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**Via Email (brian.considine@wsgc.wa.gov)**

**August 2, 2018**

Commissioner Bud Sizemore, Chair  
Commissioner Julia Patterson, Vice-Chair  
Commissioner Chris Stearns  
Commissioner Ed Troyer  
Commissioner Alicia Levy  
Brian Considine, Esq., Legal and Legislative Manager

Washington State Gambling Commission  
4565 7th Avenue S.E.  
Lacey, WA 98503

Re: Big Fish Games, Inc. Petition for Declaratory Order

Dear Mr. Chairman, Commissioners, and Mr. Considine:

We appreciate the opportunity to provide the Commission with this submission to follow up on our July 3, 2018 petition for a declaratory order and address questions raised at the Commission's July 12, 2018 meeting. We also submitted a letter on July 26, 2018 (attached here as well), regarding the Commission's "necessary party" regulation, and look forward to the Commission's August 9 meeting, where it will further consider our petition for a declaratory order that Big Fish Casino games are not subject to the Commission's jurisdiction as "gambling" under RCW 9.46.0237 since their virtual tokens are not things "of value" because they cannot be sold, redeemed, or cashed out for money or a prize, are prohibited by the games' terms of use from being transferred for commercial gain, and have no real-world value.

Washington state law provides in RCW 9.46.0237 that "gambling" means "staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the person's control or influence, upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome." RCW 9.46.0285, in turn, defines "thing of value" as "any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise, directly or indirectly, contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge."

The Commission correctly explains in its 2014 brochure that these statutory provisions mean that, among other things, a social game is not "gambling" if, like Big Fish Casino, its

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virtual tokens cannot be sold or redeemed for real money or a prize. *Online Social Gaming: When is it legal? What to Consider, Let's play a game.*<sup>1</sup>

The Commission's 2014 brochure specifies that it "gives general guidance to determine if you are playing on, or operating, a legal Social Gaming website in Washington State." *Id.* Hundreds of thousands of Washingtonians have downloaded and played games being offered by companies that have relied on this guidance for understanding state law,<sup>2</sup> including companies in Washington's social gaming industry, which employs more than 6,000 individuals.<sup>3</sup> The brochure's guidance and resulting understanding of state law is consistent with the ordinary understanding of "gambling"—that it does not encompass games that are played for entertainment without possibility of winning a prize of real money or something of value outside the game.

The Commission's guidance that games like Big Fish Casino games are not gambling within the meaning of RCW 9.46.0237 is correct as a matter of Washington law for a variety of reasons, many of which were articulated in Big Fish Games' petition for a declaratory order:

- The relevant language in the Gambling Act excludes from its coverage the type of virtual tokens used in Big Fish Casino games. Those tokens are not within any of the four categories of "thing of value" provided in RCW 9.46.0285. They are not: (1) "money or property"; (2) "any token . . . exchangeable for money or property"; or (3) "any form of credit or promise, directly or indirectly, contemplating transfer of money or property or any interest therein." Indeed, Big Fish Casino's terms of use forbid the transfer of tokens for commercial gain.<sup>4</sup> And they are not (4) "any form of credit or promise, directly or indirectly . . . involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge," RCW 9.46.0285, because there is no "charge" otherwise required to play the games to begin with. Big Fish Casino games provide virtual tokens automatically when a player begins play, and at other frequent, regular intervals. These virtual tokens cannot be exchanged or cashed out for money and have no value in the real world.

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<sup>1</sup> A copy of the *Online Social Gaming* brochure is Exhibit A to the Declaration of Gary Rubman in Support of Big Fish Games Inc.'s Petition for a Declaratory Order, which was submitted on July 3, 2018. For the Commission's convenience, a copy of the Declaration of Gary Rubman and its Exhibits are attached to this letter.

<sup>2</sup> See Declaration of Andy Vella in Support of Big Fish Games Inc.'s Petition for a Declaratory Order ¶ 7 ("More than 865,000 installations of [Big Fish Casino] have come from an IP address geo-located in the State of Washington, and there have been more than 100,000 such installations in the past twelve months. "). For the Commission's convenience, a copy of the Declaration of Andy Vella and its Exhibit are attached to this letter.

<sup>3</sup> See *Video Games in the 21st Century, The 2017 Report*, at 13, attached as Exhibit B to Declaration of Gary Rubman.

<sup>4</sup> See *Big Fish Terms of Use* at 3, attached as Exhibit A to the Declaration of Andy Vella.

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- Washington law governing the interpretation of state statutes requires this reading, because one term in a group must be interpreted relative to and consistent with the other terms in the group. *See Wright v. Jeckle*, 158 Wash. 2d 375, 381 (2006). The first three categories in the “thing of value” statutory definition include only things that are money or that can be monetized in the real world, *i.e.*, “money,” “property,” and a property interest. The fourth category of “thing[s] of value” therefore necessarily follows suit, requiring that the “credit or promise” carry value in the real world; that is, the “credit or promise” must be redeemable for cash or capable of being monetized. Excluded from that definition, therefore, is a virtual item that is of use only within a game itself. This category, then, does not include Big Fish Casino game virtual tokens that can never be redeemed for cash or a prize in the real world, no matter how long a player plays or how many tokens a player has.
- Washington law of statutory interpretation also requires that general terms, when listed in a sequence with specific terms, be interpreted to include only those items that are similar to those items included in the specific terms. *See Davis v. Dep’t of Licensing*, 137 Wash. 2d 957, 970 (1999). Because the first three categories in the definition of “thing of value” encompass only items with real-world value beyond the game, so must the fourth.
- Washington statutes also must be interpreted consistent with “the legislative intent in the context of the *whole* statute and its general purpose.” *City of Seattle v. State*, 136 Wash. 2d 693, 701 (1998). The stated purpose of the Gambling Act is “to keep the criminal element out” of gambling without “restricting participation by individuals in activities and social pastimes, which . . . are more for amusement rather than for profit, do not maliciously affect the public, and do not breach the peace.” RCW 9.46.010. Big Fish Casino games are unmistakably social pastimes played only for entertainment because they cannot be played for profit or anything of real-world value.
- In addition, the rule of lenity compels a narrow interpretation of the scope of “thing of value.” Specifically, the Gambling Act imposes criminal sanctions, and the circumstances in which these sanctions apply depend on what constitutes “gambling” and “thing of value.” *See, e.g.*, RCW 9.46.160 (prescribing “class B felony”), 9.46.198 (prescribing “gross misdemeanor”). As a result, Washington law requires that the Gambling Act’s terms be read narrowly, so as to favor a party who would be facing a penalty under the statute, in a manner that limits potential liability—and thus in a manner that properly recognizes that Big Fish Casino games are not “gambling,” under RCW 9.46.0237. *See State v. Roberts*, 117 Wash. 2d 576, 586 (1991).
- The Commission’s longstanding enforcement practices and the Washington Court of Appeals’ application of the Gambling Act also support this understanding of state law. *See* Petition for Declaratory Order at 8-9.

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With regard to a question raised at the July 12 Commission meeting about proceedings in other states on this issue, courts have rejected various attempts to extend other states' gambling laws to reach social games similar to Big Fish Casino games. Those unsuccessful attempts to expand the reach of gambling laws included laws in Maryland, California, Illinois, and Michigan, and the courts rejected them on various grounds. The social games at issue in those cases included a casino-themed social game, a war-themed game, and a fantasy battle game, and the games involved virtual tokens, virtual currency, or virtual prizes that could be used only within each game and could not be cashed out. *See Mason v. Mach. Zone, Inc.* 851 F.3d 315 (4th Cir. 2017); *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871 (N.D. Ill. 2016); *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill. 2016).

We appreciate the opportunity to provide this information to the Commission.

Sincerely,



Beth Brinkmann

# Attachments

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BEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG  
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Via Email (brian.considine@wsgc.wa.gov)

July 26, 2018

Commissioner Bud Sizemore, Chair  
Commissioner Julia Patterson, Vice-Chair  
Commissioner Chris Stearns  
Commissioner Ed Troyer  
Commissioner Alicia Levy  
Brian Considine, Esq., Legal and Legislative Manager

Washington State Gambling Commission  
4565 7th Avenue S.E.  
Lacey, WA 98503

## Re: Big Fish Games, Inc. Petition for Declaratory Order

Dear Mr. Chairman, Commissioners, and Mr. Considine:

Thank you for the opportunity to present to the Commission at its July 12, 2018 meeting. We look forward to further opportunities to address the Commission as it considers Big Fish Games Inc.'s petition for a declaratory order confirming the Commission's earlier guidance that Big Fish Casino games are not subject to the Commission's jurisdiction as "gambling" under RCW 9.46.0237 because their virtual tokens are not things "of value," cannot be cashed out, are prohibited by the games' terms of use from being transferred for profit, and have no real-world value.

We are writing this letter in response to a question discussed at the July 12 meeting regarding whether Cheryl Kater is a necessary party to these proceedings within the meaning of WAC 230-17-180(5), such that her failure to consent to the proceeding could bar the Commission from acting on our declaratory order petition.

As you are aware, the Commission's regulations provide that it "may not enter a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding." WAC 230-17-180(5); *see also* RCW 34.05.240(7) (providing the same for state agencies under Washington's Administrative Procedure Act). Whatever interest Ms. Kater may have in the legal arguments at issue in these proceedings, she does not qualify as a "necessary party" within the meaning of this regulation, and thus cannot prevent the Commission from issuing the requested declaratory order.

The requested declaratory order will not substantially prejudice any "rights" of Ms. Kater's that could render her a necessary party. Although Ms. Kater may have an interest in what state law means and how it is interpreted by the Commission, such an interest is not a

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“right” specific to her that would enable her to prevent Commission action on the declaratory order petition. Other agencies that have similarly adopted regulations under RCW 34.05.240(7) have made clear that the “necessary party” provision protects a third party from having an agency directly adjudicate in a declaratory order proceeding that party’s specific rights without that party’s consent. The regulation has not been applied, however, to prevent agency action merely because a third party has an interest in the meaning of a state statute that may also be implicated in litigation.

For example, the Public Employees Relations Commission held in *In re SEIU, District 925*, 1997 WL 810875 (1997), that an employer was a necessary party to a declaratory order proceeding where the petitioner labor union sought an order declaring that the union’s collective bargaining agreement with the employer no longer covered certain union employees. As a party to the agreement, of course, a declaratory order would affect the employer’s contractual rights and obligations. The order sought here, by contrast, would not have any direct legal force against Ms. Kater. In like fashion, the Pollution Control Hearings Board held in *The Boeing Co. v. Dep’t of Ecology*, 2011 WL 3546624 (2011), that the Department of Ecology was a necessary party to the declaratory order proceeding there because the petitioner sought to have the Board enter an order that would legally invalidate the Department’s own guidance. The order sought here, on the other hand, would have no such legal effect on any right of Ms. Kater. And the Utilities and Transportation Commission explained in *re AT&T Commc’ns of Pac. Nw., Inc.*, 1996 WL 760070 (1996), that a company was a necessary party to the declaratory order proceeding there because the order sought would declare that the company specifically was not permitted “to unilaterally determine that its status as designated toll carrier and as carrier of last resort . . . ended simply because a customer determine[d] to use another toll provider.” Again, the declaratory order sought here would not adjudicate Ms. Kater’s rights, nor would it constitute any type of legal order against Ms. Kater.

That Ms. Kater’s pending lawsuit contains allegations involving the Big Fish Casino games does not change the fact that she has no “right” that would be prejudiced by a declaratory order confirming the Commission’s earlier guidance that virtual tokens in social games like Big Fish Casino, which cannot be redeemed for “real” money, and are prohibited by the games’ terms of use from being transferred for profit, are not things “of value” under Washington’s gambling laws and regulations, and that such games are not “gambling” in Washington because the required “prize” element is not present.

The Commission is not being asked to enter a declaratory order denying relief to Ms. Kater on her legal claims in her lawsuit. That is a matter for the federal court in which the lawsuit is pending. Indeed, the Ninth Circuit ruling that created the uncertainty necessitating the declaratory order request will remain unchanged by any order issued by the Commission. That ruling was based on a reading of the allegations (not *evidence*) in Ms. Kater’s lawsuit, at a preliminary phase of litigation, that differ from the evidence before the Commission in the sworn affidavit supporting the declaratory order petition. That federal court ruling did not determine the application of Washington law to the facts as presented to the Commission, which the Commission has authority to determine pursuant to state law. Indeed, the Ninth Circuit’s opinion expressly noted that it was constrained by the allegations in Kater’s complaint and could not consider the actual evidence at this preliminary stage of the case. *See Kater v. Churchill*

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*Downs Inc.*, 886 F.3d 784, 787 (9th Cir. 2018) (“Churchill Downs argues that this does not matter, because users receive free chips throughout gameplay, such that extending gameplay costs them nothing. But because Churchill Downs’ allegation is not included in the complaint, we do not further address this contention.”).

That Ms. Kater’s “rights” are not at issue in this declaratory order is reinforced by the fact that Ms. Kater’s interest in the legal interpretation and application of state law is shared by a vast number of other members of the public, who desire to know whether the longstanding meaning of the Washington Gambling Act continues to recognize that online social games involving tokens that lack real-world value and that cannot be transferred for commercial gain under the terms of use, do not constitute gambling under the Act. Game owners and players alike throughout Washington have relied on this understanding for years as set forth in the Commission 2014 guidance document, and have a strong interest in the Commission confirming the lawfulness of their business conduct and game-playing. Indeed, the Commission is charged by its authorizing statute, RCW Chapter 9.46, with responsibility for interpreting and enforcing the State’s gambling laws, and for deciding where they do not apply, as well.

Neither the language of the “necessary party” regulation, nor the agency orders applying it, contemplate preventing agency action when the issue of state law is of such general interest to members of the public. Were it otherwise, the declaratory order authority of state agencies could be thwarted unilaterally by a wide range of persons, including apparently thousands of putative class members in pending lawsuits that involve the same state law, claiming a right to foreclose agency action on a declaratory order petition. Litigation brought by plaintiffs in federal court does not supplant or reduce a state agency’s authority or responsibility for interpreting and providing public guidance concerning the laws it is charged with implementing and enforcing. State law interpretation and application are the province of the state legislature and the agencies it creates by legislation, not of the federal courts.

The letter submitted by Ms. Kater’s counsel on July 11, 2018, mistakenly suggests that the Commission’s “necessary party” regulation, WAC 230-17-180(5), is governed by the meaning of Washington Superior Court Civil Rule 19, entitled “Joinder of Persons Needed for Just Adjudication,” which applies when parties must be joined in civil lawsuits in court. But the two provisions are worded differently, serve different purposes, and have not been held by a court to impose the same standard.

First, the text of WAC 230-17-180(5) addresses the situation where a party has “rights” that would necessarily be “substantially prejudiced” by the declaratory order sought, whereas Civil Rule 19 is much broader, addressing any party that “claims *an interest relating to the subject matter of the action.*” Civil Rule 19 (a)(2) (emphasis added). Second, their purposes are distinct, such that it makes sense that there would be a higher showing of rights being substantially prejudiced under the regulation in order to strip an agency of its decision-making authority, as compared to a lower showing of interest relating to the subject matter of a court action in order for a party to be joined to participate. Third, Ms. Kater’s counsel does not cite any authority from Washington courts equating these two provisions or somehow reconciling such a view with the fact that they say different things and serve different purposes. *See also The Boeing Co.*, 2011 WL 3546624 (applying WAC 230-17-180(5) without reference to Civil Rule

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19); *In re SEIU, District 925*, 1997 WL 810875 (same); *In re AT&T Commc'ns of Pac. Nw., Inc.*, 1996 WL 760070 (same).

Moreover, Ms. Kater would not qualify as a necessary party under Civil Rule 19 even if that standard did apply. The case that Ms. Kater provides in support of her position shows only that Civil Rule 19 requires that a party be joined in a court action where that party's legal interests would otherwise be directly adjudicated in its absence. *See Burt v. Washington State Dep't of Corr.*, 168 Wash. 2d 828, 833, 836-37 (2010) (holding that a "requester of public documents (records) . . . is a necessary party to an action . . . seeking to enjoin disclosure of those records"). In addition, it is well established that "[a] mere financial stake in [an] action's outcome," which is what Ms. Kater purports to claim here, "will not suffice" to require joinder under Civil Rule 19. *Auto. United Trades Org. v. State*, 175 Wash. 2d 214, 223 (2012). To satisfy Civil Rule 19's joinder requirement, a party's interest in an action must be "sufficiently weighty" and "legally protected," like a litigant's interest in enforcing a contract to which it is a party. *Id.* at 223-24. Should the Commission's determination of Ms. Kater's purported necessary party status be appealed to a Washington court, there would be no basis for the court to impose a less demanding standard to constitute a necessary party under WAC 230-17-180(5) than under Civil Rule 19; for the reasons discussed above, a higher showing should be imposed, consistent with the text and purpose of WAC 230-17-180(5).

Furthermore, even if Ms. Kater could somehow qualify as a necessary party to the declaratory order petition, the requested order would not "substantially prejudice" any rights she might claim, as required under WAC 230-17-180(5), so her refusal to consent does not preclude the entry of the order sought. The order would not have a legally binding effect against any right of Ms. Kater's; how any application of state law in the Commission's order is weighed by the federal court or arbitrator presiding over her litigation would be a matter for that court or arbitrator to determine. *See In re Tanner Elec. Co.*, 1991 WL 11864524 (Utils. and Transp. Comm'n 1991) (Nintendo was not a necessary party to declaratory order petition seeking "a ruling whether RCW 80.28.110 require[d] Puget Sound Power & Light Company . . . to serve Nintendo . . . on request," because "Nintendo would not be bound by the stipulated facts [underlying the proceedings] if it chose to participate in later litigation" regarding the same issue).

