To be Argued by:
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New York Supreme Court

Appellate Division—First Department

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

Plaintiff-Respondent,

– against –

DRAFTKINGS, INC.,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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QUESTIONS PRESENTED

1. Whether the New York Attorney General met his burden of establishing that he was likely to prove that DraftKings' daily fantasy sports contests are "contests of chance" under Section 225.00 of the New York Penal Law when the undisputed evidence demonstrated that skill, not chance, is the dominant factor in determining the winner of such contests and that daily fantasy sports are not meaningfully different from season-long fantasy sports, which the Attorney General concedes are legal.

The trial court erred in answering yes.

2. Whether the New York Attorney General met his burden of establishing that he was likely to prove that a daily fantasy sports contestant "stakes or risks something of value upon the outcome of" a daily fantasy sports contest under Section 225.00 of the Penal Law by paying an entry fee to participate in the contest, when under binding precedent a contestant who pays an entry fee for the opportunity to compete for a fixed prize does not engage in gambling.

The trial court erred in answering yes.

3. Whether the New York Attorney General met his burden of establishing that the balance of equities weighed in favor of granting a preliminary

injunction where Attorney General submitted no admissible evidence that tends to prove that DraftKings' daily fantasy sports contests harm anyone, the record demonstrated that a shutdown of DraftKings' operations throughout New York State would cause significant irreparable harm to DraftKings, and the injunction sought by the Attorney General would disrupt the longstanding status quo.

The trial court erred in answering yes.

NATURE OF THE CASE

For nearly a decade, New York residents have enjoyed playing daily fantasy sports ("DFS")—without any state official ever before suggesting that they might be illegal. Now, New York's Attorney General ("NYAG"), after years of that office's silent acceptance, has decided to take the position that DFS contests amount to "gambling" under New York law. But there was no reason to rush to judgment and shut down DraftKings *immediately*, before the NYAG's novel legal theory could be thoroughly examined by the New York courts, particularly where the NYAG's position—adopted by the trial court in issuing the preliminary injunction order—rests on an unprecedented, and erroneous, construction of the gambling statute that is at odds with the way New York courts have interpreted it for more than a century. The preliminary injunction was entered without hearing any testimony, without making findings of fact, and without addressing the extensive evidence offered by DraftKings.

In this case, affirming the preliminary injunction order entered by Justice Mendez below would immediately force DraftKings to shutter its business in New York, depriving its 375,000 New York customers of the contests they have enjoyed for years, and causing DraftKings to lose millions of dollars in unrecoverable revenue while irreparably harming its relationships with its customers, investors,

business partners, professional sports leagues, and the general public. R. 203 ¶ 8; R. 217 ¶¶ 68–70; R. 824 ¶ 7; R. 1349–50 ¶¶ 4–6.

Rather than identify the concrete and immediate harms necessary to obtain a preliminary injunction, the NYAG instead resorted to conclusory attacks and speculation, stretching to tie DFS contests to everything from child abuse to over-eating, among other things. *See* R. 1145. DFS contests have been offered openly, honestly, and permissibly in New York for nearly a decade; and if the NYAG had actual *evidence* that they caused imminent public harm, he would have identified it to the trial court. There is none—which is sufficient reason alone to vacate the preliminary injunction order.

In the court below, DraftKings emphasized four points:

(1) The NYAG offered no evidence—none—in support of the NYAG's alleged basis for a preliminary injunction (*i.e.*, that daily fantasy sports contests are either a "contest of chance" or a "future contingent event" whose outcome is beyond the "control or influence" of DFS contestants), and urged the court to adopt the wrong standard—namely, that *any* element of chance renders a game a "contest of chance"—rather than evaluating whether chance is the "dominating" or "material" element.

(2) The undisputed evidence, including the unrebutted affidavits of three experts, showed that the outcome of DFS contests is significantly "influenced" or "controlled" not by chance but by the knowledge and skill of DFS contestants.

(3) The NYAG explicitly conceded that season-long fantasy sports contests are lawful. The trial court made no attempt to reconcile the NYAG's explicit concession that season-long fantasy sports contests are lawful with the undisputed evidence that the outcomes of DFS contests are even more "influenced" and "controlled" by the knowledge and skill of DFS contestants than are season-long contests.

(4) New York case law is settled that the contest hosts can charge entry fees and award prizes to participating contestants without violating New York's gambling laws.

The NYAG failed to confront these dispositive bars to the relief he sought in the trial court.

A motion for preliminary injunction, as the trial court recognized, must be based on "undisputed facts". R. 19; *accord Residential Bd. of Managers of the Columbia Condominium v. Alden*, 178 A.D.2d 121 (1st Dept. 1991). None of the affidavits or other materials that the NYAG introduced below addressed the central question of whether DFS contests are illegal contests of chance or contests the outcome of which is beyond the influence of DFS contestants.

Rather than confront the undisputed evidence that the skill of DFS contestants in selecting fantasy rosters "influences," and generally "controls," the "outcomes" of DFS contests, the NYAG claimed that the minimal amount of chance involved is irrelevant. R. 35:25–36:4. There is no case that so holds; all precedent is to the contrary.[1] Since every contest has some element of chance, the NYAG's rewriting of New York law would effectively outlaw every contest for which an entry fee is paid and a prize awarded.

The NYAG's rationalizations attempting to avoid the necessary consequences of his repeated concessions that *season-long* fantasy sports are legal, while contending that DFS is not, have become increasingly tenuous and incoherent with each successive filing. The obvious truth is that there is no difference between the two under New York law. It is the same game, differentiated by the period of time over which each is played. The undisputed evidence is that DFS contestants exercise even more influence and control over the outcome of their contests than do season-long contestants. The NYAG contended that season-long contest operators *sometimes* charge no entry fee and contestants *sometimes* collect no prizes. R. 93:16–22. But the NYAG nowhere explained how these marginal differences could even conceivably have any legal significance.

[1] *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 170–71 (1904; *People v. Jun Feng*, 34 Misc. 3d 1205(A), Slip Op. 50004(U), at *4 & n.1 (Crim. Ct. Kings County 2012); *People v. Li Ai Hua*, 24 Misc. 3d 1142, 1145 (Crim. Ct. New York County 2009).

The very analogy chosen by the NYAG to try to show that DFS is different from contests that are concededly not illegal gambling under New York law—namely, horse racing—in fact proves just the opposite.

In his brief to the trial court, the NYAG conceded that the Court in *People ex rel. Lawrence v. Fallon* ("*Fallon I*"), 4 A.D. 82, 88 (1st Dep't 1896), *aff'd*, 152 N.Y. 12 (1897), held that "paying to enter your own horse in" a race is not gambling where "horse owners paid fees to enter races organized by a racing association that announced predetermined prizes to be handed out to the winners." R. 573. The NYAG tried to distinguish *Fallon* by stating:

> 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.

Id.

However, that argument fails because the "competing parties" in a DFS contest *are* the DFS contestants who pay an entry fee and compete for a prize. Indeed, the plain text of Section 225 makes clear that the "future contingent event" over which a player must have some "control or influence" is the contest for which the prize is awarded—here, the DFS contest. Just as the horse owner competes based on the performance of his horse and jockey, so does the DFS player compete

based on the performance of his selected fantasy team. In his earlier brief to this Court, the NYAG then tried to distinguish the *Fallon* rule by asserting:

> The horse owner retained some degree of control or influence over the performance of his horse on the track—through his choice of a trainer, a jockey, etc.—even though chance undoubtedly played some role in the outcome of the race itself.

R. 1134 n.10. That argument also fails because just as a horse owner exercises "control or influence" over whether the owner wins a prize by the owner's "choice of a trainer, a jockey, etc.," DFS contestants exercise even more "control or influence" over whether they win a prize by their choice of a roster. While no horse owner wins anything close to a majority of his or her races, skilled DFS contestants repeatedly win contest after contest.

The NYAG's horse race example also confirms that the relevant "control or influence" is over the selection of the horse or roster, not its later performance. Once the race starts, the horse owner has no control over what happens—not over what happens as the result of chance (a cracked hoof coming out of the starting gate, a splash of mud on the jockey's goggles, being caught in a box or being bumped) or what happens as the result of the skill of the jockey the owner has picked.

Congress examined these very issues when drafting the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA") and specifically concluded that fantasy sports contests involving entry fees and prizes are not unlawful gambling

because fantasy sports are games of skill and do not involve wagering on the outcome of real-life sporting events. 31 U.S.C § 5362(1)(E)(ix). Although the UIGEA does not preempt state law, Congress' reasoned judgment on the questions at issue here is instructive and sharply undercuts the NYAG's erroneous position.

DraftKings is likely to prevail on the merits of this case and will suffer irreparable financial and reputational harm if the preliminary injunction goes into effect. Moreover, the balance of equities tip decidedly in DraftKings' favor, as the NYAG cannot claim any emergency here, but DraftKings will be put out of business in New York if the trial court's preliminary injunction is affirmed. Daily fantasy sports contests have been offered in New York for nearly a decade without objection and without any harm to the public. This Court should therefore maintain the status quo by reversing Justice Mendez' order.

