SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Plaintiffs,

Index No. 5861-16

-against-

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

Defendants.

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MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Article I §9 of the State Constitution expressly delegates to the Legislature the authority to enact appropriate laws to effectuate the constitutional prohibition against "gambling" -- a term the Constitution itself leaves undefined. In late 2015 and early 2016, the Legislature heard hours of testimony on the new internet games known as daily fantasy sports ("DFS") and their impact in New York; researched the operations of fantasy sports and the skill needed to succeed in DFS games; and publicly debated the character of the games to determine whether they constitute gambling within the meaning of the Constitution. Concluding that they do not, the Legislature enacted L. 2016 Ch. 237 ("Ch. 237"), which established the legal status of specific online games known as interactive fantasy sports and declared that such contests properly fall outside the definition of gambling.

Plaintiffs bring this action against Governor Cuomo and the State Gaming Commission seeking a judgment declaring that Ch. 237 is unconstitutional and enjoining the State from implementing the statute's regulatory framework. Asserting that all interactive fantasy sports contests, and DFS in particular, constitute gambling within the meaning of the Constitution, plaintiffs seek to substitute their own judgment for that of the

Legislature. But the Legislature, acting on a well developed record, and having made reasoned findings set forth in the statute, made a rational policy choice. Plaintiffs cannot prove beyond a reasonable doubt that there is no rational basis for this legislative policy choice.

In enacting Ch. 237, the Legislature carried out its constitutional mandate to devise appropriate gambling laws. Accordingly, plaintiffs' motion for summary judgment should be denied, defendants' cross-motion for summary judgment should be granted, the complaint should be dismissed, and the court should issue a judgment declaring that Ch. 237 does not violate Article I §9 of the State Constitution.[1]

STATEMENT OF FACTS

For a complete statement of the relevant facts, see the accompanying affirmation of Richard Lombardo ("Lombardo Aff."), the accompanying affidavit of Evan Stavisky ("Stavisky Aff."), and Exhibits "A" through "PP" submitted therewith.

[1]When the plaintiff seeks a declaratory judgment, the court is required to declare the rights of the parties one way or the other. Homestead Funding Corp. v. State of New York Banking Department, 95 A.D.3d 1410, 1411 n. 3 (3d Dept. 2012).

Article I §9

Article I §9 of the State Constitution provides, in relevant part:

> [E]xcept as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature..., except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, and except casino gambling at no more than seven facilities as authorized and prescribed by the legislature shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

Penal Law §225.00(2)

Penal Law §225.00(2) defines "gambling" as follows:

> A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

Record Before the Legislature on Fantasy Sports

The following description of fantasy sports is based on the testimony given at the Assembly's December 8, 2015 public hearing to examine fantasy sports games in New York State and their impact on New York consumers and the State.

Traditional Fantasy Sports

Participants in fantasy sports contests, which have existed for more than 35 years, select fantasy teams of real-world athletes and compete against other contestants based on a scoring system that awards points based on the individual athlete's performances, not the outcome of the games in which the athletes play. Contestants typically select a fantasy team of real-world players, such as quarterback, running back, wide receiver, tight end, and kicker in football, to fill positions on the fantasy teams. The object of a fantasy sports contest is to assemble a team of real-world athletes whose performance will accumulate the most points across multiple fantasy scoring categories. For example, a running back may, according to the rules of a contest, earn one point for every ten rushing yards and six points for a touchdown. Exhibit "Q" pp. 9-14, 22, 37-38, 49, 53-55, 83-84, 128.[2]

Daily Fantasy Sports

In traditional season-long fantasy sports contests, contestants must wait for the real-world season to end before a winner of the fantasy contest is determined. To provide more immediate results in shorter-term contests, online interactive

[2]All references herein to exhibits are to those submitted with the accompanying affirmation of Richard Lombardo and the accompanying affidavit of Evan Stavisky.

fantasy sports providers, the two largest of which are DraftKings, Inc. ("DraftKings") and FanDuel, Inc. ("FanDuel"), began to offer their subscribers weekly and daily online fantasy sports formats. DFS contests share many of the same features as traditional season-long contests, but are much shorter in duration. In addition, while each real-world athlete can be selected by only a single contestant in the traditional season-long format, the real-world athletes in daily and weekly leagues are assigned a fantasy salary and can be selected by any contestant so long as the fantasy team does not exceed its salary cap. Exhibit "Q" pp. 11-12, 19, 21, 23-24, 27, 37, 53-54, 68, 78-80, 84, 125, 136, 143, 166.

Commencement of the People's Actions against DraftKings and FanDuel

On November 17, 2015, the People of the State of New York ("the People"), by the Attorney General, commenced actions against DraftKings and FanDuel in Supreme Court, New York County, alleging that DFS contests constituted gambling under New York Law and seeking a judgment enjoining DraftKings and FanDuel from violating the laws of the State of New York. The lawsuits also alleged that DraftKings and FanDuel had engaged in deceptive advertising and consumer fraud and sought restitution for customers, penalties, and other relief. Lombardo Aff. ¶5; Exhibits "C" and "D".

