

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**FEDERAL TRADE COMMISSION**

600 Pennsylvania Avenue, N.W.  
Washington, DC 20580

**STATE OF CALIFORNIA**

455 Golden Gate Ave., Suite 11000  
San Francisco, CA 94302

and

**DISTRICT OF COLUMBIA**

441 Fourth Street, N.W., Suite 630-S  
Washington, DC 20001

Plaintiffs,

v.

**DRAFTKINGS, INC.**

225 Franklin Street, 26th Floor  
Boston, MA 02110

and

**FANDUEL LIMITED**

300 Park Avenue South  
New York, NY 10010

Defendants.

Civil Action No. 17-cv-01195 (KBJ)

**PUBLIC VERSION**

**COMPLAINT FOR TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION PURSUANT TO  
SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT**

Plaintiffs, the Federal Trade Commission (“FTC” or “Commission”), by its designated attorneys, and the District of Columbia and the State of California (collectively, “Plaintiff

States”), acting by and through their respective Attorneys General, petition this Court for a temporary restraining order and preliminary injunction enjoining DraftKings, Inc.

(“DraftKings”) and FanDuel Limited (“FanDuel”) from consummating their proposed merger (the “Merger”). Plaintiffs seek this provisional relief pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26. Absent such provisional relief, DraftKings and FanDuel (collectively, “Defendants”) would be free to consummate the Merger after 11:59 pm on June 20, 2017.

Plaintiffs require the aid of this Court to maintain the status quo and to prevent interim harm to competition during the pendency of an administrative trial on the merits. The Commission has already initiated that administrative trial, pursuant to Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18, 21, and Section 5 of the FTC Act, 15 U.S.C. § 45, by filing an administrative complaint on June 19, 2017. Pursuant to FTC regulations, the administrative trial on the merits will begin five months from the date of that filing (i.e., November 21, 2017). The administrative trial will determine the legality of the Merger and will provide all parties a full opportunity to conduct discovery and present testimony and other evidence regarding the likely competitive effects of the Merger.

## **I. NATURE OF THE CASE**

1. DraftKings and FanDuel are the two dominant providers of daily fantasy sports (“DFS”) in the United States. They propose to merge to near-monopoly in a market for paid DFS contests—that is, DFS contests that offer a prize. Defendants have competed ferociously in this market since 2012, when DraftKings entered to challenge FanDuel. Defendants compete to offer lower entry fees, larger contests, and a better selection of sports in an effort to win business away from each other. They closely monitor each other’s prices, and try to lure away each

other's most valuable customers. Competition between Defendants hit a fever pitch in 2015, when DraftKings and FanDuel each spent hundreds of millions of dollars on marketing to overtake each other in share of entry fees.

2. Defendants' competition has bestowed tremendous benefits on consumers, who enjoy the unique features that paid DFS offers. Users who want to play fantasy sports for prizes in short-duration contests today overwhelmingly look to DraftKings and FanDuel. Indeed, for users who want to play short-duration contests for large cash prizes, Defendants are essentially the only two options. As Defendants engage in this grueling battle against one another, they are still striving toward profitability, due largely to their significant investments in marketing and product innovations, as well as legal and regulatory issues that arose in certain states in 2015 and 2016. Defendants' preferred solution is to merge to become a *de facto* monopolist, free of the competitive constraints that each firm has imposed on the other. Essentially, DraftKings and FanDuel assert that consumers will be better off with one paid DFS provider, rather than two.

3. The FTC and Plaintiff States bring this action to reaffirm a core principle recognized by the U.S. Supreme Court in 1978, which is that antitrust "foreclose[s] the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition." *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 689 (1978). Here, the fact and benefits of competition are overwhelming. Indeed, Defendants recognize their market as a "duopoly," and DraftKings' senior executives observe that its "usual" form of competition with FanDuel is to fight tooth and nail to attract customers—to "smash them," to put a "foot on [FanDuel's] throat and press down hard," and "don't let up until they stop breathing." The Merger, if consummated, would

eliminate such vigorous price and non-price competition and the benefits it provides to paid DFS users, resulting in substantial consumer harm.

4. On June 19, 2017, by a 2-0 vote, the Commission found reason to believe that the Merger would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. Section 7 of the Clayton Act prohibits mergers and acquisitions “the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18. Section 5 of the FTC Act reads, in part, “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” 15 U.S.C. § 45(a)(1).

5. A temporary restraining order enjoining the Merger is necessary to preserve the Court’s ability to consider the Commission’s application for a preliminary injunction. Preliminary injunctive relief is similarly necessary to preserve the status quo and protect competition during the Commission’s ongoing administrative proceeding. Allowing the Merger to proceed would harm consumers and undermine the Commission’s ability to remedy the anticompetitive effects of the Merger if it found the Merger to be unlawful after a full administrative trial on the merits and any subsequent petition for review.

## **II. JURISDICTION AND VENUE**

6. This Court’s jurisdiction arises under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b); and 28 U.S.C. §§ 1331, 1337, and 1345. This is a civil action arising under Acts of Congress protecting trade and commerce against restraints and monopolies, and is brought by an agency of the United States authorized by an Act of Congress to bring this action.

7. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides in pertinent part:

Whenever the Commission has reason to believe –

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public – the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond . . . .

8. In conjunction with the Commission, the Plaintiff States bring this action for a temporary restraining order and preliminary injunction under Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent and restrain DraftKings and FanDuel from violating Section 7 of the Clayton Act, 15 U.S.C. § 18, pending the Commission’s administrative proceeding. The Plaintiff States have the requisite standing to bring this action because the Merger would cause antitrust injury in the market for paid DFS contests to DFS users in their states.

9. Defendants are, and at all relevant times have been, engaged in activities in or affecting “commerce” as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12. Defendants also are, and at all relevant times have been, engaged in commerce in each of the Plaintiff States.

10. Defendants both transact substantial business in the District of Columbia, and Defendant FanDuel has an office therein. Both defendants are subject to personal jurisdiction in the District of Columbia. Venue, therefore, is proper in this district under 28 U.S.C. § 1391(b) and (c) and 15 U.S.C. § 53(b).

### III. THE PARTIES AND THE MERGER

11. Plaintiff, the Federal Trade Commission, is an administrative agency of the United States government, established, organized, and existing pursuant to the FTC Act, 15 U.S.C. §§ 41-58, with its principal offices at 600 Pennsylvania Avenue, N.W., Washington, DC 20580. The Commission is vested with authority and responsibility for enforcing, *inter alia*, Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C § 45.

12. The Plaintiff States, by and through their respective Attorneys General, bring this action pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, in their sovereign or quasi-sovereign capacities as *parens patriae* on behalf of the citizens, general welfare, and economy of each of their states.

13. Defendant DraftKings is a privately held Delaware corporation with headquarters in Boston, Massachusetts. In 2016, DraftKings earned [REDACTED] in revenue, the vast majority of which came from its DFS operations in the United States. Today, DraftKings is the country's largest DFS provider in terms of entry fees and revenues.

14. Defendant FanDuel is a private limited company organized under the laws of the United Kingdom with headquarters in Edinburgh, Scotland. FanDuel does business in the United States through its wholly owned subsidiary, FanDuel, Inc., which is incorporated in Delaware and headquartered in New York, New York. In 2016, FanDuel generated [REDACTED] in revenue, the vast majority of which came from its DFS operations in the United States. Today, FanDuel is the country's second-largest DFS provider in terms of entry fees and revenues.

15. On November 17, 2016, DraftKings and FanDuel entered into a Transaction Agreement, pursuant to which DraftKings and FanDuel would each become a wholly owned subsidiary of a holding company. Due to the Defendants' similar size, revenue, and valuation,

they have described the transaction as a “merger of equals.” [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

16. Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a, and a timing agreement between Defendants and Commission staff, unless temporarily restrained and preliminarily enjoined by this Court, Defendants would be free to consummate the Merger after 11:59 pm on June 20, 2017.

17. On June 19, 2017, the Commission commenced an administrative proceeding on the antitrust merits of the Merger before an Administrative Law Judge, with the plenary trial scheduled to begin on November 21, 2017. The ongoing administrative proceeding provides a forum for all parties to conduct discovery, followed by a merits trial with up to 210 hours of live testimony. *See* 16 C.F.R. § 3.41 (2014). The decision of the Administrative Law Judge is subject to appeal to the full Commission, which, in turn, is subject to judicial review by a United States Court of Appeals.

18. In authorizing the filing of this complaint, the Commission determined that (1) it has reason to believe the Merger would violate the Clayton Act and the FTC Act by substantially lessening competition in one or more lines of commerce, and (2) a preliminary injunction of the Merger pending the resolution of the Commission’s administrative proceedings and any appeals will promote the public interest, so as to minimize the potential harm to customers and preserve the Commission’s ability to order an adequate remedy if it concludes, after the administrative proceeding, that the Merger is unlawful.

#### IV. DFS INDUSTRY BACKGROUND

19. Fantasy sports involve contests in which users assemble lineups of athletes currently playing in a given professional sports league—such as the National Football League (“NFL”), Major League Baseball (“MLB”), the National Basketball Association (“NBA”), or the National Hockey League (“NHL”)—in order to compete with other users. Each fantasy lineup’s performance depends directly on the real-life performance of the chosen athletes, with each athlete earning fantasy points according to a predetermined scoring system tied to objectively measurable statistical achievements (e.g., for NFL contests: passing yards, rushing yards, touchdowns, sacks, interceptions). Users with the best performing lineups in the contest win.

20. Fantasy sports include at least two distinct products: DFS and season-long fantasy sports (“SLFS”). DFS and SLFS provide drastically different user experiences and customers play them for different reasons. SLFS contests are limited to a relatively small number of users (typically between 10 and 20) and run over the course of an entire sports season (typically six months or more). Most SLFS contests do not require payment of an entry fee to the provider and do not offer any material prizes from the provider. Importantly, SLFS often serves as a vehicle for social interaction among friends, family members, or colleagues. By contrast, DFS’s features are distinctly different and users’ primary motivation for playing DFS is distinctly different.

