The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ADRIENNE BENSON and MARY SIMONSON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DOUBLEDOWN INTERACTIVE, LLC, a Washington limited liability company, INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation, and IGT, a Nevada corporation,

Defendants.

No. 18-cv-525-RSL

CLASS COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES AND ISSUANCE OF INCENTIVE AWARDS

Noting Date: March 31, 2023

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INTRODUCTION

The $415 million non-reversionary common fund from which Class Counsel now seek fees is the result of nearly five years of extremely contentious litigation and nearly a decade of Class Counsel's broader efforts on behalf of victims of the social casino industry. If finally approved, this Settlement will return life-changing sums of cash to scores of Class Members nationwide, relieving many of the dire financial (and emotional) burdens caused by losing money and becoming addicted to Defendants' slot machines.

The strength of the settlement is self-evident: a capstone achievement for Class Counsel's nearly-decade-long campaign, both inside and outside the courtroom, pursuing novel and untested claims based on the premise that social casino games constitute unlawful gambling. While those years of work undoubtedly contributed to this sixth and largest social casino class settlement that Class Counsel has achieved, in many ways this case is most remarkable for the way it stands out even from that pack. Of the seven social casino cases Class Counsel has filed in this District, this case was the most intensely litigated by far, as Class Counsel pursued nationwide class certification and far-reaching discovery in the face of what Professor William B. Rubenstein of Harvard Law School has described as a "scorched-earth defense."

And though this Class certainly benefited from the wins achieved in the other social casino cases, success here was far from guaranteed—even after the Ninth Circuit issued its favorable ruling in *Kater*, after Class Counsel reached the landmark 2020 settlements in *Kater*, *Playtika*, and *Huuuge*, after Class Counsel won on Defendants' arbitration motion before both this Court and the Ninth Circuit, and each time Class Counsel defeated one of Defendants' many pleadings motions or won a motion to compel. Perhaps the most obvious evidence of that ongoing risk is the fact that, at each of those junctures, Defendants chose not to resolve the case but instead to redouble their litigation efforts. Defendants believed, firmly, that their odds of escaping liability were worth the gamble.

But Class Counsel held the line, shouldering the added risk in each new motion Defendants filed and each new legislative and administrative initiative Defendants pursued, and

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pushing this case through the end of discovery. These extended efforts ultimately yielded the Settlement now before the Court, which significantly exceeds the *Kater* nationwide settlement—itself a remarkable achievement—in both absolute dollars and as a proportion of the Class's damages. On the basis of these exceptional results after years of risky litigation, Class Counsel seek an Order: (i) awarding $121,485,000 in attorneys' fees, reflecting approximately 29.3% of the Settlement Fund,[1] (ii) granting incentive awards of $7,500 each to the Class Representatives, and (iii) approving up to $3 million in notice and administrative costs to be recovered by the Settlement Administrator. If these requests are approved, the total amount of fees and costs borne by the Class will be up to 30% of the Settlement Fund, meaning that the Class will recover no less than 70% of the Settlement Fund.

The far-above-benchmark risks and results of this case warrant a modestly above-benchmark fee award, for all the reasons set forth below as well as those identified in the attached expert declaration of Professor William B. Rubenstein.

The Court should grant this Motion.

BACKGROUND

This Court is well-acquainted with Class Counsel's nearly-decade-long campaign on behalf of consumers suffering in the grip of the social casino industry, including the seven class action lawsuits filed in this District, five of which reached settlements that were approved by the Court. This case, like the others, alleges that Defendants "own[] and operate[] several virtual casinos that constitute illegal gambling enterprises under Washington law. [Plaintiffs] assert claims under Washington's Recovery of Money Lost at Gambling Act ("RMLGA"), Washington's Consumer Protection Act ("CPA"), and theories of unjust enrichment and seek to recover their gambling losses." *Benson v. Double Down Interactive, LLC*, 527 F. Supp. 3d 1267, 1269 (W.D. Wash. 2021). Unlike most of the prior settlements on behalf of Washington-resident classes, Plaintiffs here sought to certify a nationwide class of consumers who played Defendants'

[1] Class Counsel represent that they have incurred significant costs and expenses associated with prosecuting this case, but have decided to not seek reimbursement of those separately from their ~29.3% fee request.

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social casino games and to recover damages on their behalf. *Id.*

Professor William B. Rubenstein, the author of *Newberg on Class Actions*, has characterized Class Counsel's efforts across all of these cases and more broadly against the social casino industry as "closer in form to a civil rights litigation campaign than it is to a series of discrete class action settlements":

> Class Counsel have pursued a dozen different cases, against at least 10 different defendants, in four different federal judicial districts located in four different federal Circuits, testing whether these social casino games constituted gambling under the laws of more than a half dozen states. Class Counsel built websites to help app users avoid forced arbitration clauses, lobbied legislators and regulators, and took their efforts to the media. When Class Counsel lost, they did not give up, but changed tactics or forums and kept going. And they did all of this with their own funds, risking millions of dollars of their own money to end this practice.

See Declaration of Professor William B. Rubenstein ("Rubenstein Decl.") ¶ 2. Those years of efforts—both inside and outside the traditional litigation context—are of course crucial to the landmark results achieved here. But rather than reiterate the full history, Class Counsel instead incorporates the background set forth in prior cases. *See Kater v. Churchill Downs Inc.*, No. 15-cv-612 ("*Kater*"), Dkt. 263 (W.D. Wash. Dec. 14, 2020); *Wilson v. Playtika, Ltd.*, No. 18-cv-5277 ("*Playtika*"), Dkt. 141 (W.D. Wash. Dec. 14, 2020); *Wilson v. Huuuge, Inc.*, No. 18-cv-5276 ("*Huuuge*"), Dkt. 121 (W.D. Wash. Dec. 14, 2020); *Reed v. Light & Wonder, Inc., f/k/a Scientific Games Corp.*, No. 18-cv-565 ("*Scientific Games*"), Dkt. 178 (W.D. Wash. May 20, 2022); *Ferrando v. Zynga Inc.*, No. 22-cv-214 ("*Zynga*"), Dkt. 49 (W.D. Wash. Oct. 11, 2022).

Class Counsel's efforts in all the prior litigations, appeals, legislative advocacy, media efforts, and settlements have certainly been noteworthy, but even against that backdrop, this action stands out as a "particularly hard-fought battle of [Class Counsel's] larger war." Rubenstein Decl. ¶ 2. This Section, consequently, focuses on all the additional work that was particular to this action and for the benefit of this Class.

I. Class Counsel's 2015 Lawsuit Against DoubleDown.

Class Counsel began challenging DoubleDown's social casino business years before this action was even filed. In 2015, Class Counsel filed a proposed class action against DoubleDown

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Interactive in the Northern District of Illinois, alleging claims under Illinois gambling law. *See Phillips v. Double Down Interactive LLC*, No. 15-cv-04301 (N.D. Ill. May 14, 2015). Just like other courts initially presented with Class Counsel's novel theory that social casinos were illegal gambling, that court granted DoubleDown's motion to dismiss in its entirety, finding that the plaintiff did not "lose" money gambling as defined by Illinois's Loss Recovery Act. *Phillips*, 173 F. Supp. 3d 731, 741 (N.D. Ill. 2016).

Despite this initial case dismissal, along with four others in other courts, Class Counsel did not give up, pursuing appeals in both the Fourth Circuit and the Ninth Circuit. While the Fourth Circuit affirmed the dismissal of Class Counsel's theory, *Mason v. Mach. Zone, Inc.*, 851 F.3d 315, 320 (4th Cir. 2017), the Ninth Circuit reversed course, finding in March 2018 that Class Counsel's class action complaint stated a claim under Washington's RMLGA to recover money lost playing social casino games. *Kater*, 886 F.3d 784, 789 (9th Cir. 2018).

II. Class Counsel's Litigation of this Action.

Soon after remand in *Kater*, Class Counsel filed this proposed class action lawsuit on Plaintiffs' behalf, alleging that Defendants' operation of social casino games constituted illegal gambling under Washington's gambling laws and unfair business practices under the Washington Consumer Protection Act. *See* Dkt. #1.[2]

In the ensuing four years of litigation, Class Counsel fought on behalf of the proposed class against what Professor Rubenstein calls Defendants' "scorched earth defense." Rubenstein Decl. ¶ 22 ("I have been studying litigation for nearly four decades but find few analogues to the Defendants' efforts in this matter.").

A. Defendants' First Motion to Compel Arbitration and Related Appeal.

Defendants' first tactic was to move to compel arbitration and to stay the action, arguing

[2] The initial complaint in this case was brought solely by Adrienne Benson (on behalf of a putative class) and named DoubleDown Interactive, LLC and International Game Technology as Defendants. Class Counsel later filed an Amended Complaint adding Mary Simonson as a named Plaintiff, Dkt. #41, and then a Second Amended Complaint naming IGT, a wholly owned subsidiary of International Game Technology, as an additional Defendant, Dkt. #249.

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that Plaintiffs Benson and Simonson were on inquiry notice of the arbitration provision in DoubleDown Casino's Terms of Use. *See* Dkt. #44. After full briefing, *see* Dkts. #49, #53, #55, #56, the Court denied Defendants' motion in November 2018, *see* Dkt. #57. Defendants filed an appeal with the Ninth Circuit, Dkt. #61, and the Court granted Defendants' contested motion to stay pending appeal, Dkts. #63, #68, #70, #72, #77. The Parties submitted appellate briefing along with supplemental briefing requested by the Ninth Circuit. *See generally Benson v. DoubleDown Interactive, LLC*, No. 18-36015 (9th Cir.). In January 2020, the Ninth Circuit affirmed the denial of Defendants' motion to compel. *See id.*; Dkt. #84.

B. Defendants' Pleading Motions.

Defendants spent the next several months filing an onslaught of pleadings motions, but Class Counsel defeated each one—including Defendants' multiple follow-on motions for reconsideration or interlocutory appeal. First, in June 2020, Defendants filed a Motion to Certify Questions to the Washington Supreme Court, arguing that Plaintiffs' RMLGA and CPA claims involved novel state-law questions that should be resolved by the state's highest court. Dkt. #103. After full briefing, *see* Dkts. #111, #115, the Court denied the motion in August 2020, Dkt. #127. Defendants filed a Motion for Reconsideration, Dkt. #133, the Parties submitted additional briefing, Dkts. #154, #155, and the Court denied it in January 2021, Dkt. #156.

In August 2020, two days after the Court denied the Motion to Certify Questions, Defendants tried a Motion to Strike Nationwide Class Allegations, arguing that conflicts of law between Washington's and other states' gambling laws prohibited certification of a nationwide class. Dkt. #128. The Parties submitted full briefing, Dkts. #141, #149 and the Court denied the motion in March 2021, Dkt. #209. DoubleDown moved to certify that order for interlocutory appeal, Dkt. #257, the Parties briefed that issue, Dkts. #269, #288, and the Court denied the motion, Dkt. #338.

In September 2020, before Plaintiffs had even responded to the Motion to Strike, Defendants piled on an additional Motion to Dismiss Under Fed. R. Civ. P. 12(b)(1) and a Motion to Abstain, arguing that various abstention doctrines prevented the Court from exercising

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jurisdiction and that it should allow the Washington state courts the opportunity to interpret the state gambling laws. Dkt. #138. After full briefing, Dkts. #150, #152, the Court denied the Motion in March 2021, Dkt. #210. Defendants again moved to certify this order for interlocutory appeal, Dkt. #230, then withdrew the motion on the day Plaintiffs' response was due, Dkt. #248.

Two additional pleadings motions remained pending when the case settled and was stayed. In May 2021, after Plaintiffs filed a Second Amended Complaint adding IGT (a subsidiary of International Game Technology) as a Defendant, Dkt. #249, IGT filed a Motion to Dismiss under Rule 12(b)(6), Dkt. #289. The Parties submitted full briefing. Dkts. #326, #330. Also in May 2021, DoubleDown filed a Renewed Motion to Compel Arbitration, arguing that Plaintiffs Benson and Simonson testified at deposition that they had actual notice of DoubleDown's terms of use. Dkt. #264. The Parties fully briefed that motion as well. Dkts. #293, #307.

C. Plaintiffs' Motion for Class Certification and Preliminary Injunction.

Amid Defendants' repeated efforts to dismiss the case and change the venue, in February 2021, Class Counsel moved to certify a class under Fed. R. Civ. P. 23(b)(2) and to preliminarily enjoin the sale of virtual chips in DoubleDown social casino games. Dkt. #164. Even the briefing schedule regarding this motion was contested, *e.g.*, Dkts. #188, #195, #197, #206, but the Defendants eventually filed oppositions to class certification and preliminary injunctive relief in May 2021. Dkts. #276, #281. Class Counsel filed a reply brief, Dkt. #298, marshaling significant discovery evidence in support of a preliminary injunction—uncovered in the three months between the original motion and the reply, while Defendants were simultaneously pursuing various pleading motions—and Defendants each filed surreply briefs, Dkts. #308, #311. The motion remained pending when the parties reached a settlement and the Court stayed this case.

D. Discovery and Related Motion Practice.

In addition to the barrage of pleadings motions described above, Class Counsel's litigation efforts in this case stand out—even from Class Counsel's other social casino class actions in this District—on account of the volume and breadth of discovery pursued. Class

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Counsel vigorously litigated this action through the end of the discovery period, pushing the case far closer to trial than in any of the prior cases to reach settlements approved by this Court. Indeed, in March 2021, the Court set a November 1, 2021 trial date, *see* Dkt. #208, so Class Counsel worked assiduously to pursue discovery in preparation for that date.[3]

Class Counsel pursued and obtained significant written discovery both from the Defendants and from third-party Platform Providers (Apple, Google, and Facebook). Logan Decl. ¶ 7. From these efforts, Class Counsel procured transaction data regarding the purchase of virtual chips in DoubleDown Casino (Defendants' flagship social casino application) along with internal company documents and communications about Defendants' business structure, strategies, and practices. *Id.* ¶ 8. In all, the Parties exchanged approximately 325,000 pages of documents. *Id.* In addition, between March and August 2021, Defendants took (and Class Counsel defended) depositions of Adrienne Benson, Mary Simonson, and six other members of the proposed Class. *Id.* ¶ 9. During that same period, Class Counsel took Rule 30(b)(6) depositions of DoubleDown, International Game Technology, and IGT, as well as depositions of four other DoubleDown employees and two of Defendants' proposed expert witnesses. *Id.* ¶ 10.

None of this discovery was obtained easily; the Parties fought tooth and nail over nearly every step, resulting in extensive discovery motion practice (on top of near-constant correspondence and conferral efforts with Defendants' counsel). For example, after Plaintiffs served subpoenas on Apple, Facebook, and Google (the "Platforms") in April 2020 and June 2020, DoubleDown filed Motions for Protective Order regarding each subpoena. Dkts. #92, #109. Around the same time, Plaintiffs served initial discovery requests on DoubleDown and in July 2020 filed a motion to compel DoubleDown to produce transaction data for virtual chip purchases in the Applications. Dkt. #118. The Parties fully briefed all three motions, *see* Dkts. #101, #108, #113, #114, #122, #125 before the Court's August 2020 order regarding the scope of

[3] DoubleDown subsequently filed two motions to extend the trial date and other pretrial deadlines, both of which Class Counsel opposed. Dkts. #327, #333, #336, #344, #347, #360, #361. On July 19, 2021, the Court struck the November 2021 trial date, to be reset pending resolution of the class certification motion and other discovery motions, but the discovery period still ended on August 24, 2021. Dkt. #368.

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initial discovery, Dkt. #126.

From February to September 2021, the Parties filed and briefed ten additional discovery motions, including two motions seeking spoliation sanctions against the Defendants:

(1) Defendants' Motion for Protective Order and to Compel. Dkts. #159, #190, #200; *see also* Dkt. #206 (order granting in part and denying in part).

(2) Plaintiffs' Motion to Compel Production of Documents Responsive to RFP No. 14. Dkts. #211, #221, #227; *see also* Dkt. #366 (order granting motion and compelling DoubleDown to produce responsive documents).

(3) Plaintiffs' Motion to Compel Production of Documents Responsive to RFP No. 26. Dkts. #244, #261, #263; *see also* Dkt. #367 (order granting motion and compelling DoubleDown to produce responsive documents).

(4) Plaintiffs' Motion for Leave to Submit an Affirmative Expert Report and a Rebuttal Expert Report. Dkts. #322, #334, #343.

(5) Plaintiffs' Motion to Compel the Production of Documents Responsive to Nine Requests. Dkts. #340, #353, #363.

(6) Plaintiffs' Motion for Leave to Take Seven Additional Depositions. Dkts. #373, #389, #409.

(7) Plaintiffs' Motion to Amend the ESI Agreement and Compel Production of a Post-Filing Privilege Log. Dkts. #377, #386, #394, #407.

(8) Plaintiffs' Motion to Compel Production of Documents Responsive to Thirteen Requests. Dkts. #381, #395, #398, #413.

(9) Plaintiffs' Motion for Spoliation Sanctions and Evidentiary Hearing. Dkts. #405, #418, #426, #431, #433, #438, #440.

(10) Plaintiffs' Rule 26(b)(5)(B) Motion to Preserve, to Compel Additional Documents, and to Compel Davis Wright Tremaine to Appear Under Oath at an Evidentiary Hearing. Dkts. #442, #447, #453, #455.

The sheer volume of discovery motion practice makes clear that Class Counsel vigorously pursued discovery through the end of the discovery period, preparing the case for summary judgment and trial.

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III. Class Counsel's Successful Dismissal of DoubleDown's State Court Action.

Concurrent with Class Counsel's litigation of this action—including defeating Defendants' various pleadings motions before this Court—Class Counsel also successfully defended the interests of the Class in state court litigation filed by Defendants. In September 2020, DoubleDown and International Game Technology filed a separate action in Washington Superior Court against Benson and Simonson, seeking a declaratory judgment regarding the RMLGA and CPA claims in this action. *See DoubleDown Interactive, LLC v. Benson*, No. 20-2-02023-34 (Wash. Super. Ct., Thurston Cty. Sept. 11, 2020); Logan Decl., Ex. 1 (Complaint). Class Counsel filed a Motion to Dismiss or Stay in February 2021, on the grounds that the claim for declaratory relief should have been filed as a compulsory counterclaim in this action and that the case should be dismissed or stayed under the priority of action rule. *Id.*, Ex. 2 (Motion to Dismiss). After full briefing on the motion, the Superior Court stayed the case in July 2021, and then dismissed the case in August 2021. *Id.*, Ex. 3 (Opposition), Ex. 4 (Reply), Ex. 5 (Order); *id.* ¶ 17.

IV. Class Counsel's Policy and Media Efforts on Behalf of the Class.

As with the prior social casino settlements in this District, Class Counsel's advocacy on behalf of the Class extended beyond the courtroom and the bounds of traditional litigation. The Defendants in this case participated actively in administrative and legislative attacks on the Class's claims, and Class Counsel stood up to meet those efforts.

First, Class Counsel protected this litigation from collateral administrative attacks. Two weeks after the Ninth Circuit's mandate issued in *Kater*, Defendants' industry peer, Big Fish Games, presented a "Petition for a Declaratory Order," asking the Commission to declare that Big Fish's games "do[] not constitute gambling within the meaning of the Washington Gambling Act, RCW 9.46.0237." *Kater*, Dkt. #79-5 at 3. DoubleDown Interactive dispatched its General Manager, Joe Sigrist, along with an attorney from Davis Wright Tremaine (who was working actively on this litigation), to present testimony at the July 2018 Commission Meeting in Tacoma. Logan Decl., Ex. 6. Class Counsel appeared in person before the Commission at each of

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the three public hearings on Big Fish's petition—in July 2018 (in Tacoma), August 2018 (in Pasco), and October 2018 (in Olympia)—and presented live argument at both the Tacoma and Pasco hearings. *Id*. ¶ 21. Davis Wright Tremaine, on DoubleDown's behalf, also submitted a formal letter to the Commission in support of Big Fish's Petition, and a former employee of both DoubleDown and IGT did the same. *Id.*, Exs. 7-8. Class Counsel similarly supplemented its appearances with a formal letter to the Commission (ahead of the Tacoma hearing) and, on the Commission's request, with an eighteen-page comment for the Commission's consideration (between the Tacoma and Pasco hearings). Logan Decl. ¶ 21. The WSGC ultimately declined to enter a Declaratory Order. *See Kater*, Dkt. #74-1. And even after the initial declaratory order proceedings, Class Counsel continued to represent the interests of the Class in additional flare-ups before the WSGC, including in similar declaratory order proceedings initiated by The Stars Group. *See* Logan Decl. ¶ 25.

Second, Class Counsel has been the frontline opposition to the social casino industry's attempt to change Washington's gambling laws. Starting in early 2019, the International Social Gaming Association ("ISGA")—a trade organization in which IGT is a member and in which the former head of IGT's Online Gaming Group serves as Chairman—provided legislators with draft legislation that would amend Washington's gambling statutes with the effect (and specific intent) of gutting Class Counsel's social casino lawsuits. *Id.* ¶ 26. Over time, these efforts gained steam, with Senators Mark Mullet and John Braun, as well as Representatives Zack Hudgins, Brandon Vick, Bill Jenkin and Brian Blake, collectively sponsoring four bills threatening to kill these cases by "clarifying" that players who lose money playing social casino games cannot recover under the RMLGA. H.B. 2720, 66th Leg., Reg. Sess. (Wash. 2020); S.B. 6568, 66th Leg., Reg. Sess. (Wash. 2020); H.B. 2041, 66th Leg., Reg Sess. (Wash. 2019); S.B. 5886, 66th Leg., Reg. Sess. (Wash. 2019). Local and national media covered these efforts and left no doubt as to what the ISGA hoped to accomplish. *See, e.g.*, Phillip Conneller, *Washington State Social Gaming Legislation Could Rescue Big Fish Casino From Legal Trouble*, CASINO.ORG (Jan. 29, 2020), https://bit.ly/39dKtWM. DoubleDown was actively involved in these legislative attacks on the

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Class's claims; for example, Joe Sigrist testified before the House Civil Rights & Judiciary Committee on January 28, 2020 in support of H.B. 2720, which proposed exempting social casino games from the RMLGA. *See* Public Hr'g on HB 2720, *available at* https://www.tvw.org/watch/?clientID=9375922947&eventID=2020011330&startStreamAt=3670&stopStreamAt=5220.

In response to the ISGA's and Defendants' legislative work, Class Counsel engaged the lobbying firm Peggen & Mara Political Consulting LLP—experts in Washington tribal and gambling laws—to help Class Counsel (i) stay on top of all administrative and legislative developments in the Washington gaming industry; (ii) understand the intricacies of Washington's specific legislative process, including the nuances of—and procedures for—bill drafting; (iii) understand who the relevant lawmakers and stakeholders in Washington's gaming industry were, what those lawmakers and stakeholders cared about, and how Class Counsel could educate those lawmakers and stakeholders about social casinos; and (iv) work with legislative groups, task forces, and other interested parties in in Washington's gaming industry, including the Washington Indian Gaming Association ("WIGA"). *See* Logan Decl. ¶ 27.

Class Counsel then used this information and expertise to amplify the Class's interests and concerns. Class Counsel drafted memos and prepared handouts for a variety of stakeholders, including State Senators and Representatives, the WIGA, the Washington Trial Attorneys' Association, the Public Interest Research Group, and other organizations dedicated to remedying problem gambling. *See id.* ¶ 28.

Class Counsel also personally met with lawmakers in the Washington Senate and House, met with officials in the Executive branch, and provided in-person testimony to the Washington Legislature. *See id.* ¶ 29. For example, in January 2019—after Class Counsel got wind that the ISGA was planning to gut Washington's gambling statutes (in what would become the failed H.B. 2041 and S.B. 5886)—Class Counsel met in-person with Representative Shelley Kloba, then-Representative (and now Senator) Derek Stanford, then-Lieutenant Governor Cyrus Habib, and several other government officials. *See id.* ¶ 30. On January 28, 2020, Class Counsel met

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with Senator Stanford at the State Capital—following Class Counsel's written and in-person testimony before the House Civil Rights & Judiciary Committee in (successful) opposition to H.B. 2720 (the same hearing at which Joe Sigrist, along with an IGSA attorney, testified). *See id.* ¶ 31.

In addition, on March 21, 2019, Class Counsel sent formal correspondence to Senator Mark Mullet ahead of a planned work session before the Senate and Financial Institutions, Economic and Trade Committee about social casinos—in which Defendants' industry peers had been invited, but Class Counsel had not. *See id.* ¶ 32. In August 2019, Class Counsel travelled to Anacortes—on Swinomish Tribe land—to speak at a monthly WIGA meeting, in opposition to the ISGA-backed bills. *See id.* ¶ 33. And in early 2020, Class Counsel coordinated the submission of more than 200 letters to Washington State Representatives from social casino players across the country and spoke with local press about the ISGA's renewed efforts to gut these lawsuits. *See id.* ¶ 34; *see also* Melissa Santos, *'Free' casino apps prey on addiction, users say, and WA lawmakers are considering a crackdown*, CROSSCUT (Feb. 7, 2020), https://bit.ly/3hfFxDl. These efforts held the line—each bill introduced since the onset of this litigation has stalled.

To be clear, Class Counsel's efforts to protect Washington's gambling laws continues to this day. Because of active litigation before this Court and in the Northern District of California, Class Counsel will refrain here from publicizing the specifics of their ongoing lobbying and other advocacy strategies outside of the confines of traditional litigation. But Class Counsel can confirm that their ongoing advocacy incudes meetings with regulatory officials as well as officials from the legislative and executive branches. Logan Decl. ¶ 35.

Third, beyond Class Counsel's work on legislative, executive, and administrative fronts, Class Counsel also helped its clients sound the alarm on social casinos to the public at large by helping clients share their stories with local and national media, including in the following pieces:

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- *Harpooned by Facebook*, REVEAL (Aug. 3, 2019), https://bit.ly/39NIdri (featuring radio interview with Class Counsel's client)

- Nate Halverson, *How social casinos leverage Facebook user data to target vulnerable gamblers*, PBS NEWSHOUR (Aug. 13, 2019), https://to.pbs.org/3lPRd1m (featuring television interview with Class Counsel's client)

- Melissa Santos, *'Free' casino apps prey on addiction, users say, and WA lawmakers are considering a crackdown*, CROSSCUT (Feb. 7, 2020), https://bit.ly/3qBBd6M (featuring Class Counsel's clients and Class Counsel Alexander Tievsky)

- Cyrus Farivar, *Addicted to losing: How casino-like apps have drained people of millions*, NBC NEWS (Sept. 14, 2020), https://nbcnews.to/39Lo1X1

- Connections: A Healthy Gambling and Gaming Podcast, *What's the Deal with Social Casinos*?, EVERGREEN COUNCIL ON PROBLEM GAMBLING (Oct. 28, 2021), https://bit.ly/3ysA9c1 (featuring Class Counsel Todd Logan)

V. Settlement Negotiations, Mediation, and the Settlement Now Before the Court.

Class Counsel engaged in intermittent settlement talks with the Defendants over the course of litigation, including in September 2021 at Court-ordered settlement conferences. *See* Dkt. #451. In June 2022, settlement talks renewed in earnest, and the Parties agreed to schedule a videoconference mediation session on July 28, 2022 with Niki Mendoza of Phillips ADR. Logan Decl. ¶ 36. In the weeks leading up to that July 28 mediation date, Class Counsel was in frequent communication with Defendants and with the Phillips ADR team, submitted mediation briefs, and supplemented that briefing with telephonic and written correspondence with Defendants and the Phillips ADR team. *Id.* ¶ 37. On July 28, Class Counsel and Defendants participated in a more-than-full day mediation session via videoconference, but did not reach a resolution. Shortly thereafter, Class Counsel filed and fully briefed a Temporary Restraining Order regarding certain foreign assets, which the Court denied. *See* Dkts. #482, #489, #493, #494, #495. With the benefit of the Court's order, the Parties—through the Phillips ADR team—re-engaged the settlement efforts and engaged in daily communication with Phillips ADR. Logan Decl. ¶ 39.

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On August 23, 2022, the Parties reached an agreement in principle on the material terms of a class action settlement, and they executed a Term Sheet on August 26, 2022. *Id.* ¶ 40. For the next few weeks, the Parties continued negotiating the details of the full class action settlement, exchanged multiple rounds of a working settlement document and exhibits, met and conferred telephonically to iron out remaining disputes, vetted and engaged a settlement administrator, and began meeting and conferring with the Platform Providers to design a robust notice and administration plan. *Id.* ¶ 41. On September 19, 2022, the Parties completed execution of the Settlement Agreement, *id.* ¶ 42, and Class Counsel filed an unopposed motion for preliminary approval of that Agreement on November 11, 2022. Dkt. #507.

On November 14, 2022, the Court preliminarily approved the terms of the Settlement, including the creation of a $415 million, non-reversionary Settlement Fund from which every Class Member who has ever lost money playing Defendants' social casino games is entitled to recover a substantial portion of their losses back. *See* Dkts. #511; Dkt. #508-1 §§ 1.35, 1.37 (the "Agreement"). Class Members with higher levels of losses are entitled to recover increasingly higher percentages of their losses, and the upper echelons of "VIP" players stand to recover more than half of their losses. *See* Agreement §§ 1.38, 2.1(c). The Settlement also requires DoubleDown to implement meaningful prospective relief, including by maintaining and honoring a self-exclusion policy akin to what one might expect to see at the Emerald Queen or the Muckleshoot casinos. *See id.* § 2.2. The Court also preliminarily approved Incentive Awards of up to $7,500 each for Plaintiffs Benson and Simonson, attorneys' fees of up to 30% of the Fund plus reimbursement of expenses, and the payment of Settlement Administration expenses which—together with any Fee Award and Incentive Awards—would not exceed 30% of the Settlement Fund. Dkt. #511.

ARGUMENT

Consistent with the Court's Preliminary Approval Order, Class Counsel seek an award of $121,485,000 in attorneys' fees, reflecting approximately 29.3% of the $415 million Settlement

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Fund.[4] As with the award of attorneys' fees in any class action settlement, the Court must "assume the role of fiduciary for the class plaintiffs," so "[r]ubber-stamp approval, even in the absence of objections, is improper." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002). The Court's scrutiny is welcome here. Though Class Counsel is seeking a fee at the high end of the usual 20–30% range, and above the Ninth Circuit's 25% "benchmark," an above-benchmark fee is justified and reasonable for this case, in light of the outstanding result achieved for the Class, the high degree of risk borne by Class Counsel, and the significant efforts expended by Class Counsel in this particularly hard-fought litigation (as well as all the efforts poured into the eight-year broader campaign), as discussed further below and in the analysis provided by the leading scholar on class action fee awards. In addition, Class Counsel's expenses were necessary to prosecute this class action and should be reimbursed, and the Court should issue incentive awards to the two Class Representatives in recognition of their service to the Class.

I. The Court Should Award Class Counsel ~29.3% of the $415 Million Common Fund.

Because Washington law governs the claims in this case, it also governs the award of fees. *Id.* at 1047. Under Washington law, the percentage-of-recovery approach is generally used to calculate fees in common fund cases, and 20–30% is the usual range. *Bowles v. Dep't of Ret. Sys.*, 847 P.2d 440, 451 (1993) (observing that the lodestar method is generally reserved for statutory fee cases); *see also Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1302 (W.D. Wash. 2001) ("The Washington Supreme Court rejected the lodestar method for determining attorneys fees in a common fund action."), *aff'd*, 290 F.3d 1043 (9th Cir. 2002). While the "benchmark" award is 25% of the recovery obtained, that number can adjusted "[u]nder special circumstances." *Bowles*, 847 P.2d at 451 (citing *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)).

[4] The Settlement Administrator has confirmed to Class Counsel that the Settlement Administration Expenses are anticipated not to exceed $3,000,000. Logan Decl. ¶ 43. Therefore, the requested fee award, together with those Settlement Administration Expenses and the requested Incentive Awards, will not exceed 30% of the Settlement Fund. *See* Dkt. #511.

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Washington courts look to federal law for guidance on determining an appropriate fee percentage, *see, e.g.*, *Vizcaino*, 290 F.3d at 1047, and the Ninth Circuit has laid out a number of considerations to guide that analysis. Specifically, both Ninth Circuit and Washington state courts consider the following, non-exhaustive list of qualitative factors: "(1) the extent to which class counsel achieved exceptional results for the class; (2) whether the case was risky for class counsel; (3) whether counsel's performance generated benefits beyond the cash settlement fund; (4) the market rate for the particular field of law; (5) the burdens class counsel experienced while litigating the case; (6) and whether the case was handled on a contingency basis." *See In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 930 (9th Cir. 2020) (citing *Vizcaino*); *see also City of Seattle v. Okeson*, 137 Wash. App. 1051 (2007) (citing *Vizcaino* and noting that "the Ninth Circuit identified a number of other considerations in awarding attorney fees under the common fund doctrine including the results achieved, risks taken, duration of the case, and the degree to which the attorney had to forego other work"). In "megafund" cases, such as this one, the Ninth Circuit also considers the size of the settlement fund as "one relevant circumstance to which courts must refer" when determining the reasonableness of a fee award. *Vizcaino*, 290 F.3d at 1047; *In re Optical Disk Drive*, 959 F.3d. at 932 (noting that the Ninth Circuit has "not identified a bright-line definition for 'megafund,'" but that a settlement of $124.5 million qualified).

"Selection of the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case." *Vizcaino*, 290 F.3d at 1048. After weighing all the factors, "[a]wards above the 25 percent benchmark may be appropriate when counsel achieves exceptional results for the class, undertakes extremely risky litigation, generates benefits for the class beyond simply the cash settlement fund, or handles the case on a contingency basis." *Borelli v. Black Diamond Aggregates, Inc.*, No. 2:14-CV-02093-KJM-KJN, 2022 WL 2079375, at *9 (E.D. Cal. June 9, 2022) (internal citations omitted); *see also Pena v. Taylor Farms Pac., Inc.*, No. 2:13-CV-01282-KJM-AC, 2021 WL 916257, at *5 (E.D. Cal. Mar. 10, 2021).

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Here, an assessment of the relevant factors demonstrates that an upward departure from the 25% benchmark is justified by the exceptional result in this extraordinarily risky, novel, and hard-fought litigation. As this Court has recognized, Class Counsel's efforts in prior social casino litigation and the broader campaign on behalf of consumers who lost money to the social casino industry "could [] justif[y] a larger award" than the 25% benchmark due to Class Counsel's "hard, hard work," the "difficult hill" Class Counsel had to climb, and the many "pitfalls" throughout the litigation. *See* Final Approval Hr'g Tr., *Scientific Games* (W.D. Wash. Aug. 12, 2022); *see also* Final Approval Hr'g Tr., *Zynga* (W.D. Wash. Dec. 1, 2022) (noting that Class Counsel's 25% fee request was "less money than you could have asked for"). Class Counsel respectfully submits that if there's a case within the broader set of social casino settlements that justifies an above-benchmark award, it's this one.

A. Class Counsel Obtained an Unprecedented Result for the Class.

When determining an award of attorneys' fees in a class action, "[t]he most important factor is the results achieved for the class." *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 4:14-md-2541-CW, 2017 WL 6040065, at *3 (N.D. Cal. Dec. 6, 2017), *aff'd*, 768 F. App'x 651 (9th Cir. 2019). Typically, courts "aim to tether the value of an attorneys' fees award to the value of the class recovery." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013). In a common fund case in which class counsel seek an award as a percentage of the fund, "this task is fairly effortless. The district court can assess the relative value of the attorneys' fees and the class relief simply by comparing the amount of cash paid to the attorneys with the amount of cash paid to the class. The more valuable the class recovery, the greater the fees award." *Id.*

Here, the results Class Counsel achieved are extraordinary, certainly in the context of consumer class action settlements and even when compared to Class Counsel's other unprecedented social casino class settlements. By any standard, the Settlement amount in this case is outstanding: Defendants have agreed to pay $415,000,000 in cash to settle the Settlement

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Class's claims. Not only is this number impressive in absolute terms, but it also reflects a sizeable portion of the Class's losses, just as in the prior social casino settlements. Specifically, Plaintiffs' counsel anticipate the gross Class recovery to be approximately 19.5% of Class Members' Lifetime Spending Amount during the applicable 4-year limitations period. *See* Logan Decl. ¶ 44. That means that the Settlement stands to achieve a 19.5% recovery of the Class's damages—far beyond typical recoveries in consumer class action settlements. *See, e.g.*, *In re MyFord Touch Consumer Litig.*, No. 13-cv-03072-EMC, 2019 WL 1411510, at *10 (N.D. Cal. Mar. 28, 2019) (approving settlement of consumer claims for approximately 6% of exposure); *In re Omnivision Techs.*, 559 F.Supp.2d 1036, 1042 (N.D. Cal. 2007) (6%); *Rinky Dink Inc v. Elec. Merch. Sys. Inc.*, No. 13-cv-1347 JCC, 2015 WL 11234156, at *4–5 (W.D. Wash. Dec. 11, 2015) (1.4%). A 19.5% recovery also substantially exceeds the 14.35% recovery rate Class Counsel previously achieved in *Kater* on behalf of a nationwide settlement class, even though the Class's damages here are roughly double the estimated damages in *Kater*. *See Kater*, Dkt. #286 ¶ 4. In other words, this Settlement surpasses the incredibly high standard set by *Kater* both in absolute and proportional terms.

As Professor Rubenstein notes, the settlement amount also "represents a remarkable level of disgorgement of the Defendants' assets and hence reflects a meaningful deterrent to such behavior in the future . . . . In the aggregate, the $415 million settlement constitutes 11.6% of the two Defendants' equity values combined." Rubenstein Decl. ¶ 24. It also reflects more than 85% of DoubleDown's market capitalization ($482.65 million, as of October 2022). Logan Decl. ¶ 45. Based on DoubleDown's net income of $78.2 million in 2021, the common fund constitutes more than five full years of profitability for the DoubleDown apps. *Id.*

Moreover, just like the *Zynga*, *Scientific Games*, *Playtika*, *Huuuge*, and *Kater* settlements, Class Counsel predicts based on their experience that the highest spenders—those who lost more than $100,000—will likely recover *more than half* of their losses. *See id.* ¶ 46. For thousands of class members, credit card debts will be wiped out; home equity lines of credit will be paid off; and other five-figure and six-figure debts accumulated from playing Defendants'

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games will be erased overnight.

It is difficult to overstate what a triumph this Settlement—even more than its predecessors—is for the Settlement Class. Though the social casino industry has been a multibillion-dollar business for the better part of a decade, Class Counsel's 2020-2022 social casino settlements marked the first time a social casino company had ever before paid to settle class allegations that social casino games are illegal gambling. Moreover, as described above and in the prior settlements before this Court, the federal judiciary's initial reception to these cases was far from favorable.

Professor Rubenstein describes the recovery, under the circumstances, as an "astounding accomplishment," and notes that this settlement amount is in the top 1-2% of all common fund class action settlements. Rubenstein Decl. ¶¶ 2, 24 & n.39. It is difficult to compare this Settlement to other consumer settlements, given that the social casino settlements Class Counsel has achieved have no true peers to be reasonably measured against. The closest factual comparator is probably *In Re: Daily Fantasy Sports Litigation*, where consumers alleged that betting companies DraftKings and FanDuel purveyed online contests that constituted "illegal gambling" under a variety of state and federal laws, unfairly causing "millions of users" to lose "hundreds of millions of dollars." No. 16-md-2677-GAO, Dkt. #227 (Consolidated Complaint) ¶¶ 491, 793 (D. Mass. June 30, 2016). The settlements there were paltry: DraftKing users, for example, were primarily compensated in "DK Dollars" and the cash component of the settlement totaled $720,000. *See* Dkt. #459 at 6.

Perhaps a better comparator is *Zanca v. Epic Games*, where the class alleged that so-called "loot boxes" in games like *Fortnite* "capitalize on and encourage addictive behavior, akin to gambling" and unfairly coaxed children to spend "significant amounts of money"—some "thousands of dollars"—on in-game currency. No. 21-CVS-534, Complaint ¶¶ 25, 36, 131 (Wake Cnty. Sup. Ct. Jan. 12, 2021), *available at* https://bit.ly/3PzpMsN. There, the settlement appears to have established no common fund at all, instead giving class members 1,000 "credits" to spend on loot boxes in addition to either "up to $50" in cash or another 13,000 "credits." *See*

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Epic Games Settlement FAQs, EPIQ SYSTEMS, INC. (May 11, 2022), *available at* https://bit.ly/3MC2LUb. Similarly, in *In re Apple In-App Purchase Litigation*, the class alleged that certain apps offered within Apple's App Store were "highly addictive, designed deliberately so, and tend to compel children playing them to purchase large quantities" of in-game currency, "amounting to as much as $100 *per purchase* or more." No. 5:11-cv-01758-EJD, 2013 WL 1856713, at *1 (N.D. Cal. May 2, 2013) (emphasis added). But there, the settlement likewise established no common fund, the default recovery for participating class members was five dollars (yes, $5), and with adequate proof some claiming class members could claim refunds for a single 45-day period of purchases. *Id.* at *5. Ultimately, there is just no comparison between any prior settlements reached in factually-similar cases and the social casino settlements that Class Counsel has achieved before this Court, including this Settlement.

Given that the benefits of this Settlement eclipse those in any other remotely comparable class action settlement and outshine even the settlements in *Zynga*, *Scientific Games*, *Playtika*, *Huuuge*, *and Kater*, the results achieved here support the reasonableness of an above-benchmark fee of ~29.3%. *Cf. HP*, 716 F.3d at 1178 (discussing the benefits of tying counsel's compensation to class members' recovery). As discussed further below, courts nationwide have approved fees of this size many times, even in "megafund" cases like this one. *See* Rubenstein Decl. Ex. C. The results achieved here are extraordinary; Class Counsel respectfully submits that awarding ~29.3% of the common fund would reflect those outstanding results.

B. Class Counsel's Efforts Generated Non-Monetary Benefits.

The monetary component of this Settlement is the chief relief made available to the Settlement Class, and it is the only component of the Settlement that Class Counsel ask to be compensated for directly. That said, the non-monetary benefits that Class Counsel achieved for the Class in this litigation are significant, and they further justify the appropriateness of the requested fee award here. *See Borelli*, 2022 WL 2079375, at *9 ("Awards above the 25 percent benchmark may be appropriate when counsel . . . generates benefits for the class beyond simply

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the cash settlement fund." (internal quotation marks omitted)).

First, and most obviously, the Settlement requires DoubleDown to implement meaningful prospective relief, including by (a) placing resources related to video game behavior disorders within its applications; (b) publishing on its website a "voluntary self-exclusion policy;" and (c) enabling continued play without the requirement of continued payment. *See* Settlement Agreement at ¶ 2.2. These in-game changes are a monumental achievement for the Settlement Class, since they represent the first steps toward much-needed self-regulation within the social casino industry.

Second, this litigation, along with the other social casino cases, also spawned legislative and regulatory efforts—by DoubleDown itself as well as by well-funded industry groups such as the ISGA—to defang Washington's gambling laws. *See* Logan Decl. ¶ 26. Had Class Counsel ignored these efforts, a change to Washington's gambling laws could have caused consumers to lose any opportunity to recover in this litigation as well as left them unprotected more generally. Instead, Class Counsel deployed significant resources in Olympia and elsewhere to educate legislators on the social casino industry, to coordinate efforts by other interested parties, and to generally ensure that Class Members' voices were heard. *See id.* ¶¶ 18-35. Absent these efforts, the loudest voices in Olympia and before the WSGC would have been DoubleDown's General Manager Joe Sigrist, as well as lawyers and lobbyists paid for by Defendants' industry peers and the trade organizations they helped bankroll. Simply put, Class Counsel's legislative and regulatory efforts were an integral part of successfully prosecuting this case, and Class Counsel's success in these areas created enormous benefits for the Class. *See id.*

Finally, it bears mentioning that this case—in conjunction with the other social casino cases Class Counsel have pursued in this Court since 2015—catalyzed substantial reforms of challenged practices in the social casino industry. Rubenstein Decl. ¶ 24 ("[T]hese settlements provide an important and unique public service. Through their persistent and protected efforts, Class Counsel have helped establish legal limits to a socially destructive practice: gambling addiction."). Many of the Class Members in this action play and lose money at a number of

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social casino games not at issue in this lawsuit. So while the Court should consider the additional attorneys' fees awarded in the other settled social casino cases as part of its consideration of the fee requested in this case, *see In re Optical Disk*, 959 F.3d at 933, it should also consider that: (i) this case conferred substantial benefits upon many Class Members outside the confines of this specific Settlement, and (ii) unlike in *Optical Disk Drive*, Class Counsel was not merely handed a leadership seat in a run-of-the-mill antitrust case and then allowed to harvest repeated fee awards. Rather, Class Counsel has litigated a *de facto* MDL against social casino game developers on its own accord, has faced unique litigation challenges in each case, and its perseverance has helped many individual class members obtain multiple recoveries across multiple lawsuits.

C. Pursuing this Litigation on a Contingent Basis Was Extremely Risky for Class Counsel, Especially Given the Substantial Litigation Burdens in this Case.

In determining the appropriateness of a fee award, the next step is to consider the flip side of the results—risk. That is, the amount of the fee depends in part on whether, and to what degree, "class counsel ran the risk of not being paid at all." *Steiner v. Am. Broad. Co.*, 248 F. App'x 780, 782 & n.2 (9th Cir. 2007). Here, Class Counsel worked entirely on contingency for over four years on this case alone, advancing both their time and significant costs and expenses. *See* Logan Decl. ¶ 47. If Defendants had won this case, through any number of avenues, Class Counsel would not have been compensated at all.

While that risk exists in all contingency litigation, it was substantially more acute here than in other cases. *See* Rubenstein Decl. ¶ 22 ("Eleven independent factors demonstrate the riskiness of all of the social casino cases . . . ."). The *Vizcaino* case illustrates that point well, where the Ninth Circuit approved the district court's characterization of the case as "extremely risky[.]" 290 F.3d at 1048. The district court arrived at that conclusion because:

> [T]here were no controlling precedents concerning their claims, only analogies involving various areas of law. In addition, Class Counsel's risk was even greater, and their work made more difficult, because Microsoft is

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> one of the nation's largest and most formidable companies and it, and several law firms, defended the case vigorously for several years.

Vizcaino, 142 F. Supp. 2d at 1303.

Here, Class Counsel found themselves in much the same situation. Unlike other statutes that commonly form the basis for class actions (*e.g.*, the Telephone Consumer Protection Act, the Fair Credit Reporting Act, the Fair Debt Collections Practices Act, etc.), Washington's "Return of Money Lost at Gambling" statute had not been heavily litigated when the related *Kater* case was filed in 2015. In fact, to Class Counsel's knowledge, prior to *Kater*, no class action had ever before alleged claims for recovery under the RMGLA. *See* Logan Decl. ¶ 48. Certainly, no class action had ever before alleged claims under the RMLGA against social casino companies. *Id.* Even after the Ninth Circuit's opinion in *Kater*, Class Counsel alone filed claims against DoubleDown. *Id.* ¶ 49. This "[l]ack of competition not only implies a higher fee but also suggests that most members of the [class action] bar saw this litigation as too risky for their practices." *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (Easterbrook, J.) (affirming fee award of 27.5% of $200 million settlement); *see also In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068, at *13 (N.D. Cal. Aug. 17, 2018) (citing *Silverman*, looking to competition among the plaintiffs' bar as an indicator of risk, and awarding an above-benchmark fee even where the "Court received 18 separate motions to serve as lead counsel in this action[.]"). Contingent fee awards are designed to incentivize attorneys to take on these sorts of risky cases, and to "assur[e] competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose." *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994).

Moreover, the novelty of Class Counsel's social casino lawsuits meant that nearly all the elements of plaintiffs' claims were matters of first impression. The factual landscape was similarly undeveloped. While some class actions follow on the heels of a government enforcement action in which a public agency has already identified and investigated a problem, this one did not. *See* Rubenstein Decl. ¶ 21 ("These cases were risky because they did not piggy-back on a government enforcement action . . . . [here,] Class Counsel detected, investigated,

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theorized, and executed the entire litigation campaign from scratch."). In fact, one of the defenses that Defendants repeatedly advanced in this litigation was that the WSGC had purportedly endorsed social casinos. *See, e.g.*, Dkt. #138 at 1 (Defendants' Motion to Dismiss Under Fed. R. Civ. P. 12(B)(1) and Motion to Abstain).

The risks of litigating in a novel area were not merely hypothetical. In fact, five federal district courts initially presented with Class Counsel's novel theory of these cases rejected it—some emphatically so. A synopsis of those setbacks, through which Class Counsel nevertheless persevered, follows below.

1. ***Dupee v. Playtika Santa Monica, et al.* No. 15-cv-01021 (N.D. Ohio).** In this Northern District of Ohio case, the plaintiff alleged that Slotomania violated Ohio and Nevada gambling laws. On March 1, 2016, the district court dismissed the case with prejudice. *See Dupee*, 2016 WL 795857, at *1.

2. ***Mason v. Mach. Zone, Inc.*, No. 15-cv-01107 (D. Md.).** In this District of Maryland case, the plaintiff alleged that a virtual slot machine in the video game violated California and Illinois gambling laws. On October 20, 2015, the district court dismissed the case with prejudice, calling plaintiff's complaint "a hodgepodge of hollow claims lacking allegations of real-world harms or injuries." *Mason*, 140 F. Supp. 3d at 459. In March 2017, after briefing and oral argument, the Fourth Circuit affirmed. *See Mason*, 851 F.3d at 316.

3. ***Kater v. Churchill Downs Inc.*, No. 15-cv-612 (W.D. Wash.).** *Kater* was filed in this District and raised claims that "Big Fish Casino" violated Washington's gambling laws. Plaintiff's core theory was that because users wagered virtual chips on virtual slot machines, those virtual chips were "things of value" that extended the privilege of continued gameplay. On November 19, 2015, the Honorable Marsha J. Pechman dismissed Kater's claims with prejudice. Judge Pechman reasoned that Big Fish Casino could not constitute illegal gambling in Washington because, *inter alia*, "there is never a possibility of receiving real cash or merchandise, no matter how many chips a user wins." *Kater*, 2015 WL 9839755, at *3.

4. ***Phillips v. Double Down Interactive LLC,* No. 15-cv-04301 (N.D. Ill.).** In this Northern District of Illinois case, the plaintiff claimed DoubleDown Casino violated Illinois gambling laws. On March 25, 2016, the court dismissed the case. *Phillips*, 173 F. Supp. 3d at 739.

5. ***Ristic v. Mach. Zone, Inc.*, No. 15-cv-08996 (N.D. Ill.).** In this Northern District of Illinois case, the plaintiff alleged that the virtual slot machine in the videogame violated Illinois law. On September 19, 2016, the court dismissed, finding that, "while any type of addiction is unfortunate, this [c]ourt . . . does not read [Illinois law] to protect [the plaintiff] from his own decision to play the Casino." *Ristic*, 2016 WL 4987943, at *4.

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These initial losses not only illustrate the novelty and risk inherent in the legal claims presented in this case, but also provide important context when considering Class Counsel's request for fees in this and the prior settlements. As Professor Rubenstein explains, "the 30% figure, standing alone, exaggerates Class Counsel's actual yield." Rubenstein Decl. ¶ 19. Class Counsel's eight-year campaign against social casino defendants has thus far resulted in five lost cases and six settled actions, including this one. "[A]s Class Counsel have garnered 25% fees in five prior settlements, if the 30% fee were approved here, their average rate across the six cases would be under 26% and the weighted average about 28%; if the winning and losing cases are each seen as single data points, the average rate across the 11 cases is 14%." *Id.* ¶ 1. Courts approve of higher contingency fees in risky cases for just this reason—the contingent fee award is meant to compensate attorneys for risk—including uncompensated work that eventually led to success. As the Ninth Circuit has recognized: "In common fund cases, attorneys whose compensation depends on their winning the case[ ] must make up in compensation in the cases they win for the lack of compensation in the cases they lose." *Vizcaino*, 290 F.3d at 1051 (alteration in original; internal quotation marks omitted); *see also, e.g.*, *Thomas v. Dun & Bradstreet Credibility Corp.*, No. CV1503194BROGJSX, 2017 WL 11633508, at *22 (C.D. Cal. Mar. 22, 2017) ("Courts have compensated class counsel for work performed in prior, related case where the work performed advanced [the instant] class action." (alteration in original; internal quotation marks omitted)); *Krakauer v. Dish Network, L.L.C.*, No. 1:14-CV-333, 2018 WL 6305785, at *4 (M.D.N.C. Dec. 3, 2018) (noting that "Class Counsel's prior work in [a parallel unsuccessful action] illustrates the risk they assumed by litigating the present matter. In [the parallel case], Class Counsel spent over 5,000 hours on a TCPA case that the named plaintiff voluntarily dismissed after the court denied class certification. While Class Counsel was able to leverage some of [that] work into the litigation of this case, it will not recover fees for the 5,000-plus hours it spent on that case.").

Even after the Ninth Circuit's ruling in *Kater*, and even after the initial wave of settlements in 2020, this remained an extremely risky case. To date, no court has issued a merits

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ruling on RMLGA or CPA claims against social casinos (or, to Class Counsel's knowledge, on any claims that social casinos constitute gambling), and no court has certified a nationwide class of consumers bringing RMLGA and CPA claims. Logan Decl. ¶ 50. And as set forth above, Defendants' aggressive litigation strategy added additional layers of risk in this case. *See also* Rubenstein Decl. ¶ 22. For example, Defendants moved to compel arbitration *twice* and pursued a Ninth Circuit appeal on the issue, arguing that their terms of use subjected the plaintiffs' claims to mandatory arbitration on an individual, not class, basis. Had either of these motions been granted, Class Counsel would have been unable to proceed with any type of class action, as aggregate proceedings would have been prohibited. Defendants also tried just about every conceivable avenue to change venue, seeking relief both before this Court and in state court. Defendants argued that choice-of-law rules and Rule 23 precluded certification of a nationwide class; a victory on this question would have drastically altered the potential damages at issue in this case and limited any settlement to a fraction of the results achieved here. And Defendants resisted discovery at every turn. These defensive maneuvers all increased the risks and burdens of litigating this case.

That defense also expanded beyond the bounds of traditional litigation. As just one example, discussed above, DoubleDown joined its industry peers in (i) asking the Washington State Gambling Commission to issue a ruling that their social casinos did not constitute gambling as it is defined in Washington law, and (ii) introducing a series of bills in the Washington State legislature that would have altered Washington law so as to, specifically, terminate these actions. As Professor Rubenstein explains:

> [N]ot only did Class Counsel fight these cases in courts across the country, but as they did, proponents of these games attempted to . . . cram down new non-litigation dispute resolution rules on game users mid-case, and change existing gambling laws and regulations; these actions forced Class Counsel to defend their efforts in multiple arenas simultaneously, lest the entire endeavor be lost. Class Counsel shouldered all this risk while litigating against large and rich corporations, with seemingly bottomless coffers, yet they did so in a lean fashion without enlisting dozens of law firms to share the risk.

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Rubenstein Decl. ¶ 1.

The legislative risk in this case made this litigation even more risky than in *Vizcaino*, where Microsoft's powerful lobbying presence in Washington would not legitimately have been able to affect its liability to the class because the claims alleged were common-law contract claims. Here, on the other hand, DoubleDown and industry groups like the ISGA used their lobbying influence in Olympia to attempt to gut the RMLGA and end these cases almost before they got off the ground. *See* Logan Decl. ¶ 26. DoubleDown, other social casino industry peers, and the Stars Group likewise repeatedly attempted to convince the WSGC to issue a "Declaratory Order" effectively immunizing Defendants from any liability in this litigation. *Id.* ¶¶ 21, 25. Class Counsel's quick organizing efforts and personal visits to Olympia and various locations for Commission hearings avoided that outcome, but it was—and remains—an extremely serious risk. Indeed, at least once since the *Kater* decision in 2018, industry groups in another state successfully pressured state legislators to amend a gambling statute to immunize social casino companies. *See* Act of April 30, 2019, ch. 60, 2019 Me. Laws 251, *available at* https://bit.ly/3MF9r43.

Moreover, like in *Vizcaino*, Defendants were extraordinarily well-funded. DoubleDown is one of the biggest names in social gaming, reaping annual revenue in excess of $300 million. Rubenstein Decl. ¶ 22. International Game Technology generates $4.2 billion in annual revenues and boasts an enterprise valuation of $10.9 billion. *Id.* Having effectively unlimited resources, Defendants hired Baker & Hostetler LLP and Duane Morris, firms of about 1,000 attorneys each; Davis Wright Tremaine, a firm of over 500 lawyers that is one of the largest firms in Washington State; as well as Bird Marella P.C., a top-flight Los Angeles litigation boutique. Professor Rubenstein notes that Class Counsel, "armed with only its own resources and small staff, . . . faced tremendous risk litigating against such deep-pocketed, high-powered opponents." *Id.*

In sum, this case involved bringing claims under an untested statute against a multi-million-dollar social casino company and a multi-billion-dollar gambling conglomerate, who

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then proceeded—alongside industry peers and trade groups—to challenge nearly every issue in nearly every available forum. Defendants' strategy in this case itself speaks to the risks Class Counsel faced: the fact that the case proceeded to the close of discovery—through four years of active (and expensive) litigation, and after five of Defendants' industry peers had already settled the parallel actions against them—"indicates that defendants believed their prospects for escaping liability without settling were good." *Aranda v. Caribbean Cruise Line, Inc.*, No. 12 C 4069, 2017 WL 1369741, at *7 (N.D. Ill. Apr. 10, 2017), *aff'd sub nom. Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792 (7th Cir. 2018). As Defendants' own choices indicate, the risk of nonpayment to the Class was extreme, even as the litigation progressed, and that should factor heavily in the Court's determination of a reasonable fee.

D. Class Counsel Experienced Significant Burdens While Litigating the Case.

For the same reasons this case carried very high risk, it also imposed significant "burdens [on] class counsel [] while litigating the case." *Optical Disk Drive*, 959 F.3d at 930; *Vizcaino*, 290 F.3d at 1050. Relevant burdens include representation on a contingency basis, especially where litigation spans many years and entails significant expense and where the intensity or difficulty of the litigation prevents counsel from pursuing different or additional work, resulting in a decline in firm income. *Vizcaino*, 290 F.3d at 1050.

In addition to all the burdens associated with Class Counsel's broader campaign against the social casino industry—which undoubtedly redounded to the benefit of this Settlement Class—Class Counsel vigorously litigated this case for over four years, progressing farther in litigation than any other among Class Counsel's social casino cases, and advancing significant time and resources and forgoing other work in order to prevail here. Class Counsel did this in the face of the "scorched-earth defense" detailed above; Professor Rubenstein commented that he "ha[s] been studying litigation for nearly four decades but find few analogues to the defendants' efforts in this matter." Rubenstein Decl. ¶ 22 (noting that there was a "large amount of money at issue in the case – and the Defendants litigated it accordingly"). The extent of the burden this litigation imposed on Class Counsel can be seen in the more-than-500 docket entries as well as

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the background set forth above, but in summary: Class Counsel filed and lost a case against DoubleDown in the Northern District of Illinois years before this action was filed; filed this action in 2018; defeated Defendants' motion to compel arbitration and won an appellate victory on the issue; defeated multiple pleading motions, including follow-on motions for reconsideration or interlocutory appeal; won two motions to compel the production of documents; filed and opposed additional motions that remained pending at the time the case settled, including a motion for class certification and preliminary injunction, several discovery motions, and motions for spoliation sanctions; exchanged extensive discovery including approximately 325,000 pages of documents and 17 depositions; and engaged in multiple rounds of lengthy settlement negotiations, culminating in this settlement and its preliminary approval in November 2022. At the same time, Class Counsel also successfully defended against a declaratory judgment action initiated by DoubleDown in state court, ultimately succeeding on a motion to dismiss or stay. And Class Counsel supplemented all these litigation efforts defending against Defendants' administrative and legislative attacks on the Class's claims, as set forth in detail above. These burdens of time and expense are significant, particularly when shouldered solely by a relatively small law firm. *See* Rubenstein Decl. ¶ 22 ("Defendants had at their disposal more than 62 times as many lawyers as did the class represented solely by Class Counsel's approximately 40-lawyer firm (and local counsel).").

E. The Market Supports the Requested Fee.

Although the Ninth Circuit has not adopted the full market-mimicking approach of other circuits, "the market rate for the particular field of law" is still an important consideration. *Optical Disk Drive*, 959 F.3d at 930. Here, a market-based analysis supports the reasonableness of both the percentage method to calculate the fee in this case and the specific percentage Class Counsel requests.

The market for high-stakes, high-value, plaintiff's-side litigators is entirely driven by a percentage-of-the-recovery model, with sophisticated clients typically incentivizing their lawyers by agreeing to a fixed percentage of between 30% and 40% of the recovery. *See Jenson v. First*

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Tr. Corp., No. 05-cv-3124 ABC-CTX, 2008 WL 11338161, at *13 n.15 (C.D. Cal. June 9, 2008) ("If this were non-representative litigation, the customary fee arrangement would likely be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery."); *In re M.D.C. Holdings Sec. Litig.*, No. 89-cv-0090 E (M), 1990 WL 454747, at *7 (S.D. Cal. Aug. 30, 1990) ("In private contingent litigation, fee contracts have traditionally ranged between 30% and 40% of the total recovery."); *George v. Acad. Mortg. Corp. (UT)*, 369 F. Supp. 3d 1356, 1382 (N.D. Ga. 2019) ("Plaintiffs request for approval of Class Counsel's 33% fee falls within the range of the private marketplace, where contingency-fee arrangements are often between 30 and 40 percent of any recovery"). The relevant market comparison for the fee in this case, therefore, is the percentage of recovery.

In terms of the specific amount requested here, the private market would easily support a fee higher than the ~29.3% that Class Counsel request. The Ninth Circuit has questioned the market-based approach where the sole point of comparison is other judicially approved fees. *See Vizcaino*, 290 F.3d at 1049. Accordingly, a good starting point for the market comparison is "commercial litigation where the fee is determined by application of the negotiated contingency percentage to the amount of the recovery." *Id.* Although no such market truly exists for class actions, *see id.*, there are meaningful comparisons to be had in other areas of law. For example, sophisticated business clients who serve as named plaintiffs in class actions commonly agree to pay fees of 33 percent or greater to their counsel. *See, e.g.*, *San Allen, Inc. v. Buehrer*, No. CV-07-644950, Motion for Attorneys' Fees at 24 (Ohio Com. Pl. Nov. 7, 2014) (business plaintiffs signed retainers agreeing to pay 33.3% of recovery); *In re U.S. Foodservice, Inc. Pricing Litigation*, No. 3:07-md-1894 (AWT), Dkt. #510-1 at 20-21 (D. Conn. Aug. 29, 2014) (business plaintiffs agreed to fee award as high as 40%). Similar rates prevail in antitrust class actions where businesses participate as plaintiffs. *See, e.g.*, *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG, Dkt. #870 at 10; (E.D. Pa. Oct. 15, 2015) (noting that courts "have routinely granted a fee award of 33%" in Hatch-Waxman antitrust cases). Ditto pharmaceutical cases, where a 33% fee "heavily dominate[s]" the market and "the average [is] 32.85 percent."

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Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 FORDHAM L. REV. 1151, 1161 (2021). And in patent cases, where plaintiffs agreed to pay their lawyers using a flat contingent fee, "the mean rate [is] 38.6% of the recovery." David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 360 (2012). In the private market, many sophisticated clients agree to pay their attorneys escalating percentages as the case matures and/or as the recovery increases. *See* Herbert M. Kritzer, RISKS, REPUTATIONS, AND REWARDS at 39-40 (2004) (study finding that 60% of clients chose a fixed one-third percentage, and 31% chose escalating percentages); *In re AT & T Corp.*, 455 F.3d 160, 163 (3d Cir. 2006) (describing escalating marginal fee agreement between class counsel and "the lead plaintiff New Hampshire Retirement Systems," where "attorneys' fees would equal 15% of any settlement amount up to $25 million, 20% of any settlement amount between $25 million and $50 million, and 25% of any settlement amount over $50 million.").

Comparison to judicially approved fees can also be useful, and Class Counsel's requested fee award falls within the usual, 20–30% range recognized by Washington and Ninth Circuit courts. Plus, as Professor Rubenstein notes, "as Class Counsel have garnered 25% fees in five prior settlements, if the 30% fee were approved here, their average rate across the six cases would be under 26% and the weighted average about 28%[.]" Rubenstein Decl. ¶ 1; *see also In re Capacitors Antitrust Litig.*, No. 3:14-CV-03264-JD, 2023 WL 2396782, at *1 (N.D. Cal. Mar. 6, 2023) (approving a 40% fee for a $165 million settlement, and reasoning that class counsel would receive "a cumulative 31.01%" of the $604,550,000 in "total settlements reached for the benefit of the Class" against twenty different defendants). While the requested fee award is higher than the Ninth Circuit benchmark (25%) and the mean percentage awarded in the Western District of Washington (27%), an award of this size "is consistent with fee percentages courts across the circuits have approved in dozens of other mega-fund cases." Rubenstein Decl. ¶ 20. As Professor Rubenstein explains, the "empirical data on percentage awards for this level of settlement ($415 million) is thin." *Id.* ¶ 16. Nevertheless, Professor Rubenstein identifies 47 cases across circuits in which courts approved fee awards of 30% or greater even though the

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settlement fund was $100 million or more. *Id.* ¶ 17, Ex. C. Ninth Circuit courts' review of class action settlements similarly shows that above-benchmark fee awards in large settlements are not rare. In *Vizcaino*, the Ninth Circuit included an appendix "survey[ing] fee awards from 34 common fund settlements of $50-200 million from 1996-2001." 290 F.3d at 1050 n.4. Half of the cases listed in that appendix awarded a fee of 25% or more, including *Vizcaino* itself, where the fee was 28% of a $97 million fund. *Id.* at 1052. Another court found that "of the 19 antitrust settlements between 2009 and 2013, with a mean recovery of $501.09 million and a median recovery of $37.3 million, the mean and median fee percentages were 27% and 30%." *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 2017 WL 6040065, at *2, *aff'd*, 768 F. App'x 651 (9th Cir. 2019).

In sum, Class Counsel's request for a ~29.3% fee award is consistent with the relevant private market rate and to other judicially approved settlements, even in megafund cases.

F. The Size of the Settlement Fund Does Not Justify a Reduction of the Fee Award Percentage.

In "megafund" cases such as this one, the Ninth Circuit has "declined to adopt a bright-line rule" requiring a reduction or "sliding-scale" for fee awards, *In re Optical Disk Drive*, 959 F.3d at 933, but recognizes the size of the settlement fund as "one relevant circumstance to which courts must refer" when determining the reasonableness of a fee award. *Vizcaino*, 290 F.3d at 1047. The logic behind this consideration is set forth in *In re Optical Disk Drive*, where the Court noted that "in many instances the increase in recovery is merely a factor of the size of the class and has no direct relationship to the efforts of counsel," and cited other circuits' observation that "economies of scale could cause windfalls in common fund cases." 959 F.3d at 933; *but see* Alba Conte, Herbert B. Newberg, William Rubenstein, *Newberg and Rubenstein on Class Actions* § 15:81 (6th ed. 2022) (criticizing this approach because "the 'mega-fund' concept is a crude proxy for windfall as it may prove both under- and over-inclusive.").

The windfall logic does not apply here, where the size of the recovery is plainly not "merely a factor of the size of the class." Class Counsel's prior $155 million settlement in

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Kater—itself an unprecedented and remarkable result—was reached on behalf of a similar nationwide class. The size of this Settlement outstrips even that recovery, both in absolute terms and as a percentage of the class's damages, recovering approximately 19.5% rather than 14.35% of the Class's recoverable spending. The $415 million figure, therefore, is not merely a factor of class size, but rather was generated by, *inter alia*, Class Counsel's extended litigation of this action through the end of discovery—much further than the *Kater* case progressed. Class Counsel's extraordinary efforts and the unique results Class Counsel achieved in this case, even compared to Class Counsel's other successful social casino settlements, confirm that the requested fee award, while certainly significant, is not fairly characterized as a windfall.

Moreover, the size of the settlement fund must be weighed among all the other reasonableness factors; this Court should not throw the other reasonableness factors out the window merely because of the size of the settlement. Ninth Circuit courts conducting this analysis have awarded above-benchmark fees even in megafund cases. *See, e.g.*, *Andrews v. Plains All Am. Pipeline L.P.*, No. 15-cv-4113-PSG-JEMX, 2022 WL 4453864, at *4 (C.D. Cal. Sept. 20, 2022) (approving 32% fee award of $230 million settlement); *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, No. C-07-5944 JST, 2016 WL 183285, at *2 (N.D. Cal. Jan. 14, 2016) (approving 30% fee award of $127.45 million settlement); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-MD-1827 SI, 2011 WL 7575003, at *2 (N.D. Cal. Dec. 27, 2011) (approving 30% fee award of $405.02 million settlement); *cf. Reyes v. Experian Info. Sols., Inc.*, 856 F. App'x 108, 110-11 (9th Cir. 2021) (finding error where district court relied on large settlement number ($25 million) to find that benchmark fee would be a windfall, without looking to circumstances of case).

Similarly, courts in other circuits that analyze similar reasonableness factors have granted fee awards of 30% or more in megafund cases where most factors other than the size of the settlement weighed in favor of the reasonableness of the requested award. *See, e.g.*, *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1115 (D. Kan. 2018), *aff'd* No. 19-3008, 2023 WL 2262878 (10th Cir. Feb. 28, 2023) (awarding a 33.33% fee award in a $1.51

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billion settlement after considering size of settlement and factors such as novelty and difficulty of the litigation, the results obtained, the absence of piggy-backing on a government investigation, and burden on class counsel); *In re: Urethane Antitrust Litig.*, No. 04-1616-JWL, 2016 WL 4060156, at *6 (D. Kan. July 29, 2016) (declining to reduce a 33.33% award of a $835 million settlement because "counsel achieved an incredible result for the class, in a case with an extreme amount of risk at all stages of the litigation, . . . [c]ounsel had to build this case on their own, without the help of a governmental investigation or prosecution, after other counsel had declined to pursue it, and they toiled for many years, at great expense to themselves, with a very real risk that they would not recover anything from this defendant."); *In re Vitamins Antitrust Litig.*, No. MDL 1285, 2001 WL 34312839, at *12 (D.D.C. July 16, 2001) (declining to "reduce the requested award simply for the sake of doing so when every other factor ordinarily considered weighs in favor of approving class counsel's request of thirty percent."); *In re TikTok, Inc., Consumer Priv. Litig.*, __ F. Supp. 3d __, 2022 WL 2982782, at *25-26 (N.D. Ill. July 28, 2022) (awarding 33.33% in fees for $92 million settlement achieved "at an early stage of litigation" and declining to apply a sliding-scale approach); Order Granting Final Approval at 5, *Rivera v. Google LLC*, No. 2019-CH-00990 (Ill. Circuit Ct. Cook Cty. Sept. 28, 2022) (awarding 35% fee award in $100 million settlement); *see also* Rubenstein Decl. Ex. C (consolidating megafund class action settlements with percentage awards of 30% or more).

Here, as in the cases cited above, the factors outlined in *Vizcaino* weigh so strongly in favor of granting Class Counsel's requested ~29.3% fee award that the size of the fund does not justify a reduction. Class Counsel built this case from the ground up, and the exceptional monetary and non-monetary results were solely the product of Class Counsel's litigation and litigation-related efforts. This case involved novel and hotly-contested questions of law and fact, recovery was always in doubt, there were no prior or parallel government proceeding against the defendants, litigation was extensive and exhaustive, and an exceptional recovery was achieved for plaintiffs and the public more broadly. In other words, the Class's recovery moved from zero to a megafund *solely* because of Class Counsel's efforts, skill, and persistence—both over an

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eight-year campaign and specifically in this action. Class Counsel's requested ~29.3% fee award is well-earned and would not constitute an unjustified windfall.

G. A Lodestar Cross-Check Is Unnecessary and Unhelpful.

Class Counsel respectfully submit that consideration of lodestar in this case would not accurately account for the efforts Class Counsel contributed toward the Settlement it obtained for the Class, would not be relevant to preventing a windfall, and would create perverse incentives for future class actions with regard to efficiency. For that reason, the Court should not—and certainly need not—conduct a lodestar cross-check. *See* Rubenstein Decl., ¶ 31 ("A lodestar cross-check is not a helpful tool by which to assess the reasonableness of Class Counsel's proposed percentage award in the unique circumstances presented by these interrelated cases.").

First, Washington state law does not use a lodestar cross-check in common fund cases. *See Vizcaino*, 142 F. Supp. 2d at 1302 ("Under Washington law, the percentage method, without a lodestar cross-check, should be used in common fund cases."); *accord* Rubenstein Decl. ¶ 28 n.65. Similarly, it is "settled" law that the Ninth Circuit does not require a lodestar cross-check. *Farrell v. Bank of Am. Corp. N.A.*, 827 F. App'x 628, 631 (9th Cir. 2020); *accord Campbell v. Facebook*, 951 F.3d 1106, 1126 (9th Cir. 2020); *In re Hyundai & Fuel Econ. Litig.*, 926 F.3d 539, 571 (9th Cir. 2019) (en banc); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d at 944; *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 738–39 (9th Cir. 2016); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998); *Six (6) Mexican Workers*, 904 F.2d at 1311.

It is true that some Ninth Circuit panels have encouraged district courts to employ a lodestar cross-check when using the percentage method to award fees based on a common fund. *See In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d at 944. But as Professor Rubenstein explains, the Ninth Circuit has also recently found error in—and even reversed—district court decisions for inappropriately applying a lodestar cross-check. *See* Rubenstein Decl. ¶ 20 (citing *Reyes*, 856 F. App'x at 111 (reversing district court decision that relied on a lodestar cross-check to limit a fee award below the Circuit benchmark); *In re Wells Fargo & Co. S'holder Derivative Litig.*, 845 F. App'x 563, 565 n.3 (9th Cir. 2021) (district court erred when applying cross-

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check)).

Rather, a district court may appropriately determine that the circumstances of a given case warrant a certain percentage of a fund without considering class counsel's lodestar. *See Farrell*, 827 F. App'x at 630; *accord* Rubenstein Decl. ¶ 28 (observing that the Ninth Circuit has found the lodestar crosscheck to be "inapplicable or unhelpful in certain specific situations" and identifying this case as one such situation). Courts in this district, including this Court, routinely do just that. *See, e.g.*, *In re HQ Sustainable Mar. Indus., Inc. Derivative Litig.*, No. 11-cv-910 RSL, 2013 WL 5421626, at *3 (W.D. Wash. Sept. 26, 2013) (Lasnik, J.) (closely scrutinizing the requested fee award but declining to conduct a lodestar cross-check; awarding class counsel 32% of the benefits conferred on the class in recognition of the complexity of the dispute, the expense of prosecuting related actions, and the difficulty of reaching a settlement with many participants); *Ikuseghan v. Multicare Health Sys.*, No. 14-cv-5539 BHS, 2016 WL 4363198, at *1-2 (W.D. Wash. Aug. 16, 2016) (Settle, J.) (collecting cases, awarding 33% of the fund and declining to conduct a lodestar cross-check).

As Professor Rubenstein explains, at least four unique circumstances specific to this case renders a cross-check unhelpful here:

- *First*, this settlement does not stand alone but is one of a group of current (and possibly future) settlements and/or judgments Class Counsel will achieve against social casinos. In this multiple case situation, it is often difficult to attribute lodestar to any one specific case, rendering application of a lodestar cross-check problematic.

- *Second*, the Ninth Circuit has excused application of the cross-check in situations in which counsel achieve a meaningful settlement quickly; some of the cases in this litigation campaign – though not this one – fit this description, complicating application of the cross-check across the entire campaign.

- *Third*, Class Counsel's work in the social casino space not only encompasses a number of settlements, it also encompasses a number of unsuccessful matters. Contingent fee lawyers do not get paid for losing cases. . . . [But] the question presented by the lodestar cross-check is not whether to *pay* class counsel, but what hours of work to recognize in

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> checking the level of counsel's proposed fees in the cases that reach a settlement or judgment for the class. . . . At the least, it is fair to acknowledge that the fact that a conventional cross-check might *not* account for these hours renders such a cross-check less than optimal on facts such as these.
>
> - *Fourth*, this case does not involve solely [traditional] litigation activities. Class Counsel were forced to work on behalf of the class in multiple forums, including legislative arenas and executive branch administrative proceedings. Courts have not hesitated to award fees for such activities in appropriate circumstances, but including hours and rates for non-litigation work in a litigation-related lodestar cross-check risks an uncomfortable level of imprecision even within that back-of-the-envelope endeavor.

See Rubenstein Decl. ¶ 29.

More broadly, myriad class action scholars have argued that using the lodestar crosscheck effectively blunts the incentives for class counsel to achieve the largest possible award for the class, in turn reducing the deterrence effect of a class action. *See* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 150-55 (2006). Similarly, Professor Brian T. Fitzpatrick argues that a lodestar cross-check is simply a way to "sneak the lodestar method in the backdoor," which "sends a bad message to future class action lawyers: don't resolve cases too quickly; drag them out to beef up your lodestar so your fee percentage isn't cut." Brian T. Fitzpatrick, *The Conservative Case for Class Actions* (2019).

Consider, for example, *In re Volkswagen "Clean Diesel" Marketing Sales Practices, & Products Liability Litigation*, No. 15-md-2672 CRB (JSC), 2017 WL 1047834 (N.D. Cal. Mar. 17, 2017). In *Volkswagen*, almost no adversarial litigation took place. The court expressly noted that "Volkswagen's liability [was] not contested" and commented on "the short time frame it took the parties to settle the . . . class action claims." *Id.* at *2. The Parties reached a settlement by July 2016, which Judge Breyer approved in March 2017. *Id.* at *1. Nevertheless, class counsel in *Volkswagen* managed to expend approximately 98,000 hours litigating and settling the case, arriving at a lodestar of $63.5 million. *Id.* at *5. The court found the hours and lodestar reasonable and determined that "there is no indication that [c]lass [c]ounsel sought to artificially

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inflate their hours to justify the lodestar amount." *Id.*

In this litigation—where nearly *everything* was contested, from venue to discovery requests—Class Counsel have long known they could, like the attorneys in *Volkswagen*, have expended an almost unlimited number of billable hours. Yet, consistent with their principled approach to all cases they handle, Class Counsel staffed this case leanly and worked efficiently. *See* Logan Decl. ¶ 51. Where appropriate, primary responsibility for tasks was assigned to more junior attorneys, with partners acting in a supervisory capacity. *See id.* ¶ 52. For example, associate-level attorneys on the case drafted the majority of the voluminous briefing in this case, and took 8 of the 9 depositions of Defendants' witnesses and experts. *See id.*

That is not to say having fewer lawyers on the case slowed down Class Counsel or that Edelson's senior partners did not closely manage this case—they of course did. The point is that Class Counsel has worked diligently on this case, has not overstaffed it, and has not performed unnecessary tasks in an effort to pad its lodestar. Consequently, relying on a lodestar cross-check here would effectively penalize Class Counsel's efficiency and incentivize attorneys in similar situations in the future to delay and overstaff cases for the purpose of manufacturing thousands of unnecessary, additional hours for the sole purpose of inflating lodestars. The Court should not create those incentives with its fee decision in this case.

II. The Court Should Issue Adrienne Benson and Mary Simonson Incentive Awards of $7,500 Each.

The Court should also approve incentive awards to the Class Representatives in recognition of their service to the Class. "Incentive awards are fairly typical in class action cases [to] . . . compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009); *see also In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 786-87 (9th Cir. Sept. 28, 2022) (confirming that reasonable incentive awards may be awarded). To determine the appropriate amount of an award, courts consider "the actions the plaintiff has

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taken to protect the interests of the class, the degree to which the class has benefitted from those actions, [and] the amount of time and effort the plaintiff expended in pursuing the litigation[.]" *Bell v. Consumer Cellular, Inc.*, No. 15-cv-941, 2017 WL 2672073, at *8 (D. Or. June 21, 2017).

The Court should award Adrienne Benson and Mary Simonson incentive awards of $7,500 each. As detailed more fully in their declarations, both Benson and Simonson invested dozens of hours of time making substantial contributions to the Class, including stepping forward to serve as class representatives and named Plaintiffs, staying in regular communication with Class Counsel, timely responding to requests for information, sitting for depositions, and closely reviewing the Settlement Agreement before approving it. *See* Declaration of Adrienne Benson ("Benson Decl.") ¶¶ 5-6; Declaration of Mary Simonson ("Simonson Decl.") ¶¶ 5-6. Both have made substantial personal sacrifices for the benefit of the Class, including the fact that anyone who Googles their names now sees pages of websites talking about their involvement in these lawsuits. *See* Benson Decl. ¶ 4; Simonson Decl. ¶ 4. For these efforts and sacrifices, the Court should issue $7,500 incentive awards, which are reasonable and extremely modest relative to the $415,000,000 Settlement Fund that the Class Representatives helped secure for the Settlement Class. *See Scientific Games*, 2022 WL 3348217, at *2 (W.D. Wash. Aug. 12, 2022) (approving $10,000 incentive award to Donna Reed); *Kater*, 2021 WL 511203, at *2 (W.D. Wash. Feb. 11, 2021) (approving $10,000 incentive awards each to Cheryl Kater and Manasa Thimmegowda); *see also In re Apple Inc. Device Performance Litig.*, 50 F.4th at 785; *McClintic v. Lithia Motors, Inc.*, No. 11-cv-859 RAJ, 2011 WL 13127844, at *6 (W.D. Wash. Oct. 19, 2011) ($10,000 incentive award reasonable in $1.74 million settlement); *In re Portfolio Recovery Assocs., LLC, Tel. Consumer Prot. Act Litig.*, No. 11-md-02295, 2017 WL 10777695, at *3 (S.D. Cal. Jan. 25, 2017) (incentive award appropriate where class representatives were "required to review documents" and "they will earn little for their efforts without [] incentive payments").

CONCLUSION

Plaintiffs respectfully request that the Court enter an order: (i) awarding $121,485,000 in

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attorneys' fees, reflecting approximately 29.3% of the Settlement Fund,[5] (ii) granting incentive awards of $7,500 each to the Class Representatives, and (iii) approving up to $3,000,000 in notice and administrative costs to be recovered by the Settlement Administrator. If these requests are approved, the total amount of fees and costs borne by the Class will be up to 30% of the Settlement Fund, meaning that the Class will recover no less than 70% of the Settlement Fund.

The Court should grant this Motion.

Respectfully submitted,

Dated: March 13, 2023

ADRIENNE BENSON and MARY SIMONSON, individually and on behalf of all others similarly situated,

By: /s/ Todd Logan

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[5] To reiterate, Class Counsel represent that they have incurred significant costs and expenses associated with prosecuting this case, but have decided to not seek reimbursement of those separately from their ~29.3% fee request.

By: /s/ Cecily C. Jordan

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Class Counsel and Plaintiffs' Attorneys

*Admitted *pro hac vice*

LCR 7(e) Certification

I certify that this memorandum contains 14,579 words. Plaintiffs' have contemporaneously filed a Motion for Leave to File Overlength Brief.

/s/ Todd Logan

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ADRIENNE BENSON and MARY SIMONSON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DOUBLEDOWN INTERACTIVE, LLC, a Washington limited liability company, INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation, and IGT, a Nevada corporation,

Defendants.

No. 18-cv-525-RSL

[PROPOSED] ORDER GRANTING CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE INCENTIVE AWARDS

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WHEREAS, Plaintiffs have submitted authority and evidence supporting Class Counsel's Motion for Award of Attorneys' Fees and Expenses and Issuance of Incentive Awards; and

WHEREAS, the Court, having considered the Motion and being fully advised, finds that good cause exists for entry of the Order below; therefore,

IT IS HEREBY FOUND, ORDERED, ADJUDGED, AND DECREED THAT:

1. Unless otherwise provided herein, all capitalized terms in this Order shall have the same meaning as set forth in Class Counsel's Motion for Award of Attorneys' Fees and Expenses and Issuance of Incentive Awards.

2. The Court confirms its appointment of Jay Edelson, Rafey S. Balabanian, Todd Logan, Alexander G. Tievsky, Brandt Silver-Korn, and Amy Hausmann of Edelson PC as Class Counsel.

A. Attorneys' Fees

3. Class Counsel has requested the Court calculate their award using the percentage-of-the-fund method. Class Counsel requests the Court award $121,485,000 in attorneys' fees, reflecting approximately 29.3% of the $415,000,000 Settlement Fund.

4. Class Counsel represents that the Settlement Administration Expenses are anticipated not exceed $3,000,000 from the common fund. Therefore, the requested fee award, together with the Settlement Administration Expenses and incentive awards, does not exceed 30% of the common fund. Nothing in this order shall prevent the Settlement Administrator from requesting further reimbursement, drawn exclusively from the interest accrued to the common fund, in the event of an unforeseen circumstance.

5. These requested attorneys' fees, which reflect an upward departure from the 25% "benchmark" fee award in common fund cases, are fair and reasonable. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047, 1052 (9th Cir. 2002). The Court reaches this conclusion after analyzing: (1) the extent to which class counsel achieved exceptional results for the class; (2) whether the case was risky for class counsel; (3) whether counsel's performance generated benefits beyond the cash settlement fund; (4) the market rate for the particular field of law; (5)

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the burdens class counsel experienced while litigating the case; (6) and whether the case was handled on a contingency basis. *Id.* at 1048-50; *see also In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 786-87 (9th Cir. Sept. 28, 2022) (noting that courts must conduct heightened fairness inquiry and should not defer to recommendations of counsel). The Court also considered the size of the settlement fund as "one relevant circumstance" because this settlement constitutes a "megafund." *Vizcaino*, 290 F.3d at 1047; *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 932 (9th Cir. 2020) (noting that the Ninth Circuit has "not identified a bright-line definition for 'megafund,'" but that a settlement of $124.5 million qualified). Finally, the Court has taken into account the settlements reached, and fee awards requested, in the *Ferrando v. Zynga*; *Reed v. Scientific Games*; *Kater v. Churchill Downs*; *Wilson v. Playtika*; and *Wilson v. Huuuge* actions. *See In re Optical Disk Drive*, 959 F.3d at 930.

6. After consideration of all relevant factors, the Court finds that an upward departure from the 25% benchmark is justified by the exceptional result in this extraordinarily risky, novel, and hard-fought litigation. Class Counsel performed exceptional work and achieved an unparalleled result for the Class. The $415 million settlement amount is in the top 1-2% of all common fund class action settlements and reflects a sizeable portion of the damages at issue. Class Members stand to recover substantial portions of their Lifetime Spending Amount on Defendants' Applications.

7. Class Counsel further achieved exceptional non-monetary benefits for the Class. Among other things, Defendant DoubleDown has agreed to meaningful prospective relief for the Class, including by (a) placing resources related to video game behavior disorders within its applications; (b) publishing on its website a "voluntary self-exclusion policy;" and (c) enabling continued play without the requirement of continued payment.

8. This litigation was extremely risky for Class Counsel. Class Counsel worked entirely on contingency, prosecuted a line of several class actions against well-funded corporations, and pursued an entirely novel legal theory: that Defendants' internet-based "social casinos" violated Washington's "Return of Money Lost at Gambling" statute (RCW 4.24.070).

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On top of this, Class Counsel defended the Class's interests before the Washington State Gambling Commission and the Washington State Legislature.

9. Class Counsel also experienced significant burdens while litigating this case. Relevant burdens include representation on a contingency basis, especially where litigation spans many years and entails significant expense and where the intensity or difficulty of the litigation prevents counsel from pursuing different or additional work, resulting in a decline in firm income. *Vizcaino*, 290 F.3d at 1050. In addition to all the burdens associated with Class Counsel's broader campaign against the social casino industry—which undoubtedly redounded to the benefit of this Settlement Class—Class Counsel vigorously litigated this case for over four years, progressing farther in litigation than any other among Class Counsel's social casino cases, and advancing significant time and resources, and forgoing other work, in order to prevail here.

10. The market also supports Class Counsel's fee request. Class Counsel's requested fee award falls within the usual, 20-30% range recognized by Washington and Ninth Circuit courts. While these figures are higher than the Ninth Circuit benchmark (25%), and the mean percentage awarded in the Western District of Washington (27%), Class Counsel's requested fee award "is consistent with fee percentages courts across the circuits have approved in dozens of other mega-fund cases." Rubenstein Decl. ¶ 20; *see also Andrews v. Plains All Am. Pipeline L.P.*, No. 15-cv-4113-PSG-JEMX, 2022 WL 4453864 (C.D. Cal. Sept. 20, 2022) (approving 32% fee award of $230 million settlement); *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, No. C-07-5944 JST, 2016 WL 183285, at *2 (N.D. Cal. Jan. 14, 2016) (approving 30% fee award of $127.45 million settlement); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. MDL 3:07-MD-1827 SI, 2011 WL 7575003 (N.D. Cal. Dec. 27, 2011) (approving 30% fee award of $405.02 million settlement); *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1115 (D. Kan. 2018), *aff'd* No. 19-3008, 2023 WL 2262878 (10th Cir. Feb. 28, 2023) (awarding a 33.33% fee award in a $1.51 billion settlement).

11. The size of the fund does not warrant a fee reduction because all other factors weigh strongly in favor of the reasonableness of a 29.3% fee award. *Andrews*, 2022 WL

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4453864, at *4 (approving 32% fee award of $230 million settlement after consideration of all factors, including size of settlement fund). Furthermore, the size of the settlement fund is the result of Class Counsel's exceptional efforts, not merely the size of the class. *In re Optical Disk Drive*, 959 F.3d at 933 (noting that a reduction may be appropriate to prevent a windfall where "the increase in recovery is merely a factor of the size of the class and has no direct relationship to the efforts of counsel."). Class Counsel's requested fee award is well-earned and would not constitute an unjustified windfall.

12. The Court is not required to conduct a lodestar cross-check, *Farrell v. Bank of Am. Corp., N.A.*, 827 F. App'x 628, 631 (9th Cir. 2020), and declines to do so here. Given the unique circumstances presented by this litigation, the Court concludes that a lodestar cross-check would not be a valuable tool to help assess the reasonableness of Class Counsel's fee request. *See* Rubenstein Decl. ¶¶ 29-30; *Andrews*, 2022 WL 4453864, at *2 (declining to conduct a lodestar cross-check "[d]ue to the exceptional circumstances of this case" and the Court's extensive involvement in supervising the litigation.).

13. The Court grants Class Counsel's request for a attorneys' fee award of $121,485,000, reflecting approximately 29.3% of the $415,000,000 Settlement Fund.

B. Costs and Expenses

14. Class Counsel represent that they have incurred significant costs and expenses in connection with prosecuting this action, but have decided to not seek reimbursement of those separately from their ~29.3% fee request.

15. Consequently, the Court does not award Class Counsel any amount for costs and expenses.

C. Incentive Awards

16. Class Counsel requests incentive awards of $7,500 each for Adrienne Benson and Mary Simonson.

17. The requested incentive awards are fair and reasonable. Both Benson and Simonson have made substantial contributions to the Class, including stepping forward to serve

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as class representatives and named Plaintiffs, staying in regular communication with Class Counsel, timely responding to requests for information, sitting for depositions, and closely reviewing the Settlement Agreement before approving it. Both also made substantial personal sacrifices for the benefit of the Class, including the fact that anyone who Googles their names now sees pages of websites talking about their involving in these lawsuits. $7,500 incentive awards are reasonable for their services. *See In re Apple Inc. Device Performance Litig.*, 50 F.4th at 786-87; *McClintic v. Lithia Motors, Inc.*, No. 11-cv-859-RAJ, 2011 WL 13127844, at *6 (W.D. Wash. Oct. 19, 2011); *In re Portfolio Recovery Assocs., LLC, Tel. Consumer Prot. Act Litig*., No. 11-md-02295, 2017 WL 10777695, at *3 (S.D. Cal. Jan. 25, 2017).

D. Notice and Administration

18. Class Counsel have represented that the Settlement Administrator anticipates the costs of notice and administration not to exceed $3,000,000. The Court finds that this amount, reflecting approximately .7% of the Settlement Fund, is fair and reasonable. The Court consequently approves of the Settlement Administrator recovering up to $3,000,000 for notice and administration related fees and costs. Nothing in this order shall prevent the Settlement Administrator from requesting further reimbursement, drawn exclusively from the interest accrued to the common fund, in the event of an unforeseen circumstance.

E. Conclusion

19. Based on the foregoing findings and analysis, the Court:

(i) Approves an award of $121,485,000 in attorneys' fees to Class Counsel, reflecting approximately 29.3% of the Settlement Fund;

(ii) Approves incentive awards of $7,500 each to the Class Representatives; and

(iii) Approves up to $3 million in notice and administration costs to be recovered by the Settlement Administrator.

IT IS SO ORDERED.

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DATED this _____ day of _____, 2023.

_____
ROBERT S. LASNIK
UNITED STATES DISTRICT JUDGE

Presented by:

By: /s/ Todd Logan

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Plaintiffs' Attorneys and Class Counsel

*Admitted *pro hac vice*

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ADRIENNE BENSON and MARY SIMONSON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DOUBLEDOWN INTERACTIVE, LLC, a Washington limited liability company, INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation, and IGT, a Nevada corporation,

Defendants.

No. 18-cv-525-RSL

DECLARATION OF TODD LOGAN IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES AND ISSUANCE OF INCENTIVE AWARDS

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Pursuant to 28 U.S.C. § 1746, I declare and state as follows:

1. I am a Partner at Edelson PC.

2. This declaration is based upon my personal knowledge unless otherwise indicated. If called upon to testify as to the matters stated herein, I could and would competently do so.

* * *

3. In approximately 2014, Edelson PC began investigating the social casino industry's business practices as potentially illegal under various state consumer and gambling laws.

4. The results of that investigation revealed, in Edelson PC's view, that social casino companies—including those bought out by multinational gambling corporations—were violating a host of state consumer and gambling laws, including laws requiring the return of monies lost at illegal gambling.

5. Based on their investigation, in 2015 Edelson PC began filing lawsuits against social casino companies, in courts nationwide, alleging claims under state gambling laws.

6. To date, Edelson PC has filed at least thirteen class action lawsuits against social casino companies. Edelson PC has, in my view, indisputably carried the torch on behalf of consumer victims of the social casino industry.

* * *

7. In response to subpoenas Edelson PC served on Apple, Google, and Facebook (the "Platforms") in April 2020, the Platforms produced transaction data for purchases of virtual chips in DoubleDown Casino by Washington-based users.

8. In response to discovery requests Edelson PC served on Defendants throughout the litigation, Defendants produced transaction data for purchases of virtual chips in DoubleDown Casino by all U.S.-based users. Defendants also produced tens of thousands of internal company documents and communications about their business structure, strategies, and practices. In all, the Parties exchanged approximately 325,000 pages of documents in discovery.

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9. Between March and August 2021, Defendants took (and Class Counsel defended) the depositions of Adrienne Benson, Mary Simonson, and six other members of the proposed Class (Patrick Bailey, Sandra Logan, Deborah Raymond, Jan Saari, Olivia Werner, and Catherine Witt).

10. During the same period, Class Counsel took Rule 30(b)(6) depositions of DoubleDown, International Game Technology, and IGT, as well as depositions of four other DoubleDown employees (Alex Entrikin, Jude Cooper, Julie Frederick, and Leslie Keddie) and two of Defendants' proposed expert witnesses (Dr. Marc Potenza and Dr. Daniel Sahl).

11. During this period, the Parties engaged in near-constant correspondence and conferral efforts, including telephonically, regarding discovery and other litigation issues.

* * *

12. Attached hereto as Exhibit 1 is a true and accurate copy of the Complaint DoubleDown and International Game Technology filed against Adrienne Benson and Mary Simonson in Washington Superior Court in September 2020.

13. Attached hereto as Exhibit 2 is a true and accurate copy of the Motion to Dismiss or Stay that Edelson PC filed in February 2021.

14. Attached hereto as Exhibit 3 is a true and accurate copy of DoubleDown's and International Game Technology's consolidated opposition to that motion.

15. Attached hereto as Exhibit 4 is a true and accurate copy of the reply Edelson PC filed in support of the Motion.

16. Attached hereto s Exhibit 5 is a true and accurate copy of the order entered by the Thurston County Superior Court staying the case.

17. In August 2021, the Thurston County Superior Court dismissed the action entirely.

* * *

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18. Since 2014, Edelson PC has devoted a substantial amount of its relatively limited time, energy, and resources toward the successful prosecution of lawsuits over social casino games.

19. Of the time, energy, and resources (the "Efforts") referenced above, only a portion is reflected within the motion practice and settlement documents in the above-captioned case.

20. Paragraphs 21-35 below describe some of the Efforts Edelson PC has expended, since 2015, that aided the prosecution and settlement in this case and other related social casino cases but may not be completely (if at all) reflected on the Court's docket.

21. Two weeks after the Ninth Circuit's mandate issued in *Kater*, Defendant's industry peers dispatched lawyers to the Washington State Gambling Commission's ("WSGC" or "Commission") session in Tacoma to present a "Petition for a Declaratory Order" asking the Commission to declare that other social casino games "do not constitute gambling within the meaning of the Washington Gambling Act, RCW 9.46.0237." At each of the three public hearings that followed—in July 2018 (in Tacoma), August 2018 (in Pasco), and October 2018 (in Olympia)—Edelson PC attorneys appeared before the Commission and presented live argument at both the Tacoma and Pasco hearings. Edelson PC supplemented these appearances with a formal letter to the Commission (ahead of the Tacoma hearing) and, on the Commission's request, with an eighteen-page comment for the Commission's consideration (between the Tacoma and Pasco hearings). The WSGC ultimately declined to enter a Declaratory Order.

22. Attached hereto as Exhibit 6 is a true and accurate copy of the July 12, 2018 WSGC meeting transcript regarding Big Fish's Petition for a Declaratory Order. A copy of Exhibit 6 is also publicly available at https://wsgc.wa.gov/sites/default/files/public/agenda/2017/Commission%20Packet_5.pdf.

23. Attached hereto as Exhibit 7 is a true and accurate copy of a letter submitted to the WSGC by Davis Wright Tremaine on DoubleDown's behalf in support of Big Fish's

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Petition. A copy of Exhibit 7 is also publicly available at https://wsgc.wa.gov/sites/default/files/public/agenda/2017/Commission%20Packet_5.pdf.

24. Attached hereto as Exhibit 8 is a true and accurate copy of a letter submitted to the WSGC by a former DoubleDown employee in support of Big Fish's Petition. A copy of Exhibit 8 is also publicly available at https://wsgc.wa.gov/sites/default/files/public/agenda/2017/Commission%20Packet_5.pdf.

25. Even after the initial declaratory order proceedings, Edelson PC continued to represent the interests of the Class in additional flare-ups before the WSGC, including in similar declaratory order proceedings initiated by The Stars Group.

26. Starting in early 2019, the International Social Gaming Association ("ISGA") provided legislators draft legislation that would amend Washington's gambling statutes with the effect (and specific intent) of gutting these lawsuits.

27. In response, Edelson PC engaged the lobbying firm Peggen & Mara Political Consulting LLP—experts in Washington tribal and gambling laws—to help Edelson PC (i) stay on top of all administrative and legislative developments in the Washington gaming industry; (ii) understand the intricacies of Washington's specific legislative process, including the nuances of—and procedures for—bill drafting; (iii) understand who the relevant lawmakers and stakeholders in Washington's gaming industry were, what those lawmakers and stakeholders cared about, and how Edelson PC could educate those lawmakers and stakeholders about social casinos; and (iv) work with legislative groups, task forces, and other interested parties in in Washington's gaming industry, including the Washington Indian Gaming Association ("WIGA").

28. Edelson PC then used this information and expertise to amplify the Class's interests and concerns. Edelson PC drafted memos and prepared handouts for a variety of stakeholders, including State Senators and Representatives, the WIGA, the Washington Trial Attorneys' Association, the Public Interest Research Group, and other organizations dedicated to remedying problem gambling.

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29. Edelson PC attorneys also flew to Washington multiple times and personally met with lawmakers in the Washington Senate and House, met with officials in the Executive branch, and provided in-person testimony to the Washington Legislature.

30. For example, in January 2019—after Edelson PC got wind that the ISGA was planning to gut Washington's gambling statutes (in what would become the failed H.B. 2041 and S.B. 5886)—Edelson PC attorneys met in-person with Representative Shelley Kloba, then-Representative (and now Senator) Derek Stanford, then-Lieutenant Governor Cyrus Habib, and several other government officials.

31. On January 28, 2020, Edelson PC attorneys met with Senator Stanford at the State Capital—following Edelson PC's written and in-person testimony before the House Civil Rights & Judiciary Committee in (successful) opposition to H.B. 2720.

32. On March 21, 2019, Class Counsel sent formal correspondence to Senator Mark Mullet ahead of a planned work session before the Senate and Financial Institutions, Economic and Trade Committee about social casinos—in which Defendants' industry peers had been invited, but Class Counsel had not.

33. In August 2019, Edelson PC attorneys traveled to Anacortes—on Swinomish Tribe land—to speak at a monthly WIGA meeting, in opposition to the ISGA-backed bills.

34. And in early 2020, Edelson PC coordinated the submission of more than 200 letters to Washington State Representatives from Big Fish Casino players across the country and spoke with local press about the ISGA's renewed efforts to gut these lawsuits.

35. Class Counsel's ongoing advocacy includes meetings with regulatory officials as well as officials from the legislative and executive branches.

* * *

36. Though Edelson PC engaged in intermittent settlement talks with Defendants over the course of litigation, including in September 2021 at Court-ordered settlement conferences, settlement talks renewed in earnest in June 2022. The Parties agreed to schedule a videoconference mediation session on July 28, 2022 with Niki Mendoza of Phillips ADR.

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37. In the weeks leading up to that July 28 mediation date, Edelson PC was in frequent communication with Defendants and with the Phillips ADR team, submitted mediation briefs, and supplemented that briefing with telephonic and written correspondence with Defendants and the Phillips ADR team.

38. On July 28, Edelson PC and Defendants participated in a more-than-full day mediation session via videoconference, but did not reach a resolution that day.

39. In August 2022, with the benefit of the Court's order on Plaintiffs' Motion for Temporary Restraining Order, the Parties (through Phillips ADR) re-engaged in settlement efforts and engaged in daily communication with Phillips ADR.

40. On August 23, 2022, the Parties reached an agreement in principle on the material terms of a class action settlement, and they executed a Term Sheet on August 26, 2022.

41. For the next few weeks, the Parties continued negotiating the details of the full class action settlement, exchanged multiple rounds of a working settlement document and exhibits, met and conferred telephonically to iron out remaining disputes, vetted and engaged a settlement administrator, and began meeting and conferring with the Platform Providers to design a robust notice and administration plan.

42. On September 19, 2022, the Parties completed execution of the Settlement Agreement.

* * *

43. The court-appointed Settlement Administrator in this case has confirmed to Edelson PC that the Settlement Administration Expenses are anticipated not to exceed $3,000,000.

44. I anticipate the gross Class recovery to be approximately 19.5% of Class Members' Lifetime Spending Amount during the applicable 4-year limitations period.

45. Based on publicly available records, I understand that the market capitalization of DoubleDown Interactive was approximately $482.65 million as of October 2022, and that its net income in 2021 was $78.2 million.

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46. Like the settlements in *Kater*, *Playtika*, *Huuuge*, *Scientific Games*, and *Zynga*, Edelson PC predicts based on their experience that the highest spenders—those who lost more than $100,000—will likely recover more than half of their losses.

47. In this case, Edelson PC worked entirely on contingency, advancing its time as well as a substantial amount of money on costs and expenses.

48. To my knowledge, prior to the *Kater* case, no class action had ever before alleged claims for recovery under Washington's Recover of Money Lost at Gambling Act ("RMLGA"). Certainly, no class action had ever before alleged claims under Washington's RMLGA against social casino companies.

49. Even after the Ninth Circuit's opinion in *Kater*, Edelson PC was the only law firm to file RMLGA claims regarding Defendants' social casino applications.

50. To my knowledge, no court has issued a merits ruling on RMLGA or CPA claims against social casinos, or any claim that social casinos constitute gambling. To my knowledge, no court has certified a nationwide class of consumers bringing RMLGA and CPA claims.

51. Edelson PC staffed these cases leanly and worked efficiently.

52. Briefs were not drafted by committee, but instead assigned to a single attorney who took charge of drafting the arguments, soliciting feedback, and revising accordingly. Where appropriate, primary responsibility for tasks was assigned to more junior attorneys, with partners acting in a supervisory capacity. For example, the majority of the briefing was drafted by associate-level attorneys, not senior partners. And associate-level attorneys took 8 of the 9 depositions of Defendants' witnesses and experts.

* * *

I declare under penalty of perjury that the above and foregoing is true and correct.

Executed on this 13th day of March, 2023 at San Francisco, California.

/s/ Todd Logan

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Exhibit 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

DOUBLE DOWN INTERACTIVE, LLC, a Washington limited liability company, and INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation,

Plaintiffs,

v.

ADRIENNE BENSON, an individual, and MARY SIMONSON, an individual,

Defendants.

No. 20-2-02023-34

COMPLAINT FOR DECLARATORY RELIEF

Plaintiffs Double Down Interactive, LLC ("Double Down") and International Game Technology ("IGT") (together "Plaintiffs"), bring this complaint against Defendants Adrienne Benson ("Benson") and Mary Simonson ("Simonson"), and allege as follows:

I. NATURE OF THE ACTION

1. This is a civil action for declaratory relief concerning whether Plaintiffs have violated Washington's gambling laws by having allegedly operated unlawful gambling games by selling virtual chips which may be used only on games within the DoubleDown Casino "app" or Facebook platform.

2. DoubleDown Casino's video games include online social games that entertain players with a variety of animation and virtual casino situations. The games are free to download, free to play, and never result in monetary prizes. Because players receive free virtual

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chips in a variety of ways, they need not purchase any virtual chips to play. Players first receive free chips when they download the app and later obtain additional free chips. Virtually no Double Down players purchase chips in order to continue to play. In DoubleDown Casino, via either the app or through Facebook, players can obtain additional free virtual chips every day or more often. Players may also receive additional free chips by participating in free promotional offers. Double Down's games never award monetary winnings or real-world prizes. A player cannot "cash out" their virtual chips.

3. Although the games can be played for free, Double Down's games, like many video games, allow players to buy more chips before they receive more free chips. But the player purchases knowing they will receive more free virtual chips that cannot be used outside the game, have no value in the game, and cannot be converted to money or anything else of value.

4. The video game industry, including the development of casual or social games, represents a substantial portion of Washington State's tech-driven economy, employing about 94,200 Washingtonians. Washington ranks third in the country in the total number of active video game developers, with nearly 300 such companies with offices in Washington, including major industry players and household names. Double Down likewise maintains its U.S. headquarters in Seattle, and currently employs almost 150 people in Washington.

5. Defendants Benson and Simonson have played Double Down's games and have advanced claims that their purchase and use of virtual chips in DoubleDown Casino was unlawful gambling under Washington law.

6. Plaintiffs seek a declaration that the sale of virtual chips to Defendants Benson and Simonson to be used only in games played by Benson and Simonson within the DoubleDown Casino is not unlawful gambling under Washington law and that Benson and Simonson may not recover any amounts based upon their allegations that the games they played were unlawful in Washington.

7. Pursuant to RCW 7.24, Plaintiffs are entitled to a declaratory judgment as to the rights, duties, and obligations of the parties under applicable Washington law.

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8. The parties to this case are already parties in a separate federal putative class action in which Benson and Simonson, as named plaintiffs, have asserted state law claims alleging causes of action under the Recovery of Money Lost at Gambling Act, the Consumer Protection Act, as well as for unjust enrichment. A true and correct copy of the Amended Complaint filed in *Benson, et al. v. Double Down Interactive, LLC, et al*., Case No. 2:18-cv-00525 (the "Benson Case") is attached hereto as Exhibit "A."

9. The Benson Case remains in preliminary stages and there have been no decisions on the merits.

10. No Washington state court has considered whether the video games offered by Plaintiffs that offer no cash or merchandise prize is unlawful gambling under Washington law. Plaintiffs bring this suit for the sole purpose to permit the Washington state courts to make this fundamental state law determination.

11. The State of Washington must be allowed to decide the novel issue of what is and what is not gambling within the State of Washington for itself. For this reason, Double Down and IGT have filed a Motion to Dismiss the Benson Case based upon the doctrine of abstention and for a stay of proceedings pending resolution of this state law issue by Washington state courts. A true and correct copy of the Motion for Abstention as filed in the Benson Case is attached hereto as Exhibit "B."

12. This action is necessary and proper in order that Plaintiffs may seek a declaration from this court as to whether or not DoubleDown Casino violates Washington's gambling laws.

II. THE PARTIES

13. Plaintiff Double Down is a limited liability company organized under the laws of the State of Washington with a principal place of business in Seattle, Washington.

14. Plaintiff IGT is a corporation organized under the laws of the State of Nevada with its principal place of business at 6355 South Buffalo Drive, Las Vegas, Nevada, 89113. Double Down Interactive, LLC is a former subsidiary of IGT.

15. Defendant Adrienne Benson is a natural person and a citizen of Spokane County in the state of Washington.

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16. Defendant Mary Simonson is a natural person and a citizen of Thurston County in of the state of Washington.

III. JURISDICTION AND VENUE

17. This Court has jurisdiction over this action pursuant to RCW 2.08.010 and RCW 7.24.010, and because the events giving rise to this litigation took place within the state of Washington.

18. The Court has personal jurisdiction over Defendants Adrienne Benson and Mary Simonson because, based upon information and belief, both reside in Washington.

19. Venue is proper in Thurston County Superior Court pursuant to RCW 4.12.025 because, based upon information and belief, either one or both Defendants reside in Thurston County.

IV. GENERAL ALLEGATIONS

Washington's Video Game Industry

20. The video game industry, including the development of casual or social games – like the DoubleDown Casino games – represents a substantial portion of Washington State's tech-driven economy.

21. The unsettled questions here raise important public policy issues for Washington because they have implications far beyond casino-themed video games. The imposition of civil liability amounting to a full refund of customer purchases and potential criminal penalties could substantially disrupt and dismantle the video game producing industry in Washington and impact thousands of Washingtonians' jobs. This is especially true where the laws of other states do not regard the same games to be gambling. *See Mason v. Mach. Zone, Inc*., 140 F. Supp. 3d 457 (D. Md. 2015) (rejecting claims that free-to-play games constitute gambling) *aff'd*, 851 F.3d 315 (4th Cir. 2017); *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill. 2016) (same); *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871 (N.D. Ill. 2016) (same).

22. The development and sale of video games generate billions of dollars in revenue annually in Washington State. Developers include start-up companies, mid-size businesses, and members of the Fortune 100. There is no meaningful way to distinguish free-to-play casino-

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themed video games offering micro transactions from other free-to-play video games offering micro transactions. A "contest of chance" for purposes of the Washington gambling code (RCW 9.46.0237) is further defined broadly under RCW 9.46.0225 to include any game where "outcome depends in a material degree upon an *element of chance*, notwithstanding that *skill of the contestants may also be a factor.*" *Id*. (emphasis added).

23. Washington first enacted its Recovery of Money Lost at Gambling statute ("RMLGA") in 1879 and the relevant "thing of value" language was enacted in 1987. If Washington's statute is construed to make Washington the *first state* to effectively ban the sale of virtual items purchased in all such video games whose outcome depends in a material degree upon an *element of chance*, even though many Washington State companies employ thousands of people in Washington, that multi-billion-dollar decision should be left to the Washington state courts.

24. Congress mandates "the States," and *not* the federal government (including its judicial branch), "should have the primary responsibility for determining what forms of gambling may legally take place within their borders." 15 U.S.C. 3001(a)(1).

25. Federal courts have recognized repeatedly that the power to regulate gambling is reserved to the states under the Tenth Amendment. *See Murphy v. NCAA*, 584 US 138 S. Ct. 1461, 1478 (2018) (prohibition of state authorization of sports gambling schemes violates the anti-commandeering rule under the Tenth Amendment); *Thomas v. Bible*, 694 F. Supp. 750, (D. Nev. 1988) (licensed gaming is reserved to the states within the meaning of the Tenth Amendment) *aff'd* 896 F.2d 555 (9th Cir. 1990); *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.*, 399 F.3d 1276, 1278 (11th Cir. 2005) (regulation of gambling lies at the "heart of the state's police power" (quoting *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 720 (4th Cir.1999))), *certified question answered*, 948 So. 2d 599 (Fla. 2006); *United States v. King*, 834 F.2d 109, 111 (6th Cir. 1987) (regulation of gambling has been left to the state legislatures); *Medina v. Rudman*, 545 F.2d 244, 251 (1st Cir.1976) (enactment of gambling laws is proper exercise of the state's police power); *Chun v. New York*, 807 F. Supp. 288, 292 (S.D.N.Y. 1992) (scope of laws regulating gambling and lotteries is clearly matter of state concern); *Winshare*

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Club of Canada v. Dep't of Legal Affairs, 542 So. 2d 974, 975 (Fla. 1989) (gambling is "a matter of peculiarly local concern that traditionally has been left to the regulation of the states"); *State v. Rosenthal*, 93 Nev. 36, 44 (1977) ("We view gaming as a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution.").

26. Washington has a complete, careful, and complex statutory and regulatory scheme for gambling, with a rulemaking body, the Washington State Gambling Commission (the "Commission"), that has the authority and the duty to interpret, enforce, and adjudicate the state's gambling laws. To effectuate its intent, the legislature created the Commission. RCW 9.46.040. The Commission has wide powers, including the right "[t]o regulate and establish the type and scope of and manner of conducting the gambling activities authorized by this chapter," RCW 9.46.070(11), as well as "[t]o perform all other matters" to enforce the state's gambling laws, RCW 9.46.070(22). Those powers include the power to both prosecute criminal violations and pursue other, non-criminal remedies. *See, e.g.*, RCW 9.46.210(3) (power to enforce penal gambling laws); RCW 9.46.075 (power to deny or suspend licenses).

27. The Commission considered the subject of social gaming in connection with a public meeting on March 9, 2013 and subsequently posted its guidance in March 2014 that sites such as DoubleDown Casino were not unlawful. It has taken no enforcement action at any time as to DoubleDown Casino or any other so-called "social gaming" web business.

28. In a public meeting on March 9, 2013, Paul Dasaro, Administrator of the Electronic Gambling Lab, and Rick Herrington, Program Manager in the Criminal Intelligence Unit, prepared and gave a staff presentation on "Social Gaming" and the Commission's public meeting. A true and correct copy of the May 9, 2013 Social Gaming Presentation is attached hereto as Exhibit "C." Their presentation to the Commission expressly used DoubleDown Casino as an example. (Exhibit C, p. 12.)

29. The presentation observed that "Social Gaming" was not gambling because the "prize" element of gambling was absent:

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(Exhibit C, p. 17.)

30. The minutes of the Commission's meeting reflect the consideration of the business model now challenged by Defendants:

> The casino-style games in social gaming are characterized by the use of virtual game play credits that players can earn or they can purchase credits to play the game with real money, but the credits cannot be redeemed for real money. The social gaming media makes most of its money from players that are offered the option of purchasing items within the game.

(Exhibit C, p. 21.)

31. The minutes further reflect consideration of how DoubleDown Casino's virtual chips cannot be redeemed for real value, and importantly that "these" companies make their money when people purchase more chips or more time to play with real money:

> One of the most popular poker games is a standard Texas Hold'em game called DoubleDown Casino. Players are sitting at a virtual poker table playing with other real people who can be anywhere in the world. They are playing with virtual chips that can either be purchased or just gained through entering the game. This is a company that was purchased recently by IGT and is an IGT themed slot game. DoubleDown is based out of Seattle. It is an online version of the same game that has been approved for Washington TLS, and is in many jurisdictions throughout the world. Players are using virtual chips and not real chips, and these virtual chips cannot be redeemed for real cash. With DoubleDown's ability to purchase virtual chips, players get 150,000 chips for $3, which they can purchase directly through their Facebook page. Zynga has a different conversion, but is essentially the same concept. Players can purchase more chips or more time to play with real money, which is how these companies make their money.

(Exhibit C, pp. 21-22.)

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32. The conclusion of the presentation was that social games as described was not gambling:

> **Program Manager Rick Herrington** explained that when he looks at any form of gambling, especially on the internet, he applies the basic rules of gambling: chance, consideration, or prize. In each of these games, there are two of the elements, but not the third, which is an actual prize. Players do get virtual prizes and/or an endorphin rush; they can build their avatar and improve their avatar by purchasing other things of the same nature. It is not gambling in the current format according to Washington State law. At any time in the future, if the federal government or Washington State changes its laws, any one of these social platforms could be changed to a real gambling platform overnight.

(Exhibit C, p. 22)

33. After this meeting, in March 2014, the Commission prepared and posted a brochure on its website to give "general guidance" concerning whether social gaming was gambling, entitled "Online Social Gaming – When is it Legal? What to Consider." A true and correct copy of brochure entitled "Online Social Gaming – When is it Legal? What to Consider." is attached hereto as Exhibit "D." The brochure states:

34. Double Down was aware of and relied upon the Commissions' guidance and lack of enforcement at all pertinent times.

35. IGT owned Double Down Interactive LLC at the time of the Commission's May 9, 2013 meeting, and was similarly aware of and relied upon the Commissions' guidance and lack of enforcement at all pertinent times.

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36. Subsequently, in *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 789 (9th Cir. 2018), the Ninth Circuit ruled that a complaint stated a cause of action under Washington's Recovery of Money Lost at Gambling Act and should not have been dismissed. The Ninth Circuit ruled that the plaintiff's allegation that it was necessary to purchase virtual chips in order to continue to play games on Big Fish Casino satisfied the definition of "thing of value" under RCW 9.46.0285, such that Plaintiff stated a cause of action under RCW 9.46.0237. *Id*. *Kater* was not a merits ruling. The reversal of a grant of a motion to dismiss is only a ruling that a complaint alleges a cause of action, and is not a decision on the merits. Moreover, *Kater* is distinguishable from this case because the vast majority of Double Down players, including Benson and Simonson, do not purchase virtual chips in order to continue playing virtual games but to enhance their experience and play games that they wish to play.

37. Nevertheless, immediately after the *Kater* decision, Benson filed the Benson Case against Double Down and IGT. Simonson later joined Benson as a plaintiff when they filed an amended complaint.

38. After the Ninth Circuit's ruling in *Kater*, Big Fish brought a petition before the Commission. The Commission declined to rule on the legality of Big Fish's social casino games, and instead, improperly, yielded to the federal court case. It would be futile for Double Down and IGT to bring a petition before the Commission, since the Commission already stated that it would not decide the issue.

39. Double Down and IGT bring this action because Benson's and Simonson's attempt to use *Kater* to supply a federally issued definition of gambling subjects Double Down not only to parallel oversight but to contradictory oversight. *See Johnson v. Collins Entm't Co.*, 199 F.3d 710, 719-20 (4th Cir. 1999) (federal district court's attempt to interpret certain portions of state statute prohibiting certain forms of gambling "supplanted the legislative, administrative, and judicial processes of South Carolina and sought to arbitrate matters of state law and regulatory policy that are best left to resolution by state bodies."); *see also Metro Riverboat Assocs., Inc. v. Bally's La., Inc.*, 142 F. Supp. 2d 765, 775-76 (E.D. La. 2001) (abstaining from

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deciding RICO claim because it implicated important issues of Louisiana's gaming regulatory scheme).

The Benson Case

40. Adrienne Benson and Mary Simonson, individually and on behalf of a class, filed the Benson Case against Double Down and IGT in the District Court for the Western District of Washington on April 9, 2018.

41. The First Amended Complaint, the operative pleading, filed on July 23, 2018, alleges causes of action for (1) Recovery of Money Lost at Gambling under RCW 4.24.070; (2) violations of the Washington Consumer Protection Act, RCW 19.18.010, *et seq*.; and (3) unjust enrichment.

42. Ms. Benson and Ms. Simonson seek, in part, injunctive relief requiring Double Down and IGT to "cease the operation of their games." (Exhibit A, at ¶ 58.)

43. The allegations are based on Ms. Benson and Ms. Simonson playing DoubleDown Casino games.

44. Ms. Benson alleges that she has been playing DoubleDown Casino on Facebook since 2013, and after losing the balance of her initial allocation of free chips, she purchased chips. Benson alleges she continued playing games within the DoubleDown Casino, and that since 2016, she has lost over $1,000. (Exhibit A, at ¶¶ 33-34.)

45. Ms. Simonson alleges that she has been playing DoubleDown Casino on her mobile phone since 2017, and after losing the balance of her initial allocation of free chips, she purchased chips. Simonson alleges that she continued playing games within the DoubleDown Casino, and that since December 2017, she has lost over $200. (Exhibit A, at ¶¶ 35-36.)

46. For example, the Benson case alleges that the purchase of virtual chips in DoubleDown Casino is unlawful gambling under RCW § 9.46.0237. (See, e.g., Exhibit A, at ¶ 50.)

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FIRST CAUSE OF ACTION
No Right to Recover Money Lost at Gambling Under RCW 4.24.070

47. An actual justiciable controversy exists between Plaintiffs and Defendants with respect to Defendants' claims they are entitled to recover money lost at gambling, pursuant to Washington's "Recovery of Money Lost at Gambling" statute, RCW 4.24.070.

48. RCW 4.24.070 provides that "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."

49. "Gambling" is defined 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.

50. "Thing of value" is defined as "any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise, directly or indirectly, contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge." RCW 9.46.0285.

51. Benson and Simonson are not entitled to any recovery under RCW 4.24.070 with respect to the DoubleDown Casino games because the games in DoubleDown Casino do not constitute "illegal gambling games" and Benson and Simonson have not lost any "thing of value" under Washington law.

52. RCW 9.46.0285 provides in full:

> "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**.

RCW 9.46.0285 (with emphasis).

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53. Synonyms for the verb to "extend" include many terms and ideas, including both to "lengthen" and to "offer." https://synonyms.reverso.net/synonym/en/extend. Benson and Simonson's attempted usage in the context of RCW 9.46.0285 is wrong.

54. The term "extension" relates to "service," to "entertainment" and to "a privilege," all of which are objects in the same sentence. As a basic rule of statutory construction, the term "extension" cannot mean different things in the same sentence. One would not say they lengthened a service, lengthened entertainment or lengthened a privilege "without charge." One would say they offered a service, offered entertainment or offered a privilege "without charge."

55. In addition, under RCW 9.46.0285 the "thing of value" won must be a "form of credit or promise." This term fits grammatically with the idea of a winning a credit or promise to provide a service, entertainment or a privilege without charge. The term does not fit grammatically with the idea of a winning a credit or promise to lengthen a service, entertainment or a privilege without charge. Plaintiffs' shorthand reference to the liability question as extending the time of "gameplay" before more chips must be purchased is a misguided crutch that ignores how the term "extension" is used in RCW 9.46.0285.

56. The purpose of Washington's gambling code can be found in RCW 9.46.010, which states that the purpose of Washington's gambling law is to "keep the ***criminal element*** out of gambling," recognizing the "close relationship between professional gambling and ***organized crime***," while ***not restricting*** "***social pastimes,***" which are "***more for amusement rather than for profit.***" RCW 9.46.010 (emphasis added).

57. Benson and Simonson bought virtual chips without any expectation of "profit," as they were aware at all times that the Double Down games award no cash or prize and that the virtual chips, once purchased, could not be transferred or used for any purpose other than to play games. Paying to play video games, where no cash or merchandize prize can be won, are current-day social pastimes engaged in for amusement and entertainment and are outside the ambit of the legislature's intent behind the gambling code.

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58. Benson and Simonson purchased virtual chips when it was unnecessary to do so in order to continue playing because they still had enough chips to use continue to play DoubleDown Casino.

59. An actual and justiciable controversy exists between Plaintiffs and Defendants concerning whether DoubleDown Casino games are illegal gambling games; whether chips are "things of value", entitling Defendants to recovery lost money under RCW 4.24.070; and whether Benson and Simonson's specific play constituted violations of Washington's gambling laws.

60. For the reasons alleged above, Plaintiffs seek a judicial determination and order from the Court declaring that Defendants are not entitled to recover under RCW 4.24.070, as DoubleDown Casino games are not illegal gambling games; that the virtual chips purchased and used by Benson and Simonson are not "things of value" under Washington law; and that Benson and Simonson's play did not constitute violations of Washington's gambling laws.

SECOND CAUSE OF ACTION
No Violation of Washington's Consumer Protection Act, RCW 19.86.010, *et seq*.

61. Plaintiffs re-allege and incorporate by reference the allegations of Paragraphs 1-59 of this Complaint, as though fully set forth herein.

62. Benson and Simonson allege a right to recover under Washington's Consumer Protection Act, RCW 19.86.010, *et seq*. ("CPA") as a result of the alleged gambling. Benson and Simonson's alleged allegations under the CPA result from their allegations that their play of DoubleDown Casino constituted "gambling." The same state law issues regarding gambling as described above and in the First Cause of Action are determinative of their allegations of CPA violations. Benson and Simonson allege, under RCW 19.86.093, that "a claimant may establish that the act or practice is injurious to the public interest because it ". . . Violates a statute that contains a specific legislative declaration of public interest impact." (Exhibit A ¶ 62; *see* RCW 19.86.093.) Benson and Simonson claim the "public interest" violated by Plaintiffs is established by RCW 9.46.010, which expresses a "public policy" of Washington recognizing the close relationship between professional gambling and organized crime, and seeking to restrain all

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persons from seeking profit from professional gambling activities in this state and all persons from patronizing professional gambling activities. *Id*.

63. An actual justiciable controversy exists between the parties with respect to whether Double Down and IGT have violated the CPA, which prohibits any person from using "unfair methods of competition or unfair or deceptive acts or practices in the conduct of any trade of commerce . . . ." RCW 19.86.020.

64. Double Down and IGT have not violated any Washington statute, including but not limited to Washington's Gambling Act, RCW 9.46.010, *et seq*. ("Gambling Act"), the legislative declaration of which provides:

> The public policy of the state of Washington on gambling is to keep the criminal element out of gambling and to promote the social welfare of the people by limiting the nature and scope of gambling activities and by strict regulation and control.
>
> It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling and organized crime, to restrain all persons from seeking profit from professional gambling activities in this state; to restrain all persons from patronizing such professional gambling activities; to safeguard the public against the evils induced by common gamblers and common gambling houses engaged in professional gambling; and at the same time, both to preserve the freedom of the press and to avoid restricting participation by individuals in activities and social pastimes, which activities and social pastimes are more for amusement rather than for profit, do not maliciously affect the public, and do not breach the peace.

65. Accordingly, an actual and justiciable controversy exists between Plaintiffs and Defendants concerning whether Double Down and IGT have violated the CPA, and the Gambling Act.

66. For the reasons alleged above, Plaintiffs seek a judicial determination and order from the Court declaring that Double Down and IGT have not violated the CPA or the Gambling Act.

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THIRD CAUSE OF ACTION
No Unjust Enrichment

67. Plaintiffs re-allege and incorporate by reference the allegations of Paragraphs 1-65 of this Complaint, as though fully set forth herein.

68. An actual justiciable controversy exists between the parties with respect to whether Plaintiffs have been unjustly enriched in connection with Defendants' playing DoubleDown Casino games.

69. Benson and Simonson's unjust enrichment claim is based on the allegation that DoubleDown Casino constitutes illegal gambling. (Exhibit A, at ¶¶ 72-75.) The same state law issues regarding gambling as described above and in the First Cause of Action are determinative of their allegations of unjust enrichment.

70. Double Down and IGT have not been unjustly enriched, as the DoubleDown Casino is not an unlawful gambling game.

71. Defendants contend that Double Down and IGT "should not be permitted to retain the money obtained from [Defendants] and the members of the Class, which [Double Down and IGT] have unjustly obtained as a result of their unlawful operation of unlawful online gambling games." (Exhibit A, at ¶ 74.)

72. Accordingly, an actual and justiciable controversy exists between Plaintiffs and Defendants concerning whether Double Down and IGT have been unjustly enriched in connection with Defendants' playing DoubleDown Casino games.

73. For the reasons alleged above, Plaintiffs seek a judicial determination and order from the Court declaring that DoubleDown Casino is not an unlawful gambling game and that Double Down and IGT have not been unjustly enriched.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. For a declaration that Benson and Simonson are not entitled to recover under RCW 4.24.070;

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2. For a declaration that the virtual chips purchase and used by Benson and Simonson in DoubleDown Casino games are not "things of value" as defined by RCW 9.46.0285;

3. For a declaration that DoubleDown Casino games played by Benson and Simonson are not illegal gambling games under Washington law;

4. For a declaration that Benson and Simonson's play did not constitute violations of Washington's gambling laws;

5. For a declaration that Plaintiffs have not violated the CPA;

6. For a declaration that Plaintiffs have not been unjustly enriched;

7. For entry of judgment in favor of Plaintiffs for the amount of all costs incurred in this action; and

8. For such other and further relief this Court deems just.

DATED this 10th day of September, 2020.

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ATTESTATION PER GENERAL RULE 30

The e-filing attorney hereby attests that concurrence in the filing of the document has been obtained from each of the other signatories indicated by a conformed signature (s/) within this efiled document.

Dated: September 10, 2020

By *s/ Lauren M. Case*
Lauren M. Case

Attorneys for International Game Technology

EXHIBIT A

THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ADRIENNE BENSON AND MARY SIMONSON, individually and on behalf of all others similarly situated, *Plaintiffs*, *v.* DOUBLE DOWN INTERACTIVE, LLC, a Washington limited liability company, and INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation, *Defendants*.	Case No. 2:18-cv-00525-RBL **FIRST AMENDED CLASS ACTION COMPLAINT** **JURY DEMAND**

Plaintiffs Adrienne Benson and Mary Simonson ("Plaintiffs") bring this case, individually and on behalf of all others similarly situated, against Double Down Interactive, LLC ("Double Down") and International Game Technology ("IGT") (collectively "Defendants") to enjoin Defendants' operation of illegal online casino games. Plaintiffs allege as follows upon personal knowledge as to themselves and their own acts and experiences, and upon information and belief, including investigation conducted by their attorneys, as to all other matters.

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NATURE OF THE ACTION

1. Defendants own and operate video game development companies in the so-called "casual games" industry—that is, computer games designed to appeal to a mass audience of casual gamers. Defendants (at all relevant times) owned and operated a popular online casino under the name Double Down Casino.

2. Double Down Casino is available to play on Android, and Apple iOS devices, and on Facebook.

3. Defendants provide a bundle of free "chips" to first-time visitors of Double Down Casino that can be used to wager on games within Double Down Casino. After consumers inevitably lose their initial allotment of chips, Defendants attempt to sell them additional chips for real money. Without chips, consumers cannot play the gambling game.

4. Freshly topped off with additional chips, consumers wager to win more chips. The chips won by consumers playing Defendants' games of chance are identical to the chips that Defendants sell. Thus, by wagering chips that have been purchased for real money, consumers have the chance to win additional chips that they would otherwise have to purchase.

5. By operating the Double Down Casino, Defendants have violated Washington law and illegally profited from tens of thousands of consumers. Accordingly, Plaintiffs, on behalf of themselves and a Class of similarly situated individuals, bring this lawsuit to recover their losses, as well as costs and attorneys' fees.

PARTIES

6. Plaintiff Adrienne Benson is a natural person and a citizen of the state of Washington.

7. Plaintiff Mary Simonson is a natural person and a citizen of the state of Washington.

8. Defendant Double Down Interactive, LLC is a limited liability company organized and existing under the laws of the State of Washington with its principal place of

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business at 605 Fifth Avenue South, Suite 300, Seattle, Washington 98104. Double Down conducts business throughout this District, Washington State, and the United States.

9. Defendant International Game Technology is a corporation existing and organized under the laws of the State of Nevada with its principal place of business at 6355 South Buffalo Drive, Las Vegas, Nevada 89113. IGT conducts business throughout this District, Washington State, and the United States.

JURISDICTION AND VENUE

10. Federal subject-matter jurisdiction exists under 28 U.S.C. § 1332(d)(2) because (a) at least one member of the class is a citizen of a state different from any Defendants, (b) the amount in controversy exceeds $5,000,000, exclusive of interests and costs, and (c) none of the exceptions under that subsection apply to this action.

11. The Court has personal jurisdiction over Defendants because Defendants conduct significant business transactions in this District, and because the wrongful conduct occurred in and emanated from this District.

12. Venue is proper in this District under 28 U.S.C. § 1391(b) because a substantial part of the evens giving rise to Plaintiffs' claims occurred in and emanated from this District.

FACTUAL ALLEGATIONS

I. Free-to-Play and the New Era of Online Gambling

13. The proliferation of internet-connected mobile devices has led to the growth of what are known in the industry as "free-to-play" videogames. The term is a misnomer. It refers to a model by which the initial download of the game is free, but companies reap huge profits by selling thousands of "in-game" items that start at $0.99 (purchases known as "micro-transactions" or "in-app purchases").

14. The in-app purchase model has become particularly attractive to developers of games of chance (*e.g.*, poker, blackjack, and slot machine mobile videogames, amongst others), because it allows them to generate huge profits. In 2017, free-to-play games of chance generated

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over $3.8 billion in worldwide revenue, and they are expected to grow by ten percent annually.[1] Even "large land-based casino operators are looking at this new space" for "a healthy growth potential."[2]

15. With games of chance that employ the in-game purchase strategy, developers have begun exploiting the same psychological triggers as casino operators. As one respected videogame publication put it:

> "If you hand someone a closed box full of promised goodies, many will happily pay you for the crowbar to crack it open. The tremendous power of small random packs of goodies has long been known to the creators of physical collectible card games and companies that made football stickers a decade ago. For some … the allure of a closed box full of goodies is too powerful to resist. Whatever the worth of the randomised [sic] prizes inside, the offer of a free chest and the option to buy a key will make a small fortune out of these personalities. For those that like to gamble, these crates often offer a small chance of an ultra-rare item."[3]

16. Another stated:

> "Games may influence 'feelings of pleasure and reward,' but this is an addiction to the games themselves; micro-transactions play to a different kind of addiction that has existed long before video games existed, more specifically, an addiction similar to that which you could develop in casinos and betting shops."[4]

17. The comparison to casinos doesn't end there. Just as with casino operators, mobile game developers rely on a small portion of their players to provide the majority of their profits. These "whales," as they're known in casino parlance, account for just "0.15% of players" but provide "over 50% of mobile game revenue."[5]

18. Game Informer, another respected videogame magazine, reported on the rise (and danger) of micro-transactions in mobile games and concluded:

> "[M]any new mobile and social titles target small, susceptible populations for

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[1] GGRAsia – Social casino games 2017 revenue to rise 7pct plus says report, http://www.ggrasia.com/social-casino-games-2017-revenue-to-rise-7pct-plus-says-report/ (last visited Jul. 23, 18)

[2] *Report confirms that social casino games have hit the jackpot with $1.6B in revenue | GamesBeat,* https://venturebeat.com/2012/09/11/report-confirms-that-social-casino-games-have-hit-the-jackpot-with-1-6b-in-revenue/ (last visited Jul. 23, 18)

[3] PC Gamer, *Microtransactions: the good, the bad and the ugly*, http://www.pcgamer.com/microtransactions-the-good-the-bad-and-the-ugly/ (last visited Apr. 5, 2018).

[4] The Badger, *Are micro-transactions ruining video games? | The Badger*, http://thebadgeronline.com/2014/11/micro-transactions-ruining-video-games/ (last visited Apr. 5, 2018).

[5] *Id.* (emphasis added).

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> large percentages of their revenue. If ninety-five people all play a [free-to-play] game without spending money, but five people each pour $100 or more in to obtain virtual currency, the designer can break even. These five individuals are what the industry calls whales, and we tend not to be too concerned with how they're being used in the equation. While the scale and potential financial ruin is of a different magnitude, a similar profitability model governs casino gambling."[6]

19. Academics have also studied the socioeconomic effect games that rely on in-app purchases have on consumers. In one study, the authors compiled several sources analyzing so-called free-to-play games of chance (called "casino" games below) and stated that:

> "[Researchers] found that [free-to-play] casino gamers share many similar sociodemographic characteristics (*e.g.*, employment, education, income) with online gamblers. Given these similarities, it is perhaps not surprising that a strong predictor of online gambling is engagement in [free-to-play] casino games. Putting a dark line under these findings, over half (58.3%) of disordered gamblers who were seeking treatment stated that social casino games were their first experiences with gambling."
>
> …
>
> "According to [another study], the purchase of virtual credits or virtual items makes the activity of [free-to-play] casino gaming more similar to gambling. Thus, micro-transactions may be a crucial predictor in the migration to online gambling, as these players have now crossed a line by paying to engage in these activities. Although, [sic] only 1–5% of [free-to-play] casino gamers make micro-transactions, those who purchase virtual credits spend an average of $78. Despite the limited numbers of social casino gamers purchasing virtual credits, revenues from micro-transactions account for 60 % of all [free-to-play] casino gaming revenue. Thus, a significant amount of revenue is based on players' desire to purchase virtual credits above and beyond what is provided to the player in seed credits."[7]

20. The same authors looked at the link between playing free-to-play games of chance and gambling in casinos. They stated that "prior research indicated that winning large sums of virtual credits on social casino gaming sites was a key reason for [consumers'] migration to online gambling," yet the largest predictor that a consumer will transition to online gambling was "micro-transaction engagement." In fact, "the odds of migration to online gambling were

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[6] Game Informer, *How Microtransactions Are Bad For Gaming - Features - www.GameInformer.com*, http://www.gameinformer.com/b/features/archive/2012/09/12/how-microtransactions-are-bad-for-gaming.aspx?CommentPosted=true&PageIndex=3 (last visited Apr. 5, 2018)

[7] Hyoun S. Kim, Michael J. A. Wohl, *et al.*, *Do Social Casino Gamers Migrate to Online Gambling? An Assessment of Migration Rate and Potential Predictors*, Journal of gambling studies / co-sponsored by the National Council on Problem Gambling and Institute for the Study of Gambling and Commercial Gaming (Nov. 14, 2014), *available at* http://link.springer.com/content/pdf/10.1007%2Fs10899-014-9511-0.pdf (citations omitted).

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approximately *eight times greater* among people who made micro-transactions on [free-to-play] casino games compared to [free-to-play] casino gamers who did not make micro-transactions."[8]

21. The similarity between micro-transaction games of chance and games of chance found in casinos has caused governments across the world to intervene to limit their availability.[9] Unfortunately, such games have eluded regulation in the United States. As a result, and as described below, Defendants' online casino games have thrived and thousands of consumers have spent millions of dollars unwittingly playing Defendants' unlawful games of chance.

II. A Brief Introduction to Double Down and IGT

22. Double Down is a leading game developer with an extensive library of free-to-play online casino games. Double Down sells in-app chips to consumers in the Double Down Casino so that consumers can play various online casino games in Double Down Casino.

23. IGT is a global leader in the gaming industry with long ties to the traditional casino market. It has developed a multitude of casino and lottery games, including traditional slot machines and video lottery terminals. In 2012, IGT acquired Double Down and its library of online casino games, and has since "grown into one of the largest and most successful brands in the North American social casino market."[10]

24. In 2017, IGT sold Double Down for $825 million to DoubleU Games.[11] In addition to the sale, IGT has also entered into a long-term game development and distribution

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[8] *Id.* (emphasis added).

[9] In late August 2014, South Korea began regulating "social gambling" games, including games similar to Defendants', by "ban[ning] all financial transactions directed" to the games. PokerNews.com, *Korea Shuts Down All Facebook Games In Attempt To Regulate Social Gambling | PokerNews*, https://www.pokernews.com/news/2014/09/korea-shuts-down-facebook-games-19204 htm (last visited Apr. 5, 2018). Similarly, "the Maltese Lotteries and Gambling Authority (LGA) invited the national Parliament to regulate all digital games with prizes by the end of 2014." *Id.*

[10] *IGT To Sell Online Casino Unit DoubleDown To South Korean Firm For $825 Million - Poker News,* https://www.cardplayer.com/poker-news/21554-igt-to-sell-online-casino-unit-doubledown-to-south-korean-firm-for-825-million (last visited Ap. 6, 2018).

[11] *Id.*

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agreement with DoubleU to offer its online casino games in Double Down Casino.[12] IGT notes that it will continue to collect royalties from its online casino game content.[13]

25. Defendants have made large profits through their online casino games. In 2016, alone, Double Down generated $280 million in revenue. As explained further below, however, the revenue Defendants receives from Double Down Casino is the result of operating unlawful games of chance camouflaged as innocuous videogames.

III. Defendants' Online Casino Contains Unlawful Games of Chance

26. Consumers visiting Double Down Casino for the first time are awarded 1 million free chips. *See* Figure 1. These free sample chips offer a taste of gambling and are designed to encourage player to get hooked and buy more chips for real money.

(**Figure 1.**)

27. After they begin playing, consumers quickly lose their initial allotment of chips. Immediately thereafter, Double Down Casino informs them via a "pop up" screen that they have "insufficient funds." *See* Figure 2. Once a player runs out of their allotment of free chips, they

[12] *IGT Completes Sale Of Double Down Interactive LLC To DoubleU Games,* https://www.prnewswire.com/news-releases/igt-completes-sale-of-double-down-interactive-llc-to-doubleu-games-300467524.html (last visited Apr. 6, 2018).

[13] *Id.*

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cannot continue to play the game without buying more chips for real money.

(**Figure 2**.)

28. To continue playing the online casino game, consumers navigate to Double Down Casino's electronic store to purchase chips ranging in price from $2.99 for 300,000 chips to $99.99 for 100,000,000 chips. *See* Figure 3.

(**Figure 3.**)

29. The decision to sell chips by the thousands isn't an accident. Rather, Defendants

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attempt to lower the perceived cost of the chips (costing just a fraction of a penny per chip) while simultaneously maximizing the value of the award (awarding millions of chips in jackpots), further inducing consumers to bet on their games.

30. To begin wagering, players select the "LINE BET" that will be used for a spin, as illustrated in Figure 4. Double Down Casino allows players to increase or decrease the amount he or she can wager and ultimately win (or lose). Double Down Casino allows players to multiply their bet by changing the number of "lines" (*i.e.*, combinations) on which the consumer can win, shown in Figure 4 as the "LINE" button.

(Figure 4.)

31. Once a consumer spins the slot machine by pressing "SPIN" button, no action on his or her part is required. Indeed, none of the Double Down Casino games allow (or call for) any additional user action. Instead, the consumer's computer or mobile device communicates with and sends information (such as the "TOTAL BET" amount) to the Double Down Casino servers. The servers then execute the game's algorithms that determine the spin's outcome. Notably, none of Defendants' games depend on any amount of skill to determine their outcomes—all outcomes are based entirely on chance.

32. Consumers can continue playing with the chips that they won, or they can exit the game and return at a later time to play because Double Down Casino maintains win and loss records and account balances for each consumer. Indeed, once Defendants' algorithms determine the outcome of a spin and Double Down Casino displays the outcome to the consumer, Defendants adjusts the consumer's account balance. Defendants keep records of each wager, outcome, win, and loss for every player.

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FACTS SPECIFIC TO PLAINTIFF BENSON

33. Since 2013, Plaintiff Benson has been playing Double Down Casino on Facebook. After Benson lost the balance of her initial allocation of free chips, she purchased chips from the Double Down Casino electronic store.

34. Thereafter, Benson continued playing various slot machines and other games of chance within the Double Down Casino where she would wager chips for the chance of winning additional chips. Since 2016, Benson has wagered and lost (and Defendants therefore won) over $1,000 at Defendants' games of chance.

FACTS SPECIFIC TO PLAINTIFF SIMONSON

35. Since 2017, Plaintiff Simonson has been playing Double Down Casino on her mobile phone. After Simonson lost the balance of her initial allocation of free chips, she purchased chips from the Double Down Casino electronic store.

36. Thereafter, Simonson continued playing various slot machines and other games of chance within the Double Down Casino where she would wager chips for the chance of winning additional chips. Since December 2017, Simonson has wagered and lost (and Defendants therefore won) over $200 at Defendants' games of chance.

CLASS ALLEGATIONS

37. **Class Definition**: Plaintiffs Benson and Simonson bring this action pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3) on behalf of themselves and a Class of similarly situated individuals, defined as follows:

> All persons in the United States who purchased and lost chips by wagering at the Double Down Casino.

The following people are excluded from the Class: (1) any Judge or Magistrate presiding over this action and members of their families; (2) Defendants, Defendants' subsidiaries, parents, successors, predecessors, and any entity in which the Defendants or their parents have a controlling interest and their current or former employees, officers and directors; (3) persons who properly execute and file a timely request for exclusion from the Class; (4) persons whose claims

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in this matter have been finally adjudicated on the merits or otherwise released; (5) Plaintiffs' counsel and Defendants' counsel; and (6) the legal representatives, successors, and assigns of any such excluded persons.

38. **Numerosity**: On information and belief, tens of thousands of consumers fall into the definition of the Class. Members of the Class can be identified through Defendants' records, discovery, and other third-party sources.

39. **Commonality and Predominance**: There are many questions of law and fact common to Plaintiffs' and the Class's claims, and those questions predominate over any questions that may affect individual members of the Class. Common questions for the Class include, but are not necessarily limited to the following:

a. Whether Double Down Casino games are "gambling" as defined by RCW 9.46.0237;

b. Whether Defendants are the proprietors for whose benefit the online casino games are played;

c. Whether Plaintiffs and each member of the Class lost money or anything of value by gambling;

d. Whether Defendants violated the Washington Consumer Protection Act, RCW 19.86.010, *et seq.*; and

e. Whether Defendants have been unjustly enriched as a result of their conduct.

40. **Typicality**: Plaintiffs' claims are typical of the claims of other members of the Class in that Plaintiffs' and the members of the Class sustained damages arising out of Defendants' wrongful conduct.

41. **Adequate Representation**: Plaintiffs will fairly and adequately represent and protect the interests of the Class and have retained counsel competent and experienced in complex litigation and class actions. Plaintiffs' claims are representative of the claims of the other members of the Class, as Plaintiffs and each member of the Class lost money playing

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Defendants' games of chance. Plaintiffs also have no interests antagonistic to those of the Class, and Defendants have no defenses unique to Plaintiffs. Plaintiffs and their counsel are committed to vigorously prosecuting this action on behalf of the Class and have the financial resources to do so. Neither Plaintiffs nor their counsel have any interest adverse to the Class.

42. **Policies Generally Applicable to the Class**: This class action is appropriate for certification because Defendants have acted or refused to act on grounds generally applicable to the Class as a whole, thereby requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the members of the Class and making final injunctive relief appropriate with respect to the Class as a whole. Defendants' policies that Plaintiffs challenges apply and affect members of the Class uniformly, and Plaintiffs' challenge of these policies hinges on Defendants' conduct with respect to the Class as a whole, not on facts or law applicable only to Plaintiffs. The factual and legal bases of Defendants' liability to Plaintiffs and to the other members of the Class are the same.

43. **Superiority**: This case is also appropriate for certification because class proceedings are superior to all other available methods for the fair and efficient adjudication of this controversy. The harm suffered by the individual members of the Class is likely to have been relatively small compared to the burden and expense of prosecuting individual actions to redress Defendants' wrongful conduct. Absent a class action, it would be difficult if not impossible for the individual members of the Class to obtain effective relief from Defendants. Even if members of the Class themselves could sustain such individual litigation, it would not be preferable to a class action because individual litigation would increase the delay and expense to all parties and the Court and require duplicative consideration of the legal and factual issues presented. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single Court. Economies of time, effort, and expense will be fostered and uniformity of decisions will be ensured.

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44. Plaintiffs reserve the right to revise the foregoing "Class Allegations" and "Class Definition" based on facts learned through additional investigation and in discovery.

FIRST CAUSE OF ACTION
Violations of Revised Code of Washington 4.24.070
(On behalf of Plaintiffs and the Class)

45. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

46. Plaintiffs, members of the Class, and Defendants are all "persons" as defined by RCW 9.46.0289.

47. The state of Washington's "Recovery of money lost at gambling" statute, RCW 4.24.070, provides that "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."

48. "Gambling," defined by RCW 9.46.0237, "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."

49. Defendants' "chips" sold for use at the Double Down Casino are "thing[s] of value" under RCW § 9.46.0285.

50. Double Down Casino games are illegal gambling games because they are online games at which players wager things of value (the chips) and by an element of chance (*e.g.*, by spinning an online slot machine) are able to obtain additional entertainment and extend gameplay (by winning additional chips).

51. Defendants Double Down and IGT are the proprietors for whose benefit the online gambling games are played because they operate the Double Down Casino games and/or derive profit from their operation.

52. As such, Plaintiffs and the Class gambled when they purchased chips to wager at Double Down Casino. Plaintiffs and each member of the Class staked money, in the form of chips purchased with money, at Defendants' games of chance (*e.g.*, Double Down Casino slot

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machines and other games of chance) for the chance of winning additional things of value (*e.g.*, chips that extend gameplay without additional charge).

53. In addition, Double Down Casino games are not "pinball machine[s] or similar mechanical amusement device[s]" as contemplated by the statute because:

a. the games are electronic rather than mechanical;

b. the games confer replays but they are recorded and can be redeemed on separate occasions (*i.e.*, they are not "immediate and unrecorded"); and

c. the games contain electronic mechanisms that vary the chance of winning free games or the number of free games which may be won (*e.g.*, the games allow for different wager amounts).

54. RCW 9.46.0285 states that a "'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."

55. The "chips" Plaintiffs and the Class had the chance of winning in Double Down Casino games are "thing[s] of value" under Washington law because they are credits that involve the extension of entertainment and a privilege of playing a game without charge.

56. Double Down Casino games are "Contest[s] of chance," as defined by RCW 9.46.0225, because they are "contest[s], game[s], gaming scheme[s], or gaming device[s] in which the outcome[s] depend[] in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." Defendants' games are programmed to have outcomes that are determined entirely upon chance and a contestant's skill does not affect the outcomes.

57. RCW 9.46.0201 defines "Amusement game[s]" as games where "The outcome depends in a material degree upon the skill of the contestant," amongst other requirements. Double Down Casino games are not "Amusement game[s]" because their outcomes are

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dependent entirely upon chance and not upon the skill of the player and because the games are "contest[s] of chance," as defined by RCW 9.46.0225.

58. As a direct and proximate result of Defendants' operation of their Double Down Casino games, Plaintiffs and each member of the Class have lost money wagering at Defendants' games of chance. Plaintiffs, on behalf of themselves and the Class, seek an order (1) requiring Defendants to cease the operation of their games; and/or (2) awarding the recovery of all lost monies, interest, and reasonable attorneys' fees, expenses, and costs to the extent allowable.

SECOND CAUSE OF ACTION
Violations of the Washington Consumer Protection Act, RCW 19.86.010, *et seq.*
(On behalf of Plaintiffs and the Class)

59. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

60. Washington's Consumer Protection Act, RCW § 19.86.010 *et seq.* ("CPA"), protects both consumers and competitors by promoting fair competition in commercial markets for goods and services.

61. To achieve that goal, the CPA prohibits any person from using "unfair methods of competition or unfair or deceptive acts or practices in the conduct of any trade or commerce. . . ." RCW § 19.86.020.

62. The CPA states that "a claimant may establish that the act or practice is injurious to the public interest because it . . . Violates a statute that contains a specific legislative declaration of public interest impact."

63. Defendants violated RCW § 9.46.010, *et seq.* which declares that:

> "The public policy of the state of Washington on gambling is to keep the criminal element out of gambling and to promote the social welfare of the people by limiting the nature and scope of gambling activities and by strict regulation and control.
>
> It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling and organized crime, to restrain all persons from seeking profit from professional gambling activities in this state; to restrain all persons from patronizing such professional gambling activities; to safeguard the public against the evils induced by common gamblers and common gambling houses engaged in professional gambling; and at the same time, both to preserve the freedom of the press and to avoid restricting participation by individuals in activities and social pastimes, which activities and social pastimes

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> are more for amusement rather than for profit, do not maliciously affect the public, and do not breach the peace."