By orders dated December 11, 2015, Supreme Court granted the People's motion for a preliminary injunction. Lombardo Aff. ¶6; Exhibit "E".

By order dated January 11, 2016, the Appellate Division, First Department stayed Supreme Court's preliminary injunction pending DraftKings and FanDuel's appeals therefrom. Lombardo Aff. ¶7; Exhibit "F".[3]

L. 2016 Ch. 237

On August 3, 2016, while the People's actions against DraftKings and FanDuel were pending, Governor Cuomo signed into law Ch. 237 (Lombardo Aff. ¶10; Exhibit "K"), which amends the Racing, Pari-Mutuel Wagering and Breeding Law ("Racing Law") by adding a new Article 14. The statute defines an "interactive fantasy sports contest" as "a game of skill wherein one or more contestants compete against each other by using their knowledge and understanding of athletic events and athletes to select and manage rosters of simulated players whose performance directly corresponds with the actual performance of human competitors on sports teams and in sports events." Racing Law §1401(8).

Ch. 237 sets forth the Legislature's findings and declaration that:

[3]On March 23, 2016, DraftKings and FanDuel agreed to suspend their DFS games in New York pending the resolution of the legal status of interactive fantasy sports. Lombardo Aff. footnote 2.

> 1.... (a) Interactive fantasy sports are not games of chance because they consist of fantasy or simulation sports games or contests in which the fantasy or simulation sports teams are selected based upon the skill and knowledge of the participants and not based on the current membership of an actual team that is a member of an amateur or professional sports organization;
>
> (b) Interactive fantasy sports contests are not wagers on future contingent events not under the contestants' control or influence because contestants have control over which players they choose and the outcome of each contest is not dependent upon the performance of any one player or any one actual team. The outcome of any fantasy sports contest does not correspond to the outcome of any one sporting event. Instead, the outcome depends on how the performances of participants' fantasy roster choices compare to the performance of others' roster choices.
>
> 2. Based on the findings in subdivision one of this section, the legislature declares that interactive fantasy sports do not constitute gambling in New York state as defined in article two hundred twenty-five of the penal law.

Racing Law §§1400(1) and (2).

Ch. 237 further provides for safeguards and minimum standards for interactive fantasy sports and the registration, regulation, and taxation of interactive fantasy sports providers. Racing Law §§1402 to 1410. The statute declares that only interactive fantasy sports contests that are registered and conducted pursuant to the law are authorized to proceed (Racing Law §1411) and expressly prohibits the conduct of unregistered interactive fantasy sports contests (Racing Law §1412). To become registered, the interactive fantasy sports

registrant must implement measures that "ensure all winning outcomes reflect the relative knowledge and skill of the authorized players and shall be determined predominantly by accumulated statistical results of the performance of individuals in sports events." Racing Law §1404(1)(o). Recognizing that the contests are heavily influenced by skill and knowledge, the operators must identify (to other players) the highly experienced players and limit the number of entries (Racing Law §§1404(1)(g) and (2)), so less skillful players are on notice of the quality of opponents in a contest and may choose contests against less skillful players.

Both houses passed the bill on June 17, 2016 (Exhibits "L", "M", and "N") after their members had the opportunity to review the Assembly and Senate memoranda in support of the bill (Exhibits "O" and "P"); consider the findings of the Assembly Standing Committees on Racing and Wagering and Consumer Affairs and Protection as well as the Legislative Commission on Administrative Regulations Review (collectively "the Committees") that fantasy sports are not gambling within the meaning of the Constitution (Exhibit "L" p. 145);[4] and debate the

[4]While Exhibit "Q" is the complete transcript of the Committees' December 8, 2015 public hearing, Exhibits "L" and "M" contain the relevant portions of the transcripts of the Legislature's June 17, 2016 proceedings. The page numbers referred to herein are the original page numbers of the complete transcripts.

issue of whether fantasy sports constitute gambling within the meaning of the Constitution (Exhibit "L" pp. 146-72). Notably, the Committees' findings were made after researching the operations of fantasy sports and a December 8, 2015 public hearing to examine fantasy sports games in New York State and their impact on New York consumers and the State, at which both proponents and opponents of DFS testified at length (Exhibit "L" p. 145; Exhibit "Q").

