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

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

Index No. **453054/2015**

Plaintiffs,

IAS Part 13 (Justice Mendez)

-against-

NYSCEF Case

DRAFTKINGS INC.

Defendant.

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MEMORANDUM OF LAW IN OPPOSITION TO DRAFTKINGS' ORDER TO SHOW CAUSE AND REQUEST FOR A STAY OF THE PROCEEDINGS

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PRELIMINARY STATEMENT

When this Court held that DraftKings and FanDuel's "daily fantasy sports" contests likely constitute illegal gambling, it set off a drumbeat. Six attorneys general—representing states as diverse as Hawaii, Illinois, and Texas—reached the same conclusion: daily fantasy sports ("DFS") likely constitutes illegal gambling under their laws as well.[1] While continuing to face scrutiny from government agencies nationwide, DraftKings and FanDuel (collectively the "DFS Operators") are deluged with more than 80 federal lawsuits by consumers, including many rooted in the deceptive practices at issue in the pending enforcement actions. Meanwhile, they have begun to default on their advertising obligations and encounter other serious threats to their viability, including the refusal of certain third-party payment processors to process DFS wagers. As a result, at least one investor disclosed a 60% drop in the value of its stake in DraftKings. These motions are simply a tactic to postpone the inevitable.

The pending motions to stay the enforcement actions by the New York Attorney General ("NYAG") are procedurally improper and legally deficient. For a trial court to impose the "drastic remedy" of a stay pending appeal, the appeal should decide "all questions" in the litigation and feature "complete identity" of both "the causes of action and the judgment sought." The DFS Operators fail to meet this burden.

First, the Appellate Division will not reach, let alone "resolve," all the claims in the enforcement actions, including four causes of action alleging consumer fraud entirely unrelated to whether DFS constitutes illegal gambling. These claims are not on appeal. ***Second,*** the appeal of the preliminary injunction implicates, and will resolve, an entirely different judicial

[1] These opinions are attached as Exhibits 1-6 to the Supporting Affirmation of Assistant Attorney General Justin Wagner ("Wagner Aff.").

inquiry (whether to grant an injunction) than the underlying litigation. In fact, the DFS Operators urge the Appellate Division to reverse this Court's ruling based on a raft of alleged errors that have absolutely nothing to do with the merits. These errors purportedly include the Court's failure to balance the equities adequately; to properly analyze the irreparable harm of imposing the injunction; and to carry out various procedural prerequisites for its ruling. Should the Appellate Division ever reach the merits, the review will center on whether NYAG made a *prima facie showing* that it is *likely* to succeed on its illegal gambling claims—as necessary for a preliminary injunction—not whether it will be entitled to a final judgment. ***Third,*** the preliminary injunction on appeal and the underlying litigation seek entirely *different* judgments and entirely *different* remedies; irrespective of how the appeal is resolved, this Court will need to determine whether to grant a permanent injunction, restitution to harmed New Yorkers, and other relief.

This conclusion is not altered by the throwaway arguments that remain, including the so-called lack of prejudice to the State and the burden of discovery. Not only do the DFS Operators overlook the ravages of gambling on New York communities highlighted by the Court in its decision, they ignore the basic precept that justice delayed exacts its own price. This is a principle that the DFS Operators once well understood. While their motions for preliminary relief were pending, they implored this Court to hasten the start of trial, urging: *"we also need expedited hearing, expedited discovery. We want to be here for trial with you as quickly as possible. We want to have a hearing as quickly as possible because your Honor we are going to win this case."* Their mistaken prediction aside, the Court should not now deny the People their day in court.

The pending Orders to Show Cause must be recognized for what they are: a transparent and legally defective ploy by the DFS Operators to avoid their day of reckoning. Their request to stay this action should be rejected and this case should move forward.

BACKGROUND

On November 17, 2015, NYAG filed separate lawsuits against DraftKings and FanDuel.[2] Each complaint asserts causes of action under Executive Law § 63(12) seeking to halt the DFS Operators' repeated illegal and fraudulent gambling operations; under Business Corporation Law § 1303 seeking to annul the DFS Operators' authority to conduct business in the State; and under General Business Law §§ 349 and 350 seeking relief for the DFS Operators' deceptive practices and false advertising. NYAG also moved for a preliminary injunction.

