

**BEFORE THE JUDICIAL PANEL  
ON MULTIDISTRICT LITIGATION**

***IN RE:* FANDUEL ILLEGAL GAMBLING LITIGATION**

**MDL Docket No. \_\_\_\_\_**

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF AISSA KHIRANI'S  
MOTION FOR TRANSFER OF ACTIONS TO THE SOUTHERN DISTRICT OF NEW  
YORK AND FOR COORDINATION OR CONSOLIDATION OF ALL PRETRIAL  
PROCEEDINGS PURSUANT TO 28 U.S.C. §1407**

## **INTRODUCTION**

There are at least eight related actions filed in four federal district courts against FanDuel, Inc. (“FanDuel”) (the “Actions”). The Actions assert similar claims and all claims stem from the same or similar alleged conduct of FanDuel, that is, FanDuel’s unlawful, and/or illegal, and/or unconscionable conduct directed at its customers, including Plaintiff, as an online gambling service provider for Daily Fantasy Sports (“DFS”) betting. Including this action, all of the Actions are brought as putative classes.

### **A. The Actions Allege Common Issues of Fact and Law.**

FanDuel is a Delaware corporation, headquartered in New York, New York. FanDuel has transacted, conducted, and advertised its business throughout the nation, with the exception that FanDuel alleges that it does not transact business within the jurisdictions of Montana, Washington, Iowa, Arizona, and Louisiana, believing it unlawful and/or illegal for it to do so. FanDuel has derived substantial revenue from its DFS online gambling platform nationwide. FanDuel is a citizen of the State of Delaware and the State of New York.

Plaintiff Aissa Khirani is citizen of the State of New York and resident of New York County. Plaintiff is a customer of FanDuel and has paid fees for and incurred losses as a result of using FanDuel’s online DFS gambling service. The putative class that Plaintiff represents is a nationwide group of persons who have, like Plaintiff, used FanDuel’s online DFS gambling service, paid monies for that service, and incurred losses in connection therewith and as a result thereof.

FanDuel is operating an illegal online sports betting business within the State of New York. FanDuel defines its sports betting scheme as Daily Fantasy Sports (“DFS”) in a feeble

attempt to circumvent New York Penal Law (“NYPL”) which expressly prohibits profiting from “any contest, game [or] gaming scheme...in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.” FanDuel’s sports betting contests are based upon the performance of team and individuals that participate in NCAA college football, NCAA college basketball, NFL, NBA, MLB and the NHL.

In traditional fantasy sports leagues, contestants draft their teams before the season, maintaining the same core roster for months. In contrast to season-long fantasy sports, FanDuel accepts wagers from bettors for various sporting events using a scheme it created that assigns values (points) based upon the performance of athletes and teams engaged in amateur and professional athletic competitions. After the sporting events are concluded, FanDuel calculates a score using the scheme it created that awards points based upon the various individual college and professional athletes’ performance and pays bettors that have the highest total number of points. Bettors select an entry fee, which is up to \$5,000, and the number of games or teams they wish to play. If their roster generates more points than their rivals on that day or week, they win all the money in the pot, minus FanDuel’s average 6.5% percent cut.

FanDuel has outdueled rivals like DraftKings and Draft, claiming an 80 percent market share of daily fantasy sports betting and boasting more than 1 million paid active users – numbers that in 2014 translated to \$622 million in entry fees, and cash payouts in excess of \$564 million. FanDuel expects to pay out more than \$1 billion in 2015, corresponding to roughly \$100 million in revenue.

Lawmakers have recently scrutinized FanDuel’s business model and operations, alleging all too familiar similarities between FanDuel and online poker, and other gambling websites.

FanDuel incorrectly claims its sports bookmaking operations were made legal by the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA). Indeed, former fifteen-term Representative Jim Leach recently stated that his anti-gambling act – the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) – was supposed to stop gambling on the internet, not promote it, referring to FanDuel. Poignantly, Leach told The Associated Press: “There is no credible way fantasy sports betting can be described as not gambling.” “Only a sophist can make such a claim.” The federal legislation is codified at 31 U.S.C. 5361 *et seq.* The Act expressly provides that it shall not be construed as altering, limiting, or extending any state law that prohibits, permits, or regulates gambling within the United States. 31 U.S.C. 5361 § 5361(b). Moreover the Federal Bureau of Investigation and the Department of Justice are probing whether the business model of daily fantasy sports operators like FanDuel violates this and other federal laws.

