# STATE OF NEW YORK – SUPREME COURT
# APPELLATE DIVISION – THIRD DEPARTMENT

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

*Plaintiffs-Respondents-Cross-Appellants,*

*-against-*

**No. 528026**

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

*Defendants-Appellants-Respondents.*

## CORRECTED REPLY BRIEF FOR PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS

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## PRELIMINARY STATEMENT

This corrected Reply Brief, submitted on behalf the Plaintiffs-Respondents-Cross-Appellants (hereinafter "Plaintiffs") in response to this Court's Order dated July 3, 2019, will address the arguments advanced in their respective Briefs by the Defendants-Appellants-Cross-Appellants ("the State" and/or "Defendants") and the *amici,* FanDuel, Inc. and DraftKings, Inc.

## ARGUMENT

## POINT I

### Defendants and *Amici* Have Admitted the "Materiality" of Future Contingent Events By Acknowledging that the Outcomes of Daily Fantasy Sports Contests Depend on the Future Performance of Real-Life Athletes

There are inescapable, inconvenient truths that neither the State nor *amici* have been able to refute or hide in their respective briefs. The outcome of every single DFS[1] contest depends on the

[1] "DFS" refers to "daily fantasy sports" and is used here interchangeably with "IFS" which means "interactive fantasy sports."

future performance of athletes participating in real-life sporting events, and contestants participating in DFS contests have no influence or control over how those athletes will actually perform in what are indisputably future contingent events. *See* ¶ "2" of Statement of Agreed Upon Facts [R. 441].[2] Indeed, both FanDuel and DraftKings admit "materiality" when they acknowledge that the outcomes of the contests they conduct depend on the statistics amassed from the performance of those athletes. *See* testimony before the Legislature of Jeremy Kudon, Esq., the attorney and lobbyist for FanDuel, DraftKings and the Fantasy Sports Trade Association [R. 764].

Mr. Kudon unequivocally stated that "fantasy sports contests by comparison [to traditional sports wagering] *turn on* the aggregation of individual statistical performances from ... anywhere from 6 to 10 players" (emphasis supplied) [R. 766]. The alleged distinction that Mr. Kudon and his lobbying clients claim exists

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[2] Numbers in brackets preceded by "R." refer to the numbered pages of the Record on Appeal.

between fantasy sports and real world wagering is a distinction without a difference. The fact that the athletes are on a fantasy team roster rather than a real world roster does not negate the fact that those athletes must actually perform in future real-life events over which the contestants exercise no control. While it may be true that DFS contestants control what players they choose to be on their roster, the more important point is that the DFS contestants cannot control how those athletes will actually perform. Nor can there be any doubt that those performances are both "future contingent events" that contain elements of chance that are "material" to the outcome of the contests. Indeed, without those future contingent events, there could be no DFS contests. The outcome of the DFS contests necessarily *"turn on"* the aggregation of individual statistical performances. These facts alone make DFS "gambling" under any commonly understood meaning of the term not to mention the Penal Law § 225.00(1) and (2).

According to the court below, these self-evident truths that "success in DFS is predicated upon the performance of athletes in

future contests", coupled with the "constitutionally broad language and application of the constitutional prohibition, [and] the common understanding of ... the particular words "book-making" and "gambling," were by the far the most compelling reasons for it to conclude correctly that DFS contests violated Article I, § 9 of the Constitution, as implemented by the Legislature pursuant to Penal Law § 225.00(1) and 225.00(2), which define "gambling" and "contest of chance" [R. 30].

## POINT II

### The Court Below Properly Applied the Only Definition of "Gambling" Provided by the Legislature

As the State itself concedes, the "only currently valid definition of the meaning of the term 'gambling' in Article I, § 9 is found in Penal Law § 225.00(2)" [R. 1232, fn 7]. This is important because, in enacting Chapter 237 of the Laws of 2016 purporting to authorize DFS, the Legislature did not repeal the definition of gambling, which clearly states that "gambling" includes "risking something of value on the outcome of a game of chance *or* a future contingent event not

under [the person's] influence or control" (emphasis supplied). The "or" is a disjunctive, not a conjunctive. If a future contingent event is involved, it is gambling regardless of whether it is otherwise a game of chance. A "game of chance," in turn, is defined as "any contest, game, gaming scheme ... in which the outcome depends in a material degree upon an element of chance, *notwithstanding that skill of contestants may also be a factor therein*" (emphasis supplied). *See* Penal Law § 225.00(1).

Rather than redefining either "gambling" or a "contest of chance," which is subsumed within the definition of gambling, the Legislature, instead simply declared that DFS is neither. *See* Racing Law,[3] § 1400(2). In order to pass constitutional muster, however, this attempt to exclude DFS from the constitutional prohibition must have necessary factual support. *Spielvogel v. Ford*, 1 N.Y.2d 558, 562 (1956). *See* Plaintiffs' opening brief at 29, *et seq.* For the reasons set forth in Point II of Plaintiffs' opening brief, those facts just do not exist.

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[3] "Racing Law" refers to the "Racing, Pari-Mutuel Wagering and Breeding Law."

The so-called "facts" the Legislature relied upon were not facts, but "opinions" that have no rational basis. The first of the two opinions was that DFS games are not games of chance "because they consist of fantasy or simulation sports teams selected based upon the skill and knowledge of the participants and not based on the current membership of an actual team" [Racing Law, § 1400(1)(a)]. The second rationale was that DFS did not constitute wagers on future contingent events not under the contestant's 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 [Racing Law, § 1400(1)(b)]. As previously stated, there is no doubt that (1) the outcome of the games depends on future contingent events over which participants have no control (Penal Law § 225.00[2]), and (2) the outcome of these contingent events necessarily and materially affect the results of the contests (Penal Law, § 225.00[1]).

The State also incorrectly argues that the definitions in subdivisions (1) and (2) of Penal Law § 225.00 no longer apply by

virtue of the Legislature's adoption of a subsequent statute excluding DFS from their application, citing the rule of statutory construction that a later enacted more specific statute takes precedence over an earlier and more general enactment. State's Reply Brief at 6-7. While superficially logical, this argument does not withstand closer scrutiny. As pointed out by the court below [R. 28], the State itself concedes that the Penal Law definition of gambling in § 225.00(1) and (2) is the "only" definition the Legislature used to carry out its Constitutional mandate to implement the prohibition against gambling, as required by Article I, § 9 of the Constitution [R. 1232, footnote 7]. Since this constitutional prohibition is not self-executing, it can only be implemented via legislation as the Court below correctly noted, citing *People ex rel. Sturgis v. Lavin*, 152 N.Y. 1, 11 (1897) [R. 31]. Since Penal Law § 225.00(1) and (2) were not repealed by Chapter 237 of the Laws of 2016, those subdivisions remain as the only constitutional standard that applies. Therefore, whether DFS is or is not gambling must be measured against the constitutional standard adopted by the Legislature in Penal Law § 225.00.

Subdivisions (1) and (2) of Penal Law § 225.00 are not, therefore, just like any other statute. They have the force and effect of the Constitution behind them such that exceptions to them may not be carved out at the whim of the Legislature. As the Court below also correctly found, "such discretionary exclusion ... does not have the effect of changing the meaning of the constitutional terms each time the statute is revised; the Constitution is not so fungible" [R. 28].

There is, therefore, no merit to the State's argument that the Courts are free to substitute the "dominance of skill" test in lieu of the current tests in subdivision (1) and (2) of Penal Law § 225.00. *See* State's Reply Brief at 31-32. The only standards that apply are the ones embodied in subdivisions (1) and (2) and neither mentions "skill" except to emphasize its irrelevance if a material degree of

chance exists. Penal Law § 225.00(1). Here there is no question that there is a material degree of chance in DFS.[4]

It is not the Legislature's prerogative to carve out an exception to the prohibition against gambling that applies only to DFS, which otherwise meets the definition of gambling. The other exceptions in Article I, § 9 of the Constitution, like the lottery, pari-mutuel wagering on horse-racing, and casino gambling at a limited number of locations, were made by the People by amending the New York Constitution pursuant to Article XIX. The Legislature cannot unilaterally usurp that function.

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[4] The reliance by *amici* on § 906 of the Racing Law purporting to allow handicapping tournaments by authorized operators of pari-mutuel wagering is inapposite. That law does not apply to DFS, and, in any event, its legality has never been challenged in court. The State Attorney General is on record that handicapping is present in multiple forms of activities that are nevertheless gambling [R. 194-195].

## POINT III

### The Applicable Test to Determine Whether DFS Constitutes Gambling is the Materiality of Chance Test Rather Than the Dominance of Skill Test

*Amici* also cannot succeed in their effort to suggest that the alleged "dominance" of skill in DFS contests necessarily excludes those contests from the definition of "gambling." A contest of chance exists "notwithstanding that skill may be a factor therein" if there is a *material* element of chance. Penal Law § 225.00(1). Contrary to the current contention in the brief of *amici* that there is no difference between the dominance and materiality tests, DraftKings said precisely the opposite in a prior legal opinion it drafted for the National Hockey League where it stated as follows:

> "Unfortunately, [the dominating element test] is not the only test the Courts employ in the various states. For example, in some states, games are prohibited if chance is a *material element* in the outcome. Such a test recognizes that although skill may primarily influence the outcome of a game, a state may prohibit wagering on the game if chance has more than a mere incidental effect on the game. This is a lesser standard than the

> predominance test, and effectively makes it more difficult to offer skill-based gaming for residents of those states if the games in question resort to a chance component in determining the outcome" (emphasis added). [R. 235]

FanDuel also acknowledged the difference, stating in a legal opinion to the National Basketball Association that the materiality test requires chance to be less of a factor, and prohibits more contests than the predominant factor test" [R. 239].

Even the State agrees with Plaintiffs that the materiality and dominance test differ. *See* the Attorney General's Memorandum of Law in *People of the State of New York ex rel. Schneiderman v. DraftKings* [R. 238-240]. FanDuel and DraftKings, however, now contradict their very own prior legal opinions and seek to part company with the State, arguing that the dominance of skill test survived the overhaul of the Penal Law in 1965, and that the reasoning of the Court of Appeals over 100 years ago, based on a prior statute in *People ex rel. Ellison v. Lavin* (1904), is still "good law." That argument ignores the language of the current Penal Law and the overwhelming body of case law applying it. FanDuel and

DraftKings also omit any analysis of the current statute itself, which is the clearest indication of legislative intent. "The starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583 (1998). If the words of the statute have a "definite meaning which involves no absurdity or contradiction, there is no room for construction, and courts have no right to add or take away from that meaning." *Majewski*, 91 N.Y.2d at 583. Here, the words "material degree" appear in the statute. The words "dominating element" do not, and those two phrases are not equivalent. In another context, the Court of Appeals interpreted "material" to mean "more than minor or incidental." *Taub v. Altman*, 3 N.Y.3d 30, 34 (2004).

In any event, the argument of *amici* that DFS is predominantly a game of skill has a particularly hollow, hypocritical ring. While now telling the Courts how skillful the game is, DraftKings, in an effort to attract players, advertised to the public that "winning is as easy as milking a two-legged goat." *See*, Attorney General's

Complaint in *People v. DraftKings*, ¶ "75" [R. 568]. Commercial available online at https://www.ispot.tv/ad/7FuC/draftkings-milking-a-two-legged-goat.

