STATE OF NEW YORK
SUPREME COURT – COUNTY OF ALBANY

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

Plaintiffs,

-against-

Index No.

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

Defendants,

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR REARGUMENT

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Dated: November 27, 2018

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PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted on behalf of Plaintiffs in support of their application for an Order to Show Cause seeking reargument of this Court's Decision, Order and Judgment dated October 26, 2018 and, more specifically, requesting that this Court grant the following relief upon such reargument:

1. Amending said Decision, Order and Judgment by deleting so much thereof as upheld those parts of Chapter 237 of the Laws of 2016 that excluded interactive fantasy sports (IFS) from the definition of "gambling" in Article 225 of the Penal Law;

2. Declaring that the provisions of Chapter 237 purporting to exclude IFS from the definition of "gambling" in Article 225 of the Penal Law are unconstitutional;

3. Enjoining Defendants from taking any further action to implement the provisions of Chapter 237 of the Laws of 2016;

4. Ordering Defendants to direct the current operators of IFS that have been licensed pursuant to Chapter 237 of the Laws of 2016 to immediately cease and desist from engaging in any IFS activity whatsoever; and

5. Granting such other further and different relief as the Court deems just and appropriate, including whatever orders are necessary to prevent any further IFS activity in this State.

ARGUMENT

POINT I

This Court's Decision, Order and Judgment Should Be Amended to Declare Unconstitutional the Provisions of Chapter 237 of the Laws of 2016 That Exclude IFS From the Definition of "Gambling" in Article 225 of the Penal Law

In its Decision dated October 26, 2018, this Court correctly found "beyond a reasonable doubt" that IFS, as defined in Chapter 237, was "gambling" within the meaning of Article I, § 9 of the Constitution and that the Legislature had, therefore, acted in violation of the Constitution in enacting Chapter 237 to the extent that law purported to authorize and regulate IFS within the State of New York. *Id.* at 27.

This Court also held, however, that notwithstanding the fact that the Legislature's stated rationale for finding "that IFS does not constitute gambling as defined in the Penal Law does not support such conclusion," the provisions of Chapter 237 purporting to exclude IFS from the definition of "gambling" in Article 225 of the Penal Law were not unconstitutional. *Id.* at 25-26.

This Court reasoned that while the Legislature could not authorize IFS, the Constitution did not mandate that the Legislature necessarily criminalize it, citing 1994 N.Y. Op. Att'y Gen. 1, 22-23, which noted the "faulty premise" in equating "what is forbidden to criminals with what is allowed to the State." *Id.* at 26. This is where Plaintiffs respectfully submit that the Court erred because, in upholding the exclusion of IFS from the Penal Law definition of gambling, it effectively allowed IFS to continue, a result which flies directly in

the face of the mandate in Article I, § 9, that "no gambling ... pool-selling, book-making, or any other kind of gambling ... shall be authorized ***or allowed*** within this State and the Legislature shall pass appropriate laws ***to prevent*** offenses against any other provision of this section" (emphasis added).

It is true that the Legislature could have "decriminalized" IFS by excluding IFS from the definition of gambling in Chapter 237 but only if it had simultaneously included another provision of law substituting some other prohibition – not necessarily penal in nature - which would have prevented any gambling. It could, for example, have enacted a civil law prohibiting gambling and imposing civil fines preventing any person or entity from operating IFS. Instead, it left a statutory and regulatory vacuum by decriminalizing gambling while not substituting something else in its place to prevent gambling. It did so intentionally, as Article 225 was the only statute on the books prohibiting this type of gambling. By deleting IFS from the definition of "gambling," the Legislature sought not only to decriminalize such activity, it sought ot permit it.

The supreme irony is that as a result of this Court's decision, the current situation is one in which IFS operators, such as FanDuel and DraftKings, continue to operate in New York with total impunity in defiance of this Court's decision that the authorization for such activity was unconstitutional.[1] Moreover, the State is left powerless to do anything about it, as there is no longer any criminal or civil statute to prevent FanDuel and DraftKings from

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[1] *See* Affirmation of Cornelius D. Murray, attached to Order to Show Cause containing exhibits "C" and "D" confirming that FanDuel and DraftKings that they are continuing to conduct IFS operations in New York after this Court's Decision, Order and Judgment.

engaging in IFS because, as this Court noted, the Constitutional prohibition against gambling is not "self-executing" (*Id.* at 25). It therefore falls to the Legislature to pass laws to prevent gambling. Despite the Legislature's affirmative duty to pass laws to prevent gambling, it has taken precisely the opposite course, and it has done so deliberately.

This is precisely why Chapter 237 should be struck down in its entirety, and not just partially, as this Court did. The Legislature did not exclude IFS from the Penal Law definition of "gambling" because it intended to substitute in its place some alternative measure to prevent it. Quite to the contrary, it inserted the exclusion for the obvious and sole purpose of enabling IFS to occur, so that the State could regulate and tax it. This is precisely why the exclusion is unconstitutional because it had the effect - an effect that was the Legislature's deliberate objective – to enable that which is constitutionally prohibited. Lest there be any doubt as to the Legislature's motive, one need only look at the Assembly and Senate sponsors' Memoranda in Support of the legislation which ultimately became Chapter 237. They stated that the purpose of the bill was to "provide for the registration, regulation and taxation of interactive fantasy sports contests in New York State." *See* Murray Affirmation, Exhibits "A" and "B". Obviously, such registration, regulation and taxation could not occur unless the Legislature sought to exclude IFS from the definition of "gambling."

