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A Changing Game: Challenging the Status Quo in Sports Law

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Jeffrey S. Moorad Sports Law Journal Symposium

A CHANGING GAME: CHALLENGING THE STATUS QUO IN SPORTS LAW

The 2016 Jeffrey S. Moorad Sports Law Journal Symposium—*A Changing Game: Challenging the Status Quo in Sports Law*—provides an in-depth look at the major sports law stories of the year. Panelists with distinguished and diverse backgrounds—such as Attorneys General, former professional athletes, and sports industry leaders—discussed the current legal and regulatory landscape of Daily Fantasy Sports, compensation for NCAA athletes, and preparation for life after professional sports. The conversations were intelligent, stirring, and wonky. The Symposium continued the high-standard of sports law Symposia at the Villanova University Charles Widger School of Law and was, without a doubt, the second-most significant Villanova sports event of 2016.

Panel 1

TODAY'S PROFESSIONAL ATHLETE: THE POWER FROM WITHIN

MODERATORS: Andrew Brandt and Jeffrey Moorad

PANELISTS: David Falk and Justin Tuck

Panel 1 featured one of the most successful sports agents ever, David Falk, and two-time Super Bowl winner, Justin Tuck. Moderated by Andrew Brandt and Jeffrey Moorad, the panel discussed the challenges professional athletes face as they transition to a career off the field. Through terrific stories and experiences, both panelists stressed the importance of utilizing the power inherent to star-athletes throughout their careers to set up post-retirement opportunities.

Jeffrey Moorad: Super Bowl Champ and Super-Agent. Now that's a pretty good start.

Andrew Brandt: I think on, a personal note, I go way back with David. He hired me right out of law school, at Georgetown. I learned so much from this guy. Sort of an old friend. Not old, but known him a long time . . .

Jeffrey Moorad: We're all old!

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Andrew Brandt: . . . And then a new friend. Since retiring from the NFL. We were hooked up by a guy named Gerry Matalon, from ESPN. And Justin and I have become close in the last few months, and I want you to hear about his journey forward. From being a professional athlete to new ventures going forward. So, I'm personally very proud of these two guys, someone I've known a long time and someone I've just got to know, and what they are able to share with you. I'll let Jeff ask the first question.

Jeffrey Moorad: Well, I think you've set the stage. I mean, Justin, great to have you. Thank you for being here. I've had the pleasure of getting to know Justin over the last six or seven years. When I ran the Padres in San Diego, Justin was actually a visitor to the owner's box a couple of times. We did a couple of things in the community together. I still remember seeing you at the MIT Analytics Conference. Which at the time, you know, here is a Defensive End for the New York Giants and I ran into him at the MIT conference. Like, wow, that's pretty interesting. So tell us about how you push yourself in that way. How do you end up at the MIT Conference—when there aren't any other football players there?

Justin Tuck: Uh, mostly tricked into doing it. No, seriously, for me personally, I've always been the "athlete" that didn't want to be the "athlete." I didn't want everybody to perceive me as just a "jock." So education, learning, rebranding yourself has always been in my forefront. So anytime I get the opportunity to do something new, do something that is out-of-the-norm for athletes, I encourage it, I look forward to it, you know. Malcolm Gladwell was at that Conference and I was on a panel with him. I'm a huge fan of his books, so when they asked me to be a part of it, I jumped at the opportunity.

Andrew Brandt: Yeah, can I follow up? When you say you don't want to be known as a jock, what things can you do—because you know how people stereotype—beyond an MIT conference and some of the things you are doing now to separate from that world?

Justin Tuck: Well, I think honestly, man, unfortunately with anything in life, with anything you do, people try to make judgments with you based off experiences with others in your state. You know as well as I know, that in football, or in athletics in general, ninety-nine percent of us are just regular, you know, small-town kids that God has given us a great talent. And we got very lucky that we were able to showcase it. That doesn't change when you start getting in the limelight—making a lot of money—whatever it may be. We are

still those small-town kids that grew up trying to hit that last-second shot with an invisible defender, or kid, in front of us.

So I think for me, in order to kind of, stand apart or stand differently than the norm. It all just comes down to just how people perceive you. It's tough, because no matter how much hard work you do, one mistake can kind of ruin that or one bad judgmental thing can ruin all of that. It's tough, you just have to be you, be who you are and don't be ashamed of that. I think people can see, you know, what your intentions are. Sometimes they don't come across like you'd want them to, you know, especially in my line of work, you gotta deal with media. You can say one thing and it gets portrayed one way or the other, whatever it may be. But at the end of the day you have to be you. You have to know what you want and try to figure out ways of getting that across. I've been very blessed having great people in my corner—throughout my entire career, whether that was in college; I obviously got drafted to the greatest football team ever to play the sport. I know that's not going to go well down here . . .

Andrew Brandt: [Laughter] You have to figure out where you are, here.

Justin Tuck: . . . in Philadelphia. But, I was blessed—in a lot of ways. You know, a lot of that doesn't have anything to do with me, it just has to do with timing and being able to be placed in those spots.

Andrew Brandt: David, you've represented players for forty years now. You've seen players come and go. When you listen to Justin about creating an image beyond the job, about creating a power within, what do you think of?

David Falk: Well, first of all I really admire what he is trying to do. When you think of athletes and how difficult it is to reach the level of success that Justin has reached, talk about a handful—you go to college, there are a hundred guys on the team, or more, and at most schools, except maybe in the southeast, you know, you have two or three guys that may go pro. Yet, you have the same level of discipline it takes to become at professional sports, a lot of athletes don't spend enough attention while they're playing on how to parlay their popularity and visibility on the field into a post-sports career. They become sort of like the “dumb-blonde” in a movie that always plays the “dumb-blonde.” People look at them as “blonde” and what he is trying to do is to break out of the mold, which I really admire. But I think it's the kind of thing you need to start thinking about way earlier than the end of your career, because,

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you know, a guy like Justin will play football—average football player plays three or four years, average basketball player maybe ten years. So you're going to be in your thirties when you're done. You guys are in law school, you are going to finish in your mid to late twenties and you're gonna work for the next fifty years.

You don't worry about transitioning in your twenties when you're a lawyer. I wasn't thinking about transitioning in my twenties. But as an athlete, you have to really have a much keener awareness, especially playing in place like New York—the biggest media market in the world. The popularity you attain as the Super Bowl Champ is the ticket to doing the things he is trying to do now. And it is so difficult, as a manager of players, to try to get your client to focus on a life after sports while they are really at the top of their careers and they can translate their popularity into opportunities.

Jeffrey Moorad: David, great comments and I want to turn the discussion slightly and talk about you and talk about the impact you've made on the NBA and on the players in the NBA—certainly on the salary structure over the years. It was once said, that, aside from David Stern, you may have been the most powerful person in the NBA for a fifteen or twenty-year period of your career. Now you are kind of in a second career period, where you've downsized . . .

David Falk: I'm like Justin: Trying to transition.

Jeffrey Moorad: . . . Now you've got the practice that everyone in the agent business dreams of—the super-star practice. Which is the best of all. Ten or less players who make a lot of money. It's a business that's impossible to craft if you haven't put in thirty years on the front-end, that is really the bottom line. But, the advent of the agent's power has been something you've been a part of, you've had a front row seat for. And you've been, in fact, the brand of that, as it has evolved. Representing Michael Jordan, you know, was an incredible piece of that process, but its more than that because you've had countless All-Stars that have made millions of dollars over their careers. You are a twelve-time Most Powerful Person in Sports by the Sporting News. What's that been like, from your own experience and your perspective?

David Falk: Well, first of all, I've lived my own dream. I always wanted to be a lawyer and I've always loved sports. And when I was in college at Syracuse, I became best friends the first day with the star recruit of our class. When I was a senior, I wanted to represent him, but I realized I didn't have a clue how to do it, so I went to law school. So, you know, I did what I always dreamed of doing. And I think in many ways, I've connected with my own clients because

while I'm not very good at throwing the football or dribbling the basketball, I'm very competitive. I think that my clients, people like Michael or Patrick, or Coach K, or John Thompson sort of recognized that I was as competitive on my court, or in my field, as they were in their field. So we sort of had a natural-kind of a bond.

I always thought I was like a Congressman from the richest district in America. I had the best clients and my job was to try to promote their agenda—promote rules, changes in the game, that would benefit my clients. And we didn't have homogeneous clients. I represented fifty-two players, in my career, drafted in the top-ten picks in the first-round, fifteen guys in the top-two picks. Those are really special players and they gave me a level of influence because I was speaking on their behalf. My influence grew—it was a derivative of who they were. And conversely, my mom was a teacher, and at this point in my career I look at myself way more as a teacher than a dealmaker. I'm trying to teach young Justin Tucks, when they are in their early twenties, to understand the power they have as athletes—the power to do things in the community, the power to do things in business, the power to change the way people perceive athletes. And I really enjoy that immensely.

I use an expression, some of you are too young, anyone here see the movie *The Wizard of Oz*? Ok, so here's an important question, how did Dorothy get back to Kansas at the end of the movie? Anybody, just raise your hand. [inaudible—wrong answers]. Exactly, Mr. Cornwell, my A-student. She clicked her heels three times. Now, here's the important part—we're in law school, so I have to ask the follow-up question. Why didn't she click her heels three times in the beginning of the movie and get back right away? And the answer is, "Because she didn't know she could." She didn't know she had the power to get back anytime she wanted to get back. So, at an early point in my career, the one player I lost that always broke my heart was Grant Hill. Grant Hill committed to us as a client—his mother who is a very highly-educated woman, was Hillary Clinton's roommate at Wellesley—didn't think he should pay an hourly-percentage fee. So one night, I was in Boston and the Pistons were playing the next night. Grant was in about his fourth year, was a three-time All-Star. He is a really tremendous human being—smart, attractive, classy. And he told me that the coach had just gotten fired. And I said, "Well, who would like to see be the next coach?"

And he said, "I'd like to see our assistant coach, Alvin Gentry, be the coach."

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And the older leader on the team was a good friend of mine, named Joe Dumars, and I said, “Well, who does Joe like to see be the coach?”

And he said, “Oh, Joe likes Alvin Gentry, also.”

I said, “Well, I guess Alvin’s going to be the next coach.”

And he says, “What do you mean?”

I said, “What do you mean, ‘What do I mean?’ You’re the star, Joe’s the veteran. If you guys go to management and say, ‘Hey, we want Alvin Gentry,’ it’s over.”

But, he didn’t learn—he’s now in his fourth year, his father’s a professional football player, went to Yale, named Calvin Hill, his mother went to Wellesley, is an extremely successful businessman—but his representative hadn’t taught him after four years, there’s a certain level of power that comes with being a perennial All-Star. Learn how to use it, without abusing it.

I’d say that’s what I’m really into. I’m into teaching my clients how to be smart business guys. I’ve had a lot of football clients, some great All-Pro players. I had a young Justin Tuck, named Chris Dolman, who is the fourth all-time sacker in NFL history. And I take great pride in trying to do something more for my clients than just make them a lot of money—which is something I am good at. But that’s not really going to last a lifetime, you want to teach someone how to be a smart and meaningful part of society.

Andrew Brandt: With Michael, you and I—I say I represented Michael—I worked for the guy who represented Michael. I held the bags. With leverage, and with Michael Jordan, how much did you use it? Do you use it? Do you ever feel like you abuse it to help other clients, to help other situations? It’s kind of a tricky battle, right—with someone of that caliber—in how much you leverage his name?

David Falk: Yeah, you know one of the interesting things in sports—Justin can relate to this—is that—it takes place more in football than in basketball, not really sure about baseball, probably a lot in baseball as well—it’s called slotting. So, if you’re an agent, and you have a—Justin gets drafted number 5 in the draft, his agent is going to look at what the guy got at number 4, what the player got at number 6, and the team’s going to look to try to sort of slot him. After about five years in the business, I thought to myself, if—if Michael Jordan hires me and goes number 3, and all I do is get him the average of what the guys got in front of me and behind me, he doesn’t need me. He should hire the other two agents, because

they're going to create his deal for him. So, I decided we were going to stop slotting our players.

And I developed—because I had so many number 1 picks—I developed what I came to call my own fame—that was the name of my company, Fame mini-market—and I would tell the GMs, I don't care what the guy got at number 5, unless he's my client. If he's my own client, you can hold me to my own deal. And so, of course, I came to realize that when Michael Jordan came into the league in 1984—I had a player two years in front of him named James Worthy—who was way better than he was in college—he was the number 1 pick in the draft. Mike was number 3. And before him was Phil Ford, who was the National Player of the Year from Carolina—number 2. And after him was Patrick Ewing. And so, I felt that I had an expression sort of like in football—the horses pull the ponies—you know, a great running back doesn't hit the hole unless a lineman opens up the hole for him. You know, very few guys could do it by themselves. And I realized that there were times where the veterans—the success the veterans have—would create leverage for the younger players.

Over time, I learned that as the system changed, we inverted the market, and we made the rookies make more money than the veterans. Because they're—because, in 1985, we represented Patrick Ewing. It was the first year the NBA put the draft lottery in. I majored in economics in college, and I realized that when you take the chances of the number 1 team—having them—having the two teams with the worst records in the history of the NBA would flip a coin to see who got the number 1 pick. So you had some very famous coin flips. If you want to be—this is fantasy, this is reality. 1969, the Milwaukee Bucks flipped with the Phoenix Suns. The Phoenix Suns lost and got Neal Walk. The Bucks won and got Kareem Abdul-Jabar. Ten years later, the Bulls had a flip with the Lakers. The Bulls lost and drafted David Greenwood. The Lakers won and drafted Magic Johnson. So, in 1985, the league changed the rules. And instead of the two worst teams flipping—the seven teams that didn't make the playoffs went into a lottery. Now, you'll hear a lot about this—fantasy sports, and gambling. The minute you do that, you're changing the odds of 50-50 of getting the number 1 pick, to 1 out of 7, which is 14 percent.

So, when Patrick was a rookie, we signed him to a deal—1 year after Magic Johnson signed \$25 million for 25 years—we signed Patrick for \$32 million for 10 years—which is 50 percent higher than the highest paid veteran—which was Kareem—had ever made in

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the league. Four years later we did the same thing again with Danny Ferry. It's because the chances of a team getting a player who could change the fortunes of their team overnight—a LeBron—a player of that caliber—an Anthony Davis—are so rare, this could happen once every ten years—that the rookies actually came to have more leverage than the veterans. So, I think your job—I always thought my job—and I recommend a great book, if you haven't read it, it's called "The Road Ahead" by Bill Gates—I always thought my job was—as a lawyer you train to look at precedent, you know you get to law school day 1 and you learn about *Hadley v. Baxendale*, which happened like in 1789. A hundred years from now, a first-year law student at Villanova is going to learn about *Hadley v. Baxendale*. As an entrepreneur, my job is to try and see where the business is going five years down the road—and to not make a 25-year, \$25 million deal for a super-star like Magic Johnson—which is probably the worst contract in the history of the NBA, because the poor guy never made what he deserved to make—he was locked into a long deal, when the market was exploding.

And so, just like a player has to learn how to use their power, when I represented Michael, I was 33 years old—I was pretty cocky. It took me about two-years to realize that I was just lucky to be on Jordan's team. You know, whether I was the number two guy, the number fifteen guy. And he helped me with that, because he's a very modest guy off the court.

But you have to learn how to use your power, and use your leverage, dealing with GMs, companies. You have to be aggressive, but you have to—I would say if I could summarize it, that every negotiation—I think there's a level of fairness. As an agent, your job is to be at the top of the scale. And as a management person, your job is to be at the bottom of the scale. But if you ever get outside the scale—as in you was eluding to the last panel—then you really have a problem because you're losing the good will you need to continue to deal effectively with these people.

Jeffrey Moorad: Justin, you come out of Notre Dame, you hire an agent, I assume it's your indoctrination into the business of football. What was that business like over your career? A lot of great playing memories, a lot of success—but what was the business like, hiring an agent as a 22-year-old kid? What was it like going through contract negotiations and ultimately free-agency when you left the Giants and went to the Raiders? Give us a sense of that part of your career.

Justin Tuck: Well coming out of Notre Dame, it was interesting because it was kind of two-fold because my junior year I was slotted as a top ten pick, so agents were literally at my front door at my apartment in South Bend, IN at the end of my junior year. A lot of people thought I was going to come out early that year. One of the best things that probably happened to me was that I blew my ACL out the last game of my junior year. I had already decided to forgo my senior year and go out which would have been a really stupid thing. So I blow my ACL out and rehab it and off the strength of everyone telling me I'd be a top-10 pick I came back a little early, which wasn't smart, and developed tendonitis in my knee.

So my senior year I had a very subdued senior year. I only had about seven sacks, I didn't play in the bowl game, a lot of red flags about my knee, so agents start to trickle down. One guy was very consistent, who believed in me as a player. His name was Bill Hendrickson, who was, ironically, partners with the great Eugene Parker who passed this morning. So I told Doug, "Doug, I have no idea, I'm just a country boy from Alabama"—there are more people in this room than my entire hometown—I know its April Fools, but that is not a joke, its true!

So I told Doug, "Listen Doug, you come to Alabama and you convince my grandfather"—he was 63 at the time, who was 6'6", probably 230 [lbs.] at the time, he probably had more muscle definition than I did at that point—"you convince him, my 3 uncles,"—who were about the same size—"my pop,"—who was about the same size—"and my brother,"—who is about the same size—"and whoever else—it's a small town, you never know who is going to show up—it could be 40 people. But if you can convince them, I will sign with you guys."

So anyone who knows Doug, Doug is the typical Californian. The surfer boy, always talks with his hands. I told him, "That's not going to fly in rural Alabama, you may want to tone it down and take off that tan!"

