STATE OF NEW YORK
SUPREME COURT – COUNTY OF ALBANY

JENNIFER WHITE, KATHERINE WEST, CHARLOTTE WELLINS and ANNE REMINGTON,

Plaintiffs,

-against-

Index No. 05861-16
(Gerald W. Connolly, J.S.C.)

HON. ANDREW CUOMO, as Governor of the State of New York, and the NEW YORK STATE GAMING COMMISSION,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted on behalf of Plaintiffs in support of their Motion for Summary Judgment to (1) declare illegal and unconstitutional the enactment of Chapter 237 of the Laws of 2016[1] purporting to authorize "interactive fantasy sports"; and (2) enjoin permanently Defendant New York State Gaming Commission from taking any further action or making any further expenditures of taxpayer funds to implement said legislation.

By previous Decision and Order dated August 31, 2017, this Court denied Defendants' Motion to Dismiss the Complaint, and after conferring with counsel for both parties, issued a Scheduling Order directing the parties to submit cross-motions for summary judgment. *See* Orders dated October 19, 2017 and January 3, 2018.

This Memorandum should be read in conjunction with all the documents heretofore filed in this action, including the Complaint (with exhibits), Defendants' Motion to Dismiss, the Affirmation of Richard Lombardo representing the Attorney General's office dated January 11, 2017 in support of said Motion to Dismiss, the exhibits annexed to that Affirmation, Plaintiffs' Memorandum of Law dated April 7, 2017 opposing said Motion, the Affirmation of Plaintiffs' counsel, Cornelius D. Murray, Esq., dated April 6, 2017, the exhibits annexed thereto submitted in opposition to the Motion to Dismiss, and the Agreed-Upon Statement of Facts filed by the parties on January 18, 2018. The Court's attention is

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[1] See Article 14 of the Racing, Pari-Mutuel Wagering and Breeding Law §§ 1400-1412, inclusive.

also respectfully directed to the other filings now being submitted along with this Memorandum of Law in support of Plaintiffs' Motion for Summary Judgment. These include the Affirmation of Cornelius D. Murray, Esq., dated January 29, 2018, the exhibits annexed thereto, and the Affidavits of Plaintiffs Jennifer White and Charlotte Wellins, sworn to January 15, 2018 and January 24, 2018, respectively.

SUMMARY OF ARGUMENT

> In gambling, the many must lose in order that the few may win. (George Bernard Shaw)[2]

The sole question in this case is whether "interactive fantasy sports," as authorized and defined by Chapter 237 of the Laws of 2016 is "gambling." If it is, then it was enacted in violation of the Bill of Rights of the New York State Constitution and, more specifically, Article I, § 9 which, subject to certain exceptions not applicable hereto, requires that:

> "no pool-selling, bookmaking, ***or any other kind of gambling ... shall hereafter be authorized or allowed within this State;*** and the Legislature shall pass appropriate laws to prevent any offenses against any of the provisions of this section" (emphasis added).

Here, the Legislature has done precisely the opposite.

As will be demonstrated in this Memorandum of Law, there is no question that interactive fantasy sports ("IFS") is indeed gambling, notwithstanding the Legislature's blatant attempt to circumvent the constitutional prohibition by resorting to semantics and

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[2] In paragraph "115" of the Complaint filed by Attorney General Schneiderman in *People v. DraftKings*, N.Y. Sup. Ct., N.Y. County (Index #453054/2015), the Attorney General alleged that "DraftKings data show that 89.3% of daily fantasy sports players had an overall negative return on investment in 2013 and 2014."

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euphemisms in a vain effort to disguise its true nature. For example, in Chapter 237 "bets" or wagers paid by contestants ("bettors") seeking to participate in IFS contests are referred to instead as "entry fees." Those contests involve betting on how real-life athletes (constituting a so-called "fantasy team roster") will perform in future real-life sporting events. Although the athletes are, in fact, real-life professional players, they are referred to as "simulated" athletes. *See* Racing, Pari-Mutuel Wagering and Breeding Law ("RPMWBL") § 1401(a). The term "fantasy" is indeed apt, albeit not in the manner the Legislature may have intended. The fantasy is the Legislature's self-delusion that betting on the future performance of real-life athletes somehow is not gambling.

IFS itself can take many forms, with some contests lasting all season long (*e.g.*, baseball fantasy sports lasting the entire baseball season), or weekly, but also "daily fantasy sports" ("DFS"), a relatively more recent iteration which is extremely popular in which contests are conducted on a weekly or daily basis. *See* Defendants' Memorandum of Law in support of their previous Motion to Dismiss, dated January 11, 2017 at 4.[3] Whatever the length of the contest (season-long, weekly, or daily), the common denominator in every one is that the outcome and winners are determined by the actual real-life performances of real-life athletes competing in future real-life sporting events (*Id.* at 3). That is, the actual sporting events take place after the betting entries are closed – just like in pari-mutuel horse-racing where all betting windows are closed before a race starts. As Defendants

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[3] *See also*, Transcript of testimony before Assembly Standing Committee on Racing and Wagering; December 8, 2015 at 19-24 (Exh. "M" of Affirmation of Richard Lombardo, dated January 11, 2017) for a description of how the contests are run.

concede, participants (the "bettors") in an IFS contest "cannot control how the athletes [selected to be members of their] fantasy team will perform in such sporting events." *See* ¶ 2 of "Agreed-Upon Statement of Facts," filed January 18, 2018.

Entry fees ("bets") are placed with licensed registrants (the operators of IFS contests approved by the Defendant New York Gaming Commission). These operators set up internet platforms which contestants may access in order to participate in the contests. Winnings are paid out to successful contestants from the entry fees ("bets") paid by all contestants, and the IFS registrants derive their income by retaining a portion of said entry fees. ¶ 3 of Agreed-Upon Statement of Facts.

IFS has all the earmarks of "gambling." It involves "betting" on the performance of real-life athletes in future sporting events over which the contestant / bettor has no control. Bets are "pooled" by the operators of the contest who take a piece of the action (the "vig" or "rake" in gambling parlance). The law itself was codified in the New York Racing, Pari-Mutuel Wagering and Breeding Law that deals exclusively with gambling issues. The regulatory oversight is vested in the New York Gaming Commission. The law contains provisions to protect "compulsive players" requiring provisions that allow "compulsive players" to self-exclude themselves from participation.

In spite of the above, the Legislature has declared that IFS is not gambling, offering two rationales:

- "Interactive fantasy sports are not games of chance because they consist of fantasy or simulation sports games or contests in which the fantasy or simulation sports teams are selected based upon the skill and knowledge of the participants and not based on the current membership of an actual team that is a member of an amateur or professional sports organization" (RPMWBL, § 1400[1][a]; and

- "Interactive fantasy sports contests are not wagers on future contingent events not under the contestant's control or influence, because contestants have control over which players they use and the outcome of each contest is not dependent upon the performance of any one player or any actual team. The outcome of any fantasy sports contest does not correspond to the outcome of any one sporting event. Instead, the outcome depends on how the performances or participants' fantasy roster choices compare to the choices of others' roster choices" (RPMWBL, § 1400[1][b]).

As will be shown, neither of these legislative rationales (findings) is sufficient to overcome the constitutional prohibition against "gambling." The skill/choice distinction is a false dichotomy as many forms of gambling entail elements of both skill and chance. The fact that a gambler may have the skill to calculate odds to improve his/her chances of winning is common in many forms of gambling, including, for example, horse-racing[4] craps, roulette, poker, etc. All those activities, however, are still gambling. Skill and chance are not mutually exclusive. *See United States v. DiCristina*, 726 F.3d 92, 98, n. 5 (2d Cir. 2013).

