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IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

COLIN DEW-BECKER	) On review of the Opinion of the Appellate
	) Court of Illinois, First Judicial District
Plaintiff/Appellant,	) No. 1-17-1675
	)
v.	) Appeal from the Circuit Court of Cook
	) County, Illinois, No. 2016 M1 011598
ANDREW WU,	)
	) The Honorable Leon Wool,
Defendant/Appellee.	) Judge Presiding

BRIEF OF DEFENDANT-APPELLEE

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

QUESTIONS PRESENTED FOR REVIEW

1. Whether Plaintiff may recover under 720 ILCS 5/28-8(a) from Defendant for alleged gambling losses as a result of his participation in a head-to-head online Daily Fantasy Sports contest.

NATURE OF THE ACTION

On April 1, 2016, Plaintiff and Defendant entered into a "head-to-head" daily fantasy sports ("DFS") contest offered by FanDuel on the FanDuel website (www.fanduel.com). Plaintiff, using only a screen name on the website, found another person, the Defendant, also using a screen name on the website, who was willing to enter a DFS contest created by the Plaintiff. Defendant won. Plaintiff filed suit, claiming a right to recover $100 from Defendant under subsection (a) of the Illinois Loss Recovery Act, 720 ILCS 5/28-8(a) (the "LRA"). On June 26, 2017, after Plaintiff testified, introduced an exhibit and called Defendant as an adverse witness, Plaintiff lost a small-claims bench trial on the merits. The trial court found in favor of the Defendant, reasoning that the LRA did not allow recovery for suits between users of DFS websites because the alleged gambling activity is not "connected and conducted" between two persons. R. 22-23. The appellate court similarly determined the LRA did not apply to alleged gambling facilitated by a third party website where a direct connection between persons known to one another was lacking, observing further that the result urged by Plaintiff - that every victorious contestant on the FanDuel website was subject to an LRA claim by any loser - would wreak havoc on the court system and was inconsistent with the current trends toward expansion of gambling. Opinion ¶¶ 19-20, 22, 25, P. App. 6-9.[1]

This test case seeks a green light for a cottage industry in Illinois – lodging hundreds of thousands of claims against unsuspecting citizens who have been engaging in online DFS contests in Illinois for at least over a decade. As a workaround to the LRA's requirement that the "loser" would know the "winner," Plaintiff/Plaintiff's counsel

[1] "P. App" references to the Appendix to Plaintiff's Opening Brief.

articulates how he would first utilize Supreme Court Rule 224 to sue a DFS operator to ascertain the identity of "winners." Plaintiff ignores, entirely, the jurisdictional, constitutional, and privacy issues implicated by a scheme that would require a website to give up the personal identity of any one of millions of different users around the globe so they may be dragged into court if they refuse to pay and settle. Plaintiff also ignores that DFS is now indisputably legal in Illinois as a result of PA 101-0031, and that prior to the passage of the new law massively expanding gambling in Illinois, DFS was not "gambling" under 720 ILCS 5/28-1(a) because contests of skill are excepted under 28-1(b)(2) and because contest entrance fees are not bets or wagers.

Plaintiff's end game is not even limited to the pursuit of hundreds of thousands of subsection (a) claims brought by actual contestants. If any actual loser does not assert their claim under subsection (a) within 6 months of the "loss," subsection (b) of the LRA allows *any* person to file a suit and recover *triple* the amount of the gambling loss which the actual loser could have asserted under subsection (a). 720 ILCS 5/28-8(b). A reversal here means that this Plaintiff, or any other straw person, may file an unlimited number of subsection (b) suits (and SCR 224 suits to identify winners) arguing that he or she has standing to pursue a subsection (b) claim against any and every winner on any DFS website operating in Illinois.

The legislative intent behind a pre-Civil War statute could only have contemplated gambling between persons known to, and in direct contact with, one another. Considerations of the legislative intent and the grave consequences of Plaintiff's attempt to twist about an ancient law to create a windfall litigation opportunity supports the trial court's judgment and the appellate court's decision. The appellate court properly

chose to limit the scope of claims to those which could have been contemplated at the time of enactment of the LRA, as between persons known to each other, such as those persons sitting at a physical gambling table in Illinois. Plaintiff's attempt to misuse an anachronistic statute adopted over 150 years before computers even existed should be rejected. This Court should affirm.

STATUTES INVOLVED

720 ILCS 5/28-8:

> Sec. 28-8. Gambling losses recoverable.
>
> (a) Any person who by gambling shall lose to any other person, any sum of money or thing of value, amounting to the sum of $50 or more and shall pay or deliver the same or any part thereof, may sue for and recover the money or other thing of value, so lost and paid or delivered, in a civil action against the winner thereof, with costs, in the circuit court. No person who accepts from another person for transmission, and transmits, either in his own name or in the name of such other person, any order for any transaction to be made upon, or who executes any order given to him by another person, or who executes any transaction for his own account on, any regular board of trade or commercial, commodity or stock exchange, shall, under any circumstances, be deemed a "winner" of any moneys lost by such other person in or through any such transactions.
>
> (b) If within 6 months, such person who under the terms of Subsection 28-8(a) is entitled to initiate action to recover his losses does not in fact pursue his remedy, any person may initiate a civil action against the winner. The court or the jury, as the case may be, shall determine the amount of the loss. After such determination, the court shall enter a judgment of triple the amount so determined.
>
> (c) Gambling losses as a result of gambling conducted on a video gaming terminal licensed under the Video Gaming Act are not recoverable under this Section.

720 ILCS 5-1/5

Sec. 1-5. State criminal jurisdiction.

(a) A person is subject to prosecution in this State for an offense which he commits, while either within or outside the State, by his own conduct or that of another for which he is legally accountable, if:

(1) the offense is committed either wholly or partly within the State; or

(2) the conduct outside the State constitutes an attempt to commit an offense within the State; or

(3) the conduct outside the State constitutes a conspiracy to commit an offense within the State, and an act in furtherance of the conspiracy occurs in the State; or

(4) the conduct within the State constitutes an attempt, solicitation or conspiracy to commit in another jurisdiction an offense under the laws of both this State and such other jurisdiction.

(b) An offense is committed partly within this State, if either the conduct which is an element of the offense, or the result which is such an element, occurs within the State. In a prosecution pursuant to paragraph (3) of subsection (a) of Section 9-1, the attempt or commission of a forcible felony other than second degree murder within this State is conduct which is an element of the offense for which a person is subject to prosecution in this State. In homicide, the "result" is either the physical contact which causes death, or the death itself; and if the body of a homicide victim is found within the State, the death is presumed to have occurred within the State.

(c) An offense which is based on an omission to perform a duty imposed by the law of this State is committed within the State, regardless of the location of the offender at the time of the omission.

STANDARD OF REVIEW

Plaintiff incorrectly asserts that the trial court's decision is subject entirely to review *de novo*. A circuit court's determinations of fact shall not be disturbed unless against the manifest weight of the evidence. *Samour, Inc. v. Board of Elections Commissioners*, 224 Ill.2d 530, 542 (2007). Factual findings and determinations of a trial court are entitled to stand, unless they are contrary to the manifest weight of the evidence. *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶17 (2013); *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 72 (2006). A trial court's decision is considered to be against the manifest weight of the evidence only where the opposite conclusion is clearly evident

or the finding is arbitrary, unreasonable, or not based in evidence. *Hartney*, 2013 IL 115130, ¶17. Any factual findings of the trial court, to the extent pertinent to this appeal, are subject to review under the manifest weight of evidence standard.

The decision of a circuit court interpreting and applying a statute or regulation presents a question of law subject to review *de novo*. *People ex rel. Madigan v. Illinois Commerce Com'n*, 231 Ill.2d 370, 377 (2008). The appellate court can sustain the trial court's judgment on any ground properly before it, regardless of whether the trial court relied on that ground or whether the trial court's reasoning was correct. *See, e.g.*, *Material Service Corp. v. Dep't of Revenue*, 98 Ill.2d 382, 387 (1983).

STATEMENT OF FACTS[2]

At the time of trial, Plaintiff was familiar with the FanDuel website, having learned of it three or four years prior to trial and having used it in the past. R. 10. FanDuel is a website[3] that operates daily fantasy sports contests. *Id.* Plaintiff testified that there are a large number of types of fantasy sports contests, but the one in particular which he entered with Defendant was a "head-to-head" fantasy sports contest. *Id.* This type of contest involves two individuals, and each makes a lineup of players from a certain sports league. *Id.* In this case, it was the NBA. *Id.* According to Plaintiff, each participant of the contest is wagering on the performance of their players from their lineup. R.10. On April 1, 2016, Plaintiff entered into a single head-to-head contest with Defendant involving NBA games. R. 11.

[2] Plaintiff fails to comply with Illinois Supreme Court Rule 341(h)(6), which requires a statement of facts "necessary to an understanding of the case." The court may affirm and should dismiss this appeal for the reasons set forth in Defendants argument, *infra* at p. 12.
[3] www.fanduel.com

Trial Exhibit 1 was the "scorecard" from the head-to-head fantasy sports contest between Plaintiff and Defendant, in the form of a screenshot from the FanDuel website. R. 3, R. 11. The scorecard does not reflect the actual names of Plaintiff or Defendant but rather screen names of "dewbeckc" and "questionablylegal," respectively. *Id*. No information about the users or their location are provided on the scorecard. There was no evidence that the website provided any information that would reveal the location or identity of any user to another user or any other person accessing the website.

Plaintiff created the contest at issue. R. 11. The scorecard reflects that each contestant selected nine different players in different positions. R. 3, R. 11. The scorecard reflects a differing "salary" ostensibly paid to the fantasy player, but there was no evidence at trial as to specifically how the salaries were awarded or rationed by the contestants, or how fantasy players were selected. *Id*. Plaintiff chose the players on the left side of the scorecard hoping they would score the most possible points for his team. R. 11. Plaintiff claimed to have wagered $100 on the hope of winning $200. *Id*. Plaintiff paid a $9 intermediary fee to FanDuel to set the rules and bet on the website. R. 13. In order to win, Plaintiff was trying to create a lineup of players that will score the most points. *Id*. FanDuel assigns points to players based on their performance in games that evening. R. 13. Based upon the scorecard, Plaintiff's team scored 96.3 points and Defendant's team scored 221.1 points, so Defendant won the contest. R. 12. Plaintiff claimed the payout was $200 and that Defendant received the money. R. 13.

On the subject of skill involved in the contest, Plaintiff considered FanDuel to be a contest of skill, believing that there was skill involved as well as luck. R. 15. Plaintiff opined that there was an element of "knowing" how good players are and how many

points you think they're going to score but there are also elements that are "completely out of your control," such as injury or impact of weather. R. 14.

At trial *pro se*, Defendant disputed that he had engaged in any illegal behavior, noting that there were "millions of daily fantasy sports users," such that the implication that daily fantasy sports in general have been illegal "for this whole time" and that the losses could be recovered under the LRA is "kind of ludicrous." R. 9. Defendant also argued that the idea that millions of current daily fantasy sports users are engaging in illegal behavior and would be subject to a claim under the LRA is "kind of a reach." *Id.*

Defendant testified that FanDuel appeared to be a "mediator" as it was otherwise entirely impossible to go head-to-head against a person one knew nothing about beyond the username on a website. R. 16. Defendant testified that he did not view the contest as "an illegal gambling situation." *Id.* Defendant admitted that he chose to join the contest voluntarily and that he paid $100 to FanDuel with the understanding that if he did not win that the money would go to Plaintiff. Defendant was not asked, however, whether he actually received any part of Plaintiff's money from Plaintiff or FanDuel.

In closing, Plaintiff argued that the LRA should be interpreted and enforced as written and that there was no express exemption anywhere for DFS. R. 19. Defendant submitted that the idea, as applied to the millions of persons currently playing the game every day, that each of the contests is an illegal wager was too broad an interpretation of the LRA, which could result in millions of cases. R. 22.

The trial court found in favor of the Defendant, reasoning that the LRA did not allow recovery when the alleged gambling activity is not connected and conducted between two persons. R. 22-23. The trial court did not otherwise express any additional

factual conclusions supporting its decision. The appellate court, reviewing the matter *de novo*, affirmed the trial court's application and construction of the statute, reasoning that "any person who by gambling shall lose to any other person" required a "direct connection between the two persons involved in the wager." Opinion ¶19. The appellate court made a factual finding that although Plaintiff and Defendant presumably knew each other, FanDuel did not require all contestants in head-to-head DFS contests to know one another because such a contest could be conducted between two strangers. Opinion ¶20.

The appellate court was also concerned that construing the act in the manner urged by Plaintiff would frustrate the statute's purpose and yield absurd results, as the "floodgates of litigation" would be opened to thousands of Illinois residents engaged in DFS contests. Opinion ¶22. The appellate court found it absurd that the LRA's drafters would have intended to inundate the court system with such a high volume of claims. Lastly, the appellate court compared the "dwindling" relevance and applicability of the LRA since its inception with the current era of expansion of legalized sports gambling, including bills before the Illinois legislature proposing the legalization and regulation of sports gambling. Opinion ¶¶25-6.

Plaintiff does not contest any of the factual findings of the courts below.

ARGUMENT

The LRA is a penal statute which implements an anti-gambling morality from a bygone era in Illinois. Consistent with the times in which the LRA was enacted, the appellate court specifically noted that the LRA was intended to address wagers made between persons who know each other and that extension to wagers made between any users on or through internet gambling websites was problematic, would frustrate the

purpose of the statute and would lead to an absurd result. *Dew-Becker v. Wu*, 2018 IL App (1st) 171675 (the "Opinion") at ¶¶ 20-21. The appellate court properly found in favor of Defendant, construing the language of the statute consistently with the intent of the drafters to find that subsection (a) of the LRA was intended to apply to gambling activities where there is a direct connection between the two persons involved, such as persons physically present in Illinois. Opinion ¶26. The appellate court affirmed the trial court's construction and application of the statute, reasoning that the construction urged by Plaintiff would wreak havoc on the court system with a flood of claims and that expansion of the LRA was inconsistent with the current trends toward expansion of gambling. Opinion ¶¶ 19-20, 22, 25, P. App. 6-9.

Plaintiff fails to present a record to this court from which it could determine whether the activity on the DFS website between Plaintiff and Defendant on April 1, 2016 was "gambling" for purposes of the LRA. The appellate court assumed, without actually making any determination, that the activity in question was gambling. Under Illinois law, DFS is not gambling because it is a contest of skill. Illinois' definition of gambling provides an exception for a participant in any contest that offers "prizes, award or compensation to the actual contestants in any *bona fide* contest for the determination of skill, speed, strength or endurance…" 720 ILCS 5/28-1(b)(2). For the LRA to apply, Plaintiff was required to prove that gambling occurred in Illinois on April 1, 2016, which Plaintiff failed to do. The Court may affirm on this basis, alone.

There has never been any criminal prosecution in Illinois against any DFS website or contestant in Illinois. The Attorney General Opinion relied upon so heavily by Plaintiff was admitted by the Attorney General to be advisory only and was never

enforced or followed by the State, any city or municipality. Of the 32 states which Plaintiff contends have similar gambling loss recovery acts as Illinois, no case is cited from any jurisdiction which allowed a claim against a winning participant on a DFS website. In addition, consistent with the appellate court's observation of the trend toward expansion of gambling including acts which had been introduced in Illinois, the Illinois House and Senate have passed, and the Governor has signed, a massive gambling expansion bill, SB 690, now Public Act 101-0031,[4] which expressly authorizes and regulates sports betting as well as DFS.

Plaintiff seeks to apply the LRA in a vacuum, and completely ignores the absurd ramifications of allowing claims against all DFS "winners" of $50 or more. The drafters of the LRA could not have envisioned the virtual internet environments where anyone around the world could create a screen name and enter contests anonymously. The virtual global environment of a web-based gaming platform is not the equivalent of a gambling "house" envisioned by the drafters of the LRA. Instead, Plaintiff, relying heavily on turn-of-the-century precedents, argues there is no difference between an old-fashioned "house" of gambling and a DFS internet contest, and that it does not matter that the "person" engaged in the alleged gambling may have no idea who the other "person" is because Plaintiff could file a pre-lawsuit lawsuit just to find out the identity of the "winner." Plaintiff is wrong on both counts.

Plaintiff ignores and fails to explain where the "house" is located and where the "game" takes place when the accused winner is outside Illinois (or indeed the United States). The application of the LRA to hail a winner who has never set foot in Illinois

[4] http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=101-0031

and would also have no way of knowing whether the putative loser (in a head-to-head contest) or other persons (in a tournament, league or multiple person contest) were in Illinois would be profoundly unconstitutional, as an Illinois court would lack personal jurisdiction. *See, e.g.*, *Wiles v. Morita Iron Works Co.*, 125 Ill. 2d 144, 149-53 (1988) (discussing limits of personal jurisdiction). The web-based considerations were not at issue in any of the turn-of-the-century decisions relied upon by Plaintiff.

I. PLAINTIFF FAILED TO FULLY AND FAIRLY PRESENT THE FACTS SUPPORTING THIS APPEAL OR THE RIGHT TO RECOVER UNDER THE ACT

Plaintiff fails to comply with Illinois Supreme Court Rule 341(h)(6), which requires a statement of facts "necessary to an understanding of the case." Under these rules, appellant has an affirmative duty to present all facts fully and fairly in its brief. *See John Crane Inc. v. Admiral Ins. Co*., 391 Ill. App. 3d 693, 698 (1st Dist. 2009); *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 9 (2d Dist. 2012) (court is within its rights to dismiss appeal). Plaintiff appeals a judgment entered against Plaintiff following a trial on the merits, yet Plaintiff's Statement of Facts has not set forth the facts or evidence concerning the alleged gambling activity, the persons involved, the operations or involvement of the FanDuel website on which the alleged gambling activity occurred, or the evidence which otherwise supports Plaintiff's right to recover and argument that the LRA applied. Plaintiff assumes that the court must know how the "DFS" contest created by Plaintff works and how the FanDuel website operated on April 1, 2016. Plaintiff "created" the subject contest (R. 11) yet provides little to no detail what that means. Plaintiff's creation of the contest is indeed contrary to his argument that FanDuel was the "house."

Plaintiff's failure to present full and fair facts and argument on the subject of the DFS contest and application of the LRA to such facts rises to the level that this appeal should be dismissed. *See John Crane*, 391 Ill. App. 3d at 698; *Hall*, 2012 IL App (2d) 111151 at ¶¶ 9, 15. A party's failure to comply with Rule 341 is grounds for disregarding its arguments on appeal. *Burmac Metal Finishing Co. v. West Bend Mut. Ins. Co*., 356 Ill. App. 3d 471, 478 (2d Dist. 2005) (citing *Alderson v. Southern Co*., 321 Ill. App. 3d 832, 845 (1st Dist. 2001), *Jeffrey M. Goldberg & Associates, Ltd. v. Collins Tuttle & Co*., 264 Ill. App. 3d 878, 886 (1st Dist. 1994)). Although the record in this matter is not voluminous, this does not excuse Plaintiff's failure to comply with the rules.

It is Plaintiff's burden to show that the activity engaged in was gambling and that payment was made by Plaintiff to Defendant. At trial and in its brief, Plaintiff failed to satisfy these elements of proof. Plaintiff's complaint and the arguments of counsel in the record were not evidence at trial. *Cf. Direct Auto Ins. Co. v. Beltran*, 2013 IL APP (1st) 121128 at ¶69 (allegations of complaint—even where admitted against certain defaulting defendants—not evidence against non-defaulting defendants); *People v. Smith*, 2014 IL App (1st) 103436 at ¶74 (approving of trial court's instruction to jury that "[w]hat the lawyers say is not evidence and should not be considered by you as evidence"). Nor may the Court take judicial notice of what types of contests were offered on www.fanduel.com on April 1, 2016 or any other date. This court may affirm on any grounds - including the Plaintiff's failure to present evidence at trial establishing all of the elements necessary for recovery. *Material Service Corp. v. Dep't of Revenue*, 98 Ill.2d 382, 387 (1983). The record is otherwise not developed enough in this matter for the

Court to conduct review *de novo* of whether the DFS head-to-head contest on April 1, 2016, was gambling for purpose of the LRA.

A. The Court Should Defer Ruling on the Issue of Legality of DFS or Remand for Further Proceedings.

As a by-product of this appeal, Plaintiff's response to the decisions below is to seek validation of the idea that one could use Supreme Court Rule 224 to ascertain the identity of any "winner" on a DFS website and then use that information to sue under the LRA. Notably, the underlying facts of this case do not present that scenario, as the parties were presumed to know each other by the appellate court (Opinion, ¶20) and Plaintiff does not argue otherwise. While the Court should consider the rationale of the appellate court, Plaintiff's attempt to ratify the theory that any DFS "loser" may proceed under the LRA without knowing the "winner" is based upon facts not at issue in this appeal, and in effect seeks an advisory opinion from this Court. *See, e.g.*, *People ex rel. Partee v. Murphy*, 133 Ill.2d 402, 408 (1990) (citation omitted) ("An advisory opinion results if the court resolves a question of law which is not presented by the facts of the case."); *Howlett v. Scott*, 69 Ill.2d 135, 143 (1977) (citation omitted) ("Illinois judges have no authority to issue advisory opinions.").

The record here is devoid of any details concerning any other type of contest other than a "head-to-head" type of contest entered into between persons known to each other. If Plaintiff wishes to attempt to use SCR 224 to sue a DFS operator to learn the identity of a winner, Plaintiff should actually do so and allow the true stakeholders - the DFS websites - to defend their business and litigate their own interests.

B. Plaintiff Failed to Satisfy the Element of Gambling Necessary to Recover under the Act as to a DFS Contest.

Games of skill which award prizes to contestants do not violate Illinois law. Illinois law provides that a party commits "gambling" if it "knowingly plays a game of chance or skill for money or other thing of value, unless excepted in subsection (b) of this Section." 720 ILCS 5/28-1(a)(12). Subsection (b)(2) provides an exception for a participant in any contest that offers "prizes, award or compensation to the actual contestants in any *bona fide* contest for the determination of skill, speed, strength or endurance…" 720 ILCS 5/28-1(b)(2). Although the record in this case is not robust, the DFS contest at issue should qualify as *bona fide* contest of skill. To the extent the record is insufficient on the subject of whether the exception applies, the case should be remanded.

FanDuel's fantasy sports contests are the types of contests that the drafters of Section 28-1 sought to exempt from the criminal prohibition on illegal gambling. They are like chess, scrabble, or crossword puzzle tournaments, in that they do not test athletic skill, but mental prowess, here as a professional sports scout, general manager, and talent development director. The "skill" being determined in a fantasy sports contest is no less a "skill" for it involving mental acuity and not athleticism—the skill is in selecting effective players. And the fact that FanDuel's contests depend partially on outside factors do not remove them from the *bona fide* contest exception. *See, e.g.*, *Humphrey v. Viacom, Inc.*, 2007 WL 1797648 at *10 (D.N.J., June 20, 2007) ("In addition to the fact that fantasy leagues are not gambling and that defendants do not win anything, participants suffer no 'loss' in participating in the fantasy leagues.").

Federal law also specifically contains a carve-out, excepting fantasy sports contests from the realm of wagering and gambling. Under the Unlawful Internet Gambling Enforcement Act ("UIGEA"), entrance fees for fantasy sports contests are not bets or wagers. 31 U.S.C. § 5362(1)(E)(ix) (2006) ("The term 'bet or wager' . . . does not include . . . participation in any fantasy or simulation sports game . . . .").

Instead of providing any legal argument of his own, Plaintiff's sole argument toward satisfying the element of "gambling" is based upon the Attorney General Opinion dated December 23, 2015. Ill. Op. Att'y Gen. No. 15-006 (December 23, 2015), P. App at pp. 13-24. After the Attorney General issued the opinion letter, FanDuel brought suit the next day seeking a declaration that the opinion was invalid and that its services were lawful under Illinois law. See Complaint, *FanDuel Inc. v. Madigan*, No. 15-MR-1136 (7 Jud. Cir. Sangamon County, December 24, 2015), D. App. at pp. 1-14.[5] Plaintiff omits mention that the Attorney General sought to avoid adjudication of the legality of DFS, filing a motion to dismiss which declared that opinion was a "nonbinding advisory opinion" that does not have the force of law. *See* Mem. in Supp. of Att'y Gen. Mot. to Dismiss, *FanDuel Inc. v. Madigan*, No. 15-MR-1136 (7 Jud. Cir. Sangamon County, Jan. 22, 2016) at 1, D. App. at p. 15. As the Attorney General stated, the opinion "did not order specific conduct, adjudicate any parties rights or obligations, or threaten legal liability." *Id.*, D. App. at p. 23. Indeed, the Attorney General acknowledged that it "has not threatened any criminal prosecution," and approvingly cited cases stating that "the

[5] This court may take judicial notice of statements of the Attorney General. See, e.g., *In re Linda B.*, 2017 IL 119392 at ¶31, n. 7 (citations omitted) ("Public documents, such as those included in the records of other courts and administrative tribunals, fall within the category of 'readily verifiable' facts capable of instant and unquestionable demonstration of which a court may take judicial notice."); *People v. Mosley*, 2015 IL 115872 at ¶16, n.6 (citations omitted) ("[W]e may take judicial notice of briefs filed in another case.")

opinions issued by the Attorney General … are entitled no more weight than that given the opinion of any other competent attorney." *Id.*, D. App. at pp. 23-24.

In her opinion, the Attorney General argued that 28-1(b)(2) only applies to the "actual contestants" in the actual sporting event, and does not apply to daily fantasy contest entrants. D. App. at p. 35. The Attorney General's exceedingly narrow view of the statutory exception is wrong because it fails to acknowledge that (1) the fantasy sports contests themselves are contests for the determination of skill; (2) the skill being determined in the fantasy sports contests is the ability to evaluate the talent and predict the performance of individual players, just as professional general managers do; and (3) the "actual contestants" in these fantasy sports contests are the contestants who participate in those contests, not the athletes whose performances the contestants are seeking to predict.

Additionally, despite issuing the opinion nearly 4 years ago, no agency in Illinois has sought to enforce and Illinois gambling law against a DFS operator (or contestant). To the contrary, the Attorney General affirmatively sought to dismiss a declaratory judgment action brought by FanDuel and DraftKings ("DFS Operators") following the opinion's issuance, arguing that (1) the office's opinion was nonbinding and was not "subject to enforcement in a court of law" and (2) the DFS Operators lacked standing because the office "did not order Plaintiffs to cease operations and did not pursue or threaten Plaintiffs with any civil or criminal litigation." D. App. at pp. 15, 20-25. Nor has the Attorney General sought to obtain an injunction to stop the DFS Operators from operating at any time since issuing the opinion.

Ultimately, after over two years passed in the Sangamon County declaratory judgment suit without any ruling from the circuit court on the State's motion to dismiss and without any law enforcement measures, FanDuel (and DraftKings, which joined the suit) dismissed the case without prejudice and with the right to refile if necessary. March 5, 2018 Order, D. App at pp. 59-61. In short, contrary to Plaintiff's assertion (Brief p. 11) the Attorney General did not decide the issue of legality of DFS in Illinois and the issue remains a matter of first impression.

Entries in fantasy sports contests are not bets and wagers for purposes of Loss Recovery Act statutes. The leading state case addressing the legality of fantasy sports contests under state law is *Humphrey v. Viacom*, 2007 WL 1797648 at *8 (D.N.J. June 20, 2007). In *Humphrey,* the plaintiff sued several fantasy sports sites under "loss recovery acts" ("LRA") in the District of Columbia, Illinois, Georgia, Kentucky, Massachusetts, New Jersey, Ohio, and South Carolina. The court dismissed the plaintiff's claims challenging fantasy sports contests finding that paying an entry fee to compete in a tournament for guaranteed prizes awarded by a third party does not constitute gambling. *See also Hardin v. NBC Universal, Inc.*, 283 Ga. 477, 479, 660 S.E.2d 374, 376 (2008) (text message charge to enter a contest does not constitute a "bet or wager"); *Las Vegas Hacienda v. Gibson,* 77 Nev. 25, 359 P.2d 85 (1961) (offering prize to winner of competition is not a wagering contract if the operator does not participate in the competition and has no chance of winning the prize).

Humphrey follows other cases outside the fantasy sports context. In *State v. Am. Holiday Ass'n, Inc.*, 151 Ariz. 312, 727 P.2d 807 (1986), the Arizona Supreme Court explained the difference between skill-based tournaments and gambling. The defendant

offered a "word bingo" game contest with an entry fee between $1 and $15. Each player received a grid containing the letters "BINGO" in some squares and a list of words. Players then placed words so that every line and column spelled a word on the word list, and the letters "BINGO" were in their original locations. Once players completed the first puzzle correctly, they competed in "playoff level" rounds until only one winner remained. During each playoff level, users could pay more fees to become eligible for more valuable prizes. The court found these contests were not gambling, because "not every contest charging an entry fee and awarding a prize becomes an illegal gambling operation." *Id.* at 314. The court further observed that the contest was unlike a sports gambling operation because the prizes awarded were known from the start and did not depend on the "bookies' odds" or the number or amount of entry fees received. *See also Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 87 (Nev. 1961).

Ultimately, not every contest of skill must be gambling under 720 ILCS 5/28-1(a)(1), otherwise subsection (b)(2) has no purpose. Defendant submits that the record here is woefully insufficient to adjudicate the legality of DFS generally and that the court should remand for further proceedings unless it is able to dispose of the appeal on other grounds.

C. Plaintiff's Argument For Extension of the Act is at Odds With the Massive Modern Gambling Expansion Recently Approved in Illinois.

To say the LRA is outdated is an understatement. The LRA dates back at least as far as Section Nine of the "Vice & Immorality Act" adopted in the 1807 Laws of the Territory of Illinois—some 11 years before Illinois was granted statehood. The 1807 law similarly criminalized activities such as "doing or performing any worldly employment, or business whatsoever, on . . . Sunday" (Section 1) and "profanely curs[ing], damn[ing]

or swear[ing], by the name of God, Christ Jesus, or the Holy Ghost" (Section 2). *See* Nathaniel Pope, Pope's Digest 416-26 (The Trustees of the Illinois State Historical Library, 1938), https://archive.org/details/popesdigest181530illi/page/422. The LRA appeared as a law of the new State of Illinois for the first time in 1819. *See* An Act for the Prevention of Vice and Immorality, § 9, 1819 Ill. Laws 126-27 (codified Ill. Rev. Laws 1827, p. 235).[6]

On June 1, 2019, and June 2, 2019, the Illinois House and the Illinois Senate, respectively, passed Senate Bill 690, as amended by House Amendment 3, implementing historic and massive gaming expansion throughout Illinois. Governor Pritzker signed SB 690 into law on June 28, 2019, as PA 101-0031.[7] As a result, the Defendant's activity, which Plaintiff claims is illegal, is now indisputably within the bounds of the law. The new law includes the Sports Wagering Act, which enables a new legislative and regulatory scheme for the expansion of sports-based wagering on land, by the internet and via mobile devices.[8]

Under the Sports Wagering Act, "Sports wagering" means accepting wagers on sports events or portions of sports events, or *on the individual performance statistics of athletes in a sports event or combination of sports events*, by any system or method of wagering, including, but not limited to, in person or over the Internet through websites and on mobile devices. S.B. 690, 101st Gen. Assemb. Reg. Sess. §25-10 (Ill. 2019), pp.

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[6] For ease of reference, relevant pages of the cited legislative history are attached as D. App pp. 62-83.

[7] SB 690 / PA 101-0031 is voluminous. Pertinent sections are included in the Defendants' Appendix and cited to as D. App pp. 84-123.

[8] *See, e.g.*, *Johnson v. Ames*, 2016 IL 121563 at ¶7 (citation omitted) (Court may take notice of public records); *Karbin v. Karbin*, 2012 IL 112815 at ¶46, n. 2 ("[T]his court may take judicial notice of the fact that legislation was pending at the time of briefing.).