Discontinuance of the People's Actions against DraftKings and FanDuel

After the enactment of Ch. 237, on August 12, 2016, the People discontinued those portions of its actions against FanDuel and DraftKings that had alleged, before the enactment of Ch. 237, that DFS contests constituted gambling under New York law. Lombardo Aff. ¶8; Exhibits "G" and "H".[5]

[5]Plaintiffs try to make much of the fact that, prior to the enactment of Ch. 237, the People commenced actions against DraftKings and FanDuel alleging that DFS constitutes gambling within the meaning of Article I §9. But, plaintiffs overlook a critical feature of that constitutional provision -- it entrusts the Legislature with the responsibility to determine, within rational bounds, the legal scope of the prohibition. The Legislature has now determined that interactive fantasy sports contests do not constitute gambling; the legal analysis has fundamentally changed; and this office is defending the Legislature's constitutionally valid determination. Nor do the opinions reflected in the gambling community or the New York Times crossword puzzle (Plaintiffs' Memorandum in Support of their Motion for Summary Judgment ("Pl. Mem.") pp. 30-31) trump the reasoned judgment of the Legislature. The issue before the court is not whether certain third parties might prefer to view interactive fantasy sports as "gambling", but whether there is a rational basis for the Legislature's determination that it is not.

After settling the People's remaining claims against DraftKings and FanDuel,[6] on October 25, 2016, the People discontinued the remaining portions of its actions. Lombardo Aff. ¶9; Exhibits "I" and "J".

ARGUMENT

THE LEGISLATURE'S DETERMINATION THAT INTERACTIVE FANTASY SPORTS CONTESTS DO NOT CONSTITUTE GAMBLING WAS A RATIONAL IMPLEMENTATION OF ITS AUTHORITY TO DETERMINE THE SCOPE OF THE CONSTITUTIONAL GAMBLING PROHIBITION

A. Legislation is presumed to be constitutional.

Ch. 237 carries a strong presumption of constitutionality and, in order to overcome that presumption, the plaintiffs must establish the invalidity of the statute beyond a reasonable doubt. Dalton v. Pataki, 5 N.Y.3d 243, 255, cert. denied, 546 U.S. 1032 (2005); Pharmaceutical Manufacturers Association v. Whalen, 54 N.Y.2d 486, 493-94 (1981); Cook v. City of Binghamton, 48 N.Y.2d 323, 330 (1979). "Every legislative enactment carries a strong presumption of constitutionality including a rebuttable presumption of the existence of necessary factual support for its provisions." Birkeland v. State, 98 A.D.2d 395, 398 (2d Dept.), affirmed, 64 N.Y.2d 663 (1984).

[6]The settlements required DraftKings and FanDuel to pay penalties and costs and implement various reforms to their marketing practices. Lombardo Aff. footnote 3.

Demonstrating unconstitutionality beyond a reasonable doubt is a very heavy burden and courts should strike down statutes on the ground of unconstitutionality only as a last unavoidable result. Lighthouse Shores, Inc. v Town of Islip, 41 N.Y.2d 7, 11 (1976); Van Berkel v. Power, 16 N.Y.2d 37, 40 (1965). See also N.Y. Statutes Law §150 ("The courts should not strike down a statute as unconstitutional unless such statute clearly violates the Constitution"). As set forth below, the plaintiffs cannot meet this heavy burden.

B. The Legislature has the authority to make rational decisions to determine what conduct constitutes prohibited gambling.

Article I §9 of the State Constitution prohibits gambling in New York, apart from the exceptions enumerated therein (i.e., State lottery, pari-mutuel wagering on horse racing, commercial casinos, and charitable gaming), and authorizes the Legislature to "pass appropriate laws to prevent offenses against any of the provisions of this section." Thus, the constitutional prohibition against gambling is not self-executing. People ex rel. Sturgis v. Fallon, 152 N.Y. 1, 11 (1897) ("[T]his provision of the Constitution was not intended to be self-executing... as it expressly delegates to the legislature the authority, and requires it to enact such laws as it shall deem appropriate to carry it into execution.").

Although Article I §9 does not define gambling, the delegation to the Legislature of the responsibility to "pass appropriate laws to prevent offenses..." necessarily gives the Legislature latitude to determine what conduct constitutes (and does not constitute) impermissible gambling in New York. Such authority has been recognized by the courts even without an explicit statement (as here) in the Constitutional provision that assigns the primary responsibility for effectuating such provision to the Legislature. See, e.g., Birkeland v. State, 98 A.D.2d at 398 (when the Constitution requires using competitive civil service examinations "to the extent practicable", it is province of the Legislature to determine when such requirement is impracticable). Here, Article I §9 explicitly instructs the Legislature to determine what laws are appropriate to implement a general prohibition of gambling.

