To Be Argued By:
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New York County Clerk's Index No. 453056/15

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—

FANDUEL, INC.,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

QUESTIONS PRESENTED 7

STATEMENT OF THE CASE 7

A. Fantasy Sports Competitions, a Core Part of American Sports Culture, Involve Contests in Which Sports Fans Lawfully Match Their Roster-Picking Skill Against Others 7

B. Except for the Shorter Duration, "Daily" Fantasy Sports Work the Same Way as Season-Long Fantasy Sports 10

C. Fantasy Sports Contests Are Separate Competitions in Which the Contestant Is a Participant, Not Mere Bets or Wagers on Someone Else's Contest 12

D. Procedural History 14

ARGUMENT 17

I. THE STATE HAS NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS IN ESTABLISHING A VIOLATION OF NEW YORK'S ANTI-GAMBLING STATUTE 18

A. FanDuel's Contests Do Not Involve Staking or Risking Anything of Value Under Penal Law Section 225.00, But Rather the Payment of an Entry Fee to Compete for Prizes 19

1. New York Adheres to the Longstanding Common Law Rule That *Bona Fide* Contests for Prizes Do Not Constitute Gambling 19

2. Fantasy Sports Contests Fall into the Category of *Bona Fide* Contests for Prizes That Are Legally Distinct from Gambling, as Courts and the U.S. Congress Have Acknowledged 22

3. Fantasy Sports Contests Are Not a Form of Betting 26

B. FanDuel's Fantasy Sports Contests Turn on the Relative Skill of the Contestants and Thus Are Not Games of Chance 28

1. The Outcomes of Fantasy Sports Contests Are Dominated by Participants' Skill 29

2. A Contest Is Not Gambling When Skill, Rather Than Chance, Is the Dominating Element 31

3. Under Any Reading of the Statute, the Facts Demonstrate That Fantasy Sports Contests Are Games of Skill, Not Chance 35

C. FanDuel's Contests Are Not Gambling on a Future Contingent Event Beyond the Contestant's Control or Influence 39

1. Participants in a Fantasy Sports Contest Are Active Players in a Competition of Their Own, Not Bettors on a Sporting Event.....41

2. A Broad Application of the "Future Contingent Event" Theory of Gambling Liability Would Violate the Rule of Lenity, Constitutional Requirements of Due Process and Common Sense 44

II. THE STATE HAS NOT DEMONSTRATED A PROBABLE VIOLATION OF NEW YORK'S CONSTITUTION, AND THE COURT SHOULD CONSIDER ONLY THE STATE'S CLAIMS OF STATUTORY VIOLATION 48

III. THE STATE HAS NOT PUT FORWARD EVIDENCE OF IRREPARABLE HARM 50

IV. THE BALANCE OF HARDSHIPS TIPS IN FAVOR OF FANDUEL 54

CONCLUSION 55

PRINTING SPECIFICATION STATEMENT 57

TABLE OF AUTHORITIES

CASES

A.J. Baynes Freight Contractors, Ltd. v. Polanski,
90 A.D.3d 1630 (4th Dep't 2011).....49

Amusement Enters. Inc. v. Fielding,
189 Misc. 625 (Sup. Ct. Kings County 1946),
modified, 272 A.D. 917 (2d Dep't 1947).....35, 36

Beach v. Shanley,
62 N.Y.2d 241 (1984).....48

City of Rochester v. Sciberras,
55 A.D.2d 849 (4th Dep't 1976).....51

Dalton v. Pataki,
11 A.D.3d 62 (3d Dep't 2004), *modified*, 5 N.Y.3d 243 (2005).....32

Faircloth v. Central Fla. Fair, Inc.,
202 So. 2d 608 (Fla. 4th Dist. Ct. App. 1967).....21

Federal Commc'ns Comm'n v. Am. Broad. Co.,
347 U.S. 284 (1954).....45

Housing Works, Inc. v. City of New York,
255 A.D.2d 209 (1st Dep't 1998).....17

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

In re Daily Fantasy Sports Mktg. & Sales Practices Litig.,
MDL No. 2677 (J.P.M.L. Feb. 4, 2016).....9

Kolender v. Lawson,
461 U.S. 352 (1983).....45

Korea Life Ins. Co., Ltd. v. Morgan Guar. Trust Co. of N.Y.,
269 F. Supp. 2d 424 (S.D.N.Y. 2003).....46

Koultukis v. Phillips,
285 A.D.2d 433 (1st Dep't 2001).....17

Las Vegas Hacienda, Inc. v. Gibson,
77 Nev. 25, 359 P.2d 85 (1961).....21, 24, 27, 37

Liss v. Manuel,
58 Misc.2d 614 (Civ. Ct. N.Y. County 1968) 46

Matter of Plato's Cave Corp. v. State Liquor Authority,
115 A.D.2d 426 (1st Dep't 1985) 32, 33

NCAA v. Governor of N.J.,
730 F.3d 208 (3d Cir. 2013) 24, 42

People ex rel. Ellison v. Lavin,
179 N.Y. 164 (1904).....31, 32, 33, 36

People ex rel. Lawrence v. Fallon,
152 N.Y. 12 (1897).....19, 20, 21

People ex rel. Sturgis v. Fallon,
152 N.Y. 1 (1897).....49

People v. Aleynikov,
49 Misc. 3d 286 (Sup. Ct. N.Y. County 2015).....44

People v. Cohen,
160 Misc. 10 (Magis. Ct. Queens Borough 1936).....36, 37

People v. Collier,
72 N.Y.2d 298 (1988).....34

People v. Correa,
15 N.Y.3d 213 (2010).....45

People v. Davidson,
181 Misc. 2d 999 (Sup. Ct. Monroe County 1999), *rev'd*, 291 A.D.2d
810 (4th Dep't), *appeal dismissed*, 98 N.Y.2d 738 (2002) 32

People v. Finkelstein,
9 N.Y.2d 342 (1961).....45

People v. Golb,
23 N.Y.3d 455 (2014).....44

People v. Green,
68 N.Y.2d 151 (1986) 44

People v. Hawkins,
1 Misc. 3d 905(A), 2003 N.Y. Slip Op. 51516(U)
(Crim. Ct. N.Y. County 2003) 32

People v. Hunt,
162 Misc. 2d 70 (Crim. Ct. N.Y. County 1994) 33

People v. Jun Feng,
34 Misc. 3d 1205(A), 2012 N.Y. Slip Op. 50004(U)
(Crim. Ct. Kings County 2012) 35, 42, 43

People v. Li Ai Hua,
24 Misc. 3d 1142 (Crim. Ct. Queens County 2009) 31, 32

People v. Melton,
159 Misc. 2d 649 (Sup. Ct. Monroe County 1991) 32

People v. New York Carbonic Acid Gas Co.,
128 A.D. 42 (3d Dep't 1908) 51

People v. Sailor,
65 N.Y.2d 224 (1985) 49

People v. Stiffel,
61 Misc. 2d 1100 (App. Term 2d Dep't 1969) 32

People v. Tillman,
13 Misc. 3d 736 (Crim. Ct. Kings County 2006) 37

Scotto v. Mei,
219 A.D.2d 181 (1st Dep't 1996) 17

State of Arizona v. Am. Holiday Ass'n, Inc.,
151 Ariz. 312, 727 P.2d 807 (1986) 20, 21, 23

Toomey v. Penwell,
76 Mont. 166, 245 P. 943 (1926) 21

Town of Esopus v. Fausto Simoes & Assocs.,
145 A.D.2d 840 (2d Dep't 1988) 51

Tucker v. Toia,
54 A.D. 2d 322 (4th Dep't 1976) 17

United States v. DiCristina,
886 F. Supp. 2d 164 (E.D.N.Y. 2012), *rev'd*, 726 F.3d 92 (2d Cir. 2013) 39

Valentin v. El Diario–La Prensa,
103 Misc. 2d 875 (Civ. Ct. Bronx County 1980) 32

WNEK Vending & Amusements Co. v. City of Buffalo,
107 Misc. 2d 353 (Sup. Ct. Erie County 1980) 33

CONSTITUTIONAL PROVISIONS AND STATUTES

New York State Constitution Article I, Section 1 45

New York State Constitution Article I, Section 6 45

New York State Constitution Article I, Section 9 .....6, 48, 49

United States Constitution Amendment XIV 45

New Jersey Statutes Annotated § 2A:40-1 .....22, 23

New York Civil Practice Law and Rules § 2512.....55

New York Penal Law § 5.00.....44, 45

New York Penal Law § 225.00.....*passim*

New York Racing, Pari-Mutuel Wagering and Breeding Law § 906 .....5, 22, 36

Unlawful Internet Gambling Enforcement Act of 2006,
31 U.S.C. §§ 5361–5365.....5, 25, 47

OTHER AUTHORITIES

Bennett Liebman, *Chance v. Skill in New York's Law of Gambling: Has the Game Changed?*, 13 GAMING L. REV. & ECON. 461 (2009) 31

Commission Staff Notes on the Proposed New York Penal Law, in TEMP. COMM'N ON REVISION OF PENAL LAW & CRIM. CODE, THIRD INTERIM REPORT (1964) 34

PRELIMINARY STATEMENT

This is an appeal from an order of Supreme Court, New York County (Hon. Manuel J. Mendez), entered December 11, 2015, preliminarily enjoining FanDuel Inc.—a leading fantasy sports provider with hundreds of thousands of New York users—from offering its fantasy sports contests to New York customers. The motion court summarily granted this injunction based on the State's novel theory that FanDuel's contests constitute illegal gambling under New York law. But the State's theory and the motion court's decision are directly contrary to prior court decisions, as well as the judgment of the United States Congress, that have made clear that fantasy sports contests adhere to specific criteria that fundamentally differentiate them from illegal gambling. FanDuel's fantasy sports competitions are legally valid, skill-based contests for a prize of a type that New York and other states have long excluded from the scope of anti-gambling laws. The injunction should therefore be reversed because the State failed to meet its burden of showing likelihood of success on the merits.

