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

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FanDuel, Inc.

Index No. 161691/2015

Plaintiff,

IAS Part 13
Assigned to Justice Mendez

-against-

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York; and STATE OF NEW YORK,

Defendants.

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MEMORANDUM OF LAW IN OPPOSITION TO FANDUEL'S MOTION FOR A PRELIMINARY INJUNCTION, AND IN FURTHER SUPPORT OF THE NYAG'S MOTION FOR A PRELIMINARY INJUNCTION[1]

[1] As of November 24, 2015, FanDuel had not filed a notice of motion for a preliminary injunction. To the extent that FanDuel seeks a preliminary injunction against the Office of the Attorney General, all arguments herein apply equally to FanDuel as to DraftKings.

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PRELIMINARY STATEMENT

On the day of the initial hearing in this matter, DraftKings crowned winners in its "Millionaire Maker" contest. As one winner told a reporter, he won over $400,000 with one of his first wagers on "Daily Fantasy Sports" ("DFS") even though he "couldn't name 10 players in the NFL." The winner, reported as paying "scant attention" to that day's games, came just shy of winning the $1 million top prize, ultimately losing out because the Bengals did not score a fourth quarter touchdown. The winner candidly explained, "It's close to winning the lottery. I was nine points away from winning the lottery."

Applying New York's Constitution and laws to any common sense review of the facts, the DFS contests offered by FanDuel and DraftKings (together, the "DFS Operators") constitute illegal sports gambling. Players risk "something of value" – as much as $10,600 per wager. They do so with an "agreement or understanding" that they can win prizes that top out at over $1 million. And whether the bettor wins depends on predicting a "contingent future event" outside the bettor's control: the performance of professional or amateur athletes in actual live games.

DFS is also a "contest of chance." Defined under New York law as any game whose outcome depends to a "material degree" on an element of chance, this language has long been understood and applied in a clear-cut manner: even if some skill is involved, unless chance is *immaterial* to the outcome, it is a "contest of chance." Whether a wager depends on guessing the order of horses in a betting parlay, the number of runs scored in a ballgame, or, as with DFS, the performance of athletes on any given Sunday, there is simply no way to eliminate chance from the contest. Chance is pervasive at every level of DFS – the unpredictable performance of an athlete in a given game (*e.g.*, amount of points scored); to the pronouncements of the league

office (*e.g.*, athlete suspensions); to the whims of nature (*e.g.*, rained out games). DFS cannot escape its status as a contest of chance, and thus wagering on its outcome is gambling.

DraftKings and FanDuel know this. Accordingly, they have resorted to desperate measures. After the Office of the New York Attorney General ("NYAG") sent letters describing the illegality of their conduct, demanding that they stop, and notifying them that NYAG would commence an enforcement action if they failed to do so, the DFS Operators filed anticipatory and improper lawsuits and sought temporary restraining orders calculated to interfere with the lawful exercise of an enforcement agency's powers. Last week, this Court denied FanDuel's and DraftKings' motions, finding that it "cannot enjoin the Attorney General from the enforcement of a penal statute." Yet, DraftKings persists in its efforts to seek the same relief again.

Without relevant authority for their position under New York gambling laws, the DFS Operators can only stitch together a patchwork of clearly outdated, irrelevant out-of-state case law and arguments about games that look nothing like DFS. Indeed, the DFS Operators stake much of their legal argument on one unreported opinion from the District of New Jersey, *Humphrey v. Viacom.* That case lacks any precedential value in this court. Moreover, the case interprets a *qui tam* statute, not New Jersey's gambling laws, and interprets words – "bets" and "wagers" – that do not even appear in New York's definition of gambling. If that were not enough, the *Humphrey* Court also explicitly declined to consider whether the game at issue – traditional season-long fantasy football, which differs in material respects from DFS – is one of chance or skill, and never confronted the question of whether the game constitutes a wager on a "future contingent event." The DFS Operators' heavy reliance on this case is a red herring.

Having no legal basis for their motion, the DFS Operators are left grasping at straws, arguing that characterizing "entry fees" as "wagers" criminalizes benign activities like marathons

and spelling bees. But the very cases the DFS Operators cite, including one from the New York Court of Appeals, stand for the opposite proposition: that paying an entry fee as a competitor in a true skill game is *not* gambling. Of course, DFS is not a game of skill. Similarly, none of the constitutional claims put forth by DraftKings have any merit. NYAG is empowered by the New York State Constitution, the Penal Law and Executive Law § 63(12), among other statutes, to do exactly what it is doing. No one's rights are violated when companies engaged in illegal activity are forced to cease after a proceeding held in a New York court. Accordingly, NYAG respectfully requests that the Court grant its motion for a preliminary injunction and deny the improper request for preliminary relief submitted by DraftKings.[2]

STATEMENT OF FACTS

The facts relevant to this application are set forth in detail in the respective Complaints; NYAG's Memo. of Law in Support of the Preliminary Injunction, Nov. 17, 2015, Case No. 453056/2015, D.I. 7 (hereinafter, "NYAG Mem."); the Affidavits and Affirmations filed with this Court on November 17, 2015; and the transcript of the hearing of November 16, 2015 ("Tr."). In connection with this submission, NYAG further submits: the November 23, 2015 Affirmation of Justin Wagner ("Wagner Aff. II"), and the November 23, 2015 Affidavit of Donald Siegel ("Siegel Aff."), annexed as Ex. A to Wagner Aff. II.

[2] NYAG's and DraftKings' motions are for preliminary injunction. FanDuel did not move for a preliminary injunction. The DFS Operators have filed actions for declaratory judgment, albeit through different procedural mechanisms. NYAG will move to dismiss both actions after the preliminary injunction motions are decided.

This memorandum of law has also been filed in the NYAG's case against DraftKings. The arguments herein apply equally to DraftKings, and so for the Court's convenience, the NYAG has filed one brief in connection with both cases.

ARGUMENT

I. THE NYAG HAS ALREADY DEMONSTRATED ENTITLEMENT TO INJUNCTIVE RELIEF

As addressed in NYAG's moving brief, the DFS Operators should lose on the merits for all the same reasons that NYAG should prevail in its motion for a preliminary injunction: the DFS Operators are operating illegal gambling businesses in clear violation of Article 1, Section 9 of the New York State Constitution and Sections 225.05, 225.10, 225.15, and 225.20 of the Penal Law. Their ongoing illegal and fraudulent conduct also violates Executive Law § 63(12), General Business Law §§ 349 and 350 and Business Corporation Law § 1303.

A. DFS Wagers Constitute Illegal Gambling Under the New York State Constitution and Penal Law

By its express terms, the New York State Constitution prohibits bookmaking, pool-selling, and gambling in *all* forms not specifically exempted.[3] N.Y. Const. Art. I, § 9. FanDuel and DraftKings run afoul of the Constitution's bookmaking prohibition, which has long been defined 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 (1956).

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. N.Y. Penal Law §§ 225.00-225.40. Penal Law § 225.00(2) sets out the 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

[3] The DFS Operators do not claim to qualify for any of the limited number of enumerated exceptions. *See* N.Y. Const. Art. I, § 9 (exceptions for the state-run lottery, pari-mutuel betting at horse racetracks, and seven casinos).

> control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

Thus, there are three elements: (1) a person "stakes or risks something of value" upon a particular outcome; (2) the outcome depends on either (i) a "contest of chance" or (ii) 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*. The DFS Operators do not dispute that if DFS constitutes illegal gambling, they are in violation of Penal Law §§ 225.05, 225.10, 225.15, and 225.20. Nor do they dispute that a DFS player on their sites plays based on "an agreement or understanding" that he will receive "something of value."

1. The Money DFS Players Risk to Enter DFS Contests Is "Something of Value"

DFS players pay for a chance to win a cash prize. If they win, they get their money back and then some – in certain cases winning the top prize is worth upwards of one million dollars. NYAG Mem. at 5, 9. If a DFS player loses, he forfeits his wager. Betting begins at $0.25 for DraftKings and $1 for FanDuel and can reach over $10,000 per wager. NYAG Mem. at 5. In this arrangement, DFS players clearly risk "something of value": the money they paid to play. NYAG Mem. at 20.

FanDuel and DraftKings assert that the money the bettors risk are an "entry fee" not a "bet or wager."[4] That assertion ignores the fact that New York's statutory definition of gambling *neither references nor relies* on the concept of a "bet" or "wager." Rather, the gambling statute at

[4] DraftKings' Mem. of Law in Support of Its App. by Order to Show Cause for a Temp. Restraining Order, Prelim. Inj., and Expedited Proceeding and Disc., and Its Art. 78 Petition, Nov. 16, 2015, Case No. 102014-15 ("DK Mem.") at 12. (emphasis in original); Mem. in Support of App. by Pl. FanDuel Inc. for an Order to Show Cause and Temp. Restraining Order, Nov. 16, 2015, Case No. 161691/2015, D.I. 15 ("FD Mem. ") at 9-10.

issue concerns whether a player "stakes or risks something of value." Penal Law § 225.00(2). The prospect of losing *money* – forfeiting the payment to enter the contest – clearly qualifies as risking "something of value." *Cf. People v. Miller*, 271 N.Y. 44, 48 (1936) (price of movie ticket was consideration for a game of chance, since moviegoer got a chance to win a prize). This is all that New York law requires to satisfy the first element of gambling. Penal Law § 225.00(2).

