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## PRELIMINARY STATEMENT

In this case, the State attempts to declare criminal the vast majority of fantasy sports competitions—contests that hundreds of thousands of New Yorkers have enjoyed for decades and that are now a valued part of American sports culture. But fantasy sports, including FanDuel’s contests, are legal. They are contests of skill of a type long recognized not to constitute illegal gambling, in which participants compete to select the best performing fantasy “roster” based on many strategic judgments designed to replicate the role of general managers and coaches.

The State’s position is founded on multiple contradictions. The State contends that FanDuel’s contests are “plainly illegal,” but then says that season-long fantasy leagues are “lawfully enjoyed,” even though the State can point to no legal distinction between the two types of contests. The State attacks FanDuel as a gambling enterprise by arguing that its contests are games of chance, but it attacks FanDuel’s advertising as misleading on the ground that only the most skilled players win. The State grounds its attack on daily fantasy sports on the supposed prevalence of “problem gaming,” but it ignores the actual empirical facts on that question, which do not support its position.

These inconsistencies are emblematic of the broader flaws in the State’s argument, which fails for three basic reasons. First, FanDuel’s games are legal contests for a prize, not gambling. Contests in which participants pay entrance fees with advance disclosure of the prizes for winners, and then match their skills against each other with winners taking home prizes, have long been a valued component of the American social fabric. Such contests are permitted under New York law because they do not constitute “stak[ing] or risk[ing] something of value” on a “contest of chance” or a “future contingent event not under [the participant’s] control or influence” under New York’s anti-gambling statute. The list of recognized contests of skill that



do not amount to gambling even though participants pay entry fees and receive cash prizes include spelling bees, essay and speaking competitions, state-fair livestock or quilting or cooking competitions, fishing and hole-in-one golfing tournaments, chess, checkers, backgammon, mahjong, duplicate bridge, arcade games, marathons and other road races, and many more. FanDuel's contests fit squarely within this tradition. FanDuel contestants pay a fixed entry fee and compete for preannounced prizes. FanDuel has no stake in the contests' outcome, because it can never keep the prize.

Second, the evidence conclusively establishes that FanDuel's contests are games of skill, not chance. Players who work intensively on their roster selections and develop substantial expertise consistently outperform players with less analytical rigor and skill. A thorough study by an MIT professor, using actual data from FanDuel's contests, demonstrates beyond dispute that over time, skill determines who wins fantasy sports competitions. The State cannot convert FanDuel's contests into games of chance simply by applying the labels "bet," "wager" and "gambling." Nor can the state convert these contests into gambling by claiming that they involve certain elements outside the control of the participants. In *all* contests of skill, the outcome is not preordained, and events outside the participants' control may result in a less skilled player's winning some individual competitions.

Third, FanDuel's contestants are active competitors in a contest separate and apart from any real-world sporting event, not passive observers wagering on the outcome of someone else's game. The State's contention that fantasy sports contestants are indistinguishable from gamblers on sporting events or other "future contingent events not under [their] control or influence" rests on a misunderstanding of the nature of fantasy sports. The outcomes of FanDuel's contests are fundamentally detached from the outcomes of the underlying sporting events. Instead, they are

separate competitions of their own, existing only in the “fantasy” realm, as to which participants test their skills by selecting a roster of players who do not actually play together in the real world. Unlike passive observers at a real-world chess match making a side bet, the contestants in a FanDuel contest do not wager on events over which they have no influence; they compete in separate contests, the outcomes of which are provably influenced by their preparation, effort and skill. Significantly, unlike every supposedly analogous form of gambling cited by the State, there is no corresponding real-world event that yields a winner or score that correlates with the outcome of the distinct fantasy contest. If all skill activities that depend on analyzing events outside of the participants’ immediate control were gambling under New York law, a wide variety of legitimate business activities that do not amount to gambling would be criminalized, including insurance, investing, underwriting, and trading in commodities futures or derivative instruments, all of which including some elements of forecasting behavior based on prior performance and future conditions.

This is not the law. And if it were, all forms of fantasy sports would be illegal. Thus, the State’s attempt to criminalize daily contests while sparing season-long leagues proves that its reading of the law is flawed. If FanDuel were criminally “promoting gambling” as the State asserts, then so would be the “commissioner” of every season-long fantasy league who collects entry fees from participants and distributes prizes to winners at the season’s end based on the outcome of similarly-scored contests, as well as all the major media companies who run fantasy sports website that assist them in carrying out that task.

The State’s reading of New York law is simply wrong. The only court ever to address fantasy sports’ legality squarely held that “entry fees for . . . fantasy sports contests are not bets or wagers as a matter of law,” stating that in the fantasy sports context it would be “patently

absurd to hold that the combination of an entry fee and a prize equals gambling.” *Humphrey v. Viacom*, No. 06-2768, 2007 WL 1797648, at \*7, \*9 (D.N.J. June 20, 2007). Consistent with longstanding common-law definitions of gambling under New York’s and other states’ laws, the U.S. Congress similarly has specified in a federal statute that fantasy sports do not constitute gambling under that law when they satisfy the criteria that FanDuel follows in creating its contests. Further, the courts and all of the major sports leagues have recognized the fundamental distinction between sports wagering, which has historically been outlawed in part because of concerns that it could impact the integrity of the real-world game, and fantasy sports, which raises no such concerns because the contests operate under separate rules wholly removed from the score of the real games.

FanDuel’s conduct is legal. Fantasy sports contests—whether conducted over the duration of a season, a half-season, a week, or a day—are not gambling. And FanDuel’s advertising, which the State attacks without identifying a single inaccurate statement, is neither false nor misleading. The Court accordingly should deny the State’s requested injunction and enter the injunction requested by FanDuel.

#### **STATEMENT OF FACTS**

As one court noted nearly a decade ago, “[f]antasy sports have become extremely popular in recent years. They have earned a place in modern popular culture and are the subject of countless newspaper and magazine articles, books, Internet message boards and water-cooler conversation.” *Humphrey*, 2007 WL 1797648, at \*1. Evolved from “strat-o-matic baseball” games played with statistically based cards derived from actual player performance and “rotisserie” leagues in which competitors selected their “dream team” of baseball players, fantasy sports games are now recognized as a form of competition in their own right, separate and apart from the real-world sporting events that provide their playing field. *See* Affidavit of

David Dodds (“Dodds Aff.”) ¶¶ 3–5. At their core, fantasy sports are about providing passionate fans the opportunity to simulate the role of general manager by selecting a group of athletes, under various constraints, and then competing with family, friends and fellow sports fanatics to determine who can assemble the best team. *Id.* ¶ 2.

#### **A. Fantasy Sports Come in a Variety of Forms**

Although the State tries to place all of fantasy sports into two buckets—“daily” and “traditional”—in reality, there is a huge range of fantasy-sports contest types, with a broad array of combinations of features. *Id.* ¶¶ 5–9. There are head-to-head contests, leagues, keeper leagues, dynasty contests, best-ball, victory points, survivor contests and large-format tournaments. *Id.* ¶ 5. There are contests that last a day, contests that last a week, contests that last for part of a season or for an entire season, and contests that carry on for years, with participants signing their fantasy players to multi-year “contracts.” *Id.* ¶ 6. Competitors can choose their players through drafts, auctions, or through the use of fictitious “salary caps” that simulate the kind of resource-maximization decisions a real general manager must confront. *Id.* ¶¶ 7–10.

The Internet has contributed to the rapid growth and popularity of fantasy sports. *Id.* ¶ 13. Historically and today, the vast majority of online fantasy sports websites charge entry fees for users to participate in the offered contests. *Id.* ¶¶ 20–21. In exchange, the sites often award cash prizes to winners, host the leagues, maintain records, tabulate points, and maintain a platform through which participants can communicate with each other. *Id.* ¶ 22. The majority of fantasy games now involve an entry fee or a prize, either collected by the host website or collected by a player acting as “commissioner” using tools that the host website provides to facilitate the collection of entry fees and payment of prizes. *Id.* For example, many of the

largest season-long fantasy sites such as Yahoo!, the NFL, CBS, and ESPN offer a large pool of cash or other prizes for winning players at the end of the season. *Id.* ¶ 23. And as the State’s cease and desist notice acknowledged, even when the sponsoring website does not provide prizes, private “commissioners” of self-selected leagues often provide them to the winners in their leagues. *See* Cease and Desist Notice, Affidavit of Nicholas M. Bonaddio (“Bonaddio Aff.”) Ex. 4, at 2; *see also* Compl. ¶ 21; Dodds Aff. ¶¶ 12–13, 22.

Whatever the particular format, “[t]he success of a fantasy sports team depends on the participants’ skill in selecting players for his or her team.” *Humphrey*, 2007 WL 1797648, at \*2. The strategies that fantasy sports participants employ are numerous and varied. Dodds Aff. ¶ 25. Just as a skilled general manager evaluates an enormous amount of information, fantasy sports participants will look at past performance, injury history, performance trends of statistically comparable players, the particular strength of schedule for an athlete’s team, coaching philosophy, and any changes to league rules that could influence an athlete’s statistical performance. *Id.* Innumerable blogs, podcasts, books and strategy websites provide players with research, insights and advice. *Id.* ¶ 34. There are even fantasy sports boot camps that help to train participants in the necessary skills. *Id.*

**B. FanDuel’s Contests Are a Mainstream Variation of the Classic Fantasy Sports Contest**

Among the many forms of fantasy sports offerings are the “daily” fantasy sports (“DFS”) contests hosted by FanDuel and others. Those contests represent a natural step in the continued evolution of fantasy sports, and contrary to the State’s characterizations, they occupy an accepted and mainstream place in the broader fantasy sports community. *Id.* ¶ 35. They also work in fundamentally the same way as other games. Like some season-long leagues, they employ a “salary cap” method of player selection. *Id.* ¶ 17. Their sole difference is that they are shorter:

Whereas some contests last for a full real-world sports season or several seasons, DFS contests typically begin and end in a week for NFL games, or a day for other games. *Id.* ¶ 16.

