IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

FANDUEL, INC., and HEAD2HEAD SPORTS LLC,	)	
Plaintiffs,	)	
vs.	)	Case No: 2015-MR-1136
LISA MADIGAN, in her official capacity as Attorney General of the State of Illinois,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF THE ATTORNEY GENERAL'S MOTION TO DISMISS

The Attorney General of Illinois is tasked with issuing written opinions on "constitutional or legal questions." 15 ILCS 205/4. Consistent with this statutory authority, on December 23, 2015, the Attorney General issued a nonbinding advisory opinion to the Chair and Vice-Chair of the Illinois House Judiciary–Criminal Committee that certain daily fantasy sports contests such as those run by plaintiff FanDuel, Inc. constitute illegal gambling under the Illinois Criminal Code ("Opinion"). (Compl. ¶5; Ex. A, Dec. 25, 2015 Ill. Attorney General Opinion.) Unhappy with the Attorney General's Opinion, FanDuel filed this complaint the next day. Oddly, FanDuel is joined by plaintiff Head2Head Sports, LLC, an entity that was not referenced in the Opinion and that does not operate daily fantasy sports contests.

Plaintiffs' claim is at the outset barred by sovereign immunity because the Attorney General was acting on behalf of the State, and her advisory Opinion was well within her constitutional and statutory powers and did not violate any law.

Further, the Attorney General's advisory Opinion to a state legislative committee does not create an actual controversy between the parties that is ripe for determination. The Attorney General did not order Plaintiffs to cease operations and did not pursue or threaten Plaintiffs with

any civil or criminal litigation. Indeed, the Attorney General does not enforce the Criminal Code unless a State's attorney requests her to do so. *See* 15 ILCS 205/4. Moreover, Plaintiffs have not alleged any facts demonstrating the concrete hardship necessary to convert their disagreement with the Opinion into a ripe justiciable controversy.

Accordingly, this Court should dismiss the case under 735 ILCS 5/2-619 based on sovereign immunity and a lack of a justiciable controversy.

STATEMENT OF FACTS

A. The Attorney General's Authority to Issue Written Opinions

The Illinois Constitution provides that the Attorney General "shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law." Ill. Const. art. V, §15. The Attorney General Act provides that these duties include:

> Eighth – To give written opinions, when requested by either branch of the general assembly, or any committee thereof, upon constitutional or legal questions.

15 ILCS 205/4. The Attorney General's opinions are only advisory, and not binding upon a court, although a well-reasoned opinion is entitled "to considerable weight in resolving a question of first impression in this State regarding the construction of an Illinois statute." *City of Springfield v. Allphin,* 74 Ill. 2d 117, 130-131 (1978); *see also* Compl. ¶6 (conceding "the ILAG Opinion is not binding on the Illinois courts").

B. Daily Fantasy Sports In Illinois

On October 27, 2015, Illinois House Bill 4323 was introduced to amend the Criminal Code to exempt fantasy sports contests from the prohibition on gambling and to create the Fantasy Sports Act which would require operators to implement certain policies and procedures. 99th Ill. Gen. Assem. House Bill 4323. On December 9, 2015, the Attorney General was asked by the Vice-Chair of the House Judiciary-Criminal Committee, to opine on the legality of daily

fantasy sports contests run by FanDuel and another company (DraftKings, Inc.). (Ex. B, Dec. 9, 2015 Rep. Drury Letter.) Given the expectation that legislation would be debated early in 2016, the request sought an opinion by December 31, 2015.

C. The Attorney General's December 23, 2015 Opinion

On December 23, 2015, the Attorney General issued the advisory Opinion to the Chair and Vice-Chair of the Illinois House Judiciary–Criminal Committee. (*See* Ex. A; Compl. ¶5.) The Attorney General concluded that: "It is my opinion that daily fantasy sports contests offered by FanDuel and DraftKings clearly constitute gambling under subsection 28-1(a) of the Criminal Code of 2012 and that the exemption set forth in subsection 28-1(b)(2) of the Criminal Code does not apply." (Ex. A at p. 13; Compl. ¶5.)

The Attorney General's office sent the Opinion to counsel for FanDuel with a cover letter stating, in part:

> In light of the opinion, we expect that both FanDuel and DraftKings will amend their Terms of Use to include Illinois as an additional state whose residents are not eligible to participate in contests unless and until the Illinois General Assembly passes legislation specifically exempting daily fantasy sports contests from subsection 28-1(a) of the Illinois Criminal Code of 2012.

(Ex. C, Dec. 23, 2015 Letter.) The Attorney General has not taken or threatened any action against Plaintiffs.