Long story short, he convinced them, and I ended up signing with him and I've been with him ever since. The business-side for me going forward—like I said, I was very blessed being drafted by the New York Giants—I've been blessed to have relationships. For me the business-side was about relationships. People I met at Notre Dame, people I gradually met in New York and who I made contact with and gradually developed those relationships. It's still very interesting to me because I look at that little kid from Alabama and I'm doing Subway commercials. I'm on billboards in Times Square

and I'm getting offers to do whatever. The business-side was always intriguing and that's one of the reasons why—to this day—I'm intrigued by business. I majored in business in college. Honestly, when I majored in business in college, it was more just like that it sounded like the right thing to do not knowing there were so many facets to it. All these conversations with agents, lawyers, owners of teams, executives of franchises, and deciding if these deals are what I want to do, if they're benefitting me more than just monetarily, but from an exposure [standpoint], how people see me—is this a company I want to be tied to—it all comes into play. It has to be because you don't want to be a part of something where people look at you and say, "He did that?"

I always had that in the forefront and I always let my team know that. There are those deals that came about that might have had great monetary value to them but wouldn't be good for my brand—they wouldn't even bring them to me because we were on the same page. Any time I talk to the kids now—I call them kids because the league as drastically changed since I came in, now what you call the millennials—it's completely changed now, so when I talk to them now, I tell them it has to be something you can be a part of and you can embrace. Don't sign with Nike just because of Michael Jordan, sign with Nike because they have what you want to do. You have to like what they stand for more than just the shoe you wear. My thing was always, "Are these people I feel comfortable going to dinner with?" "Are these people that I feel comfortable inviting to my house to have a drink with and play with my kids in the backyard?" That always came into play for me. So, how I addressed the business-side of things—I don't think it was "normal" but it worked for me. I'm pretty happy with how it played out and how it continues to play out. I think because of that, the opportunities after football are pretty tremendous for me.

Andrew Brandt: Tell us quickly, what you're looking at after football now. We may have Justin around Philadelphia.

Justin Tuck: [Laughs] I'll find out in a couple weeks if I get accepted to Wharton Business School that's what I want to do.

[Audience Applause].

Andrew has given me a lot of guidance in that direction. But, like you said earlier about teaching the young kids, you have to have a vision of what you want to do before its time to do that. So, I retired in February, if I said to myself in January, "Ah I want to do this" and that was when I started to put the acts in motion, then I'm way behind the 8-ball. But, lucky for me—again that word luck

comes up—the thing of the Irish luck, I got drafted in New York, there was this guy named Michael Strahan, who was right in front of me, and I just watched him. Not only on pass moves, how he practiced, what he did in the weight room, what he ate, what car he drove, I watched everything he did. I watched how he developed relationships, I watched how he went into studios after practice in New York and developed his craft, and, obviously, you know what he's doing now.

So, I mean, that was, for me at an early age in this league, I learned that you have to put these acts into motion and I've done that. I went and worked with private equity companies in New York City in 2008, when no one knew that I did those things. And that's not to pat me on the back, that's to say, again, I was lucky to be smart enough to watch people in front of me, people around me that were doing things that maybe I wanted to do. At the time, did I know I wanted to be in business or go to business school, no I didn't. I didn't know that until like probably a year ago. But again, I just watched people in front of me and I attached that to my business side of things too. I watched people in front of me. I watched the success that they were having. A lot of time, as athletes, we're so cocky, and we're so un-modest, that we try to reinvent the wheel, and that wheel has been sharpened through and through time by a lot of great athletes, a lot of great businessmen, a lot of great people, and it behooves us just to kind of sit back and learn from it.

David Falk: Yeah, I've got to take two minutes to tell a great story that involves Andrew and Jeff that Justin's story about hiring his agent reminded me of. So in 1986, Andrew and I got invited out to Columbus, Ohio, to meet Mike Tomczak, who was a quarterback, and Jim Lachey, [Jeffrey Moorad's] client, was an All-Pro lineman for the Redskins, and they had a screening committee of eight local businessmen, headed by a guy named Stan Glick, who owned some furniture stores. And they had some of the top groups in the country—they had IMG, Leigh Steinberg and Jeff, it was great competition. So, we made our presentation, and Stan says to me, "David, look, you've got great qualification, you've got great clients, but like, these guys are farm boys,"—sort of like [Justin Tuck's] Alabama story—"from small-town Ohio, and you really got to tone it down or you're going to lose these guys."

I said, "Look, I'm a very passionate advocate, I'm not a California surfer kind of guy, I'm not Leigh Steinberg,"—who's a really good friend of mine—"this is who I am."

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And he said, “Well, I respect that, but my strong advice is tone it back.”

So, Andrew and I went into the meeting, and I did my best to tone myself back, which is not very easy for me. About a week goes by, and Stan called me back and said, “Both guys really liked you, competition was great, and they both picked Jeff and Leigh.”

And I said, “Well, those are really good people, good friends of mine, I don’t like losing, but I don’t mind losing to someone I really respect. What do you think could’ve gone better in the meeting?”

And Stan said, “Well, both guys thought you were a little too low-key.”

[Audience and Panelists Laugh]

So, the reason I tell this story, which Justin’s story reminded me of, is because I think you have to always be yourself. This is not like Hollywood, where you’re acting. This is the way I am. When I meet players, I act exactly like I’m acting now. I don’t try to put on a show, I don’t try to be low-key, I don’t try to be like a surfer dude, I don’t try to be a hip-hop guy. I’m an old guy, I’ve been doing it this way, it’s worked, for me, pretty well. I think it’s really important for you, as you get into business, decide—like [Justin Tuck] is trying to decide—decide who do you want to be, and just be yourself. That’s always going to work the best, give you the most credibility. You can’t keep switching roles like a Hollywood actor because, when you deal with a GM or a head of a company or an owner of a team, they’re going to see right through it, so you just have to be consistent. Some people may not like you, but you’ve got to be consistent.

Justin Tuck: And it’s funny he says that, because I was at a basketball game while Doug was doing his pitch, Doug and Ken Lampshire. And I walk in, pretty much when it was over, but I got the last glimpse of Doug doing his pitch and he was in his California state, talking with his hands, very animated. And I walked in, I was like, “Well, Doug’s not going to be my agent.”

And my dad, after Doug left, said, “You know, I like him because he’s the only one that came in that felt like it was real, it was the real Doug.”

So, I piggy-back your story to say yeah, be yourself, if that’s not good enough, then it wasn’t meant to be.

Andrew Brandt: Quick story with David—one thing I’ll never forget is we were negotiating—I don’t even know what player—with

some owner, and we were not getting anywhere in the negotiation. So David says, “You know what? If we don’t get what we want, you know, I think Michael will be sick by the time the Bulls play your team.”

And I said, “David can I talk to you for a second?”

I said, “What? You’re gonna hold Michael out? Is he gonna be sick?”

“No, of course not.”

“Are you gonna do this?”

“No, of course not.”

I could never do it, but David did it. We go back in. We have a deal. He scared them into thinking the one day they sell out every year, Michael Jordan wouldn’t come. He did it. I couldn’t do it. He did it.

David Falk: I’ll tell you something interesting. When I was very young, my mentor—my mentor in sports—is a guy named John Thompson, my hero in life. I love the man. I’ve been his manager for 35 years, but I probably learned way more from him than any man I’ve ever met in my life, including my own father. And when I was young and we first got to know each other, he called me one day and said, “Son, I think you have a problem.”

I got really nervous. John’s a very forceful individual. And I said, “What’s that?”

And he said, “Do you want people to like you?”

I said, “Absolutely. That’s the most basic human emotion.”

And he said, “Get out of the business.” He said, “When you walk in the door and you ask a rich, white owner to pay one hundred million dollars for a hip-hop guy like Allen Iverson, that guy is gonna hate your guts. And if that bothers you, quit the business.” He said, “What you want is your clients to like you and the people you deal with to respect you.”

And that is a hard thing to come to grips with. I am not a confrontational person by nature. One of the things that Justin said that I want to amplify in this discussion is the thing in psychology called “functional fixity”: where you look at an object a certain way. You’re at dinner, and a guy comes in to rob the restaurant. You say, “God, I wish I had a gun.” Well, you have plenty of weapons. You’ve got a knife. You’ve got a fork, but you don’t look at knives and forks as weapons. You look at them as eating utensils. In sports, people see a guy like Patrick Ewing in New York with no helmet, no uniform, no shoulder pads, and he plays really aggres-

sively. And they say, “God, that guy is a thug.” Patrick Ewing is one of the sweetest, most respectful, most low-key people I’ve ever met. He’s terrific. But people look at him, who don’t know him, in a certain way. People look at Justin wreaking havoc on a football field and say, “God, that guy is a hooligan”—and he’s about to go to Wharton Business School. So, you know, I got to the point I said to people, when I put on my uniform, sort of what I’m wearing most of the time, and I go to work, I am very aggressive. I am very passionate. When I’m with my friends sitting around, that’s not who I am. I don’t say, if you don’t do this, I’m gonna—you know, whatever.

And you have to learn to differentiate your role when you put your uniform on for two or three hours, and you go to work, and you have controlled mayhem, and how you are is a pretty low-key guy from Alabama. I don’t think too many offensive linemen would say he is low-key when he’s playing. You don’t want to be low-key when you are playing. You have to learn how to shift gears when you are playing, and you also have to learn how to evaluate people when they’re playing versus when they’re relaxing. You can’t be “on” all the time or you’re just going to burn yourself out.

Justin Tuck: And you know, again, to piggy-back off what you just said, I’ve got a rule of thumb that’s literally two—I’m bipolar in a way. I don’t know how to describe this, but we call it the white line affair. When you cross the white line in football, for me, it was like I was number ninety-one, which is a completely different entity than I am away from the white line. Right now, I’m Justin Tuck. So Justin Tuck and number ninety-one are two separate—It’s like Clark Kent and Superman—it’s two different things. Me inside the white lines, I am a thug, I am ruthless, I am competitive. I am doing just about anything, within the rules, to help my team win. That’s who ninety-one is.

When I step off the field, instantly I’m a different guy. It’s a good reason we wear football helmets because we are gladiators in a sense, but you don’t see me wearing a helmet now. So I’m not in the present moment—I am not the gladiator. I am hopefully the scholar or the father, the husband, the friend. So it’s hard. And I mean it goes back to the business thing. You know I always tell cats—kids—the easiest way to get recognized is to do something.

Really, it is because in football, unlike basketball or baseball, you know, we see—we saw every minute Jordan played—we saw his face. Every minute Magic Johnson played, we saw his face. If Eli Manning didn’t have a Super Bowl ring and didn’t have DirecTV

commercials, would you know what he looked like? I mean, I could name a lot of All-Pros right now, and you wouldn't: Tyron Smith from Dallas. Anybody here know what he looks like? And he signed a one-hundred-and-fifteen-million-dollar deal as an O-line-man, but nobody knows what he looks like because we wear helmets. So, in the business side of things, it gave you the opportunity to get the helmet off. The best thing in terms of notoriety, that I could have did was be on national commercials for Subway. No one really knew me as number ninety-one in New York at the time. When I went on Subway, everyone was like, "Oh, Five-Dollar Footlong!"

[Audience laughter]

It's funny, but it kind of upset me in a way, "Like, damn, am I not playing well enough?"

Andrew Brandt: Two Super Bowl rings, but that Footlong

Justin Tuck: Yeah, that Footlong. But that's part of it. And again, it goes back to what I said earlier about the business-side of things, about being very conscious of companies you want to work with and how they promote you and vice versa.

David Falk: I'd like to say one other thing.

Jeffrey Moorad: You gotta be quick, we gotta move on.

David Falk: I want to talk about transitioning—so we have two people up here as moderators. Andrew worked for me for a number of years, was a specialist in football. He went run the Barcelona Dragons in the European version of the NFL. Was an Assistant GM of the Green Bay Packers. Jeff was a great friend, a colleague, a competitor, a guy I always respected. He was way smarter than I was—left the agent business and became an owner. So when you talk about transitioning, you've got two sort of role models up here of people that didn't wait until they were sixty-five and they couldn't sign players or whatever. Now Andrew is running the [Moorad] Center. I think it's always important to continue to move on and try to find the road ahead and to understand what your skill set is that will translate into something and evolve, so my kudos to the moderators.

Panel 2

DAILY FANTASY SPORTS: A LEGAL VIEW

MODERATOR: Jami Wintz McKeon '81

PANELISTS: David Apfel, Adam Berger '10, Zane Memeger, and
Sean Sansiveri '08

Panel 2, moderated by Jami Wintz McKeon, Chair of Morgan, Lewis & Bockius LLP, examined the legalities surrounding Daily Fantasy Sports. David Apfel and Adam Berger, two experienced gaming lawyers working with various Daily Fantasy Sports companies, Zane Memeger, the United States Attorney for the Eastern District of Pennsylvania, and Sean Sansiveri, Vice President of Business and Legal Affairs for the NFL Players Association discussed several issues, such as, game-of-skill versus game-of-chance, illegal gambling operations, the Professional and Amateur Sports Protection Act (PASPA), the Unlawful Internet Gaming Enforcement Act (UIGEA), and future implications for partners of Daily Fantasy Sports companies.

Jami Wintz McKeon: Thanks, everyone. That first panel is a tough act to follow—even if Jeff hadn't described us as bad news, here comes the next panel. But actually the first panel was a great set up because we're moving from talking about some of things in the real world of sports to daily sports fantasy. And we're also going to talk about the intersection of that with the real world of sports.

And our panel is going to address the legal view. You'll be hearing a little bit later the business view, the legislative view. So we're going to talk about the legal view and we're going to try to set this all up for you, give you a framework. Let me introduce our panelists, so starting with David Apfel down there. David is at Goodwin Procter. He's a former federal prosecutor. He is the head of the firm's gambling practice group and he also represents the DraftKings.

Adam Berger is next to him, from Duane Morris. He's active in the firm's gaming law practice. He represents casinos and gaming equipment manufacturers and he represents FanDuel.

Next to him is Zane Memeger. Zane is the United States Attorney for the Eastern District of Pennsylvania, our leading federal prosecutor. He's also one of my former partners. Zane is on a number of task forces and committees with the government including the AG advisory committee.

And then next, Sean—Pronounce your last night for me.

Sean Sansiveri: Sansiveri.

Jami Wintz McKeon: Sansiveri. Okay, Sean Sansiveri is the Vice President of Business and legal for the NFL Players Association. He's very active with all of their licensing and sponsorship activities and is very directly involved in the issues related to Daily Fantasy Sports. So we're going to kick this off by trying to give you a sense of where we are in the law, what the legal framework is, and Adam is going to kick us off talking about where we are from the stateside, and then Zane will fill in the federal picture, and then we'll move on to sort of what the current landscape looks like and the how it intersects with the various associations and actual sports. Adam?

Adam Berger: Thank you, Jami. It's a pleasure be back here—2010 graduate. So the key issue with Daily Fantasy Sports if you've been following it on the news is whether this is legal or not. And that ultimately comes down to the question of, is it gambling or is it not gambling? Gambling law in this country you have to look at from the federal perspective then also from the state perspective. I'll briefly touch on federal law, but I'll allow Zane as the expert to really cover that topic. But there is a federal law called the Unlawful Internet Gaming Enforcement Act which was adopted in 2006 which made it illegal for banks and other financial institutions to process payments related to unlawful Internet gambling.

That law created an exemption, though, for fantasy sports. So that's been one of the areas where at least under federal law the Daily Fantasy Sports companies have been able to claim that their offering is permissible. But the real issue in reality really goes on a state law basis. And states define gambling uniquely in all fifty states. And there's no one common definition. States generally determine that gambling is illegal but exempt certain types of activities. For example, casino gambling, lotteries, horse-racing would be considered permissible gambling.

Fantasy sports, generally speaking, is not into one of those caveats. So if fantasy sports is considered gambling, it'll be considered illegal. So the question then becomes: what is gambling? Very broadly speaking, states usually use a three-pronged approach. Three prongs are consideration, chance, and prize. So that means if you pay money or something of value for the opportunity to win a prize and whether you win or lose is dependent on chance, you've then engaged in gambling.

In the fantasy sports context, players play an entry fee so consideration is met and there's prizes at the end for the winners of the contest, so that element is met. So the question is, is Daily Fantasy

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Sports a game of chance? If not, is it a game of skill? Like anything, the states don't have one unique test for what is a game of chance.

Generally speaking, there's four tests the states broadly use. The first test would be the "any chance test"—and that means if there's any level of chance at all involved, you have a game of chance. I like to think of it as a golf hole-in-one contest. If you've ever played golf and you're trying to get a hole-in-one in a par three, you know that if you're not skilled at all, you're not going to be able to do it, and it takes the most skilled person to be able to get that hole-in-one. But even that great golfer, you know, maybe needs that slight element of luck—that low gust wind, their ball lands not in a divot on the green. In any chance state, in any chance state that would be considered a game of chance even though skill, you know, far out-dominates the level of chance involved.

The next test used is the "material element test," which is used by a large number of states. In this test, it says if chance plays a material element in the outcome of a contest, then you have a contest of chance, even if the amount of skill outweighs the amount of chance involved. You know, a good example of this—the state that uses it would be New Jersey. And several years ago they analyzed a game of backgammon. And the court who analyzed that determined that even though the most skilled backgammon players win most of the time based on their strategy, because there's a roll of the dice at the start of every game that chance—the role of the dice was material, that level of chance was material and found that backgammon was a game of chance and ultimately gambling.

The next test which is used by again a great number of states is a dominant factor also known as the "predominant factor test." This test says if skill dominates over chance, you have a game of skill and not a game of chance and, therefore, not gambling. In the fantasy sports context if you follow the news at all you'll see that skilled players are able to use their knowledge, their strategy, their statistical ability to dominate over the less skilled players, for lack of a better word. So the dominant factor test is a very favorable test to fantasy sports companies.

