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. 17-cv-01195 (KBJ) **Public Version**

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANTS' MOTION FOR CHANGE OF VENUE

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Plaintiffs Federal Trade Commission (the "FTC" or "Commission"), District of Columbia, and State of California (collectively, "Plaintiffs") respectfully submit this memorandum of points and authorities in opposition to the motion filed by defendants DraftKings, Inc. and FanDuel Limited (collectively, "Defendants") to transfer venue in this action to the District of Massachusetts.

I. INTRODUCTION

Plaintiffs' choice of forum deserves substantial weight, and that principle of law applies with particular force to the government's choice of venue in an antitrust case. Defendants bear a heavy burden to demonstrate that transfer is necessary in "the interest of justice." 28 U.S.C. § 1404(a). Here, Defendants lack any legal basis to undo Plaintiffs' choice of this District, and the facts show that Defendants cannot justify transferring this case to another jurisdiction:

- This District is the home forum of two of the three Plaintiffs in this case;
- Defendants collect [redacted] in entry fees in Washington, D.C. every year, and compete vigorously for the business of District of Columbia residents;
- Only one of the Defendants is based in Massachusetts—DraftKings, which is headquartered in Boston. The other Defendant, FanDuel, is based in New York City—which is as close to this District as to Boston, Massachusetts—and maintains an office in the District of Columbia but not in Boston (or anywhere else in Massachusetts);
- Witnesses in the short preliminary injunction hearing in this case will include Defendants' employees and paid consultants, and Defendants have not shown that these witnesses will not be available to testify in this District;
- Nearly all potential third-party witnesses reside outside of Massachusetts, most are no closer to Massachusetts than to Washington, D.C., and many are closer to Washington, D.C.;
- Defendants have expressly agreed to litigate matters related to the Merger in [redacted] not Massachusetts; and
- The FTC's and the District of Columbia's attorneys who worked on the investigation leading to this suit are all based in this District, as are Defendants' outside antitrust counsel and one of their two economic consultants; trying this case in Massachusetts

would impose significant additional costs on all parties (except, possibly, DraftKings), as well as on U.S. and District of Columbia taxpayers.

The only real connection between this litigation and the District of Massachusetts is that DraftKings—one of the five parties to this case—has its headquarters there. DraftKings may prefer to litigate this case near its corporate offices, but DraftKings' convenience alone is not the legal standard applicable to a motion to transfer venue under 28 U.S.C. §1404. Defendants ignore that a plaintiff's choice of venue receives presumptive deference, particularly the Federal Trade Commission, which has statutory authority to choose its venue for litigation. 15 U.S.C. § 53(b).

Unable to overcome this presumption under the well-established factors applied by courts in this Circuit, Defendants claim, over and over, that the Merger Agreement was negotiated, and potential witnesses are located, in "Massachusetts and New York" and "the Northeast." There is, of course, no "District of Massachusetts and New York" or "District of the Northeast." Moreover, the Merger Agreement was by-and-large negotiated outside of Massachusetts, including in Scotland, but even that ignores that the effects of the Merger occur across the United States. Defendants also ignore the fact that, other than DraftKings' own employees, almost no one involved in this case has a presence in Massachusetts. Contrary to Defendants' artfully worded suggestions, most of the potential non-DraftKings witnesses are located closer to this District (or at least equidistant) than to Defendants' preferred forum.

Transferring this case would inconvenience most of the parties and third-party witnesses, impose substantial costs on federal and District of Columbia taxpayers, and contradict the antitrust venue statutes and well-established case law in this District and Circuit. Therefore, the Court should deny Defendants' motion to transfer venue.

II. FACTUAL AND PROCEDURAL BACKGROUND

On June 19, 2017, the Commission issued an administrative complaint alleging that the Proposed Merger of DraftKings and FanDuel is anticompetitive in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45. That complaint followed a months-long investigation by FTC staff that uncovered overwhelming evidence that the Proposed Merger of the Defendants—which are, by far, the two largest providers of paid daily fantasy sports ("DFS") contests in the United States today, and each other's only competitors of consequence—would drastically reduce competition in the paid DFS market and harm consumers by resulting in higher prices and lower product quality. If the Commission finds, after a full administrative proceeding scheduled to begin on November 21, 2017, that the proposed merger violates the antitrust laws, it may order such relief as is necessary and appropriate, including a prohibition against the consummation of the proposed merger. 15 U.S.C. §§ 21, 45.

Also on June 19, Plaintiffs filed in this Court a Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the FTC Act, ECF No. 3 (the "Complaint"). The purpose of this case is to obtain preliminary injunctive relief to preserve the *status quo*, so as to prevent interim harm to consumers and to preserve the Commission's ability to conduct its administrative proceeding and, if necessary, to order meaningful relief. "[T]he whole point of a preliminary injunction is to avoid the need for intrusive relief later, since even with the considerable flexibility of equitable relief, the difficulty of 'unscrambl[ing] merged assets' often precludes 'an effective order of divestiture'" at the conclusion of the administrative adjudicatory proceeding. *FTC v. Whole Foods Mkt, Inc.*, 548 F.3d 1028, 1034 (D.C. Cir. 2008) (quoting *FTC v. Dean Foods Co.*, 384 U.S. 597, 607 n.5 (1966)).

