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BEFORE THE WASHINGTON STATE GAMBLING COMMISSION

IN THE MATTER OF THE PETITION
OF BIG FISH GAMES, INC. FOR A
DECLARATORY ORDER
PURSUANT TO RCW 34.05.240(1)

ORDER DENYING REQUEST TO
ISSUE DECLARATORY ORDER

I. INTRODUCTION

On July 3, 2018, the Washington State Gambling Commission (Commission) received a Petition for a Declaratory Order (petition) from Big Fish Games, Inc. (Petitioner). The petition asked the Commission to issue a declaratory order finding that Petitioner’s Big Fish Casino suite of online video games does not constitute gambling within the meaning of the Washington Gambling Act, RCW 9.46.0237, and therefore is not subject to the Commission’s regulatory and enforcement jurisdiction. As noted in the petition, the Ninth Circuit Court of Appeals had previously issued a ruling on March 28, 2018, which held that, under the facts alleged in the Plaintiff’s complaint, Big Fish Casino’s online games constitute gambling under Washington State law. See *Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018). The appellate court remanded to the trial court for further proceedings and the case remains an open matter in Federal court.

II. PROCEDURE

Pursuant to RCW 34.05.240(1) and WAC 230-17-180(1), any person may petition an agency for a “declaratory order with respect to the applicability of specified circumstances of a rule, order or statute enforced by the agency.” Upon receipt of a petition for declaratory order,

1 the Commission must within thirty days do one of the following: (a) Enter an order declaring
2 the applicability of the statute, rule, or order in question to the specified circumstances; or (b)
3 set the matter for specified proceedings to be held no more than ninety days after receipt of the
4 petition and give reasonable notification to the person(s) of the time and place for such hearing
5 and of the issues involved; or (c) set a specified time no more than ninety days after receipt of
6 the petition by which it will enter a declaratory order; or (d) decline to enter a declaratory order,
7 stating the reasons for its action. WAC 230-17-180(3). The ninety day time limits set forth in
8 WAC 230-17-180(3)(b) and (c) may be extended for good cause. WAC 230-17-180(4).

9 On July 9, 2018, Commission staff provided notice of the petition via email to the parties
10 in the active federal litigation, including attorneys for Cheryl Kater, the named Plaintiff in
11 *Kater v. Churchill Downs*. The Commission also posted the petition to its agency website. At
12 the July 12, 2018, regularly scheduled Commission meeting, the Commission initially reviewed
13 the petition, accepted public comment, and issued an order continuing review of the petition for
14 declaratory order to the Commission's August 9, 2018, regularly scheduled meeting. At the
15 Commission's August meeting, the Commission heard further from Petitioner's attorney and
16 Cheryl Kater's attorney regarding legal issues raised by the petition. The Commission issued an
17 order continuing review of the petition to its October 18, 2018, regularly scheduled meeting to
18 allow for further consideration and found good cause to extend WAC 230-17-180(3)(b)'s ninety
19 day deadline to allow for such consideration.

20 The Commission considered all timely submitted public comments including
21 presentations from counsel for Big Fish Games, Inc. and Ms. Kater and written submissions and
22 oral testimony by interested members of the public. After due consideration, the Commission
23 decides this matter as specified below.

24 III. DISCUSSION

25 The Commission declines to enter the requested order. RCW 34.05.240(5)(d) and WAC
26 230-17-180(3)(d) provide that the Commission may decline to enter a declaratory order and state

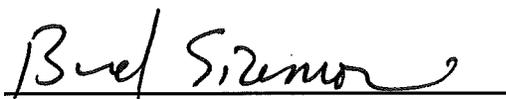
1 the reasons for its action. The petition asks the Commission to issue an order regarding a matter
2 of statutory interpretation that is, as of the date of this order, the subject of active federal litigation
3 involving Big Fish Casino games and other companies with similar products. The Commission
4 declines to insert itself into active and ongoing civil litigation via a declaratory order. In
5 declining to enter the requested order, the Commission makes no ruling, implied or otherwise,
6 on whether Cheryl Kater is a necessary party to this petition or whether the online games offered
7 by Big Fish are, or are not, illegal gambling under Washington law.
8