Moreover, if the Legislature had re-codified the prior law, as FanDuel and DraftKings maintain, the Legislature would have used the words "dominating element." That, however, is not what the Legislature did. Certainly, at the time Section 225 of the Penal Law was codified, that expression ("dominating element") was well-established, with the *Lavin* test even being cited by numerous courts in other jurisdictions outside the State of New York. *See, e.g., State ex rel. Green v. One 5 [Cents] Fifth Inning Baseball Machine*, 241 Ala. 455, 457 (1941); *Las Vegas Hacienda v. Gibson*, 77 Nev. 25, 30 (1961). Nor can FanDuel and DraftKings provide an explanation for *Plato's Cave Corp. v. State Liquor Authority*, in which the First Department held that no further inquiry is required once a material element of chance is present. 115 A.D.2d 426, 428 (1st Dep't 1985); *aff'd on other grounds*, 68 N.Y.2d 791 (1986) (despite failing to measure the "degree of skill" involved, agency determination that a game depended to a

"material degree" on an element of chance was not arbitrary or capricious).

Aside from the admission of *amici* that the outcome of DFS contests depends on statistical data accumulated from the performance of athletes in future sporting events that occur after wagering has closed (*see* Point I, *supra*), the "materiality" of those statistics is also clear from a study by the experts who submitted reports to the Legislature finding that in fantasy football, hockey, baseball and basketball, the ratio of luck / skill can be anywhere from 45% to 15%, respectively [R. 1197, figure 6].[5] Aside from the materiality of chance which these statistics demonstrate, they also prove that the materiality of skill and chance are not mutually exclusive. Both can be material at the same time. If, however, a material element of chance exists, the materiality of skill becomes irrelevant. Penal Law § 225.00(1).

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[5] Even assuming, *arguendo*, that the dominance of skill test could be applied, the State itself previously argued that under that test DFS would still be "gambling." See the Attorney General's Memorandum of Law in *People ex rel. Schneiderman v. DraftKings* [R. 241-243].

As the Attorney General urged in court in its prosecution of FanDuel and DraftKings, the sort of precise mathematical balancing they would require to determine whether skill outweighs luck "conflicts with the statutory standard" *citing* 7-76 New York Clinical Practice, § 7602 (observing that the dominating element test was abandoned because the mathematical calculation ... could be inordinately difficult to reconcile with the prosecutor's burden of proof") [R. 242-243]. Even in *People ex rel. Ellison v. Lavin*, 179 N.Y. 164 (1904), cited throughout the brief of *amici*, the court noted that the determination of whether a game is one of skill or chance should not be viewed from the perspective of experts, but rather of the public at large. 179 N.Y. at 172-174. This is critical because both the *amici* and the State now seem to emphasize that most of the DFS contests are won by a very small percentage of contestants. The Attorney General argued in its prosecution of DraftKings that "as a mass-market prediction game that is designed for non-experts and experts alike, applying the dominating element test to DFS leads to the ... conclusion [that] DFS is a contest of chance" [R. 241]. What may be a

game of skill for a few expert players who win (known as "sharks" in gambling parlance) is nevertheless a game of luck for the vast majority of average persons who lose (known in gambling parlance as "minnows").[6] *See, e.g., State v. Prevo*, 44 Haw. 665, 675-676 (1961). Article I, § 9 of the Constitution prohibiting gambling was designed to protect the minnows from the sharks.

Yet the State wants to have it both ways. On the one hand, it tells the Court that DFS is a game of skill in which the experts overwhelmingly defeat the novices, but that it is leveling the playing field by evening the odds through limiting the number of entries any contestant may submit and disclosing the expert players in advance. *See* State's Reply Brief, Point I(A). This will inevitably increase the element of luck in winning when the contestants in any game are of similar skill as the experts have stated [R. 1198-1199]. The State cannot have its proverbial cake and eat it too.

