

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

JENNIFER WHITE, KATHERINE WEST, CHARLOTTE
WELLINS and ANNE REMINGTON,

Plaintiffs,

-against-

SUMMONS

Index No.

HON. ANDREW CUOMO, as Governor of the State of New
York, and the NEW YORK STATE GAMING
COMMISSION,

RJI No.

Defendants.

TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to serve an answer to the annexed complaint in this action upon Plaintiffs' attorney within twenty (20) days after the service of this summons, exclusive of the day of service, or within thirty (30) days after service is completed if this summons is not personally delivered to you within the State of New York. Take notice that the nature of this action is one for Declaratory and Injunctive Relief to declare Chapter 237 of the Laws of 2016 unconstitutional and to enjoin Defendants from implementing said statute. In case of your failure to answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of the venue designated is that Defendants are elected officials of the State of New York or agencies of the State of New York and the Defendant Governor's office is located in the City and County of Albany, New York.

DATED: October 5, 2016
 Albany, New York

O'CONNELL AND ARONOWITZ

By:

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

JENNIFER WHITE, KATHERINE WEST, CHARLOTTE
WELLINS and ANNE REMINGTON,

Plaintiffs, **VERIFIED**
COMPLAINT

-against-

HON. ANDREW CUOMO, as Governor of the State of New
York, and the NEW YORK STATE GAMING
COMMISSION,

Index No.
RJI No.

Defendants.

Plaintiffs, by their attorneys, O'Connell and Aronowitz, allege upon information and belief as follows:

OVERVIEW OF THE CASE

1. This is an action for a declaratory judgment and permanent injunction to declare Chapter 237 of the Laws of 2016 of the State of New York unconstitutional and to enjoin permanently the State and its agencies and officials from implementing Chapter 237. Chapter 237, a copy of which is annexed hereto as Exhibit "A", was signed into law by the Governor on August 3, 2016, and purports to legalize and regulate "interactive fantasy sports" gambling (which includes "daily fantasy sports" ["DFS"]), and to allow DFS to be operated by commercial for-profit business enterprises that register with and are approved by the New York State Gaming Commission and adhere to the provisions of Chapter 237 and rules and regulations to be promulgated by the Commission.

2. Article I, § 9 of the New York State Constitution, however, explicitly prohibits such gambling. It reads in pertinent part as follows:

(E)xcept as hereinafter provided, **no** lottery or the sale of lottery tickets, **pool-selling, bookmaking, or any other kind of gambling**, except lotteries operated by the state ... except pari-mutuel betting on horse races ... and except casino gambling at no more than seven facilities ... **shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.** (emphasis supplied)

3. “Interactive fantasy sports” and, in particular, DFS, constitutes gambling that falls within the express prohibition in Article I, § 9, which is part of the State Constitution’s Bill of Rights. Subject to certain exceptions¹ not applicable hereto, Article I, § 9 not only prohibits lotteries, pool-selling, book-making, “or any other kind of gambling,” but also affirmatively directs the Legislature to enact laws to “prevent offenses against” Article I, § 9. In enacting Chapter 237, however, the Legislature has done precisely the opposite.

4. New York State’s chief law enforcement officer, the Attorney General of the State of New York, has already declared in court filings that DFS violates Article I, § 9 of the Constitution and successfully obtained an injunction to prevent such activity prior to the adoption of Chapter 237. *See People v. FanDuel*, N.Y. Sup. Ct., Index No. 453056, 2015, decided December 11, 2015. A copy of said order is annexed hereto as Exhibit “B”. The enactment of Chapter 237, however, does not and cannot amend the Constitution to legalize what the Constitution prohibits.

¹ As indicated, the principal exceptions are for pari-mutuel wagering on horses to help support government, lotteries operated by the State to benefit education, and casinos licensed by the State at no more than seven locations statewide. N.Y. Const., Art. I, § 9(1). Also authorized are bingo and other games of chance operated by non-profit entities for small amounts of money. N.Y. Const. Art. I, § 9(2).

5. Boiled down to its essentials, interactive fantasy sports entails the placing of bets (euphemistically referred to as “entry fees” by its proponents) by individuals who enter into contests sponsored by an interactive sports “operator.” Currently the two dominant DFS operators are FanDuel, Inc., a Delaware corporation whose principal offices are in New York, and DraftKings, a Delaware corporation with its principal offices in Massachusetts. Those operators supply an internet platform upon which the contests are conducted based upon the rules those operators establish. “Entry fees” can be as high as \$10,600 per game for certain types of contests, and winning purses for the lucky bettor can exceed \$1 million. Winners of contests are those bettors who have guessed, in advance, as to the composition of a winning roster of real-life athletes that make up a “fantasy team.” Depending on how those particular athletes actually perform in subsequent (post-wager) real-life athletic contests, the winning wagers are determined based upon a point system established by the operator. Prizes (usually in the form of money) are awarded to bettors who guessed at the best performing fantasy team (based upon the aggregate points amassed by each athlete on the roster). A portion of the entry fees (bets) are kept by the operator as the “rake” or “vig,” as profit, while the remainder is paid out in prizes.

6. Typically, roster selection is governed by a “salary cap” such that no contestant can simply choose all the supposedly best athletes because the sum of individual salaries assigned by the operator to athletes would exceed the salary cap established by the operator. For example, in a fantasy sports baseball contest Albert Pujols of the Los Angeles Angels might be assigned a salary of \$10,000 while the overall salary cap for a particular game might be only \$50,000 such that a contestant selecting Mr. Pujols for his

fantasy team would only have \$40,000 of fictional money left available to spend in selecting the remainder of the roster.

7. No entrant ("bettor") may select more than a limited number of players from any single team. A contest, for example, could be based on the performance of baseball players. The winner or winners would be determined based on the actual subsequent performance over a specified period of time by a roster of actual baseball players (a "fantasy team") selected by a bettor whose roster was at or below the salary cap. The operator might require a bet of \$100 and take, for example, a 10% cut as its fee, commonly referred to in gambling parlance as a "rake" or a "vig." As part of the rules of the contest, the operator might agree in advance to distribute \$90,000 to the contestants with \$60,000 going to the highest scoring entrant who submitted the luckiest fantasy team, and \$20,000 to the second luckiest contestant and \$10,000 to the third luckiest. Assuming 10,000 bettors at \$10 per entry fee, the operator would make a profit of \$10,000 off that single contest while distributing \$90,000 to the bettors, which would include 3 winners and 997 losers. If, however, there are more than 10,000 bettors, say, for example, 100,000, the operator's profits increase accordingly, while still paying out only \$90,000 total. Luring more bettors to make larger wagers as often as possible is the key to DFS' profit growth, just like any other form of commercial gambling.

8. Typically, the winning team in this DFS baseball contest might consist of three outfielders, one each from the Yankees, Mets and Dodgers; four infielders, one each from the Phillies, Cardinals, Red Sox and Pirates; a catcher from the Kansas City Royals; and a designated hitter from the Chicago White Sox. To illustrate how scoring works, a player might be awarded five points for a home run, four points for a triple, three for a

double, two for a single, or one for a base on balls. Additional points could be awarded for runs batted in (RBI's). How those players performed in actual games over the designated time span would determine the overall aggregate scores of each fantasy lineup as compared to lineups submitted by other hopeful bettors. In all cases, however, the success of any fantasy team would still be based upon the actual performance of real-life athletes competing in actual real-life sporting events that take place after the roster has been submitted and entries are closed. In all such cases, the bettors would have absolutely no control over how the athletes subsequently perform, nor over other external factors that might affect the outcome such as weather, field conditions, injuries, or bad bounces, all of which necessarily exist independently of athletes' ability.

9. As a quick visit to the websites of either FanDuel or DraftKings will reveal, the foregoing example of a baseball fantasy sports game is simply one example of a virtually infinite number of variations that can be applied not just to baseball, but to all kinds of professional sports – *e.g.*, professional football, basketball, hockey, golf, etc.

10. DFS, as a subset of interactive fantasy sports, differs from more traditional season-long fantasy sports which is played for fun as a social activity by and among friends, family members or co-workers with no commercial middleman taking a profit. Season-long fantasy games are usually played over the course of several months. Internet gambling operators altered this model by condensing the timeframe to as little as a day or a weekend and, just like a bookie, profit from the money bet by a participant. Moreover, the unpredictable elements of a bad coaching decision, an injury, a bad bounce, a blown referee's call, or adverse weather event could have a more profound and immediate effect on the outcome of a contest lasting only a day or a weekend.

11. Interactive fantasy sports is clearly gambling just as it would be gambling to bet on whether Albert Pujols would get 2 or more hits in the next game. The fact that bets are placed on fictional “fantasy” teams is irrelevant as the success of the fantasy team is still based on the subsequent performance of real life athletes. Equally irrelevant is the argument that DFS is more a game of skill because contestants who spend more time studying past player performances and their relative values might enjoy a competitive edge *vis-à-vis* other contestants in assembling a fantasy team. This is a non-sequitur and the principal fallacy in the arguments advanced by DFS proponents. Skill and chance are not mutually exclusive, and just as betting on a horse race can involve skill, the outcome remains uncertain and a bet that one horse will win is still a gamble. Guessing on how an athlete will actually perform in a subsequent real life game always involves chance. That includes an “educated” guess. The prohibition in Article I, § 9 is all-inclusive in that it prohibits “any other kind of gambling.” No one seriously argues that horse racing is not gambling, despite the fact that an element of skill may be present. The same is true of poker. The more sophisticated player will more likely than not defeat a novice, but there is also the luck of the draw. Skill and chance co-exist. Indeed, on its website, last visited on September 9, 2016, the New York State Council on Problem Gambling, funded by New York State’s Office of Alcoholism and Substance Abuse Services, defines “gambling” as “**any** activity (*e.g.*, a **game of chance or skill**) where an item of value is placed at risk in an attempt to gain something of greater value” (emphasis supplied). Furthermore, horse racing, poker, and fantasy sports all can be played without wagering. In the commercial context, however, two activities are occurring (1) the underlying event, and (2) gambling on the outcome. It is the second element that Article I, § 9 of the Constitution prohibits.

12. The “skill” versus “chance” distinction is a false dichotomy conjured up in an obvious effort both to circumvent a clear and unequivocal constitutional prohibition and to prevent the people from exercising their exclusive right to decide whether the Constitution should be amended to exclude DFS from the constitutional ban on gambling.² To argue otherwise is a direct affront to common sense and the cardinal rule that words in a Constitution should be given their common meaning when courts interpret them.

13. According to the National Council on Problem Gambling, a 2012 study of 23,000 college student athletes (when DFS was in its infancy) reported that those who played fantasy sports had a significantly higher percentage of gambling problems. Gamblers Anonymous has added fantasy sports to its list of activities it defines as gambling.

14. Sheldon Adelson, the chief executive officer of the Las Vegas Sands and one of the most prominent executives in the gambling business world unequivocally stated that “daily fantasy sports is gambling. There is no question about it.” *See* “Exclusive: Why Sheldon Adelson is Against Daily Fantasy Sports.” <https://ca.news.yahoo.com/exclusive-why-sheldon-adelson-is-against-daily-fantasy-sports-144543169.html>.”

15. MGM Casinos Chairman Jim Murren said those who argue that daily fantasy games are not gambling are “absolutely utterly wrong. I don’t know how to run a football team, but I do know how to run a casino and this is gambling.” *See* “Gambling on a Game of Skill: Debate Swirls Over Fantasy Sports,” Las Vegas Review Journal, July 11,

² A May 2016 statewide poll by Siena College showed voters opposed to allowing DFS by a 45-37 percent margin. <https://www.siena.edu/news-events/article/plurality-says-corruption-still-top-end-of-session-issue-is-more-serious-in>

2015, <http://www.reviewjournal.com/business/casinos-gaming/gambling-or-game-skill-debate-swirls-over-fantasy-sports>

16. In any event, whatever the New York Legislature might try to do to distort the ordinary definition of “gambling” as a means to evade a Constitutional prohibition, Chapter 237, as state legislation, cannot authorize the violation of federal law, the Professional and Amateur Sports Protection Act (“PASPA”), 28 U.S.C. §§ 3701, *et seq.* See *NCAA v. Governor of New Jersey*, No. 14-4546 (3d Cir. August 11, 2016).

17. The Professional and Amateur Sports Protection Act (Public Law 102-559, codified at 28 U.S.C. §§ 3701-3704, inclusive) provides that “it shall be unlawful for ... a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact ... a lottery, sweepstakes, or other betting, gambling or wagering scheme based directly or indirectly ... on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.” 28 U.S.C. § 3702.

18. Plaintiffs in this action are citizens who are residents and taxpayers of the State of New York who either have gambling disorders or are relatives and family members of such persons. Their heartbreaking stories include a litany of suffering marked by child neglect, bankruptcy, divorce, loss of homes and the agony of rehabilitation and relapse, all directly caused and threatened to continue to be caused by DFS gambling. Under the Bill of Rights of the New York State Constitution (Article I, § 9) they enjoy a Constitutional right to be protected from gambling in this State. So do the citizens indirectly harmed by the unconstitutional gambling Chapter 237 purports to authorize. This State’s highest court has ruled that the Constitutional prohibition against gambling “was adopted with a view

toward protecting the family man of meager resources from his own imprudence at the gambling tables.” *International Hotels Corp. v. Golden*, 15 N.Y.2d 9, 15 (1964). The Legislature has failed them in that regard.

19. The Legislature may not amend the Constitution under the guise of legislating. It cannot unilaterally define “gambling” to deviate from its ordinary and well-understood meaning as used in the Constitution by excluding therefrom interactive fantasy sports and, in particular, DFS. It cannot usurp the right of the People as any such redefinition is the exclusive prerogative of the People via a Constitutional amendment approved in a statewide referendum. *See* New York Constitution, Article XIX. That process was not followed here.

20. Chapter 237 should therefore be declared unconstitutional and the Defendant State officials and agencies should be permanently enjoined from implementing it.

THE PARTIES

21. Plaintiff Jennifer White is a resident of Grand Island, Erie County, New York, and is a citizen and taxpayer of the State of New York eligible to vote in any and all elections.

22. Plaintiff White is the direct victim of gambling as her life was nearly ruined by her father’s gambling addiction.

23. As early as 1992, when Plaintiff White was only 13 years of age, Ms. White’s father constantly patronized off-track betting facilities throughout Western New York.

24. Plaintiff White's mother was thereafter besieged by phone calls from creditors, loansharks appearing at her door, cars being repossessed, all culminating in a divorce.

25. As late as 2011, when Ms. White's mother died in a hospital as a result of sepsis following an acute cellulitis infection, she learned that her father had accessed her mother's bank card, making withdrawals of approximately \$1,100 while present at the Seneca Niagara Casino in Niagara Falls.

26. Over a ten-year period, Ms. White's father amassed over \$500,000 in gambling losses.

27. Plaintiff Katherine West is a resident, citizen, taxpayer and eligible voter of the State of New York. She resides in the City of Buffalo, Erie County.

28. Plaintiff West's husband is a compulsive gambler who "maxed out" the family's credit cards, overdrew the checking accounts, cleaned out the savings account, invaded the funds set aside for their children's college fund, all of which directly affected her health, causing depression, acute headaches, and stomach disorders which in turn caused her to miss work, thereby exacerbating her own financial distress, all while attempting to hide her husband's problems from their daughters.

29. Ms. West was forced to take time off from work to search for him in casinos, while struggling to cover his debts.

30. Plaintiff Charlotte Wellins is a citizen, taxpayer and eligible voter in the State of New York who resides in Wellesley Island, New York. She is the victim of gambling as her husband was a compulsive gambler who signed his name to loans without her knowledge.

31. Ms. Wellins' husband's gambling led to the loss of their home, which had been mortgaged to the hilt, bankruptcy, divorce, and the forced uprooting of their children from their home and schools, plus the loss of their college education funds.

32. Plaintiff, Anne Remington, is a citizen and taxpayer of the State of New York who resides in Jefferson County, and is eligible to vote in all state elections.

33. Ms. Remington is afflicted with a gambling addiction that nearly ruined her life and her family. Article I, § 9 of the Constitution of the State of New York was adopted to protect people like her.