Ironically, in any case, the DFS Operators have represented that the money paid to enter their contests are "bets," "wagers," or "stakes." *See* NYAG Mem. at 8-9. In fact, DraftKings embedded code in its website that is tailor-made to bring those interested in "betting" directly to its doorstep. NYAG Mem. at 8. Indeed, the DFS Operators act in much the same way as online poker and traditional bookmakers: rather than risk their own money, the DFS Operators make a market for bettors and take a cut of every wager. *See* Siegel Aff. ¶ 17. Poker players call this cut a "rake." Sports bettors call it a "vig." Those terms refer to the same thing. And, in fact, each of these terms has been used at one time or another by the DFS Operators themselves. NYAG Mem. at 29.

2. DFS Wagers Constitute Gambling Because Winning Depends on a Future Contingent Event Outside the Bettor's Control

The next prong provides that gambling exists if something of value is risked upon the outcome of "a future contingent event not under his control or influence," *i.e.*, an independent factor that is extrinsic to the contest. Because the success or failure of a DFS wager depends exclusively on the real-game performance of others – athletes playing competitive sports – DFS fulfills this prong.

New York courts have long recognized two separate categories of gambling: (i) wagering on sports and other contingent events, and (ii) wagering on games of chance. *See, e.g., Wilkenfeld v. The Attic Club*, 74 Misc. 543, 134 N.Y.S. 507 (1907) (explaining the intent of the

Legislature "to distinguish between acts of gambling, commonly known as bets or wagers contingent upon the happening of an event, such as racing or elections, and those which have to do with games of chance, such as card or dice playing"). The archetypal sports gambling crime – bookmaking – is defined, in relevant part, as running a business that accepts bets based "upon the outcomes of future contingent events." N.Y. Penal Law § 225.00(9); *see also* Siegel Aff. ¶¶ 6-8.

The DFS Operators argue that this element is limited to a single sports event. But that is not the law. Betting on events beyond one's control or influence has been interpreted to cover a wide range of wagers – from betting on horseraces to elections. *See, e.g.*, *People v. Giordano*, 640 N.Y.S.2d 432 (1995) (sports); *People v. Busco*, 46 N.Y.S.2d 859 (1942)(horseracing); *Liebman v. Miller*, 20 Misc. 705 (N.Y. City Ct. 1897)(elections). Unsurprisingly, New York's gambling laws have long prohibited complex sports wagering schemes like DFS, including bets on combinations of games (*i.e.*, "parlay" bets) and on game statistics (*i.e.*, "prop" bets). *See People v. Feinlowitz*, 29 N.Y.2d 176 (1971) (affirming conviction on charges of bookmaking and possession of bookmaking records under former Penal Law, where defendant had taken bets including a "three-team-parlay bet"); *People v. McDonald*, 177 A.D. 806 (2d Dep't 1917) (affirming conviction under former Penal Law § 986 for recording parlays, among other types of bets, on horse races); *People v. Wright*, 100 Misc. 205 (N.Y. County Ct. 1917) (affirming gambling conviction for wagering scheme involving total runs scored by combinations of baseball teams). The unsupported assertion by DraftKings that "contingent event" can refer only to the outcome of a "particular game" is flatly wrong. DK Mem. at 20.

For example, in *People v. Wright*, the court affirmed the conviction of a man charged with pool-selling under § 986 of the former Penal Law for a wagering game similar to DFS. 100 Misc. at 214. In that game, bettors selected one baseball team for each day of the week (except

Sunday). *Id.* at 207. At the end of the week, the pool-seller tallied up the runs scored by each team and made cash payouts to the bettors whose six-team combinations scored the most cumulative runs. *Id.* at 208. The court recognized that this scheme – a forerunner of contests like DFS – was gambling. *Id.* at 213.

The notion that DFS exists as a contest separate and apart from actual sports is baseless: there are and can be no winners or losers without the happening of a future contingent event outside of their influence or control. There is no "successful roster" until the relevant athletes compete in actual skill games. DFS cannot escape the law by pretending that it is somehow different from every other sports bet that has ever been placed in New York. There is nothing special about DFS. It is simply a way to wager on a future contingent event – and thereby qualifies as illegal gambling.

3. DFS is Also a Game Whose Outcome Depends Upon Chance to a Material Degree

DFS is also a game whose outcome depends upon chance to a material degree. The Legislature defined gambling explicitly, as any contest or game where the outcome depends "in a material degree" on "an element of chance, notwithstanding that skill of the contestants may also be a factor therein." N.Y. Penal Law § 225.00(1).

"[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). Stated another way, a skill game is one where the role of chance is *immaterial*. New York decisions are virtually unanimous in recognizing the statutory "material degree" test as the applicable standard for determining whether a game properly constitutes a "contest of chance." *See Plato's Cave Corp.*

v. State Liq. Auth., 115 A.D.2d 426 (1st Dep't 1985); *Matter of Pace-o-matic, Inc. v. N.Y. State Liq. Auth.*, 72 A.D.3d 1144 (3d Dep't 2010); *People v. Jun Feng*, 34 Misc. 3d 1205(A), 1205A (City Crim. Ct. 2012); *People v. Delacruz*, 23 Misc. 3d 720 (Crim. Ct. Kings Cnty. 2009); *People v. Tillman*, 13 Misc. 3d 736 (Crim. Ct. Kings Cnty. 2006); *People v. Turner*, 165 Misc. 2d 222 (Crim. Ct. N.Y. Cnty. 1995); *People v. Denson*, 192 Misc. 2d 48 (Crim. Ct. N.Y. Cnty. 2002); *People v. Mohammed*, 187 Misc. 2d 729 (Crim. Ct. N.Y. Cnty. 2001); *Beamel Amusement Corp. v. Police Dep't of Suffolk Cnty.*, 54 Misc. 2d 946 (Sup. Ct. Suffolk Cnty. 1967).

With DFS, chance is clearly not immaterial. Numerous chance occurrences separate winners from losers. These include the unknowable performance of athletes on a given day (*e.g.*, slumps, hot streaks, or strategic calls); the decisions of sports leagues (*e.g.*, cancelling games or suspending players); and acts of nature (*e.g.*, weather or freak injuries). Any one of those factors, standing alone, can fundamentally alter the outcome of a DFS wager and introduce indelible and unavoidable elements of chance into any DFS contest. That is particularly apparent because the margin of victory in a DFS contest is often measured in *fractions* of points. Nov. 17, 2015 Affidavit of Vanessa Ip Pertaining to DraftKings, Inc., Case No. 453054/2015, D.I. 43 ("Ip DK Aff.") ¶ 48.

As noted in NYAG Mem. at 6, the number of illustrations demonstrating the role of chance in DFS are limitless. Here is another: late in the game on October 5, 2015, a receiver for the Detroit Lions fumbled just shy of a touchdown and out of bounds. The opposing team, the Seattle Seahawks, interfered with the ball in the end zone. Technically, this violation should have returned possession to the Lions – as the NFL's Vice President for Officiating later confirmed. Yet a referee's flubbed call on the field gave possession of the ball to the Seahawks – crediting the Seahawks with a "turnover." This bad call was not corrected in DraftKings' ranking. As a

result, one DFS player lost the $1.2 million jackpot, and a different player won it. *See* Wagner Aff. II, ¶¶ 6-7.

B. Irreparable Harm, Which Need Not be Shown, Nevertheless Will Result Unless an Injunction is Issued against the DFS Operators

Unlike private litigants, the NYAG need not prove irreparable injury because such injury is presumed in a statutory enforcement action under Executive Law § 63(12). *People v. Apple Health & Sports Club, Ltd. Inc.*, 174 A.D.2d 438, 439 (1st Dep't 1991), *aff'd*, 80 N.Y.2d 803 (1992). Even so, the public is and will continue to suffer irreparable harm. The societal ramifications of facilitating gambling addicts cannot be compensated. For example, the National Council on Problem Gambling estimates the annual costs of gambling addiction in the United States in 2013 at about $7 billion, including from crime, incarceration and bankruptcy. Wagner Aff. II ¶ 4, Ex. B. DraftKings' own records demonstrate their callousness towards customers who try to rid themselves of their habit – instead of cancelling their accounts they pull them back in by offering new games and free play.[5] And it has been reported that the National Council on Problem Gambling has requested that the DFS Operators add the number 1-800-GAMBLER to their websites; they have refused that request.[6]

Moreover, DFS Operators' advertising is ubiquitous – they are spending millions of dollars to lure more and more people into playing. These ads often target more vulnerable

[5] The New York Times reported that one player emailed the company, "I no longer wish to be able to bet . . . Additionally I would like the balance of my winnings in the form of a check to a cause to help gamblers." DraftKings emailed him promotional materials that included statements like: "You Scored Big! Your invite is inside: Claim your FREE Entry" and "We've selected you for this! Your shot at winning $100K tonight." Wagner Aff. ¶8, Bogdanovich and Williams, "For Addicts, Fantasy Sites Can Lead to Ruinous Path," *New York Times*, at A1 (Nov. 22, 2015), *available at* http://www.nytimes.com/2015/11/23/sports/fantasy-sports-addiction-gambling-draftkings-fanduel.html (hereinafter, "Ruinous Path"); *see also* NYAG Mem. at 32-33.

[6] "Ruinous Path," at A1. ("'We have consistently urged them to list our help line and website,' [Keith Whyte] said.").

populations, such as college-age males, with hollow promises: "I've won over 29 thousand dollars on FanDuel. *Nothing special about me.* The difference is I played and they didn't." NYAG Mem. at 10. In truth, an investor presentation suggests that the average return for all FanDuel users is negative 9.5% – meaning that the average player loses far more than they win.[7] There is no easy way of winning cash. The advertising also attempts to convince the public that the game is one of skill – a feature that further draws in gamblers and has been criticized by those who treat gambling addictions.[8] That advertising is false and misleading and must stop.

