

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of

**DraftKings, Inc.**  
**a corporation,**  
**and**  
**FanDuel Limited**  
**a corporation.**

**Docket No. 9375**

**ANSWER AND DEFENSES OF RESPONDENT FANDUEL, LTD.**

FanDuel, Ltd. (“FanDuel” or “Defendant”), by and through their undersigned counsel, respond below to the Federal Trade Commission’s (“FTC” or “Plaintiffs”) Complaint dated June 19, 2017. At the outset, FanDuel strongly contends that the underlying premises of the Complaint – that the Merger Agreement between FanDuel and DraftKings, Inc. (“DraftKings”) constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, and that the Merger, if consummated, would violate Section 7 of the Clayton Act, as amended – reflects an unnecessarily rigid and uninformed application of the antitrust laws to an underdeveloped, nascent industry, and largely ignores rigorous economic analysis that has demonstrated unequivocally that prices are not likely to increase as a result of the transaction. Plaintiffs’ challenge to the proposed transaction flatly ignores the core rule emphasized by the Horizontal Merger Guidelines, which is that the antitrust analysis of any given transaction should

favor economic analysis of likely competitive effects and harm, not speculation based solely on an alleged market structure.

To the extent the Complaint's introductory statement requires a response, FanDuel denies the allegations alleged therein.

## **RESPONSE TO SPECIFIC ALLEGATIONS**

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

1. FanDuel denies the allegations contained in Paragraph 1 of the Complaint, except FanDuel admits that (a) it competes with many fantasy sports, sports entertainment, and other gaming and recreation companies; and (b) it has invested hundreds of millions of dollars in efforts to drive growth, awareness and trust in its product offerings.

2. FanDuel denies the allegations contained in Paragraph 2 of the Complaint, except that FanDuel admits that (a) it continues to strive towards profitability; and (b) there were significant legal and regulatory issues that arose across multiple states in 2015 and 2016, which continue today and into the foreseeable future; and (c) the merger will provide significant benefits to consumers.

3. FanDuel denies the allegations contained in Paragraph 3 of the Complaint and avers that the Commission's selective quotation of unidentified written materials or communications, offered without dates or context, is misleading as framed. FanDuel respectfully refers the Commission to the quoted documents, noting the dates on which these documents were created, for a complete and accurate description of their contents.

### **II. BACKGROUND**

**A. Jurisdiction**

4. FanDuel admits the facts contained in Paragraph 4 of the Complaint, except to the extent that Paragraph 4 contains legal conclusions to which no response is required.

5. FanDuel admits the facts contained in Paragraph 5 of the Complaint, except to the extent that Paragraph 5 contains legal conclusions to which no response is required.

**B. Respondents**

6. FanDuel lacks information to respond to allegations in Paragraph 6 of the Complaint concerning the corporate structure and financial performance of DraftKings. On information and belief, FanDuel believes DraftKings is the country's largest DFS provider in terms of entry fees and revenues.

7. FanDuel admits the allegations contained in Paragraph 7 of the Complaint, with the exception of the Complaint's allegation concerning the origin of the "vast majority" of its revenue, which FanDuel is unable to admit or deny due to the ambiguity of the term "vast". On information and belief, FanDuel believes that it is the country's second-largest DFS provider in terms of entry fees and revenues.

**C. The Merger**

8. FanDuel admits the allegations contained in Paragraph 8 of the Complaint.

**III. DFS INDUSTRY BACKGROUND**

9. FanDuel admits the allegations contained in Paragraph 9 of the Complaint only to the extent they describe certain types of fantasy sports.

10. FanDuel denies the allegations contained in Paragraph 10 of the Complaint, except that FanDuel admits that fantasy sports include a multitude of variants involving different scoring systems, roster construction and selection methods, entry fee price points and prize distribution criteria, duration of leagues/contests, and other factors that represent a continuum of different product offerings comprising fantasy sports.

11. FanDuel denies the allegations contained in Paragraph 11 of the Complaint to the extent they suggest that all DFS contests are short-duration.