34. Ms. Remington's initial game of choice was scratch-off instant lottery tickets that started with an occasional purchase and then progressed to the point of lacking money to buy groceries or gas for her family.

35. Ms. Remington had been entrusted with control over her family's finances (checkbook, savings, everything).

36. By her own admission, Ms. Remington's obsession with scratch-offs made her, however, a liar, a cheat and a person she herself grew to hate.

37. Ms. Remington invaded her family's checkbook, then the savings account, until both were depleted.

38. Ms. Remington got to the point where she fended off creditors calling her and turned off the home phone, and when her husband inquired as to why it was unplugged, blamed it on the family's pet cat.

39. The power company threatened to turn off Ms. Remington's power, cable, internet and phone service because of unpaid bills.

40. When Ms. Remington's husband inquired as to what was happening, she blamed it on a bookkeeping error on the part of the public utilities serving her residence.

41. Ms. Remington kept the books in her husband's business and ultimately he learned the truth when his business was lost.

42. Things got so bad that on February 25, 2005, Ms. Remington was arrested for writing bad checks on an account that her husband had closed.

43. By that time, Ms. Remington had already been attending gambling addiction support groups, but would continue to stop to gamble on her way to meetings.

44. Ms. Remington has been "clean" for the past twelve years, but she is always concerned about a relapse, especially now that online access to DFS brings a virtual casino into her living room.

45. Any increase in Ms. Remington's ability to access gambling, such as the legalization of daily fantasy sports, would only make her more vulnerable to a relapse.

46. If a proposition were on the ballot to amend the New York Constitution to authorize daily fantasy sports, Ms. Remington would vote against it.

47. Plaintiffs White, West, Wellins and Remington are all opposed to the proliferation of gambling and would vote against any proposed constitutional amendment to exempt interactive fantasy sports and DFS from the prohibitions against gambling currently embodied in Article I, § 9 of the Constitution of the State of New York, which was enacted to protect them from being victimized and fleeced by gambling operators.

48. Defendant Andrew Cuomo is the duly elected and serving governor of the State of New York, with his principal offices located in the City and County of Albany,

and as such he is responsible, *inter alia*, for adhering to his oath of office which requires him to uphold and defend the Constitution of the State of New York.

49. Defendant New York State Gaming Commission (the “Commission”) is a public body created within the Executive Department pursuant to § 102 of the Racing, Pari-Mutuel, Wagering and Breeding Law, with its principal offices located in Schenectady County, New York.

50. Under Article 14 of the Racing, Pari-Mutuel Wagering and Breeding Law, enacted pursuant to Chapter 237 of the Laws of 2016, the Commission is charged with regulatory oversight of interactive fantasy sports, as defined in Section 1401(1)(a), (b) of the Racing, Pari-Mutuel Wagering and Breeding Law.

51. The Defendant Commission’s oversight and regulatory responsibility includes the registration of interactive fantasy sports operators, the issuance of permits to such operators to conduct interactive fantasy sports contests, and the promulgation of rules and regulations governing the operation of interactive fantasy sports, including a requirement that registered operators of interactive fantasy sports contests provide information on their websites concerning assistance for “compulsive play.”

FACTUAL BACKGROUND

An Internet Gambling Prohibition Inspires a New Form of Internet Gambling

52. In 2006, the U.S. Congress passed the Unlawful Internet Gambling Enforcement Act (“UIGEA”) to expand the mechanisms available to federal prosecutors seeking to enforce anti-gambling laws against internet-based gambling companies. This

statute primarily introduced new consequences for financial institutions that process illegal gambling transactions.

53. UIGEA explicitly left all other federal and state gambling laws intact, and provided that: “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.”

54. Former Congressman, Jim Leach, one of the sponsors of UIGEA, has publicly said there was no intent to allow internet gambling in the form of DFS. Rep. Leach stated: “The assumption was that while unconstrained Internet gambling could change the nature of America’s savings and investment patterns, fantasy sports would be a ‘de minimus’ footnote. No one ever conceived of it being a large scale activity or that it could transition into one-day contests.” “The only unique legal 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 firms,” Leach said. “But 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 ... what is self-evident is that UIGAEA exempted fantasy sports from one specific law enforcement mechanism but not from the broad sweep of law itself.”³ Leach added that fantasy sports companies are still bound by state and federal laws on sports betting, wire transfers, anti-trust and securities laws, among others.”

³ “Former congressman says DFS is ‘cauldron of daily betting,’” *Associated Press*, Oct. 12, 2015, <http://bigstory.ap.org/article/7b3af0d8b0c04f059e8b301adf8b1784/former-congressman-says-dfs-cauldron-daily-betting>

55. In 2008, an online betting entrepreneur named Nigel Eccles and a few partners founded the online wagering platform Hubdub. That site let users bet on the outcome of news events. As a former employee at two online gambling companies in the United Kingdom, Eccles reportedly saw potential in “combining the fun and excitement of online gambling with the mass interest in news.” As Eccles put it, the idea was to “gamble on what you believe will happen. You can bet on any subject under the sun.”

56. Hubdub, however, had a fatal flaw. Because UIGEA made processing wagers involving real money illegal in the United States, the site operated with *virtual* currency. This apparently provided insufficient excitement for bettors, and the news-betting component folded a few years later.

57. Eccles, however, seized on language in UIGEA that excluded certain “fantasy sports and simulations” from the definition of “bet or wager.” Although previously not a fan of fantasy sports or American sports, in 2009, he concocted a new betting game for the U.S. market - dubbed daily fantasy sports (“DFS”).

58. Hubdub quickly spun off a new company, FanDuel, to accept bets with real money.

By Exploiting a Loophole, DFS Created a New Business Model for Online Gambling

59. DFS is a new business model for online gambling. The DFS sites themselves collect wagers (styled as “fees”), set jackpot amounts, and directly profit from the betting on their platforms. DFS’ rules enable near-instant gratification to players, require no time commitment, and simplify game play, including by eliminating all long-term strategy.

60. In several fundamental respects, DFS represents a clear departure from season-long fantasy sports as heretofore described in Paragraph 10:

a) First, DFS games run on a daily and weekly basis. Scoring depends on the performance of particular athletes in a given week, a given weekend, on a given night, or even a given tournament or race (as with golf or NASCAR). This allows for faster-paced games that require less time commitment.

b) Second, DFS games allow no trading; no dropping players; and no adjusting lineups. Players must “lock in” or finalize their lineup by a particular deadline. After the lineup is locked, a DFS player can do nothing but watch as the performance of athletes in real-world games determines whether he or she won.

c) Third, DFS uses neither of the competitive draft formats, *i.e.* either the “snake” or the auction draft. Instead, it uses a salary cap. In a salary cap draft, the site assigns each athlete a theoretical value (a “salary”). Bettors can fill their team with players until they have exhausted their salary cap or allocation. Thus, the same athlete can appear on multiple teams.

61. The “salaries” assigned to athletes constitute odds roughly reflecting how the DFS operator (*e.g.*, FanDuel and DraftKings) expects a particular athlete to perform over a given time period.

62. The quick time frame of DFS and the ability to set the lineup only once eliminates any of the strategic elements associated with managing a traditional fantasy team over the course of a season. As compared to traditional fantasy sports, DFS’ rules also eliminate any strategy associated with drafting good players first because the same players can appear in every lineup.

63. As FanDuel exhorted on its website, with DFS: “The format simplified. The winning amplified. And the money? Let’s just say your season-long league won’t pay out \$75 million a week.”

64. Rather than a new type of fantasy league, DFS simply devised another way to bet on sports by bringing internet gambling directly into the homes of New Yorkers.

65. Casinos and bookmaking operations in Nevada and non-U.S. jurisdictions with legalized sports gambling have long allowed “prop” (short for proposition) bets—i.e., bets on statistics and milestones that occur in given games or in connection with particular players.

66. Indeed, FanDuel and DraftKings recognize that DFS is akin to sports prop betting. FanDuel advised on its website: “By taking into account over-under lines, as well as money lines and player props, FanDuel players gives [*sic*] themselves more opportunities to win.” DraftKings’ website advised: “Player props are also an excellent source of information for daily fantasy owners. Props are Vegas’s best guess for a player’s production – basically their projection for him in fantasy.”

67. In a parlay, a bettor attempts to correctly predict the outcome of several variables as part of a single wager. A DFS lineup is a parlay bet in which the relevant variables are the athletes.

68. As the Chief Executive Officer of one DFS company put it, the large format DFS games are like “a sports betting parlay on steroids.”

FanDuel Enters the Sports Gambling Business

69. Early on, FanDuel recognized the potential of DFS as a business model for online betting.

70. As FanDuel sought to grow its business it told one investor its target market was male sports fans who “cannot gamble online legally.” FanDuel observed that its users have a “higher preponderance to gambling”; more than half of respondents to a FanDuel customer survey said they bet or gamble online for real money.

71. FanDuel offers several game styles to appeal to a variety of tastes.

72. FanDuel offers “Guaranteed Prize Pool” or “GPP” games, 50/50 games, and head-to-head games. Each game is structured differently.

a) GPP games. The GPP games are the most popular based on numbers of individual players, most lineups and highest payouts. Some GPPs can accept up to several hundred-thousand lineups from DFS players, with the highest-scoring lineups winning major cash prizes. To play, GPPs cost anywhere from less than a dollar to upwards of \$5,000 to submit a single wager. In one of the largest GPPs, known as the “Millionaire Maker,” DFS players wager \$25 per lineup for a chance to win a jackpot of up to \$1 million.

b) 50/50 games. 50/50 games allow DFS players to effectively double their money if a lineup places in the top half of point-scoring lineups.

c) Head-to-Head games. In head-to-head games, two DFS players enter a lineup against each other, and the lineup with more points wins. Bettors can wager up to \$10,600 in head-to-head games. The bettor with the winning lineup gets the pot, minus the cut FanDuel takes.

73. FanDuel takes a cut of all wagers, which, using poker slang, FanDuel executives at times refer to as its “rake.” The rake constitutes the company’s primary source of revenue—ranging from about 6% to more than 14%.

74. As part of its marketing, FanDuel allows DFS players to play certain games for free. Borrowing another term from poker, these free games are called “freerolls.”

75. Except for limited exceptions, FanDuel requires players to put money at risk for a chance to win cash prizes.

76. FanDuel accepts wagers in connection with a wide range of sports. The company’s offerings include: Major League Baseball, NFL football, NBA basketball, college football, and college basketball.⁴

How Betting and Scoring on FanDuel Works

77. A DFS wager constitutes a prediction by a DFS player about the combination of athletes (*i.e.*, the lineup) that he or she believes may score the most points in a particular DFS game. After finalizing his lineup, a DFS player cannot control or influence whether the athletes he chose will perform at, above, or below expectations.

78. Given this inherent uncertainty, certain DFS players will enter hundreds, or even thousands, of unique lineups in the hopes that one or more combinations of athletes will score well, or that he or she will even play. Chapter 237 seeks to limit the number of entrants.

79. The FanDuel rules identify several circumstances where even the athletes on the field may have no influence over the number of DFS points scored. For example, the points associated with a particular athlete may be reduced or zeroed out due to:

- a) rained out, postponed, suspended, or shortened game;

⁴ The legislation challenged herein, Chapter 237 of the Laws of 2016, otherwise allowing DFS does prohibit betting on amateur sports (*i.e.*, college and/or high school athletics), and also would limit the number of entries by any contestant.

b) the league failing to correct official game statistics before declaring a winner; or

c) a trade or injury involving the athlete that occurs after a contest is created.

80. The scores applied to any DFS lineup directly reflect the real-game performance of athletes.

81. Until a tally of the final box scores is available, the winning DFS wager or wagers are unknown and unknowable.

82. FanDuel's rules for each major sport (professional football, baseball, basketball, and hockey) specify that FanDuel will "wait until all the player statistics have been reported by our third party stats provider. This lets us ensure that the final box scores are complete."

83. Similar to other types of sports betting, DFS players will try to predict or "handicap" whether the odds offered by the bookmaker (*i.e.*, the salary FanDuel assigns a given athlete) accurately reflect the expected outcome (*i.e.*, how well that athlete will perform in an actual game).

84. Just as the most sophisticated sports handicapper has no control over whether the team he chose will beat the point spread, a DFS player has no control over whether the lineup he chose will perform.

85. As a FanDuel spokesperson aptly observed, the results in DFS are "contingent on the positive performance of all of their players" in actual games.

FanDuel Markets Itself as a Game Anyone Can Win

86. In a bid for players and market share, FanDuel dramatically increased advertising spending in the fall of 2015. FanDuel spent a reported \$46.9 million on television commercials that aired almost 9,500 times in the month of September 2015 alone.

87. FanDuel's advertisements emphasized the ease of winning massive jackpots, including through purported testimonials from ordinary people stating how easy it is to win big.

88. Featuring vignettes of different purported winners, one FanDuel ad provided: "I've won over \$29,000 on FanDuel. Nothing special about me. The difference is, is that I played, and they didn't ... Even the novice can come in and spend 1 or 2 dollars and win 10, 20 thousand dollars."

89. Another FanDuel advertisement urged: "It's simple: choose a dollar league or play for more. . . FanDuel pays out over \$75 million a week – more than any other site."

90. The ease and simplicity of playing and winning was further emphasized on the FanDuel website. On its homepage, FanDuel promised:

a) "No season-long commitment."

b) "WIN REAL CASH – Paying out expected \$2 Billion in real cash prizes this year. And get instant payouts as soon as contests end."

91. Elsewhere on its website, FanDuel featured a promotional video for its "High Roller" contest in Las Vegas. Billed as "the ultimate tournament for high rollers," the promotional video highlighted DFS users being showered with cash or with champagne while holding a giant check for one million dollars.

FanDuel Operates a Gambling Business

92. Since 1894, Article I, Section 9 of the New York State Constitution has expressly prohibited bookmaking and all other forms of sports gambling (apart from an exception for pari-mutuel betting on horseracing).

93. Until the recent enactment of Chapter 237 of the Laws of 2016, the New York Penal Law had long recognized crimes for promoting gambling, including bookmaking, and for maintaining gambling devices and records. Gambling was defined, in part, as wagering on a “future contingent event” not under the bettor’s control or influence or a “contest of chance.”

94. Recognizing that these laws and similar laws in other jurisdictions were directly contrary to the DFS model, FanDuel’s U.S. website maintained that DFS was “considered a game of skill and, therefore, legal.”

95. Yet, in the United Kingdom, where sports gambling is legal, FanDuel had taken the necessary regulatory steps to operate as an online sports betting company. In an October 30, 2015 article in the Herald Scotland, FanDuel said it planned to launch in the U.K. soon. FanDuel’s application with the U.K. Gambling Commission to operate “gambling software” was listed as in progress on the Commission’s website. In a related statement, a FanDuel spokesperson said the application “is a part of the regulatory compliance process to offer fantasy sports in the UK market.”

96. When presenting to investors, FanDuel was even more direct about its relationship to gambling. For example, in an investor presentation, FanDuel noted it had hired the online poker company Full Tilt’s head of affiliates to help FanDuel acquire new users. Several of FanDuel’s affiliates were gambling oriented, including companies like

Vegas Insider and BetVega, a sports betting and handicapping website and FanDuel's ninth largest affiliate.

97. Elsewhere, FanDuel conceded to investors that when FanDuel surveyed its users, almost twenty-percent of respondents who acknowledged they bet or gamble said their friends would describe them as "a bit of an addict."

98. The investing community likewise views FanDuel and DFS companies as gambling operations. For example, in a presentation prepared for the Fantasy Sports Trade Association's winter conference in 2014 (the "FSTA Presentation"), Eilers Research, a gaming industry research firm, compared DFS to the "comparable industries" of casinos, lotteries, and sports betting.

99. In an analysis provided to one investor, FanDuel benchmarked its performance to that of Bwin.Party, one of the largest online gambling companies in the world and whose core business is sports gambling. Among other comparisons, the spreadsheets dropped the pretense of referring to the bets on the FanDuel site as "fees," comparing FanDuel's total "stakes" by quarter to the equivalent numbers for Bwin.Party's Sports Betting operation.

