

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

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

Plaintiffs,

-against-

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

Defendants.

AFFIRMATION
ON BEHALF OF
PLAINTIFFS IN
OPPOSITION TO
DEFENDANTS'
MOTION TO
DISMISS

Index No. 05861-16

RJI No.

CORNELIUS D. MURRAY, an attorney duly admitted to practice before the courts
of this State, hereby affirms under penalties of perjury as follows:

1. I am the attorney for Plaintiffs in the above-captioned action and
respectfully submit this Affirmation in support of Plaintiffs' opposition to Defendants'
Motion to Dismiss for failure to state a cause of action.

2. Attached hereto as Exhibit "A" is a true and complete copy of a "Special
to the New York Daily News" dated November 19, 2015, written and submitted by
Attorney General Eric Schneiderman.

3. Attached hereto as Exhibit "B" is a true and complete copy of an archived
post which was submitted by Attorney General Schneiderman on behalf of Plaintiffs as
NYSCEF Document No. 21 in a case entitled *People ex rel. Schneiderman v. DraftKings*
(Supreme Court, New York County, Index No. 453054/2015).

4. Attached hereto as Exhibit "C" is a true and complete copy of NYSCEF
Document No. 25 submitted by Attorney General Schneiderman in *People ex rel.*
Schneiderman v. DraftKings.

5. Attached hereto as Exhibit "D" is a true and complete copy of a Memorandum of Law in support of a Motion for a Preliminary Injunction submitted by Attorney General Schneiderman in *People ex rel. Schneiderman v. DraftKings, Inc.*

6. Attached hereto as Exhibit "E" is a true and complete copy of a Memorandum of Law submitted by Attorney General Schneiderman on behalf of Plaintiffs in *People ex rel. Schneiderman v. DraftKings*. This document was NYSCEF Document No. 76.

7. Attached hereto as Exhibit "F" is a true and complete copy of an article from the *Washington Post* entitled "Daily Fantasy Sports Sites Say Their Users Aren't Gambling. They're Wrong." This document was submitted by Attorney General Schneiderman in *People ex rel. Schneiderman v. DraftKings*.

8. Attached hereto as Exhibit "G" is a true and complete copy of an opinion from the Attorney General of the State of Hawaii, addressing the issue of whether Daily Fantasy Sports constitutes "gambling." This document was submitted by Attorney General Schneiderman in *People ex rel. Schneiderman v. DraftKings*.

9. Attached hereto as Exhibit "H" is a true and complete copy of an opinion of the Attorney General of the State of Maryland, addressing the issue of whether or not Daily Fantasy Sports is gambling. This document was also submitted by Attorney General Schneiderman in the case of *People ex rel. Schneiderman v. DraftKings*.

10. Attached hereto as Exhibit "I" is a true and complete copy of an opinion of the Attorney General of the State of Illinois, addressing the question of whether or not daily fantasy sports constitutes gambling. It was submitted by Attorney General Schneiderman in the case of *People ex rel. Schneiderman v. DraftKings*.

11. Attached hereto as Exhibit "J" is a true and complete copy of the opinion of the Attorney General of the State of Texas, addressing the question of whether daily fantasy sports constitutes gambling. It was submitted by Attorney General Schneiderman in a case entitled *People ex rel. Schneiderman v. DraftKings*.

12. Attached hereto as Exhibit "K" is a true and complete copy of the Affirmation of the Attorney General of the State of Mississippi, addressing the question of whether daily fantasy sports constitutes gambling. It was submitted by Attorney General Schneiderman in a case entitled *People ex rel. Schneiderman v. DraftKings*.

13. Attached hereto as Exhibit "L" is a true and complete copy of an opinion of the Attorney General of the State of Louisiana, addressing the question of whether or not daily fantasy sports constitutes gambling. It was submitted by Attorney General Schneiderman in a case entitled *People ex rel. Schneiderman v. DraftKings*.

14. Attached hereto as Exhibit "M" is a true and complete copy of an opinion of the Attorney General of the State of Nevada, addressing the question of whether or not daily fantasy sports constitutes gambling. It was submitted by Attorney General Schneiderman in a case entitled *People ex rel. Schneiderman v. DraftKings*.

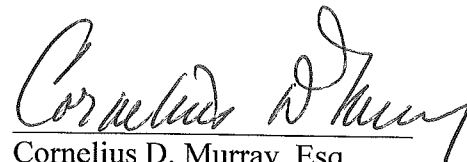
15. Attached hereto as Exhibit "N" is a true and complete copy of an article entitled "Former Congressman Says DFS Is Cauldron of Daily Betting." It was submitted as a document by Attorney General Schneiderman in a case entitled *People ex rel. Schneiderman v. DraftKings*.

16. Attached hereto as Exhibit "O" is a true and complete copy of an article entitled "Why Sheldon Edelson Is Against Daily Fantasy Sports."

17. Attached hereto as Exhibit "P" is a true copy of the Assembly Legislative Memorandum in support of the bill that became Chapter 237 of the Laws of 2016.

18. Attached hereto as Exhibit "Q" is a true copy of the Senate Legislative Memorandum in support of the bill that became Chapter 237 of the Laws of 2016.

DATED: April 6, 2017
Albany, New York


Cornelius D. Murray, Esq.

G:\DATA\Health Department\CDM\Daily Fantasy Sports Lawsuit\AMmurray.docx

Exhibit A

Attorney General Eric Schneiderman: Daily fantasy sports bluff the law in N.Y.

BY ERIC SCHNEIDERMAN

SPECIAL TO NEW YORK DAILY NEWS Thursday, November 19, 2015, 8:36 PM



The CEO of DraftKings suggested that it operates in the "gambling space," and described its revenue model as "identical to a casino." (SCOTT OLSON/GETTY IMAGES)

My job is to enforce the law, without fear or favor. For more than a century, New York laws have banned gambling. The few narrow exceptions that exist — which do not include sports betting — all come with strong regulation and oversight to ensure fairness and protect New Yorkers from fraud.

So when a massive, illegal gambling operation exploded in New York — along with allegations of potentially fraudulent practices — it was not even a question that my responsibility was to take action. That is why I have asked a court to stop the top two daily fantasy sports companies, DraftKings and FanDuel, from continuing to operate in New York.

Daily fantasy sports is much closer to online poker than it is to traditional fantasy sports. Unlike most traditional, season-long fantasy sports sites, which make most of their money from administrative fees and advertising, FanDuel and DraftKings take a cut of every bet. That is what bookies do, and it is illegal in New York.

DAVID BOIES: SCHNEIDERMAN'S OVERREACH ON FANTASY SPORTS

In fact, as our court papers lay out, these companies are based on business models that are identical to other forms of gambling. FanDuel was created by a veteran of the legal online betting industry in the United Kingdom, while the CEO of DraftKings suggested that it operates in the "gambling space," and described its revenue model as "identical to a casino." FanDuel and DraftKings have made the argument, over and over — including yesterday in this paper — that they run "games of skill" and are therefore legal. This is nonsense. New York law prohibits sports wagering — betting money on a future event outside of the gambler's control — regardless of the skill involved. Yet this provision of the law is deliberately ignored by both FanDuel and DraftKings.

Consider the final moments of a football game where the outcome has been decided and the winning quarterback takes a knee to run out the clock and assure victory. Let's say it's Eli Manning, and the Giants are defeating the Eagles or the Cowboys. Statistically, this play would cost the quarterback one yard — a yard that could make the difference between someone on DraftKings or FanDuel winning or losing tens of thousands of dollars.



FanDuel was created by a veteran of the legal online betting industry in the United Kingdom. (SCOTT OLSON/GETTY IMAGES)

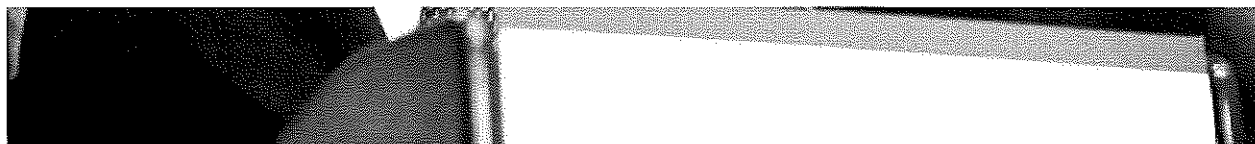
What did that have to do with the bettor's skill? It's the classic risk involved in sports betting.

Games of chance often involve some amount of skill; this does not make them legal. Good poker players often beat novices. But poker is still gambling, and running a poker room — or online casino — is illegal in New York.

Like online poker, daily fantasy sports rely on a steady stream of "minnows" to feed the "sharks." That's why more than 89% of one site's players are losers, despite seemingly endless TV ads promising easy money. This doesn't bear on the question of whether daily fantasy sports is legal — but it is a reminder that laws against gambling are more than just the whims of the state.

CHECK OUT OUR NEW APP: GET THE DAILY NEWS ON ANDROID & IOS





Eric Schneiderman is New York's attorney general. (BARRY WILLIAMS/FOR NEW YORK DAILY NEWS)

In fact, we have heard from experts that daily fantasy sports players are increasingly showing up in Gamblers Anonymous meetings and the offices of addiction counselors. In 2013, the National Council on Problem Gambling estimates the annual costs of gambling addiction in the United States at about \$7 billion, including from crime, incarceration and bankruptcy.

Daily fantasy sports may be a particularly pernicious form of illegal gambling precisely because it is so easy to access. Players can lose lots of money with a few touches on their smartphone — any time, any place, drunk or sober. Finally, it is extraordinarily difficult to verify the age of a gambler when they are nothing more than an online identity.

Daily fantasy sports companies are welcome to try and persuade the Legislature, the governor and the public that their businesses should be legalized and regulated like every other form of legal gambling in New York. Until then, I believe they are as illegal as a casino in Times Square — and, in the absence of any consumer protections or oversight, potentially more harmful. I was elected to enforce the law, and that's exactly what I intend to do.

Eric Schneiderman is New York's attorney general.

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Exhibit B

FRONT ALL RANDOM GADGETS SPORTS GAMING PICS WORLDNEWS VIDEOS ASKREDDIT AWW MUSIC FUNNY NEWS MORE



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Want to join? Log in or sign up in seconds. | English

This is an archived post. You won't be able to vote or comment.

We quit our jobs to pursue a dream of starting a fantasy sports game company. Last week we raised \$1.4M to do it. AMA.

submitted 3 years ago * by dkredditor

We are 3 guys who played fantasy sports so much that we thought we could build a business around it. We all quit our jobs at the same time, started the process of trying to get money from people, went broke, but ultimately succeeded in the end (so far). Ask us anything.

Edit:

Proof is here:

<http://www.facebook.com/draftkings> and here:

<http://www.bizjournals.com/boston/blog/startups/2012/07/draftkings-fantasy-sports-atlas-venture.html>

24 81 comments share

All 81 Comments

sorted by: best

[-] **PowerTaxRelief** 4 points 3 years ago

I wasn't sure how I felt about this idea until you explained it fully. Holy crap this is awesome. Get this on Grantland--your target audience!

welcome to
/r/IAmA

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Submitted on **26 Jul 2012**

24
points (70% upvoted)

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AMAs are scheduled in Eastern Standard Time (GMT-5:00).

We quit our jobs to pursue a dream of starting a fantasy sports game company. Last week we raised \$1.4M t...

[permalink](#)

[–] [dkredditor](#) [S] 3 points 3 years ago

Wow.. thanks! I'll check out Grantland
thanks for the tip!

[permalink](#) [parent](#)

[–] [\[deleted\]](#) 3 points 3 years ago

First of all, what's your website? Second of all,
what has been your biggest setback, and finally,
why in the hell did you guys do this (make the
company, when there already exist so many
fantasy sports leagues),

Thanks!

[permalink](#)

[–] [dkredditor](#) [S] 5 points 3 years ago*

1. Our site is <http://www.draftkings.com>
2. Hard to say what the biggest setback was but here are a few..raising money is extremely difficult..dozens of meetings canceled last minute.. you spend the entire night preparing for a meeting with a guy who can make you or break you, and he cancels the morning of the meeting. That's incredibly heartbreaking and demoralizing. The other big one is when your friends or family aren't 100% behind you. One of the other guys has had a lot of issues with his personal life on this... and it comes out in stressful situations.
3. The concept is different from traditional fantasy leagues. Our concept is a mashup between poker and fantasy sports. Basically, you pick a team, deposit your wager, and if your team wins, you get the pot. Fantasy sports has a carve out from the 2006 gambling regulation because it's considered a game of skill. This concept where you can basically "bet" your team will win is new and different from traditional leagues that last an entire season. [edit spelling and addition of #3]

[permalink](#) [parent](#)

[–] [\[deleted\]](#) -1 points 3 years ago

		Person	Description
13 Nov	10am	Betsy Mayotte	American Student Assistance
13 Nov	12pm	Ron Jeremy	Porn Star
13 Nov	12pm	Flobots	Musicians
13 Nov	2pm	Lockheed Martin	FORTIS Exoskeleton Team
13 Nov	4pm	Greg Cipes	Voice Actor
13 Nov	4pm	Toyota Mirai team	Hydrogen powered car production team
15 Nov	5pm	Rainn Wilson	Actor/Author
16 Nov	1pm	Union of Concerned Scientists	Nonprofit science advocacy organization
18 Nov	12pm	Carl Zimmer	Author
18 Nov	3pm	Jack Douglass	YouTube Personality
19 Nov	3pm	Keith "Bang Bang" McCurdy	Celebrity Tattoo Artist
19 Nov	3pm	Rooster Teeth	Production Company
20 Nov	11am	Col. Richard Graham	Former SR-71 Pilot
20 Nov	2pm	Hubble Heritage Team	Scientists

[see more...](#)

Submitting:

AMAs should be about:

- Something uncommon that plays a central role in your life, or
- A truly interesting and unique event.
- Explanation and examples of this rule can be found [here](#)

We quit our jobs to pursue a dream of starting a fantasy sports game company. Last week we raised \$1.4M t...

So this is "a game of skill", and online poker is "a place where terrorists launder money and destroy the soul of America"? Of course!

[permalink](#) [parent](#)

28 Sept 1 [barnackeljuice](#) 2 points 3 years ago [NASA](#) [Semi-Truck Driver](#) [05 Oct](#) [NASA](#) [Mars Travel Scientists](#) [02 Oct](#) [HOWIE CARR](#)

Forgive my ignorance, but what exactly are fantasy sports?

[Please check out our Rules and FAQs](#)

Something like those mini-games in The Legend of Zelda, you know, the "favourite sports of Hyrule" kind of thing that totally would never exist in real life ? Like, uh...fishing?

[permalink](#)

[–] [dkredditor](#) [S] 3 points 3 years ago

There are different types, but I'll give you a simple example. For our daily fantasy baseball, you have 9 positions, pitcher, catcher, 1st, 2nd, 3rd, short stop, and 3 outfielders. You pick any player from any team playing in any game tomorrow. I might pick a pitcher from Atlanta, a catcher from Detroit, and so on. My team gets points when the players on the real teams perform certain things. For example, when anyone on my fantasy team hits a homerun in real life, I get points on my team. The person with the most points at the end of ALL the games, wins. In our case, you win the total wager amount of all the people who had teams in that contest. If there were 10 people and each put in \$10 dollars, you'd win \$100 (minus 10% which goes to us).

[permalink](#) [parent](#)

[–] [KorayA](#) 2 points 3 years ago

Have you thought about using PFF stats to change scoring? Using their advanced metrics you could revolutionize fantasy football. I suppose you could do the same with sabremetrics, I've been waiting for someone to do this for a while.

[permalink](#)

[–] [dkredditor](#) [S] 2 points 3 years ago

No I haven't.. would be interested in hearing about it though.. can you elaborate on it more?

All AMAs require proof.

- Proof should be included in the text of the post when you start your AMA. If it must remain confidential, you can message it to the moderators and we can verify you.
- See here for [information](#) and examples

Request threads

- Requests must be reasonable and realistic. All requests must have 5 questions for the person being requested.
- Requests for celebrities must contain their public contact info in the body of the request.
- See here for [information](#) about requests

Commenting:

Please note:

- All initial responses to posters must contain a properly punctuated question.
- Attempting to bypass this rule by adding a ? to a non question will result in a permanent ban.
- See more on our [comment removals policy](#) here

Other:

Useful Links!

- 1 [Step-by-step guide to doing an AMA](#)
- 2 [Our Traffic and Visitor Stats](#)
- 3 [Related subreddits](#)

We quit our jobs to pursue a dream of starting a fantasy sports game company. Last week we raised \$1.4M t...

[permalink](#) [parent](#)

[–] [albenesi](#) 2 points 3 years ago

Are you hiring?

[permalink](#)

[–] [dkredditor](#) [S] 2 points 3 years ago

We are hiring for all kinds of stuff, especially tech! send your resume to mkalish@draftkings.com

[permalink](#) [parent](#)

[–] [SodaPopinski69](#) 2 points 3 years ago

I just joined your site and am participating in a weekly contest today cause I saw your post. I like the site very much so far :)

[permalink](#)

[–] [\[deleted\]](#) 1 point 3 years ago

What is your company called? What is the mission statement? What are you selling? What makes you different from other similar ideas? Congrats on raising money and following your dreams.

[permalink](#)

[–] [dkredditor](#) [S] 3 points 3 years ago

1. Company is called DraftKings (<http://www.draftkings.com>)
2. We're not selling anything other than you can play fantasy games every day and win real money.
3. The concept is different from traditional fantasy leagues. Our concept is a mashup between poker and fantasy sports. Basically, you pick a team, deposit your wager, and if your team wins, you get the pot. Fantasy sports has a carve out from the 2006 gambling regulation because its considered a game of skill. This concept where you can basically "bet" your team will win is new and different from traditional leagues that last an entire season.

[permalink](#) [parent](#)

[–] [\[deleted\]](#) 1 point 3 years ago

What is the cost of getting involved? Is it betting against the house, ie the company?

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X

211 points · 316 comments
[IamA Flobots AMA!](#)

We quit our jobs to pursue a dream of starting a fantasy sports game company. Last week we raised \$1.4M t...

[permalink](#) [parent](#)

[–] [dkredditor](#) [S] 3 points 3 years ago

No, there is no house advantage because the house does not participate in the game at all. You are playing against other players, we simply act as the "points tally" and "money distributor". There are free games that don't cost anything at all (but you also don't win any real money). Here is an example of that

<https://www.draftkings.com/Contest/DraftTeam/15194> - You are simply playing for fun. You pick a team, and at the end of all the games, you either win or lose.

With regard to real money, here is an example of what is called a "Free roll".

<https://www.draftkings.com/Contest/DraftTeam/15195> This is where you literally are picking a team and if your team wins, you win the pot. There is zero cost for it. We lose money on those, but it gets people playing the game.

There are other real money games as well, but you put a wager down on them as your bet, and if you win, you get the pot.

[permalink](#) [parent](#)

[–] **BRACE-YOURSELF** 1 point 3 years ago

How did you get the money!? from whom!?

[permalink](#)

[–] [dkredditor](#) [S] 2 points 3 years ago

Atlas Venture and a few others..

<http://www.masshightech.com/stories/2012/07/16/daily75-DraftKings-nets-14M-in-seed-capital.html>

[permalink](#) [parent](#)

[–] **[deleted]** 1 point 3 years ago*

What is your Fantasy Football sleeper pick? (I saw its fantasy baseball but the season is half way over.)

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permalink

[–] dkredditor [S] 3 points 3 years ago

I don't have one.. but I'll ask the other guys
and get back to you :)

permalink parent

[–] dkredditor [S] 3 points 3 years ago

I don't know if I'd call him a sleeper, but
I think Demaryius Thomas could have a
big year with Peyton at the helm. He'll
probably be available late. Also, Randy
Moss might be worth a late flyer, though
he is a bit riskier to me. What do you
guys think?

permalink parent

[–] dusters 1 point 3 years ago

Foster or Rice #1?

permalink

[–] dkredditor [S] 2 points 3 years ago

Is that still a question? Foster.

permalink parent

[–] pewshda 1 point 3 years ago

Awwwwwwwww yeaaaaah.

permalink

[–] dkredditor [S] 2 points 3 years ago

uh huh huh!

permalink parent

[–] Aerokeiser 1 point 3 years ago

How did you raise the needed money? Did you
get any financial assist from investors? If so, did
you create your business model based on a
template? Which one?

I might be going the same path (but not in
fantasy sports) in a few months from now, and it
would be awesome to know a bit more about the
business part! :)

permalink

[–] dkredditor [S] 2 points 3 years ago

Raising money to build a software company
is becoming increasingly difficult because
there are not many new ideas. The ones that
are new have an even lower barrier to entry
because if the end product doesnt already
exist, there is likely an open source set of
components that can be mushed together to

We quit our jobs to pursue a dream of starting a fantasy sports game company. Last week we raised \$1.4M t...

build it. Getting a meeting with a VC is quite difficult.. In the end, Atlas Venture in Boston ended up doing the deal along with a few others but it was a process getting there!

[permalink](#) [parent](#)

[–] JayP812 1 point 3 years ago

Will you be doing fantasy hockey when it is in season?

[permalink](#)

[–] [dkredditor](#) [S] 2 points 3 years ago

For sure. Hockey and NBA will be coming out along with NFL this Fall!

[permalink](#) [parent](#)

[–] avonv 1 point 3 years ago

Kudos to your endeavors. I actually had an identical idea many years ago, and I am sure you have thought about your idea for some time.

1. How much money in net income has your site generated? My biggest obstacle I saw to creating a fantasy sports interface much like sit-and-go / multi-table poker tournaments was the very low income it would generate and would require several thousands of users to sustain / cover costs.
2. What percentage of your seed money went into the software development and how much in marketing / other expenses?
3. What was the hardest thing you had to overcome?

Thanks and best of luck

[permalink](#)

[–] [dkredditor](#) [S] 3 points 3 years ago

1. I can't share the net income numbers publicly, but you are right that you need several thousand users. We're seeing really strong interest, though, so I think it is very achievable to get thousands of users playing on the site.
2. About 45% went to software and product development, about 45% to marketing, and the rest to miscellaneous expenses like legal fees and subscription costs for the statistics feed.

We quit our jobs to pursue a dream of starting a fantasy sports game company. Last week we raised \$1.4M t...

3. Raising money was the biggest challenge. It took us awhile, and there was a lot of rejection along the way. But we are passionate about our idea and our company, and we try to always have a never give up attitude!

permalink parent

[–] Thisisopposite 1 point 3 years ago

You raised \$1.4m?

How did you manage to raise that much money on the basis of an idea for a company?

I want in!

permalink

[–] dkredditor [S] 3 points 3 years ago

Lots of persistence and a bit of luck. We were introduced along the way to some investors that believed in the idea and more importantly in the team. The biggest thing I learned during fundraising is that the most important thing is the team. Investors will back a team they like even if they aren't sure about the idea over an idea they like with a team they aren't so sure about. Fortunately, I think we have both! ;)

permalink parent

[–] Thisisopposite 2 points 3 years ago

Nice, It's nice to see people achieving dreams, I wish you every success!

permalink parent

[–] diogenesi 1 point 3 years ago

I'm not really into fantasy sports, but I really like "online management sports games", kind of Football (Soccer) Manager" but online, I personally play hattrick.org. What you guys think of this kind of game?

permalink

[–] dkredditor [S] 2 points 3 years ago

I'll tell you in a couple hours, going to play it now

permalink parent

[–] diogenesi 1 point 3 years ago

I think you will only receive you team in a couple of days, but if you like

We quit our jobs to pursue a dream of starting a fantasy sports game company. Last week we raised \$1.4M t...

soccer/football and "sim sports" games
you will like it.

[permalink](#) [parent](#)

[–] [dkredditor](#) [S] 2 points 3 years ago

I just played it! I like the game for
sure.. but i know nothing about
soccer! stupid 'murican here.

[permalink](#) [parent](#)

[–] [lkjasdfikjasdf](#) 1 point 3 years ago

This question is for the geeks. Can you talk about
how the website was coded? did you code it? was
it hard to incorporate money? how long did the
site take to be up and running? any code related
tips are appreciated. Thanks!

[permalink](#)

[–] [dkredditor](#) [S] 3 points 3 years ago

The website is written on a .net platform
with an HTML5 and JQuery front-end. The
money part was probably the hardest by far
to incorporate, followed by the statistics
integration. I could probably post an entire
dissertation on the coding experience and
tips, but I don't want to take up that much
space! What I will say is that everything took
way longer than we thought, and the biggest
coding tip I have for anyone doing something
brand new for them is to assume it will take
twice (maybe three times) as long as you
think it will and set expectations
accordingly... especially if you have
investors. ;)

[permalink](#) [parent](#)

[–] [garlan_](#) 1 point 3 years ago

what were the 3 jobs you guys quit? i guess
software related?

[permalink](#)

[–] [dkredditor](#) [S] 2 points 3 years ago

We all used to work at Vistaprint. The three
jobs were pretty different actually - only one
was technology related, and predictably that
person (Paul) is our CTO. Jason (me) is our
CEO and had more general business
management and customer acquisition
experience, while Matt has a background in
product and CRM. We all have a background

https://www.reddit.com/r/IAmA/comments/x5zrn/we_quit_our_jobs_to_pursue_a_dream_of_starting_a/

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in web and business analytics. We run our company based on the data!

[permalink](#) [parent](#)

[–] [ryanc1991](#) 1 point 3 years ago

any good bonus codes?

[permalink](#)

[–] [dkredditor](#) [S] 2 points 3 years ago

You actually don't need to use a bonus code anywhere on the site. You can play our \$100 Freeroll everyday (and it's a \$500 freeroll on Sunday). For those of you who don't know the industry yet, a freeroll is just a tournament you can enter entirely for free and win real cash prizes. Those are just always running on our site daily. The other good offer we have is a 100% match for first-time depositors, and that is just available if you go to the deposit page. You don't need a code or a link to access it, even if some of the other sites out there tell you that you do.

[permalink](#) [parent](#)

[–] [foxboro24](#) 1 point 3 years ago

I am a 24 year old journalism student trying to start my own sports online newsletter....I get a good amount of people to my blog but I am having trouble getting new readers. How did you get more people to filter to your site?

[permalink](#)

[–] [dkredditor](#) [S] 2 points 3 years ago

There's no one answer, but we test lots of stuff and look at data to see what works. What's your website? I'd love to check it out.

[permalink](#) [parent](#)

[–] [foxboro24](#) 1 point 3 years ago

did you get it? I didn't want to blog spam so I pmed you

[permalink](#) [parent](#)

[–] [dkredditor](#) [S] 1 point 3 years ago

Did we get what? The fundraising?

[permalink](#) [parent](#)

[–] [foxboro24](#) 1 point 3 years ago

the site you asked me for

[permalink](#) [parent](#)

https://www.reddit.com/r/IAmA/comments/x5zrn/we_quit_our_jobs_to_pursue_a_dream_of_starting_a/

We quit our jobs to pursue a dream of starting a fantasy sports game company. Last week we raised \$1.4M t...

[–] dkredditor [S] 1 point 3 years ago

Sorry, yes I got it.. :P
reading now

[permalink](#) [parent](#)

[–] ziggytwo 1 point 3 years ago

I just graduated law school, but decided I didn't want to be a lawyer and wanted to find a job in sports. I used to write for a number of fantasy sites (mostly defunct now) and I've played fantasy sports for over a decade. This sounds like something I wish I did with my life years ago. Will you hire me?

[permalink](#)

[–] dkredditor [S] 1 point 3 years ago

We're always looking for good talent. We need the help! Are there any links you can send me with samples of your writing? If it's easier to just email me, send a note to support@draftkings.com and mention we talked on Reddit and I told you to email.

[permalink](#) [parent](#)

[–] rukus5o 1 point 3 years ago

How are you guys different from this company: <http://socialnetworks.com/>?

[permalink](#)

[–] dkredditor [S] 0 points 3 years ago

Our company is a bit different because we make our own products, whereas this website appears to be a white-label solution. I may have missed something, but I think that is the key difference. Also, it looks like they don't have their fantasy sports stuff up yet!

[permalink](#) [parent](#)

[–] rukus5o 1 point 3 years ago

Got it. What do you think the relevancy is for a white label solutions like that? Do you think it's something that publishers are looking for to help further monetize their user bases? Do you see it as a good solution to increase engagement or do you think users are more likely to use a product like yours or something that's existing?

https://www.reddit.com/r/IAmA/comments/x5zm/we_quit_our_jobs_to_pursue_a_dream_of_starting_a/

We quit our jobs to pursue a dream of starting a fantasy sports game company. Last week we raised \$1.4M t...

permalink parent

[–] dkredditor [S] 1 point 3 years ago

Brand recognition is paramount in this industry. Especially when it comes to users depositing real money. There are a lot of fly by night companies in the gambling space which get users to deposit money and disappear. White label solutions are tough because users need to feel like their cash is going to be there.. we're not interested in licensing the platform, we're interested in building a brand that users trust and identify with.

permalink parent

[–] rukus50 1 point 3 years ago

That makes sense. But what if you're giving this white label solution out to trusted publishers (NYT, Boston Globe, etc.). I hesitated in asking, but who knows.. Do you think people would want to play fantasy sports through their local news org? Do you think there's a better vertical to go after?

permalink parent

[–] dkredditor [S] 1 point 3 years ago

Interesting concept.. let me cogitate this..

permalink parent

[–] Bofu2U 1 point 3 years ago

Do you see the company as being something you can stay in long-term, or just looking for a decent exit?

Assuming long-term given you said you all played it so long, but worth asking anyway.

permalink

[–] dkredditor [S] 2 points 3 years ago

I could see it playing out either way, but I do believe there is a big market opportunity here. Over 30 million people play fantasy

We quit our jobs to pursue a dream of starting a fantasy sports game company. Last week we raised \$1.4M t...

sports each year, and most people have never played a daily format for cash like our game. Plus, we are going to keep building beyond this. We have a mobile game, a Facebook app, and several other exciting products coming out for football season. We love doing this stuff, so it's basically our dream to be doing this long-term. That said, I wouldn't cry if we had a decent exit in a few years. ;)

[permalink](#) [parent](#)

[–] Bofu2U 2 points 3 years ago

Well from one person who's made the leap to another, congrats. Stay on the grind. No feeling is better than waking up knowing it "doesn't feel like work" but is fun to do.

Well, except getting bought out.

[permalink](#) [parent](#)

[–] dkredditor [S] 2 points 3 years ago

Lol. It is definitely a different feeling being excited to go to work everyday! Of course, we are all working harder than we've ever worked before, but it's easier when you love it!

[permalink](#) [parent](#)

[–] Bofu2U 1 point 3 years ago

Indeed it is. :) Good luck!

[permalink](#) [parent](#)

[–] dkredditor [S] 2 points 3 years ago

Thanks. You, too!

[permalink](#) [parent](#)

[–] danman9984 1 point 3 years ago

Sorry to bring a competitor into the questioning, but how would you guys say you're business is different than fanduel.com ? Im big into fantasy sports and play there a lot.

[permalink](#) [parent](#)

[–] dkredditor [S] 1 point 3 years ago

haha, this isnt about the company or the competition. No issue answering this. FanDuel is a

We quit our jobs to pursue a dream of starting a fantasy sports game company. Last week we raised \$1.4M t...

competitor - sort of. However, our strategy is to make all others in the space irrelevant. We have some pretty amazing things in the pipeline that will indeed do - just that. Read Blue Ocean Strategy one day, and you'll understand what I'm talking about.

[permalink](#) [parent](#)

[–] [avonv](#) 1 point 3 years ago

Back with some more questions if you are still around, I find your business too interesting and cannot resist chatting with fellow entrepreneurs:

1. Is there a legal grey-area with online betting? How did you "shore up" the legal issues of offering essentially what is a sports-betting platform packaged in a different way - I see it no different than poker, there are ways you could probably give yourself a little "edge" so to speak, but by and large you are gambling on a crapshoot (any night any given player could get hot, etc.).
2. How much of your personal funds went into this initially? What made you guys go broke at first? And as for the coding, how many developers did you guys hire and how did you come about choosing them out of all other developers?
3. Can you talk about the rough timeline of events from the when your idea was born to when your beta or final product was launched?

I signed up to your site and I have to say, I am impressed with the ease of the interface! Very well-done on that end.

[permalink](#)

[–] [dkredditor](#) [S] 1 point 3 years ago

Hi here's the answers: 1. There is no legal grey-area. Fantasy sports has a carve out from the Unlawful Internet Gambling Enforcement Act of 2006 as long as it meets specific requirements (<http://www.opencongress.org/wiki/Unlawful>

We quit our jobs to pursue a dream of starting a fantasy sports game company. Last week we raised \$1.4M t...

[_Internet_Gambling_Enforcement_Act_of_2006\)](#)

1. When you don't have much in the way of savings, basically your entire personal savings goes into it :P. We didn't raise money right away. It took several months and even then it didn't close right away. Initially it was a single developer (Paul) who did all the coding. Once we had money, it became
2. Now there are 5 coders split between the main site and a social game which is located here [BIG Baller Fantasy](#) and Jordan "DrNickBurns" from the "Standing Desk post" last year heads up that app.
2. The initial thought was about a year from the time it was just a thought to the time it was an actual beta. Only about 3 months of development went into that.. about 4 months of trying to raise money. All in all it went pretty fast.

edit: THANKS FOR THE COMPLIMENT!

[permalink](#) [parent](#)

[–] [ponchedeburro](#) 1 point 3 years ago

That's pretty awesome. Following your dream and working with what you find interesting. that's my dream as well!

[permalink](#)

[–] [dkredditor](#) [S] 1 point 3 years ago

Thanks! I just hope my dream doesn't turn out to be a nightmare. ;)

[permalink](#) [parent](#)

[–] [ponchedeburro](#) 1 point 3 years ago

Well, right now you're living your dream. The least you're gonna get out of it is an experience.

[permalink](#) [parent](#)

[–] [wheatrick](#) 1 point 3 years ago

How well are [fanduel.com](#) and the other fantasy league by day/week/season doing? And how are you guys gonna catch em?

Congrats on the raise!

https://www.reddit.com/r/IAmA/comments/x5zrn/we_quit_our_jobs_to_pursue_a_dream_of_starting_a/

We quit our jobs to pursue a dream of starting a fantasy sports game company. Last week we raised \$1.4M t...

permalink

[–] dkredditor [S] 2 points 3 years ago

Thanks! Fanduel is definitely the market leader, but we think we can catch them! We also think that there is room for more than one or two. Most people don't know about this type of game, and it seems that people who try it get really into it. The hardest part is getting people to try it for the first time.

permalink parent

[–] wheatrick 1 point 3 years ago

So a better user on board experience? I've tried fanduel and others, the problem I have with that carve out of uigea or whatever it's called: the twisted construct of daily fantasy leagues is intellectually interesting but it lacks the real gut emotion of betting on outcomes.

permalink parent

[–] dkredditor [S] 1 point 3 years ago

Try this for onboarding, its our "social game version" of DraftKings, its called "BIG Baller"
<http://apps.facebook.com/bigballerfantasy>

Let me know your thoughts, I spent a lot of time on the Coach O'Keefe onboard process (this is Jordan)

permalink parent

[–] unsuitable_sick_burn 1 point 3 years ago

Grilled or Fried chicken?

permalink

[–] dkredditor [S] 5 points 3 years ago

FRIED

permalink parent

[–] TalkingBackAgain 1 point 3 years ago

How is that ever supposed to make money?

permalink

[–] dkredditor [S] 5 points 3 years ago

The concept is almost identical to a casino.. specifically Poker. We make money when people win pots.

permalink parent

[–] TalkingBackAgain 1 point 3 years ago

https://www.reddit.com/r/IAmA/comments/x5zrn/we_quit_our_jobs_to_pursue_a_dream_of_starting_a/

We quit our jobs to pursue a dream of starting a fantasy sports game company. Last week we raised \$1.4M t...

Well, as long as it works for you, by all means, engage.

[permalink](#) [parent](#)

[\[-\]](#) [dredditor](#) [S] 4 points 3 years ago

thank you number 1

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11

Exhibit C

(1)

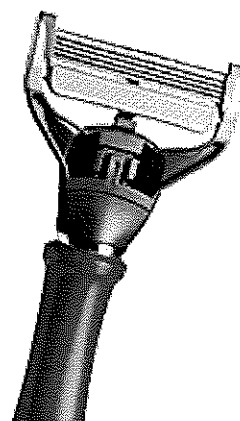




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FILE - In this Sept. 9, 2015 file photo, an employee in the software development department of...

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BOSTON (AP) — Top daily fantasy sports companies are fiercely rejecting the idea that their rapidly growing industry should be considered gambling in the United States.

But FanDuel and DraftKings are OK with that label in the United Kingdom. They're embracing it as a step toward global expansion.

U.K. gambling regulators granted a gambling license to DraftKings in August, while FanDuel applied earlier this month for a license as a "gambling software" company.

Jeffrey Haas, chief international officer for DraftKings, maintains there's no contradiction. DraftKings is simply approaching each jurisdiction case by case, he said.

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"Our product is a game of skill. In order to be successful, you need to apply your skill in order to have the best line ups to go into our contests to win," Haas said. "Nevertheless, our games of skill are looked at differently by regulators in different jurisdictions around the world."

But with the gambling debate heating up at home, some in the fantasy sports industry say the international moves put the two companies in an increasingly untenable position.

"It's pretty naive to go get gambling licenses in the U.K. and expect people to believe you're not gambling," said Shergul Arshad, founder of Mondogol, a U.K. based daily fantasy sports startup focused on professional soccer that would likely compete with DraftKings and FanDuel.

"You can't come to a state that bans you and say it's not gambling and then have a U.K. gaming license," he said. "It's hypocrisy."

Haas said DraftKings plans to offer its familiar range of NFL, NBA, Major League Baseball and NHL contests in the U.K. but with a special emphasis on professional soccer, including the English Premier League, North America's Major League Soccer and Europe's Champions League.

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DraftKings and FanDuel say they support developing U.S. regulations for their industry, which grew out of traditional, season-long fantasy sports games played by millions of Americans. They just don't want regulations as restrictive as those imposed on casino gambling.

Many U.S. states use a chance versus skill argument to help define gambling. In daily fantasy sports, players compete for cash prizes online by assembling teams of individual athletes to rack up "fantasy" points based on how those athletes perform in real-world games.

New York's attorney general is the latest to challenge daily fantasy, declaring the contests amount to illegal sports betting in his state. He ordered DraftKings and FanDuel to stop accepting in-state bets. DraftKings and FanDuel promptly asked the state Supreme Court to nullify the order and declare the games legal.

The international push for daily fantasy sports has been in the cards long before the latest scrutiny in the United States.

Haas said DraftKings will have all the required gambling protections called for in U.K. law, including age verification of gamblers and "self-exclusion" technology that allows those who are addicted to gambling to voluntarily block themselves from contests.

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"We're on track," said Haas, who is based in London. "We want to be the biggest and best daily fantasy sports operator in the world."

The expansion is a risk for the companies, which still aren't profitable despite millions in investor funds.

Unlike in the United States, where sports betting is legal only in a handful of states, daily fantasy sports will have to compete with a well-established, lucrative sports betting industry internationally, industry watchers note.

And the furor at home is already forcing a financial retrenchment of sorts by the companies, which may siphon energy and resources from global expansion efforts, they say.

FanDuel declined to discuss the company's international plans, stressing its U.K. application is the first step in a lengthy review. But Haas, of DraftKings, argues the increased scrutiny at home makes international expansion all the more critical to his company's outlook.

"In the U.K., we have an opportunity to work in a perfectly clear regulatory environment where we understand what the rules are, the tax rates are and the sustainability of the business will be," he said. "And as we look to expand internationally, it's an opportunity to expand the footprint of the business in a very different way."

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Exhibit D

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

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

Plaintiffs,

-against-

Index No.

IAS Part _____
Assigned to Justice _____

MEMORANDUM OF LAW
IN SUPPORT OF
PLAINTIFF'S MOTION
FOR A PRELIMINARY
INJUNCTION

DraftKings, Inc.,

Defendant.

-----X

**MEMORANDUM OF LAW IN SUPPORT OF MOTION
FOR A PRELIMINARY INJUNCTION**

Preliminary Statement

The New York State Constitution has prohibited bookmaking and other forms of sports gambling since 1894. Under New York law, a wager constitutes gambling when it depends on *either* a (1) “future contingent event not under [the bettor’s] control or influence” *or* (2) “contest of chance.” So-called Daily Fantasy Sports (“DFS”) wagers fit squarely in both these definitions, though by meeting just one of the two definitions DFS would be considered gambling. DFS is nothing more than a rebranding of sports betting. It is plainly illegal.

The two dominant DFS operators, FanDuel and DraftKings, offer rapid-fire contests in which players can bet on the performance of a “lineup” of real athletes on a given day, weekend, or week. The contests are streamlined for instant-gratification, letting bettors risk up to \$10,600 per wager and enter contests for a chance to win jackpots upwards of \$1 million. The DFS operators themselves profit from every bet, taking a “rake” or a “vig” from all wagering on their sites.

Like any sports wager, a DFS wager depends on a “future contingent event” wholly outside the control or influence of any bettor: the real-game performance of athletes. A bettor can try to *guess* how athletes might perform, but no bettor—no matter how shrewd or sophisticated—can *control* or *influence* whether those athletes will succeed. The moment a DFS player submits a wager, he becomes a spectator whose fate is sealed by the real-game performance of athletes. The rules of DFS make this relationship crystal clear. The “final box scores”—a tally of the real-game performance of athletes—determines who wins and who loses a DFS contest. Until this tally is available, no prizes can be awarded for any DFS contest. Until the occurrence of that future contingent event, the winners and losers are *unknown* and *unknowable*.

DFS bets also constitute wagers as a “contest of chance.” As New York law has long recognized, gambling often mixes elements of chance and skill. The key question is whether the outcome depends in any “material degree” on an element of chance, “notwithstanding that skill of the contestants may also be a factor.” In DFS, chance plays a significant role. A player injury, a slump, a rained out game, even a ball taking a bad hop, can each dictate whether a bet wins or loses. By itself, any single chance occurrence can irrevocably alter the outcome of a DFS contest. Given the frequency and number of chance occurrences, no amount of research, investigation, or judgment can assure in advance that a certain DFS result will occur or how. That the margin between a winning and losing DFS wager is often measured in *fractions* of a point only makes the chance element even more obvious.

Yet FanDuel and DraftKings insist that DFS is not gambling because it involves skill. But this argument fails for two clear reasons. First, this view overlooks the explicit prohibition against wagering on future contingent events, a statutory test that requires no judgment of the relative importance of skill and chance—they are irrelevant to the question. Second, the key factor establishing a game of skill is not the presence of skill, but the absence of a material element of chance. Here, chance plays just as much of a role (if not more) than it does in games like poker and blackjack. A few good players in a poker tournament may rise to the top based on their skill; but the game is still gambling. So is DFS.

The false assertion that DFS is a skill game is particularly galling in light of the unrelenting barrage of advertisements that depict FanDuel and DraftKings as a new form of lottery. With commercials depicting cash falling from the ceiling and oversized novelty checks, the message is clear: anyone can play DFS and anyone can win. “Try it,” one FanDuel ad urges. “It takes a few minutes. . . .I’ve deposited a total of \$35 on FanDuel and won over two million!”

“Taking home your share is simple,” a DraftKings ad promises, “It’s the simplest way of winning life-changing piles of cash.”

Denying that DFS is gambling also runs counter to how DFS sites depicted themselves in the past and how they portray themselves behind closed doors. At one point, DraftKings’ CEO openly admitted that DFS contests run by DraftKings constitute a “mash[-]up between poker and fantasy sports,” that exist in the “gambling space,” and make money in a way “identical to a casino.” In pitches to investors, FanDuel and DraftKings unabashedly sell themselves as gambling ventures, comparing themselves to online poker and sports wagering.

Meanwhile, the DFS contests are causing the precise harms that New York’s gambling laws were designed to prevent. Problem gamblers are increasingly being seen at Gamblers Anonymous meetings and at counselors’ offices addicted to DFS. For DraftKings, at least, this should not come as a shock: records show that their customer service representatives have responded to pleas from self-described gambling addicts to close accounts and permanently ban them from the site.

* * *

On November 10, 2015, the New York Office of the Attorney General (“NYAG”) sent FanDuel and DraftKings separate letters demanding that each company cease and desist from illegally accepting DFS wagers in New York State. Both companies refused to comply and then filed seemingly coordinated—and procedurally improper—actions with this court.¹

NYAG thereafter filed separate actions against FanDuel and DraftKings and is seeking preliminary injunctions to restrain FanDuel and DraftKings from continuing to accept illegal

¹ On November 13, 2015, DraftKings filed an action against NYAG through a verified petition, which is annexed to the Affirmation of Justin Wagner (“Wagner Aff.”) as Ex. A, and referred to hereafter as “DK Compl.” On November 13, 2015, FanDuel filed a related action against NYAG through a complaint, which is annexed as Ex. B to the Wagner Aff. and referred to hereafter as “FD Compl.”

wagers from New York, and other relief. This consolidated memorandum of law supports each such action.

STATEMENT OF FACTS

DraftKings and FanDuel (together, the “DFS Operators” or “DFS Sites”) offer substantially the same online sports betting contests, which they market as “Daily Fantasy Sports” (“DFS”). In DFS contests,² players place bets—styled as “entry fees”—on “lineups” of amateur and professional athletes. The winners of DFS contests are determined based on the real-game performance of the athletes competing in a particular sports league (*e.g.* the National Football League (“NFL”)) during a particular period, over a week, a weekend, or even on a particular day. DFS contest winners receive cash awards, while the losers forfeit their bets.

