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Memorandum to Christian Genetski, Chief Legal Officer and Chief Commercial Officer

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Legal Analysis re: New York Mobile Sports Wagering Legislation

FanDuel, Inc. ("FanDuel") has requested that we consider three issues relevant to current efforts to enact legislation in New York expressly authorizing state-licensed casinos to offer mobile sports wagering, in which the casinos could accept bets placed via mobile devices throughout New York. In particular, FanDuel has requested that we evaluate whether authorizing casinos to accept sports wagers placed remotely via mobile devices (1) is consistent with Article I, section 9 of the New York State constitution; (2) would impair obligations regarding gaming under existing tribal-state compacts; and (3) would necessarily allow casinos or tribes to offer other forms of casino gambling via mobile devices.

Based on our analysis of these questions to date, our views are as follows:

- The New York Legislature would not exceed its constitutional authority by enacting legislation to permit licensed casinos to accept sports wagers placed remotely via mobile devices;
- Authorizing casinos to accept mobile sports wagers does not appear to impair any obligations under existing tribal-state compacts; and
- Permitting licensed casinos to accept mobile sports wagers likely would not have the effect of permitting other mobile gambling offerings.

The following memorandum sets forth the relevant legal framework and discussion regarding each of these issues in more detail. This discussion is not intended to be exhaustive, and any

changes in our assumptions, the applicable law, or the particular aspects of the proposed legislation could alter this analysis.

I. Authorizing Licensed Casinos to Accept Wagers on Sporting Events Placed Remotely by Mobile Device Will Likely Be Found Constitutional.

In relevant part, Article I, section 9 of the New York Constitution provides:

> [N]o lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, . . . 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.[1]

This provision affords the legislature great discretionary authority and responsibility to enact laws giving it force, including the scope of the activities that may be conducted by the licensed casinos, by horse racing facilities, or by the state in conducting a lottery. Alone, Article I, section 9 is neither self-defining nor self-executing, a characteristic that New York courts have long recognized.[2]

Consistent with this constitutional authority, sports wagering is already included within the kinds of gambling expressly permitted by statute to take place at licensed casino facilities,[3] and such legislative determinations have been accorded great deference by New York courts. For example, prior to a constitutional amendment explicitly permitting pari-mutuel horse racing

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1 N.Y. Const., art. 1, § 9 (emphasis added).

2 *See, e.g.*, *People ex rel Sturgis v. Fallon*, 46 N.E. 302, 302 (N.Y. 1897) (noting that Article I, section 9 "was not intended to be self-executing is manifest" and that the provision "expressly delegates to the legislature [implementing] *authority* . . . and requires it to enact such laws as it shall deem appropriate to carry it into execution."); *People v. Wilkerson*, 73 Misc. 2d 895, 901 (Monroe Cnty. Ct. 1973) ("[S]ince the Constitution commits to the Legislature the duty of preventing gambling, the measures to be adopted in furtherance of that end also rest in the legislative discretion.").

3 *See* N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 1367(2) (2013) (permitting "sports wagering" following a change in federal law).

wagers, the New York Court of Appeals upheld a statute enacted under Article I, section 9, that eliminated criminal penalties for certain types of wagering on horse races.[4] In doing so, the Court articulated an extremely deferential standard of review, explaining that "[s]o long as th[e] legislation was in any degree appropriate to carry into effect the purpose of the Constitution, it d[id] not fall under its condemnation" and stating that the Court was "aware of no principle of constitutional law which would authorize this [C]ourt to condemn [the legislation as invalid or unconstitutional, because, in [the Court's] opinion, some more effective or more appropriate law might have been devised and enacted."[5] We therefore assess the proposed legislation with such deference to the Legislature's authority in mind; in our view any reasonable construction of the activities available to licensed casinos "authorized and prescribed" by the Legislature is likely to survive constitutional scrutiny.

A. Mobile sports wagering is a system or method of wagering that the Legislature may authorize and prescribe.

In relevant part, section 1367 provides that, "[i]n addition to authorized gaming activities, a licensed gaming facility may when authorized by subdivision two of this section operate a sports pool upon the approval of the commission and in accordance with the provisions of this section and applicable regulations . . . ."[6] A "'[s]ports pool' means the business of accepting wagers on any sports event by any system or method of wagering,"[7] and the statute requires that "[a] sports pool . . . be operated in a sports wagering lounge located at a casino." A "'[s]ports

4 *Fallon*, 46 N.E. at 302.

