

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

----- X
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.
----- X

Index No. _____/2015

NYSCEF Case

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Plaintiff FanDuel Inc. (“FanDuel”), by its undersigned attorneys, for its
Complaint against Defendant Eric T. Schneiderman, in his official capacity as Attorney
General of the State of New York (the “NYAG”), and Defendant the State of New York,
alleges as follows:

PRELIMINARY STATEMENT

1. This is an action seeking a declaratory judgment and injunctive relief to
prevent the NYAG from pursuing further efforts to shut down FanDuel’s enormously
popular fantasy sports activities in New York state. Such a shutdown would deprive
hundreds of thousands of subscribing New Yorkers of the opportunity to pit their skills
against the skills of others in selecting a “fantasy” team of athletes from different sports
teams and competing in contests offering prizes to the players whose fantasy teams
perform best. The NYAG, in a November 10, 2015 cease and desist letter that the
NYAG disseminated to the press, has taken the legally incorrect position that the

presence of prize money in these contests transforms FanDuel's activities into illegal sponsorship of gambling, and that FanDuel's advertisements have been false and misleading. FanDuel is entitled to a declaration that its conduct is legal and an injunction against enforcement efforts based on claims of illegality by the NYAG, so that FanDuel's New York business is not destroyed as a result of the NYAG's claims.

2. FanDuel is a leading provider of daily fantasy sports ("DFS") contests. Like the traditional fantasy sports contests that millions of Americans have enjoyed for decades, DFS contests allow sports fans to compete against each other by selecting athletes for their "fantasy team" and then earning points based on the statistical performance of their chosen athletes in major sporting events. Participants pay an entry fee into contests and, depending on their selected athletes' performance relative to the performance of other participants' selected athletes, win pre-announced 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. FanDuel's DFS contests differ from traditional fantasy sports contests in two primary ways. First, they are shorter. Traditional fantasy sports contests ordinarily last an entire season, but DFS contests typically begin and end in a single day (for baseball, basketball and hockey), or a week (for football). Second, FanDuel's DFS contests use a different method for selecting players. In FanDuel fantasy contests, participants select a group of players as to each of whom FanDuel has assigned a fantasy "value," subject to the competitive discipline that the collective value of all players in each participant's roster cannot exceed a "cap," whereas in traditional fantasy sports

contests competitors most commonly choose their team through a “draft” in which they take turns selecting athletes for their roster. Both of these forms of player selection are designed to simulate the rigors and challenges of roster selection experienced by actual general managers of teams.

4. FanDuel’s contests have become enormously popular. Launched in 2009, FanDuel now has millions of users and offers a variety of contest formats, all of which are expressly compliant with federal law that specifies the types of fantasy sports contests that do not constitute a bet or wager.

5. On November 10, 2015, the Office of the NYAG sent FanDuel a letter titled “Notice to Cease and Desist and Notice of Proposed Litigation Pursuant to New York Executive Law § 63(12) and General Business Law § 349” (the “Notice”). The Notice demands that FanDuel cease and desist from offering its DFS contests to residents of New York State, declaring that after a “review,” the NYAG has determined that FanDuel’s contests constitute illegal gambling under New York law. (Notice at 1.) The notice states that unless FanDuel ceases offering its contests to New York residents, it intends to bring a civil enforcement action against FanDuel under Executive Law § 63(12) seeking injunctive relief from a court. (*Id.* at 3.) The Notice also states that the NYAG intends to bring a civil action against FanDuel seeking an injunction against certain of FanDuel’s advertisements under General Business Law (“GBL”) §§ 349 and 350 and Executive Law § 63(12), alleging that they are misleading to consumers. (*Id.*)

6. The NYAG released a copy of the Notice to the media, and it has contacted current and potential FanDuel customers, service providers, investors and other

members of the public to make those entities aware of the NYAG's allegations. On information and belief, the NYAG directly contacted FanDuel's payment processors, pressuring them outside the judicial process to cease providing service to FanDuel unless FanDuel immediately suspends business in the New York market. These actions were intended to immediately disrupt FanDuel's New York business adversely, and they have done so.

7. FanDuel has been consistently operating in New York since 2009, and its contests are enjoyed by hundreds of thousands of New York residents. FanDuel therefore has an urgent need for a judgment resolving the legality of its contests under New York law, which FanDuel submits are games of skill and are legal under the relevant statutes.

8. Accordingly, Plaintiff seeks a declaration that its DFS contests do not constitute illegal "gambling" or "bookmaking" under New York law, and an injunction prohibiting the NYAG from pursuing enforcement actions based on its different view.

