WHY DFS REQUIRES REGULATION REGARDLESS OF WHETHER IT IS SKILL BASED: AN OUTLINE OF THE GROWTH OF FANTASY SPORTS, THE SCANDALS, AND A RETURN TO GAMING IN THE UNITED STATES

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INTRODUCTION

Billy was having a rough sports year. He lost a race to Jimmy Johnson, got spanked on the links by Rory McIlroy, and starting Big Papi resulted in a donut against David Price. To top it all off, last year’s Robert Griffin III pick crippled his fantasy team, just when he was thinking this might be the year to take the championship from his buddy, who has won it three years running. Even though Billy would never dream of winning a chess match against reigning World Chess Champion Magnus Carlsen, he would still like a shot to play a couple hands of Texas Hold ‘Em against Johnny Chan or Phil Ivey. But the truth is Billy cannot afford to play against them. Even if Billy were to go to Las Vegas, unless he has a bankroll large enough to choke a dog, he cannot pay to play at a pro table because the buy-in is so high, never mind the raises. Sharks look for bigger, fatter fish.

Settling in for week one of the NFL season, Daily Fantasy Football ads

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Great plentitudes of gracious gratitude graciously given to the following: my mother (for all the inglorious tasks bespeaking love), my father (for always buying dinner and taking care of the plants and house when I’m away), John and Lynne Molini (I would be buried without your help; you kept the future financially viable), Cullen and Mary Wojcik (I never would have gone to law school without your persistence and care), Katherine Yeats (for the casita in Salt Lake City during the summer of 2015), and Dennis and Lynda Beeghly (for the truck). Last, thank you to my wonderful wife, mother of Nolan. Your sacrifice and struggle has made attending law school possible. We did this (with lots of help) together, my love.

1 This note often references a number of professional athletes to illustrate certain issues and hypotheticals; apologies to those for whom these are not common parlance.
bombard the network at the rate of 1 ad every 90 seconds.\textsuperscript{2} In fact, Billy—a sentient being—has noticed DraftDuel’s\textsuperscript{3} logo feces smeared on just about anything and everything that stands still long enough to get tagged or branded, from billboards and buses to ESPN segments and even the Triple Crown winner, American Pharaoh. Billy is part of a coveted target demographic: sports fans 18-35 years old.\textsuperscript{4} The ads ask: “are your dreams big enough to cash a giant check?”\textsuperscript{5} He misses, as likely intended if not hoped for, the small legal print explaining that the average win is about $22.\textsuperscript{6} But $25 for a buy-in, why not? Because even if it is gambling, nobody cares.\textsuperscript{7} After signing up and entering a big contest by drafting his team for this \textit{tilt}, he draws an opponent named maxdalury.\textsuperscript{8}

In the 1990s, you were a weirdo if you played fantasy sports.\textsuperscript{9} Nowadays, you are a weirdo if you don’t.\textsuperscript{10} Fantasy Sports, originally “a hobby as niche as 19\textsuperscript{th}-century stamp collecting,” was becoming mainstream by the early 2010s.\textsuperscript{11} And with season-long fantasy sports came daily fantasy sports (DFS). Traditional fantasy sports might be a game of skill. But DFS is a new animal all together. DFS is gambling.\textsuperscript{12} It is not gaming. Gaming is regulated gambling.

\textsuperscript{3} One way of referring to FanDuel and DraftKings simultaneously.
\textsuperscript{7} See infra Section II.B.1 (stating that unless gambling rings reach a certain size, the federal government does not actively pursue shutting them down).
\textsuperscript{8} See infra Section V.D.2.
\textsuperscript{10} \textit{Id.}
\textsuperscript{12} But see Marc Edelman, \textit{Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law}, 2016 U. ILL. L. REV. 117, 129-135 (2016) (pointing out that different kinds of DFS contests might be legal depending on the format and corresponding state law) [hereinafter Edelman, \textit{Navigating}] (this note addresses the primary DFS formats: contest entries, 50/50s,
This note sketches an outline of early modern fantasy sports, contrasts how to play traditional fantasy sports with DFS, and tracks the rise of DFS from early startup companies to industry behemoths worth billions on paper in Part I. Part II touches on paradigm shifts about gambling in the NBA and contrasts it with that of the NFL’s supposed steady state. Part III highlights DFS’s connections to online Poker. Part IV examines how those poker roots are essential to explaining the insider scandals that stole the thunder from daily fantasy sports operators (DFSOs) in 2015. Finally, Part V explains how and why DFSOs colluded with high volume players fleecing the pants off of the unsuspecting; one section of this final part investigates the scandals involving Ethan Haskell and maxdalury. A brief conclusion arguing for nation-wide gaming regulation follows.

I. GROWTH OF AN INDUSTRY

A. Roots of Modern Traditional Fantasy Sports

Although earlier versions of simulated sports games date back to the 1920s, the first modern game that allowed for the incorporation of a player’s performance throughout a particular season began in 1961. The Baseball Seminar determined a winner at the end of the season by assigning points to various statistical categories. Daniel Okrent—who played in the Baseball Seminar with one of its original founders, Robert Sklar—updated the rules and announced the beginning of the “Rotisserie League.” Named after the French Bistro in New York where Okrent had first proposed the game to his friends, the Rotisserie League contained elements that most of us would recognize as modern Fantasy Sports: team owners drafted players; players were “owned” by that fantasy owner and could not be drafted by another team; there was a salary cap of sorts, so a team owner could bid on players to be drafted; and most importantly, each team owner earned points in four offensive and four defensive statistical categories depending on how the player in the field performed. What made the Rotisserie League a massive step forward is that points were calculated not by statistics already known and printed on the back of baseball cards but by how the players performed in the field over the course of a season. At the end of the season, whoever had the most points won and

and especially head-to-head).

14 Id. at 4-5.
15 Id. at 6.
16 Id. at 6-7.
17 Id. at 6.
18 Id. at 7.
was rewarded with both a cash prize and a chocolate milk dousing.\textsuperscript{20}

Computing those points required near mathlete levels of dedication and work with a calculator and newspaper.\textsuperscript{21} The proliferation of the internet, however, gave fantasy sports its first boom,\textsuperscript{22} and alongside that boom, a secondary wave exploded as numerous companies produced “fantasy magazines, season guides, radio shows, statistical services, management groups, sportswear, and newsletters” marketing fantasy sports.\textsuperscript{23} With these resources, in other words, the hassle of mathematically tabulating projections for player performance (before a season, to determine who to pick for your team, and during the season, to determine a winner of a particular game) became a little internet research.\textsuperscript{24}

Then it got easier still. The first company to provide an internet version of fantasy baseball that automatically calculated the points was the Entertainment Sports Programming Network, aka ESPN, in 1995.\textsuperscript{25} Five years later, ESPN offered fantasy platforms for “football, basketball, hockey, NASCAR, soccer, golf, and even fly fishing.”\textsuperscript{26}

\section*{B. How to Play Fantasy Sports}

\subsection*{1. Traditional Fantasy Sports (seasonal leagues)}

Initially, traditional fantasy games were played in the context of a season, and, hence, a winner would not be crowned until the end of that season when all games had been played.\textsuperscript{27} To play, team owners, usually friends, join a league and draft a team.\textsuperscript{28} Each real-world player can only be drafted by one team owner.\textsuperscript{29} So once Larry Fitzgerald or Max Scherzer is drafted by a team, he is no longer available for other owners to draft. Most of the best players are quickly drafted, but sometimes they can be acquired later by trade.\textsuperscript{30} For the skilled, dedicated, or simply competitive traditional fantasy sports team owner, the race for the championship usually begins months before the draft.\textsuperscript{31} This type of team owner needs to attend to and monitor the real team’s style of
play, strengths and weaknesses, injury issues during the season, players taken by a real team in the draft, free agent signings, etc. Further, a good owner not only stays on top of real events affecting his fantasy team but also knows who is getting hot (i.e. scoring lots of points or constantly scoring more points than projected); dedicated MLB should also monitor who the big league team might call up in baseball. Certainly, some luck is involved, just as luck plays a role in the game itself. But courts agree that traditional fantasy sports involve enough skill to be legal and are therefore distinguished from gambling. Said another way, playing traditional fantasy sports requires “strategy, skill, patience, and perseverance” to be successful.

2. How to Play Daily Fantasy Sports (daily games)

On the opposite side of the field, two major differences distinguish DFS from traditional fantasy sports. Whereas in traditional formats a player drafted is no longer available for other owners to select, DFS allows any participant to draft any player. So Tom Brady or Madison Bumgarner might be on several teams simultaneously, even if those teams compete against each other. Secondly, for the purpose of maintaining a competitive balance, each player has a price, and each participant who fields a team has to stay below a salary cap. Accordingly, if a participant pays top dollar, so to speak, for Rob Gronkowski and Julio Jones, that participant will also have to select a more affordable quarterback, such as Derek Anderson or Brian Hoyer, in order to field a team below the salary cap. One aspect benefiting DFS players, then, is that an injury to a player does not ruin the whole season—only one game. New players can be drafted for tomorrow’s game. In essence, what is missing

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32 For example, part of what makes a particular running back so valuable in fantasy football formats is whether the team he plays for depends upon a running game. A stud running back frequently doesn’t have to share the number of times he carries the ball, thereby allowing him to rack up yards in the game and by extension, fantasy points for owners; by way of contrast, the dreaded running-back-by-committee strategy that shapes how real teams, in an effort to keep their running backs fresh and healthy, approach the game obviously produces fewer points for the owner since the number of carries and yards is split between two players. And woe to the owner who starts the running back who doesn’t score the touchdowns.