21. As their name reflects, DFS contests are short-duration, lasting from one day to one week, depending on the sport.

22. In the vast majority of DFS contests, including in all contests offered by DraftKings and FanDuel, users create their lineups through a “salary cap” draft. Under the salary-cap drafting method, all users in a contest have the same imaginary budget with which to “buy” athletes for their lineups. The DFS provider assigns each available athlete an imaginary

“salary” based on the athlete’s projected performance, with more-promising athletes receiving higher salaries. Users may spend their budget on any athletes they want.

23. Athlete selections in DFS contests are not exclusive; in other words, the same athlete can appear on any or even all users’ lineups in the same contest. As a result, the maximum number of users who can participate in a single DFS contest is almost limitless (although in practice DFS providers cap the number of users who may participate, as well as the number of lineups a user may submit, in a given contest).

24. After users select their lineups, a DFS contest begins when the first real-life sporting event on which the contest is based commences. For example, a weeklong NFL DFS contest begins when the first NFL game of the week begins. Users earn fantasy points based on the real-life statistical performance of the athletes in their lineup. The aggregate number of fantasy points generated by the athletes in each lineup determines that lineup’s ranking in the contest. Based on this ranking and the rules of the contest, DFS providers identify winning lineups and award prizes to users who entered winning lineups.

25. DFS providers offer contests at a wide range of sizes, from “head-to-head” contests involving only two users to large “tournament” contests with tens of thousands of entrants. DraftKings and FanDuel regularly offer contests that include 50,000 or more entries.

26. Most DFS contests require users to pay an entry fee for each lineup submitted and involve the potential for cash prizes. DFS providers, including Defendants, generate revenue from each contest by retaining a portion of the entry fees as their commission (or “rake”). The commission is the price that DFS providers charge their users to play DFS contests. The remaining portion of users’ entry fees funds the contest’s prize pool, which the provider ultimately pays to the contest’s winners.

27. By law, DFS providers must disclose a contest's entry fee and total prize pool to all potential users. Most DFS providers, including DraftKings and FanDuel, also disclose the maximum number of entries allowed, the number of lineups already submitted, and the contest's payout structure (i.e., how many lineups win and how much each winning lineup earns in prizes). From this information, users can calculate a contest's target commission rate by multiplying the entry fee by the maximum number of lineups allowed to get total entry fees, subtracting the prize pool, and dividing the remainder by total entry fees. For example, in a contest with a \$1 entry fee, a maximum of 110 lineups, and a \$100 prize pool, the target commission rate is slightly greater than 9% (i.e., a \$10 commission divided by total entry fees of \$110 is 9.09%).

28. DFS providers can adjust at least three contest attributes—the size of the prize pool, the entry fee amount, and the maximum number of entries—to change a contest's commission rate. Holding everything else constant, reducing the size of the prize pool, increasing the entry fee amount, or raising the number of entries each independently increases the commission rate.

29. Many DFS contests feature a guaranteed prize pool ("GPP"). Contests with GPPs are guaranteed to pay out the specified prize pool regardless of how many lineups enter. Even if a GPP contest does not fill—that is, does not attract the maximum number of entries—the provider nevertheless must pay out the guaranteed prize amounts, thereby reducing the provider's commission. Thus, a GPP contest that does not fill benefits users by reducing the effective commission rate for that contest. If the number of entries falls so far short that the total entry fees collected are less than the guaranteed prize amounts, the provider must cover the shortfall out of its own pocket, thereby running the contest at a loss. The cost of covering this

shortfall is known in the industry as “overlay.” DFS providers have sometimes offered GPP contests that they do not expect to fill, as a way to attract users.

30. By contrast, if a *non*-GPP DFS contest does not fill (i.e., does not take in the maximum number of allowed entries), it can be canceled, in which case the provider would refund users any entry fees already paid.

31. DraftKings and FanDuel recognize two general categories of DFS users: professional and casual. DraftKings uses the term “VIP” to refer to its professional users, while FanDuel uses the term “HVP,” which stands for “high-value player.” Professional users tend to participate in many contests, submit high volumes of entries, and win a meaningful amount of prizes. Professional users represent a small fraction of DFS customers but generate approximately half of Defendants’ combined entry fees. By contrast, casual users tend to play DFS less often, submit fewer entries, and lose their entry fees at a higher rate.

## **V. RELEVANT MARKET**

32. The provision of paid DFS in the United States constitutes a relevant market for evaluating the effects of the Merger.

### **A. Relevant Product Market**

33. Paid DFS constitutes a distinct relevant product market. As described more fully below, paid DFS contests are fantasy sports contests of short duration (typically one day to one week) in which the contest provider awards a prize of value (cash, experiential, in-kind, or otherwise) to the winner(s).

34. Paid DFS may be evaluated as the provision of paid DFS contests through an online platform.

35. Paid DFS may also be evaluated as the cluster of paid DFS contests for sports that both Defendants provide and for which competitive conditions are substantially similar.

36. Paid DFS constitutes a relevant market because Defendants compete to provide paid DFS contests, other potential alternatives are not sufficiently substitutable for paid DFS, and industry participants, including Defendants, recognize a market for paid DFS that is distinct from SLFS and other potential alternatives.

37. Crucially, other potential alternatives, including SLFS contests, are not sufficiently substitutable to belong in a paid DFS relevant product market.