Fantasy sports contests are an integral part of American sports culture, enjoyed by tens of millions of people nationwide. Fantasy contests allow fans to be more than just spectators. In a fantasy contest, fans compete in their own separate competition that tests their knowledge of sports and their analytical skills against the skills of other participants. The contestants select a fantasy "roster" of

players, which is scored based on the combination of the accumulated statistics of each player on the roster. Creating a winning lineup involves many of the same skill-based judgments a coach or general manager would make: evaluating matchups, game conditions, and athletes' capabilities, momentum and motivation, all with the constraints of a salary cap or draft to limit their player selections. Backed by sophisticated investors and major sports league partners, FanDuel has been offering its contests consistently in New York since 2009 with no suggestion that its activities were in any way illegal.

The State's new claim that fantasy sports contestants are engaged in illegal gambling is based on the prohibitions on gambling in Penal Law Article 225, but fantasy sports competitions do not satisfy either of the two required elements of gambling under that statute: they do not involve (i) "stak[ing] or risk[ing] something of value," as courts have consistently construed these terms, or (ii) attaching such stakes to the outcome of "contest[s] of chance" or "future contingent event[s] not under [the participants'] control or influence." Instead, competitions in which participants pay an entry fee and pit their skills against each other, with a sponsor paying a preannounced prize to the winners, have been historically treated as lawful prize contests rather than wagers, bets or stakes on an outcome. This makes sense because a fisherman who pays an entrance fee to a fishing tournament has never before been treated as having placed a bet on himself

to win. The only previous court to have directly considered whether fantasy sports constitute gambling has determined that fantasy sports exist as part of the widely-accepted prize contests that have long been part of the American social fabric—from beauty contests to county fairs—and therefore fall outside the definition of illegal gambling. That finding alone—equally applicable here—is fatal to the State's case, without any need even to consider the second prong of the statutory test.

FanDuel's contests similarly do not violate the second prong of New York's definition of illegal gambling. They are not "contests of chance" like lotteries or roulette or bingo games, but games of skill as to which the evidence overwhelmingly demonstrates that the application of talent and effort to roster selection dominates contest outcomes. They also do not involve wagers on the outcome of "future contingent events" as to which the participants have no "control or influence." N.Y. Penal Law § 225.00(2) ("A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence. . . ."). Rather, fantasy sports competitors influence the outcome of the contests in which they compete. By making better selections than their opponents, fantasy sports competitors change the outcome of their fantasy sports contest, just as a

real-world coach or general manager picking players influences the performance of an actual sports team.

The State's effort to characterize fantasy sports players as simple sports bettors rather than participants in *bona fide* contests misconstrues both the nature of fantasy sports and the scope of the anti-gambling laws. While the outcome of fantasy sports contests is affected by the performance of individual athletes, the contests at issue in fantasy sports do not depend on the outcome of any actual sporting event. The members of a chosen fantasy roster never play together or play against any other roster in any real-world athletic contest. The scoring of fantasy sports contests is not based on the scoring of any real-world game. And the relative performances of individual athletes on particular fantasy rosters are detached from the outcome of the underlying sporting events. Rather, the contest turns on the participants' skill in roster selection, much as a stock trader's success is based on her skill in stock selection. Similarly, all other types of legally valid contests involve certain contingencies beyond the contestant's control (for example, in a fishing contest, the fish have to take the bait) but that does not prevent them from being valid contests.

If, as the State urges, merely paying an entrance fee in the hope of reaping rewards based on the successful competitive conduct of others qualified as illegally "stak[ing] . . . something of value upon the outcome of . . . a future contingent

event not under [the participant's] control or influence," then nearly all forms of passive investment, stock purchase or insurance would constitute illegal gambling. But a fantasy sports contestant no more engages in illegal gambling by paying an entry fee than does an investor by risking funds on the stock market. The same principle protects both activities. The United States Congress has specifically recognized this principle, explicitly including fantasy sports contests, along with various kinds of investments, in a list of activities falling outside its definition of illegal gambling in the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA"), 31 U.S.C. § 5362. New York's Legislature also has expressly recognized, in the context of authorizing "handicapping tournaments" in which participants compete over who is best at selecting outcomes of a large number of horse races, that competitions over ability to predict performances by others can be valid "contests of skill" and not gambling. N.Y. Racing, Pari-Mutuel Wagering & Breeding Law § 906 ("A handicapping tournament operated [by a horse racing association] . . . shall be considered a contest of skill and shall not be considered gambling.").

The motion court erred in finding the State likely to prevail ultimately on its claims that all forms of FanDuel's fantasy sports contests with an entry fee amount to illegal gambling, based on the conclusion that the highest entry fee permissible in any defendant's contest is substantial enough to amount to "risk[ing] something

of value." N.Y. Penal Law § 225.00(2). The court did not address the law respecting legally valid competitions involving payment of entry fees, matching of skills and prizes to winners. It also did not analyze FanDuel's extensive evidence demonstrating that fantasy sports competitions are "contests of skill," rather than chance, or FanDuel's demonstration that such competitions do not involve outcomes outside the fantasy players' "influence."

The motion court's order shutting down FanDuel's business for its hundreds of thousands of New York customers was based on an explicitly provisional ruling acknowledged to be subject to change after discovery. The court attached no weight to the extraordinary nature of a shutdown order before any final judgment of illegality, with the obvious and irremediable adverse consequences such a shutdown would present. Record on Appeal ("R.") 14. The court further erred in finding the State likely to succeed in demonstrating that fantasy sports contests violate the prohibition against gambling in Article I, § 9 of the New York Constitution. R. 13. In that regard, the court failed to address the fact that the constitutional provision is not self-executing and expressly leaves the definition of illegal gambling to the Legislature, and thus that this case does not involve the separate question of whether legislative authorization of fantasy sports contests would be permissible under the Constitution.

This Court should recognize that fantasy sports competitions are legally valid contests for prizes, falling outside the statutory definition of gambling, and reverse the motion court's decision.

QUESTIONS PRESENTED

1. Did the State demonstrate a likelihood of success on the merits of its claim that all FanDuel fantasy sports contests involving an entry fee constitute illegal gambling under Penal Law Article 225? The motion court answered this question in the affirmative; it should be answered in the negative.

2. Did the State demonstrate that fantasy sports contests likely violate Article I, § 9 of the New York Constitution, and that the court should consider that issue? The motion court answered this question in the affirmative; both parts should be answered in the negative.

3. Did the State demonstrate irreparable harm and a balance of hardships tipping in its favor? The motion court answered this question in the affirmative; it should be answered in the negative.

STATEMENT OF THE CASE

A. Fantasy Sports Competitions, a Core Part of American Sports Culture, Involve Contests in Which Sports Fans Lawfully Match Their Roster-Picking Skill Against Others

Fantasy sports competitions, which millions of sports fans have played throughout the United States for decades, are a type of contest in which the competitors mimic the role of general managers of sports teams. R. 702 ¶ 2.

Fantasy sports competitors use their sports knowledge and skill to select real athletes from multiple teams in a given sport for "fantasy" lineups or rosters. *Id.* They then match their fantasy teams against those of their friends, family members or others, accumulating points based on the performance of the athletes on their fantasy teams in real-world sporting events. *Id.* Just as a skilled general manager evaluates extensive information in selecting players for a real-life team, fantasy sports contestants picking a fantasy team may look at past performance, injury history, performance trends of comparable players, the strength of schedule for an athlete's team, projected matchups for particular games, coaching philosophy, changes to league rules that could influence an athlete's performance, and other factors. R. 711 ¶ 25.

Fantasy sports competitions have become highly popular among sports fans and have particularly grown in recent years because of the Internet. R. 707 ¶ 14. Companies like Yahoo!, CBS Sports and the ESPN Network—as well as FanDuel and many others—currently operate highly popular fantasy sports competitions on their websites. R. 710 ¶ 23. Sports teams and leagues have enthusiastically embraced fantasy sports as a way of enhancing spectators' excitement about professional sports that does not present concerns about the integrity of games, as betting on sports events could. R. 690-91 ¶ 11. FanDuel currently has partnership

or sponsorship deals with 16 NFL teams and 16 NBA teams, and is the NBA's Official One-Day Fantasy Sports Partner. *Id.*[1]

Fantasy sports come in a wide variety of types and formats, including head-to-head contests, leagues and large-format tournaments. R. 704-05 ¶¶ 5-10. Contests can last a day, a week, part or all of a season, or years (with participants signing their fantasy players to multi-year "contracts"). R. 708 ¶ 16. Contestants' choice of rosters can be governed through a variety of means—such as drafts, auctions or the use of fictitious "salary caps"—all intended to simulate the kind of resource-allocation decisions a real general manager must confront. R. 705-06 ¶¶ 7-11. FanDuel's preferred selection method involves salary caps. As compared to the "draft" selection method, the "salary cap" approach carries the advantage that every athlete is available for selection by any contestant no matter what order of selection takes place. In all of these variants, participants compete against each other in acting as simulated general managers of their respective fantasy teams.

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[1] Not only have fantasy sports contests become enormously popular, but they have been widely regarded as legal as well. There is perhaps no better illustration of that reality than a recent decision of the U.S. Judicial Panel on Multidistrict Litigation (the "JPML"). In considering whether to consolidate certain class-action suits filed against FanDuel and DraftKings, the JPML had to invoke the rule of necessity in order to assure a quorum of the Panel to decide the matter because "certain Panel members . . . could be members of the putative classes"—that is, because those federal judges were players on FanDuel or DraftKings. *In re Daily Fantasy Sports Mktg. & Sales Practices Litig.*, MDL No. 2677, slip op. at 1 n.* (J.P.M.L. Feb. 4, 2016). Accordingly, a number of panel members "renounced their participation in these classes and . . . participated in th[e] decision." *Id*.

