

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

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In the Matter of the Application of :
DRAFTKINGS, INC., A Delaware Corporation, :
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Petitioner/Plaintiff, : Index No.
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 : IAS Part
 :
— against — : Justice
 :
 : **VERIFIED PETITION**
 :
ERIC T. SCHNEIDERMAN, :
in his official capacity as Attorney General of the :
State of New York; and :
STATE OF NEW YORK, :
 :
Respondents/Defendants. :
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Petitioner/Plaintiff DraftKings, Inc. (“DraftKings”), by and through its attorneys, Gibson, Dunn & Crutcher LLP, as and for its Verified Petition and Complaint, alleges as follows:

PRELIMINARY STATEMENT

1. This action seeks to stop New York Attorney General Eric Schneiderman from carrying out his threat to banish from this State a lawful industry beloved by hundreds of thousands of New Yorkers. The Attorney General, misreading New York’s gambling laws, is attempting to bully DraftKings—a celebrated company offering Daily Fantasy Sports (“DFS”) to millions of Americans—and its vendors into immediately shutting down DraftKings’ New York operations before it even has a chance to defend itself. Using strong-arm tactics and defying the rule of law, the Attorney General earlier this week sent a self-styled “cease-and-desist” letter to DraftKings, accusing it of engaging in prohibited “gambling” activities and supposedly giving DraftKings five business days to “cease and desist” before any enforcement proceeding would be

filed. But the Attorney General's staff then turned around and contacted DraftKings' business partners, threatening to take action against them unless they immediately ceased performing services for DraftKings in New York. Emergency declaratory and injunctive relief is therefore necessary to bar the Attorney General from continuing to abuse his power and to prevent the irreparable harm that will result from it.

2. Fantasy sports have become a national pastime. DFS—a natural and more sophisticated outgrowth of traditional season-long fantasy sports—is enjoyed by millions of Americans. Although DraftKings only entered the DFS market in April 2012, today it is one of the nation's two largest and most successful DFS operators. It serves more than two million customers across 44 states, including New York. Indeed, DFS companies have operated openly and permissibly in New York for nearly a decade.

3. This past Tuesday evening, November 10, without any prior notice, consultation, deliberation or opportunity to be heard, the New York Attorney General publicly announced that he considered DraftKings and another DFS operator, FanDuel, to be promoting “illegal gambling” and demanded they “cease and desist” offering DFS contests in New York. The Attorney General's decree was communicated in a four-page letter devoid of judicial authority or coherent analysis. Indeed, the Attorney General's letter contains damning admissions that undermine his newfound position. Within hours of his announcement, the Attorney General took to the airwaves to publicly slander DraftKings and FanDuel, alleging that the companies are “the leaders of a massive, multi-billion-dollar scheme intended to evade the law and fleece sports fans across the country”—a malicious falsehood unwarranted by the facts and unbecoming of a public official. DraftKings and FanDuel promptly announced that they intended to exercise their First Amendment rights to petition the courts and seek judicial review from an impartial arbiter.

4. In the face of DraftKings' resolve to protect itself in the courts, the Attorney General resorted to acts of retaliation and intimidation. He claimed that his banishment was effective "immediately"—despite the explicit five-day notice period mandated by the very statutes he cites in his letter. When DraftKings would not back down, the Attorney General resolved to act as judge, jury, and executioner. His aides targeted DraftKings' most important business partners and vendors, including the payment processors on which it depends, threatening them with adverse action if they did not immediately stop performing their contractual obligations to DraftKings in New York.

5. The Attorney General's actions constitute a shocking overreach. He has unleashed an irresponsible, irrational, and illegal campaign to destroy a legitimate industry, intending to deprive hundreds of thousands of New Yorkers of the use and enjoyment of these services. Adding insult to injury, he has done so in defiance of New York law, which plainly permits games of skill such as DFS. Indeed, academic scholarship, skills studies, and commentary conclusively establish that DFS is a classic game of skill and entirely legal under New York law. That evidence was fully available to the Attorney General, but he ignored it. Since the Attorney General first contacted DraftKings five weeks ago to inquire about employee gameplay and data security issues, DraftKings has provided its full cooperation, twice meeting with his office, communicating regularly by phone, responding to information requests, and producing reams of documents. Never—not once—during any of those communications did the Attorney General even suggest that he was considering, for the first time ever, declaring DFS illegal in New York. Instead, the Attorney General chose to proceed in secret, reaching an illogical and incorrect interpretation of law, and then trying to strong-arm industry participants into submission before having their day in court. To ban an entire industry from the State,

without even once informing these companies that such a thing was possible or affording them any opportunity to be heard, violates the most basic tenets of fairness and due process.