The shorter contest length was inspired by and consistent with FanDuel’s founding mission: to enhance user enjoyment of fantasy sports. *See* Affirmation of Tom Griffiths (“Griffiths Aff.”) ¶¶ 5–7. FanDuel’s founders sought feedback on the existing offerings and learned that players were often frustrated by the season-long format. *Id.* A participant’s place in the draft often had a lasting and significant effect on his fantasy team’s performance, and a chance event like an athlete’s injury early in the season could mean that one’s team was essentially out of contention for the duration of the contest. *Id.* As a result, some participants in a fantasy league would lose interest and stop playing, decreasing the fun for the whole group. *Id.*

FanDuel designed its contests based on this feedback. *Id.* ¶ 6. Originally, the site offered only one type of contest: head-to-head competitions in which one user competed with another (thus the name “FanDuel”). *Id.* The original site also used a draft-type selection process, in which the two competing users formed their teams by selecting from a choice of players at each position in turns. *Id.* The game was designed to be highly social and mobile-friendly, two trends transforming other areas of daily life at the time of FanDuel’s creation. *Id.*

In response to feedback from fans who wanted more game options and preferred the “salary cap” selection method, FanDuel now offers a range of contest types, all of which use a “salary cap.” *Id.* ¶¶ 7–8. In most of them, participants pay a fixed entry fee to enter prize contests. *Id.* ¶ 16. FanDuel’s prizes are made known to participants before the contest begins, and for all of FanDuel’s paid contests, the prize values do not change based on the number of entries in the announced contest. *Id.* In all contests, FanDuel sets a maximum number of participants who can compete for preannounced prizes. *Id.* Some contests limit the number of

entries a participant can submit; others allow participants to submit multiple entries in a single contest. *Id.*

The main contest types FanDuel offers are tournaments (which offer guaranteed, preannounced prizes to the winners, with thousands of players typically competing); leagues (which are similar to tournaments but include between 2 and 99 participants, often self-selected groups of friends and co-workers); 50/50 contests (in which the top 50% of entrants win the same preannounced prize); and head-to-head contests (in which two participants compete against one another directly for a preannounced prize). *Id.* ¶ 15. FanDuel also offers contests specifically for beginners, in which entries are limited to one per player and to players competing for the first time in that particular kind of format. *Id.*

FanDuel has offered its contests to residents of the United States, including New York, since 2009, and has offered to U.S. residents the full array of current contest types, in roughly the same format, since around 2011. *Id.* ¶ 9. Today, FanDuel has over five million users, including hundreds of thousands of sports fans in New York. *Id.* ¶ 10. FanDuel also has partnership and sponsorship deals with professional sports teams and the leagues themselves, including serving as the exclusive one-day fantasy sponsor of sixteen teams in the National Football League (NFL) and another sixteen teams in the National Basketball Association (NBA), including the New York Jets, Buffalo Bills and Brooklyn Nets. *Id.* ¶ 11. Further, FanDuel is currently the Official One-Day Fantasy Partner of the NBA. *Id.*

### **C. FanDuel's Contests Are Competitions of Skill**

Exhaustive empirical studies, the experience of fantasy players over decades and the only court to address the issue all confirm a basic fact about fantasy sports: “The success of a fantasy sports team depends on the participants’ skill.” *Humphrey*, 2007 WL 1797648, at \*2. Skill

markedly increases participants' prospects for winning individual contests and markedly affects their overall success rates over time. All contests of all kinds involve some degree of chance, but the empirical evidence demonstrates that, over time, skill is the dominant factor in success at fantasy sports.

### **1. The Empirical Evidence**

Review of actual FanDuel contest data confirms the central role that skill plays in participants' prospects for winning. Professor Anette Hosoi is a leading mathematics and engineering professor from the Massachusetts Institute of Technology ("MIT") who has focused on application of mathematics to sports. Affidavit of Anette (Peko) Hosoi ("Hosoi Aff.") ¶¶ 2, 6, 8. For the past ten months, Professor Hosoi has been analyzing a vast FanDuel data set to assess the degree to which the outcome of FanDuel's DFS contests can be attributed to skill vs. chance. *Id.* ¶ 8. As explained in Professor Hosoi's affidavit, this data-driven approach demonstrates "that skill plays a decisive role in a player's cumulative performance over time." *Id.* ¶ 31.

In particular, Professor Hosoi's analysis confirms three basic conclusions. *First*, Professor Hosoi examined whether actions that a player takes in the contest have statistically significant impacts on the results that are achieved. *Id.* ¶¶ 10, 16. In this analysis, Professor Hosoi ran simulations that pitted actual lineups chosen by FanDuel users against computer-generated lineups, chosen at random within the constraints of the games. *Id.* ¶ 21. As Professor Hosoi explains, "[t]he results of this comparison were definitive, and indicate that human choices influence the results of the contest." *Id.* ¶ 24. Even when Professor Hosoi constrained the simulated lineups to those that were within 85% percent of the salary cap and were distributed among position players according to FanDuel averages, thereby simulating some degree of player skill instead of the randomness of chance, the actual FanDuel user still beat the weighted simulated lineup in the overwhelming majority of cases. *Id.* ¶¶ 25–31. For NFL users, lineups



created by FanDuel players won against the weighted simulated lineups 86% of the time. FanDuel users beat the simulated lineups in NBA DFS 95% of the time, while in MLB and NHL contests, the FanDuel users won 73% and 68% of the time, respectively. *Id.* ¶ 30. As Professor Hosoi observed, the “FanDuel users’ winning percentages were such that skill plays a decisive role in a player’s cumulative performance over time.” *Id.* ¶ 31.

*Second*, Professor Hosoi tested the extent to which skill persists over time among DFS players, a strong mathematical indicator of the degree of skill involved in the games. *Id.* ¶ 17. The premise behind this analysis is that in skill-based activities, most players develop a discernible proclivity toward winning or losing that is generally consistent from one period of play to the next. *Id.* ¶¶ 11, 32. After the initial period of first learning the game, players continue to improve their skills, but good players tend to remain good; mediocre players tend to stay mediocre; and bad players tend to stay bad. *Id.* ¶ 32. Over a large population of users, a consistency of results for individual users but a diversity of skill levels and results across the population of users is a powerful indication of the relation between skill and chance in any game. *Id.* ¶¶ 32–33. Measured on this spectrum of persistence, FanDuel’s games are overwhelmingly skill-based. *Id.* ¶¶ 37–41. Indeed, as Professor Hosoi explains (and as shown below), “the role of skill is clearly more significant in DFS contests across all four sports than it is in poker, which many other independent studies have shown is highly correlated with skill.” *Id.* ¶ 41.

*Third*, Professor Hosoi examined the extent to which FanDuel users improve their performance in DFS contests through experience and “practice.” *Id.* ¶ 18. In a contest of chance, no amount of practice would impact a player’s expected outcome. But a skill is something one can get better at through practice. This is readily observable in everyday life—from learning a musical instrument to sports. The same is true of DFS contests. By grouping

FanDuel users based on their level of experience (*i.e.*, by the number of games played), Professor Hosoi observed that over time FanDuel users with more experience had significantly higher win rates than players with little experience, thus establishing that with practice, DFS players can acquire skill and expect better results. *Id.* ¶ 52–59.

Based on this analysis, performed on two seasons of data spanning FanDuel’s entire user base, Professor Hosoi unequivocally concluded that the results of her analysis “indicate that in the aggregate the outcomes of FanDuel’s contests are predominantly based on skill.” *Id.* ¶ 67.

## **2. Skill in Daily vs. Season-Long Contests**

The State does not seriously dispute that fantasy sports generally are games of skill, pointing out the many strategic judgments involved. *See* Compl. ¶ 40. As discussed in Part I.B of the Argument section below, that conclusion is also compelled by New York law. But without any support, the State makes the startling assertion that daily contests eliminate “any and all strategic aspects” of fantasy sports competitions. State’s Memorandum of Law in Support of Its Preliminary Injunction Motion in *People v. FanDuel* (“Mem.”) at 11. That assertion is ill-informed and incorrect.

Experts in fantasy sports believe that short-term contests require *greater* skill than season-long leagues. *See* Dodds Aff. ¶ 27. In FanDuel contests, contestants must choose an entirely new lineup every day or every week and make selection decisions with knowledge of the particular conditions of play, including weather, game location, injuries, player motivations and specific matchups between players and opponents. *Id.* ¶ 26. There are many more skilled-based judgments required to formulate a new fantasy roster than there are in making adjustments to the same roster that the contestant assembled at the beginning of the season. *Id.* Further, in season-long leagues, a player’s place in the draft, which is most often randomly selected, can heavily influence the outcome of the entire contest before it even begins. *See* Griffiths Aff. ¶ 24. In

short-term contests, by contrast, players all start from the same position and do not miss out on an athlete simply because another participant was randomly selected to make an earlier pick. *Id.*

Athletes' fictional "salaries" under the salary cap are not "odds," as they have no effect on how much money the participant pays up front or wins if successful. Rather, just like the "snake draft" described by the State, the "salary cap" is a way to replicate for the fantasy participants the experience of managing a real team, by requiring the participants to maximize resources and pick a balanced team of stronger and weaker players. In fact, the "salary cap" system increases the role of skill, because the order in which participants choose their players becomes irrelevant.

