

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

07 03 2017
587325

In the Matter of

DraftKings, Inc.
a corporation,
and
FanDuel Limited
a corporation.

Docket No. 9375

PUBLIC VERSION

ORIGINAL

ANSWER AND DEFENSES OF RESPONDENT DRAFTKINGS, INC.

Respondent DraftKings Inc. (“DraftKings”), by and through its undersigned counsel, responds below to the Federal Trade Commission’s (“Commission”) Administrative Complaint (“Complaint”) dated June 19, 2017. At the outset, DraftKings strongly contends that the underlying premises of the Complaint – that the Merger Agreement between DraftKings and FanDuel Limited (“FanDuel”) constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, and that the Merger, if consummated, would violate Section 7 of the Clayton Act, as amended – reflect an unnecessarily rigid and uninformed application of the antitrust laws to an underdeveloped, nascent industry, and largely ignore rigorous economic analysis that has revealed consistently, no matter which way it is analyzed, that prices are not likely to increase as a result of the transaction. The Commission’s challenge to the proposed transaction is not rooted in what has long been emphasized by the Horizontal Merger Guidelines,

which is that the antitrust analysis of any given transaction should favor economic analysis of likely competitive effects and harm over simple market structure wherever possible.

To the extent the Complaint's introductory statement requires a response, DraftKings denies the allegations alleged therein.

RESPONSE TO SPECIFIC ALLEGATIONS

I. NATURE OF THE CASE

1. DraftKings denies the allegations contained in Paragraph 1 of the Complaint, except DraftKings admits that (a) it competes with many fantasy sports, sports entertainment, and other gaming and recreation companies; and (b) it has invested hundreds of millions of dollars in efforts to drive growth, awareness and trust in its product offerings.

2. DraftKings denies the allegations contained in Paragraph 2 of the Complaint, except that DraftKings admits that (a) it is striving toward profitability; (b) there were significant legal and regulatory issues that arose across multiple states in 2015 and 2016, which continue today and into the foreseeable future; and (c) the merger will provide significant benefits to consumers.

3. DraftKings denies the allegations contained in Paragraph 3 of the Complaint and avers that the Commission's selective quotation of unidentified written materials or communications, offered without dates or context, is misleading as framed. DraftKings respectfully refers the Commission to the quoted documents, noting the dates on which these documents were created, for a complete and accurate description of their contents.

II. BACKGROUND

A. Jurisdiction

4. DraftKings admits the facts contained in Paragraph 4 of the Complaint, except to the extent that Paragraph 4 contains legal conclusions to which no response is required.

5. DraftKings admits the facts contained in Paragraph 5 of the Complaint, except to the extent that Paragraph 5 contains legal conclusions to which no response is required.

B. Respondents

6. Upon information and belief, DraftKings believes it is the country's largest Daily Fantasy Sports ("DFS") provider in terms of entry fees and revenues. DraftKings otherwise admits the facts contained in Paragraph 6 of the Complaint.

7. DraftKings lacks the knowledge or information to respond to allegations in Paragraph 7 of the Complaint concerning the corporate structure and financial performance of FanDuel.

C. The Merger

8. DraftKings admits the allegations contained in Paragraph 8 of the Complaint.

III. DFS INDUSTRY BACKGROUND

9. DraftKings denies the allegations contained in Paragraph 9 of the Complaint, except that DraftKings admits the allegations contained in Paragraph 9 of the Complaint only to the extent they describe certain types of fantasy sports.

10. DraftKings denies the allegations contained in Paragraph 10 of the Complaint, except that DraftKings admits that fantasy sports include, but are not limited to, both season-long fantasy sports (“SLFS”) and DFS, but specifically denies the characterization that SLFS and DFS are distinct.

11. DraftKings denies the allegations contained in Paragraph 11 of the Complaint to the extent they suggest that all DFS contests are short-duration.

12. DraftKings denies the allegations contained in Paragraph 12 of the Complaint, except that on information and belief, DraftKings admits the allegations contained in Paragraph 12 of the Complaint, to the extent they describe many of the contests offered by DraftKings and FanDuel.

13. DraftKings denies the allegations contained in Paragraph 13 of the Complaint to the extent they purport to describe all DFS contests.

14. DraftKings denies the allegations to the extent they characterize all DFS products as the same, except that DraftKings admits that a contest on DraftKings’s platform begins when the first real-life sporting event on which the contest is based commences, and DraftKings admits the remaining allegations contained in Paragraph 14 of the Complaint only as the allegations relate to DraftKings’s contests.

15. DraftKings denies the allegations in Paragraph 15 of the Complaint given the ambiguity of the term “regularly,” except that upon information and belief, DraftKings admits that DFS providers offer a variety of contests at a wide range of sizes.