12. On information and belief, FanDuel admits the allegations contained in Paragraph 12 of the Complaint, to the extent they describe many of the contests currently offered by FanDuel and DraftKings.

13. FanDuel denies the allegations contained in Paragraph 13 of the Complaint to the extent they purport to describe all DFS contests.

14. FanDuel admits that a contest on FanDuel's platform begins when the first real-life sporting event on which the contest is based commences. FanDuel admits the remaining allegations contained in Paragraph 14 of the Complaint only as the allegations relate to FanDuel's contests; FanDuel otherwise denies the allegations to the extent they characterize all DFS products as the same.

15. FanDuel denies the allegations in Paragraph 15 of the Complaint given the ambiguity of the term "regularly," except that upon information and belief, FanDuel admits that DFS providers, including FanDuel, offer a variety of contests at a wide range of sizes, including leagues of friends playing together in groups from 8-16 participants.

16. FanDuel denies the allegations contained in Paragraph 16 of the Complaint, and specifically denies that commission is the sole “price” that DFS providers charge their users to play DFS contests, except that FanDuel admits that (a) some DFS contests require users to pay an entry fee for each lineup submitted and involve the potential to win cash prizes; and (b) it generates revenue from some contests by retaining a portion of the entry fees as its commission.

17. FanDuel denies the allegations contained in Paragraph 17 of the Complaint, except to the extent that Paragraph 17 describes the way one calculation can theoretically be made to determine the maximum commission rate of certain types of contests. Paragraph 17 contains general legal conclusions relating to unspecified jurisdictions to which no response is required.

18. FanDuel denies the allegations contained in Paragraph 18 of the Complaint, except that FanDuel admits that adjusting the size of the prize pool, the entry fee amount, or the maximum number of entries under certain circumstances may change a contest’s commission rate, but not necessarily aggregate commissions. FanDuel avers that it lacks the knowledge or information to respond to allegations in Paragraph 18 concerning all DFS providers.

19. FanDuel denies the allegations contained in Paragraph 19 of the Complaint, except that it admits that (a) it has, from time to time, offered different types of contests; (b) not all of its contests attract the maximum number of entries; and (c) if one of its contests has a guaranteed prize pool that prize pool will be paid out regardless of the number of entries in that contest. FanDuel avers that it lacks the knowledge or information to respond to allegations in Paragraph 19 concerning all DFS providers.

20. FanDuel avers that it lacks the knowledge or information to respond to allegations concerning all DFS providers in Paragraph 20 of the Complaint.

21. FanDuel denies the allegations contained in Paragraph 21 of the Complaint, except that it admits that different users may enter different contests, submit different volumes of entry fees, and win different amounts of prizes. FanDuel admits that it uses the terms HVP and casual users, among other terms to describe its customers. FanDuel avers that it lacks the knowledge or information to respond to allegations regarding DraftKings' views and confidential business information.

#### **IV. PURPORTED RELEVANT MARKET**

22. FanDuel denies the allegations contained in Paragraph 22 of the Complaint, and specifically denies that the provision of "paid DFS" constitutes a relevant market.

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

23. FanDuel denies the allegations contained in Paragraph 23 of the Complaint, and specifically denies that the provision of "paid DFS" constitutes a relevant product market, except that FanDuel admits that fantasy sports contests may have varying durations and varying prizes.

24. FanDuel denies the allegations contained in Paragraph 24 of the Complaint, except that FanDuel admits that fantasy sports can be played in multiple settings, including online.

25. FanDuel denies the allegations contained in Paragraph 25 of the Complaint, and specifically denies that "the provision of "paid DFS" constitutes a relevant product market.

26. FanDuel denies the allegations contained in Paragraph 26 of the Complaint, and specifically denies that the provision of “paid DFS” constitutes a relevant product market.

27. FanDuel denies the allegations contained in Paragraph 27 of the Complaint, and specifically denies that the provision of “paid DFS” constitutes a relevant product market.

28. FanDuel denies the allegations contained in Paragraph 28 of the Complaint, and specifically denies that the provision of “paid DFS” constitutes a relevant product market.