I. The Operation of DFS Contests

Each DFS Operator runs a range of wagering contests, including so-called “Guaranteed Prize Pools” (“GPP”), where players can enter a pool with up to hundreds of thousands of other players, and “Head-to-Head” match-ups where DFS players bet that their lineup will perform better than the athletes picked by another DFS player. *See* Ip FD Aff. ¶25; Ip DK Aff. ¶ 17. These DFS contests, and others, are offered across a range of sports, including football, basketball, baseball, and hockey. Ip FD Aff. ¶10; Ip DK Aff. ¶12. As with illegal sports wagering more broadly, the most popular sport for DFS contests is NFL football.

To compete for cash prizes, DFS players put money at risk. The minimum bets to enter vary based on the contest format and other factors. For example, a DFS player can enter one

² Both DFS Operators offer certain “freeroll” or “freeplay” contests, where DFS players can enter for free. The winners of these contests may be granted a prize, which may include cash or a free entry into a cash prize contest. For purposes of this action, DFS contests refer to the games that require DFS players to pay an entry fee for an opportunity to win a cash prize, which constitute the vast majority of their games.

contest on DraftKings for as little as \$0.25 and on FanDuel for as little as \$1, *see* Ip DK Aff. ¶15; *See* Ip FD Aff. ¶ 26, while the minimum wager for other contests on either DFS Site can be as high as \$10,600. *Id.* If the DFS player does not win a cash prize, he loses his wager.

In each contest, a DFS player must make his wager, pick a “lineup” from a list of eligible professional or amateur athletes, and then wait to see if the lineup wins a cash prize based on the performance of athletes in competitive sports. For DFS contests involving team sports, a DFS player picks a lineup of athletes who will be playing in real-world games during the contest period (*e.g.*, on a given day). The performance of those athletes in real games is the sole factor determining whether the wager wins or loses.

The DFS Sites require that the lineup observes two basic rules. *First*, the lineup must include athletes who play on at least two separate teams and represent a range of positions. *See* Ip DK Aff. ¶20; *See* Wagner Aff. ¶5 (FanDuel requires players from three separate teams). *Second*, each DFS Site assigns a fictional “salary” to each real-world athlete. The combined salary of any lineup may not exceed a fictional salary allocation or “cap” that the sites assign in connection with each wager. *See* Ip FD Aff. ¶30; Ip DK Aff. ¶27.

The “salaries” assigned to athletes constitute odds that consider the athletes’ past performance and other factors to predict how any athlete could be expected to perform during the contest period. *See e.g.*, Ip DK Aff. ¶31. Like traditional sports handicappers, DFS players will try to predict how particular athletes will perform relative to the odds (*i.e.*, the “salaries”). *See* Ip DK Aff. ¶33. When determining whether a particular athlete constitutes a good bet, tellingly, FanDuel and DraftKings recommend that DFS players consult the odds set by Nevada sports prop bookmakers.³ *See* Wagner Aff. ¶6.

³ In sports prop betting, a player can wager on various aspects of professional sports, from the performance of a particular athlete to various intra-game statistics (*e.g.*, the number of points by halftime in a football game). Nor is

Prior to the start of the contest period, each DFS Site “locks” the lineups submitted by the bettors. After lineups lock, the bettor can take no action related to the contest. *See* Ip DK Aff.

¶29; Ip FD Aff. ¶36. The DFS player is merely a spectator, with the success of his wager to be determined by the real-game performance of the athletes. The outcome of the wager is thereafter wholly contingent on the performance of these athletes.

Each DFS Operator establishes its own rules for how an athlete’s performance translates into points. In NFL contests offered by each site, for example, a touchdown thrown by a quarterback translates into four points. *See* Ip DK Aff. ¶25; Ip FD Aff. ¶19. Based on research, experience, or simply a hunch, a DFS player might reasonably predict a particular quarterback will throw two touchdowns, only for that quarterback to be injured on the first play. Or throw only one touchdown. Or throw several interceptions instead. Or face an unexpected blizzard. Or vie with any number of other unforeseen and unforeseeable elements of chance. Or perhaps the quarterback completes the touchdowns. The DFS player has no more influence over the hoped-for outcome than he does over the weather.

For a real-life illustration, consider the Monday night NFL game on November 9, 2015. As the game entered its final moments, the Chicago Bears were leading by a tight margin. In a common strategic move, Quarterback Jay Cutler took a knee to run out the clock and assure victory. This play cost the Bears one yard, and reduced Cutler’s total fantasy production by *one-tenth* of one point—and reportedly cost one unlucky FanDuel player \$20,000; he had apparently picked Cutler and the one-tenth of a point reduction spelled the difference between winning \$50,000 in first place and \$30,000 in second place. (By contrast, that same one-tenth of a point reduction was a lucky break for the DFS player who took first prize.) *See* Wagner Aff. ¶28.

sports prop betting the only overlap with a well-established form of sports gambling. The CEO of a rival DFS company referred to the GPP-format of DFS as a “sports betting parlay on steroids.” *See* Wagner Aff. Ex. F at p.32.

Indeed, the rules of each DFS Operator contemplate numerous circumstances where points may be reduced or zeroed out through no fault of the athlete. These include where: the real game gets rained out, postponed, suspended, or shortened; the professional or amateur league fails to correct a mistake in official game statistics before the DFS Operator declares a contest winner; or a trade involving the athlete occurs after a contest begins. *See* Ip DK Aff. ¶¶ 22-25; Ip FD Aff. ¶¶ 21-24. Some of these occurrences are relatively common. All of them can materially affect the outcome of a wager and all are subject to chance.

The ultimate outcome of any DFS contest is judged based on the final box scores of actual games played during the relevant contest period. This is set out in the rules of both sites. DraftKings' rules provide that no prizes will be awarded: "until all of the final box scores have been reported for each contest's games to ensure that the final results are accurate." *Wagner Aff.* ¶ 7. FanDuel's rules likewise specify that no winners can be announced until "the final box scores are complete." *Ip. FD Aff.* ¶ 25.

In the words of a spokesperson for FanDuel, the outcome of a DFS player's wager is "contingent on the positive performance of all of their players" in actual games. *See Wagner Aff.* ¶ 9. As DraftKings observed, the success of any DFS wager "depends on the combined performance" of real-world athletes. *DK Compl.* ¶ 22.

II. The DFS Business Model

FanDuel and DraftKings' current denials about DFS constituting gambling are belied by how the sites depicted themselves in the past and how they portray themselves behind closed doors. FanDuel's DFS contests were designed by a veteran of the legal online betting industry in the United Kingdom, Nigel Eccles. *See Wagner Aff.* ¶ 10. The company admitted to an early investor that its target market is male sports fans who "cannot gamble online legally." *See Wagner Aff.* ¶ 11. An analysis FanDuel prepared for another investor equated the company with

Bwin.Party, one of the world's largest online sports betting companies. *See* Wagner Aff. ¶ 12.

That same analysis, in fact, dropped the pretense of calling FanDuel's bets "fees," instead using betting terminology to compare its total "stakes" by quarter to the total "stakes" for Bwin.Party's Sports Betting operation. *Id.*

DraftKings depicts itself to investors in a similar fashion. For example, in one investor presentation, DraftKings pitched itself to a prospective investor by noting the "Global opportunity for online betting," pointing to the massive revenue of the "global online poker market," and making direct comparisons throughout the presentation to poker and sports wagering. *See* Wagner Aff. ¶ 13, at p. 10. The CEO of DraftKings previously spoke openly about DraftKings as a gambling company. He called DFS a "mash[-]up between poker and fantasy sports," suggested that DraftKings operates in the "gambling space," and described its revenue model as "identical to a casino." *See* Wagner Aff. ¶ 14 at Ex. L (p. 2, 16).

The rejection of the gambling label by the DFS sites is particularly hard to square with the overt strategy of recruiting gamblers. For FanDuel, this has meant hiring a former top executive from Full Tilt, the online poker company, and affiliating with gambling industry stalwarts like "Vegas Insider" and BetVega, a sports betting and handicapping website. For DraftKings, this has meant aligning itself closely and negotiating sponsorships with other gambling ventures, like the World Series of Poker and the Belmont Stakes. *See* Wagner Aff. ¶ 15 and ¶ 16. DraftKings has also embedded gambling keywords into the programming code for its website. Some of these keywords include "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." *See*

Wagner Aff. ¶ 17 at Ex. O (p. 10). This increases the likelihood that search engines, like Google, will send users looking for gambling straight to the DraftKings site.

The attempt to have it both ways extends to the approach of DFS sites with regulators. In the U.S., FanDuel and DraftKings disclaim any links to gambling—where such activities face serious prohibitions. Yet in the United Kingdom, where gambling online is permitted with the appropriate licenses, both companies applied for, and DraftKings received, licenses from the U.K. Gambling Commission. *See* Wagner Aff. ¶ 18.

III. Marketing DFS

In 2015, in a bid for market share, both DFS Operators massively increased their advertising spending. Wagner Aff. ¶ 19. In all of 2014, for example, DraftKings spent just \$1 million on broadcast and cable advertising with NBC Universal/Comcast. In the first ten months of 2015, DraftKings spent \$21 million, an increase of over 2,000%. *See* Wagner Aff. at ¶ 20. Similarly, FanDuel spent just \$2.2 million to advertise with NBC Universal/Comcast in all of 2014. In the first ten months of 2015, FanDuel spent \$12 million, an increase of 545%. *Id.*

The DFS Operators applied these advertising dollars to promote DFS Sites to ordinary and potential players. In advertisement after advertisement running non-stop on television and online, the DFS Sites portray DFS as anything but a “skill game.” Rather, they promote their contests like a lottery—as easy to play and easy to win. Money falls from the ceiling, winners are pictured amid confetti holding novelty checks, and the simplicity of playing is front-and-center.

FanDuel’s advertisements commonly showcase testimonials from ostensibly ordinary DFS players (*e.g.*, “Zack from Fairfield, California”), and play up the ease of playing and of winning huge cash prizes:

- “*Try it. It takes a few minutes. You’ll have a blast. . . . I’ve deposited a total of \$35 on FanDuel and won over two million!*”

- “My third week of playing I won \$15,000 off of a five dollar entry...There’s five million bucks on the line in week one Sunday million.”
- “I’ve won over 29 thousand dollars on FanDuel. *Nothing special about me.* The difference is I played and they didn’t.”
- “He’s a personal trainer, and he turned \$2 into over \$2 million on FanDuel.”

DraftKings advertisements are cut from the same cloth:

- “...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.*”
- “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?”
- “The giant check is no myth. . . BECOME A MILLIONAIRE!”

See Ip DK Aff. ¶¶ 4-8; Ip FD Aff. ¶¶ 4-7; Wagner Aff. ¶¶ 21-22.

The reality is that like poker, blackjack, and horseracing, a small percentage of professional gamblers use research, software, and large bankrolls to extract a disproportionate share of DFS jackpots. With poker and DFS, professional players, known as “sharks,” profit at the expense of casual players, known as “minnows.” The numbers show that the vast majority of players are net losers, losing far more money playing on the sites than they win. DraftKings data show that 89.3% of DFS players had an overall *negative* return on investment across 2013 and 2014. See Wagner Aff. ¶39.

IV. DFS Breaks From Traditional Fantasy Sports

The model for DFS diverges from traditional fantasy sports in fundamental respects.

Most significantly, DFS is a business model for gambling—where DFS Sites *directly profit* from the wagering on their platforms. On sites hosting traditional fantasy leagues, most players compete for bragging rights or side wagers, not massive jackpots offered by the sites themselves. Moreover, DFS eschews a competitive draft and any and all strategic aspects associated with a season-long competition, which include making trades with other participants, constantly adjusting lineups, dropping and adding players, and so forth.

Both DraftKings and FanDuel fully appreciate that DFS is radically different than what came before. DraftKings promises “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!

See Wagner Aff. ¶ 26

In describing the departure from traditional fantasy sports, FanDuel exhorts: “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.” *See Wagner Aff.* ¶ 27.

V. The Harms of DFS

While irresponsibly denying their status as gambling companies, the DFS Sites pose precisely the same risks to New York residents that New York’s anti-gambling laws were intended to avoid. 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 illnesses.

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

Anonymous meetings. For those struggling with gambling addiction or those who are vulnerable to it, certain structural characteristics make DFS particularly dangerous. 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.

Whyte Aff. ¶ 8.⁴

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.” Derevensky Aff. ¶ 10.

At least for DraftKings this should come as no surprise: their customer service representatives have fielded pleas from self-described gambling addicts to close accounts and permanently ban them from the site. DraftKings’ own 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.” *See* Wagner Aff ¶ 23.

⁴ As discussed in affidavits submitted by Dr. Jeffrey L. Derevensky, the Director of the International Centre for Youth Gambling Problems and High-Risk Behaviors, and Keith S. Whyte, the Executive Director of the National Council on Problem Gambling, DFS attracts compulsive gamblers and those at risk for gambling addiction. Affidavit of Keith S. Whyte, dated November 12, 2015 (“Whyte Aff.”), annexed as Ex. EE to the Wagner Aff., ¶¶ 6-11; Affirmation of Dr. Jeffrey L. Derevensky, dated November 12, 2015 (“Derevensky Aff.”), annexed as Ex. FF to the Wagner Aff., ¶¶ 5-9.

VI. Procedural Posture

On October 5, 2015, *The New York Times* published an expose of DFS titled “Scandal Erupts in the Unregulated World of Fantasy Sports.” *See* Wagner Aff. ¶ 29. That article described how DFS managed to grow rapidly without regulatory scrutiny—and in spite of observations that “the setup is hardly different from Las Vegas-style gambling that is normally banned in the sports world.” The story centered on allegations that a DraftKings’ employee may have misused proprietary information to win a FanDuel contest.

The next day, on October 6, 2015, the Office of the New York Attorney General (“NYAG”) issued separate letters to FanDuel and DraftKings. Each letter sought documentation and information relating to the integrity of the company’s business, observing that its “policies and practices are matters of concern to the public, particularly to the many customers who put money at risk on your site each day.”

NYAG engaged in an expedited inquiry, meeting several times with the respective representatives of DraftKings and FanDuel and reviewing the documentation they provided. NYAG also engaged in broader fact-finding, which included seeking information from investors, DFS industry witnesses, and experts in gambling and gambling addiction. *Id.* NYAG made several startling discoveries regarding the approach of the DFS Operators to basic compliance issues. Until recently, for example, both DraftKings and FanDuel *explicitly* encouraged their employees to play DFS games on competitors’ platforms—competing against regular customers who had no knowledge of the extent of the DFS employees they were competing against. *See e.g.,* Wagner Aff. ¶ 24 (FanDuel’s Daily Fantasy Sports Play Policy instructed employees “[p]laying on other sites helps employees do their jobs better”). FanDuel recognized that this policy would be ill-received, instructing employees to minimize their public presence “so users

are less likely to be suspicious or angry” and avoid becoming “among the top five players by volume” because “top players frequently become targets for accusations.” *Id.*

Further, serious questions have arisen regarding whether DraftKings is abiding by anti-gambling laws in jurisdictions where even the company accepts that DFS is wholly illegal. Wagner Aff. ¶ 25. NYAG’s investigation uncovered documentation indicating that, in 2014, DraftKings received \$484,897 in entry fees from player accounts registered in states where DraftKings purports not to offer DFS for legal reasons (Montana, Arizona, Washington, Louisiana, and Iowa). *See* Wagner Aff. ¶ 34. Indeed, an increasing number of states reviewing the status of DFS under their own state gambling laws, including Nevada, Illinois, Georgia, and Washington State—which has precisely the same definition for gambling as New York—have all declared DFS to be gambling or raised serious questions about its legality. NYAG’s most pressing concern, however, was the violation of New York law.

Thus, on Tuesday, November 10, 2015, NYAG furnished separate letters to FanDuel and DraftKings relaying its conclusion that DFS constitutes illegal gambling for purposes of New York law. Each letter demanded that the companies cease and desist from illegally accepting DFS wagers in New York State. In relevant part, the letter stated:

Our review concludes that [the DFS Site’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.” [the DFS Site’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 [DFS Site] wager represents a wager on a “contest of chance” where winning or losing depends on numerous elements of chance to a “material degree.”

The letters also provided formal pre-litigation notice pursuant to New York State General Business Law (“GBL”) §§ 349 and 350 and Executive Law § 63(12). Notwithstanding the explicit demand to stop accepting wagers from New York State, the companies

continued. On Friday, November 13, 2015, each company filed seemingly coordinated—and procedurally improper—actions with this court.

This action proceeds as a result.

ARGUMENT

THE COURT SHOULD ENJOIN DEFENDANTS DRAFTKINGS AND FANDUEL FROM CONTINUING TO OPERATE ILLEGAL GAMBLING BUSINESSES

I. The Attorney General has Authority to Seek and the Court Has Authority to Grant an Injunction Against DraftKings’ and FanDuel’s Illegal Gambling Businesses.

The Attorney General seeks a preliminary injunction prohibiting DraftKings and FanDuel from continuing to operate an illegal sports gambling business in New York, in defiance of the state constitution, the penal law, and other statutes.

Executive Law § 63(12) empowers the Attorney General to petition the court for injunctive relief on behalf of the people of the state of New York whenever a company engages in “repeated . . . or persistent fraud or illegality in the carrying on, conducting or transaction of business.” Incident to the authority to issue permanent injunctive relief, this Court has broad equitable powers to grant ancillary relief necessary to accomplish complete justice. *See, e.g., People of the State of New York v. Apple Health and Sports Clubs, Ltd.*, 80 N.Y.2d 803 (1992). In the past, the Attorney General has successfully brought actions pursuant to Executive Law § 63(12) to enjoin the very conduct at issue in this proceeding: the operation of an illegal online gambling business. *See People v. World Interactive Gaming Corp.*, 185 Misc. 2d 852, 856 (Sup. Ct. N.Y. County 1999).

Business Corporation Law (“BCL”) § 1303 similarly authorizes the Attorney General to seek an injunction against a foreign corporation that operates an illegal and fraudulent business in New York State. In particular, the statute allows the Attorney General to seek an injunction

against a foreign corporation like FanDuel or DraftKings based on the same misconduct that would give rise to the dissolution of a New York corporation. BCL § 1303; *see also* BCL § 1101. Such injunctive relief is warranted to restrain corporations that engage in illegality or persistent fraud. *See* Business Corporation Law § 1101; *See also, e.g., People by Abrams v. Oliver School*, 206 A.D.2d 143, 619 N.Y.S.2d 911 (4th Dept 1994); *State v. Saksniit*, 332 N.Y.S.2d 343, 350 (Sup. Ct. N.Y. County 1972).

General Business Law (“GBL”) § 349(b) separately authorizes the Attorney General to bring an action for injunctive and other relief on behalf of the people of the state of New York when any person engages in deceptive practices in the state and provides that “in such action preliminary relief may be granted under article sixty-three of the civil practice law and rules.” Relatedly, the Attorney General may seek injunctive and other relief in actions pursuant to GBL § 350, which prohibits “[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state.” *See People by Vacco v. Lipsitz*, 174 Misc. 2d 571 (Sup. Ct. N.Y. County 1997).

II. NYAG Meets the Standard for Granting a Preliminary Injunction

The traditional three-prong test for issuing a preliminary injunction consists of the following: (i) a likelihood of success on the merits, (ii) irreparable injury, and (iii) a balance of the equities in plaintiffs’ favor. *Albini v. Solork Associates*, 37 A.D.2d 835 (2d Dept. 1971). Unlike private litigants, however, the Attorney General need not prove irreparable injury because injury is presumed in a statutory enforcement action under Executive Law § 63(12) and GBL § 349. *People v. Apple Health & Sports Club, Ltd. Inc.*, 174 A.D.2d 438, 439 (1st Dept 1991), *aff’d*, 80 N.Y.2d 803 (1992); *People v. P.U. Travel, Inc.* 2003 N.Y. Misc. LEXIS 2010, at *7-8, (Sup. Ct. N.Y. County 2003).

As set forth below, plaintiff meets each of the traditional prongs for preliminary relief regardless.

A. NYAG Will Succeed on the Merits

In connection with this proceeding, NYAG has demonstrated a likelihood of success on the merits under Executive Law § 63(12), BCL § 1303, and GBL §§ 349 and 350. As set forth in the complaints and affidavits, including the evidence annexed to the Wagner Affirmation and Ip Affidavits, the Defendants have operated, and continue to operate, illegal sports gambling businesses in violation of the New York State Constitution and other laws.

The complaints and supporting evidence also demonstrate that the defendants have violated New York consumer protection laws by falsely advertising and repeatedly misrepresenting their businesses to New York residents.

Defendants' businesses are plainly illegal for the following reasons:

1. DraftKings and FanDuel Have Repeatedly and Persistently Violated the Constitution and the Penal Law, Thereby Violating Executive Law § 63(12)

A claim under Executive Law § 63(12) is brought either for repeated or persistent fraud or repeated or persistent illegality. Here, the State brings its claims under the prong of repeated illegality. Courts have repeatedly found that a violation of state, federal, or local law constitutes illegality within the meaning of Executive Law § 63(12). *State v. Princess Prestige*, 42 N.Y.2d 104, 107 (1977); *People v. Empyre Inground Pools, Inc.*, 227 A.D.2d 731, 733 (3d Dept 1996); *Lefkowitz v. E.F.G. Baby Products*, 40 A.D.2d 364 (3d Dept 1973). This includes violations of the penal code. *See State v. World Interactive Gaming Corp.*, 185 Misc. 2d 852 (Sup. Ct. N.Y. Cnty. 1999) (promoting gambling in violation of New York Penal Law Article 225 and federal Wire and Travel Acts, 18 U.S.C. §§ 1084. 1952, 1953); *Freedom Discount Corp. v. Korn*, 28

A.D.2d 517 (1st Dept 1967) (violation of Penal Law §§ 1370 and 1371); *Wiener v. Abrams*, 119 Misc. 2d 970 (Sup. Ct. Kings County 1983) (violation of Penal Law § 180.55); *State by Lefkowitz v. Colo. State College of Church of Inner Power, Inc.*, 76 Misc. 2d 50 (violation of Penal Law § 950); *State v. ITM*, 52 Misc. 2d 39 (Sup. Ct. N.Y. Cnty. 1966) (violation of Penal Law §§ 1370 and 1371).

The illegality must be repeated or persistent, each of which is defined in the statute.

“Repeated” is defined as “repetition of any separate and distinct ... illegal act or conduct which affects more than one person.” Exec. Law § 63(12); *People v. Wilco Energy Corp*, 284 A.D.2d 469 (2d Dept 2001); *Empyre*, 227 A.D.2d at 733. “Persistent” is defined as “continuance or carrying on of any ... illegal act of conduct.” Exec. Law § 63(12). Courts have found that under these definitions, the Attorney General is not required to establish that a large percentage of the person’s or business’s transactions was illegal. *Princess Prestige*, 42 N.Y.2d at 107 (finding 16 out of 3,600 total transactions a sufficient basis to proceed under Executive Law § 63(12)); *People v. Credit Solutions of Am.*, 2012 N.Y. Misc. LEXIS 2090, at *5 (Sup. Ct. N.Y. County 2012) (finding that to show repeated illegal conduct “a large percentage of violations is not necessary”). Nor is the existence of willing consumers a defense to otherwise fraudulent and illegal practices. *State v. Midland Equities of N.Y., Inc.*, 117 Misc. 2d 203, 207 (Sup. Ct. N.Y. County 1982); *see also FTC v. Crescent Publ’g Grp. Inc.*, 129 F. Supp. 2d 311, 322 (S.D.N.Y. 2001).

Thus, under Executive Law § 63(12) if the Defendants are conducting an illegal gambling operation in violation of the Constitution or the penal law they will be in violation of Executive Law § 63(12).

2. DFS Violates the State Constitutional Ban on Gambling

By its express terms, the New York State Constitution prohibits bookmaking, pool-selling, and gambling in *all* forms not specifically exempted:

[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).

FanDuel and DraftKings run afoul of New York's prohibition on bookmaking, which has long defined bookmaking as the "acceptance of bets on a professional basis ' . . . upon the result of any trial or contest of skill, speed or power of endurance of man or beast. '" *People v. Abelson*, 309 N.Y. 643, 650 (N.Y. 1956). This is the precise business of both DFS operators: to accept bets, re-branded as contest "fees," and award payouts based on the outcome of the real-game performance of athletes in actual games of skill, like football. A sports betting operation like DFS qualifies as neither a state-run lottery nor an approved casino. *See* N.Y. Const. Art. I, § 9. Nor does it fall within any of the other limited exceptions to the blanket prohibition against gambling. *Id.*

Because DFS is not an authorized form of gambling, FanDuel and DraftKings are in direct violation of the state constitution.

3. DFS Contests Constitute Gambling Under New York Penal Law

Article 225 of the State Penal Law establishes several criminal offenses related to gambling, including for promoting gambling and for possessing gambling devices and records.

See generally N.Y. Penal Law §§ 225.00-225.40.⁵ The statute sets out the following definition for “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).

“Gambling” therefore consists of three statutory elements: (1) A person “stakes. . .something of value” upon a particular outcome; (2) The outcome depends on either a “contest of chance” or a “future contingent event not under his control or influence”; and (3) The person has an agreement or understanding to “receive something of value” from another person when a certain outcome occurs. *Id.* All three elements are present in DFS contests.

a) DFS Players Stake Something of Value

As an initial matter, DFS players stake something of value to participate in DFS contests: the “fee” they pay to enter. “Something of value” is defined broadly to include, among other things, “any money or property, any token, object or article exchangeable for money or property.” N.Y. Penal Law § 225.00(6). The cost of entry for NFL-based contests on DraftKings ranges from \$0.25 to \$10,600. *See* Ip DK Aff. ¶15. The cost of entry for NFL-based contests on FanDuel ranges from \$1 to \$10,600. *See* Ip FD Aff. ¶ 26. Depending on how his lineup of athletes performs, the DFS player could either win a cash prize or walk away empty-handed. *Cf. People v. Cadle*, 7 A.D.2d 65 (4th Dept. 1958) (holding that seat rental fee may constitute valuable consideration for lottery). The entry fee paid to participate in a DFS contest accordingly constitutes a wager. *Cf. Harris v. Economic Opportunity Comm’n, Inc.*, 171 A.D.2d 223, 227 (2d Dept 1991) (donation to enter charity raffle constitutes risking “something of value”).

⁵ New York law imposes no criminal liability on the players themselves.

b) The Outcome of DFS Wagers Depend on Future Contingent Events and Result from Contests of Chance

Under New York law, two types of wagers qualify as gambling: (1) wagers on future contingent events beyond the control or influence of the bettors; and (2) wagers on contests of chance. N.Y. Penal Law § 225.00(2)(Definition of “Gambling”). Under either prong of the statutory definition, DFS contests qualify as gambling. *See People v. Turner*, 165 Misc. 2d 222, 224, 225 (N.Y. City Crim. Ct. 1995) (finding a shell game constituted a “game of chance” and the outcome also depended on a “contingent event” not under the control of the player).

Each DFS wager depends on a “future contingent event” beyond the bettor’s control: the performance of athletes in real-world games.⁶ The penal law incorporates the “future contingent event” language for precisely the circumstance at issue here:

. . . [Consider] a chess game between A and B, with A and B betting against each other and X and Y making a side bet. Despite the character of the game itself as one of pure skill, X and Y are “gambling” because, from their standpoints, the outcome depends upon “chance” in the sense that neither has any control or influence over it. . . . It is this feature that requires a definition of “gambling” embracing not only a person who wagers or stakes something upon a game of chance but also one who wagers on “a future contingent event [whether involving chance or skill] not under his control or influence.” Without the latter clause, a bet on a horse race would not constitute “gambling.”

Denzer and McQuillan, Practice Commentary, McKinney’s Penal Law [“McKinney’s”] § 225.00, pp. 23 (1967) (second set of brackets in original); see *People v. Jun Feng*, 34 Misc. 3d 1205(A), 1205A (N.Y. City Crim. Ct. 2012) (citing McKinney’s for this proposition).

In an inquiry into whether the outcome depends on a “future contingent event,” the degree of talent or knowledge a bettor displays in making a prediction is irrelevant. *See People v.*

⁶ The New York Penal law’s “future contingent event” language codifies the traditional understanding of illegal sports betting: the wagering of money on the performance of others, like betting money on a boxing match, or taking side bets in a baseball game. *See, e.g., Grant v. State*, 75 Ga. App. 784 (1947) (wagering on whether a baseball player would hit a fly ball is a form of illegal gambling).

Turner, 165 Misc. 2d 222, 225 (N.Y. City Crim. Ct. 1995) (holding that the fact that a “talented player” might increase his odds of winning does not affect whether a wager constitutes gambling on a future contingent event). For example, in the illustration above, the bet between two observers of a chess game is gambling regardless of whether one knew who the better chess player was.

A DFS player can try to make an informed *guess* of how particular athletes might perform, but no DFS player can (legally) influence how those athletes *will* perform. In connection with his wager, a player on either DFS Site takes a single action: picking a lineup. After his lineup “locks,” he is a spectator whose fate is determined by the combined performance of real athletes competing in real-world games.

Indeed, DFS contests are decided based on the same future contingent event as all sports bets: a tally reflecting the cumulative performance of particular athletes. This fact is a foundation of DFS, whose rules underscore that winners and losers are judged by the “final box scores.” *Ip FD Aff.* ¶ 24. As a FanDuel spokesperson observed, the success of a wager by any DFS player is “contingent on the positive performance of all of their players” in actual games. DraftKings likewise observes that the success of DFS lineups “depends on the combined performance” of real-world athletes. *DK Compl.* ¶ 22. DFS wagers then depend directly on the real-game performance of athletes during the contest period—a future contingent event.

Yet, in its verified petition, DraftKings insists that, despite all appearances, DFS players do not bet on a future contingent event. Instead, “selecting the lineup determines the winners and losers” – as if the competition is over upon completing the lineup. *DK Compl.* ¶ 26. This argument is incomprehensible. By the same logic, every sports bet could be recast not as a bet on the outcome of a game but as a competition where “selecting the team determines the winners and losers.” DraftKings’ argument also misses a more obvious point: there is no winning or

losing lineup, nor will there ever be, if the real games do not take place. Nor is it possible to identify the winning lineup *without a tally of the final box scores*. This is what it means for a wager to be contingent on a future event. FanDuel's complaint does not even address this factor.

Until the athletes play and a complete tally is made, the identities of the winners and losers of any DFS contest are *unknown* and *unknowable*. A DFS wager therefore depends on a future contingent event that the DFS players can neither influence nor control. Wagering on DFS therefore constitutes gambling.

A DFS wager also depends on the outcome of a "contest of chance." The penal law defines a "contest of chance" as any "contest, game, gaming scheme or gaming devise 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." N.Y. Penal Law § 225.00(1) (emphasis added). This definition rejected an earlier approach that required a court to weigh whether chance or skill was the "dominating element" because:⁷

In many instances, it may be virtually impossible to determine whether chance or skill *dominates*; it should be sufficient that, despite the importance of skill in any given game, 'the outcome depends *in a material degree* upon an element of chance.'"

McKinney's § 225.00, at pp. 23 (emphasis in original); *People v. Jun Feng*, 34 Misc. 3d at 1205A (citing McKinney's for this proposition).

To determine whether a game constitutes a "contest of chance," the relevant inquiry is whether the outcome depends on chance to any "material degree"—irrespective of the role played by skill. *See Plato's Cave Corp. v. State Liquor Auth.*, 115 A.D.2d 426, 428 (1st Dept 1985), *aff'd on other grounds Plato's Cave Corp. v. State Liquor Authority*, 68 N.Y.2d 791

⁷ DraftKings and FanDuel each try to resurrect the earlier "dominating element" test that was articulated in *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 170-171 (N.Y. 1904). *See* FD Compl. at 25; DK Compl. at. 66. In the face of clear statutory language, this argument is untenable.

(1986). “[G]ames of chance may also include those ‘in which the skill of the contestants may play a role, as long as the outcome depends in a material degree on chance.’” *People v. Delacruz*, 23 Misc. 3d 720, 725 (N.Y. City Crim. Ct. 2009).

“[A]n event depends on an element of chance when, despite research, investigation, skill or judgment, one still cannot make a definite assessment that a certain result will occur or not occur, or the manner in which it will occur.” 7-76 Kamins, Mehler, Schwartz & Shapiro, New York Criminal Practice, Second Edition § 76.02 (Matthew Bender). Here, from the perspective of a DFS player, numerous elements of chance can dictate whether a DFS wager wins or loses. First, as described above, DFS players cannot influence, and have no way to control, the performance of the athletes in their lineups. An athlete injury, a slump, a hot streak, although frequent occurrences, can each directly and materially affect whether a particular wager wins or loses. This is particularly apparent because the margin of victory in a DFS contest is often measured in *fractions* of points. *Ip DK Aff.* ¶ 48. Second, the rules of DFS specifically contemplate numerous unpredictable factors—some relatively common—that can dictate the outcome of a DFS contest completely outside the control not only of the DFS players but of the athletes themselves: a rained-out game, a late trade, a player suspension, or even a box score adjusted too late. *Ip DK Aff.* ¶¶ 22-25, *Ip FD Aff.* ¶¶ 21-24.

Where a contest depends to a material degree on chance, no further inquiry is required. *See Plato’s Cave Corp. v. State Liquor Authority*, 115 A.D.2d at 428 (despite failing to measure the “degree of skill” involved, agency determination that game depended to a “material degree” on element of chance not arbitrary or capricious). Even so, the main purported “skill” in DFS is no different than it is for poker, blackjack, and other forms of sports betting: the ability to calculate probabilities and try to handicap the odds of future events.

DraftKings admits this explicitly, providing on its website that the “skills” needed to perform well in DFS contests are the “same concepts that have helped [poker players] on the felt: probability, risk/reward, and so on.” See Wagner Aff. ¶ 30 at Ex. Y (p. 4). Such purported “skills” no more transform DFS into a contest of skill than they do for poker. The courts have squarely addressed whether poker is gambling and have found it to be a contest of chance. See, e.g., *People v. Dubinsky*, 31 N.Y.S.2d 234, 237 (N.Y. Spec. Sess. 1941)(“There is no doubt that playing ‘stud’ poker for money is a game of chance and constitutes gambling.”); *United States v. DiCristina*, 726 F.3d 92, 98 n. 5 (2d Cir. 2013).

Indeed, New York courts have rejected the notion that calculating probabilities and handicapping odds convert a “contest of chance” into a game of skill. First, handicapping and evaluating odds is fundamental to *every form of sports and horserace betting*,⁸ which have long been considered gambling in New York State. N.Y. Const. Art. I, § 9; see also *People v. Fortunato*, 452 N.Y.S.2d 451 (2d Dept 1982) (affirming jury conviction on charges of promoting gambling and possession of gambling records related to illegal sports betting enterprise); *People v. Giordano*, 87 N.Y.2d 441 (1995) (affirming convictions on charges of promoting gambling related to illegal sports betting enterprise).

Second, in finding a “shell game” constituted a “game of chance,” a New York court addressed and soundly refuted the notion that handicapping odds are properly considered a “skill,” observing:

Games of chance range from those that require no skill, such as a lottery, to those such as poker or blackjack which require considerable *skill in calculating the probability of drawing particular cards*. Nonetheless, the latter are as much games of chance as the former, since the outcome depends to a material degree

⁸ See, e.g., *Lasky v. Van Lindt*, 115 Misc. 2d 259, 261 (Sup. Ct. N.Y. County 1982) (quoting definition of handicapper in horseracing as “one who rates the entries in a race before post time, who figures out the order of finish of a race beforehand. Factors include distance, weight, track condition, riders, past performances, breeding, idiosyncras[ies of horses, etc.]”); *Green v. Fornario*, 486 F.3d 100, 101 (3d Cir. 2007)(“Handicappers are the stock analysts of the sports gambling world: they provide information to sports bettors.”)

upon the random distribution of cards. *The skill of the player may increase the odds in the player's favor, but cannot determine the outcome regardless of the degree of skill employed.*

People v. Turner, 165 Misc. at 223-24 (emphasis added) (citations omitted). Also, critically, the purported “skill” of a few would not alter the character of DFS as a “game of chance” for the great majority of people who play it. *Cf. People ex rel. Ellison v. Lavin*, 179 N.Y. at 172-74 (Rejecting the proposition that the “chance” element in a widely publicized contest is judged from the perspective of “experts” rather than the public at-large).

Even if probing DFS contests for the precise quantum of “skill” involved was merited (as explained above, it is not), the purported “skills” for DFS—the skill of handicapping odds possessed by a small minority—would not change the legal outcome: DFS depends to a material degree on an element of chance.

Indeed, even the self-serving “skill” studies purchased by the DFS Operators show that DFS involves far more chance than not only true skill games, like chess, but also long established contests of chance, like poker. In one FanDuel skills analysis, for example, the top 10% of players beat the bottom 90% just 59% of the time. *See* Wagner Aff. ¶ 35 at Ex. DD (appendix). DFS simply does not compare to a game of skill, like chess, where a skilled player *consistently* beats an unskilled player. Even a well-established contest of *chance* like poker has skilled players beating unskilled players 97% of the time. *See* Wagner Aff. ¶ 36.

Finally, even if skill played a substantial role in a contest—an impossible argument with DFS—the contest would still qualify as a “contest of chance” where the size of the *prize* “depends in a material degree upon an element of chance.” *Matter of Pace-o-matic, Inc. v. New York State Liquor Auth.*, 72 A.D.3d 1144, 1146 (3d Dept 2010) (Upholding ruling that skill-based video game constituted a “contest of chance” where chance affected the value of the prizes). Here, the distribution of cash prizes in any DFS contest depends on exceedingly minor

contest quirks. For example, in a recent GPP on DraftKings for professional basketball only .25 points separated the top point-scorer from second place, a point difference equivalent to less than one missed jump shot. First prize won \$5,000, while second prize won \$2,500. *Ip DK Aff.* ¶ 48. In a recent GPP on FanDuel for professional basketball only six points separated the first and second place prize winners, the difference in cash winnings ranging from \$400 to \$2,000. *Ip FD Aff.* ¶ 43. A well-considered lineup picked by an experienced DFS player could easily take home a lesser prize or no prize—while a randomly assigned lineup could win the jackpot.

* * *

The outcome of a DFS wager depends on a “future contingent event” beyond the control or influence of the players and is a “contest of chance.” Either way, DFS contests constitute gambling.

c) DFS Bettors Understand That They Will Receive Something of Value in the Event of a Certain Outcome

For each contest that requires payment of an entry fee or bet, the DFS Sites and their bettors have an agreement that the Sites will award cash prizes to a portion of bettors whose lineups perform well relative to others in contention. The respective “Terms of Use” for FanDuel and DraftKings specify that prizes will be awarded to the winning DFS player. *See Wagner Aff.* ¶¶ 31-32.

While the details concerning the number of bettors who will win cash prizes and the value of those prizes vary depending on the contest format, DFS bettors undeniably participate on the understanding that they will win money if they win the contest. This understanding is the reason that DFS bettors pay money to enter DFS contests. It is also why the advertisements for the DFS Sites feature oversized checks and cash falling from the ceiling.

4. **DraftKings is Promoting Gambling in the Second Degree**

Section 225.05 of the Penal Law defines the misdemeanor offense of “Promoting gambling in the second degree,” as follows: “A person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity.” The terms “advance gambling activity,” “profit from gambling activity,” and “unlawful” are, in turn, defined in NY Penal § 225.00(4), (5), and (12):

4. “Advance gambling activity.” A person “advances gambling activity” when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity. Such conduct includes but is not limited to conduct directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any other phase of its operation. . . .

5. “Profit from gambling activity.” A person “profits from gambling activity” when, other than as a player, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity.

12. “Unlawful” means not specifically authorized by law.

In *People v. World Interactive Gaming Corp.*, the New York Attorney General brought a special proceeding under Executive Law § 63(12) to enjoin an internet gambling company from accepting wagers in New York. 185 Misc. 2d 852, 855-56 (Sup. Ct. N.Y. County 1999). There, the court held that such companies had unlawfully promoted gambling because “having established the gambling enterprise, and advertised and solicited investors to . . . gamble through its on-line casino, respondents have ‘engage[d] in conduct which materially aids . . . gambling activity.’” *Id.* at 861. The Court concluded that “[b]ecause all of respondents’ activities illegally advanced gambling . . . they have knowingly violated Penal Law § 225.05.” *Id.*

The DFS Operators advance unlawful gambling activity in the course of their daily operation. Specifically, the companies run the DFS contests, which are not authorized by law, set their rules, administer the websites and back-end systems that run the contests, advertise and otherwise solicit bettors to participate in the contests, collect and process wagers, and distribute cash prizes. Each time the DFS Operators accept an entry fee, it profits from gambling activity. By retaining approximately 10% of each entry fee as a “rake,” the DFS Operators also “participate[] in the proceeds of gambling activity.” In 2014 alone, DraftKings processed more than \$25 million of wagers from New York residents. *See Wagner Aff.* ¶ 34. In that same period, NYAG estimates that FanDuel received \$31 million in wagers from New York residents. *See Wagner Aff.* ¶ 33.

5. DraftKings and FanDuel Promote Gambling in the First Degree

Section 225.10 of the Penal Law defines the felony of “Promoting gambling in the first degree,” in relevant part, as follows:

A person is guilty of promoting gambling in the first degree when he knowingly advances or profits from unlawful gambling activity by:

1. Engaging in bookmaking to the extent that he receives or accepts in any one day more than five bets totaling more than five thousand dollars.

The term “bookmaking” is defined in Penal Law § 225.00(9) as:

“Bookmaking” means advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events.

The entire business model for FanDuel and DraftKings consists of accepting bets from members of the public. Each indisputably accepts bets numbering in the thousands and totaling millions of dollars on a daily, weekly, monthly, and yearly basis.

6. DraftKings and FanDuel Possess Gambling Records in the Second Degree

Section 225.15 of the Penal Law defines the misdemeanor offense of “Possession of gambling records in the second degree,” in relevant part, as follows:

A person is guilty of possession of gambling records in the second degree when, with knowledge of the contents or nature thereof, he possesses any writing, paper, instrument or article:

1. Of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise.

Incident to running their contests, DraftKings and FanDuel maintain records reflecting the selected lineups, the amounts wagered, and the winners of prizes. The DFS Sites necessarily have knowledge of their contents; indeed, such records are essential to the operation of gambling or bookmaking enterprises, such as those operated by DraftKings and FanDuel. The two DFS operators have been in possession of gambling records in the second degree for the duration of their operation.

7. DraftKings Possesses Gambling Records in the First Degree

In addition to the elements described in Penal Law § 225.15, Penal Law § 225.20 defines the felony of “Possession of gambling records in the first degree” as also requiring that the relevant gambling records “reflect[] or represent[] more than five bets totaling more than five thousand dollars.” DraftKings has recorded countless bets totaling millions of dollars since it launched its operations in 2012. FanDuel has been in operation since 2009, and likewise has recorded countless bets from New York residents totaling millions of dollars.

8. DraftKings and FanDuel are Engaging in Fraudulent and Deceptive Business Practices under Executive Law § 63(12) and GBL §§ 349 and 350.

Through representations on their website, in their television advertising, and elsewhere, DraftKings and FanDuel have engaged, and are engaging, in fraudulent and deceptive business

practices and false advertising, including misrepresentations about the legality of its business, the likelihood of individual players winning, and the characterization of DFS as a skill game.

Fraud under § 63(12) is broadly defined in the statute as “any device, scheme or artifice to defraud, any deception, misrepresentation, concealment, suppression, false promise or unconscionable contract provision.” Consistent with this broad statutory definition, courts have construed statutory fraud as going beyond common law fraud. Thus, proof of scienter or bad faith is not necessary. *See, e.g. People v. Federated Radio Corp.*, 244 N.Y. 33, 38-39 (1926); *Lefkowitz v. Bull Investment Group, Inc.*, 46 A.D.2d 25, 28 (3rd Dept. 1974); *Matter of State by Lefkowitz v. Interstate Tractor Trailer Training, Inc.*, 66 Misc.2d 678, 682 (Sup. Ct. N.Y. County 1971); *State by Lefkowitz v. Bevis Indus., Inc.*, 63 Misc.2d 1088, 1090 (Sup. Ct. N.Y. County 1970).

GBL § 349 declares unlawful “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state.” GBL § 350 similarly declares unlawful “false advertising in the conduct of any business, trade or commerce or in the furnishing of any service.” The definition of deceptive practices under GBL § 349 and false advertising under GBL § 350 are given parallel construction to that of fraud under Executive law § 63(12). *See, e.g., Colo. State Christian College of Church of Inner Power, Inc.*, 76 Misc. 2d at 54. Like Executive Law § 63(12), these statutes are “intended to be broadly applicable, extending far beyond the reach of common law fraud.” *State v. Feldman*, 210 F. Supp. 2d 294, 301 (S.D.N.Y. 2002).

DraftKings and FanDuel each made repeated misrepresentations in public statements, in television advertisements, or on their websites. The DFS Sites claimed (i) that they comply with all applicable laws, which as explained above, is untrue; (ii) that playing and winning is simple, while data reveal that most DFS players lose; and (iii) that DFS is a skill game, notwithstanding

that the contest legally qualifies as a “contest of chance.” Such material deceptions and omissions constitute fraudulent business practices in violation of Executive Law § 63(12) and deceptive business practices and false advertising pursuant to GBL §§ 349 and 350 respectively.

B. Defendant’s Illegal Gambling Business is Causing Irreparable Harm

As noted above, the Attorney General, unlike private litigants, need not prove irreparable injury because such injury is presumed in a statutory enforcement action under Executive Law § 63(12). *See People v. Apple Health & Sports Club, Ltd. Inc.*, 174 A.D.2d 438, 439 (1st Dept 1991), *aff’d*, 80 N.Y.2d 803 (1992); *Spitzer v. Lev*, 2003 NY Slip Op 51049(U) at 6-7 (Sup. Ct. N.Y. County 2003) (“when the Attorney General is authorized by statute to seek injunctive relief to enjoin fraudulent or illegal acts, no showing of irreparable harm is necessary.”).