16. DraftKings denies the allegations contained in Paragraph 16 of the Complaint, and specifically denies that (a) the commission is the only appropriate measure of “price” for users playing DFS contests and (b) DraftKings generates revenue from each contest by retaining a portion of the entry fees as its commission, except that DraftKings admits that some DFS contests require users to pay an entry fee for each lineup submitted and involve the potential to win cash prizes.

17. DraftKings denies the allegations contained in Paragraph 17 of the Complaint, except to the extent that Paragraph 17 describes the way one calculation can theoretically be made to determine the maximum commission rate of certain types of contests. Paragraph 17 contains general legal conclusions relating to unspecified jurisdictions to which no response is required.

18. DraftKings denies the allegations contained in Paragraph 18 of the Complaint, except that DraftKings admits that adjusting the size of the prize pool, the entry fee amount, or the maximum number of entries under certain circumstances may change a contest’s potential commission, but not necessarily aggregate commissions. DraftKings avers that it lacks the knowledge or information to respond to allegations in Paragraph 18 concerning all DFS providers.

19. DraftKings denies the allegations contained in Paragraph 19 of the Complaint, except that it admits that (a) it has, from time to time, offered different types of contests; (b) not all of its contests attract the maximum number of entries; and (c) if one of its contests has a guaranteed prize pool that prize pool will be paid out regardless of the number of entries in that

contest. DraftKings avers that it lacks the knowledge or information to respond to allegations in Paragraph 19 concerning all DFS providers.

20. DraftKings avers that it lacks the knowledge or information to respond to allegations concerning all DFS providers in Paragraph 20 of the Complaint.

21. DraftKings denies the allegations contained in Paragraph 20 of the Complaint.

25. DraftKings denies the allegations contained in Paragraph 25 of the Complaint,

37. DraftKings denies the allegations contained in Paragraph 37 of the Complaint, except that it admits that it has offered different types of contests.

38. DraftKings denies the allegations contained in Paragraph 38 of the Complaint, except that it admits that (a) DFS users also play SLFS; (b) SLFS users play DFS; (c) DFS users can and do switch to SLFS or other DFS substitutes; and (d) commissions have increased on certain DraftKings contests in 2015 and 2016.

B. Purported Relevant Geographic Market

39. DraftKings avers that Paragraph 39 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, DraftKings denies the allegations in Paragraph 39.

40. DraftKings takes no position on the characterization of “regulations” absent a specific allegation concerning a particular jurisdiction and therefore denies the allegations in Paragraph 40 of the Complaint. DraftKings avers that it lacks the knowledge and information to respond to allegations regarding the operations of other DFS providers. DraftKings further avers that Paragraph 40 contains legal conclusions to which no response is required.

41. DraftKings denies the allegations in Paragraph 41 of the Complaint given the ambiguity of the term “generally.” DraftKings further avers that it lacks the knowledge and information to respond to allegations regarding the operations of other DFS providers.

42. DraftKings denies the allegations in Paragraph 42, except that it admits it competes with many fantasy sports, sports entertainment, and other gaming and recreation

companies. DraftKings avers that Paragraph 42 of the Complaint contains legal conclusions to which no response is required.

43. DraftKings denies the allegations in Paragraph 43, except that DraftKings admits that it competes with many fantasy sports, sports entertainment, and other gaming and recreation companies, wherever they are located. DraftKings further avers that to the extent that Paragraph 43 of the Complaint contains legal conclusions, no response is required.

V. PURPORTED MARKET STRUCTURE AND THE MERGER'S PURPORTED PRESUMPTIVE ILLEGALITY

44. DraftKings denies the allegations contained in Paragraph 44 of the Complaint given the ambiguity of the phrase “by far.” DraftKings further avers that it lacks the knowledge and information to form a belief regarding the truth of the allegation in Paragraph 44 as it pertains to FanDuel.

45. DraftKings denies the allegations contained in Paragraph 45 and avers that the Commission’s selective quotation of unidentified written materials or communications, offered without context, is misleading as framed and DraftKings respectfully refers the Court to the quoted documents. DraftKings avers that it lacks the knowledge and information to respond to allegations concerning FanDuel’s investor relations.

46. DraftKings avers that Paragraph 46 of the Complaint contains legal conclusions, to which no response is required.

47. DraftKings denies the allegations contained in Paragraph 47 of the Complaint.

48.

54. DraftKings denies the allegations contained in Paragraph 54 of the Complaint, specifically including the characterization of DFS as an “industry,” except that DraftKings admits that (a) in 2016, its products faced regulatory challenges; (b) the DFS industry’s growth relies on outside investors to provide capital; and (c) it competes with many fantasy sports, sports entertainment, and other gaming and recreation companies.

62. DraftKings denies the allegations contained in Paragraph 62 of the Complaint, except that it admits that at certain points in time it has offered cash bonuses to certain users.