29. FanDuel denies the allegations contained in Paragraph 29 of the Complaint, and specifically denies that the provision of “paid DFS” constitutes a relevant product market.

30. FanDuel denies the allegations contained in Paragraph 30 of the Complaint and avers that Commission’s selective quotation of unidentified written materials or communications, offered without context, is misleading as framed and FanDuel respectfully refers the Court to the quoted documents, except FanDuel admits that certain fantasy sports contests can run for one day, one week, or one season among other durations, and notes that multiple companies, including FanDuel, offer all such types of contests.

31. FanDuel denies the allegations contained in Paragraph 31 of the Complaint and avers that Commission’s selective quotation of unidentified written materials or communications, offered without context, is misleading as framed and FanDuel respectfully refers the Court to the quoted documents.

32. FanDuel denies the allegations in Paragraph 32 of the Complaint, except that FanDuel admits that some of its contests involve entry fees and cash prizes. FanDuel avers that the Commission’s selective quotation of unidentified written materials or communications,

offered without context, is misleading as framed and FanDuel respectfully refers the Court to the quoted documents. FanDuel further avers that it lacks the knowledge and information to respond to generalized allegations regarding user views and other providers' operations.

33. FanDuel denies the allegations contained in Paragraph 33 of the Complaint, and specifically the characterization that "SLFS" and "DFS" are distinct products with distinct characteristics rather than a wide range of products with different attributes, except that FanDuel admits that it offers fantasy contests in which athlete selections are not exclusive, and different fantasy contests may have different number of entries. FanDuel avers that it lacks the knowledge and information to respond to generalized allegations regarding the operation of contests by other providers.

34. FanDuel denies the allegations contained in Paragraph 34 of the Complaint, except that FanDuel admits that it offers certain contests in which athletes are selected via a salary cap draft. FanDuel avers that it lacks the knowledge and information to respond to allegations regarding the operation of contests by other providers.

35. FanDuel denies the allegations contained in Paragraph 35 of the Complaint. FanDuel further avers that it lacks the knowledge and information to respond to generalized allegations regarding the views of other providers.

36. FanDuel denies the allegations contained in Paragraph 36 of the Complaint. FanDuel further avers that it lacks the knowledge and information to respond to generalized allegations regarding the views of other providers.



37. FanDuel denies the allegations contained in Paragraph 37 of the Complaint, except that it admits that it has offered different types of contests.

38. FanDuel denies the allegations contained in Paragraph 38 of the Complaint, except that it admits that FanDuel users can and do switch among other fantasy sports product substitutes and a range of other entertainment options and activities focused on a return on investment of capital; and (d) commissions have increased on certain FanDuel contests in 2015 and 2016.

### **B. Purported Relevant Geographic Market**

39. FanDuel avers that to the extent that Paragraph 39 of the Complaint contains legal conclusions, no response is required. To the extent a response is required, FanDuel denies the allegations in Paragraph 39.

40. FanDuel takes no position on the characterization of “regulations” absent a specific allegation concerning a particular jurisdiction. FanDuel admits that it must comply with certain states regulations in order to offer products to residents of those states. FanDuel further avers that it lacks the knowledge and information to respond to allegations regarding the operations of other fantasy sports providers who may be subject to such regulations.

41. FanDuel denies the allegations in Paragraph 41 of the Complaint given the ambiguity of the term “generally.” FanDuel further avers that it lacks the knowledge and information to respond to allegations regarding the operations of other DFS providers.

42. FanDuel avers that to the extent that Paragraph 42 of the Complaint contains legal conclusions, to which no response is required. To the extent a response is required, FanDuel

denies the allegations in Paragraph 42, except that it admits it competes with many fantasy sports, sports entertainment, and other gaming and recreation companies.

43. FanDuel avers that to the extent that Paragraph 43 of the Complaint contains legal conclusions, no response is required. To the extent a response is required, FanDuel denies the allegations in Paragraph 43, except that FanDuel admits that it competes with many fantasy sports, sports entertainment, and other gaming and recreation companies in the United States, wherever they are located.