To be clear: real people are suffering real harm from DFS. In the November 23, 2015 New York Times piece, one player profiled comments, "[DFS] would be akin to an alcoholic finding out about a whole new street of bars that he never knew about — exciting, great bars . . . For an addict, it wasn't what I needed." The player reported losing $20,000 and even considered suicide.[9]

There is a reason this State has chosen to prohibit gambling, and when it has decided to permit gambling, to do so only in a highly regulated environment with protections for the public and the players. DFS should not be permitted to circumvent that structure any longer.

C. The Balance of the Equities Favors the NYAG

New York law is clear that for an injunction to issue, a petitioner must affirmatively establish "a balance of the equities in their favor." *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860

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[7] *See* Wagner Aff. II, ¶ 9, Ex. G (presentation compiled by Bain and Company; the NYAG's investigation has established that the name "Falcon" is a code word for FanDuel).

[8] Whyte Aff. and Derevensky Aff.; *see also* Ruinous Path," at A1 ("Yet gambling counselors say they could more easily help people like Mr. Adams [a compulsive gambler and DFS player] if fantasy companies did not portray their games as involving mostly skill. That alone is a risk for addiction, said Keith Whyte, executive director of the National Council on Problem Gambling. 'The perception of skill has led many, many people down a very dark path,' he said.").

[9] *Id.*

(1990). "It is well settled that a plaintiff should be denied an injunction where it lacks equitable standing to obtain affirmative equitable relief." *W. T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 518 (1981) (internal citations omitted) (denying injunction).

First, to the extent the Court finds that the DFS Operators are operating their business in violation of the Penal Law, there can be no equity in issuing an injunction to allow an illegal business to continue. Rather, the equities lie with the State, which seeks to stop a practice that is in plain violation of the law. *Brookford, LLC v. Penraat*, 47 Misc. 3d 723, 735 (Sup. Ct. N.Y. Cnty. 2014) ("equities lie in favor of shutting down an illegal, unsafe, deceptive business practice, rather than allowing said business to continue to operate"); *Hirsch v. New York City Dept. of Educ*., 2011 NY Slip Op 30003(U), at *5 (Sup. Ct. N.Y. Cnty. Jan. 3, 2011) (balance of equities favored city given its interest in preventing possible illegal activity by petitioner); *McDonald v. North Shore Yacht Sales, Inc*., 134 Misc. 2d 910, 917 (Sup. Ct. N.Y. Cnty. 1987) (equities balanced *against* entity alleged to be promulgating false advertisements to millions of New Yorkers).

Second, equity suggests that DFS Operators should be held to their public statements. When pitching their games to the public (and in making arguments in their legal papers), the DFS Operators talk about games of "skill" and profess shock that anyone could think that what they offer is sports gambling. But when the spotlight is off, the story changes dramatically. When DFS Operators describe themselves to investors or potential business partners, they liken DFS to "poker," say it exists in the "gambling space," and operates in a way "identical to a casino." (Wagner Aff. ¶14.) The DFS Operators even register themselves as gambling concerns abroad, in order to access those lucrative markets. (Wagner Aff. ¶ 18.) DraftKings has gone so far as to embed code into its websites to attract people specifically looking to gamble. (Wagner

Aff. ¶17.) Equity should not operate to shield the DFS Operators from the State's legitimate interest in investigating these practices, and if necessary stopping them by appropriate legal action.

Third, the equities do not favor the granting of injunctive relief to DraftKings given its admissions of wrongdoing. For example, DraftKings has cloaked the questionable legality of its business to the public and investors in UIGEA.[10] The company even represented to this Court that "federal law carves out fantasy sports games from the definition of 'unlawful Internet gambling' in this statute. DraftKings operates with careful attention to UIGEA." DK Pet. ¶38. DraftKings takes a vastly different position behind closed doors. The NYAG investigation has discovered minutes from a board meeting of the Fantasy Sports Trade Association from May, 2015 discussing whether DraftKings' contests relating to NASCAR and golf violated UIGEA.[11] Shockingly, those minutes reflect DraftKings CEO "Jason [Robins'] **acknowledge[ment] that Golf and NASCAR [contests] do not comply with the letter of UIGEA** . . . He indicated that state law supersedes UIGEA. From his perspective, the only relevant question is whether you are in violation of state law." *See* Wagner Aff. II ¶ 11 (emphasis added). When Robins faced criticism from fellow board members about being non-compliant with the trade association charter and being in violation of UIGEA, he proposed amending the trade association charter to provide an exemption for this behavior. *Id.*

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[10] *See e.g.*, Nov. 2014 Interview with Jason Robins, Wagner Aff. II ¶ 12 (Mr. Robins saying "[r]ight now, of course fantasy sports being a game of skill have carve out by the Unlawful Internet Gambling Enforcement Act (UIGEA) and permissible in most states in the US…").

[11] An email from the President of the Fantasy Sports Trade Association, Paul Charchian, alerts board members "there's a brewing issue… DraftKings is offering single-event contests for NASCAR, PGA and MMA. Those contests are not in compliance with the carve-out language in UIGEA. And since DraftKings is not in compliance with UIGEA, they're not in compliance with the FSTA's paid-entry contest operator charter." *See* Wagner Aff. II ¶ 13.

Finally, DraftKings argues that the NYAG is not entitled to an injunction because DFS has been operating for years in New York. Any claim of laches or estoppel is unavailable against the State where, as here, it enforces a public right or takes action to protect the public interest. *See, e.g., U.S. v. Thompson*, 98 U.S. 486 (1878); *United States v. Angell*, 292 F.3d 333, 338 (2d Cir. 2002); *U.S. v. Manhattan-Westchester Med. Servs, P.C.*, 2008 U.S. Dist. LEXIS 5819, at *9 (S.D.N.Y. 2008); *Matter of Hampton Hosp. v. Moore*, 52 N.Y.2d 88 (1981); *A.C. Transp. v. Bd. of Educ*., 253 A.D.2d 330, 337 (1st Dep't 1999); *People v. System Properties*, 281 A.D. 433 (3d Dep't 1953), *mod. on other grds*, 2 N.Y.2d 330 (1957); *Town of Kinderhook v. Slovak*, 21 Misc. 3d 1115(A) (Sup. Ct. Columbia Cnty. 2006). The State is not a party to the facts, and has the latitude to discover illegal behavior and enforce it – so long as it is within the statute of limitations. Moreover, although the DFS Operators may have been operating for years, their operations have changed dramatically over the last year. For example, they have exponentially increased their advertising. In all of 2014, DraftKings spent just $1 million on advertising with NBC Universal/Comcast. But, in the first ten months of 2015, DraftKings spent $21 million, an increase of over 2,000%. *See* Wagner Aff. ¶ 20. FanDuel spent just $2.2 million to advertise with NBC Universal/Comcast in all of 2014, which amount increased to $12 million in the first ten months of 2015, an increase of 545%. *Id.*

The DFS Operators' behavior evidences they will say almost anything to consumers, investors, and the general public to attempt to avoid answering for their knowingly unlawful conduct.

II. THERE IS NO BASIS FOR GRANTING INJUNCTIVE OR DECLARATORY RELIEF TO THE DFS OPERATORS

A. It Is Procedurally Improper to Enjoin the NYAG's Enforcement Action, or Grant Declaratory Relief to the DFS Operators

DraftKings is not entitled to injunctive relief under any standard, nor are the DFS Operators entitled to a declaratory judgment. The only relief available to them now is to oppose NYAG's motions for preliminary injunction. Accordingly, the Court should deny DraftKings' motion for a preliminary injunction.

This Court has already held that it "cannot enjoin the Attorney General from the enforcement of a penal statute." (Nov. 16, 2015 Transcript from Hearing, Index No. 102014/15 and Index No. 161691/2015 ("Tr.") at 30:23-24). That holding applies equally to a request for a preliminary injunction. Injunctions that prohibit the government from enforcing penal statutes are improper, unless the requesting party can demonstrate both "irreparable injury, ***and*** [that] the sole question involved is one of law."[12] *See Snap 'N' Pops, Inc. v. Dillon*, 66 A.D.2d 219, 220 (2d Dep't 1979) (emphasis added); *Reed v. Littleton*, 275 N.Y. 150, 153 (1937) (courts "will not ordinarily intervene to enjoin the enforcement of the law by prosecuting officials").

DraftKings can demonstrate neither. It seeks to enjoin the State from enforcing New York Penal Law §§ 225.00, 225.05, 225.10, 225.15, and 225.20 and Executive Law § 63(12), but as set forth in Section II(B), *infra*, it has not shown that it would be irreparably injured by its inability to continue violating those laws. Moreover, the "sole question involved" is not one of law. Questions of law include, for example, challenges to a statute's facial validity. *See Ulster*

[12] FanDuel and DraftKings also seek declaratory and/or injunctive relief regarding their violations of New York GBL §§ 349 and 350 and Executive Law § 63(12). FanDuel, Inc. Complaint for Declaratory and Injunctive Relief, Nov. 13, 2015, Case No. 161691/2015 D.I. 3 ("FD Compl.") ¶¶ 42-47. Though they are not part of the Penal Law, the analysis in this Section applies with equal force to those statutes, which relate to enforcing laws prohibiting fraud and misrepresentation in connection with their Penal Law violations.

v. Home Care Inc. v. Vacco, 255 A.D.2d 73, 75 (3d Dep't 1999). Here, DraftKings seeks to establish certain facts that it suggests demonstrate that the clearly-established Penal Law should not apply to it, not that the Penal Law is unconstitutional. Under DraftKings' interpretation, every time a government agency with enforcement authority opined that an entity's conduct was illegal and notified the entity, that entity could use any such notice to attempt to enjoin future enforcement against it. That has not been, and cannot be, the law.[13]

Second, even if DraftKings could seek injunctive relief – which it cannot – the requested relief of a declaratory judgment would be improper. When a party claims that an otherwise valid penal law has been unconstitutionally applied to its conduct, *and that claim raises mixed issues of fact and law*, declaratory judgment is unavailable. *Cooper v. Town of Islip*, 56 A.D.3d 511, 513 (2d Dep't 2008). Instead, courts have held that such a determination is properly made in the context of an enforcement proceeding. *See Church of St. Paul and St. Andrew v. Barwick*, 67 N.Y.2d 510, 523 (1986); *Kelly's Rental, Inc. v. City of N.Y.*, 44 N.Y.2d 700, 702 (1978). Far from demonstrating that "no questions of fact exist," FanDuel and DraftKings cite to hundreds of pages of expert reports, press releases, and news articles. In doing so, they demonstrate that the proper procedure for determining whether they have violated New York Penal Law is not a declaratory judgment, but rather the pending enforcement proceeding. *See Intn'l Mutoscope Reel Co., Inc. v. Valentine*, 247 A.D. 130 (1st Dep't 1936); *aff'd* 271 N.Y. 622; *Snap 'N' Pops, Inc.*, 66 A.D.2d at 219.