33 Trippiedi, supra note 28, at 207.

34 Id. at 209.

35 Id. at 208–09.

36 Trippiedi, supra note 28, at 209.

37 Id. at 209.

38 Id.

39 Id.

40 Id. at 208–09.
from DFS is the constant “micromanagement” necessary for seasonal leagues.  

C. Rise of Daily Fantasy Sports Operators: It’s Not about Fun, It’s About the Money

Even though the Fantasy Sports Trade Association (FSTA) has been around since 1998 and held its first convention in 1999, the creator of DFS remains unclear. One likely father is former professional poker player Chris Fargis, who created Instant Fantasy Sports in 2007. His idea was to “take the time frame of season-long fantasy sports leagues and shrink it.” In order to make his version of DFS more accessible, the web page appeared similar to online poker pages. His site launched a year after the passage of Unlawful Internet Gambling Enforcement Act (UIGEA 2006), which had killed the online poker industry. Notably, the launch of his site rang a bell that continues resounding today among DFSOs—wagering money on fantasy sports is not only completely legal but is protected by UIGEA.

The originator of the phrase “daily fantasy sports” and another possible progenitor is Kevin Bonnett. He launched FantasySportsLive.com in the same year that Fargis launched his site; Bonnett hoped that calling his game “daily fantasy sports” would give the contests “the aura of legality.” Like Fargis, he too knew his target audience, and he designed the website to look like a sportsbook. But the websites did not explode into the mainstream marketplace because of legal concerns. The first DFS players, consequently, were mostly from the online gambling community. The big dogs of the industrial sports complex (ESPN, FOX, CBS, etc) stayed away. For the next several years, no

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41 Id. at 208.
42 History of FSTA, supra note 19.
44 Id.
45 Id.
46 Id.
47 See infra Section II.B.2.A.
48 Id.; see Kang, supra note 43.
49 See Edelman, Navigating, supra note 12, at 124.
50 Id.
51 Id.
52 Id. at 125.
54 See infra Section IV.A.1.
heads rolled, and the sword of the Department of Justice (DOJ) remained sheathed. So Yahoo announced it would begin operating a DFS website and jumped into these lucrative waters in the summer of 2015.\footnote{Vindu Goel, \textit{Fantasy Sports Inquiry Puts Spotlight on a Success for Yahoo}, N.Y. TIMES (Nov. 18, 2015), http://www.nytimes.com/2015/11/19/technology/yahoo-faces-an-inquiry-on-fantasy-sports-push.html.}


Research supports Charchian’s position. Season-long players are more likely to say they play fantasy sports as a social activity;\footnote{Dustin Gouker, \textit{FanDuel Studies: Seasonlong and Daily Fantasy Sports Players Exhibit Key Differences}, \textsc{Legal Sports Rep.} (Jan. 20, 2015), http://www.legalsportsreport.com/370/fanduel-seasonlong-and-daily-fantasy-sports-players-differences/ (citing 71 percent of season-long players compared to 25 percent of DFS players).} they are also more likely to enjoy rituals associated with the league.\footnote{Id. (citing 58 percent of season-long players compared to only 17 percent of DFS players).} In contrast, DFS players are more likely than traditional fantasy sports players to play fantasy sports as a way to make money\footnote{Id. (citing 66 percent of DFS players compared to 43 percent of season-long players).} and more likely to enjoy the flexibility offered by the numerous contests available on DFSO websites.\footnote{Id. (citing 50 percent of DFS players and only 24 percent of season-long players).} Only 31 percent of DFS players say they play for excitement.\footnote{Id.; but see Harwell, \textit{Move Over Bud}, supra note 5 (quoting managing director of Eilers Research Adam Krejcik, who says the main reason people play is entertainment value, not money; it is “the added thrill and excitement that it provides the player who’s already watching sports.”).}

The growth in the number of fantasy sports players looks like an outbreak

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57 Id. at 125.
62 Id. (citing 58 percent of season-long players compared to only 17 percent of DFS players).
63 Id. (citing 66 percent of DFS players compared to 43 percent of season-long players).
64 Id. (citing 50 percent of DFS players and only 24 percent of season-long players).
65 Id.; but see Harwell, \textit{Move Over Bud}, supra note 5 (quoting managing director of Eilers Research Adam Krejcik, who says the main reason people play is entertainment value, not money; it is “the added thrill and excitement that it provides the player who’s already watching sports.”).
of an epidemic. In 2008, 7 million North Americans played fantasy sports;\(^6^6\) in 2009\(^6^7\) through 2011\(^6^8\) that number grew to 27 million and remained steady. In 2013, when fantasy sports—especially DFS—really took off due to the millions of dollars invested,\(^6^9\) that number reached 32 million;\(^7^0\) in 2014, 41 million;\(^7^1\) in 2015, 57 million players.\(^7^2\)

Along with these players, a massive river of cash flowed to DFSOs. Last year, payment processors cha-chinged 2.6 billion dollars in entry fees for DFSOs.\(^7^3\) The majority of player entry fees (62 percent) were at one or two dollars,\(^7^4\) and the median deposit on FanDuel was 25 bucks.\(^7^5\) Between 2011 and 2015, DraftKings raised 74.8 million dollars; FanDuel, 88 million dollars.\(^7^6\) Additionally, in 2015, DFS players spent an estimated 257 million dollars on fantasy related materials, while traditional players only spent an estimated 162 million.\(^7^7\) But there’s more. Playing DFS resulted in 40 percent more consumption of NFL games, which raised a player’s viewing hours from 17 to 24 hours per week on average.\(^7^8\)

Here is another way to think about the amount of money thrown at Fantasy Sports. During the first week of the 2015 NFL season alone, FanDuel and DraftKings generated 60 million dollars in entry fees.\(^7^9\) Las Vegas sportsbooks handled a mere 30 million in the action.\(^8^0\)

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\(^6^6\) Garcia, supra note 60.
\(^6^7\) Reign in Online Fantasy Sports Gambling, N.Y. TIMES (Oct. 5 2015), http://www.nytimes.com/2015/10/05/opinion/rein-in-online-fantasy-sports-gambling.html.
\(^6^9\) St. Amant, supra note 9; Edelman, Navigating, supra note 12, at 126.
\(^7^1\) Kilgore, supra note 58.
\(^7^4\) Gouker, supra note 61.
\(^7^5\) Id. (DraftKings does not release this information).
\(^7^6\) See Kilgore, supra note 58.
\(^7^8\) Klemko, supra note 73.
\(^7^9\) Brustein & Boudway, supra note 53.
\(^8^0\) Id.
In spite of these staggering numbers, Matt King, CFO at FanDuel, estimated only 5% of fantasy players play DFS. As a result, investments are pouring in, and media companies are betting on a future in which sports betting is legalized. A total of 300 million dollars was invested in DraftKings; the largest contributors included Madison Square Gardens, MLB, NHL, and MLS; for FanDuel, 275 million dollars was contributed from NBC Sports, Time Warner’s Turner Sports, Google, and Comcast. Total investments in DFSOs nearing the end of 2015 reached over 1 billion dollars. While no one is surprised that these companies are worth billions on paper, what is surprising is that these companies are spending millions of dollars just as fast as those millions are coming in. According to the managing director at Eilers Research, Adam Krejeik, DraftKings could quickly run out of money.

So “where’s the . . . money, Lebowskis?” While DFSOs generated $87 million dollars in revenue during 2014, they also paid $870 million dollars in winnings. In 2015, they were on pace to pay out three billion dollars. And that does not include the cost of carpet bombing sports network programing with advertisements. About halfway through 2015, DFS advertising was predicted to exceed that of PokerStars and FullTilt during the pre-2011 poker barrage. DraftKings blew through more than $80 million on


83 Harwell, Rise of DFS, supra note 77.


86 Sandomir, Gaining Clout, supra note 81.

87 THE BIG LEBOWSKI (PolyGram Filmed Entertainment 1998) (demanded by the film noir-ish detective, the Dude, when he realizes that Jeffery Lebowski has ensnared our hero in a scheme to launder money from the Lebowski family foundation for his personal enrichment).


89 Id.

national airtime between August 1 and September 16, 2015, becoming the number one advertiser in America ahead of Geico, Verizon, and AT&T.\footnote{Harwell, Move Over Bud, supra note 5.} FanDuel spent $20 million for the same period, about the salary of a top NFL quarterback during a season.\footnote{Id.} By mid-October, those numbers grew to $107.5 million and $85.8 million, respectively.\footnote{Richard Sandomir, Despite Industry Crisis, Fantasy Sports Leaders Pour on Ads, N.Y. TIMES (Oct. 16, 2015), http://www.nytimes.com/2015/10/17/sports/despite-industry-crisis-fantasy-sports-leaders-pour-on-ads.html?_r=0 [hereinafter Sandomir, Despite Industry Crisis].} Their combined advertising budget exceeded that of the entire beer industry.\footnote{Chen, supra note 2.} Even during the DFSO industry crisis that began in early October of 2015, DraftKings’ 15.1 million dollars bought 3,752 airings of ads, while $29.8 million bought FanDuel 5,568 airings of ads.\footnote{Sandomir, Despite Industry Crisis, supra note 93.} And all of this during a three hour broadcast of a live NFL game that averages about 11 minutes of actual game play.\footnote{Drape & Belson, Ad Blitz, supra note 82.}