100. As reflected in the FSTA Presentation, DFS has had success converting casual gamblers—like those who play the lottery—into DFS players. One slide observed that the large-prize GPPs run by DraftKings, FanDuel, and others were already "attracting new users & serving as a new alternative for some ticket/lottery players."

101. Yet just as in poker, blackjack, and horseracing, a small percentage of professional gamblers manage to use research, software, and large bankrolls to extract a disproportionate share of DFS jackpots. With blackjack, professional players profit at the

expense of the casino. With poker and DFS, professional players, also known as “sharks,” profit at the expense of casual players, also known as “minnows.”

102. According to the New York Attorney General, of the top 10,000 players by cumulative amount wagered, 74% lost money over 2013 and 2014.

103. On any given day, FanDuel will accept substantially more than five wagers placed by New York residents. These wagers total significantly more than \$5,000.

104. Based on numbers from FanDuel, over 250,000 individual New York residents are registered with the company as of September 2015.

Gambling Addiction Associated with DFS is an Increasingly Serious Problem

105. Experts in gambling addiction and other compulsive behaviors have identified DFS as a serious and growing threat to people at-risk for, or already struggling with, gambling-related problems.

106. DFS is an especially powerful draw for young males who are increasingly seeking help for compulsive gambling related to DFS with counselors and appearing at Gamblers Anonymous meetings.

107. For those struggling with gambling addiction or vulnerable to it, certain structural characteristics make DFS particularly dangerous.

108. As Keith Whyte, the Executive Director of the National Council on Problem Gambling (“NCPG”) explains, these structural characteristics—which are generally absent from season-long fantasy leagues—include:

the ability for players to place large bets; the chance for players to win large payouts; the high speed of play (or, put another way, the relatively short interval between the placing

of a bet and the determination of the outcome of the bet); and the perception of skill as a determinant in the outcome of the wager.

109. Dr. Jeffrey L. Derevensky, Director of the International Centre for Youth Gambling Problems and High-Risk Behavior at McGill University, notes that, among other things, false or misleading representations of the skill involved in DFS “can lead players to a preoccupation with DFS, chasing of losses, and developing symptoms and behaviors associated with a gambling disorder.”

FanDuel Attracts Scrutiny as Gambling Business

110. After incorporating in 2009, FanDuel quietly attracted investments, but remained relatively unknown outside of the subculture of DFS players and the investor community.

111. The FSTA Presentation estimated that just 2.5% of participants in traditional fantasy leagues played DFS.

112. As the president of the FSTA observed earlier this year, as “recently as two years ago everything changed. [DFS] was close to zero, a nascent pastime.”

113. FanDuel began an advertising blitz designed to expand DFS beyond its niche market and grow market share as quickly as possible.

114. For all of 2014, FanDuel spent just over \$2 million on advertising with NBC Universal/Comcast. In just the first ten months of 2015, FanDuel spent over \$12 million with NBC Universal/Comcast.

115. On October 5, 2015, The New York Times published an expose titled “Scandal Erupts in Unregulated World of Fantasy Sports.” The story focused on DFS’

fairness and strongly suggested that a DraftKings employee had improperly used inside proprietary information to improve his chances of winning on FanDuel.

116. On October 6, 2015, the Office of the New York Attorney General (“NYAG”) opened an investigation into FanDuel’s operations.

117. Reports soon emerged indicating that various other federal and state enforcement agencies and regulators were probing the operations of both FanDuel and DraftKings.

118. Gambling officials in several states raised questions as to the legality of the DFS business.

Washington State

119. Until the recent enactment of Chapter 237 of the Laws of 2016, Washington State and New York State laws had identical statutory definitions of “gambling” and “contest of chance.” Relying on those definitions, the Washington State Gambling Commission has previously declared that online “fantasy sports wagering is not authorized for play in Washington State.”

120. While continuing to offer games in New York, neither DraftKings nor FanDuel accepted wagers in Washington State. On October 21, 2015, Chris Stearns, Chairman of the Washington State Gambling Commission, highlighted this inconsistency, observing in a tweet: “NY definition of ‘contest of chance’ & ‘gambling’ same as WA’s . . . Yet DFS offered in NY but not WA.”

Michigan

121. On September 1, 2015, the Chairman of the Michigan Gaming Control Board stated that that DFS is “illegal under current Michigan law.”

Georgia

122. On September 23, 2015, citing the gambling prohibitions in the Georgia state constitution and criminal laws, the Georgia Lottery Corporation demanded that the two rival DFS companies explain “how it is that FanDuel and DraftKings are able to lawfully operate fantasy sports games in the State of Georgia.”

Nevada

123. On October 15, 2015, the Nevada Gaming Control Board issued a public notice announcing that DFS constituted gambling. The notice stated, among other things, that:

because DFS involves wagering on the collective performance of individuals participating in sporting events, under current law, regulation and approvals, in order to lawfully expose DFS for play within the State of Nevada, a person must possess a license to operate a sports pool issued by the Nevada Gaming Commission.

124. In a memorandum dated October 16, 2015, the Office of the Nevada Attorney General issued a formal opinion supporting the decision of the Nevada Gaming Control Board. The opinion concluded:

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.

125. FanDuel and DraftKings stopped accepting wagers in Nevada a few hours after the decision of the Nevada Gaming Control Board.

Illinois

126. On October 16, 2015, a spokesperson for the Illinois Gaming Board expressed the Board's view that DFS is illegal in Illinois. The Board sought a formal opinion from the Illinois State Attorney General, which has since been issued. <http://www.legalsportsreport.com/7015/illinois-ag-says-dfs-is-gambling/>

Other States

127. On information and belief, bills have been introduced in at least 21 states to legalize DFS but have either failed or are on hold. They are Alabama, Arizona, Connecticut, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Nebraska, New Mexico, Oklahoma, Rhode Island, South Carolina, Vermont, Washington, West Virginia and Wisconsin. See <http://www.legalsportsreport.com/dfs-bill-tracker/>

National Collegiate Athletic Association ("NCAA")

128. On August 27, 2015, the NCAA sent a cease-and-desist letter to FanDuel objecting to DFS games involving college sports.

129. The NCAA's letter provided that DFS is "inconsistent with our values, by-laws, rules and interpretations regarding sports wagering," and may violate the UIGEA, the Professional and Amateur Sports Protection Act, and state gambling laws.

130. On September 22, 2015, the NCAA reportedly told college athletic directors that the NCAA considers DFS to be gambling, and that athletes found to violate a ban on playing DFS would face a suspension from college sports of no less than one year.

131. FanDuel continued to run DFS games connected with college sports contrary to the NCAA's specific demand until it finally agreed to stop doing so after the end of the 2016 NCAA College Basketball Tournament.

DraftKings Enters the Sports Gambling Business

132. The history, rapid development and mode of operation by DraftKings is strikingly similar to that of FanDuel.

133. Early on, Jason Robins, the CEO and co-founder of Draft Kings, recognized the potential of DFS as a business model for online betting, just as its major competitor, FanDuel, had also recognized the potential.

134. Shortly after founding DraftKings, Robins reportedly started a thread in the online forum reddit.com in which he explained: "This concept where you can basically **'bet'** your team will win is new and different from traditional leagues that last an entire season." (emphasis added).

135. Elsewhere on the thread, Robins emphasized: "The concept is different from traditional fantasy leagues. Our concept is a mash[-]up between poker and fantasy sports. Basically, you pick a team, deposit your **wager**, and if your team wins, you get the pot." (emphasis added).

136. This is reflected in DraftKings marketing, with DFS promising "rapid-fire contests" of:

much shorter duration than the traditional season-long leagues and require no team management after the draft. Salary cap draft format takes just minutes to complete, unlike the hours-long snake drafts in traditional leagues. We offer new contests every day of the season, and our winners are crowned nightly. Payouts happen immediately after the games - no more waiting until the end of the season to collect winnings!

137. Like FanDuel, DraftKings offers several game styles to appeal to a variety of tastes.

138. Like FanDuel, DraftKings offers "Guaranteed Prize Pool" or "GPP" games, 50/50 games, and head-to-head games. Each game is structured differently.

a) GPP games. The GPP games are the most popular based on numbers of individual players, most lineups and highest payouts. Some GPPs can accept up to several hundred-thousand lineups from DFS players, with the highest-scoring lineups winning major cash prizes. To play, GPPs cost anywhere from less than a dollar to upwards of \$5,000 to submit a single wager. In one of the largest GPPs, known as the "Millionaire Maker," DFS players wager \$20 per lineup for a chance to win a jackpot upwards of \$1 million.

b) 50/50 games. 50/50 games allow DFS players to effectively double their money if a lineup places in the top half of point-scoring lineups.

c) Head-to-Head games. In head-to-head games, two DFS players enter a lineup against each other, and the lineup with more points wins. Bettors can wager up to \$10,600 in head-to-head games. The bettor with the winning lineup gets the pot, minus the cut DraftKings takes.

139. Like FanDuel, DraftKings takes a cut of all wagers, which, using poker slang, DraftKings executives at times refer to as its "rake." The rake constitutes the company's primary source of revenue-ranging from about 6% to more than 14%.

140. Robins agreed in an interview earlier in 2015 that, although he preferred the term "commission," DraftKings' cut constitutes a "vig," betting slang for the charge taken by a sports bookie.

141. As part of its marketing, DraftKings, like FanDuel, allows DFS players to play certain games for free. Borrowing another term from poker, these free games are called "freerolls."

142. Freeroll games do not typically offer cash prizes, but may award the winner a spot in a cash prize game.

143. Except for limited exceptions, DraftKings, like FanDuel, requires players to put money at risk for a chance to win cash prizes.

144. Like FanDuel, DraftKings accepts wagers in connection with a wide range of sports. The company's offerings include: Major League Baseball, NFL football, NBA basketball, PGA golf, Major League Soccer, NASCAR, and Mixed Martial Arts.

How Betting and Scoring on DraftKings Works Much Like FanDuel

145. As at FanDuel, a DFS wager in a DraftKings contest constitutes a prediction by a DFS player about the combination of athletes (i.e., the lineup) that he/she believes may score the most points in a particular DFS game. After finalizing his/her lineup, a DFS player cannot control or influence whether the athletes he/she chose will perform at, above, or below expectations.

146. Like FanDuel, given this inherent uncertainty, certain DraftKings DFS players will enter hundreds, or even thousands, of unique lineups in the hopes that one or more combinations of athletes will score well, although Chapter 237 would limit the number of lineups.

147. Like FanDuel, the DraftKings rules identify several circumstances where even the athletes on the field may have no influence over the number of DFS points scored. For example, the points associated with a particular athlete may be reduced or zeroed out due to:

- a) rained out, postponed, suspended, or shortened game;
- b) the league failing to correct official game statistics before DraftKings declares a winner; or
- c) a trade involving the athlete that occurs too close to when lineups lock.

148. As at FanDuel, the scores applied to any DFS lineup directly reflect the real-game performance of athletes.

149. As at FanDuel, until a tally of the final box scores is available, the winning DFS wager or wagers in a DraftKings contest are unknown and unknowable.

150. DraftKings' rules for each major sport (professional football, baseball, basketball, and hockey) specify that: "DraftKings will wait until all of the final box scores have been reported for each contest's games to ensure that the final results are accurate."

151. Similar to other types of sports betting, and just like FanDuel, DFS players in DraftKings contests will try to predict or "handicap" whether the odds offered by the

bookmaker (i. e. the salary DraftKings assigns a given athlete) accurately reflect the expected outcome (i.e. how well that athlete will perform in an actual game).

152. Just as the most sophisticated sports handicapper has no control over whether the team he chose will beat the point spread, a DFS player in a DraftKings contest has no control over whether the lineup he or she chose will perform.

153. In a November 13, 2015 court filing, DraftKings observed that the success of DFS lineups "depends on the combined performance" of real-world athletes.

DraftKings Markets Itself as a Game Anyone Can Win

154. In a bid for players and market share, DraftKings dramatically increased advertising in the fall of 2015. DraftKings alone spent a reported \$81 million on television commercials that aired more than 22,000 times in the lead-up to the NFL season, August 1, 2015 through September 14, 2015.

155. In commercial-after-commercial, DraftKings' advertisements emphasized the ease of winning massive jackpots.

156. One DraftKings ad promised: " ... taking home your share is simple: just pick your sport, pick your players, and pick up your cash. That's it. It's the simplest way of winning life-changing piles of cash."

157. Another DraftKings television commercial explained: "They make winning easier than milking a two-legged goat ... Do you want to be a fantasy football hero? Do you want it to be easy and fun with a shot to win millions?"

158. "The giant check is no myth" urged another DraftKings ad " ... BECOME A MILLIONAIRE!"

159. The ease and simplicity of playing and winning was further reinforced on the DraftKings' website. Among the "5 GREAT REASONS" to play DFS on DraftKings:

- a) "No commitment- get your sweat on in the industry's highest paying guaranteed tournaments." (emphasis added)
- b) "Build your team in only minutes and watch your scores update live online." (emphasis added)

DraftKings Operates a Gambling Business

160. Recognizing that New York's Constitution prohibits gambling and is directly contrary to the DFS model, DraftKings' U.S. website maintains that DFS "is a skill game and is not considered gambling."

161. Yet, in the United Kingdom, where sports gambling is legal, DraftKings has taken the necessary regulatory steps to operate as a legitimate online sports betting company. In an August 17, 2015 press release, DraftKings announced it had received a license to operate in the U.K. . The release neglected to mention the name of the entity that issued the license (the U.K. Gambling Commission) or the business categories in which the license entitled DraftKings to compete (gambling software and pool-betting).

162. The DraftKings' CEO was more straightforward in his 2012 reddit thread, explaining that DraftKings operates in the "**gambling** space" (emphasis supplied).

163. When presenting to investors, DraftKings is even more direct about its relationship to gambling.

164. For example, in an investor presentation, DraftKings used slides on casinos, online poker, and sports betting to showcase DraftKings' "Market Opportunity":

a) Slide 10: "Global opportunity for online betting and casino market estimated at ~\$27B now, ~\$36B by 2018," which charts the revenue growth in the "Global online poker market" and in the "Global online betting and casino markets"; and,

b) Slide 11: "Sports Wagering Vertical is a large addressable market," which highlights the billions of dollars in revenue from legal and illegal sports betting in the United States.

165. DraftKings business model is directly modeled on other gambling ventures. In his 2012 reddit thread, Robins described DFS as a "mash[-]up between poker and fantasy sports." DraftKings, Robins explained, makes its money in a way that "is almost identical to a casino."

166. Converting gamblers to DFS and associating DraftKings' brand with gambling ventures is central to its growth strategy.

167. DraftKings signed sponsorship deals with well-known gambling events and venues, including the World Series of Poker, the World Poker Tour, and-in a deal with the New York Racing Association-the Belmont Stakes, the third and final leg of the Triple Crown.

168. One DraftKings executive-Jon Aguiar, who is himself a former professional poker player--credits poker players with a good part of DraftKings' rise, explaining to LegalSportsReport.Com that they pick up DFS quickly: "Once they get to DraftKings, they already know how to deposit, they understand how a bonus works, they can navigate the lobby [i.e., the wagering system] with ease."

169. DraftKings embedded keywords related to gambling in the code on its website. This led search engines like Google to suggest DraftKings to users looking for gambling. For example, DraftKings used keywords like "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."

170. As reflected in the FSTA Presentation, DFS has had success converting casual gamblers-like those who play the lottery-into DFS players. One slide observed that the large-prize GPPs run by DraftKings, FanDuel, and others were already "attracting new users & serving as a new alternative for some ticket/lottery players."

171. DraftKings data show that 89.3% of DFS players had an overall negative return on investment for 2013 and 2014.

172. On any given day, DraftKings will accept substantially more than five wagers placed by New York residents. These wagers total significantly more than \$5,000.

173. Based on numbers from DraftKings, over 150,000 individual New York residents placed bets with the company between April 25, 2012 and October 25, 2015.

174. According to documents shared with a potential DraftKings investor, numerous DFS players struggling with gambling addiction have called customer service to cancel their accounts and to plead with DraftKings to permanently block them from playing. DraftKings' records show customer inquiries from DFS players seeking assistance with subjects like "Gambling Addict do not reopen," "Please cancel account. I have a gambling problem," and "Gambling Addiction needing disabled account."

