



January 21, 2016

Office of the Attorney General
c/o DFS Regulations
One Ashburton Place
Boston, MA 02108

**Comments on:
Draft Regulations 940 C.M.R. 34.00:
Daily Fantasy Sports Contest Operators in Massachusetts**

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In October of 2015, the Public Health Advocacy Institute (“PHAI”) submitted a deeply and carefully research legal memo to this office analyzing the legality of paid Daily Fantasy Sports (“DFS”) operations in Massachusetts (included as Appendix A).¹ Our submission was on our behalf along with the organization known as “Stop Predatory Gambling.”² In the memo, we noted the appeal of DFS to youth and the potential for DFS to promote compulsive gambling that will have a negative impact on public health.³

Our major finding was that, while there is no Massachusetts statute or court that has specifically declared paid DFS to be illegal gambling, it is very clear that DFS operators such as DraftKings and FanDuel are conducting illegal gambling operations in the Commonwealth. This was based on an analysis of the applicable statutory law and decisions of the Supreme Judicial Court. Our conclusion is that, without a legislative carve-out for DFS, these firms are operating outside the law in Massachusetts.

Despite this, the Office of the Attorney General has declined to take legal action against DFS operators for conducting illegal gambling in the Commonwealth. This has several potential adverse consequences:

First, as currently operated, DFS is a rip-off for consumers, who are encouraged to play by incessant advertising hyping big cash winnings. The reality couldn’t be further from the truth.

¹ Public Health Advocacy Institute, *PHAI Finds Online Fantasy Sports Gambling Operators in “Clear” Violation of Massachusetts Law* (Oct.26, 2015), <http://wp.me/p3Nxs2-Pi>.

² Stop Predatory Gambling, *Mission Statement*, <http://stoppredatorygambling.org/about-us/the-movement/>.

³ See Appendix A; see also MARLENE D. WARNER, MASSACHUSETTS COUNCIL ON COMPULSIVE GAMBLING, *PROBLEM GAMBLING WITHIN A PUBLIC HEALTH FRAMEWORK IN THE COMMONWEALTH OF MASSACHUSETTS* (Oct. 28, 2013), <http://massgaming.com/wp-content/uploads/1-Problem-Gambling-Within-a-Public-Health-Framework.pdf>.

Recent research has found that a mere 1.3 percent of players win 91 percent of total player profits.⁴ These top players generally wager tens of thousands of dollars each week on hundreds of games. Their success relies on proprietary analytical software to choose their players and rapidly change their player lineups based on highly sophisticated algorithms.

Second, Massachusetts went through a long and contentious process to permit a very limited number of gambling establishments in an effort to create jobs and direct revenue to the state's coffers.⁵ Companies bypassing the licensing process and simply operating a specialized online sports casino was not what anyone had in mind during the Massachusetts casino debate, and the fact that this law is rigorously enforced reflects that legislative intent.⁶

Finally, tolerating this gambling by DFS operators sets a dangerous precedent. How can the Attorney General permit DFS and not allow games such as a monetized Internet-based Candy Crush or other addictive games played on smartphones and tablets? Online gambling creates unlimited opportunities for compulsive gamblers as well as those at risk of becoming addicted to the games.

Nevertheless, the Commonwealth has made an effort to seek a middle ground between filing for an injunction to shutter DFS operations in Massachusetts and allowing these companies to operate an enterprise affecting so many consumers with virtually no regulatory protections. Unfortunately, it may not be practical or even possible to strike that balance for two reasons:

- 1) Some of the most important consumer protections proposed in these regulations may be very difficult, if not technically impossible, to meaningfully enforce; and
- 2) These very protections, if implemented and rigorously enforced, would disrupt the DFS business model to such an extent that it is no longer a viable one.

For example, proposed 940 CMR 34.06 is designed to ensure that there is only one DFS account for each player. By banning the use of proxy servers, requiring company-verified "true identities" from users, and limiting users to one session at a time, it will be difficult for professional DFS players or "sharks," to use scripts and algorithms to consistently win dozens of games daily against casual players. Assuming that operators have the technical capability to carry out these requirements and the Office of the Attorney General ("OAG") has the capability and capacity to enforce these provisions, there would be no way to stop predatory professional players from using proxy accounts in others' names to play multiple games at different skill levels.

⁴ Ed Miller & Daniel Ginger, For Daily Sports Operators, the Curse of Too Much Skill, STREET & SMITH'S SPORTS BUSINESS JOURNAL, July 27, 2015, <http://www.sportsbusinessdaily.com/Journal/Issues/2015/07/27/Opinion/From-the-Field-of-Fantasy-Sports.aspx>.

⁵ See, e.g., COLLEGE OF MANAGEMENT, UNIVERSITY OF MASSACHUSETTS BOSTON, DICE OR NO DICE: THE CASINO DEBATE IN MASSACHUSETTS (2011), http://scholarworks.umb.edu/financialforum_pubs/28.

⁶ See, e.g., Felicia Gans, *Multimillion Dollar Illegal Sports Betting Operation Busted*, BOSTON GLOBE, Nov. 13, 2015, <https://www.bostonglobe.com/metro/2015/11/13/gambling/cRVnepnKnt4s1yGHXe81EI/story.html>.

This same logic applies to some of the proposed fairness protections at 940 CMR 34.12 as well. Subsections 5 and 6 establish beginners' games and seek to exclude highly experienced players. Proxy players could evade this restriction and play for a professional player in such contests.

Of particular concern is whether the prohibition on scripts is enforceable by the operators or the OAG. The sophistication of customized third-party scripts may make them largely undetectable by the DFS operators. Use of these scripts may be one of the more problematic aspects of the unfair play and an important reason why so few players take upwards of 90% of the winnings.

Without such an unfair advantage, would the DFS operators even be viable? If these proposed regulations were enforceable and vigorously enforced, it very well might end the DFS business by ensuring that it is not a viable business for the operators.

As New York Times Magazine writer Jay Caspian Kang wrote in an extended article (attached as Appendix B), and as corroborated by several others, this is less a budding business than it is a business scheme.⁷ The article, a piece of investigative journalism, explains why attracting and retaining professional players who have an overwhelming advantage over casual players is an essential element of the business models of companies like DraftKings and FanDuel.

Here is the problem: Unless professionals stake significant money on DFS contests, the contests' prizes will be too low to draw sufficient users to the contests to cover the promised prize. The operators only make money on a percentage of total funds wagered (known as "the rake"), so it is necessary to attract large numbers of inexperienced players, referred to as "fish" or "minnows," to "feed the sharks" and ensure attractive big money contests and profitable rakes for the operators. The entry fees that the "sharks" put up, along with massive marketing efforts, constitute "bait" for the "fish."⁸

If effective and enforced consumer protections are put into place to prevent the use of scripts and third-party software allowing professionals to rapidly enter and change lineups for many contests in very little time, they will not play and the model falls apart.

If professionals cannot effectively "bumhunt," a term used to describe the use of software tools to quickly find large numbers of inexperienced players to challenge, those "sharks" will not play and the model falls apart.