And then the final test for a game of chance, which is used in a very small minority of states, says it doesn't matter if it's chance or skill. If you risk money for a chance to win a prize on a game of chance or skill gambling is present. So obviously that is a very, very tough test for Daily Fantasy Sports companies to overcome. One of

the things that I think Daily Fantasy Sports companies focus on is the amount of skill involved regardless of what test is used. Again, prayers in daily fantasy contests are able to study teams, they are able to study players, study their players' opponents and, most importantly, they're able to look at the salary cap and the salary cap value assessed to players. And it's that collective skill that will determine whether or not they're successful in a game in a fantasy contest.

And also people who are opponents of this and say fantasy really is a game of chance will often say, well what about things the players can account for, whether injuries—and the skilled player in fantasy sports will argue that that is skill because they can look into a player's injury history. They analyze weather conditions, whether it's going to be windy, if it's going to rain, how that may affect a particular player playing a game. I know I'm sort of running up against my time for the brief analysis. So I'll hand it over to David.

Jami Wintz McKeon: We're going to go to Zane first.

Adam Berger: Okay, I apologize.

Jami Wintz McKeon: Zane is going to talk about sort of the federal piece of this because, as Adam has said, this is generally sort of state regulated. You're going to hear a lot about that on a later panel. But apart from the regulatory or the legislative aspect how about the legal aspect on the federal side, Zane?

Zane Memeger: Yeah, well first off it's a pleasure being here this morning. And from really the federal perspective, as Adam noted, a lot of gambling regulation and legislation is debt with at the state level. But the federal government really got involved with gambling enforcement really from the perspective back with regard to organized crime. That was kind of the driving force of why the federal government got involved in terms of enforcement. And so if you look a little bit about the history of the statutes that come into play, that more or less sort of gives you an example of why we're here.

We're concerned about sort of the violence that's associated with collection of unlawful debt. You've got the bookmakers who are running the operations, you've got the gamblers who are making bets and whether or not people are going out smashing fingers, breaking kneecaps in order to collect debts, things of that nature. You're concerned about the fixing of real-time sporting events, which gets back in the fantasy league as to whether or not that could be considered a real-time sporting event or not. You have victimization of minors and compulsive gamblers and then you

have the money laundering activity where you have illegal activity that's being floated through financial institutions in order to conceal the illegal activity or to make the money clean so that it can be utilized for the purposes.

So, in 1961, you had two statutes put into place that except where sports betting was legalized it was unlawful to use a wire transmission to transmit wagering information. And it was also unlawful to transmit paraphernalia, writings, tickets, betting slips, things of that nature. You move to 1970 and that's when the RICO statutes get put into place, so it's unlawful to engage in a pattern of racketeering activity or the collection of unlawful debts. You've got the illegal gambling business section 1955 that gets put into place during that period of time as well.

You follow that up in 1986, you get the money laundering statutes that are put into place. And then in 1992, the Professional and Amateur Sports Protection Act goes into place and with the exception, I think, of Nevada, Montana, Oregon and one other state that slips my mind at the moment, um, basically what that did was it made it unlawful for either government entities or persons to authorize sports betting.

And you move forward the internet comes into existence, and Adam alluded to this a little bit earlier, but you have you UIGEA which makes it unlawful to process payments with regard to illegal gambling operations. But it also contains the exception for fantasy sports which in the view of the statute isn't tied to sort of real-world timing, real-world sporting activity in the sense that you have an actual competition going on and you're making a better wager on that activity. Really what you're doing is you're taking the players that are involved in that sporting activity and creating a fictional league, a fictional team in which you're measuring their performance and you get points, etc. and you can possibly win a prize. And so there's that exception that's contained in those statutes.

So when you look at what the federal government's doing right now, in terms of the type of cases that we're doing, we're really more focusing on real-time sports betting. We've done cases here in the Eastern District of Pennsylvania. There's recently one up in Manhattan, one out in the District of Oklahoma where you have these large organizations where they're taking bets with regard to real-time sports betting operations and making billions and millions of dollars and we've enforce the laws in that context.

So right now we're really, from the Department of Justice's perspective, waiting to see what the states are going do with fantasy

sports in terms of whether or not it is truly a game of skill or a game of chance is something that they're going to regulate and make unlawful which will then tie into whether or not there's going to be federal enforcement with regard to illegal gambling activity.

Jami Wintz McKeon: That tees up David's comments. David's going talk to us about where we are today. Many of you are probably aware that there's been a lot of news activity, legislation, litigation sort of surrounding this issue. So David, bring us up to speed with where things stand as of now.

David Apfel: Good morning, everybody; pleasure to be here. There's an old expression a fish doesn't know that it's wet. And I mentioned the expression because you can't really understand the current state of play of Daily Fantasy Sports unless you understand the contrast where we were not so long ago. Daily Fantasy Sports has been around since 2008. FanDuel was launched in 2009, had games up and running in 2009. In 2012, DraftKings started, had games up and running in 2012. But as of October 1st of 2015, there was virtually no activity in the Daily Fantasy Sports legal arena. That has changed dramatically over the course of these past six months.

Let me give you a couple of comparisons. So, for instance, back on October 1st of last year, FanDuel and DraftKings played their games, promoted their contests in all but five states. Today, they have blacked out contests in nine states and FanDuel is about to black out the contest in a tenth state starting at the beginning of May, the state being Texas. There were no AG opinions, no Attorney General opinions up or down with regard to Daily Fantasy Sports as of October 1st of last year. Now there are eleven formal opinions from AG's offices around the country and one quasi-opinion, or indirect opinion, from the Attorney General in Massachusetts. Ten of those opinions have found Daily Fantasy Sports to be unlawful in the particular states in which the opinions have been issued. Only one state—only Rhode Island's Attorney General has formally found that Daily Fantasy Sports, DFS, doesn't run afoul of Rhode Island law. And the Massachusetts Attorney General has implicitly found Daily Fantasy Sports to be legal by promulgating regulations for daily fantasy.

Obviously, if you haven't concluded at least implicitly that the sport or that the games are lawful under state law, one wouldn't be promulgating regulations to protect the consumer with regards to these otherwise lawful activities. Other ways in which there had been changes is there were about ten states as of October 1st that were looking at legislation in one way or another with respect to

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fantasy sports, none that were really looking at legislation specifically with regard to Daily Fantasy Sports. Now there are approximately thirty different state legislators that in one way or another are examining or looking into DFS and whether it's legal.

There was no litigation involving Daily Fantasy Sports and any governmental entities as of October 1st. Today, with the exception of New York which we'll come back to in a second, there have been three pieces of litigation in three major states involving Daily Fantasy Sports: New York, Illinois, and Texas. Illinois and Texas are pending and in New York there's more of an armistice than there is a settlement, and we'll talk about the details of that in a moment.

Perhaps the biggest way in which there has—I was very pleased to hear Zane say that he doesn't see a means of prosecuting Daily Fantasy Sports under federal law and I hope other federal prosecutors have the same view. There have been reports that there are investigations going on in other US Attorney's offices around the country and our hope and expectation is that those will come to nod. But although your offices are now looking at DFS, the Southern District of New York has at least reported, the US Attorney's Office in Boston as well as the middle District of Florida—the Tampa office—is looking at Daily Fantasy Sports, at least those are the reports.

And perhaps the most vivid way in which we can see a change in the landscape over these past six months is by looking at class actions. As of October 1st of last year, just taking DraftKings as an example, there were six class actions pending against DraftKings, none of which challenge the actual legality of the sport. All of them had to do in one form or another with a species of false advertising. Today, DraftKings have over 130 class actions that have been brought against it. Almost all of which, obviously almost all of which, have been started in the last six months.

So the question is: what's changed? What caused this? And I think that's a long discussion. But the quick answer—at least the two things that come to mind that really have made a difference over these last six months. One is what got a lot of play at the beginning of October. Starting around October 5th was the so-called insider-trading scandal. And the insider-trading scandal was occurred when a middle level DraftKings employee, a kid named Ethan Haskell, came in second place. He was a DraftKings employee who came in second place in FanDuel's million-dollar maker NFL fantasy contest and won \$350,000 as a result.

There were allegations that he had taken advantage of information, nonpublic material information from DraftKings to actually form his team and make his entry into the FanDuel game. It turned out he had not used any information from DraftKings in putting in his lineup for the billion-dollar maker. But, as everyone knows, perception weighs more than half of reality, and in this case perception took on a life of its own and the insider trading scandal immediately led to plaintiff's lawyers circling in the waters, smelling blood and bringing class-action lawsuits alleging fraud of one sort or another. It also led to the New York Attorney General's action, which has also gotten a lot of play.

The other thing that I think has made a huge difference and that has led to the dramatic change in landscape that we've seen over these past six months is the incredible advertising blitz that both DraftKings and FanDuel put on at the beginning of the NFL season. I mean, all of you will remember that it was impossible to turn on television, to listen to the radio, to walk down the street without hearing or seeing either a DraftKings or FanDuel advertisement. They spent literally hundreds and hundreds of millions of dollars on advertising and there was more advertising for DFS in September and October, then I think for any other product or any other industry in the country. And that was a way effectively of leading with their chin. They were putting themselves out there, they were announcing themselves to be "in the big leagues" and prosecutors' offices, AG offices started paying attention in a way that they hadn't started paying attention previously. Jami, am I out of time or can I say—

Jami Wintz McKeon: Well let's just pause for a minute because I want to come back to you on the settlement and some of those other issues.

David Apfel: And where we're going.

Jami Wintz McKeon: And where we're going. But first, I want to get Sean in from the perspective of the professional sports associations, their involvement, their position, and what role you play in this area.

Sean Sansiveri: Yeah, absolutely. Let me see if I can figure this thing out like everybody else. Uh, and you guys thought I couldn't fit with your start athletes and agents, right? I'm really happy to be back here. I'm an '08 grad, so thank you for having me and I'm honored to share the stage with a panel that really has some really deep knowledge in this area. Our interactions—the players associations and how we fit in is sort of on two levels. Number one, all of

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the sports unions are the federal labor law the exclusive bargaining representative of the players, so we interact with the league and league policy, which obviously follows law and I'll get back to that in a minute.

Also, most of the sports unions have a for-profit subsidiary that does marketing licensing, sponsorship on behalf of the players—in our case NFL players—and through that subsidiary we've negotiated licensing deals with DraftKings and FanDuel. So taking a step back into the union side, the leagues promulgate, typically unilaterally, player policies that serve to give notice to players of what their respective commissioners think is conduct detrimental. An example of that is the gambling policy.

The gambling policies in respective leagues right now actually actively carve out fantasy. They don't specifically speak to daily fantasy, but they do carve out fantasy and we actively license group player rights, for instance, to the league for use in the general fantasy. In that gambling policy it says that players cannot participate in fantasy games when it's pay-to-play or there are cash prizes. It says nothing about endorsements. And I think saying nothing about endorsements actually says a lot, and actively we have a number of players who are endorsers, both through our deals with FanDuel and DraftKings and individually as well.

So from the top-level standpoint of how we ultimately fit in, we're constantly following the law to make sure that all of our deals comply with that. If there's a change on the state level, we build in flexibility so much that we can stop operating, stop having endorsers in those various states and jurisdictions if the league policy on gambling changes so that daily fantasy becomes or is considered gambling, then ultimately we'd be able to adjust that as well.

Jami Wintz McKeon: Sean, there's a perception that there's a difference among the different professional sports organizations and how they look at this issue. What's your perspective on that?

Sean Sansiveri: Yeah, I think there's a difference in the way the leagues look at gambling, but not as big of a difference as a way leagues look at daily fantasy. I think all the leagues are pretty clear on the team level or on the league level in saying that daily fantasy is not gambling. And most of the players across the leagues are allowed to endorse daily fantasy. However, the policies differ slightly in the way that players can participate themselves in daily fantasy. The NFL specifically says guys can't pay-to-play or with cash prizes. Others just bar straight up participation in your own sport when it's pay-to-play and cash prizes as well, so very similar.

Jami Wintz McKeon: Okay. So let's go, David, to sort of where we are now and talk about where we think we're going and then, you know, invite the other panelists to participate in that discussion from their perspective. But take us back to the current—I think you just described it as an armistice or truce, or whatever.

David Apfel: Truce.

Jami Wintz McKeon: Whatever it is that's getting the highest profile attention and then let's talk about what comes next.

David Apfel: Okay, so let me give you a little sense—this is just me talking. I'm not talking as DraftKings' lawyer, I'm just sort of thinking about how I see the future in this industry over the course of the next two to three years. I think that what we've seen over the last six months, if you compare the beginning of the NFL season to the end of the NFL season, we went from a blitzkrieg of advertisements for DFS to DFS being gone, absent. I mean it's disappeared. There are no advertisements whatsoever.

We've gone from Daily Fantasy Sports being in-your-face all the time to Daily Fantasy Sports being in the news occasionally but not there all the time. And I think that is really a metaphor for where we're going. We're going from a period of litigation to a period of legislation. And there's going to be a transition where the real activity is at the state level in the legislators and I believe the recent deal that was cut between the New York Attorney General's office and DraftKings and FanDuel really is sort of the emblematic where I think much of the activity is going to be headed.

So let me give you a quick summary of this settlement. It's not a settlement. On its face you can call it up and get a copy of it on the web. It's called a provisional settlement and it very much is provisional. It's a truce. It's a peace; it's an armistice between the two sides.

As most of you probably know, a trial court in New York issued a preliminary injunction against DraftKings and FanDuel to preclude them from doing business in New York in early November. DraftKings and FanDuel immediately got a stay of that order from an appeals court and continued to do business, and meanwhile appeal the judge's preliminary injunction ruling. As the case was going to be on for argument before the intermediate Court of Appeals in New York in the May term, which starts on April 18th and ends approximately a month later on May 24th, as a result of the armistice what's happened is that the case has been put on hold. All argument has been pushed off until September at the earliest. DraftKings and FanDuel have agreed to stop doing busi-

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ness in New York and they stopped doing business immediately after the settlement just about ten days ago.

The Attorney General has given up or agreed provisionally to give up all of the claims including prospective criminal claims, claims seeking restitution, disgorgement in the tens or hundreds of billions of dollars, only reserving a false advertising claim or false advertising claims that exist. And they're now going to wait and see what happens with the state legislator. And June 30th has become a magic date in the provisional settlement, because if legislation passes in New York, legislation that authorizes fantasy sports—and there's an expectation that that may well happen—if that legislation passes in New York by June 30th, then the lawsuit is over, DraftKings and FanDuel are back in business in New York and the only claim that the Attorney General has is the false advertising claim.

If there's no legislation by June 30th, then the litigation continues. And if the Attorney General wins on the appeal—meanwhile DraftKings and FanDuel cannot do business in New York but they wait and see what happens with the appeal. If the Attorney General wins, the case is over. The Attorney General can only pursue his false advertising claim. DraftKings and FanDuel are out of business. But, again, they have protected themselves against the downside of potential criminal exposure as well as massive disgorgement and restitution exposure on the civil side. If DraftKings and FanDuel win, on the other hand, in the appeal, then all bets are off and effectively the parties are back to square one although there is an agreement in the provisional settlement that if the appeal goes forward and DraftKings and FanDuel win the parties, the parties shall continue to negotiate in good faith, but they're not bound to do anything one way or another. So everything could be back on the table.

Jami Wintz McKeon: Yeah and, of course, the interesting part about this being dominantly a state issue is there are respects in which what happens in New York doesn't necessarily have anything to do with what happens in some of the states. And Adam, when you talked about those four different categories, what category was New York in?

Adam Berger: New York follows the material element test, so it's interesting that the court would have to actually adopt a real standard and define what a material element is. New York—to date, there's not been real clear guidance on what exactly that means. So if this case had gone forward, the court would've been

forced to make that decision. Now they probably would have affected other states determinations, but, of course, it would not be binding on it.

I think David made a really great point that moving forward, this has become a very much a state legislative play. And I think the industry—the major players and even the smaller players in the industry recognize after the insider trading scandal that they were a growing industry, their companies grew in a period of eight years in the case of FanDuel, three or four years in the case of DraftKings, into these behemoths that have billion-dollar valuations. And they recognize that regulation was a good thing. They embrace regulation, but they said regulation needs to be tailored to our business, common sense regulations. And I think the industry has done a great job on lobby in front. They've had two big successes in, you know, Virginia and Indiana in the past few weeks.

And those legislations in those days have been enacted and will become law—well they're law now—but will go to effect very soon. Basically, say the Daily Fantasy Sports has some issues that need to be addressed; for example, they don't want kids playing, people under the age of eighteen should not be playing Daily Fantasy Sports. So once this legislation becomes effective, the fantasy sports companies will have to take really serious procedures to make sure people under age don't play. They'll have to take steps to address problem players.

People have the proclivity to get addicted to this type of thing are going to be able to self-exclude themselves from their sites. And the other thing that the legislation will address head-on—which is a key issue to the industry—is this idea of insider trading, insider play, if you will, and also will eliminate the possibility of athletes participating in fantasy sports on games in which they're a participant. I think Zane touched on the idea before; one of the biggest concerns, certainly under federal law but also under state law, is that there's not manipulation, that there's not the opportunity for criminals, mafia-type to get involved in sports contests to influence them and create an unfair outcome.

The legislation that these companies, the industry broadly, has really promulgated and really pushed for will address all of those issues and allow the industry to move forward in hopeful—in a very effective, but in also a safe manner for players and for the community generally.

Jami Wintz McKeon: Although given the size of the businesses themselves and the various states involved it, it's hard to imagine

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how you don't run up against all of those various issues. And, I guess, Zane, I'm thinking about your statement that, you know, the federal government will wait and see, sort of watch and see what happens. But realistically, you know, is this something that you can assume can just be regulated by the states without people then running afoul of some of those various federal statutes that you talked about?

