Received: 5/25/2018 2:17 PM
Filed: 05/30/2018

Supreme Court Case No. 18S-CQ-00134

Indiana Supreme Court

Akeem Daniels, Cameron Stingily, and Nicholas Stoner,

Plaintiffs-Appellants,

-against-

FanDuel, Inc. and DraftKings, Inc.,

Defendants-Appellees.

U.S. Court of Appeals for the Seventh Circuit

Case No. 17-3051

New Sports Economy Institute's Amended Brief of *Amicus Curiae* in Support of Akeem Daniels, Cameron Stingily, and Nicholas Stoner

Libby Yin Goodknight
KRIEG DeVAULT LLP
One Indiana Square, Suite 2800
Indianapolis, Indiana 46204
Telephone: (317) 636-4341
Facsimile: (317) 636-1507
Email: lgoodknight@kdlegal.com

Attorney for Amicus Curiae
the New Sports Economy Institute

TABLE OF CONTENTS

Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE

The New Sports Economy Institute ("NSEI") is a non-profit, tax-exempt organization dedicated to transforming society through sports and finance. Consistent with this mission, NSEI's objective is to end sports gambling, create a strong economy with strong ethics and bring financial literacy to the masses via socially beneficial sports trading instruments.

NSEI believes sports is an asset class, and has considerable expertise at the intersection of sports and finance. NSEI operates AllSportsMarket, which enables users to trade stock-like instruments based on sports performance. In 2008, a sister entity of NSEI developed SportsRiskIndex ("SRI"), a proxy for valuing sports franchises, and SRI futures. Therefore, NSEI is in a unique position to identify issues not addressed by either party.

In this brief, NSEI offers a unique point of view, specifically, that athlete statistics are like financial indices, and their unconsented *use* for commercial purposes violates the right-of-publicity under Indiana law (just like the unconsented use of the indices for commercial purposes constitutes misappropriation). NSEI advances another critical argument: daily fantasy sports is illegal under *federal* law because it is a gambling *market* as opposed to a game.

PRELIMINARY STATEMENT

The issue certified by the Seventh Circuit to this Court is as follows:

> Whether online fantasy sports operators that condition entry on payment, and distribute cash prizes, need the consent of players whose

> names, pictures, and statistics are used in the contests, in advertising the contests, or both.

After certifying the question, the Seventh Circuit added the following:

> We have phrased this question in general terms so that the Supreme Court of Indiana may consider any matters it deems relevant – not only the statutory text but also, for example, **plaintiffs' arguments about the legality of defendants' fantasy games** and the possibility that there is an extratextual illegal-activity exception to the provisions of Ind. Code 32-36-1-1. The state judiciary should feel free to rephrase the question if it deems that step appropriate. (emphasis added)

Akeem Daniels, et al. v. Fanduel Inc., et al., No. 17-3051 (7th Cir., Mar. 7, 2018) ("Seventh Circuit Decision").

In response to the Seventh Circuit's certified question and explanatory note, NSEI contends that Defendants-Appellees FanDuel and DraftKings, the two largest daily fantasy sports ("DFS") operators, are (i) unlawfully misappropriating the names, pictures, and statistics of the College players, and (ii) engaged in illegal gambling.

Numerous courts addressing misappropriation in the financial services industry have concluded that while the indices themselves can freely be distributed and consumed by the public as financial news items, those exploiting the indices for their *own* commercial use are engaged in unlawful misappropriation. Similarly, in the present case, the dissemination and reporting of player statistics, which is incidental and non-integral to the DFS operations, is not improper; rather the *use* of such statistics by DFS, for commercial gain to determine winners and losers constitutes misappropriation.

With respect to the second argument, DFS is, and has always been, illegal under federal law because it is a market offering unregulated securities or illegal commodity contracts.

