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 TO DISMISS

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PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted on behalf of Plaintiffs in opposition to Defendants' Motion to Dismiss the Complaint. It should be read in conjunction with Plaintiffs' Complaint, the Defendants' papers in support of their Motion to Dismiss, and the Affirmation of Cornelius D. Murray, with exhibits, submitted herewith on behalf of Plaintiffs in opposition to Defendants' Motion.

INTRODUCTION

> "What's in a name? That which we call a rose by any other name would smell as sweet." William Shakespeare, *Romeo and Juliet*, Act II, Scene 2.

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "It means what I choose it to mean – neither more nor less." Lewis Carroll, *Through The Looking Glass*, Ch. 6, p. 205 (Charles L. Dodgson) (1934) (first published in 1871).

The issue in this case is whether the New York State Legislature's recent enactment of Chapter 237 of the Laws of 2016[1] purporting to legalize and authorize Daily Fantasy Sports ("DFS") – also known as "interactive fantasy sports" – violates Article I, § 9 of the New York State Constitution which prohibits gambling.

The answer to that question depends on whether we live in the Shakespearean world inhabited by Romeo and Juliet where substance trumps form, and a rose is, in fact, a rose;

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[1] Chapter 237 of the Laws of 2016 is annexed to the Complaint as Exhibit "A".

or whether we live in a parallel universe of alternative facts, like the one inhabited by Humpty Dumpty – and now by the New York State Legislature – where "gambling" is not "gambling" simply because the Legislature has decided to call it something else.

In this case, Plaintiffs have challenged Chapter 237 as a blatant attempt to circumvent the Constitution's prohibition against gambling and Defendants have now moved pursuant to CPLR 3211(a)(7) to dismiss the Complaint for failure to state a cause of action. That motion is without merit and should be denied.

BACKGROUND AND STATEMENT OF THE CASE

With certain exceptions[2] not applicable hereto, Article I, § 9 of the State Constitution provides that "no lotteries, pool-selling, book-making, ***or any other kind of gambling*** ... shall hereafter be authorized or allowed within this state" (emphasis supplied) and "the Legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section." Article I is the Bill of Rights of the Constitution and the anti-gambling provision in § 9 was specifically inserted to protect those, like Plaintiffs, who are gambling's victims.[3] *See International Hotels Corp. v. Golden*, 15 N.Y.2d 9 (1964) (prohibition was intended to protect the family man from his own imprudence. *Id.* at 15).

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[2] The exceptions are pari-mutuel wagering on horseracing, lotteries operated by the State, casino gambling at no less than seven localities across the State (N.Y. Const. Art. I, § 9[1]), and bingo and other games of chance if approved by local municipalities and operated solely by not-for-profit entities for charitable purposes involving small amounts of money (N.Y. Const. Art. I, § 9[2]).

[3] The Court is respectfully referred to ¶¶ "21"-"51", inclusive, of the Complaint that sets forth in detail how the Plaintiffs in this action have been directly victimized and continue to be threatened by gambling.

By specifically directing the Legislature to pass laws to prevent gambling, Article I, § 9 did not, as Defendants claim here, empower the Legislature to redefine "gambling" so as to "exclude" and, in fact, "promote" an activity – DFS – which clearly falls within the commonly understood meaning of the term "gambling." Article I, § 9 was adopted when the Constitution was approved by the People in 1894 and it has been consistently interpreted over the past century and a quarter by Attorneys General of this State to forbid the type of activity the Legislature has sought to permit. That includes the current Attorney General, who only recently prosecuted two of the principal DFS operators in this State on the grounds they violated Article I, § 9.

More specifically, in papers filed in Supreme Court, New York County, the Attorney General cited, with approval, the characterization of DFS made by the Chief Executive Officer of a major sports betting company who stated: "DFS is like a sports betting parlay on steroids." *See* Exhibit "A" of the Affirmation of Assistant Attorney General Richard Lombardo, sworn to January 11, 2017 (¶ 7 of Complaint filed by the Attorney General in *People v. DraftKings* [N.Y. Sup. Ct. N.Y. Cty. Index No. 453054/2015]). New York's current Attorney General is also on record that "the illegality of DFS is clear from any reasonable interpretation of our laws beginning with the New York State Constitution," citing Article I, § 9. *See* Attorney General letter dated November 10, 2015 addressed to the CEO of Fan Duel, Inc. (Complaint, Exhibit "C").

The same Attorney General also obtained injunctions against both Fan Duel, Inc. and DraftKings, Inc., the two major operators of DFS (*See* Complaint, Exhibit "B"). In those cases, the New York State Supreme Court, New York County, concluded:

> The NY AG has a greater likelihood of success on the merits under the New York State Constitution, Article I, Section 9, and the definitions of gambling and "contests of chance" as currently stated in Penal Law § 225.00[1], [2]. The NY AG has established that both Fan Duel, Inc. and DraftKings, Inc., as out-of-state corporations, can be enjoined pursuant to BCL § 1303 from their activities in the State of New York. The NY AG is not required to show irreparable harm under Executive Law § 63[12], it is implied in the need to prevent the effects of fraudulent illegal conduct on the general public. *People v. Apple Health and Sports Clubs*, 599 N.Y.2d 803, *supra*. The balancing of the equities are in favor of the NY AG and the State of New York, due to their interest in protecting the public, particularly those with gambling addictions. (*People of the State of New York, by Eric T. Schneiderman, Attorney General of the State of New York, Plaintiff, against Fan Duel, Inc.* [N.Y. Sup. Ct. N.Y. Cty., Index No. 45306/15 – Manuel J. Mendez, J.S.C., December 11, 2015 at 9]).

Subsequently, however, the Attorney General entered into stipulations of partial discontinuance with both Fan Duel and DraftKings, relinquishing claims related to the constitutioanlity of DFS while preserving other claims relating to false advertising and consumer fraud, which were separate parts of his lawsuit, and which were based on allegations that both Fan Duel and DraftKings had deceived and were deceiving New Yorkers with false promises regarding their chances of winning at DFS.[4] *See* Complaint, ¶¶ "154" – "159". *See also* the Attorney General's Complaint in both *People v. Fan Duel* and *People v. DraftKings*, attached as Exhibits "A" and "B" to the Lombardo Affidavit).

