IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, STATE OF CALIFORNIA, and DISTRICT OF COLUMBIA Plaintiffs, v. DRAFTKINGS, INC. and FANDUEL LIMITED Defendants.	Civil Action No. 1:17-cv-01195 (KBJ) **PUBLIC VERSION**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DRAFTKINGS INC. AND FANDUEL LTD.'S MOTION FOR CHANGE OF VENUE PURSUANT TO 28 U.S.C. § 1404(a)

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INTRODUCTION

Defendants DraftKings Inc. ("DraftKings") and FanDuel Limited ("FanDuel") (collectively "the Companies") respectfully submit this memorandum of law in support of their motion to transfer this action to the District of Massachusetts, pursuant to 28 U.S.C. § 1404(a).

On June 19, 2017, plaintiff Federal Trade Commission ("the FTC") filed an administrative complaint before the FTC pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b) alleging that the Companies executed a merger agreement in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act. Compl. at 1, *In the Matter of DraftKings, Inc.*, FTC Docket No. 9375 (June 19, 2017). In parallel, the FTC filed a federal complaint ("Complaint") against the Companies, seeking a temporary restraining order and preliminary injunction enjoining DraftKings and FanDuel from consummating their proposed merger pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26. Compl. at 2.

There are no compelling reasons for this case to be litigated in the District of Columbia. The mere fact that the FTC resides in the District deserves no deference. Rather, the convenience of the parties and witnesses weighs in favor of transfer to the District of Massachusetts. All of the material events giving rise to the FTC's claim occurred in Massachusetts or elsewhere in the Northeast, including the negotiation and execution of the merger agreement, and the majority of the witnesses, including all of the relevant employees of the parties and third-party investors and competitors, are located in the Northeast.

Similarly, the public interest supports transfer of this case to the District of Massachusetts. The locus of this action is in Massachusetts, and thus Massachusetts has a direct local interest in deciding this local controversy. While Massachusetts accounts for the [redacted] of the Companies by state, the District of Columbia [redacted]

Accordingly, this Court should transfer this action to the District of Massachusetts.

ARGUMENT

I. THE COURT SHOULD TRANSFER THIS MATTER TO THE DISTRICT OF MASSACHUSETTS

The Companies respectfully request that the Court transfer this case to the District of Massachusetts for the convenience of the parties and because the District of Columbia has no meaningful connection to the controversy. 28 U.S.C. § 1404(a). DraftKings is headquartered in Massachusetts. FanDuel is headquartered in New York. All material events giving rise to this matter occurred in either Massachusetts or New York. The vast majority of DraftKings and FanDuel employees that will provide testimony or possess knowledge regarding the merger are located in Massachusetts or elsewhere in the Northeast.

Motions to transfer are governed by 28 U.S.C. § 1404(a),[1] which provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). Courts have "broad discretion" to transfer venue pursuant to Section 1404(a). *In re Scott*, 709 F.2d 717, 720 (D.C. Cir. 1983). In reviewing a motion to transfer, "the proper technique to be employed is a factually analytical, case-by-case determination of convenience and fairness." *SEC v. Savoy Indus.*, 587 F.2d 1149, 1154 (D.C. Cir. 1978) (citation omitted). In determining whether to grant a transfer of venue, "the movant must first establish that the action could have been brought in the proposed transferred district." *FTC v. Graco, Inc.*, No. 11-cv-02239 (RLW), 2012 WL 3584683, at *4 (D.D.C. Jan. 26, 2012) (citation omitted). Second, the movant must demonstrate that the "balance of convenience of the parties and witnesses and the

[1] In recent history, the District Court for the District of Columbia has seen a number of motions for transfer under Section 1404(a) pertaining to antitrust actions. *E.g.*, *FTC v. Graco, Inc.*, No. 11-cv-02239 (RLW), 2012 WL 3584683, at *7 (D.D.C. Jan. 26, 2012) (holding that the District of Columbia had "no meaningful connection" to Washington, D.C. and granting transfer under Section 1404(a)); *FTC v. Cephalon, Inc.*, 551 F. Supp. 2d 21, 24 (D.D.C. 2008) (stating that the governing statute is 28 U.S.C. § 1404(a)).

interest of justice" favor transfer. *Id.* (quoting *Thayer/Patricof Educ. Funding LLC v. Pryor Res.*, 196 F. Supp. 2d 21, 31 (D.D.C. 2002)). As discussed below, the criteria for change of venue are met here.

