

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

-----X	
FANDUEL INC.,	:
	:
Plaintiff,	:
- against -	:
	:
ERIC SCHNEIDERMAN, in his official capacity	:
as Attorney General of the State of New York, and the	:
STATE OF NEW YORK,	:
	:
Defendants.	:
-----X	

Index No. 161691/2015
Motion Sequence No. 1
IAS Part 13 (Justice Mendez)

NYSCEF Case

**MEMORANDUM IN SUPPORT OF APPLICATION BY
PLAINTIFF FANDUEL INC. FOR AN ORDER TO SHOW
CAUSE AND TEMPORARY RESTRAINING ORDER**

Of Counsel:

Marc Zwillinger*
ZWILLGEN PLLC
1900 M Street NW, Suite 250
Washington, DC 20036
**Not admitted in New York*

John S. Kiernan
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
Phone: (212) 909-6000

Matthew E. Fishbein
Eric R. Dinallo
Carl Micarelli
W. David Sarratt

Attorneys for Plaintiff FanDuel Inc.

TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	2
A. FanDuel’s Daily Fantasy Sports Contests.....	2
B. The NYAG’s Abrupt and Unilateral Efforts to Shut Down FanDuel’s Business in New York.....	4
ARGUMENT	6
I. A TEMPORARY RESTRAINING ORDER IS NECESSARY TO MAINTAIN THE STATUS QUO AND TO AVOID IRREPARABLE HARM TO FANDUEL’S BUSINESS	7
II. FANDUEL IS OPERATING ITS BUSINESS LAWFULLY, AS IT HAS FOR THE LAST SIX YEARS	9
A. New York’s gambling laws apply only to bets or wagers, not contests for prizes.....	11
B. Fantasy sports contests, whether seasonal or daily, are games of skill, not chance, and therefore lawful under New York law	13
C. The NYAG’s attempts to distinguish daily from traditional fantasy sports are unfounded	16
CONCLUSION.....	17

TABLE OF AUTHORITIES

CASES

110 Manno Realty Corp. v. Town of Huntington,
61 Misc. 2d 702 (Sup. Ct. Suffolk County 1970).....9

Barclay’s Ice Cream Co. v. Local No. 757 of Ice Cream Drivers & Emp. Union,
51 A.D.2d 516 (1st Dep’t 1976), *aff’d*, 41 N.Y.2d 269 (1977)7

CanWest Global Commc’ns Corp. v. Mirkaei Tikshoret Ltd.,
9 Misc. 3d 845 (Sup. Ct. N.Y. County 2005)6

Faircloth v. Cent. Fla. Fair, Inc., 202 So. 2d 608 (Fla. 4th Dist. Ct. App. 1967).....12

Humphrey v. Viacom, Inc., No. 06-2768, 2007 WL 1797648
(D.N.J., June 20, 2007) 10, 11, 12, 14, 15, 16

Komyathy v. Bd. of Educ. of Wappinger Cent. School Dist. No. 1,
75 Misc. 2d 859 (Sup. Ct. Dutchess County 1973).....9

Las Vegas Hacienda, Inc. v. Gibson, 77 Nev. 25, 359 P.2d 85 (1961)12

Local Gov’t Assistance Corp. v. Sales Tax Asset Receivable Corp., Index No. 5218/03,
2003 WL 25729965 (Sup. Ct. Albany County, Aug. 14, 2003)9

Matter of Fortuna v. Prusinowski,
22 Misc. 3d 974 (Sup. Ct. Suffolk County 2008)9

Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208 (2013).....11

People ex rel. Ellison v. Lavin, 179 N.Y. 164 (1904)..... 10, 13, 14

People ex rel. Lawrence v. Fallon, 152 N.Y. 12 (1897).....10, 11, 12

People v. Hunt, 162 Misc. 2d 70 (Crim. Ct. N.Y. County 1994)10, 13, 16

People v. Li Ai Hua, 24 Misc. 3d 1142 (Crim. Ct. Queens County 2009)13

People v. Stiffel, 61 Misc. 2d 1100 (App. Term 2d Dep’t 1969)10

Reuschenberg v. Town of Huntington,
16 A.D.3d 568 (2d Dep’t 2005)8

Robinson v. Wood, 119 Misc. 299 (Sup. Ct. Ulster County 1922).....8

State of Ariz. v. Am. Holiday Ass’n, Inc., 151 Ariz. 312, 727 P.2d 807 (1986).....11, 12

