



DraftKings' competitor FanDuel Inc.'s ("FanDuel") effective departure from the State of Texas to recognize that the Attorney General's actions pose direct and particularized harm to DraftKings.

### **I. PRELIMINARY STATEMENT**

For more than 50 years, millions of Texans have enjoyed playing traditional season-long fantasy sports. Virtually every level of every sport—from professional football to college basketball to international soccer—has given rise to some form of fantasy contest, in which friends, neighbors, coworkers, and even strangers enhance their enjoyment of the sport by competing against one another for prizes in organized leagues to determine who has the skill—akin to a general manager of a sports team—to put together the most successful fantasy team. Over the past decade, hundreds of thousands of Texans have also enjoyed daily fantasy sports contests—the same fundamental game as season-long fantasy sports, although played over a shorter timeframe and therefore requiring even more skill. While a late-entrant into the well-developed daily fantasy sports market, DraftKings is a start-up, formed in 2012, that has since grown into one of the nation's two largest providers of daily fantasy sports contests.

All fantasy sports, including those offered by DraftKings, are contests of skill. The contestants in fantasy contests act as general managers of their

fantasy teams, and in that role, they have to use their skill, knowledge of the sport and athletes—and master complex econometric and statistical concepts—to select their fantasy rosters of real-world athletes under a salary cap and other rules applicable to these fantasy sports. Then, the winners of the contests are those who, using their skill, put together the superior fantasy teams that outperform others' fantasy teams in terms of fantasy points earned, which are based on the statistical performance of those athletes in real-world sporting events. The results do not depend on the outcome of any one game or the performance of any one athlete in any actual game. Rather, they turn entirely on the performance of the fantasy team as a whole competing against other fantasy teams.

That DFS games are contests of skill is now beyond credible dispute. To DraftKings' knowledge, every statistical and economic expert who has studied DFS games has concluded that their outcomes turn on skill, not chance. Indeed, one leading University of Chicago statistician put it more bluntly, calling chance “overwhelmingly immaterial” to the outcome of DFS contests. *See* Affidavit of Zvi Gilula, attached as Exhibit C to appended Affidavit of Robert C. Walters. DraftKings' contestants select their fantasy rosters to compete in fantasy games, and thereby are the actual contestants in a bona fide contest—the fantasy contest—the outcome of which is determined by their skill in assembling fantasy rosters. This is why, time after time, the most

skilled DFS contestants win the lion's share of prizes. That is the definition of a skill game.

In this regard, DFS contests are no different from the many other contests beloved by Texans, such as bass fishing, bull riding, stock picking, and even beauty pageants, all of which involve participants paying entry fees and then using their wits and skills to try to win a predetermined prize. While every contest theoretically may be affected by some degree of chance—the caprice of the fish, the weather conditions, the vigor of the bull, the vicissitudes of the stock market, and the subjective preferences of the judges—skill controls. Therefore, like DFS, they are all contests of skill, and all legal and permissible under Texas law.

Indeed, for a decade, DFS contests have been offered in Texas without a single regulator, prosecutor, or state official questioning their legality. Nevertheless, on January 19, 2016, the Attorney General unilaterally issued an opinion letter declaring fantasy sports illegal. *See* Attorney General Opinion KP-0057, attached as Exhibit A to appended Affidavit of Robert C. Walters. He opined, for the very first time, that DFS contests involve participants making a “bet,” and therefore “a court would likely determine that participation in daily fantasy sports leagues is illegal gambling under section 47.02 of the Penal Code.” *Tex. Att’y Gen. Op. No. KP-0057*, at 9 (Jan. 19, 2016) (hereinafter “opinion” or “opinion letter”).

In doing so, the Attorney General misapprehended clear Texas law and showed a fundamental misunderstanding of the basic, indisputable facts surrounding fantasy sports. Any prohibition on gambling in this State must emanate from the Texas Constitution itself, which provides only that “[t]he Legislature shall pass laws prohibiting lotteries” but “may authorize and regulate bingo games” for certain purposes. TEX. CONST. art. III, sec. 47. Acting within that limited constitutional band, the Texas Legislature enacted Chapter 47 of the Texas Penal Code, which defines as illegal gambling the “mak[ing of] a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest.” Tex. Penal Code § 47.02(a)(1). The Code explicitly exempts from the definition of “bet,” however, “an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill.” Tex. Penal Code § 47.01(1)(B). In other words, unless a person makes a “bet” within the meaning of the Code, there can be no illegal gambling.

That is where the Attorney General’s opinion collapses—and why DraftKings is entitled to declaratory relief. As already explained, DraftKings’ contests are games of skill among actual competitors who pit their fantasy teams against one other. As such, DraftKings’ customers are “the actual contestants in a bona fide contest for the determination of skill[,]” Tex. Penal Code § 47.01(1)(B), and, therefore, are exempted from Texas’s statutory

prohibitions. Moreover, on the plain language of the statute, DraftKings' DFS contestants do not "bet" on the "result" of any particular game or any player's individual "performance" in any particular game. *See* Tex. Penal Code § 47.01(1)(B). Rather, they pay an entry fee to compete against one another for predetermined "prize[s]," based on the overall performance of the complex mosaic of athletes that comprise their personally selected fantasy teams. Thus, DFS games do not fit in the definition of a "bet," without even looking to the statutory exemption.

But the Attorney General's opinion letter is not the end of the story; it is instead the opening volley in a campaign by the Attorney General to distort Texas law and drive lawful DFS operators out of the state. Indeed, the Attorney General's actions pose irreparable harm to DraftKings' business, threatening to damage it in Texas and nationwide. Already, DraftKings has suffered substantial harm based on the Attorney General's actions: customers have withdrawn money, erroneously believing DraftKings to be illegal; significant problems have arisen with DraftKings' banks and payment processors; DraftKings has lost investment opportunities and potential business partners; and DraftKings has seen its value as a business decrease. Moreover, in the wake of the Attorney General's actions, DraftKings now also potentially faces a significant risk of civil enforcement actions by the State, and even criminal prosecution in counties across the State. These are no idle

concerns; in fact, the harm DFS companies face is now so acute that FanDuel entered into an agreement with the Texas Attorney General to effectively depart the state. *See* Settlement Agreement and Release, attached as Exhibit B to appended Affidavit of Robert C. Walters (“Beginning no later than May 2, 2016[,] FanDuel will include Texas on the list of states on its website where contestants may not deposit funds or enter paid contests while physically located in the state [and] FanDuel will block people located in Texas . . . from entering FanDuel’s contests which both charge an entry fee and offer a prize of value[.]”). DraftKings could face the same fate, absent this Court’s intervention.