#### **D. FanDuel's Contests Are Fundamentally Unlike Gambling**

The State seeks to analogize fantasy sports, and FanDuel's contests in particular, to various forms of gambling—from "prop" or "parlay" sports betting to poker to lotteries. Compl. ¶¶ 6–7. Those characterizations rest on a fundamental misunderstanding and gross distortion of what fantasy sports contests are and the way that they actually work. *See Dodds Aff.* ¶ 29.

FanDuel is not like the "house" in a casino; players do not "bet" against FanDuel, and FanDuel does not stand to win if a player loses. *Griffiths Aff.* ¶ 21. Prizes are preannounced and paid regardless of who wins. *Id.* FanDuel is therefore indifferent as to the outcome.

FanDuel's contests also are not like "sports betting." Fantasy sports competitors are not passive risk-takers in a wager over which they have no influence or control, like observers of a chess match or bettors on the outcome of a football game. Instead, fantasy sports players are active players in a parallel contest of their own, which exists separate and apart from the underlying athletic event. *See Dodds Aff.* ¶ 29. That separate fantasy sports contest is not a "bet" on any real-world football game, and the outcome of any football game does not determine

the winner in the fantasy game. (For that reason, professional sports' leagues support fantasy sports even as they oppose gambling on games as harmful to the integrity of the game.) Instead, these distinct contests exist only in the "fantasy" realm, where each contestant tests his or her skill at selecting a roster that will never actually play together for comparison against other competitors' selections. *Id.* In this separate fantasy competition, the participants heavily influence the outcome through their selection of the fantasy roster, and they are in active competition against one another. Hosoi Aff. ¶¶ 10, 21–31.

For the same reasons, fantasy sports contests are fundamentally different from "prop betting" on sporting events, which is binary and simplistic—a prediction of whether a single athlete accomplishes or fails to accomplish a particular statistical milestone. *See* Griffiths Aff. ¶ 22. Fantasy sports contests also do not constitute "parlay betting," which most often is simply betting on the outcome of more than one sporting event. *Id.* Fantasy sports is a fundamentally different kind of endeavor: it is a contest to simulate the job of a general manager or coach, using one's sports knowledge to choose from among millions of possibilities to assemble the best fantasy team roster for a particular contest on a particular day. *Id.*

Similarly, fantasy sports contests are very different from poker or other games of cards that some courts have found to constitute gambling. *Id.* ¶ 23. In poker, players start each hand on a non-level playing field based on cards that are randomly dealt and hidden from other players' eyes. *Id.* In FanDuel's contests, players start in the exact same position as one another and have complete control over their lineup. *Id.* Real-world sporting events merely provide the backdrop for FanDuel participants to pit their skills at choosing the best roster against one another. *Id.* The outcome of these real-world sporting events does not dictate who wins any fantasy sports contest. A real-world team can win or lose even though one of its players has

performed distinctively well or poorly in the opposite direction. Fantasy sports participants are required to diversify their rosters across multiple real-world teams to avoid creating a correlation between the fantasy roster's performance and the outcome for any individual real-world team. And FanDuel contests are not like games of chance such as the lottery or a roulette wheel, because, as explained in the preceding section, *see supra* Part C, skill plays such a powerful role in determining the outcome of a fantasy sports competition. Hosoi Aff. ¶¶ 9–13.

**E. People Play FanDuel's Fantasy Sports Contests Because They Enjoy Competing Against Other Sports Fans, Not Because They Want to Gamble**

The State portrays a grossly inaccurate and insulting picture of FanDuel and the people who enjoy its contests. That characterization lacks support and is contradicted by the actual evidence. In reality, FanDuel's typical user is a married man aged 25 to 44 from a small town or suburb. He has a college degree, works a full-time job and earns more than \$75,000 a year. Griffiths Aff. ¶ 27. The vast majority of FanDuel enthusiasts also play in a season-long fantasy league, and play daily or weekly games at FanDuel as well because they enjoy making the specific roster decisions associated with shorter-term contests based on more current information about performance, expected playing conditions and anticipated matchups. *Id.* ¶¶ 27–28. Their primary reasons for participating in fantasy sports are that having their carefully chosen roster to follow makes each week's games more fun and exciting, that they enjoy the challenge of selecting their rosters and that they enjoy competing against other choosers of fantasy rosters. *Id.* ¶ 28.

FanDuel has no interest in attracting users who have gambling problems, and the format of its contests is not conducive to compulsive gaming. *Id.* ¶¶ 29–30. FanDuel does not offer “instant gratification” of the kind associated with gambling, as the State has erroneously asserted. Affidavit of Stephen L. Martino (“Martino Aff.”) ¶ 10. The most popular NFL

contests last an entire week, with contests opening shortly after Sunday midnight and the applicable games being played from Thursday to Monday evening. *Id.* While shorter than an NFL season, a week-long contest is far longer than the type of quick gratification that comes from a roll of the dice, a pull on a slot-machine lever, or a spin of a roulette wheel. *Id.* Moreover, success at fantasy sports including daily contests requires skill and extensive research leading to an involved process of selecting every player position on a fantasy team. *Id.* ¶ 11. Although FanDuel’s games are designed to be user-friendly and accessible, they would be a complicated and unattractive endeavor for someone just looking for a quick gambling fix. *Id.*

The evidence refutes the State’s claim that FanDuel has “ensnared compulsive gamblers” and threatened segments of the population at risk of addiction. *Id.* ¶ 8. The State offers no support for those assertions apart from two short “expert” affidavits that are by their terms anecdotal and speculative and describe no scientific, medical or other investigation or study underlying or supporting their contentions. See Affirmation of Justin Wagner (“Wagner Aff.”) Exs. EE & FF. There is no evidence that participation in daily fantasy sports contests causes problematic behavior associated with addiction. Griffiths Aff. ¶ 30; Martino Aff. ¶ 12. Only a tiny fraction of players on FanDuel have demonstrated any characteristics associated with problem gambling. *Id.* Over the entire history of FanDuel, the total number of customers that have self-reported having a problem is 225, or 0.007% of FanDuel’s participants. *Id.* In the more than six years that FanDuel has offered contests in New York, only 292 New Yorkers, or 0.09% of all New York customers, have had net losses exceeding \$10,000. *Id.* Only 30 users, or one per ten thousand of New York customers, have had net losses exceeding \$50,000. *Id.*; Bonaddio Aff. Ex. 2.

Despite the extreme rarity of observed problems, FanDuel has taken a number of proactive steps to detect and protect any user identified as having a potentially unhealthy level of play on DFS. *See* Griffiths Aff. ¶ 31; Martino Aff. ¶ 12. For example, FanDuel’s customer support team is trained to identify and recognize cues indicating a potential problem. Griffiths Aff. ¶ 31. All such cases are immediately escalated. *Id.* For users identified as having such a problem, FanDuel will immediately terminate their accounts. *Id.* FanDuel began identifying additional ways it can protect such users earlier this year, and efforts are currently underway to implement those new policies. *Id.*

**F. FanDuel’s Advertisements Truthfully Highlight the Advantages of FanDuel’s Products**

FanDuel’s advertising aims to highlight DFS’ improvements on other fantasy sports offerings, including the lack of season-long commitment, the user-friendly website and ability to play on mobile platforms, and the ability for all participants to win. *Id.* ¶ 32. The State accuses FanDuel of instead using its advertisements to misrepresent “the likelihood that a casual player will win a jackpot” and “the degree of skill implicated in the games,” but remarkably does not point to even a single statement in any of FanDuel’s advertisements that it claims is false or misleading Compl. ¶ 144.

FanDuel offers players of all skill levels the opportunity to win prizes in differing DFS contests. *See* Griffiths Aff. ¶ 33. In a 50/50 contest, for example, half of the entries are guaranteed to win. *Id.* In head-to-head games, one of the two players is guaranteed to win. *Id.* And players’ skill improves with practice, as Professor Hosoi’s research demonstrates. *See* Hosoi Aff. ¶ 12. In tournament contests, which typically involve many players and large prizes, the site fully discloses the maximum number of participants and the full schedule of prizes to all entrants in advance of the contest. Griffiths Aff. ¶ 33. As in all popular and widely subscribed

contests, any reasonable player would recognize that, no matter how skillful the player is, the probability of winning the largest prizes is small. *Id.*<sup>1</sup>

It is thus true—indeed it is a point of pride for FanDuel—that any user can win its contests, and the most skilled ones will win most often. That is consistent with fantasy sports’ identity as contests of skill.

### PROCEDURAL HISTORY

On November 10, 2015, the New York State Attorney General’s office sent “cease and desist” letters to FanDuel and its competitor DraftKings, taking the position that DFS is illegal gambling in New York and demanding that the two sites cease offering DFS contests to customers in New York and cease running advertisements that the State contends are misleading. Bonaddio Aff. Ex. 4. On November 13, DraftKings and FanDuel each commenced a special proceeding or civil action against the Attorney General in his official capacity and the State of New York seeking, among other relief, a declaration that their actions were legal.

