

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION – FIRST DEPARTMENT

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

Plaintiff-Respondent,  
-against-

Index No. 453056/15  
Supreme Court  
New York County

FANDUEL, INC.,

Defendant-Appellant.

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ERIC T. SCHNEIDERMAN, Attorney General of  
the State of New York,

Plaintiff-Respondent,  
-against-

Index No. 453054/15  
Supreme Court  
New York County

DRAFTKINGS, INC.,

Defendant-Appellant.

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**MEMORANDUM OF LAW IN OPPOSITION TO  
DEFENDANTS' MOTION FOR AN INTERIM STAY**

STEVEN C. WU  
*Deputy Solicitor General*  
VALERIE FIGUEREDO  
*Assistant Solicitor General  
of Counsel*

ERIC T. SCHNEIDERMAN  
*Attorney General of the  
State of New York*  
Attorney for Plaintiff-Respondent  
120 Broadway, 25th Floor  
New York, NY 10271  
(212) 416-8019

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## PRELIMINARY STATEMENT

Defendants FanDuel and DraftKings—operators of daily fantasy sports (DFS) games—seek to stay a preliminary injunction issued by Supreme Court, New York County (Mendez, J.) halting their illegal gambling operations in New York. This Court should deny the stay. FanDuel and DraftKings run massive and rapidly growing businesses that offer nothing more than a rebranded form of sports betting, which has long been prohibited in New York. Like a sports bettor, a DFS player makes a wager that pays out depending on the performance of athletes on the field—events over which DFS players, like sports bettors, have no influence or control. As Supreme Court found, the proliferation of DFS threatens substantial harm to the public, including to New Yorkers with gambling addictions. In light of DFS’s plainly illegal nature and its ongoing harms, Supreme Court’s preliminary injunction appropriately halts defendants’ gambling operations—only as a temporary matter—while the parties continue litigating their dispute below. FanDuel and DraftKings have not demonstrated their entitlement to the extraordinary relief of a stay pending appeal that would effectively endorse their continued operations.

Both the New York Constitution and the Penal Law make gambling illegal. Under New York law, a wager constitutes gambling if its outcome turns on *either* (1) a “future contingent event not under [the player’s] control or influence,” *or* (2) a “contest of chance.” DFS easily satisfies both definitions.

In DFS contests, players construct “rosters” of athletes, and those rosters earn points based upon the chosen athletes’ performances in real-world games. A DFS player wins if his roster as a whole receives more points than other rosters. These contests plainly depend on “future contingent event[s] not under [the players’] control or influence” because the critical determinant of victory in a DFS contest is the real-game performance of athletes. Like a sports bettor, a DFS player can try to *guess* how athletes might perform, but he has no way whatsoever to control or influence the performance of those athletes. And there is no winner of any DFS contest until the actual sports events occur.

A DFS game is also a “contest of chance” because its outcome “depends in a material degree upon an element of chance.” Penal Law § 225.00(1). Any number of contingencies can affect athletic performance and change the outcome of a DFS contest—or a sports bet.

DFS players may exercise some skill in researching and predicting athletic performances, but that “skill” is no different from the research that a sports bettor or horse-racing gambler does to make better-informed guesses. However much research a DFS player, sports bettor, or horse-racing gambler may do, chance remains an ineradicable element of the outcome of their wagers.

There is thus little question that DFS involves gambling under New York law. Defendants have no cognizable interest in continuing to operate illegal businesses. And Supreme Court correctly found that the public interest supported a preliminary injunction. Like other forms of gambling, DFS causes substantial harm to the public and undermines New York’s longstanding public policy against gambling. These harms are real, not theoretical: in particular, DFS has caused serious harm to gambling addicts, who have found the readily accessible nature of DFS games irresistible. And the concrete harms caused by DFS will only grow. Both FanDuel and DraftKings have vastly expanded their operations in just the last year, bringing in hundreds of thousands of additional players in New York alone. A stay here would thus not

merely preserve the status quo, but instead give a green light to the continued, massive growth of DFS into the New York market.

By contrast, FanDuel and DraftKings will suffer no irreparable harm if a stay is denied. Supreme Court’s preliminary injunction halts only their operations in New York, which constitute only single-digit percentages of their nation-wide business. Indeed, FanDuel voluntarily stopped accepting bets in New York when this litigation was filed, without suffering any serious harm to its overall business—only to immediately resume operations once a single justice of this Court granted an interim stay. If FanDuel and DraftKings feel aggrieved by Supreme Court’s preliminary injunction, their remedy is to promptly perfect their appeal, not to seek a stay pending appeal that will effectively nullify Supreme Court’s order.<sup>1</sup>

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<sup>1</sup> Regardless of the decision on the stay, and even before ruling on defendants’ motions, this Court should order defendants to perfect their appeals for the April term and hold oral argument as early as practicable during that term.

## STATEMENT OF THE CASE

### A. Factual Background

#### 1. The mechanics of daily fantasy sports

In traditional sports betting, gamblers make wagers based on their predictions of athletic or team performances in particular sports. See William N. Thompson, *Gambling in America: An Encyclopedia of History, Issues, and Society* 355 (2001). Gamblers can make simple bets that one or another team will prevail in a particular contest. They can also make what are known as “proposition bets” about whether a particular specific outcome will occur during a game—for example, wagering ten dollars that Eli Manning will throw more than two touchdowns on Sunday. (Affirmation of Valerie Figueredo (“Figueredo Affirm.”) Ex. A ¶ 43 (describing prop bets).) And gamblers can aggregate multiple wagers (for example, on the outcome of several games, or on the performances of several athletes) into what are known as “parlay bets” under which the gambler prevails if multiple different bets are successful.<sup>2</sup> (Figueredo Affirm. Ex. A ¶ 46.) Although the

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<sup>2</sup> Horse racing similarly gives gamblers many ways to hinge the outcome of a wager on the performance of multiple individual horses.  
(continued on the next page)

details of each type of bet differ, all sports betting shares one feature in common: whether the bet wins or loses depends on the outcome of athletic performances that the gambler can try to predict, but fundamentally cannot influence or control.

Like sports bets, the daily fantasy sports (DFS) games at issue in this litigation turn on the outcomes of athletic performances in particular games. In DFS games, each player creates a “fantasy” team of professional athletes in a particular sport, with the goal of selecting the athletes who the player predicts will have the best performances in an upcoming game.<sup>3</sup> (Figueredo Affirm. Ex. A ¶¶ 16-17.) All scoring in fantasy sports is based entirely on the real-life performances of athletes. (Figueredo Affirm. Ex. A ¶ 17; *id.* Ex. B ¶ 18.) For example, a player

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*See* About Sports, “How to Box an Exacta in Horse Race Betting,” <http://horseracing.about.com/cs/handicapping/ht/exactabox.htm> (describing an “exacta” bet which requires the bettor to select the first two finishers in a race); About Sports, “Bet the Pick 6,” <http://horseracing.about.com/cs/handicapping/ht/pick6.htm> (describing “The Pick 6” which requires the bettor to select the winner of six consecutive races).

