



October 16, 2015

Attorney General Maura Healey  
Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108

Dear Attorney General Healey:

On behalf of Stop Predatory Gambling and the Public Health Advocacy Institute at Northeastern University, we write to demonstrate that a close reading of Massachusetts statutes and their interpretation by the Supreme Judicial Court show that daily fantasy sports operators such as DraftKings and FanDuel are conducting illegal gambling operations in the Commonwealth.

### **I. What Is “Daily Fantasy Sports” And Why Is It A Problem?**

Season-long fantasy sports started as a hobby and a form of community among enthusiasts. It was largely a social activity. The trophy mattered more than the money. With the introduction and massive promotion of “Daily Fantasy Sports” (DFS), it has been turned into a profit-making commercial operation that clearly incorporates the three elements of gambling: consideration, chance, and prize.

FanDuel, DraftKings and other DFS companies have corrupted the traditional structure and recreational nature of hobbyists’ fantasy sports activities (commonly known as “rotisserie leagues”). Daily fantasy sports games restart constantly and typically are played against strangers. Rather than simply hosting leagues for users, daily fantasy sports operators serve as an exchange and profit by retaining a percentage of the moneys wagered (“entrance fees”). Another contrast between traditional fantasy sports leagues and the new breed of DFS is that these companies are multi-billion dollar profit centers with rewards for very few of their players that bear no resemblance to traditional rotisserie leagues that, until recently, defined the term fantasy sports.<sup>1</sup> Most importantly, as outlined below, DFS is a form of illegal gambling under Massachusetts law.

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<sup>1</sup> See Bob Hohler, *An Uncertain Line Between Fantasy Sports, Gambling*, BOSTON GLOBE, August 2, 2015, <http://www.bostonglobe.com/sports/2015/08/02/fantasy-games-draw-scrutiny-ban-sports-gambling-blurs/XxWUs2cwrveLvJe8bFt3wI/story.html>.

## II. Under Massachusetts Law, “Daily Fantasy Sports” Constitutes Illegal Internet Sports Gambling

“Daily fantasy sports” is internet sports gambling that is legally indistinguishable from a privately run lottery or numbers game. Both internet gambling and commercial sports gambling are illegal in Massachusetts. Such online gambling operations fall squarely within the state’s legal definition of prohibited lottery gambling.

### **A. The Massachusetts Legislature Has Prohibited Gambling, and Has Not Created a Carve-Out Exception or Explicit Provision to Legalize Daily Fantasy Sports Enterprises**

There is a presumption in Massachusetts law that any lottery or gambling activity that is not *specifically* authorized is prohibited. M.G.L. ch. 271, § 7 prohibits individuals or corporations from setting up or promoting any private lottery. As of 2011, the statute also prohibits any gambling that is “not taking place in a gaming establishment [casino] licensed pursuant to M.G.L. ch. 23K.”

Likewise, M.G.L. ch. 271, § 16A, prohibits the provision of facilities for gambling or “assist[ing] in the provision of facilities or services for the conduct of illegal lotteries, or . . . the illegal registration of bets or the illegal buying or selling of pools upon the result of a trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the happening of any event, or upon the result of a game, competition, political nomination, appointment or election . . .” Thus, far from being authorized, providing facilities for betting on the performances of individual athletes (“the skill, speed or endurance of man”) is expressly prohibited.

In 2011, the Legislature enacted specific exemptions in these two statutes for casino establishments that are regulated under M.G.L. ch. 23K. Express exemptions are the norm in these laws. Both statutes make specific reference to an exemption the MA Legislature created in 2011 for casino establishments, embodied in M.G.L. ch. 23K. If the Legislature had intended to exempt DFS from G.L. ch. 271 § 7 and §16A, it would have included it within the purview of ch. 23K. The legislature did not do so, however, and thus there is no statutory authorization in Massachusetts.<sup>2</sup>

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<sup>2</sup> In addition, M.G.L. ch. 271, § 5B bans internet gambling. This statute, which contains express exemptions for the state lottery, for certain charitable bingo games, and supermarket sweepstakes, shows that, under Massachusetts law, any form of gambling is illegal unless there is an act of the Legislature, expressly authorizing it.

## **B. Massachusetts Statutes (as Interpreted by the MA Supreme Judicial Court) Prohibit Private Lottery Enterprises**

The Supreme Judicial Court has long ago settled on the interpretation of these statutes. A lottery is defined in the following manner:

- The word “lottery” signifies a scheme for distribution of prizes by chance.<sup>3</sup>
- The fact that skill as well as chance enters into a game does not prevent it from being classified as a lottery.<sup>4</sup>
- There are three elements in a lottery: (1) payment of price for (2) the possibility of winning a prize, depending upon (3) hazard or chance.<sup>5</sup>

DFS meets all of the requirements of the fundamental definition of gambling. It has *payment of price* (the player wagers money), *the possibility of winning a prize* (the player wins cash prizes), and *hazard or chance* (there must be at least enough variance that an unskilled or lesser skilled bettor can, at least occasionally, win the prize).