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[4] DraftKings emphasized the ease of winning "massive jackpots" and promoted DFS as making "winning easier than milking a three-legged goat." See Exhibit "A" of Affirmation of Richard Lombardo, ¶ "75". The irony is that now they and the Attorney General argue that very few people win at DFS, thereby proving it to be a game of skill, rather than chance. *See* Defendant's Memorandum of Law at 19 ("a very small percentage of DFS contestants receives a very large percentage of the prize money, suggesting that the skill exercised by this small percentage of winners naturally affects the outcome of these contests").

The Attorney General's sudden about-face and decision to discontinue his prosecution of Fan Duel and DraftKings' operation of DFS on the grounds that they violated the Constitution was prompted by the Legislature's enactment of Chapter 237 of the Laws of 2016, passed by the Legislature during the 2016 session and signed by the Governor on August 3, 2016. It is that legislation purporting to legalize Daily Fantasy Sports that is challenged in this Complaint.

In a Special to the New York *Daily News* entitled "Daily Fantasy Sports Bluff The Law in N.Y.", Attorney General Schneiderman characterized Fan Duel and DraftKings as a "massive, illegal gambling operation" and of doing "what bookies do by taking a cut of every bet" and that it operated in "gambling space" with a model "identical to a casino" [*See* Exhibit "A" of Affirmation of Cornelius D. Murray, sworn to April 6, 2017]. After the law was enacted, he stated in a press release dated June 18, 2016 that "it will be my job to enforce and defend the law." https://ag.ny.gov/press-release/statement-ag-schneiderman-daily-fantasy-sports-legislation The Legislature's enactment of Chapter 237 has placed the Attorney General in the awkward position of having to defend the indefensible.

The Attorney General may not seek refuge in Chapter 237. That legislation did not, nor could it, amend the Constitution. Amending the Constitution is the exclusive prerogative of the People, not the Legislature. *See* N.Y. Const. Art. XIX. This prompts the question as to what exactly is DFS and what did Chapter 237 do in an effort to make an end run around the prohibitions in Article I, § 9. To answer that question, the Court is respectfully referred to the Complaint herein, and more specifically, paragraphs "59"-"91",

132-153, inclusive, which contain a description of DFS that the Attorney General does not and cannot dispute.[5] Indeed, the allegations in the Complaint are taken almost verbatim from the allegations set forth by the Attorney General himself in the Complaints he filed under his own name on behalf of the People against both DraftKings and Fan Duel less than two years ago. Compare the Complaint in this action with the Attorney General's complaints in *People ex rel. Schneiderman v. DraftKings* and *People ex rel. Schneiderman v. Fan Duel*, attached as Exhibits "A" and "B" to the Lombardo Affirmation.

DFS entails the placing of bets (euphemistically referred to as "entry fees")[6] by individuals who enter into contests sponsored by an interactive sports "operator," that provides an on-line platform for such betting. Currently the two dominant DFS operators are Fan Duel, Inc. and DraftKings, Inc. The contests are conducted based upon the rules they establish. "Entry fees" can be as high as $10,600 per game for certain types of contests, and winning purses for the lucky bettor can exceed $1 million. Winners of contests are those bettors who have guessed, in advance, as to the composition of a winning roster of real-life athletes that make up a "fantasy team." Depending on how those particular athletes perform in subsequent (post-wager) real-life athletic contests, the winning wagers are determined based upon a point system established by the operator.

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[5] In *Rovello v. Orfino Realty Co.*, 40 N.Y.2d 633, 634-635 (1976), the Court of Appeals made it clear that when a Defendant makes a motion to dismiss based on CPLR 3211(a)(7), the allegations of the Complaint must be deemed to be true. In addition, Plaintiff is entitled to every favorable inference that might be drawn from them. *Westhill Experts Ltd. v. Pope*, 12 N.Y.2d 491, 496 (1963).

[6] Chapter 237 defines "entry fee" as "cash or cash equivalent that is paid to an operator ... in a [DFS] contest ..." *See* Racing, Pari-Mutuel Wagering and Breeding Law, § 1401(4).

Prizes (usually in the form of money) are awarded to bettors who assembled the best performing fantasy team (based upon the aggregate points amassed by each athlete on the roster). A portion of the entry fees (bets) are kept by the operator as profit, while the remainder is paid out in prizes (*See* Complaint, ¶ 5).

Roster selection is governed by a "salary cap" such that no contestant can simply choose all the supposedly best athletes because the sum of individual salaries assigned by the operator to athletes would exceed the salary cap established by the operator. For example, in a fantasy sports baseball contest, Albert Pujols of the Los Angeles Angels might be assigned a salary of $10,000 by the operator, while the overall salary cap for a team in a particular DFS contest might only be $50,000, such that a contestant selecting Mr. Pujols for his fantasy team would only have $40,000 of fictional money left to spend in selecting the remainder of the roster (Complaint, ¶ 6).

No contestant ("bettor") may select more than a limited number of players from any single team. A contest, for example, could be based on the performance of baseball players. The winner or winners would be determined based on the actual subsequent performance over a specified period of time[7] by a roster of actual baseball players from many different teams (a "fantasy team") selected by a bettor whose roster was at or below the salary cap. The operator might require an entry fee bet of $100 and take, for example, a 10% cut as its fee, commonly referred to in gambling parlance as a "rake" or a "vig." As

[7] Professional baseball contests are frequently run on a daily basis while football contest are typically conducted on a weekly basis during the professional football season.

part of the rules of the contest, the operator might agree in advance to distribute $90,000 to the contestants with $60,000 going to the highest scoring entrant who submitted the luckiest fantasy team, $20,000 to the second luckiest contestant, and $10,000 to the third luckiest. Assuming 10,000 bettors at $10 per entry fee, the operator could make a profit of $10,000 off that single contest while distributing $90,000 to the bettors, which would include 3 winners and 997 losers. (Complaint, ¶ 7).