In this case, the requested relief would nonetheless prevent further irreparable harm to the public. As discussed in expert affidavits submitted by Dr. Jeffrey L. Derevensky, the Director of the International Centre for Youth Gambling Problems and High-Risk Behaviors, and Keith S. Whyte, the Executive Director of the National Council on Problem Gambling, DFS attracts compulsive gamblers and those at risk for gambling addiction. Whyte Aff., ¶¶ 6-11; Derevensky Aff., ¶¶ 5-9. The ongoing availability and marketing of DraftKings in the state of New York offers instant access to these vulnerable populations. As Dr. Deverensky observed

[I]ndividuals are bombarded with advertisements suggesting that many people who start with small amounts of money eventually win large sums of money. I find such advertising to be misleading as it inaccurately encourages DFS players to believe that they can improve their chances of winning if they spend additional money and time playing DFS. This perception can lead players to a preoccupation with DFS, chasing of losses, and developing symptoms and behaviors associated with a gambling disorder. Derevensky Aff., ¶ 10.

Indeed, a keynote presentation prepared for the 2014 Winter Conference of the Fantasy Sports Trade Association (“FSTA”), a leading advocate for DFS, touts the fact that DFS serves

as “a viable alternative” to players who otherwise “do not have access to sports wagering” and a “new alternative for some instant ticket / lottery players.” *See* Wagner Aff. Ex. F, p.9. Moreover, DraftKings’ own records show pleas from DFS players to deactivate their accounts or permanently block them from the site because of self-identified gambling addiction. The company’s customer service representatives have fielded pleas from self-described gambling addicts to close accounts and permanently ban them from the site, with subjects like “Gambling Addict do not reopen,” “Please cancel account. I have a gambling problem,” and “Gambling Addiction needing disabled account.” *See* Wagner Aff. ¶ 23.

The societal ramifications of allowing DFS to continue are serious and cannot be compensated. Without immediate action to stop illegal gambling, families and neighborhoods will continue to suffer the consequences. Loved ones will continue to fall into the spiral of addiction. Promising futures will continue to get derailed. And our communities will continue to pay the price. This type of danger is the sort of irreparable harm that merits preliminary relief most.

C. The Balance of Equities Tilts for the State

In evaluating injunctive relief, courts must consider the welfare and interest of the general public. *New York v. Castro*, 143 Misc. 2d 766, 769-770 (Sup. Ct. N.Y. County 1989) (granting an injunction to enjoin defendant from use of space where an illegal gambling operation was conducted “in order to protect the public safety, health or morals”). The fact that the laws being violated here were specifically designed to protect the public tips the equities decidedly in the State’s favor. *See City of New York v Smart Apts. LLC*, 39 Misc.3d 221, 233 (Sup. Ct. N.Y. County 2013) (“the equities lie in favor of shutting down an illegal, unsafe, deceptive business, rather than in allowing said business to continue to operate (to defendants’ presumed financial advantage)”). Where the government shows that a violation of law has occurred, “the public

equities receive far greater weight” than any “private equities” appellants may have. *F.T.C. v. Warner Communications Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984).

By contrast, there are no private equities in defendants’ favor. Defendants have no right to operate an illegal gambling operation. Any burden imposed in requiring DraftKings and FanDuel to operate in full compliance with the law is reasonable.

CONCLUSION

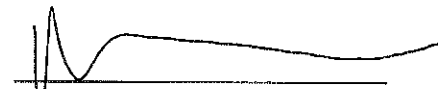
For the foregoing reasons, Plaintiffs’ application for a preliminary injunction should be granted.

Dated: New York, NY
November 16, 2015

Respectfully submitted,

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Exhibit E

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

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

Index No. 453054/2015

Plaintiffs,

-against-

IAS Part 13
Assigned to Justice Mendez

DraftKings, Inc.,

Defendant.

-----X

**MEMORANDUM OF LAW IN OPPOSITION TO DRAFTKINGS' MOTION
FOR A PRELIMINARY INJUNCTION, AND IN FURTHER SUPPORT OF THE
NYAG'S MOTION FOR A PRELIMINARY INJUNCTION**

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PRELIMINARY STATEMENT

On the day of the initial hearing in this matter, DraftKings crowned winners in its “Millionaire Maker” contest. As one winner told a reporter, he won over \$400,000 with one of his first wagers on “Daily Fantasy Sports” (“DFS”) even though he “couldn’t name 10 players in the NFL.” The winner, reported as paying “scant attention” to that day’s games, came just shy of winning the \$1 million top prize, ultimately losing out because the Bengals did not score a fourth quarter touchdown. The winner candidly explained, “It’s close to winning the lottery. I was nine points away from winning the lottery.”

Applying New York’s Constitution and laws to any common sense review of the facts, the DFS contests offered by FanDuel and DraftKings (together, the “DFS Operators”) constitute illegal sports gambling. Players risk “something of value” – as much as \$10,600 per wager. They do so with an “agreement or understanding” that they can win prizes that top out at over \$1 million. And whether the bettor wins depends on predicting a “contingent future event” outside the bettor’s control: the performance of professional or amateur athletes in actual live games.

DFS is also a “contest of chance.” Defined under New York law as any game whose outcome depends to a “material degree” on an element of chance, this language has long been understood and applied in a clear-cut manner: even if some skill is involved, unless chance is *immaterial* to the outcome, it is a “contest of chance.” Whether a wager depends on guessing the order of horses in a betting parlay, the number of runs scored in a ballgame, or, as with DFS, the performance of athletes on any given Sunday, there is simply no way to eliminate chance from the contest. Chance is pervasive at every level of DFS – the unpredictable performance of an athlete in a given game (*e.g.*, amount of points scored); to the pronouncements of the league

office (*e.g.*, athlete suspensions); to the whims of nature (*e.g.*, rained out games). DFS cannot escape its status as a contest of chance, and thus wagering on its outcome is gambling.

DraftKings and FanDuel know this. Accordingly, they have resorted to desperate measures. After the Office of the New York Attorney General (“NYAG”) sent letters describing the illegality of their conduct, demanding that they stop, and notifying them that NYAG would commence an enforcement action if they failed to do so, the DFS Operators filed anticipatory and improper lawsuits and sought temporary restraining orders calculated to interfere with the lawful exercise of an enforcement agency’s powers. Last week, this Court denied FanDuel’s and DraftKings’ motions, finding that it “cannot enjoin the Attorney General from the enforcement of a penal statute.” Yet, DraftKings persists in its efforts to seek the same relief again.

Without relevant authority for their position under New York gambling laws, the DFS Operators can only stitch together a patchwork of clearly outdated, irrelevant out-of-state case law and arguments about games that look nothing like DFS. Indeed, the DFS Operators stake much of their legal argument on one unreported opinion from the District of New Jersey, *Humphrey v. Viacom*. That case lacks any precedential value in this court. Moreover, the case interprets a *qui tam* statute, not New Jersey’s gambling laws, and interprets words – “bets” and “wagers” – that do not even appear in New York’s definition of gambling. If that were not enough, the *Humphrey* Court also explicitly declined to consider whether the game at issue – traditional season-long fantasy football, which differs in material respects from DFS – is one of chance or skill, and never confronted the question of whether the game constitutes a wager on a “future contingent event.” The DFS Operators’ heavy reliance on this case is a red herring.

Having no legal basis for their motion, the DFS Operators are left grasping at straws, arguing that characterizing “entry fees” as “wagers” criminalizes benign activities like marathons

and spelling bees. But the very cases the DFS Operators cite, including one from the New York Court of Appeals, stand for the opposite proposition: that paying an entry fee as a competitor in a true skill game is *not* gambling. Of course, DFS is not a game of skill. Similarly, none of the constitutional claims put forth by DraftKings have any merit. NYAG is empowered by the New York State Constitution, the Penal Law and Executive Law § 63(12), among other statutes, to do exactly what it is doing. No one's rights are violated when companies engaged in illegal activity are forced to cease after a proceeding held in a New York court. Accordingly, NYAG respectfully requests that the Court grant its motion for a preliminary injunction and deny the improper request for preliminary relief submitted by DraftKings.¹

STATEMENT OF FACTS

The facts relevant to this application are set forth in detail in the respective Complaints; NYAG's Memo. of Law in Support of the Preliminary Injunction, Nov. 17, 2015, Case No. 453056/2015, D.I. 7 (hereinafter, "NYAG Mem."); the Affidavits and Affirmations filed with this Court on November 17, 2015; and the transcript of the hearing of November 16, 2015 ("Tr."). In connection with this submission, NYAG further submits: the November 23, 2015 Affirmation of Justin Wagner ("Wagner Aff. II"), and the November 23, 2015 Affidavit of Donald Siegel ("Siegel Aff."), annexed as Ex. A to Wagner Aff. II.

¹ NYAG's and DraftKings' motions are for preliminary injunction. FanDuel did not move for a preliminary injunction. The DFS Operators have filed actions for declaratory judgment, albeit through different procedural mechanisms. NYAG will move to dismiss both actions after the preliminary injunction motions are decided.

This memorandum of law has also been filed in the NYAG's case against FanDuel. The arguments herein apply equally to FanDuel, and so for the Court's convenience, the NYAG has filed one brief in connection with both cases.

ARGUMENT

I. THE NYAG HAS ALREADY DEMONSTRATED ENTITLEMENT TO INJUNCTIVE RELIEF

As addressed in NYAG's moving brief, the DFS Operators should lose on the merits for all the same reasons that NYAG should prevail in its motion for a preliminary injunction: the DFS Operators are operating illegal gambling businesses in clear violation of Article 1, Section 9 of the New York State Constitution and Sections 225.05, 225.10, 225.15, and 225.20 of the Penal Law. Their ongoing illegal and fraudulent conduct also violates Executive Law § 63(12), General Business Law §§ 349 and 350 and Business Corporation Law § 1303.

A. DFS Wagers Constitute Illegal Gambling Under the New York State Constitution and Penal Law

By its express terms, the New York State Constitution prohibits bookmaking, pool-selling, and gambling in *all* forms not specifically exempted.² N.Y. Const. Art. I, § 9. FanDuel and DraftKings run afoul of the Constitution's bookmaking prohibition, which has long been defined as the "acceptance of bets on a professional basis ' . . . upon the result of any trial or contest of skill, speed or power of endurance of man or beast.'" *People v. Abelson*, 309 N.Y. 643, 650 (1956).

Article 225 of the State Penal Law establishes several criminal offenses related to gambling, including for promoting gambling and for possessing gambling devices and records. N.Y. Penal Law §§ 225.00-225.40. Penal Law § 225.00(2) sets out the definition for "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

² The DFS Operators do not claim to qualify for any of the limited number of enumerated exceptions. *See* N.Y. Const. Art. I, § 9 (exceptions for the state-run lottery, pari-mutuel betting at horse racetracks, and seven casinos).

control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

Thus, there are three elements: (1) a person “stakes or risks something of value” upon a particular outcome; (2) the outcome depends on either (i) a “contest of chance” or (ii) a “future contingent event not under his control or influence”; and (3) the person has an “agreement or understanding to receive something of value” from another person when a certain outcome occurs. *Id.* The DFS Operators do not dispute that if DFS constitutes illegal gambling, they are in violation of Penal Law §§ 225.05, 225.10, 225.15, and 225.20. Nor do they dispute that a DFS player on their sites plays based on “an agreement or understanding” that he will receive “something of value.”

1. *The Money DFS Players Risk to Enter DFS Contests Is “Something of Value”*

DFS players pay for a chance to win a cash prize. If they win, they get their money back and then some – in certain cases winning the top prize is worth upwards of one million dollars. NYAG Mem. at 5, 9. If a DFS player loses, he forfeits his wager. Betting begins at \$0.25 for DraftKings and \$1 for FanDuel and can reach over \$10,000 per wager. NYAG Mem. at 5. In this arrangement, DFS players clearly risk “something of value”: the money they paid to play. NYAG Mem. at 20.

FanDuel and DraftKings assert that the money the bettors risk are an “entry fee” not a “bet or wager.”³ That assertion ignores the fact that New York’s statutory definition of gambling *neither references nor relies* on the concept of a “bet” or “wager.” Rather, the gambling statute at

³ DraftKings’ Mem. of Law in Support of Its App. by Order to Show Cause for a Temp. Restraining Order, Prelim. Inj., and Expedited Proceeding and Disc., and Its Art. 78 Petition, Nov. 16, 2015, Case No. 102014-15 (“DK Mem.”) at 12. (emphasis in original); Mem. in Support of App. by Pl. FanDuel Inc. for an Order to Show Cause and Temp. Restraining Order, Nov. 16, 2015, Case No. 161691/2015, D.I. 15 (“FD Mem.”) at 9-10.

issue concerns whether a player “stakes or risks something of value.” Penal Law § 225.00(2).

The prospect of losing *money* – forfeiting the payment to enter the contest – clearly qualifies as risking “something of value.” *Cf. People v. Miller*, 271 N.Y. 44, 48 (1936) (price of movie ticket was consideration for a game of chance, since moviegoer got a chance to win a prize). This is all that New York law requires to satisfy the first element of gambling. Penal Law § 225.00(2).

Ironically, in any case, the DFS Operators have represented that the money paid to enter their contests are “bets,” “wagers,” or “stakes.” *See* NYAG Mem. at 8-9. In fact, DraftKings embedded code in its website that is tailor-made to bring those interested in “betting” directly to its doorstep. NYAG Mem. at 8. Indeed, the DFS Operators act in much the same way as online poker and traditional bookmakers: rather than risk their own money, the DFS Operators make a market for bettors and take a cut of every wager. *See* Siegel Aff. ¶ 17. Poker players call this cut a “rake.” Sports bettors call it a “vig.” Those terms refer to the same thing. And, in fact, each of these terms has been used at one time or another by the DFS Operators themselves. NYAG Mem. at 29.

2. *DFS Wagers Constitute Gambling Because Winning Depends on a Future Contingent Event Outside the Bettor’s Control*

The next prong provides that gambling exists if something of value is risked upon the outcome of “a future contingent event not under his control or influence,” *i.e.*, an independent factor that is extrinsic to the contest. Because the success or failure of a DFS wager depends exclusively on the real-game performance of others – athletes playing competitive sports – DFS fulfills this prong.

New York courts have long recognized two separate categories of gambling: (i) wagering on sports and other contingent events, and (ii) wagering on games of chance. *See, e.g., Wilkenfeld v. The Attic Club*, 74 Misc. 543, 134 N.Y.S. 507 (1907) (explaining the intent of the

Legislature “to distinguish between acts of gambling, commonly known as bets or wagers contingent upon the happening of an event, such as racing or elections, and those which have to do with games of chance, such as card or dice playing”). The archetypal sports gambling crime – bookmaking – is defined, in relevant part, as running a business that accepts bets based “upon the outcomes of future contingent events.” N.Y. Penal Law § 225.00(9); *see also* Siegel Aff. ¶¶ 6-8.

The DFS Operators argue that this element is limited to a single sports event. But that is not the law. Betting on events beyond one’s control or influence has been interpreted to cover a wide range of wagers – from betting on horseraces to elections. *See, e.g., People v. Giordano*, 640 N.Y.S.2d 432 (1995) (sports); *People v. Busco*, 46 N.Y.S.2d 859 (1942)(horseracing); *Liebman v. Miller*, 20 Misc. 705 (N.Y. City Ct. 1897)(elections). Unsurprisingly, New York’s gambling laws have long prohibited complex sports wagering schemes like DFS, including bets on combinations of games (*i.e.*, “parlay” bets) and on game statistics (*i.e.*, “prop” bets). *See People v. Feinlowitz*, 29 N.Y.2d 176 (1971) (affirming conviction on charges of bookmaking and possession of bookmaking records under former Penal Law, where defendant had taken bets including a “three-team-parlay bet”); *People v. McDonald*, 177 A.D. 806 (2d Dep’t 1917) (affirming conviction under former Penal Law § 986 for recording parlays, among other types of bets, on horse races); *People v. Wright*, 100 Misc. 205 (N.Y. County Ct. 1917) (affirming gambling conviction for wagering scheme involving total runs scored by combinations of baseball teams). The unsupported assertion by DraftKings that “contingent event” can refer only to the outcome of a “particular game” is flatly wrong. DK Mem. at 20.

For example, in *People v. Wright*, the court affirmed the conviction of a man charged with pool-selling under § 986 of the former Penal Law for a wagering game similar to DFS. 100 Misc. at 214. In that game, bettors selected one baseball team for each day of the week (except

Sunday). *Id.* at 207. At the end of the week, the pool-seller tallied up the runs scored by each team and made cash payouts to the bettors whose six-team combinations scored the most cumulative runs. *Id.* at 208. The court recognized that this scheme – a forerunner of contests like DFS – was gambling. *Id.* at 213.

The notion that DFS exists as a contest separate and apart from actual sports is baseless: there are and can be no winners or losers without the happening of a future contingent event outside of their influence or control. There is no “successful roster” until the relevant athletes compete in actual skill games. DFS cannot escape the law by pretending that it is somehow different from every other sports bet that has ever been placed in New York. There is nothing special about DFS. It is simply a way to wager on a future contingent event – and thereby qualifies as illegal gambling.

3. *DFS is Also a Game Whose Outcome Depends Upon Chance to a Material Degree*

DFS is also a game whose outcome depends upon chance to a material degree. The Legislature defined gambling explicitly, as any contest or game where the outcome depends “in a material degree” on “an element of chance, notwithstanding that skill of the contestants may also be a factor therein.” N.Y. Penal Law § 225.00(1).

“[A]n event depends on an element of chance when, despite research, investigation, skill or judgment, one still cannot make a definite assessment that a certain result will occur or not occur, or the manner in which it will occur.” 7-76 Kamins, Mehler, Schwartz & Shapiro, New York Criminal Practice, Second Edition § 76.02 (Matthew Bender). Stated another way, a skill game is one where the role of chance is *immaterial*. New York decisions are virtually unanimous in recognizing the statutory “material degree” test as the applicable standard for determining whether a game properly constitutes a “contest of chance.” *See Plato’s Cave Corp.*

v. State Liq. Auth., 115 A.D.2d 426 (1st Dep’t 1985); *Matter of Pace-o-matic, Inc. v. N.Y. State Liq. Auth.*, 72 A.D.3d 1144 (3d Dep’t 2010); *People v. Jun Feng*, 34 Misc. 3d 1205(A), 1205A (City Crim. Ct. 2012); *People v. Delacruz*, 23 Misc. 3d 720 (Crim. Ct. Kings Cnty. 2009); *People v. Tillman*, 13 Misc. 3d 736 (Crim. Ct. Kings Cnty. 2006); *People v. Turner*, 165 Misc. 2d 222 (Crim. Ct. N.Y. Cnty. 1995); *People v. Denson*, 192 Misc. 2d 48 (Crim. Ct. N.Y. Cnty. 2002); *People v. Mohammed*, 187 Misc. 2d 729 (Crim. Ct. N.Y. Cnty. 2001); *Beamel Amusement Corp. v. Police Dep’t of Suffolk Cnty.*, 54 Misc. 2d 946 (Sup. Ct. Suffolk Cnty. 1967).

With DFS, chance is clearly not immaterial. Numerous chance occurrences separate winners from losers. These include the unknowable performance of athletes on a given day (*e.g.*, slumps, hot streaks, or strategic calls); the decisions of sports leagues (*e.g.*, cancelling games or suspending players); and acts of nature (*e.g.*, weather or freak injuries). Any one of those factors, standing alone, can fundamentally alter the outcome of a DFS wager and introduce indelible and unavoidable elements of chance into any DFS contest. That is particularly apparent because the margin of victory in a DFS contest is often measured in *fractions* of points. Nov. 17, 2015 Affidavit of Vanessa Ip Pertaining to DraftKings, Inc., Case No. 453054/2015, D.I. 43 (“Ip DK Aff.”) ¶ 48.

As noted in NYAG Mem. at 6, the number of illustrations demonstrating the role of chance in DFS are limitless. Here is another: late in the game on October 5, 2015, a receiver for the Detroit Lions fumbled just shy of a touchdown and out of bounds. The opposing team, the Seattle Seahawks, interfered with the ball in the end zone. Technically, this violation should have returned possession to the Lions – as the NFL’s Vice President for Officiating later confirmed. Yet a referee’s flubbed call on the field gave possession of the ball to the Seahawks – crediting the Seahawks with a “turnover.” This bad call was not corrected in DraftKings’ ranking. As a

result, one DFS player lost the \$1.2 million jackpot, and a different player won it. *See* Wagner Aff. II, ¶¶ 6-7.

B. Irreparable Harm, Which Need Not be Shown, Nevertheless Will Result Unless an Injunction is Issued against the DFS Operators

Unlike private litigants, the NYAG need not prove irreparable injury because such injury is presumed in a statutory enforcement action under Executive Law § 63(12). *People v. Apple Health & Sports Club, Ltd. Inc.*, 174 A.D.2d 438, 439 (1st Dep’t 1991), *aff’d*, 80 N.Y.2d 803 (1992). Even so, the public is and will continue to suffer irreparable harm. The societal ramifications of facilitating gambling addicts cannot be compensated. For example, the National Council on Problem Gambling estimates the annual costs of gambling addiction in the United States in 2013 at about \$7 billion, including from crime, incarceration and bankruptcy. Wagner Aff. II ¶ 4, Ex. B. DraftKings’ own records demonstrate their callousness towards customers who try to rid themselves of their habit – instead of cancelling their accounts they pull them back in by offering new games and free play.⁴ And it has been reported that the National Council on Problem Gambling has requested that the DFS Operators add the number 1-800-GAMBLER to their websites; they have refused that request.⁵

Moreover, DFS Operators’ advertising is ubiquitous – they are spending millions of dollars to lure more and more people into playing. These ads often target more vulnerable

⁴ The New York Times reported that one player emailed the company, “I no longer wish to be able to bet . . . Additionally I would like the balance of my winnings in the form of a check to a cause to help gamblers.” DraftKings emailed him promotional materials that included statements like: “You Scored Big! Your invite is inside: Claim your FREE Entry” and “We’ve selected you for this! Your shot at winning \$100K tonight.” Wagner Aff. ¶8, Bogdanovich and Williams, “For Addicts, Fantasy Sites Can Lead to Ruinous Path,” *New York Times*, at A1 (Nov. 22, 2015), available at <http://www.nytimes.com/2015/11/23/sports/fantasy-sports-addiction-gambling-draftkings-fanduel.html> (hereinafter, “Ruinous Path”); *see also* NYAG Mem. at 32-33.

⁵ “Ruinous Path,” at A1. (“‘We have consistently urged them to list our help line and website,’ [Keith Whyte] said.”).

populations, such as college-age males, with hollow promises: “I’ve won over 29 thousand dollars on FanDuel. *Nothing special about me.* The difference is I played and they didn’t.” NYAG Mem. at 10. In truth, an investor presentation suggests that the average return for all FanDuel users is negative 9.5% – meaning that the average player loses far more than they win.⁶ There is no easy way of winning cash. The advertising also attempts to convince the public that the game is one of skill – a feature that further draws in gamblers and has been criticized by those who treat gambling addictions.⁷ That advertising is false and misleading and must stop.

To be clear: real people are suffering real harm from DFS. In the November 23, 2015 New York Times piece, one player profiled comments, “[DFS] would be akin to an alcoholic finding out about a whole new street of bars that he never knew about — exciting, great bars . . . For an addict, it wasn’t what I needed.” The player reported losing \$20,000 and even considered suicide.⁸

There is a reason this State has chosen to prohibit gambling, and when it has decided to permit gambling, to do so only in a highly regulated environment with protections for the public and the players. DFS should not be permitted to circumvent that structure any longer.

C. The Balance of the Equities Favors the NYAG

New York law is clear that for an injunction to issue, a petitioner must affirmatively establish “a balance of the equities in their favor.” *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860

⁶ See Wagner Aff. II, ¶ 9, Ex. G (presentation compiled by Bain and Company; the NYAG’s investigation has established that the name “Falcon” is a code word for FanDuel).

⁷ Whyte Aff. and Derevensky Aff.; see also *Ruinous Path*,” at A1 (“Yet gambling counselors say they could more easily help people like Mr. Adams [a compulsive gambler and DFS player] if fantasy companies did not portray their games as involving mostly skill. That alone is a risk for addiction, said Keith Whyte, executive director of the National Council on Problem Gambling. ‘The perception of skill has led many, many people down a very dark path,’ he said.”).

⁸ *Id.*

(1990). “It is well settled that a plaintiff should be denied an injunction where it lacks equitable standing to obtain affirmative equitable relief.” *W. T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 518 (1981) (internal citations omitted) (denying injunction).

First, to the extent the Court finds that the DFS Operators are operating their business in violation of the Penal Law, there can be no equity in issuing an injunction to allow an illegal business to continue. Rather, the equities lie with the State, which seeks to stop a practice that is in plain violation of the law. *Brookford, LLC v. Penraat*, 47 Misc. 3d 723, 735 (Sup. Ct. N.Y. Cnty. 2014) (“equities lie in favor of shutting down an illegal, unsafe, deceptive business practice, rather than allowing said business to continue to operate”); *Hirsch v. New York City Dept. of Educ.*, 2011 NY Slip Op 30003(U), at *5 (Sup. Ct. N.Y. Cnty. Jan. 3, 2011) (balance of equities favored city given its interest in preventing possible illegal activity by petitioner); *McDonald v. North Shore Yacht Sales, Inc.*, 134 Misc. 2d 910, 917 (Sup. Ct. N.Y. Cnty. 1987) (equities balanced *against* entity alleged to be promulgating false advertisements to millions of New Yorkers).

Second, equity suggests that DFS Operators should be held to their public statements. When pitching their games to the public (and in making arguments in their legal papers), the DFS Operators talk about games of “skill” and profess shock that anyone could think that what they offer is sports gambling. But when the spotlight is off, the story changes dramatically. When DFS Operators describe themselves to investors or potential business partners, they liken DFS to “poker,” say it exists in the “gambling space,” and operates in a way “identical to a casino.” (Wagner Aff. ¶14.) The DFS Operators even register themselves as gambling concerns abroad, in order to access those lucrative markets. (Wagner Aff. ¶ 18.) DraftKings has gone so far as to embed code into its websites to attract people specifically looking to gamble. (Wagner

Aff. ¶17.) Equity should not operate to shield the DFS Operators from the State's legitimate interest in investigating these practices, and if necessary stopping them by appropriate legal action.

Third, the equities do not favor the granting of injunctive relief to DraftKings given its admissions of wrongdoing. For example, DraftKings has cloaked the questionable legality of its business to the public and investors in UIGEA.⁹ The company even represented to this Court that “federal law carves out fantasy sports games from the definition of ‘unlawful Internet gambling’ in this statute. DraftKings operates with careful attention to UIGEA.” DK Pet. ¶38. DraftKings takes a vastly different position behind closed doors. The NYAG investigation has discovered minutes from a board meeting of the Fantasy Sports Trade Association from May, 2015 discussing whether DraftKings’ contests relating to NASCAR and golf violated UIGEA.¹⁰ Shockingly, those minutes reflect DraftKings CEO “Jason [Robins’] **acknowledge[ment] that Golf and NASCAR [contests] do not comply with the letter of UIGEA . . .** He indicated that state law supersedes UIGEA. From his perspective, the only relevant question is whether you are in violation of state law.” *See* Wagner Aff. II ¶ 11 (emphasis added). When Robins faced criticism from fellow board members about being non-compliant with the trade association charter and being in violation of UIGEA, he proposed amending the trade association charter to provide an exemption for this behavior. *Id.*

⁹ *See e.g.*, Nov. 2014 Interview with Jason Robins, Wagner Aff. II ¶ 12 (Mr. Robins saying “[r]ight now, of course fantasy sports being a game of skill have carve out by the Unlawful Internet Gambling Enforcement Act (UIGEA) and permissible in most states in the US...”).

¹⁰ An email from the President of the Fantasy Sports Trade Association, Paul Charchian, alerts board members “there’s a brewing issue... DraftKings is offering single-event contests for NASCAR, PGA and MMA. Those contests are not in compliance with the carve-out language in UIGEA. And since DraftKings is not in compliance with UIGEA, they’re not in compliance with the FSTA’s paid-entry contest operator charter.” *See* Wagner Aff. II ¶ 13.

Finally, DraftKings argues that the NYAG is not entitled to an injunction because DFS has been operating for years in New York. Any claim of laches or estoppel is unavailable against the State where, as here, it enforces a public right or takes action to protect the public interest. *See, e.g., U.S. v. Thompson*, 98 U.S. 486 (1878); *United States v. Angell*, 292 F.3d 333, 338 (2d Cir. 2002); *U.S. v. Manhattan-Westchester Med. Servs, P.C.*, 2008 U.S. Dist. LEXIS 5819, at *9 (S.D.N.Y. 2008); *Matter of Hampton Hosp. v. Moore*, 52 N.Y.2d 88 (1981); *A.C. Transp. v. Bd. of Educ.*, 253 A.D.2d 330, 337 (1st Dep't 1999); *People v. System Properties*, 281 A.D. 433 (3d Dep't 1953), *mod. on other grds*, 2 N.Y.2d 330 (1957); *Town of Kinderhook v. Slovak*, 21 Misc. 3d 1115(A) (Sup. Ct. Columbia Cnty. 2006). The State is not a party to the facts, and has the latitude to discover illegal behavior and enforce it – so long as it is within the statute of limitations. Moreover, although the DFS Operators may have been operating for years, their operations have changed dramatically over the last year. For example, they have exponentially increased their advertising. In all of 2014, DraftKings spent just \$1 million on advertising with NBC Universal/Comcast. But, in the first ten months of 2015, DraftKings spent \$21 million, an increase of over 2,000%. *See* Wagner Aff. ¶ 20. FanDuel spent just \$2.2 million to advertise with NBC Universal/Comcast in all of 2014, which amount increased to \$12 million in the first ten months of 2015, an increase of 545%. *Id.*

The DFS Operators' behavior evidences they will say almost anything to consumers, investors, and the general public to attempt to avoid answering for their knowingly unlawful conduct.

II. THERE IS NO BASIS FOR GRANTING INJUNCTIVE OR DECLARATORY RELIEF TO THE DFS OPERATORS

A. It Is Procedurally Improper to Enjoin the NYAG's Enforcement Action, or Grant Declaratory Relief to the DFS Operators

DraftKings is not entitled to injunctive relief under any standard, nor are the DFS Operators entitled to a declaratory judgment. The only relief available to them now is to oppose NYAG's motions for preliminary injunction. Accordingly, the Court should deny DraftKings' motion for a preliminary injunction.

This Court has already held that it "cannot enjoin the Attorney General from the enforcement of a penal statute." (Nov. 16, 2015 Transcript from Hearing, Index No. 102014/15 and Index No. 161691/2015 ("Tr.") at 30:23-24). That holding applies equally to a request for a preliminary injunction. Injunctions that prohibit the government from enforcing penal statutes are improper, unless the requesting party can demonstrate both "irreparable injury, *and* [that] the sole question involved is one of law."¹¹ *See Snap 'N' Pops, Inc. v. Dillon*, 66 A.D.2d 219, 220 (2d Dep't 1979) (emphasis added); *Reed v. Littleton*, 275 N.Y. 150, 153 (1937) (courts "will not ordinarily intervene to enjoin the enforcement of the law by prosecuting officials").

DraftKings can demonstrate neither. It seeks to enjoin the State from enforcing New York Penal Law §§ 225.00, 225.05, 225.10, 225.15, and 225.20 and Executive Law § 63(12), but as set forth in Section II(B), *infra*, it has not shown that it would be irreparably injured by its inability to continue violating those laws. Moreover, the "sole question involved" is not one of law. Questions of law include, for example, challenges to a statute's facial validity. *See Ulster*

¹¹ FanDuel and DraftKings also seek declaratory and/or injunctive relief regarding their violations of New York GBL §§ 349 and 350 and Executive Law § 63(12). FanDuel, Inc. Complaint for Declaratory and Injunctive Relief, Nov. 13, 2015, Case No. 161691/2015 D.I. 3 ("FD Compl.") ¶¶ 42-47. Though they are not part of the Penal Law, the analysis in this Section applies with equal force to those statutes, which relate to enforcing laws prohibiting fraud and misrepresentation in connection with their Penal Law violations.

v. Home Care Inc. v. Vacco, 255 A.D.2d 73, 75 (3d Dep't 1999). Here, DraftKings seeks to establish certain facts that it suggests demonstrate that the clearly-established Penal Law should not apply to it, not that the Penal Law is unconstitutional. Under DraftKings' interpretation, every time a government agency with enforcement authority opined that an entity's conduct was illegal and notified the entity, that entity could use any such notice to attempt to enjoin future enforcement against it. That has not been, and cannot be, the law.¹²

Second, even if DraftKings could seek injunctive relief – which it cannot – the requested relief of a declaratory judgment would be improper. When a party claims that an otherwise valid penal law has been unconstitutionally applied to its conduct, *and that claim raises mixed issues of fact and law*, declaratory judgment is unavailable. *Cooper v. Town of Islip*, 56 A.D.3d 511, 513 (2d Dep't 2008). Instead, courts have held that such a determination is properly made in the context of an enforcement proceeding. *See Church of St. Paul and St. Andrew v. Barwick*, 67 N.Y.2d 510, 523 (1986); *Kelly's Rental, Inc. v. City of N.Y.*, 44 N.Y.2d 700, 702 (1978). Far from demonstrating that “no questions of fact exist,” FanDuel and DraftKings cite to hundreds of pages of expert reports, press releases, and news articles. In doing so, they demonstrate that the proper procedure for determining whether they have violated New York Penal Law is not a declaratory judgment, but rather the pending enforcement proceeding. *See Intn'l Mutoscope Reel Co., Inc. v. Valentine*, 247 A.D. 130 (1st Dep't 1936); *aff'd* 271 N.Y. 622; *Snap 'N' Pops, Inc.*, 66 A.D.2d at 219.

¹² The cases cited by DraftKings are not to the contrary. Those cases, in which petitioners were entitled to declaratory and/or injunctive relief, presented *solely* questions of law, because petitioners challenged either the facial constitutionality of a statute, *see Ulster Home Care, Inc.*, 255 A.D.2d at 77; *Robinson v. Wood*, 119 Misc. 299, 300 (Sup. Ct. Sullivan Cnty. 1922); *Kings County Lighting Co. v. Lewis*, 104 Misc. 157, 160 (Sup. Ct. N.Y. Cnty. 1918), or the statute's effective date, *see Day Wholesale, Inc. v. State of New York*, 51 A.D.3d 383, 384 (4th Dep't 2008).

B. DraftKings Is Not Otherwise Entitled to a Preliminary Injunction

To obtain a preliminary injunction, a movant must demonstrate, by clear and convincing evidence, “(1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balancing of the equities in the movant’s favor.” *Greystone Staffing v. Warner*, 106 A.D.3d 954, 954 (2d Dep’t 2013); *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988). Such an injunction should be granted only when the movant demonstrates “a clear right to that relief under the law and the undisputed facts upon the moving papers.” *1234 Broadway LLC v. West Side SRO Law Project, Goddard Riverside Community Ctr.*, 86 A.D.3d 18, 23 (1st Dep’t 2011). DraftKings has failed to meet this burden.

1. The DFS Operators’ Arguments that DFS Is Not Illegal Gambling are Wholly Unsupported

The DFS Operators, in connection with these motions and elsewhere, have argued that their games are not illegal gambling under the Penal Law. In addition to the arguments already set forth above, the DFS Operators’ arguments are entirely unsupported.

a. The Primary Case Relied Upon by the DFS Operators – Humphrey – Is a Red Herring

The centerpiece of the DFS Operators’ argument that contest “entry fees” do not constitute gambling when paired with a guaranteed prize and neutral administrator is *Humphrey v. Viacom, Inc.*, 2007 U.S. Dist. LEXIS 44679 (D.N.J. June 19, 2007). Counsel for DraftKings calls it the “the key case” “that has decided this issue,” (Tr. 8:25–9:1), and FanDuel’s brief cites the opinion more than any other case. FD Mem. at 10, 11, 12, 14, 15, 16.

Humphrey is procedurally, factually, and substantively irrelevant. *Humphrey* is an unreported federal trial court decision from New Jersey applying New Jersey law. Not only does it lack precedential value to a New York state court (or indeed to a federal court), but the court

dismissed the action on procedural grounds, before reaching the part of the analysis the DFS Operators cite.¹³ As such, the material to which the DFS Operators cite is dicta.

In any event, the New Jersey laws analyzed in that decision have no bearing on this case. Contrary to DraftKings' suggestion that *Humphrey* applied a gambling statute "nearly identical to New York's,"¹⁴ the case did no such thing. DK Mem. at 12. Indeed, the New Jersey gambling statute alluded to by DraftKings is not addressed in *Humphrey* at all. Instead, the *Humphrey* Court considered a New Jersey *qui tam* statute that let gamblers sue to recover their losses. That statute focused on the interpretation of two words – "wagers" and "bets" – that appear *nowhere* in the definition of "gambling" under New York law. See N.Y. Penal Law § 225.00(2). As such, that court's analysis of what constitutes a "bet" or "wager" is irrelevant to the questions before this Court. As noted above, the New York statute defines gambling, in relevant part, as risking "something of value." Thus the proper inquiry is not whether the DFS Operators' "entry fees" constitute wagers – the inquiry is whether the entry fees are "something of value." They clearly are.

Indeed, because it was not relevant to the New Jersey *qui tam* statute under review, the *Humphrey* court (i) specifically declined to opine on whether the traditional fantasy sports game

¹³ The plaintiff in *Humphrey* brought a claim under New Jersey's *qui tam* statute, which is derived from the 1710 Statute of Queen Anne allowing gambling losers to recover losses. The court granted defendants' motion to dismiss because plaintiff failed to allege that he or anyone else gambled on any site or had any losses, and failed to bring the case within the required six months. As such, before the court even discussed the definition of the terms relied on by the DFS Operators – "wager" and "bet" – the claim was dismissed for failing to plead allegations necessary to state a claim.

¹⁴ At oral argument, counsel for DraftKings doubled down on this position: "They don't even get out of the box on gambling. That's exactly what the *Humphrey* case says in New Jersey under *the identical statute*." Tr. 9:20-21 (emphasis added).

at issue constituted a game of chance or skill; and (ii) never addressed whether the game relied on future contingent events. *Humphrey*, 2007 U.S. Dist. LEXIS 44679 at *22, *24.

Finally, the key features of traditional season-long fantasy sports that motivated the *Humphrey* decision are completely absent from DFS contests.¹⁵ Reviewing traditional, season-long fantasy sports contests, the court in *Humphrey* observed:

- The prizes were largely “nominal”—such as t-shirts and bobble head dolls (as compared to DFS’s \$1 million jackpots) (*Id.* at *4);
- The participants paid a one-time administrative fee, at the beginning of a long sports season (not rapid-fire, daily wagers of up to \$10,600) (*id.* at *28-*29);
- The fee mainly supported services “necessary to manage the fantasy team” (*id.* at *3), as opposed to DFS, wherein the wagers underwrite massive prizes and a “rake” of every wager is kept by the DFS Operator; and
- The games involved season-long play, an initial draft, trading, adding and dropping players over the course of the season, and deciding which players would start and which would be benched each week, (as opposed to the streamlined DFS contests, which eliminate any long-term strategic thinking) (*Id.* at *3-*4).¹⁶

Accepting the DFS Operators’ view that all contests where contestants pay a fee to a neutral administrator for a chance to win a predetermined prize are legal would have truly absurd consequences. DK Mem. at 12-13; FD Mem. at 11-12. It would eviscerate existing New York prohibitions against gambling, including those set out in the Constitution. Anyone could establish a private lottery, because lottery operators also act as neutral administrators, charge contestants a predetermined fee to enter, and announce prizes in advance. DFS-like syndicates

¹⁵ Indeed, *Humphrey* was decided in 2007 – two and five years, respectively, before FanDuel and DraftKings launched their so-called DFS companies.

¹⁶ Indeed, there is a New Jersey state court case that lays out the actual law on gambling in New Jersey. *Boardwalk Reg. Corp. v. Attorney Gen. of N.J.*, 457 A.2d 847 (Sup. Ct. of N.J. 1982). In that case, there was a non-refundable entry fee and prizes awarded involving the game of backgammon. The court found backgammon to be gambling because rolls of the dice were both a “decidedly material element” of chance and a “future contingent event not under the actor’s control or influence upon which the players risk something of value.”

could run prediction contests on every imaginable subject, including sports betting on a single sports match – so long as wagers are called “entry fees” and prizes are determined in advance. The end result would be to reverse the clear prohibitions on pool-selling, bookmaking, and other kinds of gambling set out in the Constitution and carried into the New York Penal Law. NY Constitution Art. I § 9; N.Y Penal Art. 225.

b. The DFS Operators Wrongly Suggest that the Wagers they Accept are Mere “Entry Fees”

The DFS Operators equate the wagers paid to play their games with entry fees paid by competitors in well-established skill competitions like spelling bees, marathons, or golf tournaments, some of which offer prizes for winners. DK Mem. at 12; FD Mem. at 11. While marathoners or golfers do pay something to enter such events, their success or failure depends on their own talents. It does *not* depend on any material element extrinsic to the game. *People v. Stiffel*, 1969 N.Y. Misc. LEXIS 1042 (2d Dep’t 1969).

People ex rel. Lawrence v. Fallon, cited by the DFS Operators, does not suggest otherwise. In *Fallon*, horse owners paid fees to enter races organized by a racing association that announced predetermined prizes to be handed out to the winners, as in the later developed Kentucky Derby or the Belmont Stakes. 152 N.Y. 12 (1897). The New York Court of Appeals held that the “competing parties” were not gambling. Thus, paying to enter your own horse in the Belmont Stakes is not gambling, but betting by spectators and other third parties on the race *is* gambling, albeit gambling that is currently exempted under the law.

The DFS Operators nonetheless cite *Fallon* to support the argument that *all* entry fees for predetermined prizes must be legal. FD Mem. at 9; Tr. 9:13-18 (DraftKings counsel referring to “case law going back a hundred years in New York . . . that a contest that has an entry fee for a predetermined prize is not a stake, is not staking or wagering or betting”). *Fallon* says no such

thing. *Fallon* only held that entry fees by those in the race did not constitute illegal gambling – it said nothing about those watching at home.

FanDuel cites another case, *State v. American Holiday Ass'n*, 151 Ariz. 312, 314 (1986) on this subject, but that decision explicitly recognized that skill games are distinct from betting on the performances of others. Reviewing a mail-order crossword competition, the court concluded that the game was “not like most bookmaking operations because prizes are not awarded on the basis of *the outcome of some event involving third parties*.”¹⁷ *State v. American Holiday Ass'n*, 151 Ariz. 312, 314 (1986) (emphasis added). Indeed, the court’s ultimate conclusion as to what does constitute gambling applies directly to DFS wagers:

The legislature has seen fit to license and permit many forms of gambling once considered anathema. These include horse racing and dog racing, both operations in which *the bettor is not a participant* and the money laid down is not an entrance fee but a wager between parties who are not contestants and whose gain or loss will be determined by the *results of a game played by others*. On most of these activities, the state takes its percentage, something that can only be described as bookmaking, though, by legislative edict, not illegal.¹⁸

Id. at 317 (emphasis added); *see also Faircloth v. Central Florida Fair, Inc.*, 202 So. 2d 608 (Fla. Dist. Ct. App. 4th Dist. 1967) (entry fee paid to compete with others in a game of skill for a predetermined prize does not constitute gambling) (cited in FD Mem. at 12).

The DFS Operators’ attempt to explain away the plain statutory language regarding “contingent events” by asserting that reading this prong to cover DFS would make “*every game gambling*.” DK Mem. at 19-20; *see also* FD Mem. at 13-14. Not so. To use DraftKings’ own

¹⁷ *American Holiday*, discussed by the court in *Humphrey*, also concerned the interpretation of “bet” and “wager,” which do not appear in New York’s statutory definition of “gambling.”

¹⁸ The DFS Operators also rely on *Las Vegas Hacienda v. Gibson*, 77 Nev. 25 (1961), which stands for the irrelevant proposition that an offer to the public to pay a fee for the opportunity to win a prize by accomplishing some feat of skill (specifically, shooting a hole-in-one) is a valid contract under Nevada law. That has nothing to do with the definition of gambling under New York law.

example, a tennis player could well lose a point because of a contingent event beyond her “control,” say, a gust of wind. The athlete, however, still retains agency that the DFS player sitting at home lacks: the ability to *influence* the outcome of the game. *Cf. People ex rel. Lawrence v. Fallon*, 152 N.Y. 12, 12 (1897) (those “competing” in horse races are not gambling). Having submitted a wager, a DFS player is at the total mercy of the athletes participating in *actual* skill games and of countless other chance factors that he can neither influence nor control, from the weather to player injuries to the actions of sports leagues. The distinction under New York law is simple: entering in a *bona fide* skill game is *not* gambling, but betting that relies on the games of others *is* gambling. DFS falls into the latter category.¹⁹

In their slipperiest rhetorical move, the DFS Operators attempt to redefine DFS as a game solely between two players matching their wits against each other – somehow divorced from the sports to which they relate. FD Mem. at 14-15; DK Mem. at 19. But such a rule would apply to *every single type of sports betting*, because every bettor attempts to outwit his fellow bettors.

¹⁹ Nor is the alleged distinction made between “performance” and “outcome” under federal law relevant. DK Mem. at 20. The Unlawful Internet Gambling Enforcement Act (“UIGEA”) does distinguish between the performance of athletes and complete games – because the law sought to exempt traditional, season-long fantasy sports from the definition of “bet or wager” for purposes of a *particular* federal statute. 31 USC §5362(10)(D)(2). No such exemption exists under New York’s gambling laws. In fact, ***UIGEA expressly provides that it does not displace or vary state law prohibitions on gambling.*** 31 U.S.C. §5361(b) (“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.”); *see also* Wagner Aff. II ¶ 5 (“Quite precisely, UIGEA does not exempt fantasy sports companies from any other obligation to any other law.”).