6. Because the Attorney General rushed to judgment without engaging in any deliberation or discussion, he got it wrong, proffering an incoherent and self-defeating interpretation of New York law that cannot stand. The Attorney General's own reasoning undermines the position he has strained to reach. The Attorney General's cease-and-desist letter claims that DFS is a game of chance, not skill. Yet in the very next breath, the Attorney General admits that a minority of experienced, skilled players reaps the vast majority of winnings—a fact that confirms DFS is, in fact, necessarily skill-based. The Attorney General also acknowledges that “the legality of traditional fantasy sports has never been seriously questioned in New York.” Yet daily fantasy sports is, in fact, grounded in the same game of skill as traditional fantasy sports played over an entire season and, indeed, is even more heavily skill-based—a fact that the Attorney General would have understood had he bothered to review expert opinions and skills studies readily available to him.

7. Advancing a patently incorrect interpretation of New York law belied by its plain language, the Attorney General is now an outlier who stands alone. No New York official—including the Attorney General's immediate predecessor and now-Governor Andrew Cuomo—ever found DFS to be illegal. And in New Jersey—where the gambling law is essentially identical to New York's—a federal court recently ruled that fantasy sports leagues did not violate the state's gambling statutes, finding that “[t]he success of a fantasy sports team depends on the participants' skill in selecting players for his or her team” *Humphrey v. Viacom, Inc.*, 2007 WL 1797648, at *2 (D.N.J. June 20, 2007) (emphasis added). As Massachusetts Governor Charlie Baker proclaimed yesterday after participating in a fantasy sports contest for fun: “It's a

game of skill.” That’s exactly what DraftKings offers and New York law expressly permits—games of skill. That should end the inquiry.

8. The irreparable harm that would result from the Attorney General’s threatened shutdown is self-evident, and this Court’s immediate intervention is necessary to prevent it. New York is home to more than approximately 7% of DraftKings’ customers nationwide. Furthermore, the Attorney General’s cease-and-desist letter—and the adverse publicity attendant to it—are having a chilling effect on DraftKings’ business nationwide, as well as its ability to attract new investors and partners. Moreover, the Attorney General’s letter is impeding DraftKings’ ability to continue its relationships with its current investors and partners. Absent emergency relief, the Attorney General will succeed in forcing DraftKings to shutter its New York operations, harming not just the company, but hundreds of thousands of New Yorkers who enjoy its games—all prior to any judicial determination settling the question of the legality of DraftKings’ operations. That outcome would make a mockery of due process by effectively denying DraftKings its day in court, forcing it to shut down before it has even had the opportunity to defend itself.

9. Meanwhile, the equities here militate strongly in favor of urgent relief. After conducting an abbreviated, five-week look into DFS, supposedly focused on consumer-related issues, the Attorney General then rushed to ban an industry that has been operating openly and honestly and permissibly in New York for nearly a decade. Not once during that time did any Attorney General so much as suggest that those companies might be violating the law. Nothing changed this week that required such a precipitous about-face on the Attorney General’s part. The only thing that changed was this Attorney General’s mind. In short, there is no justification for the Attorney General’s draconian rush to judgment, but his misguided conduct could have

devastating consequences for DraftKings. This Court should therefore bring an immediate halt to the Attorney General's irresponsible, irrational, and illegal actions here.

PARTIES

10. Petitioner DRAFTKINGS, INC., is a Delaware corporation with its principal place of business in Boston, Massachusetts.

11. Respondent ERIC T. SCHNEIDERMAN is the Attorney General of the State of New York. DraftKings brings this Article 78 proceeding against Mr. Schneiderman in his official capacity.

12. Respondent STATE OF NEW YORK (the "State") is a sovereign State and is a necessary party to this action.

JURISDICTION AND VENUE

13. This Court has jurisdiction pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR").

14. Venue is proper because Respondent Schneiderman's Division of Economic Justice, Internet Bureau, is located in New York County, New York. Numerous meetings between DraftKings and Respondents took place within New York County, including meetings at which the parties discussed the services of DraftKings. Respondents' violations of due process also took place in New York County. *See* C.P.L.R. §§ 506(b), 7804(b).

FACTUAL ALLEGATIONS RELATED TO ALL COUNTS

A. DraftKings And Fantasy Sports Contests

15. DraftKings provides an online platform for individuals to enter DFS contests with friends, family, or other fantasy-sports enthusiasts.

16. While DraftKings has offered DFS since approximately April 2012, DFS games have been around at least since the launch of Fantasy Sports Live in June 2007. Since then, other

companies have entered the DFS marketplace, including FanDuel, which was founded in or about 2009.

17. Traditional fantasy sports—which the Attorney General explicitly endorses as legal—have existed since as early as the 1960s and provide fans with an opportunity to assemble a fantasy team of real-life players to compete against other fantasy players. Traditional fantasy contests generally span the entire season of a particular sport—typically four to six months.

18. DFS was a natural and more sophisticated outgrowth of traditional season-long fantasy sports. Like season-long games, DFS gave sports fans the opportunity to use knowledge, skill, and evidence-based analytics to strategically assemble a team of players within firm salary constraints. However, unlike season-long contests, DFS games last one day or one week (depending on the sport), rather than for many months.

19. DraftKings now offers DFS games in 44 states of the United States.

20. DraftKings offers a variety of contest types (for example, large-field tournaments, head-to-head contests, private leagues) in eleven different sports and e-sports.