This case has nationwide ramifications, especially since Texas is a leading DFS market, and other states are watching. The Attorney General’s actions, if left unchecked, could force DraftKings, like FanDuel, to effectively exit Texas, leaving hundreds of thousands of Texans unable to participate in the daily fantasy sports games they have enjoyed for the past decade. The Attorney General has now effectively branded as criminals everyone involved in DFS—operators, business partners and participating contestants—even though they have operated openly, transparently, and permissibly in Texas for years, and no State official ever questioned the legality of DFS before. Moreover, DraftKings now faces irreparable harm to its business relationships with payment processors, vendors, and other business partners, damage to its

customer goodwill and business reputation, and backlash across the country. And the equities are clearly in DraftKings' favor: it faces the extinction of its Texas business, while the Attorney General, in contrast, was late to act and cites no exigency here.

This Court's intervention is therefore necessary to redress this injustice and permit DraftKings to remain in business, rather than have to shut down before it has a full and fair opportunity to defend itself in the face of the Attorney General's rush to judgment. This Court should declare that DFS contests are fully legal under Texas law, for at least two reasons: (1) DFS contestants are contestants seeking a prize or award and engaging in a bona fide contest of skill, and therefore do not bet under Texas law; and (2) DFS contests turn neither on the partial or final result of a single game or contest nor on the performance of a single participant in a game or contest as required for a person to commit an offense under Texas law, but instead turn on the performance of a mosaic of athletes across a variety of athletic teams and one or more contests.

## **II. DISCOVERY CONTROL PLAN**

1. Plaintiff intends for discovery in this case to be conducted under Level 3 Discovery as that is defined in Tex. R. Civ. P. 190.4.

### III. PARTIES

2. Plaintiff DraftKings, Inc. is a Delaware corporation, with its principal place of business in Boston, Massachusetts.

3. Defendant Ken Paxton is the Attorney General of the State of Texas. DraftKings brings this proceeding against Attorney General Paxton in his official capacity.

### IV. JURISDICTION AND VENUE

4. This Court has original jurisdiction over the subject matter of this case under TEX. CONST. Art. 5 § 8; Tex. Gov't Code Ann. §§ 24.007 and 24.008. The Court also has jurisdiction over the subject matter of this case under Tex. Civ. Prac. & Rem. Code §§ 37.003 and 37.004, as DraftKings seeks a declaratory judgment.

5. Venue is proper in Travis County, Texas under Tex. Civ. Prac. & Rem. Code § 15.002(a)(1), because a substantial part of the events giving rise to DraftKings' claim occurred in Austin. Most importantly, the Attorney General issued the advisory opinion that necessitated this action in Travis County.

6. The proper construction of a criminal statute that causes direct harm to a business's economic interests is the proper subject of an action for a declaratory judgment. *See generally City of Austin v. Austin City Cemetery*

*Ass'n*, 28 S.W. 528 (Tex. 1894). As the Texas Supreme Court has explained, courts sitting in equity maintain jurisdiction to construe criminal laws that harm businesses when such laws create a chilling effect on the business's customers. *Id.* at 530 (“As long as the ordinance remains undisturbed, it acts *in terrorem*, and practically accomplishes a prohibition[.]”).

## V. FACTUAL ALLEGATIONS

### A. DraftKings and Fantasy Sports Contests

7. DraftKings provides online platforms for an individual to enter DFS contests with friends, family, or other fantasy-sports enthusiasts. DraftKings' contests involve detailed and complex gameplay that integrates innumerable strategic elements that consistently permit more skilled contestants to defeat less skilled contestants.

8. Fantasy sports contests have existed since at least the 1960s. They provide sports fans with an opportunity to become a fantasy general manager, and in that role assemble a fantasy team of real-life athletes to compete against other fantasy general managers. Traditional fantasy contests generally span an entire season of a particular sport—typically four to six months. Daily fantasy sports contests last anywhere from a single day to a week.

9. While DraftKings has offered DFS since approximately April 2012, DFS games have existed at least since the launch of Fantasy Sports Live in

June 2007. Since then, many other companies have entered the DFS marketplace, including FanDuel, which was founded in or about 2009.

10. DFS was a natural and more sophisticated outgrowth of traditional season-long fantasy sports. Like season-long games, DFS gives sports fans the opportunity to use knowledge, skill, and evidence-based analytics to strategically assemble a team of athletes within firm salary constraints, and are decided based on the fantasy points compiled in the contest. Both season-long and DFS games bear exactly the same relationship to real-world sporting events: fantasy results are based on fantasy points, which are awarded based on statistics compiled by real athletes, but are never mere proxies for the binary outcome of real-world sporting events. Indeed, every fantasy contest—whether it is fantasy football, baseball, or scrabble—operates according to this principle. But unlike season-long contests, DFS games last one day or one week, depending on the sport, rather than for many months. And DFS games involve *more* skill than season-long fantasy sports, because DFS games implicate complex econometric concepts like a salary cap (discussed *infra*), while avoiding chance-based features such as a randomized draft order.

11. DraftKings now offers paid, prize-eligible DFS games in forty-one U.S. states and the District of Columbia.

12. DraftKings offers a variety of contest types (including, but not limited to, large-field tournaments, head-to-head contests, and private leagues) in 9 different sports and e-sports.

13. DraftKings contestants pay an entry fee to enter cash contests, while there is no entry fee to play in free contests. Contest winners receive prizes, the structure of which is always known ahead of time when contestants decide to pay an entry fee and enter a contest. The prizes do not change based on the number of entries.

14. A DraftKings contestant's lineup comprises between five and eleven real-world athletes (depending on the sport involved), and the success of a lineup depends on the combined performance in numerous statistical categories of those athletes across one or more real-world sporting events.

15. The strategy required to play DFS successfully is wholly unrelated to correctly predicting the ultimate win-loss outcome or margin of victory in any real-world sporting event, such as a football or basketball game, as in a traditional sports bet. The results of DraftKings' fantasy contests are not tethered to the outcomes of those real-world sporting events. Nor do they have anything to do with predicting whether a particular athlete will achieve a particular in-game achievement, as in a traditional proposition bet. DraftKings' customers do not place bets on events outside of their control; rather, they pay entry fees to participate in a fantasy contest against other

contestants in which they compete by selecting the lineup that determines winners and losers of the fantasy contest.

16. On March 4, 2016, FanDuel entered into an agreement with the Texas Attorney General providing for FanDuel to effectively exit the Texas DFS market. *See* Settlement Agreement and Release, attached as Exhibit B to appended Affidavit of Robert C. Walters. This agreement evidences the Attorney General's intent to scuttle DFS operators in the State of Texas, and illustrates the harm that DraftKings could itself face without this Court's intervention.

## **B. The Statutory Framework Covering This Case**

### **1. Texas's Statutory Framework Surrounding Games of Chance and Games of Skill.**

17. Texas law has long distinguished between games of chance, which generally are considered illegal gambling, and games of skill, which are not gambling and are not illegal. The prohibition on gambling begins with the Texas Constitution itself, which provides that "[t]he Legislature shall pass laws prohibiting lotteries," but also "may authorize and regulate bingo games" for certain purposes. TEX. CONST. art. III, sec. 47. Acting on that constitutional directive, the Texas Legislature enacted Chapter 47 of the Penal Code, which provides that a person commits an offense if he:

(1) makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest;

(2) makes a bet on the result of any political nomination, appointment, or election or on the degree of success of any nominee, appointee, or candidate; or

(3) plays and bets for money or other thing of value at any game played with cards, dice, balls, or any other gambling device.

