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*By email – [brian.considine@wsgc.wa.gov](mailto:brian.considine@wsgc.wa.gov)*

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

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

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

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

The Entertainment Software Association (“ESA”) welcomes this opportunity to share our perspective on this important matter. The ESA is the U.S. trade association that represents the business and public affairs needs of companies that publish computer and video games for video game consoles, handheld devices, personal computers, and the internet.<sup>1</sup> ESA supports the Petition by Big Fish Games, Inc. for a declaratory order confirming that the Big Fish Casino suite of online video games (“BFC”) does not constitute gambling within the meaning of the Washington Gambling Act, RCW 9.46.0237 (“Petition”), and therefore is not subject to the Commission’s regulatory or enforcement jurisdiction.

1. The Petition sets forth the facts, procedural history, and legal arguments for why the BFC is not gambling. The ESA agrees with the conclusions in the Petition and will address in this letter some additional legal arguments and important policy considerations. First, however, the ESA would like to provide more context about the video game industry.
2. Many of today’s video games incorporate non-convertible play currencies into the game experience. As players progress through a game, they collect points for achieving tasks (e.g., capturing an enemy stronghold or winning a race), and those points can be used

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<sup>1</sup> Game developers and publishers directly employ over 6,000 people in the State of Washington who work on a variety of game platforms and game genres, including, among others, social or casual games played on mobile devices. *See Video Games in the 21<sup>st</sup> Century: The 2017 Report*, ENTERTAINMENT SOFTWARE ASSOCIATION (2017), p. 15, Table C-4, available at [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).

within the game to acquire virtual items that may be attractive or useful for the player, such as a new car for a racing game, a powerful crossbow for an assassin, or health potions that restore a player in the midst of heated battle. In some games, players can choose to enhance their experience by purchasing points that they can then use to acquire virtual items. These point systems add a dynamism and flexibility to the game play experience. Many mobile games are based upon a “free-to-play” business model, in which there is no cost to download the game, and players have the option to buy points if they wish; but they need not do so to play the game. In fact, only a tiny fraction of gamers who use “free-to-play” mobile games buy *any* virtual items.<sup>2</sup> Critically, these play currencies, whether earned or purchased, are only usable within the game universe, cannot be converted into cash, and have no monetary value.

3. We agree with Big Fish Games that the BFC does not constitute gambling under the Washington Gambling Act (“WGA”). For there to be gambling, one requirement is that the virtual tokens distributed in the game would have to be a “thing of value.” The BFC virtual tokens do not fit into any of the four categories of “thing of value,” according to the Petition.<sup>3</sup> This non-convertible play currency does not qualify as “money or property,” nor is it exchangeable for “money or property.”<sup>4</sup> The applicable terms that govern BFC’s usage clearly specify that the tokens are non-convertible into cash and have no monetary value.<sup>5</sup> Additionally, the terms prohibit transfer or resale of the tokens, and for that reason these tokens do not qualify as a “form of credit” that “contemplate[s] the transfer of money or property.”<sup>6</sup> The fourth category, “extension of a service . . . without charge,” is best understood as implying that the initial experience otherwise involves a charge, and here that is not the case. Because Big Fish Games continually replenishes players’ accounts with free virtual tokens, the player need not incur any charge to play the game.<sup>7</sup>
4. If the virtual chips are deemed to be a thing of value, this would lead to an absurd result that runs contrary to the stated policy of the WGA (“WGA Policy”).<sup>8</sup> If the chips “won” are a thing of value, then even playing with chips that the user acquires *for free* (and for which she never risks a cent) would be gambling. Under this scenario, the user plays chips (presumptively “a thing of value”) for a chance to win more chips (presumptively “a thing of value”). It is inconceivable that the WGA was intended to find gambling where a player risks no money and has no chance to make a profit. Yet, if this result were adopted, it could impact many other apps and games that undoubtedly are not the types of activities that would be considered gambling under the traditional principles that have guided that analysis.

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<sup>2</sup> See Lauren Keating, *Report Finds that Only 1.9 Percent of Mobile Gamers Make In-App Purchases*, TECHTIMES (March 26, 2016), <https://www.techtimes.com/articles/144329/20160325/report-finds-1-9-percent-mobile-gamers-make-app-purchases.htm> (last visited Aug. 2, 2018).

<sup>3</sup> Petition at Par. 17.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at Par. 18.