State of New York v. City of New York, 275 A.D.2d 740 (2d Dep’t 2000)9

STATUTES

CPLR 6301.....6

CPLR 6313.....6, 9

Executive Law § 63(12).....1, 7

General Business Law § 349.....1, 5, 7

General Business Law § 350.....1, 5, 7

N.Y. Penal Law § 225.00.....10, 12, 13

31 U.S.C. §§ 5361-536512, 16

OTHER AUTHORITIES

State of New York Temporary Commission on Revision of the Penal Law and Criminal Code, *Commission Staff Notes on the Proposed New Penal Law* (1964).....13

TCS New York City Marathon, *Prize Money and Bonus Awards* (2015).....14

Walt Bogdanich, Joe Drape & Jacqueline Williams, *New York Tells 2 Sites to Halt Fantasy Games*, N.Y. Times, Nov. 11, 2015, at A15

PRELIMINARY STATEMENT

This is an application for a temporary restraining order (“TRO”) restraining the New York Attorney General (“NYAG”) from taking enforcement action against Plaintiff FanDuel, Inc. (“FanDuel”) and its service providers pending the resolution of FanDuel’s motion for a preliminary injunction. The proposed TRO is designed to preserve the status quo of allowing FanDuel to continue its longstanding business of daily and weekly fantasy sports (“DFS”) contests for New York residents pending the resolution of FanDuel’s preliminary injunction motion, thereby preventing irreparable harm to that business following recent public and incorrect assertions by the NYAG that FanDuel’s DFS contests constitute illegal gambling under New York law.

FanDuel is a leading provider of DFS contests, which allow participants to pit their skills against those of other sports fans by selecting a roster of players within a fictional salary cap and earning points based on their chosen athletes’ performance in major sporting events. Participants in FanDuel’s contests pay a fixed entry fee to compete for pre-announced prizes. FanDuel now has over five million users, hundreds of thousands of them in New York alone, and has been operating consistently in New York since 2009.

Without any warning to FanDuel, and despite FanDuel’s longstanding presence in the State, on November 10, 2015, the NYAG announced to FanDuel and the public his view that FanDuel’s contests constitute illegal gambling under New York law. The NYAG threatened legal action under Executive Law § 63(12) and General Business Law §§ 349 and 350. The NYAG’s office also apparently contacted FanDuel’s payment processors directly, in an effort to achieve a shutdown of FanDuel’s business with New York participants independently of the judicial process provided for by the Executive Law and the General Business Law.

As a result of these efforts, FanDuel is now unable to accept deposits from its customers in New York, causing incalculable, immediate and irreparable harm to FanDuel's business. The merits of this matter should be resolved by the judicial process, and FanDuel is entitled to its day in court. The TRO FanDuel requests is warranted as a matter of fairness to avert irreparable harm to FanDuel and to allow the Court to address the important legal issues presented by this action in an orderly fashion.

The urgent relief being sought is particularly appropriate because the NYAG's new legal opinion is incorrect. The NYAG's view is contrary to that of the principal decision addressing fantasy sports games, inconsistent with explicit provisions of federal law making clear that FanDuel's fantasy sports games are not gambling, and unsupported under the New York statute. Entering a contest to compete in a game of skill for a fixed, pre-announced prize is not and never has been gambling under New York law. FanDuel requests that the Court set an expedited briefing and hearing schedule on FanDuel's motion for a preliminary injunction and restrain the NYAG from effectively foreclosing FanDuel's business with New York customers, through enforcement actions or threats of legal action against FanDuel and its business partners, until the merits of this important matter can be heard.

STATEMENT OF FACTS

A. FanDuel's Daily Fantasy Sports Contests

For over twenty-five years, sports fans throughout the country have enjoyed playing fantasy sports. Fantasy sports allow participants to use their sports knowledge to select real athletes in a given sport to make up a "fantasy" lineup or roster. (Complaint ¶ 17; *see* Genetski Aff. ¶ 4 (verifying Complaint).) Participants then accumulate points based on the statistical performance of the athletes they selected in real-world sporting events. (Complaint ¶ 17.) Fantasy contests have made sports more enjoyable for many fans, providing them a forum for

putting their sports knowledge and skills in selecting a fantasy team against those of other sports fans and expanding their interest in following multiple teams on game days. (*Id.* ¶ 2.)

