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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Maureen K. Ohlhausen, Acting Chairman**
Terrell McSweeny

In the Matter of **DraftKings, Inc.** **a corporation,** **and** **FanDuel Limited** **a corporation.**	**Docket No. 9375** **REDACTED PUBLIC VERSION**

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents DraftKings, Inc. ("DraftKings") and FanDuel Limited ("FanDuel") have executed a merger agreement in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

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. Respondents have competed ferociously in this market since 2012, when DraftKings entered to challenge FanDuel. Respondents 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 Respondents 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. That 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, Respondents are essentially the only two options. As Respondents 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. But Respondents' 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. This action reaffirms 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, Respondents 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 proposed merger of DraftKings and FanDuel ("the Merger"), if consummated, would eliminate such vigorous price and non-price competition and the benefits it provides to DFS users, resulting in substantial consumer harm.

II.

BACKGROUND

A.

Jurisdiction

4. Respondents, and each of their relevant operating entities and parent entities are, and at all relevant times have been, engaged in commerce or in activities 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.

5. The Merger constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

B.

Respondents

6. Respondent 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.

7. Respondent 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.

C.

The Merger

8. On November 17, 2016, DraftKings and FanDuel entered into a Transaction Agreement (the "Merger Agreement"), pursuant to which DraftKings and FanDuel would each become a wholly owned subsidiary of a holding company. Due to the Respondents' similar size, revenue, and valuation, they have described the transaction as a "merger of equals." [redacted]

III.

DFS INDUSTRY BACKGROUND

9. 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.

10. 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.

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

12. 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.

13. 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).

14. 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.

15. 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.

16. Most DFS contests require users to pay an entry fee for each lineup submitted and involve the potential for cash prizes. DFS providers, including Respondents, 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.

17. 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%).

18. 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.

19. 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.

20. 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.

21. 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 Respondents' 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.

IV.

RELEVANT MARKET

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

A.

Relevant Product Market

23. 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).

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

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

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

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

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

<u>Key Distinctions Between DFS and SLFS</u>

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

<u>Contest Duration</u>

30. 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. Respondents themselves market the fact that DFS, unlike SLFS, provides "instant gratification."

31. 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.

<u>Financial Component and Player Motivation</u>

32. 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

33. 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.

34. 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

35. Respondents recognize DFS as distinct from other markets. In their own ordinary-course analyses, Respondents 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.

36. 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.

37. 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.

38. 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. Respondents observed no meaningful decrease in demand for these contests, and their revenue increased as a result.

B.

Relevant Geographic Market

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

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

41. 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 Respondents and other DFS providers do not vary by state.

42. Respondents themselves recognize a national market. They analyze their performance, and compare it to each other's, on a national basis.

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

V.

MARKET STRUCTURE AND THE MERGER'S PRESUMPTIVE ILLEGALITY

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

45. Respondents 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] concluded in 2015 that "[FanDuel] and DraftKings have ~96% market share with 20+ smaller DFS sites competing for the rest." [redacted] documents estimate that Respondents control more than 95% of the DFS market in terms of entry fees.

46. 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.

47. The DFS market is already highly concentrated, and Respondents 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.

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

VI.

ANTICOMPETITIVE EFFECTS:

The Merger Would Eliminate Vital Head-to-Head Competition Between DraftKings and FanDuel

49. Respondents 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. Respondents are much larger than any other competitor on each of these metrics.

50. Respondents 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."

51. Reflecting how closely and significantly they compete, Respondents are the first and second DFS choices for most users. Many users maintain accounts on both Respondents' sites, allocating their play between the sites based on price and quality factors. Each Respondent 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 Respondent's platform versus the other's.

52. Throughout their history, Respondents 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.

53. Competition between Respondents 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.

54. 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.

55. 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.

56. 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.

57. 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

58. Respondents 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 Respondent's rates, fearing that a higher commission rate will drive users (particularly professional users) to move business to the other Respondent. In these ways, Respondents serve as the primary constraint on each other's prices.

59. This head-to-head price competition has existed for years and is ongoing. The following are but a few recent examples showing that Respondents (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 [redacted] in August 2016. He evaluated three different proposals based on how [redacted] compared to DraftKings' [redacted]: "[P]roposal #1 wouldn't put us substantially above DK [redacted] . . . [redacted]. Proposal #2 would put us [redacted] above them [at entry fee levels] from [redacted] and would cause only moderate user complaints. [redacted]. Proposal #3 would put us substantially higher than DK [redacted] and [redacted]."

60. As these examples show, the Merger would eliminate a significant constraint on Respondents' ability to increase commission rates. Respondents 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 Respondents' prices today and no firm that could constrain the prices of a merged DraftKings/FanDuel.

61. Competition between Respondents 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: "[redacted], 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."

62. Respondents also compete on price by providing discounts to users. Both Respondents 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.

63. 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."

64. While both Respondents reduced their spending on acquisition and retention bonuses in 2016, the aggressive price competition between Respondents continued. For example, in January 2016, DraftKings gave [redacted] VIP users "[redacted] as a match of FD's aggressive offers." In July 2016, [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.

65. Respondents 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 Respondents, and the post-Merger company—which would be substantially larger than each Respondent 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

66. 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—Respondents 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

67. Contest size is an aspect of quality. All else equal, users generally prefer to play contests with larger prize pools, and Respondents 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.

68. 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] in GPPs, beating the corresponding FanDuel contests by [redacted].

69. Respondents each engaged in a variety of cost-cutting efforts in 2016, including large reductions in their marketing and promotional expenditures, but Respondents' 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]." 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] contest 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."

70. In fact, DraftKings has [redacted] The Merger would eliminate this intense and pervasive head-to-head competition on contest size.

71. No other DFS provider consistently offers GPP contests that approach the size of either Respondent's largest prize pools, and Respondents 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

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

73. Respondents regularly monitor each other's new product features. DraftKings [redacted] specifically to monitor FanDuel's product improvements. FanDuel, for its part, [redacted]. Respondents 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, Respondents prioritize developing and improving specific product features to increase and maintain their respective market shares.

74. Respondents 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

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

76. Respondents 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 Respondents 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.

77. Respondents 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 Respondents to offer new sports and contest formats.

VII.

LACK OF COUNTERVAILING FACTORS

A.

Barriers to Entry and Expansion

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

79. A firm seeking to enter or expand in the market for the provision of 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 Respondents. Entry into the DFS market also requires significant investments in information technology infrastructure and software product development.

80. 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.

81. 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.

B.

Efficiencies

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

C.

Failing Firm

83. Neither Respondent is a failing firm. Respondents 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.

VIII.

<u>VIOLATION</u>

COUNT I—ILLEGAL AGREEMENT

84. The allegations of Paragraphs 1 through 83 above are incorporated by reference as though fully set forth.

85. The Merger Agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

COUNT II—ILLEGAL ACQUISITION

86. The allegations of Paragraphs 1 through 83 above are incorporated by reference as though fully set forth.

87. The Merger, if consummated, may substantially lessen competition in the relevant market or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the twenty-first day of November, at 10 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted. If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Merger challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Merger is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant market, with the ability to offer such products and services as DraftKings and FanDuel were offering and planning to offer prior to the Merger.

2. A prohibition against any transaction between DraftKings and FanDuel that combines their businesses in the relevant market, except as may be approved by the Commission.

3. A requirement that, for a period of time, DraftKings and FanDuel provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant market with any other company operating in the relevant markets.

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore DraftKings and FanDuel as viable, independent competitors in the relevant market.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this nineteenth day of June, 2017.

By the Commission.

Donald S. Clark
Secretary

SEAL: