Case No. 16-35010

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHERYL KATER,
Plaintiff-Appellant,

v.

CHURCHILL DOWNS INCORPORATED
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
Case No. 2:15-cv-00612-MJP
The Honorable Marsha J. Pechman

CHURCHILL DOWNS INCORPORATED'S PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Other Authorities

RULE 35(b)(1) STATEMENT AND INTRODUCTION

The panel opinion in this case has misinterpreted Washington State law to treat as gambling a wide variety of popular online video games that millions of people throughout the country play on a daily basis. The panel's ruling is contrary to the longstanding interpretation of the state statute by the Washington State Gambling Commission, the agency charged with enforcing the statute. One legal scholar has noted that the decision "may turn a lot of things into illegal gambling" under Washington law, including online video games with different themes, be they casino-themed, candy-themed, or something else, if they involve virtual "chips," "lives," or other play credits within the game, even if those credits cannot be converted to real money. *See* California Appellate Report, https://bit.ly/2K4NxHG (discussing potentially broad implications of the panel's opinion for online games that were previously understood not to constitute gambling).

The panel's ruling already has had adverse consequences for businesses offering such games and the individuals who play them. Shortly after the panel issued its opinion, five class actions were filed against various companies offering online video games in Washington.[1] The lawsuits were

[1] *See Wilson v. Playtika, Ltd.*, No. 18-cv-5277 (W.D. Wash. Apr. 6, 2018); *Wilson v. Huuuge, Inc.*, No. 18-cv-5276 (W.D. Wash. Apr. 6, 2018); *Wilson v. PTT, LLC, d/b/a/ High 5 Games, LLC*, No. 18-cv-5275 (W.D. Wash. Apr.

all brought in federal district court in Washington, and attempt to leverage the panel's new interpretation of state law, under which various video games, which all had understood to be lawful before the panel's ruling, could now be considered gambling. In addition, after the panel's opinion was issued, the Washington State Gambling Commission received "communications from angry customers holding the Washington State Gambling Commission responsible for their discontinued service," which prompted the Commission to post on its website that it "did not order these sites to discontinue free online play for Washington residents." Wash. State Gambling Comm'n, *Director's statement regarding Ninth Circuit Court of Appeals' published decision in Kater v. Churchill Downs* (Apr. 17, 2018), https://bit.ly/2HZhzPL; Wash. State Gambling Comm'n, *Statement regarding access to free online poker sites* (Apr. 4, 2018), https://bit.ly/2HXDRB9.[2]

The district court correctly rejected the claim that the online video game at issue here constitutes gambling under Washington law. The court

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6, 2018); *Benson v. Double Down Interactive, LLC*, No. 18-cv-525 (W.D. Wash. Apr. 9, 2018); *Fife v. Scientific Games Corp.*, No. 18-cv-565 (W.D. Wash. Apr. 17, 2018).

[2] A request for this Court to take judicial notice under Ninth Cir. Rule 27-1 of the posts by the state agency on its official website, is filed contemporaneously with this petition.

held, consistent with the interpretation of the Washington State Gambling Commission, that the video game does not meet the prize requirement to constitute gambling under Washington State's Gambling Act, Wash. Rev. Code ("RCW") 9.46.0237, *i.e.*, that a person receive something "of value." EOR 12. The district court correctly concluded that the virtual credits for additional playing time within the game, referred to as "virtual chips," do not meet the statutory definition of "thing of value," RCW 9.46.0285, because they have no monetary value outside the game, and because use of the virtual chips within the game, regardless of how acquired, results only in "the amusement that accompanies continuing to play a game that is already available to play for free," not a pecuniary gain to the user. EOR 13.

The panel, however, reversed and adopted a contrary interpretation, with scant statutory analysis, that pays no heed to fundamental principles that govern a federal court's interpretation of state law. The panel summarily rejected as too informal the interpretation of the Washington State Gambling Commission. And the panel misconstrued state law in a manner fraught with potential adverse consequences given that the state gambling statute, Chapter 9.46 of the Washington Revised Code, imposes liability on gambling activities in a number of different circumstances under both civil and criminal law.

En banc review is warranted in light of the significant disruption to businesses, law enforcement, and game users alike that the panel opinion creates. The upending of these settled expectations presents a question of exceptional importance. Fed. R. App. P. 35(a)(2). Review is also warranted because the panel opinion conflicts with this Circuit's precedent and that of other Circuits governing the rules for how a federal court interprets state law. Fed. R. App. P. 35(a)(1), (2). When a federal court considers competing interpretations of a state statute, one of which extends liability while the other reasonably restricts it, the federal court's interpretation should not extend liability under state law. That is especially true where, as here, the narrower interpretation has been adopted by the state agency charged with enforcing that law, businesses and game users have relied for years on that interpretation, and the rule of lenity applies under state law.

BACKGROUND

The proposed class action complaint in this case was filed by Plaintiff Cheryl Kater, a resident of Michigan, who plays the Big Fish Casino online video game on her Android device. EOR 28. Plaintiff filed suit in April 2015 against Churchill Downs Incorporated, a Kentucky corporation and then-owner of Big Fish Games, Inc., which, in turn, owns and operates the

video game at issue here.[3] Plaintiff alleges she spent more than $1,000 buying virtual chips within the game, and purports to sue on behalf of a nationwide class of other game users who purchased virtual credits within the game.