II. THE PROFESSIONAL SPORTS LEAGUES

A. Recognizing the NBA’s Heroic Rationality

It is common knowledge that until recently, the Leagues (MLB, NHL, NBA, NFL)\footnote{One could certainly add the NCAA to this list, which truly might have concerns about legalizing sports wagering since they do not pay their athletes (see Anthony N. Cabot & Robert D. Faiss, Sports Gambling in the Cyberspace Era, 5 CHAP. L. REV. 1, 7 (2002), but that topic is beyond the scope of this note; see also David Purdum, World Looks to U.S. to Legalize Sports Betting, Fight Match-Fixing, ESPN (May 21, 2015), http://www.espn.com/chalk/story/_/id/12925786/why-legalization-sports-betting-only-first-step-us-gambling (noting that point shaving in college basketball produces one scandal every student cycle).} were against sports betting,\footnote{Another issue for the NCAA, if they decide to pay athletes, is whether the pay will be sufficient to deter players from throwing games. For example, the 2010 Pakistani Cricket Team made less than half as much as English speaking teams, and this apparently motivated three players to commit particular on-field actions at particular times that not only allowed England to win the match but also allowed one bettor to win by placing bets on the timing of all three fouls. See Matthew Taylor, Vikram Dodd & David Hopps, Pakistan Spot-Betting Scandal Throws Cricket into Crisis, THE GUARDIAN (Aug. 29, 2010, 3:46 PM), https://www.theguardian.com/sport/2010/aug/29/pakistan-spot-betting-scandal-cricket (alleging the spot-fixing scandal is only the most recent in a “long list of cheating allegations”); see generally Lawrence Booth, Pakistan Betting Scandal: Divide and Fall in Cricket’s Great Pay Gap, DAILY MAIL (Aug. 30, 2010), http://www.dailymail.co.uk/sport/cricket/article-1307552/Pakistan-betting-scandal-Crickets-great-pay-gap.html (pointing out the discrepancy between wages received by the Pakistani national team and others).} and they have used that billy club...
to lame Las Vegas’s bid for a professional sports team for decades.99 Even the Las Vegas Convention and Visitor’s Authority has been denied the opportunity to advertise during the Super Bowl.100 Yet it is widely acknowledged (everywhere but the United States) that gaming regulation actually protects the game.101 Gaming regulators use betting integrity monitors and data resource tracking102 to watch line movements and measure the amounts of money coming in on a game.103 There is even a proposal before the Nevada Gaming Control Board to allow technology that, if requested by a professional sports body, would identify: a bettor, the amounts wagered, on which sports, and on which events.104

Monitoring techniques already in place in other countries have proven useful for protecting the integrity of games and hindering match-fixing.105 When bets on an Australian Open tennis match drew excessive action, an online sportsbook stopped taking bets.106 During an Italian semi-pro league soccer match, replays showed what looked like a Turkish goaltender pulling his hand away from the soccer ball at the last minute;107 Italian authorities rounded up fifty people including team managers, players, and a suspected mobster for their role in the scheme to fix the match.108 China, using these techniques, even

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101 Purdum, supra note 97.

102 Fainaru, Lavigne & Purdum, supra note 101.

103 Purdum, supra note 97.


105 Fainaru, Lavigne & Purdum, supra note 101.

106 Purdum, supra note 97.

107 Id.
banned 33 soccer players and officials for life for match-fixing in 2013.\textsuperscript{109}

The United States has a rocky relationship with gambling. Lotteries, one of the earliest forms of gambling in America, not only contributed to establishing the Virginia Company in 1612 but also raised money for public works in colonial America.\textsuperscript{110} Lotteries contributed funds to the American Revolution.\textsuperscript{111} Lotteries financed buildings at Harvard and Yale.\textsuperscript{112} But several states outlawed them after the 1870 Louisiana Lottery Scandal.\textsuperscript{113} A federal ban followed.\textsuperscript{114} But beginning with New Hampshire in 1964,\textsuperscript{115} lotteries slowly returned to several states because they were seen as a way to reduce the tax burden on the general public.\textsuperscript{116}

Moving to gambling and sports, players betting on the game they play, especially when they actively play in that game or are involved in strategic decisions during that game, has traditionally been frowned upon. Just as the eight players of the 1919 Black Sox who fixed the World Series remain banned for life,\textsuperscript{117} so too did Pete Rose.\textsuperscript{118} But MLB has been trying to stoke up interest with younger fans,\textsuperscript{119} and MLB along with the NHL, has started to revise its positions on legalized sports betting.\textsuperscript{120}

However, it is Adam Silver, president of the NBA, who should be applauded for taking a mature approach to gaming. “Sports betting should be brought out of the underground and into the sunlight,” he said.\textsuperscript{121} There is a “thriving underground business that operates free from regulation or

\textsuperscript{109}Id.
\textsuperscript{111}Id.
\textsuperscript{112}Id.
\textsuperscript{113}Id.
\textsuperscript{114}Id.
\textsuperscript{115}Id.
\textsuperscript{116}Id.
\textsuperscript{120}Purdum, supra note 97.
oversight.” What people obviously want is “a safe and legal way to wager on professional sports events.” The NBA already relies on casinos for marketing, and the league would profit from the legalization of sports wagering outside of Nevada. “It’s inevitable that, if all these states are broke, that there will be legalized sports betting in more states than Nevada[,] and we will ultimately participate in that.” In other words, Adam Silver gets it. He is not only honest but forthcoming about how regulated gaming sweetens the NBA’s pot.

And he is not the only one who thinks legalized sports wagering is inevitable. Nevada State Senator Mark Lippetelli, former head of the Nevada Gaming Control Board, thinks it is only a matter of time.

There is just way too much money involved for the Leagues not to come around to the idea of legalized sports betting.

B. NFL Hypocrisy by Any Other Name Would Still Gall the Reasonable Individual

On the other side of forthcoming is the NFL. Deploying the classic say-one-thing-do-something-else tactic of a conniving child, the NFL swears it is against gambling, and gambling threatens the integrity of its sport. The NFL pats itself on the back for consistently maintaining this position. Yet their actions suggest otherwise.

Cards speak is a poker phrase meaning that regardless of what a player says he has, especially if he misstates the value of his hand, the cards indicate the true value of the hand. This expression is best kept in mind when dealing

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123 Id.
125 Id.
126 See Purdum, supra note 97.
127 Fainaru, Lavigne & Purdum, supra note 101.
128 See id.
129 Id.
131 See id.; see generally Fainaru, Lavigne & Purdum, supra note 101 (citing NFL spokesman Brian McCarthy about the NFL’s consistent stance against gaming).
132 Cards Speak, POKER ZONE, http://dictionary.pokerzone.com/Cards-Speak (last visited Apr. 23, 2017) (explaining poker terminology meaning that verbal statements do not make the value of a player’s hand, but the value of the cards do).
with conniving children or the NFL: judge both not on what they say, but rather on what they show. Here is what the NFL’s cards speak.

1. NFL Acquires Equity Stake in Gambling Service Provider

The size of the stake has not been disclosed, but the NFL dropped its longtime data provider to acquire an ownership interest in Sportradar US, a subsidiary of a sports company, Sportradar AG, that provides real-time statistics, scores, and odds to bookmakers, including ones that operate multiple offshore sportsbooks that offer illegal betting in the United States. Sportradar US can provide real-time data milliseconds faster than the previous data provider. So when the NFL is caught with its hands in the cake larder and asked directly whether interests in sports wagering contributed to the acquisition of Sportradar US, the NFL, no surprise here, denies it. Yet a source with knowledge of the negotiations confirmed what any reasonable person would think: gambling was “a big part of the discussion,” and the NFL’s concern was the potential for using league data for the purpose of sports betting. What makes the NFL’s deal unique is that they also acquired an ownership stake in the company. Records show that right about the time that Sportradar US was incorporated domestically, a magic wand made the menu tabs for “betting solutions” and the client list for “bookmakers” disappear. Wiping crumbs from its shirt front, the NFL clarified that this acquisition was for Sportradar US and not Sportradar AG, the company that provides that nasty-bad-ol’ gambling information in real-time for Europe and Asia and for multiple offshore books offering illegal wagering in the United States.

When Sportradar, doing what gambling data companies normally do for their customers, later announced it was offering an app that allows customers to bet on the outcome of every play, the namby-pamby NFL kicked and screamed that the app had not been generated with its consent. Eager to keep the NFL happy, Sportradar explained subsequently that the app was actually only for social gaming. However, they technically still provide this real-time

133 Fainaru, Lavigne & Purdum, supra note 101.
134 See generally id. (analyzing various deals between the Leagues and gambling information data providers that rely on speed by having a direct transmission rather than one that is unofficial and can “cause transmission delays up to 30 seconds—an eternity in live wagering. . . . when you’re talking a few milliseconds faster than anyone else, it makes a big difference”).
135 Id.
136 Id.
137 Id.
138 Id.
139 See id.
140 Id.
141 Id.
142 Id.
NFL information to iPro, whose ringit! app does the same thing.¹⁴³

So technically speaking, it is Sportradar AG that provides the “unofficial feed” of NFL data to bookmakers¹⁴⁴ and has its fingers in the operation of nine sportsbooks in Las Vegas.¹⁴⁵ It is only Sportradar’s other affiliated companies that have been tied to multiple gambling prosecutions in the US.¹⁴⁶

One of those companies, for example, is Bovada.¹⁴⁷ Bovada offered 79 bets on a single game between the Lions and Packers in December¹⁴⁸ — on a Thursday.¹⁴⁹ During a one-year period, 97 percent of the 190 million visits to Bovada’s website originated from the United States.¹⁵⁰

How do these websites dance around federal laws prohibiting gambling? Short answer: proxy server. Longer answer: the more sophisticated sportsbooks outside the United States take payments online.¹⁵¹ Not only do they have telephone representatives that will help you open an account and provide you with instructions on how to use a proxy server so it appears that your wagers originate from outside the United States, they actually send a heads-up note reminding users that charges to credit cards and bank accounts will not include the company’s name.¹⁵² You know, in the case the bank contacts you to verify those charges.¹⁵³

