *Stubbs v. State*, 40 So. 2d 256, 258 (Miss. 1949), the Court examined this statute[1] and found it is a crime when a person has a wager on his play at any game, play or amusement or when a person has a wager upon any game, play, amusement -- in this case, a dice game. When a player places a wager and picks a lineup for a Daily Fantasy Sports contest, each selection is locked-in once the chosen athletes begins their real world competition. In a Season Long Fantasy game, a participant may make any number of changes over the course of a season. In either case, winners are selected based on the tally of points earned by the athletes. This method of play is similar to betting on a horse race or making a parlay bet (which, though not allowed in Mississippi , is defined by Nevada Gaming Regulations as a "wager on the outcome of a series of 3 or more games, matches or similar sports events or on a series of 3 or more contingencies incident to a particular games, matches or similar sports events." *NV GAM REG 22.090*)[2]. It is different from betting on the outcome of a regular football game only in that the player can choose from any number of hypothetical "teams" which the player can possibly pick or create, rather than being limited to picking from the teams available as they actually exist in the NFL. It is argued that the amount of skill is greater than that needed to pick which real sports team will win a particular game, or to win a game of poker, or to pick the best horse in a race. Assuming that is true, it is irrelevant because, as proscribed by Miss. Code Section 97-33-1, the fantasy sports model involves a wager "upon any game, play, amusement ... or upon the result of any ... event or contingency whatever," namely, upon how the selected players perform.

Additionally, as stated in your letter, Daily Fantasy games are currently being offered via computer and/or mobile phone to players in Mississippi. These games require an entry fee and the operator takes a percentage of the total prize. Miss. Code Section 75-76-5(k) defines a gambling game as "any banking or percentage game played with cards, with dice or with any mechanical, electromechanical or electronic device or machine for money, property, checks, credit or any representative of value." Mississippi law doesn't expand upon the definitions of banking or percentage games, but Nevada case law states that "[e]xamples of banking games are craps, roulette and twenty-one, where the casino wagers against the patron. Percentage games are poker, panguingui and similar games where patrons wager against each other and the house takes a percentage of each wager as a "rake-off." *Hughes Properties, Inc. v. State*, 680 P.2d 970, 971 (Nev. 1984). Daily Fantasy games are offered via electronic device, wherein patrons wager against each other and the operator takes a percentage of each wager. Therefore, the game as offered is a gambling game and is illegal pursuant to Miss. Code Section 75-76-55, which prohibits gambling games as defined under Miss. Code Section 75-76-5(k), unless conducted pursuant to a state gaming license.

Pursuant to Section 97–33–29 of the Mississippi Code, "[a]ll laws made or to be made for the suppression of gambling or gaming, are remedial and not penal statutes, and

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[1]Section 2190 of the Mississippi Code of 1942, the predecessor to 97-33-1.

[2]Mississippi's Act is modeled closely on Nevada's.

shall be so construed by the courts." As explained by both the Mississippi Supreme Court and the Fifth Circuit Court of Appeals, this provision clarifies that the state criminal statutes prohibiting gambling are to be construed liberally, as an exception to the normal rule of lenity requiring strict construction of criminal statutes in favor of the accused. In particular, Section 97–33–1 is "to be construed liberally — not liberally in favor of the culprit, but for the suppression of vice." *Trainer v. State*, 930 So.2d 373, 380(Miss. 2006); and *U.S. v. Stewart*, 205 F.3d 840, 843 (5th Cir.2000), citing *Fuller v. State*, 83 Miss. 30, 35 So. 214, 215 (1903).

There is a line of Mississippi cases wherein the court distinguishes between games of skill and games of chance. However, all but one of these cases are applying Section 97-33-7 and its predecessors which forbid the possession of slot machines and other gambling devices, as those are defined by statute. For example, *Mississippi Gaming Commission v. Henson*, 800 So. 2d 110, at 113 (Miss. 2001) applied the latest definition and held:

> The Court recognizes that the definition of slot machines provided in Section 76–75–5(ff) of the Gaming Control Act is broader than that applied by this Court in pre-Gaming-Control Act cases. In *Rouse v. Sisson*, 190 Miss. 276, 282, 199 So. 777, 778 (1941), for example, in order for a device to be subject to the provisions of [Chapter 353, Laws of 1938, the predecessor to] Section 97–33–7, an uncontrolled and uncontrollable chance must have existed. As a result, those devices in which the outcome was determined solely by skill were not prohibited. Under the Gaming Control Act, however, "whether by reason of the skill of the operator or application of the element of chance, or both," amusement devices satisfying the elements of consideration and payoff are deemed illegal gaming devices and seized accordingly. Miss.Code Ann. § 75–76–5(ff) (2000).

None of this analysis specifically addressed whether activity constitutes illegal gambling under 97-33-1. However, even if the outdated, stricter *Rouse v. Sisson* analysis were applied to 97-33-1, "an uncontrolled and uncontrollable chance" exists in that the outcome, regardless of the skill of the fantasy sport participant, is determined by the play of others, i.e, the actual players of the sport. The outcome of the wager in fantasy sports is not, as was the case of the trivia or "IQ machine" in *Rouse*, "under the absolute control of the player from start to finish." As stated generally by our supreme court in a case involving the statute prohibiting lotteries, "gambling consists of a consideration, an element of chance and a reward." *Knight v. State of Mississippi*, 574 So.2d 662, 669 (1990). It is beyond reasonable dispute that daily fantasy leagues involve an element of chance regarding how a selected player will perform on game day. *Accord* TX AG Op. to Crownover (Jan. 19, 2016).

The only case applying a skill/chance analysis to a question other than whether a device was a gambling device was *Wortham v. State*, 59 Miss. 179 (1881), which also did not involve the predecessor to 97-33-1. The statute in question in *Wortham* was found in

Chapter 39 of the 1880 Code, which regulated the sale of liquors (Chapter 77 of the 1880 Code established crimes and misdemeanors, including Section 2844, the predecessor to 97-33-1). In particular, Section 1121 of the Code of 1880 stated, "If any person who sells vinous or spiritous liquors shall permit card playing, dice throwing or other game of chance on his premises..." he would be guilty of a misdemeanor. Notably, the statute did not require that any money be wagered on the games to hold the seller of liquors accountable. The *Wortham* court held that playing billiards was not a game of chance under the statute. It did not address whether betting upon such games would constitute a violation of the predecessor to 97-33-1. Again, this case is inapplicable to whether fantasy sports wagering violates Section 97-33-1.

Our opinion to Ringer of August 19, 1991, stated that participating in foosball and pool tournaments for prizes is not prohibited by 97-33-1, but that betting on such games would be. Similarly, in our opinion to the City of Hernando (MS AG Op.,Stockton, Sept. 25, 2105), we stated that it was not illegal for teams of citizens to compete for prizes donated by local businesses in a scavenger hunt conducted by the city to create awareness of local businesses and organizations. Betting on the outcome of the scavenger hunt presumably would be, though that question was not asked. In contrast, fantasy sports, although in the form of a tournament or contest amongst players to pick the best teams, also involves a wager upon the performance of others. It is this element together with the nature of the game that brings fantasy sports within the prohibition of the statute[3]. In our opinion, the possible existence of an element of skill in picking players in a fantasy sports game (or in picking between real teams when wagering on regular NFL games, or in picking horses in a horse race, etc.) is irrelevant to any charge of gambling on Fantasy Sports under Section 97-33-1 of the Mississippi Code.

If our office may be of further assistance, please advise.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:

Michael Lanford
Deputy Attorney General

[3]Our opinions to Ringer and Stockton are hereby modified to the extent they differ from our opinion herein.

NEWS RELEASE
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Alabama Attorney General
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FOR IMMEDIATE RELEASE

April 5, 2016

ATTORNEY GENERAL DETERMINES PAID DAILY FANTASY SPORTS CONTESTS ARE ILLEGAL GAMBLING

Cease and Desist Letters Sent to DraftKings and FanDuel

(MONTGOMERY)—Alabama Attorney General Luther Strange today announced that he has issued cease and desist letters to DraftKings and FanDuel after reviewing Alabama's gambling statutes and determining that paid daily fantasy sports contests constitute illegal gambling. DraftKings and FanDuel have until May 1, 2016, to cease offering paid daily fantasy sports contests in Alabama.

"As Attorney General, it is my duty to uphold Alabama law, including the laws against illegal gambling," Attorney General Strange said. "Daily fantasy sports operators claim that they operate legally under Alabama law. However, paid daily fantasy sports contests are in fact illegal gambling under Alabama law."

In Alabama, an activity constitutes illegal gambling if a person stakes something of value on a contest of chance, even when skill is involved, in order to win a prize.

In paid daily fantasy sports contests, players create a "fantasy roster" of real-life athletes. Each athlete is awarded points based on his or her performance, and the "owners" of the teams with the highest scoring rosters win cash prizes.

There is, of course, a measure of skill involved in creating a fantasy roster. But in the end, contestants have no control over the performance of the players on their rosters. For example, a player could fall ill before a game, be injured in pre-game warm-ups, or miss a large portion of the game due to injury or equipment failure. All of these factors, and many more, are outside the control of a fantasy sports player. Thus, the results of paid daily fantasy sports contests depend to a large degree on chance. This is the very definition of gambling under Alabama law.

Alabama now joins 11 other states in which paid daily fantasy sports contests have been declared illegal.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Plaintiffs,

-against-

FanDuel, Inc.,

Defendant.
----------X

Index No.

IAS Part_____
Assigned to Justice_____

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

Preliminary Statement

The New York State Constitution has prohibited bookmaking and other forms of sports gambling since 1894. Under New York law, a wager constitutes gambling when it depends on *either* a (1) "future contingent event not under [the bettor's] control or influence" *or* (2) "contest of chance." So-called Daily Fantasy Sports ("DFS") wagers fit squarely in both these definitions, though by meeting just one of the two definitions DFS would be considered gambling. DFS is nothing more than a rebranding of sports betting. It is plainly illegal.

The two dominant DFS operators, FanDuel and DraftKings, offer rapid-fire contests in which players can bet on the performance of a "lineup" of real athletes on a given day, weekend, or week. The contests are streamlined for instant-gratification, letting bettors risk up to $10,600 per wager and enter contests for a chance to win jackpots upwards of $1 million. The DFS operators themselves profit from every bet, taking a "rake" or a "vig" from all wagering on their sites.

Like any sports wager, a DFS wager depends on a "future contingent event" wholly outside the control or influence of any bettor: the real-game performance of athletes. A bettor can try to *guess* how athletes might perform, but no bettor—no matter how shrewd or sophisticated—can *control* or *influence* whether those athletes will succeed. The moment a DFS player submits a wager, he becomes a spectator whose fate is sealed by the real-game performance of athletes. The rules of DFS make this relationship crystal clear. The "final box scores"—a tally of the real-game performance of athletes—determines who wins and who loses a DFS contest. Until this tally is available, no prizes can be awarded for any DFS contest. Until the occurrence of that future contingent event, the winners and losers are *unknown* and *unknowable*.

DFS bets also constitute wagers as a "contest of chance." As New York law has long recognized, gambling often mixes elements of chance and skill. The key question is whether the outcome depends in any "material degree" on an element of chance, "notwithstanding that skill of the contestants may also be a factor." In DFS, chance plays a significant role. A player injury, a slump, a rained out game, even a ball taking a bad hop, can each dictate whether a bet wins or loses. By itself, any single chance occurrence can irrevocably alter the outcome of a DFS contest. Given the frequency and number of chance occurrences, no amount of research, investigation, or judgment can assure in advance that a certain DFS result will occur or how. That the margin between a winning and losing DFS wager is often measured in *fractions* of a point only makes the chance element even more obvious.

Yet FanDuel and DraftKings insist that DFS is not gambling because it involves skill. But this argument fails for two clear reasons. First, this view overlooks the explicit prohibition against wagering on future contingent events, a statutory test that requires no judgment of the relative importance of skill and chance—they are irrelevant to the question. Second, the key factor establishing a game of skill is not the presence of skill, but the absence of a material element of chance. Here, chance plays just as much of a role (if not more) than it does in games like poker and blackjack. A few good players in a poker tournament may rise to the top based on their skill; but the game is still gambling. So is DFS.

The false assertion that DFS is a skill game is particularly galling in light of the unrelenting barrage of advertisements that depict FanDuel and DraftKings as a new form of lottery. With commercials depicting cash falling from the ceiling and oversized novelty checks, the message is clear: anyone can play DFS and anyone can win. "Try it," one FanDuel ad urges. "It takes a few minutes. . . .I've deposited a total of $35 on FanDuel and won over two million!"

"Taking home your share is simple," a DraftKings ad promises, "It's the simplest way of winning life-changing piles of cash."

Denying that DFS is gambling also runs counter to how DFS sites depicted themselves in the past and how they portray themselves behind closed doors. At one point, DraftKings' CEO openly admitted that DFS contests run by DraftKings constitute a "mash[-]up between poker and fantasy sports," that exist in the "gambling space," and make money in a way "identical to a casino." In pitches to investors, FanDuel and DraftKings unabashedly sell themselves as gambling ventures, comparing themselves to online poker and sports wagering.

Meanwhile, the DFS contests are causing the precise harms that New York's gambling laws were designed to prevent. Problem gamblers are increasingly being seen at Gamblers Anonymous meetings and at counselors' offices addicted to DFS. For DraftKings, at least, this should not come as a shock: records show that their customer service representatives have responded to pleas from self-described gambling addicts to close accounts and permanently ban them from the site.

* * *

On November 10, 2015, the New York Office of the Attorney General ("NYAG") sent FanDuel and DraftKings separate letters demanding that each company cease and desist from illegally accepting DFS wagers in New York State. Both companies refused to comply and then filed seemingly coordinated—and procedurally improper—actions with this court.[1]

NYAG thereafter filed separate actions against FanDuel and DraftKings and is seeking preliminary injunctions to restrain FanDuel and DraftKings from continuing to accept illegal

[1] On November 13, 2015, DraftKings filed an action against NYAG through a verified petition, which is annexed to the Affirmation of Justin Wagner ("Wagner Aff.") as Ex. A, and referred to hereafter as "DK Compl." On November 13, 2015, FanDuel filed a related action against NYAG through a complaint, which is annexed as Ex. B to the Wagner Aff. and referred to hereafter as "FD Compl."

wagers from New York, and other relief. This consolidated memorandum of law supports each such action.

STATEMENT OF FACTS

DraftKings and FanDuel (together, the "DFS Operators" or "DFS Sites") offer substantially the same online sports betting contests, which they market as "Daily Fantasy Sports" ("DFS"). In DFS contests,[2] players place bets—styled as "entry fees"—on "lineups" of amateur and professional athletes. The winners of DFS contests are determined based on the real-game performance of the athletes competing in a particular sports league (*e.g.* the National Football League ("NFL")) during a particular period, over a week, a weekend, or even on a particular day. DFS contest winners receive cash awards, while the losers forfeit their bets.

I. The Operation of DFS Contests

Each DFS Operator runs a range of wagering contests, including so-called "Guaranteed Prize Pools" ("GPP"), where players can enter a pool with up to hundreds of thousands of other players, and "Head-to-Head" match-ups where DFS players bet that their lineup will perform better than the athletes picked by another DFS player. *See* Ip FD Aff. ¶25; Ip DK Aff. ¶ 17. These DFS contests, and others, are offered across a range of sports, including football, basketball, baseball, and hockey. Ip FD Aff. ¶10; Ip DK Aff. ¶12. As with illegal sports wagering more broadly, the most popular sport for DFS contests is NFL football.

To compete for cash prizes, DFS players put money at risk. The minimum bets to enter vary based on the contest format and other factors. For example, a DFS player can enter one

[2] Both DFS Operators offer certain "freeroll" or "freeplay" contests, where DFS players can enter for free. The winners of these contests may be granted a prize, which may include cash or a free entry into a cash prize contest. For purposes of this action, DFS contests refer to the games that require DFS players to pay an entry fee for an opportunity to win a cash prize, which constitute the vast majority of their games.

contest on DraftKings for as little as $0.25 and on FanDuel for as little as $1, s*ee* Ip DK Aff. ¶15; *See* Ip FD Aff. ¶ 26, while the minimum wager for other contests on either DFS Site can be as high as $10,600. *Id.* If the DFS player does not win a cash prize, he loses his wager.

In each contest, a DFS player must make his wager, pick a "lineup" from a list of eligible professional or amateur athletes, and then wait to see if the lineup wins a cash prize based on the performance of athletes in competitive sports. For DFS contests involving team sports, a DFS player picks a lineup of athletes who will be playing in real-world games during the contest period (*e.g.*, on a given day). The performance of those athletes in real games is the sole factor determining whether the wager wins or loses.

The DFS Sites require that the lineup observes two basic rules. *First*, the lineup must include athletes who play on at least two separate teams and represent a range of positions. *See* Ip DK Aff. ¶20; *See* Wagner Aff. ¶5 (FanDuel requires players from three separate teams). Second, each DFS Site assigns a fictional "salary" to each real-world athlete. The combined salary of any lineup may not exceed a fictional salary allocation or "cap" that the sites assign in connection with each wager. *See* Ip FD Aff. ¶30; Ip DK Aff. ¶27.

The "salaries" assigned to athletes constitute odds that consider the athletes' past performance and other factors to predict how any athlete could be expected to perform during the contest period. *See e.g.*, Ip DK Aff. ¶31. Like traditional sports handicappers, DFS players will try to predict how particular athletes will perform relative to the odds (*i.e.*, the "salaries"). *See* Ip DK Aff. ¶33. When determining whether a particular athlete constitutes a good bet, tellingly, FanDuel and DraftKings recommend that DFS players consult the odds set by Nevada sports prop bookmakers.[3] *See* Wagner Aff. ¶6.

[3] In sports prop betting, a player can wager on various aspects of professional sports, from the performance of a particular athlete to various intra-game statistics (*e.g.*, the number of points by halftime in a football game). Nor is

Prior to the start of the contest period, each DFS Site "locks" the lineups submitted by the bettors. After lineups lock, the bettor can take no action related to the contest. *See* Ip DK Aff. ¶29; Ip FD Aff. ¶36. The DFS player is merely a spectator, with the success of his wager to be determined by the real-game performance of the athletes. The outcome of the wager is thereafter wholly contingent on the performance of these athletes.

Each DFS Operator establishes its own rules for how an athlete's performance translates into points. In NFL contests offered by each site, for example, a touchdown thrown by a quarterback translates into four points. *See* Ip DK Aff. ¶25; Ip FD Aff. ¶19. Based on research, experience, or simply a hunch, a DFS player might reasonably predict a particular quarterback will throw two touchdowns, only for that quarterback to be injured on the first play. Or throw only one touchdown. Or throw several interceptions instead. Or face an unexpected blizzard. Or vie with any number of other unforeseen and unforeseeable elements of chance. Or perhaps the quarterback completes the touchdowns. The DFS player has no more influence over the hoped-for outcome than he does over the weather.

For a real-life illustration, consider the Monday night NFL game on November 9, 2015. As the game entered its final moments, the Chicago Bears were leading by a tight margin. In a common strategic move, Quarterback Jay Cutler took a knee to run out the clock and assure victory. This play cost the Bears one yard, and reduced Cutler's total fantasy production by *one-tenth* of one point—and reportedly cost one unlucky FanDuel player $20,000; he had apparently picked Cutler and the one-tenth of a point reduction spelled the difference between winning $50,000 in first place and $30,000 in second place. (By contrast, that same one-tenth of a point reduction was a lucky break for the DFS player who took first prize.) *See* Wagner Aff. ¶28.

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sports prop betting the only overlap with a well-established form of sports gambling. The CEO of a rival DFS company referred to the GPP-format of DFS as a "sports betting parlay on steroids." *See* Wagner Aff. Ex. F at p.32.

Indeed, the rules of each DFS Operator contemplate numerous circumstances where points may be reduced or zeroed out through no fault of the athlete. These include where: the real game gets rained out, postponed, suspended, or shortened; the professional or amateur league fails to correct a mistake in official game statistics before the DFS Operator declares a contest winner; or a trade involving the athlete occurs after a contest begins. *See* Ip DK Aff. ¶¶ 22-25; Ip FD Aff. ¶¶ 21-24. Some of these occurrences are relatively common. All of them can materially affect the outcome of a wager and all are subject to chance.

The ultimate outcome of any DFS contest is judged based on the final box scores of actual games played during the relevant contest period. This is set out in the rules of both sites. DraftKings' rules provide that that no prizes will be awarded: "until all of the final box scores have been reported for each contest's games to ensure that the final results are accurate." Wagner Aff. ¶ 7. FanDuel's rules likewise specify that no winners can be announced until "the final box scores are complete." Ip. FD Aff. ¶ 25.

In the words of a spokesperson for FanDuel, the outcome of a DFS player's wager is "contingent on the positive performance of all of their players" in actual games. *See* Wagner Aff. ¶ 9. As DraftKings observed, the success of any DFS wager "depends on the combined performance" of real-world athletes. DK Compl. ¶ 22.

II. The DFS Business Model

FanDuel and DraftKings' current denials about DFS constituting gambling are belied by how the sites depicted themselves in the past and how they portray themselves behind closed doors. FanDuel's DFS contests were designed by a veteran of the legal online betting industry in the United Kingdom, Nigel Eccles. *See* Wagner Aff. ¶ 10. The company admitted to an early investor that its target market is male sports fans who "cannot gamble online legally." *See* Wagner Aff. ¶ 11. An analysis FanDuel prepared for another investor equated the company with

Bwin.Party, one of the world's largest online sports betting companies. *See* Wagner Aff. ¶ 12. That same analysis, in fact, dropped the pretense of calling FanDuel's bets "fees," instead using betting terminology to compare its total "stakes" by quarter to the total "stakes" for Bwin.Party's Sports Betting operation. *Id.*

DraftKings depicts itself to investors in a similar fashion. For example, in one investor presentation, DraftKings pitched itself to a prospective investor by noting the "Global opportunity for online betting," pointing to the massive revenue of the "global online poker market," and making direct comparisons throughout the presentation to poker and sports wagering. *See* Wagner Aff. ¶ 13, at p. 10. The CEO of DraftKings previously spoke openly about DraftKings as a gambling company. He called DFS a "mash[-]up between poker and fantasy sports," suggested that DraftKings operates in the "gambling space," and described its revenue model as "identical to a casino." *See* Wagner Aff. ¶ 14 at Ex. L (p. 2, 16).

The rejection of the gambling label by the DFS sites is particularly hard to square with the overt strategy of recruiting gamblers. For FanDuel, this has meant hiring a former top executive from Full Tilt, the online poker company, and affiliating with gambling industry stalwarts like "Vegas Insider" and BetVega, a sports betting and handicapping website. For DraftKings, this has meant aligning itself closely and negotiating sponsorships with other gambling ventures, like the World Series of Poker and the Belmont Stakes. *See* Wagner Aff. ¶ 15 and ¶ 16. DraftKings has also embedded gambling keywords into the programming code for its website. Some of these keywords include "'fantasy golf betting,'' "weekly fantasy basketball betting," ''weekly fantasy hockey betting," "weekly fantasy football betting," "weekly fantasy college football betting," "weekly fantasy college basketball betting," "Fantasy College Football Betting," "daily fantasy basketball betting," and "Fantasy College Basketball Betting." *See*

Wagner Aff. ¶ 17 at Ex. O (p. 10). This increases the likelihood that search engines, like Google, will send users looking for gambling straight to the DraftKings site.

The attempt to have it both ways extends to the approach of DFS sites with regulators. In the U.S., FanDuel and DraftKings disclaim any links to gambling—where such activities face serious prohibitions. Yet in the United Kingdom, where gambling online is permitted with the appropriate licenses, both companies applied for, and DraftKings received, licenses from the U.K. Gambling Commission. *See* Wagner Aff. ¶ 18.

III. Marketing DFS

In 2015, in a bid for market share, both DFS Operators massively increased their advertising spending. Wagner Aff. ¶ 19. In all of 2014, for example, DraftKings spent just $1 million on broadcast and cable advertising with NBC Universal/Comcast. In the first ten months of 2015, DraftKings spent $21 million, an increase of over 2,000%. *See* Wagner Aff at ¶ 20. Similarly, FanDuel spent just $2.2 million to advertise with NBC Universal/Comcast in all of 2014. In the first ten months of 2015, FanDuel spent $12 million, an increase of 545%. *Id.*

The DFS Operators applied these advertising dollars to promote DFS Sites to ordinary and potential players. In advertisement after advertisement running non-stop on television and online, the DFS Sites portray DFS as anything but a "skill game." Rather, they promote their contests like a lottery—as easy to play and easy to win. Money falls from the ceiling, winners are pictured amid confetti holding novelty checks, and the simplicity of playing is front-and-center.

FanDuel's advertisements commonly showcase testimonials from ostensibly ordinary DFS players (*e.g.*, "Zack from Fairfield, California"), and play up the ease of playing and of winning huge cash prizes:

- "*Try it. It takes a few minutes.* You'll have a blast. . . . I've deposited a total of $35 on FanDuel and won over two million!"

- "My third week of playing I won $15,000 off of a five dollar entry…There's five million bucks on the line in week one Sunday million."
- "I've won over 29 thousand dollars on FanDuel. *Nothing special about me.* The difference is I played and they didn't."
- "He's a personal trainer, and he turned $2 into over $2 million on FanDuel."

DraftKings advertisements are cut from the same cloth:

- "…taking home your share is *simple*: just pick your sport, pick your players, and pick up your cash. That's it. *It's the simplest way of winning life-changing piles of cash.*"
- "They make winning *easier* than milking a two-legged goat . . . Do you want to be a fantasy football hero? Do you want it to be *easy and fun* with a shot to win millions?"
- "The giant check is no myth. . . BECOME A MILLIONAIRE!"

See Ip DK Aff. ¶¶ 4-8; Ip FD Aff. ¶¶ 4-7; Wagner Aff. ¶¶ 21-22.

The reality is that like poker, blackjack, and horseracing, a small percentage of professional gamblers use research, software, and large bankrolls to extract a disproportionate share of DFS jackpots. With poker and DFS, professional players, known as "sharks," profit at the expense of casual players, known as "minnows." The numbers show that the vast majority of players are net losers, losing far more money playing on the sites than they win. DraftKings data show that 89.3% of DFS players had an overall *negative* return on investment across 2013 and 2014. *See* Wagner Aff. ¶39.

IV. DFS Breaks From Traditional Fantasy Sports

The model for DFS diverges from traditional fantasy sports in fundamental respects.

Most significantly, DFS is a business model for gambling—where DFS Sites *directly profit* from the wagering on their platforms. On sites hosting traditional fantasy leagues, most players compete for bragging rights or side wagers, not massive jackpots offered by the sites themselves. Moreover, DFS eschews a competitive draft and any and all strategic aspects associated with a season-long competition, which include making trades with other participants, constantly adjusting lineups, dropping and adding players, and so forth.

Both DraftKings and FanDuel fully appreciate that DFS is radically different than what came before. DraftKings promises "rapid-fire contests" of:

> much shorter duration than the traditional season-long leagues and require no team management after the draft. Salary cap draft format takes just minutes to complete, unlike the hours-long snake drafts in traditional leagues. We offer new contests every day of the season, and our winners are crowned nightly. Payouts happen immediately after the games – no more waiting until the end of the season to collect winnings!

See Wagner Aff. ¶ 26

In describing the departure from traditional fantasy sports, FanDuel exhorts: "The format simplified. The winning amplified. And the money? Let's just say your season-long league won't pay out $75 million a week." *See* Wagner Aff. ¶ 27.

V. The Harms of DFS

While irresponsibly denying their status as gambling companies, the DFS Sites pose precisely the same risks to New York residents that New York's anti-gambling laws were intended to avoid. Experts in gambling addiction and other compulsive behaviors have identified DFS as a serious and growing threat to people at risk for, or already struggling with, gambling-related illnesses.

DFS is an especially powerful draw for young males, who are increasingly seen seeking help for compulsive gambling related to DFS with counselors and appearing at Gamblers

Anonymous meetings. For those struggling with gambling addiction or those who are vulnerable to it, certain structural characteristics make DFS particularly dangerous. As Keith Whyte, the Executive Director of the National Council on Problem Gambling ("NCPG") explains, these structural characteristics—which are generally absent from season-long fantasy leagues—include:

> the ability for players to place large bets; the chance for players to win large payouts; the high speed of play (or, put another way, the relatively short interval between the placing of a bet and the determination of the outcome of the bet); and the perception of skill as a determinant in the outcome of the wager.
>
> Whyte Aff. ¶ 8.[4]

Dr. Jeffrey L. Derevensky, Director of the International Centre for Youth Gambling Problems and High-Risk Behavior at McGill University, notes that, among other things, false or misleading representations of the skill involved in DFS "can lead players to a preoccupation with DFS, chasing of losses, and developing symptoms and behaviors associated with a gambling disorder." Derevensky Aff. ¶ 10.

At least for DraftKings this should come as no surprise: their customer service representatives have fielded pleas from self-described gambling addicts to close accounts and permanently ban them from the site. DraftKings' own records show customer inquiries from DFS players seeking assistance with subjects like "Gambling Addict do not reopen," "Please cancel account. I have a gambling problem," and "Gambling Addiction needing disabled account." *See* Wagner Aff ¶ 23.

[4] As discussed in affidavits submitted by Dr. Jeffrey L. Derevensky, the Director of the International Centre for Youth Gambling Problems and High-Risk Behaviors, and Keith S. Whyte, the Executive Director of the National Council on Problem Gambling, DFS attracts compulsive gamblers and those at risk for gambling addiction. Affidavit of Keith S. Whyte, dated November 12, 2015 ("Whyte Aff."), annexed as Ex. EE to the Wagner Aff., ¶¶ 6-11; Affirmation of Dr. Jeffrey L. Derevensky, dated November 12, 2015 ("Derevensky Aff."), annexed as Ex. FF to the Wagner Aff., ¶¶ 5-9.

VI. Procedural Posture

On October 5, 2015, *The New York Times* published an expose of DFS titled "Scandal Erupts in the Unregulated World of Fantasy Sports." *See* Wagner Aff. ¶ 29. That article described how DFS managed to grow rapidly without regulatory scrutiny—and in spite of observations that "the setup is hardly different from Las Vegas-style gambling that is normally banned in the sports world." The story centered on allegations that a DraftKings' employee may have misused proprietary information to win a FanDuel contest.

The next day, on October 6, 2015, the Office of the New York Attorney General ("NYAG") issued separate letters to FanDuel and DraftKings. Each letter sought documentation and information relating to the integrity of the company's business, observing that its "policies and practices are matters of concern to the public, particularly to the many customers who put money at risk on your site each day."

NYAG engaged in an expedited inquiry, meeting several times with the respective representatives of DraftKings and FanDuel and reviewing the documentation they provided. NYAG also engaged in broader fact-finding, which included seeking information from investors, DFS industry witnesses, and experts in gambling and gambling addiction. *Id.* NYAG made several startling discoveries regarding the approach of the DFS Operators to basic compliance issues. Until recently, for example, both DraftKings and FanDuel *explicitly* encouraged their employees to play DFS games on competitors' platforms—competing against regular customers who had no knowledge of the extent of the DFS employees they were competing against. *See e.g.*, Wagner Aff. ¶ 24 (FanDuel's Daily Fantasy Sports Play Policy instructed employees "[p]laying on other sites helps employees do their jobs better"). FanDuel recognized that this policy would be ill-received, instructing employees to minimize their public presence "so users

are less likely to be suspicious or angry" and avoid becoming "among the top five players by volume" because "top players frequently become targets for accusations." *Id.*

Further, serious questions have arisen regarding whether DraftKings is abiding by anti-gambling laws in jurisdictions where even the company accepts that DFS is wholly illegal. Wagner Aff. ¶ 25. NYAG's investigation uncovered documentation indicating that, in 2014, DraftKings received $484,897 in entry fees from player accounts registered in states where DraftKings purports not to offer DFS for legal reasons (Montana, Arizona, Washington, Louisiana, and Iowa). *See* Wagner Aff. ¶ 34. Indeed, an increasing number of states reviewing the status of DFS under their own state gambling laws, including Nevada, Illinois, Georgia, and Washington State—which has precisely the same definition for gambling as New York—have all declared DFS to be gambling or raised serious questions about its legality. NYAG's most pressing concern, however, was the violation of New York law.

Thus, on Tuesday, November 10, 2015, NYAG furnished separate letters to FanDuel and DraftKings relaying its conclusion that DFS constitutes illegal gambling for purposes of New York law. Each letter demanded that the companies cease and desist from illegally accepting DFS wagers in New York State. In relevant part, the letter stated:

> Our review concludes that [the DFS Site's] operations constitute illegal gambling under New York law, according to which, "a person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence." [the DFS Site's] customers are clearly placing bets on events outside of their control or influence, specifically on the real-game performance of professional athletes. Further, each [DFS Site] wager represents a wager on a "contest of chance" where winning or losing depends on numerous elements of chance to a "material degree."

The letters also provided formal pre-litigation notice pursuant to New York State General Business Law ("GBL") §§ 349 and 350 and Executive Law § 63(12). Notwithstanding the explicit demand to stop accepting wagers from New York State, the companies

continued. On Friday, November 13, 2015, each company filed seemingly coordinated—and procedurally improper—actions with this court.

This action proceeds as a result.

ARGUMENT

THE COURT SHOULD ENJOIN DEFENDANTS DRAFTKINGS AND FANDUEL FROM CONTINUING TO OPERATE ILLEGAL GAMBLING BUSINESSES

I. The Attorney General has Authority to Seek and the Court Has Authority to Grant an Injunction Against DraftKings' and FanDuel's Illegal Gambling Businesses.

