No. APL-2020-00027

State of New York
Court of Appeals

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

Plaintiffs-Respondents,

v.

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

Defendants-Appellants.

RECORD ON APPEAL

(VOLUME III OF III – PAGES 1004-1465)

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Written Testimony
Before the New York Assembly
Standing Committees on Racing and Wagering and Consumer Affairs and Protection
and Legislative Commission on Administrative Regulations Review
December 8, 2015

By
Jeremy Kudon
Partner, Orrick, Herrington & Sutcliffe LLP

Good morning Chairmen Pretlow, Dinowitz, and Zebrowksi and members of the committees. My name is Jeremy Kudon and I am a partner at the law firm of Orrick, Herrington & Sutcliffe. I am here today on behalf of DraftKings, FanDuel, and the Fantasy Sports Trade Association.

Rather than repeat what has already been said about "skill vs. chance" or the difference between season-long and daily/weekly contests (**Spoiler Alert:** There is none!), I thought I would use my time to debunk two myths that I've seen in the media or heard from our opponents.

Myth #1: *Fantasy sports contests are a form of sports betting.* This myth seems to arise from a simple equation: sports + prizes = sports betting. This equation, however, doesn't compute. Traditional sports betting involves wagering money on the outcome of a single real-world athletic contest or event. Fantasy sports contests, by comparison, turn on the aggregation of individual statistical performances of anywhere from 6 to 10 real-world players. The rules require this, in fact—all daily fantasy sports contests place limits on the number of players from one real-world team a fantasy contestant can draft. So a contestant's success can never turn on the ability to predict the outcome of one team's performance. That difference is key. It explains why, whatever one's view of regulation of sports betting, fantasy sports does not fall in the same category.

Fantasy sports also does not raise the integrity concerns that have plagued sports betting (e.g., the Black Sox or Pete Rose). It bears repeating: *Fantasy sports contests—regardless of duration—do not depend on the outcome a single sporting event.* Eli Manning threw six touchdowns against the Saints a few weeks ago—and the Giants lost the game. Eli, however, led the Kudon Primetimes to a dominating victory in my fantasy league. Similarly, a fantasy sports contest will never turn significantly enough on the performance of a single player to make bribing one's way to victory practicable or even possible. There is no integrity risk, plain and simple.

Myth #2: *Fantasy sports are no different than poker, blackjack or other traditional games of chance.* This too is false. The difference lies in the element of "systemic chance." Poker has it; fantasy sports contests do not. Systemic chance exists when the game itself has elements created either by a random number generator in a computer program or some other random event such as a dice throw, ball draw, or card shuffle. This simply does not exist for

fantasy sports contests—regardless of duration. Instead, fantasy sports contests are played by considering a number of known, interlocking, and often shifting factors that, through strategic risk-taking and decision-making, help predict an enormously diverse set of future events. The presence of an element of systemic chance is a crucial determiner of whether an activity is gambling, and a clear distinction between fantasy sports and gambling.

Thank you and I am happy to answer any questions

Exhibit U: Written testimony offered on behalf of the Fantasy Sports Trade Association on Dec 8, 2015

Written Testimony
Before the New York Assembly
Standing Committees on Racing and Wagering and Consumer Affairs and Protection
December 8, 2015

By
Peter Schoenke
Chairman, Fantasy Sports Trade Association

Good morning Chairmen Pretlow, Dinowitz, and Zebrowski and to all of the members of the committees. Thank you for the opportunity to testify today. My name is Peter Schoenke and I am the Chairman of the Fantasy Sports Trade Association.

I'm also the founder and president of RotoWire.com, a leading information web site for fantasy sports. I founded the web site almost 20 years ago when fantasy sports were just starting to be played on the Internet. I'm a small business owner based in Madison, Wisconsin who made this industry my profession because I'm passionate about playing fantasy sports and helping so many to enjoy the hobby. And this industry was started by similar entrepreneurs who loved the hobby, even the more recent daily fantasy sports companies, not big corporations trying to "fleece" customers. And I'm here because this pastime may not continue in full in New York.

I know it's hard to believe that a trade association for fantasy sports even exists, let alone that it has over 300 members, including ESPN, Yahoo!, CBS Sports, and NBC. But it exists for a simple reason. Fantasy sports have become our new national pastime. Over 50 million Americans participate in some form of fantasy sports. New York is hardly an outlier. We estimate that over 3.5 Million New York residents participate in these contests each year. And they do so because it is a form of entertainment that gives them a deeper appreciation for the sports that they love.

I have three objectives this morning. First, I want to provide the committee with a brief primer on what a fantasy sports contest entails, with particular emphasis on the weekly or daily format. Second, I want to discuss why these contests, regardless of duration, are games of skill and therefore legal under New York law. Finally, I want to end with a discussion of where we go from here. As I have told many of you, we want to be part of the solution, not the problem.

Let us begin with a brief primer on fantasy sports. I know that for some of you, this issue has come out of nowhere. In fact, some may be under the impression that fantasy sports did not even exist until the first week of September, when everyone started seeing all those ads, or the first week of October, when it seems like every journalist in American wrote an article about this subject. The truth is that fantasy sports have existed for over 35 years. And while there have been innovations, like head-to-head contests, the concept has remained the same throughout.

The objective is to select a team of real-world athletes and participate against others based on a scoring system that uses statistical measures of individual athletes' performances, as opposed to the outcome of a game. Let us use fantasy football as an example. Players typically draft or select a team of eight real-world football players to fill positions like quarterback, running back, wide receiver, tight end, and kicker. Like any owner or general manager the goal is to assemble a team of players that will accumulate the most points. A running back, for instance, earns one point for every ten rushing yards and six points for a touchdown. But again, I want to emphasize, fantasy sports is not about who wins or loses the game, it is about who performs the best in certain statistical areas. Take Eli Manning for example. He threw six touchdowns against the Saints earlier this season. Yet Eli's team, the New York Giants, lost.

Now, let us turn to the weekly or daily format. I think there is a view out there that those contests are drastically different from the traditional season-long format—that the latter is more akin to chess, while the weekly or daily format is akin to roulette or slots. Nothing could be further from the truth. The two formats are

virtually identical. All of the same basic principles found in the season-long format exist in the daily or weekly format. You still need to assemble a team of eight to ten real-world players. You still have to fill multiple positions with players from different teams. And those players earn points through the exact same scoring system that we use in my season-long league. And the daily format resembles the salary cap contests provided in print publications back when I started playing. The only difference is the duration of the contest. Rather than wait until the end of an eighteen-week season to crown a champion, a daily or weekly contest takes place over the course of a single day or weekend. Think speed chess versus traditional chess, or writing a short story versus writing a novel.

That brings me to my second point. Regardless of the length of the contest, fantasy sports is a game of skill, not a game of chance. It is not enough to know the most popular teams and their most recognizable stars. You need to understand scoring systems, the particular strengths of different players, the type of offensive scheme that they play in, and the quality of their matchups. And I can tell you this from my own experience, whether a participant wins or loses depends entirely on the amount of time, research, experience, and talent—skill—that he or she has relative to the other players in the contest. If you are in a fantasy league, over the years you learn that some members of your league win more regularly than others because they try harder and have innate skills of picking the best players.

In fact, the most common excuse that someone gives when I ask whether they play fantasy sports is, "I just don't have the time." You do not hear that about roulette, blackjack, or other games of chance. And that is because unlike those contests; there is no systemic chance in fantasy sports. Winning and losing does not come down to the spin of the wheel, the roll of the dice, or the turn of the card. Or, in the words of one group, "the typical fantasy sports league is not 'gambling' because winning is based predominantly on skill and knowledge about the featured sports and its athletes, not on chance. In other words, fantasy sports leagues challenge the participants to exercise judgment-making skills similar to a coach or general manager."[i] Now those are not the words of some fantasy sports advocate. That statement comes from a 2012 guide that the group "Stop Predatory Gambling" prepared for state lawmakers.

The $64,000 question for today's hearing is whether skill plays the same role in a daily or weekly contest. And the answer, at least, in mine and others' view, is yes. Skill is just as determinative of the outcome in a daily or weekly contest than it is in a season-long contest. It requires a different set of skills, but skill still predominates.

Now I know some of you are skeptical about this, but in a daily fantasy sports contest you are forced to make a decision on every player scheduled to play that day. For example, in a traditional fantasy baseball league few backup catchers are used because they play so infrequently. You need not study them.

In daily fantasy sports suddenly every player is an option - even a backup catcher such as Drew Butera, who with a .507 career OPS ranks as one of the worst hitters in modern major league history. If you chose a lineup with a bunch of superstars, you may be forced to pick a cheap player such as Butera if he's in the starting lineup. And he may be a value if he's playing in a hitter's park like Coors Field or faces a pitcher that he's had some success against. Yes, you need to study Drew Butera and hundreds of other players each night, while also taking into account such factors as wind direction and platoon splits. It's a different skill set than used in traditional fantasy baseball, but I think you'd agree just as much work.

But again, do not just take my word for it. Ask Sports Illustrated. In a February 2015 article that publication said the following:

> DFS is strategic, and it can be unforgiving to the casual participant who chooses players based on emotion, media narratives and hometown favoritism. Often that participant is facing analytically inclined opponents who rely on game theory and probability to calculate their likelihood of winning from an assortment of variables.[ii]

This is also consistent with how Congress treated fantasy sports contests in the Unlawful Internet Gambling Enforcement Act of 2006. It exempted fantasy sports contests from the Act's definition of unlawful

internet gambling.[iii] I know there is some controversy about this exemption, but no one can dispute its significance. Congress looked at this issue and determined that fantasy sports contests are not inherently games of chance, but can be structured to ensure they are contests of skill.

And finally, it is consistent with the conclusions reached by Major League Baseball, the NBA, NHL, and MLS. All four of those leagues have kicked the tires on the legality of daily fantasy sports and kicked them hard. And all four have not only concluded that daily fantasy sports is a game of skill, they have partnered with and even invested in one of the two major daily fantasy sports operators.

But we are not here today to wrap ourselves in the cloak of skill and tell this committee to leave fantasy sports alone. We are well aware of some of the concerns that have arisen in recent weeks. To that end the FSTA is working to establish an independent self-regulatory entity, called the Fantasy Sports Control Agency, which is headed by President Obama's former acting Labor Secretary Seth Harris. We realize that the rapid changing technology – who thought even five years ago you could play daily fantasy sports on your phone – gives our industry new challenges that don't fit with centuries old laws. We came here today just as we plan to go to other states, looking for legislation that will provide clarity on the legality of fantasy sports contests and, at the same time, require operators to satisfy reasonable, yet important, consumer protection obligations. To that end, I urge the committee to look at a bill that was filed a few weeks ago in Illinois by Representative Mike Zalewski. It is a tough bill for the industry, but it is a fair bill. It is the sort of legislation that will allow us to continue to operate in the State, while providing our players with a safe environment.

Thank you and I am happy to answer any questions.

---

i *Unlawful Internet Gambling Enforcement Act of 2006—Fact Sheet*, STOP PREDATORY GAMBLING, http://stoppredatorygambling.org/wp-content/uploads/2012/12/UIGEA-2006-Fact-Sheet.pdf

ii Albert Chen, *Every Sunday is Super Bowl Sunday*, SPORTS ILLUSTRATED, Feb. 2, 2015, http://on.si.com/1K3hLSV.

iii 31 U.S.C. §5362(1)(E)(ix)

Exhibit V: Written testimony offered on behalf of the Brooklyn Nets on Dec. 8, 2015

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BARCLAYS CENTER

Written Testimony
Before the New York Assembly
Standing Committees on Racing and Wagering and Consumer Affairs and Protection
December 8, 2015

On behalf of the Brooklyn Nets, we appreciate the opportunity to submit testimony on a topic that is important to our entire organization: The future of fantasy sports in the State of New York.

The growing popularity of fantasy sports is beyond question. We understand that over 50 million Americans participate in some form of fantasy sports.

In April 2014, the Nets organization entered into a marketing partnership with FanDuel, a leading daily fantasy sports operator that is headquartered a few miles away in Union Square. Our relationship with FanDuel has benefitted the organization in two substantial ways:

First, this relationship allows us to engage our fans at another level and increase their knowledge and interest in both the club and the league in general. Assembling their own team of real-world NBA players and competing against other fans in contests of skill brings our fans closer to the action on the floor. This, in turn, increases overall consumption of our product—i.e., the more knowledgeable our fans are about the NBA, the more attention they are willing to invest in the Brooklyn Nets. Fans who play fantasy sports watch our games longer and consume more of our content.

Second, FanDuel gives us access to a crucial demographic: millennials. The average FanDuel customer is between 25 and 35 years old, college educated, and passionate about sports. These are exactly the sort of New Yorkers that we want to attract to our games and turn into lifelong Nets fans. FanDuel provides us a gateway to these individuals—both via traditional marketing and unique fan experiences.

Bottom-line: The future of fantasy sports in New York is important to the Brooklyn Nets organization and could have a real impact on our business. Fantasy sports are a popular and accepted form of entertainment in the vast majority of U.S. states. It would be unfair to deny New York fans the opportunity to participate in this activity. We therefore urge you to consider legislation affirming that fantasy sports may continue to be offered in New York.

NBA

Exhibit W: Letter from FanDuel,
dated June 7, 2016

FanDuel

Nigel Eccles, CEO and Co-Founder
FanDuel
300 Park Avenue South, 14th Floor
New York, NY 10010

June 7, 2016

John J. Flanagan
Majority Leader
New York State Senate
Room 330, State Capitol Building
Albany, NY 12247

Carl E. Heastie
Speaker
New York State Assembly
LOB 932
Albany, NY 12248

The Honorable Majority Leader Flanagan and Speaker Heastie,

FanDuel was founded in 2009 with the goal of improving the fantasy sports experience. **We felt, instinctively, our business needed to be in New York** – that residing near the professional sports leagues, media networks and top tech talent here, and being headquartered in Silicon Alley with other thriving startups, would give us the best opportunity to be successful. So in 2011, FanDuel moved our handful of employees to a 500 square foot office on 37th Street, where we shared meeting spaces with other companies and bathrooms with cockroaches (this was pre-WeWork days). In 2013, we moved to TechSpace on 11th Street. We hired 40 more employees, quickly outgrew the space, and took over Pandora's old office space in Union Square in 2014. We were following in the steps of another tech success story, but also paving our own way.

We developed partnerships in New York with major publishers, marketing firms, CBS, NBC, the NBA and professional teams across the state, namely the Buffalo Bills, New York Jets and the Brooklyn Nets. Currently, FanDuel proudly employs 175 professionals here, many of whom have relocated to New York to join our company. **Our success is due in no small part to the people, infrastructure, partnerships and opportunities very few locations in the world can offer. And we are hardly the only fantasy sports company to see what New York provided.**

The exponential rise in popularity of fantasy sports has directly **spawned a new industry** in the sports tech space, with data, analytics, analysis, and media content **companies related to fantasy sports emerging, growing and receiving major investment from the venture capital community.** Successful New York-based companies like numberFire, Draft and FNTSY Network are a few examples of companies that have thrived here, creating new platforms, mobile applications and sophisticated new services with potential applications beyond fantasy sports. **In fact, there are now nearly 30 fantasy sports related companies in New York,** from contest operators like FanDuel to the aforementioned companies servicing fantasy sports players, and they all likely came here for the same reasons that led us here five years ago.

The fantasy sports ecosystem – encompassing contest play, research tools, analysis services and more – **has swelled to a more than $20 billion a year industry in North America,** according to Ipsos market research, and **New York may have more opportunity to benefit from this industry than any other state.** Yet despite the growth and potential, FanDuel's future and the future of this industry in New York is currently unclear.

We are seeking legislation to certify that companies like ours can operate our contests in New York. We are asking for regulations to safeguard innovation, as well as consumers. This legislation is imperative for us to operate here. **Without it, FanDuel will likely be forced to find a new home, as our operations, employees and industry would not be welcome in New York.**

I feel certain the same is true for many of the other fantasy companies in New York. The gravity of the situation could not be more clear – **if fantasy sports contests are not permitted in New York,** it will deprive legions of New York fantasy sports enthusiasts from competing against residents of neighboring states and states across the country, and **it will ensure that a burgeoning industry in this state with unimaginable potential will invest its future elsewhere.**

We recognize there has been a debate about how fantasy sports bills in the Senate and Assembly would affect the New York economy and whether our industry needs to be linked to New York casino operators.

The casinos demand for fantasy sports to be tied to local brick and mortar casino operations is misguided. The idea is fundamentally flawed: it is grounded in misperception, violates the U.S. Constitution, and flies in the face of New York's history as an incubator for new technology, new business models and sensible regulation promoting commerce, while protecting citizens.

The casino lobby's competition argument ignores all available data, which shows how different our audiences are, and it ignores basic logic: **while fantasy sports has grown, the gaming industry in New York has NOT suffered – in fact it has thrived.** Annual statewide casino revenues in Fiscal Year 2016 closed at nearly $1 billion higher than when we got started

in 2009, so a 105% increase in annual revenue during the fantasy sports boom era.[1] Put plainly and grounded in data: **fantasy sports have no impact on casino gambling. None.**

Further, it is my understanding that **requiring fantasy sports to be tied to in-state casinos would be a clear violation of interstate commerce protections.** The U.S. Supreme Court has held in ruling after ruling that states cannot favor local businesses with a physical presence and penalize those who do not have a physical presence – which is exactly what the casino lobby proposal would achieve. You may recall a directly related example in New York State, where the U.S. Supreme Court struck down the state's wineries law, which prevented wineries from selling in New York unless they had an in-state distribution facility.[2] The casino proposal is nearly identical to the unconstitutional wineries law.

Setting aside the unconstitutional issue, the casinos are not actually seeking to protect New York brick and mortar businesses generally – after all, FanDuel operates in a brick and mortar (and glass) building in Manhattan right now. As do other New York fantasy companies. The casinos simply want to favor their select group of specific businesses at the expense of all others. And remember, fantasy sports is already a nationwide business, with premier companies like ESPN, Yahoo! and CBS operating strong fantasy sports contest businesses. **Trying to reduce an industry with a national marketplace into a regional offering is not only illogical, it simply will not work.**

Lastly, **tying fantasy sports to brick and mortar casinos will suffocate innovation, and choke off a generation of entrepreneurs we want building businesses in New York.** It will relegate what could be a thriving independent industry here into just another game option in a casino. It won't create jobs, it won't attract new investments.

Although our businesses are distinct, there is no reason for **New York gaming companies to be our enemies. Frankly, they could be directly benefiting from the fantasy sports community.** We've held highly successful live events at venues across the country, as fantasy sports fans love to convene and as a company we love bringing our players together. We have relationships with dozens of other New York companies and we are open to working with anyone to explore opportunities to bring our New York players together at live events here in New York. But those discussions can only be had when we know our fate in New York.

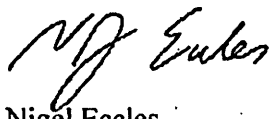
New York is the sports capital of the world. It has some of the most committed, most passionate fans anywhere. The state supports 11 major sports franchises. All major professional sports leagues are headquartered here. I think no one is surprised by the popularity of fantasy sports amongst New Yorkers and the growth of fantasy sports businesses here. **As the world's sports capital, New York should be embracing the latest and fasting growing pastime supporting the sports industry – fantasy sports.**

---

[1] New York State Gaming Commission, Statewide Monthly Reports http://nylottery.ny.gov/wps/wcm/connect/9228db41-27b8-4c16-9912-35fbb15063c0/160603+Statewide+Totals.pdf?MOD=AJPERES&CACHEID=9228db41-27b8-4c16-9912-35fbb15063c0

Enthusiasts of fantasy sports from across the state have sent more than 60,000 emails to legislators in support of establishing a law to protect their right to play the games they love. The legislation we hope you will pass will protect a product millions of New Yorkers love and nurture a nascent industry, which is already supporting hundreds of jobs and has limitless potential for economic growth across the state. **We want to stay in New York, as a leader in the New York tech scene, and we want to see the entire industry grow here – as long as you will have us.**

Respectfully and sincerely,



Nigel Eccles
CEO and co-founder
FanDuel

Exhibit X: Letter from the New York Jets, dated Aug. 2, 2016

NEW YORK JETS

August 2, 2016

The Honorable Andrew Cuomo
Governor
New York State Capitol
State Street and Washington Avenue
Albany, NY 12224

Dear Governor Cuomo:

On behalf of the New York Jets, I am writing to you in support of A. 10736. This legislation, which authorizes and regulates the fantasy sports industry, ensures that New Yorkers can play fantasy sports games with important safeguards in place.

We consider fantasy sports to be an entertaining fan engagement platform that helps to expand and deepen fan interest and support for the Jets and other NFL teams. We also recognize the importance of establishing regulations to protect consumers when they are participating in fantasy sports.

Please let us know if you need any information from us as you consider signing this legislation.

Sincerely,

Neil Glat
President

ATLANTIC HEALTH JETS TRAINING CENTER
One Jets Drive • Florham Park, New Jersey • 07932
tel 973.549.4800
www.newyorkjets.com

Exhibit Y: Letter from the Brooklyn Nets,
dated March 24, 2016

15 MetroTech Center, 11th Floor
Brooklyn, New York 11201
phone 718.933.3000
fax 718.522.3544
brooklynnets.com

BRETT D. YORMARK
Chief Executive Officer

BARCLAYS CENTER

March 24, 2016

The Honorable Andrew Cuomo
Governor of New York
Executive Chamber
State Capitol
Albany, NY 12224

The Honorable John Flanagan
Temporary President & Majority Leader of the New York State Senate
Albany, NY 12247

The Honorable Carl Heastie
Speaker of the New York State Assembly
Albany, NY 12248

Dear Governor Cuomo, Senator Flanagan and Speaker Heastie,

I am writing to express our strong support for fantasy sports in New York State.

As you know, fantasy sports have grown tremendously in recent years and have had a significant positive impact for the professional teams in New York State by helping to increase fan engagement. Fantasy has become a conduit for fans to be more connected with teams and for fans to watch more, read more, and enjoy sports more.

We understand and agree the games should have some sensible regulations. Any new industry that grows so rapidly should be scrutinized and consumer protections should be installed in this case. However, let's make sure New York fans and teams, located in the sports capital of the world, are not denied the tremendous benefits of fantasy sports.

With a settlement announced recently and major fantasy operators leaving the state, we hope the Governor and Legislature will take effective steps towards establishing a regulatory framework for fantasy sports that ensures consumers are both protected and empowered to resume participation in the fantasy sports games they love.

I know you are taking a thoughtful approach to this issue, and I hope you and your colleagues in Albany are able to resolve this matter expeditiously for New York's fans and teams. Please let us know if we can be of any assistance and we sincerely thank you for your time and consideration.

Respectfully,

Brett D. Yormark

Exhibit Z: Letter from the Buffalo Bills,
dated July 28, 2016

BUFFALO BILLS • One Bills Drive • Orchard Park, New York 14127 • 716.648.1800 • buffalobills.com

Russell H. Brandon
Managing Partner/President

July 28, 2016

A.10736 — by M of A Pretlow and
Senator Bonacic

AN ACT to amend to amend the racing, pari-mutuel wagering and breeding law, in relation to the registration and regulation of interactive fantasy sports contests

APPROVAL RECOMMENDED

Hon. Andrew Cuomo
Governor
NY State Capitol
Albany, NY 12224

Dear Governor Cuomo:

On behalf of the Buffalo Bills, I am writing to you to urge you to sign A. 10736 into law when it reaches your desk. This legislation will regulate the fantasy sports industry, ensuring that New Yorkers can once again play fantasy sports games and follow their favorite players across the league, while also establishing important safeguards for consumers and generating tax revenue for the state.

We consider fantasy sports to be a powerful vehicle for sports fan engagement that helps to both widen and deepen a fan's interest and support for our team and teams across all sports leagues. We also recognize the importance of establishing regulations to ensure that consumers are protected when participating in fantasy sports.

I'd like to thank the members of your administration, as well as Senator Bonacic and Assemblyman Pretlow, for their efforts to draft and pass this important legislation. Because this legislation ensures that the New Yorkers who enjoy fantasy sports can continue to participate with confidence that the state had adopted a regulatory structure to protect consumers, I urge you to sign it when it is transmitted to you.

Sincerely,

Russell H. Brandon
Managing Partner & President.

Exhibit AA: Memorandum dated June 3, 2016
on behalf of the Parkside Group

PARKSIDE
THE PARKSIDE GROUP

132 NASSAU STREET • NEW YORK, NY 10038 • T:212.571.7717 • F:212.571.7757

To: Interested Parties
From: The Parkside Group, LLC
Date: June 3, 2016
Re: Fantasy Sports Survey Findings

At the request of Fantasy Sports for All, The Parkside Group conducted a poll to survey attitudes of New York State voters likely to participate in the 2016 General Election. Key findings of this survey include:

60% of New Yorkers Support Allowing Adults To Play Fantasy Sports Online. By a 28-point margin, voters believe that New Yorkers over the age of 18 should be permitted to play online fantasy sports. Overall 60% of likely voters support this idea, while 32% oppose. The strongest supporters of allowing adults to play fantasy sports online include voters aged 18-44 (72% support) and those who have already played online fantasy sports (90% support). There was majority support for allowing New Yorkers to play online fantasy sports across all geographic regions and political parties.

New Yorkers Support Sensible Regulation of Online Fantasy Sports. By a better than 3-1 margin, New Yorkers support regulating online fantasy sports (70% favor/23% oppose). A majority of every income, party, geography, ethnicity, age, and gender group supports regulating online fantasy sports. Other proposals supported by New York voters include:

- Requiring online fantasy sports companies to register with the state — 75% support
- Require online fantasy sports companies to implement standards to ensure participants are over the age of 18 and meet other eligibility requirements — 85% support
- Require online fantasy sports companies to pay annual state taxes and fees — 75% support

Voters Want To Keep Fantasy Sports Separate From Casinos & Racetracks. By a 43-point margin, New Yorkers oppose efforts to limit online fantasy sports to casinos and racetracks. Overall, 65% of voters oppose the proposal, while 22% support it. Opposition is strongest among Republicans (67% opposed), voters aged 18-44 (74% opposed), and upstate (75% opposed in the Central New York/ Capital District/North Country regions and 73% opposed in the Western New York/Finger Lakes/Southern Tier regions).

Many Fantasy Sports Players Will Hold Lawmakers Accountable For Their Votes. Among those voters who have played online fantasy sports 47% would be less likely to vote for a state legislator who wants to make it illegal to participate in online fantasy sports contests in New York, while just 2% said it would make them more likely to vote for someone (the remainder of those who have played online fantasy sports either had no opinion or said that it would have no effect on their vote in November). According to industry estimates, out of the nearly 14.5 Million New Yorkers over the age of 18, there are approximately 1,000,000 New Yorkers who have played online fantasy sports.

A note about methodology. The poll was conducted June 1-2, 2016 among 800 likely General Election voters. At the 95% confidence level, the margin of error in the survey is 3.46%. The margin of error is higher among sub-groups. This survey was drawn from a sample of voters with a history of voting in even-year elections. In addition, screening questions were employed to identify those voters in the sample most likely to vote this November.

About The Parkside Group. Described as "New York's leading full-service public affairs firm" by *Campaigns & Elections* magazine, the Parkside Group has been providing electoral, corporate, and advocacy clients with public relations, public affairs, government relations, campaign management, quantitative research and advertising services for more than 15 years.

Exhibit BB: Editorials from Newsday and the New York Post dated May 24, 2016, May 17, 2016 and May 27, 2016

Newsday

Take fantasy out of New York gambling rules

May 24, 2016 By The Editorial Board

The race to legalize daily fantasy sports wagering in New York is in the home stretch. It appears likely a deal will come together before the end of the legislative session next month, but there is still plenty to be worked out.

The first congressional hearing on the subject, in Washington earlier this month, is only muddying the waters, though it seems unlikely regulation of these games is going to end up in federal hands. One big question being debated in New York is licensing fees, which were $500,000 per company in an early Senate bill, a level that would kill the smallest of the 28 companies in the New York market. Also key to passage are safeguards against cheating, preventing play by minors and truth in advertising — the industry can't really argue that it's a game of skill and then advertise that casual players can easily score big money by beating the pros.

State Attorney General Eric T. Schneiderman and representatives of the industry he shut down, such as giants DraftKings and FanDuel, agreed to a truce in March. The sites stopped taking plays in the state. If the State Legislature and Gov. Andrew M. Cuomo declare the contests legal, Schneiderman will drop his attempts to stop the games in court. If the games are not legalized, his case, which hinges on whether daily fantasy sports are games of chance and thus constitutionally banned gambling, will be heard in September.

Leaders of legislative committees who oversee wagering say they are working on legislation to legalize the games, which is wise. Players want them and non-players mostly don't care. And the pretense that the state constitution prohibits gambling has gone from silly to simply exhausting.

— The editorial board

FanDuel DRAFT KINGS

NEW YORK POST

Fantasy sports means new jobs for New York — unless lawmakers fumble

By Post Editorial Board May 17, 2016

For once, can New York lawmakers get it together to tell a growing industry they'd like it to stay?

The Legislature needs to pass a law to OK (and regulate) fantasy-sports sites like FanDuel and DraftKings before it knocks off in June. Otherwise, it's putting jobs at risk.

Attorney General Eric Schneiderman forced the industry's top firms to stop serving New York players in March, but says he'll drop his ongoing litigation if the Legislature explicitly legalizes fantasy-sports gaming.

The Senate passed one bill in March. And on Monday, Assemblyman J. Gary Pretlow (D-Mt. Vernon) tweeted that "legislation will be introduced" in his chamber in the "coming days." But if the two chambers can't agree on a bill, the industry's out of luck in New York through the football season, its top source of revenue.

FanDuel is based in the city, as are several smaller "satellite" firms that offer services to fantasy-sports fanatics. All told, at least 28 firms in the industry employ nearly 200 New Yorkers — with more jobs on the way.

More, that is, unless state lawmakers tell the industry it's not welcome here.

The still-young fantasy-sports industry drew $267 million in entry fees last year from New Yorkers alone. That promises serious tax revenues for some state down the line.

Eight states (including DraftKings' home, Massachusetts) have OK'd fantasy sports, with more surely to come.

Albany better go to a hurry-up offense. Because New York will lose if fantasy sports' enemies run out the clock.

NEW YORK POST

The gambling industry's hypocritical bid for a piece of the fantasy-sports action

By Post Editorial Board May 27, 2016

If New York's casino and racino operators can't control online fantasy sports in the state, then no one should.

That's basically the gambling industry's argument for killing any bill in Albany that would legalize (and regulate) fantasy sports, "unless it is tied to brick-and-mortar facilities" — like, say . . . the facilities they own.

Talk about gobbling up the competition.

"The New York Gaming Association is unanimous" against legislation to green-light fantasy sports — unless it's "in cooperation with the existing industry," says the NYGA's president, James Featherstonhaugh.

Can anything be more blatantly selfish?

Yet this may be enough to keep the Legislature from doing its job and OK'ing the fantasy sites.

Attorney General Eric Schneiderman forced the industry's big guns, FanDuel and DraftKings, to take a hiatus in New York until lawmakers formally legalize their games. If the Legislature doesn't get it done by the June 16 end of its session, fantasy sports might be shuttered for Empire State players through the lucrative football season.

But NYGA — whose members are big political donors — may throw a wrench into the works.

Lawmakers should tell the group to take a hike. The NYGA's hypocrisy is immense.

Greg Carlin of Rush Street Gaming, which is building a casino in Schenectady, is demanding a "high regulatory barrier" for fantasy sports. But Rush Street is a Chicago-based firm with ties to Rotterdam and Houston; it's even sought Chinese investors.

Meanwhile, the growing fantasy business already employs nearly 200 people here.

Lawmakers need to decide: Do a special favor for casinos and block online sports — or put the rest of the state's interests first?

Exhibit CC: Memorandum from Debevoise & Plimpton

Debevoise & Plimpton

Memorandum

This memorandum addresses why legislation expressly authorizing and regulating fantasy sports contests in New York would not implicate or in any way conflict with the compacts between New York and the Seneca, Mohawk and Oneida Nations.

I. DFS Contests Do Not Implicate the State's Compacts with the Nations

A. The Text and Structure of the Compacts Make Clear That the Tribes' Exclusivity Does Not Extend to Fantasy Sports Competitions

The Nation-State Gaming Compact between the Seneca Nation of Indians and the State of New York ("Seneca Compact") provides that "the Nation shall have total exclusivity with respect to the installation and operation of, and no person or entity other than the Nation shall be permitted to install or operate, Gaming Devices, including slot machines, within the geographic area . . . ." Seneca Compact § 12(a)(1).[1]

The Seneca Compact itself indicates that the definition of "Gaming Devices" is strictly limited to those physical devices operated in a casino or other specified location. Section 12(a)(1) provides that "no person or entity other than the Nation shall be permitted to install or operate, Gaming Devices . . . ." The plain terms of this provision make clear that the grant of exclusivity is intended to apply to physical objects that require installation in a specific, bricks-and-mortar location. Fantasy sports contests do not implicate the Compact for the basic reason that they are not physical objects that require installation in any location. They are interactive online contests between competitors across the country that allow entrants – using devices that belong to and are controlled by them – to pit their skills against each other in simulating the role of a general manager. The overall structure and context of the Compact reinforce this point, and demonstrate that fantasy sports contests do not in any way implicate the exclusivity granted in the Compact.[2]

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[1] For illustrative purposes, this memorandum refers primarily to the Seneca Compact definitions. While there are variations in the State's agreements with the Oneida and Mohawk Nations, those variations are not material to the analysis herein.

[2] The 2005 Amendment to the 1993 Tribal State Compact Between the St. Regis Mohawk Tribe and the State of New York ("Mohawk Compact") grants the Mohawk Tribe exclusivity with regard to "slot machines." 2005 Amendment to Mohawk Compact, Appendix A § XXVII(c) (definition of slot machines identical to the definition set forth in the Seneca Compact). The 1999 Amendment to the same agreement permits the Mohawk Tribe to exclusively operate "electronic gaming devices," defined as "[a] network of five or more contiguous on-line terminals, connected to the On-Line System, with touch-screen or button controlled video

For example, Appendix B to the Seneca Compact provides specific design requirements for Gaming Devices. These specifications include the following provisions:

- "Each gaming Device shall have an on/off switch that controls electrical current. Such switch shall be located in a place readily accessible within the interior of the device and shall not be accessible from the device's exterior. The on/off positions of the switch shall be clearly labeled." Seneca Compact Appendix B § 76(b)(2).

- "Liquid Spills. Liquid spills applied to the exterior of a Gaming Device shall not affect the normal operation of the device, the integrity of the material or information stored inside the cabinet, or the safety of the players operating the equipment. If liquids are spilled into a coin acceptor or bill acceptor, the acceptor shall reject all inputs and/or generate an error condition." Seneca Compact Appendix B § 76(b)(4)(a)(6).

- "Player terminal identification. Each Gaming Device shall have a permanent metal identification plate which shall be mounted in a manner that does not permit its removal without leaving evidence of tampering. Such identification plate shall be permanently affixed to a location on the exterior of the cabinet by the manufacturer in a location approved in writing by the SGA and shall list, at a minimum, the following information: a. The manufacturer; b. A unique serial number; c. The Gaming Device model number; and d. The date of manufacture." Seneca Compact Appendix B § 76(c)(1).

- "Tower lights. Except [those machines equipped with an audible alarm activated whenever the interior of a device is accessed], each Gaming Device

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screen . . . which dispenses a Game Play Ticket immediately after a Patron's enrollment in a Game." 1999 Amendment to Mohawk Compact, Appendix A § XXVII(A)(4). Fantasy sports competitions do not constitute "electronic gaming devices" under this definition because, among other reasons, they do not dispense tickets, and they do not involve physical "terminals" that are "contiguous."

The Settlement Agreement by the Oneida Nation, the State of New York, the County of Madison and the County of Oneida ("Oneida Settlement") grants the Nation the exclusive right with respect to the "installation and operation of Casino Gaming and Gaming Devices." Oneida Settlement § IV.A. Fantasy sports competitions do not constitute "Casino Gaming" as defined in the settlement agreement, because, as set forth below, they do not constitute Class III gaming under the Indian Gaming Regulatory Act ("IGRA"). *See* Oneida Settlement § II.B.

> shall have a light located conspicuously on its uppermost surface that automatically illuminates whenever: a. A player has won a prize in an amount exceeding the threshold amount for which a Redemption Ticket can be printed; b. A player is entitled to credits in an amount exceeding the threshold amount of credits the device can award; c. An error condition has occurred, and d. The 'Call Attendant' condition has been initiated by the player." Seneca Compact Appendix B § 76(c)(5).

The above specifications obviously have no applicability to fantasy sports contests. Fantasy sports contests have no switches, lights, bill acceptors, metal plates, tickets or spill-mitigation protections. The specifications, however, shed considerable light on the overall purpose and contemplation of the Compact, which was to grant exclusivity to operate physical gaming devices in brick-and-mortar facilities. *See RM Realty Holdings Corp. v. Moore*, 64 A.D.3d 434, 436 (1st Dep't 2009) ("Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby") (internal citations omitted); *Beverage Industry Local No. 744 Health & Welfare Fund v. Quality Beers Ltd. P'Ship*, 58 F. Supp. 2d 910, 915 (N.D. Ill. 1999) (giving effect to and achieving consistency among all contractual provisions is a cardinal principle of contract construction). Courts will not give contractual terms a meaning that would be absurd in light of the parties' clear intentions and the other provisions of the agreement. *Givati v. Air Techniques, Inc.*, 104 A.D.3d 644, 645 (2d Dep't 2013) (courts interpret contracts in light of the contract as a whole and seek a sensible meaning of the words in the contract). The grant of exclusivity in the Compact simply cannot be stretched beyond its plain and intended meaning to extend to fantasy sports contests.

Indeed, the Nations and the State have battled for years regarding the scope of the exclusivity provisions in the Compacts. However, in the seven years that fantasy sports contests have been conducted in the exclusivity zones, the Nations have never previously voiced any concern that such contests implicate their exclusive right to install and operate gaming devices.

B. The Definitions in the Compact Confirm That Fantasy Sports Competitions Are Not Gaming Devices

Even if the grant of exclusivity in the Compacts could be construed to extend beyond its intended context of bricks-and-mortar facilities – and it cannot – fantasy sports contests do not fall within any of the subsidiary definitions of gaming devices in the Compact, which include "slot machines" and "video lottery games." A "slot machine" is defined as follows:

> [A] video facsimile or slot machine which means any mechanical, electrical or other device, contrivance or machine, which upon insertion of a coin, currency, token or

> similar object therein, or upon payment of any consideration whatsoever, is available to play or operate, the play or operation of which, whether by reason of the skill of the operator or application of the element of chance or both, may deliver or entitle the person playing or operating the machine to receive cash or tokens to be exchanged for cash or to receive any merchandise or thing of value, whether the payoff is made automatically from the machine or in any other manner whatsoever.

Seneca Compact, § 1(m) and Appendix A § 9(a)(1).[3] Based on any reasonable reading of the terms "slot machine" and "facsimile," fantasy sports contests do not fall within those definitions. *See RM Realty Holdings Corp.*, 64 A.D.3d at 436 ("Form should not prevail over substance and a sensible meaning of words should be sought.") (internal citations omitted).[4] Fantasy sports contests are not "slot machines" because they are not played on any physical device owned or operated by the fantasy sports contest operator. Fantasy

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[3] Moreover, "slot machine" as defined in the Oneida Settlement plainly contemplates a "random number generator." Oneida Settlement § II(R) (providing that "the outcome of each iteration of play or operation of the machine is determined at the time of play or operation, whether through the operation of an on-board random number generator in the machine itself or by a central determinant system which employs a random number generator"). This provision not only makes clear that what was contemplated by "slot machines" is consistent with the ordinary meaning of that term, but also further clarifies that daily fantasy sports contests are not "slot machines" within the context of the Compacts. Daily fantasy sports contests do not include any such random generator, as they are contests determined by the skill of the contestants at selecting a roster of real-world athletes to participate in a fantasy team.

[4] For similar reasons, fantasy sports competitions do not constitute "Video Lottery Gaming Devices," which are defined as "a network of five or more player terminals, connected to the On-Line System, with touch-screen, button-controlled video screen or other electronic display devices" which performs certain functions including "[p]roved[ing] players with the ability to choose, or have the video lottery gaming devices automatically choose for them, combinations of numbers, colors and/or symbols." Seneca Compact Appendix A § 9(a)(2). DFS contests are not "Video Lottery Gaming Devices" under this definition for the obvious reason that they are not a "network" connected to the "On-Line System" which provide players with the ability to choose "combinations of numbers, colors and/or symbols." *See also* Oneida Settlement § II.T (substantially similar definition of "Video Lottery Gaming Devices").

sports contestants do not "operat[e]" any machine at all; they compete against each other, rather than against the device. *Cf.* N.Y. Penal Law § 225.00(8) (defining "slot machines" as "a gambling device, which, as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such manner that, depending upon elements of chance, it may eject something of value"). Moreover, as noted above, any ambiguity in the definition of "slot machines" must be resolved by looking to the overall structure and context of the Compacts, which make clear that the Compacts contemplate physical gaming devices installed in specific physical locations, consistent with the ordinary meaning of that term.

Fantasy sports contests are also not "facsimiles" of any other game. A facsimile is defined as "[a]n exact copy, especially of written or printed material."[5] That term makes sense as applied to games such as video poker, video blackjack, or video horse racing: they are video simulations, copies, or "facsimiles" of the actual games (poker, blackjack, horse racing). But the term "facsimile" makes no sense as applied to fantasy sports competitions, which are not copies or replications of any other contest. Fantasy sports competitions *are* the underlying game, in which individuals compete to assemble the best-performing roster of athletes, none of whom ever compete as a team in any real-life sporting event. There is no "brick-and-mortar" or physical analog to a DFS contest.[6] DFS competitions thus are not "facsimiles" in any plausible sense of that term.

II. Because DFS Contests Are Not Prohibited Gambling, They Are Not Subject to the Nations' Exclusivity Provisions

The proposed legislation authorizing fantasy sports contests does not implicate the Compacts for the additional reason that such fantasy sports contests do not – as the legislation will expressly provide – constitute a form of gambling. The Seneca Compact authorizes the Seneca Nation to conduct Class III gaming specifically provided in Appendix A. Seneca Compact § 3; *see also* 25 U.S.C. § 2703(8). Class III gaming is defined under 25 U.S.C. §2703(8) to include all forms of gaming that are not class I gaming (social games solely for prizes of minimal value or traditional forms of Indian

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5 "facsimile." Oxford English Dictionary, http://www.oxforddictionaries.com/us/definition/american_english/facsimile (last visited June 7, 2016).

6 Even if it is determined that the Nations' exclusivity provisions are breached by the conduct of daily fantasy sports contests in the exclusive zones, the Nations' remedy would be limited to the cessation of its obligation to pay a contribution to the state regarding that particular category of activity. *See* Seneca Compact § 12(a)(4). Such a breach would not result in a significant loss of revenue to the state, particularly compared to the increase in state revenue resulting from the regulation of fantasy sports operators.

gaming) or class II gaming (bingo and certain card games). *See* 25 U.S.C. §2703(6)-(7). The Nation's exclusive authority to install and operate gaming devices is, therefore limited to those activities that would otherwise constitute "gaming" or illegal gambling.

Fantasy sports contests do not constitute prohibited gambling under federal law. Congress expressly distinguished fantasy sports contests from impermissible gambling when it adopted the Unlawful Internet Gambling Enforcement Act ("UIGEA") based on its findings that (1) fantasy sports contests are tests of the relative skill of the fantasy contestants, not binary bets against the house; (2) unlike pari-mutuel betting, the prizes do not vary depending on other players' choices; and (3) fantasy sports contests do not depend on (or compromise the integrity of) the outcome of underlying sporting events. *See* 31 U.S.C. § 5362(1)(E)(ix). Thus, fantasy sports contests do not constitute Class III gaming pursuant to the IGRA, 25 U.S.C. § 2703(8). The tribal compacts are "Class III Gaming Compact[s]" and authorize the conduct of "Class III Gaming Games." *See* Seneca Compact § 3. Because fantasy sports contests are not Class III gaming, the State would not be required to automatically amend the compact as a result of legislation clarifying the legality of fantasy sports contests. *See* Seneca Compact § 16(c)(1); Oneida Compact § 15(b)(1); Mohawk Compact § 13(c)(1). As we have discussed, and for the reasons set forth in the separate memorandum we have submitted, the New York Legislature is similarly empowered to determine that fantasy sports contests do not constitute gaming or gambling under New York law.

Exhibit DD: Memorandum from Orrick, Herrington & Sutcliffe

ORRICK

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The Unconstitutionality of Tying Daily Fantasy Sports to Brick-and-Mortar Casinos

As New York considers clarifying the legality of online daily fantasy sports (DFS) contests and enacting sensible consumer-protection regulations, the local gaming industry has its own idea of what the legislation should include. Under its proposal, online DFS operators would only be able to serve New York customers if they partner with existing brick-and-mortar gaming licensees. Although the local gaming industry has not offered details on how this proposal would work, the goal is obvious: online DFS would be legal in New York only if DFS providers tie themselves to local brick-and-mortar gaming operations, thereby making casinos the gatekeepers of daily fantasy in New York.

That option, however, is not available to the Legislature because it would plainly violate the Commerce Clause of the U.S. Constitution and its prohibition on laws that discriminate against interstate commerce. The U.S. Supreme Court has articulated a clear rule: It is unconstitutional to condition businesses' ability to operate on whether they have a local brick-and-mortar facility in the state or partner with businesses that do. The gaming industry's proposal violates that rule because DFS operators would not be able to serve New York customers unless they first partner with a local gaming operator. Such a law will grant DFS operators who establish (or casinos that already have) physical presence in New York a monopoly over daily fantasy sports in the state.

The constitutional question is not even a close one, and the U.S. Supreme Court's decision in *Granholm v. Heald*, 544 U.S. 460 (2005), answers it directly. At issue was a New York law that prevented wineries from selling to local customers unless they had an in-state distribution operation or, alternatively, sold their wines through local wholesalers who had such operations. The U.S. Supreme Court "ha[d] no difficulty concluding" that the law unconstitutionally discriminated against interstate commerce because it "subject[ed] out-of-state wineries" to the requirement of "hav[ing] a physical presence in the State," and gave wineries that already had a physical presence "access to the State's consumers on preferential terms." *Id.* at 474-76. The gaming industry's proposal will have the same result of closing the New York market to DFS providers unless they establish physical presence via brick-and-mortar

partnerships, and will give local casinos the exclusive ability to serve New York's DFS consumers.

Granholm is only the most recent in a long line of U.S. Supreme Court decisions holding that a state cannot favor businesses based upon whether they operate from or have a connection to a physical location in the state. So, for example, the Court has invalidated tax laws that penalized businesses unless they used in-state manufacturing facilities, *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), shipped their products from in-state ports, *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984), or ran their stock trades through in-state exchanges, *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977). These laws were invalid because—like the local gaming industry's proposal here—they "discriminat[ed] based on the extent of local operations," they "raise[d] the cost of doing business" in the state, and they penalized "business operations performed in any other State." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42 n.9 (1980); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 351 (1977); *Boston Stock Exch.*, 429 U.S. at 337.

It is constitutionally irrelevant that the local gaming industry apparently believes its proposal will make it easier to regulate DFS. The gaming industry's goals are plainly protectionist and, in any event, there is simply no reason to believe that New York will derive any regulatory benefits from requiring that DFS providers partner with brick-and-mortar entities. Even if there are some marginal regulatory advantages, the law would still be unconstitutional. Laws that discriminate against interstate commerce "face 'a virtually per se rule of invalidity.'" *Granholm*, 544 U.S. at 476. Thus, a discriminatory law like the one the local gaming industry proposes is unconstitutional even if the discrimination was unintentional and "even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 352-53 (1977). Unsupportable speculation that requiring brick-and-mortar partnerships *might* increase compliance with gaming regulations or *might* ease the administrative burden of regulating DFS contests does not permit discrimination.

In sum, the Commerce Clause of the U.S. Constitution embodies a clear rule. States have wide latitude to regulate commerce within their borders, but they plainly may not require that businesses establish physical presence or have particular local ties in order to serve in-state customers. If enacted, the local gaming industry's proposal to require that DFS operators partner with brick-and-mortar casinos will assuredly meet the same fate as the multiple analogous laws considered by the U.S. Supreme Court: invalidation.

Exhibit EE: Memorandum from Debevoise & Plimpton dated March 17, 2016

Debevoise
& Plimpton

Legal Analysis of FanDuel, Inc.

March 17, 2016

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EXECUTIVE SUMMARY

Fantasy sports contests are an integral part of American sports culture, enjoyed by tens of millions of people nationwide. Fantasy contests allow fans to be more than just spectators. In a fantasy contest, fans compete in their own separate competition that tests their knowledge of sports and their analytical skills against the skills of other participants. The contestants select a fantasy "roster" of players, which is scored based on the combination of the accumulated statistics of each player on the roster. Creating a winning lineup involves many of the same skill-based judgments a coach or general manager would make: evaluating matchups, game conditions, and athletes' capabilities, momentum and motivation, all with the constraints of a salary cap or draft to limit their player selections. Backed by sophisticated investors and major sports league partners, FanDuel has been offering its contests consistently in New York since 2009, until recently with no suggestion that its activities were in any way illegal.

A legislative enactment explicitly excluding fantasy sports from the definition of gambling under the New York Penal law would be within the Legislature's authority as set forth in Article I, Section 9 of the New York Constitution and would clarify that fantasy sports are legal under current New York law.

A new statute explicitly excluding fantasy sports from the scope of prohibited gambling would be a proper exercise of the Legislature's authority. Article I, Section 9 of the New York Constitution, which prohibits gambling, is neither self-executing nor self-defining. The provision explicitly delegates to the Legislature the responsibility and discretion to enact laws to give the provision force. The Legislature has broad latitude to define gambling, and has previously exercised this discretion in excluding certain activities, such as handicapping tournaments on horse races, from the gambling prohibition. Other state legislatures, Congress,

and courts have excluded fantasy sports from the definition of gambling. Consistent with these precedents, a statute declaring that fantasy sports contests do not constitute prohibited gambling would constitute a reasonable and permissible implementation of Article I, Section 9.

A legislative enactment is also appropriate to clarify that fantasy sports are legal under current New York law. Fantasy sports contests adhere to specific criteria that fundamentally differentiate them from illegal gambling. FanDuel's fantasy sports competitions are legally valid-skill based contests for a prize of a type that New York and other states have long excluded from the scope of anti-gambling laws.

First, competitions in which participants pay an entry fee and pit their skills against each other, with a non-participating sponsor paying a preannounced prize to the winner have been historically treated as lawful prize contests rather than wagers, bets, or stakes on an outcome. The only previous court to have directly considered whether fantasy sports constitute gambling determined that fantasy sports exist as part of the widely-accepted prize contests that have long been part of the American social fabric—from county fairs to the Belmont Stakes—and therefore fall outside the definition of illegal gambling.

Second, empirical evidence shows that fantasy sports are games of skill as to which the application of talent and effort to roster selection dominates contest outcomes. Fantasy sports contests also do not involve wagers on the outcome of "future contingent events" as to which the participants lack "control or influence." Rather, by using their sports acumen to make better roster selections than their opponents, fantasy sports competitors change the outcome of their fantasy sports contest, just as a real-world coach or general manager picking players influences the performance of an actual sports team. Thus, the entrants in a fantasy contest are not like

mere spectators, but are competitors in the own separate contest in which they match their skills against other competitors for a prize, conduct that has never been illegal in New York.

The litigation currently pending before the Appellate Division, First Department, will not likely result in a decision that casts doubt on the pending legislation expressly authorizing fantasy sports under New York law. It is a bedrock legal principle that courts do not decide constitutional questions when a case can be disposed of on a non-constitutional ground. Because the issues before the Appellate Division can be decided entirely as a matter of statutory interpretation under existing law, the court will have no need to address whether fantasy sports contests would constitute "gambling" within the meaning of the New York constitution. Were the court to express any preliminary opinion on that issue, it would purely advisory, a practice the First Department has consistently avoided.

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FACTUAL BACKGROUND

A. Fantasy Sports Competitions, a Core Part of American Sports Culture, Involve Contests in Which Sports Fans Lawfully Match Their Roster-Picking Skill Against Others

Fantasy sports competitions, which millions of sports fans have played throughout the United States for decades, are a type of contest in which the competitors mimic the role of general managers of sports teams. Fantasy sports competitors use their sports knowledge and skill to select real athletes from multiple teams in a given sport for "fantasy" lineups or rosters. They then match their fantasy teams against those of their friends, family members or others, accumulating points based on the performance of the athletes on their fantasy teams in real-world sporting events. Just as a skilled general manager evaluates extensive information in selecting players for a real-life team, fantasy sports contestants picking a fantasy team may look at past performance, injury history, performance trends of comparable players, the strength of schedule for an athlete's team, projected matchups for particular games, coaching philosophy, changes to league rules that could influence an athlete's performance, and other factors.

Fantasy sports competitions have become highly popular among sports fans and have particularly grown in recent years because of the Internet. Companies like Yahoo!, CBS Sports and the ESPN Network—as well as FanDuel and many others—currently operate highly popular fantasy sports competitions on their websites. Sports teams and leagues have enthusiastically embraced fantasy sports as a way of enhancing spectators' excitement about professional sports that does not present concerns about the integrity of games, as betting on sports events could. FanDuel currently has partnership or sponsorship deals with 16 NFL teams and 16 NBA teams, and is the NBA's Official One-Day Fantasy Sports Partner. *Id.*

Fantasy sports come in a wide variety of types and formats, including head-to-head contests, leagues and large-format tournaments. Contests can last a day, a week, part or all of a

season, or years (with participants signing their fantasy players to multi-year "contracts"). Contestants' choice of rosters can be governed through a variety of means—such as drafts, auctions or the use of fictitious "salary caps"—all intended to simulate the kind of resource-allocation decisions a real general manager must confront. FanDuel's preferred selection method involves salary caps. As compared to the "draft" selection method, the "salary cap" approach carries the advantage that every athlete is available for selection by any contestant no matter what order of selection takes place. In all of these variants, participants compete against each other in acting as simulated general managers of their respective fantasy teams.

B. Except for the Shorter Duration, "Daily" Fantasy Sports Work the Same Way as Season-Long Fantasy Sports

Among these many forms of fantasy sports offerings, the "daily" fantasy sports contests offered by FanDuel and others work in fundamentally the same way as other competitions, except that their duration is shorter. So-called daily fantasy contests typically begin and end in a week for NFL games or a day for other games. These contests place particular premiums on participants' assessments of individual players' prospects for strong performance in a single sports event, requiring extra analysis of performance trends, matchups, team dynamics and other factors capable of influencing an individual's performance in a single contest, and application of those judgments to all of the players on a fantasy roster.

FanDuel offers daily fantasy sports in several different formats. FanDuel's original type of contest was a "head-to-head" competition in which two participants competed directly against each other (hence the name "FanDuel"). These contests may be played between two friends or acquaintances who choose to play against each other, or a contestant may choose to be matched with a stranger who also is looking for someone to play against. FanDuel also offers "50/50" contests, in which the top 50% of entrants win the same preannounced prize, so that individual

participants have a better prospect of experiencing the fun of winning. Another popular type of contest is the "league" contest, involving between 2 and 99 fantasy teams, which are often played by self-selected groups of friends or co-workers but also can be played against strangers. And FanDuel offers "tournament" contests, which involve a large number of entrants and a limited number of preannounced, often large prizes.

FanDuel has offered fantasy sports contests, including to New York residents, since 2009, and it has offered the full array of current contest types, in roughly the same formats, since around 2011. Today, FanDuel has over five million users, including hundreds of thousands in New York.

The typical FanDuel customer is an enthusiastic sports fan who enjoys competition over making roster decisions based on the most current available information about performance, expected playing conditions and anticipated matchups. Many fans prefer the shorter-term format of daily fantasy sports because they can pick rosters based on their assessments of particular single-game matchups for individual players on the roster, or because a bad pick in a daily fantasy game does not leave a competitor in a disadvantaged position for the entire season as can happen readily with season-long games.

C. Fantasy Sports Contests Are Separate Competitions in Which the Contestant Is a Participant, Not Mere Bets or Wagers on Someone Else's Contest

In fantasy sports, the key to the outcome of each contest is the participant's success at assembling a better performing fantasy roster than other participants selected. The outcome of a real-world athletic contest, or even a series of real-world athletic contests, does not determine or even influence the winner in any of FanDuel's fantasy sports contests. Instead, the winner of the separate fantasy contest is determined by points awarded based on an aggregation of game statistics that measure how well, compared to others, the contestant selected a fantasy roster of

players who never actually step on a field together. Unlike sports bettors, whose wagers turn directly on the actual outcome of external events over which the bettors have no influence or control, fantasy sports competitors are active participants in a parallel fantasy contest of their own, which exists separate and apart from any underlying athletic event and does not turn on the outcome of any such event, or on the outcome of any other single real-world occurrence. Indeed, a sustained empirical study of fantasy sports outcomes by Professor Anette Hosoi of MIT demonstrates that fantasy contestants directly influence the outcome of that separate contest, based on the acumen with which they select their fantasy rosters.

Fantasy players are thus participants in legally valid contests in the same ways as participants in dog shows, golf tournaments, fishing competitions, beauty pageants, county fair competitions and innumerable other types of contests.. All of these are competitions involving entry fees for participants, matching of skills among the contestants and pre-identified prizes for winners. New Yorkers have competed in such contests for decades without any suggestion that they were engaged in illegal gambling.

Fantasy sports contests are not like lotteries or roulette, because their outcome depends on skill in roster selection rather than random outcomes. They are not subject to the "chance" element of a draw of cards. Instead of being "dealt" a particular "hand," all participants start on a level playing field, in the exact same position as each other, and have complete control over the lineup they select, constrained by the same fantasy "salary cap" that applies to everyone. Unlike the "house" in a casino, FanDuel cannot win a contest and has no interest in who wins; rather, prizes are announced in advance and guaranteed to the winners. Unlike pari-mutuel betting on horse races (which is illegal unless state-sponsored) or illegal sports gambling, the size of the

prize in fantasy sports contests does not change based on "odds" determined by the number of entrants or their selections; rather, all prizes are announced in advance.

Fantasy contests also are not like "prop" and "parlay" bets over a binary, yes-or-no outcome, such as whether a particular individual will accomplish a particular feat, but multi-factorial, turning on relative performance across a spectrum of possibilities by the collection of multiple individuals on a particular roster. They pose no threat of undermining the integrity of the underlying contests in which the athletes compete—it is logistically impossible to "fix" a fantasy sports competition. The proposition that the outcome of fantasy contests can be affected by the actions of individuals other than the contestants, and by other factors outside the contestants' control, reflects an inherent element of competitions and does not distinguish fantasy sports contests from any other contests long recognized as legal.

LEGAL ANALYSIS

I. The Constitution Delegates Authority to the Legislature to Enact a Statute Authorizing Fantasy Sports

A. The Constitution Requires the Legislature to Define Gambling

The Legislature would not violate Article I, Section 9 of the Constitution if it enacted a new statute that specifically excluded fantasy sports from the scope of prohibited gambling. The Constitution affords the legislature discretionary authority to enact a statute authorizing fantasy sports and imposing regulations on the conduct of such contests to promote consumer protections.

Article I, Section 9 provides, in relevant part:

> **[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, 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.** (Emphasis added.)

As is evident from the text, the constitutional provision concerning gambling is neither self-executing nor self-defining. It is not self-executing because it does not, by its own force, prohibit or punish any primary conduct of New York's citizens. To the contrary, the provision delegates authority to the Legislature to enact laws that will implement and give force to its anti-gambling directive. New York courts have long recognized that in the absence of such laws, the constitutional provision has no independent proscriptive effect. *See, e.g., People ex rel. Sturgis v. Fallon*, 152 N.Y. 1, 11 (1897) (noting "[t]hat this provision of the Constitution was not intended to be self-executing is manifest" and that Article I, Section 9 "expressly delegates to the legislature the authority [to implement the provision], and requires it to enact such laws as it shall deem appropriate to carry it into execution.").

B. The Scope of the Legislature's Authority

Article I, Section 9 equally is not self-defining. "[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." *People v. Wilkerson*, 73 Misc. 2d 895, 901 (Monroe Cnty. Ct. 1973). The Constitutional delegation to the Legislature of responsibility to "pass appropriate laws to prevent offenses" necessarily gives the Legislature the role of defining what type of conduct constitutes impermissible "gambling" that it will prohibit citizens from pursuing. As the variety of definitional formulations in statutes around the country demonstrates, the Legislature could have chosen to define "gambling" in different ways, and the current statute

simply represents one possible formulation. *Dalton v. Pataki*, 5 N.Y.3d 243, 264 (2005) (noting the absence of any constitutional definition of "lottery"); *see also*, 1985 N.Y. Op. Att'y Gen. (Inf.) 75 (noting that the current definition of gambling is in the Penal Law, rather than the constitution).

Prohibited "gambling" is not by its nature susceptible to comprehensive self-definition, because there are so many undisputedly permissible forms of conduct in which participants put money at risk in the hope that their decisions will lead to substantial return as a result of actions by people other than themselves. This reality has led legislatures and courts to confirm that no assertion of impermissible gambling will attach to most varieties of passive investment, the sale of insurance, many kinds of contests with entry fees and prizes, and many forms of private activities in which losers' money is transferred to winners. *See, e.g., People ex rel. Lawrence v. Fallon*, 152 N.Y. 12 (1897) ("stakes" competition where the owner of the winning horse collects winnings from sponsors of losing horses is not gambling under N.Y. State Constitution or applicable statutory provision).

New York courts have confirmed that, in selecting the applicable definition of "gambling" pursuant to constitutional directive, the Legislature has substantial latitude. In *Sturgis*, for example, the Court of Appeals reviewed a statute that left intact civil forfeiture remedies but eliminated any criminal penalty for certain forms of wagering on horse races (prior to the constitutional amendment explicitly permitting pari-mutuel wagers on horse racing). 152 N.Y. at 11. In upholding that statute under Article I, Section 9, the Court of Appeals articulated a highly deferential standard of review:

> It 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 more appropriate law might have been devised and

> enacted. So long as this legislation was in any degree appropriate to carry into effect the purpose of the Constitution, it does not fall under its condemnation.

The New York Legislature has previously exercised this authority for the precise purpose of permitting forms of conduct not specifically authorized in the Constitutional provision by refining the definition of whether that conduct constitutes gambling. Section 906 of New York Racing, Pari-Mutuel Wagering and Breeding Law, for example, specifically authorizes handicapping tournaments based on horse races. Although Article I, Section 9 of the Constitution authorizes "pari-mutuel betting on horse races . . . from which the state shall derive a reasonable revenue," handicapping tournaments, structured with pre-defined entry fees and prizes that provide no revenue to the State, do not satisfy this Constitutional exception. Nonetheless, the Legislature has expressly sanctioned such contests – without challenge – based on its definitional judgment that, subject to regulatory requirements, "a handicapping tournament . . . *shall be considered a contest of skill and shall not be considered gambling.*" N.Y. Rac. Pari-Mut. Wag & Breed. Law § 906 (emphasis added).

Similarly, the Legislature has exercised its broad definitional authority under Article 1, Section 9 in promulgating the current definitions in Section 225.00 of the Penal Law. Those definitions include some activities under the "gambling" label but also specifically exclude other kinds of activity that could be so described. For example, the Legislature carves out a nuanced definition of a "player" in Section 225.00(3), excluding from the statute's reach individuals who engage in "gambling activity" through particular kinds of "social" participation without financial reward.

The Legislature has equally recognized its authority to provide definitions that affect the scope of constitutional provisions in other contexts where the Constitution has expressly provided it that authority. For example, Article I, Section 6 exempts "cases of petit larceny

under the regulation of the legislature" from the requirement of a grand jury indictment prior to prosecution, and the Legislature amended the Penal Law in 1986 to quadruple the value of stolen items necessary to constitute grand larceny, thereby greatly reducing the number of constitutionally required grand jury indictments. *See* McKinney's 1986 Session Laws, Vol. 2, at 2966. Similarly, Article II, Section 3 provides that "[t]he legislature shall enact laws excluding from the right of suffrage all persons convicted of . . . any infamous crime," and the Legislature has passed and twice amended the statute implementing this mandate to eliminate categories of individuals to whom this disenfranchisement applies and shorten the period of their disenfranchisement. N.Y. Elec. L. § 5-106(2). The Legislature understood in both instances that the delegation of authority gave it a role in applying the Constitutional mandate through the imposition of definitions that could be subject to change.

C. Legislation Authorizing Fantasy Sports Contests is Constitutionally Permissible

Consistent with this previous practice, the New York Legislature would not exceed its delegation under Article I, Section 9 if it enacted a new statute containing a definition of gambling that permitted fantasy sports contests. States across the country – and the United States Congress – have adopted a range of approaches to defining "gambling" under the law. A legislative enactment of a different statute declaring that some or all of FanDuel's contests should not be considered gambling would be among the rational and reasonable means of implementing Article I, Section 9 – *i.e.*, "in any degree appropriate to carry into effect the purpose of the Constitution," as indicated in *Sturgis* – adopting that law would be within the Legislature's authority and entitled to judicial deference.

That conclusion is amply supported by the existing legal sources that exclude fantasy sports from the definition of gambling. Specifically:

- Courts: As set forth in Section II.A *infra*, in the most relevant prior case concerning the characterization of fantasy sports contests for these purposes, the court in *Humphrey v. Viacom, Inc.*, No. 06-cv-2768, 2007 WL 1797648 (D.N.J. June 20, 2007), held "as a matter of law" that entry fees for such contests are not "bets," "wagers" or "stakes." As the United States Court of Appeals for the Third Circuit has concluded, there is 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) (citing *Humphrey*, 2007 WL 1797648, at *9, and *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85, 86-87 (1961)). These cases provide strong support for the sustainability of a legislative determination that "gambling" does not necessarily encompass fantasy sports for constitutional purposes.

- Federal Legislation: Congress followed a similar analysis in adopting the Unlawful Internet Gambling Enforcement Act ("UIGEA"), which expressly distinguished fantasy sports contests from impermissible gambling based on its findings that (1) fantasy sports contests are tests of the relative skill of the fantasy contestants, not binary bets against the house; (2) unlike pari-mutuel betting, the prizes do not vary depending on other players' choices; and (3) fantasy sports contests do not depend on (or compromise the integrity of) the outcome of underlying sporting events. *See* 31 U.S.C. § 5362(1)(E)(ix). UIGEA's determination that fantasy sports satisfying the statutory requirements do not constitute gambling is expressly not pre-emptive of state gambling laws, but it reflects a cognizable definitional approach available to New York's Legislature in addressing whether fantasy sports contests constitute gambling.

- State Statutes: Maryland, Kansas and Virginia have passed laws expressly providing that fantasy sports contests do not fall within the definition of gambling, betting, or wagering. *See* Md. Code Crim. L. § 12-114; K.S.A. § 21-6403(a)(9); Va. Code Ann. § 59.1-559.[1]

All of these sources of law reflect reasonable approaches to defining what is and what is not gambling, and by aligning with their definitions the Legislature would not exceed its delegated authority under the Constitution. The key questions underlying the application of Article I, Section 9 to fantasy sports are best viewed as ones of policy that the Legislature is best positioned to address. As set forth in Section II.B *infra*, ample empirical evidence would support a legislative judgment that fantasy sports contests are predominantly based on skill and do not

[1] Although Maryland's Attorney General has recently questioned whether the Maryland statute validating daily fantasy sports contests should have been adopted by referendum under Maryland's constitution, the Attorney General has also acknowledged that the Legislature is best suited to resolve the difficult question whether daily fantasy sports should be classified as "commercial gaming," Maryland Att'y Gen. Op. at 1, 22 (Jan. 15, 2016).

implicate the core concerns animating the constitutional provision, particularly if a new statute included the type of robust consumer protections FanDuel supports.

II. A Law Authorizing and Regulating Fantasy Sports Would Serve To Clarify that Fantasy Sports are Legal Under Current New York Law

Fantasy sports do not constitute gambling under New York's Penal Law, and thus a legislative enactment explicitly authorizing fantasy sports would not be inconsistent with, but instead would add clarity to, current New York law. Penal Law § 225.00(2) provides that:

> 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.

Fantasy sports competitions do not satisfy either of the two required elements of gambling under that statute: *First*, fantasy sports contests do not involve "stak[ing] or risk[ing] something of value," in the nature of a bet or wager, which courts in New York (and elsewhere) have consistently interpreted to exclude paying an entry fee to match skills against others in a valid contest for a preannounced prize. *Second*, fantasy sports contests do not depend on the outcome of (i) a "contest of chance" or (ii) "a future contingent event not under [the participant's] control or influence."[2] As a result, fantasy sports contests do not constitute illegal gambling under current New York law, and a legislative enactment explicitly specifically authorizing fantasy sports contests would therefore not be inconsistent with New York's prohibition of illegal gambling.

[2] Pending litigation between FanDuel, DraftKings, and the New York Attorney General focuses on this question of law.

A. Fantasy Sports Contests Do Not Involve Staking or Risking Anything of Value Under Penal Law Section 225.00, But Rather the Payment of an Entry Fee to Compete for Prizes

Courts in New York and elsewhere have recognized for more than a century that paying an entry fee to match skills against others in a contest for a prize does not constitute staking, risking, betting or wagering something of value under anti-gambling laws. As the United States Congress and courts have acknowledged, fantasy sports contests fit squarely into that category of contests for a prize and therefore are not gambling.

1. New York Adheres to the Longstanding Common Law Rule that *Bona Fide* Contests for Prizes Do Not Constitute Gambling

The Court of Appeals expressly endorsed the legality of contests involving entry fees and prizes in *People ex rel. Lawrence v. Fallon*, 152 N.Y. 12 (1897), 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. *Id.* at 16-18, 20. The court rejected the State's contention that this contest was an illegal "wager" or "bet":

> If the doctrine contended for by the [State] is sustained, it would seem to follow that the farmer, the mechanic or the stockbreeder who attends his town, county or state fair, and exhibits the products of his farm, his shop or his stable, in competition with his neighbors or others for purses or premiums offered by the association, would become a participant in a crime, and the officers offering such premium would become guilty of gambling under the provisions of the Constitution relating to that subject. Those transactions are in all essential particulars like this. In those, as in this, one of the parties strives with others for a prize; the competing parties pay an entrance fee for the privilege of joining in the contest, and in those cases, as in this, the entrance fee forms a part of the general fund from which the premiums or prizes are paid. Indeed, all those transactions are so similar to this as to render it impossible to discover any essential difference between them.

Id. at 19. The court accordingly concluded that "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 20. In fantasy sports as well, participants pay an entry fee to participate in a contest, and the entry fees generate the fund from which the successful contestants win prizes. Just as in *Fallon*, participation in such a contest is not a bet or wager and does not constitute gambling.

Numerous courts around the country have followed the New York Court of Appeals' foundational decision in *Fallon*. 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 but a contest. The court observed, on similar reasoning to *Fallon*, that "[t]he fact that each contestant is required to pay an entrance fee where the entrance fee does not specifically make up the purse or premium contested for does not convert the contest into a wager." *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 similarly recognized that contests for prizes over cumulative predictions relating to a broad series of events can be outside the bounds of illegal gambling. In particular, 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 drawn from the entry fees to the winners, are lawful subject to certain regulatory requirements—and, unlike betting on individual horse races, do not count as gambling. N.Y. Racing, Pari-Mutuel Wagering & Breeding Law § 906 ("[a] handicapping tournament . . . shall be considered a *contest of skill* and shall *not be considered gambling*") (emphasis added). In much the same way as a handicapping tournament of the kind recognized by the Legislature, a fantasy sports contest also is a contest of skill and not gambling—in both cases, participants compete by pitting their skills against each other in a separate contest that does not depend on the outcome of any real-life race or athletic event.

2. Fantasy Sports Contests Fall into the Category of *Bona Fide* Contests for Prizes That Are Legally Distinct from Gambling, as Courts and the U.S. Congress Have Acknowledged.

The only court to consider whether fantasy sports constituted gambling before the actions currently on appeal before the Appellate Division, First Department—the New Jersey federal district court in *Humphrey v. Viacom, Inc.*, No. 06-2768 DMC, 2007 WL 1797648, at *9 (D.N.J. June 20, 2007)—held for exactly these reasons that fantasy sports are *bona fide* contests for prizes, not bets, wagers, stakes or risks in connection with illegal gambling. The plaintiff in *Humphrey* brought suit against ESPN and other fantasy sports operators under a New Jersey *qui tam* statute that defines gambling in terms indistinguishable for the purposes of this dispute from

New York's Penal Law § 225.00. *See* N.J. Stat. Ann. § 2A:40-1 ("[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"). The *Humphrey* court dismissed the complaint, concluding "as a matter of law" that the payment of an entry fee to participate in a fantasy sports contest is not wagering, betting or staking money. *Humphrey*, 2007 WL 1797648, at *9. 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. As examples of permissible contests with entry fees and prizes to winners that do not constitute gambling, the court recited the list that the Arizona Supreme Court had identified in *Am. Holiday Assoc., Inc.*, *supra*, and added some others—"livestock, poultry and produce exhibitions, track meets, spelling bees, beauty contests and the like"—concluding that it would be "patently absurd" to adopt a definition of wagering that might mean that such "contest participants and sponsors could all be subject to criminal liability." *Humphrey*, 2007 WL 1797648, at *7.

Humphrey correctly found fantasy sports directly analogous to these traditional forms of contests, identifying key characteristics of legal fantasy contests that the contests offered by FanDuel all satisfy: (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." *Id.* at *7. The Court also recognized the fantasy contest as separate from

the underlying sporting events, observing that "[t]he success of a fantasy sports team depends on the participants' skill in selecting players for his or her team[.]" *Id.* at *2.

The United States Court of Appeals for the Third Circuit later endorsed this analysis, stating that there is 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). In so concluding, the court cited precisely the cases FanDuel discusses here, including *Humphrey*, 2007 WL 1797648, at *9, which it described as broadly "holding that fantasy leagues that require an entry fee are not subject to anti-betting and wagering laws," and *Las Vegas Hacienda*, 77 Nev. at 28, 359 P.2d at 86-87 (1961), which it viewed as analogously "holding that a 'hole-in-one' contest that required an entry fee was a prize contest, not a wager." *NCAA*, 730 F.3d at 223 n.4.

Against the backdrop of this common-law understanding of gambling, Congress specifically declared that fantasy sports contests did not involve gambling in the UIGEA, 31 U.S.C. § 5362(1)(E)(ix) (2006). In that statute addressing financial transactions involving unlawful gambling proceeds, Congress began by defining "bet or wager"—the basis for the substantive prohibitions and penalties under the statute—in terms strikingly similar to the New York law 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). Recognizing the inherent ambiguity and unclear boundaries of that provision, Congress went on to make specifically clear that fantasy sports contests involving an entry fee and a prize do not constitute unlawful gambling so long as three criteria are satisfied: (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). FanDuel's contests meet all of those requirements.

In adopting this provision, Congress recognized in the statutory language that fantasy sports contests should be distinguished from sports betting and other forms of gambling because (1) fantasy sports contests are tests of the relative skill of the fantasy contestants, not binary bets against the house; (2) unlike pari-mutuel betting, the prizes do not vary depending on other players' choices; and (3) fantasy sports contestants test their skills against each other in ways that do not depend on (or compromise the integrity of) the outcome of underlying sporting events. UIGEA does not preempt state gambling prohibitions. Nonetheless, the similarities between the gambling definitions in UIGEA and the New York Penal Law provide a strong indication that a provision explicitly authorizing fantasy sports would not be inconsistent with the prohibition of illegal gambling set forth in Penal Code § 225.00(2).

B. FanDuel's Fantasy Sports Contests Turn on the Relative Skill of the Contestants and Thus Are Not Games of Chance

FanDuel's contests are not "contests of chance," *see* N.Y. Penal Law § 225.00(1)-(2), but are determined by participants' skill and therefore do not constitute gambling under New York state law.

1. The Outcomes of Fantasy Sports Contests Are Dominated by Participants' Skill

Extensive research – including that of Professor Anette Hosoi[3], an MIT scientist who specializes in the application of mathematics to sports – demonstrates that the outcomes of

[3] Professor Hosoi's work involved a nearly year-long study of the role of skill in daily fantasy sports based on an extensive data set obtained from FanDuel's records.

fantasy sports contests are dominated by the skill of the participants. Professor Hosoi's analysis, which focused primarily on the head-to-head and 50/50 contests in which individual players have the best statistical prospects for winning, identified three components of the outcomes of a large number of fantasy sports contests demonstrating "that skill plays a decisive role in a player's cumulative performance over time."

(i) Predictability. Professor Hosoi confirmed that fantasy lineups selected by actual players beat randomly selected lineups (including lineups designed to approach the salary cap) an overwhelming percentage of the time.

(ii) Replicability/Persistence of Results. Professor Hosoi found substantial statistical correlations indicating that over time, strong and successful fantasy players tend to remain strong and successful; moderately successful players tend to remain moderately successful; and weak and unsuccessful players tend to remain weak and unsuccessful.

(iii) Capacity to Improve. Professor Hosoi observed that over time FanDuel users improved their skills and could expect better results to a statistically significant degree.

These characteristics of predictability, replicability/persistence and capacity for improvement are all are highly indicative of the role of skill in increasing the probability of favorable outcomes. For the same reason, they are incompatible with a finding of outcomes dominated by chance, because such outcomes tend over time toward randomness. This evidence powerfully confirms that FanDuel's daily fantasy sports contests are dominated by skill rather than chance.

2. A Contest Is Not Gambling When Skill, Rather Than Chance, Is the Dominating Element

Courts throughout the country, including in New York, have 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." *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 170-71 (1904). Following the New York Court of Appeals' landmark decision in *Lavin*, the "dominating element" test became the established test throughout the country. *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).

As part of an overall revision of the Penal Law in 1965, the Legislature adopted Penal Law § 225.00(1), which defines "contest of chance" as any contest that depends "in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." This did not, however, alter the "dominating element" test that the Court of Appeals adopted in *Lavin*. On the contrary, the case law postdating the enactment of § 225.00(1) makes clear that the *Lavin* test and the statutory test are synonymous. For example, *People v. Li Ai Hua*, 24 Misc. 3d 1142 (Crim. Ct. Queens County 2009), quoted the *Lavin* "dominating element" 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). Numerous other New York cases after the 1965 adoption of Penal Law § 225.00(1) have continued to cite and follow *Lavin*—sometimes explicitly invoking its "dominating factor" test, and sometimes implicitly applying it—as providing the test for whether an activity constitutes gambling.[4]

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[4] *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 County 1999), *rev'd on other grounds*, 291 A.D.2d 810 (4th Dep't),

Similarly, in *Matter of Plato's Cave Corp. v. State Liquor Authority*, 115 A.D.2d 426 (1st Dep't 1985), the First Department 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 a case that had found video games not to be 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 County 1980)).

The legislative history of the Penal Law confirms, as the case law indicates, that the 1965 revision of the Penal Law does not overrule or alter the *Lavin* "dominant element" test. The Court of Appeals has held 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).

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appeal dismissed, 98 N.Y.2d 738 (2002) (citing *Lavin* to hold that playing dice for money is gambling); *People v. Hunt*, 162 Misc. 2d 70 (Crim. Ct. N.Y. County 1994) (quoting the statutory "material degree" test and concluding that three card monte was not gambling because "skill rather than chance is the material component" of the game); *People v. Melton*, 152 Misc. 2d 649, 651 (Sup. Ct. Monroe County 1991) (same); *People v. Hawkins*, 1 Misc. 3d 905(A), 2003 N.Y. Slip Op. 51516(U), at *2 (Crim. Ct. N.Y. County 2003) (same); *Valentin v. El Diario–La Prensa*, 103 Misc. 2d 875, 878 (Civ. Ct. Bronx County 1980) (citing *Lavin* and applying its "dominating factor" test to conclude that "voting contest" sponsored by newspaper was gambling).

With regard to the law's gambling provisions, the Bartlett Commission 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) (discussing dismissals of cases because prosecutors had mistakenly charged the wrong section of the old law). 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. Although some commentators have speculated that this standard reflected a softening of the test for identifying a "contest of chance," not a single case since Section 225.00's enactment has applied that statutory test to reach a different outcome than would have been reached under the "dominating element" test.

3. Under Any Reading of the Statute, the Facts Demonstrate That Fantasy Sports Contests Are Games of Skill, Not Chance

Even if "material degree" only meant an important or substantial but not necessarily dominant element of chance, FanDuel's fantasy sports contests would still qualify as contests of skill rather than chance. "Material degree" in this context must at the very least mean that chance is an important element. If it were satisfied merely because chance might occasionally change the outcome, then almost nothing would be a game of skill, as "[i]t is difficult to conceive of any game which does not have present . . . the element of chance." *Amusement Enters., Inc. v. Fielding*, 189 Misc. 625, 628 (Sup. Ct. Kings County 1946), *modified on other grounds*, 272 A.D. 917 (2d Dep't 1947).

New York courts have recognized numerous games—including tennis, golf, basketball, billiards, bowling, alley ball, shooting games, chess and checkers—to be contests of skill. *See,*

e.g., *Amusement Enters.*, 189 Misc. at 628 (alley ball, a game similar to skee-ball; also listing basketball, tennis, billiards, bowling and golf); *Lavin*, 179 N.Y. at 170 (chess, checkers, billiards and bowling); *People v. Cohen*, 160 Misc. 10, 11 (Magis. Ct. Queens Borough 1936) (coin-operated electric-eye shooting game). They do not become games of chance just because, in most of those games, "occasionally an unskilled player may make a lucky shot." *Cohen*, 160 Misc. at 11; *accord Lavin*, 179 N.Y. at 170; *see also Las Vegas Hacienda*, 77 Nev. at 30, 359 P.2d at 87 ("a skilled player will get it (the ball) in the area where luck will take over more often that an unskilled player").

In determining whether a particular type of contest is dominated by skill or chance, it makes no sense to look at a single particular outcome, because even the most skill-based contests—apart from contests so lopsided that they are not genuinely competitive—will not yield the same outcome every time. Instead, the sensible approach is to rely on empirical evidence regarding probabilities over time. "Skill" is properly viewed as the capacity, through the exercise of effort and aptitude, to increase the prospects of achieving a desired result over what would be expected if events were unfolding at random. This is true for fishing contests, spelling bees, sporting events and other games of skill—proof of the dominance of skill lies in the ability of individual players to increase significantly their prospects of winning through the exercise of effort and aptitude. More able competitors will prevail more of the time in all of these contests, even though the vagaries of any individual competition may mean that the biggest fish will avoid the most skilled fisherman's hook (or jump onto the least skilled fisherman's hook), the best speller is given a rare word she does not know (or her opponent receives only words she knows), or a last-second gust of wind causes a correctly kicked football to drift wide of the uprights. These contests remain contests of skill even though, like all contests, they may be affected by

small differences in performance by the contestant or others that are part of the nature of contests and that nobody could predict. Fantasy sports share the same dynamics of skill-based judgments, capacity to increase prospects for winning through effort and aptitude, and susceptibility to a range of outcomes as these other games of skill.

C. FanDuel's Contests Are Not Gambling on a Future Contingent Event Beyond the Contestant's Control or Influence

FanDuel's contests likewise do not constitute wagering on "a future contingent event not under the [person's] control or influence." N.Y. Penal Law § 225.00. The plain language of the "future contingent event" provision makes clear that a contest is not gambling if the player has "influence" over the outcome. As explained above, using sports acumen and knowledge, FanDuel contestants unquestionably *influence the outcome of the relevant contest—the fantasy sports contest*—by making skilled roster choices. Fantasy sports contestants compete against each other at the task of selecting players, while operating within the constraints of the fantasy salary cap, to assemble an optimum lineup from millions of theoretical combinations. Those decisions and skill-based selections undeniably influence the outcome of the fantasy sports contest. The fantasy contestant's inability to influence the outcome of any real-world sporting event is beside the point, because fantasy contestants can influence the outcome of the contest in which they are seeking to win prizes.

The "future contingent event" clause plainly addresses the fundamentally different scenario in which a person stakes something of value on the outcome of an actual, real-world game or similar event such that his own success rises and falls directly in line with the outcome of that real-world event over which he has no influence. Take a week of NFL football games. The outcomes of wagers on the games themselves can be readily gleaned from the same NFL record books that document which teams won or lost the game, how many points they scored,

and so on. But those same archives, even to the extent they contain all of the various individual statistics that are ascribed different values in the intricate rule sets for fantasy sports contests, shed no light on who may have won or lost fantasy contests dependent on millions of variables in scoring system, lineup configuration, salary cap value, and the performance of other fantasy managers. The results of fantasy contests – independent competitions in their own right – reside only in FanDuel's (or a given league commissioner's) record books. If construed in an expansive and unbounded manner, the "future contingent event" provision would not only raise serious constitutional questions but also outlaw a range of universally approved activities of daily life.

1. Participants in a Fantasy Sports Contest Are Active Players in a Competition of Their Own, Not Bettors on a Sporting Event

FanDuel's fantasy sports contests are clearly separated from the underlying sporting events, as FanDuel offers no contests based on any single sporting event and does not permit participants to construct any lineup that substantially coincides with an actual, real-world team. As the Third Circuit has recognized, there is 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*, 730 F.3d at 223 n.4 (citing *Humphrey*, 2007 WL 1797648, at *9).

Similarly, unlike "prop" bets, in which a participant bets on a particular event in a sporting event—for example, a bet on whether a specific batter, on a specific occasion at bat, would hit a fly ball to the outfield. That kind of binary, either-or bet is fundamentally different from a fantasy sports contest (either season-long or daily), which is built on the separate competitive and skill-based exercise of building a fantasy team to compete against other fantasy teams. Fantasy sports do not look to whether a particular athlete or even a collection of athletes

achieves a particular milestone, but to how the performances of participants' fantasy roster choices compare to the performance of others' roster choices.

Only in the rarest of cases have New York courts relied on the "future contingent event" prong of the statute to decide whether a given activity constitutes gambling, and none have done so in a situation even arguably analogous to FanDuel's fantasy sports contests. Indeed, the only reported case that has found a gambling violation under the "future contingent event" prong demonstrates that that statutory test deals only with situations that are vastly different from FanDuel's contests. In *People v. Jun Feng*, 34 Misc. 3d 1205(A), 2012 N.Y. Slip Op. 50004(U) (Crim. Ct. Kings County 2012), a mahjong house was profiting from the wins of the mahjong players by taking a cut of their winnings. *Id.* at *4-*5. Although the court found that this arrangement gave the house an interest in the "future contingent event" of the outcomes of individual games, it still found that the players were not gambling under that provision because they had "some control" over the outcome. *Id.* at *6 n.1. But in fantasy sports, there is no "house." FanDuel does not gain or lose anything based on the outcome of participants' contests. It acts only as administrator of fantasy sports contests, and entry fees and prizes are both fixed in advance. It is the relative skill of the fantasy players that determines success in fantasy sports contests.

2. A Broad Application of the "Future Contingent Event" Theory, as Urged by the New York Attorney General, Would Criminalize a Host of Legitimate Business Activities

Under a broad interpretation of the "future contingent event" prong of Penal Law § 225.00(2), such as the one advocated by the New York Attorney General, prohibited activity would include any event that leads to a return based on a prediction of others' behavior or performance. That would criminalize a wide variety of legitimate business activities that clearly

do not amount to gambling—including insurance, investing and trading in commodities futures and derivative instruments. Each of these activities involves a chance of gain or loss based on future contingent events outside one's control or influence and therefore, on the broad reading of the statute urged by the New York Attorney General, would appear to violate New York law.

For example, insurance, by its very nature, involves an agreement to pay based on a contingent future event beyond the insurance company's influence or control. But it is not gambling. Likewise, a passive investor in a company has no influence over the outcome of his or her investment, which is plainly a future contingent event as to which the investor depends on actions by others, but such investments are not considered gambling. The same is true for trading in futures or derivatives, even though no actual commodities or other items ever change hands, as those instruments involve nothing more than a contingent promise to pay money in the future. *See, e.g., Korea Life Ins. Co., Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 269 F. Supp. 2d 424, 442 (S.D.N.Y. 2003) ("Derivatives transactions, forward contracts and swap agreements in currencies and commodities are not considered illegal gambles, and do not violate New York's gambling statute."); *Liss v. Manuel*, 58 Misc. 2d 614, 617 (Civ. Ct. N.Y. County 1968) (recognizing futures contracts as "an approved and judicially enforceable mode or form of business and regardless of risk, not a bet, wager or illegal gamble"). Yet the insurance carrier, the investor or investment advisor and the general manager do not act based on chance—they act based on expertise, underwriting and analysis—and thus have a significant opportunity to influence the performance of their portfolios by their choosing, even though they do not control the results. The same is true for fantasy sports contests.[5]

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[5] It is no answer that insurance, securities and commodities trading, and similar activities are, in today's world, typically subject to state or federal regulation. Many forms of passive investment (such as investments in real estate or in companies that are not

In enacting UIGEA, the U.S. Congress recognized precisely the danger of the overly broad construction of gambling the New York Attorney General presses here. The provisions making clear that fantasy sports contests do not constitute wagering or betting under federal law were accordingly grouped with similar provisions excluding from the statute's scope "any contract of insurance," commodities futures and similar derivative transactions, and the "purchase or sale of securities," among other forms of passive investment in predicted performance of others not under the investor's control. 31 U.S.C. § 5362(1)(E). Congress adopted these provisions to steer courts away from the same interpretive pitfall that the New York Attorney General has advocated: the erroneous view that all forms of predictive judgment about the performance of others on which a financial consequence turns are gambling. That has never been the law of New York. Unlike UIGEA, Penal Law § 225.00 itself contains no express exceptions, not even for investing or insurance; rather, the Legislature has relied on the courts to apply the law in a sensible way. And, as noted above, courts have understandably been reluctant to rely on this provision or to endorse a sweeping construction that would call into question obviously legitimate activities.