Sports wagering within the United States is also easy. Numerous websites operate with impunity and have been conveniently stored on U.S. servers (Beteagle,¹⁵⁴ Ubet, Vitalbet, Pinnacle).¹⁵⁵ Some gambling sites, like Bovada, even have local agents to help those interested.¹⁵⁶ These agents identify whales and grant them access to favored sites via passwords.¹⁵⁷ And as romantic as it sounds, good-old-hard cash is still collected in brown paper lunch sacks by gambling outfits determined to avoid electronic transactions.¹⁵⁸ Yet the federal

¹⁴³ Id.
¹⁴⁴ Id.
¹⁴⁵ Id.
¹⁴⁶ Id.
¹⁴⁷ Id.
¹⁴⁸ Id.
¹⁴⁹ Id.
¹⁵⁰ Id. (stating that this server in New Jersey has been connected to the Genovese crime family).
¹⁵¹ Id.
¹⁵² See id.
¹⁵³ Id.
¹⁵⁴ Id.
¹⁵⁵ Id.
¹⁵⁶ See id.
¹⁵⁷ Id.
¹⁵⁸ Id.
government has been unwilling to prosecute these or the more than 100 more
gambling sites operating in the United States.\footnote{159} Unless these gambling rings
reach a certain size and draw enough of the public’s attention, the DOJ seems
to have bigger fish to fry.\footnote{160}

2. UIGEA, Thy Name Is Ineptitude

a. Legislative Railroading and Best Intents

Before moving on to the carve out in UIGEA, currently the center of the
(il)legality of the DFS debate, it is important to understand the history and aims
of the bill. First, it should be noted that “we the people”\footnote{161} did not want to
prohibit internet gaming.\footnote{162} Republican congressmen and congresswomen
nonetheless found a way to get the bill passed by tacking it on to a Homeland
Security Bill.\footnote{163} Several Democrats wanted to know what a port security bill
had to do with Internet gambling,\footnote{164} but Republicans, fearing a turnover in an
election year,\footnote{165} succeeded blocking all amendments and railroaded the rider
through.\footnote{166} They hoped prohibition of Internet gambling would succeed if they
could punish not individuals but payment processors, those entities that process
the ones and zeros of online payments and deduct bank accounts accordingly.\footnote{167}

In one sense, UIGEA was successful; it effectively killed Internet poker.\footnote{168}
Several major online poker sites were charged with multiple UIGEA violations.
FullTilt, PokerStars, Ultimate Bet, and Absolute Poker—all key players—were
knocked out of the game,\footnote{169} even though several smaller sites continued to
exist.\footnote{170} The prosecutions resulting from UIGEA might have been a response
to rampant online poker advertising that raised republican ire.\footnote{171}

Either way, the key here is payment processors were charged.\footnote{172} The
headache for the payment processors is that on any given day, they process

159 \textit{Id.}
160 \textit{See id.}
161 U.S. CONST. pmbl.
162 Joe Falchetti, \textit{UIGEA, 6 Years Later, CALVINAYRE.COM} (Oct. 15, 2012),
\url{http://calvinayre.com/2012/10/15/business/unlawful-internet-gambling-enforcement-act-2006/}.
163 \textit{Id.}
164 Bogdanich, Glanz & Armendariz, \textit{supra} note 150.
165 Falchetti, \textit{supra} note 162.
166 Bogdanich, Glanz & Armendariz, \textit{supra} note 150.
167 \textit{Id.}
168 \textit{See Klemko, supra} note 73.
169 Falchetti, \textit{supra} note 162.
170 \textit{Id.}
171 Klemko, \textit{supra} note 73.
172 Falchetti, \textit{supra} note 162.
millions of these financial instruments as banking transactions, and simply put, the companies processing the payments lack the requisite time and sophisticated tools to sort through those charges looking for violations.\textsuperscript{173}

However, UIGEA is a spectacular failure in every other area. UIGEA doesn’t prohibit Internet gambling at all because it only applies to payment processors who process electronic financial instruments connected with online betting.\textsuperscript{174} Individual bettors logging on to sites have not been prosecuted under its statutes.\textsuperscript{175} and illegal betting continues to thrive in a shadow banking system.\textsuperscript{176} Also, offshore books are completely unaffected by UIGEA.\textsuperscript{177} Although briefly successful at eliminating startup gambling companies, offshore books with mob connections quietly stepped back in while DOJ loudly celebrated its victory.\textsuperscript{178}

\textit{b. Looking to the Future, the Weird Sisters Demanded a Carve Out}

Although nobody had DFS in mind in 2006,\textsuperscript{179} fantasy sports “were already part of the American betting scene.”\textsuperscript{180} UIGEA, poorly written as it was, effectively muddied the legal waters, thereby allowing DFSOs to operate without the legal safeguards that regulate casinos and sportsbooks.\textsuperscript{181} In fact, it allowed DFSOs to sing the sonorous siren song that DFS was specifically authorized by UIGEA.\textsuperscript{182}

Despite the NFL’s red-faced-trumped-up outrage that anyone would watch its sacred competition for anything other than pure love of the game, it is also universally known that the NFL played a crucial role in securing the carve-out in the bill.\textsuperscript{183} They were not alone. The NCAA, NBA, NHL, and MLB all

\textsuperscript{173} Id.
\textsuperscript{174} See Edelman, \textit{Short Treatise}, \textit{supra} note 13, at 37.
\textsuperscript{175} Cohn, \textit{supra} note 105.
\textsuperscript{176} Bogdanich, Glanz & Armendariz, \textit{supra} note 150.
\textsuperscript{177} Falchetti, \textit{supra} note 162.; accord Bogdanich, Glanz & Armendariz, \textit{supra} note 150.
\textsuperscript{178} Bogdanich, Glanz & Armendariz, \textit{supra} note 150.
\textsuperscript{179} Reign in Online Fantasy Sports Gambling, \textit{supra} note 67.
\textsuperscript{180} Kilgore, \textit{supra} note 58.
\textsuperscript{181} Bogdanich, Glanz & Armendariz, \textit{supra} note 150.
wanted to ensure the survival of fantasy sports. These weird sisters already knew that fantasy sports “drives traffic.” More traffic means the opportunity to sell more advertising and more signage. More traffic means they can demand more for television rights. They embrace fantasy sports because it generates more money for them.

While soiling their hands with UIGEA legislation, the NFL, along with the rest of the Leagues, simultaneously and consistently maintains the 1992 Professional and Amateur Sports Protection Act (PASPA) against New Jersey to prevent that state—or any other—from legalizing sports betting. Likewise, the NFL bars its professional stars from participating in DFS sponsored events at Las Vegas Casinos, but still offers a free fantasy sports “Master Class” on its website that includes a section dedicated to player projections, player rankings by fantasy points, expert analysis, and, of course, weekly pick’em games. This peevish child wants to have its cake and eat it, too.

At the same time, the NFL has the most to gain from fantasy sports legalization because football is the most popularly played fantasy sport. And the NFL knows this. The NFL RedZone channel does not show whole games but instead shows a kind of highlight reel of players scoring. In other words, it shows players generating fantasy points in real time game-breaker-like situations. RedZone’s success is thus directly connected to the rise of fantasy sports.

Just as the NFL operates with duplicity in legislation, it also does so with

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185 Drape, *Lost a Fantasy Game?*, supra note 119.


187 Id.

188 Id.


191 Drape & Belson, *Ad Blitz*, supra note 82.


194 Davis, * supra* note 182.
business operations in London. Because DraftKings is technically considered
gambling in the United Kingdom, the NFL’s puerile contract with Wembley
Stadium allows the DFSO to display their logo, just not on any of the
signboards near the field; American viewers might see them and presumably
get confused. But remember, this is in spite of the fact that DraftKings and
FanDuel have built brand new massive fan party zones inside NFL stadiums
that look just like—yep—sportsbooks.

In the meantime, the NFL keeps Las Vegas at bay with a 39-and-a-half-
foot-Grinch pole, while giddily promoting its three London games and while
deviously scheming a franchise expansion to the English city. For the record,
sports betting is legal in Britain. It has been since 1961. And since 1961,
British soccer scandals have dropped in number. As NFL spokesman Brian
McCarthy points out, sports betting is part of the “culture in that country[,] and
we are comfortable conforming to the cultural norms of the where we play.”
Fans wager conveniently at any of Wembley Stadium’s nearby betting
parlors. And of course, while wagering kiosks within Wembley Stadium are
unplugged when the NFL is in town, attending fans may happily hack at the
hallowed “integrity of the game” from their seats by placing live bets from their
cell phones. The NFL thinks this risk to “the integrity of the game” is a good
idea until at least 2020. All the while, twenty-eight of thirty-two NFL teams
have made exclusive deals with the DFSO of their choice. What the cards
speak and what the NFL says are different.

