

September 18, 2018

Brian Considine
Washington State Gambling Commission
By email: brian.considine@wsgc.wa.gov

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

Dear Mr. Considine:

My name is Stacy Friedman. My company, Olympian Gaming LLC, is a Commission licensee. I support the petition by Big Fish Games, Inc. for a declaratory order confirming that a non-redeemable virtual game credit is not a “thing of value” under the Washington Gambling Act, and I welcome this opportunity to provide this submission to the Commission.

Executive Summary

1. The 9th Circuit construed “extension ... of a privilege of playing at a game or scheme without charge” in RCW 9.46.0285 as meaning “prolong” the play of that game.
2. That construction is incongruous with that term’s use elsewhere in the statute, implicates games that are not intended to fall under the definition of “gambling” such as video arcade games, board games or casino simulations, and has nonsensical implications for tax policy.
3. In context, the proper interpretation of “extension” in RCW 9.46.0285 is “proffer.”
4. Under that construction, “thing of value” does not include virtual game credits or play money in video arcade games, board games or casino game simulations, but *does* include casino free bet chips and slot machine free play vouchers that have non-zero expected value.
5. Gaming addiction and gambling addiction are both important public policy concerns but are unrelated to the statutory interpretations being considered by the Commission.

Introduction

I am a professional casino game designer and mathematician with over 20 years of experience in the gaming industry, including employment with slot machine manufacturers Silicon Gaming and IGT. In 2001, I started Olympian Gaming, LLC to advise Internet casino software vendors, new game developers, and casino game manufacturers on wagering, gameplay design, mathematical analysis, and statistical verification. In late 2010 through 2011, I was engaged by DoubleDown Interactive in Seattle, a social gaming company offering free-to-play slot machine games on Facebook, and I designed the mathematics, payouts, and game features for all of DoubleDown's virtual slot machine games prior to its acquisition by IGT in 2012.

Olympian Gaming also designs, markets, and licenses proprietary games. Olympian Gaming has held a Washington State Gambling Commission license since 2007 and Bad Beat Blackjack has been approved and operated in Washington State since 2009.

I also serve as a subject matter expert consultant in gaming-related disputes. Since 2005 I have provided expert witness testimony or analysis in over 40 cases, including for the Mississippi Gaming Commission, the Alabama Attorney General, the Humboldt County California Public

Defender, a Costa Rican legislator, the Seneca Nation of Indians, and the Atlantic Lottery Corporation in Canada. I have also consulted on many intellectual property disputes between gaming manufacturers, including testimony before the U.S. Patent and Trademark Office as well as courts in the United States, Canada, and the United Kingdom. I have also been interviewed by several media organizations for my perspective on gambling topics, including NPR, CBS, and the Oregonian newspaper.

I have reviewed the materials posted on the Commission's website related to the Big Fish petition, including the transcripts of Commission meetings held July 12 and August 9, 2018. In my view, the submissions relating to "thing of value" have not directly addressed the construction of the phrase "extension of a service, entertainment, or a privilege of playing at a game or scheme without charge." I specifically address that issue in this submission.

Washington Gambling Act, RCW 9.46

The relevant definitions in RCW 9.46 are:

RCW 9.46.0237: "Gambling," as used in this chapter, 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. Gambling does not include ... bona fide business transactions valid under the law of contracts ...

RCW 9.46.0225: "Contest of chance," as used in this chapter, means any contest, game, gaming scheme, or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.

RCW 9.46.0285: "Thing of value," as used in this chapter, means 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 9th Circuit noted the well-known three-part understanding of gambling in *Kater*: "[A]ll forms of gambling involve prize, chance, and consideration."¹ With this in mind, several initial conclusions can be reached from the statutory language:

First, a "contest of chance" must have at least two outcomes because a contest with a solitary outcome would not *depend in a material degree upon* an element of chance. Similarly, a "future contingent event" must also have at least two outcomes or it is not *contingent* on anything.

Second, at least one of the outcomes in a gambling game must result in someone "receiv[ing] something of value in the event of [that] outcome." There is no gambling if there can be no prize.

¹ *Kater v. Churchill Downs, Inc* (886 F.3d 784, 786)

Third, it must be possible to play a contest of chance with something that is not a thing “of value” because otherwise the words “of value” in the definition of “gambling” are surplusage.

Fourth, in a gambling game where “extension of entertainment” is the prize or “thing of value,” that entertainment is separate from the “contest of chance” being wagered upon. Otherwise any entertaining chance-based game would be its own reward (that is, the chance and prize elements would be the same thing), violating the three-part understanding of “gambling” and reducing the meaning of “entertainment” to surplusage.