As explained below, this District is the proper venue for adjudicating this preliminary injunction proceeding, and both the facts and Defendants' arguments fail to meet the heavy burden of demonstrating that transfer is appropriate.

III. THE COURT SHOULD DENY DEFENDANTS' MOTION TO TRANSFER VENUE.

A. Standard of Review

The federal change of venue statute, 28 U.S.C. § 1404, gives a district court discretion to transfer a case to another district where, unlike here, doing so would be "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). This District has a well-established standard for whether a court should grant a motion to transfer venue, under which the court weighs a series of public and private interest factors. *See Thayer/Patricof Educ. Funding, LLC v. Pryor Res., Inc.*, 196 F. Supp. 2d 21, 31 (D.D.C. 2002). "The moving party has the burden of establishing that a transfer is proper." *Miller v. Insulation Contractors, Inc.*, 608 F. Supp. 2d 97, 101 (D.D.C. 2009). Moreover, "courts have imposed a heavy burden on those who seek transfer and a court will not order transfer unless the balance is strongly in favor of the defendant." *United States v. H&R Block, Inc.*, 789 F. Supp. 2d 74, 78 (D.D.C. 2011) (citation omitted). Courts in this District (and elsewhere) routinely deny transfer motions when movants have failed to meet this heavy burden. *See, e.g.*, *Bederson v. United States*, 756 F. Supp. 2d 38, 55 (D.D.C. 2010) (denying motion). Defendants cite cases in their brief that have reached the same conclusion. *See In re Scott*, 709 F.2d 717, 721-22 (D.C. Cir. 1983) (vacating grant of transfer motion as inadequately supported by the facts); *Sec. & Exch. Comm'n v. Savoy Indus., Inc.*, 587 F.2d 1149, 1158 (D.C. Cir. 1978) (affirming denial of transfer motion); *H&R Block*, 789 F. Supp. 2d at 85 (denying motion).

B. Venue Is Proper in the District of Columbia.

As a threshold matter, both Defendants are subject to personal jurisdiction in the District of Columbia, and venue is proper in this Court. Both DraftKings and FanDuel do business in the District of Columbia, and FanDuel maintains a place of business in the District. *See* Ex. 1 (PX04238, Response of DraftKings to the FTC's Second Request) at 104; Ex. 2 (PX05151, Response of FanDuel to the FTC's Second Request) at 89-91. Thus, Section 13(b) of the FTC Act authorizes the Commission to bring suit here. *See* 15 U.S.C. § 53(b) (authorizing the Commission to bring suit in any district "where such person, partnership, or corporation resides or transacts business"). Defendants have not moved to dismiss for improper venue and do not argue that this District is not a proper venue.[1]

C. The Private Interest Factors Weigh Against Transfer.

In determining whether they should transfer a case under Section 1404(a), courts typically look to the following private interest factors: "(1) the plaintiff's choice of forum; (2) the defendant's choice of forum; (3) where the claim arose; (4) the convenience of the parties; (5) the convenience of the witnesses; and (6) the ease of access to the sources of proof." *Bederson*, 756 F. Supp. 2d at 46. Here, those factors militate strongly against transferring this action to the District of Massachusetts.

1. Plaintiffs' Choice of Forum Deserves Substantial Deference.

"The plaintiff's choice of a forum is 'a paramount consideration' in any determination of a transfer request." *Thayer/Patricof*, 196 F. Supp. 2d at 31 (quoting *Sheraton Operating Corp. v. Just Corporate Travel*, 984 F. Supp. 22, 25 (D.D.C. 1997)). As such, the "moving party bear[s] a heavy burden of establishing that plaintiff['s] choice of forum is inappropriate." *Malveaux v.*

[1] Likewise, Plaintiffs do not dispute that the District of Massachusetts would also be a proper venue for this action.

Christian Bros. Servs., 753 F. Supp. 2d 35, 40 (D.D.C. 2010) (internal quotations omitted). Defendants do not—and cannot—show that hearing this case in this District is inappropriate.

It is beyond question that "a plaintiff's choice of a forum will rarely be disturbed . . . unless the balance of convenience is strongly in favor of the defendant." *Gross v. Owen*, 221 F.2d 94, 95 (D.C. Cir. 1955). Deference to the plaintiff's choice of forum is particularly strong where the plaintiff has chosen its home forum, as both the FTC and the District of Columbia have in this case. *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 11 (D.D.C. 2007); *see also H&R Block*, 789 F. Supp. 2d 74, 80 n.3 ("[I]n this case, the DOJ has filed in its home district.").

Moreover, "some courts have found that the government's choice of venue in an antitrust case is entitled to heightened respect." *FTC v. Cephalon, Inc.*, 551 F. Supp. 2d 21, 26 (D.D.C. 2008) (internal quotations omitted) (citing *United States v. Brown Univ.*, 772 F. Supp. 241, 242 (E.D. Pa. 1991)). This is because Congress, in Section 13(b) of the FTC Act and Section 12 of the Clayton Act, 15 U.S.C. § 22, provided the FTC and the U.S. Department of Justice, respectively, with broad powers to choose the venue when they bring actions to enforce the antitrust laws. *See See Microsemi*, Civ. A. No. 08-1311, 2009 WL 577491, at *7 ("Where venue is proper, a plaintiff's choice of forum is entitled to substantial weight, particularly where the plaintiff's choice of forum is authorized by the more liberal antitrust venue provision."); *see also Brown Univ.*, 772 F. Supp. at 242 (collecting cases).