In deciding a case in which the gambling activity has a mix of skill and chance, Massachusetts applies the *predominance test*. The MA Supreme Judicial Court first set forth the elements of the predominance test in *Commonwealth v. Plissner* in 1936, stating “With reference to cases where both elements [skill and chance] are present, the rule generally stated is that if the element of chance rather than that of skill predominates, the game may be found to be a lottery.”<sup>6</sup> Importantly, the Court further elaborated with a second, alternative test “that if the element of chance is present in such a manner as to thwart the exercise of skill or judgment in a game, there may be a lottery . . . This test is in harmony with the rule that a result is determined by chance where it is determined ‘by means making the result independent of the will of the manager of the game.’”<sup>7</sup> The performances of individual athletes on any given day, which form the basis of DFS contests, are independent of the will of the manager of the game.

In 1944, in *Commonwealth v. Lake*, the SJC revisited the issue of applying the predominance test, noting that there are an infinite number of types of games that can involve both skill and chance, and that “in order to render the laws against lotteries effectual to combat the evils at which they are aimed, it has been found necessary to draw a compromise line between the two elements, with the result that by the weight of authority a game is now considered a lottery where the element of chance predominates and is not a lottery where the element of skill predominates.”<sup>8</sup> The *Lake* Court interpreted the predominance test applying the following standard: “[I]n determining which element predominates, where the game is not one of pure skill or of pure chance, some courts have held, we think rightly, that it is permissible in appropriate instances to *look beyond the bare mechanics of the game itself* and to consider

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<sup>3</sup> *Commonwealth v. Mackay*, 177 Mass 345 (1901).

<sup>4</sup> *Commonwealth v. Plissner*, 295 Mass 457 (1936).

<sup>5</sup> See *Commonwealth v. Lake*, 317 Mass 264 (1944); *Commonwealth v. Frate*, 405 Mass 52 (1989).

<sup>6</sup> See *Commonwealth v. Plissner*, 295 Mass 457, 464 (Mass. 1936).

<sup>7</sup> *Id.* at 466.

<sup>8</sup> *Commonwealth v. Lake*, 317 Mass. 264, 267 (Mass. 1944).

whether as actually played by the people who play it chance or skill is the prevailing factor.”<sup>9</sup>  
The crux of the jury’s decision properly focused on:

1. Whether the players have any “appreciable degree of skill;”
2. Whether “to the great majority of players the game would be primarily a game of chance;” and
3. Whether “the appeal of the game to the public would be a gambling appeal, with all the evil consequences of a lottery.”<sup>10</sup>

DFS operators deceptively claim that DFS is “a game of skill” but the presence of skill is largely irrelevant. Even if one were to argue that a “skilled” DFS player is not gambling, then it would also be true that a lesser or unskilled player is, in fact, gambling. The very existence of skilled DFS players – playing with an edge and for a profit – depends on the presence of lesser skilled players willing to gamble at a disadvantage against them.

A recent analysis of DFS winners and losers concluded that the majority of DFS customers lack the skill to ever have success and thus are relying largely on chance to recoup some of their investment: “While any player might get lucky on the back of a handful of entries, over time nearly all of the prize money flows to a tiny elite equipped with elaborate statistical modeling and automated tools that can manage hundreds of entries at once and identify the weakest opponents.”<sup>11</sup> Another study demonstrates that DFS enterprises reap profits by relying on a huge pool of unskilled players who win a smaller percentage of the time (1.3%) than those who make sports bets legally in Las Vegas (4.5%) or even those who play completely randomly. As more fully explained below, for the great majority of DFS players, the game is primarily a game of chance.<sup>12</sup>

#### **IV. “Daily Fantasy Sports” Profit Only By Attracting Unskilled Players**

FanDuel, DraftKings and similar commercial sports gambling operators (*e.g.*, Victiv, Kountermove, BetAmerica, HotRoster, DailyMVP, FanNation, ScoreStreak, Tradesports) are not the result of a grassroots citizens movement demanding internet gambling. Rather, they are the end result of powerful financial interests seeking to exploit what they wrongly believe is an unregulated area of law at the expense of everyday people.<sup>13</sup>

DFS’s business model only works by attracting unskilled players – sometimes referred to as the “minnows” - to feed the skilled ones – known as the “sharks.” The “sharks” are the

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<sup>9</sup> *Id.* at 267-268 (emphasis added).

