# DraftKings, FanDuel in Settlement Talks Over Consumer Class Actions

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By Amanda Bronstad | April 13, 2018

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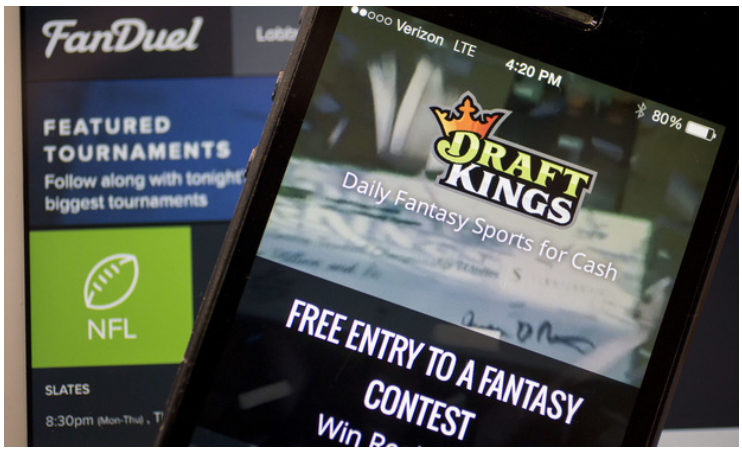
A joint motion




**DraftKings and FanDuel websites/courtesy of Bloomberg Finance LP**

(https://images.law.com/contrib/content/uploads/documents/398/14136/DraftKings-FanDuel-settlement-mtn-to-stay.pdf) filed on Tuesday gave no details other than to say

the lawyers would update the court in 90 days about the settlement talks. The move comes as both sides were awaiting a ruling from U.S. District Judge George O'Toole in Boston on whether to grant the defendants' motions to compel arbitration. O'Toole held a hearing (https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/07/13/boies-bolsters-bid-by-draftkings-fanduel-to-fend-off-class-action/) on July 12, but both sides submitted additional briefing after the U.S. Court of Appeals for the Second Circuit ruled for Uber in a case challenging a similar online arbitration agreement.

"We're always open to discussions with the defendants in this litigation, and we're hoping this will go forward in a quick fashion," said Hunter Shkolnik, of Napoli Shkolnik in New York, who is co-lead counsel in the litigation. "Whenever you have a decision like this outstanding, it's always an interesting time to have discussions."

Damien Marshall, a partner at Boies Schiller Flexner in New York who represents DraftKings, and FanDuel attorney David McDowell, a partner at Morrison & Foerster in Los Angeles, did not respond to requests for comment.

More than 80 class actions alleged (https://www.law.com/nationallawjournal/almID/1202748994374/fantasy-sports-class-actions-consolidated-in-boston-court/)that the websites, which allow players to create their own fantasy teams and win prize money based on the performance of real athletes, engaged in "insider trading" by allowing their employees to participate in contests using nonpublic information, or they enticed consumers to participate in illegal gambling.

In 2016, the companies paid $12 million (https://www.law.com/newyorklawjournal/almID/1202770744726/fantasy-sportsbetting-companies-settle-suits-with-ny-ag-for-12-million/) to settle a case brought by the New York attorney general and, last year, the Massachusetts attorney general

settled its case (http://www.mass.gov/ago/news-and-updates/press-releases/2017/2017-09-07-draftkings-and-fanduel.html) with the companies for $2.6 million.

The scandal also prompted legislative overhauls. Both companies abandoned (https://www.law.com/nationallawjournal/almID/1202792961844/DraftKings-FanDuel-Abandon-Merger-Plans-in-Wake-of-FTC-Pushback/?mcode=1202617074964&curindex=0)talks to merge with one another last year following pushback (https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/06/21/ftc-proposed-complaint-says-fantasy-sports-merger-creates-monopoly/) from the Federal Trade Commission.

In court, DraftKings and FanDuel moved to arbitrate the cases in 2016. In their motions, the companies relied on court rulings supporting "click-wrap" arbitration agreements. The sports fantasy sites also had class action waivers in their arbitration agreements.

But on Aug. 17, the Second Circuit found (https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/08/17/appeals-court-finds-for-uber-says-app-made-service-terms-clear) that Uber users had agreed to the ride-hailing company's terms of service, including an arbitration agreement, when they downloaded the app. Last month, U.S. District Judge Jed Rakoff sent (https://www.law.com/newyorklawjournal/2018/03/08/rakoff-sends-uber-suit-to-arbitration-but-first-sounds-off-on-why-the-law-is-wrong/) the Uber case to arbitration on remand—although reluctantly.

In an Aug. 25 supplemental brief to address the Second Circuit's ruling in *Meyer v. Uber Technologies*, plaintiffs challenged only FanDuel's arbitration agreement, which they said had some screen details that differed from Uber's. Those include hyperlinks to its terms of use that were neither blue nor highlighted and "lines of text that were more cluttered than Uber's screen."

FanDuel countered in an Aug. 30 supplemental brief that its registration process was "substantially similar" to Uber's.

"*Meyer* is strong support for FanDuel's motion to compel arbitration and severely undermines Plaintiffs' arguments against notice and mutual assent," McDowell wrote. "The decision confirms that the content and format of FanDuel's registration process was sufficient to put Plaintiffs on notice that they 'would be subject to [FanDuel's] contractual terms."

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