B. Except for the Shorter Duration, "Daily" Fantasy Sports Work the Same Way as Season-Long Fantasy Sports

Among these many forms of fantasy sports offerings, the "daily" fantasy sports contests offered by FanDuel and others work in fundamentally the same way as other competitions, except that their duration is shorter. So-called daily fantasy contests typically begin and end in a week for NFL games or a day for other games. R. 691 ¶ 12. These contests place particular premiums on participants' assessments of individual players' prospects for strong performance in a single sports event, requiring extra analysis of performance trends, matchups, team dynamics and other factors capable of influencing an individual's performance in a single contest, and application of those judgments to all of the players on a fantasy roster. R. 712 ¶ 27.

FanDuel offers daily fantasy sports in several different formats. FanDuel's original type of contest was a "head-to-head" competition in which two participants competed directly against each other (hence the name "FanDuel"). R. 689 ¶ 6. These contests may be played between two friends or acquaintances who choose to play against each other, or a contestant may choose to be matched with a stranger who also is looking for someone to play against. R. 692-93 ¶ 15. FanDuel also offers "50/50" contests, in which the top 50% of entrants win the same preannounced prize, so that individual participants have a better prospect of experiencing the fun of winning. *Id.* Another popular type of contest is the

"league" contest, involving between 2 and 99 fantasy teams, which are often played by self-selected groups of friends or co-workers but also can be played against strangers. *Id.* And FanDuel offers "tournament" contests, which involve a large number of entrants and a limited number of preannounced, often large prizes. *Id.*

FanDuel has been offering daily fantasy sports contests, including to New York residents, since 2009, and it has offered the full array of current contest types, in roughly the same formats, since around 2011. R. 690 ¶ 9. Today, FanDuel has over five million users, including hundreds of thousands in New York. R. 690 ¶ 10.

The typical FanDuel customer is an enthusiastic sports fan who enjoys competition over making roster decisions based on the most current available information about performance, expected playing conditions and anticipated matchups. R. 696-97 ¶¶ 27-28. Many fans prefer the shorter-term format of daily fantasy sports because they can pick rosters based on their assessments of particular single-game matchups for individual players on the roster, or because a bad pick in a daily fantasy game does not leave a competitor in a disadvantaged position for the entire season as can happen readily with season-long games. R. 688-89 ¶¶ 5-7.

C. Fantasy Sports Contests Are Separate Competitions in Which the Contestant Is a Participant, Not Mere Bets or Wagers on Someone Else's Contest

In fantasy sports, the key to the outcome of each contest is the participant's success at assembling a better performing fantasy roster than other participants selected. R. 695 ¶¶ 22-23. The outcome of a real-world athletic contest, or even a series of real-world athletic contests, does not determine or even influence the winner in any of FanDuel's fantasy sports contests. *Id.* Instead, the winner of the separate fantasy contest is determined by points awarded based on an aggregation of game statistics that measure how well, compared to others, the contestant selected a fantasy roster of players who never actually step on a field together. Unlike sports bettors, who place wagers the success or failure of which turns directly on the actual outcome of external events over which the bettors have no influence or control, fantasy sports competitors are active participants in a parallel fantasy contest of their own, which exists separate and apart from any underlying athletic event and does not turn on the outcome of any such event, or on the outcome of any other single real-world occurrence. *See* R. 713 ¶ 29. Indeed, a sustained empirical study of fantasy sports outcomes by Professor Anette Hosoi of MIT demonstrates (in evidence unrebutted by the State) that fantasy contestants directly influence the outcome of that separate contest, based on the acumen with which they select their fantasy rosters. R. 529 ¶¶ 9-10; R. 532-36 ¶¶ 21-31.

Fantasy players are thus participants in legally valid contests in the same ways as participants in dog shows, golf tournaments, fishing competitions, beauty pageants, county fair competitions and innumerable other types of contests. All of these are competitions involving entry fees for participants, matching of skills among the contestants and pre-identified prizes for winners. New Yorkers have competed in such contests for decades without any suggestion that they were engaged in illegal gambling.

Fantasy sports contests are not like lotteries or roulette, because their outcome depends on skill in roster selection rather than random outcomes. They are not subject to the "chance" element of a draw of cards. Instead of being "dealt" a particular "hand," all participants start on a level playing field, in the exact same position as each other, and have complete control over the lineup they select, constrained by the same fantasy "salary cap" that applies to everyone. R. 695 ¶ 23. Unlike the "house" in a casino, FanDuel cannot win a contest and has no interest in who wins; rather, prizes are announced in advance and guaranteed to the winners. R. 694-95 ¶ 21. Unlike pari-mutuel betting on horse races (which is illegal unless state-sponsored) or illegal sports gambling, the size of the prize in fantasy sports contests does not change based on "odds" determined by the number of entrants or their selections; rather, all prizes are announced in advance. R. 693 ¶ 16.

Fantasy contests also are not like "prop" and "parlay" bets over a binary, yes-or-no outcome, such as whether a particular individual will accomplish a particular feat, but multi-factorial, turning on relative performance across a spectrum of possibilities by the collection of multiple individuals on a particular roster. R. 713 ¶ 29. They pose no threat of undermining the integrity of the underlying contests in which the athletes compete—it is logistically impossible to "fix" a fantasy sports competition. The proposition that the outcome of fantasy contests can be affected by the actions of individuals other than the contestants, and by other factors outside the contestants' control, reflects an inherent element of competitions and does not distinguish fantasy sports contests from any other contests long recognized to be legal.

D. Procedural History

On November 10, 2015, the New York Attorney General's office sent a "cease and desist" letter to FanDuel, and a similar letter to its competitor DraftKings, Inc., demanding that they cease offering daily fantasy sports contests in New York. R. 683-86. FanDuel responded by commencing an action in New York County Supreme Court seeking, among other relief, a declaration that its contests are legal. R. 89-105.

The State separately filed this action on November 17, 2015, R. 17-46, and moved for a preliminary injunction prohibiting FanDuel from offering New York

customers any contests with an entry fee during the pendency of this litigation. R. 47-50. The court held oral argument on the State's preliminary injunction motion on November 25, 2015, *see* R. 49, but did not hear live witness testimony.[2]

On December 11, 2015, the court issued an order granting the State's motion for a preliminary injunction against FanDuel. R. 5-15, 2015 N.Y. Slip Op. 32332(U). The order does not explain the basis for its conclusion that the State is likely to prevail ultimately on the merits of its claim of illegal gambling. It primarily recites the arguments presented by both sides and then states that "Fanduel, Inc. . . . do[es] not refute the evidence provided by the NYAG," R. 10, even though FanDuel submitted extensive affidavit and documentary evidence explicitly refuting the State's presentation. R. 527-722.

The order remarks that "[t]he 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,'" R. 11, but does not analyze the relevant words "stakes or risks" separately from "something of value," *see* N.Y. Penal Law § 225.00(2), does not address why the amount of the entry fee should be determinative, and does not address the much lower entry fees for the vast majority of daily fantasy sports contests (including entry fees as low as 25 cents). *See* R. 11. The order also does

[2] The motion was heard and decided together with a motion by FanDuel for injunctive relief in the action it had previously filed, as well as similar motions in a proceeding by DraftKings against the State and an action by the State against DraftKings. *See* R. 5.

not present findings that FanDuel's contests violate the second prong of the gambling statute, in that they involve "contest[s] of chance" or wagers on the outcome of "future contingent events not under [the participants'] control or influence." Instead, it merely states that the State has "a greater likelihood of success" on both a claim of statutory violation and a claim of violation of the New York Constitution, while acknowledging that this view "is not a final determination of the merits and rights of the parties, therefore discovery is needed after joinder of issue." R. 13. The order then declares that the State is not required to show irreparable harm because such harm "is implied in the need to prevent the effects of fraudulent and illegal conduct on the general public." The order concludes with the assertion that "[t]he 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," and that this interest "outweighs any potential loss of business" to FanDuel. *Id.*

FanDuel immediately appealed, R. 4, and moved in this Court for a stay of the preliminary injunction order pending resolution of this appeal. This Court, first through a single judge and then by a full panel, granted the stay. Order Granting Interim Stay (Dec. 11, 2015) (Feinman, J.); Order on Motion No. M-6204, 2016 N.Y. Slip Op. 60797(U) (Jan. 11, 2016) (Friedman, Renwick, Saxe and Moskowitz, JJ.).

ARGUMENT

A preliminary injunction is a "drastic remedy and will 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). A party seeking a preliminary injunction therefore "must clearly demonstrate (1) the likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the injunction is not issued; and (3) a balance of the equities in the movant's favor." *Hous. Works, Inc. v. City of New York*, 255 A.D.2d 209, 213 (1st Dep't 1998) (reversing grant of preliminary injunction). Mere allegations will not suffice to meet this burden; "[p]roof establishing these elements must be by affidavit and other competent proof, with evidentiary detail," and "[i]f key facts are in dispute, the relief will be denied." *Scotto v. Mei*, 219 A.D.2d 181, 182 (1st Dep't 1996).

The standard for granting a preliminary injunction is even more stringent when, as in this case, the State seeks a mandatory injunction that does not preserve the status quo but instead shuts down a longstanding business based on a legal theory that presents a question of first impression. *See Tucker v. Toia*, 54 A.D.2d 322, 326 (4th Dep't 1976) (recognizing the importance of preserving the status quo on an issue of first impression "while the legal issues are determined in a deliberate and judicious manner").

The motion court's order granting a preliminary injunction should be reversed because the State has failed to demonstrate a likelihood of success on the merits, irreparable injury in the absence of injunctive relief or a balance of the equities tipping in its favor.

I. THE STATE HAS NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS IN ESTABLISHING A VIOLATION OF NEW YORK'S ANTI-GAMBLING STATUTE

The State's claims that FanDuel's contests constitute illegal gambling do not satisfy either of the two separate requirements that Penal Law Section 225.00 imposes for such a finding. First, the State has not demonstrated that FanDuel's contests involve "stak[ing] or risk[ing] something of value," in the nature of a bet or wager, which courts in New York (and elsewhere) have consistently interpreted to exclude paying an entry fee to match skills against others in a valid contest for a preannounced prize. Second, even apart from its failure to satisfy this first requirement, the State has not shown that the putative wager depends on the outcome of (i) "a contest of chance" or (ii) "a future contingent event not under [the participant's] control or influence." *Id*. As a result, the State does not have a likelihood of success in demonstrating that all of FanDuel's various types of contests involving entry fees constitute illegal gambling.

