



JAN ALAN BRODY
JOHN M. AGNELLO
CHARLES M. CARELLA
JAMES E. CECCHI

CHARLES C. CARELLA
11/21/33 – 11/4/23

DONALD F. MICELI
MELISSA E. FLAX
DAVID G. GILFILLAN
G. GLENNON TROUBLEFIELD
BRIAN H. FENLON
CAROLINE F. BARTLETT
ZACHARY S. BOWER+
DONALD A. ECKLUND
CHRISTOPHER H. WESTRICK*
STEPHEN R. DANEK
MICHAEL A. INNES
MEGAN A. NATALE
KEVIN G. COOPER

OF COUNSEL
PETER G. STEWART
CARL R. WOODWARD, III
FRANCIS C. HAND
JAMES A. O'BRIEN, III
JOHN G. ESMERADO
STEVEN G. TYSON
MATTHEW J. CERES
ZACHARY A. JACOBS***
JASON H. ALPERSTEIN

RAYMOND J. LILLIE
GREGORY G. MAROTTA
MARYSSA P. GEIST
BRITTNEY M. MASTRANGELO
GRANT Y. LEE***
MAYBOL HALL
WILLIAM J. MANORY
NESLIHAN Z. TALU

*CERTIFIED BY THE SUPREME COURT OF
NEW JERSEY AS A CIVIL TRIAL
ATTORNEY

***MEMBER IL BAR ONLY
+MEMBER FL BAR ONLY

March 9, 2026

Via ECF

Honorable Justin T. Quinn, U.S.M.J.
Clarkson S. Fisher Building & U.S. Courthouse
402 East State Street
Trenton, NJ 08608

DRAFTKINGS v. WINVIEW
IPR2026-00175
DRAFTKINGS 1047

**Re: *WinView IP Holdings, LLC v. DraftKings Inc., et al.*, No. 3:21-cv-13405-GC-JTQ
WinView IP Holdings, LLC v. DraftKings Inc., et al., No. 3:25-cv-01143-GC-JTQ**

Response to WinView's Discovery Letter Brief

Dear Judge Quinn:

This Firm, together with WilmerHale, represents the DraftKings defendants in connection with the above-referenced matters. We write in response to WinView's March 3, 2026 request for a *de bene esse* deposition (the "Mot.").

WinView's request for a *de bene esse* deposition of David Lockton should be denied for multiple reasons. *De bene esse* depositions are typically held *after* the close of fact discovery, with courts considering factors such as: "the unavailability of the witness to appear at trial; whether the deposing party knew of the information the potential witness would testify to prior to the deposition; and whether the opposing party will be prejudiced by granting the deposition—*with special attention given to the question of prejudice.*" *Coface Collections N. Am., Inc. v. Newton*, No. CA 11-52, 2012 WL 6738391, at *1 (D. Del. Dec. 28, 2012) (emphasis added); *Havens v.*

Honorable Justin T. Quinn, U.S.M.J.

March 9, 2026

Page 2

Mar. Commc'ns/Land Mobile, LLC, No. CIV. 11-993, 2014 WL 2094035, at *4 (D.N.J. May 20, 2014) (applying *Coface's* factors). Those factors overwhelmingly favor denying WinView's request.

First, the extraordinary nature of WinView's request is difficult to understate. WinView seeks trial testimony **before** these cases have advanced beyond the pleadings. Essentially, WinView is seeking to call its first trial witness before it has even survived initial dispositive motions. Discovery has not opened. DraftKings has received no information about WinView's claims and defenses beyond what is in the complaints—which have been amended numerous times and remain subject to fully-briefed motions to dismiss for failure to state a claim. *WinView IP Holdings v. DraftKings Inc., et al.*, No. 21-cv-13405-GC-JTQ (“*WinView I*”), Dkts. 109, 119, 121 (D.N.J.); *WinView IP Holdings v. DraftKings Inc. et al.*, No. 25-cv-01143-GC-JTQ (“*WinView II*”), Dkts. 49-51 (D.N.J.).¹ And the Court has already dismissed the *WinView I* complaint once as inadequately pleaded. *WinView I*, Dkt. 79.

In these circumstances, “it would be extremely prejudicial to Defendants to permit Plaintiff's *de bene esse* deposition to go forward at this time when the parties have not had the benefit of essentially any fact discovery on Plaintiff's claims.” *Weiss v. First Unum Life Ins., C.A.* No. 02-429, 2010 WL 1027610, at *3 (D.N.J. Mar. 16, 2010) (denying leave for *de bene esse* deposition). *De bene esse* depositions must comply with the overall case schedule and cannot be used to circumvent the normal discovery process. *Indian Brand Farms v. Novartis Crop Prot.*

¹ There are also fully-briefed motions to dismiss pending in the FanDuel cases, including a motion that would be fully dispositive of *WinView II* if granted. *WinView IP Holdings, LLC v. FanDuel, Inc.*, No. 3:25-cv-01146-GC-JTQ, Dkts. 60-62 (D.N.J.); *WinView IP Holdings, LLC v. FanDuel, Inc.*, No. 3:21-cv-13807-GC-JTQ, Dkts. 123, 126-127 (D.N.J.).