III. The Pending Litigation Will Not Result in a Decision That Would Call into Question the Constitutionality of Legislation Authorizing Daily Fantasy Sports

The pending appeal before the Appellate Division, First Department is unlikely to address whether daily fantasy sports contests would constitute "gambling" within the meaning of Article I, Section 9 of the New York constitution because the court has no need to consider that question. Rather, it is settled law that "[c]ourts should not decide constitutional questions when

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publicly traded) are subject to no regulation beyond a prohibition on outright fraud. Those activities do not amount to gambling regardless of whether Congress or the Legislature has chosen to regulate them.

a case can be disposed of on a nonconstitutional ground." *Beach v. Shanley*, 62 N.Y.2d 241, 254 (1984) (declining to decide whether the state constitution mandated a reporter's privilege, because a statute resolved the issue). As a matter of basic separation of powers principles, it is not appropriate for courts to issue what amount to advisory opinions on constitutional issues. In our view it is extremely unlikely the First Department will violate that rule here.

Although the lower court made a passing reference to the constitutional prohibition on "gambling" in its decision, the First Department will likely recognize the impropriety of issuing an opinion that could be seen as tying the Legislature's hands for the future. As set forth in Section I *supra*, New York courts have made clear that Article I, Section 9 is neither self-executing nor self-defining. Accordingly, any claim of illegality must be brought under a statute enacted to implement that provision. *See, e.g., People ex rel. Sturgis v. Fallon*, 152 N.Y. 1, 11 (1897) (noting "[t]hat this provision of the Constitution was not intended to be self-executing is manifest" and that Article I, Section 9 "expressly delegates to the Legislature the authority [to implement the provision], and requires it to enact such laws as it shall deem appropriate to carry it into execution."). Moreover, even if the First Department issues an opinion touching on constitutional issues, such a decision would necessarily be tentative in nature given the procedural posture of the case. The question before the First Department on appeal is whether the Attorney General is likely to succeed on its claims; the court will not make an ultimate determination on the merits of the issues. Indeed, the lower court recognized as much in noting that its ruling on the preliminary injunction motion was "not a final determination on the merits." *People v. Fanduel, Inc.*, No. 453056/15, 2015 WL 8490461, at *8 (N.Y. Sup. Ct. Dec. 11, 2015). The same would be true of any appellate decision, and thus any unlikely discussion of constitutional issues in the Appellate Divisions decision – other than to make clear that such

issues are unnecessary to resolve the case and therefore should not be addressed – would be not only advisory but preliminary in nature.

CONCLUSION

A legislative authorization of fantasy sports would align New York law with judgments by Congress, courts and other state legislatures that fantasy sports contests do not constitute illegal gambling. Such legislation would reflect a reasonable implementation of the New York Constitution's delegation to the Legislature of the responsibility to define what conduct constitutes or does not constitute illegal gambling and enact appropriate laws to prohibit gambling.

Dated: March 15, 2016

Respectfully submitted,

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Exhibit FF: Memorandum from Greenberg Trauring, dated July 29, 2016

600 North Lake Shore Drive
Chicago, IL 60611

Hon. Andrew M. Cuomo
Governor of New York State
NYS Capitol Building
Albany, NY 12224

Dear Governor Cuomo:

Please find attached a memo prepared by our outside counsel regarding the constitutionality under New York law of S8153/AB10736. This is intended to supplement the earlier memo we provided with additional constitutional analysis.

Please let me know if I can provide any additional information.

Thank you very much.

Sincerely,

Peter Schoenke

Peter Schoenke
Chairman, Fantasy Sports Trade Association
peter@rotowire.com

GT GreenbergTraurig

Memorandum

TO: Peter Schoenke, Chairman of the Board
Fantasy Sports Trade Association

FROM: Carmen Beauchamp Ciparick
Susan Phillips Read
Henry M. Greenberg

DATE: July 29, 2016

RE: The Interactive Fantasy Sports Bill and Article I, § 9 of the New York State Constitution

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I. Introduction

This memorandum is in response to your request for a legal analysis of the constitutionality of New York State Assembly Bill A10736/New York State Senate Bill S8153 (the "Bill") — an act to "provide for the registration, regulation, and taxation of interactive fantasy sports contests in New York State" — under Article I, § 9 of the New York State Constitution (the "Constitution").

Article 1, § 9 generally proscribes "the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling," except lotteries operated by the state, pari-mutuel betting on horse races, and casino gambling at no more than seven facilities.[1] In enacting the Bill, the Legislature explicitly declares that "interactive fantasy sports do not constitute gambling" because such contests are neither "games of chance" nor "wagers on future contingent events not under the contestants' control or influence."[2] As explained in detail below, such a declaration is a proper exercise of legislative authority, and, as a duly enacted statute, would be afforded deferential review. Thus, if signed into law, New York courts would likely uphold the Bill in the face of a constitutional challenge based on Article I, § 9.

II. Background

In November 2015, New York State Attorney General Eric T. Schneiderman issued cease-and-desist letters to DraftKings, Inc. and FanDuel, Inc. — companies that operate websites that host daily fantasy sports contests — ordering them to immediately stop accepting "wagers" in New York State. In March 2016, DraftKings, Inc. and FanDuel, Inc. entered into settlement

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[1] N.Y. Const. art. I, § 9.1.

[2] Bill § 1400 (N.Y. 2016).

agreements pursuant to which both companies would immediately halt operations in New York State.[3]

On June 21, 2016, the New York State Senate gave final legislative approval, by a vote of 45 to 17, to Senate Bill 58153, substituted by Assembly Bill A10736, which had previously passed the Assembly by a similarly wide margin. The Bill seeks to amend the Racing, Pari-Mutuel Wagering and Breeding Law by adding a new Article 14 that provides "for the registration, regulation, and taxation of interactive fantasy sports contests in New York State."[4] Its provisions establish requirements for the registration and regulation of interactive fantasy sports, and impose a state tax on revenue generated by fantasy sports contests, among other things.[5]

In enacting the Bill, the Legislature expressly found that interactive fantasy sports contests are excluded from the purview of Article I, § 9 because they "do not constitute gambling"[6] under § 225.00 of New York's Penal Law, which provides 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.[7]

Specifically, § 1400 of the Bill sets forth the Legislature's findings that interactive fantasy sports are not (1) "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"; or (2) "wagers on future contingent events not under the contestants' control or influence because contestants have control over

[3] Provisional Settlement Agreement at 2, *People v. DraftKings*, Index No. 453054/2015 (Mar. 21, 2016); Provisional Settlement Agreement at 2, *People v. FanDuel*, Index No. 453056/2015 (Mar. 21, 2016).

[4] Introducer's Memorandum in Support of S.B. S8153 (N.Y. 2016).

[5] Bill §§ 1402-1412.

[6] *Id.* at § 1400(2) ("[T]he 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.").

[7] *See* Bill § 1400(2); N.Y. Penal Law § 225.00(2).

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."[8]

The Bill aims to "regulate all interactive fantasy sports contests" by establishing a statutory framework that begins with a detailed registration process.[9] The Bill also provides consumers with a host of protections, including a prohibition on players under the age of 18, a limitation of one active account per player, and a requirement that registrants post information regarding assistance for compulsive play on their websites.[10] Additionally, the Bill offers a new source of revenue for education in New York by levying a 15% tax on revenue generated from

[8] Bill § 1400(1). The Legislative findings and purpose are set forth in §§ 1400(1)-(3) of the Bill as follows:

> 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.
>
> 3. The legislature further finds that as the internet has become an integral part of society, and interactive fantasy sports a major form of entertainment for many consumers, any interactive fantasy sports enforcement and regulatory structure must begin from the bedrock premise that participation in a lawful and licensed interactive fantasy sports industry is a privilege and not a right, and that regulatory oversight is intended to safeguard the integrity of the games and participants and to ensure accountability and the public trust.

[9] Introducer's Memorandum in Support of S.B. S8153 (N.Y. 2016).

[10] Bill § 1404.

New York participants, after prizes are awarded, as well as an additional one-half percent tax, capped at $50,000 a year.[11]

III. The Bill is a Constitutionally Permissible Use of the Legislature's Authority

A. New York Courts Apply a Deferential Standard of Review to Legislative Enactments

As a preamble to our analysis, we note that the legislation under consideration, if approved by the Governor, would "carry with [it] a strong presumption of constitutionality, that [it] will be stricken as unconstitutional only as a last resort and that courts may not substitute their judgment for that of the Legislature as to the wisdom and expediency of the legislation."[12] Time and again, the Court of Appeals has stated that the invalidity of duly-enacted legislation "must be demonstrated beyond a reasonable doubt."[13] "Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional."[14] Thus, "[a] party mounting a facial constitutional challenge bears the substantial burden of demonstrating that in any degree and in every conceivable application, the

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[11] *Id.* § 1407; Introducer's Memorandum in Support of S.B. S8153 (N.Y. 2016).

[12] *People v. Davis*, 43 N.Y.2d 17, 30, 400 N.Y.S.2d 735, 742, 371 N.E.2d 456, 462 (1977), *cert. denied*, 438 U.S. 914 (1978). *See also People v. Foley*, 94 N.Y.2d 668, 677, 709 N.Y.S.2d 467, 472, 731 N.E.2d 123, 128 (2000), *cert. denied*, 531 U.S. 875 (2000) ("As a preamble to our analysis, we note that an enactment of the Legislature, a coequal branch of government, is presumed to be valid, and that one seeking to invalidate a statute bears the heavy burden of showing that it is unconstitutional."); *People v. Tichenor*, 89 N.Y.2d 769, 773, 658 N.Y.S.2d 233, 235, 680 N.E.2d 606, 608 (1997) ("As a threshold matter, a party seeking to nullify a statute as unconstitutional must overcome the presumption of constitutionality that favors legislative enactments."); *People v. Bright*, 71 N.Y.2d 376, 382, 526 N.Y.S.2d 66, 70, 520 N.E.2d 1355, 1358 (1988) ("An enactment of our Legislature is presumed to be valid and the heavy burden of demonstrating that a statute is unconstitutional rests with the one seeking to invalidate the statute."); *see also* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 150.

[13] *Dalton v. Pataki*, 5 N.Y.3d 243, 256, 802 N.Y.S.2d 72, 76, 835 N.E.2d 1182, 1186 (2005) ("Legislative enactments are entitled to a strong presumption of constitutionality. While the presumption is not irrefutable, parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt.") (internal quotation marks & citations omitted); *People v. Pagnotta*, 25 N.Y.2d 333, 337, 305 N.Y.S.2d 484, 488, 253 N.E.2d 202, 205 (1969). *See also LaValle v. Hayden*, 98 N.Y.2d 155, 161, 746 N.Y.S.2d 125, 129, 773 N.E.2d 490, 494 (2002) ("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.") (internal quotation marks omitted).

[14] *LaValle v. Hayden*, 98 N.Y.2d at 161, 746 N.Y.S.2d at 129, 773 N.E.2d at 494.

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."[15]

The New York Court of Appeals has consistently applied this deferential standard of review in the context of gambling legislation and rejected challenges based on claims that legislation violated the state constitutional gambling prohibition.[16] In a decision from 1897, upholding a statute under Article I, § 9 that eliminated any criminal penalty for certain forms of wagering on horse racing, the Court noted as follows:

> It is not within the province of this court to declare that [the legislation under consideration] is in contravention of the Constitution, for the reason that it does not deem the provision adopted appropriate or sufficient to prevent such offenses. The Constitution in express terms reposed in the legislature the power, and imposed upon it the duty of passing such laws, thus clothing it with the right to consider and determine for itself what laws were appropriate and should be passed to carry it into effect. That the law under consideration is, in a sense, appropriate to accomplish the purpose of that provision must be admitted. Whether it will prove less effective to accomplish that result than some other we are not called

[15] *Matter of Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448, 757 N.Y.S.2d 513, 516, 787 N.E.2d 624, 627 (2003) (internal quotation marks and citations omitted). *See also Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth.*, 12 N.Y.2d 379, 389, 240 N.Y.S.2d 1, 6, 190 N.E.2d 402, 405 (1963) (if a piece of legislation is susceptible to "two possible interpretations[,] the court will accept that which avoids constitutional doubts"); McKinney's Cons. Laws of N.Y., Book 1, Statutes § 150, at 324 ("Thus, where an act is susceptible of two constructions, one of which will make it constitutional and the other unconstitutional, the former will be adopted.").

[16] *See, e.g., Dalton v. Pataki*, 5 N.Y.3d at 265, 835 N.E.2d at 1193, 802 N.Y.S.2d at 85 (holding that there was no violation of the constitution authorizing video lottery terminals or participation in an interstate lottery, as the conditions for constitutionally authorized exceptions were met); *Finger Lakes Racing Association v. N.Y. State Off-Track Pari-Mutuel Betting Commission*, 30 N.Y.2d 207, 221, 331 N.Y.S.2d 625, 632, 282 N.E.2d 592, 597 (1972) (rejecting constitutional challenge to legislation establishing Off-Track Pari-Mutuel Betting Commission and authorizing a system of off-track pari-mutuel betting at locations other than within the enclosure of a racetrack); *Saratoga Harness Racing Ass'n v. Agriculture & New York State Horse Breeding Dev. Fund*, 22 N.Y.2d 119, 122-23, 291 N.Y.S.2d 335, 238 N.Y.S.2d 730, 732-37 (1968) (rejecting constitutional challenge to legislation that required that a percentage of horse racing revenues be set aside for the benefit of the sport and its horsemen and breeders; in response to argument that the diversion of such amounts violated the provisions of Article 1 § 9, the Court held that the Legislature was within its rights to require that a certain portion of the revenues derived from racing be set aside for the general improvement of the sport and the facilities); *People ex. rel. Sturgis v. Fallon*, 152 N.Y. 1, 9-12, 46 N.E. 302, 305 (1897) (upholding legislation that made gambling at licensed racetracks not a crime but a mere civil penalty, because the constitutional gambling prohibition was not self-executing, and the extent of the penalty for gambling was up to the discretion of the Legislature).

> upon to determine. It 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 more appropriate law might have been devised and enacted. So long as this legislation was in any degree appropriate to carry into effect the purpose of the Constitution, it does not fall under its condemnation.[17]

Much more recently, in *Dalton v. Pataki*, the Court again held that plaintiffs failed to rebut the "strong presumption of constitutionality" with respect to legislation authorizing the multistate lottery and the use of video lottery terminals at certain racetracks.[18]

B. Enactment of the Bill Falls Squarely within the Scope of the Legislature's Constitutional Authority

As noted, Article I, § 9 contains a general prohibition against "the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling," subject to certain exceptions not applicable to interactive fantasy sports contests. Yet the provision does not itself provide a means of effectuating this gambling prohibition. Simply put, Article I, § 9 is neither self-executing nor self-defining[19] — a point made clear by examining the text of the constitutional gambling prohibition:

> [N]o lottery or the sale of lottery tickets, pool-selling, bookmaking, 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,

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[17] *People ex rel. Sturgis v. Fallon*, 152 N.Y. at 10, 46 N.E. at 305.

[18] *Dalton v. Pataki*, 5 N.Y.3d at 265, 835 N.E.2d at 1193, 802 N.Y.S.2d at 85.

[19] *People* v *Wilkerson*, 73 Misc. 2d 895, 900-01, 342 N.Y.S.2d 936, 942 (Cnty. Ct. Monroe Cnty. 1973) ("[G]ambling is a constitutionally prohibited activity. This prohibition is not self-executing. It requires enforcement by the Legislature. And, since 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.") (citations omitted); *People v. Mumford*, 171 Misc. 397, 399, 12 N.Y.S.2d 925, 927 (N.Y.C. Magistrates Ct. 1939) ("This provision of the Constitution is clearly not intended to be self-executing as it expressly delegates to the legislature authority and requirement to enact such laws as it shall deem appropriate to carry it into execution."); PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 162 (1996); CONSTITUTIONAL CONVENTION COMM., PROBLEMS RELATING TO LEGISLATIVE ORGANIZATION AND POWERS 366 (1938).

> 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.***[20]

Thus, by its express terms, the Legislature is required to "pass appropriate laws" to give the provision force and effect.[21] The Bill, and specifically the Legislature's declaration that "interactive fantasy sports do not constitute gambling," falls squarely within this mandate.

New York courts have recognized the Legislature's authority to take measures to enforce, clarify, and refine the Constitution's prohibition on gambling,[22] and have "interpreted . . . the scope of its legislative authority broadly."[23] As noted, the Legislature defined the term "gambling" in § 225.00 of the New York Penal Law.[24] It has also before — and without contest — declared that certain conduct does not constitute gambling and, as such, does not fall within Article I, § 9's proscription. For example, in the Racing, Pari-Mutuel Wagering and Breeding Law, the Legislature specifically authorized handicapping tournaments that provide no revenue to the State, declaring that they "shall be considered a contest of skill and shall not be considered gambling."[25]

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[20] N.Y. Const. art. I, § 9.1 (emphasis added).

[21] *See, e.g., People ex rel. Sturgis v. Fallon*, 152 N.Y. at 11, 46 N.E. at 305 (upholding a statute under Article I, § 9 that eliminated any criminal penalty for certain forms of wagering on horse racing); *see also People v. Mumford*, 171 Misc. at 399, 12 N.Y.S.2d at 927 ("[Article I, § 9] is clearly not intended to be self-executing as it expressly delegates to the Legislature authority and requirement to enact such laws as it shall deem appropriate to carry it into execution.").

[22] *People v. Wilkerson*, 73 Misc. 2d at 901, 342 N.Y.S.2d at 942 ("[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."); *see also People v. Mumford*, 171 Misc. at 399, 12 N.Y.S.2d at 927.

[23] Gerald Benjamin, *When Does a Gambling Prohibition Not Prohibit Gambling? Or an Alternative Mad Hatter's Riddle and How It Helps Us to Understand Constitutional Change in New York*, 75 ALB. L. REV. 739, 759 (2012).

[24] 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 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.")

[25] N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 906.

C. The Bill is a Rational and Reasonable Means of Implementing Article I, § 9

In response to your specific inquiry, the Bill reflects a thoughtful and reasoned exercise of the Legislature's delegated authority under Article I, § 9 to implement its provisions. The Bill contains detailed Legislative findings and establishes a comprehensive regulatory scheme for interactive fantasy sports contests — one which will generate much needed revenue for education in the State. If the Governor approves the Bill, New York will join multiple states, including Maryland, Kansas and Virginia, which have enacted legislation expressly providing that fantasy sports contests do not fall within the definition of gambling.[26]

While not binding on New York courts, we find instructive the rationales employed by courts in other jurisdictions. In *Humphrey v. Viacom, Inc.*, for example, the United States District Court for the District of New Jersey held, as a matter of law, that fantasy sports contests fall outside the definition of gambling envisioned by New Jersey's *qui tam* statute and, specifically, that entry fees for such contests do not constitute "bets," "wagers," or "stakes" for the purposes of that statute.[27] The *Humphrey* court suggested that fantasy sports participants relied on their own skill, rather than chance, to draft and manage their team throughout the season. The court also noted that there were no actual "losses" in fantasy sports because all players receive the services of the companies, in the form of statistical and analytical services, in return for their fees.

In reaching its conclusion, the *Humphrey* court also looked to federal legislation, specifically the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA"). The UIGEA confirms that fantasy sports contests do not constitute gambling as a matter of federal law. The UIGEA broadly prohibits internet gambling and related transactions but explicitly states that fantasy sports leagues do not constitute gambling as a matter of law.[28] Pursuant to the UIGEA, "participation in any fantasy or simulation sports game" is expressly excluded from an illegal

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[26] *See* Md. Code Crim. L. § 12-114 ("Notwithstanding the provisions of this or any other title, the prohibitions against betting, wagering, and gambling do not apply to participation in a fantasy competition); K.S.A. § 21-6403(a)(9) ("'Bet' means a bargain in which the parties agree that, dependent upon chance, one stands to win or lose something of value specified in the agreement. A bet does not include . . . a fantasy sports league as defined in this section."); Va. Code Ann. § 59.1-559.1 ("Fantasy contests conducted under this chapter not illegal gambling. Nothing contained in Article 1 (§ 18.2-325 et seq.) of Chapter 8 of Title 18.2 shall be applicable to a fantasy contest conducted in accordance with this chapter.").

[27] *Humphrey v. Viacom, Inc.*, 2007 U.S. Dist. LEXIS 44679, 2007 WL 1797648 (D.N.J. June 19, 2007).

[28] *See* 31 U.S.C. § 5361 et seq.; 31 U.S.C. § 5362(1)(E)(ix).

"bet" or "wager" where specific factors — similar to the safeguards put in place by the Bill — are present.[29]

We are mindful that a few commentators have argued that fantasy sports contests constitute gambling because they are games of chance and involve wagering upon future contingent events.[30] Yet, the framers of Article 1, § 9 conferred on the Legislature the responsibility to define the parameters of prohibited gambling — precisely what the Legislature has done here in enacting the Bill. Case law makes clear that challenges to such determinations are entitled to deference and should be upheld.

Thus, if the Bill becomes law, we think it unlikely a constitutional challenge to it under Article 1, § 9 would be able to meet "the substantial burden of demonstrating that in any degree

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[29] Under the UIGEA, an illegal "bet" or "wager" does not include participation in any fantasy or simulation sports game where:

> (I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.
>
> (II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominately by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.
>
> (III) No winning outcome is based —
>
> > (aa) on the score, point-spread, or any performance or performances of any single real-world team or a combination of such teams; or
> >
> > (bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.

31 U.S.C. §§ 5362(1)(E)(ix)(I)-(III). *See National Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208, 223 n. 4 (3d Cir. 2013); *Las Vegas Hacienda v. Gibson*, 77 Nev. 25, 28, 359 P.2d 85, 86 (1961) (explaining that a wager offers each party a chance of gain or loss, whereas the party offering a prize must lose what is offered upon performance of a specified act).

[30] *See* Bennett M. Liebman, *Poker Flops Under New York Law*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, n. 173 (2006); *see also* Neville Firdaus Dastoor, *Note, The Reality of Fantasy: Addressing the Viability of a Substantive Due Process Attack on Florida's Purported Stance against Participation in Fantasy Sports Leagues that Involve the Exchange of Money*, 6 VAND. J. ENT. L. & PRAC. 355 (2004); Nicole Davidson, *Comment, Internet Gambling: Should Fantasy Sports Leagues Be Prohibited*, 39 SAN DIEGO L. REV. 201 (2002).

and in every conceivable application, the law suffers wholesale constitutional impairment."[31] As noted, the federal government and other states permit fantasy sports contests. That it is debatable whether such contests do — or do not — constitute gambling only serves to confirm, in our view, that the lines drawn by the Legislature in the Bill are rational, reasonable and entitled to deference.

[31] *Matter of Moran Towing Corp.*, 99 N.Y.2d at 448, 757 N.Y.S.2d at 516, 787 N.E.2d at 627.

Exhibit GG: Letter from the Fantasy Sports Trade Association, dated July 6, 2016

FSTA
FANTASY SPORTS TRADE ASSOCIATION
600 North Lake Shore Drive • Chicago, IL 60611

July 6, 2016

A.10736 — by M of A Pretlow and Senator Bonacic

AN ACT to amend to amend the racing, pari-mutuel wagering and breeding law, in relation to the registration and regulation of interactive fantasy sports contests

APPROVAL RECOMMENDED

Hon. Andrew Cuomo
Governor
State of New York
Executive Chamber
State Capitol
Albany, NY 12224

Dear Governor Cuomo:

On behalf of the Fantasy Sports Trade Association ("FSTA"), a national trade association which has served as a voice for, and represented the interests of, the fantasy sports industry since 1998, I am writing to respectfully urge you to sign the above captioned legislation that has passed both houses of the Legislature and will shortly be delivered to you for executive action. The members of the FSTA commend the sponsors, Assemblymember Gary Pretlow and Senator John Bonacic, and members of your administration who worked with the Legislature on this legislation.

This legislation will provide sorely needed clarity on the legality of fantasy sports contests in New York. The critical Court of Appeals case on New York's constitutional

prohibition on gambling was issued in 1897,[1] four years before the establishment of baseball's American League and 82 years before the creation of the first Rotisserie Baseball contest. As Rotisserie Baseball evolved into fantasy sports, and eventually led to daily fantasy sports ("DFS")—activities enjoyed by millions of New Yorkers without interference until last fall—it is vital that the state act to clarify the legal status of these contests. The Assembly and Senate have done so with A.10763, exercising a power that the Court of Appeals made clear that the Legislature possesses 119 years ago.

Most importantly, this legislation will permit the hundreds of thousands of New Yorkers who enjoy daily or weekly fantasy sports contests to resume an activity that they love, while establishing rigorous consumer protections to ensure a safe and fair environment for all contestants. The bill will also signal to the technology community that New York remains open for innovation, and is committed to supporting start-ups such as FanDuel and DraftKings as they grow and thrive.

On a broader level, this bill serves as an example of government working the way it should. Instead of opting for protracted litigation, relevant stakeholders in the government and the industry came together to reach consensus on a constructive path forward, recognizing the Legislature's primary role in defining the legal landscape for fantasy sports contests in New York. I know that your staff also made invaluable contributions that improved the legislation and ensured that it can be effectively implemented by your administration.

The bill that passed the Legislature reflects New York's leadership in both incubating and properly regulating this growing industry, and will serve as a model to other states currently grappling with how to authorize and regulate fantasy sports contests. The passage of this legislation in New York has already prompted additional state legislatures to act, with lawmakers in multiple states engaging on the issue in the days immediately following the New York State Legislature's passage of A.10736.

This national momentum builds upon the overwhelming support that this legislation has received in New York where it was advanced by five separate legislative committees by overwhelming margins and passed on the floor in both the Senate and Assembly by wide margins.

I realize that you will be considering a multitude of bills in the coming weeks. For your convenience, I have also enclosed a compilation of the relevant materials previously provided to your office over the last few months regarding A.10736, all of which are summarized briefly in this memorandum. I am happy to provide any other materials that may be helpful to you in your review of the bill.

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[1] *People ex rel. Sturgis v. Fallon*, 152 N.Y. 1, 11 (1897)

As you know, the breadth and depth of public support for A.10736 from diverse groups of New Yorkers has been truly remarkable, as reflected in the many thousands of emails, calls, petitions and other outreach from New York voters. The support that this bill received demonstrates that government can listen, and that the voices of ordinary New Yorkers have been heard. But the support is not just from fans—the community of New York's professional sports teams also enthusiastically welcomes this bill.

Because of the overwhelming support of A.10736 by the Legislature, and the strong desire of sports fans to once again play the game they love, I urge you to not only sign this legislation but to do so in enough time that daily fantasy sports companies can resume operation in time for the 2016 football season.

I. New York Is the Home of Fantasy Sports

Like many great stories, the story of fantasy sports began at a restaurant in New York City. In 1979, a group of journalists gathered at a Manhattan bistro, *La Rotisserie Francaise*, to draft their own teams of real life Major League Baseball players. Each participant paid an entry fee and competed on the basis of which "fantasy team" accumulated the best statistics in a pre-determined set of categories. The group named the contest, "Rotisserie Baseball," after the restaurant where the idea was born, and set in motion a new form of entertainment that has captured the imagination of tens of millions of Americans.

Nearly 40 years later, over 50 million Americans compete in some form of fantasy sports, whether it's a football or baseball league with their friends and family, a basketball league with their co-workers, or, more recently, daily or weekly contests against millions of fellow fantasy enthusiasts from across the country.[2] Fantasy sports have become essential to the fan experience, and are the subject of rabid conversations on TV, radio, pre-game shows, social media, podcasts, analysis sites, and more. Perhaps more importantly, it's become an important part of our social fabric. It is not uncommon for friends, family, and coworkers to call, email, or text each other about great (or not so great) draft choices, lineups, trades, and team management. This bond is not so different from the one that passionate fans of the Bills, Jets, Giants, or Yankees share in rooting for their team. Indeed, in many respects, fantasy sports are rapidly becoming our new national pastime.

New York is hardly an outlier. An estimated three million New Yorkers participated in a fantasy sports contest over the past 12 months. This level of participation is not surprising—New York has some of the most passionate and committed fans in the world, with a fervent fan base capable of supporting 11 major professional sports franchises. And those fans view fantasy sports as a form of skill-based entertainment, not chance-based gaming. Indeed, look at the average FanDuel player for example: a typical FanDuel contestant is highly educated (86% have greater than a high school degree), affluent (average income in excess of $75,000 per year), and plays in small dollar amounts, spending

[2] Industry Demographics, Fantasy Sports Trade Association, http://fsta.org/research/industry-demographics/

on average $6 per contest and making an average initial deposit of $45.[3] In other words, most New Yorkers spend more on the movies or their monthly cable subscription than they spend on fantasy sports contests.

As discussed in Part V, below, it should come as no surprise then that New Yorkers have been equally passionate about this legislation. During the past six months, they have sent approximately 100,000 emails to your office and their state legislators urging them to support a bill that (i) confirms that fantasy sports are legal under New York law; and (ii) ensures that they are competing in a safe and fair environment.

A. Fantasy Sports Represents a Major Potential Economic Growth Sector

Fantasy sports, however, are not just a hobby for New Yorkers. ***They are also the epicenter for the booming fantasy sports industry—an industry that is estimated to generate over $1 billion of revenue in 2016 alone.*** Nearly 30 fantasy sports operators and related businesses are either headquartered in New York or have a substantial economic presence in the state.

Take FanDuel for example. Founded in 2009, the Company moved its headquarters to Manhattan's Silicon Alley in 2011 with just a handful of employees. Since then, it has grown to 175 employees in its New York office and was valued in 2015 at over $1 billion, which, at the time, made it one of New York's rare technology "unicorns."[4] This legislation will allow FanDuel to keep its employees in New York and send a powerful message to start-ups, disruptors, and other innovative technology companies that New York remains open for business. *See* Exhibit A (June 7, 2016 Letter from Nigel Eccles to Hon. John J. Flanagan and Hon. Carl E. Heastie).

But FanDuel is not the only fantasy sports operator or business that has a presence in New York—not by a longshot. The nation's other leading DFS operator, DraftKings, has an office in Silicon Alley and employs over 40 New Yorkers. The same can also be said for Yahoo!—it has approximately 2,000 employees in New York, including many who work on its fantasy sports products. In fact, the four leading DFS operators (FanDuel, DraftKings, Yahoo!, and DraftOps) are all either based in or have an office in New York.

New York is also a hotbed for the businesses that support the booming fantasy sports ecosystem—*i.e.*, companies that provide the data, research, analysis, and media

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[3] These figures are drawn from internal FanDuel customer data. The FSTA is happy to provide back-up for these figures upon request.

[4] Steve O'Hear, "Fantasy Sports Company FanDuel Raises $275M Series E, Confirms $1B Valuation" Tech Crunch (July 14, 2015) https://techcrunch.com/2015/07/14/fanicorn/; Paul Sawers, "Fresh from $275M funding round, fantasy sports firm FanDuel acquires app development firm Kotikan," VentureBeat (July 20, 2015) http://venturebeat.com/2015/07/20/fantasy-sports-firm-fanduel-acquires-mobile-app-firm-kotikan-1-week-after-whopping-275m-funding-round/; "The Unicorns with the Biggest Valuation Increases in 2015," CB Insights (Nov. 30, 2015) https://www.cbinsights.com/blog/unicorn-valuation-increases-2015/.

content that fantasy sports enthusiasts rely upon to improve their performance. Successful New York-based companies such as numberFire and FNTSY Network are a few examples of fantasy-related businesses that have thrived here, creating new platforms, mobile applications and sophisticated new services with potential applications beyond fantasy sports. Those companies came to New York for many of the same reasons that FanDuel did—it offers the perfect mix of sports, technology and business. And much like FanDuel and DraftKings, they will have no choice but to leave the Empire State unless A.10736 is signed into law.

i. *Cascading Economic Impacts*

Fantasy sports have also been an important source of revenue for New York's 11 major professional sports franchises, each of whom has entered into a significant marketing partnership with FanDuel, DraftKings, or DraftOps. As the Brooklyn Nets explained in a letter to Assemblyman Gary Pretlow in November 2015, partnering with DFS operators such as FanDuel isn't just about earning much needed ad revenue; it's about bringing new fans to the Barclays Center to root for the team. *See* Exhibit B (December 8, 2015 Written Testimony of the Brooklyn Nets before the New York Assembly Standing Committees on Racing and Wagering and Consumer Affairs and Protection). As your staff can attest from the calls they have received from team executives, this legislation is important to the New York professional sports community. In fact, it could be the one thing that the Yankees, Mets, Giants, Jets, Bills, Rangers, Islanders, Sabres, Liberty, Knicks, and Nets can all agree about.

Many of the major investors in FanDuel and DraftKings also have substantial ties to New York—companies such as Comcast, KKR, BDS Capital, Fox Sports, and Verizon. All of these investors are supportive of this legislation and the future of DFS and other forms of fantasy sports in New York.

ii. *Even More Partner Potential*

It is fair to say that fantasy sports have only scratched the surface of their impact on the New York economy. If you sign A.10736 into law, operators like FanDuel and DraftKings will have the opportunity to forge partnerships with other New York businesses, such as the agreement that FanDuel recently signed with Western Regional OTB.[5] And as the Nets' experience shows, those partnerships should bring more than just marketing dollars to Batavia Downs; it should also bring FanDuel's players—*i.e.*, millennials—to local racinos, many for the first time. These sort of marketing partnerships are a far better value proposition for the State's casinos and racinos than forcing technology companies to operate their Internet based businesses through brick-and-mortar establishments.

[5] Tom Precious, Western Regional OTB may partner with fantasy sports giant FanDuel, The Buffalo News, June 16, 2016 (available at http://www.buffalonews.com/city-region/state/western-regional-otb-may-partner-with-fantasy-sports-giant-fanduel-20160616)

II. Why Is This Legislation Necessary For New York?

A. *Background on Fantasy Sports Contests*

Before explaining the importance of A.10736 to the fantasy sports industry and the three million New Yorkers who view fantasy football or baseball as an essential part of their lives, it might help to step back and provide some background on the contests themselves.

Whether season-long or daily, all fantasy sports contests operate in the same basic way. Contestants play the role of a general manager by creating a fantasy lineup of real-world athletes and accumulate fantasy points based on the performance of the athletes on their fantasy teams in real-world sporting events. Just as a skilled general manager evaluates extensive information in selecting athletes for a real-life team, fantasy sports contestants picking a fantasy team may look at past performance, injury history, performance trends of comparable players, the strength of schedule for an athlete's team, projected matchups for particular games, coaching philosophy, changes to league rules that could influence an athlete's performance, and other factors.

Daily or weekly contests differ from season-long contests in a few respects. These differences showcase the importance of the contestant's knowledge, skill, and strategy. Unlike typical season-long contests, (i) DFS contests impose a "salary cap" that requires contestants to balance an athlete's value against his cost, adding a layer of analysis not present in season-long contests; (ii) DFS contests last one day or one week as opposed to several months, minimizing the impact of injuries and other chance events while maximizing the opportunities for contestants to use the most current information when selecting a fantasy lineup; and (iii) DFS contests allow all contestants to pick any real-world athlete (subject to the salary cap and roster constraints), such that multiple contestants can select the same athletes. These aspects of DFS contests underscore the elements of skill inherent in all fantasy sports contests.

In all fantasy sports, the key to the outcome of each contest is the participant's skill at assembling a better performing fantasy roster than the rosters selected by other participants. The outcome of a real-world athletic contest, or even a series of real-world athletic contests, has no influence on the winner of any of the fantasy sports contests. Instead, the winner of the fantasy contest is determined by fantasy points awarded based on an aggregation of game statistics that measure how well, compared to other contestants, the contestant selected a fantasy roster of real-world players who never actually step on a field together.

B. *Recent Controversy Over the Legality of Fantasy Sports in New York*

While some may be under the impression that DFS contests did not exist until the start of last year's NFL season, FanDuel and other operators have been offering these

contests to New Yorkers since 2009.

On November 10, 2015, however, the New York Attorney General's office sent "cease and desist" letters to the two largest DFS operators, FanDuel and DraftKings, demanding that they cease offering daily fantasy sports contests in New York. The two operators responded by commencing actions in New York County Supreme Court seeking, among other relief, declarations that DFS contests are legal. The Attorney General's Office separately filed its own actions shortly thereafter, seeking preliminary injunctions prohibiting FanDuel and DraftKings from offering New York customers any contests with an entry fee during the pendency of this litigation.

On December 11, 2015, the trial court issued an order granting the Attorney General's motions for a preliminary injunction against the operators, although the court made clear that its ruling was tentative and subject to discovery and further proceedings. The operators appealed that same day, moving the Appellate Division for a stay of the preliminary injunction order pending resolution of their appeal. The Appellate Division granted the stay immediately, first through a single judge and then later by a full panel.

Despite this heated dispute, the operators continued to engage in productive discussions with the Attorney General's Office. In March 2016, the parties reached a provisional settlement that fundamentally recognized that the controversy regarding the legality of DFS could be resolved more efficiently and effectively by the Legislature than through litigation. Accordingly, the companies agreed to stay the pending litigation and stop offering contests in New York—a decision that other operators followed over the next several weeks—in order to allow the Legislature an opportunity to address this issue. By the terms of that settlement, if the legislation passed by both Houses is signed into law, it will fully and finally resolve the litigation over the legality of DFS contests, including for all past conduct—a point that Attorney General Schneiderman confirmed following final legislative approval of A.10736.[6] Thus, the parties have both clearly acknowledged that the Legislature has the constitutional authority—indeed, the responsibility—to define what conduct is and is not gambling, a role the Legislature has properly exercised here.

C. *Legislation Is Required to Bring Fantasy Sports Back to New York*

In the event the legislation does not become law, however, the parties will be forced to return to contentious and costly litigation and look to the Appellate Division to rule on the trial court's preliminary injunction order. A decision from the Appellate Division is unlikely to be issued until January 2017 at the earliest. Thus, a return to litigation will mean that hundreds of thousands of New Yorkers will be deprived of the opportunity to participate in fantasy sports for the entire 2016 football season. Moreover, if the companies are successful—as the Appellate Division's stay ruling suggests they may well be—contests would resume thereafter *without* any of the bill's strong consumer protection requirements,

[6] Press Release, Office of the Attorney General, (June 18, 2016) http://www.ag.ny.gov/press-release/statement-ag-schneiderman-daily-fantasy-sports-legislation

gameplay improvements, and other transparency measures, as well as without the revenue for education. Given the need for operators to obtain a provisional license pursuant to the legislation, this bill should be signed as soon as possible to ensure that New York fans will be able to participate in the contests they love when football season begins in September.

III. Overview of Legislation

If signed into law, New York will be the ninth state in the country to pass a law that authorizes and/or regulates fantasy sports contests.[7] It should also become the model for the rest of the country.[8] Why? Two reasons:

First, the bill recognizes and confirms that fantasy sports are games of skill and are not gambling, consistent with federal law. Second, and perhaps more importantly, the bill includes stringent consumer protections, mandating a safe and fair environment for all players; requires operators to obtain licenses and grants oversight and rulemaking authority to the Gaming Commission; and subjects operators to a revenue-generating tax (the highest in the nation) to benefit education.

A. *The Definition of Fantasy Sports as a Contest of Skill is Accurate, Appropriate and Consistent with Federal Law*

The new legislation 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." A.10736 § 1401(8). In adopting this bill, the legislature recognized that fantasy sports contests are fundamentally distinct from sports betting or other forms of gambling—rather, they are bona fide contests in themselves, the outcomes of which are determined by the relative skill of the fantasy competitors.

This understanding is consistent with federal law. When it enacted the Unlawful Internet Gambling Enforcement Act ("UIGEA"), Congress expressly distinguished fantasy sports contests from impermissible gambling based on its findings that (1) fantasy sports contests are tests of the relative skill of the fantasy contestants, not binary bets against the house; (2) unlike pari-mutuel betting, the prizes do not vary depending on other players' choices; and (3) fantasy sports contests do not depend on (or compromise the integrity of) the outcome of underlying sporting events. *See* 31 U.S.C. § 5362(1)(E)(ix). The New York

[7] Colorado (2016), Indiana (2016), Kansas (2015), Maryland (2012), Mississippi (2016), Missouri (2016), Tennessee (2016), and Virginia (2016) have already passed such legislation.

[8] Indeed, earlier this week, the Delaware General Assembly introduced a bill substantially similar to A.10736. *See* Del. House Bill 444 (2016).

legislation reflects precisely the same judgment and objectively reasonable determination that fantasy sports contests are not a form of gambling.

B. *Requires Operators to Meet Strict Consumer Protection Mandates*

The new legislation requires that fantasy sports operators meet some of the strictest consumer protection mandates in the nation. For example, the legislation requires effective tools to prohibit minors from participating in the contests, through parental controls and other procedures, and enable players to exclude themselves from contests or permanently close their accounts at any time. A.10736 § 1404(1)(b). New players are offered introductory on-boarding, which covers the rules of the contest and explains how to recognize "highly experienced players," who are clearly identified for all users to see. A.10736 § 1404(1)(f)-(g). Players are able to see the number of entries a player may submit to each contest, and the number of total entries allowed for each contest. A.10736 § 1404(1)(h)-(i). The legislation bans the use of scripts or scripting programs. A.10736 § 1404(7). Finally, players are further protected by requirements that fantasy sports operators ensure that play money is accessible at all times, and to take measures to protect the privacy and online security of players and their accounts. A.10736 § 1404(1)(j)-(l).

C. *Fantasy Sports Operators Must Register With, And Are Overseen By, The New York State Gaming Commission*

The legislation also requires all fantasy game operators to be registered and vetted by the State. A.10736 § 1411. All paid-entry fantasy sports operators wishing to do business in the State must apply with the New York State Gaming Commission. This process requires, for example, background checks of the applying companies' officers, and other due diligence of the company's compliance with legal requirements. A.10736 § 1403. Registrations are for three years, and the commission would put into place a process for registration renewal. The bill also grants the commission the power to promulgate regulations to carry the law into effect. A.10736 § 1402(b)(3).

D. *Fantasy Sports Operators Are Subject To A 15 Percent Tax, Which Will Fund Public Education*

Finally, under A.10736, fantasy sports operators are subject to a 15 percent tax on gross revenues derived from New York players. A.10736 § 1407. These funds will go directly to the state's lottery fund, which is used to fund public education. This is the highest tax on fantasy sports operators in the nation. Thus, in a very real sense, as New Yorkers compete in the contests they love, they will be providing valuable revenue for education in New York State. Fantasy sports operators will also pay up to 50 thousand dollars annually from an additional tax of 0.5 percent of revenues which will defray the State's regulation costs. *Id*

IV. Dispelling Some of the Myths About The Legislation

Although fantasy sports has been a hot topic in the legislature since Assemblyman Pretlow's informational hearing in December 2015, no one spoke out against this legislation until the final weeks of the legislative session, when the New York Gaming Association ("NYGA") launched an all-out offensive against the bill.

NYGA's opposition, however, has never made sense to the bill's supporters.[9] For starters, there is no evidence that any of the 3 million New Yorkers who participate in fantasy sports contests are spending less time or money at New York racinos or casinos. To the contrary, New York was one of the few states where racinos experienced year-over-year growth between 2014 and 2015. If DFS contests were truly a competitive threat, those numbers would have declined—not by a little, but by a lot. To that end, it's also worth noting that local racinos and casinos helped FanDuel and DraftKings pass similar legislation in Indiana, Colorado, Missouri, and Mississippi this year. Again, if DFS was truly a threat to NYGA and its members, why would similarly situated casinos and racinos in those states support bills similar to A.10736? Finally, if this legislation poses such a threat to the New York gaming industry, why didn't NYGA oppose a prior iteration of A.10736, which was passed in March as part of the Senate's one House budget?

The answer is simple—skill-based fantasy sports contests are not and never will be a substitute for the type of lottery or table games offered at a racino or casino. Instead, they are, at best, a form of entertainment that can help brick-and-mortar establishments bring new customers in the door—not unlike the way the casinos in Las Vegas use Celine Dion, Penn & Teller, or Britney Spears.

Nevertheless, the sections that follow briefly address the two principal arguments that NYGA has asserted in opposition to the bill. (Both arguments are addressed in more detail in Exhibits C and D to this memo.)

A. *A.10736 Is Constitutional*

As the operators' agreement with the Attorney General's Office reflects, the Legislature plainly has the authority under the constitution to define what constitutes prohibited gambling in New York, and, as Congress and many other states have done, to make clear that fantasy sports contests are not a form of gambling. Article I, Section 9 of the New York Constitution provides, in relevant part:

> [N]o lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, . . . shall hereafter be authorized or allowed within this state; and the legislature shall

[9] Nor is NYGA's opposition unanimous across its membership. Out of nine voting members of NYGA, at least three members were neutral on the bill, and a fourth—Batavia Downs—was supportive.

> pass appropriate laws to prevent offenses against any of the provisions of this section.

The constitution itself, however, does not define "gambling," a term that has been defined and applied in myriad ways over time and across jurisdictions.[10] Rather, the constitution delegates to the Legislature the responsibility to "pass appropriate laws to prevent [gambling] offenses." *Id.* That delegation necessarily gives the Legislature the role of defining in such laws precisely what type of conduct constitutes impermissible "gambling" that citizens will be prohibited from pursuing. *See, e.g., 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."). As the variety of definitional formulations in statutes around the country demonstrates, the Legislature could have chosen to define "gambling" in many different ways, and the current statute simply represents one possible formulation. *Dalton v. Pataki*, 5 N.Y.3d 243, 264 (2005) (noting the absence of any constitutional definition of "lottery"); *see also*, 1985 N.Y. Op. Att'y Gen. (Inf.) 75 (noting that the current definition of gambling is in the Penal Law, rather than the constitution).

To take just one example, following the adoption of Article I, Section 9, the Court of Appeals in *People ex rel. Ellison v. Lavin*, 179 N.Y. 164 (1904), held that chance must "predominate" over skill in determining an outcome before a contest is considered to be gambling as an impermissible "game of chance." Although some have contended that the current definition of "contest of chance" in the Penal Law reflects a tightening of that definition, *see* Penal Law 225.00(1) (defining that term to mean "any contest . . . 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"), none would contend that the Legislature would exceed its constitutional authority by expressly adopting the *Lavin* standard announced by the Court of Appeals. Indeed, courts in many other states did precisely that, and the "dominant factor" test is now by far the majority rule across the country, a test DFS contests easily satisfy because skill is the predominant factor in DFS outcomes.

This constitutional framework, in which the Legislature has primary definitional authority for constitutional terms, is not unique. The state constitution, for example, requires the Legislature to "enact laws excluding from the right of suffrage all persons convicted of . . . any infamous crime." *See* Article II, Section 3. The Legislature has passed and twice amended the statute implementing this mandate to eliminate categories of individuals to whom this disenfranchisement applies and shorten the period of their disenfranchisement. N.Y. Elec. L. § 5-106(2). The constitutional language properly

[10] Article I, Section 9 does not, by its own force, prohibit or punish any primary conduct of New York's citizens. To the contrary, the provision delegates authority to the Legislature to enact laws that will implement and give force to its anti-gambling directive. In the absence of such laws, the constitutional provision has no independent proscriptive effect. *See, e.g., People ex rel. Sturgis v. Fallon*, 152 N.Y. 1, 11 (1897).

empowers the Legislature to determine what is an "infamous" crime and how long a convicted person must remain excluded.

The Legislature has likewise exercised its broad definitional authority under Article 1, Section 9 in promulgating the current definitions in Section 225.00 of the Penal Law. In particular, the Legislature has carved out a nuanced definition of a "player" in Section 225.00(3), which makes clear that social or friendly games in which the hosting party does not derive any financial reward other than as an equal participant in the games will not be considered gambling under the Penal Law. Similarly, Section 906 of New York Racing, Pari-Mutuel Wagering and Breeding Law, specifically authorizes handicapping tournaments based on horse races that are structured with pre-defined entry fees and prizes. Although these contests do not satisfy this Constitutional exception for pari-mutuel betting on horse racing, the Legislature has nonetheless expressly sanctioned such contests – without challenge – based on its definitional judgment that such tournaments "*shall be considered a contest of skill and shall not be considered gambling.*" N.Y. Rac. Pari-Mut. Wag & Breed. Law § 906 (emphasis added).

New York courts have confirmed that, in selecting the applicable definition of "gambling" pursuant to constitutional directive, the Legislature has substantial latitude. In *Sturgis*, for example, the Court of Appeals reviewed a statute that left intact civil forfeiture remedies but eliminated any criminal penalty for certain forms of wagering on horse races (prior to the constitutional amendment explicitly permitting pari-mutuel wagers on horse racing). 152 N.Y. at 11. In upholding that statute under Article I, Section 9, the Court of Appeals articulated a highly deferential standard of review:

> It 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 more appropriate law might have been devised and enacted. So long as this legislation was in any degree appropriate to carry into effect the purpose of the Constitution, it does not fall under its condemnation.

Id. This same deferential standard will apply to any review of the new fantasy sports legislation. And given that the legislation merely follows the overwhelming majority approach in the United States – as reflected in federal law, the growing number of states that have recently adopted fantasy sports legislation, as well as the numerous states that apply the "dominant factor" test adopted by the Court of Appeals in *Lavin* – the legislature's decision to expressly exclude fantasy sports from the definition of prohibited gambling is clearly a choice within the Legislature's discretion to make.

B. *NYGA's Alternative Approach Would Not Pass Constitutional Muster*

The bill also ensures that fantasy sports are legal in New York, and does so in a manner that is wholly consistent with New York's obligations under the U.S. Constitution. NYGA preferred an alternative scheme under which only brick-and-mortar casino operators could offer daily fantasy sports. Under their proposal, existing daily fantasy sports providers could only have operated in New York if they partnered with brick-and-mortar casinos. The Legislature wisely rejected that effort to monopolize the daily fantasy sports market, which would not only have harmed the state's consumers, but would also have discriminated against interstate commerce in violation of the U.S. Constitution.

The U.S. Supreme Court has articulated a clear rule: It is unconstitutional to condition businesses' ability to operate on whether they have a local brick-and-mortar facility in the state or partner with businesses that do. The unconstitutionality of the gaming industry's proposal is not a close question, and the U.S. Supreme Court's decision in *Granholm v. Heald*, 544 U.S. 460 (2005), answers it directly. At issue were laws in New York and Michigan that prevented wineries from selling to local customers unless they had an in-state distribution operation or, alternatively, sold their wines through local wholesalers who had such operations. The U.S. Supreme Court "ha[d] no difficulty concluding" that the law unconstitutionally discriminated against interstate commerce because it "subject[ed] out-of-state wineries" to the requirement of "hav[ing] a physical presence in the State," and gave wineries that already had a physical presence "access to the State's consumers on preferential terms." *Id.* at 474-76. The gaming industry's proposal will have the same result of closing the New York market to DFS providers unless they establish physical presence via brick-and-mortar partnerships, and will give local casinos the exclusive ability to serve New York's DFS consumers.

Granholm is only the most recent in a long line of U.S. Supreme Court decisions holding that a state cannot favor businesses based upon whether they operate from or have a connection to a physical location in the state. For example, the Court has invalidated tax laws that penalized businesses unless they used in-state manufacturing facilities, *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984); shipped their products from in-state ports, *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984); or ran their stock trades through in-state exchanges, *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977). These laws were invalid because—much like the local gaming industry's proposal for daily fantasy sports—they "discriminat[ed] based on the extent of local operations," they "raise[d] the cost of doing business" in the state, and they penalized "business operations performed in any other State." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42 n.9 (1980); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 351 (1977); *Boston Stock Exch.*, 429 U.S. at 337.

The gaming industry offered its proposal under the pretext that tying daily fantasy sports to brick-and-mortar casinos would make it easier to regulate daily fantasy sports. The gaming industry's goals were plainly protectionist and, in any event, it offered no reason to believe that New York would gain any regulatory benefit. And, even if there were any

regulatory advantages, the law would still be unconstitutional: Laws that discriminate against interstate commerce "face 'a virtually per se rule of invalidity.'" *Granholm*, 544 U.S. at 476. Thus, a discriminatory scheme such as the one the local gaming industry proposed is unconstitutional even if the discrimination was unintentional and "even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 352-53 (1977). Unsupportable speculation that requiring brick-and-mortar partnerships *might* increase compliance with gaming regulations or *might* ease the administrative burden of regulating DFS contests does not permit discrimination.

In sum, the Commerce Clause of the U.S. Constitution embodies a clear rule. States have wide latitude to regulate commerce within their borders, but they plainly may not require that businesses establish physical presence or have particular local ties in order to serve in-state customers. The Legislature correctly rejected the demand made by some New York racinos because it would have assuredly met the same fate as the multiple analogous laws considered by the U.S. Supreme Court: invalidation.

V. Passionate Support for Legislation From a Myriad of Stakeholders

Of the hundreds of bills that will be sent to you for your signature in the weeks ahead, it is likely that few have received as much support from as many diverse stakeholders. Whether it was the hundred thousand plus emails from constituents, the tens of thousands of tweets and Facebook posts, calls from the Jets, Giants, Nets, Bills, Mets, Knicks, and Yankees, or direct outreach from local gaming interests, such as Western Regional OTB, the message is clear: **This is a bill that New Yorkers care about.**

To give you a sense of just how much support this legislation has received, below please find a few key metrics:

- ***Emails to New York legislators***: Over the past 9 months, New Yorkers have sent approximately 102,000 e-mails to their Assembly and Senate representatives in support of fantasy sports legislation such as A.10736.

- ***Emails to Executive Chamber:*** During this same period, New Yorkers have sent approximately 27,000 emails to the Executive Chamber asking you to support fantasy sports legislation. Again, every single one of these emails is from a New York resident—not some fantasy sports enthusiast in Colorado or Indiana.

- ***Social Media Engagement:*** Fantasy enthusiasts also deluged social media with support for the bill, with over 71,000 engagements with efforts to pass the bill across Facebook, Twitter, Instagram and Snapchat.

- ***Online Petition***: Starting in November 2015, multiple fantasy sports enthusiasts and local operators initiated multiple petitions and campaigns. In total, over 35,000 New

Yorkers signed a petition pledging their support to legalize and regulate fantasy sports.

- ***Direct calls to legislators***: During the final month of the legislative session, an industry group facilitated approximately 6,000 calls from New Yorkers to their representatives to express their support for fantasy sports legislation.

- ***Calls to the Executive Chamber and/or legislators from New York professional sports franchises***: Over the past few months, the following professional sports teams have weighed in with your administration and/or members of the Legislature in support of the bill: the Brooklyn Nets, Buffalo Bills, New York Giants, New York Jets, Mets, and the New York Yankees. Comcast, Disney, Fox Sports, Madison Square Garden, Verizon and other local business interests have also registered support for the legislation with the Office and/or state representatives.

Editorial coverage:

- **Newsday: Take fantasy out of New York gambling rules** (May 24, 2016)

  "Leaders of legislative committees who oversee wagering say they are working on legislation to legalize the games, which is wise. Players want them and non-players mostly don't care. And the pretense that the state constitution prohibits gambling has gone from silly to simply exhausting"

- **NY Post: Fantasy sports means new jobs for New York — unless lawmakers fumble** (May 17, 2016)

  "Eight states (including DraftKings' home, Massachusetts) have OK'd fantasy sports, with more surely to come. Albany better go to a hurry-up offense. Because New York will lose if fantasy sports' enemies run out the clock"

- **NY Post: The gambling industry's hypocritical bid for a piece of the fantasy-sports action** (May 27, 2016)

  "Meanwhile, the growing fantasy business already employs nearly 200 people here. Lawmakers need to decide: Do a special favor for casinos and block online sports — or put the rest of the state's interests first?"

These editorials are provided in Exhibit E.

Conclusion

Thank you for considering my organization's views on this matter.

The FSTA firmly believes that this bill reflects the passion of New York sports fans who were able to make their voices heard in Albany. It reflects cooperation across the separate branches of our government, which together were able to foster a constructive solution that allows New Yorkers to resume the contests they love in a way that both guarantees the fairness of the contests and generates meaningful revenue for education. It shows New York's commitment to helping innovative technology companies, not just at the start-up phase, but also through the inevitable growing pains as they mature into thriving businesses. And it shows New York's leadership on an issue many states across the country are now considering. Those elements of passion, cooperation, innovation and leadership speak volumes about what New York is doing right.

The Fantasy Sports Trade Association urges you to sign A.10736 without delay.

Sincerely yours,

Peter Schoenke

Peter Schoenke
Chairman
Fantasy Sports Trade Association

EXHIBIT A

FanDuel

Nigel Eccles, CEO and Co-Founder
FanDuel
300 Park Avenue South, 14th Floor
New York, NY 10010

June 7, 2016

John J. Flanagan
Majority Leader
New York State Senate
Room 330, State Capitol Building
Albany, NY 12247

Carl E. Heastie
Speaker
New York State Assembly
LOB 932
Albany, NY 12248

The Honorable Majority Leader Flanagan and Speaker Heastie,

FanDuel was founded in 2009 with the goal of improving the fantasy sports experience. **We felt, instinctively, our business needed to be in New York** – that residing near the professional sports leagues, media networks and top tech talent here, and being headquartered in Silicon Alley with other thriving startups, would give us the best opportunity to be successful. So in 2011, FanDuel moved our handful of employees to a 500 square foot office on 37th Street, where we shared meeting spaces with other companies and bathrooms with cockroaches (this was pre-WeWork days). In 2013, we moved to TechSpace on 11th Street. We hired 40 more employees, quickly outgrew the space, and took over Pandora's old office space in Union Square in 2014. We were following in the steps of another tech success story, but also paving our own way.

We developed partnerships in New York with major publishers, marketing firms, CBS, NBC, the NBA and professional teams across the state, namely the Buffalo Bills, New York Jets and the Brooklyn Nets. Currently, FanDuel proudly employs 175 professionals here, many of whom have relocated to New York to join our company. **Our success is due in no small part to the people, infrastructure, partnerships and opportunities very few locations in the world can offer. And we are hardly the only fantasy sports company to see what New York provided.**

The exponential rise in popularity of fantasy sports has directly **spawned a new industry** in the sports tech space, with data, analytics, analysis, and media content **companies related to fantasy sports emerging, growing and receiving major investment from the venture capital community.** Successful New York-based companies like numberFire, Draft and FNTSY Network are a few examples of companies that have thrived here, creating new platforms, mobile applications and sophisticated new services with potential applications beyond fantasy sports. **In fact, there are now nearly 30 fantasy sports related companies in New York,** from contest operators like FanDuel to the aforementioned companies servicing fantasy sports players, and they all likely came here for the same reasons that led us here five years ago.

The fantasy sports ecosystem – encompassing contest play; research tools, analysis services and more – **has swelled to a more than $20 billion a year industry in North America,** according to Ipsos market research, and **New York may have more opportunity to benefit from this industry than any other state.** Yet despite the growth and potential, FanDuel's future and the future of this industry in New York is currently unclear.

We are seeking legislation to certify that companies like ours can operate our contests in New York. We are asking for regulations to safeguard innovation, as well as consumers. This legislation is imperative for us to operate here. **Without it, FanDuel will likely be forced to find a new home, as our operations, employees and industry would not be welcome in New York.**

I feel certain the same is true for many of the other fantasy companies in New York. The gravity of the situation could not be more clear – **if fantasy sports contests are not permitted in New York,** it will deprive legions of New York fantasy sports enthusiasts from competing against residents of neighboring states and states across the country, and **it will ensure that a burgeoning industry in this state with unimaginable potential will invest its future elsewhere.**

We recognize there has been a debate about how fantasy sports bills in the Senate and Assembly would affect the New York economy and whether our industry needs to be linked to New York casino operators.

The casinos demand for fantasy sports to be tied to local brick and mortar casino operations is misguided. The idea is fundamentally flawed: it is grounded in misperception, violates the U.S. Constitution, and flies in the face of New York's history as an incubator for new technology, new business models and sensible regulation promoting commerce, while protecting citizens.

The casino lobby's competition argument ignores all available data, which shows how different our audiences are, and it ignores basic logic: **while fantasy sports has grown, the gaming industry in New York has NOT suffered – in fact it has thrived.** Annual statewide casino revenues in Fiscal Year 2016 closed at nearly $1 billion higher than when we got started

in 2009, so a 105% increase in annual revenue during the fantasy sports boom era.[1] Put plainly and grounded in data: **fantasy sports have no impact on casino gambling. None.**

Further, it is my understanding that **requiring fantasy sports to be tied to in-state casinos would be a clear violation of interstate commerce protections.** The U.S. Supreme Court has held in ruling after ruling that states cannot favor local businesses with a physical presence and penalize those who do not have a physical presence – which is exactly what the casino lobby proposal would achieve. You may recall a directly related example in New York State, where the U.S. Supreme Court struck down the state's wineries law, which prevented wineries from selling in New York unless they had an in-state distribution facility.[2] The casino proposal is nearly identical to the unconstitutional wineries law.

Setting aside the unconstitutional issue, the casinos are not actually seeking to protect New York brick and mortar businesses generally – after all, FanDuel operates in a brick and mortar (and glass) building in Manhattan right now. As do other New York fantasy companies. The casinos simply want to favor their select group of specific businesses at the expense of all others. And remember, fantasy sports is already a nationwide business, with premier companies like ESPN, Yahoo! and CBS operating strong fantasy sports contest businesses. **Trying to reduce an industry with a national marketplace into a regional offering is not only illogical, it simply will not work.**

Lastly, **tying fantasy sports to brick and mortar casinos will suffocate innovation, and choke off a generation of entrepreneurs we want building businesses in New York.** It will relegate what could be a thriving independent industry here into just another game option in a casino. It won't create jobs, it won't attract new investments.

Although our businesses are distinct, there is no reason for **New York gaming companies to be our enemies. Frankly, they could be directly benefiting from the fantasy sports community.** We've held highly successful live events at venues across the country, as fantasy sports fans love to convene and as a company we love bringing our players together. We have relationships with dozens of other New York companies and we are open to working with anyone to explore opportunities to bring our New York players together at live events here in New York. But those discussions can only be had when we know our fate in New York.

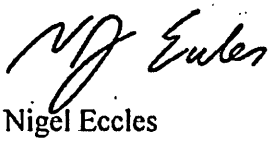
New York is the sports capital of the world. It has some of the most committed, most passionate fans anywhere. The state supports 11 major sports franchises. All major professional sports leagues are headquartered here. I think no one is surprised by the popularity of fantasy sports amongst New Yorkers and the growth of fantasy sports businesses here. **As the world's sports capital, New York should be embracing the latest and fasting growing pastime supporting the sports industry – fantasy sports.**

---

[1] New York State Gaming Commission, Statewide Monthly Reports http://nylottery.ny.gov/wps/wcm/connect/9228db41-27b8-4c16-9912-35fbb15063c0/160603+Statewide+Totals.pdf?MOD=AJPERES&CACHEID=9228db41-27b8-4c16-9912-35fbb15063c0

Enthusiasts of fantasy sports from across the state have sent more than 60,000 emails to legislators in support of establishing a law to protect their right to play the games they love. The legislation we hope you will pass will protect a product millions of New Yorkers love and nurture a nascent industry, which is already supporting hundreds of jobs and has limitless potential for economic growth across the state. **We want to stay in New York, as a leader in the New York tech scene, and we want to see the entire industry grow here – as long as you will have us.**

Respectfully and sincerely,



Nigel Eccles
CEO and co-founder
FanDuel

EXHIBIT B

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Written Testimony
Before the New York Assembly
Standing Committees on Racing and Wagering and Consumer Affairs and Protection
December 8, 2015

On behalf of the Brooklyn Nets, we appreciate the opportunity to submit testimony on a topic that is important to our entire organization: The future of fantasy sports in the State of New York.

The growing popularity of fantasy sports is beyond question. We understand that over 50 million Americans participate in some form of fantasy sports.

In April 2014, the Nets organization entered into a marketing partnership with FanDuel, a leading daily fantasy sports operator that is headquartered a few miles away in Union Square. Our relationship with FanDuel has benefitted the organization in two substantial ways:

First, this relationship allows us to engage our fans at another level and increase their knowledge and interest in both the club and the league in general. Assembling their own team of real-world NBA players and competing against other fans in contests of skill brings our fans closer to the action on the floor. This, in turn, increases overall consumption of our product—i.e., the more knowledgeable our fans are about the NBA, the more attention they are willing to invest in the Brooklyn Nets. Fans who play fantasy sports watch our games longer and consume more of our content.

Second, FanDuel gives us access to a crucial demographic: millennials. The average FanDuel customer is between 25 and 35 years old, college educated, and passionate about sports. These are exactly the sort of New Yorkers that we want to attract to our games and turn into lifelong Nets fans. FanDuel provides us a gateway to these individuals—both via traditional marketing and unique fan experiences.

Bottom-line: The future of fantasy sports in New York is important to the Brooklyn Nets organization and could have a real impact on our business. Fantasy sports are a popular and accepted form of entertainment in the vast majority of U.S. states. It would be unfair to deny New York fans the opportunity to participate in this activity. We therefore urge you to consider legislation affirming that fantasy sports may continue to be offered in New York.

EXHIBIT C

Debevoise & Plimpton

Legal Analysis of FanDuel, Inc.

March 17, 2016

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EXECUTIVE SUMMARY

Fantasy sports contests are an integral part of American sports culture, enjoyed by tens of millions of people nationwide. Fantasy contests allow fans to be more than just spectators. In a fantasy contest, fans compete in their own separate competition that tests their knowledge of sports and their analytical skills against the skills of other participants. The contestants select a fantasy "roster" of players, which is scored based on the combination of the accumulated statistics of each player on the roster. Creating a winning lineup involves many of the same skill-based judgments a coach or general manager would make: evaluating matchups, game conditions, and athletes' capabilities, momentum and motivation, all with the constraints of a salary cap or draft to limit their player selections. Backed by sophisticated investors and major sports league partners, FanDuel has been offering its contests consistently in New York since 2009, until recently with no suggestion that its activities were in any way illegal.

A legislative enactment explicitly excluding fantasy sports from the definition of gambling under the New York Penal law would be within the Legislature's authority as set forth in Article I, Section 9 of the New York Constitution and would clarify that fantasy sports are legal under current New York law.

A new statute explicitly excluding fantasy sports from the scope of prohibited gambling would be a proper exercise of the Legislature's authority. Article I, Section 9 of the New York Constitution, which prohibits gambling, is neither self-executing nor self-defining. The provision explicitly delegates to the Legislature the responsibility and discretion to enact laws to give the provision force. The Legislature has broad latitude to define gambling, and has previously exercised this discretion in excluding certain activities, such as handicapping tournaments on horse races, from the gambling prohibition. Other state legislatures, Congress,

and courts have excluded fantasy sports from the definition of gambling. Consistent with these precedents, a statute declaring that fantasy sports contests do not constitute prohibited gambling would constitute a reasonable and permissible implementation of Article I, Section 9.

A legislative enactment is also appropriate to clarify that fantasy sports are legal under current New York law. Fantasy sports contests adhere to specific criteria that fundamentally differentiate them from illegal gambling. FanDuel's fantasy sports competitions are legally valid-skill based contests for a prize of a type that New York and other states have long excluded from the scope of anti-gambling laws.

First, competitions in which participants pay an entry fee and pit their skills against each other, with a non-participating sponsor paying a preannounced prize to the winner have been historically treated as lawful prize contests rather than wagers, bets, or stakes on an outcome. The only previous court to have directly considered whether fantasy sports constitute gambling determined that fantasy sports exist as part of the widely-accepted prize contests that have long been part of the American social fabric—from county fairs to the Belmont Stakes—and therefore fall outside the definition of illegal gambling.

Second, empirical evidence shows that fantasy sports are games of skill as to which the application of talent and effort to roster selection dominates contest outcomes. Fantasy sports contests also do not involve wagers on the outcome of "future contingent events" as to which the participants lack "control or influence." Rather, by using their sports acumen to make better roster selections than their opponents, fantasy sports competitors change the outcome of their fantasy sports contest, just as a real-world coach or general manager picking players influences the performance of an actual sports team. Thus, the entrants in a fantasy contest are not like

mere spectators, but are competitors in the own separate contest in which they match their skills against other competitors for a prize, conduct that has never been illegal in New York.

The litigation currently pending before the Appellate Division, First Department, will not likely result in a decision that casts doubt on the pending legislation expressly authorizing fantasy sports under New York law. It is a bedrock legal principle that courts do not decide constitutional questions when a case can be disposed of on a non-constitutional ground. Because the issues before the Appellate Division can be decided entirely as a matter of statutory interpretation under existing law, the court will have no need to address whether fantasy sports contests would constitute "gambling" within the meaning of the New York constitution. Were the court to express any preliminary opinion on that issue, it would purely advisory, a practice the First Department has consistently avoided.

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FACTUAL BACKGROUND

A. Fantasy Sports Competitions, a Core Part of American Sports Culture, Involve Contests in Which Sports Fans Lawfully Match Their Roster-Picking Skill Against Others

Fantasy sports competitions, which millions of sports fans have played throughout the United States for decades, are a type of contest in which the competitors mimic the role of general managers of sports teams. Fantasy sports competitors use their sports knowledge and skill to select real athletes from multiple teams in a given sport for "fantasy" lineups or rosters. They then match their fantasy teams against those of their friends, family members or others, accumulating points based on the performance of the athletes on their fantasy teams in real-world sporting events. Just as a skilled general manager evaluates extensive information in selecting players for a real-life team, fantasy sports contestants picking a fantasy team may look at past performance, injury history, performance trends of comparable players, the strength of schedule for an athlete's team, projected matchups for particular games, coaching philosophy, changes to league rules that could influence an athlete's performance, and other factors.

Fantasy sports competitions have become highly popular among sports fans and have particularly grown in recent years because of the Internet. Companies like Yahoo!, CBS Sports and the ESPN Network—as well as FanDuel and many others—currently operate highly popular fantasy sports competitions on their websites. Sports teams and leagues have enthusiastically embraced fantasy sports as a way of enhancing spectators' excitement about professional sports that does not present concerns about the integrity of games, as betting on sports events could. FanDuel currently has partnership or sponsorship deals with 16 NFL teams and 16 NBA teams, and is the NBA's Official One-Day Fantasy Sports Partner. *Id.*

Fantasy sports come in a wide variety of types and formats, including head-to-head contests, leagues and large-format tournaments. Contests can last a day, a week, part or all of a

season, or years (with participants signing their fantasy players to multi-year "contracts"). Contestants' choice of rosters can be governed through a variety of means—such as drafts, auctions or the use of fictitious "salary caps"—all intended to simulate the kind of resource-allocation decisions a real general manager must confront. FanDuel's preferred selection method involves salary caps. As compared to the "draft" selection method, the "salary cap" approach carries the advantage that every athlete is available for selection by any contestant no matter what order of selection takes place. In all of these variants, participants compete against each other in acting as simulated general managers of their respective fantasy teams.

B. Except for the Shorter Duration, "Daily" Fantasy Sports Work the Same Way as Season-Long Fantasy Sports

Among these many forms of fantasy sports offerings, the "daily" fantasy sports contests offered by FanDuel and others work in fundamentally the same way as other competitions, except that their duration is shorter. So-called daily fantasy contests typically begin and end in a week for NFL games or a day for other games. These contests place particular premiums on participants' assessments of individual players' prospects for strong performance in a single sports event, requiring extra analysis of performance trends, matchups, team dynamics and other factors capable of influencing an individual's performance in a single contest, and application of those judgments to all of the players on a fantasy roster.

FanDuel offers daily fantasy sports in several different formats. FanDuel's original type of contest was a "head-to-head" competition in which two participants competed directly against each other (hence the name "FanDuel"). These contests may be played between two friends or acquaintances who choose to play against each other, or a contestant may choose to be matched with a stranger who also is looking for someone to play against. FanDuel also offers "50/50" contests, in which the top 50% of entrants win the same preannounced prize, so that individual

participants have a better prospect of experiencing the fun of winning. Another popular type of contest is the "league" contest, involving between 2 and 99 fantasy teams, which are often played by self-selected groups of friends or co-workers but also can be played against strangers. And FanDuel offers "tournament" contests, which involve a large number of entrants and a limited number of preannounced, often large prizes.

FanDuel has offered fantasy sports contests, including to New York residents, since 2009, and it has offered the full array of current contest types, in roughly the same formats, since around 2011. Today, FanDuel has over five million users, including hundreds of thousands in New York.

The typical FanDuel customer is an enthusiastic sports fan who enjoys competition over making roster decisions based on the most current available information about performance, expected playing conditions and anticipated matchups. Many fans prefer the shorter-term format of daily fantasy sports because they can pick rosters based on their assessments of particular single-game matchups for individual players on the roster, or because a bad pick in a daily fantasy game does not leave a competitor in a disadvantaged position for the entire season as can happen readily with season-long games.

C. Fantasy Sports Contests Are Separate Competitions in Which the Contestant Is a Participant, Not Mere Bets or Wagers on Someone Else's Contest

In fantasy sports, the key to the outcome of each contest is the participant's success at assembling a better performing fantasy roster than other participants selected. The outcome of a real-world athletic contest, or even a series of real-world athletic contests, does not determine or even influence the winner in any of FanDuel's fantasy sports contests. Instead, the winner of the separate fantasy contest is determined by points awarded based on an aggregation of game statistics that measure how well, compared to others, the contestant selected a fantasy roster of

players who never actually step on a field together. Unlike sports bettors, whose wagers turn directly on the actual outcome of external events over which the bettors have no influence or control, fantasy sports competitors are active participants in a parallel fantasy contest of their own, which exists separate and apart from any underlying athletic event and does not turn on the outcome of any such event, or on the outcome of any other single real-world occurrence. Indeed, a sustained empirical study of fantasy sports outcomes by Professor Anette Hosoi of MIT demonstrates that fantasy contestants directly influence the outcome of that separate contest, based on the acumen with which they select their fantasy rosters.

Fantasy players are thus participants in legally valid contests in the same ways as participants in dog shows, golf tournaments, fishing competitions, beauty pageants, county fair competitions and innumerable other types of contests. All of these are competitions involving entry fees for participants, matching of skills among the contestants and pre-identified prizes for winners. New Yorkers have competed in such contests for decades without any suggestion that they were engaged in illegal gambling.

Fantasy sports contests are not like lotteries or roulette, because their outcome depends on skill in roster selection rather than random outcomes. They are not subject to the "chance" element of a draw of cards. Instead of being "dealt" a particular "hand," all participants start on a level playing field, in the exact same position as each other, and have complete control over the lineup they select, constrained by the same fantasy "salary cap" that applies to everyone. Unlike the "house" in a casino, FanDuel cannot win a contest and has no interest in who wins; rather, prizes are announced in advance and guaranteed to the winners. Unlike pari-mutuel betting on horse races (which is illegal unless state-sponsored) or illegal sports gambling, the size of the

prize in fantasy sports contests does not change based on "odds" determined by the number of entrants or their selections; rather, all prizes are announced in advance.

Fantasy contests also are not like "prop" and "parlay" bets over a binary, yes-or-no outcome, such as whether a particular individual will accomplish a particular feat, but multi-factorial, turning on relative performance across a spectrum of possibilities by the collection of multiple individuals on a particular roster. They pose no threat of undermining the integrity of the underlying contests in which the athletes compete—it is logistically impossible to "fix" a fantasy sports competition. The proposition that the outcome of fantasy contests can be affected by the actions of individuals other than the contestants, and by other factors outside the contestants' control, reflects an inherent element of competitions and does not distinguish fantasy sports contests from any other contests long recognized as legal.

LEGAL ANALYSIS

I. The Constitution Delegates Authority to the Legislature to Enact a Statute Authorizing Fantasy Sports

A. The Constitution Requires the Legislature to Define Gambling

The Legislature would not violate Article I, Section 9 of the Constitution if it enacted a new statute that specifically excluded fantasy sports from the scope of prohibited gambling. The Constitution affords the legislature discretionary authority to enact a statute authorizing fantasy sports and imposing regulations on the conduct of such contests to promote consumer protections.

Article I, Section 9 provides, in relevant part:

> **[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, 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.** (Emphasis added.)

As is evident from the text, the constitutional provision concerning gambling is neither self-executing nor self-defining. It is not self-executing because it does not, by its own force, prohibit or punish any primary conduct of New York's citizens. To the contrary, the provision delegates authority to the Legislature to enact laws that will implement and give force to its anti-gambling directive. New York courts have long recognized that in the absence of such laws, the constitutional provision has no independent proscriptive effect. *See, e.g., People ex rel. Sturgis v. Fallon*, 152 N.Y. 1, 11 (1897) (noting "[t]hat this provision of the Constitution was not intended to be self-executing is manifest" and that Article I, Section 9 "expressly delegates to the legislature the authority [to implement the provision], and requires it to enact such laws as it shall deem appropriate to carry it into execution.").

B. The Scope of the Legislature's Authority

Article I, Section 9 equally is not self-defining. "[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." *People v. Wilkerson*, 73 Misc. 2d 895, 901 (Monroe Cnty. Ct. 1973). The Constitutional delegation to the Legislature of responsibility to "pass appropriate laws to prevent offenses" necessarily gives the Legislature the role of defining what type of conduct constitutes impermissible "gambling" that it will prohibit citizens from pursuing. As the variety of definitional formulations in statutes around the country demonstrates, the Legislature could have chosen to define "gambling" in different ways, and the current statute

simply represents one possible formulation. *Dalton v. Pataki*, 5 N.Y.3d 243, 264 (2005) (noting the absence of any constitutional definition of "lottery"); *see also*, 1985 N.Y. Op. Att'y Gen. (Inf.) 75 (noting that the current definition of gambling is in the Penal Law, rather than the constitution).

Prohibited "gambling" is not by its nature susceptible to comprehensive self-definition, because there are so many undisputedly permissible forms of conduct in which participants put money at risk in the hope that their decisions will lead to substantial return as a result of actions by people other than themselves. This reality has led legislatures and courts to confirm that no assertion of impermissible gambling will attach to most varieties of passive investment, the sale of insurance, many kinds of contests with entry fees and prizes, and many forms of private activities in which losers' money is transferred to winners. *See, e.g., People ex rel. Lawrence v. Fallon*, 152 N.Y. 12 (1897) ("stakes" competition where the owner of the winning horse collects winnings from sponsors of losing horses is not gambling under N.Y. State Constitution or applicable statutory provision).

New York courts have confirmed that, in selecting the applicable definition of "gambling" pursuant to constitutional directive, the Legislature has substantial latitude. In *Sturgis*, for example, the Court of Appeals reviewed a statute that left intact civil forfeiture remedies but eliminated any criminal penalty for certain forms of wagering on horse races (prior to the constitutional amendment explicitly permitting pari-mutuel wagers on horse racing). 152 N.Y. at 11. In upholding that statute under Article I, Section 9, the Court of Appeals articulated a highly deferential standard of review:

> It 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 more appropriate law might have been devised and

> enacted. So long as this legislation was in any degree appropriate to carry into effect the purpose of the Constitution, it does not fall under its condemnation.

The New York Legislature has previously exercised this authority for the precise purpose of permitting forms of conduct not specifically authorized in the Constitutional provision by refining the definition of whether that conduct constitutes gambling. Section 906 of New York Racing, Pari-Mutuel Wagering and Breeding Law, for example, specifically authorizes handicapping tournaments based on horse races. Although Article I, Section 9 of the Constitution authorizes "pari-mutuel betting on horse races . . . from which the state shall derive a reasonable revenue," handicapping tournaments, structured with pre-defined entry fees and prizes that provide no revenue to the State, do not satisfy this Constitutional exception. Nonetheless, the Legislature has expressly sanctioned such contests – without challenge – based on its definitional judgment that, subject to regulatory requirements, "a handicapping tournament . . . *shall be considered a contest of skill and shall not be considered gambling.*" N.Y. Rac. Pari-Mut. Wag & Breed. Law § 906 (emphasis added).

Similarly, the Legislature has exercised its broad definitional authority under Article 1, Section 9 in promulgating the current definitions in Section 225.00 of the Penal Law. Those definitions include some activities under the "gambling" label but also specifically exclude other kinds of activity that could be so described. For example, the Legislature carves out a nuanced definition of a "player" in Section 225.00(3), excluding from the statute's reach individuals who engage in "gambling activity" through particular kinds of "social" participation without financial reward.

The Legislature has equally recognized its authority to provide definitions that affect the scope of constitutional provisions in other contexts where the Constitution has expressly provided it that authority. For example, Article I, Section 6 exempts "cases of petit larceny

under the regulation of the legislature" from the requirement of a grand jury indictment prior to prosecution, and the Legislature amended the Penal Law in 1986 to quadruple the value of stolen items necessary to constitute grand larceny, thereby greatly reducing the number of constitutionally required grand jury indictments. *See* McKinney's 1986 Session Laws, Vol. 2, at 2966. Similarly, Article II, Section 3 provides that "[t]he legislature shall enact laws excluding from the right of suffrage all persons convicted of . . . any infamous crime," and the Legislature has passed and twice amended the statute implementing this mandate to eliminate categories of individuals to whom this disenfranchisement applies and shorten the period of their disenfranchisement. N.Y. Elec. L. § 5-106(2). The Legislature understood in both instances that the delegation of authority gave it a role in applying the Constitutional mandate through the imposition of definitions that could be subject to change.

C. Legislation Authorizing Fantasy Sports Contests is Constitutionally Permissible

Consistent with this previous practice, the New York Legislature would not exceed its delegation under Article I, Section 9 if it enacted a new statute containing a definition of gambling that permitted fantasy sports contests. States across the country – and the United States Congress – have adopted a range of approaches to defining "gambling" under the law. A legislative enactment of a different statute declaring that some or all of FanDuel's contests should not be considered gambling would be among the rational and reasonable means of implementing Article I, Section 9 – *i.e.*, "in any degree appropriate to carry into effect the purpose of the Constitution," as indicated in *Sturgis* – adopting that law would be within the Legislature's authority and entitled to judicial deference.

That conclusion is amply supported by the existing legal sources that exclude fantasy sports from the definition of gambling. Specifically:

- Courts: As set forth in Section II.A *infra*, in the most relevant prior case concerning the characterization of fantasy sports contests for these purposes, the court in *Humphrey v. Viacom, Inc.*, No. 06-cv-2768, 2007 WL 1797648 (D.N.J. June 20, 2007), held "as a matter of law" that entry fees for such contests are not "bets," "wagers" or "stakes." As the United States Court of Appeals for the Third Circuit has concluded, there is 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) (citing *Humphrey*, 2007 WL 1797648, at *9, and *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85, 86-87 (1961)). These cases provide strong support for the sustainability of a legislative determination that "gambling" does not necessarily encompass fantasy sports for constitutional purposes.

- Federal Legislation: Congress followed a similar analysis in adopting the Unlawful Internet Gambling Enforcement Act ("UIGEA"), which expressly distinguished fantasy sports contests from impermissible gambling based on its findings that (1) fantasy sports contests are tests of the relative skill of the fantasy contestants, not binary bets against the house; (2) unlike pari-mutuel betting, the prizes do not vary depending on other players' choices; and (3) fantasy sports contests do not depend on (or compromise the integrity of) the outcome of underlying sporting events. *See* 31 U.S.C. § 5362(1)(E)(ix). UIGEA's determination that fantasy sports satisfying the statutory requirements do not constitute gambling is expressly not pre-emptive of state gambling laws, but it reflects a cognizable definitional approach available to New York's Legislature in addressing whether fantasy sports contests constitute gambling.

- State Statutes: Maryland, Kansas and Virginia have passed laws expressly providing that fantasy sports contests do not fall within the definition of gambling, betting, or wagering. *See* Md. Code Crim. L. § 12-114; K.S.A. § 21-6403(a)(9); Va. Code Ann. § 59.1-559.[1]

All of these sources of law reflect reasonable approaches to defining what is and what is not gambling, and by aligning with their definitions the Legislature would not exceed its delegated authority under the Constitution. The key questions underlying the application of Article I, Section 9 to fantasy sports are best viewed as ones of policy that the Legislature is best positioned to address. As set forth in Section II.B *infra*, ample empirical evidence would support a legislative judgment that fantasy sports contests are predominantly based on skill and do not

[1] Although Maryland's Attorney General has recently questioned whether the Maryland statute validating daily fantasy sports contests should have been adopted by referendum under Maryland's constitution, the Attorney General has also acknowledged that the Legislature is best suited to resolve the difficult question whether daily fantasy sports should be classified as "commercial gaming," Maryland Att'y Gen. Op. at 1, 22 (Jan. 15, 2016).

implicate the core concerns animating the constitutional provision, particularly if a new statute included the type of robust consumer protections FanDuel supports.

II. A Law Authorizing and Regulating Fantasy Sports Would Serve To Clarify that Fantasy Sports are Legal Under Current New York Law

Fantasy sports do not constitute gambling under New York's Penal Law, and thus a legislative enactment explicitly authorizing fantasy sports would not be inconsistent with, but instead would add clarity to, current New York law. Penal Law § 225.00(2) provides that:

> 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.

Fantasy sports competitions do not satisfy either of the two required elements of gambling under that statute: *First*, fantasy sports contests do not involve "stak[ing] or risk[ing] something of value," in the nature of a bet or wager, which courts in New York (and elsewhere) have consistently interpreted to exclude paying an entry fee to match skills against others in a valid contest for a preannounced prize. *Second*, fantasy sports contests do not depend on the outcome of (i) a "contest of chance" or (ii) "a future contingent event not under [the participant's] control or influence."[2] As a result, fantasy sports contests do not constitute illegal gambling under current New York law, and a legislative enactment explicitly specifically authorizing fantasy sports contests would therefore not be inconsistent with New York's prohibition of illegal gambling.

[2] Pending litigation between FanDuel, DraftKings, and the New York Attorney General focuses on this question of law.

A. Fantasy Sports Contests Do Not Involve Staking or Risking Anything of Value Under Penal Law Section 225.00, But Rather the Payment of an Entry Fee to Compete for Prizes

Courts in New York and elsewhere have recognized for more than a century that paying an entry fee to match skills against others in a contest for a prize does not constitute staking, risking, betting or wagering something of value under anti-gambling laws. As the United States Congress and courts have acknowledged, fantasy sports contests fit squarely into that category of contests for a prize and therefore are not gambling.

1. New York Adheres to the Longstanding Common Law Rule that *Bona Fide* Contests for Prizes Do Not Constitute Gambling

The Court of Appeals expressly endorsed the legality of contests involving entry fees and prizes in *People ex rel. Lawrence v. Fallon*, 152 N.Y. 12 (1897), 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. *Id.* at 16-18, 20. The court rejected the State's contention that this contest was an illegal "wager" or "bet":

> If the doctrine contended for by the [State] is sustained, it would seem to follow that the farmer, the mechanic or the stockbreeder who attends his town, county or state fair, and exhibits the products of his farm, his shop or his stable, in competition with his neighbors or others for purses or premiums offered by the association, would become a participant in a crime, and the officers offering such premium would become guilty of gambling under the provisions of the Constitution relating to that subject. Those transactions are in all essential particulars like this. In those, as in this, one of the parties strives with others for a prize; the competing parties pay an entrance fee for the privilege of joining in the contest, and in those cases, as in this, the entrance fee forms a part of the general fund from which the premiums or prizes are paid. Indeed, all those transactions are so similar to this as to render it impossible to discover any essential difference between them.

Id. at 19. The court accordingly concluded that "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 20. In fantasy sports as well, participants pay an entry fee to participate in a contest, and the entry fees generate the fund from which the successful contestants win prizes. Just as in *Fallon*, participation in such a contest is not a bet or wager and does not constitute gambling.

Numerous courts around the country have followed the New York Court of Appeals' foundational decision in *Fallon*. 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 but a contest. The court observed, on similar reasoning to *Fallon*, that "[t]he fact that each contestant is required to pay an entrance fee where the entrance fee does not specifically make up the purse or premium contested for does not convert the contest into a wager." *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 similarly recognized that contests for prizes over cumulative predictions relating to a broad series of events can be outside the bounds of illegal gambling. In particular, 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 drawn from the entry fees to the winners, are lawful subject to certain regulatory requirements—and, unlike betting on individual horse races, do not count as gambling. N.Y. Racing, Pari-Mutuel Wagering & Breeding Law § 906 ("[a] handicapping tournament . . . shall be considered a *contest of skill* and shall *not be considered gambling*") (emphasis added). In much the same way as a handicapping tournament of the kind recognized by the Legislature, a fantasy sports contest also is a contest of skill and not gambling—in both cases, participants compete by pitting their skills against each other in a separate contest that does not depend on the outcome of any real-life race or athletic event.

2. Fantasy Sports Contests Fall into the Category of *Bona Fide* Contests for Prizes That Are Legally Distinct from Gambling, as Courts and the U.S. Congress Have Acknowledged.

The only court to consider whether fantasy sports constituted gambling before the actions currently on appeal before the Appellate Division, First Department—the New Jersey federal district court in *Humphrey v. Viacom, Inc.*, No. 06-2768 DMC, 2007 WL 1797648, at *9 (D.N.J. June 20, 2007)—held for exactly these reasons that fantasy sports are *bona fide* contests for prizes, not bets, wagers, stakes or risks in connection with illegal gambling. The plaintiff in *Humphrey* brought suit against ESPN and other fantasy sports operators under a New Jersey *qui tam* statute that defines gambling in terms indistinguishable for the purposes of this dispute from

New York's Penal Law § 225.00. *See* N.J. Stat. Ann. § 2A:40-1 ("[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"). The *Humphrey* court dismissed the complaint, concluding "as a matter of law" that the payment of an entry fee to participate in a fantasy sports contest is not wagering, betting or staking money. *Humphrey*, 2007 WL 1797648, at *9. 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. As examples of permissible contests with entry fees and prizes to winners that do not constitute gambling, the court recited the list that the Arizona Supreme Court had identified in *Am. Holiday Assoc., Inc.*, *supra*, and added some others—"livestock, poultry and produce exhibitions, track meets, spelling bees, beauty contests and the like"—concluding that it would be "patently absurd" to adopt a definition of wagering that might mean that such "contest participants and sponsors could all be subject to criminal liability." *Humphrey*, 2007 WL 1797648, at *7.