For example, playing video arcade games is not gambling. Although the game costs money and the player may earn an extra credit, no possible outcome results in any person receiving something of value regardless of how long the game may last. The quarter played in an arcade game is not a wager, it is a purchase of entertainment. Similarly, playing poker with Monopoly money is not gambling. Although poker is a contest of chance, Monopoly money is not a “thing of value.” Also excluded from gambling are computer-based casino game simulations involving no money whatsoever (other than the purchase of software) that depict simulated wagering of virtual game credits on slot machines, blackjack, roulette, and the like. Such computer games have been in the market for over 30 years and include products from Washington-based companies such as Sierra On-Line and Microsoft.

Kater v. Churchill Downs and the Meaning of “Thing of Value”

However, in March 2018 the 9th Circuit held that game credits with no monetary value are nevertheless “things of value” because they “extend the privilege of playing.”² As such, the 9th Circuit has opened the door to the interpretation that many types of games involving non-redeemable game credits fall under the Washington statutory definition of “gambling” because the game credits themselves can be viewed as both “consideration” and “prize,” regardless of how those credits are obtained or what they are worth.

Specifically, the Court stated:

- a) “They then can play the games for free using the chips that come with the app, and may purchase additional chips to *extend* gameplay.”³
- b) “In sum, these virtual chips *extend* the privilege of playing Big Fish Casino.”⁴
- c) “users receive free chips throughout gameplay, such that *extending* gameplay costs them nothing.”⁵

As demonstrated by these passages, the Court has construed “extension of ... a privilege of playing at a game or scheme without charge” to mean “prolonging the play of any game.” Under this interpretation, if a game credit prolongs gameplay, whatever the game, then it is a “thing of value” even if that credit is freely provided or cannot be redeemed for money or property.

² *Kater v. Churchill Downs, Inc* (886 F.3d 784, 787).

³ *Id.* at 785

⁴ *Id.* at 787

⁵ *Id.*

Respectfully, this interpretation is mistaken. The term “game or scheme” is properly understood to be a winnable “contest of chance” as opposed to some other type of game, and the term “extension” is properly understood to mean “proffer” as opposed to “prolong.”

“Extension” Means “Proffer”

The statutory construction of “extension” must be consistently applied to all three categories: “extension of a service, entertainment or a privilege of playing at a game or scheme without charge.” But it is not true that a service (e.g., an oil change) or entertainment (e.g., a baseball game) is a thing of value only when it is *prolonged*. Services and entertainment are things of value by themselves, regardless of duration. For the same reason, the “privilege of playing at a game or scheme without charge” is also a thing of value by itself, regardless of duration. Therefore, “extension” does not mean “prolong.” The only meaning of “extension” that leads to consistent and sensible interpretations for all three categories is “proffer.”

The proffer of a service such as an oil change is a thing of value. The proffer of entertainment such as a baseball game is also a thing of value. The proffer of a privilege of playing at a game or scheme without charge is also a thing of value, because the player can win when playing at that game or scheme.⁶ For example, a token that can substitute for a \$10 wager at a casino’s roulette table, and that can win or lose just like any other \$10 wager, is also a thing of value.

The token in this last example is exactly what is meant by the statutory language “extension of a privilege of playing at a game or scheme without charge.” Such tokens are commonly known as “free bet” or “match play” for table games, or “free play” in slot machines. Free bets and free play have been part of casino gambling operations for many decades and predate the passage of the 1973 Washington Gambling Act. Depicted below are two examples of free play tokens, one good for a \$1 bet on craps, roulette or blackjack and the other good for a free slot play.⁷



⁶ The words “game” and “scheme” are used equivalently in the definitions of both “contest of chance” and “thing of value.” The privilege to play a contest of chance without charge must be distinct from “entertainment” or it is surplusage, and the distinction lies in the possibility for the player to win. In its petition, Big Fish notes that the qualification “without charge” means that a “form of credit” is a thing of value only if it is a credit for playing at a game for which there would otherwise be a charge. That is correct but not sufficient: bowling or arcade games also normally cost money but neither is what is meant by “privilege to play at a game or scheme without charge.” As described in this section, that privilege should be understood as a free substitute for “consideration” in a game that also has both “chance” and “prize.”

