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February 27, 2017

Via E-Mail

DraftKings, Inc.
c/o Sara Koch
Assistant Director of Government Affairs
skoch@draftkings.com

Dear Ms. Koch,

Re: Fantasy Sports in Florida

DraftKings, Inc. has requested a legal opinion concerning the impact, if any, that new legislation authorizing online fantasy sports will have on the 2010 Compact ("Compact") between the Seminole Tribe of Indians of Florida (the "Seminole Tribe") and the State of Florida.[1]

In preparing this legal opinion, we have reviewed and relied upon Senate Bill 8 (SB 8) 2017 and House Bill (HB 149) 2017, the legal opinion of and analysis from the Lockwood Law Firm, and federal and state laws, rules, and regulations. Our opinion is solely based on the foregoing information.[2] The opinion may be modified if new information concerning the subject matter of the opinion is received and we understand that DraftKings will notify us of any such material germane to the opinion provided herein. This opinion represents a snapshot of past, current, and existing proposed legislation and, unless otherwise agreed in writing, will not be updated based on any new laws or proposed legislation, decisions, or regulations. Additionally, this opinion represents our analysis of the issues covered and is not a guarantee of how a court, agency, or governmental entity or official will address the issues covered.

The Compact

On April 4, 2010, the State of Florida and Seminole Tribe entered into the Compact whereby the Seminole Tribe agreed to pay to the State of Florida more than $1 billion. In return, the State of Florida granted the Seminole Tribe the exclusive rights to operate certain games,

[1] This legal opinion was prepared exclusively for use by DraftKings and is not intended to be relied upon by any third party.

[2] Although SB 8 and HB 149 expressly address and are, in part, based upon a 2015 Compact entered into by the Governor of the State of Florida that purports to replace the 2010 Compact, DraftKings has asked that we not address the 2015 Compact. Therefore, our discussion of the proposed legislation is, in part, hypothetical.

many of which were otherwise illegal under Florida law. *See* Compact at 2, 3, 7. The games the Seminole Tribe has exclusive authority to operate, denominated in the Compact as the "Covered Games," are Class III games, as defined under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 et seq., and include: (1) slot machines; (2) banked card games; (3) raffles and drawings; and (4) "any new game authorized by Florida law ...." Compact at 4.

Payments Due Under the Compact

Under the Compact, the Tribe was required to make minimum guaranteed payments (the "Guaranteed Payments") in the following amounts: First year: $150 million; Second year: $150 million; Third year: $233 million; Fourth year: $233 million; and Fifth year: $234 million. In years three through five, the Tribe agreed to pay the State of Florida the greater of the Guaranteed Minimum and a percentage of revenue (the "Revenue Share Amount") earned from Covered Games. After year five, the Tribe became responsible for paying the State of Florida the Revenue Share Amount only. Because the Compact has been in effect for more than five years, the Seminole Tribe's obligation to make the Guaranteed Payments has expired.

To promote the Seminole Tribe's exclusivity over the Covered Games, the Compact, Part XI, provided financial disincentives to the State of Florida if: (1) an act of the Florida Legislature or an amendment to the Florida Constitution authorized "new forms [or the operation] of Class III gaming or other casino-style game" that were not in operation as of February 1, 2010; or (2) an expansion of new Class III gaming or other casino-style gaming was implemented as a result of a court decision or administrative ruling. Compact at 39.

Depending on the cause of the loss of exclusivity, the Compact authorizes the Seminole Tribe to cease all payments to the State of Florida (if the new game is authorized by Constitution or Statute) or pay amounts due under the Compact into an escrow account (if the new game is authorized by court decision or administrative action). Thus, the events causing a total cessation of payments were narrowly drawn to apply only to new Class III gaming or other casino-style gaming that was not in operation as of 2010.