The complaint seeks relief under Washington's Recovery of Money Lost at Gambling statute, which provides that "all persons losing money or anything of value at or on illegal gambling games shall have a cause of action to recover from the dealer or player winning, or from the proprietor for whose benefit such game was played or dealt, or such money or things of value won, the amount of the money or the value of the thing so lost." RCW 4.24.070.

Plaintiff alleges that Big Fish Casino constitutes "gambling" under RCW 9.46.0237, meaning the "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." Plaintiff claims that a "virtual chip" that can be used to play the online game meets the statutory definition of "thing of value" that a

[3] Churchill Downs' sale of Big Fish Games, Inc. to Aristocrat Leisure, Ltd. closed on January 9, 2018. *See* Appellee's Reply in Support of Appellee's Mot. to Substitute, Dkt. No. 51 (Jan. 24, 2018).

person receives, *i.e.*, "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." RCW 9.46.0285.

The district court granted the Defendant's motion to dismiss. The court explained that "users can play the games for free by using only the virtual casino chips awarded to them without charge." EOR 8. Users also "have the option to purchase additional chips and a wide variety of other low-cost virtual items that enhance or extend gameplay," and "also receive additional chips as a reward when they win one of Big Fish Casino's games." *Id.* The court explained that users are required to have "a minimum quantity of chips in order to play the games," and "if users run out of chips but wish to continue playing, they must either wait until additional chips are awarded to them free of charge or they must purchase additional chips directly from Defendant." *Id.* The terms of use for the game state that virtual chips "have no cash value, and cannot be exchanged for cash or merchandise." *Id.*

The district court ruled that Plaintiff "cannot satisfy the prize element required to establish that Big Fish Casino constitutes 'gambling' under

Washington law" because "Big Fish Casino is free to play and there is never a possibility of receiving real cash or merchandise, no matter how many [virtual] chips a user wins." EOR 12-13. The court emphasized that "extended gameplay cannot result in any gain to the user, pecuniary or otherwise, aside from the amusement that accompanies continuing to play a game that is already available to play for free." EOR 13.[4]

The panel of this Court reversed, holding that the virtual chips purchased by users meet the definition of "thing of value" because they are a "form of credit" without which a user "is unable to play Big Fish Casino's various games," and permit extension of game play without charge. App., *infra*, 6a.

Although the panel suggested that purchased chips are required to extend gameplay, that is contrary to the district court's correct description of the game, EOR 2, and the Complaint contains no such allegation. The panel declined to address the argument that users receive free virtual chips

[4] Plaintiff also alleged that the "thing of value" requirement was met based on a secondary market, but the district court rejected that theory and the panel affirmed. App., *infra*, 8a n.2. Because Plaintiffs failed to establish that the game user receives something of value to constitute "gambling" under Washington law, the district court did not address the other elements required to state a claim, and did not address other requirements for relief, *e.g.*, RCW 4.24.070 (cause of action to recover only against "the dealer or player winning" or "the proprietor for whose benefit such game was played"). The panel likewise did not address these additional issues.

throughout gameplay (and that only a small number of users choose to *purchase* virtual chips) so that extending play is not a thing of value, because the court viewed the Complaint to not include that allegation. App., *infra*, at 6.

The panel rejected the interpretation of the Washington State Gambling Commission that an online video game does not meet the prize requirement to constitute gambling under the Washington Gambling Act if the game's virtual gameplay credits cannot be converted to real money. App., *infra*, 9a n.3 (taking judicial notice of Commission materials). The panel also analogized the instant case to *Bullseye Distributing LLC v. State Gambling Commission*, 127 Wash. App. 231, 241-42 (2005), even though the district court had correctly distinguished that case, consistent with the Commission's interpretation, as involving a game where a gameplay "credit" could be exchanged for real money.

REASONS FOR GRANTING THE PETITION

I. The Panel's Extension Of Liability Under The Washington State Gambling Statute Conflicts With Decisions Of This Court And Other Circuits Regarding A Federal Court's Role When Interpreting State Law

A. When a federal court is called upon to interpret state law, its task is to "approximate state law as closely as possible in order to make sure that the vindication of the state rights is without discrimination because of the

federal forum." *Del Webb Cmtys., Inc. v. Partington*, 652 F.3d 1145, 1154 (9th Cir. 2011) (citation omitted). "Federal courts should 'hesitate prematurely to extend the law . . . in the absence of an indication from the [state] courts or the [state] legislature that such an extension would be desirable.'" *Id.* (quoting *Torres v. Goodyear Tire Rubber Co.*, 867 F.2d 1234, 1238 (9th Cir. 1989)).

Although this Court has indicated that a federal court may resolve state law issues even in the absence of a clear rule from the state highest court or legislature, it has never suggested that liability under state law should be extended by a federal court in a manner contrary to the interpretation of that law by the state agency charged with enforcing it. To the contrary, this Court has emphasized that, when construction of state law "involves a policy choice and a balance of social costs," it is not for the federal court to "make up [the state court's] mind for it." *Hernandez v. DeClay*, 931 F.2d 60 (Table), 1991 WL 66271, at *2 (9th Cir. Apr. 30, 1991) (citation omitted) (unpublished; cited pursuant to Ninth Cir. R. 36-3(c)(iii) "to demonstrate the existence of a conflict among opinions").

In construing the Washington statute to vastly extend the definition of "gambling," the panel also broke company with the approach mandated by the Third, Sixth, Seventh, and Eighth Circuits, which have adopted the

requirement that "[w]hen given a choice between an interpretation of [state] law which reasonably restricts liability, and one which greatly expands liability, [the court] should choose the narrower and more reasonable path." *Combs v. Int'l Ins. Co.*, 354 F.3d 568, 577 (6th Cir. 2004) (citation omitted); *see also Kingman v. Dillards, Inc.*, 643 F.3d 607, 617 (8th Cir. 2011) (citation omitted) (same); *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 680 (3d Cir. 2002) (same); *Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1412 (7th Cir. 1994) (same).

The resulting conflict should be corrected by this Court sitting en banc. Even if this Court were not inclined to adopt in whole the approach of those other Circuits to resolving questions of state law, it can eliminate the Circuit split by holding that, at least where the state agency charged with enforcement of a state statute has unambiguously signaled its interpretation of that statute, a federal court sitting in diversity may not adopt a liability-extending interpretation that directly conflicts with the agency's interpretation.

B. Contrary to the precedent from both this Court and those other Circuits, the panel greatly extended the specter of civil liability under Washington state law for online video games, despite all indications being to

the contrary from the State of Washington about its interpretation of this issue of state law.

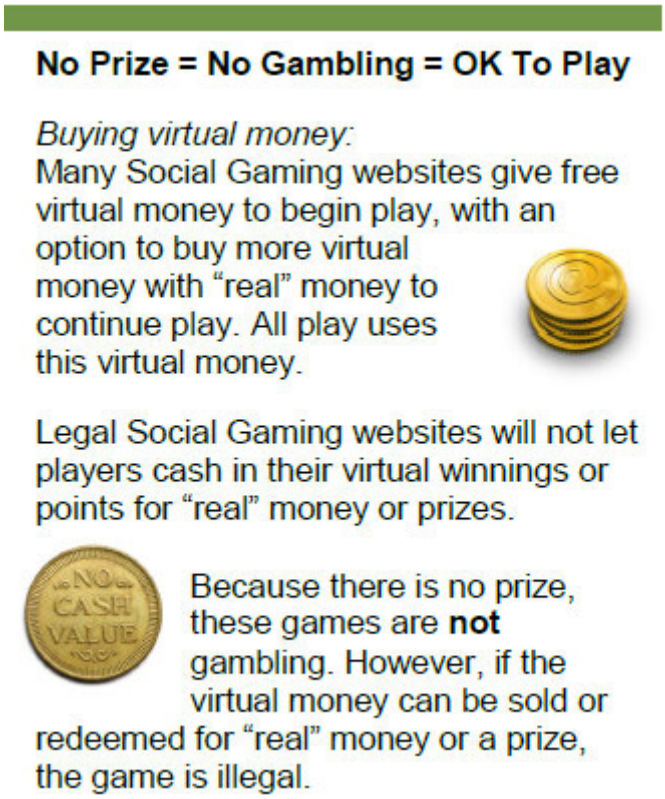
The sole opinion from a Washington appellate court construing "thing of value" in RCW 9.46.0285 involved a game, unlike the game at issue here, that was *not* free to play and provided *real money* in exchange for playing time credits that users could be awarded by the game. That case was correctly distinguished by the district court because users there "could receive actual cash or merchandise prizes by playing the game," which was "increasingly achievable the longer the user played the game." EOR 12–13 (distinguishing *Bullseye*, 127 Wash. App. at 236). Moreover, contrary to the instant case, the Washington State Gambling Commission had declared the game at issue in *Bullseye* to be illegal gambling under state law. *Bullseye*, 127 Wash. App. at 234.

In fact, the Washington State Gambling Commission has interpreted the state statute for years in a manner that conflicts with the panel's interpretation. The Commission is the state agency charged by the legislature with, among other things, the "power to enforce" the "penal laws of [the] state relating to the conduct of or participation in gambling activities," RCW 9.46.210(3), and with "adopt[ing] such rules and

regulations as are deemed necessary to carry out the purposes and provisions of" the Washington Gambling Act, RCW 9.46.070(14).

Since March 2014, information to guide the public and online video game providers about the scope of the state gambling law has been set forth in a Commission brochure entitled *Online Social Gaming: When is it legal? What to Consider* (March 2014). App., *infra*, 12a–13a. That publication bears the Commission's official seal, and quotes RCW 9.46.0237, the statute's definition of "gambling." The brochure discusses the ever-expanding range of online video games, "from tending a farm to playing a soldier in combat," and explains that games permitting users to buy in-game "virtual money, points, and other items" that cannot be redeemed for "'real' money or a prize" are "**not** gambling" under state law

and therefore are legal. The brochure explicitly states that such games are "OK To Play":



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.