9. FanDuel also seeks a declaration that its advertising does not contain false statements of fact and is not misleading under New York law, plus injunctive relief against enforcement, as the NYAG's position on that point also rests on an error of law.

THE PARTIES

10. Plaintiff FanDuel Inc. is a Delaware corporation duly authorized to do business in the State of New York. Its principal place of business is in New York, New York.

11. FanDuel is one of the world's largest DFS providers, with over five million registered users, including over 250,000 registered users in New York. FanDuel offers DFS 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").

12. Defendant Eric T. Schneiderman is the Attorney General of New York State and is sued in his official capacity.

13. The State of New York also is a defendant in this action.

JURISDICTION AND VENUE

14. This action for a declaratory judgment and an injunction is within this Court's general original jurisdiction and not with the jurisdiction of any court of limited jurisdiction of this state.

15. This Court has personal jurisdiction over Defendants.

16. Venue in New York County is proper under CPLR 503 because Plaintiff FanDuel Inc.'s principal offices are located in this county.

FACTUAL AND LEGAL BACKGROUND

FanDuel's DFS Contests

17. FanDuel's DFS contests allow participants 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. Unlike traditional fantasy sports, which play out over the course of an entire season, DFS offers participants new contests on a daily (or in the case of the NFL, weekly) basis. DFS participants are given a fictional salary cap within which to select a team for that day's games. FanDuel assigns a price or value to each player in advance, so that participants 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, the contest is over, and prizes are awarded based on a schedule announced to participants before they entered the contest.

18. FanDuel offers a number of different contest formats. These include tournaments, which can have thousands of entries; leagues, which are still only one-day or one-week contests but include between 2 and 99 participants; "multiplier" contests, in which all participants who finish in the top 50% or top 30% of contestants will win the same amount; and head-to-head contests, in which two participants compete against one another directly.

19. For each type of contest, FanDuel'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 participant can submit; others allow participants to submit multiple entries in a single contest.

20. With this innovative format and the offering of fantasy sports without a season-long commitment, FanDuel has grown rapidly in recent years, with over one million people entering FanDuel contests in 2014.

Statutory Framework

21. The Notice states that the NYAG intends to bring a civil action for an injunction under § 63(12) of the New York Executive Law, which authorizes the NYAG to bring a civil action to enjoin “repeated fraudulent or illegal acts” or “persistent fraud or illegality” in the “carrying on, conducting or transaction of business” in New York. (Notice at 3.) The Notice also references Business Corporation Law (“BCL”) § 1303, which, when read in conjunction with BCL § 1101, similarly authorizes the NYAG to bring a civil action to enjoin a non-New York corporation from carrying on, conducting or transacting business in a “persistently fraudulent or illegal manner” in this state.

22. As a predicate for the NYAG’s threatened claims for injunctive relief under Executive Law § 63(12), the NYAG’s Notice alleges that DFS constitutes illegal “gambling” or “bookmaking” in violation of various provisions of New York law, including Constitution Article I, § 9, and Penal Law §§ 225.05, 225.10, 225.15 and 225.20. (Notice at 2-3.) Those provisions do not apply to FanDuel’s business. Among other reasons, FanDuel’s DFS contests do not meet the definition of “gambling” under New York law because they are games of skill, not chance, and because entry fees to participate in DFS contests are not bets or wagers. FanDuel’s business does not constitute “bookmaking” under New York law because the underlying DFS contests are not gambling and because FanDuel does not stand to profit based on the result of those

contests (or have any economic interest in one outcome over another, as a bookmaker or casino would).

23. The NYAG's Notice also relies on GBL § 349, which authorizes the NYAG to bring a civil action to enjoin "[d]eceptive acts or practices in the conduct of any business, trade or commerce," and on GBL § 350, which authorizes the NYAG to bring a civil action to enjoin "false advertising." The Notice relies on those statutes both as independent causes of action for injunctive relief and as a predicate for seeking injunctive relief under Executive Law § 63(12). Contrary to the Notice's assertions, FanDuel's advertising is truthful, accurate and not misleading, and the terms of each of its contests – including the amount of the entry fee, the maximum number of participants, and the schedule of prizes – are clearly and accurately disclosed to all contest participants before they enter contests.

FanDuel's DFS Contests Are Games of Skill, Which, Like Traditional Fantasy Sports Contests, Have Been Expressly Authorized By Federal Law

24. FanDuel's contests are games of skill and therefore do not constitute illegal gambling under New York law. As investors make selections for their portfolios, FanDuel participants base their DFS player selections on historical performance, statistics, research and trends. These selections 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 team, and predictions about how other DFS players are likely to make selections. Indeed, in making roster selections for FanDuel's

DFS contests, participants consider a wealth of current information relevant to athletes' expected performance that is not available at the beginning of any season.