To the extent Ms. Kater has an interest in her views being heard by the Commission, the Commission has accommodated that interest and can continue to do so, by allowing her counsel's appearance before the Commission

We appreciate the opportunity to provide this information to the Commission regarding the question of the applicability of WAC 230-17-180(5).

Sincerely,

  
Beth Brinkmann

1 **BEFORE THE WASHINGTON STATE GAMBLING COMMISSION**

2  
3 In the Matter of the Petition of Big Fish Games,  
4 Inc. for a Declaratory Order

Matter No.:

5 **DECLARATION OF GARY RUBMAN IN**  
6 **SUPPORT OF BIG FISH GAMES, INC.'S**  
7 **PETITION FOR A DECLARATORY**  
8 **ORDER**

9 I, Gary Rubman, hereby declare as follows:

10 1. I am a partner at the law firm of Covington & Burling LLP, counsel to Big Fish  
11 Games, Inc. ("BFG"). I make this declaration based on my personal knowledge.

12 2. Attached as Exhibit A is a true and correct copy of a brochure published by the  
13 Washington State Gambling Commission, entitled *Online Social Gaming: When is it legal, What to*  
14 *Consider*. The brochure bears the mark "GC5-027 (3/14)" and my understanding is that it was  
15 published in 2014 and was available on the website of the Washington State Gambling Commission  
16 until recently.

17 3. Attached as Exhibit B is a true and correct copy of an excerpt of a report  
18 published by the Entertainment Software Association ("ESA"), entitled *Video Games in the 21st*  
19 *Century, The 2017 Report*. The full report is available on the ESA's website at  
20 [http://www.theesa.com/wp-content/uploads/2017/02/ESA\\_EconomicImpactReport\\_Design\\_V3.pdf](http://www.theesa.com/wp-content/uploads/2017/02/ESA_EconomicImpactReport_Design_V3.pdf) (last  
21 accessed July 3, 2018).

22  
23 I declare under the penalty of perjury under the laws of the United States that the  
24 foregoing is true and correct. This declaration is executed this 3rd day of July, 2018, in Washington,  
25 DC.

26  
27   
28 Gary Rubman

# **Exhibit A**



## What is Social Gaming?

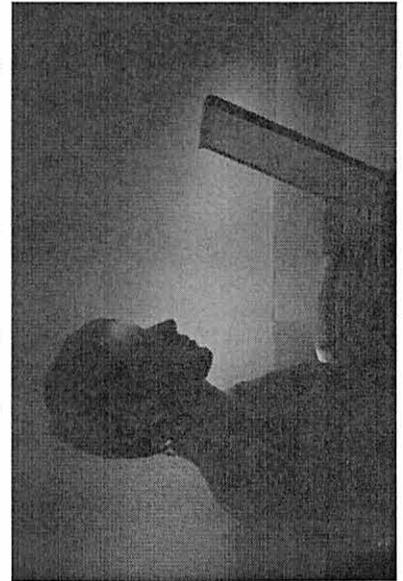
The Oxford dictionary defines **Social Gaming** as the activity or practice of playing an online game on a social media platform, with a major emphasis on friends and community involvement.

Social Gaming ranges from tending a farm to playing a soldier in combat. Ideas for new games are constantly thought up. Some popular social games involve:

- Role playing;
- Adventure;
- Arcade style games; and
- Casino style games.

Social Gaming is growing at an unprecedented rate and with it comes questions. This brochure gives general guidance to help you determine if you are playing on, or operating, a legal Social Gaming website in Washington State.

"Real" money = Legal tender, U.S. Currency.



## Is Social Gaming Legal in Washington?

Social Gaming is legal in Washington State if no gambling takes place.

### What is Gambling?

Gambling involves **3 elements**:

1. Prize;
2. Consideration (something of value, wager, fee to play); and
3. Chance.

**Legal:** If one of the **3 elements** of gambling is removed, the game is not gambling.

Things to keep in mind, to keep it legal:

- There must be a way to play for free.
- If "real" money can be used to enhance or extend play, there must be no prize.

**Illegal:** If a Social Game has the **3 elements** of gambling, it is illegal and cannot be played, or operated, in Washington State. It is illegal to solicit Washington residents to play illegal Social Games.

**Website's Rules of Play:**

- If you are thinking about participating in a Social Game, read the website's Rules or Terms of Use to determine if one of the **3 elements** of gambling is removed.
- Website operators should clearly state in their Rules that virtual money, points, and other items cannot be sold or redeemed for "real" money or prizes.

Washington State law defines gambling as:

"staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the person's control or influence, upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome." (RCW 9.46.0237)



## No Prize = No Gambling = OK To Play

*Buying virtual money:*

Many Social Gaming websites give free virtual money to begin play, with an option to buy more virtual money with "real" money to continue play. All play uses this virtual money.



Legal Social Gaming websites will not let players cash in their virtual winnings or points for "real" money or prizes.



Because there is no prize, these games are **not** gambling. However, if the virtual money can be sold or redeemed for "real" money or a prize, the game is illegal.

*Buying virtual prizes, avatars & tools:*

If a player spends "real" money for a virtual prize, avatar or tool to assist with game play and these items cannot be sold or redeemed for "real" money or a prize, it's **not** gambling.



For example, let's say a player uses "real" money to purchase a key to open a chest containing a rare item that the

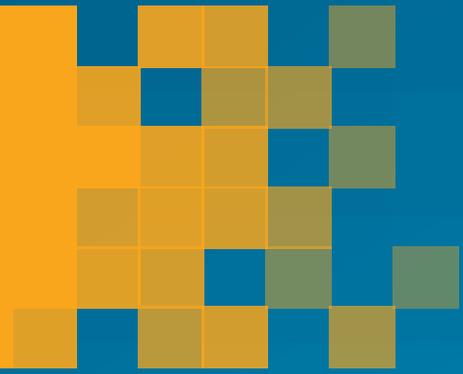
player's character can use to advance their position in the game.

Even though "real" money is used to buy a key to get a rare item, neither the key or rare item have any real-world value because they cannot be sold or redeemed for "real" money. Because there is no prize, it's **not** gambling.

## **Exhibit B**



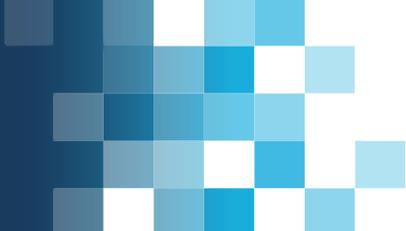
entertainment<sup>®</sup>  
software  
association



# VIDEO GAMES IN THE 21<sup>ST</sup> CENTURY

THE 2017 REPORT

BY STEPHEN E. SIWEK



# EXECUTIVE SUMMARY

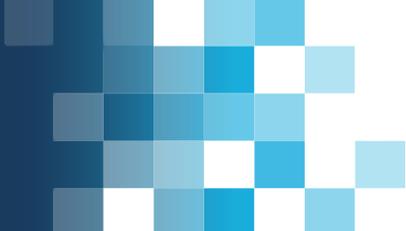
*Video Games in the 21st Century: The 2017 Report* measures the economic contributions made by the U.S. entertainment software industry to the American economy. *The 2017 Report* updates and expands upon earlier studies that quantified the economic benefits provided by the entertainment software industry to the U.S. economy as a whole<sup>12</sup>. *The 2017 Report* concludes that:

- Total video game software sales exceeded **\$24.5 billion in 2016**.
- In 2015, there were **2,457 video game companies operating at 2,858 locations in all 50 states**.
- The total direct employment by the U.S. game industry now exceeds **65,000 employees**.
- The total employment that depends on the game software industry **now exceeds 220,000**.
- Between 2012 and 2014, the number of game company locations **grew at an annual rate of 14.1%**.
- Between 2013 and 2015, direct employment in the U.S. game company industry **grew at an annual rate of 2.9%**.
- In 2015, the average annual compensation per employee (wages, salaries and employer contributions for pensions, insurance and government social insurance) **was about \$97,000**.
- The U.S. game company industry's value added to U.S. GDP was more than **\$11.7 billion in 2015**.
- The real annual growth rate of the U.S. game software industry's **value added was 3.7%** for the period 2013-2015.

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<sup>1</sup> Siwek, Stephen E., *Video Games in the 21st Century: Economic Contributions of the U.S. Entertainment Software Industry*, Entertainment Software Association (2007).

<sup>2</sup> Siwek, Stephen E., *Video Games in the 21st Century: The 2010 Report*, Entertainment Software Association (2010).



# INTRODUCTION

The U.S. industry that develops and publishes video game software continues to create wholly new forms of entertainment for consumers worldwide. The industry also generates sales in the billions of dollars and creates thousands of American jobs.