Zane Memeger: Yeah, well I mean in terms of our gambling prosecutions, I mean the driving statute usually is Title 18 United States Code § 1955, which makes it unlawful to run an illegal gambling business, and it has really three elements. First, the business violates state laws so that gets into the whole context of what's going on in the states, what's going on in New York or Illinois or other locations in terms of fantasy sports; is it illegal or not, and then you look at whether or not it involves five or more persons who conduct finance, manage, supervise, direct, or own all or part of the business. And then you look at whether or not it's in continuous operation for thirty days or in a single day makes more than \$2,000. But it really gets back to what's going on in the states; is that activity illegal or not? And so that's something as a prosecutor you need to sort through before you go ahead and charge it.

Now, that being said, let's assume that Daily Fantasy Sports is legal. Are there other concerns that may be in place? And it gets back to maybe the insider trader problem. There are the ways to get at that activity. You have wire fraud and whether or not it's a level playing field for the consumers who are now engaged in Daily Fantasy Sports. Do you have insiders who are utilizing information that they have access to that the consumer doesn't and then they're participating in a league where they're able to utilize that information to put themselves in a better advantage? That's going to be of concern to the federal government, something that the federal government will probably take a look at. Whether or not it will be an investigation or prosecution yet to be determined. But that would raise red flags as far as the federal governments concerned.

Jami Wintz McKeon: One of the things that Justin talked about—I don't know why this isn't working. Is it? Okay. One of the things that Justin talked about in our last panel was sort of the reputation activity of the players, you know, the choices that you make about what you're affiliated with. And here you have something that is kind of teetering along with people questioning: is it legal? Is it not legal? Is it going to be found to be unlawful? Is it gambling? Is it not? How do you look at that from the players' side

and from the professional league side when you talk about endorsements and, you know, some of those other issues? What are you guys thinking about and keep your eyes on for that?

Sean Sansiveri: You know, I mean, what our eyes are primarily focused on would be the legal gambling policy again. The commissioner certainly in our sport makes *no hesitation* to let players know when he thinks that they're running afoul and something that doesn't look like for the game. Yeah, exactly, so ultimately, right now, there has been no—the NFL has not taken a position on Daily Fantasy Sports and players are actively endorsing it. And so, while fantasy has been a long-standing part of football endorsements and the like, daily fantasy just is newer and as the laws evolve I think the policies will evolve and we'll be following that very closely.

Sort of an extension of that, I think, are the interaction with the publicity rights laws and—obviously most of you are probably aware of Pierre Garcon's lawsuit against FanDuel which related to FanDuel's use of Pierre's name in advertising, associated with the game. The lawsuit also extended to use of his image, name, numbers, statistics in the game itself. But there's a string of fantasy cases, CDC and CBS, that unfortunately went in a direction that doesn't really benefit players protecting the commercial use of their images. So, taking that place of the lawsuit together with the other claim that they were using his name to promote the game itself was a reason why players were upset and Pierre was upset with them. But he brought them to the table and, and we ultimately helped broker a license that resulted in the landscape we have now with the relationship directly with FanDuel and the settlement of that case.

Jami Wintz McKeon: Yeah, I'm sure the business panel will get into this, but there's a lot of money here for everybody involved, right? So there's some real world economic impacts on this. We want to try to stay pretty much on time. I wanted to give people in the audience a chance, if anybody had a question, our panel is happy to answer that, following which we'll just do a quick wrap-up. But does anybody have a question on any of the topics we've talked about? Yes. Right here.

Audience Member 1: I was just wondering what roles each state gaming board has in all of this. I know Nevada gaming board came up pretty early and said something and then other states where casinos are operating, just, you know—

Jami Wintz McKeon: Yeah for those of you in the back, the question was, "What role did the state's gaming boards play in this?"

And I actually think we have someone on one of our later panels who can talk about that, too, but David, you want to take that one?

David Apfel: Sure. It differs from state to state, but in many states, the state's gaming board plays a role either in tandem or independent of the AG's office as either a regulator or in an advisory capacity with respect to what the law is. For instance, the principal reason that FanDuel and DraftKings have not operated in the state of Washington is a formal opinion from the gaming board there indicating that in the state of Washington, daily fantasy is illegal. On the other hand, there's a similar opinion from the gaming board in Michigan which will say something about the authority of that gaming board in that state as compared to Washington, where Michigan's gaming board is given a similar opinion to the opinion given in Washington but both FanDuel and DraftKings continue to operate in Michigan.

Jami Wintz McKeon: Adam, did you want to add something?

Adam Berger: Sure. I think that was a really excellent question and something that was very unclear even to the industry as of a few months ago. So it's a very involving issue.

The one thing I'll just add is that, in a lot of states, the state gaming agencies, the state gaming regulators are government authorities which had limited roles and their only allowed to regulate what their governing statutes say that they can regulate. So in states like that, for example, they may only be allowed to govern lottery, casino gaming, horse-racing. So in those states the gaming regulation has taken a more passive role. Does that mean the state AG's offices, the state governor's office, the state legislators will not go to those regulators who are experts in areas of all things gaming and ask for their at least informal opinion? No. So that sort of thing does happen. But I think it's just important to keep in mind that until legislation comes through that actually gives gaming regulators authority to regulate Daily Fantasy Sports, you'll see them play a more passive role. And just one example would be Indiana, which recently passed legislation where the state gaming commission was actually given authority and told to create a separate sub-agency for that.

David Apfel: Massachusetts is actually a perfect example of what Adam just said. Massachusetts—the gaming commission in Massachusetts has no authority with respect to Daily Fantasy Sports, but that didn't stop the attorney general from asking the gaming commission to weigh in with its views on Daily Fantasy Sports. And in January of this year, they issued a lengthy white paper regarding

their views of the legality of Daily Fantasy Sports under both federal and state law.

Jami Wintz McKeon: Was there another question over here? Did I see—Yes.

Audience Member 1: Yes. Is yesterday's decision about DraftKings and FanDuel to suspend daily fantasy is, that an admission at some parts of the, uh, business model might not pass—

Jami Wintz McKeon: So we were talking about this earlier. I'm glad you raised it. The question was whether or not the decision yesterday that was announced by DraftKings and FanDuel to suspend Daily Fantasy Sports at the collegiate level—whether that's an admission that some portion of the business doesn't pass muster. So who wants to address that? The people who represent DraftKings and FanDuel—I can predict what they're going to say, but we'll see if I'm right.

David Apfel: Well, the answer to the question is: it is *categorically not an admission*.

Jami Wintz McKeon: I was right!

David Apfel: That's the short answer. I mean you think it is, again, representative, emblematic of what I described before as the road forward where—without making any admissions—there is a recognition of certain realities and a willingness to negotiate in the face of realities and in an attempt to develop productive working relationships with counter parties and prospective business partners.

Jami Wintz McKeon: I think also you have to wonder whether or not there's some element maybe of PR and sort of given the focus on all of them right now and the legislation whether people are trying to make that a little more palatable. So we have time for one more. Yeah.

Audience Member 2: Just a question with regard to subdivisions that have grown up around—and marketing of statistical data, surrounding players' statistics and team statistics and the trafficking of that information to interstate commerce. If the current activity is found to be illegal shouldn't the trafficking of the information—that facilitates that become illegal as well?

Jami Wintz McKeon: So the question has to do with the legality of sort of the subsidiary areas of focus like the exchange of statistical information and whether or not the trafficking of that especially in interstate commerce—and I was also thinking of the wire trans-

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fers and all those whether or not if the top level is illegal what does that do down below?

Zane Memeger: Right. Well that is a key point. I mean, if you look at the statutes, if you look at the Wire Act or you look at the transportation paraphernalia, it's illegal to send that information via wire or through the mail, etcetera. But what you have to look at, again, is what does state law say, because it basically says it's illegal except in those cases where sports wagering or betting is legal, you can't do it until you come back to what's going on in the states. And you have the fifty states and you're trying to figure out kind of what the lay of the land is in terms of the betting and wagering act. That's going to be the driving force in terms of where the federal government decides to investigate and prosecute a case.

Jami Wintz McKeon: So we'd love to continue this discussion, but we want to make sure you get to the other panels and they're all going to be talking about many of these issues from the different perspectives—the business and the legislative perspective—so thank you all very much and I think we're going to the next panel.

Panel 3

EXAMINING *O'BANNON V. NCAA*

INTERVIEWER: Andrew Brandt

PANELIST: Ed O'Bannon

Panel 3 was a one-on-one interview between Director Andrew Brandt and Ed O'Bannon. Mr. O'Bannon, a former collegiate and professional basketball player, took the audience through his journey as the lead plaintiff of one of the most groundbreaking and publicized lawsuits ever against the NCAA. Mr. O'Bannon joined the Symposium over a Skype call from his home in Las Vegas, Nevada.

Andrew Brandt: I think when you talk about sports law, and here we are at a sports law center—hopefully one of the more prominent in the country and even in the world—you look for certain pioneers in the industry that become litigants and put their name on something that's bigger than them. There's a few people out there in sports law history we know of—the Curt Floods and the John Mackey's, people like that. Well here's one right in front of us. A pioneer that has attached his name to a major lawsuit against a major institution. Please give a warm welcome to Ed O'Bannon.

Ed O'Bannon: Hello everyone.

Andrew Brandt: Good Morning and I, I will say this, Ed was really wanting to come out here from his home in Vegas, but has had some knee surgery lately. So while his knees are healing up, he's joining us through Skype. Ed, we really appreciate you joining us.

Ed O'Bannon: My pleasure. Thank you for having me. I'm sorry I couldn't be there with you guys.

Andrew Brandt: Ed, tell us how you came to be the name plaintiff in Ed O'Bannon versus the NCAA. I'll let just you have the floor and tell us all about it.

Ed O'Bannon: Wow. Um, well I—It's kind of a story that I've told a few times. I was just at a friend's house and his kid was playing a video game and, uh, I saw my image and I was actually pretty fired up—I gotta be honest. It was, I thought it was sweet. I thought it was really cool!

Andrew Brandt: [Laughs].

Ed O'Bannon: When, um, we got to talking and, he had mentioned that I didn't get paid on it, uh, you know, for my image.

Andrew Brandt: So you saw the video game and it's you?

Ed O'Bannon: Yes.

Andrew Brandt: It's you on the screen?

Ed O'Bannon: It, it was—Yeah, it was me. It was, you know, it was my jersey number, the guys that was playing, um, was, uh, tall, skinny—slim, I should say—bald headed, uh, black guy. And he was left handed. And the thing that tipped it off—his jumper kept going in the basket and I just, I just knew that was me.

Andrew Brandt: [Laughs].

Ed O'Bannon: Um, but anyway, I initially, you know, like I said, I was pretty fired up about it and then, and then he had said, you know, about not getting paid and, and I, you know, I just, I said to myself, you know, "Here I am." I think I was thirty-seven at the time or thirty-six at the time and I, and I just, I kinda just said to myself, "Man, I've been out of school for 15 years, and they're still profiting off of my image," but I, I just, you know, for me it was kind of a "chalk it up as, you know, a part of the game." Uh, you know, about the, part of the system I should say. And, really, kinda just forgot about it. I didn't really think about it too much after that.

And then I got a phone call from an old friend who I'd ran into recently, at the time, Sonny Vaccaro. And he had mentioned—we were just kind of touching base, which we did every so often, uh and he had mentioned that he was making about, um, uh,

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uh, you know, starting a lawsuit against NCAA, uh, and I told him about my recent experience. I said, “Wow, it’s funny you say that because I recently saw my image and my teammates’ images on this video game.”

And he says, you know, “Wow. You know, we could add that to the lawsuit, if you want,”

And I just—initially it was like, you know, I don’t know how much sense that makes but, you know, I’ll play the game.

Uh, and so, that’s really kinda how it was introduced to me and he told me, he said, “Look. There’s a number of guys that I’m trying to get in contact with to be the lead plaintiff. You’re one. Talk it over with your wife. Weigh your options,”—that sort of thing—”and give me a call.”

And so a day or two later, after talking with my wife and my family, um, we decided that we would be a part of the lawsuit so, that’s really kinda how it started for me—long story, didn’t mean to, you know, give you the long version but that’s really kinda how it happened for me.

Andrew Brandt: No it’s a great story.

Ed O’Bannon: The, the beginning anyway.

Andrew Brandt: And did you process—at the time—what that actually meant with Sonny Vaccaro in terms of— [O’Bannon waves off-camera] Hey, how you doing? [Laughs] In terms of, uh—

Ed O’Bannon: I’m sorry. Kids going to school. I’m sorry.

Andrew Brandt: Oh, we all send them off well, okay?

Ed O’Bannon: Yeah, yeah. Appreciate it.

Andrew Brandt: Yeah.

Ed O’Bannon: I’m sorry.

Andrew Brandt: Did you process what it meant to be a litigant—a plaintiff against the NCAA—with so much power. Here we are on Final Four weekend, uh, so much strength in the industry of sports, not only college sports. Did it ever sort of—you ever sort of lie in bed or walk around one day and say, “Wow. You know, that’s my name up against the NCAA?”

Ed O’Bannon: You know, um, initially when this was introduced to me and my wife, um, they said—lawyers and Mr. Vaccaro, and others that were involved—said, you know, “Your name is gonna be a part of this, it’s gonna be attached to this and it’s gonna be in your name. It’s going to be bigger than—bigger than you, bigger than anything that you’ve been a part of. Just know that you’re helping to bring about change—possibly.”

And I didn't really process it at the time when I initially heard it. Um, and it's still—at this moment—still kinda hard to, uh—It's weird to see my name on it, you know, because every now and then someone will say to me, you know, “the O'Bannon case, blah, blah, blah,” and I'll kinda sit back and say, “Well, that is my last name, you know. Um, I guess they're talking about what, you know, what I'm a part of.” It's, it doesn't seem like—you know—it's like a, there's a title and then there's my last name.

And it's, it's funny, it's weird to kinda combine the two. I don't know if I'm answering your question but, um, you know, I'll even talk to my lawyers and they'll say, “Yes, uh, you know, something, you know, O'Bannon versus NCAA,” and I'll say, “Uh, well Sathy,”—his name is Sathy—“I'll well Sath, you know, are you talking about me?”

You know and it's, you know, the two just doesn't seem to kinda match for me. It's weird but I don't know if I'm explaining it correctly.

Andrew Brandt: No, very well.

Ed O'Bannon: But, it's, uh, it's weird to see my name on it. You know, um—I don't know. I just, uh, it's—it's kinda, it's kinda weird, I guess.

Andrew Brandt: So talk a couple minutes about the case itself. What you are going after is compensation for use as you saw on your video game when you sat at your friend's house, for your name, for your image and for your likeness. Take us through the twists and turns of the case and sort of—you've had a swing of emotions in watching it all go through.

Ed O'Bannon: Absolutely, um, I think, you know, the, the biggest thing for me—my wife and I, we almost kinda trained ourselves, initially to not expect much, A. And B, understand that we are in the front line of this, and there's going to be—you know, when a system is one way for so long and, you know, everyone's used to a certain way of, uh, doing business, and then change all of a sudden comes or the possibility of change comes—there will be, uh, I don't know if venom is the word but, it'll be hard to change. And we understood that. Uh, we also understood that, um, you know, this is gonna be a long and tedious process, and not to expect anything right away—whether it's change, whether it's, uh, anything. You know?

It's, I always say it's, it's a marathon, it's not a sprint and, uh, you know, you, you, you kinda train yourself to, uh, to understand those things, um, be available when, when needed, uh, and not nec-

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essarily, um, let this lawsuit run your life. And, and that's—for, us—that's how it's always been since day one. We always, we always knew that and we always understood it, and didn't expect anything from it, financially, or, any kinda credit or anything. I've always wanted to—and I've always said that for me it's always been a wave to spark conversation. I personally never sought anything from this. Um, it, it's always been a way to really spark conversation and really kinda—

You know, if you see something that you think—me personally, if I, if I see something that I think—needs to, needs to change, then, I'm gonna do what I can to at least, uh, spark conversation so that the possible change can come. And, and this is, this is one of those situations.

So, me personally—my wife and I, you know—since, since day one, I know when, when we first started, it was our side—my wife and I—our side was getting EA Sports, to—to at least acknowledge that what they were doing was wrong and that to take the image of athletes and use it without, without their consent. Never mind paying the players—but even without their consent. And that was one of the things that I said to my friend when he mentioned that I didn't get paid, was I initially—I looked at him and I said, “Man and I didn't even—They didn't even ask me for my image.”

You know, never mind getting paid but they didn't even ask me. Even if they called and said, “Hey Ed. You know, um, we want to use your left hand and your bald head to, you know, to put on this video game.” I would have been like, you know, “Hell yeah! Let's do it,” you know. Um, but I didn't even get a phone call and that's, and that's what, you know, that's, that was my biggest thing. You know, talk to me, communicate with me, uh, and we can get something done. And there wasn't even any communication—so that's where my side of the story was and then it kind grew into, you know, fighting the NCAA and then it got bigger and beyond my dreams and from what I understand, even bigger than, uh, Mr. Vaccaro's dreams but, you know, that's kinda where I am.

Andrew Brandt: Yeah and I think that really humanizes it for us and I think we should clear up the misconceptions—as you have many times. This is not a “pay for play” lawsuit and this is not about getting athletes paid. And we talk about big-business at the NCAA, especially this weekend. This was all about what you said: name, image, likeness, consent, and eventually making some compensation for their use of that. We had Jeffrey Kessler in these seats last year. He's got a lawsuit which is more about, again, “pay for play,”

but that's not what this is about and this is a name, image, and likeness lawsuit and it's now on petition in the United States Supreme Court.

