

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

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AARON HODGE, individually and on  
behalf of all others similarly situated,

Plaintiff,

v.

DRAFTKINGS, INC.,

Defendant.

No.

**COMPLAINT  
CLASS ACTION**

**DEMAND FOR JURY TRIAL**

**I. INTRODUCTION**

Plaintiff Aaron Hodge (“Plaintiff”), individually, and on behalf of all others similarly situated, by and through counsel, bring this actions against DraftKings, Inc. (“DraftKings”) (“Defendant”).

**II. NATURE OF THE ACTION**

1. This is a class action complaint against DraftKings, a company operating Daily Fantasy Sports (“DFS”) websites in a manner that violates Georgia Law.

2. Plaintiff bring this action on their own behalf and on the behalf of an Georgia class of persons (defined in the definition of Class below) who, like Plaintiff, have sustained ascertainable losses arising out of DraftKings systematic and continued violation of the Official Code of Georgia Anotated and various criminal laws (the “Class Members”). Under the authority of OCGA §13-8-3(b), the loser of a gambling consideration can maintain a private, civil action to recover damages from the winner.

3. DraftKings is operating an illegal online sports betting (gambling) business within the State of Georgia.

4. The Constitution of the State of Georgia expressly states:

**Article I. Section II. Paragraph VIII. Lotteries and nonprofit bingo games.** . . . Except as herein specifically provided in this Paragraph VIII, all lotteries, and the sale of lottery tickets, and all forms of pari-mutuel betting and casino gambling are hereby prohibited; and this prohibition shall be enforced by penal laws prohibits Paragraph III

5. Througout this operative Complaint, a reference to “betting” or “bet(s)” shall also have the meaning of “gambling” or “gamble(s),” respectively, and such words shall be used interchangeably herein.

6. DraftKings a defines its sports betting scheme as DFS in a specious attempt to circumvent Georgia law which expressly prohibits “gambling,” which includes making a “bet upon the partial or final result of any game or contest or

upon the performance of any participant in such game or contest.” O.C.G.A § 16-12-21 (a). Under Georgia law, a “[b]et” means an agreement that, dependent upon chance even though accompanied by some skill, one stands to win or lose something of value.” O.C.G.A § 16-12-21(1).

7. DraftKings sports betting contests are based upon the performance of teams and individuals that participate in NCAA college football, NCAA college basketball, NFL, NBA, MLB and NHL, and also upon the partial or final result of games.

8. In traditional fantasy sports leagues contestants draft their teams before the season, maintaining the same core roster for months.

9. In contrast to season-long fantasy sports, DraftKings accept wagers from bettors for various sporting events using a scheme they created that assigns values (points) based upon the performance of athletes and teams engaged in amateur and professional athletic competitions.

10. After the sporting events are concluded, DraftKings calculates a score using the scheme they created that awards points based upon the various individual college and professional athletes' performance and pays bettors that have the highest total number of points.

11. Bettors select an entry fee, which is up to \$5,000, and the number of the games or teams they wish to play. If their roster generates more points than their rivals on that day or week, they win all the money in the pot, minus DraftKings' average cut of, upon information and belief, 6.5%.

12. Upon information and belief, DraftKings uses "bots" or fake accounts to act as "shills" in the gambling scheme in order that certain winnings go to the "house" (DraftKings), and also creating the illusion to the DraftKings user of interacting with a gambler on equal footing. The employment of "shills" (or "bots"/fake accounts) employs a similar concept to those "shills" that are permitted by law in states with casinos such as Nevada, but Georgia does not permit any gambling, never mind the use of "shills" in the form of "bots" or otherwise fake accounts. And regardless, in states where such devices are employed, there is no illusion, nor effort to create the illusion, that the "house" is not winning the losing bets (in the form of monies that are attributed to "shills") and in the case of DraftKings, there is no disclosure of the use of "shills" nor any legal basis for doing so in Georgia.

13. Recently, lawmakers have scrutinized DraftKings' business model and operations, alleging substantial similarities between DraftKings and online poker and other gambling websites. Specifically, the General Counsel for the

Georgia State Lottery, Joseph Kim, wrote DraftKings and noted that Georgia's constitution bans gambling except for state lottery activities. <http://bigstory.ap.org/article/d2f22b64c83748468dfc6e4d84f8b001/georgia-joins-states-scrutinizing-fantasy-sports-companies>

14. DraftKings appears to operate under the misrepresentation that DFS is a game of skill – not chance, and thus legal: “The legality of daily fantasy sports is the same as that of season long fantasy sports. Federal Law and 45 of the 50 US state allow skill based gaming. Daily fantasy sports are a skill game and are not considered gambling.” *See* DraftKings.com. However, DraftKing knows that its DFS is not a game of skill but instead is one of chance.

15. According to a similar website, FanDuel.com, FanDuel also misinterprets, in error, that its gambling operations were made legal by the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”).

▼ [Is this site legal in the US and Canada?](#)

Yes, fantasy sports is considered a game of skill and received a specific exemption from the 2006 Unlawful Internet Gambling Enforcement Act. FanDuel uses exactly same rules as any other season long fantasy sports game, the only difference is that our games last only a day. Thanks to fantasy sports being specifically excluded from laws affecting online betting, FanDuel is safe for players in the US and Canada.