On December 11, 2015, this Court granted NYAG's motion for a preliminary injunction and enjoined FanDuel and DraftKings from "accepting entry fees, wagers or bets from New York consumers in regards to" DFS contests. *See* Order Granting Preliminary Injunction, Dec. 11, 2015 (hereinafter "P.I. Order") at 10. In a lengthy decision, the court extensively reviewed the parties' arguments, and concluded, based on undisputed facts, that NYAG had demonstrated a likelihood of success on the merits of its claims. *See* P.I. Order at 9. Specifically, this Court held that the "broadly-worded" definition of gambling set out in the Penal Law is "sufficient for finding that DFS involves illegal gambling." *Id* at 7. The Court also rejected the DFS Operators' allegations of irreparable injury based solely on monetary harm, concluding that "the protection of the general public outweighs any potential loss of business." *Id* at 9. Finally, the Court found

[2] Amended Complaints against FanDuel and DraftKings ("NYAG Am. Compl. Against FD" and "NYAG Am. Compl. Against DK" respectively) were filed on December 31, 2015. Given the similarities in DFS Operators' respective Orders to Show Cause, NYAG is filing duplicate versions of this opposition in both pending enforcement actions.

that the equities favor the issuance of a preliminary injunction because of the "interest in protecting the public, particularly those with gambling addictions." *Id.*

The DFS Operators sought, and were granted, a stay of the injunction from the Appellate Division (First Department) until their appeal of the injunction could be heard. The DFS Operators' appeal is scheduled to be perfected for the May 2016 Term.[3]

This Court's P.I. Order led government and law enforcement officials nationwide to take a closer look at DFS. A cascade of legal opinions followed from state officials, including the attorneys general representing Hawaii, Illinois, Maryland, Mississippi, Texas, and Vermont, that often cited this Court's P.I. Order and declared that DFS likely constituted gambling as defined by their respective state laws.[4] (This was in addition to the six states where the DFS Operators already did not operate.)

Just three weeks ago, a prosecuting attorney in Hawaii—a state with the *exact same* statutory gambling definition[5] as in New York—raised the specter of criminal prosecution by sending cease-and-desist letters demanding that the DFS Operators immediately stop illegally accepting wagers in the state. Tellingly, they did.

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[3] The first briefs to the Appellate Division were filed just two days ago. *See* DraftKings 2/24/16 Appeal Brief to the First Department (hereinafter "DK P.I. App. Brief"); FanDuel 2/24/16 Appeal Brief to the First Department (hereinafter "FD P.I. App. Brief"), attached as Ex. 7 and Ex.8, respectively, to the Wagner Aff.

[4] *See e.g.*, 12/23/2015 Opinion of the Attorney General of Illinois, Ex. 1 Wagner Aff. ("It is my opinion that the daily fantasy sports contests offered by FanDuel and DraftKings clearly constitute gambling…."); 1/19/2016 Opinion Letter of the Attorney General of Texas, Ex. 2 Wagner Aff. ("odds are favorable that a court would conclude that participation in daily fantasy sports leagues is illegal gambling under… the Penal Code"); 1/29/2016 Opinion of the Mississippi Attorney General, Ex. 3 Wagner Aff. (finding DFS violates the State's prohibitions on wagering on future contingencies and because it depends on an element of "uncontrolled and uncontrollable chance"); 1/15/2016 Letter from the Maryland Attorney General's Office, Ex. 4 Wagner Aff. ("[w]e believe a reviewing court could conclude that both forms of fantasy sports -and particularly DFS - meet the 'chance' criterion of the "consideration, chance, and reward" test for purposes of Criminal Law $ 12-102(a)(1)" and adding "it is also our view that DFS might qualify as a 'pool' or "bookmaking" under…the Criminal Law"); 1/27/2016 Opinion Letter of the Hawaii Attorney General's Office, Ex. 5 Wagner Aff. (finding DFS illegal under both the "contingent events" and "contest of chance" prongs of the gambling law).

[5] Haw. Rev. Stat. §712-1220 (2014).

Meanwhile, news reports indicate that a federal grand jury in Florida is investigating the DFS Operators' business and that I.R.S. agents and the F.B.I. are examining how daily fantasy games affect problem gamblers.[6] Consumers have filed a flood of federal and state lawsuits nationwide against the DFS Operators on topics ranging from gambling to misleading advertisements to a lack of consumer protections. Over 80 of these suits were recently consolidated in a federal multidistrict litigation in Massachusetts.

On January 26, 2016, the DFS Operators moved, by Order to Show Cause, for both a stay of this litigation (respectively, the "DK Stay OSC" and the "FD Stay OSC"; collectively, the "Stay Motions") pending resolution of their appeals on the preliminary injunction, and for an extension of time to answer or otherwise respond to the Amended Complaint until 20 days after the stay expires.

ARGUMENT

I. The Stay Motions Fail Because the Appeal of the Preliminary Injunction Will Not Resolve *All* Questions in the Underlying Litigation

The DFS Operators urge this Court to grant them a stay of the entire trial court litigation, which includes claims not on appeal, while they seek reversal of this Court's P.I. Order. They are entitled to no such relief.