5 *Id.*

6 N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 1367(a).

7 *Id.* § 1367(1)(h)).

wagering lounge' means an area wherein a sports pool is operated."[8] The existing statute does not specify or restrict the manner in which wagers may be accepted.[9]

Pursuant to the proposed legislation, mobile sports betting would mean "wagering on sporting events or any portion thereof, or on the individual performance statistics of athletes participating in a sporting event, or combination of sporting events" through a "system or method of wagering" that utilizes "electronic communication through internet websites accessed via a mobile device or computer and mobile device applications,"[10] which is "authorized and prescribed by the [L]egislature" in the same manner as in-person sports wagering.[11] Specifically, the bill would provide that "[a]n operator shall accept wagers on sports events only from persons physically present in the sports wagering lounge, or through mobile sports wagering offered pursuant to section thirteen hundred sixty-seven-a of this title."[12] Section 1367-a, in turn, sets forth technical specifications and operational rules for a mobile wagering system.[13]

We believe that New York case law addressing questions such as this strongly suggests the proposed legislation would survive constitutional review. In *Dalton v. Pataki*,[14] for example, the New York Court of Appeals rejected a challenge to the Legislature's approval of a of digital "video lottery terminals" ("VLTs"), rejecting any suggestion that modern features of the updated lottery system rendered the VLTs materially different from the kind of gaming permitted under the constitution.[15] In particular, the Court stated that:

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8 *Id.* § 1367(1)(i).

9 *Id.* § 1367(3)(b).

10 Legislative Bill Drafting Comm'n 14923-15-8 ("Proposed Bill") at 6:6–15.

11 N.Y. Const., art. 1, § 9; *see also* Proposed Bill at 6:6–15.

12 Proposed Bill at 8:11–15.

13 *Id.* at 20:5–25:16.

14 835 N.E.2d 1180 (N.Y. 2005).

15 *Id.* at 1193.

> It is of no constitutional significance that the tickets are electronic instead of paper. The particular methods of conducting the lottery are subject to change with time. The language of the Constitution is not so rigid as to prevent this type of update and modernization. Thus, we conclude that the video lottery is a valid lottery under article I, § 9(1), and that, rather than slot machines, VLTs are simply mechanical devices for the implementation of the video lottery.[16]

A similar analysis would likely apply here. Mobile sports wagering is little more than a system or method utilizing modern "mechanical devices for the implementation of" permissible sports wagering, which is duly authorized and prescribed by the Legislature.[17] As in *Dalton*, "[i]t is of no constitutional significance" that sports wagers accepted through a mobile wagering system "are electronic instead of paper," and "[t]he language of the Constitution is not so rigid as to prevent this type of update and modernization."[18]

B. Mobile sports wagering complies with the constitutional requirement that casino gambling occur at certain authorized facilities.

Mobile sports wagering would also be consistent, in our view, with the constitutional limitation that the Legislature may permit "casino gambling at no more than seven facilities,"[19] because New York law deems wagers to be made where the wager is accepted and becomes binding on the bettor. This venerable principle was recognized by New York courts long before the amendment of Article I, section 9 in 2013, and incorporates the background common law understanding at the time the amendment was originally adopted.[20] This same principle was

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16 *Id.* (internal citations omitted).

17 *Id.*

18 *Id.*; *accord Matter of Mellman v. Metropolitan Jockey Club, Inc.*, 195 Misc. 121, 123–25 (Sup. Ct. N.Y. Cty. 1949) (rejecting argument that constitution requires wagering to be accomplished through specific technology).

