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New York Supreme Court

Appellate Division—First Department

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

Plaintiff-Respondent,

-against-

DRAFTKINGS, Inc.

Defendant-Appellant.

and,

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 *AMICUS CURIAE* IN SUPPORT OF THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, by the New Sports Economy Institute

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INTEREST OF AMICUS CURIAE

The New Sports Economy Institute ("NSEI") is a 501(c)(3) non-profit, tax exempt organization, whose main mission is to anchor sports at the center of society as its core organizing principle. Consistent with this mission, NSEI (i) champions the socially beneficial union of sports, money, and public interest in the form of regulated financial products, (ii) envisions a brand new ecosystem that will lead to meaningful job creation, significant economic growth, and increased tax revenues based on sports as an asset class, and (iii) delivers educational reform through sports, first by advancing financial literacy and then making sports the core of all education. A key objective powers this three-part mission: to end sports gambling.

NSEI and its predecessor entities have considerable expertise at the intersection of sports, money, and regulation, and have been strong proponents of regulation and legal certainty from the very beginning of the operations, dating back to 2004. At that time, said operations consisted of the AllSportsMarket ("ASM") exchange, which was a web-based platform where stock-like instruments on sports performance were traded for real money. After an extensive analysis, it was concluded that it may be difficult to establish legal certainty at the time with the recent passage of the Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5362 ("UIGEA"). As a result, a decision was made to wind down the ASM platform and to turn the focus to the development of an index, SportsRiskIndex ("SRI"), a formula that produces a proxy for franchise valuation based on various economic factors including, but not limited to, attendance and TV ratings. Since the SRI tracks risks faced by businesses in and related to sports, it was also used as a base for index futures with the goal of listing and trading it on regulated futures markets.

Here, NSEI is moving for permission of this Court to appear as *amicus curiae* in this proceeding. Having the goal to end sports gambling, NSEI has a particular interest in this proceeding. In addition, having considerable expertise at the intersection of sports, money, and regulation, and having developed and presented a discussion of two sports-based financial instruments (SRI and ASM) to the regulators, NSEI is in a unique position to identify law and/or arguments not raised by others to this Court. Among other things, in this brief, NSEI (i) offers a methodology, called the Mars Test, that delivers an intuitive yet powerful explanation that crystallizes the meaning of a 'future contingent event', a key piece of the New York law that may have a significant impact on the outcome, (ii) presents a taxonomy of games/contests which provides a needed structure and puts arguments and/or case law cited by the appellants in proper context, (iii) brings to this Court's attention a widely ignored cease-and-desist action by the SEC that shut down a daily fantasy offering characterizing their dealings as 'unregulated trading of security-based swaps', and (iv) provides broad-based insights developed as a result of spending 13 years at the intersection of sports, money and regulation.

Accordingly, NSEI respectfully requests that this Court grant its motion for leave to appear as *amicus curiae* in these proceedings, and consider this *amicus* brief in its deliberations.

PRELIMINARY STATEMENT

The people of New York, and our nation in general, was served with a bittersweet victory on March 21, 2016. The New York Attorney General ("NYAG") entered into separate settlement agreements, effective March 21, 2016, with FanDuel, Inc. ("FanDuel") and DraftKings, Inc. ("DraftKings) ("Settlement Agreements"), both appellants in this proceeding. Pursuant to the Settlement Agreements, FanDuel and DraftKings shall block participants in New York from participating in daily fantasy sports. NSEI applauds the NYAG for enforcing the law

on sports gambling disguised as daily fantasy sports ("DFS"). That said, NSEI remains deeply concerned that, without a hearing on the merits, DFS will continue to carry the torch on a destructive march to nationwide legalized sports gambling.

March 21 is supposed to signify the beginning of spring and joy. If the DFS industry has its way, however, it will instead be the start of a dark age in which sports gambling is made legal. NSEI believes that the DFS operators have entered into the Settlements Agreements primarily to buy themselves time to try and secure a gambling exemption for DFS at the legislature. Potentially avoiding a deadly loss in the courts, DFS is now in a prime position to leverage its size into nationwide sports gambling. What is unfolding here is a clear example of too big to fail. The recipe for future generations is clear: get real big, real fast, legality be damned, and use that clout toward an empty promise of economic benefits.

The NYAG acted properly and was able to stop, for the time being, DFS gambling in the State of New York. However, the ideal solution in this case is to have a genuine discussion on the merits. If DFS is not gambling it should welcome that discussion.[1]

In this *amicus* brief, NSEI presents an intuitive, yet powerful test that crystallizes the meaning of 'future contingent event' – a critical condition of the three-part gambling test that, incredibly, was omitted by DraftKings in its "Questions Presented" section. App. Br. pp. 1,2. When faced with an alleged game or contest, the test simply asks: "Can we play this on Mars?" It is clear that people who happen to find themselves bored on Mars can play chess, card games, scrabble, spelling bee, or the actual game of football. What they cannot do is to "play" daily

[1] NSEI believes that DFS well knows that it cannot win the case in the courts under current law and that it therefore is focused on a major lobbying campaign. To the extent the battle is fought outside the courts, it will be up to the legislature to avoid a hasty decision without vetting the merits, the federal regulators who have broad authority and jurisdiction to declare DFS illegal gambling under federal law, and most important of all, the people of America to stand up against the gambling devil and make sure America is back on track as a power that leads by example.

fantasy sports, because the "game" will never conclude. Depending on access to the real world information produced by people playing the actual game of football on Earth, the people on Mars can never identify the winner(s). Meanwhile, the football games on Earth will continue to take place with the athletes not realizing there are a few people on another planet trying to figure out what to do with their imaginary line-ups.

In this brief, NSEI also presents a taxonomy of games/contests by dividing them into three classes: i) direct participation contests; ii) supervisory contests; and iii) human/animal teaming contests. It is true that these contests offer varying degrees of control. Trying to capitalize on that simple fact, the appellants align themselves with the third class, human/animal teaming contests, heavily relying on *Fallon* along the way. *People ex. rel. Lawrence v. Fallon*, 152 N.Y. 12 (1987). The alleged contradiction between the lower court ruling and *Fallon* simply does not exist when analyzed through the lens of the Mars Test: horse owners on Mars can train their horses and enter them into a contest. What they *can't* do is to identify a winner if they risk money on the horse races that are *already* taking place on Earth.

The appellants seem very keen on turning the proceeding, and the broader public policy discussion, into a referendum between skill and chance. This behavior is rational; there is *some* skill involved in DFS. Whether that is enough to escape the gambling characterization under New York law is, however, a moot point. As soon as the 'future contingent event' part of the test is satisfied, the skill debate does not need to be addressed at all. Yet the appellants understand that any slightest hint of DFS involving skill could still provide DFS operators some immunity in other states and an opportunity to bully their way into nationwide legalized sports gambling.

Sensing that possibility, FanDuel, one of the appellants, consistently invokes references to regulated capital markets, e.g., the stock market, the derivatives markets, and insurance markets, trying to cast an aura of legitimacy on what is really sports gambling in disguise. This is a clear attempt to have the best of both worlds: taking the prerequisite of successful participation in capital markets, skill, and using it as a justification to "pass the test" in the context of a game/contest. NSEI strongly feels that it is its responsibility to invite this Court to consider a coherent and unifying narrative that unveils the mask of gaming DFS operators love to wear.