STATEMENT OF FACTS

A. New Yorkers Have Openly Played Fantasy Sports For Decades—And Daily Fantasy Sports For Years—Without Any Suggestion That They Are Engaged In Illegal Gambling.

Fantasy sports have been a national pastime since at least the 1960s. Today, more than 50 million Americans play fantasy sports. Fantasy sports provide sports fans with an opportunity to assemble a fantasy team of athletes in a particular sport to compete against other fantasy teams. R. 836-37 ¶¶ 6, 7. Some fantasy contests, known as season-long fantasy sports, span an entire sports season—usually four to

six months. R. 824 ¶ 5. Many season-long fantasy sports providers charge contestants entry fees and award cash prizes to successful contestants. R. 909–12. The NYAG admits that season-long fantasy sports have been "enjoyed and legally played by millions of people nationwide, including in New York," R. 119 ¶ 1, and "the legality of traditional fantasy sports has never been seriously questioned in New York," R. 777.

DFS contests, which span a day or a week, are a natural outgrowth of season-long fantasy sports. R. 836 ¶ 6. DFS contests have been offered to New Yorkers at least since June 2007. R. 824 ¶ 4. Since that time, many companies have entered the DFS marketplace, including FanDuel (founded in 2009) and DraftKings (founded in 2012). *Id*. DraftKings and the other operators of DFS contests have operated openly, publicly, and legally in New York since their inception without any suggestion that they are engaged in illegal gambling.

DraftKings currently serves more than two million customers across 44 states, including hundreds of thousands in New York. R. 200 ¶ 2; R. 823 ¶ 3; R. 1349 ¶ 4. It has financial support from partnerships with major sports entities that have strongly opposed sports gambling but endorse fantasy sports competitions, such as Major League Baseball, the National Hockey League, Major League Soccer, and the owners of numerous New York-based sports teams. R. 824 ¶ 7, 1352 ¶ 15. DraftKings offers a variety of contest types in eleven

different sports and e-sports. R. 823 ¶ 3; R. 837 ¶ 7. It offers both cash contests, for which DraftKings customers pay an entry fee, and free contests, for which they pay nothing. R. 826 ¶ 12. Winners of both types of contests receive prizes. *Id*. DraftKings announces the terms of the prizes before customers decide to pay an entry fee to enter a contest. *Id*. The terms of the prize, including the amount offered to winners, does not change after the announcement. R. 826 ¶¶ 12–13. DraftKings does not itself participate in the contests. R. 824 ¶ 6.

B. Fantasy Sports Are Contests Of Skill.

In both season-long and DFS games, contestants act as "General Managers" of a fantasy team in a particular sport in competition with other contestants. R. 824 ¶ 5; R. 836 ¶ 6. Contestants select a combination of real-world athletes to fill virtual positions on a fantasy sports team, regardless of what team the athletes play for in real life, R. 824 ¶¶ 5, 8, and score "points" based on the performance statistics of those athletes in numerous categories across multiple real-world sporting events, R. 824–26 ¶¶ 8–11. A contestant's score is the sum of the fantasy points generated by the athletes in the contestant's lineup.

A DFS contestant wins if his roster as a whole accrues more points than other rosters at the end of the contest period. *Id.* Thus, the outcome of a DFS contest—as with all fantasy sports contests—does not depend on any particular

athlete's hitting any particular benchmarks of individual performance *(e.g.*, throwing at least three touchdowns or gaining at least 100 yards). *Id.*

The "players" in a fantasy sports contest are not the real-world athletes, but rather the contestants who assemble fantasy teams and compete against other fantasy sports contestants. Because it is the unique combination of athletes on a fantasy team that dictates success, each fantasy sports contestant is able to exert substantial control and influence over the results of the contest by selecting his fantasy lineup. *See* R. 837–42 ¶¶ 8–23; R. 903–04 ¶¶ 6–12.

Success at fantasy sports—and DFS in particular—is determined by how skillfully a contestant assembles his lineup. A successful DFS contestant must exercise the skills of the General Manager of a team in the relevant sport, including research, preparation, and strategy accounting for variables including salary cap, athletes' historical performance statistics, strategic tendencies of coaches and athletes, athletes' consistency, injury reports, game psychology, and team and athlete matchups. R. 837 ¶¶ 10–11; R. 903–04 ¶¶ 6–11. DFS contestants rely on sports knowledge and evidence-based analytics to assemble fantasy rosters, R. 824–25 ¶¶ 5, 8–10, and the most successful DFS contestants expend significant time and effort honing their analytical skills, R. 837–42 ¶¶ 8–23; R. 903–04 ¶¶ 6–12.

The record evidence below establishes that DFS contests are dominated by skill, not chance, *id.*, demonstrated by the undisputed fact that a small group of skilled contestants consistently wins.

For example, one study of daily fantasy baseball outcomes by Ed Miller, an MIT-trained engineer and noted author of gaming strategy books, and Daniel Singer, the leader of McKinsey & Company's Global Sports and Gaming Practice, found that just 1.3% of contestants won 91% of contest winnings over the period studied. R. 841 ¶ 21. Miller and Singer identified two primary ways in which skilled DFS contestants succeed over unskilled ones: (1) employing lineups that create covariance by choosing a combination of athletes intended to produce the outcomes necessary to win a large field tournament; and (2) using sophisticated models to optimize lineups by projecting which athletes are most likely to under- or over-perform relative to their "salaries" on a given day. R. 841 ¶ 22. Another study conducted by a University of Chicago professor of statistics and econometrics concluded that "it is overwhelmingly unlikely that the performance of any exceptionally performing" contestant "could be due to chance." R. 888 ¶ 17. And yet another study comparing the performance of top-earning contestants against randomly generated lineups found that the top contestants outperformed the random lineups between 82% and 96% of the time, depending on the sport. R. 839–40 ¶¶ 14–17.

Certain elements of DFS increase the sophistication of the contest, reduce the effect of chance, and increase each contestant's ability to control his degree of success, as compared to season-long competitions. R. 825 ¶ 9, 838 ¶ 13. These elements include: (a) the shorter duration of the contest, which minimizes the impact of variables such as player injury and unexpected weather patterns; (b) a "salary cap" limiting the sum of the salaries of an individual lineup, which requires contestants to balance an athlete's expected value against his "salary" and account for the opportunity costs of other real-world athletes who are not selected; and (c) the ability for multiple DFS contestants to select the same athletes (subject to the salary cap)—in lieu of a sequential draft that prevents contestants from selecting athletes another contestant has already chosen—which requires contestants to employ complex strategies and game theory when selecting a lineup. R. 824–25 ¶¶ 5, 8–10.

The NYAG offered no evidence below, and the trial court relied on no evidence in the record, to rebut the skill-based nature of DFS contests. In fact, the NYAG acknowledges that DFS contestants "may exercise some skill," R. 1110, and his own investigation confirmed that "the top one percent of DraftKings' winners receive the vast majority of the winnings." R. 777.

PROCEDURAL HISTORY

Daily fantasy sports companies have operated DFS contests in New York openly and transparently for nearly a decade. DraftKings has done so for almost four years. Before the NYAG's abrupt announcement, no state prosecutor or regulator had ever questioned the legality of fantasy sports under New York law.

On October 6, 2015, the NYAG began investigating DraftKings for an unrelated matter. R. 827 ¶ 17. DraftKings fully cooperated with the NYAG's investigation and repeatedly met with the NYAG's representatives between October 9 and 29. R. 827 ¶ 18. Nevertheless, on November 10, the NYAG issued and publicly released cease-and-desist letters demanding that DraftKings (and one of its competitors, FanDuel) effectively shut down New York operations. R. 776, 778–79.

The NYAG's letter asserted that he intended to file suit "to enjoin repeated illegal and deceptive acts and practices" and gave DraftKings five days to explain why he "should not initiate any proceedings." R. 776, 778–79. On November 13, DraftKings filed suit in Supreme Court (New York County) seeking, among other things, declaratory and injunctive relief against the NYAG. R. 15; R. 199–226. On November 16, DraftKings moved for a temporary restraining order and preliminary injunction in order to preserve the status quo. *See* R. 16; R. 740. The trial court denied the temporary restraining order that day. *See* R. 16.

On November 17, the NYAG filed this action in Supreme Court (New York County) and moved for a preliminary injunction seeking to enjoin DraftKings' operations in the State of New York, largely on the basis of *ipse dixit* assertions that DFS contests are a form of illegal gambling and unsupported hearsay in two affidavits alleging various public harms purportedly caused by DFS. R. 16; R. 119–538. In opposition, DraftKings submitted affidavits and studies from respected statisticians, experts, and top players demonstrating that DFS contests are games of skill in which a small minority of the most skilled contestants win the vast majority of the time. R. 795–821; R. 839–41 ¶¶ 14–20; R. 860–82; R. 883–900; R. 901–18.