19 N.Y. Const., art. 1, § 9.

20 *See, e.g.*, *People ex rel. Lawrence v. Fallon*, 4 A.D. 82, 87 (1st Dep't 1896) (noting that the constitutional provision concerning gambling "must of course be construed" according to what had "been understood to be gambling . . . at th[e] time" it was adopted).

firmly rooted in New York law prior to the passage of section 1367,[21] and "[t]he Legislature is presumed to be aware of the law in existence at the time of an enactment and to have abrogated the common law only to the extent that the clear import of the language of the statute requires."[22] Accordingly, both Article I, section 9 and section 1367 incorporate, and are consistent with, the principle that bets are deemed made where the bet is accepted and becomes binding on the bettor.

New York law regarding pari-mutuel wagers reflects this rule. New York law has long made "clear that a *facility* may accept wagers" via the telephone in the context of horse racing.[23] Further, current law expressly permits pari-mutuel wagers to be received through "telephone wagering accounts," which "include all those wagers which utilize any wired or wireless communications device, including but not limited to . . . wireless telephones and the internet to transmit the placement of wagers on races and special events offered . . . in this state."[24] In 2013, the New York State Gaming Commission (the "Commission") promulgated regulations clarifying that, with respect to such wagers, "[a]ll telephone bets shall be deemed to have been made in the county in which the telephone exchange receiving such telephone call bet is located."[25] In other words, the location at which the electronic wager is deemed to occur is the location at which the wager is accepted. Courts would likely apply the same principle to mobile sports wagering.[26]

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[21] *See, e.g.*, *Saratoga Harness Racing, Inc. v. City of Saratoga Springs*, 55 A.D.2d 295, 297–98 (3d Dep't), *aff'd*, 380 N.E.2d 163 (N.Y. 1978) (observing that "[t]he location of the bettor at the time he places his bet is immaterial").

[22] *B & F Bldg. Corp. v. Liebig*, 564 N.E.2d 650, 652 (N.Y. 1990).

[23] *Matter of New York Racing Ass'n, Inc. v. Hoblock*, 270 A.D.2d 31, 32 (1st Dep't 2000) (emphasis added).

[24] N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 1012(17) (2015).

[25] N.Y. Comp. Codes R. & Regs. ("N.Y.C.R.R."), tit. 9, § 4400.1(i).

[26] *Cf.* 1984 N.Y. Op. Att'y Gen. 11 (1984) ("Accepting bets on the outcome of a football game is the legal equivalent of accepting bets on the outcome of a horse race.").

New York case law addressing the physical location of electronic wagers is sparse, but decisions by courts addressing related matters provide some support. For example, in *Saratoga Harness Racing, Inc. v. City of Saratoga Springs*, the court observed that, for taxation purposes, "[t]he location of the bettor at the time he places his bet is immaterial in the same sense that no reasonable person would consider that the famous betting parlors of London . . . are conducting betting in any other country from which someone might place a bet by telephone or cable."[27] Moreover, some courts have described "the usual definition of the 'conduct' of a bet" as encompassing a wider series of actions than merely stating a wager, and include the "regular acceptance of money to be wagered; the transmission of such money to the place of betting; [and] the placing of the bet and the collection of the proceeds"[28] as part of that "conduct" – all of which would occur here, if at all, on the premises of a licensed casino.[29] Enforcement of gambling prohibitions also generally has focused not on bettors, but on regulation of establishments where bets are accepted.[30]

These authorities support a conclusion that betting activity in the context of sports wagers would be deemed to occur where the bet is accepted, a rule that is consistent with contract and criminal law principles historically applied in other states as well. *See, e.g.*, *Reading v. Western*

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27 55 A.D.2d at 297–98.

28 *Application of Stewart*, 22 N.Y.S.2d 164, 167 (Sup. Ct.), *aff'd sub nom. Stewart v. Dep't of State*, 260 A.D. 979 (3d Dep't 1940) (holding that a corporation could not be organized to accept bets outside a pari-mutuel racing track for subsequent forwarding to the track because the Legislature did not intend to authorize "*transactions of betting* outside race tracks under the guise of an agency to perform acts thereby made lawful within a race track") (emphasis added).

29 C*f. People v. Giordano*, 663 N.E.2d 588, 592–93 (N.Y. 1995) (observing that, "[i]nasmuch as neither defendants nor their associates *accepted or received bets in Nassau County*, the People necessarily relied on evidence" regarding "promoting gambling activity" rather than "engaging in a bookmaking business" to establish jurisdiction in Nassau County) (emphasis added).

