

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,

Plaintiffs,

-against-

Index No.

IAS Part _____

Assigned to Justice _____

MEMORANDUM OF LAW
IN SUPPORT OF
PLAINTIFF'S MOTION
FOR A PRELIMINARY
INJUNCTION

DraftKings, Inc.,

Defendant.

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION
FOR A PRELIMINARY INJUNCTION**

Preliminary Statement

The New York State Constitution has prohibited bookmaking and other forms of sports gambling since 1894. Under New York law, a wager constitutes gambling when it depends on *either* a (1) “future contingent event not under [the bettor’s] control or influence” *or* (2) “contest of chance.” So-called Daily Fantasy Sports (“DFS”) wagers fit squarely in both these definitions, though by meeting just one of the two definitions DFS would be considered gambling. DFS is nothing more than a rebranding of sports betting. It is plainly illegal.

The two dominant DFS operators, FanDuel and DraftKings, offer rapid-fire contests in which players can bet on the performance of a “lineup” of real athletes on a given day, weekend, or week. The contests are streamlined for instant-gratification, letting bettors risk up to \$10,600 per wager and enter contests for a chance to win jackpots upwards of \$1 million. The DFS operators themselves profit from every bet, taking a “rake” or a “vig” from all wagering on their sites.

Like any sports wager, a DFS wager depends on a “future contingent event” wholly outside the control or influence of any bettor: the real-game performance of athletes. A bettor can try to *guess* how athletes might perform, but no bettor—no matter how shrewd or sophisticated—can *control* or *influence* whether those athletes will succeed. The moment a DFS player submits a wager, he becomes a spectator whose fate is sealed by the real-game performance of athletes. The rules of DFS make this relationship crystal clear. The “final box scores”—a tally of the real-game performance of athletes—determines who wins and who loses a DFS contest. Until this tally is available, no prizes can be awarded for any DFS contest. Until the occurrence of that future contingent event, the winners and losers are *unknown* and *unknowable*.

DFS bets also constitute wagers as a “contest of chance.” As New York law has long recognized, gambling often mixes elements of chance and skill. The key question is whether the outcome depends in any “material degree” on an element of chance, “notwithstanding that skill of the contestants may also be a factor.” In DFS, chance plays a significant role. A player injury, a slump, a rained out game, even a ball taking a bad hop, can each dictate whether a bet wins or loses. By itself, any single chance occurrence can irrevocably alter the outcome of a DFS contest. Given the frequency and number of chance occurrences, no amount of research, investigation, or judgment can assure in advance that a certain DFS result will occur or how. That the margin between a winning and losing DFS wager is often measured in *fractions* of a point only makes the chance element even more obvious.

Yet FanDuel and DraftKings insist that DFS is not gambling because it involves skill. But this argument fails for two clear reasons. First, this view overlooks the explicit prohibition against wagering on future contingent events, a statutory test that requires no judgment of the relative importance of skill and chance—they are irrelevant to the question. Second, the key factor establishing a game of skill is not the presence of skill, but the absence of a material element of chance. Here, chance plays just as much of a role (if not more) than it does in games like poker and blackjack. A few good players in a poker tournament may rise to the top based on their skill; but the game is still gambling. So is DFS.

The false assertion that DFS is a skill game is particularly galling in light of the unrelenting barrage of advertisements that depict FanDuel and DraftKings as a new form of lottery. With commercials depicting cash falling from the ceiling and oversized novelty checks, the message is clear: anyone can play DFS and anyone can win. “Try it,” one FanDuel ad urges. “It takes a few minutes. . . .I’ve deposited a total of \$35 on FanDuel and won over two million!”

“Taking home your share is simple,” a DraftKings ad promises, “It’s the simplest way of winning life-changing piles of cash.”

Denying that DFS is gambling also runs counter to how DFS sites depicted themselves in the past and how they portray themselves behind closed doors. At one point, DraftKings’ CEO openly admitted that DFS contests run by DraftKings constitute a “mash[-]up between poker and fantasy sports,” that exist in the “gambling space,” and make money in a way “identical to a casino.” In pitches to investors, FanDuel and DraftKings unabashedly sell themselves as gambling ventures, comparing themselves to online poker and sports wagering.

Meanwhile, the DFS contests are causing the precise harms that New York’s gambling laws were designed to prevent. Problem gamblers are increasingly being seen at Gamblers Anonymous meetings and at counselors’ offices addicted to DFS. For DraftKings, at least, this should not come as a shock: records show that their customer service representatives have responded to pleas from self-described gambling addicts to close accounts and permanently ban them from the site.

* * *

On November 10, 2015, the New York Office of the Attorney General (“NYAG”) sent FanDuel and DraftKings separate letters demanding that each company cease and desist from illegally accepting DFS wagers in New York State. Both companies refused to comply and then filed seemingly coordinated—and procedurally improper—actions with this court.¹

NYAG thereafter filed separate actions against FanDuel and DraftKings and is seeking preliminary injunctions to restrain FanDuel and DraftKings from continuing to accept illegal

¹ On November 13, 2015, DraftKings filed an action against NYAG through a verified petition, which is annexed to the Affirmation of Justin Wagner (“Wagner Aff.”) as Ex. A, and referred to hereafter as “DK Compl.” On November 13, 2015, FanDuel filed a related action against NYAG through a complaint, which is annexed as Ex. B to the Wagner Aff. and referred to hereafter as “FD Compl.”

wagers from New York, and other relief. This consolidated memorandum of law supports each such action.

STATEMENT OF FACTS

DraftKings and FanDuel (together, the “DFS Operators” or “DFS Sites”) offer substantially the same online sports betting contests, which they market as “Daily Fantasy Sports” (“DFS”). In DFS contests,² players place bets—styled as “entry fees”—on “lineups” of amateur and professional athletes. The winners of DFS contests are determined based on the real-game performance of the athletes competing in a particular sports league (*e.g.* the National Football League (“NFL”)) during a particular period, over a week, a weekend, or even on a particular day. DFS contest winners receive cash awards, while the losers forfeit their bets.

I. The Operation of DFS Contests

Each DFS Operator runs a range of wagering contests, including so-called “Guaranteed Prize Pools” (“GPP”), where players can enter a pool with up to hundreds of thousands of other players, and “Head-to-Head” match-ups where DFS players bet that their lineup will perform better than the athletes picked by another DFS player. *See* Ip FD Aff. ¶25; Ip DK Aff. ¶ 17. These DFS contests, and others, are offered across a range of sports, including football, basketball, baseball, and hockey. Ip FD Aff. ¶10; Ip DK Aff. ¶12. As with illegal sports wagering more broadly, the most popular sport for DFS contests is NFL football.

To compete for cash prizes, DFS players put money at risk. The minimum bets to enter vary based on the contest format and other factors. For example, a DFS player can enter one

² Both DFS Operators offer certain “freeroll” or “freeplay” contests, where DFS players can enter for free. The winners of these contests may be granted a prize, which may include cash or a free entry into a cash prize contest. For purposes of this action, DFS contests refer to the games that require DFS players to pay an entry fee for an opportunity to win a cash prize, which constitute the vast majority of their games.

contest on DraftKings for as little as \$0.25 and on FanDuel for as little as \$1, *see* Ip DK Aff. ¶15; *See* Ip FD Aff. ¶ 26, while the minimum wager for other contests on either DFS Site can be as high as \$10,600. *Id.* If the DFS player does not win a cash prize, he loses his wager.