DraftKings Attracts Scrutiny as Gambling Business

175. After incorporating in 2012, DraftKings quietly attracted investments, but remained relatively unknown outside of the subculture of DFS players and interested investors.

176. The FSTA Presentation estimated that just 2.5% of participants in traditional leagues played DFS.

177. As the president of the FSTA observed earlier this year, as "recently as two years ago everything changed. [DFS] was close to zero, a nascent pastime."

178. In 2015, DraftKings began an advertising blitz designed to expand DFS beyond its niche market and grow market share as quickly as possible.

179. For all of 2014, for example, DraftKings spent just over \$1 million on advertising with NBC. In just the first ten months of 2015, DraftKings spent about \$21 million with NBC Universal/Comcast.

180. Recently, and in the wake of the enforcement actions heretofore taken by the New York Attorney General, DraftKings has dramatically toned down its media advertising and carefully avoided using language that alludes to or suggests that it is engaged in gambling, all in recognition of the fact that its previous marketing was an admission of what it was actually doing.

181. On October 5, 2015, The New York Times published an expose titled "Scandal Erupts in Unregulated World of Fantasy Sports" that introduced DFS for the first time to many non-players. The story focused on DFS' fairness and strongly suggested that a DraftKings employee had improperly used inside proprietary information to improve his chances of winning on FanDuel.

182. On October 6, 2015, the Office of the New York Attorney General ("NYAG") opened an investigation.

183. In a special to the New York Daily News dated November 19, 2015, New York Attorney General Eric Schneiderman accused both FanDuel and DraftKings of operating a "massive, illegal gambling operation," stating that they "take a cut of every bet" in their daily fantasy sports operations and "that is what bookies do," quoting the CEO of DraftKings who suggested that it operated in "gambling space" and that its revenue model was "identical to a casino." Schneiderman characterized the argument that DFS games are "games of skill and are therefore legal" as "nonsense," quoting from the National Council on Problem Gambling that estimated "The annual costs of gambling addiction in the United States at about \$7 billion, including crime, incarceration, and bankruptcy."

184. According to DraftKings' own estimate obtained by the New York State Attorney General, during the course of that office's investigation of DraftKings, the estimated size of the DFS market in the United States and Canada grew from \$20 million in 2011 to between \$3 and \$4 billion by 2015, with a projected growth to somewhere between \$17 and \$22 billion by 2017.⁵

185. On November 10, 2015, the New York Attorney General's Office sent identically worded letters to Jason Robins, the Chief Executive Officer of DraftKings, Inc., and Nigel Eccles, CEO of FanDuel, Inc., demanding that their companies "cease and desist from illegally accepting wagers in New York State in connection with daily fantasy sports." Copies of those letters are annexed hereto as Exhibits "C" and "D", respectively. Those

⁵ See *People v. DraftKings*, N.Y. Sup. Ct., N.Y. Ct. Index No. 453054/2015, NYCEF Document 9, Exhibit "K".

letters stated, *inter alia*, that the “illegality of DFS is clear from any reasonable interpretation of our laws, beginning with the New York State Constitution.” The Attorney General’s letter went on to specifically cite Article I, § 9.

**The Attorney General Successfully Brings Legal Action
Against FanDuel and DraftKings**

186. Thereafter, on November 17, 2015, the New York Attorney General filed separate lawsuits in New York State Supreme Court (New York County) against both DraftKings and FanDuel alleging, *inter alia*, that their activities violated Article I, § 9 of the Constitution and the provisions of the Penal Law (Article 225) enacted pursuant to the mandate in Article I, § 9 of the Constitution to enact laws to prevent gambling. The lawsuit also contained causes of action alleging that both FanDuel and DraftKings had engaged in false and deceptive advertising and consumer fraud.

187. On December 11, 2015, Supreme Court, New York County (Mendez, J.), granted the Attorney General’s motions in both cases for a preliminary injunction enjoining and restraining both DraftKings, Inc. and FanDuel, Inc. from “doing business in the State of New York [and from] accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on [Defendants’] websites.” *People v. FanDuel, Inc.*, New York Sup. Ct., N.Y. Cty. Index No. 43056/15, decided December 11, 2015. *See* Exhibit “B”.

188. In so ruling, the court stated that the New York Attorney General had “established a likelihood of success warranting injunctive relief,” that the Attorney General “has a greater likelihood of success on the merits under New York Constitution Article I, § 9,” and that the “balancing of the equities are in favor of the New York Attorney General

of the State of New York due to their [*sic*] interest in protecting the public, particularly those with gambling addictions.” *Id.*, *slip op.* at 9.

189. At the same time, the Court denied FanDuel’s and DraftKings’ applications for an injunction in companion cases they had filed against the Attorney General seeking to prevent any enforcement action he initiated. The Court also denied DraftKings’ and FanDuel’s subsequent application for a stay pending appeal.

190. On March 21, 2016, FanDuel and DraftKings suspended their operations in New York and a day later, New York Attorney General Eric Schneiderman issued a statement on Yahoo! Daily Fantasy Sports stating “that FanDuel and DraftKings will follow the law and stop taking **bets** in New York State and that Yahoo! will do the same” (emphasis supplied).

The Legislature Enacts Chapter 237 of the Laws of 2016 and Daily Fantasy Sports Starts Up Again

191. In the meantime, bills were introduced in both houses of the New York Legislature which ultimately culminated in the enactment of Chapter 237 of the Laws of 2016. Chapter 237 included a “legislative finding” that interactive fantasy sports are not games of chance, but rather games of skill and are, therefore, not “gambling” that would be subject to the prohibitions in Article 225 of the Penal Law, which was enacted by the Legislature pursuant to the directive in Article I, § 9 of the Constitution that the Legislature adopt laws to prevent gambling. *See* New York Racing, Pari-Mutuel Wagering and Breeding Law, § 1400(1), (2) as added by Chapter 237 of the Laws of 2016.

192. Chapter 237 of the Laws of 2016 also empowered the New York Gaming Commission to register operators and permit them to conduct interactive fantasy sports on

platforms over the internet that would allow them to accept bets from New York residents, all subject to rules and regulations to be promulgated by the Commission. The law also permitted existing operators to continue their present activity with temporary permits until the Commission adopted permanent regulations.⁶

193. Despite the attempt to except interactive fantasy sports from the prohibition against gambling, the legislation had all the earmarks of other legislation authorizing gambling, including (1) a minimum age for contestants, (2) limiting users to a single account, (3) requiring operators to enable users to exclude themselves from contests, and (4) mandating operators to provide information regarding assistance for compulsive players.

194. Based on that legislation, the Attorney General entered into stipulations of partial discontinuance of the State's lawsuits against FanDuel and DraftKings, relinquishing claims related to the illegality of gambling while preserving those related to false advertising and consumer fraud.

195. Following passage of the legislation and even before the Governor signed it into law, Attorney General Schneiderman issued a press release dated June 18, 2016 stating "that it will now be my job to ... defend [the law]," notwithstanding his prior statement that FanDuel and DraftKings were accepting "bets." As a result, FanDuel and DraftKings, along with several other temporary permittees, are once again fully operational

⁶ By letters dated August 22, 2016, the Commission issued temporary permits to FanDuel, DraftKings, Yahoo!, Inc., Fantasy Draft LLC and Star Street, Inc. On September 13, 2016, the Commission issued additional temporary permits to iTeam Network, DraftDay, Synkt Games, Inc. (doing business as letsRUMBL) and Fantasy Aces LP. All these businesses will be the beneficiaries of an unconstitutional law at the expense of the vast majority of New Yorkers who bet and lose playing DFS.

in New York just in time for the advent of the National Football League's regular 2016 season which "kicked off" on September 8, 2016.

196. The New York Gaming Commission will also be spending taxpayers' dollars to implement the legislation and exercise regulatory and enforcement oversight with respect to interactive fantasy sports.

197. Daily fantasy sports poses an immediate and serious threat to the State and, in particular, to those with gambling addictions and to the youth of this State, as emphasized by New York's Attorney General who stated: "Daily fantasy sports may be a particularly pernicious form of illegal gambling because it is so easy to access. Players can lose lots of money with a few touches of their smartphone – any time, any place, drunk or sober ... [I]t is extraordinarily difficult to verify the age of a gambler when they are nothing more than an online entity." New York Daily News, November 19, 2015. "Attorney General Eric Schneiderman: Daily Fantasy Sports Bluff the Law in N.Y." <http://www.nydailynews.com/new-york/ag-schneiderman-bad-gamble-bluff-law-article-1.2441071>

**AS AND FOR A FIRST, SEPARATE AND
COMPLETE CAUSE OF ACTION, PLAINTIFFS
ALLEGE AS FOLLOWS:**

198. Plaintiffs repeat and reallege all the foregoing paragraphs of this Complaint as if fully set forth herein.

199. Chapter 237 of the Laws of 2016 of the State of New York is in direct violation of Article I, § 9 of the Constitution of the State of New York in that it purports to not only exempt from the prohibition against gambling activity that is clearly gambling, but also to authorize such gambling.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter a judgment declaring Chapter 237 of the Laws of 2016 of the State of New York null and void, and that Defendants, their agents, and others working under or pursuant to their direction and control be enjoined from implementing any of its provisions or expending taxpayer dollars to implement any such provisions. Plaintiffs further request that this Court award such other further and different relief as it deems warranted, including, but not limited to, legal fees to Plaintiffs and/or their counsel, along with the costs and disbursements associated with this action.

DATED: October __, 2016
 Albany, New York

Yours, etc.

JENNIFER WHITE
KATHERINE WEST
CHARLOTTE WELLINS
ANNE REMINGTON

By:

Cornelius D. Murray, Esq.
O'CONNELL AND ARONOWITZ
Attorneys for Plaintiffs
Office and P.O. Address
54 State Street
Albany NY 12207-2501
(518) 462-5601

STATE OF NEW YORK)
)ss.:
COUNTY OF ALBANY)

CORNELIUS D. MURRAY, ESQ., being duly sworn, deposes and says that he is an attorney-at-law and is a member of the law firm of O'Connell and Aronowitz, P.C., attorneys for the Plaintiffs; that he has read the foregoing Complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

The reason why this verification is made by Deponent and not by the Plaintiffs, is that the Plaintiffs do not reside within the County of Albany, which is the county where Deponent has his offices.

Cornelius D. Murray, Esq.

Sworn to before me this
 day of , 2016.

Notary Public, State of New York

EXHIBIT A

CHAPTER 237 – LAWS OF 2016 OF THE STATE OF NEW YORK

A10736 Text:

STATE OF NEW YORK

10736

IN ASSEMBLY

June 14, 2016

Introduced by COMMITTEE ON RULES -- (at request of M. of A. Pretlow) --
read once and referred to the Committee on Racing and Wagering

AN ACT to amend the racing, pari-mutuel wagering and breeding law, in
relation to the registration and regulation of interactive fantasy
sports contests

The People of the State of New York, represented in Senate and Assem-
bly, do enact as follows:

- 1 Section 1. The racing, pari-mutuel wagering and breeding law is
2 amended by adding a new article 14 to read as follows:
3 ARTICLE 14
4 INTERACTIVE FANTASY SPORTS
5 Section 1400. Legislative findings and purpose.
6 1401. Definitions.
7 1402. Registration.
8 1403. Scope of registration review.
9 1404. Required safeguards, minimum standards.
10 1405. Powers and duties of the commission.
11 1406. Annual report.
12 1407. State tax.
13 1408. Additional regulatory costs.
14 1409. Disposition of taxes.
15 1410. Determination of tax liability.
16 1411. Contests authorized.
17 1412. Contests prohibited.
18 § 1400. Legislative findings and purpose. 1. The legislature hereby
19 finds and declares that:
20 (a) Interactive fantasy sports are not games of chance because they
21 consist of fantasy or simulation sports games or contests in which the
22 fantasy or simulation sports teams are selected based upon the skill and
23 knowledge of the participants and not based on the current membership of
24 an actual team that is a member of an amateur or professional sports
25 organization;
26 (b) Interactive fantasy sports contests are not wagers on future
27 contingent events not under the contestants' control or influence
28 because contestants have control over which players they choose and the
29 outcome of each contest is not dependent upon the performance of any one
30 player or any one actual team. The outcome of any fantasy sports contest

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 does not correspond to the outcome of any one sporting event. Instead,
2 the outcome depends on how the performances of participants' fantasy
3 roster choices compare to the performance of others' roster choices.

4 2. Based on the findings in subdivision one of this section, the
5 legislature declares that interactive fantasy sports do not constitute
6 gambling in New York state as defined in article two hundred twenty-five
7 of the penal law.

8 3. The legislature further finds that as the internet has become an
9 integral part of society, and interactive fantasy sports a major form of
10 entertainment for many consumers, any interactive fantasy sports
11 enforcement and regulatory structure must begin from the bedrock premise
12 that participation in a lawful and licensed interactive fantasy sports
13 industry is a privilege and not a right, and that regulatory oversight
14 is intended to safeguard the integrity of the games and participants and
15 to ensure accountability and the public trust.

16 § 1401. Definitions. As used in this article, the following terms
17 shall have the following meanings:

18 1. "Authorized player" shall mean an individual located in New York
19 state, who is not a prohibited player, that participates in an interac-
20 tive fantasy sports contest offered by a registrant.

21 2. "Collegiate sport or athletic event" shall mean a sport or athletic
22 event offered or sponsored by or played in connection with a public or
23 private institution that offers education services beyond the secondary
24 level.

25 3. "Commission" shall mean the New York state gaming commission.

26 4. "Entry fee" shall mean cash or cash equivalent that is paid by an
27 authorized player to an operator or registrant to participate in an
28 interactive fantasy sports contest offered by such operator or regis-
29 trant.

30 5. "High school sport or athletic event" shall mean a sport or athlet-
31 ic event offered or sponsored by or played in connection with a public
32 or private institution that offers education services at the secondary
33 level.

34 6. "Highly experienced player" shall mean an authorized player who
35 has:

36 (a) entered more than one thousand contests offered by a single opera-
37 tor or registrant; or

38 (b) won more than three prizes valued at one thousand dollars each or
39 more from a single operator or registrant.

40 7. "Horse racing event" shall mean any sport or athletic event
41 conducted in New York state subject to the provisions of articles two,
42 three, four, five, six, nine, ten and eleven of this chapter, or any
43 sport or athletic event conducted outside of New York state, which if
44 conducted in New York state would be subject to the provisions of this
45 chapter.

46 8. "Interactive fantasy sports contest" or "contest" shall mean a game
47 of skill wherein one or more contestants compete against each other by
48 using their knowledge and understanding of athletic events and athletes
49 to select and manage rosters of simulated players whose performance
50 directly corresponds with the actual performance of human competitors on
51 sports teams and in sports events.

