# 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.

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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):

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

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

In the Matter of the Application of
DRAFTKINGS, INC., A Delaware Corporation,

Petitioner,

-against-

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York and the STATE OF NEW YORK,

Respondents.

INDEX NO. 102014/2015
MOTION DATE 11-25-2015
MOTION SEQ. NO. 001
MOTION CAL. NO. ____

The following papers, numbered 1 to 11 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 ____ | 7 - 11 |
| Replying Affidavits ____ | ____ |

**Cross-Motion:** Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that petitioner's motion, 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, filed under Motion Sequence 001, is denied and decided in accordance with the attached Decision and Order filed under Index #453056/2015, Motion Sequence 001.

COPY

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):

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

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

FANDUEL, INC.,

Plaintiff,

-against-

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, and the STATE OF NEW YORK,

Defendants.

INDEX NO. 161691/2015
MOTION DATE 11-25-2015
MOTION SEQ. NO. 001
MOTION CAL. NO. ____

The following papers, numbered 1 to 12 were read on this motion to/for Injunctive relief:

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 - 8 |
| Answering Affidavits — Exhibits ____ cross motion ____ | 9 - 12 |
| Replying Affidavits ____ | |

**Cross-Motion:** Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion 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 decided in accordance with the attached Decision and Order filed under Index #453056/2015, Motion Sequence 001.

ENTER:

COPY

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):

# 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 |

**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

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

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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

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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,

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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

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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

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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



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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,



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(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



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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.



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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,



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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.

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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