63. DraftKings denies the allegations contained in Paragraph 63 of the Complaint, and further avers that the Commission's selective quotation of unidentified written materials or communications, offered without context, is misleading as framed and DraftKings respectfully refers the Court to the quoted documents.

64. DraftKings denies the allegations contained in Paragraph 64 of the Complaint, except that DraftKings admits that it reduced its spending on acquisition and retention bonuses in 2016 as compared to 2015. DraftKings further avers that the Commission's selective quotation of unidentified written materials or communications, offered without context, is misleading as framed and DraftKings respectfully refers the Court to the quoted documents.

65. DraftKings denies the allegations contained in Paragraph 65 of the Complaint.

66. DraftKings denies the allegations contained in Paragraph 66 of the Complaint.

67. DraftKings denies the allegations contained in Paragraph 67 of the Complaint, except that DraftKings admits that users can take into account many considerations when deciding to enter a certain contest. DraftKings further avers that it lacks the knowledge and information to respond to generalized allegations in Paragraph 67 as they pertain to other providers.

68. DraftKings denies the allegations contained in Paragraph 68 of the Complaint given the ambiguity of the term "regularly," except that DraftKings admits that it competes with many fantasy sports, sports entertainment, and other gaming and recreation companies.

DraftKings further avers that the Commission's selective quotation of unidentified written materials or communications, offered without context, is misleading as framed and DraftKings respectfully refers the Court to the quoted documents.

69. DraftKings denies the allegations contained in Paragraph 69 of the Complaint, except that DraftKings admits that it engaged in significant cost-cutting efforts in 2016, including large reductions in marketing and promotional expenditures. DraftKings further avers that the Commission's selective quotation of unidentified written materials or communications, offered without context, is misleading as framed and DraftKings respectfully refers the Court to the quoted documents.

70. DraftKings denies the allegations contained in Paragraph 70 of the Complaint.

71. DraftKings denies the allegations contained in Paragraph 71 of the Complaint.

72. DraftKings denies the allegations contained in Paragraph 72 of the Complaint, except DraftKings admits that it develops new products and features in order to attract and retain customers in competition with many fantasy sports, sports entertainment, and other gaming and recreation companies. DraftKings further avers that it lacks the knowledge and information to form a belief regarding the truth of the allegations in Paragraph 72 as they pertain to FanDuel.

73. DraftKings denies the allegations contained in Paragraph 73 of the Complaint, except it admits it develops new products and features in order to attract and retain customers in competition with many fantasy sports, sports entertainment, and other gaming and recreation companies. DraftKings further avers that it lacks the knowledge and information to form a belief regarding the truth of the allegations in Paragraph 73 as they pertain to FanDuel.

79.

COUNT II – PURPORTED ILLEGAL ACQUISITION

86. DraftKings denies the allegations contained in Paragraphs 1 through 83, except where specifically admitted above.

87. DraftKings denies the allegations contained in Paragraph 87.

IX. AFFIRMATIVE AND OTHER DEFENSES

DraftKings asserts the following defenses, without assuming the burden of proof on such defenses that would otherwise rest with the Commission:

1. The Complaint fails to state a claim upon which relief can be granted.
2. The relief sought is contrary to the public interest.
3. The Complaint fails to allege a plausible relevant product market.
4. The Complaint fails to allege any plausible harm to competition.
5. The Complaint fails to allege any plausible harm to any consumers.
6. The Complaint fails to allege any plausible harm to consumer welfare.
7. New entry and expansion by competitors is easy, and can be timely, likely, and sufficient, such that it will ensure that there will be no harm to competition, consumers, or consumer welfare.
8. The combination of DraftKings and FanDuel's businesses will be procompetitive. The merger will result in substantial merger-specific efficiencies, cost-savings, innovation, and other procompetitive effects that will directly increase the

consumer value proposition. These benefits greatly outweigh any and all purported anticompetitive effects.

9. DraftKings reserves the right to assert other defenses as they become known to DraftKings.

WHEREFORE, having fully answered the Complaint, DraftKings respectfully requests that the Commission: (1) deny the Commission's contemplated relief; (2) dismiss the Complaint in its entirety with prejudice; (3) award DraftKings its costs of suit, including expert's fees and reasonable attorneys' fees, as may be allowed by law; and (4) award each other or further relief as the Commission may deem just and proper.

DATE: July 3, 2017

Respectfully submitted,

/s/ Chong S. Park

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that

Notice of Electronic Service

I hereby certify that on July 03, 2017, I filed an electronic copy of the foregoing Answer and Defenses of Respondent DraftKings, Inc., with:

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I hereby certify that on July 03, 2017, I served via E-Service an electronic copy of the foregoing Answer and Defenses of Respondent DraftKings, Inc., upon:

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I hereby certify that on July 03, 2017, I served via other means, as provided in 4.4(b) of the foregoing Answer and Defenses of Respondent DraftKings, Inc., upon:

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