<sup>10</sup> *Id.* at 268.

<sup>11</sup> Joshua Brustein & Ira Boudway, *You Aren’t Good Enough to Win Money Playing Daily Fantasy Football*, BLOOMBERG BUSINESSWEEK, September 10, 2015, <http://www.bloomberg.com/news/articles/2015-09-10/you-aren-t-good-enough-to-win-money-playing-daily-fantasy-football>.

<sup>12</sup> See Ed Miller & Daniel Ginger, *For Daily Sports Operators, the Curse of Too Much Skill*, STREET & SMITH’S SPORTS BUSINESS JOURNAL, July 27, 2015, <http://www.sportsbusinessdaily.com/Journal/Issues/2015/07/27/Opinion/From-the-Field-of-Fantasy-Sports.aspx>.

<sup>13</sup> Sacha Feinman & Josh Israel, *The Hot New Form of Fantasy Sports Is Probably Addictive, Potentially Illegal And Completely Unregulated*, THINK PROGRESS (May 7, 2015, 8:31 AM), <http://thinkprogress.org/sports/2015/05/07/3648832/daily-fantasy-sports-gambling/>.

players whose successes are used in marketing to attract masses of “minnows” who place less sophisticated wagers in order to generate a substantial amount of winnings for the “sharks” and profits or “rake” for the game operators. These “sharks” are experts, designing and using highly sophisticated proprietary algorithms to win consistently.

“Minnows” are those who tend to be new sign-ups with limited experience and who lose their money. Finding new “fish” to feed to the “sharks” is the most important requirement for this enterprise to succeed over the next few years, and DFS operators’ unprecedented mass advertising campaigns and marketing deals with pro sports teams and leagues are a key to making it happen. The only real driver of growth and profit for these operations lies in finding as many new “minnows” as possible, without which, the model falls apart.<sup>14</sup>

A recent study<sup>15</sup> breaks down the divide between the benefits the sharks reap versus the losses the minnows suffer:

- The top 11 players paid on average \$2 million in entry fees and profited \$135,000 each. They accounted for 17 percent of all entry fees. The winningest player in the study profited \$400,000 on \$3 million in entry fees.
- The rest of the top 1.3 percent of players paid on average \$9,100 in entry fees and profited \$2,400 each, for a 27 percent ROI, which is extremely impressive. These contestants accounted for 23 percent of all entry fees and 77 percent of all profits.
- 5 percent of players are the big fish; they lost \$1,100 on entry fees of \$3,600 on average.
- 80 percent of players were the minnows; they lost \$25 on entry fees of \$49 on average.

Even if the DFS companies try to disguise the nature of their business, their winningest customers (of whom there are only a few) are clear-eyed about what is taking place. As highly successful DFS players recently told the *Wall Street Journal*,

[T]he future of the industry is based on attracting casual fans. "If this is going to get huge, we need the guys who are going to buy in for \$20. They do it for fun," Wiggins says. *But if that happens, number-crunching sharks like Albertson will be lying in wait.* If casual players embrace daily fantasy in bigger numbers, Albertson says, "then we'll really be a printing press."<sup>16</sup>

## **V. Sports Gambling Operators Are Targeting Massachusetts Youth**

A key demographic for internet sports gambling operators like FanDuel and DraftKings is youth. This should concern everyone because it is well-established that the younger children start gambling, the more likely it is they will become habitual gamblers and also problem

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<sup>14</sup> See Miller, *supra* note 12 (analyzing how DFS enterprises reap profits by relying on a huge pool of unskilled players who win a smaller percentage of the time (1.3%) than those who make sports bets legally in Las Vegas (4.5%) or play completely randomly); see also Brustein, *supra* note 11.

<sup>15</sup> See Brustein, *supra* note 11.

<sup>16</sup> Brad Regan, *A Fantasy Sports Wizard's Winning Formula*, THE WALL STREET JOURNAL, June 4, 2014, <http://online.wsj.com/articles/a-fantasy-sports-wizards-winning-formula-wsj-money-june-2014-1401893587>

gamblers.<sup>17</sup> One report cites data from the Fantasy Sports Trade Association estimating that almost 10 million of the estimated 51.6 million fantasy sports players are under 18.<sup>18</sup> One of the companies to launch its own sports gambling operation, Yahoo, has recruited thousands of minors to play free fantasy sports. The obvious business model is for Yahoo to convert these “for-free” players into “real-money” gamblers. Such youth is at risk for being lured into real-money gambling whether at Yahoo, other DFS gambling sites, or with other illegal gambling operations. This approach is directly akin to the unfair practice used for years by tobacco companies to get youth addicted to smoking by offering them free cigarettes.<sup>19</sup>

Internet gambling is especially addictive for youth who have grown up playing video games. By deceptively luring the Commonwealth’s youth into online gambling, these sports gambling operators are setting up an entire generation of young people to become problem gamblers by making exploitive forms of gambling omnipresent in everyday life, whether in their own homes or on the smartphones they carry with them everywhere. When that ubiquitous presence and availability are combined together with the intense passion many young people have for their favorite athletes and sports, and then blend in sophisticated targeted marketing, player data tracking and tendency exploitation, it is clear that DFS presents a dangerous, predatory mix to children in the short and longer term.

## **VI. Other States Have Recognized That DFS IS Gambling**

Nevada is only the most recent state to recognize that DFS is “gambling.”<sup>20</sup> A statement released by the Nevada Gaming Control Board states “DFS involves wagering on the collective performance of individuals participating in sporting events, under current law, regulation and approvals, in order to lawfully expose DFS for play within the State of Nevada, a person must possess a license to operate a sports pool issued by the Nevada Gaming Commission.”<sup>21</sup> Likewise, the Washington State Gambling Commission has specifically declared that fantasy sports constitutes gambling, declaring “[F]antasy sports have never been authorized as gambling activities in Washington and are illegal.”<sup>22</sup> In addition, the states of Arizona and Louisiana treat DFS as gambling, and prohibit it because the operators are commercial businesses that receive a share of the amounts wagered.<sup>23</sup>

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<sup>17</sup> NEW YORK COUNCIL ON PROBLEM GAMBLING - KNOW THE ODDS, THE DANGERS OF YOUTH GAMBLING ADDICTION, (May 2013), [http://knowtheodds.org/wp-content/uploads/2013/05/NYCPEG\\_ebook\\_YouthGambling\\_052114.pdf](http://knowtheodds.org/wp-content/uploads/2013/05/NYCPEG_ebook_YouthGambling_052114.pdf)

<sup>18</sup> Robert DellaFave, *Identify Verification, Financial Checks At Yahoo Daily Fantasy Sports Lag Far Behind Industry Standards*, LEGAL SPORTS REPORT, July 29, 2015, <http://www.legalsportsreport.com/2405/problems-with-yahoo-dfs-platform/>

<sup>19</sup> Ronald M. Davis & Leonard A Jason, *The Distribution Of Free Cigarette Samples To Minors*, 4(1) AM. J. PREV. MED. 21 (1988 Jan-Feb), <https://industrydocuments.library.ucsf.edu/documentstore/z/x/b/b/zxbb0142/zxbb0142.pdf>.

<sup>20</sup> Callum Borchers & Shelley Murphy, *Nevada Orders Fantasy Sports Sites To Shut Down*, BOSTON GLOBE, October 15, 2015, <https://www.bostonglobe.com/business/2015/10/15/nevada-orders-fantasy-sports-sites-shut-down/xgzblWGDtcwskI6mIsGvYI/story.html>.

<sup>21</sup> A.G. Burnett, Chairman, Nevada Gaming Control Board, *Notice To Licensees, Legality of Offering Daily Fantasy Sports In Nevada*, (October 15, 2015), <http://gaming.nv.gov/modules/showdocument.aspx?documentid=10481>.

<sup>22</sup> Bobby P. Meek, *Exploring the Fantasy World of Internet Gambling*, 18 (May 14, 2015), <https://uarkive.uark.edu/xmlui/bitstream/handle/10826/1161/MEEK-THESIS-2015.pdf?sequence=1>.

<sup>23</sup> Id.

Like these other states, Massachusetts has clearly delineated, through the courts and its statutes, the types of gambling that it deems appropriate and allowable under the current law (a state-run lottery, charitable bingo games, state-regulated casino establishments). The Commonwealth's prohibition on all other gambling contains no exception for DFS enterprises, yet they are proliferating to the point of ubiquity in Massachusetts.<sup>24</sup> The lack of any action to stop this illegal enterprise and either to tolerate it or wait until some future legislative action allows it sends the wrong message: that it is acceptable to engage in an illegal enterprise now and, if it generates enough revenue, wait until lobbyists and corporate interests change its legal status. We urge you to take affirmative action to clarify that this type of business enterprise is illegal in the Commonwealth.

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<sup>24</sup> Bob Hohler, *An Uncertain Line Between Fantasy Sports, Gambling* (August 2, 2015), <http://www.bostonglobe.com/sports/2015/08/02/fantasy-games-draw-scrutiny-ban-sports-gambling-blurs/XxWUs2cwrveLvJe8bFt3wI/story.html>.