In each contest, a DFS player must make his wager, pick a “lineup” from a list of eligible professional or amateur athletes, and then wait to see if the lineup wins a cash prize based on the performance of athletes in competitive sports. For DFS contests involving team sports, a DFS player picks a lineup of athletes who will be playing in real-world games during the contest period (*e.g.*, on a given day). The performance of those athletes in real games is the sole factor determining whether the wager wins or loses.

The DFS Sites require that the lineup observes two basic rules. *First*, the lineup must include athletes who play on at least two separate teams and represent a range of positions. *See* Ip DK Aff. ¶20; *See* Wagner Aff. ¶5 (FanDuel requires players from three separate teams). *Second*, each DFS Site assigns a fictional “salary” to each real-world athlete. The combined salary of any lineup may not exceed a fictional salary allocation or “cap” that the sites assign in connection with each wager. *See* Ip FD Aff. ¶30; Ip DK Aff. ¶27.

The “salaries” assigned to athletes constitute odds that consider the athletes’ past performance and other factors to predict how any athlete could be expected to perform during the contest period. *See e.g.*, Ip DK Aff. ¶31. Like traditional sports handicappers, DFS players will try to predict how particular athletes will perform relative to the odds (*i.e.*, the “salaries”). *See* Ip DK Aff. ¶33. When determining whether a particular athlete constitutes a good bet, tellingly, FanDuel and DraftKings recommend that DFS players consult the odds set by Nevada sports prop bookmakers.³ *See* Wagner Aff. ¶6.

³ In sports prop betting, a player can wager on various aspects of professional sports, from the performance of a particular athlete to various intra-game statistics (*e.g.*, the number of points by halftime in a football game). Nor is

Prior to the start of the contest period, each DFS Site “locks” the lineups submitted by the bettors. After lineups lock, the bettor can take no action related to the contest. *See* Ip DK Aff. ¶29; Ip FD Aff. ¶36. The DFS player is merely a spectator, with the success of his wager to be determined by the real-game performance of the athletes. The outcome of the wager is thereafter wholly contingent on the performance of these athletes.

Each DFS Operator establishes its own rules for how an athlete’s performance translates into points. In NFL contests offered by each site, for example, a touchdown thrown by a quarterback translates into four points. *See* Ip DK Aff. ¶25; Ip FD Aff. ¶19. Based on research, experience, or simply a hunch, a DFS player might reasonably predict a particular quarterback will throw two touchdowns, only for that quarterback to be injured on the first play. Or throw only one touchdown. Or throw several interceptions instead. Or face an unexpected blizzard. Or vie with any number of other unforeseen and unforeseeable elements of chance. Or perhaps the quarterback completes the touchdowns. The DFS player has no more influence over the hoped-for outcome than he does over the weather.

For a real-life illustration, consider the Monday night NFL game on November 9, 2015. As the game entered its final moments, the Chicago Bears were leading by a tight margin. In a common strategic move, Quarterback Jay Cutler took a knee to run out the clock and assure victory. This play cost the Bears one yard, and reduced Cutler’s total fantasy production by *one-tenth* of one point—and reportedly cost one unlucky FanDuel player \$20,000; he had apparently picked Cutler and the one-tenth of a point reduction spelled the difference between winning \$50,000 in first place and \$30,000 in second place. (By contrast, that same one-tenth of a point reduction was a lucky break for the DFS player who took first prize.) *See* Wagner Aff. ¶28.

sports prop betting the only overlap with a well-established form of sports gambling. The CEO of a rival DFS company referred to the GPP-format of DFS as a “sports betting parlay on steroids.” *See* Wagner Aff. Ex. F at p.32.

Indeed, the rules of each DFS Operator contemplate numerous circumstances where points may be reduced or zeroed out through no fault of the athlete. These include where: the real game gets rained out, postponed, suspended, or shortened; the professional or amateur league fails to correct a mistake in official game statistics before the DFS Operator declares a contest winner; or a trade involving the athlete occurs after a contest begins. *See* Ip DK Aff. ¶¶ 22-25; Ip FD Aff. ¶¶ 21-24. Some of these occurrences are relatively common. All of them can materially affect the outcome of a wager and all are subject to chance.

The ultimate outcome of any DFS contest is judged based on the final box scores of actual games played during the relevant contest period. This is set out in the rules of both sites. DraftKings' rules provide that that no prizes will be awarded: "until all of the final box scores have been reported for each contest's games to ensure that the final results are accurate." Wagner Aff. ¶ 7. FanDuel's rules likewise specify that no winners can be announced until "the final box scores are complete." Ip. FD Aff. ¶ 25.

In the words of a spokesperson for FanDuel, the outcome of a DFS player's wager is "contingent on the positive performance of all of their players" in actual games. *See* Wagner Aff. ¶ 9. As DraftKings observed, the success of any DFS wager "depends on the combined performance" of real-world athletes. DK Compl. ¶ 22.

II. The DFS Business Model

FanDuel and DraftKings' current denials about DFS constituting gambling are belied by how the sites depicted themselves in the past and how they portray themselves behind closed doors. FanDuel's DFS contests were designed by a veteran of the legal online betting industry in the United Kingdom, Nigel Eccles. *See* Wagner Aff. ¶ 10. The company admitted to an early investor that its target market is male sports fans who "cannot gamble online legally." *See* Wagner Aff. ¶ 11. An analysis FanDuel prepared for another investor equated the company with

Bwin.Party, one of the world's largest online sports betting companies. *See* Wagner Aff. ¶ 12. That same analysis, in fact, dropped the pretense of calling FanDuel's bets "fees," instead using betting terminology to compare its total "stakes" by quarter to the total "stakes" for Bwin.Party's Sports Betting operation. *Id.*

DraftKings depicts itself to investors in a similar fashion. For example, in one investor presentation, DraftKings pitched itself to a prospective investor by noting the "Global opportunity for online betting," pointing to the massive revenue of the "global online poker market," and making direct comparisons throughout the presentation to poker and sports wagering. *See* Wagner Aff. ¶ 13, at p. 10. The CEO of DraftKings previously spoke openly about DraftKings as a gambling company. He called DFS a "mash[-]up between poker and fantasy sports," suggested that DraftKings operates in the "gambling space," and described its revenue model as "identical to a casino." *See* Wagner Aff. ¶ 14 at Ex. L (p. 2, 16).

The rejection of the gambling label by the DFS sites is particularly hard to square with the overt strategy of recruiting gamblers. For FanDuel, this has meant hiring a former top executive from Full Tilt, the online poker company, and affiliating with gambling industry stalwarts like "Vegas Insider" and BetVega, a sports betting and handicapping website. For DraftKings, this has meant aligning itself closely and negotiating sponsorships with other gambling ventures, like the World Series of Poker and the Belmont Stakes. *See* Wagner Aff. ¶ 15 and ¶ 16. DraftKings has also embedded gambling keywords into the programming code for its website. Some of these keywords include "fantasy golf betting," "weekly fantasy basketball betting," "weekly fantasy hockey betting," "weekly fantasy football betting," "weekly fantasy college football betting," "weekly fantasy college basketball betting," "Fantasy College Football Betting," "daily fantasy basketball betting," and "Fantasy College Basketball Betting." *See*

Wagner Aff. ¶ 17 at Ex. O (p. 10). This increases the likelihood that search engines, like Google, will send users looking for gambling straight to the DraftKings site.