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195 Belson & Drape, NFL’s Forays to London, supra note 183.
196 Id.
197 Drape & Belson, Ad Blitz, supra note 82.
200 Cohn, supra note 105.
201 Id.
202 Florio, supra note 199.
203 See id.
204 Belson & Drape, NFL’s Forays to London, supra note 183.
III. DFS, BASTARD CHILD OF ONLINE POKER

A. Systemic Connections to Poker

In early 2015, the FSTA sensed a change in the legal waters. They warned DFSOs about using poker terminology to promote their games.\textsuperscript{207} The poker lingo on their websites might not have been such a big deal, except that DFSOs stylistically designed their sites to appear as online poker sites.\textsuperscript{208} Even the graphics used to promote DFS were the same as online poker before the sites were folded by the DOJ.\textsuperscript{209}

DFS players’ language reveals poker roots, too. Players refer to in-game action as “tilting” because of “variance”,\textsuperscript{210} when a player scores well above or below his projections. Players enter “tournaments” where they compete to finish at a higher percentile than others in order to get paid out a “jackpot.”\textsuperscript{211} And playing directly against each other is labeled “head-to-head”\textsuperscript{212} as when two poker players square off against each other because either everyone else folded or they remain the last two standing.\textsuperscript{213}

And those following the industry noticed a significant amount of overlap between online poker pros and top-ranked DFS players.\textsuperscript{214} Why? Because they love fantasy games?\textsuperscript{215} No.\textsuperscript{216} According to Kevin Bonnet,\textsuperscript{217} DFS focuses on “traditional sports gambling and poker strategies.”\textsuperscript{218} Strategies like predicting outcomes.\textsuperscript{219} So poker pros became DFS pros.\textsuperscript{220} And former poker pros feast on fish playing DFS.\textsuperscript{221}

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\textsuperscript{207} Christy Keenan, \textit{Daily Fantasy Sports and the PokerStars Paradox}, \textit{Legal Sports Rep.} \textit{(May 6, 2015, 5:54 PM)}, http://www.legalsportsreport.com/1297/amaya-sets-sights-on-dfs/; Keenan is part of SupperLobby.com, “a brand new site dedicated to helping DFS players find the softest contestants and the best value.” \textit{Id.}; see generally infra Sections V.B, V.C.

\textsuperscript{208} Kang, supra note 43.

\textsuperscript{209} Klemko, supra note 73.

\textsuperscript{210} Kang, supra note 43.

\textsuperscript{211} Klemko, supra note 73.

\textsuperscript{212} Id.

\textsuperscript{213} Head-to-head, \textit{PokerZone}, http://dictionary.pokerzone.com/Head-to-Head (last visited Apr. 23, 2017).


\textsuperscript{215} See supra Section I.C; see generally Turner, supra note 214.

\textsuperscript{216} Id.

\textsuperscript{217} See supra Section I.C.

\textsuperscript{218} Edelman, \textit{Navigating}, supra note 12, at 124 n.36; accord Turner, supra note 214.

\textsuperscript{219} Turner, supra note 214.

\textsuperscript{220} Keenan, supra note 207; accord Turner, supra note 214.

\textsuperscript{221} Davis, supra note 182.
DFSos, moreover, hire senior management from online gambling companies or from the ranks of professional poker players. For example, Matthew Boccio, previously a sportsbook analyst at Pinnacle, now determines the values of players relative to the salary caps that owners select for their teams. Jon Aguiar was primarily a poker pro known online as FatalError before becoming director of VIP services at DraftKings. Tim Dent, the former CEO of Everest Poker, currently serves as CFO of Draftkings. One of the early inventors of DFS who designed his webpages to resemble those of online poker, Chris Fargis, also works at DraftKings. RotoGrinders, essentially the ESPN of fantasy sports, is a clone of the online poker strategy site Pocket Fives, which was cofounded in part by Cal Spears, a former poker player. Pocket Fives advertised DFS before prize pools started booming. Before the prize pools started booming, DFS’s early rise was primarily fueled by former online poker players. DraftDay launched in order to take advantage of the significant overlap between DFS and online poker, thereby allowing poker players to use those predictive skills to turn a profit.

Other industry connections to publically-traded-online-gaming companies abound. Perhaps the most prominent example is StarsDraft, run by PokerStars.com. It is not only the biggest name in online poker, but has been king of the ring since 2001. Rational Group, owner of PokerStars and FullTilt (the industry-ranked number six contender in online poker), was recently acquired by Amaya, gladiator maximus in the gambling software arena. The $4.9 billion acquisition makes Amaya the largest publicly-

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222 Bogdanich, Glanz & Armendariz, supra note 150.
223 Id. (he also won $50,000 playing on DraftKings).
224 Id. (see also supra Section I.C).
225 Id.
226 Id.
227 Kang, supra note 43.
228 Drape & Williams, Insiders’ Edge, supra note 6.
229 Id.
230 Brustein & Boudway, supra note 53.
231 Edelman, Navigating, supra note 12, at 124-25 n.36.
233 Keenan, supra note 207.
235 Keenan, supra note 207.
236 Id.
listed online poker company.\textsuperscript{242} Amaya boasts 97 million cumulative registered users on its worldwide suite of online poker sites: PokerStars, Full Tilt, BetStars, StarsDraft, European Poker Tour, PokerStars Caribbean Adventure, Latin American Poker Tour, and Asia Pacific Poker Tour.\textsuperscript{243} Given the use of the word “tilt” to refer to fantasy games, one commentator suggested that if Amaya wants to enter the DFS arena, it ought to do so under the recently acquired FullTilt, instead of the PokerStars arm, so as not to raise the swords of the DOJ and congressional policy makers.\textsuperscript{244} DFS is, thus, the “bastard child of online poker” and “inextricably” linked to online poker.\textsuperscript{245}

IV. DFSO IS FOLLOWING IN THE FOOTSTEPS OF UBER AND STUBHUB

A. DFSO’s Battling for Market Share

As things currently stand in the quest for market share, FanDuel and DraftKings find themselves in a Coke-v.-Pepsi-style battle on top of this industrial hill. So why take the risk and invite DOJ scrutiny? This answer is two parts, and the first part has two pieces.

1. Part I: Establishing a Foothold in the Sports Industrial Entertainment Complex

Because ESPN, Yahoo, and others were sweating legal ambiguities,\textsuperscript{246} wildcatting start-up companies were able to take the lead in the development of DFS.\textsuperscript{247} For example, Yahoo, the first major player with significant cash reserves and a household name, did not venture into the fray until the middle of 2015\textsuperscript{248} and instantly became the third most popular DFSO in the nascent industry.\textsuperscript{249} But the scale of FanDuel and DraftKings is so extensive that they are now the giants of the DFS industry, and the established big dogs of the sports industrial entertainment complex can only nip at their heels.\textsuperscript{250} In short,

\textsuperscript{241} Id.
\textsuperscript{243} Id.
\textsuperscript{244} Keenan, supra note 207.
\textsuperscript{245} Kang, supra note 43.
\textsuperscript{246} Joshua Brustein, Fantasy Sports and Gambling: Line Is Blurred, N.Y. TIMES (Mar. 11, 2013), http://www.nytimes.com/2013/03/12/sports/web-sites-blur-line-between-fantasy-sports-and-gambling.html; see generally Drape & Belson, Ad Blitz, supra note 82 (quoting Geoff Freeman, president and chief executive of the American Gaming Association, “the current lack of legal clarity is an obstacle.”); Falchetti, supra note 162.
\textsuperscript{247} Brustein, supra note 246.
\textsuperscript{248} Goel & Drape, supra note 186.
\textsuperscript{249} Goel, supra note 55.
\textsuperscript{250} See Klemko, supra note 73.
both companies have effectively employed the Stubhub model of business growth: make industry connections with influence-wielding companies, and then flood all available channels of advertising to dominate the market.\textsuperscript{251}

So while some suggested the best way to handle the crisis was to dial it back and not poke “a stick in the eyes of the federal government or the F.B.I.”\textsuperscript{252} DFSOs continued to run adds.\textsuperscript{253} A crisis communications expert explains their strategy:

They have no choice. Either you disappear or you thunder forward, and I think they’ll thunder forward. . . . There’s no advantage in undermining your business. Somebody else will take it. The more money they have, the more money they have to protect themselves. Put a strong face on, move forward cautiously, and keep advertising.\textsuperscript{254}

Even though DFSOs were no longer among the top ten advertisers during that time, they did not pull their ads.\textsuperscript{255} But they did not buy anymore either.\textsuperscript{256}

Another commentator likened the DFS crisis to Nevada’s “heavy-handed” crackdown on Uber.\textsuperscript{257} Uber was eventually allowed to continue operating in Nevada by leveraging an angry public petitioning lawmakers to make it legal.\textsuperscript{258} In September of 2015, CEO of FanDuel Nigel Eccles not only continued to ring the DFS-is-protected-by-UGEA bell but indirectly likened the popularity of the DFS business model to that of Stubhub and Uber.\textsuperscript{259} Jason Robbins, CEO of DraftKings explains: “It would just take a lot to reverse course right now. It would be such a public outcry, I just don’t see how it could happen.”\textsuperscript{260} Because of the popularity of DFS, in other words, DFS must be legal. However, not all stories are success stories, and it is entirely possible that DFS heads down the road of PokerStars and Full Tilt.\textsuperscript{261} The bluff initially

\begin{thebibliography}{99}
\item[251] See id.
\item[252] Sandomir, Despite Industry Crisis, supra note 93.
\item[253] Id.
\item[254] Id.
\item[256] Id.
\item[259] E.g., Klemko, supra note 73; Nevada to DFS sites: License, Please, supra note 257.
\item[261] Smith, supra note 4.
\end{thebibliography}
seems to have paid off since just one week after the scandal DFSOs took in $45 million in entry fees.  

2. Part II: Reaching For an Uncultivated Niche in Order to Compete

FanDuel is estimated to have three times the market of their competitors.  

To compete, DraftKings needs to tap into a market that FanDuel isn’t cultivating, and it does so by converting or “educating” online poker players.  

This strategy is not new for DraftKings. They have consciously cultivated former poker players by using betting terminology on their websites.  

Nevada regulators even cited a 2012 Reddit.com interview in which CEO Jason Robbins described his site as a casino and DFS as a “mashup between poker and fantasy sports.”  

While FanDuel, in spite of some slip-ups, generally maintains a stifling stiff arm on poker terminology, DraftKings not only sponsors the World Poker Tour but even goes so far as to sponsor the World Series of Poker Main Event.  

What’s more, if you win one of DraftKings’ biggest competitions, you win a seat at that final poker table.  

So why risk DOJ scrutiny? Partly because DraftKings has to.