Following communications from the Attorney General’s Office, FanDuel’s payment providers informed FanDuel that they would no longer do business with FanDuel unless FanDuel

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<sup>1</sup> The Attorney General’s office, without any evidentiary basis, claimed in its cease and desist letter that “the top one percent of FanDuel’s winners receive the vast majority of winnings.” Bonaddio Aff. Ex. 4, at 2. The State, however, has not repeated that misleading claim in its Complaint or Brief. Actual analysis of who wins FanDuel’s contests shows that although the most skilled players do win most often (because DFS is a game of skill), it is far from just the top 1% who win all the prizes. For single-entry NFL contests in 2014, for example, the top 1% of New York players (ranked by overall prize winnings) won less than 40% of the winnings paid out by FanDuel. Bonaddio Aff. Ex. 3. To date in 2015, that percentage is almost identical. *Id.* The top 20% of New York players in FanDuel’s NFL contests win roughly 85% of FanDuel’s prize money. *Id.* These statistics are less meaningful than Professor Hosoi’s analysis (which focuses on 50/50 and head-to-head contests), though, because the nature of the very large tournaments is that the top winners (who end up in the top 1% of all winners because of the size of their prizes) invariably collect a large portion of overall prize winnings. Again, given that FanDuel’s contests are games of skill, it is hardly surprising that a talented group of players would prove most successful.



immediately put measures in place to ensure that it was not accepting new deposits from anyone in New York. Affidavit of Christian Genetski in *FanDuel v. Schneiderman* ¶ 10. As a result, FanDuel stopped accepting new deposits from within New York on November 13, although residents with existing balances in their FanDuel accounts could continue to play. *Id.*

On Monday, November 16, DraftKings and FanDuel each submitted a proposal for an order to show cause seeking a preliminary injunction and a temporary restraining order (“TRO”) restraining the State from interference with the operation of their businesses or other actions to enforce the cease and desist order pending decision on their requests for preliminary injunctions. This Court denied the TRO that afternoon, but signed a modified version of the order to show cause and directed the parties to appear for hearing on the preliminary injunction motion on Wednesday, November 25.

That evening, FanDuel blocked new entries to paid DFS games by New York residents, even those with existing deposits, pending the outcome of its preliminary injunction motion. New York customers remain free to withdraw funds from their accounts.

The next day, November 17, the State commenced separate civil actions against DraftKings and FanDuel. Both actions contend that DFS is illegal gambling and that certain television commercials by the two companies are misleading. In each action, the State submitted a proposed order to show cause why a preliminary injunction should not be issued and sought its own TROs (misabeled as “preliminary injunctions”). This Court rejected the State’s proposed TROs and otherwise signed modified versions of the proposed orders in both actions on November 18, and made the State’s motions returnable contemporaneously with DraftKings’ and FanDuel’s motions, on November 25.

## ARGUMENT

To obtain a preliminary injunction pending final judgment, a party must show (1) a likelihood of success on the merits, (2) irreparable harm if an injunction is not granted, and (3) a balance of equities tipping in its favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990) (affirming denial of preliminary injunction); *Cruz v. McAneney*, 29 A.D.3d 512 (2d Dep’t 2006) (affirming grant of preliminary injunction). The statutory restriction against restraining a state officer in the exercise of statutory duties applies only to temporary restraining orders, not preliminary injunctions. Compare CPLR § 6311(1) (“A *preliminary injunction* to restrain a public officer . . . from performing a statutory duty may be granted . . . by the supreme court . . .”) (emphasis added) with CPLR § 6313(a) (“No *temporary restraining order* may be granted . . . against a public officer . . . to restrain the performance of statutory duties”) (emphasis added).

FanDuel’s fantasy sports contests are legal under New York law, and FanDuel’s advertisements are accurate and not misleading. Accordingly, only FanDuel, not the State, has a likelihood of success on the merits. It follows that FanDuel’s lawful conduct is causing no irreparable injury to the State, that the State’s interference with FanDuel’s legitimate business is causing irreparable injury to FanDuel, and that the equities tip in FanDuel’s favor. FanDuel’s motion for a preliminary injunction should therefore be granted, and the State’s motion should be denied.

## I. FANDUEL’S FANTASY SPORTS CONTESTS DO NOT CONSTITUTE GAMBLING UNDER NEW YORK LAW

FanDuel’s DFS contests are not prohibited by Article 225 of the Penal Law (§§ 225.00 *et seq.*), the statutory implementation of the New York State Constitution’s restrictions on illegal gambling (in Art. I, § 9). The State alleges that FanDuel’s activities constitute promotion of gambling in violation of Penal Law §§ 225.05 and 225.10, and possession of gambling records under Penal Law §§ 225.15 and 225.20. Compl. ¶¶ 115–141. Those offenses require “knowingly advanc[ing] or profit[ing] from unlawful *gambling* activity,” *id.* §§ 225.05, 225.10 (emphasis added), or possessing records “[o]f a kind commonly used in the operation or promotion of a *bookmaking* scheme or enterprise,” *id.* §§ 225.15(1), 225.20(1) (emphasis added). “Bookmaking,” in turn, is defined as “advancing *gambling* activity by unlawfully accepting bets from members of the public as a business . . . upon the outcomes of future contingent events,” Penal Law § 225.00(9) (emphasis added), and thus cannot exist unless the underlying activity is “gambling.” Thus, each of the State’s contentions depends on its assertion that FanDuel’s contests are “gambling.”

To establish gambling as defined in Section 225.00(2), the State must demonstrate that FanDuel’s contests involve (1) “stak[ing] or risk[ing] something of value” (2) upon the outcome of (i) “a contest of chance” or (ii) “a future contingent event not under [the participant’s] control or influence.” *Id.* § 225.00(2). The State’s case fails at both elements.

**First**, FanDuel’s DFS competitions are contests of skill among the participants for a pre-determined prize. Under longstanding New York law, the entry fees paid by participants are therefore not properly viewed as “stak[ing] or risk[ing] something of value upon [an] outcome.” *Id.*

*Second*, the outcome of a FanDuel contest is determined by the participants' skills, rather than any "contest of chance" or "future contingent event not under [the participant's] control or influence," as those terms have been defined and should be applied here. *Id.* Empirical evidence demonstrates that FanDuel's contests are overwhelmingly games of skill, and that a player's lineup selections plainly influence the outcome of the fantasy contest. FanDuel's DFS contests therefore fall outside of the definition of illegal gambling in New York.

**A. FanDuel's DFS Contests Do Not Involve Staking or Risking Anything of Value Under the Gambling Laws, But Rather the Payment of an Entry Fee to Compete for Prizes**

In contending that FanDuel's fantasy sports contests constitute gambling, the State's submission takes no account of the long-recognized rule of New York law that contests in which participants pay an entry fee and engage in a competition involving skill with predetermined prizes for winners are legally valid. This principle protects the legality of many kinds of competitions, from golf or chess tournaments to agricultural competitions at county fairs. Applied here, this rule reflects that an entry fee to compete in a FanDuel contest does not constitute "stak[ing] or risk[ing]" something of value as an illegal bet or wager under Penal Law 225.00. The only court to directly address whether fantasy sports constitute illegal gambling ruled on precisely this ground, finding that fantasy sports constitute lawful contests for prizes. *Humphrey*, 2007 WL 1797648, at \*9.

**1. Paying a Fee to Enter a Contest for a Preannounced Prize Is Not a Wager**

New York's Court of Appeals provided a leading articulation of the principle that entry fees for prizes in contests of skill are not gambling. In *People ex rel. Lawrence v. Fallon*, 152 N.Y. 12 (1897), the Court of Appeals upheld the lower court's decision to overturn the arrest of an officer of a club in which horse owners who paid an entrance fee could race their horses

against each other for a purse in a preannounced, fixed amount to the winners, payable from the association's general assets (which of course included the participants' entrance fees), with the association having no stake in the race's outcome. *Id.* at 16–18, 20. In language that applies equally here, the court rejected the State's contention that this contest was a “wager” or “bet” for payments from a pool:

If the doctrine contended for by the [State] is sustained, it would seem to follow that the farmer, the mechanic or the stockbreeder who attends his town, county or state fair, and exhibits the products of his farm, his shop or his stable, in competition with his neighbors or others for purses or premiums offered by the association, would become a participant in a crime, and the officers offering such premium would become guilty of gambling under the provisions of the Constitution relating to that subject. Those transactions are in all essential particulars like this. In those, as in this, one of the parties strives with others for a prize; the competing parties pay an entrance fee for the privilege of joining in the contest, and in those cases, as in this, the entrance fee forms a part of the general fund from which the premiums or prizes are paid. Indeed, all those transactions are so similar to this as to render it impossible to discover any essential difference between them.

*Id.* at 19.

Numerous courts have endorsed the principles described in *Fallon*. In *State of Arizona v. American Holiday Association, Inc.*, 151 Ariz. 312, 727 P.2d 807 (Ariz. 1986) (en banc), the Arizona Supreme Court relied on *Fallon* in holding that a company that charged a fee to enter a word game, and awarded advertised prizes to the winning entries, was not taking bets or wagers.

As the court explained,

[A]n entrance fee does not suddenly become a bet if a prize is awarded. If the combination of an entry fee and a prize equals gambling, then golf tournaments, bridge tournaments, local and state rodeos or fair contests and even literary or essay competitions, are all illegal gambling[.]

*Id.* at 314, 727 P.2d at 809 (citing *Fallon*, 152 N.Y. at 19). The court also confirmed the distinction courts follow between a “bet” or “wager” and a prize:

A bet is a situation in which the money or prize belongs to the person posting it, each of whom has a chance to win it. Prize money, on the other hand, is found when the money or other prize belongs to the persons offering it, who has no chance to win it and who is unconditionally obligated to pay it to the successful claimant.

*Id.* at 315, 727 P.2d at 810 (citation omitted). The elements of a pre-fixed prize amount and no opportunity for the sponsor to keep or win the announced purse make that purse a “prize.”