30 *See, e.g.*, *Watts v. Malatesta*, 186 N.E. 210, 210–11 (N.Y. 1933) (quoting *People v. Stedeker*, 67 N.E. 132, 134 (1903)) (noting that "casual betting or gaming by individuals, as distinguished from betting or gambling as a business or profession, is not a crime," and stating that "[t]he distinction . . . has long 'obtained in this state where ordinary betting has never been made a crime while the keeping of a gambling house . . . ha[s] been subjected to severe punishment'").

Union Tel. Co., 57 N.W. 2d 537 (Mich. 1953) ("[A] bet is made at the time and place where the offer of it is accepted."); *McQuestern v. Steinmetz*, 58 A. 876 (N.H. 1904) (stating that "the defendant, acting as agent for persons in Nashua, [New Hampshire,] . . . telegraphed [money] to various persons in New York, who there wagered the money as directed" and observing that "[u]nder these circumstances the bets were made in New York, and the business conducted by defendant in Nashua was lawful"); *Lescallet v. Commonwealth*, 17 S.E. 546, 548 (Va. 1893) ("If . . . an offer to bet is telegraphed by a person in [Richmond, Virginia] to another in New York, . . . the betting is done, not in Richmond, but in New York because the offer, being accepted there, takes effect there."); *Hatch v. Hanson*, 46 Mo. App. 323 (1891) (concluding that "whether the plaintiff applied . . . to [a] lottery company" from Missouri "by letter" or "at its office in the state of Louisiana" was "immaterial" because "the minds of the plaintiff and the lottery company . . . first met and . . . the contract was made" in Louisiana). While some courts arguably have reached different conclusions in certain contexts,[31] those decisions appear distinguishable on factual grounds, including because the cases addressed gambling conduct different from sports wagering and considered only whether such conduct bore a sufficient relation to the State of New York so as to be subject to the state's laws.[32]

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[31] *See, e.g.*, *People ex rel. Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 850 (Sup. Ct. 1999) (stating that "[t]he act of entering the bet and transmitting the information from New York via the Internet is adequate to constitute gambling activity within the New York state," but finding that "[e]ven though gambling is legal where the bet was accepted, the activity was transmitted from New York"); *see also United States v. Gotti*, 459 F.3d 296, 340 (2d Cir. 2006) (citing *World Interactive Gaming Corp.* and stating that "[w]hen bets are placed from New York, the gambling activity is illegal under New York law, regardless of whether the activity is legal in the location to which the bets were transmitted").

[32] *See Gotti*, 459 F.3d at 340 (concluding that "bookmaking and [electronic] joker-poker" by members of the Gambino crime family violated New York law and noting that several defendants "were New York-based . . . [and] had been operating a local branch of the business, essentially managing a stable of clients who placed their bets from New York"); *United States v. Elie*, No. S3 10 CRIM. 0336 LAK, 2012 WL 383403, at *2 (S.D.N.Y. Feb. 7, 2012) (considering whether poker companies headquartered overseas were subject to New York law); *United States v. Kaczowski*, 114 F. Supp. 2d 143, 151 (W.D.N.Y. 2000) ("[R]egardless of whether placing bets, *simpliciter*, is legal in New York, a plain reading of the Indictment indicates Defendants are accused of more than solely placing bets."); *World Interactive Gaming Corp.*, 714 N.Y.S.2d at 849–50 (concluding that online operation of an off-shore casino violated New York law where the corporation

Pursuant to the proposed bill, "[t]he intermediate routing of electronic data in connection with mobile sports wagering shall not determine the location or locations in which a wager is initiated, received or otherwise made[.]"[33] Applying the above principles, which predate the operative amendment to Article I, section 9, mobile sports wagers should be deemed to be placed where they are accepted – here, at licensed casinos consistent with the constitution.[34]

II. Authorizing Licensed Casinos to Accept Mobile Sports Wagers Does Not Appear to Impair Obligations Under Existing Tribal-State Compacts.