B. Sharks and Confidence Games

The second part of the answer as to why DraftKings continues to attract poker players is the business model behind a successful DFSO—two words: growing jackpots. A player choosing between a site promising $500,000 for first prize and another site offering $100,000, will most likely choose to spend $25 chasing the bigger jackpot.

Here’s how it works: Let’s say you run D.F.S. Site A, and D.F.S. Site B has just announced a weekly megacontest in which first place will take home $1million. Now you have to find a way to host a comparable . . . jackpot. The

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263 See Valerio, supra note 226.

264 Id.


266 Id.

267 Kang, supra note 43 (citing Nigel Eccles the CEO of FanDuel as associating the differing denominations on FanDuel’s site as tables).

268 Valerio, supra note 226.

269 Id.

270 Drape & Williams, Insiders’ Edge, supra note 6.

271 Valerio, supra note 226.

272 Kang, supra note 43.
problem is that you have only 25,000 users, and the most you can charge them
to enter is $20 per game (anything higher is prohibitively expensive). And
you’ll need $2 million or even $3 million in a prize pool if first prize is valued
at $1 million (remember, you still have to pay second place, third place and
beyond). So you need to somehow quadruple the number of entries. But how?
You’re already paying high cost-per-acquisition fees to sites like
RotoGrinders, which charge... anywhere between $100 and $200 per person
they refer to your site, and you’ve already put your logo on every bus, trash
can and ESPN screaming-heads show out there. You’ve also kicked in some
of your own money (known as “overlay”) to spice up the pot.
The solution is simple: You let each contestant enter hundreds of times. But
even given this freedom, a majority of people will enter only a few more
times, which will help but probably won’t get you all you need. If, however,
you can attract a few high rollers who are willing to book several hundred or
even several thousand entries apiece, the path to the $1 million first prize
becomes a lot more manageable. And as long as you can make sure those
players keep pouring in their thousands of entries, you can keep posting the $1
million first prize all over your ads. (Each company has instituted caps on the
number of entries per player, but more enterprising high rollers have found
ways around this.)
Now, however, you have an even bigger problem: You need the high roller
more than he needs you. You need his entry fees to gas up your prize pools,
and you also need the roughly 10 percent service fee he pays for the hundreds
of thousands of dollars he bets on the site. 273
In short, DFSOs need to keep bringing money into their prize pools to keep
the pools large enough to attract more and more players 274 because so few
players actually win. 275 The more money a DFSO has coming in, the greater the
rake—DFSOs earn almost 10 percent from every individual entry. 276 For a
DFSO, revenue is about volume. 277 So they spend huge amounts of money on
advertising in order to bring in “new dumb money.” 278

V. CONSPIRING WITH SHARKS

A. Bumhunting

One might be tempted to think any fool can purchase any number of lottery
tickets desired or wager on as many different sporting events as one’s bankroll
can afford. Enter bumhunting. Using mechanics to manipulate the deck rather
than explicitly bumhunting (although they are certainly bumhunting), the

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273 Id.
274 See id.
275 EJ Fagan, Why I Am Quitting Daily Fantasy Baseball, ESPN (Sept. 14, 2015),
http://itsaboutthemoney.net/blog/archives/2015/09/14/why-i-am-quitting-daily-
fantasy-baseball.
276 Id.
277 Id.
278 Id.
popular poker movie *Rounders* showed two blue-collar players secretly working together, taking money off ivy-league-sweater-wearing, east-coast-rich kids in order to pay off a debt. Chip placement, signaling, and trapping, for example, are all cheating techniques surreptitiously indicating the value of one player’s cards to another, which allows the team to lead other players into bad positions and bad bets.

Like mechanics, bumhunting takes advantage of the inexperienced. “The bumhunter’s dream is to play thousands of games of poker a day against a never-ending line of fresh, inexperienced newbies.” In Las Vegas, you don’t play with the best when you join a poker game because in order to make money, the pros are at the highest buy-in tables. And even if there are predators slumming at lower-value tables, they are likely spread throughout a casino. “It’s like the nature channel; you don’t see piranhas eating each other.”

In the world of online poker, one of the easiest forms of bumhunting involves coordinating play over the phone. A group of telephonically connected friends playing at the same online table informs team members of the value of their cards, thereby leaving the unsuspecting fish at a distinct disadvantage. The problem, of course, is bumhunting cannot be fully automated. One has to wait for the action, analyze the cards on the flop, turn, or river if necessary, manage raises and counter raises, and wait for the victim to read each new card, evaluate the chances of success, and decide whether to fold or continue. A new hand necessarily means the same waiting all over again in order to get paid again.

Unlike in live poker, a newbie—a fish—in DFS will play the very best. It is not because ten-time world poker champion Johnny Chan sits at

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279 *Rounders* (Miramax 1998).
280 *Id.*
281 Kang, *supra* note 43.
282 Harwell, *All the Reasons*, *supra* note 262.
283 Fagan, *supra* note 275; *But see Rounders*, *supra* note 279 (where the professionals aren’t playing as a team with each other, but aren’t playing against each other either).
284 *Rounders*, *supra* note 279 (aquatic predator metaphors abound in gambling: sharks, whales, fish. The director employs a new metaphor here; the professionals, as the metaphorical piranha, are sitting at a table together since piranha are most effective when attacking as one).
285 Klemko, *supra* note 73.
286 *Id.*
287 Kang, *supra* note 43.
288 See *id.*
289 See *id.*
290 An inexperienced DFS player. See Kang, *supra* note 43; *see also Rounders*, *supra* note 279.
291 Harwell, *All the Reasons*, *supra* note 262.
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every table.292 At every table there are three Johnny Chans.293 When playing DFS, anyone can see another player’s profile,294 determine that player’s experience,295 and, naturally, challenge that new player to a head-to-head.296 Repeatedly.297

B. DFS’s “Rapacious Ecosystem”298

So while it is not worth it for a poker shark to chase minnows by playing at a low-bid table in live or online poker because of the waiting involved, a click of a mouse resolves that problem in DFS.299 Within the DFS game offered by a DFSO, rampant bumhunting300 produces a predatory market.301 Every year more players are added to the market, and DFS produces more losers.302 The market breaks down into sharks, big fish, and minnows.303 A frequently cited study of big winners revealed that 91 percent of player profits were won by a mere 1.3 percent of players.304 The top 11 players of that 1.3 percent, moreover, average $2 million in entry fees.305 Among these great whites are also smaller sharks that make up the rest of the 1.3 percent of winners; each of their entry fees average $9,100.306 Together, this 1.3 percent of players accounts for 40 percent of the total entry fees to be won.307

While 80 percent of players are minnows, contributing a mere 8% of the entry fees, only 5% of players are big fish.308 However, big fish account for 36 percent of the entry fees.309 “The DFS economy depends heavily on retaining the big fish.”310 But the problem is that “[the big fish] had a staggering loss rate of 31 percent of what they paid in entry fees and accounted for 75 percent of all losses.” By comparison, a “minnow loses less than $10 per month.”311 If the

292 Fagan, supra note 275.
293 Id.
294 Id.
295 See id.
296 See Drape & Williams, Insiders’ Edge, supra note 6.
297 Id.; see infra Section V.D.2.
298 Kang, supra note 43.
299 See id.; see also, Fagan, supra note 275.
300 See supra Section V.A.
301 Kang, supra note 43.
302 See Brustein & Boudway, supra note 53.
303 Miller & Singer, supra note 90.
304 Id.
305 Id.
306 Id.
307 Id.
308 Id.
309 Id. (the remaining 13.7 percent of players contribute 16 percent of the entry fees).
310 Id.
311 Id.
sharks cannot indulge themselves on big fish essential to generating large prize pools and thus, big payouts, they search for other waters. In other words, the business model of a DFSO “only makes sense if most players lose money.”

C. DFS Strategy: Sleepers, aka, Finding a Particular Zebra in a Herd of Zebras

Moving to basic DFS strategy, picking your favorite player has two problems: one, you may get a lot of points when he scores, but so will your competitors because that player is likely owned by numerous teams; two, picking players expected to earn lots of points necessarily involves spending a greater percentage of your salary cap, thus limiting your ability to acquire other studs. Also, in order to succeed at DFS, a tournament player will need to do more than finish in the top half or third of the contest because the big prize money feeds only those at the upper echelons of the DFS food chain. And remember, you still have to beat the rake, so you need to win at least 53 percent of head-to-head matches.

In order to do that, as well as succeed in head-to-head matches, you must select players whom few other entrants have selected but who perform well, aka “the sleepers,” because the more unique your lineup, the more value a big performance will impact your overall score. The sleepers are the unsung stock that perform better than expected. These undervalued and little-known players must perform “not just great but surprisingly great.” These players are, by definition, hard to find.

Imagine someone had information highlighting the percentage of players on all the teams for a particular DFSO’s set of contests. That information would allow that someone to know mathematically who was not as frequently

312 See supra Section IV.B.
313 Kang, supra note 43.
315 Harwell, All the Reasons, supra note 262.
316 Belson, supra note 85; see Miller & Singer, supra note 90 (citing 1.3 percent won 91 percent of player profits).
317 See Kang, supra note 43 (suggesting it’s impossible to make a net positive return without bumhunting).
318 Belson, supra note 85.
320 Klemko, supra note 73.
321 Belson, supra note 85.
322 Harwell, All the Reasons, supra note 262.
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selected.323 And that someone would have a “great advantage for tactical
design,”324 Armed with that information, that someone could submit a whole
team roster of less frequently selected players and score a lot of points.325 That
someone would not have to seek to separate a single zebra within the herd but
rather could set his sights on a single solitary zebra on an open swath of
savannah silhouetted against the stars.