The winning team in this DFS baseball contest might consist of three outfielders, one each from the Yankees, Mets and Dodgers; four infielders, one each from the Phillies, Cardinals, Red Sox and Pirates; a catcher from the Kansas City Royals; and a designated hitter from the Chicago White Sox. A player might be awarded five points for a home run, four points for a triple, three for a double, two for a single, or one for a base on balls, based upon the actual performance of the players on his roster. Additional points could be awarded for runs batted in (RBI's). How athletes on a contestant's so-called "fantasy team" perform in subsequent real-life actual games over the designated time span would determine the overall aggregate scores of each fantasy lineup as compared to lineups submitted by other hopeful bettors. In all cases, however, the success of any fantasy team would still be based upon the actual performance of real-life athletes competing in actual real-life sporting events that take place after the roster has been submitted by a contestant and entries are closed. In all such cases, the bettors would have absolutely no control over how the athletes subsequently perform, nor over other external factors that might affect the outcome such as weather, field conditions, injuries, or bad bounces, all of which necessarily exist independently of an athlete's ability (Complaint, ¶ 8).

Defendants concede the essential attributes of DFS. They admit that real-world athletes in daily or 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. Defendants' Memorandum of Law at 4. Defendants also concede that "participants in fantasy sports contests ... select fantasy teams of real-world athletes and compete against other contestants based upon a scoring system that awards points based on the individual athlete's performances, not the outcome of the games in which the athletes play." Defendants' Memorandum of Law at 3. This is no different from placing a bet on one player on a team rather than on an entire team. The fact that the team selected by a contestant is a fantasy team that does not exist does not obscure the fact that the success of the so-called "fantasy team" is still dependent upon how real-life players on that team actually perform in games held subsequent to the placement of a bet.

The Legislature, however, sought to justify its "finding" that DFS is not gambling but rather a game of skill "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. Racing, Pari-Mutuel Betting and Breeding Law, § 1400(1)(b).

The inescapable and undeniable reality, however, is that DFS involves betting on the future performance of real-life athletes competing in real-life athletic contests. Under any common sense interpretation, this is the very definition of the term "gambling." Betting in DFS involves not just a performance of a single real-life athlete, but the

performance of several real-life athletes. That is no fantasy, it is reality.[8] While skill may also be involved in selecting a roster, the same is true for a variety of other games where skill and chance co-exist. DFS is no different from other games like poker, blackjack and other sports betting where contestants calculate probabilities and handicap the odds on future events. That is still gambling.

The proponents of DFS and now the Legislature, however, have entered into a fantasy world of alternative facts where they attempt to disguise reality by resorting to semantical, linguistic gymnastics in which they euphemistically refer to "bettors" as "participants" and/or "contestants" and "bets" as "entry fees," while the operators from such games profit from taking a percentage of each entry fee from the pool of bets as a "commission." (*See* Racing, Pari-Mutuel Wagering and Breeding Law, § 1401[4]) As previously stated, in the real world, this is what gamblers call the "vig" or the "rake." *See* Paragraph 56 of the Attorney General's Complaint in *People v. DraftKings*. Lombardo Affirmation, Exhibit "A".

The Attorney General is asking this Court to endorse the Legislature's farcical charade that makes a mockery of the English language and the Constitution. He argues that this Court's hands have been tied by the Legislature's findings and declaration that:

- "interactive fantasy sports" are not games of chance (Racing, Pari-Mutuel Wagering and Breeding Law § 1400(1)(a));

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[8] If one were to stake money on whether Albert Pujols would get a hit in an upcoming game, that clearly would be a "bet." DFS is nothing more than a parlay of bets, where instead of betting on how one specific baseball player might perform, the outcome of the "bet" is dependent on how several real-life players (on a fictional team's roster selected by the contestant) perform in real-life competition.

- Interactive fantasy sports contests are not wagers on future contingent events not under the contestants' control or influence but rather are games of skill 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 of any one actual team (Racing, Pari-Mutuel Wagering and Breeding Law, § 1400(1)(b)); and

- Interactive fantasy sports do not constitute gambling in New York State, as defined in Article 225 of the Penal Law (Racing, Pari-Mutuel Wagering and Breeding Law, § 1400[2]).

SUMMARY OF ARGUMENT

Defendants' reliance on the Legislature's declarations and findings in Chapter 237 is misplaced and their motion to dismiss must be denied. They have not met their heavy burden necessary to prevail on a motion to dismiss. *Rovello v. Orfino Realty*, 40 N.Y.2d 633 (1976). It is well-settled law that terms in a Constitution not otherwise defined must be given their ordinary meeting. *Matter of King v. Cuomo*, 81 N.Y.2d 247, 253 (1993). Exceptions to prohibitions must be strictly and narrowly construed. *Ramesar v. State of New York*, 224 A.D.2d 757 (3d Dep't 1991); *lv to app denied*, 88 N.Y.2d 811 (1996). The Legislature does not have the power to redefine the Constitution, and the judicial deference owed by a court to the Legislature does not apply where the meaning of the Constitution itself is at issue. This is especially the case where, as here, the Legislature has turned the meaning of the word "gambling" inside out and engaged in a false skill / chance dichotomy. Skill and chance are not mutually exclusive. The Attorney General himself called such a proposition "nonsense" in an article he submitted to the New York *Daily News* on November 19, 2015 (Complaint, ¶ "183", Murray Affirmation, Exhibit "A"). The fact that an element of skill may be involved in DFS does not eliminate a material element of

chance. That is why poker and betting on horse racing involve skill and chance, but both are nevertheless still gambling.[9]

The arguments advanced by Defendants are frankly preposterous. Nobody disputes that it would be gambling if a "middleman" were to establish a betting pool whereby contestants would submit an "entry fee" along with a card filled out selecting which NFL teams the contestant believes would win on an upcoming weekend and the middleman would thereafter award the pool ("pot") – minus, of course, a "commission" ("rake" or "vig") – to the contestant who selected the most winning teams. Yet Defendants would have this Court believe a similar arrangement would not be gambling where the only difference would be that the selections are based on the subsequent real-life performance of real-life athletes playing for a "fantasy team" assembled by the contestant. Differentiating betting on how a player rather than a team will perform exalts form over substance. It is a classic example of a "distinction without a difference" with respect to whether or not "gambling" has occurred.