229-230 (D. App. at pp. 87-88). The definition, which references wagers based upon the "individual performance statistics of athletes" encompasses the type of "gambling" described by the Plaintiff. Under the new law, "master sports wagering licenses" may be granted to existing racetracks,[9] casinos and riverboats[10] as well as sports stadiums[11] to conduct sports wagering at their facilities, over the internet and through mobile applications. The Bill also authorizes as many as three new online-only sports wagering operators.[12]

The new law plainly substantiates the appellate court's consideration apprehension of the trend toward societal gambling permissiveness by authorizing as many as six new casinos, including in the City of Chicago, allowing riverboats to become permanent land-based casinos,[13] and allowing racetracks to conduct table games and slots.[14] In addition, under the Video Gaming Act, licensed locations are authorized to increase the number of video gaming terminals (VGTs) from 5 to 6 VGT's per location and truck stop establishments are now authorized and may have as many as 10 VGT's per location.[15]

The apprehension of the court in *Sonnenberg v. Amaya Group Holdings (IOM) Ltd.*, 810 F.3d 509, 510 (7th Cir. 2016) against expanding reach of the LRA and the similar rationale of the appellate court - that the trend in Illinois is to foster and expand gambling in all available media and forms - is now markedly validated. Plaintiff has no

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[9] S.B. 690, 101st Gen. Assemb. Reg. Sess. §25-30 (Ill. 2019), pp. 237-39 (D. App at pp. 90-92).
[10] *Id.* §25-35, pp. 240-41 (D. App. at pp. 93-95).
[11] *Id.* §25-40, pp. 242-44 (D. App. at pp. 96-98).
[12] *Id.* §25-45, pp. 244-47 (D. App. at pp. 98-101).
[13] *Id.* §35-55(7)(e), p. 638 (D. App. at p. 107).
[14] *Id.* §35-55(7.7)(g), p. 661 (D. App. at p. 118).
[15] *Id.* §35-60(25)(e), p. 739 (D. App. at p. 123).

answer for it other than to trudge forth with blinders. There are undoubtedly many ancient laws on the books which have not been repealed, but application of the LRA toward virtual environments which the drafters could not have imagined to reach a result is at direct odds with current law and policy.

II. LITERAL CONSTRUCTION OF THE ACT REQUIRES GAMBLING AND PAYMENTS BETWEEN PERSONS KNOWN TO EACH OTHER

The only attention paid by Plaintiff to construction of the statute at issue is to observe that the LRA contains no express exception for a gambling game conducted by a third party such as FanDuel (Brief p. 10) and that the LRA contains express exceptions for trading securities, video gaming terminals and 14 items under Section 28-1(b) of the Criminal Code including horse racing, insurance contracts, church bingo etc. Notably, Plaintiff omits any mention or analysis considering 28-1(b)(2) which exempts skill contests and Illinois. *See supra* at 15.

Plaintiff's argument that a claim under the LRA must exist because it is not expressly prohibited by exception is illogical, as the drafters in 1815 could not be required to curb their intent by excepting things they could not even begin to imagine. Nor is the legislature impossibly duty-bound to amend every statute to expressly exclude events and inventions as they occur in real time. Plaintiff presents no precedent to support either of these presumptions.

Rather, it is plain that the LRA created a new civil claim or right (to recover gambling losses) that did not exist prior to the statute. As such, the LRA did not need to expressly except situations to which it does not apply, and actions under the LRA are necessarily limited to its boundaries. *See, e.g.*, *Anderson v. Bd. Of Educ.*, 390 Ill. 412 (1945) ("If a statute creates a liability where none would otherwise exist . . . it will be

strictly construed" and "courts will not extend or enlarge the liability by construction."). Importantly, the LRA is penal in nature and therefore must be strictly construed. *Langone v. Kaiser*, 2013 U.S. Dist LEXIS 145941 *7 (attached at D. App. pp. 124-30) citing *Robson v. Doyle*, 191 Ill. 566 (1901), *Phillips v. Prudential Ins. Co. of Am.*, 714 F. 3d 1017, 1023 and *Reuter v. Mastercard Int'l., Inc*., 399 Ill.App.3d 915 (5th Dist 2010); *Kizer v. Walden*, 198 Ill. 274, 65 N.E. 116 (1902); *Johnson v. McGregor*, 157 Ill. 350, 41 N.E. 558 (1895). Plaintiff's attempt to avoid this higher authority in favor of citing *Salzman v. Boeing*, 304 Ill. App. 405, 411 (1st Dist. 1940) (Brief p. 13) to argue that the LRA is "remedial" is patently ineffective. The court in *Salzman* actually observed that while the LRA "has been held to be remedial as to the loser," the lawsuit brought under the LRA is "penal." 304 Ill. App. at 411.

Another major defect in the Plaintiff's argument is the absence of any argument that "gambling" has occurred. This was not a point raised or considered by the trial court at all. The appellate court assumed *arguendo* without analysis that this element was satisfied. Opinion, ¶17. This Court should not make this assumption. In view of the gravity of any decision other than affirmation by this court, if the court may not decide the case on grounds other than legality of DFS, it should remand. See *supra* at 13.

Most critically, however, beyond noting the presence or absence of express exceptions to the LRA, Plaintiff attempts no actual construction of the language under subsection (a) necessary to sustain Plaintiff's action or to reverse the courts below.

The key language for construction found pertinent by the appellate court was the requirement that a "person" must lose at gambling "to" another "person." Opinion, ¶¶18-19. The statute also provides that the person who loses the sum of $50 or more to another

person shall also "pay or deliver the same or any part thereof." 720 ILCS 5/28-8(a). This language, applied literally, supports the requirement of a direct connection and payment between gamblers. When viewed in context of its drafters, a direct connection between persons known to each other would have been the only plausible construction.

Subsection (a) of the LRA must also be read in connection subsection (b), which allows any third person to assert a claim against the winner if the actual loser under subsection (a) fails to assert a claim within six months of the loss. *Langone*, cited by Plaintiff, expressly rejected Plaintiff's "John Doe" approach, reasoning that the language of the LRA did not allow the interpretation that a suit could be maintained against any gambling winner generally:

> Moreover, § 8(b) only permits a non-loser plaintiff to recover money from "the winner," demonstrating that the legislature intended to limit a non-loser plaintiff's cause of action to the cause of action the loser could have brought against "the winner" described in § 8(a). The Chicago Manual of Style provides that the definite article "the" is used when the reader knows exactly to which subject the writer refers. 16th ed. (2010), at 222-23. If the legislature had intended to permit non-loser plaintiffs to bring actions against gambling winners generally, without specifically identifying the related losers, the legislature would have used the indefinite article "a" and permitted plaintiffs to sue "a winner" not necessarily "the winner" described by § 8(a). In short, the Loss Recovery Act requires an allegation of specific individual losers.

Langone, at *14.

Beyond the only plausible intent of the drafters, the express language of the LRA, under applicable rules of construction, limits its reach to actions against "the" winner - a person known to the loser. *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill. 2016) is inapplicable. The court in *Phillips* held only that an online social casino selling virtual chips for users to play online casino games like slots was not an

appropriate "winner" under the LRA because it did not have any stake in the outcome of any individual game. 173 F. Supp. 3d 731, 740. The putative class plaintiff in *Phillips* did not name any user as a defendant. Nor did the *Langone* court consider the merits of any LRA claim against a user of a website.

Plaintiff attempts no actual construction, and instead assumes, without any support in the record, its own the analogy of FanDuel acting as a virtual "house." In every case cited by Plaintiff, the "house" was located in Illinois, the persons involved were present in Illinois, the wagering took place in Illinois, and there was no instance in which the parties or their agents were not known to each other. In *Zellers v. White*, 208 Ill 518 (1904), for example, all of the persons involved in the poker game at the poker house were players or agents all known to one another.

Nor is the decision of the appellate court tantamount to a ruling that all gambling conducted through a game room or casino would be exempted "by virtue of the mere presence of the house." (Brief, p. 15). That was not the basis for the ruling below. The appellate court did not reason that the LRA did not apply simply because there was a "house" involved, and in fact did not rule that FanDuel was acting as the "house." Rather, the appellate court reasoned that the contest facilitated on the website would allow a person to engage in contests with a stranger and that the LRA was intended to apply when two people who knew each other engaged in illegal gambling. Opinion, ¶21.

Another important distinction is that the game at issue in *Zellers* - poker - was indisputably illegal and subject to enforcement in 1904, such that players would have known that they were engaged in illegal gambling in Illinois. The same cannot be said of DFS in 2016. This is important because the offense of gambling requires that one

"knowingly" engage in a game of skill or chance that would be considered gambling under the Criminal Code. 720 ILCS 5/28-1(a)(1). Plaintiff ignores the fundamental unfairness of surprising players that they have committed a criminal offense by using a website that has been used openly by hundreds of thousands of citizens in Illinois for a decade and millions more globally without enforcement measures of any kind (nary a cease and desist letter) against the operators of the website. Nor is Defendant aware that any user of a DFS website in Illinois (or any other state) has ever been charged with the offense of gambling. In addition, even if Plaintiff is correct that 32 other states have gambling loss recovery acts akin to Illinois' LRA (Brief, p. 18), Plaintiff fails to cite to any case actually supporting a state law claim filed against a winning contestant on a DFS website.

Curiously, the record here reveals that Plaintiff created the game, not FanDuel. (R. 11). At most there is evidence that FanDuel collected entry fees for the contest created by Plaintiff and tallied the outcome based upon the performance of the players picked by the parties. R. 10-12. The record is actually devoid of any conversion of "cash" into a "digital currency" (Brief, p. 12) or the extent to which FanDuel acted in any way equivalent to the "house" in *Zellers.* Rather Plaintiff created the contest, set the stakes, and invited Defendant, such that Plaintiff was the principal of the alleged gambling game. Applying Plaintiff's own analogy, Plaintiff was the "house" whether he hosted his contest at his home or paid a third party to host his game online. Where Plaintiff created the alleged gambling and invited the Defendant, it is a perversion of the law that a bookmaker (here, Plaintiff) could recover his alleged losses on alleged sports gambling which he solicited. *See, e.g.*, *Kearney v. Webb*, 275 Ill. 17, 22 (1917)

(recognizing "well-established" rule that a court will not permit recovery on an illegal gaming contract because "to allow such a recovery the court would be lending its aid and sanction to such illegal contract").

Importantly, Plaintiff cites to no case which suggests that a statute may be construed without relation to its time and purpose. *See, e.g.*, *In re Judgment & Sale of Delinquent Properties for the Tax Year 1989*, 167 Ill.2d at 168 ("In interpreting a statute, the primary rule of construction, to which all other rules are subordinate, is to ascertain and give effect to the true intent and meaning of the legislature."). Consistent with the penal nature of the civil claim created by statute and the times in which the LRA was enacted, the appellate court properly refused to construe or apply the penalty to extend to gaming facilitated over a website between strangers. Opinion, ¶¶ 20-21. In view of the penal nature of the statute, the penalty afforded by the LRA must be construed narrowly. *See Langone v. Kaiser*, 2013 U.S. Dist LEXIS 145941 *7 (attached at D. App. pp. 124-30) citing *Robson v. Doyle*, 191 Ill. 566 (1901), *Phillips v. Prudential Ins. Co. of Am.*, 714 F. 3d 1017, 1023 and *Reuter v. Mastercard Int'l., Inc*., 399 Ill.App.3d 915 (5th Dist 2010); *Kizer v. Walden*, 198 Ill. 274, 65 N.E. 116 (1902); *Johnson v. McGregor*, 157 Ill. 350, 41 N.E. 558 (1895). If the right should be extended more broadly, that should be the province of the legislature.

A. A Hypothetical Plaintiff Cannot Properly Pursue an Action Under Supreme Court Rule 224 to First Identify a Winner and Then Sue Under the LRA.

As a proposed liniment for the obvious infirmities in applying the LRA to a global, virtual and anonymous environment, Plaintiff contends that Supreme Court Rule 224 authorizes a pre-suit action to ascertain the identity of any particular winner on the DFS website. (Brief, p. 13). Plaintiff failed to make this argument to the trial court and

also failed to raise it on appeal to the First District. Arguments not made below by appellant are waived. *IPF Recovery Co. v. Ill. Ins. Guar. Fund*, 356 Ill. App. 3d 658, 666 (1st Dist. 2005) (citation omitted).

Plaintiff cites cases supporting the use of pre-suit discovery actions to learn the identify of persons to support common law claims for defamation. (Brief, p. 13).[16] Plaintiff ignores that the action he proposes seeks the identity of persons for the purpose of applying a statutory penalty to a person accused of violating a criminal code. Plaintiff cites to *Langone* (Brief, pp. 14-15) but omitted any mention of the district court's analysis rejecting Plaintiff's "John Doe" interpretation of the LRA. *See Langone*, at *13-15.

Plaintiff also ignored this Court's decision in *Robson v. Doyle*, CITE. *Robson*, cited by *Langone*, strongly rejected the Plaintiff's lead argument that a putative LRA plaintiff could use a bill of discovery to identify "losers" in order to proceed with an LRA claim.

> So far as the bill is filed to obtain evidence for the purpose of commencing suits in the future and recovering penalties from the defendant it is bad beyond all question. That part of the bill not only seeks to compel the defendant to disclose a cause of action against himself for penalties for transgressing the law where the bill shows no cause of action whatever, but it is purely a fishing bill so far as it seeks such a discovery. It does not seem to be contended that the bill in that respect is authorized by any principle of the law or any statutory provision. The suits already brought by the complainant are qui tam actions under the penal statute forbidding gambling on pain of forfeiting a penalty of three times the amount won, if the person who has lost the money does not sue for it within six months… The purpose of the discovery asked for is to enable the plaintiff to maintain the prosecution and recover the penalties. The very purpose of the discovery is to subject the defendant to the

[16] *Hadley v. Doe*, 2015 IL 118000 ¶25; *Maxon v. Ottawa Publishing Co.*, 402 Ill. App. 3d 704, 716 (2010); *Stone v. Paddock Publications, Inc.*, 2011 IL App (1st) 093386 ¶18.

> penalties prescribed by the statute, and with the sole object of recovering such penalties. Now, courts of equity have always withheld their aid in actions which were penal in their nature, and would never compel a defendant to disclose facts which would expose him to criminal punishment or prosecution, or to pains, penalties, fines, or forfeitures. A defendant may refuse to answer, not only as to facts directly criminating him, but as to any fact which might form a link in the chain of evidence establishing his liability to punishment, penalty, or forfeiture. 1 Daniell, Ch. Prac. 561–569; 2 Daniell, Ch. Prac. 1557; 1 Pom. Eq. Jur. §§ 196, 202; 6 Enc. Pl. & Prac. 742, 744. This was the settled rule of the English courts of equity, and the principle was made a part of our fundamental law in the state and federal constitutions. It makes no difference that the suits brought by complainant are civil in form. They are brought for penalties for alleged offenses against the laws of the state, and are criminal cases, within the meaning of the constitutional provision. Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746. They are criminal prosecutions, in aid of which the plaintiff, by bill for discovery, calls upon the defendant to convict himself, and the rules of equity, as well as the state and federal constitutions, forbid such proceedings.

191 Ill. 566 at 569-70.[17] The reasoning of this Court is no different as applied to determining the identity of a winner. For purposes of the penal statute and the criminal code, the "winner" targeted by the penalty action under subsection (a) or (b) must have engaged in the criminal act of gambling.

Lastly, the defamation cases cited by Plaintiff reveal another fatal flaw - in order to obtain discovery under SCR 224, a plaintiff must demonstrate that it has pleaded an underlying cause of action that would withstand a motion to dismiss. *Hadley v. Doe*, 2015 IL 118000 at ¶9; *Maxon v. Ottawa Publishing Co.*, 402 Ill. App. 3d 704, 711; *Stone v. Paddock Publs. Inc.*, 2011 IL App (1st) 093386 at ¶18. An LRA complaint, in order to be properly pleaded, must identify a specific winner, a specific loser, and a specific loss

[17] A litigant is required to bring all pertinent authority to the attention of the court. *See, e.g.*, *State Farm Ins. Co. v. Gebbie*, 288 Ill. App. 3d 640, 644 (1997) (citing 134 Ill. 2d R. 3.3(a)(3)). Plaintiff has made no argument as to why these cases do not apply.

of each loss/win. *See Langone v. Kaiser*, No. 12 C 2073, 2013 WL 5567587 at *4 (N.D. Ill. Oct. 9, 2013); *Fahrner v. Tiltware* LLC, No. 13-0227-DRH, 2015 WL 1379347 at *6 (S.D. Ill. March 24, 2015). There is no authority for the proposition - rejected in *Robson* and *Langone* - that a plaintiff may sue first to learn the identity of losers or winners or specific losses in order to then be able to fabricate a complaint that would withstand a motion to dismiss.

III. THE ACT SHOULD NOT BE CONSTRUED IN A MANNER LEADING TO AN ABSURD RESULT CONTRARY TO THE PURPOSE AND SCOPE OF THE ACT

The framers of the LRA could not have envisioned its application to the internet, fantasy sports, or the synthesis of the two that is now DFS. This Court should use common sense and avoid the absurd result reached by the strict and reflexive application of such an antiquated statute. *See, e.g.*, *People v. Hanna*, 207 Ill. 2d 486, 498 (2003) ("where a plain or literal reading of a statute produces absurd results, the literal reading should yield" (citing *People ex. rel. Cason v. Ring*, 41 Ill. 2d 305, 312-13 (1968) (when literal construction leads to consequences the legislature could not have contemplated, courts are not bound to follow that construction)) (additional citations omitted).

A. Plaintiff's Construction of the Act Will Result in a Flood of Litigation Contrary to the Purpose of the Act.

A large part of the rationale for the decision in *Dew-Becker* was the court's consideration of the era in which the LRA was enacted, the statute's emphasis on discouraging betting between persons known to each other, and the highly problematic result of construing the LRA in a way which allow scads of suits related to all bets made on internet websites. Opinion at ¶¶ 20-22, 25-26.

> Further, to construe the Act in a manner that would allow plaintiff to recover would frustrate the statute's purpose and yield absurd

> results. Simply put, the floodgates of litigation would be opened to the thousands of Illinois residents who engage in DFS contests. If we adopted plaintiff's interpretation of the Act, then any person who lost more than $50 on a DFS website such as FanDuel would be able to bring a small claims action in circuit court. It is absurd to believe that the Act's drafters intended to inundate the court system with such a high volume of claims.

Id. at ¶¶ 22.

Plaintiff has no plausible argument that its construction of the LRA would not open the floodgates of litigation to a claim by an actual loser against any winner of more than $50.00. The record reveals only that there are "millions" of players. R. 9. Plaintiff also ignores the impact of subsection (b), which would allow any third party to pick up the claim of any loser under subsection (a) if not submitted within six months. There is no time limit in which to bring a subsection (b) claim which accrues after six months has passed. The catch-all limitations period of 5 years under 735 ILCS 5/13-205 arguably applies. The LRA applies, as Plaintiff would have it, to every individual wager in excess of $50 made on any DFS website for at least the past 5 ½ years running. The scheme urged by Plaintiff would undeniably result in hundreds of thousands of claims and lawsuits under the LRA, if not more. Moreover, whatever massive number of lawsuits would be engendered by Plaintiff's scheme may be doubled, because Plaintiff would first file a discovery lawsuit to discover the identity of the winners.

Plaintiff hypothesizes, without any consideration of the terms of service between FanDuel and its users or any legal support, that if a loser commences suit under the LRA, that "there is no doubt" that other players and FanDuel "would not invite that player back," so there is no "'floodgates of litigation' parade of horribles." (Brief, p. 19). This nonsensical rhetoric does not speak at all to the sheer number of lawsuits Plaintiff sponsors on appeal.

Construing the LRA to greatly expand its reach is inconsistent with the times, as observed by the appellate court. It would be absurd to create hundreds of thousands or more claims against DFS at a watershed moment when Illinois has just allowed sports betting as part of a massive expansion of gambling by land, by internet and by mobile device, including DFS. The appellate court declined to interpret the LRA in a manner that "would frustrate the statute's purpose and yield absurd results," and this Court should do the same. Opinion at ¶ 22.

B. The Act May Not Apply Permissibly Beyond the Borders of Illinois.

Plaintiff's fleeting reference to an alleged "violation of the doctrine of separation of powers" (Brief, p. 18) is sorely misguided and ignores the unconstitutional impacts of the Plaintiff's scheme. If the Attorney General or law enforcement genuinely believed DFS were illegal under Illinois law, there has been a decade and ample opportunity to test that theory via criminal prosecutions or an injunctive suit to shut down an offending business. The same may be said for the legislature, which has not acted at all with respect to DFS other than to legalize it as well as sports betting in a massive gambling expansion law, PA 101-0031. The Attorney General in fact sought to avoid resolution of this issue, instead moving to dismiss the FanDuel complaint on the basis that there was no case or controversy created by her opinion. *See supra* at 16-17. It is not the function of the courts to impermissibly expand the application of a penal code in order to allow the Plaintiff or trial lawyers to chase DFS out of the State of Illinois indirectly by torturing their users with LRA claims and lawsuits.

The courts must avoid applying a statute in a manner which would arrive at an unconstitutional result. *See, e.g.*, *In re Judgment & Sale of Delinquent Properties for the Tax Year 1989*, 167 Ill.2d 161, 168 (1995) (internal citations omitted) ("If there is doubt

as to the construction to be given a legislative enactment, the doubt must be resolved in favor of an interpretation which supports the statute's validity; statutes will be construed to avoid an unconstitutional result."). It is furthermore the power and authority of the legislature to determine which acts are unlawful as well as to create civil rights of action under decidedly penal provisions such as the LRA. *Cf. People v. Buffer*, 2019 IL 122327 at ¶¶34-35 (recognizing role of legislature in enacting penal provisions and establishing the punishment therefor).

Plaintiff indiscriminately fails to consider the consequences of attempting to apply the LRA to persons wholly outside of the State of Illinois. Plaintiff also fails to establish the proverbial "house" of gambling was located in Illinois. The FanDuel website lists New York City at the bottom of a webpage ("© 2009-2019. All Rights Reserved FanDuel Group New York, N.Y ").[18] There is actually no evidence at trial in this case that Defendant was in Illinois at the time he entered the contest, at the time he won, or when Defendant was alleged to have been paid by Plaintiff. Nor is there any evidence in the record concerning Plaintiff's whereabouts.

Illinois law prevents enforcement of a criminal statute unless the offense is committed wholly or partly in Illinois or if the activity outside the state is an attempt to commit an offense within the state. 720 ILCS 5/1-5.8. A violation of the criminal code is an element of any LRA claim. Any construction which would assail a winner outside of the State of Illinois is impermissible under the express terms of the criminal code. The LRA cannot be read or applied inconsistently with 720 ILCS 5/1-5.8. *See, e.g.*, *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100, 184-85 (2005) (recognizing long-standing

[18] https://www.fanduel.com/about (attached as D. App p. 136 (bottom page 6))

rule that statute should not be construed to have extraterritorial effect absent clear legislative intent).

One underpinning of 720 ILCS 5/1-5.8 is undoubtedly the constitutional limitation for personal jurisdiction. Because the actual identity of participants is unknown on the DFS website, Plaintiff's "John Doe" winners located outside the state of Illinois would have no reason to know or believe that they were entering into any type of transaction with an Illinois resident, much less be subject to any Illinois criminal law or penalty. *See Nat'l Gun Victims Action Council v. Schecter*, 2016 IL App (1st) 152694 at ¶¶22-25 (no personal jurisdiction where defendant did not "purposely direct" their efforts at Illinois residents, plaintiffs "just happened to be" residents of Illinois, transaction was not based on in-person negotiation or agreement in Illinois, and nothing about the transaction was required to take place in Illinois); *see also People v. Ridens*, 59 Ill.2d 362, 369-70 (1974) (citations omitted) ("basic principle" that criminal statute must provide "fair warning" to potential violators). These are definitive reasons why the parties must know each other under the LRA.

Not every state has a penalty provision akin to Illinois. Many states, including Illinois, have now legalized and regulated DFS. The law around the globe where DFS users are located cannot be ascertained or predicted. Illinois' LRA, as construed by Plaintiff, would conflict with the law of other states and foreign jurisdictions which allow DFS or which do not have a gambling loss recovery act. Application of the LRA to any person outside of Illinois constitutes an attempt to enforce Illinois law outside of its borders, which would violate the Dormant Commerce Clause. See, e.g., *BMW of North Am. v. Gore*, 517 U.S. 559, 571-72 (1996). Imposition of one state's regulations to

conduct in another state or country or another country violates the Dormant Commerce Clause. See *Healy v. The Beer Institute*, 491 U.S. 324 (1989) (state); *Quill Corp v. North Dakota*, 504 U.S. 298 (1992) (state); *South-Central Timber Devel. v. Wunnicke*, 467 U.S. 82 (1984) (country); *Midwest Title Loans v. Mills*, 593 F3d 660, 666 (7th Cir. 2010) (enjoining application of Indiana consumer credit code to Illinois company lending money to Indiana residents in Illinois). Applying the LRA as urged by Plaintiff, without regard for location of the winner, would be a *per se* unconstitutional violation of the Dormant Commerce Clause. *See also Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) (Foreign Commerce Clause).

CONCLUSION

The judgment should be affirmed. The LRA cannot be construed permissibly such that the penalty created under subsection (a) may apply against a person unknown to the putative loser under the LRA. Such construction is inconsistent with the language of the statute, could not have been envisioned by the drafters and would cause innumerable practical and constitutional defects in the claims which would follow. The construction urged by Plaintiff is also dramatically opposed to the purpose and spirit of PA 101-0031, which signifies the legislative intent to boldly expand gambling within Illinois, including authorizing sports gambling by land, internet and mobile device, and further providing that DFS be part of the new regulatory scheme. Plaintiff also fails to provide a record which establishes that the DFS contest at issue was unlawful gambling on April 1, 2016, which was a necessary element for the Plaintiff to recover. Plaintiff's test case and the corresponding flood of constitutionally impermissible lawsuits it seeks to hatch should be rejected.

Dated: July 3, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341 (a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 35 pages.

/s/ William M. Gantz
William M. Gantz

APPENDIX

IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

FANDUEL, INC., and HEAD2HEAD SPORTS LLC, Plaintiffs,	)	
vs.	)	Case No. 2015MR001136
LISA MADIGAN, in her official capacity as Attorney General of the State of Illinois, Defendant.	)	

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs FanDuel, Inc. ("FanDuel") and Head2Head Sports LLC ("Head2Head"), by their undersigned attorneys, for their Complaint for Declaratory Judgment against Defendant Lisa Madigan, in her official capacity as Attorney General of the State of Illinois (the "ILAG"), allege as follows:

PRELIMINARY STATEMENT

1. This action seeks a declaratory judgment that FanDuel's and Head2Head's popular fantasy sports contests are lawful under Illinois law. Plaintiffs' contests fit squarely within the Legislature's exemption for "the actual contestants in a bona fide contest for the determination of skill" from the state's criminal prohibition on "gambling." *See* 725 ILCS 5/28-1(a), (b)(2). FanDuel and Head2Head bring this action one day after the ILAG opined that fantasy sports contests, such as those offered by the plaintiffs, "constitute illegal gambling" in Illinois under Section 5/28-1(a) ("ILAG Opinion"). The analysis in the ILAG Opinion applies not only to FanDuel's shorter-term fantasy sports contests, but also to those taking place over a longer period of time, such as a professional sports "season," like the contests typically offered by plaintiff Head2Head. Nothing in the ILAG Opinion draws a legal distinction based on the

duration of the contests, meaning that the ILAG has declared all fantasy sports contests illegal in Illinois. By suddenly issuing the ILAG Opinion six years after FanDuel began operating in Illinois and 21 years after Head2Head did so, the ILAG risks eliminating the ability of plaintiffs and others to continue offering their fantasy sports contests to people in Illinois. FanDuel and Head2Head are entitled to a declaration that their conduct is legal so that the ILAG's erroneous application of Illinois law does not harm both plaintiffs' Illinois businesses. In short, FanDuel and Head2Head, like other fantasy sports providers, conduct games of skill, in which prizes are offered to the fantasy sports contests' *actual contestants*: the users who play the fantasy games, competing against each other by selecting rosters of fantasy teams in various sports under simulated conditions that test their abilities to replicate the role of a real coach or general manager.

2. FanDuel and Head2Head are leading providers of fantasy sports contests, which millions of Americans have enjoyed in some form for decades. Fantasy sports contests allow sports fans to compete against each other by selecting athletes for their fantasy team and then earning points tied to the statistical performance of their chosen athletes in major sporting events. Contestants pay an entry fee to participate in contests and, depending on their skill in selecting a fantasy roster relative to that of other contestants, win pre-announced prizes. Other contestants "lose" the contest and do not win prizes. These fantasy contests have made sports more fun for many fans, providing them a forum for pitting their skills in selecting a team against those of other sports fans.

3. The fantasy sports contests offered by FanDuel and Head2Head differ only in the duration of the contests they offer. Head2Head's contests typically last for an entire season of a particular sport, while FanDuel's contests begin and end in a single day (for baseball, basketball,

and hockey), or a week (for football). Players in Head2Head's fantasy sports contests, and in FanDuel's fantasy sports contests, select players for inclusion on fantasy teams in a simulation designed to replicate the rigors and challenges of roster selection experienced by teams' actual general managers. In some contests, fantasy sports providers, including Head2Head, permit contestants to select players through a "draft," in which they take turns selecting athletes for their roster. In FanDuel's contests, and in some of Head2Head's, contestants select a group of players through a "salary cap" method: Each athlete is assigned a fantasy value, and just like a real sports team's coach or general manager, the contestant must choose a team subject to the competitive discipline that the collective value of all players cannot exceed a cap ("Salary Cap"). Both of these forms of player selection test not only the contestants' knowledge of the particular sport, but also their knowledge and skill in evaluating the actual and potential talents of individual athletes. The contestants who succeed are those who have selected their fantasy teams most wisely and who have exhibited the most predictive skill, either through draft or "cap" modalities that simulate the business of operating a professional sports franchise.

4. Fantasy sports contests such as those operated by FanDuel and Head2Head have become enormously popular. Launched in 2009, FanDuel now has millions of users and offers a variety of contest formats, all of which comply with federal law specifying the types of fantasy sports contests that do not constitute an unlawful bet or wager. Head2Head has been operating fantasy sports contests since 1994. Both rely on the same exception in Illinois law for the conduct of their contests.

5. On December 23, 2015, the ILAG sent an opinion letter to the chair and vice-chair of the Illinois House of Representatives Criminal Subcommittee, opining that fantasy sports contests operated by FanDuel and another contest organizer, DraftKings, Inc., are illegal

under two different subsections of 720 ILCS 5/28-1(a) of the Illinois Criminal Code of 2012 (the "Criminal Code"). (ILAG Opinion at 13.) In that letter, the ILAG incorrectly opined that FanDuel's fantasy sports contests do not qualify as the type of gaming activity specifically exempted from prosecution under 28-1(b) of the Criminal Code. (*Id.*) The ILAG's analysis made no distinction between whether the fantasy sports contests are conducted on a daily or a seasonal basis, thereby casting a legal shadow over not only FanDuel's Illinois operations, but also Head2Head's fantasy sports operations—and, in fact, all fantasy sports contest operations in the state. Other than stating some generalities about fantasy sports, the ILAG Opinion did not review facts or draw any conclusions about whether fantasy sports involve or are dependent on the skill of the millions of consumers who play them.

6. Fantasy sports are not a sudden phenomenon, nor have they been operating in the shadows. As noted above, consumers have been enjoying fantasy sports for decades. FanDuel has been consistently operating in Illinois since 2009 and Head2Head has operated in Illinois since 1994. Hundreds of thousands of Illinois residents continue to enjoy FanDuel's and Head2Head's contests. While the ILAG Opinion is not binding on Illinois courts, the mere suggestion of illegality by the highest-ranking law enforcement official in Illinois, incorrect though it may be, threatens to harm FanDuel's and Head2Head's Illinois operations by, among other things, discouraging consumers from participating in the contests and discouraging FanDuel's and Head2Head's vendors, or "payment processors," from facilitating the financial transactions necessary to the operation of the business, and interfering with the sponsorship contracts FanDuel has with Illinois businesses, including multi-year sponsorship agreements with the Chicago Bears and the Chicago Bulls. If contestants cannot pay fees by credit card, and

if winning contestants cannot be paid their prize money, FanDuel and Head2Head would have to shut down in Illinois, and its advertising deal with the Chicago Bears would be jeopardized.

7. By opining that fantasy sports are illegal and selectively requesting that FanDuel (as well as one other competitor, but no others) suspend operations, the ILAG Opinion has created an actual controversy and an ongoing injury to FanDuel and Head2Head, which was not named in the ILAG Opinion but which was also adversely affected by it. Both FanDuel and Head2Head have an obvious and immediate interest in the resolution of that controversy.

8. Accordingly, FanDuel and Head2Head seek a declaration that their fantasy sports contests do not constitute illegal gambling under Illinois law.