Authorizing licensed casinos to accept mobile sports bets should not impair any obligations under tribal-state compacts (the "Compacts") with the Seneca, Oneida, and St. Regis Mohawk Nations (collectively, the "Nations"). Tribes may engage in Class III gaming activities in New York only as permitted under New York law and in accordance with the Compacts.[35] The Compacts grant the Nations exclusivity only with regard to the gaming activity specified in the Compacts, and none of the Compacts expressly references sports wagering.[36]

"operated its entire business from its corporate headquarters in Bohemia, New York" and "the evidence also indicate[d] that the individuals who gave the computer commands operated from [a] New York office").

[33] Proposed Bill at 2:18–20.

[34] If placing such bets is legal under New York law, then transmission of the bets to a licensed casino within New York would not be prohibited by federal law. *See* 18 U.S.C. § 1084(b) ("Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce . . . the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State . . . where betting on that sporting event or contest is legal into a State . . . in which such betting is legal.").

[35] The Indian Gaming Regulatory Act ("IGRA"), Pub. L. 100-497, 25 U.S.C. §§ 2701 *et seq.*, classifies gaming activities into three types. It permits federally-recognized tribes to operate Class I and II gaming on their sovereign land, with the latter allowed if legal in the state in which the tribe is located, but makes Class III gaming activities lawful only if "located in a State that permits such gaming for any purpose by any person, organization, or entity, and . . . conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect." 25 U.S.C. § 2710(d)(1)(B)–(C). The IGRA defines Class III gaming as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8). The National Indian Gaming Commission ("NIGC"), established by the IGRA, defines Class III gaming as including "[a]ny sports betting and pari-mutuel wagering including but not limited to wagering on horse racing, dog racing or jai alai." 25 C.F.R. 502.4(c).

[36] *See* Seneca Compact § 12(a)(1); Mohawk Compact, 2005 Amend., App'x A § 25(ii)(c); Oneida Settlement § IV.A. The Oneida Settlement additionally grants exclusivity with respect to Casino Gaming, defined as "the types of gaming activities referenced in the [IGRA] . . . as Class III gaming activity," but not including specific charitable gaming, pari-mutuel horse race wagering, or the state lottery. Oneida Settlement § II.B; *see id.* § IV.A. Though the NIGC includes sports betting as a type of Class III gaming, its operation in New York

A system for mobile sports wagering likely would not conflict with the Compacts because such a system does not appear to come within the definition of relevant permitted gaming devices under the Compacts (collectively referred to herein as "Gaming Devices"). In relevant part, all of the Compacts define relevant Gaming Devices to include devices including or comparable to "Slot Machines," "Video Lottery Gaming Devices," or other "Electronic Game Devices."[37] Express references to physical requirements and standards for permitted Gaming Devices, however, demonstrate that the Compacts grant exclusive rights with respect to gaming activities for which individuals are physically present at brick-and-mortar facilities; the Compacts likely do not reach a system enabling electronic sports wagering to occur irrespective of a bettor's location. Moreover, even assuming *arguendo* that the Compacts' definitions of Gaming Devices could be construed to encompass a system for mobile sports wagering, such a system likely would not infringe exclusive rights granted to the Nations under the Compacts in light of other limitations in the Compacts.

For instance, the Compacts generally define Video Lottery Gaming Devices as "a network of five or more player terminals, connected to [an] On-Line System, with touch-screen,

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would only be lawful if it were, among other things, legalized by New York and "conducted in conformance with a 'tribal-state compact' that regulates such gaming." *Citizens Against Casino Gambling in Erie Cty. v. Hogen*, No. 07-CV-0451S, 2008 WL 2746566, at *14 (W.D.N.Y. July 8, 2008); *see also* 25 U.S.C. § 2710(d)(1)(C). The Compacts contain provisions mandating that should New York legalize a Class III gaming activity, automatic amendment to permit such activity is required. *See* Seneca Compact § 16(c)(1) ("If the State (i) makes lawful a Class III Gaming game not authorized to be conducted . . . [it] shall give the Nation Gaming Operation written notice of such action within thirty (30) days . . . If the Nation Gaming Operation accepts such game and its specifications . . . a corresponding amendment shall be made to the appropriate appendices hereunder to authorize the Nation Gaming Operation to conduct such games."); *see* Oneida Compact § 15(b)(1) *and* Mohawk Compact § 13(c)(1) (substantially similar provisions). Thus, should New York legalize sports betting, the Compacts likely will require amendment to authorize such activity.