<sup>3</sup> In football, for instance, each player selects eight athletes and one team defense to comprise his fantasy team: one quarterback, two running backs, three wide receivers, one tight end, one kicker, and a team defense. (Figueredo Affirm. Ex. C ¶ 30.)

earns four points for each touchdown pass thrown by the quarterback on his fantasy roster during a National Football League (NFL) game, or six points if an athlete on his fantasy roster returns a kickoff for a touchdown. (Figueredo Affirm. Ex. C ¶ 19; *see also id.* ¶¶ 18, 21.) The outcomes of DFS games are determined daily for most sports, and weekly for the NFL.<sup>4</sup> The winning DFS team at the end of the day or week is the one with the most points—*i.e.*, the one in which the player’s predictions of athletic performance best match up with events on the field of play. (Figueredo Affirm. Ex. A ¶¶ 18, 59; *id.* Ex. B ¶ 64; *id.* Ex. C ¶ 28.)

DFS games use a salary-cap draft to limit players’ choice of athletes for their roster. In such a draft, the DFS operator assigns every athlete a fictional “salary” that reflects the odds that he will perform well in a sporting event. (Figueredo Ex. A ¶ 39; *id.* Ex. C ¶ 31.) For instance, FanDuel assigned Green Bay Packers quarterback Aaron Rodgers—the NFL’s most valuable player in 2014—a salary of \$8,900,

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<sup>4</sup> For example, DFS fantasy baseball or basketball games are played in a single day. (Figueredo Affirm. Ex. C ¶ 40.) By contrast, DFS fantasy football games last one week, with the “week” beginning on Thursday and ending on Monday (the days when NFL games are played). (*See id.* Ex. A ¶ 38.)

whereas the salary for the Carolina Panthers’ third-string quarterback was only \$4,800. (Figueredo Affirm. Ex. C ¶ 31.) DFS players are each given a “salary cap”—*i.e.*, a maximum amount of money that they can spend selecting athletes to fill their fantasy team—and players can select athletes until that cap is reached. (Figueredo Affirm. Ex. A ¶ 38.)

## **2. Daily fantasy sports operators’ acceptance of wagers and payments of prizes**

FanDuel and DraftKings are the two largest DFS operators in New York. (Figueredo Affirm. Ex. O, at 1.) These operators lure players into playing DFS games by advertising the opportunity to quickly and easily win life-changing amounts of cash. (Figueredo Affirm. Ex. C ¶¶ 4-10.) In one advertisement, FanDuel claimed that it pays out “over \$75 million [in prizes] a week.” (Figueredo Affirm. Ex. C ¶ 7.) Each operator offers players the opportunity to enter thousands of fantasy leagues daily in a variety of different sports, ranging from football to golf. (Figueredo Affirm. Ex. C ¶ 10; *id.* Ex. A ¶¶ 50-51, 55.)

To win cash prizes, DFS players stake or risk an amount of money that varies from \$0.25 to \$10,600, depending on the game. (Figueredo Affirm. Ex. D ¶¶ 15, 26; *id.* Ex. A ¶ 54; *id.* Ex. C ¶ 26.) Just as

bookmakers profit by collecting a “rake”—*i.e.*, a percentage cut—from every bet that they collect, so FanDuel and DraftKings earn the bulk of their revenue by retaining a percentage of each player’s stake. (Figueredo Affirm. Ex. A ¶ 52; *id.* Ex. B ¶ 55.) A DFS player who does not win a cash prize loses his initial payment.

The most popular type of contest on either website, the “Guaranteed Prize Pool,” offers the highest payout for potential winners, and accepts up to several hundred thousand fantasy teams. (Figueredo Affirm. Ex. A ¶ 51.) For instance, on Fan Duel one guaranteed prize pool contest advertised \$25,000 in guaranteed prizes for a \$2.00 entry fee. (Figueredo Affirm. Ex. C ¶ 35.) In this type of contest, the players with the highest-scoring fantasy team win a cash prize. (Figueredo Affirm. Ex. A ¶ 51.)

FanDuel and DraftKings also offer “50/50” contests and “Head-to-Head” contests. (Figueredo Affirm. Ex. A ¶ 51; *id.* Ex. B ¶ 54.) A player in a 50/50 contest can double his winnings if his fantasy team finishes in the top half of all teams in the league. (*Id.*) Alternatively, a Head-to-Head contest involves only two players, and the winner is the player whose fantasy team generates the most points. (*Id.*)

A DFS player is required to select his team’s line-up by a preannounced time. (Figueredo Affirm. Ex. D ¶ 29; *id.* Ex. C ¶ 36.) After that time, the line-up is “locked” and cannot be altered. At that point, the player becomes a spectator, and his team’s fate is entirely contingent on the real-world performances of athletes that the player can neither influence nor control. (Figueredo Affirm. Ex. A ¶¶ 56-57, 64.)

## **B. Procedural History**

### **1. The Attorney General’s enforcement action**

On November 10, 2015, the Attorney General sent FanDuel and DraftKings cease-and-desist letters demanding that they halt their illegal gambling operations. (Figueredo Affirm. Ex. A ¶ 11; *id.* Ex. B ¶ 11.) In response, FanDuel stopped accepting wagers from players in New York.<sup>5</sup> DraftKings continued operations despite the cease-and-desist letters.

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<sup>5</sup> See Chris Grove, “FanDuel No Longer Accepting Daily Fantasy Sports Deposits From New York As Legal Battle Escalates,” Legal Sports Report, Nov. 13, 2015, available at <http://www.legalsportsreport.com/6215/fanduel-blocks-ny-dfs-deposits/>; Dustin Gouker, “New York AG Files for Injunction to Stop DraftKings, FanDuel from Operating in NY,” Legal Sports Report, Nov. 17, 2015, (continued on the next page)

The Attorney General then filed separate complaints against FanDuel and DraftKings in Supreme Court, New York County (Mendez, J.). Each complaint asserts causes of action under Executive Law § 63(12) seeking to halt the DFS operators' repeated illegal and fraudulent gambling operations; under Business Corporation Law § 1303 seeking to annul the DFS operators' authority to conduct business in the State; and under General Business Law §§ 349 and 350 seeking relief for the DFS operators' deceptive practices and false advertising.

The Attorney General also moved by order to show cause for a preliminary injunction to prevent DraftKings and FanDuel from continuing to accept wagers from players in New York pending resolution of the enforcement action. Executive Law § 63(12) and General Business Law § 349(b) expressly authorize the Attorney General to seek such injunctive relief to halt ongoing fraudulent or illegal activities.<sup>6</sup>

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available at <http://www.legalsportsreport.com/6329/new-york-ag-vs-fanduel-draftkings/>.