The attempt to have it both ways extends to the approach of DFS sites with regulators. In the U.S., FanDuel and DraftKings disclaim any links to gambling—where such activities face serious prohibitions. Yet in the United Kingdom, where gambling online is permitted with the appropriate licenses, both companies applied for, and DraftKings received, licenses from the U.K. Gambling Commission. *See* Wagner Aff. ¶ 18.

III. Marketing DFS

In 2015, in a bid for market share, both DFS Operators massively increased their advertising spending. Wagner Aff. ¶ 19. In all of 2014, for example, DraftKings spent just \$1 million on broadcast and cable advertising with NBC Universal/Comcast. In the first ten months of 2015, DraftKings spent \$21 million, an increase of over 2,000%. *See* Wagner Aff. at ¶ 20. Similarly, FanDuel spent just \$2.2 million to advertise with NBC Universal/Comcast in all of 2014. In the first ten months of 2015, FanDuel spent \$12 million, an increase of 545%. *Id.*

The DFS Operators applied these advertising dollars to promote DFS Sites to ordinary and potential players. In advertisement after advertisement running non-stop on television and online, the DFS Sites portray DFS as anything but a “skill game.” Rather, they promote their contests like a lottery—as easy to play and easy to win. Money falls from the ceiling, winners are pictured amid confetti holding novelty checks, and the simplicity of playing is front-and-center.

FanDuel’s advertisements commonly showcase testimonials from ostensibly ordinary DFS players (*e.g.*, “Zack from Fairfield, California”), and play up the ease of playing and of winning huge cash prizes:

- “*Try it. It takes a few minutes. You’ll have a blast. . . . I’ve deposited a total of \$35 on FanDuel and won over two million!*”

- “My third week of playing I won \$15,000 off of a five dollar entry...There’s five million bucks on the line in week one Sunday million.”
- “I’ve won over 29 thousand dollars on FanDuel. *Nothing special about me.* The difference is I played and they didn’t.”
- “He’s a personal trainer, and he turned \$2 into over \$2 million on FanDuel.”

DraftKings advertisements are cut from the same cloth:

- “...taking home your share is *simple*: just pick your sport, pick your players, and pick up your cash. That’s it. *It’s the simplest way of winning life-changing piles of cash.*”
- “They make winning *easier* than milking a two-legged goat . . . Do you want to be a fantasy football hero? Do you want it to be *easy and fun* with a shot to win millions?”
- “The giant check is no myth. . . BECOME A MILLIONAIRE!”

See Ip DK Aff. ¶¶ 4-8; Ip FD Aff. ¶¶ 4-7; Wagner Aff. ¶¶ 21-22.

The reality is that like poker, blackjack, and horseracing, a small percentage of professional gamblers use research, software, and large bankrolls to extract a disproportionate share of DFS jackpots. With poker and DFS, professional players, known as “sharks,” profit at the expense of casual players, known as “minnows.” The numbers show that the vast majority of players are net losers, losing far more money playing on the sites than they win. DraftKings data show that 89.3% of DFS players had an overall *negative* return on investment across 2013 and 2014. See Wagner Aff. ¶39.

IV. DFS Breaks From Traditional Fantasy Sports

The model for DFS diverges from traditional fantasy sports in fundamental respects.

Most significantly, DFS is a business model for gambling—where DFS Sites *directly profit* from the wagering on their platforms. On sites hosting traditional fantasy leagues, most players compete for bragging rights or side wagers, not massive jackpots offered by the sites themselves. Moreover, DFS eschews a competitive draft and any and all strategic aspects associated with a season-long competition, which include making trades with other participants, constantly adjusting lineups, dropping and adding players, and so forth.

Both DraftKings and FanDuel fully appreciate that DFS is radically different than what came before. DraftKings promises “rapid-fire contests” of:

much shorter duration than the traditional season-long leagues and require no team management after the draft. Salary cap draft format takes just minutes to complete, unlike the hours-long snake drafts in traditional leagues. We offer new contests every day of the season, and our winners are crowned nightly. Payouts happen immediately after the games – no more waiting until the end of the season to collect winnings!

See Wagner Aff. ¶ 26

In describing the departure from traditional fantasy sports, FanDuel exhorts: “The format simplified. The winning amplified. And the money? Let’s just say your season-long league won’t pay out \$75 million a week.” *See* Wagner Aff. ¶ 27.

V. The Harms of DFS

While irresponsibly denying their status as gambling companies, the DFS Sites pose precisely the same risks to New York residents that New York’s anti-gambling laws were intended to avoid. Experts in gambling addiction and other compulsive behaviors have identified DFS as a serious and growing threat to people at risk for, or already struggling with, gambling-related illnesses.

DFS is an especially powerful draw for young males, who are increasingly seen seeking help for compulsive gambling related to DFS with counselors and appearing at Gamblers

Anonymous meetings. For those struggling with gambling addiction or those who are vulnerable to it, certain structural characteristics make DFS particularly dangerous. As Keith Whyte, the Executive Director of the National Council on Problem Gambling (“NCPG”) explains, these structural characteristics—which are generally absent from season-long fantasy leagues—include:

the ability for players to place large bets; the chance for players to win large payouts; the high speed of play (or, put another way, the relatively short interval between the placing of a bet and the determination of the outcome of the bet); and the perception of skill as a determinant in the outcome of the wager.

Whyte Aff. ¶ 8.⁴

Dr. Jeffrey L. Derevensky, Director of the International Centre for Youth Gambling Problems and High-Risk Behavior at McGill University, notes that, among other things, false or misleading representations of the skill involved in DFS “can lead players to a preoccupation with DFS, chasing of losses, and developing symptoms and behaviors associated with a gambling disorder.” Derevensky Aff. ¶ 10.

At least for DraftKings this should come as no surprise: their customer service representatives have fielded pleas from self-described gambling addicts to close accounts and permanently ban them from the site. DraftKings’ own records show customer inquiries from DFS players seeking assistance with subjects like “Gambling Addict do not reopen,” “Please cancel account. I have a gambling problem,” and “Gambling Addiction needing disabled account.” *See* Wagner Aff ¶ 23.

⁴ As discussed in affidavits submitted by Dr. Jeffrey L. Derevensky, the Director of the International Centre for Youth Gambling Problems and High-Risk Behaviors, and Keith S. Whyte, the Executive Director of the National Council on Problem Gambling, DFS attracts compulsive gamblers and those at risk for gambling addiction. Affidavit of Keith S. Whyte, dated November 12, 2015 (“Whyte Aff.”), annexed as Ex. EE to the Wagner Aff., ¶¶ 6-11; Affirmation of Dr. Jeffrey L. Derevensky, dated November 12, 2015 (“Derevensky Aff.”), annexed as Ex. FF to the Wagner Aff., ¶¶ 5-9.

VI. Procedural Posture

On October 5, 2015, *The New York Times* published an expose of DFS titled “Scandal Erupts in the Unregulated World of Fantasy Sports.” *See* Wagner Aff. ¶ 29. That article described how DFS managed to grow rapidly without regulatory scrutiny—and in spite of observations that “the setup is hardly different from Las Vegas-style gambling that is normally banned in the sports world.” The story centered on allegations that a DraftKings’ employee may have misused proprietary information to win a FanDuel contest.