9 While the Commission declines to issue the requested order, the Commission is
10 concerned by the allegations raised by Ms. Kater in her public comment regarding the operation
11 of Big Fish Casino games. See Comment of Cheryl Kater dated August 2, 2018 as located here:
12 <https://www.wsgc.wa.gov/news/big-fish-games-inc-petition-declaratory-order>. The allegations
13 regarding the operation of Big Fish Casino as described by Ms. Kater, if true, raise serious policy
14 concerns for the Commission related to consumer protection and problem gambling addiction.
15

16 IV. ORDER

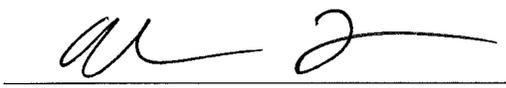
17 The Commission declines to enter a Declaratory Order for the reasons set forth herein.

18 DATED this 18th day of October, 2018.

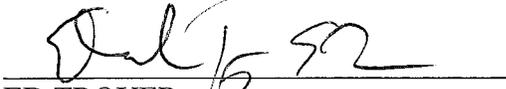
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20 _____
BUD SIZEMORE – CHAIR

Julia Patterson

JULIA PATTERSON – VICE CHAIR

21 
22 _____
ALICIA LEVY

CHRIS STEARNS

23 
24 _____
ED TROYER

1 NOTICE: RECONSIDERATION

2 PURSUANT TO THE PROVISIONS OF RCW 34.05.470, WAC 230-17-140, AND WAC 230-
3 17-0180(6), YOU MAY FILE A PETITION FOR RECONSIDERATION WITH THE
4 COMMISSION WITHIN TEN (10) DAYS FROM THE DATE THIS FINAL ORDER IS
5 SERVED UPON YOU. ANY REQUEST FOR RECONSIDERATION MUST STATE THE
6 SPECIFIC GROUNDS FOR THE RELIEF REQUESTED. PETITIONS MUST BE
7 DELIVERED OR MAILED TO:

8 WASHINGTON STATE GAMBLING COMMISSION
9 PO BOX 42400
10 OLYMPIA, WA 98504-2400

11 NOTICE: PETITION FOR JUDICIAL REVIEW

12 YOU ALSO HAVE THE RIGHT TO APPEAL THIS FINAL ORDER TO SUPERIOR
13 COURT, PURSUANT TO THE PETITION FOR JUDICIAL REVIEW PROVISIONS OF
14 RCW 34.05.542. ANY PETITION FOR JUDICIAL REVIEW OF THIS FINAL ORDER
15 MUST BE FILED WITH THE COURT AND ALSO SERVED UPON BOTH THE
16 COMMISSION AND THE OFFICE OF THE ATTORNEY GENERAL WITHIN THIRTY (30)
17 DAYS AFTER THE DATE THIS FINAL ORDER IS SERVED UPON YOU.
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7 **BEFORE THE WASHINGTON STATE GAMBLING COMMISSION**

8 IN THE MATTER OF THE PETITION
9 OF BIG FISH GAMES, INC. FOR A
10 DECLARATORY ORDER
11 PURSUANT TO RCW 34.05.240(1)

DISSENT TO THE ORDER
DENYING REQUEST TO ISSUE
DECLARATORY ORDER

12 **I. INTRODUCTION**

13 STEARNS, C. (dissenting) - The majority of my colleagues on the Washington State
14 Gambling Commission ("Commission") agree to deny Petitioner Big Fish Games, Inc.'s ("Big
15 Fish," "BFC") petition to issue a Declaratory Order that the social casino games offered by Big
16 Fish do not constitute gambling under Washington law. The Petitioner asks us to use our
17 expertise and authority to construe the State's gambling laws that we are charged with
18 interpreting and enforcing and, in this case, I would do so. I would grant Big Fish's request
19 and find its social casino games do not constitute gambling under Washington law. I
20 respectfully dissent.

