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

THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York Plaintiff, — against — DraftKings, Inc., Defendant.	Index No. 453054/2015 IAS Part 13 Justice Manuel J. Mendez

DRAFTKINGS' MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Daily Fantasy Sports ("DFS") is a challenging and exciting form of competitive entertainment enjoyed by millions of Americans. For more than seven years, online DFS competitions have been played by hundreds of thousands of New Yorkers without any suggestion from the New York Attorney General ("NYAG") or any other law enforcement agency that their offerings constituted unlawful gambling.

Almost four years ago, in reliance on what was then the settled legality of DFS competitions, DraftKings entered the New York market and, through competitive offerings, became one of the two leading suppliers of DFS entertainment. During the last few years, several major public companies and investment firms (*e.g.*, Comcast, Fox Sports, NBC Sports, KKR) have invested heavily in FanDuel, DraftKings, and other DFS suppliers; those investments both relied on, and reflected, the settled legality of DFS competitions. Yahoo entered the DFS market, including in New York, earlier this year—again reflecting the settled legality of DFS competitions.

Relying on a conclusory expression of "concern" for consumer welfare—with no support from any statistical analysis or studies—the NYAG now seeks to declare DFS to be illegal gambling. But "concern" does not empower the Attorney General to unilaterally change the law. Any change in the law should be left to the legislature, not the NYAG.

The central merits issue in this case is whether DraftKings' customers are engaged in illegal gambling when they pay DraftKings an entry fee and compete for fixed prizes. It is undisputed that DraftKings itself does not engage in gambling—it risks nothing; its revenue depends entirely on entry fees that are not related to the outcome of any contest. The NYAG's allegation against DraftKings is that it "advances" or "profits from" the unlawful gambling of its

customers—which, of course, requires a judgment that those customers are engaged in unlawful gambling.

What constitutes "gambling" is defined by state law. Different states have different definitions of gambling, and any analysis of whether DFS constitutes gambling under New York law must begin with New York's statutory definition.

The NYAG's argument essentially tries to ignore the New York statutory definition and rely on informal discussions as to whether or not DFS is gambling in the colloquial sense. None of the comments on which the NYAG seeks to rely—not a single one—concerns whether DFS is gambling under New York's statutory definition.

Whether there are other state laws under which DFS could be considered gambling is not relevant to this case. There are also certainly colloquial uses of the term gambling that are broader than New York's definition (*e.g.*, Pete Rose is alleged to have "gambled" by betting on his own team to win, although such a wager would clearly not be gambling under New York law); those uses, too, are irrelevant to this case. What is relevant to this case, and the only definition or usage relevant to this case, is New York's legislative definition of gambling.

Under New York law it is clear that New Yorkers competing in DFS are not engaged in illegal gambling for two independent reasons. First, as a threshold matter for there to be gambling players must "stake or risk" something of value on the outcome of a contest or future event. DFS participants pay an entry fee to compete for fixed prizes. The fee is collected, and kept by DraftKings, regardless of the outcome of the competition; it enables DraftKings to recover its costs and earn a profit; and the amount of the prizes awarded are unrelated to any particular outcome. No court interpreting New York law or a similar statute has held that the paying of such an entry fee constitutes "staking or risking" the amount of that fee. In fact, courts

in New York have recognized for more than a century that "there is a distinction between the words 'bet' or 'wager' and that which is conveyed by the term 'purses,' 'prizes,' and 'premiums.'" *People ex rel. Lawrence v. Fallon*, 4 A.D. 82, 88 (1st Dep't 1896), *aff'd*, 152 N.Y. 12 (1897).

Second, for there to be gambling under New York law the contest or event at issue must be one that is a "contest of chance" or an event not subject to the "control or influence" of the player. By contrast, the undisputed evidence is that DFS competitions are contests requiring great skill and knowledge. Perhaps because of the NYAG's hasty and precipitous change of position, the NYAG has seriously misunderstood how DFS competitions operate, or has simply ignored the undisputed evidence.

In a DFS competition, players assume the role of a general manager assembling a fantasy team with which to compete in a fantasy game with teams assembled by other players. Every player's decisions regarding the composition of his team require skill and knowledge because they must account for factors such as athletes' past performance, team matchups, weather, injury reports, and salary cap, among many others. Success in any DFS competition depends on how skillfully a player assembles the player's team—which, of course, is entirely under the player's control or influence. Conclusive proof of the extent to which skill predominates in DFS competitions is the extent to which the most skilled players consistently win. Indeed, the likelihood that the results of actual DFS competitions could be due to chance is less than one in a trillion.

The NYAG recognizes and accepts that "seasonal" fantasy sports competitions are contests of skill, the outcome of which players control or influence—and hence not illegal gambling under New York law. This concession is fatal to the NYAG's attack on DFS. In fact,

DFS competitions require more skill, and entail less chance, than seasonal fantasy sports. Like seasonal players, DFS players must

- Research the teams and players involved in order to gain insight into and knowledge of the sport.
- Carefully and skillfully assemble a roster of players in an effort to score the most fantasy points.
- Account for each individual player's relative worth in order to maximize talent while conforming to the applicable limits.
- Adjust their rosters based on their knowledge of the sport in response to real-world events.

Indeed, DFS requires more skill than season-long fantasy sports competitions. For example:

DFS	**Seasonal**
No draft; players assemble lineups based purely on strategic choices; more than one player can select the same athlete	Players cannot select same athlete; random draft position affects athlete availability
Salary cap requires players to use skill and strategy to compose creative, competitive lineups	No salary cap; assembling lineup requires less skill without salary constraints
Players are able to select lineups each day (or week) from all possible athletes depending on what is currently known	Players must select lineups at the beginning of season before much is known. Because unpredictable events can change the value of team members (*e.g.*, injuries, weather), and because there is a limited ability to adjust (can select only athletes originally drafted or "free agents" that no one wanted), this reduces the role of skill

The NYAG's sudden about-face concerning the legality of DFS seeks to deprive the more than 600,000 New Yorkers who enjoy DraftKings and FanDuel DFS competitions of their right to do so. Telling citizens how they can spend their money, and what kind of entertainment they can enjoy, is a big step in a free society. When it is done, it should be done only based on

compelling facts, and it must only be done by democratically elected legislators.

The New York legislature, like the legislatures of eight other states, has made the explicit judgment that New Yorkers should be free to compete for prizes in contests in which their skill can "control or influence" the outcome. If that judgment is to be changed, it is up to the legislature to make that change, not a single public official however well-intentioned he may be.

Until the surprise issuance of a cease and desist letter on November 10, 2015, the NYAG seemed to agree. He, and his predecessors, had long accepted the legality of DFS. Moreover, for five weeks prior to November 10, DraftKings and FanDuel had furnished extensive information to, and had engaged in extensive discussions with, the NYAG concerning their operations and whether their advertising was fair and accurate; never, not once, in any of those discussions did the NYAG or any of his staff state, imply, or hint that DFS was itself illegal gambling. Whatever the policy reason, if any, for the NYAG's sudden about-face, it cannot overcome the fact that the New York statutes permit New Yorkers to compete for DFS prizes and if this right is to be taken away from them it is up to the legislature, not the NYAG.

STATEMENT OF FACTS

A. DraftKings and Fantasy Sports Contests

DraftKings provides an online platform for individuals to enter DFS contests with friends, family, or other fantasy-sports enthusiasts. Affidavit of Jason Robins, attached hereto as Exhibit A ("Robins Aff.") ¶ 3. DFS games have been offered to the public at least since the launch of Fantasy Sports Live in June 2007. Since then, other companies have entered the DFS marketplace, including FanDuel, which was founded in or about 2009. *Id.* ¶ 4. DraftKings has offered DFS since approximately April 2012. *Id.* ¶ 3.

Seasonal fantasy sports—which the NYAG explicitly endorses as legal—have existed for

decades and provide fans with an opportunity to assemble a fantasy lineup of real-life athletes to compete against the fantasy lineups of other DFS players or contestants. Seasonal fantasy contests generally span the entire season of a particular sport—typically four to six months. *Id.* ¶ 5.

DFS is a natural outgrowth of season-long fantasy sports. Like season-long contests, DFS gives sports fans the opportunity to use knowledge and skill to strategically assemble a fantasy team of real-world athletes. *Id.* ¶ 9. However, unlike season-long contests, DFS games (a) last one day or one week (depending on the sport), rather than for many months, (b) impose a "salary cap" that requires DFS players to balance potential team members' value against their cost, and (c) permit DFS players to pick any real-world athletes (subject to the salary cap) so that multiple DFS players can select the same athletes, rather than utilizing a draft that prevents players from selecting athletes that another player has already chosen. *Id.* ¶¶ 5, 8-9. As compared to season-long contests, these differences increase the sophistication of DFS, reduce elements of chance, and increase each player's ability to control his degree of success.

DraftKings now offers DFS games in 44 states. *Id.* ¶ 3. It offers a variety of contest types (for example, large-field tournaments, head-to-head contests, private leagues) in eleven different sports and e-sports. *Id.* ¶ 3. DraftKings customers pay an entry fee to enter cash contests, but pay nothing to play in free contests. Winners of both types of contests receive prizes. The prize structure is always known ahead of time when customers decide to pay an entry fee and enter a contest, and does not change. *Id.* ¶¶ 12-13.