Tex. Penal Code § 47.02(a).

18. Those offenses all turn on the definition of “bet,” which the Code defines as “an agreement to win or lose something of value solely or partially by chance.” Without a “bet,” there can be no violation of section 47.02(a)(1).

19. The Code explicitly exempts from the definition of “bet” “an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill[.]” Tex. Penal Code § 47.01(1)(B).

20. Moreover, in order for “[a] person to commit an offense” related to the outcome of sporting events, he must “make[] a bet on the partial or final result of *a* game or contest or on the performance of *a* participant in *a* game or contest.” *Id.* at § 47.02(a)(1) (emphasis added).

21. These two provisions of the Code—namely, § 47.01(1)(B), and § 47.02(a)(1)—make clear that the daily fantasy sports contests run by DraftKings involve no bets and in no way constitute unlawful gambling.

a. *DraftKings Contestants Are The Actual Contestants In A Bona Fide Contest Of Skill—The DFS Contest—And Therefore Do Not Make A “Bet” Under Texas Law.*

22. Without a “bet,” there can be no violation of § 47.02(a)(1). And the Legislature expressly defined the term “bet” to exclude “an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill.” *Id.* § 47.01(1)(B). Thus, a contest does not violate Texas gambling law if three requirements are met: (1) a prize is offered, (2) the contest participants are the recipients of the prize, and (3) the participants are “contestants in a bona fide contest for the determination of skill.” *Id.* § 47.01(1)(B). There can be no dispute that DFS contestants are offered a prize, and that DFS participants are the recipients of any awarded prizes.

23. From these two provisions of Texas law emerge a simple dichotomy: wagering on another person’s performance may be an unlawful bet under § 47.02(a)(1). But it is entirely lawful under § 47.01(1)(B) to pay an entry fee for the opportunity to win a prize based on one’s own performance in a game of skill.

24. DFS contestants actually compete against one another to determine who put together the best-performing fantasy lineup, and as such they are the actual contestants in a contest. No one would deny that while football players compete in a game of skill, so too do the general managers of real-world football teams, competing against other real-world general

managers in constructing rosters through their strategy, knowledge, and analysis. So too with DFS, where contestants act as their fantasy team's general manager, using strategy, knowledge, and analysis to craft their rosters and compete against the rosters of other DFS contestants. The fantasy competition is the only contest in which DFS contestants pay an entry fee to compete, and in which they are eligible to win a predetermined prize. And DFS contestants profoundly influence the outcome of the fantasy contest by using skill to exercise complete control over their chosen lineups.

25. Accordingly, fantasy sports contests—unlike sports gambling—involve prizes for a contest of skill that is completely distinct from the games being played on the athletic field. Nothing in DraftKings' gameplay allows a contestant to simply wager on the number of touchdowns Tom Brady throws, or the number of baskets LeBron James scores. The fantasy game remains a discrete game unto itself—with distinct rules involving distinct elements applied to distinct contestants—the DFS players who are competing in DFS contests. It is a contest in its own right.

26. Put another way, sports wagering involves passive spectators betting on whether one real-world general manager will beat another real world general manager. In fantasy sports, by contrast, the contestant is the general manager making the tough choices, rather than simply watching (and wagering on) someone else's choices. And it is the choices the fantasy general

manager personally makes that determine his performance in the fantasy competition. DFS contests, therefore, are the “actual contestants” in a bona fide skill contest—namely, the DFS contest. Tex. Penal Code § 47.01(1)(B).

27. And just because there is some chance in DFS contests does not mean that DFS contests are not games of skill. To take just a few examples:

- Anglers across the State regularly enter bass fishing tournaments. They pay an entry fee in the belief that they possess the skill to reel in the heaviest or the most bass, and thereby win a prize.
- The surfers of Texas gather along the Gulf Coast and pay fees to enter surfing contests in the hopes of winning prizes.
- At the Fort Worth Stockyards, rodeo-loving Texans pay entry fees to win a prize for staying on the bull longer than their opponents.
- Many Texas towns host beauty and talent pageants, where contestants pay entry fees in the hopes that they best satisfy the judge’s subjective views of beauty and talent.
- Some Texans enjoy figure skating contests where, once again, contestants compete to impress subjective judges in the hopes of turning their entry fees into a prize.
- Still other Texans might prefer stock picking contests, where participants compete over who can best assemble a hypothetical investment portfolio.

28. There is no doubt that each and every one of the above activities can be swayed by some amount of chance. But the chance involved in those activities does not deprive them of their character as bona fide contests in which the person who pays the entry fee is an actual contestant actively seeking to better his peers through his skill. And it is for that precise reason that these contests are lawful (and popular) games of skill in Texas.

29. There should also be no doubt that fantasy sports games are “contest[s] . . . of skill.” Notwithstanding the degree of chance on the athletic field, it takes skill for a fantasy general manager to ascertain the fantasy value of various athletes, subject to the constraints of the fantasy salary cap, in order to beat the general manager of another fantasy team. And this is so even though there is some modest degree of chance involved as with other skill contests: the fish might not bite, the bull might not kick, the wave might not break, the golf ball might hit a rock, the referee might miss the call. Fantasy sports are not about assembling teams of roulette players, but rather about assembling teams of skilled athletes.

30. The fact that a fantasy general manager’s success turns in part on the performance of others on the field whom the fantasy general manager cannot control is not a problem under § 47.01—for the same reason that a team bass fishing tournament, a doubles tennis tournament, a team golf tournament, or a pairs figure skating competition is not unlawful. Under all

of these scenarios, the contestant's ability to win a prize depends in part on the performance of another person—a teammate, doubles partner, golfing buddy, or figure skating partner. But the character of these activities remains the same. They remain contestants in bona fide contests in which actual contestants receive prizes based on their skill.

31. Under Texas law, even if a given contest involves a material element of chance, it still may be a “bona fide contest for the determination of skill,” the element of chance notwithstanding. Tex. Penal Code § 47.01(1)(B). Indeed, under the statute's terms, a “bona fide contest for the determination of skill” can involve chance without losing its skill-based character, so long as skill predominates. *See id.*; *see also Adams v. Antonio*, 88 S.W.2d 503, 505 (Tex. Civ. App.—Waco 1935, writ ref'd) (endorsing the proposition that whether the gaming statute is violated depends on whether chance predominates over skill).

32. Any contrary reading—including the interpretation set out in the Attorney General's opinion letter here—misreads the statute. Indeed, the statute defines “bet” to mean “an agreement to win or lose something of value solely or partially by chance.” Tex. Penal Code § 47.01(1). But it exempts from that definition “bona fide contests for the determination of skill[.]” *Id.* § 47.01(1)(B). It follows that even if an agreement is based “partially on chance,” it nevertheless cannot be a “bet” if it is a “bona fide contest for the

determination of skill[.]” *Id.* That is the heart of the Attorney General’s legal error: he reads “partially by chance” out of the text of section 47.01(a).