On November 25, the trial court heard argument on the NYAG's motion for a preliminary injunction. R. 25–102. The court did not hold an evidentiary hearing or hear live testimony. On December 11, the court issued a preliminary injunction requiring DraftKings to shut down all operations in New York, ruling with little underlying explanation that the "NYAG has established the likelihood of success warranting injunctive relief" and that the "balancing of the equities are in favor of the NYAG and the State of New York." R. 22.

That same day, DraftKings appealed, and Justice Paul G. Feinman of this Court issued an interim stay of the trial court's order granting the preliminary injunction. R. 924. After further briefing, a motion panel comprised of Justices

David Friedman, Dianne T. Renwick, David B. Saxe, and Karla Moskowitz granted a stay of the preliminary injunction order pending this Court's hearing and determination of DraftKings' appeal, on the condition that the appeal be perfected for the May 2016 term, which DraftKings has now done. R. 1583; *see also* R. 1122 (noting that a stay pending appeal will be granted only where the movant has demonstrated likelihood of success on the merits of its appeal, irreparable harm absent a stay, and the balance of equities in its favor).

LEGAL STANDARDS

To obtain a preliminary injunction, the moving party must show: "(1) likelihood of success on the merits; (2) irreparable injury absent the injunction; and (3) a balancing of the equities in its favor." *Matter of 35 N.Y.C. Police Officers v. City of New York*, 34 A.D.3d 392, 394 (1st Dep't 2006). Because a preliminary injunction is a "drastic remedy," it should "only be granted if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers." *Koultukis v. Phillips*, 285 A.D.2d 433, 435 (1st Dep't 2001); *accord Gulf & W. Corp. v. N.Y. Times Co.*, 81 A.D.2d 772, 773 (1st Dep't 1981) (right to injunctive relief must be demonstrated by a "certain[ty] as to the law and the facts").

Conclusory allegations do not satisfy a movant's burden: "Proof establishing these elements must be by affidavit and other competent proof, with evidentiary

detail." *Scotto* v. *Mei*, 219 A.D.2d 181, 182 (1st Dep't 1996). The purpose of a preliminary injunction is to preserve the status quo. Thus, where a preliminary injunction would *change* the status quo, such as by shutting down a business, it should issue only in "extraordinary circumstances." *Village of Westhampton Beach v. Cayea*, 38 A.D.3d 760, 761 (2d Dep't 2007); *see also O'Hara v. Corp. Audit Co., Inc.*, 161 A.D.2d 309, 310 (1st Dep't 1990) (holding that granting a preliminary injunction where "conflicting affidavits" present "sharp issues of fact" constitutes reversible error, particularly where such relief "upsets, rather than maintains, the status quo of the past ten years").

An order granting a preliminary injunction must be reversed if the trial court erred in its interpretation of the governing law, *see Pringle v. Wolfe*, 88 N.Y.2d 426, 432 (1996), or otherwise abused its discretion, *see Heldman v. Douglas*, 33 A.D.2d 695, 695 (2d Dep't 1969).

ARGUMENT

In granting the preliminary injunction, the trial court committed multiple errors of law and fact and abused its discretion. The NYAG did not come close to carrying his burden of demonstrating, on "the law and the undisputed facts found in the moving papers," *Koultukis*, 285 A.D.2d at 435, that each of the three requirements for a preliminary injunction was satisfied. In fact, none of the

requirements was satisfied. Accordingly, the preliminary injunction should be vacated.

A. The Trial Court Erred In Finding That The New York Attorney General Is Likely To Succeed On The Merits.

DraftKings—not the NYAG—is likely to succeed on the merits of this case, because the NYAG's position is irreconcilable with the plain terms of the anti-gambling statute and the overwhelming force of precedent.[2] N.Y. Penal Law § 225.00(2) defines illegal "gambling" as follows:

> A person engages in gambling when he [1] stakes or risks something of value upon the outcome of [2] a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

Both statutory criteria must be met. Here, neither is.

1. The Court Applied The Wrong Legal Standard, And Ignored The Undisputed Evidence, In Finding That Daily Fantasy Sports Contests Are Games of Chance.

The trial court erred in concluding that the NYAG was likely to prove that daily fantasy sports are a "'contest of chance' as currently stated in Penal Law

[2] The trial court further erred in finding that the NYAG is likely to succeed in demonstrating that DFS violates the prohibition against gambling in Article I, § 9 of the New York Constitution. R. 22. It is "manifest" that "this provision of the Constitution was not intended to be self-executing," *People ex rel. Lawrence v. Fallon* ("*Fallon II*"), 152 N.Y. 12, 19 (1897), and the Constitution expressly delegates the duty of defining gambling to "the legislature," N.Y. Const. art. I, § 9. Because the NYAG is not likely to succeed on the statutory merits, it cannot succeed on the constitutional merits.

§225.00 [1],[2]." R. 22. This conclusion had no support in the record and ignored over a century of precedent.

a. A "Contest of Chance" Is One Where Chance Is the *Dominating Element*.

A "'contest of chance'" is "any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." N.Y. Penal Law § 225.00(1). The fact that chance has some degree of influence on the outcome of a game does not prove that the game is a "contest of chance," or else virtually every contest—even those that courts have long held to be lawful—would be rendered illegal. *See People v. Cohen*, 160 Misc. 10, 11 (Magis. Ct. Queens Borough 1936) (explaining that immaterial elements of chance are present in all games of skill, as "there is hardly a game known to man that is purely skill where the slightest element of chance has on place"). For a game to be illegal gambling, chance must affect the game to a "material degree." *Li Ai Hua*, 24 Misc. 3d at 1145 (explaining that "if the outcome depends in a material degree upon an element of chance, the game will be deemed a contest of chance" (internal quotation marks omitted)); *see also, e.g.*, *People v. Stiffel*, 61 Misc. 2d 1100, 1100 (App. Term 2d Dep't 1969) (per curiam) (reversing conviction for gambling on billiards because "[w]agering by the participants on the outcome of a game of skill is not gambling") (applying *Lavin*, 179 N.Y. at 170-71).

Under settled law, the materiality requirement is satisfied only if chance is "'the *dominating element* that determines the result of the game.'" *Li Ai Hua*, 24 Misc. 3d at 1145 (quoting *Lavin*, 179 N.Y. at 170-71) (emphasis added); *see also* Crim. Law in New York § 31:4 (4th ed. 2014) ("To determine if the game is one of chance, the court will look at the dominating element that determines the result of the game.") (internal quotation marks omitted); 62 N.Y. Jur. 2d Gambling § 3 (2015) ("The test of the character of a game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the results of the game."); *S. & F. Corp. v. Wasmer*, 195 Misc. 860, 865 (Sup. Ct. Onondaga County 1949) (same).[3]

The trial court erred in failing to apply the "dominating element" test of materiality. The trial court also erred in holding that the NYAG was likely to carry his burden of proof at trial without *any* findings or analysis or evidence that any element of chance in DFS was material.

No court has ever suggested that the role of chance predominates over the role of the contestant's skill in fantasy sports. In fact, the only court to have addressed this issue reached the opposite conclusion:

> The success of a fantasy sports team depends on the participants' skill in selecting players for his or her team, trading players over the course of the season, adding and dropping players during the course of the

[3] Although the New York gambling statute was amended in certain respects in 1965, the appropriate test has not changed, as evidenced by the post-1965 authorities cited above.

> season and deciding who among his or her players will start and which players will be placed on the bench.

Humphrey v. Viacom, Inc., No. 06-2768, 2007 WL 1797648, at *2 (D.N.J. June 20, 2007).

While the trial court distinguished *Humphrey* on the basis that it involved season-long fantasy sports contests, R. 20, that is a distinction without a difference—the two types of fantasy sports contests are identical in all ways relevant to the statutory definition of gambling. Both require the same analytical skillsets for success; both involve contests in which contestants pay an entry fee for each lineup, select a lineup of fantasy players, and compete for prizes; and both types of contests are run by third-party, for-profit providers. Indeed, the NYAG conceded at oral argument below that there is "no distinction about whether daily fantasy sports is more or less dependent on skillful decisions than traditional fantasy sports leagues." R. 88:9–12. Season-long contests, as a closely analogous and indisputably legal game of skill, therefore provide an obvious point of reference for the legality of daily fantasy sports. Yet the trial court offered no substantive explanation for why the reasoning of *Humphrey* should not apply with equal force to daily fantasy sports.

b. The Trial Court Ignored DraftKings' Overwhelming, Unchallenged Evidence That Chance Is Immaterial In DFS Contests.