52 9. "Interactive fantasy sports gross revenue" shall mean the amount
53 equal to the total of all entry fees not attributable to New York state
54 prohibited sports events that a registrant collects from all players,
55 less the total of all sums not attributable to New York state prohibited
56 sports events paid out as winnings to all players, multiplied by the

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1 resident percentage for New York state; provided, however, that the
2 total of all sums paid out as winnings to players shall not include the
3 cash equivalent value of any merchandise or thing of value awarded as a
4 prize.
5 10. "Interactive fantasy sports operator" or "operator" shall mean any
6 person or entity that offers any interactive fantasy sports contest to
7 any authorized player through any interactive fantasy sports platform.
8 11. "Interactive fantasy sports platform" or "platform" shall mean the
9 combination of hardware, software, and data networks used to manage,
10 administer, or control contests and any associated entry fees.
11 12. "Interactive fantasy sports registrant" or "registrant" shall mean
12 an operator that is registered by the commission. A registrant may
13 utilize multiple interactive fantasy sports platforms and offer multiple
14 contests, provided that each platform and each contest has been reviewed
15 and approved by the commission.
16 13. "Minor" shall mean any person under the age of eighteen years.
17 14. "Prohibited player" shall mean:
18 (a) any member, officer, employee or agent of an operator or regis-
19 trant;
20 (b) any spouse, child, brother, sister or parent residing as a member
21 of the same household in the principal place of abode of any member,
22 officer, employee or agent of an operator or registrant;
23 (c) any individual with access to non-public confidential information
24 about contests;
25 (d) any amateur or professional athlete whose performance may be used
26 to determine the outcome of a contest;
27 (e) any sports agent, team employee, referee, or league official asso-
28 ciated with any sport or athletic event on which contests are based;
29 (f) any individual located in a state where the conduct of contests is
30 expressly prohibited; or
31 (g) any minor.
32 15. "Prohibited sports event" shall mean any collegiate sport or
33 athletic event, any high school sport or athletic event or any horse
34 racing event.
35 16. "Resident percentage" shall mean, for each interactive fantasy
36 sports contest, the percentage, rounded to the nearest tenth of a
37 percent, of the total entry fees collected from players located in New
38 York state, divided by the total entry fees collected from all players
39 in interactive fantasy sports contests not prohibited in New York state.
40 17. "Sports event" shall mean any amateur or professional sport or
41 athletic event, except a prohibited sports event.
42 § 1402, Registration. 1. (a) No operator shall administer, manage, or
43 otherwise make available an interactive fantasy sports platform to
44 persons located in New York state unless registered with the commission
45 pursuant to section fourteen hundred three of this article. A registrant
46 may use multiple interactive fantasy sports platforms and offer multiple
47 types of contests, provided that each platform and each type of contest
48 has been reviewed and approved by the commission. This article, and any
49 and all rules and regulations adopted under the authority of this arti-
50 cle, shall apply only to interactive fantasy sports contests for which
51 an authorized player pays an entry fee.
52 (b) Any operator that was offering contests to persons located in New
53 York state prior to the tenth of November, two thousand fifteen, may
54 continue to offer contests to persons located in New York state until
55 such operator's application for registration has been approved or denied
56 in accordance with section fourteen hundred three of this article.

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1 provided that such operator receives a temporary permit pursuant to
2 subdivision two of this section and files an application for registra-
3 tion with the commission within ninety days of the promulgation of regu-
4 lations to effectuate this article.

5 2. The commission shall provide a temporary permit to each operator
6 that was offering contests pursuant to paragraph (b) of subdivision one
7 of this section to allow such operator to continue to offer such
8 contests, on a provisional basis, until such operator's application for
9 registration has been approved or denied in accordance with section
10 fourteen hundred three of this article, provided that such operator
11 meets all the requirements in section fourteen hundred four of this
12 article.

13 3. Registrations issued by the commission shall remain in effect for
14 three years. The commission shall establish a process for renewal.

15 4. Interactive fantasy sports contests offered by a registrant in
16 accordance with the provisions of this article shall not constitute
17 gambling as defined in article two hundred twenty-five of the penal law.

18 5. The commission shall publish a list of all operators registered in
19 New York state pursuant to this section on the commission's website for
20 public use.

21 6. The commission shall promulgate regulations to implement the
22 provisions of this article, including the development of the initial
23 form of the application for registration. Such regulations shall
24 provide for the registration and operation of contests in New York state
25 and shall include, but not be limited to, responsible protections with
26 regard to compulsive play and safeguards for fair play.

27 § 1403. Scope of registration review. 1. The commission shall
28 prescribe the initial form of the application for registration which
29 shall require, but not be limited to:

30 (a) the full name and principal address of the operator;

31 (b) if a corporation, the name of the state in which incorporated and
32 the full names and addresses of any partner, officer, director, share-
33 holder holding ten percent or more equity, and ultimate equitable
34 owners;

35 (c) if a business entity other than a corporation, the full names and
36 addresses of the principals, partners, shareholders holding five percent
37 or more equity, and ultimate equitable owners;

38 (d) whether such corporation or entity files information and reports
39 with the United States Securities and Exchange Commission as required by
40 section thirteen of the Securities Exchange Act of 1934, 15 U.S.C. §§
41 78a-78kk) or whether the securities of the corporation or entity are
42 regularly traded on an established securities market in the United
43 States;

44 (e) the type and estimated number of contests to be conducted annual-
45 ly;

46 (f) a statement of the assets and liabilities of the operator.

47 2. The commission may require the full names and addresses of the
48 officers and directors of any creditor of the operator, and of those
49 stockholders who hold more than ten percent of the stock of the credi-
50 tor.

51 3. Upon receipt of an application for registration for each individual
52 listed on such application as an officer or director, the commission
53 shall submit to the division of criminal justice services a set of fing-
54 erprints, and the division of criminal justice services processing fee
55 imposed pursuant to subdivision eight-a of section eight hundred thir-
56 ty-seven of the executive law and any fee imposed by the federal bureau

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1 of investigation. Upon receipt of the fingerprints, the division of
2 criminal justice services shall promptly forward a set of the individ-
3 ual's fingerprints to the federal bureau of investigation for the
4 purpose of a nationwide criminal history record check to determine
5 whether such individual has been convicted of a criminal offense in any
6 state other than New York or in a federal jurisdiction. The division of
7 criminal justice services shall promptly provide the requested criminal
8 history information to the commission. For the purposes of this section,
9 the term "criminal history information" shall mean a record of all
10 convictions of crimes and any pending criminal charges maintained on an
11 individual by the division of criminal justice services and the federal
12 bureau of investigation. All such criminal history information sent to
13 the commission pursuant to this subdivision shall be confidential and
14 shall not be published or in any way disclosed to persons other than the
15 commission, unless otherwise authorized by law.

16 4. Upon receipt of criminal history information pursuant to subdivi-
17 sion three of this section, the commission shall make a determination to
18 approve or deny an application for registration; provided, however, that
19 before making a determination on such application, the commission shall
20 provide the subject of the record with a copy of such criminal history
21 information and a copy of article twenty-three-A of the correction law
22 and inform such prospective applicant seeking to be credentialed of his
23 or her right to seek correction of any incorrect information contained
24 in such criminal history information pursuant to the regulations and
25 procedures established by the division of criminal justice services.
26 The commission shall deny any application for registration, or suspend,
27 refuse to renew, or revoke any existing registration issued pursuant to
28 this article, upon the finding that the operator or registrant, or any
29 partner, officer, director, or shareholder:

30 (a) has knowingly made a false statement of material fact or has
31 deliberately failed to disclose any information required by the commis-
32 sion;

33 (b) has had a registration or license to offer or conduct contests
34 denied, suspended, or revoked in any other state or country for just
35 cause;

36 (c) has legally defaulted in the payment of any obligation or debt due
37 to any state or political subdivision; or

38 (d) has at any time knowingly failed to comply with any requirement
39 outlined in section fourteen hundred four of this article, any other
40 provision of this article, any regulations promulgated by the commission
41 or any additional requirements of the commission.

42 5. All determinations to approve or deny an application pursuant to
43 this article shall be performed in a manner consistent with subdivision
44 sixteen of section two hundred ninety-six of the executive law and arti-
45 cle twenty-three-A of the correction law. When the commission denies an
46 application, the operator shall be afforded notice and the right to be
47 heard and offer proof in opposition to such determination in accordance
48 with the regulations of the commission.

49 § 1404. Required safeguards, minimum standards. 1. As a condition of
50 registration in New York state, each operator and registrant shall
51 implement the following measures:

52 (a) limit each authorized player to one active and continuously used
53 account, and prevent prohibited players from maintaining accounts or
54 participating in any contest offered by such operator or registrant;

55 (b) prohibit minors from participating in any contest, which includes:

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- 1 (i) if a registrant becomes or is made aware that a minor has partici-
2 ipated in one of its contests, such registrant shall promptly, within no
3 more than two business days, refund any deposit received from the minor,
4 whether or not the minor has engaged in or attempted to engage in a
5 contest; provided, however, that any refund may be offset by any prizes
6 already awarded;
- 7 (ii) each registrant shall publish and facilitate parental control
8 procedures to allow parents or guardians to exclude minors from access
9 to any contest or platform. Such procedures shall include a toll-free
10 number to call for help in establishing such parental controls; and
- 11 (iii) each registrant shall take appropriate steps to confirm that an
12 individual opening an account is not a minor.
- 13 (c) when referencing the chances or likelihood of winning in adver-
14 tisements or upon contest entry, make clear and conspicuous statements
15 that are not inaccurate or misleading concerning the chances of winning
16 and the number of winners;
- 17 (d) enable authorized players to exclude themselves from contests and
18 take reasonable steps to prevent such players from entering a contest
19 from which they have excluded themselves;
- 20 (e) permit any authorized player to permanently close an account
21 registered to such player, on any and all platforms supported by such
22 operator or registrant, at any time and for any reason;
- 23 (f) offer introductory procedures for authorized players, that shall
24 be prominently displayed on the main page of such operator or regis-
25 trant's platform, that explain contest play and how to identify a highly
26 experienced player;
- 27 (g) identify all highly experienced players in any contest by a symbol
28 attached to such players' usernames, or by other easily visible means,
29 on all platforms supported by such operator or registrant;
- 30 (h) disclose the number of entries a single authorized player may
31 submit to each contest;
- 32 (i) disclose the maximum number of total entries allowed for each
33 contest;
- 34 (j) implement measures to protect the privacy and online security of
35 authorized players and their accounts;
- 36 (k) offer all authorized players access to his or her account history
37 and account details;
- 38 (l) ensure authorized players' funds are protected upon deposit and
39 segregated from the operating funds of such operator or registrant and
40 otherwise protected from corporate insolvency, financial risk, or crimi-
41 nal or civil actions against such operator or registrant;
- 42 (m) list on each website, in a prominent place, information concerning
43 assistance for compulsive play in New York state, including a toll-free
44 number directing callers to reputable resources containing further
45 information, which shall be free of charge;
- 46 (n) ensure the value of any prizes and awards offered to authorized
47 players shall be established and made known to such players in advance
48 of the contest, and such value shall not be determined by the number of
49 authorized players or the amount of any entry fees paid by such players;
- 50 (o) ensure all winning outcomes reflect the relative knowledge and
51 skill of the authorized players and shall be determined predominantly by
52 accumulated statistical results of the performance of individuals in
53 sports events;
- 54 (p) ensure no winning outcome shall be based on the score, point
55 spread, or performance of a single sports team, or any combination of
56 such teams;

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1 (g) ensure no winning outcome shall be based solely on any single
2 performance of an individual athlete in a single sport or athletic
3 event; and

4 (r) ensure no game or contest shall be based on a prohibited sports
5 event.

6 2. Each registrant shall restrict the number of entries submitted by a
7 single authorized player for any contest to a maximum of one hundred
8 fifty entries per player per contest, or a maximum of three percent of
9 the total number of entries by all players for any contest, whichever is
10 less, or as determined by the commission. Registrants shall take reason-
11 able steps to prevent authorized players from submitting more than the
12 allowable number of entries per contest. The commission shall promul-
13 gate regulations to further effectuate this subdivision to ensure that
14 the number of entries submitted by a single authorized player for any
15 contest will lead to a fair and equitable distribution of number of
16 entries.

17 3. (a) Operators shall not directly or indirectly operate, promote, or
18 advertise any platform or contest to persons located in New York state
19 unless registered pursuant to this article.

20 (b) Unless otherwise approved by regulation of the commission, opera-
21 tors and registrants shall not directly or indirectly promote or adver-
22 tise any online fantasy or simulation sports games or contests with an
23 entry fee during the conduct of any online fantasy or simulation sports
24 games or contests without an entry fee. This paragraph shall not apply
25 to any operator or registrant that prohibits prohibited players from
26 participating in online fantasy or simulation sports games or contests
27 without an entry fee.

28 4. Registrants shall not offer any contest based on any prohibited
29 sports event.

30 5. Registrants shall not permit any minor or prohibited participant to
31 enter any contest.

32 6. Advertisements for contests and prizes offered by a registrant
33 shall not target prohibited participants, minors, or self-excluded
34 persons. Representations or implications about average winnings from
35 contests shall not be unfair or misleading. Such representations shall
36 include, at a minimum:

37 (a) the median and mean net winnings of all authorized players partic-
38 ipating in contests offered by such registrant; and

39 (b) the percentage of winnings awarded by the registrant to highly
40 experienced players participating in contests offered by such registrant
41 within the preceding calendar year.

42 7. Registrants shall prohibit the use of third-party scripts or
43 scripting programs for any contest and ensure that measures are in place
44 to deter, detect and, to the extent reasonably possible, prevent cheat-
45 ing, including collusion, and the use of cheating devices, including use
46 of software programs that submit entry fees or adjust the athletes
47 selected by an authorized player.

48 8. Operators and registrants shall develop and prominently display
49 procedures on the main page of such operator's or registrant's platform
50 for the filing of a complaint by the authorized player against such
51 registrant. An initial response shall be given by such registrant to
52 such player filing the complaint within forty-eight hours. A complete
53 response shall be given by such registrant to such player filing the
54 complaint within ten business days. An authorized player may file a
55 complaint alleging a violation of the provisions of this article with
56 the commission.

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1 9. Registrants shall maintain records of all accounts belonging to
2 authorized players and retain such records for five years from the date
3 an account was created.

4 § 1405. Powers and duties of the commission. 1. The commission shall
5 promulgate regulations to implement the provisions of and effectuate the
6 policy and objectives of this article as the commission may deem neces-
7 sary or advisable, including the development of the initial form of the
8 application for registration. Such regulations shall provide for the
9 registration and operation of contests in New York state and shall
10 include, without limitation, responsible protections with regard to
11 compulsive play and safeguards for fair play. Such regulations may regu-
12 late the conduct and operation of contests and platforms, protect
13 contestants and promote the fairness, honesty and integrity of contests.

14 2. The commission shall have the following powers and duties for
15 purposes of administering, regulating, and enforcing the provisions of
16 this article:

17 (a) all powers and duties assigned by this article, as well as all
18 powers necessary and proper to fully and effectively execute this arti-
19 cle;

20 (b) to approve and deny applications for registration to conduct
21 contests in New York state, and to suspend, refuse or renew, or revoke
22 any registration issued to a registrant under this article;

23 (c) to review and approve each platform and each contest offered by an
24 operator or registrant;

25 (d) to accept and investigate complaints of any kind from an author-
26 ized player and attempt to mediate such complaints where appropriate;

27 (e) to investigate alleged violations of this article;

28 (f) to initiate proper enforcement proceedings where such action is
29 deemed by the commission to be necessary or appropriate; and

30 (g) all powers and duties assigned by this chapter.

31 § 1406. Annual report. 1. Each registrant shall annually submit a
32 report to the commission no later than the thirtieth of June of each
33 year, which shall include the following information as it shall apply to
34 accounts held by authorized players located in New York state:

35 (a) the number of accounts held by authorized players on all platforms
36 offered by the registrant, and the number of accounts held by highly
37 experienced players on all platforms offered by the registrant;

38 (b) the total number of new accounts established in the preceding
39 year, as well as the total number of accounts permanently closed in the
40 preceding year;

41 (c) the total amount of entry fees received from authorized players;

42 (d) the total amount of prizes awarded to authorized players;

43 (e) the total amount of interactive fantasy sports revenue received by
44 the registrant;

45 (f) the total number of authorized players that requested to exclude
46 themselves from contests;

47 (g) any additional information that the commission deems necessary to
48 carry out the provisions of this article.

49 2. Upon the submission of such annual report, to such extent that the
50 commission deems it to be in the public interest, the commission shall
51 be authorized to conduct a financial audit of any registrant, at any
52 time, to ensure compliance with this article.

53 3. The commission shall annually publish a report based on the aggre-
54 gate information provided by all registrants pursuant to subdivision one
55 of this section, which shall be published on the commission's website no

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1 later than one hundred eighty days after the deadline for the submission
2 of individual reports as specified in subdivision one of this section.

3 § 1407. State tax. For the privilege of conducting interactive fanta-
4 sy sports contests in the state, registrants shall pay a tax equivalent
5 to fifteen percent of their interactive fantasy sports gross revenue
6 generated within the state, in addition, registrants shall pay a tax
7 equal to one-half of one percent, but not to exceed fifty thousand
8 dollars annually.

9 § 1408. Additional regulatory costs. The commission may assess annual-
10 ly, in arrears, on each registrant proportional to the interactive
11 fantasy sports gross revenue of such registrant in the preceding year
12 compared to the aggregate interactive fantasy sports gross revenue of
13 all registrants in the preceding year actual costs necessary to regulate
14 in accordance with the provisions of this article. Such assessments
15 shall be made only within amounts appropriated therefor.

