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State of Connecticut

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Senate President Martin Looney
LOB Room 3300
Hartford, CT 06106

Senate Majority Leader Bob Duff
LOB Room 3300
Hartford, CT 06106

Dear Senators Looney and Duff:

You have asked for a formal opinion about the impact legislation authorizing daily fantasy sports contests may have on the State's current revenue-sharing arrangements with the Mashantucket Pequot Tribal Nation ("MPTN") and the Mohegan Tribe of Indians of Connecticut (the "Mohegan Tribe," together with MPTN, the "Tribes"). For the reasons that follow, I conclude that although there is a high degree of uncertainty, there is a substantial risk that the passage of such legislation could jeopardize the State's revenue-sharing arrangements with the Tribes.

On April 7, 2016, the Committee on Finance, Revenue and Bonding (the "Finance Committee") favorably reported out of committee a substitute for House Bill 5046, *An Act Concerning Revenue Items to Implement the Governor's Budget*. Although the official substitute language for HB 5046 has not yet been released by the Legislative Commissioners' Office, the Offices of Legislative Research and Fiscal Analysis have provided Finance Committee members with a memorandum summarizing the proposal. According to that memorandum, the substitute for HB 5046 would require the Department of Consumer Protection to adopt and enforce regulations intended to protect daily fantasy sports contest players from unfair or deceptive acts or practices. The proposal would require daily fantasy contest operators to pay initial and renewal registration fees and would impose an 8.75% surcharge on the total entry fees charged by operators, net of cash payouts. Lastly, and most importantly for present purposes, HB 5046 would specifically exempt daily fantasy sports contests from the state's criminal gambling laws.

The memorandum summarizing HB 5046 does not define daily fantasy sports. A separate proposal, however, Senate Bill 192, *An Act Concerning Daily*

Fantasy Sports, defines a "daily fantasy sports contest" as "a contest in which the offer or award of a prize is connected to the statistical performance or finishing position of one or more individual competitors in an underlying amateur or professional sports competition, but does not include the offer or award of a prize to a winner of or competitor in the underlying competition itself." [1] SB 192 further requires the Commissioner of Consumer Protection to adopt regulations governing daily fantasy sports contests, including "a provision that daily fantasy sports contests are not contests of chance." SB 192 defines a "contest of chance" as "a contest in which the outcome of such contest depends in a material degree upon an element of chance." We presume, for purposes of this opinion, that HB 5046 will include a definition of "daily fantasy sports contests" that is substantially similar to the definition set forth in SB 192. Proposed bills in other states use a similar definition.

Any legislation authorizing daily fantasy sports contests must be viewed against the backdrop of the existing agreements between the State and the Tribes. In 1991, under the provisions of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 *et seq.*, the Secretary of the Interior approved the Final Mashantucket Pequot Gaming Procedures ("Mashantucket Procedures"), governing the operation of casino gaming on the Mashantucket reservation.[2] In 1994, the State and the Mohegan Tribe entered into a Gaming Compact ("Mohegan Compact", together with the Mashantucket Procedures, the "Compacts"), similarly governing the operation of casino gaming on the Mohegan reservation. Both the Mashantucket Procedures and the Mohegan Compact contain provisions imposing a moratorium on video facsimile games absent certain conditions. Specifically, § 15(a) of the Mashantucket Procedures provides:

> Notwithstanding the provisions of section 3(a)(ix), the Tribe shall have no authority under this Compact to conduct Class III video facsimile games as defined pursuant to section 3(a)(ix) unless and until either: (a) it is determined by agreement between the Tribe and the State, or by a court of competent jurisdiction, that by virtue of the existing laws and regulations of the State the operation of video facsimiles of games of chance would not be unlawful on the grounds that the Tribe is not located in a State that permits such

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[1] On March 11, 2016, the General Law Committee reported favorably on a substitute for SB 192. The bill subsequently was referred to the Finance Committee. The Finance Committee has not taken any action on SB 192. Instead, it has addressed daily fantasy sports contests in HB 5046.

