New York Supreme Court
Appellate Division – Third Department

Appellate Case No.: 528026

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

Plaintiffs-Respondents-Cross-Appellants,

– v. –

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

Defendants-Appellants-Respondents.

NOTICE OF MOTION ON BEHALF OF FANDUEL, INC. AND DRAFTKINGS, INC. FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

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Albany County Clerk's Index No. 5861/16

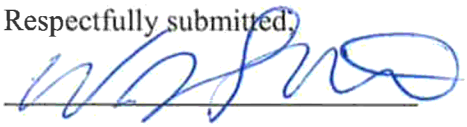
PLEASE TAKE NOTICE that upon the annexed Affirmation of W. David Sarratt and the accompanying brief, dated April 30, 2019, FanDuel Inc., by its attorneys Debevoise & Plimpton LLP and ZwillGen PLLC, and DraftKings, Inc, by its attorneys Boies, Schiller, & Flexner LLP, will move this Court, at the Supreme Court, Appellate Division, Third Department, Robert Abrams Building for Law and Justice, State Street, Albany, New York 12223, on May 20, 2019 at 10:00 a.m. or as soon thereafter as counsel may be heard, for an order permitting the proposed *Amici* to serve and file a brief as *Amici Curiae*, and for leave for W. David Sarratt and Joshua Schiller to participate in argument for ten minutes each.

PLEASE TAKE NOTICE that pursuant to CPLR 2214(b), answering papers, if any, must be served upon the undersigned at least seven (7) days before the return date of this motion.

This motion is filed pursuant to CPLR 2214 and Rule 1250.4(f) of the Practice Rules of the Appellate Division and relates to the above-captioned appeal filed by the Defendants-Appellants-Respondents Hon. Andrew Cuomo, as Governor of the State of New York, and the New York State Gaming Commission, and should be heard by the same motions panel assigned to hear Defendants-Appellants-Respondents' motion.

Dated: New York, New York
April 30, 2019

Respectfully submitted,



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Defendants-Appellants-Respondents.

AFFIRMATION OF W. DAVID SARRATT IN SUPPORT OF MOTION ON BEHALF OF FANDUEL, INC. AND DRAFTKINGS, INC. FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

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W. DAVID SARRATT, an attorney duly admitted to practice before the courts of the State of New York, affirms the following to be true under penalty of perjury pursuant to CPLR § 2106:

1. I am a member in good standing of the Bar of the State of New York and a partner in the law firm of Debevoise & Plimpton LLP, attorneys for one of the proposed *amici*, FanDuel, Inc. ("FanDuel"). This affirmation is made in support of FanDuel, Inc. and DraftKings, Inc.'s Motion for Leave to File Brief as *Amici Curiae* in Support of Defendants-Appellants-Respondents. FanDuel has a demonstrated interest in the issues in this matter and can be of special assistance to the Court. A copy of the brief is attached hereto as Exhibit A.
2. FanDuel is one of the country's leading providers of interactive and daily fantasy sports contests, which are fee-based or free competitions in which contestants match their "fantasy" teams against other competitors', using their sports knowledge and skill to select real-world athletes from multiple teams in a sport to create "fantasy" lineups or rosters. Participants compete for pre-announced, guaranteed prizes.
3. In accordance with New York's statutory scheme, FanDuel maintains a license to operate legally valid, skill-based fantasy sports contests.
4. This appeal is of great concern to FanDuel because it addresses the question of whether the gambling prohibition in Article I, § 9 of the New York State Constitution is violated by state legislation authorizing and

providing for the regulation of interactive fantasy sports. Indeed, this appeal is vital to FanDuel's business in New York.

5. In the attached brief, FanDuel provides the Court with a review of the longstanding common law jurisprudence, in New York and elsewhere, illustrating that fantasy sports contests, as bona fide contests for a prize in which skill is the dominant factor, have long been distinguished from gambling, and that the New York legislature's authorization of fantasy sports contests is reasonable, deserving of deference, and should be upheld as a valid and constitutional exercise of authority.
6. Defendants-Appellants-Respondents' and Plaintiffs-Respondents-Cross-Appellants' counsel have been notified of this motion.
7. The notice of appeal and notice of cross-appeal invoking this Court's jurisdiction are attached hereto as Exhibits B and C, respectively.
8. The order appealed from is attached hereto as Exhibit D.

WHEREFORE, I respectfully request that the Court grant the motion to participate in this appeal as *Amici Curiae*.

Dated: New York, New York
April 30, 2019

Respectfully submitted,

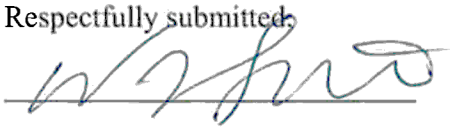

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EXHIBIT A

To be Argued by:
W. DAVID SARRATT
(Time Requested: 10 Minutes)
JOSHUA SCHILLER
(Time Requested: 10 Minutes)

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INTEREST OF AMICI CURIAE

FanDuel, Inc. ("FanDuel") and DraftKings, Inc. ("DraftKings") (together, "Amici") are the country's leading fantasy sports contest providers, with hundreds of thousands of New York customers. In accordance with New York's statutory scheme, FanDuel and DraftKings maintain licenses to operate legally valid, skill-based fantasy sports contests. Such contests, in which skill is the dominating element, have long been distinguished from gambling, a fact the legislature expressly recognized in explicitly authorizing "interactive fantasy sports" contests in Chapter 237. This appeal is, therefore, vital to Amici's business here.

Amici's brief provides the Court with a review of the longstanding common law jurisprudence, in New York and elsewhere, illustrating that fantasy sports contests, as bona fide contests for a prize in which skill is the dominant factor, have long been considered distinct from illegal gambling, despite that – as in any skill-based contest, like golf or a spelling bee – some element of chance remains. The New York legislature's authorization of interactive fantasy sport contests is entirely reasonable, deserving of deference, and should be upheld as a valid and constitutional exercise of its authority.

PRELIMINARY STATEMENT

In adopting Chapter 237, the legislature properly applied the longstanding "dominating element" test, used for over 100 years and still used today by New

York and courts across the country to reasonably – and correctly – conclude that such contests are bona fide contests of skill and not gambling. Chapter 237's legislative history, New York judicial precedent (both old and recent), and numerous sister states and jurisdictions all make clear that this "dominating element" standard remains the leading test to determine if an activity is gambling. Under this test, a contest in which skill is the dominant factor, even though some element of chance necessarily remains, is not considered gambling, but rather a bona fide contest for a prize. As Amici show here, New York's continued application of this test was not altered by the current Penal Law provision that refers to a "material element" of chance; to the contrary, the tests are substantively equivalent. Even if the current version of the Penal Law were more restrictive, that would not prevent the legislature at any point from reverting to the leading common law test. In concluding that skill is the dominant factor in fantasy sports contests, the legislature properly carried out its responsibility to determine what types of contests are "gambling" for purposes of the New York Constitution; the legislature's decision was thus entirely reasonable and must be upheld.

BACKGROUND

I. Daily Fantasy Sports Contests Are Lawful Competitions in Which Contestants Compete Against Each Other.

Fantasy sports competitions, which millions of sports fans have played throughout the United States for decades, are fee-based or free contests in which contestants match their fantasy teams against other competitors', using their sports knowledge and skill to select real-world athletes from multiple teams in a sport to create "fantasy" lineups or rosters.[1] Record on Appeal ("R.") 727-728, 730-731, 739-740. Daily fantasy sports ("DFS") contests are one variant of fantasy sports competitions in which the outcome of the contest is not decided over the course of a season, but (often) within the same day. R. 729, 741. When creating a lineup, DFS contestants extensively evaluate information, including past performance, injury history, projected game matchups, coaching philosophy, and many other factors. R. 441, 728, 757. A winner of a DFS contest is decided by which fantasy

[1] Fantasy sports competitions have become increasingly popular in recent years because of the Internet and the ability of competitors to enter contests on their mobile devices. R. 739. Indeed, the increased acceptability of fantasy sports competitions – and DFS contests in particular – is illustrated by a recent decision of the U.S. Judicial Panel on Multidistrict Litigation (the "JPML"). In considering whether to consolidate certain suits involving FanDuel and DraftKings, the JPML had to invoke the rule of necessity in order to assure a quorum of the Panel could decide the matter because "certain Panel members . . . could be members of the putative classes" – that is, because those federal judges were players on FanDuel or DraftKings. *In re Daily Fantasy Sports Mktg. & Sales Practices Litig.*, MDL No. 2677, slip op. at 1 n.* (J.P.M.L. Feb. 4, 2016). Accordingly, a number of Panel members "renounced their participation in these classes and . . . participated in th[e] decision." *Id.*

team, relative to all other fantasy teams in that contest, accumulated the highest total points of any single fantasy team. R. 441, 728, 740.

The outcome of a DFS contest depends on a contestant's skill in constructing a roster compared to other contestants: all contestants start on a level playing field, in the same position, and have complete control over their selected lineup, with resource constraints known as a "salary cap." R. 441, 728-730, 740-741. Unlike a casino "house," fantasy sports operators cannot win contests and have no interest in who wins the contests; rather, prizes are announced in advance and guaranteed to the entrants. R. 441. The size of the prize in fantasy sports contests does not change based on any "odds" determined by the number of entrants or their selections. R. 441; *see* Racing, Pari-Mutuel Wagering and Breeding Law § 1404(1)(n).

II. Daily Fantasy Sports Contests Are Competitions Between Two or More Contestants Distinguished from Bets or Wagers on Someone Else's Contest.

Unlike sports bettors, DFS contestants actively participate in, and, through their skill, directly influence, separate contests of their own that are merely parallel to sporting events. *See* R. 1184-1205 (empirical study of fantasy sports outcomes demonstrating that contestants directly influence outcome of separate contest, based on roster-selection acumen). The outcome of a DFS contest is determined by a contestant's ability to assemble a higher scoring fantasy roster than other

contestants': the winner is determined by points awarded based on an aggregation of game statistics that measure how well, comparatively, the contestant selected the roster of real-world athletes. R. 441, 728, 740. The outcome of a real-world athletic contest (*e.g.*, which team wins or loses) or even a series of outcomes, does not determine who wins any licensed fantasy sports contest in New York. R. 441, 728, 740.

III. Under Its Constitutional Authority, the New York Legislature Authorized Interactive Fantasy Sports Contests and Provided for Their Regulation.