33. That a “bona fide contest for the determination of skill” can turn on some material element of chance is hardly a novel idea; it was endorsed by numerous previous Texas Attorneys General. Indeed, one former Attorney General opinion correctly identified that the relevant inquiry under the Texas Penal Code is whether the game at issue “involves the dominating element of skill, as opposed to chance[.]” Tex. Att’y Gen. Op. No. JM-1267 (1990). It reached that conclusion in reliance on at least five previous Texas Attorney General opinions adopting a “dominating element” standard. *See* Tex. Att’y Gen. Op. Nos. C-619 (1966), WW-222 (1957), V-1483 (1952), V-544 (1948), V-238 (1947). But rather than abide by those decades of precedent, the Attorney General has endorsed a different—and incorrect—statutory test.

*b. DFS Contests Do Not Meet Many Of The Required Elements Of A “Bet” Under Tex. Penal Code § 47.02(a).*

34. The plain text of Tex. Penal Code § 47.02(a) states that “[a] person commits an offense if he . . . makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest.”

35. Put another way, the statute refers specifically to making bets on the outcome of a **single** game or contest, or on the performance of a **single** athlete or participant in a contest. That the statute twice refers to the singular

is no accident; it is an intentional decision to criminalize gambling on the outcome of an individual sporting event.

36. As shown below, DraftKings' DFS contests turn on a series of complex interconnected performance metrics from *many* players selected by DFS contestants across one or more athletic contests. DFS contests involve a mosaic of athletes, and it is the performance of that rich tapestry of multiple athletes that determines success—not the outcome of “*a* game” or the performance of “*a* participant in *a* game.”

37. The outcome of one of DraftKings' DFS contests does not and never will turn on the outcome of an individual game or of an individual athlete. Rather, in assembling these fantasy teams of multiple real-world athletes competing in real-world events, DraftKings contestants do not win prizes based on the outcome of a game or contest (i.e., which athletic team will win or by how much), or on the performance of a single participant in a game or contest (i.e., whether a particular athlete will achieve or not achieve a particular statistic or performance metric). As a consequence, DFS contests fall squarely outside the Penal Code's prohibition on betting.

## **2. The Federal Statutory Framework**

38. The federal statutory framework provides a worthwhile backdrop to the operative Texas statute. The Unlawful Internet Gambling Enforcement

Act (“UIGEA”), 31 U.S.C. §§ 5361-5367 (2006), prohibits any person engaged in the business of betting or wagering from accepting any credit or funds from another person in connection with the latter’s participation in “unlawful Internet gambling.” 31 U.S.C. § 5363. Under UIGEA, “unlawful Internet gambling” means “to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet” in a jurisdiction where applicable federal or state law makes such a bet illegal. 31 U.S.C. § 5362(10)(A).

39. Critically, however, Congress recognized that fantasy sports activities are different from the gambling UIGEA prohibits because American enjoyment of fantasy sports activity has been traditionally understood not as criminal activity, but as innocent and innocuous conduct. Congress codified this understanding in UIGEA by defining a “bet or wager” as “the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome,” 31 U.S.C. § 5362(1)(A), and then *excluding* from that definition, among other things, “participation in any [qualifying] fantasy or simulation sports game.” *See* 31 U.S.C. § 5362(1)(E)(ix)(I)-(III). Congress concluded that fantasy sports reflect the “relative knowledge and skill of the participants” and are in no way equivalent

to gambling on the outcome of a real-world sporting event or performance. *Id.* § 5362(1)(E)(ix). Although UIGEA does not preempt state law, Congress' reasoned judgment on the questions at issue here is instructive.

**C. DraftKings' Contests Are Complex Games of Skill, Not Gambling.**

40. The evidence is overwhelming that DraftKings' contests are complex games of skill. In essence, DraftKings' contestants act as general managers of a fantasy team and compete against other contestants to see who can execute the managerial skill set most effectively, as measured by fantasy points earned. Succeeding as a fantasy general manager requires mastering a broad array of concepts and skills, but at the heart of the contests are three core strategic elements: (1) the salary-cap structure, which implicates econometric strategies concerning opportunity cost and relative value; (2) the fantasy-point scoring systems, which affect relative valuation of athletes; and (3) the contest rules and prizing eligibility, which affect athlete selection strategies.

**1. Core Strategic Element #1: Salary Cap Management**

41. DraftKings assigns a fictional "salary" to each real-world athlete who could be selected by any DFS contestant, as well as a "salary cap" that limits the sum of the salaries of athletes that a DFS contestant can select for a lineup. The same salary cap and fictional "salaries" of real-world athletes

applies consistently to all contestants in a particular contest, which significantly augments the skill required to participate and succeed in those contests. This mechanism prevents DFS contestants from merely selecting the real-world athletes that they believe will score the most fantasy points at every position in their lineup—such a strategy would cause them to exceed the salary cap. Rather, DFS contestants must analytically estimate the expected fantasy points of each real-world athlete, set against the constraint of the salary cap, the overall composition of the roster, and the opportunity cost of other real-world athletes who are not selected.

42. Managing the salary cap—that is, picking the right mixture of athletes to play on the fantasy team—lies at the heart of DFS strategy, and mastering that strategy is incredibly complex.

43. The strategic elements of managing the salary cap are magnified by the fact that an athlete's salary does not change during the contest, whether the contest lasts for one day (as in NBA and MLB games) or one week (as in NFL games). While sports betting lines fluctuate as real-world sporting events approach to respond to new market information, all DFS athlete salaries remain fixed once they are established. This creates a strong incentive for DFS contestants to exercise research and analytical skill, constantly monitoring any sports-related news that may affect athlete valuations, such as injury reports

that emerge from team practices. Late-breaking real-world lineup changes can have a dramatic impact on strategic choices in DFS lineups.

44. As an illustration of the core principle that the better real-world athlete may often not be the better selection in the fantasy contest, consider the following comparison between NBA players LeBron James of the Cleveland Cavaliers and Jerryd Bayless of the Milwaukee Bucks for DraftKings contests held on November 2, 2015. James's and Bayless's DraftKings salaries were \$9,700 and \$3,200, respectively, out of the overall \$50,000 salary cap space allotted.

45. In their real-life games, James and Bayless produced the following statistics and corresponding DraftKings points: James (22 points, 9 rebounds, 11 assists, 4 steals, 2 blocks, 61.75 DraftKings fantasy points); Bayless (26 points, 3 rebounds, 2 assists, 0 steals, 0 blocks, 34.75 DraftKings fantasy points).

46. James is universally considered a far superior real-life NBA player to Bayless, and indeed on this particular night he played a far superior game and earned more fantasy points. However, within the strategic regime created by DraftKings' contests, Bayless was a *significantly better* fantasy selection.