The Actions seek declarative relief that the contracts executed by and between class members and FanDuel be declared void on several legal theories, including fraudulent inducement, illegality, and state statutes declaring such contracts void because the contracts govern gambling activity (*see, e.g.*, New York General Obligations Law § 5-411 “All contracts for or on account of any money or property, or thing in action wagered, bet or staked, as provided in § 5-401, shall be void.”). The Actions seek damages in the form of restitution on several legal theories, including those that flow from the contracts being void as a matter of the respective states’ common and/or statutory laws. The Actions further seek damages in the form of lost wagers (monies that FanDuel’s customers wagered and lost, and that directly or indirectly benefited FanDuel) on various legal theories, including *inter alia*, unjust enrichment, and where available, state laws supplying this remedy (*see, e.g.*, New York General Business Law § 5-421

“Every person who shall, by playing at any game, or by betting on the sides or hands of such as do play, lose at any time or sitting, the sum or value of twenty-five dollars or upwards, and shall pay or deliver the same or any part thereof, may, within three calendar months after such payment or delivery, sue for and recover the money or value of the things so lost and paid or delivered, from the winner thereof”).

In addition to similar remedies sought and claims made, the Actions share the following mixed questions of law and fact:

- a. Whether Plaintiff and members of the putative classes in the Actions have entered into contracts with FanDuel over the past six years;
- b. Whether such contracts are *per se* void, pursuant to New York criminal law;
- c. Whether such contracts are void pursuant to the various Actions’ states’ statutory civil laws;
- d. Whether Plaintiff and members of the putative classes in the Actions paid monies to FanDuel in consideration of those contracts;
- e. Whether FanDuel’s operations are a game of chance under all applicable laws and rules in the various Actions’ jurisdictions;
- f. Whether FanDuel made material misrepresentations concerning the legality of its services;
- g. Whether FanDuel made material misrepresentations concerning the fairness of its purported “contests;”
- h. Whether FanDuel’s “contests” are games of skill or chance;
- i. Whether FanDuel’s advertisements were false, misleading, and/or unfair;
- j. Whether FanDuel unconscionably “competed” against its customers;

- k. Whether the FanDuel contracts are unconscionable, illusory, fraudulent, or otherwise invalid;
- l. Whether FanDuel engaged in deceptive and/or misleading advertisement activity in violation of applicable states' consumer protection statutes; and
- m. Whether Plaintiff and members of the Class are entitled to restitution and entitled to recovery of lost wagers from FanDuel.

**B. Procedural History of the Actions.**

A few days prior to commencing the instant action, four similar actions were filed in the Southern District of New York, the Southern District of Illinois, and the Eastern District of Louisiana. Thereafter, (and after the instant action), three similar actions commenced in the Southern District of New York, and one similar action commenced in the Southern District of Florida. *See* Schedule of Actions.

Each of these Actions arises from the same or similar nucleus of operative facts as Plaintiff's case, and each Action will involve substantially similar discovery, with the same or similar documents and witnesses. Discovery has not commenced in any of the Actions.

Since these Actions involve the same or similar questions of law and fact, prompt action by the Panel to transfer, consolidate, and coordinate these Actions in the Southern District of New York will promote their just and efficient prosecutions, enhance judicial economy, and serve the convenience of the respective parties.