16 § 1409. Disposition of taxes. 1. The commission shall pay into the
17 state lottery fund all taxes imposed by this article; any interest and
18 penalties imposed by the commission relating to those taxes; all penal-
19 ties levied and collected by the commission; and the appropriate funds,
20 cash or prizes forfeited from interactive fantasy sports.

21 2. The commission shall require at least monthly deposits by the
22 interactive fantasy sports operator of any payments pursuant to section
23 fourteen hundred seven of this article, at such times, under such condi-
24 tions, and in such depositories as shall be prescribed by the state
25 comptroller. The deposits shall be deposited to the credit of the state
26 lottery fund. The commission shall require a monthly report and reason-
27 ation statement to be filed with it on or before the tenth day of
28 each month, with respect to gross revenues and deposits received and
29 made, respectively, during the preceding month.

30 § 1410. Determination of tax liability. The commission may perform
31 audits of the books and records of an interactive fantasy sports opera-
32 tor with a permit or registrant, at such times and intervals as it deems
33 appropriate, for the purpose of determining the sufficiency of tax
34 payments. If a return required with regard to obligations imposed is not
35 filed, or if a return when filed or is determined by the commission to
36 be incorrect or insufficient with or without an audit, the amount of tax
37 due shall be determined by the commission. Notice of such determination
38 shall be given to the interactive fantasy sports operator liable for the
39 payment of the tax. Such determination shall finally and irrevocably fix
40 the tax unless the person against whom it is assessed, within thirty
41 days after receiving notice of such determination, shall apply to the
42 commission for a hearing in accordance with the regulations of the
43 commission.

44 § 1411. Contests authorized. Interactive fantasy sports contests
45 registered and conducted pursuant to the provisions of this chapter are
46 hereby authorized.

47 § 1412. Contests prohibited. The conduct of unregistered interactive
48 fantasy sports contests is prohibited.

49 § 2. Section 104 of the racing, pari-mutuel wagering and breeding law
50 is amended by adding a new subdivision 23 to read as follows:

51 23. To register and regulate interactive fantasy sports in New York
52 state.

53 § 3. This act shall take effect immediately.

EXHIBIT B

**DECISION AND ORDER DATED DECEMBER 11, 2015 BY SUPREME COURT,
NEW YORK COUNTY (Mendez, J.)**

***People v. FanDuel* (Index No. 453056/2015).**

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ

PART 13

Justice

THE PEOPLE OF THE STATE OF NEW YORK, By
ERIC T. SCHNEIDERMAN, Attorney General of the
State of New York,

Plaintiff,

against

FANDUEL, INC.,

Defendant.

INDEX NO. 453054/15
MOTION DATE 11-25-15
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 14 were read on this motion to/for Injunctive relief:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____ cross motion _____

Replying Affidavits _____

PAPERS NUMBERED

1 - 7

8 - 13

14

Cross-Motion : Yes ☒ No

Upon a reading of the foregoing cited papers it is Ordered that the motion by Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, for an Order seeking injunctive relief, enjoining and restraining Fanduel, Inc. from doing business in the State of New York, and from accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on defendant's website, is granted. The motion by Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, filed under Index #453054/2015, Motion Sequence 001, seeking injunctive relief, enjoining and restraining Draftkings, Inc. from doing business in the State of New York, accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on Draftkings, Inc.'s website, is granted.

Fanduel Inc.'s motion filed under Index # 161691/2015, Motion Sequence 001, seeking an Order pursuant to CPLR §§6301 and 6313, granting a preliminary injunction and temporary restraining order against the Attorney General of the State of New York and the State of New York, from taking any enforcement action or other action derived from any allegation that the operation of daily fantasy sports contests are a violation of law, against Fanduel, Inc., and its employees, agents and suppliers of goods and services is denied. Draftkings Inc.'s motion filed under Index Number 102014/2015, Motion Sequence 001, seeking an Order pursuant to CPLR §§6301 and 6313 granting a preliminary injunction and temporary restraining order against the Attorney General of the State of New York and the State of New York from taking any enforcement action or other action, against Draftkings, Inc., and its employees, agents and suppliers of goods and services, and for expedited discovery, hearing and trial, is denied.

Fanduel, Inc. and Draftkings, Inc. are online Daily Fantasy Sports (DFS) companies that operate websites. On October 6, 2015, the Office of the New York Attorney General (hereinafter referred to as "NYAG") commenced an investigation into both

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Fanduel, Inc. and Draftkings, Inc., related to allegations that employees of the competing company websites utilized inside information to improve chances of winning competitions on the competing sites. As a result of the investigation the NYAG determined that the DFS competitions on Fanduel, Inc. and Draftkings, Inc. websites, are in actuality illegal gambling operations, subjecting the public to the fraudulent perceptions that the games are winnable.

On November 10, 2015 the NYAG served a "cease and desist" letter on both companies, demanding that they, "cease and desist from illegally accepting wagers in New York State in connection with 'Daily Fantasy Sports (DFS)'." The NYAG's investigation determined that DFS on Fanduel, Inc. and Draftkings, Inc., results in customers placing bets on events they cannot control or influence, "on the real-game performance of professional athletes" and that in reality the entrance fees are wagers on a "contest of chance," with the results depending on numerous elements of chance to a "material degree." The NYAG also determined that the websites involve the companies having full and active control with direct profit from the wagering, they set prizes, control relevant variables such as athletes wages, and promote themselves like a lottery. DFS on the companies websites was deemed to create public health and economic concerns including the equivalent of gambling addiction, with advertisements misleading the public with the lure of easy money while only the top one percent, typically professional gamblers profit. The NYAG pursuant to General Business Law §§349 and 350, provided five days for Fanduel, Inc. and Draftkings, Inc. to show why the NYAG should not initiate any proceedings.

On November 13, 2015, Fanduel Inc. commenced an action against Eric T. Schneiderman, in his official capacity as NYAG and the State of New York, under Index #161691/2015. The complaint asserts two causes of action seeking declaratory and injunctive relief and alleges that Fanduel Inc. operates in compliance with New York Law and functions as a game of skill. Fanduel, Inc., under Index #161691/2015, brought an Order to Show Cause seeking a preliminary injunction and temporary restraining order pursuant to CPLR §6301 and §6313, enjoining Eric T. Schneiderman, in his capacity as NYAG, and the State of New York, from taking any enforcement action or other action derived from any allegation that the operation of DFS contests are a violation of the law, as against Fanduel, Inc., and its employees, agents and suppliers of goods and services. On November 16, 2015, this Court denied Fanduel Inc.'s application for a temporary restraining order and reserved its decision on the injunctive relief. This Decision and Order also addresses the defendant's motion filed under Index #161691/2015, Motion Sequence 001.

On November 13, 2015, Draftkings, Inc. commenced an Article 78 proceeding under index #102014/2015, against the NYAG and the State of New York. The verified petition alleges that the actions of the NYAG are arbitrary and capricious, in excess of his jurisdiction, and seeks declaratory and injunctive relief. The petition asserts claims of violation of the due process and separation of powers provisions in the New York State Constitution and violation of equal protection provision and uncompensated takings in violation of the New York State Constitution, the U.S. Constitution, and 42 U.S.C. §1983. Draftkings, Inc. also asserted claims of tortious interference with a contract and tortious interference with prospective business relations. Draftkings, Inc. brought an Order to Show Cause seeking injunctive relief and a temporary restraining order, enjoining the NYAG and the State of New York, from taking any enforcement action or other action derived from any allegation that the operation of daily sports contests are a violation of the law, together with seeking expedited discovery, hearing and trial. On

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November 16, 2015 this Court denied Draftkings, Inc.'s application for a temporary restraining order and reserved its decision on the injunctive relief. This Decision and Order also addresses Draftkings, Inc.'s motion filed under Index #102014/2015, Motion Sequence 001.

The NYAG commenced an action against Fanduel Inc., under index #453056/2015, on November 17, 2015. The complaint asserts nine causes of action and alleges that plaintiff under the authority of Executive Law §63[12], is entitled to enjoin the defendants from illegal and fraudulent conduct and seeks injunctive relief pursuant to Business Corporation Law (BCL) §1303, General Business Law (GBL) §§ 349 and 350. The NYAG's motion filed under index # 453056/2015, Motion Sequence 001, seeks an Order pursuant to Executive Law §63[12] BCL§1303, GBL §§349 and 350, and CPLR §§6301 and 6313 enjoining and restraining Fanduel, Inc., from doing business in the State of New York as a result of its fraudulent and illegal practices. The NYAG also seeks to enjoin the defendant from accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on its website.

The NYAG commenced a separate action against Draftkings, Inc., under index #453054/2015, on November 17, 2015 asserting nine causes of action making the same allegations as were asserted against Fanduel, Inc. The NYAG's motion filed under index #453054/2015, Motion Sequence 001, seeks an Order granting the same injunctive relief against Draftkings, Inc., as is sought against Fanduel, Inc..

The NYAG on its motions filed under index #453054/2015 and 453056/2015 argues that pursuant to Executive Law §63[12], the Attorney General has authority to seek injunctive relief because of Fanduel, Inc. and Draftkings, Inc.'s repeated, ongoing, illegal and fraudulent activities. The NYAG also seeks injunctive relief under the consumer protection provisions of GBL §§ 349 and 350. Pursuant to BCL §1303, the NYAG claims empowerment to sue to enjoin and restrain Fanduel, Inc. and Draftkings, Inc. as foreign corporations registered in Delaware, and doing business in New York from doing business in New York as a result of the fraudulent and illegal acts or practices.

Executive Law §63[12], permits the NYAG to bring an action for injunctive relief or damages to remedy repeated fraud or illegality (State of New York v. Princess Prestige Co., 42 N.Y. 2d 104, 366 N.E. 2d 61, 397 N.Y.S. 2d 360 [1977]). The NYAG is entitled to injunctive relief pursuant to Executive Law § 63 [12], upon a showing that there was a repeated statutory violation (Schneiderman v. One Source Networking, Inc., 125 A.D. 3d 1345, 3 N.Y.S. 3d 505 [4th Dept., 2015]). A prima facie claim of fraud pursuant to Executive Law § 63 (12), is established by showing that, "...the act complained of has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud" (People ex rel. Spitzer v. Applied Card Sys., Inc., 27 A.D. 3d 104, 805 N.Y.S. 2d 175 [1st Dept., 2005] and People ex rel. Spitzer v. General Electric Company, Inc., 302 A.D. 314, 756 N.Y.S. 2d 520 [1st Dept., 2003]).

Pursuant to GBL §349, a prima facie case is established by a showing of injury resulting from "consumer-oriented conduct," and that the defendant is engaging in an act or practice that is materially misleading or deceptive, likely to, "...mislead a reasonable consumer acting reasonably under the circumstances" (Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y. 2d 20, 647 N.E. 2d 741, 623 N.Y.S. 2d 529 [1995]). Pursuant to GBL §349, an omission is deceptive, if a business possesses material or information relevant to the consumer and fails to provide it to the consumer (Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y. 2d 20,

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supra). GBL §350, specifically applies to false advertising, otherwise the standard to establish a prima facie case is the same as that for a claim, pursuant to GBL §349. (Goshen v. Mutual Life Ins. Company of New York, 98 N.Y. 2d 314, 774 N.E. 2d 1190, 746 N.Y.S. 2d 858 [2002]). GBL §350, also requires an allegation of reliance on, or knowledge of the defendant's advertisement (Non-Linear Trading Co. v. Braddis Associates, Inc., 243 A.D. 2d 107, 675 N.Y.S. 2d 5 [1st Dept., 1998]).

BCL §1303, permits the NYAG to, "...bring an action to enjoin or annul the ~~authority of a foreign corporation which operates within this state contrary to law~~, has done or omitted any act which if done by a domestic corporation would be a cause for its dissolution under section 1101 (Attorney-general's action for judicial dissolution)..." (McKinney's Con. Laws Annotated, Business Corporation Law §1303). BCL §1303, has been applied to enjoin a foreign corporation from doing business in a fraudulent or illegal manner and the court can grant a decree of forfeiture and annulment of the right to do business in the state of New York (People v. American Ice. Co., 135 A.D. 180, 120 N.Y.S. 41 [1st Dept., 1909]).

The NYAG argues that the DFS games played on the Fanduel, Inc. and Draftkings, Inc. websites constitutes illegal sports gambling as defined in the New York State Constitution Article I, § 9[1] and under Penal Law §225.00-225.40, specifically Penal Law §225.05, §225.10, §225.15 and §225.20 which are alleged to have been violated. It is the NYAG's contention that Penal Law sections §225.00-225.40, apply to the DFS games played on Fanduel, Inc. and Draftkings, Inc.'s websites, which is "gambling" as defined in Penal Law §225.00 [2], with each player participating in a "contest of chance" as defined in Penal Law §225.00 [1], not a game of skill.

New York State Constitution Article I, §9[1], states in relevant part,

"...no lottery or the sale of lottery tickets, pool-selling, book making or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, except pari-mutual betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, and except casino gambling at no more than seven facilities as authorized and prescribed by the legislature, shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section." (Emphasis added) (McKinney's Con. Laws Annotated, Const. Art. I, §9[1]).

The provisions of New York State Constitution Article I, §9[1], reflects the public policy of the State of New York against commercialized gambling. The New York State Constitution Article I, §9[1] permits the legislature through the relevant sections of the Penal Law to regulate gambling, the statutory provisions are subject to strict construction and prohibit unauthorized activity. Laws authorizing gambling should not be extended by implication beyond what is specified by the Legislature (New York Racing Ass'n, Inc. v. Hoblock, 270 A.D. 2d 31, 704 N.Y.S. 2d 52 [1st Dept., 2000]).

The definition of "gambling" is found in the Penal Law §225.00 [2], which defines gambling as when a person, "... stakes or risks something of value upon the outcome of

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a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome." (McKinney's Con. Laws Annotated, Penal Law §225.00[2]). Penal Law §225.00 [6] defines "something of value" as, "...any form of money or property... or credit...involving...a privilege of playing at a game or scheme without charge," the award of a free game has been held a violation of the Penal Law. The term "something of value," is established by the payment of cash to play, and the receipt of a cash award. (Plato's Cave Corp. v. State Liquor Authority, 68 NY 2d 791, 498 N.E. 2d 420, 506 N.Y.S. 2d 856 [1986]).

It is the NYAG's contention that DFS played on Fanduel, Inc. and Draftkings, Inc., results in customers placing bets labeled "entrance fees" on events they cannot control or influence, relying on the real-game performance of professional athletes, to win a prize, which amounts to gambling as defined in Penal Law §225.00 [2]. The NYAG claims that the "entrance fee" is not returned in the event of a loss and because the statute only requires "something of value," not requiring that it be classified as a "bet or wager" the "entrance fee" is sufficient to establish gambling.

In support of the NYAG's contention, internet screen shots are submitted showing the manner in which a potential DFS player may sign-up for each of the websites. The published rules or terms of use for each website include statements of legality and the finality of the roster. Terms of use and rules for each website establish that a player selects a set number of professional athletes for their DFS team and once the DFS team is selected, the players are "locked in," and the selections may no longer be changed. Scoring for the DFS team is tallied by Fanduel, Inc. and Draftkings, Inc., who rely on individual real game performances of the athletes selected for the DFS team by the online player. The NYAG provided a copy of the DFS scoring system for professional football but the scoring system varies with different types of sports. The terms of use and rules for each website state that points allotted to the DFS team are affected if there is a rain out, postponement, suspension, or shortened game for any of the DFS athletes selected by the player as part of the DFS team. The final tally of a daily or weekly DFS competition occurs when the final box scores of the sporting events of the respective DFS team players have concluded.