Tell us where you are right now with it as, as it moves towards—and for the Cliff Notes version: the court of appeals has agreed that this continues to be an antitrust violation, however, they have not allowed a stipend, simply the cost of attendance to be going to athletes, which a lot of the bigger schools already do. So as it moves for consideration by the United States Supreme Court, you're just following it through your lawyers. How are you feeling now as it reaches, perhaps, it's conclusive phase?

Ed O'Bannon: Uh, I feel pretty good. Um, we have, sent our paperwork and our petition to go to the Supreme Court. Uh, we are, at this moment, waiting on word back from the NCAA and their participation in this, uh, phase, and hopefully we'll hear back from them in the next couple weeks. Um, but, you know, there's somewhat of a light at the end of the tunnel, uh, if you will. Hopefully it's not a train. You know, I think it's been, again, a long, hard road in one way or another—whether it be emotionally, uh, or, uh, you know, for some people, financially. Um, I think, at this moment, again we're waiting for word back from then NCAA and what they're gonna do but, um, you know, we're happy. Um, we're excited on our end.

Uh, I think the biggest thing is to stay positive like we've always been. Uh, I know my wife and I, you know, we will continue to raise our family in the same way we've been doing. Uh, this hasn't changed our lives one way or another. But we have continuously been positive and, you know, we just—again, we're trying to stay very simple, uh, very basic, and, uh, living our lives as if none of this happened. It's been—I wouldn't say it's been hard—but it's been a, a challenge, but right now, you know, uh, we've sparked conversation and that's, that has been my biggest thing.

You know, there have been small changes—whether it's been athletes getting paid, with the, uh, cost of attendance, or, you know, they'll get an extra meal here and there. You know, maybe they will get paid while they're in school. Maybe they'll get, you know, an account set up for them and then they can get whatever they're owed once they graduate. You know, there's many different, uh, ways this lawsuit has turned but, you know, we're excited. At this point in time, we're excited and we're positive. And, and yes, it's eventually gonna conclude and it'll be soon. Um, hopefully it'll end in a positive for both sides. You know, I've always said that I

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think that there should be a—and is—a happy medium somewhere, and hopefully, we can reach that.

Andrew Brandt: And as you mentioned, you have sparked change. I mean there are families being taken care of travel wise at the Final Four this weekend. Maybe not directly, but very indirectly related to you. There's stipends going out, there's cost of attendance, there's food increases—as you know. You've been a pioneer. You have paved the way for many others—even though there is no conclusion—already. So we salute you Ed. And thanks for being with us, and Go, Go Villanova. I hope you feel that way tomorrow.

Ed O'Bannon: Yeah, absolutely!

Andrew Brandt: [Laughs] Okay! That's the right answer.

Ed O'Bannon: Absolutely [laughs].

Andrew Brandt: Thanks for being with us.

Ed O'Bannon: My pleasure, my pleasure. Good luck this weekend, by the way.

Andrew Brandt: Thank you. Thank you again, Ed.

Ed O'Bannon: All right.

Andrew Brandt: But Ed O'Bannon—one more time. Thanks so much. [applause].

Ed O'Bannon: Thank you all.

Panel 4

DAILY FANTASY SPORTS: A BUSINESS VIEW

MODERATORS: Andrew Brandt and Jeffrey Moorad

PANELISTS: David Falk and Mike Kerns

Panel 4 was an open conversation between Super-Agent and investor, David Falk and Mike Kerns, President of Digital for the Chernin Group. The duo was joined by Jeffrey Moorad and Andrew Brandt. The panelists evaluated the Daily Fantasy Sports industry through the eyes of investors and venture capitalists. The group discussed the beginnings of Daily Fantasy Sports and pondered the lasting impact on the world of sports, in general.

Jeffrey Moorad: I'm privileged to be able to host now, with Andrew, a panel that's going to focus on the business side of Daily Fantasy. And for this panel, we're going to bring back up one of our favorites—David Falk, who, I might add, has his own sports management school named after him—the Falk Management School—up at Syracuse. So, you know, all sorts of crossover this

week and at this event. But, David, you've been introduced already please come up again.

And with David is a great friend of mine, someone that I've known for many years. He worked for me when I first came out of college, back in the day, as they say. He went on to be a great success—started several companies in the technology space; sports technology has been his focus and expertise over time. He became a senior executive at Yahoo!—ran much of their sports content and actually did more than that, but I'll let him tell a little about it.

And today, he is the president of digital for the Chernin Group uh which was started by Peter Chernin, a longtime News Corp exec—who left the company some years ago and formed the Chernin Group. Mike is someone who is running their efforts in sports content and again I'll let him explain more detail around that.

But we appreciate the two of you being here to—and Andrew grab a mic, please. But we appreciate you being here to discuss the, you know, impact of fantasy sports and, you know, for example what an investor might think—there are a lot of high-profile ones that have been involved and got involved in fantasy sports—what are they thinking today, um how do they view the industry going forward given the legal concerns that we've heard and the regulatory concerns that we will hear about a little later this morning. And from David Falk's perspective, you know, how the players look at fantasy sports.

You know, how does a player look at the idea of being “gambled on” or “bet on” or, you know, how do they view—I think most players understand that, you know, there's some pretty firm lines between involvement or any kind of relationships between gamblers or gambling but how do they feel about fantasy sports? David also speaks from the perspective of being a, a very savvy sports tech investor, so I think his perspective in this area will be helpful as well. But let's start with Mike Kerns, who came all the way from San Francisco to be here this morning, we thank you for that. Um maybe a little about your background and how Daily Fantasy Sports and tech have crossed your career.

Mike Kerns: It's great to be here; good luck this weekend! I'll be rooting for Villanova because UCLA didn't even make the tournament this year. I am a UCLA connection, as well, with Jeff and Ed [O'Bannon]. Um, so I started my career working with a guy named Ron Conway, who's probably the most active early-stage technology investor in the world—he runs a fund called SV Angel.

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Then I went and worked with Jeff and Lee and David Cornwell in sports management. And then I started a company that was called Pro Trade which, uh, only exists on some obscure links on Google still, I'm sure.

But essentially it was Daily Fantasy. It was—we basically create a virtual stock market of athletes—a portfolio of athletes that people would pick and we will let people bet on the outcome of their portfolios appreciation against their competitor. And then we would take a fee. This was about four years before FanDuel started—I remember when FanDuel started, Pro Trade didn't make it, for a variety of reasons, thankfully we had long-term investors who were supportive of us.

We basically re-branded the company to be Citizen Sports and we brought fantasy sports and Commute Sports data to Facebook, when Facebook opened up their platform in 2007. And we were one of the largest application developers on Facebook—so those of you who you might remember Facebook back in '07, '08, '09—there were the multi-million-person March Madness bracket games. We used to have 5 million people playing March Madness brackets on Facebook through our apps. We had a multi-million-person fantasy football product that Yahoo! ended up acquiring our business.

We also have the mobile app called Sportacular which was the biggest sports app on iOS and Android—significantly bigger than ESPN ScoreCenter. Yahoo! bought us in 2010. While at Yahoo!, for the last three years, I reported to Marissa [Mayer] and ran our Global media uh business and product which included Yahoo! Sports which is the largest uh fantasy provider in the world. Uh and we recently got into Daily Fantasy, actually, this year at Yahoo!. Um I left Yahoo! about a year ago, but was involved in the building of Daily Fantasy. We looked at acquiring FanDuel and Draft Kings—confidentially, while at Yahoo! and uh didn't. And I can also say that the Chernin Group is an investor in the Daily Fantasy company I personally looked at—those Daily Fantasy businesses—outside of any official capacity.

So I feel like I started a fantasy business; managed the Yahoo! fantasy business; the Chernin Groups is an active investor in digital media companies from Sound Cloud to Twitter to Tumblr to Pandora—which are in the same vein, to some respects, of FanDuel and DraftKings—as relates to technology-based unicorns if you will. Um, I certainly have a perspective, although we—the Chernin group—and I are not personally an investor in FanDuel or

DraftKings, so everything I say would be kind of from an investment-perspective, but not necessarily directly related to those particular companies.

Jeffrey Moorad: Great. David, what do players think about this?

David Falk: Well I can tell you what players should think about this. Um, so since 1982 in the NBA—I don't know exactly what year it started in football—uh the players earned a fixed economic relationship with the owners, where they share roughly 50/50 on the revenues—and it's been a long time since 1982. And so, if, if the four of us were partners in a business and we each owned 25%, and we wanted to make more money, and Jeff wasn't willing to give up some of his 25% and Andrew wasn't willing to give some of his 25%, I'd say, "Guys, how do we make more money?" I think someone would tell me, "God David, this is really simple. We have to grow the business."

So if you look at the amount of money involved in sports gambling—which is, you know, huge—billions, maybe bigger than the television contracts in the NBA, maybe not in the NFL, but certainly it would be the second largest revenue source. It is only a matter of time before the leagues figure out how to work with the local State Attorneys' General offices in each of the states and legalize the gambling. I was the guest editor at *Worth Magazine* in the March issue which is a high net-worth magazine and, without trying to be comical, I likened it to marijuana.

You know, the amount of revenue that is flowing is so great, you know, either you are going to legalize it and make money taxing it or you're going to, like, close your eyes and say, "hey, it's not proper." So, I think if you're a player, you want to embrace the revenue stream from gambling, and, at the same time, obviously, you need to have some protections from the leagues to ensure that it doesn't interfere with the integrity of the sport.

Mike Kerns: In many ways David, well I completely agree with you, in many ways legalizing and regulating sports wagering would be a very strong enhancement towards preventing fixing. Right? I mean, you have a lot of evidence of this in your up where Betfair—which is a real-time trading market of in match betting—is the greatest determinant of fixing going on in tennis. In very obscure tennis matches—third rate level tours—fixes are being discovered based on irregular betting patterns and trading patterns and trading patterns on Betfair, right? I'll analogize this to an SEC and the New York Stock Exchange.

It's beyond hypocritical—I mean, it was very interesting listening to the lawyers and they have very you know precise words and precise definitions of this and that. Someone needs to explain to me how it's legal to bet on a horse race down the road, but it's not legal to bet on the Sixers game down the road, but it is legal to bet on the Sixers game in Las Vegas. That makes no sense to me at all—um, but I'm not nearly as smart as everyone that was up here before.

David Falk: The other thing I guess—I like to be a little bit of a student of sports history—so in, I think, April of 1989, Bart Giamatti suspended Pete Rose for gambling on baseball. Today, the NBA is a partner in FanDuel and so, you know, it's evolved and I think it's a reality, I mean as he explains, way better than I could, you know gambling is part of our society—people gamble on sports all the time.

You look at the tremendous interest over the last ten years in bracketology, you know, you have shows dedicated to handicapping. I was watching my Alma Mater play Virginia last week they were down sixteen at a certain point in time and someone came on said the odds are 1000-to-1 that Syracuse is going to win the game—right in the middle of the game. And so in our society, it's a reality—it's here, it's goes on—it has to be merged into the fabric of sports in a way that protects the integrity of the game.

It will be an enormous resource financially and so if you're a player like LeBron and you have a maximum amount of money you could make under the collective bargaining agreement and someone comes along and says, "Hey wait a minute LeBron, we are going to triple what you could make because we have an extra few billion dollars coming in from, you know, a new partner—it's not Turner sports, it's not ESPN or ABC—it's FanDuel," and, whatever, the players are going to embrace it.

Mike Kerns: If you take all of the money spent on all sports rights, annually, which is I think the biggest contributor towards league income—is sports rights, the amount of wagering in the United States, where it's illegal to wager on sports—anywhere outside of Las Vegas—is five-times bigger than all of the sports rights included. So, your business that we all own, is not only increasing—which is going to increase LeBron's max cap—but it's increasing dramatically if they can get a piece.

And what what's fascinating is the United States is one of the few Western countries where sports wagering is illegal other than horse racing and in Las Vegas. But we are the largest sports wager-

ing society in the world per capita. Americans wager on sports more than any other society in the world including China, United Kingdom, uh, what-have-you. On both the per capita basis and on a gross basis. Um, so we are a nation infatuated with gambling but it's all occurring still in brown paper bags illegally, which just makes no sense.

David Falk: Lets change the equation for a minute. You're Jeffrey Moorad and you're a sports owner, OK? And the salary cap at basketball is going to go from about fifty-three billion two years ago to one-hundred and ten in two years—you are going to double your payroll. Now if you're in New York, LA, Chicago, Miami, it's great, if you're in a small market like Milwaukee, Charlotte, Utah, you're thinking, "Gosh, how do I—where's the money come from for me to pay an extra sixty-million-dollars a year salaries, which I have to pay? I have no choice."

And so if you're an owner—I think this is almost like a nirvana—that you have a new revenue stream. People have been questioning for years, "how high can the rights fees go in television, how much more money can the leagues milk out of—?" I mean, when ESPN has got to pay Andrew's salary, which keeps going up, people wonder how much more, how much?

Andrew Brandt: Couch cushion money there.

David Falk: [Laughing] How much higher can the rights fees go? So, I think from both players and owners and the league, you know, they want to get their hands around the gambling issue. It's not a moral issue, as is explained, it's strictly a business issue. But I think the biggest impediment is how to control any potential slip on the, on the integrity of the game.

Jeffrey Moorad: There has been a bit of a creep on the issue overtime, I mean, for example, when I ran the Diamondbacks in Arizona, we had to go to Major League Baseball, at one point, and ask them permission to sign up Gila River and, ultimately, Salt River Casinos, you know, who play prominent roles. The Attorney General from Arizona is going to be on the next panel, so we'll be able to hear his perspective on those kinds of issues.

But, you know, we went to Major League Baseball and asked for permission to have those companies sponsor us and today, I'm going to guess at least in the West, as well as other teams around the country, some of the Indian tribes are paying some of the largest sponsorship deals of any that teams have significant income. So, you know, again one of the questions was, "Well, wait a minute. Do they have sports betting? What are we going to do? Is that appro-

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priate?” Look, like anything, I think change takes time. It evolves and I think that’s what’s happening in this industry.

But let’s turn the discussion a bit here to the business side of Daily Fantasy, which is, you know, obviously the focus of this morning. What are your perspectives on—David, you invest in a lot of technology companies, Mike has started them, run them, now buys them—you know, how does an investor look at the current state of Daily Fantasy? What are the kinds of things that you’d be thinking if you were an investor—understanding that neither of you are.

Mike Kerns: Today I’d be thinking about how to protect my downside, frankly. I think, I don’t know, if it’s been reported but there’s certainly rumors in the industry that both FanDuel and DraftKings have raise additional capital recently from current investors. Um, I’m not sure what investors participated and which didn’t. You know you have some of the biggest and best investors in the world involved in these companies—from KKR to, I believe, Silver Lakes invested in one of them, News Corps invested, Comcast, NBC Universal’s invested.

Jeffrey Moorad: Presumably new investment at lower valuations.

Mike Kerns: Presumably a lower valuation—with terms that probably protect downside even more in terms of preferences and what-have-you. There’s also been a lot of speculation, publicly, that the companies will ultimately merge, which to me, as an outsider, makes total sense, right? I mean, right now they’re competing with each other in customer acquisition, marketing, what-have-you. So that’s kind of, I think, the state of the state from a business perspective today. Obviously the regulatory issues have been well covered, there is no reason for me to go into that, but that’s going to be a big determinant factor in where these businesses go.

The more, kind of, I would say, mundane analysis of the business opportunity that I think is worth pointing out considering is: I think Daily Fantasy is a much, much smaller business than people realize. Meaning it’s a much smaller business relative to the press attention, the marketing dollars, and all the regulatory oversight that’s going into it. You’re talking about single-digit millions of Americans who are playing—of those, even if only a fraction of are playing regularly, and of those I think it’s something like two to five percent win ninety percent of the money.

So, you know, you only have a few people who sit in their basements and have algorithms and they’re winning all the money, right? They’re the smart money, all the rest of people playing Daily

Fantasy are throwing darts and have no chance. Now, increasingly, these companies are trying to create environments where people are playing against their friends so it's dumb money playing against dumb money and maybe your chances will increase because you're not playing against the algorithm guys, have fun.

I, personally, think the only investment hypothesis that makes any sense to support multi-billion dollar valuations is that these companies are going to get such big brand awareness and have league relationships and union relationships. That's when and if sports gambling gets regulated they become the consumer brands. To all of a sudden become the, you know, "Coca-Cola" and "McDonald's" and "Walmart" in terms of the consumer brands of the sports bookies.

Other than that I don't think that these businesses will ever get to the point where they justify multi-billion-dollar valuations based on the size of the market, the complexity of the consumer experience, and the attrition in turn that those businesses have with people all losing to smart money.

David Falk: I would like to offer a slightly different perspective. Let's take out the layer of gambling. I think that ten years from now, Millennials will go to a football arena, a basketball arena, a baseball stadium, and they're going to watch two teams play—and while they're watching them play, probably in their seats—the back of their seats—will be an iPad or some kind of a digital and these kids will say, "I don't really want to watch the Giants play the Dodgers. I want to make up my own team."

You know, they're going to take guys, and while the games going on, I think that the fan experience, I think the impact of fantasy—the digital fantasy experience—will change the way stadiums are built, the way fans watch the games over the next five to ten years—independent of the gambling part. I think it's going to just totally—just as smartphones and iPhones changed the way we experience books, movies, you know, over the last 10 years.

Jeffrey Moorad: Along with virtual reality.

David Falk: Absolutely, and Peter Gruber—who owns a piece of the Golden State Warriors and the Dodgers and the football team in L.A.; is a pioneer with his virtual reality company—is one of the smartest people.

Jeffrey Moorad: Football, as in soccer.

David Falk: Exactly, one of the smartest guys I've ever met, certainly in the sports world—used to run Sony Pictures—and so, I think, the whole fan experience is going to change, because of the

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fantasy thing and I agree it's only a matter of time before they merge—but it's interesting to me when you mentioned the comparison to Coca-Cola—it's exactly what I feel, you know, I wanted to say this on an early panel.