[13] The cases cited by DraftKings are not to the contrary. Those cases, in which petitioners were entitled to declaratory and/or injunctive relief, presented *solely* questions of law, because petitioners challenged either the facial constitutionality of a statute, *see Ulster Home Care, Inc.*, 255 A.D.2d at 77; *Robinson v. Wood*, 119 Misc. 299, 300 (Sup. Ct. Sullivan Cnty. 1922); *Kings County Lighting Co. v. Lewis*, 104 Misc. 157, 160 (Sup. Ct. N.Y. Cnty. 1918), or the statute's effective date, *see Day Wholesale, Inc. v. State of New York*, 51 A.D.3d 383, 384 (4th Dep't 2008).

B. DraftKings Is Not Otherwise Entitled to a Preliminary Injunction

To obtain a preliminary injunction, a movant must demonstrate, by clear and convincing evidence, "(1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balancing of the equities in the movant's favor." *Greystone Staffing v. Warner*, 106 A.D.3d 954, 954 (2d Dep't 2013); *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988). Such an injunction should be granted only when the movant demonstrates "a clear right to that relief under the law and the undisputed facts upon the moving papers." *1234 Broadway LLC v. West Side SRO Law Project, Goddard Riverside Community Ctr.*, 86 A.D.3d 18, 23 (1st Dep't 2011). DraftKings has failed to meet this burden.

1. The DFS Operators' Arguments that DFS Is Not Illegal Gambling are Wholly Unsupported

The DFS Operators, in connection with these motions and elsewhere, have argued that their games are not illegal gambling under the Penal Law. In addition to the arguments already set forth above, the DFS Operators' arguments are entirely unsupported.

a. The Primary Case Relied Upon by the DFS Operators – *Humphrey* – Is a Red Herring

The centerpiece of the DFS Operators' argument that contest "entry fees" do not constitute gambling when paired with a guaranteed prize and neutral administrator is *Humphrey v. Viacom, Inc.*, 2007 U.S. Dist. LEXIS 44679 (D.N.J. June 19, 2007). Counsel for DraftKings calls it the "the key case" "that has decided this issue," (Tr. 8:25–9:1), and FanDuel's brief cites the opinion more than any other case. FD Mem. at 10, 11, 12, 14, 15, 16.

Humphrey is procedurally, factually, and substantively irrelevant. *Humphrey* is an unreported federal trial court decision from New Jersey applying New Jersey law. Not only does it lack precedential value to a New York state court (or indeed to a federal court), but the court

dismissed the action on procedural grounds, before reaching the part of the analysis the DFS Operators cite.[14] As such, the material to which the DFS Operators cite is dicta.

In any event, the New Jersey laws analyzed in that decision have no bearing on this case. Contrary to DraftKings' suggestion that *Humphrey* applied a gambling statute "nearly identical to New York's,"[15] the case did no such thing. DK Mem. at 12. Indeed, the New Jersey gambling statute alluded to by DraftKings is not addressed in *Humphrey* at all. Instead, the *Humphrey* Court considered a New Jersey *qui tam* statute that let gamblers sue to recover their losses. That statute focused on the interpretation of two words – "wagers" and "bets" – that appear *nowhere* in the definition of "gambling" under New York law. *See* N.Y. Penal Law § 225.00(2). As such, that court's analysis of what constitutes a "bet" or "wager" is irrelevant to the questions before this Court. As noted above, the New York statute defines gambling, in relevant part, as risking "something of value." Thus the proper inquiry is not whether the DFS Operators' "entry fees" constitute wagers – the inquiry is whether the entry fees are "something of value." They clearly are.

Indeed, because it was not relevant to the New Jersey *qui tam* statute under review, the *Humphrey* court (i) specifically declined to opine on whether the traditional fantasy sports game

[14] The plaintiff in *Humphrey* brought a claim under New Jersey's *qui tam* statute, which is derived from the 1710 Statute of Queen Anne allowing gambling losers to recover losses. The court granted defendants' motion to dismiss because plaintiff failed to allege that he or anyone else gambled on any site or had any losses, and failed to bring the case within the required six months. As such, before the court even discussed the definition of the terms relied on by the DFS Operators – "wager" and "bet" – the claim was dismissed for failing to plead allegations necessary to state a claim.

[15] At oral argument, counsel for DraftKings doubled down on this position: "They don't even get out of the box on gambling. That's exactly what the *Humphrey* case says in New Jersey under ***the identical statute***." Tr. 9:20-21 (emphasis added).

at issue constituted a game of chance or skill; and (ii) never addressed whether the game relied on future contingent events. *Humphrey*, 2007 U.S. Dist. LEXIS 44679 at *22, *24.

Finally, the key features of traditional season-long fantasy sports that motivated the *Humphrey* decision are completely absent from DFS contests.[16] Reviewing traditional, season-long fantasy sports contests, the court in *Humphrey* observed:

- The prizes were largely "nominal"– such as t-shirts and bobble head dolls (as compared to DFS's $1 million jackpots) (*Id.* at *4);
- The participants paid a one-time administrative fee, at the beginning of a long sports season (not rapid-fire, daily wagers of up to $10,600) (*id*. at *28-*29);
- The fee mainly supported services "necessary to manage the fantasy team" (*id.* at *3) , as opposed to DFS, wherein the wagers underwrite massive prizes and a "rake" of every wager is kept by the DFS Operator); and
- The games involved season-long play, an initial draft, trading, adding and dropping players over the course of the season, and deciding which players would start and which would be benched each week, (as opposed to the streamlined DFS contests, which eliminate any long-term strategic thinking) (*Id.* at *3-*4). [17]

Accepting the DFS Operators' view that all contests where contestants pay a fee to a neutral administrator for a chance to win a predetermined prize are legal would have truly absurd consequences. DK Mem. at 12-13; FD Mem. at 11-12. It would eviscerate existing New York prohibitions against gambling, including those set out in the Constitution. Anyone could establish a private lottery, because lottery operators also act as neutral administrators, charge contestants a predetermined fee to enter, and announce prizes in advance. DFS-like syndicates

[16] Indeed, *Humphrey* was decided in 2007 – two and five years, respectively, before FanDuel and DraftKings launched their so-called DFS companies.

[17] Indeed, there is a New Jersey state court case that lays out the actual law on gambling in New Jersey. *Boardwalk Reg. Corp. v. Attorney Gen. of N.J.*, 457 A.2d 847 (Sup. Ct. of N.J. 1982). In that case, there was a non-refundable entry fee and prizes awarded involving the game of backgammon. The court found backgammon to be gambling because rolls of the dice were both a "decidedly material element" of chance and a "future contingent event not under the actor's control or influence upon which the players risk something of value."

could run prediction contests on every imaginable subject, including sports betting on a single sports match – so long as wagers are called "entry fees" and prizes are determined in advance. The end result would be to reverse the clear prohibitions on pool-selling, bookmaking, and other kinds of gambling set out in the Constitution and carried into the New York Penal Law. NY Constitution Art. I § 9; N.Y Penal Art. 225.

b. The DFS Operators Wrongly Suggest that the Wagers they Accept are Mere "Entry Fees"

The DFS Operators equate the wagers paid to play their games with entry fees paid by competitors in well-established skill competitions like spelling bees, marathons, or golf tournaments, some of which offer prizes for winners. DK Mem. at 12; FD Mem. at 11. While marathoners or golfers do pay something to enter such events, their success or failure depends on their own talents. It does *not* depend on any material element extrinsic to the game. *People v. Stiffel*, 1969 N.Y. Misc. LEXIS 1042 (2d Dep't 1969).

People ex rel. Lawrence v. Fallon, cited by the DFS Operators, does not suggest otherwise. In *Fallon*, horse owners paid fees to enter races organized by a racing association that announced predetermined prizes to be handed out to the winners, as in the later developed Kentucky Derby or the Belmont Stakes. 152 N.Y. 12 (1897). The New York Court of Appeals held that the "competing parties" were not gambling. Thus, paying to enter your own horse in the Belmont Stakes is not gambling, but betting by spectators and other third parties on the race *is* gambling, albeit gambling that is currently exempted under the law.

The DFS Operators nonetheless cite *Fallon* to support the argument that *all* entry fees for predetermined prizes must be legal. FD Mem. at 9; Tr. 9:13-18 (DraftKings counsel referring to "case law going back a hundred years in New York . . . that a contest that has an entry fee for a predetermined prize is not a stake, is not staking or wagering or betting"). *Fallon* says no such

thing. *Fallon* only held that entry fees by those in the race did not constitute illegal gambling – it said nothing about those watching at home.