The presence of skill in selecting a fantasy roster in IFS contests does not eliminate the element of chance, which can dramatically affect the performance of an athlete – *e.g.*, an injury, a bad hop, the weather, the quality of the opposition (who's the opposing pitcher?) or a multitude of other unforeseeable and unpredictable events over which an IFS contestant has no control. Or an athlete may simply have an "off night." Even league batting champions in baseball may go 0-4 in any given game. No Cy Young award winning

[4] Pari-mutuel wagering on horse-racing is legal, but that is not because it is not gambling. Instead, it is because pari-mutuel wagering on horse-racing is a specific exception to the Constitution's prohibition against gambling. This exception would be unnecessary if horse-racing were not gambling to begin with. It is the proverbial exception that proves the rule.

pitcher ever had an undefeated season. All these uncertainties inject material elements of chance into the equation, which is why IFS is "gambling."

The Constitution does not draw a skill / chance distinction as it prohibits "pool-selling, bookmaking ***or any other kind of gambling***" (emphasis supplied). In addition, the fact that the outcome of a DFS contest is not based on the performance of actual teams, but on a fantasy team, is both irrelevant and disingenuous. The Legislature deliberately overlooks the indisputable fact that the success of these fantasy teams nevertheless depends on the actual performance of real-life athletes that must compete in real-life games. Betting on the future performance of real-life athletes competing in real-life sporting events, even though they may be on a fantasy team roster, does not by some legislative alchemy magically transform gambling into something different.

The Legislature's declaration in RPMWBL § 1401(1)(b) that fantasy sports contests "are not wagers on future events not under the contestant's control or influence because contestants have control over which players they choose" is pure sophistry (not to mention a "double negative"). The contestants may have control over which athletes they choose to be on their fantasy team roster, but they still have no control over how those athletes will actually perform in a subsequent real-life contest.

To be sure, there are instances where skill and chance (gambling) may be mutually exclusive, even though money is involved. That occurs, however, when people pay entry fees to participate in a sporting event in which they themselves compete. If they win, they may be awarded a monetary prize. In those cases, like a golf tournament, they win because of the "skill" they possess in playing the sport itself. In contrast here, the only "skill"

exercised by a contestant in IFS is NOT athletic skill, but only the skill at calculating the odds – which may be a "skill," but it is nevertheless a skill at gambling, which is prohibited.

Chapter 237 defies logic. On the one hand, it would still be illegal gambling if an IFS operator were to accept bids from two contestants on whether professional basketball player "A" would score more points in an upcoming game on a given night than professional basketball player "B" who would be competing in a different game on the same night if the IFS operator paid the winner while keeping a portion of the wagers for itself. If, however, the only difference were that the first bettor bet that the total points scored by players "A", "C", "D", "E", "F", "G", "H" and "I" (all from different teams) would exceed the points scored by players "B", "J", "K", "L", "M", "N", "O" and "P" (all from different teams), selected by the second bettor, that would be perfectly legal. In other words, betting on the relative performance of two athletes is gambling, but somehow betting on how combinations of several athletes may perform is not.

As will be shown below, New York Attorneys General past and present have stated that betting on sports violates Article I, § 9 of the Constitution. The current Attorney General himself has declared that DFS violates the Constitution and that its operators have "fleeced" the public.[5] He even went to court and successfully obtained injunctions against the two major DFS operators, FanDuel and DraftKings, obtaining cease and desist orders prohibiting them from engaging in such activities. While that occurred shortly before the enactment of Chapter 237 of the Laws of 2016, the constitutional prohibition itself has not

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[5] *See* Exhibit "H" of Affirmation of Richard Lombardo dated January 11, 2017 containing the Assembly debate that preceded passage of Chapter 237 and quoting Attorney General Schneiderman at p. 147.

changed. Since "gambling" is not otherwise defined by the Constitution, under the long accepted tenets of interpretation the term must be given its ordinary commonly understood definition, and exceptions to its prohibitions must be strictly and narrowly construed. It is axiomatic that the Legislature cannot unilaterally rewrite the Constitution. That is the exclusive prerogative of the People. *See*, N.Y. Const., art. XIX. Otherwise the protections in Article I, § 9 of the Constitution's Bill of Rights that "… no pool-selling, bookmaking or any other kind of gambling shall hereafter be authorized or allowed in this State" would exist only on paper. The reality is that these rights could be totally eviscerated at any time at the whim of the Legislature should it decide to simply call a particular form of gambling something else as it has attempted to do here via the enactment of Chapter 237.[6]

If the Legislature is unhappy with the wording of the Constitution, there is a process for amending it pursuant to Article XIX, which, of course, will ultimately require the approval of the voters of this State. That, rather than an end run around the Constitution, is the proper path to follow. By unilaterally attempting to rewrite the Constitution, as it has attempted here, the Legislature has usurped what is the exclusive prerogative of the People.

Accordingly, the relief sought by Plaintiffs herein to declare Chapter 237 unconstitutional and to enjoin its implementation should be granted.

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[6] The constitutional protections were adopted with a view toward protecting the family man from his own imprudence at the gaming table. *International Hotels Corp. v. Golden*, 15 N.Y.2d 9, 15 (1964).

FACTS, STATUTORY FRAMEWORK AND PROCEDURAL HISTORY

New York State's constitutional prohibition against gambling has a long history. It began with the prohibition against "lotteries" adopted in 1821: "No lotteries shall hereafter be authorized or any sale of lottery tickets allowed within the State." *See* Charles Z. Lincoln, *Constitutional History of New York*, Vol. III, p. 46. In 1894, the prohibition was expanded to read as follows: "nor shall any lottery or the sale of lottery tickets, pool-selling, bookmaking ***or any other kind of gambling*** hereafter be authorized or allowed within the State" (emphasis supplied). In the very next legislative session following the 1894 Amendment, the Penal Code was amended to make pool-selling and bookmaking a felony (L. 1895, ch. 572, § 1). *See* Exhibit "A" annexed to the Affirmation of Cornelius D. Murray, dated January 29, 2018. That statute specified that the prohibition extended to encompass any contest involving gambling on "the skill, speed, or power of endurance of man or beast" involving "any unknown or contingent event whatsoever." Nearly a century later, in 1984, the Office of the Attorney General stated:

> From the history it is indisputable that since at least 1877, when the Penal Code specifically defined as criminal wagering on the outcome of contests of speed, ***skill*** or power of endurance of man or beast, New York law has viewed lotteries and betting on sports events as two distinct forms of gambling. ***This distinct statutory ban on sports wagering was elevated to the Constitutional level in 1894 and has remained by explicit language in the Constitution until today***. 1984 N.Y. Op. Atty. Genl. 1 (1984 N.Y. AG LEXIS 94 *4 (emphasis supplied).

In that same 1984 opinion, the Attorney General concluded: "If the State government is to be authorized to run a program in which it accepts wagers on the outcome

of professional athletic contests, whether single contests or multi-contest parlays, such authorization can only be acquired through an amendment to the Constitution." *Id.* at *13.

Since the 1894 adoption of the amendment prohibiting gambling, four major exemptions have been carved out of the general prohibition. None applies here. The first, in 1938, allowed pari-mutuel wagering on horse-racing; the second, in 1957, authorized the conduct of games of chance such as bingo and lottery, on a local option basis for prizes which were limited in amount and games could only be operated by bona fide religious or non-profit organizations. The third exception came in 1996, to allow lotteries operated by the State in which the proceeds were to be used exclusively for education. In 2013, the People approved an additional amendment to allow casinos to be operated at no more than seven locations throughout the State. The Constitution has not been amended to carve out any other exception for sports betting.