47. While James cost \$157 of DraftKings salary for each fantasy point earned, Bayless cost only \$92 per fantasy point. DraftKings contest data confirms that Bayless's superior point-per-dollar value produced superior

results for DFS contestants who selected him. DraftKings rosters that included Bayless on November 2 produced an average lineup score approximately 16 fantasy points higher than rosters that included James—an enormous margin. Furthermore, entries that included Bayless had a win rate in head-to-head and 50/50 contests that was 24 percentage points higher than entries that included James.

48. DraftKings participants who are unfamiliar or unskilled at employing the necessary strategic principles may incorrectly assume that simply picking the best superstar is the key to success, but skilled DFS contestants were able to identify Bayless as a superior value on November 2 by monitoring late-breaking lineup news: normally a reserve player, Bayless was announced as the starting point guard for that evening’s game less than one hour before it began. Because DraftKings salaries are fixed, selecting a starting point guard at a “backup price” presented a clear opportunity to gain a strategic advantage.

49. The skill- and salary-cap-based athlete selection format used in DraftKings’ DFS contests is not utilized in most season-long fantasy contests, which instead utilize a randomized draft process—involving less skill by fantasy contestants—in which contestants can typically select the best available athlete.

## **2. Core Strategic Element #2: Fantasy Point Scoring System**

50. DFS contests are governed according to unique fantasy point scoring systems that determine how many fantasy points are gained or lost for each applicable real-world statistic. Learning, understanding, and mastering each sport's—and each DFS provider's—unique scoring system adds another level of strategic decision-making to the DFS General Manager's skill set.

51. For example, in Classic NFL contests, the DraftKings scoring system awards 1.0 fantasy points for a reception, while the FanDuel scoring system awards only 0.5 fantasy points. The difference may appear negligible, but a sophisticated contestant understands its enormous implications for the relative valuation among running backs, wide receivers, and even quarterbacks.

52. In a DraftKings contest, a skilled participant will likely assign more value to pass-catchers than he would in a FanDuel contest, while a FanDuel participant will likely assign relatively more value to quarterbacks.

53. Other examples of strategy-enhancing scoring differences between DraftKings and FanDuel include: DraftKings awards special bonus fantasy points for individual milestones such as 300 yards passing by a quarterback, while FanDuel does not; FanDuel uses placekickers in NFL contests and awards points based on field goals, while DraftKings does not; DraftKings

MLB contests award 2 fantasy points per strikeout, while FanDuel awards only 1 fantasy point.

54. Each of these slight differences—and many more—affect the skills-based strategic judgments that inform DFS contestants' decisions.

### **3. Core Strategic Element #3: Contests Rules Regarding Prize Eligibility**

55. Another DFS contest attribute that drives athlete selection strategy is prize structure—who wins, and how much. DraftKings offers a variety of different types of contests, with some contests involving a more top-heavy prize structure than others. Again, these differences in contest design create drastically disparate strategic incentives.

56. Large-field tournaments generally have top-heavy prize structures in which approximately the top 20% of finishers earn prizes, and the vast majority of prizes, by dollar amount, are paid out to the top 1% of finishers. By contrast, in both head-to-head and larger 50/50 contests, a DFS contestant wins the maximum prize merely finishing in the top half of the field.

57. There are at least three key strategic considerations that vary depending on whether a participant enters a large-field tournament or a head-to-head (or 50/50) contest: (1) athlete volatility, (2) game theory and contrarian play, and (3) stacking versus hedging.

58. In head-to-head and 50/50 contests, a skilled DFS contestant might select real-life athletes who offer lower volatility and therefore less risk. Consider two hypothetical wide receivers who average the same 15 DraftKings points per week. Athlete A routinely scores fewer than 5 fantasy points or more than 25 fantasy points in contests, while Athlete B never scores below 12 or greater than 18 fantasy points. In head-to-head and 50/50 contests, Athlete B is likely the more strategically sound selection because such a selection eliminates the risk of a 5-fantasy point performance. Because of the unique prize structure in large tournaments, by contrast, the possibility of scoring 25 or more fantasy points is worth that risk, and thus Athlete A might be the sounder choice.

59. Large-field tournaments incentivize what game theory experts call “contrarian strategy”: purposely differentiating one’s lineup from the lineups of other contestants. To increase the likelihood of achieving high enough scores to be eligible for top prizes, DFS contestants in large-field tournaments typically strive to select a fantasy roster that will score well and be unique among the field. To finish within the top 1% of all entries, it is not enough to select athletes who perform well; successful contestants will select athletes who perform well and are chosen by relatively few of their competitors.

60. Finally, head-to-head contests and large-field tournaments generally create opposite incentives when it comes to positive and negative

correlation among prospective fantasy selections. In large-field tournaments, it is often strategically advantageous to employ a technique known as “stacking”: selecting a combination of athletes whose expected fantasy performances are positively correlated. An example of stacking in NFL contests is the selection of a quarterback and the wide receiver who is known to be the quarterback’s favorite pass-catching target, in order to make it more likely that his or her fantasy team will accumulate the extremely high number of fantasy points that is necessary to win a large-field tournament. In head-to-head contests, it is often wiser to do the opposite: “hedge” against one’s quarterback selection by choosing wide receivers from other real-life teams.

61. For example, consider a DraftKings participant who has selected the Green Bay Packers’ Aaron Rodgers as her quarterback and is deciding between the Packers’ Randall Cobb and the Arizona Cardinals’ Larry Fitzgerald at wide receiver. Cobb and Fitzgerald are historically comparable fantasy producers with comparable DraftKings salaries. In a large-field tournament, a skilled DFS contestant might well consider selecting Cobb, as Cobb is statistically likely to have a good performance if Rodgers has a good performance—even though Cobb is likely to have a poor performance if Rodgers does—in order to make it more likely that his or her fantasy team will accumulate the extremely high number of fantasy points that is necessary to win a large-field tournament. By contrast, in a head-to-head contest, Larry

Fitzgerald might be the safer (and thus wiser) choice, because a poor performance by Rodgers has no bearing on Fitzgerald's fantasy output.

62. The strategic and skill-based concepts described above are by no means unique to DFS; they are an integral part of basic investment strategies for approaching the stock market as well. The concepts of hedging, positive and negative correlation, expected value, contrarian play, exposure, variance, and return-on-investment are basic economic terms that guide not only how to assemble a fantasy roster, but also how to build a stock portfolio.

**D. Evidence Establishes the Skill-Based Nature of DFS.**

63. The skill-based nature of DFS games has been repeatedly confirmed by leading experts. For example, Ed Miller—an MIT-trained engineer and noted author of gaming strategy books—and Daniel Singer—the leader of McKinsey & Company's Global Sports and Gaming Practice—penned an article published by Sports Business Daily entitled: "For daily fantasy sports operators, the curse of too much skill." Among Miller and Singer's findings was that the preponderance of DFS player profits were won by the most skilled players.

64. Miller and Singer also identified two primary ways in which skilled contestants succeed over unskilled contestants: (1) skilled contestants employ lineups that create covariance by choosing multiple athletes from the

same real-life team in order to produce the extreme DFS outcomes—good and bad—that are necessary to win a large-field tournament; and (2) skilled contestants exploit salary cap pricing inefficiencies by using sophisticated models to optimize their lineups by projecting which athletes are most likely to under- or over-perform relative to their salary on a given day.