The NYAG claims the "entrance fees" a DFS player can pay ranges from \$.25 to \$10,600.00 on Draftkings, Inc.'s website and from \$1.00 to \$10,600.00 on Fanduel, Inc.'s website. The amounts of the entrance fee is calculated in part on salary capped at up to \$50,000.00 and on the athletes perceived value. There are multiple types of contests a DFS player may enter including, "head to head" match-ups involving a DFS player betting that the line-up they choose will perform better than those picked by another DFS player, and "Guaranteed Prize Pools" involving a pool with up to hundreds of thousand other players. It is also the NYAG's contention that the types of games played are more like "parlay" bets contingent on combinations of games and "prop" bets relying on statistics, than "contests of skill." The NYAG submits advertisements for Fanduel, Inc. and Draftkings, Inc. as proof that they advertise themselves as legal, operate in a manner similar to that of a lottery, and that they claim competitions are "winnable" regardless of the level of skill, with instant gratification to DFS players.

It is the NYAG's contention that both Fanduel, Inc. and Draftkings, Inc. take between 6% and more than 14% of the "entry fee" as "commission" on every competition, and equates this to the equivalent of a "rake" or "vig" charge taken on wagers by a sports bookie. Their terms of use on entry fees are exactly alike, there is no

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specific set fee or percentage paid as an entry fee, DFS players participate in a contest with the amount debited from their account determined by Fanduel, Inc. and Draftkings, Inc.. There is no breakdown of fees per type of game, which across different sports can potentially result in multiple entry fees paid daily by the same DFS player, allowing Fanduel, Inc. and Draftkings, Inc. to profit from every entry fee being paid.

Penal Law §225.00 [1] defines "'Contest of Chance' to mean, "...any contest, game, gaming scheme, or gaming device in which the outcome depends in a material degree upon an element of chance, *notwithstanding* that skill of the contestants may also be a factor therein" (emphasis added). (McKinney's Con. Laws Annotated, Penal Law §225.00[1]).

The NYAG contends that DFS played on the websites are "contests of chance" because although the skill of the contestants is a factor, the outcome depends substantially on chance and factors not within the DFS player's control, including whether the athletes chosen are injured, or the game is "rained out." Furthermore, once a team is chosen for a contest there is no means of physically altering the outcome.

Fanduel, Inc. and Draftkings, Inc., do not refute the evidence provided by the NYAG, instead each seeks a preliminary injunction pursuant to CPLR § 6301 and a temporary restraining order pursuant to CPLR § 6313. They argue that DFS games as played on their websites are not illegal gambling. They claim that DFS is a "game of skill" and not a "contest of chance," with DFS players acting like general managers and relying on a team that does not exist in reality. They refer to *Humphrey v. Viacom, Inc.*, 2007 WL 1797648, and the Federal Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) 31 U.S.C. §§5362, 5363, as support for their contention that they have the likelihood of success because, they argue, DFS is not illegal gambling as defined in the New York Penal Law §225.00.

CPLR § 6301 grants this court the power to issue an order directing that a party be enjoined from performing an act, or to refrain from performing an act which would be injurious. The issuance of a preliminary injunction is within the discretion of the trial court. A movant seeking a stay or injunction, is required to show, "(1) the likelihood of ultimate success on the merits; (2) irreparable injury to him absent granting of the preliminary injunction; and (3) that a balancing of the equities favors his position" (*Doe v. Axelrod*, 73 N.Y. 2d 748, 532 N.E. 2d 1272, 536 N.Y.S. 2d 44 [1998] and *Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 N.Y. 3d 839, 833 N.E. 2d 191, 800 N.Y.S. 2d 48 [2005]).

A preliminary injunction should not be granted unless its necessity and justification is clear based on undisputed facts (*Residential Board of Managers of the Columbia Condominium v. Alden*, 178 A.D. 2d 121, 576 N.Y.S. 2d 859 [1st Dept., 1991]). The likelihood of ultimate success on the merits requires a prima facie showing of the right to relief (*DiMartini v. Chatham Green, Inc.*, 169 A.D. 2d 689, 575 N.Y.S. 2d 712 [1st Dept., 1991]). Irreparable injury requires a showing that there is no other remedy at law, including monetary damages, that could adequately compensate the party seeking relief (*Zodkevitch v. Feibush*, 49 A.D. 3d 424, 854 N.Y.S. 2d 373 [1st Dept., 2008]). The balancing of the equities requires the Court to determine the relative prejudice to each party accruing from a grant or denial of the requested relief (*Ma v. Lien*, 198 A.D. 2d 186, 604 N.Y.S. 2d 84 [1st Dept., 1993]). CPLR §6313 permits the imposition of a temporary Restraining Order pending the determination of a motion for preliminary

injunction (People v. Asiatic Petroleum Corp., 45 A.D. 2d 835, 357 N.Y.S. 2d 542 [1st Dept., 1974]).

Fanduel, Inc. and Draftkings Inc., each refer to Humphrey v. Viacom, Inc., 2007 WL 1797648 [D.C.N.J., 2007], an unreported decision from the New Jersey U.S. District Court addressing the New Jersey Qui Tam statute (N.J.S.A. 2A:40-1) permitting illegal gambling losers to recover losses. This case has no application in this jurisdiction and is distinguishable. The Court in Humphrey v. Viacom, Inc., granted a motion to dismiss the complaint, and determined that the payment of an entry fee in order to participate in seasonal fantasy sports is not an illegal "wager" or "bet" pursuant to the New Jersey Qui Tam statute. The Court in Humphrey v. Viacom, Inc., stated that, "entry fees do not constitute bets or wagers where they are paid unconditionally for the privilege of participating in a contest, and the prize is for an amount certain that is guaranteed to be won by one of the contestants (but not the entity offering the prize)." Humphrey v. Viacom, Inc., involved seasonal fantasy sports in which the players paid a nonrefundable one time entry fee. Contrary to Humphrey v. Viacom, Inc., the facts in this action involve DFS, the participants pay a fee every time they play, potentially multiple times daily instead of one seasonal entry fee, with a percentage of every entry fee being paid to Fanduel, Inc. and Draftkings, Inc.. Furthermore the New York State Penal Law does not refer to "wagering" or "betting," rather it states that a person, "risks something of value." The payment of an "entry fee" as high as \$10,600.00 on one or more contests daily could certainly be deemed risking "something of value." The language of Penal Law §225.00 is broadly worded and as currently written sufficient for finding that DFS involves illegal gambling.

Fanduel, Inc. and Draftkings, Inc. refer to the Federal Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) 31U.S.C. §§5362, 5363, arguing it carves out an exception for Fantasy Sports. UIGEA [1][e][ix], permits participation in, "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 that is a member of an amateur or professional sports organization..."(31U.S.C. §5362 [1][e][ix]) The UIGEA language exempting fantasy sports has no corresponding authority under New York State law as currently written. UIGEA creates an exception for state statutes, specifically stating, "The term 'unlawful internet gambling' means to place, receive, or otherwise knowingly transmit a bet or wager by 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 (emphasis added) (31U.S.C. §5362 [2][10][A]). The exception found in UIGEA does not apply under the current New York State statutory language. UIGEA by its own language does not apply to "...placing, receiving, or otherwise transmitting a bet or wager where..(i) the bet or wager is initiated and received or otherwise made exclusively within a single State;..."(31U.S.C. §5362 [2] [10][B][i], [ii]). UIGEA is not a basis to find the NYAG exceeded its authority or to grant Fanduel, Inc. and Draftkings, Inc., the injunctive relief sought.

Fanduel, Inc. and Draftking, Inc.'s claims of laches or estoppel cannot be invoked against a government agency to prevent the discharge of statutory duties where the acts the agency seeks to prevent could easily result in extensive public fraud (Parkview Associates v. City of New York, 71 N.Y. 2d 274 77, 519 N.E. 2d 1372, 525 N.Y.S. 2d 176 [1988] and New York State Medical Transporters Ass'n, Inc. v. Perales, N.Y. 2d 126, 566 N.E. 2d 134, 564 N.Y.S. 2d 1007 [1990]). The possibility of estoppel against a governmental agency is to be denied, in all but the, "rarest of cases" such as where,

(1) there is no awareness of the law sought to be enforced and it could not be discovered by reasonable diligence, (2) there is no potential for public fraud and (3) "manifest injustice" will result (New York State Medical Transporters Ass'n, Inc. v. Perales, N.Y. 2d 126, supra). The DFS corporations, have not stated a basis to find the "rarest of cases" exception applies to the NYAG's claims, and the potential for public fraud has not been eliminated. Defendant's contention that plaintiff failed to seek restraint as to Seasonal Fantasy Sports, is not relevant to the pending motion because that relief is not before this Court.

Draftkings, Inc., has asserted constitutional arguments of violations of due process and equal protection in its Order to Show Cause seeking injunctive relief. Due process requires notice and the opportunity to be heard (People v. Apple Health & Sports Clubs, 80 N.Y. 2d 803, 599 N.E. 2d 279, 587 N.Y.S. 2d 279 [1992]). The NYAG conducted an investigation over the course of a month and provided both notice and an opportunity for Draftkings, Inc. to be heard in the November 10, 2015, "cease and desist letter." Draftkings, Inc. commenced a special proceeding and brought an Order to Show Cause seeking injunctive relief during the period provided by the NYAG. The due process argument fails because Draftkings, Inc. has been provided with the opportunity to be heard by both the NYAG and this Court. The equal protection argument also fails to avoid injunctive relief. Draftkings, Inc. claims that the NYAG is selectively enforcing the illegal gambling provisions of Penal Law §§225.00-225.40, solely against DFS as played on the corporation's website. Draftkings, Inc. is required to provide evidence that other DFS websites or corporations that are "similarly situated" have been exempted by the NYAG from its investigation and enforcement to establish a violation of the equal protection provisions of the Constitution (Dezer Entertainment Concepts, Inc. v. City of New York, 8 A.D. 3d 37, 778 N.Y.S. 2d 18 [1st Dept., 2004]). Draftkings, Inc. failed to provide evidence that "similarly situated" DFS websites were exempted from the NYAG's investigation, such that injunctive relief should be denied.

Draftkings, Inc. asserted the constitutional argument of separation of powers in its Order to Show Cause filed under index # 102014/2015. It fails to establish that the injunctive relief sought by the NYAG should be avoided under the separation of powers doctrine. It is Draftkings, Inc.'s contention that the NYAG by its interpretation of the New York State Constitution, Article I, §9 and the Penal Law, is engaging in "Judicial powers" and "legislative powers" instead of applying executive authority. Draftkings, Inc. claims that the NYAG is applying judiciary power by determining whether a particular individual or company has violated the law and seeking to shut the company down. The November 10, 2015, "cease and desist letter," was not a final determination, and the NYAG in providing the opportunity for Draftkings, Inc. to be heard did not infringe on "judicial powers." The injunctive relief sought by the NYAG is not seeking to determine the ultimate issues raised by the parties.

Draftkings, Inc. claims that the NYAG is engaging in policy decisions that should be restricted to the legislature. The separation of powers is implied in each of the three coordinated branches of government: executive, legislative and judicial. The Legislature's powers involve, "making critical policy decisions, while the executive branch's responsibility is to implement those policies." Although there is a "functional separation" between the legislative and the executive branches they, "...cannot neatly be divided into isolated pockets" (Bourquin v. Cuomo, 85 N.Y. 2d 781, 652 N.E. 2d 171, 628 N.Y.S. 2d 618 [1995]). The four part test for infringement of legislative powers involves determining if an agency, (1) is not authorized to, "structure its decision making in a cost-benefit analysis," (2) create a comprehensive set of rules without guidance from the

legislature, (3) is acting to "fill the vacuum" in an area the legislature had been unable to, "reach an agreement on the goals and methods that should govern" and (4) the technical competence necessary to provide details for broadly stated legislative policies (*Boreali v. Axelrod*, 71 N.Y. 2d 1, 517 N.E. 2d 1350, 523 N.Y.S. 2d 464 [1987]). The four part test requires proof that the statutory provisions, "have numerous exemptions," there is repeated attempts at legislative enactments with failure to reach an agreement in the legislature after "substantial public debate and vigorous lobbying," and a showing that there is no special expertise or competence of the agency involved (*Festa v. Leshen*, 145 A.D. 2d 49, 537 N.Y.S. 2d 147 [1st Dept., 1989]). Draftkings, Inc. has not provided any proof in support of the contentions that the NYAG has failed to meet the four part test. The mere assertions that the NYAG fails to meet the requirements is not enough to avoid the injunctive relief sought by the NYAG.

The NYAG in opposition to the separation of powers argument, argues that the injunctive relief sought by Draftkings, Inc. amounts to the extraordinary relief of a writ of prohibition. "The extraordinary remedy of a writ of prohibition lies only where 'there is a clear legal right' to such relief, and only when the body or officer involved acts or threatens to act in a manner over which he or she has no jurisdiction or where he or she exceeds his or her authorized powers..." (*Kimyagarova v. Spitzer*, 791 N.Y.S. 2d 610 [2nd Dept., 2005]). Draftkings, Inc.'s argument that the NYAG has exceeded its authority and misinterpreted the meaning and application of the New York State Constitution Article I, §9 and the Penal Law, does not require that this Court utilize the extraordinary remedy of restraining the NYAG (*Morgenthau v. Erlbaum*, 59 N.Y. 2d 143, 451 N.E. 2d 150, 464 N.Y.S. 2d 392 [1983] and *Matter of Johnson v. Price*, 28 A.D. 3d 79, 810 N.Y.S. 2d 133 [1st Dept., 2006]). Draftkings, Inc. has not established a clear legal right to the injunctive relief sought, prohibiting the NYAG from taking enforcement action.

The NYAG has established the likelihood of success warranting injunctive relief under the authority provided in Executive Law §63[12], to avoid fraudulent or illegal acts and violations of GBL §§349 and 350. The NYAG has a greater likelihood of success on the merits under the New York State Constitution Article I, §9, and the definitions of gambling and "contest of chance" as currently stated in Penal Law §225.00 [1],[2]. The NYAG has also established that both Fanduel, Inc. and Draftkings, Inc., as out of state corporations, can be enjoined pursuant to BCL §1303 from their activities in the State of New York. The NYAG is not required to show irreparable harm under Executive Law §63[12], it is implied in the need to prevent the effects of fraudulent and illegal conduct on the general public (*People v. Apple Health & Sports Clubs*, 599 N.Y. 2d 803, *supra*). The balancing of the equities are in favor of the NYAG and the State of New York due to their interest in protecting the public, particularly those with gambling addictions. Fanduel, Inc. and Draftkings, Inc., are only enjoined and restrained in the State of New York. DFS is permitted in other states, and the protection of the general public outweighs any potential loss of business.

Fanduel, Inc. and Draftkings, Inc. have not established entitlement to a preliminary injunction, however, a granting or denial of a preliminary injunction does not constitute a determination of the ultimate issues (*Walker Memorial Baptist Church v. Saunders*, 285 N.Y. 462, 35 N.E. 2d 42 [1941] and *Jou-Jou Designs, Inc. v. International Ladies Garment Workers' Union, Local 23-25*, 94 A.D. 2d 395, 465 N.Y.S. 2d 163 [1st Dept., 1983]). Fanduel, Inc. and Draftkings, Inc.'s failure to establish entitlement to a preliminary injunction, is not a final determination of the merits and rights of the parties, therefore discovery is needed after joinder of issue. The relief sought by Draftkings, Inc.

in its motion papers filed under Index Number 102014/2015, Motion Sequence 001, seeking expedited discovery, hearing and trial, is premature since the NYAG and State of New York have not had an opportunity to answer.