THE PARTIES

9. Plaintiff FanDuel is a Delaware corporation. Its principal place of business is in New York, New York. FanDuel is one of the world's largest fantasy sports contest providers, with over five million registered users, including more than 250,000 registered users in Illinois. FanDuel offers contests for all the major team sports, including for the National Football League ("NFL"), Major League Baseball ("MLB"), the National Basketball Association ("NBA"), the National Hockey League ("NHL"), NCAA Division I Men's College Football ("NCAAF"), and NCAA Division I Men's College Basketball ("NCAAB").

10. Plaintiff Head2Head is a Delaware, Limited Liability Company. Head2Head's principal place of business is in Scottsdale, Arizona, and it has more than 60,000 registered users, including over 2,000 registered users in Illinois. Like FanDuel, Head2Head Sports offers fantasy sports contests for the NFL, MLB, NBA, NHL, NCAAF, and NCAAB. Head2Head also offers fantasy sports contests for the Professional Golf Association ("PGA TOUR").

11. Defendant Lisa Madigan is the Attorney General of the State of Illinois, and is sued in her official capacity.

JURISDICTION AND VENUE

12. This Court has jurisdiction over this action based on 735 ILCS 5/2-209(c).

13. Venue is proper in this court because the ILAG is a resident of Sangamon County given that she is the highest ranking law enforcement official in the State of Illinois and that she maintains an office in Springfield. Venue is also proper in this Court because transactions and events out of which this action arises occurred in Sangamon County. 735 ILCS 5/2-101.

FACTUAL AND LEGAL BACKGROUND

FanDuel's and Head2Head's Fantasy Sports Contests

14. FanDuel's and Head2Head's fantasy sports contests allow contestants to select real athletes in a given sport who make up their fantasy lineup or roster. Participants then accumulate points based on the statistical performance of the athletes they selected in real-world sporting events, according to pre-defined rules set by the contest provider for which statistics generate "fantasy points." Contestants are given a fictional salary cap within which to select a team. Both FanDuel and Head2Head assign a price or value to each player in advance, so that contestants experience the discipline of selecting non-stars as well as stars for their rosters to fit within the cap, and must assess not only players' absolute value but also their value per fictional unit of price attached to them. When the last game ends for a particular day or week in the case of FanDuel, or at the end of a season in the case of Head2Head, the contest is over, and prizes are awarded, based on a schedule announced to contestants before they entered the contest.

15. FanDuel and Head2Head each offer the contestants a number of different contest formats. The formats include tournaments, which can have thousands of entries, and leagues, which include multiple contestants. The league contestants compete against one another, each day or week (for football) under FanDuel, and typically each season under Head2Head.

16. For each type of contest, FanDuel's and Head2Head's prizes are made known to participants before the contest begins, and the prize values do not change based on the number of entries in the announced contest. For the larger contests like tournaments, FanDuel sets a maximum number of participants vying for pre-announced prizes. Some contests limit the number of entries a contestant can submit; others allow contestants to submit multiple entries in a single competition.

The Federal Statutory Framework

17. Congress enacted the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA"), which authorizes fantasy sports contests such as those operated by FanDuel and Head2Head. The UIGEA prohibits any person engaged in the business of "betting" from knowingly accepting credit, electronic fund transfers, checks, or any other payment involving a financial institution to settle unlawful internet gambling debts. 31 U.S.C. § 5363 (2012). However, the UIGEA excludes from the definition of "bet or wager" the participation in any fantasy sports game where: (1) all prize amounts are made known before the contest begins; (2) all winning outcomes are based on the relative skill and knowledge of the participants; and (3) no winning outcome is based on the scores or performance of a single, real world event or the performance of any real world team. 31 U.S.C. § 5362(1)(E)(ix) (2012).

18. The ILAG concedes, as she must, that FanDuel's contests (and, thereby, Head2Head's contests) comply with the UIGEA, which expressly recognizes that fantasy sports contests, such as those offered by FanDuel, are games of skill and that "participation in any fantasy sports game" does not constitute a "bet or wager." (ILAG Opinion at 4, citing 31 U.S.C. § 5362(1)(E)(ix) (2012).) A similar analysis applies to Head2Head's fantasy sports activities.

19. To comply with the federal law cited by the ILAG, all of FanDuel's and Head2Head's contests must—and, in fact, do—ensure that (1) no fantasy or simulation team is

based on the current membership of a real amateur or professional sports team; (2) no winning result is based on the score, point spread, or any performance or performances of any single real-world team or combination of such teams; (3) no winning result is based solely on any single performance of an individual athlete in any single real-world sporting or other event; and (4) prizes and awards are established and made known to participants before the game or contest and their value is not determined by the number of participants or amount of fees paid. (*See* ILAG Opinion at 4; 31 U.S.C. § 5362(1)(E)(ix).) These requirements help protect the integrity of individual sporting events.

The Illinois Statutory Framework

20. The Illinois Criminal Code of 2012 provides that a person commits the criminal offense of "gambling" when he or she "knowingly plays a game of chance or skill for money or other thing of value, unless otherwise excepted in subsection (b) of this Section." 720 ILCS 5/28-1(a)(1). It is also unlawful in Illinois to operate an Internet site "that permits a person to play a game of chance or skill for money or other thing of value by means of the Internet . . . ." 720 ILCS 5/28-1(a)(12). Nonetheless, Section 28-1 provides that participants in certain activities "shall not be convicted of gambling," including "[o]ffers of prizes, award or compensation to the actual contestants in any bona fide contest for the determination of skill." 720 ILCS 5/28-1(b)(2).

The Actual Controversy Created By the December 23, 2015 ILAG Opinion

21. The ILAG Opinion created an actual controversy, which the plaintiffs are asking this Court to resolve, about whether the plaintiffs may operate their fantasy sports contests lawfully in the State of Illinois. This Court should resolve the controversy, which stands to affect hundreds of thousands of Illinois residents who are contestants in FanDuel's and Head2Head's fantasy sports competitions. The Court's resolution should be a declaration that

the fantasy sports contests are not illegal gambling under Illinois law, which specifically excludes the actual participants in a contest of skill from the definition of "gambling." The contestants in FanDuel's and Head2Head's fantasy sports contests are, in fact, the actual contestants in the competitions, which are, in fact, bona fide contests for the determination of skill.

22. FanDuel, Head2Head, and the hundreds of thousands of Illinois residents who participate in fantasy sports have an interest in a decision by a court of law concerning the legality of their conduct. A statement by the highest law enforcement officer of the state threatens to harm plaintiffs' businesses by discouraging consumers from participating and by causing vendors to cease providing services necessary to their businesses.

23. The ILAG Opinion argues that while Section 28-1(b)(2) exempts offering prizes, awards, or other compensation to "the actual contestants in any bona fide contest for the determination of skill," such "actual contestants" can only be the athletes participating in the sporting events because the "bona fide contest for determination of skill" can only be the sporting events in which the athletes are participating. This exceedingly narrow view of the statutory exemption is wrong because it fails to acknowledge that: (1) the fantasy sports contests themselves are contests for the determination of skill; (2) the skill being determined in the fantasy sports contests is the ability to evaluate the talent and predict the performance of individual players, just as professional general managers do; and (3) the "actual contestants" in these fantasy sports contests are *the contestants who participate in those contests*, not the athletes whose performances the contestants are seeking to predict. Fantasy sports contests, such as those operated by FanDuel and Head2Head, are precisely the types of contests that the drafters of Section 28-1 sought to exempt from the criminal prohibition on illegal gambling. They are like

chess, scrabble or crossword puzzle tournaments, in that they do not test athletic skill, but instead mental prowess, here as a professional sports scout, general manager, and talent development director, not a chess player. The "skill" being determined in a fantasy sports contest is no less a "skill" for it involving mental acuity and not athleticism—the skill is in drafting or selecting effective players under the restrictions of a draft or a Salary Cap. The ILAG Opinion offers no basis at all for ignoring the actual skills element of fantasy sports contests, or for ignoring the participation of the contestants in the fantasy sports contests as "actual contestants," which they clearly are.

24. The fact that FanDuel and Head2Head's contests are partially dependent on outside factors do not remove them from the bona fide contest exception. Like investors who make selections for their portfolios, or commodity or energy traders who have to anticipate weather impact on crops and demand for power, FanDuel and Head2Head contestants base their player selections on historical performance, statistics, research, matchups, and trends. 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.

25. The facts upon which fantasy players rely can include a multitude of strategic factors, including the venue for a contest, a player's or team's matchup against a particular opponent, days of rest between games, how a player's performance may correlate (or not) with other players on his or her team, and predictions about how other fantasy sports players are likely to make selections. Indeed, in making roster selections for FanDuel's and Head2Head's contests, contestants consider a wealth of current information relevant to athletes' expected

performance. The success of a contestant is not a matter of luck, any more than was the success of the architects of the 1985 Super Bowl-winning Chicago Bears. No one could argue that the selection of star linemen like Dan Hampton or Keith Van Horne in the first round of the NFL draft, standout middle linebacker Mike Singletary in the second round, and key utility players like running back Dennis Gentry or backup cornerback Reggie Phillips—who returned a interception for a touchdown in Super Bowl XX—was the product of anything but managerial skill. And that is what fantasy sports contests are all about: They put the contestants in the shoes of a team's top scouts and managers, and therein lies the contest—not on the playing field itself, as the ILAG has incorrectly assumed.

26. For example, a review of actual FanDuel contest data that will be introduced in this case will confirm the central role that skill plays in fantasy sports contestants' prospects for winning. First, the data show that actions players take in the contests have a statistically significant impact on the results that are achieved. Second, the data confirm that skills persist over time among fantasy sports contestants, which is a strong mathematical indicator of the degree of skill involved in the games. Over a large population of users, a consistency of results for individual users but diversity of skill levels and results across the population of users is a powerful indication of the relation between skill and chance in any game. Based on this measure, FanDuel's contests are overwhelmingly skill-based. And third, the data demonstrate that users improve their performance in fantasy sports contests through experience and practice. In a contest of chance, no amount of practice would impact a player's expected outcome. But a skill is something one can improve through practice. According to the FanDuel data, FanDuel users with more experience have significantly higher win rates than players with little experience, thus establishing that with practice, fantasy sports contestants can acquire skill and

expect better results. A similar analysis applies to Head2Head contestants, as the only difference in the contests is their duration.

27. Finally, the ILAG Opinion wrongly suggests that fantasy sports contestants are no different than "persons who wager on the outcome of any sporting event in which they are not participants." (ILAG Opinion at 10.) But FanDuel's and Head2Head's contests are not like sports betting. The fantasy sports contestants are not passive risk-takers in a wager over which they have no influence or control, like bettors on the outcome of a football game. Instead, the fantasy sports contestants are active players *in a parallel contest of their own*, which exists separate and apart from the underlying athletic event. These distinct contests exist only in the "fantasy" realm, where each contestant tests his or her skill at selecting a roster that will never actually play together for comparison against other competitors' selections.

CAUSE OF ACTION FOR DECLARATORY JUDGMENT

(Declaratory Judgment That FanDuel's and Head2Head's Fantasy Sports Contests Are Not Illegal Under Illinois Gambling Laws)

28. Plaintiffs restate paragraphs 1 to 27 as if fully set forth here.

29. This case presents a present, ripe and actual controversy as to the rights and other legal relations of the parties. Because of the ILAG's issuance of the Opinion and other efforts, FanDuel and Head2Head now have an urgent need to resolve the legality of their operations in Illinois.

30. The ILAG's incorrect allegations about the purported illegality, or even criminality, of FanDuel's business (and, by implication, Head2Head's business) of offering fantasy sports contests to their contestants are causing immediate and continuing harm to FanDuel and Head2Head by damaging their reputation with consumers, service providers, and the public, and by impeding their ability to operate their legitimate businesses.

31. FanDuel and Head2Head are entitled to a declaratory judgment that their fantasy sports contests do not violate any applicable provision of Illinois law.

32. In particular, FanDuel and Head2Head are entitled to a declaratory judgment that their fantasy sports contests do not constitute illegal gambling under Section 28-1(a)(1) and Section 28-1(a)(12) because the contests fit squarely within the statutory exemption for "offers of prizes, award or compensation to the actual contestants in any bona fide contest for the determination of skill" under Section 28-1(b)(2).

33. Declaratory relief is appropriate to resolve whether FanDuel's and Head2Head's fantasy sports contests comply with Illinois law.

REQUEST FOR RELIEF

34. Plaintiffs respectfully request that the Court issue a declaration in favor of Plaintiffs and against Defendant that:

A. FanDuel's and Head2Head's fantasy sports contests are activities protected by Section 28-1(b)(2), in that they are "offers of prizes, award or compensation to the actual contestants in any bona fide contest for the determination of skill"; and

B. As a result, FanDuel's and Head2Head's fantasy sports contests do not constitute illegal gambling under Section 28-1(a)(1) or Section 28-1(a)(12).

35. Plaintiffs further request the award of their costs in this action, including attorneys' fees to the extent authorized by law.

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

Dated: December 24, 2015

Respectfully submitted,

FanDuel, Inc.
Head2Head Sports LLC

By: /s/ Gabriel A. Fuentes
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IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

FANDUEL, INC., and HEAD2HEAD SPORTS LLC,	)	
Plaintiffs,	)	
vs.	)	Case No: 2015-MR-1136
LISA MADIGAN, in her official capacity as Attorney General of the State of Illinois,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF THE ATTORNEY GENERAL'S MOTION TO DISMISS

The Attorney General of Illinois is tasked with issuing written opinions on "constitutional or legal questions." 15 ILCS 205/4. Consistent with this statutory authority, on December 23, 2015, the Attorney General issued a nonbinding advisory opinion to the Chair and Vice-Chair of the Illinois House Judiciary–Criminal Committee that certain daily fantasy sports contests such as those run by plaintiff FanDuel, Inc. constitute illegal gambling under the Illinois Criminal Code ("Opinion"). (Compl. ¶5; Ex. A, Dec. 25, 2015 Ill. Attorney General Opinion.) Unhappy with the Attorney General's Opinion, FanDuel filed this complaint the next day. Oddly, FanDuel is joined by plaintiff Head2Head Sports, LLC, an entity that was not referenced in the Opinion and that does not operate daily fantasy sports contests.

Plaintiffs' claim is at the outset barred by sovereign immunity because the Attorney General was acting on behalf of the State, and her advisory Opinion was well within her constitutional and statutory powers and did not violate any law.

Further, the Attorney General's advisory Opinion to a state legislative committee does not create an actual controversy between the parties that is ripe for determination. The Attorney General did not order Plaintiffs to cease operations and did not pursue or threaten Plaintiffs with

any civil or criminal litigation. Indeed, the Attorney General does not enforce the Criminal Code unless a State's attorney requests her to do so. *See* 15 ILCS 205/4. Moreover, Plaintiffs have not alleged any facts demonstrating the concrete hardship necessary to convert their disagreement with the Opinion into a ripe justiciable controversy.

Accordingly, this Court should dismiss the case under 735 ILCS 5/2-619 based on sovereign immunity and a lack of a justiciable controversy.

STATEMENT OF FACTS

A. The Attorney General's Authority to Issue Written Opinions

The Illinois Constitution provides that the Attorney General "shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law." Ill. Const. art. V, §15. The Attorney General Act provides that these duties include:

> Eighth – To give written opinions, when requested by either branch of the general assembly, or any committee thereof, upon constitutional or legal questions.

15 ILCS 205/4. The Attorney General's opinions are only advisory, and not binding upon a court, although a well-reasoned opinion is entitled "to considerable weight in resolving a question of first impression in this State regarding the construction of an Illinois statute." *City of Springfield v. Allphin*, 74 Ill. 2d 117, 130-131 (1978); *see also* Compl. ¶6 (conceding "the ILAG Opinion is not binding on the Illinois courts").

B. Daily Fantasy Sports In Illinois

On October 27, 2015, Illinois House Bill 4323 was introduced to amend the Criminal Code to exempt fantasy sports contests from the prohibition on gambling and to create the Fantasy Sports Act which would require operators to implement certain policies and procedures. 99th Ill. Gen. Assem. House Bill 4323. On December 9, 2015, the Attorney General was asked by the Vice-Chair of the House Judiciary-Criminal Committee, to opine on the legality of daily

fantasy sports contests run by FanDuel and another company (DraftKings, Inc.). (Ex. B, Dec. 9, 2015 Rep. Drury Letter.) Given the expectation that legislation would be debated early in 2016, the request sought an opinion by December 31, 2015.

C. The Attorney General's December 23, 2015 Opinion

On December 23, 2015, the Attorney General issued the advisory Opinion to the Chair and Vice-Chair of the Illinois House Judiciary–Criminal Committee. (*See* Ex. A; Compl. ¶5.) The Attorney General concluded that: "It is my opinion that daily fantasy sports contests offered by FanDuel and DraftKings clearly constitute gambling under subsection 28-1(a) of the Criminal Code of 2012 and that the exemption set forth in subsection 28-1(b)(2) of the Criminal Code does not apply." (Ex. A at p. 13; Compl. ¶5.)

The Attorney General's office sent the Opinion to counsel for FanDuel with a cover letter stating, in part:

> In light of the opinion, we expect that both FanDuel and DraftKings will amend their Terms of Use to include Illinois as an additional state whose residents are not eligible to participate in contests unless and until the Illinois General Assembly passes legislation specifically exempting daily fantasy sports contests from subsection 28-1(a) of the Illinois Criminal Code of 2012.

(Ex. C, Dec. 23, 2015 Letter.) The Attorney General has not taken or threatened any action against Plaintiffs.

D. Plaintiffs' Complaint Against the Attorney General

Plaintiffs filed this single count declaratory action on December 24, 2015, the day after the Attorney General issued her opinion. In the Complaint, Plaintiffs express disagreement with the Attorney General's Opinion. *See, e.g.*, Compl. ¶1 ("the ILAG's erroneous application of Illinois law"). Plaintiffs assert that the nonbinding Opinion is "damaging their reputation with consumers, service providers, and the public, and by impeding their ability to operate their

legitimate businesses." (Compl. ¶30.) Plaintiffs seek a declaration that their contests do not violate the Criminal Code, costs (including attorneys' fees), and "such other, further and different relief" including "relief further or consequential to Plaintiffs' request for declaratory relief."[1] (Compl. ¶¶34-36.)

E. FanDuel's New York Litigation

Prior to filing this Illinois suit, FanDuel has been engaged in litigation in New York against the New York Attorney General. There, the New York Attorney General issued a "demand" that FanDuel "cease and desist" offering daily fantasy sports contests to New York residents. (*See, e.g.,* Ex. D, Nov. 10, 2015 New York cease and desist letter.) Unlike the Attorney General's advisory Opinion here, however, the New York Attorney General did not act pursuant to statutory authority to issue advisory opinions. Also unlike here, the New York Attorney General filed a complaint against FanDuel and sought a preliminary injunction to stop FanDuel from operating in New York. (Ex. E, *Schneiderman v. FanDuel, Inc.*, Dec. 11, 2015 Order, Sup. Ct. of N.Y.). Three days later, FanDuel filed a countersuit, seeking its own declaration and injunction. (*Id.* at 2.) The New York court ruled in favor of the New York Attorney General and entered an injunction against FanDuel, though that injunction has been stayed pending appeal. (*Id.* at 10-11.)

ARGUMENT

I. Plaintiffs' Claim Is Barred By Sovereign Immunity.

The State Lawsuit Immunity Act provides that "the State of Illinois shall not be made a defendant or party in any court" except as provided in limited statutory exceptions that do not apply here. 745 ILCS 5/1; *see also Shirley v. Harmon*, 405 Ill. App. 3d 86, 90 (2d Dist. 2010). "The purpose of sovereign immunity is to protect the state from interference with the

[1] To the extent this prayer for relief seeks damages against the State, it should be stricken because it is barred by absolute immunity. *See, e.g., Blair v. Walker*, 64 Ill. 2d 1, 7-10 (1976).

performance of governmental functions and to preserve and to protect state funds." *People ex rel Manning v. Nickerson*, 184 Ill. 2d 245, 248 (1998). Actions against a state official are barred "if a judgment in favor of the plaintiff could operate to control the actions of the state or subject it to liability." *Id.* Where sovereign immunity applies, the court lacks subject matter jurisdiction over the lawsuit. *Currie v. Lao*, 148 Ill. 2d 151, 157 (1992). Because this action is against a State officer and does not allege that the Attorney General violated any law, sovereign immunity bars this action.

A. Exceptions To Sovereign Immunity for Prospective Relief Do Not Apply.

The State Immunity Act does not provide an exception for declaratory judgment actions against state officials performing their constitutional and statutory duties. Under the "officer suit" exception, sovereign immunity does not bar certain claims for prospective injunctive relief. *State Bldg. Venture v. O'Donnell*, 239 Ill. 2d 151, 162 (2010). For this exception to apply, however, the plaintiff must allege facts showing that the official's actions exceed his or her delegated authority and violate state law. *PHL, Inc. v. Pullman Bank & Trust Co.*, 216 Ill. 2d 250, 266-67 (2005). Plaintiffs' allegations do not fit within this exception. Plaintiffs do not allege that the Attorney General exceeded her delegated authority or violated state law. The Complaint acknowledges, as it must, that the Attorney General issued the Opinion to the House Judiciary Committee Chair and Vice-Chair to address the request for an opinion on whether certain daily fantasy sports contests qualify as "gambling" under the Illinois Criminal Code. (Compl. ¶5.) The Attorney General thus issued the Opinion under her authority under the Attorney General Act, which provides for the Attorney General to issue "written opinions, when requested by either branch of the general assembly, or any committee thereof, upon constitutional or legal questions." 15 ILCS 205/4.

Plaintiffs repeatedly contend that the Attorney General's conclusions in the Opinion are

"erroneous" and "wrong." (*See, e.g.,* Compl. ¶¶ 1, 23.) These allegations do not defeat sovereign immunity because mere disagreement with an official's actions will not support an assertion that the official exceeded or abused their discretionary authority. *President Lincoln Hotel Venture v. Bank One, Springfield*, 271 Ill. App. 3d 1048, 1057 (1st Dist. 1994).

II. The Complaint Should Be Dismissed Because There Is No Actual Controversy Ripe For Judicial Determination.

Even if the Court were to decide that Plaintiffs' request for declaratory judgment is not barred by sovereign immunity, the Court should still refuse to consider Plaintiffs' Complaint because their disagreement with the Attorney General's nonbinding Opinion does not present an actual controversy ripe for judicial determination.

To maintain a justiciable action for declaratory judgment, a plaintiff must have an actual controversy between adverse parties that is ripe. 735 ILCS 5/2-701; *In re Adoption of Walgreen*, 186 Ill. 2d 362, 365 (1999) ("[t]he existence of a real controversy is a prerequisite to the exercise of our jurisdiction"); *Underground Contractors Ass'n v. City of Chicago*, 66 Ill. 2d 371, 375 (1977).

III. The Attorney General's Advisory Opinion Is Not Fit For Judicial Determination.

Illinois courts have confirmed that the Attorney General's advisory opinions are not ripe for judicial determination. For example, Illinois law gives the Attorney General the discretion to opine on FOIA requests by issuing either a binding opinion or an advisory opinion. *Brown v. Grosskopf*, 2013 IL App. (4th) 120402, ¶11. "An advisory opinion is not subject to review." *Id.* As a result, "[a] nonbinding or advisory opinion cannot be the basis for a lawsuit or subject to enforcement in a court of law." *Id.* (where "the only basis of Brown's lawsuit against Madigan is the nonbinding opinion letter, the lawsuit cannot survive Madigan's motion to dismiss"). *See also City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶56.

Similarly, the Illinois Supreme Court has held that a non-binding investigative report released by the Attorney General "cannot serve to create an actual controversy or justiciable matter prior to some indication by the supervisor as to the course of action he intends to take." *Howlett v. Scott*, 69 Ill. 2d 135, 141-42 (1977). In *Howlett*, the Attorney General released a report opining that the Secretary of State had a conflict of interest. The Supreme Court held that the ensuing declaratory action was not justiciable because there was "no indication by the Attorney General of an intent to prosecute a constructive trust action against the Secretary of State." *Id.* For the same reason, the appellate court has held that a "merely advisory" recommendation contained in a comprehensive plan does not create a ripe controversy. *Smart Growth Sugar Grove, LLC v. Vill. of Sugar Grove*, 375 Ill. App. 3d 780, 790-91 (2d Dist. 2007) (recommendation is not binding and "plaintiff has not alleged that the Village has in any way acted" on the recommendation). *Cf. Bartlow v. Shannon*, 399 Ill. App. 3d 560, 569 (5th Dist. 2010) (dispute ripe where agency "threatened a possible fine of more than $1.6 million, among other sanctions").

Here, Plaintiffs do not and cannot allege that the Attorney General either pursued or threatened them with any civil enforcement action. The Opinion merely concluded that "daily fantasy sports contests offered by FanDuel and DraftKings" violate the Criminal Code. The Attorney General has not threatened any criminal prosecution, nor could she, because under Illinois law, she does not have primary enforcement powers in such matters. 15 ILCS 205/4. No doubt recognizing this, Plaintiffs do not allege any threat or fear of criminal prosecution.

Plaintiffs' conclusory assertion that the Attorney General "selectively request[ed] that FanDuel (as well as one other competitor, but no others) suspend operations" fares no better. (Compl. ¶7.) The Attorney General never made such a request, rather, the Attorney General sent FanDuel the advisory Opinion along with a cover letter stating that the Attorney General

expected FanDuel to follow the law. (Ex. C.) Elementary statements informing a party of an expectation they will comply with Illinois law do not render FanDuel's dispute ripe regarding the Attorney General's advisory Opinion, especially on a criminal law that she does not enforce.

The Court need only contrast the Attorney General's Opinion with the dispute in New York. There, the New York Attorney General issued a "demand" that FanDuel "cease and desist" operations in New York, threatened litigation, and then pursued litigation to shutter FanDuel's operations. (Exs. D, E.) Here, the Attorney General issued an advisory opinion to a House Committee regarding the interpretation of a statute and expressed her expectation that FanDuel would follow the law.

Plaintiff Head2Head Sports' claim also fails to present an actual ripe controversy. Head2Head Sports admits its "was not named in the ILAG Opinion." (Compl. ¶7.) The Attorney General did not send her opinion to Head2HeadSports. The Opinion focuses solely on "daily fantasy sports contests offered by FanDuel and DraftKings," (Ex. A at p. 13), not the kind of contests operated by Head2Head. Head2Head Sports purports to operate fantasy sports contests that take place over an entire sports season, rather than the daily fantasy sports contests offered by FanDuel. (Compl. ¶¶3, 14.) The Attorney General's advisory Opinion on the legality of DraftKings' and FanDuel's daily fantasy sports contests cannot create a ripe dispute for Head2Head Sports, a company that was not named in the advisory Opinion, was not threatened with any enforcement action, and does not operate daily fantasy sports contests.

In *National Marine, Inc. v. Illinois Environ. Prot. Agency*, 159 Ill. 2d 381, 389 (1994), the Illinois Supreme Court addressed a similar issue and deemed the matter premature for consideration. There, the Illinois EPA informed the plaintiff by letter that it may be potentially liable for the release of a hazardous substance. *Id.* at 383. The Court held that the ensuing declaratory action was premature because the letter "neither determines nor adjudicates the

liability, rights, duties or obligations of the party subject to it." *Id.* at 389. The Court instructed that merely "[n]otifying a party that it is subject to an investigation which may potentially lead to the institution of an action against that party does not create a claim capable of judicial resolution." *Id.* A similar result is warranted here. The Attorney General's advisory Opinion did not order specific conduct, adjudicate FanDuel's rights or obligations, or threaten legal liability. The Opinion certainly did not do so for Head2Head.

The majority of state courts around the country have held that attorney general opinions do not raise a justiciable controversy. *See, e.g., Yes on Prop 200 v. Napolitano*, 160 P.3d 1216, 1227 (Ariz. Ct. App. 2007) (declaratory judgment was not justiciable where attorney general issued nonbinding opinion and office lacked power to compel agencies to act); *Anonymous v. State,* 2000 WL 739252 *6 (Del. Ch. June 1, 2000) (unpublished)(suit to enjoin attorney general from enforcing alleged restraint on political speech was not justiciable absent "more than a theoretical likelihood of enforcement, even if a 'specific' threat of enforcement was not required."); *Askew v. City of Ocala*, 348 So.2d 308, 310 (Fla. 1977) ("respondents really seek judicial advice which is different from that advanced by the attorney general and the state attorney, or an injunctive restraint on the prosecutorial discretion of the state attorney. Neither is available under the guise of declaratory relief"); *Hitchcock v. Kloman*, 76 A.2d 582, 584 (Md. 1950) (whether naturopathy was illegal practice of medicine was not properly before court where there was no threat from Board of Medical Examiners, police, or state's attorney "beyond that implied by existence of the … opinions delivered by the Attorney General of Maryland"); *Kelley v. Bd. of Registration Optometry*, 218 N.E.2d 130, 133 (Mass. 1966)("That the Attorney General has rendered an opinion does not, of itself, raise the matter to the dignity of a justiciable controversy….There is no evidence that the Attorney General has acted upon the opinion."); *Gershman Inv. Corp. v. Danforth*, 517 S.W.2d 33,36 (Mo. 1974) ("we hold there is no justiciable

controversy in this case, because the opinions issued by the Attorney General … are entitled no more weight that that given the opinion of any other competent attorney."); *Saefke v. Stenehjem*, 673 N.W.2d 41, 45-46 (N.D. 2003)("any resolution … about the correctness of [attorney general's] opinion would result in an advisory opinion."); *Democratic Party of Okla. v. Estep*, 652 P.2d 271, 278 (Okla. 1982)("Until policy is enacted and implemented by agency rules, all the issues tendered here lack the necessary attributes of justiciability."); *State v. Margolis*, 439 S.W.2d 695, 699 (Tex. Ct. App. 1969)(action seeking declaration that business was not violating antitrust laws was not justiciable, where record was "devoid of any showing that appellees had been ordered to discontinue their operations" and there was no "bona fide threat" by attorney general to enforce); *American Veterans v. City of Austin*, 2005 WL 3440786, *3 (Tex. Ct. App. Dec. 15, 2005) (declaration that would resolve the real controversy is one "concerning the validity of the ordinance, not the validity of the attorney general opinion."); *State ex rel. Morrisey v. W. Va. Office of Disciplinary Counsel*, 764 S.E.2d 769, 776 (W.Va. 2014) (mere threat of disciplinary ethics action for future conduct did not create justiciable dispute over advisory ethics opinion).[2] These opinions are consistent with the Illinois decisions, discussed above, holding that an attorney general's advisory opinion is not ripe for adjudication, especially in situations like here when the office has not threatened action and does not have the power to enforce such an advisory opinion.

A. Plaintiffs Have Failed to Allege Sufficient Hardship.

A ripe dispute also requires a "hardship to the parties that would result from withholding judicial consideration." *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 490 (2008). Plaintiffs' complaint also fails this prong of *Morr-Fitz* because Plaintiffs have not alleged facts

[2] *But see, e.g.*, *Acupuncture Soc'y of Kan. v. Kan. State Bd. of Healing Arts*, 602 P.2d 1311 (Kan. 1979); *Me. Turnpike Auth. v. Brennan*, 342 A.2d 719, 723 (Me. 1975); *Cummings v. Beeler*, 223 S.W.2d 913, 915-16 (Tenn. 1949); *Brimmer v. Thomson*, 521 P.2d 574, 578-79 (Wyo. 1974); *State ex rel. Stratton v. Roswell Indep. Sch.*, 806 P.2d 1085, 1097-98 (N.M. Ct. App. 1991).

demonstrating any cognizable hardship if the Court withholds consideration at this time. As discussed above, Plaintiffs do not allege any fear of criminal prosecution. Further, Plaintiffs do not assert any present pecuniary harm — nor could they, given they filed suit less than 24 hours after the Attorney General issued the opinion. Instead, Plaintiffs merely allege that the Opinion "*threatens* to harm FanDuel's and Head2Head's Illinois operations" by "discouraging consumers . . . discouraging vendors . . . and interfering with the sponsorship contracts FanDuel has with Illinois businesses…." (Compl. ¶6, emphasis added). Such statements are conclusory, and speculative at best. *See, e.g.,* Compl. ¶30 (the Opinion is "causing immediate and continuing harm … by damaging their reputation with consumers, service providers, and the public, and by impeding their ability to operate legitimate businesses"). Plaintiffs do not allege any specific facts indicating that they has lost customers or revenue in Illinois because of the Opinion, that vendors have ceased processing payments, or that their "reputation" has been harmed. Given the lack of hardship from a delayed consideration of the underlying question, the matter is premature and should be dismissed.