One of the things that intrigues me—having been in this business a long time—is that you hear players talk about their brands today, you know, I don't think they're probably ten players in most leagues that really have a brand and they talk more about their brand than they do about winning. But I think something like FanDuel and DraftKings overnight have become brands. The amount of attention they've drawn is incredible and maybe they won't become Coca-Cola but they'll become part of our everyday experience just like Google or Apple has become part of our experience.

Jeffrey Moorad: So assume for a moment that that sports gambling is legalized across the board, are there companies or are there investors that are preparing for that? In other words, the ancillary companies that some of what you're involved with, Mike, at Chernin—that support the sports industry—some obviously have the ability to cross over into gambling, you know, whether it's fantasy sports or whether it's pure legalized gambling on sports. What type of marketplace do you think is being created for some of those ancillary businesses?

David Falk: Well the company that you mentioned that one under that has the competitor Fan Text which got bought, I can't remember.

Mike Kerns: Fan Text.

David Falk: And they created an entire stock market where you could buy LeBron James and, you know, for certain valuation I think you are going to have of a lot of—it's going to get so sophisticated that people try to create, like, an off-the-court, off-the-field world, like, you know, of sports. Which is why it's fantasy. Where you combine your own teams, you can change coaches, you get to change general managers.

I think it's going to be—I think it's going to get extremely complex because of the sophistication of digital and as the devices become quicker under Moore's law—changing this thing as fast as we could talk about it. I think we could have a whole peripheral industry of people making products that will change the entire way we experience sports.

Jeffrey Moorad: Mike?

Mike Kerns: Yeah I, I totally agree with that David. I think that we are investing and looking at business opportunities today—from a Chernin group perspective—that are not Daily Fantasy transaction businesses—which I’ll describe FanDuel and DraftKings as—and certainly not interested in getting involved at all in any level with transactional sports betting.

However, there are, we think, really interesting media information and data analytics businesses to be investing in and building and acquiring today in both potential anticipation of sports gambling getting regulated. But, frankly, even without sports gambling getting legalized and regulated we think today that there’s an under-served media information business targeting people who wager on sports considering what I said earlier—that America is the number one sports wagering society in the world.

Yet, you turn on ESPN, CBS, NBC, Fox—who are the primary rights holders, broadcasters of sports media—and they don’t talk about sports betting because of their complex relationship, primarily with the NFL. Now that’s starting to change, my co-founder from Pro Trades is a sports gambling analyst on ESPN, named Jeff Ma, he’s the MIT card counting guy, Scott Van Pelt on the Scott Van Pelt show has recently added a segment of “bad beats,” right? Where you have the over-under, it’s forty-five points in the NFL and it’s a forty-two to nothing game and the team decides to kick a field goal with one second left for no reason—all of a sudden you hit your over.

I mean by—I think entire media companies can be built looking at sports games through the lens of the over/under before the game, during the game, and after the game—targeting those fans. David?

David Cornwell (from audience): Isn’t that the danger? I mean, if, after Super Bowl XXV, instead of the cover of Sports Illustrated—instead of the cover being Everson Walls holding his finger up, the headline is Giants failed to cover the spread. That’s the danger, right?

Mike Kerns: I don’t, I don’t know that. What’s dangerous about that? That’s already happening, the Super Bowl is the most wagered on sports event, right?

David Cornwell: But will you still write about the game instead of gambling?

Mike Kerns: But people—there’s always going to be a massive percent of society that’s not going to be wagering on sports and they’re going to be very interested in the game. My only point is

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that there is also a lot of people who are looking at the game through the lens of the wager—and they're being under served from a media and information prospective.

David Cornwell: Do you move away from the integrity of the game? Is that not a danger?

Mike Kerns: But do you think that the integrity of the Premier League matches is challenged because there are sports betting shops on every corner in the United Kingdom? I mean it's a big deal right, I mean Manchester United play Liverpool the cover of you know the Daily Mail or the Telegraph, whatever, is not, you know, they failed to get three goals, therefore, a lot of people lost on the over. It's, "Oh my gosh, that was an amazing match," and it was one nil—but betting is pervasive, it's accepted in society, it's part of pop culture and people can bet without worrying about the integrity because it's regulated, it's measured, and people who want to consume media through the lens of it can do that if they choose.

Jeffrey Moorad: By the way in the U.K., and in other places outside the U.S., the betting goes to a level that is hard to even comprehend from a U.S. perspective. For example, you go to a to a soccer match in the U.K. and, you know, you walk into a box, they hand you, literally, a menu of bets that you can make you can bet on when the first goal is scored. You can bet on the first penalty kick—you can bet on every element of the match that you are about the watch. So that winning and losing points and spreads are one thing but the betting goes to a level that's really unbelievable.

Andrew Brandt: Well, the NFL plays now at Wembley Stadium three times a year and the NFL has this mantra of integrity against gambling—but there's betting parlors at Wembley, where they play their game once a year, as Jeff said. I think we're at this moment of time in sports where we hear this word so often—integrity, gambling bad. Yet, we have the NBA investing in FanDuel, yet, we have two NFL owners investing in DraftKings, MLB with DraftKings.

So, I guess, from an investment point of view, did these early investors you mention—KKR, these big-time investors—did they not see the heat coming with legislators, with lawsuits, with litigation coming as we heard so often?

Mike Kerns: I think that, I don't know, obviously, I can't speak for them. But my assumption is that they made a calculated risk. Um, it's certainly, you know, I can say while at Yahoo!, we certainly made a very conscious, deliberate discussion we did investigation and research into the regulatory environment—the game of skill, the Kyle Bill—and we made a determination that, you know, in our

opinion it was a game of skill—we excluded certain states which were very clear at the time we launched it. And we're obviously—they are certainly following the "environment" and I think they have recently shut down New York—as have others. So I, I think it was a calculated risk.

Jeffrey Moorad: It sounds to me, from listening to the two of you that, that FanDuel and DraftKings are really but a catalyst, you know, of change and a catalyst that is forcing the issue—the broader issue of sports gambling—to the forefront. And I think, as we listen to our regulatory panel next and we're going to pick up, you know, some more of those themes—but to me, that's really what I'm hearing this morning and throughout these discussions.

David Falk: Well you know let me say personally I am extremely sensitive about gambling my father was a compulsive gambler—lost every penny he ever earned at the racetrack. But, and I think it's a little bit like the [Electronic Arts] discussion we just saw on Skype, I mean, for me, I'm a little bit of a traditionalist. While I don't think it's necessarily appropriate for E.A. to be using Ed O'Bannon's image without permission, the fact that it costs \$73,000 to go to NYU—so if you play sports at NYU for four years that's three-hundred grand. What if you said to the Ed O'Bannons, "Okay, we'll pay for your likeness. But you're not LeBron James, you're not Michael Jordan, you're not Kobe Bryant. Maybe it's worth \$20,000 over four years and you could pay for the right to go to UCLA and try out for a professional career."

I don't think—it's a very emotional issue, it's a very complex issue—and gambling is very, very emotional. I think from a pure business side, just the sheer volume of the dollars involved is going to force it to be legalized in a matter of time. Whether it's federally or state-by-state, New York state is not going to lose the revenue inherent in sports gambling at some point in time. We are all going to have to come to grips with it.

I think there's a whole layer in the investment side, in my opinion, in fantasy sports external to gambling. I think it's going to totally change—it's like 3D television or HD television, you know, digital versus analog—the revolution going on at digital advertising. Everything is changing—the whole way we view content is changing and I think the fantasy experience—there are a lot of people who aren't sports fans—geeks—that are going to love fantasy sports that don't really follow real sports at all. They are going to make up their own teams their own coaches, they are going to have avatars in

the game, they are going to have characters that aren't men or women playing the games.

Um and I think it's going to, it's going to be like going to the movies in a way, it's going to be like a whole different entertainer experience. I think, if two totally different sides of the fantasy issue, you have the gambling side which I think is the economics at the end of the day are too great for us to ignore it will become a part of our everyday society.

But I think there's a whole other layer where really smart people will create the next level of virtual reality, 3-D, maybe 5-D, I don't know what it's going to be. And you're going to go to watch a game and it's just going to be—I mean if you ask me, and I'm sixty-five years old, when I go to watch the Wizards I sit on the floor and all, during the game I got my smartphone out—I want to see how my clients are doing, how the stats are, sometimes I turn on, you know, NBA Live and watch the games while I'm at the game.

If you would have told me I was going to do that twenty-five years ago, I would have said, "Yeah, when I come out of crack rehab. Never going to happen." So, I think the fantasy sports world is going to completely change not only the experience of the fans, it's going to change the way architects design stadiums, it's going to change the way you order food.

Jeffrey Moorad: It already has.

Mike Kerns: Yeah, I mean, I totally agree that, you know, what we define as fantasy sports which started as rotisserie baseball then evolved to a spreadsheet, then evolved to a website—now has evolved as a daily, and, you know, I think it's going to evolve to be much more like an E.A. video game and the definition of fantasy sports is going to evolve and it's certainly enhancement towards interactivity, engagement—the beneficiaries will ultimately end up being sponsors, leagues, and team owners.

Because it's just going to drive more interactivity, more engagement, more attention, more interest—which fundamentally is the primary benefit of fantasy sports, right? It drives "tune in," it drives people watching the game. I think it being a catalyst towards sports gambling is an unknown—it could end up backfiring, right? That's the regulatory environment—New York could come out with is even stronger against Daily Fantasy—which closes the door even more firmly on sports gambling regulatory environment opening up.

And it could be, you know, we can come back up here in another ten years and talk about how hypocritical, in my opinion, that

still is—given that it’s largely shut down for moral reasons—but, yet, I don’t know how many people have seen the movie *The Big Short*, I mean what’s going on in the commodities markets and the trading markets, I think is far more immoral, far more speculative—with all of our 401Ks and incomes being jeopardized—by people who are, essentially, just gambling. Yet, gambling on an individual sporting events somehow is morally against the fabric of the United States, it, it literally goes back to puritanical anti mob laws that um are just antiquated at this point relative to the rest of Western society.

And I agree with you David, I think it goes too far you know you don’t want kids gambling, you don’t want to enhance gambling, you want to stop problem gambling. And I think regulating it is actually a very meaningful step towards stopping irregular gambling because right now, there’s no checks and balances in place with the illegal bookmaking happening—and problem gamblers are not being looked after through any regulatory or statutory means, so I think that’s a strong argument for regulating as well.

David Falk: Plus New York did invent OTB right?

Mike Kerns: Hmm? What’s that?

David Falk: Didn’t New York invent off track betting? First state in America to be able to bet without going to the track. So, again, not being too cynical and I love *The Big Short*—.

Mike Kerns: I’m very cynical. The biggest anti-sports betting legislative forces have historically been Las Vegas casinos, because they want to protect their monopoly on legalized sports betting and, increasingly, it’s the Indian casinos because they want to make sure that if you need to get your fix, you can drive—I have never been here before—I assume within thirty miles we could get in the car and go make a bet on Blackjack at an Indian casino, but we can’t make a bet on the Sixers.

David Falk: Well, the other thing is a “litmus test,” I think, for many years the NBA said there would never be a franchise in Las Vegas because of the gambling. I think today it’s the opposite, I think Las Vegas is the safest place to put a franchise because the gambling is so regulated—there more than any other state—and there’s going to be a franchise in Vegas, it’s just a matter of time. You know, I think the hysteria over the gambling has sort of flipped—when the league becomes partners in FanDuel, it’s pretty hard to say you’re worried about having the franchise in the gambling capital of the world.

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It's a very interesting time and it's obviously the issue of gambling is so emotional, just like the whole issue whether to pay players and colleges is a very emotional issue. It's almost like abortion and politics, I mean, it's a lightning rod for people to express their emotions—but at the end of the day, the sheer preponderance of the money is too great, it's going to have to be regulated.

Andrew Brandt: And the leagues know what an incredible fan engagement tool it is. I mean, as we talked about—what's a fan in Florida going to pay attention to a Utah Jazz game, but for, having a player on their team.

Jeffrey Moorad: Well, thank you uh both, terrific insights and, um, I think we're finally back on time here. So, I want to thank David and Mike, both, for their participation, their perspectives, and I also want to go a little out of bounds here—only because I didn't have time to ask the question on the earlier panel. Mike, if you'll excuse me, I want to know one thing from David Falk—and that is: tell us about the most successful endorsement deal in the history of sports. I know it doesn't have anything to with fantasy sports.

David Falk: It's my fantasy.

Jeffrey Moorad: But there is a little fantasy to creating Michael Jordan's Nike relationship. I would just like to have you talk about it for a few minutes, because I didn't have a chance to ask early.

David Falk: Sure, it's a fun thing to talk about. So, um, I started in this business in 1974, when I was in law school. In 1976, I went to Portland, Oregon, when Nike was a fledgling company, to watch my rookie client, Wally Walker, beat Philadelphia in the [NBA] Finals. The next day, the head of marketing for Nike, a guy named Rob Strasser—in the midst of this hysteria in Portland and parades going on—negotiating deals for our—that year we had the first, fifth, and sixth pick in the draft. I think the highest guy got \$1,500 and \$2,500 for 2 years—which is considered a really big deal at the time.

By 1982, we had the number one pick of the draft, which is James Worthy—he was the highest paid player in the history of the NBA for a shoe deal with New Balance—on the same team with Kareem and Magic, ironically, making \$150,000 a year. So Michael came along in '84, he was the star of the Olympic team, which played in Los Angeles—dominated the Olympics—and nobody really thought he was going to be a great player but they thought he'd be really exciting—sort of like a Dominique Wilkins kind of a player.

And so I went to all the companies, I said to them, “We’re not going to make any offers for Jordan—we will invite you to make an offer, but you have to explain to us what will you do to market him.” And at the time Converse was the official shoe of the NBA, and the Olympics, ironically. Adidas was an enormous company—we represented the owner of Adidas, Horst Dassler, who is the son of the founder.

Jeffrey Moorad: And Adidas had been the North Carolina brand.

David Falk: No Converse. And despite what you may have seen on these videos with Sonny Vaccaro and my good friend George Raveling, who each take 100% credit for bringing Jordan to Nike, after recruiting him for an entire year, Jordan did not want to get on the plane and even go visit Nike. He wanted us to sign with Adidas. So, I love how Sunny tells how influential he was, I would say that I have a vivid recollection of Sonny’s role when Michael finally did get on the plane. He opened the door when the plane landed on the tarmac and said to Mrs. Jordan, “Welcome to Portland,” and that was the last thing he said the entire day. Now, if that closed the deal Sunny is way more influential than I give him credit for. [Laughter].

And so what I wanted for Michael—having in the early part of my career worked for a firm that represented mostly tennis players, a lot of the great ones, Arthur Ashe, Stan Smith, Jimmy Connors, Tracy Austin, Ivan Lendl—in Golf and Tennis everyone has their own lines—Jordan Spieth has his on line, McIlroy has his own line, shoes clothes, tennis rackets, golf clubs, balls it’s—it’s normal.

In basketball, the only guy that ever had that was Ralph Sampson, the year before Michael, with Puma, and it didn’t work. So, we told all the companies that if you want to sign Jordan, you have to create a line for him. And because Nike at the time was probably a thirty-million-dollar company—it’s now eighty-five-billion. Brand Jordan, alone, is now a three-billion-dollar company, today.

Rob was sort of willing to do it and he came to my office in Washington in August—it was hot as hell on a Saturday, the air conditioning was off at the building and he said, “OK, we’re willing to do the line—what do you want to call it?” I looked at him like he was nuts, I said, “what do I want to call it? This is called an autographed line—a signature line. We want to call it Michael Jordan.” And he goes, “No, we can’t call it Michael Jordan,” he said, “You know, America is fed up with designers slapping labels on

products—whether it’s sunglasses, beach chairs, cars, you know, that trend is gone—you can’t call it Michael Jordan.”

I said, “OK smarty-pants, what do you want to call it?”

“Ah that’s your challenge. We’ll come up with a line—you come up with a name, but it can’t be Michael Jordan.”

I wanted to rip his throat out. So I’m sitting in my office thinking—and Nike just come out with a new line of track shoes, running shoes that have this allegedly revolutionary technology called “Air Soles” that cushion your feet. So I thought for about literally a minute—just got this idea popped into my mind and I said, “OK, I got it. We’re going to call it ‘Air Jordan.’” Air for the duality of the combination of the cushioning in the shoes and the fact that Michael played in the air.

So they agreed to make the deal—to put it in perspective, it’s a five-year deal and Rob came back to me and said, “Look, we’re going to do this but what happens if Michael’s not as good as everyone hopes he’s going to be? But we want to keep the deal for five years, but we want to stop having to make the shoe if he doesn’t really become a star.” I said, “OK, I’m cool with that—I don’t think that’s a big risk.” He said, “OK, if he doesn’t become the ‘Rookie of the Year’ or if he doesn’t average twenty points at any time in the first three years or if he doesn’t become an All-Star anytime in the first three years, we want to have the right to stop making the shoe at the end of the third year of the contract.”

“OK,” I said, “No problem, but let me ask you a question. Hypothetically, supposed none of that happens but you are really selling a ton of shoes—what do you care what he’s done if it’s working?” He said, “That’s a good point.” I said, “How many shoes would you expect to sell at the end of the third year?” Now, you have to understand no one had this: Dr. J didn’t have it, Magic Johnson didn’t have it, Larry Bird didn’t have it, Kareem didn’t have it. And Nike wasn’t a very big company, so they did some checking and said, “OK, if he does none of the performance categories, doesn’t become ‘Rookie of the Year,’ whatever, but if he sells three-million-dollars worth of ‘Jordans’ by the end of the third year, we will keep the deal going.”

At the end of year one, we sold a hundred-thirty million. [Laughter].

