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27 **UNITED STATES DISTRICT COURT**
28 **NORTHERN DISTRICT OF CALIFORNIA**

ZHICHENG ZHEN *et al.*, individually and
on behalf of others similarly situated,

Plaintiffs,

vs.

DRAFTKINGS, INC., AND DOES 1-20,

Defendants.

Case No. 3:25-cv-4618-CRB

Related Cases:

3:25-cv-4916-CRB

3:25-cv-5542-CRB

3:25-cv-7211-CRB

**PLAINTIFFS' OPPOSITION TO
DRAFTKINGS' MOTION TO DISMISS**

Assigned to: Hon. Charles R. Breyer

Hearing Date: November 14, 2025

Time: 10:00 AM

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Like Captain Renault in *Casablanca*, Defendant DraftKings, Inc. (“DraftKings”) “purports
3 to be shocked—shocked!—to find that [daily fantasy sports] could constitute illegal gambling.”
4 *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 785 (9th Cir. 2018). Yet in the Motion to Dismiss,
5 DraftKings does not address the central legal question in this case—do its daily fantasy sports
6 contests violate the California Penal Code. It does not do so for a simple reason. DraftKings knows
7 that squarely addressing Plaintiffs’ theory of the case would result in a finding that its daily fantasy
8 sports contests constitute illegal “bets” and “wagers” within the meaning of California Penal Code
9 Section 337a(a)(6), effectively ending the case in Plaintiffs’ favor. In fact, after this lawsuit was
10 filed, the California Attorney General confirmed that DraftKings’ gambling enterprise violates
11 California law: “California law prohibits the operation of daily fantasy sports games Such
12 games constitute wagering on sports in violation of Penal Code section 337a.”¹

13 Despite the Attorney General’s Opinion, DraftKings continues to prominently represent and
14 warrant on its website that “DraftKings Daily Fantasy Sports is legal in . . . California,” and that
15 “DraftKings monitors new developments and acts quickly to ensure it is in compliance with the
16 laws in any jurisdiction where it operates. As laws change or regulations are implemented,
17 DraftKings will take steps to ensure its continued compliance, and changes to this site may take
18 place to reflect any such new laws or regulations.” [https://www.draftkings.com/where-is-](https://www.draftkings.com/where-is-draftkings-legal)
19 [draftkings-legal](https://www.draftkings.com/where-is-draftkings-legal) (September 25, 2025); *see also* Compl. ¶¶ 64-67 (same). Both statements are false.
20 Rather than taking responsibility for its actions, in the Motion, DraftKings doubles down on a series
21 of technicalities that DraftKings claims exempt it from civil liability, conveniently leaving
22 DraftKings with the millions it has unlawfully taken from the class. Each of these arguments fail.

23 **First**, DraftKings does not dispute that Plaintiffs state an unlawful claim under California’s
24 Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, (“UCL”) based on DraftKings’
25 violations of the Penal Code—nor could it. “Virtually any law—federal, state or local—can serve
26 as a predicate for a section 17200 action.” *Smith v. Wells Fargo Bank, N.A.*, 135 Cal. App. 4th

27 _____
28 ¹ Opinion of the California Attorney General No. 23-1001 (“AG Opinion”), available online at
<https://oag.ca.gov/system/files/attachments/press-docs/23-1001.pdf> (July 3, 2025); ECF No. 19.

1 1463, 1480 (2005). Instead, DraftKings contends that the portions of claims arising under the UCL
2 and the Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.* (“CLRA”), predicated on
3 false representations cannot proceed. This is a non-starter. DraftKings spends a half *billion* dollars
4 each year on advertising and marketing (among the highest spends in the industry)—including
5 California-specific ad campaigns—that are designed to entice law abiding Californians to engage
6 in illegal gambling activities by creating the false impression that DraftKings’ activities are legal
7 and permitted in California when they are not. In the Complaint, Plaintiffs identify examples of
8 specific false statements DraftKings made, state their reasonable reliance on those statements, and
9 confirm that but for the false statements, they would not have used DraftKings’ Gambling Websites
10 in California. Nothing more is required.

11 **Second**, DraftKings attempts to invoke the “public policy doctrine” that was articulated in
12 *Kelly v. First Astri Corp.*, 72 Cal. App. 4th 462 (1999) to argue that California imposes a categorical
13 bar on civil litigation related to gambling. DraftKings’ extreme reading of *Kelly* is not the law. As
14 Judge Chhabria recently found, the “policy [in *Kelly*] stems from the general rule against enforcing
15 contracts founded on illegal consideration, which is intended to prevent the guilty party from
16 reaping the benefit of his wrongful conduct[.]” *Colvin v. Roblox Corp.*, 2024 WL 4231090, at *4
17 (N.D. Cal. Sept. 19, 2024) (cleaned up). Indeed, in *Kyablue v. Watkins*—which was decided after
18 *Kelly*—the California Court of Appeal held that the public policy doctrine must be applied flexibly,
19 weighing the “relative moral fault of the plaintiff and the defendant” as well as “the degree of moral
20 turpitude involved” instead of applying a categorical bar to gambling-related claims. 210 Cal. App.
21 4th 1288, 1292-93 (2012). This balancing inquiry is fundamentally factual in nature, and *Kelly* itself
22 was only decided at summary judgment. 72 Cal. App. 4th at 496. Moreover, by its own terms, the
23 public policy doctrine articulated in *Kelly* does not apply to statutory causes of action—the only
24 claims at issue here—and does not address injunctive relief. *See id.* at 466.

25 **Third**, DraftKings argues that Plaintiffs lack statutory standing because they received what
26 they paid for—entry into a sports betting contest. But DraftKings’ self-serving characterization
27 does not fit Plaintiffs’ theory of the case. Plaintiffs allege that what they agreed to purchase was a
28 *legal* entry into a gambling contest, but what they received from DraftKings was *per se* defective

1 because it was actually an entry into an *illegal* gambling contest, which inherently has less value.
2 The “difference between what was paid and what a reasonable consumer would have paid *at the*
3 *time of purchase* without the fraudulent or omitted information” is a classic economic injury
4 sufficient to create statutory standing under the UCL and CLRA. *Pulaski & Middleman, LLC v.*
5 *Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015).

6 **Fourth**, DraftKings contends that Plaintiffs lack standing to pursue injunctive relief claims,
7 but as DraftKings’ own authorities recognize, “a previously deceived consumer may have standing
8 to seek an injunction . . . even though the consumer now knows or suspects that the advertising
9 was false at the time of the original purchase, because the consumer may suffer an actual and
10 imminent, not conjectural or hypothetical threat of future harm.” *Davidson v. Kimberly-Clark*
11 *Corp.*, 889 F.3d 956, 969 (9th Cir. 2018). That is certainly the case here, where Plaintiffs expressly
12 state that they wish to *lawfully* gamble online (Compl. ¶¶ 121, 134), and DraftKings continues to
13 falsely represent that “DraftKings Daily Fantasy Sports is legal in . . . California.” *Id.* ¶ 65.

14 **Fifth**, DraftKings asks this Court to make a factual determination that Plaintiff Smith’s
15 claims are time barred, but such a determination is not appropriate on the pleadings. Moreover,
16 even if the Court could make this determination now (it cannot), Plaintiffs expressly allege that the
17 statute of limitations has been tolled based on DraftKings’ affirmative (and ongoing)
18 misrepresentations of legality, preserving their claims. *See, e.g., Conmar Corp. v. Mitsui & Co.*
19 *(U.S.A.)*, 858 F.2d 499, 506 (9th Cir. 1988) (reversing dismissal of tolled claim).

20 **Sixth**, DraftKings contends that the CLRA does not apply to online gambling transactions
21 because they are not “goods” or “services” within the meaning of the CLRA. However, “[i]n light
22 of the CLRA’s underlying purpose to protect consumers and the liberal construction with which
23 courts should interpret it,” the case law recognizes that “Plaintiffs’ claims [arising from online
24 gambling] fall within the purview of the CLRA.” *Ochoa v. Zeroo Gravity Games LLC*, 2023 WL
25 4291650, at *13 (C.D. Cal. May 24, 2023).

26 **Seventh**, seeking to avoid punitive damages for its willful operation of an unlawful
27 gambling enterprise, DraftKings also moves “to dismiss or strike” Plaintiffs’ claims for punitive
28 damages, but DraftKings’ Motion is only brought under Rule 12(b)(6)—and not Rule 12(f)—and

1 “a request for punitive damages is not a ‘claim’ and is not the proper subject of a motion to
2 dismiss[.]” *Shimy v. Wright Med. Tech., Inc.*, 2014 WL 3694140, at *4 (C.D. Cal. July 23, 2014).

3 **Finally**, DraftKings argues that this Court lacks equitable jurisdiction over Plaintiffs’
4 claims because Plaintiffs fail to use the magic words “no adequate remedy at law” in their
5 Complaint. This is not the law, and even if it were, Plaintiffs can easily cure this supposed
6 deficiency via amendment by adding additional factual allegations and causes of action.

7 Put simply, and as shown in detail below, the Motion should be denied in its entirety.

8 **II. FACTUAL BACKGROUND**

9 **A. DraftKings’ California Gambling Operations.**

10 DraftKings is one of the largest daily fantasy sports providers in the country, offering “Daily
11 Fantasy Sports” (“DFS”) and “Pick6” through its website and mobile apps (collectively, “Gambling
12 Websites”) to California residents. Compl. ¶ 40; *see also id.* ¶¶ 44-61 (step-by-step explanation of
13 DFS); *id.* ¶¶ 68-87 (Pick6). DraftKings spends half a *billion* dollars each year promoting its
14 gambling services (*id.* ¶ 92), including California specific marketing campaigns (*id.* ¶ 94).

15 “Well aware that customers would otherwise refuse to play its Daily Fantasy Sports [and
16 Pick6] contests if they knew and understood those contests violated California criminal law, on its
17 Daily Fantasy Sports website, DraftKings repeatedly assures prospective customers that Daily
18 Fantasy Sports [and Pick6] are legal in California.” Compl. ¶¶ 62, 88; *id.* ¶¶ 67, 91 (mobile apps).
19 For example, on the main DraftKings landing page, DraftKings includes a “Where is DFS legal”
20 link, which reflects that California is a legal market. *See id.* ¶¶ 64, 66; ¶ 67 (mobile apps); ¶¶ 88-
21 91 (Pick6). DraftKings further warrants that it actively monitors state law to ensure legality:

22 Daily Fantasy Sports contests are governed by both federal and state law.
23 Federal law specifically exempts fantasy sports contests from the prohibitions
24 of the Unlawful Internet Gambling Enforcement Act, or UIGEA. At the state
25 level, legislation and regulation vary state-to-state. In recent years, many state
26 legislatures have passed laws confirming and clarifying the legality of Daily
27 Fantasy Sports contests. DraftKings monitors new developments and acts
28 quickly to ensure it is in compliance with the laws in any jurisdiction where it
operates. As laws change or regulations are implemented, DraftKings will take
steps to ensure its continued compliance, and changes to this site may take place
to reflect any such new laws or regulations.

Compl. ¶ 65 (quoting DraftKings’ website).

1 Despite DraftKings’ representations, in reality, its gambling services violate the California
 2 Penal Code, including Section 337a(a)(6), which makes it a crime to “offer[] or accept[] any . . .
 3 bets . . . or wagers[.]” Compl. ¶ 17; *see also id.* ¶¶ 14-26 (additional Penal Code violations).

4 **B. Plaintiffs File Suit on Behalf of Themselves and the Putative California Class.**

5 On June 1, 2025, Plaintiffs Zhicheng Zhen and Jonathan Smith filed this lawsuit on behalf
 6 of themselves and a putative California class. Each Plaintiff explicitly alleges that DraftKings’
 7 representations were material in their respective decisions to use DraftKings, and that if DraftKings
 8 had not “represent[ed] that such activities were legal (when, unknown to Plaintiff[s] at the time,
 9 they in fact were not legal), [they] would not have made any of those bets or wagers and would not
 10 have paid any money to DraftKings.” *See* Compl. ¶¶ 112-124 (Zhen); ¶¶ 125-142 (Smith). Plaintiffs
 11 bring claims under the UCL and the CLRA on behalf of themselves and the class. *Id.* ¶¶ 159-178.

12 **C. The California Attorney General Confirms that DraftKings’ Gambling Services**
 13 **Violate the California Penal Code, Yet DraftKings Continues to Operate.**

14 After this lawsuit was filed, the California Attorney General confirmed the unlawful nature
 15 of DraftKings’ gambling enterprise, issuing an Opinion that “California law prohibits the operation
 16 of daily fantasy sports games Such games constitute wagering on sports in violation of Penal
 17 Code section 337a.”² Despite the AG’s Opinion, DraftKings continues to offer its illegal gambling
 18 services in California and expressly (and falsely) represent that those gambling services are legal.

19 **III. ARGUMENT**

20 In the Motion, DraftKings does not dispute that Plaintiffs state a UCL unlawful claim based
 21 on DraftKings’ violations of the Penal Code—nor could it: “[v]irtually any law—federal, state or
 22 local—can serve as a predicate for a section 17200 action.” *Smith*, 135 Cal. App. 4th at 1480.
 23 Instead, DraftKings throws a scattershot of technical legal arguments against the wall, hoping that
 24 one will stick. As shown below, each of DraftKings’ arguments fail, and even if the Court were to
 25 find otherwise (it should not), any supposed deficiency can be cured through amendment.

26
 27
 28 ² AG Opinion, available online <https://oag.ca.gov/system/files/attachments/press-docs/23-1001.pdf>
 (July 3, 2025); *see also* ECF No. 19 (attaching opinion).

1 **A. Plaintiffs’ Detailed Allegations Sufficiently State UCL and CLRA Claims.**

2 In the Motion, DraftKings contends that the portions of the UCL and CLRA claims
3 predicated on false and deceptive representations cannot proceed due to a supposed failure to plead
4 these allegations with specificity, but DraftKings’ argument fails.

5 **First**, and tellingly, DraftKings never identifies the relevant legal standard for assessing the
6 misrepresentations that give rise to Plaintiffs’ UCL and CLRA claims—the statements are governed
7 by the “reasonable consumer test.” *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir.
8 2008). Under the reasonable consumer test, plaintiffs need only “show that members of the public
9 are likely to be deceived, whether by explicitly false representations or by misleading, deceptive,
10 or confusing representations.” *Gilbert v. MoneyMutual, LLC*, 2018 WL 8186605, at *18 (N.D. Cal.
11 2018) (cleaned up). Here, Plaintiffs have met this standard by identifying the specific false and
12 deceptive statements of legality made on DraftKings’ Gambling Websites. *See* Compl. ¶¶ 40-87.
13 For example, for years, DraftKings has affirmatively represented that “DraftKings Daily Fantasy
14 Sports is legal in . . . California,” (*id.* ¶ 66), and has continued to make this representation despite
15 the AG’s Opinion, which is directly to the contrary. *See* [https://www.draftkings.com/where-is-](https://www.draftkings.com/where-is-draftkings-legal)
16 [draftkings-legal](https://www.draftkings.com/where-is-draftkings-legal). Any reasonable consumer encountering DraftKings’ statements (including
17 Plaintiffs) are left with one understanding: DraftKings’ gambling contests are legal in California.

18 **Second**, to the extent Rule 9(b) applies, Plaintiffs’ allegations are more than sufficient to
19 give DraftKings “notice of the particular misconduct [claimed against it] . . . so that [DraftKings]
20 can defend against the charge and not just deny that [it has not] done anything wrong.” *Bly-Magee*
21 *v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001). Plaintiffs have done so here by alleging the
22 “Who,” “What,” “When,” “Where,” and “How” of their claims:

- 23 • **Who:** Plaintiffs (Compl. ¶¶ 112-142); the class (*id.* ¶ 148); DraftKings (*id.* ¶¶ 40-97).
- 24 • **What:** Unlawful gambling on the DraftKings Gambling Websites (*id.* ¶¶ 40-61, 68-87),
25 and false and deceptive representations about the legality of those gambling services in
26 California (*e.g.*, *id.* ¶¶ 62-67, 88-91).
- 27 • **When:** Since at least 2012 and continuing to present as to the putative class (*id.* ¶¶ 40,
28 148), between 2024 and February 2025 for Plaintiff Zhen (*id.* ¶ 113, 120), and between

1 2019 and present for Plaintiff Smith (*id.* ¶ 126, 130).

- 2 • **Where:** On the Gambling Websites, namely DraftKings.com and the DraftKings apps
3 (*id.* ¶¶ 40-87), with users physically located in California (*id.* ¶¶ 112, 125, 148).
- 4 • **How:** Taking bets and wagers in violations of the California Penal Code (*id.* ¶¶ 14-26,
5 41-87) and falsely representing that the transactions were legal (*id.* ¶¶ 62-67, 88-91).

6 While DraftKings contends that Plaintiffs fail to identify the specific false statements they
7 were exposed to, this argument misses the mark. Plaintiffs expressly identify that at the time of
8 account signups “DraftKings represented to Plaintiff[s] that the products and services it offered in
9 California were legal.” Compl. ¶ 113 (2024 for Zhen), ¶ 126 (2019 for Smith). Further, they allege
10 that “[s]ince that time, DraftKings has continued to represent to Plaintiff[s,] including on the
11 Gambling Websites themselves—that the services it provides in California are legal.” *Id.* ¶114
12 (Zhen), ¶ 127 (Smith). Plaintiffs also specifically allege the recent types of representations they
13 were exposed to on the Gambling Websites, including by providing screen captures of statements.
14 *Id.* ¶¶ 40-97. While DraftKings attempts to rely on *Kearns v. Ford Motor Co.*, 567 F.3d 1120 (9th
15 Cir. 2009) to argue that more details are required, “*Kearns* did not require such specific
16 allegations.” *Bronson v. Johnson & Johnson*, 2013 WL 5731817, at *6 (N.D. Cal. Oct. 22, 2013).
17 Indeed, “it would be unfair to require plaintiffs to recall and specify precisely which of the many
18 advertisements they [saw or] the particular advertisements they relied upon. It suffices for plaintiffs
19 to provide examples of advertisements similar to those they saw as long as all the advertisements
20 convey the core allegedly fraudulent message.” *In re Oreck Corp.*, 2012 WL 6062047, at *15 (C.D.
21 Cal. Dec. 3, 2012).

22 **Finally**, and contrary to DraftKings’ contentions, Plaintiffs also sufficiently allege “actual
23 reliance.” In *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009), the California Supreme Court held
24 that to satisfy this requirement the plaintiff must show that he personally lost money or property
25 because of his own actual and reasonable reliance on the allegedly untrue or misleading statements.
26 *Id.* at 326-28. Plaintiffs have satisfied this requirement by alleging that they relied on DraftKings’
27 representations concerning the legality of its gambling services, that they would not have used
28 DraftKings’ gambling services if they had known that they were not legal, and that they each

1 personally lost money as a result. Compl. ¶¶ 114-16, 127-29. Plaintiffs’ reliance is particularly
 2 reasonable here, as DraftKings expressly warrants not only that its gambling services are legal, but
 3 that it “monitors new developments and acts quickly to ensure it is in compliance with the laws in
 4 any jurisdiction where it operates. As laws change or regulations are implemented, DraftKings will
 5 take steps to ensure its continued compliance, and changes to this site may take place to reflect any
 6 such new laws or regulations.” *Id.* ¶ 65 (quoting DraftKings’ website).

7 **B. The “Public Policy Doctrine” Does Not Defeat Plaintiffs’ Claims.**

8 In the Motion, DraftKings attempts to invoke *Kelly v. First Astri Corp.*, 72 Cal. App. 4th
 9 462 (1999) to insist that the “public policy doctrine” categorically bars Plaintiffs’ claims because
 10 they arise from illegal gambling transactions. DraftKings’ attempt to blame the victims of its
 11 unlawful gambling enterprise—and keep their money—fails for at least six reasons.

12 **First**, and as a threshold matter, DraftKings overstates the public policy doctrine as a
 13 categorical bar on the recovery of gambling losses and ignores that *Kelly* is not the California Court
 14 of Appeal’s final word on the public policy doctrine. In *Kyablue v. Watkins*, 210 Cal. App. 4th
 15 1288, 1292 (Cal. 2012)—decided 13 years after *Kelly*—the Court of Appeal examined *Kelly* and
 16 clarified that the public policy doctrine should not be applied “inflexibly,” and courts instead must
 17 weigh the “relative moral fault of the plaintiff and the defendant” as well as “the degree of moral
 18 turpitude involved” in determining whether the doctrine bars a particular claim:

19 *The rule is intended to prevent the guilty party from reaping the benefit of his*
 20 *wrongful conduct, or to protect the public from the future consequences of an*
 21 *illegal contract. To serve these objectives courts recognize varying forms and*
 22 *degrees of illegality, and that the particular facts of the case must be considered*
 23 *before remedy is refused. The rule is not intended to be inflexibly applied in its*
 24 *fullest rigor under any and all circumstances, but involves weighing the relative*
 25 *moral fault of the plaintiff and the defendant, whether refusing a remedy can*
 26 *protect the public, the degree of moral turpitude involved, and whether application*
 27 *of the rule will result in the unjust enrichment of the defendant at the expense of*
 28 *the plaintiff. . . .*

Stated another way, granting relief to one who repudiates an illegal contract is
entirely different from granting relief to one who seeks to enforce it.