The picket lines that formed in New York City in November 2015, most of which were reportedly employees of DFS, chanted "Game. Of. Skill. Game. Of. Skill." *See* The Daily Fantasy Sports Protests in NYC Looked Hilarious. Huffington Post, November 13, 2015. The skill part of that argument is being beat to death, but to NSEI's knowledge, nobody really pondered the more interesting question: "Is DFS a game?" NSEI argues that it is not. It's a *market*. Further, since it is a pure entertainment vehicle that does not serve the public interest, it is a *gambling market*.

The distinction between games/contests and markets is crucial because they are evaluated on completely different criteria. In games/contests, more skill means the characterization is moving away from gambling. At one end of the spectrum, chess is pure skill and not gambling. Roulette sits at the other end as a pure chance game, therefore it is gambling. Poker is arguably somewhere in the middle, where the characterization, among other things, depends on i) how much skill is involved; and ii) the minimum level of skill needed in a particular state to escape the gambling characterization.

In markets, public interest, not skill, determines what is gambling. The stock markets, the derivatives markets, and the insurance market, references offered by FanDuel, serve the public interest by serving a useful purpose: capital formation, hedging, and risk management, among others. At the other extreme are sports betting markets, a pure entertainment vehicle that does not satisfy any purpose whatsoever.

It is instructive what FanDuel *didn't* cite and *couldn't* cite as part of that discussion. FanDuel *didn't* cite sports betting, because doing so would be an admission that there exists another gambling market where skill is involved. It would simply highlight the fact that the existence of skill and the gambling characterization are not at odds with each other, once they are evaluated under the right framework. FanDuel also *couldn't* cite a game/contest where outcomes depend on future contingent events. There is a very simple reason for this: there are no games/contests that depend on future contingent events. That follows almost by definition: dependence on future contingent events *is* what makes a market.

The lawmakers in New York had perfect foresight. They understood, a long time ago, that gambling could happen in the context of games/contests and in the context of markets. DFS is not a game, but it's a market so it fails the test as a gambling market. The Mars Test, once understood as a threshold question to distinguish games/contests from markets, crystallizes this key insight.

That daily fantasy is a market is not pure conjecture, either. In that regard, NSEI respectfully brings a completely overlooked precedent to this Court's attention. In early 2015, an obscure site, called Stock Battle, was running a "fantasy contest" where participants were picking stocks. Stock Battle identified itself as the first fantasy gaming stock market competition and even cited, on its now defunct website, UIGEA as its legal basis. The SEC sent the site a

cease-and-desist letter and said the firm's games amounted to dealing in "unregulated security-based swaps." *See* Will Regulators Sideline Fantasy Stock-trading Games? Yahoo Finance, May 13, 2015. Stock Battle promptly closed its operations.

It makes no sense that stock-picking fantasy offerings amount to unregulated security-based swaps and athlete-picking fantasy offerings amount to games with skill. The alternative story, the one that is advanced in this *amicus* brief, is much more compelling. Daily fantasy sports is nothing but an unregulated security or commodity.

The appellants find themselves in the unenviable position of trying to put a square peg into a round hole and offer a completely incoherent narrative around DFS being a parallel contest based on skill. When that fails, one of them tries to earn legitimacy by making frequent references to capital markets that serve a purpose. When that fails, the appellants throw some Hail Marys by citing investors and supporters, essentially arguing that DFS became too big to fail -- an awful reason to not enforce laws on illegal activity. Appellants also try to find some relief in the fact that they haven't been stopped before, an argument that, if accepted, would invite people to continue to break the law as long as they were not caught.

Ultimately, DFS aligns itself, haphazardly, to whatever example has the highest potential of confusing the audience under a specific context. Sometimes it tries to be a spelling bee. Elsewhere it attempts to mimic the stock market. Yet in other cases it seeks solace under the wings of its bigger, and better cousin, traditional season-long fantasy sports. The result is a skill-based-investment-type-game-market-similar-to-traditional-fantasy-we-don't-know-what-it-really-is. In other words, a true Frankenstein. NSEI strongly believes that the unifying framework offered in this *amicus* brief will help assist the Court in seeing through the noise and

see what DFS really is: a sports gambling market conveniently disguised under the desperate, if not inaccurate moniker, "the game we love."

ARGUMENT

I. The State Has Demonstrated a Likelihood of Success in Establishing a Violation of New York's Anti-gambling Statute

The determination of whether something constitutes gambling under New York law is fundamentally a very simple test dependent on three distinct parts:

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

N.Y. Penal Law § 225.00(2).

Whether something of value is received is not contested by the appellants and does not require a further discussion.

A. The Mars Test Intuitively and Powerfully Explains What 'Future Contingent Event' Means

DFS tries to turn this case, and more broadly the public policy discussion, into a referendum between skill and chance. It is a strategic move with the intention of taking the focus away from the 'future contingent event' part of the test, which DFS clearly satisfies.

To see why that is the case, NSEI invites the Court to hypothesize that Elon Musk, the infamous entrepreneur who wants to colonize Mars, gets his wish and starts shuttling people to Mars, say, 100 at a time. It is not hard to imagine that after eating, sleeping, and socializing,

these brave adventurers will eventually get bored and start playing games. They can play chess, if they brought a chessboard and the pieces with them, and if not, they can always improvise with the rocks on Mars. A deck of cards would undoubtedly lead to a variety of card games. If there are children in the group, a spelling bee contest would surely be organized sooner or later. This first group of 100 would presumably have some sports fans as well, and a fantasy sports enthusiast would likely gather a few others and gladly explain how the "game" works. If they wanted to mimic daily fantasy, they could assign someone to be the "operator" who then assigns prices to the athletes in a pool from which the participants can select their line-ups. Once the fantasy teams are formed, it is conceivable that a newcomer to fantasy sports would ask, "How will we determine the winners?", to which the fantasy sports enthusiast would confidently reply, "We'll assign points to each player on our imaginary teams based on how they perform and add them up." Puzzled, the newcomer may inquire, "How will we know how they perform? We are on Mars."

Trying to advance an incoherent narrative around DFS players having their own 'parallel competition', the appellants are trying to distract this Court from a simple reality. There cannot be a winner of a fantasy sports "game" on Mars, while every other game can identify a winner based on a predetermined set of rules.

This point is so obvious, the debate around the 'future contingent event' should effectively end here. Nevertheless, a taxonomy of contests may be helpful in putting some of the appellants' arguments in context. Specifically, games/contests can be grouped into three categories: direct participation contests, supervisory contests, and human/animal teaming contests.

The direct participation contests are ones where a human adult is a participant in the contest. They have full control over all controllable aspects of the game/contest. They can leave the contest any time and their actions directly impact the outcome. In a chess match, for example, a chess player's moves will determine whether he wins or loses. The chess player is also free to leave the game whenever he so chooses. Similarly, in a golf tournament, the outcome depends on how the golfer swings the club. The golfer, like the chess player, can simply stop playing at any point.