**ARGUMENT**

**A. Transfer, Consolidation, and Coordination of the Actions is Appropriate Under 28 U.S.C. §1407**

28 U.S.C. §1407 provides for the transfer of actions to one district for coordinated or consolidated pretrial proceedings where actions pending in different districts involve at least one

common question of fact. 28 U.S.C. §1407(a). The Panel may authorize the transfers upon a determination that such transfers will be for the convenience of the parties and witnesses, and will promote the just and efficient conduct of the actions. *Id.*

The purpose of the multidistrict litigation process is to “eliminate the potential for contemporaneous pretrial rulings by coordinating district and appellate courts in multidistrict related civil actions.” *In re Multidistrict Private Civ. Treble Damages Litig.*, 298 F.Supp. 484, 491-92 (J.P.M.L. 1968). Consolidation is especially important in class actions where “the potential for conflicting, disorderly, chaotic” action is greatest. *Id.* at 493. Transfer of related actions to a single district for pretrial proceedings avoids conflicting pretrial discovery and ensures uniform and expeditious treatment in the pretrial procedures. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1230 (9th Cir. 2006).

Transfer, coordination and consolidation are appropriate here because many common questions of fact and law exist. The Actions all arise from the same or similar nucleus of operative facts and Whether Plaintiff and members of the putative classes in the Actions have entered into contracts with FanDuel over the past six years;

- a. Whether such contracts are *per se* void, pursuant to New York criminal law;
- b. Whether such contracts are void pursuant to the various Actions’ states’ statutory civil laws;
- c. Whether Plaintiff and members of the putative classes in the Actions paid monies to FanDuel in consideration of those contracts;
- d. Whether FanDuel’s operations are a game of chance under all applicable laws and rules in the various Actions’ jurisdictions;

- e. Whether FanDuel made material misrepresentations concerning the legality of its services;
- f. Whether FanDuel made material misrepresentations concerning the fairness of its purported “contests;”
- g. Whether FanDuel’s “contests” are games of skill or chance;
- h. Whether FanDuel’s advertisements were false, misleading, and/or unfair;
- i. Whether FanDuel unconscionably “competed” against its customers;
- j. Whether the FanDuel contracts are unconscionable, illusory, fraudulent, or otherwise invalid;
- k. Whether FanDuel engaged in deceptive and/or misleading advertisement activity in violation of applicable states’ consumer protection statutes; and
- l. Whether Plaintiff and members of the Class are entitled to restitution and entitled to recovery of lost wagers from FanDuel.

Determination of these and other common issues in a single district will benefit the parties and witnesses, and promote the efficient prosecution and resolution of the Actions. Without transfer, coordination and consolidation of the Actions, the significant hazard of inconsistent rulings exists, along with judicial inefficiency, overlapping discovery, and unnecessary expense.

Transfer, coordination and consolidation are especially appropriate because formal discovery has not yet commenced and no responsive pleadings have been filed to any of the other Actions. Transfer, coordination and consolidation of the Actions in a single district are appropriate for the just and efficient prosecution of the Actions and convenience of the parties and witnesses.



**B. The Southern District of New York is the Most Appropriate Forum for Transfer and Consolidation for Coordination.**

Currently five (5) of the eight (8) Actions are pending in the Southern District of New York. Moreover, FanDuel is headquartered in the Southern District of New York, having its principle place of business located at 1375 Broadway, sixth floor, New York, New York 10018.

**(1) The United States District Court for the Southern District of New York is Centrally Located Among the Pending District Filings and is Accessible.**

Simply put, New York is the center of the illegal gambling scheme advanced by the Defendant. Although it chose to incorporate in Delaware, and advertise its illegal scheme across the country, the brainstem of FanDuel's enterprise is in New York City. Its entire decision making has been made in New York. FanDuel developed its scheme in New York. FanDuel's founder and its principles organized the scheme in New York. FanDuel's corporate decision-making that advanced and continues to advance its criminal enterprise was hatched in New York. Decidedly, there is no venue where the nexus to the enterprise is stronger than in New York.

Moreover, every other venue advanced in the recently filed cases simply provide a nexus for injury that is no greater than in districts other than the Southern District of New York. The Southern District of New York and its judges have dealt with some of the most complicated illegal corporate enterprise actions that have arisen in the past decade, and it is most suited to deal with this litigation in an expedient manner.