In addition to applying an incorrect legal standard, the trial court also erred by (1) failing to adequately consider the record evidence introduced by DraftKings and (2) failing to give adequate weight to the noticeable *absence* of evidence from the NYAG. That the court overlooked key evidence is obvious from its incorrect finding that "Fanduel, Inc. and Draftkings, Inc., do not refute the evidence provided by the NYAG" regarding the amount of chance that exists in DFS games. R. 19. This could not be further from the truth: the *only* statistical evidence in the record below examining the outcomes of actual DFS games overwhelmingly confirms that skill is the dominating element in determining the outcome of DFS contests.

For example, Professor Daniel L. Rubinfeld, Professor of Law at New York University Law School and Robert L. Bridges Professor of Law and Professor of Economics (Emeritus) at the University of California, Berkeley, analyzed the issue from a quantitative perspective. He began by noting that if DFS involved substantial skill (which differed across players), then "it is very likely that some players will substantially and persistently outperform other players." R. 798 ¶ 11. To that end, Professor Rubinfeld ran a simulation showing that the "large observed differences in performance across DraftKings clients are consistent with some

players persistently out-performing other players over time." R. 799 ¶ 12. Professor Rubinfeld concluded "based on the evidence in the record at this point that while there is an element of chance in DFS games offered by DraftKings, as a general rule, winning a prize depends heavily on skill." R. 798 ¶ 8.

Likewise, in a study examining the win percentage of 28 of DraftKings' most successful players, Professor Zvi Gilula, former Chair of the Department of Statistics at Hebrew University and current Visiting Professor of Statistics and Econometrics at the University of Chicago, concluded that "it is overwhelmingly unlikely that the performance of any exceptionally performing client could be due to chance." R. 888 ¶ 17. For example, one player considered in Professor Gilula's study played in 70 MLB fantasy contests and won in all of them. R. 899. The probability that such a record could occur by chance is "less than one in one million raised to the power of 50" (*i.e.*, less than 1 divided by 10^{300}). R. 888 ¶ 16. Based on these findings, Professor Gilula concluded that "chance is overwhelmingly immaterial in the probability of winning the fantasy games offered by DraftKings." R. 888 ¶ 17. Similarly, Ed Miller and Daniel Singer, concluded that just 1.3% of players won 91% of DFS player profits in the first half

of the 2015 MLB season, demonstrating that DFS suffered from "the curse of *too much* skill."[4] R. 841 ¶¶ 21–22 (emphasis added).

The NYAG did not offer, and the trial court did not identify, *anything* to rebut this overwhelming evidence establishing that DFS are games of skill. In fact, the NYAG offered no evidence whatsoever to support his contention that the degree of chance involved in DFS games is "material." Instead, the NYAG argued—without citing to any evidence and contrary to statutory authority—that "skill" did not matter in the trial court's analysis because it was only "skill at gambling." R. 35:25–36:4. Congress, in drafting the UIGEA, rejected this reasoning. After extensive study and consideration, Congress concluded that fantasy sports reflect the "relative knowledge and skill of the participants" and are in no way equivalent to gambling on the outcome of a real-world sporting event or performance. 31 U.S.C. § 5362(1)(E)(ix). The NYAG's assertion to the contrary, of course, assumes its own conclusion—that DFS contests are illegal gambling—without attempting to apply the relevant legal standard. The trial court's grant of a preliminary injunction based on this circular reasoning squarely contradicts the

[4] Miller and Singer identified two important ways in which skilled users succeed: they employ lineups that take advantage of covariance by choosing multiple players from the same real-life team in order to produce the extreme outcomes that are necessary to win an occasional "big score"; and they exploit salary cap pricing inefficiencies by using sophisticated models to optimize their lineups by projecting which players are most likely to under- or over-perform relative to their salary on a given day. R. 841 ¶ 22.

language of Section 225.00 and well-settled case law; this constitutes reversible error.

The NYAG's argument relies wholly on *ipse dixit* claims about the similarity of DFS to sports betting. But the NYAG offered no evidence supporting his assertion that the influence of skill in DFS is comparable to the skill involved in sports betting. For example, the NYAG introduced no evidence that 1% of skilled sports gamblers receive upwards of 90% of winnings on baseball bets, or that top sports gamblers outperformed randomly placed bets as much as 82% and 96% of the time, as DraftKings showed for various DFS contests. *See* R. 839–41 ¶¶ 14–17, 21. The NYAG has no evidence or basis for asserting that the role of skill in daily fantasy sports is comparable to the role of skill in sports betting. *See Li Ai Hua*, 24 Misc. 3d at 1146–47 (granting motion to dismiss illegal gambling charge where there was "no support given for the claim that mah jong is a game of chance" other than the detective's say-so and documents containing inadmissible hearsay). A preliminary injunction shutting down a business simply cannot be based on unproven speculation and specious analogies.

Indeed, all record evidence militated in favor of finding that DraftKings, not the NYAG, was likely to succeed on the merits. Even the NYAG's own investigation confirmed that "the top one percent of DraftKings winners receive the vast majority of the winnings"—a finding completely at odds with the

proposition that DFS contests amount to illegal gambling because they are games of chance.[5] R. 777; *see also People v. Hunt*, 162 Misc. 2d 70, 73 (Crim. Ct. N.Y. County 1994) ("Differing skill levels, however, do not transform the game into a contest of chance.").

Moreover, the NYAG's concession that the legality of season-long fantasy sports "has never been seriously questioned in New York," R. 777, again proves fatal to his position on the merits—this time in light of the record evidence. There is no logical basis for construing the Penal Law to permit season-long fantasy sports while prohibiting daily fantasy sports given the evidence before the trial court. The record below demonstrates that the rules of DFS are designed to ensure that the impact of chance on the outcome is *reduced* when compared to season-long fantasy sports. These features in DFS contests include:

(1) *Frequency of selection.* In season-long fantasy sports, lineups are selected only *once*, at the start of the season, exposing season-long fantasy teams to the effect of a full season's barrage of weather and injury events. By contrast, in

[5] In criticizing this "disproportionate" result, the NYAG confuses "chance" in the probabilistic sense with "chance" meaning randomness or arbitrariness, as used in the New York Penal Law. As one court explained, "one could say that an amateur tennis player facing a title-holding champion may not have a 'chance' of winning. In that context, the term 'chance' denotes the probability of winning that the amateur has, not that tennis is a game of chance as opposed to a game of skill. Similarly, the People's argument, that because the player has a one in three chance of winning, the game is one of chance, rests on a definition of the term 'chance' as it relates to probabilities. As almost all games, involving either skill or chance, or a combination thereof, can be reduced to a statistical probability, this argument does not address the issue before the court." *Hunt*, 162 Misc. 2d at 73.

DFS, the lag between athlete selection and competition completion is much shorter (*e.g.*, days or weeks), allowing the contestant to minimize the role of unexpected injuries and better take into account predictions regarding weather. R. 838 ¶ 13.

(2) *Athlete choice.* In season-long fantasy sports, contestants assemble teams by participating in a draft, in which each contestant takes turns claiming exclusive "ownership" of an athlete for fantasy team composition purposes. The randomly assigned positions in the drafting order introduce an element of chance that can affect the season-long competition outcome. DFS contests eliminate this element of chance by allowing each contestant to select any athlete. R. 825 ¶ 9.[6]

(3) *Salary cap.* DFS contests, unlike season-long fantasy sports, have a fantasy salary cap limiting the total amount of fantasy dollars any contestant can spend on the roster. This economic constraint requires contestants to strategize by choosing those athletes likely to provide the most value for their assigned salaries. R. 825 ¶ 9–10.

Finally, to the extent that the trial court adopted the NYAG's argument that weather, injuries, and similar factors render DFS a contest of chance, the trial court did not address the fact that such factors affect numerous games of skill—

[6] Participants cannot trade athletes in DFS contests, but the relatively short window between the selection of athletes and DFS contests eliminates the utility of trades. Instead, participants in DFS contests are permitted to substitute fantasy players up to the time when the event involving those players begins.

including season-long fantasy sports—without converting them into contests of chance. Even real-life athletes have no control over the weather or injuries. A wide receiver, for example, cannot control a sudden gust of wind affecting the quarterback's throw, and a slalom skier has no control over the icy conditions on the ski slopes. Yet the potential influence of a gust of wind or icy mountain does not transform football or skiing into contests of chance; they are still contests in which skill is the "dominating element." Because nothing in the record suggested that chance is the dominating element in daily fantasy sports—and the record evidence in fact demonstrated the opposite—the court below erred by holding that the NYAG was likely to carry his burden of proof at trial.

2. The Trial Court Failed To Apply Binding Precedent In Holding That Entry-Fee-Paying Daily Fantasy Sports Contestants Stake Something Of Value "Upon The Outcome" Of The Game.

Under Section 225.00(2), an activity is not illegal gambling unless its participants "stake[ ] or risk[ ] something of value upon the outcome" of a certain event. The trial court erred in concluding, contrary to longstanding precedent, that contestants meet that statutory requirement when they pay entry fees to compete in DFS contests run by DraftKings. *See* R. 20 ("The payment of an 'entry fee' as

high as $10,600.00 on one or more contests daily could certainly be deemed risking 'something of value.'").[7]

a. A Predetermined Entry Fee Is Not A "Bet" Or "Wager" Under New York Law.