Even more baffling is DraftKings’ suggestion that the Professional and Amateur Sports Protection Act (“PASPA”), 28 U.S.C. § 3702 makes DFS legal in New York. DK Mem. at 20. PASPA seeks to prohibit *all* direct and indirect betting on sports in the United States. The statute uses a belt-and-suspenders approach to ensure that no reading of the law would permit *precisely the type of scheme DFS represents*. Certainly, a law designed to make schemes like DFS *illegal* almost everywhere in the United States cannot be understood to render it *legal* under New York law.

That's true whether the bet is about a particular team beating the point spread, or involves a complex parlay with multiple permutations. Of course bettors have *control* and *influence* over who or what they bet on. What bettors *do not* control and what they *cannot* influence is the *future contingent event* that ultimately determines whether they win or lose – the sports games on which they are betting.

c. The “Dominating Element” Standard Upon Which the DFS Operators Rely is No Longer the Law in New York

The DFS Operators spend much time attempting to convince the Court that it should seek to determine whether skill or chance is the “dominating element” of DFS games. The Court should decline to do so. As discussed above, the text of the Penal Law sets forth a “material degree” test, which superseded the “dominating element” test first enunciated over 100 years ago in *People Ex. Rel. Lavin*, 179 N.Y. 164, 171 (1904). As a leading commentary explains, the current text of the Penal Law eschews “the dominant-element phrasing” and instead

subjects a defendant to prosecution if chance is **merely** a material element of the game. **This definition makes easier not only the quantum of the prosecutor’s proof, but also its character, in the sense that, however imprecise material element may be,** the mathematical calculation of whether skill or luck dominates could be inordinately difficult to reconcile with a prosecutor’s burden of proof.

7-76 New York Criminal Practice § 76.02 (emphasis added).

The DFS Operators ignore the language of the Penal Law, and the overwhelming case law applying it, when they insist that the Court should determine whether skill is a dominating element of DFS games. *First*, the DFS Operators skip past any analysis of the statute itself. As the clearest indicator of legislative intent, “the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof.” *Majewski v. Broadalbin-Perth Cent. School Dist*, 91 N.Y.2d 577, 583 (1998). If the words of a statute have a “definite meaning, which involves no absurdity or contradiction, there is no room for

construction, and courts have no right to add to or take away from that meaning.” *Majewski*, 91 N.Y.2d at 583. Here, the words “material degree” appear in the statute. The words “dominating element” do not and those two phrases do not have equivalent meanings. In another context, the Court of Appeals interpreted “material” to mean “more than minor or incidental.” *Taub v. Altman*, 3 N.Y.3d 30, 34 (N.Y. 2004).²⁰ Indeed, an excerpt from a legal opinion letter DraftKings prepared for the National Hockey League well describes the state of the law, explaining:

Unfortunately, [the dominating element test] is not the only test that courts employ in the various states. For example, in some states, a game is prohibited if chance is a *material element* in the outcome. Such a test recognizes that although skill may primarily influence the outcome of a game, a state may prohibit wagering on the game if chance has more than a mere incidental [e]ffect on the game. **This is a lesser standard than the predominance test and effectively makes it more difficult to offer skill-based gaming to residents of those states if the games in question resort to a chance component in determining the outcome.**

Wagner Aff. II ¶ 14 (emphasis added). A legal opinion letter FanDuel prepared for the National Basketball Association similarly explains: “The ‘material degree’ test requires chances to be less of a factor, and prohibits more contests than the predominant factor test.” Wagner Aff. II ¶ 15.

Moreover, had the Legislature codified the prior law – as the DFS Operators maintain it did – the Legislature would have used the words “dominating element.” Certainly, at the time Section 225 of the Penal Law was codified, that expression was well-established, with the *Lavin* test even entering the jurisprudence of numerous courts outside of New York. See, e.g., *State ex*

²⁰ To argue that the statutory material degree test did not supersede the dominating element test, DraftKings cites several cases for the proposition that the Legislature “is presumed to be aware of the law in existence at the time of an enactment and to have abrogated the common law only to the extent that the clear import of the language of the statute requires.” *B & F Bldg. Corp. v. Liebig*, 76 N.Y.2d 689, 693 (1990); *Scarpelli v. Marshall*, 92 Misc. 2d 244, 247 (1977). That rule of construction is limited to *omissions*, not the circumstance here, where a statute includes express language on a particular topic. *Transit Com. v. Long I. R. Co.*, 253 N.Y. 345, 355 (1930) (noting “rule of construction applicable to an omission.”); see also *Pacurib v. Villacruz*, 183 Misc. 2d 850 (1999) (“omission is an indication that the Legislature intended its exclusion.”)

rel. Green v. One 5 [cents] Fifth Inning Base Ball Machine, 241 Ala. 455, 457 (1941); *Longstreth v. Cook*, 215 Ark. 72, 80 (1949); *Lucky Calendar Co. v. Cohen*, 20 N.J. 451, 462 (1956); *Las Vegas Hacienda v. Gibson*, 77 Nev. 25, 30 (1961). But that is not what the Legislature did.

In advocating a dominating element analysis, the DFS Operators also distort the case law. Together, they cite to five more recent New York decisions that DraftKings claims “continue to rely on *Lavin* and its dominating element test.” DK Mem. at 14-15; FD Mem. at 13. Four of those decisions do not mention, let alone apply, the dominating element test; rather, the cases cite to *Lavin* for dicta that dice is a contest of chance and that billiards is a game of skill. See *People v. Hawkins*, 1 Misc. 3d 905(a) NY Crim. Ct. N.Y. Cnty. 2003; *People v. Davidson*, 181 Misc. 2d 999, 1001 (Sup. Ct. Monroe Cnty. 1999); *People v. Melton*, 152 Misc. 2d 649, 651 (Sup. Ct. Monroe Cnty. 1991); *People v. Stiffel*, 1969 N.Y. Misc. LEXIS 1042 (2d Dep’t 1969). One case concerning mah jong errantly quotes the dominating element test, but does so *alongside* the material degree test. *People v. Li Ai Hua*, 24 Misc. 3d 1142, 1145 (N.Y. City Crim. Ct. 2009). A later decision also concerning mah jong, citing *Li Ai Hua*, pointedly refused to apply the dominating element test, explaining that “[t]he current definition of contest of chance does not require that the element of chance be the dominating element.” *People v. Jun Feng*, 34 Misc. 3d 1205(A), 1205A (N.Y. City Crim. Ct. 2012) (quotations omitted) (emphasis added). Nor do the DFS Operators provide an explanation for *Plato’s Cave Corp. v. State Liquor Authority*, in which the First Department held that no further inquiry is required where a material element of chance is present. 115 A.D.2d 426, 428 (1st Dep’t 1985), *aff’d on other grounds*, 68 N.Y.2d 791 (1986) (despite failing to measure the “degree of skill” involved, agency determination that game depended to a “material degree” on element of chance not arbitrary or capricious).

d. Even if the “Dominating Element” Standard is Applied, DFS Qualifies as Illegal Gambling

Even under a “dominating element” analysis, DFS qualifies as a “game of chance,” for the same reason the contest in *Lavin* did. In both cases, contest organizers awarded payouts to contestants whose entries best anticipated some unknown future event – in *Lavin*, the contest consisted of guessing the number of cigars to be taxed the following month; for DFS, it is the performance of athletes over a definite time period. *Lavin*, 179 N.Y. at 171. In both cases, the organizers provided contestants with the “requisite data required for making an estimate.” *Id.* at 174. In *Lavin*, previous statistics relevant to cigar taxation; for DFS, athlete statistics and site-assigned “salaries” that purport to reflect the relative value of each athlete.²¹ NYAG Mem. at 5. In both cases, “experts” could allegedly use their skill to make more accurate predictions than the public at large. *Id.* at 173; see DK Mem. at 16-18; FD Mem. at 14-15. And in both cases, the contests were not restricted to experts, but were open to members of the general public for whom the element of chance would be a dominant element of the game. *Id.* at 173. On that basis, the *Lavin* court concluded that the cigar game was a “game of chance.” *Id.* at 174. As a mass-market prediction game that is designed for non-experts and experts alike, applying the “dominating element” test to DFS leads to the same conclusion: DFS is a contest of chance.

FanDuel, for its part, provides no basis for its assertion that DFS is a game of skill, other than to quote NYAG’s observation that a small percentage of DFS players account for a large percentage of winnings. FD Mem. at 15. That no more establishes DFS as a “skill” game than

²¹ As the *Lavin* court observed, the very reason that the contest organizer provided contestants with the numbers of cigars taxed in previous months was: “*to eliminate as far as practicable the elements of knowledge and judgment*, and by giving the general statistics of the subject make the contest *as fair a gamble for the advertiser’s customers as possible*.” *Id.* at 174 (emphasis added). The same applies to DFS, where all DFS “lineups” with the maximum permitted aggregate “salary” have, according to the DFS Operators’ own theories about player valuation, equal chances of winning any given contest.

similar arguments do for poker.²² *People v. Dubinsky*, 31 N.Y.S.2d 234, 237 (N.Y. Spec. Sess. 1941) (“There is no doubt that playing ‘stud’ poker for money is a game of chance and constitutes gambling.”). That poker has long been considered a game of chance under New York law is fatal to the position of the DFS Operators. Some poker players are unquestionably more successful than others – we see them on TV winning millions in the World Series of Poker. However, those few successes do not change that poker is a game of chance under New York law. Indeed, poker is a much more skillful game than DFS. In poker, on every single hand the player has decisions to make: ante, raise, fold or go “all in.” On every single hand the player needs to read the posture of other players. All these decisions impact the outcome of a poker hand. In DFS, a bettor cannot do anything to impact the performance of athletes in real world sporting events at all, including after their bet is placed. The skill involved in poker dwarfs that of DFS, and yet, poker is a game of chance in New York. *See Dubinsky*, 31 N.Y.S.2d at 237.

In its effort to establish that DFS is only about “skill,” DraftKings points to four reports selectively quoted in an employee affidavit but not actually entered into the record. DK Mem. 16-18. Although the NYAG asked for production of those reports and the underlying data, DraftKings took the request “under advisement” and has so far failed to produce them. Because the NYAG has not had the opportunity to review the reports or their data, the Court should ignore the reports and the arguments based on them.²³ Even so, as explained above, the sort of

²² A concentration of winnings by one or few players cannot prove skill. For example, just last week, one lucky New York resident was the first in a year to win the New York Lotto, for a \$43 million jackpot. While representing an infinitesimal percentage of overall players, he undoubtedly represents an overwhelming percentage of winnings in the last twelve months. The winner, a Cayuga County resident, attributes his winning numbers (his parents’ birthdays) to divine intervention, not to skill. Wagner Aff. II ¶ 16.

²³ The portions of DraftKings’ submission that rely on these reports (DraftKings MOL, pp. 15-18, the Affidavit of Gregory B. Karamitis, November 16, 2015, Case No. 102014-15 (“Karamitis Aff.”) ¶¶ 15-23) are not properly before the Court.

mathematical balancing that DraftKings is urging is unwarranted and in direct conflict with the statutory standard. 7-76 New York Criminal Practice § 76.02 (observing that the dominating element test was abandoned because “the mathematical calculation of whether skill or luck dominates could be inordinately difficult to reconcile with a prosecutor’s burden of proof”). Nonetheless, even a cursory review demonstrates that the reports do not support the conclusion the DFS Operators urge. Most significantly, the report commissioned by DraftKings considers “skill” only from the perspective of handpicked high performers—representing the top .01% of players—not from the perspective of the average player, as a “dominating element” analysis would demand. *Cf. Lavin*, 179 N.Y. at 172-74 (rejecting the proposition that the “chance” element in a widely publicized contest is judged from the perspective of “experts” rather than the public at-large); *see also State v. Prevo*, 44 Haw. 665, 675-676 (1961) (“[T]he test of whether a game is one of skill or of chance” is measured “by that of the average skill of a majority of players likely to play the game”). Thus, given the numerous elements of chance described above, even if the “dominating element” test represented the right inquiry – which it does not – the DFS Operators have provided no basis for their contention that theirs is a game of skill.

e. DraftKings Wrongly Suggests that the “Rule of Lenity” Can Overcome the Plain Language of the Statute

In urging the Court to strictly construe the Penal Law’s prohibition against “gambling” under the “rule of lenity,” DraftKings mischaracterizes well-established New York law. The Court of Appeals has long recognized that:

[T]he common-law policy of strictly construing a penal code no longer obtains in this State. The Legislature expressly abolished that rule, and ordained instead that the provisions of the Penal Law be interpreted “according to the fair import of their terms to promote justice and effect the objects of the law” (Penal Law § 5.00). Although this rule obviously does not justify the imposition of criminal sanctions for conduct that falls beyond the scope of the

Penal Law, it does authorize a court to dispense with hypertechnical or strained interpretations of the statute. Thus, conduct that falls within the plain, natural meaning of the language of a Penal Law provision may be punished as criminal.

People v. Ditta, 52 N.Y.2d 657, 660 (1981) (citations omitted); accord *People v. Versaggi*, 83 N.Y.2d 123, 131 (1994); *People v. Keyes*, 75 N.Y.2d 343, 348 (1990); *People v. Foster*, 73 N.Y.2d 596, 610 (1989); *People v. Teicher*, 52 N.Y.2d 638, 647 (1981). New York courts routinely cite this principle in rejecting defendants' attempts to narrowly construe the Penal Law. See, e.g., *Versaggi*, 83 N.Y.2d at 130-32 ("courts should not legislate or nullify statutes by overstrict construction"); *People v. Sene*, 66 A.D.3d 427 (1st Dep't 2009) (penal statutes are not to be given "hypertechnical or strained interpretations"); *People v. Holmes*, 101 A.D.3d 1632, 1633 (4th Dep't 2012) (same); see also *People v. Busco*, 46 N.Y.S.2d 859, 870 (Ct. Spec. Sess. N.Y. Cnty. 1942) ("It is a well known fact that these gamblers attempt to circumvent statutory enactments by devising clever subterfuges which they believe will strip their activities of the necessary evidentiary elements which are required to convict.").

The one case on which DraftKings relies, *People v. Golb*, is not to the contrary. There, the court construed the crime of unauthorized use of a computer to exclude the defendant's commission of various crimes on a computer he had been given permission to use. The court found that, while the defendant was guilty of the underlying crimes, the provision at issue and its legislative history evidenced the legislature's intent for it to prohibit computer use without permission (i.e., "hacking") and not permitted computer use. 23 N.Y.3d 455, 486 (2014). As that decision and others by the Court of Appeals make clear, when invoking the rule of lenity to construe a Penal Law provision, "the core question always remains that of legislative intent." *People v. Green*, 68 N.Y.2d 151, 153 (1986); see also *People v. Feldman*, 7 Misc. 3d 794, 821 (Sup. Ct. Kings County 2005) ("[L]enity is a doctrine of last resort, and will be invoked only if a

court can only make no more than a guess as to what [the Legislature] intended.”) (citations and quotation marks omitted).

DraftKings makes no argument that the legislature intended for the Penal Law definition of gambling to exclude its conduct, nor could it. The Court of Appeals has long recognized the legislature’s intent for New York’s prohibition on gambling to sweep broadly, stamping out “all ... forms” of gambling not specifically authorized by the state and stopping professional organizations from tempting individuals to gamble and offering them a means to do so. *See Watts v. Malatesta*, 262 N.Y. 80, 81-82 (1933); *Ruckman v. Pitcher*, 1 N.Y. 392, 400 (1848); *see also* William C. Donnino, Practice Commentary, McKinney’s Cons. Laws of N.Y., Book 39, Penal Law § 225.00 (quoting Staff Notes of the Commission on Revision of the Penal Law. Proposed N.Y. Penal Law. McKinney’s Spec. Pamph. (1964) at 382)).

2. *DraftKings Has No Likelihood of Success on Its Collection of Other Claims*

DraftKings also makes a number of constitutional arguments that fail as a matter of law and have no likelihood of success on the merits.

a. DraftKings Fails to State a Due Process Claim

Even though NYAG sent a letter warning DraftKings it would take action, DraftKings alleges state and federal due process violations because NYAG allegedly “did not provide notice and an opportunity to be heard before ordering DraftKings and its business partners to shut down.” DK Mem. at 24-27; DraftKings, Inc. Verified Petition, November 13, 2015, Case No. 102014/15 (“DK Pet.”) ¶¶ 75-78. There is no merit to that claim.

Due process requires that individuals receive notice and an opportunity to be heard before being deprived of property. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993); *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 163 (1978). To prevail, a plaintiff

must demonstrate (i) a protected property interest, (ii) a deprivation of property, (iii) without adequate notice and an opportunity to be heard. *McMenemy v. City of Rochester*, 241 F.3d 279, 285-86 (2d Cir. 2001).

This claim fails on its face because there has been no deprivation of property. The cease and desist letters issued to the DFS Operators by the NYAG are not self-executing documents – they did not shut down anyone’s business. Only a court order could enjoin DraftKings from operating in New York. Thus, DraftKings could not have been and was not deprived of a property right. Rather, it received a letter intended to “afford [DraftKings] the opportunity to show orally or in writing to [NYAG], within five business days of receipt of this notice, why the [NYAG] should not initiate any proceedings” to enjoin the wrongdoing. Affirmation of Avi Weitzman, Esq., November 16, 2015, Case No. 102014/2015, a Ex. 5. And despite DraftKings’ claims that if only NYAG understood its legal position, litigation would not be necessary, DraftKings made no effort to explain that position and instead filed a motion for a temporary restraining order. As such, DraftKings used what was a courtesy to attempt to strategically jump ahead of NYAG in court.

Moreover, DraftKings has not been deprived of notice or the opportunity to be heard. Rather, DraftKings has been provided notice not only in the form of the cease and desist letter, but a letter of intent to sue and, now, the filing of a motion for a preliminary injunction. It was heard on November 16 and will be heard again on November 25, 2015. Its due process claim therefore fails. *People v. Apple Health & Sports Clubs*, 80 N.Y.2d 803, 807 (1992) (rejecting claim that parties to NYAG’s enforcement action were denied due process).

DraftKings also alleges that NYAG threatened its vendors and payment processors with legal action, and that this somehow constituted a deprivation of due process. DK Pet. ¶ 1; DK

Mem. at 25. That is a non-starter. As already explained to the Court, there was no such threat. Tr. 24:11-14. More importantly, truthful statements made by law-enforcement officials in pursuit of their legitimate goals are privileged, and cannot provide a basis for liability – never mind to enjoin the very law-enforcement efforts they relate to. *Stubbolo v. City of New York*, 2008 N.Y. Slip Op. 31208(U), at *15 (Sup. Ct. N.Y. Cty. Apr. 23, 2008). Indeed, enforcement of the gambling laws and the consumer deception statutes are the duty of NYAG. Exec. Law § 63(1). As such, it is the right of NYAG to inform DraftKings, the public, and any other business of its understanding of the application of the law to DFS and their vendors.²⁴ Any outcome to the contrary would lead to the absurd result that any law enforcement agency (including district attorneys, United States Attorneys, or the Department of Justice) could not inform either interested parties or the public whether it believes a business to be operating illegally.

b. DraftKings Fails to State a Claim for Equal Protection

DraftKings argues that NYAG is selectively enforcing the gambling laws by pursuing DraftKings and FanDuel for operating DFS websites, and not prosecuting operators of season-long fantasy sports sites. DK Pet. ¶¶ 81-84; DK Mem. at 27-28. These arguments provide no basis for a viable claim of selective prosecution or “discriminatory enforcement.”

First, C.P.L.R. § 3013 requires a pleading to be “sufficiently particular” – claims that are

²⁴ DraftKings’ allegations are premised on hearsay and “the court cannot grant the extreme remedy of a preliminary injunction based on such hearsay.” *Water Quality Ins. Syndicate v. Safe Harbor Pollution Ins., LLC*, 2014 N.Y. Misc. LEXIS 33, *12 (N.Y. Sup. Ct. Jan. 3, 2014); see also *Bellew v. New York, Westchester & Connecticut Traction Co.*, 47 A.D. 447, 448 (2d Dep’t 1900) (reversing grant of preliminary injunction where hearsay affidavit was introduced). The one case cited by DraftKings, from the federal court in Nebraska, *Activision v. Pinnacle Bancorp., Inc.*, 976 F. Supp. 2d 1157 (D. Neb. 2013), is utterly unlike this case. DK Mem. at 25. Nebraska’s Attorney General is authorized by statute to issue a “cease and desist order ... with or without prior notice,” Neb. Rev. Stat. § 87-303.03 (1)(b), and the Nebraska AG ordered a law firm to cease initiating new patent infringement enforcement efforts on behalf of its client, which constituted a prior restraint on the client’s First Amendment free speech rights and its right to select counsel of its choice, with no prior notice or opportunity to be heard. Nothing of the sort is alleged here.

vague, conclusory, or that fail to give fair notice of any factual underpinnings should be dismissed. *Fowler v. American Lawyer Media, Inc.*, 306 A.D.2d 113 (1st Dep't 2003); *Menon v. Kennedy*, 24 A.D.2d 849 (1st Dep't 1965). Indeed, a plaintiff seeking injunctive relief based on a selective enforcement equal protection claim is not entitled to an evidentiary hearing where the facts are not set forth in sworn affidavits. *303 West 42nd Street Corp. v. Klein*, 46 N.Y.2d 686, 696 (1979) ("*Klein*"). Here, neither DraftKings' Verified Petition nor its affidavits contain *any* factual allegations to support an equal protection claim. See DK Pet. ¶¶ 81-84.

Second, there is no conceivable basis for the "selective prosecution" claim. Not only does DraftKings have to overcome the weighty presumption that the enforcement of laws is undertaken in good faith and without discrimination, but the law is clear that latitude must be accorded authorities charged with making decisions related to legitimate law enforcement interests, at times even permitting them to proceed with an unequal hand. For example, it has been held that certain violators may be selected for prosecution out of the class of all known violators. Think speeding tickets. Or consider a decision to pursue only the most serious violators. That legitimate law enforcement would be hampered by requiring a hearing every time someone felt they had been unfairly singled out would be untenable.²⁵ *Klein*, 46 N.Y.2d at 694-95 (citations omitted). NYAG has a legitimate government interest in protecting the public from illegal gambling businesses and businesses that mislead the public through deceptive advertising.²⁶ Any claim of deprivation of equal protection is not likely to succeed on the merits.

²⁵ In addition, DraftKings would have to show an impermissible motive and that it was singled out with an "evil eye and an unequal hand." *Bower Associates v. Town of Pleasant Valley*, 2 N.Y.3d 617, 631 (2004); *Klein*, 46 N.Y.2d at 693. It has put forth no such evidence.

²⁶ The Court should also deny any request by DraftKings for discovery to establish a selective prosecution claim because it has failed to proffer admissible evidence tending to establish the existence of the essential elements of a selective prosecution defense, and that documents in the

c. DraftKings Fails to State a Claim Based Upon Separation of Powers²⁷

DraftKings alleges that NYAG's actions violate the separation of powers doctrine, and seeks an injunction on this basis. DK Pet. ¶¶ 71-72, 79-80. These claims fail to state a viable cause of action.

As already recognized by the Court, an injunction is generally unavailable to restrain the enforcement of the penal law. *See* Section II(A), *supra*. Even where such relief is available, a party seeking to enjoin governmental action must meet the requirements for a writ of prohibition under C.P.L.R. Article 78, which is an "extraordinary remedy." C.P.L.R. 7801; *Rush v. Mordue*, 68 N.Y.2d 348, 352 (1986); *Schumer v. Holtzman*, 60 N.Y.2d 46 (1983); *Kimyagarova v. Spitzer*, 16 A.D.3d 507 (2d Dep't 2005). Stringent standards must be met before prohibition will issue because liberal encouragement of prohibition would threaten the "orderly administration of justice." *La Rocca v. Lane*, 37 N.Y.2d 575, 579 (1975). "Because of its extraordinary nature, prohibition is available only where there is a clear legal right, and then only when [the party to be restrained] acts or threatens to act either without jurisdiction or in excess of its authorized powers." *Holtzman v. Goldman*, 71 N.Y.2d 564, 569 (1988). And prohibition will not lie for claims of errors of substantive or procedural law "however egregious the error may be, and however cleverly the error may be characterized by counsel as an excess of jurisdiction or power." *Rush*, 68 N.Y.2d at 353. Moreover, the writ of prohibition cannot issue where the grievance may be redressed through other legal proceedings. C.P.L.R. 7801(1); *Molea v.*

government's possession would indeed be probative of these elements. *Comm'r of the Dep't of Soc. Servs. v. Estate of Warrington*, 308 A.D.2d 311, 312 (1st Dep't 2003); *People v. Miller*, 138 Misc. 2d 639, 647 (Sup. Ct. N.Y. Cnty. 1988); *Town of Kinderhook v. Slovak*, 21 Misc. 3d 1115(A) (Sup. Ct. Columbia Co. 2006) (citing *Jefferies v. N.Y. City Hous. Auth.*, 8 A.D.3d 178 (1st Dep't 2004)).

²⁷ DraftKings brings other causes of action such as tortious interference of contract, but does not move on those claims. Those claims are also meritless and will be the subject of a motion to dismiss.

Marasco, 64 N.Y.2d 718, 720 (1984); *Morgenthau v. Erlbaum*, 59 N.Y.2d 143, 147 (1983); *Matter of Dondi v. Jones*, 40 N.Y.2d 8, 13 (1976).

A writ of prohibition is not available here. NYAG is the chief law enforcement officer of the State, and exercises his statutory duty by conducting investigations and bringing actions to enforce the law. Executive Law § 63. The Legislature has empowered “the Attorney-General to be on the lookout for fraudulent practices and ... to appeal to the courts to enjoin unlawful practices” following an investigation. *Dunham v. Ottinger*, 243 N.Y. 423, 436 (1926). NYAG is discharging its statutorily granted discretionary powers and duties to enforce the Penal Law and consumer protection statutes for the benefit of the public, which includes the power to enjoin a recalcitrant corporation engaging in illegal activity. *People v. Abbott Maintenance Corp.*, 11 A.D.2d 136 (1st Dep’t 1960), *aff’d*, 9 N.Y.2d 810 (1961); *see also Kimyagarova*, 16 A.D.3d at 507-08.

Nor have plaintiffs shown a “clear legal right” to relief. A contention, such as the one made by DraftKings here, that prohibition should issue because an official “is acting ultra vires as a result of its legal interpretation of a statute does not justify the invocation of this extraordinary remedy, even if ultimately nonreviewable by way of appeal.” *Cuomo v. Hayes*, 54 A.D.3d at 858 (citing *State of New York v. King*, 36 N.Y.2d 59, 63 (1975); *Matter of Johnson v. Price*, 28 A.D.3d 79, 81-82 (1st Dep’t 2006)). Here, the gravamen of DraftKings’ claim is not that NYAG is acting outside of its authority, but that NYAG has misinterpreted the gambling laws by asserting that they apply to the alleged facts of DraftKings’ operations. DK Pet. ¶¶ 25-35, 60-66; DK Mem. at 11-23; FD Compl. ¶¶ 8, 22, 24, 29, 31.

Moreover, DraftKings possesses a complete and adequate alternative remedy – defending its behavior in response to NYAG’s enforcement proceedings. *Erlbaum, supra*; *Dondi*,

supra; *State v. Wolowitz*, 96 A.D.2d 47, 58 (2d Dep't 1983). Thus, DraftKings makes no colorable argument that the NYAG has acted beyond the grant of powers to it, or violated the separation of powers principles. DK Pet. ¶¶ 71-72, 79-80; DK Mem. at 27-31.

Indeed, DraftKings has its argument backwards, because the separation of powers doctrine prohibits courts from intruding upon a prosecutor's exercise of discretion in deciding whether to bring civil or criminal charges. *People v. Murray*, 129 A.D.2d 319, 321 (1st Dep't 1987), *aff'd sub nom. People v. Robles*, 72 N.Y.2d 689 (1988) ("respect for the basic separation of powers ... compels this court not to interfere with the prosecutor's authority."); *People v. Ballard*, 134 N. Y. 269, 293 (1892) ("We think that the question as to what the public interests require is committed to the absolute discretion of the attorney-general, and that it cannot be made the subject of inquiry by the courts"); *Kellog v. Supreme Court, County of Queens*, 29 N.Y.2d 615, 616 (1971) (affirming dismissal of C.P.L.R. Article 78 petition seeking the "extraordinary writ of prohibition" to restrain prosecutor from further proceedings); *see also Santora v. Silver*, 20 Misc. 3d 836, 841 (Sup. Ct. N.Y. Cty. 2008), *aff'd as mod.*, 61 A.D.3d 621 (1st Dep't 2009).

As the court put it in *Application of Hassan v. Magistrates Court of New York*, a case cited by DraftKings itself (DK Mem. 30):

The courts have not only refused to interfere with or control the discretion exercised by a District Attorney or the Attorney-General in the cases of crimes, but in related matters such as 'public offenses.' ... [The transcendent] issue is whether the decision of the District Attorney (or the Attorney-General) as 'an executive official of the State' in deciding whether or not to prosecute in any individual situation is subject to review by the courts. I am convinced that it is not. ... [T]he court holds that it *does not have the power to substitute its judgment for that of the District Attorney* ... The official duty of determining whether, when and whom to prosecute is vested in him and him alone.²⁸

²⁸ DraftKings' reliance on *Boreali v. Axelrod*, 71 N.Y. 2d 1 (1987), is misplaced. In *Boreali*, the Court of Appeals held that the Public Health Commission ("PHC") had overstepped its authority by promulgating regulations that prohibited smoking in a variety of indoor areas open to the public for reasons which included concerns entirely apart from those related to public health.

20 Misc. 2d 509, 511 (N.Y. Sup. Ct. 1959) (emphasis in original).

3. *DraftKings Cannot Establish That It Would Suffer Irreparable Harm in the Absence of an Injunction*

The DFS Operators have asserted that extraordinary injunctive relief is necessary to prevent further irreparable harm, insofar as the State's investigation has allegedly impacted their ability to conduct their business in New York in various respects – for instance, impeding their ability to attract new investors, damaging their reputation, and in the case of FanDuel, forcing its decision to temporarily stop accepting wagers from within New York. FD Mem. at 7-8; DK Mem. at 31-35. Those arguments are without merit.

First, there can be no cognizable injury (much less irreparable harm) in being ordered to refrain from illegal activity. *See, e.g., U.S. v. Diapulse Corp of America*, 457 F.2d 25, 29 (2d Cir. 1972) (“Nor can appellant complain that the injunction is impermissible because it will put him out of business. He ‘can have no vested interest in a business activity found to be illegal.’”); *see United States v. Rx Depot, Inc.*, 290 F. Supp. 2d 1238, 1248 (N.D. Okla. 2003) (“The defendants have no vested interest in an illegal business activity.”).

Second, the arguments that they have been, or will be, subject to non-compensable harms (such as loss of reputation, un-specified impacts on “business relationships” or the “ability to attract new investors”) are vague, speculative, and without any evidentiary support whatsoever, much less the “clear and convincing” support necessary to support an injunction. *See Indy 3000, Inc. v. Cirillo*, 2011 N.Y. Misc. LEXIS 3332, at *13 (Sup. Ct. Suffolk Cnty., July 5, 2011). New

The Court found that the PHC usurped the legislative role in particular because it exempted certain businesses from the rules for non-health related, economic reasons, outside PHC's scope of authority and that the PHC was not merely “filling in the details” of broad legislation but wrote a comprehensive set of rules on a blank slate. That is not remotely this case—NYAG has not promulgated any rule, and is simply attempting to enforce the existing penal and consumer protection statutes, a function squarely within its statutory mandate. Exec. Law § 63(12).

York courts routinely reject such unsupported speculation when determining whether injunctive relief is appropriate. *LGC USA Holdings, Inc. v. Taly Diamonds, LLC*, 995 N.Y.S.2d 6, 7 (1st Dep't 2014) (injunction denied "in light of the largely speculative assertions in the affidavit of its president and the facts that were sharply contradicted by defendants' affidavits"); *Trump on the Ocean, LLC v. Ash*, 916 N.Y.S.2d 177, 180 (2d Dep't 2011) ("Trump's vague and conclusory allegations that its principals would suffer harm to their business reputations were not sufficient to establish irreparable injury."); *Copart of Conn., Inc. v. Long Is. Auto Realty, LLC*, 839 N.Y.S.2d 791, 793 (2d Dep't 2007) ("contention that [petitioner] could be forced to discontinue business operations if the application is withdrawn and the Town commences enforcement proceedings is speculative and unsupported by any evidence in the record").

Third, the DFS Operators claim that "[c]onstraining a party from operating an ongoing business at all or in a particular geographic area" is recognized as causing irreparable harm. FD Mem. at 7; *see also* DK Mem. at 31-35. That not only mischaracterizes the circumstances of this matter, but is a misstatement of New York law. In fact, the DFS Operators have cited no cases suggesting that a lack of ability to operate a business in a particular manner or in a particular place is "irreparable harm." In *Reuschenger*, the court found that a failure to issue an injunction against the City of Huntington would "destroy" the plaintiffs' business entirely, so much so that "plaintiffs will lose their livelihoods." *Reuschenberg v. Town of Huntington*, 791 N.Y.S.2d 652, 570 (2d Dep't 2005). That is a far cry from the actual circumstances of this matter, wherein the State ultimately seeks only to require them to operate in accordance with New York law for that portion of their business that deals with bets made from New York. In fact, upon the granting of all the relief New York seeks, the DFS Operators will remain free to continue operating their business in 43 other states, accounting for approximately 93% percent of their existing

customers, at least in the case of DraftKings. DK Pet. ¶ 8. The vast majority of their business is simply not affected by this proceeding.²⁹

In *Barclay's Ice Cream*, an injunction was issued to stop conduct that the court explicitly found *was not* mere lawful picketing, as FanDuel suggests, but rather illegal and anti-competitive coercion (including false statements) to close the New York City market entirely from a competitor. *Barclay's Ice Cream Co. v. Local No. 757 of Ice Cream Drivers & Emp. Union*, 378 N.Y.S.2d 395, 397 (1st Dep't 1976). If anything, the *Barclay's Ice Cream* case supports the NYAG's motion for an injunction against FanDuel and DraftKings, who are engaging in illegal conduct that reaches millions of New York consumers.

4. *Petitioners Have Made No Showing that the Equities are Balanced in Their Favor*

For the reasons set forth in Section I(C), above, the equities are balanced in the favor the NYAG. For that reason, an injunction should not issue against the NYAG.

²⁹ Alternatively, the DFS Operators could operate their business in a manner consistent with New York law, which indisputably authorizes innumerable other types of contests, such as those played for free or those in which contestants cannot win anything of value. Penal Law § 225.00(2).

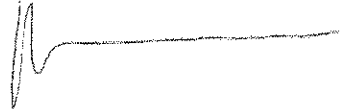
CONCLUSION

For the foregoing reasons, NYAG's application for a preliminary injunction should be granted.

Dated: New York, NY
November 23, 2015

Respectfully submitted,

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Exhibit F

The Washington Post

PostEverything

Daily fantasy sports sites say their users aren't gambling. They're wrong.

Why the government won't be leaving DraftKings and FanDuel alone anytime soon



By Dustin Gouker October 13

Dustin Gouker covers the daily fantasy sports industry for Legal Sports Report.

On Oct. 5, the Seattle Seahawks played the Detroit Lions on ESPN's "Monday Night Football." The game hinged on a late fumble by Lions receiver Calvin Johnson, who lost the ball just before he scored what would have been a go-ahead touchdown. It bounced into the Seattle end zone and (with some help from a Seahawks defender) out of bounds. Under the NFL's rules, that made it Seattle's ball, with a three-point lead and less than two minutes left. Game over.

Not just for the Lions, though. Even though the Seahawks never recovered the fumble, it was classified as a turnover by the software powering DraftKings, one of the two dominant daily fantasy sports sites that have exploded onto the NFL scene this year. So it also swung the outcome of the site's Millionaire Maker contest, winning the week's \$1.2 million top prize for a user calling himself ChipotleAddict. If there were no fumble recovery credited to Seattle, a different bettor would have won the \$1.2 million top prize.

That contest took place just as allegations about the security of data and employees' access to it started to rock the daily fantasy sports industry. Before that, it had been largely smooth sailing for daily fantasy operators, which sprung up in the wake of a carve-out for fantasy sports in the 2006 Unlawful Internet Gambling Enforcement Act. Because it involves making picks based on studying past performance and future projections, daily fantasy sports isn't gambling. That is what the chief executives of DraftKings, FanDuel and other daily fantasy sites would like you to believe.

But no matter how the law sees it, it's almost impossible to identify daily fantasy as anything but a way to bet on sporting events from a casual perspective. And if you agree with that assessment, it brings up the obvious issue that daily fantasy is treated very differently than any other type of gambling in the United

States. Most forms of gaming are generally highly regulated, limited or considered illegal on a state-by-state basis.

If you're not familiar with daily fantasy, it's not a hard concept to grasp. It's a lot like its season-long cousin that tens of millions of Americans play during NFL season (as well as during baseball, basketball, hockey, even soccer seasons). You pick some players and your fantasy team scores points based on the performance of those players. Your players scoring touchdowns or piling up yardage results in points. If you pick the right players, you can win cash.

The big difference between daily fantasy and the older season-long version is frequency. There are thousands of contests that you can choose to enter on a variety of sites, with entry fees from 25 cents to thousands of dollars. Those buy-ins are how daily fantasy sites make money; they take a percentage of each entry fee. The biggest contests routinely pay out millions of dollars.

Does it sound like gambling, on its face? Gambling can be defined as wagering money on an uncertain outcome — like, say, a last-minute fumble that wins a player more than a million dollars. Sure sounds like daily fantasy fits the bill.

That's not to say daily fantasy isn't legal in the United States, although authorities in a few states are making that argument. The aforementioned carve-out from the 2006 federal law paves the way for states to determine the legality of daily fantasy sports. DraftKings and FanDuel — both valued at more than a billion dollars now — pay some lawyers pretty good money to tell them they can operate in 45 states as a “game of skill.” (However, a federal grand jury in Florida is now reportedly looking into daily fantasy companies; several fantasy companies actually operate in fewer than 45 states.)

But jurisdictions outside of the United States and Canada have identified daily fantasy as gambling. To wit, DraftKings has applied for and received a gaming license to operate in Britain, where sports betting is legal and very popular. (It has not started taking wagers across the pond, however.)

This also isn't an argument against daily fantasy sports being a skill game. The best players in the world will almost always be winners over a large enough sample size; there are daily fantasy pros that make six figures annually. At the same time, some skill can be found in almost every form of gambling, as long as there is a decision that can be made. Good poker players will beat lesser players over the long haul. Skillfully setting a blackjack hand will reduce a casino's edge.

Over small sample sizes, or single contests, though, there is a lot of variance in daily fantasy results, and no guarantee that skill trumps chance. What the casual fantasy player is doing — betting a few bucks in the hopes of winning millions — is certainly gambling.

The legal repercussions of calling fantasy sports “gambling” is why we’ve heard DraftKings chief executive Jason Robins and FanDuel chief executive Nigel Eccles take turns saying daily fantasy is a skill game, over and over, akin to things like chess, spelling bees or races, as ridiculous as some of those comparisons sound. For example, an amateur chess player will likely never beat a grandmaster; a hastily constructed fantasy lineup will beat a pro’s lineup some percentage of the time. Even pros can put together what appears to be an optimal lineup, but a bad bounce here or an untimely injury there and the best roster of fantasy players — at least on paper — can be blown up. With the sites classified as skill, not gambling, some leagues have gone all-in on daily fantasy: At last count, Major League Baseball, the NBA, the NHL and Major League Soccer all had equity in either DraftKings or FanDuel.

But get outside of the daily fantasy executive suites and you can find plenty of rational people calling DFS gambling:

- Most mainstream media outlets have identified daily fantasy as a betting product, routinely using gambling terms to describe it. Look at The Washington Post, the New York Times and the Chicago Tribune.
- Gaming executives like MGM Resorts chief executive Jim Murren have called out the daily fantasy industry on more than one occasion. He once said, “I don’t know how to run a football team, but I do know how to run a casino, and this is gambling.”
- New York Attorney General Eric Schneiderman, in opening an inquiry into DraftKings and FanDuel, called them “totally unregulated gambling venues.”
- Even some daily fantasy pros can identify it as gambling. Cory Albertson, one such pro, wrote in a Wall Street Journal op-ed: “Let’s cut to the chase here: Playing daily-fantasy sports games for money is gambling.”

The latest to classify daily fantasy as a form of betting? The National Council on Problem Gambling just last week published a resolution about daily fantasy, including statements like this: “NCPG believes fantasy sports contest participants are at high risk to, and do, develop gambling problems.”

Executive Director Keith Whyte says his group has gotten feedback from people in the gambling treatment community that there's been an increase in problems related to daily fantasy as the sites — and the potential prizes — have gotten bigger. And the symptoms are just like other types of gambling — losing lots of money over a short period of time and becoming obsessed with playing.

"Perception of skill is a big factor in the development of addiction; we see it in things like poker, and we see it in fantasy," Whyte says. "Especially for the addict, it becomes, 'The longer I play, the better I get, so I should play more, and especially if I am losing money, the only way to win that money back — and the only way I feel good — is to keep gambling.'"

Some daily fantasy advertising reinforces the possibility of problem gambling. In one commercial, a player claims, "It's like the best adrenaline rush ever!" Another says, "After I played FanDuel the first time, I was hooked!" And it's those ubiquitous advertisements — DraftKings and FanDuel have combined to spend hundreds of millions of dollars this year on TV commercials — that have drawn scrutiny. That includes from Congress, which appears poised to hold hearings on the industry.

The danger of getting hooked to a skill game with no money on the line would be pretty minimal. But daily fantasy allows users to put money on statistical performances of sporting events, almost at any time they want. That sure sounds a lot like gambling to those of us who don't have a vested interest in the daily fantasy industry. And if everyone thinks it's gambling, daily fantasy sites may not be able to keep the government out of their business for much longer.

Exhibit G



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RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY GENERAL

January 27, 2016

The Honorable Rosalyn H. Baker
Senator, Sixth District
Twenty-Eighth Legislature
State of Hawai'i
State Capitol, Room 230
415 South Beretania Street
Honolulu, Hawai'i 96813

Dear Senator Baker:

Re: Legality of Daily Fantasy Sports Contests

This letter responds to your request, dated January 21, 2016, in which you requested an opinion regarding the legality of daily fantasy sports contests such as FanDuel and DraftKings under Hawai'i law.¹

We conclude that daily fantasy sports contests constitute illegal gambling under Hawai'i law.

FanDuel and DraftKings are websites allowing Hawai'i residents to participate in daily fantasy sports contests and win money based on the performance of athletes they select. There are two definitions of gambling under Hawai'i law and these contests fit both of them. They are "contests of chance" because chance is a material element for most people participating in them. Haw. Rev.

¹ FanDuel and DraftKings do not offer games in Arizona, Iowa, Louisiana, Montana, and Washington State. See People of the State of New York v. FanDuel and DraftKings, Supreme Court of the State of New York, New York County, Motions for a Preliminary Injunction, page 3, filed November 17, 2015; Index Nos. 453056 and 453054.

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Stat. § 712-1220 (2014). Alternatively, the contests involve "future contingent events" because they depend on the actions of athletes entirely outside the participants' influence or control. Id.

I. BACKGROUND.

A. Traditional Fantasy Leagues vs. Daily Fantasy Sports Contests.

We understand nearly sixty million Americans participate in fantasy sports, with the vast majority playing the traditional variety. Traditional fantasy sports leagues—usually organized between a group of friends or colleagues—consist of regular fans of a particular sport who each "own" their fantasy teams. Each team includes a roster of individuals playing the sport in real life, typically by way of a "draft" at the beginning of the season. Points are awarded each week based on the combined performances of those athletes. All the teams in a league are paired up each week and the team with the higher combined score wins the matchup. Lineups can be altered by trading players or using a "waiver wire" to pick up remaining free agents. At the end of the athletic season, the team with the best record wins the league.

Unlike traditional fantasy sports leagues, daily fantasy sports contests involve competitions between hundreds or thousands of people and are played daily. Any player can put any athlete onto his or her team, and each athlete can be picked up an unlimited number of times. Instead of a draft at the beginning of the season, a person can draft a new team each day for a wager (or "buy-in"). The goal in a daily fantasy sports contest is to pick the highest scoring players who cost the least in order to net the most points overall. The frequency in which an owner wins or loses a cash prize increases to daily, because an owner plays in a new "league" every day. See Michael Trippiedi, Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?, 5 UNLV Gaming L.J. 201, 203-204 (Fall 2014).

The amount of money involved differs tremendously between traditional and daily fantasy sports. While there are varieties of traditional leagues, they often involve around twelve players and a "buy in" of around \$50, leading to a total pot of around \$600. Daily fantasy sports contests, by contrast, allow wagers of up to \$1,000, involve thousands of players at a time, and allow each individual multiple entries leading to top prizes of up to \$1 million. The high stakes and rapid rewards of daily fantasy sports

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contests resemble poker more than traditional fantasy leagues, and this resemblance is no accident as "the daily fantasy industry grew out of the rubble of online poker." Jay Caspian Kang, How the Daily Fantasy Sports Industry Turns Fans into Suckers, N.Y. Times Mag., Jan. 6, 2016, <http://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html>. Daily fantasy sports contests were crafted to comply with the federal Unlawful Internet Gambling Enforcement Act (UIGEA) that had shuttered online poker sites but specifically exempted fantasy sports. See 31 U.S.C.A. § 5362(1)(E)(ix) (West 2016). The UIGEA is clear that none of its provisions should "be construed as altering, limiting, or extending any Federal or State law . . . prohibiting, permitting, or regulating gambling within the United States." 31 U.S.C.A. § 5361(b) (West 2016). Thus the legality of daily fantasy sports contests is a matter of state law.