He outsold every other shoe company in the United States—and the thing that I’m the most-proud of is that I used to tease Michael, when he was very young because as he is the ultimate needler, teases you like twenty-four hours a day. I said, “You know, I

told him two things, my dream is that—he was 21 years old—that one day you meet a woman, you get married, you’ll have kids, and if one of them is a boy—could you imagine if you walk into Footlocker maybe thirty years from now and order a pair of ‘Jordans?’ How cool would that be?”

The other thing I told—which has happened, he has two sons, Marcus and Jeffrey, both played college basketball, both played together for a year at Central Florida. The other thing I used to tease him was, those of you that know Converse, Converse basketball shoes, historically, there is a brand called “Chuck Taylors.” No one knows who Chuck Taylor is but his name is on the shoe. And I used to tell Michael, you know, there is going to come a time, big time, when a kid buys your shoe and says, “Are you kidding me? Michael Jordan played basketball? I thought he was the guy that designed the shoe.” We are getting a little—he is fifty-three years old now—we are getting a little close to that time.

So, it’s been a wonderful experience. The brand is amazing; I think it’ll be a ten-billion-dollar brand by 2020. It’s killing it in China, he’s making—Michael Jordan today sells more shoes than if you took every player in the NBA who’s got his own shoe: LeBron, Kobe, Dwayne Wade, Chris Paul, Carmelo Anthony, Dwight Howard—added them all together and multiplied them by three, Jordans sells more than them all combined, by far. And so it’s uh it’s probably the best—now as a footnote, I would tell you that while I’ll say it’s probably the best deal ever made in my career, it’s also probably the worst day ever made in my career, because not knowing how successful it could be, you know, when you’re make a deal like this—a licensing deal—you have guaranteed money and your royalty compensation.

And the deal was for 1.4 million dollars a year for five years and a very small royalty—I think he got like fifteen cents a shoe. If I had known how many shoes they would have sold I would have signed them for a dollar a year and gone 50/50. Now as a final epilogue to the story, about four or five years go by and we want to make a deal for Michael with the NBA to do videos. The NBA had a deal with CBS/FOX to produce videos. Sort of like music videos and the two most successful ones they produced were Magic Johnson and Kareem.

So the current hockey commissioner, Gary Bettman, who was in charge of all of the NBA licensing at the time. So I went to him and I said, “I want to make it like an old-fashioned Hollywood deal. I want to do three videos and I want you to pay Michael six-hun-

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dred-grand guaranteed against a fifteen percent royalty and he said, “Do you always have to be such a blank?” I said, “How am I being a blank?” He said, “Do you know how many videos we would have to sell to cover six-hundred-thousand-dollar guarantee?” I said, “I have no idea.” He said, “two-hundred-thousand units.” And I said, “Well, is that a lot?” He said, “Magic has the highest video in the history of the NBA—he sold fifty-thousand units, Kareem is number two at thirty-five-thousand units and you’re asking me to cover you for two-hundred-thousand units.” So we went back and forth we ended up making the deal I should have made with Nike. We cut the guarantee from six hundred to three hundred and we went 50/50.

How many units did he sell? Anyone just pick a number.

Audience Member: Three-hundred-thousand.

David Falk: You’re close. He sold two-million, [laughter]. *Two-million.* So after I made that deal, I realized I had really screwed up the Nike deal and so we actually raised the royalties for the rest of the time and today you know it wouldn’t matter if Nike paid Michael a million dollars a year, ten-million dollars a year, fifty-millions dollars guarantee—he’s making over one-hundred-million dollars a year in sales, because the company is at three-billion. And it’s a, it’s a tribute to his enduring popularity and how much he’s loved around the world.

Jeffrey Moorad: Well, thank you, David.

Panel 5

DAILY FANTASY SPORTS: A REGULATORY VIEW

MODERATOR: Lori Kalani

PANELISTS: Mark Brnovich, Martha Coakley,
William H. Ryan, Jr., Gary Slaiman

The final panel observed the current regulatory landscape across the country. Arizona Attorney General Mark Brnovich, Former Massachusetts Attorney General Martha Coakley, and Pennsylvania Gaming Commissioner William Ryan surveyed the various state regulations and proposed regulations relating to Daily Fantasy Sports. Gary Slaiman of Morgan, Lewis & Bockius LLP provided his perspective of the current regulatory view of the federal government. The panel was moderated by Lori Kalani, Co-Chair of the State Attorney General Practice of Cozen O’Connor.

Andrew Brandt: As we covered so many angles today of Daily Fantasy, we're now going to hit the regulatory angle. We have an esteemed panel here with a current Attorney General, a former Attorney General, and some people prominent in the industry. So I'm just going to turn it over to the co-chair of the Attorney General Practice at Cozen O'Connor, Ms. Lori Kalani, and she'll welcome the panel.

Lori Kalani: Thanks, Andrew. Thanks everybody for sticking around. I know this is the last panel on a Friday, so I appreciate everybody staying. Let me start with introductions. I'm joined here by a panel of very impressive people. I have General Brnovich from the state of Arizona, next to me. To his left, is Martha Coakley, the former Attorney General of Massachusetts and a partner of Foley Hoag in Boston. Gary Slaiman with Morgan Lewis out of Washington, D.C., and Bill Ryan, formerly with the Pennsylvania Attorney General's Office and currently the chairman of the Pennsylvania Gaming Control Board.

William H. Ryan: Former—

Lori Kalani: Sorry, former chairman.

William H. Ryan: I'm the commissioner now.

Lori Kalani: Oh, sorry. Commissioner.

William H. Ryan: That's okay.

Lori Kalani: I give everybody a raise. So, sorry about that promotion.

So you know it's interesting, I heard a lot of interesting comments here today, and I think we have an interesting panel because, like the legal panel, there's no right or wrong answer here, and like the topic today—A Changing Game—I think that everything is changing day to day. Like David Apfel said, pre-October 1st, everything was quiet. We were representing—our firm represents DraftKings—and there was not a single AG complaint out in the country that we were aware of.

And then, post-October 1st—I actually still believe today—there's probably less than five Attorney General complaints that have come in to offices about consumers having issues with the technology—with the game. But obviously we're in a very, very different place today, and a lot of action in the states that's been taking place, and if we fast forward to a year from now, that we'll probably have a very different story to tell about all the different regulatory action that's been taken.

So today I wanted to discuss sort of where we've been in the past six months or four months, and what we think might take place over the next year. And I'd love to get some opinions about what we think is appropriate, because I think we all have different experiences and, and you all probably have some different thoughts on what we think is appropriate.

Let me just give a, give a quick overview of sort of some current regulatory landscape, and what's taken place. In 2015, Kansas passed some legislation that exempted Fantasy Sports from the definition of a bet in Gaming Laws. That legislation imposed no regulatory scheme whatsoever. It was silent with respect to regulation. More recently, as I think Adam said earlier, Virginia and Indiana both passed legislation that imposed different regulation on the game. Virginia had some regulation. Indiana had also some regulation. In fact, a bit more regulation.

There's about twenty additional states right now that have legislation pending that all have some form of regulation. In Pennsylvania, the legislature passed the bill that requires the Gaming Control Board to submit a report to the legislature on Fantasy Sports, which we'll talk about as well.

And then last week, Massachusetts, which was big news, finalized their consumer protection regulations coming out of the EG's office, and those are very detailed regulations and very thoughtful that will regulate the DFS industry, and I want to talk a lot about those, but let me start with General Brnovich.

General, you know it's very—it's very different industries. First, as former Director of the Department of Gaming in Arizona, and currently as the Attorney General. So tell me why you believe a government entity would need to take steps to regulate this industry?

Mark Brnovich: Well, let me begin by saying thank you very much to Lori for having me here today, to Jeff for inviting me, and for all the people that are sitting here today. I know we're the last panel, and sometimes that's tough. I couldn't help but think that you were talking about this distinguished panel. At this point, I feel a little bit like Larry Fortensky, and does anybody know who Larry Fortensky is? Okay. I see a lot of heads shaking no.

Larry Fortensky was Elizabeth Taylor's seventh husband. [Laughter]. And at this point I feel like everything has been said and done, so I'm not sure if I'm going to be able to do anything that will impress the crowd here today. But I do think I've come at this from this perspective: when I was an Assistant United States

Attorney in Arizona, I prosecuted the largest gambling crimes in Arizona history. I was the State Gaming Director, as a state agent, I represented the Arizona Department of Gaming and negotiations with our Native American tribes at gaming complexes. So I have a lot of experience in this area—from a lot of perspectives—and one thing that I think history has taught me personally, if you look at the history of gambling, is—and I know there are people at Daily Fantasy Sports industry that don't think it's gambling. I know there was a panel on skill versus chance, but anytime you have a cash-intensive industry, whether it's banking, whether it's gaming, whatever—whatever that industry is, it tends to attract moths, like moths to a flame.

Gaming, banking, cash-intensive industries attract crime, crooks, and corruptions, so I would submit that they all need to be regulated. And what history has taught us—when you have these cash-intensive industries and they're not regulated—you end up with problems, you end up with scandals, and you end up with the public losing confidence in those institutions, regardless of what they are. And so, there's places like—you know, Ben Franklin had organized a lottery here in Pennsylvania—lotteries were used to finance the Revolutionary War. But then, there were scandals, there were corruptions, all sorts of associated problems with gambling, and then the public says, you know, we don't want it. So we've always had this ebb and flow throughout our history.

So, regardless of whether you think if DFS is a skill, chance, gambling, not gambling, we know it's a cash-intensive industry and it should be regulated. I have always been a big believer that when it comes to traditional inherent police powers of the State, those should be left to the States and not the Federal Government. So I've always been a proponent that it should be left up to the fifty individual laboratories of democracy—that Justice Brandeis said—to decide how and what types of Daily Fantasy Sports they would allow or not allow. And it should be left up to the respective States to determine, you know, how much or how little regulations they truly want.

Lori Kalani: But when you're talking about a nascent industry like this in fifty different states, do you stunt an industry? I'll let General Coakley answer that question. Are you essentially stunting an industry by saying, okay, Tennessee's going to have these regulations—and I'm not suggesting it's right or wrong—but, you know, Illinois will have these regulations, and how does a company that's very technology-driven have one-hundred-fifty engineers hired just

to implement all those regulations, or is there a way to deal with that and to solve for that?

Martha Coakley: Well, in so that's—and again, thanks to Villanova for this, because some fascinating insight today—I have been an Attorney General for eight years a year ago, and then became involved working with DraftKings last August. They're based in Boston. I met the owners; they're young, smart guys with a great consumer-tech platform. And as I saw some of what was happening with the increase in advertising, I said, "I can help you with this landscape a little bit, on how AG's think about this, because if they're not doing it yet, they will be when newspapers are saying, 'how come AG of state X or Y, you're not doing anything about this?'"

And so, it did in the last, really, six months, just explode in terms of consciousness, even though it had been around. But I would phrase it this way, you know, whether it's legal or not, remember there's legal gambling and illegal gambling, so it's no conclusion to say whether it's gambling or not.

To say it's a game of skill or chance is a first-year legal problem. What really we should be looking at is your law review article, law students, and your business about how we see this new industry, and as you heard from the last panel, the business platforms that are going to come out of it. And I'm thinking, you know, in 10 years we'll be sitting in the ball park with those little screens in front of us like you're on your JetBlue flight, and you'll be wagering in Bitcoin.

And so how do we look at these new industries and what that model is, and how we safely regulate it is challenging, and that process is underway. And I would recommend to you, for instance, for law students particularly, or if you can't fall asleep at night, take a look at the regulations that Massachusetts has generated. They are thorough, they address the things the Attorney General was concerned about—they belong in three buckets really. Kids, making sure people under twenty-one—and she was firm about that—that the advertising to minors is regulated. It's about fairness in that—we talked a little bit about the "sharks and minnows" problem—how is this going to be fair to consumers. And the third thing it really addresses is fairness to people with consumer—with behavioral problems, compulsive players for instance.

And I think you'll see, if you look at those regulations as a sausage that came out of a great discussion with our attorney, my former office, the Attorney General's Office of Massachusetts, the players in the industry, those who don't like any kind of gaming,

those who didn't like this kind of gaming, and others to say, "what is it that we do?" And it wasn't so much about we need our piece of the pie, that I think has driven some regulations on states. Nevada may be one of those. But more so from a consumer protection angle, what are the evils we're concerned about? What are the things we need to address? And, and that is a process that I think works.

Other states are looking at legislation, I would just say, regulations give you a little bit more flexibility in terms of, as the games develop—as other games develop. And I will also credit our gaming commission, who has asked to do a report, I think David mentioned earlier. And their question was not whether it's legal or not, but do we want it in our State? And if we do, what are going to be the rules of the road for it? And it was an intensive, good process that I think allows this industry to move forward in Massachusetts and I hope in other States. And I hope other states will take a look at that process for fairness.

But getting the input of the industry is an important, whether you're going to do regulations around consumer financing, around non-for-profit colleges, around mortgages—and keeping in mind that the technology piece is really important—that your legislators and your regulators understand what's happening.

Lori Kalani: Martha, if the legislature were to act in Massachusetts, or if the AG's office decided that those regulations needed to be tweaked as they learn more, or as another year goes by, would the legislature change those, or would the AG's office change those?

Martha Coakley: Well, either option. The legislature could certainly act if they wanted to give the authority for regulation to a gaming commission. That would have to—certain things would have to come from the legislature, but I think that the legislature has left the consumer protection piece to the Attorney General. And I think we could see a need as the games evolve or other issues arise, you know, that either the legislature or the Attorney General could approach it. But I think the important thing is: what is it that we're trying to accomplish to keep this game safe and fair? And I said that this business model in Daily Fantasy Sports is not going to succeed unless the people who play it are convinced that it's transparent and fair. This is not like regulating a utility or a bank. You know, people choose to play, they choose to get involved. They're going to demand that of the model, and I think both FanDuel and DraftKings and the other players in the industry understand that.

And that's where it's important for the regulators and the legislators to understand what it is they're trying to address before they issue regulations.

I think that's happening in Massachusetts. We and DraftKings don't agree with everything that they have regulated, but they understand it. They're going to comply and that allows for fairness in the industry, too. You want to make sure that your consumers are protected, but that you keep out the bad players in the industry—the kinds of things we just talked about in the earlier panel. If you're regulated, and it's fair, and your regulatory body is fair and free from corruption, then that's the best way to go.

Mark Brnovich: But let us not forget, as Mark Twain once said, that no person's life, liberty, or property is safe while the legislature's in session. [Laughter].

Lori Kalani: Very good point. Bill, can you talk a little bit about the report that you all are putting together? What can you tell us about that and what focus—I know that the legislature laid out what you need to look at, but can you give us a little bit more insight on what you expect that report to say?

William H. Ryan: I can give you some—again, my name is Bill Ryan. I am one of the seven commissioners on the Pennsylvania Gaming Control Board here in Pennsylvania. And what we do by law on the Gaming Board—we're all independent—what we do is regulate the twelve casinos that we have right now in the state of Pennsylvania. That's all we're charged with doing. Anybody who knows anything about casinos knows how heavily they are regulated. I've said to people that the only industry that may be more regulated than Pennsylvania casinos, nuclear power would be it.

And for that reason, perhaps a couple of weeks ago, Act 7 of 2016 became law, which very briefly states that the Pennsylvania Gaming Control Board shall submit a report to the General Assembly on the potential of fantasy sports as a gambling product in this commonwealth. In compiling a report, the Pennsylvania Gaming Control Board shall consider and address the following. There are ten issues—a couple of them, ladies and gentlemen: one, the definition of fantasy sports, structure of the different fantasy sports formats and the underlying activities that may be appropriate for oversight, how a regulation of fantasy sports would fit into the common law's current gambling laws and policies, compulsive problem gambling, protection of minors, safeguards and mechanisms to ensure that reporting of gambling winnings, and facilitate the collection of taxes, recommendations for legislative action. And then,

the good old catch-all: any other information related to the conduct and operation of fantasy sports as the Board may deem appropriate.

So basically, I think what the General Assembly is telling the Board is, “Okay. With fantasy sports, what’s going on, and what do we do about it here in Pennsylvania?” Which is a great question. Fortunately, we don’t have to get back to the General Assembly until the end of May. And all of you, I think, today have heard the differing versions of regulation. In Pennsylvania because it’s—I’m only one of seven, I can only speak rather carefully about what we’re going to recommend. But clearly the question has to be asked, is regulation necessary? If it is, next question is, who’s going to do it? How much regulation is enough? How much is too much? And then, questions go on to the specifics, most of which you know.

Right now, we’re in the beginning phases. It’s going to be interesting. And there’s no question that this is now, that is fantasy sports, has gone from being just about nowhere in the public mind, to being right there, front and center. So not only Pennsylvania, obviously, but across the country, we’re all going to have to deal with it.

Lori Kalani: Is your agency going to meet with the parties and with the industry to learn more? How are they going to form, form their basis of their study?

William H. Ryan: Well, yes. Our staff—we will do whatever we have to make sure we’re as informed as we have to be to give the General Assembly an intelligent product. So I would expect that we will be meeting with the industry and the report will be, I assure everybody, thorough.

Lori Kalani: Gary, earlier in the year, Congressman Pallone and Menendez wrote—or Senator Menendez—wrote a letter to the FTC asking them to investigate. And so, where do—can you give us an update on where that is? Or have you heard anything? And where do you expect that to go perhaps?

Gary Slaiman: So, they did write the letter. The FTC has authority, particularly on the—the FTC has both competition and consumer protection authority. On the consumer protection side, they would have authority and I think they have an authority under the Unfair Deceptive Trade Practice in respect to advertising and things that companies, or any industry, does in terms of informing the public about their business.