If these regulations could be and were enforced, the DFS business would decrease significantly because it is built on and requires a business model that is unfair for consumers.

⁷ Jay Caspian Kang, How the Daily Fantasy Sports Industry Turns Fans Into Suckers, NEW YORK TIMES MAGAZINE, Jan 6, 2016, http://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html?_r=0.

⁸ *Id.*

Unfortunately, our view is that this creates an untenable situation for effective regulation. Requiring fair play for consumers in this otherwise unregulated industry is a laudable and important goal. In theory, the proposed regulations should accomplish that goal and are carefully crafted to protect consumers. Fair play, however, will be fatal to the DFS industry's business model and would result, indirectly, in a shutdown. One way the companies could avoid that fate would be to evade enforcement efforts.

These proposed regulations may unintentionally create a situation that invites cheating of both the consumer and of the Commonwealth. This result should be avoided in the simplest manner possible: by enforcing the illegal gambling laws we already have and banning paid DFS operations in Massachusetts unless and until there is express authorization by the Legislature.

This approach has been adopted or is being pursued in 9 states, notably New York, Illinois, and, most recently, Texas. Six additional states previously banned these companies' operations. Massachusetts ought to be the tenth state to take this approach rather than the first to issue regulations for DFS operations that may not be able to deliver the protection of consumers that they are intended to provide.

Halting DFS operations pending legislative action is the most responsible approach for protecting both consumers and public health in the Commonwealth.



October 26, 2015

Massachusetts Gaming Commission
101 Federal Street, 12th Floor
Boston, MA 02110

Dear Massachusetts Gaming Commission:

On behalf of Stop Predatory Gambling and the Public Health Advocacy Institute at Northeastern University, we write to demonstrate that a close reading of Massachusetts statutes and their interpretation by the Supreme Judicial Court show that daily fantasy sports operators such as DraftKings and FanDuel are conducting illegal gambling operations in the Commonwealth.

I. What Is “Daily Fantasy Sports” And Why Is It A Problem?

Season-long fantasy sports started as a hobby and a form of community among enthusiasts. It was largely a social activity. The trophy mattered more than the money. With the introduction and massive promotion of “Daily Fantasy Sports” (DFS), it has been turned into a profit-making commercial operation that clearly incorporates the three elements of gambling: consideration, chance, and prize.

FanDuel, DraftKings and other DFS companies have corrupted the traditional structure and recreational nature of hobbyists’ fantasy sports activities (commonly known as “rotisserie leagues”). Daily fantasy sports games restart constantly and typically are played against strangers. Rather than simply hosting leagues for users, daily fantasy sports operators serve as an exchange and profit by retaining a percentage of the moneys wagered (“entrance fees”). Another contrast between traditional fantasy sports leagues and the new breed of DFS is that these companies are multi-billion dollar profit centers with rewards for very few of their players that bear no resemblance to traditional rotisserie leagues that, until recently, defined the term fantasy sports.¹ Most importantly, as outlined below, DFS is a form of illegal gambling under Massachusetts law.

¹ See Bob Hohler, *An Uncertain Line Between Fantasy Sports, Gambling*, BOSTON GLOBE, August 2, 2015, <http://www.bostonglobe.com/sports/2015/08/02/fantasy-games-draw-scrutiny-ban-sports-gambling-blurs/XxWUs2cwrveLvJe8bFt3wI/story.html>.

II. Under Massachusetts Law, “Daily Fantasy Sports” Constitutes Illegal Internet Sports Gambling

“Daily fantasy sports” is internet sports gambling that is legally indistinguishable from a privately run lottery or numbers game. Both internet gambling and commercial sports gambling are illegal in Massachusetts. Such online gambling operations fall squarely within the state’s legal definition of prohibited lottery gambling.

A. The Massachusetts Legislature Has Prohibited Gambling, and Has Not Created a Carve-Out Exception or Explicit Provision to Legalize Daily Fantasy Sports Enterprises

There is a presumption in Massachusetts law that any lottery or gambling activity that is not *specifically* authorized is prohibited. M.G.L. ch. 271, § 7 prohibits individuals or corporations from setting up or promoting any private lottery. As of 2011, the statute also prohibits any gambling that is “not taking place in a gaming establishment [casino] licensed pursuant to M.G.L. ch. 23K.”

Likewise, M.G.L. ch. 271, § 16A, prohibits the provision of facilities for gambling or “assist[ing] in the provision of facilities or services for the conduct of illegal lotteries, or . . . the illegal registration of bets or the illegal buying or selling of pools upon the result of a trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the happening of any event, or upon the result of a game, competition, political nomination, appointment or election . . .” Thus, far from being authorized, providing facilities for betting on the performances of individual athletes (“the skill, speed or endurance of man”) is expressly prohibited.

In 2011, the Legislature enacted specific exemptions in these two statutes for casino establishments that are regulated under M.G.L. ch. 23K. Express exemptions are the norm in these laws. Both statutes make specific reference to an exemption the MA Legislature created in 2011 for casino establishments, embodied in M.G.L. ch. 23K. If the Legislature had intended to exempt DFS from G.L. ch. 271 § 7 and §16A, it would have included it within the purview of ch. 23K. The legislature did not do so, however, and thus there is no statutory authorization in Massachusetts.²

² In addition, M.G.L. ch. 271, § 5B bans internet gambling. This statute, which contains express exemptions for the state lottery, for certain charitable bingo games, and supermarket sweepstakes, shows that, under Massachusetts law, any form of gambling is illegal unless there is an act of the Legislature, expressly authorizing it.

B. Massachusetts Statutes (as Interpreted by the MA Supreme Judicial Court) Prohibit Private Lottery Enterprises

The Supreme Judicial Court has long ago settled on the interpretation of these statutes. A lottery is defined in the following manner:

- The word “lottery” signifies a scheme for distribution of prizes by chance.³
- The fact that skill as well as chance enters into a game does not prevent it from being classified as a lottery.⁴
- There are three elements in a lottery: (1) payment of price for (2) the possibility of winning a prize, depending upon (3) hazard or chance.⁵

DFS meets all of the requirements of the fundamental definition of gambling. It has *payment of price* (the player wagers money), *the possibility of winning a prize* (the player wins cash prizes), and *hazard or chance* (there must be at least enough variance that an unskilled or lesser skilled bettor can, at least occasionally, win the prize).

In deciding a case in which the gambling activity has a mix of skill and chance, Massachusetts applies the *predominance test*. The MA Supreme Judicial Court first set forth the elements of the predominance test in *Commonwealth v. Plissner* in 1936, stating “With reference to cases where both elements [skill and chance] are present, the rule generally stated is that if the element of chance rather than that of skill predominates, the game may be found to be a lottery.”⁶ Importantly, the Court further elaborated with a second, alternative test “that if the element of chance is present in such a manner as to thwart the exercise of skill or judgment in a game, there may be a lottery . . . This test is in harmony with the rule that a result is determined by chance where it is determined ‘by means making the result independent of the will of the manager of the game.’”⁷ The performances of individual athletes on any given day, which form the basis of DFS contests, are independent of the will of the manager of the game.