[2] The Mashantucket Procedures are not technically a gaming compact, but rather procedures approved by the Secretary of the Interior following a mediation process pursuant to IGRA. *See* 25 U.S.C. § 2710(d)(7)(B)(vii). The distinction is not material for purposes of this discussion.

> gaming for any purpose by any person, organization, or entity within the meaning of 25 U.S.C. § 2710(d)(1)(B) (it being understood and agreed that there is a present controversy between the Tribe and the State in which the Tribe takes the position that such gaming is permitted under the existing laws of the State and the State takes the position that such gaming is not permitted under the existing laws of the State); or (ii) ***the existing laws or regulations of the State are amended to expressly authorize the operation of any video games of chance for any purpose by any person, organization or entity.*** Upon such determination the operation by the Tribe of video facsimile games of chance shall be subject to the applicable provisions of the Standards of Operation and Maintenance for Games of Chance adopted pursuant to section 7 of the Compact.

Mashantucket Procedures, § 15(a) (emphasis added). A substantively identical provision is found at § 15(a) of the Mohegan Compact. Thus, the operation of video facsimile games may become permissible in one of three ways: by agreement of the State and the Tribe; by a court order; or by a change in State law that allows the operation of video facsimile games for any purpose by any person, organization or entity. *See* A.G. Op. No. 93-004 (Feb. 11, 1993).[3]

As a resolution of the dispute between the State and the Tribes over video facsimile games referenced in § 15(a), both Tribes entered into memoranda of understanding (MOUs) with the State that suspended the moratorium on video facsimile games. Under the MOUs, the Tribes may operate video facsimile games and the State receives 25 percent of the gross operating revenues from those games. The MOUs further provided that the right to operate video facsimile games and the payments to the State would continue "so long as no change in State law is enacted to permit the operation of video facsimiles or other commercial casino games by any other person and no other person within the State lawfully operates video facsimile games or other commercial casino games...." Mohegan MOU dated May 17, 1994, at 2. Thus, under the MOUs, the Tribes' authority to operate video facsimile games and the payment to the State

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[3] In addition, Section 17(d) of the Mashantucket Procedures and Mohegan Compact provide that the Tribes shall not be deemed to have waived "the right to request negotiations for a tribal-state compact with respect to a Class III gaming activity which is to be conducted on the Reservation[s] but is not permitted under the provisions of this Compact, including forms of Class III gaming which were not permitted by the State ***for any purpose by any person***, organization, or entity at the time when this compact was negotiated but ***are subsequently so permitted by the State***, in accordance with 25 U.S.C. §2710 (d) (3) (A)." (emphasis added).

would both cease if State law permitted any person other than the Tribes to operate such games or other commercial casino games. *See* A.G. Op. No. 94-003 (Feb. 4, 1994).

HB 5046 raises several important concerns under both the Compacts and MOUs. Under the Compacts, the Tribes are permitted to operate Class III video facsimile games, including video slot machines, *free of their payment obligations under the MOUs* if state law is amended to authorize such games for any purpose by any person, organization or entity. The Compacts broadly define a "video facsimile" as "any mechanical, electrical *or other device, contrivance or machine*, which, upon insertion of a coin, currency, token or similar object therein, *or upon payment of any consideration whatsoever*, is available to play or operate, *the play or operation of which is a facsimile of a game of chance*, and which may deliver or entitle the person playing or operating the machine to receive cash or tokens to be exchanged for cash *or to receive any merchandise or thing of value, whether the payoff is made automatically from the machine or in any other manner whatsoever.*" *See* Compacts, Section 2(cc) (emphasis added).