ARGUMENT

I. DFS Is Not Newsworthy or An Event or Topic of General or Public Interest

Indiana's Right of Publicity Statute contains the following exemptions:

1. The use of a personality's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms in material that has political or newsworthy value. Ind. Code § 32-36-1-1(c)(1)(B)
2. The use of a personality's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms in connection with the broadcast or reporting of an event or a topic of general or public interest. Ind. Code § 32-36-1-1(c)(3)

The accurate reading of the statute is critical. The Seventh Circuit re-focused the case and clarified the relevant question: "But the statute asks not whether a given name or performance is "newsworthy" or of "public interest" but whether the name and other details appear "*in … [m]aterial* that has … newsworthy value" or "in connection with the *… reporting* of an event … of general or public interest." Seventh Circuit Decision, *Akeem Daniels, et al. v. Fanduel Inc., et al.,* No. 17-3051 (7th Cir., Mar. 7, 2018). (emphasis original). It opined: "Plaintiffs' names and details on FanDuel and DraftKings are not necessarily "in" newsworthy "material" or a form of "reporting"." *Id.* NSEI agrees.

A. DFS Is Not "Newsworthy"

The Appellees' argument that DFS is "newsworthy" is incorrect. While it is true, as the District Court found, that "[n]umerous media outlets produce weekly fantasy sports-related broadcasts, offering strategy and advice for success in fantasy competition," this does not mean that DFS itself is "newsworthy" but only that the underlying statistics, and more broadly the sports itself are of interest to those participating. *Daniels, et al. v. Fanduel, Inc., et al.*, Case No. 16-cv-01230-TWP-DKL 2017 U.S. Dist. LEXIS 162563 (S.D. Ind. 2017). Moreover, it seems evident that those participating in DFS are concerned exclusively with how their own virtual teams are performing and whether they are winning or losing their own "contests" – with little to no regard for the other results.

For example, by analogy, a car recall is newsworthy because it has a measurable impact on the public. But, John Smith's slight loss in his stock portfolio (containing shares of the car manufacturer) is not. In sports, the public cares about the underlying event, but not whether somebody had a financial gain or loss *driven by the underlying event.*[1]

B. DFS Is Neither an "Event" Nor "Topic of General or Public Interest"

A similar argument applies to the reporting prong of the statute. As is the case with newsworthiness, it is not the reporting of factual data and statistics that

[1] We concede that some events *related to* the industry DFS operates in may be deemed newsworthy, such as the recent Supreme Court decision in *Murphy v. NCAA,* No.16-476. However, the "contests" within DFS are not.

is at issue, but whether those statistics are used in connection with the reporting of an event or a topic of general or public interest. That Villanova guard Donte DiVincenzo scored a career high 31 points and carried Villanova to a national title is clearly a "topic of general or public interest" and exempted by the statute. That Donte DiVincenzo scored a career high 31 points and carried Jane Doe to winning a DFS "contest" is not.

The Appellees also argue that "providing their users with real-life athlete statistics is a core function of Appellees' websites." App. Br. P. 27 (January 16, 2018). This argument is disingenuous. A core functionality cannot be disposed of. Here, the Appellees could dispose of every single historical statistic of every athlete and only provide their users with athlete salaries, oversee the scoring, and still announce winners. That *is* the DFS business.

C. Athlete Statistics are Akin to Financial Indices – and Both are Subject to Misappropriation

An index indicates or measures something, and in finance, it typically refers to a statistical measure of change in a securities market. https://www.investopedia.com/terms/i/index.asp. Similarly, athlete statistics are a measure of athletic performance. S&P Dow Jones Indices develops and owns various financial indices regularly used as the basis for a wide range of financial instruments. https://us.spindices.com/services/index-licensing/. It licenses its indices to major financial institutions around the world. *Id.*

While index licensing is commonly accepted as an industry norm today, the index providers had to fight -- and win -- to get here. Indeed, over the last forty years, courts have consistently sided with the index developers when they faced potential misappropriation by others trying to free ride on their efforts for commercial profit. For example, in *Standard & Poor's Corp. v. Commodity Exchange, Inc.,*538 F. Supp. 1063 (S.D.N.Y.1982), *aff'd*, 683 F.2d 704 (2d Cir.1982), the Second Circuit concluded, if Comex were to use, without a license, the value of the S&P 500 index "as an integral part of a commercial venture" by using it as settlement price of its future contract, "the injury to S&P would likely be irreparable," and affirmed a preliminary injunction against Comex.