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[6] *See also* Press Release of Attorney General dated November 19, 2015 ("daily fantasy sports rely on a steady stream of 'minnows' to feed the 'sharks.'" [R. 140])

## POINT IV

### There Is No Merit to the Attempt by the State and *Amici* to Distinguish DFS Contests From Gambling on the Grounds That They Are *Bona Fide* Contests for Prizes for which Contestants Merely Pay Entry Fees

In Point I(C) of its Reply Brief, the State argues that skill-based contests involving entry fees and prizes are not illegal gambling activities. State's Brief at 12-13. That argument relies on three cases - *People ex rel. Lawrence v. Fallon*, 4 App. Div. 82, 88 (1st Dep't 1896), *aff'd* 152 N.Y. 12 (1897), *State v. Am. Holiday Assn.*, 151 Ariz. 312, 727 P.2d 807, 809-11 (Ariz. 1986); *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85, 86-87 (Nev. 1961). These cases are all inapposite and easily distinguishable. While individuals may pay an entry fee to enter contests like spelling bees, marathons or golfing tournaments, their success or failure depends on their own talents. It does not depend on any material element extrinsic to the game, unlike DFS contests where the ultimate outcome absolutely depends on the actions of others who do not participate in the game, not to

mention weather, poor officiating, etc. *See, e.g.*, *People v. Stiffel*, 61 Misc. 2d 1100 (App. Term, 2d Dep't [1969]).

*People ex rel. Lawrence v. Fallon*, cited by the State and *amici*, does not suggest otherwise. There, horse owners paid fees to enter races held by a racing organization that announced pre-determined prizes to be handed out to the winners. 152 N.Y. 12 (1897). The New York Court of Appeals held that the "competing" parties were not gambling. *Id.* at 20. Thus, paying to enter your own horse in the Kentucky Derby, for example, is not gambling, but betting by spectators and other third parties on that same horse is gambling.[7] The same analysis applies to other contests like chess tournaments. DFS contests are different because the outcome depends upon the skill of others rather than the contestants who pay entry fees.

*Amici* nevertheless cite *Fallon* for the proposition that entry fees for predetermined prizes must be legal. *Fallon* says no such thing. It only held that entry fees by those competing in the race did

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[7] As noted in Plaintiffs' main brief in this appeal, there is currently an exception spelled out in the Constitution for horse racing, but there is no such exception for DFS.

not constitute legal gambling – it said nothing about other spectators. Equally inapposite is *State of Arizona v. American Holiday Association, Inc.*, 151 Ariz. 312 (1986), which, contrary to the argument by the State and *amici*, expressly recognizes that skill games are distinct from betting on the performances of others. Reviewing a mail-order crossword competition, the court concluded that the game was "not like most bookmaking operations because prizes are not awarded on the basis of the *outcome of some event involving third parties*" (emphasis supplied). 151 Ariz. 312 at 314, 727 P.2d at 809 (1986). The Court's ultimate conclusion as to what did constitute gambling applies directly to DFS wagers:

> The Legislature has seen fit to license and permit many forms of gambling once considered anathema. These include horse racing and dog racing, both operations in which the bettor is not a *participant* and the money laid down is not an entrance fee, but a wager between parties who are not contestants and whose gain or loss will be determined by *the results of a game played by others*. (*Id.* at 317, 727 P.2d at 812 (emphasis supplied)).

Reliance by the State on *Las Vegas Hacienda v. Gibson*, 77 Nev. 25, 359 P.2d 85 (1961), is also misplaced. It stands for the proposition that an offer to the public to pay a fee for the opportunity to win a prize by completing some feat of skill (specifically, shooting a hole-in-one) is a valid contract under New York law. *Id.* at 29, 359 P.2d at 88. That has nothing whatsoever to do with the definition of gambling under New York law.