Similarly, the Nevada Supreme Court held in *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85 (Nev. 1961), that the offer of a \$5,000 prize to any golfer who scored a hole-in-one after paying a 50¢ entry fee was not a gambling contract but a contest, on similar reasoning to *Fallon*, observing that “[t]he fact that each contestant is required to pay an entrance fee where the entrance fee does not specifically make up the purse or premium contested for does not convert the contest into a wager.” *Id.* at 29, 359 P.2d at 87 (citation omitted). Courts in other states have reached similar results. *See, e.g., Faircloth v. Central Fla. Fair, Inc.*, 202 So. 2d 608, 609 (Fla. 4th Dist. Ct. App. 1967) (distinguishing single-game wagering from playing games of skill for prizes: “No one seriously considers such activities to be gambling.”); *Toomey v. Powell*, 76 Mont. 166, 173, 245 P. 943, 945 (1926) (paying to enter horse in race for prize was not illegal betting on horse races).

The principles set forth in *Fallon* (as an interpretation of Article 1, Section 9 of the State Constitution) and other cases following its reasoning remain good law under the Penal Law provisions that were enacted after *Fallon* was decided. The State has not suggested otherwise and has not cited any case rejecting the principle that the entry fee in a contest involving skill-based competition for a preannounced prize is not a “wager.” Rather, the State appears to

acknowledge that the presence of a “wager” is a threshold requirement for establishing illegal gambling (captured in the element of “stak[ing] or risk[ing] something of value,” Penal Law § 225.00(1)), before even considering whether any such wager depends on the outcome of a “contest of chance” or “a future contingent event not under [the player’s] control or influence.” Mem. at 1. Applying the principle explained in *Fallon* and cases following it, the State cannot meet this requirement here.

**2. Fantasy Sports, Including FanDuel’s DFS Contests, Fall Within the Scope of Contests for Prizes That Do Not Constitute Gambling**

FanDuel’s DFS contests contain all the elements of a contest for prizes that courts have held do not constitute gambling. The only court to consider whether fantasy sports contests are gambling confirmed precisely that conclusion, holding that fantasy sports contests are *bona fide* contests for prizes—not bets, wagers, stakes or risks—applying the same test that the New York courts have applied. In *Humphrey*, 2007 WL 1797648, the plaintiff brought suit against ESPN and other fantasy sports operators under a New Jersey *qui tam* statute that defines gambling in terms similar to Penal Law § 225.00 (not a federal statute, as the State’s representative incorrectly stated at the TRO hearing in this case. See TRO Hr’g Tr., Nov. 16, 2015, at 30:13 - 16. The court dismissed the complaint on multiple grounds, concluding that “as a matter of law,” the payment of an entry fee to participate in a fantasy sports league is not wagering, betting or staking money. *Humphrey*, 2007 WL 1797648, at \*7. As the court explained:

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).

*Id.* at \*8. As examples of permissible contests that do not constitute gambling, the court recited the list that the Arizona Supreme Court had identified in *State of Arizona v. American Holiday*

*Association, Inc., supra*, and added some others—“livestock, poultry and produce exhibitions, track meets, spelling bees, beauty contests, and the like”—concluding that it would be “patently absurd” to adopt a definition of wagering that might mean that such “contest participants and sponsors could all be subject to criminal liability.” *Humphrey*, 2007 WL 1797648, at \*7. The court adopted the distinction between a “wager” and an “entry fee” for a “prize” recognized by other courts, recognizing that in the fantasy sports contests in issue “the entrance fee does not specifically make up the purse or premium contended for.” *Id.* at \*8.

The *Humphrey* court also recognized that (as is true for the New York statute), the determination that participation in fantasy sports did not constitute a “bet” or “wager” made it unnecessary to determine with regard to fantasy sports contests “whether the outcome of the game is determined by skill or chance.” *Id.* (“Whereas we have concluded that the contract is not a gaming transaction [because there is no bet or wager], consideration of . . . [whether] the shooting of a ‘hole-in-one’ was a feat of skill . . . becomes unnecessary.”) (quoting *Las Vegas Hacienda*, 359 P.2d at 87) (alterations in original).

This description fits DFS no less than seasonal fantasy sports, and the State does not identify any differences that are relevant to the tests applied in *Fallon* and in *Humphrey*. FanDuel’s contests allow participants to pay a fixed entry fee that is the same for all participants in order to compete against others for a fixed set of prizes that will be paid no matter how many people participate and that cannot be won by the sponsor. These terms render FanDuel’s contests lawful.

Congress has codified this common law rule for purposes of federal law, explicitly providing that fantasy sports competitions fall outside the definition of “bet or wager” in the federal Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”), 31 U.S.C. §§ 5361–



5365. That provision extends to any fantasy sports contest involving an entry fee in which (1) prizes are established and announced in advance, (2) outcomes reflect the “relative knowledge and skill of the participants” and are determined “predominantly” by the performances of athletes in multiple games, and (3) the result is not determined by the outcome for a real-world team or teams or an athlete’s performance in a single real-world sporting event. *Id.* § 5362(1)(E)(ix). FanDuel’s games fully satisfy those conditions. UIGEA reflects an important legislative application to fantasy sports leagues of the fundamental distinction between gambling and contests for a prize, which was already long-established in New York law.<sup>2</sup>

In sum, FanDuel’s contests do not constitute illegal gambling because the State fails the threshold test of showing a bet or wager (“stak[ing] or risk[ing] something of value”). Rather, FanDuel’s contests allow participants to pay an entry fee to compete for preannounced, guaranteed prizes, a form long recognized as lawful by New York courts and more recently by the only court to address whether fantasy sports constitute gambling.

#### **B. FanDuel’s Fantasy Sports Contests Are Games of Skill, Not Chance**

Even apart from the State’s inability to satisfy the first element of the Penal Law’s test for “gambling,” the State also does not satisfy the second element of demonstrating that DFS games are “contests of chance,” *see* Penal Law §§ 225.00(1)-(2).

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<sup>2</sup> The State’s assertion that FanDuel’s CEO Nigel Eccles “seized on” UIGEA as a “loophole” to “concoct” DFS, Compl. ¶ 35, is not fair or accurate. Shorter term fantasy sports had been invented well before Mr. Eccles and the company’s other co-founders began creating FanDuel. *See* Griffiths Aff. ¶ 7. Improving a lawful existing game like fantasy sports does not constitute “seizing on” anything, and acting within an explicit Congressional exemption based on a substantive view about the legality of fantasy sports is not seizing a loophole.

**1. A Game Is Not Gambling If Skill, Rather Than Chance, Is the Dominating Element**

Courts throughout the country, including in New York, have recognized that the test for whether a game is one of chance or of skill is whether chance or skill “is the dominating element that determines the result of the game.” *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 170–71 (1904). Following the New York Court of Appeals’ landmark decision in *Lavin*, the “dominating element” test became the established test throughout the country. See Bennett Liebman, *Chance v. Skill in New York’s Law of Gambling: Has the Game Changed?*, 13 GAMING L. REV. & ECON. 461, 461–62 (2009).

The “dominating element” test for distinguishing between contests of skill and contests of chance continues to be applied by New York courts today. For example, the court in *People v. Li Ai Hua*, 24 Misc. 3d 1142 (Crim. Ct. Queens County 2009), quoting *Lavin*, held that the relevant “test” was whether skill or chance was the “dominating” element. *Id.* at 1145. Because the indictment failed to allege facts that would support a conclusion that mahjong is a game of chance under that standard, the court dismissed the indictment. *Id.* at 1147.

The State asserts that the Court of Appeals’ “dominating element” test adopted in *Lavin* is no longer good law because the 1965 general revision to the Penal Law included a definition of “contest of chance” as any contest that depends “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), which the State claims means that gambling can exist when chance is less than the “dominating element.” Mem. at 23. The State cites numerous New York cases simply quoting the “material degree” language of the statute. But the State does not identify even a single case applying that statutory test to mean something other than the “dominating element” test or to reach a different outcome than would have been reached under the “dominating element” test.

On the contrary, the case law that postdates the enactment of § 225.00 makes clear that the two tests are synonymous. For example, *Li Ai Hua* quoted the *Lavin* “dominating element” test as providing the meaning of the statutory phrase “material degree”:

While some games may involve both an element of skill and chance, if the outcome depends in a *material degree* upon an element of chance, the game will be deemed a contest of chance. 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[.]

24 Misc. 3d at 1145 (emphasis added; quotation marks and citations omitted). Numerous other New York cases after the 1965 adoption of § 225.00 have continued to cite and follow *Lavin* as providing the test for whether an activity constitutes gambling.<sup>3</sup>

Similarly, in *People v. Hunt*, 162 Misc. 2d 70 (Crim. Ct. N.Y. County 1994), the court considered whether chance was dominant in deciding whether three-card monte, if honestly played, was a contest of chance under the “material degree” language of the statute. The court quoted the “material degree” test, analyzed the State’s allegations, and concluded that the game was not gambling because “skill *rather than chance* is the material component” of the game. *Id.* at 72 (emphasis added). In other words, in applying the “material degree” test, the court looked

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<sup>3</sup> See, e.g., *Dalton v. Pataki*, 11 A.D.3d 62, 82 n.5 (3d Dep’t 2004), *modified on other grounds*, 5 N.Y.3d 243 (2005) (citing *Lavin* for basic meaning of “game of chance” in New York law); *People v. Stiffel*, 61 Misc. 2d 1100 (App. Term 2d Dep’t 1969) (citing *Lavin* to hold that billiards is not gambling); *People v. Davidson*, 181 Misc. 2d 999, 1001 (Sup. Ct. Monroe County 1999), *rev’d on other grounds*, 291 A.D.2d 810 (4th Dep’t), *appeal dismissed*, 98 N.Y.2d 738 (2002) (citing *Lavin* to hold that playing dice for money is gambling); *People v. Melton*, 152 Misc. 2d 649, 651 (Sup. Ct. Monroe County 1991) (same); *People v. Hawkins*, 1 Misc. 3d 905(A), 2003 N.Y. Slip Op. 51516(U), at \*2 (Crim. Ct. N.Y. County 2003) (same); *Valentin v. El Diario–La Prensa*, 103 Misc. 2d 875, 878 (Civ. Ct. Bronx County 1980) (citing *Lavin* and applying “dominating factor” test to conclude that “voting contest” sponsored by newspaper was gambling).

to whether skill outweighed chance, not (as the State now appears to argue) whether chance played any significant part.