Similarly, the Supreme Court of Illinois held that the Board of Trade's "use of the averages constituted commercial misappropriation 'of the Dow Jones index and averages.'" *Board of Trade of the City of Chicago v. Dow Jones & Co.*, 456 N.E.2d 84 (Ill. 1983). More recently, the Illinois Appellate Court affirmed that ISE's proposed listing of options constituted misappropriation. *Chicago Board Options Exchange, Inc. v. International Securities Exchange, L.L.C.*, 2012 IL App (1st) 102228.

The *CBOE* Court observed: "Plaintiffs are aware that they may assert no rights in the **published index values themselves**, which have been held by courts to constitute 'a matter of basic market fact.'" (emphasis added, internal citations omitted). *Id.* "Rather, plaintiffs' misappropriation claim was premised on ISE's unauthorized *use* of the research, expertise, reputation, and goodwill associated with the plaintiffs' product for ISE's own gain. (emphasis original). *Id.*

In the present case, "[n]o one doubts that television can show college football games and discuss plaintiffs' performances without their consent." Seventh Circuit Decision. The Appellees are free to offer statistics and research tools on their website, just like the companies are free to disseminate the values of financial indices. What Appellees cannot do, however, is create a platform where the performance statistics are used to determine winners and losers without obtaining the athletes' consent. Otherwise it is misappropriation.[2]

II. DFS is an Illegal Gambling Market Under Federal Law

The Court should also find in favor of the Plaintiffs because DFS is a gambling *market*, not a game, and state law is preempted by federal securities and commodities laws.[3]

A. DFS is Not a Game

DFS operators almost always frame the issue as whether they operate a game of skill or a game of chance because the "skill" versus "chance" spectrum is determinative under standard and time-tested principles of gaming law. See e.g.

---

[2] Misappropriation and the right-of-publicity are generally treated interchangeably. "[T]he elements of the two torts are essentially the same." Doe v. TCI Cablevision, 110 S.W.3d 363, 368 (Mo. 2003). In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the Supreme Court likened a violation of a right of publicity to appropriation. See also Eric E. Johnson, *Disentangling the Right of Publicity*, 111 Nw. U. L. Rev. 891 (2017). https://scholarlycommons.law.northwestern.edu/nulr/vol111/iss4/1 "In this Article, I treat appropriation (or misappropriation) and the right of publicity as one."

[3] *Murphy v. NCAA* only found that the Professional and Amateur Sports Protection Act is unconstitutional, not that sports gambling is legal.

Walter T. Champion, Jr. and I. Nelson Rose, *Gaming Law in a Nutshell* 89 (2012). The greater the level of chance, the more likely the game will be considered gambling.

However, the more fundamental question is whether "daily fantasy sports is a game in the first place?" It is not, because unlike DFS, gaming is separated from real life and involves precise limits of space.

As early as 1950, a Dutch historian explained "play is distinct from 'ordinary' life both as to locality and duration." Johan Huizinga, *Home Ludens: A Study of the Play-Element in Culture* 9 (1950). "We found that one of the most important characteristics of play was its spatial separation from ordinary life. A closed space is marked out for it … hedged off from the everyday surroundings." *Id.*, at 19.

Roger Caillois, a French sociologist, agreed: "In effect, play is essentially a separate occupation, carefully isolated from the rest of life, and generally is engaged in with precise limits of time and place. There is place for play: as needs dictate, the space for hopscotch, the board for checkers or chess, the stadium, the racetrack, the list, the ring, the stage, the arena, etc. Nothing that takes place outside this ideal frontier is relevant… In every case, the game's domain is therefore a restricted, closed, protected universe: a pure space." Roger Caillois, *Man, Play and Games* 6-7 (1961).

Some games, say chess, can now be played online, even when they are not within a confined space. However, the players *could* bypass the technology and play

the game the old-fashioned way if they wished. This is not true for DFS. The issue is not that DFS can be carried out online. It is the fact that these alleged "games" could not conclude without having a connection to real life.