The Compacts are governed by federal law. Federal courts have exclusive jurisdiction over disputes arising out of the Compacts. Amendments to gaming compacts under IGRA require approval by the Secretary of the Interior (Secretary). The Mashantucket Procedures and the Mohegan Compact both expressly require amendments to be approved by the Secretary. *See* Mashantucket Procedures, § 17(c); Mohegan Compact, § 17(c). In addition, the federal regulations governing gaming compacts expressly provide that "[a]ll amendments, regardless of whether they are substantive amendments or technical amendments, are subject to review and approval by the Secretary." 25 C.F.R. § 293.4(b); *see* 25 C.F.R. § 291.14 (amendments for gaming procedures). Moreover, the requirement for Secretarial review and approval cannot be waived. As the Interior Department has explained:

> [T]he Secretary must review and approve all amendments to gaming compacts. It is of no consequence that such a document is titled "memorandum of understanding" or something else. Absent Secretarial review and approval of an amendment to a compact, and publication of the notice of approval in the Federal Register, it would be of no force and effect under IGRA.

Letter from Paula L. Hart, Director, Office of Indian Gaming, Department of Interior, to Hon. Peter S. Yucupicio, Chairman, Pascua Yaqui Tribe of Arizona,

dated June 15, 2013, at 2; *see also* 73 Fed. Reg. 74005 (Dec. 5, 2008) (preamble to regulations).

The key questions for a federal court in any dispute over whether HB 5046 authorizes a video facsimile game would be whether the legislation authorizes a "video facsimile" of "a game of chance."[4] In making that determination, a federal court very likely would not be bound by a state legislature's – or any other state official's – characterization of daily fantasy sports contests as not constituting "contests of chance." Indeed, in determining the meaning and application of the phrase "video facsimile" as used in the Compacts, a court might not grant any weight to legislation unilaterally promulgated by one party to a Compact enacted more than two decades previously. Rather, a court likely would examine the games the bill actually authorizes and determine whether they fall within the scope of the Compacts' terms.

There presently exists a high degree of uncertainty about whether daily fantasy sports contests constitute games of skill or games of chance. That presumably is one of the main reasons HB 5046 has been proposed.[5] Though my Office has no jurisdiction over the State's criminal gambling laws, which are enforced by the State's Attorneys' Offices, several other state Attorneys General offices have concluded, either formally or informally, that these games constitute illegal gambling under their states' respective criminal laws.[6] In reaching those

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[4] The Tribes did not testify at the public hearing for SB 192 and, to our knowledge, have not taken any sort of public position on legislative proposals to authorize daily fantasy sports contests. Historically, the Tribes have been vocal about legislation arguably implicating the exclusivity provisions of the MOUs.

[5] If daily fantasy sports contests are, in fact, strictly games of skill, they are not "gambling" under Connecticut's criminal laws and the section of HB 5046 exempting such contests from the definition of gambling would be unnecessary. Section 53-278a of the General Statutes defines gambling as "risking any money, credit, deposit or other thing of value for gain *contingent in whole or in part upon lot, chance or the operation of a gambling device*, including the playing of a casino gambling game such as blackjack, poker, craps, roulette or a slot machine, *but does not include: Legal contests of skill, speed, strength or endurance in which awards are made only to entrants or the owners of entries*; legal business transactions which are valid under the law of contracts; activity legal under the provisions of sections 7-169 to 7-186, inclusive; any lottery or contest conducted by or under the authority of any state of the United States, Commonwealth of Puerto Rico or any possession or territory of the United States; and other acts or transactions expressly authorized by law on or after October 1, 1973." (Emphasis added).

[6] As of the date of this letter, officials in Alabama, Georgia, Hawaii, Illinois, Mississippi, Nevada, New York, Tennessee, Texas and Vermont have indicated that daily fantasy sports contests likely violate their respective state gambling laws. The Rhode Island Attorney General is the only state Attorney General to have formally opined that such contests do not violate state gambling laws. Even that opinion, however, stopped short of concluding that daily fantasy sports contests are pure

conclusions, many of the Attorneys General determined that the outcomes of such games depend, at least in part, upon an element of chance. To date, the only court to have undertaken any analysis of that question held that there was a reasonable likelihood that the State of New York would succeed on its claim that daily fantasy sports constitute illegal gambling under New York law. That decision, reached by a trial court in the context of an application for a preliminary injunction, is now on appeal. *See People ex rel. Schneiderman v. DraftKings, Inc.*, No. 453054/2015 (N.Y. Sup. Ct., December 11, 2015), *appeal pending*; *People ex rel. Schneiderman v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct., December 11, 2015), *appeal pending*.