25. Given the deep sports knowledge and strategic thinking required in these contests, it is natural and expected that more skilled and experienced players will win more often. Thus, although the NYAG's allegation in the Notice that "the top one percent of FanDuel's winners receive the vast majority of the winnings" is factually incorrect in its particulars, as a general matter it is true that the most highly skilled players win a higher percentage of the prizes. (Notice at 2.) That simply reflects that DFS is primarily a game of skill and does not depend on a material or dominating element of chance.

26. Congress has expressly recognized that fantasy sports contests, such as those offered by FanDuel, are games of skill and that "participation in any fantasy or simulation sports game" does not constitute a "bet or wager." 31 U.S.C. § 5362(1)(E)(ix). In doing so, Congress recognized that, because winning outcomes in fantasy sports contests "reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events," entries in such contests do not constitute bets or wagers. *Id.*

27. In compliance with this federal law, all of FanDuel's contests 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 any 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 id.* These requirements help protect the integrity of individual sporting events.

28. Consistent with this federal law and with years of historical practice, the NYAG's Notice explicitly concedes that season-long fantasy sports are not gambling, noting that the legality of these contests "has never been seriously questioned in New York." (Notice at 2.) In the same letter, however, the NYAG attempts to draw a "critical distinction" between FanDuel's DFS contests and traditional fantasy sports by noting that "FanDuel's customers are clearly placing bets on events outside of their control or influence, specifically on the real-game performance of professional athletes." (*Id.* at 1-2.) However, under the NYAG's theory, any fantasy contest of any duration in which entry fees and a prize are awarded would meet the definition of gambling—a premise he himself dismisses as clearly wrong. FanDuel's arranging for contests to run over a shorter period of time, and its administration of part of the process for selecting rosters by assigning player values and applying a salary cap instead of administering a draft, does not distinguish FanDuel's contests in any factually or legally meaningful sense from the traditional fantasy contests that the Notice acknowledges are entirely legal.

29. There is equally no merit to the NYAG's claim that FanDuel's DFS contests constitute illegal gambling because they are "designed for instant gratification, stressing easy game play and no long-term strategy." (*Id.* at 2.) DFS's practice of

offering more frequent individual contests (and hence more prizes) than traditional fantasy sports has no bearing on the relative role of skill and chance. The ease with which a participant can compete is similarly irrelevant to an analysis of whether DFS constitutes illegal gambling; FanDuel's improvement on traditional fantasy sports contests by making them more user-friendly does not make them illegal. In many respects, the short duration of FanDuel's contests allows for a greater exercise of skill, and involves less chance, than contests that play out over a full season, because the participant has more available information (from team and player matchups to injury status and weather) into the factors that may affect the performance of the rostered player in particular games. By contrast, in season-long fantasy, similar information is unavailable at the time of player selection.

30. FanDuel has attracted over five million users because the participants enjoy the games and find the establishment of a fantasy roster and the competition with others over rosters' performance a mechanism for expanding the number of games they follow and enhancing their enjoyment of sports. The overwhelming majority of people who participate in DFS are dedicated sports fans who recognize the commitment to knowledge-gathering and making judgments about player capability that is necessary to enhance prospects of winning the contests they enter.

Advertising

31. The NYAG's Notice further demands that FanDuel cease and desist "[m]isrepresenting that FanDuel complies with applicable laws . . . and misrepresenting that FanDuel's Games are not considered gambling, in violation of Executive Law

§ 63(12) and GBL §§ 349 and 350.” (Notice at 4.) As stated above, the DFS games operated by FanDuel are compliant with applicable laws and are not gambling, and FanDuel seeks a declaration in this action confirming as much. To the extent that FanDuel has made any statements to that effect, they are true, accurate and not misleading.

32. The NYAG also accuses FanDuel of “misrepresenting the likelihood that an ordinary player will win a jackpot” and “misrepresenting the degree of skill implicated in the games.” (*Id.*) In appearing to fault FanDuel’s advertisements for failing adequately to disclose to novice players just how much skill is involved in the games, the NYAG appears to be advancing a position directly at odds with the NYAG’s assertion that the contests are games of chance. The NYAG does not and cannot identify any FanDuel advertising that would tend to mislead customers into thinking that skill plays little part in the outcome of FanDuel’s DFS contests.

33. The few specific examples of assertedly misleading advertising presented in the Notice do not support the NYAG’s claims. The Notice identifies only two allegedly false and misleading statements: that “anybody can play, anybody can succeed”; and “Play for real money with immediate cash payouts . . . the money is real!” (*Id.* at 2.) Each of these statements is true, accurate and in no way misleading.