*See* <https://www.FanDuel.com/p/AddFundsFtd?>

16. In referring to DraftKings, former Congressman Jim Leach stated that his anti-gambling act, the UIGEA, was supposed to stop gambling on the internet –

not promote it. Former Rep. Jim Leach said lawmakers had no idea daily fantasy sports would “morph into today's cauldron of daily betting.”<sup>1</sup> In fact, former Congressman Leach told the Associated Press: “There is no credible way fantasy sports betting can be described as not gambling.” *Id.* “Only a sophist can make such a claim.” *Id.* The federal regulation is codified at 31 U.S.C. 5361 *et seq.* The Act expressly provides that it shall not be construed as altering, limiting, or extending any state law that prohibits, permits, or regulates gambling within the United States. 31 U.S.C. 5361 § 5361(b).

17. The Federal Bureau of Investigation and the Department of Justice are also probing whether the business model of DFS operators like DraftKings violates this and other federal laws.<sup>2</sup>

18. Additionally, on October 15, 2015, the Nevada Gaming Control Board (“NGCB”) ordered DraftKings a to cease their operations in the State of Nevada, because their operations constitute gambling and they need a gambling license to continue operations in that state.<sup>3</sup>

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<sup>1</sup> <http://bigstory.ap.org/article/7b3af0d8b0c04f059e8b301adf8b1784/former-congressman-says-dfs-cauldron-daily-betting>

<sup>2</sup> <https://www.washingtonpost.com/news/sports/wp/2015/10/20/draftkings-fanduel-fbi-investigation-could-freeze-daily-fantasy-players-money-for-years/>

<sup>3</sup> See NOAG October 15, 2015 Notice, attached hereto as **Exhibit A**.

19. A day after the NGCB issued its Notice, the State of Nevada Office of the Attorney General (“NOAG”) offered its legal analysis, concluding that “In short, daily fantasy sports constitute sports pools and gambling games. They may also constitute lotteries, depending on the test applied by the Nevada Supreme Court. As a result, pay-to-play daily fantasy sports cannot be offered in Nevada without licensure.”<sup>4</sup>

20. On November 10, 2015, Eric T. Schneiderman of the State of New York Office of the Attorney General sent DraftKings a Notice to Cease and Desist and Notice of Proposed Litigation.<sup>5</sup> According to Attorney General Schneiderman, the Office’s “review conclude[d] that DraftKings’ operations constitute illegal gambling under New York law . . . .” Moreover, it stated that

New York Attorney General has been deeply concerned to learn from health and gambling experts that DFS appears to be creating the same public health and economic problems associated with gambling, particularly for populations prone to gambling addiction and individuals who are unprepared to sustain losses, lured by the promise of easy money. Certain structural aspects of DFS make it especially dangerous, including the quick rate of play, the large jackpots, and the false perception that it is eminently winnable. Ultimately, it is these types of harms that our Constitution and gambling laws were intended to prevent in New York.

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<sup>4</sup> See NOAG October 16, 2015 Legal Analysis, attached hereto as Exhibit B.

<sup>5</sup>See NOTICE TO CEASE AND DESIST AND NOTICE OF PROPOSED LITIGATION PURSUANT TO NEW YORK EXECUTIVE LAW § 63(12) AND GENERAL BUSINESS LAW § 349, dated November 10, 2015, attached hereto as **Exhibit C**.

*Id.* at 2.

21. Under Georgia law, “[g]ambling contracts are void; and all evidences of debt, except negotiable instruments in the hands of holders in due course or encumbrances or liens on property, executed upon a gambling consideration, are void in the hands of any person.” O.C.G.A. § 13-8-3(a). “Money paid or property delivered upon a gambling consideration may be recovered from the winner by the loser by institution of an action for the same within six months after the loss and, after the expiration of that time, by institution of an action by any person, at any time within four years, for the joint use of himself and the educational fund of the county.” O.C.G.A. § 13-8-3(b).

22. OCGA § 13-8-3 had its genesis in the Acts of 1764 and 1765 (Cobb 725-727); the Act of 1765 first “provided that persons who might lose money or goods by ‘playing’ or ‘betting’ at ‘any game whatever’ might, after having ‘paid or delivered’ the money or goods so lost, maintain a suit for its recovery against the ‘winner.’” *Lasseter v. O’Neill*, 162 Ga. 826, 829, 135 S.E. 78 (1926). The public policy interests underlying the Act were described in *Dyer v. Benson*, 69 Ga. 609, 610 (1882): “[T]he great rule of public policy established by our legislature is, that the winner shall not be protected in his unlawful gains, and that the loser, though party to an illegal wager, may sue and recover back the money.”

23. Under the Official Code of Georgia Annotated, a “[b]et means an agreement that, dependent upon chance even though accompanied by some skill, one stands to win or lose something of value.” In relevant part, a “[g]ambling device’ means: (A) Any contrivance which for a consideration affords the player an opportunity to obtain money or other thing of value, the award of which is determined by chance even though accompanied by some skill, whether or not the prize is automatically paid by contrivance.” OCGA §13-8-3

24. A person commits the offense of gambling when he: “makes a bet upon the partial or final result of any game or contest or upon the performance of any participant in such game or contest.” O.C.G.A § 16-12-21(a).