Having submitted a wager, a DFS contestant is at the total mercy of the athletes participating in actual skill games and countless other chance factors that he/she can neither influence nor control – whether it be the weather or injuries, or an umpire's bad call. Notably, the State itself has taken the exact opposite position than the one it advances here with respect to games involving entry fees. *See* its Memorandum of Law in *People v. DraftKings*, reproduced in the Record at R. 235-238, differentiating games with entry fees involving the skill of the entrant from games with entry fees where the outcome depends on the skill of someone other than the entrant.

Equally misplaced is the reliance by *amici* on *Humphrey v. Viacom, Inc.*, 2007 WL 1797648 (D.N.J. June 20, 2007). That case is procedurally, factually and substantively irrelevant. *Humphrey* was a Federal trial court decision in New Jersey applying New Jersey law. The Court dismissed the action on procedural grounds before reaching any part of the analysis DFS operators relied upon. The New Jersey law analyzed in that decision has no bearing on this case. The New Jersey gambling statute involved in *Humphrey* was a *qui tam* statute allowing gamblers to pursue and recover their losses. *Id.* at *5-7. The court specifically declined to opine on whether the traditional fantasy sports game constituted a game of chance and never addressed the issue of whether the outcome of the game depended upon future contingent events. *Id.* at *9. Once again, the Court's attention is called to what New York's Attorney General had said previously – this time in reference to the inapplicability of *Humphrey*. *See* its Memorandum of Law in *People v. DraftKings* [R. 232-235]. *See also* the decision by Judge Mendez in *People v.*

*FanDuel*, distinguishing *Humphrey* and rejecting its applicability [R. 98].

Accepting the argument that contests in which individuals pay a fee to a neutral administrator for a chance to win a pre-determined prize are automatically legal would have absurd consequences. It would eviscerate existing New York prohibitions against gambling, including those set out in the Constitution. As pointed out by the Attorney General's office, "anyone could establish a private lottery, because lottery operators also act as neutral administrators, charge contestants a pre-determined fee to enter, and announce prizes in advance. DFS-like syndicates could run prediction contests on any imaginable subject, including sports betting on a single sports match – so long as wagers are called "entry fees" and prizes are determined in advance. The end result would be to reverse the clear prohibitions of pool-selling, book-making and other kinds of gambling set out in the Constitution and carried into the New York Penal Law. N.Y. Const. Art. I, § 9; New York Penal Law, Article 225." *See,* Attorney General's Memorandum of Law in *People v. DraftKings* [R. 234-235].

## POINT V

### The Court Below Erred in Decriminalizing Daily Fantasy Sports In the Absence of Any Other Statute Prohibiting Gambling

The State has contradicted itself. In the Court below, it unequivocally stated that Penal Law § 225.00 was the "only currently valid" statute that implemented the constitutional prohibition against gambling [R. 1232, fn 7]. In Point II of its Reply Brief, however, the State now argues that Plaintiffs incorrectly contend that Penal Law § 225.00 is the only statute on the books preventing "gambling" (State's Brief at 17). In support of that later argument, the State erroneously cites other statutes – namely the General Business Law § 349 and 350, and Executive Law § 63(12). Those statutes, however, can only be invoked by the Attorney General to prevent illegal gambling if in fact they have already been declared unlawful by another statute. Enforcement under the General Business Law and/or the Executive Law is predicated on the assumption that the activity is otherwise illegal to begin with. Indeed, General Business Law §§ 349 and 350 were invoked by the

Attorney General as the basis for that office's prior enforcement action against both FanDuel and DraftKings predicated on the violation of § 225 of the Penal Law. Absent the prohibitions in the Penal Law, there would have been nothing for the Attorney General to pursue under General Business Law §§ 349, 350 and/or Executive Law § 63(12). To that point, once Chapter 237 of the Laws of 2016 was enacted purporting to decriminalize Daily Fantasy Sports, the Attorney General ceased prosecution and entered into a settlement agreement based on other non-gambling violations of the law [R. 452-483].