**V. PURPORTED MARKET STRUCTURE AND THE MERGER'S PURPORTED PRESUMPTIVE ILLEGALITY**

44. FanDuel denies the allegations contained in Paragraph 44 of the Complaint given the ambiguity of the phrase "by far." FanDuel further avers that it lacks the knowledge and information to form a belief regarding the truth of the allegation in Paragraph 44 as it pertains to DraftKings.

45. FanDuel denies the allegations contained in Paragraph 45 and avers that the Commission's selective quotation of unidentified written materials or communications, offered without context, is misleading as framed and FanDuel respectfully refers the Court to the quoted documents. FanDuel avers that it lacks the knowledge and information to respond to allegations concerning DraftKings' documents.

46. FanDuel avers that Paragraph 46 of the Complaint contains legal conclusions, to which no response is required.

47. FanDuel denies the allegations contained in Paragraph 47 of the Complaint.

48. FanDuel denies the allegations contained in Paragraph 48 of the Complaint.

## **VI. PURPORTED ANTICOMPETITIVE EFFECTS**

49. FanDuel denies the allegations contained in Paragraph 49 of the Complaint.

50. FanDuel denies the allegations contained in Paragraph 50 of the Complaint.

FanDuel further avers that the Commission's selective quotation of unidentified written materials or communications, offered without context, is misleading as framed and FanDuel respectfully refers the Court to the quoted documents.

51. FanDuel denies the allegations contained in Paragraph 51 of the Complaint, except that FanDuel admits that users choose to spend their time and money on many fantasy sports, sports entertainment, and other gaming and recreation companies' sites.

52. FanDuel denies the allegations contained in Paragraph 52 of the Complaint, except that FanDuel admits that it competes with many fantasy sports, sports entertainment, and other gaming and recreation companies.

53. FanDuel denies the allegations contained in Paragraph 53 of the Complaint, except that FanDuel admits that it has invested hundreds of millions of dollars in efforts to drive growth, awareness and trust in its product offerings. FanDuel further avers that Plaintiffs' selective quotation of unidentified written materials or communications, offered without context, is misleading as framed and FanDuel respectfully refers the Court to the quoted documents.

54. FanDuel denies the allegations contained in Paragraph 54 of the Complaint, specifically including the characterization of DFS as an "industry," except that FanDuel admits

that (a) in 2016, its products faced regulatory challenges; (b) its growth relies on outside investors to provide capital; and (c) it competes with many fantasy sports, sports entertainment, and other gaming and recreation companies.

55. FanDuel denies the allegations contained in Paragraph 55 of the Complaint.

56. FanDuel denies the allegations contained in Paragraph 56 of the Complaint.

57. FanDuel denies the allegations contained in Paragraph 57 of the Complaint.

58. FanDuel denies the allegations contained in Paragraph 58 of the Complaint, except that FanDuel admits that it competes with many fantasy sports, sports entertainment, and other gaming and recreation companies.

59. FanDuel denies the allegations contained in Paragraph 59 of the Complaint, and further avers that the Commission's selective quotation of unidentified written materials or communications, offered without context, is misleading as framed and FanDuel respectfully refers the Court to the quoted documents.

60. FanDuel denies the allegations contained in Paragraph 60 of the Complaint.

61. FanDuel denies the allegations contained in Paragraph 61 of the Complaint, and further avers that the Commission's selective quotation of unidentified written materials or communications, offered without context, is misleading as framed and FanDuel respectfully refers the Court to the quoted documents.

62. FanDuel denies the allegations contained in Paragraph 62 of the Complaint, except that it admits that at certain points in time it has offered cash bonuses to certain users.

63. FanDuel denies the allegations contained in Paragraph 63 of the Complaint, and further avers that the Commission's selective quotation of unidentified written materials or communications, offered without context, is misleading as framed and FanDuel respectfully refers the Court to the quoted documents.