In 1944, in *Commonwealth v. Lake*, the SJC revisited the issue of applying the predominance test, noting that there are an infinite number of types of games that can involve both skill and chance, and that “in order to render the laws against lotteries effectual to combat the evils at which they are aimed, it has been found necessary to draw a compromise line between the two elements, with the result that by the weight of authority a game is now considered a lottery where the element of chance predominates and is not a lottery where the element of skill predominates.”⁸ The *Lake* Court interpreted the predominance test applying the following standard: “[I]n determining which element predominates, where the game is not one of pure skill or of pure chance, some courts have held, we think rightly, that it is permissible in appropriate instances to *look beyond the bare mechanics of the game itself* and to consider

³ *Commonwealth v. Mackay*, 177 Mass 345 (1901).

⁴ *Commonwealth v. Plissner*, 295 Mass 457 (1936).

⁵ See *Commonwealth v. Lake*, 317 Mass 264 (1944); *Commonwealth v. Frate*, 405 Mass 52 (1989).

⁶ See *Commonwealth v. Plissner*, 295 Mass 457, 464 (Mass. 1936).

⁷ *Id.* at 466.

⁸ *Commonwealth v. Lake*, 317 Mass. 264, 267 (Mass. 1944).

whether as actually played by the people who play it chance or skill is the prevailing factor.”⁹
The crux of the jury’s decision properly focused on:

1. Whether the players have any “appreciable degree of skill;”
2. Whether “to the great majority of players the game would be primarily a game of chance;” and
3. Whether “the appeal of the game to the public would be a gambling appeal, with all the evil consequences of a lottery.”¹⁰

DFS operators deceptively claim that DFS is “a game of skill” but the presence of skill is largely irrelevant. Even if one were to argue that a “skilled” DFS player is not gambling, then it would also be true that a lesser or unskilled player is, in fact, gambling. The very existence of skilled DFS players – playing with an edge and for a profit – depends on the presence of lesser skilled players willing to gamble at a disadvantage against them.

A recent analysis of DFS winners and losers concluded that the majority of DFS customers lack the skill to ever have success and thus are relying largely on chance to recoup some of their investment: “While any player might get lucky on the back of a handful of entries, over time nearly all of the prize money flows to a tiny elite equipped with elaborate statistical modeling and automated tools that can manage hundreds of entries at once and identify the weakest opponents.”¹¹ Another study demonstrates that DFS enterprises reap profits by relying on a huge pool of unskilled players who win a smaller percentage of the time (1.3%) than those who make sports bets legally in Las Vegas (4.5%) or even those who play completely randomly. As more fully explained below, for the great majority of DFS players, the game is primarily a game of chance.¹²

IV. “Daily Fantasy Sports” Profit Only By Attracting Unskilled Players

FanDuel, DraftKings and similar commercial sports gambling operators (*e.g.*, Victiv, Kountermove, BetAmerica, HotRoster, DailyMVP, FanNation, ScoreStreak, Tradesports) are not the result of a grassroots citizens movement demanding internet gambling. Rather, they are the end result of powerful financial interests seeking to exploit what they wrongly believe is an unregulated area of law at the expense of everyday people.¹³

DFS’s business model only works by attracting unskilled players – sometimes referred to as the “minnows” - to feed the skilled ones – known as the “sharks.” The “sharks” are the

⁹ *Id.* at 267-268 (emphasis added).

¹⁰ *Id.* at 268.

¹¹ Joshua Brustein & Ira Boudway, *You Aren’t Good Enough to Win Money Playing Daily Fantasy Football*, BLOOMBERG BUSINESSWEEK, September 10, 2015, <http://www.bloomberg.com/news/articles/2015-09-10/you-aren-t-good-enough-to-win-money-playing-daily-fantasy-football>.

¹² See Ed Miller & Daniel Ginger, *For Daily Sports Operators, the Curse of Too Much Skill*, STREET & SMITH’S SPORTS BUSINESS JOURNAL, July 27, 2015, <http://www.sportsbusinessdaily.com/Journal/Issues/2015/07/27/Opinion/From-the-Field-of-Fantasy-Sports.aspx>.

¹³ Sacha Feinman & Josh Israel, *The Hot New Form of Fantasy Sports Is Probably Addictive, Potentially Illegal And Completely Unregulated*, THINK PROGRESS (May 7, 2015, 8:31 AM), <http://thinkprogress.org/sports/2015/05/07/3648832/daily-fantasy-sports-gambling/>.

players whose successes are used in marketing to attract masses of “minnows” who place less sophisticated wagers in order to generate a substantial amount of winnings for the “sharks” and profits or “rake” for the game operators. These “sharks” are experts, designing and using highly sophisticated proprietary algorithms to win consistently.

“Minnows” are those who tend to be new sign-ups with limited experience and who lose their money. Finding new “fish” to feed to the “sharks” is the most important requirement for this enterprise to succeed over the next few years, and DFS operators’ unprecedented mass advertising campaigns and marketing deals with pro sports teams and leagues are a key to making it happen. The only real driver of growth and profit for these operations lies in finding as many new “minnows” as possible, without which, the model falls apart.¹⁴

A recent study¹⁵ breaks down the divide between the benefits the sharks reap versus the losses the minnows suffer:

- The top 11 players paid on average \$2 million in entry fees and profited \$135,000 each. They accounted for 17 percent of all entry fees. The winningest player in the study profited \$400,000 on \$3 million in entry fees.
- The rest of the top 1.3 percent of players paid on average \$9,100 in entry fees and profited \$2,400 each, for a 27 percent ROI, which is extremely impressive. These contestants accounted for 23 percent of all entry fees and 77 percent of all profits.
- 5 percent of players are the big fish; they lost \$1,100 on entry fees of \$3,600 on average.
- 80 percent of players were the minnows; they lost \$25 on entry fees of \$49 on average.

Even if the DFS companies try to disguise the nature of their business, their winningest customers (of whom there are only a few) are clear-eyed about what is taking place. As highly successful DFS players recently told the *Wall Street Journal*,

[T]he future of the industry is based on attracting casual fans. "If this is going to get huge, we need the guys who are going to buy in for \$20. They do it for fun," Wiggins says. *But if that happens, number-crunching sharks like Albertson will be lying in wait.* If casual players embrace daily fantasy in bigger numbers, Albertson says, "then we'll really be a printing press."¹⁶

V. Sports Gambling Operators Are Targeting Massachusetts Youth

A key demographic for internet sports gambling operators like FanDuel and DraftKings is youth. This should concern everyone because it is well-established that the younger children start gambling, the more likely it is they will become habitual gamblers and also problem

¹⁴ See Miller, *supra* note 12 (analyzing how DFS enterprises reap profits by relying on a huge pool of unskilled players who win a smaller percentage of the time (1.3%) than those who make sports bets legally in Las Vegas (4.5%) or play completely randomly); see also Brustein, *supra* note 11.

