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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]"

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.

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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,

A handwritten signature in black ink, appearing to read "Kevin K. Takata", written over a horizontal line.

Kevin K. Takata
Deputy Attorney General

APPROVED:

A handwritten signature in black ink, appearing to read "Douglas S. Chin", written over a horizontal line.

Douglas S. Chin
Attorney General