As authorized by C.P.L.R. § 2201, the First Department has repeatedly emphasized the limited circumstances when a trial court may stay an underlying proceeding:

> In general, only where the decision in one action **will determine *all* the questions in the other action**, and the judgment on one trial will dispose of the controversy in both, is a stay justified; this **requires a *complete identity* of the parties, the causes of action and the judgment sought**.

[6] *See "Fantasy Sites Are Dealt New Rebuff by Citigroup",* N.Y. TIMES, 2/5/2016, attached as Ex.9 Wagner Aff.; *"What a Federal Grand Jury Could Mean for Daily Fantasy Sports Companies"*, SPORTS ILLUSTRATED ONLINE, 10/10/2015, attached as Ex. 10 Wagner Aff.

952 Assoc., LLC v. Palmer, 52 A.D.3d 236, 236-237 (1st Dep't 2008) (emphases added); *see also Somoza v. Pechnik,* 3 A.D.3d 394, 394 (1st Dep't 2004) ("[a] stay of one action pending the outcome of another is appropriate only where the decision in one will determine all the questions in the other…"). As a leading treatise explains:

> A stay of an action can easily be a drastic remedy, on the simple basis that justice delayed is justice denied. It should therefore be refused unless the proponent shows good cause for granting it… Some excellent reason would have to be demonstrated before a judge is asked to bring a halt to a litigant's quest for a day in court.[7]

It follows, then, that New York courts routinely deny requests to stay trial proceedings where related appeals are pending. *See e.g.*, *Gunn v. Palmieri*, 158 A.D.2d 671, 672 (2d Dep't 1990) (holding "the interests of justice would not be served" by a stay of the action pending an appeal); *All Metro Health Care Servs. v. Edwards,* 2009 NY Slip Op 31177(U) (Sup Ct. N.Y. Cnty. 2009) (denying a stay pending resolution of an appeal).

As more fully addressed below, there is no valid basis for the drastic remedy of a stay pending appeal in this case for at least three separate reasons:

(1) The underlying litigation and the appeal of the preliminary injunction do not share a "complete identity" of causes of action. Close to half of the causes of action against each DFS Operator allege misconduct unrelated to whether DFS is gambling. Those claims are not on appeal.

(2) The appeal of the preliminary injunction will not "resolve all the questions" in the underlying litigation. At its core, the preliminary injunction is a separate and independent inquiry from the litigation. The DFS Operators appeal the P.I. Order based on a series of alleged errors wholly unrelated to the merits—and the Appellate Division may therefore never reach the merits at all. Moreover, the merits review on appeal will be limited to the "likelihood of success," will review the sufficiency of NYAG's "prima facie showing," and will apply an "abuse of discretion" standard.

[7] *See* Patrick M. Connors and David D. Siegel, Practice Commentaries, MCKINNEY'S CONS. LAWS OF NEW YORK, CPLR C2201:7 (2010).

(3) The appeal and litigation do not share "complete identity" of the judgments sought. While the underlying litigation seeks a final judgment, a permanent injunction, and restitution, the appeal narrowly concerns the award of preliminary relief.

The pending appeal holds no promise whatsoever of resolving the enforcement actions. Nor will it otherwise moot the need for this Court to make a full determination on the merits. As such, a stay is unjustified.

A. The Stay Motions Fail Because the Appellate Division Cannot "Resolve" Consumer Protection Claims Not Before It

The Stay Motions should fail for the straightforward reason that close to half of NYAG's causes of action against the DFS Operators include allegations of fraud or deceptive practices neither implicated by the P.I. Order nor otherwise on appeal. *See e.g., Viking Global Equities, LP v. Porsche Automobile Holding SE*, 36 Misc.3d 1233(A), 2012 WL 3640684 (Sup. Ct. N.Y. Cnty. 2012) ("Although there are undoubtedly overlapping facts between this action and [the other action] the causes of action and judgment sought are distinct"). In causes of action six, seven, eight and nine, NYAG asserts that the DFS Operators' promotional materials and other representations are fraudulent and violate Executive Law § 63(12), Business Corporation Law §1303, General Business Law §349, and General Business Law §350. *See* NYAG Am. Compl. Against DK at 30-33; NYAG Am. Compl. Against FD at 29-32. These causes of action allege, among other things, that DFS Operators misrepresented (i) the likelihood that a casual player would win a jackpot, (ii) the degree of skill in the contests, and (iii) the "Welcome Bonus" or "Deposit Bonus" promotion where DFS Operators purported to match new user deposits. *Id.* These misrepresentations are bread-and-butter consumer protection claims that are separate from whether DFS constitutes gambling. These issues were not relevant to the disposition of the P.I. Order. Nor are they on appeal in any form or fashion.