¹⁵ See Brustein, *supra* note 11.

¹⁶ Brad Regan, *A Fantasy Sports Wizard's Winning Formula*, THE WALL STREET JOURNAL, June 4, 2014, <http://online.wsj.com/articles/a-fantasy-sports-wizards-winning-formula-wsj-money-june-2014-1401893587>

gamblers.¹⁷ One report cites data from the Fantasy Sports Trade Association estimating that almost 10 million of the estimated 51.6 million fantasy sports players are under 18.¹⁸ One of the companies to launch its own sports gambling operation, Yahoo, has recruited thousands of minors to play free fantasy sports. The obvious business model is for Yahoo to convert these “for-free” players into “real-money” gamblers. Such youth is at risk for being lured into real-money gambling whether at Yahoo, other DFS gambling sites, or with other illegal gambling operations. This approach is directly akin to the unfair practice used for years by tobacco companies to get youth addicted to smoking by offering them free cigarettes.¹⁹

Internet gambling is especially addictive for youth who have grown up playing video games. By deceptively luring the Commonwealth’s youth into online gambling, these sports gambling operators are setting up an entire generation of young people to become problem gamblers by making exploitive forms of gambling omnipresent in everyday life, whether in their own homes or on the smartphones they carry with them everywhere. When that ubiquitous presence and availability are combined together with the intense passion many young people have for their favorite athletes and sports, and then blend in sophisticated targeted marketing, player data tracking and tendency exploitation, it is clear that DFS presents a dangerous, predatory mix to children in the short and longer term.

VI. Other States Have Recognized That DFS IS Gambling

Nevada is only the most recent state to recognize that DFS is “gambling.”²⁰ A statement released by the Nevada Gaming Control Board states “DFS involves wagering on the collective performance of individuals participating in sporting events, under current law, regulation and approvals, in order to lawfully expose DFS for play within the State of Nevada, a person must possess a license to operate a sports pool issued by the Nevada Gaming Commission.”²¹ Likewise, the Washington State Gambling Commission has specifically declared that fantasy sports constitutes gambling, declaring “[F]antasy sports have never been authorized as gambling activities in Washington and are illegal.”²² In addition, the states of Arizona and Louisiana treat DFS as gambling, and prohibit it because the operators are commercial businesses that receive a share of the amounts wagered.²³

¹⁷ NEW YORK COUNCIL ON PROBLEM GAMBLING - KNOW THE ODDS, THE DANGERS OF YOUTH GAMBLING ADDICTION, (May 2013), http://knowtheodds.org/wp-content/uploads/2013/05/NYCPCG_ebook_YouthGambling_052114.pdf

¹⁸ Robert DellaFave, *Identify Verification, Financial Checks At Yahoo Daily Fantasy Sports Lag Far Behind Industry Standards*, LEGAL SPORTS REPORT, July 29, 2015, <http://www.legalsportsreport.com/2405/problems-with-yahoo-dfs-platform/>

¹⁹ Ronald M. Davis & Leonard A Jason, *The Distribution Of Free Cigarette Samples To Minors*, 4(1) AM. J. PREV. MED. 21 (1988 Jan-Feb), <https://industrydocuments.library.ucsf.edu/documentstore/z/x/b/b/zxbb0142/zxbb0142.pdf>.

²⁰ Callum Borchers & Shelley Murphy, *Nevada Orders Fantasy Sports Sites To Shut Down*, BOSTON GLOBE, October 15, 2015, <https://www.bostonglobe.com/business/2015/10/15/nevada-orders-fantasy-sports-sites-shut-down/xgzblWGDtcwskI6mIsGvYI/story.html>.

²¹ A.G. Burnett, Chairman, Nevada Gaming Control Board, *Notice To Licensees, Legality of Offering Daily Fantasy Sports In Nevada*, (October 15, 2015), <http://gaming.nv.gov/modules/showdocument.aspx?documentid=10481>.

²² Bobby P. Meek, *Exploring the Fantasy World of Internet Gambling*, 18 (May 14, 2015), <https://uarkive.uark.edu/xmlui/bitstream/handle/10826/1161/MEEK-THESIS-2015.pdf?sequence=1>.

²³ Id.

Like these other states, Massachusetts has clearly delineated, through the courts and its statutes, the types of gambling that it deems appropriate and allowable under the current law (a state-run lottery, charitable bingo games, state-regulated casino establishments). The Commonwealth's prohibition on all other gambling contains no exception for DFS enterprises, yet they are proliferating to the point of ubiquity in Massachusetts.²⁴ The lack of any action to stop this illegal enterprise and either to tolerate it or wait until some future legislative action allows it sends the wrong message: that it is acceptable to engage in an illegal enterprise now and, if it generates enough revenue, wait until lobbyists and corporate interests change its legal status. We urge you to take affirmative action to clarify that this type of business enterprise is illegal in the Commonwealth.

²⁴ Bob Hohler, *An Uncertain Line Between Fantasy Sports, Gambling* (August 2, 2015), <http://www.bostonglobe.com/sports/2015/08/02/fantasy-games-draw-scrutiny-ban-sports-gambling-blurs/XxWUs2cwrveLvJe8bFt3wI/story.html>.



Magazine | F ATUR

How the Daily Fantasy Sports Industry Turns Fans Into Suckers

By JAY CASPIAN KANG JAN. 6, 2016

Full disclosure: I am a 36-year-old dude who bores easily, drinks I.P.A.s and wears sports-themed T-shirts, especially ones with faded, nostalgic logos that suggest better times. In my early 20s, I developed a gambling problem that I've since learned to spread out over a variety of low-stakes games — Scrabble, pitch-and-putt golf, my stock profile on ETrade. I watch somewhere between six and 20 hours of basketball per week. I try to keep up with the usual cultural things — documentaries about conflict in South Sudan, Netflix binge shows, memes — but whenever I find myself awake in the early morning and there is no email to answer and no news to track, I watch SportsCenter, or I scan the previous night's N.B.A. box scores to check up on Porzingis, or I read some dissertation on Johnny Cueto's unusual ability to hold runners on first base. It's not the most glamorous way to spend my time, but what can I do? My mind, at its most aimless, obsessively seeks out sports information. I am, in other words, the target demographic for the daily fantasy sports industry.

Since the start of this N.F.L. season, I have lost roughly \$1,900 on DraftKings and FanDuel, the two main proprietors of daily fantasy sports (D.F.S.). I play pretty much every night. This requires me to pick a team of players — whether baseball, basketball, football, hockey or soccer — each of whom have been assigned a dollar amount, and fit them all under a salary cap.