64. Defendants have violated RCW § 9.46.010, *et seq.*, because the Double Down Casino games are illegal online gambling games as described in ¶¶ 42-55 *supra.*

65. Defendants' wrongful conduct occurred in the conduct of trade or commerce—*i.e.*, while Defendants were engaged in the operation of making computer games available to the public.

66. Defendants' acts and practices were and are injurious to the public interest because Defendants, in the course of their business, continuously advertised to and solicited the general public in Washington state and throughout the United States to play their unlawful online casino games of chance. This was part of a pattern or generalized course of conduct on the part of Defendants, and many consumers have been adversely affected by Defendants' conduct and the public is at risk.

67. Defendants have profited immensely from their operation of unlawful games of chance, amassing hundreds of millions of dollars from the losers of their games of chance.

68. As a result of Defendants' conduct, Plaintiffs and the Class members were injured in their business or property—*i.e.*, economic injury—in that they lost money wagering on Defendants' unlawful games of chance.

69. Defendants' unfair or deceptive conduct proximately caused Plaintiffs' and the Class members' injuries because, but for the challenged conduct, Plaintiffs and the Class members would not have lost money wagering at or on Defendants' games of chance, and they did so as a direct, foreseeable, and planned consequence of that conduct.

70. Plaintiffs, on their own behalf and on behalf of the Class, seek to enjoin further violation and recover actual damages and treble damages, together with the costs of suit, including reasonable attorneys' fees.

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THIRD CAUSE OF ACTION
Unjust Enrichment
(On behalf of Plaintiffs and the Class)

71. Plaintiffs incorporate by reference the foregoing allegations as if fully set forth herein.

72. Plaintiffs and the Class have conferred a benefit upon Defendants in the form of the money Defendants received from them for the purchase of chips to wager on Double Down Casino games.

73. Defendants appreciate and/or have knowledge of the benefits conferred upon them by Plaintiffs and the Class.

74. Under principles of equity and good conscience, Defendants should not be permitted to retain the money obtained from Plaintiffs and the members of the Class, which Defendants have unjustly obtained as a result of their unlawful operation of unlawful online gambling games. As it stands, Defendants have retained millions of dollars in profits generated from their unlawful games of chance and should not be permitted to retain those ill-gotten profits.

75. Accordingly, Plaintiffs and the Class seek full disgorgement and restitution of any money Defendants have retained as a result of the unlawful and/or wrongful conduct alleged herein.

PRAYER FOR RELIEF

Plaintiffs Adrienne Benson and Mary Simonson, individually and on behalf of all others similarly situated, respectfully request that this Court enter an Order:

a) Certifying this case as a class action on behalf of the Class defined above, appointing Adrienne Benson and Mary Simonson as representatives of the Class, and appointing their counsel as class counsel;

b) Declaring that Defendants' conduct, as set out above, violates the CPA;

c) Entering judgment against Defendants, in the amount of the losses suffered by Plaintiffs and each member of the Class;

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d) Enjoining Defendants from continuing the challenged conduct;

e) Awarding damages to Plaintiffs and the Class members in an amount to be determined at trial, including trebling as appropriate;

f) Awarding restitution to Plaintiffs and the Class members in an amount to be determined at trial, and requiring disgorgement of all benefits that Defendants unjustly received;

g) Awarding reasonable attorney's fees and expenses;

h) Awarding pre- and post-judgment interest, to the extent allowable;

i) Entering judgment for injunctive and/or declaratory relief as necessary to protect the interests of Plaintiffs and the Class; and

j) Awarding such other and further relief as equity and justice require.

JURY DEMAND

Plaintiffs request a trial by jury of all claims that can be so tried.

Respectfully Submitted,

ADRIENNE BENSON AND MARY SIMONSON, individually and on behalf of all others similarly situated,

Dated: July 23, 2018

By: /s/ Janissa A. Strabuk
One of Plaintiffs' Attorneys

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**Pro hac vice* admission granted.

Attorneys for Plaintiffs and the Putative Class

EXHIBIT B

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ADRIENNE BENSON AND MARY SIMONSON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DOUBLE DOWN INTERACTIVE, LLC, a Washington limited liability company, and INTERNATIONAL GAME TECHNOLOGY, a Nevada Corporation,

Defendants.

Case No. 2:18-cv-00525-RSL

DEFENDANTS' MOTION TO DISMISS UNDER FED. R. CIV P. 12(B)(1) AND MOTION TO ABSTAIN

ORAL ARGUMENT REQUESTED

NOTE ON MOTION CALENDAR: October 9, 2020

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I. INTRODUCTION

Critical concepts of state sovereignty and federalism make this case the "exceptional circumstance" where this Court should abstain from exercising jurisdiction to permit the Washington state courts to address "difficult questions of state law bearing on policy problems of substantial public import" under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976), and the related federal abstention principles articulated in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), *Railroad Commission of Texas v. Pullman Co*., 312 U.S. 496, 500-01 (1941), and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Double Down Interactive, LLC ("Double Down") and International Game Technology ("IGT") respectfully move that this Court to abstain and stay this matter pending resolution of unsettled state law by the Washington courts.

Gambling laws are an area where state law has long been preeminent. Plaintiffs' claims rest on novel and untested interpretations of Washington's gambling laws that, when resolved, will be determinative of Defendants' ultimate liability. No Washington court has determined whether the mere extension of time playing any game may serve as a "thing of value" under RCW 9.46.0285 and how the law may apply when players purchase virtual chips for purposes other than to extend gameplay. These questions, and others about the interplay of civil liability under a criminal statute, transcend this case and impact the entire online gaming industry in Washington. The interpretation of these unsettled questions regarding Washington's gambling statutes should be left for Washington courts to decide. Moreover, Washington has a coherent administrative structure set by statute. The Washington State Gambling Commission ("Commission") has exclusive authority to enforce the state's gambling statutes. This state regulatory system militates toward this Court abstaining from hearing this case to allow the state to interpret its own gambling laws, especially given that the Commission previously published guidance explicitly stating that DoubleDown Casino, the game at issue here, did not violate Washington law. Thus, because it is inappropriate for this Court, or any federal court, to adjudicate these fundamental state law issues, this Court should abstain from interpreting Washington's gambling laws, yield that interpretation to the Washington state courts, and stay this action pending the Washington courts' resolution.

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II. FACTUAL BACKGROUND

A. Allegations in the First Amended Complaint

Plaintiffs' First Amended Complaint does not allege any federal law questions. *See generally* Dkt. 41. Instead, Plaintiffs allege state law causes of action against Double Down and IGT for Recovery of Money Lost at Gambling under RCW 4.24.070; Violation of Washington Consumer Protection Act under RCW 19.86.010 *et seq.*; and Unjust Enrichment. Dkt. 41 ¶¶ 45-75. Each of the allegations is premised upon the theory that Plaintiffs' purchases of virtual chips in DoubleDown Casino are unlawful gambling under RCW 9.46.0237[1] and rests on their interpretation that virtual chips "are 'thing[s] of value' under RCW 9.46.0285[2] because they are credits that involve the "extension of entertainment and a privilege of playing a game without charge." Dkt. 41 at 14:16-18. Plaintiffs also seek injunctive relief requiring Defendants to "cease the operation of their games." *Id.* ¶ 58. Defendants deny these allegations. Dkt. 74 at 20:1-2, 21:17.

Double Down and IGT did not choose this forum. Plaintiffs commenced this action asserting state law claims only, invoking jurisdiction of the federal court under the Class Action Fairness Act. Dkt. 41 ¶ 10.

B. The State Law Issues Presented Are Undecided by Any Washington Court

Double Down's video games include social games that entertain players with a variety of animation and virtual situations. Dkt. 104 ¶ 2. The games are free to download, free to play, and never result in monetary prizes. *Id*. Because players receive free virtual chips in a variety of ways, they need not purchase any virtual chips to play. *Id*. Players first receive free chips when they download the app and later obtain additional free chips. *Id*. In fact, contrary to the

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[1] "'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." RCW 9.46.0237.

[2] Under RCW 9.46.0285, "[t]hing of value" . . . "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."

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allegations of Plaintiffs that users must purchase virtual coins in order to play,[3] virtually no Double Down players purchase chips in order to continue to play. *Id*. A player cannot "cash out" their virtual chips. *Id*. Nor may players sell or transfer their accounts or any virtual chips in their account to another person. *Id.* Although the games can be played for free, Double Down's games, like many video games, allow players to buy more chips before they receive more free chips. *Id*.

The video game industry, including the development of casual or social games, represents a substantial portion of Washington's tech-driven economy, employing about 94,200 Washingtonians. *Id.* ¶¶ 4-9 & Exs. 1-4. Washington ranks third in the country in the total number of active video game developers, with nearly 300 such companies with offices in Washington, including major industry players and household names. *Id.* ¶ 4. Double Down likewise maintains its U.S. headquarters in Seattle, and currently employs almost 150 people in Washington. *Id.* ¶ 5.

C. The Commission Has Approved the Games in Question.

The Commission considered the subject of social gaming in connection with a public meeting on March 9, 2013, and subsequently posted its guidance in March 2014, that games such as DoubleDown Casino were not unlawful. In the March 9, 2013, public meeting, Paul Dasaro, Administrator of the Electronic Gambling Lab, and Rick Herrington, Program Manager in the Criminal Intelligence Unit, prepared and gave a staff presentation on "Social Gaming" at the Commission's public meeting. Social Gaming Presentation, May 9, 2013, Dkt. 107, Ex. 1. Their presentation to the Commission used DoubleDown Casino as an example. Dkt. 107 at 12. The presentation observed that "Social Gaming" was not gambling because the "prize" element of gambling was absent:

[3] Dkt. 41 ¶¶ 33, 35.

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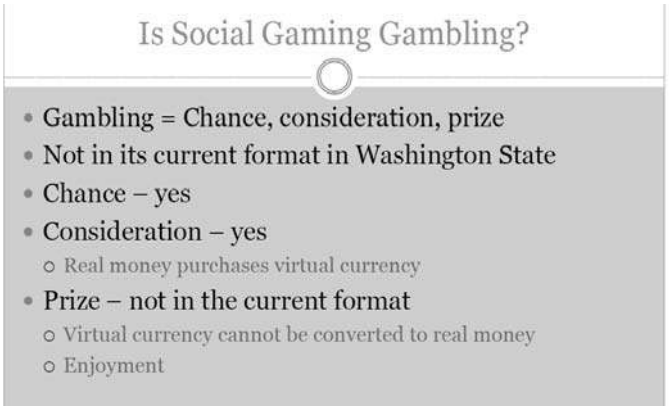

Id. at 17.

The Commission considered "casino-style games . . . characterized by the use of virtual game play credits," the exact business model now challenged by Plaintiffs. *Id*. at 21. In fact, the Commission commented on DoubleDown Casino:

> One of the most popular poker games is a standard Texas Hold'em game called DoubleDown Casino. Players are sitting at a virtual poker table playing with other real people who can be anywhere in the world. They are playing with virtual chips that can either be purchased or just gained through entering the game. This is a company that was purchased recently by IGT and is an IGT themed slot game. DoubleDown is based out of Seattle. It is an online version of the same game that has been approved for Washington TLS, and is in many jurisdictions throughout the world. Players are using virtual chips and not real chips, and these virtual chips cannot be redeemed for real cash. With DoubleDown's ability to purchase virtual chips, players get 150,000 chips for $3, which they can purchase directly through their Facebook page. Zynga has a different conversion, but is essentially the same concept. Players can purchase more chips or more time to play with real money, which is how these companies make their money.

Id. at 21-22.

The conclusion of the project and presentation requested by the Commission was that the games were **not** gambling because there was no prize:

> **Program Manager Rick Herrington** explained that when he looks at any form of gambling, especially on the internet, he applies the basic rules of gambling: chance, consideration, or prize. In each of these games, there are two of the elements, but not the third, which is an actual prize. Players do get virtual prizes and/or an endorphin rush; they can build their avatar and improve their avatar by purchasing other things of the same nature. **It is not gambling in the current format according to Washington State law**. At any time in the future, if the federal government or Washington State changes its laws, any one of these social platforms could be changed to a real gambling platform overnight.

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Id. at 22 (emphasis added).

After this meeting, the Commission acted consistently with the presentation and its conclusion that the Double Down games were not gambling under Washington law. In March 2014, the Commission prepared and posted a brochure on its website to give "general guidance" to the public confirming that social gaming was not gambling, entitled "Online Social Gaming – When is it Legal? What to Consider." Dkt. 107, Ex. 3. The brochure states:

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.

Id. at 49, Ex. 3.

DDI was aware of and relied upon the Commission's guidance and lack of enforcement at all pertinent times. IGT owned Double Down Interactive LLC at the time of the Commission's May 9, 2013 meeting, and was similarly aware of and relied upon the Commission's guidance and lack of enforcement at all pertinent times.

D. Procedural Status of the Lawsuit

This case is in its early stages. In the two years since the original Complaint was filed, the parties have litigated only whether Plaintiffs agreed to arbitration. After an appeal on the requirement to arbitrate, the case returned to this Court on February 20, 2020. Dkt. 88. The Court

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has ruled on cross-motions for protective orders and a motion to compel regarding discovery issues, Dkt. 126, and denied Defendants' Motion to Certify Questions to the Washington Supreme Court, Dkt. 127, which Defendants have timely moved to reconsider, Dkt. 133. Defendants have also moved to strike nationwide class allegations. Dkt. 128.

Defendants have filed a declaratory judgment action in Thurston County Superior Court asking the court to issue a declaration that (1) the virtual chips purchased and used by Benson and Simonson in DoubleDown Casino are not "things of value" as defined by RCW 9.46.0285; (2) that DoubleDown Casino games played by Benson and Simonson are not illegal gambling games under Washington law; (3) that Benson and Simonson are not entitled to recover under RCW 4.24.070, the Washington Consumer Protection Act, RCW 19.18.010, *et seq*. or for unjust enrichment. *See* Exhibit 1, Complaint for Declaratory Relief (without exhibits).

III. LEGAL STANDARDS

A motion to dismiss filed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure "allow[s] a party to challenge the subject matter jurisdiction of the district court to hear a case." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). In a Rule 12(b)(1) motion, the burden of proving that jurisdiction exists falls to the party asserting jurisdiction. *Ramming*, 281 F.3d at 161.

Multiple federal abstention doctrines support this Court in abstaining from exercising jurisdiction here. Under the *Colorado River* doctrine, a court considers whether concurrent adjudication with a state court action is appropriate based on considerations of "wise judicial administration, giving regard to conservation of judicial resources, and comprehensive disposition of litigation." *Colorado River*, 424 U.S. at 817 (citation & internal quotation marks omitted). Abstention is likewise appropriate under *Thibodaux* where a case "present[s] difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result" in that particular case. *Id.* at 814 (citing *Thibodaux*, 360 U.S. 25). The Ninth Circuit considers the following eight-factor test when considering *Colorado River* abstention:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or

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> state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

Seneca Ins. Co. v. Strange Land, Inc., 862 F.3d 835, 841-42 (9th Cir. 2017) (quoting *R.R. Street & Co. v. Transp. Ins. Co.*, 656 F.3d 966, 978-79 (9th Cir. 2011)).

Under *Burford*, abstention is appropriate where (1) the case presents a difficult issue of state law, (2) the case is in an area of important state policy, and (3) there is a unified state enforcement mechanism for the rights in question. *Burford*, 319 U.S. at 333-34.

Similarly, abstention is appropriate under *Pullman* where a three-pronged test, including considerations of sensitive social policy, constitutional issues, and uncertainty of state law is considered. *Canton v. Spokane Sch. Dist. No. 81*, 498 F.2d 840, 845 (9th Cir. 1974) (quoting *Pullman*, 312 U.S. at 498-99).

When abstention is warranted, in a case involving money damages, the appropriate remedy is for the court to stay the federal action pending the resolution of the state court issues by the state court. *See Quackenbush v. Allstate Ins. Co*., 517 U.S. 706, 721 (1996) (federal courts must only stay actions for damages based on abstention).

IV. ARGUMENT

This case presents the "exceptional circumstances" required under a myriad of decisions explaining the fundamental concept that federal courts should abstain from exercising their jurisdiction under certain circumstances. "[T]he proposition that a court having jurisdiction must exercise it, is not universally true." *Id.* at 716 (quoting *Canada Malting Co. v. Patterson S.S.*, 285 U.S. 413, 422 (1932)). The principles underlying the abstention doctrine reflect "our federal system whereby the federal courts, exercising a wise discretion, restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal judiciary." *Pullman*, 312 U.S. at 500-01 (internal quotation marks omitted). Abstention here, where this Court's determination and interpretation of Washington's gambling laws intrudes on state sovereignty, is proper when considering "proper constitutional adjudication," "regard for federal-state relations," and "wise judicial administration." *Colorado*

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River, 424 U.S. at 817.

A. Abstention Is Required Because the Interpretation and Application of Gambling Laws Are Reserved for the States.

The Constitution reserves issues regarding state gambling laws for state self-determination under the Tenth Amendment. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018) (prohibition of state authorization of sports gambling schemes violates the anti-commandeering rule under the Tenth Amendment); *Thomas v. Bible*, 694 F. Supp. 750, 760 (D. Nev. 1988) (licensed gaming is reserved to the states under the Tenth Amendment), *aff'd*, 896 F.2d 555 (9th Cir. 1990)); *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.*, 399 F.3d 1276, 1278 (11th Cir. 2005) (regulation of gambling lies at the "heart of the state's police power" (quoting *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 720 (4th Cir. 1999))), *certified question answered*, 948 So. 2d 599 (Fla. 2006); *United States v. King*, 834 F.2d 109, 111 (6th Cir. 1987) (regulation of gambling has been left to the state legislatures); *Medina v. Rudman*, 545 F.2d 244, 251 (1st Cir. 1976) (enactment of gambling laws is proper exercise of the state's police power); *Chun v. New York*, 807 F. Supp. 288, 292 (S.D.N.Y. 1992) (scope of laws regulating gambling and lotteries is clearly matter of state concern); *Winshare Club of Canada v. Dep't of Legal Affairs*, 542 So. 2d 974, 975 (Fla. 1989) (gambling is "a matter of peculiarly local concern that traditionally has been left to the regulation of the states"); *State v. Rosenthal*, 93 Nev. 36, 44 (1977) ("We view gaming as a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution.").

In addition, the United States Congress has recognized that "[s]ince the founding of our country, the Federal Government has left gambling regulation to the States. . . . The Federal Government has largely deferred to the authority of States to determine the type and amount of gambling permitted." *See* H.R. REP. NO. 106-655 (2000) (proposal for 2000 federal gambling regulations*); Gambling in America*: *Final Report of the Commission on the Review of National Policy Toward Gambling* 1, 5 (1976) ("[T]he States should have the primary responsibility for determining what forms of gambling may legally take place within their borders. The Federal Government should prevent interference by one State with the gambling policies of another, and

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should act to protect identifiable national interests."); *see also* 15 U.S.C. § 3001(a)(1) ("[T]he States should have the primary responsibility for determining what forms of gambling may legally take place within their borders[.]").

Because of this, courts regularly abstain when gambling laws underpin merits issues. In a case considering a near identical situation to Plaintiffs' claims against Defendants here, the Fourth Circuit, in *Johnson*, grappled with the same issues of comity indicative in interplay between the states' rights to determine their own gambling law and the federal court's interpretation of state gambling and consumer protection laws. 199 F.3d at 720. In *Johnson*, the putative class alleged that they became addicted to video poker because defendants were offering cash payouts in excess of the maximum amount allegedly allowed under South Carolina law. *Id.* at 717. Plaintiffs further claimed that the offering of illegal cash prizes constituted both a "special inducement" to play video poker in violation of state gambling law and the South Carolina Unfair Trade Practices Act. *Id.*

The Fourth Circuit found abstention was required and reversed the district court because the "court ventured into an area where state authority has long been preeminent. The regulation of gambling enterprises lies at the heart of the state's police power." *Id*. at 720. Specifically, "the district court contravened *Burford* principles by attempting to answer disputed questions of state gaming law that so powerfully impact the welfare of South Carolina citizens." *Id*. The federal district court's attempt to interpret certain portions of South Carolina's statute prohibiting certain forms of gambling improperly "supplanted the legislative, administrative, and judicial processes of South Carolina and sought to arbitrate matters of state law and regulatory policy that are best left to resolution by state bodies." *Id*. at 732-33.

The Fourth Circuit held that abstention was appropriate because (1) federal adjudication there would require a federal court to answer "disputed questions of state gaming law that ... powerfully impact the welfare of [state] citizens" and (2) the relief sought would "effectively establish[] parallel federal and state oversight of the [state] video poker industry." *Id*. at 720, 724 (internal quotations omitted). The exact same considerations exist here. Plaintiffs' claims turn on the Ninth Circuit's interpretation, on a motion to dismiss, of Washington's gambling law that

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defines a "thing of value" as including extended play. Plaintiffs' entire suit rests on the Ninth Circuit's novel interpretation of what constitutes a "thing of value." But, no Washington court has considered or approved this interpretation. Without this Court abstaining, the federal court's interpretation will remain and this Court will be asked to further interpret Washington's gambling laws — all without the Washington courts ever interpreting their own gambling law on this issue. Moreover, if this Court abstains and Washington courts agree with the Defendants' and the Commission's interpretation of Washington's gambling law, Plaintiffs will have no claims and no class.

Similarly, multiple other federal courts have abstained when state gambling laws are at issue. *See, e.g.*, *Chun*, 807 F. Supp. at 292 (abstaining under both *Burford* and *Pullman* where New York's gambling laws were "clearly a matter of predominately state concern" and subject to a "complex and comprehensive statutory scheme"); *Diamond Game Enters. v. Howland*, 1999 WL 397743, at *14 (D. Or. Mar. 23, 1999) (abstaining under *Pullman* when question as to whether defendants' gaming dispensers fall within the Oregon law); *Club Ass'n of W. Va, Inc. v. Wise*, 156 F. Supp. 2d 599, 609 (S.D. W. Va. 2001) (abstention appropriate under *Pullman* when plaintiffs sought a declaration that video lottery was unconstitutional under state law), *aff'd*, 293 F.3d 723 (4th Cir. 2002); *Metro Riverboat Assocs., Inc. v. Balley's La., Inc.*, 142 F. Supp. 2d 765, 775 (E.D. La. 2001) (*Burford* abstention appropriate where case sat in state's gambling regulatory framework and determinative issues in the federal court litigation would be decided in the state court first); *G2, Inc. v. Midwest Gaming, Inc.*, 485 F. Supp. 2d 757, 765-66 (W.D. Tex. 2007) (finding abstention under *Burford* where gaming is an "area of important state policy" and the lottery commission provides a "unified State enforcement mechanism").

B. Plaintiffs' Claims Rest on an Unsettled Interpretations of Washington's Gambling Laws.

1. No Washington state court has considered whether the types of games at issue in this case are gambling.

Plaintiffs' claims under Washington's Recovery of Money Lost at Gambling statute ("RMLGA") turn on "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Quackenbush*, 517

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U.S. at 707 (quoting *Colorado River*, 424 U.S. at 814). Washington courts have not determined whether virtual tokens with no cash prize meet RCW 9.46.0285's definition of "thing of value", and whether Double Down Casino's games are therefore "gambling" under Washington law. Depending on the answer to that unsettled question of state law, how and whether the RMLGA should be interpreted and enforced as to video games like the game at issue here remains unresolved, and the answer implicates policy problems of substantial public import impacting all video gaming industry participants offering games in Washington.

Plaintiffs allege that Double Down Casino games are illegal gambling games because virtual chips are "things of value" under RCW 9.46.0285. *See* Dkt. 41 ¶¶ 50, 55. Under RCW 9.46.0285, a "thing of value":

> 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.

Yet, RCW 9.46.0285 has been discussed only once by a Washington state court, fifteen years ago, under a materially different set of facts. In *Bullseye Distributing LLC v. State Gambling Commission*, 127 Wn. App. 231 (2005), the Court of Appeals decided whether the Commission erred in determining that a slot-machine-like game which awarded cash prizes in a sports card vending machine was a promotional contest of chance exempt from regulation by the Commission. The court affirmed an administrative law judge's determination that an electronic vending machine designed to dispense collectible sports cards and emulate a casino slot machine was a "gambling device" because at least one of the elements of gambling, including a cash prize, were present. *Id*. at 233-34. Players paid cash to win points that could be redeemed for cash and/or merchandise in the *Bullseye* game. In *dicta*, the court noted that though the "play points" lacked pecuniary value on their own, they fell within the definition of "thing of value" because they extended the privilege of playing a game (which allowed a cash prize) without charge. *Id*. at 242. In the context of that case, the term "extension" was construed as offering the ability to play at a game to win cash, and not a mere temporal "extension" of play time that could be applied to any type of video game. *Id*.

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Unlike the game in *Bullseye*, DoubleDown Casino is a modern-era ubiquitous form of digital entertainment with no prize, as opposed to *Bullseye*'s physical vending machine, casino slot game awarding cash. *Bullseye* did not consider a game like DoubleDown Casino, which is (1) a virtual game, (2) using virtual coins, and (3) with no cash or merchandise prize. The *dicta* in *Bullseye* does not indicate how Washington views games played where there is no cash prize, such as the games at issue for Double Down. And, in fact, the application of this *dicta* by the Ninth Circuit in *Kater v. Churchill Downs, Inc.*, 886 F.3d 784, 787-88 (9th Cir. 2018), as the sole underpinning for its decision, fifteen years later, directly conflicts with the Commission's guidance that Double Down's game was not gambling. Moreover, *Kater*'s interpretation of a "thing of value," which was made on a motion to dismiss, is not a decision on the merits and is, therefore, an incomplete analysis of the RMLGA, including missing any discussion of the legislative intent behind the RMLGA or RCW 9.46.0285. These unresolved questions of state law are exactly the types of questions that should be answered by Washington state courts.

Importantly, also, because it was ruling on a motion to dismiss, the court in *Kater* assumed the allegations of the complaint were true – that a user must purchase more virtual chips in order to continue to play the games offered in the Big Fish Casino. *Id.* Yet the facts of this case transcend the limited facts assumed to be true by the court in *Kater*. Nearly all paying players of DoubleDown Casino buy chips when they already have enough chips to continue to play. Dkt. 104; Dkt. 117. They are not purchasing chips in order to have "the privilege of playing the game" under *Kater*, 886 F.3d at 787. Therefore, as actually purchased and used by players, virtual chips in DoubleDown Casino do not meet the statutory definition of a thing of value. RCW 9.46.0285. That *Kater* does not resolve the question of virtual coins sold and used for reasons other than continuing to play is acknowledged in the related litigation, where Plaintiff's counsel has conceded that illegal gambling does not occur if a user does not need to purchase virtual coins to extend gameplay on the explanation that freely obtained virtual coins are not "things of value" under Washington gambling law. *See Kater v. Churchill Downs Inc.*, No. 2:15-cv-00612-RBL (W.D. Wash. July 24, 2020), Dkt. 218-1 § 3.4 ("Big Fish Settlement Agreement"); Class Action Settlement Agreement, *Wilson v. Playtika Ltd.*, No. 3:18-cv-05277-RBL (W.D. Wash. Aug. 6,

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2020), Dkt. 121-1 , § 3.4 ("Playtika Settlement Agreement").[4]

The answer to these unresolved questions under Washington law impacts all video gaming industry participants offering games in Washington. The free-to-play business model involving micro transactions predominates in the industry today. Dkt. 104 ¶ 6 (80% of all video game revenue). In this prevailing model, players can play a game for free, and they can spend money for additional or enhanced fun by buying in-game items such as virtual chips. *See id.* ¶¶ 2-6. Washington plays a major role in video game development. "Washington ranks third in the country in the total number of active video game developers, with nearly 300 such companies with offices in Washington, including major industry players and household names." *Id.* ¶ 4. The Washington video game industry generates $20 billion annually and directly employs 23,000 individuals in Washington. *Id.* ¶ 7. With a distinct local impact, video game developers have a great deal to lose if a federal court interpretation of century-old state law is held to turn chance-based video games that allow the purchase of virtual items where those items are not required to continue play, into illegal gambling.

2. The interplay between the criminal and civil implications has not been considered by a Washington state court.

In addition to these unresolved issues, Washington's gambling law is a criminal statute that requires lenity in its interpretation when courts are determining both criminal and noncriminal applications. *Internet Cmty. & Entm't Corp. v. Wash. State Gambling Comm'n*, 148 Wn. App. 795, 808 (2009) (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004)), *rev'd on other grounds*, 169 Wn.2d 687 (2010). The lack of previous enforcement by the Commission and the affirmation

[4] In support of the Big Fish settlement, the parties have stipulated that because "players who run out of sufficient virtual chips to continue to play the game they are playing will be able to continue to play games within the Application they are playing without needing to purchase additional virtual chips or wait until they would have otherwise received free additional virtual chips in the ordinary course," the virtual chips used in the Applications will be "gameplay enhancements, not 'things of value' as defined by RCW 9.46.0285." Big Fish Settlement Agreement, § 2.2(c); § 3.4. In the Playtika Settlement Agreement, the parties stipulate that as a result of changes implemented by Playtika which "ensures that players who run out of sufficient virtual coins to continue to play slot games in the Application they are playing are able to continue to play slot games within the Application they are playing without needing to purchase additional virtual coins or to wait until they would have otherwise received free additional virtual coins in the ordinary course," the virtual coins in the Applications are "gameplay enhancements" and not "things of value." Playtika Settlement Agreement, § 2.2(c); § 3.4.

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by the Commission that DoubleDown Casino was not unlawful gambling, which conflict with *Kater*'s new interpretation of Washington law in a civil case, support the application of lenity here to prevent an unfair schism between the state's interpretation of criminal law and civil liability. Washington state courts need to resolve this inconsistency, rather than additional federal court interpretations without any input from the state.

Another similar and entirely novel question of state law is presented as to whether the Washington Consumer Protection Act ("CPA") may apply where the CPA cause of action depends upon the alleged commission of a crime that is not recognized or treated as a crime by the law enforcement body charged exclusively with enforcement. The Commission has taken no action concerning the "social games" other than to provide guidance that social gaming without a cash prize is not gambling. Plaintiffs' CPA claim is that "a claimant may establish that the act or practice is injurious to the public interest because it . . . Violates a statute that contains a specific legislative declaration of public interest impact." Dkt. No. 41 ¶ 61. The declaration of public interest alleged violated by Defendants is found in RCW 9.46.010, which expresses a public policy which the Commission is required oversee and implement.

Lastly, also wrapped within the concerns regarding the application of a criminal statute is the Plaintiffs' own criminal culpability for their conduct since Washington law provides that people *placing* unlawful internet wagers are committing a crime. *See* RCW 9.46.240 ("[W]hoever knowingly transmits or receives gambling information by . . . the internet . . . or knowingly installs or maintains equipment for the transmission or receipt of gambling information shall be guilty of a class C felony . . . ."). Washington courts must address the criminal law impact, as a matter of policy, if Plaintiffs' theory of the case is true, including the extent to which Plaintiffs' culpability impacts the viability of Plaintiffs' or other putative class members' claims.

C. Defendants Meet the Criteria for Abstention.

1. The Ninth Circuit's factors favor *Colorado River* abstention.

Courts in the Ninth Circuit evaluate the propriety of a stay under *Colorado Rive*r pursuant to the following factors:

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> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

Seneca, 862 F.3d at 841-42 (quoting *R.R. Street & Co.*, 656 F.3d at 978-79). These factors are not a "mechanical checklist," as some may not have any applicability to this case, rather they are examined in "a pragmatic, flexible manner with a view to the realities of the case at hand." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16, 21 (1983). On balance, six out of the eight factors favor abstention, while two are inapplicable or neutral. Even weighing the factors, as required, in favor of the court exercising jurisdiction, the factors favor abstention. *See id.* at 16.

Four factors weigh heavily in favor of abstention. The third factor—the desire to avoid piecemeal litigation—weighs heavily in favor of abstention because it makes sense to first permit the states to resolve the interpretation of their gambling laws, as required by the Tenth Amendment, to avoid a potential contradictory result from the federal courts guessing at the state's interpretation. "Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results." *Am. Int'l Underwriters (Philippines), Inc. v. Cont'l Ins. Co.*, 843 F.2d 1253, 1258 (9th Cir. 1988). It is insufficient for there to be merely the possibility of conflicting results, rather there must be exceptional circumstances making piecemeal litigation particularly problematic. *See Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1369 (1990) (declining to abstain where ordinary contract and tort issues did not constitute exceptional circumstances risking inconsistent judgments); *Employers' Innovative Network, LLC v. Bridgeport Benefits, Inc.*, 2019 WL 539075, at *7 (S.D.W. Va. Feb. 11, 2019) (declining to abstain in a "rather mundane contract dispute" by distinguishing "*Johnson*, which implicated a controversial gambling statute"). In *Seneca*, the Ninth Circuit found this factor was not met when the case, though complex, involved tort and insurance issues and did not identify "any special concern counseling in favor of federal abstention, such as a 'clear federal

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policy' of avoiding 'piecemeal adjudication of water rights'" justifying abstention in *Colorado River*. *Seneca*, 862 F.3d at 843 (citation omitted). As discussed above, this case is the exceptional circumstance where the constitution and federal policy provide that gambling within a state is an area left to state law and state regulation.

The risk of inconsistent decisions here is real — if this Court and the state courts or agencies interpret Washington gambling law differently, the ramifications for Double Down's ultimate alleged liability and the ongoing viability of DoubleDown Casino, could be subject to conflicting decisions. Everything about this case yearns for a single adjudication and interpretation of the Washington gambling code and civil statutes by a Washington court to avoid conflicting results. This factor is decisively in favor of abstention.

Similarly, the fifth factor weighs equally in favor of abstention because it is the state law that provides the rule of decision on the merits of gambling law. That law should be interpreted by Washington state court, not by the Ninth Circuit's interpretation on a pleadings motion in *Kater.* The "presence of federal-law issues must always be a major consideration weighing *against* surrender" of jurisdiction, but "the presence of state-law issues may weigh in favor of that surrender" only "in some rare circumstances." *Moses H. Cone*, 460 U.S. at 26 (emphasis added). It is not enough that state law provides the rule of decision, but it must present questions that are complex and difficult, and better resolved by the state court. *See R.R. St.*, 656 F.3d at 980-81 (concluding that the source of law factor is "neutral" where the complexity of the action "stems from the number of policies and insurers, not from the type of [state] law involved in the action"). This case is distinguishable because it does not present "routine issues of state law — misrepresentation, breach of fiduciary duty, and breach of contract," rather it implicates unique and undecided issue of gambling law reserved for the state's determination. *See Madonna*, 914 F.2d at 1370; *c.f. Seneca*, 862 F.3d at 841-42 (complex state tort and insurance issues do not present the "exceptional circumstances" necessary to support abstention).

The sixth factor — whether state court proceedings protect the rights of federal litigants (the "adequacy" factor) — and the eighth factor — whether the determination of issues will resolve the merits in the federal suit, or significantly narrow the issues (the "parallelism" factor)

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— also weigh in favor of abstention. *See R.R. St.*, 656 F.3d at 981-82. The adequacy factor looks at whether state proceedings might not be adequate to protect federal rights. *Madonna*, 914 F.2d at 1370 ("This factor involves the *state* court's adequacy to protect *federal* rights, not the federal court's adequacy to protect state rights.") (citing *Moses H. Cone*, 460 U.S. at 26). Here, there are no federal questions at issue, thus the issue favors abstention. The eighth factor, or the parallelism factor, considers whether the state court will "be an adequate vehicle for complete and prompt resolution of the issues between the parties." *Cone Mem'l Hosp.*, 460 U.S. at 28. "[E]xact parallelism . . . is not required"; only a substantial similarity of claims is necessary before abstention is available. *Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989). Here, Plaintiffs' claims hinge on the interpretation of the Washington gambling code and the determination of how to interpret Washington's gambling laws by the state court will resolve the underlying merits issues in the federal suit, and either dispose of the federal suit entirely, or significantly narrow the issues. Parallelism weighs significantly in favor of abstention.

The fourth factor — the order in which the forums obtained jurisdiction — favors abstention, since no merits rulings have occurred in this case. The inquiry into the order that suits are brought is not about a date in time, but rather whether the state court action was brought "before any proceedings of substance on the merits have taken place in the federal court." *Polykoff v. Collins,* 816 F.2d 1326, 1332 (9th Cir. 1987) (citation & internal quotation marks omitted); *Meadow Valley Contractors, Inc. v. Johnson,* 89 F. Supp. 2d 1180, 1184 (D. Nev. 2000) (propriety of abstention is determined "not by a comparison of the starting dates of the federal and state proceedings, but rather whether state proceedings have been initiated before the performance of any proceedings of substance on the merits in the federal action") (citation & internal quotation marks omitted); *see also Aaron v. Target Corp.*, 357 F.3d 768, 775 (8th Cir. 2004) ("There is no fixed requirement in the law that a state judicial proceeding must have been initiated before the federal case was filed for abstention to be appropriate[.]"). Defendants filed the state court action before this Court addressed any merits issues.

The seventh factor — the desire to avoid forum shopping — also favors abstention. When evaluating forum shopping, courts inquire as to whether either party sought more favorable rules

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in its choice of forum or after facing setbacks in the originally filed proceeding. *See Nakash*, 882 F.2d at 1417 (finding forum shopping where, after three-and-a-half years of litigation in a case that was progressing to its detriment, one party sought a "new forum for [its] claims"); *Am. Int'l Underwriters*, 843 F.2d at 1259 (finding forum shopping where, after two-and-a-half years, a party "abandon[ed] its state court case solely because it believe[d] that the Federal Rules of Evidence [we]re more favorable to it than the state evidentiary rules"). Here, where there are no merits decisions, no forum shopping has occurred.

The remaining two factors are either inapplicable or neutral. The first factor is inapplicable because no property is at stake. The second factor is neutral because neither the federal nor state forums are any more or less convenient than one another for the litigants, all of whom are Washington residents or limited liability companies, other than IGT who submits to the state court's jurisdiction by bringing an action to have those courts interpret Washington's gambling laws.