⁷ Images from eBay auctions

In my opinion, and to directly answer Director Trujillo’s question from the August 9, 2018 meeting,⁸ such free play tokens and the like are what the Washington legislature intended by the statutory term “extension of a privilege of playing at a game or scheme without charge.”⁹

In a casino, free play tokens, vouchers or credits have no pecuniary value by themselves and may not be redeemed for money. However, the privilege to play a gambling game “without charge” yet have the right to win money *as if a wager had been placed* has a calculable and non-zero *theoretical or expected value* (EV).

Those outside the gambling industry may not be familiar with the concept of EV so I provide a brief overview. All wagers have an “expected value” which is the sum of each possible outcome multiplied by its probability. The EV of a wager is related to its “house edge,” and for slot machine games, to the “return to player” percentage or RTP. The EV of a \$10 roulette wager on “red” is about \$9.47. If the player actually bets \$10, this expected \$9.47 represents a theoretical loss of \$0.53. Similarly, the EV of \$10 wagered in a slot machine with a 95% RTP is \$9.50.

If a player is given a free bet token for a \$10 roulette red bet, the value of that token is still \$9.47. In other words, the “privilege” to make a \$10 roulette bet “without charge” is worth an average of \$9.47. This is why free bet tokens are things of value. Similarly, for a slot machine with a 95% RTP, \$10 in free play for that slot machine game has an EV of \$9.50. Thus the privilege to wager \$10 on roulette or slot machines “without charge” is a thing of value even though the privilege cannot be redeemed for money. The free wager may win or lose, but the privilege to make that wager without charge is itself a “thing of value” because it *could* win.

“Extension” Does Not Mean “Prolong”

The 9th Circuit’s holding that a gameplay-prolonging virtual game credit is a “thing of value,” combined with the unstated position that “game or scheme” can be any game whatsoever, means any such in-game credit can legally satisfy both the prize *and* consideration elements of gambling – even when the credits do not exist outside the game itself and the game never returns anything to the player. This leads to nonsensical outcomes by expanding the scope of gambling in Washington to include:

1. Any video arcade game where players can win extra credits via some element of chance. This includes many coin-operated arcade games such as Ms. Pac Man or Asteroids, even when set to free play mode, since players can win game-prolonging extra credits or extra lives and many game behaviors are random.
2. Any board game involving both play money and an element of chance, such as dice, if that play money can be won during the game and prolongs gameplay. Board games such as Monopoly fall into this category.

⁸ “Can you explain why the legislature would write “without charge,” what that means?”

<https://www.wsgc.wa.gov/sites/default/files/public/news/big-fish/8-9-18-BigFishPetitionTranscript.pdf>, at 1:43:16

⁹ The prior statutory definition of gambling, which appears to be from 1909, uses the phrase “money or property or any representative of either.” Free bet tokens arguably did not meet that prior definition but they clearly meet the current one. I cannot think of another reason why lawmakers would have added the language if not to reflect free bets tokens and other casino equivalents.

- Any chance-based casino game simulation using free and non-redeemable play credits, whether digital or otherwise, because the credits used to play the game can also be won and thereby prolong play.

This last example is personally relevant. I invented Bad Beat Blackjack, a casino game approved by the Commission that has been played in Washington since 2009. There is a playable demo of this game using virtual game credits on the Olympian Gaming website.¹⁰ Depicted in the screenshot below are a main wager of \$100, a Bad Beat Blackjack wager of \$25, and a player’s bankroll of \$2,025 in the lower right. The virtual game credits, called “chips” in this demo, can neither be purchased nor redeemed for money. These chips are created on demand by the demo software: if a visitor to my website wants to prolong play, he or she can click the message directly beneath the bankroll that reads “CLICK HERE TO GET \$500 MORE CHIPS.”



Olympian Gaming holds a license from the Commission to distribute gambling games but not to operate them, and in any event online gambling is illegal in Washington. I recently renewed the license for Olympian Gaming and re-agreed to the Oath of Application which includes the following language: “I understand that untruthful, misleading, or incomplete answers whether through misrepresentation, concealment, inadvertence, or mistake, are cause for suspension or

¹⁰ <https://olympiangaming.com/bad-beat-blackjack/>

revocation of any gambling license(s) currently held, or denial of any future applications for a new license. **I understand that I am responsible to know and comply with all rules and laws, RCW 9.46 and WAC 230**” emphasis added. If the entirely free online casino game simulations on the Olympian Gaming website are “gambling” because the virtual credits created by my website are “things of value” then (a) Olympian Gaming’s license may be at risk and (b) I may be personally liable for criminal prosecution.¹¹ To be blunt, that would be a ridiculous outcome. Therefore, the 9th Circuit interpretation cannot be correct.