Under our Constitution's separation of powers and its built-in system of checks and balances, the judiciary is a co-equal branch of government whose sacred function is to preserve the integrity of the Constitution and to protect the People from legislative overreach. It is not a subordinate branch that was meant to serve as a judicial rubber stamp

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[9] The fact that pari-mutuel betting on horse racing is legal is only because the Constitution itself contains such an exception to the general prohibitions against gambling. If wagering on horse racing were not gambling, then there would have been no need for the exception to have been specified in the first place. Indeed, this is a classic case where the exception proves the rule as there is no similar exception for DFS.

that must place its imprimatur on whatever scheme the Legislature may conjure up to circumvent the Constitution.

The only way to exempt DFS from the prohibition against gambling is to amend the Constitution. *See* N.Y. Const., Art. XIX (requiring first a prposed amendment agreed to by two successively elected Legislatures, after which the People must approve it in a statewide referendum or through a proposal from a Constitutional Convention of delegates elected by the People. Any such proposal must also be approved in a statewide referendum). The Legislature in this case usurped the People's prerogative by short-circuiting the Amendment process and denying the right of the People themselves to decide whether to weaken the Bill of Rights and broaden the exceptions to the constitutional prohibition against gambling.

Defendants and the Legislature have resorted to tortured logic in a futile effort to portray DFS as something other than "gambling." Plaintiffs ask this Court to heed the sage observation of an American poet who aptly stated, albeit in less majestic language than Shakespeare: "When I see a bird that walks like a duck and sounds like a duck and quacks like a duck, I call that bird a duck." (James Whitcomb Riley, 1849-1916).

ARGUMENT

POINT I

For Purposes of Defendants' Motion to Dismiss For Failure to State a Cause of Action, the Allegations of the Complaint Must Be Assumed To Be True, and Plaintiffs Are Entitled to Every Favorable Inference That Can Be Reasonably Drawn From Them

The law in the Third Department is well-settled. In ruling upon a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), a court must accept the allegations of the Complaint as true. *Herbest and Morrisey, Inc. v. W.H. Ins. Agency*, 259 A.D.2d 829, 830 (3d Dep't 1999). In addition, Plaintiffs are entitled to every favorable inference that can reasonably be drawn from such allegations. *Rovello v. Orfino Realty*, 40 N.Y.2d at 634 (1976). *Westhill Exports, Ltd. v. Pope*, 12 N.Y.2d 491 (1963). See also, Siegel, *New York Practice*, § 265 at 462-563 (5th Ed. 2011). Accordingly, for purposes of this motion, the following facts, set forth in the Complaint, must be deemed to be true as Defendants have not denied them, nor could they, for many of them are identical to the allegations that the Attorney General himself set forth in *People ex rel. Schneiderman v. DraftKings* (Sup. Ct. N.Y. Co., Index 453054/2015) and *People ex rel. Schneiderman v. Fan Duel* (Sup. Ct. N.Y. Co., Index No. 453056/2015). Compare the Complaint in the present case with complaints in *Fan Duel* and *DraftKings*, attached as Exhibits "A" and "B" to the Affirmation of Richard Lombardo, Assistant Attorney General, in support of Defendants' Motion to Dismiss (the "Lombardo Affirmation").

The following facts are alleged in the Complaint in the case at bar:

- DFS operators supply an internet platform for contests in which contestants pay an entry fee as high as $10,600 with prizes as high as $1 million to be awarded (Complaint, ¶ "5").

- The winning contestant is determined by which contestant's so-called fantasy team performed best in real-life athletic events that occurred after the betting entries were closed (*Id.*, ¶¶ "6"-"8", "60(c)", "77", "80", "84", "85", "148").

- The outcome of real-life athletic events are affected by elements of chance over which the contestants who bet in DFS games have no control. Those elements of chance include bad bounces, injuries, weather affecting playing conditions, erroneous referee calls, etc. (*Id.*, ¶¶ "8", "79", "145", "147", "152").

- The DFS operators make their money by taking a percentage off the top from the pool of money wagered by the contestants. In gambling parlance, this percentage is known as a "rake" or "vig" (*Id.*, ¶¶ "7", "73", "139").

- Sheldon Adelson, one of the most prominent executives in the gambling industry, stated that "daily fantasy sports is gambling. There is no question about it." (*Id.*, ¶ "14")

- MGM Casinos Chairman Jim Murren said those who argue that DFS is not gambling are "absolutely utterly wrong. I don't know how to run a football team, but I do know how to run a casino and this is gambling" (*Id.*, ¶ "15").

- The Chief Executive Officer of one DFS company stated that DFS games are like "a sports betting parlay on steroids" (*Id.*, ¶ "68").

- Fan Duel requires players to put money at risk for a chance to win prizes (*Id.*, ¶ "75").

- Just as in poker, blackjack and horse racing, a small percentage of professional gamblers manage to use research, software and large bank rolls to extract a disproportionate share of DFS jackpots. With blackjack, professional players profit at the expense of the casino. With poker and DFS, professional players, also known as "sharks," profit at the expense of casual players, also known as "minnows" (*Id.*, ¶ "101").

- On any given day, Fan Duel and DraftKings each accept substantially more than five wagers placed by New York residents. These wagers total significantly more than $5,000 (*Id.*, ¶ "103" and "172").

- Dr. Jeffrey L. Derevensky, Director of the International Centre for Youth Gambling Problems and High-Risk Behaviour at McGill University, notes that false or misreading representations of the skill involved in DFS "can lead players to a preoccupation with DFS, chasing of losses, and developing symptoms of behaviors associated with a gambling disorder" (*Id.*, ¶ "109").