A. FanDuel's Contests Do Not Involve Staking or Risking Anything of Value Under Penal Law Section 225.00, But Rather the Payment of an Entry Fee to Compete for Prizes

Courts in New York and elsewhere have recognized for more than a century that paying an entry fee to match skills against others in a contest for a prize does not constitute staking, risking, betting or wagering something of value under anti-gambling laws. As Congress and prior courts have acknowledged, fantasy sports contests fit squarely into that category of contests for a prize and therefore are not gambling.

1. New York Adheres to the Longstanding Common Law Rule That *Bona Fide* Contests for Prizes Do Not Constitute Gambling

The Court of Appeals expressly endorsed the legality of contests involving entry fees and prizes in *People ex rel. Lawrence v. Fallon*, 152 N.Y. 12 (1897), upholding a club in which horse owners paid an entry fee to race their horses against each other for a preannounced, fixed purse payable from association assets that included the entry fees, with the association having no stake in the race's outcome. *Id.* at 16-18, 20. In language that applies here, the court rejected the State's contention that this contest was an illegal "wager" or "bet":

> If the doctrine contended for by the [State] is sustained, it would seem to follow that the farmer, the mechanic or the stockbreeder who attends his town, county or state fair, and exhibits the products of his farm, his shop or his stable, in competition with his neighbors or others for purses or premiums offered by the association, would become a participant in a crime, and the officers offering such

> premium would become guilty of gambling under the provisions of the Constitution relating to that subject. Those transactions are in all essential particulars like this. 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.

Id. at 19. The court accordingly concluded that "the offering of premiums or prizes to be awarded to the successful horses in a race is not in any such sense a contract or undertaking in the nature of a bet or wager as to constitute gambling." *Id.* at 20. In fantasy sports as well, participants pay an entry fee to participate in a contest, and the entry fees generate the fund from which the successful contestants win prizes. Just as in *Fallon*, participation in such a contest is not a bet or wager and does not constitute gambling.

Numerous courts around the country have followed the New York Court of Appeals' foundational decision in *Fallon*. In *State of Arizona v. Am. Holiday Ass'n, Inc.*, 151 Ariz. 312, 727 P.2d 807 (1986) (en banc), for example, the Arizona Supreme Court relied on *Fallon* in holding that a company that charged a fee to enter a word game, and awarded advertised prizes to the winning entries, was not taking bets or wagers. As the court explained,

> [A]n entrance fee does not suddenly become a bet if a prize is awarded. If the combination of an entry fee and a prize equals gambling, then golf tournaments, bridge tournaments, local and state

> rodeos or fair contests and even literary or essay competitions, are all illegal gambling[.]

Id. at 314, 727 P.2d at 809 (citing *Fallon*, 152 N.Y. at 19).

Similarly, the Nevada Supreme Court held in *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85 (1961), that the offer of a $5,000 prize to any golfer who scored a hole-in-one after paying a 50¢ entry fee was not a gambling contract but a contest. The court observed, on similar reasoning to *Fallon*, that "[t]he fact that each contestant is required to pay an entrance fee where the entrance fee does not specifically make up the purse or premium contested for does not convert the contest into a wager." *Id.* at 29, 359 P.2d at 87 (citation omitted); *accord Faircloth v. Central Fla. Fair, Inc.*, 202 So. 2d 608, 609-10 (Fla. 4th Dist. Ct. App. 1967) (various games involving skill played at fair did not constitute gambling); *Toomey v. Penwell*, 76 Mont. 166, 173, 245 P. 943, 945 (1926) (horse racing stakes event with $2 entry fee and $375 purse was not gambling).

The New York Legislature has similarly recognized that contests for prizes over cumulative predictions relating to a broad series of events can be outside the bounds of illegal gambling. In particular, New York law provides that handicapping tournaments, in which participants pay entry fees and match their skills at predicting the outcome of multiple identified horse races against others, with prizes drawn from the entry fees to the winners, are lawful subject to certain regulatory requirements—and, unlike betting on individual horse races, do not

count as gambling. N.Y. Racing, Pari-Mutuel Wagering & Breeding Law § 906 ("[a] handicapping tournament . . . shall be considered a *contest of skill* and shall *not be considered gambling*") (emphasis added). In much the same way as a handicapping tournament of the kind recognized by the Legislature, a fantasy sports contest also is a contest of skill and not gambling—in both cases, participants compete by pitting their skills against each other in a separate contest that does not depend on the outcome of any real-life race or athletic event.

2. Fantasy Sports Contests Fall into the Category of *Bona Fide* Contests for Prizes That Are Legally Distinct from Gambling, as Courts and the U.S. Congress Have Acknowledged

The only court that considered whether fantasy sports constituted illegal gambling before the decision now on appeal—the New Jersey federal district court in *Humphrey v. Viacom, Inc.*, No. 06-2768 DMC, 2007 WL 1797648, at *9 (D.N.J. June 20, 2007)—held for exactly these reasons that fantasy sports are *bona fide* contests for prizes, not bets, wagers, stakes or risks in connection with illegal gambling. The plaintiff in *Humphrey* brought suit against ESPN and other fantasy sports operators under a New Jersey *qui tam* statute that defines gambling in terms indistinguishable for the purposes of this dispute from New York's Penal Law § 225.00. *See* N.J. Stat. Ann. § 2A:40-1 ("[a]ll wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any

lot, chance, casualty or unknown or contingent event").[3] The *Humphrey* court dismissed the complaint, concluding "as a matter of law" that the payment of an entry fee to participate in a fantasy sports contest is not wagering, betting or staking money. *Humphrey*, 2007 WL 1797648, at *9. As the court explained:

> 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. As examples of permissible contests with entry fees and prizes to winners that do not constitute gambling, the court recited the list that the Arizona Supreme Court had identified in *Am. Holiday Assoc., Inc.*, *supra* at 20-21, and added some others—"livestock, poultry and produce exhibitions, track meets, spelling bees, beauty contests and the like"—concluding that it would be "patently absurd" to adopt a definition of wagering that might mean that such "contest participants and sponsors could all be subject to criminal liability." *Humphrey*, 2007 WL 1797648, at *7.

Humphrey correctly found fantasy sports directly analogous to these traditional forms of contests, identifying key characteristics of legal fantasy

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[3] In the order on appeal here, the motion court sought to distinguish *Humphrey* on the basis that "the New York State Penal Law does not refer to 'wagering' or 'betting,' rather it states that a person, 'risks something of value.'" R. 11. The court, however, did not attempt to identify a difference in meaning between these terms and remarkably disregarded that both statutes used identical words to prohibit "stak[ing]" money on games of "chance" or "contingent events."

contests that the contests offered by FanDuel all satisfy: (1) "participants pay a set fee for each team they enter in a fantasy sports league"; (2) "prizes are guaranteed to be awarded at the end of the [contest], and the amount of the prize does not depend on the number of entrants"; and (3) the contest operators are "neutral parties in the fantasy sports games—they do not compete for the prizes and are indifferent as to who wins the prizes." *Id*. at *7. The Court also recognized the fantasy contest as separate from the underlying sporting events, observing that "[t]he success of a fantasy sports team depends on the participants' skill in selecting players for his or her team[.]" *Id*. at *2.

The United States Court of Appeals for the Third Circuit later endorsed this analysis, stating that there is a "legal difference between paying fees to participate in fantasy leagues and single-game wagering as contemplated by the [New Jersey] Sports Wagering Law." *NCAA v. Governor of N.J.*, 730 F.3d 208, 223 n.4 (3d Cir. 2013). In so concluding, the court cited precisely the cases FanDuel relies upon here, including *Humphrey*, 2007 WL 1797648, at *9, which it described as broadly "holding that fantasy leagues that require an entry fee are not subject to anti-betting and wagering laws," and *Las Vegas Hacienda*, 77 Nev. at 28, 359 P.2d at 86-87 (1961), which it viewed as analogously "holding that a 'hole-in-one' contest that required an entry fee was a prize contest, not a wager." *NCAA*, 730 F.3d at 223 n.4.

Against the backdrop of this common-law understanding of gambling, Congress specifically declared that fantasy sports contests did not involve gambling in UIGEA, 31 U.S.C. § 5362(1)(E)(ix) (2006). In that statute addressing financial transactions involving unlawful gambling proceeds, Congress began by defining "bet or wager"—the basis for the substantive prohibitions and penalties under the statute—in terms strikingly similar to the New York law at issue here: "staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome." *Id*. § 5362(1)(A). Recognizing the inherent ambiguity and unclear boundaries of that provision, Congress went on to make specifically clear that fantasy sports contests involving an entry fee and a prize do not constitute unlawful gambling so long as three criteria are satisfied: (1) prizes are established and announced in advance, (2) outcomes reflect the "relative knowledge and skill of the participants," and (3) the result is not determined by the outcome for a real-world team or teams or an athlete's performance in a single real-world sporting event. *Id.* § 5362(1)(E)(ix). FanDuel's contests meet all of those requirements.

In adopting this provision, Congress recognized in the statutory language that fantasy sports contests should be distinguished from sports betting and other

forms of gambling because (1) fantasy sports contests are tests of the relative skill of the fantasy contestants, not binary bets against the house; (2) unlike pari-mutuel betting, the prizes do not vary depending on other players' choices; and (3) fantasy sports contestants test their skills against each other in ways that do not depend on (or compromise the integrity of) the outcome of underlying sporting events. While the motion court correctly recognized that this federal statutory exception does not preempt state gambling laws, the court erroneously attached no weight to the persuasive reasons motivating Congress's judgment that fantasy sports contests do not amount to illegal gambling under the statute.