CONCLUSION

For the foregoing reasons, the Illinois Attorney General respectfully requests that Plaintiffs' Complaint be dismissed with prejudice.

Respectfully submitted,

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OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 23, 2015

FILE NO. 15-006

SPORTS AND GAMING:
Daily Fantasy Sports
Contests as Gambling

The Honorable Elgie R. Sims, Jr.
Chairperson, Judiciary - Criminal Committee
State Representative, 34th District
8658 South Cottage Grove, Suite 404B
Chicago, Illinois 60619

The Honorable Scott R. Drury
Vice-Chairperson, Judiciary - Criminal Committee
State Representative, 58th District
425 Sheridan Road
Highwood, Illinois 60040

Dear Representative Sims and Representative Drury:

You have inquired whether daily fantasy sports contests offered by FanDuel and DraftKings (collectively Contest Organizers) constitute "gambling" under Illinois law. For the reasons stated below, it is my opinion that the contests in question constitute illegal gambling under subsection 28-1(a) of the Criminal Code of 2012 (the Criminal Code) (720 ILCS 5/28-1(a)

EXHIBIT A

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100 West Randolph Street, Chicago, Illinois 60601 • (312) 814-3000 • TTY: (312) 814-3374 • Fax: (312) 814-3806
1001 East Main, Carbondale, Illinois 62901 • (618) 529-6400 • TTY: (618) 529-6403 • Fax: (618) 529-6416
Fanduel, Inc. v. Lisa Madigan (Sangamon Co. 15-MR-1130) Page 12 of 44

A-26

(West 2014)), and the exemption set forth in subsection 28-1(b)(2) of the Criminal Code (720 ILCS 5/28-1(b)(2) (West 2014)) does not apply.

BACKGROUND

The Contest Organizers are currently two of the most prominent companies offering online daily fantasy sports contests. The term "fantasy sports contests" commonly refers to contests involving virtual teams in which participants choose current athletes in a given professional or college sport to create a fantasy sports team and then compete against other fantasy sports participants, with the winner or winners determined based on how those athletes individually perform in their actual professional or college sports game. *See generally Langone v. Kaiser*, No. 12-C-2073, 2013 WL 5567587 (N.D. Ill. October 9, 2013).

Unlike traditional fantasy sports contests, which operate on a season-long timetable, daily fantasy sports contests are conducted over short-term periods, such as a week or single day of competition. Participants who have created accounts with the Contest Organizers pay an entry fee to participate in one or more of a Contest Organizer's fantasy sports contests[1] and select a team of athletes in a certain sport under an imaginary "salary cap," a maximum budget to

[1]The Contest Organizers offer a number of different contest formats including leagues, tournaments, head-to-heads, and multipliers. Leagues have a set number of entries allowed, while tournaments do not have a cap on the number of entries. Most tournaments have guaranteed prize pools, where a prize is guaranteed no matter the total number of entrants. In head-to-head contests, two participants compete against each other directly. In multiplier contests, those in a certain top percentage of the total number of participants will win the same amount. FanDuel Website, *available at* https://www.fanduel.com/how-it-works; DraftKings Website, *available at* https://www.draftkings.com/help/faq.

spend on athletes for the creation of a fantasy sports team.[2] The prizes are known in advance of the playing of the actual games, and the prize values do not change based on the number of entries in a particular contest. Participants earn fantasy points based on the statistical performance of the athletes in the actual games. Depending on the athletes' overall performance, participants may win a share of the predetermined prize. Entry fees help fund prizes, with a portion of the fees also going to the appropriate Contest Organizer. Complaint for Declaratory and Injunctive Relief at 5-6, *FanDuel, Inc. v. Schneiderman*, No. 161691/2015 (N.Y. Sup. Ct., New York County); Verified Petition at 7-8, *DraftKings, Inc. v. Schneiderman*, No. 102014/2015 (N.Y. Sup. Ct., New York County).

ANALYSIS

The Contest Organizers have suggested that their daily fantasy sports contests are authorized under Federal law. The Professional and Amateur Sports Protection Act (PASPA) (28 U.S.C. §3701 *et seq.* (2012)), which was enacted in 1992, makes it unlawful for "a person to sponsor, operate, advertise, or promote * * * a lottery, sweepstakes, or other betting, gambling, or wagering scheme based * * * on one or more competitive games in which amateur or professional athletes participate[.]" 28 U.S.C. §3702 (2012). However, the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) (31 U.S.C. §5361 *et seq.* (2012)) was enacted after

[2]*See* FanDuel Website, *available at* https://www.fanduel.com/how-it-works; DraftKings Website, *available at* https://draftkings.com/help/how-to-play. Both FanDuel and DraftKings offer free "contests." However, this opinion addresses only those contests in which participants pay an entry fee.

PASPA's passage and prohibits any person engaged in the business of "betting" from knowingly accepting credit, electronic fund transfers, checks, or any other payment involving a financial institution to settle unlawful internet gambling debts. 31 U.S.C. §5363 (2012). The UIGEA excludes from the definition of "bet or wager" the participation in any fantasy sports game where: (1) all prize amounts are made known before the contest begins; (2) all winning outcomes are based on the relative skill and knowledge of the participants; and (3) no winning outcome is based on the scores or performance of a single, real world event or the performance of any real world team. 31 U.S.C. §5362(1)(E)(ix) (2012). The UIGEA specifically provides, however, that "[n]o provision of this subchapter shall be construed as * * * limiting * * * State law * * * or regulating gambling within the United States." 31 U.S.C. §5361(b) (2012). The UIEGA thus leaves to each state the authority to determine whether daily fantasy sports contests which fall under the UIEGA's requirements constitute illegal gambling.

In that regard, the online Terms of Use for FanDuel provide that individuals who are physically located in Arizona, Iowa, Louisiana, Montana, Nevada, New York, or Washington are not eligible to participate in contests. FanDuel Website, *available at* https://www.fanduel.com/terms. Similarly, the online Terms of Use for DraftKings provide that legal residents physically located in the foregoing states, with the exception of New York, are ineligible to participate in contests. DraftKings Website, *available at* https://www.draftkings.com/help/terms. It appears that the excluded states have gambling statutes that either expressly prohibit fantasy

sports gambling (Mont. Code Ann. §23-5-802 (2015), *available at* http://leg.mt.gov/bills/mca/23/5/23-5-802.htm) or internet gambling (La. Rev. Stat. §14:90.3 (2015), *available at* http://www.legis.la.gov/legis/LawSearch.aspx; Wash. Rev. Code §9.46.240 (2015), *available at* http://apps.leg.wa.gov/RCW/default.aspx?cite=9.46.240) or have been construed by State enforcement authorities to prohibit fantasy sports contests (*see* Ariz. Att'y Gen. Op. No. I98-002, issued January 21, 1998 (concluding that fantasy football constitutes gambling under Arizona law); Memorandum from J. Brin Gibson, Bureau Chief of Gaming and Government Affairs and Ketan D. Bhirud, Head of Complex Litigation, Office of the Nevada Attorney General, to A.G. Burnett, Chairman, Nevada Gaming Control Board, Terry Johnson, Member, Nevada Gaming Control Board, and Shawn Reid, Member, Nevada Gaming Control Board (October 16, 2015) (concluding that daily fantasy sports constitute sports pools and gambling games under Nevada law and therefore cannot be offered in Nevada without first obtaining a gaming license)).[3] *See also* 86th Iowa Gen. Assem., Senate File 166, 2015 Sess. (pending legislation proposing to add "Fantasy or Simulation Sports Contests" to the list of lawful *bona fide* contests).

[3]Additionally, on November 10, 2015, the New York Attorney General's Office issued cease and desist letters to FanDuel and DraftKings, asserting that their operations constitute illegal gambling under New York law. *See* Letter from Kathleen McGee, Chief, Internet Bureau, Office of the New York Attorney General, to Jason Robins, Chief Executive Officer, DraftKings, Inc. (November 10, 2015); Letter from Kathleen McGee, Chief, Internet Bureau, Office of the New York Attorney General, to Nigel Eccles, Chief Executive Officer, FanDuel Inc. (November 10, 2015). That matter is currently in litigation. *See* note 10.

The Honorable Elgie R. Sims, Jr.
The Honorable Scott R. Drury - 6

In Illinois, the legality of daily fantasy sports is a matter of first impression.[4] The Criminal Code prohibits the playing of both "games of chance or skill for money[.]" Specifically, subsection 28-1(a) of the Criminal Code (720 ILCS 5/28-1(a) (West 2014)) defines the offense of gambling and provides, in pertinent part:

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[4]There is one decision from a Federal district court in Illinois addressing daily fantasy sports contests. In *Langone v. Kaiser*, the plaintiff brought a claim under section 28-8 of the Illinois Loss Recovery Act (720 ILCS 5/28-8 (West 2012)) seeking, in part, to recover money from FanDuel and from an Illinois resident that a third party allegedly lost to in a daily fantasy sports contest hosted by FanDuel. The court determined that "[t]he relevant question for the purposes of the Loss Recovery Act is not whether FanDuel's activity is illegal; the question is whether FanDuel is 'the winner' with respect to any particular 'loser.'" *Langone*, 2013 WL 5567587, at *7. The court held that because FanDuel does not risk its own money on the contests, it cannot be a winner or a loser under the Loss Recovery Act. Because the court specifically declined to address whether daily fantasy sports contests constitute illegal gambling under Illinois law, the case has no bearing on the instant inquiry.

We are also aware of four lawsuits pending in the Federal courts in Illinois involving DraftKings and/or FanDuel. *Izsak v. DraftKings, Inc.*, No. 14-cv-7952 (N.D. Ill. (2014)) (A class action alleging that DraftKings violated the Federal Telephone Consumer Protection Act (47 U.S.C. §227 *et seq.* (2012)) by sending unsolicited text messages to the cell phones of the plaintiff and the class members.); *Hemrich v. DraftKings, Inc.*, No. 3:15-cv-445 (S.D. Ill. (2015)) (A class action alleging that DraftKings violated the Illinois consumer fraud statute (815 ILCS 505/1 *et seq.* (West 2014)) and Missouri law by misleading consumers into believing that their initial deposit would be doubled through a "100% First-Time Deposit Bonus" and seeking money damages in the amounts of the doubled first-time deposits that the plaintiffs did not receive. The complaint specifically alleges that "DraftKings' business is a legal one under United States law[,]" citing the Unlawful Internet Gambling Enforcement Act of 2006 (31 U.S.C. §5362(1)(E)(ix) (2012). *Hemrich* Complaint at 4, ¶18.); *Guarino v. DraftKings, Inc. and FanDuel, Inc.*, No. 3:15-cv-1123 (S.D. Ill. (2015)) (A class action alleging that DraftKings and FanDuel fraudulently induced plaintiff and the class members into paying money to participate by claiming the games were fair games of skill without the potential for insiders to use non-public information to compete against them when, in fact, the defendants willfully failed to disclose that employees of DraftKings and FanDuel had valuable, non-public data and would use this information to compete against plaintiff and the class members. The complaint seeks a full refund for all of the money paid to the defendants by the class members, damages and restitution, or other equitable relief. As part of the allegations, the complaint states that daily fantasy sports contests are "not gambling because of the skill involved in picking a winning team." *Guarino* Complaint at 6, ¶ 29.); *Stoddart v. DraftKings, Inc.*, No. 3:15-cv-1307 (S.D. Ill. (2015)) (A class action brought on behalf of a plaintiff who participated in DraftKings' contests and lost money and others similarly situated. The complaint alleges that DraftKings' daily fantasy sports contests are illegal gambling under Illinois law and seeks an order requiring DraftKings to disgorge all of the money wagered and lost by the plaintiff and the class members.). Only the *Stoddart* case raises the question of whether daily fantasy sports contests violate Illinois criminal law. The court has not reached that issue, however. The case is currently subject to an Order to Stay proceedings, pending the resolution of a Multidistrict Litigation transfer motion. Order, *Stoddart v. DraftKings, Inc.*, No. 3:15-cv-1307 (S.D. Ill. December 16, 2015).

The Honorable Elgie R. Sims, Jr.
The Honorable Scott R. Drury - 7

> (a) A person commits gambling when he or she:
>
> (1) knowingly plays a game of chance or skill for money or other thing of value, unless excepted in subsection (b) of this Section;
>
> * * *
>
> (12) knowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money or other thing of value by means of the Internet or to make a wager upon the result of any game, contest, political nomination, appointment, or election by means of the Internet. This item (12) does not apply to activities referenced in items (6) and (6.1) of subsection (b) of this Section.[5]

Subsection 28-1(b) of the Criminal Code (720 ILCS 5/28-1(b) (West 2014)) exempts certain activities from the general prohibition on gambling. The Contest Organizers contend that the following exception applies to the daily fantasy sports contests they offer:

> (b) Participants in any of the following activities shall not be convicted of gambling:
>
> * * *
>
> (2) 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 owners of animals or vehicles entered in such contest.

---

[5]Subsections 28-1(b)(6) and 28-1(b)(6.1) of the Criminal Code (720 ILCS 5/28-1(b)(6), (b)(6.1) (West 2014)) respectively exempt from the illegal gambling prohibitions lotteries conducted by the State of Illinois in accordance with the Illinois Lottery Law (20 ILCS 1605/1 *et seq.* (West 2014)) and the online purchase of lottery tickets for a lottery conducted by the State of Illinois under the program established in section 7.12 of the Illinois Lottery Law (20 ILCS 1605/7.12 (West 2014)).

The Honorable Elgie R. Sims, Jr.
The Honorable Scott R. Drury - 8

The offense of gambling is a Class A misdemeanor under Illinois law. A second or subsequent conviction under subsections 28-1(a)(3) through (a)(12) of the Criminal Code is a Class 4 felony. 720 ILCS 5/28-1(c) (West 2014).

The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly. *Illinois Department of Healthcare and Family Services v. Warner*, 227 Ill. 2d 223, 229 (2008). Legislative intent is best evidenced by the language used in the statute, and where statutory language is clear and unambiguous, it must be given effect as written. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). One must view all of the provisions of the statute as a whole. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 422 (2002). Words and phrases should not be construed in isolation, but interpreted in light of other relevant portions of the statute. *Land*, 202 Ill. 2d at 422. Illinois criminal statutes must be narrowly construed in favor of the accused. *People v. Williams*, 239 Ill. 2d 119, 127 (2010); *People v. Christensen*, 102 Ill. 2d 321, 328 (1984).

Subsection 28-1(a)(1) of the Criminal Code provides that a person commits the offense of gambling when he or she "knowingly plays a game of chance or skill for money[,]" unless excepted in subsection 28-1(b). The statutory language is straightforward and unequivocal. It clearly declares that *all* games of chance *or* skill, when played for money, are illegal gambling in Illinois, unless excepted. While the Contest Organizers assert that daily

fantasy sports contests are games of skill[6] rather than games of chance, that argument is immaterial because subsection 28-1(a)(1) expressly encompasses both. Moreover, participants must pay an entry fee or buy-in amount in order to win a prize. Consequently, the act of playing daily fantasy sports contests in Illinois constitutes illegal gambling under subsection 28-1(a)(1) of the Criminal Code, unless otherwise excepted.

Pursuant to subsection 28-1(a)(12) of the Criminal Code, a person also commits gambling when he or she "knowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money or other thing of value by means of the Internet or to make a wager upon the result of any game[.]" The Contest Organizers operate websites that allow individuals to play games of chance or skill for money. Accordingly, entities which operate such contests commit the offense of gambling under Illinois law, unless otherwise excepted. *See Cie v. Comdata Network, Inc.*, 275 Ill. App. 3d 759, 764-65 (1995), *appeal denied*, 165 Ill. 2d 548 (1996) (subsection 28-1(b) exceptions apply to all gambling prohibitions in subsection 28-1(a)).

Subsection 28-1(b) of the Criminal Code sets out the only exceptions to activities that otherwise would constitute gambling under subsection 28-1(a). The Contest Organizers assert that their contests are excepted under subsection 28-1(b)(2). This subsection was included in the original enactment of article 28 of the Criminal Code of 1961 (*see* 1961 Ill. Laws 1983,

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[6]*See* FanDuel Website, *available at* https://fanduel.zendesk.com/hc/en-us/articles/210202858-Is-FanDuel-legal; DraftKings Website, *available at* https://www.draftkings.com/help/why-is-it-legal.

2033-37; Ill. Rev. Stat. 1961, ch. 38, par. 28-1 *et seq.*) and exempts "[o]ffers 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 owners of animals or vehicles entered in such contest."[7] (Emphasis added.)

Reading the statute as a whole, it is clear that subsection 28-1(b)(2) applies only to the "actual contestants" in the actual sporting event.[8] In the context of daily fantasy sports, the "actual contestant" upon whose performance success or failure is based is the athlete or athletes whose "skill, speed, strength or endurance" determine the outcome. Thus, subsection 28-1(b)(2) exempts only those who actually engage in a *bona fide* contest for the determination of skill, speed, strength, or endurance, and not a daily fantasy sports contest participant who pays a fee to build a "team" and who may win a prize based on the statistical performance of particular athletes. In this regard, persons whose wagers depend upon how particular, selected athletes perform in actual sporting events stand in no different stead than persons who wager on the outcome of any sporting event in which they are not participants. None of these persons are the

[7]There is only one Illinois case which cites to this exception. In *People v. Mitchell*, 111 Ill. App. 3d 1026, 1028 (1983), the court upheld a jury's conclusion that "Hold 'em" poker was not a "bona fide contest for the determination of skill" under subsection 28-1(b)(2). The court held that the evidence supported the jury's conclusion that "the games, in fact, required a combination of skill and chance, and that they were definitely not the type of '*bona fide* contests' excepted from subsection [28-1](a)(1)." (Emphasis in original.) *Mitchell*, 111 Ill. App. 3d at 1028.

[8]The Contest Organizers have not suggested that daily fantasy sports contests involve determining the speed, strength, or endurance of the fantasy sports participants who enter the contests, nor could such a suggestion be made in good faith.

actual contestants in a *bona fide* contest for the determination of skill, speed, strength, or endurance.

This interpretation is consistent with a 1994 opinion of the Texas Attorney General's Office construing substantially similar statutory language to that found in subsection 28-1(b)(2) of the Criminal Code. Tex. Att'y Gen. Op. No. LO-94-051, issued June 9, 1994. In that opinion, the Texas Attorney General's office addressed whether a contest which requires an entry fee, pays prizes to winners, and is based on forecasting the outcomes of a number of sporting events constitute illegal gambling under Texas law.[9] The Texas Attorney General's Office concluded that the contest at issue did not fall within the gambling exception and therefore constituted illegal gambling:

> We cannot think of any distinction the words "*actual* contestants" could be intended to make other than that between those actually participating in a contest and able by their performance to affect its outcome, and those merely betting on it. Thus, while the subsection (1)(B) exclusion may embrace athletes actually competing in the sporting events you refer to, it does not embrace

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[9]*See* Texas Penal Code §47.01(1)(B) (2015), *available at* http://www.statutes.legis.state.tx.us/docs/PE/pdf/PE.47.pdf, which provides, in pertinent part:

> (1) "Bet" means an agreement to win or lose something of value solely or partially by chance. A bet does not include:
>
> * * *
>
> (B) an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest[.]

> those who pay entry fees for a chance to win a prize from forecasting the outcome of the events. (Emphasis in original.) Tex. Att'y Gen. Op. No. LO94-051 at 2.[10]

Although daily fantasy sports contests may involve some degree of skill, such as selecting an athlete for a participant's team based on knowledge of the athlete's historical

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[10]The New York Supreme Court recently made this same distinction when granting the New York Attorney General's motions to enjoin the Contest Organizers from accepting entry fees from New York State consumers for any daily fantasy sports contests which they operate, pending a final determination. *See* Decision and Order for Injunctive Relief, *People ex rel. Schneiderman v. DraftKings, Inc.*, No. 453054/2015 (N.Y. Sup. Ct., New York County, December 11, 2015); Decision and Order for Injunctive Relief, *People ex rel. Schneiderman v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct., New York County, December 11, 2015) (Decisions and Orders). New York law defines "gambling" as follows:

> *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. (Emphasis added.) N.Y. Penal Law §225.00(2) (2015), *available at* http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO:.

The New York Attorney General argued that the participants paid entry fees "on events they cannot control or influence, relying on the real-game performance of professional athletes, to win a prize, which amounts to gambling" under New York law. Decisions and Orders, at 5. The New York Attorney General further argued that daily fantasy sports contests are "contests of chance" because the outcome depends substantially on chance and factors not within the participant's control, and that once a team is chosen for a contest, there is no means of altering the outcome. Decisions and Orders, at 6. The court concluded that the language of the statute "is broadly worded and as currently written sufficient for finding that DFS [daily fantasy sports] involves illegal gambling." Decisions and Orders, at 7. The Contest Organizers immediately appealed the court's decision. Notice of Appeal, *People ex rel. Schneiderman v. DraftKings, Inc.*, No. 453054/2015 (N.Y. Sup. Ct., New York County, December 11, 2015); Notice of Appeal, *People ex rel. Schneiderman v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct., New York County, December 11, 2015). The New York Supreme Court, Appellate Division granted an interim stay of the enforcement of the injunction against FanDuel pending a determination by a full panel. Notice of Entry of Appellate Division Interim Stay Order, *People ex rel. Schneiderman v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct., New York County, December 11, 2015).

Additionally, the Kansas Legislature recently amended its gambling statute, which contains a substantially similar exclusion for "offers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill, speed, strength or endurance or to the bona fide owners of animals or vehicles entered in such a contest[,]" to also exclude "a fantasy sports league as defined in this section[.]" Kan. Stat. Ann. §§21-6403(a)(2), (a)(9) (2014), as amended by 2015 Kan. Sess. Laws 835-38, *available at* http://www.sos.ks.gov/pubs/sessionlaws/2015/2015_Session_Laws_Volume_1.pdf.

performance, match-up against a particular opponent, performance in a particular venue, and/or performance in particular weather conditions, the phrase "actual contestants" as used in subsection 28-1(b)(2) does not apply to those persons who pay entry fees for a chance to win a prize for forecasting the performance of professional or college athletes over whom they have no control or influence. Accordingly, it is my opinion that subsection 28-1(b)(2) does not exempt daily fantasy sports contests from the Illinois gambling provisions.

CONCLUSION

It is my opinion that the daily fantasy sports contests offered by FanDuel and DraftKings clearly constitute gambling under subsection 28-1(a) of the Criminal Code of 2012 and that the exemption set forth in subsection 28-1(b)(2) of the Criminal Code does not apply.

In closing, I note that there is legislation currently pending in each chamber of the Illinois General Assembly which proposes, in part, to create a new Act – the Fantasy Contests Act – and to exempt "fantasy contests as defined under the Fantasy Contests Act" from the general prohibition against gambling. *See* 99th Ill. Gen. Assem., House Bill 4323, Senate Bill 2193, 2015 Sess.[11] Thus, it appears that a number of General Assembly members have reached this same conclusion, as they have agreed to sponsor the foregoing legislation. Absent legislation

[11]House Bill 4323 was referred to the House Rules Committee on November 9, 2015. Senate Bill 2193 was referred to the Senate Assignments Committee on November 3, 2015. Previously-filed legislation proposing to create the Daily Fantasy Sports Regulation Act contained only a short title provision and was referred to the House Rules Committee on April 14, 2015. *See* 99th Ill. Gen. Assem., House Bill 4200, 2015 Sess.

The Honorable Elgie R. Sims, Jr.
The Honorable Scott R. Drury - 14

specifically exempting daily fantasy sports contests from the gambling provisions, it is my opinion that daily fantasy sports contests constitute illegal gambling under Illinois law.

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

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ILLINOIS HOUSE OF REPRESENTATIVES
SCOTT R. DRURY
STATE REPRESENTATIVE • 58TH DISTRICT

December 9, 2015

VIA EMAIL
Hon. Lisa Madigan
James R. Thompson Center
100 W. Randolph Street
Chicago, Illinois 60601

Re: Daily Fantasy Sports

Dear Attorney General Madigan:

I respectfully request your opinion on whether the activities/operations of Daily Fantasy Sports websites and/or organizations such as Draft Kings and Fan Duel constitute "gambling" or are otherwise prohibited or illegal under current Illinois law. This is a narrow request at this time and does not seek an opinion on: (a) potential legal options with respect to the regulation of Daily Fantasy Sports websites and/or organizations; or (b) how Illinois should treat these websites and/or organizations from a public policy standpoint.

Given that this issue is likely to be debated in the Illinois General Assembly in 2016, I respectfully request that an opinion be provided on or before December 31, 2015. Thank you for your attention to this issue.

If you have any questions or would like to discuss this request further, please let me know.

Very truly yours,

SCOTT R. DRURY
State Representative – District 58

EXHIBIT
B

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

December 23, 2015

Lisa Madigan
ATTORNEY GENERAL

Via Email and Regular Mail

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Jenner & Block
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Washington, DC 20036

Re: Illinois Attorney General Opinion on Daily Fantasy Sports

Gentlemen:

I enclose the Attorney General's opinion concluding that the daily fantasy sports contests offered by FanDuel and DraftKings constitute "gambling" under Illinois law. In light of the opinion, we expect that both FanDuel and DraftKings will amend their Terms of Use to include Illinois as an additional state whose residents are not eligible to participate in contests unless and until the Illinois General Assembly passes legislation specifically exempting daily fantasy sports contests from subsection 28-1(a) of the Illinois Criminal Code of 2012.

Please do not hesitate to call me if you would like to discuss this matter further.

Very Truly Yours,

Gary S. Caplan
Assistant Chief Deputy Attorney General

EXHIBIT C

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF ECONOMIC JUSTICE
INTERNET BUREAU

November 10, 2015

NOTICE TO CEASE AND DESIST AND
NOTICE OF PROPOSED LITIGATION PURSUANT TO
NEW YORK EXECUTIVE LAW § 63(12) AND GENERAL BUSINESS LAW § 349

BY CERTIFIED AND EXPRESS MAIL
Mr. Nigel Eccles
Chief Executive Officer
FanDuel Inc.
19 Union Square West, 9th Floor
New York, NY 10003

Dear Mr. Eccles:

This letter constitutes a demand that FanDuel, Inc. ("FanDuel") cease and desist from illegally accepting wagers in New York State in connection with "Daily Fantasy Sports."

As you know, on October 6, 2015, the Office of the New York State Attorney General ("NYAG") commenced an investigation of FanDuel. Although this inquiry initially centered on allegations of employee misconduct and unfair use of proprietary information, FanDuel's operations and business model – known colloquially as Daily Fantasy Sports ("DFS") – necessarily came under review.

Our review concludes that FanDuel's operations constitute illegal gambling under New York law, according to which, "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." FanDuel's customers are clearly placing bets on events outside of their control or influence, specifically on the real-game performance of professional athletes. Further, each FanDuel wager represents a wager on a "contest of chance" where winning or losing depends on numerous elements of chance to a "material degree."

FanDuel DFS contests are neither harmless nor victimless. Daily Fantasy Sports are creating the same public health and economic concerns as other forms of gambling, including addiction. Finally, FanDuel's advertisements seriously mislead New York citizens about their prospects of winning.

EXHIBIT D

We believe there is a critical distinction between DFS and *traditional* fantasy sports, which, since their rise to popularity in the 1980s, have been enjoyed and legally played by millions of New York residents. Typically, participants in traditional fantasy sports conduct a competitive draft, compete over the course of a long season, and repeatedly adjust their teams. They play for bragging rights or side wagers, and the Internet sites that host traditional fantasy sports receive most of their revenue from administrative fees and advertising, rather than profiting principally from gambling. For those reasons among others, the legality of traditional fantasy sports has never been seriously questioned in New York.

Unlike traditional fantasy sports, the sites hosting DFS are in active and full control of the wagering: FanDuel and similar sites set the prizes, control relevant variables (such as athlete "salaries"), and profit directly from the wagering. FanDuel has clear knowledge and ongoing active supervision of the DFS wagering it offers. Moreover, unlike traditional fantasy sports, DFS is designed for instant gratification, stressing easy game play and no long-term strategy. For these and other reasons, DFS functions in significantly different ways from sites that host traditional fantasy sports.

Further, FanDuel has promoted, and continues to promote DFS like a lottery, representing the game to New Yorkers as a path to easy riches that anyone can win. The FanDuel ads promise: "anybody can play, anybody can succeed"; "Play for real money with immediate cash payouts … the money is real!" and similar enticements. Like most gambling operations, FanDuel's own numbers reveal a far different reality. In practice, DFS is far closer to poker in this respect: a small number of professional gamblers profit at the expense of casual players. To date, our investigation has shown that the top one percent of FanDuel's winners receive the vast majority of the winnings.

Finally, during the course of our investigation, the New York Attorney General has been deeply concerned to learn from health and gambling experts that DFS appears to be creating the same public health and economic problems associated with gambling, particularly for populations prone to gambling addiction and individuals who are unprepared to sustain losses, lured by the promise of easy money. Certain structural aspects of DFS make it especially dangerous, including the quick rate of play, the large jackpots, and the false perception that it is eminently winnable. Ultimately, it is these types of harms that our Constitution and gambling laws were intended to prevent in New York.

The illegality of DFS is clear from any reasonable interpretation of our laws, beginning with the New York State Constitution. The Constitution prohibits gambling in all forms not specifically authorized:

> [E]xcept as hereinafter provided, **no** lottery or the sale of lottery tickets, **pool-selling, book-making, or any other kind of gambling,** except lotteries operated by the state . . ., except pari-mutuel betting on horse races . . . , and except casino gambling at no more than seven facilities. . . **shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to**

prevent offenses against any of the provisions of this section.

N.Y. Const. Art. I, § 9 (emphasis added).

To enforce this clause, the Legislature established a series of criminal offenses applying to businesses that promote gambling. *See, generally,* N.Y. Penal Law §§ 225.00-225.40. These provisions all apply the same statutory definition of gambling:

> 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). The penal law imposes no criminal liability on individual bettors, focusing instead on bookmakers and other operations that advance or profit from illegal gambling activity. *See, e.g.,* N.Y. Penal Law § 225.10 (Promoting Gambling in the first degree).

FanDuel wagers easily meet the definition of gambling. FanDuel bettors make bets (styled as "fees") that necessarily depend on the real-world performance of athletes and on numerous elements of chance. The winning bettors receive large cash prizes – and the company takes a "rake" or a cut of from each wager.[1]

Accordingly, we demand that FanDuel cease and desist from illegally accepting wagers in New York State as part of its DFS contests.

This letter also serves as formal pre-litigation notice pursuant to New York State General Business Law ("GBL") §§ 349 and 350 and Executive Law § 63(12). These statutes direct the State to give notice prior to commencing a summary proceeding to enjoin repeated illegal and deceptive acts and practices, and to obtain additional injunctive relief, restitution, penalties, damages, and other relief that a court may deem just and proper.

The unlawful and illegal conduct under consideration by our Office includes, but is not limited to, the following:

(a) Running a book-making or other kind of gambling business in violation of Article I, Section 9 of the New York State Constitution;

(b) Knowingly advancing and profiting from unlawful gambling activity by receiving and accepting in any one day, more than five bets totaling more than five thousand dollars in violation of New York Penal Law § 225.10;

(c) Knowingly advancing or profiting from unlawful gambling activity in violation of New York Penal Law § 225.05;

---

[1] Washington State, which has substantially the same statutory definition of gambling, has reached the same legal conclusions with respect to DFS.

(d) With knowledge of the contents thereof, possessing any writing, paper, instrument or article of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise and constituting, reflecting or representing more than five bets totaling more than five thousand dollars in violation of New York Penal Law § 225.20;

(e) With knowledge of the contents thereof, possessing any writing, paper, instrument or article of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise in violation of New York Penal Law § 225.15;

(f) Misrepresenting that FanDuel complies with applicable laws; misrepresenting the likelihood that an ordinary player will win a jackpot; misrepresenting the degree of skill implicated in the games; and misrepresenting that FanDuel's games are not considered gambling, in violation of Executive Law § 63(12) and GBL §§ 349 and 350; and

(g) Conducting or transacting its business in a persistently fraudulent and illegal manner in violation of BCL § 1303.

Pursuant to GBL §§ 349 and 350, FanDuel is afforded the opportunity to show orally or in writing to this Office, within five business days of receipt of this notice, why the Attorney General should not initiate any proceedings.

Sincerely,

Kathleen McGee
Chief, Internet Bureau

cc: Marc Zwillinger, Esq.