The second question for purposes of the Compacts is whether, assuming daily fantasy sports contests are "games of chance," the legislation authorizes the play or operation of a "facsimile" of those games on a device, contrivance or machine. Fantasy sports contests are in recent years typically played over the internet on computers, tablets, smartphones or other electronic devices. Players select their teams and track and learn the outcomes of the games on those devices through an internet connection. Our understanding is that various fantasy sports contests existed well before the advent of the internet and widespread personal computer access, and presumably are still in some instances played without video technology. When played on an electronic device, they arguably constitute a "video facsimile." It is not clear if a federal court would regard the current form of fantasy sports contests as sufficiently distinct, in the substance or process of play, as to constitute a different game. As a result, like the question of whether such games constitute games of chance for purposes of the Compacts, a high degree of uncertainty exists about whether a court would conclude that HB 5046 authorizes a facsimile of such games on a device, contrivance or machine. That degree of uncertainty is heightened by the broad interpretation the State has historically given to the term "video facsimiles."

Notably, in the past, the State has taken the position that a number of games other than video slot machines operated by the Tribes on their respective reservations constituted video facsimile games to which the State was entitled a share of revenue under the MOUs because the games were initiated through a device or machine rather than a person. In the event of a future dispute over whether daily fantasy sports constitute video facsimile games, the Tribes would almost surely point to the State's expansive past interpretation of that term.

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games of skill. Rather, the Rhode Island Attorney General concluded that daily fantasy sports contests do not violate Rhode Island state law because, in his view, the outcomes of such games are based upon a "mixture" of the elements of chance and skill and Rhode Island gambling laws only prohibit games in which elements of chance "dominate" the distribution of prizes.

Senate President Martin Looney
Senate Majority Leader Bob Duff
LOB Room 3300

In addition to the question of whether daily fantasy sports contests constitute video facsimile games for purposes of the Compacts, there is a separate question about whether such contests constitute "commercial casino games" for purposes of the MOUs. As set forth above, the MOUs provide that the Tribes' payments to the State will continue "so long as no change in State law is enacted to permit the operation of video facsimiles *or other commercial casino games by any other person* and no other person within the State lawfully operates video facsimile games *or other commercial casino games*...." Mohegan MOU dated May 17, 1994, at 2 (emphasis added). The MOUs do not define the term "commercial casino games," and no court has interpreted that term for purposes of the MOUs. Although the State could argue that daily fantasy sports contests are not prevalent in casinos, the current regulatory landscape is changing rapidly, and it is difficult to predict whether, at some point in time, such games will be restricted to such a setting. Moreover, as a general matter, courts have been sympathetic to tribal efforts to protect their rights under the Indian Gaming Regulatory Act and other federal statutes. *See, e.g.*, *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990). As a result, HB 5046 also poses significant risks to the State's revenue under the MOUs because the Tribes may claim, at some point in time, that daily fantasy sports contests are both video facsimile games and commercial casino games.

I want to emphasize that, if these issues were ever to be litigated in court, there are sound arguments that could be made that the Compacts and MOUs are not implicated by daily fantasy sports contests. Nonetheless, no one can predict with any level of certainty how a court, if faced with these issues, would rule. With that uncertainty comes the risk that legislation of the sort proposed could place in jeopardy the State's revenue-sharing arrangements with the Tribes.

I hope this information is helpful. Please feel free to contact me if you have any questions or concerns.

Very truly yours,

George Jepsen
ATTORNEY GENERAL