B. A Brief History of Hawaii's Gambling Laws.

Gambling, in one form or another, has been illegal in Hawai'i since at least 1850. See The King v. Yeong Ting, 6 Haw. 576, 577 (1885). In 1893, the Provisional Government passed a law outlawing many specific types of gambling and "any other game in which money or anything of value is lost or won." 1893 Haw. Sess. L. Act 21. This law remained in force for nearly eighty years until replaced by the current, more comprehensive scheme with the adoption of the Hawaii Penal Code in 1972. 1972 Haw. Sess. L. Act 9. The commentary to the current law notes that "for the most part, the coverage of the previous law has been preserved, although the emphasis has been changed in several instances." Haw. Rev. Stat. §§ 712-1221-1223 cmt. (2014). While the gambling provisions were patterned on those proposed in Michigan and adopted in New York, Hawai'i took "a more cautious approach" than those two states. Id.; Legislative Reference Bureau, Hawaii Penal Code 22-23 (1970) (referring specifically to Hawaii's "social gambling" affirmative defense).

According to the Conference Committee Report on the bill adopting the Code, "The basic thrust of gambling offenses of [the proposed Code] is to impose heavy penalties on various forces of institutionalized gambling and at the same time to recognize that society no longer condemns as criminal, casual gambling in a social context." Conf. Comm. Rep. No. 1-72, in 1972 Senate Journal, at 739. Indeed, it was the intention of the Conference Committee that the gambling section "preclude a nightclub, hotel, bar, restaurant, or any other business in interstate commerce from providing any accommodation for the promotion of any form of gambling." Id.

(emphases added). Relatively few cases have interpreted the current law. While none of these modern cases have cited decisions under the previous law as persuasive, neither have any denied their persuasive effect.

II. ANALYSIS.

A. Daily fantasy sports betting is gambling under Hawai'i law.

In the absence of a specific exclusion or defense, gambling is prohibited in the State of Hawai'i. Haw. Rev. Stat. §§ 712-1220 et seq. The activity involved in daily fantasy sports betting is gambling under the plain meaning of Hawaii's gambling statute.² This statute sets out three main requirements to meet the definition of "gambling" (numbers added):

A person engages in gambling if [1] he [or she] stakes or risks something of value [2] upon the outcome of a contest of chance or a future contingent event not under his control or influence, [3] upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome.

Haw. Rev. Stat. § 712-1220 (2014).³

Daily fantasy sports betting meets each of these requirements. We address the first and third prongs here and the second prong (contest of chance or future contingent event) is addressed below. As to the first prong, the amount wagered on each daily fantasy sports contest is "something of value" that is being "stake[d]"

² Whether further grounds exist for criminal or civil enforcement and to what extent will depend on the particular facts of each case.

³ The definitions section also states:

Gambling does not include bona fide business transactions valid under the law of contracts, including but not limited to contracts for the purchase or sale at a future date of securities or commodities, and agreements to compensate for loss caused by the happening of chance, including but not limited to contracts of indemnity or guaranty and life, health, or accident insurance.

Haw. Rev. Stat. § 712-1220 (2014).

despite being called an "entry fee." Under Hawaii's previous gambling law, the Hawai'i Supreme Court ruled that such a "playing fee" was a stake in the outcome of a game. See State v. Prevo, 44 Haw. 665, 677, 361 P.2d 1044, 1051 (1961) ("Every player of 'Fascination' pays a playing fee of ten cents. It is obvious from the character of the game that each player stakes his fee on a chance of winning something of value, be it a prize or a free game."). As for the third prong, both major daily fantasy sports companies lay out in detail what players will receive on the basis of certain outcomes.⁴ Furthermore, as examined below, a daily fantasy sports contest is a "contest of chance" or involves "a future contingent event not under [a player's] control or influence." Haw. Rev. Stat. § 712-1220. By statute an activity constitutes "gambling" if either requirement is met; in our view, daily fantasy sports contests qualify under both. This is discussed below.

1. Daily fantasy sports contests are contests of chance.

Daily fantasy sports contests are contests of chance under Hawai'i law, which defines them as "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." Haw. Rev. Stat. § 712-1220 (2014). No Hawai'i court has interpreted the phrase "material degree upon an element of chance." The appellate courts in two states with the same statutory language—Nebraska and New York—define "material" to mean "predominant." Am. Amusements Co. v. Neb. Dep't of Revenue, 807 N.W.2d 492, 502 (Neb. 2011); People v. Li Ai Hua, 24 Misc.3d 1142, 1145 (N.Y. Crim. Ct. 2009). But an appellate court in Missouri held that while "chance must be a material element in determining the outcome . . . [i]t need not be the dominant element." Thole v. Westfall, 682 S.W.2d 33, 37 n.8

⁴ See Terms of Use, <https://www.draftkings.com/help/terms> (last visited Jan. 27, 2016) ("Contest results and prize calculations are based on the final statistics and scoring results at the completion of the last professional sports game of each individual Contest. Once Contest results are reviewed and graded, prizes are awarded."); Terms of Use, <https://www.fanduel.com/terms> (last visited Jan. 27, 2016) ("The players in each contest who accumulate the most fantasy points and comply with eligibility requirements and applicable rules will win prizes as set out in the posted contest details.").

(Mo. Ct. App. 1984) (emphasis omitted). As discussed below, under either interpretation, daily fantasy sports contests are contests of chance under Hawai'i law because chance is a material element for the vast majority of players.

In State v. Prevo, the Hawai'i Supreme Court upheld the conviction of a player of the game "Fascination" despite her argument that the game was one of skill. State v. Prevo, 44 Haw. 665, 361 P.2d 1044 (1961).⁵ The Court concluded that: "'gambling' is an appropriate characterization of the conduct of some or most of the participants in the games . . . notwithstanding that some of the players may be deemed so skilled as not to be gambling." Id. at 677, 361 P.3d at 1051. According to the Court:

[T]he test of whether a game is one of skill or of chance, or one in which skill greatly predominates over chance, is not to be measured by the standard of experts or any limited class of players, but by that of the average skill of a majority of players likely to play the game, for the purpose is to determine the primary object of the game and this is one of the ways of doing so.

Id. at 675-76, 361 P.3d at 1050 (citing Ruben v. Keuper, 127 A.2d 906 (N.J. Super. Ct. Ch. Div. 1956)).

For the tiny minority of top-performing players, skill makes a real difference in daily fantasy sports contests. But for the vast majority of players, chance predominates. See, e.g., Aff. of Zvi Gilula at 5, People v. DraftKings, Inc., Index No. 453054/2015 (N.Y. Sup. Ct. Nov. 24, 2014), NYSCEF Doc. No. 104 (noting that the typical client playing DraftKings' MLB-Fifty-Fifty game 134 times would have a win ratio of roughly 45%, i.e., very slightly worse than random chance). Under Hawai'i law, therefore, these contests are contests of chance.

2. Daily fantasy sports contests involve future contingent events not under the control of players.

Participants in daily fantasy sports contests win money based on the performance of athletes during athletic events. Daily fantasy sports players exercise no control or influence over the

⁵ Fascination is a game somewhat akin to a mix of skee-ball and bingo where players compete against each other to be the first one to roll a rubber ball into five holes in a line. Id. at 666-67, 361 P.2d at 1046.

The Honorable Rosalyn H. Baker
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actions of those players. A chosen athlete may become injured or not play in a given game. Additionally, there are uncontrollable circumstances that may affect the points scored by an athlete, including weather and officiating. Thus, daily fantasy sports players "risk[] something of value upon the outcome of . . . a future contingent event not under [their] control or influence." Haw. Rev. Stat. § 712-1220 (2014). Indeed, the only Hawai'i Supreme Court case to explicitly mention future contingent event gambling involved gambling on a sporting event. State v. Okamura, 63 Haw. 342, 343, 626 P.2d 282, 283 (1981) (per curiam).

Based on the discussion above, we conclude that daily fantasy sports contests constitute illegal gambling under Hawai'i law. We hope that we have adequately responded to your inquiry. Please contact us should you require further assistance.

Very truly yours,



Kevin K. Takata
Deputy Attorney General

APPROVED:



Douglas S. Chin
Attorney General

Exhibit H

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January 15, 2016

The Honorable Thomas V. Mike Miller, Jr.
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Dear President Miller:

You have asked for our view as to whether Chapter 346 of 2012, which exempted fantasy sports from the prohibitions against betting, wagering, and gambling contained within Title 12 of the Criminal Law Article, had the effect of expanding commercial gaming and thus should have been subject to referendum under Maryland Constitution Article XIX, § 1(c). Whether Chapter 346 should have been referred to the electorate depends on three subsidiary questions: (1) Does the codification of Chapter 346 within Title 12 of the Criminal Law Article mean that it is exempt from the Article XIX referendum requirement when that requirement does not apply to "[g]aming conducted under Title 12 . . . of the Criminal Law Article"?; (2) If Chapter 346 is not exempt, did it authorize *daily* fantasy sports as well as *traditional* fantasy sports?; and (3) If so, do fantasy sports qualify as "commercial gaming" such that their authorization under Chapter 346 triggered the referendum requirement of Article XIX?

As discussed below, the answers to these subsidiary questions are close calls; none is clear and some involve statutory language and legislative history that conflict in critical respects. In addition, there are many different types of fantasy sports platforms and it is difficult, if not impossible, to reach broad conclusions that would apply to all of them in the absence of the type of factual inquiry for which our advisory function is ill-equipped. Further complicating matters is the fact that *daily* fantasy sports have only emerged in the last few years and there are few judicial opinions—and none in Maryland—that address this new form of fantasy sports.

Subject to those caveats, we believe that the better answer to each question leads to the conclusion that Chapter 346, to the extent it authorized daily fantasy sports, should have been referred to the electorate under Article XIX. However, due to the substantial uncertainty surrounding these issues and because the legislative history surrounding Chapter 346 suggests that the focus of the debate in the General Assembly in 2012 was not on the regulation of daily fantasy sports, we recommend that the Legislature squarely take up the issue this session and clarify whether daily fantasy sports are authorized in Maryland. By contrast, we think it is clear that traditional fantasy sports were authorized by Chapter 346. Because we conclude that it is likely that traditional gaming does not constitute "commercial" gaming within the meaning of Article XIX, Chapter 346, as applied to traditional fantasy sports, may be given effect.

Background

Fantasy sports come in a variety of forms, too numerous to discuss here. The earliest fantasy football games date back to the early 1960's, when Wilfred "Bill the Gill" Winkench created the Greater Oakland Professional Pigskin Prognosticators League and held their first draft in August of 1963. Michael B. Engle, *The No-Fantasy League: Why the National Football League Should Ban Its Players from Managing Personal Fantasy Football Teams*, 11 DePaul J. Sports L. & Contemp. Probs. 59, 62 (2015) (hereinafter "Engle"). Scoring was done manually by consulting the local sports section of the newspaper. *Id.* To keep it simple, only touchdowns were considered in scoring. *Id.* Fantasy leagues also developed for other sports. As computers became more common they began to be used for score keeping and the scoring systems became more complex. Eventually, host websites developed that would provide scoring and other services for free.

The traditional form of fantasy sports is descended from these early fantasy leagues. As described in *Humphrey v. Viacom, Inc.*, 2007 WL 1797648 (D.N.J. 2007), the providers of traditional online fantasy sports require participants to pay a fee to purchase a fantasy sports team and gain access to the various support services that the host website provides. These services typically include everything the participant needs to manage the fantasy team, including real time statistical information, expert opinions and analysis, and message boards for communicating with other participants. The purchase price also covers the data-management services necessary to run a fantasy sports team by drafting a slate of players, tracking the performance of those players, trading players throughout the season, and deciding which players will start and which are on the bench. *Id.* at *1-2. The teams are grouped into leagues, either by the participants forming their own leagues, or in groups formed by the host website.

Although fantasy games can take a variety of forms, typically no player can be chosen for more than one team in a league. Winners are generally determined based on points earned as a result of the performance of individual players chosen for the team. The team with the highest score is declared the winner at season's end. The website host may provide prizes of nominal value for winning teams in a league, and larger prizes for the highest score among all leagues. *Id.* at *2. Monetary prizes may also be awarded. Whatever the prize, the value is determined in advance as part of the agreement for services. In the rest of this letter, we will refer to this kind of fantasy gaming as traditional fantasy sports ("TFS").

Your question also relates to a more recent type of fantasy game where an online company itself operates a wide variety of games that people can participate in online. These games are not ordinarily based on an entire season, but rather on a week, a day, or even a single time of play, such as all professional football games played at 4 p.m. on a particular Sunday. While a fantasy game is never based on a single game, it is our understanding that there are fantasy games based on as few as three real-life games. These are known as daily fantasy sports ("DFS").

The two types of fantasy sports are similar in many respects; in both versions the participants draft players and the winner is determined on the basis of the selected players' performance over the relevant time period. But that is where the similarity ends. Whereas the archetypal TFS game is a contest among friends, DFS contests include leagues, tournaments, head-to-heads, and multipliers, which can involve hundreds of thousands of people who compete more or less anonymously over the internet. See *People of the State of New York v. FanDuel*, Index No. 453056/15, Decision and Order at 5 (N.Y. Sup. N.Y. County Dec. 11, 2015). Whereas TFS participants manage their teams throughout the season by trading and benching players, DFS participants select players for one day only, and must "lock-in" those selections before the relevant games begin. *Id.* And while TFS providers typically charge a flat rate entry fee for the statistical and analytical support they provide, DFS entry fees vary widely by type of contest. In fact, entry fees for providers such as FanDuel and DraftKings can be as low as \$.25 (or even free) but can range as high as \$10,600 for a single competition. See *FanDuel*, Index No. 453056/15, at 5; see also *Langone v. Kaiser*, 2013 WL 5567587 at *1 (N.D. Ill. 2013). The prizes too can be much more valuable in DFS; whereas TFS contests typically involve jerseys, televisions, or other modest cash prizes, DFS are advertised as "get rich quick" schemes, with large cash prizes that can be as high as \$1 million.

The manner in which a DFS provider funds the prizes it offers seems to be a matter of some debate. In pending litigation brought by the New York Attorney General,¹ FanDuel and DraftKings maintain that the prize pools they offer are set in advance and are funded with money that is entirely separate from the entry fees that they collect. As evidence of this, the providers point out that they actually *lose* money in contests where the number of participants is low enough that the entry fees collected are less than the money paid out. There is, however, some indication in the court decisions and elsewhere that the online providers actually take a "commission" from every entry fee paid. *Langone*, 2013 WL 5567587 at 1, 6 (stating that FanDuel "derives its profit from commissions"); *FanDuel*, Index No. 453056/15 at 5, 7 (stating that "a percentage of every entry fee [is] paid to" FanDuel and DraftKings); see also Drew Casey, "DraftKings, FanDuel make millions, and give them away, as fantasy revs up," CNBC (Sept. 20, 2015) (quoting FanDuel's Co-founder Nigel Eccles as stating that "[p]layer prizes [are] really driven by entry fees" and that "[t]he money that comes in, we take about a 10-percent cut and we pay out everything else in prizes, so it's really self-funding"). Whether the financial return derives from a per-entry

¹ The two cases are *People of the State of New York v. FanDuel, Inc.*, Index No. 453056/15, and *People of the State of New York v. DraftKings, Inc.*, Index No. 453054/15, both of which resulted in the New York Supreme Court (a trial court in the New York system) finding that the Attorney General had established a likelihood of success on the merits of his claim that DFS constituted illegal gambling under New York Law. The court granted temporary injunctions preventing the companies from accepting entry fees, wagers, or bets from New York residents in connection with any competition, game, or contest that the companies run on their websites. The temporary injunctions were subsequently stayed by an appellate court. *People of the State of New York v. FanDuel, Inc., et al.*, Nos. M-6204, M-6206 (N.Y. App. Div. Jan. 11, 2016).

commission or from net profit, DFS providers reportedly clear between 6% and 14% of the entry fees paid to them, *FanDuel*, Index No. 453056/15, at 5, and take in millions of dollars in revenue every week.

Chapter 346 and the Regulation of Fantasy Sports

Until recently, no statute or court decision expressly had addressed the legality of fantasy sports under Maryland's gaming laws. Those laws had for many years made it illegal to "bet, wager, or gamble," Crim. Law § 12-102(a)(1), but their applicability to fantasy sports was never made clear. In 2006, an Opinion of the Attorney General on the legality of certain poker tournaments cast doubt on the legality of fantasy sports to the extent that they involved consideration, chance, and reward. These three criteria, the Attorney General stated, are "[t]he three main elements common to all gambling."² 91 *Opinions of the Attorney General* 64, 65 (2006) (citing *Chesapeake Amusements, Inc. v. Riddle*, 363 Md. 16, 24 (2001)). As a result of that opinion, many fantasy sports providers blocked Maryland residents from receiving t-shirts and other prizes.³ See Hearing on House Bill 7 Before the Ways and Means Comm., 2012 Leg., Reg. Sess. (March 16, 2012) (testimony of the Hon. John A. Olszewski, Jr.) ("2012 Olszewski Testimony").

In 2008, Delegate Olszewski—himself a participant in fantasy sports—asked the Department of Legislative Services to examine the relationship between traditional fantasy sports competitions and Maryland's gaming laws. Some people apparently had "contended" that TFS constituted gambling because the entry fee is "wagered" and the outcome of the contest depends "on luck more than skill." Memorandum from Lindsay A. Eastwood, Policy Analyst, to Del. John A. Olszewski, Jr., at 1 (Nov. 17, 2008). The policy analyst concluded that fantasy sports "would probably not be considered gambling," but that new legislation on the topic would "clarify" that "fantasy competition should not fall into the realm of gambling." *Id.* at 5. The memorandum did not, however, address *daily* fantasy sports. See *id.* at 1 (describing fantasy sports as allowing for "moment-by-moment team management," where participants "trade players over the course of a season, and decide which players will start and which will be on the bench," and stating, "A winner is declared at the end of the season, with prizes ranging from bobble-head dolls to flat-screen televisions").

² The terms gaming and gambling are interchangeable. Black's Law Dictionary (9th Ed. 2004) at 746; see also 94 *Opinions of the Attorney General* 32, 36 (2009).

³ Maryland is not the only state whose residents' access to online fantasy sports has been limited at one time or another. The current terms of use for FanDuel, for example, note that people who are "physically located" in Arizona, Iowa, New York, Louisiana, Montana, Nevada or Washington are not eligible to participate. See www.fanduel.com/terms. DraftKings' terms of use note that residents of these same states (with the exception of New York) are "ineligible for prizes." See www.draftkings.com/help/terms.

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In response, Delegate Olszewski introduced House Bill 21 in the 2009 session of the General Assembly. The bill, which was unsuccessful, would have enacted § 12-114 in substantially the same form that it exists today. Delegate Olszewski introduced an identical bill in 2010 (H.B. 750) and it also failed. Both bills were focused on the status of traditional fantasy sports and both were intended to enable Maryland residents who participate in fantasy sports to be eligible to receive prizes to the same extent as the residents of other states. *See* 2012 Olszewski Testimony. The relevant fiscal reports made no mention of fantasy sports carried out on a daily basis.

The 2012 session saw the successful enactment of what is now § 12-114 of the Criminal Law Article. 2012 Md. Laws, ch. 346. That section, in its entirety, provides:

- (a) In this section, “fantasy competition” includes any online fantasy or simulated game or contest such as fantasy sports, in which:
 - (1) participants own, manage, or coach imaginary teams;
 - (2) all prizes and awards offered to winning participants are established and made known to participants in advance of the game or contest;
 - (3) the winning outcome of the game or contest reflects the relative skill of the participants and is determined by statistics generated by actual individuals (players or teams in the case of a professional sport); and
 - (4) no winning outcome is based:
 - (i) solely on the performance of an individual athlete; or
 - (ii) on the score, point spread, or any performances of any single real-world team or any combination of real-world teams.
- (b) Notwithstanding the provisions of this or any other title, the prohibitions against betting, wagering, and gambling do not apply to participation in a fantasy competition.
- (c) The Comptroller may adopt regulations to carry out the provisions of this section.⁴

Although the focus of the 2012 legislation—like its earlier iterations—was traditional fantasy sports, the legislative history mentions that some fantasy sports platforms operate on competitions “based on performance on one given day.” H.B. 7, Revised Fiscal and Policy Note at 4; Ways and Means Committee Floor Report at 3.

⁴ The Comptroller has begun the process of gathering information and conferring with other agencies and officials in order to promulgate appropriate regulations.

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Section 12-114 is based on 31 U.S.C. § 5362(1)(E)(ix), which excludes fantasy and simulation sports games and educational games and contests from the provisions of the Unlawful Internet Gambling Enforcement Act ("UIGEA"). 2012 Olszewski Testimony. The federal Act, which was enacted in 2006 before the advent of DFS,⁵ does not make any gaming activity legal or illegal, but prohibits the acceptance of credit, electronic funds transfers and other forms of payment in connection with the participation of another person in unlawful Internet gambling. See 31 U.S.C. § 5363; see also Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 Sports Law. J. 79, 95 (2015) (hereinafter "Ehrman"); Michael Trippiedi, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV Gaming L.J. 201, 214 (2015) (hereinafter "Trippiedi"). Unlawful Internet gambling is defined as transmitting bets or wagers by means that include the use of the Internet "where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made." 31 U.S.C. § 5362(10)(A).⁶

⁵ Although we have not researched the issue, it has been reported that the only mention of short-term fantasy sports contests in the legislative history surrounding the passage of UIGEA raises it as a potential concern. See *Internet Gambling: Hearing Before the Subcomm. on Tech., Terrorism, and Gov't Information of the Sen. Comm. on the Judiciary*, 106th Cong., 1st Sess. (March 23, 1999) (Sen. Kyl stating with respect to fantasy sports that "generally—and as far as I know, totally right now—the leagues are based upon competition over time, over a long enough period of time that it would be very difficult to influence the final result by any particular player's actions" and asking "at what point does that become a problem, when you have a week of activity or a month of activity or a couple days of activity"); see also Ryan Rodenberg, *The true Congressional origin of daily fantasy sports*, ESPN.com (Oct. 28, 2015) (stating that the exchange involving Sen. Kyl was "the closest any Congressional hearing got to addressing concerns specific to short-duration fantasy leagues").

⁶ The legality of fantasy gaming under other federal laws is less than clear. The sole case on point, *Humphrey v. Viacom*, involved traditional season-long fantasy games and the court held that the entry fee paid at the beginning of the season was not a bet or wager, and thus, in the view of the court, not gaming under federal law. It has been suggested, however, that fantasy games could be subject to prosecution under federal laws other than UIGEA, including the Wire Act, 18 U.S.C. § 1804, the Travel Act, 18 U.S.C. § 1952, the Interstate Transportation of Wagering Paraphernalia Act, 18 U.S.C. § 1953, the Illegal Gambling Business Act, 18 U.S.C. § 1955, and the Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701-3704. Ehrman, at 88-92; Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 Harv. J. Sports & Ent. L. 1, 34-38 (2012); Geoffrey T. Hancock, *Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire and the Reality of U.S. Gaming Law*, 31 T. Jefferson L. Rev. 317 (2009).

The Regulation of Commercial Gaming and Article XIX of the Maryland Constitution

The legalization of casinos and large video lottery facilities in Maryland was one of the most controversial legislative measures of the last 20 years, and the idea reflected in Article XIX—that the *people* should have the power to determine the extent to which commercial gaming would be allowed in Maryland—has a long legislative history. As early as 1995, legislators turned to our Office for guidance in formulating a legislative approach to ensure that the people had that power. See 80 *Opinions of the Attorney General* 151 (1995). Bills introduced starting in the late 1990's would have amended the Constitution to authorize the licensing and regulation of video lottery gaming and would have prohibited additional forms and expansion of commercial gaming in the future, effectively requiring an amendment to the Constitution for any additional forms or expansion of commercial gaming. See House Bill 678 of 1998, House Bill 1170 of 2001, House Bill 732 of 2002. Other bills would have enacted similar language in statute. See H.B. 1190 of 1999, H.B. 1170 of 2000 and H.B. 78 of 2003. None of these bills made it out of committee, but all of them included some mechanism limiting the introduction of additional forms or expansion of commercial gaming. See also Third Reader version of S.B. 322 of 2003, S.B. 197 of 2004, S.B. 205 of 2005, H.B. 1178 of 2006, and H.B. 166 of 2007.

With Maryland facing an impending \$1.7 billion deficit for the 2009 fiscal year, Governor Martin O'Malley issued an Executive Order in October 2007 calling the General Assembly into special session to, among other things, permit the use of video lottery machines as a source of tax revenue. See Exec. Ord. 01.01.2007.23; *Stop Slots Md. 2008 v. State Board of Elections*, 424 Md. 163, 169 (2012); *Smigiel v. Franchot*, 410 Md. 302, 305 (2009). The legislative consensus that the electorate should decide whether to allow commercial gaming had not lost its strength by the time of the 2007 Special Session. During that session, legislative leaders expressly emphasized the desire to give the people the right to vote on expanding commercial gaming. The issue was highlighted in House proceedings by Delegate Sheila Hixson, the Chair of the Ways and Means Committee, when she brought forth the favorable committee report on the bill proposing the new constitutional amendment to allow video lottery facilities. House Proceedings on H.B. 4 of the Special Session of 2007, Calendar day November 16, 2007.⁷

In that special session, the General Assembly ultimately enacted what is now Article XIX of the Maryland Constitution. Two aspects of Article XIX are important here. First, § 1(d) and (e) provide that:

⁷ Delegate Hixson noted that 80% of the people of Maryland had indicated that they believed the issue of commercial gaming should be put to a statewide vote. This is apparently a reference to the poll mentioned in *Support builds for referendum on slots*, Steven T. Dennis, *Gazette.net* (April 30, 2004), where Speaker Busch states that “he was struck by a recent poll showing 80 percent of Marylanders would prefer that the issue be decided at the ballot box instead of in Annapolis.”

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(d) Except as provided in subsection (e) of this section, on or after November 15, 2008, the General Assembly may not authorize any additional forms or expansion of commercial gaming.

(e) The General Assembly may only authorize additional forms or expansion of commercial gaming if approval is granted through a referendum, authorized by an act of the General Assembly, in a general election by a majority of the qualified voters in the State.

These two provisions thus require that any subsequent authorization of "additional forms or expansion of commercial gaming" must be approved by the voters through a referendum. The General Assembly has done this on only one occasion, authorizing an additional video lottery facility in Prince George's County and the use of table games in Chapter 1 of the Second Special Session of 2012, which was approved on referendum in the 2012 general election.

The second part of Article XIX that bears on the question you ask is subsection (a), which made clear that the prohibition in subsection (d) and (e) did not apply to the existing statutory provisions that governed gaming, including bingo and lotteries:

(a) This article does not apply to:

(1) Lotteries conducted under Title 9, Subtitle 1 of the State Government Article of the Annotated Code of Maryland;

(2) Wagering on horse racing conducted under Title 11 of the Business Regulation Article of the Annotated Code of Maryland; or

(3) Gaming conducted under Title 12 or Title 13 of the Criminal Law Article of the Annotated Code of Maryland.

To answer the question you ask, we must analyze three subsidiary questions. First, we will determine whether the codification of Chapter 346 within Title 12 of the Criminal Law Article means that it is exempt from the Article XIX referendum requirement. If Chapter 346 is not exempt, we will turn to whether it authorized daily fantasy sports as well as traditional fantasy sports. We will conclude with whether fantasy sports, to the extent that they are authorized under Chapter 346, qualify as "commercial gaming" such that their authorization triggered the referendum requirement of Article XIX.

Analysis

I. Article XIX, § 1(a)(3) Does Not Exempt the Forms of Gaming That Were Authorized Under § 12-114 of the Criminal Law.

At first blush, the interplay between Article XIX and Chapter 346 seems fairly straightforward: The authorization of fantasy sports provided by Chapter 346 was codified in Chapter 12 of the Criminal Law Article, which is expressly exempted from the reach of the Article XIX by the plain language of (a)(3) of the constitutional amendment. The process of statutory interpretation typically begins with the plain language, and, if statutory language is clear and unambiguous, the “inquiry ordinarily ends there.” *Smith v. State*, 399 Md. 565, 578 (2007). When the plain language is unambiguous, “the Legislature is presumed to have meant what it said and said what it meant.” *Kushell v. Dep’t Of Nat. Res.*, 385 Md. 563, 577 (2005) (internal quotations marks omitted). A reviewing court applying the plain language here might conclude that the referendum requirements of Article XIX simply do not apply to Chapter 346.

That said, the “cardinal rule of statutory construction is to ascertain and effectuate legislative intent.” *McClanahan v. Washington County Dep’t of Soc. Servs.*, No. 79 Sept. Term 2014, 2015 WL 9300639, at *4 (Dec. 22, 2015) (quoting *Motor Vehicle Admin. v. Shrader*, 324 Md. 454, 462 (1991)). Although courts, in their efforts to discover that intent, start with the plain language of the statute, “the plain-meaning rule ‘is not a complete, all-sufficient rule for ascertaining a legislative intention’” *Kaczorowski v. Mayor & City Council of Baltimore*, 309 Md. 505, 513-15 (1987) (quoting *Darnall v. Connor*, 161 Md. 210, 215 (1931)). Rather, “the meaning of the plainest language is controlled by the context in which it appears.” *Montgomery County v. Phillips*, 445 Md. 55, 63 (2015). If the statutory language, when read in context, is “reasonably capable of more than one meaning,” it is ambiguous and we turn to other interpretive aids. *Mayor & Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 551-52 (2002).

We believe the language subsection (a)(3), when read in context of the larger constitutional provision, is capable of more than one meaning. That language provides that the referendum requirement of Article XIX does not apply to “[g]aming conducted under Title 12.” It is not clear from this language whether the Legislature intended to exempt from the Constitution’s reach *any* gaming that might subsequently be conducted under Title 12 or only those gaming activities that, at the time the amendment was enacted, were “conducted under Title 12.” For a number of reasons, however, we believe the latter interpretation best reflects legislative intent.

First, reading subsection (a)(3) so as to exempt gaming activities that are subsequently regulated under Title 12 would create a loophole that would render paragraphs (d) and (e) of the constitutional amendment essentially meaningless. That is, any subsequent Legislature could circumvent the referendum requirement of Article XIX simply by codifying an expansion of commercial gaming in Title 12 or Title 13 of the Criminal Law Article. Not only would such a result render the referendum requirement essentially meaningless, it would lead to the conclusion that the Legislature, while crafting a provision that was important both to the passage of the bill and acceptance by the public, left itself a way to subvert that purpose at will. That is not how

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constitutions are made, and it is not the kind of intent that courts attribute to the Legislature. *See In re Adoption/Guardianship of Tracy K.*, 434 Md. 198, 206-07 (2013) (stating that a statute must be interpreted "as a whole so that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless or nugatory, or given an interpretation that is absurd, illogical, or incompatible with common sense" (internal quotation marks and citations omitted)); *see also Kadan v. Bd. of Sup'rs of Elections of Baltimore County*, 273 Md. 406, 416 (1974) (describing the rules of statutory construction and concluding that "these rules should be applied here in the process of interpretation of the Constitution of this State").

Second, the interpretation described above is contrary to the legislative history of the provision. The House Floor Report on House Bill 4 of the Special Session of 2007 specifically forecloses a reading of Article XIX that would allow it to be circumvented in the manner described above:

It is the intent of the Ways and Means Committee, in adopting this bill and its amendments, that the exclusion provided for gaming conducted under Titles 12 and 13 of the Criminal Law Article is intended to cover all gaming conducted under those titles as of November 15, 2007. It is not the intention of the Committee to allow any subsequent forms of gaming that would otherwise be subject to General Assembly approval and referendum to instead be placed in Titles 12 and 13 in an effort to circumvent the constitutional amendment.

The Fiscal and Policy Note on House Bill 4 corroborates what the floor report states; it makes clear that the exemption provided in the constitutional amendment applied only to "currently authorized forms of gambling." (Emphasis added.) The non-technical ballot summary of the amendment that was provided to the voters for ratification of the amendment similarly suggests that the exemption provided by (a)(3) was not intended to encompass new forms of gaming regulated under Title 12 of the Criminal Law Article: "this constitutional amendment provides that it does not apply to gaming conduct as authorized by certain other laws, such as lotteries, wagering on horse racing, and charitable gaming." Inasmuch as lotteries and horse racing are exempt under paragraphs (a)(1) and (a)(2) respectively, the clear implication is that the (a)(3) exemption was intended to cover "charitable gaming," which is all that Title 12 authorized at the time.

In other respects as well, the legislative history does not support an intent to allow the Legislature to circumvent the constitutional limitations on the expansion of gambling simply by codifying any expansion in Title 12 or Title 13. When the bill was brought out on the floor of the House on November 16, 2007, the chair explained, repeatedly, that the determination had been made that it was important to allow the people to vote on any expansion of gaming, that the people wanted, and were to have, the right to vote on any expansion of commercial gaming, and that all such issues would be sent to them.

We recognize that it could be argued that limiting (a)(3) to existing gaming might also render it meaningless, since existing gaming would not require a subsequent legislative enactment that might trigger Article XIX's referendum requirement. But it appears that the purpose of the provision, as described in the House Floor Report, was simply to assure legislators that currently authorized forms of gaming would not be affected. Indeed, as initially drafted, subsection (a)(3) identified the specific types of gaming that were authorized at the time, namely, "gaming conducted by a bona fide fraternal, civic, war veterans', religious or charitable organization, volunteer fire company, or substantially similar organization included under Title 12 or Title 13 of the Criminal Law Article of the Annotated Code of Maryland." This initial formulation would have made clear that other, subsequently-authorized forms of gaming would not fall within the exemption. The Ways and Means Committee Amendments ultimately struck the language relating to the different entities conducting the gaming, but at the same time clarified in the floor report that, by doing so, it was not opening the door to a legislative expansion of gaming under Title 12. Based on the legislative record, it seems clear that the purpose of the exemption was simply to address the general concern that the constitutional amendment might disrupt existing, authorized forms of gaming.

In light of the above, it is our view that the exemption from referendum provided at subsection (a)(3) of Article XIX is limited to the forms of gaming that had been authorized as of 2007, and because Chapter 346 was enacted after that date, it is not covered by the exemption.⁸ As a result, the bill would have been required to go to referendum if it authorized "additional forms" of, or the "expansion" of, "commercial gaming." We turn next to what types of fantasy sports Chapter 346 authorized and whether they qualify as "commercial gaming."

⁸ The conclusion that we reach does not, we believe, call into question the validity of other gaming law provisions that have been amended since the adoption of Article XIX. For example, Chapter 603 of the 2012 session extended a sunset provision that would have foreclosed the operation of electronic instant bingo machines that had been in operation as of 2007 and early 2008. We do not believe that the extension of that provision had the effect of "expanding" gaming when it allowed only for machines that were operated "in the same manner" and in the same number as they were at the earlier time. See Crim. Law § 12-308. The bill also made other adjustments that restricted, rather than expanded, gaming. See 2012 Md. Laws, ch. 603 (revising the definition of "slot machine" in Crim. Law § 12-301(2) and (3) so as to create new restrictions on gaming over the Internet and on handheld bingo machines; adding regulatory oversight and certification of "electronic gaming devices" under Crim. Law § 12-301.1). And while that legislation removed from the definition of "slot machine" any "skills-based amusement device that awards prizes of minimal value" approved by regulation, Crim. Law § 12-301(3)(vii), the provision would seem to call for a regulatory refinement of existing devices, rather than an expansion or new form of gaming. But if a court were to determine that these provisions were, in fact, additional forms or an expansion of gaming—and "commercial" gaming at that—the remedy would be to subject them to referendum under Article XIX, not to exempt Chapter 346 from that requirement.

II. *What Types of Fantasy Sports Are Covered by § 12-114 of the Criminal Law Article?*

The first step in determining whether Chapter 346 authorized the expansion of commercial gaming is identifying what types of activities are included within its reach. As noted above, Chapter 346 was modeled on TFS and it seems clear that TFS is included. Whether the bill was intended to encompass DFS as well is less clear.

Although the focus of the bill was traditional fantasy sports, there is some indication that the Legislature was aware that the bill would encompass *daily* fantasy sports as well. The Fiscal and Policy Note, for example, indicates that, “[w]hile competition over the course of an entire season is common, some fantasy competitions have far shorter durations, including competitions based on performance on one given day.” This language also appears in the Ways and Means Committee Floor Report. Still, there was not a thorough discussion of the daily games or how they worked; in 2012, daily fantasy sports were still in their “infancy.” Darren Heitner, “An Abbreviated History of FanDuel and DraftKings,” *Forbes* (Sept. 20, 2015). Rather, the clear focus of the bill was on traditional fantasy gaming between friends and the fact that many online sites had blocked Maryland residents from receiving modest prizes such as t-shirts. Moreover, the language of the statute exempts *participation* in fantasy competition, not the companies that provide the competition itself. That makes sense with respect to TFS, where the participants themselves organize the games and the online platforms provide statistical and other services. It does not make sense with respect to DFS, where the online provider establishes the competition and does not participate in the competition. Finally, a recent statement attributed to former Delegate Olszewski seems to confirm that the daily fantasy sites to which the Department of Legislative Services referred are not the type of DFS that concern us here: “I don’t think anyone even back in 2012 envisioned the evolution we’ve seen. We’re not talking about friends and family leagues anymore.” Jeff Barker, “Maryland warily eyes fantasy sports boom,” *Baltimore Sun* (Nov. 22, 2015).

Notwithstanding the uncertainty as to whether applicability to DFS was envisioned by the Legislature, DFS may well satisfy the statutory criteria for the exemption provided by § 12-114. DFS participants own, manage, or coach imaginary teams; the prizes offered to winning participants are established and made known to participants in advance of the contest; and no winning outcome is based solely on the performance of an individual athlete or a real-world team. See § 12-114(a)(1), (2), and (4). It also seems clear that the winning outcomes are determined by statistics generated by actual players on sports teams as required by § 12-114(a)(3). The question with respect to DFS is whether the winning outcome of the game “reflects the relative skill of the participants” in the fantasy games themselves, as is further required by § 12-114(a)(3). Ultimately, this poses a question of fact that cannot be determined by this office, but it seems plausible that a reviewing court would conclude that DFS meets this criterion as well.⁹ For

⁹ As discussed below, the DFS providers maintain that skill is in fact the *predominant* factor in determining who wins their contests, with experienced players consistently outperforming the more casual participant.

purposes of this letter, therefore, we assume that at least some forms of DFS would be covered by § 12-114. We turn next to whether DFS constitutes “gaming” and, if so, whether it qualifies as “commercial gaming” such that its authorization under § 12-114 would have triggered the Article XIX referendum requirement.

III. Do Fantasy Sports Qualify as “Commercial Gaming” Under Article XIX?

Article XIX does not define the term “commercial gaming” and no statutory provision, court decision, or Attorney General opinion establishes a generally-accepted meaning of the term. The legislative history surrounding the development of what eventually became the 2007 constitutional amendment contains some indication that the referendum requirement was focused on additional slot machines and slots venues, not on other forms of commercial gaming. For example, in a 2004 letter to then-Governor Robert Ehrlich, House Speaker Michael Busch explained that “[p]ressure to expand the number of slots locations and machines will begin immediately after a bill is enacted as it has in every jurisdiction that has approved slots at [horse-racing] tracks. Only a constitutional amendment will slow that process and make the lobbying more transparent.” David Nitkin, “Taking aim at Bush, Ehrlich,” *Baltimore Sun* (Aug. 31, 2004).¹⁰

Early versions of the amendment seemed to focus on more than just slots facilities, however, by including within their reach “casino-style gaming” more generally. For example, legislation introduced in the 2003 session stated that “the general assembly . . . may not authorize statutorily any additional forms or expansion of commercial gaming, including casino-style gaming, card games, dice games, roulette, slot machines, and video lottery terminals.” House Bill 890 (§ 2(a)); *see also id.* (preamble, stating that “[t]he authorization of any additional forms or expansion of commercial gaming, such as casino-style gaming, in the State is prohibited by this Act”). As enacted in 2007, the amendment omitted the illustrative term “such as casino-style gaming,” and instead categorically required a referendum to approve legislation authorizing “commercial gaming,” including “additional forms” of commercial gaming.¹¹ We turn to the constituent parts of that term next, first to whether DFS constitutes “gaming” under Maryland law and, if so, then to whether DFS constitutes “commercial” gaming.

¹⁰ Mr. Nitkin is currently the Director of Communications for the Office of the Maryland Attorney General.

¹¹ Although the legislative history surrounding the enactment of Article XIX does not mention fantasy sports as one such “additional form” of commercial gaming, one would not expect it to do so. DFS as we know it now was not a going concern as of 2007; the two online providers that began DFS—FanDuel and DraftStreet—were both created in 2009. DraftKings, which ultimately acquired DraftStreet, was not founded until 2012. *See The Complete History of the Daily Fantasy Sports Industry*, available at <http://dailyfantasynews.com>.

A. Does DFS Qualify as "Gaming" Under Maryland Law?

Maryland's gaming laws contain two prohibitions that could be implicated by DFS: (1) § 12-102(a)(1) of the Criminal Law Article, which provides that a person may not "bet, wager, or gamble"; and (2) subsection (a)(2) of that same provision, which states that a person "may not . . . make or sell a book or pool on the result of a race, contest, or contingency." We will address each in turn.

1. Section 12-102(a)(1) and What it Means to "Bet, Wager, or Gamble"

It is our view that, at the time Chapter 346 was enacted, fantasy gaming for which an entry fee or other consideration is paid could be found to violate Criminal Law Article, § 12-102(a)(1). Although the terms "bet, wager, or gamble" are not defined by statute, the Attorney General opined that "[e]stablishing a violation of this provision requires a showing of 'consideration, chance, and reward.'" 91 *Opinions of the Attorney General* at 65 (quoting *Chesapeake Amusements*, 363 Md. at 24); see also 94 *Opinions of the Attorney General* at 36 n.10. All three seem to be present in DFS.

Consideration. Consideration means that there must be money or another thing of value given for the opportunity to receive the reward. 91 *Opinions of the Attorney General* at 65-66. Consideration can include not only money paid to participate, but such things as donations to charity, a "nominal fee," payment of a cover charge to enter the bar where the tournament is held, and entrance fees, as well as membership fees for a poker league. *Id.* at 66. Under this broad definition, fantasy games with any sort of entry fee would likely be found to involve consideration.¹² In the *Humphrey* case, the federal district court concluded that the entry fees paid for TFS "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)." *Id.* at *8 (parentheses in original). Regardless of whether it is a bet or wager, money paid to participate is clearly consideration. The *FanDuel* court did not expressly disagree with the conclusion of the *Humphrey* court, but differentiated the fees charged by FanDuel and DraftKings for DFS, which were charged for each separate game, and were, in some cases, significantly higher than those charged for seasonal play. As a result, the New York court found that the entry fees were "consideration." Neither *Humphrey* nor *FanDuel* is binding on Maryland courts, but together with the 2006 Attorney General's Opinion, they suggest that the variable "entry fees" for DFS would constitute consideration, though an entry fee for TFS may not if it is charged uniformly and in a manner that reflects that it is for services rendered, such as statistics and computer time.

¹² By contrast, contests that are free to enter would not satisfy this criterion and thus would not constitute gaming under Maryland law.

Chance. Courts around the country have taken a number of different approaches to determining whether a game depends on chance or skill. The majority view is the “dominant element” test, which examines whether chance or skill is the major factor in the result of a contest. This test has been described as looking to whether an activity is one of chance, where “greater than 50 percent” of the result is derived from chance, Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 Harv. J. Sports & Ent. L. 1, 28-29 (2012) (hereinafter “Edelman”), or whether the outcome of a given game is controlled by mere chance or factors that the participant is able to control. Ehrman at 96 (2015). While this test is fairly straightforward, there is no definitive way to determine whether chance or skill predominates, and courts have reached differing conclusions in borderline games such as poker, backgammon and three-card monte. Jon Boswell, *Fantasy Sports: A Game of Skill That is Implicitly Legal Under State Law, and Now Explicitly Under Federal Law*, 25 Cardozo Arts & Ent. L.J. 1257, 1265 (2008) (hereinafter “Boswell”).

There are other tests used in a small number of states. Among them is the “material element test,” which will prohibit wagering on a game “if chance has more than a mere incidental effect on the game,” even if “skill may primarily influence the outcome.” Anthony N. Cabot et al., *Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 Drake L. Rev. 383, 392-93 (2009). New York follows this approach. See New York Penal Code, § 225.00 (defining “gambling” as risking something of value on a “contest of chance” or “a future contingent event not under his control or influence,” and defining “contest of chance” as “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”). Also included among these more marginal tests are the “any chance” test, under which the element of chance will be found if there is *any* chance that influences the outcome of the game, and the “gambling instinct” test, which looks to the nature of an activity to determine if it appeals to one’s gambling instinct. Edelman at 29. Finally, in Illinois it appears that the degree of chance or skill is irrelevant to whether an activity qualifies as “gambling.” See 720 Ill. Comp. Stat. Ann. 5/28-1(a)(1) (“A person commits gambling when he or she . . . knowingly plays a game of chance or skill for money or other thing of value”); see also *id.* at (b)(2) (exempting participants in “any bona fide contest for the determination of skill, speed, strength or endurance or to the owners of animals or vehicles entered in such contest”).