App., *infra*, 13a; *id.* at 9a n.3 (taking judicial notice of document).

The publication of the brochure followed a public hearing the previous year that included a detailed presentation to the Commission. At its May 9, 2013, meeting, the Commission had reviewed features of several games, including Big Fish Casino, Dkt. 29-2 at 12, as well as games with non-casino themes, and the presentation had relied on the same analysis as the Commission's brochure to explain why the games are not "gambling"

under Washington state law because they do not meet the "prize" element when the "virtual currency cannot be converted to real money," *id.* at 13.[5]

The brochure makes clear that the Commission was created "to regulate and control authorized and illegal gambling activities (RCW 9.46)." App., *infra*, 13a. The brochure provides a link to the Commission's website and other information on how to contact the Commission. *Id.* The brochure states that it gives "general guidance to help you determine if you are playing on, or operating, a legal Social Gaming website in Washington State," *id.*, and, following another reference to "general guidance," the brochure states that an attorney should be contacted if a person has "questions or [is] unsure whether a game has the **3 elements** of gambling," *id.* Those statements concern whether application of the Commission's interpretation of the statute to a particular game means that the game is gambling. They in no way suggest that the Commission's interpretation of the statute is anything other than the official position of the Commission.

The panel's rejection of the Commission's interpretation as "only 'general guidance'" and lacking an "official, definitive analysis" of the

[5] The statute's reference to the "extension" of "a privilege of playing at a game or scheme without charge," RCW 9.46.0285, also supports the Commission's interpretation because no "privilege" is needed to play "without charge" a game that can be played for free.

issue, App., *infra*, 9a, was therefore in error. The brochure explicitly quotes the statutory text that it is interpreting, and its interpretation is clear and definitive. If anything, the format of the publication—which is designed to communicate directly to ordinary citizens and businesses in plain language the Commission's interpretation of the statute—is all the more reason to follow the Commission's interpretation.

Consistent with the interpretation of state law set forth in the brochure, the Commission has taken action against various types of conduct that it considers to be illegal gambling under state law, [6] but it has taken no action against the type of online video games at issue here. Nor has the Washington legislature taken any action to contradict that interpretation of state gambling law.

Following the panel's opinion in this case, the Commission posted that it "continue[s] to receive communications from angry customers holding the Washington State Gambling Commission responsible for their discontinued service," and then clarified that the Commission is "not a party to the civil court case," "did not testify in the case," and "did not order these

[6] *See, e.g.*, Wash. State Gambling Comm'n, *Gambling Commission agents break up loansharking and money laundering operation at Tukwila casino* (March 30, 2018), *available at* https://bit.ly/2vK1UOC; Jacob Wolf, *Washington State Gambling Commission orders Valve to stop skins gambling*, ESPN.com (Oct. 5, 2016), https://es.pn/2cUiNHk.

sites to discontinue free online play for Washington residents." Wash. State Gambling Comm'n, *Director's statement regarding Ninth Circuit Court of Appeals' published decision in Kater v. Churchill Downs*; *see also supra*, note 2 (referencing request for judicial notice of same).

The Commission's interpretation is wholly consistent with the stated purpose of the Washington Gambling Act, which is "to keep the criminal element out" of gambling, in particular "organized crime," and to restrain "professional" gambling, but "at the same time," to "avoid 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.

In short, the Commission's longstanding public interpretation is a reasonable one. As such, the panel's extension of liability under the state statute is in conflict with this Court's precedent regarding the appropriate role of a federal court when it interprets state statutory law.

C. The panel's opinion is also problematic because of the criminal consequences that could follow from its interpretation of "thing of value" in RCW 9.46.0285, for purposes of the Washington Gambling Act, which constitutes Chapter 9.46 of the state penal code. The Act authorizes several different types of gambling, subject to varying rules and/or licenses, while

declaring other types of gambling illegal and imposing criminal sanctions on those who engage in such conduct. The panel's interpretation of "thing of value" thus has potential to expand criminal liability under Washington law. *See, e.g.*, RCW 9.46.180 (class B felony for causing, aiding, abetting, or conspiring to cause violation of the gambling statute); RCW 9.46.240 (class C felony for transmitting or receiving "gambling information" over the internet unless related to activities authorized by the statute).

The panel's failure to apply the rule of lenity as that rule is applied in Washington conflicts with this Court's precedent. This Court has made clear that federal courts must apply state law "as . . . the [state] Supreme Court would apply it." *In re K F Dairies, Inc. & Affiliates*, 224 F.3d 922, 924 (9th Cir. 2000). Here, that requires application of the rule of lenity to a statute imposing penal or criminal sanctions, including in cases that are "civil in form." *Kahler v. Kernes*, 42 Wash. App. 303, 308 (1985) ("As it is a penal statute, although civil in form, we *must* adopt the interpretation most favorable to [the party facing penalty]." (emphasis added)). Where, as here, the meaning of the relevant statute could be argued to be, at most, ambiguous, "[t]he rule of lenity *requires* the court to adopt an interpretation *most favorable* to the . . . defendant" according to state law. *State v. Roberts*, 117 Wash. 2d 576, 586 (1991) (emphasis added).