DraftKings customers' lineups are comprised of between five and eleven real-world athletes. The success of those lineups is determined by the number of "fantasy points" earned, corresponding to the performance statistics of the real-world athletes in numerous categories

across multiple real-world sporting events. *Id.* ¶ 8. DraftKings assigns a fictional "salary" to each real-world athlete that a DFS player may select to his fantasy team, as well as a "salary cap" that limits the sum of the salaries of athletes that can comprise a DFS player's lineup. *Id.* ¶ 9. The same salary cap and fictional "salaries" of real-world athletes apply consistently to all DFS players, which significantly increases the skill required to participate and succeed. *Id.* DFS players must consider the expected value of each real-world athlete, set against the constraint of the salary cap, the overall composition of the roster, and the opportunity cost of other real-world athletes who are not selected. *Id.* ¶ 10.

While DraftKings sets the salaries and salary caps, it has no control over the fantasy lineups selected by its customers, or the results its customers achieve. *Id.* ¶ 14. Nor do DraftKings' revenues or profits depend on such results. *Id.* ¶ 13.

B. DraftKings' Contests Are Complex Games of Skill, the Outcome of Which Participants Control; They Are Not Contests of Chance and Are Not Gambling under New York Law.

There is overwhelming, undisputed evidence that DraftKings' contests are complex games of skill. To begin, the skill set required to play DFS successfully has nothing to do with correctly predicting the ultimate win-loss outcome or margin of victory of a real-world sporting event, such as a football or basketball game. Robins Aff. ¶ 11. The results of DraftKings' fantasy contests are not tethered to the outcomes or margins of victory of real-world sporting events. *Id.* DraftKings customers do not place bets on events outside of their control; rather, they pay entry fees to participate in a fantasy contest against other DFS players in which they each compete by selecting fantasy lineups of athletes that, in the real world, compete against one another rather than on the same team. *Id.* ¶¶ 5, 8. It is the combination of multiple performance statistics for each of the real-life athletes in the DFS player's fantasy lineup that determines DFS winners and losers.

Furthermore, the restraints of the salary cap, coupled with the large number of real-world athletes and statistical categories for which fantasy points are earned provide a nearly infinite number of possible lineups and results, making DFS completely unlike the binary outcomes in sports proposition bets (win/loss, over/under). *Id.* ¶ 11. Instead, the relevant skill-set involves accurately projecting the performance of individual athletes and strategically assembling individual athletes into optimal lineups given the constraints of the salary cap. *Id.* ¶¶ 9-10.

Leading experts have repeatedly confirmed the skill-based nature of DFS games. For example, Ed Miller—an MIT-trained engineer and noted author of gaming strategy books—and Daniel Singer—the leader of McKinsey & Company's Global Sports and Gaming Practice—penned an article published by Sports Business Daily entitled: "For daily fantasy sports operators, the curse of too much skill." Affidavit of Gregory Karamitis, attached hereto as Exhibit B ("Karamitis Aff.") ¶ 21. Among Miller and Singer's conclusions was the finding that in the first half of the 2015 MLB season, just 1.3% of players won 91% of contest winnings. *Id.* Miller and Singer also identified two primary ways in which skilled DFS players succeed over unskilled players: (1) skilled players employ lineups that create covariance by choosing a combination of athletes intended to produce the extreme DFS outcomes necessary to win a large field tournament; and (2) skilled players use sophisticated models to optimize their lineups by projecting which athletes are most likely to under- or over-perform relative to their salary on a given day. *Id.* ¶ 22.

To help measure the degree of control DFS players exercise over their outcomes, DraftKings engaged Gaming Laboratories International ("GLI") to conduct sophisticated computer simulations involving DraftKings contests in MLB, NBA, NHL, and NFL. *Id.* ¶¶ 14-15. GLI tested the performance of DraftKings lineups generated at random—subject only to the

constraint that at least 90% of the salary cap must be used—compared to the results achieved by top-earning DraftKings customers. In each case, skilled DFS players dramatically outperformed the computer simulations in head-to-head contests: 83% of the time in MLB, 96% of the time in NBA, 82% of the time in NHL, and 84% of the time in NFL. *Id.* ¶¶ 16-17.

DFS is also fundamentally different from other games that have previously prompted debates about which the issue of skill versus chance, such as poker. Unlike poker, where players start each hand on a dramatically unequal playing field based on the cards they are randomly dealt, in DFS, each player starts in the exact same position and has complete and total control over the lineup the DFS player chooses, within the consistent constraint of the salary cap. *Id.* ¶ 14. The fact that a DFS player has no control over athlete injuries does not make DFS more subject to chance than the season-long fantasy sports games the NYAG has determined to be skill-based and lawful under New York law. *Id.* ¶ 13. It is also no different from an athlete's inability to control the chance of *his own* injury in a real-world sporting event.

In fact, DFS players are able to select lineups each day (or week) from all possible athletes based on the current state of play. By comparison, seasonal fantasy sports players must select lineups at the beginning of a season with the greater chance that unpredictable events (*e.g.*, injuries, weather) will change the value of an athlete with only a limited ability to adjust because alternate athletes are already taken. *Id.*

In addition to reducing the impact of injured and underperforming athletes, DFS also allows players to refine their skills every week and improve the degree to which they learn from mistakes, develop their skills, and refine their strategic thinking between contests over the course of one real-life season.

C. DraftKings' Cooperation with the NYAG's Office

Since it began operating in New York in 2012, DraftKings has advertised on broadcast

television and radio stations and entered into sponsorship agreements with some of New York's major sports teams. Robins Aff. ¶ 7. Despite operating throughout New York for the past three years, openly and transparently, no state prosecutor has ever brought gambling charges against DraftKings or questioned the legality of DraftKings' games. *Id*. ¶ 16.

On or about October 6, 2015, the NYAG publicly announced that he was reviewing DFS. That same day, the NYAG sent a letter to DraftKings requesting that DraftKings respond to certain information requests. *Id.* ¶ 17. The NYAG's inquiry and letter followed unsubstantiated press reports alleging that a DraftKings employee, Ethan Haskell, may have used nonpublic DraftKings data to gain an unfair advantage in a contest that he entered, and won, on FanDuel—an allegation that was later proven to be incorrect. *Id*. ¶ 17.

After receiving the letter, counsel for DraftKings immediately contacted the NYAG and communicated DraftKings' desire to cooperate fully. *Id.* ¶ 18. Between October 9 and 29, 2015, counsel for DraftKings met with representatives of the NYAG on multiple occasions and provided documents and written responses to the NYAG's requests. *Id.* Throughout DraftKings' cooperation and dialogue with the NYAG, the NYAG never once indicated that he was investigating DraftKings' compliance with gambling laws. *Id*.

D. The November 10, 2015 Cease-and-Desist Letter and Initiation of Legal Proceedings

On November 10, 2015, the NYAG issued and publicly released a cease-and-desist letter ("NYAG Letter," Affirmation of Joshua I. Schiller Ex. 1) with a "demand" that DraftKings "cease and desist from illegally accepting wagers in New York," asserting that he intended to file suit "to enjoin repeated illegal and deceptive acts and practices" and purporting to provide DraftKings a five-day period to explain why he "should not initiate any proceedings." NYAG Letter at 1, 3-4.

In the NYAG Letter, the NYAG concedes that "the legality of traditional fantasy sports has never been seriously questioned in New York" (NYAG Letter at 2), and in his complaint he concedes that fantasy sports contests are "enjoyed and legally played by millions of people nationwide." Compl. ¶ 1.

On November 13, 2015, DraftKings filed suit in this Court seeking, among other things, declaratory and injunctive relief against the NYAG. On November 16, 2015, DraftKings filed a motion for a temporary restraining order and a preliminary injunction in order to preserve the status quo. That same day, the Court denied the motion for a temporary restraining order and set a November 25, 2015 hearing date for the motion for a preliminary injunction. On November 17, 2015, the NYAG initiated this action and filed the instant motion for a preliminary injunction, seeking to enjoin DraftKings' operations in the State of New York. The cases and motions have been consolidated for hearing on November 25, 2015.

LEGAL STANDARD

A preliminary injunction is a "drastic remedy and will only be granted if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers." *Koultukis v. Phillips*, 285 A.D.2d 433, 435 (1st Dep't 2001). Indeed, because it is "a drastic remedy," it "should be used sparingly." *Fischer v. Deitsch*, 168 A.D.2d 599, 601 (2d Dep't 1990). "In order to obtain a preliminary injunction, the moving party must demonstrate (1) likelihood of success on the merits; (2) irreparable injury absent the injunction; and (3) a balancing of the equities in its favor." *Matter of 35 N.Y. City Police Officers v. City of New York*, 34 A.D.3d 392, 394 (1st Dep't 2006). Conclusory allegations will not satisfy a movant's burden: "Proof establishing these elements must be by affidavit and other competent proof, with evidentiary detail." *Scotto v. Mei*, 219 A.D.2d 181, 182 (1st Dep't 1996). Where the issue being

resolved is one of first impression, a preliminary injunction upending the *status quo* is inappropriate. *See Tucker v. Toia*, 54 A.D. 2d 322, 326 (4th Dep't 1976) (issuing preliminary injunction to *preserve the status quo* on an issue of first impression "while the legal issues are determined in a deliberate and judicious manner").