Just one case cited by the State, *People v. Jun Feng*, 34 Misc. 3d 1025(A), 2012 N.Y. Slip Op. 50004(U) (Crim. Ct. Kings County 2012), quoted commentary opining that chance need not be the dominating element for a game to constitute a game of chance. But the court did not actually apply that test. Instead, it held that the operators of a mahjong parlor, by using a “house container” to collect a \$1 cut of every hand that won \$15 or more, were betting on how many hands would be won for at least \$15. *See id.* at \*5–\*6. Thus, they were gambling under the “future contingent event” prong of the statutory definition regardless of whether the underlying game was one of skill or chance. *Id.* at \*6. The court noted, however, that under that test, the mahjong players themselves “would not be engaged in gambling, since they have *some control* over the outcome of the game using their skill.” *Id.* at \*6 n.1 (emphasis added). The State’s case against FanDuel thus fails under the test that *Jun Feng* applied, because fantasy sports has no “house container”—FanDuel has no stake in the outcome of the fantasy sports contests it administers—and fantasy sports participants, like mahjong players, plainly have at least “some control” over the outcome of the games through their skill. *Id.*

The legislative history of the Penal Law confirms what the case law indicates, namely that the 1965 revision of the Penal Law was never intended to overrule the *Lavin* “dominant element” test. The 1965 Penal Law revisions were based on a proposal by a temporary legislative commission known as the Bartlett Commission, and the Court of Appeals has held that the 1965 revisions should not be interpreted to make fundamental changes in existing law unless the Commission specifically identified those changes in its working papers:

The Bartlett Commission comprehensively studied the entire body of law and was unquestionably aware of [existing Court of Appeals

precedents]. Surely their work would have reflected such a fundamental change had it been intended.

*People v. Collier*, 72 N.Y.2d 298, 302 n.1 (1988). With regard to the gambling provisions of the law, the Bartlett Commission was focused on streamlining and unifying the provisions to “simplify the framing and lodging of charges in gambling cases.” Commission Staff Notes on the Proposed New York Penal Law, *in* TEMP. COMM’N ON REVISION OF PENAL LAW & CRIM. CODE, THIRD INTERIM REPORT, at 382 (1964) (discussing dismissals of cases because prosecutors had mistakenly charged the wrong section of the old law). Consistent with this goal, the Commission emphasized that it was making “few actual changes of substance” but “considerable revision with respect to form.” *Id.* at 381. The Commission’s report does not even mention the “material degree” language it inserted in the definition of “gambling.”

The “material degree” language of the statute adopted in 1965 was not meant to alter the “dominant element” test in any way, but rather to codify it. Had the Bartlett Commission meant to adopt a radical change to the longstanding meaning of games of chance—as framed by the Court of Appeals in a leading case that had been followed in New York and other states for nearly a century—it would not have shrugged off this alteration as “few actual changes of substance” without further discussion. *Id.*; *see Collier*, 72 N.Y.2d at 303 n.1.

## **2. Under Any Reading of the Statute, the Facts Demonstrate That Fantasy Sports Contests Are Games of Skill, Not Chance**

Even if “material degree” only meant an important or substantial but not necessarily dominant element of chance, DFS contests would still qualify as contests of skill rather than chance. “Material degree” in this context must at the very least mean that chance is an important element. If it were satisfied merely because chance might occasionally change the outcome, then almost nothing would be a game of skill, as “[i]t is difficult to conceive of any game which does not have present . . . the element of chance.” *Amusement Enters., Inc. v. Fielding*, 189 Misc.

625, 628 (Sup. Ct. Kings County 1946), *modified on other grounds*, 272 A.D. 917 (2d Dep’t 1947). The State highlights the role that unpredictable events—an injury, the weather, or a bad hop—play in fantasy sports, but all those same events equally can affect the outcomes of real sporting events or other competitions without altering their nature as contests of skill. Numerous games have been acknowledged to be contests of skill by the courts in New York, including tennis, golf, basketball, billiards, bowling, alley ball, shooting games, chess and checkers. *See, e.g., Amusement Enters.*, 189 Misc. at 628 (alley ball, a game similar to skee-ball; also listing basketball, tennis, billiards, bowling and golf); *Lavin*, 179 N.Y. at 170 (chess, checkers, billiards and bowling); *People v. Cohen*, 160 Misc. 10, 11 (Magis. Ct. Queens Borough 1936) (coin-operated electric-eye shooting game). They do not become games of chance just because, in most of those games, “occasionally an unskilled player may make a lucky shot.” *Cohen*, 160 Misc. at 11; *accord Lavin*, 179 N.Y. at 170.

As noted above, empirical evidence overwhelmingly confirms that FanDuel’s contests are games of skill by demonstrating that skilled players’ considered choices consistently outperform not only random choices but also choices when some degree of skill is simulated, that competitors tend strongly to perform consistently with their skill levels over time and that continued play tends to lead to improved performance over time. These characteristics of fantasy sports are incompatible with the randomness that attaches to games of chance like lotteries, roulette and bingo.

In determining whether a particular type of contest is dominated by skill or chance, it makes no sense to look at a single particular outcome, because even the most skill-based contests—apart from contests so lopsided that they are not genuinely competitive—will not yield the same outcome every time. Instead, “skill” is properly viewed as the capacity, through the

exercise of effort and aptitude, to increase the prospects of achieving a desired result over what would be expected if events were unfolding at random. As the Nevada Supreme Court recognized in *Las Vegas Hacienda, supra*, for example, it was “within the province of the trial court to determine” that a hole-in-one contest was a contest of skill because “a skilled player will get it (the ball) in the area where luck will take over more often than an unskilled player.” 77 Nev. at 30, 359 P.2d at 87. The reality that superior skill increases the prospect for achieving the hole-in-one only by enabling the player to get close more often without guaranteeing that result, and that a poor player could defy the odds by achieving a hole-in-one ahead of superior players, did not transform the contest into one “dominated” by chance.

The same is true for fishing contests, spelling bees, sporting events and other games of skill—proof of the dominance of skill lies in the ability of individual players to increase significantly their prospects of winning through the exercise of effort and aptitude. More able competitors will prevail more of the time in all of these contests, even though the vagaries of any individual competition may mean that the biggest fish avoid the most skilled fisherman’s hook (or jump onto the least skilled fisherman’s hook), the best speller is given a rare word she does not know (or her opponent receives only words she knows), or a presence or absence of a fingertip’s deflection leads to a reception or interception that changes the course of a football game. These contests remain contests of skill even though they, like all contests, may be affected by small differences in performance by the contestant or others that are part of the nature of contests and that nobody could predict. To the extent the range of potential outcomes is characterized as “chance”—even though true “chance” is in its nature more random—it cannot be considered so “material” against the backdrop of the dominant role of skill that it transforms the prizes in these contests into the proceeds of “gambling” within the meaning of the statute.

Fantasy sports share the same dynamic of skill-based decisions, capacity to increase prospects for winning through effort and aptitude, and susceptibility to a range of outcomes as these other games of skill. The inference of skill is strong—far stronger, for example, than the inference of skill in outcomes in poker, where courts have wrestled with whether the skill-based nature of the game was sufficient to characterize it as a game of skill. *See United States v. DiCristina*, 886 F. Supp. 2d 164, 235 (E.D.N.Y. 2012) (considering degree to which Texas Hold ’Em is properly considered a “game of skill”), *rev’d on other grounds*, 726 F.3d 92 (2d Cir. 2013). The kinds of individual events that the State imagines as potentially affecting the performance of an individual player on a fantasy roster do not transform this skill-based competition into a game of chance under the Penal Law.

**C. Fantasy Sports Contests Are Not Wagers on the Outcome of a “Future Contingent Event” Outside the Player’s “Control or Influence”**

Unable to mount a serious argument that FanDuel’s fantasy sports contest are games of chance, the State ultimately resorts to a little-cited portion of the statute that prohibits staking or wagering something on “a future contingent event not under the [person’s] influence or control.” But that contention also fails. For reasons explained above, payments to compete in FanDuel’s contests are not “wagers” or “stakes” at all, but rather entry fees in a contest for a prize. *See Part I.A. supra*. In addition, the plain language of the “future contingent event” clause makes clear that a contest is not gambling if the player has any “influence” over the outcome—there is no requirement that the degree of influence be significant.

In fantasy sports, prizes are distributed based on the outcome of the fantasy contest, not the outcome of any real-world event. Professor Hosoi’s study shows that the primary determinant of the outcome of that fantasy contest is the skill of the player. Thus, it should be beyond dispute that the contest entrants have an “influence” on the outcome of the event for



which the prize is awarded. That the fantasy contestant cannot influence the outcome of any real-world sporting event is not relevant, because fantasy contestants cannot win prizes based on the outcome of the real-world sporting event.

By its plain meaning, the “future contingent event” clause addresses the fundamentally different scenario in which a person stakes something of value on the outcome of a real-world game or similar event in which he is a purely passive observer and has no influence. If it were construed in the expansive and unbounded manner urged by the state, the “future contingent event” provision would not only raise serious constitutional questions but also outlaw a whole range of activities that are part of daily life.