In relevant part, Article I, section 9 of the New York Constitution provides:

> [N]o lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, . . . except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, and except casino gambling at no more than seven facilities as authorized and prescribed by the legislature 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.[2]

This provision affords the legislature great discretionary authority and responsibility to enact laws giving it force, including the scope of permissible

[2] N.Y. Const., art. 1, § 9.

activities. Alone, Article I, section 9 is neither self-defining nor self-executing, a characteristic that New York courts have long recognized.[3]

Consistent with this constitutional authority, in 2016, the legislature expressly authorized "interactive fantasy sports" contests and regulated them by enacting Chapter 237. In doing so, the legislature recognized a longstanding common law distinction between illegal gambling on contests of chance and lawful, bona fide contests for a prize in which skill is the dominating element, squarely and correctly placing fantasy sports contests in the latter category. *See People ex rel. Lawrence v. Fallon*, 152 N.Y. 12 (1897); *see also* R. 20.

Plaintiffs, a group of New York taxpayers with alleged gambling disorders themselves or relatives with such, sued to challenge Chapter 237, arguing that it violates the anti-gambling provision of Article 1, section 9. *See White v. Cuomo*, 87 N.Y.S.3d 805 (Sup. Ct. Albany Cnty. Oct. 29, 2018). The Supreme Court held that the legislature violated the Constitution in authorizing and regulating interactive fantasy sports contests through Chapter 237 because they constitute "gambling" prohibited by Article 1, section 9. *Id.* Yet simultaneously, the

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[3] *See, e.g.*, *People ex rel. Sturgis v. Fallon*, 152 N.Y. 1, 11 (1897) (finding it "manifest" that Article I, section 9 "was not intended to be self-executing" and that the provision "expressly delegates to the legislature [implementing] *authority*, and requires it, to enact such laws as it shall deem appropriate to carry it into execution") (emphasis added); *People v. Wilkerson*, 73 Misc. 2d 895, 901 (Monroe Cnty. Ct. 1973) ("[S]ince the Constitution commits to the Legislature the duty of preventing gambling, the measures to be adopted in furtherance of that end also rest in the legislative discretion.").

Supreme Court upheld Chapter 237's elimination of criminal penalties for operating licensed interactive fantasy sports, concluding that the determination of whether to criminalize such conduct was constitutionally delegated to the legislature alone. *Id.*

The State appealed the Supreme Court's first ruling. Amici join to emphasize a basic, but crucial, point: the common law test to distinguish illegal gambling from lawful contests of skill has long been whether skill is the *dominating element* in determining the outcome of the contest. It is beyond dispute on appeal that Amici's licensed fantasy sports contests meet that test, as the legislature found and the Supreme Court below accepted. The Constitution does not hamstring the legislature from following this longstanding common law rule, which was devised by the Court of Appeals and has been applied for decades in New York. Because the legislature passed Chapter 237 by applying this common law standard to fantasy sports contests specifically, the Supreme Court's first ruling regarding the constitutionality of the State legislation authorizing and regulating interactive fantasy sports contests must be reversed.

ARGUMENT

In finding that interactive fantasy sports are contests of skill and not gambling, and expressly authorizing such contests, the legislature exercised its constitutional authority to clarify what particular activities are considered gambling

or, as here, are not considered gambling. In doing so, the legislature applied the longstanding and still valid common law "dominating element" test, first articulated by the New York Court of Appeals decades ago to determine whether a contest is one of chance or skill. *See* N.Y. Const., art. 1, § 9 (expressly authorizing the legislature to "pass appropriate laws to prevent [gambling] offenses"); *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 170-71 (1904) (articulating "dominating element" test).

I. New York Adheres to the Longstanding Common Law Rule that Bona Fide Contests of Skill for Cash Prizes, Such as Interactive Fantasy Sports, Do Not Constitute Gambling.

Courts across the country, including in New York, have consistently held that paying an entry fee to match skills against others in a valid contest for a preannounced prize does not constitute gambling. Over a century ago, the New York Court of Appeals expressly endorsed the legality of such contests involving entry fees and prizes in *Fallon*, upholding a club in which horse owners paid an entry fee to race their horses against each other for a preannounced, fixed purse payable from association assets that included the entry fees, with the association having no stake in the race's outcome. *Fallon*, 152 N.Y. at 16-18, 20. In rejecting the State's contention that this contest was an illegal "wager" or "bet," the court explained the absurd result that would flow therefrom: "the farmer . . . who attends his town, county or state fair, and exhibits [his] products . . . would become

a participant in a crime, and the officers offering such premium would become guilty of gambling." *Id.* at 19. The court explained that, just as in such instances, when parties compete for a prize and pay an entrance fee "for the privilege of joining in the contest" that then forms part of the prize fund, similarly, "the offering of premiums or prizes to be awarded to the successful horses in a race is not in any such sense a contract or undertaking in the nature of a bet or wager as to constitute gambling." *Id.* at 19-20.

Numerous courts have followed this foundational decision. In *State of Arizona v. Am. Holiday Ass'n, Inc.*, 151 Ariz. 312, 727 P.2d 807 (1986) (en banc), for example, the Arizona Supreme Court relied on *Fallon* in holding that a company that charged a fee to enter a word game, and awarded advertised prizes to the winning entries, was not taking bets or wagers. As the court explained,

> [A]n entrance fee does not suddenly become a bet if a prize is awarded. If the combination of an entry fee and a prize equals gambling, then golf tournaments, bridge tournaments, local and state rodeos or fair contests and even literary or essay competitions, are all illegal gambling[.]

Id. at 314, 727 P.2d at 809 (citing *Fallon*, 152 N.Y. at 19). Similarly, the Nevada Supreme Court held in *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85 (1961), that the offer of a $5,000 prize to any golfer who scored a hole-in-one after paying a 50¢ entry fee was not a gambling contract, observing (on similar reasoning to *Fallon*) that the required entry fee "does not convert the contest into a

wager," and found sufficient evidence on the record to sustain the lower court's finding that the contest was a "feat of skill." *Id.* at 29, 359 P.2d at 87 (citation omitted); *accord Faircloth v. Central Fla. Fair, Inc.*, 202 So. 2d 608, 609-10 (Fla. 4th Dist. Ct. App. 1967) (various games involving skill played at fair did not constitute gambling); *Toomey v. Penwell*, 76 Mont. 166, 173, 245 P. 943, 945 (1926) (horse racing stakes event with $2 entry fee and $375 purse was not gambling).

The New York legislature has previously determined that contests for prizes over cumulative predictions relating to a broad series of events can be outside the bounds of illegal gambling. For example, New York law provides that handicapping tournaments, in which participants pay entry fees and match their skills at predicting the outcome of multiple identified horse races against others, with prizes to the winners drawn from the entry fees, are lawful, subject to certain regulatory requirements and "shall be considered contest[s] of skill and shall not be considered gambling." N.Y. Racing, Pari-Mutuel Wagering & Breeding Law § 906.

Like the handicapping tournaments recognized by the legislature as contests of skill and not gambling, DFS contests require entrants to pit their roster-picking skills against each other in a contest that does not depend on the outcome of any real-life race or athletic event. And just as the New York Court of Appeals held in

Fallon, and as numerous courts across the country have subsequently held, the fact that fantasy sports contestants pay an entry fee does not mean they are engaging in betting, wagering, or gambling. *Fallon*, 152 N.Y. at 19-20. Fantasy sports players are thus contestants in legal contests similar to golf tournaments, fishing contests, beauty pageants, dog shows, county fair competitions and innumerable other types of contests, all of which involve entry fees, matching of skills among contestants, and pre-identified prizes for winners.

Indeed, the only court to have considered the issue before the 2015 litigation brought by the New York Attorney General agreed.[4] In 2007, a New Jersey federal court dismissed a complaint against fantasy sports operators, holding that, "as a matter of law," the entry fees for the fantasy sports leagues at issue were not

[4] Even then, it should be noted that the Supreme Court in *The People of the State of New York v. Fanduel, Inc.*, 2015 WL 8490461 (Sup. Ct. N.Y. County Dec. 11, 2015), only issued a preliminary injunction, based on pre-discovery briefing, which was immediately stayed pending appeal before the matter was ultimately resolved outside of court. Moreover, consistent with the understanding that entry fees for fantasy sports contests do not constitute bets or wagers, the court in *Langone v. Kaiser*, 2013 WL 5567587 (N.D. Ill. Oct. 9, 2013) dismissed a plaintiff's loss recovery action against FanDuel where the enabling statute required loss "by gambling," finding that FanDuel's taking of commissions from entry fees paid by participants in its fantasy sports games did not make it a "winner" within the meaning of the statute. *Id*. at *1, 6 ("FanDuel risks nothing when it takes entry fees . . . The prize that FanDuel is obligated to pay is predetermined . . . FanDuel does not place any 'wagers' with particular participants by which it could lose money based on the happening of a future event (i.e., the performance of certain athletes), but merely provides a forum for the participants to engage each other in fantasy sports games.").

bets or wagers.[5] *Humphrey v. Viacom, Inc.*, No. 06-2768 DMC, 2007 WL 1797648, at *9 (D.N.J. June 20, 2007). As the court explained:

> Courts have distinguished between *bona fide* entry fees and bets or wagers, holding that entry fees do not constitute bets or wagers where they are paid unconditionally for the privilege of participating in a contest, and the prize is for an amount certain that is guaranteed to be won by one of the contestants (but not the entity offering the prize).

Id. at *8.[6] Importantly, the New Jersey *qui tam* statute defined gambling in terms indistinguishable, for the purposes of this dispute, from New York's Penal Law § 225.00.[7] *See* N.J. Stat. Ann § 2A:40-1. The court also recognized the fantasy sports contest as separate from real-world events, observing that "[t]he success of a fantasy sports team depends on the participants' skill in selecting players for his or her team[.]" *Humphrey*, 2007 WL 1797648, at *2.

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[5] The court identified three key characteristics of fantasy sports: (1) "participants pay a set fee for each team they enter in a fantasy sports league;" (2) "prizes are guaranteed to be awarded at the end of the [contest], and the amount of the prize does not depend on the number of entrants;" and (3) the contest operators are "neutral parties in the fantasy sports games – they do not compete for the prizes and are indifferent as to who wins the prizes." *Humphrey v. Viacom, Inc.*, No. 06-2768 DMC, 2007 WL 1797648, at *7 (D.N.J. June 20, 2007).