Humphrey correctly found fantasy sports directly analogous to these traditional forms of contests, identifying key characteristics of legal fantasy contests that the contests offered by FanDuel all satisfy: (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." *Id.* at *7. The Court also recognized the fantasy contest as separate from

the underlying sporting events, observing that "[t]he success of a fantasy sports team depends on the participants' skill in selecting players for his or her team[.]" *Id.* at *2.

The United States Court of Appeals for the Third Circuit later endorsed this analysis, stating that there is 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). In so concluding, the court cited precisely the cases FanDuel discusses here, including *Humphrey*, 2007 WL 1797648, at *9, which it described as broadly "holding that fantasy leagues that require an entry fee are not subject to anti-betting and wagering laws," and *Las Vegas Hacienda*, 77 Nev. at 28, 359 P.2d at 86-87 (1961), which it viewed as analogously "holding that a 'hole-in-one' contest that required an entry fee was a prize contest, not a wager." *NCAA*, 730 F.3d at 223 n.4.

Against the backdrop of this common-law understanding of gambling, Congress specifically declared that fantasy sports contests did not involve gambling in the UIGEA, 31 U.S.C. § 5362(1)(E)(ix) (2006). In that statute addressing financial transactions involving unlawful gambling proceeds, Congress began by defining "bet or wager"—the basis for the substantive prohibitions and penalties under the statute—in terms strikingly similar to the New York law 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). Recognizing the inherent ambiguity and unclear boundaries of that provision, Congress went on to make specifically clear that fantasy sports contests involving an entry fee and a prize do not constitute unlawful gambling so long as three criteria are satisfied: (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). FanDuel's contests meet all of those requirements.

In adopting this provision, Congress recognized in the statutory language that fantasy sports contests should be distinguished from sports betting and other forms of gambling because (1) fantasy sports contests are tests of the relative skill of the fantasy contestants, not binary bets against the house; (2) unlike pari-mutuel betting, the prizes do not vary depending on other players' choices; and (3) fantasy sports contestants test their skills against each other in ways that do not depend on (or compromise the integrity of) the outcome of underlying sporting events. UIGEA does not preempt state gambling prohibitions. Nonetheless, the similarities between the gambling definitions in UIGEA and the New York Penal Law provide a strong indication that a provision explicitly authorizing fantasy sports would not be inconsistent with the prohibition of illegal gambling set forth in Penal Code § 225.00(2).

B. FanDuel's Fantasy Sports Contests Turn on the Relative Skill of the Contestants and Thus Are Not Games of Chance

FanDuel's contests are not "contests of chance," *see* N.Y. Penal Law § 225.00(1)-(2), but are determined by participants' skill and therefore do not constitute gambling under New York state law.

1. The Outcomes of Fantasy Sports Contests Are Dominated by Participants' Skill

Extensive research – including that of Professor Anette Hosoi[3], an MIT scientist who specializes in the application of mathematics to sports – demonstrates that the outcomes of

[3] Professor Hosoi's work involved a nearly year-long study of the role of skill in daily fantasy sports based on an extensive data set obtained from FanDuel's records.

fantasy sports contests are dominated by the skill of the participants. Professor Hosoi's analysis, which focused primarily on the head-to-head and 50/50 contests in which individual players have the best statistical prospects for winning, identified three components of the outcomes of a large number of fantasy sports contests demonstrating "that skill plays a decisive role in a player's cumulative performance over time."

(i) Predictability. Professor Hosoi confirmed that fantasy lineups selected by actual players beat randomly selected lineups (including lineups designed to approach the salary cap) an overwhelming percentage of the time.

(ii) Replicability/Persistence of Results. Professor Hosoi found substantial statistical correlations indicating that over time, strong and successful fantasy players tend to remain strong and successful; moderately successful players tend to remain moderately successful; and weak and unsuccessful players tend to remain weak and unsuccessful.

(iii) Capacity to Improve. Professor Hosoi observed that over time FanDuel users improved their skills and could expect better results to a statistically significant degree.

These characteristics of predictability, replicability/persistence and capacity for improvement are all are highly indicative of the role of skill in increasing the probability of favorable outcomes. For the same reason, they are incompatible with a finding of outcomes dominated by chance, because such outcomes tend over time toward randomness. This evidence powerfully confirms that FanDuel's daily fantasy sports contests are dominated by skill rather than chance.

2. A Contest Is Not Gambling When Skill, Rather Than Chance, Is the Dominating Element

Courts throughout the country, including in New York, have 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." *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 170-71 (1904). Following the New York Court of Appeals' landmark decision in *Lavin*, the "dominating element" test became the established test throughout the country. *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).

As part of an overall revision of the Penal Law in 1965, the Legislature adopted Penal Law § 225.00(1), which defines "contest of chance" as any contest that depends "in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." This did not, however, alter the "dominating element" test that the Court of Appeals adopted in *Lavin*. On the contrary, the case law postdating the enactment of § 225.00(1) makes clear that the *Lavin* test and the statutory test are synonymous. For example, *People v. Li Ai Hua*, 24 Misc. 3d 1142 (Crim. Ct. Queens County 2009), quoted the *Lavin* "dominating element" 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). Numerous other New York cases after the 1965 adoption of Penal Law § 225.00(1) have continued to cite and follow *Lavin*—sometimes explicitly invoking its "dominating factor" test, and sometimes implicitly applying it—as providing the test for whether an activity constitutes gambling.[4]

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[4] *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 County 1999), *rev'd on other grounds*, 291 A.D.2d 810 (4th Dep't),

Similarly, in *Matter of Plato's Cave Corp. v. State Liquor Authority*, 115 A.D.2d 426 (1st Dep't 1985), the First Department 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 a case that had found video games not to be 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 County 1980)).

The legislative history of the Penal Law confirms, as the case law indicates, that the 1965 revision of the Penal Law does not overrule or alter the *Lavin* "dominant element" test. The Court of Appeals has held 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).

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appeal dismissed, 98 N.Y.2d 738 (2002) (citing *Lavin* to hold that playing dice for money is gambling); *People v. Hunt*, 162 Misc. 2d 70 (Crim. Ct. N.Y. County 1994) (quoting the statutory "material degree" test and concluding that three card monte was not gambling because "skill rather than chance is the material component" of the game); *People v. Melton*, 152 Misc. 2d 649, 651 (Sup. Ct. Monroe County 1991) (same); *People v. Hawkins*, 1 Misc. 3d 905(A), 2003 N.Y. Slip Op. 51516(U), at *2 (Crim. Ct. N.Y. County 2003) (same); *Valentin v. El Diario–La Prensa*, 103 Misc. 2d 875, 878 (Civ. Ct. Bronx County 1980) (citing *Lavin* and applying its "dominating factor" test to conclude that "voting contest" sponsored by newspaper was gambling).

With regard to the law's gambling provisions, the Bartlett Commission 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) (discussing dismissals of cases because prosecutors had mistakenly charged the wrong section of the old law). 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. Although some commentators have speculated that this standard reflected a softening of the test for identifying a "contest of chance," not a single case since Section 225.00's enactment has applied that statutory test to reach a different outcome than would have been reached under the "dominating element" test.

3. Under Any Reading of the Statute, the Facts Demonstrate That Fantasy Sports Contests Are Games of Skill, Not Chance

Even if "material degree" only meant an important or substantial but not necessarily dominant element of chance, FanDuel's fantasy sports contests would still qualify as contests of skill rather than chance. "Material degree" in this context must at the very least mean that chance is an important element. If it were satisfied merely because chance might occasionally change the outcome, then almost nothing would be a game of skill, as "[i]t is difficult to conceive of any game which does not have present . . . the element of chance." *Amusement Enters., Inc. v. Fielding*, 189 Misc. 625, 628 (Sup. Ct. Kings County 1946), *modified on other grounds*, 272 A.D. 917 (2d Dep't 1947).

New York courts have recognized numerous games—including tennis, golf, basketball, billiards, bowling, alley ball, shooting games, chess and checkers—to be contests of skill. *See,*

e.g., *Amusement Enters.*, 189 Misc. at 628 (alley ball, a game similar to skee-ball; also listing basketball, tennis, billiards, bowling and golf); *Lavin*, 179 N.Y. at 170 (chess, checkers, billiards and bowling); *People v. Cohen*, 160 Misc. 10, 11 (Magis. Ct. Queens Borough 1936) (coin-operated electric-eye shooting game). They do not become games of chance just because, in most of those games, "occasionally an unskilled player may make a lucky shot." *Cohen*, 160 Misc. at 11; *accord Lavin*, 179 N.Y. at 170; *see also Las Vegas Hacienda*, 77 Nev. at 30, 359 P.2d at 87 ("a skilled player will get it (the ball) in the area where luck will take over more often that an unskilled player").

In determining whether a particular type of contest is dominated by skill or chance, it makes no sense to look at a single particular outcome, because even the most skill-based contests—apart from contests so lopsided that they are not genuinely competitive—will not yield the same outcome every time. Instead, the sensible approach is to rely on empirical evidence regarding probabilities over time. "Skill" is properly viewed as the capacity, through the exercise of effort and aptitude, to increase the prospects of achieving a desired result over what would be expected if events were unfolding at random. This is true for fishing contests, spelling bees, sporting events and other games of skill—proof of the dominance of skill lies in the ability of individual players to increase significantly their prospects of winning through the exercise of effort and aptitude. More able competitors will prevail more of the time in all of these contests, even though the vagaries of any individual competition may mean that the biggest fish will avoid the most skilled fisherman's hook (or jump onto the least skilled fisherman's hook), the best speller is given a rare word she does not know (or her opponent receives only words she knows), or a last-second gust of wind causes a correctly kicked football to drift wide of the uprights. These contests remain contests of skill even though, like all contests, they may be affected by

small differences in performance by the contestant or others that are part of the nature of contests and that nobody could predict. Fantasy sports share the same dynamics of skill-based judgments, capacity to increase prospects for winning through effort and aptitude, and susceptibility to a range of outcomes as these other games of skill.

C. FanDuel's Contests Are Not Gambling on a Future Contingent Event Beyond the Contestant's Control or Influence

FanDuel's contests likewise do not constitute wagering on "a future contingent event not under the [person's] control or influence." N.Y. Penal Law § 225.00. The plain language of the "future contingent event" provision makes clear that a contest is not gambling if the player has "influence" over the outcome. As explained above, using sports acumen and knowledge, FanDuel contestants unquestionably *influence the outcome of the relevant contest—the fantasy sports contest*—by making skilled roster choices. Fantasy sports contestants compete against each other at the task of selecting players, while operating within the constraints of the fantasy salary cap, to assemble an optimum lineup from millions of theoretical combinations. Those decisions and skill-based selections undeniably influence the outcome of the fantasy sports contest. The fantasy contestant's inability to influence the outcome of any real-world sporting event is beside the point, because fantasy contestants can influence the outcome of the contest in which they are seeking to win prizes.

The "future contingent event" clause plainly addresses the fundamentally different scenario in which a person stakes something of value on the outcome of an actual, real-world game or similar event such that his own success rises and falls directly in line with the outcome of that real-world event over which he has no influence. Take a week of NFL football games. The outcomes of wagers on the games themselves can be readily gleaned from the same NFL record books that document which teams won or lost the game, how many points they scored,

and so on. But those same archives, even to the extent they contain all of the various individual statistics that are ascribed different values in the intricate rule sets for fantasy sports contests, shed no light on who may have won or lost fantasy contests dependent on millions of variables in scoring system, lineup configuration, salary cap value, and the performance of other fantasy managers. The results of fantasy contests – independent competitions in their own right – reside only in FanDuel's (or a given league commissioner's) record books. If construed in an expansive and unbounded manner, the "future contingent event" provision would not only raise serious constitutional questions but also outlaw a range of universally approved activities of daily life.

1. Participants in a Fantasy Sports Contest Are Active Players in a Competition of Their Own, Not Bettors on a Sporting Event

FanDuel's fantasy sports contests are clearly separated from the underlying sporting events, as FanDuel offers no contests based on any single sporting event and does not permit participants to construct any lineup that substantially coincides with an actual, real-world team. As the Third Circuit has recognized, there is 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*, 730 F.3d at 223 n.4 (citing *Humphrey*, 2007 WL 1797648, at *9).

Similarly, unlike "prop" bets, in which a participant bets on a particular event in a sporting event—for example, a bet on whether a specific batter, on a specific occasion at bat, would hit a fly ball to the outfield. That kind of binary, either-or bet is fundamentally different from a fantasy sports contest (either season-long or daily), which is built on the separate competitive and skill-based exercise of building a fantasy team to compete against other fantasy teams. Fantasy sports do not look to whether a particular athlete or even a collection of athletes

achieves a particular milestone, but to how the performances of participants' fantasy roster choices compare to the performance of others' roster choices.

Only in the rarest of cases have New York courts relied on the "future contingent event" prong of the statute to decide whether a given activity constitutes gambling, and none have done so in a situation even arguably analogous to FanDuel's fantasy sports contests. Indeed, the only reported case that has found a gambling violation under the "future contingent event" prong demonstrates that that statutory test deals only with situations that are vastly different from FanDuel's contests. In *People v. Jun Feng*, 34 Misc. 3d 1205(A), 2012 N.Y. Slip Op. 50004(U) (Crim. Ct. Kings County 2012), a mahjong house was profiting from the wins of the mahjong players by taking a cut of their winnings. *Id.* at *4-*5. Although the court found that this arrangement gave the house an interest in the "future contingent event" of the outcomes of individual games, it still found that the players were not gambling under that provision because they had "some control" over the outcome. *Id.* at *6 n.1. But in fantasy sports, there is no "house." FanDuel does not gain or lose anything based on the outcome of participants' contests. It acts only as administrator of fantasy sports contests, and entry fees and prizes are both fixed in advance. It is the relative skill of the fantasy players that determines success in fantasy sports contests.

2. A Broad Application of the "Future Contingent Event" Theory, as Urged by the New York Attorney General, Would Criminalize a Host of Legitimate Business Activities

Under a broad interpretation of the "future contingent event" prong of Penal Law § 225.00(2), such as the one advocated by the New York Attorney General, prohibited activity would include any event that leads to a return based on a prediction of others' behavior or performance. That would criminalize a wide variety of legitimate business activities that clearly

do not amount to gambling—including insurance, investing and trading in commodities futures and derivative instruments. Each of these activities involves a chance of gain or loss based on future contingent events outside one's control or influence and therefore, on the broad reading of the statute urged by the New York Attorney General, would appear to violate New York law.

For example, insurance, by its very nature, involves an agreement to pay based on a contingent future event beyond the insurance company's influence or control. But it is not gambling. Likewise, a passive investor in a company has no influence over the outcome of his or her investment, which is plainly a future contingent event as to which the investor depends on actions by others, but such investments are not considered gambling. The same is true for trading in futures or derivatives, even though no actual commodities or other items ever change hands, as those instruments involve nothing more than a contingent promise to pay money in the future. *See, e.g., Korea Life Ins. Co., Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 269 F. Supp. 2d 424, 442 (S.D.N.Y. 2003) ("Derivatives transactions, forward contracts and swap agreements in currencies and commodities are not considered illegal gambles, and do not violate New York's gambling statute."); *Liss v. Manuel*, 58 Misc. 2d 614, 617 (Civ. Ct. N.Y. County 1968) (recognizing futures contracts as "an approved and judicially enforceable mode or form of business and regardless of risk, not a bet, wager or illegal gamble"). Yet the insurance carrier, the investor or investment advisor and the general manager do not act based on chance—they act based on expertise, underwriting and analysis—and thus have a significant opportunity to influence the performance of their portfolios by their choosing, even though they do not control the results. The same is true for fantasy sports contests.[5]

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[5] It is no answer that insurance, securities and commodities trading, and similar activities are, in today's world, typically subject to state or federal regulation. Many forms of passive investment (such as investments in real estate or in companies that are not

In enacting UIGEA, the U.S. Congress recognized precisely the danger of the overly broad construction of gambling the New York Attorney General presses here. The provisions making clear that fantasy sports contests do not constitute wagering or betting under federal law were accordingly grouped with similar provisions excluding from the statute's scope "any contract of insurance," commodities futures and similar derivative transactions, and the "purchase or sale of securities," among other forms of passive investment in predicted performance of others not under the investor's control. 31 U.S.C. § 5362(1)(E). Congress adopted these provisions to steer courts away from the same interpretive pitfall that the New York Attorney General has advocated: the erroneous view that all forms of predictive judgment about the performance of others on which a financial consequence turns are gambling. That has never been the law of New York. Unlike UIGEA, Penal Law § 225.00 itself contains no express exceptions, not even for investing or insurance; rather, the Legislature has relied on the courts to apply the law in a sensible way. And, as noted above, courts have understandably been reluctant to rely on this provision or to endorse a sweeping construction that would call into question obviously legitimate activities.

III. The Pending Litigation Will Not Result in a Decision That Would Call into Question the Constitutionality of Legislation Authorizing Daily Fantasy Sports

The pending appeal before the Appellate Division, First Department is unlikely to address whether daily fantasy sports contests would constitute "gambling" within the meaning of Article I, Section 9 of the New York constitution because the court has no need to consider that question. Rather, it is settled law that "[c]ourts should not decide constitutional questions when

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publicly traded) are subject to no regulation beyond a prohibition on outright fraud. Those activities do not amount to gambling regardless of whether Congress or the Legislature has chosen to regulate them.

a case can be disposed of on a nonconstitutional ground." *Beach v. Shanley*, 62 N.Y.2d 241, 254 (1984) (declining to decide whether the state constitution mandated a reporter's privilege, because a statute resolved the issue). As a matter of basic separation of powers principles, it is not appropriate for courts to issue what amount to advisory opinions on constitutional issues. In our view it is extremely unlikely the First Department will violate that rule here.

Although the lower court made a passing reference to the constitutional prohibition on "gambling" in its decision, the First Department will likely recognize the impropriety of issuing an opinion that could be seen as tying the Legislature's hands for the future. As set forth in Section I *supra*, New York courts have made clear that Article I, Section 9 is neither self-executing nor self-defining. Accordingly, any claim of illegality must be brought under a statute enacted to implement that provision. *See, e.g., People ex rel. Sturgis v. Fallon*, 152 N.Y. 1, 11 (1897) (noting "[t]hat this provision of the Constitution was not intended to be self-executing is manifest" and that Article I, Section 9 "expressly delegates to the Legislature the authority [to implement the provision], and requires it to enact such laws as it shall deem appropriate to carry it into execution."). Moreover, even if the First Department issues an opinion touching on constitutional issues, such a decision would necessarily be tentative in nature given the procedural posture of the case. The question before the First Department on appeal is whether the Attorney General is likely to succeed on its claims; the court will not make an ultimate determination on the merits of the issues. Indeed, the lower court recognized as much in noting that its ruling on the preliminary injunction motion was "not a final determination on the merits." *People v. Fanduel, Inc.*, No. 453056/15, 2015 WL 8490461, at *8 (N.Y. Sup. Ct. Dec. 11, 2015). The same would be true of any appellate decision, and thus any unlikely discussion of constitutional issues in the Appellate Divisions decision – other than to make clear that such

issues are unnecessary to resolve the case and therefore should not be addressed – would be not only advisory but preliminary in nature.

CONCLUSION

A legislative authorization of fantasy sports would align New York law with judgments by Congress, courts and other state legislatures that fantasy sports contests do not constitute illegal gambling. Such legislation would reflect a reasonable implementation of the New York Constitution's delegation to the Legislature of the responsibility to define what conduct constitutes or does not constitute illegal gambling and enact appropriate laws to prohibit gambling.

Dated: March 15, 2016

Respectfully submitted,

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EXHIBIT D

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The Unconstitutionality of Tying Daily Fantasy Sports to Brick-and-Mortar Casinos

As New York considers clarifying the legality of online daily fantasy sports (DFS) contests and enacting sensible consumer-protection regulations, the local gaming industry has its own idea of what the legislation should include. Under its proposal, online DFS operators would only be able to serve New York customers if they partner with existing brick-and-mortar gaming licensees. Although the local gaming industry has not offered details on how this proposal would work, the goal is obvious: online DFS would be legal in New York only if DFS providers tie themselves to local brick-and-mortar gaming operations, thereby making casinos the gatekeepers of daily fantasy in New York.

That option, however, is not available to the Legislature because it would plainly violate the Commerce Clause of the U.S. Constitution and its prohibition on laws that discriminate against interstate commerce. The U.S. Supreme Court has articulated a clear rule: It is unconstitutional to condition businesses' ability to operate on whether they have a local brick-and-mortar facility in the state or partner with businesses that do. The gaming industry's proposal violates that rule because DFS operators would not be able to serve New York customers unless they first partner with a local gaming operator. Such a law will grant DFS operators who establish (or casinos that already have) physical presence in New York a monopoly over daily fantasy sports in the state.

The constitutional question is not even a close one, and the U.S. Supreme Court's decision in *Granholm v. Heald*, 544 U.S. 460 (2005), answers it directly. At issue was a New York law that prevented wineries from selling to local customers unless they had an in-state distribution operation or, alternatively, sold their wines through local wholesalers who had such operations. The U.S. Supreme Court "ha[d] no difficulty concluding" that the law unconstitutionally discriminated against interstate commerce because it "subject[ed] out-of-state wineries" to the requirement of "hav[ing] a physical presence in the State," and gave wineries that already had a physical presence "access to the State's consumers on preferential terms." *Id.* at 474-76. The gaming industry's proposal will have the same result of closing the New York market to DFS providers unless they establish physical presence via brick-and-mortar

partnerships, and will give local casinos the exclusive ability to serve New York's DFS consumers.

Granholm is only the most recent in a long line of U.S. Supreme Court decisions holding that a state cannot favor businesses based upon whether they operate from or have a connection to a physical location in the state. So, for example, the Court has invalidated tax laws that penalized businesses unless they used in-state manufacturing facilities, *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), shipped their products from in-state ports, *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984), or ran their stock trades through in-state exchanges, *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977). These laws were invalid because—like the local gaming industry's proposal here—they "discriminat[ed] based on the extent of local operations," they "raise[d] the cost of doing business" in the state, and they penalized "business operations performed in any other State." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42 n.9 (1980); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 351 (1977); *Boston Stock Exch.*, 429 U.S. at 337.

It is constitutionally irrelevant that the local gaming industry apparently believes its proposal will make it easier to regulate DFS. The gaming industry's goals are plainly protectionist and, in any event, there is simply no reason to believe that New York will derive any regulatory benefits from requiring that DFS providers partner with brick-and-mortar entities. Even if there are some marginal regulatory advantages, the law would still be unconstitutional. Laws that discriminate against interstate commerce "face 'a virtually per se rule of invalidity.'" *Granholm*, 544 U.S. at 476. Thus, a discriminatory law like the one the local gaming industry proposes is unconstitutional even if the discrimination was unintentional and "even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 352-53 (1977). Unsupportable speculation that requiring brick-and-mortar partnerships *might* increase compliance with gaming regulations or *might* ease the administrative burden of regulating DFS contests does not permit discrimination.

In sum, the Commerce Clause of the U.S. Constitution embodies a clear rule. States have wide latitude to regulate commerce within their borders, but they plainly may not require that businesses establish physical presence or have particular local ties in order to serve in-state customers. If enacted, the local gaming industry's proposal to require that DFS operators partner with brick-and-mortar casinos will assuredly meet the same fate as the multiple analogous laws considered by the U.S. Supreme Court: invalidation.

EXHIBIT E

Newsday

Take fantasy out of New York gambling rules

May 24, 2016 By The Editorial Board

The race to legalize daily fantasy sports wagering in New York is in the home stretch. It appears likely a deal will come together before the end of the legislative session next month, but there is still plenty to be worked out.

The first congressional hearing on the subject, in Washington earlier this month, is only muddying the waters, though it seems unlikely regulation of these games is going to end up in federal hands. One big question being debated in New York is licensing fees, which were $500,000 per company in an early Senate bill, a level that would kill the smallest of the 28 companies in the New York market. Also key to passage are safeguards against cheating, preventing play by minors and truth in advertising — the industry can't really argue that it's a game of skill and then advertise that casual players can easily score big money by beating the pros.

State Attorney General Eric T. Schneiderman and representatives of the industry he shut down, such as giants DraftKings and FanDuel, agreed to a truce in March. The sites stopped taking plays in the state. If the State Legislature and Gov. Andrew M. Cuomo declare the contests legal, Schneiderman will drop his attempts to stop the games in court. If the games are not legalized, his case, which hinges on whether daily fantasy sports are games of chance and thus constitutionally banned gambling, will be heard in September.

Leaders of legislative committees who oversee wagering say they are working on legislation to legalize the games, which is wise. Players want them and non-players mostly don't care. And the pretense that the state constitution prohibits gambling has gone from silly to simply exhausting.

— The editorial board

FanDuel DRAFT KINGS

NEW YORK POST

Fantasy sports means new jobs for New York — unless lawmakers fumble

By Post Editorial Board May 17, 2016

For once, can New York lawmakers get it together to tell a growing industry they'd like it to stay?

The Legislature needs to pass a law to OK (and regulate) fantasy-sports sites like FanDuel and DraftKings before it knocks off in June. Otherwise, it's putting jobs at risk.

Attorney General Eric Schneiderman forced the industry's top firms to stop serving New York players in March, but says he'll drop his ongoing litigation if the Legislature explicitly legalizes fantasy-sports gaming.

The Senate passed one bill in March. And on Monday, Assemblyman J. Gary Pretlow (D-Mt. Vernon) tweeted that "legislation will be introduced" in his chamber in the "coming days." But if the two chambers can't agree on a bill, the industry's out of luck in New York through the football season, its top source of revenue.

FanDuel is based in the city, as are several smaller "satellite" firms that offer services to fantasy-sports fanatics. All told, at least 28 firms in the industry employ nearly 200 New Yorkers — with more jobs on the way.

More, that is, unless state lawmakers tell the industry it's not welcome here.

The still-young fantasy-sports industry drew $267 million in entry fees last year from New Yorkers alone. That promises serious tax revenues for some state down the line.

Eight states (including DraftKings' home, Massachusetts) have OK'd fantasy sports, with more surely to come.

Albany better go to a hurry-up offense. Because New York will lose if fantasy sports' enemies run out the clock.

NEW YORK POST

The gambling industry's hypocritical bid for a piece of the fantasy-sports action

By Post Editorial Board May 27, 2016

If New York's casino and racino operators can't control online fantasy sports in the state, then no one should.

That's basically the gambling industry's argument for killing any bill in Albany that would legalize (and regulate) fantasy sports, "unless it is tied to brick-and-mortar facilities" — like, say . . . the facilities they own.

Talk about gobbling up the competition.

"The New York Gaming Association is unanimous" against legislation to green-light fantasy sports — unless it's "in cooperation with the existing industry," says the NYGA's president, James Featherstonhaugh.

Can anything be more blatantly selfish?

Yet this may be enough to keep the Legislature from doing its job and OK'ing the fantasy sites.

Attorney General Eric Schneiderman forced the industry's big guns, FanDuel and DraftKings, to take a hiatus in New York until lawmakers formally legalize their games. If the Legislature doesn't get it done by the June 16 end of its session, fantasy sports might be shuttered for Empire State players through the lucrative football season.

But NYGA — whose members are big political donors — may throw a wrench into the works.

Lawmakers should tell the group to take a hike. The NYGA's hypocrisy is immense.

Greg Carlin of Rush Street Gaming, which is building a casino in Schenectady, is demanding a "high regulatory barrier" for fantasy sports. But Rush Street is a Chicago-based firm with ties to Rotterdam and Houston; it's even sought Chinese investors.

Meanwhile, the growing fantasy business already employs nearly 200 people here.

Lawmakers need to decide: Do a special favor for casinos and block online sports — or put the rest of the state's interests first?

Exhibit HH: Circular entitled "Pretlow Bill Myths and Realities"

PRETLOW BILL MYTHS AND REALITIES

MYTH #1

Assemblyman Pretlow's legislation—A. 10473—will "send revenue out of New York." FALSE. To the contrary:

- This legislation will keep 600 high paying jobs in New York and send a powerful message to start-ups, disruptors, and other innovative technology companies that the Empire State is open for business. What NYGA doesn't want you to know is that **New York is the epicenter of the booming fantasy sports industry**—an industry that is estimated to generate over $1 billion of revenue in 2016 alone.
- **Over 30 fantasy sports operators and related businesses are either headquartered in New York** (e.g., FanDuel, Fantasy Sports Network, and DraftOps), or have a substantial economic presence in the State (e.g., Yahoo, ESPN, CBS Sportsline, and DraftKings). **If this legislation doesn't pass in the next 2 weeks, most of those companies will have no choice but to move their jobs and offices to other states.**

MYTH #2

Fantasy sports operators, like FanDuel and DraftKings, compete with Saratoga Casino and Raceway and other New York casinos/racinos for customers. FALSE. Most of the 1 million New Yorkers who participate in daily fantasy sports (DFS) either **never step foot in a casino/racino or do so no more than once per year.** And there is no evidence that any of those players are spending less time or money at New York casinos/racinos because they participate in fantasy sports contests. To the contrary:

- **New York casinos and racinos have grown—not shrunk—since the explosion of DFS.** New York was one of the few states where racinos experienced year-over-year growth between 2014 and 2015. If DFS was truly a competitive threat, those numbers would have declined—not by a little, but by a lot.
- **The casino/racino industry HELPED the fantasy sports industry pass similar bills in Indiana, Colorado, Missouri, and Mississippi.** If fantasy sports was truly a threat to the casino/racino industry why would casinos and racinos in those states SUPPORT bills like A. 10473? The answer is simple—skill based fantasy sports contests are not—and will never be—a substitute for the type of games (poker, blackjack or roulette) offered at a casino or racino.

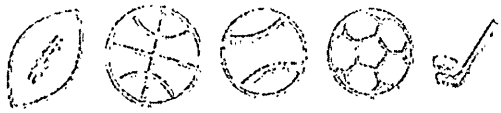
MYTH #3

There are no legal or constitutional impediments in limiting paid fantasy sports contests to brick and mortar casinos. FALSE.

- The U.S. Constitution bars states from passing laws that require companies to either open or affiliate with an in-state "brick and mortar" operator in order to do business in the state.
- Nor could a racino offer a new form of gaming—their characterization of DFS contests, not ours—without running afoul of the State Constitution and the NY Court of Appeal's decision in **Dalton v. Pataki.**

Exhibit II: Circular entitled "Bonacic Bill Myths and Realities"

BONACIC BILL MYTHS AND REALITIES



MYTH #1

Senator Bonacic's legislation—S. 6793—will "send revenue out of New York." FALSE. This legislation will keep 600 high paying jobs in New York and send a powerful message to start-ups, disruptors, and other innovative technology companies that the Empire State is open for business. What NYGA doesn't want you to know is that **New York is the epicenter of the booming fantasy sports industry**—an industry that is estimated to generate over $1 billion of revenue in 2016 alone. **Over 30 fantasy sports operators and related businesses are either headquartered in New York** (e.g., FanDuel, Fantasy Sports Network, and DraftOps), or have a substantial economic presence in the State (e.g., Yahoo, ESPN, CBS Sportsline, and DraftKings). **If this legislation doesn't pass in the next 2 weeks, most of those companies will have no choice but to move their jobs and offices to other states.**

MYTH #2

Fantasy sports operators, like FanDuel and DraftKings, compete with Saratoga Casino and Raceway and other New York casinos/racinos for customers. FALSE. Most of the 1 million New Yorkers who participate in daily fantasy sports (DFS) either **never step foot in a casino/racino or do so no more than once per year.** And there is no evidence that any of those players are spending less time or money at New York casinos/racinos because they participate in fantasy sports contests. To the contrary:

- **New York casinos and racinos have grown—not shrunk—since the explosion of DFS.** New York was one of the few states where racinos experienced year-over-year growth between 2014 and 2015. If DFS was truly a competitive threat, those numbers would have declined—not by a little, but by a lot.
- **The casino/racino industry HELPED the fantasy sports industry pass similar bills in Indiana, Colorado, Missouri, and Mississippi.** If fantasy sports was truly a threat to the casino/racino industry why would casinos and racinos in those states SUPPORT bills like S. 6793? The answer is simple—skill based fantasy sports contests are not—and will never be—a substitute for the type of games (poker, blackjack or roulette) offered at a casino or racino.

MYTH #3

S. 6793 violates the state constitutional ban on the expansion of gambling. FALSE. Time and again, the New York Court of Appeals has confirmed that the legislature has the power to determine what is and what is not gambling. And that's exactly what S. 6793 does—it confirms that fantasy sports contests are exempt from the state's gambling laws.

MYTH #4

There are no legal or constitutional impediments in limiting paid fantasy sports contests to brick and mortar casinos. FALSE.

- The U.S. Constitution bars states from passing laws that require companies to either open or affiliate with an in-state "brick and mortar" operator in order to do business in the state.
- Nor could a racino offer a new form of gaming—their characterization of DFS contests, not ours—without running afoul of the State Constitution and the NY Court of Appeal's decision in **Dalton v. Pataki.**

Exhibit JJ: Circular entitled "Debunking the Myths About Fantasy Sports"

DEBUNKING THE MYTHS ★ ABOUT FANTASY SPORTS ★

Our opponents have gone to tremendous lengths to convince state legislatures that fantasy sports contests are akin to slots, roulette, and other forms of illegal gambling. In their zeal to defeat bills that would benefit millions of Americans, they have disseminated a flood of myths, falsehoods, and flat-out inaccurate statements about fantasy sports in general and this legislation in particular. Rather than allow this fake news to proliferate, we have prepared this document to set the record straight.

MYTH #1 Paid fantasy sports contests are illegal in most states.

False. Paid fantasy sports operators, like DraftKings and FanDuel, legally operate in 40 states.

MYTH #2 State XX would be an outlier if it passes this legislation.

False. Over the past 2 years, 10 states have updated their laws to confirm that paid fantasy sports contests are legal and NOT a form of gambling. And that number should grow exponentially in 2017—similar bills are moving through the legislative process in 20 additional states.

MYTH #3 These bills are unpopular with conservatives.

False. Not only was Vice President Mike Pence the third governor in the nation to sign a fantasy sports bill, but ALEC endorsed a model fantasy sports bill in August 2016 upon which this bill is modeled. In fact, a number of states with Republican super majorities, like Arkansas, Indiana, Mississippi, and Tennessee passed fantasy sports bills with little to no opposition.

MYTH #4 I could lose my election if vote for this bill.

False. There are few issues that are more important to your constituents. We estimate that 25% of the voters in your district have participated in a fantasy sports contest—and we understand that hundreds of them have reached out and urged you to vote in favor of the bill. Not convinced? According to a 2016 survey, **47% of individuals who participated in a fantasy sports contest will consider how their legislator votes on a fantasy sports bill the next time they go to the poll.**

MYTH #5 Entry fee + cash prize = gambling.

False. As long as a contest is one of skill, entry fees and cash prizes are perfectly legal—just look at bowling, golf, and fishing tournaments. The touchstone isn't the exchange of money; it's whether skill is more determinative of the contest's outcome than chance.

MYTH #6 This bill would legalize a new form of gambling.

False. Congress specifically exempted fantasy sports contests from the definition of illegal gambling in the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA). Since then, 11 states have passed laws that expressly state that fantasy sports contests—regardless of duration—are NOT a form of gambling.

MYTH #7 Come on—if it quacks like a duck and looks like a duck, it's a duck.

Not this time. But don't just take our word for it. The following quote is from a document that the anti-gambling group, Stop Predatory Gambling, prepared for state lawmakers in 2012:

> *The typical fantasy sports league is not 'gambling' because winning is based predominantly on skill and knowledge about the featured sports and its athletes, not on chance. In other words, fantasy sports leagues challenge the participants to exercise judgment-making skills similar to a coach or general manager.*

Stop Predatory Gambling, "Unlawful Internet Gambling Enforcement Act of 2006 – Fact Sheet," p. v-3, available at http://stoppredatorygambling.org/wp-content/uploads/2012/12/UIGEA-2006-Fact-Sheet.pdf (last visited March 21, 2017). We couldn't have said it better ourselves.

MYTH #8 Season-long fantasy sports contests require skill while daily fantasy sports contests are determined by chance.

False. Experts at MIT, University of Chicago, and other esteemed universities have reached the opposite conclusion. All have concluded that daily fantasy contests require all the same skill as season-long contests. **This makes sense:** Daily contests require participants to construct a team with the same "salary cap" restraints as real-life general managers; they also can factor in more data points (e.g., weather, match-ups, injuries, coaching strategy) when setting their line-ups than in season-long contests.

MYTH #9 Fantasy sports contests are gambling because contestants do not control the performance of the athletes on the field.

False. This same logic would force the New York Stock Exchange to move to Las Vegas and effectively prohibit day trading, life insurance, and countless other "skill based" activities that turn, in part, on some external factor that's not under the participant's direct control. It also misstates the nature of a fantasy sports contest: the outcome turns, almost entirely, on the skill of the participants in forecasting how a group of real-life players from different real-life teams will perform in certain statistical areas (hits, walks, RBIs, strike-outs, etc.) in real-life contests.

MYTH #10 Fantasy sports contests are gambling because they're not 100% skill.

False. No activity is 100% skill—even chess is only 94% skill because a coin flip determines which player has the first move advantage. All that matters is that skill is the predominant factor in determining who wins a fantasy sports contest.

MYTH #11 DFS contests played by beginners are not contests of skill.

False. The same could be said of chess, golf, tennis and every other skill based contest.

MYTH #12 Fantasy sports are like poker and should share the same legal status.

False. Unlike fantasy sports contests, the outcome of a poker game can turn on the draw of the cards. The presence of a "systemic element of chance" is often the touchstone that courts use to determine which side of the skill/chance line a contest falls. Furthermore, skill studies show that fantasy sports contests are far more skillful than poker; the average DFS contest is between 65% and 90% skill; poker studies usually fall between 45% and 55%.

MYTH #13 Fantasy sports are like pari-mutuel horse betting, which is often regulated as gambling.

False. States have long viewed horse betting as a form of gambling because of the risk of corruption—a problem that simply does not exist for the type of fantasy sports contests authorized under the bill. Also, pari-mutuel betting involves an undetermined prize pool and odds, neither of which is permitted under the bill.

MYTH #14 Come on—this is no different than sports betting.

False. Unlike sports betting, which is prohibited under federal law, fantasy sports contests do not threaten the integrity of the games. NFL Commissioner Roger Goodell has said,

> "I don't think daily fantasy is [team sports gambling]. I don't think [daily fantasy] affects the outcome of games. There's a mashup of all these personalities, there's no influence to try to change the outcome of a game. That's the area where we have a very heavy line. Daily fantasy, to me, is not in that category... For our standpoint, we do not see the same risk to the integrity of the game". (April 29, 2016)

MYTH #15 Fantasy sports are regulated by gaming commissions in some states, and therefore must be gambling.

False. Legislatures have assigned fantasy sports oversight to the agencies that can best regulate the activity with the least expense. Again, every fantasy sports bill that has passed or is under consideration makes clear that contests that meet the specified criteria are NOT a form of gambling.

MYTH #16 The bill will allow minors to play in fantasy sports contests for money.

False. The bill does the opposite—it prohibits minors from entering paid fantasy sports contests.

MYTH #17 Daily fantasy sports are highly addictive.

False. Fantasy sports opponents cannot point to any studies or other verifiable evidence to support the argument that DFS is addictive. Regardless, the bill would require operators to provide players with self-exclusion options to limit their participation.

MYTH #18 Only the top 1% of players win contests.

False. On DraftKings and FanDuel, between 70% and 80% of players won at least one contest they entered in 2016.

MYTH #19 Season long contests are for fun; DFS contests cost thousands of dollars.

False. According to the Fantasy Sports Trade Association, the average fantasy sports player paid $184 to participate in season-long fantasy sports contests in 2016. The median entry fee paid by players per contest on DraftKings is $3, with a median deposit of $20. These entertainment costs are comparable to (or more cost effective than) other hobbies or activities like going to concerts or movies.

MYTH #20 This bill will put an online casino in every home.

False. Rather than open the door to gambling, it will slam it shut. The bill only permits fantasy sports contests that meet specified criteria—one of which is that the outcome must turn on skill.

MYTH #21 The bill legalizes esports.

False. The bill narrowly defines fantasy sports, and esports do not fall within that definition.

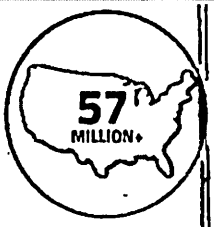
MYTH #22 The CEO of DraftKings compared the business to a casino.

False. DraftKings CEO Jason Robins simply pointed out that DraftKings has no stake in the outcome of a contest—i.e., does not act as the "house"—but rather collects an administrative fee for hosting contests.

Exhibit KK: Circular entitled "Fantasy Sports: A Game of Skill"

Fantasy Sports: A Game of Skill

Over 57 million Americans participate in some form of fantasy sports, a contest of skill that allows them to have a deeper appreciation for the sports they follow and love. No less an authority than the NFL has said, **"Fantasy football is a game of skill, and gambling is not."**



Whether a participant wins or loses **depends on his or her skill** relative to the other participants in the fantasy contest. It's not like games of chance, where no matter how skilled the player is, the game is designed to come down to luck – a spin of a wheel or the draw of a random card.

But don't just take our word for it, many others agree:

MLB, NFL, NHL, NBA, and NASCAR all support the Daily Fantasy Sports Industry because they agree it is not gambling and enriches the fan experience.

Federal law acknowledges that fantasy sports contests determined by the relative skill of players are not gambling under the Unlawful Internet Gambling Enforcement Act of 2006.

"I don't think daily fantasy is [team sports gambling]. I don't think [daily fantasy] affects the outcome of games. There's a mashup of all these personalities, there's no influence to try to change the outcome of a game. That's the area where we have a very heavy line. Daily fantasy, to me, is not in that category... For our standpoint, we do not see the same risk to the integrity of the game."

NFL Commissioner Roger Goodell, April 29, 2016

"I think that fantasy is an important source of fan engagement, it has been for a long time. We did thoroughly investigate the games that were available on [DraftKings]...I'm quite convinced it is a game of skill, as defined by the federal statute. And I'm comfortable with the idea that it's not gambling."

MLB Commissioner Rob Manfred, October 22, 2015

"[B]ecause of the legal definition of daily fantasy vs. what sports betting is...daily fantasy, as it's currently constructed, is clearly a game of skill."

NBA Commissioner Adam Silver, October 21, 2015

"You have to be an idiot to think playing daily fantasy sports games are like sports betting or poker. It's not gambling, it's not gambling, it's not gambling...The only people who think it's gambling, as opposed to skill, are people who haven't played or people who have other political agendas."

Mark Cuban, January 8, 2016

"Daily Fantasy Sports is strategic, and it can be unforgiving to the casual participant who chooses players based on emotion, media narratives and hometown favoritism. Often that participant is facing analytically inclined opponents who rely on game theory and probability to calculate their likelihood of winning from an assortment of variables: injuries, coaching tendencies, weather. Smart risk-taking and attentiveness are rewarded."

Sports Illustrated, February, 2015

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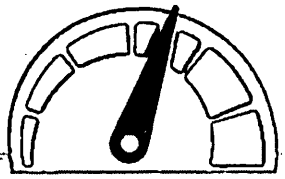
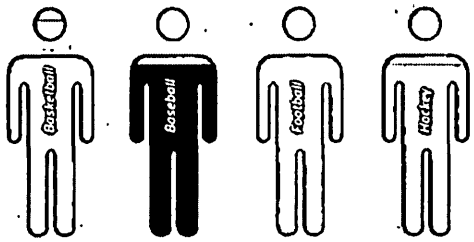
Numerous independent academic studies of Daily Fantasy Sports conclude that they are contests of skill:

"[W]inning a prize in any of the games that DraftKings offers strongly depends more on skill than on chance, and that chance is immaterial in the probability of winning."

University of Chicago Professor of Statistics and Econometrics Zvi Gilula who analyzed DrafKings user contest data for football, basketball, and baseball contests.

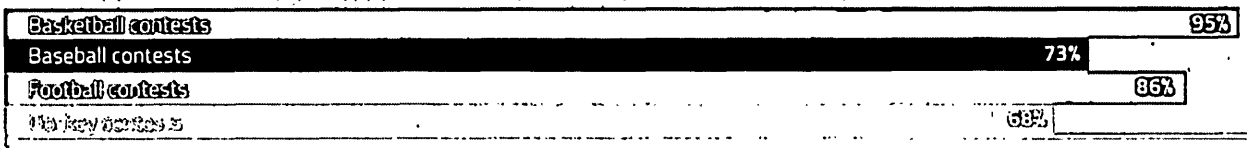


There is "a persistently higher win rate of Top Performers relative to Average Performers over time... **DFS is a game in which skill plays an important role.**" - Daniel L. Rubinfeld, Professor of Law and Economics Emeritus at the University of California Berkley and Professor of Law at NYU Law School, analysis of DraftKings' basketball, baseball, and football contests.



96.1% 82.8% 83.4% 81.9%

Skilled players' lineups dominated over randomly generated unskilled computer simulations 96.1% of the time in basketball contests, 82.8% in baseball contests, 83.4% in football contests, and 81.9% in hockey contests. - Gaming Laboratories International (GLI) skill study of DraftKings contests.



Actual users beat computer-generated lineups 95% of the time in basketball contests, 73% in baseball, 86% of the time in football, and 68% of the time in hockey on FanDuel and users improve with practice. Users with more experience had significantly higher win rates over time. The consistency of the results of individual users as compared to the diversity of results over the population of users indicates that **skill level is important in determining outcomes.** - Anette Hosoi, Professor of Mathematics and Engineering at MIT analysis of FanDuel players' actual results as compared to computer-generated lineups.

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Exhibit LL: Circular entitled "Fantasy Sports Contests are Demonstrably Different from Gambling Games"

Fantasy Sports Contests are Demonstrably Different From Gambling Games

	Fantasy Sports	Horse Racing	Sports Betting	Sports Prop Betting	Roulette	Blackjack	Poker	Lottery
SKILL / NON-GAMBLING FACTORS								
Contest Decided Predominately by Skill	YES							
Predetermined Prize That Does Not Change	YES							
GAMBLING FACTORS								
Corruption of Sport Concerns	NO	X	X	X				
Outcome of Sports Game Determines Contest	NO	X	X					
Play against the House	NO	X	X	X	X	X		
Prize determined by Number of Entrants or Amount Wagered	NO	X	X	X	X	X	X	X
Prize based on Odds or Lines	NO	X	X	X	X			
Considered to be a Traditional Casino/ Gambling Game	NO	X	X	X	X	X	X	
House Controls Device or Location that determines Contest Outcome	NO	X			X	X	X	X
Systemic Element of Chance	NO				X	X	X	X

DFS is not like poker or other casino games because there is no systemic chance.

Systemic chance exists when the game itself has elements created either by a random number generator in a computer program or some other random event such as a dice throw, ball draw, or card shuffle. DFS does not have any element of system chance. Instead, DFS is played by considering a number of known, interlocking, and often shifting factors through strategic risk-taking and decision-making. The presence of systemic chance is a crucial determiner of whether an activity is gambling, and a clear distinction between DFS and gambling.

But don't just take our word for it, many others agree:

"I don't think daily fantasy is [team sports gambling]. I don't think [daily fantasy] affects the outcome of games. There's a mashup of all these personalities, there's no influence to try to change the outcome of a game. That's the area where we have a very heavy line. Daily fantasy, to me, is not in that category... For our standpoint, we do not see the same risk to the integrity of the game."

NFL Commissioner Roger Goodell, April 29, 2016

"I think that fantasy is an important source of fan engagement, it has been for a long time. We did thoroughly investigate the games that were available on [DraftKings]...I'm quite convinced it is a game of skill, as defined by the federal statute. And I'm comfortable with the idea that it's not gambling."

MLB Commissioner Rob Manfred, October 22, 2015

"[B]ecause of the legal definition of daily fantasy vs. what sports betting is...daily fantasy, as it's currently constructed, is clearly a game of skill."

NBA Commissioner Adam Silver, October 21, 2015

Exhibit MM: Second circulare entitled "Fantasy Sports Contests are Demostrably Different from Gambling Games"

Fantasy Sports Contests are Demonstrably Different From Gambling Games

	Fantasy Sports	Horse Racing /Parimutuel	Sports Betting	Sports Prop Betting	Roulette	Blackjack	Poker	Lottery
SKILL / NON-GAMBLING FACTORS								
Contest Decided Predominately by Skill	YES							
Predetermined Prize That Does Not Change	YES							
GAMBLING FACTORS								
Corruption of Sport Concerns	NO	X	X	X				
Outcome of Sports Game Determines Contest	NO	X	X					
Play against the House	NO	X	X	X	X	X		
Prize determined by Number of Entrants or Amount Wagered	NO	X	X	X	X	X	X	X
Prize based on Odds or Lines	NO	X	X	X	X			
Considered to be a Traditional Casino / Gambling Game	NO	X	X	X	X	X	X	
House Controls Device or Location that determines Contest Outcome	NO	X			X	X	X	X
Systemic Element of Chance	NO				X	X	X	X

DFS is not like poker or other casino games because there is no systemic chance.

Systemic chance exists when the game itself has elements created either by a random number generator in a computer program or some other random event such as a dice throw, ball draw, or card shuffle. DFS does not have any element of system chance. Instead, DFS is played by considering a number of known, interlocking, and often shifting factors through strategic risk-taking and decision-making. The presence of systemic chance is a crucial determiner of whether an activity is gambling, and a clear distinction between DFS and gambling.

DFS is not like sports betting because it is not outcome determinative and there are no corruption concerns.

Sports betting involves betters wagering money on the outcome of a sports contest. By definition, DFS contests do not turn on the binary outcome of a single, real-world game. They turn instead on the aggregation of individual performances of a number of different real-world competitors.

DFS contests do not pose the integrity concerns linked with traditional sports betting—specifically, the risk that gamblers will "fix" the results of professional sporting events through bribes. Because DFS contests do not depend on the outcome of a single sporting event, one player performing poorly will never effect a DFS contest significantly enough to make bribing one's way to victory practicable or even possible. The NFL, MLB, NBA, and NHL all agree there are no corruption concerns with DFS.

Exhibit NN: Report by Gaming Laboratories International, dated Apr. 15, 2015

GLI

World Headquarters
600 Airport Road
Lakewood, NJ 08701
Phone (732) 942-3999
Fax (732) 942-0043
www.gaminglabs.com

April 15, 2015

Mr. Tim Dent, CFO & COO
DraftKings, Inc.
225 Franklin Street, 26th Floor
Boston, MA 02110

RE: Skill Simulation Analysis of *DraftKings Daily Fantasy Baseball Contest* (**Gaming Laboratories International, LLC** Proposal #MA-20140815-11 dated August 14, 2014)

REF: MA-00-DFK-14-01

Evaluating Location:

GLI World Headquarters
600 Airport Road
Lakewood, NJ 08701

Dear Mr. Dent,

As per DraftKings, Inc.'s (hereafter DraftKings) request, please find **Gaming Laboratories International, LLC's (GLI)** skill simulation analysis for the fantasy baseball game, *Daily Fantasy Baseball Contest.*

This report only verifies the mathematical aspects of this game and DOES NOT offer an opinion as to whether or not this game is currently authorized for use in any jurisdiction.

Game Description

Draftkings.com hosts daily fantasy baseball contests on their website during the Major League Baseball (MLB) season. Contests, or fantasy leagues, exist for one day only. Contests are offered on a daily basis. Numerous leagues are offered on the website and most consist of ten to twenty participants. All leagues are independent of one another and people can participate in more than one league.

Worldwide Locations

World Headquarters
Lakewood, New Jersey

U.S. Regional Offices
Colorado
Nevada

International Offices
GLI Africa
GLI Asia
GLI Australia Pty Ltd
GLI Austria GmbH
GLI Europe BV
GLI Italy
GLI South America

For each league, participants draft rosters of MLB players. Rosters consist of eight hitters (C, 1B/DH, 2B, 3B, SS, OF, OF, OF) and two pitchers. A total of ten players must be selected from at least three different MLB teams. Participants compete against one another on the basis of the statistics accumulated by the players on their roster. Each available player has a daily fantasy salary. The sum of all salaries on a fantasy roster cannot exceed $50,000.00. Player salaries are set by DraftKings on a daily basis prior to any contests starting.

Accumulation of fantasy points is described in Table 1.

Batters	Pitchers
Single = +3 PTs	Inning Pitched = +2.25 PTs
Double = +5 PTs	Strike Out = +2 PTs
Triple = +8 PTs	Win = +4 PTs
Home Run = +10 PTs	Earned Run Allowed = -2 PTs
Run Batted In = +2 PTs	Hit Against = -0.6 PTs
Run = +2 PTs	Base on Balls Against = -0.6 PTs
Base on Balls = +2 PTs	Hit Batsman = -0.6 PTs
Hit By Pitch = +2 PTs	Complete Game = +2.5 PTs
Stolen Base = +5 PTs	Complete Game Shut Out = +2.5 PTs
Caught Stealing = -2 PTs	No Hitter = + 5 PTs

Table 1. Fantasy Points Schedule.

Contest participants are awarded cash prizes based upon the performance of their fantasy roster chosen for a given league.

Mathematical Analysis

GLI conducted a Skill Simulation Analysis of the DraftKings *Daily Fantasy Baseball Contest* using historical data from the 2014 Major League Baseball season. The data used in the simulation was provided by DraftKings. The analysis included simulation of the DraftKings *Daily Fantasy Baseball Contest* and statistical analysis of the simulation results. Using the supplied game rules, two broad classes of participants were simulated: skilled and unskilled.

- The *skilled participants* had full knowledge of the official team lineup cards at the moment of roster selection. Lineup cards contained the batting order, positions of starting players and available position-players and pitchers. The skilled participants choose their rosters based on selected information contained in the lineup cards and the players' respective daily fantasy salary and not according to any additional information that an actual human participant may use, such as injury status, strength of scheduled opposing team, etc.

- The *unskilled participants* choose their rosters completely at random from the eligible list of players without any informed decisions. The list contains all batters with daily salaries assigned by DraftKings and starting pitchers only. No prior knowledge of past game play or points earned per game was considered. The unskilled participants were required to utilize at least 90.00% of the $50,000.00 salary cap.

Beginning with the first day of the 2014 MLB season that included at least two scheduled games, the program set a skill-based roster for each hour of the day where at least two games were started. Skill-based rosters were set using a custom algorithm that valued players based upon daily salaries and lineup card information. The values of the positions in the batting order were ranked as 3, 1, 4, 2, 5, 6, 7, 8, and 9. The values of positions on the fantasy roster were ranked as 1B, 2B, 3B, C, OF, OF, OF, and SS. Using these rankings, the highest rated player would have been a 1B batting third. The algorithm was applied to the data submitted by DraftKings.

Each day contained at least one skilled roster depending on the daily start times. The purpose setting skilled rosters by start times was to ensure that all skilled rosters were set using publicly available information at the time. Official lineup cards are more likely to be publicly available closer to game time. After the game starts, players for these teams are locked for the game that has been started and are therefore not available when the lineup cards for later games are made public.

The unskilled rosters were set by first compiling a list of all eligible players at each position. Eligible batters were defined to be players that were assigned a fantasy salary by DraftKings for the given day. Eligible pitchers were limited to starters only. It was assumed that fantasy players would not select relief pitchers since there was no guarantee they would play. Rosters were then filled by randomly selecting from the eligible player pools. Total roster salaries were restricted to a range of $45,000.00 to $50,000.00. Players were allowed to be drafted on multiple rosters.

For every skilled roster that was created, 10,000 randomly generated unskilled rosters were built. This scenario represents a single fantasy contest. The skill-based roster was matched head-to-head with all corresponding 10,000 unskilled rosters. Wins, losses, ties and total fantasy points were recorded with each contest. Over the course of the 2014 MLB season, the program simulated 551 fantasy contests.

The results of the simulation were analyzed by examining the magnitude of the fantasy points scored and the frequency of the skilled participant wins versus the unskilled participant in head-to-head matchups.

The methods used to create skilled and unskilled rosters returned an average of 90.42 and 70.01 fantasy points, respectively. The percentiles of the fantasy points distribution by roster are provided in Table 2.

Percentile	Unskilled	Skilled
0.975	117.95	146.20
0.500	69.20	89.85
0.025	26.95	37.81
Std. Dev.	23.14	26.94

Table 2. Fantasy Points Percentiles.

The simulated 95.00% confidence interval for the total number of fantasy points earned by roster is [26.95, 117.95] and [37.81, 146.20] respectively for unskilled and skilled participants. Skilled participants' scores dominate unskilled participants' scores at each of the percentile ranks report in Table 2.

The average win percentage for the skilled participant in head-to-head matchups against the unskilled participant for the 2014 MLB season was found to be 73.29% The median was 73.43% with a simulated 95.00% confidence interval of [72.44%, 75.05%]. The conditions of the simulation for which these numbers were obtained are thirty iterations of 551 contests from the 2014 data. An iteration is defined to be one simulation of the entire season.

Given the defined methods for setting skilled and unskilled fantasy rosters, the results of our analysis show that the skilled players will defeat the unskilled players on a head-to-head basis between 72.44% and 75.05% of the time at a confidence level of 95.00% under the conditions simulated.

Supplementary DraftKings Player Analysis

DraftKings identified the top fifteen earning fantasy baseball participants in the 2013 season by their profit. The play of these participants was tracked during the 2014 season. Of the fifteen players, 1001 fantasy baseball rosters were created. DraftKings provided GLI with the total fantasy points scored by all 1001 rosters. GLI was also provided the pool of eligible MLB players for which each roster was chosen. This data was used to compare the cohort of DraftKings top participants with computer-selected skilled rosters and computer-selected unskilled rosters. The definitions of these rosters are given in the Math Analysis section of this report.

Under the conditions described in the skill simulation analysis, GLI simulated the 2014 season 1000 times for comparing the DraftKings fifteen to randomly created unskilled rosters. For every iteration of the simulation a randomly generated unskilled roster was created by the computer. The roster was created from the same player pool that the respective Draftkings players created their rosters. The total fantasy points from the unskilled roster were compared against the total fantasy points of the DraftKings fifteen roster created from the same pool. A single simulation returned a total of 1001 wins, losses and ties for the cohort of DraftKings players.

Over the course of 1000 simulations, it was found that the DraftKings fifteen won 82.78% of head-to-head matchups with an unskilled roster. The 95% confidence level for the mean was [80.44%, 85.12%].

A set of skill-based rosters was created from the same player pools used by the DraftKings fifteen to build all 1001 rosters. The DraftKings fifteen won 65.13% of head-to-head matchups with the computer generated skilled roster. Over the course of a 149 contest season, we expect the DraftKings fifteen to outscore the computer generated skilled roster between 62.18% and 68.09% of the time at a confidence level of 95%.

The results of the Supplementary DraftKings Player Analysis show that the DraftKings fifteen outperformed the computer-generated skill rosters and the computer-generated unskilled rosters. It should be noted however that the purpose of the algorithm employed to generate computer skilled rosters was to show that an iterative roster selection method based on selected information would produce higher fantasy point totals than one simply chosen at random. The computer skilled rosters were not created using any external information about players - information that human players would have. It was also assumed that lineup card information used by the computer skilled algorithm was available for all players at the time of roster selection.

Summary

The intent of this analysis was to simulate and investigate the magnitude of the effect that participant skill and knowledge has in influencing the outcome of the proposed fantasy sports implementation. The results of the simulation described herein indicate that skilled fantasy participants will defeat unskilled fantasy participants more often than not in a daily fantasy baseball head-to-head matchup as defined herein. The skilled participant's total score was consistently within the 74th percentile when compared with the unskilled participant's total scores while repeatedly simulating the full 2014 MLB season.

The supplementary analysis shows that the top performing fantasy baseball participants, as defined by DraftKings, will routinely defeat the computer generated rosters created in the Skill Simulation Analysis.

Please note that GLI does not offer an opinion on the summary catergorization as to whether the game qualifies under the fantasy sports exemption of the Unlawful Internet Gaming Enforcement Act.

Please refer to the attached Terms and Conditions which apply to the information being provided within this report.

Should you have any questions, please feel free to contact our office.

Sincerely,
GAMING LABORATORIES INTERNATIONAL, LLC

Christine M. Gallo
Vice President of Technical Compliance and Quality Assurance

Enclosure

gv/awg

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The analysis provided by this Report applies exclusively to tests conducted using current and retrospective methodology developed by GLI on the specific hardware and software submitted by the Client. It is the responsibility of the manufacturer and/or developer of the subject hardware and software to apply for, obtain and maintain all necessary gaming licensure in each jurisdiction in which they do business, including state and tribal jurisdictions, where applicable. During the course of testing, GLI inspects for marks or symbols indicating that a device has undergone product safety compliance testing. GLI also performs, where practicable, a cursory review of submissions and information contained therein related to Electromagnetic Interference (EMI), Radio Frequency Interference (RFI), Magnetic Interference, Liquid Spills, Power Fluctuations and Environmental Conditions. Electrostatic Discharge Testing is intended only to simulate techniques observed in the field being used to attempt to disrupt the integrity of Electronic Gaming Devices. Compliance with any such regulations related to the aforementioned design is the sole responsibility of the device manufacturer; GLI accepts no responsibility, makes no representations and disclaims any liability with respect to all such non-gaming testing. The actual data showing the tests performed by GLI, and the excluded tests, are available to the Client upon written request.

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Exhibit OO: Article written by Daniel Getty, Hao Li, Masayuki Yano, Charles Gao and A.E. Hosoi

LUCK AND THE LAW: QUANTIFYING CHANCE IN FANTASY SPORTS AND OTHER CONTESTS*

DANIEL GETTY†, HAO LI‡, MASAYUKI YANO§, CHARLES GAO¶, AND A. E. HOSOI‖

Abstract. Fantasy sports have experienced a surge in popularity in the past decade. One of the consequences of this recent rapid growth is increased scrutiny surrounding the legal aspects of the game which typically hinge on the relative roles of skill and chance in the outcome of a competition. While there are many ethical and legal arguments that enter into the debate, the answer to the skill versus chance question is grounded in mathematics. Motivated by this ongoing dialogue we analyze data from daily fantasy competitions played on FanDuel during the 2013 and 2014 seasons and propose a new metric to quantify the relative roles of skill and chance in games and other activities. This metric is applied to FanDuel data and to simulated seasons that are generated using Monte Carlo methods; results from real and simulated data are compared to an analytic approximation which estimates the impact of skill in contests in which players participate in a large number of games. We then apply this metric to professional sports, fantasy sports, cyclocross racing, coin flipping, and mutual fund data to determine the relative placement of all of these activities on a skill-luck spectrum.

Key words. Fantasy sports, chance, statistics of games

AMS subject classifications. 62-07, 62P99, 91F99

1. Introduction. In his 1897 essay, Supreme Court Justice Oliver Wendell Holmes famously wrote: "For the rational study of the law the blackletter man may be the man of the present, but the man of the future is the man of statistics ..." [11]. This view has proven to be prescient as recent trends show that legal arguments grounded in data analysis are becoming increasingly common [7]. In light of this shift – although historical and ethical arguments remain the purview of legal professionals – physicists, mathematicians, and others well versed in data science have an obligation to provide rigorous mathematical foundations to ground these statistical legal debates.

One such debate that is currently being argued in the courts involves fantasy sports, a game in which participants assemble virtual teams of athletes and compete based on the athletes' real-world statistical performance. Fantasy sports have experienced a surge in popularity in the past decade. The Fantasy Sports Trade Association [2] estimates that 56.8 million people played fantasy sports in 2015 (up from 41.5 million in 2014) and that the concomitant economic impact of the industry is on the order of billions of dollars per year. One of the consequences of the recent rapid growth in activity is an increased scrutiny regarding the legal aspects of the game. In particular, contests that involve online exchange of funds are now subject to the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) which regulates online financial transactions associated with betting or wagering [3]. Currently, the

*Submitted to the editors September 25, 2016.

Funding: This work was partially funded by FanDuel. FanDuel did not exercise any editorial control over this paper.

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This manuscript is for review purposes only.

UIGEA excludes fantasy sports stating that the definition of a "bet or wager" does *not* include "participation in any fantasy or simulation sports game" [3]. However, at the time of this writing eight states do not allow fantasy sports competitions for cash.

In general, legal questions surrounding classification of games as "bets" or "wagers" hinge on whether the outcome of the game is determined predominantly by skill or by chance. Typically "skill" is defined as the extent to which the outcome of a game is influenced by the actions or traits of individual players, compared to the extent to which the outcome depends on random elements. Note that here we are considering the role of skill in the game framework, i.e. our goal is to quantify the utility of a players' abilities in general, rather than to measure the skill of individual players.

In a fantasy sports contest, players manage teams that accrue points based on the statistics of real athletes. For example, a fantasy football player with receiver X on their roster earns points every time X makes a catch in a professional football game. Rules for constructing a fantasy team roster – and hence strategies for assembling optimal line-ups – vary by league. In this study, we analyze data from *salary cap* games in which each player has a fictional dollar amount they can spend, and athlete "salary" values are set by the game provider.[1]

While there have been relatively few empirically-based investigations on the roles of skill and chance in fantasy sports, studies exist to determine whether skill is a distinguishing factor among NFL kickers [19], whether the outcome of shootouts in hockey are primarily determined by luck [12], and whether perceived "streaks" in basketball should be attributed to chance or to "the hot hand" [25, 27, 28]. In addition, many authors have explored whether scoring patterns in basketball [4, 9, 24], baseball [17, 24], cricket [23], soccer [10], tennis [13, 22] and Australian rules football [14] display statistical signatures of random processes. Perhaps the most relevant, extensive (and hotly debated) body of work is the analysis of the relative roles of skill and chance in poker [6, 5, 26, and references therein]. Unfortunately, most of these analyses cannot be applied directly to fantasy sports which differ from card games in at least one critical aspect: in card games, it is a relatively straightforward combinatorial exercise to estimate the probability of every possible outcome (e.g. how likely is a flush). This is not the case for fantasy sports in which performance on any given day is coupled to a host of factors such as weather, skill of opponent, injury, home versus away games, etc. Owing to this added layer of complexity, it is unclear whether the bulk of previous poker analyses can be adapted to fantasy games.

Instead, we take a data-driven approach analogous to the one proposed by Levitt *et al.* [16, 15]. Their study was performed in the context of poker but, unlike the combinatorial approaches of e.g. [6], it does not require prior knowledge of outcome probabilities and hence can be easily adapted to other activities that combine skill and chance. Our strategy will be to examine data from the online fantasy sports platform FanDuel, and test whether statistical outcomes are consistent with expected outcomes associated with games of chance. If the measured outcomes deviate significantly from those we expect in a contest of pure chance, we can quantify the extent of the deviation to place fantasy sports and other activities on a skill-luck spectrum.

Levitt *et al.* [16] note that there are at least four tests that can be applied to distinguish games of pure chance from those involving skill. The authors propose that tests can be framed as the following four questions:

1. Do players have different expected payoffs when playing the game?

[1]Here, and throughout this paper, we use the term *player* to refer to a person participating in a fantasy sports competition whereas *athlete* refers to professional athletes.

MLB	P	C	1B	2B	3B	SS	OF	OF	OF
NBA	PG	PG	SG	SG	SF	SF	PF	PF	C
NFL	QB	RB	RB	WR	WR	WR	TE	K	D
NHL	LW	LW	RW	RW	C	C	D	D	G

TABLE 1

FanDuel 2013/2014 roster rules. MLB: P = pitcher, C = catcher, 1B = 1st baseman, 2B = 2nd baseman, 3B = 3rd baseman, SS = shortstop, OF = outfielder. NBA: PG = point guard, SG = shooting guard, SF = small forward, PF = power forward, C = center. NFL: QB = quarterback, RB = runningback, WR = wide receiver, TE = tight end, K = kicker, D = defense. NHL: LW = left wing, RW = right wing, C = center, D = defenseman, G = goalie.

2. Do there exist predetermined observable characteristics about the player that help one to predict payoffs across players?
3. Do actions that a player takes in the game have statistically significant impacts on the payoffs that are achieved?
4. Are player returns correlated over time, implying persistence in skill?

If the answer to *all four* questions is "no," then we can conclude that the game under consideration is a game of chance. One of the many appealing aspects of this test is that the analysis can be framed in terms of inputs (player actions) and outputs (win-loss records), hence the game itself can be treated as a black box and the relative roles of skill and luck can be quantified irrespective of the detailed rules of the game.

2. Empirical tests of skill applied to fantasy sports data. To estimate the relative roles of skill and chance in these contests, we analyze data from FanDuel, currently one of the largest providers of daily fantasy sports. We consider two types of daily fantasy games – head-to-head (H2H) and 50/50 competitions – associated with four sports leagues – Major League Baseball (MLB), the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL). In H2H competitions, the player pits his team against a single opponent; both players pay the same amount to play and the winner takes all (minus the overhead to the host site). In a 50/50 league a pool of players each pay the same entry fee to enter the competition; the top half of scorers in the fantasy league each receive the same payout (roughly double what they put in), while the bottom half receives nothing. When a player elects to play in a *game* (e.g. a particular 50/50 competition), they may pay to submit multiple *entries*. Hence each player has a win fraction associated with each game defined as their fraction of winning entries. These entries are typically not independent and players may submit multiple copies of the same entry.

FanDuel provided us with 12 sets of data [1]. The first four were anonymized results from H2H competitions for MLB, NBA, NFL, and NHL. Each entry in the data set represented the performance of one user in one game (G_i) and contained: a user ID (UID), number of entries submitted by UID in G_i, number of winning entries for UID in G_i, average score (averaged across all UID's entries in G_i), and the top score for UID in G_i. The next four data sets contained similar information for 50/50 competitions. The final four datasets contained athlete performance data. Each entry in the dataset included: athlete name, date of competition, team, FanDuel "salary" on the date of that particular competition, position (summarized in Table 1), and number of FanDuel points scored by that athlete in that particular competition.

	MLB	NBA	NFL	NHL
# plr (H2H)	89,338	107,796	190,562	20,802
# plr (50/50)	130,515	158,532	312,263	30,607
Max games/plr	686	383	155	271
Max entries/plr	60,200	64,287	49,657	21,209
Salary cap	35,000	60,000	60,000	55,000
# athletes	1,261	501	584	891

TABLE 2
Overview of the FanDuel dataset. Note that players (plrs) may have multiple entries for each game.

We considered two full seasons (2013/14 and 2014/15) of all FanDuel H2H and 50/50 contests for NBA, NHL, NFL, and MLB. Each fantasy team for all sports contains nine athletes (see Table 1). The salary caps, number of fantasy players, and number of athletes in our dataset are summarized in Table 2. In the following we use this data to test questions 1, 3, and 4 proposed by Levitt *et al.* In all cases we found no significant differences between the H2H and 50/50 data so the results presented herein were obtained using the combined datasets unless otherwise noted. Since our data is anonymized we do not have information on predetermined player characteristics; hence we do not address question 2.

2.1. Expected payoff. In a game of chance, the expected payoff for all players is the same. To test whether this is true of our data, we divide each of our datasets – fantasy NBA, MLB, NFL, and NHL – into five subsets according to the number of entries N_i played by the ith player. The first group contains players who have submitted the fewest number of entries and the fifth group contains players who have submitted the largest number of entries. In the FanDuel playing population, we observe that the number of players, m, who have played n_i games decays approximately exponentially (i.e. most players play only a few games, see Figure 4), hence ranges were selected to reflect a logarithmic distribution such that the first group contains 90% of the players, the second group 90-99%, the third 99-99.9%, etc. If the measured win fraction distribution varies across these five subsets in a statistically significant manner we can conclude that something other than chance played a role in the outcome of the contest. Here the win fraction of the ith player is computed as

$$w_i = \frac{1}{n_i}\sum_{j=1}^{n_i} x_{ij} \tag{1}$$

where x_{ij} represents the fraction of winning entries in the j-th game: $0 \leq x_{ij} \leq 1$ and $x_{ij} = 1$ if all of player i's entries in the j-th game were winners.

Some care must be taken in this analysis as it can be argued that players who win their initial games (whether by skill or by luck) may be more likely to keep playing; conversely, players on a losing streak may be more likely to quit. To determine whether this is the case, we computed the average win fraction across the population for the n_ith game (i.e. the last game the player played before they quit), the $n_i - 1$ game, (i.e the second-to-last game the player player before they quit), etc. These data are summarized in Figure 1 (Left) which shows a "quitting boundary layer" indicating that players are indeed more likely to quit after a string of losses. In our dataset,

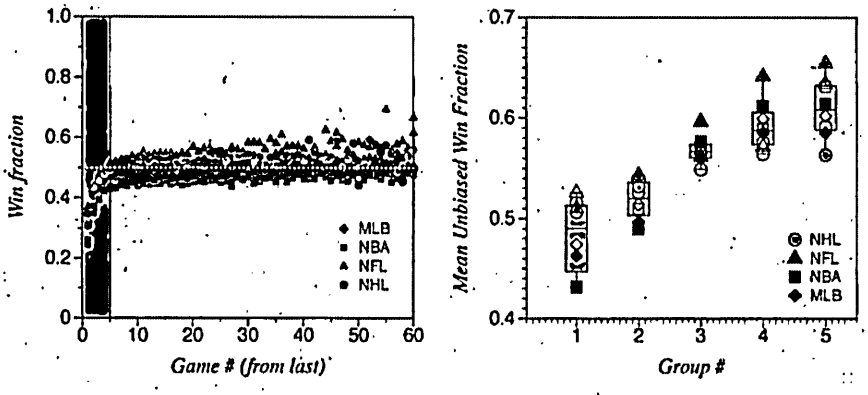

FIG. 1. *(Left) Win fraction associated with each player's last game (game # = 1), second to last game (game # = 2), etc. averaged across the entire playing population. Grey symbols correspond to 50/50 games, blue symbols to H2H games from the 2013/14 season; shapes correspond to different sports as summarized in the legend. The blue shaded region on the left corresponds to the "quitting boundary layer." (Right) Mean win fraction for fantasy MLB, NBA, NFL, and NHL in which the boundary layer points have been removed for each player. Group 1 corresponds to players who have played the fewest number of games; group 5 corresponds to players who have played the largest number of games. Filled symbols correspond the 2014/15 season; empty symbols correspond to the 2013/14 season. Light blue boxes are a standard IQR box-and-whisker plots.*

the boundary layer, n_{BL}, is measured to be approximately five games wide in all four sports. This introduces a bias in the calculation since the boundary layer accounts for a larger fraction of games in the first group in which the population has played the fewest number of games. To correct for this bias, we remove the last five games played by every player and compute the win fraction of the remaining games:

$$w_{i,unbiased} = \frac{1}{n_i - n_{BL}} \sum_{j=1}^{n_i - n_{BL}} x_{ij}. \tag{2}$$

The removal of the boundary layer increases the average win fraction significantly in the first group but has only a minor impact on groups 2–5.

A number of trends are clearly observable in the data summarized in Figure 1 (Right). First, players who play the fewest games systematically underperform the other groups with an average win fraction of 0.48 (averaged over all four sports). In contrast, in the cohort that played the most games, the mean win fraction increased to 0.61 (averaged over all four sports). Thus these data are not consistent with a game of pure chance. (Additional details are available in Table 4 in the Appendix.)

2.2. Effect of player action. To test the effects of player actions, we compare outcomes of real players with those of a league of players who draw randomly from all possible line ups. Ideally we would like to compare the distribution of scores generated by real fantasy players with the distribution of scores for all possible line-ups, however the combinatorics associated with generating all possible line-ups proved to be computationally intractable. Instead we estimate the "all possible line-up" distribution using a Monte Carlo approach. Two strategies were tested to construct the Monte Carlo rosters. In the first, athletes for each roster slot were picked randomly from a normal distribution of salaries, centered at one ninth of the salary cap. In the second, the center of the salary distributions varied by position; for example, if on

average quarterbacks cost twice as much as kickers, then the mean of the normal salary distribution for quarterbacks was set to be twice as much as the mean of the normal salary distribution for kickers, with the constraint that the sum of the means across all positions must be equal to the salary cap.

One hundred random line-ups that conform to the rules of the game were generated for each day of competition. In all cases including football, only daily competitions were considered which corresponds to a range of 51 (NFL) – 182 (MLB) competitive days per year depending on the sport. Each roster is checked to see if the total salary is below the salary cap and above a minimum threshold. In the data shown here, the threshold is set to 85% of the salary cap which roughly maximizes the mean score of the random line-ups using FanDuel data. (If the threshold is too low, cheap line-ups can skew the distribution towards low scoring rosters; if the threshold is too high, the constraint is too rigid and high performing rosters are missed.) Randomly generated rosters that satisfy these constraints are accepted, all others are rejected. The process is repeated until 100 acceptable rosters per day were generated. We found very little difference between the two Monte Carlo strategies, i.e. equal distribution versus position-weighted distribution. Results for the weighted distribution are shown in Figure 2.

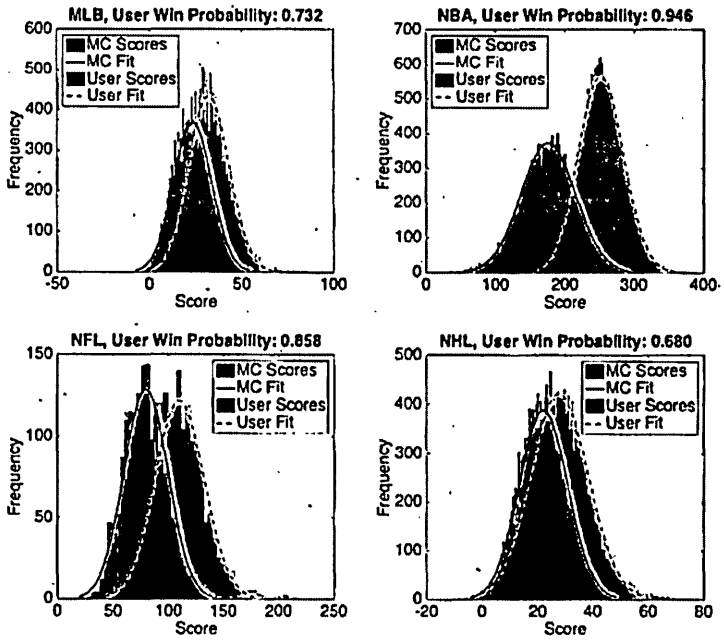

FIG. 2. *Comparison of scores from line-ups constructed by real FanDuel players (light grey) with line-ups from the Monte Carlo simulation (dark grey). Resulting distributions are fit with a normal distribution to estimate confidence intervals on user win probabilities.*

In all cases FanDuel players beat the Monte Carlo simulation with user win probabilities ranging from 62% (NHL, equal distribution) to 95% (NBA, weighted distribution) as summarized in Table 3 suggesting that player actions do indeed influence the outcome of the game.

	MLB	NBA	NFL	NHL
User win prob (weighted)	0.732	0.946	0.864	0.680
95% CI (weighted)	±0.007	±0.004	±0.016	±0.007
User win prob (equal)	0.781	0.898	0.809	0.618
95% CI (equal)	±0.006	±0.005	±0.019	±0.007

TABLE 3
Summary of win probability of user generated rosters versus Monte Carlo generated rosters.

2.3. Persistence. To address the question of persistence, we begin with the hypothesis that skill is an intrinsic quality of a fantasy player and does not change significantly over the course of the season. If this is the case we expect to observe a distribution of underlying skill across the playing population in which the win fraction of each individual player in the first half of the season is correlated with that player's win fraction in the second half. To determine whether this is consistent for FanDuel players, we plot the win fraction for the first half of the season versus the win fraction for the second half of the season for each player. (Note that here and in all subsequent calculations, the quitting boundary layer has been removed.) These data are shown in the scatter plots in Figure 4; each circle represents one FanDuel player and the size of the point represents the number of games played by that particular player.

In order to quantify the role of skill in determining the outcomes of the competitions represented in these plots, we seek a metric with the following properties. Ideally the accuracy of the metric should improve as number of contests per player grows, $n_i \to \infty$, and as the number of players grows, $m \to \infty$. In particular, the metric must capture the expected behaviors at the two extremes: competitions of pure luck and competition of pure skill. In contests of pure luck, the expected outcome of every player is the same. Hence – assuming a zero-sum game in which players are playing against one another – as the number of games per player increases, win fractions for the first half of the season versus win fractions for the second half of the season for all players converge to a single point at $(1/2, 1/2)$. Conversely, in a skill dominated competition, we expect to observe a distribution of skill across the playing population; in this case we expect the data converge to a line with slope one as the number of games per player increases.

Sketches of expected user win fractions for the first half of the season versus user win fractions for the second half of the season for high and low values of n_i and m are shown in Figure 3. To characterize these distributions, perhaps the most obvious metrics to try are the Pearson product-moment correlation coefficient or a standard linear regression. However, both of these are problematic. The linear regression fails to accurately capture the extreme of pure luck since, in the limit that the number of games per player becomes large, all of the data collapses onto a single point. The Pearson product-moment correlation coefficient is problematic as it cannot distinguish between lines of different slopes. In our case, in the limit of pure skill, we expect a line of slope 1, whereas lines with different slopes, no matter how well correlated, are not representative of intrinsic skill. Hence we seek an alternate measure. Motivated by the expected outcomes shown in Figure 3, we propose to use the ratio of the variance along the diagonal in our scatter plots (denoted as S in Figure 3), to the variance in the orthogonal direction (denoted as T in Figure 3) as a measure of the relative importance of skill and luck in a competition.

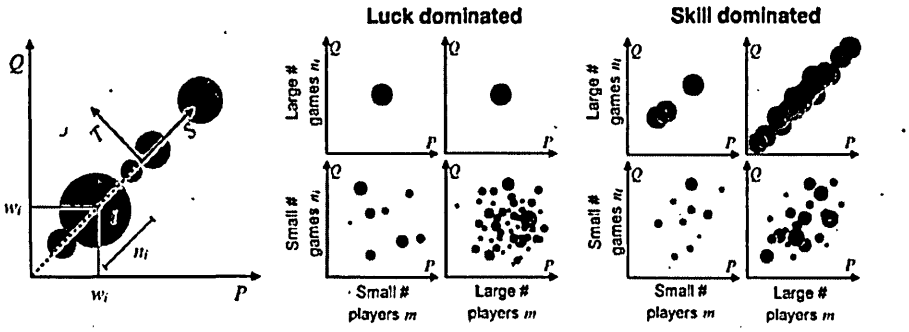

FIG. 3. *(Left) Sketch of expected outcomes for first half win fractions P (horizontal axes) versus second half win fractions Q (vertical axes) along with rotated coordinate system (S,T). (Center and Right) Sketches of expected distributions for games dominated by luck and games dominated by skill in the limit of small and large numbers of contests per player (n_i) and small and large numbers of players (m). In each sketch, points represent individual FanDuel players in which the size of the point represents the number of games played by the ith player, n_i.*

To evaluate this quantity, we characterize each player by two numbers: n_i, the number of games played by player i, and w_i the win fraction of player i as computed in Equation (1). Note that in the following analysis we will be computing quantities associated with a distribution of m players where the ith player constitutes a distribution of n_i games. Hence quantities with the subscript i refer to individual players while quantities with no subscript refer to aggregates over all players. Next, we introduce random variables P_i and Q_i associated with the win fraction of player i in the first and second half of the season, respectively. If the game is truly random, then P_i and Q_i have the same distribution and $E[P_i] = E[Q_i] = 1/2$ (where $E[X]$ indicates the expected value of X); however, if the outcome of the game is primarily determined by skill, then $E[P_i] = E[Q_i] = w_i$, where w_i represents the true underlying skill of player i.

Rotating the (P, Q) coordinate system by $\pi/4$ and shifting the origin, we introduce the transformed random variables as sketched in Figure 3:

$$S_i = \frac{1}{\sqrt{2}}(P_i + Q_i - 1) \tag{3}$$

$$T_i = \frac{1}{\sqrt{2}}(Q_i - P_i). \tag{4}$$

Here T_i represents the difference in the win fraction distribution between the first and second halves of the season, and S_i represents the variation of P_i and Q_i from the nominal value of 1/2. Note that, if the game is truly random, then in the new coordinate system $E[S_i] = E[T_i] = 0$; however, if the outcome of the game is determined by skill, then $E[T_i] = 0$ and $E[S_i] = (2w_i - 1)/\sqrt{2}$, where w_i varies according to the skill level of the individual player. In games that combine skill and chance, we expect the measured values to lie somewhere between these two extremes.

To characterize the role of skill in determining the outcome of the game, we

compute a weighted variance in S and T over the aggregate of all players

$$A \equiv \sigma_S^2 = \frac{1}{m}\sum_{i=1}^{m}(S_i - E[S])^2\theta_{S_i} \tag{5}$$

$$B \equiv \sigma_T^2 = \frac{1}{m}\sum_{i=1}^{m}(T_i - E[T])^2\theta_{T_i}, \tag{6}$$

where $E[S] = (1/m)\sum_i^m S_i = 0$, $E[T] = (1/m)\sum_i^m T_i = 0$, and θ_{S_i} and θ_{T_i} are weighting functions that reflect the our confidence in the ith data point. Finally, we define the quantity

$$R^* = 1 - \frac{B}{A} \tag{7}$$

which provides a single metric to quantify the relative role of skill and chance in determining the outcome of the game. For games that are truly random, $E[R^*] = 0$; for games that are purely skill-based, $E[R^*] = 1$. [2]

To estimate the distribution, expected value, and variance of R^* from real data, we first compute the sample mean estimate for each player associated with the win fraction in the first and second half of the season, respectively, using

$$\hat{p}_i = \frac{1}{n_i/2}\sum_{j=1}^{n_i/2} x_{ij}, \qquad \hat{q}_i = \frac{1}{n_i/2}\sum_{j=n_i/2+1}^{n_i} x_{ij}. \tag{8}$$

Next we model the skill of each player, as reflected by the win fraction, by a normal distribution. Towards this end, we only consider players that satisfy the condition under which the binomial distribution may be well-approximated by a normal distribution namely

$$n_i w_i/2 > 5 \quad \text{and} \quad n_i(1-w_i)/2 > 5. \tag{9}$$

In this case, the variance in the half season win fraction of the ith player can be approximated by

$$\sigma_i^2 = \frac{2w_i(1-w_i)}{n_i}. \tag{10}$$

Note that if skill is a persistent quality that is intrinsic to the player, then the win fraction in the first and second half of the season should be equal – namely $\hat{p}_i$ and $\hat{q}_i$ should both approach w_i as the number of games per player becomes large – and players can be represented by points along the diagonal as sketched in Figure 3 (Left).

We can now directly compute the R^* value associated with FanDuel data. At this point we are not computing a distribution, rather the particular instance of R^* that was observed in the 2013/14 and 2014/15 seasons. Rotating $\hat{p}_i$ and $\hat{q}_i$ as defined above to shift to $\hat{S}_i$ and $\hat{T}_i$ coordinates, weighting the ith data point by the variance $\theta_{S_i} = \theta_{T_i} = 1/\sigma_i^2$, and using $E[S] = E[T] = 0$, we compute

$$\hat{A} = \frac{1}{m}\sum_{i=1}^{m}\frac{\hat{S}_i^2}{\sigma_i^2} \qquad \hat{B} = \frac{1}{m}\sum_{i=1}^{m}\frac{\hat{T}_i^2}{\sigma_i^2} \tag{11}$$

[2]Here we choose $R^* = 1 - B/A$ as opposed to $R^* = B/A$ as game designers found it more intuitive to associate games of skill with $R^* = 1$.

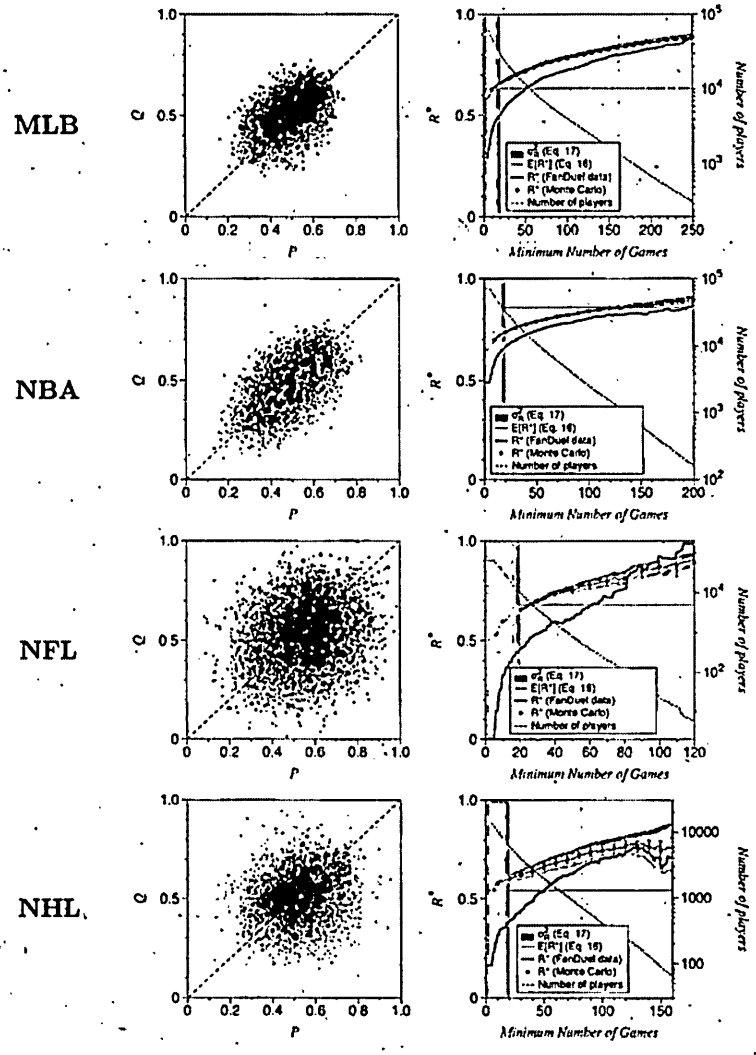

FIG. 4. *Left: Scatter plot of P versus Q for FanDuel players who have played a minimum of G_{min} games. To improve readability in the plots, G_{min} was selected for each sport to display approximately 5000 data points; $G_{min,MLB} = 85$, $G_{min,NBA} = 75$, $G_{min,NFL} = 25$, $G_{min,NHL} = 20$. Each circle represents a single FanDual player; size of the circle represents the number of games played. Right: R^* value calculated from FanDuel data (solid black line), expected value of R^* from Monte Carlo simulations (blue filled circles; error bars represent standard deviation across Monte Carlo trials), computed error (blue shaded region), and number of players in the FanDuel population (dashed line). Vertical dotted line represents the number of games in the corresponding professional sports season and the horizontal dotted line represents the R^* value calculated for the 2010–2015 seasons corresponding to the relevant professional league.*

and find $\hat{R}^* = 1 - \hat{B}/\hat{A}$. This observed value of $\hat{R}^*$ for the 2013/14 and 2014/15 NBA, MLB, NFL, and NHL FanDuel players is shown by the solid black lines in Figure 4. In each plot we consider a range of playing populations defined by the minimum number of games per player represented along the horizontal axis (e.g. if the minimum number of games is 100 then we discard players who have played 99 games or less). The dashed

line (right vertical axis) represents the number of players in each population which is surprisingly well-approximated by an exponential distribution in all four sports suggesting that the measured value of R^* is dominated by players who have played the fewest number of games in the sample.

While this calculation serves as a starting point to estimate the role of skill in a particular FanDuel season, ideally we would like to estimate the expected value of R^* (and the variance, etc.) if a large number of seasons were played with the same player population. Towards this end, we model the win fraction of each player in the first and second half by random variables $P_i \sim \mathcal{N}(w_i, \sigma_i^2)$ and $Q_i \sim \mathcal{N}(w_i, \sigma_i^2)$ where $\mathcal{N}(\mu, \sigma^2)$ indicates a normal distribution with mean μ and variance σ^2. Applying the rotated coordinate system transform to obtain the estimated win fractions as before we find

$$S_i = \frac{1}{\sqrt{2}}(P_i + Q_i - 1) \sim \mathcal{N}(\mu_{S_i}, \sigma_i^2) \tag{12}$$

$$T_i = \frac{1}{\sqrt{2}}(Q_i - P_i) \sim \mathcal{N}(\mu_{T_i}, \sigma_i^2) \tag{13}$$

where S_i and T_i are also normally distributed random variables with means given by $\mu_{S_i} = (2w_i - 1)/\sqrt{2}$ and $\mu_{T_i} = 0$. The quantities $\hat{A}$ and $\hat{B}$ can now be computed as in Equation (11) with $\hat{S}_i$ and $\hat{T}_i$ drawn from the specified normal distribution.

In practice, we may estimate the distribution of R^* using a Monte Carlo approach. For each player we can generate a "season" (i.e. x_{ij}'s) with the constraint that the simulated season must have the same n_i and w_i as the real player's season. From this data we can compute a specific instance of $\hat{R}^*$. This process is repeated to construct a distribution which can then be used to estimate quantities of interest, such as the mean, confidence region, etc. Results from the Monte Carlo simulations for NBA, MLB, NFL, and NHL FanDuel players are shown in blue filled symbols in Figure 4. The blue dots represent the mean value of R^* computed for 100 Monte Carlo seasons. Error bars on the symbols represent the standard deviation across the 100 trials.

We may also estimate both the expected value and variance of R^* directly from the player data by approximating $E[R^*] = E[1 - B/A] \approx 1 - E[B]/E[A]$. Because $S_i/\sigma_i \sim \mathcal{N}(\mu_{S_i}/\sigma_i, 1)$, the random variable A is distributed as a noncentral chi-squared distribution with the parameters m and $\lambda_S = \sum_{i=1}^{m}(\mu_{S_i}/\sigma_i)^2$. Similarly, the random variable B is distributed as a noncentral chi-squared distribution with the parameters m and $\lambda_T = \sum_{i=1}^{m}(\mu_{T_i}/\sigma_i)^2$. Hence

$$E[A] = \frac{1}{m}(m + \lambda_S) = 1 + \frac{1}{m}\sum_{i=1}^{m}\frac{(2w_i - 1)^2 n_i}{2w_i(1 - w_i)} \tag{14}$$

$$E[B] = \frac{1}{m}(m + \lambda_T) = 1, \tag{15}$$

from which $E[R^*]$ can be computed as

$$E[R^*] = 1 - \left[1 + \frac{1}{m}\sum_{i=1}^{m}\frac{(2w_i - 1)^2 n_i}{4w_i(1 - w_i)}\right]^{-1}. \tag{16}$$

The expected value of R^* computed directly from Equation (16) using FanDuel player data is shown in Figure 4 as solid blue lines.

Similarly, the variance can be estimated directly from player data by propagating the uncertainty associated with the fact that each player only plays a finite number of games:

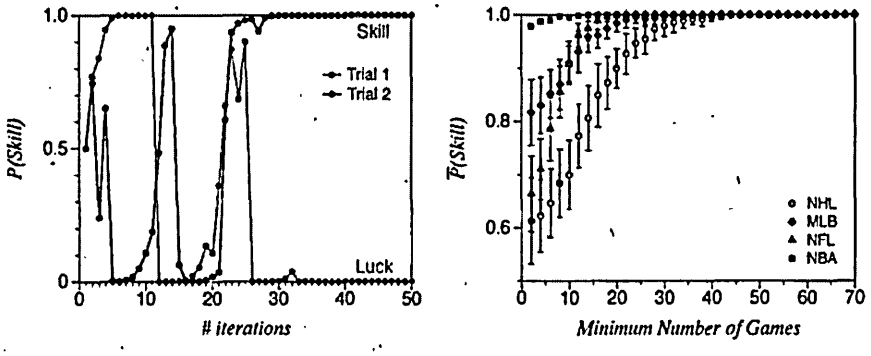

FIG. 5. *(Left) Sample evolution of* $P(\text{Skill})$ *as more player data are added to update the prior for players who have played at least 10 fantasy MLB games. (Right) The probability that the outcome of the contest is determined by skill,* $P(Skill)$ *as a function of the minimum number of games in the playing population. Data is shown for all four sports MLB, NBA, NFL, and NHL.*

$$\sigma_R^2 \approx \sum_{i=1}^{m} \left(\frac{\partial \hat{R}^*}{\partial \hat{w}_i} \right)^2 \sigma_i^2 = \frac{m^2}{8} (m + \lambda_S)^{-4} \sum_{i=1}^{m} \frac{n_i (2\hat{w}_i^2 - 1)^2}{\hat{w}_i^3 (1 - \hat{w}_i)^3}. \tag{17}$$

This estimate is indicated by the shaded light blue regions in Figure 4. In all four sports, both the analytic estimate and the Monte Carlo simulation provide a reasonable approximation to the FanDuel data for players that have played more than approximately 100 games. For players with fewer games, Equation (16) and the Monte Carlo simulations over-predict the measured value of R^* suggesting that the assumption that players are well-represented by a normal distribution with mean w_i and variance σ_i breaks down for small n_i.

3. A Bayesian approach. As a final consistency check, we analyze the data from a Bayesian perspective. First, we associate with any given competition a random variable, which characterizes the probability that the competition is a game of luck or a game of skill, with a sample space {Luck, Skill}. Our goal is to infer the probability that the competition is a game of luck (or skill) based on observed data. To this end, we appeal to Bayes' theorem:

$$P(\text{ Skill } | w_i) = \frac{P(w_i | \text{ Skill }) P(\text{ Skill })}{P(w_i)} \tag{18}$$

where $P(\text{ Skill } | w_i)$ is the conditional probability that the competition is a game of skill given the observed win fraction of the ith player, w_i ; $P(w_i | \text{ Skill })$ is the probability of observing w_i if the competition is a game of skill (the *likelihood*); and $P(\text{Skill})$ is the *prior probability* that the competition is a game of skill. The denominator $P(w_i)$ is the probability of observing w_i regardless of contest type (the evidence) and is given by

$$P(w_i) = P(w_i | \text{ Luck }) P(\text{ Luck }) + P(w_i | \text{ Skill }) P(\text{ Skill }).$$

If we take z_i to be the number of wins and N_i to be the number of entries of the ith player (note that N_i, the number of entries, may be greater than n_i, the number of games, since players may submit more than one entry per game), $P(w_i | \text{ Luck })$ is

equivalent to the probability distribution one would observe in a coin flipping competition and is given by the binomial distribution,

$$P(w_i|\text{ Luck }) = P_{\text{bin}}(z_i = N_i w_i) = \left(\begin{array}{c} N_i \\ z_i \end{array} \right) \phi^{z_i} (1-\phi)^{N_i - z_i}$$

where $\phi = 1/2$ and $\left(\begin{array}{c} N_i \\ z_i \end{array} \right)$ is the binomial coefficient.

For a game in which the outcome is determined solely by skill, players can, in theory, be ranked according to their skill level. In any match-up, the higher ranked player wins the contest. Hence the best player wins all of their games, the next best wins all but one, etc., and the probability distribution $P(w_i|\text{ Skill })$ is uniform:

$$P(w_i|\text{ Skill }) = P_{\text{unl}}(z_i = N_i w_i) = 1/N_i.$$

Finally, since there are only two possible outcomes in this formulation (i.e. the sample space is {Luck, Skill}), $P(\text{Skill}) = 1 - P(\text{Luck})$.

Starting with a uniform prior of $P(\text{Luck}) = P(\text{Skill}) = 1/2$, we iteratively evaluate $P(w_i|\text{ Skill })$ using Equation (18) and the observed data $\{z_i, N_i\}$ for a randomly picked player until the probability, $P(\text{Skill})$ converges (see Figure 5, Left) to one or zero. As before, we consider different populations defined by the minimum number of games per player. For all four sports, we draw 200 random samples from the relevant population and iteratively compute $P(w_i|\text{Skill})$. We record the outcome of this exercise (a one or zero), and repeat the process fifty times. We then average over all fifty outcomes to compute a mean $\overline{P}(\text{Skill})$. This process is repeated 50 times which allows us to compute not only the mean of $P(\text{Skill})$ but also the standard deviation of our computed mean as represented by the error bars in Figure 5 (Right). In all cases we find that $\overline{P}(\text{Skill})$ converges to one if the minimum number of games per player is sufficiently large. Hence for each sport there exists a transition game number, N_{TG} above which the outcome of the game is definitively determined by skill, i.e. for playing populations in which every player has played more games than N_{TG}, $\overline{P}(\text{Skill})$ converges to one. For all four sports in our FanDuel dataset, $\overline{P}(\text{Skill})$ is always greater than 1/2; furthermore for all NBA populations, $N_{TG} \approx 1$ suggesting that skill is always the dominant factor in determining the outcome of these contests regardless of how many games are played.

Although one should not necessarily expect a one-to-one mapping between the Bayesian approach and the previous analysis, we can check that trends and features are consistent across both methods. First, the ordering is as we would expect with fantasy basketball being the most skill-based and fantasy-hockey being the closest of the four to chance. More quantitatively, we can estimate the minimum number of games required to cross over into the skill-dominated region from Figure 4, and compare those numbers with N_{TG} from Figure 5 (Right). If we take $R^* = 1/2$ as the critical cross-over value, we would expect to see $N_{TG,MLB} \approx 20$, $N_{TG,NBA} \approx 5$, $N_{TG,NFL} \approx 25$, and $N_{TG,hockey} \approx 40$. These numbers for NBA, MLB, and NHL are surprisingly close across the two methods; for NFL, the R^* calculation is slightly more conservative, overestimating N_{TG} by approximately 10 games.

4. Perspectives on the relative role of skill and chance in games and other activities. The outcomes of these tests leave no doubt that skill plays a role in the outcome in fantasy sports competitions. However, it is useful to add perspective to these results by considering the relative role of skill and luck in the context of other

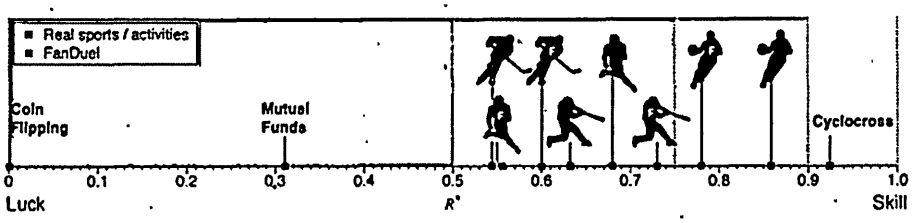

FIG. 6. *R^* values computed for fantasy sports, real sports, cyclocross racing, coin flipping, and mutual funds. Games of pure luck lie on the left and games of pure skill lie on the right. Blue sports icons represent fantasy sports and black sports icons represent professional sports.*

activities. The third test, persistence, can easily be applied to data from a variety of activities as shown in Figure 6 which quantifies R^* values for the four fantasy sports discussed in this study; real MLB, NBA, NFL, and NHL athletic competitions; cyclocross racing; coin flipping; and mutual funds. The R^* values for real MLB, NBA, NFL, and NHL athletic competitions were computed using publicly available data from the past five seasons (2010-2014). Each point in the $\hat{p}_i$ versus $\hat{q}_i$ plot represents the win fraction for the first half versus the win fraction for the second half of a single season for a particular professional sports team (hence each team is represented by five points on the p-q scatter plot corresponding to the five seasons we considered).

As one might expect, we find basketball at the skill end of the spectrum since there are many games in a basketball season and many scoring opportunities per game. Hence small differences in skill are amplified over the course of a season and strong teams tend to come out on top. At the other end of the sports cluster, we find hockey which typically has a small number of goals per game hence one "lucky shot" can make a big difference. While the R^* values for most of the sports and fantasy sports are consistent with our expectations, there is one point that is somewhat puzzling. Note that each sport and fantasy sport pair are relatively close to one another. The exception is professional football. According to the computed R^* value, professional football contests are largely determined by skill. This is somewhat surprising since there are only 16 games per team in the NFL season and the number of scoring opportunities per game is limited (compared to e.g. basketball). We currently have no explanation for this and we leave it as a puzzle for future investigation.

To compute the R^* values associated with cyclocross racing, we considered the finishing places of the top 30 performers using publicly available data from crossresults.com for 2015. For each athlete, $\hat{p}_i$ and $\hat{q}_i$ values were computed using the average finishing place for the first and second half of the season i.e. for each race, first place corresponds to 1, second place corresponds to 2, etc. Note that each athlete participates in a different set of races (although elite performers tend to all participate in a subset of key events). These $\hat{p}_i$ and $\hat{q}_i$ values were again rotated and used to compute R^* – taking care to include $E[S]$ which is not zero in this case – as shown in Figure 6. The coin flipping data point was computed using a simulation of a population of 100 players flipping 100 coins. The average R^* value over 100 trials – which not surprisingly is approximately zero – is shown in Figure 6.

As we have seen in the fantasy sports data, the measured value of R^* depends on the number of games associated with each player, n_i. For real sports it is easy to select a representative value of n_i since each team plays the same number of games in a season. For fantasy sports, the choice is less obvious since each player plays

in a different number of contests. To estimate the characteristic number of games per player, we seek an appropriate average. Because the number of players who have played n_i games decays approximately exponentially (as shown in Figure 4), computing a simple average not ideal since the signal is swamped by players who have only played a few games. To address this we computed a logarithmically weighted average:

$$\overline{n} = \sum_{j=1}^{G_{max}} \frac{j \log(m_j)}{\log(m_j)}.$$

Here G_{max} is the maximum number of games played by any player in the playing population and m_j is the number of players who have played j games. Using this weighed average to compute a characteristic number of games played in each sport, we find $\overline{n}_{MLB} = 110$, $\overline{n}_{NBA} = 82$, $\overline{n}_{NFL} = 34$, and $\overline{n}_{NHL} = 60$. These values were used to compute the values of R^* for the fantasy sports shown in Figure 6.

Finally, we consider mutual funds. Mutual funds – investment programs controlled by (perhaps skillful) managers – have long been considered strategies that can beat the market while limiting risk. Savvy investors are constantly evaluating whether skilled money managers produce sufficient returns to justify their cost. Previous studies have found that chance certainly plays a role in manager performance, but placement on the skill-luck spectrum ranges from predominantly chance [8] to a more balanced skill-chance split [18]. In the context of the current study, a mutual fund manager – similar to a player in fantasy sports – must decide how to allocate funds to achieve optimal performance by identifying value in an open market. A fantasy sports player picks athletes who are projected to yield the most points relative to their price; a mutual fund manager invests in companies that they project to yield returns higher than their trading price. Hence we can compute R^* for mutual fund managers using market-adjusted mutual fund performance data (i.e. the performance of each fund was evaluated relative to the performance of the overall market) from Wharton Research Data Services (WRDS) from the past ten years (2005-2015). Here $\hat{p}_i$ and $\hat{q}_i$ for each mutual fund were computed for first and second half of the year, respectively, for each of the 10 years. We considered 44,938 distinct mutual funds with a total of 307,471 "entries." The results are shown in Figure 6. This estimate yields a diplomatic answer that splits the difference between previous chance-dominant calculations ($R^* \approx 0$) [8] and previous skill-chance balanced results ($R^* \approx 0.5$) [18].

4.1. Speculations on game design. To some extent – as beautifully articulated by Clauset *et al.* – it is the artful balance of skill and chance that makes sports so compelling:

> "On one hand, events within each game are unpredictable, suggesting that chance plays an important role. On the other hand, the athletes are highly skilled and trained, suggesting that differences in ability are fundamental. This tension between luck and skill is part of what makes these games exciting for spectators ..." [4]

Striking this balance is essential in the design of any competition. In any type of game there are a number of strategies a game designer can adopt to adjust the relative importance of luck in the outcome. First let us consider the effect of the distribution of skill within the playing population. To illustrate the importance of skill distribution consider a professional golfer playing against a novice versus two professionals (or two novices) playing each other. In the first case the outcome is a near certainty since the skill of the professional will dominate. In the second case, if the ability of the

two players is similar, skill is no longer a distinguishing characteristic and the relative importance of chance in the outcome increases [20, 21]. Hence tournaments that are divided up into classes of different skill levels (e.g. having beginners play in a separate pool) are likely to have a larger element of luck than those in which everyone plays in the same pool.

The second game parameter that games designers may choose to adjust is the number of contests per player. Calculating the overall win probability in a best of seven series given the win probability of an individual game is a common exercise assigned in elementary probability courses and it is well-known that the role of skill is amplified through multiple contests. In the words of Levitt *et al.* "Even tiny differences in skill manifest themselves in near certain victory if the time horizon is long enough" [16]. Hence perhaps the simplest way to increase the role of skill in a contest is to increase the number of games per player in the competition.

Finally, game designers can address the balance of skill and chance head-on by addressing the role of chance as reflected in the rules of the game. For example, in a fantasy sports salary cap game, one of the parameters that can be tuned by game designers is player pricing. It is interesting to note that more accurate pricing algorithms push games towards the luck end of the spectrum. Consider the extreme case of perfect pricing in which the price of the player exactly mirrors their expected payoff. In this case, there is no strategy in assembling a line-up (other than to get as close to the salary cap as possible) and the outcome of the fantasy game is determined purely by luck. However, as the pricing becomes less accurate (i.e. less reflective of the expected payoff), skilled fantasy players can capitalized on undervalued players. Hence, to increase the role of skill in a fantasy competition, game designers could either add random noise to their pricing algorithms or increase points awarded for less-frequent, larger-variance events such that "perfect pricing" is inherently more difficult.

Acknowledgments. The authors would like to thank FanDuel for providing access to their data and for partial funding of the research. FanDuel did not exercise any editorial control over this paper. The authors would also like to thank two anonymous referees for their creative and insightful suggestions with led to the section on Bayesian inference and the "quitting boundary layer" analysis.

Appendix A. FanDuel Data, Rules, and Scoring. The number of players and the range of entries per player in each group in the expected payoff calculation is summarized in Table 4. Roster positions and scoring for the FanDuel 2014 season are summarized in Tables 1, 6 and 5 respectively.

		Grp 1	Grp 2	Grp 3	Grp 4	Grp 5
	average w_i	0.4741	0.5138	0.5706	0.5991	0.602
MLB	# plrs	28,027	2,803	280	28	5
2013/14	range of entries	6–141	142–1,552	1,553–6,990	6,991–14,088	14,089–24,390
	average w_i	0.4626	0.4967	0.5598	0.5853	0.5851
MLB	# plrs	66,556	6,656	666	66	9
2014/15	range of entries	6–132	132–1,566	1,566–10,512	10,513–28,632	28,631–60,205
	average w_i	0.4306	0.5096	0.5678	0.5891	0.6312
NBA	# plrs	21,635	2,163	216	22	4
2013/14	range of entries	6–160	160–1,485	1,485–6,301	6,302–14,279	14,280–64,292
	average w_i	0.4319	0.4891	0.5764	0.612	0.6141
NBA	# plrs	88,435	8,844	884	89	11
2014/15	range of entries	6–124	124–1,476	1,476–9,666	9,667–26,636	26,636-41,621
	average w_i	0.5253	0.54	0.5613	0.5715	0.6336
NFL	# plrs	32,633	3,264	326	33	5
2013/14	range of entries	6–42	42–248	249–1,853	1,854–6,726	6,727–49,662
	average w_i	0.5102	0.5429	0.596	0.6414	0.6542
NFL	# plrs	117,582	11,758	1,176	117	15
2014/15	range of entries	6–43	43–311	312–2,868	2,869–13,239	13,240–26,478
	average w_i	0.5155	0.526	0.549	0.5642	0.5914
NHL	# plrs	4,625	463	46	5	2
2013/14	range of entries	6–103	103–610	611–1,871	1,872–4,377	4,378–16,787
	average w_i	0.5062	0.5319	0.5652	0.5757	0.5757
NHL	# plrs	16,577	1,657	166	17	3
2014/15	range of entries	6–108	108–918	919–5,964	5,965–12,110	12,111–21,214

TABLE 4

Summary of average win fraction, number of players, and the range of number of entries per player in each group as computed in section 2.1.

MLB		NBA		NFL		NHL	
W	4			Sacks	1	Wins	3
ER	−1			Fumbles recovered	2	Goals against	−1
SO	1			Return touchdowns	6	Saves	0.2
IP	1			Extra point return	2	Shutouts	2
				Safeties	2		
				Blocked punt/kick	2		
				Interceptions made	2		
				0 points allowed	10		
				1-6 points allowed	7		
				7-13 points allowed	4		
				14-20 points allowed	1		
				28-34 points allowed	−1		
				35+ points allowed	−4		

TABLE 5
FanDuel 2013 and 2014 scoring (defense).

MLB		NBA		NFL		NHL	
1B	1	3-pt FG	3	Rushing yards made	0.1	Goals	3
2B	2	2-pt FG	2	Rushing touchdowns	6	Assists	2
3B	3	FT	1	Passing yards	0.04	Plus/minus	1
HR	4	Rebound	1.2	Passing touchdowns	4	Penalty minutes	0.25
RBI	1	Assist	1.5	Interceptions	−1	Powerplay points	0.5
R	1	Block	2	Receiving yards	0.1	Shots on goal	0.4
BB	1	Steal	2	Receiving touchdowns	6		
SB	2	Turnover	−1	Receptions	0.5		
HBP	1			Kickoff return TDs	6		
Out	−0.25			Punt return TDs	6		
				Fumbles lost	−2		
				2-point conversions scored	2		
				2-point conversion passes	2		
				FG from 0-39 yds	3		
				FG from 40-49 yds	4		
				FG from 50+ yds	5		
				Extra point conversions	1		

TABLE 6
FanDuel 2013 and 2014 scoring (offense).

This manuscript is for review purposes only.

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Exhibit PP: Report by Zvi Gilula,
dated Apr. 27, 2015

EXPERT'S OPINION REGARDING FANTASY SPORTS CONTESTS OFFERED BY DRAFTKINGS, INC.

I was asked by the law firm Lewis Roca Rothgerber LLP to examine the fantasy games operation of Draftkings, Inc. ("the company") and provide a statistical analytic report answering the question:

> **Is the probability of winning any of the nine (9) fantasy games the company is offering, predominantly determined by skill or chance, and whether chance is immaterial in such probability?**

My unequivocal conclusion, based on facts, analyses, and arguments detailed in the following report is that **winning a prize in any of the said nine (9) games strongly depends more on skill than on chance, and that chance is evidently immaterial in the probability of winning.**

1. INTRODUCTION

Most fantasy sport games (e.g., FOOTBO, NEOPOLY, CLEVER TV, FANTASY LEAGUE, to name a few) have a lot in common in terms of the objectives defined and the structure of the game, even though these games may relate to very different sports games. The major common denominator of all fantasy sports games is that the person, who participates in the fantasy game for a fee and is competing for a prize ("the client"), chooses a "fantasy team" out of a list of players.[1] After a real sporting event takes place (where part or all players chosen for the fantasy team actually played), the client gets an overall score determined by a list of parameters applied to the chosen players. Clients with top scores (the top three, for instance) win cash prizes.

The company's fantasy sports operation analyzed herein involves fantasy games on three (3) sports (the MLB, NBA and NFL) with three (3) prize structures (Head to Head, 50/50 (aka Fifty Fifty) and GPP). The terms and conditions of each of these nine (9) fantasy offerings can be found in the rules of the games, which were provided to me, and are made available at the company's internet site,

In the games, clients test their abilities to predict athletes' future performances by assessing the athletes' and their opponents' strengths and weaknesses, to create a balanced team, and to strategically select players. In particular, each fantasy sports game offered by the company is designed to test the proficiency of the clients in exercising their skill and knowledge of a sport and the fantasy sports rules to create their own fantasy team of players in effort to accumulate the most points (see for details).

There are some relevant important papers from the law disciplines as to the skill-based nature of fantasy sports games. For example, Farquhar and Meeds report in their research on profiling fantasy sports clients that "*[c]rafting a good team takes legitimate skill, no matter whether it's football or tennis, and a good team is very rewarding.*" Lee K. Farquhar & Robert Meeds, *Types of Fantasy Sports Users and Their Motivations*, 12 J.

[1] Throughout this report I assume that the reader is familiar with fantasy sports games.

COMPUTER-MEDIATED COMM. 1208, 1217 (2007). *See also* Jon Boswell, Note, *Fantasy Sports: A Game of Skill That Is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 1257 (2008); M. Christine Holleman, RECENT DEVELOPMENT: *Fantasy Football: Illegal Gambling or Legal Game of Skill?*, 8 N.C. J.L. & TECH 59 (2006). Of particular relevance is a Gaming Law Symposium article that states:

> ***On September 30, 2006, the United States Congress passed the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA"). The criminal provisions of UIGEA provide that no person engaged in the business of betting or wagering may knowingly accept directly or indirectly virtually any type of payment from a player in unlawful internet gambling (i.e. bets that are unlawful under other state or Federal laws). Fantasy sports are exempt from the definition of unlawful internet gambling provided that:***
>
> > ***• They are not based on the current membership of an actual sports team or on the score, point spread or performance of teams;***
> >
> > ***• All prizes and awards are established and made known before the start of the contest;***
> >
> > ***• Winning outcomes are based on the skill of the participants and predominately by accumulated statistics of individual performances of athletes, but not solely on a single performance of an athlete.***

Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. MARSHALL L. REV. 1195, 1197 (2007).

From these papers and the character of the fantasy games offered by the company, one must conclude that the INHERENT nature of Draftkings' games is that winning in such games obviously requires skill. The nature of this skill is the ability to evaluate and compare the talents of the players comprising the fantasy teams and their corresponding rivals.

To determine how strongly (if at all) skill dominates chance in fantasy games one has to:

1. Carefully study a representative sample of performances of clients over a reasonable period of time.
2. Define a "typical client" namely, a performance profile that represent the majority of the clients.
3. Show that there are very few clients with outlying performance.
4. Assess the likelihood of achieving such extreme performance AT RANDOM.
5. Compare the performance of the few extremes to that of the typical client.

The rest of this report follows the above-mentioned five (5) steps.

EG

2. ANALYSIS

1. Data Description

As noted above, the nine (9) fantasy games offered by the company are divided into three (3) sports game categories where each category has three (3) prize structures: Head to Head, 50/50 (aka Fifty Fifty) and GPP. The data I obtained from Draftkings is PER INDIVIDUAL client. For each client, sport category and prize structure, the data relates to the number of contests played during the entire underlying period, the number of prizes won, entry fees paid, and the amount of times the client was in the top percentages of winners. The data date range of the sports is as follows:

- NFL – 2014/15 Season, including Preseason & Playoffs (22 Aug, 2014 – 25 Jan, 2015)
- MLB – 2014 Season, including Playoffs (31 Mar, 2014 – 15 Oct, 2014)
- NBA – 2013/14 Season, including Playoffs (29 Oct, 2013 – 30 May, 2014)

Table 1 lists the number of clients per each sports game category and each prize structure:

Table 1

	Prize Structure		
Sport	**Fifty Fifty**	**Head to Head**	**GPP**
MLB	33,078	20,604	73,009
NBA	14,624	10,184	26,897
NFL	188,186	95,252	381,173

I observe a big difference in the number of clients during the above-mentioned periods when data was collected. The smallest body of clients relates to NBA - Head to Head (10,184 clients) and the largest relates to NFL - GPP (381,173 clients). This big difference in the number of clients may relate to the type of sport, the season in which it is played, the popularity of an underlying game and/or the arsenal of exceptional players of that sport the clients can choose from to create a fantasy team.

2. Descriptive Statistics

I first computed summarized distributions of the number of contests played per game category by prize structure. Such distributions are given in Table 2. For space considerations I did list every percentile point but rather deciles (every 10 percentile point).

Table 2

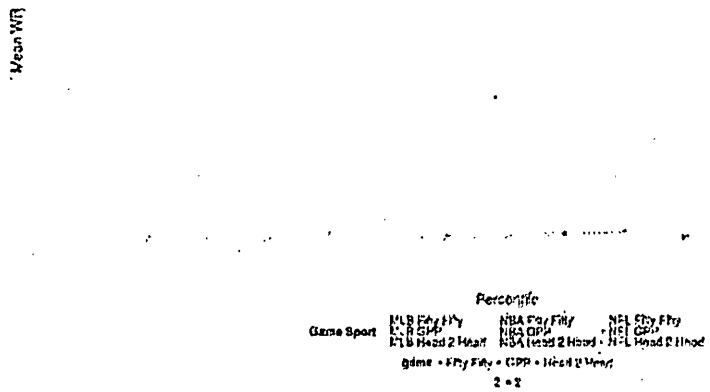
Game	Sport	Players	Mean	Median	Std Dev	0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%
Fifty Fifty	MLB	33078	40.456	3	254.581	1	1	1	1	2	3	5	9	18	50	10782
Fifty Fifty	NBA	14625	51.453	4	275.613	1	1	1	2	2	4	6	10	23	72	12381
Fifty Fifty	NFL	188568	13.428	2	137.536	1	1	1	1	2	2	3	5	8	17	19370
Head to Head	MLB	20606	22.527	3	155.780	1	1	1	1	2	3	5	7	13	31	7928
Head to Head	NBA	10184	25.450	3	149.426	1	1	1	1	2	3	5	8	15	38	5884
Head to Head	NFL	95525	11.074	2	126.584	1	1	1	1	2	2	3	5	8	15	20707
GPP	MLB	73009	38.923	3	195.238	1	1	1	1	2	3	5	9	21	67	11901
GPP	NBA	26897	51.111	6	158.382	1	1	1	2	4	6	11	22	48	127	5690
GPP	NFL	382728	25.999	7	105.809	1	1	2	3	5	7	10	16	26	55	12932

2c

As is clearly seen, all distributions are sharply right-skewed. Namely, there is a very small number of clients who were playing an overwhelmingly big number of contests. For instance, in the NFL - Head to Head, the mean number of contests played is about 11, the upper 1 percentile is 111 contests but the upper limit is 20,707 contests played!

Attention is focused now on the WIN RATIO ("wr"). This is the proportion of entries won out of the number of contests played. This proportion serves as a quantitative measure for success of the playing client. As is implied from the road map, stated at the bottom of page 2 of this report, one needs to first check whether there are clients with a seemingly exceptional number of repeated winnings and assess the probability of achieving such a performance at random. Since a relatively large number of contests participated in is required to safely estimate outlying success of a client, **I focused on clients in the upper 15% of the distributions of contests played**. Figure 1 exhibits how win ratio may depend on the number of contests played.

Figure 1



Upon review, it seems as if the win ratio tends to improve when a very large number of contests are played for most of the games. To rule out that total entry fees paid by clients impacts win ratio, I computed the correlation between entry fees paid and win ratio and these are reported in Table 3 on the next page.

Table 3 - Correlations between USD invested and WR

Game	Sport	Correlation
Fifty Fifty	MLB	0.124
Fifty Fifty	NBA	0.074
Fifty Fifty	NFL	-0.001
Head to Head	MLB	0.145
Head to Head	NBA	-0.015
Head to Head	NFL	-0.003
GPP	MLB	0.090
GPP	NBA	0.272
GPP	NFL	0.166

It is evident from Table 3 that there is a weak correlation between the underlying variables. Such correlations are immaterial in the following analyses.

3. *Probabilistic Evaluation of Skill Versus Chance*

I now proceed to seek and evaluate exceptional performances of clients. The justification for such an approach is that if a non-negligible amount of clients with extreme repeated winnings are found, there is no way to attribute it to chance in our context. Games where chance is material are characterized, among other things, by the extremely low likelihood of a player to CONSISTENTLY repeat his/her winnings. Such an approach has been used by experts in other instances of evaluating skills vs. chance (e.g., Backgammon, Texas Hold'em, Poker, and more).

If indeed clients with exceptional performance are found, it is obligatory to compare their performances to those of TYPICAL CLIENTS in a game and prize structure categories. To define the typical client performance, I took the mean win ratio of all clients playing a given game (one of the three—MLB, NFL and NBA) by a given prize structure (one of the three—Fifty Fifty, Head to Head and GPP). The following 3x3 table (Table 4) presents the performance of all nine (9) typical clients. Each cell in the table contains two (2) entries: the mean win ratio and the numbers of clients upon whom the mean was computed.

Table 4 – Typical Client Performances

		Game		
Sport	Value	Fifty Fifty	Head to Head	GPP
MLB	Mean Win Ratio	0.4559	0.4475	0.1879
	Player Count	9,505	5,195	21,805
NBA	Mean Win Ratio	0.4213	0.4226	0.1951
	Player Count	4,615	2,819	11,469
NFL	Mean Win Ratio	0.4616	0.4563	0.1931
	Player Count	33,058	15,852	158,099

Next I surveyed the data to find clients with exceptional performance in terms of outstandingly repeated wins. For each game and prize structure combination (nine (9) in total), I looked at the top 50 performers by win ratio among those clients who have gained a significant amount of experience playing the game. **Experience in this case was defined as being in the top 15% of clients by contests played.** Looking only at the clients who have high experience allows me to rule out "lucky streaks" and also allows enough time for the client to gain experience and become a skilled performer at the game.

For each of the top 50 performers in each game and prize structure combination (450 in total), I looked for repeat winners. Namely, winners that appear in more than one (1) game and prize structure combination. I found 28 of these exceptional clients whose performance is presented in Table 5.

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Table 5 -- Exceptionally Performing Clients by Game, Prize Structure, and Performance

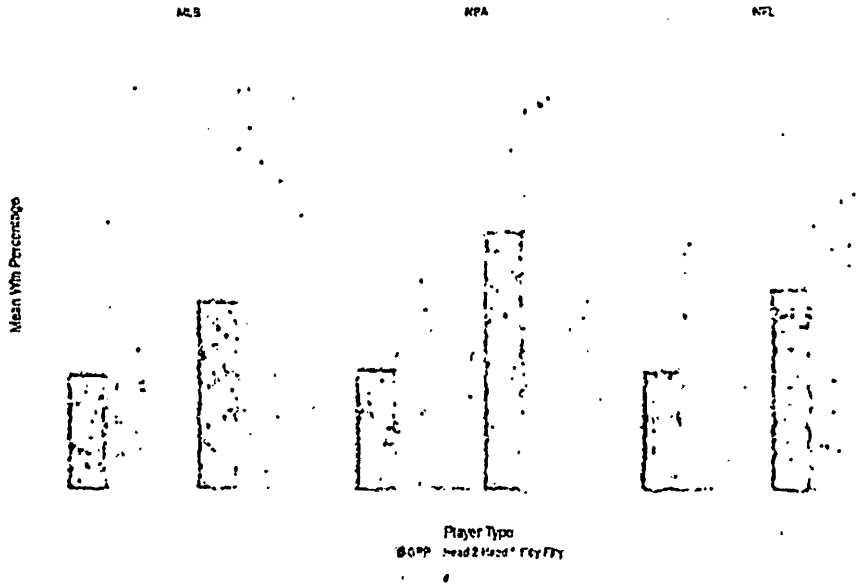
User ID	Game	Prize Strucutre	Entries	Win Ratio	Average Entries	Average Win Ratio	Probability "P"
156	MLB	Fifty Fifty	70	1	134	0.455897693	<1E-300
156	MLB	GPP	43	0.44186	124	0.187898282	2.08E-05
2503	NBA	Fifty Fifty	612	0.803922	157	0.421257267	6.09E-85
2503	NBA	GPP	107	0.598131	116	0.195051145	4.84E-21
2503	NBA	Head 2 Head	40	0.825	85	0.422553367	7.84E-09
3306	NBA	GPP	3290	0.461702	116	0.195051145	4.06E-262
3306	NBA	Head 2 Head	3698	0.701731	85	0.422553367	2.13E-258
76178	NBA	Fifty Fifty	53	0.716981	157	0.421257267	1.53E-06
76178	NFL	Fifty Fifty	79	1	64	0.461617493	<1E-300
77666	MLB	Fifty Fifty	29	0.931034	134	0.455897693	2.81E-10
77666	NBA	Fifty Fifty	39	0.74359	157	0.421257267	4.10E-06
88679	NBA	Fifty Fifty	2036	0.715128	157	0.421257267	3.13E-159
88679	NBA	Head 2 Head	2833	0.693258	85	0.422553367	1.19E-186
90757	NBA	Head 2 Head	58	0.706897	85	0.422553367	1.50E-06
90757	NFL	Head 2 Head	34	0.970588	53	0.456296205	1.08E-10
99478	MLB	GPP	58	0.448276	124	0.187898282	8.96E-07
99478	NBA	Head 2 Head	92	0.728261	85	0.422553367	3.29E-10
105745	MLB	Fifty Fifty	163	0.803681	134	0.455897693	5.60E-21
105745	MLB	Head 2 Head	196	0.734694	81	0.447491735	4.42E-17
119248	MLB	Fifty Fifty	41	0.829268	134	0.455897693	4.07E-08
119248	NBA	GPP	207	0.52657	116	0.195051145	3.33E-27
119248	NBA	Head 2 Head	4035	0.702354	85	0.422553367	5.92E-283
157441	MLB	Head 2 Head	830	0.715663	81	0.447491735	6.70E-56
157441	NBA	Head 2 Head	40	0.95	85	0.422553367	2.57E-15
159288	NBA	Fifty Fifty	1992	0.7249	157	0.421257267	1.46E-166
159288	NBA	Head 2 Head	506	0.687747	85	0.422553367	3.73E-34
163806	MLB	Fifty Fifty	40	0.9	134	0.455897693	5.48E-11
163806	MLB	Head 2 Head	36	0.833333	81	0.447491735	8.08E-08
206493	MLB	Fifty Fifty	75	0.76	134	0.455897693	8.36E-09
206493	NBA	GPP	112	0.571429	116	0.195051145	1.56E-19
217935	NBA	Fifty Fifty	43	0.860465	157	0.421257267	7.32E-11
217935	NBA	Head 2 Head	48	0.6875	85	0.422553367	2.88E-05
220426	MLB	Fifty Fifty	313	0.872204	134	0.455897693	3.78E-55
220426	MLB	GPP	589	0.449915	124	0.187898282	1.84E-48
222243	NBA	Fifty Fifty	1131	0.783378	157	0.421257267	1.92E-137
222243	NBA	GPP	268	0.544776	116	0.195051145	8.13E-38
222243	NBA	Head 2 Head	614	0.754072	85	0.422553367	1.62E-63
252559	MLB	Fifty Fifty	720	0.779167	134	0.455897693	2.17E-71
252559	MLB	GPP	513	0.454191	124	0.187898282	9.16E-44
252559	NBA	Head 2 Head	24	0.791667	85	0.422553367	1.25E-05
262341	NBA	Fifty Fifty	399	0.699248	157	0.421257267	5.15E-30
262341	NBA	Head 2 Head	136	0.742647	85	0.422553367	3.91E-15

Zb

User ID	Game	Prize Strucutre	Entries	Win Ratio	Average Entries	Average Win Ratio	Probability "P"
278012	NBA	Fifty Fifty	308	0.707792	157	0.421257267	4.02E-25
278012	NBA	GPP	132	0.439394	116	0.195051145	3.02E-11
278649	NBA	GPP	80	0.5125	116	0.195051145	2.92E-11
278649	NBA	Head 2 Head	30	0.7	85	0.422553367	0.000249558
289818	NBA	Fifty Fifty	137	0.766423	157	0.421257267	1.80E-17
289818	NBA	Head 2 Head	111	0.747748	85	0.422553367	3.60E-13
292040	MLB	GPP	64	0.53125	124	0.187898282	8.71E-11
292040	NBA	Fifty Fifty	220	0.713636	157	0.421257267	2.36E-19
328907	MLB	Fifty Fifty	36	1	134	0.455897693	5.24E-13
328907	NBA	Fifty Fifty	163	0.785276	157	0.421257267	1.87E-22
358345	MLB	Fifty Fifty	207	0.903382	134	0.455897693	4.53E-44
358345	MLB	Head 2 Head	65	0.830769	81	0.447491735	9.41E-12
359017	MLB	Fifty Fifty	31	0.83871	134	0.455897693	4.41E-07
359017	MLB	GPP	71	0.43662	124	0.187898282	2.52E-07
529494	NFL	GPP	37	0.72973	58	0.193127172	5.87E-14
529494	NFL	Head 2 Head	139	0.971223	53	0.456296205	1.29E-43
676584	MLB	Fifty Fifty	55	0.763636	134	0.455897693	3.19E-07
676584	MLB	Head 2 Head	33	0.69697	81	0.447491735	0.000504122

Before exploring Table 5 in depth, observe in Figure 2 the following summary statistics comparing the 28 exceptionally performing clients in Table 5 to the company's entire clients' performances.

Figure 2



As is seen, the top performers outshine the rest in all categories, hence, exhibiting superiority that will now be shown to be totally unlikely to depend on chance.

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Observe carefully Table 5. Since clients tend to play more than one (1) sports game, we see in Table 5 61 winning performances relating to 28 highly performing clients. These are the most important results in this document, and I will now explain the content of Table 5 in detail.

The first column relates to a client ID followed by type of game and prize structure. The next column reports the number of contests played followed by the win ratio. For example, the first client in the list, #156, played in 70 contests of MLB 50:50 and won in ALL OF THEM. The next two columns relate to the "typical clients." Column 6 lists the average number of contests played in that underlying category and column 7 reports the average win ratio of clients in the same underlying category (taken from Table 4).

The last column, 8, is the probabilistic evaluation of the client's performance RELATIVE TO THE TYPICAL CLIENT'S PERFORMANCE in the underlying category. This probability is a Normal approximation to $P\{X>x\}$, where $X \sim Bin(N,p)$ (X follows a Binomial distribution), and N is the average number of contests played in the category

(a) The probability of winning, p, is equal to the mean win ration (column 7)
(b) The lower limit x of contests to be won by the typical client is the win ratio of the underlying high performing client times N (the expected value, or the mean of the Binomial distribution

The Binomial distribution adopted here signifies the CHANCE probability of achieving a performance AT LEAST as good as the underlying highly performing client given the mean win ration. For client 156 playing MLB 50:50, for instance, p= 0.45589769, N= 134, and x= 134. Also, in column 8, whenever the entry is written as "<E-300" it means that the chance of exhibiting at random a performance at as least as good as the underlying client is less than 1 in a Million raised to power of 50! All entries in column 8 should be interpreted in a similar manner.

As one can see, it may NOT take a very large number of contests to participate in order to show an outstanding performance. Take for instance, client #77666. This client played only 29 contests in (MLB, 50:50)—the lowest number of contests in the list—with a win ratio of 0.93. This is an outstanding performance relative to the typical clients in this group- 2.81E-10. It means that the chance probability of exhibiting such performance or better is about 3 in 10 Billion.

The findings in Table 5 are quite striking and decisive. All of the entries in column 8 are very low to extremely low. That means that it is OVERWHELMINGLY unlikely that the performance of any of the exceptionally performing clients in Table 5 could be due to chance. For a non-negligible amount of such clients, in a given sport category, this chance probability is SMALLER THAN WINNING THE MEGA MILLION OR POWER BALL LOTTERY MORE THAN TWICE. Moreover, a close examination of Table 5 points out at a non-negligible amount of high performing clients that show expertise in a single type of game—NFL, NBA and so on. Just one of numerous examples from Table 5 is client # 76178. While in NBA 50:50 the chance of doing better than him/her is about 1.5 in a Million, his/her performance NFL 50:50 is the best possible. Clearly, that would never be likely if winning in such games would depend on chance, even slightly.

III. CONCLUSION

Based on the findings reported in Table 5, one MUST conclude that the fantasy games offered by Draftkings have an inherent and vast character of skill where chance is overwhelmingly immaterial in the probability of winning in such games.

EXPERT'S CREDENTIALS

Zvi Gilula is Professor (Emeritus), and former Chairman, Dept. of Statistics, Hebrew University. He is also an Adjunct Professor of Statistics and Econometrics, at the Graduate School of Business, University of Chicago.

Zvi Gilula has been a methodological consultant to many big firms and companies among which are Hoffman-La Roche (Switzerland), Solvay (Germany), Navistar (USA), Midas (USA), Fortelligent (USA), The Morningside Group (China), Agis-Perrigo (Israel, USA), Teva (Israel), TNS (UK, USA, Canada).

Zvi Gilula has been a consultant of Mifal Hapais- The Israeli national Lottery, and is currently Chief Methodological Advisor and Supervisor of the Israeli TV Rating Committee, and is also the statistical advisor of the Israeli Advertising Association.

Zvi Gilula has provided many expert opinions concerning the evaluation of skills vs. chance in the gaming industry.

April 27, 2015
Date

Zvi Gilula

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

----------X

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

Plaintiffs,

Index No. 5861-16

-against-

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

Defendants.

----------X

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Article I §9 of the State Constitution expressly delegates to the Legislature the authority to enact appropriate laws to effectuate the constitutional prohibition against "gambling" -- a term the Constitution itself leaves undefined. In late 2015 and early 2016, the Legislature heard hours of testimony on the new internet games known as daily fantasy sports ("DFS") and their impact in New York; researched the operations of fantasy sports and the skill needed to succeed in DFS games; and publicly debated the character of the games to determine whether they constitute gambling within the meaning of the Constitution. Concluding that they do not, the Legislature enacted L. 2016 Ch. 237 ("Ch. 237"), which established the legal status of specific online games known as interactive fantasy sports and declared that such contests properly fall outside the definition of gambling.

Plaintiffs bring this action against Governor Cuomo and the State Gaming Commission seeking a judgment declaring that Ch. 237 is unconstitutional and enjoining the State from implementing the statute's regulatory framework. Asserting that all interactive fantasy sports contests, and DFS in particular, constitute gambling within the meaning of the Constitution, plaintiffs seek to substitute their own judgment for that of the

Legislature. But the Legislature, acting on a well developed record, and having made reasoned findings set forth in the statute, made a rational policy choice. Plaintiffs cannot prove beyond a reasonable doubt that there is no rational basis for this legislative policy choice.

In enacting Ch. 237, the Legislature carried out its constitutional mandate to devise appropriate gambling laws. Accordingly, plaintiffs' motion for summary judgment should be denied, defendants' cross-motion for summary judgment should be granted, the complaint should be dismissed, and the court should issue a judgment declaring that Ch. 237 does not violate Article I §9 of the State Constitution.[1]

STATEMENT OF FACTS

For a complete statement of the relevant facts, see the accompanying affirmation of Richard Lombardo ("Lombardo Aff."), the accompanying affidavit of Evan Stavisky ("Stavisky Aff."), and Exhibits "A" through "PP" submitted therewith.

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[1]When the plaintiff seeks a declaratory judgment, the court is required to declare the rights of the parties one way or the other. Homestead Funding Corp. v. State of New York Banking Department, 95 A.D.3d 1410, 1411 n. 3 (3d Dept. 2012).

Article I §9

Article I §9 of the State Constitution provides, in relevant part:

> [E]xcept 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..., 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.

Penal Law §225.00(2)

Penal Law §225.00(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.

Record Before the Legislature on Fantasy Sports

The following description of fantasy sports is based on the testimony given at the Assembly's December 8, 2015 public hearing to examine fantasy sports games in New York State and their impact on New York consumers and the State.

Traditional Fantasy Sports

Participants in fantasy sports contests, which have existed for more than 35 years, 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, not the outcome of the games in which the athletes play. Contestants typically select a fantasy team of real-world players, such as quarterback, running back, wide receiver, tight end, and kicker in football, to fill positions on the fantasy teams. The object of a fantasy sports contest is to assemble a team of real-world athletes whose performance will accumulate the most points across multiple fantasy scoring categories. For example, a running back may, according to the rules of a contest, earn one point for every ten rushing yards and six points for a touchdown. Exhibit "Q" pp. 9-14, 22, 37-38, 49, 53-55, 83-84, 128.[2]

Daily Fantasy Sports

In traditional season-long fantasy sports contests, contestants must wait for the real-world season to end before a winner of the fantasy contest is determined. To provide more immediate results in shorter-term contests, online interactive

[2]All references herein to exhibits are to those submitted with the accompanying affirmation of Richard Lombardo and the accompanying affidavit of Evan Stavisky.

fantasy sports providers, the two largest of which are DraftKings, Inc. ("DraftKings") and FanDuel, Inc. ("FanDuel"), began to offer their subscribers weekly and daily online fantasy sports formats. DFS contests share many of the same features as traditional season-long contests, but are much shorter in duration. In addition, while each real-world athlete can be selected by only a single contestant in the traditional season-long format, the real-world athletes in daily and weekly leagues are assigned a fantasy salary and can be selected by any contestant so long as the fantasy team does not exceed its salary cap. Exhibit "Q" pp. 11-12, 19, 21, 23-24, 27, 37, 53-54, 68, 78-80, 84, 125, 136, 143, 166.

Commencement of the People's Actions against DraftKings and FanDuel

On November 17, 2015, the People of the State of New York ("the People"), by the Attorney General, commenced actions against DraftKings and FanDuel in Supreme Court, New York County, alleging that DFS contests constituted gambling under New York Law and seeking a judgment enjoining DraftKings and FanDuel from violating the laws of the State of New York. The lawsuits also alleged that DraftKings and FanDuel had engaged in deceptive advertising and consumer fraud and sought restitution for customers, penalties, and other relief. Lombardo Aff. ¶5; Exhibits "C" and "D".

By orders dated December 11, 2015, Supreme Court granted the People's motion for a preliminary injunction. Lombardo Aff. ¶6; Exhibit "E".

By order dated January 11, 2016, the Appellate Division, First Department stayed Supreme Court's preliminary injunction pending DraftKings and FanDuel's appeals therefrom. Lombardo Aff. ¶7; Exhibit "F".[3]

L. 2016 Ch. 237

On August 3, 2016, while the People's actions against DraftKings and FanDuel were pending, Governor Cuomo signed into law Ch. 237 (Lombardo Aff. ¶10; Exhibit "K"), which amends the Racing, Pari-Mutuel Wagering and Breeding Law ("Racing Law") by adding a new Article 14. The statute 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." Racing Law §1401(8).

Ch. 237 sets forth the Legislature's findings and declaration that:

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[3]On March 23, 2016, DraftKings and FanDuel agreed to suspend their DFS games in New York pending the resolution of the legal status of interactive fantasy sports. Lombardo Aff. footnote 2.

1.... (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.

Racing Law §§1400(1) and (2).

Ch. 237 further provides for safeguards and minimum standards for interactive fantasy sports and the registration, regulation, and taxation of interactive fantasy sports providers. Racing Law §§1402 to 1410. The statute declares that only interactive fantasy sports contests that are registered and conducted pursuant to the law are authorized to proceed (Racing Law §1411) and expressly prohibits the conduct of unregistered interactive fantasy sports contests (Racing Law §1412). To become registered, the interactive fantasy sports

registrant 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." Racing Law §1404(1)(o). Recognizing that the contests are heavily influenced by skill and knowledge, the operators must identify (to other players) the highly experienced players and limit the number of entries (Racing Law §§1404(1)(g) and (2)), so less skillful players are on notice of the quality of opponents in a contest and may choose contests against less skillful players.

Both houses passed the bill on June 17, 2016 (Exhibits "L", "M", and "N") after their members had the opportunity to review the Assembly and Senate memoranda in support of the bill (Exhibits "O" and "P"); consider the findings of the Assembly Standing Committees on Racing and Wagering and Consumer Affairs and Protection as well as the Legislative Commission on Administrative Regulations Review (collectively "the Committees") that fantasy sports are not gambling within the meaning of the Constitution (Exhibit "L" p. 145);[4] and debate the

[4]While Exhibit "Q" is the complete transcript of the Committees' December 8, 2015 public hearing, Exhibits "L" and "M" contain the relevant portions of the transcripts of the Legislature's June 17, 2016 proceedings. The page numbers referred to herein are the original page numbers of the complete transcripts.

issue of whether fantasy sports constitute gambling within the meaning of the Constitution (Exhibit "L" pp. 146-72). Notably, the Committees' findings were made after researching the operations of fantasy sports and a December 8, 2015 public hearing to examine fantasy sports games in New York State and their impact on New York consumers and the State, at which both proponents and opponents of DFS testified at length (Exhibit "L" p. 145; Exhibit "Q").

Discontinuance of the People's Actions against DraftKings and FanDuel

After the enactment of Ch. 237, on August 12, 2016, the People discontinued those portions of its actions against FanDuel and DraftKings that had alleged, before the enactment of Ch. 237, that DFS contests constituted gambling under New York law. Lombardo Aff. ¶8; Exhibits "G" and "H".[5]

[5]Plaintiffs try to make much of the fact that, prior to the enactment of Ch. 237, the People commenced actions against DraftKings and FanDuel alleging that DFS constitutes gambling within the meaning of Article I §9. But, plaintiffs overlook a critical feature of that constitutional provision -- it entrusts the Legislature with the responsibility to determine, within rational bounds, the legal scope of the prohibition. The Legislature has now determined that interactive fantasy sports contests do not constitute gambling; the legal analysis has fundamentally changed; and this office is defending the Legislature's constitutionally valid determination. Nor do the opinions reflected in the gambling community or the New York Times crossword puzzle (Plaintiffs' Memorandum in Support of their Motion for Summary Judgment ("Pl. Mem.") pp. 30-31) trump the reasoned judgment of the Legislature. The issue before the court is not whether certain third parties might prefer to view interactive fantasy sports as "gambling", but whether there is a rational basis for the Legislature's determination that it is not.

After settling the People's remaining claims against DraftKings and FanDuel,[6] on October 25, 2016, the People discontinued the remaining portions of its actions. Lombardo Aff. ¶9; Exhibits "I" and "J".

ARGUMENT

THE LEGISLATURE'S DETERMINATION THAT INTERACTIVE FANTASY SPORTS CONTESTS DO NOT CONSTITUTE GAMBLING WAS A RATIONAL IMPLEMENTATION OF ITS AUTHORITY TO DETERMINE THE SCOPE OF THE CONSTITUTIONAL GAMBLING PROHIBITION

A. Legislation is presumed to be constitutional.

Ch. 237 carries a strong presumption of constitutionality and, in order to overcome that presumption, the plaintiffs must establish the invalidity of the statute beyond a reasonable doubt. Dalton v. Pataki, 5 N.Y.3d 243, 255, cert. denied, 546 U.S. 1032 (2005); Pharmaceutical Manufacturers Association v. Whalen, 54 N.Y.2d 486, 493-94 (1981); Cook v. City of Binghamton, 48 N.Y.2d 323, 330 (1979). "Every legislative enactment carries a strong presumption of constitutionality including a rebuttable presumption of the existence of necessary factual support for its provisions." Birkeland v. State, 98 A.D.2d 395, 398 (2d Dept.), affirmed, 64 N.Y.2d 663 (1984).

[6]The settlements required DraftKings and FanDuel to pay penalties and costs and implement various reforms to their marketing practices. Lombardo Aff. footnote 3.

Demonstrating unconstitutionality beyond a reasonable doubt is a very heavy burden and courts should strike down statutes on the ground of unconstitutionality only as a last unavoidable result. Lighthouse Shores, Inc. v Town of Islip, 41 N.Y.2d 7, 11 (1976); Van Berkel v. Power, 16 N.Y.2d 37, 40 (1965). See also N.Y. Statutes Law §150 ("The courts should not strike down a statute as unconstitutional unless such statute clearly violates the Constitution"). As set forth below, the plaintiffs cannot meet this heavy burden.

B. The Legislature has the authority to make rational decisions to determine what conduct constitutes prohibited gambling.

Article I §9 of the State Constitution prohibits gambling in New York, apart from the exceptions enumerated therein (i.e., State lottery, pari-mutuel wagering on horse racing, commercial casinos, and charitable gaming), and authorizes the Legislature to "pass appropriate laws to prevent offenses against any of the provisions of this section." Thus, the constitutional prohibition against gambling is not self-executing. People ex rel. Sturgis v. Fallon, 152 N.Y. 1, 11 (1897) ("[T]his provision of the Constitution 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.").

Although Article I §9 does not define gambling, the delegation to the Legislature of the responsibility to "pass appropriate laws to prevent offenses..." necessarily gives the Legislature latitude to determine what conduct constitutes (and does not constitute) impermissible gambling in New York. Such authority has been recognized by the courts even without an explicit statement (as here) in the Constitutional provision that assigns the primary responsibility for effectuating such provision to the Legislature. See, e.g., Birkeland v. State, 98 A.D.2d at 398 (when the Constitution requires using competitive civil service examinations "to the extent practicable", it is province of the Legislature to determine when such requirement is impracticable). Here, Article I §9 explicitly instructs the Legislature to determine what laws are appropriate to implement a general prohibition of gambling.

The Legislature has exercised this constitutional authority in both criminal and civil statutes. For example, Penal Law §225.00(2) defines gambling as a contest in which a person stakes something of value upon the outcome of a contest of chance or a future contingent event not under his control or

influence.[7] Penal Law §225.00(1) defines a contest of chance as one in which the outcome depends in a material degree upon an element of chance.[8] See Harris v. Economic Opportunity Commission of Nassau County, 171 A.D.2d 223, 227 (2d Dept. 1991) ("Among the 'appropriate laws' enacted by the Legislature in furtherance of the constitutional prohibition against gambling is Penal Law article 225, which supplies the definitions of proscribed gambling activities."). Moreover, the Legislature

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[7]Plaintiffs inaccurately assert that "the best evidence of the meaning of the term 'gambling' in Article I, §9..." is set forth in Penal Law §351 ("the pool-selling/book-making statute"), as amended in 1895 (L. 1985 Ch. 572 §1). Pl. Mem. pp. 26-28. In fact, although it was amended "immediately on the heels of..." Article I §9 (Pl. Mem. p. 26), the pool-selling/book-making statute (then Penal Law §986) was repealed in 1965 when Penal Law §225.00 was enacted. L. 1965 Ch. 1030. Because 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 meaning of the term "gambling" in Article I §9 is found in Penal Law §225.00(2). Moreover, in Formal Opinion No. 84-F1, in which the Attorney General opined that sports betting constitutes gambling within the meaning of Article I §9, he simply referred to the pool-selling/book-making statute when discussing the "early prohibitions" of gambling. Thus, there is no basis for plaintiffs' assertion that Ch. 237 "contradicts" Formal Opinion No. 84-F1 (Pl. Mem. pp. 27-29).

[8]Enacted in 1965, Penal Law §225.00(1) (L. 1965 Ch. 1030) defined a "contest of chance" more expansively than required by the Constitution as interpreted by the Court of Appeals. Prior to the enactment of Penal Law §225.00(1), games that were determined primarily by chance were unlawful. See People ex rel. Ellison v. Lavin, 179 N.Y. 164, 170-71 (1904) ("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." (emphasis added)). Under Penal Law §225.00(1), the definition of a contest of chance was expanded to encompass games in which the outcome depends in a material degree upon an element of chance. See Plato's Cave Corp. v. State Liquor Authority, 115 A.D.2d 426, 428 (1st Dept. 1985), affirmed, 68 N.Y.2d 791 (1986).

has determined in the civil context that certain wagers are illegal and has provided civil remedies in regard to the recovery of prohibited wagers. General Obligations Law §§5-401 and 5-419.

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, in exercising its duty to "pass appropriate laws to prevent offenses..." against Article I §9. For instance, when it enacted Penal Law §225.00, the Legislature could have retained the definition of a contest of chance set forth in People ex rel. Ellison v. Lavin, 179 N.Y. at 170-71, i.e., a game in which chance is the dominating element that determines the result of the game. Such a determination would have been a rational legislative choice. Another rational choice was the Legislature's determination to define a contest of chance as a game in which the outcome depends in a material degree upon an element of chance. Penal Law §225.00(1).

Similarly, the Legislature could have made bettors criminally culpable for illegal gambling. Cf. Ga. Code Ann. §16-12-21. However, the New York Legislature rationally determined that the gambling activity of players themselves does not create criminal culpability under Penal Law Article 225 (see

Penal Law §225.00(3); People v. DiCarlo, 62 Misc.2d 638, 639 (Erie Co. Ct. 1970)), but that promoting gambling activity is a crime (see Penal Law §§225.05 and 225.10).[9] The Constitution does not mandate any of those policy options. Rather, the Constitution explicitly assigns to the Legislature the policy decisions of what "appropriate laws" to enact to prevent gambling, as the Legislature might see fit in the rational exercise of its duty.

The Legislature's discretion to determine what conduct constitutes gambling within the meaning of the Constitution is, of course, not unfettered. Rather, were the Legislature to enact an irrational law authorizing gambling activity, a person challenging such a statute could demonstrate that the Constitution's general gambling prohibition would constrain such a law. For example, were the Legislature to pass a statute generally authorizing roulette games in New York, such a law would plainly violate Article I §9. Unlike fantasy sports, roulette is a game of pure chance, in which a wheel is spun and a ball settles in a compartment labeled with a number, after

[9]Contrary to plaintiffs' argument (Pl. Mem. p. 37), there is no measure of the "incidental" nature of private gambling or whether wagered sums are "insignificant". Whether privately wagered sums not facilitated by others are significant or insignificant, all are regulated civilly rather than criminally. See General Obligations Law §§5-401 through 5-410.

players have placed wagers in regard to which numbered compartment the ball will settle. See 9 NYCRR §5324.4(c) (describing conduct of roulette in commercial casinos at which Article I §9 authorizes gambling). The general authorization of any game of pure chance on which players wager would, unlike Ch. 237, be an irrational exercise of the Legislature's Constitutional duty to pass appropriate laws to prevent gambling.

The Legislature has also exercised its constitutional authority by determining whether specific activities should be construed to be gambling. For example, Racing Law §906 authorizes certain commercial entities to operate horse-racing handicapping tournaments, at which the participants may be charged an entry fee. The Legislature declared that "[a] handicapping tournament operated in accordance with the provisions of this section shall be considered a contest of skill and shall not be considered gambling." Racing Law §906(3).[10] This policy choice of the Legislature is rational and it contradicts plaintiffs' assertion that the Legislature's

[10]This provision was enacted in 1995 as Racing Law §908(3). L. 1995 Ch. 2 §110. It was renumbered §906(3) in 2008. L. 2008 Ch. 18 §81. Defendants have not found any indication that there has ever been a challenge to the constitutionality of this provision.

determination of what constitutes gambling renders the Constitution a "nullity" (Pl. Mem. P. 23).

Plaintiffs also assert that the delegation to the Legislature of the responsibility to "pass appropriate laws to prevent offenses..." does not authorize it to "carve out exceptions to the prohibitions against gambling...." Pl. Mem. p. 23. Yet, the authority to define what is gambling necessarily permits the Legislature to define what is not gambling. Cf. Lambert v. California, 355 U.S. 225, 228 (1957) ("There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition."). The Legislature has, in the past, appropriately used the delegation of authority to define gambling to determine what conduct does not constitute gambling. This is precisely what was done when Ch. 237 was enacted. While plaintiffs argue that the presence of skill in selecting an interactive fantasy sports roster does not eliminate the element of chance (Pl. Mem. p. 5), there is no requirement that the Legislature prohibit as gambling any activity that includes any element of chance.

In this instance, the Legislature once again exercised its authority to determine whether a certain activity constitutes prohibited gambling. Upon careful consideration of the facts, the Legislature determined that certain registered and regulated

forms of interactive fantasy sports are contests of skill, not gambling.

C. The courts have accorded the Legislature substantial latitude in determining what conduct constitutes prohibited gambling.

New York courts have confirmed that the Legislature has substantial latitude in determining and legislating what conduct constitutes gambling within the meaning of the Constitution. This determination is ultimately a policy choice that lies within the province of the Legislature to address. See Saratoga County Chamber of Commerce Inc. v. Pataki, 293 A.D.2d 20, 26 (3d Dept. 2002), modified in part, 100 N.Y.2d 801, cert. denied 540 U.S. 1017 (2003) (issues affecting the health and welfare of state residents implicate policy choices lying squarely within the province of the Legislature); Dalton v. Pataki, 11 A.D.3d 62, 65 (3d Dept. 2004), modified in part, 5 N.Y.3d 243, cert. denied 546 U.S. 1032 (2005) (same); People v. Taylor, 9 N.Y.3d 129, 160 (2007) (Smith, J. concurring) (citing Hernandez v. Robles, 7 N.Y.3d 338 (2006)) (courts should defer to what the Legislature decides with respect to controversial issues of public policy); Campaign for Fiscal Equity, Inc. v. State, 8 N.Y.3d 14, 28 (2006) (noting the necessary deference of the courts to the policies of the Legislature).

Whether particular activities that are not pure chance games are gambling is not, contrary to what plaintiffs claim,

"self-evident" (Pl. Mem. p. 30). Such an argument is nothing more than reasoning by assertion. See also Pl. Mem. p. 25 ("[T]here is simply no doubt that the term 'gambling', as written into the Constitution in 1894, includes [interactive fantasy sports]..." (Pl. Mem. p. 25). In fact, the Legislature may act in regard to activities unknown to the Legislature of 1894, so long as it acts rationally. For example, in People ex rel. Sturgis v. Fallon, 152 N.Y. at 11, in upholding a statute that eliminated any criminal penalties for certain forms of wagering on horse races, the Court of Appeals set forth a highly deferential standard of review of the Legislature's implementation of Article I §9:

> [W]e 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 more appropriate law might have been devised and enacted. So long as this legislation was in any degree appropriate to carry into effect the purpose of the Constitution, it does not fall under its condemnation.

In Mellman v. Metropolitan Jockey Club, Inc., 195 Misc. 121, 123-25 (Sup. Ct. N.Y. Co. 1949), the petitioner alleged that daily double wagering at racetracks is "not pari-mutuel betting on horse races as permitted by Article I §9..." if the tickets were not vended, computed, and determined by a totalizator machine. The Constitution is silent on totalizator machines and the Legislature had enacted a law to sanction the

sale of daily double tickets by means not mechanical or electrical. The petitioner alleged that allowing daily double wagering expanded gambling without proper authority. 195 Misc. at 124. The court applied the presumption of constitutionality and held that the Legislature had not acted unreasonably in enacting the statute. Id. at 124-25.

Moreover, courts give due deference to the Legislature's duty to "pass appropriate laws to prevent offenses against any of the provisions..." of Article I §9. For example, in Dalton v. Pataki, 5 N.Y.3d at 263-65, the Court of Appeals applied the presumption of constitutionality in rejecting a challenge to the Legislature's inclusion of video lottery games within the operation of the State lottery. Article I §9 does not define what constitutes a lottery and expressly directs the Legislature to prescribe the operation of the State lottery. The court gave the Legislature latitude to determine that an electronic form of lottery was a permissible lottery game.[11]

[11]Plaintiffs misconstrue case law when they assert that "[e]xceptions to prohibitions must be strictly construed...." Pl. Mem. p. 25 (citing Ramesar v. State of New York, 224 A.D.2d 757, 759 (3d Dept.), leave denied, 88 N.Y.2d 811 (1996); Molina v. Games Management Services, 58 N.Y.2d 523, 529 (1983)). In fact, the cases on which plaintiffs rely simply stand for the proposition that agency regulations in regard to lawful gambling must be construed strictly. They do not even address the Legislature's latitude to define gambling.

Here, the Legislature's enactment of Ch. 237 carries the presumption that it is a constitutional exercise of its duty to pass appropriate laws in regard to defining permissible and prohibited gambling activities. The rationale for affording the Legislature broad latitude in weighing the appropriate scope of New York gambling laws is enhanced for interactive fantasy sports, online games that did not exist until recently, were not contemplated by the drafters of either the Constitution or the general gambling statutes, and have attributes not present in traditional gambling contests. As the Court of Appeals stated in Dalton v. Pataki, 5 N.Y.3d at 265, "[t]he language of the Constitution is not so rigid as to prevent this type of update and modernization."

D. The Legislature rationally determined that interactive fantasy sports contests do not constitute gambling.

"Every legislative enactment carries a... rebuttable presumption of the existence of necessary factual support for its provisions." Birkeland v. State, 98 A.D.2d at 398 (citations omitted). The Legislature has found and declared that interactive fantasy sports, regulated and conducted in a manner described by Ch. 237 with safeguards and minimum

standards,[12] are neither games of chance (Racing Law §1400(1)(a)) nor wagers on future contingent events not under the contestants' control or influence (Racing Law §1400(1)(b)) and, therefore, do not constitute gambling in New York as defined in Penal Law §225.00 (Racing Law §1400(2)). The Legislature had sufficient evidence before it to support these findings. Moreover, the Legislature's finding that interactive fantasy sports contests are games of skill is corroborated by extrinsic evidence.

1. The Legislature had sufficient evidence before it to support its findings.

(a) The Legislative Record

The legislative record demonstrates that fantasy sports contests challenge a participant to exercise judgment, similar to a general manager of a real-world sports team, by analyzing data and statistics and numerous variables to assemble the best possible roster of real-world athletes with whom to win the fantasy contest. Exhibit "Q" pp. 13, 21-22, 30, 37-39, 54, 66, 73-74, 104. The evidence further showed that fantasy sports allow a contestant to make meaningful decisions that affect the

[12]For example, in response to concerns raised by the fact that "certain DFS players will enter hundreds, or even thousands, of unique lineups..." (complaint ¶¶78, 146), Racing Law §1404(2) restricts the number of entries that may be submitted by a single interactive fantasy sports participant.

result of the fantasy competition by selecting the roster of real-world athletes for the fantasy team. See Racing Law §§1404(1) and (2) (setting forth restrictions on permissible contests). The Legislature could thus rationally determine that a contestant's ability to win turns on the contestant's level of skill and the amount of time and effort that the contestant devotes to analyzing the roster choices for the fantasy contest, compared to the knowledge, skill, time, and effort of competing contestants. Exhibit "Q" pp. 12-14, 34, 36-39; 44, 74-75, 104-05.[13] And the Legislature requires that every interactive fantasy sports game, as regulated, must "ensure that outcomes are based on the relative skill and knowledge of the contestants." Racing Law § 1404(1)(o).

This Legislative determination is further supported by evidence showing that a very small percentage of interactive fantasy sports contestants receive a very large percentage of the prize money, suggesting that the skills exercised by this small percentage of winners materially affects the outcome of these contests. Exhibit "Q" pp. 12, 36-37, 39-41, 43, 45. For example, when a study was conducted pitting human players

[13]Thus, there was a rational basis for the Legislature to distinguish interactive fantasy sports from games of chance such as poker, where "the outcome depends to a material degree upon the random distribution of cards." United States v. DiCristina, 726 F.3d 92, 98 n. 5 (2d Cir. 2013) (Pl. Mem. pp. 32-33).

against randomly generated lineups in a series of simulations, the skilled human players defeated the computers more than 80 percent of the time. Exhibit "Q" pp. 41-42. Thus, although the results of fantasy sports contests depend, to some extent, upon "the subsequent actual performance of actual athlete(s) in actual sporting events..." (Pl. Mem. p. 30), the Legislature has required lawful fantasy contests to be decided by an accumulation of results from multiple players on each fantasy roster, thus ensuring that, in the Legislature's judgment, the element of skill will dominate the determination of results. The Legislature, recognizing the signal importance of knowledge and skill in these contests, also requires that highly experienced players be identified (to other players) and limits their number of entries in each contest. Racing Law §§1404(1)(g) and (2).[14]

Moreover, unlike traditional sports betting, which involves wagering money on the outcome of a single real-world contest, the outcomes of fantasy sports contests are not determined by a single random event or one team's performance. Rather, fantasy sports contests turn on the aggregation of individual

[14]Contrary to plaintiffs' assertion, this requirement does not "reduce the element of 'skill'...". Pl. Mem. p. 36. The requirement simply provides for a more level playing field for the less skillful contestants who may wish to compete against only those players who have similar experience levels.

statistical performance of rosters of real-world players from several different real world teams, as selected by the contestants. Exhibit "Q" pp. 47-51, 73-74, 149.

The evidence presented to the Committees provided a rational basis for the Legislature to determine that registered and regulated interactive fantasy sports contests are not gambling offenses to be declared illegal.[15] While plaintiffs may disagree as a matter of policy, the Legislature's determination is presumed to be constitutional. Plaintiffs cannot meet their burden of demonstrating beyond a reasonable doubt that Ch. 237 contravenes Article I §9. Thus, there is no basis for the plaintiffs to urge the court to substitute its own judgments and preferences for that of the Legislature.

(b) Additional Information Submitted in Support of Ch. 237

Additional information submitted to the Legislature and the Governor in support of Ch. 237 (Stavisky Aff. ¶¶3-21; Exhibits "R" through "II") further demonstrates the rationality of the challenged legislative action. These submissions included:

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[15]That some members of the Legislature argued and voted against the bill (see Pl. Mem. pp. 13-14, 34-36) merely establishes that reasonable minds may differ as to what constitutes gambling. It further demonstrates that the very arguments that plaintiffs now make "ha[ve] already been considered and rejected by the Legislature." Steele v. Board of Education of the City of New York, 40 N.Y.2d 456, 474 (1976) (Fuchsberg, J. dissenting). In this case, they were rejected overwhelmingly by votes of 111 to 21 in the Assembly and 45 to 17 in the Senate. See Exhibit "N".

written testimony, correspondence, and other materials from representatives of DraftKings, FanDuel, the Fantasy Sports Trade Association, and professional sports teams, which describe the mechanics of the interactive fantasy sports contests and the proposed legislation, demonstrate that fantasy sports contests are games of skill, and advocate for the regulation of interactive fantasy sports in New York (Exhibits "R" through "AA", "HH", and "II"); editorials from Newsday and the New York Post (Exhibit "BB"); and memoranda containing detailed, reasoned legal analyses of the constitutionality of Ch. 237 (Exhibits "CC" through "GG"). These additional documents submitted to the Legislature and the Governor provide ample factual and legal support for the conclusion that fantasy sports contests are neither contests of chance nor wagers on future contingent events not within the contestants' control or influence and that Ch. 237 is a rational means of implementing Article I §9.

2. The Legislature's finding that interactive fantasy sports contests are games of skill is corroborated by extrinsic evidence.

When determining whether there is a rational basis for a legislative enactment, "any conceivable rational basis is sufficient to sustain the statute's constitutionality." New York State United Teachers v. State of New York, 46 Misc. 3d 250, 264 (Sup. Ct. Albany Co. 2014) (emphasis added). "Since

the challenged statute is presumed to be valid, the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it whether or not the basis has a foundation in the record." Affronti v. Crosson, 95 N.Y.2d 713, 719 (2001) (citations and internal quotation marks omitted) (emphasis in original). Thus, although the evidence before the Legislature was more than adequate to support its conclusions, when assessing the rationality of the Legislature's determination that registered and regulated interactive fantasy sports contests are games of skill, the court may consider available extrinsic evidence as well.

First, there is a significant amount of literature from the online fantasy sports industry that explains how fantasy sports contests operate and how the outcome of such contests turns almost entirely on the skill of the participants. See, e.g., Exhibits "JJ" through "MM"; Stavisky Aff. ¶¶23-26. More significantly, numerous statistical studies corroborate the Legislature's finding that interactive fantasy sports contests are games of skill.[16]

For example, a statistical study of FanDuel contest data, conducted by four professors from the Massachusetts Institute of

[16]Some of these studies were discussed during the December 8, 2015 legislative hearing. See, e.g., Exhibit "Q" pp. 41-42.

Technology and one from the University of Toronto Institute for Aerospace Studies, confirms that outcomes of fantasy sports contests are predominantly based on skill. First, simulations that pitted actual lineups chosen by FanDuel users against lineups chosen at random demonstrated that human choices significantly influence the results of the contest. Second, over a large enough set of contests, fantasy sports contestants can improve their performance over time based on practice and experience. Third, although skill does improve gradually, when measured over a single season, the identifiable skill profile of fantasy sports participants remains relatively consistent. A copy of the report of that study, entitled "Luck and the Law: Quantifying Change in Fantasy Sports and Other Contests", is submitted herewith as Exhibit "OO". Stavisky Aff. ¶28.

Further, a statistical analysis of DraftKings' fantasy games operations conducted by a professor of statistics at Hebrew University also "showed that fantasy games offered by DraftKings have an inherent and vast character of skill where chance is overwhelmingly immaterial in the probability of winning in such games." This is demonstrated by the high winning percentage of DraftKings' most successful players. A copy of the report of this study is submitted herewith as Exhibit "PP". Stavisky Aff. ¶29.

In addition, Gaming Laboratories International performed a skill simulation analysis of DraftKings' fantasy baseball contests. The study pitted rosters prepared by skilled players against rosters chosen at random by unskilled players in more than 550 contests. The results of this analysis showed that skilled players defeated unskilled players over 70 percent of the time. The study also pitted 1,000 rosters prepared by the top 15 earning fantasy baseball participants against the same number of computer generated skilled and unskilled rosters. The top 15 performers defeated the computer generated unskilled rosters over 80 percent of the time and the computer generated skilled rosters over 65 percent of the time. A copy of the report of this study is submitted herewith as Exhibit "NN". Stavisky Aff. ¶27.

These studies scientifically support the Legislature's conclusion that fantasy sports contests are games of skill. First, if, as plaintiffs insist, fantasy sports contests were games of chance, lineups chosen by actual contestants would not consistently beat those chosen at random. Second, if as plaintiffs assert, fantasy sports contests were not games of skill, contestants would not improve their performance over

time. Third, if as plaintiffs allege, fantasy sports contests were gambling, contestants' skill levels would not remain constant over a single season. Finally, if, as plaintiffs claim, fantasy sports contests constituted betting on the outcome of a future contingent event not under the contestants' control or influence, a small majority of participants, i.e., the most skillful players, would not win a majority of the contests.

E. The Legislature's determination that interactive fantasy sports contests do not constitute gambling is consistent with determinations made by 18 other State Legislatures and the United States Congress.

Finally, the rationality of our Legislature's determination that interactive fantasy sports contests do not constitute gambling is further supported by similar determinations made by 18 other State Legislatures and the United States Congress. See Brous v. Smith, 304 N.Y. 164, 169 (1952) (when considering challenge to the constitutionality of a New York statute, court noted that similar statutes had been enacted in other states and found to be constitutional); Landes v. Landes, 1 N.Y.2d 358, 362 (1956) (same).

Interactive fantasy sports contests have been determined not to be gambling by the Legislatures of Arkansas (A.C.A. §23-

116-103), Colorado (C.R.S. §12-15.5-101 *et. seq.*), Connecticut (Conn. P.A. 17-2 §649), Delaware (29 Del. C. §4871), Indiana (Ind. Code Ann. §4-33-24-1), Kansas (K.S.A. §21-6403(a)(9)), Maine (2017 Me. SP 449), Maryland (Md. Crim. Law Code §12-114), Massachusetts (2016 Mass. Acts Ch. 219 §135), Mississippi (Miss. Code Ann. §97-33-301 *et. seq.*), Missouri (§313.920 R.S.Mo.), New Hampshire (2017 NH HB 580), New Jersey (N.J. Stat. § 5:20-2), Ohio (O.R.C. Ann. §3774.01 *et seq.*), Pennsylvania (4 Pa. C.S. §301 *et seq.*), Tennessee (Tenn. Code Ann. §39-17-501), Vermont (2017 Vt. S. 136), and Virginia (Va. Code Ann. §59.1-569).

Moreover, in prohibiting certain financial transactions associated with gambling, Congress expressly excluded fantasy sports (as well as other activities such as insurance and stock market speculation) from the scope of the federal statute. See 31 U.S.C. §5362(1)(E)(ix)).

CONCLUSION

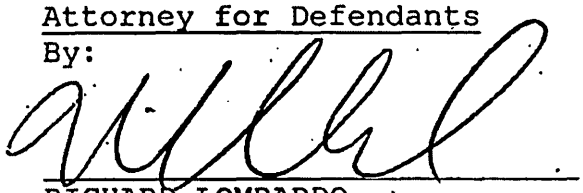
As demonstrated above, the challenged statute constitutes a rational exercise of the Legislature's constitutional authority to enact appropriate laws to effectuate the constitutional prohibition against gambling. Accordingly, plaintiffs' motion for summary judgment should be denied, defendants' cross-motion

for summary judgment should be granted, the complaint should be dismissed, and the court should issue a judgment declaring that Ch. 237 does not violate Article I §9 of the State Constitution.

Dated: Albany, New York
March 9, 2018

Yours, etc.,

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for Defendants
By:



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Affirmation of Cornelius Murray, dated May 1, 2018

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.

AFFIRMATION IN SUPPORT OF PLAINTIFFS
Index No. 5861-16
(Hon. Gerald Connolly)

CORNELIUS D. MURRAY, an attorney duly admitted to practice before the courts of this State, affirms under penalties of perjury as follows:

1. I am the attorney for Plaintiffs in the above-captioned matter.

2. Attached hereto as Exhibit "A-1" is the Report by the New York State Joint Commission on Public Ethics (JCOPE) for the years 2015, 2016 and 2017, showing New York-based lobbying expenditures made by the daily fantasy sports industry.

3. Attached hereto as Exhibit "A-2" are relevant excerpts from JCOPE's annual reports for 2015, 2016 and 2017 providing the data used to calculate the figures in Exhibit "A-1".

4. Annexed hereto as Exhibit "B" is the analysis of the odds affecting the outcome of the 2017 Super Bowl LI at a point in time when the Atlanta Falcons led the New England Patriots by a score of 28-3.

5. Attached hereto as Exhibit "C" is a copy of New York Senate Bill S.3898-A, sponsored by John Bonacic, Chair of the Racing, Gaming and Wagering Committee for the Legislative Session 2017-2018.

6. Annexed hereto as Exhibit "D" is a copy of New York Assembly Bill A.2520, sponsored by Gary Pretlow, Chairman of the Committee on Racing and Wagering for the Legislative Session 2017-2018.

7. Annexed hereto as Exhibit "E" is a copy of New York Senate Bill S-7900, sponsored by Sen. John Bonacic, introduced in the 2017-2018 Legislative Session.

DATED: May 1, 2018
Albany, New York

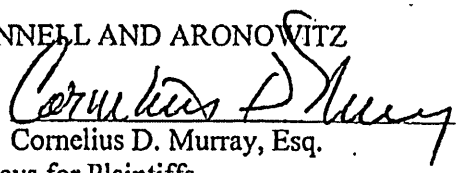
O'CONNELL AND ARONOWITZ
By: 
Cornelius D. Murray, Esq.
Attorneys for Plaintiffs
Office and P.O. Address
54 State Street
Albany NY 12207-2501

EXHIBIT "A-1"

Report by the New York State Joint Commission on Public Ethics (JCOPE) for the years 2015, 2016 and 2017, showing New York-based lobbying expenditures made by the daily fantasy sports industry.

LOBBYING EXPENDITURES TOTALS 2015-2017				
Organization	**Compensation Paid**	**Expenses**	**Reimbursed Expenses**	**Total Compensation and Expenses Paid (Not Factoring Reimbursed Expenses)**
FanDuel, Inc	$630,708.00	$13,299.00	$0.00	$644,007.00
FanDuel, Inc (FSTA)	$113,700.00	$1,000.00	$0.00	$114,700.00
DraftKings, Inc	$590,093.00	$12,799.00	$0.00	$602,892.00
DraftKings, Inc (FSTA)	$108,200.00	$1,000.00	$0.00	$109,200.00
Fantasy Sports For All	$105,200.00	$443,054.00	$120,174.00	$548,254.00
Small Business Fantasy Sports Inc.	$10,000.00	$1,470.00	$0.00	$11,470.00
Boom Shakalaka, Inc. (d/b/a Boom Fantasy)	$40,000.00	$0.00	$0.00	$40,000.00
Total	**$1,597,901.00**	**$472,622.00**	**$120,174.00**	**$2,070,523.00**

Sources: *Listing of Lobbyists and Public Corporations Based Upon Reports Received As Of March 7, 2016,* New York State Joint Commission on Public Ethics ("JCOPE"), *2015 Annual Report* at pp. 68, 126, 181, 190, and 209; *Listing of Lobbyists and Public Corporations Based Upon Reports Received As Of March 31, 2017,* JCOPE, *2016 Annual Report* at pp. 2, 66-67, 79-80, 92, 131, 172-73, 184, 193, 200, 212, 226-27, 238; *Listing of Lobbyists and Public Corporations, Based upon Reports Received as of March 19* , 2018, JCOPE, *2017 Annual Report* at pp. 79, 156, 224, and 246.

EXHIBIT "A-2"

Relevant excerpts from JCOPE's annual reports for 2015, 2016 and 2017 providing the data used to calculate the figures in Exhibit "A-1".

NEW YORK STATE
JOINT COMMISSION ON PUBLIC ETHICS

2015
ANNUAL REPORT

JCOPE.NY.GOV

2015

LISTING OF

LOBBYISTS AND PUBLIC CORPORATIONS BASED UPON REPORTS

RECEIVED AS OF MARCH 7, 2016.