64. FanDuel denies the allegations contained in Paragraph 64 of the Complaint, except that FanDuel admits that it reduced its spending on acquisition and retention bonuses in 2016 as compared to 2015. FanDuel further avers that the Commission's selective quotation of unidentified written materials or communications, offered without context, is misleading as framed and FanDuel respectfully refers the Court to the quoted documents. FanDuel avers that it lacks information sufficient to respond to allegations concerning DraftKings' bonus and retention programs.

65. FanDuel denies the allegations contained in Paragraph 65 of the Complaint.

66. FanDuel denies the allegations contained in Paragraph 66 of the Complaint.

67. FanDuel denies the allegations contained in Paragraph 67 of the Complaint, except that FanDuel admits that users can take into account many considerations when deciding to enter a certain contest. FanDuel further avers that it lacks the knowledge and information to respond to generalized allegations in Paragraph 67 as they pertain to other providers.

68. FanDuel denies the allegations contained in Paragraph 68 of the Complaint given the ambiguity of the term "regularly," except that FanDuel admits that it competes with many fantasy sports, sports entertainment, and other gaming and recreation companies in the United States. FanDuel further avers that Plaintiffs' selective quotation of unidentified written materials

or communications, offered without context, is misleading as framed and FanDuel respectfully refers the Court to the quoted documents.

69. FanDuel denies the allegations contained in Paragraph 69 of the Complaint, except that FanDuel admits that it engaged in significant cost-cutting efforts in 2016, including large reductions in marketing and promotional expenditures. FanDuel further avers that the Commission's selective quotation of unidentified written materials or communications, offered without context, is misleading as framed and FanDuel respectfully refers the Court to the quoted documents.

70. FanDuel denies the allegations contained in Paragraph 70 of the Complaint. FanDuel further avers that it lacks the knowledge and information to form a belief regarding the truth of the allegations in Paragraph 70 as they pertain to DraftKings' contest-sizing policies or practices.

71. FanDuel denies the allegations contained in Paragraph 71 of the Complaint.

72. FanDuel denies the allegations contained in Paragraph 72 of the Complaint, except it admits it develops new products and features in order to attract and retain customers in competition with many fantasy sports, sports entertainment, and other gaming and recreation companies in the United States. FanDuel further avers that it lacks the knowledge and information to form a belief regarding the truth of the allegations in Paragraph 72 as they pertain to DraftKings.

73. FanDuel denies the allegations contained in Paragraph 73 of the Complaint, except it admits it develops new products and features in order to attract and retain customers in

competition with many fantasy sports, sports entertainment, and other gaming and recreation companies in the United States. FanDuel further avers that it lacks the knowledge and information to form a belief regarding the truth of the allegations in Paragraph 73 as they pertain to DraftKings.

74. FanDuel denies the allegations contained in Paragraph 74 of the Complaint. FanDuel further avers that it lacks the knowledge and information to form a belief regarding the truth of the allegations in Paragraph 74 as they pertain to DraftKings.

75. FanDuel admits that it competes with many fantasy sports, sports entertainment, and other gaming and recreation companies, including FanDuel, to offer a broad variety of sports and contest formats.

76. FanDuel denies the allegations contained in Paragraph 76 of the Complaint, except it admits it competes with many fantasy sports, sports entertainment, and other gaming and recreation companies in the United States. FanDuel further avers that it lacks the knowledge and information to form a belief regarding the truth of the allegations in Paragraph 76 as they pertain to DraftKings.

77. FanDuel denies the allegations contained in Paragraph 77 of the Complaint, except that FanDuel admits that it no longer offers contests based on college sports today. FanDuel further avers that the Commission's selective quotation of unidentified written materials or communications, offered without context, is misleading as framed and FanDuel respectfully refers the Court to the quoted documents. FanDuel further avers that it lacks the knowledge and information to form a belief regarding the truth of the allegations in Paragraph 77 as they pertain to DraftKings.

## **VII. PURPORTED LACK OF COUNTERVAILING FACTORS**

### **A. Purported Barriers to Entry and Expansion**

78. FanDuel denies the allegations contained in Paragraph 78 of the Complaint.

79. FanDuel avers that it lacks the knowledge and information to form a belief regarding the truth of the allegations in Paragraph 79 of the Complaint as they pertain to other firms, but specifically denies that there are significant barriers to entry or expansion.