21. DraftKings users pay an entry fee to enter cash contests, while there is no entry fee whatsoever to play in free contests. Winners of contests receive prizes. The prize structure is always known ahead of time when users decide to pay an entry fee and enter a contest, and does not change.

22. DraftKings users' lineups are comprised of between five and eleven real-world athletes, and the success of those lineups depends on the combined performance in numerous statistical categories of those real-world athletes across many real-world sporting events.

23. DraftKings assigns a fictional “salary” to each real-world athlete who could be selected to any fantasy team, as well as a “salary cap” that limits the sum of the salaries of

athletes that can comprise a user's lineup. The same salary cap and fictional "salaries" of real-world athletes applies consistently to all players in a particular contest, which significantly augments the skill required to participate and succeed in those contests. This mechanism prevents DFS players from merely selecting the real-world athlete that they believe will score the most points at every position in their lineup—such a strategy would cause them to exceed the salary cap. Rather, DFS players must consider the expected value of each real-world athlete, set against the constraint to the salary cap, the overall composition of the roster, and the opportunity cost of other real-world athletes who are not selected.

24. While DraftKings sets the salaries and salary caps, it in no way has any control, let alone full control, of the contests, entry fees, or fantasy lineups selected by its customers.

B. DraftKings' Contests Are Complex Games Of Skill, Not Gambling

25. There is overwhelming evidence that DraftKings' contests are complex games of skill.

26. To begin, the skill set required to play DFS successfully has nothing to do with correctly predicting the ultimate win-loss outcome or margin of victory of a real-world sporting event, such as a football or basketball game. The results of DraftKings' fantasy contests are not tethered to the outcomes of real-world sporting events. DraftKings customers do not place bets on events outside of their control; rather, they pay entry fees to participate in a fantasy contest against other contestants in which they compete by selecting the lineup that determines the winners and losers.

27. Furthermore, the restraints of the salary cap, coupled with the large number of real-world players and statistical categories for which fantasy points are earned provide a nearly infinite number of possible lineups and results, making DFS completely unlike the binary outcomes in sports proposition bets. Instead, the relevant skill-set involves accurately projecting

the performance of individual athletes *and* strategically assembling individual athletes into optimal lineups given the constraints of the salary cap.

28. Sophisticated DFS players know that “optimal” lineup construction varies dramatically by contest type. In a two-person contest or small league, for example, the optimal lineup strategy primarily involves avoiding risk and maximizing the minimum expected fantasy output of each lineup slot within the salary cap. In a large-field Guaranteed Prize Pool (“GPP”) tournament, however, prizes are awarded only to the top-20% of entries, so outperforming a single opponent or 50% of a tournament field is not sufficient. As a result, success in GPP contests over time requires employing an extremely high level of skill and strategy that emphasizes high-upside (but also high beta) lineups.

29. The skill-based nature of DFS games has been repeatedly confirmed by leading experts. For example, Ed Miller—an MIT-trained engineer and noted author of gaming strategy books—and Daniel Singer—the leader of McKinsey & Company’s Global Sports and Gaming Practice—penned an article published by Sports Business Daily entitled: “For daily fantasy sports operators, the curse of too much skill.” Among Miller and Singer’s conclusions was the assertion that in the first half of the 2015 MLB season, 91% of DFS player profits were won by just 1.3% of players.

30. Miller and Singer also identified two primary ways in which skilled users succeed over unskilled users: (1) skilled users employ lineups that create covariance by choosing multiple athletes from the same real-life team in order to produce the extreme DFS outcomes—good and bad—that are necessary to win a large field tournament; and (2) skilled users exploit salary cap pricing inefficiencies by using sophisticated models to optimize their lineups by projecting which athletes are most likely to under- or over-perform relative to their salary on a given day.

31. To help measure the degree of control DFS users exercise over their outcomes, DraftKings engaged Gaming Laboratories International (“GLI”) to conduct sophisticated computer simulations involving DraftKings contests in MLB, NBA, NHL, and NFL.

32. GLI tested the performance of DraftKings lineups generated at random—subject only to the constraint that 90% of the salary cap must be used—compared to the results achieved by top-earning DraftKings users. In each case, skilled users dramatically outperformed the computer simulation in head-to-head contests: 83% of the time in MLB, 96% of the time in NBA, 82% of the time in NHL, and 84% of the time in NFL.

33. DFS is also fundamentally different than other games about which the issue of skill versus chance has been previously debated, such as poker. Unlike poker, where players start each hand on a non-level playing field based on the cards they are randomly dealt, in DFS, each user starts in the exact same position and has complete and total control over the lineup the user chooses, within the consistent constraint of the salary cap. The fact that a DFS user has no control over player injuries is in no meaningful way different from the season-long fantasy sports games the Attorney General has determined to be skill-based and lawful under New York law.

34. In addition to reducing the impact of injured and underperforming players, DFS also greatly enhances the degree to which users can learn from mistakes, develop their skills, and refine their strategic thinking between contests over the course of one real-life season.