FanDuel's DFS contests, which have been offered for the past six years, differ from traditional fantasy sports contests in two primary ways that have no effect on their fundamental nature as contests of skill for a prize. First, FanDuel's contests typically begin and end in a day or, for NFL games, in a week. Traditional fantasy sports contests ordinarily last through the better part of a given sport's regular season schedule. (*Id.* ¶ 3.) Second, FanDuel's contests use a fantasy "salary cap" system for the selection of athletes to a fantasy team, whereas traditional fantasy sports use a fantasy "draft" system or an "auction" format where participants bid for players under a fantasy salary cap. (*Id.* ¶ 3.) FanDuel attaches a "salary" to each player, and participants select players for their fantasy rosters based on assessments of their prospects in the upcoming week for generating performance points per fraction of the salary cap that they represent. Both of these forms of player selection are designed to simulate the rigors and challenges of roster selection experienced by actual general managers of teams. (*Id.* ¶ 3.)

Like any other online fantasy sports game operator, FanDuel performs all the administrative functions needed for participants to compete against each other in a fantasy sports contest. Those functions include providing statistics that participants can use to research athletes for their fantasy team, setting notional "salaries" for individual athletes and adjusting them from time to time based on players' recent performances, recording individual participants' chosen rosters, compiling game performance statistics, scoring each selected player's performance points and the total points for all players on the roster in that contest, and providing reports on performance and rankings. (*See id.* ¶ 28.)

FanDuel offers a number of different contest formats. These include tournaments, which can have thousands of entries; leagues, which are still only one-day or one-week contests but include between 2 and 99 participants; “multiplier” contests, in which all participants who finish in the top 50% or top 30% of contestants will win the same amount; and head-to-head contests, in which two participants compete against one another directly. (*Id.* ¶ 18.) For each type of contest, FanDuel’s prizes are made known to participants before the contest begins, and the prize values do not change based on the number of entries in the announced contest. (*Id.* ¶ 19.) For the larger contests, like tournaments, FanDuel sets a maximum number of participants vying for pre-announced prizes. Some contests limit the number of entries a participant can submit; others allow participants to submit multiple entries in a single contest. (*Id.* ¶ 19.)

FanDuel’s contests have become enormously popular. (*Id.* ¶ 11.) Today, FanDuel has over five million users, including hundreds of thousands of sports fans in New York. (*Id.* ¶ 11.)

B. The NYAG’s Abrupt and Unilateral Efforts to Shut Down FanDuel’s Business in New York

FanDuel has been operating openly and without incident in New York for the past six years, advertises in major media and is well-known to sports fans. (Genetski Aff. ¶ 6.) Indeed, FanDuel has marketing partnerships with 15 NBA franchises (including the Brooklyn Nets), and the NBA itself, as well as sponsorship agreements with 16 NFL teams (including the New York Jets and the Buffalo Bills). FanDuel, through its counsel, has been in discussions in the past month with the NYAG’s office relating to its inquiry into other aspects of FanDuel’s business, but in those discussions the NYAG’s office never indicated that it was considering the legality of DFS games, much less that it believed they constituted gambling under New York law. (*Id.* ¶ 7.)

Nonetheless, without prior notice, the NYAG’s office sent a cease-and-desist letter to FanDuel on Tuesday, November 10, 2015, demanding that FanDuel cease accepting entries from

New York customers on the ground that DFS contests constituted illegal gambling. (*Id.* ¶ 8 & Ex. 2.) The letter also claimed that FanDuel’s advertisements were misleading, primarily because they implied that daily fantasy sports contests are legal and stated that any participant in a contest could be a winner. (Genetski Aff. Ex. 2, “NYAG Letter” at 2.) Although the NYAG’s letter conceded that “traditional” fantasy sports are not gambling within the meaning of New York law, it asserted that daily fantasy sports are different from traditional fantasy sports in ways that, according to the NYAG, transform DFS contests into illegal gambling. (*Id.* at 2.) The letter stated that, as required by Sections 349 and 350 of the General Business Law (“GBL”), the NYAG would allow FanDuel to respond within five business days to his allegations before commencing civil proceedings. (*Id.* at 4.)

The NYAG, however, did not wait for the five-day period to expire before taking extrajudicial action to impair FanDuel’s business in New York based on his unprecedented interpretation of New York law. At the same time the NYAG’s office provided its letter to FanDuel, that office also reportedly provided the letter to the press together with statements communicating to FanDuel’s customers and the public that FanDuel was not legally permitted to operate in New York. *See, e.g.,* Walt Bogdanich, Joe Drape & Jacqueline Williams, *New York Tells 2 Sites to Halt Fantasy Games*, N.Y. Times, Nov. 11, 2015, at A1. (*See also* Genetski Aff. ¶ 9.) Stories about the NYAG’s actions were widely reported in the press immediately upon issuance of the letter.