2015 LIST OF LOBBYISTS AND THEIR
COMPENSATION, REIMBURSED EXPENSES AND TOTAL EXPENSES BY CLIENT

	Compensation	Reimbursed Expenses	Expenses
1199 SEIU UNITED HEALTHCARE WORKERS EAST			
1199 SEIU UNITED HEALTHCARE WORKERS EAST	8000	0	0
1199/SEIU & GNYHA HEALTHCARE EDUCATION PROJECT			
1199/SEIU & GNYHA HEALTHCARE EDUCATION PROJECT	3000	0	0
50CAN, INC. (FKA NYCAN (50CAN): NEW YORK CAMPAIGN FOR ACHIEVEMENT NOW)			
50CAN, INC. (FKA NYCAN (50CAN): NEW YORK CAMPAIGN FOR ACHIEVEMENT NOW)	0	0	0
92ND STREET YOUNG MEN'S AND YOUNG WOMEN'S HEBREW ASSOCIATION			
92ND STREET Y	1008	0	0
99 SOLUTIONS LLC.			
1-10 BUSH TERMINAL OWNER, LP/19-20 BUSH TERMINAL OWNER, LP	60000	0	0
ASSOCIATION FOR AFFORDABLE HOUSING (NEW YORK STATE)	75000	0	0
CADMAN ASSOCIATES	60000	0	0
CSC HOLDINGS, LLC	90000	0	0
GEMINI ARTS INITIATIVE, INC.	54000	0	0
L + M DEVELOPMENT PARTNERS, INC.	75000	0	0
LENOX TERRACE DEVELOPMENT ASSOCIATES	26000	0	0
MSG HOLDINGS, L.P.	22500	0	0
MSG SPORTS & ENTERTAINMENT LLC	7500	0	0
REAL ESTATE BOARD OF NEW YORK, INC.	84000	0	0
SLATE PROPERTY GROUP LLC	5000	0	0

SPORTS & ARTS IN SCHOOLS FOUNDATION, INC	42000	0	0
ST. MICHAEL'S CEMETERY	60000	0	0
T.A. AHERN CONTRACTORS CORP.	90000	0	0
TD BANK US HOLDING COMPANY	130000	0	0
TOUR CENTRAL PARK INC.	10000	0	0
VASS STEVENS GROUP INC.	11000	0	0
WALGREEN CO.	96000	0	0
WASTE MANAGEMENT OF NEW YORK, LLC	180000	0	0
ZHN CONTRACTING CORPORATION	57000	0	0
CONSUMERS UNION OF US, INC.			
CONSUMERS UNION OF U.S., INC.	11338	4432	4489
CONTINUING CARE LEADERSHIP COALITION			
CONTINUING CARE LEADERSHIP COALITION (CCLC)	57572	1002	91
COPPOLA, JOHN			
ASSOCIATION OF ALCOHOLISM & SUBSTANCE ABUSE PROVIDERS, INC. (NY)	9950	0	0
CORDO & COMPANY, LLC			
1199 SEIU LABOR MANAGEMENT INITIATIVES, INC., HEALTHCARE EDUCATION PROJECT	132000	0	0
1199 SEIU UNITED HEALTHCARE WORKERS EAST	120000	0	0
ADVOCATE COMMUNITY PROVIDERS, INC. (FKA COMMUNITY PREFERRED PROVIDERS, LLC (NEW YORK))	180000	0	0
BAITING HOLLOW HOLDINGS	65000	0	0
BEDFORD PHYSICIANS RISK RETENTION GROUP, INC.	55000	0	0
BEER WHOLESALERS ASSOCIATION (NYS)	66666	2782	2782
BOUNDLESS ENERGY NE, LLC	85000	0	0

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CAMELOT GLOBAL SERVICES LIMITED	41250	0	0
CIGAR ASSOCIATION OF AMERICA, INC.	54498	0	0
COLLEGE OF AMERICAN PATHOLOGISTS	3500	0	0
COMMISSION ON INDEPENDENT COLLEGES AND UNIVERSITIES (CICU)	25002	0	0
COMPPHARMA, LLC	84000	0	0
CONSORTIUM FOR WORKER EDUCATION	75000	0	0
CVS HEALTH	240000	0	0
DIRECTV LLC	37500	0	0
DISH NETWORK L.L.C.	45000	0	0
DISTRICT COUNCIL OF CARPENTERS PAC (NYC)	120000	0	0
DRAFTKINGS INC. (FANTASY SPORTS TRADE ASSOCIATION)	19000	0	0
EDGENUITY INC.	40000	0	0
EDUCATORS 4 EXCELLENCE-NEW YORK	88000	0	0
EXPEDIA, INC.	65625	0	0
FANDUEL, INC. (FANTASY SPORTS TRADE ASSOCIATION)	9500	0	0
FELD ENTERTAINMENT, INC.	42000	0	0
FIG LLC	29250	0	0
GENERATION READY, INC.	32000	0	0
GENTING NEW YORK LLC	300000	0	0
H.Q. ENERGY SERVICES (U.S.) INC.	84000	0	0
HALMAR INTERNATIONAL, LLC	90000	0	0
HEALTHPLUS HP, LLC (FKA AMERIGROUP NEW YORK, LLC DBA HEALTH PLUS AMERIGROUP) (ANTHEM, INC., AND ITS AFFILIATES DBA EMPIRE BLUECROSS BLUESHIELD HEALTHPLUS (FKA AMERIGROUP NEW YORK)	120000	0	0
HILTON WORLDWIDE	16000	0	0
HOTEL AND MOTEL TRADES COUNCIL, AFL-CIO (NEW YORK)(FKA HOTEL & MOTEL TRADES COUNCIL (NY))	72000	0	0

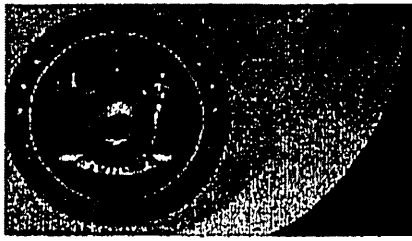
JCDECAUX NORTH AMERICA, INC.			
JCDECAUX NORTH AMERICA	10025	0	0
JEFFERS, DARRELL			
HEALTHCARE ASSOCIATION OF NEW YORK STATE (WILSON ELSER MOSKOWITZ EDELMAN AND DICKER LLP)	13500	0	0
JEM ASSOCIATES NY, LLC			
AMERICAN CHEMISTRY COUNCIL	80000	0	0
CHINESE-AMERICAN PLANNING COUNCIL, INC.	30000	0	0
COURT OFFICERS BENEVOLENT ASSOCIATION OF NASSAU COUNTY, INC.	5000	0	0
DR. PEPPER SNAPPLE GROUP	53496	0	0
FELD ENTERTAINMENT	120000	0	0
GENERIC PHARMACEUTICAL ASSOCIATION (GPHA)	60000	0	127
GOOD SHEPHERD SERVICES	24000	0	127
LIBRARY ASSOCIATION (NY)	36000	0	127
LIGHT TOWER FIBER LONG ISLAND, LLC (TLM ASSOCIATES, LLC)	8000	0	127
NORTHROP GRUMMAN SYSTEMS CORPORATION (TLM ASSOCIATES, LLC)	21000	0	0
PRATT INSTITUTE	27000	0	127
RAI SERVICES COMPANY	65004	0	127
JENKINS, JOANNE E.			
LIFE INSURANCE COMPANY (NEW YORK)	32495	0	4116
JENKINS, PATRICK B. & ASSOCIATES			
B&B SUPPORTIVE LLC	60000	660	13370
BANK STREET COLLEGE OF EDUCATION	70000	0	12195
CVS HEALTH (CORDO & CO; LLC)	40000	0	6990

DRAFTKINGS INC. (FANTASY SPORTS TRADE ASSOCIATION)	7125	0	363
EDUCATION REFORM NOW ADVOCACY	7500	0	725
FANDUEL, INC. (FANTASY SPORTS TRADE ASSOCIATION)	7125	0	363
FRIENDS OF SCHOOL IN THE SQUARE	15000	0	2755
FUTURE LEADERS INSTITUTE CHARTER SCHOOL (THE)	2500	0	725
GENTING NEW YORK LLC	42580	0	817
JOHN V. LINDSAY WILDCAT ACADEMY CHARTER HIGH SCHOOL	2500	0	725
NBX MERCHANT SERVICE CORP.	20000	0	2259
NETSPEND CORP.	52500	0	6824
NORTHEAST CHARTER SCHOOLS NETWORK	7500	0	725
PALLIATECH NY LLC	82500	0	5695
PANASIA ESTATE, INC.	20000	0	2984
RENAISSANCE CHARTER SCHOOL	2500	0	725
SOMERSET PARTNERS LLC	40000	0	2306
TRIAL LAWYERS ASSOCIATION (NYS)	232500	0	12366
UBER TECHNOLOGIES, INC.	116000	0	12991
UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA	45000	0	2306
JENNISON ASSOCIATES LLC			
JENNISON ASSOCIATES LLC	838	0	0
JEWISH ASSOCIATION FOR SERVICES FOR THE AGED			
JEWISH ASSOCIATION FOR SERVICES FOR THE AGED	3439	0	70
JEWISH BOARD OF FAMILY AND CHILDREN'S SERVICES, INC.			
JEWISH BOARD OF FAMILY & CHILDREN'S SERVICES, INC.	13636	145	2764

OPPORTUNITIES FOR A BETTER TOMORROW, INC.	1863	1694	1694
ORELL, STACIE			
PUBLIC INTEREST RESEARCH GROUP FUND, INC. (NEW YORK)	3500	0	105
OREXO US, INC.			
OREXO US, INC.	3783	363	40
ORGANIZATION OF NURSE EXECUTIVES AND LEADERS (NEW YORK) (FKA MURRAY, CLAIRE)			
ORGANIZATION OF NURSE EXECUTIVES, INC. (NY)	1867	286	0
ORGANIZATION OF NYS MANAGEMENT /CONFIDENTIAL EMPLOYEES, INC.			
ORGANIZATION OF NYS MANAGEMENT/CONFIDENTIAL EMPLOYEES, INC.	654	0	0
ORRICK, HERRINGTON & SUTCLIFFE LLP			
DRAFTKINGS, INC.	1750	0	0
FANDUEL, INC.	1750	0	0
OSTROFF ASSOCIATES, INC. (FKA OSTROFF, HIFFA & ASSOCIATES, INC.)			
ACADIA REPUBLIC FARMINGDALE LLC	15000	0	193
ADMIT ONE	12000	0	665
ALBANY PORT DISTRICT COMMISSION	60000	0	665
ALTRIA CLIENT SERVICES (ALCS) (MULTISTATE ASSOCIATES INC.)	48000	0	665
ALTRIA CLIENT SERVICES LLC AND ITS AFFILIATES (FKA ALTRIA CLIENT SERVICES, INC. AND ITS AFFILIATES)	155002	0	659
AMERICAN ADDICTION CENTERS	5000	0	128
AMERICAN TRAFFIC SOLUTIONS, INC.	90000	0	665
ARVERNE BY THE SEA, LLC	96000	0	665
ASSOCIATION OF CONVENIENCE STORES (NY)	60000	0	665
BANK OF NEW YORK MELLON (THE)	72000	0	665

VERIZON	60000	0	2911
WALT DISNEY COMPANY (THE)	60000	0	2911
WESTERN NEW YORK ENERGY, LLC	24000	0	2911
YONKERS RACING CORPORATION	90000	0	2427
PARKS & TRAILS NEW YORK			
PARKS & TRAILS NEW YORK	10422	0	1399
PARKSIDE GROUP, LLC (THE)			
ACADEMY OF TRIAL LAWYERS (NYS)	90000	0	0
APICHA COMMUNITY HEALTH CENTER (FKA ASIAN & PACIFIC ISLANDER COALITION ON HIV / AIDS)	30000	0	0
ASIAN AMERICANS FOR EQUALITY INC.	48000	0	0
ASSOCIATION OF HOME INSPECTORS (NEW YORK STATE)	8000	0	0
CAMBA, INC.	48000	0	0
CARES, INC. (NY)	0	0	0
CHINESE NAIL SALON ASSOCIATION OF EAST AMERICA, INC.	10500	0	0
CONNOISSEUR ENCOUNTERS COMPANY INC.	90000	0	0
CUNY CREATIVE ARTS TEAM	54000	0	0
DIRECTV LLC	51000	0	12990
DISH NETWORK L.L.C	51000	0	12952
DRAFTKINGS INC. (FANTASY SPORTS TRADE ASSOCIATION)	7500	0	0
ENTERGY NUCLEAR OPERATIONS, INC.	78000	0	0
EQUINOX CAPITAL , INC.	60000	0	0
FANDUEL INC (FANTASY SPORTS TRADE ASSOCIATION)	22500	0	0
FRESH DIRECT, LLC.	78000	0	0
G4S SECURE SOLUTIONS (MULTISTATE ASSOCIATES INC.)	25000	0	0

ASSOCIATION OF SURROGATE'S & SUPREME COURT REPORTERS WITHIN THE CITY OF NEW YORK	40000	0	2571
ASSOCIATION OF VETERINARY TECHNICIANS (NYS)	18000	0	1157
BUILDING AND REALTY INSTITUTE OF WESTCHESTER AND THE MID-HUDSON REGION (THE)	48000	0	3089
IRON WORKERS DISTRICT COUNCIL (NYS)	30000	0	1930
MASTERCARD INTERNATIONAL INCORPORATED	75000	0	4823
OCCUPATIONAL THERAPY ASSOCIATION (NYS)	24000	0	1544
PFIZER, INC. (ELK STREET GROUP, LLC)	36000	0	2314
TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NY (FKA TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY	60000	0	3858
RIDDETT ASSOCIATES, INC.			
ASSOCIATION OF ELECTRICAL CONTRACTORS, INC. (NYS)	24000	0	0
DRAFTKINGS INC. (FANTASY SPORTS TRADE ASSOCIATION)	7125	0	0
FANDUEL, INC. (FANTASY SPORTS TRADE ASSOCIATION)	7125	0	0
NECA OF NEW YORK STATE COUNCIL	24000	0	0
TRIAL LAWYERS ASSOCIATION (NYS)	425000	3949	3949
WENDY WHITE JUSTICE FUND	60000	0	0
RIDDLE, GARY			
EISAI INC.	156	0	0
RIGHT TO LIFE COMMITTEE, INC. (NYS)			
RIGHT TO LIFE COMMITTEE, INC. (NYS)	704	267	539
ROARKE, ROBERT R.			
WILSON, ELSER, MOSKOWITZ, EDELMAN AND DICKER, LLP	0	0	0
ROBINSON & COLE LLP			
AMERICAN FEDERATION OF TEACHERS (STROOCK & STROOCK & LAVAN LLP)	90000	0	208



NEW YORK STATE JOINT COMMISSION ON PUBLIC ETHICS

2016

LISTING OF

LOBBYISTS AND PUBLIC CORPORATIONS BASED UPON REPORTS

RECEIVED AS OF MARCH 31, 2017

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2016 LIST OF LOBBYISTS AND THEIR
COMPENSATION, REIMBURSED EXPENSES AND TOTAL EXPENSES BY CLIENT

	Compensation	Reimbursed Expenses	Expenses
1199 SEIU UNITED HEALTHCARE WORKERS EAST			
1199 SEIU UNITED HEALTHCARE WORKERS EAST	9000	0	0
50CAN, INC. (FKA NYCAN (50CAN): NEW YORK CAMPAIGN FOR ACHIEVEMENT NOW)			
50CAN, INC. (FKA NYCAN (50CAN): NEW YORK CAMPAIGN FOR ACHIEVEMENT NOW)	800	0	800
92ND STREET YOUNG MEN'S AND YOUNG WOMEN'S HEBREW ASSOCIATION			
92ND STREET Y	184	0	0
99 SOLUTIONS LLC.			
1-10 BUSH TERMINAL OWNER, LP (FKA 1-10 BUSH TERMINAL OWNER, LP/19-20 BUSH TERMINAL OWNER, LP)	29250	0	0
138 WILLOUGHBY LLC	52500	0	0
19-20 BUSH TERMINAL OWNER, LP	26750	0	0
80 FLATBUSH AVENUE, LLC	24000	0	0
BRP CATON FLATS LLC	10000	0	0
CADMAN ASSOCIATES	50000	0	0
CSC HOLDINGS, LLC	90000	0	0
GEMINI ARTS INITIATIVE, INC.	72000	0	0
L + M DEVELOPMENT PARTNERS, INC.	75000	0	0
LENOX TERRACE DEVELOPMENT ASSOCIATES	94500	0	0
MSG SPORTS & ENTERTAINMENT LLC	30000	0	0
REAL ESTATE BOARD OF NEW YORK, INC.	84000	0	0
TISHMAN SPEYER PROPERTIES, L.P.	60000	0	0
A BETTER ROCHESTER, INC.			
A BETTER ROCHESTER, INC.	0	0	405481

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AAA NEW YORK STATE, INC. (FKA CORLETT, JOHN, A)			
AAA NEW YORK STATE, INC.	0	0	41402
AAA NORTHEAST	40002	0	240
ABBAN, GERALD (FKA MCGEOWN, CHRIS)			
FIDELITY BROKERAGE SERVICES LLC	0	0	0
ABRAHAM CROWN & ASSOCIATES LLC			
FIRST TRANSIT	54000	0	0
ACADEMY OF MEDICINE (NY) (THE)			
ACADEMY OF MEDICINE(NY)	3058	0	0
ACCENTURE LLP			
ACCENTURE LLP	0	0	0
ACE GROUP - NORTH AMERICA			
CHUBB - NORTH AMERICA (ACE GROUP- NORTH AMERICA)	3265	0	0
ACQUIRE DIGITAL			
FANTASY SPORTS FOR ALL	5200	120174	120174
ACTIS GP LLP			
ACTIS GP LLC	3928	0	0
ACTWIRELESS (FKA MYWIRELESS.ORG)			
MYWIRELESS.ORG	0	0	0
ADAMS, JOHN			
CALGON CARBON CORPORATION	4460	1555	0
ADIRONDACK COUNCIL (THE)			
ADIRONDACK COUNCIL(THE)	20564	0	61273

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CONSUMERS UNION OF US, INC.			
CONSUMERS UNION OF U.S., INC.	10556	1058	1238
CONTINUING CARE LEADERSHIP COALITION			
CONTINUING CARE LEADERSHIP COALITION (CCLC)	44545	489	5251
COPPOLA, JOHN			
ASSOCIATION OF ALCOHOLISM & SUBSTANCE ABUSE PROVIDERS, INC. (NY)	11000	0	0
CORDO & COMPANY, LLC			
1199 SEIU LABOR MANAGEMENT INITIATIVES, INC., HEALTHCARE EDUCATION PROJECT	162000	0	0
1199 SEIU UNITED HEALTHCARE WORKERS EAST	120000	0	0
ADVOCATE COMMUNITY PROVIDERS, INC. (FKA COMMUNITY PREFERRED PROVIDERS, LLC (NEW YORK))	180000	0	0
BEDFORD PHYSICIANS RISK RETENTION GROUP, INC.	50000	0	0
BEER WHOLESALERS ASSOCIATION, INC. (NYS)	66666	0	0
BOUNDLESS ENERGY NE, LLC	40000	0	0
CAMELOT GLOBAL SERVICES LIMITED	0	0	0
CHARTER COMMUNICATIONS, INC. (TWC ADMINISTRATION LLC)	30000	0	0
CIGAR ASSOCIATION OF AMERICA, INC.	54498	0	0
COMMISSION ON INDEPENDENT COLLEGES AND UNIVERSITIES (CICU)	25002	0	0
COMPPHARMA, LLC	84000	0	0
CONSORTIUM FOR WORKER EDUCATION	75000	0	0
CVS HEALTH	240000	946	946
DISH NETWORK L.L.C.	72000	0	0
DISTRICT COUNCIL OF CARPENTERS, PAC (NYC)	120000	0	0
DRAFTKINGS INC.	49600	0	0
DRAFTKINGS INC. (FANTASY SPORTS TRADE ASSOCIATION)	16150	0	0
EDUCATORS FOR EXCELLENCE, INC.	96000	0	0

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EMUSC, LLC	48000	0	0
EXPEDIA, INC.	75000	0	0
FANDUEL INC.	45500	0	0
FANDUEL, INC. (FANTASY SPORTS TRADE ASSOCIATION)	16150	0	0
FELD ENTERTAINMENT, INC.	38000	0	0
FIG LLC	52000	0	0
GENERATION READY, INC.	28000	0	0
GENTING NEW YORK LLC	300000	0	0
H.Q. ENERGY SERVICES (U.S.) INC.	84000	0	0
HALMAR INTERNATIONAL, LLC	7500	0	0
HEALTHPLUS HP, LLC (FKA AMERIGROUP NEW YORK, LLC DBA HEALTH PLUS AMERIGROUP) (ANTHEM, INC., AND ITS AFFILIATES DBA EMPIRE BLUECROSS BLUESHIELD HEALTHPLUS (FKA AMERIGROUP NEW YORK)	120000	0	0
HOTEL AND MOTEL TRADES COUNCIL, AFL-CIO (NEW YORK)(FKA HOTEL & MOTEL TRADES COUNCIL (NY))	72000	0	0
HUDSON RIVER HEALTHCARE	105000	0	0
INOVALON, INC.	40000	0	0
MILLENNIUM PIPELINE, L.L.C.	50000	0	0
NATIONAL POPULAR VOTE (FKA NATIONAL POPULAR VOTE, INC.)	20000	0	0
NYSAIS OPERATIONS, INC.	36000	0	0
PALLIATECH, INC.	18000	0	0
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA (PCI)	167496	0	0
SHORT TERM RENTAL AND HOSPITALITY ASSOCIATION (STRAHA)	0	0	0
TRIPADVISOR, LLC	77500	0	0
UBER TECHNOLOGIES, INC.	7500	0	0
VISITING NURSE SERVICE OF NEW YORK	90000	0	0
CORE SERVICES GROUP, INC.			
CORE SERVICES GROUP, INC.	0	0	0
CORNING PLACE COMMUNICATIONS			

DEUTSCHE BANK TRUST COMPANY AMERICAS	0	0	0
DEWEY SQUARE GROUP, LLC			
EXELON CORPORATION	80000	2213	45383
DIAGEO			
DIAGEO NORTH AMERICA	4998	0	0
DICKINSON & AVELLA, PLLC.			
HANDY	20000	0	0
INFORMATION TECHNOLOGY MANAGEMENT, INC.	18000	0	0
JETRO/RESTAURANT DEPOT	30000	0	0
LEMONADE, INC.	30000	0	0
LONG ISLAND UNIVERSITY	35000	0	0
THOROUGHBRED BREEDERS, INC. (NEW YORK)	22500	0	0
THOROUGHBRED HORSEMEN'S ASSOCIATION, INC. (NY)	18000	0	0
U.S. JUSTICE ACTION NETWORK	62500	0	0
DIETL, RICHARD			
DRAFTKINGS INC.	10000	0	0
FANDUEL INC.	10000	0	0
DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC.			
DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC. (FKA DISTILLED SPIRITS COUNCIL OF THE US)	18000	0	0
DISTINCTIVE PUBLIC AFFAIRS, LLC			
GWR. MEDICAL INC.	90000	0	0
HERBALIFE INTERNATIONAL OF AMERICA INC.	63000	0	0
HUDSON COMPANIES, INC. (THE)	66000	0	0
INVEST IN EDUCATION COALITION, INC.	140000	0	0
UBER TECHNOLGIES, INC.	70000	0	0

DISTRICT COUNCIL 37, AFSCME			
DISTRICT COUNCIL 37, AFSCME	111941	0	66929
DJM ADVISORY			
ERNST & YOUNG LLP	415	0	0
DOMINION RESOURCES (FKA WEEKLEY, DANIEL A.)			
DOMINION RESOURCES, INC.	4385	0	1267
DONG ENERGY WIND POWER U.S.			
DONG ENERGY WIND POWER U.S. INC	23933	103	103
DONOHUE, GAVIN J.			
INDEPENDENT POWER PRODUCERS OF NEW YORK, INC.	11708	0	48657
DRAFTKINGS INC.			
DRAFTKINGS INC.	14460	0	7000
DREXELIUS, JR., JOHN R.			
DEVELOPMENTAL DISABILITY ALLIANCE OF WESTERN NEW YORK	35002	7501	125
DRIESSEN, VAN E. (FKA HANNESSON, PAUL)			
CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR NY	17214	1312	21708
DRISCOLL GROUP, INC. (FKA DRISCOLL, WILLIAM)			
241-15 NORTHERN LLC	20000	0	0
BUSINESS OUTREACH CENTER NETWORK, INC.	37000	0	0
CHAMBER OF COMMERCE BOROUGH OF QUEENS	46500	0	0
CHILD CENTER OF NY, INC. (THE) (FKA THE CHILD CENTER OF NY)	48000	0	0
CRETANS ASSOCIATION OMONIA INC	27000	0	0
F. WILLIAM BROWN LLC	27000	0	0

FAMILIES FOR EXCELLENT SCHOOLS ADVOCACY, INC.	0	0	0
FAMILIES FOR EXCELLENT SCHOOLS, INC.			
FAMILIES FOR EXCELLENT SCHOOLS, INC.	0	0	2106807
FAMILIES TOGETHER IN NYS, INC.			
FAMILIES TOGETHER IN NYS, INC.	2660	0	0
FAMILY PLANNING ADVOCATES OF NYS			
FAMILY PLANNING ADVOCATES OF NEW YORK STATE	13209	24672	7986
FANDUEL INC.			
FANDUEL INC.	15940	0	7500
FANTASY SPORTS FOR ALL			
FANTASY SPORTS FOR ALL	0	0	322880
FARBER, FELICE			
GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC. (THE)	7102	0	103
FARERI ASSOCIATES, LP			
FARERI ASSOCIATES, LP	10000	0	0
FARLEY & KESSLER, P.C.			
AMUSEMENT & MUSIC OWNERS ASSOCIATION OF NY	7000	0	0
FARM BUREAU, INC. (NY)			
FARM BUREAU, INC. (NY)	132228	126	46382
FARMERS INSURANCE GROUP			
FARMERS INSURANCE GROUP	19800	1074	0
FARRELL, DANIEL (FKA BRIAND, ELIZABETH)			
AMERICAN RED CROSS IN GREATER NEW YORK	19998.	0	10674

UNIVERSITY SUPPORT SERVICES, LLC (TLM ASSOCIATES, LLC)	15000	0	0
JENKINS, JOANNE E.			
LIFE INSURANCE COMPANY (NEW YORK)	62953	0	2906
JENKINS, PATRICK B. & ASSOCIATES			
BSB SUPPORTIVE LLC	55000	0	637
BANK STREET COLLEGE OF EDUCATION	74000	0	637
BRIGHTSIDE ACADEMY, INC.	25000	0	0
CHARTER COMMUNICATIONS, INC.	5000	0	0
CVS HEALTH (FKA CVS PHARMACY, INC.)	79998	0	637
DELOITTE & TOUCHE LLP	37500	373	637
DJI TECHNOLOGY, INC.	93500	0	312
DRAFTKINGS INC. (FANTASY SPORTS TRADE ASSOCIATION)	16150	0	637
DRAFTKINGS, INC.	49600	0	0
EDUCATION REFORM NOW ADVOCACY	60000	0	637
ERNST & YOUNG LLP	37500	0	637
EXPEDIA, INC.	5000	0	0
FANDUEL INC.	49600	0	0
FANDUEL, INC. (FANTASY SPORTS TRADE ASSOCIATION)	16150	0	637
FIRST HARTFORD CORP.	70833	0	0
FUTURE LEADERS INSTITUTE CHARTER SCHOOL (THE)	30000	0	637
GENTING NEW YORK LLC	240000	0	637
HELEN KELLER INTERNATIONAL	10000	0	0
JOHN V. LINDSAY WILDCAT ACADEMY CHARTER HIGH SCHOOL	30000	0	637
KNIC LLC	64138	0	0
KPMG, LLP	37500	373	637
NETSPEND CORPORATION	45000	0	637

MILLS, LAWRENCETYNAN			
KINDER MORGAN INC (STATEWIDE PUBLIC AFFAIRS, INC.)	11655	0	0
MILROY, JAMES			
SUNY GENESEO	2512	0	632
MINKWON CENTER FOR COMMUNITY ACTION, INC.			
MINKWON CENTER FOR COMMUNITY ACTION, INC.	1682	0	0
MIRRAM GROUP, LLC (THE)			
1-10 BUSH TERMINAL OWNER LP (FKA 1-10 BUSH TERMINAL OWNER LP AND 19-20 BUSH TERMINAL OWNER LP)	50000	0	0
19-20 BUSH TERMINAL OWNER LP	54250	0	0
2520 JEROME LLC	80000	0	0
82ND STREETACADEMICS	15000	0	0
ACACIA NETWORK, INC.	130000	0	0
ACADIA SHERMAN AVENUE LLC	2500	0	0
AFRO-LATIN JAZZ ALLIANCE OF NY, INC. (THE)	0	0	0
ALLSTATE INSURANCECOMPANY	91818	0	0
AMERICAN CHEMISTRY COUNCIL, INC.	120000	0	0
ASDR REALTY CORP	25000	0	0
BIOTECHNOLOGY INNOVATION ORGANIZATION	94000	0	0
BLUE MARBLE PROJECT	31000	0	0
BROADWAY HOUSING COMMUNITIES	30000	0	0
BROADWAY LEAGUE INC. (THE)	0	0	0
CENTER FOR COURT INNOVATION (FUND FOR THE CITY OF NEW YORK)	36000	172	344
CHARTER COMMUNICATIONS OPERATING, LLC	60000	0	0
COCA-COLA COMPANY (THE)	120000	0	0
COMUNILIFE, INC.	70000	0	0
CSC HOLDINGS LLC	120000	0	0

DJ AMBULETTE SERVICE	3750	0	0
DRAFTKINGS INC.	15000	0	0
ENSEMBLE STUDIO THEATRE (THE)	18000	0	0
FANDUEL INC.	15000	0	0
FINANCIAL SERVICE CENTERS OF NEW YORK	120000	0	75075
GREATER NEW YORK HOSPITAL ASSOCIATION	250000	0	0
HAMILTON UPTOWN, LLC	10000	0	0
HISPANIC FEDERATION, INC.	33000	0	0
JEWISH THEOLOGICAL SEMINARY (THE)	15000	0	0
LIVERY BASE OWNERS, INC.	30000	0	0
LSNY BRONX CORP. DBA LEGAL SERVICES NYC- BRONX	6000	0	0
MOHSSACK GROUP INC.	22500	0	0
MID-BRONX HAULAGE CORP.	37500	0	0
MONTEFIORE HEALTH SYSTEM, INC.	60000	0	0
MSG SPORTS & ENTERTAINMENT, LLC	120000	0	0
NATIONAL MEDTRANS NETWORK & IPA	150000	0	0
NEW VISIONS FOR PUBLIC SCHOOLS, INC.	40000	0	0
PERSHING SQUARE CAPITAL (GLOBAL STRATEGY GROUP)	42473	0	0
PHARMACISTS SOCIETY OF THE STATE OF NEW YORK, INC.	100000	0	0
PROCIDA CONSTRUCTION CORP.	20000	0	0
SAMARITAN FOUNDATION, INC.	65000	0	0
SANITATION SALVAGE CORPORATION	37000	0	0
SUGAR HILL CHILDREN'S MUSEUM OF ART & STORYTELLING	5000	0	0
TAHL-PROPP MANHATTAN NORTH INVESTORS IV LLC (FKA TAHL PROPP EQUITIES)	84000	0	0
TRANSPORT WORKERS UNION, LOCAL 100	156000	0	0
TWC ADMINISTRATION LLC (FKA TIME WARNER CABLE)	30000	0	0

UNITED FOOD AND COMMERCIAL WORKERS (UFCW) LOCAL 2013	36500	0	0
URBAN HEALTH PLAN, INC.	30000	0	0
VERA INSTITUTE OF JUSTICE, INC.	35500	0	0
WESTCHESTER AMBULETTE SERVICE	3750	0	0
YESHIVA UNIVERSITY	60000	0	0
ZUFFA LLC	30000	0	0
MIRRER, LOUISE			
HISTORICAL SOCIETY (NY)	21246	0	0
MLV STRATEGIES, LLC			
FANDUEL INC.	35000	0	0
MONEY SERVICES ROUND TABLE (THE)			
MONEY SERVICES ROUND TABLE ("TMSRT") (THE)	3200	0	0
MONTEFIORE MEDICAL CENTER			
MONTEFIORE MEDICAL CENTER	2538	0	0
MONTGOMERY, MCCRACKEN, WALKER & RHOADS, LLP			
580 PARK AVENUE, INCORPORATED	5255	0	0
MOON CAPITAL MANAGEMENT LP			
MOON CAPITAL MANAGEMENT LP	60	0	0
MOONEY, WILLIAM			
WESTCHESTER COUNTY ASSOCIATION	1845	0	2705
MOORE CONSULTANCY CORP (FKA MOORE, MUSA)			
S&G REALTY 1 LLC	22500	0	0
MOORE, SEAN			
CONSUMER HEALTHCARE PRODUCTS ASSOCIATION	473	0	0

OREXO US, INC.			
OREXO US, INC.	3486	77	77
ORGANIZATION OF NURSE EXECUTIVES AND LEADERS (NEW YORK) (FKA MURRAY, CLAIRE)			
ORGANIZATION OF NURSE EXECUTIVES AND LEADERS, INC. (NY) (FKA ORGANIZATION OF NURSE EXECUTIVES,	2302	0	0
ORGANIZATION OF NYS MANAGEMENT /CONFIDENTIAL EMPLOYEES, INC.			
ORGANIZATION OF NYS MANAGEMENT/CONFIDENTIAL EMPLOYEES, INC.	884	0	0
ORRICK, HERRINGTON & SUTCLIFFE LLP			
DRAFTKINGS, INC.	32250	0	0
FANDUEL, INC.	32250	0	0
ORRICK, HERRINGTON & SUTCLIFFE LLP	1469	0	0
OSTROFF ASSOCIATES, INC. (FKA OSTROFF, KIFFA & ASSOCIATES, INC.)			
OTSUKA AMERICA PHARMACEUTICALS, INC. (FKA OTSUKA PHARMACEUTICAL DEVELOPMENT &	72000	0	470
215 CHRYSTIE LLC	20000	0	155
84 LUMBER COMPANY	60602	0	393
ACADIA REPUBLIC FARMINGDALE LLC	60000	0	470
ADMIT ONE	12000	0	470
AEON NEXUS CORPORATION	52069	0	470
AETNA, INC.	45000	0	393
ALBANY PORT DISTRICT COMMISSION	60000	0	470
ALLEY CAT ALLIES	42742	0	393
ALTRIA CLIENT SERVICES (ALCS) (MULTISTATE ASSOCIATES INC.)	48000	0	470
ALTRIA CLIENT SERVICES LLC AND ITS AFFILIATES (FKA ALTRIA CLIENT SERVICES, INC. AND ITS AFFILIATES)	155002	0	470
AMERICAN MUSICAL AND DRAMATIC ACADEMY	50000	0	399
AMERICAN TRAFFIC SOLUTIONS, INC.	90000	0	470

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PARKS & TRAILS NEW YORK			
PARKS & TRAILS NEW YORK	10845	0	1002
PARKSIDE GROUP, LLC (THE)			
ACADEMY OF TRIAL LAWYERS (NYS)	90000	0	0
ALLIANCE FOR CONEY ISLAND, INC.	5000	0	0
AMF BOWLING CENTERS, INC	2500	0	0
APICHA COMMUNITY HEALTH CENTER (FKA ASIAN & PACIFIC ISLANDER COALITION ON HIV / AIDS)	30000	0	0
ASIAN AMERICANS FOR EQUALITY INC.	48000	0	0
ASSOCIATION OF HOME INSPECTORS, INC. (NYS)	12000	0	0
ASSOCIATION OF REALTORS, INC. (NEW YORK STATE)	68750	0	0
AT&T SERVICES, INC.	51000	0	0
AUTOLOTTO, INC. (MULTISTATE ASSOCIATES, INC.)	4000	0	0
BROOKLYN CAPITAL PARTNERS LLC	26000	0	0
CAMBA, INC.	48000	0	0
CARES, INC. (NY)	0	0	0
CHINESE NAIL SALON ASSOCIATION OF EAST AMERICA, INC.	6000	0	0
CLEARVIEW FESTIVAL PRODUCTIONS, INC.	18750	0	0
CONNOISSEUR ENCOUNTERS COMPANY INC.	75000	0	0
CUNY CREATIVE ARTS TEAM (RESEARCH FOUNDATION OF THE CITY UNIVERSITY OF NEW YORK (THE))	49500	0	0
DISH NETWORK L.L.C.	51000	0	0
DRAFTKINGS INC.	58875	0	0
DRAFTKINGS INC. (FANTASY SPORTS TRADE ASSOCIATION)	17250	0	0
ENTERGY NUCLEAR OPERATIONS, INC.	78000	0	0
EQUINOX CAPITAL , INC.	60000	0	0
FANDUEL INC (FANTASY SPORTS TRADE ASSOCIATION)	17250	0	0
FANDUEL INC.	58875	0	0

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PERSONS, ERIC (FKA QUINN, KEVIN)			
SYRACUSE UNIVERSITY	61702	0	6507
PETROCCIONE LAW FIRM, LLC (THE)			
EMPIRE STATE ENERGY ASSOCIATION, INC. (FKA EMPIRE STATE PETROLEUM ASSOCIATION, INC.)	30000	0	660
SMALL CUSTOMER MARKETER COALITION	40000	2670	130
PFM ASSET MANAGEMENT LLC			
PFM ASSET MANAGEMENT LLC	0	0	0
PFUNDSTEIN, GREGORY			
CHIAROSCURO GROUP	0	0	0
PGIM, INC. (FKA PRUDENTIAL INVESTMENT MANAGEMENT, INC.)			
PGIM, INC. (FKA PRUDENTIAL INVESTMENT MANAGEMENT, INC.)	0	0	0
PHILLIPS LYTLE			
MOBILITIE LLC	16161	376	377
PHIPPS HOUSES			
PHIPPS NEIGHBORHOODS, INC. (PHIPPS HOUSES)	14432	25	75
PHYSICAL THERAPY ASSOCIATION (NY)			
PHYSICAL THERAPY ASSOCIATION (NY)	0	0	4742
PILLORS CONSULTING LLC			
GLENWOOD MANAGEMENT CORP. (PITTA BISHOP DEL GIORNO & GIBLIN LLC)	3750	0	0
HUMAN FIRST, INC. (PITTA BISHOP DEL GIORNO & GIBLIN LLC)	0	3	0
PITTA BISHOP DEL GIORNO & GIBLIN LLC			
20/20 INSPECTIONS INC.	15000	0	1176
2777 FLATBUSH HOLDING CORP.	25000	0	785
298 EAST VILLAGE OWNER LLC	12500	0	491

570 EAST 105TH STREET REALTY LLC	1335	0	1764
A.T.U. DIVISION 1181-1601 AFL-CIO (FKA ATU LOCAL 1181)	36000	0	1764
ADCO ELECTRICAL CORPORATION	72000	0	1764
AECOM INC.	120000	0	1764
AHRC NEW YORK CITY (FKA NYSARC, INC-NEW YORK CITY CHAPTER)	55000	0	1764
ALM MEDIA, LLC	72000	0	1764
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS	72000	0	1764
ANGIULI MOTORS INC.	14000	0	368
ANTHEM, INC. AND ITS AFFILIATES	60000	0	1764
APPROVED OIL CO. OF BROOKLYN, INC.	32000	0	294
ARAB-AMERICAN FAMILY SUPPORT CENTER	54000	0	1764
ASSOCIATED BRICK MASON CONTRACTORS OF GREATER NEW YORK, INC.	39000	0	1764
BAY RIDGE AUTOMOTIVE COMPANY LLC (D/B/A BAY RIDGE FORD	60000	0	1764
BEDFORD-CARP CONSTRUCTION INC.	26000	0	1764
BIO-REFERENCE LABORATORIES, INC.	60000	0	1764
BJ'S WHOLESALE CLUB	24361	994	1764
BLACK CAR OPERATOR'S INJURY COMPENSATION FUND, INC. (NEW YORK)	200000	0	1764
BLUE STAR GROUP LLC	60000	0	1764
BOBBIQUE LLC	4755	0	1764
BROOKLYN LEGAL SERVICES CORPORATION A	60000	0	1764
BUILDING INDUSTRY ASSOCIATION OF NEW YORK CITY, INC.	27000	0	1470
CAMERON CLUB OF STATEN ISLAND, INC.	0	7	1764
CARE FOR THE HOMELESS	36000	0	1764
CARP CONSTRUCTION CORP.	3000	0	588
CENTER FOR FAMILY REPRESENTATION, INC.	72000	0	1764
CHARTER COMMUNICATIONS, INC. (TWC ADMINISTRATION LLC)	60000	0	882

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COALITION OF OPERATING ENGINEERS, INC. (NEW YORK CITY)	120000	0	1764
COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1182	42000	0	1764
COMMUNITY HEALTH CENTER OF RICHMOND INC.	54000	0	1764
CORRECTION OFFICERS' BENEVOLENT ASSOCIATION, INC.	90000	0	1764
COUNCIL OF SCHOOL SUPERVISORS & ADMINISTRATORS	72000	0	1764
COURT CLERKS ASSOCIATION (NYS)	30000	0	1764
DETECTIVES ENDOWMENT ASSOCIATION, INC. (FKA DETECTIVES ENDOWMENT ASSOCIATION POLICE DEPARTMENT CITY	72000	1194	1764
DISTRICT COUNCIL 4, INTERNATIONAL UNION OF PAINTERS & ALLIED TRADES, AFL-CIO	24000	0	1764
DISTRICT COUNCIL NO. 9 INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES	90000	0	1764
EDEN II SCHOOL FOR AUTISTIC CHILDREN, INC.	21000	0	1178
EGER LUTHERAN HOMES AND SERVICES INC	13129	1	1764
GLENWOOD MANAGEMENT CORP.	150000	0	1764
GRASMERE AND CAMERON LAKES BLUEBELT CONSERVANCY, INC.	0	0	1764
GREENBURGER CENTER FOR SOCIAL AND CRIMINAL JUSTICE, INC.	72000	0	1764
HISTORIC OLD BERMUDA INN, INC. (THE)	6105	0	1470
HOTEL AND MOTEL TRADES COUNCIL, AFL-CIO (NEW YORK)	60000	1346	1764
HOTEL TRADES COUNCIL (NY) & HOTEL ASSOC. OF NYC, HEALTH BENEFITS FUND	82500	0	1764
HUMAN FIRST, INC.	21000	0	1079
INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNION NO. 138, 138A, 138B & 138C	0	0	785
JOSEPH CAMPAGNA & SONS, INC.	18500	0	491
JR CRUZ CORP.	45000	0	1470
KNICKERBOCKER PLAZA ASSSOCIATES	54000	0	1764
LAKESIDE MANOR HOME FOR ADULTS, INC.	6975	0	1764
LOCAL 101, TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO	12710	0	1764
LOCAL 14-14B, INTERNATIONAL UNION OF OPERATING ENGINEERS	84000	0	1764
LOCAL 420, NEW YORK CITY HEALTH CARE WORKERS	66000	0	1764
LOCAL 6, HOTEL, RESTAURANT & CLUB EMPLOYEES & BARTENDERS EMPLOYEES UNION, AFL-CIO	60000	1117	1764

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LOCAL UNION NO. 3 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS NEW YORK	3500	0	785
LOCAL UNION NO. 94-94A-94B, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO	42000	0	1764
MAGNACARE ADMINISTRATIVE SERVICES, LLC	60000	0	1764
MBX ACQUISITION HOLDINGS, LLC	30000	0	588
MEDREVIEW INC.	60000	0	1764
METROPOLITAN TRUCKER'S ASSOCIATION	60000	0	1764
MILROSE CONSULTANTS, INC.	3348	0	1764
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF PSYCHOANALYSIS, INC.	28200	0	1764
NOSTALGIC PARTNERS LLC D/B/A STATEN ISLAND YANKEES	1800	0	1764
OFFICE OF PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 153, & OFFICE OF PROFESSIONAL EMPLOYEES	36000	1424	1764
PARKCHESTER SOUTH CONDOMINIUM, INC.	75000	0	1764
PLUMBERS AND GASFITTERS LOCAL UNION NO. 1	48000	0	1764
PUBLIC HEALTH SOLUTIONS	49000	0	1764
RED APPLE GROUP INC.	2465	0	1470
RICHMOND UNIVERSITY MEDICAL CENTER	102000	0	1764
SANDY HOOK PILOTS ASSOCIATION (NY/NJ)	86000	3973	2214
SAVO PLAZA LLC	6225	0	882
SHARE: SELF-HELP FOR WOMEN WITH BREAST OR OVARIAN CANCER INC.	48000	0	1764
SIMON WIESENTHAL CENTER, INC.	48000	0	1764
SLATE PROPERTY GROUP LLC	12713	0	1764
SMALL BUSINESSES OF FANTASY SPORTS INC.	10000	0	1470
SNUG HARBOR CULTURAL CENTER & BOTANICAL GARDEN	42000	0	1764
SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371 AFSCME, AFL-CIO	0	0	1764
SPRING STUDIOS NEW YORK, LLC	40000	0	1764
TEAMSTERS LOCAL 237	54000	0	1764
TIME EQUITIES, INC.	14800	0	588

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VIEW, INC.	50000	0	0
WASHINGTON COMPUTERS SERVICES INC.	40000	0	0
RHONE, ADRIENNE			
INTERNATIONAL BUSINESS MACHINES CORPORATION	1175	0	362
RICHARDSON MANAGEMENT			
FREY ELECTRIC	30000	0	486
GENESEE COUNTY ECONOMIC DEVELOPMENT CENTER (PARK STRATEGIES, LLC)	25500	0	486
GREYHOUND LINES, INC. (FKA GREYHOUND CARRIERS)	32000	0	418
MODERN CORPORATION	30000	0	487
NIAGARA COUNTY COMMUNITY COLLEGE (PARK STRATEGIES, LLC)	30000	0	487
O'BRIEN AND GERE	22500	0	452
PERSONAL CARE PRODUCTS COUNCIL	21000	0	105
STERLING ENERGY	0	0	35
TOSKI & CO.	24000	0	487
WESTERN REGIONAL OFF-TRACK BETTING CORPORATION	9000	0	105
RIDDELL GROUP, LLC (THE)			
ASSOCIATION OF SURROGATE'S & SUPREME COURT REPORTERS WITHIN THE CITY OF NEW YORK	40000	0	1471
BUILDING AND REALTY INSTITUTE OF WESTCHESTER AND THE MID-HUDSON REGION (THE)	52000	0	1910
IRON WORKERS DISTRICT COUNCIL (NYS)	30000	0	1103
MASTERCARD INTERNATIONAL INCORPORATED	75000	0	2755
OCCUPATIONAL THERAPY ASSOCIATION (NYS)	10000	0	595
PFIZER, INC. (ELK STREET GROUP, LLC)	36000	0	1323
TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NY (FKA TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY	60000	0	2205
RIDDETT ASSOCIATES, INC.			
ASSOCIATION OF ELECTRICAL CONTRACTORS, INC. (NYS)	24000	0	0

DRAFTKINGS INC.	49308	0	0
DRAFTKINGS INC. (FANTASY SPORTS TRADE ASSOCIATION)	16150	0	0
FANDUEL INC.	49308	0	0
FANDUEL, INC. (FANTASY SPORTS TRADE ASSOCIATION)	16150	0	0
NECA OF NEW YORK STATE COUNCIL	24000	0	0
TRIAL LAWYERS ASSOCIATION (NYS)	467502	3771	3771
WENDY WHITE JUSTICE FUND	60000	0	0
RIDDLE, GARY			
HEALTHCARE DISTRIBUTION ALLIANCE (FKA HEALTHCARE DISTRIBUTION MANAGEMENT ASSOCIATION)	3370	710	97
RIGHT TO LIFE COMMITTEE, INC. (NYS)			
RIGHT TO LIFE COMMITTEE, INC. (NYS)	0	0	92
RIVERKEEPER, INC.			
RIVERKEEPER, INC.	20095	0	5386
ROARKE, ROBERT R.			
WILSON, ELSER, MOSKOWITZ, EDELMAN AND DICKER, LLP	0	0	0
ROBINSON & COLE LLP			
AMERICAN FEDERATION OF TEACHERS (STROOCK & STROOCK & LAVAN LLP)	45000	0	99
CSC HOLDINGS, LLC	70000	0	137
DATTO INC.	216	0	84
EXELON GENERATION COMPANY, LLC (FKA CONSTELLATION ENERGY GROUP)	80304	0	221
FILM ACADEMY LTD. (NEW YORK) (FKA FILM ACADEMY (NY))	11722	0	221
PROMONTORY FINANCIAL GROUP, LLC	80000	0	137
UNITED FEDERATION OF TEACHERS (STROOCK & STROOCK & LAVAN LLP)	90000	0	221
UNITED TECHNOLOGIES CORPORATION	48000	0	221
ROCHESTER INSTITUTE OF TECHNOLOGY (FKA STENDARDI, DEBORAH M.)			

SOLARCITY			
SOLARCITY	70892	0	0
SOTO, THOMAS			
TCW U.S. LLC	197	403	0
SOUTHERN TIER INDEPENDENCE CENTER			
SOUTHERN TIER INDEPENDENCE CENTER	8253	0	0
SPEAK UP FOR A BETTER BRONX, INC.			
SPEAK UP FOR A BETTER BRONX, INC.	5500	0	64655
SPORTS LEGENDS GROUP, LLC			
FANTASY SPORTS FOR ALL	100000	0	0
ST. LUKE'S CORNWALL HOSPITAL			
ST. LUKE'S CORNWALL HOSPITAL	14782	733	676
STARWOOD CAPITAL, L.L.C.			
STARWOOD CAPITAL, L.L.C.	0	0	0
STATE & BROADWAY, INC.			
ALM MEDIA, LLC	48000	0	0
ASSOCIATION OF COMMUTER RAIL EMPLOYEES	42000	0	0
AVANT GARDNER LLC	60000	0	0
BROADWAY STAGES, LTD	60000	0	0
CARMEL CAR AND LIMOUSINE SERVICE	48000	0	0
CHARTER COMMUNICATIONS, INC. (TWC ADMINISTRATION LLC)	30000	0	0
CHIROPRACTIC COUNCIL (NEW YORK)	36500	0	0
CITY OF NEW ROCHELLE	72000	0	0

COUNCIL FOR UNITY, INC.	0	0	0
DIAL 7 CAR & LIMOUSINE SERVICE, INC.	28000	0	0
DIRECTORS GUILD OF AMERICA, INC.	41250	0	0
DRAFTKINGS INC.	9500	0	0
ELECTRICAL CONTRACTORS ASSOCIATION (NEW YORK)	60000	0	0
EXPERIENCE HENDRIX, LLC	32000	0	0
FANDUEL INC.	9500	0	0
FINANCIAL SERVICES INSTITUTE, INC.	64000	0	0
FRACTURED ATLAS (FKA FRACTURED ATLAS PRODUCTIONS INC.)	12000	0	0
IATSE LOCAL 52	53500	0	0
KARHOO USA INC.	18000	0	0
KINGSWAY REALTY LLC	7000	0	0
LIVERY ROUND TABLE, INC.	0	0	0
LOCAL 372, NEW YORK CITY BOARD OF EDUCATION EMPLOYEES - DISTRICT COUNCIL 37 AFSCME AFL-CIO	78000	0	0
MOTION PICTURE EDITORS GUILD - IATSE LOCAL 700 (THE)	42000	0	0
NY IS MUSIC, LLC	0	0	0
POSIGEN NEW YORK, LLC	24000	0	0
POST NEW YORK ALLIANCE	48000	0	0
REYNARD PRODUCTIONS, LLC	13000	0	0
SAVE LIVES NOW NEW YORK FOUNDATION	0	0	0
SCREEN ACTORS GUILD - AMERICAN FEDERATION OF TELEVISION AND RADIO ARTIST	59300	0	0
SUBCONTRACTORS TRADE ASSOCIATION	36000	0	0
THEATRICAL TEAMSTERS LOCAL 817	46500	0	0
URBAN LEAGUE (NEW YORK)	0	0	0
VILLAGECARE	63000	0	0
WATERMARK CAPITAL GROUP	48000	0	0

TULLY CONSTRUCTION			
TULLY CONSTRUCTION	6875	0	0
TURNER, FRANCINE			
CIVIL SERVICE EMPLOYEES POLITICAL ACTION FUND	273071	0	1381
TUSK STRATEGIES, INC.			
AMTRUST FINANCIAL SERVICES, INC.	5000	0	0
BIOHITECH GLOBAL, INC	2000	0	0
FANDUEL INC.	4135	0	0
HANDY TECHNOLOGIES, INC.	1000	0	0
NATIONAL GENERAL HOLDINGS CORP.	5000	0	0
PATROLMEN'S BENEVOLENT ASSOCIATION (NYC)	94000	0	0
TESLA MOTORS	6000	0	0
TIMES SQUAREALLIANCE	45000	0	0
TUSK VENTURES LLC	18500	0	0
UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA	8000	0	0
TWC ADMINISTRATION LLC (FKA TIME WARNER CABLE, TIME WARNER ENTERTAINMENT COMPANY, L.P.)			
CHARTER COMMUNICATIONS, INC. (TWC ADMINISTRATION LLC)	857	0	1922
TYSON, LISA			
LONG ISLAND PROGRESSIVE COALITION	40	50	0
U.S. GREEN BUILDING COUNCIL, NEW YORK CHAPTER			
U.S. GREEN BUILDING COUNCIL, NEW YORK CHAPTER	3996	0	50
UBER TECHNOLOGIES, INC.			
UBER TECHNOLOGIES, INC.	82270	18	1491833
UCB, INC.			

NEW YORK STATE

JOINT COMMISSION ON PUBLIC ETHICS

2017 ANNUAL REPORT

JCOPE.NY.GOV

APPENDIX B

2017 | Listing of Lobbyists and Public Corporations

Based upon reports received as of March 19, 2018

2017 LIST OF LOBBYISTS AND THEIR
COMPENSATION, REIMBURSED EXPENSES AND TOTAL EXPENSES BY CLIENT

	Compensation	Reimbursed Expenses	Expenses
1199 SEIU UNITED HEALTHCARE WORKERS EAST			
1199 SEIU UNITED HEALTHCARE WORKERS EAST	18000	0	0
50CAN, INC. (FKA NYCAN (50CAN): NEW YORK CAMPAIGN FOR ACHIEVEMENT NOW)			
50CAN, INC. (FKA NYCAN (50CAN): NEW YORK CAMPAIGN FOR ACHIEVEMENT NOW)	0	0	0
99 SOLUTIONS LLC.			
1-10 BUSH TERMINAL OWNER, LP	25500	0	0
19-20 BUSH TERMINAL OWNER, LP	25500	0	0
80 FLATBUSH AVENUE, LLC	48000	0	0
BRP CATON FLATS LLC	60000	0	0
CORNELL REALTY MANAGEMENT LLC	70000	0	0
CSC HOLDINGS, LLC	45000	0	0
GEMINI ARTS INITIATIVE, INC.	72000	0	0
LENOX TERRACE DEVELOPMENT ASSOCIATES	144000	0	0
MSG SPORTS & ENTERTAINMENT, LLC	30000	0	0
REAL ESTATE BOARD OF NEW YORK, INC.	96000	7834	7834
TISHMAN SPEYER PROPERTIES, L.P.	60000	0	0
AAA NEW YORK STATE, INC. (FKA CORLETT, JOHN, A)			
AAA NEW YORK STATE, INC.	0	0	13409
AAA NORTHEAST	1073	0	752

CONSUMER DIRECTED PERSONAL ASSISTANCE ASSOCIATION OF NYS (FKA MARCOU-O'MALLEY, BRYAN)			
CONSUMER DIRECTED PERSONAL ASSISTANCE ASSOCIATION OF NYS (CDPAANYS)	14250	0	7840
CONSUMER REPORTS, INC. (FKA CONSUMERS UNION OF US, INC.)			
CONSUMER REPORTS, INC.	7518	1092	1092
CONTINUING CARE LEADERSHIP COALITION			
CONTINUING CARE LEADERSHIP COALITION (CCLC)	52253	0	9317
COOPER SQUARE COMMUNITY DEVELOPMENT COMMITTEE			
COOPER SQUARE COMMUNITY DEVELOPMENT COMMITTEE	843	0	0
COOPER, RESI			
1199 SEIU GREATER NY WORKER PARTICIPATION FUND	75000	0	0
ONEXIM SPORTS AND ENTERTAINMENT HOLDINGS USA, INC. (RED LAND STRATEGY, INC. D/B/A REDLAND STRATEGIES)	30000	0	0
COPPOLA, JOHN			
ASSOCIATION OF ALCOHOLISM AND SUBSTANCE ABUSE PROVIDERS INC. (NEW YORK)	5000	0	0
CORDO & COMPANY, LLC			
1199 SEIU LABOR MANAGEMENT INITIATIVES, INC., HEALTHCARE EDUCATION PROJECT	180000	0	0
1199 SEIU UNITED HEALTHCARE WORKERS EAST	120000	0	0
ACUPATH LABORATORIES, INC.	20000	0	0
ADVOCATE COMMUNITY PROVIDERS, LLC (FKA COMMUNITY PREFERRED PROVIDERS, LLC (NEW YORK))	180000	0	0
ALLERGAN USA, INC.	45000	0	0
BEER WHOLESALERS ASSOCIATION, INC. (NYS)	66666	0	0

BOOM SHAKALAKA, INC. (D/B/A BOOM FANTASY)	24000	0	0
CIGAR ASSOCIATION OF AMERICA, INC.	55000	0	0
CONSORTIUM FOR WORKER EDUCATION	75000	0	0
CVS PHARMACY, INC.	220000	0	0
DISH NETWORK, L.L.C.	72000	0	0
DISTRICT COUNCIL OF CARPENTERS, PAC (NYC)	120000	0	0
DRAFTKINGS, INC.	72000	0	0
EDUCATORS FOR EXCELLENCE, INC.	96000	0	0
EMUSC, LLC	72000	0	0
EXPEDIA, INC.	75000	0	0
FANDUEL, INC.	72000	0	0
FELD ENTERTAINMENT, INC.	24000	0	0
GENTING NEW YORK LLC	300000	0	0
H.Q. ENERGY SERVICES (U.S.) INC.	84000	0	0
HEALTHPLUS HP, LLC (FKA AMERIGROUP NEW YORK, LLC DBA HEALTH PLUS AMERIGROUP) (ANTHEM, INC., AND ITS AFFILIATES DBA EMPIRE BLUECROSS BLUESHIELD HEALTHPLUS (FKA AMERIGROUP NEW YORK)	50000	0	0
HOTEL AND MOTEL TRADES COUNCIL (NEW YORK)	72000	0	0
HUDSON RIVER HEALTHCARE	105000	0	0
INNOVATIVE LENDING PLATFORM ASSOCIATION	46500	0	0
NG ADVANTAGE	8000	0	0
PALLIATECH, INC.	72000	0	0
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA (PCI)	167496	0	0
SOMOS YOUR HEALTH IPA, INC.	90000	0	0

JENKINS, PATRICK B. & ASSOCIATES			
AMAYA SERVICES LIMITED	142500	0	0
ASTORIA GENERATING COMPANY, L.P.	30000	0	0
AUTOMOBILE LEASING ASSOCIATION (NEW YORK) (DBA NYALBA)	30000	0	0
B&B SUPPORTIVE LLC	60000	0	0
BANK STREET COLLEGE OF EDUCATION	60000	0	0
BERGER, MAX	5000	0	0
CHARTER COMMUNICATIONS, INC.	85000	0	0
CVS HEALTH	79998	0	0
DELOITTE & TOUCHE LLP	37500	0	0
DJI TECHNOLOGY, INC.	85000	0	0
DRAFTKINGS, INC.	72000	0	0
DYNEGY, INC.	30000	0	0
EDUCATION REFORM NOW ADVOCACY	60000	0	0
ERNST & YOUNG LLP	37500	0	0
EXPEDIA, INC.	35000	0	0
FANDUEL INC.	72000	0	0
FIRST HARTFORD CORP.	99998	0	0
FUTURE LEADERS INSTITUTE CHARTER SCHOOL (THE)	40000	0	0
GENTING NEW YORK LLC	240000	0	0
HANDY TECHNOLOGIES, INC.	25000	0	0
HELEN KELLER INTERNATIONAL	60000	0	0
HNTB CORPORATION	48333	0	0

1295

TRIAD GROUP LLC	38000	0	3207
UNITED WAY OF NEW YORK CITY	60000	0	3207
UNIVERSAL MANAGEMENT TECHNOLOGY SOLUTIONS, INC.	60000	0	3207
UNIVERSITY PHYSICIANS OF BROOKLYN, INC.	45000	0	1602
UPPER MOHAWK VALLEY AUDITORIUM AUTHORITY	60000	0	3207
VERIZON	60000	0	3207
VOCASIO VENTURES, LLC	27500	0	2133
WALT DISNEY COMPANY (THE)	60000	0	3207
WE R HERE COALITION	7500	0	529
WESTERN NEW YORK ENERGY, LLC	24000	0	3187
WESTERN REGIONAL OFF-TRACK BETTING CORPORATION	35000	0	2140
WILLIAMSBURG INFANT & EARLY CHILDHOOD DEVELOPMENT CENTER, INC.	40000	0	2140
WINDSOR UNIVERSITY SCHOOL OF MEDICINE	60000	0	2140
WINTERS BROS. WASTE SYSTEMS OF LONG ISLAND, LLC	80000	0	3207
PARKHILL PLANNING + DEVELOPMENT, LLC			
BOGART PLAZA LLC	30000	0	0
PARKS & TRAILS NEW YORK			
PARKS & TRAILS NEW YORK	10637	0	291
PARKSIDE GROUP, LLC (THE)			
ACADEMY OF TRIAL LAWYERS (NYS)	90000	0	0
ALLIANCE FOR CONEY ISLAND, INC.	60000	0	33070
AMC ENTERTAINMENT HOLDINGS, INC.	10000	0	0

APICHA COMMUNITY HEALTH CENTER (FKA ASIAN & PACIFIC ISLANDER COALITION ON HIV / AIDS)	30000	0	0
ASIAN AMERICANS FOR EQUALITY INC.	48000	0	0
ASSOCIATION OF HOME INSPECTORS, INC. (NYS)	12000	0	0
ASSOCIATION OF REALTORS, INC. (NEW YORK STATE)	75000	0	773
AUTOLOTTO, INC. DBA LOTTERY.COM (MULTISTATE ASSOCIATES, INC.)	48000	0	0
BOOM SHAKALAKA, INC. (D/B/A BOOM FANTASY)	16000	0	0
BROOKLYN CAPITAL PARTNERS LLC	0	0	0
CAMBA, INC.	48000	0	0
CARES, INC. (NY)	0	0	0
CLEARVIEW FESTIVAL PRODUCTIONS, INC.	12500	0	0
CONNOISSEUR ENCOUNTERS COMPANY INC.	45000	0	0
DISH NETWORK L.L.C.	51000	0	0
DRAFTKINGS, INC.	85500	0	5799
ENTERGY NUCLEAR OPERATIONS, INC.	78000	0	0
EQUINOX CAPITAL, INC.	60000	0	0
FANDUEL, INC.	85500	0	5799
FRESH DIRECT, LLC.	78000	0	0
G4S NORTH AMERICA (MULTISTATE ASSOCISTES INC.)	0	0	0
GREEN CHARGE NETWORKS, LLC (NATIONAL STRATEGIES, LLC)	20000	0	0
GROUPON, INC. (FKA GROUPON)	90000	0	0
HANAC, INC.	43500	0	0
HEALTH MANAGEMENT SYSTEMS, INC.	78000	0	0

WHEATFIELD GARDENS	20000	0	0
RIDDELL GROUP, LLC (THE)			
ASSOCIATION OF SURROGATE'S & SUPREME COURT REPORTERS WITHIN THE CITY OF NEW YORK	40000	0	1419
BUILDING AND REALTY INSTITUTE OF WESTCHESTER AND THE MID-HUDSON REGION (THE)	52000	0	1845
IRONWORKERS DISTRICT COUNCIL (NYS)	30000	0	1064
MASTERCARD INTERNATIONAL INCORPORATED	75000	0	2662
OCCUPATIONAL THERAPY ASSOCIATION (NYS)	15000	0	913
PFIZER, INC. (ELK STREET GROUP, LLC)	36000	0	1278
TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK (THE)	60000	0	2129
RIDDETT ASSOCIATES, INC.			
ASSOCIATION OF ELECTRICAL CONTRACTORS, INC. (NYS)	24000	0	0
DRAFTKINGS, INC.	72000	0	0
EDGEMONT INCORPORATED COMMITTEE	5000	0	0
FANDUEL INC.	72000	0	0
NECA NEW YORK STATE COUNCIL	24000	0	0
TRIAL LAWYERS ASSOCIATION (NYS)	467499	4526	4526
WENDY WHITE JUSTICE FUND	20000	0	0
RIGHT TO LIFE COMMITTEE, INC. (NYS)			
RIGHT TO LIFE COMMITTEE, INC. (NYS)	0	0	0
RIVERA LAW, PLLC (FKA RIVERA CAREY, PLLC)			
ALBANY LAW SCHOOL OF UNION UNIVERSITY	0	0	747

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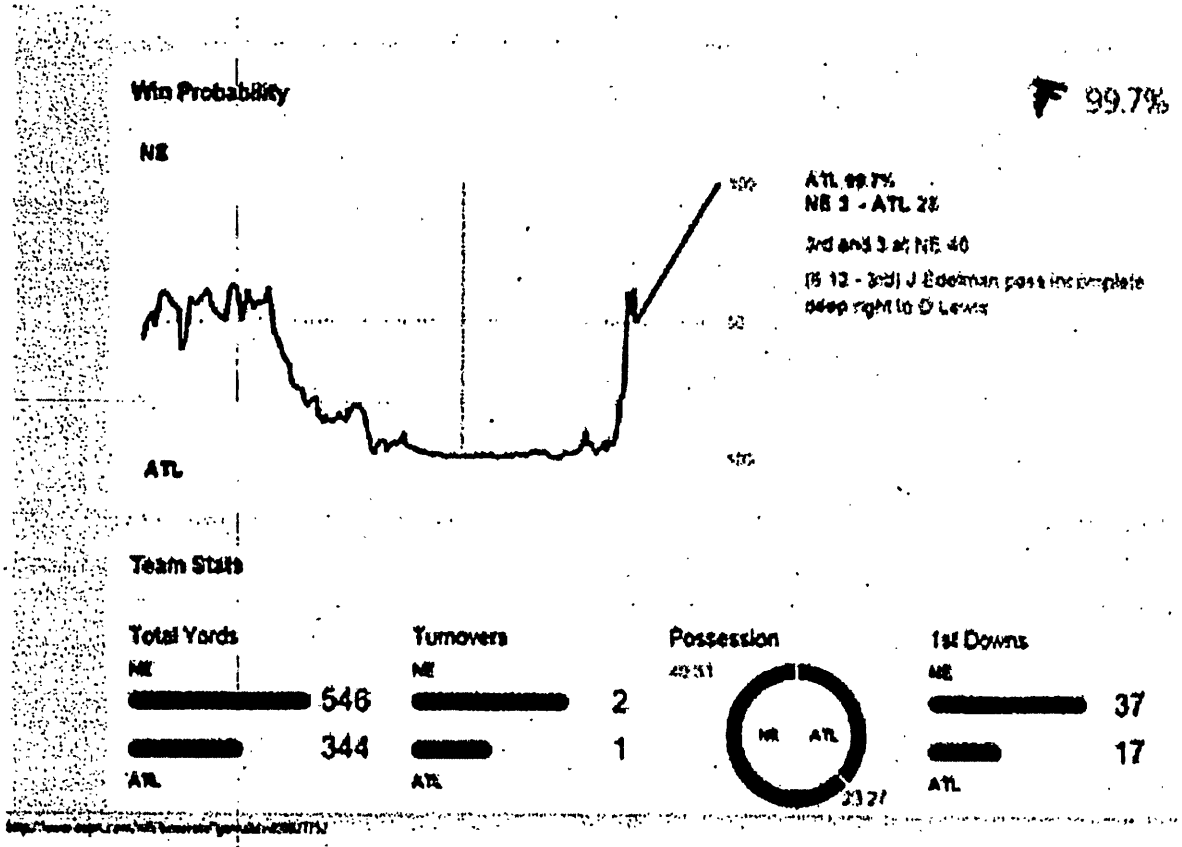
EXHIBIT "B"

Analysis of the odds affecting the outcome of the 2017 Super Bowl LI at a point in time when the Atlanta Falcons led the New England Patriots by a score of 28-3.

Screenshot:

Gamecast: Super Bowl LI, ESPN



Taken April 26, 2018 from:

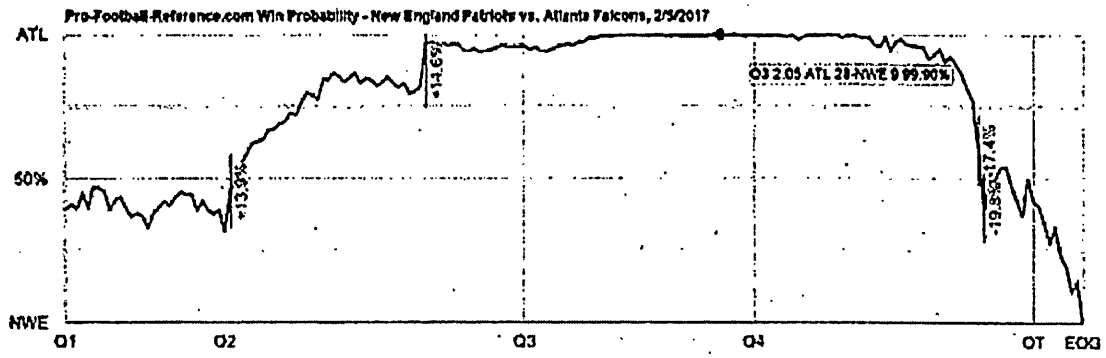
http://www.espn.com/nfl/game?gameId=400927752

Screenshot:

Super Bowl LI - New England Patriots vs. Atlanta Falcons - February 5th, 2017, Pro Football Reference

NFL Scores & Boxes | 2016 NFL Scores & Schedule | Atlanta Falcons Schedule | New England Patriots Schedule | Back to top ▲

Win Probability



Embed this graph...

The win probability graph is intended to be a measure of a team's chance of winning the game after every play of the game, based on the line, current score, and current field position. For a detailed explanation, see Neil's writeup on the Win Probability Model

Taken April 26, 2018 from:

https://www.pro-football-reference.com/boxscores/201702050atl.htm

EXHIBIT "C"

Copy of New York Senate Bill S.3898-A, sponsored by John Bonacic, Chair of the Racing, Gaming and Wagering Committee for the Legislative Session 2017-2018.

Senate Bill S3898A

2017-2018 Legislative Session

Relates to allowing certain interactive poker games

DOWNLOAD BILL TEXT PDF (HTTP://LEGISLATION.NYSENATE.GOV/PDF/BILLS/2017/S3898A)

SHARE THIS BILL

SPONSORED BY

John J. Bonacic (/Senators/John-J-Bonacic)
(R, C, IP) 42ND SENATE DISTRICT

CURRENT BILL STATUS -
In Senate Finance Committee (/Committees/Finance)

DO YOU SUPPORT THIS LEGISLATION?

✓ AYE ✗ NAY

ACTIONS

VIEW ACTIONS (13)

VOTES

VIEW VOTES

BILL AMENDMENTS

A (ACTIVE)

CO-SPONSORS

Tony Avella (/Senators/Tony-Avella)
(D) 11TH SENATE DISTRICT

S3898A (ACTIVE) - DETAILS

Law Section:

Racing, Pari-Mutuel Wagering and Breeding Law

Laws Affected:

Add Art 15 §§1500 - 1506, RWB L; amd §225.00, add §225.36, Pen L

Versions Introduced in Previous Legislative Sessions:
2015-2016: S5302D (/Legislation/Bills/2015/S5302)
2013-2014: S6913A (/Legislation/Bills/2013/S6913/Amendment/A)

S3898A (ACTIVE) - SUMMARY

Allows certain interactive poker games be considered games of skill rather than games of luck; includes definitions, authorization, required safeguards and minimum standards, the scope of licensing review and state tax implications; makes corresponding penal law amendments.

S3898A (ACTIVE) - SPONSOR MEMO

BILL NUMBER: S3898A

TITLE OF BILL : An act to amend the racing, pari-mutuel wagering and breeding law and the penal law, in relation to allowing certain interactive poker games

PURPOSE :

To authorize the New York State Gaming Commission to license certain entities to offer for play to the public certain variants of internet poker which require a significant degree of skill, specifically "Omaha Hold'em" and "Texas Hold'em."

SUMMARY OF PROVISIONS :

Section 1: Amends the Racing, Pari-Mutuel Wagering and Breeding Law to create a new Article 15 which authorizes the New York State Gaming Commission to license certain entities to offer online poker as provided below:

Section 1500. Legislative findings and purpose. Provides for legislative findings.

Section 1501. Definitions. Provides definitions.

Section 1502. Authorization. Authorizes the New York State Gaming

Commission promulgate regulations in order to implement interactive gaming and to offer up to 11 licenses to operate interactive gaming. Licensees shall be required to be licensed by the state to offer either video lottery gaming pursuant to Section 1617-a of the Tax Law or operate a Class III gaming facility pursuant to Article 13 of the Pari-Mutuel Wagering and Breeding Law. Each license fee shall be in the amount of $10,000,000 and the license shall be in effect for 10 years. This license fee shall be applied as an offset against the taxes paid over the first sixty months of operation.

Section 1503. Required Safeguards/minimum standards. Provides that the New York State Gaming Commission shall require licensees to implement certain standards to protect the public against underage gaming, fraud and compulsive gambling.

Section 1504. Scope of licensing review. Provides that the New York State Gaming Commission shall thoroughly review the background of any applicant seeking a license to provide interactive gaming to the public.

Section 1505. State tax. This section provides that internet poker licensees shall pay a tax of 15% of their interactive gaming gross revenue to the state.

Section 1506. Disposition of taxes. This section provides that all tax revenue received by the state shall be paid into the state lottery fund for education.

Section 2: Amends Penal Law section 225.00(1) as to the definition of a contest of chance.

Section 3: Amends the Penal Law by adding a new section 225.36 known as the Interactive gaming offenses and exceptions.

Section 4: Effective date.

EXISTING LAW :

Under New York penal law a person engages in gambling when he or she stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his or her control or influence, upon an agreement or understanding that he or she will receive something of value in the event of a certain outcome. Games of skill are not considered games of chance under the current penal law definitions.

JUSTIFICATION :

Presently, numerous New York residents are participating in illegal, unregulated and unsafe gaming operations which offer games of chance over the Internet. This bill will allow the state to license operators that meet the high standards set by the state and offer limited games of poker which require a high level of skill. This bill will require such operators to take steps to protect consumers, combat compulsive gaming, and prevent minors from accessing online gaming sites. In addition, this legislation would create additional revenue for the State of New York by clearly defining certain variants of poker, "Omaha Hold'em" and Texas "Hold'em," as games of skill and thus allowing licensed interactive gaming operators to offer these games to the public. Thus, not only this will help New York regulate an industry that is present operating without oversight in New York State, but also generate additional revenue from taxes and licenses fees associated with a licensed online poker system in New York State.

LEGISLATIVE HISTORY :

S.5302-D of 2016: Passed Senate, Died in Assembly Racing and Wagering.
S.5302 of 2015: Died in Senate Racing, Gaming and Wagering.
S.6913-A of 2014: Died in Senate Racing, Gaming and Wagering Committee

FISCAL IMPLICATIONS :

Increased tax revenue to the state through taxing interactive gaming as well as up to $110,000,000 generated from the licensing of up to 11 interactive gaming operators.

EFFECTIVE DATE :
This act shall take effect on the one hundred eightieth day after it shall have become a law.

VIEW LESS ^

S3898A (ACTIVE) - BILL TEXT

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STATE OF NEW YORK

3898--A

Cal. No. 895

2017-2018 Regular Sessions

IN SENATE

January 27, 2017

Introduced by Sens. BONACIC, AVELLA -- read twice and ordered printed, and when printed to be committed to the Committee on Racing, Gaming and Wagering -- reported favorably from said committee and committed to the Committee on Finance -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the racing, pari-mutuel wagering and breeding law and the penal law, in relation to allowing certain interactive poker games

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The racing, pari-mutuel wagering and breeding law is amended by adding a new article 15 to read as follows:

ARTICLE 15

INTERACTIVE GAMING

SECTION 1500. LEGISLATIVE FINDINGS AND PURPOSE.
1501. DEFINITIONS.
1502. AUTHORIZATION.
1503. REQUIRED SAFEGUARDS/MINIMUM STANDARDS.
1504. SCOPE OF LICENSING REVIEW.
1505. STATE TAX.
1506. DISPOSITION OF TAXES.

S 1500. LEGISLATIVE FINDINGS AND PURPOSE. THE LEGISLATURE HEREBY FINDS AND DECLARES THAT: 1. UNDER THE NEW YORK PENAL LAW A PERSON ENGAGES IN GAMBLING WHEN HE OR SHE STAKES OR RISKS SOMETHING OF VALUE UPON THE OUTCOME OF A CONTEST OF CHANCE OR A FUTURE CONTINGENT EVENT NOT UNDER HIS OR HER CONTROL OR INFLUENCE, UPON AN AGREEMENT OR UNDERSTANDING THAT HE OR SHE WILL RECEIVE SOMETHING OF VALUE IN THE EVENT OF A CERTAIN OUTCOME.

2. A CONTEST OF CHANCE IS DEFINED AS 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. (SUBDIVISION 1 OF SECTION 225.00 OF THE PENAL LAW). THUS, GAMES OF CHANCE MAY INVOLVE SOME SKILL, BUT IN THOSE GAMES

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD04134-07-7

THE LEVEL OF SKILL DOES NOT DETERMINE THE OUTCOME REGARDLESS OF THE DEGREE OF SKILL EMPLOYED. SEE PEOPLE V. TURNER, 165 MISC. 2D 222, 224, 629 N.Y.S.2D 661, 662 (CRIM. CT. 1995). ON THE OTHER HAND, WHERE A CONTEST PITS THE SKILL LEVELS OF THE PLAYERS AGAINST EACH OTHER, NEW YORK COURTS HAVE FOUND A GAME TO BE ONE OF SKILL RATHER THAN CHANCE. SEE PEOPLE V. HUNT, 162 MISC. 2D 70, 72, 616 N.Y.S.2D 168, 170 (CRIM. CT. 1994) ("PLAYED FAIRLY, SKILL RATHER THAN CHANCE IS THE MATERIAL COMPONENT OF THREE-CARD MONTE.");

3. POKER IN MANY INSTANCES HAS BEEN DEFINED AS A GAME OF SKILL AND A NEW YORK FEDERAL COURT IN U.S. V. DICRISTINA, 886 F. SUPP. 2D 164, 224, ASSESSED THAT UNDER FEDERAL LAW POKER WAS PREDOMINANTLY A GAME OF SKILL;

4. NEW YORK COURTS HAVE INTERPRETED NEW YORK LAW TO APPLY A MORE RIGOROUS TEST IN IDENTIFYING A "CONTEST OF CHANCE" THAN IS APPLIED BY MOST STATES IN THIS NATION AND THE COURTS HAVE FOUND THAT WHERE A CONTEST PITS THE SKILL LEVELS OF THE PLAYERS AGAINST EACH OTHER, THOSE GAMES ARE GAMES OF SKILL AND NOT GAMES OF CHANCE. FURTHERMORE, THE COURTS HAVE NOT LIMITED THE LEGISLATURE'S ABILITY TO DETERMINE THAT CERTAIN FORMS OF POKER SHOULD FALL OUTSIDE THE GENERAL DEFINITION OF GAMBLING SINCE THOSE GAMES ARE GAMES OF SKILL;

5. TEXAS HOLD'EM POKER INVOLVES TWO CARDS DEALT FACE DOWN TO EACH PLAYER AND THEN FIVE COMMUNITY CARDS PLACED FACE-UP BY THE DEALER, A SERIES OF THREE, THEN TWO ADDITIONAL SINGLE CARDS, WITH PLAYERS DETERMINING WHETHER TO CHECK, BET, RAISE OR FOLD AFTER EACH DEAL. OMAHA HOLD'EM POKER IS A SIMILAR GAME, IN WHICH EACH PLAYER IS DEALT FOUR CARDS AND MAKES HIS OR HER BEST HAND USING EXACTLY TWO OF THEM, PLUS EXACTLY THREE OF THE FIVE COMMUNITY CARDS. THESE GAMES ARE CONSIDERED TO BE COMPLEX FORMS OF POKER WHICH INVOLVE PLAYER STRATEGY AND DECISION-MAKING AND WHICH PIT THE SKILL LEVELS OF THE PLAYERS AGAINST EACH OTHER. AS GAMES OF SKILL, THESE FORMS OF POKER DO NOT FALL UNDER THE DEFINITION OF GAMBLING AS PROHIBITED BY THE PENAL LAW; AND

6. THE LEGISLATURE FURTHER FINDS THAT AS THE INTERNET HAS BECOME AN INTEGRAL PART OF SOCIETY, AND INTERNET POKER A MAJOR FORM OF ENTERTAINMENT FOR MANY CONSUMERS, ANY INTERACTIVE GAMING ENFORCEMENT AND REGULATORY STRUCTURE MUST BEGIN FROM THE BEDROCK PREMISE THAT PARTICIPATION IN A LAWFUL AND LICENSED GAMING INDUSTRY IS A PRIVILEGE AND NOT A RIGHT, AND THAT REGULATORY OVERSIGHT IS INTENDED TO SAFEGUARD THE INTEGRITY OF THE GAMES AND PARTICIPANTS AND TO ENSURE ACCOUNTABILITY AND THE PUBLIC TRUST.

S 1501. DEFINITIONS. AS USED IN THIS ARTICLE, THE FOLLOWING TERMS SHALL HAVE THE FOLLOWING MEANINGS:

1. "AUTHORIZED GAME" MEANS OMAHA HOLD'EM AND TEXAS HOLD'EM POKER, AS WELL AS ANY OTHER POKER GAME THAT THE COMMISSION DETERMINES IS THE MATERIAL EQUIVALENT OF EITHER OF THOSE, WHETHER IN A CASH GAME OR TOURNAMENT.

2. "AUTHORIZED PARTICIPANTS" MEANS PERSONS WHO ARE EITHER PHYSICALLY PRESENT IN THIS STATE WHEN PLACING A WAGER OR WHO OTHERWISE ARE PERMITTED BY APPLICABLE LAW, AS DETERMINED BY THE COMMISSION, TO PLACE A WAGER. THE INTERMEDIATE ROUTING OF ELECTRONIC DATA IN CONNECTION WITH INTERACTIVE GAMING SHALL NOT DETERMINE THE LOCATION OR LOCATIONS IN WHICH A WAGER IS INITIATED, RECEIVED OR OTHERWISE MADE.

3. "CORE FUNCTION" MEANS ANY OF THE FOLLOWING: (A) THE MANAGEMENT, ADMINISTRATION OR CONTROL OF WAGERS ON INTERACTIVE GAMING; (B) THE MANAGEMENT, ADMINISTRATION OR CONTROL OF THE GAMES WITH WHICH THOSE WAGERS ARE ASSOCIATED; OR (C) THE DEVELOPMENT, MAINTENANCE, PROVISION OR OPERATION OF AN INTERACTIVE GAMING PLATFORM.

4. "COMMISSION" MEANS THE NEW YORK STATE GAMING COMMISSION.

5. "COVERED ASSET" MEANS ANY OF THE FOLLOWING CATEGORIES OF ASSETS IF USED IN CONNECTION WITH THE KNOWING AND WILLFUL ACCEPTANCE OF ANY WAGER FROM PERSONS LOCATED IN THE UNITED STATES OF ANY FORM OF INTERACTIVE GAMING (INCLUDING BUT NOT LIMITED TO POKER) AFTER DECEMBER THIRTY-FIRST, TWO THOUSAND SIX, THAT HAS NOT BEEN AFFIRMATIVELY AUTHORIZED BY LAW OF THE UNITED STATES OR OF EACH STATE IN WHICH PERSONS MAKING SUCH WAGER

WERE LOCATED: (A) ANY TRADEMARK, TRADE NAME, SERVICE MARK OR SIMILAR INTELLECTUAL PROPERTY THAT WAS USED TO IDENTIFY ANY ASPECT OF THE INTERNET WEBSITE OR OF THE OPERATOR OFFERING THE WAGERS OR GAMES TO ITS PATRONS; (B) ANY DATABASE OR CUSTOMER LIST OF INDIVIDUALS RESIDING IN THE UNITED STATES WHO PLACED SUCH WAGERS; (C) ANY DERIVATIVE OF A DATABASE OR CUSTOMER LIST DESCRIBED IN PARAGRAPH (B) OF THIS SUBDIVISION; OR (D) AN ASSET USED TO PROVIDE A CORE FUNCTION.

6. "DIVISION" MEANS THE DIVISION OF GAMING, ESTABLISHED UNDER PARAGRAPH (C) OF SUBDIVISION TWO OF SECTION ONE HUNDRED THREE OF THIS CHAPTER.

7. "INTERACTIVE GAMING" MEANS THE CONDUCT OF GAMES THROUGH THE USE OF THE INTERNET OR OTHER COMMUNICATIONS TECHNOLOGY THAT ALLOWS A PERSON, UTILIZING MONEY, CHECKS, ELECTRONIC CHECKS, ELECTRONIC TRANSFERS OF MONEY, CREDIT CARDS, DEBIT CARDS OR ANY OTHER INSTRUMENTALITY, TO TRANSMIT TO A COMPUTER INFORMATION TO ASSIST IN THE PLACING OF A WAGER AND CORRESPONDING INFORMATION RELATED TO THE DISPLAY OF THE GAME, GAME OUTCOMES OR OTHER SIMILAR INFORMATION. THE TERM DOES NOT INCLUDE THE CONDUCT OF (A) NON-GAMBLING GAMES THAT DO NOT OTHERWISE REQUIRE A LICENSE UNDER STATE OR FEDERAL LAW; OR (B) GAMES THAT OCCUR ENTIRELY AMONG PARTICIPANTS WHO ARE LOCATED ON A LICENSED CASINO PREMISES. FOR PURPOSES OF THIS PROVISION, "COMMUNICATIONS TECHNOLOGY" MEANS ANY METHOD USED AND THE COMPONENTS EMPLOYED BY AN ESTABLISHMENT TO FACILITATE THE TRANSMISSION OF INFORMATION, INCLUDING, WITHOUT LIMITATION, TRANSMISSION AND RECEPTION BY SYSTEMS BASED ON WIRE, CABLE, RADIO, MICROWAVE, LIGHT, OPTICS OR COMPUTER DATA NETWORKS, INCLUDING, WITHOUT LIMITATION, THE INTERNET AND INTRANETS.

8. "INTERACTIVE GAMING GROSS REVENUE" MEANS THE TOTAL OF ALL SUMS PAID TO A LICENSEE FROM INTERACTIVE GAMING INVOLVING AUTHORIZED PARTICIPANTS, LESS ONLY THE TOTAL OF ALL SUMS PAID OUT AS WINNINGS TO PATRONS AND PROMOTIONAL GAMING CREDITS; PROVIDED, HOWEVER, THAT THE CASH EQUIVALENT VALUE OF ANY MERCHANDISE OR OTHER NON-CASH THING OF VALUE INCLUDED IN A CONTEST OR TOURNAMENT SHALL NOT BE INCLUDED IN THE TOTAL OF ALL SUMS PAID OUT AS WINNINGS TO PLAYERS FOR PURPOSES OF DETERMINING INTERACTIVE GAMING GROSS REVENUE.

(A) NEITHER AMOUNTS DEPOSITED WITH A LICENSEE FOR PURPOSES OF INTERACTIVE GAMING NOR AMOUNTS TAKEN IN FRAUDULENT ACTS PERPETRATED AGAINST A LICENSEE FOR WHICH THE LICENSEE IS NOT REIMBURSED SHALL BE CONSIDERED TO HAVE BEEN "PAID" TO THE LICENSEE FOR PURPOSES OF CALCULATING INTERACTIVE GAMING GROSS REVENUE.

(B) "PROMOTIONAL GAMING CREDIT" INCLUDES BONUSES, PROMOTIONS AND ANY AMOUNT RECEIVED BY A LICENSEE FROM A PATRON FOR WHICH THE LICENSEE CAN DEMONSTRATE THAT IT OR ITS AFFILIATE HAS NOT RECEIVED CASH.

9. "INTERACTIVE GAMING PLATFORM" MEANS THE COMBINATION OF HARDWARE, SOFTWARE AND DATA NETWORKS USED TO MANAGE, ADMINISTER OR CONTROL WAGERS ON INTERACTIVE GAMING OR THE GAMES WITH WHICH THOSE WAGERS ARE ASSOCIATED.

10. "INTERNET" MEANS A COMPUTER NETWORK OF INTEROPERABLE PACKET-SWITCHED DATA NETWORKS.

11. "LICENSEE" MEANS A PERSON WHO IS LICENSED BY THE COMMISSION TO OFFER INTERACTIVE GAMING, USING AN INTERACTIVE GAMING PLATFORM TO

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AUTHORIZED PARTICIPANTS. A LICENSEE MAY UTILIZE MULTIPLE INTERACTIVE GAMING PLATFORMS PROVIDED THAT EACH PLATFORM IS APPROVED BY THE COMMISSION.

12. "OMAHA HOLD'EM POKER" MEANS THE POKER GAME MARKETED AS OMAHA HOLD'EM POKER OR OMAHA POKER IN WHICH EACH PLAYER IS DEALT FOUR CARDS AND MUST MAKE HIS OR HER BEST HAND USING EXACTLY TWO OF THEM, PLUS EXACTLY THREE OF THE FIVE COMMUNITY CARDS.

13. "SIGNIFICANT VENDOR" MEANS ANY PERSON WHO OFFERS OR WHO PROPOSES TO OFFER ANY OF THE FOLLOWING SERVICES WITH RESPECT TO INTERACTIVE GAMING: (A) A CORE FUNCTION; (B) SALE, LICENSING OR OTHER RECEIPT OF COMPENSATION FOR SELLING OR LICENSING A DATABASE OR CUSTOMER LIST OF INDIVIDUALS RESIDING IN THE UNITED STATES SELECTED IN WHOLE OR IN PART BECAUSE THEY PLACED WAGERS OR PARTICIPATED IN GAMBLING GAMES WITH OR THROUGH AN INTERNET WEBSITE OR OPERATOR (OR ANY DERIVATIVE OF SUCH A DATABASE OR CUSTOMER LIST); (C) PROVISION OF ANY TRADEMARK, TRADENAME, SERVICE MARK OR SIMILAR INTELLECTUAL PROPERTY UNDER WHICH A LICENSEE OR SIGNIFICANT VENDOR IDENTIFIES INTERACTIVE GAMES TO CUSTOMERS; OR (D) PROVISION OF ANY PRODUCT, SERVICE OR ASSET TO A LICENSEE OR SIGNIFICANT

VENDOR IN RETURN FOR A PERCENTAGE OF INTERACTIVE GAMING REVENUE (NOT INCLUDING FEES TO FINANCIAL INSTITUTIONS AND PAYMENT PROVIDERS FOR FACILITATING A DEPOSIT OR WITHDRAWAL BY AN AUTHORIZED PARTICIPANT). THE TERM "SIGNIFICANT VENDOR" SHALL NOT INCLUDE A PROVIDER OF GOODS OR SERVICES TO A LICENSEE THAT ARE NOT SPECIFICALLY DESIGNED FOR USE AND NOT PRINCIPALLY USED IN CONNECTION WITH INTERACTIVE GAMING.

14. "TEXAS HOLD'EM POKER" MEANS THE TYPE OF POKER MARKETED AS TEXAS HOLD'EM POKER THAT INVOLVES TWO CARDS BEING DEALT FACE DOWN TO EACH PLAYER AND THEN FIVE COMMUNITY CARDS BEING PLACED FACE-UP BY THE DEALER, A SERIES OF THREE THEN TWO ADDITIONAL SINGLE CARDS, WITH PLAYERS HAVING THE OPTION TO CHECK, BET, RAISE OR FOLD AFTER EACH DEAL.

S 1502. AUTHORIZATION. 1. THE COMMISSION SHALL, WITHIN ONE HUNDRED EIGHTY DAYS OF THE DATE THIS ARTICLE BECOMES LAW, PROMULGATE REGULATIONS TO IMPLEMENT INTERACTIVE GAMING IN THIS STATE AND SHALL AUTHORIZE UP TO ELEVEN LICENSES TO OPERATE INTERACTIVE GAMING INVOLVING AUTHORIZED PARTICIPANTS, SUBJECT TO THE PROVISIONS OF THIS ARTICLE AND OTHER APPLICABLE PROVISIONS OF LAW.

2. APPLICANTS ELIGIBLE TO APPLY FOR A LICENSE AS AN OPERATOR PURSUANT TO THIS ARTICLE SHALL BE THOSE ENTITIES:

(A) LICENSED BY THE STATE PURSUANT TO SECTION SIXTEEN HUNDRED SEVENTEEN-A OF THE TAX LAW TO OPERATE VIDEO LOTTERY GAMING AND HAS EXPERIENCE IN THE OPERATION OF INTERACTIVE GAMING BY BEING LICENSED IN A STATE WITH COMPARABLE LICENSING REQUIREMENTS OR GUARANTEES ACQUISITION OF ADEQUATE BUSINESS COMPETENCE AND EXPERIENCE IN THE OPERATION OF INTERACTIVE GAMING; OR

(B) LICENSED BY THE STATE TO OPERATE A CLASS III GAMING FACILITY PURSUANT TO ARTICLE THIRTEEN OF THIS CHAPTER AND HAS EXPERIENCE IN THE OPERATION OF INTERACTIVE GAMING BY BEING LICENSED IN A STATE WITH COMPARABLE LICENSING REQUIREMENTS OR GUARANTEES ACQUISITION OF ADEQUATE BUSINESS COMPETENCE AND EXPERIENCE IN THE OPERATION OF INTERACTIVE GAMING.