FILED: NEW YORK COUNTY CLERK 12/11/2015 09:53 AM INDEX NO. 453054/2015
NYSCEF DOC. NO. 107 RECEIVED NYSCEF: 12/11/2015

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

PRESENT: MANUEL J. MENDEZ **PART** 13
Justice

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

Plaintiff,

-against-

DRAFTKINGS, INC.,

Defendant.

INDEX NO. 453054/2015
MOTION DATE 11-25-2015
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 16 were read on this motion to/for Injunctive relief:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 5
Answering Affidavits — Exhibits ____cross motion ____	6 - 16
Replying Affidavits ____	

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion seeking injunctive relief, enjoining and restraining Draftkings, Inc. from doing business in the State of New York, accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on Draftkings, Inc.'s website, filed under Motion Sequence 001, is granted and decided in accordance with the attached Decision and Order filed under Index #453056/2015, Motion Sequence 001.

ENTER:

MANUEL J. MENDEZ J.S.C.

MANUEL J. MENDEZ,
J.S.C..

Dated: December 11, 2015

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

EXHIBIT E

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

PRESENT: MANUEL J. MENDEZ **PART** 13
Justice

THE PEOPLE OF THE STATE OF NEW YORK, By ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,
Plaintiff,
-against -
FANDUEL, INC.,
Defendant.

INDEX NO. 453056/15
MOTION DATE 11-25-15
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 14 were read on this motion to/for Injunctive relief:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 7
Answering Affidavits — Exhibits cross motion	8 - 13
Replying Affidavits	14

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Cross-Motion : Yes X No

Upon a reading of the foregoing cited papers it is Ordered that the motion by Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, for an Order seeking injunctive relief, enjoining and restraining Fanduel, Inc. from doing business in the State of New York, and from accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on defendant's website, is granted. The motion by Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, filed under Index #453054/2015, Motion Sequence 001, seeking injunctive relief, enjoining and restraining Draftkings, Inc. from doing business in the State of New York, accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on Draftkings, Inc.'s website, is granted.

Fanduel Inc.'s motion filed under Index # 161691/2015, Motion Sequence 001, seeking an Order pursuant to CPLR §§6301 and 6313, granting a preliminary injunction and temporary restraining order against the Attorney General of the State of New York and the State of New York, from taking any enforcement action or other action derived from any allegation that the operation of daily fantasy sports contests are a violation of law, against Fanduel, Inc., and its employees, agents and suppliers of goods and services is denied. Draftkings Inc.'s motion filed under Index Number 102014/2015, Motion Sequence 001, seeking an Order pursuant to CPLR §§6301 and 6313 granting a preliminary injunction and temporary restraining order against the Attorney General of the State of New York and the State of New York from taking any enforcement action or other action, against Draftkings, Inc., and its employees, agents and suppliers of goods and services, and for expedited discovery, hearing and trial, is denied.

Fanduel, Inc. and Draftkings, Inc. are online Daily Fantasy Sports (DFS) companies that operate websites. On October 6, 2015, the Office of the New York Attorney General (hereinafter referred to as "NYAG") commenced an investigation into both

Fanduel, Inc. and Draftkings, Inc., related to allegations that employees of the competing company websites utilized inside information to improve chances of winning competitions on the competing sites. As a result of the investigation the NYAG determined that the DFS competitions on Fanduel, Inc. and Draftkings, Inc. websites, are in actuality illegal gambling operations, subjecting the public to the fraudulent perceptions that the games are winnable.

On November 10, 2015 the NYAG served a "cease and desist" letter on both companies, demanding that they, "cease and desist from illegally accepting wagers in New York State in connection with 'Daily Fantasy Sports (DFS)." The NYAG's investigation determined that DFS on Fanduel, Inc. and Draftkings, Inc., results in customers placing bets on events they cannot control or influence, "on the real-game performance of professional athletes" and that in reality the entrance fees are wagers on a "contest of chance," with the results depending on numerous elements of chance to a "material degree." The NYAG also determined that the websites involve the companies having full and active control with direct profit from the wagering, they set prizes, control relevant variables such as athletes wages, and promote themselves like a lottery. DFS on the companies websites was deemed to create public health and economic concerns including the equivalent of gambling addiction, with advertisements misleading the public with the lure of easy money while only the top one percent, typically professional gamblers profit. The NYAG pursuant to General Business Law §§349 and 350, provided five days for Fanduel, Inc. and Draftkings, Inc. to show why the NYAG should not initiate any proceedings.

On November 13, 2015, Fanduel Inc. commenced an action against Eric T. Schneiderman, in his official capacity as NYAG and the State of New York, under Index #161691/2015. The complaint asserts two causes of action seeking declaratory and injunctive relief and alleges that Fanduel Inc. operates in compliance with New York Law and functions as a game of skill. Fanduel, Inc., under Index #161691/2015, brought an Order to Show Cause seeking a preliminary injunction and temporary restraining order pursuant to CPLR §6301 and §6313, enjoining Eric T. Schneiderman, in his capacity as NYAG, and the State of New York, from taking any enforcement action or other action derived from any allegation that the operation of DFS contests are a violation of the law, as against Fanduel, Inc., and its employees, agents and suppliers of goods and services. On November 16, 2015, this Court denied Fanduel Inc.'s application for a temporary restraining order and reserved its decision on the injunctive relief. This Decision and Order also addresses the defendant's motion filed under Index #161691/2015, Motion Sequence 001.

On November 13, 2015, Draftkings, Inc. commenced an Article 78 proceeding under index #102014/2015, against the NYAG and the State of New York. The verified petition alleges that the actions of the NYAG are arbitrary and capricious, in excess of his jurisdiction, and seeks declaratory and injunctive relief. The petition asserts claims of violation of the due process and separation of powers provisions in the New York State Constitution and violation of equal protection provision and uncompensated takings in violation of the New York State Constitution, the U.S. Constitution, and 42 U.S.C. §1983. Draftkings, Inc. also asserted claims of tortious interference with a contract and tortious interference with prospective business relations. Draftkings, Inc. brought an Order to Show Cause seeking injunctive relief and a temporary restraining order, enjoining the NYAG and the State of New York, from taking any enforcement action or other action derived from any allegation that the operation of daily sports contests are a violation of the law, together with seeking expedited discovery, hearing and trial. On

November 16, 2015 this Court denied Draftkings, Inc.'s application for a temporary restraining order and reserved its decision on the injunctive relief. This Decision and Order also addresses Draftkings, Inc.'s motion filed under Index #102014/2015, Motion Sequence 001.

The NYAG commenced an action against Fanduel Inc., under index #453056/2015, on November 17, 2015. The complaint asserts nine causes of action and alleges that plaintiff under the authority of Executive Law§63[12], is entitled to enjoin the defendants from illegal and fraudulent conduct and seeks injunctive relief pursuant to Business Corporation Law (BCL) §1303, General Business Law (GBL) §§ 349 and 350. The NYAG's motion filed under index # 453056/2015, Motion Sequence 001, seeks an Order pursuant to Executive Law §63[12] BCL§1303, GBL §§349 and 350, and CPLR §§6301 and 6313 enjoining and restraining Fanduel, Inc., from doing business in the State of New York as a result of its fraudulent and illegal practices. The NYAG also seeks to enjoin the defendant from accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on its website.

The NYAG commenced a separate action against Draftkings, Inc., under index #453054/2015, on November 17, 2015 asserting nine causes of action making the same allegations as were asserted against Fanduel, Inc. The NYAG's motion filed under index #453054/2015, Motion Sequence 001, seeks an Order granting the same injunctive relief against Draftkings, Inc., as is sought against Fanduel, Inc..

The NYAG on its motions filed under index #453054/2015 and 453056/2015 argues that pursuant to Executive Law §63[12], the Attorney General has authority to seek injunctive relief because of Fanduel, Inc. and Draftkings, Inc.'s repeated, ongoing, illegal and fraudulent activities. The NYAG also seeks injunctive relief under the consumer protection provisions of GBL §§ 349 and 350. Pursuant to BCL §1303, the NYAG claims empowerment to sue to enjoin and restrain Fanduel, Inc. and Draftkings, Inc. as foreign corporations registered in Delaware, and doing business in New York from doing business in New York as a result of the fraudulent and illegal acts or practices.

Executive Law §63[12], permits the NYAG to bring an action for injunctive relief or damages to remedy repeated fraud or illegality (State of New York v. Princess Prestige Co., 42 N.Y. 2d 104, 366 N.E. 2d 61, 397 N.Y.S. 2d 360 [1977]). The NYAG is entitled to injunctive relief pursuant to Executive Law § 63 [12], upon a showing that there was a repeated statutory violation (Schneiderman v. One Source Networking, Inc., 125 A.D. 3d 1345, 3 N.Y.S. 3d 505 [4th Dept., 2015]). A prima facie claim of fraud pursuant to Executive Law § 63 (12), is established by showing that, "...the act complained of has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud" (People ex rel. Spitzer v. Applied Card Sys., Inc., 27 A.D. 3d 104, 805 N.Y.S. 2d 175 [1st Dept., 2005] and People ex rel. Spitzer v. General Electric Company, Inc., 302 A.D. 314, 756 N.Y.S. 2d 520 [1st Dept., 2003]).

Pursuant to GBL §349, a prima facie case is established by a showing of injury resulting from "consumer-oriented conduct," and that the defendant is engaging in an act or practice that is materially misleading or deceptive, likely to, "...mislead a reasonable consumer acting reasonably under the circumstances" (Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y. 2d 20, 647 N.E. 2d 741 , 623 N.Y.S. 2d 529 [1995]). Pursuant to GBL §349, an omission is deceptive, if a business possesses material or information relevant to the consumer and fails to provide it to the consumer (Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y. 2d 20,

supra). GBL §350, specifically applies to false advertising, otherwise the standard to establish a prima facie case is the same as that for a claim, pursuant to GBL §349. (Goshen v. Mutual Life Ins. Company of New York, 98 N.Y. 2d 314, 774 N.E. 2d 1190, 746 N.Y.S. 2d 858 [2002]). GBL §350, also requires an allegation of reliance on, or knowledge of the defendant's advertisement (Non-Linear Trading Co. v. Braddis Associates, Inc., 243 A.D. 2d 107, 675 N.Y.S. 2d 5 [1st Dept.,1998]).

BCL §1303, permits the NYAG to, "...bring an action to enjoin or annul the authority of a foreign corporation which operates within this state contrary to law, has done or omitted any act which if done by a domestic corporation would be a cause for its dissolution under section 1101(Attorney-general's action for judicial dissolution)..." (McKinney's Con. Laws Annotated, Business Corporation Law §1303). BCL §1303, has been applied to enjoin a foreign corporation from doing business in a fraudulent or illegal manner and the court can grant a decree of forfeiture and annulment of the right to do business in the state of New York (People v. American Ice. Co., 135 A.D. 180, 120 N.Y.S. 41 [1st Dept., 1909]).

The NYAG argues that the DFS games played on the Fanduel, Inc. and Draftkings, Inc. websites constitutes illegal sports gambling as defined in the New York State Constitution Article I, § 9[1] and under Penal Law §225.00-225.40, specifically Penal Law §225.05, §225.10, §225.15 and §225.20 which are alleged to have been violated. It is the NYAG's contention that Penal Law sections §§225.00-225.40, apply to the DFS games played on Fanduel, Inc. and Draftkings, Inc.'s websites, which is "gambling" as defined in Penal Law §225.00 [2], with each player participating in a "contest of chance" as defined in Penal Law §225.00 [1], not a game of skill.

New York State Constitution Article I, §9[1], states in relevant part,

> "...no lottery or the sale of lottery tickets, pool-selling, book making or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, except pari-mutual betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, and except casino gambling at no more than seven facilities as authorized and prescribed by the legislature, shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section." (Emphasis added) (McKinney's Con. Laws Annotated, Const. Art. I, §9[1]).

The provisions of New York State Constitution Article I, §9[1], reflects the public policy of the State of New York against commercialized gambling. The New York State Constitution Article I, §9[1] permits the legislature through the relevant sections of the Penal Law to regulate gambling, the statutory provisions are subject to strict construction and prohibit unauthorized activity. Laws authorizing gambling should not be extended by implication beyond what is specified by the Legislature (New York Racing Ass'n, Inc. v. Hoblock, 270 A.D. 2d 31, 704 N.Y.S .2d 52 [1st Dept., 2000]).

The definition of "gambling" is found in the Penal Law §225.00 [2], which defines gambling as when a person, "... 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." (McKinney's Con. Laws Annotated, Penal Law §225.00[2]). Penal Law §225.00 [6] defines "something of value" as, "...any form of money or property... or credit...involving...a privilege of playing at a game or scheme without charge," the award of a free game has been held a violation of the Penal Law. The term "something of value," is established by the payment of cash to play, and the receipt of a cash award. (Plato's Cave Corp. v. State Liquor Authority,68 NY 2d 791,498 N.E. 2d 420, 506 N.Y.S. 2d 856 [1986]).

It is the NYAG's contention that DFS played on Fanduel, Inc. and Draftkings, Inc., results in customers placing bets labeled "entrance fees" on events they cannot control or influence, relying on the real-game performance of professional athletes, to win a prize, which amounts to gambling as defined in Penal Law §225.00 [2]. The NYAG claims that the "entrance fee" is not returned in the event of a loss and because the statute only requires "something of value," not requiring that it be classified as a "bet or wager" the "entrance fee" is sufficient to establish gambling.

In support of the NYAG's contention, internet screen shots are submitted showing the manner in which a potential DFS player may sign-up for each of the websites. The published rules or terms of use for each website include statements of legality and the finality of the roster. Terms of use and rules for each website establish that a player selects a set number of professional athletes for their DFS team and once the DFS team is selected, the players are "locked in," and the selections may no longer be changed. Scoring for the DFS team is tallied by Fanduel, Inc. and Draftkings, Inc., who rely on individual real game performances of the athletes selected for the DFS team by the online player. The NYAG provided a copy of the DFS scoring system for professional football but the scoring system varies with different types of sports. The terms of use and rules for each website state that points allotted to the DFS team are affected if there is a rain out, postponement, suspension, or shortened game for any of the DFS athletes selected by the player as part of the DFS team. The final tally of a daily or weekly DFS competition occurs when the final box scores of the sporting events of the respective DFS team players have concluded.

The NYAG claims the "entrance fees" a DFS player can pay ranges from $.25 to $10,600.00 on Draftkings, Inc.'s website and from $1.00 to $10,600.00 on Fanduel, Inc.'s website. The amounts of the entrance fee is calculated in part on salary capped at up to $50,000.00 and on the athletes perceived value. There are multiple types of contests a DFS player may enter including, "head to head" match-ups involving a DFS player betting that the line-up they choose will perform better than those picked by another DFS player, and "Guaranteed Prize Pools" involving a pool with up to hundreds of thousand other players. It is also the NYAG's contention that the types of games played are more like "parlay" bets contingent on combinations of games and "prop" bets relying on statistics, than "contests of skill." The NYAG submits advertisements for Fanduel, Inc. and Draftkings, Inc. as proof that they advertise themselves as legal, operate in a manner similar to that of a lottery, and that they claim competitions are "winnable" regardless of the level of skill, with instant gratification to DFS players.

It is the NYAG's contention that both Fanduel, Inc. and Draftkings, Inc. take between 6% and more than 14% of the "entry fee" as "commission" on every competition, and equates this to the equivalent of a "rake" or "vig" charge taken on wagers by a sports bookie. Their terms of use on entry fees are exactly alike, there is no

specific set fee or percentage paid as an entry fee, DFS players participate in a contest with the amount debited from their account determined by Fanduel, Inc. and Draftkings, Inc.. There is no breakdown of fees per type of game, which across different sports can potentially result in multiple entry fees paid daily by the same DFS player, allowing Fanduel, Inc. and Draftkings, Inc. to profit from every entry fee being paid.

Penal Law §225.00 [1] defines "'Contest of Chance' to mean, "...any contest, game, gaming scheme, or gaming device in which the outcome depends in a material degree upon an element of chance, *notwithstanding* that skill of the contestants may also be a factor therein" (emphasis added), (McKinney's Con. Laws Annotated, Penal Law §225.00[1]).

The NYAG contends that DFS played on the websites are "contests of chance" because although the skill of the contestants is a factor, the outcome depends substantially on chance and factors not within the DFS player's control, including whether the athletes chosen are injured, or the game is "rained out." Furthermore, once a team is chosen for a contest there is no means of physically altering the outcome.

Fanduel, Inc. and Draftkings, Inc., do not refute the evidence provided by the NYAG, instead each seeks a preliminary injunction pursuant to CPLR § 6301 and a temporary restraining order pursuant to CPLR § 6313. They argue that DFS games as played on their websites are not illegal gambling. They claim that DFS is a "game of skill" and not a "contest of chance," with DFS players acting like general managers and relying on a team that does not exist in reality. They refer to Humphrey v. Viacom, Inc., 2007 WL 1797648, and the Federal Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) 31U.S.C. §§5362, 5363, as support for their contention that they have the likelihood of success because, they argue, DFS is not illegal gambling as defined in the New York Penal Law §225.00.

CPLR § 6301 grants this court the power to issue an order directing that a party be enjoined from performing an act, or to refrain from performing an act which would be injurious. The issuance of a preliminary injunction is within the discretion of the trial court. A movant seeking a stay or injunction, is required to show, "(1) the likelihood of ultimate success on the merits; (2) irreparable injury to him absent granting of the preliminary injunction; and (3) that a balancing of the equities favors his position" (Doe v. Axelrod, 73 N.Y. 2d 748, 532 N.E. 2d 1272, 536 N.Y.S. 2d 44 [1998] and Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 N.Y. 3d 839, 833 N.E. 2d 191, 800 N.Y.S. 2d 48 [2005]).

A preliminary injunction should not be granted unless its necessity and justification is clear based on undisputed facts (Residential Board of Managers of the Columbia Condominium v. Alden, 178 A.D. 2d 121, 576 N.Y.S. 2d 859 [1st Dept., 1991]). The likelihood of ultimate success on the merits requires a prima facie showing of the right to relief (DiMartini v. Chatham Green, Inc., 169 A.D. 2d 689, 575 N.Y.S. 2d 712 [1st Dept., 1991]). Irreparable injury requires a showing that there is no other remedy at law, including monetary damages, that could adequately compensate the party seeking relief (Zodkevitch v. Feibush, 49 A.D. 3d 424, 854 N.Y.S. 2d 373 [1st Dept., 2008]). The balancing of the equities requires the Court to determine the relative prejudice to each party accruing from a grant or denial of the requested relief (Ma v. Lien, 198 A.D. 2d 186, 604 N.Y.S. 2d 84 [1st Dept., 1993]). CPLR §6313 permits the imposition of a temporary Restraining Order pending the determination of a motion for preliminary

injunction (People v. Asiatic Petroleum Corp., 45 A.D. 2d 835, 357 N.Y.S. 2d 542 [1st Dept., 1974]).

Fanduel, Inc. and Draftkings Inc., each refer to Humphrey v. Viacom, Inc., 2007 WL 1797648 [D.C.N.J., 2007], an unreported decision from the New Jersey U.S. District Court addressing the New Jersey Qui Tam statute (N.J.S.A. 2A:40-1) permitting illegal gambling losers to recover losses. This case has no application in this jurisdiction and is distinguishable. The Court in Humphrey v. Viacom, Inc., granted a motion to dismiss the complaint, and determined that the payment of an entry fee in order to participate in seasonal fantasy sports is not an illegal "wager" or "bet" pursuant to the New Jersey Qui Tam statue. The Court in Humphrey v. Viacom, Inc., stated that, "entry fees do not constitute bets or wagers where they are paid unconditionally for the privilege of participating in a contest, and the prize is for an amount certain that is guaranteed to be won by one of the contestants (but not the entity offering the prize)." Humphrey v. Viacom, Inc., involved seasonal fantasy sports in which the players paid a nonrefundable one time entry fee. Contrary to Humphrey v. Viacom, Inc., the facts in this action involve DFS, the participants pay a fee every time they play, potentially multiple times daily instead of one seasonal entry fee, with a percentage of every entry fee being paid to Fanduel, Inc. and Draftkings, Inc.. Furthermore the New York State Penal Law does not refer to "wagering" or "betting," rather it states that a person, "risks something of value." The payment of an "entry fee" as high as $10,600.00 on one or more contests daily could certainly be deemed risking "something of value." The language of Penal Law §225.00 is broadly worded and as currently written sufficient for finding that DFS involves illegal gambling.

Fanduel, Inc. and Draftkings, Inc. refer to the Federal Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) 31U.S.C. §§5362, 5363, arguing it carves out an exception for Fantasy Sports. UIGEA [1][e][ix], permits participation in, "any fantasy or simulation sports game or educational game or contest in which...no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization..."(31U.S.C. §5362 [1][e][ix]) The UIGEA language exempting fantasy sports has no corresponding authority under New York State law as currently written. UIGEA creates an exception for state statutes, specifically stating, "The term 'unlawful internet gambling' means to place, receive, or otherwise knowingly transmit a bet or wager by means which involves the use, at least in part, of the Internet *where such bet or wager is unlawful under any applicable* Federal or *State Law in the State* or Tribal lands in which the bet or wager is initiated, received or otherwise made (emphasis added) (31U.S.C. §5362 [2],[10][A]). The exception found in UIGEA does not apply under the current New York State statutory language. UIGEA by its own language does not apply to "...placing, receiving, or otherwise transmitting a bet or wager where..(i) the bet or wager is initiated and received or otherwise made exclusively within a single State;..."(31U.S.C. §5362 [2] [10][B][I], [ii]). UIGEA is not a basis to find the NYAG exceeded its authority or to grant Fanduel, Inc. and Draftkings, Inc., the injunctive relief sought.

Fanduel, Inc. and Draftking, Inc.'s claims of laches or estoppel cannot be invoked against a government agency to prevent the discharge of statutory duties where the acts the agency seeks to prevent could easily result in extensive public fraud (Parkview Associates v. City of New York, 71 N.Y. 2d 274 77, 519 N.E. 2d 1372, 525 N.Y.S. 2d 176 [1988] and New York State Medical Transporters Ass'n, Inc. v. Perales, N.Y. 2d 126, 566 N.E. 2d 134, 564 N.Y.S. 2d 1007 [1990]). The possibility of estoppel against a governmental agency is to be denied, in all but the, "rarest of cases" such as where,

(1) there is no awareness of the law sought to be enforced and it could not be discovered by reasonable diligence, (2) there is no potential for public fraud and (3) "manifest injustice" will result (New York State Medical Transporters Ass'n, Inc. v. Perales, N.Y. 2d 126, supra). The DFS corporations, have not stated a basis to find the "rarest of cases" exception applies to the NYAG's claims, and the potential for public fraud has not been eliminated. Defendant's contention that plaintiff failed to seek restraint as to Seasonal Fantasy Sports, is not relevant to the pending motion because that relief is not before this Court.

Draftkings, Inc., has asserted constitutional arguments of violations of due process and equal protection in its Order to Show Cause seeking injunctive relief. Due process requires notice and the opportunity to be heard (People v. Apple Health & Sports Clubs, 80 N.Y. 2d 803, 599 N.E. 2d 279, 587 N.Y.S. 2d 279 [1992]). The NYAG conducted an investigation over the course of a month and provided both notice and an opportunity for Draftkings, Inc. to be heard in the November 10, 2015, "cease and desist letter." Draftkings, Inc. commenced a special proceeding and brought an Order to Show Cause seeking injunctive relief during the period provided by the NYAG. The due process argument fails because Draftkings, Inc. has been provided with the opportunity to be heard by both the NYAG and this Court. The equal protection argument also fails to avoid injunctive relief. Draftkings, Inc. claims that the NYAG is selectively enforcing the illegal gambling provisions of Penal Law §§225.00-225.40, solely against DFS as played on the corporation's website. Draftkings, Inc. is required to provide evidence that other DFS websites or corporations that are "similarly situated" have been exempted by the NYAG from its investigation and enforcement to establish a violation of the equal protection provisions of the Constitution (Dezer Entertainment Concepts, Inc. v. City of New York, 8 A.D. 3d 37, 778 N.Y.S. 2d 18 [1st Dept., 2004]). Draftkings, Inc. failed to provide evidence that "similarly situated" DFS websites were exempted from the NYAG's investigation, such that injunctive relief should be denied.

Draftkings, Inc. asserted the constitutional argument of separation of powers in its Order to Show Cause filed under index # 102014/2015. It fails to establish that the injunctive relief sought by the NYAG should be avoided under the separation of powers doctrine. It is Draftkings, Inc.'s contention that the NYAG by its interpretation of the New York State Constitution, Article I, §9 and the Penal Law, is engaging in "Judicial powers" and "legislative powers" instead of applying executive authority. Draftkings, Inc. claims that the NYAG is applying judiciary power by determining whether a particular individual or company has violated the law and seeking to shut the company down. The November 10, 2015, "cease and desist letter," was not a final determination, and the NYAG in providing the opportunity for Draftkings, Inc. to be heard did not infringe on "judicial powers." The injunctive relief sought by the NYAG is not seeking to determine the ultimate issues raised by the parties.

Draftkings, Inc. claims that the NYAG is engaging in policy decisions that should be restricted to the legislature. The separation of powers is implied in each of the three coordinated branches of government: executive, legislative and judicial. The Legislature's powers involve, "making critical policy decisions, while the executive branch's responsibility is to implement those policies." Although there is a "functional separation" between the legislative and the executive branches they, "...cannot neatly be divided into isolated pockets" (Bourquin v. Cuomo, 85 N.Y. 2d 781, 652 N.E. 2d 171, 628 N.Y.S. 2d 618 [1995]). The four part test for infringement of legislative powers involves determining if an agency, (1) is not authorized to, "structure its decision making in a cost-benefit analysis," (2) create a comprehensive set of rules without guidance from the

legislature, (3) is acting to "fill the vacuum" in an area the legislature had been unable to, "reach an agreement on the goals and methods that should govern" and (4) the technical competence necessary to provide details for broadly stated legislative policies (Boreali v. Axelrod, 71 N.Y. 2d 1, 517 N.E. 2d 1350, 523 N.Y.S. 2d 464 [1987]). The four part test requires proof that the statutory provisions, "have numerous exemptions," there is repeated attempts at legislative enactments with failure to reach an agreement in the legislature after "substantial public debate and vigorous lobbying," and a showing that there is no special expertise or competence of the agency involved (Festa v. Leshen, 145 A.D. 2d 49, 537 N.Y.S. 2d 147 [1st Dept., 1989]). Draftkings, Inc. has not provided any proof in support of the contentions that the NYAG has failed to meet the four part test. The mere assertions that the NYAG fails to meet the requirements is not enough to avoid the injunctive relief sought by the NYAG.

The NYAG in opposition to the separation of powers argument, argues that the injunctive relief sought by Draftkings, Inc. amounts to the extraordinary relief of a writ of prohibition. "The extraordinary remedy of a writ of prohibition lies only where 'there is a clear legal right' to such relief, and only when the body or officer involved acts or threatens to act in a manner over which he or she has no jurisdiction or where he or she exceeds his or her authorized powers..." (Kimyagarova v. Spitzer, 791 N.Y.S. 2d 610 [2nd Dept., 2005]). Draftkings, Inc.'s argument that the NYAG has exceeded its authority and misinterpreted the meaning and application of the New York State Constitution Article I, §9 and the Penal Law, does not require that this Court utilize the extraordinary remedy of restraining the NYAG (Morgenthau v. Erlbaum, 59 N.Y. 2d 143, 451 N.E. 2d 150, 464 N.Y.S. 2d 392 [1983] and Matter of Johnson v. Price, 28 A.D. 3d 79, 810 N.Y.S. 2d 133 [1st Dept., 2006]). Draftkings, Inc. has not established a clear legal right to the injunctive relief sought, prohibiting the NYAG from taking enforcement action.

The NYAG has established the likelihood of success warranting injunctive relief under the authority provided in Executive Law§63[12], to avoid fraudulent or illegal acts and violations of GBL §§349 and 350. The NYAG has a greater likelihood of success on the merits under the New York State Constitution Article I, §9, and the definitions of gambling and "contest of chance" as currently stated in Penal Law §225.00 [1],[2]. The NYAG has also established that both Fanduel, Inc. and Draftkings, Inc., as out of state corporations, can be enjoined-pursuant to BCL §1303-from their activities in the State of New York. The NYAG is not required to show irreparable harm under Executive Law §63[12], it is implied in the need to prevent the effects of fraudulent and illegal conduct on the general public (People v. Apple Health & Sports Clubs, 599 N.Y. 2d 803, supra). The balancing of the equities are in favor of the NYAG and the State of New York due to their interest in protecting the public, particularly those with gambling addictions. Fanduel, Inc. and Draftkings, Inc., are only enjoined and restrained in the State of New York, DFS is permitted in other states, and the protection of the general public outweighs any potential loss of business.

Fanduel, Inc. and Draftkings, Inc. have not established entitlement to a preliminary injunction, however, a granting or denial of a preliminary injunction does not constitute a determination of the ultimate issues (Walker Memorial Baptist Church v. Saunders, 285 N.Y. 462, 35 N.E. 2d 42 [1941] and Jou-Jou Designs, Inc. v. International Ladies Garment Workers' Union, Local 23-25, 94 A.D. 2d 395, 465 N.Y.S. 2d 163 [1st Dept., 1983]). Fanduel, Inc. and Draftkings, Inc.'s failure to establish entitlement to a preliminary injunction, is not a final determination of the merits and rights of the parties, therefore discovery is needed after joinder of issue. The relief sought by Draftkings, Inc.

in its motion papers filed under Index Number 102014/2015, Motion Sequence 001, seeking expedited discovery, hearing and trial, is premature since the NYAG and State of New York have not had an opportunity to answer.

Accordingly, it is ORDERED that the motion by Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, for an Order pursuant to Executive Law §63[12], Business Corporation Law §1303, General Business Law§§ 349 and 350, and CPLR §§6301 and 6313, seeking injunctive relief and a temporary restraining order, enjoining and restraining Fanduel, Inc. from doing business in the State of New York in violation of the New York State Constitution Article I, §[9] and New York Penal Law §225.05, §225.10, §225.15 and §225.20, and from accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on defendant's website, is granted, and it is further,

ORDERED, that Fanduel, Inc., is temporarily enjoined and restrained from doing business in the State of New York, including accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on Fanduel, Inc.'s website pending a final determination, and it is further,

ORDERED, that Fanduel, Inc. shall have thirty (30) days from the service of a copy of this Order with Notice of Entry to serve an answer or otherwise move in the action filed under Index #453056/2015, and it is further,

ORDERED that the motion by Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, filed under Index #453054/2015, Motion Sequence 001, for an Order pursuant to Executive Law §63[12], Business Corporation Law §1303, General Business Law§§ 349 and 350, and CPLR §§6301 and 6313, seeking injunctive relief and a temporary restraining order, enjoining and restraining Draftkings, Inc. from doing business in the State of New York in violation of the New York State Constitution Article I, Section§[9] and New York Penal Law §225.05, §225.10, §225.15 and §225.20, and from accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run on defendant's website, is granted, and it is further,

ORDERED, that Draftkings, Inc., is enjoined and restrained from doing business in the State of New York, including accepting entry fees, wagers, or bets from New York State consumers in regards to any competition, game or contest run on Draftkings, Inc.'s website until a final determination, and it is further,

ORDERED, that Draftkings, Inc. shall have thirty (30) days from the service of a copy of this Order with Notice of Entry to serve an answer or otherwise move in the action filed under Index #453054/2015, and it is further,

ORDERED, that Fanduel, Inc.'s motion filed under Index Number 161691/2015, Motion Sequence 001, seeking an Order pursuant to CPLR §§6301 and 6313, granting a preliminary injunction and temporary restraining order enjoining Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, and the State of New York, from taking any enforcement action or other action derived from any allegation that the operation of daily fantasy sports contests are a violation of law, against Fanduel, Inc., and its employees, agents and suppliers of goods and services, is denied, and it is further,

ORDERED, that the office of Eric T. Schneiderman, in his offical capacity as Attorney General of the State of New York, and the State of New York shall serve an answer or otherwise move in the action filed by Fanduel, Inc. under Index #161691/2015 within thirty (30) days of service of a copy of this Order with Notice of Entry, and it is further,

ORDERED, that Draftkings, Inc.'s motion filed under Index #102014/2015, Motion Sequence 001, seeking an Order, granting a preliminary injunction and temporary restraining order enjoining Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, from taking any enforcement action or other action, against Draftkings, Inc., and its employees, agents and suppliers of goods and services, seeking expedited discovery, hearing and trial, is denied, and it is further,

ORDERED, that the office of Eric T. Schneiderman, in his offical capacity as Attorney General of the State of New York, shall serve an answer or otherwise move in the proceeding filed by DraftKings,Inc. under Index # 102014/2015 within thirty (30) days of service of a copy of this Order with Notice of Entry.