FanDuel cites another case, *State v. American Holiday Ass'n*. 151 Ariz. 312, 314 (1986) on this subject, but that decision explicitly recognized that skill games are distinct from betting on the performances of others. Reviewing a mail-order crossword competition, the court concluded that the game was "not like most bookmaking operations because prizes are not awarded on the basis of ***the outcome of some event involving third parties***."[18] *State v. American Holiday Ass'n*, 151 Ariz. 312, 314 (1986) (emphasis added). Indeed, the court's ultimate conclusion as to what does constitute gambling applies directly to DFS wagers:

> The legislature has seen fit to license and permit many forms of gambling once considered anathema. These include horse racing and dog racing, both operations in which ***the bettor is not a participant*** and the money laid down is not an entrance fee but a wager between parties who are not contestants and whose gain or loss will be determined by the ***results of a game played by others***. On most of these activities, the state takes its percentage, something that can only be described as bookmaking, though, by legislative edict, not illegal.[19]

Id. at 317 (emphasis added); *see also Faircloth v. Central Florida Fair, Inc.*, 202 So. 2d 608 (Fla. Dist. Ct. App. 4th Dist. 1967) (entry fee paid to compete with others in a game of skill for a predetermined prize does not constitute gambling) (cited in FD Mem. at 12).

The DFS Operators' attempt to explain away the plain statutory language regarding "contingent events" by asserting that reading this prong to cover DFS would make "*every* game gambling." DK Mem. at 19-20; *see also* FD Mem. at 13-14. Not so. To use DraftKings' own

[18] *American Holiday*, discussed by the court in *Humphrey*, also concerned the interpretation of "bet" and "wager," which do not appear in New York's statutory definition of "gambling."

[19] The DFS Operators also rely on *Las Vegas Hacienda v. Gibson*, 77 Nev. 25 (1961), which stands for the irrelevant proposition that an offer to the public to pay a fee for the opportunity to win a prize by accomplishing some feat of skill (specifically, shooting a hole-in-one) is a valid contract under Nevada law. That has nothing to do with the definition of gambling under New York law.

example, a tennis player could well lose a point because of a contingent event beyond her "control," say, a gust of wind. The athlete, however, still retains agency that the DFS player sitting at home lacks: the ability to *influence* the outcome of the game. *Cf. People ex rel. Lawrence v. Fallon*, 152 N.Y. 12, 12 (1897) (those "competing" in horse races are not gambling). Having submitted a wager, a DFS player is at the total mercy of the athletes participating in *actual* skill games and of countless other chance factors that he can neither influence nor control, from the weather to player injuries to the actions of sports leagues. The distinction under New York law is simple: entering in a *bona fide* skill game is *not* gambling, but betting that relies on the games of others *is* gambling. DFS falls into the latter category.[20]

In their slipperiest rhetorical move, the DFS Operators attempt to redefine DFS as a game solely between two players matching their wits against each other – somehow divorced from the sports to which they relate. FD Mem. at 14-15; DK Mem. at 19. But such a rule would apply to *every single type of sports betting*, because every bettor attempts to outwit his fellow bettors.

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[20] Nor is the alleged distinction made between "performance" and "outcome" under federal law relevant. DK Mem. at 20. The Unlawful Internet Gambling Enforcement Act ("UIGEA") does distinguish between the performance of athletes and complete games – because the law sought to exempt traditional, season-long fantasy sports from the definition of "bet or wager" for purposes of a *particular* federal statute. 31 USC §5362(10)(D)(2). No such exemption exists under New York's gambling laws. In fact, ***UIGEA expressly provides that it does not displace or vary state law prohibitions on gambling***. 31 U.S.C. §5361(b) ("No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States."); *see also* Wagner Aff. II ¶ 5 ("Quite precisely, UIGEA does not exempt fantasy sports companies from any other obligation to any other law.").

Even more baffling is DraftKings' suggestion that the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3702 makes DFS legal in New York. DK Mem. at 20. PASPA seeks to prohibit *all* direct and indirect betting on sports in the United States. The statute uses a belt-and-suspenders approach to ensure that no reading of the law would permit *precisely the type of scheme DFS represents.* Certainly, a law designed to make schemes like DFS *illegal* almost everywhere in the United States cannot be understood to render it *legal* under New York law.

That's true whether the bet is about a particular team beating the point spread, or involves a complex parlay with multiple permutations. Of course bettors have *control* and *influence* over who or what they bet on. What bettors *do not* control and what they *cannot* influence is the *future contingent event* that ultimately determines whether they win or lose – the sports games on which they are betting.

c. The "Dominating Element" Standard Upon Which the DFS Operators Rely is No Longer the Law in New York

The DFS Operators spend much time attempting to convince the Court that it should seek to determine whether skill or chance is the "dominating element" of DFS games. The Court should decline to do so. As discussed above, the text of the Penal Law sets forth a "material degree" test, which superseded the "dominating element" test first enunciated over 100 years ago in *People Ex. Rel. Lavin*, 179 N.Y. 164, 171 (1904). As a leading commentary explains, the current text of the Penal Law eschews "the dominant-element phrasing" and instead

> subjects a defendant to prosecution if chance is **merely** a material element of the game. **This definition makes easier not only the quantum of the prosecutor's proof, but also its character, in the sense that, however imprecise material element may be,** the mathematical calculation of whether skill or luck dominates could be inordinately difficult to reconcile with a prosecutor's burden of proof.

7-76 New York Criminal Practice § 76.02 (emphasis added).

The DFS Operators ignore the language of the Penal Law, and the overwhelming case law applying it, when they insist that the Court should determine whether skill is a dominating element of DFS games. *First*, the DFS Operators skip past any analysis of the statute itself. As the clearest indicator of legislative intent, "the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." *Majewski v. Broadalbin-Perth Cent. School Dist*, 91 N.Y.2d 577, 583 (1998). If the words of a statute have a "definite meaning, which involves no absurdity or contradiction, there is no room for

construction, and courts have no right to add to or take away from that meaning." *Majewski*, 91 N.Y.2d at 583. Here, the words "material degree" appear in the statute. The words "dominating element" do not and those two phrases do not have equivalent meanings. In another context, the Court of Appeals interpreted "material" to mean "more than minor or incidental." *Taub v. Altman*, 3 N.Y.3d 30, 34 (N.Y. 2004).[21] Indeed, an excerpt from a legal opinion letter DraftKings prepared for the National Hockey League well describes the state of the law, explaining:

> Unfortunately, [the dominating element test] is not the only test that courts employ in the various states. For example, in some states, a game is prohibited if chance is a *material element* in the outcome. Such a test recognizes that although skill may primarily influence the outcome of a game, a state may prohibit wagering on the game if chance has more than a mere incidental [e]ffect on the game. **This is a lesser standard than the predominance test and effectively makes it more difficult to offer skill-based gaming to residents of those states if the games in question resort to a chance component in determining the outcome.**

Wagner Aff. II ¶ 14 (emphasis added). A legal opinion letter FanDuel prepared for the National Basketball Association similarly explains: "The 'material degree' test requires chances to be less of a factor, and prohibits more contests than the predominant factor test." Wagner Aff. II ¶ 15.

Moreover, had the Legislature codified the prior law – as the DFS Operators maintain it did – the Legislature would have used the words "dominating element." Certainly, at the time Section 225 of the Penal Law was codified, that expression was well-established, with the *Lavin* test even entering the jurisprudence of numerous courts outside of New York. *See, e.g., State ex*

[21] To argue that the statutory material degree test did not supersede the dominating element test, DraftKings cites several cases for the proposition that the Legislature "is presumed to be aware of the law in existence at the time of an enactment and to have abrogated the common law only to the extent that the clear import of the language of the statute requires." *B & F Bldg. Corp. v. Liebig*, 76 N.Y.2d 689, 693 (1990); *Scarpelli v. Marshall*, 92 Misc. 2d 244, 247 (1977). That rule of construction is limited to *omissions*, not the circumstance here, where a statute includes express language on a particular topic. *Transit Com. v. Long I. R. Co.*, 253 N.Y. 345, 355 (1930) (noting "rule of construction applicable to an omission."); *see also Pacurib v. Villacruz*, 183 Misc. 2d 850 (1999) ("omission is an indication that the Legislature intended its exclusion.")

rel. Green v. One 5 [cents] Fifth Inning Base Ball Machine, 241 Ala. 455, 457 (1941); *Longstreth v. Cook*, 215 Ark. 72, 80 (1949); *Lucky Calendar Co. v. Cohen*, 20 N.J. 451, 462 (1956); *Las Vegas Hacienda v. Gibson*, 77 Nev. 25, 30 (1961). But that is not what the Legislature did.