65. To help measure the degree of control DFS contestants exercise over their outcomes, DraftKings engaged Gaming Laboratories International (“GLI”) to conduct sophisticated computer simulations involving DraftKings contests in MLB, NBA, NHL, and NFL.

66. GLI tested the performance of DraftKings lineups generated at random—subject only to the constraint that 90% of the salary cap must be used—compared to the results achieved by top-earning DraftKings contestants. In each case, skilled DFS contestants dramatically outperformed the computer simulation in head-to-head contests: 96% of the time in NBA, 84% of the time in NFL, 83% of the time in MLB, and 82% of the time in NHL.

67. DFS is also fundamentally different than other games about which the issue of skill versus chance has been previously debated, such as poker. Unlike poker, where players start each hand on a non-level playing field based on the cards they are randomly dealt, in DFS, each contestant starts in the exact same position and has complete and total control over the lineup the contestant chooses, within the consistent constraint of the salary cap. The fact

that a DFS contestant has no control over athlete injuries is in no meaningful way different from the season-long fantasy sports contests. And it is also no different than the small degree of chance present in all games of skill.

68. In addition to reducing the impact of injured and underperforming athletes, DFS also greatly enhances the degree to which contestants can learn from mistakes, develop their skills, and refine their strategic thinking between contests over the course of one real-life season.

**E. DraftKings Has Operated Openly In Texas For Years.**

69. DraftKings has operated in Texas since 2012. It has advertised on broadcast television and radio stations, and DraftKings' Texas partners include major sports entities such as Major League Baseball and the National Hockey League—as well as numerous individual Texas teams, including the Dallas Cowboys, Houston Astros, and Texas Rangers. These partners have always understood DFS to be legal—as have the thousands of Texans who use the DraftKings website each day to pit their skills against others DFS participants.

70. Despite operating openly and transparently throughout Texas, no state official has ever brought gambling charges against DraftKings or previously questioned the legality of DraftKings' contests. Nor has any district attorney or the Attorney General brought charges against Yahoo! or other

companies that offer online DFS contests, which Texas residents have played for a decade.

## **F. The Controversy Created by the Attorney General's Opinion Letter**

### **1. The January 19, 2016 Opinion Letter**

71. On January 19, 2016, the Attorney General issued Opinion No. KP-0057, declaring that contestants in DraftKings' DFS contests make "a bet" "on the partial or final result of a game or contest or on the performance of a participant in a game or contest." Opinion at 9. He concluded: "Because the outcome of games in daily fantasy sports leagues depends partially on chance, an individual's payment of a fee to participate in such activities is a bet. Accordingly, a court would likely determine that participation in daily fantasy sports leagues is illegal gambling under section 47.02 of the Penal Code." Opinion at 9. Moreover, the opinion letter determined that DFS contestants are not contestants in bona fide contests for the determination of skill and so are not within the statutory exclusion to the term "bet" that is set out in Tex. Penal Code § 47.01(1)(B). *See* Opinion at 6–7. The opinion letter further opined that traditional, season-long fantasy contests also involve making a "bet," but that the participants in such contests are likely immune to prosecution thanks to statutory defenses. *See* Opinion at 7–8.

72. The Attorney General acknowledged explicitly that he “cannot resolve factual issues.” Opinion at 3. As a result, the opinion letter proceeded on the basis of “assume[d] facts” as set out in Opinion Request No. RQ-0071-KP.

73. The Attorney General’s opinion letter contains both factual and legal errors, and as a result of those errors, it misinterpreted both the nature of DFS contests and Texas law itself, and reached patently incorrect conclusions that threaten irreparable harm to DraftKings.

**2. The Attorney General’s Letter Is Based On Incorrect Assumptions And Arrives At Incorrect Conclusions.**

74. The Attorney General assumed, without deciding, that “daily fantasy leagues involve an element of chance.” Opinion at 4. Indeed, he noted explicitly that “on the facts [the Opinion Request] ask[s] us to assume . . . chance is an element and partial chance is involved” in DFS contests. Opinion at 6. The Attorney General explicitly acknowledged that it “may well be true” that skill, not chance, controls the outcome of DFS contests. *See* Opinion at 4. But the Attorney General disregarded that possibility, instead claiming—incorrectly—that whether “skill predominates” is irrelevant under Texas law.

75. That assumption is wrong. Experts have studied DFS closely, and concluded confidently that chance is “overwhelmingly immaterial” to success in DFS contests. *See* Affidavit of Zvi Gilula, attached as Exhibit C to appended

Affidavit of Robert C. Walters. These expert conclusions, which are unrebutted and, as far as DraftKings is aware, irrefutable, leave no doubt that DraftKings' DFS contests do not involve an unlawfully high "element of chance" under Texas law, contrary to the Attorney General's assumptions.

76. DFS contests do not involve any element of chance, as that term is used in the Texas Penal Code to define a "bet," beyond the level of chance "attendant upon every human endeavor." Tex. Att'y Gen. Op. No. GA-0335, at \*2 (2005).

77. At the very least, whether DFS contests involve an impermissible element of chance is a hotly disputed factual question, of the type that the Attorney General has previously recognized he is "not authorized" to answer. *See* Tex. Att'y Gen. Op. No. KP-0003 (2015) at 2 ("In performing its opinion function, this office is not authorized to investigate allegations of illegal conduct, nor does it have the capacity to resolve disputed issues of fact."); *see also* Tex. Att'y Gen. Op. No. KP-0020 (2015) at 2 ("[F]act-intensive determinations are not appropriate for the opinion process of this office."); Tex. Att'y Gen. Op. No. KP-0046 (2015) at 4 ("[T]his office does not resolve disputed fact questions in attorney general opinions.").

78. Furthermore, the Attorney General has fundamentally misconstrued section 47.01(1)(B), which provides that an illegal "bet" does not include participation in "a bona fide contest for the determination of skill."

Tex. Penal Code. § 47.01(1)(B). The fact that a contest might involve some small element of chance does not force that contest outside the statutory exemption set out in section 47.01(1)(B). Indeed, nothing in the statutory text suggests that the presence of some element of chance precludes a contest from being one of skill. *See* § 47.01(1)(B).

79. The Attorney General made the additional fundamental error of determining that DFS contestants are not “actual contestants” within the meaning of section 47.01(1)(B).

80. DFS contestants themselves compete in the contests of skill—serving as fantasy general managers and balancing complex and competing interests as they attempt to assemble the best DFS roster under the particular rules of a given contest.

**3. The Attorney General’s Actions Are Causing—And Will Continue To Cause—Significant And Concrete Harm To DraftKings, Its Customers, And Employees.**

81. The Attorney General’s Opinion has already caused immediate, significant, concrete, and perhaps irreversible harm to DraftKings’ reputation and business. And without this Court’s intervention, further concrete harms will follow.