In addition to Part XII, which eliminated all payments to the State of Florida under limited circumstances, Part XI.B.3 of the Compact relieves the Seminole Tribe from its obligation to make the Guaranteed Payment if (i) there is an affirmative change in law allowing "internet/online gaming (or any functionally equivalent remote gaming system that permits a person to game from home or any other location that is remote from a casino or other commercial gaming facility)" and (ii) gaming revenue declines by at least 5%. Compact at 37. The penalty for the State of Florida affirmatively authorizing "internet/online gaming" solely impacted the Seminole Tribe's obligation to make the Guaranteed Payment, which is no longer in effect.

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The Compact Does Not Cover Fantasy Sports

For the reasons described, *supra*, the passage of legislation authorizing fantasy sports should have no effect on the Compact payments if fantasy sports are determined to constitute internet/online gaming. Moreover, fantasy sports should not be considered internet/online gaming or Class III or casino-style gaming in the first instance.

Fantasy Sports and Internet/Online Gaming

In 2006, the United States passed the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5361, *et seq.* ("UIGEA"). The UIGEA contains a single prohibition – no person may knowingly accept funds "in connection with the participation of another person in unlawful Internet gambling…." 31 U.S.C. §5363. Under the UIGEA, "'unlawful Internet gambling' means to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, 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).

Despite its breadth, the UIGEA, 31 U.S.C. §5362(1)(E)(ix), expressly carved out from its ambit "any fantasy or simulation sports game or educational game or contest in which … no fantasy or simulation sports team is based on the current membership of an actual team" and three additional criteria are met:

> (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.

31 U.S.C. §5362(1)(E)(ix).

Thus, under the UIGEA, fantasy sports competitions, such as those sponsored by DraftKings, should not be classified as internet gambling in the first instance, as they do not constitute an online bet or gamble. Although not controlling, the federal government's determination should be persuasive on whether fantasy sports are within the undefined category of "internet/online gaming" under the Compact.[3]

The exclusion of fantasy sports from the definition of a "bet" or "wager" under federal law is consistent with Florida law where participation in a game is not a bet or wager. In *Faircloth v. Cent. Florida Fair, Inc*., 202 So. 2d 608, 609 (Fla. 4th DCA 1967), Florida's Fourth District Court of Appeal addressed whether certain public fairground and exposition games, such as the "milk bottle game" and "break balloon ball games," which were expressly permitted by statute, were barred by Section 849.19, Florida Statutes. *Id*. Florida's Attorney General ("AG") argued in *Faircloth* that the statutorily authorized games constituted illegal gambling because the participants in the games paid money to play and, if successful, received something valuable in return.

The Fourth District found the AG's construction of Section 849.19 over-inclusive, stating that "[t]o adopt defendant's construction we would have to find all contests of skill or ability in which there is an entry fee and prizes to be gambling." *Id*. at 609. The Court explained that under the AG's theory, the forms of illegal gambling in Florida would be "endless" and would include "golf tournaments, dog shows, beauty contests, automobile racing, musical competition, and essay contests, to name a few." *Id*

The court in *Faircloth* ultimately concluded that, "the legislature intended by enacting F.S.A. s 849.14 to proscribe '**wagering**' on the results of ball games, races, prize fights and the like as opposed to '**playing**' games of skill for prizes." *Id*. (emphasis added). The determination in *Faircloth* is entirely consistent with the AG's conclusion in a 1990 opinion, that a hole-in-one tournament requiring the participants to pay an entry fee did not violate Section 894.14. Op. Att'y Gen. Fla. 90-58 (1990). The analysis in *Faircloth* and the 1990 Florida AG's opinion are applicable to fantasy sports, which are games of skill that are *played*, not *bet on*, by participants. In Florida a game of skill is one where skill predominates chance.[4]

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[3] Staff analysis of a 2016 Bill addressing, in part, the Compact recognized that the term internet/online gaming was not defined by the Compact and refers to the definition of internet under the UIGEA. Florida Senate Staff Analysis, SB 832 (January 26, 2016) at 7-8. https://www.flsenate.gov/Session/Bill/2016/0832/Analyses/2016s0832.pre.ri.PDF