Defendants argue that the Court should abandon these principles because, they claim, this District lacks a "meaningful connection" to Plaintiffs' claims. *See* 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), ECF No. 16-2 ("Defs' Mem.") at 5-6. Nothing could be further from the truth. First and foremost, the District of Columbia itself is a plaintiff in this case; thus,

this District is the home forum of two of the three Plaintiffs. Defendants' attempt to discount the District of Columbia's involvement by claiming that it lacks "particularized harm" is demonstrably false.[2] According to the sworn statement of the Attorney General of the District of Columbia, his office has determined that the Merger would harm consumers in the District in the form of "less price competition, increased commission rates, decreased quality, and reduced incentives for innovation in the industry." Ex. 9 (Declaration of Karl A. Racine) ¶ 5. That is why the District decided to join this litigation, despite limited enforcement resources, in order "to protect the interests of District residents." *Id.* ¶¶ 6, 8; *see also* Ex. 3 (Press Release, *D.C. Joins Federal Trade Commission, California in Opposing Merger between Fantasy Sports Sites DraftKings and FanDuel* (June 19, 2017)) at 2 ("this proposed merger would harm consumers in the District"). Defendants cite no examples in which a court has granted a transfer motion out of a plaintiff state government's home forum because of a lack of meaningful connection to that forum.

Furthermore, there is in fact a meaningful connection between Defendants and this District. Defendants transact substantial amounts of business in this District—in 2016, D.C. residents paid nearly [redacted] in entry fees to Defendants. Ex. 4 (Declaration of John M. McAdams) ¶ 6. One Defendant—FanDuel—has an office location here, *see* Ex. 2 (PX05151, Response of FanDuel to the FTC's Second Request) at 90-91. Notably, FanDuel does not have an office in Massachusetts. *Id.* FanDuel's Chief Legal Officer is based in the District of Columbia. Genetski Decl. ¶ 8, ECF No. 16-4. These facts establish a powerful connection

[2] Defendants attempt to further impugn the District of Columbia by claiming that the District became involved "mere days before the FTC filed its complaint." Defs' Mem. at 5. What Defendants fail to mention is that the District requested waivers from Defendants that would allow the exchange of information with the FTC about the investigation on May 24, 2017—nearly a month before Plaintiffs filed this suit. Ex. 9 (Declaration of Karl A. Racine) ¶ 9. Defendants delayed in providing the waivers until June 9. *Id.*

between the District of Columbia and this action, and therefore entitle Plaintiffs to a strong presumption in favor of their chosen venue.

Defendants cite inapposite cases, which do not justify treating this case as an exception to the fundamental principle that a plaintiff's choice of forum is "ordinarily a 'paramount consideration' that is entitled to 'great deference.'" *FTC v. Cephalon, Inc.*, 551 F. Supp. 2d 21, 26 (D.D.C. 2008) (quoting *Thayer/Patricof Educ. Funding*, 196 F. Supp. 2d at 31). In every case Defendants cite in support of their argument, the court found specific circumstances—circumstances distinctly absent in this case—that made it appropriate to depart from the general and well-established rule.[3] In *Cephalon*, for example, the plaintiff "[did] not seriously contest that the District of Columbia ha[d] no meaningful connection to this action." *Id.* at 27. Further, the court suspected that the plaintiff selected that forum in an attempt to create inconsistent judgements across multiple fora, as a means of obtaining Supreme Court review. *Id.* at 30. For that reason, the court declined to defer to the plaintiff's choice of venue.[4]

Here, Plaintiffs have shown a strong connection between this District and this action—the District of Columbia's participation as a plaintiff (making this the home forum of two of the Plaintiffs), Defendants' substantial business dealings here, and FanDuel's physical presence in the District—and Defendants do not claim (nor could they) that Plaintiffs brought the action here

[3] Even *United States v. E.I. Du Pont De Nemours & Co.*, 83 F. Supp. 233 (D.D.C. 1949)—a decision that no court has cited since 1982—does not stand for the proposition for which Defendants cite it. The *Du Pont* court's point was simply that the advent of section 1404(a) allowed the court to exercise its discretion to transfer cases when appropriate, abrogating an old rule that gave the government "the final choice" of venue. *See id.* at 233. The *Du Pont* court did not hold that the government's choice of venue is not entitled to deference, and courts in this District and others have repeatedly recognized the appropriateness of such deference in the decades since. *See, e.g., H&R Block*, 789 F. Supp. 2d at 79; *Cephalon*, 551 F. Supp. 2d at 26; *Thayer/Patricof Educ. Funding*, 196 F. Supp. 2d at 31; *Brown Univ.*, 772 F. Supp. at 242.

[4] The "most compelling point" in the *Cephalon* court's analysis was the presence of pre-existing private antitrust litigation in the transferee forum (the Eastern District of Pennsylvania) challenging the same conduct that the *Cephalon* plaintiff sought to challenge in the District of Columbia. *See Cephalon*, 551 F. Supp. 2d at 28-29. The court determined that transfer was appropriate so that the defendant would not "be forced to simultaneously litigate two cases in two different courts arising out of precisely the same conduct." *Id.* at 29. In this case, by contrast, there are no private antitrust suits relating to the Merger in the District of Massachusetts (or anywhere else).

in order to create inconsistent judgments. Without such distinct circumstances, Defendants' analogy to *Cephalon* is inapt.