The next day, on October 6, 2015, the Office of the New York Attorney General (“NYAG”) issued separate letters to FanDuel and DraftKings. Each letter sought documentation and information relating to the integrity of the company’s business, observing that its “policies and practices are matters of concern to the public, particularly to the many customers who put money at risk on your site each day.”

NYAG engaged in an expedited inquiry, meeting several times with the respective representatives of DraftKings and FanDuel and reviewing the documentation they provided. NYAG also engaged in broader fact-finding, which included seeking information from investors, DFS industry witnesses, and experts in gambling and gambling addiction. *Id.* NYAG made several startling discoveries regarding the approach of the DFS Operators to basic compliance issues. Until recently, for example, both DraftKings and FanDuel *explicitly* encouraged their employees to play DFS games on competitors’ platforms—competing against regular customers who had no knowledge of the extent of the DFS employees they were competing against. *See e.g.*, Wagner Aff. ¶ 24 (FanDuel’s Daily Fantasy Sports Play Policy instructed employees “[p]laying on other sites helps employees do their jobs better”). FanDuel recognized that this policy would be ill-received, instructing employees to minimize their public presence “so users

are less likely to be suspicious or angry” and avoid becoming “among the top five players by volume” because “top players frequently become targets for accusations.” *Id.*

Further, serious questions have arisen regarding whether DraftKings is abiding by anti-gambling laws in jurisdictions where even the company accepts that DFS is wholly illegal. Wagner Aff. ¶ 25. NYAG’s investigation uncovered documentation indicating that, in 2014, DraftKings received \$484,897 in entry fees from player accounts registered in states where DraftKings purports not to offer DFS for legal reasons (Montana, Arizona, Washington, Louisiana, and Iowa). *See* Wagner Aff. ¶ 34. Indeed, an increasing number of states reviewing the status of DFS under their own state gambling laws, including Nevada, Illinois, Georgia, and Washington State—which has precisely the same definition for gambling as New York—have all declared DFS to be gambling or raised serious questions about its legality. NYAG’s most pressing concern, however, was the violation of New York law.

Thus, on Tuesday, November 10, 2015, NYAG furnished separate letters to FanDuel and DraftKings relaying its conclusion that DFS constitutes illegal gambling for purposes of New York law. Each letter demanded that the companies cease and desist from illegally accepting DFS wagers in New York State. In relevant part, the letter stated:

Our review concludes that [the DFS Site’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.” [the DFS Site’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 [DFS Site] wager represents a wager on a “contest of chance” where winning or losing depends on numerous elements of chance to a “material degree.”

The letters also provided formal pre-litigation notice pursuant to New York State General Business Law (“GBL”) §§ 349 and 350 and Executive Law § 63(12). Notwithstanding the explicit demand to stop accepting wagers from New York State, the companies

continued. On Friday, November 13, 2015, each company filed seemingly coordinated—and procedurally improper—actions with this court.

This action proceeds as a result.

ARGUMENT

THE COURT SHOULD ENJOIN DEFENDANTS DRAFTKINGS AND FANDUEL FROM CONTINUING TO OPERATE ILLEGAL GAMBLING BUSINESSES

I. The Attorney General has Authority to Seek and the Court Has Authority to Grant an Injunction Against DraftKings’ and FanDuel’s Illegal Gambling Businesses.

The Attorney General seeks a preliminary injunction prohibiting DraftKings and FanDuel from continuing to operate an illegal sports gambling business in New York, in defiance of the state constitution, the penal law, and other statutes.

Executive Law § 63(12) empowers the Attorney General to petition the court for injunctive relief on behalf of the people of the state of New York whenever a company engages in “repeated . . . or persistent fraud or illegality in the carrying on, conducting or transaction of business.” Incident to the authority to issue permanent injunctive relief, this Court has broad equitable powers to grant ancillary relief necessary to accomplish complete justice. *See, e.g., People of the State of New York v. Apple Health and Sports Clubs, Ltd.*, 80 N.Y.2d 803 (1992). In the past, the Attorney General has successfully brought actions pursuant to Executive Law § 63(12) to enjoin the very conduct at issue in this proceeding: the operation of an illegal online gambling business. *See People v. World Interactive Gaming Corp.*, 185 Misc. 2d 852, 856 (Sup. Ct. N.Y. County 1999).

Business Corporation Law (“BCL”) § 1303 similarly authorizes the Attorney General to seek an injunction against a foreign corporation that operates an illegal and fraudulent business in New York State. In particular, the statute allows the Attorney General to seek an injunction

against a foreign corporation like FanDuel or DraftKings based on the same misconduct that would give rise to the dissolution of a New York corporation. BCL § 1303; *see also* BCL § 1101. Such injunctive relief is warranted to restrain corporations that engage in illegality or persistent fraud. *See* Business Corporation Law § 1101; *See also, e.g., People by Abrams v. Oliver School*, 206 A.D.2d 143, 619 N.Y.S.2d 911 (4th Dept 1994); *State v. Saksniit*, 332 N.Y.S.2d 343, 350 (Sup. Ct. N.Y. County 1972).

General Business Law (“GBL”) § 349(b) separately authorizes the Attorney General to bring an action for injunctive and other relief on behalf of the people of the state of New York when any person engages in deceptive practices in the state and provides that “in such action preliminary relief may be granted under article sixty-three of the civil practice law and rules.” Relatedly, the Attorney General may seek injunctive and other relief in actions pursuant to GBL § 350, which prohibits “[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state.” *See People by Vacco v. Lipsitz*, 174 Misc. 2d 571 (Sup. Ct. N.Y. County 1997).

II. NYAG Meets the Standard for Granting a Preliminary Injunction

The traditional three-prong test for issuing a preliminary injunction consists of the following: (i) a likelihood of success on the merits, (ii) irreparable injury, and (iii) a balance of the equities in plaintiffs’ favor. *Albini v. Solork Associates*, 37 A.D.2d 835 (2d Dept. 1971). Unlike private litigants, however, the Attorney General need not prove irreparable injury because injury is presumed in a statutory enforcement action under Executive Law § 63(12) and GBL § 349. *People v. Apple Health & Sports Club, Ltd. Inc.*, 174 A.D.2d 438, 439 (1st Dept 1991), *aff’d*, 80 N.Y.2d 803 (1992); *People v. P.U. Travel, Inc.* 2003 N.Y. Misc. LEXIS 2010, at *7-8, (Sup. Ct. N.Y. County 2003).

As set forth below, plaintiff meets each of the traditional prongs for preliminary relief regardless.

A. NYAG Will Succeed on the Merits

In connection with this proceeding, NYAG has demonstrated a likelihood of success on the merits under Executive Law § 63(12), BCL § 1303, and GBL §§ 349 and 350. As set forth in the complaints and affidavits, including the evidence annexed to the Wagner Affirmation and Ip Affidavits, the Defendants have operated, and continue to operate, illegal sports gambling businesses in violation of the New York State Constitution and other laws.

The complaints and supporting evidence also demonstrate that the defendants have violated New York consumer protection laws by falsely advertising and repeatedly misrepresenting their businesses to New York residents.