D. Plaintiffs' Complaint Against the Attorney General

Plaintiffs filed this single count declaratory action on December 24, 2015, the day after the Attorney General issued her opinion. In the Complaint, Plaintiffs express disagreement with the Attorney General's Opinion. *See, e.g.*, Compl. ¶1 ("the ILAG's erroneous application of Illinois law"). Plaintiffs assert that the nonbinding Opinion is "damaging their reputation with consumers, service providers, and the public, and by impeding their ability to operate their

legitimate businesses." (Compl. ¶30.) Plaintiffs seek a declaration that their contests do not violate the Criminal Code, costs (including attorneys' fees), and "such other, further and different relief" including "relief further or consequential to Plaintiffs' request for declaratory relief."[1] (Compl. ¶¶34-36.)

E. FanDuel's New York Litigation

Prior to filing this Illinois suit, FanDuel has been engaged in litigation in New York against the New York Attorney General. There, the New York Attorney General issued a "demand" that FanDuel "cease and desist" offering daily fantasy sports contests to New York residents. (*See, e.g.,* Ex. D, Nov. 10, 2015 New York cease and desist letter.) Unlike the Attorney General's advisory Opinion here, however, the New York Attorney General did not act pursuant to statutory authority to issue advisory opinions. Also unlike here, the New York Attorney General filed a complaint against FanDuel and sought a preliminary injunction to stop FanDuel from operating in New York. (Ex. E, *Schneiderman v. FanDuel, Inc.*, Dec. 11, 2015 Order, Sup. Ct. of N.Y.). Three days later, FanDuel filed a countersuit, seeking its own declaration and injunction. (*Id.* at 2.) The New York court ruled in favor of the New York Attorney General and entered an injunction against FanDuel, though that injunction has been stayed pending appeal. (*Id.* at 10-11.)

ARGUMENT

I. Plaintiffs' Claim Is Barred By Sovereign Immunity.

The State Lawsuit Immunity Act provides that "the State of Illinois shall not be made a defendant or party in any court" except as provided in limited statutory exceptions that do not apply here. 745 ILCS 5/1; *see also Shirley v. Harmon,* 405 Ill. App. 3d 86, 90 (2d Dist. 2010). "The purpose of sovereign immunity is to protect the state from interference with the

[1] To the extent this prayer for relief seeks damages against the State, it should be stricken because it is barred by absolute immunity. *See, e.g., Blair v. Walker*, 64 Ill. 2d 1, 7-10 (1976).

performance of governmental functions and to preserve and to protect state funds." *People ex rel Manning v. Nickerson*, 184 Ill. 2d 245, 248 (1998). Actions against a state official are barred "if a judgment in favor of the plaintiff could operate to control the actions of the state or subject it to liability." *Id.* Where sovereign immunity applies, the court lacks subject matter jurisdiction over the lawsuit. *Currie v. Lao*, 148 Ill. 2d 151, 157 (1992). Because this action is against a State officer and does not allege that the Attorney General violated any law, sovereign immunity bars this action.

A. Exceptions To Sovereign Immunity for Prospective Relief Do Not Apply.

The State Immunity Act does not provide an exception for declaratory judgment actions against state officials performing their constitutional and statutory duties. Under the "officer suit" exception, sovereign immunity does not bar certain claims for prospective injunctive relief. *State Bldg. Venture v. O'Donnell*, 239 Ill. 2d 151, 162 (2010). For this exception to apply, however, the plaintiff must allege facts showing that the official's actions exceed his or her delegated authority and violate state law. *PHL, Inc. v. Pullman Bank & Trust Co.*, 216 Ill. 2d 250, 266-67 (2005). Plaintiffs' allegations do not fit within this exception. Plaintiffs do not allege that the Attorney General exceeded her delegated authority or violated state law. The Complaint acknowledges, as it must, that the Attorney General issued the Opinion to the House Judiciary Committee Chair and Vice-Chair to address the request for an opinion on whether certain daily fantasy sports contests qualify as "gambling" under the Illinois Criminal Code. (Compl. ¶5.) The Attorney General thus issued the Opinion under her authority under the Attorney General Act, which provides for the Attorney General to issue "written opinions, when requested by either branch of the general assembly, or any committee thereof, upon constitutional or legal questions." 15 ILCS 205/4.

Plaintiffs repeatedly contend that the Attorney General's conclusions in the Opinion are

"erroneous" and "wrong." (*See, e.g.*, Compl. ¶¶ 1, 23.) These allegations do not defeat sovereign immunity because mere disagreement with an official's actions will not support an assertion that the official exceeded or abused their discretionary authority. *President Lincoln Hotel Venture v. Bank One, Springfield*, 271 Ill. App. 3d 1048, 1057 (1st Dist. 1994).

II. The Complaint Should Be Dismissed Because There Is No Actual Controversy Ripe For Judicial Determination.

Even if the Court were to decide that Plaintiffs' request for declaratory judgment is not barred by sovereign immunity, the Court should still refuse to consider Plaintiffs' Complaint because their disagreement with the Attorney General's nonbinding Opinion does not present an actual controversy ripe for judicial determination.