<sup>6</sup> The DFS operators filed their own lawsuits against the Attorney General and sought temporary and preliminary injunctive relief to restrain the Attorney General's enforcement of state law. Supreme  
*(continued on the next page)*

On November 25, 2015, Supreme Court heard oral argument on the Attorney General’s request for a preliminary injunction. (*See Affirm. of Joshua I. Schiller (“Schiller Affirm.”) Ex. 2 (11/25/15 Hr’g Tr.)*)

**2. Supreme Court’s preliminary injunction restraining DraftKings and FanDuel from accepting bets in New York**

On December 11, 2015, Supreme Court granted the Attorney General’s motion for a preliminary injunction and enjoined FanDuel and DraftKings from “accepting entry fees, wagers or bets from New York consumers in regards to” DFS games. (12/11/15 Sup. Ct. Order (“Sup. Ct. Order”) at 10.) In a lengthy decision, the court extensively discussed the parties’ arguments (Sup. Ct. Order at 5-6), and concluded, based on undisputed facts, that the Attorney General had demonstrated a likelihood of success on the merits of his claims (Sup Ct. Order at 9). Specifically, Supreme Court held that DFS games constitute gambling barred by the State Constitution and the Penal Law. (Sup Ct. Order at

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Court denied the DFS operators’ motions for temporary and preliminary injunctions. (12/11/15 Sup. Ct. Order at 10-11.) Because neither FanDuel nor DraftKings has appealed from that disposition, the DFS operators’ own preliminary injunction motions are not at issue in the current appeal.

9.) The court also rejected FanDuel’s and DraftKings’ allegations of irreparable injury based solely on monetary harm, concluding that “the protection of the general public outweighs any potential loss of business.” (Sup. Ct. Order at 9.) Finally, the court found that the equities favor the issuance of a preliminary injunction because of the “interest in protecting the public, particularly those with gambling addictions.” (Sup. Ct. Order at 9.)

On the same day Supreme Court issued its order, DraftKings and FanDuel filed emergency applications for interim relief and motions for a stay pending appeal. A single justice of this Court granted an interim stay “without prejudice to determination by a full panel.” (12/11/15 App. Div. Order.)

## ARGUMENT

### THE COURT SHOULD DENY A STAY PENDING APPEAL

As operators of illegal gambling enterprises, FanDuel and DraftKings are not entitled to the extraordinary remedy of a stay pending appeal. Supreme Court carefully considered the arguments below and properly concluded both that (a) DFS is a form of online gambling prohibited under the New York Constitution and the Penal Law, and (b) the public interest warrants an immediate restraint on their large and growing gambling businesses. Granting a stay here would essentially nullify Supreme Court’s preliminary injunction and give FanDuel and DraftKings free license to continue gambling operations that Supreme Court found to be plainly unconstitutional, unlawful, and harmful to the public. This Court should deny a stay.

A stay pending appeal marks an “intrusion into the ordinary processes of . . . judicial review” and is therefore never “a matter of right, even if irreparable injury might otherwise result” from allowing a lower court order to come into effect. *Nken v. Holder*, 556 U.S. 418, 427, 433 (2009) (quotation marks omitted). The parties seeking the “drastic remedy” of a stay pending appeal—here, FanDuel and DraftKings—

bear the burden of demonstrating a “clear right” to that extraordinary relief by showing both a “reasonable probability of ultimate success” on the merits of the appeal and “the prospect of irreparable harm.” *DeLury v. City of N.Y.*, 48 A.D.2d 405, 405-06 (1st Dep’t 1975). Even if the moving parties were to prevail on those factors—and in this case they cannot—a stay should be denied if the public would otherwise be harmed. *See Prudential Prop. & Cas. Ins. Co. v. Dixon*, 161 Misc. 2d 87, 88-89 (Sup. Ct. Nassau County 1994). And because a stay here will “in effect” give FanDuel and DraftKings what they are seeking in their underlying appeal—the nullification of Supreme Court’s preliminary injunction—it should only be granted “with great caution and only when required by urgent situations or grave necessity.” *Russian Church of Our Lady of Kazan v. Dunkel*, 34 A.D.2d 799, 801 (2d Dep’t 1970); *Trio Distributor Corp. v. Bd. of Health of Albany County Health District*, 286 A.D. 945, 945 (3d Dep’t 1955) (denying stay pending appeal of preliminary injunction because appellate court should “not interfere during the pendency of the appeal with the determination” of the lower court). FanDuel and DraftKings have failed to meet the exacting standards necessary to warrant a stay pending appeal.

**A. A Stay Should Be Denied Because DraftKings and FanDuel Cannot Succeed in Overturning Supreme Court’s Finding That They Engage in Illegal Gambling Operations.**

Supreme Court correctly held (Sup. Ct. Order at 9) that FanDuel and DraftKings promote illegal gambling barred by the New York Constitution and the Penal Law. *See* N.Y. Const. art. I, § 9; Penal Law §§ 225.00, 225.05, 225.10. Under the Penal Law, a game involves illegal gambling if it contains three elements: (1) the player wins or loses depending on “the outcome of a contest of chance or a future contingent event not under [the player’s] control or influence”; (2) the player “stakes or risks something of value”; and (3) the player “receive[s] something of value in the event of a certain outcome.” Penal Law § 225.00(2). All three elements are present in DFS games offered by DraftKings and FanDuel.

Simply put, DFS is a new platform for an old form of gambling: sports betting. Like a sports bettor, a DFS player stakes money based on his predictions of how particular athletes will perform on the field. And like a sports bettor, he wins or loses depending on the outcome of those performances, which are events over which he has no control or influence. If a player were to make a similar bet based on a single athlete’s performance—for example, wagering that Odell Beckham Jr.

will have over one hundred receiving yards in a single game—that would be a proposition bet, and plainly prohibited. If a player were to make a bet based on three or four athletes’ performance—say, a quarterback, a running back, and two wide receivers—that would be a parlay bet, and plainly prohibited. If a player were to make a bet based on eight offensive NFL players and one team defense, he would have just constructed a DFS roster—but that roster is fundamentally no different from a prohibited parlay bet. A DFS roster is selected using the same types of predictions of athletic prowess that guide sports gamblers’ wagering decisions, and it wins the player money (or not) based on the same performances that dictate the outcome of sports bets.

Contrary to the DFS operators’ arguments, no evidentiary hearing is needed to determine whether DFS is gambling because there is no factual dispute as to how the games operate. (*See* Sup. Ct. Order at 6.) Both FanDuel and DraftKings acknowledge that the outcomes of DFS games hinge on the performances of multiple real-life athletes in sporting events—a quintessential form of “future contingent event not under [the player’s] control or influence.” Penal Law § 225.00(2). The DFS operators attempt to manufacture a factual dispute by asserting

that a DFS player’s selection of a roster involves more skill than chance, but that argument is a red herring. Under the Penal Law, the relative mix of skill and chance does not affect whether a game relies on “a future contingent event.” More fundamentally, the type of “skill” that goes into constructing a DFS roster is no different from the “skill” that a sports bettor employs in picking an athlete, a slate of athletes, or a team: the DFS player, like the sports bettor, is simply trying to make informed predictions of future athletic performance. Whatever “skill” is involved in predicting athletic performance is simply skill at gambling—not the type of skill that removes an activity from the realm of gambling altogether.