Defendants also repeatedly cite to *FTC v. Graco Inc.*, 2012 WL 3584683 (D.D.C. Jan. 26, 2012), another case with wildly different facts than those present here. In that case, the acquiring defendant apparently had no contacts with the District of Columbia whatsoever, raising questions about whether the court even had personal jurisdiction over it. *See id.* at *2-*4. Indeed, the merging defendants in *Graco* did not even compete in the District of Columbia. By contrast, both Defendants in this case compete vigorously for DFS players in the District, *see* Ex. 9 (Declaration of Karl A. Racine) at ¶¶ 2-5, to the tune of [redacted] in entry fees annually, *see* Ex. 4 (Declaration of John M. McAdams) at ¶ 6, and it is undisputed that this Court has personal jurisdiction over them.

The other cases Defendants cite are also either easily distinguished from the facts in this case, *see Rosales v. United States*, 477 F. Supp. 2d 213, 216 (D.D.C. 2007) (dispute between members and alleged members of an Indian tribe located in San Diego County, California, transferred there), *Kafack v. Primerica Life Ins. Co.*, 934 F. Supp. 3, 6 (D.D.C. 1996) (tort claims under Maryland law transferred to Maryland), or are cases in which the motion to transfer was denied because there *was* a nexus with the chosen forum, *see Greater Yellowstone Coal. v. Bosworth*, 180 F. Supp. 2d 124, 129 (D.D.C. 2001) (denying the transfer motion because, *inter alia*, "this case has some national significance and has a nexus to the District of Columbia").

2. Defendants' Choice of Forum Does Not Weigh in Favor of Transfer.

Unlike Plaintiffs, Defendants cannot show that their choice of forum is entitled to deference. As explained above, Plaintiffs' claims have a meaningful connection to this District, and Defendants' assertion to the contrary is false. But even if Defendants' claim were true, it

would mean only that Plaintiffs' choice of forum receives no deference—not that Defendants' choice of forum is entitled to more weight than Plaintiffs'. The only other reason Defendants advance—that "the merger agreement was negotiated in Massachusetts and New York" or the curiously defined region of the "Northeast"—is similarly unavailing, for the reasons explained below.

3. Plaintiffs' Claims Did Not Arise in Massachusetts.

Defendants argue that "[t]his [c]laim [a]rose in Massachusetts and New York" because, they say, "[t]he Merger Agreement was negotiated, drafted, and executed in Massachusetts and New York." Defs' Mem. at 7. This argument ignores that, by the admission of FanDuel's own Chief Legal Officer, the Merger was also negotiated and executed in Scotland, *see* Genetski Decl. ¶ 5, ECF No. 16-4, and ignores other evidence (described below) indicating that negotiations involved participants located throughout the country.

It is true that courts considering a motion to transfer venue in merger cases sometimes consider the place where the merger agreement was negotiated "as a proxy for where the witnesses, parties, and evidence are likely to be located in a typical case." *H&R Block*, 789 F. Supp. 2d at 80. For several reasons, however, the location where one Defendant signed the Merger Agreement would be a poor proxy in this case.

First, the other party to the Merger, FanDuel, is not based in Massachusetts and does not claim that its witnesses and evidence are located there. Second, the transaction was negotiated in part by [redacted]. *See* Ex. 5 ([redacted] IH Tr. (Mar. 29, 2017)) 226:2-6; Ex. 10 ([redacted] IH Tr. (Apr. 12, 2017)) 196:18-197:1. Nearly all of [redacted] are located far from Defendants' preferred forum. Of the three DraftKings [redacted], only

one is based in Massachusetts; the other two are based in California.[5] None of the three FanDuel [redacted] is based in Massachusetts; rather, they are based in the United Kingdom, New York, and California.[6] Third, FanDuel's Chief Legal Officer, who by his own admission is "involved in" the Merger, [redacted] works in the District of Columbia. Genetski Decl. ¶¶ 2, 8, ECF No. 16-4. Fourth, both parties' antitrust counsel work out of offices in the District of Columbia. *See* Defs' Mem. at 13. Thus, even if the place where one party negotiated the Merger had any relevance to Plaintiffs' antitrust claims—which it does not—it is clear that most of those negotiations likely took place outside of Defendants' preferred forum for this litigation.[7] Ex. 6 (Mem. Op. at 7, *United States v. EnergySolutions, Inc.*, No. 1:16-cv-01056-SLR (D. Del. Dec. 21, 2016)) (denying motion to transfer where "the record d[id] not indicate where a majority of the negotiations took place").