82. Customers of DraftKings have withdrawn money after the Attorney General’s opinion was issued, citing that opinion as their reason for

withdrawing funds. As one customer remarked upon withdrawing all funds in his DraftKings account, “I really hated to hit the withdraw button [but I] just read the article on ESPN about how the Texas AG just proclaimed daily fantasy illegal in Texas...Until this gets resolved, I didn't want to leave my money on your site for fear that I'll be locked out and unable to get my funds.” Moreover, DraftKings saw a spike in customer account closures after the Attorney General issued his opinion.

83. After the Opinion was issued, DraftKings' key business partners that process financial transactions between DraftKings and its customers indicated that they would cease to process transactions in Texas. In particular, they stated that any customer that lists a Texas address, or that attempts to access DraftKings from a Texas-based Internet protocol address, would be unable to transact any business with DraftKings. This could have the effect of forcing DraftKings to stop doing business in Texas.

84. After the Opinion was issued, DraftKings' partners indicated that only a declaration from this Court that DraftKings' contests are legal would permit them to continue to do business with it in Texas.

85. If DraftKings' partners cease to facilitate Texas-related transactions, the resulting harm to DraftKings' revenue—and its entire business model—will be nearly incalculable. DraftKings will lose a key source of revenue, which will in turn harm its valuation as a company. That sort of

decline in value will create a ripple effect that in turn will hinder DraftKings' efforts to raise additional investment funds. In short, the Attorney General's opinion and potential enforcement action already harmed DraftKings' business model, which relies on investment partners—and that harm will become irreversible absent this Court's intervention.

86. And the harm DraftKings is experiencing could spill over into other states. The Attorney General's unilateral decision to brand DFS as criminal tarnishes its reputation in a way that has harmed DraftKings' nationwide efforts to build its brand, develop its business, and provide entertainment to millions of fantasy sports fans nationwide.

**4. By Misreading Texas Law In An Attempt To Shutter DFS Companies, The Attorney General Exceeded The Scope Of His Authority.**

87. The Attorney General is statutorily empowered to issue opinion letters under Tex. Gov't Code § 402.042 (upon the request of a qualified person “the attorney general shall issue a written opinion on a question affecting the public interest . . .”).

88. The Attorney General, however, lacks authority to misinterpret the factual nature of DFS and to misinterpret Texas law. Moreover, the Attorney General lacks the authority to issue an opinion letter containing manifestly incorrect interpretations of Texas law.

89. Likewise, the Attorney General has previously recognized he is “not authorized” to resolve factual disputes. *See* Tex. Att’y Gen. Op. No. KP-0003 (2015) at 2 (“In performing its opinion function, this office is not authorized to investigate allegations of illegal conduct, nor does it have the capacity to resolve disputed issues of fact.”); *see also* Tex. Att’y Gen. Op. No. KP-0020 (2015) at 2 (“[F]act-intensive determinations are not appropriate for the opinion process of this office.”); Tex. Att’y Gen. Op. No. KP-0046 (2015) at 4 (“[T]his office does not resolve disputed fact questions in attorney general opinions.”).

90. Yet the Attorney General’s opinion does just that, resolving factual disputes that fall beyond his prerogative. For example, the Attorney General opines that “[i]t is beyond reasonable dispute that daily fantasy leagues involve an element of chance regarding how a selected player will perform on game day,” and follows those conclusions with a series of factual examples untethered to the originating Opinion Request. Opinion at 4. To the contrary, DraftKings very much disputes the role “chance” plays in those hypothetical examples.

91. In short, the Attorney General’s opinion on DFS violates the plain standards that govern the opinion process. Its conclusion is manifestly incorrect, and it reaches that conclusion both in reliance on erroneous assumed facts and on improper and unjustified resolution of factual disputes. This

departure from the Attorney General's neatly prescribed statutory role constitutes an abuse of authority.

## VI. CAUSES OF ACTION

### A. Count One: Claims For Declaratory Judgment

#### 1. **Contestants In DraftKings' DFS Contests Are "Actual Contestants In A Bona Fide Contest For The Determination Of Skill," And Thus Do Not "Bet" On "The Partial Or Final Result Of A Game Or Contest Or On The Performance Of A Participant In A Game Or Contest" Under Texas Law.**

92. DraftKings incorporates by reference Paragraphs 1-91 above as if fully set forth herein.

93. The Attorney General's actions warrant declaratory relief in favor of DraftKings, including, but not limited to, a declaration that DFS contests are lawful in Texas, that the Attorney General's opinion letter is unauthorized by—and conflicts with—Texas law, and that the Attorney General lacks authority to unilaterally terminate a company's ability to operate in Texas.

94. Specifically, DraftKings is entitled to a declaratory judgment that DFS contests are lawful in Texas because they meet the statutory criteria set out in Texas Penal Code § 47.01(1)(B). That is, they include "an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill[.]" The contestants in DraftKings' DFS contests are "actual contestants," and they compete against one another as general

managers in competitions of skill that are wholly distinct from the underlying athletic competitions. And the success of those DFS contestants in the DFS contests is based on skill.

95. In the alternative, DraftKings is entitled to a declaratory judgment that the Attorney General has exceeded his statutory authority by issuing a manifestly incorrect legal opinion in reliance on erroneous assumed facts and on improper and unjustified resolution of factual disputes.

96. This Court can issue a declaratory judgment that will “terminate the uncertainty or controversy giving rise to the proceedings.” Tex. Civil Prac. & Rem. Code § 37.004. In this instance, a declaration that DraftKings’ DFS contests do not violate Texas gambling law will terminate all uncertainty and controversy giving rise to this action.

**2. DraftKings’ DFS Contests Never Turn On The Result Of A Single Game Or Contest Or On The Performance Of A Participant In A Single Game Or Contest.**

97. DraftKings incorporates by reference Paragraphs 1-96 above as if fully set forth herein.

98. DraftKings is entitled to a declaratory judgment that DFS contests are lawful in Texas because they do not meet the “gambling” definition set out in Tex. Penal Code § 47.02(a)(1), because DraftKings’ DFS contests turn on a series of complex interconnected performance metrics from *many* players

selected by DFS contestants across one or more athletic contests, and do not turn on the outcome of “**a** game” or the performance of “**a** participant in **a** game,” as the statute forbids. Tex. Penal Code § 47.02(a)(1).

99. In the alternative, DraftKings is entitled to a declaratory judgment that the Attorney General has exceeded his statutory authority by issuing a manifestly incorrect legal opinion in reliance on erroneous assumed facts and on improper and unjustified resolution of factual disputes.

100. This Court can issue a declaratory judgment that will “terminate the uncertainty or controversy giving rise to the proceedings.” Tex. Civil Prac. & Rem. Code § 37.004. In this instance, a declaration that DraftKings’ DFS contests do not violate Texas gambling law will terminate all uncertainty and controversy giving rise to this action.