80. FanDuel denies the allegations contained in Paragraph 80 of the Complaint given the ambiguity of the term “concerns.” FanDuel further avers that it lacks the knowledge and information to form a belief regarding the truth of the allegations in Paragraph 80 as they pertain to other firms, but specifically denies that there are significant barriers to entry.

81. FanDuel avers that it lacks the knowledge and information to form a belief regarding the truth of the allegations in Paragraph 81 of the Complaint as they pertain to other firms, but specifically denies that there are significant barriers to entry.

### **B. Efficiencies**

82. FanDuel denies the allegations contained in Paragraph 82 of the Complaint.

### **C. Failing Firm**

83. FanDuel denies the allegations contained in Paragraph 83 of the Complaint, except that FanDuel continues to strive towards profitability and that it operates in a young, nascent fantasy sports industry.



**VIII. PURPORTED VIOLATIONS**

**COUNT I – PURPORTED ILLEGAL AGREEMENT**

84. FanDuel denies the allegations contained in Paragraphs 1 through 83, except where specifically admitted above.

85. FanDuel denies the allegations contained in Paragraph 85.

**COUNT II – PURPORTED ILLEGAL ACQUISITION**

86. FanDuel denies the allegations contained in Paragraphs 1 through 83, except where specifically admitted above.

87. FanDuel denies the allegations contained in Paragraph 87.

**IX. AFFIRMATIVE AND OTHER DEFENSES**

FanDuel asserts the following defenses, without assuming the burden of proof on such defenses that would otherwise rest with the Commission:

1. The Complaint fails to state a claim upon which relief can be granted.
2. The relief sought is contrary to the public interest.
3. The Complaint fails to allege a plausible relevant product market.
4. The Complaint fails to allege any plausible harm to competition.
5. The Complaint fails to allege any plausible harm to any consumers.
6. The Complaint fails to allege any plausible harm to consumer welfare.
7. New entry and expansion by competitors is easy, and can be timely, likely, and sufficient, such that it will ensure that there will be no harm to competition, consumers, or consumer welfare.

8. The combination of FanDuel's and DraftKings' businesses will be procompetitive. The merger will result in substantial merger-specific efficiencies, cost-savings, innovation, and other procompetitive effects that will directly increase the consumer value proposition. These benefits greatly outweigh any and all purported anticompetitive effects.
9. FanDuel reserves the right to assert other defenses as they become known to FanDuel.

WHEREFORE, having fully answered the Complaint, FanDuel respectfully requests that the Commission: (1) deny the Commission's contemplated relief; (2) dismiss the Complaint in its entirety with prejudice; (3) award FanDuel its costs of suit, including expert's fees and reasonable attorneys' fees, as may be allowed by law; and (4) award each other or further relief as the Commission may deem just and proper.

DATE: July 3, 2017

Respectfully submitted,

/s/ \_\_\_\_\_  
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*Counsel for Respondent FanDuel Inc.*

### **CERTIFICATE OF SERVICE**

I hereby certify that on July 3, 2017, I caused the foregoing document to be electronically filed with the Secretary of the Commission using the Federal Trade Commission's e-filing system, causing the document to be served on all of the following registered participants:

Donald S. Clark, Secretary  
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The Honorable D. Michael Chappell  
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I further certify that I delivered via electronic mail a copy of the foregoing document to:

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**CERTIFICATE FOR ELECTRONIC FILING**

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

July 3, 2017

/s/ Michelle Y. Hale  
Michelle Y. Hale

**Notice of Electronic Service**

**I hereby certify that on July 3, 2017, I filed an electronic copy of the foregoing Respondent FanDuel, Ltd.'s Answer and Defenses to Complaint, with:**

D. Michael Chappell  
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**I hereby certify that on July 03, 2017, I served via E-Service an electronic copy of the foregoing FanDuel Answer, upon:**

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