D. Abstention Is Appropriate When There Are Unresolved Issues of State Law under *Thibodaux*.

In a similar situation of unresolved state law, in *Thibodaux*, the United States Supreme Court agreed that the federal courts should abstain from deciding issues of state law. There, the issue was the scope of eminent domain power of municipalities under federal law and the federal court abstained because the issue went to the heart of state sovereignty and transcended the importance of the case itself. *See Colorado River*, 424 U.S. at 814 (discussing *Thibodaux*). The federal court recognized that its decision could affect a city's ability to exercise power of eminent domain under Louisiana law. *Id.* Similarly here, the interpretation of the Washington gambling code has not been resolved by Washington courts. And, in fact, the only guidance from Washington prior to *Kater* – the Commission's public approval of Double Down's games - directly conflicts with the interpretation in *Kater*. As *Thibodaux* explained, since the state statute at issue had never been interpreted by state courts, the district court properly abstained from ruling on the issue before it, staying proceedings pending the institution of a declaratory judgment action and subsequent decision by the Supreme Court of Louisiana. *Thibodaux*, 360 U.S. at 30. The

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legal issues presented in this case under the gambling code are not certain or settled as a result of any court decision in Washington, such that abstention is required here.

E. The Court Should Abstain Because Washington Has a Well-Established Regulatory Structure to Interpret and Enforce its Gambling Regulations.

Separately, abstention is proper because Washington has a well-established regulatory structure to interpret and enforce its gambling regulations. In *Burford*, the United States Supreme Court held that abstention is proper when the state has specially designed regulatory scheme. There, Sun Oil challenged the Texas Railroad Commission's order granting Burford a permit to drill oil wells. 319 U.S. at 317. Like Washington's Commission, Texas had a regulatory regime for oil and gas industries overseen by the Texas Railroad Commission. *Id*. at 320-27. Citing the significance of the oil and gas industries to Texas' economy, the *Burford* Court found Texas had a special interest in a unified gas and oil policy, such that parallel federal court jurisdiction would interfere with the states' specially designed regulatory scheme. *Id*. at 332-34.

Similarly, in *Wildgrass Oil & Gas Comm. v. Colorado*, 447 F. Supp. 3d 1051 (D. Colo. 2020), *appeal filed* (10th Cir. Apr. 17, 2020), a plaintiff attempted to prevent hydraulic fracturing in a residential neighborhood. Even though the court found the case to be a justiciable controversy, the court abstained under *Burford* because the state regulatory structure for drilling reflected the vital interest of the general public. *See id.* at 1065. In support, the court relied extensively on *Johnson*, analogized state drilling regulations, state land use policy, and state gambling law, and observed that "regulation of gambling [is] a 'paramount' state policy concern." *Id.* (citation omitted).

Similarly here, Washington has a regulatory body, the Commission, that enforces the state's gambling laws. Prior to *Kater*, the Commission issued publicly available advice that Double Down's game was not gambling. The Commission was undoubtedly aware of RCW 9.46.0285 at all times. To now subject Double Down to parallel and inconsistent federal court jurisdiction conflicts with the state's authority to decide the application and scope of its gambling laws. It also compromises legitimate reliance by Double Down and other social gaming industry participants upon the Commission's guidance. For the same reasons the *Burford* Court abstained,

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this Court should too.

F. Abstention Is Also Necessary Under *Pullman* Because the Interpretation of Washington Law May Avoid Potential Constitutional Issues.

In determining whether to abstain under *Pullman*, the Ninth Circuit considers whether:

> (1) The complaint 'touches a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open.'
>
> (2) 'Such constitutional adjudication plainly can be avoided in a definitive ruling on the state issue would terminate the controversy.'
>
> (3) The possibly determinative issue of state law is doubtful.

Canton, 498 F.2d at 845 (quoting *Pullman*, 312 U.S. at 498-99). Each of these three factors supports abstention. First, as discussed above, strong policy and constitutional considerations leave the laws regarding gambling to the states. *See supra* §IV. Next, a state court ruling interpreting Washington's gambling laws could moot potential constitutional issues under the Tenth Amendment regarding whether Washington's laws can be applied extraterritorially, as Plaintiffs allege. Finally, the interpretation and application of the Washington gambling code and the RMLGA to virtual games with no cash prize is unsettled law that should be determined by the Washington state courts. Thus, abstention under *Pullman* is appropriate.

V. CONCLUSION

For the foregoing reasons, the Court should stay this action pending the resolution of Washington gambling laws by the Washington courts.

DATED this 10th day of September, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED this 10th day of September, 2020.

s/ Lauren M. Case
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EXHIBIT 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

DOUBLE DOWN INTERACTIVE, LLC, a Washington limited liability company, and INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation, Plaintiffs, v. ADRIENNE BENSON, an individual, and MARY SIMONSON, an individual, Defendants.	No. _____ **COMPLAINT FOR DECLARATORY RELIEF**

Plaintiffs Double Down Interactive, LLC ("Double Down") and International Game Technology ("IGT") (together "Plaintiffs"), bring this complaint against Defendants Adrienne Benson ("Benson") and Mary Simonson ("Simonson"), and allege as follows:

I. NATURE OF THE ACTION

1. This is a civil action for declaratory relief concerning whether Plaintiffs have violated Washington's gambling laws by having allegedly operated unlawful gambling games by selling virtual chips which may be used only on games within the DoubleDown Casino "app" or Facebook platform.

2. DoubleDown Casino's video games include online social games that entertain players with a variety of animation and virtual casino situations. The games are free to download, free to play, and never result in monetary prizes. Because players receive free virtual

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chips in a variety of ways, they need not purchase any virtual chips to play. Players first receive free chips when they download the app and later obtain additional free chips. Virtually no Double Down players purchase chips in order to continue to play. In DoubleDown Casino, via either the app or through Facebook, players can obtain additional free virtual chips every day or more often. Players may also receive additional free chips by participating in free promotional offers. Double Down's games never award monetary winnings or real-world prizes. A player cannot "cash out" their virtual chips.

3. Although the games can be played for free, Double Down's games, like many video games, allow players to buy more chips before they receive more free chips. But the player purchases knowing they will receive more free virtual chips that cannot be used outside the game, have no value in the game, and cannot be converted to money or anything else of value.

4. The video game industry, including the development of casual or social games, represents a substantial portion of Washington State's tech-driven economy, employing about 94,200 Washingtonians. Washington ranks third in the country in the total number of active video game developers, with nearly 300 such companies with offices in Washington, including major industry players and household names. Double Down likewise maintains its U.S. headquarters in Seattle, and currently employs almost 150 people in Washington.

5. Defendants Benson and Simonson have played Double Down's games and have advanced claims that their purchase and use of virtual chips in DoubleDown Casino was unlawful gambling under Washington law.

6. Plaintiffs seek a declaration that the sale of virtual chips to Defendants Benson and Simonson to be used only in games played by Benson and Simonson within the DoubleDown Casino is not unlawful gambling under Washington law and that Benson and Simonson may not recover any amounts based upon their allegations that the games they played were unlawful in Washington.

7. Pursuant to RCW 7.24, Plaintiffs are entitled to a declaratory judgment as to the rights, duties, and obligations of the parties under applicable Washington law.

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8. The parties to this case are already parties in a separate federal putative class action in which Benson and Simonson, as named plaintiffs, have asserted state law claims alleging causes of action under the Recovery of Money Lost at Gambling Act, the Consumer Protection Act, as well as for unjust enrichment. A true and correct copy of the Amended Complaint filed in *Benson, et al. v. Double Down Interactive, LLC, et al*., Case No. 2:18-cv-00525 (the "Benson Case") is attached hereto as Exhibit "A."

9. The Benson Case remains in preliminary stages and there have been no decisions on the merits.

10. No Washington state court has considered whether the video games offered by Plaintiffs that offer no cash or merchandise prize is unlawful gambling under Washington law. Plaintiffs bring this suit for the sole purpose to permit the Washington state courts to make this fundamental state law determination.

11. The State of Washington must be allowed to decide the novel issue of what is and what is not gambling within the State of Washington for itself. For this reason, Double Down and IGT have filed a Motion to Dismiss the Benson Case based upon the doctrine of abstention and for a stay of proceedings pending resolution of this state law issue by Washington state courts. A true and correct copy of the Motion for Abstention as filed in the Benson Case is attached hereto as Exhibit "B."

12. This action is necessary and proper in order that Plaintiffs may seek a declaration from this court as to whether or not DoubleDown Casino violates Washington's gambling laws.

II. THE PARTIES

13. Plaintiff Double Down is a limited liability company organized under the laws of the State of Washington with a principal place of business in Seattle, Washington.

14. Plaintiff IGT is a corporation organized under the laws of the State of Nevada with its principal place of business at 6355 South Buffalo Drive, Las Vegas, Nevada, 89113. Double Down Interactive, LLC is a former subsidiary of IGT.

15. Defendant Adrienne Benson is a natural person and a citizen of Spokane County in the state of Washington.

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16. Defendant Mary Simonson is a natural person and a citizen of Thurston County in of the state of Washington.

III. JURISDICTION AND VENUE

17. This Court has jurisdiction over this action pursuant to RCW 2.08.010 and RCW 7.24.010, and because the events giving rise to this litigation took place within the state of Washington.

18. The Court has personal jurisdiction over Defendants Adrienne Benson and Mary Simonson because, based upon information and belief, both reside in Washington.

19. Venue is proper in Thurston County Superior Court pursuant to RCW 4.12.025 because, based upon information and belief, either one or both Defendants reside in Thurston County.

IV. GENERAL ALLEGATIONS

Washington's Video Game Industry

20. The video game industry, including the development of casual or social games – like the DoubleDown Casino games – represents a substantial portion of Washington State's tech-driven economy.

21. The unsettled questions here raise important public policy issues for Washington because they have implications far beyond casino-themed video games. The imposition of civil liability amounting to a full refund of customer purchases and potential criminal penalties could substantially disrupt and dismantle the video game producing industry in Washington and impact thousands of Washingtonians' jobs. This is especially true where the laws of other states do not regard the same games to be gambling. *See Mason v. Mach. Zone, Inc*., 140 F. Supp. 3d 457 (D. Md. 2015) (rejecting claims that free-to-play games constitute gambling) *aff'd*, 851 F.3d 315 (4th Cir. 2017); *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill. 2016) (same); *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871 (N.D. Ill. 2016) (same).

22. The development and sale of video games generate billions of dollars in revenue annually in Washington State. Developers include start-up companies, mid-size businesses, and members of the Fortune 100. There is no meaningful way to distinguish free-to-play casino-

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themed video games offering micro transactions from other free-to-play video games offering micro transactions. A "contest of chance" for purposes of the Washington gambling code (RCW 9.46.0237) is further defined broadly under RCW 9.46.0225 to include any game where "outcome depends in a material degree upon an *element of chance*, notwithstanding that *skill of the contestants may also be a factor.*" *Id*. (emphasis added).

23. Washington first enacted its Recovery of Money Lost at Gambling statute ("RMLGA") in 1879 and the relevant "thing of value" language was enacted in 1987. If Washington's statute is construed to make Washington the *first state* to effectively ban the sale of virtual items purchased in all such video games whose outcome depends in a material degree upon an *element of chance*, even though many Washington State companies employ thousands of people in Washington, that multi-billion-dollar decision should be left to the Washington state courts.

24. Congress mandates "the States," and *not* the federal government (including its judicial branch), "should have the primary responsibility for determining what forms of gambling may legally take place within their borders." 15 U.S.C. 3001(a)(1).

25. Federal courts have recognized repeatedly that the power to regulate gambling is reserved to the states under the Tenth Amendment. *See Murphy v. NCAA*, 584 US 138 S. Ct. 1461, 1478 (2018) (prohibition of state authorization of sports gambling schemes violates the anti-commandeering rule under the Tenth Amendment); *Thomas v. Bible*, 694 F. Supp. 750, (D. Nev. 1988) (licensed gaming is reserved to the states within the meaning of the Tenth Amendment) *aff'd* 896 F.2d 555 (9th Cir. 1990); *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.*, 399 F.3d 1276, 1278 (11th Cir. 2005) (regulation of gambling lies at the "heart of the state's police power" (quoting *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 720 (4th Cir.1999))), *certified question answered*, 948 So. 2d 599 (Fla. 2006); *United States v. King*, 834 F.2d 109, 111 (6th Cir. 1987) (regulation of gambling has been left to the state legislatures); *Medina v. Rudman*, 545 F.2d 244, 251 (1st Cir.1976) (enactment of gambling laws is proper exercise of the state's police power); *Chun v. New York*, 807 F. Supp. 288, 292 (S.D.N.Y. 1992) (scope of laws regulating gambling and lotteries is clearly matter of state concern); *Winshare*

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Club of Canada v. Dep't of Legal Affairs, 542 So. 2d 974, 975 (Fla. 1989) (gambling is "a matter of peculiarly local concern that traditionally has been left to the regulation of the states"); *State v. Rosenthal*, 93 Nev. 36, 44 (1977) ("We view gaming as a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution.").

26. Washington has a complete, careful, and complex statutory and regulatory scheme for gambling, with a rulemaking body, the Washington State Gambling Commission (the "Commission"), that has the authority and the duty to interpret, enforce, and adjudicate the state's gambling laws. To effectuate its intent, the legislature created the Commission. RCW 9.46.040. The Commission has wide powers, including the right "[t]o regulate and establish the type and scope of and manner of conducting the gambling activities authorized by this chapter," RCW 9.46.070(11), as well as "[t]o perform all other matters" to enforce the state's gambling laws, RCW 9.46.070(22). Those powers include the power to both prosecute criminal violations and pursue other, non-criminal remedies. *See, e.g.*, RCW 9.46.210(3) (power to enforce penal gambling laws); RCW 9.46.075 (power to deny or suspend licenses).

27. The Commission considered the subject of social gaming in connection with a public meeting on March 9, 2013 and subsequently posted its guidance in March 2014 that sites such as DoubleDown Casino were not unlawful. It has taken no enforcement action at any time as to DoubleDown Casino or any other so-called "social gaming" web business.

28. In a public meeting on March 9, 2013, Paul Dasaro, Administrator of the Electronic Gambling Lab, and Rick Herrington, Program Manager in the Criminal Intelligence Unit, prepared and gave a staff presentation on "Social Gaming" and the Commission's public meeting. A true and correct copy of the May 9, 2013 Social Gaming Presentation is attached hereto as Exhibit "C." Their presentation to the Commission expressly used DoubleDown Casino as an example. (Exhibit C, p. 12.)

29. The presentation observed that "Social Gaming" was not gambling because the "prize" element of gambling was absent:

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(Exhibit C, p. 17.)

30. The minutes of the Commission's meeting reflect the consideration of the business model now challenged by Defendants:

> The casino-style games in social gaming are characterized by the use of virtual game play credits that players can earn or they can purchase credits to play the game with real money, but the credits cannot be redeemed for real money. The social gaming media makes most of its money from players that are offered the option of purchasing items within the game.

(Exhibit C, p. 21.)

31. The minutes further reflect consideration of how DoubleDown Casino's virtual chips cannot be redeemed for real value, and importantly that "these" companies make their money when people purchase more chips or more time to play with real money:

> One of the most popular poker games is a standard Texas Hold'em game called DoubleDown Casino. Players are sitting at a virtual poker table playing with other real people who can be anywhere in the world. They are playing with virtual chips that can either be purchased or just gained through entering the game. This is a company that was purchased recently by IGT and is an IGT themed slot game. DoubleDown is based out of Seattle. It is an online version of the same game that has been approved for Washington TLS, and is in many jurisdictions throughout the world. Players are using virtual chips and not real chips, and these virtual chips cannot be redeemed for real cash. With DoubleDown's ability to purchase virtual chips, players get 150,000 chips for $3, which they can purchase directly through their Facebook page. Zynga has a different conversion, but is essentially the same concept. Players can purchase more chips or more time to play with real money, which is how these companies make their money.

(Exhibit C, pp. 21-22.)

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32. The conclusion of the presentation was that social games as described was not gambling:

> **Program Manager Rick Herrington** explained that when he looks at any form of gambling, especially on the internet, he applies the basic rules of gambling: chance, consideration, or prize. In each of these games, there are two of the elements, but not the third, which is an actual prize. Players do get virtual prizes and/or an endorphin rush; they can build their avatar and improve their avatar by purchasing other things of the same nature. It is not gambling in the current format according to Washington State law. At any time in the future, if the federal government or Washington State changes its laws, any one of these social platforms could be changed to a real gambling platform overnight.

(Exhibit C, p. 22)

33. After this meeting, in March 2014, the Commission prepared and posted a brochure on its website to give "general guidance" concerning whether social gaming was gambling, entitled "Online Social Gaming – When is it Legal? What to Consider." A true and correct copy of brochure entitled "Online Social Gaming – When is it Legal? What to Consider." is attached hereto as Exhibit "D." The brochure states:

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.

34. Double Down was aware of and relied upon the Commissions' guidance and lack of enforcement at all pertinent times.

35. IGT owned Double Down Interactive LLC at the time of the Commission's May 9, 2013 meeting, and was similarly aware of and relied upon the Commissions' guidance and lack of enforcement at all pertinent times.

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36. Subsequently, in *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 789 (9th Cir. 2018), the Ninth Circuit ruled that a complaint stated a cause of action under Washington's Recovery of Money Lost at Gambling Act and should not have been dismissed. The Ninth Circuit ruled that the plaintiff's allegation that it was necessary to purchase virtual chips in order to continue to play games on Big Fish Casino satisfied the definition of "thing of value" under RCW 9.46.0285, such that Plaintiff stated a cause of action under RCW 9.46.0237. *Id*. *Kater* was not a merits ruling. The reversal of a grant of a motion to dismiss is only a ruling that a complaint alleges a cause of action, and is not a decision on the merits. Moreover, *Kater* is distinguishable from this case because the vast majority of Double Down players, including Benson and Simonson, do not purchase virtual chips in order to continue playing virtual games but to enhance their experience and play games that they wish to play.

37. Nevertheless, immediately after the *Kater* decision, Benson filed the Benson Case against Double Down and IGT. Simonson later joined Benson as a plaintiff when they filed an amended complaint.

38. After the Ninth Circuit's ruling in *Kater*, Big Fish brought a petition before the Commission. The Commission declined to rule on the legality of Big Fish's social casino games, and instead, improperly, yielded to the federal court case. It would be futile for Double Down and IGT to bring a petition before the Commission, since the Commission already stated that it would not decide the issue.

39. Double Down and IGT bring this action because Benson's and Simonson's attempt to use *Kater* to supply a federally issued definition of gambling subjects Double Down not only to parallel oversight but to contradictory oversight. *See Johnson v. Collins Entm't Co.*, 199 F.3d 710, 719-20 (4th Cir. 1999) (federal district court's attempt to interpret certain portions of state statute prohibiting certain forms of gambling "supplanted the legislative, administrative, and judicial processes of South Carolina and sought to arbitrate matters of state law and regulatory policy that are best left to resolution by state bodies."); *see also Metro Riverboat Assocs., Inc. v. Bally's La., Inc.*, 142 F. Supp. 2d 765, 775-76 (E.D. La. 2001) (abstaining from

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deciding RICO claim because it implicated important issues of Louisiana's gaming regulatory scheme).

The Benson Case

40. Adrienne Benson and Mary Simonson, individually and on behalf of a class, filed the Benson Case against Double Down and IGT in the District Court for the Western District of Washington on April 9, 2018.

41. The First Amended Complaint, the operative pleading, filed on July 23, 2018, alleges causes of action for (1) Recovery of Money Lost at Gambling under RCW 4.24.070; (2) violations of the Washington Consumer Protection Act, RCW 19.18.010, *et seq*.; and (3) unjust enrichment.

42. Ms. Benson and Ms. Simonson seek, in part, injunctive relief requiring Double Down and IGT to "cease the operation of their games." (Exhibit A, at ¶ 58.)

43. The allegations are based on Ms. Benson and Ms. Simonson playing DoubleDown Casino games.

44. Ms. Benson alleges that she has been playing DoubleDown Casino on Facebook since 2013, and after losing the balance of her initial allocation of free chips, she purchased chips. Benson alleges she continued playing games within the DoubleDown Casino, and that since 2016, she has lost over $1,000. (Exhibit A, at ¶¶ 33-34.)

45. Ms. Simonson alleges that she has been playing DoubleDown Casino on her mobile phone since 2017, and after losing the balance of her initial allocation of free chips, she purchased chips. Simonson alleges that she continued playing games within the DoubleDown Casino, and that since December 2017, she has lost over $200. (Exhibit A, at ¶¶ 35-36.)

46. For example, the Benson case alleges that the purchase of virtual chips in DoubleDown Casino is unlawful gambling under RCW § 9.46.0237. (See, e.g., Exhibit A, at ¶ 50.)

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FIRST CAUSE OF ACTION
No Right to Recover Money Lost at Gambling Under RCW 4.24.070

47. An actual justiciable controversy exists between Plaintiffs and Defendants with respect to Defendants' claims they are entitled to recover money lost at gambling, pursuant to Washington's "Recovery of Money Lost at Gambling" statute, RCW 4.24.070.

48. RCW 4.24.070 provides that "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."

49. "Gambling" is defined 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.

50. "Thing of value" is defined as "any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise, directly or indirectly, contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge." RCW 9.46.0285.

51. Benson and Simonson are not entitled to any recovery under RCW 4.24.070 with respect to the DoubleDown Casino games because the games in DoubleDown Casino do not constitute "illegal gambling games" and Benson and Simonson have not lost any "thing of value" under Washington law.

52. RCW 9.46.0285 provides in full:

> "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**.

RCW 9.46.0285 (with emphasis).

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53. Synonyms for the verb to "extend" include many terms and ideas, including both to "lengthen" and to "offer." https://synonyms.reverso.net/synonym/en/extend. Benson and Simonson's attempted usage in the context of RCW 9.46.0285 is wrong.

54. The term "extension" relates to "service," to "entertainment" and to "a privilege," all of which are objects in the same sentence. As a basic rule of statutory construction, the term "extension" cannot mean different things in the same sentence. One would not say they lengthened a service, lengthened entertainment or lengthened a privilege "without charge." One would say they offered a service, offered entertainment or offered a privilege "without charge."

55. In addition, under RCW 9.46.0285 the "thing of value" won must be a "form of credit or promise." This term fits grammatically with the idea of a winning a credit or promise to provide a service, entertainment or a privilege without charge. The term does not fit grammatically with the idea of a winning a credit or promise to lengthen a service, entertainment or a privilege without charge. Plaintiffs' shorthand reference to the liability question as extending the time of "gameplay" before more chips must be purchased is a misguided crutch that ignores how the term "extension" is used in RCW 9.46.0285.

56. The purpose of Washington's gambling code can be found in RCW 9.46.010, which states that the purpose of Washington's gambling law is to "keep the ***criminal element*** out of gambling," recognizing the "close relationship between professional gambling and ***organized crime***," while ***not restricting*** "***social pastimes,***" which are "***more for amusement rather than for profit.***" RCW 9.46.010 (emphasis added).

57. Benson and Simonson bought virtual chips without any expectation of "profit," as they were aware at all times that the Double Down games award no cash or prize and that the virtual chips, once purchased, could not be transferred or used for any purpose other than to play games. Paying to play video games, where no cash or merchandize prize can be won, are current-day social pastimes engaged in for amusement and entertainment and are outside the ambit of the legislature's intent behind the gambling code.

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58. Benson and Simonson purchased virtual chips when it was unnecessary to do so in order to continue playing because they still had enough chips to use continue to play DoubleDown Casino.

59. An actual and justiciable controversy exists between Plaintiffs and Defendants concerning whether DoubleDown Casino games are illegal gambling games; whether chips are "things of value", entitling Defendants to recovery lost money under RCW 4.24.070; and whether Benson and Simonson's specific play constituted violations of Washington's gambling laws.

60. For the reasons alleged above, Plaintiffs seek a judicial determination and order from the Court declaring that Defendants are not entitled to recover under RCW 4.24.070, as DoubleDown Casino games are not illegal gambling games; that the virtual chips purchased and used by Benson and Simonson are not "things of value" under Washington law; and that Benson and Simonson's play did not constitute violations of Washington's gambling laws.

SECOND CAUSE OF ACTION
No Violation of Washington's Consumer Protection Act, RCW 19.86.010, *et seq*.

61. Plaintiffs re-allege and incorporate by reference the allegations of Paragraphs 1-59 of this Complaint, as though fully set forth herein.

62. Benson and Simonson allege a right to recover under Washington's Consumer Protection Act, RCW 19.86.010, *et seq*. ("CPA") as a result of the alleged gambling. Benson and Simonson's alleged allegations under the CPA result from their allegations that their play of DoubleDown Casino constituted "gambling." The same state law issues regarding gambling as described above and in the First Cause of Action are determinative of their allegations of CPA violations. Benson and Simonson allege, under RCW 19.86.093, that "a claimant may establish that the act or practice is injurious to the public interest because it ". . . Violates a statute that contains a specific legislative declaration of public interest impact." (Exhibit A ¶ 62; *see* RCW 19.86.093.) Benson and Simonson claim the "public interest" violated by Plaintiffs is established by RCW 9.46.010, which expresses a "public policy" of Washington recognizing the close relationship between professional gambling and organized crime, and seeking to restrain all

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persons from seeking profit from professional gambling activities in this state and all persons from patronizing professional gambling activities. *Id*.

63. An actual justiciable controversy exists between the parties with respect to whether Double Down and IGT have violated the CPA, which prohibits any person from using "unfair methods of competition or unfair or deceptive acts or practices in the conduct of any trade of commerce . . . ." RCW 19.86.020.

64. Double Down and IGT have not violated any Washington statute, including but not limited to Washington's Gambling Act, RCW 9.46.010, *et seq*. ("Gambling Act"), the legislative declaration of which provides:

> The public policy of the state of Washington on gambling is to keep the criminal element out of gambling and to promote the social welfare of the people by limiting the nature and scope of gambling activities and by strict regulation and control.
>
> It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling and organized crime, to restrain all persons from seeking profit from professional gambling activities in this state; to restrain all persons from patronizing such professional gambling activities; to safeguard the public against the evils induced by common gamblers and common gambling houses engaged in professional gambling; and at the same time, both to preserve the freedom of the press and to avoid restricting participation by individuals in activities and social pastimes, which activities and social pastimes are more for amusement rather than for profit, do not maliciously affect the public, and do not breach the peace.

65. Accordingly, an actual and justiciable controversy exists between Plaintiffs and Defendants concerning whether Double Down and IGT have violated the CPA, and the Gambling Act.

66. For the reasons alleged above, Plaintiffs seek a judicial determination and order from the Court declaring that Double Down and IGT have not violated the CPA or the Gambling Act.

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THIRD CAUSE OF ACTION
No Unjust Enrichment

67. Plaintiffs re-allege and incorporate by reference the allegations of Paragraphs 1-65 of this Complaint, as though fully set forth herein.

68. An actual justiciable controversy exists between the parties with respect to whether Plaintiffs have been unjustly enriched in connection with Defendants' playing DoubleDown Casino games.

69. Benson and Simonson's unjust enrichment claim is based on the allegation that DoubleDown Casino constitutes illegal gambling. (Exhibit A, at ¶¶ 72-75.) The same state law issues regarding gambling as described above and in the First Cause of Action are determinative of their allegations of unjust enrichment.

70. Double Down and IGT have not been unjustly enriched, as the DoubleDown Casino is not an unlawful gambling game.

71. Defendants contend that Double Down and IGT "should not be permitted to retain the money obtained from [Defendants] and the members of the Class, which [Double Down and IGT] have unjustly obtained as a result of their unlawful operation of unlawful online gambling games." (Exhibit A, at ¶ 74.)

72. Accordingly, an actual and justiciable controversy exists between Plaintiffs and Defendants concerning whether Double Down and IGT have been unjustly enriched in connection with Defendants' playing DoubleDown Casino games.

73. For the reasons alleged above, Plaintiffs seek a judicial determination and order from the Court declaring that DoubleDown Casino is not an unlawful gambling game and that Double Down and IGT have not been unjustly enriched.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. For a declaration that Benson and Simonson are not entitled to recover under RCW 4.24.070;

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2. For a declaration that the virtual chips purchase and used by Benson and Simonson in DoubleDown Casino games are not "things of value" as defined by RCW 9.46.0285;

3. For a declaration that DoubleDown Casino games played by Benson and Simonson are not illegal gambling games under Washington law;

4. For a declaration that Benson and Simonson's play did not constitute violations of Washington's gambling laws;

5. For a declaration that Plaintiffs have not violated the CPA;

6. For a declaration that Plaintiffs have not been unjustly enriched;

7. For entry of judgment in favor of Plaintiffs for the amount of all costs incurred in this action; and

8. For such other and further relief this Court deems just.

DATED this 10th day of September, 2020.

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ATTESTATION PER GENERAL RULE 30

The e-filing attorney hereby attests that concurrence in the filing of the document has been obtained from each of the other signatories indicated by a conformed signature (s/) within this efiled document.

Dated: September 10, 2020

By *s/ Lauren M. Case*
Lauren M. Case

Attorneys for International Game Technology

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ADRIENNE BENSON AND MARY SIMONSON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DOUBLE DOWN INTERACTIVE, LLC, et al.,

Defendants.

No. 2:18-cv-00525-RSL

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS UNDER FED. R. CIV P. 12(B)(1) AND MOTION TO ABSTAIN

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This matter comes before the Court on Defendants' Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(1) and Motion to Abstain ("Motion"). The Court has considered the Motion, and any response and reply. Having considered the materials submitted by the parties, and being otherwise fully advised, the Court hereby **GRANTS** Defendants' Motion.

This matter is stayed in order that the declaratory relief action filed by Defendants in Thurston County Superior Court may proceed on all issues raised therein. The stay shall remain in effect until the entry of a final and non-appealable order in the Thurston County litigation, at which time a party or the parties jointly shall advise this court by a motion to lift the stay.

IT IS SO ORDERED.

DATED this ___ day of _____, 2020.

_____
UNITED STATES DISTRICT JUDGE

Presented by:

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED this 10th day of September, 2020.

s/ Lauren M. Case
Lauren M. Case, WSBA No. 49558

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EXHIBIT C

WASHINGTON STATE
GAMBLING COMMISSION MEETING
THURSDAY, MAY 9, 2013
APPROVED MINUTES

- PUBLIC MEETING -

Chair John Ellis called the Gambling Commission meeting to order at 9:55 a.m. at the Vancouver Heathman Lodge and introduced the members present. He welcomed ex-officio member Senator Steve Conway, who represents the 29th District in Tacoma. Senator Conway has quite a background in gambling issues, in large part from him chairing for a number of years the primary House committee that heard gambling related legislation.

MEMBERS PRESENT:	**Chair John Ellis,** Seattle **Commissioner Mike Amos**, Selah **Commissioner Kelsey Gray**, Seattle/Spokane **Commissioner Margarita Prentice**, Seattle **Senator Steve Conway,** Tacoma
STAFF:	**David Trujillo**, Interim Director **Mark Harris**, Assistant Director – Field Operations **Tina Griffin,** Assistant Director – Licensing Operations **Amy Hunter**, Administrator – Communications & Legal **Callie Castillo**, Assistant Attorney General **Gail Grate**, Executive Assistant

Agenda Review / Director's Report:

Interim Director David Trujillo asked Chair Ellis to join him at the podium for a personnel recognition matter. He explained that Chair Ellis' term as Gambling Commissioner will end June 30 and he recognized Chair Ellis for his dedication to the Governor of Washington State, to this Commission, licensees, staff, and to the citizens of Washington State. Chair Ellis has served with distinction and honor. Interim Director Trujillo read a thank you letter from Governor Jay Inslee to Chair Ellis dated May 8 and presented a certificate and plaque commemorating his term of service on the Gambling Commission from February 2005 to June 2013.

Chair Ellis thanked his fellow Commissioners, the staff of the Gambling Commission, all of the stakeholders, representatives of the Tribes, and others who were present. He said it had been extremely rewarding to participate as a Commissioner on the Gambling Commission for eight plus years. It is frequently said, but cannot be said too often, that the Gambling Commission staff operate as a model public agency, and that is definitely true. It has been extremely enjoyable to be a part of and to observe their commitment to making gambling not only fair and honest, but well received, and dealing with issues openly in the state. He has enjoyed very much working with all of the stakeholders concerning gambling issues; although, some of the stakeholders may not regret

too much seeing him depart since he was not always on their side. But at the same time, Chair Ellis said he has enjoyed their professional approach to the issues that the Commission had to deal with – many of which were not easy.

Agenda Review/Director's Report

Chair Ellis announced that the executive session at the end of the meeting was going to be significantly longer than normal because the Commission would be reviewing the qualifications of applicants for the Director position. As a departure from the normal procedure, after the conclusion of the executive session, the public meeting would be reopened to make a decision concerning the recruitment process, because that needs to be made in a public meeting.

Interim Director Trujillo welcomed Senator Conway to his first meeting as an ex-officio on the Commission, adding he looked forward to learning from Senator Conway's experience. He reported that the Governor had appointed Mr. Chris Stearns to the vacant Commissioner position. He was unable to make this meeting, but does plan to attend the July Commission meeting. Commissioner Stearns is from the Navajo Nation and practices Native American law with Hobbs, Straus, Dean & Walker. He is an active member of Seattle's Native American and social justice communities, has served as Chairman of the Seattle Human Rights Commission, and serves on the Seattle Public School Strategic Plan Task Force. In 2012, he was named Vice President of the Board of Directors of the Seattle Indian Health Board. Commissioner Stearns is no stranger to Washington, D.C. as he served as the Indian Affairs Director under Energy Secretary Bill Richardson, as Democratic Counsel to the U.S. House Committee on Natural Resources under Chairman George Miller, as Deputy Counsel to the U.S. House Native American Affairs Subcommittee, as North Dakota State Campaign Director for Vice President Al Gore, and as political advisor to Tex Hall who is the President of the National Congress of American Indians.

Interim Director Trujillo reported there were no staff requested changes to the agenda. He drew attention to a letter that explains the "My Account" online feature. Beginning on May 15, various online services will be available under the "My Account" tab. With one login, licensees would be able to submit activity reports, view previously submitted activity reports, update contact information, submit organizational employee applications with one electronic payment, get the contact name and number of their field agent, tell staff what information a licensee may want to receive, view calendar information of Commission events, view the latest newsletter and tweets, and complete a customer feedback form. Staff is continuing to work towards a one-stop, one portal for the "My Account" concept. Representative Richard DeBolt sent the Commission a letter dated April 10 that said his questions from November 2012 regarding a rule petition had been answered and he encouraged the Commission to act upon the petition. Representative DeBolt had sent the Commission a letter in November 2012 asking them to take pause with a rule petition and to consider it thoughtfully.

Interim Director Trujillo pointed out an article regarding the Washington State Online Poker Ballot Initiative, explaining there were currently two Initiatives (I-582 and I-583) that they are planning to move forward with. I-582 would authorize only online poker in this state; casino games and sports betting would still not be allowed. The proposal does have a mechanism for the Washington State Gambling Commission to create a licensing process for online poker rooms. Taxes would be

paid for online poker, but I-582 was silent as to what the tax rate would be. I-583 would repeal the criminal penalties for online poker as long as the person was not involved in the operation of the gaming platform.

Chair Ellis asked if there were any questions; there were none. He welcomed Paul Dasaro and Rick Herrington.

Staff Presentation on Social Gaming Platforms *(PowerPoint Presentation)*

Mr. Paul Dasaro, Administrator of the Electronic Gambling Lab, introduced Rick Herrington, Program Manager in the Criminal Intelligence Unit, and explained they would be giving an overview about the concept of social gaming. Social gaming is a very trendy issue right now and it is very difficult to define what it is; a lot of buzz about it is heard in the technology world. There is no real industry-accepted definition of what exactly social gaming is, but generally speaking there are several characteristics that are typical of social games. Some of those characteristics include online play over the internet. Many of the games are characterized by the inclusion of multiple players. Often players interact with each other at some level in an online world. Many of the games use social media directly so people can log on to Facebook or some other social media site and play directly through their Facebook page. The casino-style games in social gaming are characterized by the use of virtual game play credits that players can earn or they can purchase credits to play the game with real money, but the credits cannot be redeemed for real money. The social gaming media makes most of its money from players that are offered the option of purchasing items within the game.

One of the popular games right now is called Farmville where players can pay a small amount of money to purchase additional land or an additional tool to use within the game. It is important to note that most social gaming is not considered traditional casino style, although one of the most popular games is poker. It is a very large and consistently growing industry with $8 billion in revenue last year. At least 78 million people play these games in the United States and 200 million players worldwide play social games. The question is what motivates people to play these games. People spend hours playing the games. Some of the items are community-based play – players playing either within a game world with other players nearby or playing directly against other players, which can be seen in the poker style games. There is a lot of competition with people trying to beat each other and everybody is trying to improve their statistics, plus virtual cash is an element. It is not necessary to buy virtual cash to play the game as most games offer players a certain amount of virtual cash just for entering. Players do not have to actually purchase virtual cash with real cash, although that is an option. The virtual cash does enhance game play and it also allows people to improve their play within the game. Another popular social game is called Candy Crush.

One of the most popular poker games is a standard Texas Hold'em game called DoubleDown Casino. Players are sitting at a virtual poker table playing with other real people who can be anywhere in the world. They are playing with virtual chips that can either be purchased or just gained through entering the game. This is a company that was purchased recently by IGT and is an IGT themed slot game. DoubleDown is based out of Seattle. It is an online version of the same game that has been approved for Washington TLS, and is in many jurisdictions throughout the

world. Players are using virtual chips and not real chips, and these virtual chips cannot be redeemed for real cash. With DoubleDown's ability to purchase virtual chips, players get 150,000 chips for $3, which they can purchase directly through their Facebook page. Zynga has a different conversion, but is essentially the same concept. Players can purchase more chips or more time to play with real money, which is how these companies make their money. Most of the social games are played through any type of internet capable device, like desktop computers through web browsers or through specialized software that can be installed. Mobile devices like Smartphones, Tablets, and iPods are a growing medium. Apple devices are a closed environment, and are a relatively small share of Smartphones and Tablets, but they are very popular in certain parts of the world. Android would be the more common types that are seen in Google and Samsung and are a more open environment, so it is a somewhat easier market for manufacturers to enter, and has a much larger market share throughout the world.