27 *Kyablue*, 210 Cal. App. 4th 1292-93, 1295 (cleaned up; emphasis added); *see also Tri-Q, Inc. v.*
 28 *Sta-Hi Corp.*, 63 Cal. 2d 199, 218 (1965) (“These rules are intended to prevent the guilty party

1 from reaping the benefit of his wrongful conduct[.]”). As the more recent and comprehensive
2 statement of the public policy doctrine by the California Court of Appeal, *Kyablue* governs here—
3 not DraftKings’ self-serving and extreme interpretation of *Kelly*.

4 **Second**, even by *Kelly*’s own terms, the public policy doctrine does not apply to this case
5 because the doctrine only applies “*in the absence of a statute* authorizing a recovery[.]” *Kelly*, 72
6 Cal. App. 4th at 489-90 (emphasis added); *see also Wallace v. Opingham*, 73 Cal. App. 2d 25, 26
7 (1946) (same). Here, Plaintiffs’ causes of action arise only under statute—the UCL and CLRA—
8 and not at common law. The UCL and CLRA are broad remedial statutes designed to protect
9 consumers from all forms of unlawful, unfair, deceptive, and fraudulent conduct and must “be
10 liberally construed and applied to promote [their] underlying purposes, which are to protect
11 consumers against unfair and deceptive business practices.” *See* Cal. Civ. Code § 1760. Against
12 these policy goals, interpreting the UCL and the CLRA to not apply to a massive consumer facing
13 industry is non-sensical. *See Ochoa*, 2023 WL 4291650, at *13 (CLRA applies to online gambling);
14 *Colvin*, 2024 WL 4231090, at *4 (UCL applies to online gambling).

15 In its Motion, DraftKings does not meaningfully address this important distinction between
16 common law and statutory claims, and ignores Judge Chhabria’s recent decision in *Colvin v. Roblox*
17 *Corp.*, which explicitly found that a “California UCL unlawful claim [based] on allegations that
18 [defendant] facilitated illegal gambling” can proceed despite the public policy doctrine. 2024 WL
19 4231090, at *2. Numerous other courts have also rejected DraftKings’ extreme construction of the
20 public policy doctrine and allowed UCL claims that arose from gambling transactions to proceed.
21 *See, e.g., Los Angeles Turf Club v. Horse Racing Labs*, 2017 WL 11634526 (C.D. Cal May 15,
22 2017), at *9 (granting summary judgment in favor of *plaintiff* on UCL claim arising from fantasy
23 sports gambling); *Ochoa*, 2023 WL 4291650, at *5, 13 (*Kelly* inapplicable to claim for UCL
24 injunctive relief and stating that CLRA applies to online gambling).

25 **Third**, even if the public policy doctrine could apply in some circumstances to statutory
26 claims, the “policy [in *Kelly*] stems from the general rule against enforcing contracts founded on
27 illegal consideration, which is intended to prevent the guilty party from reaping the benefit of his
28 wrongful conduct, or to protect the public from the future consequences of an illegal contract.”

1 *Colvin*, 2024 WL 4231090, at *4 (cleaned up); *see also Mann v. Gullickson*, 2016 WL 6473215, at
2 *6 (N.D. Cal. Nov. 2, 2016) (collecting California and federal authorities and stating that “[i]n
3 compelling cases, illegal contracts will be enforced in order to avoid unjust enrichment to a
4 defendant and a disproportionately harsh penalty upon the plaintiff”); *Asdourian v. Araj*, 38 Cal.
5 3d 276, 292 (1985) (same). As detailed in the Complaint, DraftKings spent hundreds of millions of
6 dollars on a comprehensive marketing campaign that was designed to solicit users to engage in
7 unlawful conduct. Compl. ¶¶ 95-97. Further, on the Gambling Websites, DraftKings expressly
8 represents and warrants that it carefully monitors all applicable laws and regulations and that its
9 services are legal in California. *Id.* ¶¶ 62-67, 88-91. Each Plaintiff explicitly alleges that these
10 solicitations and representations were material in their respective decisions to use DraftKings’
11 gambling services and that “[i]f DraftKings had not solicited bets and wagers from Plaintiff[s] while
12 representing that such activities were legal (when, unknown to Plaintiff[s] at the time, they in fact
13 were not legal), [they] would not have made any of those bets or wagers and would not have paid
14 any money to DraftKings.” *See* Compl. ¶ 118 (Zhen), ¶ 131 (Smith). These allegations are more
15 than sufficient to establish that the “relative moral fault of the plaintiff and the defendant” as well
16 as “the degree of moral turpitude involved” rests squarely with DraftKings, not Plaintiffs, and
17 DraftKings should not be allowed to reap the profits from the unlawful transactions it induced based
18 upon false representations. *See Kyablue*, 210 Cal. App. 4th at 1292-93.