The Attorney General seeks a preliminary injunction prohibiting DraftKings and FanDuel from continuing to operate an illegal sports gambling business in New York, in defiance of the state constitution, the penal law, and other statutes.

Executive Law § 63(12) empowers the Attorney General to petition the court for injunctive relief on behalf of the people of the state of New York whenever a company engages in "repeated . . . or persistent fraud or illegality in the carrying on, conducting or transaction of business." Incident to the authority to issue permanent injunctive relief, this Court has broad equitable powers to grant ancillary relief necessary to accomplish complete justice. *See, e.g., People of the State of New York v. Apple Health and Sports Clubs, Ltd.*, 80 N.Y.2d 803 (1992). In the past, the Attorney General has successfully brought actions pursuant to Executive Law § 63(12) to enjoin the very conduct at issue in this proceeding: the operation of an illegal online gambling business. *See People v. World Interactive Gaming Corp.*, 185 Misc. 2d 852, 856 (Sup. Ct. N.Y. County 1999).

Business Corporation Law ("BCL") § 1303 similarly authorizes the Attorney General to seek an injunction against a foreign corporation that operates an illegal and fraudulent business in New York State. In particular, the statute allows the Attorney General to seek an injunction

against a foreign corporation like FanDuel or DraftKings based on the same misconduct that would give rise to the dissolution of a New York corporation. BCL § 1303; *see also* BCL § 1101. Such injunctive relief is warranted to restrain corporations that engage in illegality or persistent fraud. *See* Business Corporation Law § 1101; *See also, e.g., People by Abrams v. Oliver School*, 206 A.D.2d 143, 619 N.Y.S.2d 911 (4th Dept 1994); *State v. Saksniit*, 332 N.Y.S.2d 343, 350 (Sup. Ct. N.Y. County 1972).

General Business Law ("GBL") § 349(b) separately authorizes the Attorney General to bring an action for injunctive and other relief on behalf of the people of the state of New York when any person engages in deceptive practices in the state and provides that "in such action preliminary relief may be granted under article sixty-three of the civil practice law and rules." Relatedly, the Attorney General may seek injunctive and other relief in actions pursuant to GBL § 350, which prohibits "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state." *See People by Vacco v. Lipsitz*, 174 Misc. 2d 571 (Sup. Ct. N.Y. County 1997).

II. NYAG Meets the Standard for Granting a Preliminary Injunction

The traditional three-prong test for issuing a preliminary injunction consists of the following: (i) a likelihood of success on the merits, (ii) irreparable injury, and (iii) a balance of the equities in plaintiffs' favor. *Albini v. Solork Associastes*, 37 A.D.2d 835 (2d Dept. 1971). Unlike private litigants, however, the Attorney General need not prove irreparable injury because injury is presumed in a statutory enforcement action under Executive Law § 63(12) and GBL § 349. *People v. Apple Health & Sports Club, Ltd. Inc.*, 174 A.D.2d 438, 439 (1st Dept 1991), *aff'd*, 80 N.Y.2d 803 (1992); *People v. P.U. Travel, Inc.* 2003 N.Y. Misc. LEXIS 2010, at *7-8, (Sup. Ct. N.Y. County 2003).

As set forth below, plaintiff meets each of the traditional prongs for preliminary relief regardless.

A. NYAG Will Succeed on the Merits

In connection with this proceeding, NYAG has demonstrated a likelihood of success on the merits under Executive Law § 63(12), BCL § 1303, and GBL §§ 349 and 350. As set forth in the complaints and affidavits, including the evidence annexed to the Wagner Affirmation and Ip Affidavits, the Defendants have operated, and continue to operate, illegal sports gambling businesses in violation of the New York State Constitution and other laws.

The complaints and supporting evidence also demonstrate that the defendants have violated New York consumer protection laws by falsely advertising and repeatedly misrepresenting their businesses to New York residents.

Defendants' businesses are plainly illegal for the following reasons:

1. DraftKings and FanDuel Have Repeatedly and Persistently Violated the Constitution and the Penal Law, Thereby Violating Executive Law § 63(12)

A claim under Executive Law § 63(12) is brought either for repeated or persistent fraud or repeated or persistent illegality. Here, the State brings its claims under the prong of repeated illegality. Courts have repeatedly found that a violation of state, federal, or local law constitutes illegality within the meaning of Executive Law § 63(12). *State v. Princess Prestige,* 42 N.Y.2d 104, 107 (1977); *People v. Empyre Inground Pools, Inc.*, 227 A.D.2d 731, 733 (3d Dept 1996); *Lefkowitz v. E.F.G. Baby Products*, 40 A.D.2d 364 (3d Dept 1973). This includes violations of the penal code. *See State v. World Interactive Gaming Corp.,* 185 Misc. 2d 852 (Sup. Ct. N.Y. Cnty. 1999) (promoting gambling in violation of New York Penal Law Article 225 and federal Wire and Travel Acts, 18 U.S.C. §§ 1084. 1952, 1953); *Freedom Discount Corp. v. Korn,* 28

A.D.2d 517 (1st Dept 1967) (violation of Penal Law §§ 1370 and 1371); *Wiener v. Abrams*, 119 Misc. 2d 970 (Sup. Ct. Kings County 1983) (violation of Penal Law § 180.55); *State by Lefkowitz v. Colo. State College of Church of Inner Power, Inc.*, 76 Misc. 2d 50 (violation of Penal Law § 950); *State v. ITM*, 52 Misc. 2d 39 (Sup. Ct. N.Y. Cnty. 1966) (violation of Penal Law §§ 1370 and 1371).

The illegality must be repeated or persistent, each of which is defined in the statute. "Repeated" is defined as "repetition of any separate and distinct … illegal act or conduct which affects more than one person." Exec. Law § 63(12); *People v. Wilco Energy Corp*, 284 A.D.2d 469 (2d Dept 2001); *Empyre*, 227 A.D.2d at 733. "Persistent" is defined as "continuance or carrying on of any … illegal act of conduct." Exec. Law § 63(12). Courts have found that under these definitions, the Attorney General is not required to establish that a large percentage of the person's or business's transactions was illegal. *Princess Prestige*, 42 N.Y.2d at 107 (finding 16 out of 3,600 total transactions a sufficient basis to proceed under Executive Law § 63(12)); *People v. Credit Solutions of Am.*, 2012 N.Y. Misc. LEXIS 2090, at *5 (Sup. Ct. N.Y. County 2012) (finding that to show repeated illegal conduct "a large percentage of violations is not necessary"). Nor is the existence of willing consumers a defense to otherwise fraudulent and illegal practices. *State v. Midland Equities of N.Y., Inc.*, 117 Misc. 2d 203, 207 (Sup. Ct. N.Y. County 1982); *see also FTC v. Crescent Publ'g Grp. Inc.*, 129 F. Supp. 2d 311, 322 (S.D.N.Y. 2001).

Thus, under Executive Law § 63(12) if the Defendants are conducting an illegal gambling operation in violation of the Constitution or the penal law they will be in violation of Executive Law § 63(12).

2. DFS Violates the State Constitutional Ban on Gambling

By its express terms, the New York State Constitution prohibits bookmaking, pool-selling, and gambling in *all* forms not specifically exempted:

> [E]xcept as hereinafter provided, **no** lottery or the sale of lottery tickets, **pool-selling, book-making, or any other kind of gambling,** except lotteries operated by the state . . ., except pari-mutuel betting on horse races . . . , and except casino gambling at no more than seven facilities. . **. shall hereafter be authorized or allowed within this state**; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.
>
> N.Y. Const. Art. I, § 9 (emphasis added).

FanDuel and DraftKings run afoul of New York's prohibition on bookmaking, which has long defined bookmaking as the "acceptance of bets on a professional basis '. . .upon the result of any trial or contest of skill, speed or power of endurance of man or beast. '" *People v. Abelson*, 309 N.Y. 643, 650 (N.Y. 1956). This is the precise business of both DFS operators: to accept bets, re-branded as contest "fees," and award payouts based on the outcome of the real-game performance of athletes in actual games of skill, like football. A sports betting operation like DFS qualifies as neither a state-run lottery nor an approved casino. *See* N.Y. Const. Art. I, § 9. Nor does it fall within any of the other limited exceptions to the blanket prohibition against gambling. *Id.*

Because DFS is not an authorized form of gambling, FanDuel and DraftKings are in direct violation of the state constitution.

3. DFS Contests Constitute Gambling Under New York Penal Law

Article 225 of the State Penal Law establishes several criminal offenses related to gambling, including for promoting gambling and for possessing gambling devices and records.

See generally N.Y. Penal Law §§ 225.00-225.40.[5] The statute sets out the following definition for "Gambling":

> A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.
>
> N.Y. Penal Law § 225.00(2).

"Gambling" therefore consists of three statutory elements: (1) A person "stakes. . .something of value" upon a particular outcome; (2) The outcome depends on either a "contest of chance" or a "future contingent event not under his control or influence"; and (3) The person has an agreement or understanding to "receive something of value" from another person when a certain outcome occurs. *Id.* All three elements are present in DFS contests.

a) DFS Players Stake Something of Value

As an initial matter, DFS players stake something of value to participate in DFS contests: the "fee" they pay to enter. "Something of value" is defined broadly to include, among other things, "any money or property, any token, object or article exchangeable for money or property." N.Y. Penal Law § 225.00(6). The cost of entry for NFL-based contests on DraftKings ranges from $0.25 to $10,600. *See* Ip DK Aff. ¶15. The cost of entry for NFL-based contests on FanDuel ranges from $1 to $10,600. *See* Ip FD Aff. ¶ 26. Depending on how his lineup of athletes performs, the DFS player could either win a cash prize or walk away empty-handed. *Cf. People v. Cadle*, 7 A.D.2d 65 (4th Dept. 1958) (holding that seat rental fee may constitute valuable consideration for lottery). The entry fee paid to participate in a DFS contest accordingly constitutes a wager. *Cf. Harris v. Economic Opportunity Comm'n, Inc.*, 171 A.D.2d 223, 227 (2d Dept 1991) (donation to enter charity raffle constitutes risking "something of value").

[5] New York law imposes no criminal liability on the players themselves.

b) The Outcome of DFS Wagers Depend on Future Contingent Events and Result from Contests of Chance

Under New York law, two types of wagers qualify as gambling: (1) wagers on future contingent events beyond the control or influence of the bettors; and (2) wagers on contests of chance. N.Y. Penal Law § 225.00(2)(Definition of "Gambling"). Under either prong of the statutory definition, DFS contests qualify as gambling. *See People v. Turner*, 165 Misc. 2d 222, 224, 225 (N.Y. City Crim. Ct. 1995) (finding a shell game constituted a "game of chance" and the outcome also depended on a "contingent event" not under the control of the player).

Each DFS wager depends on a "future contingent event" beyond the bettor's control: the performance of athletes in real-world games.[6] The penal law incorporates the "future contingent event" language for precisely the circumstance at issue here:

> . . .[Consider] a chess game between A and B, with A and B betting against each other and X and Y making a side bet. Despite the character of the game itself as one of pure skill, X and Y are "gambling" because, from their standpoints, the outcome depends upon "chance" in the sense that neither has any control or influence over it. . . . It is this feature that requires a definition of "gambling" embracing not only a person who wagers or stakes something upon a game of chance but also one who wagers on "a future contingent event [whether involving chance or skill] not under his control or influence." Without the latter clause, a bet on a horse race would not constitute "gambling."

Denzer and McQuillan, Practice Commentary, McKinney's Penal Law ["McKinney's"] § 225.00, pp. 23 (1967) (second set of brackets in original); see *People v. Jun Feng*, 34 Misc. 3d 1205(A), 1205A (N.Y. City Crim. Ct. 2012) (citing McKinney's for this proposition).

In an inquiry into whether the outcome depends on a "future contingent event," the degree of talent or knowledge a bettor displays in making a prediction is irrelevant. *See People v.*

[6] The New York Penal law's "future contingent event" language codifies the traditional understanding of illegal sports betting: the wagering of money on the performance of others, like betting money on a boxing match, or taking side bets in a baseball game. *See, e.g., Grant v. State*, 75 Ga. App. 784 (1947) (wagering on whether a baseball player would hit a fly ball is a form of illegal gambling).

Turner, 165 Misc. 2d 222, 225 (N.Y. City Crim. Ct. 1995) (holding that the fact that a "talented player" might increase his odds of winning does not affect whether a wager constitutes gambling on a future contingent event). For example, in the illustration above, the bet between two observers of a chess game is gambling regardless of whether one knew who the better chess player was.

A DFS player can try to make an informed *guess* of how particular athletes might perform, but no DFS player can (legally) influence how those athletes *will* perform. In connection with his wager, a player on either DFS Site takes a single action: picking a lineup. After his lineup "locks," he is a spectator whose fate is determined by the combined performance of real athletes competing in real-world games.

Indeed, DFS contests are decided based on the same future contingent event as all sports bets: a tally reflecting the cumulative performance of particular athletes. This fact is a foundation of DFS, whose rules underscore that winners and losers are judged by the "final box scores." Ip FD Aff. ¶ 24. As a FanDuel spokesperson observed, the success of a wager by any DFS player is "contingent on the positive performance of all of their players" in actual games. DraftKings likewise observes that that the success of DFS lineups "depends on the combined performance" of real-world athletes. DK Compl. ¶ 22. DFS wagers then depend directly on the real-game performance of athletes during the contest period—a future contingent event.

Yet, in its verified petition, DraftKings insists that, despite all appearances, DFS players do not bet on a future contingent event. Instead, "selecting the lineup determines the winners and losers" – as if the competition is over upon completing the lineup. DK Compl. ¶ 26. This argument is incomprehensible. By the same logic, every sports bet could be recast not as a bet on the outcome of a game but as a competition where "selecting the team determines the winners and losers." DraftKings' argument also misses a more obvious point: there is no winning or

losing lineup, nor will there ever be, if the real games do not take place. Nor is it possible to identify the winning lineup *without a tally of the final box scores*. This is what it means for a wager to be contingent on a future event. FanDuel's complaint does not even address this factor.

Until the athletes play and a complete tally is made, the identities of the winners and losers of any DFS contest are *unknown* and *unknowable*. A DFS wager therefore depends on a future contingent event that the DFS players can neither influence nor control. Wagering on DFS therefore constitutes gambling.

A DFS wager also depends on the outcome of a "contest of chance." The penal law defines a "contest of chance" as any "contest, game, gaming scheme or gaming devise in which the outcome depends *in a material degree* upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." N.Y. Penal Law § 225.00(1) (emphasis added). This definition rejected an earlier approach that required a court to weigh whether chance or skill was the "dominating element" because:[7]

> In many instances, it may be virtually impossible to determine whether chance or skill *dominates;* it should be sufficient that, despite the importance of skill in any given game, 'the outcome depends *in a material degree* upon an element of chance.'"

McKinney's § 225.00, at pp. 23 (emphasis in original); *People v. Jun Feng*, 34 Misc. 3d at 1205A (citing McKinney's for this proposition).

To determine whether a game constitutes a "contest of chance," the relevant inquiry is whether the outcome depends on chance to any "material degree"—irrespective of the role played by skill. *See Plato's Cave Corp. v. State Liquor Auth.*, 115 A.D.2d 426, 428 (1st Dept 1985), *aff'd on other grounds Plato's Cave Corp. v. State Liquor Authority*, 68 N.Y.2d 791

[7] DraftKings and FanDuel each try to resurrect the earlier "dominating element" test that was articulated in *People ex rel. Ellison v. Lavin*. 179 N.Y. 164, 170-171 (N.Y. 1904). *See* FD Compl. at 25; DK Compl. at. 66. In the face of clear statutory language, this argument is untenable.

(1986). "[G]ames of chance may also include those 'in which the skill of the contestants may play a role, as long as the outcome depends in a material degree on chance.'" *People v. Delacruz*, 23 Misc. 3d 720, 725 (N.Y. City Crim. Ct. 2009).

"[A]n event depends on an element of chance when, despite research, investigation, skill or judgment, one still cannot make a definite assessment that a certain result will occur or not occur, or the manner in which it will occur." 7-76 Kamins, Mehler, Schwartz & Shapiro, New York Criminal Practice, Second Edition § 76.02 (Matthew Bender). Here, from the perspective of a DFS player, numerous elements of chance can dictate whether a DFS wager wins or loses. First, as described above, DFS players cannot influence, and have no way to control, the performance of the athletes in their lineups. An athlete injury, a slump, a hot streak, although frequent occurrences, can each directly and materially affect whether a particular wager wins or loses. This is particularly apparent because the margin of victory in a DFS contest is often measured in *fractions* of points. Ip DK Aff. ¶ 48. Second, the rules of DFS specifically contemplate numerous unpredictable factors—some relatively common—that can dictate the outcome of a DFS contest completely outside the control not only of the DFS players but of the athletes themselves: a rained-out game, a late trade, a player suspension, or even a box score adjusted too late. Ip DK Aff. ¶¶ 22-25, Ip FD Aff. ¶¶ 21-24.

Where a contest depends to a material degree on chance, no further inquiry is required. *See Plato's Cave Corp. v. State Liquor Authority*, 115 A.D.2d at 428 (despite failing to measure the "degree of skill" involved, agency determination that game depended to a "material degree" on element of chance not arbitrary or capricious). Even so, the main purported "skill" in DFS is no different than it is for poker, blackjack, and other forms of sports betting: the ability to calculate probabilities and try to handicap the odds of future events.

DraftKings admits this explicitly, providing on its website that the "skills" needed to perform well in DFS contests are the "same concepts that have helped [poker players] on the felt: probability, risk/reward, and so on." *See* Wagner Aff. ¶ 30 at Ex. Y (p. 4). Such purported "skills" no more transform DFS into a contest of skill than they do for poker. The courts have squarely addressed whether poker is gambling and have found it to be a contest of chance. *See, e.g., People v. Dubinsky*, 31 N.Y.S.2d 234, 237 (N.Y. Spec. Sess. 1941)("There is no doubt that playing 'stud' poker for money is a game of chance and constitutes gambling."); *United States v. DiCristina*, 726 F.3d 92, 98 n. 5 (2d Cir. 2013).

Indeed, New York courts have rejected the notion that calculating probabilities and handicapping odds convert a "contest of chance" into a game of skill. First, handicapping and evaluating odds is fundamental to *every form of sports and horserace betting*,[8] which have long been considered gambling in New York State. N.Y. Const. Art. I, § 9; *see also People v. Fortunato*, 452 N.Y.S.2d 451 (2d Dept 1982) (affirming jury conviction on charges of promoting gambling and possession of gambling records related to illegal sports betting enterprise); *People v. Giordano*, 87 N.Y.2d 441 (1995) (affirming convictions on charges of promoting gambling related to illegal sports betting enterprise).

Second, in finding a "shell game" constituted a "game of chance," a New York court addressed and soundly refuted the notion that handicapping odds are properly considered a "skill," observing:

> Games of chance range from those that require no skill, such as a lottery, to those such as poker or blackjack which require considerable ***skill in calculating the probability of drawing particular cards***. Nonetheless, the latter are as much games of chance as the former, since the outcome depends to a material degree

[8] *See, e.g., Lasky v. Van Lindt*, 115 Misc. 2d 259, 261 (Sup. Ct. N.Y. County 1982) (quoting definition of handicapper in horseracing as "one who rates the entries in a race before post time, who figures out the order of finish of a race beforehand. Factors include distance, weight, track condition, riders, past performances, breeding, idiosyncras[]ies of horses, etc."); *Green v. Fornario*, 486 F.3d 100, 101 (3d Cir. 2007)("Handicappers are the stock analysts of the sports gambling world: they provide information to sports bettors.")

> upon the random distribution of cards. ***The skill of the player may increase the odds in the player's favor, but cannot determine the outcome regardless of the degree of skill employed***.

People v. Turner, 165 Misc. at 223-24 (emphasis added) (citations omitted). Also, critically, the purported "skill" of a few would not alter the character of DFS as a "game of chance" for the great majority of people who play it. *Cf. People ex rel. Ellison v. Lavin.* 179 N.Y. at 172-74 (Rejecting the proposition that the "chance" element in a widely publicized contest is judged from the perspective of "experts" rather than the public at-large).

Even if probing DFS contests for the precise quantum of "skill" involved was merited (as explained above, it is not), the purported "skills" for DFS—the skill of handicapping odds possessed by a small minority—would not change the legal outcome: DFS depends to a material degree on an element of chance.

Indeed, even the self-serving "skill" studies purchased by the DFS Operators show that DFS involves far more chance than not only true skill games, like chess, but also long established contests of chance, like poker. In one FanDuel skills analysis, for example, the top 10% of players beat the bottom 90% just 59% of the time. *See* Wagner Aff. ¶ 35 at Ex. DD (appendix). DFS simply does not compare to a game of skill, like chess, where a skilled player *consistently* beats an unskilled player. Even a well-established contest of *chance* like poker has skilled players beating unskilled players *97%* of the time. *See* Wagner Aff. ¶ 36.

Finally, even if skill played a substantial role in a contest—an impossible argument with DFS—the contest would still qualify as a "contest of chance" where the size of the *prize* "depends in a material degree upon an element of chance." *Matter of Pace-o-matic, Inc. v. New York State Liquor Auth.*, 72 A.D.3d 1144, 1146 (3d Dept 2010) (Upholding ruling that skill-based video game constituted a "contest of chance" where chance affected the value of the prizes). Here, the distribution of cash prizes in any DFS contest depends on exceedingly minor

contest quirks. For example, in a recent GPP on DraftKings for professional basketball only .25 points separated the top point-scorer from second place, a point difference equivalent to less than one missed jump shot. First prize won $5,000, while second prize won $2,500. Ip DK Aff. ¶ 48. In a recent GPP on FanDuel for professional basketball only six points separated the first and second place prize winners, the difference in cash winnings ranging from $400 to $2,000. Ip FD Aff. ¶ 43. A well-considered lineup picked by an experienced DFS player could easily take home a lesser prize or no prize—while a randomly assigned lineup could win the jackpot.

* * *

The outcome of a DFS wager depends on a "future contingent event" beyond the control or influence of the players and is a "contest of chance." Either way, DFS contests constitute gambling.

c) DFS Bettors Understand That They Will Receive Something of Value in the Event of a Certain Outcome

For each contest that requires payment of an entry fee or bet, the DFS Sites and their bettors have an agreement that the Sites will award cash prizes to a portion of bettors whose lineups perform well relative to others in contention. The respective "Terms of Use" for FanDuel and DraftKings specify that prizes will be awarded to the winning DFS player. *See* Wagner Aff. ¶¶ 31-32.

While the details concerning the number of bettors who will win cash prizes and the value of those prizes vary depending on the contest format, DFS bettors undeniably participate on the understanding that they will win money if they win the contest. This understanding is the reason that DFS bettors pay money to enter DFS contests. It is also why the advertisements for the DFS Sites feature oversized checks and cash falling from the ceiling.

4. DraftKings is Promoting Gambling in the Second Degree

Section 225.05 of the Penal Law defines the misdemeanor offense of "Promoting gambling in the second degree," as follows: "A person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity." The terms "advance gambling activity," "profit from gambling activity," and "unlawful" are, in turn, defined in NY Penal § 225.00(4), (5), and (12):

> 4. "Advance gambling activity." A person "advances gambling activity" when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity. Such conduct includes but is not limited to conduct directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any other phase of its operation. . . .
>
> 5. "Profit from gambling activity." A person "profits from gambling activity" when, other than as a player, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity.
>
> ***
> 12. "Unlawful" means not specifically authorized by law.

In *People v. World Interactive Gaming Corp.*, the New York Attorney General brought a special proceeding under Executive Law § 63(12) to enjoin an internet gambling company from accepting wagers in New York. 185 Misc. 2d 852, 855-56 (Sup. Ct. N.Y. County 1999). There, the court held that such companies had unlawfully promoted gambling because "having established the gambling enterprise, and advertised and solicited investors to . . . gamble through its on-line casino, respondents have 'engage[d] in conduct which materially aids . . . gambling activity.'" *Id.* at 861. The Court concluded that "[b]ecause all of respondents' activities illegally advanced gambling . . . they have knowingly violated Penal Law § 225.05." *Id.*

The DFS Operators advance unlawful gambling activity in the course of their daily operation. Specifically, the companies run the DFS contests, which are not authorized by law, set their rules, administer the websites and back-end systems that run the contests, advertise and otherwise solicit bettors to participate in the contests, collect and process wagers, and distribute cash prizes. Each time the DFS Operators accept an entry fee, it profits from gambling activity. By retaining approximately 10% of each entry fee as a "rake," the DFS Operators also "participate[] in the proceeds of gambling activity." In 2014 alone, DraftKings processed more than $25 million of wagers from New York residents. *See* Wagner Aff. ¶ 34. In that same period, NYAG estimates that FanDuel received $31 million in wagers from New York residents. *See* Wagner Aff. ¶ 33.

5. DraftKings and FanDuel Promote Gambling in the First Degree

Section 225.10 of the Penal Law defines the felony of "Promoting gambling in the first degree," in relevant part, as follows:

> A person is guilty of promoting gambling in the first degree when he knowingly advances or profits from unlawful gambling activity by:
>
> 1. Engaging in bookmaking to the extent that he receives or accepts in any one day more than five bets totaling more than five thousand dollars.

The term "bookmaking" is defined in Penal Law § 225.00(9) as:

> "Bookmaking" means advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events.

The entire business model for FanDuel and DraftKings consists of accepting bets from members of the public. Each indisputably accepts bets numbering in the thousands and totaling millions of dollars on a daily, weekly, monthly, and yearly basis.

6. DraftKings and FanDuel Possess Gambling Records in the Second Degree

Section 225.15 of the Penal Law defines the misdemeanor offense of "Possession of gambling records in the second degree," in relevant part, as follows:

> A person is guilty of possession of gambling records in the second degree when, with knowledge of the contents or nature thereof, he possesses any writing, paper, instrument or article:
>
> 1. Of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise.

Incident to running their contests, DraftKings and FanDuel maintain records reflecting the selected lineups, the amounts wagered, and the winners of prizes. The DFS Sites necessarily have knowledge of their contents; indeed, such records are essential to the operation of gambling or bookmaking enterprises, such as those operated by DraftKings and FanDuel. The two DFS operators have been in possession of gambling records in the second degree for the duration of their operation.

7. DraftKings Possesses Gambling Records in the First Degree

In addition to the elements described in Penal Law § 225.15, Penal Law § 225.20 defines the felony of "Possession of gambling records in the first degree" as also requiring that the relevant gambling records "reflect[] or represent[] more than five bets totaling more than five thousand dollars." DraftKings has recorded countless bets totaling millions of dollars since it launched its operations in 2012. FanDuel has been in operation since 2009, and likewise has recorded countless bets from New York residents totaling millions of dollars.

8. DraftKings and FanDuel are Engaging in Fraudulent and Deceptive Business Practices under Executive Law § 63(12) and GBL §§ 349 and 350.

Through representations on their website, in their television advertising, and elsewhere, DraftKings and FanDuel have engaged, and are engaging, in fraudulent and deceptive business

practices and false advertising, including misrepresentations about the legality of its business, the likelihood of individual players winning, and the characterization of DFS as a skill game.

Fraud under § 63(12) is broadly defined in the statute as "any device, scheme or artifice to defraud, any deception, misrepresentation, concealment, suppression, false promise or unconscionable contract provision." Consistent with this broad statutory definition, courts have construed statutory fraud as going beyond common law fraud. Thus, proof of scienter or bad faith is not necessary. *See, e.g. People v. Federated Radio Corp.*, 244 N.Y. 33, 38-39 (1926); *Lefkowitz v. Bull Investment Group, Inc.*, 46 A.D.2d 25, 28 (3rd Dept. 1974); *Matter of State by Lefkowitz v. Interstate Tractor Trailer Training, Inc.*, 66 Misc.2d 678, 682 (Sup. Ct. N.Y. County 1971); *State by Lefkowitz v. Bevis Indus., Inc.*, 63 Misc.2d 1088, 1090 (Sup. Ct. N.Y. County 1970).

GBL § 349 declares unlawful "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." GBL § 350 similarly declares unlawful "false advertising in the conduct of any business, trade or commerce or in the furnishing of any service." The definition of deceptive practices under GBL § 349 and false advertising under GBL § 350 are given parallel construction to that of fraud under Executive law § 63(12). *See, e.g., Colo. State Christian College of Church of Inner Power, Inc.*, 76 Misc. 2d at 54. Like Executive Law § 63(12), these statutes are "intended to be broadly applicable, extending far beyond the reach of common law fraud." *State v. Feldman*, 210 F. Supp. 2d 294, 301 (S.D.N.Y. 2002).

DraftKings and FanDuel each made repeated misrepresentations in public statements, in television advertisements, or on their websites. The DFS Sites claimed (i) that they comply with all applicable laws, which as explained above, is untrue; (ii) that playing and winning is simple, while data reveal that most DFS players lose; and (iii) that DFS is a skill game, notwithstanding

that the contest legally qualifies as a "contest of chance." Such material deceptions and omissions constitute fraudulent business practices in violation of Executive Law § 63(12) and deceptive business practices and false advertising pursuant to GBL §§ 349 and 350 respectively.

B. <u>Defendant's Illegal Gambling Business is Causing Irreparable Harm</u>

As noted above, the Attorney General, unlike private litigants, need not prove irreparable injury because such injury is presumed in a statutory enforcement action under Executive Law § 63(12). *See People v. Apple Health & Sports Club, Ltd. Inc.*, 174 A.D.2d 438, 439 (1st Dept 1991), *aff'd*, 80 N.Y.2d 803 (1992); *Spitzer v. Lev*, 2003 NY Slip Op 51049(U) at 6-7 (Sup. Ct. N.Y. County 2003) ("when the Attorney General is authorized by statute to seek injunctive relief to enjoin fraudulent or illegal acts, no showing of irreparable harm is necessary.").

In this case, the requested relief would nonetheless prevent further irreparable harm to the public. As discussed in expert affidavits submitted by Dr. Jeffrey L. Derevensky, the Director of the International Centre for Youth Gambling Problems and High-Risk Behaviors, and Keith S. Whyte, the Executive Director of the National Council on Problem Gambling, DFS attracts compulsive gamblers and those at risk for gambling addiction. Whyte Aff., ¶¶ 6-11; Derevensky Aff., ¶¶ 5-9. The ongoing availability and marketing of DraftKings in the state of New York offers instant access to these vulnerable populations. As Dr. Deverensky observed

> [I]ndividuals are bombarded with advertisements suggesting that many people who start with small amounts of money eventually win large sums of money. I find such advertising to be misleading as it inaccurately encourages DFS players to believe that they can improve their chances of winning if they spend additional money and time playing DFS. This perception can lead players to a preoccupation with DFS, chasing of losses, and developing symptoms and behaviors associated with a gambling disorder. Derevensky Aff., ¶ 10.

Indeed, a keynote presentation prepared for the 2014 Winter Conference of the Fantasy Sports Trade Association ("FSTA"), a leading advocate for DFS, touts the fact that DFS serves

as “a viable alternative” to players who otherwise “do not have access to sports wagering” and a “new alternative for some instant ticket / lottery players.” *See* Wagner Aff. Ex. F, p.9. Moreover, DraftKings’ own records show pleas from DFS players to deactivate their accounts or permanently block them from the site because of self-identified gambling addiction. The company’s customer service representatives have fielded pleas from self-described gambling addicts to close accounts and permanently ban them from the site, with subjects like “Gambling Addict do not reopen,” “Please cancel account. I have a gambling problem,” and “Gambling Addiction needing disabled account.” *See* Wagner Aff. ¶ 23.

The societal ramifications of allowing DFS to continue are serious and cannot be compensated. Without immediate action to stop illegal gambling, families and neighborhoods will continue to suffer the consequences. Loved ones will continue to fall into the spiral of addiction. Promising futures will continue to get derailed. And our communities will continue to pay the price. This type of danger is the sort of irreparable harm that merits preliminary relief most.

C. <u>The Balance of Equities Tilts for the State</u>

In evaluating injunctive relief, courts must consider the welfare and interest of the general public. *New York v. Castro*, 143 Misc. 2d 766, 769-770 (Sup. Ct. N.Y. County 1989) (granting an injunction to enjoin defendant from use of space where an illegal gambling operation was conducted “in order to protect the public safety, health or morals”). The fact that the laws being violated here were specifically designed to protect the public tips the equities decidedly in the State’s favor. *See City of New York v Smart Apts. LLC*, 39 Misc.3d 221, 233 (Sup. Ct. N.Y. County 2013) (“the equities lie in favor of shutting down an illegal, unsafe, deceptive business, rather than in allowing said business to continue to operate (to defendants’ presumed financial advantage)”). Where the government shows that a violation of law has occurred, “the public

equities receive far greater weight" than any "private equities" appellants may have. *F.T.C. v. Warner Communications Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984).

By contrast, there are no private equities in defendants' favor. Defendants have no right to operate an illegal gambling operation. Any burden imposed in requiring DraftKings and FanDuel to operate in full compliance with the law is reasonable.

CONCLUSION

For the foregoing reasons, Plaintiffs' application for a preliminary injunction should be granted.

Dated: New York, NY
November 16, 2015

Respectfully submitted,

ERIC T. SCHNEIDERMAN
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February 26, 2016

Joseph J. Kim, Esq.
Senior Vice-President and General Counsel
Georgia Lottery Corporation
250 Williams Street, Suite 3000
Atlanta, GA 30303

Re: Daily fantasy sports games

Dear Mr. Kim:

You have asked for advice on whether daily fantasy sports games are illegal under Georgia law. Specifically, you have asked whether, given the definition of "bet" in O.C.G.A. § 16-12-20(1), daily fantasy sports games constitute illegal gambling. You have also asked whether such games fall within the "actual contestant" exception found in O.C.G.A. § 16-12-20(1)(B).