With substantive causes of action not subject to appellate review, there is no prospect that the appeal will "determine *all* of the questions in this action." *See Otto v. Otto*, 110 A.D.3d 620, 621 (1st Dep't 2013) (emphasis added); *WBTL Architects, LLP v. Dewhurst Macfarlane & Partners, P.C.*, 2009 NY Slip Op 31775(U) at *6 (Sup. Ct. N.Y. Cnty. 2009) (despite "similarities between the claims asserted," stay was denied where the other action would only resolve some, but not all, of the claims at bar). In fact, the alleged misrepresentations pertaining to the bonus schemes arose for the first time in the amended complaints—which were filed *after* the Court issued the P.I. Order. They are not even part of the *record* on review.

Notably, DraftKings concedes that the four fraud-related causes of action are separate from the gambling-related claims, yet insists that those claims "rest, in large part, on the NYAG's flawed theory that DFS contests are unlawful." *See* DK Stay OSC at 3. This is demonstrably false. The four causes of action in question allege that the DFS Operators engaged in commercial misconduct unrelated to their status as illegal gambling businesses, including various bait-and-switch practices. *See* NYAG Am. Compl. Against DK at 30-33; NYAG Am. Compl. Against FD at 29-32 (Causes of Action Six, Seven, Eight, and Nine). Such fraud schemes necessarily violate New York's consumer protection laws, and would be just as unlawful and subject to legal action if the DFS Operators ran banks or bowling alleys. In fact, pursuing the consumer protections claims would be of *greater* significance, not less, if a court wrongly concluded that DFS was legal; NYAG would need to act to protect future consumers, not solely to compensate past ones.

The Appellate Division cannot address issues not presented to it. With the appeal unable to resolve nearly half of NYAG's claims, the DFS Operators' motion falls short of satisfying the complete identity of causes of action needed for a trial court stay.

B. The Stay Motions Fail Because a Ruling on the Appeal Will Resolve Different Inquiries, and Apply a Different Standard of Proof than the Underlying Litigation

While acknowledging that "the appeal involves a preliminary injunction, not a final decision on the merits, and so the forthcoming guidance will not function as a final decision on the merits," the DFS Operators ask the Court to ignore these different standards. DK Stay OSC at 6. They do so because the differences are fatal to their Stay Motions.

To warrant a stay pending the outcome of an appeal, the law demands that "the issues to be determined must be ***fully*** identical." *Smith v. Proud*, 2013 N.Y. Slip Op 33509(U), *8 (Sup. Ct. N.Y. Cnty. 2014) (denying a stay) (emphasis in the original); *Guzman v. Berlin*, 2014 N.Y. Slip Op 31233(U), at *12 (Sup. Ct. N.Y. Cnty. 2014) ("a decision here will not determine all the questions in the other action…nor will the Appellate Division's determination in the appeal dispose of the controversy in this proceeding in any discernible way"). Here, the issues are not "***fully*** identical." From a legal perspective, they could hardly be more different.

The appeal will reach the merits, if at all, in the narrow context applicable to a preliminary injunction. Specifically, the appeal centers on this Court's determination that NYAG made a "prima facie showing" of a "likelihood of success" on the merits. As the DFS Operators acknowledge on appeal, the Appellate Division will not review the grant of a preliminary injunction *de novo*, but only consider whether this Court "abused its discretion." *See* DK P.I. App. Brief at 18. This reflects a ***different burden of proof*** and ***different standard of review*** than an ultimate determination of the merits of the litigation.

To adjudicate the full litigation, the Court will not make its determination based on a prima facie showing that NYAG is likely to win, at is it did in moving for a preliminary

injunction. Instead, this Court must weigh the sufficiency of the pleadings and evidence, pursuant to a full briefing, to determine whether NYAG met its burden and prevails on its claims—not merely that the probabilities weigh in its favor. Thus, the outcome of the preliminary injunction necessarily leaves "material issues . . . unresolved." *See Fewer v. GFI Group, Inc.*, 59 A.D.3d 271, 272 (1st Dep't 2009) (vacating a stay where the other proceeding would not resolve all issues). Because the appellate review concerns a preliminary injunction, the appeal will also not relieve this Court of the need to make a final merits determination on whether the DFS Operators violated the New York State Constitution (First Cause of Action) or violated the Penal Law (Second through Fifth Causes of Action). On appeal, the DFS Operators are more forthright about the differences between these inquiries. They tell the First Department that the P.I. Order was issued without hearing sufficient evidence, *see* DK P.I. App. Brief at 3, and characterize the P.I. Order as a "provisional ruling" and "subject to change after discovery." FD P.I. App. Brief at 6. As such, the litigation will proceed in this Court irrespective of the decision on appeal. *See Wallace v. Merrill Lynch Capital Servs., Inc.*, 12 Misc.3d 1153(A) at *31 (Sup. Ct. N.Y. Cnty. 2006) ("There is no risk of wasting judicial resources by allowing this action to proceed.").