- On August 27, 2015, the National Collegiate Athletic Association sent a cease and desist letter to Fan Duel objecting to DFS games involving college sports. The NCAA's letter stated that DFS is "inconsistent with our values, by-laws, rules and interpretations regarding sports ***wagering***" (emphasis supplied) (*Id.*, ¶¶ "128"-"129").

- Fan Duel continued to run DFS games connected with college sports contrary to the NCAA's demand until it finally agreed to stop doing so after the end of the 2016 NCAA college basketball tournament (*Id.*, ¶ "131").

- Shortly after its founding, DraftKings' CEO reportedly started a thread in the online forum reddit.com in which he explained, "this concept where you can basically ***bet*** your team will win is new and different from traditional leagues that last an entire season" (emphasis added) (*Id.*, ¶ "134").

- The DraftKings CEO further emphasized that "the concept is different from traditional fantasy leagues. Our concept is a mash-up between poker and fantasy sports. Basically, you pick a team, ***deposit your wager***, if your team wins, you get the pot" (emphasis supplied) (*Id.*, ¶ "135").

- The scores applied to any DFS lineup directly reflect the real-life performance of athletes, and until a tally of the final box score is available, the winning DFS wager or wagers are unknown and unknowable (*Id.*, ¶¶ "148"-"149").

- In the United Kingdom, where sports gambling is legal, DraftKings has taken the necessary regulatory steps to operate as a legitimate online sports betting company. DraftKings announced that it had received a license to operate in the U.K., but neglected to mention the name of the entity that issued the license (the U.K. Gambling Commission) or the business categories in which the license entitled DraftKings to compete (gambling software and pool-betting) (*Id.*, ¶ "161").

- DraftKings' CEO stated in 2012 that DraftKings operates in the "***gambling*** space" (emphasis supplied) (*Id.*, ¶ "162").

- DraftKings' CEO stated that it makes money in a way that "is almost identical to a casino" (*Id.*, ¶ "165").

- On its website, DraftKings embedded keywords related to gambling. This led search engines like Google to suggest DraftKings to users looking for gambling. Those keywords included "fantasy golf ***betting***," "weekly fantasy basketball ***betting***," "weekly fantasy hockey ***betting***," "weekly fantasy football ***betting***," "weekly fantasy college football ***betting***," "weekly fantasy college basketball ***betting***," "fantasy college football ***betting***," "daily fantasy basketball ***betting***," and "fantasy college basketball ***betting***" (*Id.*, ¶ "169") (emphasis supplied).

- Numerous DFS players struggling with gambling addiction have called customer service to cancel their accounts and to plead with DraftKings to permanently block them from playing. DraftKings' record shows customer inquiries from DFS players seeking assistance with subject like "gambling addict – do not reopen," "please cancel account. I have a gambling problem," and "Gambling addiction needing disabled account" (*Id.*, ¶ "174").

- State Supreme Court (N.Y. County) denied Fan Duel and DraftKings' application for an injunction in companion cases they filed against the Attorney General seeking to prevent any enforcement he initiated. The same Court also granted the Attorney General's application for a preliminary injunction to stop Fan Duel and DraftKings from operating. The Court also denied DraftKings and Fan Duel's subsequent application for a stay pending appeal (*Id.*, ¶¶ "186" – "189").

All the foregoing facts must be deemed to be true as the Court rules on the meaning of the term "gambling" in Article I, § 9 and whether the Legislature's enactment of Chapter 237 purporting to authorize DFS gambling violates Article I, § 9. These currently undisputed facts establish beyond doubt that DFS is "gambling" under any commonly understood meaning of the term and, therefore, DFS and the legislation purporting to legalize it violate Article I, § 9 of the Constitution. *See* Point II, *infra*.

POINT II

The Legislature May Not Redefine "Gambling" In A Way That Contradicts Its Well-Accepted Commonly Understood Meaning, Which Is To Be Determined by the Courts, Not the Legislature

Defendants argue that the Legislature, not the Judiciary, can define "gambling" because that term is not defined in Article I, § 9 of the Constitution, which directs the Legislature to "pass appropriate laws to prevent offenses" against gambling. Defendants' Memorandum of Law at 10-11. They badly miss the mark.

Article I, § 9 directs the Legislature to pass laws to prevent gambling (*supra* at 2); it does not give it the power to redefine the term so as to exclude and indeed promote an activity that would otherwise clearly constitute gambling. Chapter 237 of the Laws of 2016 "enables" rather than "prevents" gambling. Defendants' contention that it is not gambling when DFS operators establish a betting pool in which the winner is the one who can determine which combination of athletes will perform the best in subsequent real-life competition subverts the entire Constitutional prohibition.

It is not within the province of the Legislature to redefine the ordinary meaning of words used in the Constitution which, unlike statutory law, is a document adopted by the People, not the Legislature. Assemblyman Gary Pretlow, the sponsor of the DFS legislation, however, claims otherwise. During the debate on the bill, he stated: "But, as legislators, we are the creator of the law and we write the law and under that ***guise***, we define what is legal and not legal and the legislative findings in this legislation are that this is not gambling, therefore, not subject to the provisions of the Constitution." (emphasis

supplied) *See* transcript of Assembly Debate, June 17, 2016, at 149. Lombardo Affirmation, Exhibit "H". Assemblymember Pretlow is simply wrong. Were his view to be accepted, the well-established jurisprudence that has governed this Nation since the earliest days of the Republic would be turned upside down. There is no question that under the separation of powers built into both the U.S. and New York Constitutions, legislative enactments are subject to judicial review to ensure they are not in violation of the Constitution. *Marbury v. Madison*, 5 U.S. 137 (1803).