I base these lineups on reasonably educated hunches, something to the effect of: I'll play the Indiana Pacers point guard George Hill tonight, because he's going up against the New Orleans Pelicans, who have been a defensive train wreck this season, especially on the perimeter. Also, Monta Ellis, Hill's back-court partner, is sitting out, which means more of the usage load should fall to Hill. Sometimes, usually while walking the dog, I'll even sit down on a park bench and check to make sure that at least some of those facts are real. My bets range anywhere from \$3 to \$100. My losses in D.F.S. are not financially crippling, nor are they happening at a rate that should be cause for concern. But every gambler, whatever the size of the problem, wants to know that he or she has some chance of winning.

The ads, I admit, are what got me. For the first 10 months of 2015, DraftKings and FanDuel spent more than a combined \$200 million on advertising, a surge that peaked at the start of the football season, when a DraftKings ad ran seemingly every couple of minutes on television. In addition to the ads, many of which showed regular guys like me who had won, in the DraftKings parlance, "a shipload of money," there were DraftKings lounges in N.F.L. stadiums, FanDuel sidelines in N.B.A. arenas and daily fantasy advice segments in the sports sections of newspapers and all over ESPN, which, during the first weeks of the N.F.L. season, felt as if it had been converted into a nonstop publicity machine for DraftKings. As of August, both companies had billion-dollar valuations and promised weekly competitions with huge payouts and fast and easy withdrawals.

Initially, D.F.S. seemed harmless enough — on Sunday mornings, I would challenge a couple of my friends in California to head-to-head match-ups for \$50 and put a few \$20 entries into the million-dollar fantasy-football contest. Then, on Sunday, Sept. 27, Ethan Haskell, an employee at DraftKings, inadvertently published information that could have given him an edge over his competitors. That day, Haskell won \$350,000 in prizes on FanDuel. (DraftKings later concluded, in an internal review conducted by a former United States attorney, that Haskell obtained the information after the

deadline for submitting his lineup in the contest and couldn't use it for profit.) Haskell's accidental disclosure and subsequent bonanza caught the attention of several media outlets, including The Times, leading to a volley of articles and columns that placed the operations of daily fantasy sports under close scrutiny.

In the three months that have passed since Haskell's post, DraftKings and FanDuel have been reeling. In October, Nevada joined Arizona, Iowa, Louisiana, Montana and Washington on the list of states where DraftKings and FanDuel cannot be played. On Nov. 10, Attorney General Eric Schneiderman of New York issued cease-and-desist letters to the two companies, and later filed lawsuits against the two companies. In response, a judge ordered them to stop accepting bets in the state. (The judge's order has now been stayed, and both companies continue to do business in New York. Last week, Schneiderman asked a judge to order DraftKings and FanDuel to reimburse the money New York State residents have lost on the site.) On Dec. 23, Lisa Madigan, attorney general for the state of Illinois, released an opinion stating that daily fantasy games "clearly constitutes gambling." (The two companies have argued that D.F.S. is a game of skill.) A chill has hit the D.F.S. industry. Prize pools have been steadily declining, and in the eyes of the public and much of the media, D.F.S. has become synonymous with online poker or offshore sports gambling — an industry, in other words, that deserves neither protection nor sympathy.

Since the scandal broke, I have traveled to D.F.S. events, spent dozens of hours playing on DraftKings and FanDuel and talked to players and industry media figures. I initially intended to write an article about the bro culture that had sprouted up around D.F.S., which, from a distance, reminded me of the sweaty, sardonic camaraderie you typically see at high-stakes poker events. At the time, the crusade against D.F.S. felt a few degrees too hot — DraftKings and FanDuel struck me as obviously gambling sites, but the game itself felt sort of like homework. You research players. You build a spreadsheet. You project data and enter a team. You watch the team either fulfill or fall short of your projections. The next day, you start over again. The ruinous thrill of other forms of gambling — sports betting, blackjack, poker — just wasn't there.

Instead, I came across a different sort of problem: a rapacious ecosystem in which high-volume gamblers, often aided by computer scripts and optimization software that allow players to submit hundreds or even thousands of lineups at a time, repeatedly take advantage of new players, who, after watching an ad, deposit some money on DraftKings and FanDuel and start betting. Both companies mostly looked the other way. And, when evidence of the competitive advantages enjoyed by these high-volume players became too overwhelming for the companies to ignore, DraftKings and FanDuel enacted rules that in the end are likely to protect the high-volume players rather than regulate them. In any case, a stricter ban on computer scripting would have been functionally impossible — because, as a representative of FanDuel told me, D.F.S. companies cannot reliably detect it on their sites.

Each company took advantage of language in a federal law that allowed them to plug directly into two huge, overlapping populations — fantasy sports players and gamblers. Each company was able to raise hundreds of millions of dollars in venture capital funding and sponsorships, all of which created pressure to increase user bases, which, in turn, led to an advertising deluge this past fall. It takes years of testing, regulation and outside oversight to create a reliable betting market. But DraftKings and FanDuel rose to prominence — and now, seemingly, have become derailed — in the course of a single N.F.L. regular season.

The betting economy that has been created is highly unstable and corrupt. One critic I spoke to was Gabriel Harber, a well-known D.F.S. podcaster and writer who has worked in the D.F.S. industry since its inception and goes by the handle CrazyGabey. He has come forward to discuss the rampant exploitation in D.F.S.'s betting economy.

“The idea that these sites exist so that regular guys can make a lot of money playing daily fantasy sports is a lie,” Harber told me. “FanDuel and DraftKings are optimized for power players to rape and pillage regular players

over and over again.”

The daily fantasy industry grew out of the rubble of online poker, which, like D.F.S., offered easy sign-ups, huge payouts and the allure of life without a 9-to-5. Then, in 2006, Congress passed the Unlawful Internet Gambling Enforcement Act (U.I.G.E.A.). Several large online poker sites, most notably Party Poker, closed their American operations, and although it was still possible to play online poker, the whole industry had been pushed to the peripheries of legality. When the United States attorney’s office effectively shut down Internet poker on April 15, 2011, a day known in gambling circles as Black Friday, nobody was all that surprised. Online poker, everyone reasoned, had it coming. Curiously, the bill included an exception for fantasy sports.

About a year after the passage of the U.I.G.E.A., Chris Fargis, a poker pro, wrote a post on his personal blog that explained a new business venture he had started called Instant Fantasy Sports. The idea, Fargis wrote, was to “take the time frame of season-long fantasy sports leagues and shrink it. ... The site will look familiar to many of you who are reading this blog because it’s set up a lot like an online poker site.”

“Given the current state of online gaming, the next logical question is, ‘Is this site legal?’” Fargis continued. “Happily, I’m able to tell you that fantasy sports games are explicitly protected by the U.I.G.E.A. (the same law that has given online poker so much trouble in the U.S.A.). Instant Fantasy Sports is 100 percent legal in the U.S.A. and Canada.”