In October 2015, New York Attorney General Eric Schneiderman's office commenced an investigation of FanDuel, Inc. and DraftKings, Inc., the two major operators of daily fantasy sports in New York State. By virtually identical letters dated November 10, 2015 (Complaint, Exhibits "C" and "D"), Attorney General Schneiderman informed both FanDuel and DraftKings that "the illegality of DFS is clear from any reasonable interpretation of our laws, beginning with the New York State Constitution." *Id.*

Mr. Schneiderman's office followed up by filing separate but virtually identical complaints against both entities in Supreme Court, New York County. *See* Exhibits "A" and "B" of Affirmation of Richard Lombardo, dated January 11, 2017. The complaints

quoted the Chief Executive Officer of one DFS operator who described DFS like a "sports betting parlor on steroids." *Id.* at ¶ 7.

The DraftKings complaint went on to describe how DFS operated. *Id.* at ¶¶ 39-70, inclusive. It quoted its CEO, Jason Robbins, who stated that DraftKings makes money in a way that "is almost identical to a casino." *Id.* at ¶ 107. In the cease and desist letters, Attorney General Schneiderman's office also stated that DraftKings (and FanDuel) customers are clearly placing bets on events outside of their control or influence, specifically on the real-life game performance of professional athletes. Further, each DraftKings [FanDuel] wager represents a wager on a "contest of chance where winning or losing depends on numerous elements of chance to a material degree." Lombardo Affirmation, dated January 11, 2017, Exhibits "C" and "D".

The Attorney General also wrote to the New York *Daily News* on November 19, 2015, stating that:

> (1) "DFS is much closer to online poker than it is to traditional fantasy sports";
>
> (2) "FanDuel and DraftKings take a cut out of every bet. That is what bookies do";
>
> (3) "these companies are based on business models that are identical to other forms of gambling;"
>
> (4) "the argument that FanDuel and DraftKings run games of skill is "nonsense"; and
>
> (5) that "games of chance often involve some amount of skill; this does not make them legal."

See Murray Affirmation, dated April 6, 2017 at Exhibit "A".

After proceeding in court against FanDuel and DraftKings, Attorney General Schneiderman filed a Memorandum of Law in support of his Motion for a Preliminary Injunction to enjoin them from accepting entry fees, wagers or bets from any New York consumers in regards to any competition, or gaming contest run on Defendants' respective websites. *See* Exhibit "D" of Affirmation of Cornelius D. Murray, dated April 6, 2017.

In that Memorandum of Law, Attorney General Schneiderman stated:

- "DFS is nothing more than a rebranding of sports betting. It is illegal." *Id.* at 1.

- "DFS operators themselves profit from every bet, taking a 'rake' or 'vig' from all wagering on their [web]sites." *Id.*

- "A DFS wager depends on a future contingent event wholly outside the control or influence of any bettor." *Id.*

- "Gambling often mixes elements of chance and skill ... in DFS, chance plays a significant role. A player injury, a slump, a rained-out game, even a ball taking a bad hop, can each dictate whether a bet wins or loses." *Id.* at 2.

- "The key factor establishing a game of skill is not the presence of skill, but the absence of a material element of chance. Here, chance plays as much of a role (if not more) than it does in games like poker and blackjack. A few good players in a poker tournament may rise to the top based on their skill, but the game is still gambling. So is DFS." *Id.*

- "DFS contests are causing the precise harm that New York's gambling laws were designed to prevent. Problem gamblers are increasingly being seen at Gamblers Anonymous meetings and at counselors' offices addicted to DFS." *Id.* at 3.

- "Experts in gambling addiction and other compulsive behaviors have identified DFS as a serious and growing threat to people at risk for or already struggling with addiction." *Id.* at 11.

- "DFS is not an authorized form of gambling. FanDuel and DraftKings are in direct violation of the New York State Constitution." *Id.* at 19.

- "The main purported skill in DFS is no different than it is for poker, blackjack or other forms of sports betting: the ability to calculate probabilities and try to handicap the odds of future events." *Id.* at 24.

These arguments resonated with the Supreme Court Justice assigned to decide the case. By decision and order dated December 11, 2015, Justice Manuel J. Mendez granted the Attorney General's motion for a preliminary injunction. *See* Complaint, Exhibit "B". Justice Mendez held, *inter alia*, that (1) the New York Attorney General had established the likelihood of success on the merits, and (2) that the balance of equities favored the Attorney General of the State of New York due to the interest in protecting the public, particularly those with gambling addictions. *Id.*, slip op. at 9.

Thereafter, on June 14, 2016, the bill that ultimately became Chapter 237 was introduced in both the Assembly and the Senate, sponsored by Assemblyman Gary Pretlow and Senator John Bonacic, respectively. Three days later it passed both houses of the Legislature – but not without some pushback.

During the debate in the Assembly, a transcript of which is appended to Exhibit "H" of the Affirmation of Richard Lombardo dated January 11, 2017, Assemblyman Andrew Goodell stated:

> Now what I thought was interesting about your bill is that it first declares that fantasy sports is not gambling and then, if I'm correct, imposes almost all the regulatory oversight that we normally impose on gambling, including requirements for notice about compulsory gambling and the problems with it. We put it under the Gaming Commission whose sole responsibility is to regulate gambling, or one of its primary responsibilities I should say. We have the funds going to

> education just like we do with the lottery which we all agree is a form of gambling. We restrict the age to 18, which is the same type of age restriction we have on gambling. We prohibit certain people who have a conflict of interest from engaging in it, just like we do in other situations involving gambling like in horse racing. I mean, obviously, jockeys and trainers are not allowed to bet on horse racing for obvious reasons.

Id. at 152.

A transcript of the Senate debate is attached as Exhibit "I" to the Lombardo Affirmation dated January 11, 2017. There, Sen. Liz Krueger spoke out as well:

> If it looks like a duck, it swims like a duck, it quacks like a duck, it's a duck. This is another gambling bill. This continues New York State's path into dreaming that all of our economic development and research problems can be solved by increasing the number of people who use all of their disposable income in different styles of gambling.
>
> Maybe we can roll them all together in a movie theater that serves liquor, and everybody can just spend their days sitting in their chairs, drinking, watching the movies, and choosing their type of online gambling.
>
> It's not a very attractive future for the State of New York. It's not really in the best interests of the people of New York. I'm particularly entertained by the resolution on our desks clarifying that if New Jersey increases some kind of gambling for themselves, we'll explore how we can do even more. I'm not even sure we could figure out how to do even more, but I'm confident we'll see more bills in the future that just continue down this rabbit hole. *Id.* at 4836.

Thereafter, the Governor signed into law Chapter 237 of the Laws of 2016, effective August 3, 2016. *See* Complaint, Exhibit "A". Chapter 237 added Article 14 to the Racing, Pari-Mutuel Wagering and Breeding Law which purported to legalize, authorize and

regulate the operation of interactive fantasy sports under the auspices of the New York Gaming Commission. It declared that interactive fantasy sports games are not games of chance, but rather, "fantasy or simulation sports games" based upon "the skills of contestants" and are not based on the current membership of an actual team. RPMWBL § 1400(1)(a). The Legislature also declared that IFS contests are not wagers on future contingent events out of their control because the contestants have control over the athletes they choose on their fantasy teams, and the outcome of each contest is not dependent upon the performance of any one player or any actual team. § 1400(1)(b) "Entry fees" are defined as the amount paid to an IFS registered operator by a contestant in order to participate in the contest. § 1401(4). The law defines a "highly experienced player" as one who has entered more than 1,000 contests offered by a single IFS operator or has won more than three prizes valued at $1,000 each from a single IFS fantasy sports operator. § 1401(g).