New York courts have long distinguished between contests involving a "bet" or "wager," and contests where participants pay an "entrance fee for the privilege of joining in the contest" and competing for a fixed "prize." *Fallon II*, 152 N.Y. at 19. Contests involving a bet or wager, where participants place "stake[s] upon a certain event," fall within the definition for "gambling." *Id.* On the other hand, where "competing parties pay an entrance fee for the privilege of joining in the contest" and the organizer pays a fixed "prize" to the winner out of its general fund (even if the "entrance fee forms a part of the general fund"), the contest does not constitute illegal gambling. *Id.* (payment of "prize or premium" funded by entry fees held "not within the condemnation of the law relating to gambling, or illegal gaming"); *accord Harris v. White*, 81 N.Y. 532, 539-40 (1880).

[7] The trial court's focus on the size of the DraftKings entry fees—"as high as $10,600.00 on one or more contests"—is misguided. R. 20. The size of an entry fee has no bearing on whether an activity constitutes illegal gambling. Even if it did, the evidence demonstrated that the vast majority of DraftKings' New York users have never participated in a DFS contest with an entry fee exceeding $20. R. 842 ¶ 24.

Even after more than a century, the Court of Appeals' description of legal, prize-granting contests in *Fallon* forcefully demonstrates why DraftKings' entry fees are not "bets" or "wagers":

> In those, as in this, 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 in those cases, as in this, the entrance fee forms a part of the general fund from which the premiums or prizes are paid. Indeed, all those transactions are so similar to this as to render it impossible to discover any essential difference between them. . . . We are of the opinion that the offering of premiums or prizes . . . is not in any such sense a contract or undertaking in the nature of a bet or wager as to constitute gambling[.]

152 N.Y. at 19–20.

Fallon controls the result here, yet the trial court did not even cite it.

Similarly, in *Humphrey*, the court rejected a claim that a season-long fantasy sports provider that charged entry fees and awarded prizes was running an illegal gambling operation. 2007 WL 1797648. In doing so, it noted, "Courts have distinguished between *bona fide* entry fees and bets or wagers, holding that entry fees do not constitute bets or wagers where they are paid unconditionally for the privilege of participating in a contest, and the prize is for an amount certain that is guaranteed to be won by one of the contestants (but not the entity offering the prize)." *Id.* at *8. The *Humphrey* court then applied that distinction to fantasy sports, finding that the online fantasy sports operators in that case hewed to the requirements for *bona fide* entry fees. *Id*. at *7; *see also* 31 U.S.C.

§ 5362(1)(E)(ix) (fantasy sports contests involving entry fees and prizes are lawful where the prizes are established and announced in advance).

Although the trial court in this case correctly noted that *Humphrey* involved New Jersey's *qui tam* statute, that fact is helpful to DraftKings. New Jersey's *qui tam* statute permits recovery of gambling losses from "wagers, bets, or stakes," *see* N.J. Stat. Ann. §§ 2A:40-1, 40-5, 40-6; "stakes" is a term of art also used in Penal Law § 225.00 to define illegal gambling.[8] *Humphrey* analyzed whether contests involving *bona fide* entry fees constitute wagers, bets, or stakes, and it held that they do not—that they are not "gambling." 2007 WL 1797648, at *9. As with *Fallon*, therefore, the *Humphrey* decision aptly demonstrates the proper interpretation of Penal Law § 225.00, particularly as it applies to DFS contests.

Both the trial court's and the NYAG's attempts to distinguish *Humphrey*, the only case directly addressing the legality of fantasy sports, are unavailing. The trial court rejected *Humphrey* on the ground that "the New York State Penal Law does not refer to 'wagering' or 'betting,' rather it states that a person, 'risks

[8] The trial court also distinguished *Humphrey* on the basis that DraftKings contestants "pay a fee every time they play, potentially multiple times daily instead of one seasonal entry fee, with a percentage of every entry fee being paid to Fanduel, Inc. and Draftkings, Inc." R. 20 (noting that in *Humphrey*, the fee was a "nonrefundable one time entry fee"). Setting aside that companies charge entry fees in every type of fantasy sports competition (daily or otherwise), the record below demonstrates that entry fees paid in daily fantasy sports competitions are nonrefundable, unconditional participation fees, just as in season-long fantasy sports, and the NYAG does not dispute this. As explained in the court below, DraftKings does not take a percentage of these fees; it retains the fees in their entirety to cover administrative costs.

something of value.'" R. 20. But as noted above, both the New York Penal Law and the relevant New Jersey statute use the same term of art: "staking" something of value. In addition, the first prong of Section 225 makes clear that a player must stake or risk something of value "*upon the outcome*" of the game at issue for that game to be considered gambling. N.Y. Penal Law § 225.00(2). Staking something *upon the outcome* of a contest—*i.e.*, putting up money that will be returned to the player if he wins the game but forfeited if he loses—is precisely how the *Humphrey* court describes "wagering" or "betting." *Humphrey*, 2007 WL 1797648, at *8 ("A prize or premium differs from a wager in that in the former, the person offering the same has no chance of his gaining back the thing offered, but, if he abides by his offer, he must lose; whereas in the latter, each party interested therein has a chance of gain and takes a risk of loss" (quoting *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 86–87 (Nev. 1961)). The trial court's reasoning also ignores the fact that *Fallon* long ago established an analogous distinction between entry fees and bets under New York law.[9]

[9] Also misplaced is the NYAG's reliance on *Harris v. Economic Opportunity Commission of Nassau County*, 142 Misc. 2d 980, 982 (App. Term 2d Dep't 1989), *aff'd*, 171 A.D.2d 223, 227–28 (2d Dep't 1991), for the proposition that entry fees are "wagers" under the gambling statute. R. 176; R. 1137. *Harris* held that a raffle for a prize automobile met Section 225.00's definition of "lottery," which, unlike the definition of "gambling," omits the requirement that "something of value" be staked or risked "against the outcome" of a game. N.Y. Penal Law § 225.00(6). The regulation of such lotteries is far afield from this case.

b. Participants Paying An Entry Fees To DraftKings Are Not Staking Or Risking Anything Of Value.

Under the correct standard, the entry fees paid to play DraftKings' contests do not meet the statutory definition of gambling set forth in Section 225.00. DraftKings serves as nothing more than an administrator that collects entry fees, sets contest rules, calculates points, and awards prizes to the winners of DFS contests from its general operating funds. DraftKings' fees are paid unconditionally, regardless of the outcome of any contest, DraftKings does not itself participate in the contests, and DraftKings announces in advance the exact amount the winners of a particular contest will receive.[10] In this way, DraftKings' entry fees are indistinguishable from the entrance fees charged by the defendants in

[10] Despite the materials introduced by DraftKings into the record, the trial court's order evidences a fundamental misunderstanding of how DraftKings operates and how entry fees are calculated. For example, the court stated that the "amounts of the entrance fee [to enter a DFS contest] is [sic] calculated in part on salary capped [sic] at up to $50,000.00 and on the athletes [sic] perceived value." R. 18. This is entirely incorrect. Contest entrance fees are determined ahead of time and have nothing to do with the fantasy salary caps imposed on each DFS contest. R. 825–26 ¶¶ 10, 12–14. Instead, the fantasy salaries and fantasy salary cap are merely mechanics introduced into DraftKings' contests to further enhance the skill-based nature of the competitions. They have no effect on, nor are they affected by, the flat entrance fees that DraftKings charges. *Id.* The trial court's mistaken description of such a fundamental feature raises serious doubts as to the accuracy and reliability of *every* determination underlying its order.

Fallon and by the organizers of many other events that, per the *Fallon* court, "No one would dream" could be considered illegal gambling. *Fallon I*, 4 A.D. at 88.[11]

The NYAG submitted no evidence to the contrary, relying instead on conclusory allegations. In fact, not only did DraftKings' evidence go unchallenged, but the NYAG never offered any rational explanation for how DraftKings' entry fees differed from the administrative fees and so-called "side wagers" involved in admittedly legal season-long fantasy sports operations.[12] In fact, the only record evidence on the issue confirms that season-long fantasy sports providers such as ESPN offer prizes between $500 and $10,000 to top season-long fantasy sports contestants. R. 911–12.

Here, again, the NYAG's inconsistent positions with respect to the legality of daily fantasy sports as compared to season-long fantasy sports proves fatal:

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[11] The NYAG was unable to adequately distinguish *Fallon* in its submissions to the trial court or at oral argument before Justice Mendez. Indeed, the NYAG could not possibly distinguish *Fallon* given its position that participants in DFS contests lack the necessary "control or influence" over the contest's outcome because they choose their lineups prior to the beginning of the relevant real-world sporting events. This is the exact scenario at issue in *Fallon*, and under the NYAG's logic the horse owner would likewise be a criminal gambler: His "choice of a trainer, jockey, etc." necessarily is "locked" before the race. But labeling the horse owner a gambler is flatly contradicted by *Fallon*'s holding that such a horse owner is not gambling but is instead competing for a legitimate prize.