To maintain a justiciable action for declaratory judgment, a plaintiff must have an actual controversy between adverse parties that is ripe. 735 ILCS 5/2-701; *In re Adoption of Walgreen,* 186 Ill. 2d 362, 365 (1999) ("[t]he existence of a real controversy is a prerequisite to the exercise of our jurisdiction"); *Underground Contractors Ass'n v. City of Chicago*, 66 Ill. 2d 371, 375 (1977).

III. The Attorney General's Advisory Opinion Is Not Fit For Judicial Determination.

Illinois courts have confirmed that the Attorney General's advisory opinions are not ripe for judicial determination. For example, Illinois law gives the Attorney General the discretion to opine on FOIA requests by issuing either a binding opinion or an advisory opinion. *Brown v. Grosskopf,* 2013 IL App. (4th) 120402, ¶11. "An advisory opinion is not subject to review." *Id.* As a result, "[a] nonbinding or advisory opinion cannot be the basis for a lawsuit or subject to enforcement in a court of law." *Id.* (where "the only basis of Brown's lawsuit against Madigan is the nonbinding opinion letter, the lawsuit cannot survive Madigan's motion to dismiss"). *See also City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶56.

Similarly, the Illinois Supreme Court has held that a non-binding investigative report released by the Attorney General "cannot serve to create an actual controversy or justiciable matter prior to some indication by the supervisor as to the course of action he intends to take." *Howlett v. Scott*, 69 Ill. 2d 135, 141-42 (1977). In *Howlett*, the Attorney General released a report opining that the Secretary of State had a conflict of interest. The Supreme Court held that the ensuing declaratory action was not justiciable because there was "no indication by the Attorney General of an intent to prosecute a constructive trust action against the Secretary of State." *Id.* For the same reason, the appellate court has held that a "merely advisory" recommendation contained in a comprehensive plan does not create a ripe controversy. *Smart Growth Sugar Grove, LLC v. Vill. of Sugar Grove*, 375 Ill. App. 3d 780, 790-91 (2d Dist. 2007) (recommendation is not binding and "plaintiff has not alleged that the Village has in any way acted" on the recommendation). *Cf. Bartlow v. Shannon*, 399 Ill. App. 3d 560, 569 (5th Dist. 2010) (dispute ripe where agency "threatened a possible fine of more than $1.6 million, among other sanctions").

Here, Plaintiffs do not and cannot allege that the Attorney General either pursued or threatened them with any civil enforcement action. The Opinion merely concluded that "daily fantasy sports contests offered by FanDuel and DraftKings" violate the Criminal Code. The Attorney General has not threatened any criminal prosecution, nor could she, because under Illinois law, she does not have primary enforcement powers in such matters. 15 ILCS 205/4. No doubt recognizing this, Plaintiffs do not allege any threat or fear of criminal prosecution.

Plaintiffs' conclusory assertion that the Attorney General "selectively request[ed] that FanDuel (as well as one other competitor, but no others) suspend operations" fares no better. (Compl. ¶7.) The Attorney General never made such a request, rather, the Attorney General sent FanDuel the advisory Opinion along with a cover letter stating that the Attorney General

expected FanDuel to follow the law. (Ex. C.) Elementary statements informing a party of an expectation they will comply with Illinois law do not render FanDuel's dispute ripe regarding the Attorney General's advisory Opinion, especially on a criminal law that she does not enforce.

The Court need only contrast the Attorney General's Opinion with the dispute in New York. There, the New York Attorney General issued a "demand" that FanDuel "cease and desist" operations in New York, threatened litigation, and then pursued litigation to shutter FanDuel's operations. (Exs. D, E.) Here, the Attorney General issued an advisory opinion to a House Committee regarding the interpretation of a statute and expressed her expectation that FanDuel would follow the law.

Plaintiff Head2Head Sports' claim also fails to present an actual ripe controversy. Head2Head Sports admits its "was not named in the ILAG Opinion." (Compl. ¶7.) The Attorney General did not send her opinion to Head2HeadSports. The Opinion focuses solely on "daily fantasy sports contests offered by FanDuel and DraftKings," (Ex. A at p. 13), not the kind of contests operated by Head2Head. Head2Head Sports purports to operate fantasy sports contests that take place over an entire sports season, rather than the daily fantasy sports contests offered by FanDuel. (Compl. ¶¶3, 14.) The Attorney General's advisory Opinion on the legality of DraftKings' and FanDuel's daily fantasy sports contests cannot create a ripe dispute for Head2Head Sports, a company that was not named in the advisory Opinion, was not threatened with any enforcement action, and does not operate daily fantasy sports contests.