34. FanDuel presents numerous opportunities for players of all skill levels to win prizes in differing DFS contests, including (a) 50/50 multiplier contests in which the top half of the participants all win the same prize; (b) league contests played among small groups of self-selected individuals such as friends or colleagues, the top few of whom

win a prize; and (c) head-to-head games in which two individuals play against each other. Tournament contests, which typically involve many players and large prizes, are also a popular offering, but the site fully discloses the maximum number of participants and the full schedule of prizes to all entrants in advance of the contest, such that any reasonable player would recognize that his or her chances of winning are small.

FIRST CAUSE OF ACTION
(Declaratory Judgment That FanDuel's DFS Contests Are Not
"Gambling" or "Bookmaking" and Injunction Against Enforcement)

35. Plaintiff restates paragraphs 1 to 34 as if fully set forth here.

36. FanDuel is entitled to a declaratory judgment that its DFS contests do not violate any applicable provision of New York law, FanDuel's DFS contests do not constitute persistent "illegality" that would authorize the Attorney General to bring a civil action against FanDuel under Executive Law § 63(12) or BCL § 1303.

37. In particular, FanDuel is entitled to a declaratory judgment that its DFS contests do not constitute unlawful "gambling" or "bookmaking" under any provision of law applicable in New York, including Article I, § 9 of the New York Constitution or §§ 225.00, 225.05, 225.10, 225.15, and 225.20 of the Penal Law.

38. The NYAG's incorrect public allegations that FanDuel's business of offering DFS to participants is illegal, combined with communications by the NYAG to the press, enterprises that process cash movements, investors and others having business dealings with FanDuel, are causing immediate and continuing harm to FanDuel by

damaging FanDuel's reputation with consumers, service providers and the public and by impeding FanDuel's ability to operate its legitimate business.

39. This case presents a present, ripe and justiciable controversy as to the rights and other legal relations of the parties. Because of the NYAG's issuance of the Notice and other efforts, FanDuel now has an urgent need to resolve the legality of its operations in New York and the validity of its public statements in New York before this Court.

40. FanDuel has incurred and will continue to incur irreparable harm because of the NYAG's actions and has no adequate remedies other than a prompt declaratory judgment coupled with an injunction against Defendants' pursuit of enforcement actions inconsistent with that declaratory judgment.

41. Declaratory and injunctive relief is appropriate to resolve whether DFS, as operated by FanDuel, complies with New York law.

SECOND CAUSE OF ACTION
(Declaratory Judgment That FanDuel's Advertisements Are
Not Misleading and Injunction Against Enforcement)

42. Plaintiff restates paragraphs 1 to 41 as if fully set forth here.

43. FanDuel is entitled to a declaratory judgment that each of its advertisements and statements referenced in the NYAG's letter is true, accurate, not misleading, and in full compliance with all applicable requirements of law, including GBL §§ 349 and 350.

44. The NYAG's incorrect public allegations that FanDuel's advertisements mislead the public are causing immediate and continuing harm to FanDuel by damaging FanDuel's reputation with consumers, service providers and the public and by impeding FanDuel's ability to operate its legitimate business.

45. This case presents a present, ripe and justiciable controversy as to the rights and other legal relations of the parties.

46. FanDuel has incurred and will continue to incur irreparable harm because of the NYAG's actions and has no adequate remedies other than a prompt declaratory judgment coupled with an injunction against Defendants' pursuit of enforcement actions inconsistent with that declaratory judgment.

47. Declaratory and injunctive relief is appropriate to resolve whether FanDuel's advertisements are true, accurate, not misleading and otherwise in compliance with applicable New York law.

REQUEST FOR RELIEF

48. Plaintiff respectfully requests that the Court, on an expedited basis, issue a declaration in favor of Plaintiffs and against Defendants pursuant to CPLR § 3001 that:

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

meaning of New York law, including Article I, § 9, of the Constitution and Section 225.00 of the Penal Law;

- b. FanDuel's statements and advertisements identified above and in the Notice do not constitute a deceptive business practice in violation of GBL § 349 or false advertising in violation of GBL § 350; and
- c. FanDuel's operation of DFS contests therefore does not constitute fraud or persistent illegality that may be the subject of an injunction or other civil remedies under Executive Law § 63(12) or GBL § 1303.

49. Plaintiff further requests an injunction against the Defendants' taking any enforcement actions inconsistent with the Court's declaratory judgment requested above.

50. Plaintiff further requests the award of its costs of this action, including attorneys' fees to the extent authorized by law.

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

Dated: New York, New York
November 13, 2015

Respectfully submitted,

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