38. Indeed, because paid DFS and SLFS contests provide fundamentally different experiences, users play them for different reasons.

**Key Distinctions Between DFS and SLFS**

39. There are several key distinctions between DFS (hereinafter, “DFS” refers to paid DFS unless otherwise specified) and SLFS, including:

**Contest Duration**

40. DFS contests run for one day or, at most, one week, while SLFS contests generally run for the duration of a sports league’s regular season (usually several months). As a result, DFS contests offer immediate fulfillment to their users, who need not wait until the end of a season to learn a contest’s outcome. Defendants themselves market the fact that DFS, unlike SLFS, provides “instant gratification.”

41. The shorter timeframe of contests gives DFS a faster pace with more condensed action compared to SLFS. In the words of FanDuel’s Chief Marketing Officer, DFS offers “more winners, more excitement, more energy” than SLFS. The shorter duration of DFS contests also means that users can begin play on almost any day of the year, unlike SLFS, in

which users generally can start to play only at the beginning of a sports season. Given these differences, DFS users tend to be motivated more by instant gratification than SLFS users.

*Financial Component and Player Motivation*

42. The chance to win money—potentially even large, “life-changing” amounts—is a primary reason users play DFS. Nearly all DFS contests require an entry fee paid to the DFS provider, and the DFS provider pays cash prizes to winning contest users, while most SLFS providers do not collect entry fees or pay prizes to winners. Consequently, SLFS participants play primarily for social reasons and because SLFS allows them to keep in touch with friends or coworkers by engaging in friendly competition. Some SLFS providers may offer promotional contests that involve prizes even though they are free to enter, while other providers offer paid SLFS contests where winners receive material prizes, usually money, funded by the entry fees paid by contest participants—but these represent a small minority of SLFS contests. SLFS contests with cash prizes typically offer much smaller prize pools for a given entry-fee amount (i.e., a materially smaller prize-to-entry-fee ratio than DFS contests) because of the limit on the number of users that may participate due to athlete exclusivity.

*Lineup Drafting and Athlete Exclusivity*

43. Another key difference between DFS and SLFS is athlete exclusivity, which leads to differences in maximum contest size and in the drafting process used to select athletes at the beginning of each contest. In DFS contests, athlete selections usually are not exclusive, which means that they can theoretically accommodate unlimited entries. Indeed, in practice, DFS contests often have thousands, or tens of thousands, of entries. By contrast, in SLFS contests, each athlete typically can appear on only one user’s team at a time. Accordingly, each SLFS participant’s athlete selection shrinks the pool of athletes available to other participants in the

draft. As a result, an SLFS league has a practical limit on how many participants may play in it—usually no more than 10 to 20, depending on the sport.

44. Because of athlete exclusivity, SLFS leagues typically use an interactive “snake” or “auction” draft system, in order to make sure that no athlete is selected by more than one participant. SLFS participants generally must schedule their draft for a date and time on which all (or most) of the league’s participants are available. DFS contests, by contrast, usually do not involve athlete exclusivity, so athlete selection for a DFS contest is typically done via a salary cap draft—an individualized, and largely non-social, process that a user can engage in at any time prior to start of the contest without regard to when other users draft their lineups.

**DFS As A Distinct Relevant Market**

45. Defendants recognize DFS as distinct from other markets. In their own ordinary-course analyses, Defendants focus only on DFS. They regularly identify a DFS market in their documents, and they limit virtually all competitive assessments to other DFS providers (and, often, focus only on each other). Other DFS providers also evaluate competition within the DFS market and generally do not view SLFS providers as competitors.

46. Likewise, SLFS providers do not view their products as substitutes for DFS. In their marketing, SLFS providers generally do not target DFS users specifically. This further demonstrates that, given the important differences between DFS and SLFS, most DFS users are not likely to turn to SLFS as a substitute product in response to a small but significant price increase. As a result, SLFS contests are not part of the relevant market.

47. Additionally, unpaid DFS contests—DFS contests in which there is no prize (cash, experiential, in-kind, or otherwise) available to contest winners—meaningfully differ from paid DFS contests. Although DFS providers may sometimes offer unpaid DFS contests as a

promotion to try to attract users to its paid DFS contests, unpaid DFS contests make up a tiny fraction of all DFS contests, and users who play paid DFS do not view unpaid contests as a substitute for paid DFS. As a result, unpaid DFS contests are not part of the relevant market.

48. Although some DFS users also play SLFS, too few DFS users would switch to SLFS or any other potential substitute to render unprofitable a small but significant non-transitory increase in price (“SSNIP”) on DFS contests. Indeed, in 2015 and 2016, DraftKings and FanDuel each raised their commissions on certain DFS contests by between [REDACTED]. DFS users did not respond by substituting SLFS (or any other activity) for DFS in substantial numbers. Defendants observed no meaningful decrease in demand for these contests, and their revenue increased as a result.

**B. Relevant Geographic Market**

49. The relevant geographic market is no broader than the United States.

50. DFS providers must satisfy regulations promulgated by certain individual states in order to market contests in those states.

