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Alexander Mandel

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FANDUEL AND DRAFTKINGS: HOW WE GOT HERE AND WHAT'S TO COME

BY [ALEXANDER MANDEL](#) / ON APRIL 26, 2016

From the moment that FanDuel and DraftKings received the cease-and-desist notice from Attorney General Eric Schneiderman on November 10, 2015,^[i] both sides have constantly gone back and forth in the courts to determine the legality of daily fantasy sports. The order insisted that both companies cease operations in the entire state of New York and refuse to accept payments from any citizens from the state. According to Schneiderman, daily fantasy games constitute as gambling, subject to criminal penalties, despite the ambiguous language in the Internet Gaming Prohibition Act ("IGPA").^[ii]

Following the notice, both companies vigorously fought in the courts to vacate the notice, on the grounds that daily fantasy sports exist in almost every state in the United States, and the interpretations of the relevant statutes seems to at least point to the possibility that daily fantasy sports can be viewed as a legal activity.^[iii] The companies view daily fantasy as a game of skill and therefore should fall within the definition of legal gaming.^[iv] With many court documents exposing the size of these companies, as the two most popular forums for daily fantasy sports, both FanDuel and DraftKings became more publically exposed than ever before, as Schneiderman honed in on ending their operations in New York completely.

Reports show that FanDuel and DraftKings make up more than 96% of the daily fantasy sport market share amongst the top twenty competitors and spent a combined \$34 million in advertising with NBC and Comcast in 2015.^[v] And with New York acting as the two companies largest market, both FanDuel and DraftKings refuse to simply allow for the government to strip their companies of revenue without a fight.

However, on December 11, 2015, a New York Supreme Court Judge ordered both FanDuel and DraftKings to cease operations, in which both companies filed an expedited stay of the decision.^[vi] While this did not result in immediately shutting down operations in New York, this was a big blow to both companies, as the judge consistently referred to daily fantasy as "risking something of value", the exact wording of New York's gambling statute.^[vii]

Following the decision, Schneiderman insisted that both FanDuel and DraftKings give back all of the revenue that the companies earned in the state of New York from their "illegal gambling operation".^[viii] The companies claim that they received over \$600,000 in 2015 from New York players alone.^[ix] While this was a farfetched plan, even in Schneiderman's view, it was a clear sign that the attorney general was going to continue to pressure the two companies into ceasing operations in New York.

On January 8, 2016, DraftKings decided that it was time to separate themselves from New York operations a little bit more by closing down their penthouse offices that are located in Manhattan.[\[x\]](#) While the company almost certainly lost some money in this real estate transaction, they felt it was important to distance themselves from the litigation until their appeal can be fully heard.

However, on January 11, 2016, FanDuel and DraftKings finally had their first victory in the courts, when a panel of New York Supreme Court Judges decided to extend the temporary stay to allow the companies to continue operating in New York until their appeal is heard.[\[xi\]](#) The companies still insist that their fantasy sports do not constitute gambling and express confidence in their appeals.

However, although both companies can continue to operate in New York, their reputations and success have been severely impacted from this litigation. After both companies spent nearly \$100 million in advertising in the five months prior to the cease and desist notice, each company has now only spent approximately \$1 million dollars in the month plus since Schneiderman attacked daily fantasy sports.[\[xii\]](#)

While things seemed to be looking up for both FanDuel and DraftKings following the extension of the stay, each company took a major blow on February 5, 2016, as they lost CitiGroup, the companies' financial transaction processor and have gone on to block transactions by New York residents.[\[xiii\]](#) This is the second processor to step away from the companies, following Vantiv Entertainment Solutions, due to legal uncertainty.[\[xiv\]](#) While the stay allows for both companies to continue operations in New York until the case is decided, without Citigroup in their corner, it may be much more difficult.[\[xv\]](#)

To make things worse for the companies, ESPN announced on February 9, 2016 that they have made the executive decision to end their exclusive advertising deal with DraftKings.[\[xvi\]](#) DraftKings had previously committed to over \$200 million per year in advertising spending on the network. Yet, the board of ESPN felt that the legal battle that DraftKings was facing raised too many red flags to continue to endorse the company. This is arguably the biggest blow yet to DraftKings, as their exclusive advertising on ESPN gave the company a huge advantage in customer acquisition.[\[xvii\]](#) DraftKings now must reassess their marketing strategy and find a new partner to advertise for them.