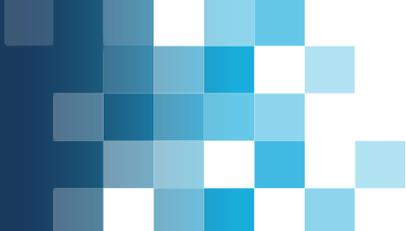
This publication, *Video Games in the 21st Century: The 2017 Report*, presents a number of statistical measures that quantify the economic contributions of the video game industry. This report is the third economic impact study prepared for the Entertainment Software Association (“ESA”), the trade association that represents the U.S. video game industry.<sup>3</sup> The basic methods used in this report were originally described in one or both of the previous ESA studies. In this study however, there is a significant change in the underlying data used to measure the economic impact of the video game industry. Unlike previous ESA studies, the source references used in this analysis were compiled directly from game company data bases and social media websites. While the basic structure of the economic impact study has not materially changed, the inclusion of data from the ESA Geographic Impact Report has had more dramatic effects on the overall estimates presented here. ESA obtained this information from multiple different data bases/websites, including Steam, Kickstarter, International Game Developers Association, Giant Bomb, and LinkedIn.

ESA’s reliance on multiple research sources is commendable. Since its origin, the video game industry has not been subject to extensive regulation of its companies or its employees. With less regulation, there have been fewer demands for the industry to gather and publish industry data and studies. For these reasons, neither the federal government nor the industry itself has invested in creating a comprehensive data base of video game companies. However, with the publication of the ESA’s Geographic Impact Report, that condition has changed.

ESA’s Geographic Impact Report quantifies industry statistics on geographic volume, employment and growth. The study identifies 2,457 game companies that function at 2,858 locations. Approximately 80% of these companies were game developers while nearly 95% were founded in the United States. Significantly, video game companies are located in all 50 states.

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<sup>3</sup> The previous studies were: Siwek, Stephen E., *Video Games in the 21st Century: Economic Contributions of the U.S. Entertainment Software Industry*, Entertainment Software Association (2007) and Siwek, Stephen E., *Video Games in the 21st Century: The 2010 Report*, Entertainment Software Association.



In addition to the data collected by ESA, many of the statistical measures included in this report either were taken directly from U.S. government sources, such as the U.S. Census Bureau or Bureau of Economic Analysis, or were derived using public data from those sources. A basic difficulty that continues to arise when using U.S. government data is that many (but not all) of the most relevant statistics measure only aggregated industry groupings such as software publishing. Largely for this reason, certain estimates presented in this report were derived using statistical data for broader industry groupings than video game publishing. Subsequently, where possible, these broader measures were adjusted to better reflect the known characteristics of the video game industry.

# III. U.S. EMPLOYMENT IN GAME PUBLISHING AND DEVELOPMENT

Employees in the U.S. video game industry may work in small game developer shops or in large game publishing companies with thousands of employees. They may be employed as programmers, arts and animation specialists, game designers, game production experts, quality assurance personnel, audio specialists, legal staff members or business and marketing personnel. Developers may specialize in games for specific types of platforms including mobile, handheld and online media.

In the video game industry, online company data bases and social media sites are available to researchers seeking to access or create their own data compilations. In this analysis, ESA used a variety of such tools to compile its own data base of video game companies. Within that data base, ESA collected data that focused on industry companies and employment. ESA's video game statistics were also collected at the levels of U.S. states, congressional districts and Metropolitan Statistical Areas ("MSAs").

The video game data compiled in the ESA Geographic Impact Report proved to be an important resource for the measurement of video game contributions to the U.S. economy. Data on U.S.-based publisher and developer locations from ESA's Geographic Impact Report data bases were used to estimate the number of workers now employed in the industry.

As shown in Table C-1, in the United States, there are at least 2,332 game developer locations across all 50 states plus the District of Columbia. There are also 526 publisher locations across 44 states. In total, there are at least 2,858 game company locations.

**TABLE C-1: U.S. GAME COMPANY DEVELOPERS AND PUBLISHERS**

TYPE OF COMPANY	LOCATIONS	STATES
DEVELOPER	2,322	51
PUBLISHER*	526	44
ALL COMPANIES	2,858	51

\* Publishers also include Hardware/Software Manufacturers, Service Providers, and Distributors.

Source: ESA Mapping Project Data.

Table C-2 shows the number of workers employed by these companies. As reported in Table C-2, there are now at least 65,678 workers directly employed at game software publisher and developer locations in the United States.<sup>5</sup> Of this total, 28,556 workers are directly employed at game publishing companies while 37,122 people now work directly for U.S.-located game developer firms.

**TABLE C-2: U.S. GAME COMPANY DIRECT EMPLOYMENT BY TYPE OF COMPANY**

TYPE OF COMPANY	LOCATIONS	STATES
DEVELOPER	37,122	1,331
PUBLISHER**	28,556	351
<b>ALL COMPANIES</b>	<b>65,678</b>	<b>1,682</b>

\* 1,176 locations do not report employment data.

\*\* Publishers also include Hardware/Software Manufacturers, Service Providers, and Distributors.

Source: ESA Mapping Project Data.

The employee data shown in Table C-2 can also be disaggregated on a state-by-state basis. The total number of workers directly employed at game software publisher and developer firms in the industries' top seven states are shown in Table C-3. The states of California, Washington, Texas, New York, Illinois, Florida, and Massachusetts collectively employ 55,915 workers, or 85% of the total direct employment for the U.S. game software industry as a whole.

<sup>5</sup> Of the 2,858 game company locations included in the ESA data reported in Table C-1, 1,176 locations do not report employment data. This leaves 1,682 locations, as reported in Table C-2.

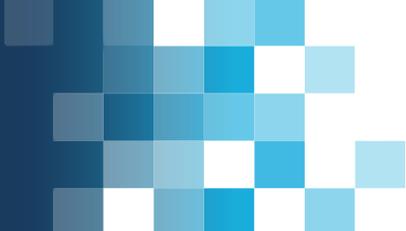
**TABLE C-3: U.S. GAME COMPANY EMPLOYMENT BY STATE  
TOP SEVEN STATES**

STATE	REPORTED EMPLOYMENT*	PERCENTAGE OF ALL EMPLOYEES
CALIFORNIA	35,325	54%
WASHINGTON	6,166	9%
TEXAS	4,883	7%
NEW YORK	4,675	7%
ILLINOIS	1,727	3%
FLORIDA	1,676	3%
MASSACHUSETTS	1,463	2%
<b>TOP 7 STATES</b>	<b>55,915</b>	<b>85%</b>
<b>ALL OTHER STATES</b>	<b>9,763</b>	<b>15%</b>
<b>ALL STATES</b>	<b>65,678</b>	<b>100%</b>

\*1,176 locations do not report employment data.

Source: ESA Mapping Project Data.

The employment figures presented in these tables refer to employees who work *directly* for entertainment software developers and publishers. However, any estimate of the number of workers who are directly employed in a given industry will not capture the full impact of that industry on the economy as a whole. The U.S. economy functions as an interlocking system where changes in supply and demand for one industry affect supply and demand in other industries as well.



The U.S. video game industry creates products that combine the skills of the industry’s employees with other inputs of goods and services purchased from other industries. For example, a game developer may need to acquire a specific type of graphic design software from another firm in order to produce the game under development. Revenue from that purchase can be used to compensate employees at the firm that makes the graphic design software product. There would also be similar linkages to suppliers of the graphic design software firm and further linkages to those suppliers and on through the economy.

The U.S. government has developed a widely accepted mathematical model, known as the Regional Input-Output Modeling System (“RIMS II”) that uses input-output relationships throughout the economy to capture these interlocking affects. The input-output relationships are industry specific and take the form of “multipliers.” In this analysis, employment multipliers for the software publishing industry were obtained from the U.S. Bureau of Economic Analysis (“BEA”) for all states where game software publishing employment had been located. These multipliers were applied to the direct game industry employee counts on a state-by-state basis. The weighted average multiplier across all states was 3.355. As shown in Table C-4, in 2015 the total direct and indirect employment for the U.S. video game industry as a whole was 220,332 people. 190,706 of these people were located in the top seven states shown in Table C-4, including 123,408 employees in California alone.

**TABLE C-4: U.S. GAME COMPANY DIRECT AND INDIRECT EMPLOYMENT BY STATE**

STATE	REPORTED DEVELOPER EMPLOYMENT	REPORTED PUBLISHER EMPLOYMENT**	REPORTED DIRECT EMPLOYMENT*	DIRECT + INDIRECT EMPLOYMENT
CALIFORNIA	16,719	18,606	35,325	123,408
WASHINGTON	3,960	2,206	6,166	19,815
TEXAS	4,159	724	4,883	17,867
NEW YORK	1,916	2,759	4,675	13,522
ILLINOIS	1,547	180	1,727	5,917
FLORIDA	646	1,030	1,676	5,607
MASSACHUSETTS	1,270	193	1,463	4,570
<b>TOP 7 STATES</b>	<b>30,217</b>	<b>25,698</b>	<b>55,915</b>	<b>190,706</b>
<b>ALL OTHER STATES</b>	<b>6,905</b>	<b>2,858</b>	<b>9,763</b>	<b>29,626</b>
<b>ALL STATES</b>	<b>37,122</b>	<b>28,556</b>	<b>65,678</b>	<b>220,332</b>

\* 1,176 locations do not report employment data.