[6] The court concluded that it would be "patently absurd" to adopt a definition of wagering that might mean that "participants and sponsors" of numerous permissible contests with entry fees and winning prizes that do not constitute gambling, such as "track meets, spelling bees, beauty contests and the like . . . could all be subject to criminal liability."[6] *Humphrey*, 2007 WL 1797648, at *7. Thus, *Humphrey* correctly found fantasy sports directly analogous to these traditional forms of contests and distinct from real-world sporting events.

[7] *Compare* N.J. Stat. Ann. § 2A:40-1 (defining gambling as "[a]ll wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event") *with* N.Y. Penal Law § 225.00(2) ("A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.").

The United States Court of Appeals for the Third Circuit later endorsed this analysis, articulating a "legal difference between paying fees to participate in fantasy leagues and single-game wagering as contemplated by the [New Jersey] Sports Wagering Law." *NCAA v. Governor of N.J.*, 730 F.3d 208, 223 n.4 (3d Cir. 2013), *abrogated on other grounds by Murphy v. NCAA*, 138 S. Ct. 1461 (2018). In so concluding, it described *Humphrey* as broadly "holding that fantasy leagues that require an entry fee are not subject to anti-betting and wagering laws," and *Las Vegas Hacienda* as analogously "holding that a 'hole-in-one' contest that required an entry fee was a prize contest, not a wager." *Id.*

Moreover, Congress recognized the same when it declared that fantasy sports contests are not considered gambling under the Unlawful Internet Gambling Enforcement Act ("UIGEA"), 31 U.S.C. § 5362(1)(E)(ix) (2006). Congress first defined "bet or wager" – the basis for the substantive prohibitions and penalties under the statute – in terms strikingly similar to the New York statute at issue here: "staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome." *Id*. § 5362(1)(A). Congress then specifically clarified that fantasy sports contests involving an entry fee and a prize do not constitute unlawful gambling so long as three criteria are satisfied, similar to those

under Chapter 237: (1) prizes are established and announced in advance; (2) outcomes reflect the "relative knowledge and skill of the participants;" and (3) the result is not determined by the outcome for a real-world team or teams or an athlete's performance in a single real-world sporting event. *Id.* § 5362(1)(E)(ix). Congress thus recognized that fantasy sports contests should be distinguished from sports betting and other forms of gambling.

II. Contests for a Prize in Which Skill Is the Dominant Factor Have Long Been Distinguished from Sports Gambling in New York and Across the Country.

Courts in New York and throughout the country have long recognized that the correct test for whether a game is one of chance or of skill is to ask which of them "is the dominating element that determines the result of the game." *Lavin*, 179 N.Y. at 170-71. The test became the principal one used throughout the country and remains the majority common law test today. *See* Bennett Liebman, *Chance v. Skill in New York's Law of Gambling: Has the Game Changed?*, 13 GAMING L. REV. & ECON. 461, 461-62 (2009).

A. Applying the Majority Common Law Test, a Contest Is Not Gambling When Skill, Rather Than Chance, Is the Dominating Element.

Over a century ago, the New York Court of Appeals articulated this "dominating element" test in its landmark *Lavin* decision. There, a company placed an advertisement in a newspaper that asked potential contestants to guess

the number of cigars on which the country would collect taxes in a certain month; provided the "principal data requisite for making an estimate;" and offered winners a certain sum of money and cigars. *Lavin*, 179 N.Y. at 165-67, 174. The court announced that "[t]he test of the character of a game is not whether it contains an element of chance or an element of skill, but which is the dominating element." *Id.* at 170-71.

Applying this test, the court determined that the game was dominated by chance: the company's provision of the same basic statistics to all participants was done "to eliminate as far as practicable the elements of knowledge and judgment" and made "the contest as fair a gamble for the . . . customers as possible." *Id.* at 174. Thus, the newspaper distribution was "controlled by chance within the meaning of the statute, and [] therefore . . . illegal." *Id.* By contrast, of course, contests in which skill is the dominating element in determining the outcome have long been considered lawful – indeed a celebrated form of competition in New York. *See, e.g.*, *Amusement Enters. Inc. v. Fielding*, 189 Misc. 625, 628 (Sup. Ct. Kings Cnty. 1946), *modified on other grounds*, 272 A.D. 917 (2d Dep't 1947) (alley ball, a game similar to skee ball; also listing basketball, tennis, billiards, bowling, and golf); *Lavin*, 179 N.Y. at 70 (chess, checkers, billiards, and bowling).

B. New York Has Continued to Adhere to the Dominating Element Test and Does So Today.

Since its articulation in *Lavin*, courts in New York and throughout the country have consistently applied the "dominating element" test to determine whether a contest or game constitutes gambling. *See* Liebman, 13 GAMING L. REV. & ECON. at 462 n.16 (collecting cases). For example, in *People v. Cohen*, 160 Misc. 10 (Magis. Ct. Queens Borough 1936), the court cited the *Lavin* test in concluding that an "electric eye" slot machine that required contestants to aim a pistol at a target was a game of skill and not gambling. The court explained that, to succeed, contestants must "possess" or "develop[] by reason of practice" "[s]kill in proper timing, as well as proper aiming." *Id.* at 12; *see also S. & F. Corp. v. Wasmer*, 91 N.Y.S.2d 132, 137 (N.Y. Sup. Ct. Onondaga Cnty. 1949) (issuing temporary injunction against interference with pinball machines until trial court considered "whether or not skill or chance predominates in their use"). In the more than six decades since *Lavin* was decided in 1904 until at least the revisions of the Penal Law in 1965, the "dominating element" test was consistently applied in New York to distinguish lawful contests from illegal gambling – all consistent with Article I, section 9.

Here we part ways with the State's view of the Penal Law amendments, but in a way important for the Court to understand in assessing Plaintiff's flawed arguments. In the State's view, the 1965 revisions to what is now Penal Law

§ 225.00 abandoned the "dominating element" test for a purportedly stricter test, outlawing any contest with a "material element" of chance. State Br. at 31. But there is a strong (we believe better) argument that the *Lavin* test was not substantively altered by the overall revisions to the Penal Law in 1965, including Penal Law § 225.00. That provision defines gambling to include "stak[ing] or risk[ing] something of value upon the outcome of a contest of chance," and defines such contest as any whose outcome "depends in a *material degree* upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." Penal Law § 225.00(1)-(2) (emphasis added). For two reasons, however, the "material element" statutory test should be understood as substantively equivalent to the "dominating element" test.

First, since the adoption of Penal Law § 225.00, numerous New York cases have continued to cite and follow *Lavin* – sometimes explicitly invoking its "dominating element" test and sometimes implicitly applying it – as providing the test for whether an activity constitutes gambling.[8] For example, in 2009, the

[8] *See, e.g.*, *Dalton v. Pataki*, 11 A.D.3d 62, 82 n.5 (3d Dep't 2004), *modified on other grounds*, 5 N.Y.3d 243 (2005) (citing *Lavin* for basic meaning of "game of chance" in New York law); *People v. Stiffel*, 61 Misc. 2d 1100 (App. Term 2d Dep't 1969) (citing *Lavin* to hold that billiards is not gambling); *People v. Davidson*, 181 Misc. 2d 999, 1001 (Sup. Ct. Monroe Cnty. 1999), *rev'd on other grounds*, 291 A.D.2d 810 (4th Dep't), *appeal dismissed*, 98 N.Y.2d 738 (2002) (citing *Lavin* to hold that playing dice for money is gambling); *People v. Melton*, 152 Misc. 2d 649, 651 (Sup. Ct. Monroe Cnty. 1991) (same); *People v. Hawkins*, 1 Misc. 3d 905(A), 2003 N.Y. Slip Op. 51516(U), at *2 (Crim. Ct. N.Y. Cnty. 2003) (same); *Valentin v. El Diario–La Prensa*, 103 Misc. 2d 875, 878 (Civ. Ct. *(continued)*

decision in *People v. Li Ai Hua*, 24 Misc. 3d 1142 (Crim. Ct. Queens Cnty. 2009), quoted the *Lavin* test as providing the meaning of the statutory phrase "material degree":

> While some games may involve both an element of skill and chance, if the outcome depends in a *material degree* upon an element of chance, the game will be deemed a contest of chance. The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the *dominating element* that determines the result of the game[.]

24 Misc. 3d at 1145 (emphasis added; quotation marks and citations omitted).

Similarly, the court in *Matter of Plato's Cave Corp. v. State Liquor Authority*, 115 A.D.2d 426 (1st Dep't 1985), applied the statutory "material degree" test by looking to whether chance or skill was the dominant element. The court upheld the State Liquor Authority's finding that a video poker game was gambling under the "material degree" test of Penal Law § 225.00 because "the outcome depends *in the largest degree* upon an element of chance." *Id.* at 428 (emphasis added). On that basis, the court distinguished another post-1965 case that had found video games were not gambling where the outcome depended "*primarily* on physical skills." *Id.* at 428 (emphasis added) (citing *WNEK Vending & Amusements Co. v. City of Buffalo*, 107 Misc. 2d 353 (Sup. Ct. Erie Cnty. 1980)).

Bronx Cnty. 1980) (citing *Lavin* and applying its "dominating factor" test to conclude that "voting contest" sponsored by newspaper was gambling).

Likewise, in *People v. Hunt*, 162 Misc. 2d 70 (Crim. Ct. N.Y. Cnty. 1994), in applying the statutory "material degree" test, the court implicitly applied the *Lavin* test and looked to whether skill outweighed chance in three-card monte, if honestly played. It quoted the statutory test, analyzed the State's allegations, and concluded that the game was not gambling because "skill *rather than chance* is the material component" of the game. *Id.* at 72 (emphasis added).

Second, legislative history confirms that Penal Law § 225.00 was not intended to overrule or alter *Lavin*'s "dominant element" test. Notably, the Court of Appeals has held specifically that the 1965 Penal Law revisions, which were based on a proposal by a temporary legislative commission, the Bartlett Commission, should not be interpreted to make fundamental changes in existing law unless the Commission specifically identified those changes in its working papers:

> The Bartlett Commission comprehensively studied the entire body of law and was unquestionably aware of [existing Court of Appeals precedents]. Surely their work would have reflected such a fundamental change had it been intended.

People v. Collier, 72 N.Y.2d 298, 302 n.1 (1988); *cf. Hechter v. New York Life Ins. Co.*, 46 N.Y.2d 34, 39 ("[I]t is a general rule of statutory construction that a clear and specific legislative intent is required to override the common law.").