Program Manager Rick Herrington explained that when he looks at any form of gambling, especially on the internet, he applies the basic rules of gambling: chance, consideration, or prize. In each of these games, there are two of the elements, but not the third, which is an actual prize. Players do get virtual prizes and/or an endorphin rush; they can build their avatar and improve their avatar by purchasing other things of the same nature. It is not gambling in the current format according to Washington State law. At any time in the future, if the federal government or Washington State changes its laws, any one of these social platforms could be changed to a real gambling platform overnight.

Senator Steve Conway asked if other states allowed prizes and how it would be monitored. He asked if staff had checked other states to see if they were allowing actual prizes with this form of gaming. **Mr. Herrington** replied he did not think anybody else was allowing prizes to be awarded. He explained it was on Facebook and is being done internationally, but they are gambling platforms right now. The only place they are not gambling formats is in the United States, but he could not say whether another state is allowing it. If they are, they are in violation of the Unlawful Internet Gambling Enforcement Act (UIGEA) and a whole myriad of other laws. UIGEA deals with internet gambling and payment services, so if there is any payment process done over the internet with any form of gambling, it is illegal. If any state is offering this and allowing it to go on, it is in violation of federal law.

Mr. Dasaro stated there were several states that were in the process of allowing regular online gaming, but as far as he knew, most of those states were not contemplating using this particular type of gaming for their online sources. A week or two ago Nevada went live with their first official intranet gambling platform, which is only within the boundaries of the state of Nevada, and that was done completely proprietary through a company called Fertitta Gaming. Ultimate Poker is the name of the site, but that is a strict online gaming platform that is not tied to Facebook or any of the other traditional social gaming platforms. Other states that are currently very close to developing similar platforms are Delaware and New Jersey. There is talk within those states of establishing interstate gambling compacts so that an operator in Nevada could offer bets to players in New Jersey or Delaware, depending on how those compacts flesh out over time. But under current law in all those states, it is just within the borders of that state.

Chair Ellis said if the issue for whether or not social gaming currently constitutes gambling under Washington law was prize, then what would players get if they won. There is the option to buy chips, but does that mean the player simply has a bigger pile of chips in front of them than somebody who is playing solely with the free chips. **Mr. Herrington** affirmed, if they are playing poker, they would have a bigger advantage over the player with fewer chips. It is all virtual currency that does not really exist; it is just there and has no redeemable value. **Chair Ellis** said that, to argue the other side of that question, as demonstrated by 78 million people playing the game in the United States there was a value in simply being able to play and to play effectively. Therefore, if players were able to play more and play better by winning the virtual chips, they would have received a prize. **Mr. Herrington** replied he would call it buying endorphins.

Chair Ellis asked if there were any more questions; there were none. He thanked Mr. Dasaro and Mr. Herrington for the presentation.

Recruitment Update

Ms. Lisa Benavidez, Administrator of the Human Resources and Training Division, gave an update on the process to date for filling the Director position. At the April Commission meeting, the Commissioners approved the position description, a salary range of consideration, and a recruitment process in which Commission staff would be responsible for recruiting for the Executive Director position. The job announcement was posted on April 15 and closed on May 5. There were 27 applications received and of those 27 applications, 8 candidates met the minimum qualifications. Of those 8 candidates, there was one application that was a really standout candidate. Ms. Benavidez had been asked to provide a grouping of applicants: the A group would be the candidates that would be recommended to move forward; the B group would be the candidates that met the minimum qualifications; and the C group would be the candidates that did not meet the qualifications required for this position. During the Executive Session, the Commissioners will consider the candidates in both the A group and the B group. Ms. Benavidez said she had a copy of the candidates placed in the C group in case the Commissioners were interested in looking at those. Ms. Benavidez recommended moving forward during the executive session to review all of the candidates that meet the minimum qualifications, then come back to the public portion of the meeting and have the Commissioners make a decision on which of the eight candidates they would like to consider further. The candidates are only identified by number in the packets of information provided to the Commissioners. Once they decided which candidates to move forward, Ms. Benavidez would contact those candidates. None of the candidates have been notified that this is a public process, so she would let them know that if they want to continue to be considered in this process, their names would be made public and the rest of the process would be happening in public. She asked that the Commissioners let her know if they have recommendations or ideas on types of interview questions they would like to ask the top candidates. Ms. Benavidez explained she would be responsible for writing the final interview questions and also for scheduling those interviews. She suggested a few dates that both she and AAG Callie Castillo was available. She hoped that all the Commissioners would be available to interview the finalists and asked if the Commissioners had any conflicts on any of the following dates: June 4, 10, 17, 18, 19, and 25. Following the interviews, Ms. Benavidez would then move forward with scheduling the psychological and polygraph exams for the candidates.

Chair Ellis asked if, in the process as Ms. Benavidez envisioned it, following the interviews but before the polygraph and psychological exams, the Commissioners would have the option to designate a preferred candidate and proceed only as to that candidate. **Ms. Benavidez** affirmed that was correct.

Commissioner Gray said she had glanced at the references and asked if they looked good. She wanted to make sure the Commissioners were also involved in checking references and know what is said. She thought it was really important the Commissioners developed questions that they have used. **Ms. Benavidez** agreed.

Chair Ellis thought that was clearly an important part of Ms. Benavidez' proposal. He suggested looking at several of the elements individually to make sure the Commissioners were all comfortable with them. He said there was one candidate in the A group that Ms. Benavidez thought had outstanding credentials and seven in the B group who met the minimum qualifications but were not on the same level as the outstanding candidate. These candidates have been identified by number only, not by name. During the executive session, the Commissioners will review all eight of the applications to make sure they are comfortable with the decision that Ms. Benavidez had made; the one candidate in the A group and the seven in the B group. He asked if that seemed like a good procedure; the other Commissioners affirmed. He explained that at the end of the executive session, he would reconvene the public meeting for the Commissioners to make a determination as to which candidate or candidates they wanted to proceed with interviews. He asked that AAG Callie Castillo attend both the executive session and the interviews to make sure the Commission does not cross the line between what can be discussed in an executive session versus what can only be discussed during an open public meeting. He suggested going over the suggested interview dates.

Commissioner Gray agreed it was a good thing to look at the suggested interview dates, but thought the Commission had not had an opportunity to really look at the candidates. She was concerned the Commission was moving too fast. She understood they were trying to get this done quickly, but felt they had not had the opportunity to really look at the A group and the B group of candidates and decide whether the Commission was looking at interviewing just one candidate or more. There may be two or three candidates from those eight. She thought the Commission could look at the suggested dates, but she did not want to get locked into just those dates and that timing. **Chair Ellis** responded he did not think the Commission was locked into anything; they would be looking at the candidates in the executive session later this afternoon. If there was any follow-up the Commissioners thought was important, that they have not talked about, that could be done as well. He explained that Ms. Benavidez was just trying to coordinate calendars, recognizing that June is entering into the vacation period. There is no need for urgency because the Commission has a very good Interim Director; there is no huge hole that demands being filled immediately. Chair Ellis asked if any of the Commissioners had a conflict with any of the suggested dates. **Commissioner Amos** had a conflict on June 10. **Chair Ellis** understood that plans could change and suggested that if any of those dates become ones where a Commissioner has a conflict, they should let him know and he would coordinate with Ms. Benavidez. He indicated that Ms. Benavidez would continue to take the lead in the process of receiving the Commissioners' input on interview areas or questions they would like to see included between now and the week of May 13. The Commissioners should give their input to Ms. Benavidez and she would prepare the questions.

It would be most efficient for all of the Commissioners who are available to attend the interviews, participate, and observe the candidates in action, and then be able to go into an executive session and discuss the qualifications of the candidates, taking into account their applications, their qualifications, and their interview performance.

Commissioner Gray asked about the group that had been selected at the April meeting that included Commissioner Amos, Ms. Benavidez, and herself. **Chair Ellis** replied that, when they talked about that at the last meeting, it occurred to him that the other Commissioners would need to be present at the interviews in order to knowledgably discuss the candidates during the executive session.

Commissioner Gray said that, in the development of the questions, she was really interested in the kinds of questions they could have. She was hoping that in executive session they could spend a bit of time on the kinds of questions. **AAG Castillo** responded that any discussion would be prohibited under the Open Public Meeting Act. Everything except the actual evaluation of the applicants must be done in a public setting; any general discussion by the Commission as a body, or any committee thereof (including two members), would have to be done in a public session. There would need to be notice to the public for any sort of meeting the Commission would have. The Open Public Meeting Act really limits what the Commission can do in executive session. She suggested that if the Commission wanted to have a general discussion, they do it here in this meeting. If a Commissioner has an individual thought, they could relay it directly to Ms. Benavidez, but if the Commission wants to have a discussion among themselves, it would have to be done in a public meeting.

For the same reason that AAG Castillo just mentioned, **Chair Ellis** cautioned against cc'ing the other Commissioners with any ideas a Commissioner may submit to Ms. Benavidez so there is not the appearance of a dialogue among the Commissioners to develop those questions. Staff will give public notice of the Special Commission meeting for the purpose of the interviews, which only requires 24-hours notice. **Commissioner Gray** asked if it was required to provide public notice that the Commission was going to have that discussion now. **Chair Ellis** replied they could have that discussion now because it fit within the confines of the agenda item of the recruitment process. **AAG Castillo** confirmed. **Commissioner Gray** asked if the Commissioners would be interested in giving Ms. Benavidez some general ideas on the kinds of questions they thought would be important. **Ms. Benavidez** asked if Commissioner Gray would be concerned about doing that in front of any potential candidates that might be in the room. **Commissioner Gray** replied no, it would just be general kinds of questions. **Chair Ellis** pointed out that Mr. Trujillo, for example, was a candidate. He thought Ms. Benavidez was asking whether Mr. Trujillo would have an advantage over other candidates the Commission may interview if he heard in advance the kinds of questions or areas of questioning the Commission was talking about. He thought Mr. Trujillo could probably leave the room, but **AAG Castillo** replied that would not be required by law. The Commission could not exclude candidates from the public meeting; it would be the candidate's own preference, but the Commission itself could not exclude the public, including applicants, from that discussion. **Chair Ellis** asked if Commissioner Gray would like to suggest some areas that she would like to see included. **Commissioner Gray** replied it was not so much in terms of areas, and she would not go into any detail, but she did believe a candidate's discussion about how they

might address a problem would be important. **Ms. Benavidez** suggested that Commissioner Gray send her an email if she would like to go into more detail. **Commissioner Gray** agreed.

Chair Ellis asked if any of the other Commissioners had areas or specific types of questions they thought should be included that they would like to discuss now. **Interim Director Trujillo** said he would prefer to step out of the room if there were any detailed questions. **Chair Ellis** asked if anyone had any detailed suggestions; there were none. Chair Ellis said the Commissioners would submit any input they had to Ms. Benavidez by the end of next week by email. **Ms. Benavidez** said she would be in the office all week so if anyone wanted to call her, she would be available. **Chair Ellis** asked if there were any other areas that Ms. Benavidez would like additional input from the Commission on. **Ms. Benavidez** replied there was not. **Chair Ellis** asked if any Commissioners had other comments or questions they would like to raise at this point.

Commissioner Prentice stated that over time, she has developed a trust for Ms. Benavidez and she did not think Ms. Benavidez needed a lot of additional instruction from the Commission. She thought they were all on the same page and did not want to get bogged down. She said it was time to proceed. **Chair Ellis** agreed, indicating that Ms. Benavidez and her staff had done a commendable job, being somewhat under the gun to proceed forward, in giving the Commission the draft job specifications, the draft bulletin, getting the bulletin published, and getting a broad response. **Commissioner Gray** agreed it was very thorough.

Legislative Update

Ms. Amy Hunter provided a quick update on the legislative process, noting there would be a special session. The last day of the regular session was Sunday, April 28 and the special session is scheduled to begin on Monday, May 13. There are just a couple of bills that are still in the process:

- ESSB 5723 is the enhanced raffle bill that Special Olympics has addressed the Commission about in the past. That bill had some amendments that were done in the House so it needed to go back to the Senate for concurrence, which has occurred. The bill went to the Governor on April 27 and Ms. Hunter anticipated that he would sign the bill. Assuming that it is signed, it would be effective on July 28. Staff has tried very hard to cover the policy issues while it was in the process so that it would be the Legislature setting everything, like the "refer a friend" drawing and other special things. If it was not spelled out in the bill then it would come to the Commission during the rule making process to figure it out. Staff thought it was better to have things be specific. The main area that was not specific dealt with an independent audit, which Special Olympics wanted in the bill for their interest in protecting their assets. That is now in the bill and it is very specific that the Commission would do rule making around that. Ms. Hunter felt that would probably be the biggest area that would need more discussion. She did not want to downplay the amount of work that would be involved with the rule making, because staff will have to go through the current rules and see if they now conflict with what this law would allow and how to best spell that out. It might be one rule that says the provisions in x, y, z rules do not apply, or go through the individual rules and say something like except for enhanced raffles these are what the requirements are. Ms. Hunter has had e-mail conversations with Mr. Eliason, who is with Special Olympics, working on this to figure out who the people are from his

organization that will be their point of contact on the rule making part. Plus staff from both Field Operations and Licensing Operations have been established. Staff is anticipating the rules would be up for filing at the July meeting. Ms. Hunter thought it was a disappointment to Special Olympics, who had some different ideas about the emergency rule making provisions and they were hoping to do a raffle by the end of the year. Assuming the process goes smoothly, Ms. Hunter anticipated the rules would be up for filing at the July meeting, up for discussion at the August meeting, up for final action at the September meeting, and effective the middle of October. The most work usually goes into rules when they are up for filing, so she thought Special Olympics would be able to make some fairly solid plans based on where the rule making process was at that point. It is on the fast track already. Typically, staff waits for the Governor's action before starting to do much more. But in this case, with all of the outreach that had gone on, Ms. Hunter said she would be very surprised if the Governor would veto the bill. If that happened, then staff would stop what they have done up to that point and go from there.

- House Bill 1403 deals with information that needs to be given to the Department of Revenue. The bill passed unanimously in both the Senate and the House, but it had been changed at different times, so the bill had to go back for concurrence. All of that happened, and the bill was delivered to the Governor who signed it on May 1. It will be effective July 28. Staff needs to let the Department of Revenue know who our coordinator is and get the applications over to the Department of Revenue. It will take some time, but is not expected to be real intense. The Commission has 38 business license applications that would be required under this bill to be provided to the Department of Revenue. Assistant Director Tina Griffin has followed the bill very closely and already has some pretty defined ideas on how that would occur.
- SGA 9158 (Commissioner Prentice's confirmation) and SGA 9106 (Commissioner Gray's confirmation) are still active. The Legislature has the ability to act on those during the special session, so there is still time. The Commissioners continue to serve even if they have not gone completely through the confirmation process.
- The statewide budget bill is obviously the one that most of the action during special session should occur on. And there is an update on page 4 of the memo explaining what the latest versions of those bills do as far as impacts on the Commission. But really, they are impacts on agencies statewide. There is nothing specific for the Gambling Commission in the budget, which is good news.

Those bills that died will be up for more discussion during the 2014 session. They do not have to be reintroduced. Some of the bills that died were gambling specific.

- House Bill 1295 modified the powers and duties of the Commission.
- HB 1824 reduced the penalty for a person when they're doing unlawful internet gambling in his or her primary residence, and it's for recreational purposes. That bill did have a hearing.
- SB 5552 deals with child support enforcement and being able to check the DSHS system if there is a winner over a certain threshold.

Ms. Hunter said she would bring to the July Commission meeting a list of bills that would require any type of agency implementation. Staff tracks many other general government bills and near the end of the legislative session, the Legislative Team goes through those bills more closely to see if there are things that staff would need to do. Ms. Hunter started presenting that list last year and hoped that was an effective way for the Commission to know some of the behind-the-scenes things that happen at the end of the session. Ms. Hunter thanked the Commission for their assistance and input as she has gone through the legislative process. She said it was always helpful to hear their ideas and pass on their input on the bills to the Legislature.

Chair Ellis asked if there were any questions; there were none. He thanked Ms. Hunter for all of the good work done by her and her staff on another successful legislative session.

House Bill 1295

Chair Ellis thanked Ms. Hunter for preparing the information; it was very helpful.

Ms. Hunter explained her memorandum included testimony on HB 1295, which several of the Commissioners had a chance to watch on TVW. This report was a follow-up to discussion at the last meeting about taking a position on HB 1295 at this meeting as opposed to waiting until the fall. Staff intends to meet with the members of the Committee during the interim, so the more they know about the Commission's position, the better they can pass that on to the committee members who are always genuinely interested in hearing what the Commission has to say. When Senator Conway was in the House, he always asked what the Commissioners thought. The bill deals with the Gambling Commission's powers and duties and gives some things to the Legislature that are currently in the Commission's powers and duties. The bill says the Legislature retains sole authority for approval of any *expansion* or *enhancement* of the scope and manner of approved gambling activities and any increase in the maximum wager, money, or other thing of value that may be wagered or contributed by a player in any gambling activity subject to that chapter. From a practical point, it means there would be some changes that are now accomplished by rule that would need to go to the Legislature. There would also be many current staff approvals that could fall under being an expansion or an enhancement. The question then becomes what the Legislature was intending and how the Commission would best deal with it.

The bill was introduced on January 22 and the prime sponsor was Representative Sam Hunt who had been the Chair of the House Government and Tribal Affairs Committee during the 2011 and 2012 sessions. That committee was responsible for hearing gambling-related bills. Prior to that committee, it had been the House Commerce and Labor Committee that had heard gambling bills for many years and was chaired by then Representative Steve Conway, who is now a Senator and an ex-officio member on the Commission. This year, gambling issues went to the Government Accountability and Oversight Committee, a newly created committee chaired by Representative Chris Hurst. There were seven other members who signed on to the bill: Representatives Rodne, Wilcox, Appleton, Zeiger, Moscoso, and McCoy. Some of those members had been on the House Government and Tribal Affairs Committee. Chair Hurst and Representative Moscoso would be the two members on the current committee who would be hearing this bill.

In January, previous Director Day and Ms. Hunter had met with Representative Hunt and Chair Hurst as a follow-up to the letter that Representative Hunt had sent to the Commission in November 2012 regarding the Galaxy Gaming petition. The timing ended up making it appear that the meeting was related to this bill, but was originally intended as a follow-up to the letter. During the meeting, the Representatives were very open to any options the Commission might see for the bill. Ms. Hunter followed up the meeting with an e-mail explaining the Commission had not had a chance to talk about the bill and that the comments had been offered from staff's perspective and to help ensure that, if legislation was passed, the Commission and staff would be properly interpreting it to carry out the intent of the bill. The Committee heard the bill on February 7 and the Commission decided at the February Commission meeting to take a neutral with concerns position on the bill. Ms. Hunter was able to relay that position to the Committee before they took executive action on the bill, which was scheduled but not voted on, so the bill died in Committee after the hearing. It was one of the few items on their agenda for that day and they devoted over 40 minutes of their one-hour hearing to the bill.

Commissioner Prentice said she had watched the hearing on television and thought they had a very good discussion. She did not have the feeling that it dragged on but felt it was done knowledgeably.

Ms. Hunter reported there were six people who testified about the bill:

- Representative Hunt did not have a lot of information about why he introduced the bill. He said that, as technology changed, he wanted to clarify that expansion of gambling was within the power of the Legislature, so his intent was to strengthen that. He also said he was willing to continue working on it and this was his first try to clarify that.
- Victor Mena said one of the themes of the hearing was the rules process, how that works, and how much time is devoted by the Commission. The piece that was missing from that testimony, which Ms. Hunter tried to make clear in her e-mail, was that much of that had to do with the laws that the Commission has to follow for rule making. By the time a petitioner files something, the Commission has to wait so many days before it is published in the register. It ends up being a minimum of a three-month process. That is not because anyone was being necessarily slow. He thought everyone could see the benefits of that three-month process as it allowed for more time.
- Ric Newgard is with Seattle Junior Hockey and the Washington Charitable and Civic Gaming Association. He said that right now they know who they need to come to for changes, which is the Gambling Commission. They have limited funds and do not have any funds to hire a lobbyist, so they would be concerned about not having access to the decision makers.
- Dolores Chiechi, Recreational Gaming Association, talked about the role that ex-officio members play, which gives the give-and-take, both for ex-officio members to give the Commissioners input and also to be able to take that back to the Legislature. She said that she was concerned and did not want to see it go backwards. The Gambling Commission was created to keep the Commission out of some of these areas.

- Chris Keeley, Recreational Gaming Association and the past owner of a card room for 14 years, spoke about some of the details the bill would have the Legislature involved in if it were to pass, like the game approvals. The Committee would be dealing with derivatives of games and some things that this five-person Commission does not presently deal with because they are done by Commission staff.

Ms. Hunter said she spoke next and tried to be clear that the Commission had not had a chance to talk about the bill yet, but that she saw it as being a policy bill and the Commissioners appreciate that it is within the Legislature's purview to decide what type of direction they want to give. The Commission would want to make sure that, if legislation passed, it was clear so they could carry out the intentions of the bill. Ms. Hunter said she went through some of the different approvals that it appeared the bill would be hitting on, like wagering limits and rule changes that range from operational to licensing. She went through how many petitions the Commission gets and how those were being disposed of. If the Commission was not getting the petitions, then in theory the Legislature would be getting bills in those arenas. She went through the list of other approvals that staff goes through. One other thing that was discussed was the pilot program. There was some discussion about whether that was a pilot program by the Legislature or by the Commission and that process.

- Martin Durkan, Jr., from the Muckleshoot Tribe signed up with a "maybe" position. He went through what his testimony was.

Ms. Hunter said Chair Hurst explained that one of the reasons he signed on to the bill was so there would be a hearing on it. They have seen many areas where major changes have occurred. He thought the Tribes had major changes also and wondered whether the Legislature had a chance to catch its breath and ask where it was going. He did reference back to the bad incident earlier that involved a couple of legislators, referring back to GamScam and everything that happened several years ago. He said that he had seen this in other areas where the Legislature had ceded too much of its authority to agencies and he was interested in that across the board. His question was whether the elected representatives of the people have enough oversight over what was going on. He wanted to make it clear that he did not want those in the industry to think this was picking on any individual person, and that he shared this same concern about rule making and wanted to make sure that the Legislature was asking some questions.

The committee talked briefly about looking at some gambling issues during the interim and had a planning meeting that was scheduled near the end of session. They ended up canceling that meeting. Ms. Hunter assumed that had they had the meeting, they would have gone through the list of what items they wanted to look at during the interim. She did not know if there would be that type of meeting during this special session, and she did not think there was any requirement that they have a work session and go over those. Obviously, they can develop their list of items that they want to look at during the interim. She was not certain if gambling would be on the horizon or not. Ms. Hunter thanked the Commissioners for their input, adding she was glad they decided to have this discussion early as opposed to waiting until the fall because that would give more time to meet with members during the interim to take back any comments the Commission has and if their position of neutral with concerns has changed.

Senator Prentice said she was still neutral with concerns, except she was glad for the chance to see what it was that had been bothering the Legislature, and some of it was just bad memory. She recalled being there – and particularly it was the pilot program -- and it was not really explained as applying to all applicants but was explained as a pilot program. She thought "pilot program" meant a limited number. She remembered thinking that she could have kicked herself because it was not defined or limited. She said she always felt a little uncomfortable and she gathered that Chair Hurst was also feeling that way, then those kinds of uncomfortable feelings begin to increase. And it looks like several legislators had questions that really did not get asked at the time. Perhaps what is being seen is a chance to have a better discussion. If the legislators are feeling uncomfortable with something, then they should say so and make it clear at the time. Commissioner Prentice did not want to see overlooked what the Commission was created for. It is going back in history, but maybe the Commission should take a look at how awful things were and why the government tried to take the politics out of it. She did not want to lose the Commission's complete focus on that. Some of the people that testified do not always agree with the Commission and do not always like the discussion. The point is, the Commission takes it seriously and tries and knows all about it. The legislators have to deal with so many things. Commissioner Prentice said another thing she was afraid of – and people always have to be careful – was if you do not get it done early, a legislator can play a few games and say move to the ninth order of business and your bill does not get through. The Commission does not do that here; they do not have that ability. They know the games that can be played. Commissioner Prentice said she would rather keep the Commission's and the Legislature's focus and have some good rancorous discussion because she believed everyone on the Commission and the Legislature was sincerely trying to do what was right within the state. The Commission does not want to deliberately have anybody fail, but it has to deal with what the federal law said to do with Tribes. It has tried to be fair. This is going to continue. She thought the kinds of discussions might be uncomfortable at the time, but also thought they were very healthy. The Commission and staff need to make the Legislature feel more comfortable with what they do. **Commissioner Gray** said she absolutely agreed.

Senator Conway made an observation that a ruling was made by Brad Owen that the enhanced raffle bill was considered an expansion of gaming in the Legislature. Probably one of the most important public issues the Legislature has to consider is how certain changes lead to the expansion of gaming in this state. He said he had left the House and moved to the Senate at the time and did not actually know how this bill came about because he was not involved in any of the development of it. The bill has not been heard in the Senate; there has not been a Senate hearing on the bill. He said that, if he understood anything about the background of this bill, the Legislative concern was that any action the Commission might take might lead to an expansion of gaming. Senator Conway knew that prior to his leaving the House, the wager bill was one of those considerations of raising the wager limits without really taking into consideration how that might potentially expand gaming in general. If there was any kind of concern he saw in this bill, it was trying to ensure that the actions of this Commission do not adversely impact the expansion of gaming because of the relationship between what the Commission authorizes and what would lead to an expansion of gaming in general. That's what he saw in the bill. He understood the complexities of the issue in terms of what was meant by enhancements. That is the kind of phraseology that would be subject to a great deal of interpretation; what is an enhancement and what is the dividing line between what the Commission can do and what the Legislature has the authority to do. In the testimony, clearly, the constitution set the authority of the Legislature in the

expansion of gaming, so that is the line that the Commission is trying to figure out here. Senator Conway said he had some background in this issue because the Legislature had some concerns about the issues of how some rule making that might occur on the Commission's level might actually expand gaming in general in the state.

Commissioner Prentice said she thought part of what was being seen was that the Chairs of the Committee had been different and that was what was being reflected in the different interest levels. Representative Chris Hurst is completely sincere and very smart, and he wants to look at the concerns a little deeper than they have been, which is fine. But it might look uncomfortable because he has a different focus, but she thought they could all live together.

Chair Ellis agreed, adding that Ms. Hunter had made the point at the last meeting that, to the extent there were comments being made by legislators, it might be time to look at these issues and study the gambling issues that reflect the change in the committee structure and the change in the committee personnel – the Representatives in the House that are now looking at gambling issues who were not there previously. Following up on the point that Senator Conway made, he noted it was not that long ago that then Representative Conway and Senator Kohl-Welles had a joint committee review of gambling issues. He did not think that any members of the House Oversight Committee were even aware that the study had gone on and he could imagine why it was difficult for the members to know that, particularly if there was also staff turnover in the interim. An important part of the process that needs to be had in connection with this bill, assuming that it continues to be on the table in the next session, is to educate the legislators about that kind of past history, as well as the past history that Commissioner Prentice and Senator Conway mentioned. The issue now before the Commission, recognizing that the Commission has taken a neutral with concerns position in the past, is whether they should take a position actively opposing the bill to make the Commission's view clear. Since the Commission was considering taking a position on this legislation, he thought the public should have the opportunity to address the issue, and opened the meeting to public comment.

Ms. Dolores Chiechi, Recreational Gaming Association (RGA), welcomed Senator Conway. She said the RGA knew how much knowledge and history Senator Conway brought to this issue, and they were encouraged by that. Ms. Chiechi said her mind was a little jumbled as to how she wanted to begin because when this bill was introduced, the industry felt it was quite a hit at them. In fact, when she met with a number of the sponsors of the bill, one of them said "Yes, Dolores, this is a target on your forehead." So when a legislator says something like that to her, she takes it seriously and does what she can to protect her members and see its defeat. She would like to see a thorough discussion and the Commission's awareness of some of those political things that occur when talking about the Legislature and the process that takes place there versus at the Commission meetings, which is much more apolitical, much more thoughtful, and a lot of time goes into it. There were many mis-statements that happened during that hearing. Ms. Chiechi said it was hard to sit in that audience and not have someone knowledgeable, like Ms. Hunter, on staff who could refute and explain to the Chair that, in fact, the Legislature did not create a pilot program; that was the Commission. The Legislature authorized house-banked card games, but the Commission made the decision to go into a pilot program. Ms. Chiechi said she did her best with all due respect to argue that point with the Committee Chair. House-banked card rooms have been in existence for 16 years and there has been all that time for the Legislature to pull back. As Commissioner

Prentice and Senator Conway know, there have been numerous bills year after year to put the card room industry out of business, to tax them out of business, and to restrict what they could do. So, they have been fighting for their existence, but they are now down to 55 clubs.

Ms. Chiechi said that when she inferred it would be difficult for the card room industry to get a hearing in front of the Legislature, the Chairman replied that "Well, there was an individual who called, asked for a hearing, got a bill drafted, and we passed it out of committee. It's as easy as that." Ms. Chiechi responded that for the past ten-plus years she has been working for this industry, and they have not been able to get a hearing on bills they want. That is the difference between this body of Commissioners and that legislative body. The RGA has presented petitions to this body and gotten some wins and some losses, but at least they get to have the dialogue, the conversation, with the Commission. She said she appreciated Commissioner Prentice's comment. It is sometimes raucous, and sometimes the industry vehemently disagrees, but it has always been done with respect and they have the opportunity to come to the podium and make their arguments. That is not the case when they cannot get a hearing on a bill that could save their industry. She wanted the Commission to understand that it was a lot different when they were talking about trying to educate 146 people in Olympia, not to mention committee staff that has changed more than three times, when committee staff does not have the knowledge to refute something the Chair says or something an individual testifies to. There were comments made that if the Tribes wanted an increase, it had to go before the Legislature – but it does not, and the committee was not corrected. The legislative staff did not correct them because maybe they were not aware. So that committee walks out thinking the bill affects everybody and that it was something that could potentially rein in the industry as a whole, but it would not. It would rein in 12 percent of the industry, but 88 percent would not be touched by this legislation. Ms. Chiechi had a hard time when those misstatements were made and she was sitting in the audience, with her tongue bleeding down her face, wanting to say "wait, that is not factual."

Some of the staff of this Commission has been doing this for decades and they understand the nuances of the industry, the licensees, and the politics of it. This Commission has been very conservative in addressing petitions that have come forward based on that, limiting the scope and nature through strict regulation and control. That is constantly part of the rules procedure and it is constantly part of the Commission's consideration as they look at petitions that are brought before them. It is really tough when the industry is outmanned, outgunned, and outspent in the Legislature. In this body, they do not have that influence because the Commission listens to the facts, the people, and the staff. Ms. Chiechi wished and hoped that the Commission would change its position and take a staunch opposition to this bill and really explain to the Legislature why it is important that these issues remain under the Commission's purview.

Commissioner Amos commented that it had been a real learning curve for him over the past five years since he was appointed. Before he got this appointment on the Commission, he was an officer with the Yakima Police Department and was the State President of WACOPS. When dealing with the legislature, they were able to go to Senator Conway's office and talk about legislation to help law enforcement, and also to talk with Senator Prentice. He said he felt the same way as Ms. Chiechi about House Bill 1295. He does not particularly care for the bill and thought the Commission needed to take a stance. The Commission should decide what it wants, and then it has to go back to the Legislature for them to vote on it. He did not think that was the

intent when it was set up all those years ago – back in the 70s when it first started because of the corruption in the gambling in this state. Commissioner Amos firmly believed the Commission needed to take concerns over this bill. He thanked Ms. Chiechi for her testimony. He said he wished he knew the hearing was going on because he would have liked to be there. Representative Chris Hurst and he have been cops together for years, which might give him a chance to discuss the bill.

Ms. Chiechi thanked Commissioner Amos, and asked what the purpose of this Commission would be if this type of legislation occurred; what the duty and the scope of this Commission would be. It would have to trim down. There would still be administrative hearings, but there would not be much point to have a meeting each month for about an hour. She thought a lot of those things should be relayed to the Committee by the staff. The statute that created the Gambling Commission outlined its duties. This Commission has been asked by the Legislature to come to them with recommendations, to come to them with the knowledge of sitting on this Commission for six years or the staff for decades, and to bring that knowledge forward to the Legislature who deals with thousands of issues every year for three months, 105 days or 60 days, and then they are bombarded with their personal jobs back in their district. They do not have time to delve into the issue as the Commission does. Ms. Chiechi thought this was an opportunity for the Commission to take a look at what the statute reads for its role and take more of a proactive position with the Legislature and show them that the Commission knows what it is doing, that the staff is educated and aware and knowledgeable on this issue.

Commissioner Prentice said she was not as inclined to punch the legislators back, but agreed they really did need more factual information. Chair Hurst talked about the industry continuing to expand, but the Commission knew that was not true. They get the list of all of those businesses that are no longer in existence, plus a couple more that are going to be gone soon. The Commission has tried to look at why. Some are because the economy is bad, but she wondered what else was going on. It is a big concern to everybody in this room, yet the assumption is it keeps growing. Commissioner Prentice thought the Legislature needed to take a look at that list, look at the changes, and look at what has happened with bingo, which is down to about 16 places now in the whole state. Each time it is less. The Commission is watching this huge change and is not just expanding everything. It is not so. But she wanted to be polite and show the Legislature a comparison of last year's list and this year's list so they can see what has actually happened. Commissioner Prentice said she was not ready, at this point, to hit back because the facts are wrong.

Ms. Chiechi replied that part of her challenge is that she could not even get a meeting with some of the legislators.

Chair Ellis commented that he was struck by the extensive number of comments about how slow the process is before the Gambling Commission and the alleged need for a faster process. As Ms. Hunter pointed out about the speed – it has to do with the Administrative Procedure Act and the various elements of that Act that have to be done at different times in order to allow public participation before a decision can be made by an administrative agency. It is ironic that when looking at the history of the petitions before this Commission, many of them have come from the RGA. And to the extent that there are victims of this slow process, it is the RGA and its members

that have been the victims, yet Ms. Chiechi was not complaining about the slowness of the process. **Ms. Chiechi** thanked Chair Ellis.

Commissioner Gray commented that as she was listening to Senator Conway, she recalled a conversation she had that she felt was really important. The Legislature makes policy; that is the role of the Legislature to make policy. The role of the Commission is to ensure that policy is followed. When she read the bill, she said that was administrative; it is taking one piece and giving that to the Legislature to deal with without really looking at the policy. She hoped that if this came back again, that in the interim some time would be spent on what the policy is that they are really looking at, and then they can begin to look at the role. She thought this bill does not do what was intended by the Legislature.

Commissioner Prentice added that the Commission is designed to be regulatory and law enforcement and she did not know if anyone in the Legislature knew that. There are assumptions about what the Commission is doing – like they were just giving the whole thing away – but she thought there was a whole lot of education that needed to be done politely. The Commission needs to be very clear about what they are about.

Senator Conway said that when he was Chairman of the House Commerce and Labor Committee he was a firm believer in having a greater relationship between the Gambling Commission and the legislative bodies, which they did work on a little bit. He shared an incident that does not deal with the Gambling Commission, but with the Lottery Commission. The Lottery Commissioners made a decision to allow machines to be put up in the grocery stores and people to be able to go directly to those stores and purchase tickets. That decision by the Lottery Commission directly impacted the gaming and how gaming is done in this state, in terms of putting money into machines. That is the issue where this line is so important. The decisions made at a Commission level may have impacts on how gaming is done and how it is authorized in the state. Many who have a long history with gaming in this state know how things have changed. Even legislators often pass bills without knowledge of how they are going to impact the general nature of gambling in this state. Senator Conway said he knew that history very well, but was not going to revisit it. He thought the Legislature was trying to ensure that everyone clearly understood how their decision-making can impact gambling in general. That case of the Lottery Commission is a good example of how they were just trying to help the sellers of their tickets do it easier and not have to have the sales going on directly with a clerk. But when they allowed that machine to disburse tickets with money going in, it impacted how gaming and gambling was done in this state. He said he just wanted to bring caution to that. Although he has had no involvement on this bill, he believed that was what the Legislature was looking at. Maybe this bill does not reflect exactly the language that is needed, but he thought that was the issue: how Commission decisions impact gambling in general or the expansion of gambling in general in this state.

Chair Ellis agreed that was an important point. There are times when it can be difficult for the members of the Commission to clearly focus on whether they are over the line in getting into developing policy in the gambling area versus enforcing what the Legislature has already decided. He thought it would be extremely valuable to the Commission going down the road that Senator Prentice is now a regular Commission member. She has on a number of occasions pointed out to the Commission that they were on that line or over it and that it was something the Legislature

should deal with. He said it would also be excellent to have Senator Conway present to the extent he was not tied up in the Legislature and was able to participate in that kind of dialogue. He asked if there were any other comments; there were none.

Commissioner Amos said he was not happy with "concerns" and asked if there was a definition from an attorney that was a little stronger that would get the point across. **Chair Ellis** asked if he meant other than oppose. **Commissioner Amos** replied he thought the Commission should oppose the bill. **Ms. Hunter** responded there were no actual definitions. The sign-up in the House and the Senate are different and people sign up under many different ways. When she signed up to talk on this bill, she put "other" because that was the closest box to neutral with concerns, and then she just explained it. Ms. Hunter did not think there was a problem with the Commission just being flat out opposed to the bill, which sends a different message than neutral with concerns. She thought the Commission was in the right place in February, but as the bill moved forward and as staff pondered enhancements and expansion, she started thinking maybe she should have recommended opposed at that point. But staff is just dealing with the best information they have at the time. All of these comments are very helpful and will help direct staff's comments, regardless of whether the Commission decides to remain neutral with concerns or opposed. Just hearing the discussion has already given Ms. Hunter many ideas of other things that can be shared with the individual members during the interim

Commissioner Amos made a motion seconded by **Commissioner Gray** to oppose House Bill 1295. *The vote was taken; the motion passed with four aye votes.*

Chair Ellis called for a break at 11:40 a.m. and reconvened the meeting at 11:55 a.m.

Problem Gambling Program Updates

Interim Director Trujillo reported that the Commission was fortunate to have two presentations on problem gambling. He explained that he and Lena Hammons from the Tulalip Tribes had known each other for a very long time; when he was a regulator from the State and she was a regulator from the Tribe. He introduced Ms. Lena Hammons from the Tulalip Tribes. **Chair Ellis** welcomed Ms. Hammons.