In the days immediately following delivery of the cease and desist letter, representatives of the NYAG also appear to have contacted the entities that process deposits and withdrawals from player accounts at FanDuel, including Vantiv, Inc., JPMorgan Chase, and PayPal Inc., for the purpose of deterring them from continuing to perform this function. The result of these

communications was that Vantiv, Chase and PayPal informed FanDuel that they would no longer do business with FanDuel after Friday, November 13, unless FanDuel immediately put measures in place to ensure that it was not accepting new deposits from anyone in the state of New York. (See Genetski Aff. ¶ 10.) FanDuel has therefore been unable to process new deposits from New York customers since the close of business on Friday, November 13, 2015. (*Id.* ¶ 11.) In this way, absent relief from this Court, the NYAG will have significantly and irreparably damaged FanDuel's established, six-year-long operation in New York based on his interpretation of the law, without giving FanDuel any opportunity to present its case. FanDuel and its users are entitled to their day in court.

ARGUMENT

Under CPLR 6301, “[a] temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.” Where the proposed temporary restraining order “merely seeks to maintain the *status quo*” pending decision by the Court, and where the opposing party would be free to take actions that could cause irreparable harm in the absence of a temporary restraining order, the “balance of equities tilts in . . . favor” of issuing the TRO. *CanWest Global Commc'ns Corp. v. Mirkaei Tikshoret Ltd.*, 9 Misc. 3d 845, 872 (Sup. Ct. N.Y. County 2005). Those standards are met in this case. Pursuant to CPLR 6313, where “immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice.”

I. A TEMPORARY RESTRAINING ORDER IS NECESSARY TO MAINTAIN THE STATUS QUO AND TO AVOID IRREPARABLE HARM TO FANDUEL'S BUSINESS

Absent immediate relief from this Court, the NYAG will effectively have prevented FanDuel from conducting business with New York customers because FanDuel is unable to accept new deposits from its customers in view of the NYAG's public position and its communications with FanDuel's payment processors. By pressing his incorrect legal theory on FanDuel's payment services providers, the NYAG has bypassed not only the need to defend his interpretation of the law in court but also the five-day waiting periods, injunctive remedies and other carefully calibrated procedures that the legislature has built in to Executive Law § 63(12) and GBL §§ 349 and 350. As a result, the NYAG has achieved implementation of his erroneous view of the law before FanDuel has been given an opportunity to present a defense.

The NYAG could not reasonably dispute that his actions have the purpose and effect of causing FanDuel irreparable harm. If FanDuel is not able to restore the ability of its New York customers to deposit money to enter fantasy sports contests, FanDuel will not only lose the revenue from those particular deposits but also risk losing the good will and continued business of some of those customers—including potentially to competing fantasy sports sites that the NYAG has not targeted. Constraining a party from operating an ongoing business at all or in a particular geographic area has long been recognized as causing irreparable harm. *See, e.g., Reuschenberg v. Town of Huntington*, 16 A.D.3d 568, 570 (2d Dep't 2005) (granting preliminary injunction against enforcement of zoning ordinance that would stop existing business from operating in particular location); *Barclay's Ice Cream Co. v. Local No. 757 of Ice Cream Drivers & Emp. Union*, 51 A.D.2d 516, 517 (1st Dep't 1976), *aff'd*, 41 N.Y.2d 269 (1977) (granting preliminary injunction against picketing aimed at stopping business from operating in New York City). That is particularly clear where, as here, FanDuel has been operating a successful business

for many years in full view of the NYAG and without incident. (*See* Genetski Aff. ¶ 6.) Courts also have not hesitated to grant a temporary restraining order when needed to restrain a public official from “interfering with the legitimate pursuit of [the plaintiff’s] business” when the official’s action is based on an invalid or mistaken legal justification. *E.g., Robinson v. Wood*, 119 Misc. 299, 301 (Sup. Ct. Ulster County 1922) (granting temporary restraining order to prevent police chief from interfering with plaintiff’s business under invalid ordinance).

Unless the NYAG is restrained, hundreds of thousands of New York residents will be deprived of the choice to engage in FanDuel’s DFS contests in which they enjoy competing, in many cases with friends from around the country. The NYAG lacks the authority to deny New Yorkers, on the basis of an incorrect legal interpretation, the freedom to participate in lawful fantasy sports games if they so choose.