**1. Participants in a Fantasy Sports Contest Are Active Players in a Competition of Their Own, Not Bettors on a Sporting Event**

The State’s effort to shoehorn FanDuel’s contests into the “future contingent event” clause is simply another manifestation of the State’s fundamental mischaracterization of how fantasy sports work. The State asserts incorrectly that fantasy sports contestants are just like the observer of a chess match who bets on an either/or, binary outcome—whether player A will defeat player B. But that is not an accurate description of a fantasy sports contest. Fantasy sports players are far more analogous to active players of their own game of chess, competing with one another in a game of skill to select the optimal roster of players. The “outcome” that is relevant to the players is not whether one real-world team beats another, but instead whether one competitor can gain more fantasy points and thereby outperform his opponent in the fantasy contest. The outcome of that separate fantasy contest is plainly within the player’s “control or influence,” because the player actively selects the fantasy team lineup that principally determines his ultimate success.

The demonstration that fantasy sports contests are games of skill, *see* Part I.B. *supra*, in which more skilled players consistently win more often, equally confirms that the contestants in those contests have influence over their outcome. As Professor Hosoi’s study shows, the primary determinant of the outcome of DFS contests over time is the relative skills of the competitors. Hosoi Aff. ¶ 67. Player results improve with experience, and player choices unquestionably and predictably influence game outcomes. *Id.* ¶¶ 10, 12. The FanDuel player is thus very much the actor in his own play, not merely an observer or a bettor against the house. The State attempts to argue otherwise, Mem. at 6, 22–23, by pointing out that once a contest “locks” and the underlying sporting events begin, the outcome is out of the fantasy player’s control. That argument simply ignores the essential part of the contest, which, in fantasy sports, is the player’s selection of lineup choices.

The same point becomes clear by understanding the absence of any correlation between the outcomes of real-world sporting events and the outcomes of fantasy contests. FanDuel’s contests are designed so that the outcomes of real-world sporting events are irrelevant to contest outcomes. FanDuel does not offer contests based on any single sporting event, and they do not permit participants to construct any lineup that substantially coincides with an actual, real-world team. Griffiths Aff. ¶ 12.

The State is therefore incorrect in its conclusory argument that fantasy contests are simply a form of sports betting. The results of the underlying sporting events are not the “outcome” on which prizes are awarded, and thus not the outcome that matters under the terms of Penal Law § 225.00(2). What matters is the outcome of the fantasy contest, and as to that, the State simply cannot make a plausible factual showing that the fantasy contest participant has no “control or influence.” *Id.*; *see Jun Feng, supra*, 2012 N.Y. Slip Op. 50004(U), at \*6 n.1. As the

United States Court of Appeals for the Third Circuit recently confirmed, there is a “legal difference between paying fees to participate in fantasy leagues and single-game wagering as contemplated by the [New Jersey] Sports Wagering Law.” *NCAA v. Governor of N.J.*, 730 F.3d 208, 223 n.4 (3d Cir 2013) (citing *Humphrey*, 2007 WL 1797648, at \*9).

For the same reasons, the State’s strained attempts to analogize fantasy sports to “prop” bets, in which a participant bets on a particular event in a sporting event, likewise fail. Mem. at 5 n.3, 21 n.6; Compl. ¶¶ 43–47. The State relies on *Grant v. State*, 75 Ga. App. 784, 44 S.E.2d 513, 515 (1947), in which the court held that it was gambling under Georgia law to take a bet on whether a specific batter, on a specific occasion at bat, would hit a fly ball to the outfield. But that kind of binary, either-or bet is fundamentally different from a fantasy sports contest (either season-long or daily), which is built on the separate competitive and skill-based exercise of building a fantasy team to compete against other fantasy teams. And fantasy sports do not look to whether a particular player or even a collection of players achieves a particular milestone, but to how the participant’s fantasy roster choices compare to the roster choices by other participants.

The remaining “future contingent event” cases on which the State relies bear even less resemblance to fantasy sports. For example, in *People v. Turner*, 165 Misc. 2d 222, 224–25 (Crim. Ct. N.Y. County 1995), involving a shell game, the court found that any skill was being exercised by the person manipulating the shells, with no real opportunity for the other participant to win except possibly by random chance. But in fantasy sports, all participants have an equal opportunity to test their skills against other participants. And in *People v. Jun Feng*, 34 Misc. 3d 1205(A), 2012 N.Y. Slip Op. 50004(U) (Crim. Ct. Kings County 2012), a mahjong house was profiting from the wins of the mahjong players by taking a cut of their winnings, *id.* at \*4–\*5.

Notably, however, the court found that the players were not gambling under that provision because they had “some control” over the outcome, *id.* at \*6 n.1. But in fantasy sports, there is no “house.” FanDuel does not gain or lose anything based on the outcome of participants’ contests. It acts only as administrator of fantasy sports contests, and entry fees and prizes are both fixed in advance. It is the relative skill of the fantasy players that determines success in fantasy sports contests.

**2. Adoption of the State’s Sweeping “Future Contingent Event” Theory of Gambling Liability Here Would Run Afoul of the Rule of Lenity, Constitutional Requirements of Due Process, and Common Sense**

Were the Court to adopt the State’s sweepingly broad “future contingent event” theory here, the same logic would criminalize a wide variety of legitimate business activities that clearly do not amount to gambling—including insurance, investing, and trading in commodities futures or derivative instruments. As the Court of Appeals has recognized, however, “[i]f two constructions of a criminal statute are plausible, the one more favorable to the defendant should be adopted in accordance with the rule of lenity.” *People v. Golb*, 23 N.Y.3d 455, 468 (2014) (quoting *People v. Green*, 68 N.Y.2d 151, 153 (1986)); *see also People v. Aleynikov*, 49 Misc. 3d 286, 323 (Sup. Ct. N.Y. County 2015) (requirement that Penal Law provisions should be construed “according to the fair import of their terms” under Penal Law § 5.00 does not supersede rule of lenity). The rule of lenity applies even if the criminal statute is being enforced in a civil action, as courts will not give two different meanings to the same law. *See, e.g., Fed. Commc’ns Comm’n v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954) (“[T]hese are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice.”).

Moreover, statutes should be construed in ways that avoid rendering them unconstitutional or even creating serious doubts about their constitutionality. *People v. Correa*,

15 N.Y.3d 213, 233 (2010); *People v. Finkelstein*, 9 N.Y.2d 342, 345 (1961). Under the “void-for-vagueness” doctrine, a penal statute violates constitutional requirements of due process unless it “define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); see U.S. Const. Amend. XIV; N.Y. Const. Art. I, §§ 1, 6. The Penal Law provision regarding staking money on a “future contingent event beyond [the participant’s] influence or control” would violate this principle—or, at the very least, raise serious constitutional questions—if it were extended beyond core activities traditionally recognized as gambling, as it would fail to provide a definite principle for distinguishing between prohibited activities and activities that are widely recognized as lawful.

For example, insurance, by its very nature, involves an agreement to pay based on a contingent future event beyond the insurance company’s influence or control. But it is not gambling. Likewise, a passive investor in a company has no influence over the outcome of his or her investment, but such investments are not considered gambling. The same is true for trading in futures or derivatives, even though no actual commodities or other items ever change hands, as those instruments involve nothing more than a contingent promise to pay money in the future. See, e.g., *Korea Life Ins. Co., Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 269 F. Supp. 2d 424, 442 (S.D.N.Y. 2003) (“Derivatives transactions, forward contracts and swap agreements in currencies and commodities are not considered illegal gambles, and do not violate New York’s gambling statute.”); *Liss v. Manuel*, 58 Misc.2d 614, 617 (Civ. Ct. N.Y. County 1968) (recognizing futures contracts as “an approved and judicially enforceable mode or form of business and regardless of risk, not a bet, wager or illegal gamble”). Yet the insurance carrier,

the investment advisor, and the general manager do not act based on chance—they act based on expertise, underwriting and analysis—and thus have a significant opportunity to *influence* the performance of their portfolios by their choosing, even though they do not *control* the results. The same is true for fantasy sports contests.<sup>4</sup>

Indeed, Congress in UIGEA recognized precisely the danger of the overly broad construction of gambling the State presses here. UIGEA, in terms nearly identical to Penal Law 225.00(2), applies to “the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance,” 31 U.S.C. § 5362(1)(A). To make clear the limits of that provision, however, Congress expressly stated that it does not apply to “any contract of insurance,” transactions in commodities, or the “purchase or sale of securities,” among other things. 31 U.S.C. § 5362(1)(E). In the very same provision, Congress also excluded fantasy sports competitions, such as those offered by FanDuel from the statute explaining the nub of why they do not constitute gambling: because the “winning outcomes reflect the relative knowledge and skill of the participants[.]” *Id.* These statutory limits, articulated in clear terms by Congress, also reflect the common law of New York and common sense. The Court should reject the State’s unprecedented attempt to extend Penal Law 225.00(2) beyond its sensible reach.

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<sup>4</sup> It is no answer that insurance, securities and commodities trading, and similar activities are, in today’s world, subject to state or federal regulation. Even today, many forms of passive investment (such as investments in real estate or in companies that are not publicly traded) are subject to no regulation beyond a prohibition on outright fraud. Those activities do not amount to gambling regardless of whether Congress or the Legislature has chosen to regulate them.

**D. FanDuel’s Contests Are Materially Indistinguishable from Season-Long Contests and Are Legal for the Same Reasons**

The State attempts to cabin the effect of its misreading of the law by claiming that it is not challenging “traditional” season-long fantasy sports. But the State cannot avoid the broad implications of its reasoning. Each of the supposedly distinctive features of “daily” fantasy sports is equally applicable to season-long contests or has no relevance to whether FanDuel’s offerings meet the legal definition of “gambling.” If, as the State contends, “traditional” season-long contests are “lawfully played,” then so too are FanDuel’s contests.