[37] *See* Seneca Compact, App'x A § 9; Oneida Settlement § II.E; Mohawk Compact, 1999 Amend. § 27(A)(4). The Oneida Settlement also includes "Instant Multi-Games" as a Gaming Device, Oneida Settlement § II.E, but that game is different from sports wagers because, *inter alia*, "[i]n Instant Multi-Game, all games offered at each player terminal are played automatically according to pre-established time sequences . . . ." Oneida Compact, App'x A § 29(b)(6).

button-controlled video screen or other electronic display devices."[38] The Seneca and Oneida Compacts further define Video Lottery Gaming Devices as those devices that perform specified functions such as "[p]rovid[ing] players with the ability to choose, or have the video lottery gaming devices automatically choose for them, combinations of numbers, colors and/or symbols," and "print[] and dispense[] a redemption ticket, or otherwise provide[] a representation of the value of player winnings . . . when the player activates the cash-out function."[39] And the Oneida Settlement additionally describes such devices as being "connected to a central determinant system that delivers to each individual player terminal an outcome, determined in advance . . . from a finite, randomly created pool of outcomes . . . ."[40]

Mobile sports wagers do not require or involve comparable "player terminals" provided for the purpose of betting. Rather, individuals may place mobile sports wagers on personal electronic devices, which – contrary to a stationary physical terminal – are portable and connect wirelessly to the internet rather than to a specified "On-Line System." Additionally, personal electronic devices exist not only for wagering, but rather are used for a wide variety of tasks and functions wholly unrelated to gambling, including phone calls, internet research, texting, emailing, word processing, graphic design, photography, or music hosting.

Further, sports wagering has nothing to do with "combinations of numbers, colors and/or symbols." Rather, sports wagers depend on the outcome of a physical contest in which human persons compete against one another. The outcomes of sporting events depend on real world events and are completely separate from the functioning of any terminal, electronic device, or

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[38] Seneca Compact App'x A § 9(a)(2); *see* Oneida Settlement § II.T (providing substantially similar definition); Mohawk Compact, 2005 Amend., App'x A § 27(f) (defining "video lottery gaming devices" similarly but providing that "[t]he Tribe agrees not to operate or conduct [such] devices").

[39] Seneca Compact App'x A §§ 9(a)(2)(b), (d); *see* Oneida Settlement §§ II.T(a), (d).

[40] Oneida Settlement § II.T.

any other machine. And the result of a sports wager certainly does not depend on a "[c]entral determinant system" for "an outcome, determined in advance." Sporting outcomes depend on human physical strength and skill, not electronic algorithms or selections, and bettors encounter new, constantly-changing variables that vary depending on the teams and individuals involved. Such wagers are wholly unlike the kind of gambling expressly permitted by Video Lottery Gaming Devices.

For similar reasons, a system for mobile sports wagering likely does not fall within the grant of exclusivity with regard to "[e]lectronic gaming devices" in the 1999 Amendment to the Mohawk Compact.[41] These devices are defined, in relevant part, as "[a] network of five or more contiguous on-line terminals," which are connected to "[a] central computer connected to all of the electronic gaming devices at a gaming facility" and "dispense[] a Game Play Ticket immediately after a Patron's enrollment in a Game."[42] As explained above, mobile sports wagering does not involve physical "contiguous . . . terminals" connected to "[a] central computer," nor are they likely to dispense tickets to bettors.

Additionally, mobile sports wagering is likely different from Slot Machine devices, which are generally defined to include "any mechanical, electrical or other device, contrivance or machine, which upon insertion of a coin, currency, token or similar object therein, or upon payment of any consideration whatsoever, is available to play or operate, the play or operation of which . . . may deliver or entitle the person playing or operating the machine to receive cash or

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41 Mohawk Compact, 1999 Amend., App'x A § 27(A)(4).