\*\* Publishers also include Hardware/Software Manufacturers, Service Providers, and Distributors.

Source: ESA Mapping Project Data.

1 **BEFORE THE WASHINGTON STATE GAMBLING COMMISSION**

2  
3 In the Matter of the Petition of Big Fish Games,  
4 Inc. for a Declaratory Order

Matter No.:

5 **DECLARATION OF ANDY VELLA IN**  
6 **SUPPORT OF BIG FISH GAMES, INC.'S**  
7 **PETITION FOR A DECLARATORY**  
8 **ORDER**

9 I, Andy Vella, hereby declare as follows:

10 1. I am a Vice President and General Manager at Big Fish Games, Inc. (“BFG”).

11 My responsibilities as General Manager include running all business and development operations for the  
12 video game Big Fish Casino (“BFC”). Prior to BFG, I worked as a Lead Engineer at Self Aware Games,  
13 the studio that created the suite of online video games that today make up BFC. For the past 6 years, my  
14 work has been dedicated to developing and enhancing BFC. I have extensive knowledge about BFC’s  
15 engineering and operations, and I am deeply familiar with gameplay protocols and player user data. I  
16 make this declaration based on my personal knowledge and review of business records maintained in the  
17 ordinary course of my employment at BFG.

18 2. BFC contains a suite of online video games that are casino-themed including, for  
19 example, virtual blackjack, poker, and roulette.

20 3. Players use virtual tokens to play BFC, which are termed “chips” per the casino  
21 theme. Players may accumulate virtual chips in various ways. All new players currently receive  
22 100,000 virtual chips automatically when they install BFC for free and create a username. Since at least  
23 2013, additional virtual chips are distributed automatically to players at various times within the games.  
24 For example, players can obtain additional virtual chips through playing the game. Players receive  
25 additional virtual chips automatically on any day that they sign in to play. They receive additional  
26 virtual chips after they are logged into BFC for certain periods of time (*e.g.*, 30 minutes) and click or  
27 press to collect more virtual chips automatically. Players also receive additional virtual chips when their  
28

1 Facebook friends install BFC, or, as of 2017, by joining a social club within BFC. Players may also  
2 purchase additional virtual chips.

3 4. Players cannot, and have never been able to, exchange or cash out BFC virtual  
4 chips for money, and the virtual chips have no value in the real world. Virtual chips can be used only  
5 within the games, such as to play the games or to obtain a virtual pet, cupcake, flag, or other virtual  
6 item.

7 5. Attached as Exhibit A is a true and correct copy of the Terms of Use that  
8 currently govern the use of BFC, dated November 30, 2017. The Terms of Use expressly forbid any  
9 transfer or sale of virtual items, including virtual chips, “for commercial gain.”

10 6. BFC does not provide any mechanism for players to sell virtual chips to each  
11 other. Since at least 2013, BFC allows a player to “gift” virtual chips to another player within the game  
12 through the use of virtual “gold bars” that are obtained through play or purchased within the games.  
13 Neither the gifting player nor BFG receives any financial compensation when virtual chips are gifted.

14 7. BFG is headquartered in Seattle, Washington. More than 865,000 installations of  
15 BFC have come from an IP address geo-located in the State of Washington, and there have been more  
16 than 100,000 such installations in the past twelve months.

17  
18 I declare under the penalty of perjury under the laws of the United States that the  
19 foregoing is true and correct. This declaration is executed this 3rd day of July, 2018, in Oakland,  
20 California.

21  
22  
23   
24 Andy Vella  
25  
26  
27  
28

# EXHIBIT A

# Big Fish Terms of Use

Last modified: November 30, 2017

## AGREEMENT AND SERVICES

PLEASE READ THESE TERMS OF USE CAREFULLY, INCLUDING THE MANDATORY ARBITRATION PROVISION IN THE SECTION TITLED "DISPUTE RESOLUTION BY BINDING ARBITRATION," WHICH REQUIRES THAT DISPUTES ARE RESOLVED BY FINAL AND BINDING ARBITRATION ON AN INDIVIDUAL AND NOT A CLASS-WIDE OR CONSOLIDATED BASIS. IF YOU DO NOT WISH TO BE SUBJECT TO ARBITRATION, YOU MAY OPT OUT OF THE ARBITRATION PROVISION BY FOLLOWING THE INSTRUCTIONS PROVIDED AT THE END OF THE SECTION TITLED "DISPUTE RESOLUTION BY BINDING ARBITRATION."

BY ACCESSING OR USING ANY BIG FISH OFFERING, YOU AGREE TO BE BOUND BY THESE TERMS OF USE AND ALL TERMS INCORPORATED BY REFERENCE. IF YOU DO NOT AGREE TO THESE TERMS OF USE IN THEIR ENTIRETY, DO NOT USE ANY BIG FISH OFFERINGS.

Big Fish Games, Inc. and/or its Affiliates provide access to the Big Fish Offerings subject to the conditions set forth in these Terms of Use. For purposes of these Terms of Use, the term "**Affiliates**" means, with respect to any party, any person or entity which controls, is controlled by, or is under common control with, such party, and the term "**Big Fish Offerings**" means the web sites of Big Fish, including [www.bigfishgames.com](http://www.bigfishgames.com), any other sites on which these Terms of Use are posted, and any other Big Fish application, service or product licensed, downloaded or otherwise accessed by you through third party sites or sources, including the products and services available through any of the foregoing.

THESE TERMS OF USE ARE ENTERED INTO BETWEEN YOU AND BIG FISH GAMES, INC. THE TERM "**BIG FISH**" MEANS BIG FISH GAMES, INC. ALONG WITH ITS AFFILIATES. Your use of the Big Fish Offerings constitutes your express acceptance without reservation of these Terms of Use.

Use of the Big Fish Offerings is also governed by our [Privacy Policy](#) and any other terms of use applicable to services you register to use within a Big Fish Offering, including any amendments or updates thereto.

Use of the Big Fish Software, as hereafter defined, is governed by the [Big Fish Games, Inc. End User license](#).

Without limiting the foregoing, each of your Big Fish Offering account(s) (each a "Big Fish account"), if applicable, and participation in any Big Fish Offerings are governed by these Terms of Use. The Big Fish Offerings are always evolving, so it is important that you periodically check these Terms of Use, as well as the specific rules for any games or activities in which you

choose to participate, for updates. Big Fish reserves the right to change or modify these Terms of Use at any time and in our sole discretion. If Big Fish makes changes to these Terms of Use, we will provide notice of such changes, such as (by way of example only) by providing notice through the Big Fish Offerings or updating the "Last Modified" date at the top of these Terms of Use. If we revise these Terms of Use, such revision(s) will take effect immediately such notice. Your continued access or use of any Big Fish Offering constitutes your acceptance of the revised Terms of Use. We encourage you to frequently review these Terms of Use to ensure that you understand the terms and conditions that apply to your use of the Big Fish Offerings. If you do not agree to any of these Terms of Use, you should discontinue using or participating in any and all Big Fish Offerings. If there is a conflict between these Terms of Use and any other rules or instructions posted within a Big Fish Offering, these Terms of Use will control.

## **ACCOUNT REGISTRATION**

If you create a Big Fish account within any Big Fish Offering, you must provide truthful and accurate information to us in creating such account. If Big Fish has reasonable grounds to suspect that you have provided any information that is inaccurate, not current or incomplete, Big Fish may suspend or terminate your ability to use or access a Big Fish Offering, and refuse any and all current or future use of or access to any or all Big Fish Offerings (or any portion thereof).

Big Fish requires all users to be over the age of thirteen (13). If you are between the ages of thirteen (13) and eighteen (18), you may create a Big Fish account or use the Big Fish Offerings only under the supervision of a parent or legal guardian who agrees to be bound by these Terms of Use.

Big Fish reserves the right to limit the number of accounts a user can establish. This limit may change over time in our sole discretion.

You are solely responsible for all activity on any and all of your Big Fish account(s) and for the security of your computer system. You should not reveal your username or password to any other person. Big Fish will not ask you to reveal your password. If you forget your password, you can request to have a new password sent to your registered e-mail address. You agree to indemnify and hold Big Fish and their respective employees, contractors, officers, directors, shareholders, agents, representatives, vendors, and content providers harmless for any improper or illegal use of any of your Big Fish account(s). This includes illegal or improper use by someone to whom you have given permission to use your Big Fish account(s) or whom you have negligently allowed to access your Big Fish account(s). Big Fish reserves the right to terminate your Big Fish account(s) if any activity that occurs with respect to such account(s) violates these Terms of Use.

## **ELECTRONIC COMMUNICATIONS**

When you access a Big Fish Offering, send e-mails or electronically chat with Big Fish, you are communicating with us electronically. You consent to receive communications from us electronically. We will communicate with you by e-mail or by posting notices in the Big Fish

Offerings. You agree that all agreements, notices, disclosures and other communications that Big Fish provides to you electronically satisfy any legal requirement that such communications be in writing.