Defendants' businesses are plainly illegal for the following reasons:

1. DraftKings and FanDuel Have Repeatedly and Persistently Violated the Constitution and the Penal Law, Thereby Violating Executive Law § 63(12)

A claim under Executive Law § 63(12) is brought either for repeated or persistent fraud or repeated or persistent illegality. Here, the State brings its claims under the prong of repeated illegality. Courts have repeatedly found that a violation of state, federal, or local law constitutes illegality within the meaning of Executive Law § 63(12). *State v. Princess Prestige*, 42 N.Y.2d 104, 107 (1977); *People v. Empyre Inground Pools, Inc.*, 227 A.D.2d 731, 733 (3d Dept 1996); *Lefkowitz v. E.F.G. Baby Products*, 40 A.D.2d 364 (3d Dept 1973). This includes violations of the penal code. *See State v. World Interactive Gaming Corp.*, 185 Misc. 2d 852 (Sup. Ct. N.Y. Cnty. 1999) (promoting gambling in violation of New York Penal Law Article 225 and federal Wire and Travel Acts, 18 U.S.C. §§ 1084. 1952, 1953); *Freedom Discount Corp. v. Korn*, 28

A.D.2d 517 (1st Dept 1967) (violation of Penal Law §§ 1370 and 1371); *Wiener v. Abrams*, 119 Misc. 2d 970 (Sup. Ct. Kings County 1983) (violation of Penal Law § 180.55); *State by Lefkowitz v. Colo. State College of Church of Inner Power, Inc.*, 76 Misc. 2d 50 (violation of Penal Law § 950); *State v. ITM*, 52 Misc. 2d 39 (Sup. Ct. N.Y. Cnty. 1966) (violation of Penal Law §§ 1370 and 1371).

The illegality must be repeated or persistent, each of which is defined in the statute. “Repeated” is defined as “repetition of any separate and distinct ... illegal act or conduct which affects more than one person.” Exec. Law § 63(12); *People v. Wilco Energy Corp*, 284 A.D.2d 469 (2d Dept 2001); *Empyre*, 227 A.D.2d at 733. “Persistent” is defined as “continuance or carrying on of any ... illegal act of conduct.” Exec. Law § 63(12). Courts have found that under these definitions, the Attorney General is not required to establish that a large percentage of the person’s or business’s transactions was illegal. *Princess Prestige*, 42 N.Y.2d at 107 (finding 16 out of 3,600 total transactions a sufficient basis to proceed under Executive Law § 63(12)); *People v. Credit Solutions of Am.*, 2012 N.Y. Misc. LEXIS 2090, at *5 (Sup. Ct. N.Y. County 2012) (finding that to show repeated illegal conduct “a large percentage of violations is not necessary”). Nor is the existence of willing consumers a defense to otherwise fraudulent and illegal practices. *State v. Midland Equities of N.Y., Inc.*, 117 Misc. 2d 203, 207 (Sup. Ct. N.Y. County 1982); *see also FTC v. Crescent Publ’g Grp. Inc.*, 129 F. Supp. 2d 311, 322 (S.D.N.Y. 2001).

Thus, under Executive Law § 63(12) if the Defendants are conducting an illegal gambling operation in violation of the Constitution or the penal law they will be in violation of Executive Law § 63(12).

2. DFS Violates the State Constitutional Ban on Gambling

By its express terms, the New York State Constitution prohibits bookmaking, pool-selling, and gambling in *all* forms not specifically exempted:

[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).

FanDuel and DraftKings run afoul of New York’s prohibition on bookmaking, which has long defined bookmaking as the “acceptance of bets on a professional basis ‘ . . . upon the result of any trial or contest of skill, speed or power of endurance of man or beast. ’” *People v. Abelson*, 309 N.Y. 643, 650 (N.Y. 1956). This is the precise business of both DFS operators: to accept bets, re-branded as contest “fees,” and award payouts based on the outcome of the real-game performance of athletes in actual games of skill, like football. A sports betting operation like DFS qualifies as neither a state-run lottery nor an approved casino. *See* N.Y. Const. Art. I, § 9. Nor does it fall within any of the other limited exceptions to the blanket prohibition against gambling. *Id.*

Because DFS is not an authorized form of gambling, FanDuel and DraftKings are in direct violation of the state constitution.

3. DFS Contests Constitute Gambling Under New York Penal Law

Article 225 of the State Penal Law establishes several criminal offenses related to gambling, including for promoting gambling and for possessing gambling devices and records.

See generally N.Y. Penal Law §§ 225.00-225.40.⁵ The statute sets out the following definition for “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).

“Gambling” therefore consists of three statutory elements: (1) A person “stakes. . .something of value” upon a particular outcome; (2) The outcome depends on either a “contest of chance” or a “future contingent event not under his control or influence”; and (3) The person has an agreement or understanding to “receive something of value” from another person when a certain outcome occurs. *Id.* All three elements are present in DFS contests.

a) DFS Players Stake Something of Value

As an initial matter, DFS players stake something of value to participate in DFS contests: the “fee” they pay to enter. “Something of value” is defined broadly to include, among other things, “any money or property, any token, object or article exchangeable for money or property.” N.Y. Penal Law § 225.00(6). The cost of entry for NFL-based contests on DraftKings ranges from \$0.25 to \$10,600. *See* Ip DK Aff. ¶15. The cost of entry for NFL-based contests on FanDuel ranges from \$1 to \$10,600. *See* Ip FD Aff. ¶ 26. Depending on how his lineup of athletes performs, the DFS player could either win a cash prize or walk away empty-handed. *Cf. People v. Cadle*, 7 A.D.2d 65 (4th Dept. 1958) (holding that seat rental fee may constitute valuable consideration for lottery). The entry fee paid to participate in a DFS contest accordingly constitutes a wager. *Cf. Harris v. Economic Opportunity Comm'n, Inc.*, 171 A.D.2d 223, 227 (2d Dept 1991) (donation to enter charity raffle constitutes risking “something of value”).

⁵ New York law imposes no criminal liability on the players themselves.

b) The Outcome of DFS Wagers Depend on Future Contingent Events and Result from Contests of Chance

Under New York law, two types of wagers qualify as gambling: (1) wagers on future contingent events beyond the control or influence of the bettors; and (2) wagers on contests of chance. N.Y. Penal Law § 225.00(2)(Definition of “Gambling”). Under either prong of the statutory definition, DFS contests qualify as gambling. *See People v. Turner*, 165 Misc. 2d 222, 224, 225 (N.Y. City Crim. Ct. 1995) (finding a shell game constituted a “game of chance” and the outcome also depended on a “contingent event” not under the control of the player).

Each DFS wager depends on a “future contingent event” beyond the bettor’s control: the performance of athletes in real-world games.⁶ The penal law incorporates the “future contingent event” language for precisely the circumstance at issue here:

. . . [Consider] a chess game between A and B, with A and B betting against each other and X and Y making a side bet. Despite the character of the game itself as one of pure skill, X and Y are “gambling” because, from their standpoints, the outcome depends upon “chance” in the sense that neither has any control or influence over it. . . . It is this feature that requires a definition of “gambling” embracing not only a person who wagers or stakes something upon a game of chance but also one who wagers on “a future contingent event [whether involving chance or skill] not under his control or influence.” Without the latter clause, a bet on a horse race would not constitute “gambling.”

Denzer and McQuillan, Practice Commentary, McKinney’s Penal Law [“McKinney’s”] § 225.00, pp. 23 (1967) (second set of brackets in original); see *People v. Jun Feng*, 34 Misc. 3d 1205(A), 1205A (N.Y. City Crim. Ct. 2012) (citing McKinney’s for this proposition).