In short, the merits analysis at the preliminary injunction stage will not resolve the underlying litigation. Nor do the ultimate merits of the underlying litigation dictate whether a preliminary injunction should have been issued at the outset.

The Appellate Division may not even reach the merits *at all*. Only the first prong of the test for a preliminary injunction – likelihood of success on the merits – even concerns the

merits.[8] Thus, appellate courts may decide preliminary injunctions on the other prongs without any analysis of the merits whatsoever. *See, e.g., White v. F.F. Thompson Health Sys., Inc.*, 75 A.D.3d 1075, 1076 (4th Dep't 2010) ("In the absence of a showing that plaintiff faced the imminent prospect of irreparable harm…the court abused its discretion in issuing a preliminary injunction, and, accordingly, there is no need for us to determine whether plaintiffs demonstrated a likelihood of success on the merits or whether the equities weigh in their favor").

In fact, the DFS Operators urge the Appellate Division to reverse this Court's P.I. Order based on alleged non-merits errors that are unique to the preliminary injunction context. As a result, they are inviting the possibility that the appeal will prove utterly irrelevant to the disposition of the underlying litigation. This parade of allegedly reversible errors includes (1) that NYAG did not establish irreparable harm (DK P.I. App. Brief at 46-47; FD P.I. App. Brief at 50), (2) that the balance of the equities did not favor granting the injunction (DK P.I. App. Brief at 45; FD P.I. App. Brief at 54), (3) that this Court unnecessarily and improperly ruled on constitutional arguments (FD P.I. App. Brief at 48), (4) that this Court did not properly analyze evidence (FD P.I. App. Brief at 29), (5) that this Court's factual understanding of DFS was so deficient as to "raise serious doubts as to the accuracy and reliability of every determination" (DK P.I. App. Brief at 34) and (6) that this Court erred procedurally by not allowing cross-examination of experts during the injunction hearing. (DK P.I. App. Brief at 52). These arguments have little or nothing to do with the underlying legal merits of NYAG's case.

[8] The traditional test for issuing a temporary restraining order or preliminary injunction consists of three prongs: (i) a likelihood of success on the merits; (ii) irreparable injury; and (iii) a balance of the equities in plaintiffs' favor. *See e.g., Albini v. Solork Assoc.*, 37 A.D.2d 835 (2d Dep't 1971). To satisfy the first prong, as DraftKings rightly observed in an earlier submission, the movant, "must make a '*prima facie* showing of a reasonable probability of success.'" DraftKings 11/23/2015 Opposition to Motion for Preliminary Injunction, at 15. DFS Operators' appellate briefing further demonstrates their understanding of the unique burden on the moving party for a preliminary injunction. *See* DK P.I. App. Brief at 17; FD P.I. App. Brief at 17.

The DFS Operators ask that the People of the State of New York wait for the resolution of an appeal that cannot reach or resolve the ultimate issues in dispute. This is unacceptable, and the Court should reject this request.

C. The Stay Motions Fail Because the Preliminary Injunction on Appeal and the Litigation Seek Different Remedies and Different Judgments

The underlying litigation seeks different remedies and judgments than a preliminary injunction. Pursuant to C.P.L.R. § 6301, the remedy sought in a preliminary injunction is to "restrain[] the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action would produce injury to the plaintiff." Here, NYAG moved for, and this Court granted, an order restraining the DFS Operators from operating their gambling business during the pendency of the litigation. *See* P.I. Order at 10. By contrast, NYAG seeks a myriad of different remedies in the litigation, including permanent injunctive relief, an accounting of monies collected from consumers in New York, disgorgement of all monies received as a result of fraudulent and illegal practices, monetary damages for harm caused by fraudulent and deceptive acts, and restitution of all funds obtained from consumers in connection with fraudulent acts, among other relief. *See* NYAG Am. Compl. Against DK at 34; NYAG Am. Compl. Against FD at 32-33. The difference in the relief sought will require the Court to weigh an entirely different set of considerations and serves as a separate, and independent, reason for denying the stay. *See Pires v. Bowery Presents, LLC*, 44 Misc. 3d 704, 714 (Sup. Ct. N.Y. Cnty. 2014) (denying a motion for a stay of the proceedings where the damages sought in the two actions were not similar).