None of these tests have been adopted by Maryland courts, but in *Brown v. State*, 210 Md. 301, 307 (1956), the Court of Appeals held that the law prohibiting the operation of a “gaming table” was not confined to games of chance, but also applied to games of skill.¹³ *Brown* thus suggests that DFS could qualify as gaming even if, as the providers maintain, skill figures prominently in determining the outcome of the DFS contest. Indeed, *Brown* notes that, “[i]n its broader aspects, playing any game for money is gaming,” particularly when “the inducement to

¹³ The slot machine law, on the other hand, has been held to require an element of chance. *Chesapeake Amusements*, 363 Md. at 24; *State v. 158 Gaming Devices*, 304 Md. 404 (1985).

play was, in part at least, the chance of gain.” *Id.* (internal quotation marks omitted); *see also F.A.C.E. Trading, Inc. v. Todd*, 393 Md. 364, 378 (2006) (quoting *Brown*).

Although no court has elaborated on how these tests relate to fantasy gaming,¹⁴ several Attorneys General have addressed the issue. The Kansas Attorney General, applying the dominant element test, concluded that fantasy sports leagues, as defined in proposed legislation based on the federal law, would not constitute a “lottery.” Kan. Atty. Gen. Op. No. 2015-9, 2015 WL 1923114 (2015). The opinion concluded that the language in the proposed legislation incorporating the federal definition of “fantasy sports leagues”—including the requirement that “all winning outcomes reflect the relative knowledge and skill of participants and are determined predominantly by accumulated statistical results of the performance of individual athletes in multiple real-world sporting events,”—effectively incorporated the dominant element test (which it referred to as the “dominant factor test”). Applying that test, the Attorney General concluded that games permitted by the legislation would be games of skill, and thus not lottery. The Attorney General did not, however, have any particular type of fantasy game before him. In contrast, the Louisiana Attorney General opined that the presence of an element of skill was relevant to whether an activity was a lottery, but not to whether it is gambling, and thus concluded that fantasy gaming was illegal gambling in that State. La. Op. Atty. Gen. 91-14, 1991 WL 575105 (1991).¹⁵ Most recently, the Illinois Attorney General has determined that DFS is illegal gambling under Illinois law—a conclusion that DFS providers have challenged in court. *See* Ill. Op. Atty. Gen., No. 15-006 (Dec. 23, 2015).

In general, commentators seem to be of the view that a traditional fantasy sports contest is a game of skill. Ehrman at 102; Edelman at 28; Boswell at 1270. Some express doubt, however, about whether *daily* fantasy sports meet that standard. Trippiedi at 202; Edelman at 30; *but see* Ehrman at 81. Although both types of fantasy sports undoubtedly require skill in the selection of players,¹⁶ DFS does not allow for the forms of roster management that simulate what a real-life

¹⁴ The *Humphrey* court recited as fact that the success of a traditional fantasy sports team depended on the participants’ skill. *Id.* at *2. The *FanDuel* court, on the other hand, presumably must have believed that the daily games met the chance requirement of New York law.

¹⁵ Although daily fantasy sports sites block residents of Louisiana, *see supra* note 3, that has not stopped Louisiana residents from filing suit against FanDuel and DraftKings over the recent use of inside information by DraftKings employees to win money from FanDuel. *Latest Daily Fantasy Sports Lawsuit Has A Twist: The Plaintiff Played From A Banned State*, Legal Sports Report (Oct. 13, 2015) www.legalsportsreport.com/5019/louisiana-daily-fantasy-sports-lawsuit.

¹⁶ In fact, DFS providers maintain that their type of draft, which allows participants to select *any* player within salary cap constraints, requires more skill than the so-called “snake draft” used in many TFS games, where a randomly-generated draft order and other players’ selections interject an element of chance. At least one commentator disagrees, arguing that TFS allow one participant to pick a player simply to prevent another participant from doing so and thereby weaken his opponent. That type of selection mechanism “allows for a greater use

team manager does, such as “negotiating trades with other owners, or engaging in other ‘team management’ activities, such as adding or dropping players.” Edelman at 30. Instead, once a DFS player has made his or her final selections, those selections are locked in before the relevant games begin. At that point, the participant can do nothing but hope that the players he has picked perform well.

Nor does DFS provide time for the participant’s management skills to offset “chance factors such as the physical and mental conditions of player, potential problems between team members, and game time weather conditions.” Edelman at 30. For example, if a DFS participant’s star player is injured on the first play, the platform provides no opportunity to insert a bench player into the lineup or select a free agent to fill the void created by the injury, as a TFS participant would be able to do. Thus, while an untimely injury will hurt both types of participants, it will *devastate* a DFS participant’s chances.

None of the foregoing dictates what path a Maryland court will take. There certainly seems to be an element of skill involved in DFS; a small percentage of experienced DFS participants consistently outperform the average player.¹⁷ At the same time, there can be no question that chance is an element in fantasy sports. Everyone involved in the debate over the legality of fantasy sports agrees that winning depends on how well one *predicts* how real-world players will perform. While a participant might vastly improve the accuracy of his or her predictions by studying the past performance of players, finding bargain players who outperform their salaries, and employing other selection strategies, ultimately the participant has no control over the athletes’ performances, which can hinge on any number of unknown factors. Engle at 79. In this respect, DFS bears some resemblance to betting on horse races—which is commonly accepted as gambling—in which one can improve one’s chances by reading up on the records of horses, the conditions in which individual horses perform well, the condition of the track and the weather on the day of the race, and the health of the horse, including whether it has been administered Lasix. Just as wagering on horses tends to reward the bettor who finds a horse that is stronger than its odds would suggest, the salary cap feature of DFS rewards a participant for

of skill, knowledge, and strategy.” Trippiedi at 220.

¹⁷ At least one of the private suits against FanDuel and DraftKings suggests that the DFS providers manipulate DFS participation in order to inflate the success rate of experienced players. In *Genchanok v. FanDuel*, Case 2:15-cv-05127-MVL-KWR (filed October 13, 2015), the Complaint alleges that FanDuel and DraftKings actively seek new customers because they rely on inexperienced new customers to keep its most active users on their site, presumably by making it more likely that the more active users will win. Complaint at ¶¶ 6 and 7. Presumably, the higher levels of wins by experienced players then boost the statistics that the sites use to support their claim that DFS is a game of skill. The *Genchanok* complaint further alleges, however, that many of the top winners supporting these statistics are employees of other DFS sites who have inside information from their employers. Complaint at ¶ 38. If shown, this would obviously weaken the skill argument.

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finding a player who outperforms his or her salary. In both activities, participants use skill to improve their chances of winning, but ultimately their success will hinge on the real-world players' performances, which, like a roll of the dice or a dealt hand of cards, is something over which DFS participants, like bettors at the race track, have no control.

This most likely explains why the cases involving games of skill typically involve betting by participants *in the game itself* rather than betting by people who seek to predict either the result of the game of skill or events within that game or a series of games. In fact, prior to a change in New York law that essentially eliminated the dominant element test in that State, the practice commentary to N.Y. Penal Code, § 225.00 noted that betting on the outcome of a chess game would constitute gambling “[d]espite chess being a game of skill, X and Y are gambling because the outcome depends upon a future contingent event that neither has any control or influence over.” See Donnino, Practice Commentary, McKinney’s Penal Law Book 39, p 355, cited in *People v. Jun Feng*, 2012 WL 28563, *3, 946 N.Y.S.2d 68 (Table) (N.Y. Crim. Kings County 2012). By contrast, the same practice commentary noted that wagering between the two chess players would not similar constitute gambling. *Id.*

We cannot predict with certainty whether a Maryland court would find that either TFS or DFS is a game of skill and therefore would not satisfy the “chance” requirement necessary to establish a violation of § 12-102(a)(1) of the Criminal Law Article. That uncertainty has both a legal and a factual component. Legally, it is difficult to predict how the Court of Appeals might rule with respect to the level of chance that is required to establish a violation of the law against betting, wagering, or gambling. Factually, it is difficult to draw broad conclusions with respect to the many different types of TFS and DFS formats available. But given that TFS and DFS contain an element of chance (*i.e.*, the performance of the players, over which the participants have no control), We believe a reviewing court could conclude that both forms of fantasy sports—and particularly DFS—meet the “chance” criterion of the “consideration, chance, and reward” test for purposes of Criminal Law § 12-102(a)(1). This is especially true in light of § 12-113 of the Criminal Law Article, which requires the Office of the Attorney General, the State Lottery and Gaming Control Commission, the Department of State Police, local law enforcement units, and the court to “construe liberally this title relating to gambling and betting to prevent the activities prohibited.” See *F.A.C.E. Trading*, 393 Md. at 377 (recounting long history of liberal construction requirement).

Reward. As for the third element of gambling, it has been said that a reward may take the form of money, or some other thing of value, such as chips convertible to money, or points convertible to some sort of prize. 91 *Opinions of the Attorney General* 64, 65 (2006). Some fantasy games apparently do not provide rewards, and, as such, would not be deemed gaming. Most, however, do provide some sort of prize, and this factor would be satisfied.

2. Section 12-102(a)(2) and What it Means to “Make or Sell a Book or Pool”

It is also our view that DFS might qualify as a “pool” or “bookmaking” under § 12-102(a)(2) of the Criminal Law Article. That provision states that a person “may not . . . make or sell a book or pool on the result of a race, contest, or contingency.” Unlike subsection (a)(1), discussed above, this provision does not depend in any way on whether the race, contest, or contingency involved skill, or whether success in picking the winner would depend on skill. It simply prohibits the making of or selling of a book or pool on the result of a race, contest or contingency.¹⁸

The term “pool” is not defined by Maryland law, and there are no Maryland cases that construe it. Resorting to the dictionary, a pool is defined as a “gambling scheme in which numerous persons contribute stakes for betting on a particular event (such as a sporting event).” Black’s Law Dictionary (9th Ed. 2009) at 1278. The common form is a combination of stakes, in which the money collected is to go to the winner. It is not necessary, however, that all of the money go to the winner, as the person running the pool ordinarily takes a share. *Commonwealth v. Sullivan*, 105 N.E. 895 (Mass. 1914). Thus, the criminal offense is established if there is a combination of stakes, a part of which is to go to the winner. *Id.* at 895-96.

As for “bookmaking,” it too is not defined by Maryland law. Dictionaries define it as “[g]ambling that entails the taking and recording of bets on an event, esp. a sporting event such as a horse race or football game.” Black’s Law Dictionary (9th Ed. 2009) at 207. As discussed above, the salary cap feature of DFS seems to function much as “odds” or the “point spread” does when betting on individual games; both reward the participant for finding under-valued picks. Still, it might be difficult to characterize DFS as bookmaking when DFS providers have no stake in the outcome of the wagers placed with them. Instead, DFS providers play a role that seems more akin to the role the “house” plays with respect to poker tables; they profit from the underlying transaction but they do not participate in it the same way that a bookmaker does. Still, we cannot rule out the possibility that a court would conclude that DFS, with its differing combinations and numbers of participants, might also qualify as “bookmaking.”

To qualify as a “pool” or “book,” however, the wager must hinge on the “result of a race, contest, or contingency.” Although a sporting event is obviously a contest, neither variety of fantasy sports involves predicting the outcome of actual games or the result of a particular play. Instead, the outcome of fantasy sports hinges on an *accumulation* of the plays that make up the games. Those discrete plays are then reflected in the selected players’ aggregate statistics and, ultimately, the participant’s “points.” While it seems a stretch to regard each of those underlying

¹⁸ In fact, the original version of Criminal Law Article, § 12-102(a)(2), enacted as Chapter 206, Laws of Maryland 1890, was designed to ensure the illegality of betting on horse races after the Court of Appeals found that activity was not covered by the provisions on gaming devices in *James v. State*, 63 Md. 242 (1885).

plays as a “contest” within the meaning of the statute, they could qualify as “contingencies.” See Black’s Law Dictionary (9th Ed. 2009) at 362 (A contingency is “[a]n event that may or may not occur; a possibility.”). Although DFS participants wager on a series of contingencies across multiple games, the use of the singular in a statute includes the plural, General Provisions Article, § 1-202, and betting that involves predicting the results of multiple games has been held to be a game of chance and not a game of skill. *Commonwealth v. Laniewski*, 98 A.2d 215, 217 (Pa. Super. 1953); *Seattle Times Co. v. Tielsch*, 495 P.2d 1366, 1370 (Wash. 1972) (en banc).

In sum, it is by no means clear that fantasy sports were legal under § 12-102 of the Criminal Law Article at the time that Chapter 346 was enacted. Given the liberal construction to which we must give our gambling laws, there are good reasons to believe that fantasy sports involved a “bet, wager, or gamble” under subsection (a)(1) of that statute or a “pool” or “book” under subsection (a)(2). Indeed, the express purpose of Chapter 346 was to “*exempt[]* certain fantasy competitions from gaming prohibitions,” which presupposes that those prohibitions applied or at least might have applied at the time. See 2012 Md. Laws, ch. 346 (preamble, emphasis added). Under the circumstances, a court could conclude that the effect of Chapter 346 was to authorize an additional form, or expansion, of gaming.¹⁹ If so, the question then becomes whether the gaming that fantasy sports involves is “commercial” gaming.

B. Does DFS Qualify as “Commercial” Gaming Within the Meaning of Article XIX?

Prior to the adoption of Criminal Law Article, § 12-114, Maryland law provided for three categories of legalized gaming: (1) for profit (*i.e.*, commercial gaming); (2) non-profit (*i.e.*, conducted for charitable, social, fraternal and other purposes); and (3) governmental (*i.e.*, the lottery). Section 12-114 was the first provision to legalize any form of *private* gaming.²⁰ It seems clear, however, that the term “commercial gaming” was not intended to include private gaming, and, as a result, that Article XIX, § 1(e) would not apply to a law permitting private gaming of a type not previously permitted.

Thus, where the participants in TFS gather to form a league, hold their own draft, and simply rely on a host to supply the necessary computer and other services for a seasonal fee, the gaming is operated by the participants and is private rather than commercial gaming. The host is no more conducting gaming than are companies who sell cards, dice, bingo supplies, trophies or other similar items. Other participants in TFS may use additional services from the host, and, depending on the facts, might still be conducting the games themselves. And the TFS-providers’ purpose in offering statistical and other services seems to be to draw more traffic to their websites

¹⁹ The Florida Attorney General reached a similar conclusion with respect to a Florida statute prohibiting betting on “the result of any trial or contest of skill, speed or power or endurance of man or beast.” See Fla. Op. Att’y Gen. 91-3, 1991 WL 528146 (Fla. A.G. 1991).

²⁰ By private gaming we mean social poker games in private homes, office NCAA brackets, picking squares at Super Bowl parties, and similar activities.

and otherwise foster greater consumer interest in the sports coverage that they offer. It is not possible to analyze all of the possible factual situations, but, in general, these considerations suggest that most TFS would not be considered commercial gaming.

DFS presents a different situation. In DFS the *provider* creates the games, determining which events are included, how many people play, and the basis of the distribution of the winnings. Far from conducting the games themselves, individual participants pick the games they will play from those that are being offered by the provider on the day they log on. Moreover, DFS providers collect a portion of the entry fee for each game—whether as a “commission” or as a built-in profit margin—rather than charging a single charge for service as appears to be the case with TFS. And unlike some online companies that provide services to TFS participants more or less to drive website traffic, the DFS provider’s *entire business model* is based on getting as many participants as possible to pay to play as frequently as possible, so as to generate millions of dollars in entry fees. Based on these limited facts, it seems clear that DFS companies, if they are conducting gaming, are conducting it for profit.

In sum, if DFS constitutes gaming under Maryland law, it would constitute “commercial gaming” that could not have been authorized by Chapter 346 without a referendum. Because no referendum was conducted, any authorization of daily fantasy sports that Chapter 346 might otherwise have provided would not be effective.

IV. Chapter 346 Can Be Given Effect to the Extent That it Reaches Gaming That Is Not Commercial

Finally, while Chapter 346 would be invalid to the extent that it could be applied to authorize an additional form of commercial gaming, it is our view that it could still validly apply to any fantasy games that were found not to be commercial or not to constitute gaming. General Provisions Article, § 1-210(a) provides that the provisions of all statutes enacted after July 1, 1973 are severable. This provision does not control in all situations, but in general, the courts will separate valid from invalid portions of a statute where it appears that the General Assembly would have intended that the statute be given partial effect if it had known that the remainder was invalid. In this case, the legislative history shows that the main focus of the General Assembly was TFS. The sponsor of the bill talked about his league and others talked about sports and news sites that offered traditional fantasy games. While the word “daily” was mentioned in one of the hearings and daily play was mentioned in the Fiscal and Policy Note and repeated in the Ways and Means Committee Floor Report, there was not a thorough discussion of daily games or how they worked. Rather, the intent of the legislation, as revealed in the testimony, was to address the fact that most traditional fantasy sports platforms had blocked Maryland residents from receiving prizes. See 2012 Olszewski Testimony. This aim would be best served by allowing Chapter 346 to be given effect to the full extent permissible under the Maryland Constitution.

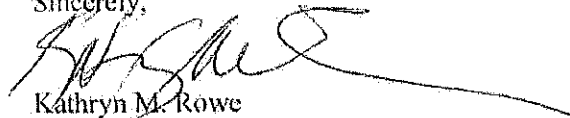
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Conclusion

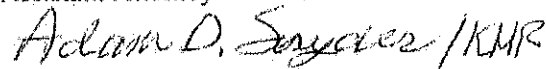
Whether Chapter 346 was subject to the referendum requirement of Article XIX depends on a number of subsidiary questions, each of which is a close call. In addition, there are many different types of fantasy sports platforms and it is difficult, if not impossible, to reach broad conclusions that would apply to all of them in the absence of the type of factual inquiry for which our advisory function is ill-equipped. Further complicating matters is the fact that *daily* fantasy sports have only emerged in the last few years and there are few judicial opinions—and none in Maryland—that address this new form of fantasy sports.

Subject to those caveats and as discussed above, we believe that the better answer to each question leads to the conclusion that Chapter 346, to the extent it authorized daily fantasy sports, should have been referred to the electorate under Article XIX. However, due to the substantial uncertainty surrounding these issues and because the legislative history surrounding Chapter 346 suggests that the General Assembly did not focus on the regulation of daily fantasy sports in 2012, and could not realistically have considered daily fantasy sports as they exist today, we recommend that the Legislature squarely take up the issue this session and clarify whether daily fantasy sports are authorized in Maryland. By contrast, we think it is clear that traditional fantasy sports were authorized by Chapter 346. Because we conclude that it is likely that traditional gaming does not constitute “commercial” gaming within the meaning of Article XIX, Chapter 346, as applied to traditional fantasy sports, may be given effect.

Sincerely,



Kathryn M. Rowe
Assistant Attorney General



Adam D. Snyder
Chief Counsel, Opinions & Advice

Exhibit I



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 23, 2015

FILE NO. 15-006

SPORTS AND GAMING:

Daily Fantasy Sports
Contests as Gambling

The Honorable Elgie R. Sims, Jr.
Chairperson, Judiciary - Criminal Committee
State Representative, 34th District
8658 South Cottage Grove, Suite 404B
Chicago, Illinois 60619

The Honorable Scott R. Drury
Vice-Chairperson, Judiciary - Criminal Committee
State Representative, 58th District
425 Sheridan Road
Highwood, Illinois 60040

Dear Representative Sims and Representative Drury:

You have inquired whether daily fantasy sports contests offered by FanDuel and DraftKings (collectively Contest Organizers) constitute "gambling" under Illinois law. For the reasons stated below, it is my opinion that the contests in question constitute illegal gambling under subsection 28-1(a) of the Criminal Code of 2012 (the Criminal Code) (720 ILCS 5/28-1(a))

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(West 2014)), and the exemption set forth in subsection 28-1(b)(2) of the Criminal Code (720 ILCS 5/28-1(b)(2) (West 2014)) does not apply.

BACKGROUND

The Contest Organizers are currently two of the most prominent companies offering online daily fantasy sports contests. The term "fantasy sports contests" commonly refers to contests involving virtual teams in which participants choose current athletes in a given professional or college sport to create a fantasy sports team and then compete against other fantasy sports participants, with the winner or winners determined based on how those athletes individually perform in their actual professional or college sports game. *See generally Langone v. Kaiser*, No. 12-C-2073, 2013 WL 5567587 (N.D. Ill. October 9, 2013).

Unlike traditional fantasy sports contests, which operate on a season-long timetable, daily fantasy sports contests are conducted over short-term periods, such as a week or single day of competition. Participants who have created accounts with the Contest Organizers pay an entry fee to participate in one or more of a Contest Organizer's fantasy sports contests¹ and select a team of athletes in a certain sport under an imaginary "salary cap," a maximum budget to

¹The Contest Organizers offer a number of different contest formats including leagues, tournaments, head-to-heads, and multipliers. Leagues have a set number of entries allowed, while tournaments do not have a cap on the number of entries. Most tournaments have guaranteed prize pools, where a prize is guaranteed no matter the total number of entrants. In head-to-head contests, two participants compete against each other directly. In multiplier contests, those in a certain top percentage of the total number of participants will win the same amount. FanDuel Website, *available at* <https://www.fanduel.com/how-it-works>; DraftKings Website, *available at* <https://www.draftkings.com/help/faq>.

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spend on athletes for the creation of a fantasy sports team.² The prizes are known in advance of the playing of the actual games, and the prize values do not change based on the number of entries in a particular contest. Participants earn fantasy points based on the statistical performance of the athletes in the actual games. Depending on the athletes' overall performance, participants may win a share of the predetermined prize. Entry fees help fund prizes, with a portion of the fees also going to the appropriate Contest Organizer. Complaint for Declaratory and Injunctive Relief at 5-6, *FanDuel, Inc. v. Schneiderman*, No. 161691/2015 (N.Y. Sup. Ct., New York County); Verified Petition at 7-8, *DraftKings, Inc. v. Schneiderman*, No. 102014/2015 (N.Y. Sup. Ct., New York County).

ANALYSIS

The Contest Organizers have suggested that their daily fantasy sports contests are authorized under Federal law. The Professional and Amateur Sports Protection Act (PASPA) (28 U.S.C. §3701 *et seq.* (2012)), which was enacted in 1992, makes it unlawful for "a person to sponsor, operate, advertise, or promote * * * a lottery, sweepstakes, or other betting, gambling, or wagering scheme based * * * on one or more competitive games in which amateur or professional athletes participate[.]" 28 U.S.C. §3702 (2012). However, the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) (31 U.S.C. §5361 *et seq.* (2012)) was enacted after

²See FanDuel Website, available at <https://www.fanduel.com/how-it-works>; DraftKings Website, available at <https://draftkings.com/help/how-to-play>. Both FanDuel and DraftKings offer free "contests." However, this opinion addresses only those contests in which participants pay an entry fee.

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PASPA's passage and prohibits any person engaged in the business of "betting" from knowingly accepting credit, electronic fund transfers, checks, or any other payment involving a financial institution to settle unlawful internet gambling debts. 31 U.S.C. §5363 (2012). The UIGEA excludes from the definition of "bet or wager" the participation in any fantasy sports game where: (1) all prize amounts are made known before the contest begins; (2) all winning outcomes are based on the relative skill and knowledge of the participants; and (3) no winning outcome is based on the scores or performance of a single, real world event or the performance of any real world team. 31 U.S.C. §5362(1)(E)(ix) (2012). The UIGEA specifically provides, however, that "[n]o provision of this subchapter shall be construed as * * * limiting * * * State law * * * or regulating gambling within the United States." 31 U.S.C. §5361(b) (2012). The UIGEA thus leaves to each state the authority to determine whether daily fantasy sports contests which fall under the UIGEA's requirements constitute illegal gambling.

In that regard, the online Terms of Use for FanDuel provide that individuals who are physically located in Arizona, Iowa, Louisiana, Montana, Nevada, New York, or Washington are not eligible to participate in contests. FanDuel Website, *available at* <https://www.fanduel.com/terms>. Similarly, the online Terms of Use for DraftKings provide that legal residents physically located in the foregoing states, with the exception of New York, are ineligible to participate in contests. DraftKings Website, *available at* <https://www.draftkings.com/help/terms>. It appears that the excluded states have gambling statutes that either expressly prohibit fantasy

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sports gambling (Mont. Code Ann. §23-5-802 (2015), *available at* <http://leg.mt.gov/bills/mca/23/5/23-5-802.htm>) or internet gambling (La. Rev. Stat. §14:90.3 (2015), *available at* <http://www.legis.la.gov/legis/LawSearch.aspx>; Wash. Rev. Code §9.46.240 (2015), *available at* <http://apps.leg.wa.gov/RCW/default.aspx?cite=9.46.240>) or have been construed by State enforcement authorities to prohibit fantasy sports contests (*see* Ariz. Att'y Gen. Op. No. I98-002, issued January 21, 1998 (concluding that fantasy football constitutes gambling under Arizona law); Memorandum from J. Brin Gibson, Bureau Chief of Gaming and Government Affairs and Ketan D. Bhirud, Head of Complex Litigation, Office of the Nevada Attorney General, to A.G. Burnett, Chairman, Nevada Gaming Control Board, Terry Johnson, Member, Nevada Gaming Control Board, and Shawn Reid, Member, Nevada Gaming Control Board (October 16, 2015) (concluding that daily fantasy sports constitute sports pools and gambling games under Nevada law and therefore cannot be offered in Nevada without first obtaining a gaming license)).³ *See also* 86th Iowa Gen. Assem., Senate File 166, 2015 Sess. (pending legislation proposing to add "Fantasy or Simulation Sports Contests" to the list of lawful *bona fide* contests).

³Additionally, on November 10, 2015, the New York Attorney General's Office issued cease and desist letters to FanDuel and DraftKings, asserting that their operations constitute illegal gambling under New York law. *See* Letter from Kathleen McGee, Chief, Internet Bureau, Office of the New York Attorney General, to Jason Robins, Chief Executive Officer, DraftKings, Inc. (November 10, 2015); Letter from Kathleen McGee, Chief, Internet Bureau, Office of the New York Attorney General, to Nigel Eccles, Chief Executive Officer, FanDuel Inc. (November 10, 2015). That matter is currently in litigation. *See* note 10.

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In Illinois, the legality of daily fantasy sports is a matter of first impression.⁴ The Criminal Code prohibits the playing of both "games of chance or skill for money[.]" Specifically, subsection 28-1(a) of the Criminal Code (720 ILCS 5/28-1(a) (West 2014)) defines the offense of gambling and provides, in pertinent part:

⁴There is one decision from a Federal district court in Illinois addressing daily fantasy sports contests. In *Langone v. Kaiser*, the plaintiff brought a claim under section 28-8 of the Illinois Loss Recovery Act (720 ILCS 5/28-8 (West 2012)) seeking, in part, to recover money from FanDuel and from an Illinois resident that a third party allegedly lost to in a daily fantasy sports contest hosted by FanDuel. The court determined that "[t]he relevant question for the purposes of the Loss Recovery Act is not whether FanDuel's activity is illegal; the question is whether FanDuel is 'the winner' with respect to any particular 'loser.'" *Langone*, 2013 WL 5567587, at *7. The court held that because FanDuel does not risk its own money on the contests, it cannot be a winner or a loser under the Loss Recovery Act. Because the court specifically declined to address whether daily fantasy sports contests constitute illegal gambling under Illinois law, the case has no bearing on the instant inquiry.

We are also aware of four lawsuits pending in the Federal courts in Illinois involving DraftKings and/or FanDuel. *Izsak v. DraftKings, Inc.*, No. 14-cv-7952 (N.D. Ill. (2014)) (A class action alleging that DraftKings violated the Federal Telephone Consumer Protection Act (47 U.S.C. §227 *et seq.* (2012)) by sending unsolicited text messages to the cell phones of the plaintiff and the class members.); *Hemrich v. DraftKings, Inc.*, No. 3:15-cv-445 (S.D. Ill. (2015)) (A class action alleging that DraftKings violated the Illinois consumer fraud statute (815 ILCS 505/1 *et seq.* (West 2014)) and Missouri law by misleading consumers into believing that their initial deposit would be doubled through a "100% First-Time Deposit Bonus" and seeking money damages in the amounts of the doubled first-time deposits that the plaintiffs did not receive. The complaint specifically alleges that "DraftKings' business is a legal one under United States law[,]," citing the Unlawful Internet Gambling Enforcement Act of 2006 (31 U.S.C. §5362(1)(E)(ix) (2012). *Hemrich* Complaint at 4, ¶18.); *Guarino v. DraftKings, Inc. and FanDuel, Inc.*, No. 3:15-cv-1123 (S.D. Ill. (2015)) (A class action alleging that DraftKings and FanDuel fraudulently induced plaintiff and the class members into paying money to participate by claiming the games were fair games of skill without the potential for insiders to use non-public information to compete against them when, in fact, the defendants willfully failed to disclose that employees of DraftKings and FanDuel had valuable, non-public data and would use this information to compete against plaintiff and the class members. The complaint seeks a full refund for all of the money paid to the defendants by the class members, damages and restitution, or other equitable relief. As part of the allegations, the complaint states that daily fantasy sports contests are "not gambling because of the skill involved in picking a winning team." *Guarino* Complaint at 6, ¶ 29.); *Stoddart v. DraftKings, Inc.*, No. 3:15-cv-1307 (S.D. Ill. (2015)) (A class action brought on behalf of a plaintiff who participated in DraftKings' contests and lost money and others similarly situated. The complaint alleges that DraftKings' daily fantasy sports contests are illegal gambling under Illinois law and seeks an order requiring DraftKings to disgorge all of the money wagered and lost by the plaintiff and the class members.). Only the *Stoddart* case raises the question of whether daily fantasy sports contests violate Illinois criminal law. The court has not reached that issue, however. The case is currently subject to an Order to Stay proceedings, pending the resolution of a Multidistrict Litigation transfer motion. Order, *Stoddart v. DraftKings, Inc.*, No. 3:15-cv-1307 (S.D. Ill. December 16, 2015).

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(a) A person commits gambling when he or she:

(1) knowingly plays a game of chance or skill for money or other thing of value, unless excepted in subsection (b) of this Section;

* * *

(12) knowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money or other thing of value by means of the Internet or to make a wager upon the result of any game, contest, political nomination, appointment, or election by means of the Internet. This item (12) does not apply to activities referenced in items (6) and (6.1) of subsection (b) of this Section.^[5]

Subsection 28-1(b) of the Criminal Code (720 ILCS 5/28-1(b) (West 2014)) exempts certain activities from the general prohibition on gambling. The Contest Organizers contend that the following exception applies to the daily fantasy sports contests they offer:

(b) Participants in any of the following activities shall not be convicted of gambling:

* * *

(2) Offers of prizes, award or compensation to the actual contestants in any bona fide contest for the determination of skill, speed, strength or endurance or to the owners of animals or vehicles entered in such contest.

⁵Subsections 28-1(b)(6) and 28-1(b)(6.1) of the Criminal Code (720 ILCS 5/28-1(b)(6), (b)(6.1) (West 2014)) respectively exempt from the illegal gambling prohibitions lotteries conducted by the State of Illinois in accordance with the Illinois Lottery Law (20 ILCS 1605/1 *et seq.* (West 2014)) and the online purchase of lottery tickets for a lottery conducted by the State of Illinois under the program established in section 7.12 of the Illinois Lottery Law (20 ILCS 1605/7.12 (West 2014)).

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The offense of gambling is a Class A misdemeanor under Illinois law. A second or subsequent conviction under subsections 28-1(a)(3) through (a)(12) of the Criminal Code is a Class 4 felony. 720 ILCS 5/28-1(c) (West 2014).

The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly. *Illinois Department of Healthcare and Family Services v. Warner*, 227 Ill. 2d 223, 229 (2008). Legislative intent is best evidenced by the language used in the statute, and where statutory language is clear and unambiguous, it must be given effect as written. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). One must view all of the provisions of the statute as a whole. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 422 (2002). Words and phrases should not be construed in isolation, but interpreted in light of other relevant portions of the statute. *Land*, 202 Ill. 2d at 422. Illinois criminal statutes must be narrowly construed in favor of the accused. *People v. Williams*, 239 Ill. 2d 119, 127 (2010); *People v. Christensen*, 102 Ill. 2d 321, 328 (1984).

Subsection 28-1(a)(1) of the Criminal Code provides that a person commits the offense of gambling when he or she "knowingly plays a game of chance or skill for money[.]" unless excepted in subsection 28-1(b). The statutory language is straightforward and unequivocal. It clearly declares that *all* games of chance or skill, when played for money, are illegal gambling in Illinois, unless excepted. While the Contest Organizers assert that daily

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fantasy sports contests are games of skill⁶ rather than games of chance, that argument is immaterial because subsection 28-1(a)(1) expressly encompasses both. Moreover, participants must pay an entry fee or buy-in amount in order to win a prize. Consequently, the act of playing daily fantasy sports contests in Illinois constitutes illegal gambling under subsection 28-1(a)(1) of the Criminal Code, unless otherwise excepted.

Pursuant to subsection 28-1(a)(12) of the Criminal Code, a person also commits gambling when he or she "knowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money or other thing of value by means of the Internet or to make a wager upon the result of any game[.]" The Contest Organizers operate websites that allow individuals to play games of chance or skill for money. Accordingly, entities which operate such contests commit the offense of gambling under Illinois law, unless otherwise excepted. *See Cie v. Comdata Network, Inc.*, 275 Ill. App. 3d 759, 764-65 (1995), *appeal denied*, 165 Ill. 2d 548 (1996) (subsection 28-1(b) exceptions apply to all gambling prohibitions in subsection 28-1(a)).

Subsection 28-1(b) of the Criminal Code sets out the only exceptions to activities that otherwise would constitute gambling under subsection 28-1(a). The Contest Organizers assert that their contests are excepted under subsection 28-1(b)(2). This subsection was included in the original enactment of article 28 of the Criminal Code of 1961 (*see* 1961 Ill. Laws 1983,

⁶*See* FanDuel Website, *available at* <https://fanduel.zendesk.com/hc/en-us/articles/210202858-Is-FanDuel-legal>; DraftKings Website, *available at* <https://www.draftkings.com/help/why-is-it-legal>.

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2033-37; Ill. Rev. Stat. 1961, ch. 38, par. 28-1 *et seq.*) and exempts "[o]ffers of prizes, award or compensation to *the actual contestants* in any bona fide contest for the determination of skill, speed, strength or endurance or to the owners of animals or vehicles entered in such contest."⁷ (Emphasis added.)

Reading the statute as a whole, it is clear that subsection 28-1(b)(2) applies only to the "actual contestants" in the actual sporting event.⁸ In the context of daily fantasy sports, the "actual contestant" upon whose performance success or failure is based is the athlete or athletes whose "skill, speed, strength or endurance" determine the outcome. Thus, subsection 28-1(b)(2) exempts only those who actually engage in a *bona fide* contest for the determination of skill, speed, strength, or endurance, and not a daily fantasy sports contest participant who pays a fee to build a "team" and who may win a prize based on the statistical performance of particular athletes. In this regard, persons whose wagers depend upon how particular, selected athletes perform in actual sporting events stand in no different stead than persons who wager on the outcome of any sporting event in which they are not participants. None of these persons are the

⁷There is only one Illinois case which cites to this exception. In *People v. Mitchell*, 111 Ill. App. 3d 1026, 1028 (1983), the court upheld a jury's conclusion that "Hold 'em" poker was not a "bona fide contest for the determination of skill" under subsection 28-1(b)(2). The court held that the evidence supported the jury's conclusion that "the games, in fact, required a combination of skill and chance, and that they were definitely not the type of 'bona fide contests' excepted from subsection [28-1](a)(1)." (Emphasis in original.) *Mitchell*, 111 Ill. App. 3d at 1028.

⁸The Contest Organizers have not suggested that daily fantasy sports contests involve determining the speed, strength, or endurance of the fantasy sports participants who enter the contests, nor could such a suggestion be made in good faith.

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actual contestants in a *bona fide* contest for the determination of skill, speed, strength, or endurance.

This interpretation is consistent with a 1994 opinion of the Texas Attorney General's Office construing substantially similar statutory language to that found in subsection 28-1(b)(2) of the Criminal Code. Tex. Att'y Gen. Op. No. LO-94-051, issued June 9, 1994. In that opinion, the Texas Attorney General's office addressed whether a contest which requires an entry fee, pays prizes to winners, and is based on forecasting the outcomes of a number of sporting events constitute illegal gambling under Texas law.⁹ The Texas Attorney General's Office concluded that the contest at issue did not fall within the gambling exception and therefore constituted illegal gambling:

We cannot think of any distinction the words "*actual* contestants" could be intended to make other than that between those actually participating in a contest and able by their performance to affect its outcome, and those merely betting on it. Thus, while the subsection (1)(B) exclusion may embrace athletes actually competing in the sporting events you refer to, it does not embrace

⁹See Texas Penal Code §47.01(1)(B) (2015), available at <http://www.statutes.legis.state.tx.us/docs/PE/pdf/PE.47.pdf>, which provides, in pertinent part:

(1) "Bet" means an agreement to win or lose something of value solely or partially by chance. A bet does not include:

* * *

(B) an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest[.]

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those who pay entry fees for a chance to win a prize from forecasting the outcome of the events. (Emphasis in original.)
Tex. Att'y Gen. Op. No. LO94-051 at 2.¹⁰

Although daily fantasy sports contests may involve some degree of skill, such as selecting an athlete for a participant's team based on knowledge of the athlete's historical

¹⁰The New York Supreme Court recently made this same distinction when granting the New York Attorney General's motions to enjoin the Contest Organizers from accepting entry fees from New York State consumers for any daily fantasy sports contests which they operate, pending a final determination. *See* Decision and Order for Injunctive Relief, *People ex rel. Schneiderman v. DraftKings, Inc.*, No. 453054/2015 (N.Y. Sup. Ct., New York County, December 11, 2015); Decision and Order for Injunctive Relief, *People ex rel. Schneiderman v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct., New York County, December 11, 2015) (Decisions and Orders). New York law defines "gambling" as follows:

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. (Emphasis added.) N.Y. Penal Law §225.00(2) (2015), available at <http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO:>.

The New York Attorney General argued that the participants paid entry 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" under New York law. Decisions and Orders, at 5. The New York Attorney General further argued that daily fantasy sports contests are "contests of chance" because the outcome depends substantially on chance and factors not within the participant's control, and that once a team is chosen for a contest, there is no means of altering the outcome. Decisions and Orders, at 6. The court concluded that the language of the statute "is broadly worded and as currently written sufficient for finding that DFS [daily fantasy sports] involves illegal gambling." Decisions and Orders, at 7. The Contest Organizers immediately appealed the court's decision. Notice of Appeal, *People ex rel. Schneiderman v. DraftKings, Inc.*, No. 453054/2015 (N.Y. Sup. Ct., New York County, December 11, 2015); Notice of Appeal, *People ex rel. Schneiderman v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct., New York County, December 11, 2015). The New York Supreme Court, Appellate Division granted an interim stay of the enforcement of the injunction against FanDuel pending a determination by a full panel. Notice of Entry of Appellate Division Interim Stay Order, *People ex rel. Schneiderman v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct., New York County, December 11, 2015).

Additionally, the Kansas Legislature recently amended its gambling statute, which contains a substantially similar exclusion for "offers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill, speed, strength or endurance or to the bona fide owners of animals or vehicles entered in such a contest[.]" to also exclude "a fantasy sports league as defined in this section[.]" Kan. Stat. Ann. §§21-6403(a)(2), (a)(9) (2014), as amended by 2015 Kan. Sess. Laws 835-38, available at http://www.sos.ks.gov/pubs/sessionlaws/2015/2015_Session_Laws_Volume_1.pdf.

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performance, match-up against a particular opponent, performance in a particular venue, and/or performance in particular weather conditions, the phrase "actual contestants" as used in subsection 28-1(b)(2) does not apply to those persons who pay entry fees for a chance to win a prize for forecasting the performance of professional or college athletes over whom they have no control or influence. Accordingly, it is my opinion that subsection 28-1(b)(2) does not exempt daily fantasy sports contests from the Illinois gambling provisions.

CONCLUSION

It is my opinion that the daily fantasy sports contests offered by FanDuel and DraftKings clearly constitute gambling under subsection 28-1(a) of the Criminal Code of 2012 and that the exemption set forth in subsection 28-1(b)(2) of the Criminal Code does not apply.

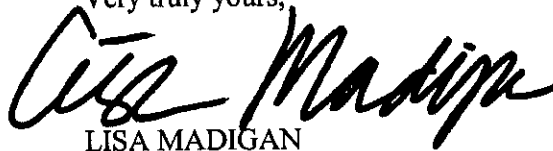
In closing, I note that there is legislation currently pending in each chamber of the Illinois General Assembly which proposes, in part, to create a new Act – the Fantasy Contests Act – and to exempt "fantasy contests as defined under the Fantasy Contests Act" from the general prohibition against gambling. *See* 99th Ill. Gen. Assem., House Bill 4323, Senate Bill 2193, 2015 Sess.¹¹ Thus, it appears that a number of General Assembly members have reached this same conclusion, as they have agreed to sponsor the foregoing legislation. Absent legislation

¹¹House Bill 4323 was referred to the House Rules Committee on November 9, 2015. Senate Bill 2193 was referred to the Senate Assignments Committee on November 3, 2015. Previously-filed legislation proposing to create the Daily Fantasy Sports Regulation Act contained only a short title provision and was referred to the House Rules Committee on April 14, 2015. *See* 99th Ill. Gen. Assem., House Bill 4200, 2015 Sess.

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specifically exempting daily fantasy sports contests from the gambling provisions, it is my
opinion that daily fantasy sports contests constitute illegal gambling under Illinois law.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Madigan". The signature is fluid and cursive, with the first name "Lisa" and last name "Madigan" clearly distinguishable.

LISA MADIGAN
ATTORNEY GENERAL

Exhibit J



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 19, 2016

The Honorable Myra Crownover
Chair, Committee on Public Health
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78711-2910

Opinion No. KP-0057

Re: The legality of fantasy sports leagues
under Texas law (RQ-0071-KP)

Dear Representative Crownover:

You ask for an opinion on two questions involving fantasy sports leagues.¹ Specifically, you ask whether

1. [d]aily fantasy sports leagues such as DraftKings.com and FanDuel.com are permissible under Texas law, and
2. [whether i]t is legal to participate in fantasy sports leagues where the house does not take a "rake" and the participants only wager amongst themselves.

Request Letter at 1.

I. Factual Background

To begin, a brief description of what we understand you to mean by "fantasy sports leagues" is necessary.² Fantasy sports leagues allow individuals to simulate being a sports team owner or manager. Generally, an individual assembles a team, or lineup, often under a salary limit or budget, comprising actual players from the various teams in the particular sports league, i.e., National Football League, National Basketball League, or National Hockey League. Points are

¹See Letter from Honorable Myra Crownover, Chair, House Comm. on Pub. Health, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (received Nov. 12, 2015), <https://www.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> ("Request Letter").

²The forthcoming description of fantasy sports play is compiled generally from the October 16, 2015, Memorandum from the Nevada Attorney General's Office, to which you refer, concerning the legality of daily fantasy sports. See generally Memorandum from J. Brin Gibson, Bureau Chief of Gaming & Gov't Affairs & Ketan D. Bhirud, Head of Complex Litig., Nev. Att'y Gen., to A.G. Burnett, Chairman Nev. Gaming Control Bd. & Nev. Gaming Control Bd. Members Terry Johnson & Shawn Reid (Oct. 16, 2015), <http://gaming.nv.gov/modules/showdocument.aspx?documentid=10487> ("Nev. Att'y Gen. Memo").

garnered for the individual's "team" based on the actual game performance of the selected players, and scoring is based on the selected player's performance in the game where actual performance statistics or measures are converted into fantasy points. Each participant "owner" competes against other owners in the fantasy league. In a traditional fantasy sports league, play takes place over the course of an entire sports season, tracking the performance of selected players for the duration of the season. In contrast, in daily fantasy sports leagues, play tracks players' performances in single games on a weekly basis. With respect to both types of fantasy games, once a participant selects his or her players as the team or "lineup," they have no control over the players' performance in the actual game or the outcome of the actual game. The participant waits for the outcome, and his or her point levels are determined by the performance of the players on game day. Individuals pay a fee to participate in a league, which fees fund the pot of money used to pay out to the participants as their earned points direct. In play on the Internet sites for DraftKings and FanDuel, a portion (ranging from 6% to 14%) of the fees collected are not paid out to the participants but are retained by the gaming site. The "commissioner" running a traditional fantasy sports league may or may not retain a portion of participants' entry fees.

Turning to the law, article III, section 47(a) of the Texas Constitution provides, "[t]he Legislature shall pass laws prohibiting lotteries and gift enterprises in this State," subject to certain exceptions.³ In accordance with article III, section 47(a), the Legislature has prohibited a variety of gambling activities through chapter 47 of the Penal Code.⁴ In Texas, a person commits a criminal offense if the person "makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest."⁵ The answer to your first question turns on whether participants make a bet. Under chapter 47, a "bet" means "an agreement to win or lose something of value solely or partially by chance."⁶ And a bet specifically excludes "an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest[.]"⁷ Lastly, it is a defense to prosecution if, among other things, "no person received any economic benefit other than personal winnings,"⁸ which cannot be true if the house takes a "rake."

³TEX. CONST. art. III, § 47(a); see *City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 701 (Tex. 1936) (articulating as elements necessary to constitute a lottery (1) the offering of a prize, (2) by chance, and (3) the giving of consideration for an opportunity to win the prize).

⁴See TEX. PENAL CODE §§ 47.01–.10; see also *Owens v. State*, 19 S.W.3d 480, 483 (Tex. App.—Amarillo 2000, no pet.) (recognizing the Legislature's adoption of chapter 47 pursuant to article III, section 47).

⁵TEX. PENAL CODE § 47.02(a)(1).