19 **Fourth**, consistent with the factual nature of the public policy doctrine inquiry, *Kelly* itself
20 was decided on summary judgment, with a fully developed record regarding the parties’ respective
21 degrees of fault. Accordingly, even if the Court were inclined to apply *Kelly* here (and it should
22 not), application at the pleading stage would be premature. *See Kelly*, 72 Cal. App. 4th at 496.

23 **Fifth**, none of DraftKings’ authorities require a different result. *Jamgotchian v. Sci. Games*
24 *Corp.* is an unpublished opinion that explicitly states that it “is not precedent,” did not address
25 *Kyablue*, and did not involve statutory causes of action. 371 F. App’x 812, at n.** (9th Cir. 2010).
26 *Lam v. Hawaiian Gardens Casino*, 2020 WL 806655, at *3 (C.D. Cal. Jan. 8, 2020) involved an
27 attempt to seek judicial intervention to *enforce* a gambling contract. And while *Ochoa* found that
28

1 claims for UCL *monetary* relief could not proceed (without considering *Kyablue*), it explicitly
2 found *Kelly* inapplicable to UCL injunctive relief claims. 2023 WL 4291650 at *5.

3 **Finally**, even if this Court were to find that application of the public policy doctrine was
4 appropriate at the pleading stage (and it should not), the result would simply be a narrowing of the
5 *remedies* available to Plaintiffs. *Kelly* “did not purport to preclude from going forward any claim
6 seeking public injunctive relief based on deceptive advertising under California’s consumer
7 protection statutes. The Court would find that the public policy rationale articulated in *Kelly* does
8 not so extend.” *Ochoa*, 2023 WL 4291650, at *5; *see also Los Angeles Turf Club*, 2017 WL
9 11634526, *9 (allowing UCL injunctive relief claim to proceed).

10 Put simply, the public policy doctrine does not prevent Plaintiffs’ claims from proceeding.

11 **C. DraftKings’ Conduct Harmed Plaintiffs.**

12 DraftKings also claims that Plaintiffs lack statutory standing to pursue their UCL and CLRA
13 claims because Plaintiffs supposedly received what they paid for—a chance to gamble on the
14 outcome of a sporting event. But DraftKings’ self-serving re-characterization of Plaintiffs’ claims
15 is disingenuous. Plaintiffs’ theory of this action is that what they agreed to was a *legal* bet on a
16 gambling contest, that the legality was material to their decision to make the bet, and that they
17 would not have made the bet if the unlawful nature of the activity was accurately disclosed. *See*
18 Compl. ¶¶ 116, 122 (Zhen); ¶¶ 129, 135 (Smith). What Plaintiffs received was *per se* defective and
19 directly contrary to DraftKings’ representations because it was entry into an *illegal* contest and
20 inherently less valuable than a legal product—in fact, it has no value.³ *See Doe v. Roblox Corp.*,
21 602 F. Supp. 3d 1243, 1260 (N.D. Cal. 2022) (purchase of virtual currency gave rise to UCL
22 statutory standing where material aspects were not disclosed); *Colvin v. Roblox Corp.*, 725 F. Supp.
23 3d 1018, 1024-25 (N.D. Cal. 2024) (economic injury from online gambling transactions).

24 The “difference between what was paid and what a reasonable consumer would have paid
25 *at the time of purchase* without the fraudulent or omitted information” is a classic economic injury
26 sufficient to create statutory standing under the UCL and CLRA. *Pulaski*, 802 F.3d at 989

27 ³ If the Court determines that an amended pleading is required (it should not), Plaintiffs can add
28 details further explaining the difference in value between legal gambling contracts (what Plaintiffs
bargained for) and illegal gambling contracts (what they received).

1 (emphasis added). Indeed, the lead *published* opinion that DraftKings relies upon confirms that this
 2 is more than sufficient. In *Hawkins v. Kroger Co.*, 906 F.3d 763 (9th Cir. 2018), the Ninth Circuit
 3 held that under California law a “consumer who relies on a product label and challenges a
 4 misrepresentation contained therein can satisfy the standing requirement of section 17204 by
 5 alleging that he or she would not have bought the product but for the misrepresentation. That
 6 assertion is sufficient to allege causation and it is also sufficient to allege economic injury.” *Id.* at
 7 768 (cleaned up); *see also Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1107 (9th Cir. 2013) (statutory
 8 standing satisfied where plaintiff relied upon defendant’s false representations that induced
 9 transaction).⁴ This is precisely what has occurred here.

10 **D. Plaintiffs Have Standing to Seek Injunctive Relief.**

11 Continuing to build a house of cards, DraftKings further claims that Plaintiffs lack standing
 12 to seek injunctive relief. While there was a historic split in this Circuit on whether a previously
 13 deceived consumer could pursue injunctive relief, as DraftKings’ lead case *Davidson v. Kimberly-*
 14 *Clark Corp.*, 889 F.3d 956, 969 (9th Cir. 2018) recognizes, the question has since been decisively
 15 resolved in favor of consumers by the Ninth Circuit:

16 We resolve this district court split in favor of plaintiffs seeking injunctive relief.
 17 We hold that a previously deceived consumer may have standing to seek an
 18 injunction against false advertising or labeling, even though the consumer now
 19 knows or suspects that the advertising was false at the time of the original
 20 purchase, because the consumer may suffer an “actual and imminent, not
 21 conjectural or hypothetical” threat of future harm.