In supervisory games, a human adult supervises other humans, kids or adults. Being a sports coach, or a general manager, is an example where an adult supervises other adults. Spelling bee, a direct participation contest from the perspective of a child, can be viewed as a supervisory contest where an adult can provide assistance with registration, logistics, and/or some coaching. Notably, the supervisor and the actual participants in the contest are part of the same team. It is true that the coach does not have full control as the actual participant. San Antonio Spurs Coach Gregg Popovich reportedly said during one timeout: "What do you want me to do? .... Figure it out." Popovich: I can't make every decision. ESPN.com, March 6, 2014. Nevertheless, coaches have some control/influence on the outcome and can, among other things, offer coaching during the game, i.e. after it started, or prevent a player from further participating in the game by benching him.

Human/animal teaming contests can be viewed as a special type of supervisory contest where the supervisor is a human, but the participant in the contest is an animal. Dog shows and horse racing (from the perspective of a horse owner and her horse) are examples. Clearly, the owner and her horse are part of the same team. There is certainly a level of control/influence in this case as well, though it may cease to exist during the game/contest in some cases. In some

dog shows, for example, the dog owner may be able to walk alongside her dog and guide her by, among other things, offering commands that the dog has surely heard many times during training sessions. In other versions of dog shows, and in horse races, an owner may not be able to influence what the animal does once the contest or race starts. Critically, however, there exists a level of control/influence at *some* point of the contest.

Viewed through this lens, there is simply no inconsistency between the ruling in the lower court and *Fallon*. The *Fallon* Court simply observed, without explicitly saying it, that a horse owner and her horse are part of the same team and represent a special class of contests: the human/animal teaming.

It is worth noting that what is delivered via case law in the state of New York is, in some cases, explicitly exempted from gambling statutes anyway. In the state of Illinois, for example, the relevant statute, 720 ILCS 5/28-1, provides the following exemption:

> Offers of prizes, award or compensation to the actual contestants in any bona fide contest for the determination of skill, speed, strength or endurance or *to the owner of animals* or vehicles entered in this contest. (emphasis added).

Therein lies the difference. Being the owner of the animal with having some control of the horse is substantially different from the gambler who risks money on horses, or the DFS gambler who is risking money on athletes. A horse owner can simply decide not to enter a contest, in which case the horse will do precisely nothing. If a gambler at the horse track decides not to risk his money, the horse will still race. The owner of that horse wouldn't even know that somebody decided not to bet on her horse. Similarly, a football coach can bench his running back after a fumble, or not to play him at all, exerting some control. Meanwhile, if a DFS participant

decides to not "play" an athlete, the athlete will still be on the football field completely unaware of the fact that somebody, somewhere, made a particular gambling decision.

The appellants may argue that the Mars Test does not apply to *Fallon*, because one does not have horses on Mars. That argument would be unconvincing. There is a subtle, but very important distinction between not having the requisite players to start the game, and not being able to conclude the game. 10 adults cannot play regulation football on Mars because they need 11 on each side. There can be no spelling bee contests on Mars if players have to be under 15 years of age and the first shuttle to Mars did not have any children in it. No dog shows can happen without dogs, and no horse racing can take place without horses. Direct participation contests may require a specific number of adults, supervisory contests may require a specific number of adults or children, and human/animal teaming contests may require a specific species of contestants. In any event, a shuttle can take the desired type and number of contestants to Mars upon which the game can *start*. The problem with DFS is not that the games cannot start, but that they cannot *conclude*. DFS cannot conclude because the entire National Football League ("NFL") organization, which is the organizer of the future contingent events that fantasy football depends on to conclude, cannot be shuttled to Mars.

Much has been made about the lock-in feature, i.e. whether the participant can control anything after the game starts. The feature is useful in the sense that it distinguishes direct participation contests from DFS. However, it may or may not draw any boundaries between DFS and the supervisory contests or human/animal teaming contests. Sensing that, the appellants have devoted numerous pages to a hopeless thesis hoping that their extended narrative can serve as a proof that DFS does not satisfy the contingent future event prong of test because there are contests where there is no control after the game starts. The only thing that this

narrative shows us, however, is that the lock-in feature simply provides too coarse of a grid, and an alternative approach is needed to distinguish future contingent events from games/contests.

The Mars Test delivers that separation conclusively. It shows us that the 'future contingent event' is separated from games and contests through a plurality of features: the ability to conclude a contest and the independence of the underlying event.

As discussed above, any other contest can be concluded on Mars, once the participants agree on the rules. That's not the case with DFS.

The independence of the contest can be understood in two ways. One is by asking the question: "Will the underlying event take place regardless?" The NFL may not be aware that there are people on Mars trying to "play" DFS but that does not change the fact that it will be business as usual and the football games will be played on Earth. This is simply a natural consequence of the DFS participant not having any control, none at all, on the event. On that note, we agree with DraftKings that "gambling occurs *only* when the outcome of the future contingent event is not at all under the contestant's control or influence." (emphasis original). But DFS satisfies this condition. In all the contests described above, the ones that fell into one of the three categories, the participant always has at least one opportunity to stop and withdraw from the contest, during *or* before the contest. That free will, the ability of making a choice of not entering the game/contest at *some* point, is the prime indicator of having control. DFS participants do not have that choice. How can they, when, as FanDuel readily admitted, "the members of a chosen fantasy roster *never* play together or play against any other roster in any real-world athletic contest."? (emphasis added). The underlying football game, the future contingent event, will simply go on.

B. Participants Are Risking Something of Value in Daily Fantasy Offerings

The first prong of the test, whether something of value is risked is, amazingly, contested by the appellants. This incoherent argument is, at best, circular or at worst, disingenuous.

As mentioned, the gambling statute under New York law is fundamentally a very simple test where three conditions need to be met to reach the gambling characterization. The first prong of the test involves "stak[ing] or risk[ing] something of value." The appellants effectively assume the conclusion, that DFS is not gambling under New York law and take that conclusion back to the first prong of the test to impose a certain characterization based on the very conclusion they assumed, i.e. entry fees vs bet or wager. We find it quite ironic that one of the appellants, DraftKings, warns against this type of circular logic in its brief (App. Br. p. 25), then turns right around and makes the very mistake that it warned against.

The cases cited in this regard (*see* e.g. FanDuel App. Br. pp. 20,21) are not helpful to the appellants. The courts in those cases either concluded that entry fees are not bets or wagers *after* they determined the game or contest at issue involved skill, or they made an argument under a different set of laws, which would create a clear circularity under New York law. In any event, one of the cases in this latter group, *Humphrey v. Viacom Inc.*, No. 06-2768, 2007 WL 1797648 (D.N.J. June 20, 2007) cites the other, *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85 (1961), and they both cite the cases that belong to the former set, precisely the ones where the skill decision is already made before arriving to the 'no bet or wager' conclusion.