ENTER:

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ,
J.S.C.

Dated: December 11, 2015

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

CERTIFICATE OF SERVICE

Karen L. McNaught, Assistant Attorney General, herein certifies that she has served a copy of the foregoing Memorandum of Law In Support of Attorney General's Motion to Dismiss upon:

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by sending an electronic copy to the electronic addresses as listed above and by causing a true copy thereof at the address referred to above in an envelope duly addressed bearing proper first class postage to be deposited in the United States mail at Springfield, Illinois on January 22, 2016.

s/ Karen L. McNaught
Karen L. McNaught
Assistant Attorney General

EFILED
3/5/2018 10:25 AM
Paul Palazzolo
7th Judicial Circuit
Sangamon County, IL

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

FANDUEL, INC., *et al.* Plaintiffs, v. LISA M. MADIGAN, in her official capacity as Attorney General of the State of Illinois, Defendant.	)	Case No. 2015 MR 001136 The Hon. John M. Madonia
DRAFTKINGS, INC., Plaintiff, v. LISA M. MADIGAN, in her official capacity as Attorney General of the State of Illinois, Defendant.	)	

PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE PURSUANT TO 735 ILCS 5/2-1009

Plaintiffs FANDUEL, INC., HEAD2HEAD SPORTS LLC, and DRAFTKINGS, INC. (together, "Plaintiffs"), by and through their attorneys, hereby move for voluntary dismissal pursuant to 735 ILCS 5/2-1009, as follows:

1. On January 22, 2016, the Attorney General moved to dismiss Plaintiffs' complaints on a number of grounds including that: (1) her December 23, 2015 Opinion regarding fantasy sports contests ("the Opinion") was an advisory opinion not "subject to enforcement in a court of law" (AG's Memo. of Law in Support of Mot. to Dismiss at 6); (2) she has not "threatened [Plaintiffs] with any criminal prosecution, nor could she, because under Illinois law, she does not have primary enforcement powers in such matters;" (*id.* 7); (3) and that "[Plaintiffs] do not and

cannot allege that the Attorney General threatened [Plaintiffs] with any civil enforcement action." (*id.*).

2. Additionally, many other states, including some of the states cited in the Opinion, have passed legislation regarding fantasy sports contests, finding them to be lawful contests of skill.
3. Accordingly, Plaintiffs move voluntarily to dismiss this action without prejudice.
4. There is no reason for the court to rule on the Attorney General's pending motion to dismiss because granting the motion would result in the same outcome as granting Plaintiffs' motion for voluntary dismissal without prejudice.

NOW, THEREFORE, pursuant to 735 ILCS 5/2-1009, Plaintiffs ask that the above-captioned matter shall be dismissed without prejudice, with Plaintiffs to pay statutory costs upon presentment.

[signature page to follow]

Dated: March 5, 2018

Respectfully submitted,

FANDUEL, INC., and HEAD2HEAD SPORTS LLC

By: s/Gabriel A. Fuentes
One of Their Attorneys

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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

FANDUEL, INC., *et al.* Plaintiffs, v. LISA M. MADIGAN, in her official capacity as Attorney General of the State of Illinois, Defendant.	)	Case No. 2015 MR 001136 The Hon. John M. Madonia
DRAFTKINGS, INC., Plaintiff, v. LISA M. MADIGAN, in her official capacity as Attorney General of the State of Illinois, Defendant.	)	

FILED
MAR 07 2018
36
Clerk of the Circuit Court

[PROPOSED] ORDER OF DISMISSAL WITHOUT PREJUDICE

This cause coming to be heard on the Motion by Plaintiffs FANDUEL, INC., HEAD2HEAD SPORTS LLC, and DRAFTKINGS, INC. (together, "Plaintiffs"), for voluntary dismissal pursuant to 735 ILCS 5/2-1009, notice having been given, and the Court being fully advised in the premises, IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Voluntary Dismissal Is GRANTED.
2. This Dismissal is without prejudice to refiling.
3. Plaintiffs shall pay statutory costs upon presentment.

SO ORDERED:

Dated: Mar. 7, 2018

Hon. John M. Madonia
Circuit Judge

VICE & IMMORALITY.

AN ACT

For the prevention of Vice and Immorality.

Passed Sept. 17, 1807.

Sunday or 1st day of the week how to be kept and observed under what penalties.

Sec. 1. If any person shall be found revelling fighting or quarrelling, doing or performing any worldly employment, or business whatsoever, on the first day of the week, commonly called Sunday (works of necessity or charity only excepted) or shall use or practise any unlawful game, sport or diversion, whatsoever, or shall be found hunting or shooting, on the said day, and be convicted thereof; every such person, so offending, shall for every such offence, forfeit and pay a sum not exceeding two dollars, nor less than fifty cents, to be levied by distress; or in case such person being a male, shall refuse or neglect to pay the said sum; or goods and chattels cannot be found whereof to levy the same by distress, he shall be committed to the charge of one of the supervisors of the highways, in the township wherein the offence was committed, to be kept at hard labor for the space of two days: *Pro-*

vided always, That nothing herein contained shall be construed to hinder watermen from landing their passengers, or ferrymen from carrying over the water, travellers, or persons removing with their families, on the first day of the week, commonly called Sunday.

Proviso in favor of ferry men.

Sec. If any person of the age of sixteen years and upwards, shall profanely curse, damn or swear, by the name of God, Christ Jesus, or the Holy Ghost; every person so offending, being thereof convicted, shall forfeit and pay for every such profane curse, damn, or oath, a sum not exceeding two dollars, nor less than fifty cents, at the discretion of the Justice, who may take cognizance thereof; and in case he shall refuse or neglect to pay the said forfeiture; or goods and chattels cannot be found, whereof to levy the same by distress, he shall be committed to the charge of one of the supervisors of the highways of the township where the offence was committed, to be kept at hard labor for the space of two days for every such offence, of which such person shall be convicted.

rofone P rsons swea ring what

And how punished

Sec. 3. If any person shall presume to appear before any court of justice within this territory, before any judge or justice of the peace, when acting as such, or before any congregation, assembled for public worship, and there make use of profane swearing, or other disorderly behavior, the effect of which would have an evident tendency to disturb that good order, to be observed on those occasions; if before a court of justice, he shall be fined in any sum not exceeding

Swearing & disorderly be havior before congrega tions &c. what and how punished

fifty nor less than five dollars; if before a Judge or Justice of the Peace, he or she shall be fined in any sum not exceeding ten, nor less than three dollars; if before any congregation assembled for divine worship, he, or she so offending, shall be fined in any sum not exceeding ten, nor less than three dollars; and it shall be the duty of any Justice of the Peace within this Territory, the same coming within his knowledge, or upon information by one or more credible witnesses, to issue his warrant and have the offender brought forthwith before him, and shall immediately assess his fine and for want of sufficient goods and chattels, belonging to the defendant, to be by him shewn to satisfy the fine and costs, aforesaid, the said Justice shall commit the offender to the jail of the proper county where the offence was committed: *Provided,* That nothing herein contained, shall be so construed, as to prevent any court of justice from punishing the like offenders, in the manner herein before mentioned.

Proviso in favor of courts of justice

Drunkenness who and how punished

Sec. 4. If any person of the age of sixteen years or upwards, shall be found in the public highway or in any public house of entertainment, intoxicated by excessive drinking of spiritous, vinous, or other strong liquors, and making or exciting any noise, contention or disturbance, it shall be lawful for any Justice of the Peace, on complaint or view, to cause such person or persons to be committed to the common jail of the county, there to remain for a term of time not exceeding forty eight hours; and every person so committed, shall pay the fees arising on such commitment; and if any person shall

be found offending as aforesaid, at any greater distance than five miles from the county jail; it shall be lawful for any justice of the peace, to commit such person or persons to the custody of any constable within the township, for the like term of time, to be by such constable confined in any proper and convenient place, for the like term of time; and the said constable shall be entitled to receive the same fees, as are allowed to the keeper of the jail in the like cases.

Judges and justices to take cognizance

Sec. 5. Every Judge of the court of Common pleas, and every justice of the peace, within the limits of their several jurisdictions, are hereby empowered, authorised & required, to proceed against, and to punish all persons offending against the preceeding sections of the law, and for that purpose each of the said judges or justices, severally, may convict such offenders upon his own view and hearing, or shall issue if need be, a warrant, summons or capias, according to the circumstance of the case, to bring the body of the person accused, as aforesaid, before him; and the same judges or justices, shall respectively, in a summary way, enquire into the truth of the accusation, and upon the testimony of one or more credible witnesses, or the confession of the party, shall convict the person who shall be guilty as aforesaid, and thereupon shall proceed to pronounce the forfeiture incurred by the person so convicted as herein before directed; and if the person so convicted, refuse, or neglect, to satisfy such forfeiture immediately, with costs, or to produce goods and chattels, whereupon to levy

May convict on view

In a summary way

And pronounce judgment

Failing to satisfy fine, to work on public highways

the said forfeiture, together with costs, then the said judge, or justice shall commit the offender to one of the supervisors of the highways, as aforesaid during such time as is herein before directed; and every such conviction may be in the following words, to wit:

Form of conviction and execution

'Be it remembered, that on the day of in the year of A B, of the county labourer, (or otherwise, as his rank, occupation, or calling may be) is convicted before me, being one of the judges, or justices, &c. in the county of of swearing profane oath or oaths, by the name of (or otherwise as the offence and case may be) and I do adjudge him to forfeit for the same, the sum of and for want of goods and chattels to be by the offender shewn, whereon to levy &c. you are to take his body into custody, and him forthwith convey to one of the supervisors of the highways of the township &c. who is commanded hereby, to receive and keep him at hard labour, on the highway, for the space of two days.—Given under my hand and seal the day and year aforesaid.'

Limitation.

Provided, That every such prosecution be commenced within seventy-two hours after the offence shall be committed.

Cock fighting

Sec. 6. If any person or persons, shall cause to fight any cock or cocks, for money, or any other valuable thing, or shall promote or encourage any match, or matches of cock fighting, by betting thereon, or shall play at any

Bullet playing

match of bullets, in any place, for money, or other valuable thing, or on any highway, or public road, with, or without a bet, or shall play at cards, dice, billiards, bowls, shovel board, or any game at hazard, or address, for money, or other valuable thing, every such person so offending, shall, upon conviction thereof, before any justice or magistrate as aforesaid, forfeit and pay three dollars for every such offence; and if any person or persons, shall run any horse mare or gelding, in any street, or public highway; every person so offending, shall, on conviction thereof before any justice of the peace, or on the view of such justice, forfeit and pay the sum of five dollars, with costs.

Cards, dice &c. how punished

Runing horses in public roads

How punished

Sec. 7. No E Q table, or other device, except as hereinafter excepted, shall be set up or maintained, in any dwelling house, out house, or other place, by any person whatsoever; on pain of forfeiting every such E O table, or other device, and of forfeiting moreover, the sum of fifty dollars; and upon conviction thereof, before any court having competent jurisdiction, held for the county wherein the offence shall be committed: *Provided always,* That nothing in this act contained, shall be construed so as to prohibit private families, from exercising their free will, within their own private houses for their amusement, in a peaceable manner: *Provided also,* That no person shall set up, or suffer to be set up, or kept in his or her house, barn, stable, or other out house, arbor, or bower, or yard, any table or other thing reputed as a gaming table, or

Keeping E. Q. and other tables

How punished

Proviso in favor of private amusements.

other device, for the purpose of encouraging gaming.

Securities made or entered into for gaming void.

Sec. 8. If any person or persons shall loose any money, or valuable thing, at, or upon any match of cock fighting, bullet playing, or horse racing, or at, or upon any game of address, game of hazard, play, or game whatsoever, the person or persons who shall loose their money, or other valuable thing, shall not be compelled to pay, or make good the same. And any contract, note, bill, bond, judgment, mortgage, or other security or conveyance whatsoever, given, granted, drawn or entered into for the security or satisfaction of the same, or any part thereof, shall be utterly void, and of no effect.

Money &c. lost at gaming may be recovered back within 30 days

Sec. 9. If any person or persons shall loose any money, or other thing of value, at, or upon any game of address, or of hazard, or other play, and shall pay, or deliver the same, or any part thereof; the person or persons, so loosing and paying, or delivering the same, shall have a right within thirty days, then next thereafter, to sue for, and recover the money or goods, so lost and paid or delivered, or any part thereof, from the respective winner or winners thereof, with costs of suit, by action of debt, or case,

Where to be prosecuted

founded on this act, to be prosecuted in any court of record, or where the value is within the sum cognizable by a single justice, the same may be recovered before any justice of the peace within this territory, subject to an appeal as in other cases.

Boxing etc. what

Sec. 10. If any pereon or persons, shall challenge another to fight or box at fisticuffs, or

with the intent to bring on a match at boxing, shall in words or gesture, endeavour to provoke any other person or persons to commit an affray, whether an affray ensues or not, every person so offending, on conviction thereof, shall forfeit and pay for every such offence, a sum not exceeding five dollars, nor less than one dollar; and every magistrate of the county, where the offence shall have been committed, shall have cognizance thereof; *Provided however,* That such prosecution be commenced within four days from the time the offence was committed.

And how punished.

Limitation.

Sec. 11. If any person within this territory, shall challenge by word, or in writing, the person of another, to fight at sword, rapier, pistol, or other deadly weapon, the person so challenging, shall forfeit and pay for every such offence, being thereof lawfully convicted, in any court of record within the county wherein the offence shall be committed, having competent jurisdiction, by the testimony of one or more witnesses, or by the confession of the party offending a sum not exceeding two hundred and fifty dollars, nor less than fifty dollars; or shall suffer imprisonment for a term not exceeding twelve months, nor less than three months, without bail or mainprize; and the person who shall accept any such challenge, shall in like manner upon conviction, forfeit and pay a sum not exceeding one hundred dollars; or shall suffer such imprisonment, for a term not exceeding six months; nor less than one month; and if any person, shall willingly and knowing-

Duels what.

Prosecutions where to be brought.

Carriers of challenges &c.

ly, carry and deliver any written challenge, or or shall verbally deliver any message, purporting to be a challenge, or shall consent to be a second in any such intended duel, and shall be legally convicted thereof, as aforesaid, the person so offending, shall for every such offence, forfeit and pay a sum not exceeding one hundred dollars, nor less than fifty dollars; or shall suffer imp isonment for a term not exceeding six months, or less than one month, as aforesaid.

How punish ed.

Nature of prosecutions under this act & whe e commenced.

Sec. 12. All prosecutions under this act shall be by action of debt, or trespass on the case, or by indictment, where the penalty exceeds a magistrate's jurisdiction; and all fines and penalties set or imposed, and paid by virtue of the provisions herein contained, shall be paid into the treasury of the county, in which such fine or penalty shall be set or imposed, for the use of the said county: *Provided always,* That no person shall be prosecuted for any offence against this act, except such offences as are enumerated in the tenth section thereof, unless such prosecution be commenced, within thirty days after the offence has been committed.

In what time to be commenced.

Persons com mitted to su pervi ors refusing to labor to be im prisoned.

Sec. 13. If any person or persons who shall be committed to the supervisor of the highways, by virtue of any of the provisions herein contained; shall disobey the orders or directions of the said supervisor; it shall be lawful for the said supervisor, to commit such person or persons to the jail of the county, there to remain until the expiration of the time, for which such person or persons may have been sen-

tenced to labor on the highway; and the said supervisor shall endorse his order of commitment, on the magistrate's warrant, and transmit the same to the jailor, who is hereby directed on the receipt thereof, to receive such person or persons, and commit him or them accordingly.

For the same term for which he was sentenced to labor. M nner of commitment

Sec. 14. If any person or persons shall wilfully and maliciously deface, obliterate, tear down, or destroy, in part, or in the whole, any copy or transcript of, or extract from, any act or law, passed by the legislature of this territory, or by the legislative authority of the United States, or proclamation of the President of the United States, or of the Governor and Commander in Chief of this territory; the same being officially fixed up in some conspicuous place by public authority, for general information; every person so offending, shall on conviction before a magistrate, forfeit and pay to the use of the territory, for every such offence, a sum not exceeding three dollars, besides costs, or be set in the stocks, at the discretion of such magistrate, for a space not exceeding three hours; or in case the offender shall be unable, or refuse to pay such fine (he being fined) then he shall be set in the stocks, for a space not exceeding three hours, and be afterwards discharged on paying costs only.

Tearing down or defacing publi cation set up by authority.

How punished.

Sec. 15. If, as aforesaid, any person shall wilfully and maliciously deface, obliterate, tear down or destroy, in part, or in the whole, any publication of the banns of matrimony, or advertisement respecting estrays, or any other notification, set up in pursuance of any act or

Tearing down or def acing bann of matrimo ny.

How punished.

law, now, or which hereafter may be in force within this Territory; such offender shall for every such offense, of which he may be convicted, as aforesaid, be set in the stocks for three hours, and pay costs or stand committed to prison till the same are paid; any thing in this, or any other act or law, to the contrary, notwithstanding.

No lotteries to be carried on.

Sec. 16. No person in order to raise money or other property for himself or another shall publickly or privately put up a lottery of blanks and prizes, to be drawn or adventured for, or any prize or thing to be raffled or played for;

under what penalty.

whoever shall offend herein, shall forfeit to the use of the territory, the whole sum of money, or property proposed to be raised or gained.

Courts to give this act in charge to juries.

Sec. 17. The presiding Judge or Justice in the several courts of law, shall at every court, give this act in charge to the Grand Jury, as soon as sworn.

SECT. 2. *And be it further enacted*, That there shall be nothing contained in this act, to deprive the said inhabitants of Cahokia, from leasing, selling or dividing all the land that was surveyed and laid off in a town on the commons of Cahokia, nearly opposite east of St. Louis, in the Missouri territory, and said land shall be vested in such inhabitants in the same manner as it was before the passage of this act.

SECT. 3. *And be it further enacted*, That the said inhabitants of Cohokia and Prairie Dupont, shall and may assemble in some public place of their respective villages, on the first Monday of March, in each year and choose three fit persons out of such inhabitants, to be styled the trustees of the common, of each village respectively. For the first election some justice of the peace of the county shall be present, and certify who are chosen to said office; and forever after, the said trustees shall certify the same to the succeeding trustees that may be chosen, and be present at the nomination.

SECT. 4. *And be it further enacted*, That when duly elected, said trustees shall have power to sue and be sued in right of said common, and to do all other business necessary to the right management of said common, for its inhabitants and owners respectively. And all such legal acts and doings of said trustees, shall be binding on said inhabitants, when said acts and doings are for the benefit of said inhabitants.

AN ACT for the prevention of Vice and Immorality.

APPROVED, March 5, 1819.

[SECT. 1.] *Be it enacted by the people of the state of Illinois represented in the general assembly*, That if any person shall be found rebelling, fighting, or quarrelling, doing or performing any worldly employment or business whatsoever on the first day of the week commonly called Sunday, (works of necessity and charity only excepted) or shall use or practise any unlawful game, sport, or diversion whatsoever, or shall be found hunting or shooting on the said day, and be convicted thereof, every such person so offending, shall forfeit and pay the sum of two dollars, to be levied by distress, or in case such person, being a male, shall refuse or neglect to pay the same, or goods and chattels cannot be found, whereof to levy the same by distress, shall be punished in the manner specified in the fourth section of this act: *Provided always*, That nothing herein contained shall be construed to hinder watermen from

landing their passengers, or ferrymen from carrying over the water, travellers or persons removing with their families, on the first day of the week, commonly called Sunday.

SECT. 2. If any person of the age of sixteen years and upwards, shall profanely curse, damn, or swear, by the name of God, Christ Jesus, or the Holy Ghost; every person so offending, and being thereof convicted, shall forfeit and pay, for every such profane (curse, dam, or) oath, a sum not exceeding two dollars, nor less than fifty cents, at the discretion of the justice who may take cognizance thereof: and in case he shall refuse or neglect to pay the said forfeiture, he shall suffer imprisonment as specified in the fourth section of this act.

SECT. 3. If any person shall appear before any court of justice within this state, before any judge or justice of the peace, when acting as such, or before any congregation assembled for public worship, and there make use of profane swearing, or other disorderly behavior, the effect of which would have an evident tendency to disturb that good order to be observed on those occasions; if before a court of justice, he shall be fined in any sum not exceeding fifty nor less than five dollars; if before a judge or justice of the peace, he or she shall be fined in a sum not exceeding ten nor less than three dollars; if before any congregation assembled for divine worship, he or she so offending shall be fined in any sum not exceeding ten nor less than three dollars. And it shall be the duty of any justice of the peace within this state, the same coming within his knowledge, or upon information of one or more credible witnesses, to issue his warrant and have the offender brought forthwith before him, and shall immediately assess his fine, and for want of sufficient goods and chattels to be by him shewn to satisfy the fine and costs aforesaid, the said justice shall commit the offender to the jail of the proper county, where the offence was committed: *Provided*, That nothing herein contained shall be so construed as to prevent any court of justice from punishing the like offenders in the manner herein before mentioned.

SECT. 4. If any person of the age of sixteen years or upwards, shall be found in the public highway or in any public house of entertainment, intoxicated by excessive drinking of spirituous, vinous, or other strong liquors, and making or exciting any noise, contention, or disturbance, it shall be lawful for any justice of the peace, on complaint or view, to cause such person or persons to be committed to the common jail of the county, there to remain for a term of time not exceeding forty-eight hours; and every person so committed shall pay

the fees arising on such commitment. And if any person shall be found offending as aforesaid, at any greater distance than five miles from the county jail, it shall be lawful for any justice of the peace to commit such person or persons to the custody of any constable within the township, for the like term of time, to be by such constable confined in any proper and convenient place for the like term of time; and the said constable shall be entitled to receive the same fees as are allowed to the keeper of the jail in like cases.

SECT. 5. Every justice of the peace, within the limits of their several jurisdictions, are hereby empowered, and authorized and required, to proceed against, and punish, all persons offending against the preceding sections of this law; and for that purpose each of the said justices may convict such offenders upon his own view and hearing, or shall issue, if need be, a warrant, summons, or capias, according to the circumstances of the case, to bring the body of the person accused, as aforesaid, before him; and the justices shall respectively, in a summary way, inquire into the truth of the accusation, and upon the testimony of one or more credible witnesses, or the confession of the party, shall convict the person who shall be guilty as aforesaid, and thereupon shall proceed to pronounce the forfeiture incurred by the person so convicted as herein before directed; and if the person so convicted, refuse or neglect to satisfy such forfeiture immediately, with costs, or to produce goods and chattels whereupon to levy the said forfeiture, with costs, then the said justice shall commit the offender to prison as mentioned in the fourth section of this act: and every such commitment may be in the following words, to-wit:

Be it remembered, on the —— day of —— in the year of —— A. B. of the county of —— laborer (or otherwise, as the case may be) is convicted before me, being one of the judges, or justices, &c. in the county of —— of swearing a profane oath or oaths by the name of —— (or otherwise as the case may be) and I do adjudge him to forfeit for the same the sum of —— and for want of goods and chattels to be by the offender shewn, whereon to levy the same, you are to take his body into custody, and him keep and imprison in any proper and convenient place, for the space of —— hours (or if within five miles of the county jail where the offence shall be committed) and him forthwith convey to the jail of —— county, and the keeper of said jail is hereby required to receive and confine his body in said jail for the space of —— hours. Given under my hand and seal, the day and year aforesaid. *Provided,*

That every such prosecution be commenced within seventy-two hours after the offence shall be committed.

SECT. 6. If any person or persons shall play at cards, dice, billiards, bowls, shovel board, or any game of hazard or address, for money or other valuable thing, every such person so offending, shall, upon conviction thereof, before any justice as aforesaid, forfeit and pay ten dollars for every such offence; and if any person or persons shall run any horse, mare, or gelding, in any street or public highway, every person so offending, shall, on conviction thereof before any justice of the peace, or on the view of such justice, forfeit and pay the sum of ten dollars, with costs.

SECT. 7. No E. O. table or other device, except as hereinafter excepted, shall be set up or maintained in any dwelling house, out house, or other place, by any person whatsoever, on pain of forfeiting every such E. O. table or other device, and of forfeiting moreover the sum of fifty dollars; and upon conviction thereof, before any court having competent jurisdiction, held for the county wherein the offence shall be committed: *Provided always*, That nothing in this act contained, shall be construed so as to prohibit private families to exercise their free will within their own private houses, for their amusement in a peaceable manner: *Provided also*, That no person shall set up or keep in his or her house, barn, stable, or other out houses, arbour, or bower, or yard, any table or other thing reputed as a gaming table, or other device, for the purpose of encouraging gaming.

SECT. 8. If any person or persons shall loose any money or valuable thing, at, or upon, any horse race, or at or upon any game of address, game of hazard, play, or game whatsoever, the person or persons who shall loose their money or other valuable thing, shall not be compelled to pay, or make good the same. And any bond, note, contract, judgment, mortgage, or other security or conveyance whatsoever, given, granted, drawn, or entered into, for the security or satisfaction of the same, or any part thereof, shall be utterly void and of no effect.

SECT. 9. If any person or persons shall loose any money or other thing of value, at or upon any game of address, or of hazard, or other play, and shall pay or deliver the same or any part thereof, the person or persons so loosing and paying or delivering the same, shall have the right, within thirty days, then next thereafter, to sue for, and recover the money or goods so lost and paid or delivered, or any part thereof, from the respective winner or winners thereof, with costs of suit, by action of debt or case, founded on this act, to be pros-

ecuted in any court of record, or where the value of the same is cognizable before a justice of the peace, the same may be recovered before any justice of the peace within this state, subject to an appeal as in other cases.

SECT. 10. If any person or persons shall wilfully and maliciously deface, obliterate, tear down, or destroy, in part or in the whole, any copy or transcript of an extract from any act or law passed by the legislature of this state, or by the legislative authority of the United States, or proclamation of the President of the United States, or of the governor or commander in chief of this state, the same being officially fixed up in some conspicuous place by public authority for general information, every person so offending, shall, on conviction, before a magistrate, forfeit and pay to the use of the county, for every such offence, a sum not exceeding twenty dollars, besides costs; and on failure to pay the same shall be committed to jail for the term of ten days, and be afterwards discharged on paying costs only.

SECT. 11. If as aforesaid, any person shall wilfully and maliciously deface, obliterate, tear down, or destroy in part, or in the whole, any publication of the banns of matrimony, or advertisement respecting estrays, or any other notification set up in pursuance of any law, now or which hereafter may be force in this state, such offender shall, for every such offence of which he may be convicted as aforesaid, be fined or imprisoned as is pointed out in the tenth section of this act.

SECT. 12. No person in order to raise money or other property for himself or another, shall publicly or privately put up a lottery of blanks and prizes, to be drawn or adventured for, or any prize or thing to be raffled or played for, whoever shall offend herein shall forfeit to the use of the county, the whole sum of money or property proprosed to be raised or gained.

AN ACT for the relief of the Poor.

APPROVED, March 5, 1819.

[SECT. 1.] *Be it enacted by the people of the state of Illinois represented in the general assembly*, That the county commissioners in the several counties in this state, at every first session of their court, yearly and every year after the first day of January, shall nominate and appoint two substantial inhabitants of every township within their respective jurisdictions, to be overseers of the poor of such township.

AN ACT to restrain Gaming.

In force January 16, 1827.

SEC. 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly,* That all promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages, or other securities or conveyances made, given, granted, drawn, or entered into, or executed, by any person or persons whatsoever, where the whole, or any part of the consideration thereof, shall be for any money, property, or other valuable thing, won by gaming, or playing at cards, dice, or any other game or games, or by betting on the side or hands of any person gaming, or for the reimbursing or paying any money or property, knowingly lent or advanced, at the time and place of such play, to any person or persons so gaming or betting; or that shall, during such play, so play or bet, shall be void and of no effect.

All contracts upon gaming consideration declared void.

SEC. 2. Any person who shall, at any time or sitting, by playing at cards, dice, or any other game or games, or by betting on the side or hands of such as do game, lose to any one or more persons, so playing or betting, any sum or sums of money, or other valuable thing, amounting in the whole to the sum of ten dollars, and shall pay or deliver the same, or any part thereof, the person or persons so losing and paying or delivering the same, shall be at liberty to sue for and recover the money, goods, or other valuable thing, so lost and paid or delivered, or any part thereof, or the full value of the same, by action of debt, detinue, assumpsit or trover, from the respective winner or winners thereof, with costs, in any court of competent jurisdiction; in which action it shall be sufficient for the plaintiff to declare generally, as in actions of debt or assumpsit for money had and received by the defendant to the plaintiff's use; or as in actions of detinue or trover upon a supposed finding, and the detaining or converting the property of the plaintiff to the use of the defendant, whereby an action hath accrued to the plaintiff, according to the form of this act, without setting forth the special matter. In case the person or persons who shall lose such money or other thing, as aforesaid, shall not, within six months, really and *bona fide*, and without covin or collusion, sue, and with effect prosecute, for such money, or other thing, by him lost and paid or delivered, as aforesaid, it shall be lawful for any other person to sue for, and recover, treble the value of the money, goods chattels, and other things, with costs of suit, by special action on the case, against such winner or winners aforesaid; one half to the use of the county, and the other to the person suing.

Persons losing may recover back money paid if it amounts to $10

By the ordinary actions

The loser must sue within six months or any other person after that time may treble the value

All contracts, judgments, &c. upon gaming contracts may be set aside in equity

SEC. 3. All judgments, mortgages, assurances, bonds, notes, bills, specialties, promises, covenants, agreements, and other acts, deeds, securities, or conveyances, given, granted, drawn or executed contrary to the provisions of this act, may be set aside and vacated by any court of equity, upon bill filed for that purpose, by the person so granting, giving, entering into, or executing the same, or by his executors or administrators; or by any creditor, heir, devisee, purchaser, or other person interested therein; or if a judgment, the same may be set aside, on motion of any person aforesaid, on due notice thereof given.

Assignments will not affect the defence in such cases

SEC. 4. No assignment of any bill, note, bond, covenant, agreement, judgment, mortgage or other security or conveyance as aforesaid, shall in any manner affect the defence of the person giving, granting, drawing, entering into or executing the same, or the remedies of any person interested therein.

The parties entitled to a discovery

SEC. 5. In all actions or other proceedings commenced or prosecuted under the provisions of this act, the parties shall be entitled to discovery as in other actions, and all persons shall be obliged and compelled to answer, upon oath, such bill or bills as shall be preferred against them for discovering the sum or sums of money, or other thing so won as aforesaid. Upon the discovery and repayment of the money, or other thing so to be discovered and repaid, the person or persons who shall discover and repay the same, as aforesaid, shall be acquitted, indemnified and discharged from any other or further punishment, forfeiture or penalty, which he or they might have incurred, by the playing for, or winning such money or other thing, so discovered or repaid as aforesaid. All acts and parts of acts coming within the provisions of this act, are hereby repealed.

Acts repealed

[*Approved, Jan.* 16, 1827.]

HABEAS CORPUS.

In force June 1 1827

AN ACT regulating the proceedings on writs of Habeas Corpus.

Applications for habeas corpus, how and to whom made

SEC. 1. *Be it enacted by the People of the State of Illinois represented in the General Assembly*, That if any person shall be, or stand committed, or detained for any criminal or supposed criminal matter, it shall and may be lawful, for him to apply to the supreme or circuit courts in term time, or any judge thereof, in vacation, for a writ of *habeas cor-*

S.B. 690, 101st Gen. Assemb. Reg. Sess. §25-10

Section 25-5. Legislative findings. The General Assembly recognizes the promotion of public safety is an important consideration for sports leagues, teams, players, and fans at large. All persons who present sporting contests are encouraged to take reasonable measures to ensure the safety and security of all involved or attending sporting contests. Persons who present sporting contests are encouraged to establish codes of conduct that forbid all persons associated with the sporting contest from engaging in violent behavior and to hire, train, and equip safety and security personnel to enforce those codes of conduct. Persons who present sporting contests are further encouraged to provide public notice of those codes of conduct.

Section 25-10. Definitions. As used in this Act:

"Adjusted gross sports wagering receipts" means a master sports wagering licensee's gross sports wagering receipts, less winnings paid to wagerers in such games.

"Athlete" means any current or former professional athlete or collegiate athlete.

"Board" means the Illinois Gaming Board.