But the location of the Merger negotiations—much of which, given the presence of modern telecommunications, likely took place via phone or email in any event—is a red herring. More significant to Plaintiffs' antitrust claims is that the relevant market alleged in this case is national, *see* Compl. ¶ 32, and the Merger will harm competition and consumers across the United States. In *H&R Block*, now-Chief Judge Howell denied the merging defendants' motion to transfer because "any anticompetitive effects of the proposed transaction would be felt by consumers across the country." *H&R Block*, 789 F. Supp. 2d at 80. Like *H&R Block,* this is not a case where "the market affected by alleged anticompetitive activity [i]s located in a specific

[5] https://www.linkedin.com/in/[redacted] ([redacted] of [redacted], based in San Francisco, CA); https://www.linkedin.com/in/[redacted] ([redacted] of [redacted], based in San Francisco, CA); https://www.linkedin.com/in/[redacted] ([redacted] of [redacted] based in Cambridge, MA).

[6] https://www.linkedin.com/in/[redacted] ([redacted] of [redacted], based in London, UK); http://[redacted] ([redacted] of [redacted] based in New York, NY); https://www.linkedin.com/in/[redacted] ([redacted] of [redacted], based in Los Angeles, CA).

[7] Additionally, the Merger Agreement indicates that [redacted] in places far outside Massachusetts, including Denver, Colorado, and San Francisco, California. Ex. 7 (PX01007, DraftKings/FanDuel Transaction Agreement) § 11.5.

geographic area," which would make it appropriate to conclude that the Plaintiffs' claims arose from that area. *Id.* Rather, as in *H&R Block*, "[g]iven the national market implicated by this case, no [local-market-related] factor here weighs in favor of transfer to any particular district." *Id*.

Ultimately, the Merger Agreement between Defendants is not a material issue in this case. This is not a contract case and there is no dispute about whether, how, or on what terms the Merger was negotiated. As with most Clayton Act cases, the issues here will involve, among other things, the history of competition between Defendants, the current and future structure of the market for paid daily fantasy sports contests, and the likely effects of the Merger. As detailed in the Complaint, these are nationwide considerations and the locus of the negotiations and execution of the Merger Agreement is, for purposes of this motion, a non-factor.

4. The Convenience of the Parties Does Not Weigh in Favor of Transfer.

There are only limited circumstances under which the convenience of the parties is a significant factor for a transfer motion, and such limited circumstances are not present here. In particular, transfer is appropriate only where "litigating in the transferee district [does] not merely shift inconvenience to [another party], but rather . . . lead[s] to an overall increase in convenience for the parties." *H&R Block*, 789 F. Supp. 2d at 80–81 (quoting *United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 771 F. Supp. 2d 42, 48 (D.D.C. 2011)) (internal quotation marks omitted) (second alteration in original). That means *all* of the parties—not just one Defendant. *See, e.g.*, Ex. 6 (Mem. Op. at 8, *United States v. EnergySolutions, Inc.*, No. 1:16-cv-01056-SLR (D. Del. Dec. 21, 2016)) ("[T]he court does not find 'convenience of the parties' to be synonymous with 'convenient for [one defendant]"). Simple math demonstrates that a transfer to Massachusetts would reduce, rather than increase,

the overall convenience to the parties in this case. Of the five parties, transfer would convenience only DraftKings (although, even then, DraftKings' outside antitrust counsel of record are located in this District). But transfer would inconvenience two Plaintiffs—the FTC and the District of Columbia—which would lose the convenience of litigating in their home forum.[8] The transfer would be neutral, at best, for FanDuel (although FanDuel has an office in D.C. but no office in Boston) and for Plaintiff State of California. Transfer would do nothing more than shift inconvenience from one Defendant to two Plaintiffs. When the defendants' preferred venue would be no more convenient, overall, than the venue the plaintiffs has chosen, "the tie is awarded to the plaintiff[s]," and transfer should be denied. *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 665 (7th Cir. 2003). That is true *a fortiori* in this case, where transfer would be *less* convenient for the parties on the whole.

Defendants do not argue that litigating in this District will cause them unreasonable expense, or cause any other them hardship. Nor could they, for their own actions belie any such claims. In the Merger Agreement, DraftKings and FanDuel agreed that any litigation between them related to the Merger would be litigated [redacted] courts, and they expressly "agree[d] that each state and federal court in the State of [redacted] shall be deemed to be a convenient forum." Ex. 7 (PX01007, DraftKings/FanDuel Transaction Agreement) § 11.8(a)(ii). As the court noted under similar circumstances in *H&R Block*, "the fact that the defendants negotiated and agreed to such a clause indicates their ability

[8] On top of causing additional inconvenience to two of the Plaintiffs, transfer would impose significant costs on the federal and District of Columbia governments, because the lawyers, economists, financial analysts, and support staff working on this case all live and work in the D.C. area. "When government lawyers and investigators incur time and travel costs to litigate in a remote forum, the burden falls on the taxpayer, who finances the federal government and who is no less worthy of the protection of the law than corporate officers, shareholders, and employees." *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 665 (7th Cir. 2003).

to avail themselves of legal protections offered by different fora around the country—including fora remote from their home districts."[9] *H&R Block*, 789 F. Supp. 2d at 81.

5. The Convenience of the Witnesses Does Not Weigh in Favor of Transfer.

Courts consider the convenience of witnesses "to the extent that the witnesses may actually be unavailable for trial in one of the fora." *Thayer/Patricof*, 196 F. Supp. 2d at 31. An appeal to witness convenience should fail if the movant cannot show that witnesses will refuse to testify absent the transfer. *See, e.g.*, *Shapiro, Lifschitz & Schram, P.C. v. R.E. Hazard, Jr. Ltd. P'shp.*, 24 F. Supp. 2d 66, 71 (D.D.C. 1998) (denying transfer motion because, *inter alia*, defendants "[d]id not suggest that . . . witnesses will refuse to appear if the trial is held in the District of Columbia"). In this case, this factor weighs against transfer.

a. Party Witnesses Will Be Available in This Forum.