51. DFS providers generally do not offer state-specific contests; rather, users from all states in which the provider does business compete against one another, and contest rules are the same across all states, conforming to the requirements of the most stringent state that allows DFS. Commission rates charged by Defendants and other DFS providers do not vary by state.

52. Defendants themselves recognize a national market. They analyze their performance, and compare it to each other’s, on a national basis.

53. The relevant geographic market includes all competitors, wherever they reside, that provide a relevant product to customers in the United States.

## VI. MARKET STRUCTURE AND THE MERGER'S PRESUMPTIVE ILLEGALITY

54. DraftKings and FanDuel are by far the two largest providers of DFS contests in the United States.

55. Defendants and [REDACTED] acknowledge that DraftKings and FanDuel are the largest players in the DFS industry and together have a dominant market share. To quote DraftKings' CEO, "as everyone knows, the vast bulk of the industry is DraftKings and FanDuel." [REDACTED] (and the post-Merger company) [REDACTED] by stating that roughly [REDACTED] of an estimated [REDACTED] active DFS users in 2016—approximately 93%—played on either FanDuel or DraftKings. [REDACTED] [REDACTED] concluded in 2015 that "[FanDuel] and DraftKings have ~96% market share with 20+ smaller DFS sites competing for the rest." [REDACTED] documents estimate that Defendants control more than 95% of the DFS market in terms of entry fees.

56. The 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines") and courts typically measure concentration using the Herfindahl-Hirschman Index ("HHI"). The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market. Under the Merger Guidelines, a merger is presumed likely to create or enhance market power—and is presumptively illegal—when the post-merger HHI exceeds 2,500 and the merger increases the HHI by more than 200 points.

57. The DFS market is already highly concentrated, and Defendants capture the vast majority of entry fees in DFS contests. The Merger would make the market substantially more concentrated than it is today. Post-Merger, the combined DraftKings/FanDuel would command more than 90% of the relevant market as measured by entry fees. That means the Merger would result in a post-Merger HHI of at least 8,100 and an increase in concentration much greater than

200 points. Thus, the Merger would produce concentration levels well beyond what is necessary to establish a presumption of competitive harm.

58. The Merger is presumptively unlawful under relevant case law and the Merger Guidelines.

**VII. ANTICOMPETITIVE EFFECTS: THE MERGER WOULD ELIMINATE VITAL HEAD-TO-HEAD COMPETITION BETWEEN DRAFTKINGS AND FANDUEL**

59. Defendants are each other's most significant competitor—and likely each other's only meaningful competitor. They are the two largest DFS providers in the United States. DraftKings and FanDuel are more similar to each other than to any other DFS provider, whether measured by number of active users, total entry fees, revenues, size of prize pools, or variety of contest sizes and types. Defendants are much larger than any other competitor on each of these metrics.

60. Defendants acknowledge that they are each other's most significant competitors. DraftKings' CEO has said, "[t]here is only one competitor of consequence – FanDuel." Likewise, FanDuel views DraftKings as its "most significant competitor today."

61. Reflecting how closely and significantly they compete, Defendants are the first and second DFS choices for most users. Many users maintain accounts on both Defendants' sites, allocating their play between the sites based on price and quality factors. Each Defendant uses a variety of methods to closely monitor changes in its "wallet share" among professional users who play on both sites—that is, the percentage of a user's spend on one Defendant's platform versus the other's.

62. Throughout their history, Defendants have competed aggressively against each other on price and non-price factors to win and retain users. FanDuel entered the DFS market in

2009. DraftKings did not enter until 2012, but it spent heavily on marketing, product innovation, and large prize pools in an effort to catch and surpass FanDuel. FanDuel responded to DraftKings' challenge by increasing its marketing spend, improving its product, and increasing the size of its prize pools.

63. Competition between Defendants intensified in 2014 and 2015, pushing DraftKings and FanDuel to spend hundreds of millions of dollars on advertising, offer increasingly large prize pools, and invest in product innovation. As FanDuel noted in June 2015, "DraftKings' significant spending push make[s] it clear they're seeking market leadership at any cost." This fierce competition led to tremendous market growth in 2015—the DFS market approximately tripled from 2014 to 2015, as measured by entry fees.

64. Beginning in 2016, the DFS industry's growth slowed, due, in part, to legal and regulatory challenges. Despite the slowdown in growth, however, DraftKings and FanDuel continued to track each other's performance and to compete vigorously against each other on price and quality terms. In particular, they [REDACTED], and increased prize pool sizes to match each other, among other things.

65. The Merger is likely to have anticompetitive effects on price, in the form of higher commission rates and lower promotional offers than would exist absent the merger.

66. The anticompetitive price effects caused by the Merger may affect users to differing degrees. For example, the merged firm could raise commissions only on certain types of contests, or certain entry fee levels, typically played by certain types of customers. Or it could raise commissions across the board, but offset the price increase for some customers—professional users, for example—by providing retention incentives directly to them.

Accordingly, the anticompetitive price effects of the Merger may not necessarily affect all consumers with equal force.

67. The Merger is also likely to have anticompetitive effects on numerous non-price factors. The Merger is likely to lead to reduced product quality, including contest size and platform features, and reduced innovation, including the development of new contest types and contests for additional sports.