Aside from providing a definition of gambling, the Commission showed no such intent to change the substantive gambling law. To the contrary, it stated that it was focused on streamlining and unifying the provisions to "simplify the framing

and lodging of charges in gambling cases." *Commission Staff Notes on the Proposed New York Penal Law*, in TEMP. COMM'N ON REVISION OF PENAL LAW & CRIM. CODE, THIRD INTERIM REPORT, at 382 (1964). Consistent with this goal, the Commission emphasized that it was making "few actual changes of substance" but "considerable revision with respect to form." *Id*. at 381. The Commission's report does not even mention the "material degree" language it inserted in the definition of "gambling." *See Collier*, 72 N.Y.2d at 303 n.1. Thus, although some commentators have speculated that the "material degree" standard reflected a softening of the test for identifying a "contest of chance," not a single case since Section 225.00's enactment (other than the motion court's decision in the litigation brought by the Attorney General[9] and the order on appeal here) has applied that statutory test to reach a different outcome than would have been reached under the "dominating element" test.[10]

Both the legislative history and post-1965 case law thus clarify that the *Lavin* test and the current statutory test are synonymous. This point matters here,

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9 *See Fanduel, Inc.*, 2015 WL 8490461.

10 *People v. Jun Feng*, 34 Misc. 3d 1025(A), 2012 N.Y. Slip Op. 50004(U) (Crim. Ct. Kings Cnty. 2012), which quoted commentary opining that chance need not be the dominating element for a game to constitute a game of chance, is not to the contrary, because the court did not actually apply that test. Instead, it held that the operators of a mahjong parlor, by using a "house container" to collect a $1 cut of every hand that won $15 or more, were betting on how many hands would be won for at least $15, and therefore – unlike the mahjong players themselves – were gambling under the "future contingent event" prong of the statutory definition, regardless of whether the underlying game was one of skill or chance. *Id.* at *5-6 & *4 n.1.

of course, because even the Court below accepted that fantasy sports contests licensed under Chapter 237 readily satisfy the dominating element test. R. 20.

C. The Dominating Element Test Remains the Majority Rule Across the Country.

Following New York's lead, numerous states across the country have adhered to and continue to apply *Lavin*'s "dominating element" test. Indeed, "[m]ost jurisdictions apply the 'dominant factor' test." *State v. Dahlk*, 111 Wis. 2d 287, 296 (Ct. App. 1983); *see also* Liebman, 13 GAMING L. REV. & ECON., at 461-62 ("The dominating element test [of *Lavin*] became the basic law in this country on whether a contest was a lottery or not . . . [and] similarly became the principal test in the nation for determining whether a game was a gambling game . . . [and] is still the basic law in most states.") (citations omitted).

For example, in determining whether an investment scheme contained the element of chance, one of three necessary elements of a lottery, the Supreme Court of Rhode Island clarified:

> [W]e adopt, as have most jurisdictions which have faced the issue, the 'dominant factor' doctrine, under which a scheme constitutes a lottery when an element of chance dominates the distribution of prizes, even though such a distribution is affected to some degree by the exercise of skill or judgment.

Roberts v. Commc'ns Inv. Club of Woonsocket, 431 A.2d 1206, 1211 (R.I. 1981). In so concluding, the court looked to numerous other states that utilized the doctrine. *See id.* at 1211 n.5 (citing *Morrow v. State*, 511 P.2d 127 (Alaska 1973);

Finster v. Keller, 18 Cal.App.3d 836, 96 Cal.Rptr. 241 (1971); *State v. Steever*, 103 N.J. Super. 149, 246 A.2d 743 (1968); *Commonwealth v. Laniewski*, 173 Pa. Super. 245, 98 A.2d 215 (1953); *Seattle Times Co. v. Tielsch*, 80 Wash.2d 502, 495 P.2d 1366 (1972)). The court thus held that it was "clear that the element of chance permeated" the scheme, despite the fact that it "may have involved some degree of skill or judgment." *Id.* at 1211. Over thirty years later, the same court reiterated the state's continued adherence to the test. *See Narragansett Indian Tribe v. State*, 81 A.3d 1106, 1109 n.5 (R.I. 2014).

Similarly, the Alaska Supreme Court has noted that "the sounder approach" to determine whether a contest is one of chance or skill "is to determine the character of the scheme under the dominant factor rule," which "[m]ost jurisdictions favor," *Morrow*, 511 P.2d at 129 & n.5 (noting that test depends on "which element predominates – skill or chance."). Thus, when skill predominates the determination of the outcome of a contest, the activity is not considered a form of gambling under this leading common law test.

III. The Legislature Properly Exercised Its Constitutional Authority in Permitting Contests in Which Skill Is the Dominant Factor.

As set forth above, following the Court of Appeals' foundational decision in *Lavin*, the majority common law "dominating element" test prevailed in New York for at least six decades (and, in our view, remains the test today). Under this test, as the motion court correctly accepted, R. 20, licensed fantasy sports contests are

not considered to be a form of gambling, but rather bona fide contests of skill for a prize.

Even if the Bartlett Commission revisions in 1965 made the current statutory test under the Penal Law more restrictive, such a change did not (and could not) reduce the legislature's constitutional authority. The legislature could at any time decide to clarify that *Lavin* remains the operative test under the Penal Law, and that New York, like so many others that have followed it,[11] remains a "dominant factor" state. In doing so, the legislature would merely clarify that New York law is in line with the longstanding majority rule in the United States for distinguishing bona fide skill contests from illegal gambling.

Yet that is precisely what the legislature did in enacting Chapter 237, as to the specific activity of fantasy sports contests. It made a factual finding that skill is the dominant factor in fantasy sports contests, and accordingly, declared that such contests are authorized to take place in New York when appropriately licensed.

There can be no doubt this was within the legislature's authority. The "dominating element" test was not unconstitutional when chosen by the Court of Appeals, only ten years after the constitutional prohibition on gambling was established in 1894, as the proper basis to distinguish illegal gambling from permissible contests of skill. It was not unconstitutional for New York courts to

[11] *See* Section II.C, *supra*.

adhere to that test consistently for over six decades, at least until 1965 and likely up to now. Unless *Lavin* was itself an unconstitutional decision – an argument Plaintiffs cannot plausibly maintain – there is no basis to contend that the legislature exceeded its authority by enacting Chapter 237. At a minimum, Article I, section 9 commits to the legislature the discretion to authorize and regulate contests in which skill is the dominant factor, as it did here with interactive fantasy sports.

For example, if an organizer of a spelling bee, a fishing contest, or a golf tournament were sued by a plaintiff in New York, on the grounds that the combination of the tournament entry fee and the award of cash prizes to the winner constitutes illegal gambling, it would be well within the power of the legislature to make clear that spelling, fishing, and golfing are all skill-based activities and outside the scope of the gambling statute – despite the fact that all of these contests involve elements of chance. No one would challenge that decision on constitutional grounds and no referendum would be needed. Such a law would be a common-sense application of the dominating element test. So too here. It is within the legislature's power to recognize and apply the longstanding gambling test for skill-based activities to a set of facts about fantasy sports contests, without any need for a constitutional amendment. Otherwise, the legislature would be

powerless to protect well-understood skill contests from inadvertent, overreaching, or overzealous interpretations of the gambling laws.

Because skill is the dominating element in determining the outcome of licensed fantasy sports contests, as the legislature found and the court below accepted, R. 20, Chapter 237 does not violate Article I, section 9 of the New York Constitution.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment should have been denied, and the State's motion for summary judgment upholding Chapter 237 of the Laws of 2016 should have been granted.

Dated: New York, New York
April 30, 2019

Respectfully submitted,

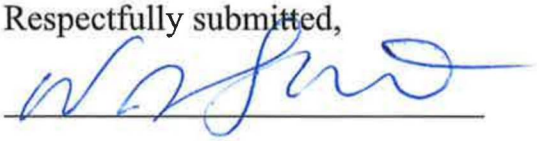

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EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

----------X

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

Plaintiffs,

-against-

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

Defendants.

----------X

NOTICE OF APPEAL

Index No. 5861-16

PLEASE TAKE NOTICE that defendants, Hon. Andrew Cuomo, as Governor of the State of New York, and the New York State Gaming Commission, hereby appeal to the Appellate Division of the Supreme Court for the Third Judicial Department, from the Decision, Order & Judgment signed by Hon. Gerald W. Connolly, Acting Justice, New York State Supreme Court, on October 26, 2018, and entered in the office of the Albany County Clerk on October 31, 2018.

This appeal is taken from each part of said Decision, Order & Judgment that aggrieves the defendants and is appealable by them.

Dated: Albany, New York
November 28, 2018

Yours, etc.,

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Attorney General of the
State of New York
Attorney for Defendants
By:

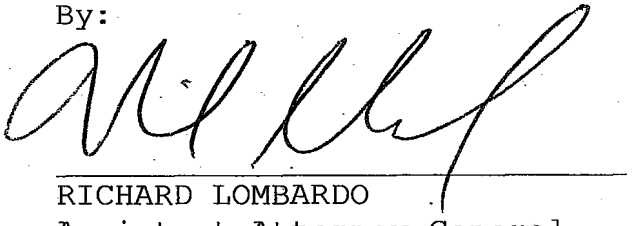

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EXHIBIT C

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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

Plaintiffs,

-against-

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

Defendants.

NOTICE OF CROSS-APPEAL

Index No. 5861-16

PLEASE TAKE NOTICE that Plaintiffs hereby cross-appeal to the Appellate Division – Third Department of State Supreme Court from so much of the Decision, Order and Judgment of Supreme Court, Albany County (Gerald W. Connolly; Acting Supreme Court Justice) dated October 26, 2018 (a copy of which is annexed hereto as Exhibit "A") insofar as said Decision, Order and Judgment (1) declared that the provisions of Chapter 237 of the Laws of 2016 excluding interactive fantasy sports from the definition of "gambling" in Article 225 of the Penal Law did not violate Article I, § 9 of the New York State Constitution); and (2) failed to issue an injunction permanently enjoining Defendants from implementing any of the provisions of Chapter 237 of the Laws of 2016 and/or expending taxpayer dollars pursuant thereto.

The Defendants filed their Notice of Appeal dated November 28, 2018 to the Appellate Division, Third Department.

DATED: November 30, 2018
Albany, New York

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EXHIBIT D

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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

Plaintiffs,

-against-

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

Defendants.