Similarly, the panel opinion conflicts with Circuit precedent on standards for federal court review of state law because it failed to apply the canon of *noscitur a sociis*, as the Washington state court would, which directs that "the meaning of words may be indicated or controlled by those with which they are associated." *State v. Roggenkamp*, 153 Wash. 2d 614, 623 (2005) (citation omitted). Here, the terms surrounding "extension of a . . . privilege of playing a game" in the statute—"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," RCW 9.46.0285—all are, or may be exchanged for, something of extrinsic value, *i.e.*, money or property. Accordingly, the statute covers only situations, unlike here, where the "extension of a . . . privilege of playing a game" can be monetized.

II. The Panel Decision Has Upended Reliance On Settled State Law And Prompted New Lawsuits Seeking Federal Court Extension Of State Law Liability, Thereby Presenting a Question of Exceptional Importance

The panel's erroneous ruling already has had far-reaching consequences that present a question of exceptional importance warranting immediate en banc review.

A. The panel decision upends the settled expectations of businesses that have operated in Washington relying on the Washington State Gambling

Commission's longstanding interpretation of what constitutes lawful online video games. Businesses must determine how to address the uncertainty created by the conflict between the Commission's interpretation of state law and the panel's interpretation. The posted response by the Washington State Gambling Commission to Washington residents being denied access to certain online video games after the panel's ruling, *see supra* at pages 2, 15-16, is concrete evidence of the disruption to game users as well that was caused by the ruling.

B. The panel's extension of Washington state law to deem certain online video games to be gambling when they previously had been understood not to be gambling, has also chummed the waters, signaling that federal courts in Washington are now the nation's go-to forum for suing companies with free-to-play online video games. This is not a theoretical concern: five new class-action complaints have been filed in federal district court in Washington since the panel issued its opinion. *See supra* n.1. Those cases have been brought against companies based in Nevada, Delaware, California, Washington, and Israel and parallel the complaint in the instant case. This Court should review *en banc*, restore the state law interpretation on which businesses and game users have relied, and curtail opportunistic litigation efforts precipitated by the panel opinion.

CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be granted.

Dated: May 11, 2018

Respectfully submitted,

s/ Beth S. Brinkmann

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CERTIFICATE OF COMPLIANCE

Form 11. Certificate of Compliance Pursuant to 9th Circuit Rules 35-4 and 40-1 for Case Number 16-35010

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the back of each copy of the petition or answer.*

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

☒ Contains 4179 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

or

☐ Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature of Attorney or Unrepresented Litigant: s/ Beth S. Brinkmann

Date: May 11, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 11, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 11, 2018 *s/ Beth S. Brinkmann*

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHERYL KATER, individually and on behalf of all others similarly situated, *Plaintiff-Appellant*, v. CHURCHILL DOWNS INCORPORATED, a Kentucky corporation, *Defendant-Appellee.*	No. 16-35010 D.C. No. 2:15-cv-00612-MJP OPINION

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, Senior District Judge, Presiding

Argued and Submitted February 6, 2018
Seattle, Washington

Filed March 28, 2018

Before: MILAN D. SMITH, JR. and MARY H. MURGUIA, Circuit Judges, and EDUARDO C. ROBRENO,* District Judge.

Opinion by Judge Milan D. Smith, Jr.

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* The Honorable Eduardo C. Robreno, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

SUMMARY[**]

Washington Gambling Law

The panel reversed the district court's dismissal of a purported class action against Churchill Downs alleging violations of Washington's Recovery of Money Lost at Gambling Act and Consumer Protection Act, and unjust enrichment; and held that Churchill Downs' virtual game platform "Big Fish Casino" constituted illegal gambling under Washington law.

All online or virtual gambling is illegal in Washington. Big Fish Casino's virtual chips have no monetary value and could not be exchanged for cash, but Big Fish Casino did contain a mechanism for transferring chips between users, which could be used to "cash out" winnings.

The panel held that the virtual chips extended the privilege of playing Big Fish Casino, and fell within Wash. Rev. Code § 9.46.0285's definition of a "thing of value." The panel concluded that Big Fish Casino fell within Washington's definition of an illegal gambling game. *See* Wash. Rev. Code § 9.46.0237.

The panel held that plaintiff Cheryl Kater stated a cause of action under Recovery of Money Lost at Gambling Act where she alleged that she lost over $1,000 worth of virtual chips while playing Big Fish Casino, and she could recover the value of those lost chips from Churchill Downs, as

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

proprietor of Big Fish Casino, pursuant to Wash. Rev. Stat. § 4.24.070.

COUNSEL

Alexander G. Tievsky (argued), Roger Perlstadt, and Ryan D. Andrews, Edelson PC, Chicago, Illinois, for Plaintiff-Appellant.

Matthew R. Berry (argued), Susman Godfrey L.L.P, Seattle, Washington; Robert Rivera, Susman Godfrey L.L.P., Houston, Texas; for Defendant-Appellee.