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In sum, the appeal cannot and will not resolve the enforcement actions. The Appellate Division cannot resolve the fraud-related claims that are not before it; will not address the

ultimate question of whether the DFS Operators, in fact, promote illegal gambling; it may not reach the merits at all; and will not rule any remedy in or out that will still be relevant at final judgment. A stay under these circumstances is untenable.

D. The DFS Operators' Requests for a Stay Defies Settled Precedent and Relies On an Invented Standard

Trial courts in the First Department routinely advance the underlying litigation while a party seeks to reverse the grant or denial of a preliminary injunction on appeal. *See e.g*., *Rosetta Mktg. Group, LLC v Michaelson*, 107 A.D.3d 536 (1st Dep't 2013) (parties engaged in discovery while appeal on the preliminary injunction ruling is briefed to the First Department); *Levkoff v. Soho Grand-West Broadway, Inc.*, 115 A.D.3d 536 (1st Dep't 2014) (answers and counterclaims interposed while appeal on preliminary injunction ruling is briefed to the First Department); *Divito v. Farrell*, 50 A.D.3d 405 (1st Dep't 2008) (summary judgment motion briefed and argued while appeal on preliminary injunction ruling is briefed to the First Department).[9]

The Stay Motions marshal just two cases dealing with a stay pending appeal in support of their argument for a trial stay. Neither supports their position or concerns a preliminary injunction. The first discusses an appeal in an out-of-state proceeding where the issues and the remedies sought were "substantially identical" to the case proceeding in trial court. *One Beacon Am. Ins. Co. v. Colgate-Palmolive Co.*, 96 A.D.3d 541, 541 (1st Dep't 2012). Here, the issues on appeal and in the underlying litigation could hardly be more different—with different causes of action (*see* supra p. 7-8), different legal standards (*see* supra p. 9-11), and different remedies (*see* supra p. 12). The second case cited by DFS Operators involved a motion to stay a matrimonial proceeding while a key issue was on appeal. *Miller v. Miller*, 109 Misc.2d 982, 983 (Sup. Ct.

[9] The referenced activity at the trial court during the pendency of the appeal for these cases (in Supreme Court, New York County) can be found in dockets for the following index numbers: *Rosetta*, Index No. 654114-2012; *Levkoff*, Index No. 153719-2012; *Divito*, Index No. 600132-2007.

Suffolk Cnty. 1981). Not only did the case not involve an appeal of a preliminary injunction, the court *denied* the stay application for reasons that apply equally here. The Court put it bluntly: "the unfortunate litigant should not pay for said appeals" with delay while the appellate process plays out.[10] NYAG and the people of New York should not have to pay for the DFS Operators' appeal either.

The lack of case precedent granting trial stays while preliminary injunction orders are on appeal is unsurprising; as discussed above, there are different legal standards, different burdens of proof, different standards of review, and different remedies with a preliminary injunction. This leaves such cases poor candidates for a trial court stay.

Ultimately, the DFS Operators know that they cannot win under the applicable legal standard, so they invented a new one. They claim to be entitled to a trial court stay because *of the chance* that the Appellate Division will give this Court *potential guidance* in its decision. DK Stay OSC at 5; *see also* FD Stay OSC at 2 (speculating that appeal may "likely" be relevant to the dispute). This is not the law. Nor do the DFS Operators identify any relevant authority to support this theory. As explained above, both the C.P.L.R. and well-settled precedent calls for a stay only in circumstances where an appeal will resolve "all" questions and there is "complete" identity between the causes of action and the remedies. *See e.g., Otto,* 110 A.D.3d at 621. The mere *prospect* that an appeal may overlap in some particulars is not enough.

Indeed, in advancing this flawed doctrine, the DFS Operators overlook the substantial authority that trial court litigants should not be forced to wait because of the mere speculative

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[10] *Id.* The court in *Miller,* which denied a stay, advised that a stay pending appeal was only appropriate when an appellate decision was "imminent." *Id.* at 983. There is no imminent decision here. The DFS Operators submitted their first appellate briefs just two days ago, with no indication when the Court will issue a decision. Given the high stakes for the DFS Operators, they are also likely to appeal any adverse decision to the Court of Appeals.