The case law is very clear. A statute must be interpreted not just by looking at its words in the abstract, but rather in context to discern its true meaning by ascertaining the legislative intent. *Friedman v. Connecticut General Life Insurance Company*, 9 N.Y.3d 105, 115 (2007) ("A court must consider a statute as a whole, reading and construing all parts of

an act together to determine legislative intent"). *See* McKinney Cons. Laws of N.Y., Book 1, Statutes, § 97. *See Riley v. County of Broome*, 95 N.Y.2d 455, 463 (2000) ("The primary consideration of courts in interpreting statutes is to ascertain and give effect to the intention of the Legislature"). Absent the removal of IFS from the definition of "gambling" in Article 225 of the Penal Law, the Legislature would have been unable to authorize, regulate and tax it. The purpose of such removal was not just to decriminalize IFS, it was to authorize it, which the Constitution specifically prohibits.

The provisions of Chapter 237 of the Laws of 2016 excluding IFS from the Penal Law definition of "gambling" cannot, therefore, be severed from the rest of Chapter 237. Given that the purpose of such exclusion was to enable and allow IFS, its effect would be to "invalidate the dog while preserving the tail." *See Association of Surrogates, et al. v. State of New York*, 79 N.Y.3d 39, 48 (1992). *See also CWM Chemical Services, LLC v. Roth*, 6 N.Y.3d 410, 423 (2006), quoting Judge Cardozo:

> "The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots" (*People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 [1920]).

See also Boreali v. Axelrod, 71 N.Y.2d 1, 14 (1987).

> It would be pragmatically impossible, as well as jurisprudentially unsound, for us to attempt to identify and excise particular provisions while leaving the remainder ... intact ... since the product of such an effort would be a

> regulatory scheme that neither the Legislature nor the [agency] intended.

In enacting Chapter 237, the Legislature itself never intended for there to be unregulated or unlicensed IFS. *See Racing, Pari-Mutuel Wagering and Breeding Law*, § 1402(a)(1). But as a result of the incongruity in this Court's present decision, that is exactly what is taking place right now.

Accordingly, this Court should grant Plaintiffs' application for reargument, and upon such reargument, it should modify its Decision, Order and Judgment dated October 26, 2018 by deleting so much thereof as declared that the provisions of Chapter 237[2] excluding IFS from the scope of New York State Penal Law definition of "gambling" is constitutional and in its place declare that "Chapter 237 of the Laws of 2016, to the extent that it excludes IFS from the scope of the New York State Penal Law definition of "gambling" at Article 225, violates Article I, § 9 of the New York State Constitution."

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[2] *See, specifically,* Racing, Pari-Mutuel Wagering and Breeding Law §§ 1400(2) and 1402(4).

POINT II

This Court's Decision, Order and Judgment Should Be Amended to Include a Permanent Injunction Enjoining Defendants from Implementing Chapter 237 and Directing Them To Order Those IFS Operators Currently Engaged in Such Activity To Immediately Cease and Desist Operations

In the Prayer For Relief of their Complaint, Plaintiffs specifically requested a permanent injunction enjoining the Defendants from any further implementation of Chapter 237 of the Laws of 2016. Despite the fact that this Court declared that IFS was gambling, and that the Defendants could neither tax nor regulate it, the Court failed to issue an injunction. The result is that both FanDuel and DraftKings (and Plaintiffs believe other "licensed" operators also) continue to operate in a "Wild West" fashion, under the cover of "licenses" that were issued by Defendants pursuant to a statute that has been declared unconstitutional.

Indeed, David Boies, Counsel for DraftKings, has stated that his client will cooperate with the Legislature to come up with a statute that will "permanently restore regulatory oversight" (Murray Affirmation, Exhibit "D"). It is apparent, however, that Mr. Boies fails to comprehend that the essence of this Court's decision is that IFS is "gambling" prohibited by Article I, § 9 of the Constitution and that the Legislature can do nothing to legalize it or "fix" the situation absent a Constitutional amendment.

It is respectfully submitted that the current confusion is caused by the incongruity of this Court's decision which, on the one hand, declared IFS to be unconstitutional gambling,

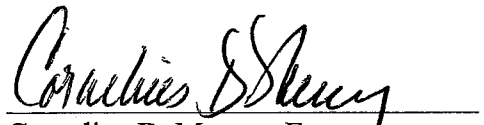
but nevertheless allowed the Legislature to pass a law that effectively allows such activity to continue.

The situation should be rectified by issuing an injunction that directs the Defendants to not only cease implementing Chapter 237, but to rescind the licenses that operators like FanDuel and DraftKings are using to continue their unconstitutional activity. Indeed, the irony is that Chapter 237 itself dictates that no unlicensed IFS activity may be conducted in the State. *See* Racing, Pari-Mutuel Wagering and Breeding Law, § 1402(1)(a).

Finally, modifying the prior Decision, Order and Judgment as requested herein would also enable the Attorney General's Office to pursue DraftKings and FanDuel as it has in the past, before Chapter 237 was enacted, as well as any other illegal operators taking advantage of the current anomaly resulting from the Court's prior decision. It is, after all, the declared public policy of the State that "the mandate of section nine of article one of the state constitution, as amended, should be carried out ... to prevent commercialized gambling ...." General Municipal Law, § 185.

DATED: November 27, 2018
Albany, New York

O'CONNELL AND ARONOWITZ
By:



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