Sections 1402 and 1403 define the registration process to become a licensed IFS operator. Provisions in § 1404 require that the number of experienced players participating in any event must be identified and the operator must include information about where compulsive players can find "assistance." Section 1404, subdivision (2) requires that no contestant may submit more than 150 entries in any game, or 3% of all entries, whichever is less. Section 1405 lists the powers and duties of the Gaming Commission and directs it to promulgate regulations to implement Article 14 of the RPMWBL.[7] Section 1407

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[7] As of the date of this Memorandum of Law, no regulations have been issued by the Gaming Commission, notwithstanding the fact that the law has now been on the books for a year and five months.

contains provisions for a state tax of 15% on gross revenues generated by IFS operators, with an additional tax of .5%, not to exceed $50,000.

After the law was enacted, Attorney General Schneiderman discontinued the lawsuits against FanDuel and DraftKings, entering into virtually identical settlement agreements. *See* Exhibits "B" and "C" of Affirmation of Cornelius D. Murray, dated January 29, 2018. While Attorney General Schneiderman discontinued the litigation to enjoin both DraftKings and FanDuel from continuing to operate interactive fantasy sports, the settlement agreements included penalties of $6 million each to be paid by both FanDuel and DraftKings for past activities, including false advertising. The Attorney General's office came down hard on DraftKings for its deceptive advertising, which suggested that it was easy to win at DFS, notwithstanding the fact that its own internal data showed differently. In fact, at one point DraftKings had advertised the ease of winning "massive jackpots" and promoted DFS as making "winning easier than milking a three-legged goat." *See* Complaint in *People v. DraftKings*, ¶ 75 of Exhibit "A" of Affirmation of Richard Lombardo, dated January 11, 2017.

In the Settlement Agreements, the Attorney General's Office made several findings:

- A McKinsey & Company study found that, on average, the top 6.3% of players participating in DraftKings contests involving major league baseball had a positive "return on investment" during the first half of the 2015 season, while, on average, the bottom 80% lost money. The study also found that 91% of DFS profits were concentrated in the hands of just 1.3% of players (¶ "8" of DraftKings settlement).

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- Additionally, in contrast to the high volume of professional players in 2013 and 2014, 89.3% of players who played on DraftKings lost money (*Id.* at ¶ "9" of DraftKings settlement).

- DraftKings identified and targeted users with a propensity for gambling and addiction, but failed to disclose the risks of playing its contests or providing safeguards (*Id.* at ¶ "37" of DraftKings settlement).

- Shortly after founding DraftKings, its CEO, Jason Robbins, explained in a Reddit forum online that DraftKings is listed in the "gambling space" , offered a "mash-up between poker and fantasy sports," and made money in a way virtually "identical to a casino." Similarly, in documents prepared for potential investors, DraftKings placed itself in the gambling sector. Moreover, DraftKings sought out and entered sponsorship agreements with various concerns popular with gamblers, including the World Series of Poker and the Belmont Stakes (*Id.* at ¶ "38" of DraftKings settlement).

- DraftKings routinely fielded requests and complaints from customers with addiction and compulsive game play issues who asked that their accounts be shut down. DraftKings records show customer service inquiries from players featuring subjects such as: "Gambling Addict – Do Not Reopen," "Please cancel account. I have a gambling problem;" and "Gambling Addiction needing disabled account" (*Id.* at ¶ "41" of DraftKings settlement).

- Despite targeting a vulnerable population and receiving complaints from customers, DraftKings never provided warnings about addiction or resources to help with compulsive behavior in any of its marketing (*Id.* at ¶ "42" of DraftKings settlement).

- Moreover, FanDuel disclosed to investors – but not consumers, who were left with a very different impression of the performance of an average player – that only 10% of all players on average won money. All other players lost money on the site. As an acknowledgement of this reality, FanDuel also disclosed privately to investors – but not consumers – that users were more likely to win if they played at high volumes (*i.e.*, entered many lineups) (¶ "6" of FanDuel settlement).

- FanDuel identified and targeted users with a propensity for gambling and addiction, but failed to disclose the risks of playing its contests or provide adequate safeguards. (*Id.* at ¶ "31" of FanDuel settlement).

- In a 2010 pitch to investors, FanDuel revealed the results of a survey that it used as indicating that over half bet on sports online and that nearly 20% self-identified as "a bit of an addict," while only 9% reported that they did not gamble. In that same pitch, FanDuel told investors its target market for DFS was male sports fans who "cannot gamble online legally" (*Id.* at ¶ "32" of FanDuel settlement).

After the Attorney General abandoned his lawsuit against DraftKings and FanDuel, the Plaintiffs, all of whom are either persons with gambling problems or those victimized by gambling, brought this action contending that their rights had been violated because the Bill of Rights (Article I, § 9 of the New York State Constitution) specifically provides that no "pool-selling, bookmaking or any other kind of gambling shall hereafter be authorized or allowed within the State."

Each Plaintiff has a tragic story to tell about how their lives have been affected by gambling. Plaintiff Jennifer White is a resident of Grand Island, Erie County, New York, and is a citizen and taxpayer of the State of New York, eligible to vote in any and all elections (Complaint, ¶ 21). She is a direct victim of gambling as her life was nearly ruined by her father's gambling addiction. *Id.* at ¶ 22. As early as 1992, when Plaintiff White was only 13 years of age, Ms. White's father constantly patronized off-track betting facilities throughout Western New York (*Id.* at ¶ 23). Plaintiff White's mother was thereafter besieged by phone calls from creditors, loan sharks appearing at her door, cars being repossessed, all culminating in a divorce (*Id.* at ¶ 25). As late as 2011, when Ms. White's mother died in the hospital as a result of sepsis following an acute cellulitis infection, she learned that her father had accessed her mother's bank card, making withdrawals of approximately $1,100 while present at the Seneca Niagara Casino in Niagara Falls (*Id.* at ¶ 25). Over a ten-year period, Ms. White's father amassed over

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$500,000 in gambling losses (*Id.* at 26). *See* Affidavit of Ms. White, sworn to January 15, 2018.

Plaintiff Katherine West is a resident, citizen, taxpayer and eligible voter of the State of New York. She resides in the City of Buffalo (*Id.* at ¶ 27). Plaintiff West's husband is a compulsive gambler who "maxed out" the family's credit card, overdrew the checking accounts, cleaned out the savings account, invaded the funds set aside for their children's college fund, all of which directly affected her health, causing depression, acute headaches, and stomach disorders which in turn caused her to miss work, thereby exacerbating her own financial stress, all while trying to hide her husband's problems from their daughters. *Id.* at 28. Ms. West was forced to take time off from work to search for him in casinos, while struggling to cover his debts (*Id.* at ¶ 29).

The third Plaintiff is Charlotte Wellins, a citizen, taxpayer and eligible voter in the State of New York who resides in Wellesley Island, New York. Her husband was a compulsive gambler who signed his name to loans without her knowledge (*Id.* at ¶ 30). His gambling led to the loss of their home (which had been mortgaged to the hilt), bankruptcy, divorce, and the forced uprooting of their children from their home and schools, plus the loss of their college education funds (*Id.* at ¶ 31). *See also* Affidavit of Charlotte Wellins, sworn to January 24, 2018.