Fallon, for example, one of the cases cited by the appellants as allegedly supporting their position on this point, states: "There is certainly a great difference between a contest *as to the speed of animals* for prizes or premiums contributed by others and a mere lottery, where the

controlling, and practically the only element, is *that of mere chance alone.*" (emphasis added). *People ex. rel. Lawrence v. Fallon*, 152 N.Y. 12 (1987). Thus, the *Fallon* court essentially concluded that skill dominates chance.[2] The *Fallon* court has never said that the horse owners are not risking anything of value, it just concluded that the horse owner was not gambling. We agree. If decided today, under the New York law, the analysis would simply be that something of value is risked, something of value is received, but it is not gambling because it is a contest of skill as a human/animal teaming contest and the outcome is partially under the horse owner's control or influence.[3]

Toomey v. Penwell, 76 Mont. 166, 245 P. 943 (1926), is essentially the state of Montana equivalent of *Fallon* and does, in fact, cite *Fallon*. The *Toomey* court recognized the critical distinction between a horse owner risking money in the contest as opposed to somebody else: "That every reputed owner or co-owner of a horse entered in the race – *and no one else* – paid a fee of $2 for the privilege of having the horse in which he was interested participate in the race." (emphasis added). *Toomey* is yet another example of a human/animal teaming contest where a horse owner's risking money would not constitute gambling, yet the same cannot be said for a third person risking money on the outcome of the race. As the *Toomey* court explained: "The purpose of the statute is not to prevent horse-racing but to prevent gambling." This is precisely the distinction that the Panel Commentary made when it cited the difference between the people playing chess versus the people who are betting on it. Denzer and McQuillan, Practice

[2] As we alluded to above, the human/animal teaming contests are also occasionally afforded explicit exemptions under state laws, e.g. in the state of Illinois.

[3] As the Mars Test hopefully made clear, that would not be true for a third person who is risking money on the outcome of the horse race because that activity would fail the future contingent part of the test (putting the issue of any current legal exemptions aside).

Commentary, McKinney's Penal Law. As such, *Toomey*, cited by FanDuel, is actually helpful to the State of New York.

In similar vein, in *State of Arizona v. Am. Holiday Ass'n, Inc.*, 151 Ariz, 312, 727 P.2d 807 (1986), the court stated:[4]

> [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[.]

Why FanDuel cites this very passage is not clear at all. There is absolutely no contradiction here. The *State of Arizona* court is simply making the observation that something of value can be risked and received, yet that wouldn't be sufficient to conclude gambling under most state laws, New York included, when sufficient skill is involved. In all the examples specifically cited in this passage, golf, bridge etc., there is a fair amount of skill involved, and, outcomes are at least partially controlled by the participants. This is yet another "2 out of 3" case, where the middle prong provides the necessary relief away from a gambling characterization.

FanDuel cites two out-of-state cases, *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85 (1961), and *Humphrey v. Viacom Inc.*, No. 06-2768, 2007 WL 1797648 (D.N.J. June 20, 2007), in support of its characterization of entry fees as a separate and distinct step irrespective of the skill discussion. It is this second set of cases that is capable of creating some confusion in the first instance. However, a closer look reveals that the argument set forth by the appellants is simply circular.

[4] FanDuel cited the same passage in its brief. App. Br. pp. 20-21.

The first prong of the New York statute translates to a very simple question: is something of value risked? Entry fees or not, the answer to that question is a resounding yes in both *Las Vegas Hacienda* and *Humphrey*. Substance, not the particular labeling of the fee, should control.

It is also noteworthy that the involvement of skill is always lurking in the background in both cases. For example, FanDuel is trying to hold on to the following passage from *Las Vegas Hacienda* for dear life: "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." App. Br. p.27. As a threshold matter, this is simply not what the New York law prescribes. Moreover, and critically, right after the above passage allegedly decoupling entry fees from skill, the *Las Vegas Hacienda* court added: "We do wish to state, however, that the record contains sufficient evidence to sustain the court's finding [in the regard of skill]." *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85 (1961).

Humphrey, as well, offers lengthy explanations concerning skill. It is true that it stated 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." *Humphrey v. Viacom Inc.*, No. 06-2768, 2007 WL 1797648 (D.N.J. June 20, 2007). What is not evident from FanDuel's brief is that the above passage from *Humphrey* is immediately followed by the same passage that FanDuel is trying to hold on to for dear life that came from *Las Vegas Hacienda*, the very opinion that felt the strong urge to note that golf is a game of skill.

Critically, both *Las Vegas Hacienda* and *Humphrey* cite the cases in the first category. *Las Vegas Hacienda*, for example cites *Toomey*, which itself cites *Fallon*. *Humphrey* cites *State*

of Arizona. In both cases, the courts are taking the argument all the way back to skill, regardless of whether they realize it or not.

This part of the case law has created, over time, some isolated language that the appellants selectively cite without paying attention to the broader context. When read in their entirety, it is clear that the existence of skill is what provides non-gambling relief, and not the particular characterization of what is risked. In any event, the appellants' argument amounts to stopping the analysis without giving any consideration whatsoever to the remaining prongs. This is not what the New York law is and imposing this erroneous and circular thinking on this case simply invalidates the remainder of the statute. That the appellants are trying to make a debate out of this is at best, an unnecessary distraction for this Court.

Above all, the appellants' argument completely defies common sense. If an individual participates in a DFS offering, he clearly has a positive probability of receiving something of value, and potentially something of *significant* value. In addition, he is risking something of value, and potentially something of significant value. The positive probability of earning substantial amounts of money with no downside risk whatsoever simply does not exist in this world. It violates the fundamental risk-return principle in finance and reminds us of the sleazy boiler room salesmen in finance.

C. The Mars Test Also Explains Why Daily Fantasy Is Not a Game in the First Place

A critical question that, to NSEI's knowledge, has not even been brought up is why daily fantasy qualifies as a game in the first place. NSEI is of the opinion that DFS is a market, not a game. In other words, NSEI believes that DFS simply amounts to unregulated securities or commodities.

At the outset, NSEI would like to note that this Court does not need to make a determination on whether daily fantasy offerings are games or markets. Nor does the Court need to opine on federal securities and commodities laws. The Mars Test powerfully demonstrates why DFS meets the 'future contingent event' prong of the test and the analysis can simply stop there.

That being said, the discussion in this section is not a red herring. One of the appellants, FanDuel, consistently invokes references to securities, commodities, and to the regulated finance world, which necessitates a thorough discussion. Absent the reconciliatory and unifying framework offered in this *amicus*, the appellants would effectively be afforded the best of both worlds. The appellants are happy to argue skill vs. chance in the context of a game or contest, and not shy of citing capital markets trying to create an aura of legitimacy. Simply put, the appellants cannot decide whether they should be evaluated under the standards of a game or a market. NSEI thinks it's the latter. In any event, it can't be both.

In the context of games and contests, the skill-chance spectrum is determinative. In many laws, including the New York Penal Law, it is one of the critical pieces that determines the fate of a game or contest. The question where exactly the game or contest falls on the skill vs. chance spectrum can be debatable, but it is clear that increasing levels of skill is a step in the direction away from gambling.