25. To state a claim against Defendant under OCGA §13-8-3, Plaintiff must allege that a “gambling contract,” which was supported by a “gambling consideration,” existed between the parties. A gambling or wagering contract was defined in *Martin v. Citizens' Bank of Marshallville*, 177 Ga. 871, 874, 171 S.E. 711 (1933), as “one in which the parties in effect stipulate that they shall gain or lose upon the happening of an event in which they have no interest except that arising from the possibility of such gain or loss.” As noted herein, there was a “gambling contract” between DraftKings, on the one hand, and Plaintiff and Class Members, on the other, and such gambling contract was supported by “gambling

consideration,” such gambling consideration being the monies paid by Plaintiff and Class Members to Defendant.

26. DraftKings takes bets on sporting events or partial sporting events and the performance of players, either full or partial performance, in such events, and such acceptance of bets or gambling consideration are gaming and/or gambling contracts.

27. The loser of the bets (gambling consideration and/or money paid) are Plaintiff and Class Members. The winner of the bets (gambling consideration and/or money paid) is DraftKings. Additionally, the winner of the bets (gambling consideration and/or money paid) is DraftKings when the “bots” or fake accounts (“shills”) are employed. Alternatively, the winner of the bets (gambling consideration and/or money paid) is DraftKings as the stakeholder that took the gambling consideration from the Plaintiff and Class Members. Alternatively, the winner of the bets (gambling consideration and/or money paid) is DraftKings (as the agent) that took the bets (gambling consideration and/or money paid) from the Plaintiff and Class Members (principal(s)) for the illegal gambling and/or gaming contracts.

28. Persons, like Plaintiff herein and the putative class, can seek to recover damages from DraftKings in the form of restitution and lost gambling wagers.

29. Additionally, DraftKings' operations are also unlawful under Georgia's criminal provisions. O.C.G.A § 16-12-22.

30. DraftKings defines its sports betting scheme as DFS in a deceptive attempt to circumvent Official Code of Georgia Annotated § 16-12-22(a), which expressly prohibits "commercial gambling" O.C.G.A § 16-12-22. Specifically, under Georgia law:

(a) A person commits the offense of commercial gambling when he intentionally does any of the following acts:

(1) Operates or participates in the earnings of a gambling place;

(2) Receives, records, or forwards a bet or offer to bet;

(3) For gain, becomes a custodian of anything of value bet or offered to be bet;

(4) Contracts to have or give himself or another the option to buy or sell or contracts to buy or sell at a future time any gain or other commodity whatsoever or any stock or security of any company, when it is at the time of making such contract intended by both parties thereto that the contract to buy or sell, the option whenever exercised or the contract resulting therefrom, shall be settled not by the receipt or delivery of such property but by the payment only of differences in prices thereof;

(5) Sells chances upon the partial or final result of or upon the margin of victory in any game or contest or upon the performance of any participant in any game or contest or upon the result of any political nomination, appointment, or election or upon the degree of success of any nominee, appointee, or candidate;

(6) Sets up or promotes any lottery, sells or offers to sell, or knowingly possesses for transfer or transfers any card, stub, ticket, check, or other device designed to serve as evidence of participation in any lottery; or

(7) Conducts, advertises, operates, sets up, or promotes a bingo game without having a valid license to operate a bingo game as provided by law.

(b) A person who commits the offense of commercial gambling shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years or by a fine not to exceed \$20,000.00, or both.

O.C.G.A § 16-12-22. Defendant also violates other criminal statutes, including O.C.G.A § 16-12-26 and § 16-12-28. Defendant's violations of the aforementioned statutes further evidences there was a "gambling contract" between DraftKings, on the one hand, and Plaintiff and Class Members, on the other, and such gambling contract was supported by "gambling consideration," such gambling consideration being the monies paid by Plaintiff and Class Members to Defendant.

31. Plaintiff and the putative class are entitled, as a matter of law, to recover the money they lost, and in addition, are entitled to any and all fees that inured to DraftKings on account of the contracts being void.

32. As a final note, Washington, one of five jurisdiction in which DraftKings does not operate because DraftKings believes that it is unlawful for it to do so, prohibits fantasy sports wagering because it falls under Washington's definition of gambling, which is “risking something of value on the outcome of a contest of chance or a future contingent event not under the person's control or influence to receive something of value in the event of a certain outcome (RCW 9.46.0237).

33. Indisputably, Washington's law and Georgia’s law are substantially identical to one another. Thus, DraftKings faces an insurmountable obstacle to even attempt a colorable allegation that its conduct operating out of the State of Georgia is lawful in any manner whatsoever.

### **III. PARTIES**

34. Plaintiff, Aaron Hodge, is a resident of DeKalb County, Georgia, and is a citizen of Georgia. He brings this action on behalf of himself individually, and on behalf of a class of persons similarly situated as described in the class definition below.

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

36. Defendant DraftKings conducts business throughout the State of Georgia, having thousands of Georgia residents accessing and gambling on its website DraftKings.com.