35. DraftKings would have provided the Attorney General’s Office with this and other conclusive evidence of the skill-based nature of DFS had the Office requested it, or informed DraftKings at any time that it was evaluating the legality of DFS under New York State law. It did not do so.

C. Federal Statutory Recognition in 2006 That Fantasy Sports Activity Warrants Distinct Recognition

36. The Unlawful Internet Gambling Enforcement Act (“UIGEA”), 31 U.S.C. §§ 5361-5367 (2006), prohibits any person engaged in the business of betting or wagering from accepting any credit or funds from another person in connection with the latter’s participation in “unlawful Internet gambling.” 31 U.S.C. § 5363. Under UIGEA, “unlawful Internet gambling” means “to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet” in a jurisdiction where applicable federal or state law makes such a bet illegal. 31 U.S.C. § 5362(10)(A).

37. Critically, however, Congress recognized that fantasy sports activities are different in nature from the conduct UIGEA prohibits, by defining a “bet or wager” as “the 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,” and then *excepting* from that definition, among other things, “participation in any fantasy or simulation sports game” *See* 31 U.S.C. § 5362(1)(E)(ix)(I)-(III).

38. In other words, federal law carves out fantasy sports games from the definition of “unlawful Internet gambling” in this statute. DraftKings operates with careful attention to UIGEA, to its exception for qualifying fantasy sports activities, and to the laws of the various states.

D. DraftKings’ Cooperation With The Attorney General’s Office

39. DraftKings has operated in New York since 2012. It has advertised on broadcast-television and radio stations, and entered sponsorship agreements with some of New York’s major sports teams. Despite operating throughout New York for the past three years, openly and

transparently, no state prosecutor has ever brought gambling charges against DraftKings or questioned the legality of DraftKings' games. Nor has any state prosecutor brought charges against CBS, Yahoo!, or other companies that offer online DFS contests, which New York residents have been playing for almost a decade.

40. On or about October 6, 2015, Respondents announced publicly that they were reviewing DFS. That same day, Respondents sent a letter to DraftKings, requesting that DraftKings respond to certain information requests. Respondents' inquiry and letter followed press reports alleging that a DraftKings employee, Ethan Haskell, may have used nonpublic DraftKings data to gain an unfair financial advantage in a contest that he entered, and won, on FanDuel. Neither the press reports nor the letter indicated that Respondents were investigating the legality of DraftKings' business under state gambling laws.

41. After receiving the letter, counsel for DraftKings immediately contacted Respondents and communicated DraftKings' desire to cooperate fully. On or about October 9, 2015, counsel for DraftKings met with representatives of Respondents.

42. On or about October 15, 2015, DraftKings produced documents and provided a written response to Respondents' October 6 requests.

43. On or about October 22, 2015, Respondents sent a second letter to DraftKings requesting a limited number of documents, none related to the legality of DraftKings' business under state gambling laws.

44. Counsel for DraftKings met again with representatives of Respondents on October 23, 2015.

45. On or about October 29, 2015, DraftKings produced documents and provided a written response to Respondents' October 22 requests.

46. At the end of October, counsel for DraftKings made repeated requests for a third meeting with Respondents. Counsel for DraftKings understood that Respondents would allow DraftKings to answer questions and discuss the documents produced. Respondents ignored DraftKings' repeated requests for additional communication.

47. Throughout DraftKings' cooperation and dialogue with the Attorney General, Respondents never once indicated that they were investigating DraftKings' compliance with gambling laws. Respondents never invited or permitted DraftKings to engage in dialogue that would allow DraftKings to explain its contests and how those contests are compliant with state gambling laws. For example, DraftKings was never given the opportunity to produce independent studies demonstrating that its DFS contests are games of skill.

48. Respondents gave no indication to DraftKings that they believed that DraftKings' contests may fall within the definition of gambling set forth in Section 225 of the New York Penal Law or within any of the other gambling provisions in the New York Penal Law.

E. The November 10, 2015 Cease-And-Desist Letter

49. On the evening of November 10, 2015, Respondents issued and released to the public a cease-and-desist letter ("Letter") "demand[ing]" that DraftKings "cease and desist from illegally accepting wagers in New York" and asserting that Respondents intend to file suit "to enjoin repeated illegal and deceptive acts and practices," while purporting to provide DraftKings a five-day period to explain why Respondents "should not initiate any proceedings." Letter at 1, 3-4.

50. The Letter is replete with gross errors and misunderstandings concerning DraftKings' offerings and the laws that govern those offerings, and contains assertions undermining the very statutory interpretation it advances.