3. Fantasy Sports Contests Are Not a Form of Betting

Contrary to what the motion court appeared to conclude, fantasy sports competitors are not mere passive observers of contests by others. Rather, in the separate fantasy context in which fantasy sports contests operate, the participants *are* the contestants. The competition is a contest of skill at selecting a roster of players as a general manager or coach would and pitting each competitor's selections against the selection efforts of others. Fantasy sports participants typically expend substantial time and effort in this competition, knowing (with strong empirical support) that they are actually engaged in competitions of skill, and that effort and aptitude in roster selection make a pivotal difference in prospects for success. Their fantasy roster teams will never actually step on a field

together or actually compete against any other team, but the participants who have selected these rosters actively compete in their own self-contained contests of skill.

Recognition that fantasy sports belong to this category of *bona fide* contests for prizes, and therefore do not involve staking, risking, betting or wagering, obviates the need for courts to calibrate the precise degree of skill and chance involved in a contest, as all true contests involve elements of both. As the court in *Las Vegas Hacienda* explained, a golfer's skill will get the ball close to the hole more often, but a hole-in-one always involves some component of chance, as indeed even a duffer may hit a great shot once in a while. 77 Nev. at 30, 359 P.2d at 87 ("a skilled player will get it (the ball) in the area where luck will take over more often that an unskilled player"). The court nonetheless had no trouble concluding that the hole-in-one challenge was a contest for a prize, outside the bounds of gambling laws. As it explained, because "we have concluded that the contract does not involve a gaming transaction, consideration of . . . [whether] the shooting of a 'hole in one' was a feat of skill, becomes unnecessary." *Id.*

The *Humphrey* court identically recognized that under the applicable statute (as is true for the New York statute), the determination that participation in fantasy sports did not constitute a bet, wager or stake obviated the need to determine with regard to fantasy sports contests "whether the outcome of the game is determined by skill or chance" under the second prong of the applicable statute. 2007 WL

1797648, at *8. The court in *Humphrey* thus held that "the question whether the money awarded is a *bona fide* prize (as opposed to a bet or wager) can be determined without deciding whether the outcome of the game is determined by skill or chance." *Id.*

Similarly here, the entry fees for fantasy sports leagues do not amount to "staking or risking" within the meaning of Section 225.00. That determination will render unnecessary any fact-bound balancing of the elements of skill and chance necessary to determine whether fantasy sports are a "contest of chance." It also renders unnecessary the determination of whether fantasy sports involve illegal staking on the outcome of "future contingent events outside [the participant's] control or influence" (in a context where fantasy sports outcomes are heavily influenced by the participants' skill in choosing rosters and where the State's over-literal interpretation of the statutory language would criminalize almost all forms of passive investment).

In short, the State's failure to meet this first requirement of the statutory test is by itself fatal to the State's likelihood of success on the merits and thus to the preliminary injunction order.

B. FanDuel's Fantasy Sports Contests Turn on the Relative Skill of the Contestants and Thus Are Not Games of Chance

Even if the State had demonstrated a likelihood of success on the first prong of the statutory test, the preliminary injunction still should have been denied

because the State separately failed to demonstrate a likelihood of success on the second prong of the statutory test—that FanDuel's fantasy sports contests are "contests of chance." *See* N.Y. Penal Law § 225.00(1)-(2). On this point, the motion court did not analyze FanDuel's evidence, did not present any reasoning or conclusions, and did not articulate the legal standard it believed governs the inquiry.

1. The Outcomes of Fantasy Sports Contests Are Dominated by Participants' Skill

Although the motion court appears to have overlooked it, *see* R. 10, FanDuel presented extensive expert evidence that the outcomes of fantasy sports contests are dominated by the skill of the participants. That evidence primarily took the form of a submission by Professor Anette Hosoi, an MIT scientist who specializes in the application of mathematics to sports, describing the results of her nearly year-long study of the role of skill in daily fantasy sports based on an extensive data set obtained from FanDuel's records. R. 528-29 ¶¶ 2, 6, 8.

Professor Hosoi's analysis, which focused primarily on the head-to-head and 50/50 contests in which individual players have the best statistical prospects for winning, identified three components of the outcomes of a large number of fantasy sports contests demonstrating "that skill plays a decisive role in a player's cumulative performance over time." R. 536 ¶ 31:

(i) Predictability. Professor Hosoi confirmed that fantasy lineups selected by actual players beat randomly selected lineups (including lineups designed to approach the salary cap) an overwhelming percentage of the time. R. 529 ¶ 10; R. 531 ¶ 16; R. 532-36 ¶¶ 21-31.

(ii) Replicability/Persistence of Results. Professor Hosoi found substantial statistical correlations indicating that over time, strong and successful fantasy players tend to remain strong and successful; moderately successful players tend to remain moderately successful; and weak and unsuccessful players tend to remain weak and unsuccessful. R. 529-31, ¶¶ 11, 17; R. 536-40 ¶¶ 32-33, 37-41.

(iii) Capacity to Improve. Professor Hosoi observed that over time FanDuel users improved their skills and could expect better results to a statistically significant degree. R. 530-31 ¶¶ 12-18; R. 543-45 ¶¶ 52-59.

These characteristics of predictability, replicability/persistence and capacity for improvement are all are highly indicative of the role of skill in increasing the probability of favorable outcomes. For the same reason, they are incompatible with a finding of outcomes dominated by chance, because such outcomes tend over time toward randomness. This evidence powerfully confirms that FanDuel's daily fantasy sports contests are dominated by skill rather than chance. R. 549 ¶ 67. The State presented no evidence to the contrary; instead, it merely made the legal

argument that fantasy sports competitions must be games of chance because happenstance during the competition can affect the outcome—but that fact is characteristic of all competitions of any kind.

2. A Contest Is Not Gambling When Skill, Rather Than Chance, Is the Dominating Element

Courts throughout the country, including in New York, have recognized that the correct test for whether a game is one of chance or of skill is to ask which of them "is the dominating element that determines the result of the game." *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 170-71 (1904). Following the New York Court of Appeals' landmark decision in *Lavin*, the "dominating element" test became the established test throughout the country. *See* Bennett Liebman, *Chance v. Skill in New York's Law of Gambling: Has the Game Changed?*, 13 GAMING L. REV. & ECON. 461, 461-62 (2009).

As part of an overall revision of the Penal Law in 1965, the Legislature adopted Penal Law § 225.00(1), which defines "contest of chance" as any contest that depends "in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." This did not, however, alter the "dominating element" test that the Court of Appeals adopted in *Lavin*. On the contrary, the case law postdating the enactment of § 225.00(1) makes clear that the *Lavin* test and the statutory test are synonymous. For example, *People v. Li Ai Hua*, 24 Misc. 3d 1142 (Crim. Ct. Queens County 2009), quoted the *Lavin*

"dominating element" test as providing the meaning of the statutory phrase "material degree":

> While some games may involve both an element of skill and chance, if the outcome depends in a *material degree* upon an element of chance, the game will be deemed a contest of chance. The 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* that determines the result of the game[.]

24 Misc. 3d at 1145 (emphasis added; quotation marks and citations omitted). Numerous other New York cases after the 1965 adoption of Penal Law § 225.00(1) have continued to cite and follow *Lavin*—sometimes explicitly invoking its "dominating factor" test, and sometimes implicitly applying it—as providing the test for whether an activity constitutes gambling.[4]

Similarly, in *Matter of Plato's Cave Corp. v. State Liquor Authority*, 115 A.D.2d 426 (1st Dep't 1985), this Court upheld the State Liquor Authority's finding that a video poker game was gambling under the "material degree" test of Penal Law § 225.00, because "the outcome depends *in the largest degree* upon an

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[4] *See, e.g.*, *Dalton v. Pataki*, 11 A.D.3d 62, 82 n.5 (3d Dep't 2004), *modified on other grounds*, 5 N.Y.3d 243 (2005) (citing *Lavin* for basic meaning of "game of chance" in New York law); *People v. Stiffel*, 61 Misc. 2d 1100 (App. Term 2d Dep't 1969) (citing *Lavin* to hold that billiards is not gambling); *People v. Davidson*, 181 Misc. 2d 999, 1001 (Sup. Ct. Monroe County 1999), *rev'd on other grounds*, 291 A.D.2d 810 (4th Dep't), *appeal dismissed*, 98 N.Y.2d 738 (2002) (citing *Lavin* to hold that playing dice for money is gambling); *People v. Melton*, 152 Misc. 2d 649, 651 (Sup. Ct. Monroe County 1991) (same); *People v. Hawkins*, 1 Misc. 3d 905(A), 2003 N.Y. Slip Op. 51516(U), at *2 (Crim. Ct. N.Y. County 2003) (same); *Valentin v. El Diario–La Prensa*, 103 Misc. 2d 875, 878 (Civ. Ct. Bronx County 1980) (citing *Lavin* and applying its "dominating factor" test to conclude that "voting contest" sponsored by newspaper was gambling).

element of chance." *Id.* at 428 (emphasis added). On that basis, this Court distinguished a case that had found video games not to be gambling where the outcome depended "*primarily* on physical skills." *Id.* at 428 (emphasis added) (citing *WNEK Vending & Amusements Co. v. City of Buffalo*, 107 Misc. 2d 353 (Sup. Ct. Erie County 1980)). Thus, this Court applied the statutory "material degree" test by looking to whether chance or skill was the dominant element.

Likewise, in *People v. Hunt*, 162 Misc. 2d 70 (Crim. Ct. N.Y. County 1994), the court considered whether chance was dominant in deciding whether three-card monte, if honestly played, was a contest of chance under the "material degree" language of the statute. The court quoted the statutory "material degree" test, analyzed the State's allegations, and concluded that the game was not gambling because "skill *rather than chance* is the material component" of the game. *Id.* at 72 (emphasis added). Thus, in applying the statutory "material degree" test, the court looked to whether skill outweighed chance, which is the same test that the Court of Appeals applied in *Lavin*.