- 1. DFS games turn on athletic performances, which are future contingent events outside of a player’s control or influence.**

Wagering on sports is a classic form of illegal gambling because every sports wager hinges on the outcome of a future contingent event outside the gambler’s control or influence—namely, the result of a game, an individual athlete’s performance on the field, or a combination of multiple games or athletes. *People v. Yedvobnik*, 65 A.D.2d 740, 741 (1st Dep’t 1978) (Sandler, J., dissenting) (recognizing that betting on

sporting events is unlawful gambling); accord *People v. Traymore*, 241 A.D.2d 226, 231 (1st Dep’t 1998); *People v. Conigliaro*, 290 A.D.2d 87, 88 (2d Dep’t 2002). DFS represents nothing more than an extension of the proposition bets and parlay bets that have long been a staple of sports bettors. A DFS player fills every position on his fantasy football team based on his prediction that his selected athlete will perform well in certain statistical categories that result in fantasy points, such as touchdowns, running yards, and so on (Figueredo Affirm. Ex. C ¶ 19)—the same types of statistics that determine the outcome of proposition bets, or parlay bets consisting of wagers on multiple athletes’ performances.<sup>7</sup> Indeed, DraftKings and FanDuel outright instruct players that to increase their chances of winning a DFS game, they should rely on “Vegas lines” (*i.e.*, the odds that sports bettors use) in selecting their athletes. (Figueredo Affirm. Ex. S; *id.* Ex. D ¶¶ 33-35.)

Indeed, both FanDuel and DraftKings have conceded that the fantasy points necessary to win a DFS game are “contingent on the

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<sup>7</sup> See Bet365.com individual player proposition bets. Bet365 homepage, <http://www.bet365.com/home/FlashGen4/WebConsoleApp.asp?&cb=10325421908>

positive performance” of athletes on the field. (Figueredo Affirm. Ex. A ¶¶ 64; *id.* Ex. B ¶ 69.) And the DFS operators’ own experts confirm that DFS games hinge on athletic performances that the fantasy player neither controls nor influences. (See Figueredo Affirm. Ex. K ¶ 6 (noting that players compete “on the basis of fantasy points earned by the real-life performances of the real-world athletes”); *id.* ¶ 10 (stating that the success of a fantasy team “depends on the combined performance in numerous statistical categories of those real-world athletes across many real-world sporting events”); *id.* Ex. L ¶ 8 (explaining that a fantasy team’s “success depends on the statistics generated by a player’s particular combination of real-world athletes, which are translated into fantasy points”).) One study submitted by DraftKings aptly explains that “the object” of DFS is to “pick the players who will hit home runs or score touchdowns in a given day of games.” (Figueredo Affirm. Ex. I.)

DFS is thus merely a new manifestation of a type of activity that has long been considered gambling. Courts have repeatedly and consistently recognized that betting on a future contingent event not under the player’s control or influence is illegal gambling, whether that event is an election, *see* National Institute of Law Enforcement &

Criminal Justice, *The Development of the Law of Gambling 1776-1976* at 146-48 (1976); a series of baseball games, *People v. Wright*, 100 Misc. 205, 206 (County Ct. Albany County 1917); or a prize fight, see *People v. Busco*, 46 N.Y.S. 2d 859, 863 (N.Y.C. Spec. Sess. Bronx County 1942).

The DFS operators' argument below that the outcome of DFS games turns on fantasy players' selections of their rosters, rather than on the performances of athletes on the field, makes no sense. No fantasy player would say that a DFS game ends once players select their fantasy line-ups, because the critical events have yet to occur: namely, the daily or weekly sports competitions that are the sole determinant of how many points every DFS roster generates. Simply put, the outcome of a DFS game cannot be determined until the athletes' actual game-day performances have been recorded.<sup>8</sup> Like all other forms of sports

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<sup>8</sup> For this reason, FanDuel's and DraftKings' rules address the accrual of fantasy points for athlete performances in suspended or postponed real-life sporting events. (See Figueredo Affirm. Ex. C ¶¶ 21-22; *id.* Ex. D ¶¶ 23-24.) And both operators require that "all player statistics have been reported by [their] third party stats provider" before the outcome of a DFS game can be finalized. (See *id.* Ex. C ¶ 24; see also *id.* ¶ 25.)

betting, DFS is dependent on the play of athletes in sporting events that fantasy players neither control nor influence.

## **2. Chance materially influences the outcome of DFS games.**

Because DFS games turn on the outcome of a “future contingent event,” it is not necessary to evaluate whether they also turn on the outcome of a “contest of chance.” Penal Law § 225.00(2). Under the Penal Law, “future contingent event” and “contest of chance” are independent ways of determining whether a particular activity is illegal gambling.

In any event, DFS games also satisfy the statutory definition of a “contest of chance,” because the outcome of these games “depend[] in a material degree upon an element of chance, *notwithstanding that skill* of the contestants may also be a factor therein.” Penal Law § 225.00(1) (emphasis added). FanDuel and DraftKings attempt to obfuscate the material effect of chance on the outcome of DFS games by offering purported expert analyses attempting to quantify the degree of chance versus skill. But these analyses miss the very essence of the statute. The relevant inquiry asks not what *amount* of chance is involved, but whether chance is *material*, notwithstanding that player skill may be a

factor. And here, the undisputed evidence proves that chance is an unavoidable and material element of DFS games. Indeed, whatever element of chance affects DFS outcomes is the same type of chance that makes sporting events and horse races unpredictable; and whatever skill DFS involves is the same type of skill exercised by sports bettors or horse-racing gamblers to control the fundamentally unpredictable outcome of their wagers. *See People v. Bruno*, 281 A.D. 941, 941 (4th Dep’t 1953) (recognizing that betting or wagering on a horse race is gambling)

At bottom, a DFS player’s ability to pick a successful fantasy team is no different from the ability of a sports bettor to pick the winning team, or the ability of a horse-racing gambler to pick a winning horse at the track. As even DraftKings’ own experts acknowledge, the fundamental “skill” exercised by all of these players is the ability to predict performances, whether of athletes or horses. (*See Schiller Affirm. Ex. 4 at ¶ 9* (acknowledging that DFS players are trying “to predict athletes’ future performance”); *id. Ex. 5 at ¶ 5* (stating that “clients test their abilities to predict athletes’ future performance”).) Some bettors, like some DFS players, can and do devote substantial time and effort into researching information that might enable them to

make more accurate or informed predictions—for example, a batter’s history against left-handed pitching, a quarterback’s experience in below-freezing weather, a horse’s past results for particular lengths or track conditions. But at the end of the day, chance remains an ineradicable and material element in all of these activities because the performance of a third party in the field, stadium, or track will determine the outcome of the game—and even with all of the “research, investigation, skill and judgment” a player can exercise, it will be “manifestly impossible for any one to ascertain or know in advance” the results of that third party’s performance. *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 169 (1904) (quotation marks omitted) (contest to determine number of cigars upon which government would collect taxes is game of chance). “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. 2d 221, 224 (N.Y. Crim. Ct. 1995).<sup>9</sup> If a game has such an element of chance it meets the definition of “gambling” under the Penal Law.