The final Plaintiff is Anne Remington, a citizen and taxpayer of the State of New York residing in Jefferson County (Complaint, ¶ 32). Ms. Remington is afflicted with a gambling addiction that nearly ruined her life and family (*Id.* at ¶ 33). Her initial game of choice was scratch-off instant lottery tickets that started with an occasional purchase and

then progressed to the point of lacking money to buy groceries or gas for her family (*Id.* at ¶ 34). Ms. Remington had been entrusted with control over her family's finances (checkbook, savings, everything). *See* Complaint, ¶ 36). By her own admission, Ms. Remington's obsession with scratch-offs made her a liar, a cheat, and a person who grew to hate herself (*Id.* at 36). She invaded her family's check book, then the savings account, until both were depleted (*Id.* at 37). She got to the point where she fended off creditors calling her and turned off the home phone, and when her husband inquired as to why it was unplugged, blamed it on the family's pet cat (*Id.* at 39). The power company threatened to turn off Ms. Remington's power, cable, Internet and phone service because of unpaid bills (*Id.* at 39). When Ms. Remington's husband inquired as to what was happening, she blamed it on a bookkeeping error on the part of the public utilities serving her residence (*Id.* at ¶ 40). Ms. Remington kept the books in her husband's business, and ultimately he learned the truth when his business was lost (*Id.* at ¶ 41). Things got so bad that on February 25, 2015, Ms. Remington was arrested for writing bad checks on her account that her husband had closed (*Id.* at ¶ 42). By that time, Ms. Remington had already been attending gambling addiction support groups, but would continue to stop to gamble on her way to meetings (*Id.* at ¶ 43). Ms. Remington has been "clean" for the past twelve years, but she is always concerned about a relapse (*Id.* at ¶ 44).

These tragic stories are grim reminders of why Article I, § 9 of the Bill of Rights of the New York State Constitution was adopted in the first place. Allowing a virtual casino to enter the living room of every New Yorker via IFS and the internet is sure to

exacerbate the very evils Article I, § 9 was intended to prevent. Indeed, Attorney General Schneiderman has himself acknowledged that:

- "DFS contests are causing the precise harm that New York's gambling laws were designed to prevent. Problem gamblers are increasingly being seen at Gamblers Anonymous meetings and at counselors' offices addicted to DFS." *See* page 3 of Attorney General Schneiderman's Memorandum of Law in *People v. DraftKings, Inc.* (Sup. Ct., N.Y. Co., Index #453054/2015) annexed as Exhibit "D" to the Affirmation of Cornelius D. Murray, dated April 6, 2017.

- "Experts in gambling addiction and other compulsive behaviors have identified DFS as a serious and growing threat to people at risk for or already struggling with addiction." *Id.* at 11.

Plaintiffs now move for summary judgment. They rely on the court to protect their rights as set forth in Article I, § 9 of the Bill of Rights which directs the Legislature to pass laws that prohibit gambling. "It is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them." *Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y. 893, 925 (2005).

ARGUMENT

POINT I

The Legislature Is Not Free to Interpret the Term "Gambling" In Article I, § 9 Any Way It Chooses

"The New York State Constitution has prohibited bookmaking and ***other forms of sports gambling*** since 1894" (emphasis supplied). These are not Plaintiffs' words, but those of Attorney General Schneiderman. *See People v. DraftKings* (Sup. Ct., N.Y. Co., Index No. 453054/2015), Plaintiffs' Memorandum of Law dated November 16, 2015 at 1.[8] They were written to enjoin the very activity that Chapter 237 of the Laws of 2016 seeks to legalize, despite the fact that in the interval of time between the submission of the Attorney General's Memorandum of Law in November 2015 and the enactment of Chapter 237 in 2016, there was no change whatsoever in the wording of Article I, § 9. Nor has there been any since.

The principal argument advanced by the Defendants is that the Constitution left to the Legislature the right to determine what constitutes gambling, thereby opening the way to legalize IFS, to which the Judiciary must defer. See Defendants' Memorandum of Law dated January 11, 2017 at 11, 17, submitted in support of their prior Motion to Dismiss.

The Defendants' expansive reading of Article I, § 9 is without merit. Article I, § 9, part of the Constitution's Bill of Rights, reads in pertinent part as follows:

> … no lottery or the sale of lottery tickets, pool-selling,

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[8] The Attorney General's Memorandum of Law is annexed as Appendix "D" to the Affirmation of Cornelius D. Murray dated April 6, 2017, heretofore submitted in opposition to Defendants' Motion to Dismiss.

> bookmaking, ***or any other kind of gambling*** … shall hereafter be authorized or allowed within this state … and the legislature shall pass appropriate laws ***to prevent offenses against any of the provisions of this section***. (emphasis supplied)

Thus, the mandate given to the Legislature was not to carve out exceptions to the prohibitions against gambling; instead, it was to pass laws to "prevent offenses against ***any*** of the provisions of this section" which offenses include "pool-selling, bookmaking, ***or any other kind of gambling***" (emphasis supplied). When, in the past, exceptions to those prohibitions have been authorized, such authorizations were only by the following amendments to the Constitution itself.

- In 1938, for pari-mutuel wagering on horse-racing;
- In 1957, for games of chance like bingo and lottery for limited prizes in games operated by small, not-for-profit entities like volunteer firefighting organizations and the like;
- In 1966, for state-run lotteries, the net proceeds of which were to be used exclusively for education; and
- In 2013, for casinos at no more than seven locations across the State.

If the People had wanted to carve out an additional exception for IFS or its subset, DFS, they could have done so, but they have not. The Legislature may not step into the breach and unilaterally rewrite the Constitution. If the Legislature had the right to define gambling any way it chooses, then the restraint that the Constitution has placed on the Legislature not to allow gambling of any kind would be a nullity.

In *King v. Cuomo*, 81 N.Y.2d 247 (1993), the Court of Appeals stated:

> ... the guiding principle of statutory interpretation is to give effect to the plain language (*Ball v. Allstate Ins. Co.*, 81 N.Y.2d 22, 25; *Debevoise & Plimpton v. New York State Dept. of Taxation & Fin.*, 80 N.Y.2d 657, 661; McKinney's Cons Laws of NY, Book 1, Statutes § 94), "***[e]specially should this be so in the interpretation of a written Constitution, an instrument framed deliberately and with care, and adopted by the people as the organic law of the State***" (*Settle v. Van Evrea*, 49 NY, at 281, *supra*). These guiding principles do not allow for interstitial and interpretative gloss by the courts or by the other Branches themselves that substantially alters the specified law-making regimen. ***Courts do not have the leeway to construe their way around a self-evident constitutional provision by validating an inconsistent "practice and usage of those charged with implementing the laws"*** (*Anderson v. Regan*, 53 N.Y.2d 356, 362, *supra; see also, People ex rel. Burby v. Howland*, 155 N.Y. 270, 282; *People ex rel. Crowell v. Lawrence*, 36 Barb 177, *affd* 41 N.Y. 137; *People ex rel. Bolton v. Albertson*, 55 N.Y. 50, 55, *supra*) ... ***the end cannot justify the means, and the Legislature, even with the Executive's acquiescence, cannot place itself outside the express mandate of the Constitution.*** We do not believe that supplementation of the Constitution [by the Legislature] is a manifestation of the will of the People. Rather, it may be seen as a substitution of the People's will expressed directly in the Constitution (emphasis supplied). 81 N.Y.2d at 253-254.