D. Insider Information/Insider Trading326

It is particularly important at this stage to keep in mind that DFSOs are
completely unregulated.327 While it is not necessarily apparent that many of the
biggest winners on any given Sunday at one company are the Monday through
Friday employees of the other,328 that body of information surfaced when
reports revealed that DFSO “employees were placing bets using information
not generally available to the public.”329 Although there previously had been
finger pointing at ghostly figures for revealing insider information,330 DFSOs
took no corrective actions. They simply ignored it.331 For instance, Leonard
Don Diego, currently an engagement manager at DraftKings, was previously
accused of sharing lineup information.332 DFS players—who had no
foreseeable knowledge that this information was available to insiders—really
got a whiff of how rotten things were in Denmark when it became clear that

323 See id.
324 Joe Drape & Jacqueline Williams, Scandal Erupts in Unregulated World of
2015/10/06/sports/fanduel-draftkings-fantasy-employees-bet-rivals.html
[hereinafter Drape & Williams, Scandal Erupts].
325 Harwell, All the Reasons, supra note 262.
326 Regarding the insider trading analogy, some have supported it while others
have critiqued its use as an aid to understanding what took place with Ethan
Haskell’s leak. Compare Peter J. Henning, The Paths for an Investigation
2015/10/20/business/dealbook/the-paths-for-an-investigation-of-fantasy-sports.html
(applying a common sense approach “looks like insider trading because it involves
taking information that belongs to the corporation and misusing it for personal
gain.” He notes the problem with the analogy as well, “but the insider trading laws
apply only to transactions in securities and commodities, which leaves out daily
fantasy sports.”), with Drape & Williams, Scandal Erupts, supra note 324, (quoting
Daniel Wallach stating the insider trading analogy works because of the distinct
tactical edge it gives a player); But see Smith, supra note 4, (quoting gambling
expert Anthony Curtis, who thinks the insider trading comparison is a bad one, but
he understands the reference; what’s really at issue for Curtis is he believes DFS is
simply unregulated gambling and not insider trading).
327 Easterbrook, supra note 314.
328 Drape & Williams, Insiders’ Edge, supra note 6.
329 Drape & Williams, Scandal Erupts, supra note 324.
330 Drape & Williams, Insiders’ Edge, supra note 6.
331 Kang, supra note 43.
332 Drape & Williams, Insiders’ Edge, supra note 6.

For their part, the DFSOs marshalled the ol’ gosh-shucks-well-its-not-illegal-Wall-Street justifications: if we do not allow our employees to play on our competitor’s website (read: transfer or win gobs of money from the unsuspecting, i.e. bumhunt), we cannot keep talent;\footnote{334}{See Drape & Williams, Insiders’ Edge, supra note 6.} blah, blah, integrity of the game is really important for us at our DFSO, blah, blah;\footnote{335}{Drape & Williams, Scandal Erupts, supra note 324.} and we are a “very ethical company.”\footnote{336}{Klemko, supra note 73.} Industry apologists pointed out that the industry relies so heavily on player populations (to build prize pools)\footnote{337}{See supra Section IV.B.} that they need crossover.\footnote{338}{Drape & Williams, Scandal Erupts, supra note 324 (citing Chris Grove, industry analyst and editor of Legal Sports Report (legalsportsreport.com)).} One DFSO even went so far as to acknowledge that their employees, dedicated fantasy sports enthusiasts that they are, simply make more money playing DFS than working for the DFSO.\footnote{339}{See Drape & Williams, Insiders’ Edge, supra note 6.}

1. Ethan Haskell:

Now, to be clear, an employee of DraftKings, Ethan Haskell, was the subject of an internal investigation by Draftkings; also, to be clear, DraftKings’ internal investigation into Haskell’s information release cleared him of any wrongdoing.\footnote{340}{Harwell, Slapped Back to Reality, supra note 88.} But the investigation should have hinged on temporal adverbs: before/after. Timing is critical. In fantasy sports, you can juggle your lineup up until it becomes finalized, usually at kickoff or seconds before kickoff. But only those players who are playing in that particular set of games are locked into position. If half of your team is playing in the NFL’s early game, for example, then each one of those players will be locked into his selected position when the real game kicks off. You would then still have time to sit, start, or draft other players for the half of your team playing in the later games up until the moment those games start.

So what happened? Ethan Haskell released internal data about Millionaire Maker.\footnote{341}{Id.} Millionaire Maker is DraftKings’ biggest contest.\footnote{342}{Id.} This data revealed “which players—included in more than 400,000 entries—were most commonly selected in lineups.”\footnote{343}{Drape & Williams, Insiders’ Edge, supra note 6.} A tactical advantage would be gained by any
player who accessed this information to set his line-up before it was locked. That player would know which real-life players were likely to score bonus points because they were not as frequently selected for other lineups. That player could fill out an entire team with the players that were rarely selected. Hence, the question is not when the information was released but rather when did Haskell have access to it: after his lineups were locked or before?

According to DraftKings, Haskell could not have used this information to edit his lineup because Haskell did not have access to the information until forty minutes after his FanDuel lineup was locked. “So [access to the data] couldn’t possibly be a situation where the data was useful to him in setting the lineup.” Haskell, on the other hand, admits he revealed the information before all lineups locked.

Well, it technically could be that both of these scenarios are true. If all of Haskell’s team played in the early games of week three of the NFL season, it is possible all of his team would be effectively locked as the CEO proposes. As for owners who had players on teams in late games, their teams would not be finalized. Player selection could be adjusted for advantage by those owners until the moment those lineups barred changes. That information would then, in theory, benefit others competing against Haskell. Unless, that is, he had access to that information before setting his lineup.

Again, let the cards speak. As things played out, it certainly looked as if Haskell was holding a hell of a hot hand. In week three of the NFL season alone, the week of the early data release, he won $350,000 and one of 120 seats at the FanDuel World Championship. Supposing he shows up to compete in that competition, he will get paid another $20,000, even if he enters a donkey lineup and finishes 120th out of 120. If he finishes just one place better than dead last, the winnings climb higher. So in one week, $370,000 in winnings is guaranteed. That is Haskell’s minimum win for a $25 entry. And should he finish first at the FanDuel World Championship, he will win the three-million-dollar first prize on top of the $350k he has already won.

But Haskell had been burning bright and building big bank on baseball,

344 Belson, supra note 85.
345 Klemko, supra note 73.
346 Drape & Williams, Scandal Erupts, supra note 324.
347 Drape & Williams, Insiders’ Edge, supra note 6; see generally Harwell, Slapped Back to Reality, supra note 88.
348 Drape & Williams, Insiders’ Edge, supra note 6.
349 Kang, supra note 43 (this is the name for a line-up created by a fish, newbie, or inexperienced player).
350 Drape & Williams, Insiders’ Edge, supra note 6.
351 See id.
352 Klemko, supra note 73.
353 See Drape & Williams, Insiders’ Edge, supra note 6.
too, even though fantasy baseball is considered “particularly sharky.” In one of those contests, Haskell used a $25 buy-in to beat nearly 13,000 other competitors. He won $50,000 for that entry. This is quite a big improvement for a guy who was a middling player before working at DFS.

2. maxdalury, aka, Saahil Sud, aka Orcinus Orca

Another question: who has access to this information? At a private DraftKings party, Madison Calvert, a big fish and a frequent player, approached Jon Aguiar to discuss his choice of a particular pitcher in a baseball contest. Aguiar whipped out his cellphone and informed the regular that the choice was not optimal since so many other contestants had the same pitcher on their teams. Admitting he should not have shown the information to a “regular player,” Aguiar laughed it off. This information—what percentage of teams selected which pitcher, center fielder, etc.—is the kind of information (insider information) companies typically keep from their employees so as to avoid the appearance of impropriety.

One of the more interesting twists here is that Calvert—a regular player—had been repeatedly challenged on FanDuel by Rick Sawyer just days earlier. After this conversation and a brief internet search, Calvert discovered that Sawyer was a business-planning manager at DraftKings who had likely pegged Calvert as a suboptimal player. Why go after Calvert? Because he’s considered a big fish in the world of DFS. He lost on average $1,100 of his $3,600 entry fee.

And so, if a select group of players has access to this “jackpot of data,” what are the odds of winning for everyone else? One player estimates that

354 Id.
355 Brustein & Boudway, supra note 53.
356 Drape & Williams, Insiders’ Edge, supra note 6.
357 Id.
358 Id.
359 Id.
360 Harwell, Slapped Back to Reality, supra note 88.
361 See infra Section III.A (Aguiar is an executive of the site).
362 Drape & Williams, Insiders’ Edge, supra note 6.
363 Id.
364 Id.
365 See Drape & Williams, Insiders’ Edge, supra note 6; Klemko, supra note 73.
366 Id.
367 Id.
368 Id.
369 Harwell, Slapped Back to Reality, supra note 88.
established players have a 75 percent chance of winning.\textsuperscript{370} Maxdalury is the number one ranked DFS player in the world, according to Rotogrinders.\textsuperscript{371} Saahil Sud is maxdalury. Sud has made more than two million dollars playing DFS.\textsuperscript{372} And he enters almost every contest, every day.\textsuperscript{373} He plays in tournaments with buy-ins of a couple bucks up to buy-ins of thousands of dollars.\textsuperscript{374} And he enters every contest multiple times.\textsuperscript{375} During baseball season, for example, he placed two hundred entries into tournaments; during football, one thousand entries.\textsuperscript{376} He is the “apex predator” of fantasy sports.\textsuperscript{377} As one might expect, Sud defines DFS as a skill-based game.\textsuperscript{378} The skill, he argues, is teaching a computer what he thinks is important for evaluating player performance in a game.\textsuperscript{379} His custom-built prediction models are designed to identify athletes not on other team’s rosters.\textsuperscript{380} Why is he allowed to do this and how can he do it? DFSOs let him and others use scripting.\textsuperscript{381} Scripting not only allows him to identify weaker players but also enters him into competitions with those fish ahead of other sharks.\textsuperscript{382} Because scripting is an automated process,\textsuperscript{383} it has other benefits, as well. When, in March of 2015, the Orlando Magic announced that Channing Fry would start instead of the injured Nikola Vucevic, Sud adjusted most of his 400 lineups within the hour.\textsuperscript{384} That night he won thousands of dollars finishing first, third, fourth, and seventh place in the same DraftKings competition.\textsuperscript{385} The DFS community was outraged that a player could blanket the field and avoid the time-intensive hassle of manually adjusting his lineups.\textsuperscript{386} Worse still, DraftKings had supposedly banned scripting in its terms of service.\textsuperscript{387} Sud is allowed to play by a different set of rules.