ARGUMENT

Five of the NYAG's claims, and the vast majority of its argument, depend on the premise that DFS games involve "gambling" as that term is defined by New York law. Specifically, the NYAG charges DraftKings with violating the State Constitution's prohibition of "gambling" and "bookmaking" (Count One, Compl. ¶¶ 126-30; N.Y. Const. art. I, § 9); "knowingly advancing and profiting from unlawful gambling activity" (Counts Two and Three, Compl. ¶¶ 131-40; N.Y. Penal Law §§ 225.05, 225.10); and possessing materials related to "bookmaking," defined as "advancing gambling activity" (Counts Four and Five, Compl. ¶¶ 141-52; N.Y. Penal Law §§ 225.00(9), 225.15, 225.20). As discussed below, those charges fail because DFS games do not meet New York's statutory definition of "gambling."

The NYAG also alleges fraudulent conduct or misrepresentations in violation of Executive Law § 63(12), Business Corporations Law § 1303, and General Business Law §§ 349 and 350. Counts Six, Seven, Eight, and Nine, Compl. ¶¶ 153-69. To the extent that these claims are premised on an alleged failure to disclose that DraftKings' contests are gambling, those claims fail for the same reason that the claims directly alleging gambling fail.

The NYAG's reliance on the New York Constitution is misplaced. First, Article I, Section 9 prohibits only the *legislature's* authorization of "gambling" or "bookmaking"; it does not impose any constraints on individuals. Second, the Constitution's prohibition applies to the act of gambling itself; it does not prohibit "advancing" or "profiting from" gambling. But

DraftKings itself is not alleged to engage in gambling; it is alleged to facilitate gambling for its customers. Therefore, except for the misrepresentation charges, *all charges depend on the NYAG's ability to show that DFS is "gambling" under New York Penal Law § 225.00*.

The majority of allegations in the NYAG's complaint and brief ("NYAG Br.") seek to distract the Court from this sole dispositive question. Allegations involving the legal status or characterization of DFS in jurisdictions *other than New York* with different definitions of "gambling" are entirely irrelevant to whether DFS is "gambling" under New York law. The fact that "DraftKings has taken the necessary regulatory steps to operate as a legitimate online sports betting company" in the United Kingdom (Compl. ¶ 80), or that other U.S. states have decided, through legislative or regulatory action, to define DFS as "gambling" (*e.g.*, *id.* ¶ 118), has no bearing whatsoever on the question of how *New York* defines that term.[1] That the laws and regulations of different states and countries vary is unremarkable—and does not alter *New York's* legislative judgment, like the legislative judgments of many other states, to exempt "games of skill" from its definition of "gambling."

Similarly, to convince the Court that DFS is illegal, the NYAG relies heavily on gambling rhetoric or "betting slang," including cherry-picked excerpts from DraftKings' alleged public statements (*e.g.*, Compl. ¶ 56 ("DraftKings' cut constitutes a 'vig,' betting slang for the charge taken by a sports bookie")). The NYAG goes so far as to quote an unnamed "DFS CEO" who compared DFS to "a 'sports betting parlay on steroids'" (Compl. ¶ 7) with the insinuation that the comment came from DraftKings—even though a simple Internet search reveals that the

[1] For instance, the United Kingdom's gambling statute covers a broad category of "gaming" and defines "game of chance" to include "(i) a game that involves both an element of chance and an element of skill, (ii) a game that involves an element of chance that can be eliminated by superlative skill, and (iii) a game that is presented as involving an element of chance." Gambling Act, 2005, c. 19 § 6 (Eng.). This expansive definition is plainly inconsistent with New York law, which deliberately distinguishes between games where skill predominates and games where chance predominates.

speaker was a former CEO of a company called DraftDay, which the NYAG has not targeted. But no amount of pejorative terminology can change the fact that DFS does not meet New York's *legal definition* of "gambling," which does not apply to games of skill. *See People v. Li Ai Hua*, 24 Misc.3d 1142, 1146 (Crim. Ct. Queens County 2009) (a game of skill, it "would not constitute gambling no matter the surrounding circumstances").

Further obscuring the only legally relevant issue of whether DraftKings' customers are engaged in illegal gambling under New York law, the NYAG, in both court filings and a media campaign, has sought to discredit DraftKings and FanDuel with inflammatory attacks that are both untrue and legally irrelevant. For example, the NYAG has represented that DraftKings' CEO "explained" on reddit.com that DraftKings' DFS games "exist in the 'gambling space,'" NYAG Br. 3, 8; Attorney General Eric Schneiderman, *Daily fantasy sports bluff the law in N.Y.*, N.Y. DAILY NEWS, Nov. 19, 2015, Schiller Affirmation Ex. 4. As is clear from the context, the informal comments the NYAG references had nothing to do with the legal issue in this case. More important, the NYAG's representation of what DraftKings' CEO purportedly said—which the NYAG has repeated in both his litigation pleadings and in the news media—is demonstrably false. The full post readily reveals that this comment did not in any way "explain" or "suggest" that DraftKings "exists" or "operates" in the "gambling space." Just the opposite: the statement, which does not mention DraftKings at all, was intended to highlight the *difference* between DraftKings and companies that offer gambling activities and the emphasis DraftKings places on earning customers' trust:

> 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.

Affirmation of Justin Wagner in Support of NYAG's Motion for Preliminary Injunction Ex. L. The NYAG's need to rely on distorted evidence in the media and in this Court confirms the weakness of the NYAG's case. The public extra-judicial use of such distorted evidence (as well as allegations in the media that DraftKings seeks "to evade the law" and "fleece sports fans") to pressure vendors, partners, and customers to stop doing business with DraftKings is improper.

I. THE NYAG'S COMPLAINT WILL FAIL ON THE MERITS.

To establish a likelihood of success on the merits, the NYAG must make a "*prima facie* showing of a reasonable probability of success." *Weissman v. Kubasek*, 112 A.D.2d 1086, 1086 (2d Dep't 1985). The NYAG falls far short of meeting this *prima facie* burden because (1) DraftKings' DFS contests are not "gambling" as New York law defines that term; and (2) the NYAG cannot state a claim for fraud, deception, or false advertising under New York law.

A. New York's Definition of "Gambling" Does Not Cover Fantasy Sports.

"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). DraftKings' DFS games do not constitute "gambling" for two independent reasons, each sufficient to defeat the NYAG's claims: (1) the only payments made by DFS players are entry fees, which are not "stake[d] or risk[ed]" upon the outcome of any single future contingent event; (2) the outcome of a DFS player's game is not dependent upon "a contest of chance" or a "future contingent event not under his control or influence."

1. Because DFS Customers Pay Only Entry Fees That Are Not "Staked or Risked" upon a Particular Outcome, DraftKings' Customers Are Not "Gambling" under New York Law.

Paying an entry fee to compete for a prize does not amount to "gambling"—a fact the

NYAG does not dispute. A game is "gambling" under New York law only if the player "stakes or risks" his payment "upon the outcome of a contest of chance or a future contingent event not under his control or influence." N.Y. Penal Law § 225.00(2). As one court has explained in affirming the legality of fantasy sports contests under a state gaming statute nearly identical to New York's:

> Courts have distinguished between *bona fide* entry fees and bets or wagers, holding that entry fees do not constitute bets or wagers where they are paid unconditionally for the privilege of participating in a contest, and the prize is for an amount certain that is guaranteed to be won by one of the contestants (but not the entity offering the prize).

Humphrey v. Viacom, Inc., No. 06-cv-2768, 2007 WL 1797648, at *8 (D.N.J. June 20, 2007). Tellingly, the NYAG's memorandum does not address *Humphrey* at all.

New York courts have recognized for more than a century that "there is a distinction between the words 'bet' or 'wager' and that which is conveyed by the term 'purses,' 'prizes,' and 'premiums.'" *Fallon*, 4 A.D. at 88. As *Fallon* explained,

> a bet or wager is ordinarily an agreement between two or more that a sum of money, in contributing which all agreeing take part, shall become the property of one of them on the happening in the future of an event at present uncertain. There is in them an element which does not enter into the purse, prize, or premium, namely, that each party to the bet gets a chance of gain from the others, and takes a risk of loss of his own to them. One or the other thing must necessarily occur. *A prize or premium is ordinarily something offered by a person for the doing of something by others in a contest in which he himself does not enter. He has not a chance of gaining the thing offered, and, if he abides by his offer, he must lose it, and give it to some one of those who contest for it*.

Id. (emphasis added). This distinction between unlawfully wagering or risking money and lawfully paying an entry fee to compete for a prize "is clear, and it has been adopted, so far as we can discover, in every case in which the question has been raised in this country." *Id.* at 88 (citing cases).