If DFS is unconstitutional, as the Court below correctly found, then the exception carved out in Chapter 237 purporting to "decriminalize" DFS would leave a statutory and regulatory vacuum such that the Attorney General would no longer be able to prosecute such conduct – either criminally or civilly. That is because the constitutional mandate in Article I, § 9 is not "self-executing." Penal Law § 225.00 was the only underlying basis upon which to pursue illegal gambling. The lower court's decision was, therefore, an

anomaly. Ironically, while holding that DFS was unconstitutional, it nevertheless frustrated the constitutional mandate in Article I, § 9 that the "Legislature shall pass laws to prevent offenses against [Article I, § 9]." That part of the lower court's decision should be reversed.

Finally, the State is absolutely wrong in arguing that Plaintiffs are foreclosed from arguing this point on appeal (State's Reply Brief at 18). "Severance" was not raised below precisely because it was not foreseeable or before the lower court. Plaintiffs' complaint was aimed at striking down Chapter 237 in its entirety on the grounds that it was unconstitutional and could not, therefore, be authorized either civilly or criminally. Plaintiffs did not foresee, nor could they have, that the Court would declare DFS unconstitutional, but simultaneously strip the Attorney General of any power to enforce that determination despite the fact that, as the Court itself recognized, Penal Law § 225 was the "only" statute on the books to

implement the anti-gambling provisions of Article I, § 9 of the Constitution [R. 28].[8]

In the absence of any ability by the Attorney General to enforce the mandate of Article I, § 9 as set forth in the Penal Law, the decision by the lower court has the absurd result of allowing both FanDuel, DraftKings and other DFS operators to continue their operations unimpeded and unabated, notwithstanding the unconstitutionality of that conduct.

## POINT VI

### Let Us Not Forget the People Whom Article I, § 9 of the Constitution was Designed to Protect

Precious little time has been spent in the dueling briefs submitted by the parties that barely mention the victims of gambling. Yet they are the very people whom Article I, § 9 was designed to protect. It is especially disturbing that instead of seeking to protect these individuals by enforcing the constitutional mandate

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[8] Plaintiffs' argument in any event are clear from the Record and this court is free to consider them. *See, Facie Libre Associates I, LLC v. Secondmarket Holdings, Inc.*, 103 A.D.3d 565 (1st Dep't 2013) and cases cited therein.

to pass laws to prevent gambling, the Record reveals that the Legislature has instead gone out of its way to desperately find some technical loophole that does not exist to enable commercial gambling operators like DFS and FanDuel to make their millions.

Legislators have apparently paid greater heed to highly paid lobbyists and their clients who generously contribute to their election campaigns [R. 1254-1298], than to the needs of the people of the State whose lives could be destroyed by the predatory conduct of companies represented by those lobbyists. As the Attorney General stated while prosecuting FanDuel and DraftKings before the enactment of Chapter 237:

> While irresponsibly denying their status as gambling companies, the DFS Sites pose precisely the same risk to New York residents that New York's anti-gambling laws were intended to avoid. Experts in gambling addiction and other compulsive behaviors have identified DFS as a serious and growing threat to people at risk for, or already struggling with, gambling-related illnesses [R. 180].

Upholding Chapter 237 of the Laws of 2016 will only exacerbate the problem.

## CONCLUSION

The Decision, Order and Judgment below should be modified by reversing so much thereof as ordered, adjudged and declared that Defendants' Cross-Motion for Summary Judgment should be granted dismissing the within action to the extent that it sought to declare the exclusion of Daily Fantasy Sports from the scope of the New York State Penal Law definition of "gambling" at Article 225 unconstitutional and in violation of Article I, § 9 of the Constitution, and as so modified, the Court should order adjudge and declare that Chapter 237 of the Laws of 2016 is unconstitutional in its entirety.

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Albany, New York

Respectfully submitted,

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## PRINTING SPECIFICATIONS STATEMENT

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