First, the “salary cap” system that FanDuel employs is also used in some season-long games, and in any event it requires no less skill than the various forms of fantasy drafts -- indeed, in many ways the salary cap format actually increases the role of skill and the variety of strategic concerns players must consider. *Dodds Aff.* ¶¶ 10, 24.

Second, seasonal fantasy sports contests, no less than daily contests, have traditionally been played for money prizes, and all the major fantasy sports sites facilitate play for financial reward -- either directly or by helping fantasy sports “commissioners” track the receipt and payment of players’ money. *Dodds Aff.* ¶ 21–23.

Third, DFS participants have a wealth of additional information to consider in setting their lineups compared with season long games, including game conditions, injuries and individual matchups, all of which allow a player to make skilled strategic judgments.

Finally, in DFS as well as season-long fantasy games, participants typically play because they enjoy competing against other sports fans and find that playing fantasy games enhances that enjoyment of sporting events. *Griffiths Aff.* ¶¶ 27–30. There is no credible evidence that DFS is more likely to attract “problem gamblers” than seasonal fantasy sports, nor is there any merit to the States’ assertion that FanDuel makes participating in fantasy sports too easy. *Compl.* ¶ 37;

Mem. at 2; *see* Martino Aff. ¶¶ 10–12. FanDuel’s players may well describe themselves as “a bit of an addict” to many sports-related activities, Compl. ¶ 77, ranging from following their favorite football team to collecting rare baseball cards, but for the State to describe that as a “gambling addiction” strains credibility.

In short, the State’s hope that it can apply its gambling laws to FanDuel’s contests, while leaving traditional season-long fantasy contests unscathed, is without foundation in law or fact. The two are the same game in all legally relevant respects. If one is gambling, then so is the other. For all of the reasons just discussed, neither daily nor season-long fantasy sports contests constitute gambling, either as a matter of common sense or as the term is used New York’s gambling laws. Any argument over whether daily games, for other reasons, ought to be regulated more strictly than season-long games is a question for the Legislature, not this Court.<sup>5</sup>

## **II. FANDUEL’S ADVERTISEMENTS ARE TRUE, ACCURATE AND NOT MISLEADING**

The State’s complaint and motion papers also allege that FanDuel engaged in false and misleading advertising. In part, the State merely complains that FanDuel has made statements that its fantasy sports contests are legal in New York and that those contests are games of skill rather than chance. As already discussed above, however, those contests are fully legal in New

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<sup>5</sup> FanDuel’s CEO has publicly welcomed “strong, common sense, enforceable consumer protection requirements to ensure its continued growth and success.” Letter from Nigel Eccles to FanDuel Users, <https://newsroom.fanduel.com/2015/10/29/a-letter-to-users-from-fanduel-ceo-nigel-eccles/> (Oct. 29, 2015). But welcoming regulation does not in any way suggest that DFS constitutes illegal gambling. To the contrary, while recognizing that DFS comports with existing law, the Massachusetts Attorney General has recently proposed DFS regulations that are intended to provide a sensible approach to both protecting consumers and allowing DFS players to continue playing the games they enjoy. *See* Draft Regulations 940 C.M.R. 34.00: Daily Fantasy Sports Contest Operators in Massachusetts, <http://www.mass.gov/ago/consumer-resources/consumer-information/dfs/> (Nov. 19, 2015).



York. *See* Part I *supra*. The overwhelming role of skill in fantasy sports contests, including FanDuel’s DFS contests, also is undeniable, as Professor Hosoi’s analysis and the nature of the contests make clear. *See* Part I.B *supra*. Statements that FanDuel has made as to the legality of its contests and the role of skill in those contests are truthful and not misleading.

Separately, the State contends that certain FanDuel commercials are likely to mislead viewers as to their probability of winning in FanDuel’s contests. Mem. at 9–10, 31.<sup>6</sup> Remarkably, the State does not identify a single statement in those commercials that it can plausibly claim is false. Although the State complains that the advertisements give the impression that “anyone can win” or that playing is “simple,” Mem. at 2–3, 31, it points to nothing in the advertisements that suggests that sports knowledge or skill is unnecessary in FanDuel’s fantasy sports contests. On the contrary, the thrust of the advertisements is that sports fans and people who already play season-long fantasy sports can use their sports knowledge and fantasy sports skills to play and win prizes on FanDuel, and that FanDuel’s website and mobile phone application are simple to use.

And in fact, it is accurate that anyone with some sports knowledge can win on FanDuel. A substantial part of FanDuel’s contests are head-to-head games, where one of the two players *must* win, or 50/50 games, where half of the participants are *guaranteed* to win. Griffiths Aff. ¶ 33. In those contests, it is true not only that anyone can win, but also that anyone has a reasonable prospect of winning at least some of the time. Moreover, FanDuel does not require participants to play against strangers; it hosts many fantasy leagues among real-world friends and acquaintances, who may already be familiar with each other’s levels of knowledge, skill and

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<sup>6</sup> The State’s brief also discusses certain DraftKings commercials, which are obviously not at issue in FanDuel’s case.

experience. Regarding the large tournament contests, the concentration of prizes among a few winners is an inherent part of the structure of any large contest—as is the reality that while skill is a powerful predictor of probability of success, anyone who enters such a contest has some possibility of winning. Because FanDuel is a web-based product, consumers wishing to enter any FanDuel contest must visit its website, where they can find full information about how many entrants are allowed in the contest and the number and amount of prizes that will be awarded, before they enter the contest. Griffiths Aff. ¶¶ 13, 16.

Under New York law, the test for deceptive business practices and false advertising is an objective one: the State has the burden of proving that FanDuel’s advertisements make “representations or omissions” that are “likely to mislead a reasonable consumer acting reasonably under the circumstances.” *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 27 (1995).<sup>7</sup> A reasonable consumer, acting reasonably, would not be misled by anything in FanDuel’s commercials. Consumers understand that television commercials aim to stir up excitement about a product, and they recognize that statements praising a product’s qualities in general terms are mere opinion and cannot be relied upon. Accordingly, “puffery” in advertising is not actionable under New York’s statutes. *Verizon Directories Corp. v. Yellow Book USA, Inc.*, 309 F. Supp. 2d 401, 405 (E.D.N.Y. 2004) (applying GBL §§ 349 and 350). For example, New York courts have held that advertisements

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<sup>7</sup> *Oswego* was decided under General Business Law (“GBL”) § 349. The test under GBL § 350 and Executive Law § 63(12) is effectively the same with respect to these issues. *See, e.g., Matter of People by Spitzer v. Applied Card Sys., Inc.*, 27 A.D.3d 104, 106–07 (3d Dep’t 2005) (applying *Oswego* test to claims under GBL §§ 349 and 350 and essentially the same test to claims under Executive Law § 63(12)). The standard also appears to be the same under Business Corporation Law (“BCL”) § 1303, as that section incorporates the standard from BCL § 1101, which contains statutory language closely similar to Executive Law § 63(12).

promoting a “secret recipe for investment success,” or “How We Beat the Stock Market—and How You Can Too” are non-actionable as puffery. *Lacoff v. Buena Vista Pub., Inc.*, 183 Misc.2d 600, 610 (Sup. Ct. N.Y. County 2000). The confirmed legality of those statements should eliminate any questions regarding the validity of FanDuel’s accurate statements regarding its contests. *Id.*

The form of injunction that the State requests regarding advertising is also impermissibly vague. Its proposed Order to Show Cause seeks an open-ended injunction prohibiting FanDuel from violating a long list of statutes—without identifying specific statements to be removed from FanDuel’s advertisements or even specifically addressing advertising at all. New York law, though, requires that an injunction “must define specifically what the enjoined person must or must not do, in language so clear and explicit that a layman can understand what he is expected to do, or refrain from doing,” without requiring the enjoined person to draw uncertain or disputable inferences or conclusions. *Xerox Corp. v. Neises*, 31 A.D.2d 195, 197–98 (1st Dep’t 1968) (quotation marks and citation omitted); *see also, e.g., Gimbel Bros. v. Brook Shopping Ctrs., Inc.*, 118 A.D.2d 532, 536 (2d Dep’t 1986). The State’s failure to specify precisely what assertedly false statements the State wants the Court to enjoin FanDuel from making presents an additional reason for denying its motion for injunctive relief with regard to the advertisements.

### **III. A PRELIMINARY INJUNCTION IN FANDUEL’S FAVOR IS NECESSARY AND APPROPRIATE TO PREVENT IRREPARABLE HARM TO FANDUEL PENDING THE OUTCOME OF THIS LITIGATION**

Since FanDuel’s contests are legal, the Court should enjoin the State from interfering with those contests, because preventing a legitimate business from operating in the State constitutes irreparable harm. *See, e.g., Reuschenberg v. Town of Huntington*, 16 A.D.3d 568, 570 (2d Dep’t 2005); *Barclay’s Ice Cream Co. v. Local No. 757 of Ice Cream Drivers & Emp.*

*Union*, 51 A.D.2d 516, 517 (1st Dep't 1976), *aff'd*, 41 N.Y.2d 269 (1977); *Robinson v. Wood*, 119 Misc. 299, 301 (Sup. Ct. Ulster County 1922). On the balance of the equities as well, the State has no legitimate interest in stopping a fully legal business from operating. Accordingly, the issues of irreparable harm and the balance of the equities both collapse into the issue of likelihood of success on the merits. If any illegal activity were taking place, it would have to cease; but since FanDuel's business is completely lawful, it has a right to continue that business without interference from officers of the State.

### CONCLUSION

For these reasons, the Court should enter a preliminary injunction against the State's enforcement of any law based on its theory that DFS is illegal gambling, and should deny the State's motion for an injunction against FanDuel.

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Respectfully submitted,

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