A. This Action Could Have Been Brought in the District of Massachusetts

The first inquiry under Section 1404(a) requires the movant establish that the action could have been brought in the requested venue. *DeLoach v. Phillip Morris Cos.*, 132 F. Supp. 2d 22, 24 (D.D.C. 2000). The relevant venue provision of the FTC Act provides, "[a]ny suit may be brought where . . . [the] corporation resides or transacts business, or wherever venue is proper under section 1391 of Title 28." 15 U.S.C. § 53(b)(2). Both DraftKings and FanDuel transact business in the District of Massachusetts. DraftKings's principal place of business is located in Boston, Massachusetts. Accordingly, the Companies' ties to Massachusetts make it "plainly evident" that the FTC could have filed its complaint there. *See Cephalon*, 551 F. Supp. 2d at 25 (holding that the defendant's transaction of business at its principal place of business in the Eastern District of Pennsylvania made it "plainly evident" that the FTC could have brought its case there).

B. On Balance, the Private Interest Factors Weigh in Favor of Transfer

The second inquiry under Section 1404(a), consideration of the convenience of parties and witnesses and the interest of justice, also cuts in favor of transfer. In adjudicating a motion for transfer, courts consider a number of private and public interest factors. *Bederson v. United States*, 756 F. Supp. 2d 38, 46 (D.D.C. 2010). "The private interest considerations include: (1) the plaintiffs' choice of forum, unless the balance of convenience is strongly in favor of the defendants; (2) the defendants' choice of forum; (3) whether the claim arose elsewhere; (4) the convenience of the parties; (5) the convenience of the witnesses . . . , but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and (6) the ease of access to

sources of proof." *Shapiro, Lifschitz & Schram, P.C. v. R.E. Hazard, Jr.*, 24 F. Supp. 2d, 66, 71 (D.D.C. 1998) (citation omitted). As set forth below, these factors support transfer to the District of Massachusetts.

(1) The FTC's Choice of Forum Should Be Afforded Little to No Deference

The enactment of Section 1404(a) helped correct the "inherently unfair" deference previously afforded the government's choice of forum. *See United States v. E.I. Du Pont De Nemours & Co.*, 83 F. Supp. 233, 234-35 (D.D.C. 1949) ("[I]t has been recognized by many that the existence of this preferential position of the Government was inherently unfair and needed modification in order that the Government and defendants might approach some degree of equality in this respect and that the defendants would have some rights in this matter."). This Court in *Cephalon* significantly limited the weight given to the plaintiff's choice of forum in antitrust actions, emphasizing that deference is only given "if the particular controversy has meaningful ties to the forum." 551 F. Supp. 2d at 26 (quoting *Thayer/Patricof Educ. Funding*, 196 F. Supp. 2d at 31). This Court went on to conclude that "apart from the fact that many of the FTC's prosecuting attorneys are located in this area, there are no meaningful ties between the District of Columbia and the events (or parties) that gave rise to this action." *Id.* Further, "the defendants' burden in a motion to transfer decreases when the plaintiff['s] choice of forum has no meaningful nexus to the controversy and the parties." *Greater Yellowstone Coalition v. Bosworth*, 180 F. Supp. 2d 124, 128 (D.D.C. 2001).

Here, none of the significant events giving rise to the FTC's claims occurred in the District of Columbia. Rather, the FTC's claims arise from conduct that took place in Massachusetts and New York, where DraftKings and FanDuel are headquartered, respectively, and where the merger agreement was negotiated. While the FTC resides in the District of

Columbia, residency without more is insufficient to entitle it to deference. *See Cephalon*, 551 F. Supp. 2d at 27 (citing *SEC v. Roberts*, No. 07-407 (EGS), 2007 WL 2007504, at *2-3 (D.D.C. July 10, 2007) ("While plaintiffs in securities cases normally receive a strong presumption in favor of their forum choice, such a presumption is misplaced here because the district is unconnected to the facts of this case other than being the destination of the SEC filings, which would occur in the mine run of cases brought by the SEC."); *Rosales v. United States*, 477 F. Supp. 2d 213, 216 (D.D.C. 2007) ("Indeed, the District of Columbia has no meaningful nexus to the dispute, other than the fact that it is the seat of the federal government.")); *see also Kafack v. Primerica Life Ins.*, 934 F. Supp. 3, 7 (D.D.C. 1996) (noting that cases decided under Section 1404(a) "have laid much less emphasis on this [residence] factor") (citation and internal quotation marks omitted). This Court has rejected arguments by the FTC that it has a meaningful connection to an antitrust action simply because it "routinely files antitrust enforcement actions in the District of Columbia, particularly when the challenged conduct . . . is felt by consumers on a nationwide scale." *Cephalon*, 551 F. Supp. 2d at 27-28 (finding that such arguments "prove[] too much" and declining to extend special consideration of the District of Columbia's status as the nation's capital) (citation omitted).