In *Kuhn v. Curran*, 294 N.Y. 207 (1945), the Court of Appeals stated:

> We may not, however, construe the words of the Constitution in exactly the same manner as we would construe the words of a will or contract drafted by careful lawyers, or even a statute enacted by the Legislature. It is the approval of the People of the State which gives force to a provision of the Constitution drafted by the convention, and in construing the Constitution we seek the meaning which the words would convey to an intelligent, careful voter. 294 N.Y. at 217.

More recently, the Third Department has stated:

> In determining legislative intent, the statute is to be construed according to its unambiguous language, or if necessary, by reference to the legislative history (*citing Matter of Yellow Book of N.Y., Inc. v. Commissioner of Taxation and Finance*, 75 A.D.3d 931, 932 [2010], *lv den*, 16 N.Y.3d 704 ... when a statutory term is undefined, it must "be given its precise and well-settled legal meaning in the jurisprudence of the State." *New York Construction Materials Association v. New York State Department of Environmental Conservation*, 83 A.D.3d 1323 at 1326 (3d Dep't 2011).

Exceptions to prohibitions must be strictly construed to ensure that they do not consume the rule itself, and this rule has been specifically applied to gambling. *Ramesar v. State of New York*, 224 A.D.2d 757, 759 (3d Dep't 1996), *lv den*, 88 N.Y.2d 811 (1996); *Molina v. Games Management Services*, 58 N.Y.2d 523, 529 (1983). *See generally*, McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 271; 62 N.Y.Jur.2d Gambling, § 9 at 18 *et seq.* *See also* 1984 N.Y. Op. Atty. Gen. 1 (1984 N.Y. AG LEXIS 94 *7).

King v. Cuomo and *Construction Materials Association*, *supra*, teach that absent a specific definition of a term in constitutional or statutory language, the term is to be given its ordinary meaning. As will be discussed below, there is simply no doubt that the term "gambling," as written into the Constitution in 1894, includes IFS.

In enacting Chapter 237, the Legislature has done exactly the opposite of what Article I, § 9 of the Constitution commands. Instead of passing laws to prevent gambling, it has enabled it. It also has provided a tortured interpretation of the term "gambling" that defies its ordinary meaning while violating the principle that exceptions to constitutional prohibitions should be strictly construed.

POINT II

The Word "Gambling," Written Into the Constitution in 1894, Includes the Type of "Interactive Fantasy Sports" Purportedly Authorized by Chapter 237 of the Laws of 2016

"The contemporaneous construction given by the Legislature to a constitutional mandate it is charged with carrying out must be given with great deference." *New York Public Interest Research Group, Inc. v. Steingut*, 40 N.Y.2d 250, 259 (1976). The key word in that citation is "contemporaneous." In *Public Interest Research Group*, the Court relied upon *People ex rel. Joyce v. Brundage*, 78 N.Y. 403 (1879), decided nearly a century earlier, which stated: "Great deference is certainly due to a legislative exposition of a constitutional prohibition and especially when it is made almost ***contemporaneously*** with such provision and may be supposed to result from the same view of policy and modes of reasoning which prevailed among the framers of the instrument propounded" (emphasis supplied). *Id.* at 406.

In 1895, immediately on the heels of the constitutional amendment which prohibited pool-making, bookmaking or any other type of gambling and which directed the Legislature to pass laws to prevent it, the Legislature, pursuant to § 1 of Chapter 572 of the Laws of 1895, amended § 351 of the Penal Code to read as follows:

> **Pool-Selling, Book-Making, Bets and Wagers, Et Cetera.** Any person who engages in pool-selling or book-making at any place or time; or any person who keeps or occupies any room, shed, tenement, tent, booth or building, boat or vessel, or any part thereof, or who occupies any place, or stand, of any kind, upon any public or private grounds, within this State, with books, papers, apparatus or paraphernalia, for the

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> purpose of recording or registering bets or wages, or for setting pools, ***and any person who records or registers bets or wages, or sells pools upon the result of any trial or contest of skill, speed or power of endurance, of man or beast***, or upon the result of any political nomination, appointment or election; or upon the result of any lot, chance, casualty, ***unknown or contingent event whatsoever*** … or any person who aids, assists or bets in any of said acts, which are hereby forbidden, is guilty of a felony … (emphasis supplied).

In *People ex rel. Sturgis v. Jones*, 152 N.Y. 1 (1897), the Court of Appeals had occasion to interpret this statute that had been enacted in the immediate aftermath of the adoption of the 1894 amendment to the Constitution. It stated that "this examination of statutes discloses that the Legislature has passed laws, the obvious purpose of which is to prevent the offenses mentioned in Section 9 of Article One of the Constitution." *Id.* at 7.

Ninety years later, in 1984, then Attorney General Robert Abrams issued Formal Opinion No. 84-F1, interpreting that law and the circumstances surrounding the enactment of that very same statute (Penal Code § 351), stating:

> In May [1894], a Constitutional Convention met in Albany. In June, there was reported to the floor of the Convention the following amendment of the Anti-Lottery Provision: "Nor shall any lottery or the sale of lottery tickets, pool-selling, book-making or any other kind of gambling hereafter be authorized or allowed within this State." Following debate roundly condemning bookmaking and bookselling, and emphasizing the need to go beyond the prohibiting of mere lotteries, the delegates adopted the new provision by a vote of 109 to 4, and the language was duly added to the Constitution. *Lincoln*, op cit. at p. 51.
>
> In the next legislative session, the Penal Code was amended to make pool-selling and book-making a felony (L. 1895, ch. 572 § 1). The statute retained the specific prohibition

> covering any contest of man or beast, but extended it to encompass any "unknown or contingent event whatsoever." L. 1895, ch. 572, § 1(1).
>
> From the history it is indisputable that since at least 1877, when the Penal Code specifically defined as criminal wagering on the outcome of "costs of speed, skill or power of endurance of man or beast," New York law has viewed lotteries and ***betting on sports events as two distinct forms of gambling. The distinct statutory ban on sports wagering was elevated to the Constitutional level in 1894 and has remained by explicit language in the Constitution until today."*** 1984 N.Y. AG LEXIS 94 *4.

Thereafter, in the same opinion, the AG noted that:

> It is axiomatic that an exception to a general policy spelled out in a constitution or statute must be given narrow interpretation in order to avoid the danger of the exception becoming so broad as to swallow the rule. *Id.* at *6.

Later, in the same opinion, the Attorney General stated:

> To summarize, we find that sports betting is not permissible under Article I, § 9 of the New York State Constitution. The specific Constitutional bans against bookmaking and pool-selling, as well as a general ban against "any other form of gambling" not expressly authorized by the Constitution would operate to invalidate a statute establishing a sports-betting program ... ***if the State government is to be authorized to run a program in which it accepts wagers on the outcome of professional athletic contests, either single contests or multi-contest parlays, such authorization can only be acquired through an amendment to the Constitution***. *Id.* at 41 (emphasis supplied).

The best evidence of the meaning of the term "gambling" in Article I, § 9, adopted in 1894, is the interpretation the Legislature charged with implementing the amendment imparted to it the following year in 1895. It is not what the Legislature in 2016 decided it

meant some 122 years after the fact. That subsequent interpretation not only contradicts the Opinion of Attorney General Robert Abrams back in 1984 (*supra* at 25), but the current Attorney General Schneiderman's own interpretation until very recently (*supra* at 12-13). His sudden about-face is nothing more than a transparent and desperate attempt to justify the constitutionality of Chapter 237.