"potential" that an appeal may relate to their action. *See e.g., All Metro Health Care Services, Inc.,* 2009 NY Slip Op 31177(U) (finding the "theoretical possibility" that an appeal could reverse a decision "insufficient reason" to justify a stay); CONNORS AND SIEGEL, PRACTICE COMMENTARIES, MCKINNEY'S CONS. LAWS OF NEW YORK, CPLR C2201:11 (2010) ("The mere fact that the case that may enunciate the dispositive rule of law is before an appellate court is not sufficient to warrant [a] stay").[11]

As explained above at pages 9-11, the DFS Operators contest each and every prong of the three-prong test for preliminary injunction. They further contest the injunction on a host of other non-merits-based arguments. As such, the Appellate Division *may* rule on either of the two non-merits-based prongs of the test or *may* rule on any number of the DFS Operators' procedural or evidence based arguments found in their appellate briefs. The Appellate Division *may* make a merits determination exclusively reaching the sufficiency of NYAG's prima facie showing; or *may* only provide a terse merits-related holding that fails to provide anything close to the roadmap that the Stay Motions argue is "likely." A trial court stay under these circumstances would lead to the precise outcome that the cases counsel against—with an aggrieved party's case delayed for no reason at all. Such a result should be rejected as contrary to law and basic principles of justice.

E. Proceeding with the Case Would Not Be Unreasonably Burdensome

The DFS Operators further object to the so-called burden of moving the case forward. *See e.g.*, FD Stay OSC at 3 (discussing the "expense, burden and prejudice to the parties" and "potentially broad discovery" requests). This assertion is at odds with the representations of

[11] DraftKings own citation to the Practice Commentary, at DK Stay OSC at 4, speaks about the appropriateness of a trial stay pending an appeal only when "the point of law involved in the case… is about to be ***definitively decided…."*** (emphasis added). There is no credible argument that the Appellate Division will definitely decide the host of issues at play in this case in the pending appeal.

DraftKings counsel to this Court that it was ready, willing, and eager to move straight to discovery. On November 16, 2015, for example, DraftKings urged:

> We need the TRO, your Honor. And **we also need expedited hearing, expedited discovery. We want to be here for trial with you as quickly as possible**. **We want to have a hearing as quickly as possible** because your Honor we are going to win this case. They are dead wrong, and [the Attorney General] is an outlier. It is wrong what he has done, and we need your help.

See Nov. 16, 2015 Transcript from Hearing, Index No. 102014/15 and Index No. 161691/2015 at 12:25-13:6 (emphasis added).[12] The burden of discovery, it seems, somehow became heavier after the DFS Operators received an adverse ruling from this Court.

There is no risk of undue burden on the DFS Operators here. As explained above, the pending appeal cannot resolve the underlying litigation. As a result, the DFS Operators will face the prospect of discovery in this matter whatever the outcome is on appeal. Moreover, the DFS Operators already face countless investigations and legal actions nationally implicating many, if not all, of the same issues raised in this litigation. DFS Operators will therefore be producing evidence relevant to NYAG's claims in any number of actions and investigations across the country. To that end, Defendant DraftKings has specifically agreed to an expedited trial date with the Illinois Attorney General's Office as early as June of this year where discovery will be taken.[13] Undoubtedly, much of the same discovery relating to NYAG's claims that DFS Operators' are promoting illegal gambling is being collected, reviewed, and sorted in connection with the Illinois action or soon will be. The assertion that advancing discovery in this case will

[12] *See also id.* at 13:9-12 (FanDuel's attorney saying "I think that we are on common ground with the Attorney General about one point, which is our mutual desire on all fronts to proceed quickly").

[13] *See* Dec. 28, 2015 Agreed Order, in DraftKings v. Lisa Madigan, Attorney General of Illinois, attached as Ex. 11 to Wagner Aff. (indicating all discovery will be completed by April 28, 2016, with a contemplated trial date of June 27, 2016); *see also "DraftKings, Illinois Agree to Expedited Schedule in Daily Fantasy Sports Lawsuit,"* CHICAGO TRIBUNE, Dec. 29, 2015, attached as Ex. 12 to Wagner Aff. Furthermore, there exists a separate litigation in Illinois involving FanDuel.

add unreasonable burden is completely unfounded, and is certainly not a justification for a trial stay in this matter.

F. A Stay Would Prejudice NYAG and the People of New York

In its Stay Motion, DraftKings recycles an unsuccessful argument it made when briefing the preliminary injunction, claiming the State will not be prejudiced by a delay in the litigation. *See* DK Stay OSC at 7-8. This reasoning is at odds with this Court's previous finding that the equities favor the issuance of an injunction because of the "interest in protecting the public, particularly those with gambling addictions." *See* P.I. Order at 9. Prolonging this litigation, and thus prolonging the time the DFS Operators are able to accept unregulated wagers in New York, causes real harm to the public.