Daily fantasy sports games are games in which participants pay to assemble an imaginary or virtual team of actual athletic contestants and then compete against other participants based on statistical performance of the contestants in actual sporting events. Money is won based on the performance of the actual athletes that play in actual sporting events. Participants draft a team to compete either on a weekly or daily basis, and each new draft requires a new entry fee.[1] In general, daily fantasy sports participants must "lock-in" their selections before the relevant games.[2] Once their choices are made, participants have no control over the outcome of the simulated games;[3] the outcome of the games is determined solely based upon the performance of others—the actual players in the athletic contests. On any given day, an athlete may become injured, may be ill, may play poorly, may be ejected from the game, may have equipment failure, or may be affected by weather or other factors. All of these circumstances are outside of the control of a fantasy sports participant.

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[1] *See* Michael Trippiedi, *Daily Fantasy Sports Leagues: Do You Have The Skill to Win at These Games of Chance?*, 5 UNLV Gaming L.J. 201, 209 (Fall 2014).

[2] *See People v. Fanduel, Inc.*, 2015 N.Y. Slip Op. 32332(U) (Sup. Ct. N.Y. County Dec. 11, 2015) (2015 N.Y. Misc. LEXIS 4521).

[3] Participants may change their selections up to the start of a game, but once the game begins players are unable to change their line-up.

Related to your first question about the legality of daily fantasy sports, Georgia has a constitutional prohibition, with limited exceptions, against lotteries, pari-mutuel betting, and casino gambling. Article I, Section II, Paragraph VIII of the Georgia Constitution provides, in part:

> (a) Except as herein specifically provided in this Paragraph VIII, all lotteries, and the sale of lottery tickets, and all forms of pari-mutuel betting and casino gambling are hereby prohibited; and this prohibition shall be enforced by penal laws.

The General Assembly has enacted a number of penal laws that make various forms of gambling, including those specifically set forth in the Georgia Constitution, illegal. *See* O.C.G.A. §§ 16-12-20 through -38.[4] Code section 16-12-21 criminalizes gambling and O.C.G.A. § 16-12-22 criminalizes commercial gambling. Code section 16-12-21 states:

> (a) A person commits the offense of gambling when he:
> (1) Makes a bet upon the partial or final result of any game or contest or upon the performance of any participant in such game or contest;
> (2) Makes a bet upon the result of any political nomination, appointment, or election or upon the degree of success of any nominee, appointee, or candidate; or
> (3) Plays and bets for money or other thing of value at any game played with cards, dice, or balls.
> (b) A person who commits the offense of gambling shall be guilty of a misdemeanor.

Code section 16-12-22 states in relevant part:

> (a) A person commits the offense of commercial gambling when he intentionally does any of the following acts:
> (1) Operates or participates in the earnings of a gambling place;
> (2) Receives, records, or forwards a bet or offer to bet . . . .

Code section 16-12-20 defines the term "bet" as follows:

> (1) "Bet" means an agreement that, dependent upon chance even though accompanied by some skill, one stands to win or lose something of value. A bet does not include:
> (A) Contracts of indemnity or guaranty or life, health, property, or accident insurance; or

[4] In addition, O.C.G.A. § 13-8-3 provides that gambling contracts are void.

> (B) An offer of a prize, award, or compensation to the actual contestants in any bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in such contest.

What constitutes gambling under Georgia law has been broadly construed to include schemes involving consideration, prize, and chance. *Monte Carlo Parties, Ltd. v. Webb*, 253 Ga. 508, 509 (1984); *Boyd v. Piggly Wiggly Southern, Inc.*, 115 Ga. App. 628, 633 (1967); *Barker v. State*, 56 Ga. App. 705, 707 (1937). All appear to be present in the case of daily fantasy sports games. Participants pay to enter the games with the hope of winning a monetary prize based on what may happen to the selected athletes chosen by the participants.

Participants in daily fantasy sports pay a fee to participate and only a portion of that fee is paid out to the winning participants; the remainder of the fee is taken by the host site. By paying this fee and participating, participants agree to win or lose something of value—a portion of the pot. This clearly constitutes a "bet" within the meaning of O.C.G.A. § 16-12-20(1).

Proponents of daily fantasy sports contend that the games are exclusively or predominantly games of skill. Although a participant may exercise some skill in picking a particular player for his or her fantasy team, the determination of winners is entirely dependent on the performance of the players in the athletic contests. All of the circumstances surrounding that performance are outside of the participant's control. In 1934, the Georgia Court of Appeals concluded that the fact that one might become more proficient at the particular gambling activity did not negate the conclusion that the activity is a game of chance. *Sparks v. State*, 48 Ga. App. 498 (1934) (*citing Equitable Loan & Sec. Co. v. Waring*, 117 Ga. 599 (1903), *overruled on other grounds by Williams v. Studstill*, 251 Ga. 466 (1983)). In doing so, the court reasoned:

> The evidence shows, without dispute, that even the most efficient could not obtain that score every time, although some, from practice, would obtain it more frequently than others. The very fact that one might come in and make that score and receive fifteen cents worth of merchandise for his nickel, and that the same person or some other person might shoot it and not receive anything, but would lose his nickel, certainly makes it a game of chance.

48 Ga. App. at 502. Thus, in *Sparks*, the court decided that whether a game was one of chance did not depend on whether a participant could become more proficient with practice, but on whether the same player could do the exact same thing and still lose—not because of his actions, but because of the action of the machine. In daily fantasy sports, a participant whose purported skill level has not changed from one game to the next is just as likely to win one tournament, then lose the next tournament due to the performance of players outside of the participant's control.

In response to your first question, and based on the above discussion, daily fantasy sports would not be authorized under Georgia law unless the "actual contestant" exclusion raised in your second question is satisfied.

Your second question is whether daily fantasy sports fall under the "actual contestant" exclusion in O.C.G.A. § 16-12-20(1)(B). That exclusion does not apply to daily fantasy sports. The purpose of the exclusion is to allow athletes competing in the sporting events to be rewarded for their efforts, not for people to receive compensation for betting on the outcome of those events or the performance of a particular athlete. *See Grant v. State*, 75 Ga. App. 784 (1947) (the Georgia Court of Appeals held that while the players in baseball games have a high proficiency of skill, wagering on whether a particular player would hit a fly ball constituted chance, and thus betting, under former Georgia Code § 26-6502). To read the "actual contestant" exclusion any other way would allow the exception to swallow the rule. Therefore, daily fantasy sports do not satisfy the "actual contestant" exclusion in O.C.G.A. § 16-12-20(1)(B).

For the above reasons, it is my informal advice that daily fantasy sports games are not authorized under Georgia law.[5] If you would like to discuss this matter further, please contact me.

Sincerely,

W. Wright Banks, Jr.
Deputy Attorney General

Brooke E. Heinz
Assistant Attorney General

WWB/BEH/jm

[5] Although the issue addressed is one of Georgia law, other states have considered the legality of daily fantasy sports under their statutes and have likewise concluded that daily fantasy sports are gambling and not authorized under their laws. *See, e.g.,* Ill. Att'y. Gen. Op. No. 15-006; Tx. Att'y. Gen, Op. No. KP-0057; Miss. Att'y Gen. Op. No. 2015-00445; Haw. Att'y Gen. Op. No. 2016-01.

DEPARTMENT OF THE ATTORNEY GENERAL

DAVID Y. IGE
GOVERNOR

DOUGLAS S. CHIN
ATTORNEY GENERAL

For Immediate Release
January 27, 2016

News Release 2016-2

ATTORNEY GENERAL OPINES THAT DAILY FANTASY SPORTS CONTESTS CONSTITUTE GAMBLING UNDER HAWAII LAW

HONOLULU – Hawaii Attorney General Doug Chin issued a formal advisory opinion today stating that daily fantasy sports contests, such as those run by FanDuel and DraftKings, constitute illegal gambling under existing state laws.

"Gambling generally occurs under Hawaii law when a person stakes or risks something of value upon a game of chance or upon any future contingent event not under the person's control," said Chin. "The technology may have changed, but the vice has not."

Nearly sixty million Americans participate in fantasy sports, with the vast majority playing in a league with friends or colleagues that might be considered "social gambling" which is legal in Hawaii. In contrast, daily fantasy sports contests typically involve competitions between hundreds or thousands of people, are played daily, involve wagers of up to $1,000, and allow each individual multiple entries leading to top prizes of up to $1 million.

"Hawaii is generally recognized to have some of the strictest anti-gambling laws in the country," said Chin.

By statute the Attorney General provides opinions upon questions of law submitted by the Governor, the state legislature or its members, or a state agency head. The Department of the Attorney General is weighing next steps, including civil or criminal enforcement, consistent with its opinion.

The text of Attorney General Opinion 2016-01 is attached.

# # #

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January 27, 2016

The Honorable Rosalyn H. Baker
Senator, Sixth District
Twenty-Eighth Legislature
State of Hawai'i
State Capitol, Room 230
415 South Beretania Street
Honolulu, Hawai'i 96813

Dear Senator Baker:

Re: Legality of Daily Fantasy Sports Contests

This letter responds to your request, dated January 21, 2016, in which you requested an opinion regarding the legality of daily fantasy sports contests such as FanDuel and DraftKings under Hawai'i law.[1]

We conclude that daily fantasy sports contests constitute illegal gambling under Hawai'i law.

FanDuel and DraftKings are websites allowing Hawai'i residents to participate in daily fantasy sports contests and win money based on the performance of athletes they select. There are two definitions of gambling under Hawai'i law and these contests fit both of them. They are "contests of chance" because chance is a material element for most people participating in them. Haw. Rev.

[1] FanDuel and DraftKings do not offer games in Arizona, Iowa, Louisiana, Montana, and Washington State. See People of the State of New York v. FanDuel and DraftKings, Supreme Court of the State of New York, New York County, Motions for a Preliminary Injunction, page 3, filed November 17, 2015; Index Nos. 453056 and 453054.

Stat. § 712-1220 (2014). Alternatively, the contests involve "future contingent events" because they depend on the actions of athletes entirely outside the participants' influence or control. Id.

I. BACKGROUND.

A. Traditional Fantasy Leagues vs. Daily Fantasy Sports Contests.

We understand nearly sixty million Americans participate in fantasy sports, with the vast majority playing the traditional variety. Traditional fantasy sports leagues—usually organized between a group of friends or colleagues—consist of regular fans of a particular sport who each "own" their fantasy teams. Each team includes a roster of individuals playing the sport in real life, typically by way of a "draft" at the beginning of the season. Points are awarded each week based on the combined performances of those athletes. All the teams in a league are paired up each week and the team with the higher combined score wins the matchup. Lineups can be altered by trading players or using a "waiver wire" to pick up remaining free agents. At the end of the athletic season, the team with the best record wins the league.

Unlike traditional fantasy sports leagues, daily fantasy sports contests involve competitions between hundreds or thousands of people and are played daily. Any player can put any athlete onto his or her team, and each athlete can be picked up an unlimited number of times. Instead of a draft at the beginning of the season, a person can draft a new team each day for a wager (or "buy-in"). The goal in a daily fantasy sports contest is to pick the highest scoring players who cost the least in order to net the most points overall. The frequency in which an owner wins or loses a cash prize increases to daily, because an owner plays in a new "league" every day. See Michael Trippiedi, Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?, 5 UNLV Gaming L.J. 201, 203-204 (Fall 2014).

The amount of money involved differs tremendously between traditional and daily fantasy sports. While there are varieties of traditional leagues, they often involve around twelve players and a "buy in" of around $50, leading to a total pot of around $600. Daily fantasy sports contests, by contrast, allow wagers of up to $1,000, involve thousands of players at a time, and allow each individual multiple entries leading to top prizes of up to $1 million. The high stakes and rapid rewards of daily fantasy sports

contests resemble poker more than traditional fantasy leagues, and this resemblance is no accident as "the daily fantasy industry grew out of the rubble of online poker." Jay Caspian Kang, How the Daily Fantasy Sports Industry Turns Fans into Suckers, N.Y. Times Mag., Jan. 6, 2016, http://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html. Daily fantasy sports contests were crafted to comply with the federal Unlawful Internet Gambling Enforcement Act (UIGEA) that had shuttered online poker sites but specifically exempted fantasy sports. See 31 U.S.C.A. § 5362(1)(E)(ix) (West 2016). The UIGEA is clear that none of its provisions should "be construed as altering, limiting, or extending any Federal or State law . . . prohibiting, permitting, or regulating gambling within the United States." 31 U.S.C.A. § 5361(b) (West 2016). Thus the legality of daily fantasy sports contests is a matter of state law.

B. A Brief History of Hawaii's Gambling Laws.

Gambling, in one form or another, has been illegal in Hawai'i since at least 1850. See The King v. Yeong Ting, 6 Haw. 576, 577 (1885). In 1893, the Provisional Government passed a law outlawing many specific types of gambling and "any other game in which money or anything of value is lost or won." 1893 Haw. Sess. L. Act 21. This law remained in force for nearly eighty years until replaced by the current, more comprehensive scheme with the adoption of the Hawaii Penal Code in 1972. 1972 Haw. Sess. L. Act 9. The commentary to the current law notes that "for the most part, the coverage of the previous law has been preserved, although the emphasis has been changed in several instances." Haw. Rev. Stat. §§ 712-1221-1223 cmt. (2014). While the gambling provisions were patterned on those proposed in Michigan and adopted in New York, Hawai'i took "a more cautious approach" than those two states. Id.; Legislative Reference Bureau, Hawaii Penal Code 22-23 (1970) (referring specifically to Hawaii's "social gambling" affirmative defense).

According to the Conference Committee Report on the bill adopting the Code, "The basic thrust of gambling offenses of [the proposed Code] is to impose heavy penalties on various forces of institutionalized gambling and at the same time to recognize that society no longer condemns as criminal, casual gambling in a social context." Conf. Comm. Rep. No. 1-72, in 1972 Senate Journal, at 739. Indeed, it was the intention of the Conference Committee that the gambling section "preclude a nightclub, hotel, bar, restaurant, or *any other business in interstate commerce* from providing *any accommodation* for the promotion of *any form of gambling*." Id.

(emphases added). Relatively few cases have interpreted the current law. While none of these modern cases have cited decisions under the previous law as persuasive, neither have any denied their persuasive effect.

II. ANALYSIS.

A. Daily fantasy sports betting is gambling under Hawai'i law.

In the absence of a specific exclusion or defense, gambling is prohibited in the State of Hawai'i. Haw. Rev. Stat. §§ 712-1220 et seq. The activity involved in daily fantasy sports betting is gambling under the plain meaning of Hawaii's gambling statute.[2] This statute sets out three main requirements to meet the definition of "gambling" (numbers added):

> A person engages in gambling if [1] he [or she] stakes or risks something of value [2] upon the outcome of a contest of chance or a future contingent event not under his control or influence, [3] upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome.

Haw. Rev. Stat. § 712-1220 (2014).[3]

Daily fantasy sports betting meets each of these requirements. We address the first and third prongs here and the second prong (contest of chance or future contingent event) is addressed below. As to the first prong, the amount wagered on each daily fantasy sports contest is "something of value" that is being "stake[d]"

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[2] Whether further grounds exist for criminal or civil enforcement and to what extent will depend on the particular facts of each case.

[3] The definitions section also states:

> Gambling does not include bona fide business transactions valid under the law of contracts, including but not limited to contracts for the purchase or sale at a future date of securities or commodities, and agreements to compensate for loss caused by the happening of chance, including but not limited to contracts of indemnity or guaranty and life, health, or accident insurance.

Haw. Rev. Stat. § 712-1220 (2014).

despite being called an "entry fee." Under Hawaii's previous gambling law, the Hawai'i Supreme Court ruled that such a "playing fee" was a stake in the outcome of a game. See State v. Prevo, 44 Haw. 665, 677, 361 P.2d 1044, 1051 (1961) ("Every player of 'Fascination' pays a playing fee of ten cents. It is obvious from the character of the game that each player stakes his fee on a chance of winning something of value, be it a prize or a free game."). As for the third prong, both major daily fantasy sports companies lay out in detail what players will receive on the basis of certain outcomes.[4] Furthermore, as examined below, a daily fantasy sports contest is a "contest of chance" or involves "a future contingent event not under [a player's] control or influence." Haw. Rev. Stat. § 712-1220. By statute an activity constitutes "gambling" if either requirement is met; in our view, daily fantasy sports contests qualify under both. This is discussed below.

1. Daily fantasy sports contests are contests of chance.

Daily fantasy sports contests are contests of chance under Hawai'i law, which defines them as "any contest, game, gaming scheme, or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." Haw. Rev. Stat. § 712-1220 (2014). No Hawai'i court has interpreted the phrase "material degree upon an element of chance." The appellate courts in two states with the same statutory language—Nebraska and New York—define "material" to mean "predominant." Am. Amusements Co. v. Neb. Dep't of Revenue, 807 N.W.2d 492, 502 (Neb. 2011); People v. Li Ai Hua, 24 Misc. 3d 1142, 1145 (N.Y. Crim. Ct. 2009). But an appellate court in Missouri held that while "chance must be a material element in determining the outcome . . . [i]t need not be the dominant element." Thole v. Westfall, 682 S.W.2d 33, 37 n.8

[4] See Terms of Use, https://www.draftkings.com/help/terms (last visited Jan. 27, 2016) ("Contest results and prize calculations are based on the final statistics and scoring results at the completion of the last professional sports game of each individual Contest. Once Contest results are reviewed and graded, prizes are awarded."); Terms of Use, https://www.fanduel.com/terms (last visited Jan. 27, 2016) ("The players in each contest who accumulate the most fantasy points and comply with eligibility requirements and applicable rules will win prizes as set out in the posted contest details.").

(Mo. Ct. App. 1984) (emphasis omitted). As discussed below, under either interpretation, daily fantasy sports contests are contests of chance under Hawai'i law because chance is a material element for the vast majority of players.

In State v. Prevo, the Hawai'i Supreme Court upheld the conviction of a player of the game "Fascination" despite her argument that the game was one of skill. State v. Prevo, 44 Haw. 665, 361 P.2d 1044 (1961).[5] The Court concluded that: "'gambling' is an appropriate characterization of the conduct of some or most of the participants in the games . . . notwithstanding that some of the players may be deemed so skilled as not to be gambling." Id. at 677, 361 P.3d at 1051. According to the Court:

> [T]he test of whether a game is one of skill or of chance, or one in which skill greatly predominates over chance, is not to be measured by the standard of experts or any limited class of players, but by that of the average skill of a majority of players likely to play the game, for the purpose is to determine the primary object of the game and this is one of the ways of doing so.

Id. at 675-76, 361 P.3d at 1050 (citing Ruben v. Keuper, 127 A.2d 906 (N.J. Super. Ct. Ch. Div. 1956)).

For the tiny minority of top-performing players, skill makes a real difference in daily fantasy sports contests. But for the vast majority of players, chance predominates. See, e.g., Aff. of Zvi Gilula at 5, People v. DraftKings, Inc., Index No. 453054/2015 (N.Y. Sup. Ct. Nov. 24, 2014), NYSCEF Doc. No. 104 (noting that the typical client playing DraftKings' MLB-Fifty-Fifty game 134 times would have a win ratio of roughly 45%, i.e., very slightly worse than random chance). Under Hawai'i law, therefore, these contests are contests of chance.

2. Daily fantasy sports contests involve future contingent events not under the control of players.

Participants in daily fantasy sports contests win money based on the performance of athletes during athletic events. Daily fantasy sports players exercise no control or influence over the

[5] Fascination is a game somewhat akin to a mix of skee-ball and bingo where players compete against each other to be the first one to roll a rubber ball into five holes in a line. Id. at 666-67, 361 P.2d at 1046.

actions of those players. A chosen athlete may become injured or not play in a given game. Additionally, there are uncontrollable circumstances that may affect the points scored by an athlete, including weather and officiating. Thus, daily fantasy sports players "risk[] something of value upon the outcome of . . . a future contingent event not under [their] control or influence." Haw. Rev. Stat. § 712-1220 (2014). Indeed, the only Hawai'i Supreme Court case to explicitly mention future contingent event gambling involved gambling on a sporting event. State v. Okamura, 63 Haw. 342, 343, 626 P.2d 282, 283 (1981) (per curiam).

Based on the discussion above, we conclude that daily fantasy sports contests constitute illegal gambling under Hawai'i law. We hope that we have adequately responded to your inquiry. Please contact us should you require further assistance.

Very truly yours,

Kevin K. Takata
Deputy Attorney General

APPROVED:

Douglas S. Chin
Attorney General

PRESIDENT'S MESSAGE

by Jason T. Hanselman

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FANTASY OR REALITY?

The fight over fantasy sports is kicking off

Most of my friends have played fantasy football for years. In the early days, it took a few days for the league commissioners to comb newspapers to compile statistics and calculate scores. At the end of a four-month season, there was a "Super Bowl" among the league participants to determine the champion. Today, feedback and scores are updated in real time on mobile apps. I suppose the logical next step was to replace season-long battles with daily fantasy battles with instant championships (gratification).

In recent years, websites DraftKings and FanDuel have come to dominate the market. It is nearly impossible to watch a sporting event now without commercials for one or both websites. Professional leagues and teams have partnered with daily fantasy operators and many stadiums even have these websites' logos plastered around the venues. One could argue that, with so much self-promotion, additional attention was inevitable.

Although that attention has resulted in tremendous growth in the daily fantasy sports market, the websites also drew some unwanted attention in the form of government regulators scrutinizing whether their operations are legal.

Federal Law

The Federal government has taken no meaningful action to address the daily fantasy sports phenomenon that has exploded in the past few years. Long before anyone thought of daily fantasy sports, Congress in 2006 passed the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), which essentially restricts banks and other financial institutions from servicing internet gambling websites. The law was designed to cripple online gambling by making it nearly impossible for websites to process payments.

As a result of a late amendment, however, UIGEA exempts from the federal prohibition against gambling "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." Although that provision has been touted as opening the door to

daily fantasy sports, UIGEA explicitly states that UIGEA does not modify substantive state law, therefore, the question of whether fantasy sports are legal turns on the law of each state. The federal government could potentially seek to stop daily fantasy sports using the Wire Act, the Travel Act, or the Organized Crime Control Act in states in which daily fantasy sports violate state law, but has not done so, leaving states to decide whether and how to address this growing trend.

Other States

New York Attorney General Eric Schneiderman not only concluded that daily fantasy sports are impermissible under New York law, but also sued both websites seeking to block their operations in New York State. The State was granted a temporary injunction on December 11, 2015 to stop DraftKings and FanDuel from operating in New York, but an appellate court reversed the decision a few hours later and lifted the injunction. The State doubled down by amending its complaint, seeking to compel the sites to return all of the money they made in New York State, which is as much as $200 million, by some estimates.

Also, in December 2015, Illinois Attorney General Lisa Madigan opined that daily fantasy sports constitute illegal gambling under Illinois law and litigation is ongoing between Illinois and both DraftKings and FanDuel. On January 19, 2016, Texas's Attorney General opined that daily fantasy sports constitutes illegal gambling under Texas law , which deals a potentially crushing blow in another major market. This leaves three of the largest fantasy sports markets—New York, Texas, and Illinois—in legal limbo while regulators and courts try to sort-out whether these games are lawful.

Michigan

Although Michigan Attorney General Bill Schuette has not yet weighed in on the issue, Michigan Gaming Control Board Executive Director Rick Kalm has stated that daily fantasy sports is illegal under Michigan law[i]. Generally, activities are considered illegal gambling when not specifically authorized by Michigan law but involve: (1) chance; (2) consideration; and (3) a prize.

Presumably, Director Kalm's statements rely more specifically upon the Michigan Penal Code, which states that the general prohibition against gambling applies "to a transaction whereby money or a valuable thing shall be paid as a gain or speculation on the result of a[n] ... event not known to the parties to be certain and concerning which the parties to the transaction do not render service directly related to the holding of the contest, race, or game or the bringing about of the event."[ii]

ALTHOUGH MICHIGAN ATTORNEY GENERAL BILL SCHUETTE HAS NOT YET WEIGHED IN ON THE ISSUE, MICHIGAN GAMING CONTROL BOARD EXECUTIVE DIRECTOR RICK KALM HAS STATED THAT DAILY FANTASY SPORTS IS ILLEGAL UNDER MICHIGAN LAW.

Director Kalm also may be relying on the Michigan Gaming Control and Revenue Act, which authorized the Detroit casinos, and limits the

> continued on page 6

ability to conduct a "gambling game" or "gambling operation" to casinos licensed under the Act.[iii]

Director Kalm's position could be bolstered by an unpublished Michigan Court of Appeals opinion that an arcade golf game (Golden Tee) is a "gambling game," because it is a "game played with cards, dice, equipment or a machine, including any mechanical, electromechanical or electronic device...for money, credit, or for any representative of value."[iv]

Given that daily fantasy sports are played online via an "electronic device" for "money," it would not be a stretch for Director Kalm to rely on that case to support his position.

Daily fantasy sports proponents argue daily fantasy sports are not games of chance because they require knowledge about a particular sport and skill to analyze statistics. Specifically, they contend that these games are skill-based because they require an understanding of the rules and probabilities involved. Daily fantasy supporters say that the shorter time-frame in daily fantasy sports arguably requires more knowledge and statistical analysis than traditional fantasy sports. Conversely though, inclement weather, an injury, or slippery fingers could alter a game in a way that is completely unpredictable.

Pending Legislation

Around the same time as Director Kalm's statements above, Michigan Senator Curtis Hertel introduced Senate Bill 459 to amend the Michigan penal code to define fantasy sports as games of skill that are legal in Michigan. SB 459 attempts to make clear that any fantasy sports that comply with the UIGEA would be legal under the Michigan Penal Code as well. Specifically, SB 459—which is only one sentence—states:

> This chapter does not apply to participation in a fantasy or simulation sports game or educational game or contest as described in and that meets all of the conditions of 31 USC 4 5362(1)(e)(ix).

Query whether amending the Penal Code goes far enough or if the Michigan Gaming Control and Revenue Act also needs to be amended to truly clarify the state of the law in this area. Some of the analysis may depend upon whether daily fantasy sports is a "game of chance." Or, in the parlance of the Michigan Penal Code, whether the wager relates to the outcome of an "event not known to the parties to be certain."

For years, online poker websites argued that poker is a skill game and, therefore, is not prohibited under various state and federal laws. As Matt Damon's character said in the movie Rounders, "[w]hy do you think the same five guys make it to the final table of the World Series of Poker every year?"

The argument is that winning poker is not predominantly dependent upon the cards dealt, but on the way players analyze and use those cards. Poker has had difficulty convincing courts in the United States that poker is a skill game and it remains to be seen whether DraftKings and FanDuel ultimately will suffer the same fate as many of those formerly popular, but now defunct, online poker websites. In the meantime, until Michigan law changes, those playing fantasy sports may find themselves in legal limbo. ❐

[i] Daily fantasy sports sites under review in Michigan, Chad Livengood, Detroit Free Press, December 8, 2015.

[ii] MCL 750.310.

[iii] MCL 432.202.

[iv] *McEntee v Incredible Techs, Inc*, No 263818, 2006 WL 659347, at *1-2 (Mich Ct App, Mar 16, 2006).

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 23, 2015

FILE NO. 15-006

SPORTS AND GAMING:
Daily Fantasy Sports
Contests as Gambling

The Honorable Elgie R. Sims, Jr.
Chairperson, Judiciary - Criminal Committee
State Representative, 34th District
8658 South Cottage Grove, Suite 404B
Chicago, Illinois 60619

The Honorable Scott R. Drury
Vice-Chairperson, Judiciary - Criminal Committee
State Representative, 58th District
425 Sheridan Road
Highwood, Illinois 60040

Dear Representative Sims and Representative Drury:

You have inquired whether daily fantasy sports contests offered by FanDuel and DraftKings (collectively Contest Organizers) constitute "gambling" under Illinois law. For the reasons stated below, it is my opinion that the contests in question constitute illegal gambling under subsection 28-1(a) of the Criminal Code of 2012 (the Criminal Code) (720 ILCS 5/28-1(a)

(West 2014)), and the exemption set forth in subsection 28-1(b)(2) of the Criminal Code (720 ILCS 5/28-1(b)(2) (West 2014)) does not apply.

BACKGROUND

The Contest Organizers are currently two of the most prominent companies offering online daily fantasy sports contests. The term "fantasy sports contests" commonly refers to contests involving virtual teams in which participants choose current athletes in a given professional or college sport to create a fantasy sports team and then compete against other fantasy sports participants, with the winner or winners determined based on how those athletes individually perform in their actual professional or college sports game. *See generally Langone v. Kaiser*, No. 12-C-2073, 2013 WL 5567587 (N.D. Ill. October 9, 2013).

Unlike traditional fantasy sports contests, which operate on a season-long timetable, daily fantasy sports contests are conducted over short-term periods, such as a week or single day of competition. Participants who have created accounts with the Contest Organizers pay an entry fee to participate in one or more of a Contest Organizer's fantasy sports contests[1] and select a team of athletes in a certain sport under an imaginary "salary cap," a maximum budget to

[1]The Contest Organizers offer a number of different contest formats including leagues, tournaments, head-to-heads, and multipliers. Leagues have a set number of entries allowed, while tournaments do not have a cap on the number of entries. Most tournaments have guaranteed prize pools, where a prize is guaranteed no matter the total number of entrants. In head-to-head contests, two participants compete against each other directly. In multiplier contests, those in a certain top percentage of the total number of participants will win the same amount. FanDuel Website, *available at* https://www.fanduel.com/how-it-works; DraftKings Website, *available at* https://www.draftkings.com/help/faq.

spend on athletes for the creation of a fantasy sports team.[2] The prizes are known in advance of the playing of the actual games, and the prize values do not change based on the number of entries in a particular contest. Participants earn fantasy points based on the statistical performance of the athletes in the actual games. Depending on the athletes' overall performance, participants may win a share of the predetermined prize. Entry fees help fund prizes, with a portion of the fees also going to the appropriate Contest Organizer. Complaint for Declaratory and Injunctive Relief at 5-6, *FanDuel, Inc. v. Schneiderman*, No. 161691/2015 (N.Y. Sup. Ct., New York County); Verified Petition at 7-8, *DraftKings, Inc. v. Schneiderman*, No. 102014/2015 (N.Y. Sup. Ct., New York County).

ANALYSIS

The Contest Organizers have suggested that their daily fantasy sports contests are authorized under Federal law. The Professional and Amateur Sports Protection Act (PASPA) (28 U.S.C. §3701 *et seq.* (2012)), which was enacted in 1992, makes it unlawful for "a person to sponsor, operate, advertise, or promote * * * a lottery, sweepstakes, or other betting, gambling, or wagering scheme based * * * on one or more competitive games in which amateur or professional athletes participate[.]" 28 U.S.C. §3702 (2012). However, the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) (31 U.S.C. §5361 *et seq.* (2012)) was enacted after

[2]*See* FanDuel Website, *available at* https://www.fanduel.com/how-it-works; DraftKings Website, *available at* https://draftkings.com/help/how-to-play. Both FanDuel and DraftKings offer free "contests." However, this opinion addresses only those contests in which participants pay an entry fee.

PASPA's passage and prohibits any person engaged in the business of "betting" from knowingly accepting credit, electronic fund transfers, checks, or any other payment involving a financial institution to settle unlawful internet gambling debts. 31 U.S.C. §5363 (2012). The UIGEA excludes from the definition of "bet or wager" the participation in any fantasy sports game where: (1) all prize amounts are made known before the contest begins; (2) all winning outcomes are based on the relative skill and knowledge of the participants; and (3) no winning outcome is based on the scores or performance of a single, real world event or the performance of any real world team. 31 U.S.C. §5362(1)(E)(ix) (2012). The UIGEA specifically provides, however, that "[n]o provision of this subchapter shall be construed as * * * limiting * * * State law * * * or regulating gambling within the United States." 31 U.S.C. §5361(b) (2012). The UIEGA thus leaves to each state the authority to determine whether daily fantasy sports contests which fall under the UIEGA's requirements constitute illegal gambling.

In that regard, the online Terms of Use for FanDuel provide that individuals who are physically located in Arizona, Iowa, Louisiana, Montana, Nevada, New York, or Washington are not eligible to participate in contests. FanDuel Website, *available at* https://www.fanduel.com/terms. Similarly, the online Terms of Use for DraftKings provide that legal residents physically located in the foregoing states, with the exception of New York, are ineligible to participate in contests. DraftKings Website, *available at* https://www.draftkings.com/help/terms. It appears that the excluded states have gambling statutes that either expressly prohibit fantasy

sports gambling (Mont. Code Ann. §23-5-802 (2015), *available at* http://leg.mt.gov/bills/mca/23/5/23-5-802.htm) or internet gambling (La. Rev. Stat. §14:90.3 (2015), *available at* http://www.legis.la.gov/legis/LawSearch.aspx; Wash. Rev. Code §9.46.240 (2015), *available at* http://apps.leg.wa.gov/RCW/default.aspx?cite=9.46.240) or have been construed by State enforcement authorities to prohibit fantasy sports contests (*see* Ariz. Att'y Gen. Op. No. I98-002, issued January 21, 1998 (concluding that fantasy football constitutes gambling under Arizona law); Memorandum from J. Brin Gibson, Bureau Chief of Gaming and Government Affairs and Ketan D. Bhirud, Head of Complex Litigation, Office of the Nevada Attorney General, to A.G. Burnett, Chairman, Nevada Gaming Control Board, Terry Johnson, Member, Nevada Gaming Control Board, and Shawn Reid, Member, Nevada Gaming Control Board (October 16, 2015) (concluding that daily fantasy sports constitute sports pools and gambling games under Nevada law and therefore cannot be offered in Nevada without first obtaining a gaming license)).[3] *See also* 86th Iowa Gen. Assem., Senate File 166, 2015 Sess. (pending legislation proposing to add "Fantasy or Simulation Sports Contests" to the list of lawful *bona fide* contests).