DECISION, ORDER & JUDGMENT

Index No.: 5861-16

(Supreme Court, Albany County, All Purpose Term)

APPEARANCES: O'Connell and Aronowitz
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Connolly, J.:

Plaintiffs, citizen-taxpayers of the State of New York who either have gambling disorders or are relatives of individuals who have such disorders, have brought the within action requesting a declaratory judgment that Chapter 237 of the Laws of 2016 of the State of New York, which authorizes interactive fantasy sports contests with monetary prizes (hereinafter "IFS"), is unconstitutional as in violation of the anti-gambling provision at Article 1, §9 of the state constitution. Plaintiffs further request a permanent injunction enjoining the State and its agencies

and officials from implementing such chapter. By Decision and Order of August 31, 2017, the Court denied the defendants' motion to dismiss the complaint. Subsequently, the parties agreed to waiver of discovery and a timetable for submission of motions for summary judgment. The parties have now fully submitted upon both the motion of plaintiffs and the cross-motion of the defendants.

Article 1, Section 9 of the State Constitution provides, in pertinent part:

> 1 .... except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, and except casino gambling at no more than seven facilities as authorized and prescribed by the legislature 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.

Chapter 237 states certain Legislative findings:

> 1. The legislature hereby finds and declares that: (a) 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; (b) Interactive fantasy sports contests are not wagers on future contingent events not under the contestants' control or influence because contestants have control over which players they choose and the outcome of each contest is not dependent upon the performance of any one player or any one 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 of participants' fantasy roster choices compare to the performance of others' roster choices.
> 2. Based on the findings in subdivision one of this section, the legislature declares that interactive fantasy sports do not constitute gambling in New York state as

defined in article two hundred twenty-five of the penal law. (RPMWBL §1400)[1].

In other pertinent part, Chapter 237 affirmatively states that "[i]nteractive fantasy sports contests registered and conducted pursuant to the provisions of this chapter are hereby authorized." (RPMWBL §1411).

Stipulated Facts

Upon the within submissions, the parties have stipulated and agreed to the following enumerated facts:

(1) Online interactive fantasy sports providers offer their subscribers season-long, weekly, and daily online interactive fantasy sports contests.

(2) Participants in such contests select fantasy teams of real-world athletes and compete against other contestants based on a scoring system that awards points based on the individual athlete's performances in actual sporting events that are held after contests are closed and no more participants may enter the contest. Participants in fantasy sports contests may use, among other things, their sports knowledge and statistical expertise to determine how athletes individually, and their fantasy teams overall, are likely to perform in such sporting events. Participants cannot control how the athletes on their fantasy sports teams will perform in such sporting events.

(3) The winnings paid to successful online interactive fantasy sports contestants come

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[1] Penal Law §225 (2) defines "Gambling" as follows: "A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome". A "Contest of Chance" is defined at Penal Law §225.00(1): "... any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein."

from the entry fees paid by all contestants. The online interactive fantasy sports providers derive their revenue by retaining a portion of such entry fees.

(4) On August 3, 2016, Governor Cuomo signed into law Chapter 237 of the Laws of 2016, which amends the Racing, Pari-Mutuel Wagering and Breeding Law (hereinafter, "RPMWBL") by adding a new Article 14.

(5) Chapter 237 of the Laws of 2016 authorizes interactive fantasy sports contests that are registered and conducted pursuant to the law (RPMWBL §1411) and prohibits unregistered interactive fantasy sports contests (RPMWBL §1412).

(6) Chapter 237 of the Laws of 2016 defines an "interactive fantasy sports contest" as "a game of skill wherein one or more contestants compete against each other by using their knowledge and understanding of athletic events and athletes to select and manage rosters of simulated players whose performance directly corresponds with the actual performance of human competitors on sports teams and in sports events." (RPMWBL §1401(8)).

(7) Chapter 237 of the Laws of 2016 provides for the registration of interactive fantasy sports providers (RPMWBL §1402), required safeguards and minimum standards as a condition of such registration (RPMWBL §1404), annual reporting by registered interactive fantasy sports providers (RPMWBL §1406), taxation of registered interactive fantasy sports providers (RPMWBL §1407), and the assessment of regulatory costs upon registered interactive fantasy sports providers (RPMWBL §1408).

(8) The total tax revenue that the State of New York received in 2016 from the operation of interactive fantasy sports conducted pursuant to Chapter 237 of the Laws of 2016 was

$2,338,607.00.

(9) To become registered, the interactive fantasy sports provider must implement measures that "ensure all winning outcomes reflect the relative knowledge and skill of the authorized players and shall be determined predominantly by accumulated statistical results of the performance of individuals in sports events." (RPMWBL§1404(1)(o)).

(10) Chapter 237 of the Laws of 2016 requires registered interactive fantasy sports providers to design games requiring the identification of highly experienced players and limiting the number of entries a contestant may submit for any single contest. (RPMWBL §1404(1)(g) and (2)).

(11) Chapter 237 of the Laws of 2016 requires registered interactive fantasy sports providers to enable contestants to "self-exclude" themselves from contests and provide information regarding assistance for compulsive players. (RPMWBL §1404(1)(d) and (m)).

Plaintiffs' Contentions

Plaintiffs argue that the plain meaning of the term "gambling" in the Constitution includes IFS and that the existence of a material degree of skill in IFS competition does not exclude IFS from the definition of gambling, as such competitions indisputably contemplate a material degree of chance. Plaintiffs reference the IFS scoring system, wherein points are awarded based upon contingent future events (performances of the selected "fantasy" players).

Plaintiffs assert that the legislative mandate in the constitutional provision is solely to pass laws to prevent gambling offenses and not to carve out exceptions to the provision. Plaintiffs argue that if the Legislature had the right to arbitrarily define gambling [via statute], the Constitutional prohibition would be a nullity. Plaintiffs assert that all prior exceptions to such prohibition,

including for pari-mutuel wagering on horse racing, certain lotteries and casinos, have been authorized solely by constitutional amendment.

Plaintiffs point to anti-gambling laws, specifically now-superceded Penal Law §351 passed shortly after the 1894 amendment expanding the scope of the constitutional prohibition, which specifically criminalized bets, wagers and pools on the results of contests of skill, speed, power or endurance, as evidence of the use and meaning of the word "gambling" in the constitutional provision. Plaintiffs argue that such an contemporaneous interpretation by the Legislature of a Constitutional provision is entitled to great deference, citing to, *inter alia, New York Public Interest Research Group v. Steingut*, 40 NY2d 250, 258 (1976) (hereinafter *Steingut*). Plaintiffs argue that the Legislature cannot now, by legislation, define "gambling" to the contrary of its common and ordinary meaning.

Plaintiffs also argue that Chapter 237 of the Laws of 2016, by its terms, appears to accept that IFS is gambling, as it requires operators to both enable contestants to exclude themselves from contests and to prominently list information on their websites concerning assistance for compulsive play. Plaintiffs note that § 225.00 of the Penal Law defines, for criminal prosecution purposes, a "contest of chance" as one that depends, to a "material degree", upon an "element of chance", and defines "gambling" as occurring when a person "stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence...". Plaintiffs enumerate multiple well-known historical amateur and professional sporting results to demonstrate the impossibility, IFS player skill notwithstanding, of any conclusively correct prediction of such results.

Plaintiffs cite to cases interpreting Article XI, §1 of the Constitution, including *Board of Education, Levittown Union Free School District v. Nyquist*, 57 NY2d 27 (1982) and *Campaign for Fiscal Equity v. State of New York*, 86 NY2d 307 (1995) for the proposition that, while the Legislature is entitled to deference in carrying out a constitutional mandate, the Courts must first define the meaning of that mandate.

Plaintiffs also cite to a prior Opinion of the Attorney General: "[t]o summarize, we find that sports betting is not permissible under Article 1, §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." (1984 NY Op. Att'y Gen. 1, 41, 1984 NY AG LEXIS 94). Plaintiffs also proffer the position taken by the Attorney General in a Memorandum of Law in cases filed against IFS providers DraftKings, Inc. and FanDuel, Inc. in 2015: "[t]he 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." (Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, pg. 12).

Plaintiffs further argue that, should the Court apply a presumption of constitutionality in this review of the duly-enacted statute, the presumption has been rebutted as Chapter 237, *inter alia*, makes daily fantasy sports legal only when the operator is registered in accordance with the provisions of RPMWBL §1402. Plaintiffs argue that, as the same activity as that allowed under

Chapter 237 would be illegal if the participant were not registered, and as the activity would, by definition, involve the same level of skill and chance as legal IFS, which would be distinguished solely by its compliance with other provisions of Chapter 237, the premise that one activity is gambling while the same is not due to factors not related to the definition of gambling renders such distinction, and Chapter 237, irrational.[2]

Defendants' contentions

Defendants assert that Chapter 237 carried out the Legislature's constitutional mandate to devise appropriate gambling laws (Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, p. 2), arguing that such mandate necessarily authorizes the Legislature to define what is not gambling. Defendants assert that the Constitution does not require a particular statutory definition of gambling and that there is sufficient basis in the record to find that the Legislature made a rational policy choice in determining that IFS is not gambling.[3]

Defendants set forth in detail the record before the Legislature at the time of the discussion of Chapter 237, and argue that such record demonstrates that "plaintiffs cannot prove beyond a reasonable doubt that there is no rational basis for this legislative policy choice" (Memorandum of

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[2] Plaintiffs finally argue that the Legislative Record evidence submitted by the defendants in support of their position that the finding that IFS is not "gambling" is insufficient to constitute a rational basis for such finding. Plaintiffs argue that significant portions of such evidence were generated by interested parties, those being the organizations (or their hirees) directly impacted by the proposed legislation.

[3] Defendants cite, at page 5 of their reply brief, to certain statutory provisions regarding horse racing for the proposition that the Legislature can make a rational determination that horse handicapping contests do not constitute gambling, though they cite to no case law applying the within constitutional provision to such statutes.

Law, p. 2). In sum, while not denying that IFS contests carry a material degree of chance, defendants argue that such showing is insufficient, in light of the evidence of skill in IFS demonstrated to the Legislature, to overcome the presumption that the statute declaring such contests games of skill and accordingly not gambling was constitutional. In support of such argument, defendants note certain submissions to the Legislature of (i) statistics demonstrating the results of the activities of Fanduel, Inc. and Draftkings, Inc., two of the largest on-line interactive fantasy sports providers[4], showing, *inter alia*, that actual users are likely to defeat computer-generated randomly selected teams and (ii) studies showing that there is a high winning percentage of the most successful IFS participants.