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<sup>9</sup> For similar reasons, courts have consistently recognized that  
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In Supreme Court, FanDuel and DraftKings argued for a different standard, found nowhere in the Penal Law: they contended that even a significant degree of chance would not transform an activity into gambling, and pointed to competitive events—such as marathons, spelling bees, and golf tournaments—in which the participating player is not deemed to be engaged in gambling even though chance can play a role in the outcome of the game she is playing. (See 12/11/15 Affirmation of John S. Kiernan (“Kiernan Affirm.”) Ex. C at 31-32.) But

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games such as poker are gambling even though they can involve significant skill. See, e.g., *Matter of Plato’s Cave Corp. v. State Liquor Auth.*, 115 A.D.2d 426, 428 (1st Dep’t 1985) (holding that Poker video game was gambling under Penal Law due to its similarity to poker; “[a]lthough there is a degree of skill and concentration involved in playing poker, the outcome depends in a material degree upon an element of chance”) (quotation marks omitted); *Dalton v. Pataki*, 11 A.D.3d 62, 82 n.5 (3d Dep’t 2004) (noting that term “contest of chance” “has been interpreted to include such games as ‘stud’ poker”); *People v. Dubinsky*, 31 N.Y.S.2d 234, 237 (N.Y.C. Spec. Sess. Bronx County 1941) (“There is no doubt that playing ‘stud’ poker for money is a game of chance and constitutes gambling.”); see also *Ginsberg v. Centennial Turf Club*, 126 Colo. 471, 477 (1952) (stating that poker is gambling); *Commonwealth of Pennsylvania v. Dent*, 992 A.2d 190, 192-93 (Pa. Super. Ct. 2010) (explaining that poker is a game of chance); *Mills-Jennings of Ohio, Inc. v. Dep’t of Liquor Control*, 70 Ohio St. 2d 95, 97 (1982) (citing state statute stating that poker is a game of chance); *Joker Club, LLC v. Hardin*, 183 N.C. App. 92, 97 (Ct. App. 2007) (concluding that poker is a game of chance); *Games Mgmt., Inc. v. Owens*, 233 Kan. 444, 449 (1983) (same).

there is a critical distinction between DFS games and the types of competitive events cited by the DFS operators: a participant in a competitive event has some direct influence over the outcome of the game, while a DFS player has zero influence—none at all—over the performance of third-party athletes on the field. *See State v. Am. Holiday Ass’n Inc.*, 151 Ariz. 312, 314 (1986) (explaining that contests like spelling bees are not gambling, in part, because “prizes are not awarded on the basis of the outcome of some event involving third parties”). The practice commentary to the Penal Law relies on precisely this distinction to explain why the *players* at a chess game may stake money on the outcome of the game without engaging in illegal gambling, while the *observers* of that chess game necessarily engage in illegal gambling if they place a bet on the outcome: the players are direct participants with some influence over the course of the game, while the observers have no influence at all. William C. Donnino, Practice Commentaries to Penal Law § 225.00, 39 McKinney’s Cons. Laws of N.Y. at 355 (2008) (quoting Denzer & McQuillan, Practice

Commentaries to Penal Law § 225.00, 39 McKinney's Cons. Laws of N.Y. at 23 (1967)).<sup>10</sup>

DraftKings and FanDuel also argue that DFS is a game of skill because a small percentage of DFS players win a majority of prizes. (Schiller Affirm. Ex. 2 (11/25/15 Hr'g Tr. at 74); DraftKings 12/11/15 Mem. of Law ("Mem. of Law") at 9; *see also* Kiernan Affirm. ¶ 10.) But this argument misses the point for two reasons. First, the time DFS players spend researching statistics to improve their chances of winning (*see, e.g.*, Figueredo Affirm. Ex. M ¶¶ 6-12) ultimately is no different from the time expended by professional sports bettors to improve the quality of their bets.<sup>11</sup> At bottom, the fact that considerable skill may be

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<sup>10</sup> For similar reasons, *People ex rel. Lawrence v. Fallon*, 152 N.Y. 12 (1897), relied on by the DFS operators, is inapposite. (Mem. of Law at 8; Kiernan Affirm. ¶ 8.) In that case, the court held that a horse owner did not engage in illegal gambling by entering his horse into a race with an entry fee and a prize. The horse owner retained some degree of control and influence over the performance of his horse on the track—through his choice of a trainer, a jockey, etc.—even though chance undoubtedly played some role in the outcome of the race itself. By contrast, there is no question that an outside observer watching the horse race would be engaged in gambling if he bet on the outcome of that race.

<sup>11</sup> *See* Mike Fish, *A Life on the Line*, ESPN The Magazine, Feb. 6, 2015 (discussing how one professional sports gambler made millions  
(continued on the next page)

required to routinely succeed at a game of chance—as is the case in poker—is immaterial to whether the outcome of the game is materially dependent on chance. *See Matter of Plato’s Cave Corp.*, 115 A.D.2d at 428. Second, a player’s skill in DFS, if any, is irrelevant to whether the outcome of the game hinges on a future contingent event not under the players influence or control. Even games of skill are encompassed by the Penal Law’s broad definition of contests of chance if the outcome of such games hinges on a future contingent event. *See* Penal Law § 225.00(2).

**3. DFS players risk or stake money for the chance to win cash prizes.**

There can be no serious question that a player “stakes or risks something of value” when he plays a DFS game, and that he has an “understanding that he will receive something of value” in the event he wins a DFS game. Penal Law § 225.00(2). The overwhelming majority of DFS games offered by DraftKings and FanDuel require that players

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through technical analysis and research) available at [http://espn.go.com/espn/feature/story/\\_id/12280555/how-billy-walters-became-sports-most-successful-controversial-bettor](http://espn.go.com/espn/feature/story/_id/12280555/how-billy-walters-became-sports-most-successful-controversial-bettor).

pay a fee to play, going as high as \$10,600.<sup>12</sup> (Figueredo Affirm. Ex. B ¶ 59; *id.* Ex. C ¶¶ 16, 26, 35.) As Supreme Court correctly recognized (Sup. Ct. Order at 5), that fee is “something of value” that is “risk[ed]” because players will lose that money if their fantasy team does not win.<sup>13</sup> (Figueredo Affirm. Ex. C ¶¶ 42-43.) *See Pace-O-Matic, Inc. v. N.Y. State Liquor Auth.*, 72 A.D.3d 1144, 1146 (3d Dep’t 2010) (concluding that “pay[ing] cash to play” video game was “risking something of value” under § 225.00); *Matter of MNDN Restaurant, Inc. v. Gazzara*, 128 A.D.2d 781, 782 (2d Dep’t 1987) (coin-operated video game).