3. THE COMMISSION SHALL, TO THE EXTENT PRACTICABLE, ISSUE LICENSES TO MULTIPLE APPLICANTS NO SOONER THAN ONE HUNDRED EIGHTY DAYS AFTER THE PROMULGATION OF REGULATIONS IN ORDER TO ENSURE A ROBUST AND COMPETITIVE MARKET FOR CONSUMERS AND TO PREVENT EARLY LICENSEES FROM GAINING AN UNFAIR COMPETITIVE ADVANTAGE.

4. NO PERSON MAY OPERATE, MANAGE OR MAKE AVAILABLE AN INTERACTIVE GAMING PLATFORM OR ACT AS A SIGNIFICANT VENDOR WITH RESPECT TO INTERACTIVE GAMING THAT IS OFFERED TO PERSONS LOCATED IN THIS STATE UNLESS

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LICENSED BY THE COMMISSION PURSUANT TO THIS ARTICLE AND ONLY THOSE GAMES AUTHORIZED BY THE COMMISSION SHALL BE PERMITTED.

5. LICENSE APPLICANTS MAY FORM A PARTNERSHIP, JOINT VENTURE OR OTHER CONTRACTUAL ARRANGEMENT IN ORDER TO FACILITATE THE PURPOSES OF THIS ARTICLE.

6. ANY PERSON FOUND SUITABLE BY THE COMMISSION MAY BE ISSUED A LICENSE AS AN OPERATOR OR SIGNIFICANT VENDOR PURSUANT TO THIS ARTICLE. IN DETERMINING SUITABILITY, THE COMMISSION SHALL CONSIDER THOSE FACTORS IT DEEMS RELEVANT IN ITS DISCRETION, INCLUDING BUT NOT LIMITED TO:

(A) WHETHER THE APPLICANT IS A PERSON OF GOOD CHARACTER, HONESTY AND INTEGRITY;

(B) WHETHER THE APPLICANT IS PERSON WHOSE PRIOR ACTIVITIES, CRIMINAL RECORD, IF ANY, REPUTATION, HABITS AND ASSOCIATIONS DO NOT:

(I) POSE A THREAT TO THE PUBLIC INTEREST OR TO THE EFFECTIVE REGULATION AND CONTROL OF INTERACTIVE GAMING; OR

(II) CREATE OR ENHANCE THE DANGERS OF UNSUITABLE, UNFAIR OR ILLEGAL PRACTICES, METHODS AND ACTIVITIES IN THE CONDUCT OF INTERACTIVE GAMING OR IN THE CARRYING ON OF THE BUSINESS AND FINANCIAL ARRANGEMENTS INCIDENTAL TO SUCH GAMING;

(C) WHETHER THE APPLICANT IS CAPABLE OF AND LIKELY TO CONDUCT THE ACTIVITIES FOR WHICH THE APPLICANT IS LICENSED IN ACCORDANCE WITH THE PROVISIONS OF THIS ARTICLE, ANY REGULATIONS PRESCRIBED UNDER THIS ARTICLE AND ALL OTHER APPLICABLE LAWS;

(D) WHETHER THE APPLICANT HAS OR GUARANTEES ACQUISITION OF ADEQUATE BUSINESS COMPETENCE AND EXPERIENCE IN THE OPERATION OF LICENSED GAMING OR OF INTERACTIVE GAMING IN THIS STATE OR IN A STATE WITH COMPARABLE LICENSING REQUIREMENTS;

(E) WHETHER THE APPLICANT HAS OR WILL OBTAIN SUFFICIENT FINANCING FOR THE NATURE OF THE PROPOSED OPERATION AND FROM A SUITABLE SOURCE; AND

(F) WHETHER THE APPLICANT:

(I) HAS AT ANY TIME, EITHER DIRECTLY, OR THROUGH ANOTHER PERSON WHOM IT OWNED, IN WHOLE OR IN SIGNIFICANT PART, OR CONTROLLED:

(A) KNOWINGLY AND WILLFULLY ACCEPTED OR MADE AVAILABLE WAGERS ON INTERACTIVE GAMING (INCLUDING POKER) FROM PERSONS LOCATED IN THE UNITED STATES AFTER DECEMBER THIRTY-FIRST, TWO THOUSAND SIX, UNLESS SUCH WAGERS WERE AFFIRMATIVELY AUTHORIZED BY LAW OF THE UNITED STATES OR OF EACH STATE IN WHICH PERSONS MAKING SUCH WAGERS WERE LOCATED; OR

(B) KNOWINGLY FACILITATED OR OTHERWISE PROVIDED SERVICES WITH RESPECT TO INTERACTIVE GAMING (INCLUDING POKER) INVOLVING PERSONS LOCATED IN THE UNITED STATES FOR A PERSON DESCRIBED IN CLAUSE (A) OF THIS SUBPARAGRAPH AND ACTED WITH KNOWLEDGE OF THE FACT THAT SUCH WAGERS OR INTERACTIVE GAMING INVOLVED PERSONS LOCATED IN THE UNITED STATES; OR

(II) HAS PURCHASED OR ACQUIRED, DIRECTLY OR INDIRECTLY, IN WHOLE OR IN SIGNIFICANT PART, A PERSON DESCRIBED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH OR WILL USE THAT PERSON OR A COVERED ASSET IN CONNECTION WITH INTERACTIVE GAMING LICENSED PURSUANT TO THIS ARTICLE.

7. THE COMMISSION FURTHER SHALL DEVELOP STANDARDS BY WHICH TO EVALUATE AND APPROVE INTERACTIVE GAMING PLATFORMS FOR USE WITH INTERACTIVE GAMING. INTERACTIVE GAMING PLATFORMS MUST BE APPROVED BY THE COMMISSION BEFORE BEING USED BY A LICENSEE OR SIGNIFICANT VENDOR TO CONDUCT INTERACTIVE GAMING IN THIS STATE.

8. THE COMMISSION SHALL REQUIRE ALL LICENSEES TO OPERATE INTERACTIVE GAMING TO PAY A ONE-TIME FEE OF TEN MILLION DOLLARS. SUCH FEE PAID BY EACH LICENSEE SHALL BE APPLIED TO SATISFY, IN WHOLE OR IN PART, AS APPLICABLE, THAT LICENSEE'S TAX OBLIGATION PURSUANT TO SECTION FIFTEEN HUNDRED FIVE OF THIS ARTICLE IN SIXTY EQUAL MONTHLY INSTALLMENTS, ALLO-

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CATED TO EACH OF THE FIRST SIXTY MONTHS OF TAX OWED AFTER THE LICENSEE HAS BEGUN OPERATING INTERACTIVE GAMING PURSUANT TO THIS ARTICLE. NO AMOUNTS NOT REQUIRED TO BE USED TO SATISFY SUCH TAX OBLIGATION DURING THAT PERIOD SHALL BE ALLOCATED TO PAYMENT OF SUCH TAX OBLIGATION AFTER THAT PERIOD.

9. LICENSES TO OPERATE INTERACTIVE GAMING ISSUED BY THE COMMISSION SHALL REMAIN IN EFFECT FOR TEN YEARS.

10. THE COMMISSION, BY REGULATION, MAY AUTHORIZE AND PROMULGATE ANY RULES NECESSARY TO IMPLEMENT AGREEMENTS WITH OTHER STATES, OR AUTHORIZED AGENCIES THEREOF (A) TO ENABLE PATRONS IN THOSE STATES TO PARTICIPATE IN INTERACTIVE GAMING OFFERED BY LICENSEES UNDER THIS ARTICLE OR (B) TO ENABLE PATRONS IN THIS STATE TO PARTICIPATE IN INTERACTIVE GAMING OFFERED BY LICENSEES UNDER THE LAWS OF THOSE OTHER STATES, PROVIDED THAT SUCH OTHER STATE OR AUTHORIZED AGENCY APPLIES SUITABILITY STANDARDS AND REVIEW MATERIALLY CONSISTENT WITH THE PROVISIONS OF THIS ARTICLE.

11. ANY REGULATIONS ADOPTED PURSUANT TO SUBDIVISION TEN OF THIS SECTION MUST SET FORTH PROVISIONS THAT ADDRESS:

(A) ANY ARRANGEMENTS TO SHARE REVENUE BETWEEN NEW YORK AND ANY OTHER STATE OR AGENCY WITHIN ANOTHER STATE; AND

(B) ARRANGEMENTS TO ENSURE THE INTEGRITY OF INTERACTIVE GAMING OFFERED PURSUANT TO ANY SUCH AGREEMENT AND THE PROTECTION OF PATRONS LOCATED IN THIS STATE.

12. THE COMMISSION MAY DELEGATE ITS RESPONSIBILITIES TO ADMINISTER THE PROVISIONS OF THIS ARTICLE TO THE DIVISION, AS IT SEES FIT, EXCEPT FOR ITS RESPONSIBILITIES TO APPROVE LICENSES.

S 1503. REQUIRED SAFEGUARDS/MINIMUM STANDARDS. THE COMMISSION SHALL REQUIRE LICENSEES TO IMPLEMENT MEASURES TO MEET THE STANDARDS SET OUT IN THIS SECTION, ALONG WITH SUCH OTHER STANDARDS THAT THE COMMISSION IN ITS DISCRETION MAY CHOOSE TO REQUIRE.

(A) APPROPRIATE SAFEGUARDS TO ENSURE, TO A REASONABLE DEGREE OF CERTAINTY, THAT PARTICIPANTS IN INTERACTIVE GAMING ARE NOT YOUNGER THAN TWENTY-ONE YEARS OF AGE.

(B) APPROPRIATE SAFEGUARDS TO ENSURE, TO A REASONABLE DEGREE OF CERTAINTY, THAT PARTICIPANTS IN INTERACTIVE GAMING ARE PHYSICALLY LOCATED WITHIN THE STATE OR SUCH OTHER JURISDICTION THAT THE COMMISSION HAS DETERMINED TO BE PERMISSIBLE.

(C) APPROPRIATE SAFEGUARDS TO PROTECT, TO A REASONABLE DEGREE OF CERTAINTY, THE PRIVACY AND ONLINE SECURITY OF PARTICIPANTS IN INTERACTIVE GAMING.

(D) APPROPRIATE SAFEGUARDS TO ENSURE, TO A REASONABLE DEGREE OF CERTAINTY, THAT THE INTERACTIVE GAMING IS FAIR AND HONEST AND THAT APPROPRIATE MEASURES ARE IN PLACE TO DETER, DETECT AND, TO THE EXTENT

REASONABLY POSSIBLE, TO PREVENT CHEATING, INCLUDING COLLUSION, AND USE OF CHEATING DEVICES, INCLUDING USE OF SOFTWARE PROGRAMS (SOMETIMES REFERRED TO AS "BOTS") THAT MAKE BETS OR WAGERS ACCORDING TO ALGORITHMS.

(E) APPROPRIATE SAFEGUARDS TO MINIMIZE COMPULSIVE GAMING AND TO PROVIDE NOTICE TO PARTICIPANTS OF RESOURCES TO HELP PROBLEM GAMBLERS.

(F) APPROPRIATE SAFEGUARDS TO ENSURE PARTICIPANTS' FUNDS ARE HELD IN ACCOUNTS SEGREGATED FROM THE FUNDS OF LICENSEES AND OTHERWISE ARE PROTECTED FROM CORPORATE INSOLVENCY, FINANCIAL RISK OR CRIMINAL OR CIVIL ACTIONS AGAINST THE LICENSEE.

S 1504. SCOPE OF LICENSING REVIEW. 1. IN CONNECTION WITH ANY LICENSE ISSUED PURSUANT TO THIS ARTICLE, THE LICENSEE, SIGNIFICANT VENDOR OR APPLICANT SHALL IDENTIFY AND THE COMMISSION SHALL REVIEW THE SUITABILITY OF SUCH LICENSEE'S, SIGNIFICANT VENDOR'S OR APPLICANT'S OWNER, CHIEF EXECUTIVE OFFICER, CHIEF FINANCIAL OFFICER AND ANY OTHER OFFICER OR

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EMPLOYEE WHO THE COMMISSION DEEMS IS SIGNIFICANTLY INVOLVED IN THE MANAGEMENT OR CONTROL OF THE LICENSEE, SIGNIFICANT VENDOR OR APPLICANT OR OF THE INTERACTIVE GAMING PLATFORM. "OWNER" FOR PURPOSES OF THIS PROVISION MEANS ANY PERSON WHO DIRECTLY OR INDIRECTLY HOLDS ANY BENEFICIAL OR OWNERSHIP INTEREST IN THE APPLICANT OF FIVE PERCENT OR GREATER OR ANY AMOUNT OF OWNERSHIP THAT THE COMMISSION DETERMINES TO BE SIGNIFICANT OWNERSHIP OF THE LICENSEE, SIGNIFICANT VENDOR, OR APPLICANT.

2. INSTITUTIONAL INVESTORS ARE SUBJECT TO THE PROVISIONS SET OUT IN THIS SECTION.

(A) AN INSTITUTIONAL INVESTOR HOLDING UNDER TWENTY-FIVE PERCENT OF THE EQUITY SECURITIES OF A LICENSEE'S OR SIGNIFICANT VENDOR'S (OR APPLICANT'S) HOLDING OR INTERMEDIARY COMPANIES, SHALL BE GRANTED A WAIVER OF ANY INVESTIGATION OF SUITABILITY OR OTHER REQUIREMENT IF SUCH SECURITIES ARE THOSE OF A CORPORATION, WHETHER PUBLICLY TRADED OR PRIVATELY HELD, AND ITS HOLDINGS OF SUCH SECURITIES WERE PURCHASED FOR INVESTMENT PURPOSES ONLY AND IT FILES A CERTIFIED STATEMENT TO THE EFFECT THAT IT HAS NO INTENTION OF INFLUENCING OR AFFECTING THE AFFAIRS OF THE ISSUER, THE LICENSEE (OR SIGNIFICANT VENDOR OR APPLICANT, AS APPLICABLE) OR ITS HOLDING OR INTERMEDIARY COMPANIES; PROVIDED, HOWEVER, THAT IT SHALL BE PERMITTED TO VOTE ON MATTERS PUT TO THE VOTE OF THE OUTSTANDING SECURITY HOLDERS. THE COMMISSION MAY GRANT SUCH A WAIVER TO AN INSTITUTIONAL INVESTOR HOLDING A HIGHER PERCENTAGE OF SUCH SECURITIES UPON A SHOWING OF GOOD CAUSE AND IF THE CONDITIONS SPECIFIED ABOVE ARE MET. ANY INSTITUTIONAL INVESTOR GRANTED A WAIVER UNDER THIS PARAGRAPH WHICH SUBSEQUENTLY DETERMINES TO INFLUENCE OR AFFECT THE AFFAIRS OF THE ISSUER SHALL PROVIDE NOT LESS THAN THIRTY DAYS' NOTICE OF SUCH INTENT AND SHALL FILE WITH THE COMMISSION A REQUEST FOR DETERMINATION OF SUITABILITY BEFORE TAKING ANY ACTION THAT MAY INFLUENCE OR AFFECT THE AFFAIRS OF THE ISSUER; PROVIDED, HOWEVER, THAT IT SHALL BE PERMITTED TO VOTE ON MATTERS PUT TO THE VOTE OF THE OUTSTANDING SECURITY HOLDERS. IF AN INSTITUTIONAL INVESTOR CHANGES ITS INVESTMENT INTENT, OR IF THE COMMISSION FINDS REASONABLE CAUSE TO BELIEVE THAT THE INSTITUTIONAL INVESTOR MAY BE FOUND UNSUITABLE, NO ACTION OTHER THAN DIVESTITURE SHALL BE TAKEN BY SUCH INVESTOR WITH RESPECT TO ITS SECURITY HOLDINGS UNTIL THERE HAS BEEN COMPLIANCE WITH ANY REQUIREMENTS ESTABLISHED BY THE COMMISSION, WHICH MAY INCLUDE THE EXECUTION OF A TRUST AGREEMENT. THE LICENSEE (OR SIGNIFICANT VENDOR OR APPLICANT, AS APPLICABLE) AND ITS RELEVANT HOLDING, INTERMEDIARY OR SUBSIDIARY COMPANY SHALL NOTIFY THE COMMISSION IMMEDIATELY OF ANY INFORMATION ABOUT, OR ACTIONS OF, AN INSTITUTIONAL INVESTOR HOLDING ITS EQUITY SECURITIES WHERE SUCH INFORMATION OR ACTION MAY IMPACT UPON THE ELIGIBILITY OF SUCH INSTITUTIONAL INVESTOR FOR A WAIVER PURSUANT TO THIS PARAGRAPH.

(B) IF AT ANY TIME THE COMMISSION FINDS THAT AN INSTITUTIONAL INVESTOR HOLDING ANY SECURITY OF A HOLDING OR INTERMEDIARY COMPANY OF A LICENSEE OR SIGNIFICANT VENDOR OR APPLICANT, OR, WHERE RELEVANT, OF ANOTHER SUBSIDIARY COMPANY OF A HOLDING OR INTERMEDIARY COMPANY OF A LICENSEE OR SIGNIFICANT VENDOR OR APPLICANT WHICH IS RELATED IN ANY WAY TO THE FINANCING OF THE LICENSEE OR SIGNIFICANT VENDOR OR APPLICANT, FAILS TO COMPLY WITH THE TERMS OF PARAGRAPH (A) OF THIS SECTION, OR IF AT ANY TIME THE COMMISSION FINDS THAT, BY REASON OF THE EXTENT OR NATURE OF ITS HOLDINGS, AN INSTITUTIONAL INVESTOR IS IN A POSITION TO EXERCISE SUCH A SUBSTANTIAL IMPACT UPON THE CONTROLLING INTERESTS OF A LICENSEE OR SIGNIFICANT VENDOR OR APPLICANT THAT INVESTIGATION AND DETERMINATION OF SUITABILITY OF THE INSTITUTIONAL INVESTOR IS NECESSARY TO PROTECT THE

PUBLIC INTEREST, THE COMMISSION MAY TAKE ANY NECESSARY ACTION OTHERWISE AUTHORIZED UNDER THIS ARTICLE TO PROTECT THE PUBLIC INTEREST.

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(C) FOR PURPOSES OF THIS SECTION, AN "INSTITUTIONAL INVESTOR" SHALL MEAN ANY RETIREMENT FUND ADMINISTERED BY A PUBLIC AGENCY FOR THE EXCLUSIVE BENEFIT OF FEDERAL, STATE, OR LOCAL PUBLIC EMPLOYEES; INVESTMENT COMPANY REGISTERED UNDER THE INVESTMENT COMPANY ACT OF 1940 (15 U.S.C. S 80A-1 ET SEQ.); COLLECTIVE INVESTMENT TRUST ORGANIZED BY BANKS UNDER PART NINE OF THE RULES OF THE COMPTROLLER OF THE CURRENCY; CLOSED END INVESTMENT TRUST; CHARTERED OR LICENSED LIFE INSURANCE COMPANY OR PROPERTY AND CASUALTY INSURANCE COMPANY; BANKING AND OTHER CHARTERED OR LICENSED LENDING INSTITUTION; INVESTMENT ADVISOR REGISTERED UNDER THE INVESTMENT ADVISORS ACT OF 1940 (15 U.S.C. S 80B-1 ET SEQ.); AND SUCH OTHER PERSONS AS THE COMMISSION MAY DETERMINE FOR REASONS CONSISTENT WITH THE PUBLIC INTEREST.

S 1505. STATE TAX. LICENSEES ENGAGED IN THE BUSINESS OF CONDUCTING INTERACTIVE GAMING PURSUANT TO THIS ARTICLE SHALL PAY A PRIVILEGE TAX BASED ON THE LICENSEE'S INTERACTIVE GAMING GROSS REVENUE AT A FIFTEEN PERCENT RATE.

S 1506. DISPOSITION OF TAXES. THE COMMISSION SHALL PAY INTO THE STATE LOTTERY FUND ALL TAXES IMPOSED BY THIS ARTICLE; ANY INTEREST AND PENALTIES IMPOSED BY THE COMMISSION RELATING TO THOSE TAXES; ALL PENALTIES LEVIED AND COLLECTED BY THE COMMISSION; AND THE APPROPRIATE FUNDS, CASH OR PRIZES FORFEITED FROM INTERACTIVE GAMING.

S 2. Subdivision 1 of section 225.00 of the penal law is amended to read as follows:

1. "Contest of chance" means any contest, game, gaming scheme or gaming device in which the outcome depends [in a material degree] PREDOMINANTLY upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.

S 3. The penal law is amended by adding a new section 225.36 to read as follows:

S 225.36 INTERACTIVE GAMING OFFENSES AND EXCEPTIONS.

1. THE KNOWING AND WILLFUL OFFERING OF UNLICENSED INTERACTIVE GAMING TO PERSONS IN THIS STATE, OR THE KNOWING AND WILLFUL PROVISION OF SERVICES WITH RESPECT THERETO, SHALL CONSTITUTE A GAMBLING OFFENSE UNDER THIS ARTICLE.

2. LICENSED INTERACTIVE GAMING ACTIVITIES UNDER SECTION FIFTEEN HUNDRED TWO OF THE RACING, PARI-MUTUEL WAGERING AND BREEDING LAW SHALL NOT BE A GAMBLING OFFENSE UNDER THIS ARTICLE.

3. A PERSON OFFERING UNLICENSED INTERACTIVE GAMING TO PERSONS IN THIS STATE SHALL BE LIABLE FOR ALL TAXES SET FORTH IN SECTION FIFTEEN HUNDRED FIVE OF THE RACING, PARI-MUTUEL WAGERING AND BREEDING LAW IN THE SAME MANNER AND AMOUNTS AS IF SUCH PERSON WERE A LICENSEE. TIMELY PAYMENT OF SUCH TAXES SHALL NOT CONSTITUTE A DEFENSE TO ANY PROSECUTION OR OTHER PROCEEDING IN CONNECTION WITH THE INTERACTIVE GAMING EXCEPT FOR A PROSECUTION OR PROCEEDING ALLEGING FAILURE TO MAKE SUCH PAYMENT.

S 4. Severability clause. If any provision of this act or application thereof shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of the act, but shall be confined in its operation to the provision thereof directly involved in the controversy in which the judgment shall have been rendered.

S 5. This act shall take effect on the one hundred eightieth day after it shall have become a law.

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A10228

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EXHIBIT "D"

Copy of New York Assembly Bill A.2520, sponsored by Gary Pretlow, Chairman of the Committee on Racing and Wagering for the Legislative session 2017-2018.

Assembly Bill A5250

2017-2018 Legislative Session

Relates to allowing certain interactive poker games

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A5250 - DETAILS

Law Section:
Racing, Pari-Mutuel Wagering and Breeding Law

Laws Affected:
Add Art 15 §§1500 - 1506, RWB L; amd §225.00, add §225.36, Pen L

Versions Introduced in Previous Legislative Sessions:
2015-2016: A9049B (/Legislation/Bills/2015/A9049)
2013-2014: A9591A (/Legislation/Bills/2013/A9591/Amendment/A)

A5250 - SUMMARY

Allows certain interactive poker games be considered games of skill rather than games of luck; includes definitions, authorization, required safeguards and minimum standards, the scope of licensing review and state tax implications; makes corresponding penal law amendments.

A5250 - BILL TEXT DOWNLOAD PDF (HTTP://LEGISLATION.NYSENATE.GOV/PDF/BILLS/2017/A5250)

STATE OF NEW YORK

5250

2017-2018 Regular Sessions

IN ASSEMBLY

February 7, 2017

Introduced by M. of A. PRETLOW -- read once and referred to the Committee on Racing and Wagering

AN ACT to amend the racing, pari-mutuel wagering and breeding law and the penal law, in relation to allowing certain interactive poker games

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The racing, pari-mutuel wagering and breeding law is amended by adding a new article 15 to read as follows:

ARTICLE 15

INTERACTIVE GAMING

SECTION 1500. LEGISLATIVE FINDINGS AND PURPOSE.
1501. DEFINITIONS.
1502. AUTHORIZATION.
1503. REQUIRED SAFEGUARDS/MINIMUM STANDARDS.
1504. SCOPE OF LICENSING REVIEW.
1505. STATE TAX.
1506. DISPOSITION OF TAXES.

§ 1500. LEGISLATIVE FINDINGS AND PURPOSE. THE LEGISLATURE HEREBY FINDS AND DECLARES THAT: 1. UNDER THE NEW YORK PENAL LAW A PERSON ENGAGES IN GAMBLING WHEN HE OR SHE STAKES OR RISKS SOMETHING OF VALUE UPON THE OUTCOME OF A CONTEST OF CHANCE OR A FUTURE CONTINGENT EVENT NOT UNDER HIS OR HER CONTROL OR INFLUENCE, UPON AN AGREEMENT OR UNDERSTANDING THAT HE OR SHE WILL RECEIVE SOMETHING OF VALUE IN THE EVENT OF A CERTAIN OUTCOME.

2. A CONTEST OF CHANCE IS DEFINED AS 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. (SUBDIVISION 1 OF SECTION 225.00 OF THE PENAL LAW). THUS, GAMES OF CHANCE MAY INVOLVE SOME SKILL, BUT IN THOSE GAMES THE LEVEL OF SKILL DOES NOT DETERMINE THE OUTCOME REGARDLESS OF THE DEGREE OF SKILL EMPLOYED. SEE PEOPLE V. TURNER, 165 MISC. 2D 222, 224,

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD04134-02-7

629 N.Y.S.2D 661, 662 (CRIM. CT. 1995). ON THE OTHER HAND, WHERE A CONTEST PITS THE SKILL LEVELS OF THE PLAYERS AGAINST EACH OTHER, NEW YORK COURTS HAVE FOUND A GAME TO BE ONE OF SKILL RATHER THAN CHANCE. SEE PEOPLE V. HUNT, 162 MISC. 2D 70, 72, 616 N.Y.S.2D 168, 170 (CRIM. CT. 1994) ("PLAYED FAIRLY, SKILL RATHER THAN CHANCE IS THE MATERIAL COMPONENT OF THREE-CARD MONTE.");

3. POKER IN MANY INSTANCES HAS BEEN DEFINED AS A GAME OF SKILL AND A NEW YORK FEDERAL COURT IN U.S. V. DICRISTINA, 886 F. SUPP. 2D 164, 224, ASSESSED THAT UNDER FEDERAL LAW POKER WAS PREDOMINANTLY A GAME OF SKILL;

4. NEW YORK COURTS HAVE INTERPRETED NEW YORK LAW TO APPLY A MORE RIGOROUS TEST IN IDENTIFYING A "CONTEST OF CHANCE" THAN IS APPLIED BY MOST STATES IN THIS NATION AND THE COURTS HAVE FOUND THAT WHERE A CONTEST PITS THE SKILL LEVELS OF THE PLAYERS AGAINST EACH OTHER, THOSE GAMES ARE GAMES OF SKILL AND NOT GAMES OF CHANCE. FURTHERMORE, THE COURTS HAVE NOT LIMITED THE LEGISLATURE'S ABILITY TO DETERMINE THAT CERTAIN FORMS OF POKER SHOULD FALL OUTSIDE THE GENERAL DEFINITION OF GAMBLING SINCE THOSE GAMES ARE GAMES OF SKILL;

5. TEXAS HOLD'EM POKER INVOLVES TWO CARDS DEALT FACE DOWN TO EACH PLAYER AND THEN FIVE COMMUNITY CARDS PLACED FACE-UP BY THE DEALER, A SERIES OF THREE, THEN TWO ADDITIONAL SINGLE CARDS, WITH PLAYERS DETERMINING WHETHER TO CHECK, BET, RAISE OR FOLD AFTER EACH DEAL. OMAHA HOLD'EM POKER IS A SIMILAR GAME, IN WHICH EACH PLAYER IS DEALT FOUR CARDS AND MAKES HIS OR HER BEST HAND USING EXACTLY TWO OF THEM, PLUS EXACTLY THREE OF THE FIVE COMMUNITY CARDS. THESE GAMES ARE CONSIDERED TO BE COMPLEX FORMS OF POKER WHICH INVOLVE PLAYER STRATEGY AND DECISION-MAKING AND WHICH PIT THE SKILL LEVELS OF THE PLAYERS AGAINST EACH OTHER. AS GAMES OF SKILL, THESE FORMS OF POKER DO NOT FALL UNDER THE DEFINITION OF GAMBLING AS PROHIBITED BY THE PENAL LAW; AND

6. THE LEGISLATURE FURTHER FINDS THAT AS THE INTERNET HAS BECOME AN INTEGRAL PART OF SOCIETY, AND INTERNET POKER A MAJOR FORM OF ENTERTAINMENT FOR MANY CONSUMERS, ANY INTERACTIVE GAMING ENFORCEMENT AND REGULATORY STRUCTURE MUST BEGIN FROM THE BEDROCK PREMISE THAT PARTICIPATION IN A LAWFUL AND LICENSED GAMING INDUSTRY IS A PRIVILEGE AND NOT A RIGHT, AND THAT REGULATORY OVERSIGHT IS INTENDED TO SAFEGUARD THE INTEGRITY OF THE GAMES AND PARTICIPANTS AND TO ENSURE ACCOUNTABILITY AND THE PUBLIC TRUST.

S 1501. DEFINITIONS. AS USED IN THIS ARTICLE, THE FOLLOWING TERMS SHALL HAVE THE FOLLOWING MEANINGS:

1. "AUTHORIZED GAME" MEANS OMAHA HOLD'EM AND TEXAS HOLD'EM POKER, AS WELL AS ANY OTHER POKER GAME THAT THE COMMISSION DETERMINES IS THE MATERIAL EQUIVALENT OF EITHER OF THOSE, WHETHER IN A CASH GAME OR TOURNAMENT.

2. "AUTHORIZED PARTICIPANTS" MEANS PERSONS WHO ARE EITHER PHYSICALLY PRESENT IN THIS STATE WHEN PLACING A WAGER OR WHO OTHERWISE ARE PERMITTED BY APPLICABLE LAW, AS DETERMINED BY THE COMMISSION, TO PLACE A WAGER. THE INTERMEDIATE ROUTING OF ELECTRONIC DATA IN CONNECTION WITH INTERACTIVE GAMING SHALL NOT DETERMINE THE LOCATION OR LOCATIONS IN WHICH A WAGER IS INITIATED, RECEIVED OR OTHERWISE MADE.

3. "CORE FUNCTION" MEANS ANY OF THE FOLLOWING: (A) THE MANAGEMENT, ADMINISTRATION OR CONTROL OF WAGERS ON INTERACTIVE GAMING; (B) THE MANAGEMENT, ADMINISTRATION OR CONTROL OF THE GAMES WITH WHICH THOSE WAGERS ARE ASSOCIATED; OR (C) THE DEVELOPMENT, MAINTENANCE, PROVISION OR OPERATION OF AN INTERACTIVE GAMING PLATFORM.

4. "COMMISSION" MEANS THE NEW YORK STATE GAMING COMMISSION.

5. "DIVISION" MEANS THE DIVISION OF GAMING, ESTABLISHED UNDER PARAGRAPH (C) OF SUBDIVISION TWO OF SECTION ONE HUNDRED THREE OF THIS CHAPTER.

6. "INTERACTIVE GAMING" MEANS THE CONDUCT OF GAMES THROUGH THE USE OF THE INTERNET OR OTHER COMMUNICATIONS TECHNOLOGY THAT ALLOWS A PERSON, UTILIZING MONEY, CHECKS, ELECTRONIC CHECKS, ELECTRONIC TRANSFERS OF MONEY, CREDIT CARDS, DEBIT CARDS OR ANY OTHER INSTRUMENTALITY, TO TRANSMIT TO A COMPUTER INFORMATION TO ASSIST IN THE PLACING OF A WAGER AND CORRESPONDING INFORMATION RELATED TO THE DISPLAY OF THE GAME, GAME OUTCOMES OR OTHER SIMILAR INFORMATION. THE TERM DOES NOT INCLUDE THE CONDUCT OF (A) NON-GAMBLING GAMES THAT DO NOT OTHERWISE REQUIRE A LICENSE UNDER STATE OR FEDERAL LAW; OR (B) GAMES THAT OCCUR ENTIRELY

AMONG PARTICIPANTS WHO ARE LOCATED ON A LICENSED CASINO PREMISES. FOR PURPOSES OF THIS PROVISION, "COMMUNICATIONS TECHNOLOGY" MEANS ANY METHOD USED AND THE COMPONENTS EMPLOYED BY AN ESTABLISHMENT TO FACILITATE THE TRANSMISSION OF INFORMATION, INCLUDING, WITHOUT LIMITATION, TRANSMISSION AND RECEPTION BY SYSTEMS BASED ON WIRE, CABLE, RADIO, MICROWAVE, LIGHT, OPTICS OR COMPUTER DATA NETWORKS, INCLUDING, WITHOUT LIMITATION, THE INTERNET AND INTRANETS.

7. "INTERACTIVE GAMING GROSS REVENUE" MEANS THE TOTAL OF ALL SUMS PAID TO A LICENSEE FROM INTERACTIVE GAMING INVOLVING AUTHORIZED PARTICIPANTS, LESS ONLY THE TOTAL OF ALL SUMS PAID OUT AS WINNINGS TO PATRONS AND PROMOTIONAL GAMING CREDITS; PROVIDED, HOWEVER, THAT THE CASH EQUIVALENT VALUE OF ANY MERCHANDISE OR OTHER NON-CASH THING OF VALUE INCLUDED IN A CONTEST OR TOURNAMENT SHALL NOT BE INCLUDED IN THE TOTAL OF ALL SUMS PAID OUT AS WINNINGS TO PLAYERS FOR PURPOSES OF DETERMINING INTERACTIVE GAMING GROSS REVENUE.

(A) NEITHER AMOUNTS DEPOSITED WITH A LICENSEE FOR PURPOSES OF INTERACTIVE GAMING NOR AMOUNTS TAKEN IN FRAUDULENT ACTS PERPETRATED AGAINST A LICENSEE FOR WHICH THE LICENSEE IS NOT REIMBURSED SHALL BE CONSIDERED TO HAVE BEEN "PAID" TO THE LICENSEE FOR PURPOSES OF CALCULATING INTERACTIVE GAMING GROSS REVENUE.

(B) "PROMOTIONAL GAMING CREDIT" INCLUDES BONUSES, PROMOTIONS AND ANY AMOUNT RECEIVED BY A LICENSEE FROM A PATRON FOR WHICH THE LICENSEE CAN DEMONSTRATE THAT IT OR ITS AFFILIATE HAS NOT RECEIVED CASH.

8. "INTERACTIVE GAMING PLATFORM" MEANS THE COMBINATION OF HARDWARE, SOFTWARE AND DATA NETWORKS USED TO MANAGE, ADMINISTER OR CONTROL WAGERS ON INTERACTIVE GAMING OR THE GAMES WITH WHICH THOSE WAGERS ARE ASSOCIATED.

9. "INTERNET" MEANS A COMPUTER NETWORK OF INTEROPERABLE PACKET-SWITCHED DATA NETWORKS.

10. "LICENSEE" MEANS A PERSON WHO IS LICENSED BY THE COMMISSION TO OFFER INTERACTIVE GAMING, USING AN INTERACTIVE GAMING PLATFORM TO AUTHORIZED PARTICIPANTS. A LICENSEE MAY UTILIZE MULTIPLE INTERACTIVE GAMING PLATFORMS PROVIDED THAT EACH PLATFORM IS APPROVED BY THE COMMISSION.

11. "OMAHA HOLD'EM POKER" MEANS THE POKER GAME MARKETED AS OMAHA HOLD'EM POKER OR OMAHA POKER IN WHICH EACH PLAYER IS DEALT FOUR CARDS AND MUST MAKE HIS OR HER BEST HAND USING EXACTLY TWO OF THEM, PLUS EXACTLY THREE OF THE FIVE COMMUNITY CARDS.

12. "SIGNIFICANT VENDOR" MEANS ANY PERSON WHO OFFERS OR WHO PROPOSES TO OFFER ANY OF THE FOLLOWING SERVICES WITH RESPECT TO INTERACTIVE GAMING: (A) A CORE FUNCTION; (B) SALE, LICENSING OR OTHER RECEIPT OF COMPENSATION FOR SELLING OR LICENSING A DATABASE OR CUSTOMER LIST OF INDIVIDUALS RESIDING IN THE UNITED STATES SELECTED IN WHOLE OR IN PART BECAUSE THEY PLACED WAGERS OR PARTICIPATED IN GAMBLING GAMES WITH OR

THROUGH AN INTERNET WEBSITE OR OPERATOR (OR ANY DERIVATIVE OF SUCH A DATABASE OR CUSTOMER LIST); (C) PROVISION OF ANY TRADEMARK, TRADENAME, SERVICE MARK OR SIMILAR INTELLECTUAL PROPERTY UNDER WHICH A LICENSEE OR SIGNIFICANT VENDOR IDENTIFIES INTERACTIVE GAMES TO CUSTOMERS; OR (D) PROVISION OF ANY PRODUCT, SERVICE OR ASSET TO A LICENSEE OR SIGNIFICANT VENDOR IN RETURN FOR A PERCENTAGE OF INTERACTIVE GAMING REVENUE (NOT INCLUDING FEES TO FINANCIAL INSTITUTIONS AND PAYMENT PROVIDERS FOR FACILITATING A DEPOSIT OR WITHDRARAL BY AN AUTHORIZED PARTICIPANT). THE TERM "SIGNIFICANT VENDOR" SHALL NOT INCLUDE A PROVIDER OF GOODS OR SERVICES TO A LICENSEE THAT ARE NOT SPECIFICALLY DESIGNED FOR USE AND NOT PRINCIPALLY USED IN CONNECTION WITH INTERACTIVE GAMING.

13. "TEXAS HOLD'EM POKER" MEANS THE TYPE OF POKER MARKETED AS TEXAS HOLD'EM POKER THAT INVOLVES TWO CARDS BEING DEALT FACE DOWN TO EACH PLAYER AND THEN FIVE COMMUNITY CARDS BEING PLACED FACE-UP BY THE DEALER, A SERIES OF THREE THEN TWO ADDITIONAL SINGLE CARDS, WITH PLAYERS HAVING THE OPTION TO CHECK, BET, RAISE OR FOLD AFTER EACH DEAL.

S 1502. AUTHORIZATION. 1. THE COMMISSION SHALL, WITHIN ONE HUNDRED EIGHTY DAYS OF THE DATE THIS ARTICLE BECOMES LAW, PROMULGATE REGULATIONS TO IMPLEMENT INTERACTIVE GAMING IN THIS STATE AND SHALL AUTHORIZE UP TO ELEVEN LICENSES TO OPERATE INTERACTIVE GAMING INVOLVING AUTHORIZED PARTICIPANTS, SUBJECT TO THE PROVISIONS OF THIS ARTICLE AND OTHER APPLICABLE PROVISIONS OF LAW.

2. APPLICANTS ELIGIBLE TO APPLY FOR A LICENSE PURSUANT TO THIS ARTICLE SHALL BE THOSE ENTITIES:

(A) LICENSED BY THE STATE PURSUANT TO SECTION SIXTEEN HUNDRED SEVENTEEN-A OF THE TAX LAW TO OPERATE VIDEO LOTTERY GAMING AND HAS EXPERIENCE IN THE OPERATION OF INTERACTIVE GAMING BY BEING LICENSED IN A STATE WITH COMPARABLE LICENSING REQUIREMENTS OR GUARANTEES ACQUISITION OF ADEQUATE BUSINESS COMPETENCE AND EXPERIENCE IN THE OPERATION OF INTERACTIVE GAMING; OR

(B) LICENSED BY THE STATE TO OPERATE A CLASS III GAMING FACILITY PURSUANT TO ARTICLE THIRTEEN OF THIS CHAPTER AND HAS EXPERIENCE IN THE OPERATION OF INTERACTIVE GAMING BY BEING LICENSED IN A STATE WITH COMPARABLE LICENSING REQUIREMENTS OR GUARANTEES ACQUISITION OF ADEQUATE BUSINESS COMPETENCE AND EXPERIENCE IN THE OPERATION OF INTERACTIVE GAMING.

3. THE COMMISSION SHALL, TO THE EXTENT PRACTICABLE, ISSUE LICENSES TO MULTIPLE APPLICANTS NO SOONER THAN ONE HUNDRED EIGHTY DAYS AFTER THE PROMULGATION OF REGULATIONS IN ORDER TO ENSURE A ROBUST AND COMPETITIVE MARKET FOR CONSUMERS AND TO PREVENT EARLY LICENSEES FROM GAINING AN UNFAIR COMPETITIVE ADVANTAGE.

4. NO PERSON MAY OPERATE, MANAGE OR MAKE AVAILABLE AN INTERACTIVE GAMING PLATFORM OR ACT AS A SIGNIFICANT VENDOR WITH RESPECT TO INTERACTIVE GAMING THAT IS OFFERED TO PERSONS LOCATED IN THIS STATE UNLESS LICENSED BY THE COMMISSION PURSUANT TO THIS ARTICLE AND ONLY THOSE GAMES AUTHORIZED BY THE COMMISSION SHALL BE PERMITTED.

5. LICENSE APPLICANTS MAY FORM A PARTNERSHIP, JOINT VENTURE OR OTHER CONTRACTUAL ARRANGEMENT IN ORDER TO FACILITATE THE PURPOSES OF THIS ARTICLE.

6. ANY PERSON FOUND SUITABLE BY THE COMMISSION MAY BE ISSUED A LICENSE AS AN OPERATOR OR SIGNIFICANT VENDOR PURSUANT TO THIS ARTICLE. IN DETERMINING SUITABILITY, THE COMMISSION SHALL CONSIDER THOSE FACTORS IT DEEMS RELEVANT IN ITS DISCRETION, INCLUDING BUT NOT LIMITED TO:

(A) WHETHER THE APPLICANT IS A PERSON OF GOOD CHARACTER, HONESTY AND INTEGRITY;

(B) WHETHER THE APPLICANT IS PERSON WHOSE PRIOR ACTIVITIES, CRIMINAL RECORD, IF ANY, REPUTATION, HABITS AND ASSOCIATIONS DO NOT:

(I) POSE A THREAT TO THE PUBLIC INTEREST OR TO THE EFFECTIVE REGULATION AND CONTROL OF INTERACTIVE GAMING; OR

(II) CREATE OR ENHANCE THE DANGERS OF UNSUITABLE, UNFAIR OR ILLEGAL PRACTICES, METHODS AND ACTIVITIES IN THE CONDUCT OF INTERACTIVE GAMING OR IN THE CARRYING ON OF THE BUSINESS AND FINANCIAL ARRANGEMENTS INCIDENTAL TO SUCH GAMING;

(C) WHETHER THE APPLICANT IS CAPABLE OF AND LIKELY TO CONDUCT THE ACTIVITIES FOR WHICH THE APPLICANT IS LICENSED IN ACCORDANCE WITH THE PROVISIONS OF THIS ARTICLE, ANY REGULATIONS PRESCRIBED UNDER THIS ARTICLE AND ALL OTHER APPLICABLE LAWS;

(D) WHETHER THE APPLICANT HAS OR GUARANTEES ACQUISITION OF ADEQUATE BUSINESS COMPETENCE AND EXPERIENCE IN THE OPERATION OF LICENSED GAMING OR OF INTERACTIVE GAMING IN THIS STATE OR IN A STATE WITH COMPARABLE LICENSING REQUIREMENTS; AND

(E) WHETHER THE APPLICANT HAS OR WILL OBTAIN SUFFICIENT FINANCING FOR THE NATURE OF THE PROPOSED OPERATION AND FROM A SUITABLE SOURCE.

7. THE COMMISSION FURTHER SHALL DEVELOP STANDARDS BY WHICH TO EVALUATE AND APPROVE INTERACTIVE GAMING PLATFORMS FOR USE WITH INTERACTIVE GAMING. INTERACTIVE GAMING PLATFORMS MUST BE APPROVED BY THE COMMISSION BEFORE BEING USED BY A LICENSEE OR SIGNIFICANT VENDOR TO CONDUCT INTERACTIVE GAMING IN THIS STATE.

8. THE COMMISSION SHALL REQUIRE ALL LICENSEES TO PAY A ONE-TIME FEE OF TEN MILLION DOLLARS. SUCH FEE PAID BY EACH LICENSEE SHALL BE APPLIED TO SATISFY, IN WHOLE OR IN PART, AS APPLICABLE, THAT LICENSEE'S TAX OBLIGATION PURSUANT TO SECTION FIFTEEN HUNDRED FIVE OF THIS ARTICLE IN SIXTY EQUAL MONTHLY INSTALLMENTS, ALLOCATED TO EACH OF THE FIRST SIXTY MONTHS OF TAX OWED AFTER THE LICENSEE HAS BEGUN OPERATING INTERACTIVE GAMING PURSUANT TO THIS ARTICLE. NO AMOUNTS NOT REQUIRED TO BE USED TO SATISFY SUCH TAX OBLIGATION DURING THAT PERIOD SHALL BE ALLOCATED TO PAYMENT OF SUCH TAX OBLIGATION AFTER THAT PERIOD.

9. LICENSES ISSUED BY THE COMMISSION SHALL REMAIN IN EFFECT FOR TEN YEARS.

10. THE COMMISSION, BY REGULATION, MAY AUTHORIZE AND PROMULGATE ANY RULES NECESSARY TO IMPLEMENT AGREEMENTS WITH OTHER STATES, OR AUTHORIZED AGENCIES THEREOF (A) TO ENABLE PATRONS IN THOSE STATES TO PARTICIPATE IN INTERACTIVE GAMING OFFERED BY LICENSEES UNDER THIS ARTICLE OR (B) TO

ENABLE PATRONS IN THIS STATE TO PARTICIPATE IN INTERACTIVE GAMING OFFERED BY LICENSEES UNDER THE LAWS OF THOSE OTHER STATES, PROVIDED THAT SUCH OTHER STATE OR AUTHORIZED AGENCY APPLIES SUITABILITY STANDARDS AND REVIEW MATERIALLY CONSISTENT WITH THE PROVISIONS OF THIS ARTICLE.

11. ANY REGULATIONS ADOPTED PURSUANT TO SUBDIVISION TEN OF THIS SECTION MUST SET FORTH PROVISIONS THAT ADDRESS:

(A) ANY ARRANGEMENTS TO SHARE REVENUE BETWEEN NEW YORK AND ANY OTHER STATE OR AGENCY WITHIN ANOTHER STATE; AND

(B) ARRANGEMENTS TO ENSURE THE INTEGRITY OF INTERACTIVE GAMING OFFERED PURSUANT TO ANY SUCH AGREEMENT AND THE PROTECTION OF PATRONS LOCATED IN THIS STATE.

12. THE COMMISSION MAY DELEGATE ITS RESPONSIBILITIES TO ADMINISTER THE PROVISIONS OF THIS ARTICLE TO THE DIVISION, AS IT SEES FIT, EXCEPT FOR ITS RESPONSIBILITIES TO APPROVE LICENSES.

S 1503. REQUIRED SAFEGUARDS/MINIMUM STANDARDS. THE COMMISSION SHALL REQUIRE LICENSEES TO IMPLEMENT MEASURES TO MEET THE STANDARDS SET OUT IN THIS SECTION, ALONG WITH SUCH OTHER STANDARDS THAT THE COMMISSION IN ITS DISCRETION MAY CHOOSE TO REQUIRE.

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(A) APPROPRIATE SAFEGUARDS TO ENSURE, TO A REASONABLE DEGREE OF CERTAINTY, THAT PARTICIPANTS IN INTERACTIVE GAMING ARE NOT YOUNGER THAN TWENTY-ONE YEARS OF AGE.

(B) APPROPRIATE SAFEGUARDS TO ENSURE, TO A REASONABLE DEGREE OF CERTAINTY, THAT PARTICIPANTS IN INTERACTIVE GAMING ARE PHYSICALLY LOCATED WITHIN THE STATE OR SUCH OTHER JURISDICTION THAT THE COMMISSION HAS DETERMINED TO BE PERMISSIBLE.

(C) APPROPRIATE SAFEGUARDS TO PROTECT, TO A REASONABLE DEGREE OF CERTAINTY, THE PRIVACY AND ONLINE SECURITY OF PARTICIPANTS IN INTERACTIVE GAMING.

(D) APPROPRIATE SAFEGUARDS TO ENSURE, TO A REASONABLE DEGREE OF CERTAINTY, THAT THE INTERACTIVE GAMING IS FAIR AND HONEST AND THAT APPROPRIATE MEASURES ARE IN PLACE TO DETER, DETECT AND, TO THE EXTENT REASONABLY POSSIBLE, TO PREVENT CHEATING, INCLUDING COLLUSION, AND USE OF CHEATING DEVICES, INCLUDING USE OF SOFTWARE PROGRAMS (SOMETIMES REFERRED TO AS "BOTS") THAT MAKE BETS OR WAGERS ACCORDING TO ALGORITHMS.

(E) APPROPRIATE SAFEGUARDS TO MINIMIZE COMPULSIVE GAMING AND TO PROVIDE NOTICE TO PARTICIPANTS OF RESOURCES TO HELP PROBLEM GAMBLERS.

(F) APPROPRIATE SAFEGUARDS TO ENSURE PARTICIPANTS' FUNDS ARE HELD IN ACCOUNTS SEGREGATED FROM THE FUNDS OF LICENSEES AND OTHERWISE ARE PROTECTED FROM CORPORATE INSOLVENCY, FINANCIAL RISK OR CRIMINAL OR CIVIL ACTIONS AGAINST THE LICENSEE.

S 1504. SCOPE OF LICENSING REVIEW. 1. IN CONNECTION WITH ANY LICENSE ISSUED PURSUANT TO THIS ARTICLE, THE LICENSEE, SIGNIFICANT VENDOR OR APPLICANT SHALL IDENTIFY AND THE COMMISSION SHALL REVIEW THE SUITABILITY OF SUCH LICENSEE'S, SIGNIFICANT VENDOR'S OR APPLICANT'S OWNER, CHIEF EXECUTIVE OFFICER, CHIEF FINANCIAL OFFICER AND ANY OTHER OFFICER OR EMPLOYEE WHO THE COMMISSION DEEMS IS SIGNIFICANTLY INVOLVED IN THE MANAGEMENT OR CONTROL OF THE LICENSEE, SIGNIFICANT VENDOR OR APPLICANT OR OF THE INTERACTIVE GAMING PLATFORM. "OWNER" FOR PURPOSES OF THIS PROVISION MEANS ANY PERSON WHO DIRECTLY OR INDIRECTLY HOLDS ANY BENEFICIAL OR OWNERSHIP INTEREST IN THE APPLICANT OF FIVE PERCENT OR GREATER OR ANY AMOUNT OF OWNERSHIP THAT THE COMMISSION DETERMINES TO BE SIGNIFICANT OWNERSHIP OF THE LICENSEE, SIGNIFICANT VENDOR, OR APPLICANT.

2. INSTITUTIONAL INVESTORS ARE SUBJECT TO THE PROVISIONS SET OUT IN THIS SECTION.

(A) AN INSTITUTIONAL INVESTOR HOLDING UNDER TWENTY-FIVE PERCENT OF THE EQUITY SECURITIES OF A LICENSEE'S OR SIGNIFICANT VENDOR'S (OR APPLICANT'S) HOLDING OR INTERMEDIARY COMPANIES, SHALL BE GRANTED A WAIVER OF ANY INVESTIGATION OF SUITABILITY OR OTHER REQUIREMENT IF SUCH SECURITIES ARE THOSE OF A CORPORATION, WHETHER PUBLICLY TRADED OR PRIVATELY HELD, AND ITS HOLDINGS OF SUCH SECURITIES WERE PURCHASED FOR INVESTMENT PURPOSES ONLY AND IT FILES A CERTIFIED STATEMENT TO THE EFFECT THAT IT HAS NO INTENTION OF INFLUENCING OR AFFECTING THE AFFAIRS OF THE ISSUER, THE LICENSEE (OR SIGNIFICANT VENDOR OR APPLICANT, AS APPLICABLE) OR ITS HOLDING OR INTERMEDIARY COMPANIES; PROVIDED, HOWEVER, THAT IT SHALL BE PERMITTED TO VOTE ON MATTERS PUT TO THE VOTE OF THE OUTSTANDING SECURITY HOLDERS. THE COMMISSION MAY GRANT SUCH A WAIVER TO AN INSTITUTIONAL INVESTOR HOLDING A HIGHER PERCENTAGE OF SUCH SECURITIES UPON A SHOWING OF GOOD CAUSE AND IF THE CONDITIONS SPECIFIED ABOVE ARE MET. ANY INSTI-

TUTIONAL INVESTOR GRANTED A WAIVER UNDER THIS PARAGRAPH WHICH SUBSEQUENTLY DETERMINES TO INFLUENCE OR AFFECT THE AFFAIRS OF THE ISSUER SHALL PROVIDE NOT LESS THAN THIRTY DAYS' NOTICE OF SUCH INTENT AND SHALL FILE WITH THE COMMISSION A REQUEST FOR DETERMINATION OF SUITABILITY BEFORE TAKING ANY ACTION THAT MAY INFLUENCE OR AFFECT THE AFFAIRS OF THE ISSUER; PROVIDED, HOWEVER, THAT IT SHALL BE PERMITTED TO VOTE ON MATTERS

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PUT TO THE VOTE OF THE OUTSTANDING SECURITY HOLDERS. IF AN INSTITUTIONAL INVESTOR CHANGES ITS INVESTMENT INTENT, OR IF THE COMMISSION FINDS REASONABLE CAUSE TO BELIEVE THAT THE INSTITUTIONAL INVESTOR MAY BE FOUND UNSUITABLE, NO ACTION OTHER THAN DIVESTITURE SHALL BE TAKEN BY SUCH INVESTOR WITH RESPECT TO ITS SECURITY HOLDINGS UNTIL THERE HAS BEEN COMPLIANCE WITH ANY REQUIREMENTS ESTABLISHED BY THE COMMISSION, WHICH MAY INCLUDE THE EXECUTION OF A TRUST AGREEMENT. THE LICENSEE (OR SIGNIFICANT VENDOR OR APPLICANT, AS APPLICABLE) AND ITS RELEVANT HOLDING, INTERMEDIARY. OR SUBSIDIARY COMPANY SHALL NOTIFY THE COMMISSION IMMEDIATELY OF ANY INFORMATION ABOUT, OR ACTIONS OF, AN INSTITUTIONAL INVESTOR HOLDING ITS EQUITY SECURITIES WHERE SUCH INFORMATION OR ACTION MAY IMPACT UPON THE ELIGIBILITY OF SUCH INSTITUTIONAL INVESTOR FOR A WAIVER PURSUANT TO THIS PARAGRAPH.

(B) IF AT ANY TIME THE COMMISSION FINDS THAT AN INSTITUTIONAL INVESTOR HOLDING ANY SECURITY OF A HOLDING OR INTERMEDIARY COMPANY OF A LICENSEE OR SIGNIFICANT VENDOR OR APPLICANT, OR, WHERE RELEVANT, OF ANOTHER SUBSIDIARY COMPANY OF A HOLDING OR INTERMEDIARY COMPANY OF A LICENSEE OR SIGNIFICANT VENDOR OR APPLICANT WHICH IS RELATED IN ANY WAY TO THE FINANCING OF THE LICENSEE OR SIGNIFICANT VENDOR OR APPLICANT, FAILS TO COMPLY WITH THE TERMS OF PARAGRAPH (A) OF THIS SECTION, OR IF AT ANY TIME THE COMMISSION FINDS THAT, BY REASON OF THE EXTENT OR NATURE OF ITS HOLDINGS, AN INSTITUTIONAL INVESTOR IS IN A POSITION TO EXERCISE SUCH A SUBSTANTIAL IMPACT UPON THE CONTROLLING INTERESTS OF A LICENSEE OR SIGNIFICANT VENDOR OR APPLICANT THAT INVESTIGATION AND DETERMINATION OF SUITABILITY OF THE INSTITUTIONAL INVESTOR IS NECESSARY TO PROTECT THE PUBLIC INTEREST, THE COMMISSION MAY TAKE ANY NECESSARY ACTION OTHERWISE AUTHORIZED UNDER THIS ARTICLE TO PROTECT THE PUBLIC INTEREST.

(C) FOR PURPOSES OF THIS SECTION, AN "INSTITUTIONAL INVESTOR" SHALL MEAN ANY RETIREMENT FUND ADMINISTERED BY A PUBLIC AGENCY FOR THE EXCLUSIVE BENEFIT OF FEDERAL, STATE, OR LOCAL PUBLIC EMPLOYEES; INVESTMENT COMPANY REGISTERED UNDER THE INVESTMENT COMPANY ACT OF 1940 (15 U.S.C. S 80A-1 ET SEQ.); COLLECTIVE INVESTMENT TRUST ORGANIZED BY BANKS UNDER PART NINE OF THE RULES OF THE COMPTROLLER OF THE CURRENCY; CLOSED END INVESTMENT TRUST; CHARTERED OR LICENSED LIFE INSURANCE COMPANY OR PROPERTY AND CASUALTY INSURANCE COMPANY; BANKING AND OTHER CHARTERED OR LICENSED LENDING INSTITUTION; INVESTMENT ADVISOR REGISTERED UNDER THE INVESTMENT ADVISORS ACT OF 1940 (15 U.S.C. S 80B-1 ET SEQ.); AND SUCH OTHER PERSONS AS THE COMMISSION MAY DETERMINE FOR REASONS CONSISTENT WITH THE PUBLIC INTEREST.

S 1505. STATE TAX. LICENSEES ENGAGED IN THE BUSINESS OF CONDUCTING INTERACTIVE GAMING PURSUANT TO THIS ARTICLE SHALL PAY A PRIVILEGE TAX BASED ON THE LICENSEE'S INTERACTIVE GAMING GROSS REVENUE AT A FIFTEEN PERCENT RATE.

S 1506. DISPOSITION OF TAXES. THE COMMISSION SHALL PAY INTO THE STATE LOTTERY FUND ALL TAXES IMPOSED BY THIS ARTICLE; ANY INTEREST AND PENALTIES IMPOSED BY THE COMMISSION RELATING TO THOSE TAXES; ALL PENALTIES LEVIED AND COLLECTED BY THE COMMISSION; AND THE APPROPRIATE FUNDS, CASH OR PRIZES FORFEITED FROM INTERACTIVE GAMING.

S 2. Subdivision 1 of section 225.00 of the penal law is amended to read as follows:

1. "Contest of chance" means any contest, game, gaming scheme or gaming device in which the outcome depends [in a material degree] PREDOMINANTLY upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.

S 3. The penal law is amended by adding a new section 225.36 to read as follows:

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S 225.36 INTERACTIVE GAMING OFFENSES AND EXCEPTIONS.

1. THE KNOWING AND WILLFUL OFFERING OF UNLICENSED INTERACTIVE GAMING TO PERSONS IN THIS STATE, OR THE KNOWING AND WILLFUL PROVISION OF

SERVICES WITH RESPECT THERETO, SHALL CONSTITUTE A GAMBLING OFFENSE UNDER THIS ARTICLE.

2. LICENSED INTERACTIVE GAMING ACTIVITIES UNDER SECTION FIFTEEN HUNDRED TWO OF THE RACING, PARI-MUTUEL WAGERING AND BREEDING LAW SHALL NOT BE A GAMBLING OFFENSE UNDER THIS ARTICLE.

3. A PERSON OFFERING UNLICENSED INTERACTIVE GAMING TO PERSONS IN THIS STATE SHALL BE LIABLE FOR ALL TAXES SET FORTH IN SECTION FIFTEEN HUNDRED FIVE OF THE RACING, PARI-MUTUEL WAGERING AND BREEDING LAW IN THE SAME MANNER AND AMOUNTS AS IF SUCH PERSON WERE A LICENSEE. TIMELY PAYMENT OF SUCH TAXES SHALL NOT CONSTITUTE A DEFENSE TO ANY PROSECUTION OR OTHER PROCEEDING IN CONNECTION WITH THE INTERACTIVE GAMING EXCEPT FOR A PROSECUTION OR PROCEEDING ALLEGING FAILURE TO MAKE SUCH PAYMENT.

S 4. Severability clause. If any provision of this act or application thereof shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of the act, but shall be confined in its operation to the provision thereof directly involved in the controversy in which the judgment shall have been rendered.

S 5. This act shall take effect on the one hundred eightieth day after it shall have become a law.

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EXHIBIT "E"

Copy of New York Senate Bill S-7900, sponsored by Sen. John Bonacic, introduced in the 2017-2018 Legislative session.

Senate Bill S7900

2017-2018 Legislative Session

Relates to regulation of sports betting and mobile sports wagering in New York

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S7900 - DETAILS

Law Section:

Racing, Pari-Mutuel Wagering and Breeding Law

Laws Affected:

Amd §§1367, 104 & 1401, add §1367-a, RWB L

S7900 - SUMMARY

Relates to regulation of sports betting and mobile sports wagering; implements a tax equivalent to eight and one-half percent of sports wagering gross revenue to be paid to the commercial gaming revenue fund; requires reporting.

S7900 - SPONSOR MEMO

BILL NUMBER: S7900

TITLE OF BILL : An act to amend the racing, pari-mutuel wagering and breeding law, in relation to regulation of sports betting

PURPOSE :

To update the existing provisions of law which allow the four upstate casino gaming resorts to conduct sports betting in the event of a change in the federal law which currently prohibits it.

SUMMARY OF PROVISIONS :

Section 1: Amends section 1367 of the Racing, Pari-Mutuel Wagering and Breeding Law as follows:

*Expands and clarifies definitions;

*Prohibits sports betting on high school athletic events;

*Provides a listing of the individuals who are prohibited from participating in sports betting;

*Clarifies the ability of casinos to place layoff bets and the authority of the Gaming Commission to regulate how they are placed;

*Requires annual reports from the casinos on sports betting;

*Requires the casinos to pay a fee of .25% of handle (not to exceed 2% of gross sports wagering revenue) to the state for sports governing bodies to be able to seek reimbursement for integrity related costs;

*Requires the casinos to pay a state tax of 8.5% of gross sports wagering revenue;

*Clarifies that interactive fantasy sports are not included in the provisions regulating sports betting conducted by casinos;

*Clarifies that pari-mutuel wagering on horse racing is not included within sports betting but provides the circumstances under which casinos may offer pari-mutuel wagering on horses;

*Provides the ability for sports governing bodies to petition the Gaming Commission to restrict certain wagers on sports events;

*Provides a structure for investigations and data sharing between the casinos, Gaming Commission and sports governing bodies;

*Provides the ability for sports governing bodies to require the use of official league data for certain wagers on sports events; and

*Provides for a civil penalty for violations of this section.

Section 2: Amends the Racing, Pari-Mutuel Wagering and Breeding Law by adding a new section 1367-a which authorizes and regulates mobile sports wagering as follows:

*Provides definitions of relevant terms;

*Provides a listing of the individuals who are prohibited from participating in sports betting;

*Requires a casino offering a mobile sports betting platform to register with the Gaming Commission;

*Requires any outside vendor offering a mobile sports betting platform for a casino to be licensed as a casino vendor enterprise;

*Requires any sports bettor to be located in the State of New York when placing a sports wager;

*Requires mobile sports betting platform operators to conform to a series of safeguards similar to those required of interactive fantasy sports operators;

*Requires sports bettors to sign up for their mobile sports betting account in person at a casino or an affiliate of a casino;

*Limits the potential affiliates of a casino to licensed racetracks, off-track betting corporations, the video lottery operator at Aqueduct racetrack, and the New York Racing Association; and

*Provides for the placement and operation, subject to the approval of the Gaming Commission, of self-service mobile sports wagering kiosks by casinos at the physical locations of their affiliates.

Section 3: Clarifies the authority of the Gaming Commission to regulate sports wagering.

Section 4: Removes the prohibition on fantasy sports contests based upon collegiate sports.

Section 5: Severability clause.

Section 6: Effective date.

JUSTIFICATION :

As part of the 2013 Upstate New York Gaming Economic Development Act, the four upstate casino gaming resorts were granted the ability to conduct sports betting should there be a change in federal law prohibiting sports betting outside of certain states. In December 2017 the United States Supreme Court heard oral arguments in Christie v. National Collegiate Athletic Association which may result in the federal prohibition being overturned. In preparation for such a situation, the Senate Committee on Racing, Gaming and Wagering held a hearing in January on the topic of sports betting which has led to the introduction of this legislation to address a number of outstanding issues that are not addressed by the current statute.

LEGISLATIVE HISTORY :

New bill

FISCAL IMPLICATIONS :

Between $10 million and $30 million annually to New York State for education based upon conservative market estimates.

EFFECTIVE DATE :
This act shall take effect on the same date and in the same manner as section 1367 of the racing, pari-mutuel wagering and breeding law pursuant to subdivision (c) of section 52 of chapter 174 of the laws of 2013.

VIEW LESS ^

S7900 - BILL TEXT DOWNLOAD PDF (HTTP://LEGISLATION.NYSENATE.GOV/PDF/BILLS/2017/S7900)

STATE OF NEW YORK

7900

IN SENATE

March 7, 2018

Introduced by Sen. BONACIC -- read twice and ordered printed, and when printed to be committed to the Committee on Racing, Gaming and Wagering

AN ACT to amend the racing, pari-mutuel wagering and breeding law, in relation to regulation of sports betting

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 1367 of the racing, pari-mutuel wagering and breeding law, as added by chapter 174 of the laws of 2013, is amended to read as follows:

S 1367. Sports wagering. 1. As used in this section:

(a) "AFFILIATE" MEANS ANY OFF-TRACK BETTING CORPORATION, FRANCHISED CORPORATION, OR RACE TRACK LICENSED PURSUANT TO THIS CHAPTER, OR AN OPERATOR OF VIDEO LOTTERY GAMING AT AQUEDUCT LICENSED PURSUANT TO SECTION SIXTEEN HUNDRED SEVENTEEN-A OF THE TAX LAW, WHICH HAS A MOBILE SPORTS WAGERING AGREEMENT WITH A CASINO PURSUANT TO SECTION THIRTEEN HUNDRED SIXTY-SEVEN-A OF THIS TITLE;

(B) "AGENT" MEANS AN ENTITY THAT IS PARTY TO A CONTRACT WITH A LICENSED GAMING FACILITY AUTHORIZED TO OPERATE A SPORTS POOL AND IS APPROVED BY THE COMMISSION TO OPERATE A SPORTS POOL ON BEHALF OF SUCH LICENSED GAMING FACILITY;

(C) "AUTHORIZED SPORTS BETTOR" MEANS AN INDIVIDUAL WHO IS PHYSICALLY PRESENT IN THIS STATE WHEN PLACING A SPORTS WAGER, WHO IS NOT A PROHIBITED SPORTS BETTOR, THAT PARTICIPATES IN SPORTS WAGERING OFFERED BY A CASINO. THE INTERMEDIATE ROUTING OF ELECTRONIC DATA IN CONNECTION WITH MOBILE SPORTS WAGERING SHALL NOT DETERMINE THE LOCATION OR LOCATIONS IN WHICH A WAGER IS INITIATED, RECEIVED OR OTHERWISE MADE;

(D) "Casino" means a licensed gaming facility at which gambling is conducted pursuant to the provisions of this article OR THE AGENT OF SUCH LICENSED GAMING FACILITY;

[(b)] (E) "Commission" means the commission established pursuant to section one hundred two of this chapter;

[(c)] (F) "Collegiate sport or athletic event" means a sport or athletic event offered or sponsored by or played in connection with a

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

public or private institution that offers educational services beyond the secondary level;

(G) "GLOBAL RISK MANAGEMENT" MEANS THE DIRECTION, MANAGEMENT, CONSULTATION AND/OR INSTRUCTION FOR PURPOSES OF MANAGING RISKS ASSOCIATED WITH SPORTS WAGERING CONDUCTED PURSUANT TO THIS SECTION AND INCLUDES THE SETTING AND ADJUSTMENT OF BETTING LINES, POINT SPREADS, OR ODDS AND WHETHER TO PLACE LAYOFF BETS AS PERMITTED BY THIS SECTION;

[(d)] (H) "HIGH SCHOOL SPORT OR ATHLETIC EVENT" MEANS A SPORT OR ATHLETIC EVENT OFFERED OR SPONSORED BY OR PLAYED IN CONNECTION WITH A PUBLIC OR PRIVATE INSTITUTION THAT OFFERS EDUCATION SERVICES AT THE SECONDARY LEVEL;

(I) "HORSE RACING EVENT" MEANS ANY SPORT OR ATHLETIC EVENT CONDUCTED IN NEW YORK STATE SUBJECT TO THE PROVISIONS OF ARTICLES TWO, THREE, FOUR, FIVE, SIX, NINE, TEN AND ELEVEN OF THIS CHAPTER, OR ANY SPORT OR ATHLETIC EVENT CONDUCTED OUTSIDE OF NEW YORK STATE, WHICH IF CONDUCTED IN NEW YORK STATE WOULD BE SUBJECT TO THE PROVISIONS OF THIS CHAPTER;

(J) "IN-PLAY SPORTS WAGER" MEANS A SPORTS WAGER PLACED ON A SPORTS EVENT AFTER THE SPORTS EVENT HAS BEGUN AND BEFORE IT ENDS;

(K) "LAYOFF BET" MEANS A SPORTS WAGER PLACED BY A CASINO SPORTS POOL WITH ANOTHER CASINO SPORTS POOL;

(L) "MINOR" MEANS ANY PERSON UNDER THE AGE OF TWENTY-ONE YEARS;

(M) "MOBILE SPORTS WAGERING PLATFORM" OR "PLATFORM" MEANS THE COMBINATION OF HARDWARE, SOFTWARE, AND DATA NETWORKS USED TO MANAGE, ADMINISTER, OR CONTROL SPORTS WAGERING AND ANY ASSOCIATED WAGERS ACCESSIBLE BY ANY ELECTRONIC MEANS INCLUDING MOBILE APPLICATIONS AND INTERNET WEBSITES;

(N) "OFFICIAL LEAGUE DATA" MEANS STATISTICS, RESULTS, OUTCOMES, AND OTHER DATA RELATING TO A SPORTING EVENT THAT HAVE BEEN OBTAINED FROM THE RELEVANT SPORTS GOVERNING BODY OR AN ENTITY EXPRESSLY AUTHORIZED BY THE SPORTS GOVERNING BODY TO PROVIDE SUCH INFORMATION TO CASINOS;

(O) "Operator" means a casino which has elected to operate a sports pool;

[(e)] (P) "Professional sport or athletic event" means an event at which two or more persons participate in sports or athletic events and receive compensation in excess of actual expenses for their participation in such event;

(Q) "PROHIBITED SPORTS BETTOR" MEANS:

(I) ANY OFFICER OR EMPLOYEE OF THE COMMISSION;

(II) ANY PRINCIPAL OR KEY EMPLOYEE OF A CASINO OR AFFILIATE, EXCEPT AS MAY BE PERMITTED BY THE COMMISSION FOR GOOD CAUSE SHOWN;

(III) ANY CASINO GAMING OR NON-GAMING EMPLOYEE AT THE CASINO THAT EMPLOYS SUCH PERSON AND AT ANY AFFILIATE THAT HAS AN AGREEMENT WITH THAT CASINO;

(IV) ANY CONTRACTOR, SUBCONTRACTOR, OR CONSULTANT, OR OFFICER OR EMPLOYEE OF A CONTRACTOR, SUBCONTRACTOR, OR CONSULTANT, OF A CASINO IF SUCH PERSON IS DIRECTLY INVOLVED IN THE OPERATION OR OBSERVATION OF SPORTS WAGERING, OR THE PROCESSING OF SPORTS WAGERING CLAIMS OR PAYMENTS;

(V) ANY PERSON SUBJECT TO A CONTRACT WITH THE COMMISSION IF SUCH CONTRACT CONTAINS A PROVISION PROHIBITING SUCH PERSON FROM PARTICIPATING IN SPORTS WAGERING;

(VI) ANY SPOUSE, CHILD, BROTHER, SISTER OR PARENT RESIDING AS A MEMBER OF THE SAME HOUSEHOLD IN THE PRINCIPAL PLACE OF ABODE OF ANY OF THE FOREGOING PERSONS AT THE SAME CASINO WHERE THE FOREGOING PERSON IS PROHIBITED FROM PARTICIPATING IN SPORTS WAGERING;

(VII) ANY INDIVIDUAL WITH ACCESS TO NON-PUBLIC CONFIDENTIAL INFORMATION ABOUT SPORTS WAGERING;

(VIII) ANY AMATEUR OR PROFESSIONAL ATHLETE IF THE SPORTS WAGER IS BASED ON ANY SPORT OR ATHLETIC EVENT OVERSEEN BY THE ATHLETE'S SPORTS GOVERNING BODY;

(IX) ANY SPORTS AGENT, OWNER OR EMPLOYEE OF A TEAM, PLAYER AND UMPIRE UNION PERSONNEL, AND EMPLOYEE REFEREE, COACH OR OFFICIAL OF A SPORTS GOVERNING BODY, IF THE SPORTS WAGER IS BASED ON ANY SPORT OR ATHLETIC EVENT OVERSEEN BY THE INDIVIDUAL'S SPORTS GOVERNING BODY;

(X) ANY INDIVIDUAL PLACING A WAGER AS AN AGENT OR PROXY FOR AN OTHERWISE PROHIBITED SPORTS BETTOR; OR

(XI) ANY MINOR;

[(f)] (R) "Prohibited sports event" means any [collegiate sport or athletic event that takes place in New York or a sport or athletic event in which any New York college team participates regardless of where the event takes place] HIGH SCHOOL SPORT OR ATHLETIC EVENT;

[(g)] (S) "Sports event" means any professional sport or athletic event and any collegiate sport or athletic event, except a prohibited sports event OR A HORSE RACING EVENT;

[(h)] (T) "SPORTS GOVERNING BODY" MEANS THE ORGANIZATION THAT PRESCRIBES FINAL RULES AND ENFORCES CODES OF CONDUCT WITH RESPECT TO A SPORTING EVENT AND PARTICIPANTS THEREIN;

(U) "Sports pool" means the business of accepting wagers on any sports event by any system or method of wagering; [and

(i)] (V) "SPORTS WAGER" MEANS CASH OR CASH EQUIVALENT THAT IS PAID BY AN AUTHORIZED SPORTS BETTOR TO A CASINO TO PARTICIPATE IN SPORTS WAGERING OFFERED BY SUCH CASINO;

(W) "SPORTS WAGERING" MEANS WAGERING ON SPORTING EVENTS OR ANY PORTION THEREOF, OR ON THE INDIVIDUAL PERFORMANCE STATISTICS OF ATHLETES PARTICIPATING IN A SPORTING EVENT, OR COMBINATION OF SPORTING EVENTS, BY ANY SYSTEM OR METHOD OF WAGERING, INCLUDING, BUT NOT LIMITED TO, IN-PERSON COMMUNICATION AND ELECTRONIC COMMUNICATION THROUGH INTERNET WEBSITES AND MOBILE DEVICE APPLICATIONS. THE TERM "SPORTS WAGERING" SHALL INCLUDE, BUT IS NOT LIMITED TO, SINGLE-GAME BETS, TEASER BETS, PARLAYS, OVER-UNDER BETS, MONEYLINE, POOLS, EXCHANGE WAGERING, IN-GAME WAGERING, IN-PLAY BETS, PROPOSITION BETS AND STRAIGHT BETS;

(X) "SPORTS WAGERING GROSS REVENUE" MEANS: (I) THE AMOUNT EQUAL TO THE TOTAL OF ALL SPORTS WAGERS NOT ATTRIBUTABLE TO PROHIBITED SPORTS EVENTS THAT AN OPERATOR COLLECTS FROM ALL PLAYERS, LESS THE TOTAL OF ALL SUMS NOT ATTRIBUTABLE TO PROHIBITED SPORTS EVENTS PAID OUT AS WINNINGS TO ALL SPORTS BETTORS, HOWEVER, THAT THE TOTAL OF ALL SUMS PAID OUT AS WINNINGS TO SPORTS BETTORS SHALL NOT INCLUDE THE CASH EQUIVALENT VALUE OF ANY MERCHANDISE OR THING OF VALUE AWARDED AS A PRIZE, OR (II) IN THE CASE OF EXCHANGE WAGERING PURSUANT TO THIS SECTION, THE COMMISSION ON WINNING SPORTS WAGERS BY AUTHORIZED SPORTS BETTORS RETAINED BY THE OPERATOR. THE ISSUANCE TO OR WAGERING BY AUTHORIZED SPORTS BETTORS AT A CASINO OF ANY PROMOTIONAL GAMING CREDIT SHALL NOT BE TAXABLE FOR THE PURPOSES OF DETERMINING SPORTS WAGERING GROSS REVENUE;

(Y) "Sports wagering lounge" means an area wherein a sports pool is operated;

(Z) "TIER ONE SPORTS WAGER" MEANS A SPORTS WAGER THAT IS DETERMINED SOLELY BY THE FINAL SCORE OR FINAL OUTCOME OF THE SPORTS EVENT AND PLACED BEFORE THE SPORTS EVENT HAS BEGUN;

(AA) "TIER TWO SPORTS WAGER" MEANS AN IN-PLAY SPORTS WAGER; AND

(BB) "TIER THREE SPORTS WAGER" MEANS A SPORTS WAGER THAT IS NEITHER A TIER ONE NOR A TIER TWO SPORTS WAGER.

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2. No gaming facility may conduct sports wagering until such time as there has been a change in federal law authorizing such or upon a ruling of a court of competent jurisdiction that such activity is lawful.

3. (a) In addition to authorized gaming activities, a licensed gaming facility may when authorized by subdivision two of this section operate a sports pool upon the approval of the commission and in accordance with the provisions of this section and applicable regulations promulgated pursuant to this article. The commission shall hear and decide promptly and in reasonable order all applications for a license to operate a sports pool, shall have the general responsibility for the implementation of this section and shall have all other duties specified in this section with regard to the operation of a sports pool. The license to operate a sports pool shall be in addition to any other license required to be issued to operate a gaming facility. No license to operate a sports pool shall be issued by the commission to any entity unless it has established its financial stability, integrity and responsibility and its good character, honesty and integrity.

No later than five years after the date of the issuance of a license and every five years thereafter or within such lesser periods as the commission may direct, a licensee shall submit to the commission such documentation or information as the commission may by regulation

require, to demonstrate to the satisfaction of the executive director of the commission that the licensee continues to meet the requirements of the law and regulations.

(b) A sports pool shall be operated in a sports wagering lounge located at a casino. The lounge shall conform to all requirements concerning square footage, design, equipment, security measures and related matters which the commission shall by regulation prescribe.

(c) The operator of a sports pool shall establish or display the odds at which wagers may be placed on sports events.

(d) An operator shall accept wagers on sports events only from persons physically present in the sports wagering lounge, OR THROUGH MOBILE SPORTS WAGERING OFFERED PURSUANT TO SECTION THIRTEEN HUNDRED SIXTY-SEVEN-A OF THIS TITLE. A person placing a wager shall be at least twenty-one years of age.

(e) AN OPERATOR MAY ALSO ACCEPT LAYOFF BETS AS LONG AS THE AUTHORIZED SPORTS POOL PLACES SUCH WAGERS WITH ANOTHER AUTHORIZED SPORTS POOL OR POOLS IN ACCORDANCE WITH REGULATIONS OF THE COMMISSION. A SPORTS POOL THAT PLACES A LAYOFF BET SHALL INFORM THE SPORTS POOL ACCEPTING THE WAGER THAT THE WAGER IS BEING PLACED BY A SPORTS POOL AND SHALL DISCLOSE ITS IDENTITY.

(F) AN OPERATOR MAY UTILIZE GLOBAL RISK MANAGEMENT PURSUANT TO THE APPROVAL OF THE COMMISSION.

(G) An operator shall not admit into the sports wagering lounge, or accept wagers from, any person whose name appears on the exclusion list.

[(f)] (H) The holder of a license to operate a sports pool may contract with [an entity] ONE OR MORE AGENTS to conduct ANY OR ALL ASPECTS OF that operation, OR THE OPERATION OF MOBILE SPORTS WAGERING OFFERED PURSUANT TO SECTION THIRTEEN HUNDRED SIXTY-SEVEN-A OF THIS TITLE, INCLUDING BUT NOT LIMITED TO BRAND, MARKETING AND CUSTOMER SERVICE, in accordance with the regulations of the commission. [That entity] EACH AGENT shall obtain a license as a casino vendor enterprise prior to the execution of any such contract, and such license shall be issued pursuant to the provisions of section one thousand three hundred twenty-seven of this article and in accordance with the regulations promulgated by the commission.

[(g)] (I) If any provision of this article or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

4. (a) All persons employed directly in wagering-related activities conducted within a sports wagering lounge shall be licensed as a casino key employee or registered as a gaming employee, as determined by the commission. All other employees who are working in the sports wagering lounge may be required to be registered, if appropriate, in accordance with regulations of the commission.

(b) Each operator of a sports pool shall designate one or more casino key employees who shall be responsible for the operation of the sports pool. At least one such casino key employee shall be on the premises whenever sports wagering is conducted.

5. Except as otherwise provided by this article, the commission shall have the authority to regulate sports pools and the conduct of sports wagering under this article to the same extent that the commission regulates other gaming. No casino shall be authorized to operate a sports pool unless it has produced information, documentation, and assurances concerning its financial background and resources, including cash reserves, that are sufficient to demonstrate that it has the financial stability, integrity, and responsibility to operate a sports pool. In developing rules and regulations applicable to sports wagering, the commission shall examine the regulations implemented in other states where sports wagering is conducted and shall, as far as practicable, adopt a similar regulatory framework. The commission shall promulgate regulations necessary to carry out the provisions of this section, including, but not limited to, regulations governing the:

(a) amount of cash reserves to be maintained by operators to cover winning wagers;

(b) acceptance of wagers on a series of sports events;

(c) maximum wagers which may be accepted by an operator from any one

patron on any one sports event;
(d) type of wagering tickets which may be used;
(e) method of issuing tickets;
(f) method of accounting to be used by operators;
(g) types of records which shall be kept;
(h) use of credit and checks by patrons;
(I) THE PROCESS BY WHICH A CASINO MAY PLACE A LAYOFF BET;
(J) THE USE OF GLOBAL RISK MANAGEMENT;
(K) type of system for wagering; and
[(j)] (L) protections for a person placing a wager.

6. Each operator shall adopt comprehensive house rules governing sports wagering transactions with its [patrons] AUTHORIZED SPORTS BETTORS. The rules shall specify the amounts to be paid on winning wagers and the effect of schedule changes. The house rules, together with any other information the commission deems appropriate, shall be conspicuously displayed in the sports wagering lounge and included in the terms and conditions of the account wagering system, and copies shall be made readily available to patrons.

7. (A) EACH CASINO THAT OFFERS SPORTS WAGERING SHALL ANNUALLY SUBMIT A REPORT TO THE COMMISSION NO LATER THAN THE TWENTY-EIGHTH OF FEBRUARY OF EACH YEAR, WHICH SHALL INCLUDE THE FOLLOWING INFORMATION:

(I) THE TOTAL AMOUNT OF SPORTS WAGERS RECEIVED FROM AUTHORIZED SPORTS BETTORS;

(II) THE TOTAL AMOUNT OF PRIZES AWARDED TO AUTHORIZED SPORTS BETTORS;
(III) THE TOTAL AMOUNT OF SPORTS WAGERING GROSS REVENUE RECEIVED BY THE CASINO;
(IV) THE TOTAL AMOUNT CONTRIBUTED TO THE SPORT BETTING INTEGRITY FUND PURSUANT TO SUBDIVISION EIGHT OF THIS SECTION;
(V) THE TOTAL AMOUNT OF WAGERS RECEIVED ON EACH SPORTS GOVERNING BODY'S SPORTING EVENTS;
(VI) THE TOTAL NUMBER OF AUTHORIZED SPORTS BETTORS THAT REQUESTED TO EXCLUDE THEMSELVES FROM SPORTS WAGERING; AND
(VII) ANY ADDITIONAL INFORMATION THAT THE COMMISSION DEEMS NECESSARY TO CARRY OUT THE PROVISIONS OF THIS ARTICLE.

(B) UPON THE SUBMISSION OF SUCH ANNUAL REPORT, TO SUCH EXTENT THAT THE COMMISSION DEEMS IT TO BE IN THE PUBLIC INTEREST, THE COMMISSION SHALL BE AUTHORIZED TO CONDUCT A FINANCIAL AUDIT OF ANY CASINO, AT ANY TIME, TO ENSURE COMPLIANCE WITH THIS ARTICLE.

(C) THE COMMISSION SHALL ANNUALLY PUBLISH A REPORT BASED ON THE AGGREGATE INFORMATION PROVIDED BY ALL CASINOS PURSUANT TO PARAGRAPH (A) OF THIS SUBDIVISION, WHICH SHALL BE PUBLISHED ON THE COMMISSION'S WEBSITE NO LATER THAN ONE HUNDRED EIGHTY DAYS AFTER THE DEADLINE FOR THE SUBMISSION OF INDIVIDUAL REPORTS AS SPECIFIED IN SUCH PARAGRAPH (A).

8. (A) WITHIN THIRTY DAYS OF THE END OF EACH CALENDAR QUARTER, A CASINO OFFERING SPORTS WAGERING SHALL REMIT TO THE COMMISSION A SPORTS WAGERING INTEGRITY FEE OF UP TO ONE-QUARTER OF ONE PERCENT OF THE AMOUNT WAGERED ON SPORTS EVENTS, HOWEVER, IN NO CASE SHALL THE INTEGRITY FEE BE GREATER THAN TWO PERCENT OF THE CASINO'S SPORTS WAGERING GROSS REVENUE. THE FEE SHALL BE REMITTED ON A FORM AS THE COMMISSION MAY REQUIRE, ON WHICH THE CASINO SHALL IDENTIFY THE PERCENTAGE OF WAGERING DURING THE REPORTING PERIOD ATTRIBUTABLE TO EACH SPORT GOVERNING BODY'S SPORTS EVENTS.

(B) NO LATER THAN THE THIRTIETH OF APRIL OF EACH YEAR, A SPORTS GOVERNING BODY MAY SUBMIT A CLAIM FOR DISBURSEMENT OF THE INTEGRITY FUNDS REMITTED BY CASINOS IN THE PREVIOUS CALENDAR YEAR IN PRO RATA PROPORTION OF THE TOTAL AMOUNT WAGERED ON THEIR RESPECTIVE SPORTS EVENTS TO REIMBURSE THE SPORTS GOVERNING BODY FOR EXPENSES INCURRED FOR INTEGRITY OPERATIONS. ELIGIBLE EXPENSES SHALL INCLUDE, BUT NOT BE LIMITED TO, INTEGRITY MONITORING EXPENSES, EXPENSES INCURRED RELATED TO INTEGRITY INVESTIGATIONS, PUBLIC RELATIONS EXPENSES ASSOCIATED WITH INTEGRITY ISSUES, AND ANY OTHER ELIGIBLE EXPENSES APPROVED BY THE COMMISSION.

(C) EACH SPORTS GOVERNING BODY WHICH RECEIVES IN EXCESS OF FIFTY-THOUSAND DOLLARS ANNUALLY FROM THE INTEGRITY FEE SHALL ANNUALLY SUBMIT A REPORT TO THE COMMISSION NO LATER THAN THE TWENTY-EIGHTH OF FEBRUARY OF EACH YEAR, WHICH SHALL INCLUDE THE FOLLOWING INFORMATION:

(I) THE TOTAL AMOUNT OF INTEGRITY FUND REIMBURSEMENT RECEIVED FROM NEW YORK;
(II) A DETAILED SUMMARY OF THE FINAL DISPOSITIONS OF INTEGRITY INVES-

TIGATIONS WHERE IT WAS DETERMINED THAT MISCONDUCT TOOK PLACE;

(III) ANY ADDITIONAL INFORMATION THAT THE COMMISSION DEEMS NECESSARY TO CARRY OUT THE PROVISIONS OF THIS ARTICLE.

(D) UPON THE SUBMISSION OF SUCH ANNUAL REPORT, TO SUCH EXTENT THAT THE COMMISSION DEEMS IT TO BE IN THE PUBLIC INTEREST, THE COMMISSION SHALL BE AUTHORIZED TO CONDUCT A FINANCIAL AUDIT OF ANY SPORTS GOVERNING BODY, AT ANY TIME, TO ENSURE COMPLIANCE WITH THIS ARTICLE.

(E) THE COMMISSION SHALL ANNUALLY PUBLISH A REPORT BASED ON THE AGGREGATE INFORMATION PROVIDED BY ALL SPORTS GOVERNING BODIES PURSUANT TO PARAGRAPH (C) OF THIS SUBDIVISION, WHICH SHALL BE PUBLISHED ON THE COMMISSION'S WEBSITE NO LATER THAN ONE HUNDRED EIGHTY DAYS AFTER THE

DEADLINE FOR THE SUBMISSION OF INDIVIDUAL REPORTS AS SPECIFIED IN PARAGRAPH (C) OF THIS SUBDIVISION.

(F) AT THE END OF THE YEAR, ANY UNCLAIMED INTEGRITY FEE REVENUE SHALL BE DISTRIBUTED TO THE SPORTS GOVERNING BODIES WHICH WERE APPROVED TO RECEIVE FUNDING, ON A PRO RATA BASIS.

9. FOR THE PRIVILEGE OF CONDUCTING SPORTS WAGERING IN THE STATE, CASINOS SHALL PAY A TAX EQUIVALENT TO EIGHT AND ONE-HALF PERCENT OF THEIR SPORTS WAGERING GROSS REVENUE.