**Price Competition**

68. Defendants compete aggressively on price, striving to offer more attractive commission rates than each other, benchmarking their prices against each other, and taking care not to set their commission rates higher than the other Defendant's rates, fearing that a higher commission rate will drive users (particularly professional users) to move business to the other Defendant. In these ways, Defendants serve as the primary constraint on each other's prices.

69. This head-to-head price competition has existed for years and is ongoing. The following are but a few recent examples showing that Defendants (sometimes referred to as DK and FD) continue to compete vigorously on price and to constrain each other's commission rates:

- a. In February 2015, DraftKings announced internally that it was "[redacted]" and noted "[t]he new rake is still less than FD at all of these price points."
- b. In February 2016, FanDuel analyzed [redacted]. According to FanDuel's Manager of Product Operations, "the [redacted] [entry fee] levels are untouchable. DK already runs their contests at [redacted]. Do we really need the extra [redacted] per contest? [redacted], and this would just give [redacted] even more of a reason to play over there." After this comparison to DraftKings' prices, FanDuel elected not to [redacted].
- c. While considering [redacted] in May 2016, DraftKings evaluated "some pricing and planning a release for 6/15. The pricing is to bring [u]s closer / parity (not higher) to Fanduel in [redacted]." DraftKings [redacted] "to match FD."

d. FanDuel's Product Operations Director proposed a contingency plan for ██████████ in August 2016. He evaluated three different proposals based on how ██████████ compared to DraftKings' ██████████: "[P]roposal #1 wouldn't put us substantially above DK ██████████ . . . ██████████. Proposal #2 would put us ██████████ above them [at entry fee levels] from ██████████ and would cause only moderate user complaints. ██████████. Proposal #3 would put us substantially higher than DK ██████████ and ██████████."

70. As these examples show, the Merger would eliminate a significant constraint on Defendants' ability to increase commission rates. Defendants worry almost exclusively about each other when setting prices; they do not consistently track or benchmark against any other DFS provider's commission rates. Thus, there is no other firm that constrains Defendants' prices today and no firm that could constrain the prices of a merged DraftKings/FanDuel.

71. Competition between Defendants also has led to reductions in commission rates. For example, in July 2014, DraftKings executives expressed concern over—and a desire to respond to—users' criticism that its commission rates exceeded FanDuel's rates: "██████████, in a 2 horse race[,] things like that are going to make a bigger difference." DraftKings' CEO responded: "I would like to move our rake to be at parity with them. I didn't realize we were this off."

72. Defendants also compete on price by providing discounts to users. Both Defendants offer cash bonuses to new and returning users to acquire and retain these users' business. These acquisition and retention bonuses reduce the effective prices that users pay to enter contests.

73. DraftKings and FanDuel attempt to match or beat each other's acquisition and retention bonuses with the goal of attracting users (particularly professional users) away from each other. For example:

- a. In June 2015, FanDuel’s Chief Marketing Officer expressed concern about “going into football with [REDACTED]. DK is out there with [REDACTED] (much clearer now) and still has [REDACTED] on site. We need to be testing here.” He testified that “[REDACTED].”
- b. Also in June 2015, [REDACTED] budgeted [REDACTED] for “individual offers designed to win wallet share from players we know split play between DK and FD.”
- c. DraftKings’ VIP Relationship Manager expressed concern in June 2015 that FanDuel was “giving [REDACTED] in [REDACTED] away to our mutual VIP customers to steal their [REDACTED]. . . . I think we need to be willing to take some risk with these [REDACTED] to make sure we don’t lose any ground.” He later wrote, “[W]e’re going to be matching fanduels [sic] offer to our VIPs which is [REDACTED] per day they play [REDACTED] in entry fees. . . . We should ignore the [REDACTED] in terms of the value of running the contest as the theory is we’re going to get our value back on the incremental action and [REDACTED].” DraftKings’ Chief Revenue Officer responded, “[W]e definitely need to ensure we continue to have a more attractive promotions mix for VIPs than FanDuel.”
- d. An October 2015 [REDACTED] presentation outlined strategies to “Win the NBA Wallet Share Battle,” including “[i]dentify[ing] [REDACTED] players and mak[ing] aggressive offers to attract them to our contests.”

74. While both Defendants reduced their spending on acquisition and retention bonuses in 2016, the aggressive price competition between Defendants continued. For example, in January 2016, DraftKings gave [REDACTED] VIP users “[REDACTED] [REDACTED] as a match of FD’s aggressive offers.” In July 2016, [REDACTED] [REDACTED] had a goal for the third quarter of 2016 to “[t]rack market share with [REDACTED] and push offers where we have ability to consolidate more volume.” He testified that DraftKings made these offers with the purpose of getting users to move some volume of play from FanDuel to DraftKings.

75. Defendants generally do not monitor the commissions and promotional offers of DFS providers other than each other. Thus, the Merger would eliminate the uniquely intense head-to-head price competition between Defendants, and the post-Merger company—which

would be substantially larger than each Defendant is today—likely would not feel the same pressure to compete aggressively on price, including commission rates, discounts, and bonuses. This reduction in competition would likely result in users paying higher prices than they would absent the Merger.