There is almost universal consensus that chess is 100% skill and therefore not gambling. Roulette is 100% chance; therefore it is gambling. Poker is arguably somewhere in the middle, which is essentially what created a substantial debate whether it is legal or not. More broadly, for games in the middle, the question is i) how much skill is involved; and ii) what is the level of chance needed that would tip the game toward the gambling end of the scale. Significant

uncertainty may exist on both dimensions. As such, if a medium level of skill game meets a middle-of-the-pack state from an acceptable level of chance perspective, the ensuing debate can go forever. Arguably, this is more or less where DFS finds itself in this case. Sensing that, DFS spends the majority of its time highlighting this uncertainty with the goal of creating enough doubt so they can at least delay the day of reckoning, notwithstanding the fact that that uncertainty cannot be a ticket to such delay because of the key phrase in the law: 'future contingent event.'

A market may be defined as a platform where multiple parties can engage in an economic transaction where outcomes are dependent on real-world events and/or information provided by those events. Critically, these events and/or the relevant information are not just supporting cast; without those events and the information provided by them, the final economic outcomes cannot be determined. In addition, the events will continue to take place regardless of whether somebody else is risking money on the implications of these events in capital markets. The farmer will harvest more oranges this year, an oil-rich country will decide to cut its supply, regulatory approval for a drug will be granted, and so on. Life will go on.

Within markets, skill arguably always matters. One needs to be skilled and be able to access and/or process information better than others to maximize the economic benefit from transacting in the market. Hard core market efficiency proponents would disagree. They would claim that skill is simply an illusion. The world will forever discuss whether Warren Buffett is the best stock picker ever, or whether he has simply gotten lucky by being the last man standing in a coin-flipping contest. That being said, the majority of the market participants believe that the market offers opportunities a savvy trader can exploit even though they are not offered everyday on a silver plate and it takes skill to find them.

If a person doesn't have the requisite skill to process the existing information better than others, the only way to "beat the market" is to differentiate himself on securing distinguished access to information; i.e. insider trading. The SEC defines illegal insider trading as buying or selling a security, in breach of a fiduciary duty or other relationship of trust and confidence, while in possession of material, nonpublic information about the security. SEC website, Fast Answers, Insider Trading. The very fact that having nonpublic access about the status of an athlete, e.g. an injury, can impact the outcome of a traditional sports bet, or a fantasy sports offering, is simply a result of fantasy sports being a market. A chess player would love to read his opponent's mind during a match, but does not care about breaking news on chess. In DFS, knowing other line-ups would provide an advantage, but so would having early access to an injury. The fact that the daily fantasy sports industry is discussing scripting, the automatization of entering and changing line-ups through software, and the securities industry is discussing high frequency trading, is the other side of the same coin. In both cases, the challenge is defining the boundaries of fairness in terms of accessing the information as well as determining acceptable options to respond to new information while everyone is trying to obtain an edge in the marketplace.

Skill can distinguish between gambling and non-gambling in the context of games and contests. In markets, however, it is simply a prerequisite to get ahead, not a determinative factor. In markets, that role is instead played by public interest. Financial markets that serve the public interest are not gambling. Markets that don't serve the public interest, like sports betting and DFS, are.

The markets have their own spectrum. The stock market is not gambling because the primary market helps with capital formation, and the secondary market results in price discovery

and offers a variety of assets for investment or portfolio diversification. Derivatives markets are also socially useful because they facilitate hedging and/or price discovery. The key insight is *why* they became regulated in the first place. They accomplished that feat because they serve the public interest. FanDuel observes that certain forms of passive investments are not subject to the same level of regulation (App. Br. p.47), but this observation misses the key point. While some instruments may be subject to different levels of regulation, they still serve a societal purpose. Investments in start-up companies, for example, propel economic growth, not to mention the fact that the SEC recently issued substantial regulations regarding raising capital through crowdfunding investments. The level of regulation may vary across different investment forms, but the single thread that connects them is the fact they all serve a purpose.[5]

Sports betting is at the opposite end of the spectrum. In *Silver Blaze*, Sherlock Holmes solves the mystery, in part, because the dog didn't bark. This case has its equivalent: what FanDuel could, but *didn't* cite: sports betting markets. Like all markets, the skilled could theoretically come out ahead in sports betting. The U.S. Department of Justice echoed this view in *United States v. DiCristina*, 886 F. Supp. 2d 164, 235 (E.D.N.Y 2012). "Sports bettors have every opportunity to employ superior knowledge of the games, teams and players involved in order to exploit odds that do not reflect the true likelihoods of the possible outcomes (citing Gov't Mem. Of L. in Opp. To Def's Rule 29 Mot. 30, Doc. Entry 96, July 27, 2012.). FanDuel could, but *didn't* cite betting markets, because that would be the ultimate acknowledgement that there is at least one other platform where skill and gambling are not mutually exclusive.

[5] A popular, yet misinformed view of Wall Street is that it is a casino. The fact that people can "gamble" in those markets does not change the fact that these markets serve a societal purpose. When used in that context, gambling simply refers to the act of speculation, often unintelligent, which defines individual behavior in the marketplace. Gambling is best understood as a characterization that belongs to markets as a whole based on a holistic evaluation around public interest and societal purpose as opposed to individual behavior.

Some prediction markets, arguably, stand somewhere in the middle on the spectrum of public interest. As an example, the domestic box office receipt derivatives survived a 3-2 vote at the CFTC level, but were later shot down by the legislators with the passage of the Financial Reform Act. Jeremy A. Gogel, *The Case for Domestic Box Office Receipt Derivatives*, 14 Chapman L. Rev. 415, Winter 2011. Political futures contracts by the North American Derivatives Exchange didn't even go that far and were prohibited by the CFTC. Order Prohibiting the Listing or Trading of Political Event Contracts, CFTC, April 2, 2012. However, with a non-profit university at the helm that imposed investment limits and other restrictions on the market, the CFTC issued a no-action letter for contracts that are substantially the same, highlighting perhaps, the difficulty of making a decision when a contract is close to the middle on the public interest spectrum. CFTC Letter No 14-130, October 29, 2014.

Somewhat ironically, the financial markets that serve a societal purpose, the ones that were heavily cited by FanDuel, struggled with the state laws on gambling themselves for close to a century. As our nation faced a big wave of financial innovation, one big question continued to loom: "How can one enforce financial transactions against challenges that they are unenforceable gambling contracts under state law?" The 19th century courts were clogged trying to answer this very question. After decades of confusion in the courts, the Supreme Court of the United States ruled that the contracts for the sale of cotton for future delivery were not gambling contracts within the meaning of the New York statute against wagers. *Bibb* v *Allen et al.*, 149 U.S. 481 (13 S.Ct. 950, 37 L.Ed. 819). The complementary question whether contracts that are settled via payment of differences constitute gambling is resolved 12 years later, again, by the Supreme Court of the United States. "Set-off has all the effects of delivery... The fact that contracts are satisfied in this way by set-off and the payment of differences detracts in no

degree from the good faith of the parties." *Board of Trade* v. *Christie Grain and Stock Company*, 198 U.S. 236, 25 S.Ct. 637, 49 L.Ed. 1031 (1905).