51. The Letter contends, “the legality of traditional fantasy sports has never been seriously questioned in New York,” Letter at 2. That is true enough and makes good sense, but the Letter at the same time incorrectly argues that DFS is illegal. In other words, the Attorney General is taking the position that if individuals play fantasy sports focused on a particular day or weekend, it is unlawful “gambling,” but if they continue to do that for a season, then it somehow transforms into a legal game of skill. Unable to support its false premise that DFS is gambling, the Letter focuses instead on what it asserts is a “critical distinction” between “traditional” fantasy sports, whose operators profit primarily from “administrative fees and advertising,” and DFS, whose operators “are in active and full control of the wagering” and “profit directly” from it. Letter at 2. Of course, this supposed distinction is both incorrect and completely irrelevant to the critical issue of whether DFS is a game of skill. The Letter also asserts that, unlike DFS, “traditional” fantasy sports lack elements of “instant gratification” and “easy game play”; require a “long-term strategy”; and are played only “for bragging rights or side wagers.” *Id.* Again, this mischaracterization of DFS has nothing to do with whether DFS is a game of skill, which is the core question to be determined under New York law.

52. The Letter further alleges that DraftKings’ offerings violate the law under the following theories:

53. First, the Letter alleges that DraftKings’ operations constitute illegal gambling under the definition set forth in New York Penal Law § 225.00 for two reasons: (1) because DraftKings’ customers place “bets”—which Respondents contend are “styled” as fees—on an “event not under [their] control or influence,” namely, the accomplishments of real-world athletes; and (2) because “winning or losing depends on numerous elements of chance to a ‘material degree.’” Letter at 1-3. The Letter states, in conclusory fashion, that the “illegality of

DFS is clear from any reasonable interpretation of our laws,” in particular, the “New York State Constitution”—which prohibits “pool-selling, book-making, or any other kind of gambling”—and, the “statutory definition of gambling” set forth in Penal Law § 225.00. Letter at 2-3.

54. Second, the Letter alleges that, because DraftKings’ offerings “easily” qualify as gambling by its customers, DraftKings has violated several New York criminal laws, including those prohibiting “knowingly . . . profiting from unlawful gambling activity” and knowingly “possessing any writing, paper, instrument or article of a kind commonly used in . . . a bookmaking scheme or enterprise.” Letter at 3-4.

55. Third, the Letter alleges that DraftKings has accordingly misrepresented that it “complies with applicable laws” and misrepresented that its games are not “considered gambling.” Letter at 4.

56. Fourth, although the Letter accuses DraftKings of operating games that are dependent on chance “to a material degree,” and of misrepresenting “the degree of skill implicated in the games,” it also accuses DraftKings of “misrepresenting the likelihood that an ordinary player will win the jackpot” because “the top one percent of DraftKings’ winners receive the vast majority of the winnings.” Letter at 1-2, 4.

57. Fifth, the Letter alleges that DraftKings “transact[s] its business in a persistently fraudulent and illegal manner.” Letter at 4.

58. The Letter also asserts broadly that DraftKings’ offerings “are neither harmless nor victimless.” Letter at 1. Respondents contend in that regard that they have learned from unnamed “health and gambling experts” that DFS “appears” to create “the same public health and economic problems associated with gambling.” *Id.* at 2. The Letter also alleges that “[c]ertain structural aspects” of DFS “make it especially dangerous” to individuals “prone to

gambling addiction.” *Id.* Those “dangerous” elements that the Letter views as distinguishing DFS include a “quick rate of play,” “large jackpots,” and a “false perception that it is eminently winnable.” *Id.* The Letter offers no support for these contentions.

59. Shortly after releasing the Letter to DraftKings, Respondent Schneiderman widely publicized the allegations in the Letter, and expanded upon them, in interviews with numerous local and national news outlets (television, radio, and print). In those remarks, Respondent Schneiderman further erred in equating DraftKings’ offerings with offerings by the “horse track guys” and the “casino industry.”

F. The Inconsistencies And Errors In Respondents’ Letter

60. Respondents’ letter is irrational, internally inconsistent, and based on a fundamental misapprehension of fantasy sports and the governing law. By way of example:

61. *First*, the Letter announces that “traditional” fantasy sports activities are legal, but that Petitioner’s DFS offerings are not. In purporting to draw a distinction between those two categories, Respondents betray their misunderstanding of the games. The notion that DFS entails “no long-term strategy,” utterly ignores the reality that selecting a winning lineup is a complex, skill-infused process involving picking (from within the salary cap) the players that will outperform others on a host of particularized criteria not directly correlated to an existing team’s winning, or even any single event. *Cf. Humphrey v. Viacom, Inc.*, No. 06 2768 DMC, 2007 WL 1797648, at *2 (D.N.J. June 20, 2007) (“The success of a fantasy sports team depends on the participants’ skill in selecting players for his or her team, trading players over the course of the season, adding and dropping players during the course of the season and deciding who among his or her players will start and which players will be placed on the bench.”). In that regard, DFS calls on very much the same complex strategies employed in season-long fantasy sports. And these are the skills that sharply distinguish DFS participation from the casino and

horse track activities to which Respondents have drawn comparisons in their statements to the press, explaining why Congress explicitly exempted fantasy sports games from the prohibitions in UIGEA.