In contrast to the irreparable harm FanDuel is confronting, there is no harm to the public interest in preserving the status quo for the short period of time it will take the parties to present and the Court to hear and consider a preliminary injunction application. DFS contests are widely known among sports fans. FanDuel and its competitors have been running their business continuously, and have been completely transparent and public about the nature of their business, for over six years without any action from the NYAG. There was no imminent event that required the NYAG to move precipitously against FanDuel without notice. There is no reason the NYAG cannot wait a short additional time until both parties have had an opportunity to present their positions in court and the Court is able to rule on the issues in the context of a preliminary injunction motion.

Although CPLR 6313(a) states that a TRO shall not issue “against a public officer, board or municipal corporation of the state to restrain the performance of statutory duties,” that

provision applies only when “defendant had a statutory duty to perform the act sought to be enjoined by the restraining order.” *110 Manno Realty Corp. v. Town of Huntington*, 61 Misc. 2d 702, 704 (Sup. Ct. Suffolk County 1970). It does not bar a temporary restraining order against discretionary actions, including the decision to take enforcement action, which is not “statutorily compelled.” *Matter of Fortuna v. Prusinowski*, 22 Misc. 3d 974, 976 (Sup. Ct. Suffolk County 2008) (“Being discretionary in nature,” decisions to commence prosecution “are not statutorily compelled and thus do not constitute ‘the performance of statutory duties’ within the purview of CPLR 6313”); *see also State of New York v. City of New York*, 275 A.D.2d 740, 741 (2d Dep’t 2000) (affirming TRO against city’s sale or alteration of community gardens, to preserve the status quo and prevent irreparable harm). Nor does it apply where the plaintiff has shown *prima facie* that the officer is acting “illegally” or “not within the performance of statutory duties.” *Komyathy v. Bd. of Educ. of Wappinger Cent. School Dist. No. 1*, 75 Misc. 2d 859, 862 (Sup. Ct. Dutchess County 1973); *Local Gov’t Assistance Corp. v. Sales Tax Asset Receivable Corp.*, Index No. 5218-03, 2003 WL 25729965 (N.Y. Sup. Ct. Albany County, Aug. 14, 2003). As set forth below, the NYAG’s reading of the relevant statutes is at a minimum *prima facie* contrary to New York law, and in any event, the actions the NYAG has taken or threatened to take, including extrajudicial measures that have adversely impacted FanDuel’s operations, are simply not part of the duties imposed on the NYAG by statute.

II. FANDUEL IS OPERATING ITS BUSINESS LAWFULLY, AS IT HAS FOR THE LAST SIX YEARS

FanDuel’s DFS contests are lawful. The law recognizes the basic, common-sense principle that participation in a contest for a fixed prize from a fund generated by entry fees is not gambling. This has been the law in New York for more than a century. *See People ex rel. Lawrence v. Fallon*, 152 N.Y. 12, 19 (1897). It follows that “as a matter of law, the entry fees

for . . . fantasy sports leagues are not ‘bets’ or ‘wagers’” because they involve the payment of a preannounced, guaranteed and unconditional prize from a fund composed of participants’ entry fees. *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 WL 1797648, at *9 (D.N.J., June 20, 2007). Congress also has endorsed the same principle in a federal statute specifically addressing the legality of accepting and processing payments for fantasy sports contests.

Moreover, as the NYAG’s letter concedes, New York’s anti-gambling laws prohibit only games in which a person wagers on a “contest of chance or a future contingent event not under his control or influence.” (NYAG Letter, at 1 (quoting N.Y. Penal Law § 225.00).) The law is clear—and has been for decades—that these prohibitions do not apply to games of skill, such as FanDuel’s contests. *See, e.g., People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 170-71 (1904); *People v. Stiffel*, 61 Misc. 2d 1100, 1100 (N.Y. App. Term 2d Dep’t 1969); *People v. Hunt*, 162 Misc. 2d 70 (Crim. Ct. N.Y. County 1994).

The NYAG’s letter recognizes that “traditional” fantasy sports contests do not constitute illegal gambling, that fantasy sports “have been enjoyed and *legally* played by millions of New York residents,” and that “the legality of traditional fantasy sports has never been seriously questioned in New York.” (NYAG Letter at 2 (emphasis added).) Each of the grounds on which the NYAG seeks to distinguish “daily” from “traditional” fantasy sports—characterizing one as entirely legitimate and the other as illegal gambling—misstates how fantasy sports contests operate, is irrelevant to the legal criteria for determining whether a particular activity is gambling, or both. All types of fantasy sports contests—whether daily contests or traditional season-long ones—require substantial skill by the participants. In both contexts, it is equally clear that “[t]he success of a fantasy sports team depends on the participants’ skill in selecting

players” and on the ability of the participants to apply their sports knowledge to the particular circumstances. *Humphrey*, 2007 WL 1797648 at *2.