## **VIRTUAL ITEMS**

Certain Big Fish Offerings may provide you with the opportunity to license a variety of virtual items such as virtual currency, virtual goods, additional levels and content packs ("virtual items") that can be used while playing the Big Fish Offering. You may be required to pay a fee to obtain virtual items. When you use virtual items within a Big Fish Offering, any virtual items that you have purchased will be deemed used before any virtual items that you have earned.

You have no property interest in any virtual items. Any purchase of virtual items, and virtual items accumulated through any applicable Big Fish Offering membership benefits, are purchases of a limited, non-transferable, revocable license to use those virtual items within the applicable Big Fish Offering. Virtual items may not be transferred or resold for commercial gain in any manner, including, without limitation, by means of any direct sale or auction service. Virtual Items may not be purchased or sold from any individual or other company via cash, barter or any other transaction. Virtual items have no monetary value, and cannot be used to purchase or use products or services other than within the applicable Big Fish Offering. Virtual items cannot be refunded or exchanged for cash or any other tangible value.

Big Fish may manage, regulate, control, modify or eliminate your virtual items in our sole discretion, and Big Fish will have no liability to you or anyone for exercising those rights. In addition, all virtual items are unconditionally forfeited if your Big Fish Offering account is terminated or suspended for any reason, in Big Fish's sole discretion, or if Big Fish discontinues any Big Fish Offering or any portion or feature of any Big Fish Offering.

Big Fish has no liability for hacking or loss of your virtual items. Big Fish has no obligation to, and will not, reimburse you for any virtual items lost due to your violation of these Terms of Use. Big Fish reserves the right, without prior notification, to limit the order quantity on any virtual items and/or to refuse to provide you with any virtual items. Price and availability of virtual items are subject to change without notice.

## **SOCIAL NETWORK SITES**

If you access a Big Fish Offering via a third party social networking site (a "**Social Game**"), you should be aware that Social Games are only available to individuals who have registered with the social networking site through which s/he accesses Social Games. You agree that your social networking site account information is accurate, current and complete.

If Big Fish has reasonable grounds to suspect that you have provided any information that is inaccurate, not current or incomplete, Big Fish may suspend or terminate your ability to use or access Social Games and refuse any and all current or future use of or access to Social Games (or any portion thereof).

# REVIEWS, COMMUNICATIONS AND SUBMISSIONS

## Generally

Without limiting the scope of these Terms of Use, you agree to comply with our [Forum FAQ](#) and [Review Guidelines](#) when you submit reviews, forum posts and other content via any Big Fish Offering. Inappropriate, obscene, defamatory, offensive language, crude or explicit sexual content, discussions of any matters which are explicitly or by inference illegal in any way, discussions of illegal or any other drugs, and racially and ethnically offensive speech are examples of unsuitable content that are not permitted within the Big Fish Offerings. Content standards may vary depending on where you are within a Big Fish Offering and the expectations of the relevant game community. Some game play may involve use of stronger language than others, including mild expletives. You should always use your best and most respectful and conservative judgment in interacting as part of any game play, and submitting any content, such as a review or post to any forums or message boards, within a Big Fish Offering.

We expressly reserve the right, but have no obligation, to: (a) monitor any communications within the Big Fish Offerings, including, without limitation, to ensure that appropriate standards of online conduct are being observed, and (b) immediately or at any time remove any content that we deem objectionable or unsuitable in our sole discretion. Big Fish does not endorse, approve, or prescreen any content that you or other users post or communicate on or through any Big Fish Offerings. Big Fish does not assume any responsibility or liability for any content that is generated, posted or communicated by any user on or through the Big Fish Offerings. You agree to indemnify Big Fish and each of their respective employees, contractors, officers, directors, shareholders, agents, representatives, vendors, and content providers from any liability or damages arising out of or resulting from any content you post or communicate on or through the Big Fish Offerings.

Without limiting the generality of these policies and standards, the following actions are examples of behavior that violate these Terms of Use and may result in any or all of your Big Fish account(s) being immediately suspended or terminated:

- Posting, transmitting, promoting, or distributing any content that is illegal
- Harassing or threatening any other user of a Big Fish Offering or any employee or contractor of Big Fish
- Impersonating another person, indicating that you are a Big Fish employee or a representative of Big Fish (if you are not), or attempting to mislead users by indicating that you represent Big Fish in any way
- Attempting to obtain a password, other account information, or other private information from any other user of a Big Fish Offering
- Uploading any software, files, photos, images or any other content to a Big Fish Offering that you do not own or have the legal right to freely distribute, or that contain a virus or corrupted data, or any other malicious or invasive code or program
- Posting messages for any purpose other than personal communication, including without limitation advertising, promotional materials, chain letters, pyramid schemes, political

campaigning, soliciting funds, mass mailings and sending "spam", or making any commercial use of any Big Fish Offering.

- Disrupting the normal flow of dialogue, or otherwise acting in a manner that negatively affects or disrupts other users.
- Improperly using any game support functions or complaint buttons, or making false complaints or other reports to Big Fish representatives.
- Posting or communicating any player's real-world personal information within a Big Fish Offering or by or through a Big Fish Offering or any related bulletin board.
- Uploading or transmitting, or attempting to upload or transmit, any material that acts as a passive or active information collection or transmission mechanism, including, without limitation, gifs, 1x1 pixels, web bugs, and other similar devices.
- Using or launching any automated system, including, without limitation, any spider, bot, cheat utility, scraper or offline reader that accesses a Big Fish Offering, or using or launching any unauthorized script or other software.
- Using a false e-mail address or otherwise disguising the source of any content that you submit within a Big Fish Offering, or using tools which anonymize your internet protocol address.
- Interfering or circumventing any Big Fish Offering security feature or any feature that restricts or enforces limitations on use of or access to a Big Fish Offering.
- Attempting to sell any part of a Big Fish Offering, including, without limitation, any virtual items (if applicable), Big Fish accounts and access to them in exchange for real currency or items of monetary or other value.
- Engaging in cheating or any other activity that Big Fish deems to be in conflict with the spirit of a Big Fish Offering.

## **Public Nature of Communications**

You acknowledge and agree that your submitted content, including your reviews and your communications with other users via online messaging, private messaging, forums or bulletin boards, and any other similar types of communications and submissions on or through any Big Fish Offering, are non-confidential, public communications, and you have no expectation of privacy concerning your use of or participation in any Big Fish Offerings (other than with respect to the information you provide to us in establishing your Big Fish account(s), if applicable). You acknowledge that personal information that you communicate publicly within any Big Fish Offering may be seen and used by others and may result in unsolicited communications. Big Fish is not liable for any information that you choose to submit or communicate to other users on or through any Big Fish Offerings, or for the actions of any other users of any Big Fish Offering.

You represent and warrant that you have all necessary rights in and to any materials that you post within any Big Fish Offering, that such materials do not infringe any proprietary or other rights of third parties, that all such content is accurate and will not cause injury to any person or entity, and that you will indemnify Big Fish and their respective employees, contractors, officers, directors, shareholders, agents, representatives, vendors, and content providers for all claims resulting from your submitted and posted content. If any such materials incorporate the name, voice, likeness and/or image of any individual, you represent and warrant that you have the right

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## **Commercial Activity and Unsolicited E-mail**

You may not use any portion of the Big Fish Offerings to collect information, including login names, about other users, and use of such information to send unsolicited e-mail or for any other purpose is strictly prohibited. You may not advertise any goods or services on any Big Fish Offerings, or otherwise exploit your participation on or through any Big Fish Offerings for any commercial purpose.

## **Customer Reviews**

You may submit reviews of certain Big Fish Offerings. Use of the reviews feature is for your personal, non-commercial use and is at your own option and risk, and you must comply with the policies set forth in these Terms of Use and the [Review Guidelines](#).

When you post a review, we will display your rating of the Big Fish Offering, along with your user name and certain other information you may provide, such as your city and state location, skill level, favorite game and favorite genres. By submitting a review, you are consenting to the release of all information that you provide in that review to a public forum. If you do not want any such information to be shared in a public forum, do not use the review feature.

## **BIG FISH SOFTWARE**

We may require that you download certain software from Big Fish, its principals or its licensors onto your computer ("**Big Fish Software**"). Subject to your compliance with these Terms of Use, Big Fish grants to you a non-exclusive, non-transferable, non-sublicensable, revocable, limited license to use the Big Fish Software to participate in the Big Fish Offerings. The Big Fish Software is for your personal use, and may not be reproduced, duplicated, copied, resold, sublicensed, or otherwise used in whole or in part by you for commercial purposes. You may not modify, translate, reverse-engineer, reverse-compile or decompile, disassemble or create derivative works from any of the Big Fish Software.