Words not specifically defined in the Constitution are to be given their ordinary meaning by courts that interpret them. In *King v. Cuomo*, 81 N.Y.2d 247 (1993), the Court of Appeals stated:

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

> ***express mandate of the Constitution.*** We do not believe that supplementation of the Constitution [by the Legislature] is a manifestation of the will of the People. Rather, it may be seen as a substitution of the People's will expressed directly in the Constitution (emphasis supplied). 81 N.Y.2d at 253-254.

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

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

More recently, the Third Department has stated:

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

Exceptions to prohibitions must be strictly construed to ensure that they do not consume the rule itself, and this rule has been specifically applied to gambling. *Ramesar v. State of New York*, 224 A.D.2d 757, 759 (3d Dep't 1996), *lv den*, 88 N.Y.2d 811 (1996); *Molina v. Games Management Services*, 58 N.Y.2d 523, 529 (1983). *See generally*,

McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 271; 62 N.Y.Jur.2d Gambling, § 9 at 18 *et seq.* *See also* 1984 N.Y. Op. Atty. Gen. 1 (1984 N.Y. Ag LEXIS 94 *7).

King v. Cuomo and *Construction Materials Association, supra*, teach that absent a specific definition of a term in constitutional or statutory language, the term is to be given its ordinary meaning. Given the facts, as set forth in the Complaint (see Point I, *supra*), which must be accepted as true for purposes of this motion, there is absolutely no question that the term "gambling" would include DFS.

POINT III

Aside From The Undisputed Allegations in the Complaint, There Is Ample Evidence That DFS Is "Gambling," As That Term is Used in Article I, § 9 of the Constitution, and Includes Contests That Often Contain Elements of Both Skill and Chance

In a Special to the N.Y. *Daily News* dated November 19, 2015, Attorney General Schneiderman himself stated:

> DFS is much closer to online poker than it is to traditional fantasy sports ... Fan Duel and DraftKings take a bite out of every ***bet***. That is what bookies do, and it is illegal in New York ... in fact, as our court papers [in *People v. Fan Duel* and *People v. DraftKings*] lay out, these companies are based on business models that are identical to other forms of ***gambling*** ... consider the final moments of a football game where the outcome has been decided and the winning quarterback takes a knee to run out the clock. In a sure victory, let's say it's Eli Manning and the Giants are defeating the Eagles or the Cowboys. Statistically, this play would cost the quarterback one yard – a yard that could make the difference between someone on DraftKings or Fan Duel winning or losing tens of thousands of dollars ... What did

> that have to do with the bettor's skill? It's the classic risk involved in sports betting. Games of choice involve some amount of skill; this does not make them legal. Good poker players often beat novices. But poker is still gambling, and running a poker room – or online casino – is illegal in New York (emphasis supplied) (Murray Affirmation, Exhibit "A").

Further evidence that Attorney General Schneiderman himself thinks that DFS is gambling is reflected in a document he submitted in the lawsuit he initiated in *People v. DraftKings* (Sup. Ct. N.Y. County, Index No. 453054/2015) which included comments from an interview of DraftKings' CEO, who stated that "our concept is a mash-up between poker and fantasy sports. Basically you pick a team, deposit your ***wager***, and if your team wins, you get the pot" (emphasis supplied). Later on, the same individual is quoted as saying, "[t]he concept is also identical to a casino – specifically poker. We make money when people win pots." *See* NYSCEF Document No. 21, submitted in *People v. DraftKings* (Murray Affirmation, Exhibit "B").

In yet another document introduced by the Attorney General in *People v. DraftKings*, an article described how Fan Duel and DraftKings eschew the label of gambling here in the United States to avoid criminal prosecution, whereas in England they applied for a gambling license (Murray Affirmation, Exhibit "C"). In his Memorandum in *People ex rel. Schneiderman v. DraftKings*, the Attorney General stated at p. 1 as follows: "Like any sports wager, a DFS wager depends on a future contingent event wholly outside the influence of any bettor … until the outcome of that future-contingent event, the winners and losers are unknown and unknowable." (Murray Affirmation, Exhibit "D")

The Attorney General's Memorandum of Law also emphasized that skill and chance are not mutually exclusive and that the presence of skill in a game is hardly dispositive of whether such a contest is gambling, noting that "the key factor establishing a game of skill is not the presence of skill, but the absence of a material element of chance. Here, [referring to DFS] chance plays just as much of a role (if not more) than it does in games like poker and blackjack. A few good players in a poker tournament may rise to the top based on their skill, but the game is still gambling. So is DFS." *Id.* at 2.[10]

In yet another filing in the *DraftKings* case, Attorney General Schneiderman stated, "DFS is a contest of chance ... chance is pervasive at every level of DFS – the unpredictable performance of an athlete in a given game (*e.g.*, amount of points scored); to the pronouncements of the league office (*e.g.*, athletic suspensions); to the whims of nature (*e.g.*, rained out games). DFS cannot escape its status as a contest of chance, and thus wagering on its outcome is gambling" (Murray Affirmation, Exhibit "E").

In the same Memorandum, the Attorney General stated: "Of course, DFS is not a game of skill. Similarly, none of the constitutional claims put forth by DraftKings have any merit." Murray Affirmation, Exhibit "E" at p. 3. Mr. Schneiderman also stated:

> The notion that DFS exists as a contest separate and apart from actual sports is baseless: there are and can be no winners or losers without the happening of a future

[10] It would also be folly to expect a court to have to calibrate precisely what percentage of a game is skill and what percentage chance in order to determine whether or not it is "gambling." No such precision is or should be required. So long as a game involves a material element of chance, it is "gambling" irrespective of the role played by skill. *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 791 (1986); *People v. Delacruz*, 23 Misc.3d 720, 725 (N.Y. City Crim. Ct. 2009).

> contingent event outside of their influence or control. There is no "successful roster" until the relevant athletes compete in actual skill games. DFS cannot escape the law by pretending that it is somehow different from every other sports ***bet*** that has ever been placed in New York. There is nothing special about DFS. It is simply a ***wager*** on a future contingent event – and therefore qualifies as illegal gambling (emphasis added) (Murray Affirmation, Exhibit "E" at 8).