Honorable Justin T. Quinn, U.S.M.J.

March 9, 2026

Page 3

Inc., No. CV 99-2118, 2011 WL 13364671, at *2 (D.N.J. Aug. 22, 2011) (“If the Court were to accept plaintiffs’ argument that the *de bene esse* deposition of an unavailable witness could be taken at any time, then fact discovery deadlines in Scheduling Orders would be rendered meaningless.”). Having received no discovery from WinView—or even an adequately pleaded complaint—DraftKings cannot meaningfully cross-examine Mr. Lockton, and the deposition would be an entirely one-sided exercise. Indeed, in response to DraftKings’ motions to dismiss, WinView repeatedly asserted that it need not disclose the basis for its infringement allegations at this stage of the case.² Permitting WinView to obtain trial testimony before DraftKings has received the disclosures and discovery necessary to cross-examine Mr. Lockton would so substantially prejudice DraftKings that this factor alone should be dispositive of WinView’s request. *See Weiss*, 2010 WL 1027610, at *3; *Coface Collections*, 2012 WL 6738391, at *1 (explaining that when considering a request for a *de bene esse* deposition that there should be “special attention given to the question of prejudice”). WinView has not cited—and cannot cite—a single case permitting a *de bene esse* deposition where, as here, discovery has not begun. The relief it is seeking appears to be completely unprecedented.

Contrary to WinView’s assertion (Mot. at 4-5), it is not feasible to cure the prejudice to DraftKings by proceeding with “limited general discovery” now because there are many gating items that need to be resolved before discovery can begin. There are motions to dismiss pending

² *See, e.g., WinView I*, Dkt. 119 at 7 (“WinView was not required to provide additional discussions ... because there is no requirement that a complaint discuss every accused product with respect to every limitation in order to state a patent infringement claim.”); *WinView II*, Dkt. 50 at 19 (“DraftKings relies on the incorrect premise that WinView is obligated to specifically address every claim limitation to state a claim”), 22 (“WinView is not obligated to provide infringement allegations for every Accused Product in the Complaint. Instead, WinView will provide element-by-element claim charts ... in its infringement contentions.”).

Honorable Justin T. Quinn, U.S.M.J.

March 9, 2026

Page 4

in both *WinView I* and *WinView II* that could dispose of *WinView II* in its entirety and limit *WinView I* to allegations of direct infringement of a single patent. The resolution of those motions will directly impact the scope of discovery (if any), and the pending IPR petitions also will need to be resolved in order to define the scope of these cases. Judge Castner has already decided to stay *WinView II* pending a resolution of the IPRs petitions DraftKings and FanDuel filed (*WinView II*, Dkt. 58), and nothing has changed that warrants revisiting that decision.³ All remaining patents asserted in these two cases are related to those challenged in the pending IPR petitions, and any work litigating this case while those IPRs remain pending may prove unnecessary or need to be redone depending on the outcome of the IPRs. WinView may not use its desire to take the deposition of one witness as a basis to upend the entire case schedule. *Indian Brand Farms*, 2011 WL 13364671, at *2 (“If the Court were to accept plaintiffs’ argument that the *de bene esse* deposition of an unavailable witness could be taken at any time, then fact discovery deadlines in Scheduling Orders would be rendered meaningless.”).⁴

Second, WinView’s assertion that DraftKings has “strategically sought to maximally stall the progression of these cases” (Mot. at 4) is incorrect. WinView itself agreed to stay *WinView I* during the pendency of IPRs that resulted in the invalidation of all asserted claims of three patents (see *WinView I*, Dkts. 48, 51, 53) and then sought a 60-day continuance to obtain new counsel (*WinView I*, Dkt. 62). After the IPRs were decided, WinView filed notices of appeal only to

³ The experience in *WinView I* demonstrates the wisdom of waiting for a resolution of those IPRs before proceeding with discovery. In *WinView I*, all asserted claims of all challenged patents were invalidated. Had discovery proceeded, the efforts expended to litigate those invalidated claims would have been wasted.

⁴ If the Court nevertheless allows WinView to proceed with a *de bene esse* deposition of Mr. Lockton, WinView should at a minimum provide a complete production of Mr. Lockton’s emails and documents before that deposition can proceed.

Honorable Justin T. Quinn, U.S.M.J.

March 9, 2026

Page 5

dismiss its appeals months later, inexplicably causing further delay. *See WinView I*, Dkt. 63 at 2 (“WinView filed a Notice of Appeal to the Federal Circuit from the PTAB’s Final Written Decisions in the IPRs on March 29, 2024 and then subsequently voluntarily dismissed those appeals on June 28, 2025 and August 19, 2024.”). Following resolution of the *WinView I* IPRs, the Court granted DraftKings’ motion to dismiss for failure to state a claim in *WinView I*. *See WinView I*, Dkt. 79. And despite having the opportunity to amend, WinView’s operative complaints in both cases still fail to state a claim for the same reasons that the Court dismissed the *WinView I* complaint. *See WinView I*, Dkt. 109; *WinView II*, 49. The fact that these cases have not advanced beyond the pleadings is a consequence of WinView’s decision to assert invalid patents and unsupported (and facially deficient) claims, not any delay by DraftKings.