37. This Honorable Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. 1331, which confers upon the Court original jurisdiction over all civil actions arising under the laws of the United States. This Honorable Court has jurisdiction pursuant to the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. 1332 (d), because the proposed class consists of 100 or more members; the amount in controversy exceeds five million (\$5,000,000.00) exclusive costs and interest and minimal diversity exists. This Honorable Court has jurisdiction pursuant to diversity jurisdiction, 28 U.S.C. 1332 (a), because the plaintiff and defendants are citizens of different states and the matter in controversy exceeds the sum or value of \$75,000 exclusive of interest and costs. This Honorable Court also has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. 1367.

#### **IV. FACTUAL BACKGROUND**

38. Defendant is operating an illegal online sports betting business within the State of Georgia.

39. Defendant accept wagers from bettors for various sporting events using a scheme they created that assigns values (points) based upon the performance of athletes engaged in amateur and professional athletic competitions.

40. After the sporting events are concluded, Defendant calculate a score using the system they created that awards points based upon the various individual college and professional athletes performance. Defendant then pay the bettors who have the highest total number of points.

41. Plaintiff, Mr. Hodge, is an individual who has utilized DraftKings' website. He has incurred monetary losses as a result of said use. Thus, Defendant DraftKings is indebted to the Plaintiff for, or received to Plaintiff use, the money so lost and paid, or converted the goods won of the Plaintiff to the Defendant DraftKings' use.

42. Plaintiff and Class Members allege that gaming on its DraftKings platform requires very little or no skill and that the outcome therefore is determined largely by chance. In fact, many of DraftKings and DraftKings customers lack even a rudimentary understanding of sports, or betting strategy in general, and yet participate in DraftKings' operations, and lose and win based on pure luck.

43. Defendant's sports betting scheme is a game of chance that involves little skill. The chance element predominates over any skill set.

44. Defendant's sports wagering scheme involves selecting a set number of athletes that will play in a single sporting event.

45. Defendant establishes a point system that correlates with the athletes' performance during a single athletic event.

46. Defendant determines which athletes its bettors can select and assigns a handicap (spread) based upon the athletes' perceived potential to score points.

47. Defendant eliminates almost the entire element of skill by establishing a handicap (similar to a point spread) for a limited number of athletes it determines can be used for a particular wagering event.

48. By establishing a "spread" for each athlete and limiting the number of athletes the bettors can use, bettors are engaging in a gambling scheme predominately based upon chance.

49. Georgia's penal law and civil law (and the UIGEA) prohibit Defendant's sports gambling scheme because it is a game of chance.

50. According to a survey conducted by the Sports Business Journal, only 1.3% of players realized gains from their participating in online fantasy sports.<sup>6</sup> This is akin to the odds one would find at a casino sports gambling operation.

51. DFS, including the sports betting schemes implemented by Defendant, return casino-type “odds” and involve little skill.

52. A player may win with a randomly generated roster, just as one may win with a carefully curated roster.

53. Defendant’s gambling scheme is a game of chance because an individual athlete’s performance (especially in one game) will always be affected by material elements of chance that affect scoring and winning outcomes including variables such as player injury, fumbles, weather conditions, controversial officiating, suspension, or other off field circumstances.

54. The bettors or gamblers have no measure of control over all the variables that affect the performance of the college and professional athletes, rendering the Defendant’s scheme a game of chance.

55. Defendant represents that its gambling scheme is not illegal.

56. Defendant’s representation that the UIGEA legalized bookmaking and gambling under the guise of “fantasy sports” is false and misleading.

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<sup>6</sup> <http://www.sportsbusinessdaily.com/Journal/Issues/2015/07/27/Opinion/From-the-Field-of-Fantasy-Sports.aspx>.

57. The UIGEA did not legalize fantasy sports, it merely provided an exemption to banks from being held liable for processing transactions relating to certain fantasy sports.

58. The UIGEA was enacted to regulate banks and other payment processors, not bookmakers.

59. Under the UIGEA's definition, 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” that is illegal under federal, state, or tribal law.

60. Georgia law prohibits sports gambling schemes, including DraftKings', and prohibits Defendant from accepting payments from or entering into gambling contracts with persons in Georgia, including Plaintiff and Class Members.

## **V. INVALIDITY OF ARBITRATION PROVISION AND TERMS OF USE**

61. At the outset, upon information and belief, when Plaintiff joined DraftKings.com, Defendant had no arbitration provision or class waiver provision in its Terms of Use.

62. Regardless, Defendant's current Terms of Use is not a valid, enforceable contract.

63. Plaintiff and Class Members were fraudulently induced into placing money onto Defendant's DraftKings platform because it was supposed to be a fair game of skill, but instead is no more than a game of chance, thus illegal gambling under Georgia law.