In *National Marine, Inc. v. Illinois Environ. Prot. Agency*, 159 Ill. 2d 381, 389 (1994), the Illinois Supreme Court addressed a similar issue and deemed the matter premature for consideration. There, the Illinois EPA informed the plaintiff by letter that it may be potentially liable for the release of a hazardous substance. *Id.* at 383. The Court held that the ensuing declaratory action was premature because the letter "neither determines nor adjudicates the

liability, rights, duties or obligations of the party subject to it." *Id.* at 389. The Court instructed that merely "[n]otifying a party that it is subject to an investigation which may potentially lead to the institution of an action against that party does not create a claim capable of judicial resolution." *Id.* A similar result is warranted here. The Attorney General's advisory Opinion did not order specific conduct, adjudicate FanDuel's rights or obligations, or threaten legal liability. The Opinion certainly did not do so for Head2Head.

The majority of state courts around the country have held that attorney general opinions do not raise a justiciable controversy. *See, e.g., Yes on Prop 200 v. Napolitano,* 160 P.3d 1216, 1227 (Ariz. Ct. App. 2007) (declaratory judgment was not justiciable where attorney general issued nonbinding opinion and office lacked power to compel agencies to act); *Anonymous v. State,* 2000 WL 739252 *6 (Del. Ch. June 1, 2000) (unpublished)(suit to enjoin attorney general from enforcing alleged restraint on political speech was not justiciable absent "more than a theoretical likelihood of enforcement, even if a 'specific' threat of enforcement was not required."); *Askew v. City of Ocala*, 348 So.2d 308, 310 (Fla. 1977) ("respondents really seek judicial advice which is different from that advanced by the attorney general and the state attorney, or an injunctive restraint on the prosecutorial discretion of the state attorney. Neither is available under the guise of declaratory relief"); *Hitchcock v. Kloman*, 76 A.2d 582, 584 (Md. 1950) (whether naturopathy was illegal practice of medicine was not properly before court where there was no threat from Board of Medical Examiners, police, or state's attorney "beyond that implied by existence of the … opinions delivered by the Attorney General of Maryland"); *Kelley v. Bd. of Registration Optometry*, 218 N.E.2d 130, 133 (Mass. 1966)("That the Attorney General has rendered an opinion does not, of itself, raise the matter to the dignity of a justiciable controversy….There is no evidence that the Attorney General has acted upon the opinion."); *Gershman Inv. Corp. v. Danforth*, 517 S.W.2d 33,36 (Mo. 1974) ("we hold there is no justiciable

controversy in this case, because the opinions issued by the Attorney General … are entitled no more weight that that given the opinion of any other competent attorney."); *Saefke v. Stenehjem*, 673 N.W.2d 41, 45-46 (N.D. 2003)("any resolution … about the correctness of [attorney general's] opinion would result in an advisory opinion."); *Democratic Party of Okla. v. Estep*, 652 P.2d 271, 278 (Okla. 1982)("Until policy is enacted and implemented by agency rules, all the issues tendered here lack the necessary attributes of justiciability."); *State v. Margolis*, 439 S.W.2d 695, 699 (Tex. Ct. App. 1969)(action seeking declaration that business was not violating antitrust laws was not justiciable, where record was "devoid of any showing that appellees had been ordered to discontinue their operations" and there was no "bona fide threat" by attorney general to enforce); *American Veterans v. City of Austin*, 2005 WL 3440786, *3 (Tex. Ct. App. Dec. 15, 2005) (declaration that would resolve the real controversy is one "concerning the validity of the ordinance, not the validity of the attorney general opinion."); *State ex rel. Morrisey v. W. Va. Office of Disciplinary Counsel*, 764 S.E.2d 769, 776 (W.Va. 2014) (mere threat of disciplinary ethics action for future conduct did not create justiciable dispute over advisory ethics opinion).[2] These opinions are consistent with the Illinois decisions, discussed above, holding that an attorney general's advisory opinion is not ripe for adjudication, especially in situations like here when the office has not threatened action and does not have the power to enforce such an advisory opinion.

A. Plaintiffs Have Failed to Allege Sufficient Hardship.

A ripe dispute also requires a "hardship to the parties that would result from withholding judicial consideration." *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 490 (2008).

Plaintiffs' complaint also fails this prong of *Morr-Fitz* because Plaintiffs have not alleged facts

[2] *But see, e.g., Acupuncture Soc'y of Kan. v. Kan. State Bd. of Healing Arts*, 602 P.2d 1311 (Kan. 1979); *Me. Turnpike Auth. v. Brennan*, 342 A.2d 719, 723 (Me. 1975); *Cummings v. Beeler*, 223 S.W.2d 913, 915-16 (Tenn. 1949); *Brimmer v. Thomson*, 521 P.2d 574, 578-79 (Wyo. 1974); *State ex rel. Stratton v. Roswell Indep. Sch.*, 806 P.2d 1085, 1097-98 (N.M. Ct. App. 1991).