Similar arguments by the FTC that the Assistant Attorney General for the District of Columbia's involvement in the case mere days before the FTC filed its complaint creates a meaningful connection should be rejected. The District of Columbia alleges no individual, particularized harm from the merger, and the FTC's Complaint alleges that the relevant geographic market is the United States. Compl. ¶ 32 ("The provision of paid DFS in the United States constitutes a relevant market for evaluating the effects of the Merger."). While the merger's nationwide scope necessarily implicates the District of Columbia, this Court has

rejected that any alleged shared harm supports a "meaningful connection" for purposes of Section 1404(a) analysis. *Graco*, 2012 WL 3584683, at *5 ("However, this broad assertion [that the acquisition is national in scope] further establishes that the District of Columbia has no meaningful connection to this action."); *Cephalon*, 551 F. Supp. 2d at 27 (rejecting that filing an enforcement action in D.C. created a meaningful connection to the action).[2]

(2) The Defendants' Desired Forum Should Be Given Deference Because All of the Material Events Occurred There

While the District of Columbia's ties to the case are minimal, the majority of the conduct that gave rise to the FTC's claims took place in Massachusetts or New York. In granting the defendant's motion for transfer of venue, the Court in *Cephalon* noted that "[n]one of the negotiations that led to the settlement agreements at the heart of this controversy took place in, or were in any other way related to, the District." 551 F. Supp. 2d at 26. Similarly, the merger agreement at the core of the FTC's challenge was never negotiated in, nor bears any relationship to, the District of Columbia. DraftKings is headquartered in the District of Massachusetts, FanDuel is headquartered in New York, and the merger agreement was negotiated in Massachusetts and New York.[3] Because the defendants can show that Massachusetts has meaningful ties to the controversy, the defendants' choice of forum factor weighs in favor of transfer.

[2] DraftKings has two employees that work and/or reside in the District of Columbia, while FanDuel has one. All three of these employees are attorneys that work on regulatory and public affairs matters. In fact, none of these employees was called as a witness during the FTC's investigation prior to issuing its complaint. Additionally, neither company maintains an office from which it conducts business in the District of Columbia. The defendant-movant in *Cephalon* maintained a "very small public affairs office in the District of Columbia," which this Court concluded failed to create a meaningful connection to this District because D.C.-based conduct was not "at the heart of [the] controversy." *Cephalon*, 551 F. Supp. 2d at 26. Similarly, none of the conduct at the heart of this matter arose from these employees' conduct in this District. Rather, the conduct at issue in this matter pertains to the merger agreement between the Companies, which has no relation to this District.

[3] Some merger negotiations occurred in Scotland to the extent that negotiations involved FanDuel Limited, the parent company of FanDuel Inc. FanDuel Limited is headquartered in Scotland, while FanDuel Inc. is headquartered in New York. [redacted]

(3) This Claim Arose in Massachusetts and New York, Not the District of Columbia

All material events pertaining to the FTC's claims arose in the Northeast:

- The Merger Agreement was negotiated, drafted, and executed in Massachusetts and New York, which included in-person negotiations at these locations;
- DraftKings has its principal place of business in Massachusetts;
- FanDuel has its principal place of business in New York.

SEC v. Ernst & Young, 775 F. Supp. 411, 414 (D.D.C. 1991). The fact that this case is a preliminary injunction proceeding in parallel with an administrative proceeding currently pending in the District of Columbia has no legal significance with regard to this factor. *See Graco*, 2012 WL 3584683, at *5. Rather, "[c]ourts in this district have held that claims 'arise' for purposes of Section 1404(a) in the location where the corporate decisions underlying those claims were made . . . or where most of the significant events giving rise to the claims occurred." *Id.* (citation omitted). Given that the significant events occurred outside of the District of Columbia in Massachusetts and New York, the third factor weighs in favor of transfer.