Defendants cite to case law which they argue demonstrates that, when an activity could reasonably be considered to be gambling or not, there is latitude for the Legislature to declare whether such activity should be prohibited (*see People ex rel Ellison v Lavin*, 179 NY 164, 170 - 171 [1904] [hereinafter *Ellison*])[5]. They argue that, given the disparity between legal definitions of the word "gambling" (referencing statutory analysis), that where, as here, the activity within does not constitute pure chance, such as roulette, the Legislature may rationally determine that the activity does not constitute gambling as used in the Constitutional prohibition. The defendants concede solely that a game of "pure chance" is prohibited by the Constitutional provision. Defendants cite to alleged Court interpretation of the Penal law prior to 1965 (a period of approximately 70 years

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[4] Fanduel, Inc. and Draftkings, Inc. offer their subscribers weekly and daily online fantasy sports formats (*see* Defendants' Memo of Law in Opposition, pgs 4-5).

[5] Defendants cite further to the exercise of the Legislature's latitude inherent in the choices made at Penal Law Art. 225 and Racing Law § 906.

from the enactment of the constitutional provision) wherein they argue that gambling referred only to activities where chance, not skill, was the "dominating element" (*see Id*).

Defendants cite to cases demonstrating deference in the interpretation of the Article 1, §9 (*see, Saratoga County Chamber of Commerce v Pataki*, 293 AD2d 26 [3d Dept 2002], *affirmed in part and modified in part*, 100 NY2d 801 [2003], *Dalton v Pataki*, 11 AD3d 62, 65 [3d Dept 2004], *affirmed in part and modified in part*, 5 NY3d 243 [2005] [hereinafter *Dalton*]). Defendants further cite to *People ex rel Sturgis v Fallon*, 152 NY 1 (1897) (hereinafter *Sturgis*) for the proposition that a highly deferential standard of review had been applied to a constitutional challenge to the sufficiency of a statute creating criminal penalties for horse racing. Defendants also assert that the Court should disregard the earlier statements of the Attorney General with regard to IFS constituting gambling as such statements were made prior to the Legislative determinations herein. Further, defendants cite to the determinations of a number of other state legislatures that IFS does not constitute gambling, though neither party has identified a case in which a Court has directly addressed the issue of whether IFS constitutes gambling for purposes of the New York (or any other state's) constitution.

Summary Judgment Standard

To obtain summary judgment, a movant must establish his or her position "'sufficiently to warrant the court as a matter of law in directing judgment'" in his or her favor (*Friends of Fur Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979], quoting CPLR §3212 [b]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any genuine material issues

of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a showing mandates denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once that showing is made, the burden shifts to the party opposing the motion for summary judgment to come forward with evidentiary proof in admissible form to establish the existence of material issues of fact which require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Discussion

"Legislative enactments enjoy a strong presumption of constitutionality [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt. Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional" (*Overstock.com, Inc. v. New York State Dept. of Taxation & Fin.*, 20 NY3d 586, 624 [2013], *citing LaValle v Hayden*, 98 NY2d 155, 161 [2002]; *see also, Dalton*, 5 NY3d 243, 255 [2005]. "A party mounting a facial constitutional challenge bears the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment. In other words, the challenger must establish that no set of circumstances exists under which the Act would be valid" (*Moran Towing Corp. v. Urbach*, 99 NY2d 443, 448 (2003)) (internal citations and quotations omitted). It is axiomatic, however, that "... 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 NY2d 893, 925 [2005]).

Based upon the stipulated facts and submissions before the Court, IFS involves, to a material degree, an element of chance, as the participants win or lose based on the actual statistical performance of groups of selected athletes in future events not under the contestants [players] control or influence. "It may be said that an event presents the element of chance so far as after the exercise of research, investigation, skill and judgment we are unable to foresee its occurrence or non-occurrence or the forms and conditions of its occurrence" *(Ellison, supra* at 169). In *People ex rel Lawrence v Fallon*, 4 AD82, 84-85 [1st Dept 1896], *aff'd*, 152 NY 12 [1897], the First Department stated as follows:

> There certainly is a wide distinction between the wager of money upon the result of any game and the purchase of shares in a lottery. To a certain extent it may be said that what is called chance enters into the result of any game, even the game of chess, and that nothing which is the result of a contest or competition is decided without some other element entering into it than the mere skill of the persons who take part in the contest. Everybody recognizes that in a baseball game or a game of football, or in running or walking matches, the result depends not alone upon the skill and strength and agility of the competitors, but upon numerous incidents which may or may not occur and whose occurrence depends upon something which nobody can predict and which so far as human knowledge is concerned have no reason for existing. This is a chance pure and simple, but yet the result of those games cannot in any just sense be said to be a lottery. The distinction we apprehend to be that in a lottery no other element is intended to enter into the distribution than pure chance, while in the result of other contests which are forbidden under the act against betting or gaming other elements enter, and the element of chance, although necessarily taken into consideration, may be, and is, eliminated to a very considerable extent by the skill, careful preparation and foresight of the competitors.

To the extent that the legislative findings stated at RPMWBL §1400(1)(a) and (b), which serve as the basis for the statutory determination that IFS does not constitute gambling as defined in Penal Law §225.00, can be read as inconsistent with the proposition that IFS involves a material degree of chance, the stipulated facts and the language of the statute (RPMWBL §1401(8)) applied

in light of the standard referenced above are sufficient to overcome any presumption or deference to be accorded such legislative finding. Neither the finding that IFS are not games of chance or the finding that IFS does not constitute wagers on future contingent events addresses the fact that points are scored (and cash pieces won or entry fees lost) based upon performances of selected athletes in events held after "contests are closed". No research, investigation, skill or judgment of the IFS participant can effect such future athletic performances.

In IFS, the scoring of the participants is directly related to the performance of their selected players[6] as compared to the performance of the selected players of other participants. IFS participants have no control whatsoever of the performance of the selected players, though the experience, research and related skill involved in selecting an IFS team can sharply impact an IFS participant's chances of prevailing. IFS only allows participants to score points based on the performance of individual players, which occur after the participant have selected their team, that is, in future events. As such, the first legislative finding proffered, that is, the rationale for why "IFS is not a game of chance", does not lead to the conclusion that there is not, to a material degree, an element of chance to IFS competition.

By the same token, the rationale for the second conclusion also does not provide a logical basis for the conclusion. The findings state that "IFS are not wagers on future events not under the

[6] The parties have not presented to the Court specific evidence with regard to the "scoring" of IFS competitions involving football players. Though the ability to create a system to award points based on individual offensive performances (e.g., yards gained, touchdowns scored, completed passes) is apparent, the ability to create such a system based on individual defensive performances, rather than team effort, is significantly less so.

contestants control or influence", and then references the facts that IFS relies upon agglomerated performances of individuals in team events rather than individual or team performances. Such rationale does not support the broad statement; the fact that IFS is scored based on agglomerated individual performances in future events not under the contestants' control or influence does not negate the fact that the wagers are placed on performances in future events not under the contestants' control or influence.

Based upon the submissions of the defense however, including the legislative findings and the (legislatively received) statistical analysis of Draftkings, Inc. and Fanduel, Inc. results demonstrating the likelihood of success of a small percentage of players as well as the performance of players against randomized computer models, it is equally clear that there is a significant element of skill in IFS competition. In light of the deference to be accorded the Legislature in the exercise of its responsibilities, the Court will, for purposes of the within discussion, accept the proposition that the chance versus skill assessment of IFS weighs on the skill side; that is, that IFS participation and success is predominated by skill rather than chance (*see* RPMWBL §1400 (1)(a)).

Legislative Authority

The constitutional provision, as relevant herein, contains two clauses: first, a proscription on the authorization or allowance of any gambling within the State, and second, a mandate that the Legislature pass appropriate laws to prevent such offenses. The latter clause "...was not intended to be self-executing...as it expressly delegates to the legislature the authority, and requires it to enact such laws as it shall deem appropriate to carry it into execution." (*Sturgis, supra* at 11). Such provision mandates that the Legislature, in the exercise its discretion, pass laws to prevent offenses

to the provision. Such grant of authority is explicit and cannot be challenged in the context of the constitutional sufficiency of scope of an anti-gambling statute. In *Sturgis* the Court held that "[i]t is not within the province of this court to declare that section seventeen is in contravention of the Constitution, for the reason that it does not deem the provision adopted appropriate or sufficient to prevent such offenses." (*Id.* at 10). The defense argues that the second clause effectively grants the Legislature authority to statutorily define the term "gambling" in the negative.

Despite such mandate, the plain language of the first referenced clause of the constitutional provision does not require absolute deference to the statute, as the mandate does not give the Legislature unlimited authority to define what is "not" gambling for purposes of such provision. Such interpretation would render the constitutional prohibitions on "...authoriz[ing] or allow[ing]..." "...pool-selling, bookmaking or any other kind of gambling" meaningless, as the entire field would then be effectively governed by statute, rather than the constitutional provision (*see Dalton*, 11 AD3d 62, 90 [3d Dept 2004], *affirmed in part and modified in part, Dalton*, 5 NY3d 243, 264 [2005])[7]. As set forth above, the Defendants to some degree accept this point, admitting that a statute authorizing an activity governed purely by chance (e.g. roulette) would be unconstitutional.

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[7] The Appellate Division in *Dalton* discussed the application of the lottery exception amendment to the constitutional ban on gambling in the context of a very general definition of lotteries advanced by defendants which was consistent with all gambling. There the Court held that "[s]uch a broad interpretation would expand the constitutional exception permitting state-run lotteries to such an extent that it would swallow the general constitutional ban on gambling" (*Dalton*, 11 AD3d 62, 90, *affirmed in part and modified in part, Dalton*, 5 NY3d 243, 264 [2005]; *see also,* 1984 Op. Atty. Gen. *supra* at 41 which provides that "[i]n addition, such arguments proceed from faulty premises in that they...seek to equate what is forbidden to criminals with what is allowed to the State.").

Plaintiffs argue that IFS is gambling, and it is axiomatic that the Legislature cannot pass a law that violates a constitutional proscription. The constitutionality of the enactment authorizing and regulating IFS turns upon the scope of the prohibition as used in the Constitution, and whether plaintiffs have demonstrated beyond a reasonable doubt, in the context of the presumption of constitutionality, that IFS, a game determined by a dominant degree of skill and a material degree of chance, fits the constitutional definitions of the prohibited activities. The Court finds that plaintiffs have made such demonstration.

"Words of ordinary import receive their understood meaning, technical terms are construed in their special sense. Especially is the plain import of the language to be given its effect in the construction of constitutional provisions, for the words are deemed to have been used most solemnly and deliberately; and where the intent of the constitutional provision is manifest from the words used and leads to no absurd conclusion, there is no occasion for interpretation, and the meaning which the words import should be accepted without conjecture" (McKinney's Cons. Laws of New York, Statutes, §94 [internal citations omitted]). "When language of a constitutional provision is plain and unambiguous, full effect should be given to the intention of the framers... as indicated by the language employed and approved by the People" (*Matter of King v Cuomo*, 81 NY2d 247, 253 [1993] [citations omitted]).