[3]Additionally, on November 10, 2015, the New York Attorney General's Office issued cease and desist letters to FanDuel and DraftKings, asserting that their operations constitute illegal gambling under New York law. *See* Letter from Kathleen McGee, Chief, Internet Bureau, Office of the New York Attorney General, to Jason Robins, Chief Executive Officer, DraftKings, Inc. (November 10, 2015); Letter from Kathleen McGee, Chief, Internet Bureau, Office of the New York Attorney General, to Nigel Eccles, Chief Executive Officer, FanDuel Inc. (November 10, 2015). That matter is currently in litigation. *See* note 10.

In Illinois, the legality of daily fantasy sports is a matter of first impression.[4] The Criminal Code prohibits the playing of both "games of chance or skill for money[.]" Specifically, subsection 28-1(a) of the Criminal Code (720 ILCS 5/28-1(a) (West 2014)) defines the offense of gambling and provides, in pertinent part:

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[4]There is one decision from a Federal district court in Illinois addressing daily fantasy sports contests. In *Langone v. Kaiser*, the plaintiff brought a claim under section 28-8 of the Illinois Loss Recovery Act (720 ILCS 5/28-8 (West 2012)) seeking, in part, to recover money from FanDuel and from an Illinois resident that a third party allegedly lost to in a daily fantasy sports contest hosted by FanDuel. The court determined that "[t]he relevant question for the purposes of the Loss Recovery Act is not whether FanDuel's activity is illegal; the question is whether FanDuel is 'the winner' with respect to any particular 'loser.'" *Langone*, 2013 WL 5567587, at *7. The court held that because FanDuel does not risk its own money on the contests, it cannot be a winner or a loser under the Loss Recovery Act. Because the court specifically declined to address whether daily fantasy sports contests constitute illegal gambling under Illinois law, the case has no bearing on the instant inquiry.

We are also aware of four lawsuits pending in the Federal courts in Illinois involving DraftKings and/or FanDuel. *Izsak v. DraftKings, Inc.*, No. 14-cv-7952 (N.D. Ill. (2014)) (A class action alleging that DraftKings violated the Federal Telephone Consumer Protection Act (47 U.S.C. §227 *et seq.* (2012)) by sending unsolicited text messages to the cell phones of the plaintiff and the class members.); *Hemrich v. DraftKings, Inc.*, No. 3:15-cv-445 (S.D. Ill. (2015)) (A class action alleging that DraftKings violated the Illinois consumer fraud statute (815 ILCS 505/1 *et seq.* (West 2014)) and Missouri law by misleading consumers into believing that their initial deposit would be doubled through a "100% First-Time Deposit Bonus" and seeking money damages in the amounts of the doubled first-time deposits that the plaintiffs did not receive. The complaint specifically alleges that "DraftKings' business is a legal one under United States law[,]" citing the Unlawful Internet Gambling Enforcement Act of 2006 (31 U.S.C. §5362(1)(E)(ix) (2012). *Hemrich* Complaint at 4, ¶18.); *Guarino v. DraftKings, Inc. and FanDuel, Inc.*, No. 3:15-cv-1123 (S.D. Ill. (2015)) (A class action alleging that DraftKings and FanDuel fraudulently induced plaintiff and the class members into paying money to participate by claiming the games were fair games of skill without the potential for insiders to use non-public information to compete against them when, in fact, the defendants willfully failed to disclose that employees of DraftKings and FanDuel had valuable, non-public data and would use this information to compete against plaintiff and the class members. The complaint seeks a full refund for all of the money paid to the defendants by the class members, damages and restitution, or other equitable relief. As part of the allegations, the complaint states that daily fantasy sports contests are "not gambling because of the skill involved in picking a winning team." *Guarino* Complaint at 6, ¶ 29.); *Stoddart v. DraftKings, Inc.*, No. 3:15-cv-1307 (S.D. Ill. (2015)) (A class action brought on behalf of a plaintiff who participated in DraftKings' contests and lost money and others similarly situated. The complaint alleges that DraftKings' daily fantasy sports contests are illegal gambling under Illinois law and seeks an order requiring DraftKings to disgorge all of the money wagered and lost by the plaintiff and the class members.). Only the *Stoddart* case raises the question of whether daily fantasy sports contests violate Illinois criminal law. The court has not reached that issue, however. The case is currently subject to an Order to Stay proceedings, pending the resolution of a Multidistrict Litigation transfer motion. Order, *Stoddart v. DraftKings, Inc.*, No. 3:15-cv-1307 (S.D. Ill. December 16, 2015).

> (a) A person commits gambling when he or she:
>
> (1) knowingly plays a game of chance or skill for money or other thing of value, unless excepted in subsection (b) of this Section;
>
> * * *
>
> (12) knowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money or other thing of value by means of the Internet or to make a wager upon the result of any game, contest, political nomination, appointment, or election by means of the Internet. This item (12) does not apply to activities referenced in items (6) and (6.1) of subsection (b) of this Section.[5]

Subsection 28-1(b) of the Criminal Code (720 ILCS 5/28-1(b) (West 2014)) exempts certain activities from the general prohibition on gambling. The Contest Organizers contend that the following exception applies to the daily fantasy sports contests they offer:

> (b) Participants in any of the following activities shall not be convicted of gambling:
>
> * * *
>
> (2) Offers of prizes, award or compensation to the actual contestants in any bona fide contest for the determination of skill, speed, strength or endurance or to the owners of animals or vehicles entered in such contest.

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[5]Subsections 28-1(b)(6) and 28-1(b)(6.1) of the Criminal Code (720 ILCS 5/28-1(b)(6), (b)(6.1) (West 2014)) respectively exempt from the illegal gambling prohibitions lotteries conducted by the State of Illinois in accordance with the Illinois Lottery Law (20 ILCS 1605/1 *et seq.* (West 2014)) and the online purchase of lottery tickets for a lottery conducted by the State of Illinois under the program established in section 7.12 of the Illinois Lottery Law (20 ILCS 1605/7.12 (West 2014)).

The offense of gambling is a Class A misdemeanor under Illinois law. A second or subsequent conviction under subsections 28-1(a)(3) through (a)(12) of the Criminal Code is a Class 4 felony. 720 ILCS 5/28-1(c) (West 2014).

The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly. *Illinois Department of Healthcare and Family Services v. Warner*, 227 Ill. 2d 223, 229 (2008). Legislative intent is best evidenced by the language used in the statute, and where statutory language is clear and unambiguous, it must be given effect as written. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). One must view all of the provisions of the statute as a whole. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 422 (2002). Words and phrases should not be construed in isolation, but interpreted in light of other relevant portions of the statute. *Land*, 202 Ill. 2d at 422. Illinois criminal statutes must be narrowly construed in favor of the accused. *People v. Williams*, 239 Ill. 2d 119, 127 (2010); *People v. Christensen*, 102 Ill. 2d 321, 328 (1984).

Subsection 28-1(a)(1) of the Criminal Code provides that a person commits the offense of gambling when he or she "knowingly plays a game of chance or skill for money[,]" unless excepted in subsection 28-1(b). The statutory language is straightforward and unequivocal. It clearly declares that *all* games of chance *or* skill, when played for money, are illegal gambling in Illinois, unless excepted. While the Contest Organizers assert that daily

fantasy sports contests are games of skill[6] rather than games of chance, that argument is immaterial because subsection 28-1(a)(1) expressly encompasses both. Moreover, participants must pay an entry fee or buy-in amount in order to win a prize. Consequently, the act of playing daily fantasy sports contests in Illinois constitutes illegal gambling under subsection 28-1(a)(1) of the Criminal Code, unless otherwise excepted.

Pursuant to subsection 28-1(a)(12) of the Criminal Code, a person also commits gambling when he or she "knowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money or other thing of value by means of the Internet or to make a wager upon the result of any game[.]" The Contest Organizers operate websites that allow individuals to play games of chance or skill for money. Accordingly, entities which operate such contests commit the offense of gambling under Illinois law, unless otherwise excepted. *See Cie v. Comdata Network, Inc.*, 275 Ill. App. 3d 759, 764-65 (1995), *appeal denied*, 165 Ill. 2d 548 (1996) (subsection 28-1(b) exceptions apply to all gambling prohibitions in subsection 28-1(a)).

Subsection 28-1(b) of the Criminal Code sets out the only exceptions to activities that otherwise would constitute gambling under subsection 28-1(a). The Contest Organizers assert that their contests are excepted under subsection 28-1(b)(2). This subsection was included in the original enactment of article 28 of the Criminal Code of 1961 (*see* 1961 Ill. Laws 1983,

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[6]*See* FanDuel Website, *available at* https://fanduel.zendesk.com/hc/en-us/articles/210202858-Is-FanDuel-legal; DraftKings Website, *available at* https://www.draftkings.com/help/why-is-it-legal.

2033-37; Ill. Rev. Stat. 1961, ch. 38, par. 28-1 *et seq.*) and exempts "[o]ffers of prizes, award or compensation to *the actual contestants* in any bona fide contest for the determination of skill, speed, strength or endurance or to the owners of animals or vehicles entered in such contest."[7] (Emphasis added.)

Reading the statute as a whole, it is clear that subsection 28-1(b)(2) applies only to the "actual contestants" in the actual sporting event.[8] In the context of daily fantasy sports, the "actual contestant" upon whose performance success or failure is based is the athlete or athletes whose "skill, speed, strength or endurance" determine the outcome. Thus, subsection 28-1(b)(2) exempts only those who actually engage in a *bona fide* contest for the determination of skill, speed, strength, or endurance, and not a daily fantasy sports contest participant who pays a fee to build a "team" and who may win a prize based on the statistical performance of particular athletes. In this regard, persons whose wagers depend upon how particular, selected athletes perform in actual sporting events stand in no different stead than persons who wager on the outcome of any sporting event in which they are not participants. None of these persons are the

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[7]There is only one Illinois case which cites to this exception. In *People v. Mitchell*, 111 Ill. App. 3d 1026, 1028 (1983), the court upheld a jury's conclusion that "Hold 'em" poker was not a "bona fide contest for the determination of skill" under subsection 28-1(b)(2). The court held that the evidence supported the jury's conclusion that "the games, in fact, required a combination of skill and chance, and that they were definitely not the type of '*bona fide* contests' excepted from subsection [28-1](a)(1)." (Emphasis in original.) *Mitchell*, 111 Ill. App. 3d at 1028.

[8]The Contest Organizers have not suggested that daily fantasy sports contests involve determining the speed, strength, or endurance of the fantasy sports participants who enter the contests, nor could such a suggestion be made in good faith.

actual contestants in a *bona fide* contest for the determination of skill, speed, strength, or endurance.

This interpretation is consistent with a 1994 opinion of the Texas Attorney General's Office construing substantially similar statutory language to that found in subsection 28-1(b)(2) of the Criminal Code. Tex. Att'y Gen. Op. No. LO-94-051, issued June 9, 1994. In that opinion, the Texas Attorney General's office addressed whether a contest which requires an entry fee, pays prizes to winners, and is based on forecasting the outcomes of a number of sporting events constitute illegal gambling under Texas law.[9] The Texas Attorney General's Office concluded that the contest at issue did not fall within the gambling exception and therefore constituted illegal gambling:

> We cannot think of any distinction the words "*actual* contestants" could be intended to make other than that between those actually participating in a contest and able by their performance to affect its outcome, and those merely betting on it. Thus, while the subsection (1)(B) exclusion may embrace athletes actually competing in the sporting events you refer to, it does not embrace

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[9]*See* Texas Penal Code §47.01(1)(B) (2015), *available at* http://www.statutes.legis.state.tx.us/docs/PE/pdf/PE.47.pdf, which provides, in pertinent part:

> (1) "Bet" means an agreement to win or lose something of value solely or partially by chance. A bet does not include:
>
> * * *
>
> (B) an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest[.]

> those who pay entry fees for a chance to win a prize from forecasting the outcome of the events. (Emphasis in original.) Tex. Att'y Gen. Op. No. LO94-051 at 2.[10]

Although daily fantasy sports contests may involve some degree of skill, such as selecting an athlete for a participant's team based on knowledge of the athlete's historical

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[10]The New York Supreme Court recently made this same distinction when granting the New York Attorney General's motions to enjoin the Contest Organizers from accepting entry fees from New York State consumers for any daily fantasy sports contests which they operate, pending a final determination. *See* Decision and Order for Injunctive Relief, *People ex rel. Schneiderman v. DraftKings, Inc.*, No. 453054/2015 (N.Y. Sup. Ct., New York County, December 11, 2015); Decision and Order for Injunctive Relief, *People ex rel. Schneiderman v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct., New York County, December 11, 2015) (Decisions and Orders). New York law defines "gambling" as follows:

> *A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence*, upon an agreement or understanding that he will receive something of value in the event of a certain outcome. (Emphasis added.) N.Y. Penal Law §225.00(2) (2015), *available at* http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO:.

The New York Attorney General argued that the participants paid entry fees "on events they cannot control or influence, relying on the real-game performance of professional athletes, to win a prize, which amounts to gambling" under New York law. Decisions and Orders, at 5. The New York Attorney General further argued that daily fantasy sports contests are "contests of chance" because the outcome depends substantially on chance and factors not within the participant's control, and that once a team is chosen for a contest, there is no means of altering the outcome. Decisions and Orders, at 6. The court concluded that the language of the statute "is broadly worded and as currently written sufficient for finding that DFS [daily fantasy sports] involves illegal gambling." Decisions and Orders, at 7. The Contest Organizers immediately appealed the court's decision. Notice of Appeal, *People ex rel. Schneiderman v. DraftKings, Inc.*, No. 453054/2015 (N.Y. Sup. Ct., New York County, December 11, 2015); Notice of Appeal, *People ex rel. Schneiderman v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct., New York County, December 11, 2015). The New York Supreme Court, Appellate Division granted an interim stay of the enforcement of the injunction against FanDuel pending a determination by a full panel. Notice of Entry of Appellate Division Interim Stay Order, *People ex rel. Schneiderman v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct., New York County, December 11, 2015).

Additionally, the Kansas Legislature recently amended its gambling statute, which contains a substantially similar exclusion for "offers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill, speed, strength or endurance or to the bona fide owners of animals or vehicles entered in such a contest[,]" to also exclude "a fantasy sports league as defined in this section[.]" Kan. Stat. Ann. §§21-6403(a)(2), (a)(9) (2014), as amended by 2015 Kan. Sess. Laws 835-38, *available at* http://www.sos.ks.gov/pubs/sessionlaws/2015/2015_Session_Laws_Volume_1.pdf.

performance, match-up against a particular opponent, performance in a particular venue, and/or performance in particular weather conditions, the phrase "actual contestants" as used in subsection 28-1(b)(2) does not apply to those persons who pay entry fees for a chance to win a prize for forecasting the performance of professional or college athletes over whom they have no control or influence. Accordingly, it is my opinion that subsection 28-1(b)(2) does not exempt daily fantasy sports contests from the Illinois gambling provisions.

CONCLUSION

It is my opinion that the daily fantasy sports contests offered by FanDuel and DraftKings clearly constitute gambling under subsection 28-1(a) of the Criminal Code of 2012 and that the exemption set forth in subsection 28-1(b)(2) of the Criminal Code does not apply.

In closing, I note that there is legislation currently pending in each chamber of the Illinois General Assembly which proposes, in part, to create a new Act – the Fantasy Contests Act – and to exempt "fantasy contests as defined under the Fantasy Contests Act" from the general prohibition against gambling. *See* 99th Ill. Gen. Assem., House Bill 4323, Senate Bill 2193, 2015 Sess.[11] Thus, it appears that a number of General Assembly members have reached this same conclusion, as they have agreed to sponsor the foregoing legislation. Absent legislation

[11]House Bill 4323 was referred to the House Rules Committee on November 9, 2015. Senate Bill 2193 was referred to the Senate Assignments Committee on November 3, 2015. Previously-filed legislation proposing to create the Daily Fantasy Sports Regulation Act contained only a short title provision and was referred to the House Rules Committee on April 14, 2015. *See* 99th Ill. Gen. Assem., House Bill 4200, 2015 Sess.

specifically exempting daily fantasy sports contests from the gambling provisions, it is my opinion that daily fantasy sports contests constitute illegal gambling under Illinois law.

Very truly yours,

LISA MADIGAN
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April 24, 2015

ATTORNEY GENERAL OPINION NO. 2015- 9

The Honorable Mark A. Kahrs
State Representative, 87th District
State Capitol, 286-N
300 S.W. 10th Avenue
Topeka, Kansas 66612

Re: Constitution of the State of Kansas–Miscellaneous–Lotteries

Synopsis: 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. Further, because the Legislature has the exclusive authority to legislate and may determine what conduct may be punished as a crime, we conclude that Section 19 of 2015 Senate Substitute for HB 2155 does not violate the constitution. Cited herein: K.S.A. 2014 Supp. 21-6403; 21-6404; Kan. Const., Art. 2 § 1; Art. 15 § 3a, 3b, 3c, 3d; 31 USC 5361 *et seq*.

* * *

Dear Representative Kahrs:

As State Representative for the 87th District, you ask our opinion on three questions concerning the Fantasy Sports League. First, you ask whether "the Fantasy Sports League is a lottery under Kansas law." Second, you ask if the Fantasy Sports League is determined not to be a lottery, "is [2015 Senate Substitute for] HB 2155 constitutional." Third, you ask if the Fantasy Sports League is determined to be a lottery, "does the Legislature have the authority to state, 'A bet does not include . . . a fantasy sports league as defined in [2015 Senate Substitute for] HB 2155?'" We will answer your questions in turn.

The Legislature has determined that gambling is a crime defined as "[m]aking a bet; . . . or entering or remaining in a gambling place with intent to make a bet, to participate in a lottery or to play a gambling device."[1] A lottery is a specific form of gambling which is prohibited by Article 15, § 3 of the Constitution of the State of Kansas. Article 15, § 3 provides, "[l]otteries and the sale of lottery tickets are forever prohibited."[2] "[T]he term lottery, as used in Art. 15, § 3 of the Kansas Constitution, has been broadly defined by [the Kansas Supreme Court] as any game, scheme, gift, enterprise, or similar contrivance wherein persons agree to give valuable consideration for the chance to win a prize or prizes."[3] The Legislature defines "lottery" under the criminal code to mean "an enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which is determined by chance."[4] While the two definitions are not identical, the judicially and legislatively created definitions consistently identify the essential elements of a lottery as: (1) prize, (2) consideration, and (3) chance.[5] For convenience, we use the term "enterprise" to refer to "any game, scheme, gift, enterprise, or similar contrivance."

If the enterprise is a lottery, and the enterprise does not fall within one of the four voter-approved exceptions,[6] the constitutional ban is self-executing[7] and the enterprise is prohibited. If an essential element of a lottery is missing, then the enterprise is not a lottery and thus does not violate the constitutional ban against lotteries. In that case, the enterprise is not prohibited, *per se*. However, the enterprise may still violate the broader criminal law against gambling in this State.[8]

Elements of a Lottery

In your first question, you ask whether the Fantasy Sports League is a lottery under Kansas law. We were not provided any facts on how the Fantasy Sports League operates. However, legislative testimony indicates that "participants select a team of real world athletes and accumulate points based on how their players perform in an actual game. The goal—regardless of format—is to select a team of players that will score the most possible points."[9]

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[1] K.S.A. 2014 Supp. 21-6404(a).
[2] This provision was adopted by convention on July 29, 1859, and was ratified by the electors on October 4, 1859.
[3] *State ex rel. Stephan v. Finney*, 254 Kan. 632, 644 (1995).
[4] K.S.A. 2014 Supp. 21-6403(b).
[5] *Id*. *See also State v. Nelson*, 210 Kan. 439, 444 (1972) and *State ex rel. Stephan v. Finney*, 254 Kan. 632, 640 (1995).
[6] Article 15 §§ 3a, 3b, 3c, and 3d; *See* Attorney General Opinion No. 2015-6.
[7] *State ex rel. Stephan v. Finney*, 254 Kan. 632, 643 (1995).
[8] *See* K.S.A. 2014 Supp. 21-6403 *et seq*.
[9] *See* Testimony presented by Jeremy Kudon on behalf of the Fantasy Sports Trade Association before the House Federal and State Affairs Committee on March 10, 2015 on 2015 SB 267. The provisions of 2015 SB 267 were placed into 2015 Senate Substitute for HB 2155 by the Senate Committee of the Whole.

Further, because current Kansas law does not define "fantasy sports league," we presume that the definition of "fantasy sports league" in 2015 Senate Substitute for HB 2155 comports with your use of the term in this request. Section 19(d) of the bill, as of this writing, defines "fantasy sports league" to mean:

> [A]ny fantasy or simulation sports game or contest in which 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 and that meets the following conditions: (1) 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; (2) 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 (3) no winning outcome is based: (A) On the score, point spread or any performance or performances of any single real-world team or any combination of such teams; or (B) solely on any single performance of an individual athlete in any single real-world sporting event.[10]

For a fantasy sports league to constitute a lottery, the elements of a lottery must be present: prize, consideration and chance. A prize is something of value received for winning the enterprise.[11]

Consideration is defined in K.S.A. 2014 Supp. 21-6403(c), which states in pertinent part:

> "[C]onsideration" means anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant. Mere registration without purchase of goods or services; personal attendance at places or events, without payment of an admission price or fee; listening to or watching radio and television programs; answering the telephone or making a telephone call and acts of like nature are not consideration. . . .

The element of chance is not defined. The common and ordinary meaning[12] of a "game of chance" is "[a] game (as a dice game) in which chance rather than skill determines

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[10] This language appears to be modeled off of the 2006 Unlawful Internet Gambling Enforcement Act (UIGEA), specifically 31 U.S.C. § 5362(1)(E)(ix), which excludes, *inter alia*, fantasy or simulation sports games, from the definition of bet or wager.

[11] *See Games Mgmt., Inc. v. Owens*, 233 Kan. 444, 449 (1983).

[12] "In attempting to discover the legislature's intent, we examine the language of the statute, giving common words their common and ordinary meanings." *Davis v. Winning Streak Sports, LLC*, 48 Kan. App. 2d 677, 682 (2013).

the outcome."[13] Similarly, Black's Law Dictionary defines a "game of chance" as "[a] game whose outcome is determined by luck rather than skill."[14] Put simply, chance is the opposite of skill. Skill, on the other hand, requires a plan, design or the exercise of volition or judgment to actually cause a desired outcome of a game when the game is played.

In between games of chance and games of skill is a spectrum of enterprises that have a mixture of varying degrees of both skill and chance. A factual determination is required before a decision on a particular enterprise can be made, because, to our knowledge, no Kansas Court has determined, as a matter of law, that fantasy sports leagues are games of chance and are therefore lotteries.[15]

To determine how to categorize the enterprises in the middle of the spectrum, we believe Kansas has adopted the "dominant factor doctrine."[16] To be considered a game of chance, chance must generally predominate over skill in the results of the game.[17] It is generally for the courts to determine, on a case-by-case basis, whether skill or chance dominates in an activity, and therefore, whether the activity is prohibited as being in the nature of a lottery.[18]

When chance is "an integral part which influences the result," chance dominates the game.[19] Chance is not "integral" to the result where "skill override[s] the effect of the chance."[20] Although chance may be present in a game of skill, its influence cannot be so great as to influence the outcome. For a court to consider skill dominant in a game, "[s]kill or the competitors' efforts must sufficiently govern the result. Skill must control the final result, not just one part of the larger scheme."[21]

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[13] "Game of chance." Merriam-Webster.com. http://www.merriam-webster.com/dictionary/game of chance (accessed 4/21/2015).

[14] Black's Law Dictionary (10th ed. 2014) (defining "game of chance").

[15] We note, however, that the Kansas Racing and Gaming Commission concluded fantasy sports leagues are predominantly games of chance and issued a statement in their FAQ section on their website stating, "We do not argue that there are some elements of skill involved in fantasy leagues. Particularly, fantasy managers must be knowledgeable of player statistics, and must execute some strategy in selecting the best players for their fantasy team. On the other hand, a manager leaves to chance a number of things, including: (1) how a drafted athlete performs in a future event; (2) whether a drafted player is injured; (3) whether the player's actual team in a given week executes a game plan that fits the player's talents; whether the coach calls plays that favor the player; and (4) how opponents of the actual player (who may be drafted by another manager) actually play."

[16] *Three Kings Holdings, L.L.C. v. Six*, 45 Kan. App. 2d 1043, 1050 (2011); *Games Mgmt., Inc. v. Owens*, 233 Kan. 444, 449 (1983).

[17] 54 C.J.S. *Lotteries* § 5 (2015).

[18] *Id*.

[19] *State ex rel. Tyson v. Ted's Game Enters*., 893 So. 2d 355, 374 (Ala. Civ. App. 2002), quoting *Sherwood & Roberts-Yakima v. Leach*, 409 P.2d 160, 163 (Wash. 1966).

[20] *Id*.

[21] *Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973), citing *Commonwealth v. Plissner*, 4 N.E.2d 241 (Mass. 1936). *See also Sherwood & Roberts-Yakima*, 409 P.2d at 163 (discussing "control").

We believe that 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 a lottery. The definition of "fantasy sports leagues" in the bill specifically incorporates the dominant factor test by requiring that "all winning outcomes reflect the relative knowledge and *skill* of participants and are determined predominantly by accumulated statistical results of the performance of individual athletes in multiple real-world sporting events."[22]

Our conclusion is bolstered by the fact that the UIGEA also specifically excludes fantasy sports leagues from the federal definition of betting. Under federal law, Congress has determined that fantasy sports leagues are games of skill.

Constitutionality of 2015 Senate Substitute for HB 2155

In your second question, you ask if the Fantasy Sports League is determined not to be a lottery, is 2015 Senate Substitute for HB 2155 constitutional?

Section 19 of 2015 Senate Substitute for HB 2155 is the section dealing with fantasy sports leagues. It amends K.S.A. 2014 Supp. 21-6403, which provides definitions for the criminal statutes on gambling. Specifically, the bill amends the definition of "bet" to exclude fantasy sports leagues from the definition as follows:

> (a) "Bet" means a bargain in which the parties agree that, dependent upon chance, one stands to win or lose something of value specified in the agreement. A bet *does not* include:
> ….
>
> (9) a fantasy sports league as defined in this section;[23]

The bill also defines "fantasy sports league." The definition of fantasy sports league in the bill has been previously cited in this opinion.

Because we believe that a fantasy sports league that comports with the definition in Section 19 of 2015 Senate Substitute for HB 2155 is not a lottery, there is no constitutional provision prohibiting such a league. In addition, because the Legislature has the exclusive authority to legislate[24] and may determine what conduct may be punished as a crime, we conclude the Section 19 of 2015 Senate Substitute for HB 2155 does not violate the constitution.

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[22] Emphasis added.
[23] Emphasis added.
[24] Article 2, § 1 of the Kansas Constitution provides, "The legislative power of this state shall be vested in a house of representatives and senate."

Definition of Bet

In your final question, you ask if the Fantasy Sports League is a lottery, "does the Legislature have the authority to state, 'A bet does not include . . . a fantasy sports league as defined in HB 2155?'" Given our answers to your first and second question, we believe this question is moot.

Sincerely,

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DS:AA:sb

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January 15, 2016

The Honorable Thomas V. Mike Miller, Jr.
State House H-107
100 State Circle
Annapolis, Maryland 21401

Dear President Miller:

You have asked for our view as to whether Chapter 346 of 2012, which exempted fantasy sports from the prohibitions against betting, wagering, and gambling contained within Title 12 of the Criminal Law Article, had the effect of expanding commercial gaming and thus should have been subject to referendum under Maryland Constitution Article XIX, § 1(e). Whether Chapter 346 should have been referred to the electorate depends on three subsidiary questions: (1) Does the codification of Chapter 346 within Title 12 of the Criminal Law Article mean that it is exempt from the Article XIX referendum requirement when that requirement does not apply to "[g]aming conducted under Title 12 . . . of the Criminal Law Article"?; (2) If Chapter 346 is not exempt, did it authorize *daily* fantasy sports as well as *traditional* fantasy sports?; and (3) If so, do fantasy sports qualify as "commercial gaming" such that their authorization under Chapter 346 triggered the referendum requirement of Article XIX?

As discussed below, the answers to these subsidiary questions are close calls; none is clear and some involve statutory language and legislative history that conflict in critical respects. In addition, there are many different types of fantasy sports platforms and it is difficult, if not impossible, to reach broad conclusions that would apply to all of them in the absence of the type of factual inquiry for which our advisory function is ill-equipped. Further complicating matters is the fact that *daily* fantasy sports have only emerged in the last few years and there are few judicial opinions—and none in Maryland—that address this new form of fantasy sports.

Subject to those caveats, we believe that the better answer to each question leads to the conclusion that Chapter 346, to the extent it authorized daily fantasy sports, should have been referred to the electorate under Article XIX. However, due to the substantial uncertainty surrounding these issues and because the legislative history surrounding Chapter 346 suggests that the focus of the debate in the General Assembly in 2012 was not on the regulation of daily fantasy sports, we recommend that the Legislature squarely take up the issue this session and clarify whether daily fantasy sports are authorized in Maryland. By contrast, we think it is clear that traditional fantasy sports were authorized by Chapter 346. Because we conclude that it is likely that traditional gaming does not constitute "commercial" gaming within the meaning of Article XIX, Chapter 346, as applied to traditional fantasy sports, may be given effect.

Background

Fantasy sports come in a variety of forms, too numerous to discuss here. The earliest fantasy football games date back to the early 1960's, when Wilfred "Bill the Gill" Winkenbach created the Greater Oakland Professional Pigskin Prognosticators League and held their first draft in August of 1963. Michael B. Engle, *The No-Fantasy League: Why the National Football League Should Ban Its Players from Managing Personal Fantasy Football Teams*, 11 DePaul J. Sports L. & Contemp. Probs. 59, 62 (2015) (hereinafter "Engle"). Scoring was done manually by consulting the local sports section of the newspaper. *Id.* To keep it simple, only touchdowns were considered in scoring. *Id.* Fantasy leagues also developed for other sports. As computers became more common they began to be used for score keeping and the scoring systems became more complex. Eventually, host websites developed that would provide scoring and other services for free.

The traditional form of fantasy sports is descended from these early fantasy leagues. As described in *Humphrey v. Viacom, Inc.*, 2007 WL 1797648 (D.N.J. 2007), the providers of traditional online fantasy sports require participants to pay a fee to purchase a fantasy sports team and gain access to the various support services that the host website provides. These services typically include everything the participant needs to manage the fantasy team, including real time statistical information, expert opinions and analysis, and message boards for communicating with other participants. The purchase price also covers the data-management services necessary to run a fantasy sports team by drafting a slate of players, tracking the performance of those players, trading players throughout the season, and deciding which players will start and which are on the bench. *Id.* at *1-2. The teams are grouped into leagues, either by the participants forming their own leagues, or in groups formed by the host website.

Although fantasy games can take a variety of forms, typically no player can be chosen for more than one team in a league. Winners are generally determined based on points earned as a result of the performance of individual players chosen for the team. The team with the highest score is declared the winner at season's end. The website host may provide prizes of nominal value for winning teams in a league, and larger prizes for the highest score among all leagues. *Id.* at *2. Monetary prizes may also be awarded. Whatever the prize, the value is determined in advance as part of the agreement for services. In the rest of this letter, we will refer to this kind of fantasy gaming as traditional fantasy sports ("TFS").

Your question also relates to a more recent type of fantasy game where an online company itself operates a wide variety of games that people can participate in online. These games are not ordinarily based on an entire season, but rather on a week, a day, or even a single time of play, such as all professional football games played at 4 p.m. on a particular Sunday. While a fantasy game is never based on a single game, it is our understanding that there are fantasy games based on as few as three real-life games. These are known as daily fantasy sports ("DFS").

The two types of fantasy sports are similar in many respects; in both versions the participants draft players and the winner is determined on the basis of the selected players' performance over the relevant time period. But that is where the similarity ends. Whereas the archetypal TFS game is a contest among friends, DFS contests include leagues, tournaments, head-to-heads, and multipliers, which can involve hundreds of thousands of people who compete more or less anonymously over the internet. *See People of the State of New York v. FanDuel*, Index No. 453056/15, Decision and Order at 5 (N.Y. Sup. N.Y. County Dec. 11, 2015). Whereas TFS participants manage their teams throughout the season by trading and benching players, DFS participants select players for one day only, and must "lock-in" those selections before the relevant games begin. *Id.* And while TFS providers typically charge a flat rate entry fee for the statistical and analytical support they provide, DFS entry fees vary widely by type of contest. In fact, entry fees for providers such as FanDuel and DraftKings can be as low as $.25 (or even free) but can range as high as $10,600 for a single competition. *See FanDuel*, Index No. 453056/15, at 5; *see also Langone v. Kaiser*, 2013 WL 5567587 at *1 (N.D. Ill. 2013). The prizes too can be much more valuable in DFS; whereas TFS contests typically involve jerseys, televisions, or other modest cash prizes, DFS are advertised as "get rich quick" schemes, with large cash prizes that can be as high as $1 million.