Additionally, the interpretation that a virtual game credit is a “thing of value” has nonsensical financial implications. If a virtual game credit that can be created on demand by software is a “thing of value,” what is that value? How much are the \$500 in free chips created by my demo worth? Gambling winnings are taxable: does winning a virtual wager with those game credits invoke tax reporting consequences? It would be ridiculous to suggest that the free chips created by Olympian Gaming or by Big Fish Casino software would have an impact on the player’s net worth or income tax – or that Olympian Gaming or Big Fish Casino should be able to deduct the “value” of the virtual game credits created by its software. This is because, in truth, there is no value to those virtual game credits. They are created freely by game software and have no financial impact to either the player or the operator. In contrast, there are very real operational and tax implications of actual casino free play that, as described above, affords the player a chance to win real money.¹²

For these reasons, the Commission should reject “prolong” as the meaning of “extension” in the definition of “thing of value,” and should further acknowledge that “privilege of playing at a game or scheme” does not apply to any of the non-wagering games described in this section.

Sidebar: Addiction, Video Games, and Public Policy

Many of the submissions to the Commission on this matter have focused on the issue of addiction and public policy. Addiction mitigation is an important public policy topic, and the Commission’s number one goal in its 2018-2022 strategic plan is to increase its role in helping people who are suffering from gambling disorders.¹³

In her comments to this Commission, Dr. Schüll writes “for regular players of **slot machines and mobile games alike** (and most certainly for **addicts** of those games), *winning money is not the point*; rather, the point is *continuing to play*,” italics in original, boldface added.¹⁴ With video games, the point has always been continuing to play. This was true for video arcade game players in the 1980s just as it is true today for players of console, desktop or mobile games. Winning money in video games was never the point because *winning money was never a possibility*.

¹¹ To this point, I incorporate by reference the comments made by Big Fish Games in its petition at paragraph 23.

¹² “The Free-Play Tax Deduction Debate: How Academic Research Can Help”, Lucas A.F. & Spilde, K.A. (2017), *UNLV Gaming Research & Review Journal*, 21(1), 25-42.

<https://pdfs.semanticscholar.org/8c88/7c256f7126119a95fc913667599620574b4e.pdf>.

¹³ https://www.wsgc.wa.gov/sites/default/files/public/reports-publications/Strategic%20Plan%202018-2022_FF.pdf

¹⁴ <https://www.wsgc.wa.gov/sites/default/files/public/news/big-fish/Dr.%20Schull%20Comments.pdf>

Dr. Schüll appears to be conflating the question of what games may be “addictive” with what games satisfy the statutory definition of “gambling.” However, Vice-Chair Patterson correctly noted that “there is a difference between gambling addiction and gaming addiction,”¹⁵ and Director Trujillo noted that Dr. Schüll’s research “applies to definitely things that are not gambling as well as things that are gambling.”¹⁶ Thus, I recommend that the Commission continue to focus on the narrow question set forth in the Big Fish Petition that I have discussed above, and decline to conflate that analysis with matters of broader public policy.¹⁷

Conclusion

For the reasons set forth above, the statutory definition of “gambling” in RCW 9.46 does not properly include (a) paying to play a video game of variable duration with no possibility to win, (b) playing Monopoly or poker with play money, and (c) playing a simulated casino computer game without money at all. However, adopting the 9th Circuit’s interpretation of Washington State law forces the opposite conclusions. As a Commission licensee whose business in Washington State would be upended by that interpretation, I support the petition from Big Fish Games and respectfully request that the Commission issue a declaratory order that “extension” in RCW 9.46.0285 should be construed to mean “proffer” rather than “prolong,” and further that virtual game credits that only prolong the duration of play and have no expected value are not “things of value” under RCW 9.46.0285.

Respectfully Submitted,



Stacy Friedman
President,
Olympian Gaming, LLC

¹⁵ <https://www.wsgc.wa.gov/sites/default/files/public/news/big-fish/8-9-18-BigFishPetitionTranscript.pdf>, at 2:00:01

¹⁶ *Id.*, at 2:00:24

¹⁷ In my opinion, any future public policy on video game regulation will need to balance the State’s interest in mitigating social harms from problem behavior with the State’s *disinterest* in restricting individual liberty such as the freedom to spend time or money on video games or to start a video game company. Consideration should be given to industry monetization models such as virtual credit purchases or loot boxes, but defining the contours of any future policy or regulatory oversight is beyond the scope of this letter.