The Legislature has exercised this constitutional authority in both criminal and civil statutes. For example, Penal Law §225.00(2) defines gambling as a contest in which a person stakes something of value upon the outcome of a contest of chance or a future contingent event not under his control or

influence.[7] Penal Law §225.00(1) defines a contest of chance as one in which the outcome depends in a material degree upon an element of chance.[8] See Harris v. Economic Opportunity Commission of Nassau County, 171 A.D.2d 223, 227 (2d Dept. 1991) ("Among the 'appropriate laws' enacted by the Legislature in furtherance of the constitutional prohibition against gambling is Penal Law article 225, which supplies the definitions of proscribed gambling activities."). Moreover, the Legislature

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[7]Plaintiffs inaccurately assert that "the best evidence of the meaning of the term 'gambling' in Article I, §9..." is set forth in Penal Law §351 ("the pool-selling/book-making statute"), as amended in 1895 (L. 1985 Ch. 572 §1). Pl. Mem. pp. 26-28. In fact, although it was amended "immediately on the heels of..." Article I §9 (Pl. Mem. p. 26), the pool-selling/book-making statute (then Penal Law §986) was repealed in 1965 when Penal Law §225.00 was enacted. L. 1965 Ch. 1030. Because Article I §9 explicitly instructs the Legislature to determine what laws are appropriate to implement a general prohibition of gambling, the only currently valid definition of the meaning of the term "gambling" in Article I §9 is found in Penal Law §225.00(2). Moreover, in Formal Opinion No. 84-F1, in which the Attorney General opined that sports betting constitutes gambling within the meaning of Article I §9, he simply referred to the pool-selling/book-making statute when discussing the "early prohibitions" of gambling. Thus, there is no basis for plaintiffs' assertion that Ch. 237 "contradicts" Formal Opinion No. 84-F1 (Pl. Mem. pp. 27-29).

[8]Enacted in 1965, Penal Law §225.00(1) (L. 1965 Ch. 1030) defined a "contest of chance" more expansively than required by the Constitution as interpreted by the Court of Appeals. Prior to the enactment of Penal Law §225.00(1), games that were determined primarily by chance were unlawful. See People ex rel. Ellison v. Lavin, 179 N.Y. 164, 170-71 (1904) ("The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game." (emphasis added)). Under Penal Law §225.00(1), the definition of a contest of chance was expanded to encompass games in which the outcome depends in a material degree upon an element of chance. See Plato's Cave Corp. v. State Liquor Authority, 115 A.D.2d 426, 428 (1st Dept. 1985), affirmed, 68 N.Y.2d 791 (1986).

has determined in the civil context that certain wagers are illegal and has provided civil remedies in regard to the recovery of prohibited wagers. General Obligations Law §§5-401 and 5-419.

When an activity could reasonably be considered to be gambling or not, there is latitude for the Legislature to declare whether such activity should be prohibited, in exercising its duty to "pass appropriate laws to prevent offenses..." against Article I §9. For instance, when it enacted Penal Law §225.00, the Legislature could have retained the definition of a contest of chance set forth in People ex rel. Ellison v. Lavin, 179 N.Y. at 170-71, i.e., a game in which chance is the dominating element that determines the result of the game. Such a determination would have been a rational legislative choice. Another rational choice was the Legislature's determination to define a contest of chance as a game in which the outcome depends in a material degree upon an element of chance. Penal Law §225.00(1).

Similarly, the Legislature could have made bettors criminally culpable for illegal gambling. Cf. Ga. Code Ann. §16-12-21. However, the New York Legislature rationally determined that the gambling activity of players themselves does not create criminal culpability under Penal Law Article 225 (see

Penal Law §225.00(3); People v. DiCarlo, 62 Misc.2d 638, 639 (Erie Co. Ct. 1970)), but that promoting gambling activity is a crime (see Penal Law §§225.05 and 225.10).[9] The Constitution does not mandate any of those policy options. Rather, the Constitution explicitly assigns to the Legislature the policy decisions of what "appropriate laws" to enact to prevent gambling, as the Legislature might see fit in the rational exercise of its duty.

The Legislature's discretion to determine what conduct constitutes gambling within the meaning of the Constitution is, of course, not unfettered. Rather, were the Legislature to enact an irrational law authorizing gambling activity, a person challenging such a statute could demonstrate that the Constitution's general gambling prohibition would constrain such a law. For example, were the Legislature to pass a statute generally authorizing roulette games in New York, such a law would plainly violate Article I §9. Unlike fantasy sports, roulette is a game of pure chance, in which a wheel is spun and a ball settles in a compartment labeled with a number, after

[9]Contrary to plaintiffs' argument (Pl. Mem. p. 37), there is no measure of the "incidental" nature of private gambling or whether wagered sums are "insignificant". Whether privately wagered sums not facilitated by others are significant or insignificant, all are regulated civilly rather than criminally. See General Obligations Law §§5-401 through 5-410.

players have placed wagers in regard to which numbered compartment the ball will settle. See 9 NYCRR §5324.4(c) (describing conduct of roulette in commercial casinos at which Article I §9 authorizes gambling). The general authorization of any game of pure chance on which players wager would, unlike Ch. 237, be an irrational exercise of the Legislature's Constitutional duty to pass appropriate laws to prevent gambling.