⁶*Id.* § 47.01(1).

⁷*Id.* § 47.01(1)(B).

⁸*Id.* § 47.02(b)(2).

II. Standard of Review

These questions require us to examine competing statutory provisions. The courts have developed time-honored canons for reconciling tension within a statute. According to the United States Supreme Court,

canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.⁹

This cardinal canon is best implemented by examining the plain contextual meaning of a statute—not by improperly removing a snippet from the statutory context.¹⁰ A court “must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous.”¹¹

In the attorney general opinion process, we cannot resolve factual issues.¹² But we can assume facts if requested, as you have here.¹³

III. Analysis

A. Paid Daily Fantasy Sports

Your first question is whether paid daily fantasy sports leagues constitute illegal gambling. Answering your question requires determining whether paid daily fantasy leagues constitute betting on the performance of a participant in a game (thus constituting illegal gambling) or instead are, in and of themselves, bona fide contests for the determination of skill (thus constituting no bet and no illegal gambling). Paid daily fantasy league participants are wagering on “the performance of a participant in a game or contest.”¹⁴ If that act constitutes a bet under the statute, then the

⁹*Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citations omitted).

¹⁰See *Cascos v. Tarrant Cty. Democratic Party*, No. 14-0470, 2015 WL 6558390, at *5 (Tex. Oct. 30, 2015) (reversing a court of appeals when its opinion “improperly takes a snippet of language out of its statutory context”); *In re Mem’l Hermann Hosp. Sys.*, 464 S.W.3d 686, 701 (Tex. 2015) (“Proper construction requires reading the statute as a whole rather than interpreting provisions in isolation.”).

¹¹See *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008).

¹²Tex. Att’y Gen. Op. No. KP-0046 (2015) at 4 (noting that attorney general opinions do not resolve disputed fact questions).

¹³See Request Letter 1 (“Please assume the following facts, as more fully explained in an October 16, 2015 memo from the Nevada attorney general’s office to the Nevada Gaming Control Board.”).

¹⁴TEX. PENAL CODE § 47.02(a)(1).

activity is illegal gambling. Participants in a daily fantasy sports league pay a fee to participate,¹⁵ only a portion of which is included in the pot of funds that are paid out to the winning “owners.” By proffering this fee, players agree to win or lose something of value—a portion of the pot.¹⁶ The dispositive question then is whether the win or loss is determined solely or partially by chance. Proponents of daily fantasy sports games argue that skill is required to predict which players will have the best performance for their position in any particular game.¹⁷ This may well be true. However, Texas law does not require that skill predominate. Instead, chapter 47 requires only a partial chance for there to be a bet.¹⁸ Texas courts have confirmed this plain language in the statute.¹⁹ And this office has previously concluded that “the plain language of section 47.01(1) . . . renders irrelevant the matter of whether poker is predominantly a game of chance or skill. . . . If an element of chance is involved in a particular game, it is embraced within the definition of ‘bet.’”²⁰

It is beyond reasonable dispute that daily fantasy leagues involve an element of chance regarding how a selected player will perform on game day. The participant’s skill in selecting a particular player for his team has no impact on the performance of the player or the outcome of the game. In any given week:

- a selected player may become injured or be ejected and not play in all or a portion of the game—such as an injury to a third-string quarterback causing a team to rotate

¹⁵We understand that some daily fantasy sports contests charge no fee to participate and pay nothing to the winners. Brief from James Ho, Gibson Dunn, to Honorable Ken Paxton at 2, 8, 9 (Dec. 21, 2015) (“GibsonDunn Brief”) (on file with the Op. Comm.). Participation in such contests involves no consideration and no bet, and as a result cannot constitute illegal gambling in Texas. *See City of Wink*, 100 S.W.2d at 701.

¹⁶TEX. PENAL CODE § 47.01(9) (defining a “thing of value” to generally mean “any benefit”).

¹⁷*See* GibsonDunn Brief at 18–25; Brief from Reid Wittliff, ZwillGen, to Honorable Ken Paxton at 6–7 (Dec. 18, 2015) (“ZwillGen Brief”) (on file with the Op. Comm.).

¹⁸*See* TEX. PENAL CODE § 47.01(1) (a “bet” means “an agreement to win or lose something of value solely or partially by chance”).

¹⁹*See Odle v. State*, 139 S.W.2d 595, 597 (Tex. Crim. App. 1940) (“The legal meaning of the term ‘bet’ is the mutual agreement and tender of a gift of something valuable, which is to belong to one of the contending parties, according to the result of the trial of chance or skill, or both combined.” (quoting *Melton v. State*, 124 S.W. 910, 911 (Tex. Crim. App. 1910), *Mayo v. State*, 82 S.W. 515, 516 (Tex. Crim. App. 1904), and *Words and Phrases*, Second Series, Vol. 1, p. 433); *State v. Gambling Device*, 859 S.W.2d 519, 523 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (“[I]t is the incorporation of chance that is the essential element of a gambling device, not the incorporation of a particular proportion of chance and skill.”).

²⁰Tex. Att’y Gen. Op. No. GA-0335 (2005) at 3–4.

three different players at quarterback in one half²¹ or a batter charging the mound after getting hit by a pitch and getting corrected and then ejected;²²

- a selected player may perform well or perform poorly against the opponent that week, perhaps due to weather conditions—such as a defensive tackle diving on a football after a blocked field goal attempt, only to allow the other team to recover the ball and score the game-winning touchdown;²³
- a selected player's performance may be impacted by the state of the game equipment (say, the underinflation of a football or the presence of cork inside a baseball bat)²⁴ or facilities (such as the air conditioning system in a basketball arena failing, causing the star player for a team aptly named "Heat" to suffer temperature induced legs cramps and be carried off the court);²⁵ and
- a selected player's performance may be impacted by a call of refereeing officials—such as a catch that all individuals not wearing stripes believe to constitute a touchdown being ruled an incompletion with instant replay.²⁶

The list goes on. All of these random circumstances, especially if they occur after the participants' selections are locked in, amount to chance and do not involve any skill on the part of the participant. Chance happens, especially on game day. "That's why they play the game."²⁷ Based

²¹John Werner, *Everybody hurts: Another QB injured, Bears stumble in home finale, 23-17*, WACO TRIB., (Dec. 6, 2015), http://www.wacotrib.com/sports/baylor/football/everybody-hurts-another-qb-injured-bears-stumble-in-home-finale/article_4e581922-a55e-5289-a7c7-dfa43ca15a5a.html.

²²See Thomas Neumann, *Nolan Ryan-Robin Ventura fight anniversary—13 things you should know*, ESPN.com, (Aug. 4, 2015), http://espn.go.com/mlb/story/_/id/13375928/nolan-ryan-robin-ventura-fight-anniversary-13-things-know.

²³Daniel Hajek, *Cowboys' Leon Lett On 'One Of The Worst Days Of My NFL Career,'* NAT'L PUB. RADIO, (Nov. 27, 2015), <http://www.npr.org/2015/11/27/457565031/cowboys-leon-lett-on-one-of-the-worst-days-of-my-nfl-career>.

²⁴Ian Rapoport, *More details on the investigation of Patriots' deflated footballs*, NFL.com, (Feb. 1, 2015), <http://www.nfl.com/news/story/0ap3000000466783/article/more-details-on-the-investigation-of-patriots-deflated-football>; Rick Weinberg, *Sammy Sosa gets caught with corked bat*, ESPN.com, (Aug. 4, 2004), <http://www.espn.go.com/espn/espn25/story?page=moments/33>.

²⁵Royce Young, *Spurs: AC back up and running*, ESPN.com, (June 6, 2014), http://www.espn.go.com/nba/playoffs/2014/story/_/id/11042810/san-antonio-spurs-say-air-conditioning-their-arena-repaired.

²⁶Brandon George, *Was it a catch? Controversial Dez Bryant play reversed*, DALLAS MORNING NEWS, (Jan. 11, 2015), <http://www.sportsday.dallasnews.com/dallas-cowboys/cowboysheadlines/2015/01/11/was-it-a-catch-controversial-dez-bryant-play-reversed>.

²⁷Bud Montet, *Random Shots*, MORNING ADVOC., Dec. 30, 1965, at 2C (attributing quote to University of Kentucky basketball coach Adolph Rupp), see THE BIG APPLE, *That's why they play the games* (sports adage), http://www.barrypopik.com/index.php/new_york_city/entry/thats_why_they_play_the_games.

on the facts you ask us to assume, the argument that skill so predominates that chance is minimal is nonetheless an admission that chance is an element and partial chance is involved.²⁸ Accordingly, odds are favorable that a court would conclude that participation in daily fantasy sports leagues is illegal gambling under section 47.02 of the Penal Code.²⁹

Two providers of daily fantasy sports leagues nonetheless contend that participation in such leagues is not gambling because the statutory exception to the definition of “bet” excludes “an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill[.]”³⁰ Specifically, they contend the element of skill so predominates in daily fantasy sports as to render chance immaterial and that the fantasy league participants are the actual contestants. While Texas courts have yet to address the actual-contestant exclusion from the definition of “bet,” this office addressed that matter in 1994. The question presented involved participants paying an entry fee for a chance to win prizes in a contest to forecast the outcome of approximately 150 sporting events, which required “using the skills necessary to analyze relevant data, including, but not limited to, point differentials as published in newspapers of general circulation, weather conditions, injuries or other factors.”³¹ We noted that the Practice Commentary to the statute indicated the actual-contestant exclusion “is intended to exclude only awards and compensation earned by direct participation in the contest—the pole-vaulter’s cup, the pro football player’s salary—not the receipt of a wager made on its outcome.”³² We concluded that, although the “exclusion may embrace athletes actually competing in the sporting events you refer to, it does not embrace those who pay entry fees for a chance to win a prize from forecasting the outcome of the events.”³³ Moreover, the other types of contests in the actual-contestant exclusion (speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or

²⁸The attorneys general in Nevada and New York have reached the conclusion that there is sufficient chance to violate the “material chance” standard in their state laws. See Nev. Att’y Gen. Memo at 9, 15–16; Letter from Kathleen McGee, Chief, New York Attorney General’s Internet Bureau, to Jason Robins, CEO, DraftKings, Inc., (Nov. 10, 2015) at 1, http://ag.ny.gov/pdfs/Final_NYAG_DraftKings_Letter_11_10_2015.pdf (“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.’”). See also *New York v. DraftKings, Inc.*, No. 453054-2015, at 7, 10 (N.Y. Sup. Ct. Dec. 11, 2015), *New York v. FanDuel Inc.*, No. 453056-2015, at 7, 10 (N.Y. Sup. Ct. Dec. 11, 2015) (orders determining that the payment of an entry fee to participate in daily fantasy sports is risking a thing of value and, under New York statutes, constitutes illegal gambling and granting preliminary injunction and temporary restraining order against defendant in each action).

²⁹Likewise, entities that promote daily fantasy sports league gambling could possibly violate section 47.03 of the Penal Code by operating a gambling place or becoming a custodian of a bet. See TEX. PENAL CODE § 47.03(a).

³⁰TEX. PENAL CODE § 47.01(1)(B). See GibsonDunn Brief at 17; ZwillGen Brief at 4.

³¹Tex. Att’y Gen. Op. No. LO-94-051, at 1.

³²*Id.* at 2.

³³*Id.*

aircraft) inform the nature of what the Legislature means with the term “skill.”³⁴ Following this office’s 1994 opinion, the Illinois Attorney General recently concluded that Illinois’s similar statutory actual-contestant exclusion does not apply to participants of daily fantasy sports leagues.³⁵

Subsection 47.01(1)(B), and our interpretation of it, remains unchanged. For example, if a person plays in a golf tournament for an opportunity to win a prize, he or she is within the actual-contestant exclusion to the definition of betting. If instead the person does not play in that tournament but wagers on the performance of an actual contestant, he or she is gambling under Texas law. To read the actual-contestant exception as some suggest would have that exception swallow the rule.³⁶

B. Season-Long Fantasy Sports

The same framework applies to traditional fantasy sports leagues, but the outcome may differ depending on whether the house takes a rake. Payment of a fee to participate in the league constitutes an agreement to win or lose something of value, and the outcome depends at least partially on chance, thus involving a bet. However, traditional fantasy sports leagues often differ from daily fantasy sports leagues in that any participation fee is not retained by the “commissioner” of the traditional fantasy sports league and is instead paid out wholly to the participants. And section 47.02 contains a defense to prosecution when “(1) the actor engaged in gambling in a private place; (2) no person received any economic benefit other than personal winnings; and (3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.”³⁷ Thus, to the extent play in a traditional fantasy sports league satisfies the above three elements, the participants in such league may avail themselves of the defense to prosecution.

³⁴See *Ross v. St. Luke’s Episcopal Hosp.*, 462 S.W.3d 496, 504 (Tex. 2015) (applying doctrine of *ejusdem generis* to hold that the a broad term in a list was constrained by the meaning of the remaining, narrower terms).

³⁵See Ill. Att’y Gen. Op. No. 15-006 (Dec. 23, 2015) at 10–13 (Letter from Honorable Lisa Madigan, Ill. Att’y Gen. to Honorable Elgie R. Sims, Jr. Ill. State Rep., Dist. 34, and Honorable Scott R. Drury, Ill. State Rep., Dist. 58).

³⁶See *Long v. Castle Tex. Prod. Ltd. P’ship*, 426 S.W.3d 73, 81 (Tex. 2014) (“[C]ourts are to avoid interpreting a statute in such a way that renders provisions meaningless.” (quotation marks omitted) (alteration in original)). One paid daily fantasy sports operator also contends that the payment of entry fees to participate in fantasy leagues are not bets. See *ZwillGen* Brief at 4. The New York court rejected this argument, holding that the entry fees were “something of value” under New York law and thus constituted a bet. *New York v. DraftKings, Inc.*, No. 453054-2015, at 7 (N.Y. Sup. Ct. Dec. 11, 2015), *New York v. FanDuel Inc.*, No. 453056-2015, at 7 (N.Y. Sup. Ct. Dec. 11, 2015). We agree with the New York court that the labelling of the consideration as an entry fee does not transform its character as consideration for the opportunity to win a prize.

³⁷TEX. PENAL CODE § 47.02(b); see Tex. Att’y Gen. Op. No. GA-0611 (2008) at 5 (acknowledging that the term “and” is usually used in a conjunctive sense).

In present form, which has remained unchanged for purposes of this analysis since its codification in 1973,³⁸ the Legislature has seen fit to prohibit betting on the performance of individuals in games or contests but to not prohibit actual contestants in contests of skill from receiving compensation or prizes.³⁹ Under this statutory framework, odds are favorable that a court would conclude that participation in paid daily fantasy sports leagues constitutes illegal gambling, but that participation in traditional fantasy sport leagues that occurs in a private place where no person receives any economic benefit other than personal winnings and the risks of winning or losing are the same for all participants does not involve illegal gambling. It is within the province of the Legislature, and not this office or the courts, to weigh the competing policy concerns necessary to alter this framework to legalize paid daily sports fantasy leagues.

³⁸See Act of May 24, 1973, 63d Leg., R.S., ch. 399, Sec. 1, § 47.01-.02, 1973 Tex. Gen. Laws 883, 965-66.

³⁹TEX. PENAL CODE §§ 47.01(1)(B), .02(a)(1).

S U M M A R Y

Under section 47.02 of the Penal Code, a person commits an offense if he or she makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest. Because the outcome of games in daily fantasy sports leagues depends partially on chance, an individual's payment of a fee to participate in such activities is a bet. Accordingly, a court would likely determine that participation in daily fantasy sports leagues is illegal gambling under section 47.02 of the Penal Code.

Though participating in a traditional fantasy sports league is also illegal gambling under section 47.02, participants in such leagues may avail themselves of a statutory defense to prosecution under section 47.02(b) of the Penal Code when play is in a private place, no person receives any economic benefit other than personal winnings, and the risks of winning or losing are the same for all participants.

Very truly yours,

A handwritten signature in black ink, appearing to read "Ken Paxton", with a stylized, flowing script.

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

BRANTLEY STARR
Deputy Attorney General for Legal Counsel

VIRGINIA K. HOELSCHER
Chair, Opinion Committee

CHARLOTTE M. HARPER
Assistant Attorney General, Opinion Committee

Exhibit K

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

January 29, 2016

Allen Godfrey, Executive Director
Mississippi Gaming Commission
Post Office Box 23577
Jackson, Mississippi 39225-3577

Re: Fantasy Sports Wagering in the state of Mississippi

Dear Mr. Godfrey:

Attorney General Jim Hood has received your request for an opinion and has assigned it to me for research and response.

Issues Presented

I write today to request an Opinion of the Mississippi Attorney General with regard to the legality of fantasy sports wagering pursuant to Mississippi state law.

While the play of fantasy sports has an extensive history, it is only with the proliferation of daily fantasy sports wagering that this issue has become of interest to the gaming industry in Mississippi. Fantasy sports (also known less commonly as rotisserie or roto) are games where participants assemble imaginary or virtual teams of real players participating in sporting events. These teams compete based on the statistical performance of those real players in actual games. These games may take place over a variety of different time periods ranging from one day to an entire season.

This agency has received numerous requests for guidance on fantasy sports wagering both from Mississippi licensed gambling establishments and the general public. The Mississippi Gaming Commission is charged with the regulation of licensed gambling and the enforcement of illegal, unlicensed gaming. Currently, daily and season long fantasy sports games are being offered to Mississippians via computers and mobile devices without regulation. Participants may play for free, but the websites offering the games also allow for wagers and the chance to win cash prizes wherein the website takes a percentage of the total prize. This activity has been banned in an increasing number of jurisdictions.

As such, the Commission requests that the Office of the Attorney General address

Allen Godfrey, Executive Director
January 29, 2016
Page 2

whether fantasy sports wagering is legal on a licensed gaming floor and/or outside of licensed gaming floors.

Response

Fantasy sports wagering is illegal in the state of Mississippi under current law both on a licensed gaming floor and outside of a licensed gaming floor. Any change to the law would be a matter within the purview of the Legislature.

Applicable Law and Discussion

I. Is Fantasy Sports Wagering Legal on a Licensed Gaming Floor?

Mississippi Code § 97-33-1 makes gambling illegal in the state of Mississippi, but it does not apply to licensed gaming activities. The Mississippi Gaming Control Act, Miss. Code Sections 75-76-1 et. seq., outline licensed gaming in Mississippi. Miss. Code Section 75-76-33(3)(a) states that:

Notwithstanding any other provision of law, each licensee shall be required to comply with the following regulations:

- (a) No wagering shall be allowed on the outcome of any athletic event, nor on any matter to be determined during an athletic event, nor on the outcome of any event, which does not take place on the premises.

In this instance, a fantasy sports wager is controlled by matters that are determined during an athletic event, and by an event which does not take place on the premises. Specifically, the statistical performance of athletes is determined during an athletic event or events. See *Mississippi Gaming Com'n v. Imperial Palace of Mississippi, Inc.* 751 So.2d 1025 (Miss. 1999) (gambling on a horse race which occurred off premises was illegal).

II. Is Fantasy Sports Wagering Legal off of a Licensed Gaming Floor?

The statute that makes gambling illegal is Miss. Code Section 97-33-1, which states that it is a crime if,

"any person shall encourage, promote or play at any game, play or amusement, other than a fight or fighting match between dogs, for money or other valuable thing, or shall wager or bet, promote or encourage the wagering or betting of any money or other valuable things, upon any game, play, amusement, cockfight, Indian ball play or duel, other than a fight or fighting match between dogs, or upon the result of any election, event or contingency whatever..."

Allen Godfrey, Executive Director
January 29, 2016
Page 3

In *Stubbs v. State*, 40 So. 2d 256, 258 (Miss. 1949), the Court examined this statute¹ and found it is a crime when a person has a wager on his play at any game, play or amusement or when a person has a wager upon any game, play, amusement -- in this case, a dice game. When a player places a wager and picks a lineup for a Daily Fantasy Sports contest, each selection is locked-in once the chosen athletes begins their real world competition. In a Season Long Fantasy game, a participant may make any number of changes over the course of a season. In either case, winners are selected based on the tally of points earned by the athletes. This method of play is similar to betting on a horse race or making a parlay bet (which, though not allowed in Mississippi, is defined by Nevada Gaming Regulations as a "wager on the outcome of a series of 3 or more games, matches or similar sports events or on a series of 3 or more contingencies incident to a particular games, matches or similar sports events." *NV GAM REG 22.090*)². It is different from betting on the outcome of a regular football game only in that the player can choose from any number of hypothetical "teams" which the player can possibly pick or create, rather than being limited to picking from the teams available as they actually exist in the NFL. It is argued that the amount of skill is greater than that needed to pick which real sports team will win a particular game, or to win a game of poker, or to pick the best horse in a race. Assuming that is true, it is irrelevant because, as proscribed by Miss. Code Section 97-33-1, the fantasy sports model involves a wager upon any game, play, amusement ... or upon the result of any ... event or contingency whatever," namely, upon how the selected players perform.

Additionally, as stated in your letter, Daily Fantasy games are currently being offered via computer and/or mobile phone to players in Mississippi. These games require an entry fee and the operator takes a percentage of the total prize. Miss. Code Section 75-76-5(k) defines a gambling game as "any banking or percentage game played with cards, with dice or with any mechanical, electromechanical or electronic device or machine for money, property, checks, credit or any representative of value." Mississippi law doesn't expand upon the definitions of banking or percentage games, but Nevada case law states that "[e]xamples of banking games are craps, roulette and twenty-one, where the casino wagers against the patron. Percentage games are poker, panguingui and similar games where patrons wager against each other and the house takes a percentage of each wager as a "rake-off." *Hughes Properties, Inc. v. State*, 680 P.2d 970, 971 (Nev. 1984). Daily Fantasy games are offered via electronic device, wherein patrons wager against each other and the operator takes a percentage of each wager. Therefore, the game as offered is a gambling game and is illegal pursuant to Miss. Code Section 75-76-55, which prohibits gambling games as defined under Miss. Code Section 75-76-5(k), unless conducted pursuant to a state gaming license.

Pursuant to Section 97-33-29 of the Mississippi Code, "[a]ll laws made or to be made for the suppression of gambling or gaming, are remedial and not penal statutes, and

¹Section 2190 of the Mississippi Code of 1942, the predecessor to 97-33-1.

²Mississippi's Act is modeled closely on Nevada's.

Allen Godfrey, Executive Director
January 29, 2016
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shall be so construed by the courts." As explained by both the Mississippi Supreme Court and the Fifth Circuit Court of Appeals, this provision clarifies that the state criminal statutes prohibiting gambling are to be construed liberally, as an exception to the normal rule of lenity requiring strict construction of criminal statutes in favor of the accused. In particular, Section 97-33-1 is "to be construed liberally — not liberally in favor of the culprit, but for the suppression of vice." *Trainer v. State*, 930 So.2d 373, 380 (Miss. 2006); and *U.S. v. Stewart*, 205 F.3d 840, 843 (5th Cir.2000), citing *Fuller v. State*, 83 Miss. 30, 35 So. 214, 215 (1903).

There is a line of Mississippi cases wherein the court distinguishes between games of skill and games of chance. However, all but one of these cases are applying Section 97-33-7 and its predecessors which forbid the possession of slot machines and other gambling devices, as those are defined by statute. For example, *Mississippi Gaming Commission v. Henson*, 800 So. 2d 110, at 113 (Miss. 2001) applied the latest definition and held:

The Court recognizes that the definition of slot machines provided in Section 76-75-5(ff) of the Gaming Control Act is broader than that applied by this Court in pre-Gaming Control Act cases. In *Rouse v. Sisson*, 190 Miss. 276, 282, 199 So. 777, 778 (1941), for example, in order for a device to be subject to the provisions of [Chapter 353, Laws of 1938, the predecessor to] Section 97-33-7, an uncontrolled and uncontrollable chance must have existed. As a result, those devices in which the outcome was determined solely by skill were not prohibited. Under the Gaming Control Act, however, "whether by reason of the skill of the operator or application of the element of chance, or both," amusement devices satisfying the elements of consideration and payoff are deemed illegal gaming devices and seized accordingly. Miss.Code Ann. § 75-76-5(ff) (2000).

None of this analysis specifically addressed whether activity constitutes illegal gambling under 97-33-1. However, even if the outdated, stricter *Rouse v. Sisson* analysis were applied to 97-33-1, "an uncontrolled and uncontrollable chance" exists in that the outcome, regardless of the skill of the fantasy sport participant, is determined by the play of others, i.e. the actual players of the sport. The outcome of the wager in fantasy sports is not, as was the case of the trivia or "IQ machine" in *Rouse*, "under the absolute control of the player from start to finish." As stated generally by our supreme court in a case involving the statute prohibiting lotteries, "gambling consists of a consideration, an element of chance and a reward." *Knight v. State of Mississippi*, 574 So.2d 662, 669 (1990). It is beyond reasonable dispute that daily fantasy leagues involve an element of chance regarding how a selected player will perform on game day. *Accord* TX AG Op. to Crownover (Jan. 19, 2016).

The only case applying a skill/chance analysis to a question other than whether a device was a gambling device was *Wortham v. State*, 59 Miss. 179 (1881), which also did not involve the predecessor to 97-33-1. The statute in question in *Wortham* was found in

Allen Godfrey, Executive Director
January 29, 2016
Page 5

Chapter 39 of the 1880 Code, which regulated the sale of liquors (Chapter 77 of the 1880 Code established crimes and misdemeanors, including Section 2844, the predecessor to 97-33-1). In particular, Section 1121 of the Code of 1880 stated, "If any person who sells vinous or spiritous liquors shall permit card playing, dice throwing or other game of chance on his premises..." he would be guilty of a misdemeanor. Notably, the statute did not require that any money be wagered on the games to hold the seller of liquors accountable. The *Wortham* court held that playing billiards was not a game of chance under the statute. It did not address whether betting upon such games would constitute a violation of the predecessor to 97-33-1. Again, this case is inapplicable to whether fantasy sports wagering violates Section 97-33-1.

Our opinion to Ringer of August 19, 1991, stated that participating in foosball and pool tournaments for prizes is not prohibited by 97-33-1, but that betting on such games would be. Similarly, in our opinion to the City of Hernando (MS AG Op., Stockton, Sept. 25, 2105), we stated that it was not illegal for teams of citizens to compete for prizes donated by local businesses in a scavenger hunt conducted by the city to create awareness of local businesses and organizations. Betting on the outcome of the scavenger hunt presumably would be, though that question was not asked. In contrast, fantasy sports, although in the form of a tournament or contest amongst players to pick the best teams, also involves a wager upon the performance of others. It is this element together with the nature of the game that brings fantasy sports within the prohibition of the statute³. In our opinion, the possible existence of an element of skill in picking players in a fantasy sports game (or in picking between real teams when wagering on regular NFL games, or in picking horses in a horse race, etc.) is irrelevant to any charge of gambling on Fantasy Sports under Section 97-33-1 of the Mississippi Code.

If our office may be of further assistance, please advise.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:



Michael Lanford
Deputy Attorney General

³Our opinions to Ringer and Stockton are hereby modified to the extent they differ from our opinion herein.

Exhibit L

1990-91 La. Op. Atty. Gen. 65 (La.A.G.), La. Atty. Gen. Op. No. 91-14, 1991 WL 575105

Office of the Attorney General

State of Louisiana
Opinion No. 91-14
April 23, 1991

*1 48 - GAMBLING

LSA-R.S. 14:90

Certain "900" number telephone service constituted gambling under the statute with the assumption that service was conducted as a business.

Colonel Marlin A. Flores
Deputy Secretary
Louisiana State Police
Post Office Box 66614
Baton Rouge, Louisiana 70896

Dear Colonel Flores:

Your opinion request of January 3, 1991 questions the legality of a certain "900" number service, specifically whether the service constitutes a violation of La.R.S. 14:90.

La. R.S. 14:90 provides that;

"Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit."

Under the "Rules and Regulations" of "900 Fantasy Football," participants select a fantasy team with Ciscorp, Inc. through either a 900 number which is represented as costing the caller \$2.00 per minute or an 800 number which would not subject the caller to any cost. It is noted in your opinion request that the 800 number (800-825-4953) contained in the media ad is not operable or "no longer a working number." This fact has been confirmed by this office.

After selecting a team, elements of the team or "players" can be varied by "trades" made only over the 900 number. Based on a point system taking into consideration the performance of each player or unit of the team, cash prizes are awarded to the participant with the highest weekly

point total and a grand prize is awarded at the end of the season.

The "900 Fantasy Football" service conducted by Ciscorp, Inc. meets all elements of the gambling statute, assuming only that the service is conducted as a business, which it appears to be.

Whether an element of skill is involved in selection of the team or individual players is relevant to determination of whether the activity is a lottery, however it is not dispositive of the issue of whether the activity constitutes gambling.

Betting on horse races or football games is not considered as constituting a lottery, see Gandolfo vs. La. State Racing Commission, 78 So.2d. 504, (La. S.Ct.,1954), however the activity still constitutes a game, contest, or contrivance.

In Gandolfo the Supreme Court recognized the legislature's power to statutorily permit regulated horse racing in conjunction with the statutory gambling prohibition, La. R.S. 14:90. No such legislative exception is applicable to "900 Fantasy Football".

Nor does the allegation that some players can select a team without incurring toll charges, which does not appear to be the case, create an exception to La. R.S. 14:90.

The statute is applicable where "a person risks the loss of anything of value in order to realize a profit".

That some person might be able to participate in "900 Fantasy Football" without incurring any costs might remove that particular transaction from the scope of the statute, however with respect to all other persons who have incurred costs in order to participate, the activity constitutes "gambling".

*2 Therefore based on the facts presented and assuming that the activity is conducted as a business it is the opinion of this office that "900 Fantasy Football" constitutes gambling prohibited by La. R.S. 14:90.

Sincerely,

William J. Guste, Jr.

Attorney General

By: Thomas A. Warner, III

Assistant Attorney General

1990-91 La. Op. Atty. Gen. 65 (La.A.G.), La. Atty. Gen. Op. No. 91-14, 1991 WL 575105

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Exhibit M



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

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

ADAM PAUL LAXALT
Attorney General

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

MEMORANDUM

Date: October 16, 2015

To: A.G. Burnett, Chairman, Nevada Gaming Control Board; Terry Johnson, Member, Nevada Gaming Control Board; Shawn Reid, Member, Nevada Gaming Control Board

From: J. Brin Gibson, Bureau Chief of Gaming and Government Affairs
Ketan D. Bhirud, Head of Complex Litigation

Subject: Legality of Daily Fantasy Sports Under Nevada Law

You have requested that our Office research the legality of daily fantasy sports under the Nevada Gaming Control Act and Nevada Gaming Commission Regulations.

Pursuant to NRS 463.0199, the Office of the Nevada Attorney General serves as legal counsel to the Nevada Gaming Control Board and the Nevada Gaming Commission. In particular, the Gaming Division within the Office of the Nevada Attorney General provides legal advice to both regulatory agencies upon request. This memorandum was drafted in response to such a request made by the Nevada Gaming Control Board and is strictly a legal analysis. In developing this analysis, our division has expressly rejected any consideration regarding claims of a double standard for daily fantasy sports as measured against the regulation of traditional sports wagering, the popularity of daily fantasy sports, the general demand for daily fantasy sports products, or the existence or potential for partnerships between daily fantasy sports operators and important industries. Furthermore, while this Office recognizes that there are strong voices on both sides of the policy debate surrounding daily fantasy sports, our goal, above all, is to provide legal advice that shows complete fidelity to the law. We believe this opinion accomplishes that purpose.

QUESTION

Do daily fantasy sports constitute gambling games, sports pools, and/or lotteries under the Nevada Gaming Control Act and Gaming Commission Regulations?

SHORT ANSWER

In short, daily fantasy sports constitute sports pools and gambling games. They may also constitute lotteries, depending on the test applied by the Nevada Supreme Court. As a result, pay-to-play daily fantasy sports cannot be offered in Nevada without licensure.¹

ANALYSIS

I. Background

A. General Description of Fantasy Sports

Fantasy sports are games where the participants, as “owners,” assemble “simulated teams” with rosters and/or lineups of actual players of a professional sport. These games are generally played over the Internet using computer or mobile software applications. Fantasy sports cover a number of actual professional sports leagues, including the NFL, the MLB, the NBA, the NHL, the MLS, NASCAR, as well as college sports such as NCAA football and basketball.

Fantasy sports can be divided into two types: (1) traditional fantasy sports, which track player performance over the majority of a season, and (2) daily fantasy sports, which track player performance over a single game. The owners of these simulated teams compete against one another based on the statistical performance of actual players in actual games. The actual players’ performance in specific sporting events is converted into “fantasy points” such that each actual player is assigned a specific score. An owner will then receive a total score that is determined by compiling the individual scores of each player in the owner’s lineup. Thus, although the owners select lineups, once the lineup has been selected—at least in the context of daily fantasy sports—the owners have basically no ability to control the outcome of the

¹ This conclusion—that daily fantasy sports are gambling—is consistent with how operators of certain daily fantasy sports describe themselves. For example, Jason Robins (the owner, co-founder, and CEO of DraftKings) stated that the concept for DraftKings.com was “almost identical to a casino.” Mr. Robins made these comments on Reddit.com, which is an entertainment, social networking, and news website where registered community members can submit content, such as text posts or direct links, making it essentially an online bulletin board system. The website contains a section titled “/r/IAMa,” which generally translates to “ask me anything.” On the thread that he started, Mr. Robins engages in an online discussion about how he and two friends started DraftKings, Inc. See https://www.reddit.com/r/IAMa/comments/x5zn/we_quit_our_jobs_to_pursue_a_dream_of_starting_a/. Similarly, DraftKings’ has applied for and received licenses to operate in the United Kingdom. <http://www.prnewswire.com/news-releases/draftkings-announces-international-expansion-300129047.html>. Although there is no question that the gambling laws of the United Kingdom and Nevada are fundamentally different, it is still noteworthy that the licenses in question are for “pool betting” and “gambling software,” and that DraftKings does not include either of those terms in its press release. Instead, DraftKings simply states that “the company has been granted a license to operate in the United Kingdom,” without identifying the licenses at issue. It appears that DraftKings recognizes the appearance of inconsistency between its position that it should be unregulated in the United States and its decision to submit to gaming regulation in the United Kingdom.

simulated games.² Specifically, the owners of the simulated teams have no ability to control how many points their simulated teams receive from an actual player's performance. The actual players in the actual games control their own performance. As a result, after an owner places a bet and sets a final lineup, the owner has no ability to influence the outcome of a simulated game. At that point, the owner waits to see what happens based upon the performance of the actual players selected.

B. Player Selection

The three most common methods of player selection in fantasy sports are (1) a snake draft; (2) an auction draft; and (3) a salary-cap draft.³ In a snake draft, owners take turns drafting actual players for their simulated teams. In an auction draft, each owner has a maximum budget to use to bid for players. Competing owners, however, cannot select the same actual players for their simulated teams as other owners. Daily fantasy sports do not generally utilize a snake draft or an auction draft.

In a salary-cap draft, just like in an auction draft, each owner has a maximum budget. Unlike in an auction draft, however, the owners do not bid against each other. Instead, each actual player has a set fantasy salary. Although (with a few exceptions)⁴ the owners can select any actual player for their teams, the owners cannot exceed their maximum budget. In this format, generally speaking, competing owners can select the same actual players for their simulated teams as other owners.

C. Types of Simulated Games

Although there are many different types of simulated games offered across the different daily fantasy websites, the simulated games can generally be divided into (1) head-to-head; and (2) tournaments.

In head-to-head simulated games, one owner competes against another owner. The owner with the highest total score will win the entire payout pool.

Tournaments are simulated games that involve more than two owners. Although there are theoretically many different kinds of tournaments, the most common are (1) 50/50; (2) double-up; (3) triple-up/quadruple-up/quintuple-up/etc.; and (4) top-X.

Although 50/50 and double-up simulated games are very similar (and some sites use the terms interchangeably), they are not necessarily identical. In a traditional 50/50 simulated game, an owner's goal is to end up in the top half of total scores. Owners who finish in the top half will equally split the payout pool. As a result, half the owners will lose their entry fee and half the owners will win. The winning owners, however, will not actually "double" their entry fee because the site operator will take a "rake"⁵ from every owner who participates. For example,

² Given that lineups on some sites do not "lock" until the start of each individual game, the owners have until the tipoff of each individual game to set each particular lineup spot.

³ Because it is not relevant to daily fantasy sports, dynasty and keeper league options are not discussed.

⁴ For example, most sites require owners to select actual players from at least three different actual teams.

⁵ A rake is a fee taken by an operator of a game.

in a 100 person, 50/50 simulated game with a \$10 entry fee, the 50 highest scoring owners would receive \$18, the 50 lowest scoring owners would receive \$0, and the site operator would receive \$100 as a rake. By contrast, in a double-up simulated game, the site operator might allow 110 owners into the simulated game, while only paying the owners with the top 50 scores. In that scenario, an owner finishing in the top 50 scores would receive \$20, an owner finishing in the bottom 60 scores would receive \$0, and the operator would take a \$100 rake.

Triple-up, quadruple-up, and quintuple-up simulated games are similar to double-up simulated games, except that instead of the opportunity to double their money, the owners have the opportunity to triple, quadruple, or quintuple their money. For example, in a triple-up league, the top third splits the payout pool; in a quadruple-up league, the top fourth splits the payout pool; and in a quintuple-up league, the top fifth of the league splits the payout pool. Similar to a double-up simulated game, site operators generally will pay less than one-third, one-fourth, or one-fifth of the total wagers placed, respectively.

In a top-X simulated game, which can consist of up to thousands of owners, the owners finishing with a total score in the top-X (top 1, top 2, top 3, etc.) will split the payout pool (either evenly or with progressively more based on how high they finish). For example, in a 100 person, top 3 simulated game with a \$10 entry fee, the first place finisher might receive \$500, the second place finisher might receive \$300, the third place finisher might receive \$100, and the operator would take a \$100 rake.

D. Guaranteed and Non-Guaranteed Simulated Games

Daily fantasy sports operators often offer both simulated games that are guaranteed and simulated games that are non-guaranteed. If a simulated game is guaranteed, the winners will be paid out regardless of how many owners enter the simulated game. If a simulated game is non-guaranteed, the simulated game will be cancelled unless a certain number of owners participate. If a non-guaranteed simulated game is cancelled, the entry fees will be fully refunded.

II. Preliminary Discussion

A. Determinations of Skill Versus Chance Under Nevada Law

In the context of addressing the legality of fantasy sports, the question of whether skill or chance is involved is often deemed important. However, under Title 41 of the Nevada Revised Statutes, the determination of whether an activity involves skill, chance, or some combination of the two, is relevant only when analyzing lotteries. By contrast, the determination of whether an activity constitutes a gambling game or a sports pool under Nevada law does not require analysis of the level of skill involved. This distinction was made crystal clear by the passage of Senate Bill (SB) 9 during the 2015 Nevada Legislative Session, which distinguishes between games of skill, games of chance, and hybrid games of both skill and chance, while recognizing that all three are gambling games.

1. Lottery

Nevada Revised Statute 462.105(1) defines "lottery" as follows:

1. Except as otherwise provided in subsection 2, "lottery" means any scheme for the disposal or distribution of property, by chance, among persons who have paid or promised to pay any valuable

consideration for the chance of obtaining that property, or a portion of it, or for any share or interest in that property upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle or gift enterprise, or by whatever name it may be known.⁶

Accordingly, there are three essential elements for a lottery: (1) prize; (2) chance; and (3) consideration. If any one of these elements is missing, the activity does not qualify as a lottery.

The case of *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85 (1961) provides some guidance as to when the element of chance would be satisfied. *Gibson* involved an “offer to pay \$5,000 to any person who, having paid 50 cents for the opportunity of attempting to do so, shot a hole in one on its golf course.”⁷ In that case, where the central question was whether the transaction involved gambling, the Nevada Supreme Court concluded—using a definition of “wager” that is different than what is in our statutes today—that a gaming transaction was not present. After doing so, the Court, in *dicta*, provided a test for determining whether a game is one of chance or skill: “The test of the character of a game is not whether it contains an element of chance or an element of skill, but which is the dominating element.”⁸ This test is commonly known as the “dominant factor test.”

Assuming the Nevada Supreme Court were to apply the same test that it outlined in *dicta* in *Gibson*, a game where skill is the dominant factor would not constitute a lottery. That being said, *Gibson* involved a situation where the alleged gamblers *directly controlled* the outcome of the event. They were the participants in the underlying sporting event. By contrast, in daily fantasy sports, the outcome of any simulated game is determined by third parties—the actual players on actual teams and not by the owners, regardless of their skill in choosing lineups and assessing various other factors that may contribute to the outcome of the simulated game. As a result, it is unclear whether a determination of skill versus chance is necessary in determining whether daily fantasy sports are lotteries.

2. Senate Bill 9

Senate Bill 9, which was passed during the 2015 Nevada Legislative Session, explicitly authorizes the Nevada Gaming Commission to adopt regulations, applicable to gaming devices, that “define and differentiate between the requirements for and the outcomes of a game of skill, a game of chance and a hybrid game.” Senate Bill 9 further provides definitions for a “game of skill”⁹ and a “hybrid game.”

Importantly, Senate Bill 9 does not comment on or address whether games of skill fall within the Gaming Control Act. Rather, it starts from the premise that they do. To the extent

⁶ (Emphasis added).

⁷ *Gibson*, 77 Nev. at 27, 359 P.2d at 86.

⁸ *Id.* at 30, 359 P.2d at 87.

⁹ “Game of skill” for the purposes of Senate Bill 9 is defined as “a game in which the skill of the player, rather than chance, is the dominant factor in affecting the outcome of the game as determined over a period of continuous play.” With this definition, the Nevada Legislature has arguably codified the “dominant factor test” as articulated in *Gibson*, although, as noted, such a test will have limited applicability in the context of the Gaming Control Act.

there was any doubt whether Nevada regulators had jurisdiction over gambling games that incorporate skill in determining their outcome, Senate Bill 9 extinguishes that doubt.

3. Gambling Games and Sports Pools

Despite the foregoing, arguments have been made that games of skill, where skill is the dominant factor, are outside of the jurisdiction of the Nevada Gaming Control Board and Commission. These arguments, however, ignore Nevada's statutory requirements.

Nevada Revised Statute 463.160 makes it unlawful for any person to deal, operate, carry on, conduct, maintain or expose for play in Nevada any gambling game without first obtaining a gaming license. "Gambling game" is defined in NRS 463.0152 as:

[A]ny game played with cards, dice, equipment *or any* mechanical, electromechanical or *electronic device* or machine for money, property, checks, credit or any representative of value, including, *without limiting the generality of the foregoing*, faro, monte, roulette, keno, bingo, fan-tan, twenty-one, blackjack, seven-and-a-half, big injun, klondike, craps, poker, chuck-a-luck, Chinese chuck-a-luck (dai shu), wheel of fortune, chemin de fer, baccarat, pai gow, beat the banker, panguingui, slot machine, *any banking or percentage game* or any other game or device approved by the Commission, but does not include games played with cards in private homes or residences in which no person makes money for operating the game, except as a player, or games operated by charitable or educational organizations which are approved by the Board pursuant to the provisions of NRS 463.409.¹⁰

In essence, under NRS 463.160, a gambling game is (1) any game played with cards, dice, equipment or any device or machine for any representative of value;¹¹ (2) any banking game; (3) any percentage game; or (4) any other game or device approved by the Nevada Gaming Commission. This broad definition makes no distinction between games of skill and games of chance. Therefore, while a determination that an activity is a game of skill is relevant to determining whether that activity is a lottery, it is not relevant to determining whether that activity constitutes a gambling game. Similarly, NRS 463.0193, which defines a "sports pool" as "the business of accepting wagers on sporting events or other events by any system or method of wagering," makes no distinction between games of skill and games of chance. Indeed, it has long been noted that there is a strong element of skill involved in sports wagering.

It is important to note that while Nevada gaming regulators clearly have authority to regulate games of skill, the present analysis does not concede the argument that daily fantasy sports are predominately skill-based. As Dr. Timothy Fong, Associate Clinical Professor of Psychiatry and Biobehavioral Sciences at the David Geffen School of Medicine at UCLA and Executive Director of the UCLA Gambling Studies Program, states in regards to fantasy football:

¹⁰ (Emphasis added.)

¹¹ The Gaming Control Act defines a "representative of value" as "any instrumentality used by a patron in a game whether or not the instrumentality may be redeemed for cash." NRS 463.01862.

Very simply, it's gambling, [it's putting] money on an event with a certain outcome in the hopes of winning more money. To call it anything else is really just not accurate. That link hasn't really been made by the players and the public—that what I'm doing is no different than playing blackjack or craps or betting on sports in Vegas casinos.¹²

The debate about whether daily fantasy sports are predominately driven by skill or chance is not settled. Nonetheless, the distinction between skill and chance is of limited significance under Title 41 of the Nevada Gaming Control Act, other than when analyzing lotteries.

B. UIGEA Did Not Legalize Fantasy Sports

As this Memorandum is written solely to analyze daily fantasy sports under Nevada law, it takes no position on the legality of daily fantasy sports under federal laws, such as the Professional and Amateur Sports Protection Act of 1992.¹³ That being said, a point of clarification is in order because there are some operators and commentators who have taken the position that the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”)¹⁴ legalized fantasy sports within the United States. Given the explicit language of UIGEA, that position is simply untenable, and often at odds with what those same operators and commentators have said in the past.