In an inquiry into whether the outcome depends on a “future contingent event,” the degree of talent or knowledge a bettor displays in making a prediction is irrelevant. *See People v.*

⁶ The New York Penal law’s “future contingent event” language codifies the traditional understanding of illegal sports betting: the wagering of money on the performance of others, like betting money on a boxing match, or taking side bets in a baseball game. *See, e.g., Grant v. State*, 75 Ga. App. 784 (1947) (wagering on whether a baseball player would hit a fly ball is a form of illegal gambling).

Turner, 165 Misc. 2d 222, 225 (N.Y. City Crim. Ct. 1995) (holding that the fact that a “talented player” might increase his odds of winning does not affect whether a wager constitutes gambling on a future contingent event). For example, in the illustration above, the bet between two observers of a chess game is gambling regardless of whether one knew who the better chess player was.

A DFS player can try to make an informed *guess* of how particular athletes might perform, but no DFS player can (legally) influence how those athletes *will* perform. In connection with his wager, a player on either DFS Site takes a single action: picking a lineup. After his lineup “locks,” he is a spectator whose fate is determined by the combined performance of real athletes competing in real-world games.

Indeed, DFS contests are decided based on the same future contingent event as all sports bets: a tally reflecting the cumulative performance of particular athletes. This fact is a foundation of DFS, whose rules underscore that winners and losers are judged by the “final box scores.” *Ip FD Aff.* ¶ 24. As a FanDuel spokesperson observed, the success of a wager by any DFS player is “contingent on the positive performance of all of their players” in actual games. DraftKings likewise observes that that the success of DFS lineups “depends on the combined performance” of real-world athletes. *DK Compl.* ¶ 22. DFS wagers then depend directly on the real-game performance of athletes during the contest period—a future contingent event.

Yet, in its verified petition, DraftKings insists that, despite all appearances, DFS players do not bet on a future contingent event. Instead, “selecting the lineup determines the winners and losers” – as if the competition is over upon completing the lineup. *DK Compl.* ¶ 26. This argument is incomprehensible. By the same logic, every sports bet could be recast not as a bet on the outcome of a game but as a competition where “selecting the team determines the winners and losers.” DraftKings’ argument also misses a more obvious point: there is no winning or

losing lineup, nor will there ever be, if the real games do not take place. Nor is it possible to identify the winning lineup *without a tally of the final box scores*. This is what it means for a wager to be contingent on a future event. FanDuel's complaint does not even address this factor.

Until the athletes play and a complete tally is made, the identities of the winners and losers of any DFS contest are *unknown* and *unknowable*. A DFS wager therefore depends on a future contingent event that the DFS players can neither influence nor control. Wagering on DFS therefore constitutes gambling.

A DFS wager also depends on the outcome of a “contest of chance.” The penal law defines a “contest of chance” as any “contest, game, gaming scheme or gaming devise in which the outcome depends *in a material degree* upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.” N.Y. Penal Law § 225.00(1) (emphasis added). This definition rejected an earlier approach that required a court to weigh whether chance or skill was the “dominating element” because:⁷

In many instances, it may be virtually impossible to determine whether chance or skill *dominates*; it should be sufficient that, despite the importance of skill in any given game, ‘the outcome depends *in a material degree* upon an element of chance.’”

McKinney's § 225.00, at pp. 23 (emphasis in original); *People v. Jun Feng*, 34 Misc. 3d at 1205A (citing McKinney's for this proposition).

To determine whether a game constitutes a “contest of chance,” the relevant inquiry is whether the outcome depends on chance to any “material degree”—irrespective of the role played by skill. *See Plato's Cave Corp. v. State Liquor Auth.*, 115 A.D.2d 426, 428 (1st Dept 1985), *aff'd on other grounds Plato's Cave Corp. v. State Liquor Authority*, 68 N.Y.2d 791

⁷ DraftKings and FanDuel each try to resurrect the earlier “dominating element” test that was articulated in *People ex rel. Ellison v. Lavin*. 179 N.Y. 164, 170-171 (N.Y. 1904). *See* FD Compl. at 25; DK Compl. at 66. In the face of clear statutory language, this argument is untenable.

(1986). “[G]ames of chance may also include those ‘in which the skill of the contestants may play a role, as long as the outcome depends in a material degree on chance.’” *People v. Delacruz*, 23 Misc. 3d 720, 725 (N.Y. City Crim. Ct. 2009).

“[A]n event depends on an element of chance when, despite research, investigation, skill or judgment, one still cannot make a definite assessment that a certain result will occur or not occur, or the manner in which it will occur.” 7-76 Kamins, Mehler, Schwartz & Shapiro, *New York Criminal Practice*, Second Edition § 76.02 (Matthew Bender). Here, from the perspective of a DFS player, numerous elements of chance can dictate whether a DFS wager wins or loses. First, as described above, DFS players cannot influence, and have no way to control, the performance of the athletes in their lineups. An athlete injury, a slump, a hot streak, although frequent occurrences, can each directly and materially affect whether a particular wager wins or loses. This is particularly apparent because the margin of victory in a DFS contest is often measured in *fractions* of points. *Ip DK Aff.* ¶ 48. Second, the rules of DFS specifically contemplate numerous unpredictable factors—some relatively common—that can dictate the outcome of a DFS contest completely outside the control not only of the DFS players but of the athletes themselves: a rained-out game, a late trade, a player suspension, or even a box score adjusted too late. *Ip DK Aff.* ¶¶ 22-25, *Ip FD Aff.* ¶¶ 21-24.

Where a contest depends to a material degree on chance, no further inquiry is required. *See Plato’s Cave Corp. v. State Liquor Authority*, 115 A.D.2d at 428 (despite failing to measure the “degree of skill” involved, agency determination that game depended to a “material degree” on element of chance not arbitrary or capricious). Even so, the main purported “skill” in DFS is no different than it is for poker, blackjack, and other forms of sports betting: the ability to calculate probabilities and try to handicap the odds of future events.

DraftKings admits this explicitly, providing on its website that the “skills” needed to perform well in DFS contests are the “same concepts that have helped [poker players] on the felt: probability, risk/reward, and so on.” *See* Wagner Aff. ¶ 30 at Ex. Y (p. 4). Such purported “skills” no more transform DFS into a contest of skill than they do for poker. The courts have squarely addressed whether poker is gambling and have found it to be a contest of chance. *See, e.g., People v. Dubinsky*, 31 N.Y.S.2d 234, 237 (N.Y. Spec. Sess. 1941)(“There is no doubt that playing ‘stud’ poker for money is a game of chance and constitutes gambling.”); *United States v. DiCristina*, 726 F.3d 92, 98 n. 5 (2d Cir. 2013).

Indeed, New York courts have rejected the notion that calculating probabilities and handicapping odds convert a “contest of chance” into a game of skill. First, handicapping and evaluating odds is fundamental to *every form of sports and horserace betting*,⁸ which have long been considered gambling in New York State. N.Y. Const. Art. I, § 9; *see also People v. Fortunato*, 452 N.Y.S.2d 451 (2d Dept 1982) (affirming jury conviction on charges of promoting gambling and possession of gambling records related to illegal sports betting enterprise); *People v. Giordano*, 87 N.Y.2d 441 (1995) (affirming convictions on charges of promoting gambling related to illegal sports betting enterprise).