The presumption that DFS is a game of skill leads to a logically impossible result. If it is a game of skill *and* not gambling, the immediate implication is that traditional sports betting, which also involves skill, is not gambling, either. If, on the other hand, DFS is a game of skill *and* gambling, then the gaming law, and the prize/chance/consideration framework is effectively dead. Since there is no other possibility, DFS cannot be a game.[4]

B. DFS Is a Market, and DFS Operators Acknowledged They Are a Market

In markets, multiple parties engage in economic transactions where outcomes are dependent on real-world events and/or information provided by those events. Without them, the final economic outcomes cannot be determined. As such, DFS is not a game, it is a market.

Indeed, FanDuel has likened DFS to investing: "Like investors who make selections for their portfolios, or commodity or energy traders who have to anticipate weather impact on crops and demand for power, FanDuel contestants base their player selections on historical performance, statistics, research, matchups, and trends." *FanDuel Inc., and Head2Head Sports LLC vs. Lisa*

[4] If, alternatively, DFS is a game of chance, then it was unquestionably gambling under Indiana law prior to the signage of the DFS bill, not to mention many other states where it currently operates.

Madigan, Complaint for Declaratory Judgment at 10, December 24, 2015 ("IL Complaint").

Following *Murphy v. NCAA*, FanDuel stated "This decision allows us to bring the passion and engagement we have seen among our users to **new and expanded marketplaces** and create a sports betting product that fans will love…" (emphasis added), implying that sports betting and DFS are markets. https://newsroom.fanduel.com/2018/05/14/fanduel-statement-on-supreme-court-decision/.

C. DFS is a Sports Gambling Market

The fact that DFS is a market does not mean it is gambling. Markets that serve the public interest are socially useful, and not gambling. The stock market is socially useful because it facilitates capital formation and price discovery. Derivatives markets are also socially useful because they facilitate hedging and price discovery. Sports gambling is at the other end of spectrum. Both sports betting and DFS are entertainment vehicles that do not serve a purpose, and sports gambling proponents have never argued otherwise.

D. Sports Gambling Contracts (such as DFS) Can be Characterized as Either (Unregulated) Securities or Illegal Commodity Contracts Subject to Federal Law and, Thus, Cannot Lawfully Operate in Indiana

Sports gambling contracts can be characterized as unregulated securities. The mission of the SEC is "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." https://www.sec.gov/Article/

whatwedo.html. Whether the opportunity presented to a potential investor is a true investment, or a highly speculative opportunity masquerading as an investment, is not controlling. "Congress' purpose in enacting the securities laws was to regulate *investments*, in whatever form they are made and by whatever name they are called." *Reves v. Ernst & Young*, 494 U.S. 56, 61 (1990) (emphasis original). "To that end, it enacted a broad definition of 'security,' sufficient 'to encompass virtually any instrument that might be sold as an investment.'" *SEC v. Edwards*, 540 U.S. 389, 393 (2004) (citing *Reves*, 494 U.S. at 61 (1990)). "An investment contract thus came to mean a contract or scheme for "the placing of capital or laying out of money in a way intended to secure income or profit from its employment.'" *SEC v. Howey Co.*, 328 U.S. 293, 298 (1946) (internal citations omitted). Under the Howey test, sports gambling contracts can reasonably be characterized as investment contracts subject to SEC regulation. *Id.* The Securities and Exchange Act of 1934, among other things, prohibits the sale of any security that is not registered with the SEC.

Sports gambling contracts can also be classified as commodity contracts. The CFTC was created by Congress through the Commodity Futures Trading Commission Act ("CFTC Act") of 1974, which also expanded the definition of a commodity to reflect the shifts in the U.S. economy away from its agricultural roots.

The Commodity Exchange Act defines the excluded commodity, *inter alia*, as "an occurrence, extent of an occurrence, or contingency … that is (I) beyond the control of the parties to the relevant contract, agreement, or transaction; and (II) associated with a financial, commercial, or economic consequence." 7 U.S.C. § 1a

(19). "A broad interpretation of 'excluded commodity' might include betting transactions on sporting and other events. Wagers on sporting events might satisfy the definition because, absent chicanery, the occurrence or contingency is not within the control of the parties to the relevant contract and the outcome may be 'associated with an economic consequence,'" Paul Architzel, Event Markets Evolve: Legal Certainty Needed, Futures Industry, March/April 2006.

