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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.<sup>1</sup> In general, daily fantasy sports participants must "lock-in" their selections before the relevant games.<sup>2</sup> Once their choices are made, participants have no control over the outcome of the simulated games;<sup>3</sup> 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.

<sup>1</sup> 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).

<sup>2</sup> 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).

<sup>3</sup> 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.<sup>4</sup> 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

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<sup>4</sup> 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.

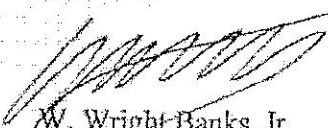
48 Ga. App. at 502. Thus, in *Sparks*, the court decided that whether a game was one of chance did not depend on whether a participant could become more proficient with practice, but on whether the same player could do the exact same thing and still lose—not because of his actions, but because of the 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.

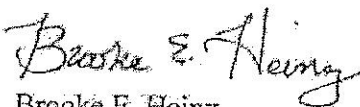
Your second question is whether daily fantasy sports fall under the "actual contestant" exclusion in O.C.G.A. § 16-12-20(1)(B). That exclusion does not apply to daily fantasy sports. The purpose of the exclusion is to allow athletes competing in the sporting events to be rewarded for their efforts, not 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.<sup>5</sup> 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

<sup>5</sup> 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.