The D.F.S. industry is still inextricably tied up in those poker roots. Players talk about “tilting” because of “variance,” especially when a “fish” puts in a “donkey” lineup that ends up going crazy. (In regular American English, this translates roughly to “I am really mad because some idiot punched in some random lineup that ended up catching every conceivable break and beating me.”) And it’s not only the former poker players who talk like this — when I first spoke to Nigel Eccles, the C.E.O. and founder of FanDuel, he

referred to the different denominations of D.F.S. games as “tables,” in the same way a pit boss at a casino might point you to the \$10 blackjack or the \$25 baccarat tables. Rotogrinders, by far the biggest site for D.F.S. discussion, commentary and content, was founded in part by Cal Spears, a former poker player from Tennessee who used to run an online forum for poker strategy called PocketFives. Jonathan Aguiar, DraftKings’ director of V.I.P. services, is also a former poker player known as FatalError. Fargis, too, now works at DraftKings.

Over the next few years, dozens of other gaming entrepreneurs started their own daily fantasy companies. There were DraftDay and DraftStreet, along with pretty much every possible portmanteau of “draft,” “fan” and “fantasy.” The sites made no attempts to hide their connection to poker. They weren’t big enough to warrant attention from law enforcement or regulators. Many of the contestants were career game players who all knew one another from the poker circuit. Prize pools rarely rose much higher than \$10,000. The companies failed for all the obvious reasons that companies run by gamblers usually fail.

Then, in March 2009, Nigel Eccles, a wiry, youthful entrepreneur from Northern Ireland and an alumnus of the management consulting firm McKinsey, started FanDuel. He had never played fantasy sports before. In Britain, Eccles, who holds an advanced degree in statistics, had started a company called Hubdub that hosted prediction markets on news stories. Readers who had just finished an article on, say, Hillary Clinton’s chances in the New Hampshire primary could then put a wager on it using virtual currency. According to Eccles, Hubdub failed because it “didn’t have a business model.”

But in the burgeoning D.F.S. scene, Eccles saw a completely legal opportunity to make a huge amount of money. Initially, his investors weren’t so sure. They believed D.F.S. was a niche product that would appeal only to a hard-core audience. But at FanDuel’s first live final in December 2010, where all the qualifying players met up in Las Vegas, Eccles realized that the investors

were wrong. The players who had qualified weren't all oddball quants and gamblers. "They were all mainstream sports fans," Eccles said. "That was the point where I was like, O.K., this is not niche. If we can convert a couple hundred, even a few thousand players, then we can probably convert millions of players. There's no difference between these players and the tens of millions of fantasy sports fans out there."

Eccles often talks about how FanDuel cultivates a sense of community among fans. There's some truth to what he says. D.F.S. can be a way to connect with people who live far away (I certainly used it that way), and, like Words with Friends or any card game, it can be a fun, low-investment excuse to talk smack with your friends. But on the whole, Fargis, in his introductory blog post, had it spot on: D.F.S. is the bastard child of online poker, with its dizzying prize pools, fast action and, perhaps most important, the dream of an easy living. The only difference is that poker, despite its seedy glamour, is associated with casinos and shady underground games. Fantasy sports, by contrast, evokes visions of dads sitting in basements with their college friends, yelling out the names of their favorite athletes.

As the horde of D.F.S. start-ups clawed their way out of the muck of online poker, only the sites with the biggest prize pools could survive. A new player choosing between a site promising a \$500,000 first prize and one promising \$100,000 will naturally pick the bigger number. Until recently, FanDuel offered the biggest payouts in the industry, including the first \$1 million prize, in December 2013. DraftKings, which made its debut in 2012, tried to outdo FanDuel, ramping up its prizes.

Here's how it works: Let's say you run D.F.S. Site A, and D.F.S Site B has just announced a weekly megacontest in which first place will take home \$1 million. Now you have to find a way to host a comparable contest, or all your customers will flee to Site B to chase that seven-figure jackpot. The problem is that you have only 25,000 users, and the most you can charge them to enter is \$20 per game (anything higher is prohibitively expensive). And you'll need \$2

million or even \$3 million in a prize pool if first prize is valued at \$1 million (remember, you still have to pay second place, third place and beyond). So you need to somehow quadruple the number of entries. But how? You're already paying high cost-per-acquisition fees to sites like RotoGrinders, which charge, according to Harber, anywhere between \$100 and \$200 per person they refer to your site, and you've already put your logo on every bus, trash can and ESPN screaming-heads show out there. You've also kicked in some of your own money (known as "overlay") to spice up the pot.

The solution is simple: You let each contestant enter hundreds of times. But even given this freedom, a majority of people will enter only a few more times, which will help but probably won't get you all you need. If, however, you can attract a few high rollers who are willing to book several hundred or even several thousand entries apiece, the path to the \$1 million first prize becomes a lot more manageable. And as long as you can make sure those players keep pouring in their thousands of entries, you can keep posting the \$1 million first prize all over your ads. (Each company has instituted caps on the number of entries per player, but more enterprising high rollers have found ways around this.)

Now, however, you have an even bigger problem: You need the high roller more than he needs you. You need his entry fees to gas up your prize pools, and you also need the roughly 10 percent service fee he pays for the hundreds of thousands of dollars he bets on the site. In big casinos, high rollers have been known to negotiate rules with the house. If, for example, a whale from China wants to play a variant of blackjack in which the dealer has to hit on soft 17, the casino, especially if it is struggling, will sometimes adjust to please the whale.

D.F.S. high rollers similarly come with demands, and because there's no powerful regulatory body involved, DraftKings and FanDuel have been mostly free to set the parameters of play, which, as it turns out, is near anarchy, especially for the D.F.S. elite. High rollers want to be able to use third-party

computer scripts that will allow them to enter thousands of lineups at once, something that your average player cannot do. High rollers can gain access into D.F.S.'s inner circle, in which they get to be on first-name, texting basis with executives and employees at DraftKings and FanDuel. They can operate under the cover of plausible deniability — if other players complain that the high roller has been using tools that destroy competitive balance, he might expect the sites to stick up for him.

The difference between the D.F.S. high roller and the blackjack whale, of course, is that the whale is trying to take millions from a multinational casino corporation and not from the honeymooners from Fresno who are betting away at the \$5 tables.

“Bumhunting” is a word that comes from the poker world. It means seeking out an inexperienced player and mercilessly exploiting him for all he's worth. Bumhunters are pariahs because they turn what can be a cerebral, competitive game into its most cynical iteration, and, in the process, discourage that new player from ever coming back. But poker has built-in safeguards against rampant bumhunting — new players tend to play at lower limits, which make it harder for bumhunters to take in huge profits. The bumhunter's dream is to play thousands of games of poker a day against a never-ending line of fresh, inexperienced newbies. He falls short of that lofty goal because he has to actually bet, raise or fold his hands — he can play multiple tables at once, but he cannot fully automate his bumhunting.

In the game lobbies of DraftKings and FanDuel, however, sharks are free to flood the marketplace with thousands of entries every day, luring inexperienced, bad players into games in which they are at a sizable disadvantage. The imbalanced winnings in D.F.S. have been an open secret since this past September, when Bloomberg Businessweek published an exposé on the habits of high-volume players. The numbers are damning. According to DraftKings data obtained by the New York State attorney general's office, between 2013 and 2014, 89.3 percent of players had a negative return on

investment. A recent McKinsey study showed that in the first half of the 2015 Major League Baseball season, 91 percent of the prize money was won by a mere 1.3 percent of the players.