OPINION

M. SMITH, Circuit Judge:

In this appeal, we consider whether the virtual game platform "Big Fish Casino" constitutes illegal gambling under Washington law. Defendant-Appellee Churchill Downs, the game's owner and operator, has made millions of dollars off of Big Fish Casino. However, despite collecting millions in revenue, Churchill Downs, like Captain Renault in *Casablanca*, purports to be shocked—shocked!—to find that Big Fish Casino could constitute illegal gambling. We are not. We therefore reverse the district court and hold that because Big Fish Casino's virtual chips are a "thing of value," Big Fish Casino constitutes illegal gambling under Washington law.

FACTUAL AND PROCEDURAL BACKGROUND

Big Fish Casino is a game platform that functions as a virtual casino, within which users can play various electronic

casino games, such as blackjack, poker, and slots. Users can download the Big Fish Casino app free of charge, and first-time users receive a set of free chips. They then can play the games for free using the chips that come with the app, and may purchase additional chips to extend gameplay. Users also earn more chips as a reward for winning the games. If a user runs out of chips, he or she must purchase more chips to continue playing. A user can purchase more virtual chips for prices ranging from $1.99 to nearly $250.

Big Fish Casino's Terms of Use, which users must accept before playing any games, state that virtual chips have no monetary value and cannot be exchanged "for cash or any other tangible value." But Big Fish Casino does contain a mechanism for transferring chips between users, which can be utilized to "cash out" winnings: Once a user sells her chips on a secondary "black market" outside Big Fish Casino, she can use the app's internal mechanism to transfer them to a purchaser. Plaintiff-Appellant Kater alleges that Churchill Downs profits from such transfers because it charges a transaction fee, priced in virtual gold, for all transfers. In other words, Kater alleges that Churchill Downs "facilitates the process" of players cashing out their winnings.

Kater began playing Big Fish Casino in 2013, eventually buying, and then losing, over $1,000 worth of chips. In 2015, Kater brought this purported class action against Churchill Downs, alleging: (1) violations of Washington's Recovery of Money Lost at Gambling Act (RMLGA), Wash. Rev. Code § 4.24.070; (2) violations of the Washington Consumer Protection Act, Wash. Rev. Code § 19.86.010; and (3) unjust enrichment. The district court dismissed this case with prejudice, holding that because the virtual chips are not a "thing of value," Big Fish Casino is not illegal

gambling for purposes of the RMLGA.[1] Kater moved for reconsideration, but the district court denied her motion. Kater then timely appealed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We review the dismissal of Kater's complaint *de novo*. *Petrie v. Elec. Game Card, Inc.*, 761 F.3d 959, 966 (9th Cir. 2014). Our review "is limited to the complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice." *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008).

ANALYSIS

Pursuant to the RMLGA:

> All persons losing money or anything of value at or on any illegal gambling games shall have a cause of action to recover from the dealer or player winning, or from the proprietor for whose benefit such game was played or dealt, or such money or things of value won, the amount of the money or the value of the thing so lost.

Wash. Rev. Code § 4.24.070. "Gambling" is defined as the "[1] staking or risking something of value [2] upon the outcome of a contest of chance or a future contingent event not under the person's control or influence, [3] upon an

[1] The parties agree that the viability of Kater's other claims is contingent on Big Fish Casino constituting illegal gambling.

agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome." *Id.* § 9.46.0237; *see State ex rel. Evans v. Bhd. of Friends*, 247 P.2d 787, 797 (Wash. 1952) ("[A]ll forms of gambling involve prize, chance, and consideration . . . ." (quoting *State v. Coats*, 74 P.2d 1102, 1106 (Or. 1938))). All online or virtual gambling is illegal in Washington. *See Rousso v. State*, 239 P.3d 1084, 1086 (Wash. 2010).

I. Big Fish Casino's Virtual Chips Are a "Thing of Value" Under Washington Law

The parties dispute whether Big Fish Casino's virtual chips are a "thing of value" pursuant to Washington's definition of gambling. Pursuant to Washington law, a "thing of value" is:

> [A]ny 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.

Wash. Rev. Code § 9.46.0285. Kater's primary argument is that the virtual chips are a "thing of value" because they are a "form of credit . . . involving extension of . . . entertainment or a privilege of playing [Big Fish Casino] without charge." *Id.*

We agree. The virtual chips, as alleged in the complaint, permit a user to play the casino games inside the virtual Big Fish Casino. They are a credit that allows a user to place another wager or re-spin a slot machine. Without virtual

chips, a user is unable to play Big Fish Casino's various games. Thus, if a user runs out of virtual chips and wants to continue playing Big Fish Casino, she must buy more chips to have "the privilege of playing the game." *Id.* Likewise, if a user wins chips, the user wins the privilege of playing Big Fish Casino without charge. In sum, these virtual chips extend the privilege of playing Big Fish Casino.