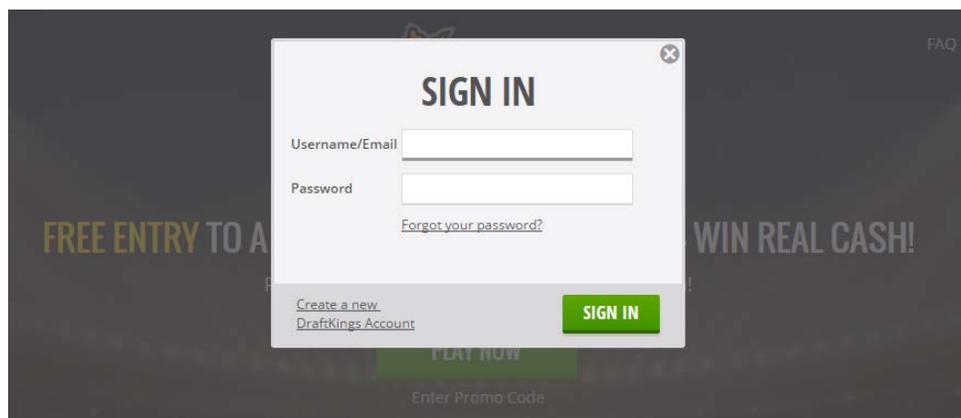
64. The so-called "Terms of Use" do not constitute a valid, mutual agreement because the promises made by Defendants are illusory. Indeed, there is no restriction on Defendants' ability to terminate the "agreement" or to refuse to perform. For example, the so-called "Terms of Use" provide that Defendants and related individuals such as officers and directors are released from any liability for any claim by the user "whatsoever": "By entering into a Contest or accepting any prize, entrants, including but not limited to the winner(s), agree to indemnify, release and to hold harmless Defendants, its parents, subsidiaries, affiliates and agents, as well as the officers, directors, employees, shareholders and representatives of any of the foregoing entities (collectively, the "Released Parties"), from any and all liability, claims or actions of any kind whatsoever, including but not limited to ... [examples of various types of liability listed]." *See* <https://www.draftkings.com/help/terms>

65. Yet another reason why the so-called "Terms of Use" is an illusory contract is that it purports to give Defendants the right, "without prior notice," to

“revoke any or all of your rights granted hereunder.” Thus, once again, Defendants are not bound to any performance obligation. *See* <https://www.draftkings.com/help/terms>

66. The Terms of Use purport to require arbitration, but gives Defendants the exclusive right to revoke the arbitration provision because it states that “Any claim or dispute between you and Defendants that arises in whole or in part from the Terms of Use, the Website or any Contest shall be decided exclusively by a court of competent jurisdiction located in...” Suffolk County, Massachusetts. *See* <https://www.draftkings.com/help/terms>

67. In addition, a user only has to check a box saying he or she has read the Terms of Use to sign up for the website, and the deposit of money and entry into contests is done through separate transactions that do not reference or refer to any Terms of Use. Moreover, when signing into DraftKings.com at any particular time, no “Terms of Use” are referenced or otherwise shown.



68. Another reason why the so-called “Terms of Use” is an illusory contract is that it purports to reserve to Defendants the right to deny service to any user for any reason “whatsoever”: “DraftKings reserves the right, in its sole and absolute discretion, to deny any contestant the ability to participate in head-to-head contests for any reason whatsoever.” Thus, Defendants are not bound to any performance obligation. *See* <https://www.draftkings.com/help/terms>

69. As a result of all of the foregoing numbered paragraphs, Plaintiff and Class Members did not assent or agree to arbitrate any claims or waive their right to bring any claims as a class for any gambling contract formed with DraftKings.

70. Further, the entirety of the contracts between DraftKings and Plaintiff and Class Members are void as a matter of law (as noted herein), including any arbitration or class waiver provisions in the “Terms of Use.”

71. The Terms of Use are procedurally and substantively unconscionable.

72. As a direct and proximate result of the actions described above, Plaintiff and Class Members have been damaged.

## **VI. CLASS ALLEGATIONS**

73. A class action is the proper form to bring Plaintiff’s claims under Federal R. Civ. Proc. 23. The potential class is so large that joinder of all members would be impracticable. Additionally, there are questions of law or fact common to

the class, the claims or defenses of the representative parties are typical of the claims or defenses of the class, and the representative parties will fairly and adequately protect the interests of the classes.

74. This action satisfies all of the requirements of Federal R. Civ. Proc. 23, including numerosity, commonality, typicality, adequacy, predominance and superiority.

75. **Numerosity:** the Class is so numerous that joinder of all members is impracticable. While the exact number is not known at this time, it is generally ascertainable by appropriate discovery. News accounts discuss how millions of users compete on the websites of Defendant.

76. **Commonality:** the claims made by Plaintiff and Class Members meet the commonality requirement because they present shared questions of law and fact, and resolving these questions will resolve the class wide litigation. These shared questions predominate over individual questions, and they include, without limitation:

a) Whether Plaintiff and Class Members have entered into contracts with Defendant within the past eight (8) years.

b) Whether such contracts are per se void, pursuant to Georgia law;

c) Whether Plaintiff and Class Members paid monies to Defendant in consideration of those contracts;

d) Whether Defendant's operations are a game of chance under all applicable laws and rules;

e) Whether the contracts entered into between Defendants and Plaintiff and Class Members are "gambling contracts" supported by "gambling consideration";

f) Whether the Plaintiff and Class Members are "loser(s)" and DraftKings the "winner" under O.C.G.A. § 13-8-3(b).