(4) The District of Massachusetts Is a More Convenient Forum for the Parties and the Witnesses

The convenience of the parties and witnesses also clearly favors transfer. The sole reason the District of Columbia is more convenient for the FTC is that its lawyers are located here, a factor that "carries little, if any, weight in an analysis under 1404(a)." *Reiffin v. Microsoft Corp.*, 104 F. Supp. 2d 48, 52 n.7 (D.D.C. 2000) (citation omitted). In contrast, the majority of the witnesses for both parties, including the defendants' key employees, who are likely to be called to testify at trial are located in Massachusetts and elsewhere in the Northeast. All key DraftKings employees that were subject to the FTC's Investigational Hearings are located at the

company's headquarters in Boston, and most key FanDuel employees that were subject to the same Investigational Hearings are located at its New York office.

Moreover, it appears that most third-party witnesses are located in Massachusetts or elsewhere in the Northeast. The Companies jointly retained Boston Consulting Group, headquartered in Boston, Massachusetts, to conduct efficiencies analysis and premerger integration planning at its own offices in Massachusetts and the defendants' offices in Massachusetts and New York. More than half of DraftKings's current institutional investors—[redacted]—are located in either Massachusetts or New York. Indeed, almost all of DraftKings's institutional investors are headquartered some place other than this District. With respect to FanDuel, all of its current institutional investors are located outside this District, [redacted] Other potential witnesses like sports leagues that have partnered with the Companies, as well as ESPN, Yahoo!, and CBS, are located predominantly in the Northeast.[4] Although 15 U.S.C. § 23 may enable the Companies and the FTC to obtain compulsory process over relevant witnesses,[5] courts weigh witness convenience even more heavily in antitrust actions where nonparty witnesses may be forced to travel from distant fora without the protection of Rule 45(c)(1)(A).[6] *See, e.g.*, *United States v. General Motors Corp.*, 183 F. Supp. 858, 861-62 (S.D.N.Y. 1960) ("In a Government antitrust

[4] The National Football League, National Basketball Association, Major League Baseball, and National Hockey League, for example, are all headquartered in New York. CBS is also headquartered in New York. ESPN is headquartered in Bristol, Connecticut. Yahoo! is headquartered in California.

[5] 15 U.S.C. § 23 provides, "In any suit, action, or proceeding brought by or on behalf of the United States subpoenas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district: Provided, That in civil cases no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown."

[6] Rule 45(c)(1)(A) provides that "A subpoena may command a person to attend a trial, hearing, or deposition only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person." Fed. R. Civ. P.

suit, the court must consider the welfare of nonparty witnesses, because they are without the protection from subpoena to attend at places far from home normally afforded them by [Rule 45(c)]."). For the foregoing reasons, it would be more convenient for the many nonparty witnesses and Companies' key witnesses who are located in Massachusetts and elsewhere in the Northeast, to conduct a trial in Massachusetts. "Taken alone, this factor would not warrant transferring the case, but viewed collectively it modestly aids [DraftKings's and FanDuel's] showing." *See Cephalon*, 551 F. Supp. 2d at 28-29.

Notably, in 2016, the Judicial Panel on Multidistrict Litigation consolidated lawsuits filed across the nation against DraftKings and FanDuel in the District of Massachusetts, reasoning "[t]he District of Massachusetts presents a convenient and accessible forum with a significant connection to this litigation. DraftKings is headquartered in the district and the individual defendants reside either in the district or nearby, which will facilitate discovery."[7]

(5) Ease of Access to Sources of Proof Weighs in Favor of Transfer

DraftKings conducts its business primarily in Boston, while FanDuel conducts its business primarily in New York. Almost all documentary evidence relating to the FTC's claim has been sourced from these two locations. To the extent that documentary evidence is already in this District, it is only because the FTC "subpoenaed [it] to its D.C. office." *See Ernst & Young*, 775 F. Supp. at 415. "[T]he mere presence of certain documents in Washington does not change the location of the facts underlying this action." *Id.* Despite the fact that much of the documentary evidence is in electronic form, "technological advances do not obviate the access to evidence inquiry entirely." *Graco*, 2012 WL 3584683, at *6 (citing *In re Apple, Inc.*, 602 F.3d 909, 914 (8th Cir. 2010) ("if the need arises to refer to original documents or evidence in the

[7] *United States Judicial Panel on Multidistrict Litigation*, MDL Nos. 2677-79, at 5 (Feb. 4, 2016), https://dlbjbjzgnk95t.cloudfront.net/0755000/755470/https-ecf-jpml-uscourts-gov-doc1-8501699034.pdf.

litigation, [the district where the movant is headquartered] would prove more convenient")). Accordingly, ease of access to sources of proof in Massachusetts and elsewhere in the Northeast weighs in favor of transfer.

