



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

555 East Washington Avenue, #3900
Las Vegas, Nevada 89101-1068

ADAM PAUL LAXALT
Attorney General

WESLEY K. DUNCAN
Assistant Attorney General
NICHOLAS A. TRUTANICH
Assistant Attorney General

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/x5zn/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,

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

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:

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

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, UIGEA 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

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,

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

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

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. On Sporting Events or Other Events by Any System or Method of Wagering

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 or 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.

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.”

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

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

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.

October 16, 2015

Page 17

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