NEITHER BIG FISH GAMES, INC. NOR ITS LICENSORS IS LIABLE FOR ANY DAMAGES IN CONNECTION WITH YOUR USE OF ANY BIG FISH SOFTWARE (INCLUDING LIABILITY FOR ANY CONSEQUENTIAL OR INCIDENTAL DAMAGES OR DAMAGE TO YOUR COMPUTER HARDWARE OR SOFTWARE), AND THE ENTIRE

RISK OF USE, INCLUDING, WITHOUT LIMITATION, ANY DAMAGE TO YOUR COMPUTER HARDWARE OR SOFTWARE, RESULTING FROM ANY USE OF THE BIG FISH SOFTWARE, RESIDES WITH YOU.

## **THIRD PARTY LINKS and THIRD PARTY CONTENT AND SERVICES**

Any and all software, content and services (including advertising) within a Big Fish Offering that are not owned by Big Fish are "**third party content and services.**" Big Fish acts merely as an intermediary service provider of, and accepts no responsibility or liability for, third party content and services. In addition and without limiting the generality of the foregoing, certain Big Fish Offerings may include links to sites operated by third parties, including advertisers and other content providers. Those sites may collect data or solicit personal information from you. Big Fish does not control such sites, and is not responsible for their content, policies, or collection, use or disclosure of any information those sites may collect.

## **VIOLATION OF THESE TERMS OF USE**

If you violate our Terms of Use, Big Fish reserves the right, in its sole discretion, to immediately terminate your participation in any or all Big Fish Offerings, including any and all Big Fish accounts you have established. You acknowledge that Big Fish is not required to notify you prior to terminating any such account.

## **TERMINATION OF ANY BIG FISH ACCOUNT**

Big Fish and you each have the right to terminate or cancel any of your Big Fish account(s), if applicable, at any time for any reason. You understand and agree that cancellation of your Big Fish account(s) and/or ceasing use of any and all Big Fish Offerings are your sole right and remedy with respect to any dispute with Big Fish. This includes, but is not limited to, any dispute arising out of or directly or indirectly related to: (a) any provision contained in these Terms of Use or any other agreement between you and Big Fish, including, without limitation, the [Privacy Policy](#), or Big Fish's enforcement or application of these Terms of Use or any other such agreement, including, without limitation, the [Privacy Policy](#), (b) the content available on or through the Big Fish Offerings, or any change in or to such content, (c) your ability to access and/or use any Big Fish Offerings, or (d) the amount or type of any fees, surcharges, applicable taxes, billing methods, or any change to the fees, applicable taxes, surcharges or billing methods, in each case imposed or implemented by Big Fish on or through any Big Fish Offering.

Big Fish reserves the right to collect fees, surcharges or costs incurred before you cancel your Big Fish account(s) or a particular subscription. In the event that your Big Fish account or a particular subscription is terminated or cancelled, no refund will be granted, no online time or other credits (e.g., points in an online game) will be credited to you or converted to cash or other form of reimbursement, and you will have no further access to your account or anything associated with it (such as points, tokens or in-game items). Any delinquent or unpaid accounts

must be settled before Big Fish may allow you to create any new or additional accounts. All virtual items are unconditionally forfeited if your Big Fish account is terminated or suspended for any reason, in Big Fish's sole discretion, or if Big Fish discontinues any Big Fish Offering that includes virtual items.

Without limiting the foregoing provisions, if you violate these Terms of Use, Big Fish may issue you a warning regarding the violation, or, in Big Fish's sole discretion, immediately terminate any and all Big Fish accounts that you have established with any Big Fish Offering, with or without notice.

## **INTELLECTUAL PROPERTY RIGHTS**

The names and logos, and other graphics, logos, icons, and service names associated with the Big Fish Offerings are trademarks, registered trademarks or trade dress of Big Fish or its licensors or principals in the United States and/or other countries. Big Fish's trademarks and trade dress may not be used in connection with any product or service that is not owned or operated by or on behalf of Big Fish, or in any manner that is likely to cause confusion among consumers or that disparages or discredits Big Fish or any Big Fish Offering. The compilation of all content on the Big Fish Offerings is the exclusive property of Big Fish and is protected by United States and international copyright laws. You may not use, copy, transmit, modify, distribute, or create any derivative works from any content from the Big Fish Offerings unless we have expressly authorized you to do so in writing. All other trademarks not owned by Big Fish that appear on the Big Fish Offerings are the property of their respective owners, who may or may not be affiliated with or connected to Big Fish. If you fail to adhere to these Terms of Use, other content owners may take criminal or civil action against you. In the event legal action is taken against you for your acts and/or omissions with regard to any content on the Big Fish Offerings, you agree to indemnify and hold harmless Big Fish and its employees, contractors, officers, directors, shareholders, agents, representatives, vendors, and content providers.

## **LIMITATIONS ON WARRANTIES AND LIABILITY**

YOU EXPRESSLY AGREE THAT THE USE OF ANY BIG FISH OFFERING, BIG FISH SOFTWARE AND THE INTERNET IS AT YOUR SOLE RISK. ALL BIG FISH OFFERINGS AND BIG FISH SOFTWARE ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS FOR YOUR USE, WITHOUT WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, UNLESS SUCH WARRANTIES ARE LEGALLY INCAPABLE OF EXCLUSION. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, BIG FISH DOES NOT GUARANTEE THAT YOU WILL BE ABLE TO ACCESS OR USE THE BIG FISH OFFERINGS OR BIG FISH SOFTWARE AT ANY PARTICULAR TIMES OR LOCATIONS, OR THAT THE BIG FISH OFFERINGS, BIG FISH SOFTWARE, NEWSLETTERS, E-MAILS OR OTHER COMMUNICATIONS SENT FROM BIG FISH ARE FREE FROM VIRUSES OR OTHER HARMFUL COMPONENTS.

YOU ACKNOWLEDGE AND AGREE THAT YOUR SOLE AND EXCLUSIVE REMEDY FOR ANY DISPUTE WITH BIG FISH IS TO STOP USING THE BIG FISH OFFERINGS AND BIG FISH SOFTWARE, AND TO CANCEL ANY AND ALL OF YOUR BIG FISH ACCOUNTS, IF APPLICABLE. YOU ACKNOWLEDGE AND AGREE THAT BIG FISH IS NOT LIABLE FOR ANY ACT OR FAILURE TO ACT ON ITS OWN PART, OR FOR ANY CONDUCT OF, OR COMMUNICATION OR CONTENT POSTED WITHIN A BIG FISH OFFERING BY, ANY BIG FISH OFFERING USER. IN NO EVENT SHALL BIG FISH'S OR ITS EMPLOYEES', CONTRACTORS', OFFICERS', DIRECTORS' OR SHAREHOLDERS' LIABILITY TO YOU EXCEED THE AMOUNT THAT YOU PAID TO BIG FISH FOR YOUR PARTICIPATION IN ANY BIG FISH OFFERING. IN NO CASE SHALL BIG FISH OR ITS EMPLOYEES, CONTRACTORS, OFFICERS, DIRECTORS OR SHAREHOLDERS BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING FROM YOUR USE OF ANY BIG FISH OFFERING OR BIG FISH SOFTWARE. BECAUSE SOME STATES OR JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR THE LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, IN SUCH STATES OR JURISDICTIONS, SUCH LIABILITY SHALL BE LIMITED TO THE FULL EXTENT PERMITTED BY LAW.

YOU FURTHER SPECIFICALLY ACKNOWLEDGE THAT BIG FISH IS NOT LIABLE, AND YOU AGREE NOT TO SEEK TO HOLD BIG FISH LIABLE, FOR THE CONDUCT OF THIRD PARTIES, INCLUDING OTHER USERS OF BIG FISH OFFERINGS AND OPERATORS OF SOCIAL NETWORKING AND OTHER EXTERNAL SITES, AND THAT THE RISK OF USING OR ACCESSING BIG FISH OFFERINGS AND BIG FISH SOFTWARE, SOCIAL NETWORKING SITES AND OTHER EXTERNAL SITES, AND OF INJURY FROM THE FOREGOING, RESTS ENTIRELY WITH YOU.

## **INDEMNIFICATION**

You agree to defend, indemnify and hold harmless Big Fish and their respective employees, contractors, officers, directors, shareholders, agents, representatives, vendors, and content providers from and against any and all liabilities, claims and expenses, including attorneys' fees, that arise from a breach of these Terms of Use for which you are responsible or in connection with your transmission of any content to, on or through any Big Fish Offering. Without limiting your indemnification obligations described herein, Big Fish reserves the right, at its own expense, to assume the exclusive defense and control of any matter otherwise subject to indemnification by you.

## **IMPORT TAXES AND FEES**

When you buy physical goods (e.g. CD-ROM) through any Big Fish Offering for delivery outside the United States, you are considered an importer and, as between you and Big Fish, you will be responsible for payment of all taxes, duties, fees or other charges that may be applicable to such importation, including VAT, and you must comply with all laws and regulations of the country in which you are receiving the goods. Your privacy is important to us and we know that you care about how information about your order is used and shared. We would like our

international customers and customers dispatching products internationally to be aware that cross-border deliveries are subject to opening and inspection by customs authorities.