The constitutional prohibition against gambling reflects New York's long-held judgment that unrestricted gambling imposes great public health and economic harms. Gambling comes with higher rates of crime, destroys families, and economically devastates communities. *See* Kurt Eggert, *Truth in Gaming: Toward Consumer Protection in the Gambling Industry*, 63 MD. L. REV. 217, 228 (2004). Gambling addiction may also lead to depression and other compulsive disorders like alcoholism and drug addiction. *Id.* at 229.[14] Imposing a trial stay will guarantee that compulsive gamblers and those at risk for gambling addiction will remain vulnerable longer.

As a thoroughly unregulated industry, the DFS Operators also imperil the financial well-being and privacy of New York residents in other ways. Law enforcement and others have raised serious questions about the companies' business practices that run the gamut from deceptive advertising, including the alleged misconduct set out in the enforcement actions, to the security

[14] Internet gambling is no exception. *See* John Warren Kindt, *Testimony before the Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives*, 8 Rich. J. Global L. & Bus. 19, 20-24 (2008) (detailing harms of Internet gambling).

of consumer privacy and consumer funds. A trial stay would lengthen the amount of time these gambling ventures remain unfettered, increasing the risks of harming the general public.

In fact, the potential prejudice from undue delay in achieving a resolution cuts in one direction: towards the State. Faced with numerous investigations and lawsuits, and an increasing number of declarations that their businesses are illegal, the future of DraftKings and FanDuel is in doubt. This raises the question of whether the New Yorkers will ever be compensated for DFS Operators' actions. DFS Operators have recently shed employees and office space; payment processors and banks are increasingly refusing to process DFS transactions; a major investor in DraftKings recently disclosed to the S.E.C. that its investment in DraftKings had lost 60% of its value; and DraftKings fell so far behind on its contractually-agreed advertising commitments that ESPN cancelled its exclusivity arrangement.[15] In a newspaper article this past week, counsel for DraftKings was quoted as saying that losing the approximately 7 - 10% of the market that New York represents to its business would "have a catastrophic effect. It could be enough to put us out of business, I think…. There have already been those kind of pressures put on us already." *See "DraftKings Lawyer Says Firm Could Go Under If It Loses N.Y. Battle",* BOSTON GLOBE, Feb. 23, 2016, attached Ex. 13 to the Wagner Aff. As more jurisdictions scrutinize DFS and recognize that it constitutes illegal gambling, the DFS Operators may also owe substantial back taxes: the Internal Revenue Service charges a 2% excise tax on the

[15] *See "Fox Cuts Value of DraftKings Stake by 60 Percent",* BOSTON GLOBE, Feb. 9, 2016, attached as Ex. 14 to Wagner Aff; *"DraftKings is Moving Out of its New York Penthouse Offices",* BUSINESS INSIDER, Jan. 7. 2016, *available at* http://www.businessinsider.com/draftkings-is-moving-out-of-its-new-york-penthouse-offices-2016-1; *"FanDuel Lays Off Workers as Legal Pressure Mounts",* FORBES, Jan. 20, 2016, *available at* http://www.forbes.com/sites/maurybrown/2016/01/20/layoffs-hit-daily-fantasy-sports-company-fanduel/#f88935b44b6a.

collection of unauthorized wagers.[16] These are by no means an exhaustive list of the financial challenges DFS Operators currently face, and the apparent financial distress and legal turmoil facing the DFS Operators raises the costs of delay to NYAG considerably. By the time litigation commences, the DFS Operators could prove insolvent or otherwise unable to fulfill a judgment entered against them.[17] Such a scenario would leave New York residents without damages or restitution. Imposing a trial stay would increase this real risk to NYAG and impose a burden of the interests it seeks to protect.

CONCLUSION

For those reasons set forth herein, the DFS Operators' Order to Show Cause to stay the litigation pending resolution of the appeal on the preliminary injunction should be denied and the DFS Operators should Answer, or otherwise respond, to the Amended Complaint. Furthermore, discovery should commence immediately.

[16] IRC 4401(a)(2) imposes a 2% tax on the amount of any wager not described in IRC 4401(a)(1) (i.e., those not authorized by state law). Thus, if gross unauthorized wagers were $200 million, the amount of the tax would be $4 million (in addition to potential interest and penalties).

[17] This threat is not theoretical – just in the past week a DFS company, FantasyHub, ceased operations and blocked users' ability to withdraw funds. FantasyHub is a member of the same Fantasy Sports Trade Association ("FSTA") as DraftKings and FanDuel. Last month, another company, FantasyUp, closed its doors and refused to process withdrawals to customers.

Dated: New York, NY
February 24, 2016

Respectfully submitted,

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