The manner in which a DFS provider funds the prizes it offers seems to be a matter of some debate. In pending litigation brought by the New York Attorney General,[1] FanDuel and DraftKings maintain that the prize pools they offer are set in advance and are funded with money that is entirely separate from the entry fees that they collect. As evidence of this, the providers point out that they actually *lose* money in contests where the number of participants is low enough that the entry fees collected are less than the money paid out. There is, however, some indication in the court decisions and elsewhere that the online providers actually take a "commission" from every entry fee paid. *Langone*, 2013 WL 5567587 at 1, 6 (stating that FanDuel "derives its profit from commissions"); *FanDuel*, Index No. 453056/15 at 5, 7 (stating that "a percentage of every entry fee [is] paid to" FanDuel and DraftKings); *see also* Drew Casey, "DraftKings, FanDuel make millions, and give them away, as fantasy revs up," CNBC (Sept. 20, 2105) (quoting FanDuel's Co-founder Nigel Eccles as stating that "[p]layer prizes [are] really driven by entry fees" and that "[t]he money that comes in, we take about a 10-percent cut and we pay out everything else in prizes, so it's really self-funding"). Whether the financial return derives from a per-entry

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[1] The two cases are *People of the State of New York v. FanDuel, Inc.*, Index No. 453056/15, and *People of the State of New York v. DraftKings, Inc.*, Index No. 453054/15, both of which resulted in the New York Supreme Court (a trial court in the New York system) finding that the Attorney General had established a likelihood of success on the merits of his claim that DFS constituted illegal gambling under New York Law. The court granted temporary injunctions preventing the companies from accepting entry fees, wagers, or bets from New York residents in connection with any competition, game, or contest that the companies run on their websites. The temporary injunctions were subsequently stayed by an appellate court. *People of the State of New York v. FanDuel, Inc., et al.*, Nos. M-6204, M-6206 (N.Y. App. Div. Jan. 11, 2016).

commission or from net profit, DFS providers reportedly clear between 6% and 14% of the entry fees paid to them, *FanDuel*, Index No. 453056/15, at 5, and take in millions of dollars in revenue every week.

Chapter 346 and the Regulation of Fantasy Sports

Until recently, no statute or court decision expressly had addressed the legality of fantasy sports under Maryland's gaming laws. Those laws had for many years made it illegal to "bet, wager, or gamble," Crim. Law § 12-102(a)(1), but their applicability to fantasy sports was never made clear. In 2006, an Opinion of the Attorney General on the legality of certain poker tournaments cast doubt on the legality of fantasy sports to the extent that they involved consideration, chance, and reward. These three criteria, the Attorney General stated, are "[t]he three main elements common to all gambling."[2] 91 *Opinions of the Attorney General* 64, 65 (2006) (citing *Chesapeake Amusements, Inc. v. Riddle*, 363 Md. 16, 24 (2001)). As a result of that opinion, many fantasy sports providers blocked Maryland residents from receiving t-shirts and other prizes.[3] *See* Hearing on House Bill 7 Before the Ways and Means Comm., 2012 Leg., Reg. Sess. (March 16, 2012) (testimony of the Hon. John A. Olszewski, Jr.) ("2012 Olszewski Testimony").

In 2008, Delegate Olszewski—himself a participant in fantasy sports—asked the Department of Legislative Services to examine the relationship between traditional fantasy sports competitions and Maryland's gaming laws. Some people apparently had "contended" that TFS constituted gambling because the entry fee is "wagered" and the outcome of the contest depends "on luck more than skill." Memorandum from Lindsay A. Eastwood, Policy Analyst, to Del. John A. Olszewski, Jr., at 1 (Nov. 17, 2008). The policy analyst concluded that fantasy sports "would probably not be considered gambling," but that new legislation on the topic would "clarify" that "fantasy competition should not fall into the realm of gambling." *Id.* at 5. The memorandum did not, however, address *daily* fantasy sports. *See id.* at 1 (describing fantasy sports as allowing for "moment-by-moment team management," where participants "trade players over the course of a season, and decide which players will start and which will be on the bench," and stating, "A winner is declared at the end of the season, with prizes ranging from bobble-head dolls to flat-screen televisions").

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[2] The terms gaming and gambling are interchangeable. Black's Law Dictionary (9th Ed. 2004) at 746; *see also* 94 *Opinions of the Attorney General* 32, 36 (2009).

[3] Maryland is not the only state whose residents' access to online fantasy sports has been limited at one time or another. The current terms of use for FanDuel, for example, note that people who are "physically located" in Arizona, Iowa, New York, Louisiana, Montana, Nevada or Washington are not eligible to participate. *See* www.fanduel.com/terms. DraftKings' terms of use note that residents of these same states (with the exception of New York) are "ineligible for prizes." *See* www.draftkings.com/help/terms.

In response, Delegate Olszewski introduced House Bill 21 in the 2009 session of the General Assembly. The bill, which was unsuccessful, would have enacted § 12-114 in substantially the same form that it exists today. Delegate Olszewski introduced an identical bill in 2010 (H.B. 750) and it also failed. Both bills were focused on the status of traditional fantasy sports and both were intended to enable Maryland residents who participate in fantasy sports to be eligible to receive prizes to the same extent as the residents of other states. *See* 2012 Olszewski Testimony. The relevant fiscal reports made no mention of fantasy sports carried out on a daily basis.

The 2012 session saw the successful enactment of what is now § 12-114 of the Criminal Law Article. 2012 Md. Laws, ch. 346. That section, in its entirety, provides:

> (a) In this section, "fantasy competition" includes any online fantasy or simulated game or contest such as fantasy sports, in which:
>
> (1) participants own, manage, or coach imaginary teams;
>
> (2) all prizes and awards offered to winning participants are established and made known to participants in advance of the game or contest;
>
> (3) the winning outcome of the game or contest reflects the relative skill of the participants and is determined by statistics generated by actual individuals (players or teams in the case of a professional sport); and
>
> (4) no winning outcome is based:
>
> (i) solely on the performance of an individual athlete; or
>
> (ii) on the score, point spread, or any performances of any single real-world team or any combination of real-world teams.
>
> (b) Notwithstanding the provisions of this or any other title, the prohibitions against betting, wagering, and gambling do not apply to participation in a fantasy competition.
>
> (c) The Comptroller may adopt regulations to carry out the provisions of this section.[4]

Although the focus of the 2012 legislation—like its earlier iterations—was traditional fantasy sports, the legislative history mentions that some fantasy sports platforms operate on competitions "based on performance on one given day." H.B. 7, Revised Fiscal and Policy Note at 4; Ways and Means Committee Floor Report at 3.

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[4] The Comptroller has begun the process of gathering information and conferring with other agencies and officials in order to promulgate appropriate regulations.

Section 12-114 is based on 31 U.S.C. § 5362(1)(E)(ix), which excludes fantasy and simulation sports games and educational games and contests from the provisions of the Unlawful Internet Gambling Enforcement Act ("UIGEA"). 2012 Olszewski Testimony. The federal Act, which was enacted in 2006 before the advent of DFS,[5] does not make any gaming activity legal or illegal, but prohibits the acceptance of credit, electronic funds transfers and other forms of payment in connection with the participation of another person in unlawful Internet gambling. *See* 31 U.S.C. § 5363; *see also* Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 Sports Law. J. 79, 95 (2015) (hereinafter "Ehrman"); Michael Trippiedi, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV Gaming L.J. 201, 214 (2015) (hereinafter "Trippiedi"). Unlawful Internet gambling is defined as transmitting bets or wagers by means that include the use of the Internet "where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made." 31 U.S.C. § 5362(10)(A).[6]

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[5] Although we have not researched the issue, it has been reported that the only mention of short-term fantasy sports contests in the legislative history surrounding the passage of UIGEA raises it as a potential concern. *See Internet Gambling: Hearing Before the Subcomm. on Tech., Terrorism, and Gov't Information of the Sen. Comm. on the Judiciary*, 106th Cong., 1st Sess. (March 23, 1999) (Sen. Kyl stating with respect to fantasy sports that "generally—and as far as I know, totally right now—the leagues are based upon competition over time, over a long enough period of time that it would be very difficult to influence the final result by any particular player's actions" and asking "at what point does that become a problem, when you have a week of activity or a month of activity or a couple days of activity"); *see also* Ryan Rodenberg, *The true Congressional origin of daily fantasy sports*, ESPN.com (Oct. 28, 2015) (stating that the exchange involving Sen. Kyl was "the closest any Congressional hearing got to addressing concerns specific to short-duration fantasy leagues").

[6] The legality of fantasy gaming under other federal laws is less than clear. The sole case on point, *Humphrey v. Viacom*, involved traditional season-long fantasy games and the court held that the entry fee paid at the beginning of the season was not a bet or wager, and thus, in the view of the court, not gaming under federal law. It has been suggested, however, that fantasy games could be subject to prosecution under federal laws other than UIGEA, including the Wire Act, 18 U.S.C. § 1804, the Travel Act, 18 U.S.C. § 1952, the Interstate Transportation of Wagering Paraphernalia Act, 18 U.S.C. § 1953, the Illegal Gambling Business Act, 18 U.S.C. § 1955, and the Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701-3704. Ehrman, at 88-92; Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 Harv. J. Sports & Ent. L. 1, 34-38 (2012); Geoffrey T. Hancock, *Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire and the Reality of U.S. Gaming Law*, 31 T. Jefferson L. Rev. 317 (2009).

The Regulation of Commercial Gaming and Article XIX of the Maryland Constitution

The legalization of casinos and large video lottery facilities in Maryland was one of the most controversial legislative measures of the last 20 years, and the idea reflected in Article XIX—that the *people* should have the power to determine the extent to which commercial gaming would be allowed in Maryland—has a long legislative history. As early as 1995, legislators turned to our Office for guidance in formulating a legislative approach to ensure that the people had that power. *See* 80 *Opinions of the Attorney General* 151 (1995). Bills introduced starting in the late 1990's would have amended the Constitution to authorize the licensing and regulation of video lottery gaming and would have prohibited additional forms and expansion of commercial gaming in the future, effectively requiring an amendment to the Constitution for any additional forms or expansion of commercial gaming. *See* House Bill 678 of 1998, House Bill 1170 of 2001, House Bill 732 of 2002. Other bills would have enacted similar language in statute. *See* H.B. 1190 of 1999, H.B. 1170 of 2000 and H.B. 78 of 2003. None of these bills made it out of committee, but all of them included some mechanism limiting the introduction of additional forms or expansion of commercial gaming. *See also* Third Reader version of S.B. 322 of 2003, S.B. 197 of 2004, S.B. 205 of 2005, H.B. 1178 of 2006, and H.B. 166 of 2007.

With Maryland facing an impending $1.7 billion deficit for the 2009 fiscal year, Governor Martin O'Malley issued an Executive Order in October 2007 calling the General Assembly into special session to, among other things, permit the use of video lottery machines as a source of tax revenue. *See* Exec. Ord. 01.01.2007.23; *Stop Slots Md. 2008 v. State Board of Elections*, 424 Md. 163, 169 (2012); *Smigiel v. Franchot*, 410 Md. 302, 305 (2009). The legislative consensus that the electorate should decide whether to allow commercial gaming had not lost its strength by the time of the 2007 Special Session. During that session, legislative leaders expressly emphasized the desire to give the people the right to vote on expanding commercial gaming. The issue was highlighted in House proceedings by Delegate Sheila Hixson, the Chair of the Ways and Means Committee, when she brought forth the favorable committee report on the bill proposing the new constitutional amendment to allow video lottery facilities. House Proceedings on H.B. 4 of the Special Session of 2007, Calendar day November 16, 2007.[7]

In that special session, the General Assembly ultimately enacted what is now Article XIX of the Maryland Constitution. Two aspects of Article XIX are important here. First, § 1(d) and (e) provide that:

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[7] Delegate Hixson noted that 80% of the people of Maryland had indicated that they believed the issue of commercial gaming should be put to a statewide vote. This is apparently a reference to the poll mentioned in *Support builds for referendum on slots*, Steven T. Dennis, Gazette.net (April 30, 2004), where Speaker Busch states that "he was struck by a recent poll showing 80 percent of Marylanders would prefer that the issue be decided at the ballot box instead of in Annapolis."

> (d) Except as provided in subsection (e) of this section, on or after November 15, 2008, the General Assembly may not authorize any additional forms or expansion of commercial gaming.
>
> (e) The General Assembly may only authorize additional forms or expansion of commercial gaming if approval is granted through a referendum, authorized by an act of the General Assembly, in a general election by a majority of the qualified voters in the State.

These two provisions thus require that any subsequent authorization of "additional forms or expansion of commercial gaming" must be approved by the voters through a referendum. The General Assembly has done this on only one occasion, authorizing an additional video lottery facility in Prince George's County and the use of table games in Chapter 1 of the Second Special Session of 2012, which was approved on referendum in the 2012 general election.

The second part of Article XIX that bears on the question you ask is subsection (a), which made clear that the prohibition in subsection (d) and (e) did not apply to the existing statutory provisions that governed gaming, including bingo and lotteries:

> (a) This article does not apply to:
>
> (1) Lotteries conducted under Title 9, Subtitle 1 of the State Government Article of the Annotated Code of Maryland;
>
> (2) Wagering on horse racing conducted under Title 11 of the Business Regulation Article of the Annotated Code of Maryland; or
>
> (3) Gaming conducted under Title 12 or Title 13 of the Criminal Law Article of the Annotated Code of Maryland.

To answer the question you ask, we must analyze three subsidiary questions. First, we will determine whether the codification of Chapter 346 within Title 12 of the Criminal Law Article means that it is exempt from the Article XIX referendum requirement. If Chapter 346 is not exempt, we will turn to whether it authorized daily fantasy sports as well as traditional fantasy sports. We will conclude with whether fantasy sports, to the extent that they are authorized under Chapter 346, qualify as "commercial gaming" such that their authorization triggered the referendum requirement of Article XIX.

Analysis

I. Article XIX, § 1(a)(3) Does Not Exempt the Forms of Gaming That Were Authorized Under § 12-114 of the Criminal Law.

At first blush, the interplay between Article XIX and Chapter 346 seems fairly straightforward: The authorization of fantasy sports provided by Chapter 346 was codified in Chapter 12 of the Criminal Law Article, which is expressly exempted from the reach of the Article XIX by the plain language of (a)(3) of the constitutional amendment. The process of statutory interpretation typically begins with the plain language, and, if statutory language is clear and unambiguous, the "inquiry ordinarily ends there." *Smith v. State*, 399 Md. 565, 578 (2007). When the plain language is unambiguous, "the Legislature is presumed to have meant what it said and said what it meant." *Kushell v. Dep't Of Nat. Res.*, 385 Md. 563, 577 (2005) (internal quotations marks omitted). A reviewing court applying the plain language here might conclude that the referendum requirements of Article XIX simply do not apply to Chapter 346.

That said, the "cardinal rule of statutory construction is to ascertain and effectuate legislative intent." *McClanahan v. Washington County Dep't of Soc. Servs.*, No. 79 Sept. Term 2014, 2015 WL 9300639, at *4 (Dec. 22, 2015) (quoting *Motor Vehicle Admin. v. Shrader*, 324 Md. 454, 462 (1991). Although courts, in their efforts to discover that intent, start with the plain language of the statute, "the plain-meaning rule 'is not a complete, all-sufficient rule for ascertaining a legislative intention . . . .'" *Kaczorowski v. Mayor & City Council of Baltimore*, 309 Md. 505, 513-15 (1987) (quoting *Darnall v. Connor*, 161 Md. 210, 215 (1931)). Rather, "the meaning of the plainest language is controlled by the context in which is appears." *Montgomery County v. Phillips*, 445 Md. 55, 63 (2015). If the statutory language, when read in context, is "reasonably capable of more than one meaning," it is ambiguous and we turn to other interpretive aids. *Mayor & Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 551-52 (2002).

We believe the language subsection (a)(3), when read in context of the larger constitutional provision, is capable of more than one meaning. That language provides that the referendum requirement of Article XIX does not apply to "[g]aming conducted under Title 12." It is not clear from this language whether the Legislature intended to exempt from the Constitution's reach *any* gaming that might subsequently be conducted under Title 12 or only those gaming activities that, at the time the amendment was enacted, were "conducted under Title 12." For a number of reasons, however, we believe the latter interpretation best reflects legislative intent.

First, reading subsection (a)(3) so as to exempt gaming activities that are subsequently regulated under Title 12 would create a loophole that would render paragraphs (d) and (e) of the constitutional amendment essentially meaningless. That is, any subsequent Legislature could circumvent the referendum requirement of Article XIX simply by codifying an expansion of commercial gaming in Title 12 or Title 13 of the Criminal Law Article. Not only would such a result render the referendum requirement essentially meaningless, it would lead to the conclusion that the Legislature, while crafting a provision that was important both to the passage of the bill and acceptance by the public, left itself a way to subvert that purpose at will. That is not how

constitutions are made, and it is not the kind of intent that courts attribute to the Legislature. *See In re Adoption/Guardianship of Tracy K.*, 434 Md. 198, 206-07 (2013) (stating that a statute must be interpreted "as a whole so that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless or nugatory, or given an interpretation that is absurd, illogical, or incompatible with common sense" (internal quotation marks and citations omitted)); *see also Kadan v. Bd. of Sup'rs of Elections of Baltimore County*, 273 Md. 406, 416 (1974) (describing the rules of statutory construction and concluding that "these rules should be applied here in the process of interpretation of the Constitution of this State").

Second, the interpretation described above is contrary to the legislative history of the provision. The House Floor Report on House Bill 4 of the Special Session of 2007 specifically forecloses a reading of Article XIX that would allow it to be circumvented in the manner described above:

> It is the intent of the Ways and Means Committee, in adopting this bill and its amendments, that the exclusion provided for gaming conducted under Titles 12 and 13 of the Criminal Law Article is intended to cover all gaming conducted under those titles as of November 15, 2007. It is not the intention of the Committee to allow any subsequent forms of gaming that would otherwise be subject to General Assembly approval and referendum to instead be placed in Titles 12 and 13 in an effort to circumvent the constitutional amendment.

The Fiscal and Policy Note on House Bill 4 corroborates what the floor report states; it makes clear that the exemption provided in the constitutional amendment applied only to "*currently authorized* forms of gambling." (Emphasis added.) The non-technical ballot summary of the amendment that was provided to the voters for ratification of the amendment similarly suggests that the exemption provided by (a)(3) was not intended to encompass new forms of gaming regulated under Title 12 of the Criminal Law Article: "this constitutional amendment provides that it does not apply to gaming conduct as authorized by certain other laws, such as lotteries, wagering on horse racing, and charitable gaming." Inasmuch as lotteries and horse racing are exempt under paragraphs (a)(1) and (a)(2) respectively, the clear implication is that the (a)(3) exemption was intended to cover "charitable gaming," which is all that Title 12 authorized at the time.

In other respects as well, the legislative history does not support an intent to allow the Legislature to circumvent the constitutional limitations on the expansion of gambling simply by codifying any expansion in Title 12 or Title 13. When the bill was brought out on the floor of the House on November 16, 2007, the chair explained, repeatedly, that the determination had been made that it was important to allow the people to vote on any expansion of gaming, that the people wanted, and were to have, the right to vote on any expansion of commercial gaming, and that all such issues would be sent to them.

We recognize that it could be argued that limiting (a)(3) to existing gaming might also render it meaningless, since existing gaming would not require a subsequent legislative enactment that might trigger Article XIX's referendum requirement. But it appears that the purpose of the provision, as described in the House Floor Report, was simply to assure legislators that currently authorized forms of gaming would not be affected. Indeed, as initially drafted, subsection (a)(3) identified the specific types of gaming that were authorized at the time, namely, "gaming conducted by a bona fide fraternal, civic, war veterans', religious or charitable organization, volunteer fire company, or substantially similar organization included under Title 12 or Title 13 of the Criminal Law Article of the Annotated Code of Maryland." This initial formulation would have made clear that other, subsequently-authorized forms of gaming would not fall within the exemption. The Ways and Means Committee Amendments ultimately struck the language relating to the different entities conducting the gaming, but at the same time clarified in the floor report that, by doing so, it was not opening the door to a legislative expansion of gaming under Title 12. Based on the legislative record, it seems clear that the purpose of the exemption was simply to address the general concern that the constitutional amendment might disrupt existing, authorized forms of gaming.

In light of the above, it is our view that the exemption from referendum provided at subsection (a)(3) of Article XIX is limited to the forms of gaming that had been authorized as of 2007, and because Chapter 346 was enacted after that date, it is not covered by the exemption.[8] As a result, the bill would have been required to go to referendum if it authorized "additional forms" of, or the "expansion" of, "commercial gaming." We turn next to what types of fantasy sports Chapter 346 authorized and whether they qualify as "commercial gaming."

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[8] The conclusion that we reach does not, we believe, call into question the validity of other gaming law provisions that have been amended since the adoption of Article XIX. For example, Chapter 603 of the 2012 session extended a sunset provision that would have foreclosed the operation of electronic instant bingo machines that had been in operation as of 2007 and early 2008. We do not believe that the extension of that provision had the effect of "expanding" gaming when it allowed only for machines that were operated "in the same manner" and in the same number as they were at the earlier time. *See* Crim. Law § 12-308. The bill also made other adjustments that restricted, rather than expanded, gaming. *See* 2012 Md. Laws, ch. 603 (revising the definition of "slot machine" in Crim. Law § 12-301(2) and (3) so as to create new restrictions on gaming over the Internet and on handheld bingo machines; adding regulatory oversight and certification of "electronic gaming devices" under Crim. Law § 12-301.1). And while that legislation removed from the definition of "slot machine" any "skills-based amusement device that awards prizes of minimal value" approved by regulation, Crim. Law § 12-301(3)(vii), the provision would seem to call for a regulatory refinement of existing devices, rather than an expansion or new form of gaming. But if a court were to determine that these provisions were, in fact, additional forms or an expansion of gaming—and "commercial" gaming at that—the remedy would be to subject them to referendum under Article XIX, not to exempt Chapter 346 from that requirement.

II. What Types of Fantasy Sports Are Covered by § 12-114 of the Criminal Law Article?

The first step in determining whether Chapter 346 authorized the expansion of commercial gaming is identifying what types of activities are included within its reach. As noted above, Chapter 346 was modeled on TFS and it seems clear that TFS is included. Whether the bill was intended to encompass DFS as well is less clear.

Although the focus of the bill was traditional fantasy sports, there is some indication that the Legislature was aware that the bill would encompass *daily* fantasy sports as well. The Fiscal and Policy Note, for example, indicates that, "[w]hile competition over the course of an entire season is common, some fantasy competitions have far shorter durations, including competitions based on performance on one given day." This language also appears in the Ways and Means Committee Floor Report. Still, there was not a thorough discussion of the daily games or how they worked; in 2012, daily fantasy sports were still in their "infancy." Darren Heitner, "An Abbreviated History of FanDuel and DraftKings," Forbes (Sept. 20, 2015). Rather, the clear focus of the bill was on traditional fantasy gaming between friends and the fact that many online sites had blocked Maryland residents from receiving modest prizes such as t-shirts. Moreover, the language of the statute exempts *participation* in fantasy competition, not the companies that provide the competition itself. That makes sense with respect to TFS, where the participants themselves organize the games and the online platforms provide statistical and other services. It does not make sense with respect to DFS, where the online provider establishes the competition and does not participate in the competition. Finally, a recent statement attributed to former Delegate Olszewski seems to confirm that the daily fantasy sites to which the Department of Legislative Services referred are not the type of DFS that concern us here: "I don't think anyone even back in 2012 envisioned the evolution we've seen. We're not talking about friends and family leagues anymore." Jeff Barker, "Maryland warily eyes fantasy sports boom," Baltimore Sun (Nov. 22, 2015).

Notwithstanding the uncertainty as to whether applicability to DFS was envisioned by the Legislature, DFS may well satisfy the statutory criteria for the exemption provided by § 12-114. DFS participants own, manage, or coach imaginary teams; the prizes offered to winning participants are established and made known to participants in advance of the contest; and no winning outcome is based solely on the performance of an individual athlete or a real-world team. *See* § 12-114(a)(1), (2), and (4). It also seems clear that the winning outcomes are determined by statistics generated by actual players on sports teams as required by § 12-114(a)(3). The question with respect to DFS is whether the winning outcome of the game "reflects the relative skill of the participants" in the fantasy games themselves, as is further required by § 12-114(a)(3). Ultimately, this poses a question of fact that cannot be determined by this office, but it seems plausible that a reviewing court would conclude that DFS meets this criterion as well.[9] For

[9] As discussed below, the DFS providers maintain that skill is in fact the *predominant* factor in determining who wins their contests, with experienced players consistently outperforming the more casual participant.

purposes of this letter, therefore, we assume that at least some forms of DFS would be covered by § 12-114. We turn next to whether DFS constitutes "gaming" and, if so, whether it qualifies as "commercial gaming" such that its authorization under § 12-114 would have triggered the Article XIX referendum requirement.

III. Do Fantasy Sports Qualify as "Commercial Gaming" Under Article XIX?

Article XIX does not define the term "commercial gaming" and no statutory provision, court decision, or Attorney General opinion establishes a generally-accepted meaning of the term. The legislative history surrounding the development of what eventually became the 2007 constitutional amendment contains some indication that the referendum requirement was focused on additional slot machines and slots venues, not on other forms of commercial gaming. For example, in a 2004 letter to then-Governor Robert Ehrlich, House Speaker Michael Busch explained that "[p]ressure to expand the number of slots locations and machines will begin immediately after a bill is enacted as it has in every jurisdiction that has approved slots at [horse-racing] tracks. Only a constitutional amendment will slow that process and make the lobbying more transparent." David Nitkin, "Taking aim at Bush, Ehrlich," Baltimore Sun (Aug. 31, 2004).[10]

Early versions of the amendment seemed to focus on more than just slots facilities, however, by including within their reach "casino-style gaming" more generally. For example, legislation introduced in the 2003 session stated that "the general assembly . . . may not authorize statutorily any additional forms or expansion of commercial gaming, including casino-style gaming, card games, dice games, roulette, slot machines, and video lottery terminals." House Bill 890 (§ 2(a)); *see also id.* (preamble, stating that "[t]he authorization of any additional forms or expansion of commercial gaming, such as casino-style gaming, in the State is prohibited by this Act"). As enacted in 2007, the amendment omitted the illustrative term "such as casino-style gaming," and instead categorically required a referendum to approve legislation authorizing "commercial gaming," including "additional *forms*" of commercial gaming.[11] We turn to the constituent parts of that term next, first to whether DFS constitutes "gaming" under Maryland law and, if so, then to whether DFS constitutes "commercial" gaming.

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[10] Mr. Nitkin is currently the Director of Communications for the Office of the Maryland Attorney General.

[11] Although the legislative history surrounding the enactment of Article XIX does not mention fantasy sports as one such "additional form" of commercial gaming, one would not expect it to do so. DFS as we know it now was not a going concern as of 2007; the two online providers that began DFS—FanDuel and DraftStreet—were both created in 2009. DraftKings, which ultimately acquired DraftStreet, was not founded until 2012. *See The Complete History of the Daily Fantasy Sports Industry*, available at http://dailyfantasynews.com.

A. Does DFS Qualify as "Gaming" Under Maryland Law?

Maryland's gaming laws contain two prohibitions that could be implicated by DFS: (1) § 12-102(a)(1) of the Criminal Law Article, which provides that a person may not "bet, wager, or gamble"; and (2) subsection (a)(2) of that same provision, which states that a person "may not . . . make or sell a book or pool on the result of a race, contest, or contingency." We will address each in turn.

1. Section 12-102(a)(1) and What it Means to "Bet, Wager, or Gamble"

It is our view that, at the time Chapter 346 was enacted, fantasy gaming for which an entry fee or other consideration is paid could be found to violate Criminal Law Article, § 12-102(a)(1). Although the terms "bet, wager, or gamble" are not defined by statute, the Attorney General opined that "[e]stablishing a violation of this provision requires a showing of 'consideration, chance, and reward.'" 91 *Opinions of the Attorney General* at 65 (quoting *Chesapeake Amusements*, 363 Md. at 24); *see also* 94 *Opinions of the Attorney General* at 36 n.10. All three seem to be present in DFS.

Consideration. Consideration means that there must be money or another thing of value given for the opportunity to receive the reward. 91 *Opinions of the Attorney General* at 65-66. Consideration can include not only money paid to participate, but such things as donations to charity, a "nominal fee," payment of a cover charge to enter the bar where the tournament is held, and entrance fees, as well as membership fees for a poker league. *Id.* at 66. Under this broad definition, fantasy games with any sort of entry fee would likely be found to involve consideration.[12] In the *Humphrey* case, the federal district court concluded that the entry fees paid for TFS "do not constitute bets or wagers where they are paid unconditionally for the privilege of participating in a contest, and the prize is for an amount certain that is guaranteed to be won by one of the contestants (but not the entity offering the prize)." *Id.* at *8 (parentheses in original). Regardless of whether it is a bet or wager, money paid to participate is clearly consideration. The *FanDuel* court did not expressly disagree with the conclusion of the *Humphrey* court, but differentiated the fees charged by FanDuel and DraftKings for DFS, which were charged for each separate game, and were, in some cases, significantly higher than those charged for seasonal play. As a result, the New York court found that the entry fees were "consideration." Neither *Humphrey* nor *FanDuel* is binding on Maryland courts, but together with the 2006 Attorney General's Opinion, they suggest that the variable "entry fees" for DFS would constitute consideration, though an entry fee for TFS may not if it is charged uniformly and in a manner that reflects that it is for services rendered, such as statistics and computer time.

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[12] By contrast, contests that are free to enter would not satisfy this criterion and thus would not constitute gaming under Maryland law.

Chance. Courts around the country have taken a number of different approaches to determining whether a game depends on chance or skill. The majority view is the "dominant element" test, which examines whether chance or skill is the major factor in the result of a contest. This test has been described as looking to whether an activity is one of chance, where "greater than 50 percent" of the result is derived from chance, Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 Harv. J. Sports & Ent. L. 1, 28-29 (2012) (hereinafter "Edelman"), or whether the outcome of a given game is controlled by mere chance or factors that the participant is able to control. Ehrman at 96 (2015). While this test is fairly straightforward, there is no definitive way to determine whether chance or skill predominates, and courts have reached differing conclusions in borderline games such as poker, backgammon and three-card monte. Jon Boswell, *Fantasy Sports: A Game of Skill That is Implicitly Legal Under State Law, and Now Explicitly Under Federal Law*, 25 Cardozo Arts & Ent. L.J. 1257, 1265 (2008) (hereinafter "Boswell").

There are other tests used in a small number of states. Among them is the "material element test," which will prohibit wagering on a game "if chance has more than a mere incidental effect on the game," even if "skill may primarily influence the outcome." Anthony N. Cabot et al., *Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 Drake L. Rev. 383, 392-93 (2009). New York follows this approach. *See* New York Penal Code, § 225.00 (defining "gambling" as risking something of value on a "contest of chance" or "a future contingent event not under his control or influence," and defining "contest of chance" as "any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein"). Also included among these more marginal tests are the "any chance" test, under which the element of chance will be found if there is *any* chance that influences the outcome of the game, and the "gambling instinct" test, which looks to the nature of an activity to determine if it appeals to one's gambling instinct. Edelman at 29. Finally, in Illinois it appears that the degree of chance or skill is irrelevant to whether an activity qualifies as "gambling." *See* 720 Ill. Comp. Stat. Ann. 5/28-1(a)(1) ("A person commits gambling when he or she . . . knowingly plays a game of chance or skill for money or other thing of value"); *see also id.* at (b)(2) (exempting participants in "any bona fide contest for the determination of skill, speed, strength or endurance or to the owners of animals or vehicles entered in such contest").

None of these tests have been adopted by Maryland courts, but in *Brown v. State*, 210 Md. 301, 307 (1956), the Court of Appeals held that the law prohibiting the operation of a "gaming table" was not confined to games of chance, but also applied to games of skill.[13] *Brown* thus suggests that DFS could qualify as gaming even if, as the providers maintain, skill figures prominently in determining the outcome of the DFS contest. Indeed, *Brown* notes that, "[i]n its broader aspects, playing any game for money is gaming," particularly when "the inducement to

[13] The slot machine law, on the other hand, has been held to require an element of chance. *Chesapeake Amusements*, 363 Md. at 24; *State v. 158 Gaming Devices*, 304 Md. 404 (1985).

play was, in part at least, the chance of gain." *Id.* (internal quotation marks omitted); *see also F.A.C.E. Trading, Inc. v. Todd*, 393 Md. 364, 378 (2006) (quoting *Brown*).

Although no court has elaborated on how these tests relate to fantasy gaming,[14] several Attorneys General have addressed the issue. The Kansas Attorney General, applying the dominant element test, concluded that fantasy sports leagues, as defined in proposed legislation based on the federal law, would not constitute a "lottery." Kan. Atty. Gen. Op. No. 2015-9, 2015 WL 1923114 (2015). The opinion concluded that the language in the proposed legislation incorporating the federal definition of "fantasy sports leagues"—including the requirement that "all winning outcomes reflect the relative knowledge and skill of participants and are determined predominantly by accumulated statistical results of the performance of individual athletes in multiple real-world sporting events,"—effectively incorporated the dominant element test (which it referred to as the "dominant factor test"). Applying that test, the Attorney General concluded that games permitted by the legislation would be games of skill, and thus not lottery. The Attorney General did not, however, have any particular type of fantasy game before him. In contrast, the Louisiana Attorney General opined that the presence of an element of skill was relevant to whether an activity was a lottery, but not to whether it is gambling, and thus concluded that fantasy gaming was illegal gambling in that State. La. Op. Atty. Gen. 91-14, 1991 WL 575105 (1991).[15] Most recently, the Illinois Attorney General has determined that DFS is illegal gambling under Illinois law—a conclusion that DFS providers have challenged in court. *See* Ill. Op. Atty. Gen., No. 15-006 (Dec. 23, 2015).