The convenience of witnesses does not warrant a venue transfer when the witnesses are employees of a party and their presence can be obtained by that party. *See, e.g.*, *H&R Block*, 789 F. Supp. 2d at 82; *Brown Univ.*, 772 F. Supp. at 243. In this case, Defendants maintain that witnesses will include DraftKings and FanDuel employees. Defendants have not suggested these witnesses would be unavailable to testify in this District. Indeed, in numerous recent antitrust injunction hearings conducted in this District, employees of merging defendants have appeared even though the defendants were headquartered outside of the District. *See, e.g., United States v. Anthem, Inc.*, No. CV 16-1493, 2017 WL 685563 (D.D.C. Feb. 21, 2017), *aff'd,* 855 F.3d 345, 347 (D.C. Cir. 2017) (defendants headquartered in Indiana and Connecticut); *United States v. Aetna Inc.*, No. CV 16-1494, 2017 WL 325189 (D.D.C. Jan. 23, 2017) (Connecticut and

[9] As the court recognized in *H&R Block*—which, like this case, featured defendants that were headquartered in neither D.C. nor [redacted]—if [redacted] is a convenient foreign forum for Defendants then so is Washington, D.C. After all, [redacted] "is relatively close to this district." *H&R Block*, 789 F. Supp. 2d at 81.

Kentucky); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100 (D.D.C. 2016) (Massachusetts and Florida); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015) (Texas and Illinois). And for FanDuel employees based at its New York City headquarters, the trip to Washington will be no less convenient than travelling to Boston would be. As for DraftKings, it could not reasonably argue that travel by its executives to Washington is excessively inconvenient, given that Defendants' executives voluntarily travelled to Washington [redacted].[10] Ex. 8 (Declaration of Mark D. Seidman) ¶ 2. Because Defendants have made no representation—much less provided any proof—that their employees would be unavailable to testify in this District, this factor cannot weigh in favor of Defendants. *See Thayer/Patricof*, 196 F. Supp. 2d at 31-33; *Shapiro, Lifschitz & Schram*, 24 F. Supp. 2d at 71.

Similarly, there is nothing in the record suggesting that Defendants will not make available third-party witnesses whom they have engaged as contractors—for example, employees of [redacted], which Defendants hired to consult on transition planning and the calculation of alleged Merger synergies. *See* Defs' Mem. at 8. Although not discussed in Defendants' motion, none of the lead [redacted] personnel who prepared the synergies report for Defendants—the personnel most likely to be witnesses at the hearing—are based in Massachusetts. Indeed, the [redacted] partner in charge of the DraftKings/FanDuel engagement, [redacted], is based in the District of Columbia.[11] Thus, for the purposes of this case, the only apparent connection to the District of Massachusetts is [redacted]

[10] As the court recognized in *Cephalon*, the fact that [redacted] of Defendants' executives and employees, joined in most cases by in-house counsel, also appeared in the District of Columbia to provide oral testimony during the investigation, Ex. 8 (Declaration of Mark D. Seidman) ¶¶ 2-4, indicates that they would be available for the hearing in this District. *See FTC v. Cephalon, Inc.*, 551 F. Supp. 2d 21, 28 (D.D.C. 2008).

[11] https:/[redacted]

[redacted]. Similarly, one of Defendants' two economic consultants, [redacted], is based in the District of Columbia.[12]

b. Transfer Would Not Increase Convenience for Third-Party Witnesses.

Courts do consider the location of true third-party witnesses—that is, witnesses whose presence cannot be secured by the parties—when evaluating transfer motions. In this case, witness availability would be the same in either forum because, under 15 U.S.C. § 23, this Court is permitted to authorize trial subpoenas to be issued nationwide. In any event, transferring this case would not increase convenience to third-party witnesses.[13] Indeed, neither party has provided a preliminary witness list at this time. Considering the convenience of unidentified witnesses would be a hypothetical exercise, at best.

Defendants claim that transfer will be more convenient because "[m]ore than half of DraftKings's current institutional investors . . . are located in either Massachusetts and New York." Defs' Mem at 8. This argument is unavailing for several reasons. First, Defendants do not identify how many, or which, of their institutional investors are likely to be witnesses at the hearing.[14] Indeed, they do not provide the identity or location of *any* potential investor witness. Second, Defendants once again attempt to conflate Massachusetts and New York, ignoring that these New York-based witnesses are just as close to the District of Columbia as to Defendants' preferred forum. Third, Defendants do not claim that *any* of FanDuel's institutional investors are

[12] http://[redacted]

[13] It is worth noting that the preliminary injunction hearing will be much shorter than most full-blown civil trials. Plaintiffs contemplate a hearing lasting roughly four days, including opening statements and expert testimony. Moreover, much of the fact testimony is likely to come from Defendants' employees, which would necessarily limit the number of third-party witnesses who would testify at the hearing—and, for the reasons explained herein, transferring venue would not increase their convenience.