The entry fees that DraftKings charges its customers are paid unconditionally for

participating in DraftKings' contests. Robins Aff. ¶ 13. DraftKings retains these payments, which compensate it for its work and expenses in providing DFS games to its customers, regardless of the outcome of any contest or future event. *Id.* DraftKings fixes and announces the prize in advance of each DFS contest so that this information is known to each player before he pays his entry fee. *Id.* ¶ 12. DraftKings never competes in the contests it offers; it serves only as a neutral third-party administrator. *Id.* ¶ 6. In fact, DraftKings loses money on certain contests where the fixed prize ends up being greater than the amount of entry fees collected. Karamitis Aff. ¶ 27. Thus, the mere fact that DraftKings customers pay an entry fee to participate in some DFS games does not make the payments a "bet' or "gambling transaction." *Fallon*, 4 A.D. at 89.

Given these undisputed facts about DraftKings' unconditional entry fees and preset prize structure, the NYAG's repeated comparison of DFS to horse racing (*e.g.*, NYAG Br. 25) is absurd. Betting on horse racing, or *pari-mutuel* betting, is a system in which (1) bettors pay a wager of their choosing that is staked against the outcome of a horse race, (2) the amount of the prize or "pool" and the odds of winning fluctuate up to the start of the race depending on how many bettors participate and how much they wager, (3) bettors' wagers are returned to them (along with any profits) if they win, and (4) a bookmaker's cut depends how many bettors participate and how much they wager. None of these four features is present in DFS.

The only court to address the legality of fantasy sports applied these principles and concluded that fantasy sports are *not* "gambling" for this very reason. In *Humphrey*, the court considered a *qui tam* suit against the operators of a fantasy sports league in which participants paid an "entry fee" and competed for "prizes" that were "awarded to each participant whose team wins its league." 2007 WL 1797648, at *2. The case arose under the law of New Jersey—a state with gambling statutes nearly identical to New York's. *See* N.J. Stat. Ann. § 2C:37-1(b)

("'Gambling' means staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the actor's control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome."). In assessing the same type of entry fees as DraftKings charges, the court properly concluded:

> As a matter of law, the entry fees for Defendants' fantasy sports leagues are not 'bets' or 'wagers' because (1) the entry fees are paid unconditionally; (2) the prizes offered to fantasy sports contestants are for amounts certain and are guaranteed to be awarded; and (3) Defendants do not compete for the prizes.

Humphrey, 2007 WL 1797648, at *9.

Because DraftKings' entry fees are paid unconditionally to participate in contests for predetermined prizes in which DraftKings itself does not compete, the NYAG cannot establish that DraftKings' customers "stake or risk something of value." The NYAG therefore cannot establish that DraftKings' operations meet the first prerequisite of New York's definition of "gambling."

2. Because DFS Is Not "a Contest of Chance" and DFS Players Have "Control or Influence" over Game Outcomes, DraftKings' Customers Are Not "Gambling" under New York Law.

New York defines a game as "gambling" only if its outcome is dependent "upon the outcome of a contest of chance or a future contingent event not under his control or influence." N.Y. Penal Law § 225.00(2). Neither prong of this prerequisite is met here.

Contest of chance. New York courts distinguish between contests of chance, which are generally unlawful, and contests of skill, which are generally lawful. The NYAG will be unable to succeed on the merits for the independent reason that DFS is not "a contest of chance." "'Contest of chance' means 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." N.Y. Penal Law § 225.00(1).

To begin, the NYAG asserts that this statutory definition "rejected an earlier approach that required a court to weigh whether chance or skill was the 'dominating element.'" NYAG Br. 23. He is wrong. Since the legislature enacted Section 225.00(1) in 1965, courts and commentators have continued to apply the dominating element test, treating the "dominating element" and "material element" tests as two sides of the same coin. For example, pre-1965 authority, including *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 170-71 (1904), has been repeatedly relied on and quoted in post-1965 decisions. *See Li Ai Hua*, 24 Misc.3d at 1145 ("The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game? It follows that wagering on the outcome of a game of skill is therefore not gambling as it falls outside the ambit of the statute.") (2009 decision citing *Lavin*); *see also People v. Stiffel*, 61 Misc.2d 1100, 1100 (2d Dep't 1969) (citing *Lavin*). Current New York law in summarized in Criminal Law in New York § 31:4 (4th ed. 2014) ("Some games involve both an element of skill and chance. To determine if the game is one of chance, the court will look at the dominating element that determines the result of the game." (quotation marks omitted)).

Moreover, that there is no "material degree" of chance in the games DraftKings offers its customers is established by (1) a common sense look at how DFS games are played and won; (2) the fact that DFS is analogous to other games of skill and fundamentally different from games of chance as interpreted by New York courts; and (3) the fact that DraftKings' most skilled players consistently win the vast majority of prizes.

First, a basic understanding of how DFS is played demonstrates that skill inherently predominates in determining the outcome. The premise of fantasy sports—whether seasonal or daily—is to give the player the opportunity to play the role of a team's general manager. *See*

Like a general manager, a DFS player makes selections for each athlete position on a virtual sports team by analyzing data points including scouting reports, past performance statistics, injury reports, and game matchups. Karamitis Aff. ¶¶ 10–11; *see also* Affidavit of Peter Jennings, attached hereto as Exhibit C ("Jennings Aff.") ¶¶ 6-11. Success at DFS games is determined by how skillfully a player assembles his lineup within the overarching constraint of a salary cap that mitigates chance-based variables. A successful fantasy player must exercise extensive skill to research, prepare, and develop a strategy accounting for variables including weather, injury reports, athletes' statistical history, coach and athlete strategic tendencies, athlete consistency, game psychology, team and athlete matchups, and salary cap, among others. Karamitis Aff. ¶¶ 10–11; Jennings Aff. ¶¶ 6-11. Each DFS player's particular assemblage of athletes—not the performance of any one real-world athlete or team—dictates how many "fantasy points" a DFS player will amass.[2] As the *Humphrey* court explained:

> The success of a fantasy sports team depends on the participants' skill in selecting players for his or her team, trading players over the course of the season, adding and dropping players during the course of the season and deciding who among his or her players will start and which players will be placed on the bench.

Humphrey, 2007 WL 1797648, at *2. These types of skill factors are present and determinative of success in DFS as in seasonal fantasy sports.[3]

Second, the skill-based nature of DFS games and the subordinate role of chance make DFS analogous to other games considered "games of skill" by New York courts and fundamentally different from those considered "games of chance." For instance, video games have been deemed games of skill because they "depend upon eye-hand coordination, reflexes,

[2] NYAG Br. at 2. By NYAG's argument, Olympic swimmers—whose winning times often differ by thousands of a second—are equally subject to the whims of chance.

[3] As discussed *infra* Part I.B, the NYAG's claim that DFS is illegal while seasonal fantasy sports are legal is arbitrary and nonsensical.

muscular control and above all, concentration. Proper timing in aiming and firing is essential. The eyes and hands of an operator of a video game are in constant motion. The player must continually adapt to instantaneous changes in the position of his laser bases relative to the location of the invader projectiles." *Wnek*, 107 Misc.2d at 357. The mental skill involved in assembling a DFS team based on constantly shifting information and adaptation to constraints and changing conditions is analogous to the coordination involved in video games. By contrast, card games like video poker are games of chance because "'the outcome depends in a material degree upon an element of chance,' *i.e.*, the draw of the cards." *Plato's Cave Corp. v. State Liquor Auth.*, 115 A.D.2d 426, 428 (1st Dep't 1985), *aff'd*, 68 N.Y.2d 791 (1986). Unlike card games, where cards are randomly distributed, there is no random distribution element in DFS to introduce a "material degree" of chance. The composition of a player's fantasy lineup is not a random "draw"; it is carefully determined using skill.

Professor Abraham J. Wyner, Professor of Statistics and Chair of the Undergraduate Statistics Program at the University of Pennsylvania's Wharton School of Business, compared DFS to other games using three criteria to analyze whether DFS is skill-based or skill-dominant (*i.e.*, a game "in which chance does *not* play a material role in the outcome"). Affidavit of Prof. Abraham J. Wyner, attached hereto as Exhibit D ("Wyner Aff.") ¶ 14. Specifically, Prof. Wyner considered that DFS has the three hallmarks of skill-based games: "depth" (material to be mastered and learned), "complexity" (numerous decisions, strategies, and choices), and "differential impact" (differing levels of proficiency among the players leading to different levels of success). *Id.* Poker, in contrast, falls short on two of the three criteria. *Id.* ¶ 19. While the game may be complex, a single hand is not complex enough—nor differentiated enough based on players' levels of skill—to qualify poker as a skill-based game. *Id.*

Prof. Wyner illustrated how even games of skill are not wholly devoid of chance. Chess, for example, is undisputedly skill-based even though "a combination of internal chance and external randomness" could affect the outcome of a match between two equally skilled opponents—including the "choice of opening moves" and "the simple selection of which player moves first." *Id.* ¶ 16. Ultimately, given the amount of study required, the massive variety of choices presented to players, and statistical studies showing that differently skilled players will have different levels of success, Prof. Wyner concluded that "DFS is deep and complex, and players with the most skill will usually and consistently defeat players with less skill." *Id.* ¶ 27. Thus, while there is a "chance component in certain DFS contents, DFS satisfies all the necessary and sufficient requirements for skill-based games in which the outcome does not depend in a material degree on chance." *Id.*