22 ⁴ DraftKings also relies on two *unpublished* Ninth Circuit opinions, which are “not precedent,” *Mai*
 23 *v. Supercell Oy*, 2024 WL 2077500, at *1, n.** (9th Cir. May 9, 2024) and *Johnson v. Mitsubishi*
 24 *Digital Elecs. Am., Inc.*, 365 F. App’x 830, n.** (9th Cir. 2010). Moreover, neither addresses a
 25 claim that illegality decreased the value of the purchased item and that the purchase would not have
 26 occurred if the true nature of the product had been disclosed. DraftKings’ other authorities are
 27 similarly distinguishable. *See, e.g., Hall v. Time Inc.*, 158 Cal. App. 4th 847, 855 (2008) (no
 28 allegation that the product was “unsatisfactory” or “worth less than what he paid”); *Birdsong v.*
Apple, Inc., 590 F.3d 955, 961 (9th Cir. 2009) (hypothetical risk of future hearing loss); *Coffee v.*
Google, LLC, 2022 WL 94986, at *9 (N.D. Cal. Jan. 10, 2022) (no direct purchase from defendant
 alleged); *Taylor v. Apple, Inc.*, 2022 WL 35601, at *2 (N.D. Cal. Jan. 4, 2022) (virtual currency
 was as advertised); *Mason v. Mach. Zone, Inc.*, 140 F. Supp. 3d 457, 465 (D. Md. 2015)
 (recognizing that overpayment for an illegal good could serve as the basis for a UCL claim); *Meyer*
v. Sprint Spectrum L.P., 45 Cal. 4th 634, 643 (2009) (mere inclusion of an unconscionable contract
 term, without an attempt to enforce it, is not sufficient to create standing).

1 Subsequent to *Davidson*, District Courts have found that claims for injunctive relief are
 2 proper in cases predicated on illegal gambling claims given the risk of future harm to plaintiffs and
 3 the public. *See, e.g., Ochoa*, 2023 WL 4291650, at *5. Unlike the cases cited by DraftKings,⁵ the
 4 risk of future injury is significant here, as Plaintiffs allege that they will “continue to gamble online
 5 in California” if it becomes legal (Compl. ¶¶ 108, 121) and DraftKings continues to affirmatively
 6 represent on the Gambling Websites that “DraftKings Daily Fantasy Sports is legal in . . .
 7 California.” <https://www.draftkings.com/where-is-draftkings-legal> (Sept. 25, 2025). DraftKings’
 8 ongoing solicitation of Californians and false representations of legality are precisely the type of
 9 conduct that could lead Plaintiffs (and others) to engage in illegal gambling if not enjoined, and
 10 “prevent[ing] [Plaintiffs] from bringing suit [for injunctive relief] on behalf of a class in federal
 11 court would surely thwart the objective of California’s consumer protection laws.” *Davidson*, 889
 12 F.3d at 970-71 (quoting *Henderson v. Gruma Corp.*, 2011 WL 1362188 (C.D. Cal. Apr. 11, 2011)).

13 **E. Plaintiff Smith’s Claims Are Not Time-Barred.**

14 DraftKings also argues that Plaintiff Smith’s claims are time barred as a matter of law
 15 because he last used the Gambling Websites in 2019. But this is not what Mr. Smith alleges. Rather,
 16 Mr. Smith alleges that he *began* using the Gambling Website in 2019 (Compl. ¶¶ 126, 129) and
 17 that he since “discontinued the use of DraftKings while in California” (*id.* ¶ 134). “[W]here the
 18 statute of limitations question turns on factual issues that may be disputed, the question is more
 19 appropriately addressed at a later stage of the proceeding.” *DeBiasio v. Polaris Indus., Inc.*, 2023
 20 WL 3150098, at *2 (C.D. Cal. Mar. 29, 2023) (cleaned up). Moreover, even if discovery ultimately
 21 shows that Mr. Smith’s transactions all occurred outside the four-year statute of limitations period,⁶
 22 it would not change the result because Mr. Smith expressly alleges that the statute of limitations as

23 ⁵ For example, in addition to being unpublished and “not precedent,” the plaintiff in *Lanovaz v.*
 24 *Twinings N. Am., Inc.*, 726 F. App’x 590, 591 (9th Cir. 2018) testified at deposition that she would
 25 not purchase the product in the future even with the misrepresentations cured. DraftKings’ other
 26 authorities are similarly distinguishable. *See, e.g., Kenney v. Fruit of the Earth, Inc.*, 2024 WL
 4578981, at *1 (9th Cir. Oct. 25, 2024) (accurate information disclosed on back label); *Cimoli v.*
Alacer Corp., 546 F. Supp. 3d 897, 906 (N.D. Cal. 2021) (same).

27 ⁶ Mr. Smith is presently locked out of his DraftKings account, and DraftKings has refused to
 28 provide account information for Mr. Smith that would allow Mr. Smith’s counsel to review his
 transaction history in detail to confirm exact transaction dates. Plaintiffs’ counsel intend to seek
 full account records from DraftKings for both Plaintiffs upon the opening of discovery.