C. Public Interest Factors

Courts deciding whether to grant a request for transfer also weigh public interest factors, which include: "(1) the transferee's familiarity with the governing laws; (2) the relative congestion of the calendars of the potential transferee and transferor courts; and (3) the local interest in deciding local controversies at home." *Cephalon*, 551 F. Supp. 2d at 25 (citations omitted). As with the private interest factors, the public interest factors on balance favor transfer.

(1) The Transferee Court's Familiarity with Governing Laws Is a Neutral Factor

The first factor—familiarity with the governing laws—does not cut in favor of or against transfer. Neither the district court of Massachusetts nor the district court of the District of Columbia is a specialty court, and thus neither court is more familiar than the other with respect to federal antitrust laws governing this case. *Graco*, 2012 WL 3584683, at *6; *Cephalon*, 551 F. Supp.2d at 31.

(2) The Relative Congestion of the Calendars of the Potential Transferor and Transferee Courts Supports Transfer

The second factor—relative congestion of the transferor and transferee courts—supports transfer. Federal judicial caseload statistics show the median civil filing-to-trial time is 44.3 months in the District of Columbia and 28.1 months in the District of Massachusetts.[8] These

[8] Federal Court Management Statistics, United States District Courts—National Judicial Caseload Profile (Dec. 31, 2016), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile1231.2016.pdf.

median statistics indicate that this case would likely be resolved more quickly in the District of Massachusetts. *See Cephalon*, 551 F. Supp. 2d at 31.

Moreover, there is no evidence that transferring this case would result in delay, particularly given that this case is in such early stages that no litigation schedule has been entered in this proceeding. *See Reiffin*, 104 F. Supp. 2d at 57 (granting transfer of venue and noting, "It is not evident that a transfer . . . will lead to unnecessary delay. Additionally, this court has neither dealt with other issues in the suit nor has it familiarized itself with the underlying merits of the case. Since this case is in its earliest stages, there would be no delay associated with the [transferee] district court's having to familiarize itself with this case." (quoting *Trout Unlimited v. U.S. Dep't of Agriculture*, 944 F. Supp. 13, 19 (D.D.C. 1996))).

(3) The Local Interest in Deciding Local Controversies at Home Weighs in Favor of Transfer

The third factor—local interest in deciding local controversies at home—supports transfer. "Controversies should be resolved in the locale where they arise." *Trout*, 944 F. Supp. at 19. In this case, a "clear majority of the operative events took place" in Massachusetts, and as a result, Massachusetts "has a substantial interest in the resolution of the claims of this lawsuit." *Id*. (stating that "matters that are of great importance in the State of Colorado—should be resolved in the forum where the people 'whose rights and interests are in fact most vitally affected by the suit—the people of [Colorado]") (citations omitted). FanDuel and DraftKings negotiated and signed the merger agreement in Massachusetts, and DraftKings is headquartered in that district. Furthermore, Massachusetts [redacted] collected by the Companies by state, while the District of Columbia [redacted]. In fact, DraftKings generated [redacted] from Massachusetts-based players, but [redacted] from players in this District. Similarly, FanDuel [redacted] from Massachusetts-

based players, but [redacted] from D.C.-based players. Due to the localized nature of the operative events of this case and the business activities of FanDuel and DraftKings, Massachusetts has an interest in resolving this controversy at home. Based on these facts, this factor weighs in favor of transfer.

In summary, upon weighing the private and public interest factors implicated by Section 1404(a), the factors weigh in favor of transfer to the District of Massachusetts. While litigating in this District might be convenient for the FTC's lawyers, this factor deserves no deference, as the District of Columbia has no meaningful connection to this matter. Rather, all material events occurred outside of the District of Columbia, in Massachusetts and elsewhere in the Northeast. First, DraftKings and FanDuel negotiated the merger agreement that forms the basis of the FTC's complaint in Massachusetts and New York, where DraftKings and FanDuel are headquartered, respectively. Further, the District of Massachusetts is the more convenient forum for the Companies and key witnesses, the vast majority of which are located in Massachusetts and New York, and will facilitate the collection of documentary evidence, which is housed at the Companies' respective headquarters. Finally, the District of Massachusetts has a shorter median civil filing-to-trial time than the District of Columbia, as well as a strong local interest in this action. As such, the conditions for transfers are met.

CONCLUSION

For the reasons set forth above, this Court should grant the defendants' Motion for Change of Venue to the District of Massachusetts.

DATE: June 23, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of June, 2017, this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Chong S. Park
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