While it should be of no surprise, following the announcement that ESPN was cutting all DraftKings advertising from its network, Fox announced a large drop off in the DraftKings stock. This drop off consists of almost a 60% drop amid their legal challenges.[\[xviii\]](#) While the company was valued at almost \$2 billion in early August, financial analysts are struggling to

determine the current value of the company with the risks attached to it, especially as the appeal process continues.^[xix]

What is to be said is that whatever does happen in the litigation, both companies are taking huge hits as they continue to lose support from the big advertising companies and lose customers across the country. Even with a positive verdict, it seems as though FanDuel and DraftKings will have to go through a ton of damage control if they plan on getting back to completely monopolizing the daily fantasy sports market.

Alexander Mandel is a second-year law student at Benjamin N. Cardozo School of Law and a Staff Editor of the Cardozo Arts and Entertainment Law Journal. He is an active member of Cardozo's Sports Law Society and has a strong interest in Sports Law and Real Estate Law.

[i] Sharon Terlep, *New York Orders Daily Fantasy-Sports Companies FanDuel, DraftKings to Cease Operations*, Wall Street Journal (November 10, 2015, 8:07 PM), <http://www.wsj.com/articles/n-y-attorney-general-tells-daily-fantasy-sports-companies-to-cess-operations-in-the-state-1447197512>.

[ii] *Id.*

[iii] Associate Press, *NY court documents show big business of daily fantasy sports*, Ohio (November 20, 2015, 3:14 PM), <http://www.ohio.com/business/ny-court-documents-show-big-business-of-daily-fantasy-sports-1.642128>.

[iv] *Id.*

[v] *Id.*

[vi] Fitz Tepper, *Judge Orders DraftKings And FanDuel To Cease Operations In New York*, TechCrunch (December 11, 2015), <http://techcrunch.com/2015/12/11/judge-orders-draftkings-and-fanduel-to-cess-operations-in-new-york/>.

[vii] *Id.*

[viii] Jonathan Lemire, *New York wants FanDuel and DraftKings to give back all the money they made in the state*, Business Insider (January 1, 2016, 8:07 PM), <http://www.businessinsider.com/ap-new-york-sues-to-get-draftkings-fanduel-to-return-money-2016-1>.

[ix] *Id.*

[x] Biz Carson, *DraftKings is moving out of its New York penthouse offices*, Business Insider Australia (January 8, 2016, 1:43 PM), <http://www.businessinsider.com.au/draftkings-is-moving-out-of-its-new-york-penthouse-offices-2016-1>.

[xi] Fitz Tepper, *DraftKings And FanDuel Receive Stay In NY, Can Legally Operate Until Final Ruling*, TechCrunch (January 11, 2016), <http://techcrunch.com/2016/01/11/draftkings-and-fanduel-receive-stay-in-ny-can-legally-operate-until-final-ruling/>.

[xii] Wayne Friedman, *Daily Fantasy Sports Leagues Dramatically Cut TV Ad Spend*, MediaPost (January 22, 2016, 5:26 PM), <http://www.mediapost.com/publications/article/267339/daily-fantasy-sports-leagues-dramatically-cut-tv-a.html>.

[xiii] Dominic Patten, *FanDuel & DraftKings See Citigroup "Block" Transactions In NY State, Deadline* (February 5, 2016, 2:31 PM), <http://deadline.com/2016/02/fanduel-draftkings-citigroup-new-york-shut-down-injunction-1201697401/>.

[xiv] *Id.*

[xv] *Id.*

[xvi] Daniel Roberts, *ESPN ends exclusive advertising deal with DraftKings*, Yahoo Finance (February 9, 2016, 6:22 PM), <http://finance.yahoo.com/news/espn-ends-exclusive-draftkings-deal-215455679.html>.

[xvii] *Id.*

[xviii] Curt Woodward, *Fox cuts value of DraftKings stake by 60 percent*, Boston Globe (February 9, 2016), <https://www.bostonglobe.com/business/2016/02/09/fox-cuts-value-draftkings-stake-percent/0RCLppU4LkDreMyUVqZhKJ/story.html>.

[xix] *Id.*