"Covered persons" includes athletes; umpires, referees, and officials; personnel associated with clubs, teams, leagues, and athletic associations; medical professionals (including athletic trainers) who provide services to athletes and players; and the family members and associates of these persons where required to serve the purposes of this Act.

"Department" means the Department of the Lottery.

"Gaming facility" means a facility at which gambling operations are conducted under the Illinois Gambling Act, pari-mutuel wagering is conducted under the Illinois Horse Racing Act of 1975, or sports wagering is conducted under this Act.

"Official league data" means statistics, results, outcomes, and other data related to a sports event obtained pursuant to an agreement with the relevant sports governing body, or an entity expressly authorized by the sports governing body to provide such information to licensees, that authorizes the use of such data for determining the outcome of tier 2 sports wagers on such sports events.

"Organization licensee" has the meaning given to that term in the Illinois Horse Racing Act of 1975.

"Owners licensee" means the holder of an owners license under the Illinois Gambling Act.

"Person" means an individual, partnership, committee, association, corporation, or any other organization or group of persons.

"Personal biometric data" means an athlete's information derived from DNA, heart rate, blood pressure, perspiration rate, internal or external body temperature, hormone levels, glucose levels, hydration levels, vitamin levels, bone density, muscle density, and sleep patterns.

"Prohibited conduct" includes any statement, action, and

other communication intended to influence, manipulate, or control a betting outcome of a sporting contest or of any individual occurrence or performance in a sporting contest in exchange for financial gain or to avoid financial or physical harm. "Prohibited conduct" includes statements, actions, and communications made to a covered person by a third party, such as a family member or through social media. "Prohibited conduct" does not include statements, actions, or communications made or sanctioned by a team or sports governing body.

"Qualified applicant" means an applicant for a license under this Act whose application meets the mandatory minimum qualification criteria as required by the Board.

"Sporting contest" means a sports event or game on which the State allows sports wagering to occur under this Act.

"Sports event" means a professional sport or athletic event, a collegiate sport or athletic event, a motor race event, or any other event or competition of relative skill authorized by the Board under this Act.

"Sports facility" means a facility that hosts sports events and holds a seating capacity greater than 17,000 persons.

"Sports governing body" means the organization that prescribes final rules and enforces codes of conduct with respect to a sports event and participants therein.

"Sports wagering" means accepting wagers on sports events or portions of sports events, or on the individual performance

statistics of athletes in a sports event or combination of sports events, by any system or method of wagering, including, but not limited to, in person or over the Internet through websites and on mobile devices. "Sports wagering" includes, but is not limited to, single-game bets, teaser bets, parlays, over-under, moneyline, pools, exchange wagering, in-game wagering, in-play bets, proposition bets, and straight bets.

"Sports wagering account" means a financial record established by a master sports wagering licensee for an individual patron in which the patron may deposit and withdraw funds for sports wagering and other authorized purchases and to which the master sports wagering licensee may credit winnings or other amounts due to that patron or authorized by that patron.

"Tier 1 sports wager" means a sports wager that is determined solely by the final score or final outcome of the sports event and is placed before the sports event has begun.

"Tier 2 sports wager" means a sports wager that is not a tier 1 sports wager.

"Wager" means a sum of money or thing of value risked on an uncertain occurrence.

"Winning bidder" means a qualified applicant for a master sports wagering license chosen through the competitive selection process under Section 25-45.

Section 25-15. Board duties and powers.

S.B. 690, 101st Gen. Assemb. Reg. Sess. §§25-30, 25-35, 25-40, 25-45

any and all tier 2 sports wagers on sports contests for that sports governing body.

Within 30 days of a sports governing body notifying the Board, master sports wagering licensees shall use only official league data to determine the results of tier 2 sports wagers on sports events sanctioned by that sports governing body, unless: (1) the sports governing body or designee cannot provide a feed of official league data to determine the results of a particular type of tier 2 sports wager, in which case master sports wagering licensees may use any data source for determining the results of the applicable tier 2 sports wager until such time as such data feed becomes available on commercially reasonable terms; or (2) a master sports wagering licensee can demonstrate to the Board that the sports governing body or its designee cannot provide a feed of official league data to the master sports wagering licensee on commercially reasonable terms. During the pendency of the Board's determination, such master sports wagering licensee may use any data source for determining the results of any and all tier 2 sports wagers.

(h) A licensee under this Act may not accept wagers on a kindergarten through 12th grade sports event.

Section 25-30. Master sports wagering license issued to an organization licensee.

(a) An organization licensee may apply to the Board for a

master sports wagering license. To the extent permitted by federal and State law, the Board shall actively seek to achieve racial, ethnic, and geographic diversity when issuing master sports wagering licenses to organization licensees and encourage minority-owned businesses, women-owned businesses, veteran-owned businesses, and businesses owned by persons with disabilities to apply for licensure. Additionally, the report published under subsection (m) of Section 25-45 shall impact the issuance of the master sports wagering license to the extent permitted by federal and State law.

For the purposes of this subsection (a), "minority-owned business", "women-owned business", and "business owned by persons with disabilities" have the meanings given to those terms in Section 2 of the Business Enterprise for Minorities, Women, and Persons with Disabilities Act.

(b) Except as otherwise provided in this subsection (b), the initial license fee for a master sports wagering license for an organization licensee is 5% of its handle from the preceding calendar year or the lowest amount that is required to be paid as an initial license fee by an owners licensee under subsection (b) of Section 25-35, whichever is greater. No initial license fee shall exceed $10,000,000. An organization licensee licensed on the effective date of this Act shall pay the initial master sports wagering license fee by July 1, 2020. For an organization licensee licensed after the effective date of this Act, the master sports wagering license fee shall be

$5,000,000, but the amount shall be adjusted 12 months after the organization licensee begins racing operations based on 5% of its handle from the first 12 months of racing operations. The master sports wagering license is valid for 4 years.

(c) The organization licensee may renew the master sports wagering license for a period of 4 years by paying a $1,000,000 renewal fee to the Board.

(d) An organization licensee issued a master sports wagering license may conduct sports wagering:

(1) at its facility at which inter-track wagering is conducted pursuant to an inter-track wagering license under the Illinois Horse Racing Act of 1975;

(2) at 3 inter-track wagering locations if the inter-track wagering location licensee from which it derives its license is an organization licensee that is issued a master sports wagering license; and

(3) over the Internet or through a mobile application.

(e) The sports wagering offered over the Internet or through a mobile application shall only be offered under either the same brand as the organization licensee is operating under or a brand owned by a direct or indirect holding company that owns at least an 80% interest in that organization licensee on the effective date of this Act.

(f) Until issuance of the first license under Section 25-45, an individual must create a sports wagering account in person at a facility under paragraph (1) or (2) of subsection

(d) to participate in sports wagering offered over the Internet or through a mobile application.

Section 25-35. Master sports wagering license issued to an owners licensee.

(a) An owners licensee may apply to the Board for a master sports wagering license. To the extent permitted by federal and State law, the Board shall actively seek to achieve racial, ethnic, and geographic diversity when issuing master sports wagering licenses to owners licensees and encourage minority-owned businesses, women-owned businesses, veteran-owned businesses, and businesses owned by persons with disabilities to apply for licensure. Additionally, the report published under subsection (m) of Section 25-45 shall impact the issuance of the master sports wagering license to the extent permitted by federal and State law.

For the purposes of this subsection (a), "minority-owned business", "women-owned business", and "business owned by persons with disabilities" have the meanings given to those terms in Section 2 of the Business Enterprise for Minorities, Women, and Persons with Disabilities Act.

(b) Except as otherwise provided in subsection (b-5), the initial license fee for a master sports wagering license for an owners licensee is 5% of its adjusted gross receipts from the preceding calendar year. No initial license fee shall exceed $10,000,000. An owners licensee licensed on the effective date

of this Act shall pay the initial master sports wagering license fee by July 1, 2020. The master sports wagering license is valid for 4 years.

(b-5) For an owners licensee licensed after the effective date of this Act, the master sports wagering license fee shall be $5,000,000, but the amount shall be adjusted 12 months after the owners licensee begins gambling operations under the Illinois Gambling Act based on 5% of its adjusted gross receipts from the first 12 months of gambling operations. The master sports wagering license is valid for 4 years.

(c) The owners licensee may renew the master sports wagering license for a period of 4 years by paying a $1,000,000 renewal fee to the Board.

(d) An owners licensee issued a master sports wagering license may conduct sports wagering:

(1) at its facility in this State that is authorized to conduct gambling operations under the Illinois Gambling Act; and

(2) over the Internet or through a mobile application.

(e) The sports wagering offered over the Internet or through a mobile application shall only be offered under either the same brand as the owners licensee is operating under or a brand owned by a direct or indirect holding company that owns at least an 80% interest in that owners licensee on the effective date of this Act.

(f) Until issuance of the first license under Section

25-45, an individual must create a sports wagering account in person at a facility under paragraph (1) of subsection (d) to participate in sports wagering offered over the Internet or through a mobile application.

Section 25-40. Master sports wagering license issued to a sports facility.

(a) As used in this Section, "designee" means a master sports wagering licensee under Section 25-30, 25-35, or 25-45 or a management services provider licensee.

(b) A sports facility or a designee contracted to operate sports wagering at or within a 5-block radius of the sports facility may apply to the Board for a master sports wagering license. To the extent permitted by federal and State law, the Board shall actively seek to achieve racial, ethnic, and geographic diversity when issuing master sports wagering licenses to sports facilities or their designees and encourage minority-owned businesses, women-owned businesses, veteran-owned businesses, and businesses owned by persons with disabilities to apply for licensure. Additionally, the report published under subsection (m) of Section 25-45 shall impact the issuance of the master sports wagering license to the extent permitted by federal and State law.

For the purposes of this subsection (b), "minority-owned business", "women-owned business", and "business owned by persons with disabilities" have the meanings given to those

terms in Section 2 of the Business Enterprise for Minorities, Women, and Persons with Disabilities Act.

(c) The Board may issue up to 7 master sports wagering licenses to sports facilities or their designees that meet the requirements for licensure as determined by rule by the Board. If more than 7 qualified applicants apply for a master sports wagering license under this Section, the licenses shall be granted in the order in which the applications were received. If a license is denied, revoked, or not renewed, the Board may begin a new application process and issue a license under this Section in the order in which the application was received.

(d) The initial license fee for a master sports wagering license for a sports facility is $10,000,000. The master sports wagering license is valid for 4 years.

(e) The sports facility or its designee may renew the master sports wagering license for a period of 4 years by paying a $1,000,000 renewal fee to the Board.

(f) A sports facility or its designee issued a master sports wagering license may conduct sports wagering at or within a 5-block radius of the sports facility.

(g) A sports facility or its designee issued a master sports wagering license may conduct sports wagering over the Internet within the sports facility or within a 5-block radius of the sports facility.

(h) The sports wagering offered by a sports facility or its designee over the Internet or through a mobile application

shall be offered under the same brand as the sports facility is operating under, the brand the designee is operating under, or a combination thereof.

(i) Until issuance of the first license under Section 25-45, an individual must register in person at a sports facility or the designee's facility to participate in sports wagering offered over the Internet or through a mobile application.

Section 25-45. Master sports wagering license issued to an online sports wagering operator.

(a) The Board shall issue 3 master sports wagering licenses to online sports wagering operators for a nonrefundable license fee of $20,000,000 pursuant to an open and competitive selection process. The master sports wagering license issued under this Section may be renewed every 4 years upon payment of a $1,000,000 renewal fee. To the extent permitted by federal and State law, the Board shall actively seek to achieve racial, ethnic, and geographic diversity when issuing master sports wagering licenses under this Section and encourage minority-owned businesses, women-owned businesses, veteran-owned businesses, and businesses owned by persons with disabilities to apply for licensure.

For the purposes of this subsection (a), "minority-owned business", "women-owned business", and "business owned by persons with disabilities" have the meanings given to those

terms in Section 2 of the Business Enterprise for Minorities, Women, and Persons with Disabilities Act.

(b) Applications for the initial competitive selection occurring after the effective date of this Act shall be received by the Board within 540 days after the first license is issued under this Act to qualify. The Board shall announce the winning bidders for the initial competitive selection within 630 days after the first license is issued under this Act, and this time frame may be extended at the discretion of the Board.

(c) The Board shall provide public notice of its intent to solicit applications for master sports wagering licenses under this Section by posting the notice, application instructions, and materials on its website for at least 30 calendar days before the applications are due. Failure by an applicant to submit all required information may result in the application being disqualified. The Board may notify an applicant that its application is incomplete and provide an opportunity to cure by rule. Application instructions shall include a brief overview of the selection process and how applications are scored.

(d) To be eligible for a master sports wagering license under this Section, an applicant must: (1) be at least 21 years of age; (2) not have been convicted of a felony offense or a violation of Article 28 of the Criminal Code of 1961 or the Criminal Code of 2012 or a similar statute of any other jurisdiction; (3) not have been convicted of a crime involving

dishonesty or moral turpitude; (4) have demonstrated a level of skill or knowledge that the Board determines to be necessary in order to operate sports wagering; and (5) have met standards for the holding of a license as adopted by rules of the Board.

The Board may adopt rules to establish additional qualifications and requirements to preserve the integrity and security of sports wagering in this State and to promote and maintain a competitive sports wagering market. After the close of the application period, the Board shall determine whether the applications meet the mandatory minimum qualification criteria and conduct a comprehensive, fair, and impartial evaluation of all qualified applications.

(e) The Board shall open all qualified applications in a public forum and disclose the applicants' names. The Board shall summarize the terms of the proposals and make the summaries available to the public on its website.

(f) Not more than 90 days after the publication of the qualified applications, the Board shall identify the winning bidders. In granting the licenses, the Board may give favorable consideration to qualified applicants presenting plans that provide for economic development and community engagement. To the extent permitted by federal and State law, the Board may give favorable consideration to qualified applicants demonstrating commitment to diversity in the workplace.

(g) Upon selection of the winning bidders, the Board shall have a reasonable period of time to ensure compliance with all

applicable statutory and regulatory criteria before issuing the licenses. If the Board determines a winning bidder does not satisfy all applicable statutory and regulatory criteria, the Board shall select another bidder from the remaining qualified applicants.

(h) Nothing in this Section is intended to confer a property or other right, duty, privilege, or interest entitling an applicant to an administrative hearing upon denial of an application.

(i) Upon issuance of a master sports wagering license to a winning bidder, the information and plans provided in the application become a condition of the license. A master sports wagering licensee under this Section has a duty to disclose any material changes to the application. Failure to comply with the conditions or requirements in the application may subject the master sports wagering licensee under this Section to discipline, including, but not limited to, fines, suspension, and revocation of its license, pursuant to rules adopted by the Board.

(j) The Board shall disseminate information about the licensing process through media demonstrated to reach large numbers of business owners and entrepreneurs who are minorities, women, veterans, and persons with disabilities.

(k) The Department of Commerce and Economic Opportunity, in conjunction with the Board, shall conduct ongoing, thorough, and comprehensive outreach to businesses owned by minorities,

women, veterans, and persons with disabilities about contracting and entrepreneurial opportunities in sports wagering. This outreach shall include, but not be limited to:

(1) cooperating and collaborating with other State boards, commissions, and agencies; public and private universities and community colleges; and local governments to target outreach efforts; and

(2) working with organizations serving minorities, women, and persons with disabilities to establish and conduct training for employment in sports wagering.

(l) The Board shall partner with the Department of Labor, the Department of Financial and Professional Regulation, and the Department of Commerce and Economic Opportunity to identify employment opportunities within the sports wagering industry for job seekers and dislocated workers.

(m) By March 1, 2020, the Board shall prepare a request for proposals to conduct a study of the online sports wagering industry and market to determine whether there is a compelling interest in implementing remedial measures, including the application of the Business Enterprise Program under the Business Enterprise for Minorities, Women, and Persons with Disabilities Act or a similar program to assist minorities, women, and persons with disabilities in the sports wagering industry.

As a part of the study, the Board shall evaluate race and gender-neutral programs or other methods that may be used to

S.B. 690, 101st Gen. Assemb. Reg. Sess. §35-55(7)

required in this Act; (2) is accessible to persons with disabilities; and (3) is fully registered and licensed in accordance with any applicable laws.

(g) A person who knowingly makes a false statement on an application is guilty of a Class A misdemeanor.

(Source: P.A. 99-143, eff. 7-27-15.)

(230 ILCS 10/7) (from Ch. 120, par. 2407)

Sec. 7. Owners licenses.

(a) The Board shall issue owners licenses to persons or entities that~~, firms or corporations which~~ apply for such licenses upon payment to the Board of the non-refundable license fee as provided in subsection (e) or (e-5) ~~set by the Board, upon payment of a $25,000 license fee for the first year of operation and a $5,000 license fee for each succeeding year~~ and upon a determination by the Board that the applicant is eligible for an owners license pursuant to this Act and the rules of the Board. From the effective date of this amendatory Act of the 95th General Assembly until (i) 3 years after the effective date of this amendatory Act of the 95th General Assembly, (ii) the date any organization licensee begins to operate a slot machine or video game of chance under the Illinois Horse Racing Act of 1975 or this Act, (iii) the date that payments begin under subsection (c-5) of Section 13 of the Act, ~~or~~ (iv) the wagering tax imposed under Section 13 of this Act is increased by law to reflect a tax rate that is at least

as stringent or more stringent than the tax rate contained in subsection (a-3) of Section 13, or (v) when an owners licensee holding a license issued pursuant to Section 7.1 of this Act begins conducting gaming, whichever occurs first, as a condition of licensure and as an alternative source of payment for those funds payable under subsection (c-5) of Section 13 of this ~~the Riverboat Gambling~~ Act, any owners licensee that holds or receives its owners license on or after the effective date of this amendatory Act of the 94th General Assembly, other than an owners licensee operating a riverboat with adjusted gross receipts in calendar year 2004 of less than $200,000,000, must pay into the Horse Racing Equity Trust Fund, in addition to any other payments required under this Act, an amount equal to 3% of the adjusted gross receipts received by the owners licensee. The payments required under this Section shall be made by the owners licensee to the State Treasurer no later than 3:00 o'clock p.m. of the day after the day when the adjusted gross receipts were received by the owners licensee. A person~~, firm~~ or entity ~~corporation~~ is ineligible to receive an owners license if:

(1) the person has been convicted of a felony under the laws of this State, any other state, or the United States;

(2) the person has been convicted of any violation of Article 28 of the Criminal Code of 1961 or the Criminal Code of 2012, or substantially similar laws of any other jurisdiction;

(3) the person has submitted an application for a license under this Act which contains false information;

(4) the person is a member of the Board;

(5) a person defined in (1), (2), (3) or (4) is an officer, director or managerial employee of the entity ~~firm or corporation~~;

(6) the entity ~~firm or corporation~~ employs a person defined in (1), (2), (3) or (4) who participates in the management or operation of gambling operations authorized under this Act;

(7) (blank); or

(8) a license of the person or entity~~, firm or corporation~~ issued under this Act, or a license to own or operate gambling facilities in any other jurisdiction, has been revoked.

The Board is expressly prohibited from making changes to the requirement that licensees make payment into the Horse Racing Equity Trust Fund without the express authority of the Illinois General Assembly and making any other rule to implement or interpret this amendatory Act of the 95th General Assembly. For the purposes of this paragraph, "rules" is given the meaning given to that term in Section 1-70 of the Illinois Administrative Procedure Act.

(b) In determining whether to grant an owners license to an applicant, the Board shall consider:

(1) the character, reputation, experience and

financial integrity of the applicants and of any other or separate person that either:

(A) controls, directly or indirectly, such applicant, or

(B) is controlled, directly or indirectly, by such applicant or by a person which controls, directly or indirectly, such applicant;

(2) the facilities or proposed facilities for the conduct of ~~riverboat~~ gambling;

(3) the highest prospective total revenue to be derived by the State from the conduct of ~~riverboat~~ gambling;

(4) the extent to which the ownership of the applicant reflects the diversity of the State by including minority persons, women, and persons with a disability and the good faith affirmative action plan of each applicant to recruit, train and upgrade minority persons, women, and persons with a disability in all employment classifications; the Board shall further consider granting an owners license and giving preference to an applicant under this Section to applicants in which minority persons and women hold ownership interest of at least 16% and 4%, respectively.

(4.5) the extent to which the ownership of the applicant includes veterans of service in the armed forces of the United States, and the good faith affirmative action plan of each applicant to recruit, train, and upgrade veterans of service in the armed forces of the United

States in all employment classifications;

(5) the financial ability of the applicant to purchase and maintain adequate liability and casualty insurance;

(6) whether the applicant has adequate capitalization to provide and maintain, for the duration of a license, a riverboat or casino;

(7) the extent to which the applicant exceeds or meets other standards for the issuance of an owners license which the Board may adopt by rule; ~~and~~

(8) the ~~The~~ amount of the applicant's license bid; ~~.~~

(9) the extent to which the applicant or the proposed host municipality plans to enter into revenue sharing agreements with communities other than the host municipality; and

(10) the extent to which the ownership of an applicant includes the most qualified number of minority persons, women, and persons with a disability.

(c) Each owners license shall specify the place where the casino ~~riverboats~~ shall operate or the riverboat shall operate and dock.

(d) Each applicant shall submit with his application, on forms provided by the Board, 2 sets of his fingerprints.

(e) In addition to any licenses authorized under subsection (e-5) of this Section, the ~~The~~ Board may issue up to 10 licenses authorizing the holders of such licenses to own riverboats. In the application for an owners license, the

applicant shall state the dock at which the riverboat is based and the water on which the riverboat will be located. The Board shall issue 5 licenses to become effective not earlier than January 1, 1991. Three of such licenses shall authorize riverboat gambling on the Mississippi River, or, with approval by the municipality in which the riverboat was docked on August 7, 2003 and with Board approval, be authorized to relocate to a new location, in a municipality that (1) borders on the Mississippi River or is within 5 miles of the city limits of a municipality that borders on the Mississippi River and (2), on August 7, 2003, had a riverboat conducting riverboat gambling operations pursuant to a license issued under this Act; one of which shall authorize riverboat gambling from a home dock in the city of East St. Louis; and one of which shall authorize riverboat gambling from a home dock in the City of Alton. One other license shall authorize riverboat gambling on the Illinois River in the City of East Peoria or, with Board approval, shall authorize land-based gambling operations anywhere within the corporate limits of the City of Peoria ~~south of Marshall County~~. The Board shall issue one additional license to become effective not earlier than March 1, 1992, which shall authorize riverboat gambling on the Des Plaines River in Will County. The Board may issue 4 additional licenses to become effective not earlier than March 1, 1992. In determining the water upon which riverboats will operate, the Board shall consider the economic benefit which riverboat

S.B. 690, 101st Gen. Assemb. Reg. Sess. §35-55(7.7)

winning proposal. In the case of negotiations for an owners license, the Board may, at the conclusion of such negotiations, make the determination allowed under Section 7.3(a).

(8) Upon selection of a winning bid, the Board shall evaluate the winning bid within a reasonable period of time for licensee suitability in accordance with all applicable statutory and regulatory criteria.

(9) If the winning bidder is unable or otherwise fails to consummate the transaction, (including if the Board determines that the winning bidder does not satisfy the suitability requirements), the Board may, on the same criteria, select from the remaining bidders or make the determination allowed under Section 7.3(a).

(Source: P.A. 93-28, eff. 6-20-03.)

(230 ILCS 10/7.7 new)

Sec. 7.7. Organization gaming licenses.

(a) The Illinois Gaming Board shall award one organization gaming license to each person or entity having operating control of a racetrack that applies under Section 56 of the Illinois Horse Racing Act of 1975, subject to the application and eligibility requirements of this Section. Within 60 days after the effective date of this amendatory Act of the 101st General Assembly, a person or entity having operating control of a racetrack may submit an application for an organization gaming license. The application shall be made on such forms as

provided by the Board and shall contain such information as the Board prescribes, including, but not limited to, the identity of any racetrack at which gaming will be conducted pursuant to an organization gaming license, detailed information regarding the ownership and management of the applicant, and detailed personal information regarding the applicant. The application shall specify the number of gaming positions the applicant intends to use and the place where the organization gaming facility will operate. A person who knowingly makes a false statement on an application is guilty of a Class A misdemeanor.

Each applicant shall disclose the identity of every person or entity having a direct or indirect pecuniary interest greater than 1% in any racetrack with respect to which the license is sought. If the disclosed entity is a corporation, the applicant shall disclose the names and addresses of all stockholders and directors. If the disclosed entity is a limited liability company, the applicant shall disclose the names and addresses of all members and managers. If the disclosed entity is a partnership, the applicant shall disclose the names and addresses of all partners, both general and limited. If the disclosed entity is a trust, the applicant shall disclose the names and addresses of all beneficiaries.

An application shall be filed and considered in accordance with the rules of the Board. Each application for an organization gaming license shall include a nonrefundable application fee of $250,000. In addition, a nonrefundable fee

of $50,000 shall be paid at the time of filing to defray the costs associated with background investigations conducted by the Board. If the costs of the background investigation exceed $50,000, the applicant shall pay the additional amount to the Board within 7 days after a request by the Board. If the costs of the investigation are less than $50,000, the applicant shall receive a refund of the remaining amount. All information, records, interviews, reports, statements, memoranda, or other data supplied to or used by the Board in the course of this review or investigation of an applicant for an organization gaming license under this Act shall be privileged and strictly confidential and shall be used only for the purpose of evaluating an applicant for an organization gaming license or a renewal. Such information, records, interviews, reports, statements, memoranda, or other data shall not be admissible as evidence nor discoverable in any action of any kind in any court or before any tribunal, board, agency or person, except for any action deemed necessary by the Board. The application fee shall be deposited into the State Gaming Fund.

Each applicant shall submit with his or her application, on forms provided by the Board, a set of his or her fingerprints. The Board shall charge each applicant a fee set by the Department of State Police to defray the costs associated with the search and classification of fingerprints obtained by the Board with respect to the applicant's application. This fee shall be paid into the State Police Services Fund.

(b) The Board shall determine within 120 days after receiving an application for an organization gaming license whether to grant an organization gaming license to the applicant. If the Board does not make a determination within that time period, then the Board shall give a written explanation to the applicant as to why it has not reached a determination and when it reasonably expects to make a determination.

The organization gaming licensee shall purchase up to the amount of gaming positions authorized under this Act within 120 days after receiving its organization gaming license. If an organization gaming licensee is prepared to purchase the gaming positions, but is temporarily prohibited from doing so by order of a court of competent jurisdiction or the Board, then the 120-day period is tolled until a resolution is reached.

An organization gaming license shall authorize its holder to conduct gaming under this Act at its racetracks on the same days of the year and hours of the day that owners licenses are allowed to operate under approval of the Board.

An organization gaming license and any renewal of an organization gaming license shall authorize gaming pursuant to this Section for a period of 4 years. The fee for the issuance or renewal of an organization gaming license shall be $250,000.

All payments by licensees under this subsection (b) shall be deposited into the Rebuild Illinois Projects Fund.

(c) To be eligible to conduct gaming under this Section, a

person or entity having operating control of a racetrack must (i) obtain an organization gaming license, (ii) hold an organization license under the Illinois Horse Racing Act of 1975, (iii) hold an inter-track wagering license, (iv) pay an initial fee of $30,000 per gaming position from organization gaming licensees where gaming is conducted in Cook County and, except as provided in subsection (c-5), $17,500 for organization gaming licensees where gaming is conducted outside of Cook County before beginning to conduct gaming plus make the reconciliation payment required under subsection (k), (v) conduct live racing in accordance with subsections (e-1), (e-2), and (e-3) of Section 20 of the Illinois Horse Racing Act of 1975, (vi) meet the requirements of subsection (a) of Section 56 of the Illinois Horse Racing Act of 1975, (vii) for organization licensees conducting standardbred race meetings, keep backstretch barns and dormitories open and operational year-round unless a lesser schedule is mutually agreed to by the organization licensee and the horsemen association racing at that organization licensee's race meeting, (viii) for organization licensees conducting thoroughbred race meetings, the organization licensee must maintain accident medical expense liability insurance coverage of $1,000,000 for jockeys, and (ix) meet all other requirements of this Act that apply to owners licensees.

An organization gaming licensee may enter into a joint venture with a licensed owner to own, manage, conduct, or

otherwise operate the organization gaming licensee's organization gaming facilities, unless the organization gaming licensee has a parent company or other affiliated company that is, directly or indirectly, wholly owned by a parent company that is also licensed to conduct organization gaming, casino gaming, or their equivalent in another state.

All payments by licensees under this subsection (c) shall be deposited into the Rebuild Illinois Projects Fund.

(c-5) A person or entity having operating control of a racetrack located in Madison County shall only pay the initial fees specified in subsection (c) for 540 of the gaming positions authorized under the license.

(d) A person or entity is ineligible to receive an organization gaming license if:

(1) the person or entity has been convicted of a felony under the laws of this State, any other state, or the United States, including a conviction under the Racketeer Influenced and Corrupt Organizations Act;

(2) the person or entity has been convicted of any violation of Article 28 of the Criminal Code of 2012, or substantially similar laws of any other jurisdiction;

(3) the person or entity has submitted an application for a license under this Act that contains false information;

(4) the person is a member of the Board;

(5) a person defined in (1), (2), (3), or (4) of this

subsection (d) is an officer, director, or managerial employee of the entity;

(6) the person or entity employs a person defined in (1), (2), (3), or (4) of this subsection (d) who participates in the management or operation of gambling operations authorized under this Act; or

(7) a license of the person or entity issued under this Act or a license to own or operate gambling facilities in any other jurisdiction has been revoked.

(e) The Board may approve gaming positions pursuant to an organization gaming license statewide as provided in this Section. The authority to operate gaming positions under this Section shall be allocated as follows: up to 1,200 gaming positions for any organization gaming licensee in Cook County and up to 900 gaming positions for any organization gaming licensee outside of Cook County.

(f) Each applicant for an organization gaming license shall specify in its application for licensure the number of gaming positions it will operate, up to the applicable limitation set forth in subsection (e) of this Section. Any unreserved gaming positions that are not specified shall be forfeited and retained by the Board. For the purposes of this subsection (f), an organization gaming licensee that did not conduct live racing in 2010 and is located within 3 miles of the Mississippi River may reserve up to 900 positions and shall not be penalized under this Section for not operating those positions

until it meets the requirements of subsection (e) of this Section, but such licensee shall not request unreserved gaming positions under this subsection (f) until its 900 positions are all operational.

Thereafter, the Board shall publish the number of unreserved gaming positions and shall accept requests for additional positions from any organization gaming licensee that initially reserved all of the positions that were offered. The Board shall allocate expeditiously the unreserved gaming positions to requesting organization gaming licensees in a manner that maximizes revenue to the State. The Board may allocate any such unused gaming positions pursuant to an open and competitive bidding process, as provided under Section 7.5 of this Act. This process shall continue until all unreserved gaming positions have been purchased. All positions obtained pursuant to this process and all positions the organization gaming licensee specified it would operate in its application must be in operation within 18 months after they were obtained or the organization gaming licensee forfeits the right to operate those positions, but is not entitled to a refund of any fees paid. The Board may, after holding a public hearing, grant extensions so long as the organization gaming licensee is working in good faith to make the positions operational. The extension may be for a period of 6 months. If, after the period of the extension, the organization gaming licensee has not made the positions operational, then another public hearing must be

held by the Board before it may grant another extension.

Unreserved gaming positions retained from and allocated to organization gaming licensees by the Board pursuant to this subsection (f) shall not be allocated to owners licensees under this Act.

For the purpose of this subsection (f), the unreserved gaming positions for each organization gaming licensee shall be the applicable limitation set forth in subsection (e) of this Section, less the number of reserved gaming positions by such organization gaming licensee, and the total unreserved gaming positions shall be the aggregate of the unreserved gaming positions for all organization gaming licensees.

(g) An organization gaming licensee is authorized to conduct the following at a racetrack:

(1) slot machine gambling;

(2) video game of chance gambling;

(3) gambling with electronic gambling games as defined in this Act or defined by the Illinois Gaming Board; and

(4) table games.

(h) Subject to the approval of the Illinois Gaming Board, an organization gaming licensee may make modification or additions to any existing buildings and structures to comply with the requirements of this Act. The Illinois Gaming Board shall make its decision after consulting with the Illinois Racing Board. In no case, however, shall the Illinois Gaming Board approve any modification or addition that alters the

grounds of the organization licensee such that the act of live racing is an ancillary activity to gaming authorized under this Section. Gaming authorized under this Section may take place in existing structures where inter-track wagering is conducted at the racetrack or a facility within 300 yards of the racetrack in accordance with the provisions of this Act and the Illinois Horse Racing Act of 1975.