Likewise, DFS players unquestionably understand that they will receive a payout if they win. FanDuel’s and DraftKings’ advertisements prominently describe large prizes in an attempt to attract more and more players. (Figueredo Affirm. Ex. C ¶¶ 4-7 (including advertisement for \$5 million in cash prizes and commercial stating payout of \$75 million

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<sup>12</sup> Both operators offer a limited number of games where a player can play for free. (Figueredo Affirm. Ex. A ¶ 53.) Those games are not the subject of the Attorney General’s action because players do not risk anything of value to participate.

<sup>13</sup> Indeed, the Penal Law defines “something of value” to include “money.” *See* Penal Law § 225.00(6).

per week); *id.* Ex. D ¶¶ 4-8.) And those cash prizes are also listed on FanDuel’s and DraftKings’ websites, so players understand exactly what they can win from these games. (Figueredo Affirm. Ex. C ¶ 26.)

DraftKings argues (Mem. of Law at 3) that DFS players do not “stake or risk” anything of value because they are simply paying “entry fees” to play the game. But the label that DraftKings uses to describe what players pay is irrelevant. *See Harris v. Econ. Opportunity Comm’n of Nassau County Inc.*, 142 Misc. 2d 980, 982 (App. Term 2d Dep’t 1989) (“It matters not that the payments for the raffles may be called contributions since there is still involved the payment of something of value for chances.”), *aff’d*, 171 A.D.2d 223, 227-28 (2d Dep’t 1991) (concluding that raffle constituted unlawful gambling where participants made \$10 “contribution” to compete for chance to win car); *see also* Penal Law § 225.00(6). A player’s payment of money to a gaming operator satisfies the statutory definition of “something of value” so long as the player stands to lose that money if a contest of chance or a future contingent event does not turn in his favor. DFS players’ payments to FanDuel and DraftKings easily satisfy this definition.

In Supreme Court, DraftKings and FanDuel relied heavily on an unpublished decision from a federal district court judge in New Jersey, *Humphrey v. Viacom, Inc.*, 2007 WL 1797648, (D. N.J. 2007), to support their argument that the payments made by DFS players are not bets or wagers. Supreme Court correctly found *Humphrey* unpersuasive and inapplicable. (Sup. Ct. Order at 7.) *Humphrey* involved season-long fantasy sports, not the *daily* fantasy sports contests at issue here. And the court in *Humphrey* was interpreting the words “bets” and “wagers” in New Jersey’s qui tam statute; it did not mention New York’s definition of gambling (which does not turn on these terms), did not consider whether fantasy sports contests turned on future contingent events, and expressly disclaimed any evaluation of whether fantasy sports is “a game of skill or chance.” *Id.* at \*8. Moreover, *Humphrey* erroneously equated fantasy sports with competitive events such as spelling bees, beauty contests, and so on. *Id.* at \*7. As discussed above, these activities are easily distinguishable because in competitive events the player has some direct control over the outcome of the competition, while in fantasy sports the player has no control or influence over the athletes on the field.

**4. Gambling is a central part of FanDuel’s and DraftKings’ business strategy and marketing.**

Aside from the language of the Penal Law and the relevant precedents, perhaps the most telling indication that FanDuel and DraftKings run gambling operations is that the companies and their executives have repeatedly described themselves as running gambling operations. The DFS operators’ advertisements regularly use the language of lotteries and jackpots to attract gamblers to spend money on their games. One advertisement for DraftKings claimed that participating in DFS is as “simple” as selecting numbers in a Powerball jackpot: “just pick your sport, pick your players, and pick up your cash. . . . It’s the simplest way of winning life-changing piles of cash.” (Figueredo Affirm. Ex. B ¶ 73.) Commercials for both operators disclaim the relevance of skill and assure prospective players that DFS is “easy and fun” and “even the novice can come in and spend 1 or 2 dollars and win 10, 20 thousand dollars.” (Figueredo Affirm. Ex. A ¶ 67; *id.* Ex. B ¶ 74; *see also id.* Ex. A ¶ 66; *id.* Ex. B ¶¶ 72-74.) DraftKings has sponsorship agreements with well-known gambling events, such as the World Series of Poker and the Belmont Stakes. (Figueredo Affirm. Ex. B ¶ 87.) And the company deliberately seeks to attract persons searching

for online gambling: the coding for DraftKings' website is embedded with popular gambling-related keywords (such as "fantasy golf betting," "weekly fantasy football betting," and "daily fantasy basketball betting") so that search engines, like Google, suggest DraftKings to persons looking for gambling websites. (Figueredo Affirm. Ex. B ¶ 89.)

Given this marketing strategy, it is not surprising that DFS has succeeded at attracting casual gamblers, such as those who play the lottery. (Figueredo Affirm. Ex. A ¶ 80.) A presentation prepared by the Fantasy Sports Trade Association noted that the large-prize contests offered by both operators were "attracting new users [and] serving as a new alternative for some ticket/lottery players." (Figueredo Affirm. Ex. A ¶ 80.) And one DraftKings executive, himself a former professional poker player, credited online poker with DFS's surge in popularity because those familiar with online poker "already know how to deposit, they understand how a bonus works, [and] they can navigate the lobby [the wager system] with ease." (Figueredo Affirm. Ex. B ¶ 88.)

Both companies openly market DFS to investors as online gambling, a form of business that promises particularly high revenues and profits. (Figueredo Affirm. Ex. A ¶ 78; *id.* Ex. B ¶ 84.) In a

presentation to investors, DraftKings described its potential for future market growth by reference to the market for casinos, poker, and “online betting.” (Figueredo Affirm. Ex. B ¶ 83.) Similarly, FanDuel in a presentation to investors compared its performance to that of Bwin.Party, whose core business is sports gambling. (Figueredo Affirm. Ex. A ¶ 79.) A research firm for the gaming industry compared DFS operators to casinos, lotteries, and sports betting in explaining that the one-billion-dollar market for DFS “pales in comparison to other comparable industries.” (Figueredo Affirm. Ex. A ¶ 78; *id.* Ex. B ¶ 84.) DraftKings’ Chief Executive Officer has publicly described the company’s business model as a “mash[-]up between poker and fantasy sports,” and has stated that the company operates in the “gambling space.” (Figueredo Affirm. Ex. B ¶¶ 81, 85.) He has also described DraftKings’ revenue generation as “almost identical to a casino.” (Figueredo Affirm. Ex. B ¶¶ 81, 85.)

Finally, FanDuel and DraftKings have acknowledged to some regulators that DFS is online gambling. In the United Kingdom, for instance, DraftKings obtained a license from the U.K. Gambling Commission in the “gambling software and pool-betting” business

category (Figueredo Affirm. Ex. B ¶ 80), and FanDuel’s application for a similar license is presently pending (*id.* Ex. A ¶ 74.) Moreover, DraftKings and FanDuel do not operate in six other states (Iowa, Arizona, Washington, Nevada, Montana, and Louisiana) where it is clear under those state’s laws that DFS is a form of online gambling.<sup>14</sup> In those states, FanDuel and DraftKings do not offer paid-entry games. And in some states where DraftKings and FanDuel do offer paid games, there is substantial uncertainty involving the legality of fantasy sports: regulators in Georgia, Florida, Michigan, and Illinois have questioned the legality of DFS in light of their own States’ prohibitions on gambling. (Figueredo Affirm. Ex. A ¶¶ 105-106, 110; 1991 Florida Att’y Gen. Op. No. 91-03 (evaluating seasonal fantasy sports).)