[12] Even if true, the NYAG's allegation that the "side wagers" made by season-long fantasy sports players are not made directly through the websites of season-long fantasy sports providers is a distinction without legal significance. *See* R. 777 ("Unlike traditional fantasy sports, the sites hosting DFS are in active and full control of the wagering: DraftKings and similar sites . . . profit directly from the wagering."). The statute relied upon by the NYAG in this lawsuit prohibits operations that "knowingly advance" illegal gambling, just as it prohibits operations that directly "profit from" illegal gambling. *See* N.Y. Penal Law § 225.05.

This inconsistency was evident during the oral argument on November 25, 2015, when Justice Mendez directly questioned the NYAG's counsel, asking: "why is it that traditional Fantasy Sport would be allowed whereas Daily Fantasy Sport wouldn't? What is the difference; what is the core difference?" R. 93. The NYAG's response suggested that in season-long fantasy "there is not always an entry fee" and there is "not always a prize." *Id.*

It is error, however, to conclude that such a distinction cured the tension in the NYAG's position. As the record demonstrates, numerous high-profile, season-long fantasy sports companies provide contests that both charge an entrance fee and pay a set prize at the end of the season. *See, e.g.*, R. 911–12. While season-long fantasy sports providers offer some free competitions, so does DraftKings. The fact that season-long fantasy sports contests do "not always" charge a fee or pay a prize is of no help in determining why DFS is illegal under the same theory that apparently exempts season-long contests.

Thus, because the trial court failed to apply the *Fallon* distinction between staking money on the outcome of an event and paying an entry fee for the opportunity to compete for prizes, and because the evidence in the record demonstrated that DraftKings engages in the latter, the trial court erred in holding that the NYAG had carried its burden of showing it was likely to prove that

DraftKings' customers "stake or risk something of value on the outcome" of daily fantasy competitions.

3. Daily Fantasy Sports Contests Do Not Depend On Future Contingent Events Outside The Contestants' Control Or Influence.

A person engages in illegal gambling when he stakes something of value on the outcome of a "future contingent event not under his control or influence." N.Y. Penal Law § 225.00(2). Although the trial court did not appear to rely on this prong of the statute in its opinion, the statute's text and the record below make clear that DFS contests do not meet this criterion either. The statute's plain language makes clear that the single relevant "future contingent event" over which a player must have some "control or influence" to avoid being designated gambling is the event for which the predetermined prize is awarded. *See infra* Part a (discussing the statute's use of the word "outcome"). The NYAG's concessions regarding legal horse racing undercut any contrary argument. *See infra* Part b. Here, the relevant event is the DFS contest itself—not any real-world sporting events, as the NYAG contends. The only determinant of whether DFS contestants receive a prize—*i.e.*, the only relevant "future contingent event"—is whether the DFS contestant can assemble a fantasy roster that outperforms the rosters of all other contest participants. Plainly, this is an event over which DFS contestants exert substantial control and influence.

The NYAG was therefore mistaken in arguing that the "future contingent event" prong of Section 225.00(2) provided an alternative basis for finding that DraftKings' DFS contests are illegal gambling. R. 18, 19. To the extent that the trial court's decision was based on an acceptance of the NYAG's argument that the outcome of DFS contests depend "substantially" on "factors not within the DFS contestant's control," including the potential for severe weather or injuries, this conclusion was erroneous and constituted an abuse of discretion.[13]

a. DFS Contestants Exercise Substantial Control Or Influence Over The Outcome Of DFS Contests.

Under the plain terms of Section 225.00(2), DFS contestants exercise substantial control or influence over the outcome of the relevant "future contingent event" in this case—*i.e.*, the DFS contest itself.[14] The record evidence establishes conclusively that DFS contestants skillfully assemble a fantasy team roster based on their research into and knowledge of the relevant sport. *See, e.g.*, R. 824–26

[13] The trial court did not provide detailed reasoning for its holding that the NYAG had established a likelihood of success on the merits under Penal Law § 225.00's "definitions of gambling." R. 22. It did, however, note this argument in its summary of the parties' positions. *See* R. 18, 19.

[14] This reading is also the only way to give consistent meaning to the word "outcome" in the statute: to engage in illegal gambling, a person must (1) "stake[] or risk[] something of value upon the *outcome* of" a contest of chance or "future contingent event not under his control or influence"; and (2) "receive something of value in the event of a certain *outcome*." Penal Law § 225.00(2) (emphases added). In a DFS contest, the "outcome" for which the DFS contestant receives something of value is victory in the DFS contest. Consequently, the relevant "outcome" to look to in determining whether the DFS contestant exerts control or influence is the DFS contest, not the underlying real-world events.

¶ 8–11. The outcome of the DFS contest is then based on the aggregate "fantasy points" that the DFS competitor's lineup accumulates throughout the contest relative to the points accumulated by every other participant's unique lineup. *Id.*

Whether any real-world team wins or real-life athlete surpasses a particular benchmark of performance does not determine whether a player's fantasy lineup wins or loses. *See* R. 824 ¶ 8; R. 826 ¶ 11. In fact, a daily fantasy player can still win even if a particular athlete or athletes fail to achieve a particular in-game event (*e.g.*, a touchdown or a home run). That is why a small group of fantasy contestants consistently outperforms both randomly generated lineups and other, less skilled fantasy contestants. *See supra* Part 1.b.

Section 225.00(2) makes plain that illegal gambling occurs *only* when the outcome of the future contingent event is not at all under the contestant's "control or influence." N.Y. Penal Law § 225.00(2) (referring to "future contingent event not under his control or influence");[15] *see also Jun Feng*, 34 Misc. 3d 1205(A), Slip Op. 50004(U), at *4 & n.1 ("Mah Jong contestants would not be engaged in gambling, since they have *some control over the outcome* of the game using their skill.") (emphasis added); *cf.* Donnino, Practice Commentary, McKinney's Penal

[15] While the legislature chose to include materiality in the statutory definition of contest of chance, *see* N.Y. Penal Law § 225.00(1), it did not reference materiality in connection with the "future contingent event." Particularly given this difference within the same statutory section, "not under his control or influence" must be read according to its plain meaning of not *at all* under the contestant's control or influence.

Law § 225 (chess players wagering on their game "have a *material influence* over the outcome; they, therefore, are not 'gambling'") (emphasis added). As described above, DFS contestants not only exercise "some control over the outcome" of DFS contests, *Jun Feng*, 34 Misc. 3d, Slip. Op. 50004(U), at *4, they exercise *significant* control or influence.

Neither the trial court nor the NYAG could point to any evidence, statistics, or analysis supporting the asserted substantial effect of factors such as the weather or injuries. Nor did the NYAG account for the fact that, whatever their effect, weather and injuries are variables present in indisputably legal season-long fantasy sports contests to a greater degree than daily fantasy sports. *See supra* Part 1.b. This is to say nothing of the fact that similar factors—equally beyond the competitor's control or influence—also affect games like billiards and mah jong, which nonetheless fall outside the ambit of the anti-gambling statute. *See Lavin*, 179 N.Y. at 170–71 (games of billiards do not "cease to be games of skill because at times . . . their result is determined by some unforeseen accident, usually called luck"); *Li Ai Hua*, 24 Misc. 3d at 1146–47 (mah jong). At best, the existence of such events demonstrates that some modicum of chance is involved in DFS—a

standard so universal that it could be applied to any contest, game, or competition with equal (minimal) force.[16]

b. The NYAG Conceded That Contests Structurally Identical To Those Offered By DraftKings Are Legal Under Section 225.00(2).

In discussing the *Fallon* decision before the trial court, the NYAG conceded that "paying to enter your own horse in" a race is not gambling where the horse owner "paid fees to enter races organized by a racing association that announced predetermined prizes to be handed out to the winners." R. 573. In conceding this point, the NYAG illustrates why issuing a preliminary injunction against DraftKings was an abuse of discretion: Like the horse owners in *Fallon*, DFS contestants also pay entry fees to compete for predetermined prizes. Like the horse owners' selection of horse, trainer, and jockey in *Fallon*, contestants exercise significant control or influence over the outcome of DFS contests by carefully selecting their fantasy roster. And like the horse owners in *Fallon*, participants do

[16] The NYAG's arguments analogizing DFS contests to illegal sports betting are also incorrect. In a proposition or parlay bet, the gambler places a wager (and wins or loses) based on the outcome of one or more binary events that occur during real-life sporting events (*e.g.*, a particular team winning or scoring more than a predetermined number of points). *See, e.g.*, 1984 N.Y. Op. Att'y Gen. 11. The sports bettor can simply choose at random and, irrespective of his skill, is statistically likely to win 50% of the time. In contrast, the outcomes in DFS contests do not depend on a series of binary occurrences in real-life sporting events. As explained, participants in DFS contests carefully craft their fantasy rosters by accounting for myriad possibilities while recognizing that each fantasy player added to roster affects the contestant's strategic consideration of future selections (based on changes in remaining salary, possible covariance with other fantasy athletes, etc.).

not have control over what happens in DFS contests after they have made their selections. *See Fallon I*, 4 A.D. at 88–89, *Fallon II*, 152 N.Y. at 19–20.