In general, commentators seem to be of the view that a traditional fantasy sports contest is a game of skill. Ehrman at 102; Edelman at 28; Boswell at 1270. Some express doubt, however, about whether *daily* fantasy sports meet that standard. Trippiedi at 202; Edelman at 30; *but see* Ehrman at 81. Although both types of fantasy sports undoubtedly require skill in the selection of players,[16] DFS does not allow for the forms of roster management that simulate what a real-life

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[14] The *Humphrey* court recited as fact that the success of a traditional fantasy sports team depended on the participants' skill. *Id.* at *2. The *FanDuel* court, on the other hand, presumably must have believed that the daily games met the chance requirement of New York law.

[15] Although daily fantasy sports sites block residents of Louisiana, *see supra* note 3, that has not stopped Louisiana residents from filing suit against FanDuel and DraftKings over the recent use of inside information by DraftKings employees to win money from FanDuel. *Latest Daily Fantasy Sports Lawsuit Has A Twist: The Plaintiff Played From A Banned State*, Legal Sports Report (Oct. 13, 2015) www.legalsportsreport.com/5019/louisiana-daily-fantasy-sports-lawsuit.

[16] In fact, DFS providers maintain that their type of draft, which allows participants to select *any* player within salary cap constraints, requires more skill than the so-called "snake draft" used in many TFS games, where a randomly-generated draft order and other players' selections interject an element of chance. At least one commentator disagrees, arguing that TFS allow one participant to pick a player simply to prevent another participant from doing so and thereby weaken his opponent. That type of selection mechanism "allows for a greater use

team manager does, such as "negotiating trades with other owners, or engaging in other 'team management' activities, such as adding or dropping players." Edelman at 30. Instead, once a DFS player has made his or her final selections, those selections are locked in before the relevant games begin. At that point, the participant can do nothing but hope that the players he has picked perform well.

Nor does DFS provide time for the participant's management skills to offset "chance factors such as the physical and mental conditions of player, potential problems between team members, and game time weather conditions." Edelman at 30. For example, if a DFS participant's star player is injured on the first play, the platform provides no opportunity to insert a bench player into the lineup or select a free agent to fill the void created by the injury, as a TFS participant would be able to do. Thus, while an untimely injury will hurt both types of participants, it will *devastate* a DFS participant's chances.

None of the foregoing dictates what path a Maryland court will take. There certainly seems to be an element of skill involved in DFS; a small percentage of experienced DFS participants consistently outperform the average player.[17] At the same time, there can be no question that chance is an element in fantasy sports. Everyone involved in the debate over the legality of fantasy sports agrees that winning depends on how well one *predicts* how real-world players will perform. While a participant might vastly improve the accuracy of his or her predictions by studying the past performance of players, finding bargain players who outperform their salaries, and employing other selection strategies, ultimately the participant has no control over the athletes' performances, which can hinge on any number of unknown factors. Engle at 79. In this respect, DFS bears some resemblance to betting on horse races—which is commonly accepted as gambling—in which one can improve one's chances by reading up on the records of horses, the conditions in which individual horses perform well, the condition of the track and the weather on the day of the race, and the health of the horse, including whether it has been administered Lasix. Just as wagering on horses tends to reward the bettor who finds a horse that is stronger than its odds would suggest, the salary cap feature of DFS rewards a participant for

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of skill, knowledge, and strategy." Trippiedi at 220.

[17] At least one of the private suits against FanDuel and DraftKings suggests that the DFS providers manipulate DFS participation in order to inflate the success rate of experienced players. In *Genchanok v. FanDuel*, Case 2:15-cv-05127-MVL-KWR (filed October 13, 2015), the Complaint alleges that FanDuel and DraftKings actively seek new customers because they rely on inexperienced new customers to keep its most active users on their site, presumably by making it more likely that the more active users will win. Complaint at ¶¶ 6 and 7. Presumably, the higher levels of wins by experienced players then boost the statistics that the sites use to support their claim that DFS is a game of skill. The *Genchanok* complaint further alleges, however, that many of the top winners supporting these statistics are employees of other DFS sites who have inside information from their employers. Complaint at ¶ 38. If shown, this would obviously weaken the skill argument.

finding a player who outperforms his or her salary. In both activities, participants use skill to improve their chances of winning, but ultimately their success will hinge on the real-world players' performances, which, like a roll of the dice or a dealt hand of cards, is something over which DFS participants, like bettors at the race track, have no control.

This most likely explains why the cases involving games of skill typically involve betting by participants *in the game itself* rather than betting by people who seek to predict either the result of the game of skill or events within that game or a series of games. In fact, prior to a change in New York law that essentially eliminated the dominant element test in that State, the practice commentary to N.Y. Penal Code, § 225.00 noted that betting on the outcome of a chess game would constitute gambling "[d]espite chess being a game of skill, X and Y are gambling because the outcome depends upon a future contingent event that neither has any control or influence over." *See* Donnino, Practice Commentary, McKinney's Penal Law Book 39, p 355, cited in *People v. Jun Feng*, 2012 WL 28563, *3, 946 N.Y.S.2d 68 (Table) (N.Y. Crim. Kings County 2012). By contrast, the same practice commentary noted that wagering between the two chess players would not similar constitute gambling. *Id.*

We cannot predict with certainty whether a Maryland court would find that either TFS or DFS is a game of skill and therefore would not satisfy the "chance" requirement necessary to establish a violation of § 12-102(a)(1) of the Criminal Law Article. That uncertainty has both a legal and a factual component. Legally, it is difficult to predict how the Court of Appeals might rule with respect to the level of chance that is required to establish a violation of the law against betting, wagering, or gambling. Factually, it is difficult to draw broad conclusions with respect to the many different types of TFS and DFS formats available. But given that TFS and DFS contain an element of chance (*i.e.*, the performance of the players, over which the participants have no control), We believe a reviewing court could conclude that both forms of fantasy sports—and particularly DFS—meet the "chance" criterion of the "consideration, chance, and reward" test for purposes of Criminal Law § 12-102(a)(1). This is especially true in light of § 12-113 of the Criminal Law Article, which requires the Office of the Attorney General, the State Lottery and Gaming Control Commission, the Department of State Police, local law enforcement units, and the court to "construe liberally this title relating to gambling and betting to prevent the activities prohibited." *See F.A.C.E. Trading*, 393 Md. at 377 (recounting long history of liberal construction requirement).

Reward. As for the third element of gambling, it has been said that a reward may take the form of money, or some other thing of value, such as chips convertible to money, or points convertible to some sort of prize. 91 *Opinions of the Attorney General* 64, 65 (2006). Some fantasy games apparently do not provide rewards, and, as such, would not be deemed gaming. Most, however, do provide some sort of prize, and this factor would be satisfied.

2. Section 12-102(a)(2) and What it Means to "Make or Sell a Book or Pool"

It is also our view that DFS might qualify as a "pool" or "bookmaking" under § 12-102(a)(2) of the Criminal Law Article. That provision states that a person "may not . . . make or sell a book or pool on the result of a race, contest, or contingency." Unlike subsection (a)(1), discussed above, this provision does not depend in any way on whether the race, contest, or contingency involved skill, or whether success in picking the winner would depend on skill. It simply prohibits the making of or selling of a book or pool on the result of a race, contest or contingency.[18]

The term "pool" is not defined by Maryland law, and there are no Maryland cases that construe it. Resorting to the dictionary, a pool is defined as a "gambling scheme in which numerous persons contribute stakes for betting on a particular event (such as a sporting event)." Black's Law Dictionary (9th Ed. 2009) at 1278. The common form is a combination of stakes, in which the money collected is to go to the winner. It is not necessary, however, that all of the money go to the winner, as the person running the pool ordinarily takes a share. *Commonwealth v. Sullivan*, 105 N.E. 895 (Mass. 1914). Thus, the criminal offense is established if there is a combination of stakes, a part of which is to go to the winner. *Id.* at 895-96.

As for "bookmaking," it too is not defined by Maryland law. Dictionaries define it as "[g]ambling that entails the taking and recording of bets on an event, esp. a sporting event such as a horse race or football game." Black's Law Dictionary (9th Ed. 2009) at 207. As discussed above, the salary cap feature of DFS seems to function much as "odds" or the "point spread" does when betting on individual games; both reward the participant for finding under-valued picks. Still, it might be difficult to characterize DFS as bookmaking when DFS providers have no stake in the outcome of the wagers placed with them. Instead, DFS providers play a role that seems more akin to the role the "house" plays with respect to poker tables; they profit from the underlying transaction but they do not participate in it the same way that a bookmaker does. Still, we cannot rule out the possibility that a court would conclude that DFS, with its differing combinations and numbers of participants, might also qualify as "bookmaking."

To qualify as a "pool" or "book," however, the wager must hinge on the "result of a race, contest, or contingency." Although a sporting event is obviously a contest, neither variety of fantasy sports involves predicting the outcome of actual games or the result of a particular play. Instead, the outcome of fantasy sports hinges on an *accumulation* of the plays that make up the games. Those discrete plays are then reflected in the selected players' aggregate statistics and, ultimately, the participant's "points." While it seems a stretch to regard each of those underlying

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[18] In fact, the original version of Criminal Law Article, § 12-102(a)(2), enacted as Chapter 206, Laws of Maryland 1890, was designed to ensure the illegality of betting on horse races after the Court of Appeals found that activity was not covered by the provisions on gaming devices in *James v. State*, 63 Md. 242 (1885).

plays as a "contest" within the meaning of the statute, they could qualify as "contingencies." *See* Black's Law Dictionary (9th Ed. 2009) at 362 (A contingency is "[a]n event that may or may not occur; a possibility."). Although DFS participants wager on a series of contingencies across multiple games, the use of the singular in a statute includes the plural, General Provisions Article, § 1-202, and betting that involves predicting the results of multiple games has been held to be a game of chance and not a game of skill. *Commonwealth v. Laniewski*, 98 A.2d 215, 217 (Pa. Super. 1953); *Seattle Times Co. v. Tielsch*, 495 P.2d 1366, 1370 (Wash. 1972) (en banc).

In sum, it is by no means clear that fantasy sports were legal under § 12-102 of the Criminal Law Article at the time that Chapter 346 was enacted. Given the liberal construction to which we must give our gambling laws, there are good reasons to believe that fantasy sports involved a "bet, wager, or gamble" under subsection (a)(1) of that statute or a "pool" or "book" under subsection (a)(2). Indeed, the express purpose of Chapter 346 was to "*exempt*[] certain fantasy competitions from gaming prohibitions," which presupposes that those prohibitions applied or at least might have applied at the time. *See* 2012 Md. Laws, ch. 346 (preamble, emphasis added). Under the circumstances, a court could conclude that the effect of Chapter 346 was to authorize an additional form, or expansion, of gaming.[19] If so, the question then becomes whether the gaming that fantasy sports involves is "commercial" gaming.

B. Does DFS Qualify as "Commercial" Gaming Within the Meaning of Article XIX?

Prior to the adoption of Criminal Law Article, § 12-114, Maryland law provided for three categories of legalized gaming: (1) for profit (*i.e.*, commercial gaming); (2) non-profit (*i.e.*, conducted for charitable, social, fraternal and other purposes); and (3) governmental (*i.e.*, the lottery). Section 12-114 was the first provision to legalize any form of *private* gaming.[20] It seems clear, however, that the term "commercial gaming" was not intended to include private gaming, and, as a result, that Article XIX, § 1(e) would not apply to a law permitting private gaming of a type not previously permitted.

Thus, where the participants in TFS gather to form a league, hold their own draft, and simply rely on a host to supply the necessary computer and other services for a seasonal fee, the gaming is operated by the participants and is private rather than commercial gaming. The host is no more conducting gaming than are companies who sell cards, dice, bingo supplies, trophies or other similar items. Other participants in TFS may use additional services from the host, and, depending on the facts, might still be conducting the games themselves. And the TFS-providers' purpose in offering statistical and other services seems to be to draw more traffic to their websites

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[19] The Florida Attorney General reached a similar conclusion with respect to a Florida statute prohibiting betting on "the result of any trial or contest of skill, speed or power or endurance of man or beast." *See* Fla. Op. Att'y Gen. 91-3, 1991 WL 528146 (Fla. A.G. 1991).

[20] By private gaming we mean social poker games in private homes, office NCAA brackets, picking squares at Super Bowl parties, and similar activities.

and otherwise foster greater consumer interest in the sports coverage that they offer. It is not possible to analyze all of the possible factual situations, but, in general, these considerations suggest that most TFS would not be considered commercial gaming.

DFS presents a different situation. In DFS the *provider* creates the games, determining which events are included, how many people play, and the basis of the distribution of the winnings. Far from conducting the games themselves, individual participants pick the games they will play from those that are being offered by the provider on the day they log on. Moreover, DFS providers collect a portion of the entry fee for each game—whether as a "commission" or as a built-in profit margin—rather than charging a single charge for service as appears to be the case with TFS. And unlike some online companies that provide services to TFS participants more or less to drive website traffic, the DFS provider's *entire business model* is based on getting as many participants as possible to pay to play as frequently as possible, so as to generate millions of dollars in entry fees. Based on these limited facts, it seems clear that DFS companies, if they are conducting gaming, are conducting it for profit.

In sum, if DFS constitutes gaming under Maryland law, it would constitute "commercial gaming" that could not have been authorized by Chapter 346 without a referendum. Because no referendum was conducted, any authorization of daily fantasy sports that Chapter 346 might otherwise have provided would not be effective.

IV. Chapter 346 Can Be Given Effect to the Extent That it Reaches Gaming That Is Not Commercial

Finally, while Chapter 346 would be invalid to the extent that it could be applied to authorize an additional form of commercial gaming, it is our view that it could still validly apply to any fantasy games that were found not to be commercial or not to constitute gaming. General Provisions Article, § 1-210(a) provides that the provisions of all statutes enacted after July 1, 1973 are severable. This provision does not control in all situations, but in general, the courts will separate valid from invalid portions of a statute where it appears that the General Assembly would have intended that the statute be given partial effect if it had known that the remainder was invalid. In this case, the legislative history shows that the main focus of the General Assembly was TFS. The sponsor of the bill talked about his league and others talked about sports and news sites that offered traditional fantasy games. While the word "daily" was mentioned in one of the hearings and daily play was mentioned in the Fiscal and Policy Note and repeated in the Ways and Means Committee Floor Report, there was not a thorough discussion of daily games or how they worked. Rather, the intent of the legislation, as revealed in the testimony, was to address the fact that most traditional fantasy sports platforms had blocked Maryland residents from receiving prizes. *See* 2012 Olszewski Testimony. This aim would be best served by allowing Chapter 346 to be given effect to the full extent permissible under the Maryland Constitution.

Conclusion

Whether Chapter 346 was subject to the referendum requirement of Article XIX depends on a number of subsidiary questions, each of which is a close call. In addition, there are many different types of fantasy sports platforms and it is difficult, if not impossible, to reach broad conclusions that would apply to all of them in the absence of the type of factual inquiry for which our advisory function is ill-equipped. Further complicating matters is the fact that *daily* fantasy sports have only emerged in the last few years and there are few judicial opinions—and none in Maryland—that address this new form of fantasy sports.

Subject to those caveats and as discussed above, we believe that the better answer to each question leads to the conclusion that Chapter 346, to the extent it authorized daily fantasy sports, should have been referred to the electorate under Article XIX. However, due to the substantial uncertainty surrounding these issues and because the legislative history surrounding Chapter 346 suggests that the General Assembly did not focus on the regulation of daily fantasy sports in 2012, and could not realistically have considered daily fantasy sports as they exist today, we recommend that the Legislature squarely take up the issue this session and clarify whether daily fantasy sports are authorized in Maryland. By contrast, we think it is clear that traditional fantasy sports were authorized by Chapter 346. Because we conclude that it is likely that traditional gaming does not constitute "commercial" gaming within the meaning of Article XIX, Chapter 346, as applied to traditional fantasy sports, may be given effect.

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

Adam D. Snyder /KMR

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Chief Counsel, Opinions & Advice

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

For Immediate Release
Media Contact: Todd Dvorak
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Date: May 2, 2016

Attorney General Reaches Agreement to Terminate Paid Daily Fantasy Sports Contests in Idaho

(Boise) – Attorney General Lawrence Wasden says executives of two companies offering various paid Daily Fantasy Sports contests have agreed to quit providing those contests to consumers in Idaho.

The agreement with DraftKings Inc., and FanDuel Inc., two of the nation's biggest companies offering paid fantasy sports contests, was reached after three months of negotiations, Wasden said.

Under terms of the agreement, the companies, as of May 1, 2016, will not allow any consumers based in Idaho to participate in any of their daily paid online fantasy football, baseball, basketball and other sports contests.

Both DraftKings and FanDuel have agreed to process requests by Idaho participants to withdraw their account balances in a timely manner. The companies will monitor Idaho players based on geoblocking technology or through IP addresses.

"The concern I have is that the paid daily sports offerings provided by these companies constitute gambling under Idaho law," Attorney General Wasden said. "I have a duty to enforce and uphold that law. I commend the companies for negotiating in good faith and agreeing not to make these contests available in Idaho."

Wasden began a review of the companies and their websites in January amid concerns regarding the legality of the daily fantasy sports contests offered by those companies. The Idaho Constitution prohibits gambling except for the state lottery, pari-mutuel betting as well as bingo and raffle games.

"Idaho defines gambling, in part, as risking money or other thing of value for gain that is contingent in whole or part upon chance or the outcome of an event, including a sporting event," Wasden said. "My concern is that the daily fantasy sports offerings my office reviewed require participants to risk money for a cash prize contingent upon individual athletes' collective performances in various future sporting events. As I see it, this falls within Idaho's definition of gambling."

Nothing in the agreement precludes FanDuel or DraftKings from offering free daily fantasy sports leagues or other free contests that offer prizes to players in Idaho.

The agreement signed by both companies also provides a path to resume offering paid fantasy sports contests to Idaho consumers, including the Idaho Legislature changing the law to allow for and regulate such contests. Paid daily fantasy sports contests could also resume if a court with authority and jurisdiction in Idaho rules in favor of any form of such contests.

The companies can also restart offering such contests at any time, but executives have agreed to provide the Attorney General written notice 30 days prior to doing so. The notice serves to give the Attorney General time to evaluate the proposed contests to determine whether they comply with Idaho law.

The agreement does not constitute an admission of liability or evidence of wrongdoing by the companies, Wasden said.

- End -

Attorney General Jackley Statement on Fantasy Sports Wagering

FOR IMMEDIATE RELEASE : Monday, December 7, 2015
CONTACT: Sara Rabern (605)773-3215

Attorney General Jackley Statement on Fantasy Sports Wagering

PIERRE, S.D. – Attorney General Marty Jackley releases this further statement and update on fantasy sports wagering based upon actions occurring across the United States.

“Prosecutors are entrusted with the enormous responsibility of protecting society through criminal enforcement. Before bringing a criminal action that has the lawful authority to take away ones liberty and freedom, a prosecutor must be satisfied that the law is clear and that a knowing violation is supported by the evidence. Based upon the current state of uncertainty, including the ongoing debate on whether daily fantasy sports wagering is predominately a permissive game of skill or an unlawful game of chance, it will not be my intent to seek felony indictments here in South Dakota absent a clearer directive from our state legislature. I will continue to consider other alternatives including potential civil remedies and National Attorneys General joint action aimed at protecting the intent of our Constitutional and statutory provisions,” said Jackley.

Attorney General Jackley has provided the South Dakota Gaming Commission with the opportunity to provide guidance, and will continue to do so in relation to any potential future civil matters, and he has considered the actions of and discussions with other State Attorneys General. It is also important to recognize that Federal law, the state in which a wager is made, and the state in which a wager is received, may have jurisdiction over such wagering.

In 2011, U.S. Department of Justice Office of Legal Council issued a legal opinion concluding the Wire Act only banned sports betting, leaving interpretation issues or other forms of internet gambling. On December 4, 2015, Attorney General Jackley joined 7 Attorneys General in a letter to the leadership of the Committee on Judiciary of the U.S. Senate and House of Representatives urging the restoration of the Wire Act. This letter addresses the regulation of gambling transactions, which are interstate in nature and do not include gambling at brick-and-mortar facilities and intrastate lotteries, which are currently regulated at the state level. Based upon this Attorney General letter and request, Deadwood and South Dakota state sanctioned lottery should and would remain regulated by the State of South Dakota and not federal authorities under the Wire Act. South Dakota is joined by Maine, Michigan, Missouri, Nebraska, Nevada, Oklahoma and South Carolina on the December 7, 2015 letter.

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August 16, 2018

OFFICE OF THE ATTORNEY GENERAL
Mr. Brantley Starr , Deputy Attorney General for Legal Counsel Office of the Attorney General
P.O. Box 12548
Austin , TX 78711
BY EMAIL and MAIL

Dear Mr. Starr:

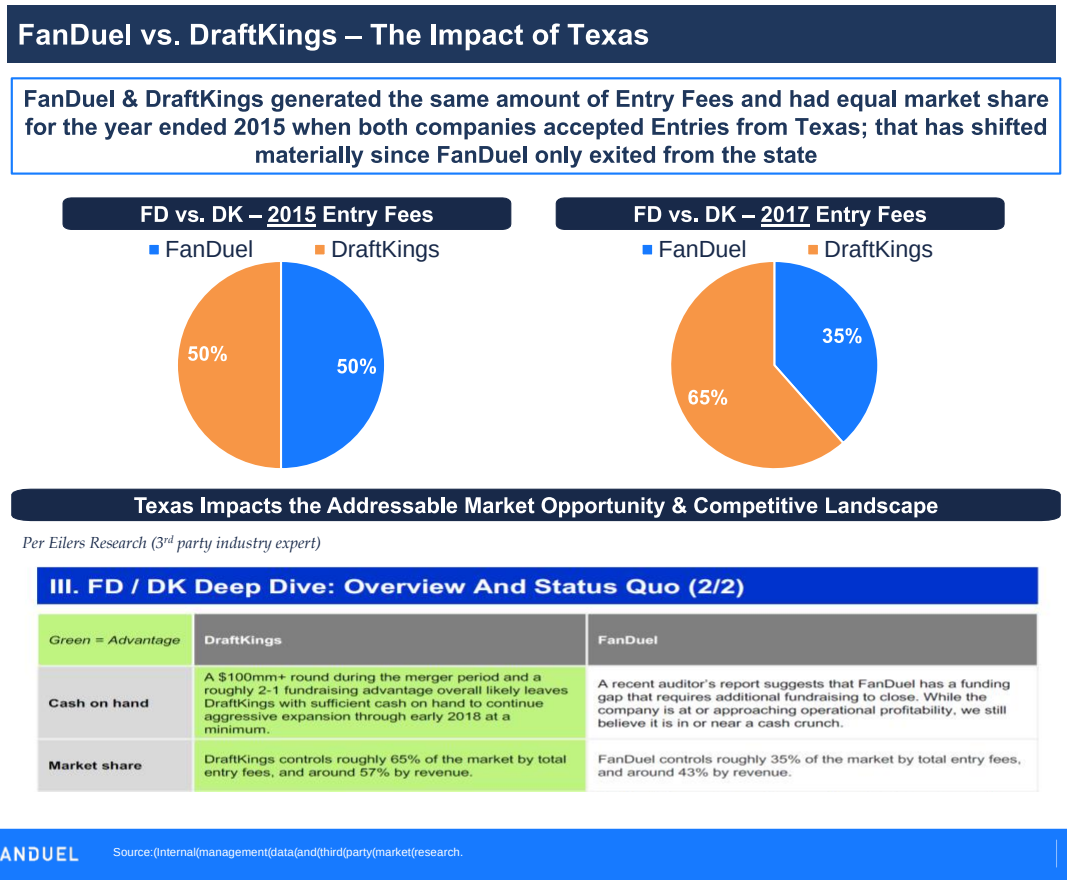
In March 2016, FanDuel Inc. reached an agreement with the Office of the Attorney General to cease offering paid daily fantasy contests in Texas on May 2, 2016. In exchange, the Attorney General agreed not to take any legal action against FanDuel Inc. or its related entities or successors and to release it from any cause of action arising out of the prior operation of its contests. FanDuel Inc. has remained in full compliance with the settlement agreement through the completion of a recent corporate merger.

On July 10, 2018, FanDuel completed a merger with Betfair Interactive U.S. As a result, the entire FanDuel Ltd. and FanDuel, Inc. businesses have been contributed into a new entity (called "FanDuel Group") that will be 60% owned (and therefore controlled) by TSE Holdings (a subsidiary of Paddy Power Betfair, a FTSE listed company based in Dublin, Ireland and London, U.K.) and 40% by FanDuel Holdings (a holding company for the interests of surviving FanDuel Inc. investors).

Under its agreement with the Attorney General, FanDuel may give the Attorney General advance notice of its intent to re-enter Texas and then re-enter the state. Due to business necessity, FanDuel Group is by this letter providing the Attorney General's office with notice of its intent to offer paid entry fantasy sports contests through the FanDuel brand to Texas residents. In this notice letter, we identify the business necessity driving this decision, as well as a set of restrictions we intend to impose on our operations in conjunction with this action. The agreement provides for a 3 day notice period, but we are providing the office with 7 days notice to permit review of this notice and provide any feedback. **Accordingly, we intend to resume offering paid entry fantasy contests on August 23, 2018**.

Business Necessity/Market Impact 2016-2018. Unlike FanDuel, its largest DFS competitor has continued to conduct operations in Texas, even proactively filing suit against the Attorney General in a 2016 civil litigation (re-filed in 2018). The contrasting positions of the two companies over these two-plus years has placed FanDuel at a material market disadvantage versus that competitor.

Texas has consistently been a top tier revenue state for daily fantasy sports, comprising over 7% of FanDuel's overall revenue in 2015. As shown in the graphics below and the analysis of the leading independent research firm on the fantasy sports sector, FanDuel's disadvantage in Texas has had a sizable negative impact on its overall business, and its largest competitor has benefited directly from taking a different path. The disparity in Texas operations that has contributed significantly to the shift in market share has negatively impacted FanDuel's valuation and impeded its ability to raise capital. Given these factors, FanDuel feels compelled by market pressure to re-enter the Texas market.



Re-Entry.

In connection with re-entering, however, FanDuel Group intends to adhere to stringent self-imposed restrictions. FanDuel Group will avoid any deceptive trade practices by:

1) Refraining from any physical in-state direct marketing of FanDuel, and any intentional marketing directed to Texas residents that makes claims about the legality of paid contests in Texas; and

2) Providing disclaimers in its Terms of Use and marketing materials that state: **FanDuel makes no representation that participation in paid entry fantasy sports contests is lawful under Texas state law.**

FanDuel Group further intends to refrain from seeking any widespread press or publicity concerning its Texas activities, other than on its own sites, apps, or social media feeds.[1]

We hope that the above identified approach and self-imposed restrictions ably address any concerns of the Attorney General's Office, but would appreciate you letting us know if that is not the case.

Sincerely,

Christian Genetski
Chief Legal Officer
FanDuel Group, Inc.

[1] The Betfair Interactive U.S. business also has a subsidiary fantasy sports site, DRAFT, which has been merged into the new FanDuel Group. DRAFT is a much smaller site that runs "snake draft" contests similar to season-long leagues but for which the duration is only one day. The site has not engaged in significant advertising in Texas, and is not involved in any litigation with the state, but does offer paid entry contests in Texas. We propose that under FanDuel Group's operation, DRAFT will abide by the same operating guidelines going forward as proposed for the FanDuel product offering.

State of New York
Supreme Court Chambers
Albany County Courthouse
16 Eagle Street, Room 219
Albany, NY 12207
(518) 285-8592
Fax (518) 285-8394

GERALD W. CONNOLLY
Judge

TARA A. KERSEY, ESQ.
Law Clerk

PATRICIA WATERBURY
Secretary

October 26, 2018

Cornelius D. Murray, Esq.
O'Connell and Aronowitz
54 State Street
Albany, New York 12207

Re: White, et al. v Cuomo, et al.
Index No.: 5861-16

Dear Counselor:

Enclosed is the executed Decision, Order and Judgment with regard to the above matter. The original is being forwarded to you for filing and service. A copy of the decision, order and judgment and the original supporting papers have been sent to the County Clerk for placement in the file.

Very truly yours,

Patricia Waterbury

Patricia Waterbury
Secretary to Judge

Enclosure

cc: Richard Lombardo, Asst. Attorney General
Office of NYS Attorney General
The Capitol
Albany, New York 12224-0341

O & A Rec'd
Received for: CDM/bd
OCT 29 2018
Key Dates entrd:_____
Reminder: ___/___/___
Due Date: ___/___/___
Atty OK: _____

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ORIGINAL

JENNIFER WHITE, KATHERINE WEST, CHARLOTTE WELLINS and ANNE REMINGTON,

Plaintiffs,

-against-

HON. ANDREW CUOMO, as Governor of the State of New York, and the NEW YORK STATE GAMING COMMISSION,

Defendants.

DECISION, ORDER & JUDGMENT

Index No.: 5861-16

(Supreme Court, Albany County, All Purpose Term)

APPEARANCES: O'Connell and Aronowitz
(Cornelius D. Murray, Esq. of Counsel)
Attorneys for Plaintiffs
54 State Street
Albany, New York 12207

Hon. Barbara D. Underwood
New York State Attorney General
(Richard Lombardo, Asst. Attorney General, of Counsel)
Attorneys for Defendants
The Capitol
Albany, New York 12224-0341

Connolly, J.:

Plaintiffs, citizen-taxpayers of the State of New York who either have gambling disorders or are relatives of individuals who have such disorders, have brought the within action requesting a declaratory judgment that Chapter 237 of the Laws of 2016 of the State of New York, which authorizes interactive fantasy sports contests with monetary prizes (hereinafter "IFS"), is unconstitutional as in violation of the anti-gambling provision at Article 1, §9 of the state constitution. Plaintiffs further request a permanent injunction enjoining the State and its agencies

and officials from implementing such chapter. By Decision and Order of August 31, 2017, the Court denied the defendants' motion to dismiss the complaint. Subsequently, the parties agreed to waiver of discovery and a timetable for submission of motions for summary judgment. The parties have now fully submitted upon both the motion of plaintiffs and the cross-motion of the defendants.

Article 1, Section 9 of the State Constitution provides, in pertinent part:

> 1 .... except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, and except casino gambling at no more than seven facilities as authorized and prescribed by the legislature shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

Chapter 237 states certain Legislative findings:

> 1. The legislature hereby finds and declares that: (a) Interactive fantasy sports are not games of chance because they consist of fantasy or simulation sports games or contests in which the fantasy or simulation sports teams are selected based upon the skill and knowledge of the participants and not based on the current membership of an actual team that is a member of an amateur or professional sports organization; (b) Interactive fantasy sports contests are not wagers on future contingent events not under the contestants' control or influence because contestants have control over which players they choose and the outcome of each contest is not dependent upon the performance of any one player or any one actual team. The outcome of any fantasy sports contest does not correspond to the outcome of any one sporting event. Instead, the outcome depends on how the performances of participants' fantasy roster choices compare to the performance of others' roster choices.
> 2. Based on the findings in subdivision one of this section, the legislature declares that interactive fantasy sports do not constitute gambling in New York state as

defined in article two hundred twenty-five of the penal law. (RPMWBL §1400)[1].

In other pertinent part, Chapter 237 affirmatively states that "[i]nteractive fantasy sports contests registered and conducted pursuant to the provisions of this chapter are hereby authorized." (RPMWBL §1411).

Stipulated Facts

Upon the within submissions, the parties have stipulated and agreed to the following enumerated facts:

(1) Online interactive fantasy sports providers offer their subscribers season-long, weekly, and daily online interactive fantasy sports contests.

(2) Participants in such contests select fantasy teams of real-world athletes and compete against other contestants based on a scoring system that awards points based on the individual athlete's performances in actual sporting events that are held after contests are closed and no more participants may enter the contest. Participants in fantasy sports contests may use, among other things, their sports knowledge and statistical expertise to determine how athletes individually, and their fantasy teams overall, are likely to perform in such sporting events. Participants cannot control how the athletes on their fantasy sports teams will perform in such sporting events.

(3) The winnings paid to successful online interactive fantasy sports contestants come

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[1] Penal Law §225 (2) defines "Gambling" as follows: "A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome". A "Contest of Chance" is defined at Penal Law §225.00(1): "... any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein."

from the entry fees paid by all contestants. The online interactive fantasy sports providers derive their revenue by retaining a portion of such entry fees.

(4) On August 3, 2016, Governor Cuomo signed into law Chapter 237 of the Laws of 2016, which amends the Racing, Pari-Mutuel Wagering and Breeding Law (hereinafter, "RPMWBL") by adding a new Article 14.

(5) Chapter 237 of the Laws of 2016 authorizes interactive fantasy sports contests that are registered and conducted pursuant to the law (RPMWBL §1411) and prohibits unregistered interactive fantasy sports contests (RPMWBL §1412).

(6) Chapter 237 of the Laws of 2016 defines an "interactive fantasy sports contest" as "a game of skill wherein one or more contestants compete against each other by using their knowledge and understanding of athletic events and athletes to select and manage rosters of simulated players whose performance directly corresponds with the actual performance of human competitors on sports teams and in sports events." (RPMWBL §1401(8)).

(7) Chapter 237 of the Laws of 2016 provides for the registration of interactive fantasy sports providers (RPMWBL §1402), required safeguards and minimum standards as a condition of such registration (RPMWBL §1404), annual reporting by registered interactive fantasy sports providers (RPMWBL §1406), taxation of registered interactive fantasy sports providers (RPMWBL §1407), and the assessment of regulatory costs upon registered interactive fantasy sports providers (RPMWBL §1408).

(8) The total tax revenue that the State of New York received in 2016 from the operation of interactive fantasy sports conducted pursuant to Chapter 237 of the Laws of 2016 was

$2,338,607.00.