In their escalating legal battles, DraftKings and FanDuel have used these statistics to bolster their argument that D.F.S. is a game of skill, not of chance: How could a contest in which the same people win nearly all the time not be the ultimate test of skill? DraftKings and FanDuel have each tried to prove that the act of projecting player performance and selecting a lineup takes more thought and expertise than, say, playing a poker hand. In paperwork filed on Dec. 24 in Illinois, the latest state to question the legality of D.F.S. lawyers wrote that D.F.S. is “like chess, Scrabble or crossword-puzzle tournaments in that they do not test athletic skill, but instead mental prowess.” They went on to argue that “the success of a contest is not a matter of luck any more than was the success of the architects of the 1985 Super Bowl-winning Chicago Bears.”

While it’s true that some of the skill required to win in DraftKings and FanDuel lies in statistical modeling, general sports knowledge and due diligence, it’s also true that it’s nearly impossible to make a net positive return on investment without bumhunting. You have to win roughly 53 percent of your bets to beat the “rake,” another poker term for the roughly 10 percent service fee DraftKings and FanDuel take out of each wager. The most efficient way to hit that number is to play as many bad opponents as possible.

For the 17 weeks I played D.F.S., whether at a \$5 entry fee or for \$100, I routinely was matched up against top players. But unless I examined win rates and researched the strengths and weaknesses of my opponents, I would never have known that I was being repeatedly bumhunted by high-volume players.

On Dec. 16, for example, I entered three \$20 N.B.A. head-to-head contests on DraftKings. My opponents were gunz4hire, Dinkpiece and Nadia4Fashion. Gunz4hire was then ranked 47th on the Rotogrinders players ranking and is generally considered one of the better players in the world. Dinkpiece, who was

20th on that same list, is the alias for Drew Dinkmeyer, a former stock trader whose winnings in D.F.S. have been so well publicized that he has his own Wall Street Journal stipple drawing.

On Christmas, the biggest day in the N.B.A.'s regular season, I entered 17 head-to-head contests on DraftKings for prices between \$1 and \$20. Once again, I was matched up against Dinkpiece and gunz4hire, along with a handful of other professionals.

The next day, I entered three more \$20 N.B.A. contests. I was able to avoid Dinkpiece and gunz4hire, but found myself in a \$20 head-to-head against Birdwings, the 2nd-ranked player in the Rotogrinders rankings.

In three days, I played three of the best D.F.S. players in the world.

In December, I traveled to the FanDuel World Fantasy Football Championships in San Diego. The festivities, which would end with one player winning a staggering \$3 million first prize, included an obstacle course in which Joe Montana and Dan Marino threw footballs at the qualifiers, as well as an extremely drunken couple in Patriots jerseys (those of Tom Brady and Rob Gronkowski, of course) who kept screaming, "We're [expletive] rich!" While the championships raged on, I asked Eccles about the gross imbalance of winners detailed in the McKinsey report. He said that baseball was not an accurate marker for how the site worked. The majority of D.F.S. novices only come to play football, and their sheer numbers and the natural variance in fantasy football distributes the money more equally. He admitted the Sunday Million, FanDuel's most-hyped N.F.L. tournament, was extremely difficult for the average player to win. He suggested, instead, that new players enroll in beginner leagues, which are open exclusively to players who have entered only a few contests, and in 50/50s, where several, even thousands of players pool their money together and reward the money to the players who finish in the top half, and head-to-head competitions, in which two players play one another, winner-take-all.

On Sunday, Dec. 27, I took Eccles's advice and entered myself into 20 separate N.F.L. head-to-head contests with buy-ins ranging from \$2 to \$20. This time, I drew Mtom347, a high-volume player ranked 42 on the Rotogrinders leader board; David Potts, winner of the 2014 FanDuel Daily Fantasy Baseball Championship; and TwoSHAE, one of the 25 top ranked daily fantasy football players in the world.

On Dec. 28, I had a phone conversation with Justine Sacco, FanDuel's director of communications. She told me that I must have misunderstood Eccles and that he was probably referring only to 50-50 match-ups, in which a large group of people enter a pool and roughly the top half wins the bottom half's money, and not head to heads, which were admittedly tough to beat. The next day, I entered an N.B.A. 50-50, once again for \$20.

There were 3,638 total entries in the 50-50 that day. Roughly two-thirds of these came from players who entered multiple lineups. Here is a small selection of those players and the number of lineups they entered:

Maxdalury, generally considered the top player in the world: 100 lineups.

Birdwings, the No. 2-rated player on the RotoGrinders rankings: 22 lineups.

rayofhope, the screen name for Cory Albertson, a former poker pro, widely regarded as one of the best: 40 lineups.

Kobe4MVP, the screen name for Eytan Jankowitz, also one of the best players in the world: 100 lineups.

Youdacao, the No. 6 player on the RotoGrinders rankings: 100 lineups.

Notorious, a regular contributor to the Rotogrinders site and the No. 24 player on their rankings: 40 lineups.

Dinkpiece, my nemesis from the last two times: five lineups

If we are going to talk about games of skill and the legal protection they deserve, we should acknowledge that much of the skill in D.F.S. lies in bumhunting. It's why maxdalury and Birdwings are slumming it in a \$20 50-50 competition with me. It's how the top players ensure their profitability. In D.F.S., as in poker, the easiest way to win money is to turn a sucker into an A.T.M.

Gabe Harber is an energetic, generously bearded basketball enthusiast from Columbus, Ohio. He started writing fantasy-sports advice columns in 2010, shortly after the creation of FanDuel. His professional life grew alongside the D.F.S. industry, which, as of today, has dozens of well-trafficked websites that produce a nonstop stream of content. Harber, like so many other D.F.S. experts, ultimately found himself at Rotogrinders — the ESPN of D.F.S. — where he became one of the site's staples, hosting a regular podcast and a daily livestream show. In the small and tightly knit D.F.S. community, nearly every big-name player has a "content site," which provides D.F.S. advice and analytics, or contributes to sites like Rotogrinders. Those sites generally have cost-per-acquisition agreements with DraftKings and FanDuel. Power players, broadcasters, content providers and DraftKings and FanDuel employees all overlap — and for the last five years, Harber has been close to the center of it all.

Over the course of extensive phone conversations and correspondence this fall and winter, Harber explained that he had begun to turn against DraftKings and FanDuel when the companies were unresponsive to complaints from the D.F.S. community about the prevalence of scripting. Last March, when maxdalury, a player named Saahil Sud, used a script that enabled him to adjust most of his 400 lineups in less than an hour, the community took notice. Sud was reacting to the breaking news that Channing Frye, usually a reserve forward for the Orlando Magic, would be starting in place of the injured Nikola Vucevic. Sud won first, third, fourth and seventh place in a big DraftKings competition that night and took home hundreds of thousands of dollars. The speed with which he made the adjustments caused many within the D.F.S.

community to protest. How could they be reasonably expected to compete if one of the players was using a tool that allowed him to both blanket the field with entries and avoid the work and hassle of manually adjusting his lineups to reflect late-breaking news? What's worse, these scripts were not supposed to be used under DraftKing's terms of service.