The legislative history of Dodd-Frank Act includes the example of a Super Bowl event contract as a contract that would not serve any commercial purpose. "[CFTC] needs the power to, and should, prevent derivatives contracts that are contrary to the public interest because they exist predominantly to enable gambling through supposed 'event contracts.' It would be quite easy to construct an 'event contract' around sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament. These types of contracts would not serve any real commercial purpose. Rather, they would be used solely for gambling." *Congressional Record, Proceedings and Debates of the 111th Congress, 2nd Sess., Senate*, July 14, 2010.

Commodity contracts, based on excluded commodities or otherwise, cannot be offered to the public if they do not serve the public interest. For example, the CFTC has found that "political event contracts are contrary to the public interest" and ordered that such contracts shall not be listed or made available for clearing or trading on the Exchange." Order Prohibiting the Listing or Trading of Political Event Contracts, CFTC, April 2, 2012. In any event, it is an absurd result that the

public can speculate on the athletic performance of the athletes or on the outcome of a sports game, but not on the outcome of an election.

E. Congress Preempted the Field with Respect to Financial Contracts

Initially, it was understood the SEC supplemented and did not totally preempt states' blue-sky laws. Over time, preemption became stronger. Congress modified the 1934 Act's preemptive powers in 1975. *Securities Acts Amendments of 1975*, Pub. L. No. 94-29, 89 Stat. 97 (1975). Then, "in the National Securities Markets Improvement Act ("NSMIA") in 1996, in contrast to the prior federal securities laws, Congress explicitly preempted vast areas of state regulation." Speech by SEC Staff: Remarks at the F. Hodge O'Neal Corporate and Securities Law Symposium, by Stephen M. Cutler, February 21, 2003, accessed at http://www.sec.gov/news/speech/spch022103smc.htm. In adopting NSMIA, Congress expressed its intent to "further advance the development of national securities markets" by establishing the SEC as "the exclusive regulator of national offerings of securities." *Id.*

The legislative history of the CFTC Act of 1974 also makes clear Congress intended to preempt state jurisdiction over the transactions that the CFTC Act covers: "[u]nder the exclusive grant of jurisdiction to the Commission, the authority in the Commodity Exchange Act (and the regulations issued by the Commission) would preempt the field insofar as futures regulation is concerned. Therefore, if any substantive State law regulating futures trading was contrary to or inconsistent with Federal law, the Federal law would govern. In view of the broad grant of

authority to the Commission to regulate the futures trading industry, the Conferees do not contemplate that there will be a need for any supplementary regulation by the States." *S. Conf. Rep. No. 93-1383, 93rd Cong., 2nd Sess.*, reprinted in 1974 U.S. Code Cong. & Adm. News, p. 5843, 5897.

The Commodity Futures Modernization Act ("CFMA") of 2000 retained the broad definition of commodity but introduced additional categories to further modernize the Commodity Exchange Act. With the CFMA, Congress also reiterated its intent to preempt state gaming statutes with respect to those transactions subject to CFMA's provisions.

In the case of both securities and commodity contracts, the Indiana law is preempted by the federal law, and it is unlawful to offer unregulated securities and/or illegal commodity contracts, which is precisely what the Appellees do.

F. SEC Has Already Taken Action Against Two Fantasy Operators

FanDuel has likened its athlete-picking "contests" to stock-picking:

> "With stock selection, commodity purchases or energy swaps, certain aspects of performance are out of the control of the participants, but no one contends that people engaged in these businesses are not exercising skill in their choices, **nor that a stock-picking contest is not a bona fide competition.**"

IL Complaint (emphasis added).

However, the SEC twice rejected the argument that a stock-picking contest can be a *bona fide* competition. In early 2015, an obscure site, called Stock Battle, was running a "fantasy contest" where participants were picking stocks. Stock

Battle identified itself as the first fantasy gaming stock market competition. Stock Battle even cited (on a now-defunct website) the Unlawful Internet Gambling Enforcement Act of 2006 as its legal basis, which DraftKings continues to, in part, rely on. https://www.draftkings.com/help/why-is-it-legal. The SEC sent Stock Battle a cease-and-desist letter and stated the firm's games amounted to dealing in "unregulated security-based swaps." *Will Regulators Sideline Fantasy Stock-trading Games?*, Yahoo Finance (May 13, 2015). Stock Battle closed its operations.

