

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,¹ 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.² In fact, Billy—a sentient being—has noticed DraftDuel’s³ 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.⁴ The ads ask: “are your dreams big enough to cash a giant check?”⁵ He misses, as likely intended if not hoped for, the small legal print explaining that the average win is about \$22.⁶ But \$25 for a buy-in, why not? Because even if it is gambling, nobody cares.⁷ After signing up and entering a big contest by drafting his team for this *tilt*, he draws an opponent named maxdalury.⁸

In the 1990s, you were a weirdo if you played fantasy sports.⁹ Nowadays, you are a weirdo if you don’t.¹⁰ Fantasy Sports, originally “a hobby as niche as 19th-century stamp collecting,” was becoming mainstream by the early 2010s.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.¹² It is not gaming. Gaming is regulated gambling.

² Albert Chen, *The Bropocalypse*, SPORTS ILLUSTRATED (Dec. 28, 2015), <http://www.si.com/vault/2016/02/11/bropocalypse>.

³ One way of referring to FanDuel and DraftKings simultaneously.

⁴ John L. Smith, *Daily Fantasy Sports: Use Promo Code ILLEGAL BETTING*, L.V. REV. J. (Oct. 17, 2015, 6:55 PM), <http://www.reviewjournal.com/opinion/columns-blogs/john-l-smith/daily-fantasy-sports-use-promo-code-illegal-betting> (statement of Matthew King, CFO of FanDuel who said their product is “aimed directly at millennials” comfortable with the online world).

⁵ Drew Harwell, *Move Over, Budweiser: Football Has a New Advertising King*, WASH. POST (Sept. 16, 2015), https://www.washingtonpost.com/business/economy/move-over-budweiser-football-has-a-new-advertising-king/2015/09/16/00c8d562-5c84-11e5-b38e-06883aacba64_story.html [hereinafter Harwell, *Move Over Bud*]; see *2014 DraftKings Commercial Twerking*, YOUTUBE (Dec. 1, 2014), <https://www.youtube.com/watch?v=Y9QpSkwr878>.

⁶ Joe Drape & Jacqueline Williams, *In Fantasy Sports, Signs of Insiders’ Edge*, N.Y. TIMES (Oct. 11, 2015), http://www.nytimes.com/2015/10/12/sports/fantasy-sports-draftkings-fanduel-insiders-edge-football.html?_r=0 [hereinafter Drape & Williams, *Insiders’ Edge*].

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).

⁸ See *infra* Section V.D.2.

⁹ Mark St. Amant, *The Fantasy-Sports Non-Scandal*, N.Y. TIMES (Oct. 15, 2015), <http://www.nytimes.com/2015/10/17/opinion/the-fantasy-sports-non-scandal.html>.

¹⁰ *Id.*

¹¹ Justin van Zuiden, *Fantasy Land*, SPORTS ILLUSTRATED (Oct. 19, 2015), <http://www.si.com/vault/2016/02/11/fantasy-land>.

¹² But see Marc Edelman, *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, *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,¹³ the first modern game that allowed for the incorporation of a player's performance throughout a particular season began in 1961.¹⁴ The Baseball Seminar determined a winner at the end of the season by assigning points to various statistical categories.¹⁵ 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.”¹⁶ Named after the French Bistro in New York where Okrent had first proposed the game to his friends,¹⁷ 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.¹⁸ 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.¹⁹ At the end of the season, whoever had the most points won and

and especially head-to-head).

¹³ Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 4 (2012) [hereinafter Edelman, *Short Treatise*].

¹⁴ *Id.* at 4-5.

¹⁵ *Id.* at 6.

¹⁶ *Id.* at 6-7.

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 7.

¹⁹ *History of FSTA*, FSTA, <http://fsta.org/about/history-of-fsta/> (last visited Nov.

was rewarded with both a cash prize and a chocolate milk dousing.²⁰

Computing those points required near mathlete levels of dedication and work with a calculator and newspaper.²¹ The proliferation of the internet, however, gave fantasy sports its first boom,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.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.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 1995.²⁵ Five years later, ESPN offered fantasy platforms for “football, basketball, hockey, NASCAR, soccer, golf, and even fly fishing.”²⁶

B. How to Play Fantasy Sports

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.²⁷ To play, team owners, usually friends, join a league and draft a team.²⁸ Each real-world player can only be drafted by one team owner.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.³⁰ For the skilled, dedicated, or simply competitive traditional fantasy sports team owner, the race for the championship usually begins months before the draft.³¹ This type of team owner needs to attend to and monitor the real team’s style of

27, 2016).

²⁰ Edelman, *Short Treatise*, *supra* note 13, at 8.

²¹ *Id.* at 9-10.

²² *Id.* at 10.

²³ *Id.* at 9.

²⁴ *Id.* at 10.

²⁵ *Id.*

²⁶ *Id.* at 10-11.

²⁷ *Id.* at 15.

²⁸ Michael Trippiedi, Note, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV GAMING L.J. 201, 207 (2014).

²⁹ *See id.*

³⁰ *Id.*

³¹ *Id.*

play,³² strengths and weaknesses, injury issues during the season, players taken by a real team in the draft, free agent signings, etc.³³ 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.³⁴ 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.³⁵ Said another way, playing traditional fantasy sports requires “strategy, skill, patience, and perseverance” to be successful.³⁶

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,³⁷ 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.³⁸ 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.³⁹ New players can be drafted for tomorrow’s game.⁴⁰ In essence, what is missing

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 208.

³⁵ *Id.* at 216–19; see *Joker Club v. Hardin*, 643 S.E.2d 626, 629–30 (N.C.App. 2007) (implying traditional fantasy sports format is a game of skill although the court does not distinguish fantasy sports as either traditional or daily).

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.⁴¹

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 1999,⁴² the creator of DFS remains unclear. One likely father is former professional poker player Chris Fargis, who created Instant Fantasy Sports in 2007.⁴³ His idea was to “take the time frame of season-long fantasy sports leagues and shrink it.”⁴⁴ In order to make his version of DFS more accessible, the web page appeared similar to online poker pages.⁴⁵ His site launched a year after the passage of Unlawful Internet Gambling Enforcement Act (UIGEA 2006),⁴⁶ which had killed the online poker industry.⁴⁷ 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.⁴⁸

The originator of the phrase “daily fantasy sports” and another possible progenitor is Kevin Bonnett.⁴⁹ He launched FantasySportsLive.com in the same year that Fragas launched his site; Bonnett hoped that calling his game “daily fantasy sports” would give the contests “the aura of legality.”⁵⁰ Like Fargis, he too knew his target audience, and he designed the website to look like a sportsbook.⁵¹ But the websites did not explode into the mainstream marketplace because of legal concerns.⁵² The first DFS players, consequently, were mostly from the online gambling community.⁵³ The big dogs of the industrial sports complex (ESPN, FOX, CBS, etc) stayed away.⁵⁴ For the next several years, no

⁴¹ *Id.* at 208.

⁴² *History of FSTA*, *supra* note 19.