**Non-Price Competition**

76. DraftKings and FanDuel also compete aggressively on non-price terms, including the size of their GPPs, new product features, and the variety of sports and contest formats they offer. Just as they focus almost entirely on each other when they set prices, they also watch and respond almost exclusively to each other to improve their DFS product offerings. No other firm provides—or would provide post-Merger—Defendants with a similar incentive to compete on non-price terms. As a result, the post-Merger firm would have significantly less incentive to maintain and to improve the quality of its contest offerings and user experience.

**GPP and Contest Size Competition**

77. Contest size is an aspect of quality. All else equal, users generally prefer to play contests with larger prize pools, and Defendants use large GPPs to attract and retain customers. As the size of a GPP increases, however, the DFS provider's risk of incurring overlay also increases. Customers benefit from contests that incur overlay because the contest's actual commission rate will be lower than the target commission rate; in other words, the contest will have a lower effective price.

78. DraftKings and FanDuel engage in vigorous head-to-head competition to offer large GPP contests. DraftKings and FanDuel regularly track and consider the size of each other's GPP contests when determining the size of their own GPPs, and often react directly to each other's GPP decisions by offering larger GPPs. For example:

- a. In a February 2015 email discussing contest sizing, a former Executive Vice President at FanDuel remarked, “I’m not sure that [REDACTED] v [REDACTED] makes any difference EXCEPT for in comparison to whatever DK are running. If they are marketing [REDACTED], or [REDACTED] prize pool, it makes our [REDACTED] seem pathetic . . . .”
- b. DraftKings responded to two [REDACTED] contests that FanDuel offered by offering a [REDACTED] contest on April 28, 2015, and another [REDACTED] contest on May 26, 2015. DraftKings’ first contest incurred [REDACTED] in overlay, while the second incurred more than [REDACTED] in overlay.
- c. On August 24, 2015, FanDuel responded to DraftKings’ [REDACTED] contest by offering a [REDACTED] contest on the same day.
- d. Over a nine-day period, from September 23 through October 1, 2015, DraftKings “countered” each of eight FanDuel contests by offering larger total prize pools at similar entry-fee levels. Combined, DraftKings’ eight contests totaled [REDACTED], beating the corresponding FanDuel contests by [REDACTED].

79. Defendants each engaged in a variety of cost-cutting efforts in 2016, including large reductions in their marketing and promotional expenditures, but Defendants’ vigorous head-to-head competition to offer larger contests continued throughout 2016 and into 2017.

Examples include the following:

- a. On April 8, 2016, FanDuel’s Product Operations Director wrote: “The real question here is whether [REDACTED] (primarily relative to DK) we risk impacting medium and long term volume by losing market share.”
- b. On October 17, 2016, FanDuel’s Chief Financial Officer explained to FanDuel’s CEO and others that he expected DraftKings “to be aggressive coming after [FanDuel’s] [REDACTED] volume” and that DraftKings recently announced a “[REDACTED] [REDACTED].” FanDuel’s CFO recommended that FanDuel respond by offering a [REDACTED] contest with a [REDACTED] entry fee to [REDACTED]. FanDuel’s CEO agreed with the recommendation.
- c. After matching a large FanDuel contest at the beginning of the 2016 [REDACTED] season, DraftKings [REDACTED] and a DraftKings employee remarked, “[REDACTED] opening day is also pacing poorly (but we did that to ourselves). FanDuel posted [REDACTED] first and [REDACTED].”
- d. On November 9, 2016, DraftKings internally recommended offering a [REDACTED] with a [REDACTED] entry fee, but, after FanDuel posted its contests for the

day, DraftKings increased the prize pool: it “went up to [REDACTED] on the [REDACTED] to match.”

80. In fact, DraftKings has [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Merger would eliminate this intense and pervasive head-to-head competition on contest size.

81. No other DFS provider consistently offers GPP contests that approach the size of either Defendant’s largest prize pools, and Defendants do not regularly monitor the prize pools of other DFS providers. Absent such competition from each other or another meaningful competitor, the combined firm would have less of an incentive to offer larger contests or to offer as many GPP contests given the risk of incurring overlay. This would likely lead to smaller contests or fewer GPPs with little risk of overlay, resulting in a reduction in quality as well as higher effective commission rates.

Product Features Competition

82. DraftKings and FanDuel also compete fiercely to offer a broad variety of products and product features. Defendants develop new products and features to differentiate themselves from each other and to attract and retain customers.

83. Defendants regularly monitor each other’s new product features. DraftKings [REDACTED] specifically to monitor FanDuel’s product improvements. FanDuel, for its part, [REDACTED]. [REDACTED]. Defendants do this to compare their products and

see which features their offerings lack. They also use such comparisons to prioritize product areas to develop to maintain a product-feature lead or to reduce or close a feature gap.

Ultimately, Defendants prioritize developing and improving specific product features to increase and maintain their respective market shares.

84. Defendants do not regularly monitor the product features of other DFS providers apart from each other, and no other provider offers a comparable range and quality of product features. Thus, the Merger would eliminate important competition on product features among DFS providers that benefits users, and the post-Merger company would have reduced incentive to innovate.