Third, the actual outcome of DraftKings games among DFS players of varying skill demonstrates conclusively that there is no material degree of change in DFS contests. Because a DFS player's skill level predominantly determines the outcome, the most skilled DFS players reap the greatest rewards. The NYAG's own investigation revealed that "the top one percent of DraftKings' winners receive the vast majority of the winnings." NYAG Letter at 2; *see also* Compl. ¶ 91 ("a small percentage of professional gamblers manage to use research, software, and large bankrolls to extract a disproportionate share of DFS jackpots"). One percent of DraftKings' players win most of the prizes not because the outcomes of games are arbitrary, but because the players vary in degree of skill. "Differing skill levels, however, do not transform the game into a contest of chance." *People v. Hunt*, 162 Misc.2d 70, 73 (Crim. Ct. N.Y. County 1994). In fact, this result is strikingly incompatible with outcomes that depend on chance to a

"material degree."[4]

Professor Daniel L. Rubinfeld, Professor of Law at New York University Law School and Robert L. Bridges Professor of Law and Professor of Economics (Emeritus) at the University of California, Berkeley, analyzed the issue from a quantitative perspective. He began by noting that if DFS involved substantial skill (which differed across players), then "it is very likely that some players will substantially and persistently outperform other players." Affidavit of Prof. Daniel L. Rubinfeld, attached hereto as Exhibit E ("Rubinfeld Aff.") ¶ 11. To that end, Prof. Rubinfeld ran a simulation showing that the "large observed differences in performance across DraftKings clients are consistent with some players persistently out-performing other players over time." *Id.* ¶ 12.

Prof. Rubinfeld concluded "based on the evidence in the record at this point that while there is an element of chance in DFS games offered by DraftKings, as a general rule, winning a prize depends heavily on skill." *Id.* ¶ 8.

In a study examining the win percentage of 28 of DraftKings' most successful players, Professor Zvi Gilula, former Chair of the Department of Statistics at Hebrew University and current Visiting Professor of Statistics and Econometrics at the University of Chicago, concluded that "it is overwhelmingly unlikely that the performance of any exceptionally performing client

[4] In criticizing this "disproportionate" result, the NYAG confuses "chance" in the probabilistic sense with "chance" meaning randomness or arbitrariness, as used in the New York Penal Law. As one court explained, "one could say that an amateur tennis player facing a title-holding champion may not have a 'chance' of winning. In that context, the term 'chance' denotes the probability of winning that the amateur has, not that tennis is a game of chance as opposed to a game of skill. Similarly, the People's argument, that because the player has a one in three chance of winning, the game is one of chance, rests on a definition of the term 'chance' as it relates to probabilities. As almost all games, involving either skill or chance, or a combination thereof, can be reduced to a statistical probability, this argument does not address the issue before the court." *Hunt*, 162 Misc.2d at 73.

See also Wnek Vending & Amusements Co. v. City of Buffalo, 107 Misc.2d 353, 357-58 (Sup. Ct. Erie County 1980), *abrogated on other grounds by Plato's Cave Corp. v. State Liquor Auth.*, 68 N.Y.2d 791 (N.Y. 1986) (finding video game to be a game of skill because, *inter alia*, "a skillful player who had played SPACE INVADERS at least 20,000 times scored over 7,500 points in less than five minutes and still had the original three laser bases plus the one extra laser base he received after 1,500 points. Another player who never operated a SPACE INVADER game scored only 20 points in 15 seconds before the game ended.").

could be due to chance." Affidavit of Prof. Zvi Gilula, attached hereto as Exhibit F ("Gilula Aff.") ¶ 17. For example, one player considered in Prof. Gilula's study played in 70 MLB fantasy contests and won in all of them. *Id.* Ex. 1 at 9. The probability that such a record could occur by chance is "less than one in one million raised to the power of 50" (*i.e.*, less than 1 divided by 10^{300}). *Id.* ¶ 16. Based on these findings, Prof. Gilula concluded that "chance is overwhelmingly immaterial in the probability of winning the fantasy games offered by DraftKings." *Id.* ¶ 17. Similarly, Ed Miller (an MIT-trained engineer and noted author of gaming strategy books) and Daniel Singer (the leader of McKinsey & Company's Global Sports and Gaming Practice), concluded that just 1.3% of players won 91% of DFS player profits in the first half of the 2015 MLB season, demonstrating that DFS suffered from "the curse of *too much* skill."[5] Karamitis Aff. ¶¶ 21-22 (emphasis added).

Control or influence. This lack of "control or influence" prong of the definition for "gambling" applies to passive games, such as roulette or sports betting, in which the player's success depends on events entirely outside his control or influence. It does not apply to active games in which the participant is actually playing the game. The original commentary to Section 225 makes this point explicit by distinguishing between *playing* a game of skill for a reward and betting on the *outcome* of a game of skill:

> One illustration of the definition of "gambling," drawn from the commentaries of Judges Denzer and McQuillan, is the chess game between A and B, with A and B betting against each other and X and Y making a side bet. Despite 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. The same is not true of A and B, who are pitting their skills against each other and thereby, have a material influence over the outcome; they, therefore, are not "gambling."

[5] Miller and Singer identified two important ways in which skilled users succeed: they employ lineups that take advantage of covariance by choosing multiple players from the same real-life team in order to produce the extreme outcomes that are necessary to win an occasional "big score;" and they exploit salary cap pricing inefficiencies by using sophisticated models to optimize their lineups by projecting which players are most likely to under- or over-perform relative to their salary on a given day. *See* Karamitis Aff. ¶ 22.

William C. Donnino, Practice Commentary, McKinney's Penal Law § 225.00 (2015) (citing Denzer and McQuillan, Practice Commentary, McKinney's Penal Law § 225.00, p. 23 (1967)); s*ee also People v. Jun Feng*, 34 Misc.3d 1205(A), 2012 N.Y. Slip Op. 50004(U), at *3 (Crim. Ct. Kings County Jan. 4, 2012) (discussing same). It is worth noting that although chess is certainly a game in which skill predominates, the player that goes first has a significant advantage—and the flip of a coin determines which player goes first. Wyner Aff. ¶ 16.

The NYAG alleges that DFS is "gambling" under New York law because "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." NYAG Br. 1 (emphases in original). This characterization demonstrates a fundamental misunderstanding of how DFS works. Success in a DFS competition turns not on how well any individual athlete performs, but on how skillfully the DFS player has assembled *his unique fantasy lineup*—an act entirely under his control or influence. As established above, DFS players select their lineups based not only on their analysis of a real-world athlete's skill, but on the principle that their custom lineup—as an interconnected whole—must outperform competing fantasy lineups. *See* Karamitis Aff. ¶¶ 10-12, 21–22; Jennings Aff. ¶ 12.[6] This is an example of the skill that gives players the ability to control or influence the outcome *of the DFS contest itself, which is the only event in which DFS players are entering, participating, or competing*. The NYAG's argument that, like in sports betting or horse racing, athletes' performance is the "sole factor" determining the outcome of a DFS competition is demonstrably

[6] DraftKings Vice President of Analytics Gregory Karamitis offers the following illustration: "skilled players often use lineups that take advantage of covariance, meaning that they realize that if New York Giants quarterback Eli Manning has a good game, then that likely correlates to his primary wide receiver Odell Beckham, Jr.'s also having a good game. This type of sophisticated knowledge of a given sport once again highlights the advantages that a skilled player has in DFS contests." Karamitis Aff. ¶ 23.

not true. A DFS player's success is not based on how many of the player's chosen athletes, if any, actually win the real-life games in which they participate. Nor is a DFS player's success in the DFS contest based on whether any of the real life-athletes in his lineup achieve particular athletic milestones, as in a proposition bet. Moreover, if real-world athletic performance were the sole determinant of the outcome, then all fantasy teams would look identical—all players would select the top athletes for their respective positions in every instance, without researching undervalued players, creating synergistic lineups, or otherwise relying on other advanced strategies based on the player's knowledge of a given sport. *See* Karamitis Aff. ¶¶ 10–12. That DFS lends itself to so many varying strategies only further underscores that players have substantial control and influence over the outcome of DFS competitions.[7]

The NYAG's contention that a DraftKings' customers have no more control over their success that bettors on horses or real-life sporting events because bettors employ information to increase their odds of winning by "calculating probabilities and handicapping odds" (NYAG Br. 25) misses the point. Bettors on horse racing have no "control or influence" over the races they bet on, regardless of how much they know about the horses in advance, because they have *no impact on how their horses actually perform* in any race—and the binary outcome of whether that horse wins or loses is the *only* determinant of success. By contrast, DFS players use their skills and knowledge to actively *create* the fantasy team that will compete for the prize—they have complete "control or influence" over the composition of that team, which is what determines the outcome of the DFS contest in which the player is competing. Furthermore, whether a real-life team or athlete wins or loses does not determine whether a player's fantasy lineup wins or loses because there are countless possible on-field happenings that translate into

[7] Robins Aff. ¶¶ 8, 10-11

"fantasy points." For example, a DFS player can still win even if his athletes' real-life teams lose on a given day because he still accrues "fantasy points" for their yardage and other statistics. Robins Aff. ¶¶ 8, 11. Moreover, a DFS player can still win even if a particular athlete or athletes fail to achieve a particular in-game event (*e.g.*, a touchdown or a homerun). Thus, the success of a DFS lineup does not depend on any single real-world game or event beyond the DFS player's control or influence.