The Attorney General continued:

> DFS operators should be held to their public statements. When pitching their games to the public (and making arguments in their legal papers), the DFS operators talk about games of "skill" and profess shock that anyone could think that what they offer supports gambling. But when the spotlight is off, the story changes dramatically. When DFS operators describe themselves to investors or potential business partners, they liken DFS to "poker," say it exists in the "gambling space," and operates in a way "identical to a casino." The DFS operators even register themselves as gambling concerns abroad, in order to access those lucrative markets (Murray Affirmation, Exhibit "E" at 12-13).

Certain facts are, therefore, absolutely undeniable. The outcome of any DFS contest ultimately depends on the performance of actual athletes in actual games. A contestant who enters a roster of players in a DFS football contest, for example, would have no control whatsoever over how many yards a running back on his "fantasy team" roster may subsequently gain, how many touchdowns he may score, what plays may be called, or whether he may slip on the wet turf due to rain. In the real world, those are all significant elements of chance. Nothing passed by the Legislature can change this indisputable reality.

In *People ex rel. Schneiderman v. DraftKings*, Attorney General Schneiderman's Memorandum of Law also argued that a Court's acceptance of DraftKings' contention "that all contests where contestants pay a fee to a neutral administrator for a chance to win a pre-determined prize are legal would have truly absurd consequences" ... [and] "would eviscerate existing New York prohibitions against gambling, including those set out in the Constitution ... The end result would be to reverse the clear prohibitions on pool selling, bookmaking and other kinds of gambling set out in the Constitution and carried into the New York Penal Law." Murray Affirmation, Exhibit "E" at 19-20.

An October 13, 2015 article from the Washington *Post* entitled "Daily Fantasy Sports Sites Says Its Users Aren't Gambling: They're Wrong," states that:

> "It's almost impossible to identify daily fantasy [sports] as anything but a way to bet on sporting events from a casual perspective ... Jurisdictions outside the United States and Canada have identified daily fantasy sports as gambling ... At the same time, some skill can be found in almost every form of gambling, as long as there is a decision that can be made. Good poker players will beat lesser poker players over the long haul. Skillfully setting a blackjack hand will reduce a casino's edge. Over small sample sizes, where single contests go, there is a lot of variation in daily fantasy results and no guarantee that skill trumps chance. What the casual fantasy player is doing, betting a few bucks in the hopes of winning millions, is certainly gambling." Murray Affirmation, Exhibit "F" at 2-3).

The same article goes on to state that the

> ... legal repercussions of calling fantasy sports "gambling" is why DraftKings chief executive Jason Robins and Fan Duel chief executive Nigel Ecles take turns saying daily fantasy sports is a skill game over and over, akin to things

> like chess, spelling bees or races, as ridiculous as some of those comparisons sound." ... But get outside of the daily fantasy executive suites, and you can find plenty of rational people calling DFS gambling, including most mainstream media outlets; gaming executives like MGM Resorts Chief Executive Jim Murren. Murray Affirmation, Exhibit "F" at 3.

Attached as Exhibits ""G", "H", "I', "J", "K", "L" and "M" to the Murray Affirmation are opinions of the Attorneys General of the States of Hawaii, Maryland, Illinois, Texas, Mississippi, Louisiana, and Nevada, respectively, all concluding that DFS is gambling. They were all submitted to the Court by Attorney General Schneiderman in *People ex rel. Schneiderman v. DraftKings*. In addition, former Congressman James Leach, who drafted the federal legislation in 2006 known as the Unlawful Internet Gambling Enforcement Act ("UIGEA"), stated that it was "sheer chutzpah" for daily fantasy sports executives to pretend that UIGEA somehow made DFS legal. He said the legislation he sponsored was supposed to stop gambling on the Internet, not promote it. "Former Congressman Says DFS Is 'Cauldron of Daily Betting.'" Murray Affirmation, Exhibit "N". This document was also submitted by Attorney General Schneiderman in *People ex rel. Schneiderman v. DraftKings.*

Attached as Exhibit "O" to the Murray Affirmation are excerpts from an interview with Sheldon Adelson, the Chief Executive Officer of the Las Vegas Sands Corporation which owns the Marina Bay Sands in Singapore that in turn controls the Venetian Resort Hotel Casino and the Sands Expo and Convention Center. Adelson states unequivocally that DFS is "gambling." "There is no question about it." He went on to say that although he is in the gambling business, he opposes DFS because it "exploits poor people."

While the Legislature purports to state that DFS is not gambling, it is ironic where it inserted the law authorizing DFS in the Consolidated Laws of New York. Chapter 237 was placed in the heart of the Racing, Pari-Mutuel Wagering and Breeding Law (see Article 14), subjected DFS to regulation by the New York Gaming Commission, the State agency with oversight responsibility over all types of gambling (*see* Racing, Pari-Mutuel Wagering and Breeding Law, § 1405), directed the Commission to include "responsible protections with regard to compulsive play" (*Id.*, § 1402[6]), established safeguards to enable compulsive gamblers to exclude themselves (*Id.*, § 1401[1][d]), and prohibited advertisements targeting self-excluded persons (*Id.*, § 1404[6]). This begs two obvious questions: (1) if DFS is not gambling, why put Chapter 237 in the Racing, Pari-Mutuel Wagering and Breeding Law; and (2) if DFS is not gambling, exactly what is it?

For all the foregoing reasons, it is clear that (1) nothing the Legislature did in enacting Chapter 237 of the Laws of 2016 changes the reality that DFS involves betting on the performance of real-life athletes over whom the bettor has no control; (2) the skill / chance dichotomy is false in that, by Attorney General Schneiderman's own admission, both skill and chance are present in many forms of prohibited gambling; (3) DFS operators pool bets and take a percentage of the pool or profit; (4) DFS is "gambling"; and (5) the enactment of Chapter 237 violates Article I, § 9 of the Constitution.