The Legislature has also exercised its constitutional authority by determining whether specific activities should be construed to be gambling. For example, Racing Law §906 authorizes certain commercial entities to operate horse-racing handicapping tournaments, at which the participants may be charged an entry fee. The Legislature declared that "[a] handicapping tournament operated in accordance with the provisions of this section shall be considered a contest of skill and shall not be considered gambling." Racing Law §906(3).[10] This policy choice of the Legislature is rational and it contradicts plaintiffs' assertion that the Legislature's

[10]This provision was enacted in 1995 as Racing Law §908(3). L. 1995 Ch. 2 §110. It was renumbered §906(3) in 2008. L. 2008 Ch. 18 §81. Defendants have not found any indication that there has ever been a challenge to the constitutionality of this provision.

determination of what constitutes gambling renders the Constitution a "nullity" (Pl. Mem. P. 23).

Plaintiffs also assert that the delegation to the Legislature of the responsibility to "pass appropriate laws to prevent offenses..." does not authorize it to "carve out exceptions to the prohibitions against gambling...." Pl. Mem. p. 23. Yet, the authority to define what is gambling necessarily permits the Legislature to define what is not gambling. Cf. Lambert v. California, 355 U.S. 225, 228 (1957) ("There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition."). The Legislature has, in the past, appropriately used the delegation of authority to define gambling to determine what conduct does not constitute gambling. This is precisely what was done when Ch. 237 was enacted. While plaintiffs argue that the presence of skill in selecting an interactive fantasy sports roster does not eliminate the element of chance (Pl. Mem. p. 5), there is no requirement that the Legislature prohibit as gambling any activity that includes any element of chance.

In this instance, the Legislature once again exercised its authority to determine whether a certain activity constitutes prohibited gambling. Upon careful consideration of the facts, the Legislature determined that certain registered and regulated

forms of interactive fantasy sports are contests of skill, not gambling.

C. The courts have accorded the Legislature substantial latitude in determining what conduct constitutes prohibited gambling.

New York courts have confirmed that the Legislature has substantial latitude in determining and legislating what conduct constitutes gambling within the meaning of the Constitution. This determination is ultimately a policy choice that lies within the province of the Legislature to address. See Saratoga County Chamber of Commerce Inc. v. Pataki, 293 A.D.2d 20, 26 (3d Dept. 2002), modified in part, 100 N.Y.2d 801, cert. denied 540 U.S. 1017 (2003) (issues affecting the health and welfare of state residents implicate policy choices lying squarely within the province of the Legislature); Dalton v. Pataki, 11 A.D.3d 62, 65 (3d Dept. 2004), modified in part, 5 N.Y.3d 243, cert. denied 546 U.S. 1032 (2005) (same); People v. Taylor, 9 N.Y.3d 129, 160 (2007) (Smith, J. concurring) (citing Hernandez v. Robles, 7 N.Y.3d 338 (2006)) (courts should defer to what the Legislature decides with respect to controversial issues of public policy); Campaign for Fiscal Equity, Inc. v. State, 8 N.Y.3d 14, 28 (2006) (noting the necessary deference of the courts to the policies of the Legislature).

Whether particular activities that are not pure chance games are gambling is not, contrary to what plaintiffs claim,

"self-evident" (Pl. Mem. p. 30). Such an argument is nothing more than reasoning by assertion. See also Pl. Mem. p. 25 ("[T]here is simply no doubt that the term 'gambling', as written into the Constitution in 1894, includes [interactive fantasy sports]..." (Pl. Mem. p. 25). In fact, the Legislature may act in regard to activities unknown to the Legislature of 1894, so long as it acts rationally. For example, in People ex rel. Sturgis v. Fallon, 152 N.Y. at 11, in upholding a statute that eliminated any criminal penalties for certain forms of wagering on horse races, the Court of Appeals set forth a highly deferential standard of review of the Legislature's implementation of Article I §9:

> [W]e are aware of no principle of constitutional law which would authorize this court to condemn it as invalid or unconstitutional, because, in our opinion, some more effective or more appropriate law might have been devised and enacted. So long as this legislation was in any degree appropriate to carry into effect the purpose of the Constitution, it does not fall under its condemnation.

In Mellman v. Metropolitan Jockey Club, Inc., 195 Misc. 121, 123-25 (Sup. Ct. N.Y. Co. 1949), the petitioner alleged that daily double wagering at racetracks is "not pari-mutuel betting on horse races as permitted by Article I §9..." if the tickets were not vended, computed, and determined by a totalizator machine. The Constitution is silent on totalizator machines and the Legislature had enacted a law to sanction the

sale of daily double tickets by means not mechanical or electrical. The petitioner alleged that allowing daily double wagering expanded gambling without proper authority. 195 Misc. at 124. The court applied the presumption of constitutionality and held that the Legislature had not acted unreasonably in enacting the statute. Id. at 124-25.