<sup>8</sup> See RCW 9.46.010 (stating explicitly the “public policy of the state of Washington on gambling”).

5. The WGA Policy is to keep the criminal element of professional gambling out while preserving the freedom to engage in social pastimes.<sup>9</sup> Video games fall squarely within this description. Games of all types, including video games, have long been a social pastime and “are more for amusement rather than for profit, do not maliciously affect the public, and do not breach the peace.”<sup>10</sup> Additionally, games clearly do not involve “the evils induced by common gamblers and common gambling houses engaged in professional gambling” as proscribed by the WGA Policy.<sup>11</sup>
6. Video games provide rich, engaging entertainment and have evolved into a popular social pastime for a wide range of demographics, as demonstrated by the following facts:
  - **64** percent of American households own a device that they use to play video games.
  - **60** percent of Americans play video games daily.
  - The average gamer is **34** years old, and gamers 18 or older represent more than 70 percent of the video game playing population.
  - Most parents (**70** percent) say video games have a positive influence on their child’s life.
  - Most parents (**67** percent) also play video games with their child at least once weekly and **94** percent say they pay attention to the video games played by their child.<sup>12</sup>
7. There is no question that the BFC is for amusement and not for the player’s profit. The BFC can be played for free solely for entertainment purposes. The players cannot make a profit by playing the game (*i.e.*, end up with more money than when they started). Players are contractually restricted from selling the chips for cash or other property; the chips cannot be cashed out; and the Terms of Use make clear that the chips have no real-world value.<sup>13</sup> Even the Ninth Circuit acknowledged these valid contractual terms.<sup>14</sup>
8. This stands in stark contrast to gambling. For example, in one form of gambling, a gambler plays casino games against the house. When a gambler walks into a casino, the gambler has a certain amount of money. The gambler plays the casino games and—win or lose depending upon the outcome of play—the gambler leaves the casino with a different amount of money. If the gambler wins, the casino loses; if the casino wins, the gambler loses. In contrast, when a player buys non-convertible points in a video game, his or her “loss,” if any, is complete with that transaction. Through game play, the player can earn additional points and thus increase his or her points balance, but there is no possibility of cashing out those points for real money under the rules of the video game.

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See *2018 Essential Facts About the Computer and Video Game Industry*, ENTERTAINMENT SOFTWARE ASSOCIATION, available at [http://www.theesa.com/wp-content/uploads/2018/05/EF2018\\_FINAL.pdf](http://www.theesa.com/wp-content/uploads/2018/05/EF2018_FINAL.pdf).

<sup>13</sup> Petition at Par. 17.

<sup>14</sup> See *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 788 n. 2 (9th Cir. 2018) (addressing BFC’s Terms of Use).

9. Other courts have distinguished playing games for entertainment and gambling devices that have a payout. One court stated:

A pinball game, such as the defendant game in this case, would unquestionably fall within the prohibition of the statute if it returned money to the player. However, whereas a slot machine or a craps table entails no skill whatever, affords no amusement beyond that which the player enjoys when he is paid money, and within a few seconds parts the player from his money through his expectation of winning additional money, a pinball game is essentially an amusement game which can be, and frequently is, played for long periods of time with no reward to the player beyond the enjoyment of playing. A pinball game which does not pay out money or anything else of value and therefore on which money cannot be staked, hazarded, bet, won or lost, is not a gambling device and does not fall within the prohibition of the statute.<sup>15</sup>

10. More recently, a federal court in Maryland dismissed claims alleging that use of virtual gold in a casino-style online game constituted illegal gambling, concluding that players of such services pay for the pleasure of entertainment *per se*, not for the prospect of economic gain. It likened the transaction involving the payment of money for chips to other entertainment transactions, such as purchasing cinema or amusement park tickets. Once the player has swapped real money for play currency, the court reasoned, the player's "loss," if any, is complete. The court continued:

Plaintiff could spend her 'gold' as she pleased within the bounds of Defendant's [Terms of Service]. ... What she could *not* do is cash out of the game. In this respect, while the casino function aesthetically resembles classic games of chance, the underlying transaction is more akin to purchasing cinema or amusement park tickets. Consumers of such services pay for the pleasure of entertainment *per se*, not for the prospect of economic gain.<sup>16</sup>

11. Other courts have distinguished between paying for an entertainment service (such as games) and gambling. With the former, the service provider does not participate in the game and has no stake in the outcome (*i.e.*, no chance of winning or losing). With gambling (*e.g.*, against a house), there is typically a winner and a loser. Indeed, the general principle that wagering requires at least two parties (a winner and a loser) has

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<sup>15</sup> *People v. One Mechanical Device*, 142 N.E.2d 98, 100 (Ill. 1957).