demonstrating any cognizable hardship if the Court withholds consideration at this time. As discussed above, Plaintiffs do not allege any fear of criminal prosecution. Further, Plaintiffs do not assert any present pecuniary harm — nor could they, given they filed suit less than 24 hours after the Attorney General issued the opinion. Instead, Plaintiffs merely allege that the Opinion "*threatens* to harm FanDuel's and Head2Head's Illinois operations" by "discouraging consumers . . . discouraging vendors . . . and interfering with the sponsorship contracts FanDuel has with Illinois businesses…." (Compl. ¶6, emphasis added). Such statements are conclusory, and speculative at best. *See, e.g.*, Compl. ¶30 (the Opinion is "causing immediate and continuing harm … by damaging their reputation with consumers, service providers, and the public, and by impeding their ability to operate legitimate businesses"). Plaintiffs do not allege any specific facts indicating that they has lost customers or revenue in Illinois because of the Opinion, that vendors have ceased processing payments, or that their "reputation" has been harmed. Given the lack of hardship from a delayed consideration of the underlying question, the matter is premature and should be dismissed.

CONCLUSION

For the foregoing reasons, the Illinois Attorney General respectfully requests that Plaintiffs' Complaint be dismissed with prejudice.

Respectfully submitted,

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OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 23, 2015

FILE NO. 15-006

SPORTS AND GAMING:
Daily Fantasy Sports
Contests as Gambling

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

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

Dear Representative Sims and Representative Drury:

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

EXHIBIT
A

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

BACKGROUND

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

Unlike traditional fantasy sports contests, which operate on a season-long timetable, daily fantasy sports contests are conducted over short-term periods, such as a week or single day of competition. Participants who have created accounts with the Contest Organizers pay an entry fee to participate in one or more of a Contest Organizer's fantasy sports contests[1] and select a team of athletes in a certain sport under an imaginary "salary cap," a maximum budget to

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

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

ANALYSIS

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

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

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

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

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

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

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

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

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

> (a) A person commits gambling when he or she:
>
> (1) knowingly plays a game of chance or skill for money or other thing of value, unless excepted in subsection (b) of this Section;
>
> * * *
>
> (12) knowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money or other thing of value by means of the Internet or to make a wager upon the result of any game, contest, political nomination, appointment, or election by means of the Internet. This item (12) does not apply to activities referenced in items (6) and (6.1) of subsection (b) of this Section.[5]

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

> (b) Participants in any of the following activities shall not be convicted of gambling:
>
> * * *
>
> (2) Offers of prizes, award or compensation to the actual contestants in any bona fide contest for the determination of skill, speed, strength or endurance or to the owners of animals or vehicles entered in such contest.

---

[5]Subsections 28-1(b)(6) and 28-1(b)(6.1) of the Criminal Code (720 ILCS 5/28-1(b)(6), (b)(6.1) (West 2014)) respectively exempt from the illegal gambling prohibitions lotteries conducted by the State of Illinois in accordance with the Illinois Lottery Law (20 ILCS 1605/1 *et seq.* (West 2014)) and the online purchase of lottery tickets for a lottery conducted by the State of Illinois under the program established in section 7.12 of the Illinois Lottery Law (20 ILCS 1605/7.12 (West 2014)).

The offense of gambling is a Class A misdemeanor under Illinois law. A second or subsequent conviction under subsections 28-1(a)(3) through (a)(12) of the Criminal Code is a Class 4 felony. 720 ILCS 5/28-1(c) (West 2014).

The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly. *Illinois Department of Healthcare and Family Services v. Warner*, 227 Ill. 2d 223, 229 (2008). Legislative intent is best evidenced by the language used in the statute, and where statutory language is clear and unambiguous, it must be given effect as written. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). One must view all of the provisions of the statute as a whole. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 422 (2002). Words and phrases should not be construed in isolation, but interpreted in light of other relevant portions of the statute. *Land*, 202 Ill. 2d at 422. Illinois criminal statutes must be narrowly construed in favor of the accused. *People v. Williams*, 239 Ill. 2d 119, 127 (2010); *People v. Christensen*, 102 Ill. 2d 321, 328 (1984).

Subsection 28-1(a)(1) of the Criminal Code provides that a person commits the offense of gambling when he or she "knowingly plays a game of chance or skill for money[,]" unless excepted in subsection 28-1(b). The statutory language is straightforward and unequivocal. It clearly declares that *all* games of chance *or* skill, when played for money, are illegal gambling in Illinois, unless excepted. While the Contest Organizers assert that daily

fantasy sports contests are games of skill[6] rather than games of chance, that argument is immaterial because subsection 28-1(a)(1) expressly encompasses both. Moreover, participants must pay an entry fee or buy-in amount in order to win a prize. Consequently, the act of playing daily fantasy sports contests in Illinois constitutes illegal gambling under subsection 28-1(a)(1) of the Criminal Code, unless otherwise excepted.