A. New York’s gambling laws apply only to bets or wagers, not contests for prizes

The only court to have directly addressed the question of the legality of online fantasy sports contests has squarely held that they are not a form of gambling. In *Humphrey*, the U.S. District Court held that playing fantasy sports for prizes was not “gambling” under a New Jersey statute because it does not involve wagering on an outcome. Because fantasy sports contests involve “(1) an entry fee paid unconditionally, (2) prizes guaranteed to be awarded and (3) prizes for which the operator is not competing,” they do not involve staking money on the outcome of an event. *Id.* at *7. *Humphrey* reasoned:

Courts throughout the country have long recognized that it would be patently absurd to hold that the combination of an entry fee and a prize equals gambling, because if that were the case, countless contests engaged in every day would be unlawful gambling, including golf tournaments, bridge tournaments, local and state rodeos or fair contests, literary or essay competitions, livestock, poultry and produce exhibitions, track meets, spelling bees, beauty contests, and the like, and contest participants and sponsors could all be subject to criminal liability.

Id. (internal quotation marks and alterations omitted) (citing *State of Ariz. v. Am. Holiday Ass’n, Inc.*, 151 Ariz. 312, 314, 727 P.2d 807, 809 (1986)); *see also Nat’l Collegiate Athletic Ass’n v. Governor of N.J.*, 730 F.3d 208, 223 n.4 (2013) (noting “the legal difference between paying fees to participate in fantasy leagues and single-game wagering as contemplated by the [New Jersey] Sports Wagering Law” (citing *Humphrey*, 2007 WL 1797648, at *9)).

The New York Court of Appeals applied the same rule in *Fallon*, holding that there is no “bet or wager” that would amount to “gambling” within the meaning of the New York Constitution where “one of the parties strives with others for a prize; the competing parties pay

an entrance fee for the privilege of joining in the contest, and . . . the entrance fee forms a part of the general fund from which the premiums or prizes are paid.” 152 N.Y. at 19. The Penal Law implements this constitutional principle when it defines “gambling” as requiring, among other things, “stak[ing] or risk[ing]” something of value on an outcome, N.Y. Penal Law § 225.00(2); in other words, betting or wagering. Nothing in the statute purports to forbid paying a preannounced prize out of a pool generated by entry fees. Courts in other states also apply the same principle that such prize contests are not gambling. *See, e.g., Am. Holiday*, 151 Ariz. at 314, 727 P.2d at 809 (quoting and following *Fallon*); *Faircloth v. Cent. Fla. Fair, Inc.*, 202 So. 2d 608, 609 (Fla. 4th Dist. Ct. App. 1967) (distinguishing single-game wagering from playing games of skill for prizes: “No one seriously considers such activities to be gambling.”); *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 27-29, 359 P.2d 85, 86-87 (1961) (also recognizing contests for prizes are not gambling; citing cases from multiple states).

Congress codified this basic understanding that fantasy sports is not gambling in 2006 when it enacted the Unlawful Internet Gambling Enforcement Act (“ UIGEA ”), 31 U.S.C. §§ 5361-5365; *see also Humphrey*, 2007 WL 1797648, at *11 (noting that “[f]ederal law confirms” the application of common law in this context that fantasy sports contests are not gambling). In UIGEA, Congress explicitly excluded from the definition of “bet or wager” any fantasy sports contest, as long as (1) prizes are established and announced in advance, (2) outcomes reflect the “relative knowledge and skill of the participants” and are determined “predominantly” by the outcome of performance of athletes in multiple games, and (3) the result is not determined by the performance of a real-world team or teams or an athlete’s performance in a single real-world sporting event. *Id.* § 5362(1)(E)(ix). Both FanDuel’s DFS contests and traditional seasonal fantasy sports meet these criteria.