⁴³ Jay Caspian Kang, *How the Daily Fantasy Sports Industry Turns Fans Into Suckers*, N.Y. TIMES MAG. (Jan. 6, 2016), <http://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html>.

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.

⁵³ *Id.*; accord Joshua Brustein & Ira Boudway, *You Aren’t Good Enough to Win Money Playing Daily Fantasy Football: Is That a Problem for DraftKings and FanDuel?*, BLOOMBERG (Sept. 10, 2015, 8:00 AM), <https://www.bloomberg.com/news/articles/2015-09-10/you-aren-t-good-enough-to-win-money-playing-daily-fantasy-football> (describing the early rise of FanDuel and DraftKings as primarily fueled by online poker players).

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 2015.⁵⁵

Regardless of paternity, the current industry leader FanDuel (2009)⁵⁶ launched in, in the midst of numerous other early DFSO competitors: Snapdraft (2008), Fantazzle (2008), Fantasy Factor (2009), DraftStreet (2010), DraftDay (2011),⁵⁷ and DraftKings (2011).⁵⁸ Connections with U.S. newspapers allowed FanDuel to expand its customer base beyond traditional gamblers and into the mainstream, making it the most popular site.⁵⁹ The founder of FSTA, Paul Charchian, described the early appeal of DFS: “you don’t play these kinds of games for the fun of it, you play it for the profit.”⁶⁰

Research supports Charchian’s position. Season-long players are more likely to say they play fantasy sports as a social activity;⁶¹ they are also more likely to enjoy rituals associated with the league.⁶² In contrast, DFS players are more likely than traditional fantasy sports players to play fantasy sports as a way to make money⁶³ and more likely to enjoy the flexibility offered by the numerous contests available on DFSO websites.⁶⁴ Only 31 percent of DFS players say they play for excitement.⁶⁵

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

⁵⁵ Vinu Goel, *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>.

⁵⁶ Edelman, *Navigating*, supra note 12, at 119 n.4.

⁵⁷ *Id.* at 125.

⁵⁸ Adam Kilgore, *Daily Fantasy Sports Web Sites Find Riches in Internet Gaming Law Loophole*, WASH. POST (Mar. 27, 2015), https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/92988444-d172-11e4-a62f-ee745911a4ff_story.html.

⁵⁹ Edelman, *Navigating*, supra note 12, at 126.

⁶⁰ Oskar Garcia, *Daily Fantasy Sports Become a Gambling Reality*, ASSOCIATED PRESS (Sept. 24, 2010), <http://sports.yahoo.com/top/news?slug=txgamblingfantasysport>.

⁶¹ Dustin Gouker, *FanDuel Studies: Seasonlong and Daily Fantasy Sports Players Exhibit Key Differences*, 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).

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, *Move Over Bud*, supra note 5 (quoting managing director of Eilers Research Adam Krejcek, 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;⁶⁶ in 2009⁶⁷ through 2011⁶⁸ 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,⁶⁹ that number reached 32 million;⁷⁰ in 2014, 41 million;⁷¹ in 2015, 57 million players.⁷²

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.⁷³ The majority of player entry fees (62 percent) were at one or two dollars,⁷⁴ and the median deposit on FanDuel was 25 bucks.⁷⁵ Between 2011 and 2015, DraftKings raised 74.8 million dollars; FanDuel, 88 million dollars.⁷⁶ Additionally, in 2015, DFS players spent an estimated 257 million dollars on fantasy related materials, while traditional players only spent an estimated 162 million.⁷⁷ 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.⁷⁸

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.⁷⁹ Las Vegas sportsbooks handled a mere 30 million in the action.⁸⁰

⁶⁶ Garcia, *supra* note 60.

⁶⁷ *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>.

⁶⁸ *Fantasy Football's \$1 Billion-a-Year Business, 27 Million Players: 'It's a Sickness'*, HOLLYWOOD REP. (Aug. 11, 2011, 7:37 AM), <http://www.hollywoodreporter.com/news/fantasy-football-1-billion-a-221105>.

⁶⁹ St. Amant, *supra* note 9; Edelman, *Navigating*, *supra* note 12, at 126.

⁷⁰ Brian Goff, *The \$70 Billion Fantasy Football Market*, FORBES.COM (Aug. 20, 2013), <http://www.forbes.com/sites/briangoff/2013/08/20/the-70-billion-fantasy-football-market/#46a0e6ec41b7>.

⁷¹ Kilgore, *supra* note 58.

⁷² Steve Tetreault, *Fantasy Sports: Gambling or Not?*, L.V. REV. J. (Sept. 14, 2015, 9:27 PM), <http://www.reviewjournal.com/politics/fantasy-sports-gambling-or-not>.

⁷³ Robert Klemko, *How Daily Fantasy Is Changing the Game*, THE MMQB (Oct. 8, 2015), <http://mmqb.si.com/mmqb/2015/10/08/fanduel-draftkings-scandal-daily-fantasy-football-dfs>.

⁷⁴ Gouker, *supra* note 61.

⁷⁵ *Id.* (DraftKings does not release this information).

⁷⁶ *See* Kilgore, *supra* note 58.

⁷⁷ Drew Harwell, *The Rise of Daily Fantasy Sports, Online Betting's Newest Empire*, WASH. POST (July 28, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/07/28/how-daily-fantasy-sites-became-pro-sports-newest-addiction-machine/> [hereinafter Harwell, *Rise of DFS*].

⁷⁸ Klemko, *supra* note 73.

⁷⁹ Brustein & Boudway, *supra* note 53.

⁸⁰ *Id.*

In spite of these staggering numbers, Matt King, CFO at FanDuel, estimated only 5% of fantasy players play DFS.⁸¹ As a result, investments are pouring in, and media companies are betting on a future in which sports betting is legalized.⁸² 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.⁸³ Total investments in DFSOs nearing the end of 2015 reached over 1 billion dollars.⁸⁴ 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.⁸⁵ According to the managing director at Eilers Research, Adam Krejeik, DraftKings could quickly run out of money.⁸⁶

So "where's the . . . money, Lebowski[s]?"⁸⁷ While DFSOs generated 87 million dollars in revenue during 2014, they also paid 870 million dollars in winnings.⁸⁸ In 2015, they were on pace to pay out three billion dollars.⁸⁹

And that does not include the cost of carpet bombing sports network programming with advertisements. About halfway through 2015, DFS advertising was predicted to exceed that of PokerStars and FullTilt during the pre-2011 poker barrage.⁹⁰ DraftKings blew through more than \$80 million on

⁸¹ Richard Sandomir, *FanDuel and DraftKings, Leaders in Daily Fantasy Sports, Are Quickly Gaining Clout*, N.Y. TIMES (July 13, 2015), <http://www.nytimes.com/2015/07/14/sports/fanduel-and-draftkings-command-attention-from-yahoo-and-investors.html> [hereinafter Sandomir, *Gaining Clout*].

⁸² Joe Drape & Ken Belson, *An Ad Blitz for Fantasy Sports Games, but Some See Plain Old Gambling*, N.Y. TIMES (Sept. 16, 2015), <http://www.nytimes.com/2015/09/17/sports/football/draftkings-fanduel-fantasy-sports-games.html> [hereinafter Drape & Belson, *Ad Blitz*].

⁸³ Harwell, *Rise of DFS*, *supra* note 77.

⁸⁴ *Daily Fantasy Sports Investment & Acquisition Tracker*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/dfs-investment-and-acquisition-tracker/> (last updated Dec. 21, 2015).

⁸⁵ See Ken Belson, *A Primer on Daily Fantasy Football Sites*, N.Y. TIMES (Oct. 6, 2015), <http://www.nytimes.com/2015/10/07/sports/football/a-primer-on-daily-fantasy-football-sites.html>.

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).

⁸⁸ Drew Harwell, *Daily Fantasy Sports Is Getting Slapped Back to Reality*, WASH. POST (Oct. 8, 2015), <https://www.washingtonpost.com/news/theswitch/wp/2015/10/08/daily-fantasy-sports-is-getting-slapped-back-to-reality/> [hereinafter Harwell, *Slapped Back to Reality*].

⁸⁹ *Id.*

⁹⁰ Ed Miller & Daniel Singer, *For Daily Fantasy-Sports Operators, the Curse of Too Much Skill*, SPORTS BUS. J. (July 27, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/07/27/Opinion/From-the-Field-of-Fantasy-Sports.aspx>.

national airtime between August 1 and September 16, 2015, becoming the number one advertiser in America ahead of Geico, Verizon, and AT&T.⁹¹ FanDuel spent \$20 million for the same period, about the salary of a top NFL quarterback during a season.⁹² By mid-October, those numbers grew to \$107.5 million and \$85.8 million, respectively.⁹³ Their combined advertising budget exceeded that of the entire beer industry.⁹⁴ 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.⁹⁵ And all of this during a three hour broadcast of a live NFL game that averages about 11 minutes of actual game play.⁹⁶

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)⁹⁷ were against sports betting,⁹⁸ and they have used that billy club

⁹¹ Harwell, *Move Over Bud*, *supra* note 5.

⁹² *Id.*

⁹³ 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*].

⁹⁴ Chen, *supra* note 2.

⁹⁵ Sandomir, *Despite Industry Crisis*, *supra* note 93.

⁹⁶ Drape & Belson, *Ad Blitz*, *supra* note 82.

⁹⁷ 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).

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).

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

⁹⁸ See Jay Sanin, *FanDuel and Pro Sports' Hypocrisy on Gambling: A Love Story*, BETSPIN (Nov. 20, 2013, 5:49 PM), <http://betspin.kinja.com/fanduel-and-pro-sports-hypocrisy-on-gambling-a-love-s-1468563701> [hereinafter Sanin, *A Love Story*]; accord Purdum, *supra* note 97.

⁹⁹ PHIL SCHAAF, SPORTS INC.: 100 YEARS OF SPORTS BUSINESS 362-63 (2004); but see Josh Kosman, *Arizona Coyotes to Move to Las Vegas Under New Owner*, N.Y. POST (June 30, 2015, 8:12 PM), <http://nypost.com/2015/06/30/arizona-coyotes-to-move-to-las-vegas-under-new-owner/> (the NHL claims the report was false, but rumors continue); Compare Brandon Schlager, *NHL, Coyotes Vehemently Deny Report Team Is Moving to Las Vegas*, SPORTING NEWS (July 1, 2015), <http://www.sportingnews.com/nhl-news/4648695-arizona-coyotes-sale-rumors-las-vegas-nhl-relocation-expansion-gary-bettman-denial-new-york-post> (denying rumors of a move), with John Breech, *Report: The Raiders Are Exploring a Possible Move to Las Vegas*, CBSSPORTS (Jan. 29, 2016), <http://www.cbssports.com/nfl/eye-on-football/25465623/report-the-raiders-are-exploring-a-possible-move-to-las-vegas> (denying various independent reports).

¹⁰⁰ SCHAAF, *supra* note 99, at 362.

¹⁰¹ Purdum, *supra* note 97; accord Steve Fainaru, Paula Lavigne & David Purdum, *Betting on the Come: Leagues Strike Deals with Gambling-Related Firms*, ESPN (Jan. 28, 2016), http://espn.go.com/espn/otl/story/_/id/14660326/nba-nfl-mlb-nhl-striking-various-business-deals-gambling-related-firms.

¹⁰² Purdum, *supra* note 97.

¹⁰³ Fainaru, Lavigne & Purdum, *supra* note 101.

¹⁰⁴ Purdum, *supra* note 97.

¹⁰⁵ Bob Cohn, *Legalized Sports Gambling Across U.S. Could Soon Become Reality*, TRIBLIVE (June 20, 2015, 9:30 PM), <http://triblive.com/sports/nationworldsports/8532839-74/sports-betting-gambling>.

¹⁰⁶ Fainaru, Lavigne & Purdum, *supra* note 101.

¹⁰⁷ Purdum, *supra* note 97.

¹⁰⁸ *Id.*

banned 33 soccer players and officials for life for match-fixing in 2013.¹⁰⁹

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.¹¹⁰ Lotteries contributed funds to the American Revolution.¹¹¹ Lotteries financed buildings at Harvard and Yale.¹¹² But several states outlawed them after the 1870 Louisiana Lottery Scandal.¹¹³ A federal ban followed.¹¹⁴ But beginning with New Hampshire in 1964,¹¹⁵ lotteries slowly returned to several states because they were seen as a way to reduce the tax burden on the general public.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,¹¹⁷ so too did Pete Rose.¹¹⁸ But MLB has been trying to stoke up interest with younger fans,¹¹⁹ and MLB along with the NHL, has started to revise its positions on legalized sports betting.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.¹²¹ There is a “thriving underground business that operates free from regulation or

¹⁰⁹ *Id.*

¹¹⁰ *Lotteries*, NAT’L GAMBLING IMPACT STUDY COMMISSION, <http://govinfo.library.unt.edu/ngisc/research/lotteries.html> (last visited Apr. 23, 2017).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Evan Andrews, *The Black Sox Baseball Scandal, 95 Years Ago*, HISTORY (Oct. 9, 2014), <http://www.history.com/news/the-black-sox-baseball-scandal-95-years-ago>.

¹¹⁸ See Tom Verducci, *Strike Three: In Again Refusing to Reinstate Pete Rose, MLB Ensured That the Hit King Will Never Be Back in the Good Graces of the Game He Loves*, SPORTS ILLUSTRATED (Dec. 21, 2015), <https://www.si.com/vault/2016/02/11/strike-three>.

¹¹⁹ Joe Drape, *Lost a Fantasy Game? Try Again Tomorrow*, N.Y. TIMES (July 28, 2014), http://www.nytimes.com/2014/07/29/sports/baseball/daily-fantasy-sports-sites-draw-the-real-worlds-attention.html?smid=tw-share&_r=1#story-continues-1 [hereinafter Drape, *Lost a Fantasy Game?*].

¹²⁰ Purdum, *supra* note 97.