**3. Neither The Attorney General Nor Any Other Governmental Entity May Rely On The Attorney General’s Opinion To Support Any Prosecution Or Civil Action Against DraftKings.**

101. DraftKings incorporates by reference Paragraphs 1-100 above as if fully set forth herein.

102. DraftKings is further entitled to a declaratory judgment that no state governmental entity may use or rely on the Attorney General’s opinion to support any criminal prosecution, statutory civil-enforcement action, common-law suit, or any other interference or related legal action against

DraftKings or its operations. In any legal action against DraftKings, the Attorney General's opinion cannot bind any Texas court. *Weaver v. Head*, 984 S.W.2d 744 (Tex. App.—Texarkana 1999, no pet.).

103. A declaratory judgment is necessary in order to forestall the apparent civil and criminal actions that could be brought by the Attorney General and other state officials invoking the Attorney General's opinion as their basis.

**B. Count Two: Denial Of Due Process: Fifth And Fourteenth Amendments Of The United States Constitution And 42 U.S.C. § 1983**

104. DraftKings incorporates by reference Paragraphs 1-103 above as if fully set forth herein.

105. DraftKings has protected property interests arising from, among other things, its extensive relationships with Texas customers and businesses, customer goodwill, and substantial investments in—and revenues from—the State of Texas and its citizens.

106. DraftKings was never afforded a meaningful opportunity to be heard before the Attorney General issued his opinion. Although counsel for DraftKings briefly met with representatives of the Attorney General before he issued the opinion letter, the Attorney General did not consider the available

evidence, and hastily decided without a reasonable basis that DFS contests are unlawful in Texas.

107. The Attorney General's actions effectively deny DraftKings its day in court, potentially bestowing a death sentence on DraftKings' Texas operations before it has had any opportunity to defend itself.

108. The Attorney General's actions constitute an unconstitutional implementation of the Attorney General's preferred and deliberate policy of banning DFS contests in Texas.

109. In depriving DraftKings of its constitutional rights, the Attorney General acted under color of law, and the deprivation arose out of an official decision, policy, or practice of the Attorney General.

110. For these reasons, the Attorney General has violated DraftKings' rights under the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution, as made enforceable through 42 U.S.C. § 1983.

**C. Count Three: Denial Of Due Course Of Law: Article I, Section 19 Of The Texas Constitution**

111. DraftKings incorporates by reference Paragraphs 1-110 above as if fully set forth herein.

112. By engaging in the conduct described above, the Attorney General has violated DraftKings' rights under the Due Course of Law Clause of Article I, Section 19, of the Texas Constitution.

**D. Count Four: Denial Of Equal Protection: Fourteenth Amendment Of The United States Constitution And 42 U.S.C. § 1983**

113. DraftKings incorporates by reference Paragraphs 1-112 above as if fully set forth herein.

114. The Equal Protection Clause of the U.S. Constitution requires that state actors treat similarly situated persons equally under the law. State actors may not treat a person differently based on distinctions that lack a rational basis. And where, as here, a law-enforcement official strictly enforces the laws against one party but declines to enforce them against a similarly situated party, the official violates equal protection if there is no rational basis for the disparate treatment.

115. The Attorney General's actions reflect his view that DFS contests are unlawful and seek to force DFS providers to shutter operations in Texas, but they do not impose any similar adverse consequences for operators of season-long contests, which are legally indistinguishable from DFS contests. Both DFS contests and season-long contests are "bona fide contests for the determination of skill," and thus both types of contests fall outside the scope of Texas' gambling prohibition. DFS contests involve more skill relative to

chance than do season-long contests, because among other things of the skill-focused salary cap player selection process used in DFS contests, but not in season-long contests. The Attorney General's decision to single out DFS contests—but leave season-long contests alone—is arbitrary and irrational. He has therefore violated DraftKings' rights under the Equal Protection Clause of the U.S. Constitution, as made enforceable through 42 U.S.C. § 1983.

**E. Count Five: Denial Of Equal Rights: Article I, Section 3 Of The Texas Constitution.**

116. DraftKings incorporates by reference Paragraphs 1-115 above as if fully set forth herein.

117. By engaging in the conduct described above, the Attorney General has violated DraftKings' rights under the Equal rights Clause of Article I, Section 3 of the Texas Constitution.

**VII. REQUEST FOR JURY TRIAL**

118. DraftKings hereby requests a trial by jury in this action on all claims and issues of fact triable to a jury under Tex. Civ. Prac. & Rem. § 37.007 and other statutes.

**VIII. REQUEST FOR DISCLOSURE**

119. Under Rule 194, DraftKings hereby requests that Defendant disclose, within 50 days of service of this request, the information or material described in Rule 194.2.

## **IX. REQUEST FOR COSTS AND ATTORNEY'S FEES**

120. DraftKings hereby requests the award of its costs in this action, including attorney's fees to the extent authorized by law, including but not limited to Texas Civil Practice & Remedies Code § 37.009.

## **X. CONCLUSION AND PRAYER**

121. DraftKings respectfully requests that this Court issue a declaratory judgment under Tex. Civ. Prac. & Rem. Code § 37.003, declaring that daily fantasy sports contests are fully legal under Texas law. In addition, DraftKings requests an order:

a. Declaring that DraftKings' DFS contestants are "contestants in a bona fide contest for the determination of skill" for which a prize or award is offered, and thus do not make a "bet" under Tex. Penal Code § 47.01 and do not violate Tex. Penal Code § 47.02(a);

b. Declaring that DraftKings' DFS contestants do not commit an offense because, rather than making a bet on the outcome of "a game or contest," the outcome of DraftKings' DFS contests depends on a series of complex interconnected performance metrics from a host of athletes, and therefore DraftKings' DFS contests do not violate Tex. Penal Code § 47.02(a);

c. Declaring that no governmental entity may use or rely on the Attorney General's opinion regarding DFS in any criminal prosecution, civil statutory suit, common-law suit, or any other interference or related legal action against DraftKings or its operations.

122. DraftKings further requests the award of its costs in this action, including attorney's fees to the extent authorized by law, including but not limited to Texas Civil Practice & Remedies Code § 37.009.

123. DraftKings also seeks any such other relief as the Court determines to be just and proper, including relief further or consequential to DraftKings' request for declaratory relief set forth above.

Dated: April 16, 2018

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Robert C. Walters

Robert C. Walters  
Texas Bar No. 20820300  
Olivia A. Adendorff  
Texas Bar No. 24069994  
2100 McKinney Avenue  
Suite 1100  
Dallas, TX 75201-6912, USA  
Telephone: (214) 698-3100  
Facsimile: (214) 571-2900

Randy M. Mastro\*  
200 Park Avenue, 47th Floor  
New York, NY 10166-0193  
Telephone: (212) 351-4000  
Facsimile: (212) 351-4035

Debra Wong Yang\*  
Douglas M. Fuchs\*  
333 South Grand Avenue  
Los Angeles, CA 90071-3197  
Telephone: (213) 229-7000  
Facsimile: (213) 229-7520

*Attorneys for Plaintiff DraftKings, Inc.*

\* *pro hac vice* to be filed