The problem, at the core, has always been the inability to define gambling. This inability resulted in overly broad definitions of gambling and the necessity of continuous revisions to the exemption of legitimate financial contracts. In other words, the law is always backward-looking. Acknowledging that shortcoming, Congress responded with defining commodities broadly, continuously refining it as markets evolved and preempting state laws with the goal of protecting capital markets from state overreach.

The CFTC was created by Congress through the Commodity Futures Trading Commission Act ("CFTCA") of 1974, which also expanded the definition of a commodity to reflect the shifts in the U.S. economy away from its agricultural roots. The CFTCA of 1974 also introduced the public interest standard for designation of commodity futures contracts and included an Economic Purpose Test, which permitted listing and trading of contracts that could be used for hedging and price basing on a more than occasional basis.

The legislative history of the CFTCA of 1974 also makes it clear that Congress intended to preempt state jurisdiction over the transactions that the Act covers. Purcell and Valdez, *The Commodity Futures Trading Commission Act of 1974: Regulatory Legislation for Commodity Futures Trading in a Market-Oriented Economy*, 21 S. Dakota L.Rev. 555, 573 (1976). Such preemption is explicit in the Commodity Exchange Act, as amended. 7 U.S.C. §16(e).

While some courts rejected preemption, see, e.g., *Kerr* v. *First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir.1984), other courts recognized and enforced it. See, e.g. *Conaway*, holding that "the Alabama gambling statutes, if construed to require actual delivery,

would directly conflict with the federal purpose of fostering the markets in that they would destroy the markets in this state, and that Congress has preempted the field." *Paine, Webber, Jackson & Curtis, Inc.* v. *Conaway*, 515 F. Supp. 202 (N.D. Ala. 1981). Today, the issue is mostly settled with the understanding that legitimate financial transactions that serve the public interest are a matter of federal laws and not state gambling laws.

FanDuel's narrative around financial markets requiring skill and outcomes on future contingent events is absolutely correct. Where FanDuel ultimately fails is how to interpret that similarity, which is fatal to its case.[6] FanDuel claims that characterizing daily fantasy sports offerings as gambling would "raise serious constitutional questions ... and it would fail to provide a definite principle for distinguishing between prohibited activities and activities widely recognized as lawful." App. Br. pp. 45, 46. That definite principle already exists: public interest. Moreover, the appropriate powers that are responsible for ensuring that public interest is served are vested in the SEC and CFTC. FanDuel trying to seek solace under regulated financial markets crystallizes what DFS really is – a sports gambling market that does not serve any purpose. Nor is DFS arguing that they serve a purpose, instead billing itself as a skill-based entertainment option. The problem is that nothing in this characterization precludes it from also being gambling.

There is another telling sign why DFS is a market, and not a self-contained game. Other than the regulated financial markets, FanDuel *couldn't* cite any real games or contests. If DFS is

[6] It is somewhat interesting that while DraftKings and FanDuel briefs broadly converge, the parties have chosen a different strategy in terms of invoking references to capital markets. FanDuel makes those arguments widely but DraftKings steers clear of them. It appears that DraftKings recognizes the logical conclusion of that argument and senses the danger and FanDuel, for whatever reason, does not share that view.

a game or contest, why are there no other examples of games and contests where the outcome depends on future contingent events?

Similar to its arguments in this proceeding, FanDuel also relied on market examples when it filed, with a co-plantiff, a lawsuit against Lisa Madigan, the Illinois Attorney General, in Sangamon County, IL. Complaint for Declaratory Judgment, December 24, 2015.

> "With stock selection, commodity purchases or energy swaps, certain aspects of performance are out of the control of the participants, but no one contends that people engaged in these businesses are not exercising skill in their choices, nor that a stock-picking contest is not a bona fide competition."

Here, FanDuel makes a fatal mistake by suggesting that a stock-picking contest can be a bona fide competition. The SEC already disagreed with that position. In early 2015, an obscure site, called Stock Battle, was running a "fantasy contest" where participants were picking stocks. Stock Battle identified itself as the first fantasy gaming stock market competition and even cited, on its now defunct website, UIGEA as its legal basis. The SEC sent the site a cease-and-desist letter and said the firm's games amounted to dealing in "unregulated security-based swaps." Will Regulators Sideline Fantasy Stock-trading Games? Yahoo Finance, May 13, 2015. Stock Battle promptly closed its operations.

It makes no sense that stock-picking fantasy offerings amount to unregulated security-based swaps and athlete-picking fantasy offerings amount to games with skill. The alternative story, the one that is advanced in this *amicus* brief, is much more compelling. Daily fantasy sports is nothing but an unregulated security or commodity. As such, whether it is gambling or not depends on whether it serves the public interest, to which we say it clearly does not. Nor is DFS arguing otherwise.

FanDuel also confuses absence of evidence with evidence of absence. In its brief, FanDuel states that: "Few other reported cases have predicated a finding of illegal gambling on the 'future contingent event' of the statute; instead courts have preferred to look to whether the game was one of skill or chance." App. Br. p. 43. Courts simply review what comes in front of them. The case flow they see is not random; they are already sorted out, to a great extent, depending on who has jurisdiction. A state court will mostly see games and contests, which is under its jurisdiction, and will, naturally, look to the skill vs. chance spectrum, which is determinative in the context of games and contest. Future contingent events are associated with markets and, consistent with the principle of preemption, they would be handled by regulatory agencies and evaluated based on a public interest standard. As the examples provided above, the box office receipt contracts and the political event contracts showed, those type of cases would, naturally, be handled by the CFTC. Moreover, even Stock Battle, a fantasy "game", was handled by the SEC. The fact that there are few cases that are based on the 'future contingent event' prong does not reflect "New York courts' consistent reluctance" as FanDuel suggests (App. Br. p.43), but simply highlights the fact that DFS is really a market disguised as a game.

The name "fantasy", perhaps not intentionally, but conveniently for DFS, hard-wired the world to think it's a self-contained game that happens in a vacuum, completely disconnected from reality. That is not the case. Fortunately, the lawmakers in New York had perfect foresight. They saw early on that gambling can take place in two different ways, through gambling games or through gambling markets, and codified that into law. The skill vs chance net is meant to capture the gambling games and the 'future contingent event' language is intended to capture the gambling markets.

II. Traditional Fantasy Sports Is Either Not Gambling under New York Law or It is Not Worthy of Enforcement

Sensing that DFS cannot escape the three-part test in New York on its own, DFS is trying to side with its bigger, and better, cousin TFS. Misbehaving children cry foul the same way after they violate the house rules: "But my brother/sister is doing the same. It's not fair." As most parents know, generally it's *not* the same, and there are legitimate reasons to enforce a consequence, whatever that may be, selectively on one child and not the other despite the misbehaving child trying to secure a safe harbor under an alleged equivalence of behavior. DFS exhibits the same behavior, and deserves the same selective enforcement.

A. Traditional Fantasy is Not Gambling Unless All Three Parts of the Test Are Met

As far as we can tell, the appellee has never represented that traditional fantasy sports ("TFS"), which generally represent season-long offerings, is *never* gambling. If that is the appellee's position, that would be erroneous and we would disagree with it.