In determining the import of the phrase "...pool-selling, book-making, or any other kind of gambling...", the Court finds that such phrase incorporates sports gambling, and such gambling is generally precluded by such constitutional prohibition. Such finding comports with Formal Opinion No. 84-F1 of the Office of the New York State Attorney General, which legally and historically

analyzed the constitutional prohibition under circumstances not dissimilar to those herein; that is, in assessing proposed legislation which would affirmatively create, and authorize the State Division of the Lottery to conduct, a game in which parlay bets would be placed on the outcome of pro sports events (*see* 1984 NY Op. Att'y Gen. 1). After discussing the 1894 Amendment to the then-existing constitutional provision (which previously banned solely lotteries) to add prohibitions upon "pool-selling, book-making or any other kind of gambling...", such opinion specifically referenced the amendment to the constitutional provision thus: "this distinct statutory ban on sports wagering [referencing the 1877 Penal Code] was elevated to the constitutional level in 1894 and has remained by explicit language in the Constitution until today" (*Id.* at 11). In light of the legal and constitutional history cited by the Attorney General in the 1984 opinion, particularly *Reilly v Gray*, 77 Hun. 202 (1894), it is clear that the added language regarding "poolselling, bookmaking and any other kind of gambling" generally encompassed sports gambling.

Further, the virtually contemporaneous enactment of then-Penal Law §351, creating criminal penalties for, *inter alia*, sports gambling, compels the conclusion that sports gambling cannot be authorized absent a constitutional amendment, as the contemporaneous interpretation of a constitutional provision by the Legislature is to be accorded great deference, and "...may be supposed to result from the same views of policy, and modes of reasoning which prevailed among the framers of the instrument propounded." (*Steingut, supra* at 258 [1976] [internal quotations and citations omitted]). This seems particularly applicable where, as both here and in *Steingut*, the contemporaneous Legislature was exercising the authority granted by the constitutional provision.

In *Sturgis,* the Court referenced (now superceded) Penal Law §351 which clearly

encompassed sports gambling and provided that "...any person who records or registers bets or wagers, 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 lot, chance, casualty, unknown or contingent event whatsoever...is guilty of a felony..." stating that "[t]his examination of the statute discloses that the legislature has passed laws, the obvious purpose of which is to prevent the offenses mentioned in section nine of article one of the constitution" (*Sturgis*, *supra* at 7).

Having concluded that the prohibition generally bans the authorization of sports gambling, the Court next turns to the position of the plaintiffs that the prohibition does not apply to a law authorizing a practice which includes any degree of skill. As stated above, in assessing such issue, the Court will presume the accuracy of the [Court-interpreted] legislative conclusion that success in IFS is predominantly determined by the skill of the participant.

Initially, the Court cannot agree with the citations of the defendants to *Ellison,* 179 NY 164 (1904), for the proposition that it has been held that the constitutional prohibition does not apply to a law authorizing a practice where the outcome is dependent upon a degree of skill (*see* Defendants' MOL in Support of Cross-Motion of Summary Judgment, pg. 13, fn. 8; Defendants' MOL in Reply, p.3). The discussion in *Ellison* was addressed to then-Penal Law §327, and does not address the meaning of the constitutional provision. Moreover, as discussed below, the statute reviewed by the Court of Appeals in *Ellison* was not the sports gambling statute enacted immediately after the constitutional amendment, but the lottery statute.

The discussion in *Ellison* was with regard to the element of chance in then Penal Law §§323 and 327 creating penalties for operation of a lottery, and accordingly focused upon whether the

allegedly illegal conduct, which created a system not governed exclusively by chance, fit such definition. There, the Court found that a contest for the guessing of the number of cigars sold violated the anti-lottery statutes, though involving elements of both chance and judgment, because chance was the dominant element. The Court did not opine on whether such conduct fit the constitutional definition of the separate constitutional terms "pool-selling, book-making or any other gambling". Such determination on what constituted a lottery for purposes of the Penal Law, in the opinion of the Court, carries no precedential value herein.

Separate from *Ellison*, the Court cannot agree with the defendants' contention that only legislative authorization of games constituting pure chance (e.g., lotteries or roulette) is barred by the prohibition. It is clear that the drafters of the 1894 prohibition intended to bar contests based on future contingent events. Former Penal Law § 351, in addition to enacting criminal penalties specific to "... the result of any trial or contest of skill, speed or power of endurance...", also encompassed "...the result of any lot, chance, casualty, unknown or contingent event whatsoever" (emphasis added) (*Sturgis, supra* at 7-8). The caution in *Steingut, supra,* that special consideration be given to relatively contemporaneous acts of the Legislature in constitutional interpretation leads to the conclusion that the actions further described in Penal Law § 351 were within the contemplation of the drafters of the constitutional prohibition.

Further evidence that the prohibition is meant to be read more broadly than the interpretation urged by the defendants is found in the plain language of the prohibition. Initially, the provision bans laws authorizing lotteries, which, as discussed in *Ellison* in detail at both the Appellate Division and Court of Appeals decisions, were arguably seen at the time as games of pure chance (*see Ellison*,

179 NY 164 [1904] *rev'g*, 93 AD 292 [1st Dept 1904]). If the intent of the Article 1, §9 drafters were to simply bar "pure chance" gambling, they could have done so, instead of going on, via the amendment of 1894, to bar pool-selling, book-making and other gambling.

Additionally, the provision does not simply bar the authorization of gambling, it bars the authorization of "...lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling" (emphasis added). Applying the rule of construction that words used in constitutional provisions should be given their ordinary meaning and not be deemed superfluous, the "any other kind" proscription calls for an expansive, not a limited, interpretation of the term "gambling". This is particularly so where the preceding language enumerates differing descriptions of gambling activities, including bookmaking, which is defined in our current Penal Law at §225.00 (9) as "...advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events". The commentaries to such statute note that it codified "...the views set forth by the Court of Appeals" defining bookmaking prior to the imposition of the statutory definition (Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law §225.00 at 356). It is axiomatic that sporting events are included within such "future contingent events" (*see generally, People v. Abelson*, 309 NY 643 [1956]; 1984 Op. Att'y. Gen. 1). It is also beyond dispute that those amending the Constitution had a clear view at the time of the differences between "pure chance" activities (*e.g.*, lotteries, roulette) and those involving bets on sporting events (*see People ex rel Collins v McLaughlin*, 128 AD 599 [1st Dept 1908] [discussing evolution of anti-gambling statutes in the State]).

While the Court is mindful of the doctrine of *ejusdem generis*, the use of "Book-making" and "Pool-selling" in the preceding language to the broad ban on "any other" form of gambling strongly implies that placing bets on performances in IFS, which practice is recognized as entailing substantial skill, falls within such prescription *(see Philbrick v Florio Co-op,* 137 AD 613, 616 [1st Dept 1910], *aff'd,* 200 NY 526 [1910]) and at least one contemporary Appellate Court discussed such prohibition in similar fashion:

> It must be remembered that the evil which the people aimed at in passing that constitutional amendment was the sale of lottery tickets, the establishment of lotteries and pool-selling and bookmaking, which had been conducted so generally and under such circumstances as to become a grave public evil. Other forms of gambling, to be sure, are mentioned--not particularly, because the people deemed it unnecessary to put a constitutional prohibition upon other forms of gambling, for the Legislature had already by stringent laws taken steps to do that--but because, as is evident from the debates in the convention, it was intended that no opening should be left by which anybody who desired to pursue the business of bookmaking or poolselling in some other way than had been pursued before, could be able to do so, and thereby evade the constitutional prohibition.
>
> (*Sturgis,* 4 AD 76, 79 [1st Dept 1896], *aff'd,* 152 NY 1 [1897]).

Further, the Court of Appeals has previously referenced the prohibition in a fashion strongly implying that it was meant to be broad in application: "[f]rom an absolute constitutional prohibition on gambling in New York of any kind, expressly including 'book-making', which has stood almost 80 years in the New York Constitution (art. I, § 9), a specific exception was carved out in 1939." (emphasis added) (*Finger Lakes Racing Ass'n v. N.Y. State Off-Track Pari-Mutuel Betting Comm'n,* 30 NY2d 207, 216 [1972]).

Finally, while the parties have not identified a Court determination defining "gambling" for the purposes of the constitutional provision, in *dicta* in *Dalton*, the Third Department, discussing the definition of the word "lottery" in article 1, §9, referenced gambling as "defined by the three

elements of consideration, chance and prize" and makes no reference to the inclusion of an element of skill as negating the application of the other three elements *(Dalton,* 11 AD3d 62, 90 [3d Dept 2004]). Such holding cites to, *inter alia*, the modern New York Penal law definitions of "Gambling" and "Contest of Chance". Such definition was adopted again, (in *dicta*) by the Court of Appeals in their decision affirming in part and modifying in part the Third Department's decision (*see Dalton*, 5 NY3d 243, 264 [2005]). Such definition comports with the modern Penal Law provisions passed in fulfillment of the constitutional mandate, and is, at a minimum, evidence of the commonly understood meaning of the term "gambling".

Defendants argue that "[b]ecause Article I, §9 explicitly instructs the Legislature to determine what laws are appropriate to implement a general prohibition of gambling, the only currently valid definition of the term "gambling" in Article 1 §9 is found in Penal Law §225.00 (2)" (*see* Defendants' MOL at pg.13, fn. 7).[8] It appears undisputed that, aside from the IFS exception specified in Chapter 237, IFS falls within the Penal Law definition of gambling. As discussed below, the Legislature has the authority to address and exclude certain acts, including IFS, from the ambit of the Penal Law. Such discretionary exclusion, however, does not have the effect of changing the meaning of the constitutional terms each time the statute is revised; the constitution is not so fungible.

The defendants also discuss the differences between IFS and real sports competitions,

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[8] Such argument, however, is inconsistent with the position of the defendants that the Legislature, in defining "contest of chance", did so more expansively than required by the constitutional provision.

including the key elements differentiating the two, those being that the points are scored based on aggregated individual (rather than team) performances and that the IFS participants select their own "team". Neither of these facts effects the conclusion that the performances of the individuals are future events over which the IFS participants have no control.