[4] Florida courts would likely use the dominant factor test to determine if a game is one of skill or chance. Fla. Op. Att'y. Gen. 91-3, 1991 WL 528146 (1991) ("Contests in which the skill of the

Although no court has had occasion to apply the dominant factor test to fantasy sports, a recent article from Harvard Law Review makes a compelling case for the predominant skill involved in fantasy sports. Zachary Shapiro, *Regulation, Prohibition, and Fantasy: The Case of Fanduel, Draftkings, and Daily Fantasy Sports in New York and Massachusetts*, 7 Harv. J. Sports & Ent. L. 289, 298-99 (2016):

> Advocates have argued that preparing a daily fantasy team requires skill, as creating a successful team requires extensive knowledge. Players must not only be familiar with the sport, the individual players, and their respective performances, but they must possess the ability to utilize this knowledge to construct a team of top-performing players within the limitation of a salary cap. The data does seem to bolster the argument that DFS is a game of skill. One study by McKinsey & Company examined the first half of the 2015 MLB season. The study estimated that 91% of winnings were won by only 1.3% of players. **This is far from the normal distribution that would be expected from a game whose outcome relies purely on chanc**e. It is also clear that inexperienced players can be at a disadvantage due to the skill of their opponents. [*Id*. (emphasis added).]

Because fantasy sports require skills entirely distinct and independent from the underlying athletic competition, it can be reasonably argued that, under *Faircloth*, fantasy sports are themselves a form of sport, requiring skill to be played, and do not constitute wagering on an athletic competition.[5]

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contestant predominates over the element of chance, such as in certain sports contests, do not constitute prohibited lotteries."); Op. Att'y Gen. Fla. 90-58 (1990) ("This office has stated that contests in which the skill of the contestant predominates over the element of chance do not constitute lotteries."); *see Johns v. Smith*, 81 So. 514, 514 (Fla. 1919) (horse races are not illegal lotteries) ; *c.f.*, *Deeb v. Stoutamire*, 53 So. 2d 873, 874 (Fla. 1951) (recognizing that all games of skill employ at least a modicum of unpredictability).

[5] The Supreme Court's 1897 decision in *McBride v. State*, 22 So. 711, 713 (Fla. 1897), made a broad pronouncement that all games where a prize is received irrespective of whether the game was of skill or chance are illegal. *McBride*, however, interpreted a different gaming statute in connection with its review of a conviction for operating a gaming room for betting on horse racing. *Id.* ("The purpose and intent of the section of the statute under discussion was to prohibit, not the gaming or gambling itself, but the *keeping of a house* or other place for any manner of gaming or gambling."). *Id.* While *McBride* should be recognized as part of the state's jurisprudence, we believe it is not operative in the context of fantasy sports.

Fantasy Sports are Not Class III or Casino-Style Gaming

Under Part XII of the Compact, the State of Florida is financially penalized if it authorizes Class III gaming or casino-style gaming that was not in operation in 2010.[6]

The Florida Supreme Court interprets Class III gaming as games where the participants play against the house. *See Florida House of Representatives v. Crist*, 999 So. 2d 601, 604 (Fla. 2008) ("Class III—the only type relevant here—comprises all other types of gaming, including slot machines, pari-mutuel wagering (such as horse and greyhound racing), lotteries, and "banked" card games—such as baccarat, blackjack (twenty-one), and chemin de fer—in which participants play against the house.").[7] Fantasy Sports are played against other fantasy sports participants and, therefore, under existing Florida Supreme Court precedent would not be categorized as a Class III game. *See id.*

Under Florida law, the phrase "casino style games" is a term of art signifying games where players, like in Class III games, play against the house and not against each other. *See* § 849.086, Fla. Stat. ("[T]he Legislature finds that authorized games as herein defined are considered to be pari-mutuel style games and not casino gaming because the participants play against each other instead of against the house."). Because casino-style gaming, under Florida law, and Class III gaming, under Florida's interpretation of federal law, is gaming that is "against the house," fantasy sports, which are played "against other players" are not casino-style gaming or Class III gaming in the first instance and should not implicate any of the financial disincentives or exclusivity provisions in the Compact.