¹²¹ Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 13, 2014), <http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html>.

oversight.”¹²² What people obviously want is “a safe and legal way to wager on professional sports events.”¹²³ The NBA already relies on casinos for marketing, and the league would profit from the legalization of sports wagering outside of Nevada.¹²⁴ “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.”¹²⁵ 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.¹²⁶ Nevada State Senator Mark Lipparelli, former head of the Nevada Gaming Control Board, thinks it is only a matter of time.¹²⁷ There is just way too much money involved for the Leagues not to come around to the idea of legalized sports betting.¹²⁸

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,¹²⁹ and gambling threatens the integrity of its sport.¹³⁰ The NFL pats itself on the back for consistently maintaining this position.¹³¹ 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.¹³² This expression is best kept in mind when dealing

¹²² Scott Cacciola, *In Sharp Pivot for N.B.A., Commissioner Backs Sports Betting*, N.Y. TIMES (Nov. 13, 2014), <http://www.nytimes.com/2014/11/14/sports/basketball/in-sharp-pivot-for-nba-commissioner-adam-silver-backs-sports-betting.html>.

¹²³ *Id.*

¹²⁴ Mason Levinson & Scott Soshnick, *NBA’s Silver Says Legal Sports Gambling in U.S. Is Inevitable*, BLOOMBERG (Sept. 4, 2014, 8:06 AM), <http://www.bloomberg.com/news/articles/2014-09-04/nba-s-silver-says-legal-sports-gambling-in-u-s-is-inevitable>.

¹²⁵ *Id.*

¹²⁶ See Purdum, *supra* note 97.

¹²⁷ Fainaru, Lavigne & Purdum, *supra* note 101.

¹²⁸ See *id.*

¹²⁹ *Id.*

¹³⁰ Austin Knoblauch, *Roger Goodell Concerned Over Role of Daily Fantasy*, NFL (Nov. 22, 2015, 3:06 PM), <http://www.nfl.com/news/story/0ap3000000585071/article/roger-goodell-concerned-over-role-of-daily-fantasy>.

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 long time 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.¹³³ Sportradar US can provide real-time data milliseconds faster than the previous data provider.¹³⁴ 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.¹³⁵ 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.¹³⁶ What makes the NFL's deal unique is that they also acquired an ownership stake in the company.¹³⁷ 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.¹³⁸ 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.¹³⁹

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,¹⁴⁰ the namby-pamby NFL kicked and screamed that the app had not been generated with its consent.¹⁴¹ Eager to keep the NFL happy, Sportradar explained subsequently that the app was actually only for social gaming.¹⁴² 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 Walt Bogdanich, James Glanz & Agustin Armendariz, *Cash Drops and Keystrokes: The Dark Reality of Sports Betting and Daily Fantasy Games*, N.Y. TIMES (Oct. 10, 2015), <http://www.nytimes.com/interactive/2015/10/15/us/sports-betting-daily-fantasy-games-fanduel-draftkings.html>.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* (stating that this server in New Jersey has been connected to the Genovese crime family).

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.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.¹⁶⁰

2. UIGEA, Thy Name Is Ineptitude

a. Legislative Railroad and Best Intent

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”¹⁶¹ did not want to prohibit internet gaming.¹⁶² Republican congressmen and congresswomen nonetheless found a way to get the bill passed by tacking it on to a Homeland Security Bill.¹⁶³ Several Democrats wanted to know what a port security bill had to do with Internet gambling,¹⁶⁴ but Republicans, fearing a turnover in an election year,¹⁶⁵ succeeded blocking all amendments and railroaded the rider through.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.¹⁶⁷

In one sense, UIGEA was successful; it effectively killed Internet poker.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,¹⁶⁹ even though several smaller sites continued to exist.¹⁷⁰ The prosecutions resulting from UIGEA might have been a response to rampant online poker advertising that raised republican ire.¹⁷¹

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

¹⁵⁹ *Id.*

¹⁶⁰ *See id.*

¹⁶¹ U.S. CONST. pmb1.

¹⁶² Joe Falchetti, *UIGEA, 6 Years Later*, CALVINAYRE.COM (Oct. 15, 2012), <http://calvinayre.com/2012/10/15/business/unlawful-internet-gambling-enforcement-act-2006/>.

¹⁶³ *Id.*

¹⁶⁴ Bogdanich, Glanz & Armendariz, *supra* note 150.

¹⁶⁵ Falchetti, *supra* note 162.

¹⁶⁶ Bogdanich, Glanz & Armendariz, *supra* note 150.

¹⁶⁷ *Id.*

¹⁶⁸ *See* Klemko, *supra* note 73.

¹⁶⁹ Falchetti, *supra* note 162.

¹⁷⁰ *Id.*

¹⁷¹ Klemko, *supra* note 73.

¹⁷² Falchetti, *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.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.¹⁷⁴ Individual bettors logging on to sites have not been prosecuted under its statutes,¹⁷⁵ and illegal betting continues to thrive in a shadow banking system.¹⁷⁶ Also, offshore books are completely unaffected by UIGEA.¹⁷⁷ Although briefly successful at eliminating startup gambling companies, offshore books with mob connections quietly stepped back in while DOJ loudly celebrated its victory.¹⁷⁸

b. Looking to the Future, the Weird Sisters Demanded a Carve Out

Although nobody had DFS in mind in 2006,¹⁷⁹ fantasy sports “were already part of the American betting scene.”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.¹⁸¹ In fact, it allowed DFSOs to sing the sonorous siren song that DFS was specifically authorized by UIGEA.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.¹⁸³ They were not alone. The NCAA, NBA, NHL, and MLB all

¹⁷³ *Id.*

¹⁷⁴ See Edelman, *Short Treatise*, *supra* note 13, at 37.

¹⁷⁵ Cohn, *supra* note 105.

¹⁷⁶ Bogdanich, Glanz & Armendariz, *supra* note 150.

¹⁷⁷ Falchetti, *supra* note 162.; *accord* Bogdanich, Glanz & Armendariz, *supra* note 150.

¹⁷⁸ Bogdanich, Glanz & Armendariz, *supra* note 150.

¹⁷⁹ *Reign in Online Fantasy Sports Gambling*, *supra* note 67.

¹⁸⁰ Kilgore, *supra* note 58.

¹⁸¹ Bogdanich, Glanz & Armendariz, *supra* note 150.

¹⁸² Noah Davis, *The Daily Fantasy Sports Takeover*, VICE SPORTS (Oct. 29, 2014), https://sports.vice.com/en_us/article/the-daily-fantasy-sports-takeover; *see also The Daily Fantasy Sports Industry*, FANDUEL, <http://web.archive.org/web/20150526175743/https://www.fanduel.com/legal> (last visited Apr. 23, 2017) (currently, the website address that previously announced UIGEA protections now designates which states allow FanDuel and which are legally ambiguous: <https://www.fanduel.com/legal>); *accord* Kang, *supra* note 43.