g) Whether Defendant's operations violate Georgia criminal law;

h) Whether Defendant's operations violate Georgia civil law;

i) Whether Plaintiff and Class Members are entitled to restitution and entitled to recovery of lost wagers from Defendant,

j) Whether Defendant fraudulently induced Plaintiff Class Members into using their website under false pretenses, through material misrepresentations or material omissions;

k) Whether Defendant converted Plaintiff's and Class Members' funds;

l) Whether Defendant have been unjustly enriched;

m) Whether Plaintiff and Class Members have been damaged;

- n) Whether Defendant are required to disgorge all monies received as a result of illegal gambling in violation of Georgia law;
- o) Whether consumers were harmed by Defendant's actions as described above; and
- p) Whether the Terms of Use are unconscionable, illusory, fraudulent or otherwise invalid;

77. **Typicality:** Plaintiff's claims are typical of those of the other Class members because Plaintiff, like every other Class Member, was induced to use Defendant's sites based on false and misleading advertisements that DFS was a game of skill when, in fact, it is a game of chance, thus constituting illegal gambling under Georgia law.

78. The claims of the class representative Plaintiff are furthermore typical of other Class Members because they make the same claims as other class members; and Plaintiff's claims and those of the Class Members are based upon the same legal theories, and arise out of the same practices and course of conduct engaged in by Defendant. Plaintiff has an interest in seeking compensation from Defendant on behalf of all Class Members.

79. Further, the representative Plaintiff's damages arise out of nearly identical and repetitive policies and practices engaged in by Defendant.

80. **Adequacy:** Plaintiff will fairly and adequately represent and protect the interests of the Class Members in that he has no disabling conflicts of interest that would be antagonistic to those of the other Class Members. Plaintiff seek no relief that is antagonistic or adverse to the Class Members and the infringement of the rights and the damages they have suffered are typical of other Class Members.

81. **Superiority:** The class litigation is an appropriate method for fair and efficient adjudication of the claims involved. Class action treatment is superior to all other available methods for the fair and efficient adjudication of the controversy alleged herein; it will permit a large number of Class Members to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort and expense that hundreds of individual actions would require. Class action treatment will permit the adjudication of relatively modest claims by certain Class Members, who could not individually afford to litigate a complex claim against large corporate Defendant. Further, even for those Class members who could afford to litigate such a claim, it would still be economically impractical.

82. The nature of this action and the nature of Georgia laws available to Plaintiff and the Class Members makes the use of the class action device a particularly efficient and appropriate procedure to afford relief to Plaintiff and the

Class Members for the wrongs alleged because Defendant would necessarily gain an unconscionable advantage since they would be able to exploit and overwhelm the limited resources of each individual Class Members with superior financial and legal resources; the costs of individual suits could unreasonably consume the amounts that would be recovered; proof of a common course of conduct to which Plaintiff were exposed is representative of that experienced by the Class Members and will establish the right of each Class Members to recover on the cause of action alleged; and individual actions would create a risk of inconsistent results and would be unnecessary and duplicative of this litigation.

83. The proposed “Class” is described as follows:

**“All persons in the State of Georgia who participated in Defendant’s DFS, deposited money in a DraftKings account, and lost money in any game or contest.”**

84. Plaintiff reserve the right to modify or amend the definition of the proposed Class and to modify, amend, add or remove proposed subclasses, before the Court determines whether certification is appropriate and as the parties engage in discovery.

85. Excluded from the Class are:

a. Defendant and any entities in which Defendant has a controlling interest;

- b. Any entities in which Defendant's officers, directors, or employees are employed and any of the legal representatives, heirs, successors, or assigns of Defendant;
- c. The Judge to whom this case is assigned and any Members of the Judge's immediate family and any other judicial officer assigned to this case;
- d. All persons or entities that properly execute and timely file a request for exclusion from the Class;
- e. Any attorneys representing the Plaintiff or the Class.

**I. VIOLATION OF OFFICIAL CODE OF GEORGIA ANNOTATED  
§ 13-8-3: GAMBLING**

86. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing allegations as though fully set forth herein.

87. Plaintiff represents himself and all Class Members in this Count and asserts this Count on behalf of the same.

88. Under Georgia law, “[g]ambling contracts are void; and all evidences of debt, except negotiable instruments in the hands of holders in due course or encumbrances or liens on property, executed upon a gambling consideration, are void in the hands of any person.” O.C.G.A. § 13-8-3(a). “Money paid or property delivered upon a gambling consideration may be recovered from the winner by the loser by institution of an action for the same within six months after the loss and,

after the expiration of that time, by institution of an action by any person, at any time within four years, for the joint use of himself and the educational fund of the county.” O.C.G.A. § 13-8-3(b).

89. To state a claim against Defendant under O.C.G.A. §13-8-3, Plaintiff must allege that a “gambling contract,” which was supported by a “gambling consideration,” existed between the parties. A gambling or wagering contract was defined in *Martin v. Citizens' Bank of Marshallville*, 177 Ga. 871, 874, 171 S.E. 711 (1933), as “one in which the parties in effect stipulate that they shall gain or lose upon the happening of an event in which they have no interest except that arising from the possibility of such gain or loss.” As noted herein, there was a “gambling contract” between DraftKings, on the one hand, and Plaintiff and Class Members, on the other, and such gambling contract was supported by “gambling consideration,” such gambling consideration being the monies paid by Plaintiff and Class Members to Defendant. The contract between DraftKings and Plaintiff and Class Members was one in which they stipulated that they would gain or lose upon the outcome of the sporting event(s) and individual performances in events in which neither DraftKings nor Plaintiff and Class Members had an interest except that arose from the possibility of gain or loss of monies.