In a similar case, on October 13, 2016, the SEC announced that Forcerank LLC had agreed to pay a $50,000 penalty for "illegally offering complex derivatives products to retail investors through mobile phone games that were described as "fantasy sports for stocks."" *Company to Pay Penalty for Stock Picking Game that was an Unregistered Swap*, SEC Press Release 2016.

It does not make sense that stock-picking fantasy offerings amount to unregulated security-based swaps and athlete-picking fantasy offerings amount to games with skill. DFS amounts to nothing but an unregulated security or an illegal commodity contract.

CONCLUSION

NSEI respectfully requests that the Court (i) conclude that online fantasy sports operators need the consent of players whose names, pictures, and statistics are used in the "contests", in advertising the "contests", or both, and (ii) conclude that pursuant to federal law, DFS is illegally operating in Indiana.

Respectfully submitted,

/s/ Libby Yin Goodknight

Libby Yin Goodknight, Attorney No. 20880-49B
KRIEG DeVAULT LLP
One Indiana Square, Suite 2800
Indianapolis, Indiana 46204
Telephone: (317) 636-4341
Facsimile: (317) 636-1507
Email: lgoodknight@kdlegal.com

Attorney for Amicus Curiae
the New Sports Economy Institute

WORD COUNT CERTIFICATE

I verify that this brief contains no more than 3750 based on the word count functionality of the word processing system used to prepare this Brief.

/s/ Libby Yin Goodknight

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Amended Brief of *Amicus Curiae* has been served electronically upon the following counsel through the Indiana E-filing System (IEFS) this 25th day of May, 2018:

John R. Maley Peter J. Rusthoven Barnes & Thornburg 11 South Meridian Street Indianapolis, Indiana 46204 john.maley@btlaw.com peter.rusthoven@btlaw.com	Ishan K. Bhabha Kenneth L. Doroshow Ian H. Gershengorn Jenner & Block 1099 New York Avenue NW, Suite 900 Washington, District of Columbia 20001 ibhabha@jenner.com kdoroshow@jenner.com igershengorn@jenner.com
Stephen B. Caplin Professional Corp. 9245 North Meridian Street, Suite 301 Indianapolis, Indiana 46260 sbcaplin@gmail.com	W. Clifton Holmes The Holmes Law Group Ltd. 350 North Orleans Street, Suite 9000N Chicago, Illinois 60654 holmes@theholmeslawgroup.com Todd L. McLawhorn Siprut PC 17 North State Street, Suite 1600 Chicago, Illinois 60602 tmclawhorn@siprut.com
Gabriel Adam Hawkins Lynn A. Toops Cohen & Malad, LLP One Indiana Square, Suite 1400 Indianapolis, Indiana 46204 ghawkins@cohenandmalad.com ltoops@cohenandmalad.com	Michael Rubin P. Casey Pitts 177 Post Street, Suite 300 Altshuler Berzon LLP San Francisco, California 94108 mrubin@altshulerberzon.com cpitts@altshulerberzon.com
John W. Borkowski Husch Blackwell LLP 1251 North Eddy Street, Suite 200 South Bend, Indiana 46617 John.borkowski@huschblackwell.com	Rudolph A. Telscher, Jr. Kara R. Fussner Husch Blackwell LLP The Plaza in Clayton 190 Carondelet Plaza, Suite 600 St. Louis, Missouri 63105 rudy.telscher@huschblackwell.com kara.fussner@huschblackwell.com

Theodore J. Minch Sovich Minch LLP 445 N. Pennsylvania Street, Suite 405 Indianapolis, Indiana 46204 tjminch@sovichminch.com	John A. Conway LaDue Curran & Kuehn LLC 100 East Wayne Street, Suite 300 South Bend, Indiana 46601 jconway@lck-law.com

/s/ Libby Yin Goodknight
Libby Yin Goodknight

KD_9541407_3.docx