¹⁸³ Bogdanich, Glanz & Armendariz, *supra* note 150; *accord* Ken Belson & Joe Drape, *N.F.L.'s Forays to London Muddle Its Stance on Sports Betting*, N.Y. TIMES (Oct. 28, 2015), <http://www.nytimes.com/2015/10/29/sports/football/nfls-forays-into-london-muddle-its-stance-on-sports-betting.html> [hereinafter Belson & Drape,

wanted to ensure the survival of fantasy sports.¹⁸⁴ These weird sisters already knew that fantasy sports “drives traffic.”¹⁸⁵ More traffic means the opportunity to sell more advertising and more signage.¹⁸⁶ More traffic means they can demand more for television rights.¹⁸⁷ They embrace fantasy sports because it generates more money for them.¹⁸⁸

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.¹⁸⁹ Likewise, the NFL bars its professional stars from participating in DFS sponsored events at Las Vegas Casinos,¹⁹⁰ 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.¹⁹¹ This peevish child wants to have its cake and eat it, too.¹⁹²

At the same time, the NFL has the most to gain from fantasy sports legalization because football is the most popularly played fantasy sport.¹⁹³ 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.¹⁹⁴

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

NFL’s Forays to London].

¹⁸⁴ Will Hobson, *Sports Gambling in U.S.: Too Prevalent to Remain Illegal?*, WASH. POST (Feb. 27, 2015), https://www.washingtonpost.com/sports/sports-gambling-in-us-too-prevalent-to-remain-illegal/2015/02/27/f1088e4c-b7d3-11e4-9423-f3d0a1ec335c_story.html.

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

¹⁸⁶ Vindu Goel & Joe Drape, *Yahoo Will Enter Daily Fantasy Sports Market*, N.Y. TIMES (July 8, 2015), <http://www.nytimes.com/2015/07/09/technology/yahoo-will-enter-daily-fantasy-sports-market.html>.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Joe Drape, *Nevada Says It Will Treat Daily Fantasy Sports Sites As Gambling*, N.Y. TIMES (Oct. 15, 2015), <http://www.nytimes.com/2015/10/16/sports/gambling-regulators-block-daily-fantasy-sites-in-nevada.html>; Jay Sanin, *U.S. Appeals Court Denies New Jersey Sports Betting*, BETSPIN (Nov. 20, 2013, 12:12 AM), <http://betspin.kinja.com/u-s-appeals-court-denies-new-jersey-sports-betting-1468024213>.

¹⁹⁰ Drape & Belson, *Ad Blitz*, *supra* note 82. *But see* Jay Sanin, *Why Is Rob Gronkowski Allowed to Shill for Fanduel?*, BETSPIN (Oct. 6, 2014, 3:32 PM), <http://betspin.kinja.com/why-is-rob-gronkowski-allowed-to-shill-for-inexplicably-1643004998>.

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

¹⁹² *See* Sanin, *A Love Story*, *supra* note 98.

¹⁹³ Sandomir, *Gaining Clout*, *supra* note 81.

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;¹⁹⁵ American viewers might see them and presumably get confused.¹⁹⁶ 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.¹⁹⁷

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.¹⁹⁸ For the record, sports betting is legal in Britain.¹⁹⁹ It has been since 1961.²⁰⁰ And since 1961, British soccer scandals have dropped in number.²⁰¹ 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.”²⁰² Fans wager conveniently at any of Wembley Stadium's nearby betting parlors.²⁰³ 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.²⁰⁴ The NFL thinks this risk to “the integrity of the game” is a good idea until at least 2020.²⁰⁵ All the while, twenty-eight of thirty-two NFL teams have made exclusive deals with the DFSO of their choice.²⁰⁶ What the cards speak and what the NFL says are different.

¹⁹⁵ Belson & Drape, *NFL's Forays to London*, *supra* note 183.

¹⁹⁶ *Id.*

¹⁹⁷ Drape & Belson, *Ad Blitz*, *supra* note 82.

¹⁹⁸ *Could Sports Betting Delay the NFL's London Expansion?*, RT (Nov. 4, 2015, 5:41 PM), <https://www.rt.com/sport/320764-nfl-london-uk-jaguars/>.

¹⁹⁹ Mike Florio, *NFL Has No Qualms About Playing in London, Despite the Gambling*, NBC SPORTS (Oct. 25, 2015, 8:05 AM), <http://profootballtalk.nbcsports.com/2015/10/25/nfl-has-no-qualms-about-playing-in-london-despite-the-gambling/>; Cohn, *supra* note 105.

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.

²⁰⁵ *NFL Agreement to Play Games in London Through 2020 a Testament to the Power of Sports Betting Regulation to Ensure Integrity*, AM. GAMING ASS'N (Oct. 22, 2015), <https://www.americangaming.org/newsroom/press-releases/nfl-agreement-play-games-london-through-2020-testament-power-sports-betting>.

²⁰⁶ Andrew Brandt, *The NFL Has a Gambling Problem*, SPORTS ILLUSTRATED (Nov. 5, 2015), <http://mmqb.si.com/mmqb/2015/11/05/nfl-gambling-daily-fantasy-dfs-draftkings-fanduel-goodell>.

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.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.²⁰⁸ Even the graphics used to promote DFS were the same as online poker before the sites were folded by the DOJ.²⁰⁹

DFS players' language reveals poker roots, too. Players refer to in-game action as "tilting" because of "variance"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."²¹¹ And playing directly against each other is labeled "head-to-head,"²¹² as when two poker players square off against each other because either everyone else folded or they remain the last two standing.²¹³

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

²⁰⁷ Christy Keenan, *Daily Fantasy Sports and the PokerStars Paradox*, LEGAL SPORTS REP. (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." *Id.*; see generally *infra* Sections V.B, V.C.

²⁰⁸ Kang, *supra* note 43.

²⁰⁹ Klemko, *supra* note 73.

²¹⁰ Kang, *supra* note 43.

²¹¹ Klemko, *supra* note 73.

²¹² *Id.*

²¹³ *Head-to-head*, POKER ZONE, <http://dictionary.pokerzone.com/Head-to-Head> (last visited Apr. 23, 2017).

²¹⁴ Davis, *supra* note 182.; accord Kurt Turner, *Poker and DFS: The Singularity*, FANTASY KNUCKLEHEADS (Jan. 8, 2015), <https://fantasyknuckleheads.com/poker-and-dfs-the-singularity/>.

²¹⁵ See *supra* Section I.C.; see generally Turner, *supra* note 214.

²¹⁶ *Id.*

²¹⁷ See *supra* Section I.C.

²¹⁸ Edelman, *Navigating*, *supra* note 12, at 124 n.36; accord Turner, *supra* note 214.

²¹⁹ Turner, *supra* note 214.

²²⁰ Keenan, *supra* note 207; accord Turner, *supra* note 214.

²²¹ Davis, *supra* note 182.