90. Defendant's contracts with Plaintiff and Class Members for DFS are not based upon skill, but instead constitute a game of chance and, thus illegal gambling under Georgia State law. The offense of "[g]ambling" includes making a "bet upon the partial or final result of any game or contest or upon the performance of any participant in such game or contest." O.C.G.A § 16-12-21 (a). Under Georgia law, a "[b]et" means an agreement that, dependent upon chance even though accompanied by some skill, one stands to win or lose something of value." O.C.G.A § 16-12-21(1). As such, those contracts violate O.C.G.A § 16-12-21 (a), O.C.G.A § 16-12-21(1), and O.C.G.A §13-8-3, and, therefore, are void as a matter of law.

91. As to Plaintiff and Class Members, Defendant are indebted to the Plaintiff and Class Members for, or received to the Plaintiff's use, the money so lost and paid, or converted the goods won of the Plaintiff and Class Members to the Defendant's use.

92. As a direct and proximate result of Defendant's violation of O.C.G.A §13-8-3 and related statutes, Plaintiff and the Class Members were damaged and are entitled to recover all monies lost as a result of Defendant's void gaming contracts on behalf of themselves and all others, as allowed under O.C.G.A § 13-8-3, as well as punitive damages.

93. As a direct and proximate result of Defendant's unjust enrichment, Plaintiff and the Class have suffered damages and continue to suffer damages in an amount to be determined at trial.

## **II. COUNT II - UNJUST ENRICHMENT**

94. Plaintiff and Class Members repeat, reallege, and incorporate by reference each of the foregoing allegations as though fully set forth herein.

95. Plaintiff represents himself and all Class Members in this Count and asserts this Count on behalf of the same.

96. Defendant has improperly and wrongfully taken possession of, profited and/or encumbered money from Plaintiff from an illegal gambling scheme, *i.e.* DFS.

97. By their actions in receiving payment and money from persons participating in the illegal gambling scheme known as DFS a benefit is conferred upon Defendant that Defendant is not entitled to and Defendant are aware of such benefit; and such benefit was conferred, premised on fraud, misrepresentation and/or bad faith.

98. By Defendant's improper and wrongful procuring of money under void gaming contracts, Defendant is financially unjustly enriched to the

commensurate financial and economic detriment of Plaintiff and the Class Members.

99. Defendant accepted and retained the benefit conferred upon it, despite their knowledge that it is illegal to participate in illegal gambling in the State of Georgia and accept monies under a void gaming contract.

100. Retaining the non-gratuitous benefits conferred upon Defendant was unjust and inequitable. Therefore, Defendant is liable for the disgorgement and payment of restitution of the benefits it retained, with applicable interest.

101. There is no enforceable agreement or contract that conflicts with Plaintiff's ability to recover under this cause of action.

102. As a direct and proximate result of Defendant's unjust enrichment, Plaintiff and the Class have suffered damages and continue to suffer damages in an amount to be determined more at trial.

### **III. COUNT III - CONVERSION**

103. Plaintiff repeat, reallege, and incorporate by reference each of the foregoing allegations as though fully set forth herein.

104. Plaintiff represents himself and all Class Members in this Count and asserts this Count on behalf of the same.

105. Defendant has and continues to improperly and wrongfully exercise dominion and control over Plaintiff's and the Class Members' personal property, namely fees and monies lost while participating in Defendant's DFS, that have been improperly and illegally taken and procured as a result of a void gambling contract, i.e. illegal gambling.

106. Plaintiff and the Class Members had, and continue to have, an ownership interest in the fees and monies they paid to Defendant as a result of the void DFS gambling contract, i.e. illegal gambling.

107. Defendant has and continues to improperly and wrongfully exercise dominion and control over Plaintiff's and the Class Members' personal property, *i.e.*, money, for a significant and indefinite period of time, and Plaintiff and the Class Members are harmed by Defendant's conduct.

108. As a direct and proximate result of Defendant's conversion, Plaintiff and the Class Members have suffered damages and continue to suffer damages in an amount to be determined more precisely at trial.

**IV. RESTITUTION AND OTHER RELIEF BASED UPON GEORGIA  
CRIMINAL LAW PROHIBITING ILLEGAL GAMBLING  
PURSUANT TO O.C.G.A § 16-12-22**

109. Plaintiff repeat, reallege, and incorporate by reference each of the foregoing allegations as though fully set forth herein.

110. Plaintiff represents himself and all Class Members in this Count and asserts this Count on behalf of the same.

111. Upon information and belief, Defendant engaged in a pattern and practice of making false and misleading representations, in which they created, promoted and fraudulently induced persons to participate in a scheme of chance and/or game of chance, thereby engaging in illegal gambling in violation of Georgia's penal law.