The legislative history of the Penal Law confirms, as the case law indicates, that the 1965 revision of the Penal Law does not overrule or alter the *Lavin* "dominant element" test. The Court of Appeals has held that the 1965 Penal Law revisions, which were based on a proposal by a temporary legislative commission, the Bartlett Commission, should not be interpreted to make fundamental changes in

existing law unless the Commission specifically identified those changes in its working papers:

> The Bartlett Commission comprehensively studied the entire body of law and was unquestionably aware of [existing Court of Appeals precedents]. Surely their work would have reflected such a fundamental change had it been intended.

People v. Collier, 72 N.Y.2d 298, 302 n.1 (1988).

With regard to the law's gambling provisions, the Bartlett Commission was focused on streamlining and unifying the provisions to "simplify the framing and lodging of charges in gambling cases." *Commission Staff Notes on the Proposed New York Penal Law*, in TEMP. COMM'N ON REVISION OF PENAL LAW & CRIM. CODE, THIRD INTERIM REPORT, at 382 (1964) (discussing dismissals of cases because prosecutors had mistakenly charged the wrong section of the old law). Consistent with this goal, the Commission emphasized that it was making "few actual changes of substance" but "considerable revision with respect to form." *Id*. at 381. The Commission's report does not even mention the "material degree" language it inserted in the definition of "gambling." *See Collier*, 72 N.Y.2d at 303 n.1. Although some commentators have speculated that this standard reflected a softening of the test for identifying a "contest of chance," not a single case since

Section 225.00's enactment has applied that statutory test to reach a different outcome than would have been reached under the "dominating element" test.[5]

3. Under Any Reading of the Statute, the Facts Demonstrate That Fantasy Sports Contests Are Games of Skill, Not Chance

Even if "material degree" only meant an important or substantial but not necessarily dominant element of chance, FanDuel's fantasy sports contests would still qualify as contests of skill rather than chance. "Material degree" in this context must at the very least mean that chance is an important element. If it were satisfied merely because chance might occasionally change the outcome, then almost nothing would be a game of skill, as "[i]t is difficult to conceive of any game which does not have present . . . the element of chance." *Amusement Enters., Inc. v. Fielding*, 189 Misc. 625, 628 (Sup. Ct. Kings County 1946), *modified on other grounds*, 272 A.D. 917 (2d Dep't 1947).

The State has sought to highlight the role that unpredictable events—an injury, the weather or a bad hop—can play in fantasy sports, but those same kinds of events equally can affect the outcomes of other competitions without altering

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[5] *People v. Jun Feng*, 34 Misc. 3d 1025(A), 2012 N.Y. Slip Op. 50004(U) (Crim. Ct. Kings County 2012), which quoted commentary opining that chance need not be the dominating element for a game to constitute a game of chance, is not to the contrary, because the court did not actually apply that test. Instead, it held that the operators of a mahjong parlor, by using a "house container" to collect a $1 cut of every hand that won $15 or more, were betting on how many hands would be won for at least $15, and therefore—unlike the mahjong players themselves—were gambling under the "future contingent event" prong of the statutory definition regardless of whether the underlying game was one of skill or chance. *Id.* at *5-6 & *4 n.1. *See also infra* at 42-43 (further discussing the *Jun Feng* case).

their nature as contests of skill. New York courts have recognized numerous games—including tennis, golf, basketball, billiards, bowling, alley ball, shooting games, chess and checkers—to be contests of skill. *See, e.g.*, *Amusement Enters.*, 189 Misc. at 628 (alley ball, a game similar to skee-ball; also listing basketball, tennis, billiards, bowling and golf); *Lavin*, 179 N.Y. at 170 (chess, checkers, billiards and bowling); *People v. Cohen*, 160 Misc. 10, 11 (Magis. Ct. Queens Borough 1936) (coin-operated electric-eye shooting game). They do not become games of chance just because, in most of those games, "occasionally an unskilled player may make a lucky shot." *Cohen*, 160 Misc. at 11; *accord Lavin*, 179 N.Y. at 170. And as noted, *supra* at 5, New York's Legislature has even recognized that a tournament testing participants' success in predicting the outcomes of multiple horse races is a "contest of skill" that "shall not be considered gambling," even when betting on a single horse race is undisputedly gambling. N.Y. Racing, Pari-Mutuel Wagering & Breeding Law § 906.

The State's argument that fantasy sports are contests of chance seems to rest on the proposition that a contest is one of chance if there is a possibility that chance could alter the outcome. Given the examples the State has listed, including injuries, weather, and bad hops, that cannot be correct; if it were, every *bona fide* contest would be transformed into one of chance. In determining whether a particular type of contest is dominated by skill or chance, it makes no sense to look

at a single particular outcome, because even the most skill-based contests—apart from contests so lopsided that they are not genuinely competitive—will not yield the same outcome every time. Instead, the sensible approach is to rely, as FanDuel has, on empirical evidence regarding probabilities over time. "Skill" is properly viewed as the capacity, through the exercise of effort and aptitude, to increase the prospects of achieving a desired result over what would be expected if events were unfolding at random. *See, e.g.*, *People v. Tillman*, 13 Misc. 3d 736, 738 (Crim. Ct. Kings County 2006) ("A game of skill . . . although the element of chance necessarily cannot be entirely eliminated, is one in which success depends principally upon the superior knowledge, attention, experience and skill of the player, whereby the elements of luck or chance in the game are overcome, improved or turned to his advantage.") (quoting *Cohen*, 160 Misc. at 11).

As the Nevada Supreme Court recognized in *Las Vegas Hacienda*, for example, it was "within the province of the trial court to determine" that a hole-in-one contest was a contest of skill because "a skilled player will get it (the ball) in the area where luck will take over more often than an unskilled player." 77 Nev. at 30, 359 P.2d at 87. The reality that superior skill increases the prospect for achieving the hole-in-one only by enabling the player to get close more often without guaranteeing that result, and that a poor player could defy the odds by

achieving a hole-in-one ahead of superior players, did not transform the contest into one "dominated" by chance.

The same is true for fishing contests, spelling bees, sporting events and other games of skill—proof of the dominance of skill lies in the ability of individual players to increase significantly their prospects of winning through the exercise of effort and aptitude. More able competitors will prevail more of the time in all of these contests, even though the vagaries of any individual competition may mean that the biggest fish will avoid the most skilled fisherman's hook (or jump onto the least skilled fisherman's hook), the best speller is given a rare word she does not know (or her opponent receives only words she knows), or a last-second gust of wind causes a correctly kicked football to drift wide of the uprights. These contests remain contests of skill even though, like all contests, they may be affected by small differences in performance by the contestant or others that are part of the nature of contests and that nobody could predict. To the extent the range of potential outcomes is characterized as "chance"—even though true "chance" is in its nature more random—it cannot be considered so "material" against the backdrop of the dominant role of skill that it transforms the prizes in these contests into the proceeds of "gambling" within the meaning of the statute.

Fantasy sports share the same dynamics of skill-based judgments, capacity to increase prospects for winning through effort and aptitude, and susceptibility to

a range of outcomes as these other games of skill. As Professor Hosoi explained in her affidavit, skill is also a substantially stronger predictor of outcomes in fantasy sports than in poker, R. 538 ¶ 66, but courts have wrestled with whether the skill-based nature of poker is sufficient to characterize it as a game of skill. *See United States v. DiCristina*, 886 F. Supp. 2d 164, 235 (E.D.N.Y. 2012) (considering degree to which Texas Hold 'Em is properly considered a "game of skill"), *rev'd on other grounds*, 726 F.3d 92 (2d Cir. 2013). The kinds of individual events that the State imagines as potentially affecting the performance of an individual player on a fantasy roster do not transform this skill-based competition into a game of chance under the Penal Law.

C. FanDuel's Contests Are Not Gambling on a Future Contingent Event Beyond the Contestant's Control or Influence

FanDuel's contests likewise do not constitute wagering on "a future contingent event not under the [person's] control or influence." N.Y. Penal Law § 225.00. The plain language of the "future contingent event" provision makes clear that a contest is not gambling if the player has "influence" over the outcome. As explained above, using sports acumen and knowledge, FanDuel contestants unquestionably *influence the outcome of the relevant contest—the fantasy sports contest*—by making skilled roster choices. Fantasy sports contestants compete against each other at the task of selecting players, while operating within the constraints of the fantasy salary cap, to assemble an optimum lineup from millions

of theoretical combinations. Those decisions and skill-based selections undeniably influence the outcome of the fantasy sports contest.

While the State asserts that fantasy sports contestants are just like the observer of a chess match who bets on an either/or, binary outcome—whether player A will defeat player B—fantasy sports players are more properly viewed as active players of their own game, competing against others in a game of skill to select the optimal roster of players. In fantasy sports, prizes are distributed based on the outcome of the fantasy contest, not the outcome of any real-world event. The "outcome" that is relevant to the players is not whether one real-world team beats another, but whether one competitor can gain more fantasy points and thereby outperform his opponent in the fantasy contest. It should be beyond dispute that the contest entrants have "influence" on the outcome of that event for which the prize is awarded. The fantasy contestant's inability to influence the outcome of any real-world sporting event is beside the point, because fantasy contestants can influence the outcome of the contest in which they are seeking to win prizes.

The "future contingent event" clause plainly addresses the fundamentally different scenario in which a person stakes something of value on the outcome of an actual, real-world game or similar event such that his own success rises and falls directly in line with the outcome of that real-world event over which he has no

influence. Take a week of NFL football games. The outcomes of wagers on the games themselves can be readily gleaned from the same NFL record books that document which teams won or lost the game, how many points they scored, and so on. But those same archives, even to the extent they contain all of the various individual statistics that are ascribed different values in the intricate rule sets for fantasy sports contests, shed no light on who may have won or lost fantasy contests dependent on millions of variables in scoring system, lineup configuration, salary cap value, and the performance of other fantasy managers. The results of fantasy contests – independent competitions in their own right – reside only in FanDuel's (or a given league commissioner's) record books. If construed in the expansive and unbounded manner urged by the State, the "future contingent event" provision would not only raise serious constitutional questions but also outlaw a range of universally approved activities of daily life.