DFSOs, moreover, hire senior management from online gambling companies or from the ranks of professional poker players.²²² For example, Matthew Boccio, previously a sportsbook analyst at Pinnacle, now determines the values of players relative to the salary cap that owners select for their teams.²²³ Jon Aguiar was primarily a poker pro known online as FatalError²²⁴ before becoming director of VIP services at DraftKings.²²⁵ Tim Dent, the former CEO of Everest Poker, currently serves as CFO of DraftKings.²²⁶ One of the early inventors of DFS who designed his webpages to resemble those of online poker,²²⁷ Chris Fargis,²²⁸ also works at DraftKings.²²⁹ RotoGrinders, essentially the ESPN of fantasy sports,²³⁰ is a clone of the online poker strategy site Pocket Fives,²³¹ which was cofounded in part by Cal Spears, a former poker player.²³² Pocket Fives advertised DFS before prize pools started booming.²³³ Before the prize pools started booming, DFS's early rise was primarily fueled by former online poker players.²³⁴ 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.²³⁵

Other industry connections to publically-traded-online-gaming companies abound. Perhaps the most prominent example is StarsDraft, run by PokerStars.com.²³⁶ It is not only the biggest name in online poker,²³⁷ but has been king of the ring since 2001.²³⁸ Rational Group, owner of PokersStars and FullTilt (the industry-ranked number six contender in online poker), was recently acquired by Amaya,²³⁹ gladiator maximus in the gambling software arena.²⁴⁰ The \$4.9 billion acquisition²⁴¹ makes Amaya the largest publicly-

²²² Bogdanich, Glanz & Armendariz, *supra* note 150.

²²³ *Id.* (he also won \$50,000 playing on DraftKings).

²²⁴ Kang, *supra* note 43.

²²⁵ Drape & Williams, *Insiders' Edge*, *supra* note 6.

²²⁶ Marco Valerio, *Why Does FanDuel Shun Online Poker, While DraftKings Can't Get Enough?*, LEGAL SPORTS REP. (Mar. 12, 2015), <http://www.legalsportsreport.com/681/contrasting-dfs-approaches-to-online-poker/>.

²²⁷ Kang, *supra* note 43.

²²⁸ *Id.* (see also *supra* Section I.C).

²²⁹ Kang, *supra* note 43.

²³⁰ *Id.*

²³¹ Valerio, *supra* note 226.

²³² Kang, *supra* note 43.

²³³ Valerio, *supra* note 226.

²³⁴ Brustein & Boudway, *supra* note 53.

²³⁵ Edelman, *Navigating*, *supra* note 12, at 124-25 n.36.

²³⁶ STARS DRAFT, <https://www.starsdraft.com/> (last visited Nov. 27, 2016).

²³⁷ Keenan, *supra* note 207.

²³⁸ *Canada's Amaya Acquiring PokerStars Owner Rational Group for \$4.9bn*, MONTREAL NEWS (June 14, 2014), <http://www.montrealnews.net/index.php/sid/222889445>.

²³⁹ Keenan, *supra* note 207.

²⁴⁰ *Id.*

listed online poker company.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.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.²⁴⁴ DFS is, thus, the “bastard child of online poker” and “inextricably” linked to online poker.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,²⁴⁶ wildcatting start-up companies were able to take the lead in the development of DFS.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 2015²⁴⁸ and instantly became the third most popular DFSO in the nascent industry.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.²⁵⁰ In short,

²⁴¹ *Id.*

²⁴² *Global Gaming Leaders*, AMAYA, <http://www.amaya.com/> (last visited Nov. 27, 2016).

²⁴³ *Id.*

²⁴⁴ Keenan, *supra* note 207.

²⁴⁵ Kang, *supra* note 43.

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.

²⁴⁷ Brustein, *supra* note 246.

²⁴⁸ Goel & Drape, *supra* note 186.

²⁴⁹ Goel, *supra* note 55.

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.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.,”²⁵² DFSOs continued to run ads.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.²⁵⁴

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

Another commentator likened the DFS crisis to Nevada’s “heavy-handed” crackdown on Uber.²⁵⁷ Uber was eventually allowed to continue operating in Nevada by leveraging an angry public petitioning lawmakers to make it legal.²⁵⁸ In September of 2015, CEO of FanDuel Nigel Eccles not only continued to ring the DFS-is-protected-by-UIGEA bell but indirectly likened the popularity of the DFS business model to that of Stubhub and Uber.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.”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.²⁶¹ The bluff initially

²⁵¹ *See id.*

²⁵² Sandomir, *Despite Industry Crisis, supra* note 93.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Zach Hall, *DraftKings, FanDuel Find Stability in Financial Metrics As NFL Regular Season Ends*, LEGAL SPORTS REP. (Jan. 8, 2016, 7:42 AM), <http://www.legalsportsreport.com/7196/draftkings-fanduel-nfl-week-17/>.

²⁵⁶ *Id.*

²⁵⁷ *Nevada to DFS sites: License, Please*, LAS VEGAS R. J. (Oct. 19, 2015), <http://www.reviewjournal.com/opinion/editorials/editorial-nevada-daily-fantasy-sports-sites-license-please>.

²⁵⁸ *See* Jason Hidalgo, *Uber Goes to Public to Restart Service in Nevada*, USA TODAY (Dec. 4 2014, 5:27 PM), <http://www.usatoday.com/story/news/nation/2014/12/04/uber-nevada-petition/19909561/>.

²⁵⁹ *E.g.*, Klemko, *supra* note 73; *Nevada to DFS sites: License, Please, supra* note 257.

²⁶⁰ Adam Kilgore, *DraftKings, FanDuel Could Face First Significant Legal Challenge After Hearing Request*, WASH. POST (Sept. 14, 2015), <https://www.washingtonpost.com/news/sports/wp/2015/09/14/draftkings-fanduel-could-face-first-significant-legal-challenge-after-hearing-request/>.

²⁶¹ Smith, *supra* note 4.

seems to have paid off since just one week after the scandal DFSOs took in \$45 million in entry fees.²⁶²

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

FanDuel is estimated to have three times the market of their competitors.²⁶³ 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.²⁶⁴ This strategy is not new for DraftKings. They have consciously cultivated former poker players by using betting terminology on their websites.²⁶⁵ 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."²⁶⁶ While FanDuel, in spite of some slip-ups,²⁶⁷ generally maintains a stifling stiff arm on poker terminology,²⁶⁸ DraftKings not only sponsors the World Poker Tour but even goes so far as to sponsor the World Series of Poker Main Event.²⁶⁹ What's more, if you win one of DraftKings' biggest competitions, you win a seat at that final poker table.²⁷⁰ So why risk DOJ scrutiny? Partly because DraftKings has to.²⁷¹

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.²⁷²

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

²⁶² Drew Harwell, *All the Reasons You (Probably) Won't Win Money Playing Daily Fantasy Sports*, WASH. POST (Oct. 12, 2015), <https://www.washingtonpost.com/news/the-switch/wp/2015/10/12/all-the-reasons-you-probably-wont-win-money-playing-daily-fantasy-sports/> [hereinafter Harwell, *All the Reasons*].

²⁶³ See Valerio, *supra* note 226.

²⁶⁴ *Id.*

²⁶⁵ Kimberly Pierceall, *State Scrutiny of Daily Fantasy Sports Grows*, ASSOCIATED PRESS (Oct. 17, 2015), <https://www.yahoo.com/news/state-scrutiny-daily-fantasy-sports-grows-033456478—finance.html?ref=gs>.