There is little, if any, identified difference between complex gambling practices (*e.g.*, poker, horse handicapping and complex betting on sports events including point spreads, over/under bets, and parleys) and IFS. Each of these actions involve a significant amount of "skill", including the ability to assess multiple options of play and, using talent, information gained by experience and dedicated research, to maximize one's chances of winning, whether against the "house" or against a group of opponents. As discussed above however, this skill/chance dichotomy was by no means unknown to those who enacted the relevant constitutional provision, and the provision made no reference to even a dominant degree of "skill" as negating the definitions of pool selling, bookmaking and any other gambling.

The broad constitutional prohibition cannot be allowed to contemplate a parsing of the degree of skill involved in a practice which encompasses a material degree of chance based upon the outcome of a future contingent event or events (the separate performances of a group of selected athletes). The proposed exclusion from such ban of games with a degree, or even a dominant degree, of skill, if intended by the provision drafters, would have been clearly stated; instead, the language was made broad enough to encompass every eventuality wherein gambling was conducted on future contingent events.

Based on all of the above, the Court finds and holds that the Constitutional prohibition upon

authorization or allowance of pool-selling, bookmaking or any other kind of gambling encompasses IFS, including in circumstances where the Legislature has determined that ultimate success in an activity premised upon the performance of selected athletes in future contests is predominantly determined by the skill of the individual selecting the athletes. The intentionally broad language and application of the constitutional prohibition, the common understanding at the time and now of the meaning of the prohibition and of the particular words "bookmaking" and "gambling", and the undisputed fact that success in IFS is predicated upon the performance of athletes in future contests all lead to such conclusion. Moreover, as referenced above, to countenance such redefining of the term would effectively eviscerate the constitutional prohibition (*see Dalton,* 11 AD3d 62 [3d Dept 2004], *affirmed in part and modified in part, Dalton,* 5 NY3d 243 [2005]). As such, the plaintiffs have demonstrated beyond a reasonable doubt, that, to the extent Chapter 237 authorizes and purports to regulate IFS registered and conducted pursuant to the provisions of such Chapter, it is unconstitutional.

Penal Law Provision

In addition to the provisions authorizing, regulating and taxing IFS, Chapter 237 also affirmatively declares, within the context of the RPMWBL, that IFS does not constitute gambling in New York as defined in Penal Law Article 225. As discussed in detail above, the legislative findings upon which such declaration is based do not factually support such declaration, and, to the extent it is not clear from the discussion above, IFS does fit the statutory definition of gambling set forth in Article 225.

As further stated above, it is facially clear that, pursuant to Article 1, § 9, the authority to

pass appropriate laws to prevent offenses against the provisions of such section rests in the Legislature. Such clause "...was not intended to be self-executing...as it expressly delegates to the legislature the authority, and requires it to enact such laws as it shall deem appropriate to carry it into execution." (*Sturgis, supra* at 11). Such grant of authority is explicit and cannot be challenged in the context of the constitutional sufficiency of scope of an anti-gambling statute (*Id.* at 10: "It is not within the province of this court to declare that section seventeen is in contravention of the Constitution, for the reason that it does not deem the provision adopted appropriate or sufficient to prevent such offenses").

In *Sturgis,* the Court declined to invalidate a statute of which "[t]he most that can be said is, ...its effect was to reduce the then existing penalty or punishment for that particular offense" (*Id. at* 10), citing to the clear mandate of legislative authority in the constitutional section. The Court went on to hold, with reference to such statute, that "[i]t being in a degree appropriate, we are aware of no principle of constitutional law which would authorize this Court to condemn it as invalid or unconstitutional because, in our opinion, some more effective or appropriate law might have been devised and enacted" (*Id.* at 11). Further, "[c]ourts do not sit in review of the discretion of the legislature, or determine upon the expediency, wisdom or propriety of legislative action in matters within the power of the legislature." (*Id.*).

The statute herein, as regards the Penal law, expressly declares that IFS does not constitute gambling for the purposes of such statutory definition. The Court has found that IFS is gambling for the purposes of the constitutional provision, and, further, that the stated rationale for the finding that IFS does not constitute gambling as defined in the Penal Law does not support such conclusion.

Nevertheless, in light of the specific discretion afforded the Legislature in the constitutional provision, that is, to enact laws to prevent such offenses, the Court cannot find that the provision ostensibly excluding IFS from the ambit of the Penal Law definition of gambling is unconstitutional. (*see* 1984 N.Y. Op. Att'y Gen. 1, 22-23 [stating, "[i]n addition, such arguments proceed from faulty premises in that they...seek to equate what is forbidden to criminals with what is allowed to the State." (*Id.* at 41)]).

The Legislature, in the exercise of its authority and discretion, has enacted an anti-gambling statute (Penal Law Article 225). It has apparently seen fit to exclude from such statute IFS. It is not within the authority of this Court to usurp the Legislature's authority in fashioning such statute. As argued by the defendants, such authority has previously been exercised by the Legislature in excluding "Players" from the scope of the anti-gambling Penal Law provisions (*see* Penal Law §225.00(3)). As the enactment of statutes to prevent gambling offenses lies within the clear responsibility of the legislature, the legislature has the full authority to define and limit such offenses in the context of an anti-gambling statute as in its discretion it deems appropriate, and any finding of unconstitutionality in such context would be beyond the scope of the judicial review authority *(see McKinney's Cons. Laws of New York, Statutes,* §73).

Accordingly, the Court finds and holds that plaintiffs have failed to meet their burden herein with regard to the provision of Chapter 237, now codified at RPMWBL §1400 (2), which purports to except IFS from the anti-gambling provisions of the Penal Law; moreover, the defendants have met their burden with regard to such provisions, and the plaintiffs have failed to meet their burden in opposition.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Accordingly, it is hereby

ORDERED, ADJUDGED and DECLARED that Plaintiff's motion for Summary Judgment is granted herein (and Defendant's cross-motion denied) as follows: that Chapter 237 of the Laws of the State of New York, to the extent that it authorizes and regulates IFS within the State of New York, is found null and void as in violation of Article I, §9 of the New York State Constitution; and it is further

ORDERED, ADJUDGED and DECLARED that Defendant's cross-motion for summary judgment granting dismissal of the within action is granted herein (and plaintiff's motion denied) as follows: Chapter 237 of the Laws of the State of New York, to the extent that it excludes IFS from the scope of the New York State Penal Law definition of "gambling" at Article 225, is not in violation of Article I, §9 of the New York State Constitution.

This shall constitute the Decision, Order and Judgment of the Court. This original Decision, Order and Judgment is being returned to the attorney for the plaintiffs. The below referenced original papers are being transferred to the Albany County Clerk's Office. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

SO ORDERED.
ENTER.

Dated: October 26, 2018
Albany, New York

Gerald W. Connolly
Acting Supreme Court Justice

Papers Considered:

1. Statement of Agreed upon Facts dated January 18, 2018;
2. Plaintiffs' Notice of Motion for Summary Judgment dated January 29, 2018 with Exhibits A-E annexed thereto; Affirmation of Cornelius D. Murray, dated January 29, 2018 with Exhibits A-E annexed thereto; Affidavit of Jennifer White, sworn to January 15, 2018 with Exhibit A annexed thereto; Affidavit of Charlotte Wellins, sworn to January 24, 2018 with Exhibit A annexed thereto; and Memorandum of Law in Support of Motion for Summary Judgment dated January 29, 2018;
3. Notice of Cross-Motion dated March 9, 2018; Affirmation of Richard Lombardo, dated March 9, 2018; Affidavit of Evan Stavisky, sworn to March 6, 2018, with Exhibits A-PP annexed thereto; and Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment dated March 9, 2018;
4. Affirmation of Cornelius D. Murray, dated May 1, 2018 with Exhibits A-E annexed thereto and Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment dated May 1, 2018;
5. Defendants' Memorandum of Law in Reply to Plaintiffs' Response to Defendants' Cross-Motion for Summary Judgment dated June 7, 2018;
6. Letter from Richard Lombardo dated August 23, 2018;
7. Letter from Cornelius D. Murray dated August 27, 2018; and
8. Letter from Cornelius D. Murray dated August 28, 2018.

New York Supreme Court
Appellate Division – Third Department

Appellate Case No.: 528026

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

Plaintiffs-Respondents-Cross-Appellants,

– v. –

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

Defendants-Appellants-Respondents.

AFFIRMATION OF JOSHUA SCHILLER IN SUPPORT OF MOTION ON BEHALF OF FANDUEL, INC. AND DRAFTKINGS, INC. FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

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Albany County Clerk's Index No. 5861/16

JOSHUA SCHILLER, an attorney duly admitted to practice before the courts of the State of New York, affirms the following to be true under penalty of perjury pursuant to CPLR § 2106:

1. I am a member in good standing of the Bar of the State of New York and a partner in the law firm of Boies, Schiller & Flexner LLP, attorneys for one of the proposed *amici*, DraftKings, Inc. ("DraftKings"). This affirmation is made in support of FanDuel, Inc. and DraftKings, Inc.'s Motion for Leave to File Brief as *Amici Curiae* in Support of Defendants-Appellants-Respondents. DraftKings has a demonstrated interest in the issues in this matter and can be of special assistance to the Court.
2. DraftKings is one of the country's leading providers of interactive and daily fantasy sports contests, which are fee-based or free competitions in which contestants match their "fantasy" teams against other competitors', using their sports knowledge and skill to select real-world athletes from multiple teams in a sport to create "fantasy" lineups or rosters. Participants compete for pre-announced, guaranteed prizes.
3. In accordance with New York's statutory scheme, DraftKings maintains a license to operate legally valid, skill-based fantasy sports contests.
4. This appeal is of great concern to DraftKings because it addresses the question of whether the gambling prohibition in Article I, § 9 of the New York State Constitution is violated by state legislation authorizing and

providing for the regulation of interactive fantasy sports. Indeed, this appeal is vital to DraftKing's business in New York.

5. In the brief, DraftKings provides the Court with a review of the longstanding common law jurisprudence, in New York and elsewhere, illustrating that fantasy sports contests, as bona fide contests for a prize in which skill is the dominant factor, have long been distinguished from gambling, and that the New York legislature's authorization of fantasy sports contests is reasonable, deserving of deference, and should be upheld as a valid and constitutional exercise of authority.

6. Defendants-Appellants-Respondents' and Plaintiffs-Respondents-Cross-Appellants' counsel have been notified of this motion.

WHEREFORE, I respectfully request that the Court grant the motion to participate in this appeal as *Amici Curiae*.

Dated: New York, New York
April 30, 2019

Respectfully submitted,

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