Churchill Downs contends that the virtual chips do not extend gameplay, but only enhance it, and therefore are not things of value. This argument fails because, as alleged in the complaint, a user needs these virtual chips in order to play the various games that are included within Big Fish Casino. 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. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

Notably, the only Washington court to analyze section 9.46.0285 supports our conclusion. In *Bullseye Distributing LLC v. State Gambling Commission*, the Washington Court of Appeals held that an electronic vending machine designed to emulate a video slot machine was a gambling device. 110 P.3d 1162, 1163, 1167 (Wash. Ct. App. 2005). To use the machine, players utilized play points that they obtained by purchase, by redeeming a once-a-day promotional voucher, or by winning a game on the machine. *Id.* at 1163–64. In reviewing an administrative law judge's decision, the court concluded that the game's play points were "things of value" because "they extend[ed] the privilege of playing the game without charge," even though they "lack[ed] pecuniary value on their own." *Id.* at 1166. Because the play points were a "thing of value," the machine fell within the

definition of a gambling device, and therefore was subject to Gambling Commission regulation. *Id.* at 1167.

Contrary to Churchill Downs' assertion, nothing in *Bullseye* conditioned the court's determination that the play points were "thing[s] of value" on a user's ability to redeem those points for money or merchandise. Instead, *Bullseye*'s reasoning was plain—"these points fall within the definition of 'thing of value' because they extend the privilege of playing the game without charge." *Id.* at 1166. Based on the reasoning in *Bullseye*, we conclude that Big Fish Casino's virtual chips also fall within section 9.46.0285's definition of a "thing of value."[2]

Churchill Downs nonetheless argues that Big Fish Casino cannot constitute illegal gambling based on the position of the Washington Gambling Commission and federal district courts that have analyzed similar games. We disagree.

Churchill Downs argues that we should defer to the Gambling Commission's conclusion that Big Fish Casino is not illegal gambling. It cites to a slideshow deck used by two non-Commission members during a presentation to the

[2] Kater makes a second argument, which we reject. She argues that the chips are a "thing of value" because users can sell them for money on the "black market." However, 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. The virtual chips cannot constitute a "thing of value" based on this prohibited use. *See Mason v. Mach. Zone, Inc.*, 851 F.3d 315, 320 n.3 (4th Cir. 2017).

Commission, and the accompanying meeting minutes,[3] but these documents do not indicate that the Commission adopted a formal position on social gaming platforms, let alone Big Fish Casino specifically. It also cites to a two-page Commission pamphlet discussing online social gaming. But the pamphlet provides only "general guidance," to which we do not defer because the pamphlet "lacks an official, definitive analysis of the issue in question." *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 998 P.2d 884, 891–92 (Wash. 2000) (requiring agency interpretation to be "clear and definitive," such as a rule, interpretive guideline, or policy statement).

Nor are we persuaded by the reasoning of other federal courts that have held that certain "free to play" games are not illegal gambling. Each case Churchill Downs cites for this proposition involves the analysis of different state statutes, state definitions, and games. *See Mason v. Mach. Zone, Inc.*, 851 F.3d 315 (4th Cir. 2017) (applying Maryland law); *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill. 2016) (applying Illinois law); *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871 (N.D. Ill. 2016) (applying California law). Our conclusion here turns on Washington statutory law, particularly its broad definition of "thing of value," so these out of state cases are unpersuasive.

Because the virtual chips are a "thing of value," we conclude that Big Fish Casino falls within Washington's

[3] We grant Kater's motion to take judicial notice of the slideshow, meeting minutes, and pamphlet because they are publicly available on the Washington government website, and neither party disputes the authenticity of the website nor the accuracy of the information. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010) (citing Fed. R. Evid. 201).

definition of an illegal gambling game. *See* Wash. Rev. Code § 9.46.0237.

II. Kater Can Recover the Value of the Virtual Chips Lost Under the RMLGA

Since Big Fish Casino, as alleged in the complaint, constitutes an illegal gambling game, Kater can recover "the value of the thing so lost" from Churchill Downs. *See* Wash. Rev. Code § 4.24.070. Citing *Mason*, Churchill Downs argues that Kater did not lose money at gambling because there was no possibility of her winning money. In *Mason*, the plaintiff could not recover money spent on virtual gold in a different game because the Maryland statute limited recovery to individuals who "lose[] money at a gaming device," Md. Code Crim. Law § 12-110, and did not "encompass virtual resources available and used only within [the game]." 851 F.3d at 320. But Washington's statute is broader than Maryland's. Washington law permits a plaintiff to recover "money or anything of value" lost from an illegal gambling game "from the dealer . . . or from the proprietor for whose benefit such game was played." Wash. Rev. Code § 4.24.070. As previously stated, this language encompasses the value of the virtual chips Kater purchased.