1. Participants in a Fantasy Sports Contest Are Active Players in a Competition of Their Own, Not Bettors on a Sporting Event

FanDuel's fantasy sports contests are clearly separated from the underlying sporting events, as FanDuel offers no contests based on any single sporting event and does not permit participants to construct any lineup that substantially coincides with an actual, real-world team. R. 691 ¶ 12. FanDuel's fantasy contests consequently are not simply a form of sports betting, as the State has urged. As the

Third Circuit has recognized, there is a "legal difference between paying fees to participate in fantasy leagues and single-game wagering as contemplated by the [New Jersey] Sports Wagering Law." *NCAA*, 730 F.3d at 223 n.4 (citing *Humphrey*, 2007 WL 1797648, at *9).

Contrary to the allegations of the State's complaint, R. 26-27 ¶¶ 43-47, fantasy sports are unlike "prop" bets, in which a participant bets on a particular event in a sporting event—for example, a bet on whether a specific batter, on a specific occasion at bat, would hit a fly ball to the outfield. That kind of binary, either-or bet is fundamentally different from a fantasy sports contest (either season-long or daily), which is built on the separate competitive and skill-based exercise of building a fantasy team to compete against other fantasy teams. Fantasy sports do not look to whether a particular athlete or even a collection of athletes achieves a particular milestone, but to how the performances of participants' fantasy roster choices compare to the performance of others' roster choices.

In the motion court, the State cited only a single case that found a gambling violation under the "future contingent event" prong of the statute, and that case demonstrates that that statutory test deals only with situations that are vastly different from FanDuel's fantasy sports contests. In *People v. Jun Feng*, 34 Misc. 3d 1205(A), 2012 N.Y. Slip Op. 50004(U) (Crim. Ct. Kings County 2012), a mahjong house was profiting from the wins of the mahjong players by taking a cut

of their winnings. *Id.* at *4-*5. Although the court found that this arrangement gave the house an interest in the "future contingent event" of the outcomes of individual games, it still found that the players were not gambling under that provision because they had "some control" over the outcome. *Id.* at *6 n.1. But in fantasy sports, there is no "house." FanDuel does not gain or lose anything based on the outcome of participants' contests. It acts only as administrator of fantasy sports contests, and entry fees and prizes are both fixed in advance. It is the relative skill of the fantasy players that determines success in fantasy sports contests.

Few other reported cases have predicated a finding of illegal gambling on the "future contingent event" prong of the statute; instead, courts have preferred to look to whether the game was one of skill or chance. New York courts' consistent reluctance to rest their decisions on the future contingent event provision reflects an appropriate effort to constrain the application of highly ambiguous statutory language that cannot have the broad meaning that the State has tried to ascribe to it, because people—for example, investors—regularly put money at risk based on perfectly legal predictions that actions by others will lead to a favorable outcome of future contingent events.

2. A Broad Application of the "Future Contingent Event" Theory of Gambling Liability Would Violate the Rule of Lenity, Constitutional Requirements of Due Process and Common Sense

Extending the "future contingent event" prong of the statute to any event that leads to a return based on a prediction of others' behavior or performance would criminalize a wide variety of legitimate business activities that clearly do not amount to gambling—including insurance, investing and trading in commodities futures and derivative instruments. Each of these activities involves a chance of gain or loss based on future contingent events outside one's control or influence and therefore, on the broad reading of the statute that the State advocated in the motion court, would appear to violate New York law.

As the Court of Appeals has recognized, however, "[i]f two constructions of a criminal statute are plausible, the one more favorable to the defendant should be adopted in accordance with the rule of lenity." *People v. Golb*, 23 N.Y.3d 455, 468 (2014) (quoting *People v. Green*, 68 N.Y.2d 151, 153 (1986)). Although Penal Law § 5.00 provides that Penal Law provisions are not "to be strictly construed" but "must be construed according to the fair import of their terms," the Court of Appeals has treated this provision as compatible with the continued application of the rule of lenity. *See Golb*, 23 N.Y.3d at 468 (applying rule of lenity to penal law provision); *Green*, 68 N.Y.2d at 153 (same); *see also People v. Aleynikov*, 49 Misc. 3d 286, 323 (Sup. Ct. N.Y. County 2015) (citing *Golb*;

holding that § 5.00 does not supersede rule of lenity). The rule of lenity applies even if the criminal statute is being enforced in a civil action, as courts will not give two different meanings to the same law. *See, e.g.*, *Fed. Commc'ns Comm'n v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954) ("[T]hese are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice.").

Statutes also should be construed in ways that avoid rendering them unconstitutional or even creating serious doubts about their constitutionality. *People v. Correa*, 15 N.Y.3d 213, 233 (2010); *People v. Finkelstein*, 9 N.Y.2d 342, 345 (1961). Under the "void-for-vagueness" doctrine, a penal statute violates federal and state constitutional requirements of due process unless it "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also* U.S. Const. Amend. XIV; N.Y. Const. Art. I, §§ 1, 6. The Penal Law provision regarding staking money on a "future contingent event beyond [the participant's] influence or control" would violate this principle—or, at the very least, raise serious constitutional questions—if it were extended beyond core activities traditionally recognized as gambling, as it would fail to provide a definite

principle for distinguishing between prohibited activities and activities widely recognized as lawful.

For example, insurance, by its very nature, involves an agreement to pay based on a contingent future event beyond the insurance company's influence or control. But it is not gambling. Likewise, a passive investor in a company has no influence over the outcome of his or her investment, which is plainly a future contingent event as to which the investor depends on actions by others, but such investments are not considered gambling. The same is true for trading in futures or derivatives, even though no actual commodities or other items ever change hands, as those instruments involve nothing more than a contingent promise to pay money in the future. *See, e.g.*, *Korea Life Ins. Co., Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 269 F. Supp. 2d 424, 442 (S.D.N.Y. 2003) ("Derivatives transactions, forward contracts and swap agreements in currencies and commodities are not considered illegal gambles, and do not violate New York's gambling statute."); *Liss v. Manuel*, 58 Misc. 2d 614, 617 (Civ. Ct. N.Y. County 1968) (recognizing futures contracts as "an approved and judicially enforceable mode or form of business and regardless of risk, not a bet, wager or illegal gamble"). Yet the insurance carrier, the investor or investment advisor and the general manager do not act based on chance—they act based on expertise, underwriting and analysis—and thus have a significant opportunity to influence the performance of their

portfolios by their choosing, even though they do not control the results. The same is true for fantasy sports contests.[6]

In enacting UIGEA, the U.S. Congress recognized precisely the danger of the overly broad construction of gambling the State presses here. The provisions making clear that fantasy sports contests do not constitute wagering or betting under federal law were accordingly grouped with similar provisions excluding from the statute's scope "any contract of insurance," commodities futures and similar derivative transactions, and the "purchase or sale of securities," among other forms of passive investment in predicted performance of others not under the investor's control. 31 U.S.C. § 5362(1)(E). Congress adopted these provisions to steer courts away from the same interpretive pitfall that the State urges on the Court here: the erroneous view that all forms of predictive judgment about the performance of others on which a financial consequence turns are gambling. That has never been the law of New York. Unlike UIGEA, Penal Law § 225.00 itself contains no express exceptions, not even for investing or insurance; rather, the Legislature has relied on the courts to apply the law in a sensible way. And, as noted, *supra* at 43, courts have understandably been reluctant to rely on this

[6] It is no answer that insurance, securities and commodities trading, and similar activities are, in today's world, typically subject to state or federal regulation. Many forms of passive investment (such as investments in real estate or in companies that are not publicly traded) are subject to no regulation beyond a prohibition on outright fraud. Those activities do not amount to gambling regardless of whether Congress or the Legislature has chosen to regulate them.

provision or to endorse a sweeping construction that would call into question obviously legitimate activities.

Given the potentially serious consequences posed by adoption of the State's overly broad theory here, not only for the established fantasy sports industry but also for other legitimate activities, the Court should reject any argument to extend Penal Law § 225.00(2) beyond its sensible reach. Doing so would both violate the rule of lenity and the due process requirement that penal statutes must clearly define the conduct that is and is not prohibited.

II. THE STATE HAS NOT DEMONSTRATED A PROBABLE VIOLATION OF NEW YORK'S CONSTITUTION, AND THE COURT SHOULD CONSIDER ONLY THE STATE'S CLAIMS OF STATUTORY VIOLATION

In finding that the State had a likelihood of ultimate success on the merits, the motion court went beyond the State's claim that FanDuel violates the applicable statute and also found that the State was likely to succeed in establishing that FanDuel's contests violate Article I, Section 9 of New York's Constitution. R. 13. This was error, because once the court had decided the motion on a statutory ground, it should not have reached any constitutional issues. As the Court of Appeals has held, "[c]ourts should not decide constitutional questions when a case can be disposed of on a nonconstitutional ground." *Beach v. Shanley*, 62 N.Y.2d 241, 254 (1984) (declining to decide whether the state constitution mandated a

reporter's privilege, because a statute resolved the issue).[7] As a matter of basic separation of powers principles, it is not appropriate for courts to issue what amount to advisory opinions on constitutional issues that could be seen as tying the Legislature's hands for the future.