*Sports and Contest Format Competition*

85. DraftKings and FanDuel also compete to offer a broad variety of sports and contest formats.

86. Defendants consider the breadth of their sports offerings and contest formats as significant competitive differentiators. Offering multiple sports is competitively advantageous because it creates opportunities to increase wallet share and market share, as customers can enter contests in more than one sport on a single platform. Offering contests in new sports also allows Defendants to compete against each other to attract new users, to encourage existing users to spend more time and money on their sites, and to keep users playing after a given sport's season ends.

87. Defendants compete to introduce sports and contest formats as a way to maintain and increase their market share. And, they closely monitor each other's sports and contest format offerings. For example, in 2015, DraftKings introduced contests based on college football as a direct competitive response to FanDuel (although neither company offers contests

based on college sports today due to NCAA concerns). Additionally, after learning that FanDuel introduced [REDACTED], DraftKings' CEO told his product development team that DraftKings should "outright steal it but let's give it our own name!" Similarly, documents suggest that FanDuel introduced [REDACTED] as a way to keep pace with DraftKings' superior sports offering and to retain its users' entry fee volume. The merger would eliminate this head-to-head competition between Defendants to offer new sports and contest formats.

### **VIII. LACK OF COUNTERVAILING FACTORS**

88. Defendants cannot demonstrate that new entry or expansion by existing firms would be timely, likely, and sufficient to offset the anticompetitive effects of the Merger.

89. A firm seeking to enter or expand in the market for the provision of paid DFS contests in the United States would face significant barriers. The largest obstacle, among many, is the difficulty and cost of acquiring a critical mass of DFS users on a provider's platform. A would-be entrant, or an existing DFS platform looking to expand, faces significant challenges in convincing DFS users to play on its platform rather than the much larger, more-established platforms offered by Defendants. Entry into the DFS market also requires significant investments in information technology infrastructure and software product development.

90. A firm considering entry into the DFS market would also face concerns about the likely size of the addressable market, regulatory compliance costs, and a considerable degree of regulatory uncertainty.

91. Facing these and other impediments to entry, several large, sophisticated, well-capitalized technology or sports media companies have either considered and rejected plans to enter the DFS market, or attempted to enter with little or no success.

92. Defendants cannot demonstrate cognizable efficiencies that rebut the strong presumption and evidence that the Merger likely would substantially lessen competition in the relevant market.

93. Neither Defendant is a failing firm. Defendants are not profitable today, but they are relatively young companies, and each of them is striving toward profitability. [REDACTED] and will continue to compete in the DFS market indefinitely.

**IX. LIKELIHOOD OF SUCCESS ON THE MERITS,  
BALANCE OF EQUITIES, AND NEED FOR RELIEF**

94. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the Commission, whenever it has reason to believe that a proposed merger is unlawful, to seek preliminary injunctive relief to prevent consummation of a merger until the Commission can adjudicate the merger's legality in an administrative proceeding. In deciding whether to grant relief, the Court must balance the likelihood of the Commission's ultimate success on the merits against the public equities. The principal public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws. Private equities affecting only Defendants' interest cannot defeat a preliminary injunction.

95. The Commission is likely to succeed in proving that the effect of the Merger may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, or Section 5 of the FTC Act, 15 U.S.C § 45. In particular, the Commission is likely to succeed in demonstrating, among other things, that:

- a. The Merger would have anticompetitive effects in the market for paid DFS contests in the United States;

- b. Substantial and effective entry or expansion in these markets is difficult and would not be timely, likely, or sufficient to offset the anticompetitive effects of the Merger; and
- c. The efficiencies asserted by Defendants are insufficient as a matter of law to justify the Merger.

96. Preliminary relief is warranted and necessary. Should the Commission rule, after the full administrative trial, that the Merger is unlawful, reestablishing the status quo ante of vigorous competition between DraftKings and FanDuel would be difficult, if not impossible, if the Merger has already occurred in the absence of preliminary relief. Moreover, without relief from this Court, substantial harm to competition would likely occur in the interim, even if a suitable divestiture remedy were obtained later.

97. Accordingly, the equitable relief requested here is in the public interest.

Wherefore, Plaintiffs respectfully request that the Court:

1. Temporarily restrain and preliminarily enjoin Defendants from taking any further steps to consummate the Merger, or any other acquisition of stock, assets, or other interests of one another, either directly or indirectly;
2. Retain jurisdiction and maintain the status quo until the administrative proceeding that the Commission has initiated is concluded; and
3. Award such other and further relief as the Court may determine is appropriate, just, and proper.

Dated: June 19, 2017

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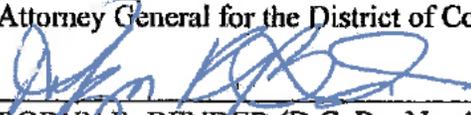
A handwritten signature in blue ink, appearing to read "Paul A. Moore III", is written over a horizontal line.

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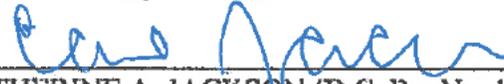
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I HEREBY CERTIFY that on the nineteenth day of June, 2017, I served the foregoing on the following counsel via electronic mail:

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