POINT III

The Plain Meaning of the Term "Gambling" Includes Interactive Fantasy Sports

The Defendants and the Legislature ask this Court to accept the proposition that IFS is not gambling because contestants are not betting on any real-life team or any one athlete, while plainly glossing over the fact that whether they win or lose depends upon the subsequent actual performance of actual athlete(s) competing in actual sporting events. Their strained, indeed tortured, interpretation of the term "gambling" violates fundamental rules of constitutional interpretation. "Courts do not have the leeway to construe their way around a self-evident Constitutional provision by validating an inconsistent practice and usage of those charged with implementing the law." *King v. Cuomo*, 81 N.Y.2d 247, 253-254, *citing Anderson v. Regan*, 53 N.Y.2d 356, 362 (1981). The idea that making up a fantasy sports roster somehow gets around the prohibition of gambling is not accepted within the gambling community itself.

- Sheldon Adelson, casino magnate and the founder, chairman and CEO of the Las Vegas Sands Corporation that owns Marina Bay Sands in Singapore and the Venetian Resort Hotel, stated that "daily fantasy sports is gambling. There is no question about it." Exhibit "O" of Affirmation of Cornelius D. Murray, dated April 6, 2017.

- MGM Casinos Chairman Jim Murren said those who argue that DFS is not gambling are "absolutely utterly wrong. I don't know how to run a football team, but I do know how to run a casino and this is gambling." *Id.*, Exhibit "F".

- The Chief Executive Officer of one DFS company stated that DFS games are like "a sports betting parlay on steroids." *See* ¶ "7" of Complaint in *People v. DraftKings*, Exhibit "A" of January 11, 2017 Affirmation of Richard Lombardo.

- DraftKings' CEO started a thread in the online forum reddit.com in which he explained, "this concept where you can basically ***bet*** your team will win is new and different from traditional leagues that last an entire season." (emphasis added) Exhibit "B" of Murray Affirmation, dated April 6, 2017.

- The DraftKings CEO further emphasized that "the concept is different from traditional fantasy leagues. Our concept is a mash-up between poker and fantasy sports. Basically, you pick a team, ***deposit your wager***, if your team wins, you get the pot." (*Id.*)

- In the United Kingdom, where sports gambling is legal, DraftKings has taken the necessary regulatory steps to operate as a legitimate online sports betting company. Complaint, *People v. DraftKings*, ¶ 101. *See* Exhibit "B' of Affirmation of Richard Lombardo, dated January 11, 2017.

- DraftKings' CEO stated in 2012 that DraftKings operates in the "***gambling*** space." (emphasis supplied) *Id.* at ¶ 102.

- DraftKings' CEO stated that it makes money in a way that "is almost identical to a casino." *Id.* at ¶ 106.

Even the New York *Times*, perhaps unwittingly, has chimed in. In its Sunday, December 31, 2017 crossword puzzle, the clue for the 72 Down entry of four letters was "Action in FanDuels and DraftKings." The solution, published a week later in the *Times* on Sunday, January 7, 2018, was "B-E-T-S." See Exhibit "D" annexed to the Affirmation of Cornelius D. Murray, dated January 29, 2018.

There is simply no doubt that "interactive fantasy sports" fits within the commonly understood definition of "gambling."

POINT IV

The Skill / Chance Distinction is a False Dichotomy

The fallacy contained in Chapter 237 is that IFS is a "game of skill" and therefore does not constitute a "game of chance." RPMWBL, § 1400(1)(a). The reality, however, is that skill and chance are not mutually exclusive, do not negate each other, and coexist in many types of gambling, including, but not limited to, horse-racing and poker, where players with skill at handicapping horses or calculating the odds of what cards may be drawn will defeat opponents with lesser skills. Poker and horse-racing are, nevertheless, indisputably gambling, as Attorney General Schneiderman himself has argued in court papers filed against DraftKings, where he stated:

- "Gambling often mixes elements of chance and skill … In DFS, chance plays a significant role. A player injury, a slump, a rained-out game, even a ball taking a bad hop, can each dictate whether a bet wins or loses;" (*supra* at 12) and

- "The key factor establishing a game of skill is not the presence of skill, but the absence of a material element of chance. Here, chance plays as much of a role (if not more) than it does in games like power and blackjack. A few good players in a poker tournament may rise to the top based on their skill, but the game is still gambling. So is DFS." (*supra* at 12)

- "Even a well-established contest of chance like poker has skilled players beating unskilled players 97% of the time" (Murray Affirmation dated April 6, 2017, Exhibit "D" at 26).

Recently, the United States Second Circuit Court of Appeals said essentially the same thing when discussing the presence of both skill and chance in a case interpreting New York law. In *United States v. DiCristina*, 736 F.3d 92 (2d Cir. 2013), the Court said:

> New York courts have long held that poker contains a "sufficient element of chance to constitute gambling under that State's laws."... noting that the term "game of chance" or "contest of choice" has been interpreted to include such games as "stud poker" ... Games of chance range from those that require no skill, such as the lottery, to those such as poker and blackjack, which require considerable skill in calculating the probability of drawing particular cards. Nonetheless, the latter are as much games of chance as the former, since the outcome depends to a material degree upon the random distribution of cards. The skill of the player may increase the odds in the player's favor, but cannot determine the outcome regardless of the degree of skill employed (internal citations omitted). *Id.* at 98, n 5.

In a Special to the New York *Daily News* dated November 19, 2015, Attorney General Schneiderman gave the following hypothetical example of how a material element of chance present in any game could affect the outcome based on the performance of a player, such as one that would be on the roster of an interactive fantasy sports team:

> Consider the final moments of a football game where the outcome has been decided and the winning quarterback takes a knee to run out the clock and assure victory. Let's say it's Eli Manning, and the Giants are defeating the Eagles or the Cowboys. Statistically, this play would cost the quarterback one yard — a yard that could make the difference between someone on DraftKings or FanDuel winning or losing tens of thousands of dollars. (See Murray Affirmation, dated April 6 ,2017, Exhibit "A")

This is more than a hypothetical, however. It is a reality. *See* Gouker, Dustin, Washington *Post* (October 13, 2015): "Daily Fantasy Sports Sites Say Their Users Aren't Gambling. They're Wrong,"

> On October 5, 2015, the Seattle Seahawks played the Detroit Lions on ESPN's "Monday Night Football." The game hinged on a late fumble by Lions receiver Calvin Johnson,

> who lost the ball just before he scored what would have been a go-ahead touchdown. It bounced into the Seattle end zone (with some help from a Seahawks defender) out of bounds. Under the NFL's rules, that made it Seattle's ball, with a three-point lead and less than two minutes left. Even though the Seahawks never recovered the fumble, it was classified as a turnover by the software powering DraftKings. So it also swung the outcome of the site's "Millionaire Maker" contest, winning the week's $1.2 million top prize for a user calling himself "Chipotle Addict." If there were no fumble recoveries credited to Seattle, a different bettor would have won the $1.2 million top prize. *See* Affirmation of Cornelius D. Murray, dated April 6, 2017, Exhibit "F".

It is apparent that despite the Legislature's self-serving argument that IFS contests are not games of chance but of skill, a material element of chance permeates them all. This is what brings IFS within the ambit of Article I, § 9 of the Constitution, which prohibits not only pool-selling and bookmaking, but also "any other kind of gambling."

The skill / chance fallacy was exposed during the Assembly debate that preceded passage of Chapter 237, where Assemblyman Andrew Goodell questioned the bill's principal sponsor, Assemblyman Gary Pretlow. Assemblyman Pretlow was in total denial with respect to the presence of chance in IFS. The entire debate is reproduced as Exhibit "H" to the January 11, 2017 Affirmation of Richard Lombardo, submitted in support of Defendants' Motion to Dismiss.