Moreover, if this Court finds, as it should, that FanDuel's contests are lawful under Penal Law § 225.00, it will remain unnecessary to decide any constitutional issues. While Article I, Section 9 of the State Constitution prohibits "gambling," other than specified state-sponsored activities (lotteries, pari-mutuel racing and casinos), it also expressly delegates to the Legislature the responsibility to "pass appropriate laws to prevent offenses against any of the provisions of this section." New York courts have made clear that Article I, Section 9 is not a self-executing provision that can be directly implemented by State officers. Instead, any claim of illegality must be brought under a statute enacted to implement that provision. *See, e.g.*, *People ex rel. Sturgis v. Fallon*, 152 N.Y. 1, 11 (1897) (noting "[t]hat this provision of the Constitution was not intended to be self-executing is manifest" and that Article I, Section 9 "expressly delegates to the Legislature the authority

[7] *See also, e.g.*, *People v. Sailor*, 65 N.Y.2d 224, 228 (1985) (resolving common-law collateral estoppel claim before constitutional double jeopardy argument); *A.J. Baynes Freight Contractors, Ltd. v. Polanski*, 90 A.D.3d 1630, 1633 (4th Dep't 2011) (vacating part of lower court order declaring local ordinance unconstitutional, given that ordinance had already been declared invalid on statutory grounds).

[to implement the provision], and requires it to enact such laws as it shall deem appropriate to carry it into execution.").

Just as it is not self-executing, the Constitution's prohibition of "gambling" also is not self-defining. It needs legislative and judicial construction, because so many forms of activity recognized to be permissible involve taking risks in hopes of obtaining returns for those risks, in ways that could be incorrectly analogized to illegal gambling. The Legislature has recognized that the constitutional provision gives it a definitional role, changing the statutory definitions of gambling over time and promulgating such laws as the one defining handicapping tournaments as "contests of skill" that "shall not be considered gambling." Thus, a finding that FanDuel's contests are lawful under Article 225 of the Penal Law also will dispose of any constitutional question.

III. THE STATE HAS NOT PUT FORWARD EVIDENCE OF IRREPARABLE HARM

The evidence in the record cannot support a showing of irreparable harm to the State in this case, nor does the presumption of irreparable harm apply at this stage absent a final judgment relating to the legality of FanDuel's business.

The motion court erroneously found, without *any* consideration of equities, that the State need not prove irreparable injury because such injury is "implied" in a statutory enforcement action. R. 13. That conclusion, particularly on a preliminary injunction motion before any final finding of illegality, was in error;

"whether immediate relief of this nature should be extended 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) (denying motion for preliminary injunction where, despite presumption of irreparable harm, "a balancing of the equities discloses no prejudice to plaintiff if it is left to await an adjudication on the merits").

New York courts have recognized that the extremely harsh remedy of an injunction shutting down a business is inappropriate prior to a final adjudication on the merits without proof that immediate harm to the public is likely. For example, in *City of Rochester v. Sciberras*, 55 A.D.2d 849 (4th Dep't 1976), the Appellate Division reversed a preliminary injunction prohibiting operation of a Roto-Rooter franchise whose operator lacked a plumbing license, finding that despite "the importance to the City of having its Ordinances obeyed" there was "no justification for the issuance of a preliminary injunction" in the face of a challenge to the plumbing license requirement absent "evidence of immediate injury to the City or its citizens." *Id.* at 850; *see also People v. New York Carbonic Acid Gas Co.*, 128 A.D. 42, 43 (3d Dep't 1908) ("defendants should not be enjoined in the prosecution of their ordinary business" while challenge to constitutionality of law was pending).

Importantly, there is no evidence in the record to support a finding of any immediate threat to public health or safety in this case. This is not a case where the State has suddenly discovered an enterprise engaged in plainly illegal activity like human trafficking or transfers of stolen goods. FanDuel has been openly advertising and offering its fantasy sports contests in New York for years. The only relevant change that took place regarding these activities in 2015 was the Attorney General's change of mind. Indeed, the State's theory has shifted considerably even during this case, with the State first declaring that "the legality of traditional fantasy sports has never been seriously questioned in New York," R. 684, only to later apparently acknowledge that under its novel theory, all public fantasy sports contests, season-long or daily, that involve an entry fee and a prize constitute gambling.[8] Although enforcement authorities are certainly permitted to change their views about whether conduct long viewed and treated as legal should now be considered illegal, the State's actions here are precipitous and unwarranted. There is no reason to treat long-tolerated fantasy sports contests as suddenly so toxic that they require an emergency shutdown of these established businesses before any court has had an opportunity to reach a final judgment on the State's undisputedly novel theory as to whether their activities are actually illegal.

[8] *See* Memorandum of Law in Opposition to Defendants' Motion for an Interim Stay, Dec. 22, 2015, at 36-37, in *People v. FanDuel*, Index No. 453056/15, Motion No. M-6204 (App. Div. 1st Dep't); Transcript of Proceedings, Nov. 25, 2015, NYSCEF Doc. No. 106, at 63, in *People v. DraftKings*, Index No. 453054/2015 (Sup. Ct. N.Y. County).

The motion court's only stated reason for ordering the shutdown of FanDuel's business for New York customers, apart from its erroneous view that a finding of the State's likelihood of success on the merits automatically warranted a shutdown in the public interest, was its uncritical acceptance of the State's assertions that daily fantasy sports particularly attract compulsive gamblers and those at risk for gambling addiction. Those assertions, however, were unsupported by admissible evidence and at odds with FanDuel's strong contrary evidence which the court below did not even mention. R. 673 ¶ 3; R. 676. Apart from quoting newspaper articles that are far from "evidentiary," the State submitted affirmations of two proposed expert witnesses, Mr. Keith S. Whyte and Dr. Jeffrey L. Derevensky, without even attempting to a lay a foundation for their opinions. Mr. Whyte's affirmation merely asserts that according to unnamed "experts in the field," certain demographic characteristics of fantasy sports players (that is, that they tend to be young adult males) place them at "high risk of gambling addiction." R. 319 ¶¶ 6-7. Mr. Whyte presents no analytical method and provides no quantitative evidence to support his bare assertion, which falls far short of demonstrating any true link between fantasy sports and gambling problems. Dr. Derevensky's affirmation similarly asserts that "college students who have gambling problems are more likely to have engaged in *both season-long fantasy sports and DFS*," without presenting any description of the basis for this assertion,

verifiable data, peer-reviewed research or other non-anecdotal support, or evidence of causal linkage associated with his anecdotal impressions of correlation. R. 322 ¶ 9 (emphasis added).

FanDuel, by contrast, has submitted unrebutted data showing that compulsive or problematic fantasy sports play is exceedingly rare, R. 673 ¶ 3; R. 676—at least in part, apparently, because fantasy sports competitions require so much more work than the forms of State-sponsored gambling (lotteries, pari-mutuel horse racing and casinos) that are the dominant sources of problem gambling. *See* R. 719-21. Particularly since those forms of legalized gambling remain readily available to New York residents, the court below erred in concluding that a preliminary injunction was warranted to prevent an imminent threat to the people of this state. On this record, the only permissible finding was that allowing FanDuel's longstanding business to continue to operate until this lawsuit is resolved on the merits will not harm the public interest.

IV. THE BALANCE OF HARDSHIPS TIPS IN FAVOR OF FANDUEL

Because the State has not (and cannot) demonstrate a likelihood of success on the merits and has failed to make any showing of irreparable harm, the balance of hardships associated with granting or denying an injunction tips sharply in favor of FanDuel. A preliminary injunction will cause FanDuel enormous loss of revenue, and could have adverse repercussions for its business nationwide.

Significantly, because the State is relieved by CPLR 2512 from any burden to obtain a bond or otherwise indemnify FanDuel for its losses from a shutdown, those losses are literally irremediable if FanDuel ultimately establishes that its conduct has been legal. In view of the absence of expression by the State of any concerns about fantasy sports for years before initiating this action, it would be at best incongruous to find any truly substantial harm to the public interest from allowing the continuation of FanDuel's business until a court reaches a final judgment on the issue of first impression in New York that this case presents.

CONCLUSION

For the foregoing reasons, the State's motion for a preliminary injunction should have been denied. Accordingly, the order appealed from should be reversed.

Dated: New York, New York
February 22, 2016

Respectfully submitted,

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PRINTING SPECIFICATION STATEMENT

Processing system:	Microsoft Word 2010
Typeface:	Times New Roman
Point size:	14 for text; 12 for footnotes
Line spacing:	Double
Word count:	13,647 (including point headings and footnotes, and excluding the table of contents, table of authorities, proof of service or certificate of compliance).

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-

FANDUEL, INC.,

Defendant.

Index No. 453056/2015
IAS Part 13 (Justice Mendez)
NYSCEF Case

PREARGUMENT STATEMENT

Pursuant to Rule 600.17 of the Appellate Division, First Judicial Department, Defendant-Appellant FanDuel Inc., by its undersigned counsel, states as follows:

1. The title of this action is set forth in the caption above.

2. The full names of the parties are stated in the captions above. There have been no changes in the parties.

3. Counsel for Defendant-Appellant is:

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5. The appeal is from a preliminary injunction order of the Supreme Court of the State of New York in and for the County of New York, the Honorable Manuel

Mendez, J.S.C., entered in the New York County Clerk's Office on December 11, 2015. A copy of the order with notice of entry is annexed hereto.

6. The Attorney General commenced this action pursuant to Executive Law § 63(12), General Business Law § 349 and Business Corporation Law § 1303, seeking to enjoin Defendant-Appellant from operating daily fantasy sports games for customers in New York on the ground that they allegedly constitute unlawful gambling. The Attorney General moved for a preliminary injunction enjoining that business as well as certain advertisements.

7. The court below granted the motion for a preliminary injunction.

8. Defendant-Appellant seeks reversal on the ground that its daily fantasy sports games do not constitute gambling under New York law; that the State therefore did not demonstrate a likelihood of success on the merits, irreparable harm, or a balance of equities in the State's favor; and that the preliminary injunction accordingly should have been denied.

9. No other appeal in this action is pending. The following related case is pending before in the Supreme Court, New York County: *FanDuel Inc. v. Eric T. Schneiderman et al.*, Index No. 161691/2015. In addition, two similar actions involving another party are also pending before the same court and justice: *People by Schneiderman v DraftKings Inc.*, Index No. 453054/2015, and *Matter of DraftKings Inc. v. Schneiderman*, Index No. 102014/2015; an appeal may have been filed to this Court in one or both of those actions.

Dated: New York, New York
December 11, 2015

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