Pursuant to subsection 28-1(a)(12) of the Criminal Code, a person also commits gambling when he or she "knowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money or other thing of value by means of the Internet or to make a wager upon the result of any game[.]" The Contest Organizers operate websites that allow individuals to play games of chance or skill for money. Accordingly, entities which operate such contests commit the offense of gambling under Illinois law, unless otherwise excepted. *See Cie v. Comdata Network, Inc.*, 275 Ill. App. 3d 759, 764-65 (1995), *appeal denied*, 165 Ill. 2d 548 (1996) (subsection 28-1(b) exceptions apply to all gambling prohibitions in subsection 28-1(a)).

Subsection 28-1(b) of the Criminal Code sets out the only exceptions to activities that otherwise would constitute gambling under subsection 28-1(a). The Contest Organizers assert that their contests are excepted under subsection 28-1(b)(2). This subsection was included in the original enactment of article 28 of the Criminal Code of 1961 (*see* 1961 Ill. Laws 1983,

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[6]*See* FanDuel Website, *available at* https://fanduel.zendesk.com/hc/en-us/articles/210202858-Is-FanDuel-legal; DraftKings Website, *available at* https://www.draftkings.com/help/why-is-it-legal.

2033-37; Ill. Rev. Stat. 1961, ch. 38, par. 28-1 *et seq.*) and exempts "[o]ffers of prizes, award or compensation to *the actual contestants* in any bona fide contest for the determination of skill, speed, strength or endurance or to the owners of animals or vehicles entered in such contest."[7] (Emphasis added.)

Reading the statute as a whole, it is clear that subsection 28-1(b)(2) applies only to the "actual contestants" in the actual sporting event.[8] In the context of daily fantasy sports, the "actual contestant" upon whose performance success or failure is based is the athlete or athletes whose "skill, speed, strength or endurance" determine the outcome. Thus, subsection 28-1(b)(2) exempts only those who actually engage in a *bona fide* contest for the determination of skill, speed, strength, or endurance, and not a daily fantasy sports contest participant who pays a fee to build a "team" and who may win a prize based on the statistical performance of particular athletes. In this regard, persons whose wagers depend upon how particular, selected athletes perform in actual sporting events stand in no different stead than persons who wager on the outcome of any sporting event in which they are not participants. None of these persons are the

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[7]There is only one Illinois case which cites to this exception. In *People v. Mitchell*, 111 Ill. App. 3d 1026, 1028 (1983), the court upheld a jury's conclusion that "Hold 'em" poker was not a "bona fide contest for the determination of skill" under subsection 28-1(b)(2). The court held that the evidence supported the jury's conclusion that "the games, in fact, required a combination of skill and chance, and that they were definitely not the type of '*bona fide* contests' excepted from subsection [28-1](a)(1)." (Emphasis in original.) *Mitchell*, 111 Ill. App. 3d at 1028.

[8]The Contest Organizers have not suggested that daily fantasy sports contests involve determining the speed, strength, or endurance of the fantasy sports participants who enter the contests, nor could such a suggestion be made in good faith.

actual contestants in a *bona fide* contest for the determination of skill, speed, strength, or endurance.

This interpretation is consistent with a 1994 opinion of the Texas Attorney General's Office construing substantially similar statutory language to that found in subsection 28-1(b)(2) of the Criminal Code. Tex. Att'y Gen. Op. No. LO-94-051, issued June 9, 1994. In that opinion, the Texas Attorney General's office addressed whether a contest which requires an entry fee, pays prizes to winners, and is based on forecasting the outcomes of a number of sporting events constitute illegal gambling under Texas law.[9] The Texas Attorney General's Office concluded that the contest at issue did not fall within the gambling exception and therefore constituted illegal gambling:

> We cannot think of any distinction the words "*actual* contestants" could be intended to make other than that between those actually participating in a contest and able by their performance to affect its outcome, and those merely betting on it. Thus, while the subsection (1)(B) exclusion may embrace athletes actually competing in the sporting events you refer to, it does not embrace

---

[9]*See* Texas Penal Code §47.01(1)(B) (2015), *available at* http://www.statutes.legis.state.tx.us/docs/PE/pdf/PE.47.pdf, which provides, in pertinent part:

> (1) "Bet" means an agreement to win or lose something of value solely or partially by chance. A bet does not include:
>
> * * *
>
> (B) an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest[.]

> those who pay entry fees for a chance to win a prize from forecasting the outcome of the events. (Emphasis in original.) Tex. Att'y Gen. Op. No. LO94-051 at 2.[10]

Although daily fantasy sports contests may involve some degree of skill, such as selecting an athlete for a participant's team based on knowledge of the athlete's historical

---

[10]The New York Supreme Court recently made this same distinction when granting the New York Attorney General's motions to enjoin the Contest Organizers from accepting entry fees from New York State consumers for any daily fantasy sports contests which they operate, pending a final determination. *See* Decision and Order for Injunctive Relief, *People ex rel. Schneiderman v. DraftKings, Inc.*, No. 453054/2015 (N.Y. Sup. Ct., New York County, December 11, 2015); Decision and Order for Injunctive Relief, *People ex rel. Schneiderman v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct., New York County, December 11, 2015) (Decisions and Orders). New York law defines "gambling" as follows:

> *A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence*, upon an agreement or understanding that he will receive something of value in the event of a certain outcome. (Emphasis added.) N.Y. Penal Law §225.00(2) (2015), *available at* http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO:.