Accordingly, it is ORDERED that the motion by Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, for an Order pursuant to Executive Law §63[12], Business Corporation Law §1303, General Business Law §§ 349 and 350, and CPLR §§6301 and 6313, seeking injunctive relief and a temporary restraining order, enjoining and restraining Fanduel, Inc. from doing business in the State of New York in violation of the New York State Constitution Article I, §[9] and New York Penal Law §225.05, §225.10, §225.15 and §225.20, and from accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on defendant's website, is granted, and it is further,

ORDERED, that Fanduel, Inc., is temporarily enjoined and restrained from doing business in the State of New York, including accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on Fanduel, Inc.'s website pending a final determination, and it is further,

ORDERED, that Fanduel, Inc. shall have thirty (30) days from the service of a copy of this Order with Notice of Entry to serve an answer or otherwise move in the action filed under Index #453056/2015, and it is further,

ORDERED that the motion by Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, filed under Index #453054/2015, Motion Sequence 001, for an Order pursuant to Executive Law §63[12], Business Corporation Law §1303, General Business Law §§ 349 and 350, and CPLR §§6301 and 6313, seeking injunctive relief and a temporary restraining order, enjoining and restraining Draftkings, Inc. from doing business in the State of New York in violation of the New York State Constitution Article I, Section §[9] and New York Penal Law §225.05, §225.10, §225.15 and §225.20, and from accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on defendant's website, is granted, and it is further,

ORDERED, that Draftkings, Inc., is enjoined and restrained from doing business in the State of New York, including accepting entry fees, wagers, or bets from New York State consumers in regards to any competition, game or contest run on Draftkings, Inc.'s website until a final determination, and it is further,

ORDERED, that Draftkings, Inc. shall have thirty (30) days from the service of a copy of this Order with Notice of Entry to serve an answer or otherwise move in the action filed under Index #453054/2015, and it is further,

ORDERED, that Fanduel, Inc.'s motion filed under Index Number 161691/2015, Motion Sequence 001, seeking an Order pursuant to CPLR §§6301 and 6313, granting a preliminary injunction and temporary restraining order enjoining Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, and the State of New York, from taking any enforcement action or other action derived from any allegation that the operation of daily fantasy sports contests are a violation of law, against Fanduel, Inc., and its employees, agents and suppliers of goods and services, is denied, and it is further,

ORDERED, that the office of Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, and the State of New York shall serve an answer or otherwise move in the action filed by Fanduel, Inc. under Index #161691/2015 within thirty (30) days of service of a copy of this Order with Notice of Entry, and it is further,

ORDERED, that DraftKings, Inc.'s motion filed under Index #102014/2015, Motion Sequence 001, seeking an Order, granting a preliminary injunction and temporary restraining order enjoining Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, from taking any enforcement action or other action, against DraftKings, Inc., and its employees, agents and suppliers of goods and services, seeking expedited discovery, hearing and trial, is denied, and it is further,

ORDERED, that the office of Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, shall serve an answer or otherwise move in the proceeding filed by DraftKings, Inc. under Index # 102014/2015 within thirty (30) days of service of a copy of this Order with Notice of Entry.

COPY

ENTER:

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ,
J.S.C.

Dated: December 11, 2015

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

EXHIBIT C

NY ATTORNEY GENERAL LETTER DATED 11/10/15 TO FANDUEL



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF ECONOMIC JUSTICE
INTERNET BUREAU

November 10, 2015

**NOTICE TO CEASE AND DESIST AND
NOTICE OF PROPOSED LITIGATION PURSUANT TO
NEW YORK EXECUTIVE LAW § 63(12) AND GENERAL BUSINESS LAW § 349**

BY CERTIFIED AND EXPRESS MAIL

Mr. Nigel Eccles
Chief Executive Officer
FanDuel Inc.
19 Union Square West, 9th Floor
New York, NY 10003

Dear Mr. Eccles:

This letter constitutes a demand that FanDuel, Inc. ("FanDuel") cease and desist from illegally accepting wagers in New York State in connection with "Daily Fantasy Sports."

As you know, on October 6, 2015, the Office of the New York State Attorney General ("NYAG") commenced an investigation of FanDuel. Although this inquiry initially centered on allegations of employee misconduct and unfair use of proprietary information, FanDuel's operations and business model – known colloquially as Daily Fantasy Sports ("DFS") – necessarily came under review.

Our review concludes that FanDuel's operations constitute illegal gambling under New York law, according to which, "a person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence." FanDuel's customers are clearly placing bets on events outside of their control or influence, specifically on the real-game performance of professional athletes. Further, each FanDuel wager represents a wager on a "contest of chance" where winning or losing depends on numerous elements of chance to a "material degree."

FanDuel DFS contests are neither harmless nor victimless. Daily Fantasy Sports are creating the same public health and economic concerns as other forms of gambling, including addiction. Finally, FanDuel's advertisements seriously mislead New York citizens about their prospects of winning.

We believe there is a critical distinction between DFS and *traditional* fantasy sports, which, since their rise to popularity in the 1980s, have been enjoyed and legally played by millions of New York residents. Typically, participants in traditional fantasy sports conduct a competitive draft, compete over the course of a long season, and repeatedly adjust their teams. They play for bragging rights or side wagers, and the Internet sites that host traditional fantasy sports receive most of their revenue from administrative fees and advertising, rather than profiting principally from gambling. For those reasons among others, the legality of traditional fantasy sports has never been seriously questioned in New York.

Unlike traditional fantasy sports, the sites hosting DFS are in active and full control of the wagering: FanDuel and similar sites set the prizes, control relevant variables (such as athlete “salaries”), and profit directly from the wagering. FanDuel has clear knowledge and ongoing active supervision of the DFS wagering it offers. Moreover, unlike traditional fantasy sports, DFS is designed for instant gratification, stressing easy game play and no long-term strategy. For these and other reasons, DFS functions in significantly different ways from sites that host traditional fantasy sports.

Further, FanDuel has promoted, and continues to promote DFS like a lottery, representing the game to New Yorkers as a path to easy riches that anyone can win. The FanDuel ads promise: “anybody can play, anybody can succeed”; “Play for real money with immediate cash payouts ... the money is real!” and similar enticements. Like most gambling operations, FanDuel’s own numbers reveal a far different reality. In practice, DFS is far closer to poker in this respect: a small number of professional gamblers profit at the expense of casual players. To date, our investigation has shown that the top one percent of FanDuel’s winners receive the vast majority of the winnings.

Finally, during the course of our investigation, the New York Attorney General has been deeply concerned to learn from health and gambling experts that DFS appears to be creating the same public health and economic problems associated with gambling, particularly for populations prone to gambling addiction and individuals who are unprepared to sustain losses, lured by the promise of easy money. Certain structural aspects of DFS make it especially dangerous, including the quick rate of play, the large jackpots, and the false perception that it is eminently winnable. Ultimately, it is these types of harms that our Constitution and gambling laws were intended to prevent in New York.

The illegality of DFS is clear from any reasonable interpretation of our laws, beginning with the New York State Constitution. The Constitution prohibits gambling in all forms not specifically authorized:

[E]xcept as hereinafter provided, **no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling**, except lotteries operated by the state . . . , except pari-mutuel betting on horse races . . . , and except casino gambling at no more than seven facilities. . . **shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to**

prevent offenses against any of the provisions of this section.

N.Y. Const. Art. I, § 9 (emphasis added).

To enforce this clause, the Legislature established a series of criminal offenses applying to businesses that promote gambling. *See, generally*, N.Y. Penal Law §§ 225.00-225.40. These provisions all apply the same statutory definition of gambling:

A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

N.Y. Penal Law § 225.00(2). The penal law imposes no criminal liability on individual bettors, focusing instead on bookmakers and other operations that advance or profit from illegal gambling activity. *See, e.g.*, N.Y. Penal Law § 225.10 (Promoting Gambling in the first degree).

FanDuel wagers easily meet the definition of gambling. FanDuel bettors make bets (styled as “fees”) that necessarily depend on the real-world performance of athletes and on numerous elements of chance. The winning bettors receive large cash prizes – and the company takes a “rake” or a cut of from each wager.¹

Accordingly, we demand that FanDuel cease and desist from illegally accepting wagers in New York State as part of its DFS contests.

This letter also serves as formal pre-litigation notice pursuant to New York State General Business Law (“GBL”) §§ 349 and 350 and Executive Law § 63(12). These statutes direct the State to give notice prior to commencing a summary proceeding to enjoin repeated illegal and deceptive acts and practices, and to obtain additional injunctive relief, restitution, penalties, damages, and other relief that a court may deem just and proper.

The unlawful and illegal conduct under consideration by our Office includes, but is not limited to, the following:

- (a) Running a book-making or other kind of gambling business in violation of Article I, Section 9 of the New York State Constitution;
- (b) Knowingly advancing and profiting from unlawful gambling activity by receiving and accepting in any one day, more than five bets totaling more than five thousand dollars in violation of New York Penal Law § 225.10;
- (c) Knowingly advancing or profiting from unlawful gambling activity in violation of New York Penal Law § 225.05;

¹ Washington State, which has substantially the same statutory definition of gambling, has reached the same legal conclusions with respect to DFS.

- (d) With knowledge of the contents thereof, possessing any writing, paper, instrument or article of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise and constituting, reflecting or representing more than five bets totaling more than five thousand dollars in violation of New York Penal Law § 225.20;
- (e) With knowledge of the contents thereof, possessing any writing, paper, instrument or article of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise in violation of New York Penal Law § 225.15;
- (f) Misrepresenting that FanDuel complies with applicable laws; misrepresenting the likelihood that an ordinary player will win a jackpot; misrepresenting the degree of skill implicated in the games; and misrepresenting that FanDuel's games are not considered gambling, in violation of Executive Law § 63(12) and GBL §§ 349 and 350; and
- (g) Conducting or transacting its business in a persistently fraudulent and illegal manner in violation of BCL § 1303.

Pursuant to GBL §§ 349 and 350, FanDuel is afforded the opportunity to show orally or in writing to this Office, within five business days of receipt of this notice, why the Attorney General should not initiate any proceedings.

Sincerely,



Kathleen McGee
Chief, Internet Bureau

cc: Marc Zwillinger, Esq.

EXHIBIT D

NY ATTORNEY GENERAL LETTER DATED 11/10/15 TO DRAFTKINGS



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF ECONOMIC JUSTICE
INTERNET BUREAU

November 10, 2015

**NOTICE TO CEASE AND DESIST AND
NOTICE OF PROPOSED LITIGATION PURSUANT TO
NEW YORK EXECUTIVE LAW § 63(12) AND GENERAL BUSINESS LAW § 349**

BY CERTIFIED AND EXPRESS MAIL

Mr. Jason Robins
Chief Executive Officer
DraftKings, Inc.
376 Boylston Street, Ste 501
Boston, MA 02116-3825

Dear Mr. Robins:

This letter constitutes a demand that DraftKings, Inc. ("DraftKings") cease and desist from illegally accepting wagers in New York State in connection with "Daily Fantasy Sports."

As you know, on October 6, 2015, the Office of the New York State Attorney General ("NYAG") commenced an investigation of DraftKings. Although this inquiry initially centered on allegations of employee misconduct and unfair use of proprietary information, DraftKings' operations and business model – known colloquially as Daily Fantasy Sports ("DFS") – necessarily came under review.

Our review concludes that DraftKings' operations constitute illegal gambling under New York law, according to which, "a person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence." DraftKings' customers are clearly placing bets on events outside of their control or influence, specifically on the real-game performance of professional athletes. Further, each DraftKings wager represents a wager on a "contest of chance" where winning or losing depends on numerous elements of chance to a "material degree."

DraftKings DFS contests are neither harmless nor victimless. Daily Fantasy Sports are creating the same public health and economic concerns as other forms of gambling, including addiction. Finally, DraftKings' advertisements seriously mislead New York citizens about their prospects of winning.

We believe there is a critical distinction between DFS and *traditional* fantasy sports, which, since their rise to popularity in the 1980s, have been enjoyed and legally played by millions of New York residents. Typically, participants in traditional fantasy sports conduct a competitive draft, compete over the course of a long season, and repeatedly adjust their teams. They play for bragging rights or side wagers, and the Internet sites that host traditional fantasy sports receive most of their revenue from administrative fees and advertising, rather than profiting principally from gambling. For those reasons among others, the legality of traditional fantasy sports has never been seriously questioned in New York.

Unlike traditional fantasy sports, the sites hosting DFS are in active and full control of the wagering: DraftKings and similar sites set the prizes, control relevant variables (such as athlete “salaries”), and profit directly from the wagering. DraftKings has clear knowledge and ongoing active supervision of the DFS wagering it offers. Moreover, unlike traditional fantasy sports, DFS is designed for instant gratification, stressing easy game play and no long-term strategy. For these and other reasons, DFS functions in significantly different ways from sites that host traditional fantasy sports.

Further, DraftKings has promoted, and continues to promote DFS like a lottery, representing the game to New Yorkers as a path to easy riches that anyone can win. The DraftKings ads promise: “It’s the simplest way of winning life-changing piles of cash”; “The giant check is no myth. . . BECOME A MILLIONAIRE!” and similar enticements. Like most gambling operations, DraftKings’ own numbers reveal a far different reality. In practice, DFS is far closer to poker in this respect: a small number of professional gamblers profit at the expense of casual players. To date, our investigation has shown that the top one percent of DraftKings’ winners receive the vast majority of the winnings.

Finally, during the course of our investigation, the New York Attorney General has been deeply concerned to learn from health and gambling experts that DFS appears to be creating the same public health and economic problems associated with gambling, particularly for populations prone to gambling addiction and individuals who are unprepared to sustain losses, lured by the promise of easy money. Certain structural aspects of DFS make it especially dangerous, including the quick rate of play, the large jackpots, and the false perception that it is eminently winnable. Ultimately, it is these types of harms that our Constitution and gambling laws were intended to prevent in New York.

The illegality of DFS is clear from any reasonable interpretation of our laws, beginning with the New York State Constitution. The Constitution prohibits gambling in all forms not specifically authorized:

[E]xcept as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state . . . , except pari-mutuel betting on horse races . . . , and except casino gambling at no more than seven facilities. . . shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

N.Y. Const. Art. I, § 9 (emphasis added).

To enforce this clause, the Legislature established a series of criminal offenses applying to businesses that promote gambling. *See, generally*, N.Y. Penal Law §§ 225.00-225.40. These provisions all apply the same statutory definition of gambling:

A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

N.Y. Penal Law § 225.00(2). The penal law imposes no criminal liability on individual bettors, focusing instead on bookmakers and other operations that advance or profit from illegal gambling activity. *See, e.g.*, N.Y. Penal Law § 225.10 (Promoting Gambling in the first degree).

DraftKings wagers easily meet the definition of gambling. DraftKings bettors make bets (styled as “fees”) that necessarily depend on the real-world performance of athletes and on numerous elements of chance. The winning bettors receive large cash prizes – and the company takes a “rake” or a cut of from each wager.¹

Accordingly, we demand that DraftKings cease and desist from illegally accepting wagers in New York State as part of its DFS contests.

This letter also serves as formal pre-litigation notice pursuant to New York State General Business Law (“GBL”) §§ 349 and 350 and Executive Law § 63(12). These statutes direct the State to give notice prior to commencing a summary proceeding to enjoin repeated illegal and deceptive acts and practices, and to obtain additional injunctive relief, restitution, penalties, damages, and other relief that a court may deem just and proper.

The unlawful and illegal conduct under consideration by our Office includes, but is not limited to, the following:

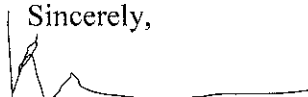
- (a) Running a book-making or other kind of gambling business in violation of Article I, Section 9 of the New York State Constitution;
- (b) Knowingly advancing and profiting from unlawful gambling activity by receiving and accepting in any one day, more than five bets totaling more than five thousand dollars in violation of New York Penal Law § 225.10;
- (c) Knowingly advancing or profiting from unlawful gambling activity in violation of New York Penal Law § 225.05;

¹ Washington State, which has substantially the same statutory definition of gambling, has reached the same legal conclusions with respect to DFS.

- (d) With knowledge of the contents thereof, possessing any writing, paper, instrument or article of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise and constituting, reflecting or representing more than five bets totaling more than five thousand dollars in violation of New York Penal Law § 225.20;
- (e) With knowledge of the contents thereof, possessing any writing, paper, instrument or article of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise in violation of New York Penal Law § 225.15;
- (f) Misrepresenting that DraftKings complies with applicable laws; misrepresenting the likelihood that an ordinary player will win a jackpot; misrepresenting the degree of skill implicated in the games; and misrepresenting that DraftKings' games are not considered gambling, in violation of Executive Law § 63(12) and GBL §§ 349 and 350; and
- (g) Conducting or transacting its business in a persistently fraudulent and illegal manner in violation of BCL § 1303.

Pursuant to GBL §§ 349 and 350, DraftKings is afforded the opportunity to show orally or in writing to this Office, within five business days of receipt of this notice, why the Attorney General should not initiate any proceedings.

Sincerely,



Kathleen McGee
Chief, Internet Bureau

cc: Stuart Shorenstein, Esq.
Alex Southwell, Esq.