In advocating a dominating element analysis, the DFS Operators also distort the case law. Together, they cite to five more recent New York decisions that DraftKings claims "continue to rely on *Lavin* and its dominating element test." DK Mem. at 14-15; FD Mem. at 13. Four of those decisions do not mention, let alone apply, the dominating element test; rather, the cases cite to *Lavin* for dicta that dice is a contest of chance and that billiards is a game of skill. *See People v. Hawkins*, 1 Misc. 3d 905(a) NY Crim. Ct. N.Y. Cnty. 2003; *People v. Davidson*, 181 Misc. 2d 999, 1001 (Sup. Ct. Monroe Cnty. 1999); *People v. Melton*, 152 Misc. 2d 649, 651 (Sup. Ct. Monroe Cnty. 1991); *People v. Stiffel*, 1969 N.Y. Misc. LEXIS 1042 (2d Dep't 1969). One case concerning mah jong errantly quotes the dominating element test, but does so *alongside* the material degree test. *People v. Li Ai Hua*, 24 Misc. 3d 1142, 1145 (N.Y. City Crim. Ct. 2009). A later decision also concerning mah jong, citing *Li Ai Hua*, pointedly refused to apply the dominating element test, explaining that ***"[t]he current definition of contest of chance does not require that the element of chance be the dominating element***." *People v. Jun Feng*, 34 Misc. 3d 1205(A), 1205A (N.Y. City Crim. Ct. 2012) (quotations omitted) (emphasis added). Nor do the DFS Operators provide an explanation for *Plato's Cave Corp. v. State Liquor Authority*, in which the First Department held that no further inquiry is required where a material element of chance is present. 115 A.D.2d 426, 428 (1st Dep't 1985), *aff'd on other grounds*, 68 N.Y.2d 791 (1986) (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).

d. Even if the "Dominating Element" Standard is Applied, DFS Qualifies as Illegal Gambling

Even under a "dominating element" analysis, DFS qualifies as a "game of chance," for the same reason the contest in *Lavin* did. In both cases, contest organizers awarded payouts to contestants whose entries best anticipated some unknown future event – in *Lavin*, the contest consisted of guessing the number of cigars to be taxed the following month; for DFS, it is the performance of athletes over a definite time period. *Lavin*, 179 N.Y. at 171. In both cases, the organizers provided contestants with the "requisite data required for making an estimate." *Id.* at 174. In *Lavin*, previous statistics relevant to cigar taxation; for DFS, athlete statistics and site-assigned "salaries" that purport to reflect the relative value of each athlete.[22] NYAG Mem. at 5. In both cases, "experts" could allegedly use their skill to make more accurate predictions than the public at large. *Id.* at 173; *see* DK Mem. at 16-18; FD Mem. at 14-15. And in both cases, the contests were not restricted to experts, but were open to members of the general public for whom the element of chance would be a dominant element of the game. *Id.* at 173. On that basis, the *Lavin* court concluded that the cigar game was a "game of chance." *Id.* at 174. As a mass-market prediction game that is designed for non-experts and experts alike, applying the "dominating element" test to DFS leads to the same conclusion: DFS is a contest of chance.

FanDuel, for its part, provides no basis for its assertion that DFS is a game of skill, other than to quote NYAG's observation that a small percentage of DFS players account for a large percentage of winnings. FD Mem. at 15. That no more establishes DFS as a "skill" game than

[22] As the *Lavin* court observed, the very reason that the contest organizer provided contestants with the numbers of cigars taxed in previous months was: "***to eliminate as far as practicable the elements of knowledge and judgment***, and by giving the general statistics of the subject make the contest ***as fair a gamble for the advertiser's customers as possible***." *Id.* at 174 (emphasis added). The same applies to DFS, where all DFS "lineups" with the maximum permitted aggregate "salary" have, according to the DFS Operators' own theories about player valuation, equal chances of winning any given contest.

similar arguments do for poker.[23] *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."). That poker has long been considered a game of chance under New York law is fatal to the position of the DFS Operators. Some poker players are unquestionably more successful than others – we see them on TV winning millions in the World Series of Poker. However, those few successes do not change that poker is a game of chance under New York law. Indeed, poker is a much more skillful game than DFS. In poker, on every single hand the player has decisions to make: ante, raise, fold or go "all in." On every single hand the player needs to read the posture of other players. All these decisions impact the outcome of a poker hand. In DFS, a bettor cannot do anything to impact the performance of athletes in real world sporting events at all, including after their bet is placed. The skill involved in poker dwarfs that of DFS, and yet, poker is a game of chance in New York. *See Dubinsky*, 31 N.Y.S.2d at 237.

In its effort to establish that DFS is only about "skill," DraftKings points to four reports selectively quoted in an employee affidavit but not actually entered into the record. DK Mem. 16-18. Although the NYAG asked for production of those reports and the underlying data, DraftKings took the request "under advisement" and has so far failed to produce them. Because the NYAG has not had the opportunity to review the reports or their data, the Court should ignore the reports and the arguments based on them.[24] Even so, as explained above, the sort of

[23] A concentration of winnings by one or few players cannot prove skill. For example, just last week, one lucky New York resident was the first in a year to win the New York Lotto, for a $43 million jackpot. While representing an infinitesimal percentage of overall players, he undoubtedly represents an overwhelming percentage of winnings in the last twelve months. The winner, a Cayuga County resident, attributes his winning numbers (his parents' birthdays) to divine intervention, not to skill. Wagner Aff. II ¶ 16.

[24] The portions of DraftKings' submission that rely on these reports (DraftKings MOL, pp. 15-18, the Affidavit of Gregory B. Karamitis, November 16, 2015, Case No. 102014-15 ("Karamitis Aff.") ¶¶ 15-23) are not properly before the Court.

mathematical balancing that DraftKings is urging is unwarranted and in direct conflict with the statutory standard. 7-76 New York Criminal Practice § 76.02 (observing that the dominating element test was abandoned because "the mathematical calculation of whether skill or luck dominates could be inordinately difficult to reconcile with a prosecutor's burden of proof"). Nonetheless, even a cursory review demonstrates that the reports do not support the conclusion the DFS Operators urge. Most significantly, the report commissioned by DraftKings considers "skill" only from the perspective of handpicked high performers—representing the top .01% of players—not from the perspective of the average player, as a "dominating element" analysis would demand. *Cf. 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); *see also State v. Prevo,* 44 Haw. 665, 675-676 (1961) ("[T]he test of whether a game is one of skill or of chance" is measured "by that of the average skill of a majority of players likely to play the game"). Thus, given the numerous elements of chance described above, even if the "dominating element" test represented the right inquiry – which it does not – the DFS Operators have provided no basis for their contention that theirs is a game of skill.

e. DraftKings Wrongly Suggests that the "Rule of Lenity" Can Overcome the Plain Language of the Statute

In urging the Court to strictly construe the Penal Law's prohibition against "gambling" under the "rule of lenity," DraftKings mischaracterizes well-established New York law. The Court of Appeals has long recognized that:

> [T]he common-law policy of strictly construing a penal code no longer obtains in this State. The Legislature expressly abolished that rule, and ordained instead that the provisions of the Penal Law be interpreted "according to the fair import of their terms to promote justice and effect the objects of the law" (Penal Law § 5.00). Although this rule obviously does not justify the imposition of criminal sanctions for conduct that falls beyond the scope of the

> Penal Law, it does authorize a court to dispense with hypertechnical or strained interpretations of the statute. Thus, conduct that falls within the plain, natural meaning of the language of a Penal Law provision may be punished as criminal.

People v. Ditta, 52 N.Y.2d 657, 660 (1981) (citations omitted); *accord People v. Versaggi*, 83 N.Y.2d 123, 131 (1994); *People v. Keyes*, 75 N.Y.2d 343, 348 (1990); *People v. Foster*, 73 N.Y.2d 596, 610 (1989); *People v. Teicher*, 52 N.Y.2d 638, 647 (1981). New York courts routinely cite this principle in rejecting defendants' attempts to narrowly construe the Penal Law. *See, e.g., Versaggi*, 83 N.Y.2d at 130-32 ("courts should not legislate or nullify statutes by overstrict construction"); *People v. Sene*, 66 A.D.3d 427 (1st Dep't 2009) (penal statutes are not to be given "hypertechnical or strained interpretations"); *People v. Holmes*, 101 A.D.3d 1632, 1633 (4th Dep't 2012) (same); *see also People v. Busco*, 46 N.Y.S.2d 859, 870 (Ct. Spec. Sess. N.Y. Cnty. 1942) ("It is a well known fact that these gamblers attempt to circumvent statutory enactments by devising clever subterfuges which they believe will strip their activities of the necessary evidentiary elements which are required to convict.").

The one case on which DraftKings relies, *People v. Golb*, is not to the contrary. There, the court construed the crime of unauthorized use of a computer to exclude the defendant's commission of various crimes on a computer he had been given permission to use. The court found that, while the defendant was guilty of the underlying crimes, the provision at issue and its legislative history evidenced the legislature's intent for it to prohibit computer use without permission (*i.e.*, "hacking") and not permitted computer use. 23 N.Y.3d 455, 486 (2014). As that decision and others by the Court of Appeals make clear, when invoking the rule of lenity to construe a Penal Law provision, "the core question always remains that of legislative intent." *People v. Green*, 68 N.Y.2d 151, 153 (1986); *see also People v. Feldman*, 7 Misc. 3d 794, 821 (Sup. Ct. Kings County 2005) ("[L]enity is a doctrine of last resort, and will be invoked only if a

court can only make no more than a guess as to what [the Legislature] intended.") (citations and quotation marks omitted).

DraftKings makes no argument that the legislature intended for the Penal Law definition of gambling to exclude its conduct, nor could it. The Court of Appeals has long recognized the legislature's intent for New York's prohibition on gambling to sweep broadly, stamping out "all … forms" of gambling not specifically authorized by the state and stopping professional organizations from tempting individuals to gamble and offering them a means to do so. *See Watts v. Malatesta*, 262 N.Y. 80, 81-82 (1933); *Ruckman v. Pitcher*, 1 N.Y. 392, 400 (1848); *see also* William C. Donnino, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 39, Penal Law § 225.00 (quoting Staff Notes of the Commission on Revision of the Penal Law. Proposed N.Y. Penal Law. McKinney's Spec. Pamph. (1964) at 382)).