[14] Indeed, Defendants do not provide the identity or location of *any* of the witnesses they actually intend to call at the hearing, leaving this Court to decide on the basis of nothing more than vague generalizations. *Cf. United States v. Bowdoin*, 770 F. Supp. 2d 133, 139 (D.D.C. 2011) ("Generally, a naked allegation that witnesses will be inconvenienced by trial in a distant forum will not suffice for transfer . . . . [T]ransfer motions must identify the inconvenienced witnesses whom defendant[ ] propose[s] to call and contain a 'showing' of the proposed witnesses' testimony.") (quoting *United States v. Haley*, 504 F. Supp. 1124, 1126 (E.D. Pa. 1981)).

located in Massachusetts, or closer to Massachusetts than to the District of Columbia. In fact, nearly all of Defendants' institutional investors are based outside of Massachusetts, and some are located in the District of Columbia (Revolution Growth, a major DraftKings investor, is based in Washington, D.C.[15]) or closer to the District of Columbia than to Boston (e.g., Shamrock Capital Advisors, a major FanDuel advisor based in Los Angeles, California[16]). On this record, there simply is no basis to conclude that Defendants' preferred forum would be more convenient for any institutional investors who might ultimately testify at the hearing.

Defendants list several third parties—[redacted], and others—as "potential witnesses," and argue that transfer is appropriate because these companies are located in the "Northeast." *See* Defs' Mem. at 8. By Defendants' own admission, however, not one of these companies is based in Massachusetts. *See id.* n.4. Most are located in New York—just as close to this District as to the District of Massachusetts—and [redacted] is based in California, which is closer to the District of Columbia than to Massachusetts. *Id.* The facts simply do not support Defendants' claims that this District is less convenient for potential third-party witnesses than the District of Massachusetts.

For all of these reasons, Defendants have not shown—and cannot show—that any witness will be unavailable to testify if the hearing is held in this District.

Finally, in a complete *non sequitur*, Defendants point out that the Judicial Panel on Multidistrict Legislation consolidated numerous lawsuits against DraftKings and FanDuel in the District of Massachusetts. *See* Defs' Mem. at 9. These are not antitrust suits; rather, they involve allegations of "insider trading," breach of contract, fraud, and other state-law torts.[17]

[15] https://www.revolution.com/contact-us/
[16] http://www.shamrockcap.com/contact
[17] *See United States Judicial Panel on Multidistrict* Litigation, MDL Nos. 2677-79 (Feb. 4, 2016), *available at* http://www.jpml.uscourts.gov/sites/jpml/files/MDL-2677_MDL-2678_MDL-2679-Initial_Transfer-01-16.pdf .

The fact that the Panel saw fit to consolidate these suits that are entirely unrelated to this case, with unrelated plaintiffs, under unrelated laws, sheds no light whatsoever on whether the circumstances in this case counsel for or against transfer.

6. Access to Sources of Proof Does Not Weigh in Favor of Transfer.

Courts in this District have noted that "the location of documents is increasingly irrelevant in the age of electronic discovery, when thousands of pages of documents can be easily digitized and transported to any appropriate forum." *Fanning v. Capco Contractors, Inc.*, 711 F. Supp. 2d 65, 70 (D.D.C. 2010); *see also National R.R. Passenger Corp. v. R & R Visual, Inc.*, Civ. A. No. 05-822, 2007 WL 2071652, at *6 (D.D.C. July 19, 2007) ("[T]echnological advances have significantly reduced the weight of the ease-of-access-to-proof factor."); *Brown Univ.*, 772 F. Supp. at 243 (holding that location of documents "is entitled to little weight" when the documents have been and can be easily transported). During the course of the Merger investigation, Defendants and third parties produced all documents electronically to the FTC, and third parties did so as well. Even if there were a need for physical evidence in this case, that evidence would inevitably have to be routed through Washington, D.C. even if the forum were transferred, because Defendants' antitrust counsel are all located here and all of Plaintiffs' counsel, except for those for the State of California, are as well. *See Air Line Pilots Ass'n v. Eastern Air Lines*, 672 F. Supp. 525, 527 (D.D.C. 1987) ("No matter where the litigation proceeds, these materials will have to be photocopied and shipped to Eastern's lawyers who live and work in the District area and to ALPA's lawyers who likewise live and work in D.C. . . . .").

Further, during discovery, Defendants undoubtedly will seek Plaintiffs' documents, including communications with third parties.[18] Those documents are located in Washington, D.C. Accordingly, the location of documentary evidence does not weigh in favor of a transfer.

D. The Public Interest Factors Weigh Strongly Against Transfer.

In addition to private factors, when analyzing a venue-transfer motion, courts examine whether transferring the case to another venue would serve the public interest. Public interest factors include: "(1) the local interest in making local decisions regarding local controversies; (2) the relative congestion of the transferee and transferor courts; and (3) the potential transferee court's familiarity with the governing law." *Bederson,* 756 F. Supp. 2d at 46.