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 players²⁷⁴ 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

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.²⁷⁹ 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.²⁸⁰

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."²⁸¹ 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.²⁸² And even if there are predators slumming at lower-value tables, they are likely spread throughout a casino.²⁸³ "It's like the nature channel; you don't see piranhas eating each other."²⁸⁴

In the world of online poker, one of the easiest forms of bumhunting involves coordinating play over the phone.²⁸⁵ 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.²⁸⁶ The problem, of course, is bumhunting cannot be fully automated.²⁸⁷ 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.²⁸⁸ A new hand necessarily means the same waiting all over again in order to get paid again.²⁸⁹

Unlike in live poker, a newbie—a fish²⁹⁰—in DFS will play the very best.²⁹¹ It is not because ten-time world poker champion Johnny Chan sits at

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.

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,³¹² they search for other waters.³¹³ In other words, the business model of a DFSO “only makes sense if most players lose money.”³¹⁴

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.³¹⁵ 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.³¹⁶ And remember, you still have to beat the rake, so you need to win at least 53 percent of head-to-head matches.³¹⁷

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,³¹⁸ aka “the sleepers,”³¹⁹ because the more unique your lineup, the more value a big performance will impact your overall score.³²⁰ The sleepers are the unsung stock that perform better than expected.³²¹ These undervalued and little-known players must perform “not just great but surprisingly great.”³²² 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.

³¹⁴ Gregg Easterbrook, *DraftKings and FanDuel Are Not Your Friends*, N.Y. TIMES (Oct. 6, 2015), <http://www.nytimes.com/2015/10/07/upshot/the-big-winners-in-fantasy-football-and-the-rest-of-us.html>.

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.

³¹⁹ *DraftKings TV Commercial, ‘The Sleeper’*, YOUTUBE (Oct. 8, 2015), <https://www.youtube.com/watch?v=QTfeK3LGpB0>.

³²⁰ Klemko, *supra* note 73.

³²¹ Belson, *supra* note 85.

³²² Harwell, *All the Reasons*, *supra* note 262.

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 Trading*³²⁶

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 Fantasy Sports*, N.Y. TIMES (Oct. 5, 2015), <http://www.nytimes.com/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 of Fantasy Sports*, N.Y. TIMES (Oct. 19, 2015), <http://www.nytimes.com/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.

employers incestuously enabled their employees to use this information for selecting lineups on their rivals' websites.³³³

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,³³⁴ blah, blah, integrity of the game is really important for us at our DFSO, blah, blah,³³⁵ and we are a "very ethical company."³³⁶ Industry apologists pointed out that the industry relies so heavily on player populations (to build prize pools)³³⁷ that they need crossover.³³⁸ 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.³³⁹

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.³⁴⁰ 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.³⁴¹ Millionaire Maker is DraftKings' biggest contest.³⁴² This data revealed "which players—included in more than 400,000 entries—were most commonly selected in lineups."³⁴³ A tactical advantage would be gained by any

³³³ Joe Drape & Jacqueline Williams, *Fantasy Sports Said to Attract F.B.I. Scrutiny*, N.Y. TIMES (Oct. 14, 2015), <http://www.nytimes.com/2015/10/15/sports/draftkings-fanduel-fbi-investigation.html>.

³³⁴ See Drape & Williams, *Insiders' Edge*, *supra* note 6.

³³⁵ Drape & Williams, *Scandal Erupts*, *supra* note 324.

³³⁶ Klemko, *supra* note 73.

³³⁷ See *supra* Section IV.B.

³³⁸ Drape & Williams, *Scandal Erupts*, *supra* note 324 (citing Chris Grove, industry analyst and editor of Legal Sports Report (legalsportsreport.com)).

³³⁹ See Drape & Williams, *Insiders' Edge*, *supra* note 6.

³⁴⁰ Harwell, *Slapped Back to Reality*, *supra* note 88.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ Drape & Williams, *Insiders' Edge*, *supra* note 6.

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.³⁴⁴ 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.³⁴⁵ “So [access to the data] couldn’t possibly be a situation where the data was useful to him in setting the lineup.”³⁴⁶ Haskell, on the other hand, admits he revealed the information before all lineups locked.³⁴⁷

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.³⁴⁸ Supposing he shows up to compete in that competition, he will get paid another \$20,000, even if he enters a donkey lineup³⁴⁹ and finishes 120th out of 120.³⁵⁰ If he finishes just one place better than dead last, the winnings climb higher.³⁵¹ So in one week, \$370,000 in winnings is guaranteed. That is Haskell’s minimum win for a \$25 entry.³⁵² And should he finish first at the FanDuel World Championship, he will win the three-million-dollar first prize³⁵³ 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,³⁵⁴ even though fantasy baseball is considered “particularly sharky.”³⁵⁵ Looking only at the month of August, he finished in the top 10 in 10 out of 13 contests.³⁵⁶ In one of those contests, Haskell used a \$25 buy-in to beat nearly 13,000 other competitors.³⁵⁷ He won \$50,000 for that entry.³⁵⁸ This is quite a big improvement for a guy who was a middling player before working at DFSO.³⁵⁹

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

Another question: who has access to this information?³⁶⁰ At a private DraftKings party, Madison Calvert, a big fish and a frequent player, approached Jon Aguiar³⁶¹ to discuss his choice of a particular pitcher in a baseball contest.³⁶² 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.³⁶³ Admitting he should not have shown the information to a “regular player,” Aguiar laughed it off.³⁶⁴ 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.³⁶⁵

One of the more interesting twists here is that Calvert—aka, a regular player—had been repeatedly challenged on FanDuel by Rick Sawyer just days earlier.³⁶⁶ 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.³⁶⁷ 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.³⁶⁸

And so, if a select group of players has access to this “jackpot of data,” what are the odds of winning for everyone else?³⁶⁹ 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.³⁷⁰

Maxdalury is the number one ranked DFS player in the world, according to Rotogrinders.³⁷¹ Saahil Sud is maxdalury. Sud has made more than two million dollars playing DFS.³⁷² And he enters almost every contest, every day.³⁷³ He plays in tournaments with buy-ins of a couple bucks up to buy-ins of thousands of dollars.³⁷⁴ And he enters every contest multiple times.³⁷⁵ During baseball season, for example, he placed two hundred entries into tournaments; during football, one thousand entries.³⁷⁶ He is the “apex predator” of fantasy sports.³⁷⁷

As one might expect, Sud defines DFS as a skill-based game.³⁷⁸ The skill, he argues, is teaching a computer what he thinks is important for evaluating player performance in a game.³⁷⁹ His custom-built prediction models are designed to identify athletes not on other team’s rosters.³⁸⁰ Why is he allowed to do this and how can he do it? DFSOs let him and others use scripting.³⁸¹ Scripting not only allows him to identify weaker players but also enters him into competitions with those fish ahead of other sharks.³⁸²

Because scripting is an automated process,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.³⁸⁴ That night he won thousands of dollars finishing first, third, fourth, and seventh place in the same DraftKings competition.³⁸⁵ The DFS community was outraged that a player could blanket the field and avoid the time-intensive hassle of manually adjusting his lineups.³⁸⁶ Worse still, DraftKings had supposedly banned scripting in its terms of service.³⁸⁷

Sud is allowed to play by a different set of rules.