(9) To become registered, the interactive fantasy sports provider must implement measures that "ensure all winning outcomes reflect the relative knowledge and skill of the authorized players and shall be determined predominantly by accumulated statistical results of the performance of individuals in sports events." (RPMWBL§1404(1)(o)).

(10) Chapter 237 of the Laws of 2016 requires registered interactive fantasy sports providers to design games requiring the identification of highly experienced players and limiting the number of entries a contestant may submit for any single contest. (RPMWBL §1404(1)(g) and (2)).

(11) Chapter 237 of the Laws of 2016 requires registered interactive fantasy sports providers to enable contestants to "self-exclude" themselves from contests and provide information regarding assistance for compulsive players. (RPMWBL §1404(1)(d) and (m)).

Plaintiffs' Contentions

Plaintiffs argue that the plain meaning of the term "gambling" in the Constitution includes IFS and that the existence of a material degree of skill in IFS competition does not exclude IFS from the definition of gambling, as such competitions indisputably contemplate a material degree of chance. Plaintiffs reference the IFS scoring system, wherein points are awarded based upon contingent future events (performances of the selected "fantasy" players).

Plaintiffs assert that the legislative mandate in the constitutional provision is solely to pass laws to prevent gambling offenses and not to carve out exceptions to the provision. Plaintiffs argue that if the Legislature had the right to arbitrarily define gambling [via statute], the Constitutional prohibition would be a nullity. Plaintiffs assert that all prior exceptions to such prohibition,

including for pari-mutuel wagering on horse racing, certain lotteries and casinos, have been authorized solely by constitutional amendment.

Plaintiffs point to anti-gambling laws, specifically now-superceded Penal Law §351 passed shortly after the 1894 amendment expanding the scope of the constitutional prohibition, which specifically criminalized bets, wagers and pools on the results of contests of skill, speed, power or endurance, as evidence of the use and meaning of the word "gambling" in the constitutional provision. Plaintiffs argue that such an contemporaneous interpretation by the Legislature of a Constitutional provision is entitled to great deference, citing to, *inter alia, New York Public Interest Research Group v. Steingut*, 40 NY2d 250, 258 (1976) (hereinafter *Steingut*). Plaintiffs argue that the Legislature cannot now, by legislation, define "gambling" to the contrary of its common and ordinary meaning.

Plaintiffs also argue that Chapter 237 of the Laws of 2016, by its terms, appears to accept that IFS is gambling, as it requires operators to both enable contestants to exclude themselves from contests and to prominently list information on their websites concerning assistance for compulsive play. Plaintiffs note that § 225.00 of the Penal Law defines, for criminal prosecution purposes, a "contest of chance" as one that depends, to a "material degree", upon an "element of chance", and defines "gambling" as occurring when a person "stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence...". Plaintiffs enumerate multiple well-known historical amateur and professional sporting results to demonstrate the impossibility, IFS player skill notwithstanding, of any conclusively correct prediction of such results.

Plaintiffs cite to cases interpreting Article XI, §1 of the Constitution, including *Board of Education, Levittown Union Free School District v. Nyquist*, 57 NY2d 27 (1982) and *Campaign for Fiscal Equity v. State of New York*, 86 NY2d 307 (1995) for the proposition that, while the Legislature is entitled to deference in carrying out a constitutional mandate, the Courts must first define the meaning of that mandate.

Plaintiffs also cite to a prior Opinion of the Attorney General: "[t]o summarize, we find that sports betting is not permissible under Article 1, §9 of the New York State Constitution. The specific Constitutional bans against bookmaking and pool-selling, as well as a general ban against 'any other form of gambling' not expressly authorized by the Constitution would operate to invalidate a statute establishing a sports-betting program." (1984 NY Op. Att'y Gen. 1, 41, 1984 NY AG LEXIS 94). Plaintiffs also proffer the position taken by the Attorney General in a Memorandum of Law in cases filed against IFS providers DraftKings, Inc. and FanDuel, Inc. in 2015: "[t]he Key Factor establishing a game of skill is not the presence of skill, but the absence of a material element of chance. Here, chance plays as much of a role (if not more) than it does in games like poker and blackjack. A few good players in a poker tournament may rise to the top based on their skill, but the game is still gambling. So is DFS." (Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, pg. 12).

Plaintiffs further argue that, should the Court apply a presumption of constitutionality in this review of the duly-enacted statute, the presumption has been rebutted as Chapter 237, *inter alia*, makes daily fantasy sports legal only when the operator is registered in accordance with the provisions of RPMWBL §1402. Plaintiffs argue that, as the same activity as that allowed under

Chapter 237 would be illegal if the participant were not registered, and as the activity would, by definition, involve the same level of skill and chance as legal IFS, which would be distinguished solely by its compliance with other provisions of Chapter 237, the premise that one activity is gambling while the same is not due to factors not related to the definition of gambling renders such distinction, and Chapter 237, irrational.[2]

Defendants' contentions

Defendants assert that Chapter 237 carried out the Legislature's constitutional mandate to devise appropriate gambling laws (Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, p. 2), arguing that such mandate necessarily authorizes the Legislature to define what is not gambling. Defendants assert that the Constitution does not require a particular statutory definition of gambling and that there is sufficient basis in the record to find that the Legislature made a rational policy choice in determining that IFS is not gambling.[3]

Defendants set forth in detail the record before the Legislature at the time of the discussion of Chapter 237, and argue that such record demonstrates that "plaintiffs cannot prove beyond a reasonable doubt that there is no rational basis for this legislative policy choice" (Memorandum of

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[2] Plaintiffs finally argue that the Legislative Record evidence submitted by the defendants in support of their position that the finding that IFS is not "gambling" is insufficient to constitute a rational basis for such finding. Plaintiffs argue that significant portions of such evidence were generated by interested parties, those being the organizations (or their hirees) directly impacted by the proposed legislation.

[3] Defendants cite, at page 5 of their reply brief, to certain statutory provisions regarding horse racing for the proposition that the Legislature can make a rational determination that horse handicapping contests do not constitute gambling, though they cite to no case law applying the within constitutional provision to such statutes.

Law, p. 2). In sum, while not denying that IFS contests carry a material degree of chance, defendants argue that such showing is insufficient, in light of the evidence of skill in IFS demonstrated to the Legislature, to overcome the presumption that the statute declaring such contests games of skill and accordingly not gambling was constitutional. In support of such argument, defendants note certain submissions to the Legislature of (i) statistics demonstrating the results of the activities of Fanduel, Inc. and Draftkings, Inc., two of the largest on-line interactive fantasy sports providers[4], showing, *inter alia*, that actual users are likely to defeat computer-generated randomly selected teams and (ii) studies showing that there is a high winning percentage of the most successful IFS participants.

Defendants cite to case law which they argue demonstrates that, when an activity could reasonably be considered to be gambling or not, there is latitude for the Legislature to declare whether such activity should be prohibited (*see People ex rel Ellison v Lavin*, 179 NY 164, 170 - 171 [1904] [hereinafter *Ellison*])[5]. They argue that, given the disparity between legal definitions of the word "gambling" (referencing statutory analysis), that where, as here, the activity within does not constitute pure chance, such as roulette, the Legislature may rationally determine that the activity does not constitute gambling as used in the Constitutional prohibition. The defendants concede solely that a game of "pure chance" is prohibited by the Constitutional provision. Defendants cite to alleged Court interpretation of the Penal law prior to 1965 (a period of approximately 70 years

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[4] Fanduel, Inc. and Draftkings, Inc. offer their subscribers weekly and daily online fantasy sports formats (*see* Defendants' Memo of Law in Opposition, pgs 4-5).

[5] Defendants cite further to the exercise of the Legislature's latitude inherent in the choices made at Penal Law Art. 225 and Racing Law § 906.

from the enactment of the constitutional provision) wherein they argue that gambling referred only to activities where chance, not skill, was the "dominating element" (*see Id*).

Defendants cite to cases demonstrating deference in the interpretation of the Article 1, §9 (*see, Saratoga County Chamber of Commerce v Pataki*, 293 AD2d 26 [3d Dept 2002], *affirmed in part and modified in part*, 100 NY2d 801 [2003], *Dalton v Pataki*, 11 AD3d 62, 65 [3d Dept 2004], *affirmed in part and modified in part*, 5 NY3d 243 [2005] [hereinafter *Dalton*]). Defendants further cite to *People ex rel Sturgis v Fallon*, 152 NY 1 (1897) (hereinafter *Sturgis*) for the proposition that a highly deferential standard of review had been applied to a constitutional challenge to the sufficiency of a statute creating criminal penalties for horse racing. Defendants also assert that the Court should disregard the earlier statements of the Attorney General with regard to IFS constituting gambling as such statements were made prior to the Legislative determinations herein. Further, defendants cite to the determinations of a number of other state legislatures that IFS does not constitute gambling, though neither party has identified a case in which a Court has directly addressed the issue of whether IFS constitutes gambling for purposes of the New York (or any other state's) constitution.

Summary Judgment Standard

To obtain summary judgment, a movant must establish his or her position "'sufficiently to warrant the court as a matter of law in directing judgment'" in his or her favor (*Friends of Fur Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979], quoting CPLR §3212 [b]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any genuine material issues

of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a showing mandates denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once that showing is made, the burden shifts to the party opposing the motion for summary judgment to come forward with evidentiary proof in admissible form to establish the existence of material issues of fact which require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Discussion

"Legislative enactments enjoy a strong presumption of constitutionality [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt. Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional" (*Overstock.com, Inc. v. New York State Dept. of Taxation & Fin.*, 20 NY3d 586, 624 [2013], *citing LaValle v Hayden*, 98 NY2d 155, 161 [2002]; *see also, Dalton*, 5 NY3d 243, 255 [2005]. "A party mounting a facial constitutional challenge bears the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment. In other words, the challenger must establish that no set of circumstances exists under which the Act would be valid" (*Moran Towing Corp. v. Urbach*, 99 NY2d 443, 448 (2003)) (internal citations and quotations omitted). It is axiomatic, however, that "... it is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them..." *(Campaign for Fiscal Equity, Inc. v. State of New York*, 100 NY2d 893, 925 [2005]).

Based upon the stipulated facts and submissions before the Court, IFS involves, to a material degree, an element of chance, as the participants win or lose based on the actual statistical performance of groups of selected athletes in future events not under the contestants [players] control or influence. "It may be said that an event presents the element of chance so far as after the exercise of research, investigation, skill and judgment we are unable to foresee its occurrence or non-occurrence or the forms and conditions of its occurrence" *(Ellison, supra* at 169). In *People ex rel Lawrence v Fallon*, 4 AD82, 84-85 [1st Dept 1896], *aff'd*, 152 NY 12 [1897], the First Department stated as follows:

> There certainly is a wide distinction between the wager of money upon the result of any game and the purchase of shares in a lottery. To a certain extent it may be said that what is called chance enters into the result of any game, even the game of chess, and that nothing which is the result of a contest or competition is decided without some other element entering into it than the mere skill of the persons who take part in the contest. Everybody recognizes that in a baseball game or a game of football, or in running or walking matches, the result depends not alone upon the skill and strength and agility of the competitors, but upon numerous incidents which may or may not occur and whose occurrence depends upon something which nobody can predict and which so far as human knowledge is concerned have no reason for existing. This is a chance pure and simple, but yet the result of those games cannot in any just sense be said to be a lottery. The distinction we apprehend to be that in a lottery no other element is intended to enter into the distribution than pure chance, while in the result of other contests which are forbidden under the act against betting or gaming other elements enter, and the element of chance, although necessarily taken into consideration, may be, and is, eliminated to a very considerable extent by the skill, careful preparation and foresight of the competitors.

To the extent that the legislative findings stated at RPMWBL §1400(1)(a) and (b), which serve as the basis for the statutory determination that IFS does not constitute gambling as defined in Penal Law §225.00, can be read as inconsistent with the proposition that IFS involves a material degree of chance, the stipulated facts and the language of the statute (RPMWBL §1401(8)) applied

in light of the standard referenced above are sufficient to overcome any presumption or deference to be accorded such legislative finding. Neither the finding that IFS are not games of chance or the finding that IFS does not constitute wagers on future contingent events addresses the fact that points are scored (and cash pieces won or entry fees lost) based upon performances of selected athletes in events held after "contests are closed". No research, investigation, skill or judgment of the IFS participant can effect such future athletic performances.

In IFS, the scoring of the participants is directly related to the performance of their selected players[6] as compared to the performance of the selected players of other participants. IFS participants have no control whatsoever of the performance of the selected players, though the experience, research and related skill involved in selecting an IFS team can sharply impact an IFS participant's chances of prevailing. IFS only allows participants to score points based on the performance of individual players, which occur after the participant have selected their team, that is, in future events. As such, the first legislative finding proffered, that is, the rationale for why "IFS is not a game of chance", does not lead to the conclusion that there is not, to a material degree, an element of chance to IFS competition.

By the same token, the rationale for the second conclusion also does not provide a logical basis for the conclusion. The findings state that "IFS are not wagers on future events not under the

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[6] The parties have not presented to the Court specific evidence with regard to the "scoring" of IFS competitions involving football players. Though the ability to create a system to award points based on individual offensive performances (e.g., yards gained, touchdowns scored, completed passes) is apparent, the ability to create such a system based on individual defensive performances, rather than team effort, is significantly less so.

contestants control or influence", and then references the facts that IFS relies upon agglomerated performances of individuals in team events rather than individual or team performances. Such rationale does not support the broad statement; the fact that IFS is scored based on agglomerated individual performances in future events not under the contestants' control or influence does not negate the fact that the wagers are placed on performances in future events not under the contestants' control or influence.

Based upon the submissions of the defense however, including the legislative findings and the (legislatively received) statistical analysis of Draftkings, Inc. and Fanduel, Inc. results demonstrating the likelihood of success of a small percentage of players as well as the performance of players against randomized computer models, it is equally clear that there is a significant element of skill in IFS competition. In light of the deference to be accorded the Legislature in the exercise of its responsibilities, the Court will, for purposes of the within discussion, accept the proposition that the chance versus skill assessment of IFS weighs on the skill side; that is, that IFS participation and success is predominated by skill rather than chance (*see* RPMWBL §1400 (1)(a)).

Legislative Authority

The constitutional provision, as relevant herein, contains two clauses: first, a proscription on the authorization or allowance of any gambling within the State, and second, a mandate that the Legislature pass appropriate laws to prevent such offenses. The latter clause "...was not intended to be self-executing...as it expressly delegates to the legislature the authority, and requires it to enact such laws as it shall deem appropriate to carry it into execution." (*Sturgis, supra* at 11). Such provision mandates that the Legislature, in the exercise its discretion, pass laws to prevent offenses

to the provision. Such grant of authority is explicit and cannot be challenged in the context of the constitutional sufficiency of scope of an anti-gambling statute. In *Sturgis* the Court held that "[i]t is not within the province of this court to declare that section seventeen is in contravention of the Constitution, for the reason that it does not deem the provision adopted appropriate or sufficient to prevent such offenses." (*Id.* at 10). The defense argues that the second clause effectively grants the Legislature authority to statutorily define the term "gambling" in the negative.

Despite such mandate, the plain language of the first referenced clause of the constitutional provision does not require absolute deference to the statute, as the mandate does not give the Legislature unlimited authority to define what is "not" gambling for purposes of such provision. Such interpretation would render the constitutional prohibitions on "...authoriz[ing] or allow[ing]..." "...pool-selling, bookmaking or any other kind of gambling" meaningless, as the entire field would then be effectively governed by statute, rather than the constitutional provision (*see Dalton*, 11 AD3d 62, 90 [3d Dept 2004], *affirmed in part and modified in part, Dalton*, 5 NY3d 243, 264 [2005])[7]. As set forth above, the Defendants to some degree accept this point, admitting that a statute authorizing an activity governed purely by chance (e.g. roulette) would be unconstitutional.

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[7] The Appellate Division in *Dalton* discussed the application of the lottery exception amendment to the constitutional ban on gambling in the context of a very general definition of lotteries advanced by defendants which was consistent with all gambling. There the Court held that "[s]uch a broad interpretation would expand the constitutional exception permitting state-run lotteries to such an extent that it would swallow the general constitutional ban on gambling" (*Dalton*, 11 AD3d 62, 90, *affirmed in part and modified in part, Dalton*, 5 NY3d 243, 264 [2005]; *see also*, 1984 Op. Atty. Gen. *supra* at 41 which provides that "[i]n addition, such arguments proceed from faulty premises in that they...seek to equate what is forbidden to criminals with what is allowed to the State.").

Plaintiffs argue that IFS is gambling, and it is axiomatic that the Legislature cannot pass a law that violates a constitutional proscription. The constitutionality of the enactment authorizing and regulating IFS turns upon the scope of the prohibition as used in the Constitution, and whether plaintiffs have demonstrated beyond a reasonable doubt, in the context of the presumption of constitutionality, that IFS, a game determined by a dominant degree of skill and a material degree of chance, fits the constitutional definitions of the prohibited activities. The Court finds that plaintiffs have made such demonstration.

"Words of ordinary import receive their understood meaning, technical terms are construed in their special sense. Especially is the plain import of the language to be given its effect in the construction of constitutional provisions, for the words are deemed to have been used most solemnly and deliberately; and where the intent of the constitutional provision is manifest from the words used and leads to no absurd conclusion, there is no occasion for interpretation, and the meaning which the words import should be accepted without conjecture" (McKinney's Cons. Laws of New York, Statutes, §94 [internal citations omitted]). "When language of a constitutional provision is plain and unambiguous, full effect should be given to the intention of the framers... as indicated by the language employed and approved by the People" (*Matter of King v Cuomo*, 81 NY2d 247, 253 [1993] [citations omitted]).

In determining the import of the phrase "...pool-selling, book-making, or any other kind of gambling...", the Court finds that such phrase incorporates sports gambling, and such gambling is generally precluded by such constitutional prohibition. Such finding comports with Formal Opinion No. 84-F1 of the Office of the New York State Attorney General, which legally and historically

analyzed the constitutional prohibition under circumstances not dissimilar to those herein; that is, in assessing proposed legislation which would affirmatively create, and authorize the State Division of the Lottery to conduct, a game in which parlay bets would be placed on the outcome of pro sports events (*see* 1984 NY Op. Att'y Gen. 1). After discussing the 1894 Amendment to the then-existing constitutional provision (which previously banned solely lotteries) to add prohibitions upon "pool-selling, book-making or any other kind of gambling...", such opinion specifically referenced the amendment to the constitutional provision thus: "this distinct statutory ban on sports wagering [referencing the 1877 Penal Code] was elevated to the constitutional level in 1894 and has remained by explicit language in the Constitution until today" (*Id.* at 11). In light of the legal and constitutional history cited by the Attorney General in the 1984 opinion, particularly *Reilly v Gray*, 77 Hun. 202 (1894), it is clear that the added language regarding "poolselling, bookmaking and any other kind of gambling" generally encompassed sports gambling.

Further, the virtually contemporaneous enactment of then-Penal Law §351, creating criminal penalties for, *inter alia*, sports gambling, compels the conclusion that sports gambling cannot be authorized absent a constitutional amendment, as the contemporaneous interpretation of a constitutional provision by the Legislature is to be accorded great deference, and "...may be supposed to result from the same views of policy, and modes of reasoning which prevailed among the framers of the instrument propounded." (*Steingut, supra* at 258 [1976] [internal quotations and citations omitted]). This seems particularly applicable where, as both here and in *Steingut*, the contemporaneous Legislature was exercising the authority granted by the constitutional provision.

In *Sturgis*, the Court referenced (now superceded) Penal Law §351 which clearly

encompassed sports gambling and provided that "...any person who records or registers bets or wagers, or sells pools upon the result of any trial or contest of skill speed or power of endurance, of man or beast... or upon the result of any lot, chance, casualty, unknown or contingent event whatsoever...is guilty of a felony..." stating that "[t]his examination of the statute discloses that the legislature has passed laws, the obvious purpose of which is to prevent the offenses mentioned in section nine of article one of the constitution" (*Sturgis, supra* at 7).

Having concluded that the prohibition generally bans the authorization of sports gambling, the Court next turns to the position of the plaintiffs that the prohibition does not apply to a law authorizing a practice which includes any degree of skill. As stated above, in assessing such issue, the Court will presume the accuracy of the [Court-interpreted] legislative conclusion that success in IFS is predominantly determined by the skill of the participant.

Initially, the Court cannot agree with the citations of the defendants to *Ellison,* 179 NY 164 (1904), for the proposition that it has been held that the constitutional prohibition does not apply to a law authorizing a practice where the outcome is dependent upon a degree of skill (*see* Defendants' MOL in Support of Cross-Motion of Summary Judgment, pg. 13, fn. 8; Defendants' MOL in Reply, p.3). The discussion in *Ellison* was addressed to then-Penal Law §327, and does not address the meaning of the constitutional provision. Moreover, as discussed below, the statute reviewed by the Court of Appeals in *Ellison* was not the sports gambling statute enacted immediately after the constitutional amendment, but the lottery statute.

The discussion in *Ellison* was with regard to the element of chance in then Penal Law §§323 and 327 creating penalties for operation of a lottery, and accordingly focused upon whether the

allegedly illegal conduct, which created a system not governed exclusively by chance, fit such definition. There, the Court found that a contest for the guessing of the number of cigars sold violated the anti-lottery statutes, though involving elements of both chance and judgment, because chance was the dominant element. The Court did not opine on whether such conduct fit the constitutional definition of the separate constitutional terms "pool-selling, book-making or any other gambling". Such determination on what constituted a lottery for purposes of the Penal Law, in the opinion of the Court, carries no precedential value herein.

Separate from *Ellison*, the Court cannot agree with the defendants' contention that only legislative authorization of games constituting pure chance (e.g., lotteries or roulette) is barred by the prohibition. It is clear that the drafters of the 1894 prohibition intended to bar contests based on future contingent events. Former Penal Law § 351, in addition to enacting criminal penalties specific to "... the result of any trial or contest of skill, speed or power of endurance...", also encompassed "...the result of any lot, chance, casualty, unknown or contingent event whatsoever" (emphasis added) (*Sturgis, supra* at 7-8). The caution in *Steingut, supra,* that special consideration be given to relatively contemporaneous acts of the Legislature in constitutional interpretation leads to the conclusion that the actions further described in Penal Law § 351 were within the contemplation of the drafters of the constitutional prohibition.

Further evidence that the prohibition is meant to be read more broadly than the interpretation urged by the defendants is found in the plain language of the prohibition. Initially, the provision bans laws authorizing lotteries, which, as discussed in *Ellison* in detail at both the Appellate Division and Court of Appeals decisions, were arguably seen at the time as games of pure chance (*see Ellison*,

179 NY 164 [1904] *rev'g*, 93 AD 292 [1st Dept 1904]). If the intent of the Article 1, §9 drafters were to simply bar "pure chance" gambling, they could have done so, instead of going on, via the amendment of 1894, to bar pool-selling, book-making and other gambling.

Additionally, the provision does not simply bar the authorization of gambling, it bars the authorization of "...lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling" (emphasis added). Applying the rule of construction that words used in constitutional provisions should be given their ordinary meaning and not be deemed superfluous, the "any other kind" proscription calls for an expansive, not a limited, interpretation of the term "gambling". This is particularly so where the preceding language enumerates differing descriptions of gambling activities, including bookmaking, which is defined in our current Penal Law at §225.00 (9) as "...advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events". The commentaries to such statute note that it codified "...the views set forth by the Court of Appeals" defining bookmaking prior to the imposition of the statutory definition (Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law §225.00 at 356). It is axiomatic that sporting events are included within such "future contingent events" (*see generally, People v. Abelson*, 309 NY 643 [1956]; 1984 Op. Att'y. Gen. 1). It is also beyond dispute that those amending the Constitution had a clear view at the time of the differences between "pure chance" activities (*e.g.*, lotteries, roulette) and those involving bets on sporting events (*see People ex rel Collins v McLaughlin*, 128 AD 599 [1st Dept 1908] [discussing evolution of anti-gambling statutes in the State]).

While the Court is mindful of the doctrine of *ejusdem generis*, the use of "Book-making" and "Pool-selling" in the preceding language to the broad ban on "any other" form of gambling strongly implies that placing bets on performances in IFS, which practice is recognized as entailing substantial skill, falls within such prescription *(see Philbrick v Florio Co-op,* 137 AD 613, 616 [1st Dept 1910], *aff'd,* 200 NY 526 [1910]) and at least one contemporary Appellate Court discussed such prohibition in similar fashion:

> It must be remembered that the evil which the people aimed at in passing that constitutional amendment was the sale of lottery tickets, the establishment of lotteries and pool-selling and bookmaking, which had been conducted so generally and under such circumstances as to become a grave public evil. Other forms of gambling, to be sure, are mentioned--not particularly, because the people deemed it unnecessary to put a constitutional prohibition upon other forms of gambling, for the Legislature had already by stringent laws taken steps to do that--but because, as is evident from the debates in the convention, it was intended that no opening should be left by which anybody who desired to pursue the business of bookmaking or poolselling in some other way than had been pursued before, could be able to do so, and thereby evade the constitutional prohibition.
>
> (*Sturgis,* 4 AD 76, 79 [1st Dept 1896], *aff'd,* 152 NY 1 [1897]).

Further, the Court of Appeals has previously referenced the prohibition in a fashion strongly implying that it was meant to be broad in application: "[f]rom an absolute constitutional prohibition on gambling in New York of any kind, expressly including 'book-making', which has stood almost 80 years in the New York Constitution (art. I, § 9), a specific exception was carved out in 1939," (emphasis added) (*Finger Lakes Racing Ass'n v. N.Y. State Off-Track Pari-Mutuel Betting Comm'n,* 30 NY2d 207, 216 [1972]).

Finally, while the parties have not identified a Court determination defining "gambling" for the purposes of the constitutional provision, in *dicta* in *Dalton*, the Third Department, discussing the definition of the word "lottery" in article 1, §9, referenced gambling as "defined by the three

elements of consideration, chance and prize" and makes no reference to the inclusion of an element of skill as negating the application of the other three elements *(Dalton,* 11 AD3d 62, 90 [3d Dept 2004]). Such holding cites to, *inter alia*, the modern New York Penal law definitions of "Gambling" and "Contest of Chance". Such definition was adopted again, (in *dicta*) by the Court of Appeals in their decision affirming in part and modifying in part the Third Department's decision (*see Dalton*, 5 NY3d 243, 264 [2005]). Such definition comports with the modern Penal Law provisions passed in fulfillment of the constitutional mandate, and is, at a minimum, evidence of the commonly understood meaning of the term "gambling".

Defendants argue that "[b]ecause Article I, §9 explicitly instructs the Legislature to determine what laws are appropriate to implement a general prohibition of gambling, the only currently valid definition of the term "gambling" in Article 1 §9 is found in Penal Law §225.00 (2)" (*see* Defendants' MOL at pg.13, fn. 7).[8] It appears undisputed that, aside from the IFS exception specified in Chapter 237, IFS falls within the Penal Law definition of gambling. As discussed below, the Legislature has the authority to address and exclude certain acts, including IFS, from the ambit of the Penal Law. Such discretionary exclusion, however, does not have the effect of changing the meaning of the constitutional terms each time the statute is revised; the constitution is not so fungible.

The defendants also discuss the differences between IFS and real sports competitions,

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[8] Such argument, however, is inconsistent with the position of the defendants that the Legislature, in defining "contest of chance", did so more expansively than required by the constitutional provision.

including the key elements differentiating the two, those being that the points are scored based on aggregated individual (rather than team) performances and that the IFS participants select their own "team". Neither of these facts effects the conclusion that the performances of the individuals are future events over which the IFS participants have no control.

There is little, if any, identified difference between complex gambling practices (*e.g.*, poker, horse handicapping and complex betting on sports events including point spreads, over/under bets, and parleys) and IFS. Each of these actions involve a significant amount of "skill", including the ability to assess multiple options of play and, using talent, information gained by experience and dedicated research, to maximize one's chances of winning, whether against the "house" or against a group of opponents. As discussed above however, this skill/chance dichotomy was by no means unknown to those who enacted the relevant constitutional provision, and the provision made no reference to even a dominant degree of "skill" as negating the definitions of pool selling, bookmaking and any other gambling.

The broad constitutional prohibition cannot be allowed to contemplate a parsing of the degree of skill involved in a practice which encompasses a material degree of chance based upon the outcome of a future contingent event or events (the separate performances of a group of selected athletes). The proposed exclusion from such ban of games with a degree, or even a dominant degree, of skill, if intended by the provision drafters, would have been clearly stated; instead, the language was made broad enough to encompass every eventuality wherein gambling was conducted on future contingent events.

Based on all of the above, the Court finds and holds that the Constitutional prohibition upon

authorization or allowance of pool-selling, bookmaking or any other kind of gambling encompasses IFS, including in circumstances where the Legislature has determined that ultimate success in an activity premised upon the performance of selected athletes in future contests is predominantly determined by the skill of the individual selecting the athletes. The intentionally broad language and application of the constitutional prohibition, the common understanding at the time and now of the meaning of the prohibition and of the particular words "bookmaking" and "gambling", and the undisputed fact that success in IFS is predicated upon the performance of athletes in future contests all lead to such conclusion. Moreover, as referenced above, to countenance such redefining of the term would effectively eviscerate the constitutional prohibition (*see Dalton,* 11 AD3d 62 [3d Dept 2004], *affirmed in part and modified in part, Dalton,* 5 NY3d 243 [2005]). As such, the plaintiffs have demonstrated beyond a reasonable doubt, that, to the extent Chapter 237 authorizes and purports to regulate IFS registered and conducted pursuant to the provisions of such Chapter, it is unconstitutional.

Penal Law Provision

In addition to the provisions authorizing, regulating and taxing IFS, Chapter 237 also affirmatively declares, within the context of the RPMWBL, that IFS does not constitute gambling in New York as defined in Penal Law Article 225. As discussed in detail above, the legislative findings upon which such declaration is based do not factually support such declaration, and, to the extent it is not clear from the discussion above, IFS does fit the statutory definition of gambling set forth in Article 225.

As further stated above, it is facially clear that, pursuant to Article 1, § 9, the authority to

pass appropriate laws to prevent offenses against the provisions of such section rests in the Legislature. Such clause "...was not intended to be self-executing...as it expressly delegates to the legislature the authority, and requires it to enact such laws as it shall deem appropriate to carry it into execution." (*Sturgis, supra* at 11). Such grant of authority is explicit and cannot be challenged in the context of the constitutional sufficiency of scope of an anti-gambling statute (*Id.* at 10: "It is not within the province of this court to declare that section seventeen is in contravention of the Constitution, for the reason that it does not deem the provision adopted appropriate or sufficient to prevent such offenses").

In *Sturgis,* the Court declined to invalidate a statute of which "[t]he most that can be said is, ...its effect was to reduce the then existing penalty or punishment for that particular offense" (*Id. at* 10), citing to the clear mandate of legislative authority in the constitutional section. The Court went on to hold, with reference to such statute, that "[i]t being in a degree appropriate, we are aware of no principle of constitutional law which would authorize this Court to condemn it as invalid or unconstitutional because, in our opinion, some more effective or appropriate law might have been devised and enacted" (*Id.* at 11). Further, "[c]ourts do not sit in review of the discretion of the legislature, or determine upon the expediency, wisdom or propriety of legislative action in matters within the power of the legislature." (*Id.*).

The statute herein, as regards the Penal law, expressly declares that IFS does not constitute gambling for the purposes of such statutory definition. The Court has found that IFS is gambling for the purposes of the constitutional provision, and, further, that the stated rationale for the finding that IFS does not constitute gambling as defined in the Penal Law does not support such conclusion.

Nevertheless, in light of the specific discretion afforded the Legislature in the constitutional provision, that is, to enact laws to prevent such offenses, the Court cannot find that the provision ostensibly excluding IFS from the ambit of the Penal Law definition of gambling is unconstitutional. (*see* 1984 N.Y. Op. Att'y Gen. 1, 22-23 [stating, "[i]n addition, such arguments proceed from faulty premises in that they...seek to equate what is forbidden to criminals with what is allowed to the State." (*Id.* at 41)]).

The Legislature, in the exercise of its authority and discretion, has enacted an anti-gambling statute (Penal Law Article 225). It has apparently seen fit to exclude from such statute IFS. It is not within the authority of this Court to usurp the Legislature's authority in fashioning such statute. As argued by the defendants, such authority has previously been exercised by the Legislature in excluding "Players" from the scope of the anti-gambling Penal Law provisions (*see* Penal Law §225.00(3)). As the enactment of statutes to prevent gambling offenses lies within the clear responsibility of the legislature, the legislature has the full authority to define and limit such offenses in the context of an anti-gambling statute as in its discretion it deems appropriate, and any finding of unconstitutionality in such context would be beyond the scope of the judicial review authority *(see McKinney's Cons. Laws of New York, Statutes,* §73).

Accordingly, the Court finds and holds that plaintiffs have failed to meet their burden herein with regard to the provision of Chapter 237, now codified at RPMWBL §1400 (2), which purports to except IFS from the anti-gambling provisions of the Penal Law; moreover, the defendants have met their burden with regard to such provisions, and the plaintiffs have failed to meet their burden in opposition.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Accordingly, it is hereby

ORDERED, ADJUDGED and DECLARED that Plaintiff's motion for Summary Judgment is granted herein (and Defendant's cross-motion denied) as follows: that Chapter 237 of the Laws of the State of New York, to the extent that it authorizes and regulates IFS within the State of New York, is found null and void as in violation of Article I, §9 of the New York State Constitution; and it is further

ORDERED, ADJUDGED and DECLARED that Defendant's cross-motion for summary judgment granting dismissal of the within action is granted herein (and plaintiff's motion denied) as follows: Chapter 237 of the Laws of the State of New York, to the extent that it excludes IFS from the scope of the New York State Penal Law definition of "gambling" at Article 225, is not in violation of Article I, §9 of the New York State Constitution.