42 *Id.* §§ 27(A)(4), (13); *compare* N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 1301(21) (defining "gaming device" or "gaming equipment" as "[a]ny electronic, electrical, or mechanical contrivance or machine used in connection with gaming or any game").

tokens . . . ."[43] The Oneida Settlement additionally defines Slot Machines as devices in which "the outcome of each iteration of play or operation of the machine is determined at the time of play or operation, whether through the operation of an on-board random number generator in the machine itself or by a central determinant system which employs a random number generator."[44]

Mobile sports wagering does not involve or require such a "machine," as bettors do not "play[] or operat[e] [a] machine to receive cash or tokens." As explained above, sports wagering outcomes are dependent on real-world events and have nothing to do with any luck or skill involved in operating a device or piece of machinery. Sports bettors also do not compete against actions of, or odds set by, any mechanical device; if they compete at all, they do so against other bettors placing wagers on the same or similar events. And neither sporting event outcomes nor related wagers depend on any "random number generator" or "central determinant system."

Third, broader provisions in the Compacts specifying physical requirements for Gaming Devices illustrate that the exclusive rights granted with regard to Gaming Devices do not contemplate mobile sports wagers. For example, the Seneca Compact mandates that Gaming Devices be operated in accordance with specifications set forth in Section 76 of its Appendix B.[45] That section details numerous physical design requirements including, *inter alia*, an "on/off switch that controls electrical current"; a "permanent identification plate which shall be mounted" on each Gaming Device"; and "Tower Lights" that shall be "located conspicuously" on each Gaming Device's "uppermost surface that automatically illuminate[]" under certain

[43] Seneca Compact, App'x A § 9(a)(1); *see also* Mohawk Compact, 2005 Amend., App'x § 27(a) *and* Oneida Settlement § II.R (providing substantially similar definitions); *accord* N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 1301(38) (providing similar definition).

[44] Oneida Settlement § II.R.

[45] Seneca Compact § 9(b).

conditions.[46] The Seneca Compact also mandates that an "independent gaming test laboratory that is competent and qualified to conduct scientific tests and evaluations of Gaming Devices" be designated; that all Gaming Devices, before being "acquire[d] or expose[d] for play," first be "tested, approved, and certified by this independent gaming test laboratory as meeting the [specified] requirements"; and that such laboratory approve the manner in which manufacturers or distributors "assemble and install all Gaming Devices."[47] Similarly, the Oneida Compact defines "Gaming services" as including "maintenance or security services for the Class III gaming facility . . . and manufacture, distribution, maintenance, testing or repair of gaming equipment."[48] These specifications shed additional light on the overall purpose and object of the Compacts, which was to grant exclusive rights to operate physical gaming devices in brick-and-mortar facilities. *See Givati v. Air Techniques, Inc.*, 104 A.D.3d 644, 645 (2d Dep't 2013) (explaining that courts interpret contracts in light of all of its provisions and seek sensible meanings for words in the contract); *RM Realty Holdings Corp. v. Moore*, 64 A.D.3d 434, 436 (1st Dep't 2009) ("Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby") (internal citations omitted).

Fourth, even if relevant Gaming Device definitions could be construed to include mobile sports wagers, which they likely cannot, permitting mobile sports wagers likely would not infringe the Compacts' grants of exclusivity. The Compacts grant the Nations exclusive rights to operate specified Gaming Devices within certain geographic areas.[49] As discussed above,

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[46] Seneca Compact App'x B §§ 76(b)(2), (c)(1), (c)(5).

[47] Seneca Compact §§ 10(a), (b)(5), (d).

[48] Oneida Compact § 1(l).

[49] *See* Seneca Compact § 12(a)(1); Mohawk Compact, 2005 Amend., App'x A § 27(c); Oneida Settlement § IV.A.

mobile sports wagering activity likely would be viewed as occurring in the physical location where a bet is accepted – *i.e.*, the place in which a sports pool is operated. Thus, even assuming that a system for mobile sports wagering falls within the Compacts' definitions of Gaming Devices, bets received by sports wagering lounges operated by licensed non-tribal casinos would not occur at locations within the geographic region over which the Nations exercise exclusive control with respect to Gaming Devices. The Compacts permit the Nations to operate physical Gaming Devices, within defined geographic territories; mobile sports wagering likely does not infringe those exclusive rights. Accordingly, authorizing casinos to accept mobile sports wagers likely would not impair any existing obligations under the Compacts.