Specifically, in its first section under the subheading “Rule of construction,” UIGEA states: “No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States.”¹⁵ Thus, it is clear that UIGEA neither made legal nor illegal any form of gambling within the United States. UIGEA simply provides “[n]ew mechanisms *for enforcing* gambling laws on the Internet,” which Congress deemed necessary as it believed “traditional law enforcement mechanisms [were] often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.”¹⁶ This conclusion is consistent with those of prominent commentators, including one of the leading attorneys representing daily fantasy sports operators, who stated, “The exemption in UIGEA for fantasy sports does not mean that fantasy sports are lawful, only that fantasy sports are not criminalized under UIGEA.”¹⁷

Former Representative Jim Leach, the congressman who drafted UIGEA, when asked whether the 2006 legislation makes daily fantasy sports operations legal, responded, “[t]he only unique basis provided fantasy sports by UIGEA is its exemption from one law enforcement mechanism where the burden for compliance has been placed on private sector financial

¹² Ramon Ramirez, *The Dark Secret About Fantasy Football No One Is Talking About*, THE KERNAL (August 30, 2015), at <http://kernelmag.dailydot.com/issue-sections/features-issue-sections/14172/is-fantasy-football-addictive/> (internal commentary omitted).

¹³ PL 102-559, October 28, 1992, 106 Stat 4227.

¹⁴ 31 U.S.C.A. §§ 5361-5367.

¹⁵ 31 U.S.C.A. § 5361(b).

¹⁶ 31 U.S.C.A. § 5361 (a)(4) (emphasis added).

¹⁷ Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. Marshall L. Rev. 1195, 1201 (2007).

firms.”¹⁸ He continued, “[b]ut it is sheer chutzpah for a fantasy sports company to cite the law as a legal basis for existing. Quite precisely, UIGEA does not exempt fantasy sports companies from any other obligation to any other law.” He concluded, “There is no credible way fantasy sports betting can be described as not gambling . . . [o]nly a sophist can make such a claim.”¹⁹

In short, UIGEA is irrelevant to determining the legality of daily fantasy sports under Nevada law.

III. Analysis of the Legality of Daily Fantasy Sports Under Nevada Law

A. Daily Fantasy Sports Are “Sports Pools” Under NRS 463.0193

Nevada Revised Statute 463.0193 defines a “sports pool” as “the business of accepting wagers on sporting events or other events by any system or method of wagering.” In order to determine if daily fantasy sports operators are operating a sports pool, one must determine (1) whether a wager is present; (2) whether the wagering is done on sporting events or other events by any system or method of wagering; and (3) whether daily fantasy sports operators are in “the business” of accepting wagers.

Daily fantasy sports meet all of these requirements and, thus, constitute “sports pools” under Nevada law. This conclusion is consistent with the views of one of the leading attorneys representing daily fantasy sports operators, who stated that “fantasy sports” was “a significant evolution in the realm of sports betting.”²⁰

1. Wagers on Sporting Events or Other Events by Any System or Method of Wagering

a. Wagers

i. Wagers Are Present in Daily Fantasy Sports

Nevada Revised Statute 463.01962 defines a “wager” as “a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain.”²¹

¹⁸ Tim Dahlberg, “Former congressman says DFS is ‘cauldron of daily betting,’ at <http://cdcgamingreports.com/former-congressman-says-dfs-is-cauldron-of-daily-betting/>.

¹⁹ *Id.*

²⁰ Anthony N. Cabot & Louis V. Csoka, The Games People Play: Is It Time for A New Legal Approach to Prize Games?, 4 Nev. L.J. 197, 215 (2004).

²¹ See Bo J. Bernhard & Vincent H. Eade, *Gambling in a Fantasy World: An Exploratory Study of Rotisserie Baseball Games*, 9 UNLV GAMING RESEARCH & REVIEW JOURNAL 29 (2004) (In his exploratory review of fantasy baseball, Dr. Bo Bernhard, Executive Director of the International Gaming Institute and Professor at the William F. Harrah College of Hotel Administration, concluded that, “[i]f we broadly define gambling as an activity that risks something of value . . . on an event whose outcome is uncertain [essentially Nevada’s definition of “wager”] (such as the whims of a professional baseball season), fantasy baseball clearly qualifies.”).

Although its holding came prior to the enactment of NRS 463.10962—and, thus, may no longer be applicable—the Nevada Supreme Court stated in *State v. GNLV Corporation*,²² that:

a “wager” exists when two or more contracting parties have mutual rights in respect to the money wagered and each of the parties necessarily risks something, and has a chance to make something upon the happening or not happening of an uncertain event. A prize differs from a wager in that the person offering the prize must permanently relinquish the prize upon performance of a specified act. In a wager, each party has a chance of gain and takes a risk of loss.²³

With some exceptions, the daily fantasy sports owners pay money to play the simulated games and compete with each other based on their total scores.²⁴ If an owner wins, the owner gets money back. If an owner loses, the owner loses the bet made. When owners play against each other, some will win and some will lose. Thus, because owners risk money on an occurrence for which the outcome is uncertain, wagers are present.²⁵

This determination is consistent with how certain daily fantasy sports operators describe themselves. For example, in the online discussion described above, the DraftKings CEO states “You are *playing against other players*, we simply act as the ‘points tally’ and ‘money distributor.’”²⁶ The DraftKings CEO also states that DraftKings’ “concept is a mashup between poker and fantasy sports. Basically, you pick a team, *deposit your wager*, and if your team wins,

²² *State v. GNLV Corp.*, 108 Nev. 456, 834 P.2d 411 (1992). *GNLV* was a case where GNLV Corp. dba The Golden Nugget Hotel and Casino (the “Golden Nugget”) ran a program known as the “24 Karat Club.” The “24 Karat Club” was a program in which enrolled patrons automatically received a fifty-cent ticket each time the last dollar of a total of \$75.00 was placed in certain designated slot machines. After the patron wagered the 75th dollar, the slot machine dispensed a ticket worth fifty cents toward the purchase of a “gold certificate. Gold certificates could be redeemed for gaming tokens, cash, room rental, food, beverages or merchandise. The slot machines dispensed the fifty-cent tickets *irrespective of gains or losses resulting from the play involved* in each \$75.00 increment. On that record, the Nevada Supreme Court held that because the Golden Nugget’s distribution of the tickets was required by the contract between the Golden Nugget and its “24 Karat Club” members, it was not dependent upon the result of a legitimate wager. As a preliminary matter, *GNLV* was decided before the enactment of NRS 463.01962 (the statute defining the term “wager”). More importantly, in *GNLV*, the patrons were neither competing against one another for the tickets nor receiving tickets based upon the outcome of an uncertain event. By contrast, in daily fantasy sports, the owners are competing against one another. As a result, each owner has a risk of loss depending on the outcome of their simulated team’s performance. Thus, although the Nevada Supreme Court found that wagers were not present in *GNLV*, wagers are present in daily fantasy sports regardless of whether one uses the new statutory definition of wager or applies the holding in *GNLV*.

²³ *Id.* at 458, 834 P.2d at 413 (1992) (internal citations omitted).

²⁴ Generally speaking, daily fantasy sports operators all offer pay-to-play games. Some, however, also offer free-to-play games.

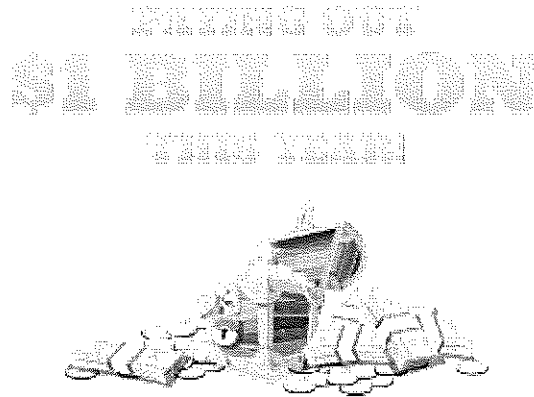
²⁵ 463.0152.

²⁶ *See*

https://www.reddit.com/r/IAmA/comments/x5zn/we_quit_our_jobs_to_pursue_a_dream_of_starting_a/ (emphasis added).

you get the pot.”²⁷ Additionally, the DraftKings CEO repeatedly refers to the payments on his sites as “wagers” and “bets,” and the activity as “betting.”²⁸

Similarly, the DraftKings website uses the following image on its website for its pages for fantasy football, weekly fantasy football, fantasy college football, weekly fantasy college football, weekly fantasy golf, daily fantasy basketball, fantasy college basketball, weekly fantasy basketball, weekly fantasy college basketball, and weekly fantasy hockey:²⁹



That image is identified on each of those webpages, through alternative text (“alt text”)³⁰ with a phrase that includes the word “betting” (i.e., “fantasy golf betting,” “weekly fantasy basketball betting,” “weekly fantasy hockey betting,” “weekly fantasy football betting,” “weekly fantasy college football betting,” “weekly fantasy college basketball betting,” “Fantasy College Football Betting,” “daily fantasy basketball betting,” and “Fantasy College Basketball Betting”). Although it is unclear why this image is identified using the alt text “betting,”—whether it is because these sites are trying to draw Internet search traffic from gamblers, because “betting” is how the sites internally discuss their product, or for some other reason—it appears that although the sites’ representatives publicly state that they do not believe daily fantasy sports involve “wagers” or “bets,” they do use the terms “betting” and “wagering” when they are not dealing with law enforcement agencies.

ii. *Las Vegas Hacienda, Inc. v. Gibson Is Inapposite*

There have been some who suggest that wagers are not present in daily fantasy sports because of the Nevada Supreme Court’s 1961 decision in *Las Vegas Hacienda, Inc. v. Gibson*.³¹ Those people are mistaken. To begin with, *Gibson* was decided several years before the gaming statutes at issue in this Memorandum were enacted. Because of that, the Court did not have the

²⁷ *Id.* (emphasis added).

²⁸ *Id.*

²⁹ See e.g., <https://www.draftkings.com/fantasy-football>, <https://www.draftkings.com/weekly-fantasy-golf>, and <https://www.draftkings.com/daily-fantasy-basketball>.

³⁰ Alt text (alternative text) is a word or phrase that can be inserted as an attribute in an HTML (Hypertext Markup Language) document to tell website viewers the nature or contents of an image. The alt text appears in a blank box that would normally contain the image.

³¹ 77 Nev. 25, 26, 359 P.2d 85, 86 (1961).

benefit of those statutes in making its determination. As a result, *Gibson* applies a common law understanding of “wager” and “gambling” that differs from our current statutory framework.

Gibson involved a golf course that offered to pay \$5,000 to any person who shot a hole-in-one after paying 50 cents for the opportunity to attempt to do so. From the record, it is unclear whether (1) the patron paid 50 cents for the opportunity to play a round of golf and, incidentally, would be awarded a prize if he or she sank a hole-in-one; or (2) the patron paid the 50 cents solely for the opportunity to try and shoot a hole-in-one. Regardless, a patron eventually shot a hole-in-one and the golf course refused to pay, arguing that a person cannot sue for recovery of money won in gambling. The Court held for the patron by determining the debt was a contractual debt rather than a gambling debt. As part of its analysis, the Court distinguished between “prizes” and “wagers.” In doing so, the Court stated:

A prize or premium differs from a wager in that in the former, the person offering the same has no chance of gaining back the thing offered, but, if he abides by his offer, he must lose; whereas in the latter, each party interested therein has a chance of gain and takes a risk of loss. . . . In a wager or a bet, there must be two parties, and it is known, before the chance or uncertain event upon which it is laid or accomplished, who are the parties who must either lose or win. In a premium or reward there is but one party until the act or thing or purpose for which it is offered has been accomplished. A premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event. In a premium it is known who is to give before the event; in a wager it is not known until after the event. The two need not be confounded.³²

Even applying these outdated elements from *Gibson*, wagers are present in daily fantasy sports. Assuming that in a wager, “each party interested therein has a chance of gain and takes a risk of loss” and “there must be [at least] two parties . . . who must either lose or win,” daily fantasy sports involve wagers because owners in daily fantasy sports all have a chance of gain and take a risk of loss based upon who wins and who loses. Additionally, even accepting that a prize “is a reward or recompense for some act done” and a wager “is a stake upon an uncertain event,” does not change the conclusion. In the case of daily fantasy sports, the primary “act” at issue is that of choosing a lineup. The completion of this “act” will not, in itself, result in any prize. The payouts in daily fantasy sports are not awarded to owners who simply set a lineup, they are awarded to the owners whose lineups receive the highest total score (which is dependent upon the *uncertain* outcomes associated with sporting events). Accordingly, even applying *Gibson*, wagers are present in daily fantasy sports.

Moreover, the Court stated that its holding was based upon the absence of a statute providing otherwise.³³ Every statute addressed in this Memorandum was enacted after *Gibson* was decided. That distinction is important to remember, because a strict application of *Gibson* in the modern day could lead to the absurd result of removing large categories of gambling from the

³² *Id.* at 28-29, 359 P.2d at 86-87.

³³ *Id.* at 27, 359 P.2d at 86 (“It is generally held, in the absence of a prohibitory statute, that the offer of a prize to a contestant therefor who performs a specified act is not invalid as being a gambling transaction.”). Additionally, NRS 463.01962, which defines a “wager” was added to the Nevada Revised Statutes in 1997. As a result, any cases, including *Gibson*, that defined the term “wager” prior to 1997 are no longer mandatory or persuasive.

control of the Nevada Gaming Control Board and Commission and, moreover, could render null a number of Nevada gaming statutes and regulations that take precedence over common law.

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

Although it seems obvious that the wagers in question are being placed on sporting events, some discussion of this element is necessary as certain commentators have suggested that because the wagers at issue are not being placed upon the *outcome* of a particular sporting event, the wagers do not fall within the requirement that they be placed on sporting events or other events. That interpretation not only belies common sense, but is also contradicted by an analysis of the Gaming Control Act and Regulations.

To begin with, that interpretation is inconsistent with Nevada's historic understanding of sports pools. For example, Nevada has been regulating "proposition bets" or "prop bets" for decades.³⁴ A prop bet is a wager on the occurrence or non-occurrence of some event during the course of a sporting event. Examples of prop bets include whether a particular quarterback will pass for more or less than 300 yards, whether a particular basketball player will score more or less than 25 points, and whether a particular pitcher will pitch more or less than 10 strikeouts. Through the use of "parlay cards," the State has also regulated combinations of prop bets. Specifically, Regulation 22.090(1) states: "As used in this section, 'parlay card wager' means a wager on *the outcome of a series of 3 or more games, matches, or similar sports events or on a series of 3 or more contingencies incident* to particular games, matches or similar sports events."³⁵ As a result, it is clear that Nevada intended to regulate wagers on both (1) the outcomes of particular sporting events; and (2) contingencies incident to particular sporting events.

Notably, NRS 463.0193, which defines "sports pool," not only fails to use the word "outcome," but instead specifically broadens its definition by adding the words "by any system or method of wagering." This is in contrast to the definition of "pari-mutuel system of wagering," which only includes wagers on "the *outcome* of a race or sporting event."³⁶ As a result, the Nevada Legislature has, in some places, distinguished between betting on the outcome of particular sporting event and simply betting generally on the sporting event "by any system of method of wagering."³⁷ The logical, and likely only, conclusion is that Nevada's regulation of sports pools includes (1) wagering on the outcome of particular sporting events; (2) wagering on any activity that takes place during particular sporting events; and (3) wagering on combinations of the outcomes of and/or activities that take place during particular sporting events.

³⁴ See, e.g., Nev. Gaming Comm'n Reg. 22.060(4).

³⁵ Nev. Gaming Comm'n Reg. 22.090(1) (emphasis added).

³⁶ NRS 464.005(5) (emphasis added).

³⁷ It should be noted, however, that although the absence of the term "outcome" within the definition of "sports pool" precludes a conclusion that the definition only prohibits wagering on the final score of sporting events, the inverse is not necessarily true. Even if the definition of "sports pool" had included the word outcome, one could find that "outcome" includes contingencies incident to particular sporting events.

2. Business of Accepting Wagers

If it is accepted that the daily fantasy sports operators are “accepting wagers on sporting events or other events by any system or method of wagering,” there seems to be no dispute that they are in the business of doing so.³⁸ With perhaps some limited exceptions, the daily fantasy sports operators are not operating their sites solely for recreation or amusement; they are operating the sites as businesses to make money.

B. Daily Fantasy Sports Are “Gambling Games”

There are, generally speaking, four types of gambling games outlined in NRS 463.0152: (1) games played with cards, dice, equipment or any device or machine for any representative of value; (2) banking games; (3) percentage games; and (4) other games or devices approved by the Nevada Gaming Commission.³⁹ These four categories are not necessarily mutually exclusive.

1. Daily Fantasy Sports Are Games Played with Cards, Dice, Equipment, Devices or Machines for Any Representative of Value

The first type of gambling game included in NRS 463.0152’s definition has two elements. First, it must be a “game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine.” Second it must be played “for money, property, checks, credit or any representative of value.” Daily fantasy sports meet both these elements and, as a result, constitute gambling games.

a. Game Played with Cards, Dice, Equipment, Device, or Machine

Although the term “electronic device” is not defined by the Gaming Control Act, other Nevada statutes have defined a computer to be an electronic device.⁴⁰ That definition is consistent with the general understanding of what an electronic device is. As a result, daily fantasy sports, which cannot possibly be played except online using computers and/or mobile phones, meet the first element requiring that the activity be a “game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine.”

b. Played for Money or Any Representative of Value

The Gaming Control Act defines a “representative of value” as “any instrumentality used by a patron in a game whether or not the instrumentality may be redeemed for cash.”⁴¹ With some exceptions, the daily fantasy sports owners pay money to play the simulated games and compete with each other based on their total scores.⁴² If an owner wins, the owner gets money back. Thus, daily fantasy sports meet the second requirement that the activity in question must be played “for money, property, checks, credit or any representative of value.”

³⁸ NRS 463.0193.

³⁹ NRS 463.0152.

⁴⁰ See NRS 205.4735 and 360B.410.

⁴¹ NRS 463.01862.

⁴² Generally speaking, daily fantasy sports operators all offer pay-to-play games. Some, however, also offer free-to-play games.

2. Daily Fantasy Sports Are Probably Not Banking Games

Nevada Revised Statute 463.01365 defines a “banking game” as “any *gambling game* in which players compete against the licensed gaming establishment,”⁴³ rather than against one another.”⁴⁴ Nevada Revised Statute 463.0152 defines a “gambling game” to include “any *banking game*.”⁴⁵ As a result, these definitions are circular and there is ambiguity as to what the statutes mean. It is worth noting that Black’s Law Dictionary defines a “banking game” as a “gambling arrangement in which the house (i.e., the bank) accepts bets from all players and then pays out winning bets and takes other bettors’ losses.”⁴⁶

A logical reconciliation of these statutes (and the traditional definition of “banking game”) is to define a banking game as a game in which (1) participants compete against the operator of the game (rather than the other participants) using representatives of value; and (2) calculation of the payout to any given participant is, generally speaking, not based upon the representatives of value used by any other participants.⁴⁷ That interpretation is consistent with the Nevada Supreme Court’s statement that craps, roulette, and black jack are examples of banking games.⁴⁸

Generally speaking, daily fantasy sports operators do not directly wager against the owners. Instead, the owners wager against each other by placing a bet and competing for the highest scores, with the operator paying out to the highest scorers. If that is true, in those circumstances, daily fantasy sports do not constitute banking games as the payouts to each owner are directly related to the payouts to other owners based upon other owners’ simulated teams’ performances. That being said, if a particular operator were to allow owners to wager directly against the operator, then that particular simulated game would be a banking game.

3. Daily Fantasy Sports Are Percentage Games

The third type of gambling game included in NRS 463.0152’s definition is a percentage game, which has two elements. First, it must be a game “where patrons wager against each

⁴³ Although this statute could arguably be read to exclude from its definition any games offered by a non-licensee, that interpretation would lead to an absurd result. The Nevada Legislature could not possibly have intended to only restrict the type of games offered by licensees, leaving the rest of the public free to offer banking games. Additionally, given that the term “banking game” appears twice in the definitions of NRS 463, and only once has this limiting language, there is additional reason to reject that interpretation.

⁴⁴ (Emphasis added.)

⁴⁵ (Emphasis added.)

⁴⁶ BANKING GAME, Black’s Law Dictionary (10th ed. 2014).

⁴⁷ We can imagine situations in which various banking games might have some sort of cumulative payout. For example, an establishment might offer blackjack but (directly or indirectly) take some percentage of each hand played and place it into a cumulative payout pool that is awarded to one or more participants based upon the occurrence of some event. That tying of some wagers with the operator to wagers with other players would not remove the game from what is contemplated by the definition of “banking game.”

⁴⁸ *Hughes Props., Inc. v. State*, 100 Nev. 295, 297, 680 P.2d 970, 971 (1984).

other.”⁴⁹ Second, “the house takes a percentage of each wager as a ‘rake-off.’”⁵⁰ Daily fantasy sports meet both these elements and, as a result, constitute gambling games.

a. Patrons Wager Against Each Other

The Gaming Control Act defines a “wager” as “a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain.”⁵¹ As was explained in Section III.A.1.a above, because the daily fantasy sports owners pay money to play the simulated games and receive money based upon which of them has the highest total scores, the owners risk money on an occurrence for which the outcome is uncertain. As a result, wagers are present and daily fantasy sports meet the requirement that “wagers” be present.

b. The House Takes a Percentage of Each Wager as a “Rake-off”

Although the specifics of how each rake is calculated differs and the rake may be a flat fee (and, as a result, the actual percentage taken in any given simulated game would vary depending upon the number of owners) the daily fantasy sports operators all make their profit by directly or indirectly taking some percentage of the wagers in each simulated game.

This conclusion is also consistent with how certain daily fantasy sports operators describe themselves. For example, in the online discussion described above, the DraftKings CEO explains that “In our case, you win the total wager amount of all the people who had teams in that contest. If there were 10 people and each put in \$10 dollars, you'd win \$100 (*minus 10% which goes to us*).”⁵²

4. Daily Fantasy Sports Have Not Been Approved by the Commission

As the Nevada Gaming Commission has not approved daily fantasy sports, analysis of these types of gambling games is unnecessary. Daily fantasy sports are not games or devices approved by the Nevada Gaming Commission.

C. Some Daily Fantasy Sports Could Be Considered Lotteries Depending on How a Court Resolves the Question of Whose Skill Is at Issue and the Amount of Skill Involved in the Particular Simulated Game at Issue

If, for some reason, daily fantasy sports are not otherwise determined to be gambling games or sports pools, they could constitute lotteries, which—with limited charitable exceptions—are prohibited by Article IV, Section 24 of the Nevada Constitution. A lottery is a scheme for the disposal of property *by chance*, among persons who have paid consideration, for the chance of obtaining all or a portion of said property.⁵³ Essentially, a lottery involves the common law elements of gambling: (1) prize; (2) chance; and (3) consideration. Because all of

⁴⁹ *Id.* (“Percentage games are poker, panguingui and similar games where patrons wager against each other and the house takes a percentage of each wager as a ‘rake-off.’”).

⁵⁰ *Id.*

⁵¹ NRS 463.01962.

⁵² *See*

https://www.reddit.com/r/IAMa/comments/x5zn/we_quit_our_jobs_to_pursue_a_dream_of_starting_a/ (emphasis added).

⁵³ NRS 462.105.

the daily fantasy sports at issue involve consideration to play and a prize, the sole issue is whether a particular simulated game is determined predominantly by skill or by chance.⁵⁴

As a preliminary matter, there may not need to be a determination of skill. As skill is generally understood when analyzing a lottery, the skill at issue is the skill of the individuals determining the actual outcome of the event. With daily fantasy sports, although the owners select a lineup for their simulated team, the owners have no ability to control how many points their simulated teams receive from an actual player's performance. The actual players in the actual games control their own performance. As a result, after an owner places a bet and sets a final lineup, the owner simply waits to see what happens based upon the performance of the actual players involved. Given that the owners' skills do not determine the outcome of the simulated games, there may be no skill involved as that term is traditionally understood in the context of lotteries. If that is the case, then daily fantasy sports constitute lotteries and are prohibited in Nevada.

If a court rejects that interpretation and decides to analyze the skill of the owners in picking their lineups, then an analysis of whether a particular simulated game is determined predominantly by skill or chance is required. There are some daily fantasy sports in which the element of chance clearly predominates. These include simulated games in which the owners are assigned a random slate of players for their virtual teams. As there is no skill involved in these games, they would be considered unlawful lotteries. By contrast, the vast majority of daily fantasy sports require some level of skill on the part of the owners. Because the level of skill involved is a question of fact, each individual simulated game must be examined by a finder of fact, who will determine this issue on a case-by-case basis.

CONCLUSION

Upon extensive review of pay-to-play daily fantasy sports, we conclude that they constitute sports pools under NRS 463.0193 and gambling games under NRS 463.0152. Daily fantasy sports may also constitute illegal lotteries under NRS 462.105(1) depending on the legal question of whose skill is being assessed and the factual question of whether skill or chance is dominant. If the skill being assessed is that of the actual players rather than that of the fantasy sports team owners, then daily fantasy sports constitute illegal lotteries. If the skill being assessed is that of the owners, then there is a factual question as to whether the skill in selecting lineups predominates over chance.

Throughout the foregoing analysis, the holdings and dicta of the *Gibson* and *GNLV* cases are distinguished from the facts, law, and context of the current matter. It is particularly noteworthy that both of these gaming cases were decided before the definition of "wager" was codified in NRS 463.01962. *Gibson*, in particular, was decided in 1961, at the most nascent stage of the Nevada Gaming Control Act and before the passage of the statutes at issue. As a result, the *Gibson* court had to rely upon traditional common law principles of gambling rather than our current statutory and regulatory framework. Consequently, the *Gibson* decision must be considered not against the backdrop of 2015, but within the historical milieu of 1961.

In summary, pay-to-play daily fantasy sports constitute sports pools and gambling games under Nevada law. They may also constitute lotteries, depending on the test applied by the

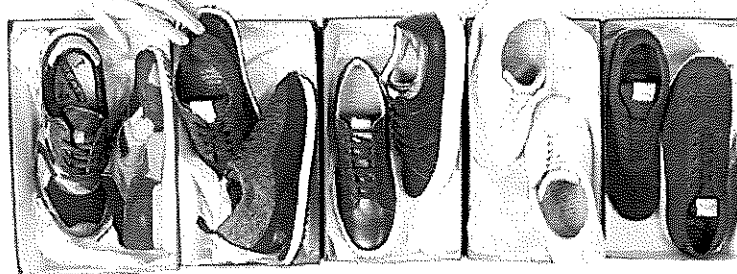
⁵⁴ *Gibson*, 77 Nev. at 30, 359 P.2d at 87.

October 16, 2015

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

Exhibit N



GREATS

Former congressman says DFS is "cauldron of daily betting"

By TIM DAHLBERG (/content/tim-dahlberg) Oct. 12, 2015 6:23 PM EDT

(MAILTO:?SUBJECT=AP BIG STORY: FORMER CONGRESSMAN SAYS DFS IS "CAULDRON OF DAILY BETTING"&BODY=FROM AP, %0D%0A

%0D%0A FORMER CONGRESSMAN SAYS DFS IS "CAULDRON OF DAILY BETTING".
%0D%0A %0D%0A LAS VEGAS (AP) — THE U.S. CONGRESSMAN WHO DRAFTED
THE 2006 LEGISLATION USED BY DRAFTKINGS AND FANDUEL AS PROOF OF
THEIR LEGITIMACY SAYS IS IT SHEER CHUTZPAH FOR THE DAILY FANTASY SITES
TO PRETEND THE LAW MAKES THEM LEGAL. %0D%0A
%0D%0A [HTTP://BIGSTORY.AP.ORG/ARTICLE
/7B3AF0D8B0C04F059E8B301ADF8B1784/FORMER-CONGRESSMAN-SAYS-DFS-
CAULDRON-DAILY-BETTING](http://bigstory.ap.org/article/7b3af0d8b0c04f059e8b301adf8b1784/former-congressman-says-dfs-cauldron-daily-betting))

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LAS VEGAS (AP) — The U.S. congressman who drafted the 2006 legislation used by DraftKings and FanDuel as proof of their legitimacy says is it "sheer chutzpah" for the daily fantasy sites to pretend the law makes them legal.

Former Rep. Jim Leach said lawmakers had no idea daily fantasy sports would "morph into today's cauldron of daily betting." He said his anti-gambling act was supposed to stop gambling on the Internet, not promote it.

In an email exchange with The Associated Press, Leach said the carve out for fantasy sports in the Unlawful Internet Gambling Enforcement Act (UIGEA) does not provide them with immunity against other federal and state laws that could limit their activities.

"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."

Daily fantasy sites have long claimed that the fantasy sports provision in the 2006 anti-gambling law allows them to operate freely in the 45 states that don't have specific prohibitions on the contests. Sports betting and other types of gambling on

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16-year-old charged as adult in California officer's killing

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(<http://bigstory.ap.org/article/41e0d974ce8441f89e6ed6a11ef2b372/scenes-horror-paris-night-becomes-bloodbath>)

Scenes of horror as a Paris night becomes a bloodbath

(<http://bigstory.ap.org/article/41e0d974ce8441f89e6ed6a11ef2b372/scenes-horror-paris-night-becomes-bloodbath>)
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the Internet are mostly illegal in the United States, though horse racing was also given an exception in the 2006 law.

FanDuel and DraftKings both promote themselves as offering games of skill, shying away from the label of gambling.

"The legality of daily fantasy sports is the same as that of season long fantasy sports," DraftKings says on its website.

But with millions of dollars at stake daily in contests that are centered on sporting events, Leach said there is no validity to the industry argument that the contests are a game of skill, not betting.

"There is no credible way fantasy sports betting can be described as not gambling," said Leach, an Iowa Republican who sponsored the legislation. "Only a sophist can make such a claim."

A scandal that erupted last week over a \$350,000 win by a DraftKings employee on FanDuel and the ubiquitous commercials promising to make millionaires out of casual fantasy players have put a spotlight on an industry that seemingly sprouted out of nowhere to become a powerhouse in the sports community. Major League Baseball has an interest in DraftKings, and NFL teams and other leagues all have relationships with the two industry leaders.

Leach said he pushed the 2006 act, which led to the eventual shut down of online poker and other gambling sites, with the intention of stopping online betting. But the law doesn't offer a clear definition of Internet gambling, referring instead to existing federal and state laws with differing interpretations.

The law, which has been used to halt online poker, specifically prevents banks and other financial institutions from processing funds relating to illegal gambling.

Leach, who lost a re-election bid in 2006 after 15 terms in office, said there are still many laws and regulations that can be applied to the fantasy industry.

"All citizens can make their own judgment whether America is better off with or without a dominating gambling ethic," he said. "But what is self-evident is that UIGEA exempted fantasy sports from one specific law enforcement mechanism but not from the broad sweep of law itself."

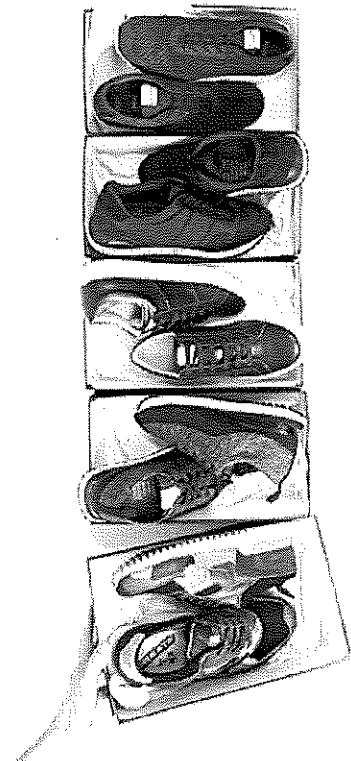
Fantasy sports companies are still bound by state and federal laws on sports betting, wire transfers, anti-trust and securities laws, among others, he said.

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Exhibit O



Yahoo Finance: Since the NFL owners will vote on whether the Raiders can move, have you tried to talk to owners and win them over? Might they object to you being an owner because you are in the gaming industry?

Sheldon Adelson: I've met with [Dallas Cowboys owner] Jerry Jones and I've talked to [New England Patriots Owner] Bobby [Kraft]. Bob is the chairman of the committee for relocation in the NFL. He's in favor of it. It's an old wives' tale that they [the NFL] say gambling is no good. I've read that 28 of the 32 teams have interest in fantasy sports. Well, that's gambling. So 28 teams are involved in gambling. *[28 teams have cut marketing partnerships with either DraftKings or FanDuel.]*

Well, that's the whole argument going on right now: whether daily fantasy sports is gambling. And state by state gambling law has become a hotly contested issue because of these companies.

Listen, I'm in the business. I'm the largest company in the gaming business by market cap *[That is correct—\$44 billion at the moment]* and I can tell you this: Daily fantasy sports is gambling. There's no question about it. Anybody can play this, and they can gamble on it.

Some say poker is not gambling. Poker is gambling. They say poker is a game of skill. I don't know how skill can apply to somebody shuffling a deck of cards and randomly giving them out to you. You don't have any control over it. Can somebody bluff and can somebody place bets better than somebody else? Yes. But that doesn't make poker a game of skill.

And look, I'm not against gambling, obviously. I know what's gambling and I know what's not gambling. And fantasy sports is gambling. I'm very much against it.

As you say, you are in the gambling business. So why are you against daily fantasy?

I think it exploits poor people. I was one myself. And I don't want people that are exploitable to be exploited. I can make money in an honest way—as a form of entertainment. If people want to come and be entertained I'm very happy to provide that service. But why do I need it, the fantasy sports? We're making money [without it], I don't need it. And I think it's immoral.

Anyone can get addicted to it. You could do it in the bathroom, you could do it in your kitchen, you could do it anywhere, privately or publicly. You know, this Pokémon thing, I don't know what it is, but as I understand it, people do it in public. They're chasing pokémon in public. It's like that.

I don't want people to be incentivized to make it so easy to play on your cellphone. It gets young kids, just like marijuana.

The biggest victims of Internet gambling, and these fantasy sports that people can access from their cellphones, are children, college students of age, and poor and middle class people. I'm not against it just because it hurts children, it hurts a lot of groups. I don't want to make money that way. I don't want to make money taking from poor people. They don't have anything to gamble. And when they do, they get in over their heads.

Many people would say that the real reason you oppose it isn't about moral grounds, but because it's business competition for you.

No. It's not a financial matter. I'm a father, I'm a grandfather, I'm a responsible businessman, and I don't want to exploit poor people.

Everybody thinks that because I'm wealthy, all I want to do is make more money. Yes, I want to make more money. But not from exploiting young people and poor people. There's no principle that I would surrender in favor of money.

This is a moral issue. When we have somebody [in the casino] that we see needs to be treated, we stop dealing to people. I don't have to hurt people to make money.

Might there be any money in it for you, though?

I have no idea. There must be some money in it, because 28 of the 32 NFL owners are involved in daily fantasy sports. So I have no idea if it would be a lot of money or a little money, but it wouldn't make a difference to me. I wouldn't do it, as a matter of morality.

It's contrary to all the rules. My father was a gambler. He couldn't stop going to the racetrack. He would bet on almost anything. I can't say that he was a gambling addict, but I can say that he gambled a lot. And when he lost money, it caused friction in the family.

If people have one compulsive behavior, they typically have more than one. My own son likes to play this fantasy game. Kids his age easily get addicted to this. But since I'm in the business, I've prevented my son from getting addicted. I tell him it's not good, and he understands. He doesn't bet. He's seen other kids in his school lose money on this. He likes the entertainment of the fantasy sports because he's a sports nut.

What about selling space to daily fantasy companies in your casino? [One DFS company, USFantasy, did apply for a gambling license in Las Vegas and got one; the company will offer pari-mutuel daily fantasy sports contests at walk-up windows in some Las Vegas casinos, but not in any LVS properties.] There are now DraftKings lounges at certain NFL stadiums, such as Gillette and Arrowhead. Would you ever do that: designate areas for fantasy sports inside your casinos and share revenue, rather than oppose the companies?

Never. I'm not going to do that. I'm not going to do any form of fantasy sports in my casino.

—

Note: Yahoo, the parent company of Yahoo Finance, offers a daily fantasy sports product.

Disclosure: The author's father, a lawyer, does some legal work for Sheldon Adelson.

Daniel Roberts is a writer at Yahoo Finance, covering sports business and technology. Follow him on Twitter at @readDanwrite. Sportsbook is our recurring sports business video series.

Read more:

Here's where every state stands on daily fantasy sports legality

FanDuel goes after ESPN and other season-long fantasy providers

DraftKings CEO shares what's next after New York bill passes

FanDuel CEO: We are 'getting closer' to DraftKings

Exhibit P

A10736 Memo:

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A10736

SPONSOR: Rules (Pretlow)

TITLE OF BILL:

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

PURPOSE OR GENERAL IDEA OF BILL:

To provide for the registration, regulation, and taxation of interactive fantasy sports contests in New York State.

SUMMARY OF SPECIFIC PROVISIONS:

Section 1 of the bill would amend the Racing, Pari-Mutuel Wagering and Breeding Law by adding a new Article 14 which would register and regulate interactive fantasy sports contests with an entry fee. Specifically:

Section 1400 provides legislative findings and purpose. Section 1401 provides definitions.

Section 1402 authorizes the registration of interactive fantasy sports operators to conduct interactive fantasy sports contests in New York State. Any operator that was offering contests to New York state residents prior to November 10, 2015 would be able to continue operating until their application for registration has been approved or denied, provided that such operator files an application for registration with the New York State Gaming Commission ("the Commission") within ninety days of the promulgation of regulations to effectuate this article. Such operators would also receive a temporary permit to operate under the required safeguards and minimum standards until their application has been approved or denied. Registrations would remain in effect for three years.

Section 1403 establishes the scope of information required from an interactive fantasy sports operator upon submission of an application for registration to the Commission.

Section 1404 establishes required safeguards and minimum standards in order to provide players with important consumer protections, including:

- *limiting players to one active and continuously used account;
- *prohibiting persons under the age of 18 from participating in any contest;
- *ensuring that accurate representations concerning the chances of winning, and the number of winners, are depicted in all advertisements;
- *ensuring that, unless otherwise approved by the Commission, online fantasy or simulation sports games or contests with an entry fee are not being directly or indirectly promoted or advertised during the conduct of any online fantasy or simulation sports games or contests without an entry fee;
- *enabling players to exclude themselves from contests and permanently close their accounts at any time;
- *offering introductory procedures for players, and identifying highly experienced players;
- *disclosing the number of entries a player may submit to each contest, and the number of total entries allowed for each contest;
- *measures to protect the privacy and online security of players and their accounts;
- *ensuring players' funds are protected upon deposit and segregated from the operating funds of the operator or registrant; and
- *information concerning assistance for compulsive play in New York State.

This section would also limit the number of entries that can be submitted by a player to any contest, prohibit any contest based on a collegiate or high school sport or athletic event, prohibit any contest based on a horse racing event, prohibit the use of third-party scripts or scripting programs, and ensure that advertisements for contests and prizes do not target prohibited participants, minors, or self-excluded persons.

Section 1405 authorizes the Commission to promulgate regulations to implement the provisions of this article. This section also assigns the Commission with all powers necessary and proper to fully and effectively execute this article, including the ability to accept and investigate complaints from players and investigate alleged violations of this article.

Section 1406 requires each registrant to submit an annual report to the Commission no later than June 30 of each year. The Commission would be authorized to conduct a financial audit of any registrant, at any time, to ensure compliance with this article. The Commission would also be required to publish a report based on the aggregate information provided by all registrants' reports, which would be published on the Commission's website.

Section 1407 imposes a 15% State tax on each registrant's interactive fantasy sports gross revenue for the privilege of conducting interactive fantasy sports contests in New York State, as well as an additional 0.5% tax that is not to exceed \$50,000 annually.

Section 1408 allows the Commission to assess the actual costs necessary to regulate registrants pursuant to this article.

Section 1409 requires the Commission to direct all taxes, interest, and penalties collected to the State Lottery Fund for education.

Section 1410 authorizes the Commission to perform audits of the books and records of operators with permits and registrants, for the purpose of determining the sufficiency of tax payments.

Section 1411 provides authorization for interactive fantasy sports contests registered and conducted pursuant to this chapter.

Section 1412 prohibits the conduct of unregistered interactive fantasy sports contests.

Section 2 of the bill would give the Commission the authority and responsibility of registering and regulating interactive fantasy sports in New York State.

Section 3 of the bill would establish an immediate effective date.

JUSTIFICATION:

On October 6, 2015, the New York State Attorney General's office launched an investigation into whether employees of the two biggest daily fantasy sports companies, DraftKings and FanDuel, were able to gain an unfair financial advantage in daily fantasy football contests by exploiting access to non-public data. On November 10, the Attorney General's office issued a notice to DraftKings and FanDuel demanding that they stop accepting wagers in New York. After months of additional litigation, DraftKings and FanDuel reached an agreement with the Attorney General to stop taking bets from New York customers on March 21, 2016. The agreements outlined the process the companies and the Attorney General would follow in the event that the State Legislature does or does not take action to legalize and regulate daily fantasy sports contests, as well as establish a statutory framework to protect consumers, on or before June 30, 2016.

Bearing in mind that "paid" interactive fantasy sports contests have the potential to produce unfair advantages for certain players, target minors, and increase compulsive play, this bill seeks to regulate all interactive fantasy sports contests with an entry fee, including daily and season-long.

This bill offers important consumer protections to ensure that all contests are safe and fair. Requirements such as limiting players to one active and continuously used account, offering introductory procedures for players, identifying highly experienced players, and depicting accurate representations concerning the chances of winning in all advertisements will help to provide transparency and fairness across all platforms. Measures to protect the privacy and online security of players and their accounts, and requiring registrants to protect players' funds upon deposit, as well as segregate such funds from the companies' operating funds, would provide players with important safety and security protections online.

In addition, requirements would be in place to ensure that players can exclude themselves from contests and permanently close their accounts at any time if they feel that they are becoming compulsive players. For this reason, registrants will also be required to provide information on their websites concerning assistance for compulsive play in New York State. Because of the risks associated with compulsive play, no person under the age of 18 would be permitted to participate in an interactive fantasy sports contest.

{ By taxing interactive fantasy sports contests, and directing such funds to the State Lottery Fund, this bill will also bring about a new and

abundant source of revenue for education in New York State.

LEGISLATIVE HISTORY:

This is new legislation.

FISCAL IMPLICATION:

To be determined.

EFFECTIVE DATE:

This act would take effect immediately.

Exhibit Q

VIEW VOTES**S8153 - DETAILS**

See Assembly Version of this Bill:

[A10736 \(/Legislation/Bills/2015/A10736\)](/Legislation/Bills/2015/A10736)

Law Section:

Racing, Pari-Mutuel Wagering and Breeding Law

Laws Affected:

Add Art 14 §§1400 - 1412, amd §104, RWB L

Versions Introduced in 2015-2016 Legislative Session:

[A10736 \(/Legislation/Bills/2015/A10736\)](/Legislation/Bills/2015/A10736)

S8153 - SUMMARY

Relates to the registration and regulation of interactive fantasy sports contests.

S8153 - SPONSOR MEMO

BILL NUMBER: S8153

TITLE OF BILL : An act to amend the racing, pari-mutuel wagering and breeding law, in relation to the registration and regulation of interactive fantasy sports contests

PURPOSE OR GENERAL IDEA OF BILL :

To provide for the registration, regulation, and taxation of interactive fantasy sports contests in New York State.

SUMMARY OF SPECIFIC PROVISIONS :

Section 1 of the bill would amend the Racing, Pari-Mutuel Wagering and Breeding Law by adding a new Article 14 which would register and regulate interactive fantasy sports contests with an entry fee. Specifically:

Section 1400 provides legislative findings and purpose.

Section 1401 provides definitions.

Section 1402 authorizes the registration of interactive fantasy sports operators to conduct interactive fantasy sports contests in New York State. Any operator that was offering contests to New York state residents prior to November 10, 2015 would be able to continue

operating until their application for registration has been approved or denied, provided that such operator files an application for registration with the New York State Gaming Commission ("the Commission") within ninety days of the promulgation of regulations to effectuate this article. Such operators would also receive a temporary permit to operate under the required safeguards and minimum standards until their application has been approved or denied. Registrations would remain in effect for three years.

Section 1403 establishes the scope of information required from an interactive fantasy sports operator upon submission of an application for registration to the Commission.

Section 1404 establishes required safeguards and minimum standards in order to provide players with important consumer protections, including:

- *limiting players to one active and continuously used account;
- *prohibiting persons under the age of 18 from participating in any contest;
- *ensuring that accurate representations concerning the chances of winning, and the number of winners, are depicted in all advertisements;
- *ensuring that, unless otherwise approved by the Commission, online fantasy or simulation sports games or contests with an entry fee are not being directly or indirectly promoted or advertised during the conduct of any online fantasy or simulation sports games or contests without an entry fee;
- *enabling players to exclude themselves from contests and permanently close their accounts at any time;
- *offering introductory procedures for players, and identifying highly experienced players;
- *disclosing the number of entries a player may submit to each contest, and the number of total entries allowed for each contest;
- *measures to protect the privacy and online security of players and their accounts;
- *ensuring players' funds are protected upon deposit and segregated from the operating funds of the operator or registrant; and
- *information concerning assistance for compulsive play in New York State.

This section would also limit the number of entries that can be submitted by a player to any contest, prohibit any contest based on a collegiate or high school sport or athletic event, prohibit any contest based on a horse racing event, prohibit the use of third-party scripts or scripting programs, and ensure that advertisements for contests and prizes do not target prohibited participants, minors, or self-excluded persons.

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funds to the State Lottery Fund, this bill will also bring about a new and abundant source of revenue for education in New York State.

LEGISLATIVE HISTORY :

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FISCAL IMPLICATION :


To be determined.

EFFECTIVE DATE :

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VIEW LESS 

S8153 - BILL TEXT

 [DOWNLOAD PDF \(HTTP://LEGISLATION.NYSENATE.GOV/PDF/BILLS/2015/S8153\)](http://legislation.nysenate.gov/pdf/bills/2015/S8153)