The New York Attorney General argued that the participants paid entry fees "on events they cannot control or influence, relying on the real-game performance of professional athletes, to win a prize, which amounts to gambling" under New York law. Decisions and Orders, at 5. The New York Attorney General further argued that daily fantasy sports contests are "contests of chance" because the outcome depends substantially on chance and factors not within the participant's control, and that once a team is chosen for a contest, there is no means of altering the outcome. Decisions and Orders, at 6. The court concluded that the language of the statute "is broadly worded and as currently written sufficient for finding that DFS [daily fantasy sports] involves illegal gambling." Decisions and Orders, at 7. The Contest Organizers immediately appealed the court's decision. Notice of Appeal, *People ex rel. Schneiderman v. DraftKings, Inc.*, No. 453054/2015 (N.Y. Sup. Ct., New York County, December 11, 2015); Notice of Appeal, *People ex rel. Schneiderman v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct., New York County, December 11, 2015). The New York Supreme Court, Appellate Division granted an interim stay of the enforcement of the injunction against FanDuel pending a determination by a full panel. Notice of Entry of Appellate Division Interim Stay Order, *People ex rel. Schneiderman v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct., New York County, December 11, 2015).

Additionally, the Kansas Legislature recently amended its gambling statute, which contains a substantially similar exclusion for "offers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill, speed, strength or endurance or to the bona fide owners of animals or vehicles entered in such a contest[,]" to also exclude "a fantasy sports league as defined in this section[.]" Kan. Stat. Ann. §§21-6403(a)(2), (a)(9) (2014), as amended by 2015 Kan. Sess. Laws 835-38, *available at* http://www.sos.ks.gov/pubs/sessionlaws/2015/2015_Session_Laws_Volume_1.pdf.

performance, match-up against a particular opponent, performance in a particular venue, and/or performance in particular weather conditions, the phrase "actual contestants" as used in subsection 28-1(b)(2) does not apply to those persons who pay entry fees for a chance to win a prize for forecasting the performance of professional or college athletes over whom they have no control or influence. Accordingly, it is my opinion that subsection 28-1(b)(2) does not exempt daily fantasy sports contests from the Illinois gambling provisions.

CONCLUSION

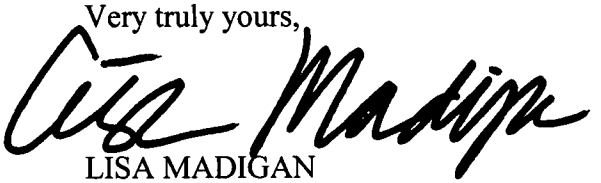
It is my opinion that the daily fantasy sports contests offered by FanDuel and DraftKings clearly constitute gambling under subsection 28-1(a) of the Criminal Code of 2012 and that the exemption set forth in subsection 28-1(b)(2) of the Criminal Code does not apply.

In closing, I note that there is legislation currently pending in each chamber of the Illinois General Assembly which proposes, in part, to create a new Act – the Fantasy Contests Act – and to exempt "fantasy contests as defined under the Fantasy Contests Act" from the general prohibition against gambling. *See* 99th Ill. Gen. Assem., House Bill 4323, Senate Bill 2193, 2015 Sess.[11] Thus, it appears that a number of General Assembly members have reached this same conclusion, as they have agreed to sponsor the foregoing legislation. Absent legislation

[11]House Bill 4323 was referred to the House Rules Committee on November 9, 2015. Senate Bill 2193 was referred to the Senate Assignments Committee on November 3, 2015. Previously-filed legislation proposing to create the Daily Fantasy Sports Regulation Act contained only a short title provision and was referred to the House Rules Committee on April 14, 2015. *See* 99th Ill. Gen. Assem., House Bill 4200, 2015 Sess.

specifically exempting daily fantasy sports contests from the gambling provisions, it is my opinion that daily fantasy sports contests constitute illegal gambling under Illinois law.

Very truly yours,



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ILLINOIS HOUSE OF REPRESENTATIVES
SCOTT R. DRURY
STATE REPRESENTATIVE • 58TH DISTRICT

December 9, 2015

VIA EMAIL
Hon. Lisa Madigan
James R. Thompson Center
100 W. Randolph Street
Chicago, Illinois 60601

Re: Daily Fantasy Sports

Dear Attorney General Madigan:

I respectfully request your opinion on whether the activities/operations of Daily Fantasy Sports websites and/or organizations such as Draft Kings and Fan Duel constitute "gambling" or are otherwise prohibited or illegal under current Illinois law. This is a narrow request at this time and does not seek an opinion on: (a) potential legal options with respect to the regulation of Daily Fantasy Sports websites and/or organizations; or (b) how Illinois should treat these websites and/or organizations from a public policy standpoint.