1 to himself (and all other users) has been tolled based on DraftKings affirmative misrepresentations
2 of legality. *See* Compl. ¶¶ 138-142. Indeed, it was only after engaging counsel that Mr. Smith was
3 able to discover the unlawful nature of DraftKings conduct.⁷ These allegations are sufficient to
4 establish tolling at the pleading stage.⁸ *See, e.g., Conmar*, 858 F.2d at 502 (reversing dismissal of
5 tolled claim); *In re Conseco Ins. Co. Annuity Mktg. & Sales Pracs. Litig.*, 2008 WL 4544441, at *8
6 (N.D. Cal. Sept. 30, 2008) (defendant’s alleged representations tolled claims); *Grisham v. Philip*
7 *Morris, Inc.*, 670 F. Supp. 2d 1014, 1048 (C.D. Cal. 2009) (tolling to be determined at trial).

8 **F. The CLRA Applies to Online Gambling Services.**

9 DraftKings also contends that the CLRA does not apply to online gambling transactions
10 because they are not “goods” or “services” within the meaning of the CLRA. However, “[i]n light
11 of the CLRA’s underlying purpose to protect consumers and the liberal construction with which
12 courts should interpret it,” the case law recognizes that “Plaintiffs’ claims [arising from online
13 gambling] fall within the purview of the CLRA.” *Ochoa*, 2023 WL 4291650, at *13; *see also Doe*,
14 602 F. Supp. 3d at 1263 (online gambling-related services “comfortably classified as an online
15 entertainment *service*” (emphasis added)).

16 **G. Plaintiffs’ Punitive Damages Claims Cannot be Resolved on a Motion to Dismiss.**

17 Seeking to escape the risk of punitive damages for its willful operation of an unlawful
18 gambling enterprise in California, DraftKings also “moves to dismiss or strike Plaintiffs’
19 allegations that it acted with ‘malice, oppression, and fraud.’” Mtn. at 15. DraftKings’ Motion,
20 however, is only brought under Rule 12(b)(6)—and not Rule 12(f)—and “a request for punitive
21 damages is not a ‘claim’ and is not the proper subject of a motion to dismiss under Fed. R. Civ. P.
22 12(b)(6),” and accordingly, the requested relief should be denied. *Shimy*, 2014 WL 3694140, at *4.
23 To the extent the Court grants the relief, Plaintiffs request leave to update their allegations to

24 _____
25 ⁷ Contrary to DraftKings’ argument, information in the public sphere questioning the legality of
26 daily fantasy sports does not overcome the application of the discovery rule or the fraudulent
27 concealment doctrine. *See, e.g., Rushing v. Williams-Sonoma, Inc.*, 2022 WL 2833980, at *6-7
28 (N.D. Cal. July 20, 2022); *West Pac. Elec. Co. Corp. v. Dragados/Flatiron*, 2018 WL 2088276, at
*7 (E.D. Cal. May 4, 2018).

⁸ To the extent the Court determines that Mr. Smith has not pled sufficient facts to support tolling,
the Court should grant him leave to amend to add additional details.

1 expressly tie their request for punitive damages to their CLRA cause of action (and any other causes
2 of action added in an amended pleading).

3 **H. Plaintiffs’ Equitable Claims Are Not Barred by *Sonner* and Its Progeny.**

4 DraftKings also argues that this Court lacks equitable jurisdiction over Plaintiffs’ claims
5 pursuant to *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020) because Plaintiffs fail
6 to use the “magic words” in the Complaint that they “lack an adequate remedy at law.” However,
7 “*Sonner* does not require Plaintiffs to ‘demonstrate’ anything at the pleading stage” and has
8 “minimal application at the pleading stage.” *Murphy v. Olly Pub. Benefit Corp.*, 651 F. Supp. 3d
9 1111, 1129 (N.D. Cal. 2023) (Breyer, J.). Further, “*Sonner* is specifically limited to restitution
10 claims and does not preclude claims for injunctive relief to prevent future harm,” *Linton v. Access*
11 *Fin. Servs., Inc.*, 2023 WL 4297568, at *3 (N.D. Cal. June 30, 2023) (Breyer, J.), and the authority
12 relied upon by DraftKings recognizes the same. *See Pitkin v. State Farm Gen. Ins. Co.*, 2023 WL
13 11990316, at *1 (N.D. Cal. July 25, 2023); *Freund v. HP, Inc.*, 2023 WL 187506, at *6 (N.D. Cal.
14 Jan. 13, 2023). Regardless, Plaintiffs can cure any equitable jurisdictional deficiencies by adding
15 additional allegations about their lack of an adequate legal remedy, a claim for damages at law
16 under the CLRA, and a cause of action for civil theft at law under Penal Code Section 496(c), and
17 intend to do so to the extent any portion of the Motion is granted.⁹

18 **IV. CONCLUSION**

19 The Motion should be denied in full. To the extent the Court grants any portion, Plaintiffs
20 respectfully request leave to amend. *See Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

21 Respectfully submitted,

22 Dated: September 25, 2025

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26 Counsel for Plaintiffs and the Proposed Class

27 _____
28 ⁹ If the Court instead dismisses (it should not), dismissal must be without prejudice to allow refileing
in state court. *Ruiz v. Bradford Exchange, Ltd.*, 2025 WL 2473007, at *4 (9th Cir. Aug. 28, 2025).

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CERTIFICATE OF SERVICE

I hereby certify that on the below date, I caused to be served a true and correct copy of the foregoing, which was served on all counsel of record using the Court’s CM/ECF system.

Dated: September 25, 2025

/s/ Wesley M. Griffith
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