In July, after months of review, instead of banning scripting, or at least forcefully regulating it, as the D.F.S. community would have liked, both DraftKings and FanDuel announced that they would change their policies to permit some scripting. The founder of DraftKings, Matt Kalish, who declined to comment for this article, told ESPN's David Purdum in July that the decision had been made to "increase and improve the experience for a couple of users, who I think were experiencing a very poor usability of the site." In other words, DraftKings had decided to accommodate players who wanted to modify the site to their own specifications. FanDuel, for its part, clarified its position on the practice and asked players to send in their scripts for "approval." This, by definition, is a game played by different rules.

Harber explained how his frustration with DraftKings and FanDuel reached a breaking point. "People may wonder why I'm coming forward now, and it's a good question," Harber wrote in one of two emailed statements to me. "My focus as a broadcaster in this industry for the last four years has been primarily as an ambassador to the community. The daily fantasy community has had very real concerns about competitive imbalances at FanDuel and DraftKings for quite some time now. I have publicly submitted simple questions in writing to both companies on numerous occasions, and both companies have completely ignored the community's concerns about the use of automated processes, sniping, multiaccounting and their own terms of service."

"Your average Joe sees a commercial for daily fantasy sports, signs up, plays and loses," Harber wrote. "He has no idea his games are being sniped by professional power users with access to automated processes and optimization

software. He has no idea that the large-field tournament he's playing in features power users with hundreds of unique lineups, all optimized using third-party software. In truth, D.F.S. is more like the stock market, with athletes instead of commodities. No new player attempting to trade stocks has any shot at success without a sizable amount of training.”

Harber continued: “I believe the major sites are fully aware of these competitive issues, yet they continue to do nothing about them because of the high amount of rake the power users are bringing in for them. As long as they can spend advertising money to bring fresh meat to the table, the power users will eat up the new players extremely fast by using their competitive advantages. No one is saying that better players should not win money off worse players, but it should not be at this rate and it should not be with misleading advertisements that prey on consumer confidence. Everyone does not have an equal chance, and everyone is not playing on the same field.

“The major daily fantasy sites do not want attention drawn to these competitive issues because they are also afraid that doing so will increase the likelihood of negative legal consequences for them. Their rationale is that if the various attorneys general and prosecutors were to become knowledgeable about these competitive issues, they would be much more likely to outright ban daily fantasy.”

DraftKings and FanDuel have instituted rules to address some of these problems — each site has sections dedicated to new players, and FanDuel, at least, says that all scripts must be approved by the company. (DraftKings’ terms of use permits “limited use of scripts” and prompts users to email them for details.) But those measures only protect players from the worst excesses of bumhunting behavior.

I asked Justine Sacco why FanDuel allowed scripting at all. She told me: “You want to allow people on the site to make their experience meaningfully better. So the idea that big players can’t bring in features to improve their time,

honestly — it feels a bit Orwellian.”

Sacco emphasized that any script that was deemed “anticompetitive” would immediately be banned, and that the company had caught and banned players for using scripts in the past, but she declined to release any specific names. She also estimated that FanDuel had approved approximately 30 scripts over all and that some of these were benign, voluntary devices used by sites like Rotogrinders to track the wins of their players. When asked if part of FanDuel’s decision to allow scripts was based on a desire to keep players from taking more of their business to DraftKings, Sacco said, “You do have to take that into account — if someone is playing hundreds of thousands of dollars and comes and says, ‘I have some ideas that would help me keep doing what I’m doing,’ only a bad business would not take that into consideration.”

Sacco also said that one reason FanDuel allowed some scripting was that the company could not completely stop it. This confirms the suspicions of many in the D.F.S. community who believe that DraftKings and FanDuel do not regulate scripts because they have become so sophisticated that the companies simply don’t know how to detect or disable all of them. (DraftKings, when asked for comment, said these “assumptions” were “inaccurate.”) When I asked Justin Park, maxdalury’s business partner at RotoQL, a site that provides third-party tools, including a scripting program that plugs straight into the DraftKings interface, if he had asked DraftKings for permission to alter their site, he said he didn’t know. He later remembered an email exchange with DraftKings. DraftKings could not confirm this.

This amounts to gaming chaos — nobody really knows what the next guy might be doing, and everyone who should be making decisions that ensure fairness is afraid to punish power players for their indiscretions. There is no gambling hole in America, whether Atlantic City or Las Vegas or a riverboat in the Mississippi, that could put out a game like DraftKings or FanDuel without running straight into the state gaming commission.

D.F.S., the game itself, is not inherently crooked. Most of the benefits praised by its enthusiasts — the ease of play, the camaraderie among fans, the challenge of solving what amounts to a math puzzle — are real. It does take skill to parse game film, diligently follow the news and interpret the thousands of bits of sports information that are generated each night. If a problem gambler at the poker rooms I frequent in New York City were to hire a programmer and flood the D.F.S. market with his lineups, he would almost certainly hemorrhage money.

Knowledge about sports will always be the main sorting mechanism for the types of dudes (FanDuel reports that 95 percent of its contestants are male) who play games like D.F.S., and there's certainly nothing wrong — especially morally wrong — with putting some money on it, but there is a point where rampant bumhunting turns a gambling economy into a predatory market.

There is, in theory, a version of D.F.S. that could work. All that's required is a transparent marketplace in which a player can reasonably expect to enter a head-to-head or 50-50 or even one of the big-money tournaments without going up against hundreds of lineups generated by professional gamblers who have been lying in wait for him.

During my many conversations with Harber, we would often find ourselves talking about my D.F.S. match-ups for the night. Both of us love the N.B.A. above all things, and we would invariably start talking about DeMarcus Cousins and his sad six years in the N.B.A., or Gerald Green's shot volume, or whether we could trust Tony Parker to put up fantasy points anymore. These, I believe, are the sorts of moments the best of the D.F.S. community wants to promote — fantasy sports is essentially a way to turn the usual sports arguments into a game.

At the start of the N.B.A. season, a couple of friends and I started a friendly league on DraftKings. Every night, we draft teams, watch the points accumulate and make fun of one another for our picks. On the first of each

month, we pay one another what we owe. One of these friends creates N.B.A. player performance models. They help him escape the cynical demands of his job as a corporate lawyer. To date, I am down \$350 to him.

“Yes, yes, yes,” Harber said when I told him about this league. “That’s how it’s supposed to be.”

Correction: January 8, 2016

An earlier version of this article referred incompletely to action against DraftKings and FanDuel. It was a judge’s order telling the companies to stop accepting wagers — not an order by the New York attorney general — that was stayed on appeal.

Jay Caspian Kang is a contributing writer for the magazine. He last wrote a profile of Kareem Abdul-Jabbar.