10. THE COMMISSION SHALL PAY INTO THE COMMERCIAL GAMING REVENUE FUND ESTABLISHED PURSUANT TO SECTION NINETY-SEVEN-NNNN OF THE STATE FINANCE LAW EIGHTY-FIVE PERCENT OF THE STATE TAX IMPOSED BY THIS SECTION; ANY INTEREST AND PENALTIES IMPOSED BY THE COMMISSION RELATING TO THOSE TAXES; ALL PENALTIES LEVIED AND COLLECTED BY THE COMMISSION; AND THE APPROPRIATE FUNDS, CASH OR PRIZES FORFEITED FROM SPORTS WAGERING. THE COMMISSION SHALL PAY INTO THE COMMERCIAL GAMING FUND FIVE PERCENT OF THE STATE TAX IMPOSED BY THIS SECTION TO BE DISTRIBUTED FOR PROBLEM GAMBLING EDUCATION AND TREATMENT PURPOSES PURSUANT TO PARAGRAPH A OF SUBDIVISION FIVE OF SECTION NINETY-SEVEN-NNNN OF THE STATE FINANCE LAW. THE COMMISSION SHALL PAY INTO THE COMMERCIAL GAMING FUND FIVE PERCENT OF THE STATE TAX IMPOSED BY THIS SECTION TO BE DISTRIBUTED FOR THE COST OF REGULATION PURSUANT TO PARAGRAPH C OF SUBDIVISION FIVE OF SECTION NINETY-SEVEN-NNNN OF THE STATE FINANCE LAW. THE COMMISSION SHALL PAY INTO THE COMMERCIAL GAMING FUND FIVE PERCENT OF THE STATE TAX IMPOSED BY THIS SECTION TO BE DISTRIBUTED IN THE SAME FORMULA AS MARKET ORIGIN CREDITS PURSUANT TO SECTION ONE HUNDRED FIFTEEN-B OF THIS CHAPTER. THE COMMISSION SHALL REQUIRE AT LEAST MONTHLY DEPOSITS BY THE CASINO OF ANY PAYMENTS PURSUANT TO SUBDIVISION NINE OF THIS SECTION, AT SUCH TIMES, UNDER SUCH CONDITIONS, AND IN SUCH DEPOSITORIES AS SHALL BE PRESCRIBED BY THE STATE COMPTROLLER. THE DEPOSITS SHALL BE DEPOSITED TO THE CREDIT OF THE STATE COMMERCIAL GAMING REVENUE FUND. THE COMMISSION SHALL REQUIRE A MONTHLY REPORT AND RECONCILIATION STATEMENT TO BE FILED WITH IT ON OR BEFORE THE TENTH DAY OF EACH MONTH, WITH RESPECT TO GROSS REVENUES AND DEPOSITS RECEIVED AND MADE, RESPECTIVELY, DURING THE PRECEDING MONTH.

11. THE COMMISSION MAY PERFORM AUDITS OF THE BOOKS AND RECORDS OF A CASINO, AT SUCH TIMES AND INTERVALS AS IT DEEMS APPROPRIATE, FOR THE PURPOSE OF DETERMINING THE SUFFICIENCY OF TAX PAYMENTS. IF A RETURN REQUIRED WITH REGARD TO OBLIGATIONS IMPOSED IS NOT FILED, OR IF A RETURN WHEN FILED OR IS DETERMINED BY THE COMMISSION TO BE INCORRECT OR INSUFFICIENT WITH OR WITHOUT AN AUDIT, THE AMOUNT OF TAX DUE SHALL BE DETERMINED BY THE COMMISSION. NOTICE OF SUCH DETERMINATION SHALL BE GIVEN TO THE CASINO LIABLE FOR THE PAYMENT OF THE TAX. SUCH DETERMINATION SHALL FINALLY AND IRREVOCABLY FIX THE TAX UNLESS THE CASINO AGAINST WHOM IT IS ASSESSED, WITHIN THIRTY DAYS AFTER RECEIVING NOTICE OF SUCH DETERMINATION, SHALL APPLY TO THE COMMISSION FOR A HEARING IN ACCORDANCE WITH THE REGULATIONS OF THE COMMISSION.

12. NOTHING IN THIS SECTION SHALL APPLY TO INTERACTIVE FANTASY SPORTS OFFERED PURSUANT TO ARTICLE FOURTEEN OF THIS CHAPTER. NOTHING IN THIS SECTION AUTHORIZES ANY ENTITY THAT CONDUCTS INTERACTIVE FANTASY SPORTS OFFERED PURSUANT TO ARTICLE FOURTEEN OF THIS CHAPTER TO CONDUCT SPORTS WAGERING UNLESS IT SEPARATELY QUALIFIES FOR, AND OBTAINS, AUTHORIZATION PURSUANT TO THIS SECTION.

13. A CASINO THAT IS ALSO LICENSED UNDER ARTICLE THREE OF THIS CHAPTER, AND MUST MAINTAIN RACING PURSUANT TO PARAGRAPH (B) OF SUBDIVISION ONE OF SECTION THIRTEEN HUNDRED FIFTY-FIVE OF THIS CHAPTER, SHALL BE ALLOWED TO OFFER PARI-MUTUEL WAGERING ON HORSE RACING EVENTS IN ACCORDANCE WITH THEIR LICENSE UNDER ARTICLE THREE OF THIS CHAPTER. NOTWITH-

STANDING SUBPARAGRAPH (II) OF PARAGRAPH C OF SUBDIVISION TWO OF SECTION ONE THOUSAND EIGHT OF THIS CHAPTER, A CASINO LOCATED IN THE CITY OF SCHENECTADY SHALL BE ALLOWED TO OFFER PARI-MUTUEL WAGERING ON HORSE RACING EVENTS, PROVIDED SUCH WAGERING IS CONDUCTED BY THE REGIONAL OFF-TRACK BETTING CORPORATION IN SUCH REGION AS THE CASINO IS LOCATED. ANY OTHER CASINO SHALL BE ALLOWED TO OFFER PARI-MUTUEL WAGERING ON HORSE RACING EVENTS, PROVIDED SUCH WAGERING IS CONDUCTED BY THE REGIONAL OFF-TRACK BETTING CORPORATION IN SUCH REGION AS THE CASINO IS LOCATED. ANY PHYSICAL LOCATION WHERE PARI-MUTUEL WAGERING ON HORSE RACING EVENTS IS OFFERED BY A CASINO AND CONDUCTED BY A REGIONAL OFF-TRACK BETTING CORPORATION IN ACCORDANCE WITH THIS SUBDIVISION SHALL BE DEEMED TO BE A BRANCH LOCATION OF THE REGIONAL OFF-TRACK BETTING CORPORATION IN ACCORDANCE WITH SECTION ONE THOUSAND EIGHT OF THIS CHAPTER. IN THE EVENT THAT THE COMMISSION APPROVES THE LOCATION OF SELF-SERVICE MOBILE SPORTS BETTING KIOSKS ON THE PREMISES OF AFFILIATES IN ACCORDANCE WITH PARAGRAPH (D) OF SUBDIVISION FIVE OF SECTION THIRTEEN HUNDRED SIXTY-SEVEN-A OF THIS CHAPTER, SUCH KIOSKS SHALL NOT BE ALLOWED TO OFFER PARI-MUTUEL WAGERING ON HORSE RACING EVENTS.

14. A SPORTS GOVERNING BODY MAY NOTIFY THE COMMISSION THAT IT DESIRES TO RESTRICT, LIMIT, OR EXCLUDE WAGERING ON ITS SPORTING EVENTS BY PROVIDING NOTICE IN THE FORM AND MANNER AS THE COMMISSION MAY REQUIRE. UPON RECEIVING SUCH NOTICE, THE COMMISSION SHALL REVIEW THE REQUEST IN GOOD FAITH, SEEK INPUT FROM THE CASINOS ON SUCH A REQUEST, AND IF THE COMMISSION DEEMS IT APPROPRIATE, PROMULGATE REGULATIONS TO RESTRICT SUCH SPORTS WAGERING. IF THE COMMISSION DENIES A REQUEST, THE SPORTS GOVERNING BODY SHALL BE AFFORDED NOTICE AND THE RIGHT TO BE HEARD AND OFFER PROOF IN OPPOSITION TO SUCH DETERMINATION IN ACCORDANCE WITH THE REGULATIONS OF THE COMMISSION. OFFERING OR TAKING WAGERS CONTRARY TO RESTRICTIONS PROMULGATED BY THE COMMISSION IS A VIOLATION OF THIS SECTION. IN THE EVENT THAT THE REQUEST IS IN RELATION TO AN EMERGENCY SITUATION, THE EXECUTIVE DIRECTOR OF THE COMMISSION MAY TEMPORARILY PROHIBIT THE SPECIFIC WAGER IN QUESTION UNTIL THE COMMISSION HAS THE OPPORTUNITY TO ISSUE TEMPORARY REGULATIONS ADDRESSING THE ISSUE.

15. (A) THE COMMISSION SHALL DESIGNATE THE DIVISION OF THE STATE POLICE TO HAVE PRIMARY RESPONSIBILITY FOR CONDUCTING, OR ASSISTING THE COMMISSION IN CONDUCTING, INVESTIGATIONS INTO ABNORMAL BETTING ACTIVITY, MATCH FIXING, AND OTHER CONDUCT THAT CORRUPTS A BETTING OUTCOME OF A SPORTING EVENT OR EVENTS FOR PURPOSES OF FINANCIAL GAIN.

(B) THE COMMISSION AND CASINOS SHALL COOPERATE WITH INVESTIGATIONS CONDUCTED BY SPORTS GOVERNING BODIES OR LAW ENFORCEMENT AGENCIES, INCLUDING BUT NOT LIMITED TO PROVIDING OR FACILITATING THE PROVISION OF ACCOUNT-LEVEL BETTING INFORMATION AND AUDIO OR VIDEO FILES RELATING TO PERSONS PLACING WAGERS; PROVIDED, HOWEVER, THAT THE CASINO BE REQUIRED TO SHARE ANY PERSONALLY IDENTIFIABLE INFORMATION OF AN AUTHORIZED SPORTS BETTOR WITH A SPORTS GOVERNING BODY ONLY PURSUANT TO AN ORDER TO DO SO BY THE COMMISSION OR A LAW ENFORCEMENT AGENCY OR COURT OF COMPETENT JURISDICTION.

(C) CASINOS SHALL IMMEDIATELY REPORT TO THE COMMISSION ANY INFORMATION RELATING TO:

(I) CRIMINAL OR DISCIPLINARY PROCEEDINGS COMMENCED AGAINST THE CASINO IN CONNECTION WITH ITS OPERATIONS;

(II) ABNORMAL BETTING ACTIVITY OR PATTERNS THAT MAY INDICATE A CONCERN WITH THE INTEGRITY OF A SPORTING EVENT OR EVENTS;

(III) ANY POTENTIAL BREACH OF THE RELEVANT SPORTS GOVERNING BODY'S INTERNAL RULES AND CODES OF CONDUCT PERTAINING TO SPORTS WAGERING, AS THEY HAVE BEEN PROVIDED BY THE SPORTS GOVERNING BODY TO THE CASINO;

(IV) ANY OTHER CONDUCT THAT CORRUPTS A BETTING OUTCOME OF A SPORTING EVENT OR EVENTS FOR PURPOSES OF FINANCIAL GAIN, INCLUDING MATCH FIXING; AND

(V) SUSPICIOUS OR ILLEGAL WAGERING ACTIVITIES, INCLUDING USE OF FUNDS DERIVED FROM ILLEGAL ACTIVITY, WAGERS TO CONCEAL OR LAUNDER FUNDS DERIVED FROM ILLEGAL ACTIVITY, USING AGENTS TO PLACE WAGERS, USING CONFIDENTIAL NON-PUBLIC INFORMATION, AND USING FALSE IDENTIFICATION.

THE COMMISSION SHALL ALSO IMMEDIATELY REPORT INFORMATION RELATING TO CONDUCT DESCRIBED IN SUBPARAGRAPHS (II), (III) AND (IV) OF THIS PARAGRAPH TO THE RELEVANT SPORTS GOVERNING BODY.

(D) CASINOS SHALL MAINTAIN THE CONFIDENTIALITY OF INFORMATION PROVIDED BY A SPORTS GOVERNING BODY TO THE CASINO, UNLESS DISCLOSURE IS REQUIRED BY THIS SECTION, THE COMMISSION, OTHER LAW, OR COURT ORDER.

16. CASINOS SHALL USE WHATEVER DATA SOURCE THEY DEEM APPROPRIATE FOR DETERMINING THE RESULT OF SPORTS WAGERING INVOLVING TIER ONE SPORTS WAGERS. CASINOS SHALL ONLY USE OFFICIAL LEAGUE DATA IN ALL SPORTS WAGERING INVOLVING TIER TWO SPORTS WAGERS, IF THE RELEVANT SPORTS GOVERNING BODY POSSESSES A FEED OF OFFICIAL LEAGUE DATA, AND MAKES SUCH FEED AVAILABLE FOR PURCHASE BY THE CASINOS. A SPORTS GOVERNING BODY MAY NOTIFY THE COMMISSION THAT IT DESIRES TO REQUIRE CASINOS TO USE OFFICIAL LEAGUE DATA IN SPORTS WAGERING INVOLVING SPECIFIC TIER THREE SPORTS WAGERS BY PROVIDING NOTICE IN THE FORM AND MANNER AS THE COMMISSION MAY REQUIRE. UPON RECEIVING SUCH NOTICE, THE COMMISSION SHALL REVIEW THE REQUEST, SEEK INPUT FROM THE CASINOS ON SUCH A REQUEST, AND IF THE COMMISSION DEEMS IT APPROPRIATE, PROMULGATE REGULATIONS TO REQUIRE CASINOS TO USE OFFICIAL LEAGUE DATA ON SPORTS WAGERING INVOLVING SUCH TIER THREE SPORTS WAGERS IF THE RELEVANT SPORTS GOVERNING BODY POSSESSES A FEED OF OFFICIAL LEAGUE DATA, AND MAKES SUCH FEED AVAILABLE FOR PURCHASE BY THE CASINOS. NO CASINO SHALL ENTER INTO AN AGREEMENT WITH A SPORTS GOVERNING BODY TO BE THE EXCLUSIVE RECIPIENT OF THEIR OFFICIAL LEAGUE DATA.

17. (A) CASINOS SHALL MAINTAIN RECORDS OF ALL BETS AND WAGERS PLACED, INCLUDING PERSONALLY IDENTIFIABLE INFORMATION OF THE MOBILE SPORTS WAGERING BETTOR, AMOUNT AND TYPE OF BET, TIME THE BET WAS PLACED, LOCATION OF THE BET, INCLUDING IP ADDRESS IF APPLICABLE, THE OUTCOME OF THE BET, RECORDS OF ABNORMAL BETTING ACTIVITY, AND VIDEO CAMERA RECORDINGS IN THE CASE OF IN-PERSON WAGERS FOR AT LEAST THREE YEARS AFTER THE SPORTING EVENT OCCURS AND MAKE SUCH DATA AVAILABLE FOR INSPECTION UPON REQUEST OF THE COMMISSION OR AS REQUIRED BY COURT ORDER.

(B) IF A SPORTS GOVERNING BODY HAS NOTIFIED THE COMMISSION THAT REAL-TIME INFORMATION SHARING FOR WAGERS PLACED ON SPORTING EVENTS IS NECESSARY AND DESIRABLE, CASINOS SHALL SHARE IN REAL TIME, AT THE ACCOUNT-LEVEL, AND IN PSEUDONYMOUS FORM, THE INFORMATION REQUIRED TO BE RETAINED PURSUANT TO PARAGRAPH (A) OF THIS SUBDIVISION (OTHER THAN VIDEO FILES) WITH THE COMMISSION, AND THE COMMISSION SHALL SHARE IN REAL TIME THE INFORMATION WITH THE SPORTS GOVERNING BODY OR ITS DESIGNEE WITH RESPECT TO WAGERS ON ITS SPORTING EVENTS.

(C) THE COMMISSION SHALL COOPERATE WITH A SPORTS GOVERNING BODY AND CASINOS TO ENSURE THE TIMELY, EFFICIENT, AND ACCURATE SHARING OF INFORMATION.

18. A CASINO SHALL NOT PERMIT SPORTS WAGERING BY ANYONE THEY KNOW, OR SHOULD HAVE KNOWN, TO BE A PROHIBITED SPORTS BETTOR.

19. SPORTS WAGERING CONDUCTED PURSUANT TO THE PROVISIONS OF THIS SECTION IS HEREBY AUTHORIZED.

20. THE CONDUCT OF SPORTS WAGERING IN VIOLATION OF THIS SECTION IS PROHIBITED.

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21. ANY PERSON, FIRM, CORPORATION, ASSOCIATION, AGENT, OR EMPLOYEE WHO KNOWINGLY VIOLATES ANY PROCEDURE IMPLEMENTED UNDER THIS SECTION, OR SECTION THIRTEEN HUNDRED SIXTY-SEVEN-A OF THIS TITLE, SHALL BE LIABLE FOR A CIVIL PENALTY OF NOT MORE THAN FIVE THOUSAND DOLLARS FOR EACH VIOLATION, NOT TO EXCEED FIFTY THOUSAND DOLLARS FOR VIOLATIONS ARISING OUT OF THE SAME TRANSACTION OR OCCURRENCE, WHICH SHALL ACCRUE TO THE STATE AND MAY BE RECOVERED IN A CIVIL ACTION BROUGHT BY THE COMMISSION.

S 2. The racing, pari-mutuel wagering and breeding law is amended by adding a new section 1367-a to read as follows:

S 1367-A. MOBILE SPORTS WAGERING. 1. AS USED IN THIS SECTION, THE FOLLOWING TERMS SHALL HAVE THE FOLLOWING MEANINGS:

(A) "AFFILIATE" MEANS ANY OFF-TRACK BETTING CORPORATION, FRANCHISED CORPORATION, OR RACE TRACK LICENSED PURSUANT TO THE RACING, PARI-MUTUEL WAGERING AND BREEDING LAW, OR AN OPERATOR OF VIDEO LOTTERY GAMING AT AQUEDUCT LICENSED PURSUANT TO SECTION SIXTEEN HUNDRED SEVENTEEN-A OF THE TAX LAW, WHICH HAS A MOBILE SPORTS WAGERING AGREEMENT WITH A CASINO PURSUANT TO THIS SECTION;

(B) "AGENT" MEANS AN ENTITY THAT IS PARTY TO A CONTRACT WITH A LICENSED GAMING FACILITY AUTHORIZED TO OPERATE A SPORTS POOL AND IS APPROVED BY THE COMMISSION TO OPERATE A SPORTS POOL ON BEHALF OF SUCH LICENSED GAMING FACILITY;

(C) "AUTHORIZED SPORTS BETTOR" MEANS AN INDIVIDUAL WHO IS PHYSICALLY

PRESENT IN THIS STATE WHEN PLACING A SPORTS WAGER, WHO IS NOT A PROHIBITED SPORTS BETTOR, THAT PARTICIPATES IN SPORTS WAGERING OFFERED BY A CASINO. THE INTERMEDIATE ROUTING OF ELECTRONIC DATA IN CONNECTION WITH MOBILE SPORTS WAGERING SHALL NOT DETERMINE THE LOCATION OR LOCATIONS IN WHICH A WAGER IS INITIATED, RECEIVED OR OTHERWISE MADE;

(D) "CASINO" MEANS A LICENSED GAMING FACILITY AT WHICH GAMBLING IS CONDUCTED PURSUANT TO THE PROVISIONS OF THIS ARTICLE OR THE AGENT OF SUCH LICENSED GAMING FACILITY;

(E) "COLLEGIATE SPORT OR ATHLETIC EVENT" MEANS A SPORT OR ATHLETIC EVENT OFFERED OR SPONSORED BY OR PLAYED IN CONNECTION WITH A PUBLIC OR PRIVATE INSTITUTION THAT OFFERS EDUCATION SERVICES BEYOND THE SECONDARY LEVEL;

(F) "COMMISSION" MEANS THE COMMISSION ESTABLISHED PURSUANT TO SECTION ONE HUNDRED TWO OF THIS CHAPTER;

(G) "HIGH SCHOOL SPORT OR ATHLETIC EVENT" MEANS A SPORT OR ATHLETIC EVENT OFFERED OR SPONSORED BY OR PLAYED IN CONNECTION WITH A PUBLIC OR PRIVATE INSTITUTION THAT OFFERS EDUCATION SERVICES AT THE SECONDARY LEVEL;

(H) "HORSE RACING EVENT" MEANS ANY SPORT OR ATHLETIC EVENT CONDUCTED IN NEW YORK STATE SUBJECT TO THE PROVISIONS OF ARTICLES TWO, THREE, FOUR, FIVE, SIX, NINE, TEN AND ELEVEN OF THIS CHAPTER, OR ANY SPORT OR ATHLETIC EVENT CONDUCTED OUTSIDE OF NEW YORK STATE, WHICH IF CONDUCTED IN NEW YORK STATE WOULD BE SUBJECT TO THE PROVISIONS OF THIS CHAPTER;

(I) "MINOR" MEANS ANY PERSON UNDER THE AGE OF TWENTY-ONE YEARS;

(J) "MOBILE SPORTS WAGERING PLATFORM" OR "PLATFORM" MEANS THE COMBINATION OF HARDWARE, SOFTWARE, AND DATA NETWORKS USED TO MANAGE, ADMINISTER, OR CONTROL SPORTS WAGERING AND ANY ASSOCIATED WAGERS ACCESSIBLE BY ANY ELECTRONIC MEANS INCLUDING MOBILE APPLICATIONS AND INTERNET WEBSITES;

(K) "OPERATOR" MEANS AN ENTITY OFFERING A MOBILE SPORTS WAGERING PLATFORM INCLUDING AN AGENT;

(L) "PROFESSIONAL SPORT OR ATHLETIC EVENT" MEANS AN EVENT AT WHICH TWO OR MORE PERSONS PARTICIPATE IN SPORTS OR ATHLETIC EVENTS AND RECEIVE

COMPENSATION IN EXCESS OF ACTUAL EXPENSES FOR THEIR PARTICIPATION IN SUCH EVENT;

(M) "PROHIBITED SPORTS BETTOR" MEANS:

(I) ANY OFFICER OR EMPLOYEE OF THE COMMISSION;

(II) ANY PRINCIPAL OR KEY EMPLOYEE OF A CASINO OR AFFILIATE, EXCEPT AS MAY BE PERMITTED BY THE COMMISSION FOR GOOD CAUSE SHOWN;

(III) ANY CASINO GAMING OR NON-GAMING EMPLOYEE AT THE CASINO THAT EMPLOYS SUCH PERSON AND AT ANY AFFILIATE THAT HAS AN AGREEMENT WITH THAT CASINO;

(IV) ANY CONTRACTOR, SUBCONTRACTOR, OR CONSULTANT, OR OFFICER OR EMPLOYEE OF A CONTRACTOR, SUBCONTRACTOR, OR CONSULTANT, OF A CASINO IF SUCH PERSON IS DIRECTLY INVOLVED IN THE OPERATION OR OBSERVATION OF SPORTS WAGERING, OR THE PROCESSING OF SPORTS WAGERING CLAIMS OR PAYMENTS;

(V) ANY PERSON SUBJECT TO A CONTRACT WITH THE COMMISSION IF SUCH CONTRACT CONTAINS A PROVISION PROHIBITING SUCH PERSON FROM PARTICIPATING IN SPORTS WAGERING;

(VI) ANY SPOUSE, CHILD, BROTHER, SISTER OR PARENT RESIDING AS A MEMBER OF THE SAME HOUSEHOLD IN THE PRINCIPAL PLACE OF ABODE OF ANY OF THE FOREGOING PERSONS AT THE SAME CASINO WHERE THE FOREGOING PERSON IS PROHIBITED FROM PARTICIPATING IN SPORTS WAGERING;

(VII) ANY INDIVIDUAL WITH ACCESS TO NON-PUBLIC CONFIDENTIAL INFORMATION ABOUT SPORTS WAGERING;

(VIII) ANY AMATEUR OR PROFESSIONAL ATHLETE IF THE SPORTS WAGER IS BASED ON ANY SPORT OR ATHLETIC EVENT OVERSEEN BY THE ATHLETE'S SPORTS GOVERNING BODY;

(IX) ANY SPORTS AGENT, OWNER OR EMPLOYEE OF A TEAM, PLAYER AND UMPIRE UNION PERSONNEL, AND EMPLOYEE REFEREE, COACH OR OFFICIAL OF A SPORTS GOVERNING BODY, IF THE SPORTS WAGER IS BASED ON ANY SPORT OR ATHLETIC EVENT OVERSEEN BY THE INDIVIDUAL'S SPORTS GOVERNING BODY;

(X) ANY INDIVIDUAL PLACING A WAGER AS AN AGENT OR PROXY FOR AN OTHERWISE PROHIBITED SPORTS BETTOR; OR

(XI) ANY MINOR;

(N) "PROHIBITED SPORTS EVENT" MEANS ANY HIGH SCHOOL SPORT OR ATHLETIC EVENT;

(O) "SPORTS EVENT" MEANS ANY PROFESSIONAL SPORT OR ATHLETIC EVENT AND ANY COLLEGIATE SPORT OR ATHLETIC EVENT, EXCEPT A PROHIBITED SPORTS EVENT;

(P) "SPORTS GOVERNING BODY" MEANS THE ORGANIZATION THAT PRESCRIBES FINAL RULES AND ENFORCES CODES OF CONDUCT WITH RESPECT TO A SPORTING EVENT AND PARTICIPANTS THEREIN;

(Q) "SPORTS POOL" MEANS THE BUSINESS OF ACCEPTING WAGERS ON ANY SPORTS EVENT BY ANY SYSTEM OR METHOD OF WAGERING;

(R) "SPORTS WAGER" MEANS CASH OR CASH EQUIVALENT THAT IS PAID BY AN AUTHORIZED SPORTS BETTOR TO A CASINO TO PARTICIPATE IN SPORTS WAGERING OFFERED BY SUCH CASINO;

(S) "SPORTS WAGERING" MEANS WAGERING ON SPORTING EVENTS OR ANY PORTION THEREOF, OR ON THE INDIVIDUAL PERFORMANCE STATISTICS OF ATHLETES PARTICIPATING IN A SPORTING EVENT, OR COMBINATION OF SPORTING EVENTS, BY ANY SYSTEM OR METHOD OF WAGERING, INCLUDING, BUT NOT LIMITED TO, IN-PERSON COMMUNICATION AND ELECTRONIC COMMUNICATION THROUGH INTERNET WEBSITES AND MOBILE DEVICE APPLICATIONS. THE TERM "SPORTS WAGERING" SHALL INCLUDE, BUT IS NOT LIMITED TO, SINGLE-GAME BETS, TEASER BETS, PARLAYS, OVER-UNDER BETS, MONEYLINE, POOLS, EXCHANGE WAGERING, IN-GAME WAGERING, IN-PLAY BETS, PROPOSITION BETS AND STRAIGHT BETS; AND

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(T) "SPORTS WAGERING GROSS REVENUE" MEANS: (I) THE AMOUNT EQUAL TO THE TOTAL OF ALL SPORTS WAGERS NOT ATTRIBUTABLE TO PROHIBITED SPORTS EVENTS THAT AN OPERATOR COLLECTS FROM ALL PLAYERS, LESS THE TOTAL OF ALL SUMS NOT ATTRIBUTABLE TO PROHIBITED SPORTS EVENTS PAID OUT AS WINNINGS TO ALL SPORTS BETTORS, HOWEVER, THAT THE TOTAL OF ALL SUMS PAID OUT AS WINNINGS TO SPORTS BETTORS SHALL NOT INCLUDE THE CASH EQUIVALENT VALUE OF ANY MERCHANDISE OR THING OF VALUE AWARDED AS A PRIZE; OR (II) IN THE CASE OF EXCHANGE WAGERING PURSUANT TO THIS SECTION, THE COMMISSION ON WINNING SPORTS WAGERS BY AUTHORIZED SPORTS BETTORS RETAINED BY THE OPERATOR. THE ISSUANCE TO OR WAGERING BY AUTHORIZED SPORTS BETTORS AT A CASINO OF ANY PROMOTIONAL GAMING CREDITS SHALL NOT BE TAXABLE FOR THE PURPOSES OF DETERMINING SPORTS WAGERING GROSS REVENUE.

2. (A) NO CASINO SHALL ADMINISTER, MANAGE, OR OTHERWISE MAKE AVAILABLE A MOBILE SPORTS WAGERING PLATFORM TO PERSONS LOCATED IN NEW YORK STATE UNLESS REGISTERED WITH THE COMMISSION PURSUANT TO THIS SECTION. A CASINO MAY USE MULTIPLE MOBILE SPORTS WAGERING PLATFORMS PROVIDED THAT EACH PLATFORM HAS BEEN REVIEWED AND APPROVED BY THE COMMISSION. A CASINO MAY CONTRACT WITH ONE OR MORE INDEPENDENT OPERATORS TO PROVIDE ITS MOBILE SPORTS WAGERING PLATFORMS.

(B) REGISTRATIONS ISSUED BY THE COMMISSION SHALL REMAIN IN EFFECT FOR FIVE YEARS. THE COMMISSION SHALL ESTABLISH A PROCESS FOR RENEWAL.

(C) THE COMMISSION SHALL PUBLISH A LIST OF ALL CASINOS REGISTERED TO OFFER MOBILE SPORTS WAGERING IN NEW YORK STATE PURSUANT TO THIS SECTION ON THE COMMISSION'S WEBSITE FOR PUBLIC USE.

(D) THE COMMISSION SHALL PROMULGATE REGULATIONS TO IMPLEMENT THE PROVISIONS OF THIS SECTION, INCLUDING THE DEVELOPMENT OF THE INITIAL FORM OF THE APPLICATION FOR REGISTRATION. SUCH REGULATIONS SHALL PROVIDE FOR THE REGISTRATION AND OPERATION OF MOBILE SPORTS WAGERING IN NEW YORK STATE AND SHALL INCLUDE, BUT NOT BE LIMITED TO, RESPONSIBLE PROTECTIONS WITH REGARD TO COMPULSIVE PLAY AND SAFEGUARDS FOR FAIR PLAY.

3. IN THE EVENT THAT A CASINO CONTRACTS WITH ONE OR MORE INDEPENDENT OPERATORS TO PROVIDE ITS MOBILE SPORTS WAGERING PLATFORMS, EACH INDEPENDENT ENTITY SHALL OBTAIN A LICENSE AS A CASINO VENDOR ENTERPRISE PRIOR TO THE EXECUTION OF ANY SUCH CONTRACT, AND SUCH LICENSE SHALL BE ISSUED PURSUANT TO THE PROVISIONS OF SECTION ONE THOUSAND THREE HUNDRED TWENTY-SEVEN OF THIS ARTICLE AND IN ACCORDANCE WITH THE REGULATIONS PROMULGATED BY THE COMMISSION.

4. (A) AS A CONDITION OF REGISTRATION IN NEW YORK STATE, EACH OPERATOR SHALL IMPLEMENT THE FOLLOWING MEASURES:

(I) LIMIT EACH AUTHORIZED SPORTS BETTOR TO ONE ACTIVE AND CONTINUOUSLY USED ACCOUNT, AND PREVENT ANYONE THEY KNOW, OR SHOULD HAVE KNOWN TO BE A PROHIBITED SPORTS BETTOR FROM MAINTAINING ACCOUNTS OR PARTICIPATING IN ANY SPORTS WAGERING OFFERED BY SUCH OPERATOR;

(II) ADOPT APPROPRIATE SAFEGUARDS TO ENSURE, TO A REASONABLE DEGREE OF CERTAINTY, THAT AUTHORIZED SPORTS BETTORS ARE PHYSICALLY LOCATED WITHIN THE STATE WHEN ENGAGING IN MOBILE SPORTS BETTING;

(III) PROHIBIT MINORS FROM PARTICIPATING IN ANY SPORTS WAGERING, WHICH INCLUDES:

(1) IF AN OPERATOR BECOMES OR IS MADE AWARE THAT A MINOR HAS CREATED AN ACCOUNT, OR ACCESSED THE ACCOUNT OF ANOTHER, SUCH OPERATOR SHALL PROMPTLY, WITHIN NO MORE THAN TWO BUSINESS DAYS, REFUND ANY DEPOSIT RECEIVED FROM THE MINOR, WHETHER OR NOT THE MINOR HAS ENGAGED IN OR ATTEMPTED TO ENGAGE IN SPORTS WAGERING; PROVIDED, HOWEVER, THAT ANY REFUND MAY BE OFFSET BY ANY PRIZES ALREADY AWARDED;

(2) EACH OPERATOR SHALL PROVIDE PARENTAL CONTROL PROCEDURES TO ALLOW PARENTS OR GUARDIANS TO EXCLUDE MINORS FROM ACCESS TO ANY SPORTS WAGER-

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ING OR PLATFORM. SUCH PROCEDURES SHALL INCLUDE A TOLL-FREE NUMBER TO CALL FOR HELP IN ESTABLISHING SUCH PARENTAL CONTROLS; AND

(3) EACH OPERATOR SHALL TAKE APPROPRIATE STEPS TO CONFIRM THAT AN INDIVIDUAL OPENING AN ACCOUNT IS NOT A MINOR;

(IV) WHEN REFERENCING THE CHANCES OR LIKELIHOOD OF WINNING IN ADVERTISEMENTS OR UPON PLACEMENT OF A SPORTS WAGER, MAKE CLEAR AND CONSPICUOUS STATEMENTS THAT ARE NOT INACCURATE OR MISLEADING CONCERNING THE CHANCES OF WINNING AND THE NUMBER OF WINNERS;

(V) ENABLE AUTHORIZED SPORTS BETTORS TO EXCLUDE THEMSELVES FROM SPORTS WAGERING AND TAKE REASONABLE STEPS TO PREVENT SUCH BETTORS FROM ENGAGING IN SPORTS WAGERING FROM WHICH THEY HAVE EXCLUDED THEMSELVES;

(VI) PERMIT ANY AUTHORIZED SPORTS BETTOR TO PERMANENTLY CLOSE AN ACCOUNT REGISTERED TO SUCH BETTOR, ON ANY AND ALL PLATFORMS SUPPORTED BY SUCH OPERATOR, AT ANY TIME AND FOR ANY REASON;

(VII) OFFER INTRODUCTORY PROCEDURES FOR AUTHORIZED SPORTS BETTORS, THAT SHALL BE PROMINENTLY DISPLAYED ON THE MAIN PAGE OF SUCH OPERATOR PLATFORM, THAT EXPLAIN SPORTS WAGERING;

(VIII) IMPLEMENT MEASURES TO PROTECT THE PRIVACY AND ONLINE SECURITY OF AUTHORIZED SPORTS BETTORS AND THEIR ACCOUNTS;

(IX) OFFER ALL AUTHORIZED SPORTS BETTORS ACCESS TO HIS OR HER ACCOUNT HISTORY AND ACCOUNT DETAILS;

(X) ENSURE AUTHORIZED SPORTS BETTORS' FUNDS ARE PROTECTED UPON DEPOSIT AND SEGREGATED FROM THE OPERATING FUNDS OF SUCH OPERATOR AND OTHERWISE PROTECTED FROM CORPORATE INSOLVENCY, FINANCIAL RISK, OR CRIMINAL OR CIVIL ACTIONS AGAINST SUCH OPERATOR;

(XI) LIST ON EACH WEBSITE, IN A PROMINENT PLACE, INFORMATION CONCERNING ASSISTANCE FOR COMPULSIVE PLAY IN NEW YORK STATE, INCLUDING A TOLL-FREE NUMBER DIRECTING CALLERS TO REPUTABLE RESOURCES CONTAINING FURTHER INFORMATION, WHICH SHALL BE FREE OF CHARGE; AND

(XII) ENSURE NO SPORTS WAGERING SHALL BE BASED ON A PROHIBITED SPORTS EVENT.

(B) OPERATORS SHALL NOT DIRECTLY OR INDIRECTLY OPERATE, PROMOTE, OR ADVERTISE ANY PLATFORM OR SPORTS WAGERING TO PERSONS LOCATED IN NEW YORK STATE UNLESS REGISTERED PURSUANT TO THIS ARTICLE.

(C) OPERATORS SHALL NOT OFFER ANY SPORTS WAGERING BASED ON ANY PROHIBITED SPORTS EVENT.

(D) OPERATORS SHALL NOT PERMIT SPORTS WAGERING BY ANYONE THEY KNOW, OR SHOULD HAVE KNOWN, TO BE A PROHIBITED SPORTS BETTOR.

(E) ADVERTISEMENTS FOR CONTESTS AND PRIZES OFFERED BY AN OPERATOR SHALL NOT TARGET PROHIBITED SPORTS BETTORS, MINORS, OR SELF-EXCLUDED PERSONS.

(F) OPERATORS SHALL PROHIBIT THE USE OF THIRD-PARTY SCRIPTS OR SCRIPTING PROGRAMS FOR ANY CONTEST AND ENSURE THAT MEASURES ARE IN PLACE TO DETER, DETECT AND, TO THE EXTENT REASONABLY POSSIBLE, PREVENT CHEATING, INCLUDING COLLUSION, AND THE USE OF CHEATING DEVICES, INCLUDING USE OF SOFTWARE PROGRAMS THAT SUBMIT SPORTS WAGERS UNLESS OTHERWISE APPROVED BY THE COMMISSION.

(G) OPERATORS SHALL DEVELOP AND PROMINENTLY DISPLAY PROCEDURES ON THE MAIN PAGE OF SUCH OPERATOR'S PLATFORM FOR THE FILING OF A COMPLAINT BY AN AUTHORIZED SPORTS BETTOR AGAINST SUCH OPERATOR. AN INITIAL RESPONSE SHALL BE GIVEN BY SUCH OPERATOR TO SUCH BETTOR FILING THE COMPLAINT WITHIN FORTY-EIGHT HOURS. A COMPLETE RESPONSE SHALL BE GIVEN BY SUCH OPERATOR TO SUCH BETTOR FILING THE COMPLAINT WITHIN TEN BUSINESS DAYS. AN AUTHORIZED SPORTS BETTOR MAY FILE A COMPLAINT ALLEGING A VIOLATION OF THE PROVISIONS OF THIS ARTICLE WITH THE COMMISSION.

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(H) OPERATORS SHALL MAINTAIN RECORDS OF ALL ACCOUNTS BELONGING TO AUTHORIZED SPORTS BETTORS AND RETAIN SUCH RECORDS OF ALL TRANSACTIONS IN

SUCH ACCOUNTS FOR THE PRECEDING FIVE YEARS.

5. (A) SUBJECT TO REGULATIONS FROMULGATED BY THE COMMISSION, CASINOS MAY ENTER INTO AGREEMENTS WITH AFFILIATES TO ALLOW FOR AUTHORIZED BETTORS TO SIGN UP TO CREATE AND FUND ACCOUNTS ON THEIR MOBILE SPORTS WAGERING PLATFORM OR PLATFORMS.

(B) AUTHORIZED SPORTS BETTORS MUST SIGN UP TO CREATE THEIR ACCOUNT ON A MOBILE SPORTS WAGERING PLATFORM IN PERSON AT A CASINO OR AN AFFILIATE OF A CASINO.

(C) AUTHORIZED SPORTS BETTORS MAY DEPOSIT FUNDS IN THEIR ACCOUNT ON A MOBILE SPORTS WAGERING PLATFORM IN PERSON AT A CASINO OR AN AFFILIATE OF A CASINO, ELECTRONICALLY RECOGNIZED PAYMENT METHODS, OR ANY OTHER MEANS APPROVED BY THE COMMISSION.

(D) SUBJECT TO APPROVAL OF THE COMMISSION, AND IN ACCORDANCE WITH REGULATIONS PROMULGATED BY THE COMMISSION, CASINOS MAY ENTER INTO AGREEMENTS WITH AFFILIATES TO LOCATE SELF-SERVICE MOBILE SPORTS BETTING KIOSKS, WHICH ARE OWNED, OPERATED AND MAINTAINED BY THE CASINO, AND CONNECTED VIA THE INTERNET TO THE CASINO, UPON THE PREMISES OF THE AFFILIATE.

S 3. Section 104 of the racing, pari-mutuel wagering and breeding law is amended by adding a new subdivision 24 to read as follows:

24. TO REGULATE SPORTS WAGERING IN NEW YORK STATE.

S 4. Subdivision 15 of section 1401 of the racing, pari-mutuel wagering and breeding law, as added by chapter 237 of the laws of 2016, is amended to read as follows:

15. "Prohibited sports event" shall mean any [collegiate sport or athletic event, any] high school sport or athletic event or any horse racing event.

S 5. Severability clause. If any provision of this act or application thereof shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of the act, but shall be confined in its operation to the provision thereof directly involved in the controversy in which the judgment shall have been rendered.

S 6. This act shall take effect on the same date and in the same manner as section 1367 of the racing, pari-mutuel wagering and breeding law pursuant to subdivision (c) of section 52 of chapter 174 of the laws of 2013, takes effect.

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Plaintiffs' Memorandum of Law in Opposition to Defendants' Cross-Motion for Summary Judgment, dated May 1, 2018

STATE OF NEW YORK
SUPREME COURT – COUNTY OF ALBANY

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

Plaintiffs,

-against-

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

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

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Dated: May 1, 2018

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PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted on behalf of Plaintiffs in opposition to Defendants' Cross-Motion for Summary Judgment and Defendants' Memorandum of Law in support thereof dated March 9, 2018. It should be read in conjunction with the Affirmation of Cornelius D. Murray, dated May 1, 2018, submitted herewith, together with the exhibits annexed thereto as well as all the other papers heretofore submitted by the parties in this action, including, especially, Plaintiffs' previous Memorandum of Law dated April 7, 2017 in opposition to Defendants' Motion to Dismiss and Plaintiffs' Memorandum of Law dated January 29, 2018 in support of their motion for summary judgment. Plaintiffs submit that Defendants' arguments lack merit and that Chapter 237 of the Laws of 2016 purporting to legalize daily fantasy sports violates Article I, § 9 of the New York State Constitution that prohibits gambling and directs the Legislature to pass laws to prevent it.

ARGUMENT

POINT I

Interactive Fantasy Sports (a/k/a Daily Fantasy Sports) Contests Violate the Constitutional Prohibition Against Gambling Because Their Outcomes Depend to a Material Degree Upon the Element of Chance Over Which the Participating Contestants Have No Control

> Everybody is entitled to his own opinion, but not to his own facts. – Daniel Patrick Moynihan[1]

> That's why we play the game; to see who'll win! – Adolph Rupp (legendary University of Kentucky basketball coach).[2]

In enacting Chapter 237 of the Laws of 2016, the Legislature made a "finding" that daily fantasy sports ("DFS") contests are not gambling because they are not "wagers on future contingent events not under the contestants' control or influence because contestants have control over which players they choose [on their fantasy team roster]..." Racing, Pari-Mutuel Wagering and Breeding Law (RPMWBL) § 1400(1)(b). Defendants' Memorandum of Law at 7. The Legislature should have heeded the words of former New York elder statesman and legislator, Daniel Patrick Moynihan, quoted above. Unlike Senator Moynihan, who knew the difference between fact and fantasy, the Legislature did the bidding of the gambling industry by turning the English language, logic and common sense on its head. In the period between 2015 and 2017 lobbyists for the gambling industry

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[1] George F. Will, *The Wisdom of Pat Moynihan*, THE WASHINGTON POST, October 3, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/10/01/AR2010100105262.html.

[2] Bud Monet, "*Random Shots*," Baton Rouge MORNING ADVOCATE, p. 2C, col. 1, December 30, 1965.

were paid over $2 million in fees and expenses - $1.3 million of which was spent in 2016 alone, the year Chapter 237 was enacted[3] – to convince the Legislature that it is not gambling or pool-selling when a person pays to enter into a contest to win a monetary prize that will be awarded based on the performances in future real-life sporting events of athletes selected to be on a contestant's "fantasy" team.

Defendants refer to the submissions to the Legislature by those lobbyists and lawyers who represented FanDuel, DraftKings and their trade association.[4] As stated, those submissions sought to sell the Legislature on the proposition that daily fantasy sports contests are somehow not gambling. But the Constitution is not for sale. The lobbyists simply cannot hide the **FACT** that the determination of contest winners depends entirely on future contingent events - the future performance of actual athletes in actual sporting events. That is the very essence of gambling no matter how the lobbyists and the Legislature may try to "spin" or disguise it by resorting to euphemisms that refer to a bet or wager as an "entry fee" rather than a "bet" (RPMWBL, § 1401, subd. 4), and a "simulated player" rather than a real-life athlete (*Id.* at subd. 8).

At the same time that the Legislature states that daily fantasy sports is not gambling, it nevertheless apparently has its own second thoughts, since it requires operators to (a) enable contestants to exclude themselves from contests, (b) take reasonable steps to prevent

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[3] *See* Report of the New York State Joint Commission on Public Ethics, attached as Exhibits "A" and "A-1" to the Affirmation of Cornelius D. Murray dated May 1, 2018.

[4] Defendants' Memorandum of Law at 25-27, and affidavits of Richard Lombardo and Evan Stavisky.

such persons from entering a contest, and (c) prominently list information on their websites concerning assistance for "compulsive" play. RPMWBL, § 1404(d) and (m).

Defendants admit, as indeed they must, that "the results of fantasy sports depend, to some extent, upon the subsequent actual performances of actual athlete(s) in actual sporting events." Defendants' Memorandum of Law at 24. They assert, however, that "the element of skill will dominate the determination of results" advancing as a "positive" that a "very small percentage [of contestants]" receive a "very large percentage of the prize money." *Id.* at 23. But then they turn around and on the very next page purport to address this problem by creating a "more level playing field" by requiring highly experienced players to identify themselves and limiting the number of entries these players can submit.

Despite the lobbyists' obfuscation and the Legislature's equivocation, what is **FACT** is that athletic events and the performances of individual athletes in those events are inherently unpredictable and represent future contingent events over which daily fantasy sport contestants exercise absolutely no control. What is **FANTASY** is that contestants in daily fantasy sports games can control the performance of the players they select or the many other factors that could positively or negatively affect the outcome – weather, injury, bad bounces, blown calls by referees, umpires, etc.

Even the most casual sports fan realizes that, yet the Legislature has now decreed that daily fantasy sports is not "gambling" as defined in Article 225 of the Penal Law. *See* RPMWBL § 1402(4). Section 225.00 of the Penal Law, however, defines a "contest of chance" as one that depends, to a "material degree," upon an "element of chance." The same section defines "gambling" as occurring when a person "stakes or risks something of

value upon the outcome or a future contingent not under his control or influence ..." The notion that the outcomes of daily fantasy sports contests do not depend to a "material degree" on the "element of chance" over which a contestant has no control / influence is itself pure fantasy, not to mention a double negative. The Court is respectfully requested to take judicial notice of the following well-known unlikely outcomes in actual sporting events which demonstrate beyond a shadow of a doubt that they depend to a material degree upon elements of chance which are an inherent part of all sporting events.[5]

On October 2, 1978, Bucky Dent, a light-hitting shortstop who batted last in the lineup and who had hit only four home runs that year and who would go on to amass a total of only 40 over his entire 12-year career, became the unlikeliest of heroes when he struck a go-ahead three- run home run off Boston Red Sox pitcher Mike Torrez with two out in the seventh inning to help the New York Yankees defeat the Red Sox and win the American League East Division in a one-game winner take all playoff. The ball barely cleared the "Green Monster" in left field at Fenway Park landing just to the right of the foul pole – a routine fly ball in any other ballpark. Until that moment, Dent had hit .243 over the course of a long season with only 37 runs batted in, and Torrez had shut the Yankees out over 6 2/3 innings, allowing only four hits over that span against a lineup of Yankee sluggers that included Thurman Munson, Lou Piniella, Reggie Jackson, Chris Chambliss and Graig Nettles. Dent's feat was even more unlikely because on the immediately preceding pitch,

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[5] See *Hamilton v. Miller*, 23 N.Y.3d 592, 603 (2004) ("a court may take judicial notice of facts which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy" citing *People v. James*, 73 N.Y.2d 427, 431 [1989])

he had fouled the ball off his foot, leaving him writhing in pain as he lay across home plate. When he got to his feet and hobbled to walk it off, it appeared for a moment that he might have to leave the game for a pinch-hitter. Dent's heroics did not end there, however. After the Yankees won the game, they went on to defeat the Kansas City Royals in the American League Championship Series, and then the Los Angeles Dodgers in the World Series, in which the "light-hitting" Dent hit .417 and was named the Most Valuable Player. As some anonymous fan somewhere once said, "Who woulda thunk it?" Dent may have shown great skill that fateful day in October 1978, but had there been daily fantasy sports in 1978, any lucky contestant who had chosen Dent on his fantasy roster would not have exercised any control or influence over Dent's performance.

What makes sporting events entertaining and exciting is the uncertainty of the outcome of a future contingent event over which the spectator has no control – unless, of course, the game is fixed.[6] The added thrill of an upset victory comes from the fact that "you never know" when the unexpected will occur.[7] The presumed "better team" does not always prevail. Games are not won on paper or by statistics but rather on the field. As the legendary Kentucky basketball coach Adolph Rupp explained, "That's why we play the game; to see who'll win!" Dent's achievement is, of course, only one example of the countless instances in the annals of sport where unexpected individual and team

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[6] That happens when money enters into the picture. See, for example, the 1919 World Series between the Chicago White ("Black") Sox and the Cincinnati Reds.

[7] *See* Defendants' own reference by the so-called "experts" to the unpredictability of events within contests which makes them so "exciting for spectators." Stavisky Affidavit, Exh. "OO" at 15, citing A. Clauset, *et al.*, Safe Leads and Lead Changes in Competitive Team Sports, Phys. Rev. E., 91 (2015), p. 062815.

performances defied the odds-makers, or where the outcomes were decided by freak bounces or other unusual occurrences. Those over 60 years of age will never forget when Cassius Clay, a/k/a Muhammad Ali, "shocked the world," knocking out the seemingly invincible Sonny Liston in 1964 to win the world heavyweight boxing championship.

In 1980 an American team of amateur hockey players defeated the Soviet Union – the prohibitive favorite to win the Gold Medal in the 1980 Winter Olympics in Lake Placid, New York in what has become known forever after as the "Miracle on Ice." There are also instances where previously high-achieving athletes disappoint and fail to meet expectations. Ted Williams, arguably the greatest hitter in baseball history, batted a puny .200 with only one RBI in the 1946 World Series, in which the Red Sox lost to the St. Louis Cardinals. In 2004, the Red Sox turned the tables and gained their sweet revenge on both the Yankees and Cardinals, coming from three games down in the American League Championship Series to defeat the Yankees in four straight games to win the American League pennant. This marked the first time in major league history that a team won a seven-game playoff series after trailing three games to none. The Red Sox then swept the Cardinals in the World Series, winning their first World Championship since 1918 and exorcising the "Curse of the Bambino."

Other famous or infamous events (depending on whom one roots for) include the "Immaculate Reception" that occurred on December 23, 1972 in an AFC divisional playoff football game between the Oakland Raiders and the Pittsburgh Steelers. Down 7-6 with only 20 seconds left on the clock, and facing fourth down on his own 40-yard line, Steelers quarterback Terry Bradshaw hurled a desperation pass over the middle, intended for

Pittsburgh Steeler receiver "Frenchy" Fuqua, only to have Oakland Raider defender Jack Tatum close on Fuqua in the last second and deflect the ball into the air for an apparent incompletion, dashing the Steelers' hopes for a victory. Seemingly out of nowhere, however, appeared Pittsburgh running back Franco Harris, who had trailed the play and scooped the ball off his shoetops just before it hit the ground. He then rumbled 35 yards for the game-winning touchdown! Had someone selected Terry Bradshaw on his/her daily fantasy sports roster, Bradshaw would have been credited with one more pass completion, one more touchdown pass, and 60 yards added to his total passing yards. Harris would have been credited with a touchdown reception and 60 more receiving yards.

On September 1, 2007, the #5 ranked University of Michigan lost its opening game to Division II Appalachian State, marking the first time in college football history that a team ranked in the Top 10 had lost to a Division II opponent.

More recently, this year's NCAA Men's basketball tournament, provided the world of sport with several other thrilling and unlikely "highlight" moments. In the opening round, #16-seeded University of Maryland-Baltimore County (UMBC) defeated #1 seeded University of Virginia – by 20 points, no less! That was the very first time after 135 previous encounters in NCAA Tournament history that a #16 seed defeated a #1 seed. The following night, March 17, 2018, the University of Houston led Michigan by two points with four seconds to go and with Houston on the foul line, shooting two shots. Improbably, Houston missed both foul shots, after which Michigan called a time out. But Michigan still had to traverse the length of the floor and score with less than four seconds left on the clock. A Michigan player threw an inbounds pass to a teammate, who forwarded a second

pass to Michigan freshman non-starter, Jordan Poole, who then made a desperate three-point shot just inside the half-court line. The final buzzer sounded as the ball swished through the nets, giving Michigan the victory. And what about the amazing "bracket-busting" University of Loyola at Chicago, an #11-seed team, defying the odds by making it all the way to the Final Four? (Well, maybe not so amazing! Loyola reportedly had God on its side thanks to the prayers of Sister Jean Delores Schmidt.)

One of the most bizarre plays in baseball history occurred on October 17, 1999 in Game 5 of the 1999 National League Championship Series between the New York Mets and the Atlanta Braves – the "Grand Slam Single!" In the bottom of the 15th inning with the score tied 3-3, the Mets' third baseman, Robin Ventura, hit what appeared to be a home run with the bases loaded, catapulting the Mets to a 6-3 victory. But in the ensuing celebration, Ventura never made it to second base as Todd Pratt, the Mets runner who had been on first base, picked up Ventura while he was attempting to circle the bases and the rest of his teammates mobbed him. Because Ventura had touched first base but never reached second, the hit was officially scored a single. While it really did not matter to the Mets who were credited with a 4-3 victory, it would have severely weakened the entry of a fantasy sports contestant had he or she selected Ventura on his/her fantasy team roster! Instead of earning several additional points for a home run and four RBI's, that contestant would have only been recognized for a single and one run batted in.

The list of "weird" events goes on and on. Jose Canseco misplayed a fly ball, hit by Carlos Martinez, that bounced off Canseco's head and into the seats for a home run, May 26, 1993 (Texas Rangers v. Cleveland Indians). If anyone had selected Carlos

Martinez on his/her fantasy roster that day, they would surely have "lucked" out. Then there's the return of the kickoff with four seconds left in the California v. Stanford football game on November 20, 1982 when California made five laterals and used as blockers the Stanford Band, which had prematurely marched on the field, to reach the end zone in a dramatic 25-20 victory.

In the 2002 Winter Olympics in Salt Lake City, Australian Steven Bradbury won the Gold Medal in the 1000 meter speed skating event. It was remarkable enough that he was the first Olympian from the Southern Hemisphere ever to win a gold medal at the Winter Olympics. But that distinction paled in comparison to how he won it. In the quarterfinal round, he finished third and the runner that finished just ahead of him was disqualified so he was awarded second place, which allowed him to qualify for the semifinals. In the semifinals he was far off the pace when three racers in front of him crashed into each other and fell to the ice, allowing him to finish first and to qualify for the finals. In the finals he trailed the field badly but history repeated itself. Just as they headed for the finish line, all four racers in front became entangled and crashed to the ice, paving the way for Bradbury to win the gold medal, although, as he himself conceded, he was both the oldest and slowest skater in the finals.

Perhaps the most improbable outcome of all was the miraculous comeback victory by the New England Patriots in Super Bowl LI in 2017 where they overcame a 28-3 deficit with less than seven minutes remaining in the third quarter to defeat the Atlanta Falcons. According to one sports authority, the odds of that occurring were 99.7 to 1. Murray Affirmation dated May 1, 2018, Exhibit "B".

Finally, what about Rocky Balboa defeating Apollo Creed? Oops! Okay, that is fiction, but it is easy to confuse fact with fiction after reading Defendants' papers and the so-called "findings" of the Legislature that betting on the future performance of real life athletes is not gambling because contestants control the fantasy sports roster they select. With the possible exception, however, of Sister Jean,[8] no spectator or bettor in any of the aforementioned sporting events ever had any control or influence over the skill of the athletes involved. The Legislature nevertheless seeks to justify daily fantasy sports contests based on their "finding" that they "are not games of chance because they consist of fantasy or simulation sports games" and the "contestants ***control*** which players they choose" (emphasis supplied). RPMWBL § 1401(1)(b).

Indeed, the Legislature goes so far as to direct that the registered operator of daily fantasy sports must "***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." Defendants' Memorandum of Law at 8; *see also* RPMWBL § 1401(1)(o). This is absurd on its face. Legislatures cannot ordain or possibly ensure how a daily fantasy sports contestant fills out his or her roster. Moreover, he or she may have absolutely no knowledge or skill with respect to sports and may simply fill out an entry that wins based upon pure luck. The Legislature is not

[8] ☺

endowed with supernatural powers such that it can ***ensure*** that "all winning outcomes reflect the relative knowledge and skill of the authorized players." Nor can it outlaw luck.[9]

To make the contests "fairer," the legislation also purports to limit the number of skillful players that can be contestants in any one game (RPMWBL § 1404[1][g] and [2]) in order to "level the playing field." Defendants' Memorandum of Law at 8, 24, n 14. Ironically, and as Defendants' supposed experts concede, limiting the participation of skillful players actually increases the odds that a less skillful contestant might win – thereby necessarily decreasing the odds that a skillful player will win; and thus undermining the very rationale that Defendants have advanced to justify the law to begin with.[10]

Daily fantasy sports is nothing more than gambling on steroids. The success of an entry is not just dependent on one future contingent event, but on a parlay of several contingent events, all of which involve the future performances of several different real-life athletes competing in real-life sporting events. How this differs from placing a Pick Six bet in horse-racing is not clear.[11]

As will be hereinafter discussed, the arguments Defendants present would be laughable were it not for the fact that they are asking this Court to turn a blind eye to reality

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[9] The Chairman of the Fantasy Sports Trade Association apparently believes otherwise. He testified before the Legislature that "whether a participant wins or loses depends ***entirely*** on the amount of time, research, experience, and talent – skill – that he or she has relative to other players." *See* Stavisky Affidavit, Exhibit "U" at 2.

[10] *See* Stavisky Affidavit, Exh. "OO", Luck and the Law at 16 ("... the simplest way to increase the role of skill in a contest is to increase the number of games per player in the competition").

[11] In Pick Six, a bettor may "win big" if he or she successfully picks six winners in six consecutive horse races before the start of the first race. That is surely gambling, but it is legal only because Article I, § 9 of the Constitution carves out an exception for pari-mutuel wagering on horse racing.

and make a mockery of the Constitution by indulging their "fantasy" that daily fantasy sports is not gambling while making the rest of us New Yorkers look foolish.[12]

POINT II

The Legislature Is Not Free to Define "Gambling" Any Way It Wishes

The gist of Defendants' argument is that the Constitutional Convention of 1894, which adopted Article I, § 9, essentially gave the Legislature the latitude to define "gambling" since the term is not otherwise defined, and that in directing the Legislature to "pass applicable laws to prevent offenses against this section," the Constitution itself left everything in the hands of the Legislature.[13]

The fact that gambling is not otherwise defined, however, is not a license for the Legislature to ignore certain kinds of gambling, let alone pass laws to enable rather than to prevent it. The term "gambling" needs no definition. Words that are not otherwise defined have their common and ordinary meaning. *See King v. Cuomo*, 81 N.Y.2d 247, 253-254 (1993). Otherwise, the prohibition against gambling, a protection embodied in the Bill of Rights in Article I of the New York Constitution, would exist only at the sufferance of the Legislature. While this case is undoubtedly being watched by the Legislature to see how far it can "push the envelope," the constitutional prohibition against gambling is in

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[12] *Last Week Tonight with John Oliver: Daily Fantasy Sports* (HBO television broadcast Nov. 15, 2015), *available at*: https://www.youtube.com/watch?v=Mq785nJ0FXQ

[13] *See*, for example, written testimony submitted jointly by counsel representing DraftKings arguing that because the term "gambling" is not defined in the Constitution, the Legislature is free to amend or clarify its statutory definition as it sees fit. Stavisky Affidavit, Exhibit "S" at 4.

imminent danger of death by a thousand cuts. Presently pending in the State Senate is a bill (S.3898A) sponsored by John Bonacic, Chair of the Racing, Gaming and Wagering Committee, that would allow interactive poker as a "game of skill." In the Assembly, his counterpart, Gary Pretlow, Chair of the Committee on Racing and Wagering, has introduced a similar bill, A.5250. *See* Murray Affirmation, Exhibits "C" and "D". It is worth noting that both Bonacic and Pretlow were also the main sponsors of Chapter 237 of the Laws of 2016. Senator Bonacic also has introduced another bill purporting to legalize sports wagering – even on college sports. *See* Senate Bill S-7900. Murray Affirmation, Exhibit "E".

As the Attorney General pointed out in 1984, in the ensuing years following the 1894 adoption of Article I, § 9 which prohibited lotteries, book-making, pool-selling ***or any other kind of gambling***, the Legislature has consistently viewed sports wagering as illegal. 1984 N.Y. Op. Att'y Gen. 1, reprinted at 1984 N.Y. AG LEXIS 94*. The Attorney General concluded:

> If the State government is to be authorized to run a program in which it accepts wages on the outcome of professional athletic contests or multi-contest parlays, such authorization can only be acquired through an amendment to the Constitution (*Id.* at * 42).

Defendants attempt to make much of the fact that in 1965 the Legislature adopted Penal Law § 225.00 defining a "game of chance" as one in which the outcome depends in a ***material degree*** upon an element of chance. Defendants' Memorandum of Law at 13. It is difficult, however, to see how that helps Defendants' cause as it is clear from Point I of

this Memorandum that there are material elements of chance in all sporting events.[14] If there were no element of chance in athletic events, the outcomes would be pre-ordained and there would be no "sport" at all. Moreover, as the Attorney General noted in the 1984 Opinion rendered long after Penal Law § 225.00 was enacted, "... even in the penal sense ... a sports betting program may not be operated under the current constitutional provisions." *Id.* at * 28.

Defendants would also have this Court ignore former Penal Law § 351, enacted in 1895 (L. 1895, ch. 572, § 1) immediately after the adoption of the 1894 Constitutional prohibition against gambling. Defendants' Memorandum of Law at 13, n. 7. Defendants argue that § 351 was repealed and superseded by the adoption of Penal Law § 225.00 in 1965. *Id.* at n. 8. While true, the 1965 law did not authorize sports wagering, as the Attorney General's 1984 opinion made clear. More importantly, courts have consistently held that the contemporaneous enactment by a Legislature of a statute implementing a very recent Constitutional provision is entitled to "great deference." *See New York Public Interest Research Group v. Steingut*, 40 N.Y.2d 250, 259 (1976). *See also People ex rel. Joyce v. Brundage*, 78 N.Y. 403, 406 (1879) ("Great deference is certainly due to a legislative exposition of a Constitutional prohibition, and especially when it is almost contemporaneous with such provision and may be supposed to result from the same views of policy, and modes of reasoning which prevailed among the framers of the instrument

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[14] *See Plato's Cave Corp. v. State Liquor Authority*, 115 A.D.2d 426, 428 (1st Dep't 1985), *aff'd on other grounds*, 68 N.Y.2d 797 (1986) (so long as a game involves a material element of chance, it is gambling regardless of the role played by skill). *See also People v. Turner*, 165 Misc.2d 222 (Crim. Ct., N.Y. Co. 1995).

propounded.") That is very significant because, as emphasized at pages 26-27 of Plaintiffs' January 29, 2018 Memorandum of Law in support of their Motion for Summary Judgment, Penal Law § 351, adopted in 1895, made it a felony for any person to "register bets or wagers or sell pools upon the result of any trial of contest of skill, speed, power or endurance of man or beast." This almost contemporaneous interpretation by the Legislature in 1895 of what Article I, § 9 (adopted in 1894) was meant to prohibit is entitled to great deference.

Ironically, in their Memorandum of Law at page 11, Defendants cite *People ex rel. Sturgis v. Fallon*, 152 N.Y. 1 (1897), but neglect to mention that this was the very court which also stated that the "obvious purpose of [Penal Law § 351] is to prevent the offenses mentioned in Section 9 of Article One of the Constitution." *Id.* at 7.

In enacting Chapter 237 in 2016, some 122 years after the Constitutional Convention of 1894 that adopted Article I, § 9 prohibiting gambling, the 2016 Legislature ignored more than a century of prior enactments by the Legislature that interpreted the ban in Article I, § 9 as applying to all forms of sports wagering. *See also Kolb v. Holling*, 285 N.Y. 104, 112 (1941) ("The practical construction put upon a constitutional provision ... by the Legislature ... is entitled to great weight, if not controlling influence, when such practical construction has continued in existence over a long period of time.")

Finally, even if the term "gambling" in Article I, § 9 were ambiguous, that would not give the Legislature the broad discretion it claims here. In *Board of Education, Levittown Union Free School District v. Nyquist,* 57 N.Y.2d 27 (1982), the Court of Appeals was called upon to interpret Article XI, § 1 of the Constitution which, like the

prohibition against gambling, was adopted at the 1894 Constitutional Convention. *Id.* at 47. Article XI, § 1 of the Constitution states:

> "The Legislature shall provide for the maintenance and support of a system of free common schools wherein all the children of this state may be educated."

The Court in *Levittown* went on to interpret the meaning of the obligation that fell to the Legislature to carry out. The Court, not the Legislature, rendered the binding interpretation of the constitutional provision, stating as follows:

> With full recognition and respect, however, for the distribution of powers in educational matters among the legislative, executive and judicial branches, it is nevertheless the responsibility of the courts to adjudicate contentions that the actions taken by the Legislature and the executive fail to conform to the mandate of the Constitution which constrains the activities of all three branches. (57 N.Y.2d at 39)

In *Levittown*, the Court of Appeals went on to hold that the language in Article XI, § 1 imposed upon the Legislature a duty to provide "a sound basic education." *Id.* at 48. Thereafter, in *Campaign for Fiscal Equity v. State of New York I*, 86 N.Y.2d 307 (1995), the Court of Appeals expanded further on that definition holding that it meant that New York's public schools must be able to teach "the basic literary, calculating and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." 86 N.Y.2d at 316.

Accordingly, *King v. Cuomo*, 81 N.Y.2d 247 (1993), *Board of Education, Levittown v. Nyquist*, 57 N.Y.2d 27 (1982) and *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307 (1995), all teach that while the Legislature may enjoy considerable

deference in carrying out a constitutional mandate, it is up to the courts in the first instance to define the meaning of that mandate. Thus, the determination on whether daily fantasy sports falls within the definition of gambling is for the Judiciary, not the Legislature, to decide.

The cases Defendants cite do not stand for the proposition that the courts must stand by helplessly while the Legislature interprets the Constitution any way it wants. The difference between what Plaintiffs and Defendants cite as precedent turns on the distinction between the "interpretation" versus the "implementation" of a constitutional mandate. It is the Judiciary's sole prerogative to interpret "gambling"; it falls to the Legislature to implement laws to prevent it. The Legislature lacks power to unilaterally redefine the term "gambling" as it has attempted to do here.

Finally, Defendants mistakenly rely on *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, *cert. denied* 540 U.S. 1017 (2003); *Dalton v. Pataki*, 5 N.Y.3d 243, *cert den.* 546 U.S. 1032 (2005); Judge Smith's concurrence in *People v. Taylor*, 9 N.Y.3d 129 (2007); *Hernandez v. Robles*, 7 N.Y.3d 338 (2006); and *Campaign for Fiscal Equity Inc. v. State of New York*, 8 N.Y.3d 14 (2006). *See* Defendants' Memorandum of Law at 18. All those cases are distinguishable. Coincidentally, Plaintiffs' counsel is intimately familiar with both *Saratoga Chamber* and *Dalton*, having represented Plaintiffs in both actions.

In *Saratoga Chamber*, where Plaintiffs prevailed, the Court of Appeals decided that under the New York State Constitution's separation of powers, the Governor lacked the authority to unilaterally enter into a compact with an Indian tribe to allow the tribe to

gamble within the State of New York pursuant to the federal Indian Gaming Regulatory Act ("IGRA"). The constitutional issue presented was whether the Executive branch had exceeded its authority by making a policy determination which Plaintiffs successfully contended was the exclusive prerogative of the Legislative branch. The most important point, moreover, for this case is that once again the Court of Appeals stated that it "falls to the courts and ultimately this court, to determine whether a challenged gubernatorial action is 'legislative' ..." *Id.* at 822. In other words, the Court, and neither the Executive nor the Legislature, decides what the Constitution means.

In *Dalton*, where Plaintiffs did not prevail, the Court nevertheless made it clear that "while our State Constitution generally prohibits gambling, this broad prohibition is subject to ***limited*** exceptions." (emphasis supplied) *Id.* at 255. The Court went on to say, however, this prohibition was pre-empted by federal law (IGRA) such that the Governor could enter into a compact to prevent gambling after receiving the requisite authorization from the Legislature as required by the Court's prior decision in *Saratoga Chamber*. *Dalton* at 259-263.

The rest of the Court's opinion in *Dalton* dealt with the State-run Lottery, which is not the subject of the current case and, besides which, the Lottery is an exception to the otherwise broad prohibition against gambling in Article I, § 9 of the Constitution. In the present case, the Constitution contains no exception for sports wagering.

In *People v. Taylor*, 9 N.Y.3d 129 (2007), Judge Smith's concurrence, made in a decision by the Court invalidating the death penalty, reads more like a dissent. He laments the fact that the rest of the majority of the Court did not defer to the Legislature. *Id.* at 160.

His concurrence hardly supports Defendants' position in this case where they argue for such deference.

Next, Defendants attempt to find support from *Hernandez v. Robles*, 7 N.Y.3d 338 (2006). This reliance on *Hernandez* is especially curious, as this was a case where the Court of Appeals deferred to the Legislature's "policy decision" banning same-sex marriage on the grounds that it did not violate the New York State Constitution's due process and equal protection clauses. If ever there were a case that shows that such deference was unwarranted, this is it. As is well known, the Court's decision in *Hernandez* was implicitly overruled by the determination of the U.S. Supreme Court in 2015 that the right of same-sex couples to marry is a fundamental right protected by the due process and equal protection clauses of the United States Constitution. *Obergefell v. Hodges*, 125 S.Ct. 2584 (2015).

Finally, Defendants cite to *Campaign for Fiscal Equity v. State of New York II*, 8 N.Y.3d 14 (2006), where the Court deferred to the amounts appropriated by the Legislature and the Executive in the State Budget to provide students with a "sound basic education." However, as stated earlier, *supra* at 15-16, the Court of Appeals had already determined earlier that Article XI, Section 1 of the Constitution that a sound basic education was a right, and now it was up to the Legislature to carry out that right. *See Board of Education, Levittown Union Free School District v. Nyquist*, 57 N.Y.2d 27, 47-48 (1982) and *Campaign For Fiscal Equity I*, 86 N.Y.2d at 316.

As stated in *Campaign for Fiscal Equity II*, the Court was mindful of the value of education and interpreted the Constitution in that fashion by defining what that right meant.

8 N.Y.3d at 20. In the case now before the Court, the Court must also determine what the right in Article I, § 9 in the Bill of Rights means. Once it does so, it is up to the Legislature to obey that mandate. How the Legislature does so may be entitled to deference, but in the first instance it may not usurp the Judiciary's role to define the right itself.

This is the point overlooked by Defendants in all the cases they rely upon. Deference is due once a right is established, but interpreting the Constitution as to what that right means is the sole and exclusive function of the Judicial Branch.

POINT III

The Presumption Favoring the Constitutionality of a Statute Is Not Irrebuttble as the Underlying Premise for the Statute Must Be Rational

Defendants seek refuge behind a familiar rule that statutes are presumptively constitutional and the burden rests upon the party challenging a statute to prove otherwise. As Defendants themselves concede, however, the presumption is rebuttable. They cite, for example, *Harris v. Economic Opportunity Commission of Nassau County*, 171 A.D.2d 223 (2d Dep't 1991) (Defendants' Memorandum of Law at 13). That case makes reference to Penal Law § 225 which supplied the definitions of proscribed gambling activities. *Id.* at 227. Respondents' reliance on *Harris* is curious indeed because, until the Legislature enacted Chapter 237, daily fantasy sports would have been among those activities prohibited by Penal Law § 225 as the Attorney General himself so strenuously and correctly argued in his prosecutions of both FanDuel and DraftKings. *See* Plaintiffs' Memorandum of Law, dated April 7, 2017 in opposition to Defendants' Motion to Dismiss.

Moreover, in enacting Chapter 237, the Legislature made daily fantasy sports legal, provided, however, the operator of such contest was registered in accordance with the provisions of RPMWBL § 1402. Otherwise, daily fantasy sports remains illegal. *See* § 1412. This is fatal to the Defendants' argument that daily fantasy sports is not illegal. Whether or not DFS is legal should not turn on the question of whether or not it is a registered activity. The element of skill and/or chance in DFS is the same regardless of whether or not a game is registered. This begs the question: if unregistered daily fantasy sports are illegal, what makes registered daily fantasy sports any different? While statutes may be presumptively legal, they cannot be based on an irrational premise as Defendants themselves concede. *See* Defendants' Memorandum of Law at 18, *et seq.* The distinction between registered and unregistered daily fantasy sports is irrational.

Carving out daily fantasy sports from the definition of gambling also subverts the whole purpose of the prohibition in Article I, § 9. In addition to the familiar rubric cited by Defendants that statutes must be presumptively constitutional, there is another long-standing rule of interpretation which states that prohibitions in the law must be strictly construed and the exceptions narrowly applied so as to not defeat the main purpose of the law. *See generally*, McKinney's Cons. Laws of N.Y., Book I, *Statutes* § 213. As argued in Plaintiffs' prior Memorandum of Law, the skill / chance dichotomy is false, as both are clearly present in many forms of gambling – *e.g.*, poker and betting on horses. *See United States v. DiChristina*, 726 F.2d 92, 98 n 5 (2d Cir. 2013). Skill and chance are not mutually exclusive and the presence of a skill in a contest is not determinative of whether or not it is gambling. The Constitution prohibits lotteries, pool-selling, bookmaking and *any other*

kind of gambling. It makes no exception for gambling that may also involve skill. If the framers of the Constitution wanted to carve out an exception for sports wagering, they were free to do so, but the fact that they have not speaks volumes. McKinney's Cons. Laws of N.Y., Book I, *Statutes*, § 213 at 373.

Defendants accuse Plaintiffs of misconstruing case law in asserting that exceptions to prohibitions must be strictly construed. *Defendants' Memorandum of Law* at 20, n. 11. That principle, however, has been well-recognized by the Courts. *See Dalton v. Pataki*, 11 A.D.3d 62, 90 (3d Dep't 2004), *modified in part*, 5 N.Y.3d 243 (2005), *cert denied* 546 U.S. 1032 (2005), *citing New York Racing Ass'n v. Hoblock*, 270 A.D.2d 31, 32-34 (1st Dep't 2000) ("Given the public policy against gambling in the State [N.Y. Const., art. I, § 9] ... the statute is subject to strict construction, and any activity not expressly authorized is prohibited.")

Defendants' reference to several other states whose legislatures have declared, by statute, that daily fantasy sports is not gambling misses the point. Defendants' Memorandum of Law at 30-31. New York's prohibition against gambling, by contrast, is embedded in the Constitution, and thus the State Legislature is not free to define "gambling" as it wishes. This is not true in several of the other jurisdictions where gambling is simply a matter of statute and those state legislatures are free to prohibit or allow gambling as they see fit.[15] Equally misplaced and misleading is Defendants'

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[15] For example, New Jersey's Constitution prohibits gambling but has a constitutional exception for sports wagering. N.J. Const, art. IV, § VII, ¶ 2. Defendants are correct about Delaware, whose Constitution prohibits gambling but by statute does allow fantasy sports.

reference to 31 U.S.C. § 5362. Defendants' Memorandum of Law at 31. Defendants state that the Federal Government excluded certain financial transactions associated with gambling. What they neglect to mention, however, is that § 5362 is part of the Uniform Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361-5366 (Public Law 109-347) ("UIGEA"), which states elsewhere that "No provision of this subchapter shall be construed as altering, limiting or extending any ... state law ... prohibiting, permitting or regulating gambling within the United States." 31 U.S.C. § 5361(b). In addition, they neglect to point out that one of UIGEA's co-authors, Rep. James Leach, stated that it was "sheer chutzpah" to pretend that UIGEA somehow made DFS legal in states that prohibited it. See *Former Congressman says DFS is "Cauldron of Daily Betting,"* Murray Affirmation, Exhibit "N", dated April 6, 2017 in opposition to motion to dismiss. *See also* Plaintiffs' Memorandum of Law dated April 7, 2017 in opposition to Defendants' motion to dismiss, noting the fact that Attorney General Schneiderman relied on the same statement by Rep. Leach in the action he had commenced against DraftKings.

Charles Z. Lincoln, the authoritative commentator of New York's early constitutional history, wrote in 1906 that the main purpose of the Constitutional prohibition against gambling adopted in 1894 was to "extend or define the prohibition already contained in the present Constitution, and which is against public gambling in the form of lotteries." He continued, writing that "this amendment is framed so as to explicitly prohibit the equally pernicious forms of public gambling known as pool-selling,[16] which has come

[16] Daily fantasy sports operators pay winners from the amounts collected from the entry fees. Stipulation of Agreed Upon Facts, ¶ "3", dated January 28, 2018.

into existence since the present constitution (1846) was framed, and the manifest and enormous evils of which are notorious." *See* Charles Z. Lincoln, *Constitutional History of New York*, Vol. III at 46-49 (1906). The Court of Appeals said essentially the same thing years later in *Intercontinental Hotels Corp. v. Golden*, 15 N.Y.2d 9 (1964), noting that the purpose of the constitutional prohibition was to "protect the family man from his imprudence at the gambling tables." *Id.* at 15. Daily fantasy sports, however, provide yet another opportunity for vulnerable men and women to ruin their lives and the lives of their families and friends.[17] Carving out an exception for daily fantasy sports, an exception not provided for in the wording of Article I, § 9, would vitiate the very purpose of the provision. As stated by Attorney General Schneiderman himself:

> ... the DFS sites pose precisely the same risks to New York residents that New York's anti-gambling laws were intended to avoid. Experts in gambling addiction and other compulsive behavior have identified DFS as a serious and growing threat to people at risk for, or already struggling with gambling-related illnesses (Exhibit "D" of Affirmation of Cornelius D. Murray, dated April 6, 2017 in opposition to Defendants' Motion to Dismiss).

While FanDuel and DraftKings may have the resources to lobby the Legislature with millions of dollars to advance their own economic interests, the Plaintiffs in this case are not so lucky. The Judiciary is their only hope. Since the prohibition against gambling is a constitutional protection enshrined in the Bill of Rights in Article I of the New York Constitution, it is the duty of the courts to protect those rights when the Legislature would

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[17] *See* Affidavits of Plaintiffs White and Wellins and Complaint, ¶¶ "21" – "46", inclusive.

violate them. *See Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d 893, 925 (2005) ("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").

POINT IV

The Alleged "Evidence" the Legislature Had Before It is Unreliable, Deeply Flawed, and Contradicts Its "Finding" That Daily Fantasy Sports Is Not Gambling

In a last-ditch effort to justify their position, Defendants resort to the "evidence" in the Legislative Record (Defendants' Memorandum of Law at 22-26) as well as the "extrinsic" evidence which they contend supports the "finding" that daily fantasy sports is not gambling. *Id.* at 26, *et seq.*

As is obvious from even a cursory review of that evidence, its credibility is immediately suspect as it consists mostly of statements and/or analyses prepared by lobbyists for the gambling industry or those with a financial stake in legalizing daily fantasy sports. For example, Defendants refer to an Assembly Committee hearing held on December 8, 2015, at which only ten of the members of the Assembly and none of the members of the Senate were present. Affirmation of Richard Lombardo, Exhibit "Q" at 2. Over 220 pages (pages 6-224) of a total of 267 pages (pages 6-273) were consumed by testimony provided by lobbyists or representatives of the gambling industry, including the Chairman of the Fantasy Sports Trade Association, the counsel for DraftKings, the counsel for FanDuel, and Jeremy Kudon, a partner in the New York office of Orrick, Huntington and Sutcliffe, the lobbyists for DraftKings, FanDuel and the Fantasy Sports Trade Association (*Id.* at 46). In addition, an affidavit containing Exhibits "R" – "PP" was

submitted by Evan Stavisky, a partner at the Parkside Group LLC, which had been retained as a political and legislative strategist by the Fantasy Sports Trade Association in connection with the legislation "codified at Chapter 237 of the Laws of New York of 2016" (Stavisky Affidavit at 1).

It is important to examine the actual documents and articles submitted by Defendants which, under close scrutiny, simply do not support the position Defendants espouse. The single most salient point is that every one of the studies submitted by the experts is not based on how daily fantasy sports will be required to operate under New York law.

First, analyses prepared by the experts purport to show that "skill" dominates "luck" in DFS. That alone is totally unremarkable, as we know that a skilled poker player, for example, will defeat a novice over time, but poker is still gambling. More significant, however, is that the studies were based on games in which there were no limits on the number of entries skilled or experienced players could submit, and there were no classified rankings, where only certain players could participate based on skill/experience. In Chapter 237 of the Laws of 2016, however, there are limits on the number of entries players can submit in any single contest (RPMWBL § 1404[2]), and experienced players must be identified such that a less skilled contestant can decide whether to play. These provisions were inserted to "level the playing field." Defendants' Memorandum of Law at 24, note 14. As noted, however, by the Massachusetts Institute of Technology professors who submitted the "Luck and the Law" analysis that appears as Exhibit "OO" to the Stavisky Affidavit, the "simplest way to increase the role of skill in a contest is to increase the

number of games per player." *Id.* at 16. The same professors also note that tournaments that are divided up into classes of different skilled players (*e.g.*, having beginners play in a separate pool) are likely to have a larger element of luck than those in which everyone plays in the same pool. *Id.* They observe that skill is no longer a distinguishing characteristic when players' skill levels are similar. *Id.*

The same experts also make it clear that while skill may be greater than luck in some daily fantasy sports contests, there is still a material degree of luck present. *Id.* at 14, Figure 6. Note that in fantasy football, the skill / luck ratio is 55/45; in hockey, it's 60/40; in baseball, it's 75/25; and in basketball, it's approximately 85/15. Who boarding an airplane would not consider it "material" if the chances it would crash were even as low as 10% (the basketball ratio), not to mention as high as 45% (the football ratio)?

Other data submitted as "evidence" relate to studies allegedly performed by other experts, all of which show that "top performers" consistently beat "average performers." Stavisky Aff., Exhibit "KK". Again, this is neither remarkable nor probative. While the percentage of success with respect to the four major professional sports vary from the estimates of other experts, the more important point is that no fantasy sports operator can assure the relative skill of the contracts in each contest. If the contests pit contestants of equal skill against each other, luck will play a much more important role in the outcome.

It must also be noted that the studies focus on the performance of skill versus unskilled players over the course of time – *e.g.*, season-long. *See, Luck and the Law*, Stavisky Affidavit, Exhibit "OO" at 4. A distinguishing aspect of daily fantasy sports, however, is that games are played on a daily basis. We all know that on "any given night"

a team in last place in baseball can defeat the team in first place, or that the league's leading hitter may go hitless while a light-hitting shortstop could hit a home run as Bucky Dent did back in 1978.

Other extrinsic evidence submitted by Defendants include:

- Two "circulars" which were authorized by the Texas Fantasy Sports Alliance and funded by Fantasy Sports for All (Stavisky Affidavit, ¶¶ 23-24);
- A "circular" with no author or source indicated, entitled "Fantasy Sports Contests are Demonstrably Different From Gambling Games" (*Id.* at ¶ 25);
- A letter drafted April 15, 2015 to Tim Dent, Chief Financial Officer and Chief Operating Officer of DraftKings, containing a "skill simulation analysis" carried out at the request of DraftKings by Gaming Laboratories International, LLC (*Id.* at ¶ 27, Exhibit "NN"). Notably, the terms and conditions which apply to the information in that report state in part that "a report may not be relied upon for any reason by any person or entity other than the client, including, but not limited to, the manufacturer and developer of the items, a non-GI laboratory, ***or a regulator not named in the report***" (emphasis added); and finally;
- A report from Professor Emeritus Zvi Giulla, prepared at the request of Louis Roca Rofgerber, LLP, a law firm which has represented FanDuel and DraftKings (*Id.* at ¶ 29, Exhibit "PP").

One of the letters submitted to the Legislature in support of legalizing Daily Fantasy Sports was written by Nigel Eccles, CEO and founder of FanDuel. *See* Stavisky Affidavit, Exhibit "W". It was he who took the necessary steps in the United Kingdom to qualify his company as "an online sports betting company." *See* ¶ 101 of Complaint filed by Attorney General Schneiderman in *People v. DraftKings* (N.Y. Sup. Ct. N.Y. Cty. Index No. 453054/2015), Affirmation of Richard Lombardo dated January 11, 2017, Exhibit "B".

Much of the "evidence" that the Defendants have submitted is biased at best, equivocal and in some respects undermines the very proposition that DFS is not gambling. In any event, and as previously stated by Plaintiffs, the skill / chance dichotomy is a false one and is not determinative of whether a particular activity is gambling. Even if it were, the studies relied upon by Defendants show that in any case, the element of chance is "material" even where the percentage of skill exceeds the percentage of chance.

SUMMARY

The Defendants rely heavily on the rule that statutes are presumptively constitutional, virtually defying the Court to find Chapter 237 of the Laws of 2016 unconstitutional because courts must defer to the Legislature's will. Judicial deference is one thing; judicial abdication, however, is something else. The presumptive constitutionality of a statute is subject to the overarching principle that the enactment of the challenged statute must have a rational basis.

The Legislature's "finding" that DFS is not gambling is irrational. There is simply no question that the outcome of fantasy sports games depends to a material degree upon future contingent events – namely, the performance of real-life athletes performing in real-

life athletic events. Nor is there any question that the contestants who pay to play daily fantasy sports have no control whatsoever with respect to how those athletes will actually perform. Putting money at risk based on the outcome of future contingent sporting events over which a person has no control has always fit within the classic definition of "gambling" since the Constitutional prohibition against gambling was adopted in 1894. *See, e.g., Pace-O-Matic, Inc. v. New York State Liquor Authority*, 72 A.D.3d 1144, 1146 (3d Dep't 2010).

The fact that there may be an element of skill in the selection of a fantasy team roster by a fantasy sports contestant does not exempt the activity from the prohibition against gambling in Article I, § 9 of the Constitution which prohibits "lotteries, book-making, ***pool-selling***, or ***any other kind of gambling***" (emphasis supplied).

The skill/chance dichotomy is patently false, since many kinds of gambling, like poker, blackjack and pari-mutuel wagering on horse racing all involve considerable elements of skill. They are, nevertheless, gambling and always have been considered as such. Horse racing is, of course, legal, but only because there is a specific exception carved out in the Constitution that permits it. There is, however, no such exemption for fantasy sports. The skill / chance dichotomy is "nonsense" according to none other than Attorney General Schneiderman, or at least it was when he wrote his article in the New York *Daily News* on November 19, 2015. *See* Complaint, ¶ 183 and Murray Affirmation, dated April 6, 2017 at Exhibit "A". Now the same Attorney General asks this Court to accept that nonsensical argument.

There is absolutely no end to the hypocrisy displayed by the gambling industry. Through a massive lobbying effort, it has succeeded in getting the Legislature to pass a law purporting to legalize fantasy sports on the basis that DFS is a game of skill. At the same time they have advertised to the public that winning is "easier than milking a three-legged goat." *See* ¶ 75 of Complaint in *People v. DraftKings*, annexed as Exhibit "A" to the Affidavit of Richard Lombardo dated January 11, 2017. *See also* Plaintiffs' Memorandum of Law dated April 7, 2017 in opposition to the Motion to Dismiss at 4, n. 4. As stated in a *Newsday* editorial dated May 24, 2016, "... the industry can't really argue that it's a game of skill and then advertise that casual players can easily score big money by beating the pros." *See Newsday* editorial, appended as Exhibit "BB" to the Stavisky Affidavit.

The so-called "evidence" relied upon by the Legislature simply does not hold up under close scrutiny. Even according to the gambling industry's own expert estimates, the element of chance is as high as 45% in fantasy football, 40% in fantasy hockey, 25% in fantasy baseball and 20% in fantasy basketball. Moreover, those percentages are based on season-long data as opposed to daily contests and the presumption that skillful players are pitted against unskilled players, whereas Chapter 237 of the Laws of 2016 seeks to "even the playing field" by limiting the number of skilled players that can participate in any contest. Note also that Defendants' own Memorandum of Law puts the percentage of luck at between 20 and 35%. Defendants' Memorandum of Law at 29.

While Article I, § 9 directs the Legislature to pass laws to prevent gambling, the Legislature has done precisely the opposite – enabling gambling by legislating a "loophole"

based upon an untruth – that DFS is not a game whose outcome is dependent to a material degree upon the element of chance.

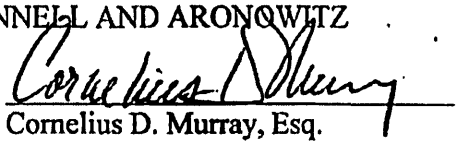
While statutes may be presumptively valid, they must be rationally based. Chapter 237 is not. Not only is it based upon an untruth, it makes registered fantasy sports legal by excepting it from the definition of gambling, but provides that unregistered operators of the very same games are acting illegally. The fact remains, however, that there is no difference in the element of chance based upon a registered versus a non-registered game. If the latter is gambling, so is the former.

Defendants have also violated the well-accepted rule that prohibitions, especially those embedded in the Constitution, must be strictly enforced and exceptions narrowly construed. Article I, § 9 is part of the Bill of Rights. If the Legislature wishes to take away a constitutional right, it must seek to amend the Constitution in accordance with the procedures set forth in Article XIX of the Constitution which gives the People the final "say" in deciding whether the Constitution should be amended. The Legislature has decided instead to bypass the people whose rights they seek to abridge.