Moreover, courts give due deference to the Legislature's duty to "pass appropriate laws to prevent offenses against any of the provisions..." of Article I §9. For example, in Dalton v. Pataki, 5 N.Y.3d at 263-65, the Court of Appeals applied the presumption of constitutionality in rejecting a challenge to the Legislature's inclusion of video lottery games within the operation of the State lottery. Article I §9 does not define what constitutes a lottery and expressly directs the Legislature to prescribe the operation of the State lottery. The court gave the Legislature latitude to determine that an electronic form of lottery was a permissible lottery game.[11]

[11]Plaintiffs misconstrue case law when they assert that "[e]xceptions to prohibitions must be strictly construed...." Pl. Mem. p. 25 (citing Ramesar v. State of New York, 224 A.D.2d 757, 759 (3d Dept.), leave denied, 88 N.Y.2d 811 (1996); Molina v. Games Management Services, 58 N.Y.2d 523, 529 (1983)). In fact, the cases on which plaintiffs rely simply stand for the proposition that agency regulations in regard to lawful gambling must be construed strictly. They do not even address the Legislature's latitude to define gambling.

Here, the Legislature's enactment of Ch. 237 carries the presumption that it is a constitutional exercise of its duty to pass appropriate laws in regard to defining permissible and prohibited gambling activities. The rationale for affording the Legislature broad latitude in weighing the appropriate scope of New York gambling laws is enhanced for interactive fantasy sports, online games that did not exist until recently, were not contemplated by the drafters of either the Constitution or the general gambling statutes, and have attributes not present in traditional gambling contests. As the Court of Appeals stated in Dalton v. Pataki, 5 N.Y.3d at 265, "[t]he language of the Constitution is not so rigid as to prevent this type of update and modernization."

D. The Legislature rationally determined that interactive fantasy sports contests do not constitute gambling.

"Every legislative enactment carries a... rebuttable presumption of the existence of necessary factual support for its provisions." Birkeland v. State, 98 A.D.2d at 398 (citations omitted). The Legislature has found and declared that interactive fantasy sports, regulated and conducted in a manner described by Ch. 237 with safeguards and minimum

standards,[12] are neither games of chance (Racing Law §1400(1)(a)) nor wagers on future contingent events not under the contestants' control or influence (Racing Law §1400(1)(b)) and, therefore, do not constitute gambling in New York as defined in Penal Law §225.00 (Racing Law §1400(2)). The Legislature had sufficient evidence before it to support these findings. Moreover, the Legislature's finding that interactive fantasy sports contests are games of skill is corroborated by extrinsic evidence.

1. The Legislature had sufficient evidence before it to support its findings.

(a) The Legislative Record

The legislative record demonstrates that fantasy sports contests challenge a participant to exercise judgment, similar to a general manager of a real-world sports team, by analyzing data and statistics and numerous variables to assemble the best possible roster of real-world athletes with whom to win the fantasy contest. Exhibit "Q" pp. 13, 21-22, 30, 37-39, 54, 66, 73-74, 104. The evidence further showed that fantasy sports allow a contestant to make meaningful decisions that affect the

[12]For example, in response to concerns raised by the fact that "certain DFS players will enter hundreds, or even thousands, of unique lineups..." (complaint ¶¶78, 146), Racing Law §1404(2) restricts the number of entries that may be submitted by a single interactive fantasy sports participant.

result of the fantasy competition by selecting the roster of real-world athletes for the fantasy team. See Racing Law §§1404(1) and (2) (setting forth restrictions on permissible contests). The Legislature could thus rationally determine that a contestant's ability to win turns on the contestant's level of skill and the amount of time and effort that the contestant devotes to analyzing the roster choices for the fantasy contest, compared to the knowledge, skill, time, and effort of competing contestants. Exhibit "Q" pp. 12-14, 34, 36-39; 44, 74-75, 104-05.[13] And the Legislature requires that every interactive fantasy sports game, as regulated, must "ensure that outcomes are based on the relative skill and knowledge of the contestants." Racing Law § 1404(1)(o).