Third, WinView’s request should also be denied for the independent reason that WinView has failed to provide sufficient evidence of Mr. Lockton’s unavailability. *See Fed. R. Civ. P.* 32(a)(4)(C). While DraftKings does not seek to diminish WinView’s concerns with Mr. Lockton’s health, the information that WinView has provided is insufficient to warrant a *de bene esse* deposition. For example, WinView submitted no physician declaration or opinion from a medical professional to support Mr. Lockton’s conditions and unavailability. *See, e.g., Weiss*, 2010 WL 1027610, at *2 (even physician’s affidavit that witness’s health was “tenuous” failed to establish likelihood of unavailability at trial). Mr. Lockton’s declaration indicates that he is receiving treatment and does not assert that he is facing any cognitive decline that would impair his memory should he provide testimony at a later date. Moreover, Mr. Lockton’s declaration contains no details as to how long he has been facing his medical conditions. Mr. Lockton was nearly 88 years old when WinView filed *WinView II*; the fact that he is nearly 89 years old now is not a reason to permit him to provide trial testimony before discovery has started. Without more, the details that

Honorable Justin T. Quinn, U.S.M.J.

March 9, 2026

Page 6

WinView has provided are simply too “conclusory in nature and not supported by sufficient facts to justify Plaintiff’s *de bene esse* deposition.” *Weiss*, 2010 WL 1027610, at *2.

Nor has WinView established the importance of Mr. Lockton’s testimony. His interactions with DraftKings in 2019 pre-date the issuance of even the earliest of the asserted patents and therefore are not relevant to willfulness or infringement. *WinView I*, Dkt. 109-1 at 25-26; *WinView II*, Dkt. 49-1 at 12-14. Indeed, the fact that those interactions pre-dated the issuance of the asserted patents was a reason that the Court granted DraftKings’ motion to dismiss willfulness in *WinView I*. See *WinView I*, Dkt. 79 at 17 (“These allegations fail to support a claim for willful infringement of the ’988 patent because these allegations pre-date the issuance of the ’988 patent.”). And Mr. Lockton’s testimony about the development of the asserted patents is not relevant to their scope or validity. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 985 (Fed. Cir. 1995), *aff’d*, 517 U.S. 370 (1996) (“The subjective intent of the inventor when he used a particular term is of little or no probative weight in determining the scope of a claim[.]”); *Bell & Howell Document Mgmt. v. Altek Sys.*, 132 F.3d 701, 706 (Fed.Cir.1997) (“The testimony of an inventor is often a self-serving, after-the-fact attempt to state what should have been part of his or her patent application....”); *Solomon v. Kimberly-Clark Corp.*, 216 F.3d 1372, 1379 (Fed. Cir. 2000) (“It is particularly inappropriate to consider inventor testimony obtained in the context of litigation in assessing validity under section 112, paragraph 2, in view of the absence of probative value of such testimony.”). In any event, there are **five other inventors** who can speak to the development of the asserted patents should Mr. Lockton become unavailable.

Fourth, WinView’s cited cases support denying a *de bene esse* deposition. In *Weiss*, the court denied a *de bene esse* deposition even with statements by the plaintiff’s doctor because those statements were conclusory (such as not specifying the list of medications, what it means to have

Honorable Justin T. Quinn, U.S.M.J.

March 9, 2026

Page 7

‘tenuous’ health, or how frequently the plaintiff suffered from infections or other illnesses), and because a deposition “would be extremely prejudicial” to defendants “at this time when the parties have not had the benefit of essentially any fact discovery on Plaintiff’s claims.” 2010 WL 1027610, at *2-3. The exact same extreme prejudice exists here. Moreover, WinView’s declaration from Mr. Lockton is even less specific than the physician “certification” deemed insufficient in *Weiss*. WinView’s other case similarly underscores the importance of discovery prior to taking a *de bene esse* deposition. In *Glass v. Metro. Washington Airport Authority*, No. 1:23CV1449, 2024 WL 1558712, at *3 (E.D. Va. Apr. 10, 2024), the court explained that without proper discovery “Defendants cannot be expected to conduct a fulsome cross-examination” and thus conditioned the grant of a *de bene esse* deposition until after fact discovery ended. WinView’s third case simply stands for the proposition that age can be a factor in whether to permit a *de bene esse* deposition, but it does not hold that a witness’s age alone is sufficient. *Texaco, Inc. v. Borda*, 383 F.2d 607, 609-10 (3d Cir. 1967). Nor does *Texaco* address the circumstances of this case, where the prejudice of a deposition before any discovery has been provided outweighs the other factors.

The law does not support the relief WinView seeks, and in this context, the Plaintiff’s request is truly extraordinary and unduly prejudicial. DraftKings respectfully requests that the Court deny WinView’s request for a *de bene esse* deposition.

Respectfully submitted,

CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO, P.C.

/s/ Melissa E. Flax
MELISSA E. FLAX

Honorable Justin T. Quinn, U.S.M.J.

March 9, 2026

Page 8

Cc: All counsel of record