21 **II. DISCUSSION**

22 **1. The Petition Satisfies The Criteria For The Issuance Of A Declaratory Order**
23 **In RCW 34.05.240(1) And WAC 230-17-180(1).**

24 I conclude that, as presented to the Commission, the petition meets the statutory
25 requirements and the four requirements in the Commission's regulations:

- 26 (a) That uncertainty necessitating resolution exists; and
(b) That there is actual controversy arising from the uncertainty such that a declaratory
order will not be merely an advisory opinion; and

1 (c) That the uncertainty adversely affects the petitioner; and
2 (d) That the adverse effect of uncertainty on the petitioner outweighs any adverse effects
on others or on the general public that may likely arise from the order requested.

3 WAC 230-17-180(1).

4 I have no doubt that the controversy over whether or not social casino games constitute
5 gambling is a serious enough issue that a declaratory order from the Commission is merited
6 under the circumstances. Clearly the uncertainty adversely affects the Petitioner, and I believe
7 that the adverse effect of this uncertainty on the Petitioner outweighs any adverse effects on
8 others if the petition were to be granted. According to materials presented to the Commission,
9 nearly 900,000 Washington residents have installed Big Fish games on their smart phones or
10 other interactive devices. This is no small matter and I believe that the public would be well
11 served by a decision. I am confident that an order granting the Petitioner's request would serve
12 the public interest by adding clarity and certainty to the enforcement of our State's gambling
13 laws. As such, an order would not be a mere advisory opinion.

14 Finally, an order granting Big Fish's petition would not "substantially prejudice the rights
15 of a person who would be a necessary party and who does not consent in writing to the
16 determination of the matter by a declaratory order proceeding." WAC 230-17-180(5). In my
17 view, there are no substantive contractual or statutory rights at stake that would be prejudiced by
18 our decision. While the plaintiff in the *Kater v. Churchill Downs, Inc.*, 886 F.3d 784, 9th Cir.
19 (Wash.) Mar. 28, 2018, has an interest, I can see no right that would be harmed. A right is vastly
20 different than an interest.

21 **2. The Social Casino Games Are Not Gambling Under Washington Law.**

22 Big Fish's online social games do not constitute gambling for purposes of RCW
23 9.46.0237. The Gambling Act defines "gambling" to mean "staking or risking something of
24 value upon the outcome of a contest of chance or a future contingent event not under the person's
25 control or influence, upon an agreement or understanding that the person or someone else will
26 receive something of value in the event of a certain outcome." RCW 9.46.0237.

1 The Gambling Act further defines “thing of value” to mean “any money or property, any
2 token, object or article exchangeable for money or property, or any form of credit or promise,
3 directly or indirectly, contemplating transfer of money or property or of any interest therein, or
4 involving extension of a service, entertainment or a privilege of playing at a game or scheme
5 without charge.” RCW 9.46.0285.

6 The fact remains that a virtual token used in a Big Fish game is not a “thing of value”
7 within the meaning of RCW 9.46.0285 because it cannot be redeemed for money or anything
8 else of real-world value. “Players cannot, and have never been able to, exchange or cash out
9 BFC virtual chips for money, and the virtual chips have no value in the real world. Virtual chips
10 can be used only within the games, such as to play the games or to obtain a virtual pet, cupcake,
11 flag, or other virtual item.” *Declaration of Andy Vella, Big Fish Vice President and General*
12 *Manager, at 2.*

13 Playing a Big Fish game does not involve the “staking or risking something of value”
14 within the meaning of RCW 9.46.0237. And a Big Fish games does not award “something of
15 value in the event of a certain outcome” within the meaning of RCW 9.46.0237. The Big Fish
16 terms of use explain that “[v]irtual items may not be transferred or resold for commercial gain
17 in any manner, including, without limitation, by means of any direct sale or auction service.”
18 The terms of use further specify that “[v]irtual items may not be purchased or sold from any
19 individual or other company via cash, barter or any other transaction.” Finally, the terms plainly
20 state that “[v]irtual items have no monetary value, and cannot be used to purchase or use products
21 or services other than within the applicable Big Fish Offering.”