The fact that the outcome of a DFS game—exactly like seasonal fantasy sports—*also* depends, in part, on the performance statistics of actual athletes, does not nullify the DFS player's control or influence.[8] Indeed, the NYAG concedes that *seasonal* fantasy sports are also "based on the performance of professional and amateur athletes in real games" (Compl. ¶ 2)—yet he admits these games are entirely legal. *Id.* ¶ 1. Accordingly, New York's statutory language does not require that a future contingent event be under a player's *complete* control or influence for the contest to avoid being labeled "gambling." *See, e.g.*, Donnino, Practice Commentary, McKinney's Penal Law (noting that chess players who wager on their game "have a *material* influence over the outcome; they, therefore, are not 'gambling'" (emphasis added)).

Indeed, such a standard would be virtually impossible to meet because *every* game depends, at least in part, on a "future contingent event" over which the contestant has no control. For example, a tennis player, while controlling her own racket, cannot control whether the wind might push her shot wide, nor can she control the shots or strategy of her opponent. Again, these

[8] The NYAG's attempt to dramatize the impact of individual athlete performances on a DFS player's outcome using the example of Jay Cutler, whose decision to take a knee at the end of a game rather than advancing one more yard "reportedly cost one unlucky FanDuel player $20,000" (NYAG Br. 6) is misleading. The situation is akin to a tennis player who loses the final point due to a sudden gust of wind; it would be absurd to say that the outcome of the match was contingent on the wind—ignoring all of the skill-based decisions that led to match point. Likewise, Cutler's taking a knee was one of hundreds of statistical inputs that comprised the FanDuel player's score, based on the combination of athletes he selected. The fact that the play occurred in the last seconds of a real-life game is entirely irrelevant to how many fantasy points it represented or to the FanDuel player's total control over his team's composition.

uncontrollable variables do not negate the player's own "control or influence" over the outcome of the game. *See* Jennings Aff. ¶¶ 8-11 (noting consideration of factors like weather, psychology, and data regarding referees and umpires). In DFS, this "control or influence" is obvious from the fact that DraftKings' top one percent of players win the majority of prizes.

Because a DFS player's game is not dependent on any "future contingent event not under his control or influence," the NYAG cannot establish that DFS is "gambling" under New York law.

3. DFS Contests Do Not Satisfy the Necessary "Certain Outcome" or "Event" Elements of the Statute.

The second definition of gambling does not apply to DFS contests for another reason: it covers only wagers upon the "*certain outcome*" of a future contingent "*event*" that is capable of being agreed-upon or understood before the wager is made. N.Y. Penal Law § 225.00(2) (emphasis added). DFS contests lack all of these required elements.

Penal Law § 225.00(2) states that 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*." The second clause, in particular—and its requirements of "upon an agreement or understanding," "in the event of," and "a certain outcome"—confirms that the statute criminalizes only the risking of a thing of value upon (1) an identifiable "event" with (2) an identifiable "certain outcome" which (3) is capable of being agreed upon or understood before the risk is taken.

The NYAG has not explained what "event" or "certain outcome" he believes is wagered on in DFS contests—nor could he. The contrast with sports betting is illustrative. If two people make a bet upon the outcome of a basketball game between the Knicks and the Nets, it is clear

that the "certain outcome" is the final score of the game, and the "event" is the basketball game between the two professional teams. But in DFS contests, there is no corresponding identifiable "certain outcome" on which wagers are made: the success of a particular fantasy lineup is determined by the complex, highly variable interaction between thousands of real-world events, is not tethered to any single real-world result (or combination of specified real world-results), and cannot be defined at the time the alleged "wager" is made.

Furthermore, the term "event" is not analogous with the real-world "performance" of athletes. For example, when federal law talks about sports betting, it distinguishes between the event (*i.e.*, the outcome of a game) and the performance (*i.e.*, how a player of the game performs). *See* 31 U.S.C. § 5362 (Unlawful Internet Gambling Enforcement Act) (the federal exemption for fantasy sports applies only if the winning outcome is not based "solely on any single *performance* of an individual athlete in any single real-world sporting or other *event*"); *see also* 28 U.S.C. § 3702 (Professional and Amateur Sports Protection Act) (distinguishing between "one or more competitive games" and "one or more performances of such athletes in such games"). Accordingly, the prohibition in N.Y. Penal Law § 225.00(2) on wagering on the "certain outcome" of a "future contingent event"—such as the result of a real-world athletic contest—does not reach DFS.

4. The Rule of Lenity Requires the Gambling Statute to Be Construed in Favor of DraftKings.

For the reasons discussed above, DFS unequivocally does not fit within New York's definition of "gambling." However, to the extent this Court believes the statute is ambiguous, the rule of lenity provides that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010) (quotation marks omitted)); *see also Golb*, 23 N.Y.3d at 468 ("If two constructions of a criminal statute are

plausible, the one more favorable to the defendant should be adopted." (citation omitted)). The rule of lenity derives from the principle that criminal statutes should give "fair notice to ordinary people who are required to conform their conduct to the law," *United States v. Kozminski*, 487 U.S. 931, 949-50 (1988), because no person should "be forced to speculate, at peril of indictment, whether his conduct is prohibited," *People v. Feldman*, 7 Misc.3d 794, 821 (Sup. Ct. Kings County 2005). Applying the rule of lenity "is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Liparota v. United States*, 471 U.S. 419, 426 (1985). The NYAG's sudden, unilateral application of the Penal Law § 225 to DFS is a radical departure from the statute's previous application, under which DraftKings and other companies have been *publicly operating DFS contests in New York for many years*.

If, contrary to all the reasoning and authorities DraftKings has set forth, it is possible for the NYAG to argue that DFS is "gambling" under New York law, such an unformed and malleable legal standard would be void for vagueness and violate fundamental constitutional principles of due process and equal protection. "The prohibition of vagueness in criminal statutes is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process." *Johnson v. United States*, 135 S. Ct. 2551, 2556-57 (2015) (quotation marks omitted). Due process imposes the "requirement of clarity," *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012), and a statute fails to meet that requirement when "it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits," *City of Chi. v. Morales*, 527 U.S. 41, 56 (1999). The NYAG, in deciding that DFS is illegal after years of being

openly and legally played by New Yorkers, seeks an inconsistent application of the law—the stereotypical situation vagueness and due process principles are meant to address.

B. There Is No Meaningful Difference Between Daily Fantasy Sports and Season-Long Fantasy Sports.

A substantial portion of the NYAG's brief is dedicated to the fiction that a meaningful distinction can be drawn between so-called "traditional" fantasy sports and DFS. NYAG Br. 10-11. Indeed, despite the fact that season-long fantasy sports are not at issue in this case, the NYAG's complaint devotes the entire first section of its "Facts" to propping up this falsity. Compl. ¶¶ 17-31. The reason for the NYAG's focus on this illusory distinction is obvious—he has acknowledged, as he must, that season-long fantasy sports are entirely legal. NYAG Letter at 2 (noting that season-long fantasy sports, "since their rise to popularity in the 1980s, have been enjoyed and legally played by millions of New York residents"). Now, faced with the certainty of judicial scrutiny, the NYAG is scrambling to defend the indefensible—he has targeted a lawfully operating company while officially endorsing activity that is indistinguishable (or, indeed, less dependent on skill than DFS). None of the NYAG's justifications for this basic unfairness hold up to scrutiny.

First, without citing any support, the NYAG claims: "On sites hosting traditional fantasy leagues, most players compete for bragging rights or side wagers, not massive jackpots offered by the sites themselves." NYAG Br. 11. Putting aside the impropriety of this type of unsupported allegation in a brief seeking a preliminary injunction, it is a fact that *seasonal fantasy sites offer significant prizes* to their players. *See, e.g.*, ESPN Fantasy homepage (noting prizes awarded for each type of season-long fantasy league of $10,000), *available at* http://games.espn.go.com/ffl/resources/help/content?name=Prizes; Sports Media News, "NFL.com Fantasy League champions can win Super Bowl tickets, championships and more via

'NFL Fantasy Ultimate Experience,'" August 26, 2011 (describing prizes for competing in season-long fantasy football sponsored by NFL, including Super Bowl tickets valued at thousands of dollars), *available at* http://sportsmedianews.com/nfl-com-fantasy-league-champions-can-win-super-bowl-tickets-championship-rings-more-via-%E2%80%9Cnfl-fantasy-ultimate-experience%E2%80%9D/. To the extent the NYAG attempts to compare DFS prizes against season-long prizes, this is simply not a distinction on which the NYAG can rationally base prosecution of businesses otherwise identical to businesses declared legal. The distinction that the NYAG is attempting to draw on prizes is false.