112. DraftKings defines its sports betting scheme as DFS in a deceptive attempt to circumvent Official Code of Georgia Annotated § 16-12-22(a), which expressly prohibits "commercial gambling" O.C.G.A § 16-12-22. Specifically, under Georgia law:

(a) A person commits the offense of commercial gambling when he intentionally does any of the following acts:

(1) Operates or participates in the earnings of a gambling place;

(2) Receives, records, or forwards a bet or offer to bet;

(3) For gain, becomes a custodian of anything of value bet or offered to be bet;

(5) Sells chances upon the partial or final result of or upon the margin of victory in any game or contest or upon the performance of any participant in any game or contest or upon the result of any political nomination, appointment, or election or upon the degree of success of any nominee, appointee, or candidate;

(b) A person who commits the offense of commercial gambling shall be of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years or by a fine not to exceed \$20,000.00, or both.

O.C.G.A § 16-12-22. Defendant is a “person” under Georgia law, and as noted in detail herein, intentionally operates in the earnings of on online gambling place, receives and records bets or offers to bet, is a custodian of monies for betting, and sells chances on the partial or final result or or upon the margin of victory in sporting games and upon the performance of participants in sporting games.

113. Defendant engaged in such pattern and practice knowingly and with the purpose of depriving Plaintiff of property such that Defendant knowingly obtained and/or exerted control over Plaintiff’s property.

114. As a direct and proximate result of Defendant’s illegal gambling in violation of O.C.G.A, Plaintiff and the Class Members have suffered damages and continue to suffer damages in an amount to be determined more precisely at trial.

**V. COUNT VI – FRAUDULENT INDUCEMENT**

115. Plaintiff repeat, reallege, and incorporate by reference each of the foregoing allegations as though fully set forth herein.

116. Plaintiff represents himself and all Class Members in this Count and asserts this Count on behalf of the same.

117. Plaintiff claim that Defendant committed fraud at the formation of the online contract to participate in DFS.

118. Defendant, by both acts of omission and commission, made false statements concerning material facts about its DFS. At the time that Plaintiff and Class Members entered into the online agreement to participate in DFS, Defendant falsely represented that its DFS was a game of skill and, therefore legal, when, in fact, the DFS that Defendant created, promoted, and perpetuated is a scheme of chance and/or a game of chance which violates both Georgia criminal and civil law. Defendant also failed to disclose the use of “bots” or fake accounts designed to operate as “shills.” These false misrepresentations induced Plaintiff and the Class Members to participate in Defendant’s DFS wherein Defendant benefitted financially to Plaintiff and the Class Members' financial detriment.

119. Specifically, as detailed above and throughout herein, Defendant represented that its DFS was not gambling and was legal under applicable Georgia state and federal laws and failed to disclose use of “bots” or fake accounts (“shills”).

120. Defendant knew at the time Plaintiff and the Class Members opened their account with Defendant that the statements, acts and omissions regarding the DFS were false and/or misleading.

121. Defendant intended that Plaintiff and the Class Members be induced by their false statements so Plaintiff and the Class Members would pay money to participate and play DFS.

122. Plaintiff and the Class Members acted in reliance on the false, material representations and omissions made by Defendant, which has caused them to incur damages.

123. Plaintiff and the Class Members would not have deposited money or engaged in any activity on Defendant's website if they had known that the services for DFS offered by Defendant were illegal in nature and used "bots" or fake accounts ("shills").

124. Defendant was aware that the legality of the games was a material fact inducing Plaintiff and the Class Members to give them money in exchange for services and agreeing to the alleged contract.

125. As a result of Defendant's fraudulent representations and fraudulent omissions, Plaintiff and the Class Members were induced into a contract that they otherwise would not have made and suffered financial injury, harm, and damages as described in this Complaint.

## **VI. PRAYER FOR RELIEF**

WHEREFORE, Plaintiff and members of the proposed Class pray for relief and judgment against Defendant, as follows:

- a. For an order certifying the Class, appointing Plaintiff and their counsel to represent the Class and notice to the Class to be paid by Defendant;
- b. For damages suffered by Plaintiff and the proposed Class Members;
- c. For restitution to Plaintiff and the proposed Class Members of all monies wrongfully obtained by Defendant;
- d. For injunctive relief requiring Defendant to cease and desist from engaging in the unlawful, unfair, illegal, and/or deceptive practices alleged in the Complaint;
- e. An order awarding declaratory relief, retrospective and prospective injunctive relief as permitted by law or equity, including enjoining Defendant from continuing the unlawful practices as set forth herein, and injunctive relief to remedy Defendant's past conduct;
- f. For Plaintiff's reasonable attorneys' fees, as permitted by law;
- g. For Plaintiff's costs incurred;
- h. For pre-judgment and post-judgment interest at the maximum allowable rate on any amounts awarded; and

- i. For such other and further relief that this Court deems just and proper under equity or law, including the award of punitive damages.

#### **VII. DEMAND FOR JURY TRIAL**

Plaintiff demands a jury trial.

DATED: November 12, 2015.

Respectfully submitted,

/s/ James F. McDonough, III.  
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**CERTIFICATE OF COMPLIANCE**

This is to certify that the foregoing has been prepared using Times New Roman 14 point font and is double spaced.

This 12 day of November.

/s/ James F. McDonough, III.

JAMES F. MCDONOUGH, III.

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