1. The Interest in Resolving Local Controversies Does Not Weigh in Favor of a Transfer.

In cases that involve "an essentially local matter," courts consider the localized nature of the dispute to be a factor in favor of transfer. *H&R Block,* 789 F. Supp. 2d at 83. This factor is neutral, however, in cases that are national in character. *Id.* ("The local interest in making decisions regarding local controversies is a neutral factor here because, as defendants concede, this case has national economic significance and does not present an essentially local matter."). As Defendants concede, this case involves allegations of harm in a national—not a local—market. Defs' Mem. at 5 (citing Compl. ¶ 32). The harm alleged will affect customers in every state where Defendants do business, not only—or even disproportionately—in Massachusetts. Indeed, beyond Massachusetts, DraftKings and FanDuel compete in 38 other states and the District of Columbia.

Defendants attempt to localize the case by rehashing their arguments about the negotiation of the Merger Agreement, *see* Part III.C.3 *supra,* and those arguments fail here for

[18] Indeed, Plaintiff FTC has already produced portions of its investigative materials to Defendants via electronic means.

the same reasons. Defendants also contend that the amount of business each of them transacts in Massachusetts favors transfer, but those very numbers show that more than [redacted]% of DraftKings' revenue, and more than [redacted]% of FanDuel's, comes from outside of that state.[19] [redacted] In a national market like this one, where Massachusetts bears no particular local interest in the case, this factor does not weigh in favor of transfer. If anything, this factor weighs against transfer, as the District of Columbia's decision to join this suit as a Plaintiff demonstrates this local community's interest in its outcome. *See generally* Ex. 9 (Declaration of Karl A. Racine).

2. Concerns About Court Congestion Weigh Against Transfer.

Statistics comparing the average filing-to-trial time in this District to the District of Massachusetts are irrelevant in this preliminary injunction proceeding. What matters is whether the forum can adjudicate this matter on the expedited timeline contemplated by the parties. It is Plaintiffs' understanding, based on the status call with the Court conducted on June 23, 2017, that this Court finds a hearing in September and a ruling in October may be feasible. Thus, a transfer would not benefit anyone.

By contrast, transfer would create uncertainty, and could lead to significant delays as the new court familiarizes itself with the case and establishes a case management order comporting with its schedule. Indeed, the delays resulting from transfer may result in the parties litigating this action in Massachusetts while concurrently litigating the administrative action in Washington, D.C., creating a serious burden for all parties. It is impossible to predict whether the transferee court would be able to adjudicate this case on the necessary expedited timeline. Given Plaintiffs' understanding of this Court's potential ability to hear the case in a timely

[19] Moreover, granting transfer to a defendant's home district simply because that district is part of the alleged relevant market would eviscerate the venue provision of Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which expressly authorizes the Commission to bring suit in *any* district where a defendant conducts business.

fashion and the uncertainty in a Massachusetts court's ability to hear this case expeditiously, this factor weighs heavily against transfer.

3. Familiarity with Applicable Law Weighs Against Transfer.

Courts generally view this factor as neutral, on the presumption that all federal courts have equal familiarity with federal law. *See, e.g.*, *H&R Block*, 789 F. Supp. 2d at 84. It is worth noting, however, that this District adjudicates far more antitrust merger challenges than any other district in the country and, as a result, has developed a robust body of case law from which to draw in deciding such cases. *See, e.g.*, *United States v. Anthem, Inc.*, No. CV 16-1493, 2017 WL 685563 (D.D.C. Feb. 21, 2017), *aff'd*, 855 F.3d 345, (D.C. Cir. 2017*)*; *United States v. Aetna Inc.*, No. CV 16-1494, 2017 WL 325189 (D.D.C. Jan. 23, 2017); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100 (D.D.C. 2016); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009); *FTC v. Whole Foods Mkt., Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007), rev'd, 548 F.3d 1028 (D.C. Cir. 2008). Indeed, this District has decided four antitrust merger cases since 2015, including one resulting in a Circuit Court opinion. *See Anthem*, 2017 WL 685563, *aff'd*, 855 F.3d 345, 347; *Aetna*, 2017 WL 325189; *Staples*,190 F. Supp. 3d 100; *Sysco*, 113 F. Supp. 3d 1.

IV. CONCLUSION

Each and every factor considered in deciding a motion to transfer venue either decisively favors Plaintiffs, or is, at worst, neutral. Thus, Defendants have not even come close to meeting the "heavy burden" of demonstrating that the balance of transfer factors weighs in their favor. Therefore, the Court should deny Defendants' motion.

Respectfully submitted,

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By: /s/ Thomas J. Dillickrath

Thomas J. Dillickrath (D.C. Bar No. 483710)
Bureau of Competition
Federal Trade Commission
400 Seventh Street, S.W.
Washington, D.C. 20024
(202) 326-3286
tdillickrath@ftc.gov

Attorney for Plaintiff Federal Trade Commission

By: /s/ Paul A. Moore III

Paul A. Moore III (Cal. Bar No. 241157)
Deputy Attorney General
Office of the Attorney General of California
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94012-7004
Tel: (415) 703-2372
paul.moore@doj.ca.gov
Counsel for Plaintiff State of California

By: /s/ Catherine A. Jackson

Catherine A. Jackson (D.C. Bar No. 1005415)
Assistant Attorney General
Office of the Attorney General
441 Fourth Street, N.W., Suite 630-S
Washington, DC 20001
Tel: (202) 442-9864
catherine.jackson@dc.gov
Counsel for Plaintiff District of Columbia