B. Fantasy sports contests, whether seasonal or daily, are games of skill, not chance, and therefore lawful under New York law

New York law is equally clear that the gambling laws do not apply to contests of skill, such as those offered by FanDuel. New York law defines “contest of chance” to mean a game “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. Case law makes clear that the mere possibility that chance could alter the outcome of a game of skill does not mean that chance is an element to “a material degree,” since chance is an element of virtually any contest. *Id.* Rather, New York courts have interpreted this statute to codify the long-standing common law rule that “[t]he test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the *dominating* element.” *People v. Li Ai Hua*, 24 Misc. 3d 1142, 1145 (Crim. Ct. Queens County 2009) (emphasis added) (quoting *People ex rel. Ellison v. Lavin*, 93 A.D. 292 (1st Dep’t 1904), *rev’d on other grounds*, 179 N.Y. 164 (1904)). In other words, courts have looked to whether skill or chance is “*the material component*” of the game. *Hunt*, 162 Misc. 2d at 72 (emphasis added).¹

Common sense also supports this reading of the statute. If a contest became a “contest of chance” merely because chance could sometimes change the outcome, then hardly anything would be a contest of skill. For example, in a golf tournament, there is the chance that an unexpected pebble or gust of wind can thwart a player’s chance of winning. But no one would suggest that this makes golf anything other than a game of skill, or that the PGA is running an

¹ The legislative history also makes clear that no substantive change to this common law rule was intended when the current Penal Law sections were adopted. The staff notes of the Commission that drafted those provisions as part of a general revision of the Penal Law state that the revisions to the gambling article made “few actual changes of substance” from preexisting law, but mainly sought to simplify the form of the statute. State of New York Temporary Commission on Revision of the Penal Law and Criminal Code, *Commission Staff Notes on the Proposed New Penal Law*, at 381 (1964).

illegal gambling ring when it charges entry fees for an open golf tournament and pays a prize to the winner. *See Humphrey*, 2007 WL 1797648, at *7. “[N]or do games of billiards cease to be games of skill because at times, especially in the case of tyros, their result is determined by some unforeseen accident, usually called luck.” *Lavin*, 179 N.Y. at 170. Similarly, the New York Marathon charges entrance fees to participate and in 2015 paid out \$705,000 in cash prizes, which is prominently advertised on its website.² Despite the fact that the race involves elements of chance—a turned ankle in an unfilled pothole could influence the outcome—no one would maintain that the runners are betting on themselves or that the Marathon is an illegal gambling endeavor. Yet that is the logical conclusion of the NYAG’s theory.

FanDuel’s contests award prizes for games of skill; they do not involve betting on games of chance. FanDuel participants base their fantasy sports player selections on their own sports knowledge and on research into historical performance, statistics, and trends. (Complaint ¶ 24; *see Genetski Aff.* ¶ 4 (verifying Complaint).) These selections can be based on a multitude of strategic factors, including the venue for a contest, a player’s matchup against a particular opponent, days of rest between games, how a player’s performance may correlate (or not) with other players on the same team, and predictions about how other contest participants are likely to make selections. (Complaint ¶ 24.) Further, participants’ strategic decisions can vary depending on the specific type of contest they are entering. (*See id.* ¶ 24.) Because FanDuel’s games are daily games, FanDuel’s participants are able to consider a wealth of current information relevant to athletes’ expected performance that is not available at the beginning of any season. (*Id.* ¶ 24.) And unlike season-long contests, where a participant may through the luck of the draw be forced

² *See* TCS New York City Marathon, *Prize Money and Bonus Awards*, <http://www.tcsnycmarathon.org/about-the-race/prize-money-and-bonus-awards> (last visited Nov. 15, 2015).

to select 12th in a 12-team league's draft or face a weekly matchup where his best players have a bye week and his opponent is at full strength, participants in FanDuel's contests choose from the same player universe for every contest, subject to the same salary cap and relative player value, as all other participants, thereby increasing the impact of the participants' acumen in selecting the most valuable roster.

In all fantasy sports, including daily fantasy sports, participants' skill in assembling a fantasy roster is the primary determinant of who wins. (*Id.* ¶ 25.) Just like traditional fantasy sports, which the NYAG has conceded are fully legal under New York law, the entire premise of DFS is that participants get to test their skill at assembling a successful roster of players. (*Id.* ¶¶ 2, 28.) Just like traditional fantasy sports, all DFS participants pay an entry fee, prizes are predetermined, and the game operator has no stake in the outcome. (*Id.* ¶¶ 19, 27.) *See Humphrey*, 2007 WL 1797648, at *7. As with countless other contests of skill in which New York State residents legally engage, some elements of chance may be present in DFS, but DFS participants primarily rely on their skill to win. In daily as well as traditional fantasy sports, the time, study, knowledge, strategy and skill required to build a participant's lineup are far more determinative of the outcome than any element of chance. (*Id.* ¶¶ 24-26, 28.)