62. Indeed, DFS is actually more skill-based than traditional season-long fantasy sports, which the Attorney General acknowledged are skill-based and unquestionably legal. *First*, every player in a traditional season-long fantasy sports contest starts off in a different and unequal position, determined largely by chance according to their position in a “competitive draft.” On the other hand, all DFS players start off in the same position, with the ability to draft any player and facing identical salary and roster constraints. *Second*, because season-long fantasy leagues go on for months, there is much more chance and unpredictability resulting from, for example, the possibility that injury or other aberrant events months down the road can affect player performance, making it difficult to predict performance over the course of the season. Additionally, season-long players are limited to playing the same athletes they drafted or picked up as free agents, even in games where adverse conditions exist. DFS players can select any athletes they want and can thus factor in a variety of additional considerations into their skill-based lineup, such as quality of opposing defense, weather conditions, expected gameplay, and many, many more variables.

63. DFS contests also differ from some season-long games in that DFS operators like DraftKings pre-announce for each contest the players’ salaries, salary cap, number of contestants, and prize pool. As a result, DFS contests involve more skill than typical season-long games, which do not require fantasy players to attempt to maximize fantasy points subject to the assigned salaries and cap.

64. While DFS contests require more skill than season-long contests, they are in many other relevant respects quite similar. Both can involve playing for bragging rights and/or a significant range of entry fees and prizes. Both types of games are designed to be user-friendly, encourage recruitment of new players, and involve game play that is easy to understand (though difficult to master). Operators of both types of contests understand and supervise the types of games that they offer. And some internet sites, like Yahoo! and CBS, host season-long contests that, like DraftKings' DFS contests, require entry fees and award prizes in amounts similar to those provided through the DraftKings platform. Like the season-long fantasy sports business that the Attorney General appears to endorse, DraftKings earns revenues from administrative fees on pay-to-enter fantasy contests. Furthermore, these similarities are completely unrelated to the skill or chance determination of the underlying fantasy contests.

65. *Second*, the Letter states that the “the top one percent of DraftKings' winners receive the vast majority of the winnings.” But that fact—that, in certain contests, a minority of experienced, skilled players may win with greater frequency—undermines the Attorney General's legal conclusion. Those players win with greater frequency precisely because DFS is a game of skill that rewards experience, talent, and improvement over time.

66. *Third*, in asserting that the relevant legal test in N.Y. Penal Law § 225.00(2) hinges on whether “winning or losing depends on numerous elements of chance to a ‘*material* degree,’” Respondents have ignored that courts and commentators have continued to use the “dominating element” standard earlier New York judicial opinions applied after the legislature enacted § 225.00 in 1965. *See, e.g., People v. Li Ai Hua*, 24 Misc. 3d 1142, 1145 (Crim. Ct. 2009) (“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.”); Criminal Law in New York § 31:4 (4th ed. 2014) (“Some games involve both an element of skill and chance. To determine if the game is one of chance, the court will look at the dominating element that determines the result of the game.” (quotation marks omitted)); 62 N.Y. Jur. 2d Gambling § 3 (2015) (“The test of the character of a game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the results of the game.”). Thus, the critical question is whether the element of chance predominates over the element of skill in DFS. It does not.

67. Had the Attorney General provided DraftKings an opportunity to discuss the legality of DFS under New York law, DraftKings would have offered these and other arguments and evidence. The Attorney General chose not to do so, despite DraftKings’ ongoing cooperation and repeated requests for continued communication.

G. Immediate And Irreparable Harm To Petitioner, Its Customers, And Employees

68. The harm threatened by Respondents to DraftKings’ customers, employees, operations, finances, and reputation is extraordinary and self-evident.

69. Those harms include the immediate ban of hundreds of thousands of New Yorkers from the DFS marketplace, as well as a chilling effect on DraftKings’ business nationwide, its relationship with existing investors and partners, and its ability to attract new investors and partners.

70. Moreover, even during the five-day notice period provided by the letter and by statute, Respondents are coercing, through press statements and private conversations, DraftKings’ vendors and business partners into ceasing business relations or providing services to DraftKings in New York.

STATEMENT OF THE CLAIMS

FIRST CAUSE OF ACTION

AGENCY ACTION INVALID AS ARBITRARY AND CAPRICIOUS AND IN EXCESS OF JURISDICTION: C.P.L.R. § 7803

71. DraftKings re-alleges and incorporates by reference the allegations of all paragraphs above as if fully set forth herein.

72. By engaging in this conduct, Respondents have violated, and unless enjoined will continue to violate, Article 78 of the New York Civil Practice Law and Rules (“CPLR”). Among other grave legal errors, the Letter is agency action unauthorized by New York law, because, among other reasons, Respondent Schneiderman does not have statutory authority to issue cease-and-desist orders. The Letter is further in conflict with New York law, including the very provisions Respondents have purported to interpret and seek to enforce.

SECOND CAUSE OF ACTION

DECLARATORY AND INJUNCTIVE RELIEF

73. DraftKings re-alleges and incorporates by reference the allegations of all paragraphs above as if fully set forth herein.