This shall constitute the Decision, Order and Judgment of the Court. This original Decision, Order and Judgment is being returned to the attorney for the plaintiffs. The below referenced original papers are being transferred to the Albany County Clerk's Office. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

SO ORDERED.
ENTER.

Dated: October 26, 2018
Albany, New York

Gerald W. Connolly
Acting Supreme Court Justice

Papers Considered:

1. Statement of Agreed upon Facts dated January 18, 2018;
2. Plaintiffs' Notice of Motion for Summary Judgment dated January 29, 2018 with Exhibits A-E annexed thereto; Affirmation of Cornelius D. Murray, dated January 29, 2018 with Exhibits A-E annexed thereto; Affidavit of Jennifer White, sworn to January 15, 2018 with Exhibit A annexed thereto; Affidavit of Charlotte Wellins, sworn to January 24, 2018 with Exhibit A annexed thereto; and Memorandum of Law in Support of Motion for Summary Judgment dated January 29, 2018;
3. Notice of Cross-Motion dated March 9, 2018; Affirmation of Richard Lombardo, dated March 9, 2018; Affidavit of Evan Stavisky, sworn to March 6, 2018, with Exhibits A-PP annexed thereto; and Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment dated March 9, 2018;
4. Affirmation of Cornelius D. Murray, dated May 1, 2018 with Exhibits A-E annexed thereto and Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment dated May 1, 2018;
5. Defendants' Memorandum of Law in Reply to Plaintiffs' Response to Defendants' Cross-Motion for Summary Judgment dated June 7, 2018;
6. Letter from Richard Lombardo dated August 23, 2018;
7. Letter from Cornelius D. Murray dated August 27, 2018; and
8. Letter from Cornelius D. Murray dated August 28, 2018.

(720 ILCS 5/Art. 28 heading)

ARTICLE 28. GAMBLING AND RELATED OFFENSES

(720 ILCS 5/28-1) (from Ch. 38, par. 28-1)

(Text of Section from P.A. 101-31, Article 25, Section 25-915)

Sec. 28-1. Gambling.

(a) A person commits gambling when he or she:

(1) knowingly plays a game of chance or skill for money or other thing of value, unless excepted in subsection (b) of this Section;

(2) knowingly makes a wager upon the result of any game, contest, or any political nomination, appointment or election;

(3) knowingly operates, keeps, owns, uses, purchases, exhibits, rents, sells, bargains for the sale or lease of, manufactures or distributes any gambling device;

…

(5) knowingly owns or possesses any book, instrument or apparatus by means of which bets or wagers have been, or are, recorded or registered, or knowingly possesses any money which he has received in the course of a bet or wager;

(6) knowingly sells pools upon the result of any game or contest of skill or chance, political nomination, appointment or election;

…

(12) knowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money or other thing of value by means of the Internet or to make a wager upon the result of any game, contest, political nomination, appointment, or election by means of the Internet. This item (12) does not apply to activities referenced in items (6), (6.1), and (15) of subsection (b) of this Section.

2020 IL 124472

IN THE

SUPREME COURT

OF

THE STATE OF ILLINOIS

(Docket No. 124472)

COLIN DEW-BECKER, Appellant, v. ANDREW WU, Appellee.

Opinion filed April 16, 2020.

CHIEF JUSTICE ANNE M. BURKE delivered the judgment of the court, with opinion.

Justices Kilbride, Garman, Theis, and Neville concurred in the judgment and opinion.

Justice Karmeier dissented, with opinion.

Justice Michael J. Burke took no part in the decision.

OPINION

¶ 1 In this case, we must determine whether the loser of a head-to-head contest on a daily fantasy sports website may recover money lost to the winner of the contest

under section 28-8(a) of the Criminal Code of 2012 (720 ILCS 5/28-8(a) (West 2014)). For the following reasons, we hold that recovery is unavailable.

¶ 2 BACKGROUND

¶ 3 On April 4, 2016, the plaintiff, Colin Dew-Becker, filed a complaint in the circuit court of Cook County against the defendant, Andrew Wu. The complaint alleged that plaintiff and defendant had engaged in a daily fantasy sports (DFS) contest on a website known as FanDuel and that, as a result of this contest, plaintiff had lost $100 to defendant. The complaint further alleged that the DFS contest constituted illegal gambling under Illinois law and, therefore, plaintiff was entitled to recover the lost money under section 28-8(a) of the Criminal Code of 2012 (*id.* § 28-8(a)), a statutory provision which allows the loser of certain illegal bets to seek recovery from the winner.

¶ 4 At a bench trial, plaintiff testified that in a DFS contest each participant creates a virtual roster of players by selecting from among current athletes in a real professional or amateur sports league. Each participant then earns fantasy points based on how well the selected athletes perform individually in their actual professional or college sports games on a given day. After all such games are completed, a total score is calculated for each of the virtual rosters, and the winner of the contest is the participant whose roster has the most points. A head-to-head DFS contest is one that involves only two participants who compete against each other directly.

¶ 5 Plaintiff testified that on April 1, 2016, he and defendant each paid a $109 entrance fee to participate in a head-to-head DFS contest on the FanDuel website. The contest involved National Basketball Association (NBA) games, and both plaintiff and defendant selected a fantasy roster of nine NBA players. Plaintiff stated that he understood when entering the contest that the winner would keep $200, the loser would get nothing, and FanDuel would keep $18. Plaintiff testified that defendant won the DFS contest by a score of 221.1 to 96.3 and that defendant received the $200 due him.

¶ 6 Defendant, appearing *pro se*, testified that he did not view the DFS contest as "an illegal gambling situation." He stated that he chose to join the fantasy contest

voluntarily and that he paid the entrance fee knowing that, if he did not win, $100 would go to plaintiff.

¶ 7 At the close of trial, the circuit court rendered judgment in favor of defendant. The court concluded defendant was entitled to judgment as a matter of law because section 28-8(a) "does not allow recovery when the gambling is not connected—conducted between one person and another person, in this case, because of FanDuel."

¶ 8 On appeal, the appellate court affirmed. 2018 IL App (1st) 171675. The appellate court agreed with the circuit court's reading of section 28-8(a), holding that recovery could only be had under the statute when there was a "direct connection between the two persons involved in the wager." *Id.* ¶ 19.

¶ 9 We granted plaintiff's petition for leave to appeal. Ill. S. Ct. R. 315 (eff. July 1, 2018).

¶ 10 ANALYSIS

¶ 11 At issue in this case is whether plaintiff can recover money lost in a head-to-head DFS contest under section 28-8(a) of the Criminal Code (720 ILCS 5/28-8(a) (West 2014)). This provision states, in relevant part:

> "(a) Any person who by gambling shall lose to any other person, any sum of money or thing of value, amounting to the sum of $50 or more and shall pay or deliver the same or any part thereof, may sue for and recover the money or other thing of value, so lost and paid or delivered, in a civil action against the winner thereof, with costs, in the circuit court." *Id.*

¶ 12 Determining the meaning of section 28-8(a) presents an issue of statutory interpretation, which we consider *de novo*. *People v. Manning*, 2018 IL 122081, ¶ 16. The fundamental rule of statutory interpretation is to ascertain and give effect to the legislature's intent, and the best indicator of that intent is the statutory language, given its plain and ordinary meaning. *People v. Alexander*, 204 Ill. 2d 472, 485 (2003). When the statutory language is clear and unambiguous, it is given effect as written without resort to other aids of statutory interpretation. *Petersen v. Wallach*, 198 Ill. 2d 439, 445 (2002).

¶ 13 The appellate court assumed, *arguendo*, that a head-to-head DFS contest is "gambling" within the meaning of section 28-8(a) (2018 IL App (1st) 171675, ¶ 17) but then went on to conclude that recovery for a loss in such a contest was unavailable under the statute. The court noted that section 28-8(a) references " '[a]ny person' " who loses by gambling " 'to any other person.' " *Id.* ¶ 19 (quoting 720 ILCS 5/28-8(a) (West 2014)). The court reasoned that this language "requires a direct connection between the two persons involved in the wager" for recovery to be allowed. *Id.* In other words, according to the appellate court, section 28-8(a) does not permit recovery when a third-party intermediary has facilitated or aided in the illegal gambling transaction. We disagree.

¶ 14 Courts are not free to read into a statute exceptions, limitations, or conditions the legislature did not express. *Illinois State Treasurer v. Illinois Workers' Compensation Comm'n*, 2015 IL 117418, ¶ 21. The only "direct" connection required under section 28-8(a) is that one person lose at gambling to another. Nothing in the statute states that a third party's help in conducting the gambling eliminates the plaintiff's right to recovery. See *Zellers v. White*, 208 Ill. 518 (1904) (interpreting a predecessor statute of section 28-8(a)). Indeed, reading in such a limitation would effectively eliminate the utility of section 28-8(a). The purpose of section 28-8(a) "is not simply to undo illegal gambling transactions but 'to deter illegal gambling by using its recovery provisions as a powerful enforcement mechanism.' " *United States v. Resnick*, 594 F.3d 562, 571 (7th Cir. 2010) (quoting *Vinson v. Casino Queen, Inc.*, 123 F.3d 655, 657 (7th Cir.1997)). If a gambling winner's liability could be avoided by simply having an agent assist with the gambling transaction in some way, the enforcement mechanism of the statute would essentially be negated.

¶ 15 The appellate court also concluded that section 28-8(a) cannot be read as applying to DFS contests hosted by websites such as FanDuel because, as a practical matter, the statute cannot work when a DFS contest takes place on the Internet. The court noted that FanDuel allows fantasy sports participants to compete in DFS contests using only a screen name rather than their real names and, thus, the loser of a DFS contest will often not know the real identity of the winner. The appellate court concluded that a loser cannot sue the winner "when the winner's identity is known only through a screen name." 2018 IL App (1st) 171675, ¶ 21.

From this, the court determined that DFS contests held on websites such as FanDuel are not covered by section 28-8(a). *Id.* Again, we disagree.

¶ 16 First, it is not always true that DFS participants do not know one another's identities. In this case, for example, plaintiff was clearly aware of defendant's true identity. Plaintiff invited defendant to participate in the DFS contest, and plaintiff's complaint identified defendant by name, even though defendant had used a screen name during the DFS contest itself. *Id.* ¶ 20. Further, even if a defendant's real name is unknown, Illinois Supreme Court rules permit limited pretrial discovery to uncover that name. See Ill. S. Ct. R. 224 (eff. May 30, 2008); *Hadley v. Doe*, 2015 IL 118000. To be sure, the use of screen names may, in some instances, make recovery more difficult for the loser of a DFS contest, but it does not make recovery impossible. Moreover, nothing in the language of section 28-8(a) excludes Internet contests from the statute's reach. We therefore cannot conclude that section 28-8(a) is *per se* inapplicable to DFS contests conducted on websites such as FanDuel.

¶ 17 The appellate court also rejected the application of section 28-8(a) to DFS contests conducted on websites such as FanDuel because, according to the court, allowing such application would open "the floodgates of litigation" to the "thousands of Illinois residents" who have participated in and lost DFS contests. 2018 IL App (1st) 171675, ¶ 22. The appellate court held that it would be "absurd" to conclude the legislature intended to "inundate the court system with such a high volume of claims" (*id.*) and, therefore, section 28-8(a) cannot apply to DFS contests. See, *e.g.*, *Carmichael v. Laborers' & Retirement Board Employees' Annuity & Benefit Fund*, 2018 IL 122793, ¶ 35 (when interpreting statutes, we presume that the legislature did not intend to create absurd results).

¶ 18 The appellate court's conclusion that applying section 28-8(a) to DFS contests would open the floodgates of litigation is speculative. See, *e.g.*, *Sonnenberg v. Amaya Group Holdings (IOM) Ltd.*, 810 F.3d 509, 511 (7th Cir. 2016) (noting that there is typically not a strong incentive for gamblers to file lawsuits to recover gambling losses because the gambler knows his money is at risk). Moreover, it is contradicted by the court's previous discussion regarding the DFS contest participants' use of screen names. As the appellate court itself noted, the fact that participants are known only by screen names would tend to limit the number of lawsuits filed. Further, and most important, section 28-8(a) is meant to encourage

the filing of lawsuits as a means of deterring illegal gambling. Any increase in litigation is therefore not an absurd result but, rather, the explicit purpose of the statute.

¶ 19 Finally, the appellate court observed that "the trend in Illinois is toward more relaxed gambling laws" and that section 28-8(a)'s "relevance and applicability have dwindled since its inception in the late 1800s." 2018 IL App (1st) 171675, ¶¶ 25-26. The court concluded for this reason, too, that section 28-8(a) should not be applied to DFS contests hosted on websites such as FanDuel.

¶ 20 It is certainly true that the "era of strong opposition" to gambling in Illinois has passed (*Sonnenberg*, 810 F.3d at 510) and, with the recent enactment of the Sports Wagering Act (Pub. Act 101-31, § 25-5 (eff. June 28, 2019) (adding 230 ILCS 45/25-1 *et seq.*)), legalized gambling has been significantly expanded.[1] However, section 28-8(a) remains the law. In the absence of any constitutional infirmity, it is not the role of the judiciary to declare the statute may not be enforced.

¶ 21 Although we do not find the appellate court's reasoning persuasive, we nevertheless agree that the judgment of the appellate court should be affirmed because the DFS contest at issue here was not gambling. In order to recover under section 28-8(a), plaintiff must establish that he lost his money while "gambling." Section 28-1(a)(1) of the Criminal Code of 2012 states that a person commits gambling if he or she "knowingly plays a game of chance or skill for money or other thing of value, unless excepted in subsection (b) of this Section." 720 ILCS 5/28-1(a)(1) (2014). Subsection (b)(2), in turn, provides an exception to gambling for a participant in any contest that offers "prizes, award[s] or compensation to the actual contestants in any bona fide contest for the determination of skill, speed, strength or endurance or to the owners of animals or vehicles entered in such contest." *Id.* § 28-1(b)(2). In this case, there is no question that when plaintiff and defendant entered into the DFS contest, they were "actual contestants" who had before them a possible "prize," "award," or "compensation." The question is whether plaintiff and defendant were engaged in a "bona fide contest for the determination of skill."

[1]The Sports Wagering Act does not address or regulate DFS contests.

¶ 22 Answering this question can present difficulties because the outcome of every contest depends, at least to some degree, on chance. Even chess, a highly skill-based contest, can be affected by the random factors of who draws white (and thus goes first) or whether one's opponent is sick or distracted. To address these difficulties and determine whether a contest is one of skill and, hence, exempt from gambling laws, courts have applied three general tests. See Marc Edelman, *Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and a Proposed Framework for Future State Legislation*, 92 Ind. L.J. 653, 663-65 (2017). The first test, and the one adopted by the majority of courts, is typically referred to as the "predominant purpose test" or "predominate factor test" *Id.* at 663; see, *e.g.*, *Joker Club, LLC v. Hardin*, 643 S.E.2d 626 (N.C. Ct. App. 2007). Under this test, contests in which the outcome is mathematically more likely to be determined by skill than chance are not considered gambling. Edelman, *supra*, at 663 n.46. As one court has put it,

> "[t]he test of the character of the game is, not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game, or, alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment." (Internal quotation marks omitted.) *O'Brien v. Scott*, 89 A.2d 280, 283 (N.J. Super. Ct. Ch. Div. 1952).

¶ 23 A second test used to differentiate between contests of skill and gambling is called the "material element test." Edelman, *supra*, at 664. Under this test, a contest is considered a game of chance if the outcome depends in a material degree upon an element of chance, even if skill is otherwise dominant. See, *e.g.*, *Thole v. Westfall*, 682 S.W.2d 33, 37 n.8 (Mo. Ct. App. 1984) (explaining "chance must be a material element in determining the outcome of a gambling game. It need not be the *dominant* element." (Emphasis in original.)).

¶ 24 The third test is the "any chance test." Edelman, *supra*, at 663 n.46. As its name suggests, this test finds a contest to be gambling if it involves any chance whatsoever. *Id.* at 664.

¶ 25 This court has not previously adopted any of the three recognized tests for determining whether a contest is one of skill or chance. We find, however, that the predominate factor test is the most appropriate. The any chance test is essentially

no test at all, as every contest involves some degree of chance. The material element test depends too greatly on a subjective determination of what constitutes "materiality." The predominate factor test, in contrast, provides a workable rule that allows for greater consistency and reliability in determining what constitutes a contest of skill. Notably, too, our legislature has used the predominate factor test in other, similar contexts. See 720 ILCS 5/28-2(a)(4)(A) (West 2018) (excluding an amusement device known as a "redemption machine" from the definition of a gambling device if the "outcome of the game is predominantly determined by the skill of the player").

¶ 26 At issue then is whether head-to-head 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. Several recent, peer-reviewed studies have established that they are. Daniel Getty et al., *Luck and the Law: Quantifying Chance in Fantasy Sports and Other Contests*, 60 SIAM Rev. 869 (2018); Brent A. Evans et al., *Evidence of Skill and Strategy in Daily Fantasy Basketball*, 34 J. Gambling Stud. 757 (2018); Todd Easton & Sarah Newell, *Are Daily Fantasy Sports Gambling?* 5 J. of Sports Analytics 35 (2019).[2] In particular, it has been shown that "skill is always the dominant factor" in head-to-head DFS contests involving NBA games. Getty, *supra*, at 882 & fig. 6; see also, generally, Jeffrey C. Meehan, *The Predominate Goliath: Why Pay-to-Play Daily Fantasy Sports Are Games of Skill Under the Dominant Factor Test*, 26 Marq. Sports L. Rev. 5 (2015). Indeed, the fact that DFS contests are predominately skill-based is not only widely recognized to be true but has created a potential revenue problem for the DFS websites. Because skilled players can predominate the DFS contests, new and unskilled players are often hesitant to participate. Ed Miller & Daniel Singer, *For Daily Fantasy Sports Operators, the Curse of Too Much Skill*, Sports Bus. J., (July 27, 2015).

¶ 27 Arguing for a different result, plaintiff points to an Illinois Attorney General opinion letter that concluded DFS contests are illegal gambling under Illinois law.

[2]A recent decision from the intermediate court of New York has recognized the role of skill in determining the outcome of DFS contests, noting that research has "demonstrated that lineups chosen by actual contestants beat those chosen at random and contestants improve their performance over time." *White v. Cuomo*, No. 528026, 2020 WL 572843, at *4 (N.Y. App. Div. Feb. 6, 2020). The decision concluded, however, that such contests are games of chance under the material element test.

See 2015 Ill. Att'y Gen. Op. No. 15-006. However, that opinion did not have the benefit of the more recent research that has established the predominance of skill in DFS contests. Moreover, the opinion relied heavily on a decision from the Texas Attorney General's Office, Tex. Att'y Gen. Letter Op. LO-94-051 (June 9, 1994). Texas employs the any chance test, not the predominate factor test. See *State v. Gambling Device*, 859 S.W.2d 519, 523 (Tex. App. 1993).

¶ 28 Because the outcomes of head-to-head DFS contests are predominately skill based, we conclude that plaintiff was not engaged in "gambling" with defendant as required under section 28-8(a). In so holding, we note that nothing in this opinion should be read as stating that regulation of DFS contests is unnecessary or inappropriate. That determination is for the legislature. We determine here only that the DFS contest at issue in this case does not fall under the current legal definition of gambling. For this reason, we affirm the judgment of the appellate court.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, the judgment of the appellate court, which affirmed the judgment of the circuit court, is affirmed.

¶ 31 Affirmed.

¶ 32 JUSTICE KARMEIER, dissenting:

¶ 33 Loss recovery statutes, such as section 28-8 of the Criminal Code of 2012 (720 ILCS 5/28-8(a) (West 2014)), are an enforcement mechanism "designed to punish and discourage" gambling by making gambling activities unprofitable. *Johnson v. McGregor*, 157 Ill. 350, 353 (1895). Throughout the history of antigambling laws, courts have recognized the effort and ingenuity man has exerted to circumvent the law by disguising activities as legal or contests of skill although the intended appeal is to chance—"to the hope, of winning by shrewd and lucky guessing disproportionately more than the contestant has put into the enterprise." *State v. Globe-Democrat Publishing Co.*, 110 S.W.2d 705, 716-17 (Mo. 1937) (*en banc*); see also *Schneider v. Turner*, 130 Ill. 28, 42 (1889) (certain contracts may be a mere

disguise for gambling); *Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973). Due to its misconception of the predominate factor test,[3] the ingenuity exerted in head-to-head DFS contests duped the majority into believing it is a game of skill when it truly is a game of chance. Therefore, I dissent.

¶ 34 In its opinion, the majority soundly rebuts the appellate court's analysis regarding the applicability of section 28-8 to games that are played by many over the Internet and involve a third-party intermediary. Following suit with many other jurisdictions, the majority adopts the predominate factor test to determine whether section 28-8 is nevertheless applicable to DFS contests. It then properly asserts the fundamental inquiry of the predominate factor test that " '[t]he test of the character of the game is, not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game, or, alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment.' " *Supra* ¶ 22 (quoting *O'Brien v. Scott*, 89 A.2d 280, 283 (N.J. Super. Ct. Ch. Div. 1952)). To this extent, I agree. In applying the predominate factor test to a DFS contest, however, the majority oddly ignores its own statement of the test and finds DFS is a contest of skill based on the results of statistical studies.

¶ 35 From the outset, I must highlight the impropriety of the majority's reliance on scientific studies—that are not found in the record or in either party's briefs—to make the factual determination that skill is the predominate factor in a contest. While defendant's brief presents a bare assertion that DFS was a game of skill, he fails to support this contention with any authority. Because the studies were not presented at any stage of this litigation, reliance on these studies raises " ' "concerns about witness credibility and hearsay normally associated with citations to empirical or scientific studies whose authors cannot be observed or cross-examined." ' " See *In re Commitment of Simons*, 213 Ill. 2d 523, 532 (2004) (quoting *People v. Miller*, 173 Ill. 2d 167, 205 (1996) (McMorrow, J. specially concurring), quoting *Jones v. United States*, 548 A.2d 35, 42 (D.C. 1988)). The

[3]Courts have ascribed different names to this test. Common names include the "dominant factor test" and "predominate factor test." *Banilla Games, Inc. v. Iowa Department of Inspections & Appeals*, 919 N.W.2d 6 (Iowa 2018); *Joker Club, LLC v. Hardin*, 643 S.E.2d 626 (N.C. Ct. App. 2007). Although "dominant factor test" seems more grammatically appropriate, for the sake of clarity, I will follow the majority and refer to the test as the "predominate factor test."

majority should not take the position of an advocate and defend against plaintiff's suit by hastily accepting the validity of studies that it searched for outside the record (see *People v. Givens*, 237 Ill. 2d 311, 324 (2010)), especially considering the majority failed to engage in its own analysis of the studies' validity or credibility. The injustice resulting from this mistake is exceedingly apparent considering that, under a proper predominate factor analysis, the evidence presented at trial proved that the contest here is clearly a game of chance.

¶ 36 Seemingly, the majority was misled by the authority it references, *O'Brien*. In determining that the contest at issue was gambling, the *O'Brien* court primarily discussed the findings of a study conducted by an expert witness, who testified in the trial court. See *O'Brien*, 89 A.2d 280. But, four years later, the same court found *O'Brien* was no longer authoritative in light of the subsequent New Jersey Supreme Court decisions, which collectively have held the test is whether the results predominately depend on chance regardless if skill predominates in the process. *Ruben v. Keuper*, 127 A.2d 906, 909-10 (N.J. Super. Ct. Ch. Div. 1956). Such analysis is considered a qualitative approach.

¶ 37 Like New Jersey, the vast majority of predominate factor jurisdictions have adopted a qualitative approach. *In re Request of the Governor for an Advisory Opinion*, 12 A.3d 1104, 1112-13 (Del. 2009); *Morrow*, 511 P.2d at 129; *Seattle Times Co. v. Tielsch*, 495 P.2d 1366, 1369 (Wa. 1972) (*en banc*); *Commonwealth v. Plissner*, 4 N.E.2d 241, 244-45 (Mass. 1936); *Globe-Democrat Publishing Co.*, 110 S.W.2d at 717 (synthesizing cases from all jurisdictions); see also *Banilla Games, Inc. v. Iowa Department of Inspections & Appeals*, 919 N.W.2d 6, 10 (Iowa 2018); *Opinion of the Justices*, 795 So. 2d 630, 641 (Ala. 2001); *Lucky Calendar Co. v. Cohen*, 120 A.2d 107, 113 (N.J. 1956); *Commonwealth v. Laniewski*, 98 A.2d 215, 217 (Pa. Super. Ct. 1953); *State v. Stroupe*, 76 S.E.2d 313, 317 (N.C. 1953); *Steely v. Commonwealth*, 164 S.W.2d 977, 979-80 (Ky. 1942). A review of these jurisdictions clarifies that, to be a contest of skill, the participant's efforts or skill must control the final result, not just one part of the larger scheme. If chance can thwart the participant's efforts or skill, it is a game of chance. "It is the character of the game, and not the skill or want of skill of the player, which determines whether the game is one of chance or skill." (Internal quotation marks omitted.) *Stroupe*, 76 S.E.2d at 317; see also *Globe-Democrat Publishing Co.*, 110 S.W.2d at 717; *Laniewski*, 98 A.2d at 217.

¶ 38 Although scientific studies may aid in this determination, under the qualitative approach, games or contests whose outcome depends on the results of a contingent event out of the participant's control, like DFS, are games of chance as a matter of law. See *In re Advisory Opinion to the Governor*, 856 A.2d at 328-29; *Opinion of the Justices*, 795 So. 2d at 641. This is so because predictions, regardless of the likelihood of being true, are mere guesses innate with chance. *Opinion of the Justices*, 795 So. 2d at 641. The knowledge of past records, statistics, contest rules, and other information can increase a participant's chances of correctly predicting the result of the event, but it cannot control the outcome, as no amount of research or judgment can assure a certain result will occur. *Laniewski*, 98 A.2d at 217. No one knows what may happen once the event commences. "What a man does not know and cannot find out is chance to him, and is recognized as chance by the law." *Dillingham v. McLaughlin*, 264 U.S. 370, 373 (1924). Thus, skill can improve or maximize the potential for winning in such contests, but it cannot determine the outcome. *Commonwealth v. Dent*, 2010 PA Super 47, ¶ 22.

¶ 39 While the issue of what constitutes a *bona fide* game of skill is one of first impression, viewing article 28 of the Criminal Code of 1961 (720 ILCS 5/art. 28 (West 2014)) as a whole, the legislature's intent supports the adoption of a qualitative approach. In construing a statute, our primary objective is to ascertain and give effect to the intent of the legislature. *People v. Goossens*, 2015 IL 118347, ¶ 9. The most reliable indicator of such intent is the plain and ordinary meaning of the statutory language itself. *Id.* We consider the statute in its entirety, keeping in mind the subject it addresses and the apparent intent of the legislature in enacting it. Further, the meaning of phrases should be ascertained by reference to the meaning of the surrounding words and phrases. *People ex rel. Madigan v. Wildermuth*, 2017 IL 120763, ¶ 17.

¶ 40 After providing the general prohibition of games of chance or skill for money, section 28-1 lists specific activities that constitute gambling, including activities regarding lotteries, bingos, and raffles; "knowingly mak[ing] a wager upon the result of any game [or] contest"; "knowingly sell[ing] pools upon the result of any game or contest of skill"; and "knowingly establish[ing], maintain[ing], or operat[ing] an Internet site that permits a person to *** make a wager upon the result of any game [or] contest." 720 ILCS 5/28-1(a)(2), (6), (7), (9), (10), (12) (West 2014). Similar activities are prohibited by section 28-1.1, which concerns

syndicated gambling.[4] *Id.* § 28-1.1. In itemizing what activities meet an element of one type of syndicated gambling, the provision includes acceptance of wagers or bets upon the result of any contests of skill or upon any "unknown or contingent event whatsoever." *Id.* § 28-1.1(d). Section 28-1.1 also provides, nearly verbatim, the same exception as section 28-1(b)(2), upon which the majority relies. *Id.* § 28-1.1(e)(2).

¶ 41 Considering that all prohibited activities enumerated in sections 28-1 and 28-1.1 involve outcomes that depend on a contingent event out of the participants' control, the legislature demonstrated its intent to broadly prohibit activities of that nature. The "*bona fide* contest for the determination of skill" must therefore not encompass games of this nature. *Rushton v. Department of Corrections*, 2019 IL 124552, ¶ 19 ("a fundamental principle of statutory construction is that all provisions of an enactment should be viewed as a whole and words and phrases should be read in light of other relevant provisions of the statute").

¶ 42 It is true that every game, to some extent, involves chance or an unknown. Nevertheless, no court would doubt that a person participating in a simple human footrace is a game of skill. The critical distinction between a game of chance and a game of skill is the participant's ability to overcome chance with superior skill. *Dent*, 2010 PA Super 47, ¶ 23; *Joker Club, L.L.C. v. Hardin*, 643 S.E.2d 626, 630-31 (N.C. Ct. App. 2007); see also *Lucky Calendar Co.*, 120 A.2d at 113. Runners can train for severe weather, divert their routes to avoid competitors, or increase their speed to make up for lost time. But a person who places a wager on the race lacks any ability to control the outcome of the race. It is this type of chance inherent in a game, which a person cannot influence, that contributes to the undeniable evils at which antigambling statutes are aimed. See *supra* ¶ 14; see also *Globe-Democrat Publishing Co.*, 110 S.W.2d at 717; *Zellers v. White*, 208 Ill. 518, 526-27 (1904). Thus, the exemption under section 28-1(b)(2) may apply only to contests in which the participant's own skill has the opportunity to overcome chance.

¶ 43 The majority's quantitative approach lacks the foresight to distinguish an activity tactfully camouflaged as a game of skill but whose outcome relies on a contingent event out of the participant's control from an activity in which the

[4]Syndicated gambling regards the interplay of gambling and other organized crime. See 720 ILCS 5/28-1.1(a) (West 2014).

participant can use his or her skill to overcome any impact chance may have on the outcome. Besides the downfalls intrinsic in statistical studies,[5] their conclusions are often premised on data showing how many times a skilled player wins over the course of many rounds of the game, which—at most—can only theoretically prove if skill is involved, and to what extent, in the entire gambling scheme. Such studies lack conditions or controls necessary to limit the data or analysis to the impact of skill or chance on the outcome of a contest.

¶ 44 As a result, the majority opinion risks legalizing traditional concepts of gambling anytime a study concludes that it involves skill more than chance. One example is poker. Our courts, like many other courts, have determined poker and other card games to be games of chance despite statistical evidence that skill dominates. *People v. Mitchell*, 111 Ill. App. 3d 1026, 1028 (1983) (poker); *People v. Dugan*, 125 Ill. App. 3d 820, 827-28 (1984) (blackjack), *rev'd in part on other grounds*, 109 Ill. 2d 8 (1985); *Dent*, 2010 PA Super 47, ¶¶ 11-23 (collecting cases on poker, electronic poker, slot machines, dice games, shell games, and Keno; concluding poker is a game of chance). Under the majority's opinion, however, because studies show skill dominates in poker, these cases are effectively overruled, and poker is now legal. This absurd result could not have been intended by the legislature. See *People v. Webb*, 2019 IL 122951, ¶ 17.

¶ 45 On the other hand, a qualitative approach focuses on what truly controls the outcome of the activity. As such, it provides a better framework to parse out activities that were intended to be prohibited by article 28.

¶ 46 Applying the proper standard here, a DFS contest is a game of chance. Once a lineup is set and the athletic games commence, the DFS participant cannot influence the athlete's performance or how points are accumulated. At this point in the game, the outcome of the contest relies entirely on a contingent event that the participant

[5]For example, the Delaware Supreme Court, in assessing whether sports lotteries would qualify as games of pure chance under the state constitution, "emphasize[d] that wide areas of disagreement exist between studies, and internal inconsistencies within studies, addressing single game betting and the issue of whether chance or skill predominates." *In re Request of the Governor for an Advisory Opinion*, 12 A.3d at 1114; see also Jonathan Bass, *Flushed From the Pocket: Daily Fantasy Sports Businesses Scramble Amidst Growing Legal Concerns*, 69 SMU L. Rev. 501, 514-16 (2016).

lacks all control over, and there is no subsequent opportunity for the participant to overcome the chance involved. Accordingly, a DFS contest is a game of chance.

¶ 47 It should be noted, however, that the legislature has since authorized sports wagering, through its enactment of the Sports Wagering Act (Act) (Pub. Act 101-31 (eff. June 28, 2019) (adding 230 ILCS 45/25-1 *et seq.*)). Although the Act does not explicitly reference daily fantasy sports, it defines "sports wagering" as "accepting wagers on sports events or portions of sports events, or on the individual performance statistics of athletes in a sports event or combination of sports events, by any system or method of wagering, including, but not limited to, in person or over the Internet through websites and on mobile devices." *Id.* (adding 230 ILCS 45/25-10). Therefore, contrary to the majority's contention (*supra* ¶ 20 n.1), because daily fantasy sports requires a wager in an attempt to accumulate the most points based on the individual performance statistics of athletes in a combination of sport events over the Internet, the Act clearly governs daily fantasy sports. While the Act has no bearing on this case, the ability to recover losses from DFS contests, when played in accordance with the Act, has now come to an end. Pub. Act 101-31 (eff. June 28, 2019) (adding 720 ILCS 5/28-1(b)(15)).

¶ 48 For the reasons stated above, I respectfully dissent.

¶ 49 JUSTICE MICHAEL J. BURKE took no part in the consideration or decision of this case.