Second, in finding a “shell game” constituted a “game of chance,” a New York court addressed and soundly refuted the notion that handicapping odds are properly considered a “skill,” observing:

Games of chance range from those that require no skill, such as a lottery, to those such as poker or blackjack which require considerable ***skill in calculating the probability of drawing particular cards***. Nonetheless, the latter are as much games of chance as the former, since the outcome depends to a material degree

⁸ *See, e.g., Lasky v. Van Lindt*, 115 Misc. 2d 259, 261 (Sup. Ct. N.Y. County 1982) (quoting definition of handicapper in horseracing as “one who rates the entries in a race before post time, who figures out the order of finish of a race beforehand. Factors include distance, weight, track condition, riders, past performances, breeding, idiosyncras[ies] of horses, etc.”); *Green v. Fornario*, 486 F.3d 100, 101 (3d Cir. 2007)(“Handicappers are the stock analysts of the sports gambling world: they provide information to sports bettors.”)

upon the random distribution of cards. ***The skill of the player may increase the odds in the player’s favor, but cannot determine the outcome regardless of the degree of skill employed.***

People v. Turner, 165 Misc. at 223-24 (emphasis added) (citations omitted). Also, critically, the purported “skill” of a few would not alter the character of DFS as a “game of chance” for the great majority of people who play it. Cf. *People ex rel. Ellison v. Lavin*, 179 N.Y. at 172-74 (Rejecting the proposition that the “chance” element in a widely publicized contest is judged from the perspective of “experts” rather than the public at-large).

Even if probing DFS contests for the precise quantum of “skill” involved was merited (as explained above, it is not), the purported “skills” for DFS—the skill of handicapping odds possessed by a small minority—would not change the legal outcome: DFS depends to a material degree on an element of chance.

Indeed, even the self-serving “skill” studies purchased by the DFS Operators show that DFS involves far more chance than not only true skill games, like chess, but also long established contests of chance, like poker. In one FanDuel skills analysis, for example, the top 10% of players beat the bottom 90% just 59% of the time. See Wagner Aff. ¶ 35 at Ex. DD (appendix). DFS simply does not compare to a game of skill, like chess, where a skilled player *consistently* beats an unskilled player. Even a well-established contest of *chance* like poker has skilled players beating unskilled players 97% of the time. See Wagner Aff. ¶ 36.

Finally, even if skill played a substantial role in a contest—an impossible argument with DFS—the contest would still qualify as a “contest of chance” where the size of the *prize* “depends in a material degree upon an element of chance.” *Matter of Pace-o-matic, Inc. v. New York State Liquor Auth.*, 72 A.D.3d 1144, 1146 (3d Dept 2010) (Upholding ruling that skill-based video game constituted a “contest of chance” where chance affected the value of the prizes). Here, the distribution of cash prizes in any DFS contest depends on exceedingly minor

contest quirks. For example, in a recent GPP on DraftKings for professional basketball only .25 points separated the top point-scorer from second place, a point difference equivalent to less than one missed jump shot. First prize won \$5,000, while second prize won \$2,500. *Ip DK Aff.* ¶ 48. In a recent GPP on FanDuel for professional basketball only six points separated the first and second place prize winners, the difference in cash winnings ranging from \$400 to \$2,000. *Ip FD Aff.* ¶ 43. A well-considered lineup picked by an experienced DFS player could easily take home a lesser prize or no prize—while a randomly assigned lineup could win the jackpot.

* * *

The outcome of a DFS wager depends on a “future contingent event” beyond the control or influence of the players and is a “contest of chance.” Either way, DFS contests constitute gambling.

c) DFS Bettors Understand That They Will Receive Something of Value in the Event of a Certain Outcome

For each contest that requires payment of an entry fee or bet, the DFS Sites and their bettors have an agreement that the Sites will award cash prizes to a portion of bettors whose lineups perform well relative to others in contention. The respective “Terms of Use” for FanDuel and DraftKings specify that prizes will be awarded to the winning DFS player. *See Wagner Aff.* ¶¶ 31-32.

While the details concerning the number of bettors who will win cash prizes and the value of those prizes vary depending on the contest format, DFS bettors undeniably participate on the understanding that they will win money if they win the contest. This understanding is the reason that DFS bettors pay money to enter DFS contests. It is also why the advertisements for the DFS Sites feature oversized checks and cash falling from the ceiling.

4. DraftKings is Promoting Gambling in the Second Degree

Section 225.05 of the Penal Law defines the misdemeanor offense of “Promoting gambling in the second degree,” as follows: “A person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity.” The terms “advance gambling activity,” “profit from gambling activity,” and “unlawful” are, in turn, defined in NY Penal § 225.00(4), (5), and (12):

4. “Advance gambling activity.” A person “advances gambling activity” when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity. Such conduct includes but is not limited to conduct directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any other phase of its operation. . . .

5. “Profit from gambling activity.” A person “profits from gambling activity” when, other than as a player, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity.

12. “Unlawful” means not specifically authorized by law.

In *People v. World Interactive Gaming Corp.*, the New York Attorney General brought a special proceeding under Executive Law § 63(12) to enjoin an internet gambling company from accepting wagers in New York. 185 Misc. 2d 852, 855-56 (Sup. Ct. N.Y. County 1999). There, the court held that such companies had unlawfully promoted gambling because “having established the gambling enterprise, and advertised and solicited investors to . . . gamble through its on-line casino, respondents have ‘engage[d] in conduct which materially aids . . . gambling activity.’” *Id.* at 861. The Court concluded that “[b]ecause all of respondents’ activities illegally advanced gambling . . . they have knowingly violated Penal Law § 225.05.” *Id.*

The DFS Operators advance unlawful gambling activity in the course of their daily operation. Specifically, the companies run the DFS contests, which are not authorized by law, set their rules, administer the websites and back-end systems that run the contests, advertise and otherwise solicit bettors to participate in the contests, collect and process wagers, and distribute cash prizes. Each time the DFS Operators accept an entry fee, it profits from gambling activity. By retaining approximately 10% of each entry fee as a “rake,” the DFS Operators also “participate[] in the proceeds of gambling activity.” In 2014 alone, DraftKings processed more than \$25 million of wagers from New York residents. *See Wagner Aff.* ¶ 34. In that same period, NYAG estimates that FanDuel received \$31 million in wagers from New York residents. *See Wagner Aff.* ¶ 33.

5. DraftKings and FanDuel Promote Gambling in the First Degree

Section 225.10 of the Penal Law defines the felony of “Promoting gambling in the first degree,” in relevant part, as follows:

A person is guilty of promoting gambling in the first degree when he knowingly advances or profits from unlawful gambling activity by:

1. Engaging in bookmaking to the extent that he receives or accepts in any one day more than five bets totaling more than five thousand dollars.

The term “bookmaking” is defined in Penal Law § 225.00(9) as:

“Bookmaking” means advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events.

The entire business model for FanDuel and DraftKings consists of accepting bets from members of the public. Each indisputably accepts bets numbering in the thousands and totaling millions of dollars on a daily, weekly, monthly, and yearly basis.

6. DraftKings and FanDuel Possess Gambling Records in the Second Degree

Section 225.15 of the Penal Law defines the misdemeanor offense of “Possession of gambling records in the second degree,” in relevant part, as follows:

A person is guilty of possession of gambling records in the second degree when, with knowledge of the contents or nature thereof, he possesses any writing, paper, instrument or article:

1. Of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise.

Incident to running their contests, DraftKings and FanDuel maintain records reflecting the selected lineups, the amounts wagered, and the winners of prizes. The DFS Sites necessarily have knowledge of their contents; indeed, such records are essential to the operation of gambling or bookmaking enterprises, such as those operated by DraftKings and FanDuel. The two DFS operators have been in possession of gambling records in the second degree for the duration of their operation.