2. DraftKings Has No Likelihood of Success on Its Collection of Other Claims

DraftKings also makes a number of constitutional arguments that fail as a matter of law and have no likelihood of success on the merits.

a. DraftKings Fails to State a Due Process Claim

Even though NYAG sent a letter warning DraftKings it would take action, DraftKings alleges state and federal due process violations because NYAG allegedly "did not provide notice and an opportunity to be heard before ordering DraftKings and its business partners to shut down." DK Mem. at 24-27; DraftKings, Inc. Verified Petition, November 13, 2015, Case No. 102014/15 ("DK Pet.") ¶¶ 75-78. There is no merit to that claim.

Due process requires that individuals receive notice and an opportunity to be heard before being deprived of property. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993); *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 163 (1978). To prevail, a plaintiff

must demonstrate (i) a protected property interest, (ii) a deprivation of property, (iii) without adequate notice and an opportunity to be heard. *McMenemy v. City of Rochester*, 241 F.3d 279, 285-86 (2d Cir. 2001).

This claim fails on its face because there has been no deprivation of property. The cease and desist letters issued to the DFS Operators by the NYAG are not self-executing documents – they did not shut down anyone's business. Only a court order could enjoin DraftKings from operating in New York. Thus, DraftKings could not have been and was not deprived of a property right. Rather, it received a letter intended to "afford [DraftKings] the opportunity to show orally or in writing to [NYAG], within five business days of receipt of this notice, why the [NYAG] should not initiate any proceedings" to enjoin the wrongdoing. Affirmation of Avi Weitzman, Esq., November 16, 2015, Case No. 102014/2015, a Ex. 5. And despite DraftKings' claims that if only NYAG understood its legal position, litigation would not be necessary, DraftKings made no effort to explain that position and instead filed a motion for a temporary restraining order. As such, DraftKings used what was a courtesy to attempt to strategically jump ahead of NYAG in court.

Moreover, DraftKings has not been deprived of notice or the opportunity to be heard. Rather, DraftKings has been provided notice not only in the form of the cease and desist letter, but a letter of intent to sue and, now, the filing of a motion for a preliminary injunction. It was heard on November 16 and will be heard again on November 25, 2015. Its due process claim therefore fails. *People v. Apple Health & Sports Clubs*, 80 N.Y.2d 803, 807 (1992) (rejecting claim that parties to NYAG's enforcement action were denied due process).

DraftKings also alleges that NYAG threatened its vendors and payment processors with legal action, and that this somehow constituted a deprivation of due process. DK Pet. ¶ 1; DK

Mem. at 25. That is a non-starter. As already explained to the Court, there was no such threat. Tr. 24:11-14. More importantly, truthful statements made by law-enforcement officials in pursuit of their legitimate goals are privileged, and cannot provide a basis for liability – never mind to enjoin the very law-enforcement efforts they relate to. *Stubbolo v. City of New York*, 2008 N.Y. Slip Op. 31208(U), at *15 (Sup. Ct. N.Y. Cty. Apr. 23, 2008). Indeed, enforcement of the gambling laws and the consumer deception statutes are the duty of NYAG. Exec. Law § 63(1). As such, it is the right of NYAG to inform DraftKings, the public, and any other business of its understanding of the application of the law to DFS and their vendors.[25] Any outcome to the contrary would lead to the absurd result that any law enforcement agency (including district attorneys, United States Attorneys, or the Department of Justice) could not inform either interested parties or the public whether it believes a business to be operating illegally.

b. DraftKings Fails to State a Claim for Equal Protection

DraftKings argues that NYAG is selectively enforcing the gambling laws by pursuing DraftKings and FanDuel for operating DFS websites, and not prosecuting operators of season-long fantasy sports sites. DK Pet. ¶¶ 81-84; DK Mem. at 27-28. These arguments provide no basis for a viable claim of selective prosecution or "discriminatory enforcement."

First, C.P.L.R. § 3013 requires a pleading to be "sufficiently particular" – claims that are

[25] DraftKings' allegations are premised on hearsay and "the court cannot grant the extreme remedy of a preliminary injunction based on such hearsay." *Water Quality Ins. Syndicate v. Safe Harbor Pollution Ins., LLC*, 2014 N.Y. Misc. LEXIS 33, *12 (N.Y. Sup. Ct. Jan. 3, 2014); *see also Bellew v. New York, Westchester & Connecticut Traction Co.*, 47 A.D. 447, 448 (2d Dep't 1900) (reversing grant of preliminary injunction where hearsay affidavit was introduced). The one case cited by DraftKings, from the federal court in Nebraska, *Activision v. Pinnacle Bancorp., Inc.*, 976 F. Supp. 2d 1157 (D. Neb. 2013), is utterly unlike this case. DK Mem. at 25. Nebraska's Attorney General is authorized by statute to issue a "cease and desist order … with or without prior notice," Neb. Rev. Stat. § 87-303.03 (1)(b), and the Nebraska AG ordered a law firm to cease initiating new patent infringement enforcement efforts on behalf of its client, which constituted a prior restraint on the client's First Amendment free speech rights and its right to select counsel of its choice, with no prior notice or opportunity to be heard. Nothing of the sort is alleged here.

vague, conclusory, or that fail to give fair notice of any factual underpinnings should be dismissed. *Fowler v. American Lawyer Media, Inc.*, 306 A.D.2d 113 (1st Dep't 2003); *Menon v. Kennedy*, 24 A.D.2d 849 (1st Dep't 1965). Indeed, a plaintiff seeking injunctive relief based on a selective enforcement equal protection claim is not entitled to an evidentiary hearing where the facts are not set forth in sworn affidavits. *303 West 42nd Street Corp. v. Klein*, 46 N.Y.2d 686, 696 (1979) ("*Klein*"). Here, neither DraftKings' Verified Petition nor its affidavits contain ***any*** factual allegations to support an equal protection claim. See DK Pet. ¶¶ 81-84.

Second, there is no conceivable basis for the "selective prosecution" claim. Not only does DraftKings have to overcome the weighty presumption that the enforcement of laws is undertaken in good faith and without discrimination, but the law is clear that latitude must be accorded authorities charged with making decisions related to legitimate law enforcement interests, at times even permitting them to proceed with an unequal hand. For example, it has been held that certain violators may be selected for prosecution out of the class of all known violators. Think speeding tickets. Or consider a decision to pursue only the most serious violators. That legitimate law enforcement would be hampered by requiring a hearing every time someone felt they had been unfairly singled out would be untenable.[26] *Klein*, 46 N.Y.2d at 694-95 (citations omitted). NYAG has a legitimate government interest in protecting the public from illegal gambling businesses and businesses that mislead the public through deceptive advertising.[27] Any claim of deprivation of equal protection is not likely to succeed on the merits.

[26] In addition, DraftKings would have to show an impermissible motive and that it was singled out with an "evil eye and an unequal hand." *Bower Associates v. Town of Pleasant Valley*, 2 N.Y.3d 617, 631 (2004); *Klein*, 46 N.Y.2d at 693. It has put forth no such evidence.

[27] The Court should also deny any request by DraftKings for discovery to establish a selective prosecution claim because it has failed to proffer admissible evidence tending to establish the existence of the essential elements of a selective prosecution defense, and that documents in the

c. DraftKings Fails to State a Claim Based Upon Separation of Powers[28]

DraftKings alleges that NYAG's actions violate the separation of powers doctrine, and seeks an injunction on this basis. DK Pet. ¶¶ 71-72, 79-80. These claims fail to state a viable cause of action.

As already recognized by the Court, an injunction is generally unavailable to restrain the enforcement of the penal law. *See* Section II(A), *supra*. Even where such relief is available, a party seeking to enjoin governmental action must meet the requirements for a writ of prohibition under C.P.L.R. Article 78, which is an "extraordinary remedy." C.P.L.R. 7801; *Rush v. Mordue*, 68 N.Y.2d 348, 352 (1986); *Schumer v. Holtzman*, 60 N.Y.2d 46 (1983); *Kimyagarova v. Spitzer*, 16 A.D.3d 507 (2d Dep't 2005). Stringent standards must be met before prohibition will issue because liberal encouragement of prohibition would threaten the "orderly administration of justice." *La Rocca v. Lane*, 37 N.Y.2d 575, 579 (1975). "Because of its extraordinary nature, prohibition is available only where there is a clear legal right, and then only when [the party to be restrained] acts or threatens to act either without jurisdiction or in excess of its authorized powers." *Holtzman v. Goldman*, 71 N.Y.2d 564, 569 (1988). And prohibition will not lie for claims of errors of substantive or procedural law "however egregious the error may be, and however cleverly the error may be characterized by counsel as an excess of jurisdiction or power." *Rush*, 68 N.Y.2d at 353. Moreover, the writ of prohibition cannot issue where the grievance may be redressed through other legal proceedings. C.P.L.R. 7801(1); *Molea v.*

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government's possession would indeed be probative of these elements. *Comm'r of the Dep't of Soc. Servs. v. Estate of Warrington*, 308 A.D.2d 311, 312 (1st Dep't 2003); *People v. Miller*, 138 Misc. 2d 639, 647 (Sup. Ct. N.Y. Cnty. 1988); *Town of Kinderhook v. Slovak*, 21 Misc. 3d 1115(A) (Sup. Ct. Columbia Co. 2006) (citing *Jefferies v. N.Y. City Hous. Auth.*, 8 A.D.3d 178 (1st Dep't 2004)).

[28] DraftKings brings other causes of action such as tortious interference of contract, but does not move on those claims. Those claims are also meritless and will be the subject of a motion to dismiss.

Marasco, 64 N.Y.2d 718, 720 (1984); *Morgenthau v. Erlbaum*, 59 N.Y.2d 143, 147 (1983); *Matter of Dondi v. Jones*, 40 N.Y.2d 8, 13 (1976).