If a TFS operator accepts money from individual participants, pools it, and returns cash back to the participants, everything in the statutory definition of gambling is met as far as the State of New York is concerned. Critically, the relative importance of skill in DFS vs. TFS, while certainly an interesting conversation, does not matter under the New York law. Something of value is risked, something of value is received, and there is a future contingent event that participants don't control or influence.

But as New York correctly observed, there is a critical difference. In many cases, the TFS operator simply collects an administration fee, which is not money risked based on the outcome, or collects nothing at all. Instead, a group of people, say co-workers in a company,

create a side pool, and the top finishers collect predetermined amounts of money that the participants initially agreed on. The "gambling" in this model happens on the side, as opposed to on a website of the TFS operator. The three-part test is not satisfied, and it is clearly not gambling under New York law.[7]

DraftKings tries to play down this simple fact by stating that: "But the NYAG nowhere explained how these *marginal* differences could conceivably have any legal significance." [emphasis added]. App. Br. p. 6. Calling these differences marginal is disingenuous. There are many situations in life where a certain outcome happens if all three conditions need to be satisfied. Imagine a basketball player going to the free throw line for three shots with no time left on the clock and his team trailing by two. If he misses two free throws, can he argue in the post-game press conference the difference between making one and making three was marginal? Can a job interviewer, who needs solid answers to all three questions in the interview say "I didn't get two out of three, but that does not matter?" Can an individual taxpayer claim a tax credit on his tax return if only one of the necessary three conditions to receive the tax credit are met?

Simply put, the difference between satisfying one prong of the test as opposed to all three is not trivial at all. That *is* the test.

[7] DraftKings argues that these TFS operators may still be liable, because they 'knowingly advance' gambling. App. Br. p. 35. That is a completely separate matter that is not in front of the Court. Moreover, the question whether this issue is enforcement-worthy would also be relevant.

B. Selective Enforcement is a Fact of Life

If TFS does meet all three conditions in the three-part test, then it is gambling under NY law. There is yet another question that needs to be answered, however. Is it worth enforcing the gambling laws on TFS operators?

The intent of the law matters. Even when the statutory definition of gambling is met, the stakes are low with TFS, and the primary purpose is social. True, both DFS and that subset of TFS are gambling, but the harms of gambling should be considered when deciding how to enforce the laws. More skill, less skill, or similar skill, DFS has the potential to destroy lives. TFS doesn't.

Traditional fantasy, although not a game itself, has shared some characteristics with games. Almost exclusively, it offered low stakes. It was a friends and family affair, creating a lot of water cooler conversations. The social aspect was at the forefront. Since it shared these characteristics with games and contests, the society did not really question why it is a game in the first place. Ultimately, the UIGEA codified that thinking into law. UIGEA, of course, is an enforcement statute. It never said that traditional fantasy sports is not gambling, it just offered a non-enforcement commitment for the money handlers under certain conditions.

DFS operators, true to form, parlayed that thinking into nationwide sports gambling, relying on the UIGEA as legal cover. They started out by combining what was mostly happening separately, the statistical tracking and administrative assistance provided by the operators, and the "side gambles." Once they put it all under one roof, they satisfied all the elements of the gambling test under New York law. Then they increased the stakes, signed up as

many investors as they could, advertised as if their life depended on it, and tried to become too big to fail.

One cannot say that DFS is gambling and TFS is not simply because one is high stakes and the other is low stakes. That argument doesn't make sense. The story is one of enforcement, and the world never questioning what TFS really was, a substantial non-gambling market that created opportunities for social, low-stakes side betting with some instances of gambling markets sprinkled around. Then DFS came along and offered a real-world experiment that showed what happens when certain layers of TFS are peeled selectively. This is why this case is in front of this Court today.

It is a fact of life that any law enforcement has limited resources that need to be used selectively. The police do have the authority to pull over drivers that are driving at 72 mph/hour when the speed limit is 70 mph/hour, but as we all know that does not happen very often. Those drivers are not necessarily creating a materially different danger, if at all, to the public than the drivers driving at 68 mph/hr. That type of strictness is simply not a practical solution in the light of resource constraints by the enforcement officials. In other words, the limits of enforcements are not necessarily perfectly aligned to the limits of violations, and there are practical reasons for that. Pointing to non-enforcement even when there is technically a violation does not prove that a much more serious violation is legal. Rather, it is only a reminder that not all technical violations can be enforced.

TFS is best understood as those drivers in that illustration. They either follow the law, or if they are violating it, they are doing it without necessarily posing a material danger to the public. DFS, on the other hand, is a truck that is driving at 100 mph/hr. It does not blend into the rest of the industry. A radar would obviously confirm the violation, but any observant

bystander can see that a violation is clearly in place. It would be absurd to vindicate a truck driver that refuses to stop when enforced by the authorities, arguing that "he hasn't been stopped for the last ten miles, so he should just keep speeding," or "everybody loves a speeding truck," or "it carries too many passengers who are 'invested' in the truck." But this is essentially what DFS was arguing until it entered into the Settlement Agreements with the State of New York on March 21, 2016. Emboldened by the fact that it had not been yet stopped, DFS was not only violating the law, but also accelerating. With the settlement, it is now shifting its focus to lobbying the legislature to increase the speed limits, so to speak. Assuming the law stays the same, DFS should be prevented from violating the laws again.

We invite the Court to evaluate *Humphrey* in this context. There are other reasons why *Humphrey* does not apply in the first place. It was not only decided under a different state's laws, but it was also a gambling recovery case under a different statute. In his ruling in December 2015, Justice Mendez characterized *Humphrey* as "distinguishable" because it involved a qui tam statute and interpreted words —"wagering" and "betting"— that do not even appear in New York's definition of gambling, which looks instead to whether a person "stakes or risks something of value." Justice Mendez noted that the latter phrase was more "broadly worded" than the New Jersey qui tam law and, as such, was "sufficient for a finding that DFS involves illegal gambling" under New York law. (Decision and Order, at p. 7). The *Humphrey* Court also observed that "Plaintiff fails to identify even one individual who participated in even one of the subject leagues, much less one who allegedly lost money to Defendants in those leagues, and concedes that he has done neither himself." *Humphrey v. Viacom Inc.*, No. 06-2768, 2007 WL 1797648 (D.N.J. June 20, 2007). Above all, however, *Humphrey*, decided at the

heels of the UIGEA, was an aberration, a gap in legal thinking that was heavily influenced by the friendly, if inaccurate perception of TFS at the time.

III. Daily Fantasy Sports is Gambling and Became Too Big to Fail

A. The Ruling Below Does Not Expand the Penal Code

DraftKings claims that by holding that DFS contests are gambling, "the trial courts' ruling converted any contest involving (i) an entry fee, (ii) a prize, and (iii) some factor outside the contestant's direct control or influence into a criminal offense." App. Br. p. 44. However, every single example cited by the appellants is demonstrably distinct from daily fantasy sports. Dog shows are not under the owner's full control, but there is still partial control before the show starts. A dog owner can always decide not to participate in the dog show. It is also quite notable and unfortunate that DraftKings tries to find relief under the very principle it mocked earlier in its brief. DraftKings states that in a dog show, the animal's performance is not within the *direct* control of the owner (emphasis added), when it said "the requirement for constant, direct, or physical 'control or influence' is found nowhere in the language of Section 225.00(2)." App. Br. p. 42. In fact, the only thing that has been consistent in the appellants' briefs is this type of hopeless inconsistency, and a desire to use examples and court cases from all walks of life without paying due respect to an overarching, coherent narrative.