74. Each and every one of the grave legal errors described herein independently warrants declaratory and injunctive relief in favor of Petitioner, including, but not limited to, the grounds that the Letter is agency action unauthorized by New York law, including because Respondent Schneiderman does not have statutory authority to issue cease-and-desist orders, and is further in conflict with New York law, including the very provisions Respondents have purported to interpret and seek to enforce.

THIRD CAUSE OF ACTION

DENIAL OF DUE PROCESS: FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND 42 U.S.C. § 1983

75. DraftKings re-alleges and incorporates by reference the allegations of all paragraphs above as if fully set forth herein.

76. By engaging in this conduct, Respondents have violated, and unless enjoined will continue to violate, DraftKings' rights under the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution, as made enforceable through 42 U.S.C. § 1983.

FOURTH CAUSE OF ACTION

DENIAL OF DUE PROCESS: ARTICLE I, SECTION 6 OF NEW YORK CONSTITUTION

77. DraftKings re-alleges and incorporates by reference the allegations of all paragraphs above as if fully set forth herein.

78. By engaging in this conduct, Respondents have violated, and unless enjoined will continue to violate, DraftKings' rights under the Due Process Clause of Article I, Section 6 of the New York Constitution.

FIFTH CAUSE OF ACTION

SEPARATION OF POWERS: ARTICLE III, SECTION 1; ARTICLE IV, SECTION 1; ARTICLE VI, SECTION 1 OF NEW YORK CONSTITUTION

79. DraftKings re-alleges and incorporates by reference the allegations of all paragraphs above as if fully set forth herein.

80. By engaging in this conduct, Respondents have violated, and unless enjoined will continue to violate, DraftKings' rights under the separation-of-powers provisions of the New York Constitution, namely Section 1 of Articles III, IV, and VI.

SIXTH CAUSE OF ACTION

DENIAL OF EQUAL PROTECTION: FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND 42 U.S.C. § 1983

81. DraftKings re-alleges and incorporates by reference the allegations of all paragraphs above as if fully set forth herein.

82. By engaging in this conduct, Respondents have violated, and unless enjoined will continue to violate, DraftKings' rights under the Equal Protection Clause of the United States Constitution, as made enforceable through 42 U.S.C. § 1983.

SEVENTH CAUSE OF ACTION

DENIAL OF EQUAL PROTECTION: ARTICLE I, SECTION 11 OF NEW YORK CONSTITUTION

83. DraftKings re-alleges and incorporates by reference the allegations of all paragraphs above as if fully set forth herein.

84. By engaging in this conduct, Respondents have violated, and unless enjoined will continue to violate, DraftKings' rights under the Equal Protection Clause of Article 1, Section 11 of the New York Constitution.

EIGHTH CAUSE OF ACTION

UNCOMPENSATED TAKINGS: FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND 42 U.S.C. § 1983

85. DraftKings re-alleges and incorporates by reference the allegations of all paragraphs above as if fully set forth herein.

86. By engaging in this conduct, Respondents have violated, and unless enjoined will continue to violate, DraftKings' rights under the Takings Clause of the Fifth Amendment of the United States Constitution, as made enforceable through 42 U.S.C. § 1983.

NINTH CAUSE OF ACTION

UNCOMPENSATED TAKINGS: ARTICLE I, SECTION 7 OF NEW YORK CONSTITUTION

87. DraftKings re-alleges and incorporates by reference the allegations of all paragraphs above as if fully set forth herein.

88. By engaging in this conduct, Respondents have violated, and unless enjoined will continue to violate, DraftKings' rights under the Takings Clause of Article I, Section 7 of the New York Constitution.

TENTH CAUSE OF ACTION

TORTIOUS INTERFERENCE WITH CONTRACT

89. DraftKings re-alleges and incorporates by reference the allegations of all paragraphs above as if fully set forth herein.

90. At all relevant times, DraftKings was a party to separate payment processing contracts with Vantiv, Inc. ("Vantiv") and PayPal Holdings, Inc. ("PayPal"). At all relevant times, DraftKings has fulfilled its contractual obligations to Vantiv and PayPal.

91. Respondents knew about DraftKings' contracts with Vantiv and PayPal. With knowledge of these contracts, Respondents contacted Vantiv, PayPal, and other third parties providing services to DraftKings, in an intentional effort to procure these third parties' breach of their contractual obligations to DraftKings. On information and belief, on November 11 and 12, 2015, Respondents contacted Vantiv and instructed the company to "immediately" stop processing payments from DraftKings' New York customers, threatening them with legal action. On information or belief, on or about November 12, 2015, Respondents similarly contacted PayPal and informed the company that it would be violating the law if it continued to process DraftKings' payments from New York customers.

92. Because of Respondents' actions, Vantiv informed DraftKings that it would imminently stop processing payments for DraftKings' New York players as a result of the Attorney General's cease-and-desist letter and outreach. In ceasing to process payments under its contract with DraftKings, Vantiv would be breaching its contract with DraftKings. Absent the outreach from Respondents on November 11 and 12, Vantiv would not breach its agreement with DraftKings.