. The issue of whether fantasy sports constitute Class III gaming, however, should not be relevant in any event because, as explained *supra*, if DraftKings' fantasy sports contests were a form of Class III gaming they would be governed by Part XI and not Part XII.

[6] Because Part XII of the Compact only precludes Class III gaming and casino-style gaming that were not in operation at the time the Compact was executed in 2010, legislation authorizing fantasy sports, which has likely been in operation since at least 2010, is arguably excluded from the financial penalties in Part XII regardless of whether it constitutes Class III or casino-style gaming.

[7] Florida Senate Staff Analysis, SB 832 (January 26, 2016) at 7-8 (analyzing but not concluding whether fantasy sports constitute Class III gaming under the IGRA.

If the Compact Was Found to Cover Fantasy Sports, the Result Would be Financially Immaterial

The effect, if any, that legislation authorizing online fantasy sports would have on the Compact would be a reduction in payments made by the Seminole Tribe to the State of Florida. As explained *supra*, the reduction in payments arising from new internet/online gaming is less severe than the reduction in payments arising from new Class III gaming or other casino-style gaming. The former forfeits only the Guaranteed Payment while the latter forfeits all payments due under the Compact.

For games that constitute *both* Class III or casino-style gaming *and* internet/online gaming, the Compact is unclear as to whether Part XI applies, Part XII applies, or both Parts apply. This ambiguity should be resolved applying traditional principles of contract interpretation. Here, under two such well-established principles, only Part XI, covering internet/online gaming, applies to games that constitute both internet/online gaming and Class III or casino-style gaming.[8]

First, a contract may not be construed in a way that renders any of its provisions meaningless. *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n, Inc.*, 169 So. 3d 197, 203 (Fla. 1st DCA 2015). Applying Part XII (alone or together with Part XI), which terminates all payments under the Compact, would impermissibly render meaningless Part XI.B.3, which requires the Tribe to continue to make Revenue Share Amount payments.

Second, when determining which of multiple provisions to apply, a specific contract provision controls over a general contract provision. *Raines v. Palm Beach Leisureville Cmty. Ass'n*, 317 So. 2d 814, 817 (Fla. 4th DCA 1975). Here, Part XI (internet/online gaming) addresses a specific form of Class III gaming, whereas Part XII (all Class III gaming and casino-style gaming) addresses the entire category of Class III and casino-style games. Therefore, as between the general Part XII and the specific Part XI.B.3, the specific provision would control.

In light of the Compact's payment provisions and applicable law, if new legislation authorized online fantasy sports that were determined to be internet/online gaming, the effect of the new legislation on payments due under the Compact would be governed exclusively by Part XI of the Compact and the Seminole Tribe would be relieved of making the Guaranteed Payment.

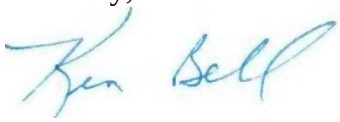
[8] In considering which Part of the Compact applies, it is not relevant whether the internet/online provision in Part XI encompasses more than Class III and casino-style gaming because even if it did, any such game would be outside the scope of Part XII.

Here, the penalty of Part XI of the Compact is financially immaterial because more than five years have elapsed since the Compact was signed and no Guaranteed Payment is presently due.[9]

Conclusion

In conclusion, I believe the passage of legislation authorizing online fantasy sports should have no effect on the payments due to the State of Florida under the Compact.

Sincerely,



Kenneth B. Bell

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[9] Additionally, Part XI only terminates the Guaranteed Payment if new internet/online gaming legislation is passed and there is a requisite decline in revenue to the Seminole Tribe.