Second, the NYAG claims, again without offering any support, that DFS "eschews a competitive draft and any and all strategic aspects associated with a season-long" fantasy competition. NYAG Br. 11. This claim demonstrates the NYAG's failure to understand the basic strategic aspects of both types of fantasy games. While DFS competitions are shorter than season-long competitions, they are at least as complex and require the same essential skills. As with seasonal fantasy sports, a DFS player must research the sport, teams, and players in order to construct the best team available. *See* Karamitis Aff. ¶¶ 10-11; Gilula Aff. ¶ 5; Jennings Aff. ¶¶ 6-11. In fact, season-long fantasy players can remain passive from week to week, while DFS payers must actively choose a new lineup for each game. Likewise, participants in both DFS and seasonal fantasy sports must assemble a roster of players in an effort to score the most fantasy points. Karamitis Aff. ¶¶ 10–11. This requires participants in both sports to similarly consider each player's relative worth in order to maximize their talent within the similar restraints of the two games—salary caps and competitive drafts. *Id.*; Compl. ¶ 23a. Finally, participants in both games have to understand the sport at issue and adjust their preferred rosters to account for real-world events, weather, competition types, and other eventualities. Karamitis Aff. ¶¶ 10–11;

Jennings Aff. ¶¶ 8-11; Compl. ¶ 23.

Importantly, the NYAG's concession regarding season-long fantasy sports misses more than just the similarities between the games. The NYAG has hinged his charge of illegal gambling on the claim that the alleged differences between season-long and daily fantasy sports mean that DFS requires less skill. But, in fact, those very differences—structural features of DFS that are designed to mitigate chance—that prove that the NYAG's argument is baseless.

In reality, the actual data now in evidence establishes that DFS requires more skill. Karamitis Aff. ¶¶ 15-22; *cf. Humphrey*, 2007 WL 1797648, at *2 (holding that success in seasonal fantasy sports "depends on the participants' skill"). Because DFS competitions are shorter, there are fewer chance-based events which can alter the outcome. Also, in DFS, participants draft their preferred roster from *all* available real-world athletes based on strategic decisions about each athlete's relative value within the consistently applied limit of the "salary cap." In contrast, seasonal fantasy players depend on the whims of a draft—however administered—to randomize player availability. Compl. ¶ 23a (referring to this process as a "competitive draft"). The NYAG identifies the snake draft in traditional fantasy sports as a feature of season-long's skill-based nature, but it is just the other way around: DFS participants all start on equal footing and gain advantage not through the lottery (*i.e.*, chance) of a draft, but through their own strategic insight.

Moreover, to the extent that the NYAG attempts to distinguish between DFS and season-long fantasy sports on the basis that DFS supposedly depends on a "future contingent event," his argument makes no sense. NYAG Br. 21-22. The future contingent event that he identifies is "the performance of athletes in real-world games." NYAG Br. 21. But it is absurd to suggest that DFS is somehow more dependent on this alleged "future contingent event" than season-long

fantasy sports. The NYAG argues that "no DFS player can (legally) influence how those athletes will perform." NYAG Br. 22. As is obvious, this is equally true in season-long fantasy. In neither contest will a fantasy sports player actually throw a pitch or shoot a basket.

Of course, all contests have some element that is beyond the contestant's control, be it weather or temperature or the decisions of other players. In this case, however, the element upon which the NYAG is focusing appears in both games in precisely the same fashion. DFS players and season-long fantasy players are affected by the exact same "real-world performance of athletes." DFS is merely shorter and thereby features less impact by alleged future contingent events, *i.e.*, less chance, than season-long fantasy sports. A slice of pizza simply cannot be illegal under the same law that finds the whole pizza lawful. There is no logic to the NYAG's attempt to draw a distinction on the basis of supposed "future contingent events."

Finally, player injuries, one of the biggest chance elements in fantasy sports, have dramatically less impact in DFS. In season-long fantasy sports, on the other hand, an injured player could hobble a fantasy team, driving down scores, and rendering victory almost impossible through no fault of the participant. Karamitis Aff. ¶ 13; Compl. ¶ 23b. Again, all of this underscores the extent to which the NYAG cannot meaningfully distinguish DFS from season-long fantasy. DFS and season-long fantasy sports involve the same elements, and to the extent one requires more skill, it is DFS.[9]

C. The NYAG's Fraud, Deception, and False Advertising Claims Will Fail.

The NYAG also claims that DraftKings is engaged in deceptive acts or practices, in violation of Executive Law § 63(12) and General Business Law §§ 349 and 350, by misrepresenting the company's compliance with applicable laws; the likelihood that an ordinary

[9] Likewise, because DFS truncates the relevant time period and thus excludes many chance-based events, the ultimate outcome of a DFS competition is *more* under the control and influence of players than the outcome of a season-long fantasy sports contest. *See* N.Y. Penal Law § 225.00(2).

player will win a jackpot; the degree of skill implicated in DFS contests; and the character of DFS contests as falling outside the realm of gambling. As to the company's compliance with applicable laws and the character of DFS contests as not gambling, these claims fall along with the NYAG's mistaken claim that DraftKings is involved in gambling.

As to the likelihood that an ordinary player will win a jackpot and the degree of skill implicated in DFS contests, DraftKings does not engage in deceptive acts or run misleading advertising. Advertisements stating that anyone who enters a DraftKings contest can win and that DraftKings has made millionaires are unequivocally true. *See Gomez-Jimenez v. New York Law Sch.*, 103 A.D.3d 13, 17 (1st Dep't 2012) (affirming dismissal of GBL § 349 where statements were not "materially deceptive or misleading"); *Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 324 n.1 (2002) ("The standard for recovery under General Business Law § 350, while specific to false advertising, is otherwise identical to section 349.").

No "reasonable consumer acting reasonably under the circumstances" would be misled by such statements. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N. A.*, 85 N.Y.2d 20, 26 (1995). These types of advertisements for contests are extraordinarily common. *See, e.g.*, *Derbaremdiker v. Applebee's Int'l, Inc.*, 519 F. App'x 77, 78 (2d Cir. 2013) (affirming dismissal of §§ 349 and 350 claims that restaurant sweepstakes was misleading when full terms and conditions were disclosed). Even advertisements inviting people to become contestants on popular game shows like 'Who Wants to Be a Millionaire' would constitute deceptive advertising under the NYAG's logic. DraftKings' advertisements do not mislead or deceive viewers about their prospects of winning. Moreover, even if the NYAG could prove false or misleading marketing, which it cannot, that could not justify the total closure of DraftKings' legal business.

Lastly, the NYAG argues that DraftKings' authority to do business in New York should be annulled and its operations enjoined pursuant to Business Corporation Law §§ 1101(a)(2) and 1303 because it is alleged to have violated a provision of law. As shown above, DraftKings is entirely legal and has violated no applicable law.

Because the NYAG has not established a likelihood of success on the merits of any of the nine charges he asserts, his motion for a preliminary injunction must fail.

II. THE BALANCE OF EQUITIES WEIGHS IN FAVOR OF DRAFTKINGS, WHICH SEEKS TO PRESERVE THE STATUS QUO.

Although the NYAG argues that he "need not prove irreparable injury because such injury is presumed in a statutory enforcement action," NYAG Br. 32, "whether immediate relief of this nature should be extended is still a matter governed by equitable principles." *Town of Esopus v. Fausto Simoes & Assocs.*, 145 A.D.2d 840, 842 (2d Dep't 1988) (denying motion for preliminary injunction where, despite presumption of irreparable harm, "a balancing of the equities discloses no prejudice to plaintiff if it is left to await an adjudication on the merits"). As demonstrated below, equitable principles dictate that the NYAG's motion must be denied. The balance of equities weighs heavily in favor of DraftKings. At bottom, granting the NYAG's motion for a preliminary injunction at this early stage would effectively put DraftKings out of business. By contrast, if the Court denies the NYAG's motion to preserve the status quo, the government will lose nothing.

The "'balancing of the equities' usually simply requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief." *Ma v. Lien*, 198 A.D.2d 186, 186-87 (1st Dep't 1993). Furthermore, New York courts have held that the balance of equities weighs in favor of the party who merely seeks to preserve the status quo. *See CanWest Global Commc'ns Corp. v. Mirkaei Tikshoret Ltd.*, 9 Misc.3d 845, 872 (Sup. Ct. N.Y.

County 2005) ("Furthermore, since CanWest merely seeks to maintain the status quo, the balance of equities tilt in its favor. Absent a TRO, MTG will be free to take additional actions which may cause CanWest further irreparable injury"); *Gramercy Co. v. Benenson*, 223 A.D.2d 497, 498 (1st Dep't 1996) ("the balance of the equities tilts in favor of plaintiffs, who merely seek to maintain the status quo . . ."); *see also State v. City of New York*, 275 A.D.2d 740, 741 (2d Dep't 2000) ("Although the State may not ultimately prevail on the merits, the equities lie in favor of preserving the status quo while the legal issues are determined in a deliberate and judicious manner.").