\textsuperscript{370} Brustein & Boudway, supra note 53.
\textsuperscript{371} Id.
\textsuperscript{372} Id.
\textsuperscript{373} Harwell, All the Reasons, supra note 262.
\textsuperscript{374} Id.
\textsuperscript{375} Fagan, supra note 275; Miller & Singer, supra note 90.
\textsuperscript{376} Brustein & Boudway, supra note 53.
\textsuperscript{377} Id.
\textsuperscript{379} Id.
\textsuperscript{380} Brustein & Boudway, supra note 53.
\textsuperscript{381} Kang, supra note 43; but see Nickisch, supra note 378 (quoting Sud defending scripting: “it’s clear to me that it’s a skill-based game”).
\textsuperscript{382} Drape & Williams, Insiders’ Edge, supra note 6.
\textsuperscript{383} Kang, supra note 43.
\textsuperscript{384} Id.
\textsuperscript{385} Id.
\textsuperscript{386} Id.
\textsuperscript{387} Id.
In big casinos, high rollers have been known to negotiate rules with the house. If, for example, a whale from China wants to play a variant of blackjack in which the dealer has to hit on soft 17, the casino, especially if it is struggling, will sometimes adjust to please the whale.

D.F.S. high rollers similarly come with demands, and because there’s no powerful regulatory body involved, DraftKings and FanDuel have been mostly free to set the parameters of play, which, as it turns out, is near anarchy. . . . High rollers want to be able to use third-party computer scripts that will allow them to enter thousands of lineups at once, something your average player cannot do.

High rollers can gain access into D.F.S.’s inner circle, in which they get to be on first-name, texting basis with executives and employees at DraftKings and FanDuel. They can operate under the cover of plausible deniability— if other players complain that the high roller has been using tools that destroy competitive balance, he might expect the sites to stick up for him.388

And they did stick up for their shark: “instead of banning scripting, or at least forcefully regulating it, as the D.F.S. community would have liked, both DraftKings and FanDuel announced that they would change their policies to permit some scripting.”389 Both sites, however, claim they have banned fish finder tools390 which are online tools that allow experienced players to identify and match up with inexperienced players.

Two reasons exist for why the DFSOs didn’t ban scripting outright. First, according to Jean Sacco, FanDuel’s director of communications, they cannot completely stop the scripts.391 They do not regulate them because the scripts have become so sophisticated DFSOs cannot disable them.392 Even more nauseating, they do not even know how to detect them.393 RotoQL provides scripting tools and is run by Justin Park.394 Guess who partners with Justin Park at RotoQL to provide third-party tools and a scripting program that plugs directly into the DraftKings’ interface: yep, maxdalury.395 When a reporter asked whether Draftkings had given permission to alter DraftKings’ website, Park said he did not know.396 Later he remembered an “email exchange,” but for their part, DraftKings would not confirm it.397

Secondly, because the sharks are their biggest customers,398 DFSOs have to

388 Id.
389 Id.
390 Brustein & Boudway, supra note 53.
391 Kang, supra note 43.
392 Id.
393 Id.
394 Id.
395 Id.
396 Id.
397 Id.
398 See supra Section V.A, V.B.
Sites permit scripting because it allows the sharks to enter as many times as they want, which builds prize pools, which generates greater rake for the DFSO. Rotogrinders even released scripts so the biggest players can enter their lineups on different DFS sites simultaneously. Again, Sacco: “If someone is playing hundreds of thousands of dollars and comes and says, ‘I have some ideas that would help me keep doing what I’m doing,’ only a bad business would not take that into consideration.” Sacco believes “the idea that players can’t bring in features to improve their time, honestly—it feels a bit Orwellian.” In other words, the DFSOs are the silent partners of the sharks.

Lastly, it should be noted that Haskell was not the only one stomping heads during week three of the NFL season. Sud also had a great week—his most financially lucrative week yet. Scripting would have allowed him to adjust many of his late-game players’ lineups according to that valuable information release within hours, just as he had done before. During week three, he won more than one million dollars.

VI. CONCLUSION:

Now reader, if you are thinking this is literally playing a game with a different set of rules because the scripts allow these players to modify the site to their own specifications, if you’re thinking that these rule changes actually protect the sharks and encourage predatory behavior, or if you’re thinking there is no way to know whether or not DFSOs will institute meaningful reform because these companies are unregulated, you would be correct. But remember this: it is an unregulated market. And as anyone who advocates for unregulated markets and for unregulated markets policing themselves will tell you, this market functions perfectly well. It enriches the top 1.3 percent.

Currently, sports betting is already the norm in spite of the Leagues’
efforts. A repeal of PASPA will allow regulated gaming when states pass initiatives to raise funds to replace lost tax dollars, just as has been done with lotteries. It will happen because the Leagues will stop fighting New Jersey’s attempt to legalize sports betting. But they will only do that when it is in their interest. That interest will not mature until the Leagues effectively dominate the gaming market companies to secure their revenue streams and leave nothing more than a pound of flesh of market share for the rest of the sports industry to chew on. In other words, the big dogs are acting like big dogs: monopolies looking to integrate and consolidate horizontally.

For now the bell\textsuperscript{412} chiming legality seems to have stopped ringing, as DFSOs can no longer claim that their sport has a special UIGEA carve-out. But DFS will likely be legalized and regulated. As mentioned above, there is too much money to be made by the Leagues. Just like the return of lotteries, states want a piece of that revenue. DFS, legalized and regulated, might even be the first step to paving the way to legalized sports betting in the United States, which would in turn protect the integrity of the sport.

**CODA: ONE YEAR LATER**

Given the nature of law school publications, one year has passed since this note was written. And there have been changes to some of the issues addressed in this article.

**A. DFSOs**

1. **Regulation**

During week 17 of the NFL season, the final week before playoffs, DFSO’s prize pools shrunk after rebounding in weeks 15 and 16.\textsuperscript{413} Still, the top three DFSOs (FanDuel, DraftKings, and Yahoo) all turned a profit.\textsuperscript{414} New York’s attorney general, Eric Schneiderman, is still suing for the return of several millions of dollars in entry fees.\textsuperscript{415} As one might expect, DFSO’s extensive advertising plays a central role in the case.\textsuperscript{416}

Also in the last year, six states have passed laws legalizing DFS.\textsuperscript{417} Some industry watchers have even claimed that the industry realizes regulation is

\textsuperscript{412} See supra Sections I.C, IV.A.1.
\textsuperscript{413} Hall, supra note 255.
\textsuperscript{414} Id.
\textsuperscript{415} Id.
\textsuperscript{416} Id.
necessary. FanDuel’s website, for example, now has a “bill of rights” for its players. Those rights include barring employees from playing on the DFSOs, offering less experienced players their own “beginner contests,” and providing icons identifying players as “experienced” and “highly experienced.” Finally, both FanDuel and DraftKings seem to have accepted that they provide a gambling game. Both companies have “responsible gaming” language on their sites now.

2. Scandals

Recognition of the need for regulation might have come a bit late. The simplest outline for the new scandal is this: DraftKings’ Fantasy Football Millionaire allows individual users to enter the contest 150 times. One year, Tom Crowley won the contest; the next year Martin Crowley—Tom’s brother—won. There were almost 257 thousand entries for this contest. In response, DraftKings is conducting another internal probe to determine whether the two colluded in order to game the system.

DraftKings, notably, has also allowed scripting tools to be used by all players. That is relevant to the recent investigation because the scripts allow players to enter certain contests up to 500 times, in other words, 500 different line-ups. Yes, for this contest, there was a limit of 150 entries per person. And the scripting tools are apparently available to all players now. But it’s possible that the brothers, using scripting tools and working together,

419 Id.
421 Id.
423 Id.
425 Id.
426 Id.
427 Id.
428 Id.
430 Id.
431 Id.
could have effectively generated a total of 300 different line-ups in order to blanket the contest, not once but twice. The internal investigation focuses on “whether at least one winner of [the] contest found ways around the site’s limits on how many entries each user can submit and the level of cooperation they can have with other players.”

Still attempting to explain the Ethan Haskell Scandal, DraftKings’ hired law firm Greenberg Traurig to conduct an independent review into what had happened. In summary, they agreed with DraftKings’ assertion that Haskell couldn’t have had a physical record of this player ownership information until 40 minutes after his starting line-up was locked. They based this finding on the following: Haskell submitted his line-up at 3:28 Sunday Morning; the contest began at 13:00 Sunday afternoon, which locked his line-up; and Haskell received an excel file with player ownership information 40 minutes later. This fatuous and asinine “investigation” misses the point.

Again, the issue is not when Haskell submitted his line-up, nor when the games began which locked his line-up (if all of it was in fact locked), nor when he received an excel file with player information. These facts are almost completely irrelevant. The question regarding fairness and insider access or insider information has not been addressed adequately.

These are the only two questions in need of an answer: when did Haskell have access to that information, and could he have used it to set up his line-up?

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432 Solana, supra note 424.
434 Id.
435 Id.