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<sup>14</sup> See 1991 Louisiana Att’y. Gen. Op. No. 91-14; Montana Code Ann. § 23-5-802; Iowa Code Ann. §§ 725.7(1)(a), 99B.41; Arizona Dep’t of Gaming, Gambling Tips to Remember, at 2, <https://gaming.az.gov/sites/default/files/documents/files/socialgamblingitps.pdf>; (Figueredo Affirm. Ex. A ¶¶ 103, 107-109 (Washington, Nevada)).

**5. “Traditional” fantasy sports is different from daily fantasy sports in critical respects.**

DraftKings and FanDuel contend that the Attorney General has conceded that “traditional,” season-long fantasy sports are legal, and that this concession is fatal to the Attorney General’s challenge to *daily* fantasy sports because the games are indistinguishable. (Mem. of Law at 3, 6.) This argument makes a mountain out of a molehill.

The “concession” that the DFS operators find so compelling is a single paragraph in the Attorney General’s cease-and-desist letter. (Schiller Affirm. Ex. 3.) Any fair reading of that paragraph demonstrates that the Attorney General’s distinction between daily fantasy sports and traditional, season-long fantasy sports rested on the different ways that these activities handled money. Season-long fantasy sports traditionally did not involve massive monetary payouts like the ones offered by FanDuel and DraftKings, but instead offered players “bragging rights,” which are not monetary at all (*see* Figueredo Affirm. Ex. B ¶¶ 27, 31; Schiller Affirm. Ex. 2 (11/25/15 Hr’g Tr. at 68)); or “side wagers,” which are private bets between players that the Penal Law does not prohibit, *see* Penal Law § 225.00(3) (exempting “gamb[ing] at a social game of chance”). Likewise, traditional fantasy sports operators

either took no money from players, and instead earned revenue through “advertising”; or accepted only small “administrative fees” to cover the cost of operating a website or service. (Figueredo Affirm. Ex. B ¶¶ 28-29; Schiller Affirm. Ex. 3 at 2.)

In other words, as an empirical matter, traditional fantasy sports were free or low-fee affairs (Schiller Affirm. Ex. 2 (11/25/15 Hr’g Tr. at 68)) that players engaged in primarily for the fun of the game, and that operators managed at cost rather than seeking to “profit[] principally from gambling” (*id.* Ex. 3 at 2; *see also* Figueredo Affirm. Ex. B ¶ 29.) There is simply no similarity between these long-standing social games, and the heavily promoted, multi-billion-dollar gambling operations that DraftKings and FanDuel seek to continue operating and promoting in New York.

**B. The Equities Favor Restoring Supreme Court’s Preliminary Injunction.**

The public interest weighs heavily against allowing FanDuel and DraftKings to continue operating gambling enterprises that Supreme Court found to be illegal. *See In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007). Allowing FanDuel and DraftKings to

continue accepting wagers in New York will cause irreparable harm to the public. New York's long-standing constitutional prohibition against gambling reflects a deep-seated judgment that gambling imposes great public health and economic harms unless it is specifically authorized and tightly regulated. Gambling is linked to higher rates of crime, including prostitution and white-collar crime; it has detrimental effects on families, such as increased rates of divorce and child abuse; and it harms businesses through an increase in the number of personal bankruptcies, forcing third parties to bear the cost of individuals unable to pay their gambling debts. *See* Kurt Eggert, *Truth in Gaming: Toward Consumer Protection in the Gambling Industry*, 63 Md. L. Rev. 217, 228 (2004). Gambling also has been cited as a cause of many other harmful disorders, such as alcoholism, drug addiction, over-eating, and suicide. *Id.* at 229. Internet gambling is no exception. *See* John Warren Kindt, *Testimony before the Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives*, 8 Rich. J. Global L. & Bus. 19, 20-24 (2008) (detailing harms of Internet gambling).

As a form of Internet gambling, DFS is an easy and too-accessible alternative for individuals who previously sought out online casino-type

games, such as poker, that are now banned by federal and state laws. (Figueredo Affirm. Ex. P, at 9 (stating that DFS attracts “a number of casual & professional poker players given similarities in underlying game mechanics and revenue model”).) DFS is also a substitute for those “who do not have access to sports wagering,” which is legal only in three states. (*Id.*) Both operators offer wholly unregulated access to sports wagering that requires only a computer and a few clicks of the mouse, or a mobile device and few taps of a finger. Registering and depositing funds is nearly instantaneous. (*See* Figueredo Affirm. Ex. C ¶¶ 10-15; *id.* Ex. D ¶¶ 9-10, 36-38.) The promise of easy and massive jackpots also attracts individuals in search of an alternative to the state-regulated lottery. (Figueredo Affirm. Ex. P, at 9.)

Like other forms of gambling, DFS is addictive. (Figueredo Affirm. Ex. Q ¶ 11.) The lure of large jackpots, the promise of a quick pay-out, and the relatively short interval between the placement of a bet and the determination of an outcome on a wager make DFS particularly attractive to compulsive gamblers and those at risk of gambling addiction. (Figueredo Affirm. Ex. Q ¶ 8; *see also id.* Ex. R ¶¶ 8, 10.) Moreover, the target demographic for DFS—college-aged males—is the

same demographic most at risk for developing a gambling addiction. (Figueredo Affirm. Ex. Q ¶¶ 7, 11; *see also id.* Ex. R ¶¶ 6, 9.)

Because of its similarities to traditional forms of gambling, it is hardly a surprise that DFS players have experienced gambling-related problems. One player explained that he considered suicide when he faced \$20,000 in losses from DFS. (*See* Figueredo Affirm. Ex. H.) And players have written to DFS operators to have their accounts closed or to be permanently banned because of their addiction to gambling. (Figueredo Affirm. Ex. U ¶ 23.) Granting a stay here would leave these individuals vulnerable to continued injury from DFS games, while at the same time imposing *none* of the regulations and controls that limit the harms caused by the very few forms of gambling permitted in New York.

By contrast, DraftKings and FanDuel can identify no irreparable injury that would be caused by restoring the effect of Supreme Court's preliminary injunction. First, merely shutting down their gambling enterprises in New York does not cause irreparable harm because there is no cognizable injury from being ordered to stop engaging in illegal activity. *See, e.g., United States v. Diapulse Corp. of Am.*, 457 F.2d 25,

29 (2d Cir. 1972) (recognizing “no vested interest in a business activity found to be illegal”); *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, DraftKings and FanDuel assert that they will lose some revenue that they would otherwise take from New Yorkers, but any such harm is purely economic. (Mem. of Law at 10-11; Kiernan Affirm. ¶ 12.) It is well-established that monetary harm is insufficient to establish an irreparable injury. *See, e.g., DiFabio v. Omnipoint Commc’ns, Inc.*, 66 A.D.3d 635, 636-37 (2d Dep’t 2009); *N.Y. City Off-Track Betting Corp. v. N.Y. Racing Ass’n, Inc.*, 250 A.D.2d 437, 442 (1st Dep’t 1998); *SportsChannel Am. Assocs. v. Nat’l Hockey League*, 186 A.D.2d 417, 418 (1st Dep’t 1992). Moreover, as Supreme Court concluded, “the protection of the general public outweighs any potential loss of business.” (Sup. Ct. Order at 9.)