93. As a direct result of Respondents' misconduct, DraftKings has suffered and will continue to suffer irreparable harm to its ability to operate its business in New York and elsewhere. DraftKings thus has no adequate remedy at law.

ELEVENTH CAUSE OF ACTION

TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS

94. DraftKings re-alleges and incorporates by reference the allegations of all paragraphs above as if fully set forth herein.

95. DraftKings developed with both Vantiv and PayPal a lucrative, productive, and mutually beneficial business relationship of processing payments from DraftKings' customers. DraftKings reasonably expected that its business relationships with Vantiv and PayPal, and the work put in to foster these relationships, would ripen into continued contractual relations.

96. Respondents unquestionably knew about DraftKings' business relationships with Vantiv and PayPal.

97. Respondents intentionally interfered with DraftKings' business relationships with Vantiv and PayPal, and used dishonest, unfair, and improper means to do so. Among other things, Respondents made explicit or implied threats of legal action, including potential criminal prosecution, to Vantiv and PayPal. The purpose of these threats was to interfere with

DraftKings' prospective business relations with Vantiv and PayPal and to shut down DraftKings' business in New York State.

98. As a direct result of Respondents' misconduct, DraftKings has suffered and will continue to suffer irreparable harm to its ability to operate its business. DraftKings has no adequate remedy at law.

JURY DEMAND

99. DraftKings demands a trial by jury in this action on each of its claims.

DRAFTKINGS IS ENTITLED TO DISCOVERY

100. DraftKings will seek expedited discovery, by order to show cause, into the record on which Respondents' cease-and-desist letter purports to be based. Such discovery is warranted to provide DraftKings with information exposing that letter as the product of a predetermined policy preference rather than law and available evidence.

NOTICE OF NEW YORK CLAIMS UNDER N.Y. GML § 50

101. This action has been commenced within one year and ninety days of the date of the occurrence of the events giving rise to this Complaint.

NO PRIOR APPLICATION

102. No prior application for this or any similar relief has been made in this Court.

PRAYER FOR RELIEF

103. DraftKings respectfully requests that the Court issue a declaration, on an expedited basis, pursuant to CPLR §§ 3001, 6301-13, and 42 U.S.C. §§ 1983 and 1988:

a. Declaring that DraftKings' DFS contests do not constitute "gambling" within the meaning of New York law, including Article I, § 9, of the Constitution and Sections 225.00, 225.05, 225.10, 225.15, and 225.20 of the Penal Law, and do not

constitute “bookmaking” within the meaning of New York law, including Article I, § 9, of the Constitution and Section 225.00 of the Penal Law;

b. Declaring that DraftKings’ statements and advertisements identified above and in the Notice do not constitute a deceptive business practice in violation of GBL § 349 or false advertising in violation of GBL § 350; and

c. Declaring that DraftKings’ operation of DFS contests therefore does not constitute fraud or persistent illegality that may be the subject of an injunction or other civil remedies under Executive Law § 63(12) or BCL § 1303.

104. DraftKings further requests an injunction against the Attorney General’s taking any enforcement actions inconsistent with the Court’s declaratory judgment requested above, and an order mandating that the Attorney General cease and desist threatening adverse action against DraftKings’ vendors, partners and financial institutions, and requiring the Attorney General to inform those vendors, partners and financial institutions already contacted about this order.

105. DraftKings further requests the award of its costs of this action, including attorneys’ fees to the extent authorized by law.

106. DraftKings also seeks such other, further and different relief as the Court determines to be just and proper, including relief further or consequential to DraftKings’ request for declaratory relief to the extent set forth above.

Dated: New York, New York
November 12, 2015

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

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Attorneys for DraftKings, Inc.

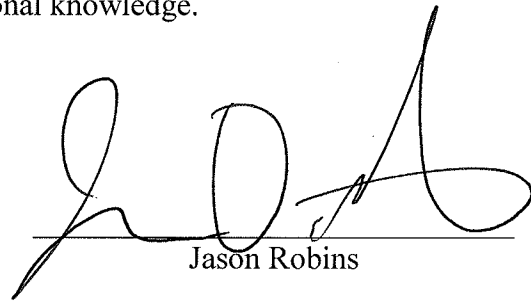
VERIFICATION

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

Jason Robins, being duly sworn, deposes and says:

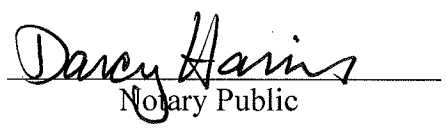
1. I am the Chief Executive Officer of DraftKings, Inc., Petitioner and Plaintiff in this consolidated Article 78 proceeding and plenary action.

2. I have read the foregoing petition and foregoing complaint, and can state that the factual contents thereof are true based upon my personal knowledge, except as to matters alleged upon information and belief, which matters I believe to be true based on my review of pertinent documents and conversations with persons with personal knowledge.



Jason Robins

Sworn to before me on this
12th day of November 2015



Notary Public

DARCY HARRIS
Notary Public, State of New York
No. 02HA6255842
Qualified in New York County
Commission Expires February 13, 2016