A writ of prohibition is not available here. NYAG is the chief law enforcement officer of the State, and exercises his statutory duty by conducting investigations and bringing actions to enforce the law. Executive Law § 63. The Legislature has empowered "the Attorney-General to be on the lookout for fraudulent practices and … to appeal to the courts to enjoin unlawful practices" following an investigation. *Dunham v. Ottinger*, 243 N.Y. 423, 436 (1926). NYAG is discharging its statutorily granted discretionary powers and duties to enforce the Penal Law and consumer protection statutes for the benefit of the public, which includes the power to enjoin a recalcitrant corporation engaging in illegal activity. *People v. Abbott Maintenance Corp.*, 11 A.D.2d 136 (1st Dep't 1960), *aff'd*, 9 N.Y.2d 810 (1961); *see also Kimyagarova*, 16 A.D.3d at 507-08.

Nor have plaintiffs shown a "clear legal right" to relief. A contention, such as the one made by DraftKings here, that prohibition should issue because an official "is acting ultra vires as a result of its legal interpretation of a statute does not justify the invocation of this extraordinary remedy, even if ultimately nonreviewable by way of appeal." *Cuomo v. Hayes*, 54 A.D.3d at 858 (citing *State of New York v. King*, 36 N.Y.2d 59, 63 (1975); *Matter of Johnson v. Price*, 28 A.D.3d 79, 81-82 (1st Dep't 2006)). Here, the gravamen of DraftKings' claim is not that NYAG is acting outside of its authority, but that NYAG has misinterpreted the gambling laws by asserting that they apply to the alleged facts of DraftKings' operations. DK Pet. ¶¶ 25-35, 60-66; DK Mem. at 11-23; FD Compl. ¶¶ 8, 22, 24, 29, 31.

Moreover, DraftKings possesses a complete and adequate alternative remedy – defending its behavior in response to NYAG's enforcement proceedings. *Erlbaum, supra*; *Dondi,*

supra; *State v. Wolowitz*, 96 A.D.2d 47, 58 (2d Dep't 1983). Thus, DraftKings makes no colorable argument that the NYAG has acted beyond the grant of powers to it, or violated the separation of powers principles. DK Pet. ¶¶ 71-72, 79-80; DK Mem. at 27-31.

Indeed, DraftKings has its argument backwards, because the separation of powers doctrine prohibits courts from intruding upon a prosecutor's exercise of discretion in deciding whether to bring civil or criminal charges. *People v. Murray*, 129 A.D.2d 319, 321 (1st Dep't 1987), *aff'd sub nom. People v. Robles*, 72 N.Y.2d 689 (1988) ("respect for the basic separation of powers … compels this court not to interfere with the prosecutor's authority."); *People v. Ballard*, 134 N. Y. 269, 293 (1892) ("We think that the question as to what the public interests require is committed to the absolute discretion of the attorney-general, and that it cannot be made the subject of inquiry by the courts); *Kellog v. Supreme Court, County of Queens*, 29 N.Y.2d 615, 616 (1971) (affirming dismissal of C.P.L.R. Article 78 petition seeking the "extraordinary writ of prohibition" to restrain prosecutor from further proceedings); *see also Santora v. Silver*, 20 Misc. 3d 836, 841 (Sup. Ct. N.Y. Cty. 2008), *aff'd as mod.*, 61 A.D.3d 621 (1st Dep't 2009).

As the court put it in *Application of Hassan v. Magistrates Court of New York*, a case cited by DraftKings itself (DK Mem. 30):

> The courts have not only refused to interfere with or control the discretion exercised by a District Attorney or the Attorney-General in the cases of crimes, but in related matters such as 'public offenses.' … [The transcendent] issue is whether the decision of the District Attorney (or the Attorney-General) as 'an executive official of the State' in deciding whether or not to prosecute in any individual situation is subject to review by the courts. I am convinced that it is not. … [T]he court holds that it *does not have the power to substitute its judgment for that of the District Attorney* … The official duty of determining whether, when and whom to prosecute is vested in him and him alone.[29]

[29] DraftKings' reliance on *Boreali v. Axelrod*, 71 N.Y. 2d 1 (1987), is misplaced. In *Boreali*, the Court of Appeals held that the Public Health Commission ("PHC") had overstepped its authority by promulgating regulations that prohibited smoking in a variety of indoor areas open to the public for reasons which included concerns entirely apart from those related to public health.

20 Misc. 2d 509, 511 (N.Y. Sup. Ct. 1959) (emphasis in original).

3. DraftKings Cannot Establish That It Would Suffer Irreparable Harm in the Absence of an Injunction

The DFS Operators have asserted that extraordinary injunctive relief is necessary to prevent further irreparable harm, insofar as the State's investigation has allegedly impacted their ability to conduct their business in New York in various respects – for instance, impeding their ability to attract new investors, damaging their reputation, and in the case of FanDuel, forcing its decision to temporarily stop accepting wagers from within New York. FD Mem. at 7-8; DK Mem. at 31-35. Those arguments are without merit.

First, there can be no cognizable injury (much less irreparable harm) in being ordered to refrain from illegal activity. *See, e.g., U.S. v. Diapulse Corp of America*, 457 F.2d 25, 29 (2d Cir. 1972) ("Nor can appellant complain that the injunction is impermissible because it will put him out of business. He 'can have no vested interest in a business activity found to be illegal.'"); *see United States v. Rx Depot, Inc.*, 290 F. Supp. 2d 1238, 1248 (N.D. Okla. 2003) ("The defendants have no vested interest in an illegal business activity.").

Second, the arguments that they have been, or will be, subject to non-compensable harms (such as loss of reputation, un-specified impacts on "business relationships" or the "ability to attract new investors") are vague, speculative, and without any evidentiary support whatsoever, much less the "clear and convincing" support necessary to support an injunction. *See Indy 3000, Inc. v. Cirillo*, 2011 N.Y. Misc. LEXIS 3332, at *13 (Sup. Ct. Suffolk Cnty., July 5, 2011). New

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The Court found that the PHC usurped the legislative role in particular because it exempted certain businesses from the rules for non-health related, economic reasons, outside PHC's scope of authority and that the PHC was not merely "filling in the details" of broad legislation but wrote a comprehensive set of rules on a blank slate. That is not remotely this case—NYAG has not promulgated any rule, and is simply attempting to enforce the existing penal and consumer protection statutes, a function squarely within its statutory mandate. Exec. Law § 63(12).

York courts routinely reject such unsupported speculation when determining whether injunctive relief is appropriate. *LGC USA Holdings, Inc. v. Taly Diamonds, LLC*, 995 N.Y.S.2d 6, 7 (1st Dep't 2014) (injunction denied "in light of the largely speculative assertions in the affidavit of its president and the facts that were sharply contradicted by defendants' affidavits"); *Trump on the Ocean, LLC v. Ash*, 916 N.Y.S.2d 177, 180 (2d Dep't 2011) ("Trump's vague and conclusory allegations that its principals would suffer harm to their business reputations were not sufficient to establish irreparable injury."); *Copart of Conn., Inc. v. Long Is. Auto Realty, LLC*, 839 N.Y.S.2d 791, 793 (2d Dep't 2007) ("contention that [petitioner] could be forced to discontinue business operations if the application is withdrawn and the Town commences enforcement proceedings is speculative and unsupported by any evidence in the record").

Third, the DFS Operators claim that "[c]onstraining a party from operating an ongoing business at all or in a particular geographic area" is recognized as causing irreparable harm. FD Mem. at 7; *see also* DK Mem. at 31-35. That not only mischaracterizes the circumstances of this matter, but is a misstatement of New York law. In fact, the DFS Operators have cited no cases suggesting that a lack of ability to operate a business in a particular manner or in a particular place is "irreparable harm." In *Reuschengerg*, the court found that a failure to issue an injunction against the City of Huntington would "destroy" the plaintiffs' business entirely, so much so that "plaintiffs will lose their livelihoods." *Reuschenberg v. Town of Huntington*, 791 N.Y.S.2d 652, 570 (2d Dep't 2005). That is a far cry from the actual circumstances of this matter, wherein the State ultimately seeks only to require them to operate in accordance with New York law for that portion of their business that deals with bets made from New York. In fact, upon the granting of all the relief New York seeks, the DFS Operators will remain free to continue operating their business in 43 other states, accounting for approximately 93% percent of their existing

customers, at least in the case of DraftKings. DK Pet. ¶ 8. The vast majority of their business is simply not affected by this proceeding.[30]

In *Barclay's Ice Cream*, an injunction was issued to stop conduct that the court explicitly found *was not* mere lawful picketing, as FanDuel suggests, but rather illegal and anti-competitive coercion (including false statements) to close the New York City market entirely from a competitor. *Barclay's Ice Cream Co. v. Local No. 757 of Ice Cream Drivers & Emp. Union*, 378 N.Y.S.2d 395, 397 (1st Dep't 1976). If anything, the *Barclay's Ice Cream* case supports the NYAG's motion for an injunction against FanDuel and DraftKings, who are engaging in illegal conduct that reaches millions of New York consumers.

4. Petitioners Have Made No Showing that the Equities are Balanced in Their Favor

For the reasons set forth in Section I(C), above, the equities are balanced in the favor the NYAG. For that reason, an injunction should not issue against the NYAG.

[30] Alternatively, the DFS Operators could operate their business in a manner consistent with New York law, which indisputably authorizes innumerable other types of contests, such as those played for free or those in which contestants cannot win anything of value. Penal Law § 225.00(2).

CONCLUSION

For the foregoing reasons, NYAG's application for a preliminary injunction should be granted.

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November 23, 2015

Respectfully submitted,

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