The NYAG's argument that DFS contests are illegal gambling under Section 225.00(2) because "once a team is chosen for a contest there is no means of physically altering the outcome," R. 19, is impossible to square with *Fallon*, and is unavailing on the face of the statute. The requirement for constant, direct, or physical "control or influence" is found nowhere in the language of Section 225.00(2). *See People v. Smith*, 63 N.Y.2d 41, 79 (1984) (holding that where an "Attorney-General's suggested interpretation is wholly at odds with the wording of the statute and would require" the Court "to rewrite the statute," the Court "cannot" adopt such an interpretation).

Moreover, the NYAG's attempts to read such requirements into the statute are untenable in light of his earlier concession: accepting the NYAG's unwritten requirement would mean that the horse owner in *Fallon* engages in illegal gambling by paying a prize to enter his horse in a race to win a predetermined prize. After all, "once the bell rings, once the gate opens, the owner's got no control over what happens in that race. The owner has picked a horse, picked a jockey, but once the gate opens, he's got no control." R. 70:3–11. In effect, the

NYAG's suggested revision of the statute would render virtually every game "gambling" in New York.[17]

c. The Rule Of Lenity Prohibits Adopting The NYAG's Expansive Misreading Of Section 225.00.

Rewriting a statute is forbidden under any circumstance—but the rewriting of criminal statutes like Section 225.00 poses special dangers. Under the rule of lenity, "If two constructions of a criminal statute are plausible, the one more favorable to the defendant should be adopted." *People v. Golb*, 23 N.Y.3d 455, 468 (2014) (citation omitted). Here, DraftKings' position—that a contestant needs to exercise only some degree of influence over the outcome of the competition to avoid violating the gambling law—is more than a "plausible" interpretation of the statute; it has in fact been embraced by the courts. *See Jun Feng*, 34 Misc. 3d 1205(A), at *4 & n.1; *cf.* Donnino, Practice Commentary, McKinney's Penal Law § 225. The statute here reads unambiguously in DraftKings' favor. But should the Court find any "ambiguity" "concerning the ambit" of Penal Law § 225, it must

[17] Many legal contests involve a point at which competitors relinquish control. For example, a person who enters her dog into a dog show exerts control or influence over the outcome of that competition by choosing a breed of dog and selecting trainers, groomers, and handlers to prepare and show the dog. But the dog owner does not physically control how her dog performs, and the extent of her control ends once the decision is turned over to the competition's judges. Once the dog show begins the owner is "locked in" to the decisions and selections she has made in preparation for the competition—but that does not negate the lawfulness of such a contest.

resolve that ambiguity "in favor of lenity." *Liparota v. United States*, 471 U.S. 419, 427 (1985).

By holding that DFS contests are "gambling," the trial court's ruling converted any contest involving (i) an entry fee, (ii) a prize, and (iii) some factor outside the contestant's direct control or influence into a criminal offense. This outcome would unduly expand the penal code to "apparently innocent conduct" that has long been widely understood to be lawful. *Liparota*, 471 U.S. at 426–27. The NYAG's novel interpretation of Section 225.00 criminalizes all manner of fantasy sports, of course, as well as events such as dog shows (where the animal's performance is not within the direct control of the owner), spelling bees (where random word selection can make the difference between victory and defeat), yachting tournaments (where wind and other weather factors can make or break a team's performance), and bass fishing (where the location and size of the fish are unpredictable). The rule of lenity requires the Court to reject such an interpretation of the criminal code. *Id*. The Court should reject this expansion of the Penal Law as a violation of both common sense and the principle that criminal statutes should give "fair notice to ordinary people who are required to conform their conduct to the law." *United States v. Kozminski*, 487 U.S. 931, 949–50 (1988).

B. The Trial Court Abused Its Discretion In Failing To Meaningfully Balance The Equities—Which Overwhelmingly Favor DraftKings.

The trial court erred further by holding that the "balancing of the equities are in favor of the NYAG and the State of New York due to their interest in protecting the public, particularly those with gambling addictions," from the "effects of fraudulent and illegal conduct." R. 22. Though the NYAG need not show irreparable harm separate from a violation of law, his allegation that DraftKings' activity constitutes gambling was legally erroneous and belied by the evidence, as demonstrated above, and should not have been credited. The NYAG can have no legitimate interest in "protecting" the public from legal activities. In any case, he is not automatically entitled to an injunction due to his asserted "interest in protecting the public." Instead, the question of whether the immediate relief of a preliminary injunction is warranted, before any adjudication on the merits, "is still a matter governed by equitable principles." *Town of Esopus v. Fausto Simoes & Assocs.*, 145 A.D.2d 840, 842 (2d Dep't 1988). This balancing of the equities "requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief," *Ma v. Lien*, 198 A.D.2d 186, 186–87 (1st Dep't 1993), and to deny a preliminary injunction sought by the government where "a balancing of the equities discloses no prejudice to [governmental] plaintiff if it is left to await an adjudication on the merits," while injunction would force private

party opponent "to dismantle its structure," a "wasteful incursion into the status quo." *Town of Esopus*, 145 A.D.2d at 842.

In this case, the balancing of the equities plainly militated against a preliminary injunction—a conclusion that would have been obvious had the court meaningfully engaged in the requisite analysis. DraftKings explained that a preliminary injunction forcing it to shutter its operations in New York would disrupt the status quo and cause DraftKings to suffer serious and immediate irreparable harm. It was only this Court's stay of that preliminary injunction that prevented many of these harms from befalling DraftKings after the trial court ruled without attempting to test the basis of the NYAG's purported "concern" for the public. By failing to engage in any substantive balancing analysis, and because that analysis weighs so heavily in DraftKings' favor, the trial court abused its discretion in issuing the preliminary injunction against DraftKings.

1. Record Evidence Overwhelmingly Demonstrated The Severe Harms To DraftKings From A Preliminary Injunction Upsetting The Status Quo.

The evidence submitted to the trial court by DraftKings established that it would be severely and irreparably harmed by an order enjoining it from operating in New York—one of its largest markets—during the pendency of these proceedings. There are 375,000 DraftKings customers in New York. These customers paid more than $99 million in entry fees in 2015, generating more than

$10 million in revenue. R. 203 ¶ 8; R. 217 ¶¶ 68–70; R. 1349–50 ¶¶ 4, 6. Should DraftKings cease operations in New York, it will suffer severe economic harm, and it will be unable to recover damages from the NYAG for its lost business upon a final resolution of this matter holding DFS legal in New York. *See* N.Y. C.P.L.R. § 2512 (exempting the State from the requirement of posting a bond as a condition of obtaining a provisional remedy such as preliminary injunction); *People v. N.Y. Carbonic Acid Co.*, 128 A.D. 42, 43 (3d Dep't 1908) (vacating preliminary injunction granted to the State because it was a "hardship to enjoin the greater part of defendants' business, with no indemnity in case they are finally successful").

DraftKings will also lose the support of its current investors, and its fundraising efforts will be severely hampered in unquantifiable ways. *See* R. 217 ¶¶ 68–70; R. 1349 ¶ 3; *Willis of N.Y., Inc. v. DeFelice*, 299 A.D.2d 240, 242 (1st Dep't 2002) (irreparable injury exists where a party will "likely sustain a loss of business impossible, or very difficult, to quantify"). DraftKings has partnered with major sports entities such as Fox Sports, Major League Baseball, the National Hockey League, Major League Soccer, and the owners of the New York Yankees, New York Giants, New York Knicks, New York Mets, New York Rangers, and New York City F.C. R. 824 ¶ 7. DraftKings also has business relationships with companies such as The Madison Square Garden Company and Legends

Hospitality. R. 1352 ¶ 15. A forced shutdown would jeopardize DraftKings' relationships with these existing partners, and curtail its ability to attract new investors and partners. *See* R. 217 ¶¶ 68–70; R. 1352 ¶ 16; *Second on Second Cafe, Inc. v. Hing Sing Trading, Inc.*, 66 A.D.3d 255, 272–73 (1st Dep't 2009) (finding irreparable injury where a company's inability to operate jeopardized business licenses, damaged revenues, harmed customer goodwill, and meant the loss of a real estate investment).