7. DraftKings Possesses Gambling Records in the First Degree

In addition to the elements described in Penal Law § 225.15, Penal Law § 225.20 defines the felony of “Possession of gambling records in the first degree” as also requiring that the relevant gambling records “reflect[] or represent[] more than five bets totaling more than five thousand dollars.” DraftKings has recorded countless bets totaling millions of dollars since it launched its operations in 2012. FanDuel has been in operation since 2009, and likewise has recorded countless bets from New York residents totaling millions of dollars.

8. DraftKings and FanDuel are Engaging in Fraudulent and Deceptive Business Practices under Executive Law § 63(12) and GBL §§ 349 and 350.

Through representations on their website, in their television advertising, and elsewhere, DraftKings and FanDuel have engaged, and are engaging, in fraudulent and deceptive business

practices and false advertising, including misrepresentations about the legality of its business, the likelihood of individual players winning, and the characterization of DFS as a skill game.

Fraud under § 63(12) is broadly defined in the statute as “any device, scheme or artifice to defraud, any deception, misrepresentation, concealment, suppression, false promise or unconscionable contract provision.” Consistent with this broad statutory definition, courts have construed statutory fraud as going beyond common law fraud. Thus, proof of scienter or bad faith is not necessary. *See, e.g. People v. Federated Radio Corp.*, 244 N.Y. 33, 38-39 (1926); *Lefkowitz v. Bull Investment Group, Inc.*, 46 A.D.2d 25, 28 (3rd Dept. 1974); *Matter of State by Lefkowitz v. Interstate Tractor Trailer Training, Inc.*, 66 Misc.2d 678, 682 (Sup. Ct. N.Y. County 1971); *State by Lefkowitz v. Bevis Indus., Inc.*, 63 Misc.2d 1088, 1090 (Sup. Ct. N.Y. County 1970).

GBL § 349 declares unlawful “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state.” GBL § 350 similarly declares unlawful “false advertising in the conduct of any business, trade or commerce or in the furnishing of any service.” The definition of deceptive practices under GBL § 349 and false advertising under GBL § 350 are given parallel construction to that of fraud under Executive law § 63(12). *See, e.g., Colo. State Christian College of Church of Inner Power, Inc.*, 76 Misc. 2d at 54. Like Executive Law § 63(12), these statutes are “intended to be broadly applicable, extending far beyond the reach of common law fraud.” *State v. Feldman*, 210 F. Supp. 2d 294, 301 (S.D.N.Y. 2002).

DraftKings and FanDuel each made repeated misrepresentations in public statements, in television advertisements, or on their websites. The DFS Sites claimed (i) that they comply with all applicable laws, which as explained above, is untrue; (ii) that playing and winning is simple, while data reveal that most DFS players lose; and (iii) that DFS is a skill game, notwithstanding

that the contest legally qualifies as a “contest of chance.” Such material deceptions and omissions constitute fraudulent business practices in violation of Executive Law § 63(12) and deceptive business practices and false advertising pursuant to GBL §§ 349 and 350 respectively.

B. Defendant’s Illegal Gambling Business is Causing Irreparable Harm

As noted above, the Attorney General, unlike private litigants, need not prove irreparable injury because such injury is presumed in a statutory enforcement action under Executive Law § 63(12). *See People v. Apple Health & Sports Club, Ltd. Inc.*, 174 A.D.2d 438, 439 (1st Dept 1991), *aff’d*, 80 N.Y.2d 803 (1992); *Spitzer v. Lev*, 2003 NY Slip Op 51049(U) at 6-7 (Sup. Ct. N.Y. County 2003) (“when the Attorney General is authorized by statute to seek injunctive relief to enjoin fraudulent or illegal acts, no showing of irreparable harm is necessary.”).

In this case, the requested relief would nonetheless prevent further irreparable harm to the public. As discussed in expert affidavits submitted by Dr. Jeffrey L. Derevensky, the Director of the International Centre for Youth Gambling Problems and High-Risk Behaviors, and Keith S. Whyte, the Executive Director of the National Council on Problem Gambling, DFS attracts compulsive gamblers and those at risk for gambling addiction. Whyte Aff., ¶¶ 6-11; Derevensky Aff., ¶¶ 5-9. The ongoing availability and marketing of DraftKings in the state of New York offers instant access to these vulnerable populations. As Dr. Deverensky observed

[I]ndividuals are bombarded with advertisements suggesting that many people who start with small amounts of money eventually win large sums of money. I find such advertising to be misleading as it inaccurately encourages DFS players to believe that they can improve their chances of winning if they spend additional money and time playing DFS. This perception can lead players to a preoccupation with DFS, chasing of losses, and developing symptoms and behaviors associated with a gambling disorder. Derevensky Aff., ¶ 10.

Indeed, a keynote presentation prepared for the 2014 Winter Conference of the Fantasy Sports Trade Association (“FSTA”), a leading advocate for DFS, touts the fact that DFS serves

as “a viable alternative” to players who otherwise “do not have access to sports wagering” and a “new alternative for some instant ticket / lottery players.” *See* Wagner Aff. Ex. F, p.9. Moreover, DraftKings’ own records show pleas from DFS players to deactivate their accounts or permanently block them from the site because of self-identified gambling addiction. The company’s customer service representatives have fielded pleas from self-described gambling addicts to close accounts and permanently ban them from the site, with subjects like “Gambling Addict do not reopen,” “Please cancel account. I have a gambling problem,” and “Gambling Addiction needing disabled account.” *See* Wagner Aff. ¶ 23.

The societal ramifications of allowing DFS to continue are serious and cannot be compensated. Without immediate action to stop illegal gambling, families and neighborhoods will continue to suffer the consequences. Loved ones will continue to fall into the spiral of addiction. Promising futures will continue to get derailed. And our communities will continue to pay the price. This type of danger is the sort of irreparable harm that merits preliminary relief most.

C. The Balance of Equities Tilts for the State

In evaluating injunctive relief, courts must consider the welfare and interest of the general public. *New York v. Castro*, 143 Misc. 2d 766, 769-770 (Sup. Ct. N.Y. County 1989) (granting an injunction to enjoin defendant from use of space where an illegal gambling operation was conducted “in order to protect the public safety, health or morals”). The fact that the laws being violated here were specifically designed to protect the public tips the equities decidedly in the State’s favor. *See City of New York v Smart Apts. LLC*, 39 Misc.3d 221, 233 (Sup. Ct. N.Y. County 2013) (“the equities lie in favor of shutting down an illegal, unsafe, deceptive business, rather than in allowing said business to continue to operate (to defendants’ presumed financial advantage)”). Where the government shows that a violation of law has occurred, “the public

equities receive far greater weight” than any “private equities” appellants may have. *F.T.C. v. Warner Communications Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984).

By contrast, there are no private equities in defendants’ favor. Defendants have no right to operate an illegal gambling operation. Any burden imposed in requiring DraftKings and FanDuel to operate in full compliance with the law is reasonable.

CONCLUSION

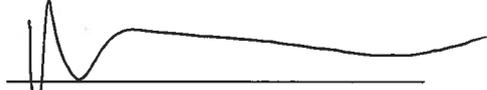
For the foregoing reasons, Plaintiffs’ application for a preliminary injunction should be granted.

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November 16, 2015

Respectfully submitted,

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