(i) An organization gaming licensee may conduct gaming at a temporary facility pending the construction of a permanent facility or the remodeling or relocation of an existing facility to accommodate gaming participants for up to 24 months after the temporary facility begins to conduct gaming authorized under this Section. Upon request by an organization gaming licensee and upon a showing of good cause by the organization gaming licensee, the Board shall extend the period during which the licensee may conduct gaming authorized under this Section at a temporary facility by up to 12 months. The Board shall make rules concerning the conduct of gaming authorized under this Section from temporary facilities.

The gaming authorized under this Section may take place in existing structures where inter-track wagering is conducted at the racetrack or a facility within 300 yards of the racetrack in accordance with the provisions of this Act and the Illinois Horse Racing Act of 1975.

(i-5) Under no circumstances shall an organization gaming licensee conduct gaming at any State or county fair.

S.B. 690, 101st Gen. Assemb. Reg. Sess. §35-60(25)

(Source: P.A. 96-34, eff. 7-13-09; 96-1410, eff. 7-30-10.)

(230 ILCS 40/25)

Sec. 25. Restriction of licensees.

(a) Manufacturer. A person may not be licensed as a manufacturer of a video gaming terminal in Illinois unless the person has a valid manufacturer's license issued under this Act. A manufacturer may only sell video gaming terminals for use in Illinois to persons having a valid distributor's license.

(b) Distributor. A person may not sell, distribute, or lease or market a video gaming terminal in Illinois unless the person has a valid distributor's license issued under this Act. A distributor may only sell video gaming terminals for use in Illinois to persons having a valid distributor's or terminal operator's license.

(c) Terminal operator. A person may not own, maintain, or place a video gaming terminal unless he has a valid terminal operator's license issued under this Act. A terminal operator may only place video gaming terminals for use in Illinois in licensed establishments, licensed truck stop establishments, licensed large truck stop establishments, licensed fraternal establishments, and licensed veterans establishments. No terminal operator may give anything of value, including but not limited to a loan or financing arrangement, to a licensed establishment, licensed truck stop establishment, licensed

large truck stop establishment, licensed fraternal establishment, or licensed veterans establishment as any incentive or inducement to locate video terminals in that establishment. Of the after-tax profits from a video gaming terminal, 50% shall be paid to the terminal operator and 50% shall be paid to the licensed establishment, licensed truck stop establishment, licensed large truck stop establishment, licensed fraternal establishment, or licensed veterans establishment, notwithstanding any agreement to the contrary. A video terminal operator that violates one or more requirements of this subsection is guilty of a Class 4 felony and is subject to termination of his or her license by the Board.

(d) Licensed technician. A person may not service, maintain, or repair a video gaming terminal in this State unless he or she (1) has a valid technician's license issued under this Act, (2) is a terminal operator, or (3) is employed by a terminal operator, distributor, or manufacturer.

(d-5) Licensed terminal handler. No person, including, but not limited to, an employee or independent contractor working for a manufacturer, distributor, supplier, technician, or terminal operator licensed pursuant to this Act, shall have possession or control of a video gaming terminal, or access to the inner workings of a video gaming terminal, unless that person possesses a valid terminal handler's license issued under this Act.

(e) Licensed establishment. No video gaming terminal may be placed in any licensed establishment, licensed veterans establishment, licensed truck stop establishment, licensed large truck stop establishment, or licensed fraternal establishment unless the owner or agent of the owner of the licensed establishment, licensed veterans establishment, licensed truck stop establishment, licensed large truck stop establishment, or licensed fraternal establishment has entered into a written use agreement with the terminal operator for placement of the terminals. A copy of the use agreement shall be on file in the terminal operator's place of business and available for inspection by individuals authorized by the Board. A licensed establishment, licensed truck stop establishment, licensed veterans establishment, or licensed fraternal establishment may operate up to 6 ~~5~~ video gaming terminals on its premises at any time. A licensed large truck stop establishment may operate up to 10 video gaming terminals on its premises at any time.

(f) (Blank).

(g) Financial interest restrictions. As used in this Act, "substantial interest" in a partnership, a corporation, an organization, an association, a business, or a limited liability company means:

(A) When, with respect to a sole proprietorship, an individual or his or her spouse owns, operates, manages, or conducts, directly or indirectly, the organization,

Langone v. Patrick Kaiser & Fanduel, Inc.

United States District Court for the Northern District of Illinois, Eastern Division

October 9, 2013, Decided; October 9, 2013, Filed

No. 12 C 2073

Reporter
2013 U.S. Dist. LEXIS 145941 *; 2013 WL 5567587

CHRISTOPHER LANGONE, Plaintiff, v. PATRICK KAISER AND FANDUEL, INC., Defendants.

Core Terms

games, fantasy, sports, winner, loser, alleges, participants, gambling, the Loss Recovery Act, brokers, initiate, winnings, lose money, website, wagers, provides, cause of action, civil action, draftadaysports, individuals, discovery, playing, league, losses, pools, won, recover money, non-loser-plaintiff, racetrack, requires

Counsel: **[*1]** For Christopher V Langone, Plaintiff: Mark T. Lavery, LEAD ATTORNEY, Lavery Law Firm, Chicago, IL.

For Patrick Kaiser, Fan Duel Inc., Defendants: Robert F. Huff, Jr., LEAD ATTORNEY, ZwillGen PLLC, Chicago, IL.

Judges: Honorable Thomas M. Durkin, United States District Judge.

Opinion by: Thomas M. Durkin

Opinion

MEMORANDUM OPINION AND ORDER

Plaintiff Christopher Langone brings this claim under the Illinois Loss Recovery Act, *720 ILCS 5/28-8*, seeking to recover money that Defendants Patrick Kaiser and FanDuel, Inc., allegedly won playing fantasy sports games on the internet. R. 8. Defendants have moved to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*. R. 12. For the following reasons, Defendants' motion is granted.

Background

Langone alleges that FanDuel, a Delaware corporation with its principal place of business in Edinburgh, Scotland, R. 8 ¶ 18, owns a website that hosts fantasy sports games. *Id.* ¶¶ 23-28. The parties agree that like typical fantasy sports games, FanDuel's games allow participants to choose "'professional players in a given sport . . . and to compete against other fantasy sports participants based upon the actual performance of those players in key statistical categories.'" R. 13 at 3 (quoting **[*2]** *Humphrey v. Viacom, Inc., 2007 U.S. Dist. LEXIS 44679, 2007 WL 1797648, at *1 (D.N.J. June 20, 2007)*); R. 8 ¶¶ 27, 30-31. Unlike typical fantasy sports games, which are based on a sport's entire season, FanDuel's games are based on only one day's worth of performances. R. 8 ¶¶ 27, 30-31; R. 13 at 3.

Defendants admit that Kaiser is both a participant in daily fantasy sports games and the operator of *www.draftadaysports.com*. R. 13 at 3-4. Langone alleges that *www.draftadaysports.com* is a fantasy sports website that directs participants to FanDuel's games, and that the website was "Powered by Fan Duel." R. 8 ¶ 25. Langone alleges that he is a New York resident, *id.* ¶14, and Kaiser is an Illinois resident. *Id.* ¶ 15.

Langone alleges that FanDuel requires participants in its fantasy sports games to pay an "entry fee" of $5, $10, $25, $50 or $100 and to play in groups or "leagues" of two, five or ten participants. *Id.* ¶ 33-34. Potential winnings are greater for the leagues with higher entry fees and greater numbers of players, but the potential winnings are predetermined for any given league. *Id.* FanDuel takes a "commission" of ten percent of the entry fees. *Id.* ¶¶ 8, 33. The remaining 90 percent of the entry fees for **[*3]** a given league constitutes the prize for the participant who wins the league. *Id.* ¶ 33. Langone alleges that by engaging in this activity, FanDuel "sells pools upon the result of games or contests of skill and chance." *Id.* ¶ 21.

Langone alleges that FanDuel's "daily" fantasy sports games are illegal gambling under Illinois law. R. 8 ¶¶ 10-11, 13. He seeks to recover money that FanDuel and Kaiser allegedly have won from participants in daily fantasy sports games. *See* R. 8. Langone brings his claims under the Illinois Loss Recovery Act, which provides the following:

> (a) Any person who by gambling shall lose to any other person, any sum of money or thing of value, amounting to the sum of $50 or more and shall pay or deliver the same or any part thereof, may sue for and recover the money or other thing of value, so lost and paid or delivered, in a civil action against the winner thereof, with costs, in the circuit court. . . .
>
> (b) If within 6 months, such person who under the terms of Subsection 28-8(a) is entitled to initiate action to recover his losses does not in fact pursue his remedy, any person may initiate a civil action against the winner. The court or the jury, as the case may be, **[*4]** shall determine the amount of the loss. After such determination, the court shall enter a judgment of triple the amount so determined.

720 ILCS 5/28-8.

Langone's complaint includes three counts. In Count I, Langone seeks to recover money from FanDuel and Kaiser that Sean Clement, of Libertyville, Illinois, allegedly lost to FanDuel and Kaiser playing fantasy sports games on www.draftadaysports.com. R. 8 ¶ 50. Langone alleges that "based upon [Clement's] volume of play, it is more likely than not that [Clement] has lost over $50." *Id.* Count I also alleges that several other named individuals "gambled and lost" on www.draftadaysports.com. *Id.* ¶ 52. [1] Langone alleges that additional "persons may be named as John Does [and] contends that he will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." *Id.* ¶ 42. Langone also alleges that "[o]ther circumstantial evidence that suggests that gamblers lost more than $50 on draftadaysports.com is that the site offers games for wagers up to $270 on a single game and promises $20,000 in cash payouts every day." *Id.* ¶ 51.

In Count II, Langone seeks to recover $403,585.88 from Kaiser that Fantasy Sports Day Corp. allegedly lost to Kaiser, when Kaiser played fantasy sports games on a website owned and operated by Fantasy Sports Day Corp. *Id.* ¶¶ 55-69.

In Count III, Langone seeks to recover $109,586.34 from Kaiser that FanDuel allegedly lost to Kaiser, when Kaiser played fantasy sports games on FanDuel's website. *Id.* ¶¶ 70-79.

Discussion

A Rule 12(b)(6) motion challenges the sufficiency of the complaint. *See, e.g.,* Hallinan v. Fraternal Order of Police of Chicago Lodge No. 7, 570 F.3d 811, 820 (7th Cir. 2009). A complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), sufficient to provide defendant with "fair notice" of the claim and the basis for it. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). This "standard demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). While "detailed factual allegations" are not required, "labels and conclusions, and a formulaic recitation of **[*6]** the elements of a cause of action will not do." Twombly, 550 U.S. at 555. The complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" Mann v. Vogel, 707 F.3d 872, 877 (7th Cir. 2013) (quoting Iqbal, 556 U.S. at 678). In applying this standard, the Court accepts as true all well-pleaded facts as true and draws all reasonable inferences in favor of the non-moving party. *Id.*

The "Loss Recovery Act should not be interpreted to yield an unjust or absurd result contrary to its purpose." Vinson v. Casino Queen, Inc., 123 F.3d 655, 657 (7th Cir. 1997). Illinois statutes like the Loss Recovery Act that are "penal in their nature," *Robson v. Doyle, 191 Ill. 566, 61 N.E. 435, 437 (Ill. 1901)*, "must be strictly construed." *See* Phillips v. Prudential Ins. Co. of Am., 714 F.3d 1017, 1023 (7th Cir. 2013); *see also* Reuter v. MasterCard Int'l, Inc., 397 Ill. App. 3d 915, 921 N.E.2d 1205, 1211, 337 Ill. Dec. 67 (Ill. App. Ct. 5th Dist. 2010) **[*7]** (noting that an Illinois Circuit Court "explained that the [Loss Recovery Act] is penal in nature and must

[1] Those individuals are Kyle Durno, Erik Maverick Scott, Zach Criswell, Ricky Epperson, **[*5]** Parker Jay Johnson, Nathan Kaiser, Scot Scholz, and Matt Clement. R. 8 ¶ 52.

therefore be strictly construed.").

A. Count I

1. Subject Matter Jurisdiction

Langone has sufficiently alleged that the parties are diverse, and the parties agree that Langone's allegations satisfy the $75,000 amount in controversy required for diversity jurisdiction under *28 U.S.C. § 1332*. *See* R. 26; R. 27. The parties' agreement as to federal jurisdiction is not enough. *Federal Rule of Civil Procedure 12(h)(3)* requires the Court to dismiss the action if the Court "determines at any time that it lacks subject-matter jurisdiction," including whether the allegations satisfy the amount in controversy requirement. *See Carroll v. Stryker Corp., 658 F.3d 675, 680 (7th Cir. 2011)*. Langone must "satisfy the amount in controversy requirement against each individual defendant" unless the defendants are jointly liable. *Middle Tenn. News Co., Inc. v. Charnel of Cincinnati, Inc., 250 F.3d 1077, 1081 (7th Cir. 2001)*.

Langone has failed to make even a bare assertion that he could recover more than $75,000 based on the money that Sean Clement and the other individuals named in Count I allegedly **[*8]** lost to FanDuel and Kaiser. Nowhere in Count I does Langone even reference *28 U.S.C. § 1332* or the $75,000 jurisdictional minimum. Even assuming that draftadaysports.com does payout $20,000 every day, as Langone alleges, Langone has not alleged that Clement or any of the other individuals Langone names in Count I have lost a portion of those alleged payouts sufficient to satisfy the jurisdictional minimum. Therefore, Count I against FanDuel is dismissed for lack of subject matter jurisdiction. [2]

Although not alleged in his complaint, Langone asserts in his briefing that an individual named Danny Sobot lost more than $75,000 to FanDuel. R. 42 at 4 n.5; *see also* R. 17 at 6 n.2. [3] Langone sued Sobot in a separate case to recover money that Sobot allegedly won from FanDuel; that case **[*9]** has since been dismissed with prejudice. *See Langone v. Sobot*, 12 C 01646, R. 37 (N.D. Ill. Mar. 11, 2013). Langone references documents he filed in that case containing information taken from the website Rotogrinders.com—a website that purports to record the fantasy sports games winnings of its members. *Id.* R. 14-1 - R. 14-120. The data that Langone cites, however, appears to list only Sobot's *winnings* from fantasy sports games on FanDuel, not his *losses. Id.* Contrary to Langone's allegations, these documents do not show that Sobot lost money to FanDuel, and so they cannot support a claim against FanDuel under the Loss Recovery Act, let alone demonstrate that the Court has subject matter jurisdiction. [4]

2. Losers

Langone also argues that the Loss Recovery Act does not require him to allege specific individual losers. In his briefing in the *Sobot* case, Langone argued that the *Loss Recovery Act § 8(b)* "does not state that Plaintiff's civil action is to be initiated 'on behalf' of anyone," and it does not require him to "identify a cognizable loser." *Langone v. Sobot*, 12 C 01646, R. 14 at 4-5 (N.D. Ill. May 25, 2012). Langone notes that whereas *§ 8(a)* requires a plaintiff to have lost money to another person, *§ 8(b)* simply provides that "any person may initiate a civil action against the winner." *Id.* With this reasoning, Langone implies that he can meet the $75,000 minimum and state a claim under the Loss Recovery Act merely by alleging that FanDuel pays out $20,000 per day and inferring that somebody lost that money. R. 8 ¶ 51.

Even if Langone is correct that *§ 8(b)* provides a cause of action wholly separate from *§ 8(a)*, *§ 8(b)* plainly states that a non-loser-plaintiff does not have a cause of action until the gambling loser has failed to bring suit within six **[*11]** months of the loss. Langone cannot allege that six months have passed without alleging the

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[2] Langone's allegations in Counts II and III that Kaiser won in excess of $75,000 do not serve to meet the jurisdictional requirement with respect to FanDuel, because Langone's allegation that FanDuel and Kaiser are "jointly and severally liable" is with respect to Count I only. R. 8 ¶¶ 6, 25. This is particularly true of Count III where Langone alleges that FanDuel lost the money Kaiser is alleged to have won.

[3] Langone does not allege that Sobot lost money to FanDuel in his complaint. But Langone argues that he would seek leave to amend the complaint to include allegations of Sobot's losses to FanDuel, R. 17 at 6 n.2, so the Court is considering arguments based on allegations regarding Sobot's losses in the interests of efficiency.

[4] Sobot admitted that he lost money playing fantasy sports games, *see Langone v. Sobot*, 12 C 01646, R. 17 at 1 n.1 (N.D. Ill. June 1, 2012), but this bare admission **[*10]** is an insufficient basis for Langone to allege that his claim against FanDuel and Kaiser in Count I meets the $75,000 threshold.

date of a loss and whether the relevant loser has failed to bring a claim. Thus, in order to allege a ripe claim under the Loss Recovery Act, Langone must allege that a specific loser lost a certain amount and failed to bring a claim for that amount within six months. He has failed to do that here.

Furthermore, § 8(b) merely provides that "any person may initiate a civil action against *the* winner." (emphasis added). This provision is vacuous without reference to the circumstances of a specific person losing a certain amount to a specific winner as provided in § 8(a). Without these specific criteria, § 8(b) begs the question of what "civil action" "any person" is permitted to "initiate." Clearly, § 8(a) provides the answer and sets forth the aforementioned elements of a cause of action.

Similarly, Langone's interpretation of the statute would render superfluous the language in § 8(b) that references § 8(a) (i.e., the following language: "If within 6 months, such person who under the terms of Subsection 28-8(a) is entitled to initiate action to recover his losses does not in fact pursue his remedy **[*12]** . . ."). *See* KM Enters., Inc. v. Global Traffic Techs., Inc., 725 F.3d 718, 729 (7th Cir. 2013) ("Interpretations that render words of a statute superfluous are disfavored as a general matter . . ."). On Langone's interpretation, § 8(b)'s reference to § 8(a) only serves to give gambling losers in § 8(a) a six month head start on recovering their losses before a non-loser-plaintiff is permitted to initiate a wholly separate action seeking gambling winnings under § 8(b). But if this was all the legislature intended, it could simply have written § 8(b) to permit any plaintiff to recover any gambling winnings that are at least six months old without referencing § 8(a) at all. Instead, the legislature expressly tied a non-loser-plaintiff's right of action to the failure to bring an action by "such person who under the terms of Subsection 28-8(a) is entitled to initiate action to recover his losses." This express link between § 8(a) and § 8(b) demonstrates that the legislature did not intend to create two causes of action—one under § 8(a) and another under § 8(b)—but rather for the non-loser-plaintiff of § 8(b) to step into the shoes of the loser of § 8(a). For § 8(b)'s reference to § 8(a) **[*13]** to have any substance, it must be understood to place a condition on the clause in § 8(b) permitting "any person [to] initiate a civil action against the winner" and to require non-loser-plaintiffs to allege the elements of § 8(a), i.e., who was the winner, who was the loser, when the loss took place, and the amount of money lost.

Moreover, § 8(b) only permits a non-loser plaintiff to recover money from "*the* winner," demonstrating that the legislature intended to limit a non-loser plaintiff's cause of action to the cause of action the loser could have brought against "the winner" described in § 8(a). The Chicago Manual of Style provides that the definite article "the" is used when the reader knows exactly to which subject the writer refers. 16th ed. (2010), at 222-23. If the legislature had intended to permit non-loser plaintiffs to bring actions against gambling winners generally, without specifically identifying the related losers, the legislature would have used the indefinite article "a" and permitted plaintiffs to sue "*a* winner" not necessarily "*the* winner" described by § 8(a). In short, the Loss Recovery Act requires an allegation of specific individual losers.

Langone also contends **[*14]** that "[i]f a copyright owner can sue a John Doe defendant and discover his identity, as for instance the RIAA routinely does in music downloading cases, then Plaintiff should be allowed to plead without providing the names of persons who wagered on 'Daily Fantasy' games." R. 17 at 5. Even if the Loss Recovery Act did not require Langone to plead the identity of the gambling loser—which, as the Court just explained, it does—the conditions necessary to make John Doe pleading appropriate are not present here.

Typically, courts permit plaintiffs to plead John Doe defendants only when the plaintiffs can otherwise state a claim for some harm they have suffered. John Doe pleading is necessary to protect plaintiffs who do not know the identity of the person who caused them harm because such plaintiffs would otherwise not have a means to redress the harm they have suffered. *See, e.g.,* Bicycle Peddler, LLC v. Does 1-12, 295 F.R.D. 274, 2013 U.S. Dist. LEXIS 95184, 2013 WL 3455849, at *2 (N.D. Ill. July 9, 2013); *see also* UMG Recordings, Inc. v. Doe, 2008 U.S. Dist. LEXIS 92788, 2008 WL 2949427, at *4 (N.D. Cal. July 30, 2008) (permitting early discovery as to John Doe defendants "where a plaintiff makes a prima facie showing of infringement . . . **[*15]** [and when] early discovery avoids ongoing, continuous harm to the infringed party and there is no other way to advance the litigation"). Langone has not been harmed here. Additionally, the John Doe losers are not alleged to have harmed anyone. Absent circumstances of a plaintiff seeking to redress harm caused by an unidentified defendant there is no reason to permit John Doe pleading.

Furthermore, to properly plead a John Doe defendant, a plaintiff must be able to show that the Court has personal jurisdiction over John Doe. Plaintiffs in

copyright infringement internet downloading cases are able to make a showing that a court has personal jurisdiction over John Doe defendants because the plaintiffs know the geographic locations associated with the IP addresses. *See, e.g., Pacific Century Int'l, Ltd. v. Does 1-37, 282 F.R.D. 189, 195-96 (N.D. Ill. 2012)* (quashing subpoena to internet service provider seeking identities of IP address users engaged in illegal downloading that were not located in the district). Here, Langone has no way of knowing where the hypothetical John Doe gambling losers reside, and, thus, Langone cannot make a showing that the Court has jurisdiction over actions **[*16]** committed by those individuals, or that their conduct is subject to Illinois law. *Cf.* *Cie v. Comdata Network, Inc., 275 Ill. App. 3d 759, 656 N.E.2d 123, 129, 211 Ill. Dec. 931 (Ill. App. Ct. 1st Dist. 1995)* ("Article 28 of the Criminal Code simply does not apply to gambling committed wholly outside of Illinois.").

Notably, the Illinois Supreme Court dismissed a complaint and motion for discovery in a case just like this one. In *Robson v. Doyle, 191 Ill. 566, 61 N.E. 435 (Ill. 1901)*, the plaintiff knew of two people who lost money to a third, and brought an action to recover that money. The plaintiff also sought discovery from the winner to learn who else had lost money to him. *Id. at 436*. The court rejected the plaintiff's motion because it sought "to compel the [winner] to disclose a cause of action against himself," and it was "purely a fishing bill so far as it seeks such discovery." *Id.* The court continued that the "very purpose of the discovery is to subject the defendant to the penalties prescribed by the statute," and "courts of equity have always withheld their aid in actions which were penal in nature." *Id. at 437*. The court then remanded the case with instructions to dismiss. *Id. at 438*. Langone seeks exactly what the Illinois **[*17]** Supreme Court has held should not be available to him. For these reasons, the Court will not permit Langone to plead John Doe gambling losers.

Therefore, Count I against FanDuel and Kaiser is dismissed because Langone has failed to allege when and how much money Sean Clement and the other named individuals (Kyle Durno, Erik Maverick Scott, Zach Criswell, Ricky Epperson, Parker Jay Johnson, Nathan Kaiser, Scot Scholz and Matt Clement) lost to FanDuel and to Kaiser.

3. Winners

Even if Langone had sufficiently alleged that specific individuals had lost the jurisdictional minimum amount of money to FanDuel, the Court would still dismiss Count I as to FanDuel and Kaiser in his capacity as operator of *www.draftadaysports.com* because neither is a "winner" under the Loss Recovery Act. Langone alleges that FanDuel is a "winner" because FanDuel takes a "commission" from the entry fees paid by participants in its games. Langone does not allege, however, that FanDuel participates in the games itself. Rather, Langone relies on *Pearce v. Foote, 113 Ill. 228 (1885)*, and *Kruse v. Kennett, 181 Ill. 199, 54 N.E. 965 (Ill. 1899)*, which held that commodities futures brokers who took commissions on the trades they executed **[*18]** were "winners," at a time when trading in futures was considered illegal gambling. The court in *Pearce* held that even though the brokers derived profit from the commissions as opposed to the gain from the illegal trades or "wagers," the brokers were nonetheless "actively participating [as] principals" in the illegal gambling activity. *Pearce, 113 Ill. at 238*.

But although FanDuel also derives its profit from commissions, FanDuel's role in its fantasy sports games is decidedly different from the brokers in *Pearce*. The Illinois Supreme Court held that the brokers were winners not because they collected commissions on gambling activity, but because the brokers *participated in the risk* of the trade or "wager." The brokers or their client could be "winners" or "losers" depending "on the happening of a certain [future] event." *Id. at 239*. The gain or loss the client would earn from the trade was uncertain when the agreement with the broker was consummated, and "if there was a loss, [the client] was to pay it to [the brokers], and if there was a gain, [the brokers] were to pay it to [the client]." *Id. at 237-38* (alterations added; internal quotation marks omitted). The brokers took a risk **[*19]** that the loss incurred on the trade might be so great that the client would not be able to cover it, or that the client's gain might be so great that the brokers would not be able to cover it. *See id. at 236* (explaining that the client had paid the brokers only part of what he owed them).

By contrast, here, FanDuel risks nothing when it takes entry fees from participants in its fantasy sports games. The prize that FanDuel is obligated to pay is predetermined according to the number of participants in a given league, and never exceeds the total entry fees. FanDuel does not place any "wagers" with particular participants by which it could lose money based on the happening of a future event (i.e., the performance of certain athletes), but merely provides a forum for the participants to engage each other in fantasy sports games. Unlike the relationship between

the brokers and client in Pearce, the forum FanDuel creates requires fantasy sports participants to compete against each other in leagues with the result that they know specifically to whom they have lost. *See Langone v. Sobot*, 12 C 01646, R. 14-121 at 1-2. [5]

FanDuel acts as the conduit for transmission of the prize to the winner, but FanDuel does not risk any of its money in producing the prize money as the brokers did in Pearce. Rather, FanDuel functions as "the house," charging an entry fee to participate in the fantasy sports games it hosts. Illinois courts have held that "the winner and not the keeper of the house is liable to the loser," unless the keeper of the house also risks money in the gambling activity. Holmes v. Brickey, 335 Ill. App. 390, 82 N.E.2d 200, 202 (Ill. App. Ct. 3d Dist. 1948) (citing Ranney v. Flinn, 60 Ill. App. 104 (3d Dist. 1894)). Thus, in *Ranney*, the Court emphasized that the owner of a saloon who provided a room for poker games was only a winner when he actually played in the games. 60 Ill. App. at 105. Similarly, in Zellers v. White, 208 Ill. 518, 70 N.E. 669, 671 (Ill. 1904), the owner of a gambling house was **[*21]** a winner not because he provided rooms for poker games, but because he also paid employees to participate in the poker games on behalf of the house. *See also* Moushon v. AAA Amusement, Inc., 267 Ill. App. 3d 187, 641 N.E.2d 1201, 204 Ill. Dec. 582 (Ill. App. Ct. 4th Dist. 1994) (restaurant owner who provided access to video poker games and slot machines was a "winner" because the owner gained the money people lost playing the games). Therefore, because FanDuel itself (and Kaiser in so far as Langone alleges that Kaiser is an operator of a fantasy sports website) does not participate in the risk associated with its fantasy sports games, it is not a "winner" for the purposes of the Loss Recovery Act.

Langone also argues that FanDuel participates in gambling and is a "winner" under the Loss Recovery Act because it "sells pools upon the result of any game or contest of skill or chance," activity which is defined as gambling by 720 ILCS 5/28-1(a)(6). Langone explains that

> A "Daily Fantasy" transaction is much like a horse-racing wager. The bettor buys a ticket, [c]hoosing a number of horses. The money wagered is pooled by the racetrack. The racetrack wins money on every wager. But the racetrack loses money on every race when it pays **[*22]** the winning wagers. The Racetrack always wins more than it loses. Thus the bettors always lose to the racetrack.
>
> Using Defendant's reasoning, a person could operate an illegal unlicensed horse-betting Internet site, but that person could not be sued by people who lost bets on horse races because Defendants do not pick horses they only participate by selling paramutel [sic] pool gambling tickets.

R. 17 at 14. Even if Langone's categorization of FanDuel's activity as "selling pools" is accurate, it is irrelevant to whether FanDuel is a winner under the Loss Recovery Act. The relevant question for the purposes of the Loss Recovery Act is not whether FanDuel's activity is illegal; the question is whether FanDuel is "the winner" with respect to any particular "loser." If, according to Langone's analogy, FanDuel never "pick[s] horses [but] participates by selling [pari-mutuel] pool gambling tickets," then FanDuel never risks its own money. [6] Since FanDuel does not risk its own money on the fantasy games it cannot be a winner or loser under the Loss Recovery Act. [7]

B. Counts II and III

Similarly, Langone has not sufficiently alleged that

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[5] The Court previously discussed that a plaintiff under § 8(a) must to identify **[*20]** the winner, the amount lost to that winner, and the date of the loss—something a loser should be able to do as they can identify who they were competing against with some particularity. Someone such as Langone who wishes to step into the "loser's" shoes needs to allege that same information, something Langone has failed to do here.

[6] The Oxford English Dictionary defines "pari-mutuel" as "[a] form of betting in which those backing the first three horses divide **[*23]** the total of the losers' stakes (*less the operator's commission*)." *See* http://www.oed.com/view/Entry/137910?redirected From=Parimutuel#eid (emphasis added).

[7] Langone has submitted, R. 49-1, and the Court has reviewed the transcript of an Illinois state court's recent oral decision denying a motion for summary judgment in another case Langone filed under the Loss Recovery Act seeking money allegedly won by daily fantasy sports games participants. *See Langone v. Kaplan*, No. 13 M1-011444 (Ill. Cir. Ct. Cook Cnty. Aug. 26, 2013) (Snyder, J.). That court found that there were questions of fact about whether the daily fantasy sports games at issue were games of skill or chance, *id.* at 5:10-23, an issue the Court does not need to address here. To the extent that the state court held that Langone must allege and prove that "there has been a loss of greater than $50 to whom and when," *id.* at 6:1-8, it is in accord with the Court's holding here.

FanDuel and Fantasy Sports Day Corp. are losers under the Loss Recovery Act because Langone has not alleged that either company participates in the risk associated with the fantasy **[*24]** sports games they host on their websites. Indeed, as the Court discussed previously, Langone alleges that FanDuel makes money from fantasy sports games not by participating in the games as such, but by taking a "commission" from the entry fees. Langone fails to make such specific allegations with respect to Fantasy Sports Day Corp., but presumably Langone would have alleged that Fantasy Sports Day Corp. actually participated in the risk of the fantasy sports games if he had a basis to do so. Because Langone has failed to allege that FanDuel and Fantasy Sports Day Corp. participate in the risk associated with fantasy sports games, Langone has failed to allege that they are losers under the Illinois Loss Recovery Act, and thus, Counts II and III are dismissed.

Conclusion

For the foregoing reasons, Defendants motion to dismiss, R. 12, is granted.

ENTERED:

/s/ Thomas M. Durkin

Honorable Thomas M. Durkin

United States District Judge

Dated: October 9, 2013

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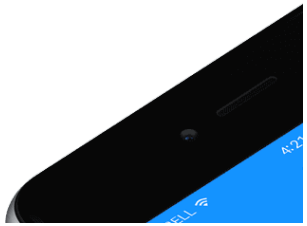

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IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

COLIN DEW-BECKER	) On review of the Opinion of the Appellate
	) Court of Illinois, First Judicial District
Plaintiff/Appellant,	) No. 1-17-1675
	)
v.	) Appeal from the Circuit Court of Cook
	) County, Illinois, No. 2016 M1 011598
ANDREW WU,	)
	) The Honorable Leon Wool,
Defendant/Appellee.	) Judge Presiding

NOTICE OF FILING

TO: Berton N. Ring, Esq.
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PLEASE TAKE NOTICE that on July 3, 2019, we caused the **BRIEF OF DEFENDANT-APPELLEE** to be filed electronically with the Illinois Supreme Court, a copy of which is attached hereto and is hereby served upon you.

Dated: July 3, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William M. Gantz, an attorney, do hereby certify that on July 3, 2019, I caused true and correct copies of the foregoing **BRIEF OF DEFENDANT-APPELLEE** to be served upon the following counsel by electronic mail:

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Attorney for Plaintiff/Appellant

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ William M. Gantz