We hold that Kater has stated a cause of action under the RMLGA. She alleges that she lost over $1,000 worth of virtual chips while playing Big Fish Casino, and she can recover the value of these lost chips from Churchill Downs, as proprietor of Big Fish Casino, pursuant to section 4.24.070.[4]

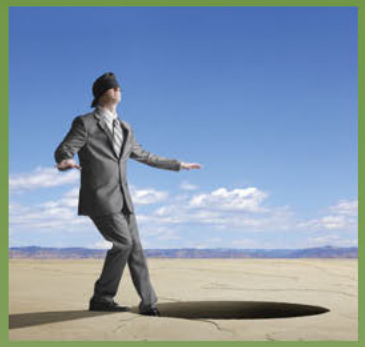
[4] We deny Churchill Downs' motion to substitute Big Fish Games, Inc. as Defendant-Appellee in place of Churchill Downs pursuant to

CONCLUSION

For the foregoing reasons, we reverse the district court's dismissal of Kater's complaint. We remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

Federal Rule of Appellate Procedure 43(b). A Rule 43(b) substitution is appropriate only where "necessary," which "means that a party to the suit is unable to continue, such as where a party becomes incompetent or a transfer of interest in the company or property involved in the suit has occurred." *Sable Commc'ns of Cal. Inc. v. Pac. Tel. & Tel. Co.*, 890 F.2d 184, 191 n.13 (9th Cir. 1989) (citation omitted) (quoting *Ala. Power Co. v. ICC*, 852 F.2d 1361, 1366 (D.C. Cir. 1988)). Churchill Downs argues it is transferring Big Fish Games, the subsidiary entity that purportedly operates Big Fish Casino, to Aristocrat. But it is not enough to claim that a transfer will occur; rather, substitution is proper where "a transfer of interest . . . has occurred." *Id.*



Get the facts to know the way to go.
Warning signs you may be playing on, or operating, an illegal Social Gaming website in Washington State:

- **There is no way to play for free.**
- **The prize can be sold or redeemed for "real" money.**
- **Players must:**
  - **Pay "real" money to play.**
  - **Give banking information to collect a prize.**
  - **Call to start play.**
  - **Disclose personal information, such as a credit card number, social security number, etc.**

Washington State Gambling Commission

Who We Are
- The Commission was created in 1973 to regulate and control authorized and illegal gambling activities (RCW 9.46).
- We are a law enforcement, regulatory and licensing agency.

What We Do
- We license and regulate all authorized gambling in the state, except for horse racing and the State Lottery.
- We investigate and control unauthorized and illegal gambling activities.

Our Mission
Protect the Public By Ensuring
That Gambling is Legal and Honest.

Learn more about us at wsgc.wa.gov

WAGambling

This brochure gives general guidance.
You should contact an attorney if you have questions or are unsure whether a game has the ***3 elements*** of gambling.

You may also contact us at:
(360) 486-3463
(800) 345-2529, ext. 3463
FAX (360) 486-3631
E-mail: AskUs@wsgc.wa.gov
Mail: P.O. Box 42400, Olympia, WA 98504-2400

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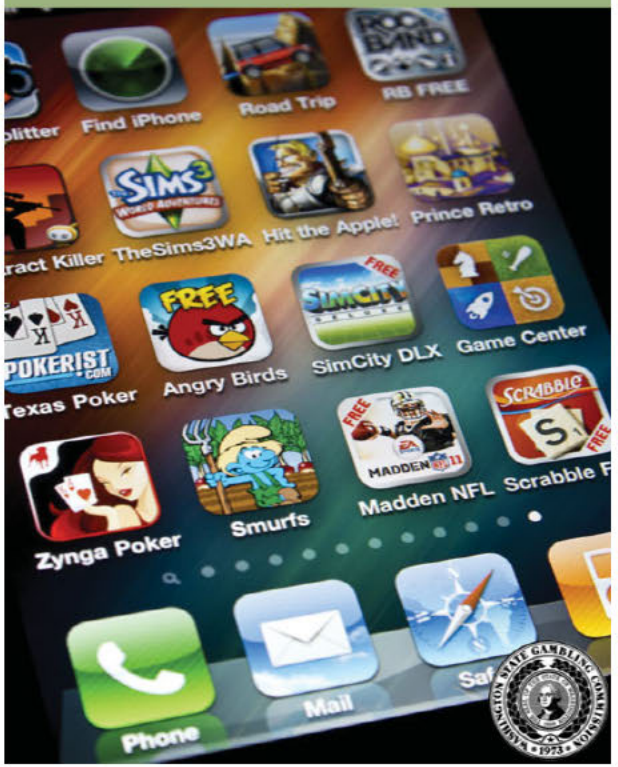
GC5-027 (3/14)

Online Social Gaming

When is it legal? What to Consider

Let's play a game



What is Social Gaming?

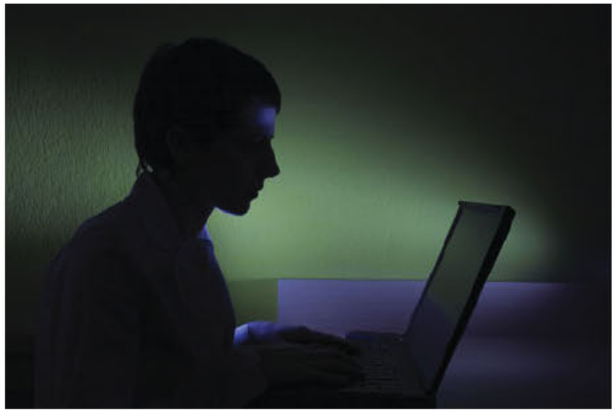
The Oxford dictionary defines **Social Gaming** as the activity or practice of playing an online game on a social media platform, with a major emphasis on friends and community involvement.

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.