This Legislative determination is further supported by evidence showing that a very small percentage of interactive fantasy sports contestants receive a very large percentage of the prize money, suggesting that the skills exercised by this small percentage of winners materially affects the outcome of these contests. Exhibit "Q" pp. 12, 36-37, 39-41, 43, 45. For example, when a study was conducted pitting human players

[13]Thus, there was a rational basis for the Legislature to distinguish interactive fantasy sports from games of chance such as poker, where "the outcome depends to a material degree upon the random distribution of cards." United States v. DiCristina, 726 F.3d 92, 98 n. 5 (2d Cir. 2013) (Pl. Mem. pp. 32-33).

against randomly generated lineups in a series of simulations, the skilled human players defeated the computers more than 80 percent of the time. Exhibit "Q" pp. 41-42. Thus, although the results of fantasy sports contests depend, to some extent, upon "the subsequent actual performance of actual athlete(s) in actual sporting events..." (Pl. Mem. p. 30), the Legislature has required lawful fantasy contests to be decided by an accumulation of results from multiple players on each fantasy roster, thus ensuring that, in the Legislature's judgment, the element of skill will dominate the determination of results. The Legislature, recognizing the signal importance of knowledge and skill in these contests, also requires that highly experienced players be identified (to other players) and limits their number of entries in each contest. Racing Law §§1404(1)(g) and (2).[14]

Moreover, unlike traditional sports betting, which involves wagering money on the outcome of a single real-world contest, the outcomes of fantasy sports contests are not determined by a single random event or one team's performance. Rather, fantasy sports contests turn on the aggregation of individual

[14]Contrary to plaintiffs' assertion, this requirement does not "reduce the element of 'skill'...". Pl. Mem. p. 36. The requirement simply provides for a more level playing field for the less skillful contestants who may wish to compete against only those players who have similar experience levels.

statistical performance of rosters of real-world players from several different real world teams, as selected by the contestants. Exhibit "Q" pp. 47-51, 73-74, 149.

The evidence presented to the Committees provided a rational basis for the Legislature to determine that registered and regulated interactive fantasy sports contests are not gambling offenses to be declared illegal.[15] While plaintiffs may disagree as a matter of policy, the Legislature's determination is presumed to be constitutional. Plaintiffs cannot meet their burden of demonstrating beyond a reasonable doubt that Ch. 237 contravenes Article I §9. Thus, there is no basis for the plaintiffs to urge the court to substitute its own judgments and preferences for that of the Legislature.

(b) Additional Information Submitted in Support of Ch. 237

Additional information submitted to the Legislature and the Governor in support of Ch. 237 (Stavisky Aff. ¶¶3-21; Exhibits "R" through "II") further demonstrates the rationality of the challenged legislative action. These submissions included:

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[15]That some members of the Legislature argued and voted against the bill (see Pl. Mem. pp. 13-14, 34-36) merely establishes that reasonable minds may differ as to what constitutes gambling. It further demonstrates that the very arguments that plaintiffs now make "ha[ve] already been considered and rejected by the Legislature." Steele v. Board of Education of the City of New York, 40 N.Y.2d 456, 474 (1976) (Fuchsberg, J. dissenting). In this case, they were rejected overwhelmingly by votes of 111 to 21 in the Assembly and 45 to 17 in the Senate. See Exhibit "N".

written testimony, correspondence, and other materials from representatives of DraftKings, FanDuel, the Fantasy Sports Trade Association, and professional sports teams, which describe the mechanics of the interactive fantasy sports contests and the proposed legislation, demonstrate that fantasy sports contests are games of skill, and advocate for the regulation of interactive fantasy sports in New York (Exhibits "R" through "AA", "HH", and "II"); editorials from Newsday and the New York Post (Exhibit "BB"); and memoranda containing detailed, reasoned legal analyses of the constitutionality of Ch. 237 (Exhibits "CC" through "GG"). These additional documents submitted to the Legislature and the Governor provide ample factual and legal support for the conclusion that fantasy sports contests are neither contests of chance nor wagers on future contingent events not within the contestants' control or influence and that Ch. 237 is a rational means of implementing Article I §9.

2. The Legislature's finding that interactive fantasy sports contests are games of skill is corroborated by extrinsic evidence.

When determining whether there is a rational basis for a legislative enactment, "any conceivable rational basis is sufficient to sustain the statute's constitutionality." New York State United Teachers v. State of New York, 46 Misc. 3d 250, 264 (Sup. Ct. Albany Co. 2014) (emphasis added). "Since

the challenged statute is presumed to be valid, the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it whether or not the basis has a foundation in the record." Affronti v. Crosson, 95 N.Y.2d 713, 719 (2001) (citations and internal quotation marks omitted) (emphasis in original). Thus, although the evidence before the Legislature was more than adequate to support its conclusions, when assessing the rationality of the Legislature's determination that registered and regulated interactive fantasy sports contests are games of skill, the court may consider available extrinsic evidence as well.

First, there is a significant amount of literature from the online fantasy sports industry that explains how fantasy sports contests operate and how the outcome of such contests turns almost entirely on the skill of the participants. See, e.g., Exhibits "JJ" through "MM"; Stavisky Aff. ¶¶23-26. More significantly, numerous statistical studies corroborate the Legislature's finding that interactive fantasy sports contests are games of skill.[16]

For example, a statistical study of FanDuel contest data, conducted by four professors from the Massachusetts Institute of

[16]Some of these studies were discussed during the December 8, 2015 legislative hearing. See, e.g., Exhibit "Q" pp. 41-42.