22 Thus, I would conclude that Big Fish games are not “gambling” within the meaning of
23 RCW 9.46.0237.

24 Furthermore, in my view the Ninth Circuit Court of Appeals’ interpretation of
25 Washington’s definition of gambling is mistaken. RCW 9.46.0285 (“Thing of Value”) provides
26 that a “thing of value” is an item “... involving extension of a service, entertainment or a

1 privilege of playing at a game or scheme without charge.” The Ninth Circuit held that game
2 credits with no monetary value are nevertheless “things of value” because they “extend the
3 privilege of playing.” *Kater* at 787. While it is true that an item may extend the length of a game,
4 that in and of itself does not make that item a thing of value. For that to occur, the item must
5 offer the player the opportunity to win money. That is why the modifier “without charge” is
6 important. A “free play” token for a casino game is a good example. While that token may not
7 be redeemable for money, when used in a casino game that token offers the player the chance to
8 win real money. That token is provided to the player “free of charge” or “without charge” yet it
9 still provides the player the right to win real money as if an actual wager, which constitutes a
10 “charge”, had been placed. In my view, “without charge” means the opportunity to win real
11 money by wagering with an item that would otherwise cost money to purchase. Big Fish’s virtual
12 chips only allow the player to extend the length of the game. But they do not provide the player
13 with any new opportunity to win real money or items that can be cashed in for real money.

14 This petition is not about the spending or loss of money. Nor is it about addiction. This
15 is a petition about the construction of Washington’s gambling law. We are being asked to clarify
16 what is gambling and what is not. That is well within the scope of our authority and our mission.
17 That is not to dismiss the clear public policy and consumer protection concerns that stem from
18 addictive and behavioral health disorders. Those are real and they plague tens, if not hundreds,
19 of thousands of Washingtonians. But not all disorders fall under the Commission’s statutory
20 mandate. Video gaming addiction, for instance, is a newly recognized disorder and certainly
21 demands study and treatment in Washington. But that properly remains under the authority of
22 other Washington agencies, particularly an agency serving mental health needs. In other words,
23 while there are many serious addictions and disorders out there, only those stemming from the
24 act of gambling fall under our statutory mission. The Legislature is free to place video gaming
25 or other non-gambling activities under our authority – as it has done with amusement games –
26 but that has yet to happen. I would welcome that should the Legislature choose to do so.

1 **3. The Commission Should Act.**

2 The Washington Legislature has given the Commission the authority to interpret the
3 State's gambling laws and the power to enforce them. *Ass'n of Wash. Bus. v. Dept. of Revenue*,
4 155 Wash.2d 430, 440, 120 P.3d 46 (2005) (quoting A. E. Bonfield, *State Administrative Rule*
5 *Making*, §6.9.1, at 280 (1986), "Every legislature wants agencies to determine the meaning of
6 the law they must enforce and to inform the public of their interpretations so that members of
7 the public may follow the law."). A federal court's view of Washington State law is not binding
8 on the State of Washington, its courts, or agencies, because it is the state that is charged with
9 interpreting and enforcing state law. See, e.g., *In re Elliott*, 74 Wash. 2d 600,602, 446 P.2d 347
10 (1968) ("...state courts are not bound by federal court interpretations of state statutes"). With
11 the foregoing in mind, it is my view that the State Gambling Commission not only has the
12 opportunity to act to interpret and clarify the State's gambling laws but, in this case, has the
13 responsibility to do so. If the Commission chose to grant the Petitioner's request, we would be
14 doing a public service to the people of Washington by providing firm and sound direction
15 regarding the scope of gambling in Washington. The people look to us for such guidance. To be
16 sure, not all cases are clear cut or easy. But in this case, I believe the law is straightforward. At
17 the end of the day, we are being asked to interpret the law. The play of Big Fish games does not
18 constitute gambling, and we should say so.

19 For these reasons, I respectfully dissent.

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21 DATED this 18th day of October, 2018.

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24 _____
25 CHRIS STEARNS, COMMISSIONER
26