DraftKings and FanDuel also drastically overstate the nature of any economic injury here. The sole effect of Supreme Court’s preliminary injunction is to restrict both operators from accepting bets and wagers in New York. (Sup. Ct. Order at 10.) Only five percent of FanDuel’s and seven percent of DraftKings’ active users are in the

State. (Figueredo Affirm. Ex. A ¶ 11; *id.* Ex. B ¶ 11; *id.* Ex. J ¶ 6.) The preliminary injunction thus leaves untouched the vast majority of FanDuel’s and DraftKings’ nationwide business, including in the forty-three other states where both companies accept wagers. *See Marcone APW, LLC v. Servall Co.*, 85 A.D.3d 1693, 1697 (4th Dep’t 2011) (concluding that equities favored injunction where business’s national operations would not be jeopardized because “over 90% of [company’s] business” would not be affected by injunction).<sup>15</sup>

DraftKings’ allegation that an injunction would require it to “shut down immediately” is thus a grand overstatement. (Mem. of Law at 10.) Indeed, we know that the DFS operators can survive without the New York market because FanDuel has already done so. During the pendency of the trial proceedings, FanDuel voluntarily stopped taking

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<sup>15</sup> In its motion for an interim stay, DraftKings suggests that an injunction would affect 375,000 of its DFS players and cost it ten million in revenues. (Mem. of Law at 10.) But this is only a small fraction of DraftKings overall player base. (*See* Figueredo Affirm. Ex. J ¶ 4 (admitting that DraftKings has 2.5 million players).) Moreover, DraftKings has failed to provide information concerning its overall revenues, and thus it is impossible for the Court to assess the severity of harm posed by a loss of ten million in revenues. Indeed, for some companies, such a loss would be negligible and certainly not irreparable.

bets in New York starting on November 17, 2015.<sup>16</sup> FanDuel did not go out of business, by forgoing a single-digit percentage of its business.<sup>17</sup> To the contrary, during the week of December 7, FanDuel generated more than eighteen million dollars in entry fees and reported a profit on its games for the fourteenth consecutive week since the start of the NFL season.<sup>18</sup> There is no reason to believe that DraftKings would be affected any differently by withdrawing from New York.

Finally, DraftKings and FanDuel are wrong in arguing that a stay pending appeal would maintain the status quo. (Mem. of Law at 11; Kiernan Affirm. ¶¶ 12-13.) In the past several months, DraftKings and FanDuel have experienced explosive growth. As the President of the

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<sup>16</sup> See Grove, *supra*; Gouker, *supra*.

<sup>17</sup> When a single justice of this Court granted an interim stay of Supreme Court’s preliminary injunction on December 11, FanDuel responded by immediately resuming operations in New York—thus treating the interim stay as license to operate a gambling business. See “FanDuel Accepting Payments in NY Pending Appeal,” WGRZ-TV, Dec. 21, 2015, available at <http://www.wgrz.com/story/news/2015/12/21/fanduel-accepting-payments-ny-pending-appeal/77719734/>.

<sup>18</sup> Thomas Barrabi, *Here’s What New York is Worth to FanDuel, DraftKings*, Fox Business, Dec. 15, 2015, available at <http://www.foxbusiness.com/industries/2015/12/15/here-what-new-york-is-worth-to-fanduel-draftkings/>.

Fantasy Sports Trade Association observed, as “recently as two years ago everything changed. [DFS] was close to zero, a nascent pastime.” (Figueredo Affirm. Ex. A ¶ 94.) Today, by contrast, it is estimated that DFS games will generate approximately \$2.6 billion in fees in 2015, representing a forty-one-percent growth since 2014.<sup>19</sup>

This growth of business is due in part to FanDuel’s and DraftKings’ substantial increase in advertising. In only the first ten months of 2015, both companies spent a combined \$33 million in advertising with just a single network, and in the third quarter of 2015 alone, DraftKings and FanDuel spent an estimated \$115 million on television and internet advertising. (Figueredo Affirm. Ex. A ¶ 96; *id.* Ex. B ¶ 107; *id.* Ex. T.)<sup>20</sup> This significant increase in advertising resulted in a triple-digit growth of players. (See Figueredo Affirm. Ex.

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<sup>19</sup> Darren Heitner, *The Hyper Growth of Daily Fantasy Sports is Going to Change Our Culture and Our Laws*, Forbes Sports Money, Sept. 16, 2015, available at <http://www.forbes.com/sites/darrenheitner/2015/09/16/the-hyper-growth-of-daily-fantasy-sports-is-going-to-change-our-culture-and-our-laws/>.

<sup>20</sup> Hayden Bird, *You’re Not Crazy, DraftKings Commercials Really Are on All the Time*, BostInno, Sept. 10, 2015, available at <http://bostinno.streetwise.co/2015/09/10/draftkings-advertising-stats-total-spending-in-2015-moves-to-number-one-in-time-for-nfl-kickoff/>.

I.) As DraftKings' Chief Financial Officer acknowledged, "the New York market is quickly growing" with "more than 125,000 new players from New York . . . in September 2015 alone." (Figueredo Affirm. Ex. J ¶ 6.)

In light of the enormous and ongoing growth in FanDuel's and DraftKings' businesses, a stay here would not preserve the status quo: instead, it would give the companies license to continue expanding their gambling operations in New York. With the sports seasons in full swing, DraftKings' and FanDuel's advertising mounting, and the lure of even larger jackpots, the State's "interest in protecting the public, particularly those with gambling addictions" is particularly compelling. (Sup. Ct. Order at 9.) The "equities lie in favor of shutting down an illegal, unsafe, deceptive business, rather than in allowing said business to continue to operate." *City of N.Y. v. Smart Apartments, LLC*, 39 Misc. 3d 221, 233 (Sup. Ct. N.Y. County 2013).

## CONCLUSION

For the reasons stated, this Court should deny FanDuel's and DraftKings' motions for an interim stay pending appeal of Supreme Court's December 11, 2015, order.

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December 22, 2015

Respectfully submitted,

ERIC T. SCHNEIDERMAN  
*Attorney General of the  
State of New York*  
Attorney for Plaintiff-Respondent

By: \_\_\_\_\_  
VALERIE FIGUEREDO  
Assistant Solicitor General

120 Broadway, 25th Floor  
New York, NY 10271  
(212) 416-8019  
valerie.figueredo@ag.ny.gov

STEVEN C. WU  
*Deputy Solicitor General*  
VALERIE FIGUEREDO  
*Assistant Solicitor General  
of Counsel*

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