<sup>16</sup> *Mason v. Machine Zone, Inc.*, 140 F. Supp. 3d 457, 465 (D. Md. 2015).

long ago been established: “In a wager, each party ‘has a chance of gain and takes a risk of loss.’”<sup>17</sup>

12. Other gambling cases have found that an entertainment service operator (like Big Fish Games) is not a gambling winner or loser. For example, in *Humphrey v. Viacom*, a gambling loss recovery case, the court found that fees paid to a fantasy sports game operator were payment for services pursuant to an enforceable contract and thus the player had no “gambling loss.”<sup>18</sup> It also found that the fantasy sports operator was not a gambling winner, stating:

Defendants plainly are not “winners” as a matter of law, but merely parties to an enforceable contract. . . . At no time do Defendants participate in any bet. Absent such participation, Defendants cannot be “winners” as a matter of law. To suggest that one can be a winner without risking the possibility of being a loser defies logic and finds no support in the law.<sup>19</sup>

13. In *Langone v. Kaiser*, another fantasy sports gambling loss recovery case, the court reached a similar conclusion. It stated: “[The game operator] risks nothing when it takes entry fees from participants in its fantasy sports games.”<sup>20</sup> Based on this, the court concluded that “because [the game operator] itself . . . does not participate in the risk associated with its fantasy sports games, it is not a ‘winner’ for the purposes of the Loss Recovery Act.”<sup>21</sup>
14. These principles have been followed in other recent cases involving alleged gambling in games. In *Phillips v. Double Down*, the court explained: “To be a winner, a person must have ‘a direct stake in the outcome of the gambling.’”<sup>22</sup> It found Double Down was not a winner, stating: “Double Down never directly participated in the games, nor did it have a direct stake in the outcome of any games. . . . Simply put, once the chips are paid for, there is no way for Double Down to lose that money.”<sup>23</sup>

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<sup>17</sup> *Gaming Comm’n v. GNLV Corp.*, 834 P.2d 411, 413 (Nev. 1992) (quoting *Las Vegas Hacienda v. Gibson*, 359 P.2d 85, 86 (Nev. 1961)). “Now, according to the definition of ‘wager,’ there must be two or more contracting parties, having mutual rights in respect to the money or other thing wagered, or, as sometimes said, ‘staked,’ and each of the parties necessarily risks something, and has a chance to make something upon the happening or not happening of an uncertain event.” *Las Vegas Hacienda*, 359 P.2d at 86-87 (quoting *Misner v. Knapp*, 9 P. 65, 66 (Ore. 1885)).

<sup>18</sup> *Humphrey v. Viacom, Inc.*, 2007 U.S. Dist. LEXIS 44679 (D.N.J. June 20, 2007).

<sup>19</sup> *Id.* at \*25-26 (citing *Las Vegas Hacienda*, 359 P.2d at 86).

<sup>20</sup> *Langone v. Kaiser*, 2013 WL 5567857, at \*19-20 (N.D. Ill. Oct. 9, 2013).

<sup>21</sup> *Id.* at \*21.

<sup>22</sup> *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731, 740 (N.D. Ill. 2016) (quoting *Fahmer v. Tiltware LLC*, 2015 U.S. Dist. LEXIS 36806, at \*7 (S.D. Ill. Mar. 24, 2015)).