Technology and one from the University of Toronto Institute for Aerospace Studies, confirms that outcomes of fantasy sports contests are predominantly based on skill. First, simulations that pitted actual lineups chosen by FanDuel users against lineups chosen at random demonstrated that human choices significantly influence the results of the contest. Second, over a large enough set of contests, fantasy sports contestants can improve their performance over time based on practice and experience. Third, although skill does improve gradually, when measured over a single season, the identifiable skill profile of fantasy sports participants remains relatively consistent. A copy of the report of that study, entitled "Luck and the Law: Quantifying Change in Fantasy Sports and Other Contests", is submitted herewith as Exhibit "OO". Stavisky Aff. ¶28.

Further, a statistical analysis of DraftKings' fantasy games operations conducted by a professor of statistics at Hebrew University also "showed that fantasy games offered by DraftKings have an inherent and vast character of skill where chance is overwhelmingly immaterial in the probability of winning in such games." This is demonstrated by the high winning percentage of DraftKings' most successful players. A copy of the report of this study is submitted herewith as Exhibit "PP". Stavisky Aff. ¶29.

In addition, Gaming Laboratories International performed a skill simulation analysis of DraftKings' fantasy baseball contests. The study pitted rosters prepared by skilled players against rosters chosen at random by unskilled players in more than 550 contests. The results of this analysis showed that skilled players defeated unskilled players over 70 percent of the time. The study also pitted 1,000 rosters prepared by the top 15 earning fantasy baseball participants against the same number of computer generated skilled and unskilled rosters. The top 15 performers defeated the computer generated unskilled rosters over 80 percent of the time and the computer generated skilled rosters over 65 percent of the time. A copy of the report of this study is submitted herewith as Exhibit "NN". Stavisky Aff. ¶27.

These studies scientifically support the Legislature's conclusion that fantasy sports contests are games of skill. First, if, as plaintiffs insist, fantasy sports contests were games of chance, lineups chosen by actual contestants would not consistently beat those chosen at random. Second, if as plaintiffs assert, fantasy sports contests were not games of skill, contestants would not improve their performance over

time. Third, if as plaintiffs allege, fantasy sports contests were gambling, contestants' skill levels would not remain constant over a single season. Finally, if, as plaintiffs claim, fantasy sports contests constituted betting on the outcome of a future contingent event not under the contestants' control or influence, a small majority of participants, i.e., the most skillful players, would not win a majority of the contests.

E. The Legislature's determination that interactive fantasy sports contests do not constitute gambling is consistent with determinations made by 18 other State Legislatures and the United States Congress.

Finally, the rationality of our Legislature's determination that interactive fantasy sports contests do not constitute gambling is further supported by similar determinations made by 18 other State Legislatures and the United States Congress. See Brous v. Smith, 304 N.Y. 164, 169 (1952) (when considering challenge to the constitutionality of a New York statute, court noted that similar statutes had been enacted in other states and found to be constitutional); Landes v. Landes, 1 N.Y.2d 358, 362 (1956) (same).

Interactive fantasy sports contests have been determined not to be gambling by the Legislatures of Arkansas (A.C.A. §23-

116-103), Colorado (C.R.S. §12-15.5-101 *et. seq.*), Connecticut (Conn. P.A. 17-2 §649), Delaware (29 Del. C. §4871), Indiana (Ind. Code Ann. §4-33-24-1), Kansas (K.S.A. §21-6403(a)(9)), Maine (2017 Me. SP 449), Maryland (Md. Crim. Law Code §12-114), Massachusetts (2016 Mass. Acts Ch. 219 §135), Mississippi (Miss. Code Ann. §97-33-301 *et. seq.*), Missouri (§313.920 R.S.Mo.), New Hampshire (2017 NH HB 580), New Jersey (N.J. Stat. § 5:20-2), Ohio (O.R.C. Ann. §3774.01 *et seq.*), Pennsylvania (4 Pa. C.S. §301 *et seq.*), Tennessee (Tenn. Code Ann. §39-17-501), Vermont (2017 Vt. S. 136), and Virginia (Va. Code Ann. §59.1-569).

Moreover, in prohibiting certain financial transactions associated with gambling, Congress expressly excluded fantasy sports (as well as other activities such as insurance and stock market speculation) from the scope of the federal statute. See 31 U.S.C. §5362(1)(E)(ix)).

CONCLUSION

As demonstrated above, the challenged statute constitutes a rational exercise of the Legislature's constitutional authority to enact appropriate laws to effectuate the constitutional prohibition against gambling. Accordingly, plaintiffs' motion for summary judgment should be denied, defendants' cross-motion

for summary judgment should be granted, the complaint should be dismissed, and the court should issue a judgment declaring that Ch. 237 does not violate Article I §9 of the State Constitution.

Dated: Albany, New York
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Yours, etc.,

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