The spelling bee is another example of this phenomenon. We agree with DraftKings (App. Br. p.44) that "random word selection can make the difference between victory or defeat," but the same DraftKings happily referenced *People ex. Rel. Ellison v. Lavin*, 179 N.Y. 164 (1904), which stated that "games of billiards do not cease to be games of skill because at times...their result is determined by some unforeseen accident, usually called luck." App. Br. p.

40. Basically, DraftKings is saying that occasional randomness does not turn a game of skill into gambling, until it does. Which one is it? The answer, of course is that a spelling bee remains a game of skill, and the holding that daily fantasy sports is gambling does not contradict that at all, because even if skill is involved in DFS, it clearly fails the future contingent event part of the test. The *State of Arizona* court made this distinction clear when it stated that "[a] bookie accepting bets on the winner of the national spelling bee cannot defend against prosecution ... by arguing that spelling bees are games of skill, not chance." *State of Arizona v. Am. Holiday Ass'n, Inc.*, 151 Ariz, 312, 727 P.2d 807 (1986). Of course, the chess example in the practice commentary made the exact same point. Denzer and McQuillan, Practice Commentary, McKinney's Penal Law.

Fanduel also makes a lenity argument, but bases it on another fallacy, that DFS cannot be held as gambling based on the future contingent event language, because doing so would "raise serious constitutional questions ... and it would fail to provide a definite principle for distinguishing between prohibited activities and activities widely recognized as lawful." App. Br. pp. 45, 46. In other words FanDuel tries to seek solace under regulated financial markets. As thoroughly discussed above, that principal is already in place: public interest, and FanDuel's extended narrative, only show that the appellants are essentially running a sports gambling market offering unregulated securities or commodities.

B. Daily Fantasy Sports is Substantially Similar to Sports Betting

As a threshold matter, as FanDuel has readily admitted, UIGEA does not preempt state law. For purposes of completing the discussion, however, some facts need to be stated.

First, traditional sports betting does not always involve binary bets against the house. For example, BetFair, a well-known European betting operator that had a market capitalization in excess of $5 billion before recently merging with Paddy Power, simply provides an exchange platform where buyers and sellers are matched with each other. Betfair, like daily fantasy sports operators, does not have an interest in who wins.

In addition, while it is true that the majority of sports bets are of a binary nature, this, in and of itself, does not have any significance. The derivatives markets themselves have binary contracts. The guiding principle, again, is purpose, and not how a contract is structured.

FanDuel correctly observes that prizes do not vary in fantasy sports offerings like they do in pari-mutuel betting (App. Br. p. 26). What FanDuel does not mention is that the same can be said for traditional sports betting. What the bettor receives, if he wins his bet, does not depend on others' choices. At the time a bet is made at certain odds, the bettor knows precisely what he will receive, regardless of whether the odds subsequently change or not. Calling one a "prize" and the other something else is a meaningless naming convention that doesn't change anything.

Finally, that fantasy sports participants "test their skills against each other in ways ...that do not compromise the integrity of the outcome of underlying sports events" (App. Br. p. 26) is a myth. As a matter of degree, NSEI agrees that daily fantasy may constitute slightly less of a threat to the integrity of sports than sports betting. That does not mean, however, that integrity is not an issue with DFS. A referee can call the Monday night football game differently if he has a certain wide receiver on his fantasy roster. A trainer may use the non-public injury information to his benefit. DFS participants can stalk student athletes to access non-public information. In DFS, just like traditional sports betting, substantial amounts of money ride on contingent events,

and therefore the cheaters will find ways to unethically, or illegally access information or otherwise conduct an unethical or illegal act themselves.

C. Daily Fantasy Sports Is Trying to Bully Its Way into Nationwide Legalized Sports Gambling and Must Be Stopped

DFS has simply become too big to fail. It is not shy about citing its close knit ties with the sports leagues, media companies, and other investors. It appears that the legality of DFS was perhaps taken for granted when there should have been a healthy dose of skepticism. In any event, the fact that DFS has tentacles in different industries and investments is not a reason to enforce the law differently. It is unfortunate that an unsuspecting investor can find herself in the middle of a legal trouble, but such is the risk that the investor takes with a nascent industry whose legality has not been tested or vetted.

The Settlement Agreements, on the surface, appear to be a victory for the public, which already has been irreparably harmed by the expansion of sports gambling masquerading as a friendly fantasy game. However, a closer look reveals a horrific possibility. If the New York legislation moves to exempt DFS from the Penal Code, a possibility that the Settlement Agreements foreshadow, it means that the appellants will have simply secured a trade-off that is unbelievably good for them, but utterly destructive for the public. At the expense of losing revenues for a few months, when the biggest game in town, football, is in off-season, DFS would secure legal clarity in New York, which they can then leverage into the rest of the nation and bully their way into nationwide legalized sports gambling. What appears to be a victory for the public, then, may simply turn to a stepping stone into substantially more irreparable harm and destroyed lives, something that no court action can ever remedy. As such, this would simply be a confirmation that DFS has become, indeed, too big to fail.

The appellants are also fond of making the argument that that they haven't been stopped before, so they cannot be stopped now. Turning that argument upside down produces some interesting results that should be pondered. It implies that the operator of an illegal activity can be advised that they should simply fly under the radar for as long as possible, and they will be able to make an argument later that "nobody said a thing." The time lapse between the birth of an illegal act and the timing of enforcement simply cannot be a validation of the business as a legitimate enterprise. Yet, potential legislative action coupled with the Settlement Agreements will only encourage this type of behavior in the future. Get real big, real fast, legality be damned, and use that size and an empty promise of economic benefits to get into lawmakers' heads. This simply cannot be the message given to future generations of businesses and entrepreneurs.

It is also NSEI's belief that reasonable expectations about the future should be taken into account by policymakers, enforcement agencies, and the Courts. For example, the legislative history makes it clear that Congress enacted The Professional and Amateur Sports Protection Act, 28 U.S.C. §3701-3704, ("PASPA") "to stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime." *Senate Report 102-248* (1991). That type of forward-looking approach is instructive, and there is no ambiguity as to where DFS was headed before its legal troubles started. It was simply getting bigger at an unstoppable pace. The announcement of the Settlement Agreements on March 21, 2016 and the punt back to the legislature confirms that DFS is fixated on carrying the torch on a destructive march to nationwide legalized sports gambling.

Fortunately for the people of New York, absent a move by legislation, this Court may still have an opportunity to sort the case out on its merits and keep sports gambling at bay. NSEI

is deeply concerned, however, that this Court may not even have that opportunity and respectfully invites the New York legislature to consider not to take any hasty action until a thorough debate on the merits can be had. Our future is at stake.

CONCLUSION

For the above stated reasons, the Court should affirm the preliminary injunction.

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Respectfully submitted,

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