This harm will not be confined to New York, but would cause a cascading effect throughout the country—including in the dozens of states where DraftKings also continues to operate lawfully—threatening its customer base, its goodwill, and its business relationships with vendors, customers, and regulators. *See Four Times Square Assocs., L.L.C. v. Cigna Invs., Inc.*, 306 A.D.2d 4, 6 (1st Dep't 2003) (finding irreparable harm where customer goodwill and business creditworthiness threatened).

The trial court erred in dismissing these many severe and irreparable harms as a mere "potential loss of business." R. 22. As suggested above, New York courts have found irreparably injury where a party will "likely sustain a loss of business impossible, or very difficult, to quantify." *Willis of New York*, 299 A.D.2d at 242; *Second on Second Cafe*, 66 A.D.3d at 272–73; *Four Times Square Assocs.*, 306 A.D.2d at 6.

Moreover, the trial court also failed to take into account that the balance of equities presumptively weighs in favor of the party who seeks to preserve the status quo—here, DraftKings. *See Gramercy Co. v. Benenson*, 223 A.D.2d 497, 498 (1st Dep't 1996) ("the balance of the equities tilts in favor of plaintiffs, who merely seek to maintain the status quo . . ."); *In re Wheaton/TMW Fourth Ave., LP v. New York City Dep't of Bldgs.*, 65 A.D.3d 1051, 1052 (2d Dep't 2009).[18] This presumption is particularly strong where, as here, "no prior court ruling" has found the challenged practice to be illegal. *S. & F. Corp.*, 195 Misc. at 865 (denying preliminary injunction in case alleging that the use of Pokerino machines is illegal gambling). In such a case, it is "only fair to permit the continuance of their use" until the trial court "has an opportunity to take evidence and fully consider" whether the practice constitutes illegal gambling. *Id*.

2. The NYAG Provided No Evidence Of Harm To Outweigh The Showing Of Irreparable Damage To DraftKings From A Preliminary Injunction.

Allowing this case to proceed on the merits without a preliminary injunction against DraftKings would not have caused any harm to the public. Daily fantasy sports contests have been offered openly and transparently in New York for nearly

[18] This is to say nothing of the fact that a forced shutdown is particularly unnecessary given that just prior to the trial court's order, New York legislators introduced legislation to ensure that DFS contests remain legal in this state. *See* Key NY lawmaker sees state legalizing daily fantasy sports, Associated Press (Dec. 8, 2015), *available at* http://bigstory.ap.org/article/f3a2aef7c5c74f4ca93d5390dfca78bc/key-ny-lawmaker-sees-state-legalizing-daily-fantasy-sports.

a decade. The NYAG's decision not to seek an injunction against such contests until recently belies any urgency in the drastic remedy it now seeks. Furthermore, the NYAG's continuing inaction against providers of season-long fantasy sports contests—not to mention providers of DFS contests other than DraftKings and FanDuel—undercuts his allegations of urgent public harm.

As explained above, the NYAG provided no basis for the conclusion that DFS contests are illegal in New York, and neither the NYAG nor the people of New York have a legitimate interest in enjoining daily fantasy sports operations that do not violate New York law. The "evidence" the NYAG relied upon below—two affirmations from purported "experts"—was nothing more than speculation and inadmissible double- or triple-hearsay:

First, the NYAG offered the affidavit of Keith S. Whyte, Executive Director of the National Council on Problem Gambling, who relied on second- and third-hand accounts from "several" unidentified individuals who claim to have spoken to other unidentified people with supposed "DFS-related gambling addictions." R. 458 ¶ 11. Whyte did not even claim to have personally spoken to a single individual who allegedly professed an addiction to fantasy sports. Aside from being double hearsay and inadmissible, Whyte did not identify any of his putative sources and made no effort to verify or analyze their claims. Nor did he reference

any published data, let alone peer-reviewed research, to substantiate his conclusions or his methodology.

Second, the NYAG offered the affirmation of Dr. Jeffrey L. Derevensky, a psychology professor, in support of its assertion that DFS contests are addictive, but this affirmation too had no evidentiary value. At most, Derevensky speculated about what "may" be true, has the "potential" to be true, or "appears" to be true, based on unspecified "research" and "observations," without citation to any supporting evidence—in other words, inadmissible hearsay that cannot be tested by reference to any objective studies or data. R. 459–60 ¶¶ 3, 7–10. And even if the affirmation contained admissible evidence, Derevensky conceded that "it is not clear whether DFS wagering causes gambling problems . . . ." R. 460 ¶ 9.

Before making factual findings based on expert evidence, a trial court must determine that the methods used by the expert have achieved general acceptance within the scientific community—and that the expert followed reliable procedures in the particular case. *See Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762, 780–81 (2014) (discussing expert testimony in the "social science arena"); *Styles v. General Motors Corp.*, 20 A.D.3d 338, 342 (1st Dep't 2005) ("evidence of the experiment and its purported results should not have been admitted in evidence" where expert "could not show that the . . . experiment had gained general

acceptance"). The NYAG's purported experts did not come close to satisfying these standards.[19]

Ultimately, therefore, the NYAG provided no competent evidence to support the trial court's sweeping pronouncement that a preliminary injunction would "prevent the effects of fraudulent and illegal conduct" or "protect[] the public, particularly those with gambling addictions." R. 22. The court's perfunctory rationale for finding that the balance of equities favors the NYAG does not comport with the well-established standard for a preliminary injunction, particularly one that results in a radical upheaval of the status quo and there is "no evidence of immediate injury to the city or its citizens" from the continued operation of the business. *City of Rochester v. Sciberras*, 55 A.D.2d 849, 849 (4th Dep't 1976) (reversing preliminary injunction). The court's failure to engage in any meaningful analysis of the equities before granting this extraordinary equitable remedy—particularly where those equities overwhelmingly favor DraftKings—was reversible error.

[19] At an absolute minimum, the trial court should have provided DraftKings with the opportunity to cross-examine these purported experts, or to take discovery on the documents and other research purportedly supporting their broad assertions, before issuing a preliminary injunction on the basis of their opinions. If DraftKings had such an opportunity, it could have demonstrated, again, that the facts relevant to this case are far from undisputed.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's grant of a preliminary injunction.

Dated: New York, New York
February 22, 2016

Respectfully submitted,

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

THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, Plaintiff, — against — DraftKings, Inc., Defendant.	Index No. 453054/2015 IAS Part 13 Justice Manuel J. Mendez

PREARGUMENT STATEMENT

Defendant-Appellant DraftKings, Inc. ("DraftKings") submits this Pre-Argument Statement pursuant to § 600.17 of the Rules of the Appellate Division of the Supreme Court of the State of New York, First Department.

1. Title of the Action.

The action's title is set forth in the caption above.

2. Full Names of Original Parties and Change in Parties.

The original parties are those identified in the caption above, The People of the State of New York, by Eric T. Schneiderman, Attorney General of the State of New York, and DraftKings, Inc.

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5. Court and County from which the Appeal Is Taken.

This appeal is taken from an Order of the Supreme Court of the State of New York, County of New York (Honorable Justice Mendez) (IAS Part 53), dated December 11, 2015, and entered in the Office of the Clerk of New York County on December 11, 2015, insofar as that Order granted Plaintiff-Respondent NYAG's motion for a preliminary injunction restraining DraftKings operations in New York. Notice of Entry of the Order was served on the parties on December 11, 2015 by Defendant-Appellant DraftKings, Inc. (a copy of which is attached hereto).

6. Nature and Object of Cause of Action.

On November 17, 2015, the People of the State of New York, by the Attorney General of the State of New York ("NYAG"), Eric T. Schneiderman, filed a complaint against DraftKings. The NYAG alleged that DraftKings violated Article I, § 9 of the New York State Constitution, New York Penal Law § 225, Business Corporation Law § 1303, General Business Law §§ 349 and 350, and Executive Law § 63(12).

On November 17, 2015, the NYAG filed a proposed order to show cause, moving for a preliminary injunction restraining DraftKings from operating in the State of New York.

7. Result Reached in Court Below.

On December 11, 2015, The Honorable Manuel J. Mendez granted the NYAG's motion for a preliminary injunction, ordering DraftKings to stop operating in the State of New York. This appeal arises from that Order, dated December 11, 2015, insofar as it granted Plaintiff-Respondent NYAG's motion for a preliminary injunction that restrains DraftKings from operating in New York.

8. Grounds for Seeking Reversal.

Defendant-Appellant DraftKings seeks reversal of the trial court's Order, dated December 11, 2015, on the ground that it misapplied the law in granting the NYAG's Motion for a Preliminary Injunction.

9. Related Actions or Proceedings Now Pending in Any Court, and Additional Pending Appeals.

   a. *DraftKings, Inc. v. Schneiderman*, Index No. 102014-15, an Article 78 petition, is pending before the Honorable Manuel J. Mendez in New York Supreme Court, New York County.

Dated: New York, New York
December 11, 2015

Respectfully submitted,

/s/ David Boies

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