<sup>23</sup> *Id.*

15. A similar result was reached in *Ristic v. Mach. Zone, Inc.*<sup>24</sup> and *Mason v. Machine Zone*.<sup>25</sup>
16. In the BFC, no one else has a chance to win based on the players using chips to play. When the player plays the chips, only the player can “win” or “lose” chips based on the outcome of the game play. Neither Big Fish Games nor anyone else stands a chance to win or lose any money or anything else of value based on the “outcome” of a player using her chips to play the game. Playing games for entertainment value with no chance of profit does not violate the WGA Policy and is not gambling.
17. The ESA agrees with Big Fish Games’ assertion that the Commission should resolve the ambiguity created by the Ninth Circuit decision. In resolving this ambiguity, it is imperative that the Commission evaluate the WGA Policy considerations in this context.
18. Interpreting gambling to cover non-convertible play currencies used in free-to-play games and other video games with optional add-on content could have a detrimental impact on video games and other entertainment-based applications with in-app purchases. For example, it may discourage game publishers from incorporating these harmless point systems into future games, which would be unfortunate for both publishers and gamers. This optional content adds a more flexible, dynamic element to the game play experience. These present uses of play currencies are far afield from the sorts of activities intended to be captured by the WGA Policy. Like transactions for the purchase of cinema or amusement park tickets, these are bona fide business transactions where people pay money for entertainment, not for profit.
19. In fact, the definition of “gambling” expressly excludes “bona fide business transactions valid under the law of contracts.”<sup>26</sup> The use of the BFC and the purchase and use of virtual chips is governed by the BFC Terms of Use,<sup>27</sup> which is a binding contract between Big Fish Games and its players. Even the Ninth Circuit acknowledged this. When rejecting one of the Plaintiff’s arguments regarding “a thing of value,” the court noted that the contractual restrictions in the Terms of Use prohibit the transfer or sale of chips.<sup>28</sup> As the purchase of virtual chips is a bona fide business transaction, subject to a

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<sup>24</sup> 2016 U.S. Dist. LEXIS 127056, at \*7 (N.D. Ill. Sept. 19, 2016) (“Ristic does not plausibly allege that Machine Zone was the ‘winner’ of his alleged gambling losses. A gambling winner is the person to whom a gambling loser has lost.”).

<sup>25</sup> 851 F.3d 315, 319 (4th Cir. 2017) (“[W]e observe that the requirement in the Loss Recovery Statute that a person ‘lose[ ] money’ suggests that a claim cognizable under the Statute also involves a winner of the money that Mason seeks to recover.”).

<sup>26</sup> RCW 9.46.0237.

<sup>27</sup> Petition at Par. 17.

<sup>28</sup> *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 788 n. 2 (9th Cir. 2018) (“Big Fish Casino’s Terms of Use prohibit the transfer or sale of virtual chips. As a result, the sale of virtual chips for cash on a secondary market violates the Terms of Use.”).

valid contract, it is expressly excluded from the scope of gambling. A similar conclusion was reached in *Humphrey v. Viacom*.<sup>29</sup>

20. The Ninth Circuit decision departs from a recent line of cases where courts found no gambling in similar circumstances. In fact, to the best of our knowledge, all other decided cases alleging gambling in video games, based on virtual items that cannot be cashed out, have found there to be no gambling.<sup>30</sup> The Ninth Circuit disregarded these decisions on the premise that the Washington state gambling statute defines “a thing of value” differently than the other jurisdictions. Nevertheless, these other decisions are instructive because they do not turn solely on that distinction but on other factors that overlap with the Washington legal test. They merit consideration by the Commission.
21. The Ninth Circuit’s decision conflicts with and ignored the Washington State Gambling Commission’s interpretation and enforcement practices related to gambling. For reasons set forth in paragraph 25 of the Petition, the Commission has already determined that the BFC, and other similar games, do not constitute gambling under the Washington statute. The Ninth Circuit declined to consider this, despite the evidence of record.

For at least these reasons, the ESA supports the Petition.

Sincerely,



Stanley Pierre-Louis  
Senior Vice President & General Counsel  
Entertainment Software Association

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<sup>29</sup> 2007 U.S. Dist. LEXIS 44679, at \*25-28 (D.N.J. June 20, 2007) (determining that the fees paid to the fantasy sports game operator were payment for services pursuant to an enforceable contract, and thus the player had no “gambling loss”).

<sup>30</sup> See *Mason v. Mach. Zone, Inc.*, 851 F.3d 315 (4th Cir. 2017); *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill. 2016); *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871 (N.D. Ill. 2016); *Ristic v. Mach. Zone, Inc.* 2016 U.S. Dist. LEXIS 127056 (N.D. Ill. Sept. 19, 2016). Three of the cases (*Sky Union, Mason and Ristic*) were strategy-based games that had different chance-based mechanics, where players could win virtual items for use in the game. The other game (*Double Down*) was a casino-style social game, where players could periodically receive virtual currency to play the casino-style games and if they ran out, could buy more or wait to receive more.