³⁷⁰ Brustein & Boudway, *supra* note 53.

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ Harwell, *All the Reasons*, *supra* note 262.

³⁷⁴ *Id.*

³⁷⁵ Fagan, *supra* note 275; Miller & Singer, *supra* note 90.

³⁷⁶ Brustein & Boudway, *supra* note 53.

³⁷⁷ *Id.*

³⁷⁸ Curt Nickisch, *Meet a Bostonian Who’s Made \$3 Million This Year Playing Daily Fantasy Sports*, WBUR NEWS (Nov. 23, 2015), <http://www.wbur.org/news/2015/11/23/dfs-power-player-profile>.

³⁷⁹ *Id.*

³⁸⁰ Brustein & Boudway, *supra* note 53.

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”).

³⁸² Drape & Williams, *Insiders’ Edge*, *supra* note 6.

³⁸³ Kang, *supra* note 43.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.*

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 tools,³⁹⁰ 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.

keep them happy.³⁹⁹ 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.⁴⁰⁰ Rotogrinders even released scripts so the biggest players can enter their lineups on different DFS sites simultaneously.⁴⁰¹ 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.”⁴⁰² Sacco believes “the idea that players can’t bring in features to improve their time, honestly—it feels a bit Orwellian.”⁴⁰³ In other words, the DFSOs are the silent partners of the sharks.⁴⁰⁴

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 week⁴⁰⁵—his most financially lucrative week yet.⁴⁰⁶ 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.⁴⁰⁷

VI. CONCLUSION:

Now reader, if you are thinking this is literally playing a game with a different set of rules⁴⁰⁸ because the scripts allow these players to modify the site to their own specifications,⁴⁰⁹ if you’re thinking that these rule changes actually protect the sharks and encourage predatory behavior,⁴¹⁰ or if you’re thinking there is no way to know whether or not DFSOs will institute meaningful reform because these companies are unregulated,⁴¹¹ 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’

³⁹⁹ Brustein & Boudway, *supra* note 53.

⁴⁰⁰ Harwell, *All the Reasons*, *supra* note 262.

⁴⁰¹ Brustein & Boudway, *supra* note 53.

⁴⁰² Kang, *supra* note 43.

⁴⁰³ *Id.*

⁴⁰⁴ Fagan, *supra* note 275.

⁴⁰⁵ *See e.g.*, Klemko, *supra* note 73.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ Kang, *supra* note 43.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ Vikas Bajaj, *Fantasy Sports Need Real Regulation*, N.Y. TIMES (Oct. 8, 2015, 12:00 PM), http://takingnote.blogs.nytimes.com/2015/10/08/fantasy-sports-need-real-regulation/?_0.

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 bell⁴¹² 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 16.⁴¹³ Still, the top three DFSOs (FanDuel, DraftKings, and Yahoo) all turned a profit.⁴¹⁴ New York's attorney general, Eric Schneiderman, is still suing for the return of several millions of dollars in entry fees.⁴¹⁵ As one might expect, DFSO's extensive advertising plays a central role in the case.⁴¹⁶

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

⁴¹² See *supra* Sections I.C, IV.A.1.

⁴¹³ Hall, *supra* note 255.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ Dustin Gouker, *2016 For Daily Fantasy Sports in State Legislatures: Win or Loss?*, LEGAL SPORTS REP. (July 25, 2016, 8:41 AM), <http://www.legalsportsreport.com/10768/2016-for-daily-fantasy-sports-in-state-legislatures-win-or-loss/>.

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necessary.⁴¹⁸ And DFSOs are at least aiming for more transparency.⁴¹⁹ FanDuel's website, for example, now has a "bill of rights" for its players.⁴²⁰ 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."⁴²¹ Finally, both FanDuel and DraftKings seem to have accepted that they provide a gambling game.⁴²² Both companies have "responsible gaming" language on their sites now.⁴²³

2. Scandals

Recognition of the need for regulation might have come a bit late.⁴²⁴ The simplest outline for the new scandal is this: DraftKings' Fantasy Football Millionaire allows individual users to enter the contest 150 times.⁴²⁵ One year, Tom Crowley won the contest; the next year Martin Crowley—Tom's brother—won.⁴²⁶ There were almost 257 thousand entries for this contest.⁴²⁷ In response, DraftKings is conducting another internal probe to determine whether the two colluded in order to game the system.⁴²⁸

DraftKings, notably, has also allowed scripting tools to be used by all players.⁴²⁹ That is relevant to the recent investigation because the scripts allow players to enter certain contests up to 500 times;⁴³⁰ 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.⁴³¹ But it's possible that the brothers, using scripting tools and working together,

⁴¹⁸ Dustin Gouker, *A Year After the DraftKings Data Leak, the Lessons Learned by the Daily Fantasy Sports Industry*, LEGAL SPORTS REP. (Oct. 3, 2016, 7:55 AM), <http://www.legalsportsreport.com/11712/draftkings-data-leak-one-year-later>.

⁴¹⁹ *Id.*

⁴²⁰ *FanDuel Bill of Rights*, FANDUEL, <https://www.fanduel.com/bill-of-rights> (last visited Apr. 24, 2017).

⁴²¹ *Id.*

⁴²² *Id.* See also *Responsible Gaming*, DRAFTKINGS, <https://www.draftkings.com/help/responsible-gaming> (last visited Apr. 24, 2017).

⁴²³ *Id.*

⁴²⁴ See Jasmine Solana, *Draftkings Probes Possible Collusion in \$1M Flagship Contest*, CALVINAYRE.COM (Sept. 29, 2016), <http://calvinayre.com/2016/09/29/business/draftkings-probes-possible-collusion-in-1m-flagship-contest/>.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ Dustin Gouker, *Back on Script: RotoGrinders Launches Automation Tool for DraftKings*, LEGAL SPORTS REP. (Aug. 2, 2015, 5:00 AM), <http://www.legalsportsreport.com/2841/back-on-script-rotogrinders-launches-automation-tool-for-draftkings/>.

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.”⁴³²

Still attempting to explain the Ethan Haskell Scandal, DraftKings’ hired law firm Greenberg Traurig to conduct an independent review into what had happened.⁴³³ 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.⁴³⁴ 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.⁴³⁵ 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 Finquestions 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?

⁴³² Solana, *supra* note 424.

⁴³³ Dustin Gouker, *DraftKings External Review: Employee Did Not Use Data to Gain Advantage in FanDuel Contest*, LEGAL SPORTS REP. (Oct. 19, 2015, 11:48 AM), <http://www.legalsportsreport.com/5441/draftkings-external-review-clears-employee/>.

⁴³⁴ *Id.*

⁴³⁵ *Id.*