Given the deep sports knowledge and strategic thinking required in fantasy sports contests, it is unsurprising that skilled and experienced players win more often. (*Id.* ¶ 25.) The NYAG himself emphasizes this point in the cease-and-desist letter. Although the NYAG's allegation in the Notice that "the top one percent of FanDuel's winners receive the vast majority of the winnings" (NYAG Letter at 2) is factually incorrect in its particulars, as a general matter the NYAG is correct that the most highly skilled players win a higher percentage of the prizes – as in any contest of skill. (Complaint ¶ 25.) That reality clearly reinforces that daily fantasy

sports is primarily a game of skill and does not depend on a material or dominating element of chance. *See Hunt*, 162 Misc. 2d at 73.

C. The NYAG’s attempts to distinguish daily from traditional fantasy sports are unfounded

While conceding that traditional fantasy sports contests are legal, the NYAG tries to distinguish them from daily fantasy sports by noting that “FanDuel’s customers are clearly placing bets on events outside of their control or influence, specifically on the real-game performance of professional athletes.” (NYAG Letter at 1-2.) But that assertion would apply equally to *all* fantasy sports contests—season-long and daily. FanDuel’s arranging for contests to run over a shorter period of time does not distinguish FanDuel’s contests in any factually or legally meaningful sense from the traditional fantasy contests that the NYAG acknowledges are entirely legal. UIGEA, the federal statute recognizing that fantasy sports are not gambling, also makes no distinctions based on the duration of the game. *See* 31 U.S.C. § 5362(1)(E)(ix).

To the extent the NYAG is asserting that success in DFS is determined by chance events outside of the participants’ control, that is simply a restatement of his contention that DFS is a game of chance rather than one of skill. With DFS as with other fantasy sports, however, “[t]he success of a fantasy sports team depends on the participants’ skill in selecting players for his or her team” and in the participant’s ability to apply his or her sports knowledge more skillfully than his or her opponents. *Humphrey*, 2007 WL 1797648, at *2. That is why, as the NYAG himself emphasizes, some DFS players win more often than others. (NYAG Letter at 2.)

There is equally no merit to the NYAG’s claim that FanDuel’s DFS contests constitute illegal gambling because they are “designed for instant gratification, stressing easy game play and no long-term strategy.” (*Id.* at 2.) DFS’s practice of offering more frequent individual contests than traditional fantasy sports has no bearing on the relative role of skill and chance.

The ease with which a participant can compete is similarly irrelevant to an analysis of whether DFS constitutes illegal gambling; FanDuel's improvement on traditional fantasy sports contests by making them more user-friendly does not make them illegal. In many respects, the short duration of FanDuel's contests allows for a greater exercise of skill, and involves less chance, than contests that play out over a full season, because the participant has more available information (from team and player matchups to injury status and weather) about the factors that may affect the performance of the rostered player in particular games. By contrast, in season-long fantasy, similar information is unavailable at the most critical time of player selection, the draft or auction that forms rosters to which users are largely tied throughout the season. (*See* Complaint ¶ 29.) At the same time, the weekly roster selection process demands a degree of attention to details about many individual players and teams that is central to DFS's core appeal to sports enthusiasts, a fact evidenced by the scores of fantasy sports analysis services and fantasy experts who regularly assert the more difficult decision-making involved in setting weekly DFS lineups over weekly traditional lineups.

FanDuel has attracted over a million users because the participants enjoy the games and relish the establishment of a fantasy roster and the competition with other sports fans. (*Id.* at 30.) FanDuel, like other fantasy sports providers, also benefits sports teams and leagues by expanding the number of games that fans follow and enhancing their enthusiasm for and enjoyment of sports. (*Id.* at 30.) There is no merit to the NYAG's sudden assertion that this popular pastime, engaged in by hundreds of thousands of dedicated and law-abiding New York sports fans, has been illegal all along.

CONCLUSION

For these reasons, FanDuel requests that the Court issue an order temporarily restraining Defendants from taking any enforcement actions based on any assertion that FanDuel's fantasy

sports games are unlawful, pending decision on Plaintiff's preliminary injunction motion; and ordering the Defendants to show cause why a preliminary injunction should not issue; and granting further relief as set forth in the proposed Order submitted herewith.

Dated: New York, New York
November 16, 2015

Respectfully submitted,

Of Counsel:

Marc Zwillinger*
ZWILLGEN PLLC
1900 M Street NW, Suite 250
Washington, DC 20036
**Not admitted in New York*

/s/ John S. Kiernan
John S. Kiernan
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
Phone: (212) 909-6000

Matthew E. Fishbein
Eric R. Dinallo
Carl Micarelli
W. David Sarratt

Attorneys for Plaintiff FanDuel Inc.