## **EXPORT CONTROL LAWS**

Certain Big Fish Offerings may be subject to United States and international export controls. By accessing Big Fish Offerings, you warrant that you are not located in any country, or exporting any Big Fish Offerings, to any person or place to which the United States, European Union or any other jurisdiction has embargoed goods. You agree to abide by all applicable export control laws and further agree not to transfer or upload, by any means electronic or otherwise, any Big Fish Offerings that may be subject to restrictions under such laws to a national destination prohibited by such laws without obtaining and complying with any required governmental authorizations.

## **OTHER LEGAL TERMS**

You agree that these Terms of Use are not intended to confer and do not confer any rights or remedies upon any third party. If any part of these Terms of Use are held invalid or unenforceable, that portion shall be construed in a manner consistent with applicable law to reflect, as nearly as possible, the original intentions of the parties, and the remaining portions shall remain in full force and effect. If any provision of these Terms of Use is found to be illegal or unenforceable, these Terms of Use will be deemed modified to the extent necessary to make them legal and enforceable, and will remain, as modified, in full force and effect. These Terms of Use, including all terms and policies referenced herein, contain the entire understanding, and supersede all prior agreements, between you and Big Fish relating to this subject matter, and cannot be changed or terminated orally.

## **PRIVACY**

Big Fish respects the privacy of Big Fish Offerings users. Please review our [Privacy Policy](#), which also governs your access to and use of the Big Fish Offerings, to understand our policies and practices with respect your personal information.

## **APPLICABLE LAW, JURISDICTION, AND VENUE**

These Terms of Use and the rights of the parties hereunder shall be governed by and construed in accordance with the laws of the State of Washington, exclusive of conflict or choice of law rules.

The parties acknowledge that these Terms of Use evidence a transaction involving interstate commerce. Notwithstanding the provision in the preceding paragraph with respect to applicable substantive law, any arbitration conducted under these Terms of Use shall be governed by the Federal Arbitration Act (9 U.S.C., §§ 1-16).

You and Big Fish irrevocably consent to the exclusive jurisdiction and venue of the state or federal courts located in King County, Washington, for all disputes arising out of or relating to these Terms of Use, the subject matter of these Terms of Use, or your access to and use of any Big Fish Offering, that are heard in court (not arbitration).

## **DISPUTE RESOLUTION BY BINDING ARBITRATION**

**PLEASE READ THIS "DISPUTE RESOLUTION BY BINDING ARBITRATION" PROVISION CAREFULLY, BECAUSE IT REQUIRES YOU TO ARBITRATE DISPUTES WITH BIG FISH AND IT LIMITS THE MANNER IN WHICH YOU CAN SEEK RELIEF.**

THIS PROVISION PRECLUDES YOU FROM BRINGING ANY CLASS, COLLECTIVE, OR REPRESENTATIVE ACTION AGAINST BIG FISH. IT ALSO PRECLUDES YOU FROM PARTICIPATING IN OR RECOVERING RELIEF UNDER ANY CURRENT OR FUTURE CLASS, COLLECTIVE, OR REPRESENTATIVE ACTION AGAINST BIG FISH BY SOMEONE ELSE. IN ADDITION, ARBITRATION PRECLUDES YOU FROM SUING IN COURT OR FROM HAVING A JURY TRIAL.

WHETHER TO AGREE TO ARBITRATION IS AN IMPORTANT DECISION. IT IS YOUR DECISION TO MAKE AND YOU SHOULD NOT RELY SOLELY ON THE INFORMATION PROVIDED IN THIS AGREEMENT, AS IT IS NOT INTENDED TO CONTAIN A COMPLETE EXPLANATION OF THE CONSEQUENCES OF ARBITRATION. YOU SHOULD TAKE REASONABLE STEPS TO CONDUCT FURTHER RESEARCH AND TO CONSULT WITH OTHERS REGARDING THE CONSEQUENCES OF YOUR DECISION. YOU MAY OPT OUT OF THIS ARBITRATION PROVISION BY FOLLOWING THE INSTRUCTIONS BELOW.

**Scope of Arbitration Provision.** You and Big Fish agree that any dispute, claim or controversy arising out of or relating to your access to or use of any Big Fish Offering or to these Terms of Use (including without limitation any dispute concerning the breach, enforcement, construction, validity, interpretation, enforceability, or arbitrability of these Terms of Use) (a "**Dispute**"), shall be determined by arbitration, except that you and Big Fish are NOT required to arbitrate any Dispute in which either party seeks equitable and other relief for the alleged unlawful use of copyrights, trademarks, trade names, logos, trade secrets, or patents.

**Location of Arbitration and Applicable Rules.** You and Big Fish agree that such arbitration shall occur in King County, Washington. You may request to appear in such proceedings telephonically. You and Big Fish agree that such arbitration shall be conducted by a single arbitrator in accordance with the rules of the Judicial Arbitration and Mediation Service ("JAMS"), as modified by these Terms of Use.

**Authority of Arbitrator.** With the exception of class procedures and remedies as discussed below under "Waiver of Class Relief," the arbitrator shall have the authority to grant any remedy that would otherwise be available in court.

**Confidentiality.** You and Big Fish shall maintain the confidential nature of the arbitration proceedings and the arbitration award, including the arbitration hearing, except as may be necessary to prepare for or conduct the arbitration hearing on the merits, or except as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an award or its enforcement, or unless otherwise required by law or judicial decision

**Allocation of Arbitration Fees.** If you assert a Dispute as a consumer, you will only be required to pay arbitration fees of \$250 of the fees charged by JAMS in connection with any arbitration under this section, and Big Fish will bear all other costs charged by JAMS or the arbitrator, including any remaining JAMS Case Management Fee and all professional fees for the arbitrator's services. You will still be responsible for paying your own attorneys' fees.

**WAIVER OF CLASS RELIEF.** WHETHER THE DISPUTE IS HEARD IN ARBITRATION OR IN COURT, YOU AGREE THAT YOU AND BIG FISH WILL NOT COMMENCE AGAINST THE OTHER A CLASS ACTION, CLASS ARBITRATION OR OTHER REPRESENTATIVE ACTION OR PROCEEDING. YOU AND BIG FISH ARE EACH WAIVING RESPECTIVE RIGHTS TO A TRIAL BY JURY OR TO PARTICIPATE IN A CLASS ACTION.

**Procedure to Opt Out of Arbitration Provision.** You may opt out of this arbitration provision only by written Notice via U.S. Mail, or by any nationally recognized delivery service (e.g., UPS, Federal Express, etc.) to Big Fish, Attn: Legal Department, at 333 Elliott Avenue West, Suite 200, Seattle, WA, 98119. **You must send such Notice within thirty (30) days of your acceptance of these Terms of Use.** You must sign and date the Notice, and include in it your name, address, and a clear statement that you do not wish to resolve disputes with Big Fish through arbitration. If you do not follow this procedure by your thirty (30) day deadline to do so, then you and Big Fish shall both be bound by the terms of this section entitled Dispute Resolution by Binding Arbitration.

If any portion of this section entitled "Dispute Resolution by Binding Arbitration" is determined by a court to be inapplicable or invalid, then the remainder shall still be given full force and effect.

## **STATUTE OF LIMITATIONS**

You and Big Fish agree that regardless of any statute or law to the contrary, any claim or cause of action arising out of or related to use of a Big Fish Offering, these Terms of Use or the [Privacy Policy](#), must be filed within ONE (1) YEAR after such claim or cause of action arose, and is thereafter forever barred.

## **SEVERABILITY**

If any part of these Terms of Use is determined by a court to be inapplicable or invalid, then the remainder shall still be given full force and effect.

## **CONTACT US**

Big Fish Games, Inc.  
Attn: Legal Department  
333 Elliott Avenue West, Suite 200  
Seattle, Washington 98119  
USA

## **DIGITAL MILLENNIUM COPYRIGHT ACT**

The Digital Millennium Copyright Act provides recourse to copyright owners who believe that their rights under the United States Copyright Act have been infringed by acts of third parties over the Internet. If you believe that your copyrighted work has been copied without your authorization and is available on or in a Big Fish Offering in a way that may constitute copyright infringement, you may provide notice of your claim to Big Fish's Designated Agent listed below. For your notice to be effective, it must include the following information:

- (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed;
- (ii) A description of the copyrighted work that you claim has been infringed upon;
- (iii) A description of where the material that you claim is infringing is located within the Big Fish Offering;
- (iv) Information reasonably sufficient to permit Big Fish to contact you, such as address, telephone number, and, if available, an e-mail address at which you may be contacted;
- (v) A statement by you that you have a good-faith belief that the disputed use is not authorized by the copyright owner, its agent, or the law; and
- (vi) A statement that the information in the notification is accurate and, under penalty of perjury, that you are authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
- (vii) Big Fish's Designated Agent is:

Big Fish Games, Inc.  
Attn: Legal Department  
333 Elliott Avenue West, Suite 200  
Seattle, Washington 98119  
USA