Indeed, a former New York Attorney General said it best:

> To summarize, we find that sports betting is not permissible under Article I, § 9 of the New York Constitution. ***The specific Constitutional bans against book-making and pool-selling, as well as a general ban against any other***

> ***form of gambling not expressly authorized by the Constitution, would operate to invalidate a statute establishing a sports betting program ...***
>
> If the State government is to be authorized to run a program in which it accepts wagers on the outcome of professional athletic contests, ***either single contests or multi-contest parlays***, such authorization can only be acquired through an amendment to the Constitution (emphasis supplied). 1984 N.Y. Op. Atty Genl (1984 N.Y. A.G. LEXIS 94 at 42).

POINT IV

Article I, § 9 Does Not Give the Legislature the Power To Ignore Gambling, Much Less Promote It

Defendants argue that Article I, § 9 of the Constitution gives the Legislature the authority to enforce the Constitutional prohibition against gambling by passing "appropriate" laws to prevent it and that the courts must defer to the Legislature's choices as to how to enforce that prohibition.[11] Defendants' Memorandum of Law at 10, *et seq.* Defendants further contend that in the exercise of that power, the Legislature arguably could decide not to prevent certain gambling activity. *Id.* at 13, 14 n 5.

That is grossly misleading. Article I, § 9 unequivocally mandates that the Legislature "***shall***" pass laws to prevent gambling. In fact, Article I, § 9 not only directs the Legislature to pass laws to prevent gambling, it also states that, subject to exceptions

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[11] Even if any deference were due the Legislature, it should be minimal in this case as the debates at the time of passage by both the Senate and Assembly were brief, superficial and clearly not dispositive of the legal issue presented here. In fact, several legislators opposed to the bill pointed out the dubious constitutionality of the measure. See transcript of debates appended to the Lombardo Affirmation, Exhibits "H" and "I".

not applicable here, "***no ... pool-selling, book-making, or any other kinds of gambling ... shall be authorized or allowed within the State.***" (emphasis supplied). Here, the Legislature has gone beyond merely ignoring gambling and, in fact, decided to authorize it and to raise revenue by taxing it. *See* Racing, Pari-Mutuel Wagering and Breeding Law, § 1407. *See also* Assembly and Senate Legislative Memoranda in Support of Chapter 237 (Murray Affirmation, Exhibits "P" and "Q" at 3-4).

Article I, § 9 does not, as Defendants imply, invite the Legislature to turn a blind eye toward gambling. It does not instruct legislators to regulate gambling; it tells them not to allow it and to pass laws to prevent it. While Article I, § 9 gives the Legislature some discretion as to how to appropriately prevent gambling, that discretion is not a license to look the other way, and it is most certainly not an invitation to enact laws to promote the very kind of activity that Article I, § 9 was clearly intended to prohibit.

Defendants' entire Memorandum of Law is premised on the notion that the courts must defer to the Legislature because Article I, § 9 affords the Legislature some discretion with respect to enforcement. It is obvious that the Legislature has misread and distorted the language in Article I, § 9 so as to create a huge loophole rendering it totally meaningless.

To be sure, in the interests of practicality and the conservation of resources, the Legislature may choose not to criminalize incidental gambling between and among individuals, friends, families, or office pools for insignificant sums of money where there is no middleman skimming money off the top as part of a commercial gambling enterprise. DFS, however, is much different. It is a multi-million dollar business as is confirmed by

the Attorney General's own Complaints in *People v. DraftKings* and *People v. Fan Duel*. Lombardo Affirmation, Exhibits "A", ¶¶ "98"-"117" and "B", ¶¶ "65"-"90", respectively. It would be ludicrous to suggest that the Legislature could ignore, let alone authorize, gambling activity of that magnitude and still comply with Article I, § 9.

POINT V

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

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

Under either of the foregoing scenarios, the process takes time, and there is, of course, no certainty that the amendments would be approved by the public. The process is

deliberate; but it was meant to be as the Constitution is the bedrock upon which the whole structure of State Government rests. The Constitution belongs to the People, not to the Legislature, and it is the function of the Judiciary to protect it. Here, the Legislature and the Governor have sought to short-circuit the process and deprive the People of their exclusive right to amend the Constitution.

POINT VI

The Court Should Consider Converting Defendants' Motion To One For Summary Judgment

CPLR § 3211(c) allows the Court, after notice to the respective parties, to convert a Motion to Dismiss as one for Summary Judgment if the situation warrants. Defendants' motion papers do not raise any genuine factual dispute as to how DFS operates. Indeed, it would be difficult to do so because, as previously noted (*supra*, at 13-16), many of the allegations in the present Complaint are virtually identical to the allegations the Attorney General himself made in *People ex rel. Schneiderman v. DraftKings* and *People ex rel. Schneiderman v. Fan Duel*. Summary judgment is therefore appropriate, and Plaintiffs respectfully ask the Court to consider such a conversion after providing notice to both parties in accordance with CPLR § 3211(c). *Mihlovan v. Grozavu*, 72 N.Y.2d 506 (1988). *See generally*, Siegel, *New York Practice*, § 270 at 466-467 (5th Ed. 2011).

That would expedite a resolution to this case, and given the importance of the issue and the potential adverse effect the proliferation of gambling may have on vulnerable New

Yorkers with gambling addictions or compulsive gambling disorders,[12] the sooner this case is resolved, the better. As the Attorney General himself stated in a Memorandum of Law submitted in *People ex rel. Schneiderman v. DraftKings, Inc.*:

> ... 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 (Murray Affirmation, Exhibit "D" at 11).

CONCLUSION

Defendants' motion to dismiss should be denied, with costs, and the Court should consider treating it as a motion for summary judgment after which the Court should enter judgment declaring Chapter 237 of the Laws of 2016 unconstitutional as violative of Article I, § 9 of the Constitution and permanently enjoining Defendants from further implementing it.

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[12] See concerns raised by Attorney General Schneiderman in his complaint in *People ex rel. Schneiderman v. DraftKings*. Lombardo Affirmation, Exhibit "A" at ¶¶ 97-102.