DraftKings would suffer serious and immediate irreparable harm if it is forced to shutter its operations in New York—one of its largest markets. There are 375,000 DraftKings customers in New York. DraftKings' New York customers have paid more than $99 million in entry fees thus far in 2015, generating more than $10 million in revenue. Should DraftKings cease operations in New York, the loss of such a large percentage of total revenue from this key market would be devastating to the company, its employees, its New York office, and to shareholder value.

DraftKings would also lose the support of its investors and its fundraising efforts would be severely hampered. DraftKings has partnered with major sports entities such as Fox Sports, Major League Baseball, the National Hockey League, Major League Soccer, and the owners of the New York Yankees, New York Giants, New York Knicks, New York Mets, New York Rangers, and New York City F.C.. Robins Aff. ¶ 7. DraftKings also has business relationships with sports companies such as The Madison Square Garden Company and Legends Hospitality. A shutdown would have a chilling effect on DraftKings' ability to attract new investors and partners and would impede its ability to continue its relationships with its existing investors and

partners. All of this harm would not be confined to New York, but would cause a cascading effect throughout the country—including in the dozens of states where DraftKings also continues to operate lawfully—adversely affecting its customer base and its business relations with vendors, customers, and regulators.

The harm to DraftKings would be severe and incalculable. New York courts have found irreparable injury where a party will "likely sustain a loss of business impossible, or very difficult, to quantify." *Willis of New York, Inc. v. DeFelice*, 299 A.D.2d 240, 242 (1st Dep't 2002); *see also IXIS N. Am., Inc. v. Solow Bldg. Co. II, L.L.C*, 16 Misc.3d 1120(A), 2007 N.Y. Slip Op. 51525(U), at *3 (Sup. Ct. N.Y. County Aug. 9, 2007) (granting plaintiff's motion for preliminary injunction where damages "would be extremely difficult to calculate and . . . would be severely detrimental to plaintiff's business"). Irreparable injury will also be found where a company's revenues and customer goodwill are threatened. *See Second on Second Cafe, Inc. v. Hing Sing Trading, Inc.*, 66 A.D.3d 255, 272-73 (1st Dep't 2009) (finding irreparable injury where a company's inability to operate jeopardized business licenses, damaged revenues, harmed customer goodwill, and meant the loss of a real estate investment); *Four Times Square Assocs., L.L.C. v. Cigna Invs., Inc.*, 306 A.D.2d 4, 6 (1st Dep't 2003) (finding irreparable harm where customer goodwill and business creditworthiness threatened).

DraftKings would also suffer irreparable harm to its reputation, including the loss of customer and public goodwill. The NYAG has made—and continues to make—defamatory statements about DraftKings, such as:

- "It is clear that DraftKings and FanDuel are the leaders of a massive, multi-billion-dollar scheme intended to evade the law and fleece sports fans across the country."
- "Daily Fantasy Sports, which we've been looking into for over a month, we've concluded is not some new version of fantasy sports, it's really just a new version of online gambling."

- "Our investigation has found that, unlike traditional fantasy sports, daily fantasy sports companies are engaged in illegal gambling under New York law, causing the same kinds of social and economic harms as other forms of illegal gambling, and misleading New York consumers."

Schiller Affirmation Ex. 2-3.

The NYAG's false and defamatory public statements have a profound stigmatizing and chilling effect; they deter potential customers and investors from getting involved in what the NYAG has mischaracterized as an unlawful business. New York courts treat harm to business reputation as *per se* irreparable. *See, e.g.*, *Jacob H. Rottkamp & Son, Inc. v. Wulforst Farms, LLC*, 17 Misc.3d 382, 388 (Sup. Ct. Suffolk County 2007) ("Damage to business reputation and good will can be difficult or impossible to quantify and demonstrates irreparable harm."); *Zomba Recording LLC v. Williams*, 15 Misc.3d 1118(A), 2007 N.Y. Slip Op. 50752(U), at *10 (Sup. Ct. N.Y. County 2007) ("A preliminary injunction may also be granted to protect a company's goodwill and credibility in its industry"); *CanWest*, 9 Misc.3d at 872 (noting that irreparable harm exists when there is a "loss of reputation, good will and business opportunities").

By contrast, DraftKings merely seeks to preserve the status quo. DFS contests have been played in New York since 2007, and the NYAG has never once asserted they were unlawful—until now.[10] There is no immediate threat to public health or safety.

The irreparable harm cited by the NYAG—that "DFS attracts compulsive gamblers and those at risk for gambling addiction," NYAG Br. 32—is dubious at best. In support, the NYAG offers the affirmations of Keith S. Whyte, Executive Director of the National Council on

[10] While the NYAG's contention that in 2014 DraftKings collected over $400,000 in entry fees which may have come from users residing in states where DraftKings declines to accept play (NYAG Br. 14) is not relevant to alleged harm to New York consumers, it is also false. An investigation into this charge by DraftKings' Analytics Group revealed that the overwhelming majority of these fees—over 92%—were paid by users who, at the time of payment, resided in states where DraftKings does operate. Karamitis Aff. ¶ 25. DraftKings immediately shut down the accounts associated with the small percentage of fees—less than 8%—that appear to have come from states where DraftKings does not operate. *Id.*

Problem Gambling, and Dr. Jeffrey L. Derevensky, a psychology professor. Neither is proffered as an expert, and the NYAG has not laid the proper foundation to introduce the opinions of these self-styled experts. Whyte opines that, according to "experts in the field," certain demographic characteristics of DFS players places them at "high risk of gambling addiction," yet he cites none of these purported experts and provides no quantitative evidence to support his bare assertion. Whyte Aff. ¶¶ 6–7. He further claims that certain "structural characteristics" of DFS make it an "attractive activity for problem gamblers," yet he again cites no hard evidence for this naked speculation. Whyte Aff. ¶ 8. Lastly, he states that he has spoken to "several" recovering gamblers "who have told me they increasingly encounter others in Gamblers Anonymous who are addicted to DFS," and that he has spoken to "several gambling counselors who have encountered people with DFS-related gambling addictions." Whyte Aff. ¶ 11. Aside from being double hearsay and inadmissible, Whyte never says how many of his anonymous sources he relies on (or whether they are even in New York), never indicates that he made any effort to verify their claims, and never attempts to make any analysis of the circumstances of the conditions of the unidentified people his anonymous sources purport to be talking about. Ostensibly, the NYAG asks this Court to accept Whyte at his word, on the basis of no actual evidence.

Dr. Derevensky's affirmation fares no better. At the outset, Dr. Derevensky claims that "college students who have gambling problems are more likely to have engaged *in both season-long fantasy sports and DFS*," Derevensky Aff. ¶ 9 (emphasis added)—a point that is fatal to the NYAG, who concedes that season-long fantasy sports are legal. Dr. Derevensky also states that his research shows that "college students experiencing problem or disordered gambling have a higher incidence of engaging in DFS *compared to their non-playing DFS peers*." Derevensky

Aff. ¶ 6 (emphasis added). Taken literally, this statement is circular (of course DFS players play more DFS than non-DFS players). If Dr. Derevensky means to say that he believes that more college students who play DFS have problems than those students who do not play DFS, he provides no basis whatsoever for that statement. There is no reference to any published data, let alone peer-reviewed research, that can be looked at to test such an assertion. There is no indication as to what is even meant by "experiencing problem or disordered gambling." There is no indication of any of the circumstances relevant to Dr. Derevensky's alleged anonymous college students, or even how many there were.

Similarly, Dr. Derevensky's conclusory opinion without any basis or support that DFS advertising is "misleading" is an irrelevant, bare legal conclusion. Derevensky Aff. ¶ 10.

The NYAG's conclusory accusations about the "rapid-fire" and addictive nature of DraftKings' games (NYAG Br. 1, 3, 11) is also strikingly belied by DraftKings' usage statistics. Of the approximately 162,500 DraftKings players residing in New York who have ever paid an entry fee (as opposed to playing DraftKings' free games), almost 75% play exclusively in contests with entry fees of $20 or less; more than 80% pay less than $20 per week in entry fees; and more than 75% play fewer than three games per week. Karamitis Aff. ¶ 24. The fact that DraftKings has locked a handful of players' accounts at their request to limit the time or money they may spend on the site (NYAG Br. 11) is evidence of a consumer *safeguard*, not consumer harm—and it has no bearing on whether DraftKings' games meet the legal definition of "gambling" under New York law.

In sum, the entire body of evidence that the NYAG has marshaled in support of its claim of irreparable harm rests on two affirmations that are both wholly incredible, unsupported, and unpersuasive. Allowing DraftKings' longstanding business to continue to operate until this

lawsuit is resolved will not harm the government in any way. "The purpose of a preliminary injunction is to preserve the status quo pending trial." *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co.*, 114 A.D.2d 165, 172 (2d Dep't 1986). That is all DraftKings seeks here: the preservation of the longstanding status quo pending a final judgment in this case.

CONCLUSION

For the foregoing reasons, the NYAG's motion for a preliminary injunction should be denied.

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Respectfully submitted,

/s/ David Boies

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