III. Authorizing Licensed Casinos to Accept Mobile Sports Wagers Likely Would Not Have the Effect of Allowing Broader Mobile Gambling Options.

While there is little law precisely on point, permitting licensed casinos to accept mobile sports bets likely would not permit other mobile gambling offerings. While the proposed bill does not purport to authorize mobile gambling beyond sports wagering,[50] other licensed casinos or the Nations could argue that other forms of gambling – *e.g.*, card or dice games like poker, blackjack, or craps – should also be deemed to "take place" at the location where a mobile game is hosted. Our preliminary analysis, however, suggests that sports wagers are meaningfully different from other forms of gambling and would be treated differently under New York law.

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[50] In particular, the bill would provide that:

> "Sports wagering" means wagering on sporting events or any portion thereof, or on the individual performance statistics of athletes participating in a sporting event, or combination of sporting events, by any system or method of wagering, including, but not limited to, in-person communication and electronic communication through internet websites accessed via a mobile device or computer and mobile device applications. The term "sports wagering" shall include, but is not limited to, single-game bets, teaser bets, parlays, over-under bets, moneyline, pools, exchange wagering, in-game wagering, in-play bets, proposition bets and straight bets.

Proposed Bill at 6:6–15.

Historically, "[w]agering on sporting events has repeatedly implicated the bookmaking and pool-selling provisions of the [New York] penal law."[51] New York law distinguishes between activities like bookmaking, on the one hand, and playing casino games, like card or dice games, on the other.[52]

With respect to casino-style games, at least one court has enjoined internet-based games even though they were operated from a location in which gambling was permissible. In *People ex rel. Vacco v. World Interactive Gaming Corp.*, a New York state court enjoined a casino from offering "virtual slots, blackjack or roulette" over the internet, even though the casino itself was located in Antigua, a jurisdiction that permitted gambling.[53] Rejecting the argument that "gambling [wa]s legal where the bet was accepted," the court stated that "the activity was transmitted from New York" and that "[t]he respondents enticed Internet users, including New York residents, to play in their casino."[54] The court concluded that, "[b]y having established the gambling enterprise, and advertised and solicited investors . . . to gamble through its on-line casino, [the] respondents ha[d] 'engaged in conduct which materially aids gambling activity', in violation of New York law."[55] This reasoning likely would apply to mobile card or dice games.

Accordingly, expressly allowing licensed casinos to accept mobile sports wagers likely would not authorize mobile gambling more broadly than sports wagering as defined in those

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51 1984 N.Y. Op. Att'y Gen. 11 n.4 (1984).

52 *Compare, e.g.*, N.Y. Penal Law § 225.00(9) (defining unlawful "[b]ookmaking" as "accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events"), *with id.* § 225.00(15) (defining "[c]asino gaming" as, *inter alia*, "games authorized to be played . . . by federally recognized Indian nations or tribes pursuant to a valid gaming compact reached in accordance with the federal Indian Gaming Regulatory Act of 1988); *cf. United States v. DiCristina*, 726 F.3d 92, 98 n.5 (2d Cir. 2013) (quoting *People v. Turner*, 629 N.Y.S.2d 661, 662 (N.Y. Crim. Ct. 1995)) ("Games of chance range from those that require no skill, such as a lottery, to those such as poker or blackjack which require considerable skill in calculating the probability of drawing particular cards.").

53 714 N.Y.S.2d 844, 847 (Sup. Ct. 1999).

54 *Id.* at 850–51.

55 *Id.* at 851 (quoting (N.Y. Penal Law § 225.00(4)) (internal alterations omitted).

provisions. Nothing in these proposed amendments to section 1367, or in the related addition of new section 1367-a, addresses the use of mobile casino-style games, and thus would not authorize mobile gambling more broadly than sports wagering as defined in those provisions. Any further expansion would require action by the Legislature expressly authorizing, consistent with its constitutional authority, additional forms of gambling. Such action would be subject to normal legislative and presentment processes, including review and approval by the Executive.[56]

[56] N.Y. Const. art. IV, § 7.