CONCLUSION

Summary judgment should be awarded to Plaintiffs, with costs, declaring that Chapter 237 of the Laws of 2016 is unconstitutional, and that Defendants should be enjoined from any further implementation of its provisions and from expending taxpayer dollars to carry it out.

DATED: Albany, New York
May 1, 2018

O'CONNELL AND ARONOWITZ
By: 
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Plaintiffs,

Index No. 5861-16

-against-

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

Defendants.

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MEMORANDUM OF LAW IN REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

In their memorandum of law in opposition to defendants' cross-motion for summary judgment ("Pl. Mem."), plaintiffs concede the fundamental legal challenge that they face -- in order to overcome a statute's presumption of constitutionality, a plaintiff must prove that there is no rational basis for the challenged legislative determination. Pl. Mem. pp. 21-22, 30, 33. Here, plaintiffs cannot meet that burden.

The gambling prohibition in the Constitution, by its terms, entrusts the Legislature with the duty to determine the reasonable scope of prohibited conduct. The legislative record demonstrates that the Legislature had a sound basis for the policy determination it reached that the attributes of interactive fantasy sports place such activity outside the scope of what constitutes gambling. Evidence presented to the Legislature supports its determination that interactive fantasy sports contests are not games of chance or wagers on future contingent events not under the contestants' control or influence. Faced with a record that underscores the rationality of the Legislature's determination, plaintiffs press their own

views on what the Legislature should have deemed to be gambling.[1] But the correct inquiry is whether plaintiffs have established that the Legislature's judgment was irrational, not whether plaintiffs, had they been legislators, might have legislated differently.

Unable to challenge seriously the legislative record, plaintiffs have not come close to meeting their burden of proving irrationality. The 2016 Legislature, considering activity unknown to the Legislature or the people in 1894 (when the Constitutional ban on gambling was enacted), made a rational policy choice that the activity did not constitute criminal gambling and yet should be regulated closely to protect consumers, advance fairness, and promote other legitimate aims.

Accordingly, the court should issue a judgment declaring that Ch. 237 does not violate Article I §9 of the State Constitution.

[1]Plaintiffs' opposition to defendants' cross-motion for summary judgment often parrots statements made by the Attorney General before the Legislature passed the law to directly address the legal status of interactive fantasy sports. Pl. Mem. pp. 21, 25, 31. Because those statements were made before the Legislature enacted L. 2016 Ch. 237 ("Ch. 237"), they have no bearing on whether the Legislature's determination was rational. The Attorney General was addressing the lawfulness of interactive fantasy sports as the law existed then, not as it exists now.

ARGUMENT

THE LEGISLATURE MADE A RATIONAL POLICY CHOICE IN DETERMINING THAT INTERACTIVE FANTASY SPORTS CONTESTS ARE NOT GAMBLING BUT SHOULD BE REGULATED

A. The Constitution does not require a particular statutory definition of gambling.

Plaintiffs' first point rests on the false premise that the constitutional prohibition against gambling is identical to the Penal Law definition of gambling. See Pl. Mem. pp. 2-13 (arguing that "interactive fantasy sports.... contests violate the constitutional prohibition against gambling because their outcomes depend to a material degree upon the element of chance over which the participating contestants have no control..."). That premise is wrong. Before the Legislature amended the Penal law in 1965, gambling referred to activities where chance, not skill, was the "dominating element". See memorandum of law in support of defendants' cross-motion for summary judgment p. 13 footnote 8; People ex rel. Ellison v. Lavin, 179 N.Y. 164, 170-71 (1904). By plaintiffs' logic, the State's criminal gambling statutes were unconstitutional for the seven decades during which a narrower definition of gambling prevailed. This argument is flawed, in no small part, because it ignores the constitutional provision that purportedly requires this absurd result.

Most significantly, the argument edits out the clear constitutional directive for the Legislature to police the outer scope of prohibited conduct. So long as it acts within rational bounds, it is the Legislature that the Constitution entrusted with the responsibility to determine what reasonably qualifies as "gambling" activity and to weigh the expected consequences of such determinations. As it did in enacting Ch. 237, the Legislature has revisited this question over time. Before 1965, state gambling laws criminalized the promotion of wagering on activity in which chance predominated over skill. In 1965, the Legislature elected to broaden the definition of gambling to cover activities that depend to a material degree on the element of chance. Both the pre-1965 and current definitions of gambling reflect a rational policy determination.

B. The Legislature has latitude to define gambling.

Plaintiffs' second point, that the Legislature is not free to define gambling in any way it wishes, is uncontroversial. See Pl. Mem. pp. 13-21. The Legislature must act rationally in carrying out the gambling prohibition. It, therefore, could not authorize wagering on games of pure chance, like roulette, since such games constitute gambling under any reasonable

interpretation. But, as defendants have demonstrated, where an activity could rationally be considered gambling, or not, Article I §9 mandates that the Legislature declare whether such activity would be prohibited in exercising its duty to "pass appropriate laws to prevent offenses...."

In determining what activity is prohibited gambling when the activity mixes elements of skill and chance, there are competing rational choices for the Legislature to make. The Legislature's past determination that horse handicapping contests conducted within statutory confines do not constitute gambling, for example, was a rational exercise of its policy discretion. See Racing, Pari-Mutuel Wagering and Breeding Law ("Racing Law") §906(3). Here, the Legislature reached a similar conclusion -- interactive fantasy sports contests, if performed in a prescribed, regulated fashion, are permissible and do not constitute gambling. See Racing Law §§1400(2), 1411. This is precisely the type of policy choice which the Constitution empowers the Legislature to make. Neither plaintiffs nor the courts may substitute their own policy judgments for a rational determination made by the Legislature.

C. The Legislature made rational determinations in regard to the nature of interactive fantasy sports contests.

Plaintiffs' third point, that the presumption of constitutionality is rebuttable, is unremarkable. They have simply failed to persuasively rebut that presumption. Regardless of how frequently or emphatically they assert that interactive fantasy sports contests constitute gambling, what plaintiffs are, in fact, asking this court to do is substitute plaintiffs' judgments and preferences for those of the Legislature. As plaintiffs recognize, the proper test is rationality. The statute at issue easily passes that test.

The legislative record demonstrates that fantasy sports contests challenge a participant to exercise the judgment of the general manager of a real-world sports team through analyzing data and statistics and numerous variables to assemble the best possible roster of real-world athletes with whom to win the fantasy contest. The evidence further shows that fantasy sports allow a contestant to make meaningful decisions that dictate the outcome of the fantasy competition by selecting the roster of real-world athletes for the fantasy team, and that a contestant's ability to win turns on the contestant's level of skill and the time and effort that the contestant devotes to analyzing the roster choices for the fantasy contest, compared to the knowledge, skill, time, and effort of other contestants.

See, e.g., Exhibit "Q" to defendants' cross-motion for summary judgment pp. 12-14, 21-22, 30, 34, 36-45, 54, 66, 73-75, 104-05. Thus, the Legislature rationally determined that interactive fantasy sports contests are neither games of chance nor wagers on future contingent events not under the contestants' control, and do not constitute criminal gambling. See Racing Law §§1400(1)(a) and (b) and 1400(2).

Plaintiffs are correct that gambling may include an element of skill. Pl. Mem. p. 22-23, 27, 30-31. But the reverse is also true -- there are elements of chance in skill games. An unexpected gust of wind can ruin a pro golfer's drive. An unlucky cold can cloud the thinking of a top chess player. Games not wholly based on skill or chance necessarily require judgment calls, which the Legislature has the power and discretion to make. Here, the Legislature closely reviewed a detailed record on the novel attributes of a relatively novel form of entertainment, interactive fantasy sports, and the degree of chance and skill involved. The Legislature considered the ways that these new games differ from blackjack, roulette, and other traditional gambling games in skill, gameplay, and other aspects. The Legislature examined statistical analyses that showed that, time and again, skilled players were advantaged in winning contests. On the basis of this record,

the Legislature was persuaded that interactive fantasy sports should be authorized and regulated.

Racing Law §§1411 and 1412 are unremarkable and are in no way "fatal" to defendants' argument, as plaintiffs oddly assert. See Pl. mem. p. 22. The Legislature has determined many unregulated activities to be illegal. For example, the Legislature has determined that holding, operating, or conducting a bingo game without wagers is unlawful and subject to criminal misdemeanor sanctions unless conducted according to certain statutory requirements. See General Municipal Law §495-a. The Legislature has declared deceptive business practices (see General Business Law §349(a)) and false advertising (see General Business Law §350) to be unlawful, but not crminal.

Similarly, here the Legislature has declared unregistered interactive fantasy sports contests to be unlawful. See Racing §1412. But an unlawfully conducted interactive fantasy sports contest is not, contrary to plaintiffs' apparent misunderstanding, criminal gambling, just as deceptive business practices or false advertising may be civilly proscribed but not carry criminal sanctions. Cf. Pl. Mem. p. 33 ("If [non-registered interactive fantasy sports] is gambling, so is [registered interactive fantasy sports]."). Rather, the Legislature has provided explicitly that interactive fantasy

sports do not constitute gambling pursuant to the Penal Law. Racing Law §1400(2).

If an operator were to conduct unregistered interactive fantasy sports in New York, the Attorney General could take action to enjoin and otherwise remedy such illegal activity, but the operator would not be subject to criminal liability pursuant to article 225 of the Penal Law. See Executive Law §63(12) (power of Attorney General to enjoin and remedy illegal activity); Racing Law §1412 (declaring unregistered interactive fantasy sports contests to be illegal).

D. When it enacted L. 237, the Legislature acted within its authority to pass appropriate laws to prevent offenses against Article I §9.

According to the plaintiffs, "the determination on whether daily fantasy sports falls within the definition of gambling is for the Judiciary, not the Legislature, to decide." Pl. Mem. p. 18. However, this argument ignores the fact that Ch. 237 was enacted in accordance with a constitutional provision which expressly directed the Legislature to determine the scope of prohibited conduct. Consistent with this constitutional mandate, the courts accord the Legislature substantial latitude to determine reasonably the extent of the conduct that constitutes prohibited gambling within the meaning of Article I §9. See, e.g., Dalton v. Pataki, 5 N.Y.3d 243,

255, 263-65, cert. denied, 546 U.S. 1032 (2005) (applying strong presumption of constitutionality to Legislature's inclusion of video lottery games within the operation of the State lottery, which is permitted, but not defined, by Article I §9); People ex rel. Sturgis v. Fallon, 152 N.Y. 1, 11 (1897) (Legislature's implementation of Article I §9 will be upheld so long as legislation "was in any degree appropriate to carry into effect the purpose of the Constitution....").

Plaintiffs state that the Legislature may not "ignore certain kinds of gambling, let alone pass laws to enable rather than to prevent it." Pl. Mem. p. 13. The Legislature, however, cannot exercise its constitutional obligation to determine the outer scope of conduct that constitutes illegal gambling without being able to include or exclude certain games or activities from the statutory definition. Indeed, the Legislature has done precisely that on several prior occasions. See, e.g., Racing Law §906 (declaring horse racing handicapping tournament to "be considered a contest of skill and... not be considered gambling..."); Penal Law §225.00(3) (providing that gambling activity of players themselves does not create criminal culpability under Penal Law Article 225).

This definitional role is appropriate with interactive fantasy sports, a newly devised, internet-only game featuring

novel attributes. Whatever plaintiffs view as the traditional or "ordinary" definition of illegal gambling (and, tellingly, their opposition papers do not propose one), there must be an appraisal of the game's characteristics to determine whether it properly falls within the scope of constitutionally prohibited conduct. Where a policy judgment is therefore required as to what does and does not constitute gambling, the Constitution expressly entrusts this responsibility to the Legislature.

When it enacted Ch. 237, the Legislature did not, as plaintiffs claim (Pl. Mem. p. 18), "redefine gambling". Because the Constitution does not define the term "gambling", Ch. 237 cannot constitute a redefinition of that term. As defendants have shown, the delegation to the Legislature of the responsibility to "pass appropriate laws to prevent offenses" necessarily requires and permits the Legislature latitude to determine what conduct constitutes impermissible gambling in New York. See, e.g., Harris v. Economic Opportunity Commission of Nassau County, 171 A.D.2d 223, 227 (2d Dept. 1991) ("Among the 'appropriate laws' enacted by the Legislature in furtherance of the constitutional prohibition against gambling is Penal Law article 225, which supplies the definitions of proscribed gambling activities.").

Finally, that the Legislature requires interactive fantasy sports operators to register with the Gaming Commission (Racing Law §1402), enable contestants to exclude themselves from contests (Racing Law §1404(1)(d)), list on their websites information concerning assistance for compulsive play (Racing Law §1404(1)(m)), identify highly experienced players (Racing Law §1404(1)(g)), and restrict the number of entries submitted by a single authorized player (Racing Law §1404(2)) does not, as plaintiffs suggest (Pl. Mem. pp. 3-4, 12, 22, 27, 32-33), render irrational the Legislature's determination that interactive fantasy sports contests do not constitute gambling. These requirements simply constitute reasonable restrictions in the Legislature's exercise of the State's inherent police power to "pass all laws for the internal regulation and government of the State, necessary for the public safety and welfare...." Flushing National Bank v. Municipal Assistance Corp., 40 N.Y.2d 731, 753 (1976) (Cooke, J. dissenting).

CONCLUSION

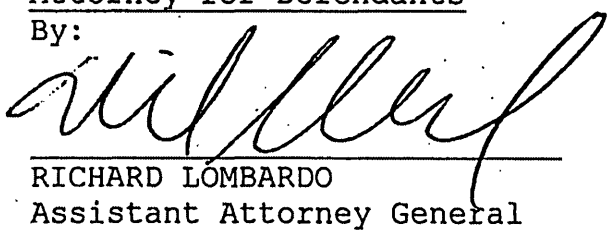
As defendants have demonstrated, the challenged statute constitutes a rational exercise of the Legislature's constitutional authority to enact appropriate laws to effectuate the constitutional prohibition against gambling. Accordingly, plaintiffs' motion for summary judgment should be denied,

defendants' cross-motion for summary judgment should be granted, the complaint should be dismissed, and the court should issue a judgment declaring that Ch. 237 does not violate Article I §9 of the State Constitution.

Dated: Albany, New York
June 7, 2018

Yours, etc.,

BARBARA D. UNDERWOOD
Attorney General of the
State of New York
Attorney for Defendants
By:



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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

----------X

JENNIFER WHITE *et al.*,

Plaintiff,

AFFIDAVIT OF SERVICE

-against-

Index No. 5861-16

HON. ANDREW CUOMO, as Governor of the State of New York, *et al.*,

Defendants.

----------X

STATE OF NEW YORK)

COUNTY OF ALBANY)

BRITTANY ERICSEN, being duly sworn, deposes and says:

I am over eighteen years of age and an employee in the office of Barbara Underwood, Attorney General of the State of New York, attorney for defendants.

On June 7, 2018, I served defendants' reply memorandum in further support of their cross-motion for summary judgment, upon the following attorneys, by depositing a true copy thereof, properly enclosed in a sealed, postpaid wrapper, in a U.S. Mail box in the City of Albany, a depository under the exclusive care and custody of the United States Postal Service, directed to the said attorneys at the address theretofore designated for that purpose, as follows:

O'Connell and Aronowitz, P.C.
Attorneys for Plaintiffs
54 State Street
Albany, New York 12207

BRITTANY ERICSEN

Sworn to before me this
7th day of June, 2018

RICHARD LOMBARDO
ASSISTANT ATTORNEY GENERAL
OF THE STATE OF NEW YORK,
WITH THE GENERAL POWERS OF
A NOTARY PUBLIC, PURSUANT TO
SECTION 73 OF THE EXECUTIVE
LAW OF THE STATE OF NEW YORK

Transcript of Oral Argument on August 22, 2018

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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

Plaintiffs,

Index No.: 5861-16

-against-

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

Defendants.

ORAL ARGUMENT

Albany County Courthouse
16 Eagle Street
Albany, NY 12207
August 22, 2018

BEFORE: HON. GERALD CONNOLLY
Acting Supreme Court Justice

APPEARANCES: CORNELIUS D. MURRAY, ESQ.
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State of New York
The Capitol
Albany, NY 12224-0341
BY: RICHARD LOMBARDO, Assistant Attorney General
Attorneys for Defendants

THE COURT: Good afternoon. This is the matter of Jennifer White, Katherine West, Charlotte Wellins and Anne Remington against Andrew Cuomo, as Governor of the State, and the New York State Gaming Commission.

This matter is on before the Court for oral argument on the cross-motions for summary judgment filed by the parties in this matter.

Counsel, do you want to place appearances on the record?

MR. MURRAY: Yes, your Honor. Good afternoon. Neal Murray, O'Connell & Aronowitz, attorneys for the plaintiffs, and with me today is my associate, Courtney Alpert.

THE COURT: Good afternoon.

MR. LOMBARDO: Good afternoon, Judge. For defendants, Office of the Attorney General by Richard Lombardo. Also present, Edmund Burns, counsel to the Gaming Commission.

THE COURT: Good afternoon. All right, I think you filed first.

MR. MURRAY: All right, thank you, your Honor.

THE COURT: Please go ahead. Counsel, you should know I have read all of your submissions more than once, so you don't need to go through all of them again, but you can certainly craft your oral argument the way you

wish to. Go ahead, Mr. Murray.

MR. MURRAY: Thank you very much, your Honor. May it please the Court, as you well know the sole issue in this case is whether Chapter 237 of the Laws of 2016 enacted by the Legislature purporting to authorize daily fantasy sports violates Article 1, Section 9 of the State Constitution which prohibits gambling, it directs the Legislature to pass appropriate laws to prevent it.

Now, I'm well aware, your Honor, that one of the classic rules of construction is that the statute is presumed to be constitutional, and the burden is obviously on the plaintiff to attack it. But there's also a rule that that is a rebuttable presumption and it presumes the existence of necessary factual support. And both sides have quoted the case of *Birkeland against State* relied on very much by the State in this case to state the principle that there's presumed constitutionality. But it's the second half of that sentence which I respectfully submit is critical, and that is that there is a rebuttable presumption and the presumption is that there must be an existence of necessary factual support.

When you look at the law that was drafted and enacted as part of Chapter 237, it's the Racing Law and it's Section 1401(a)(b). What are the factual predicates that supposedly support the notion that daily fantasy

sports is not gambling notwithstanding the irrebuttable fact that in every single contest involving daily fantasy sports the outcome of the wager, the bet or whatever euphemism you want to refer to as an entry fee, depends upon the performance of athletes in actual real games. They call them simulated athletes, but that's just a disguise. They're real athletes participating in real future games. And the performance of any entry fee or wager depends on the outcome and performance of those players. And it's not just one player, it's a multiple of players that make up a fantasy team.

Now, here are the factual predicates that the State relies on and the Legislature. There are only two. One -- and I'm sorry to burden the record, but it's not that long -- interactive fantasy sports are not games of chance, says the Legislature, because they consist of fantasy or simulation sports games or contests in which the fantasy or simulation sports team are selected based on the skill and knowledge of the participants and not based on the membership in an actual team.

What the Legislature is trying to do here is say well this isn't a game of chance because it isn't a real team. It's not a real team, but it's a real player, so it's a half truth, but it disguises the other important fact.

Here's the second fact that they rely upon. Interactive fantasy sports are not wagers on future contingent events not under the contestant's control or influence. Think about that. Are not wagers on future contingent events not under the contestant's control or influence, because contestants have control over which players they choose. That's true, but they left out the fact they choose the players, but they don't choose how they're going to perform in an actual game. If you and I were to engage in a bet tomorrow and say you know what, I think Albert Pujols is going to get a couple hits tonight and I don't think that Aaron Judge is and I don't think that Gary Sanchez is or somebody else is, that is a parlay. It's not just a bet on how one person performs, it's how they all perform.

So what I'm saying to you is that everybody is entitled to their opinion, but you cannot manufacture facts. And what has happened here through obfuscation and disguise is the Legislature has decided, who knows why, I mean there's $2 million of lobbying expenses in the last two years to try to convince the Legislature that this is not sports.

Now, it is true that there are exceptions in the Constitution, but they're embedded in the Constitution. The presumption is that statutes and Constitutional

provisions in particular have their common and ordinary meaning. And therefore, you must construe the Constitution especially the way its ordinarily meant, not by some analytics provided by an MIT professor that is trying to convince everyone that this is a game of skill as opposed to a game of choice. The two are not mutually exclusive and that is a false dichotomy.

Horse racing, for example, there's an element of skill in there. There's an element of skill in betting. Somebody who is sophisticated in sports knows a lot more than somebody who knows nothing about sports. If the two were to engage in a bet it's unfair in terms of who has skill and who doesn't. But the issue is that in all circumstances, and particularly in daily fantasy sports, you can't avoid the inescapable fact that everything is contingent upon what happens and nobody has control over that. When I grew up, that was a bet. And in particular, the Attorney Generals, since 1894, have, in opinion after opinion, talked especially about sports betting and how that is prohibited by the Constitution.

Now we have the hypocrisy of the proponents of daily fantasy sports. In particular, FanDuel and Draft Picks. They're now saying oh it's a very sophisticated game and it involves a lot of skill and therefore this trumps the element of chance. Now, but what do they tell

in their advertising? Easier than --

THE COURT: Well, let's hold off for a moment --

MR. MURRAY: It's easier to win than milking a three-legged goat. That's what they said.

THE COURT: Let's hold off on that for a moment.

MR. MURRAY: Sure.

THE COURT: I think we can agree that there is, as you say, a rebuttable presumption, a strong presumption of constitutionality of a statute.

MR. MURRAY: Correct.

THE COURT: And generally, as I understand my review of the statutes for constitutionality, any reasonable view or any evidence that can be propounded, even something that they didn't consider, the Legislature, can be considered and can be argued in order to arrive at the presumption of rationality or to support the presumption of rationality.

So as I understand the defendants' position, it is that the definition of gambling can and has varied between whether it's dominant skill as opposed to chance or just a material element of chance as our Penal Law holds.

MR. MURRAY: Correct. 225.

THE COURT: Right.

MR. MURRAY: Correct, your Honor. I'm glad

you mentioned --

THE COURT: So I think you see where I'm going --

MR. MURRAY: I do, absolutely.

THE COURT: Why aren't they entitled to that? If we agree that there is a material element of skill and chance to IFS, interactive fantasy sports -- and if you don't agree with that you should tell me -- but if we're accepting that there is a rational view in which there's a material element of skill, then why isn't their interpretation rational?

THE COURT: Your Honor, I respectfully disagree in one respect; material element of skill can be present. It's not the presence of the material element of skill, it's the presence of the material element of chance. That's it. And how does the Penal Law define that? You have to go back to Section 225, and then I'll expand on that in a second:

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 the outcome of a contest of chance.

Now, is there a material element of skill? I'm more than willing to concede that, but the issue isn't the presence of a material element of skill, the issue is the

presence of a material element of chance, that's the difference. And when you look at the reports -- and by the way, the so-called expert reports that were appended to the state's exhibits in there they have a professor from MIT and they talk about okay what did we do? We pitted a skilled player against a random computer, just selected any rosters randomly, and the outcome was 80/20. When they put the skilled players against a skilled roster selection by computers it went down to 65/35. It's in their own brief.

Now, your Honor, materially if you were to get on an airplane tomorrow and the pilot's going to say welcome, ladies and gentlemen, the good news is that this plane has a 4 to 5 chance, 80/20 chance, of not crashing, or it's got a 65/35 chance, I'm telling you I'm getting off that plane because that's a material element. That's by their own experts.

THE COURT: Guys, keep it down.

MR. LOMBARDO: Sorry, Judge.

THE COURT: Mr. Lombardo, you should know better. I need to hear Mr. Murray speak. If you're going to speak, it should be such that I can't hear you whatsoever. Please give me that last sentence back from Mr. Murray.

(The Court Reporter read back the requested

material.)

THE COURT: Go ahead, sir, please continue.

MR. MURRAY: So your Honor, I think the other issue here is I can't say it any better than the Attorney General's Office. The Attorney -- and this is not a shot at my opponent, he's got to defend his statute. But here's what the Office of the Attorney General itself has previously said specifically about daily fantasy sports:

The illegality of daily fantasy sports is clear, from any reasonable interpretation of our laws, beginning with Article 1, Section 9 of the Constitution. That's the Attorney General. In a statement to the Daily News the then Attorney General:

DFS is a massive illegal gambling operation doing what bookies do, operating gambling space identical to a casino.

Again, quoting directly from the Attorney General.

The outcome of real-life athletic contests are affected by elements of chance over which the contestants who bet in DFS, daily fantasy sports, have no control.

And you and I can agree, and I think the Attorney General can agree, that nobody can dictate or control how athletes are actually going to perform in future events.

The notion that DFS exists as a contest separate and apart from actual sports is baseless. It is simply a wager on a future contingent event. And I'm not going to go on, your Honor, I've made several references to what the Attorney General has said.

Now, the Legislature says well this isn't a gambling statute. And, you know, I have fun quoting from well if it walks like a duck, looks like a duck, quacks like a duck, it must be a duck. But where did they put this daily fantasy sports legislation? They put it in the heart of the Racing, Pari-Mutuel Wagering and Breeding Law, which is that part of the statutes in New York, the body that deals exclusively with gambling.

If the Legislature -- if we want to have daily fantasy sports there's a way to do it. Article 19 of the Constitution provides the avenue to amend it. And when you look at that it's been done four times. It was done in the 1930s for pari-mutuel wagering and horse racing. It was done in 1957 for church gambling and rescue squads and fire squadrons for charitable organizations for small amounts of money. It was done for the State lottery. And in 2013 the people in their wisdom passed a law allowing casino gambling.

Here what the Legislature has tried to do is they can't wait for a Constitutional amendment, maybe they

don't think the people will pass it, and it takes time. But this Constitution belongs to the People not the Legislature. And I respectfully submit they turned it upside-down.

THE COURT: Let me ask you this, Mr. Murray --

MR. MURRAY: Sure.

THE COURT: -- the State has pointed out the final phrase of the constitutional provision that we're discussing here which is and the Legislature shall pass appropriate laws to prevent defenses against any of the provisions of this section.

MR. MURRAY: Correct.

THE COURT: And as we've referred to, Penal Law Section 225 et seq. refers to -- are generally the Penal Law gambling section.

MR. MURRAY: Correct.

THE COURT: So separate and apart --

MR. MURRAY: I don't have any trouble with 225, your Honor, at all.

THE COURT: I didn't think you did. So separate and apart from the general presumptions of constitutionality that the courts have told us we must afford to provisions of the statutes passed by the Legislature, that seems to be, as the defendants argue, a very specific grant of discretion with regard to that

constitutional provision. It goes even a step further within the normal constitutional provision --

MR. MURRAY: Here it --

THE COURT: Let me finish for one moment.

MR. MURRAY: Absolutely. I'm sorry, your Honor.

THE COURT: In particular, Section 225, and that entire article in the Penal Law, it makes certain actions specifically criminal, punishable by criminal penalty, and it also excludes some actions; such as, a bet between yourself and Mr. Lombardo over who is going to win the Yankee game tonight, which is gambling, a material element of chance under your definition. But they exclude that. They're not going to enforce that as part of both their responsibilities as a Legislature in enforcing the provisions of Article 9 and in their discretion as perhaps even in their executive function discretion as what prosecutors will and will not prosecute.

MR. MURRAY: Right, there's a prosecutor separate discretion and some common sense. But your Honor --

THE COURT: How is this not falling within that separate and specific grant of discretion to the Legislature?

MR. MURRAY: Because what they're trying to do is take a small loophole to say okay, listen, office

betting, sports betting of that magnitude, that's one thing; what we're dealing with here though is proportionality. To try to broaden that, to drive a Mack truck through, to use a metaphor, this is $145 million -- and that's a small number, that was 2016 when it first started -- by commercial enterprises. That isn't what the Legislature had.

And the second thing I would say, your Honor, it's one thing to decide we're not going to prosecute small incidental gambling because it's too much of a drain on the resources, we all get that and we understand it. I've participated in office pools as well, so you can put the handcuffs on me, Richard. But the point is, your Honor, this is vastly different. The Legislature never intended -- and what they're doing here, your Honor, is a distinction that I hope I made in the brief between interpretation and implementation. It's up to the Legislature to implement the prohibition, but the Legislature can't redefine gambling to mean something it's not.

I'm glad you alluded to 225, and I read it myself. I'm very comfortable with that. But what they have done here in the Racing, Wagering Pari-Mutuel Law is to try to create facts to say it's not a game of chance because you get to choose the players and it's a simulated

team. It's a simulated team of real players and they still have to perform and that's a future contingent act over which nobody has control.

And I'll finish here very quickly, your Honor. The other rule of construction of course is that exceptions to prohibitions are to be strictly construed. And that is particularly true with a provision that is in the Constitution as opposed to a statute. And remember what Article 1, Section 9 was designed to protect. It was designed to protect the family man from his own imprudence at the gaming table. They've forgotten about that here.

This is where the Legislature, influenced by lobbying which Plaintiffs like Jennifer White and Katherine West and those people who were victimized and who I talked about in this, they don't have the kind of resources to go to the Legislature and hire a professor from MIT to come in and try to obscure what we all know to be the truth. They're now trying to bring gambling into the living room. And if that's what the people of the State of New York want to do by amending the Constitution, that's okay, that's the way our government works. But I don't think it's up to the Legislature to try to implement an end run around it.

I'll conclude, your Honor, with one last quote. And it's from again the Attorney General of the State of

New York and here's what he said in an opinion that's been much cited since 1984: To summarize, the specific constitutional bands against bookmaking and pool selling, as well as a general ban against any other form of gambling not expressly authorized by the Constitution would operate to invalidate a statute establishing a sports betting program. If the State government is to be authorized to run a program in which it accepts wagers on the outcomes of professional athletic contests either single contests or multi-contest parlays, such authorization can only be acquired through an amendment to the Constitution. That's the Attorney General of the State of New York speaking. Thank you, your Honor.

THE COURT: Thank you, Mr. Murray.

Mr. Lombardo.

MR. LOMBARDO: Thank you, Judge. So as you correctly noted, Judge, during Mr. Murray's argument, the Constitution does not define gambling. It's not a self-executing provision and it specifically leaves it to the Legislature to define what is and what is not gambling, and the Legislature has done so.

Mr. Murray correctly cited to the Penal Law provisions which defines gambling and defines a contest of chance. But I would like to note that to the extent that Mr. Murray argues that if the outcome depends to a

material degree upon element of chance, that would violate the Constitution. I think there's a kind of mixing of apples and oranges.

The material degree standard is found in the Penal Law, and that is actually more expansive than that which the Court of Appeals interpret the Constitution itself require back in 1904.

At that time, prior to the enactment of the Penal Law provision, the Court of Appeals interpreted the Constitution prohibition to be something which is primarily determined by chance. So when the Legislature enacted Penal Law Section 225(1) they basically provided a more expansive definition of what constitutes a game of chance, contest of chance, than that which is required by the Constitution.

THE COURT: Are they entitled to a deference in that definition?

MR. LOMBARDO: Absolutely. When you have a situation like we have --

THE COURT: In that expansive definition of gambling is the Legislature entitled to deference in their application of that definition of gambling in the context of the Penal Law?

MR. LOMBARDO: Yes. I think what you have is a situation where you have an activity, daily fantasy

sports, interactive fantasy sports, which involves both skill and chance, like many activities. And I submit to you that when you have an activity like this which has a mixture of those two elements it is within the discretion of the Legislature to make the policy choice as to whether it constitutes gambling or game of skill. They've done that in the past, they've done it here.

Specifically, the Penal Law -- I'm sorry, the Racing Law Section 96(3) says a handicapping term is a game of skill just like they have found basically that interactive fantasy sports is a game of skill. So once again, the question isn't were they right or wrong, do I agree, do you agree, do we disagree, but whether the plaintiffs have met their burden of showing the determination was irrational.

And I think what the plaintiffs are asking you to do, Judge, is to substitute your judgment for that of the Legislature, which is not your function. And I submit to you --

THE COURT: Let me ask you this, Mr. Lombardo: The Penal Law talks about the outcome depending on a material degree on an element of chance. You're arguing, as I understand it it in your papers, that that's not what should be applied here, setting aside whether that legislative determination means something to the

Constitution. But you're saying it should not be applied here because only something which is pure chance, the purest chance, is going to fall outside the ability of the Legislature to make a determination that something is not gambling. Am I misstating --

MR. LOMBARDO: Yes, I would say that there are activities which if the Legislature tried to legalize we would concede is unconstitutional.

THE COURT: Like roulette.

MR. LOMBARDO: Roulette.

THE COURT: Which you mentioned specifically because that's pure chance. Unless it's a loaded mule.

MR. LOMBARDO: That's right.

THE COURT: They roll the ball and it could fall anywhere, right?

MR. LOMBARDO: Correct.

THE COURT: Does that interpretation -- is that the interpretation you're asking me to place, not -- because before I get to what's rational -- whether it's a rational belief, I need to decide what gambling can and cannot mean. Gambling is defined in the Penal Law. Are you proposing a definition of gambling for the purpose of determining whether they rationally determine that IFS falls within that definition?

MR. LOMBARDO: Yes, I understand the question,

thank you, Judge. Basically the Legislature when it enacted the challenged statute did find it's not gambling within the meaning of 225. So that is what they found. But I am just trying to make the distinction, which I think was missed by the plaintiffs in their papers, that 225's definition of a game of chance as being a material degree is not what the Constitution requires, that's what the statute says.

But is it a distinction with a difference because the Legislature found this does not violate 225? Maybe. I just want to make clear you have the Constitution -- and I think Mr. Murray and I agree on this. You have the Constitution and you have the statute. And you can't say the statute violates a statute, you can only say the statute violates the Constitution. So to argue that the statute is unconstitutional because it violates 225 misses the mark. That's the only point I'm trying to make.

But your question is a good one. Yes, the Legislature determined that this activity does not violate the Penal Law definition of gambling. So arguably, it's six of one, half a dozen of another, but I just want to make clear the issue is not whether it violates the statute, the issue is whether it violates the Constitution.

THE COURT: Understood. You're aware that in *Dalton v. Pataki*, when they reference the deference that should be afforded to the Legislature in their determinations, the first place they looked in that decision at page 264 to figure out the definition of the term lottery in the Constitution was the Penal Law definition of lottery.

MR. LOMBARDO: Once again, that was a situation where the Constitution did not define lottery.

THE COURT: Right. And the court, in making its determination, looked to the Penal Law determination of lottery, found that it didn't give them any help because it wasn't clear enough. But that is the first place they looked to see if it was interpreted rationally.

MR. LOMBARDO: Absolutely.

THE COURT: So should I be looking at the Penal Law here first to see if this is being interpreted rationally, which is the word gambling in the Constitution?

MR. LOMBARDO: Yes.

THE COURT: Well, if I do aren't I going to find that there's a material element of chance and thereby find that this is not constitutional? Maybe I'm not following you.

MR. LOMBARDO: It's not your job, respectfully,

to determine whether there's a material element of chance, it's your job to determine whether the Legislature's determination there is not a material element of chance was irrational.

THE COURT: Did they say so? Is there a legislative determination that there's not a material element of chance? I didn't see that. I know they said it's not gambling.

MR. LOMBARDO: If you look at Section 1(a)(b) the statute does mirror the Penal Law and they made two findings: It's not a game of chance because they consist of fantasy or simulation sports or contests in which the fantasy or simulation sports teams are selected based on the skill and knowledge of the participants. And Subdivision B, not wagers on future contingent events.

THE COURT: But they don't say there's not a material element of chance?

MR. LOMBARDO: Well that's right, because if you look back at Section 225(2) defines gambling and that includes the term contest of chance. And Subdivision 1 defines contest of chance. So by implication when the Legislature says it's not a contest of chance, they're saying the outcome does not depend to a material degree on the element of chance.

It's your function, Judge, to determine whether

there was a rational basis for that. Or better put, whether the plaintiffs have shown that it was irrational.

And I submit to you that if you look at the legislative record, and it's quite extensive, and I'm sure you've seen from our papers hearings were held, many submissions were made. The Senate didn't debate it at length quite frankly, but the Assembly certainly did. In fact, at least one member of the Assembly made the very arguments that Mr. Murray is making here and that was rejected by a very large majority, I have the numbers in my papers, by the Senate and by the Assembly.

So what our position is that since the activity admittedly mixes elements of skill and chance the Legislature has the discretion to make that policy choice. Even if reasonable minds may differ, the Court should not substitute its judgment for that of the Legislature and not intervene if the plaintiffs haven't shown that the determination was irrational. And the record demonstrates irrational basis from the Legislature's determination that fantasy sports is a game of skill.

The ability to win turns on a contest's skill and the time and effort devoted to analyzing the roster choices. The analogy we made and continue to make is it's kind of like a general manager of a sports team who picks the roster. Of course you can't control how Albert Pujols

is going to hit on a particular day. But we're not just betting on a particular player's performance, what you're doing is reviewing statistics and making determinations and making your draft and determining what's the best roster. And that's the element of skill that the Legislature found and we submit was a rational determination based on the evidence.

The evidence shows that a small percentage of contestants receive a large percentage of the prize money. Studies showed that when you pitted skilled players against unskilled players the skilled players won over 70 percent of the time. And when you pitted skilled human players against computers which randomly assembled rosters, the skilled human players defeated the computers over 80 percent of the time.

The statistics showed that over a particular season each participant's skill level remained relatively constant. However, over several seasons contestants' performances improved over extended period of times. So when you look at all these factors, whether you and I come at it a different way, there's certainly a rational basis for the Legislature's determination. This is not a game of chance, it's a game of skill. It has mixed elements, it's within their discretion to make a policy determination, which is what they did.

We're not saying that the Legislature is infallible. If they tried to legalize roulette, I wouldn't be standing up here saying it was a rational determination. But I submit to you that the plaintiffs have not met their burden of demonstrating irrationality of the determination.

Plaintiffs' motion should be denied, defendants' motion should be granted, and the Court should issue a declaratory judgment that Chapter 237 of the Laws of 2016 do not violate Article 1, Section 9 of the Constitution.

THE COURT: You cite at the conclusion of I think your initial brief in this matter to 18 other state statutes which you state found that IFS did not constitute gambling.

MR. LOMBARDO: And on the federal statute too, Judge.

THE COURT: Did those statutes find that it did not constitute gambling as you're asking me to make a determination here or as the Legislature made the determination here or did those statutes simply legalize, so to speak, IFS in those states? Because I took a quick look at a couple of those statutes and in that quick look I didn't find the sort of preparatory statement that we have here and that I think you need here because of the constitutional provision.

Did those statutes actually say this is not gambling?

MR. LOMBARDO: I don't believe that -- certainly all of these states had a conflict of issue like ours. I don't recall whether one or some of them did. But the point is fair, it's not the same situation --

THE COURT: I'm asking because you cited 18 specific statutes and said in those statutes they said it does not constitute gambling. That those state legislatures made that determination. I am going to ask you to take a quick look at those statutes when you go home today and if your statement to me is mistaken, I would anticipate -- if your statement as I'm paraphrasing it to you from your memorandum of law is mistaken, then I would anticipate that you would send a brief letter to myself and Mr. Murray correcting that.

MR. LOMBARDO: I will certainly look into that, Judge.

THE COURT: I don't need any further argument, just a letter correcting it.

MR. LOMBARDO: Right. Absolutely. But I would like to refer, your Honor, to exactly what I said on page 30 of my opening brief:

Finally, the rationality of our Legislature's determination that interactive fantasy sports contests do

not constitute gambling is further supported by similar determinations made by 18 other state legislatures and the United States Congress. Congress: Interactive fantasy sports have been determined not to be gambling -- okay, fair point, Judge. If I was inartful, I apologize, and I will set that straight.

THE COURT: Well, it's an issue that interests me. I'm not trying to catch you in a mistake, all right, but if that is the case, I want to know that.

MR. LOMBARDO: Understood.

THE COURT: And have there been challenges? Are there state court determinations on any of those statutes at this point that say they do or do not consist of gambling?

MR. LOMBARDO: I did look into that and I did not find any challenges, at the time I wrote the brief, to those specific statutes.

THE COURT: I didn't either.

MR. LOMBARDO: Say again, Judge?

THE COURT: I didn't either. I wanted to make sure I hadn't seen it. Anything else, Mr. Lombardo?

MR. LOMBARDO: No, thank you.

THE COURT: Thank you. Mr. Murray, briefly.

MR. MURRAY: Thank you. And I might add to the Court I didn't either find anything, Judge. But I think

the critical difference is very simply that a Legislature and any other jurisdiction and Congress can do whatever they want to. They can legalize or not legalize gambling as they see fit. There is no constitutional prohibition. That's the difference. The Legislature there isn't tethered by a constitutional provision. Here the difference is they are.

The last thing I want to say is we're in a world right now, in a political world, where we have alternative facts. But here's the point here: The Legislature can make fact-findings, but they have to make factual findings. Here all they've done is do an opinion. They say we're finding that this is not a game of chance. Well, that's an opinion. The fact of the matter -- the inescapable fact is that in every single game of daily fantasy sports the outcome is determined by performance in actual events. If you didn't have those games where real-life performers perform there couldn't be a game. It is absolutely dependent on the performance. And if that's not material to the outcome, I don't know what is.

This is my last point, your Honor, and thank you for giving us all this time. One of the first questions that you asked Mr. Lombardo was how much deference should I give to a Legislature? You give deference to findings that are based on fact. But they have to be real facts.

The Legislature can't manufacture facts. The requirement is that the determination necessarily presumes the existence of facts that can be demonstrated. Simply stating, that well a person can choose a player, a simulated player, and that doesn't make it a game of chance, that's not creation of fact. There's a difference between finding facts and opinion. And that's what they've done.

And here's the deference issue: *Kuhn v. Curran*, New York State Court of Appeals, cited in my brief:

We may not, however, construe the words of the Constitution in exactly the same manner as we would construe the words of a will or contract drafted by careful lawyers or even a statute enacted by the Legislature. It is the approval of the people of the state which gives force to a provision in the Constitution drafted by the Constitutional Convention. And in construing the Constitution we seek the meaning which the words would convey to an intelligent, careful voter.

The Constitution belongs to the people, not the Legislature. Thank you, your Honor.

THE COURT: Thank you, Mr. Murray. Anything else, Mr. Lombardo?

MR. LOMBARDO: No, thank you, Judge.

THE COURT: Thank you, folks.

CERTIFICATE

I, **COLLEEN B. NEAL**, Senior Court Reporter in and for the Third Judicial District, State of New York, **DO HEREBY CERTIFY** that the foregoing is a true and correct transcript of my stenographic notes in the above-entitled matter.

DATED: September 5, 2018

Colleen B. Neal

Colleen B. Neal, Senior Court Reporter
Albany County Courthouse
Albany, New York 12207

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

(518) 776-2624

BARBARA D. UNDERWOOD
ATTORNEY GENERAL

DIVISION OF STATE COUNSEL
LITIGATION BUREAU

August 23, 2018

BY HAND

Hon. Gerald W. Connolly
Supreme Court of the State of New York
Albany County Courthouse
16 Eagle Street
Albany, New York 12207

Re: Jennifer White *et al.* v. Andrew Cuomo *et al.*
Index No. 5861-16

Dear Judge Connolly:

At the bottom of page 30 of defendants' memorandum of law in support of their cross-motion for summary judgment, I stated:

> Interactive fantasy sports contests have been determined not to be gambling by the Legislatures of Arkansas, Colorado, Connecticut, Delaware, Indiana, Kansas, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania, Tennessee, Vermont, and Virginia.

(citations omitted).

Arkansas Code §23-116-101(a) provides that, "[t]he General Assembly finds that a paid fantasy sports game conducted in compliance with this chapter does not constitute gambling for any purpose."

29 Delaware Code §4871(b) provides that, "the General Assembly declares interactive fantasy sports do not constitute gambling in Delaware...."

Indiana Code §4-33-24-1 provides that, "[a] paid fantasy sports game conducted under this chapter does not constitute gambling for any purpose...."

Kansas Statutes §21-6403(a)(9) provides that, "[a] bet does not include... a fantasy sports league as defined in this section....."

Maryland Criminal Code §12-114 provides that, "the prohibitions against betting, wagering, and gambling do not apply to participation in a fantasy competition."

2016 Massachusetts Acts Ch. 219 §135 provides that, "a fantasy contest shall not be considered illegal gaming."

Missouri Revised Statutes §313.920(1) provides that, "[a] fantasy sports contest conducted under this chapter... does not constitute gambling for any purpose."

New Jersey Statutes §5:20-2 provides that, "[p]articipation in fantasy sports activities cannot be considered gambling under New Jersey laws...."

Tennessee Code §39-17-501(1)(D) provides that, "gambling does not include... [a] fantasy sports contest... conducted in accordance with the Fantasy Sports Act...."

Virginia Code §59.1-569, which is entitled "Fantasy contests conducted under this chapter not illegal gambling", provides that, "[n]othing contained in Article 1 (§18.2-325 *et seq.*) of Chapter 8 of Title 18.2 shall be applicable to a fantasy contest conducted in accordance with this chapter. The award of any prize money for any fantasy contest shall not be deemed to be part of any gaming contract within the purview of §11-14."

While the Legislatures of Colorado, Connecticut, Maine, Mississippi, New Hampshire, Ohio, Pennsylvania, and Vermont have legalized regulated interactive fantasy sports contests, they have not specifically declared that such contests do not constitute gambling.

Accordingly, a more accurate statement would have been:

> Interactive fantasy sports contests have been determined ~~not~~ to be ~~gambling~~ **legal** by the Legislatures of Arkansas, Colorado, Connecticut, Delaware, Indiana, Kansas, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania, Tennessee, Vermont, and Virginia, **many of which have specifically found that regulated interactive fantasy sports contests do not constitute gambling.**

(citations omitted).

Please excuse the inartful wording of the original sentence.

Very truly yours,

Richard Lombardo
Assistant Attorney General

RL/rl
cc: Cornelius D. Murray, Esq.
(via electronic mail & regular mail)

Letter from Cornelius Murray, dated Aug. 27, 2018

O'CONNELL ARONOWITZ

ATTORNEYS AT LAW

August 27, 2018

By Hand
Honorable Gerald W. Connolly
Supreme Court of the State of New York
Albany County Courthouse
16 Eagle Street
Albany, NY 12207

Re: Jennifer White, et al. v. Andrew Cuomo, et al.
Index No. 5861-16

Dear Judge Connolly:

We are in receipt of Defendants' August 23, 2018 letter to the Court clarifying that several states have determined interactive fantasy sports ("IFS") to be legal, as opposed to concluding that IFS is not gambling.

As stated in Plaintiffs' May 1, 2018 Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment:

> New York's prohibition against gambling, by contrast, is embedded in the Constitution, and thus the State Legislature is not free to define "gambling" as it wishes. This is not true in several of the other jurisdictions where gambling is simply a matter of statute and those state legislatures are free to prohibit or allow gambling as they see fit.
>
> *Id.* at 23.

Moreover, with the exception of Delaware and New Jersey, none of the states cited by Mr. Lombardo is subject to a generalized constitutional prohibition against gambling, and New Jersey's prohibition explicitly carves out sports wagering at certain venues.

Very truly yours,

O'CONNELL AND ARONOWITZ

By: Cornelius D. Murray

cc: Richard Lombardo, Assistant Attorney General (via email)

EDWARD J. O'CONNELL 1925-1939
SAMUEL E. ARONOWITZ 1925-1973
LEWIS A. ARONOWITZ 1951-1979

CORNELIUS D. MURRAY
FRED B. WANDER
STEPHEN R. COFFEY
JEFFREY J. SHERRIN
THOMAS J. DiNOVO
PAMELA A. NICHOLS
JEFFREY A. SIEGEL
JAMI DURANTE ROGOWSKI
DAVID R. ROSS
KURT E. BRATTEN
MICHAEL P. McDERMOTT
KELLY J. MIKULLITZ
WILLIAM F. BERGLUND
ROBERT J. KOSHGARIAN
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KELLAN B. POTTS

HOLLY F. VEGAS*
(DIRECTOR, HEALTHCARE CONSULTING GROUP)

*NOT A MEMBER OF THE LEGAL PRACTICE

Letter from Cornelius Murray, dated Aug. 28, 2018

O'CONNELL ARONOWITZ

ATTORNEYS AT LAW

August 28, 2018

By Hand
Honorable Gerald W. Connolly
Supreme Court of the State of New York
Albany County Courthouse
16 Eagle Street
Albany, NY 12207

Re: Jennifer White, et al. v. Andrew Cuomo, et al.
Index No. 5861-16
Correction to August 27, 2018 Letter

Dear Judge Connolly:

This law firm represents Plaintiffs in the above-referenced matter. In our August 27, 2018 letter to the Court, we stated the following:

> Moreover, **with the exception of Delaware and New Jersey,** none of the states cited by Mr. Lombardo is subject to a generalized constitutional prohibition against gambling, and New Jersey's prohibition explicitly carves out sports wagering at certain venues. (Emphasis added).

Upon further research, we wish to revise the portion of this statement in bold above to state "with the exception of Delaware, **Maryland** and New Jersey". We apologize for burdening the Court and Mr. Lombardo with this additional clarification, which will hopefully be our last.

Very truly yours,

O'CONNELL AND ARONOWITZ

By: Cornelius D. Murray

cc: Richard Lombardo, Assistant Attorney General (via email)

EDWARD J. O'CONNELL
1925-1939
SAMUEL E. ARONOWITZ
1925-1973
LEWIS A. ARONOWITZ
1951-1979

CORNELIUS D. MURRAY
FRED B. WANDER
STEPHEN R. COFFEY
JEFFREY J. SHERRIN
THOMAS J. DiNOVO
PAMELA A. NICHOLS
JEFFREY A. SIEGEL
JAMI DURANTE ROGOWSKI
DAVID R. ROSS
KURT E. BRATTEN
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F. MATTHEW JACKSON
SCOTT W. ISEMAN
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COURTNEY L. ALPERT
KELLAN B. POTTS

HOLLY E. VEGAS*
(DIRECTOR, HEALTHCARE CONSULTING GROUP)

*NOT A MEMBER OF THE LEGAL PRACTICE

STIPULATION

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto that the foregoing are correct and complete copies of all pertinent papers on this appeal, except such exhibits, if any, as have been omitted by consent but shall be filed with the Appellate Division when the briefs are filed; and that settlement of the transcript and certification of the record are hereby waived.

DATED: January 22, 2019

Letitia James
Attorney General of the
State of New York
Attorney for *Defendants-Appellants-Respondents*

BY: Victor Paladino
Victor G. Paladino, Esq.
Assistant Solicitor General

DATED: January 22, 2019

O'CONNELL AND ARONOWITZ.
Attorney for *Plaintiffs-Respondents -Cross-Appellants*

BY: Cornelius D. Murray
Cornelius D. Murray, Esq

ADDITIONAL STATEMENT UNDER RULE 5531

7. The Notice of Appeal to the Court of Appeals is from the Opinion and Order of the Appellate Division, Third Department, entered February 6, 2020.

8. On February 14, 2020, a Notice of Appeal to the Court of Appeals was filed by defendants.

FILE COPY

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

BARBARA D. UNDERWOOD
SOLICITOR GENERAL
DIVISION OF APPEALS & OPINIONS

Telephone (518) 776-2012

February 14, 2020

Albany County Clerk
Albany County Courthouse
Eagle Street
Albany, NY 12207

Re: *White v. Cuomo*
Albany County Index No. 5861-16

Dear Sir or Madam:

This office represents defendants in the above-referenced matter. Enclosed for filing is a notice of appeal. Kindly time-stamp the enclosed copies of the notice of appeal and give them to the messenger. By a copy of this letter, the notice of appeal is being served on counsel for the plaintiffs.

Respectfully submitted,

Victor Paladino

VICTOR PALADINO
Senior Assistant Solicitor General

cc:

Cornelius D. Murray, Esq.
O'Connell and Aronowitz
54 State Street
Albany, NY 12207-2501

RECEIVED
2020 FEB 14 AM 10:47
ALBANY COUNTY CLERK

State of New York
Supreme Court County of Albany

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

Plaintiffs,

v.

HON. ANDREW CUOMO, AS GOVERNOR OF THE STATE OF NEW YORK, AND THE NEW YORK STATE GAMING COMMISSION,

Defendants.

Notice of Appeal

Albany Index No. 5861-16

PLEASE TAKE NOTICE that defendants Andrew Cuomo, as the Governor of the State of New York, and the New York State Gaming Commission hereby appeal to the Court of Appeals from the opinion and order of the Appellate Division, Third Department, entered February 6, 2020, which declared Article 14 of the Racing, Para-Mutuel Wagering and Breeding Law unconstitutional. Defendants appeal from every part of the Appellate Division's opinion and order that aggrieves defendants and is appealable by them.

RECEIVED
2020 FEB 14 AM 10:47
ALBANY COUNTY CLERK

Dated: February 14, 2020
Albany, New York

LETITIA JAMES
Attorney General of the
State of New York
Attorney for Defendants
The Capitol
Albany, New York 12224

By: Victor Paladino
VICTOR PALADINO
Senior Assistant Attorney General
(518) 776-2012

To:

CORNELIUS D. MURRAY, ESQ.
O'CONNELL AND ARONOWITZ
54 State Street
Albany, NY 12207-2501

ALBANY COUNTY CLERK
Albany County Courthouse
Eagle Street
Albany, NY 12207

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss:
COUNTY OF ALBANY)

Victor Paladino, being duly sworn, deposes and says:

I am over eighteen years of age and an employee in the office of LETITIA JAMES, Attorney General of the State of New York, attorney for Respondent(s) herein.

On the 14th day of February ~~2019~~ 2020, I served the annexed Notice of Appeal upon the attorney named below by depositing a true copy thereof, properly enclosed in a sealed, postpaid wrapper, in a letter box of the Capitol Station Post Office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Post Office Department, directed to the said attorney at the address within the State and respectively designated by him/them for that purpose as follows:

Cornelius D. Murray, Esq.
O'Connell and Aronowitz
54 State Street
Albany, New York 12207-2501

Sworn to before me this
14th day of February, ~~2019~~ 2020.

KK
NOTARY PUBLIC

KENNETH KRUEGER
Notary Public, State of New York
Reg. No. 01KR6271239
Qualified in Albany County
Commission Expires October 29, 2020

Victor Paladino

NOTICE OF ENTRY

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

JENNIFER WHITE, KATHERINE WEST, CHARLOTTE WELLINS and ANNE REMINGTON,
Plaintiffs-Respondents-Cross-Appellants,

-against-

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

NOTICE OF ENTRY

Case/Docket No. 528026

STATE OF NEW YORK :
: ss.:
COUNTY OF ALBANY :

PLEASE TAKE NOTICE that the within is a true and complete copy of the Memorandum and Order in the above proceeding entered in the Clerk's Office of the State of New York Supreme Court, Appellate Division, Third Judicial Department on February 6, 2020.

DATED: Albany, New York
February 7, 2020

O'CONNELL AND ARONOWITZ

By: Cornelius D. Murray

Cornelius D. Murray, Esq.
Attorneys for Appellants
Office and P.O. Address
54 State Street
Albany NY 12207-2501
(518) 462-5601

TO: Victor Paladino, Esq., Assistant Solicitor General
Office of the Attorney General
The Capitol
Albany, New York 12224
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

JENNIFER WHITE, KATHERINE WEST, CHARLOTTE WELLINS and ANNE REMINGTON,
Plaintiffs-Respondents-Cross-Appellants,

-against-

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

AFFIDAVIT OF SERVICE

Albany County Supreme Court Index No. 5861-16 Appellate Division Third Dept. Case No. 528026

STATE OF NEW YORK :
: ss.:
COUNTY OF ALBANY :

Rebecca D'Anza, being duly sworn, deposes and says: I am not a party to this action and am over the age of 18 years and I reside at 1605 Delaware Tpke, Delmar, New York. On February 7, 2020, I served a true and complete copy of the Notice of Entry of the Opinion and Order dated and entered February 6, 2020 in the Clerk's Office of the State of New York Supreme Court, Appellate Division, Third Judicial Department upon the following individual by depositing same in an official mailbox maintained by the U.S. Postal Service and addressed to said individuals at their official legal address:

Victor Paladino, Esq., Assistant Solicitor General
Office of the Attorney General
The Capitol
Albany, New York 12224

Rebecca D'Anza

Sworn to before me this
7th day of February, 2020.

Notary Public – State of New York

TANYA MATARAZA
Notary Public, State of New York
Qualified in Schenectady County No. 01MA6164440
Commission Expires April 23, 2023

{00541751.1}

FILED: APPELLATE DIVISION - 3RD DEPT 02/06/2020 09:46 AM 528026
NYSCEF DOC. NO. 39 RECEIVED NYSCEF: 02/06/2020

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: February 6, 2020 528026

JENNIFER WHITE et al.,
Respondents-
Appellants,
v OPINION AND ORDER

ANDREW CUOMO, as Governor of
the State of New York, et al.,
Appellants-
Respondents.

Calendar Date: November 14, 2019

Before: Garry, P.J., Clark, Mulvey, Pritzker and Reynolds Fitzgerald, JJ.

Letitia James, Attorney General, Albany (Victor Paladino of counsel), for appellants-respondents.

O'Connell and Aronowitz, Albany (Cornelius D. Murray of counsel), for respondents-appellants.

Debevoise & Plimpton LLP, New York City (W. David Sarratt of counsel) and Boies, Schiller & Flexner LLP, New York City (Joshua Schiller of counsel), for Fanduel, Inc. and another, amici curiae.

Perkins Coie LLP, New York City (Adam H. Schuman of counsel), for Capital Region Gaming, LLC, amicus curiae.

Mulvey, J.

Cross appeals from an order of the Supreme Court (Connolly, J.), entered October 31, 2018 in Albany County, which (1) partially granted plaintiffs' motion for summary judgment, and (2) partially granted defendants' cross motion for summary judgment dismissing the complaint.

In August 2016, the Legislature amended the Racing, Pari-Mutuel Wagering and Breeding Law by adding an article related to the registration and regulation of interactive fantasy sports (hereinafter IFS) contests (see Racing, Pari-Mutuel Wagering and Breeding Law art 14, as added by L 2016, ch 237). Racing, Pari-Mutuel Wagering and Breeding Law article 14 declares that IFS contests do not constitute gambling and provides for consumer safeguards, minimum standards and the registration, regulation and taxation of IFS providers. Plaintiffs – several state taxpayers who are or have been affected by the negative impacts of gambling – commenced this action seeking a declaratory judgment that article 14 violates NY Constitution, article I, § 9 and seeking to enjoin defendants from implementing the statutes. After joinder of issue, plaintiffs moved for summary judgment on their complaint. Defendants cross-moved for summary judgment dismissing the complaint and for a declaration that article 14 does not violate the NY Constitution. Supreme Court partially granted plaintiffs' motion for summary judgment, holding that article 14, to the extent that it authorizes and regulates IFS, was void as in violation of NY Constitution, article I, § 9. The court also partially granted defendants' cross motion for summary judgment dismissing the complaint, holding that article 14, to the extent that it excludes IFS from the scope of the definition of "gambling" in Penal Law article 225, was not in violation of NY Constitution, article I, § 9. Defendants appeal and plaintiffs cross-appeal.

Supreme Court properly granted summary judgment to plaintiffs inasmuch as it found that Racing, Pari-Mutuel Wagering and Breeding Law article 14, to the extent that it authorizes IFS contests, permits gambling in violation of NY Constitution, article I, § 9. "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" (Overstock.com, Inc. v New York State Dept. of Taxation & Fin., 20 NY3d 586, 593 [2013] [internal quotation marks, ellipsis, brackets and citations omitted], cert denied 571 US 1071 [2013]; see Schulz v State of N.Y. Exec., 138 AD3d 1197, 1201 [2016], appeal dismissed 27 NY3d 1123 [2016]; Matter of Concerned Home Care Providers, Inc. v State of New York, 108 AD3d 151, 154 [2013], lv dismissed 22 NY3d 946 [2013]). A

> "basic tenet of constitutional and statutory interpretation [is] that the clearest and most compelling indicator of the drafters' intent is the language itself. Resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction, and courts have no right to add to or take away from that meaning" (Hernandez v State of New York, 173 AD3d 105, 111 [2019] [internal quotation marks, brackets and citations omitted]; see Matter of King v Cuomo, 81 NY2d 247, 253 [1993]).

The dissent asserts that "our judicial inquiry is limited to deciding whether the Legislature rationally determined, after hearing and considering evidence, that IFS contests are not 'gambling' as defined under Penal Law § 225.00" (dissenting op at 12). The dissent implies that, in exercising our judicial function in this action, we are limited to reviewing the legislative record and determining whether the Legislature's determination was rational. The parties' submission of a statement of agreed-upon facts indicates that even they did not believe that the courts are so limited in what we can consider.

Further, the cases relied upon by the dissent mainly use this rationality standard to determine whether legislative actions violate the Equal Protection Clause or the Due Process

Clause of the NY and US Constitutions (see e.g. United States v Carolene Products Co., 304 US 144, 154 [1938] [analyzing an equal protection challenge by determining whether a rational basis exists for the legislation whose constitutionality is attacked]; Old Dearborn Distributing Co. v Seagram-Distillers Corp., 299 US 183, 196 [1936]; Lincoln Bldg. Assoc. v Barr, 1 NY2d 413, 415 [1956], appeal dismissed 355 US 12 [1957]). In a more recent case, while addressing arguments other than equal protection challenges, the Court of Appeals – without mentioning the source of factual information relied upon, or that such information came from the legislative record or was before the Legislature (see Dalton v Pataki, 5 NY3d 243, 263-265 [2005], certs denied 546 US 1032 [2005]) – did not use the standard invoked by the dissent here, but instead simply interpreted the language of NY Constitution, article I, § 9 against legislative enactments to determine for itself whether the statutes violated that constitutional anti-gambling provision (id. at 263-265, 270-272; compare id. at 265-266 [addressing equal protection challenge under the standard utilized by the dissent herein]). We discern our judicial function here as more than simply reviewing the legislative record to see if any known or assumed facts could support the Legislature's choice, even if other evidence would also support the opposite choice (compare Matter of Marine Holdings, LLC v New York City Commn. on Human Rights, 31 NY3d 1045, 1047 [2018] [noting that courts must approve agency action that is supported by substantial evidence in the record, even where there is substantial evidence on both sides of the issue]); rather, our role is to examine and interpret the constitutional and statutory language, and to determine for ourselves whether the legislative enactment violates the explicit constitutional provision at issue (see Dalton v Pataki, 5 NY3d at 264-265).[1] We do not rule on the wisdom of the

[1] Contrary to the dissent's assertion, we do not contend that Dalton "expanded our standard of review" (dissenting op at 13). Since long before that case, more than one standard of review has existed, and courts must select the proper one depending on the type of constitutional question involved (see e.g. Campaign for Fiscal Equity, Inc. v State of New York, 86 NY2d 307, 314 [1995] [noting application of different tests to equal protection challenges and a claim that legislation

Legislature's enactment of laws, but on whether the NY Constitution prohibited the Legislature from enacting such laws.

In the law being challenged, the Legislature declared that IFS contests do not constitute gambling (see Racing, Pari-Mutuel Wagering and Breeding Law § 1400 [2]). Because "[p]ublic policy continues to disfavor gambling," exceptions to the constitutional prohibition on gambling must be strictly construed to ensure that they do not consume the rule itself (Ramesar v State of New York, 224 AD2d 757, 759 [1996], lv denied 88 NY2d 811 [1996]; see Molina v Games Mgt. Servs., 58 NY2d 523, 529 [1983]). As Supreme Court aptly observed, allowing the Legislature unfettered discretion to determine what is not gambling would render meaningless the constitutional prohibition on "lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling" (NY Const, art I, § 9 [1]) because this area would devolve to being governed by statutory law and not by the constitutional provision (see generally Dalton v Pataki, 11 AD3d 62, 90 [2004] [holding that the general definition of lotteries advanced by the defendants, which was consistent with all gambling, "would expand the constitutional exception permitting state-run lotteries to such an extent that it would swallow the general constitutional prohibition on gambling"], mod 5 NY3d 243 [2005], certs denied 546 US 1032 [2005]). Thus, IFS contests are not excluded from the constitutional meaning of "gambling" merely because the Legislature now says that it is so.

NY Constitution, article I, § 9 (1) provides that, aside from certain enumerated exceptions, "no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling . . . shall hereafter be authorized or allowed within this state; and the [L]egislature shall pass appropriate laws to

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violated the NY Constitution's Education Article]; Board of Educ., Levittown Union Free School Dist. v Nyquist, 57 NY2d 27, 43-49[1982]). As noted above, in Dalton, the Court of Appeals applied different standards of review for equal protection challenges (Dalton v Pataki, 5 NY3d at 265-266) than it did for constitutional challenges requiring pure interpretation of the anti-gambling provision (id. at 263-265, 270-272).

prevent offenses against any of the provisions of this section."[2] The NY Constitution does not define the word "gambling." In 1965, many years before the rise in popularity of IFS, the Legislature defined "gambling" in the Penal Law (Penal Law § 225.00 [2]). According to that definition,

> "[a] person engages in gambling when he [or she] stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his [or her] control or influence, upon an agreement or understanding that he [or she] will receive something of value in the event of a certain outcome" (Penal Law § 225.00 [2]).

"'Contest of chance' means 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" (Penal Law § 225.00 [1]).

Although, at earlier points in this litigation, defendants conceded that these Penal Law definitions are appropriate to apply in interpreting the constitutional provision at issue here, defendants now contend that the statutory definition is broader than required under the NY Constitution. They assert that we should instead use the standard applied by the Court of Appeals in People ex rel. Ellison v Lavin (179 NY 164, 170-171 [1904]), namely, that "[t]he 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." Contrary to defendants' argument, the

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[2] Exceptions to the constitutional prohibition on gambling that have been approved by the people and are now enshrined in that constitutional provision include state-run lotteries with the proceeds going to support education, pari-mutuel wagering on horse races as prescribed by the Legislature, games of chance conducted by religious or charitable organizations, and "casino gambling at no more than seven facilities as authorized and prescribed by the [L]egislature" (NY Const, art I, § 9 [1]).

Court of Appeals did not propound this as the, or even a, standard for determining whether something constituted gambling under the NY Constitution, as Ellison involved the interpretation of the statutory definition of "lottery" under the then-applicable Penal Law (id. at 168). Thus,

> "[t]he current definition of 'contest of chance,' does not require that the element of chance be the 'dominating element.' Rather, it is a 'contest of chance' when, notwithstanding that the skill of the contestants may be a factor in the outcome, the outcome depends in a 'material degree' upon an element of chance" (William D. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Penal Law § 225.00; see 1984 Ops Atty Gen No. 84-F1 at 8 [noting that "(a)n attentive reading of the 1965 Penal Law shows that the Legislature rejected (the Ellison) test in crafting" new Penal Law definitions]).

We find that the current Penal Law definition comports with the common understanding of the meaning of the constitutional prohibition and of the particular words "book-making" and "gambling" – at both the time of the prohibition's enactment and now. Therefore, we accept the Legislature's own definition of gambling, as included in the Penal Law since 1965, as the appropriate definition for courts to apply when interpreting that word in the pertinent constitutional provision (see Dalton v Pataki, 5 NY3d at 264 [seeking to determine the meaning of a term that is undefined in NY Constitution, article I, § 9 by looking first to the Penal Law definition of that term]; see also Matter of Plato's Cave Corp. v State Liq. Auth., 115 AD2d 426, 428 [1985] [applying Penal Law § 225.00 definitions relating to gambling offenses to provisions of the Alcoholic Beverage Control Law, which does not contain definitions of related terms], affd 68 NY2d 791 [1986]). It is undisputed that IFS contestants pay an entry fee (something of value) in hopes of receiving a prize (also something of value)

for performing well in an IFS contest. Therefore, such contests constitute gambling if their outcomes depend to "a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein," such that they are contests of chance (Penal Law § 225.00 [1]), or if they depend on a "future contingent event not under [the contestants'] control or influence" (Penal Law § 225.00 [2]).

According to the statement of agreed-upon facts that was submitted by the parties regarding how IFS contests operate, online IFS providers offer their subscribers season-long, weekly, and daily online IFS contests. 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 performances of the selected individual athletes in actual sporting events that are held after the IFS contest is closed and no more participants may enter the contest. Participants in IFS 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, and the winnings paid to successful online IFS contestants come from the entry fees paid by all contestants.

For purposes of this discussion, we accept the information considered by the Legislature indicating that IFS contests are contests requiring skill. For example, research demonstrated that lineups chosen by actual contestants beat those chosen at random and contestants improve their performance over time. Additionally, a very small percentage of IFS contestants receive a very large percentage of the prize money, suggesting that the skills exercised by this small percentage of winners actually affects the outcome of these contests. Nevertheless, skill and chance are not mutually exclusive; they often coexist.[3] The determinative question is whether IFS contests involve a

[3] Indeed, the statutory definition of "contest of chance" acknowledges that skill may play a role in an activity that qualifies as gambling (see Penal Law § 225.00 [1]).

material degree of chance. According to the statement of agreed-upon facts, although participants in IFS contests may use their skill in selecting teams, they cannot control how the athletes on their IFS teams will perform in the real-world sporting events. For example, those performances could be affected by such disparate circumstances as, among other things, player injury or illness, unexpected weather conditions, poor officiating, a selected player having a particularly bad day or an unselected player having a surprisingly good day. In other words, the skill level of an IFS contestant cannot eliminate or outweigh the material[4] role of chance in IFS contests. Thus, we agree with Supreme Court's interpretation and finding that plaintiffs met their burden to demonstrate beyond a reasonable doubt that Racing, Pari-Mutuel Wagering and Breeding Law article 14, to the extent that it authorizes or regulates IFS (see Racing, Pari-Mutuel Wagering and Breeding Law §§ 104 [23]; 1400 [1], [3]; 1402-1411), is unconstitutional because it violates the prohibition against gambling in NY Constitution, article I, § 9.

However, we preserve Racing, Pari-Mutuel Wagering and Breeding Law § 1412, which states that "[t]he conduct of unregistered [IFS] contests is prohibited." Because, due to our invalidation of most of Racing, Pari-Mutuel Wagering and Breeding Law article 14, no IFS contests can now be registered, section 1412 is consistent with the NY Constitution's prohibition on gambling inasmuch as the statute prohibits IFS contests.

Now that we have upheld Supreme Court's invalidation of the majority of Racing, Pari-Mutuel Wagering and Breeding Law article 14, we must determine whether the court properly upheld the portion of that article that excludes IFS contests from the scope of the definition of gambling in Penal Law § 225.00 (see

[4] The dissent cites evidence that was before the Legislature wherein certain witnesses opined that the degree of chance involved in IFS contests is not material. We, however, reject the notion that materiality can be quantitatively determined. In our view, the question of whether the element of chance is material is a qualitative determination.

Racing, Pari-Mutuel Wagering and Breeding Law § 1400 [2]). More specifically, we must determine whether the decriminalization provision violates the NY Constitution and, if not, is it possible or proper to salvage that provision or must the entirety of article 14 be invalidated.

As quoted earlier, the relevant part of NY Constitution, article I, § 9 states that "no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling . . . shall hereafter be authorized or allowed within this state; and the [L]egislature shall pass appropriate laws to prevent offenses against any of the provisions of this section" (NY Const, art I, § 9 [1]). This provision "was not intended to be self-executing . . . as it expressly delegates to the [L]egislature the authority, and requires it[,] to enact such laws as it shall deem appropriate to carry it into execution" (People ex rel. Sturgis v Fallon, 152 NY 1, 11 [1897]). For example, the Court of Appeals upheld the Legislature's decriminalization of wagering at licensed horse tracks (which, at that time, was not yet permitted under an exception to NY Constitution, article I, § 9), noting that

> "[t]he authority to prescribe the punishment for the offenses mentioned in that provision of the Constitution is expressly conferred upon the [L]egislature, which necessarily included a delegation to it of the power and authority to increase or decrease the punishment for offenses of that character to such an extent as the [L]egislature deemed proper" (id. at 10).

An activity can be prohibited without being criminalized (see e.g. id. [discussing a statute that prohibited certain wagering and provided that the sole penalty would be a civil forfeiture of the sum wagered]; Penal Law § 221.10, as amended by L 2019, ch 131, § 2 [prohibiting unlawful possession of more than one ounce of marihuana as a violation, not a crime]). As NY Constitution, article I, § 9 grants the Legislature the authority to pass laws that it deems appropriate to further the

purposes of that constitutional provision, including laws that decrease penalties previously imposed, courts may not substitute their own judgment of what they deem "appropriate or sufficient to prevent such [gambling] offenses" (People ex rel. Sturgis v Fallon, 152 NY at 10). Thus, the Legislature's enactment of the provision of Racing, Pari-Mutuel Wagering and Breeding Law article 14 removing IFS from the Penal Law definition of gambling did not, by itself, violate the NY Constitution.

As to whether a portion of Racing, Pari-Mutuel Wagering and Breeding Law article 14 can be severed,

> "[t]he answer depends on whether the [L]egislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. If removing particular provisions while leaving the remainder intact would result in a law the Legislature would not have intended, the entire statute must be stricken" (Matter of Hynes v Tomei, 92 NY2d 613, 627 [1998] [internal quotation marks and citations omitted], cert denied 527 US 1015 [1999]; see People v On Sight Mobile Opticians, 24 NY3d 1107, 1109 [2014]; CWM Chem. Servs., L.L.C. v Roth, 6 NY3d 410, 423 [2006]).

Supreme Court upheld the part of article 14 that provides that, "[b]ased on the findings in [Racing, Pari-Mutuel Wagering and Breeding Law § 1400 (1)]" – including that IFS contests are not games of chance – "the [L]egislature declares that [IFS contests do] not constitute gambling in New York state as defined in [Penal Law article 225]" (Racing, Pari-Mutuel Wagering and Breeding Law § 1400 [2]). We recognize that the Legislature was sympathetic to and supportive of IFS participants (see e.g. Racing, Pari-Mutuel Wagering and Breeding Law § 1400 [3]). Nevertheless, we have rejected the Legislature's explicitly stated basis for the removal of IFS from the Penal Law definition of gambling (see Racing, Pari-Mutuel Wagering and

Breeding Law § 1400 [1]). Moreover, as part of the same legislation that decriminalized IFS, the Legislature clearly intended that IFS contests be heavily regulated (see Racing, Pari-Mutuel Wagering and Breeding Law §§ 1400 [3]; 1402-1406). Hence, we conclude that the Legislature, if it had envisioned the possibility that courts would invalidate the majority of article 14, would not have wished to preserve the decriminalization of IFS located in Racing, Pari-Mutuel Wagering and Breeding Law § 1400 (2). Thus, we refuse to sever that provision, and invalidate it as well.

Garry, P.J., Clark and Reynolds Fitzgerald, JJ., concur.

Pritzker, J. (dissenting).

Because it is my opinion that the amendment to the Racing, Pari-Mutuel Wagering and Breeding Law relating to interactive fantasy sports (hereinafter IFS) contests (see Racing, Pari-Mutuel Wagering and Breeding Law art 14, as added by L 2016, ch 237) was constitutionally enacted, I respectfully dissent. To begin, one cannot disagree that our judicial inquiry is limited to deciding whether the Legislature rationally determined, after hearing and considering evidence, that IFS contests are not "gambling" as defined under Penal Law § 225.00 (see Lincoln Bldg. Assoc. v Barr, 1 NY2d 413, 417-418 [1956], appeal dismissed 355 US 12 [1957]). Bearing in mind that our inquiry is narrow, it is my opinion that Racing, Pari-Mutuel Wagering and Breeding Law article 14 was constitutionally enacted because the legislative record supports that the outcome in an IFS contest neither depends upon (1) a "material degree upon an element of chance" nor (2) "a future contingent event not under [the contestants'] control or influence" (Penal Law § 225.00 [1], [2]). As such, the lawmakers properly determined that an IFS contest is not a constitutionally prohibited gambling activity and our decidedly non de novo inquiry ends (see Lincoln Bldg. Assoc. v Barr, 1 NY2d at 417-418).[1] Although this ultimate

[1] It is important to note that the Legislature found that IFS contests are not gambling and thus did not need to "exempt" them from the gambling prohibition contained in NY Constitution,

finding is certainly debatable – and was debated by the Legislature – absent irrationality, whether we would vote "no" on the floor of the Legislature is unrelated to our circumscribed judicial function and review of this particular law,[2] which neither encroaches upon a fundamental right nor affects a protected class (see e.g. Lincoln Bldg. Assoc. v Barr, 1 NY2d at 415; compare Randall v Sorrell, 548 US 230, 241 [2006]; Califano v Westcott, 443 US 76, 78 [1979]; Hernandez v State of New York, 173 AD3d 105, 114 [2019]). Similarly, plaintiffs' differing opinions as to the core issues, even if, as judges, we were to agree with them, cannot crest the steep summit required to declare the legislation facially

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article I, § 9. As such, the cases relied upon by the majority, which suggest that the challenged statute must be strictly construed, are inapposite, as they involve activities that are clearly gambling, such as the lottery, which were exempted by the Legislature (cf. Ramesar v State of New York, 224 AD2d 757, 759 [1996], lv denied 88 NY2d 811 [1996]; Molina v Games Mgt. Servs., 58 NY2d 523, 529 [1983]; Dalton v Pataki, 11 AD3d 62, 80 [2004], mod 5 NY3d 243 [2005], certs denied 546 US 1032 [2005]). Further, the majority contends that Dalton v Pataki (5 NY3d 243 [2005], certs denied 546 US 1032 [2005]) expanded our standard of review, because the Court of Appeals "simply interpreted the language of NY Constitution, article I, § 9 against legislative enactments to determine for itself whether the statutes [at issue] violated [the] constitutional anti-gambling provision" (majority op at 4, citing Dalton v Pataki, 5 NY3d at 270-272). However, the cited portion of that decision is inapposite because there was specific documentary evidence, particularly a Mega Millions agreement and the Tax Law, which refuted the plaintiffs' claims of unconstitutionality (id. at 270-272). As such, there was no need for the Court to review the legislative record.

[2] Our judicial function and review is constitutionally mandated in part by the separation of powers (see generally Campaign for Fiscal Equity, Inc. v State of New York, 8 NY3d 14, 28 [2006]; Cohen v State of New York, 94 NY2d 1, 8 [1999]; Hussein v State of New York, 81 AD3d 132, 134 [2011], affd 19 NY3d 899 [2012]).

unconstitutional. Simply stated, our inquiry rests solely on whether the Legislature rationally found that IFS contests are not gambling when enacting Racing, Pari-Mutuel Wagering and Breeding Law article 14.

In this vein, there is no dispute that legislative enactments enjoy a strong presumption of constitutionality (see Cohen v State of New York, 94 NY2d 1, 8 [1999]; Schulz v State of N.Y. Exec., 138 AD3d 1197, 1200-1201 [2016], appeal dismissed 27 NY3d 1123 [2016]), and opponents must surmount the heavy burden to establish the statute's unconstitutionality "beyond a reasonable doubt" (Matter of Moran Towing Corp. v Urbach, 99 NY2d 443, 448 [2003] [internal quotation marks omitted]). Plaintiffs, in mounting a facial constitutional challenge, "bear the burden to demonstrate that[,] 'in any degree and in every conceivable application,' the law suffers wholesale constitutional impairment" (Cohen v State of New York, 94 NY2d at 8, quoting McGowan v Burstein, 71 NY2d 729, 733 [1988]). Facial challenges to statutes are disfavored (see Washington State Grange v Washington State Republican Party, 552 US 442, 450 [2008]; People v Stuart, 100 NY2d 412, 422 [2003]), and, where the Legislature engaged in "line-drawing" within gray areas (FCC v Beach Communications, Inc., 508 US 307, 315 [1993]), such as comparing the elements of chance and skill involved in the outcome of an IFS contest, "restraints on judicial review have added force" (id.).

While the presumption of constitutionality is not irrebuttable (see Defiance Milk Prods. Co. v Du Mond, 309 NY 537, 541 [1956]), and "courts may scrutinize the basis of legislative enactments predicated upon the existence of a particular state of facts" (Lincoln Bldg. Assoc. v Barr, 1 NY2d at 415; see Defiance Milk Prods. Co. v Du Mond, 309 NY at 541), "[w]here[, as here,] the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the Legislature" (Old Dearborn Distributing Co. v Seagram-Distillers Corp., 299 US 183, 196 [1936]; Matter of Stubbe v Adamson, 220 NY 459, 469 [1917]). As such, courts may not substitute their judgment for that of the Legislature so long as there is "any state of facts either known or which could

reasonably be assumed" that support the legislative decision to act (United States v Carolene Products Co., 304 US 144, 154 [1938]; see East New York Sav. Bank v Hahn, 326 US 230, 234 [1945]; South Carolina Highway Dept. v Barnwell Brothers, Inc., 303 US 177, 191 [1938]). Of course, we are the ultimate arbiters of constitutionality (United States v Morrison, 529 US 598, 614 [2000]; Campaign for Fiscal Equity, Inc. v State of New York, 8 NY3d 14, 28 [2006]), and, as such, Racing, Pari-Mutuel Wagering and Breeding Law article 14 is not immune from judicial scrutiny. Thus, I agree with the majority that "IFS contests are not excluded from the constitutional meaning of 'gambling' merely because the Legislature now says that it is so" (majority op at 5). However, here, no such political ipse dixit was afoot, as the record demonstrates with vigor that the lawmakers, without caprice, acted rationally, carefully and with measured consideration.[3]

Before exploring the record, one must be mindful of the respective burdens that the parties carry on these cross motions. It is my opinion that plaintiffs failed to meet their prima facie burden of establishing that Racing, Pari-Mutuel Wagering and Breeding Law article 14 was facially unconstitutional beyond a reasonable doubt. Their submissions were almost entirely dehors the legislative record and consisted of, among other things, (1) affidavits from plaintiffs Jennifer White and Charlotte Wellins wherein they detail the sad impact that gambling has had on their lives,[4] (2) a copy of the Laws of 1895 (ch 572), amending former Penal Law § 351, (3) copies of a settlement agreement entered into by the Office of the Attorney General of the State of New York and FanDuel, Inc., (4) a copy

[3] In my view, the only ipse dixit that has been propounded is that of plaintiffs, who assert their own opinions as facts, but at the same time brand opposing opinions as fiction. This framing – conflating fact and opinion – is however needed to advance their notion that the enactment is facially unconstitutional.

[4] As social concerns are within the sole province of the Legislature (see Boreali v Axelrod, 71 NY2d 1, 13 [1987]), to the extent the affidavits are probative, neither references IFS.

of a New York Times crossword puzzle and solution thereto and (5) the 2016 annual report of the New York Gaming Commission.[5] The opinions contained therein are both interesting and heartfelt, but they are nothing more than that, opinions. While raising legitimate legal questions and important social concerns, they do little more than establish that the Legislature, in finding that IFS contests are not gambling, reached different conclusions, which is a woefully inadequate foundation to meet their burden of establishing beyond a reasonable doubt that Racing, Pari-Mutuel Wagering and Breeding Law article 14 is facially unconstitutional.[6]

In my view, the opinions offered by plaintiffs, while challenging the basis of the Legislature's findings, were insufficient to shift the burden to defendants to prove the constitutionality of Racing, Pari-Mutuel Wagering and Breeding Law article 14. Further, even if the burden was somehow shifted, to defeat summary judgment, it would not be defendants' burden to disprove plaintiffs' opinions, but rather to offer a rational contrary opinion based upon the Legislature's review of the information before it (see generally Lincoln Bldg. Assoc. v Barr, 1 NY2d at 419-420). Here, the Legislature's judgment necessarily involved determining whether an IFS contest is a "game of chance" and, as such, analyzing whether the degree of chance is "material" in determining the outcome of an IFS contest. Because it is not seriously disputed that an IFS contest involves a high degree of skill, as was found by Supreme Court, then determining whether the degree of chance inherent in an IFS contest is "material" presented a difficult and nuanced

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[5] Contrary to the majority's characterization, I do not believe we are "limited to reviewing the legislative record" (majority op at 3), but it is undoubtedly a crucial part of our review.

[6] Plaintiffs' argument would have teeth if, for example, the Legislature found that roulette is not gambling – which is a patently unsupportable opinion given that the game is randomly determined by chance – or if the Penal Law required only "a" degree of chance.

question for the Legislature.[7] And, although it may have been rational to determine that the amount of chance in an IFS contest is material, as did some of the legislators who voted against the bill, it was not at all unreasonable, based upon the legislative record, to conclude otherwise. The difference is that the legislation bears the imprimatur and presumption of constitutionality and, thus, summary judgment should not have been granted in favor of plaintiffs.

As to defendants' cross motion for summary judgment, which Supreme Court partially denied, we turn first to the legislative record. On December 8, 2015, the Assembly Standing Committee on Racing and Wagering and the Consumer Affairs and Protection Legislative Commission duly noticed and held a lengthy public hearing regarding IFS in which 11 witnesses testified and were subject to questions from the floor. The lawmakers heard from IFS advocates, as well as those who were opposed to the legislation. In addition, the Senate, Assembly and respondent Governor received many written submissions relevant to the issues at hand, including support from professional sports teams, which are traditionally opposed to sports betting. Notably, the Legislature considered, debated and made detailed findings on the salient issues raised by plaintiffs. Indeed, the Legislature considered a broad range of evidence concerning the critical issue of the amount of skill and chance that is involved in influencing the outcome of IFS contests. The record reveals that different lawmakers reached different conclusions as to this very issue. In fact, some legislators analogized IFS to day trading, while others believed the activity was more akin to sports betting. These competing opinions were the function of the rational consideration of opposing views, resulting in

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[7] Materiality is an amorphous term and the difficulty in utilizing this ambiguous standard has been recognized in the commentary to Penal Law § 225.00, which states that "[t]he modernization of the definition of 'a contest of chance' has not, however, made it easier for courts to discern whether a game is a contest of chance" (William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 225.00 at 356 [2008 ed]).

the legitimate findings of fact that formed the cornerstone of Racing, Pari-Mutuel Wagering and Breeding Law article 14.

Although there was a great deal of evidence as to the predominance of skill inherent in an IFS contest, notably, there was also evidence, both written and oral, that "[c]hance is overwhelmingly immaterial in the probability of winning . . . fantasy games."[8] In addition, in distinguishing between systemic chance random-type games and IFS, one witness testified that

> "fantasy sports are played by considering a number of interlocking and often shifting factors through strategic risk taking and decision making [which] help predict an abnormally diverse set of future events. This difference – the lack of systemic chance [–] is why [IFS contests] are not gambling and why chance is not a material element in the outcome of [IFS] contests."

An Assembly Member directly raised the issue of materiality with another IFS advocate, who stated that "the degree of chance comes nowhere close to material for daily fantasy sports." Although the Legislature was free to disregard this evidence, our own inquiry is more circumspect; we must ask ourselves this question – whether, after due consideration, was the conclusion drawn by the vast majority of legislators rational? In my opinion it was and, as such, the Legislature could, and did, reasonably determine that the outcome of an IFS contest does not depend, to a material degree, on chance, and the activity is not gambling under that category.

Similarly, the legislative record amply supports the finding that IFS contests are not games of chance under Penal Law § 225.00 (2) because, although the participants do pay an

[8] The speaker was quoting a study conducted by the former Chair of the Department of Statistics at Hebrew University, examining the win percentage of 28 of the most successful players in an IFS contest run by DraftKings, a company that hosts IFS contests.

entry fee, success is not tethered to "a future contingent event not under [the participants'] control or influence" (emphasis added). Here, Supreme Court incorrectly focused on the fact that the participants do not have actual influence over the athletes. However, this notion was debated by the Legislature and it ultimately concluded that the proper focus is not on the participants' influence over the real world events and a specific athlete's performance, but the participants' unquestionable influence on winning the contest by making skillful choices in assembling a fantasy roster. Indeed, the plethora of evidence that was rationally relied upon by the Legislature in finding that IFS contests are predominantly contests of skill – a finding that Supreme Court accepted – also supports the notion that IFS contestants meaningfully, using certain parameters such as data and salary cap management, influence the outcome of the contests. Further, the Legislature reasonably found that IFS contest participants are active players in a separate competition that is clearly unconnected to any one single sporting event and, as such, rationally distinguished IFS contests from sports gambling. Indeed, the companies hosting these IFS contests neither offer single event competitions nor rosters that mirror actual teams. Therefore, the Legislature rationally found that there is a clear "difference between paying fees to participate in fantasy leagues and single-game wagering" (i.e., sports betting) (National Collegiate Athletic Ass'n v Governor of New Jersey, 730 F3d 208, 223 n 4 [3d Cir. 2013]). Thus, it was rational to find that IFS contests are not based upon the outcome of a "future contingent event not under [the participant's] control or influence" (Penal Law § 225.00 [2]).

In conclusion, because I find that the Legislature acted rationally based upon the evidence before it, it is my opinion that Racing, Pari-Mutuel Wagering and Breeding Law article 14 is constitutional on its face and, therefore, Supreme Court erred in partially granting plaintiffs' motion for summary judgment. Rather, it should have granted defendants' cross motion for summary judgement dismissing the complaint, rendering academic defendants' remaining arguments.

ORDERED that the judgment is modified, on the law, without costs, by reversing so much thereof as upheld Racing, Pari-Mutuel Wagering and Breeding Law § 1400 (2); it is declared that (1) Racing, Pari-Mutuel Wagering and Breeding Law § 1400 (2) is void, and (2) Racing, Pari-Mutuel Wagering and Breeding Law § 1412 does not violate NY Constitution, article I, § 9; and, as so modified, affirmed.

ENTER:

Robert D. Mayberger
Clerk of the Court

CERTIFICATION PURSUANT TO RULE 2105

I, Victor Paladino, Senior Assistant Solicitor General in the Department of Law of the State of New York, do hereby certify pursuant to Rule 2105, that the foregoing papers, which constitute the additional papers to the Court of Appeals, are true and complete copies of the originals.

DATED: February 19, 2020

LETITIA JAMES
Attorney General

BY: Victor Paladino
VICTOR PALADINO
Senior Assistant Solicitor General

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