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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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

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[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

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[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.

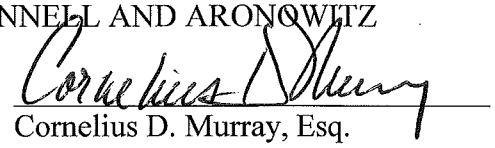
While statutes may be presumptively valid, they must be rationally based. Chapter 237 is not. Not only is it based upon an untruth, it makes registered fantasy sports legal by excepting it from the definition of gambling, but provides that unregistered operators of the very same games are acting illegally. 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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