So the question that came from the Congress was, you know, are you aware of this? Are you paying attention? Do you have adequate authority? And I think the answer has been: we are aware of it, we're paying attention, we have adequate authority. I'm not aware of any further activity in that regard, other than that they're monitoring it. And from time to time, there's questions about when they publicly agree, the chairman and other members of the Commission have said, you know, we will monitor and use our authority as necessary.

Lori Kalani: So I have a question for the AG-types here, and often times, I work with—I do all my work in the AG, and then often times, AG's are able to, what I would say, regulate fifty states by entering into, what I'd say, is a multi-state investigation. They investigate a company or industry, they dig deep, they figure what the practices are, and then they come back. They work together, they form a steering committee or an executive committee. It's a bipartisan effort, and they say—they sit down with the company, or the companies—and they say, you know, here's how we want you to change your business practices. And there's a consent decree that comes out of that, er, settlement agreement. And that's essentially a form of regulation. And I just love to get your opinion on why that hasn't been the case here. It seems to me that what Massachusetts has done is it looks a lot like what a consent decree, or an AVC, Assurance Voluntary Compliance would look like.

I could, you know, I have a stack like this that we've negotiated over the years with different companies that look very much like those regulations, so I'd be interested to hear from Mark and Martha, and even Bill on that, about why you think that that's not a way to perhaps solve this, rather than having piecemeal of legislatures, pass bills that either regulate within the bill, or give the authority to a regulatory body within their states?

Martha Coakley: I'll take a stab at that. Some of them, I think, is that this is a new, new thing. Depending on how you look at it, it looks maybe like gambling. If you look at it another way, it looks like consumer tech, it looks like a game, it looks like an extension of rotisserie baseball. Depends on how you look at it, and frankly most AG's don't have sports regulatory divisions. Some states have gambling, some have none. And the cultural and the legal contexts for states to look at, whether what this thing is and what we do with it, has been very different. And I think when you see most of the states that fit in to the material element category that we heard about, their language is pretty much the same, and they reach very

different conclusions based upon whether there's case law or not, the opinion of the AG, and how people feel about this.

I think the response of this has been very quick. It has been very emotional in some ways, and it hasn't, unlike when the mortgage crisis occurred, and all states were facing the same thing with an established industry and trade practices, they can all say, and bring claims. We have claims we can bring against Wall Street banks. We have claims we can bring against for-profit schools. That's not the case here, where people have been deciding you're either legal or you're not—I think probably too quickly in those instances—but more importantly, even if they say, well, okay, maybe you're legal, but we don't know what to do with you. And I think that's been part of the process. It's been a very, if you think of it, six months in an AG's lifetime is a nano-second, right General?

Mark Brnovich: It seems like six minutes.

Martha Coakley: Yeah.

Mark Brnovich: Underwater.

Martha Coakley: It's a very—[laughs]. Well, we'll get you some snorkels, okay? It's a very short period of time for an AG's office to—never mind for a bunch of AG's to get together, because they are working on other things, and this has not been on the forefront, and I think people have been seeing what do we do with this. And this is where I will credit the Association on FanDuel and DraftKings, and all the other players saying, look, we want a fair game, we want to have our players play, we come to you. And you know this, Lori, because they made an effort in every state to say, “ask us your questions, here we are, this is what we're doing.” They were being very transparent, and I think you will see in six months a very different scenario here. I think some of these issue will be resolved. I'm hopeful they will be resolved in a way that let the industry operate, but fairly, for consumers.

And that's really the issue for AG's: how do we make this fair in our state for consumers? Like the FTC, that's the main focus of the, the local AG's, or legislative office—unless legislation is looking for registration fees—is looking for revenue streams.

Mark Brnovich: Yeah, I do think that—just kind of dove-tailing off of those remarks—is that you haven't seen these huge problems with the major scandals, I mean, there was the one with the one employee. One of the sites that was wagering on the other site, but for the most part you haven't seen somebody lose their mortgage, or like, you know, cases we've had where people have embezzled sometimes millions of dollars from employers in order to subsidize

their gambling habit. We haven't really seen that. But I think the other factor is that—I know even in our office there are people that are involved in March Madness pools, and people's attitudes towards—

Martha Coakley: *What?!*

Mark Brnovich: Well, as long as a third party's not taking a cut, it's legal! And I've always maintained that, even as Gaming Director. The point though is people's attitudes towards gambling have changed so dramatically that people don't necessarily see this as an issue. Or we don't even call it "gambling," we call it "gaming" or now, "skill." And it's interesting because if you look at the history of the way gambling evolved—even most recent trends—you know, when New Hampshire, I'd submit, kicked off the latest kind of gambling gaming craze when they approved the lottery in '64, it took ten years because people were so apprehensive for that lottery to finally pass. And then New York did it in '67, and all these states now have—you know, every state but Utah and Hawaii has some form of gambling essentially.

And so, people's attitudes have changed dramatically and there's just not that pressure where people see this and think, "oh my gosh, this is something wrong, we need to do something about it." I think most people just got a general reaction like, "oh, that's cool, Fantasy Sports or March Madness pools." People just don't see it as a problem, because I don't think we've seen the horror stories, or we haven't seen like people lose their mortgage, and people are willing to accept that.

I do think also though, there has always been a trend, historically, with government. As I said, I'm a big believer that this is something that should be left up to the individual states. I think sometimes in government, you end up with this attitude where if they see the industry, the first impulse is to regulate it. If it moves, regulate it. If it keeps moving, you tax it. And if it stops moving, you subsidize it. And so, sometimes that's kind of the cycles of what happens within government. And so, you know, who knows, because this is such a newer industry on a national basis, it'll be interesting to see how that evolves as far as, not only the regulations, but what the states, the federal government decides to do with taxation and everything else.

Martha Coakley: And it is a popular game. People who play it, love it. And we've found meeting legislators that many of them play. They play with their kids, they play with their college roommates cross-country, some play with their fathers, and so it was a

bonding experience that they enjoy. For every kid who didn't make it pass pee-wee football or played high school, but not college, or played college, and that's true of men and women who weren't able to do it. This is a fun game, right? You're able to put your team together; you get engaged. And it's on that platform that I think people who don't understand and who want to regulate it, overreacted to it without understanding it. I just noticed Massachusetts was legalizing casino gaming recently. We never had it in Massachusetts. I was the Attorney General at the time. I found that if you were out speaking, if someone called it "gaming," they were in favor of it. If they called it "gambling," they were not. And so, the words we use and the terms we use really indicate what people's attitudes are.

But I think you're right. Just as all of these platforms, the way we communicate, the way we use technology changes the way people think. It's generational and it is what the cultural sense is. Many people who are very progressive hate gambling, and so this kind of discussion makes for very odd bedfellows as we talk about where this industry goes moving forward.

William H. Ryan: And I think the reality is that whether it is or is not gambling. Fantasy Sports seems like it's gambling to a lot of people, and it's gotten big; it's gotten a lot of attention. And as a person who worked in an Attorney General's Office, and was involved with the Consumer Protection Issues—but Consumer Protection Offices are great to respond to problems. But if you have a big issue that could cause a lot of problems for people who are at risk, then the legislature start talking regulation. The one thing regulation can do, if it's done right, it can prevent things from happening so you don't need the Attorney General to come in to try to put Humpty Dumpty back together again, which, as Martha knows well, oftentimes the Attorney General can't. The loss is too great, the money's not there.

So I think there is a realistic issue here and whether at the end of the day, there is heavy regulation, little regulation, or no regulation, that's a legitimate point. But certainly, Fantasy Sports now gotten to the point where every state in the country's going to have to look at this issue. And perhaps, eventually, even the federal government is going to have to because so many of these new gambits we see are going national because of the internet. The internet has made a morass out of gambling, out of a lot of things. But the regulation of certain facets of the industry, I think, is just something everybody has to deal with.

Lori Kalani: That's a good point about the federal government. Gary, besides the FTC, I know that we talked about the FTC, but Congressman Pallone also asked for a hearing in Energy and Commerce, and I know that they've been busy on the Hill on some other things. Do you see that hearing happening this year or next year? What are your predictions—because I know it's so easy to predict what the Hill will do.

Gary Slaiman: So, just a little background, I worked in the Senate Judiciary Committee for many years, and the one thing—no matter what we talk about the states doing—is the federal government and that Congress has oversight authority when they choose to provide oversight. And I think partly what was motivating Congressman Pallone was exercising oversight function. Partly, he has his own issues about what's going on in New Jersey, on issues that, you know, are related, but really frankly tangential in some ways. When he saw Fantasy, saw the activity around it, it sparked an interest. He's the ranking Democrat on the Energy Commerce Committee, which is appropriate authority over those issues, and so he asked for a hearing. But the Chairman of the committee, Fred Upton has said, you know, if you want to have a hearing or you want to have some oversight, that's an appropriate function. And it's said that the committee will do a hearing.

As you say, Lori, there's so much activity right now in Congress, and it's been an incredibly short session, given the election. It's unclear when it will happen, but it's a commitment by the chairman to have it, so at some point you'll see a hearing on the subject, we don't know when.

Lori Kalani: You think it'll be this year?

Gary Slaiman: It's well possible this year, I think the expectation is it'll be this year. But you know, it'll be in the subcommittee of Energy and Commerce. I know they've got a pretty robust agenda of hearings. It's just a question of fitting it in, so it'll be the chairman that decide it.

Mark Brnovich: I do think it's really fascinatingly interesting to me. I used to also work at a think tank, so I like the whole academic law school atmosphere here, and it reminds me that we, especially with law students, accept this notion that, of course, the federal government has the authority and the ability to regulate this area. And I couldn't help but think that, you know, in 1903, there was a U.S. Supreme Court case, *Champion v. Ames*, that dealt with—Congress had passed the law prohibiting the interstate transportation of lottery tickets in the U.S. mail. And that was a five-four decision; it was

a divided court. It was a hotly contested issue whether Congress had the authority under the Commerce Clause to regulate the transportation of lottery tickets in the U.S. mail from one jurisdiction, where they were legal, to another jurisdiction, where they were legal.

And it's interesting, because that case, you know, the court talked about these areas: gambling—this is traditional police powers. You know, public morals, public health, safety, welfare were areas where we didn't think the federal government should be coming in and dictating states what they should do; it should be left to the states. But that case was a five-four decision, and because those lottery tickets were being transported across state lines, the Court decided that, indeed, that statute was constitutional. But that was a close call, and we've gone from that in 100 years where we just accept the notion that the federal government can use the authority or the Commerce Clause to regulate, essentially, everything they want. Just a little side note there, related to gambling.

[Laughter].

So when you argue with your professors, remember about the Commerce Clause. I don't think the Framers wanted it to expand that broadly for all the law students.

Lori Kalani: I love the way he throws in his history, it's unbelievable. It's good, that's good, Mark. After, after a red-eye flight. That's even—

Mark Brnovich: It was related to gambling.

Lori Kalani: Yeah, no, that was good. So, I have two comments. One, I was just thinking about Myspace. I represent Facebook, and Facebook's done a great job of regulating themselves, and working with the government on regulation, and, you know, Myspace was an example of sort of an icky environment when there was no regulation out there. And so I think, looking back, that's a good, uh, lesson, where there was no regulation in the very beginning, and that did not bode well for the company. And so, to have regulation and have consumer confidence and transparency, like Mark has said, is a very good thing. And so—

Martha Coakley: Yeah.

Lori Kalani: You want to say something.

Martha Coakley: Yeah, no, Lori, that's a good point. How many of you even remember Myspace? Right? That's ancient history. And they came in, at the same, and said, "we can't do age

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verification, we don't have the technological ability to do it," which I don't think was very accurate.

Lori Kalani: And you would have to use fake names, remember?

Martha Coakley: Yeah, and they didn't want to do it, but the key thing was could they identify the predators, for instance, weren't getting on this space. And so, they didn't survive because they didn't develop the technology, and they didn't work with regulators appropriately. Some of those analogies are true, and if you look at the Mass. regs. you will see that in order to comply with them, in terms of verification of users, certain of the technical requirements of them require the development of those technological platforms in order to comply, and that's a big difference than even five years ago. So, I'm sure it will be different in a year a two. We see it with the Apple issue with the FBI. We see technology continually outpacing government, frankly. In order to regulate those things, we need to understand where that technology is going.

Lori Kalani: And we see, and we see the Mass. regs., and I should mention that a lot of these regs were already in place with FanDuel and DraftKings, and there are more players in the marketplace, those are the dominant players, but there are lots of other companies, and so a lot of the things that you see there, the companies were already doing, and there are other companies out there who will, obviously, need to comply. They were verifying age and name, and so they will continue to do that.

Earlier on the panel, I think it was Jeff that said—I think he called the companies a “technology company.” One of the panelists did, and I think it was Jeff, and I thought, that's actually the way I think of DraftKings and FanDuel is technology companies. I think Fantasy Sports have been around for a long time. When I was in college thirty years ago, my boyfriend was playing Fantasy Sports, and now it's Daily Fantasy Sports, because there's technologies infused, and we can do things in shorter spurts and more often. And so I think of this as this, you know, disruptive technology, and it changes the game, and I don't suggest that it doesn't need regulation of some sort. But it reminds me of the Uber problem, and I worked with Uber for a long time, and there's always a question of where does the regulation belong? Where does the regulation live? And some people say that the taxi cab authority should regulate Uber, and you know, how many of you would raise your hand and say, “yeah, taxi cab company, the taxi cab authority should regulate

Uber,” and I would say, “no.” Uber’s not a taxi cab business. And they’re far from it; they’re a technology company.

And so as we think about this, I know that—you know, Mark and I were talking about this, General Brnovich and I were talking about this earlier, and he was saying, “well, I think it belongs in the department of gaming,” and you had some very good reasons as to why, but I’d be very interested in everybody’s opinion on where regulation of Daily Fantasy Sports would—where should it live? There’s lots of places. In Pennsylvania it could sit in the Lottery Commission. It could be long—it could stay forever in the Attorney General’s Office. So if we could just hear from each and every one of you, where you believe that regulation should live, and Mark, you should expand on where you believe it should live in Arizona.

And we should say Arizona’s one of the states where Daily Fantasy Sports is not played. It never has been.

Mark Brnovich: It’s been played, but not when a third party can get part of the profit, or money from it.

Lori Kalani: Oh, yes. Yes. OK, now you can answer the question.

Mark Brnovich: Yes, I can answer the question now, apparently. Yeah, the short answer, I’ve always believed—I’m a big believer that when it comes to state gaming gambling policy, that it’s best to have a holistic approach where I think there’s one agency that would be responsible for overseeing it, because all these issue crop up, especially states that have tribal gaming, where a lot of compact provide exclusivity or limit the number of facilities. Some states have statutes that limit the number of, you know, gambling or operating licenses they provide.

So, when you have one department that’s responsible for overseeing everything from the race tracks to the casinos to the lottery, to whether making these determinations about charitable gaming, social gambling, whether something does fit into the category of gambling or not, you then have one holistic, consistent approach. So if somebody’s operating, whether it’s Daily Fantasy Sport, they want to open up a race track, or the state wants to sell lottery tickets, there’s one place where people can go to get a consistent public policy. And then the regulatory approach could be based on what kind of activity it is. So you have state lottery, maybe you need less regulation because the amount being wagered and the protections guarding in place in many state laws. And then with other new forms of gaming, maybe, you know, you have a different set of regu-

lation. But you have one authority that would be responsible for promulgating or enforcing those types of rules and regulations.

Martha Coakley: Well, you have states that don't have any gaming, and so don't have any gaming authorities or gaming boards. And if you look at it as primarily consumer issues, at this stage, how Massachusetts did, then the experience and the ability to oversee that through uniform issuance of regulations and enforcement of regulations on the consumer protection side is, you know, you could argue equally well in that organization of—of AG's organization, because you're looking at consumer protection, complaints that come from consumers, as opposed to, you know, the model of casinos where you allow in something, you—it's basically like a utility. You give it a license and then they have limited competition and there's a reason that you have a gaming authority. We put a lot of thought into that piece of it in Massachusetts.

This is different in my mind. This is a cutting edge, high tech consumer game that involves payment of a fee, that involves necessarily transparency, so that people pay their taxes on their winnings, and that consumers are protected. But I don't necessarily agree that you need to either to establish or create, or put into a Gaming Commission the oversight at this consumer game, at this stage.

William H. Ryan: Well, I should say, I have a completely open mind right now about where regulation should be in Pennsylvania. However, I will also say that, in Pennsylvania, the Gaming Control Board, which I am a member of, does have more experience in regulation of gaming because of our roles, our role in casino gaming. And when you look at the internet feature of this type of entertainment, it's similar perhaps to internet gaming, although we don't have internet gaming yet in Pennsylvania. The General Assembly has had bills in front of it for the last couple of years. Every year, we're told this is the year that we're going to get internet gaming in Pennsylvania, but in each of the bills introduced, the Gaming Board is given regulatory authority over internet gaming, so that could be a rational extension.

But again, from Pennsylvania's standpoint, there's still so many questions, in my mind, to be answered. But, clearly, experience in gaming and being able to deal with a particular type of entertainment fairly and not be heavy-handed, they have to be critical components of solid regulation. No doubt about that.

Gary Slaiman: So you look to me, Lori, to the extent that I have a role here on the federal side. I'd say that Congress, as you see all this activity going on in the states, particularly this Congress, is def-

erential to state authorities where you have to look at, from the federal perspective, whether it would be wrong to preempt all the activity in the states, is not the inclination of the leadership at this point. Oversight, you know, will develop other issues in the gambling that we talked about in the other panel, have a federal perspective. You got PASPA, which we talked about UIGEA, but I think largely right now, um, that we're watching what the states are doing, seeing how it plays out, and I think being differential.

Lori Kalani: Thank you. I believe we're out of time. I just want to say thank you to Villanova, thank you for inviting us, and I'm sure next year there will be a completely different story to tell with respect to the regulations. Thank you, everybody.