It is anticipated that in these Actions, there will be witnesses on behalf of Plaintiff, the respective members of the various classes of the Actions, and FanDuel located in various states, currently including Florida, Louisiana, and Illinois, and while those depositions are likely to occur in the state where they are located, for purposes of trial, New York is a central and convenient location to travel to for trial and court hearings. Again, FanDuel's principal place of

business is in New York County, a county in the Southern District of New York, and therefore, there are many parties and witnesses from the state of New York and the Southern District of New York.

The Southern District of New York courthouse is centrally located for all parties and witnesses, particularly in light of the fact that this litigation will unquestionably involve parties and witnesses located in a variety of areas throughout the United States. Additionally, traveling to this location is much more convenient and efficient than traveling across the United States. Further, the Southern District of New York courthouse is located closely to both LaGuardia and JFK international airports. LaGuardia is one of the most central travel hubs in the nation, making the Southern District of New York an appropriate choice to serve as the transferee court for this multidistrict litigation.

Public transportation, by way of the New York's rail service, Metropolitan Transportation Authority, including its rail lines and bus systems are available, in addition to many car services. Both methods of public transportation provide service to and from these airports.

The Southern District of New York is easily accessible to all parties and is the most convenient forum for all parties, witnesses, and counsel. Further, in the interest of time, convenience, and efficiency, as discussed below, these cases should be assigned to Honorable George B. Daniels, of the Southern District of New York.

**(2) The United States District Court for the Southern District of New York has the Necessary Resources for Effectively Managing this Litigation.**

The Southern District of New York provides an ideal venue for managing this litigation in the most efficient and expeditious manner. The Southern District of New York is currently handling six of the Actions. *See* Schedule of Actions. Moreover, the Southern District of New

York has well-equipped staff and excellent Clerk's office that is able to provide support services for managing this litigation. Many complex cases have previously been handled in this District.

**(3) District Court Judge George B. Daniels of the Southern District of New York should be designated as the transferee judge. Judge Daniel's qualifications, experience, and caseload favors efficient and timely management of this litigation.**

Judge Daniels is presently assigned to one of the Actions presently filed in the Southern District. Judge Daniels would be an excellent choice by the Panel for managing this complex litigation. He received a B.A. from Yale University in 1975, and a J.D. from UC Berkeley School of Law in 1978. He was a Trial attorney of Legal Aid Society of New York from 1978 to 1980. law clerk, Hon. Rose Bird, Chief Justice, California Supreme Court, 1980-1981. He was a Bar review course instructor, University of California, Hastings College of Law in 1981.

From 1981 to 1983, he was in private practice at Skadden, Arps, Slate, Meagher & Flom. Judge Daniels went on to serve as an assistant U.S. Attorney of U.S. Attorney's Office, Eastern District of New York from 1983 to 1989. He was an Adjunct professor of law, Brooklyn Law School, NY from 1988 to 1991. In addition, Judge Daniels was a judge on the Criminal Court of the City of New York from 1989 to 1990. From 1990 to 1993, Judge Daniels was a Counsel to New York City's mayor. He then was a judge on the Criminal Court of the City of New York from 1993 to 1995, and was a Justice of the Supreme Court of the State of New York from 1995 to 2000, until Judge Daniels was nominated by President Bill Clinton on August 5, 1999, to a seat vacated by Robert P. Patterson, Jr. for the Southern District of New York. Judge Daniels was confirmed by the United States Senate on February 24, 2000, and received his commission on March 9, 2000.

Throughout his career as federal judge, Judge Daniels has gained significant experience in managing complex litigation in an efficient manner. Among others, he presided over the

widely known *In re Terrorist Attacks on September 11, 2001* (03-MDL-1570) (S.D.N.Y.).

Given Judge Daniel's lengthy experience on the federal bench, his background in criminal and civil matters, such as those involved here, Judge Daniels is an appropriate choice for managing this MDL in a manner that will facilitate this litigation for the benefit of all parties.

### **CONCLUSION**

For the reasons detailed herein, Plaintiff petitions and respectfully requests that the Panel transfer the Actions for coordinated and consolidated pretrial proceedings before the Southern District of New York.

Dated: October 17, 2015

Respectfully submitted:

*/s/ Hunter Shkolnik*

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