Given that this issue is likely to be debated in the Illinois General Assembly in 2016, I respectfully request that an opinion be provided on or before December 31, 2015. Thank you for your attention to this issue.

If you have any questions or would like to discuss this request further, please let me know.

Very truly yours,

SCOTT R. DRURY
State Representative – District 58

EXHIBIT
B

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 23, 2015

Via Email and Regular Mail

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Re: Illinois Attorney General Opinion on Daily Fantasy Sports

Gentlemen:

I enclose the Attorney General's opinion concluding that the daily fantasy sports contests offered by FanDuel and DraftKings constitute "gambling" under Illinois law. In light of the opinion, we expect that both FanDuel and DraftKings will amend their Terms of Use to include Illinois as an additional state whose residents are not eligible to participate in contests unless and until the Illinois General Assembly passes legislation specifically exempting daily fantasy sports contests from subsection 28-1(a) of the Illinois Criminal Code of 2012.

Please do not hesitate to call me if you would like to discuss this matter further.

Very Truly Yours,

Gary S. Caplan
Assistant Chief Deputy Attorney General

EXHIBIT C

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF ECONOMIC JUSTICE
INTERNET BUREAU

November 10, 2015

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

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

Dear Mr. Eccles:

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

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

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

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

EXHIBIT D

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

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

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

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

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

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

prevent offenses against any of the provisions of this section.

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

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

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

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

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

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

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

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

(a) Running a book-making or other kind of gambling business in violation of Article I, Section 9 of the New York State Constitution;

(b) Knowingly advancing and profiting from unlawful gambling activity by receiving and accepting in any one day, more than five bets totaling more than five thousand dollars in violation of New York Penal Law § 225.10;

(c) Knowingly advancing or profiting from unlawful gambling activity in violation of New York Penal Law § 225.05;

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

(d) With knowledge of the contents thereof, possessing any writing, paper, instrument or article of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise and constituting, reflecting or representing more than five bets totaling more than five thousand dollars in violation of New York Penal Law § 225.20;

(e) With knowledge of the contents thereof, possessing any writing, paper, instrument or article of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise in violation of New York Penal Law § 225.15;

(f) Misrepresenting that FanDuel complies with applicable laws; misrepresenting the likelihood that an ordinary player will win a jackpot; misrepresenting the degree of skill implicated in the games; and misrepresenting that FanDuel's games are not considered gambling, in violation of Executive Law § 63(12) and GBL §§ 349 and 350; and

(g) Conducting or transacting its business in a persistently fraudulent and illegal manner in violation of BCL § 1303.

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

Sincerely,

Kathleen McGee
Chief, Internet Bureau

cc: Marc Zwillinger, Esq.

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

PRESENT: MANUEL J. MENDEZ **PART** 13
Justice

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

Plaintiff,

-against-

DRAFTKINGS, INC.,

Defendant.

INDEX NO. 453054/2015
MOTION DATE 11-25-2015
MOTION SEQ. NO. 001
MOTION CAL. NO. ____

The following papers, numbered 1 to 16 were read on this motion to/for Injunctive relief:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 5
Answering Affidavits — Exhibits ____cross motion ____	6 - 16
Replying Affidavits ____	____

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion seeking injunctive relief, enjoining and restraining Draftkings, Inc. from doing business in the State of New York, accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on Draftkings, Inc.'s website, filed under Motion Sequence 001, is granted and decided in accordance with the attached Decision and Order filed under Index #453056/2015, Motion Sequence 001.

ENTER:

MANUEL J. MENDEZ J.S.C.

MANUEL J. MENDEZ,
J.S.C..

Dated: December 11, 2015

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

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

EXHIBIT E

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

PRESENT: MANUEL J. MENDEZ **PART** 13
Justice

THE PEOPLE OF THE STATE OF NEW YORK, By ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,
Plaintiff,
-against -
FANDUEL, INC.,
Defendant.

INDEX NO. 453056/15
MOTION DATE 11-25-15
MOTION SEQ. NO. 001
MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 7
Answering Affidavits — Exhibits ____cross motion ____	8 - 13
Replying Affidavits ____	14

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

Cross-Motion : Yes X No

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ENTER:

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ,
J.S.C.

Dated: December 11, 2015

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

CERTIFICATE OF SERVICE

Karen L. McNaught, Assistant Attorney General, herein certifies that she has served a copy of the foregoing Memorandum of Law In Support of Attorney General's Motion to Dismiss upon:

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by sending an electronic copy to the electronic addresses as listed above and by causing a true copy thereof at the address referred to above in an envelope duly addressed bearing proper first class postage to be deposited in the United States mail at Springfield, Illinois on January 22, 2016.

s/ Karen L. McNaught
Karen L. McNaught
Assistant Attorney General