When Assemblyman Goodell observed that horse-racing involved skill, but was nevertheless "gambling," Pretlow's response was, "If horse-racing were to be invented today, it probably wouldn't fall under this gambling." *Id.* at 151. When Goodell observed that there is skill at poker, but poker is still gambling, Pretlow dodged, replying, "But we're

not looking at poker now, we're looking at interactive fantasy sports." *Id.* at 150-151.[9] When asked by Mr. Goodell whether the Legislature had the power by statute to redefine the words in the Constitution, Pretlow stated: "But as legislators, we are the creators of the law, we write the law, and under that guise, we define what is legal and not legal and the legislative findings in this legislation are that this is not gambling, and therefore, not subject to the provisions of the Constitution." *Id.* at 148-149.

Unfortunately, this mentality that the Legislature can define what the Constitution says and does not say reflects a fundamental misunderstanding of the role of the Legislature *vis-à-vis* the Judiciary under our Constitution's separation of powers. "]The Judiciary is] the ultimate arbiter of the State Constitution." *Campaign for Fiscal Equity v. State of New York*, 8 N.Y.3d 14 at 28 (2006), citing *Cohen v. State,* 94 N.Y.2d 1 at 11 (1995).

Finally, it should be noted that the language in Chapter 237 is inherently contradictory. On the one hand, IFS advocates have gone to great lengths to emphasize the element of skill in that activity, and bolster their arguments by noting that only a few people win most of the games. The remarks of Assemblyman Dean Murray speaking in favor of the bill during the debate on the bill that became Chapter 257 are especially informative:

> And finally, the Attorney General and many opponents have brought up the point that they were concerned that a small number or percentage of players were winning most of the pots. About the numbers, I have heard that it was less than

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[9] When Assemblyman Goddell mentioned that the legislation included protections for compulsive "gambling," Assemblayman Pretlow was quick to correct him, stating, "It's compulsive playing, not compulsive gambling," as if there were a substantive rather than semantic difference. *Id.* at 153.

> 5% of the players who were winning about 75% to 80% of the pot. Well, I think they just made my point. So either the Attorney General or we've identified about 5% of the most unbelievable lucky people in the world or they're skilled. They're skilled in doing this, which is why they win most of the games. So, once again, I submit to you that there is a lot of skill involved in playing. *Id.* at 160.

The point that IFS proponents are obviously making is that the presence of skill in IFS takes it out of the ambit of gambling. The fact that only a few contestants win and the vast majority lose is what they say makes it legal. On the other hand, the Legislature included provisions in Chapter 237 to reduce the number of entries that can be submitted by highly-experienced skilled players. *See* RPMWBL, §§ 1404(1)(g) and (2). According to Defendants, the purpose of this language was to "put less skillful players ... on notice of the quality of opponents in the contest [so that they] may choose contests against less skillful players." *See* Defendants' Memorandum of Law dated January 11, 2017 in support of Defendants' Motion to Dismiss at 7.

In other words, the bill was intended to reduce the element of "skill" – the very aspect of IFS that, according to its proponents, takes it out of the realm of gambling in the first place. Under Chapter 237's convoluted logic, IFS is not gambling, even though the odds that skillful players may win must be reduced in order that it becomes more a game of chance.

In sum, the skill / chance dichotomy does not exist. Elements of both are present in IFS games and the material element of chance is what makes IFS "sports betting" which has been prohibited by the Constitution since 1894, as the Attorney General confirmed in 1984 (*supra* at 27-28).

POINT V

IFS Is Not "Incidental" Gambling that the Legislature May Choose to Overlook

In Defendants' Memorandum of Law in Support of their Motion to Dismiss the Complaint, they argued that in the exercise of the power delegated to the Legislature by Article I, § 9, the Legislature could decide not to prevent certain gambling activity. Defendants' Memorandum of Law dated January 11, 2017 at 13-14 n 5.

To be sure, in the interest of practicality and conservation of resources, the Legislature might well choose not to criminalize incidental gambling between and among individuals, friends, families or office pools for insignificant sums of money where there is no middleman skimming money off the top as part of a commercial gambling enterprise.

IFS, however, is much different. It is a multi-million dollar business as confirmed by the 2016 Annual Report issued by the New York Gaming Commission. *See* Murray Affirmation dated January 29, 2018 at Exhibit "E". That Report discloses that $147,146,185 was wagered on interactive fantasy sports in New York State. It should be noted that this covered only the period from August 22, 2016 through December 31, 2016. *Id.* at 3. That is because the legislation authorizing IFS was not signed by Governor Cuomo until August 3, 2016. Therefore, it can reasonably be expected that the 2017 Report will show substantially greater amounts bet in New York State than what was wagered at the tail end of 2016. In addition, the 2016 Report shows that in the brief four-plus month period IFS was allowed, gross revenues by the nine registered operators of interactive fantasy sports exceeded $150 million. It would be ludicrous to suggest that the Legislature

could ignore, let alone authorize, gambling activity of that magnitude and still comply with Article I, § 9. It must be remembered that Article I, § 9 not only directs the Legislature to prohibit illegal gambling, it also says that no gambling shall be "***allowed.***" In enacting Chapter 237, the Legislature has not just failed to prohibit illegal gambling, it has affirmatively promoted it. The fact that the State of New York may tax such activity is not an excuse for making it legal. "The end cannot justify the means, and the Legislature, even with the Executive's acquiescence, cannot place itself outside the express mandate of the Constitution." *King v. Cuomo*, 81 N.Y.2d 247, 254 (1993).

POINT VI

Article XIX Of The Constitution Is The Only Route By Which IFS Could Be Authorized In This State

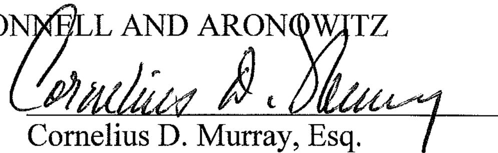
The procedure for amending the State Constitution is set forth in Article XIX. The process takes time, and it can only be accomplished by the People, not the Legislature. Section 1 of Article XIX provides that both houses of two separately elected Legislatures must first approve proposed amendments after which time the People must then vote on whether to accept such amendments at a statewide election. If the amendments are then approved, they take effect the first day of the following year. Alternatively, Section 2 of Article XIX provides that the People or the Legislature may convene a Constitutional Convention with three delegates from each Senatorial district and 15 at-large delegates to be elected by the People. It would then be up to the delegates to propose any constitutional amendments they deem appropriate. Once again, however, those amendments would be adopted only if approved by the voters in a subsequent statewide election and the amendments would not take effect until January 1 of the following year.

Under either of the foregoing scenarios, the process takes time, and there is, of course, no certainty that the amendments would be approved by the public. The process is deliberate; but it was meant to be as the Constitution is the bedrock upon which the whole structure of State Government rests. The Constitution belongs to the People, not to the Legislature, and it is the function of the Judiciary to protect it. Here, the Legislature has sought to short-circuit the process and deprive the People of their exclusive right to amend the Constitution.

CONCLUSION

Plaintiffs' motion for summary judgment should be granted, and this Court should enter a Judgment (1) declaring that Chapter 237 of the Laws of 2016 is unconstitutional because it violates Article I, § 9 of the New York State Constitution, and (2) Defendants should be permanently enjoined from spending taxpayer funds or taking any further steps to implement Chapter 237.

DATED: Albany, New York
January 29, 2018

O'CONNELL AND ARONOWITZ
By: 
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