Tulalip Tribes *(PowerPoint Presentation)*

Lena Hammons, Tribal Gaming Commission/Family Services Manager
Ellie Lorenz, Family and Youth Serviced

Ms. Hammons, Tulalip Tribal member and Executive Director of Behavioral Health that includes their problem gambling program, thanked the Commission for the honor of being here today to present her program in front of the Commission and the audience. Ms. Hammons said she has an extensive history with the problem gambling program with the State, the Tribes, and the RGA program. When she accepted this job, she had no clue that she would be in charge of the problem gambling recovery process, but was grateful to be back in this arena again. She introduced Diane Henry, who is the Clinical Supervisor in the Chemical Dependency Program and is also the Supervisor of their Problem Gambling Program. Ellie Lorenz has been in their problem gambling coalition over the past few years along with Ms. Hammons before she became Behavioral Health.

Ms. Lorenz is very knowledgeable and works very hard on the program. In addition to being the lead problem gambling counselor, Ms. Lorenz is also a chemical dependency counselor. Ms. Ellie Lorenz will be giving the presentation.

Chair Ellis welcomed Ms. Lorenz.

Ms. Ellie Lorenz introduced Diane Henry who would be showing the PowerPoint, adding that she did a wonderful job in designing the presentation. Ms. Lorenz reported that she came to work for the Tulalip Tribes in 2008. She is a Blackfeet from Montana, so she is the other Native. That was one of the good things about being able to come to work for Tulalip, which has been such a rewarding experience. Gayle Jones was their Clinical Director at that time. Ms. Lorenz said a lot of people were interested in the history of how they started their own Problem Gambling Program among the Tribes. Tulalip started the program in 1999. They wanted to have the counselors become certified, but had not yet developed the ongoing state program. Ms. Lorenz came on as a Chemical Dependency Counselor in 2008. In 2009, she was going to Doctor Maurer, who was their supervisor consultant in Seattle for the gambling program. At that time, the Tulalip had three counselors that were interested in becoming problem gambling counselors; herself, Gayle Jones, and Gary Isham. They went to training and heard about the Compact funds. Gayle Jones had the initiative to find out how the Tulalip could start its own program, which was the beginning. She wanted Ms. Lorenz to apply for the coordinator position, which is what they needed, so she began. Ms. Lorenz was under supervision, so she went to one of her monthly supervision trainings with Doctor Maurer and told him that she had been hired as the coordinator and asked what she should do. There was no manual, so Doctor Maurer suggested Ms. Lorenz meet with Maureen Greeley from the Evergreen Council on Problem Gambling and a couple other people that could be her mentors, which was absolutely incredible. From there, she had her first meeting with Ms. Greeley and Ricki Haugen from Kalispel who had started her program and had done the state certified program at the Kalispel Tribe in Spokane. They were great mentors. Ms. Lorenz went to the Advisory Committee on a quarterly basis, which was a great benefit because at that particular time new WAC rules and changes for gambling were coming in. It helped her know what was going on so she was not completely in the dark anymore. When it was time for Ms. Lorenz to get state certified, she had an idea of what to do and how to do it. Between the Advisory Committee, Ms. Greeley, and supervision with Doctor Maurer, was the ground breaking area to get this program off the ground. They are really proud to be the first state certified Problem Gambling Tribal Gaming Program in Washington State. They started outreaching into their community and did all the different things they could do to get that going, but they also reached out to everybody and offered all of their services. The Tulalip has a lot of its own cultural involvement, like the medicine wheel that brings mental, emotional, physical, and spiritual aspects to work with all of their clients. Ms. Lorenz believed there were root problems that create problem gambling, and that finding out what the roots are and being able to pull them out is very helpful. She tells her people that they are trying to eradicate all of the roots so they do not start springing up again and redeveloping. They want to get rid of them for good, which the medicine wheel gives them the ability to do. The program also has clinical assessment, with individual sessions and group counseling. Gary Isham is their group leader and deals with education. He gets down and really talks about what are pathological problem gamblers. They are also getting a recovery home off the ground to be able to reach out to people that are coming from inpatient treatment so they will have a place to go with support and ways and means to continue their freedom from the addiction. Their program has the

resources to continue the treatment without time limitations and can continue to work with people until they feel like their needs are met; they do not have a 28-session time constraint. If they have to go further, they can. They have the benefit of being able to work with them and for them for as long as it takes.

In the program's group sessions, Mr. Isham talks about finances, which is the number one thing with problem gamblers that they have to get a handle on immediately. A lot of people do not like to talk about finances, but that is what they need to reach out and touch immediately. They have to get that aspect open, shine the light on the secret and expose it, and then eradicate the root. There is a lot of grief and loss that is very heavy. People are carrying all of this within and do not even realize that it is one of the roots. A lot of times when grief or loss is mentioned, people automatically think of death, but it really is so much deeper than that. If they miss a telephone call, they can go into a grieving episode. Giving up the addiction is a grief, giving up gambling, giving up whatever their addiction is. So they spend a lot of time working on that, working on themselves, getting down and looking at what is really causing the problems. Gary Isham does a lot with values and ethics, anxiety, depression, and then Post Acute Withdrawal Syndrome (PAWS), which starts anywhere from two months and can go on for a couple of years. But PAWS is also a big part of recovery. There is addiction versus wellbriety, which is like sobriety. It is a matter of just getting well and going on from there; intellect over emotions. Mr. Isham says let's talk about their intellect; let's not go to their emotions; let's try to stay out of emotions because emotions get them into trouble. Emotion is action, so they are either going in a negative direction or a positive direction. So if they are using intellect, then hopefully they can go down the straight road. The program has inpatient treatment and can refer people if they meet the ASAM criteria and they really need inpatient treatment. Ms. Lorenz works together with Evergreen Council for referrals. There is a referral source in Louisiana and one in Oregon. There are different places where people can be sent if they really need inpatient treatment. The program also has culturally relevant programs: Sweat, Talking Circle, AWARE, and family sessions. AWARE is a very strong support system for people to be able to be around others who can support their emotions and their needs, and someone to listen to them and be there for them. Through the program, there are a lot of events to know that there are other ways to have fun besides buying into their addictions, like lots of dances, community get-togethers, and that type of thing. It is still new and is just taking off and doing well.

Currently there are more women than men in their program (about 11 men and 14 women). These are actually quite high numbers for people in gambling treatment because their Tribe does not have them knocking down the walls or kicking down the doors wanting to come in. That is because gambling is still where alcohol was about 30 or 40 years ago. It is still the elephant in the room and is something that nobody wants to talk about, nobody wants to look at, and nobody wants to identify with it – if someone knows someone who has a problem, they just deny it and try to overlook it. So it has taken time to get their numbers up, but they are up now. In 1999, when Diane Henry started the program, they had one client. All the counselors were fighting over that one client because they needed the hours to get certified, but that one client did not provide that many hours. Their people are from all around Snohomish County, so it is a lot of work to get their Tribal members in the program. Currently, they have a lot more non-tribal members. There are a few tribal members, but it is lower now than it has been in the past. There is no fee for the services and it is open to everybody, which they are very grateful for.

The number of gambling clients has increased through community awareness events. Ms. Lorenz sponsored the program with Evergreen Council on Problem Gambling because in the beginning, Maureen Greeley had opened doors for her and showed her where to go, what to do, and how to learn all the various things, which was wonderful because she had things she wanted to do. They started Four Directions Conferences, which bring the Nations together in gambling conferences to see what they have available and what problem gambling is all about. It is especially good for the Tribes that have casinos. To date they have had four of those conferences. The first one was at Muckleshoot, the next two were at Tulalip, and the last one was at Swinomish. Evergreen Council does a wonderful job of bringing this all together, and Ms. Lorenz has been pleased to be able to be a part of it. Two summers ago they offered the New Directions Summer Youth Program. Evergreen Council hired a lot of artists throughout the community to come and teach the Tulalip youth about cultural, and also provided gambling information, education on gambling, and education on different addictions. The youth also did a mural (a painting on a rock, a big beautiful one) and they were so proud of it because it was something they could look at and know they did it and were a part of.

The first couple of years, Ms. Lorenz tried to get into every community event that was imaginable. If it showed up, she was on the Richter scale and had all her stuff out there. She wanted everyone to see her, to know her, and to know that the Tribes had a problem gambling program. Even today, a lot of people do not know they have a problem gambling program, but she said she has not given up on that and is still working on it. Plans are to present at the National Conference where the Tulalip, Puyallup, and Swinomish are going to be presenters. There will be a breakout session and a hostess room to bring a lot of the Natives together and do a lot of networking, which Ms. Lorenz was excited about. It has been difficult getting the word out, letting people know who the members of the program are, and where they are located. They have benefited from the ads from Evergreen Council. The numbers are starting to go up thanks to the calls on the hotline, which has been very helpful. A meeting was started for providers, which includes five tribes that meet once a month to collaborate on what they know and to give information on what the program is doing. They bring information about what they are doing and share ideas and programs, and they have all grown from it. The Swinomish, Suquamish, Lummi, Puyallup, and Tulalip are part of the providers so far and those five Tribes have really benefited. No one showed up with a manual, so they are helping each other. The program has five staff members that include the Clinical Administrator Diane Henry and also Lena Hammons. She asked if there were any questions.

Chair Ellis asked if there were any questions of Ms. Lorenz; there were none. He thanked Ms. Hammons and Ms. Lorenz for the presentation, which was very informative on an extremely important topic. **Ms. Lorenz** thanked the Commission for their attention.

Puyallup Tribe of Indians *(PowerPoint Presentation)*

Interim Director Trujillo introduced Jennifer LaPointe, the Operations Director of the Puyallup Tribal Health Authority, who has been with the Puyallup Tribe for 11 years and has direct oversight of the Problem Gambling Program development.

Chair Ellis welcomed Ms. LaPointe.

Ms. Jennifer LaPointe, Program Manager for Health Authority, thanked the Commission for their time to hear about the Puyallup Tribe's program. She mentioned that the Honorable David Bean had planned to be at this meeting but was ill and could not attend. She reported their Tribe has a Problem Gambling Prevention Treatment Program. She would be reviewing some of the highlights in a nutshell and some of the things that are most exciting that have been done since they started going down this road of problem gambling. The Tribe has been working on a multi-level program and goes off in a lot of avenues. She said she would go over some of the different things they have done within the Health Authority, the Emerald Queen Casino, and the Tribal Gaming collaboration with their communication plan, education, treatment, and then a little bit about their vision of where they want to go next.

The Health Clinic, the General Manager of the Emerald Queen Casino operations, and the Puyallup Tribal Gaming Agency are all working together. They all are very busy entities, so it has been difficult to make time for them to collaborate. They have worked together on many things, the biggest being self-barring policies and making sure the people who are asking to be self-barred from the casino know about the program and get the right resources. The casino customer population is much bigger than any population the Health Authority can serve, but a portion of them are eligible for the services. The Tribe wants to make sure those customers know about the program and have input from the program on what should be the parameters and requirements for people re-entering the program. They have had a lot of policy-type discussions and making sure that all the dots get connected and everyone knows what each other is doing in those areas. They have had discussions and will continue to have discussions on casino employees and problem gambling within the employee population: how to serve them and how to do prevention activities with casino employees. There is a lot of problem gambling with casino employees that cannot really be avoided because they work in a casino. They work together on that and make sure the HR Department has the resources and that they continue to talk about that. It is not ever going to resolve itself, so they have to try to work together to make sure their communication line is open and active, which is a good step. A lot of time and energy has been spent on communication outreach, branding, or marketing. There are a lot of education pieces in the community like Public Service Announcements (PSA) on problem gambling, responsible gaming, and all of those different pieces, but they do not speak directly to their community, which is really important to them. They need things that speak directly to their community, that the community recognizes them as their own, and that they are associated with them, their clinic, and what they have to offer. One of the first things they wanted to work on was reaching their people.

It was a large process. They created their own poster series, have their own PSAs that are played on closed-circuit TV in their clinic and in other parts of the Tribe, and did a community assessment to see what the problems were and what kind of messages would reach them. They conducted interviews with staff of the Tribe, the Council, and with walk-in patients to the clinic. Then they moved into developing some of those. They traveled around and worked with a lot of other places that have campaigns going on in different communities and casinos. They worked with Harrahs on their responsible gaming campaigns and met with some of their staff that developed it and who keep it ongoing. They went to other Tribal casinos throughout the United States that are doing responsible gaming campaigns and talked to them about what has been successful and not successful in their communities. That information was used to develop their own posters and

PSAs. Once those poster series and PSAs were developed, they did a lot of market testing and put the posters out there and asked if they really reached people, if they looked like it reached their families, if it was specific to their community, and if it would impact people. After they got that information back, it helped the program narrow down where to go. They are committed to ongoing review of that information because they know those kinds of campaigns get outdated really fast. What is relevant to the community today might not be relevant to the community in two or three years, so they did not want to just keep doing the same thing and hoping to get a different result. Once something appears out of date, people start to ignore it. Or if they have seen it too many times, they start to ignore it. A communications specialist is on their team who previously did communications for the banking industry and other industries outside of health care. Health care has a reputation for continuing to let things get out of date and are not really fresh, so it was really important to have a true expert to continually work on that.

The Tribe also has a treatment program brochure and does things in the Tribal News. They have an actual branding guideline that all of these things follow. The idea is that when people in their community see it, they know it is about problem gambling, they know it is coming from the Tribe, and they pay attention to it. Often times in clinics there are lots of things that are printed off a computer and posted all over the walls. They really try to avoid that by having a branding scheme going on. It has taken a long time for this to be sold to their community. The PSA video was too large to include on the PowerPoint, but she offered to send it to anyone who was interested in seeing it. It is not a secret; they do not want to have too much ownership of it, but want it out there for people.

The community assessment came up with the tagline, "By not gambling today, I was able to spend more time with my family." People feel that gambling really draws time away from the family, which is the center of their culture. That seemed to be something that really hit home for people. They have a 1-800 number hotline, but those posted in their community have the clinic phone number. They did not use their community members' pictures in the posters, but consciously went out and got actors to use because of confidentiality and other issues with people everyone knows. They did proof all the pictures of the people and their tone of voice with their community to make sure that, even though this person was not from their community, it still reflected what would connect them to the community.

The Puyallup Tribe serves 10 to 12,000 patients a year from about 250 different tribes around the country. Only about 17 percent of their patient population is Puyallup Tribal members. There are different levels of acculturation in their culture. To really look at the community and find out what resonates with them cannot just be what resonates with this 17 percent. Instead of using people, they tried the traditional use of animals, symbols, and culture in their campaign. There was a lot of concern about the people who gamble because they do not have a big family to spend their time with. The wolf poster is an example of one of the other ways they went. It says, "As I became lost in gambling, the trickster inside of me took over until I asked for help." Culturally, this animal is known as a trickster. Their brochure is tri-fold and follows their branding guideline: green for treatment and with the basket design on the front so that people recognize it and it resonates with the community. Those baskets were woven by a Puyallup Tribal member, and were photographed for this purpose. A Tribal newspaper comes out bi-weekly and is used for education prevention. About once a month, there are different articles in the newspaper on problem gambling and the

treatment program. Treatment counselors provide those articles to the Communications Director who gets them in the Tribal News. It is something that is done to continually reach the Tribal community and goes out to all Tribal members and is available throughout the community for other people. A lot of people in their clinic who are not Tribal members pick up the paper and read it all the time.

Community outreach has set aside one day each quarter where the clinic is open only to Puyallup Tribal elders who are 55 and older. There is a problem gambling table and counselors are there talking to people. It is pretty effective, because the clinic is closed to everybody else so it is not a busy day. It is a very slow, relaxed day, but it reaches their prime population because the elders direct the rest of the community. So if the elders get the message, it impacts whole families. A Tribal youth outreach program works with a lot of youth programs and events. Some of the problems start really young or are impacted by someone else in their family who is doing this behavior. The Chief Leschi School has had programming for education and outreach prevention and a drop-in session for problem gambling education was recently started. The biggest thing they hear people say is "I have a family member, how do I know if it is a problem?" This group is offering more information and a class where they can come and learn. The Tribe is really trying to get people to its door by saying people do not have to have a problem to talk to the counselors or know what is going on. The flyer for the education group has the same branding. The program has been able to implement universal screening for problem gambling in their medical clinic and throughout their behavioral health. A five-question screening tool has been put into an electronic health record, which is shared between behavioral health, chemical dependency, mental health, dental health, medical health, and the pharmacy. Everybody shares the electronic health record, which is a new development. Before, everyone had their own paper chart and nobody knew what the other was doing. Now, if a person is screened in medical, their counselor can see it. It is not used 100 percent of the time, but it is in the record and their providers are being pushed to use it 100 percent of the time. It takes time, and other things seem more important so they skip over it, but it is being pushed on them.

The program is also working on the outcomes of those screenings to turn into referrals. Ten years ago during tobacco cessation, the Tribe learned that people can be asked about it the first 15 times they come in and they will not say anything, but then the 16th time they are asked, they will say "yes, actually I will take that referral now." The program also provides outpatient treatment where an assessment is done and they have individual and group sessions. The numbers are very low in those, but they are trying to do all of these other things out in the community to make sure people start to recognize the problem and come forward. The program also refers out for inpatient treatment, which had been done for the Youth Chemical Dependency Treatment. When they started doing referrals for problem gambling, they said they were going to do the same values. The Tribe believes pretty strongly in not sending its people somewhere that none of the counselors have seen. So before it becomes part of a referral network, someone from the clinic has to actually do a site visit with the treatment center because it is never known what the quality is, based on the website or talking to the person who answered the phone. An inpatient preferred referral network is being developed, but it will be slow because each place needs to be visited. That is a protection that is put out there for the Tribe's community members. Ms. LaPointe did not know if that was unique or not, but it seemed like it was to her.

There are a lot of other things that are currently being done, like community-needs assessments that are being done on a three- year cycle. Every three years, at a minimum, the counselors go back to their community and ask whether the program is happening the way that people want it to be, what could be done better, what could be done differently, and if trends in the community have changed. It is important to make sure the program stays fresh and on top because there is no real point in continuing to work to develop something that is not fitting the needs of the community. That is also done in the diabetes program and a lot of other programs because a lot of work can go into something that ultimately is not reaching the community. They are also looking at developing treatment for social media, internet addictions, text messaging, and all those other kind of things that are out there that treatment programs are being developed for. This fits in with where gambling is going with the internet gambling phase, so their program will be able to have more experts on those types of addictive behaviors. That is where the Tribe is headed.

Senator Conway asked if their program had non-tribal and tribal counseling in its facilities. **Ms. LaPointe** replied their program serves 250 Tribes. It does not do counseling for non-Natives, but does counseling for non-Puyallup Tribal members. The program generally does not serve non-Natives in its clinic, except that sometimes services are provided to spouses of tribal members and step-children who are non-Natives but are still under the care of their tribal parents. If they are an actual member of a tribal household and their Behavior Health (mental or addictive behavior) is affecting a tribal family, then the Tribe can make an exception and see them. Mainly that is based on capacity because they are serving a very large Native population in Pierce County and are already having a hard time serving all of them. The program has already maxed out on its capacity just serving the people the Tribe is required to serve by Indian Health Service.

Chair Ellis asked if there were any other questions; there were none. He thanked Ms. LaPointe for an extremely impressive program.

Approval of Minutes – April 11-12, 2013, Commission Meeting

Chair Ellis asked if there were any suggested changes or corrections to the minutes; there were none.

Commissioner Amos made a motion seconded by **Commissioner Gray** to approve the minutes from the April 11-12, 2013, Commission meeting as submitted. The v*ote was taken; the motion passed with four aye votes.*

ADMINISTRATIVE PROCEDURE ACT PROCEEDINGS

New Licenses and Class III Certifications

Assistant Director Tina Griffin reported there were no unusual items or anything to draw the Commission's attention to. Staff recommends approval of all licenses and class III certifications listed on pages 1 through 18.

Commissioner Gray made a motion seconded by **Commissioner Prentice** to approve the new licenses and class III certifications listed on pages 1 through 18. The v*ote was taken; the motion passed with four aye votes.*

Rule Up For Discussion and Possible Filing

Staff Proposed Rule Change: Fingerprinting applicants

Amendatory Section: **WAC 230-03-060** Fingerprinting of applicants

Assistant Director Griffin reported that RCW 9.46.070(7) requires the Commission to fingerprint and conduct national criminal history background checks on any person seeking a license, certification, or permit. It is also required for a person who holds any interest in any gambling activity, building, equipment used in those activities, or who participates as an employee of a gambling activity. The RCW states that the Commission must establish rules to delineate which persons named in the application are subject to the requirements. This rule proposal clarifies who does and who does not need to submit fingerprints and undergo the national criminal history background checks. It also clarifies that staff may fingerprint substantial interest holders when staff has information that the substantial interest holder may not be qualified to be licensed or participate in the gambling activity. It also meets the intent of the Statute and brings Commission rules in line with its current practice. Staff anticipates little to no impact on the licensees or applicants and recommends filing the petition for further discussion.

Chair Ellis asked if there were any questions; there were none. He asked if there was anyone in the audience that would like to address this proposed rule change; no one stepped forward.

Commissioner Prentice made a motion seconded by **Commissioner Amos** to accept for filing and further discussion WAC 230-03-060. *The vote was taken; the motion passed with four aye votes*.

PUBLIC MEETING

Nominations and Election of Officers (Effective July 1, 2013, to June 30, 2014)

Chair Ellis asked if there was a motion to nominate a Commissioner for the chair position.

Commissioner Gray nominated Commissioner Mike Amos as Commission Chair for the term expiring on June 30, 2014. **Commissioner Prentice** seconded the nomination. **Chair Ellis** asked if there were any competing motions to nominate any other candidate to be chair; there were none. *The vote was taken; the motion passed with three aye votes. Commissioner Amos abstained from voting and accepted the position.*

Chair Ellis asked if there was a motion to nominate a Commissioner for the vice-chair position.

Commissioner Amos nominated Commissioner Prentice as Commission Vice Chair for the term expiring on June 30, 2014. **Commissioner Gray** seconded the nomination. **Chair Ellis** asked if there were any competing motions to nominate any other candidate to be vice chair; there were none. *The vote was taken; the motion passed with three aye votes. Commissioner Prentice abstained from voting and accepted the position.*

Other Business/General Discussion/Comments from the Public

Chair Ellis opened the meeting for other business, general discussion, and comments from the public.

Ms. Chiechi, Recreational Gaming Association (RGA), extended her deep gratitude for Commissioner Ellis' service on the Commission. She said it has been a pleasure getting to know him. She pointed out that he runs a tight ship and that it was very much appreciated because he has conducted it very thoroughly. Although the RGA may have not liked some of the outcomes, they appreciated the ability to come before the Commission and have open dialogue. She wished Commissioner Ellis all the best in whatever is next on his life plan. The RGA will miss him.

Chair Ellis thanked Ms. Chiechi for her comments saying he appreciated them very much. He noted that earlier in the meeting, he had mentioned that he had enjoyed working with Ms. Chiechi, the other stakeholders in the industry, and everyone else that has participated in Commission activities.

Commissioner Prentice said it has really been a privilege working with Commissioner Ellis and how he approached issues in a very studious, very analytical approach. She said she hoped the Commission intended to carry on that approach, noting that Commissioner Ellis had put a real stamp on this Commission that she hoped would last for a very long time.

Chair Ellis recalled mentioning on several occasions the amount of input and education that he had received from Commissioner Prentice through a number of telephone calls and conversations throughout the time he has been on the Commission, particularly in the early years when he desperately needed that education. It has been really valuable to him, and he really appreciated Commissioner Prentice's words.

Commissioner Gray said she really appreciated the mentor that Commissioner Ellis has been for her this past year.

Chair Ellis thanked Commissioner Gray. He asked if there was any more public comment on any topic; there was none.

Executive Session to Discuss Pending Investigations, Tribal Negotiations, Litigation, and the Qualifications of Applicants for the Director Position

Chair Ellis explained he expected the executive session to last approximately 90 minutes, and then the meeting would be resumed for the purpose of selecting applicants to be interviewed by the Commission for the Director position. He noted the next meeting was scheduled for July 11 and 12 at the Bellevue Red Lion and suggested checking the Commission website prior to the meeting date for information on whether the meeting would be one or two days. He called for a break at 12:50 p.m. and called the Executive Session to order at 1:00 p.m.

Chair Ellis called the public meeting back to order at 3:05 p.m. He reported that in the executive session, Ms. Benavidez provided the Commissioners with applications for eight applicants who met the minimum qualifications for the Director position. They reviewed each of the applications,

including the application from candidate #1 who was deemed to stand out based on qualifications, as well as the applications for candidates #2 through #8 who would be good applicants for many positions. Based on that review, he asked if there was a motion concerning which applicant or applicants should be included in the interview process by the Commission for the position of Director of the Washington State Gambling Commission.

Commissioner Prentice made a motion seconded by **Commissioner Amos** that Ms. Benavidez schedule candidate #1 for an interview by the Commissioners.

Senator Prentice said it was very clear that, as they looked over the entire field, candidate #1 had many good qualities and believed this one jumped out, particularly with all of the background included.

The vote was taken; the motion passed with four aye votes.

Adjourn

Chair Ellis adjourned the meeting at 3:10 p.m.

Minutes submitted to the Commission for approval,

Gail Grate, Executive Assistant

EXHIBIT D

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

GC5-027 (3/14)

Online Social Gaming

When is it legal?
What to Consider

Let's play a game

Case 2:18-cv-00525-RBL Document 107 Filed 06/17/20 Page 48 of 52

What is Social Gaming?

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

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

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

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

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

Is Social Gaming Legal in Washington?

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

What is Gambling?

Gambling involves ***3 elements:***

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

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

Things to keep in mind, to keep it legal:

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

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

Website's Rules of Play:

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

Washington State law defines gambling as:

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

No Prize = No Gambling = OK To Play

Buying virtual money:

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

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

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

Buying virtual prizes, avatars & tools:

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

For example, let's say a player uses "real" money to purchase a key to open a chest containing a rare item that the player's character can use to advance their position in the game.

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

Exhibit 2

Hearing Date: March 5, 2021
Hearing Time: 9:00 a.m.
Judge/Calendar: The Honorable James J. Dixon

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

DOUBLEDOWN INTERACTIVE, LLC, a Washington limited liability company, and INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation,

Plaintiffs,

v.

ADRIENNE BENSON, an individual, and MARY SIMONSON, an individual,

Defendants.

Case No. 20-2-02023-34

DEFENDANTS' MOTION TO DISMISS OR STAY

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INTRODUCTION

In the spring of 2018, Washington consumers Adrienne Benson and Mary Simonson filed a class action lawsuit in the U.S. District Court for the Western District of Washington against DoubleDown Interactive, LLC ("DoubleDown") and International Game Technology ("IGT"). In their case, Benson and Simonson allege that DoubleDown Casino—an app-based "social casino" owned and operated by DoubleDown and IGT—constitutes illegal gambling under Washington law. On behalf of a nationwide class of consumers who have lost money playing DoubleDown and IGT's illegal gambling games, Benson and Simonson seek damages, an injunction, and declaratory relief.[1]

Benson's and Simonson's case has been hotly contested and has not gone well for DoubleDown and IGT. Among other motions, DoubleDown and IGT have filed: (1) a motion to compel arbitration (denied), (2) a motion to certify questions to the Washington Supreme Court (denied), (3) a motion for reconsideration of the denial of the motion to certify (denied); (4) two motions for protective orders (denied in part), (5) a motion to strike the nationwide class allegations (pending), (6) a motion for dismissal under obscure federal abstention doctrines (pending), and (7) an appeal challenging the District Court's denial of DoubleDown's arbitration motion (the District Court was affirmed). The class action is currently pending before Hon. Robert Lasnik of the Western District of Washington who is also overseeing five other class action cases against more than a dozen social casino defendants, with one of them filed in 2015 and the remainder in 2018. Three of the related cases in the Western District recently settled for more than $190 million (collectively), and in another the court recently certified a class of Washington consumers pursuant to Fed. R. Civ. P 23(b)(3) and 23(b)(2).

[1] Although the complaint does not contain enough information to ascertain the citizenship of DoubleDown Interactive, LLC, Benson and Simonson believe that DoubleDown may be a citizen of South Korea, not Washington. Consequently, Benson and Simonson are serving DoubleDown with a narrow set of jurisdictional discovery requests on the issue of citizenship. If DoubleDown's responses establish that it is not a Washington citizen (or if it unreasonably refuses to provide answers), then Benson and Simonson intend to promptly remove this action. *See Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689, 697 (9th Cir. 2005). Complete and prompt answers to Benson and Simonson's jurisdictional discovery would promote judicial efficiency here.

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Now, apparently unhappy with how the last two-and-a-half years of federal court litigation have turned out, and on the brink of class certification, DoubleDown and IGT have decided to try their luck in a new forum by filing this case. As a practical matter, it is difficult to interpret this gambit as anything but a last-ditch effort to improperly forum shop.

Moreover, DoubleDown and IGT's filing of this case was and is *per se* improper under Washington law. The complaint seeks declaratory relief on the exact same issues of liability raised in Benson's and Simonson's federal lawsuit. Therefore, under both Civil Rule 13(a) and Fed. R. Civ. P. 13(a), DoubleDown and IGT' claim for declaratory relief was a compulsory counterclaim in the federal case. By failing to raise it as a counterclaim in that suit, DoubleDown and IGT are precluded from raising it here. In addition, this case should be dismissed or stayed under the priority of action rule. Because this case involves the exact same subject matter, parties, and relief as the federal case, the Court should dismiss this case as the later-filed action. Both Rule 13(a) and the priority of action rule aim to preserve judicial resources and to avoid unnecessary proliferation of lawsuits; dismissal of this case serves those goals.

Consequently, Benson and Simonson together move to dismiss the complaint under Civil Rules 12(b)(1) and 12(b)(6). In the alternative, Benson and Simonson move for a stay of proceedings in this Court pending final resolution of the federal litigation.

BACKGROUND

A. Litigation Regarding Social Casinos.

Although all online gambling is prohibited in the State of Washington, multinational corporations have attempted to exploit what they perceive to be a loophole in the law by offering gambling games disguised as "social casinos," which are often played over the internet using mobile devices like phones and tablets. In 2015, a class action lawsuit related to these games was filed against Churchill Downs Inc., a multinational gambling corporation, in the United States District Court for the Western District of Washington. *See Kater v. Churchill Downs, Inc.*, No. 15-cv-612 (W.D. Wash. Apr. 17, 2015). The *Kater* case raised the same claims that Benson and Simonson later raised against DoubleDown and IGT, alleging violations of the Recovery of

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Money Lost at Gambling Act, RCW 4.24.070 ("RMLGA"), violations of the Consumer Protection Act, RCW 19.86.010 *et seq.* ("CPA"), and unjust enrichment. The District Court in *Kater* initially dismissed the case, but the Ninth Circuit reversed in March 2018, finding that the online casino games, as alleged in the plaintiff's complaint, constituted illegal gambling under Washington law. *See Kater v. Churchill Downs Inc.*, 886 F.3d 784, 785 (9th Cir. 2018).

Following that ruling, Benson and Simonson, represented by the same counsel who represent the plaintiff in *Kater*, filed suit against DoubleDown and IGT in April 2018. Additional proposed class actions were filed against other social casino companies at the same time. *See, e.g.*, *Wilson v. Huuuge, Inc.*, No. 18-cv-5276 (W.D. Wash. Apr. 6, 2018); *Wilson v. Playtika, Ltd.*, No. 18-cv-5277 (W.D. Wash Apr. 6, 2018); *Wilson v. High 5 Games, LLC*, No. 18-cv-5275 (Apr. 6, 2018); *Reed v. Scientific Games*, No. 18-cv-565 (W.D. Wash. Apr. 17, 2018). Six of those cases remain pending in the Western District of Washington, where they are treated as related cases and assigned to the same judge, the Honorable Robert S. Lasnik. In the past year, three of these cases have settled, and Judge Lasnik preliminarily approved those settlements. *See* Ex. 1 (Dkt. 221), *Churchill Downs*, No. 15-cv-612 (preliminarily approving $155 million class settlement); Ex. 2 (Dkt. 124), *Playtika*, No. 18-cv-5276 (preliminarily approving $38 million class settlement); Ex. 3 (Dkt. 101), *Huuuge*, No. 18-cv-5276 (preliminarily approving $6.5 million class settlement). Judge Lasnik also recently certified the plaintiffs' proposed class of Washington users in *Wilson v. High 5 Games*. *See* Ex. 4 (Dkt. 170), No. 18-cv-5275.

B. *Benson v. DoubleDown* Procedural History.

The operative pleading in Benson and Simonson's federal case is an amended complaint, filed in July 2018, which alleges violations of the RMLGA, violations of the CPA, and unjust enrichment. *See* Ex. 5 (Dkt. 41), *Benson v. DoubleDown Interactive LLC*, No. 18-cv-525 (W.D. Wash).[2] DoubleDown and IGT filed an answer to that complaint in January 2019, in which they answered allegations and asserted affirmative defenses but did not raise any counterclaims. *See*

[2] In this motion, unless otherwise specified, all further citations to Dkt. will refer to the underlying federal lawsuit, *Benson v. DoubleDown Interactive LLC*, No. 18-cv-525 (W.D. Wash.).

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Ex. 6 (Dkt. 76). Since its inception, the parties have engaged in significant motion practice: DoubleDown and IGT filed a motion to compel arbitration, Ex. 7 (Dkt. 38), and appealed the denial of that motion, Ex. 8 (Dkt. 57), to the Ninth Circuit. After the Ninth Circuit affirmed the District Court's ruling, *Benson v. DoubleDown Interactive, LLC*, 798 F. App'x 117, 120 (9th Cir. 2020), DoubleDown and IGT filed a slew of motions attempting to avoid a merits decision in federal court. They filed a motion to certify questions to the Washington Supreme Court, Ex. 9 (Dkt. 103), which the District Court denied, Ex. 10 (Dkt. 127). Hoping for a different result after the district judge retired, they filed a motion for reconsideration, Ex. 11 (Dkt. 133), which the new judge (Judge Lasnik) also denied, Ex. 12 (Dkt. 156). Currently pending before the District Court are a motion to strike Benson's and Simonson's class allegations, Ex. 13 (Dkt. 128), and a motion for abstention under the doctrines of *Colorado River*, *Thibodaux*, *Burford*, and *Pullman*, Ex. 14 (Dkt. 138). Notably, DoubleDown and IGT filed this case on September 10, 2020—two and a half years after the start of the federal case, and the same day they filed their abstention motion asking the District Court to decline jurisdiction in light of a "concurrent . . . state court action." *Id.* at 11. The complaint in this action was attached to their abstention motion. Despite DoubleDown and IGT's attempts to stall the litigation, the parties are proceeding with discovery.

In recent years, DoubleDown has tried every which way to move this dispute to a new forum. For example, in 2018, another social casino company attempted to use the streamlined declaratory ruling procedure to ask the State Gambling Commission to declare that its game was not gambling. DoubleDown General Manager Joe Sigrist appeared before the Commission to offer his live testimony in support of the other social casino company's petition for a declaratory order. *See* Transcript of July 2018 Commission Meeting at 1:15-1:17, *available at* https://www.wsgc.wa.gov/sites/default/files/public/news/big-fish/7-12-18-BigFishPetitionTranscript.pdf. The Commission nevertheless rejected the petition, "declin[ing] to insert itself into active and ongoing civil litigation." Ex. 15 (Dkt. 111-2) at 4.

Additionally, at least four bills—all of which explicitly referenced this lawsuit—were introduced in the Washington legislature in an effort to amend RCW 4.24.070. Despite yet more

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live testimony in support from Mr. Sigrist, those bills all died in committee.[3] *See* H.B. 2720, 66th Leg., Reg. Sess. (Wash. 2020) (not reported out of committee after hearing); S.B. 6568, 66th Leg., Reg. Sess. (Wash. 2020) (no committee hearing); H.B. 2041, 66th Leg., Reg Sess. (Wash. 2019) (same); S.B. 5886, 66th Leg., Reg. Sess. (Wash. 2019) (same).

ARGUMENT

In light of this background, DoubleDown and IGT's decision to file this complaint for declaratory is an obvious—and years belated—attempt at forum shopping. In any event, the claims made here by DoubleDown and IGT are precluded under Rule 13(a) since they were compulsory counterclaims in the federal action. Additionally, under Washington's "priority of action rule," the Western District of Washington has exclusive jurisdiction over this matter because it first gained jurisdiction over it, meaning this Court should dismiss or stay the action pending final resolution of the federal case. Ultimately, DoubleDown and IGT's complaint should be dismissed or stayed in order to serve the purposes of both these rules—to preserve judicial resources, to avoid unnecessary expense and the proliferation of lawsuits, and to discourage "circuity of action" by parties like DoubleDown and IGT.

A. DoubleDown and IGT's Request for a Declaratory Judgment Is a Compulsory Counterclaim Under Rule 13(a), and Their Failure to Raise It in the Federal Action Precludes the Claim Here.

DoubleDown and IGT ask this Court for a declaratory judgment that would condone the precise conduct Benson and Simonson challenge in their federal suit. Because the declaratory judgment claim was a compulsory counterclaim under both Civil Rule 13(a) and Fed. R. Civ. P. 13(a), DoubleDown and IGT should have raised it in the federal suit, and this Court should dismiss this complaint as an improper end-around those rules.

Civil Rule 13(a) requires responsive pleadings to "state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" and

[3] *See* Hearing on H.B. 2720 before the H. Civil Rights & Judiciary Committee, 66th Leg., Reg. Sess. (Wash. 2020), *available at* https://bit.ly/2FpuYAo.

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does not require any additional third parties not before the court. In determining whether claims arise from the same "transaction or occurrence," courts consider "whether the claim and counterclaim are logically related." *Chew v. Lord*, 143 Wn. App. 807, 813, 181 P.3d 25, 28-29 (2008). In order to "forc[e the] joinder of logically related claims, " Rule 13(a) makes this category of counterclaims compulsory, such that they must be "pleaded or waived." *Tallman v. Durussel*, 44 Wn. App. 181, 186, 721 P.2d 985, 988 (1986). Civil Rule 13(a) closely tracks Fed. R. Civ. P. 13(a), and both rules aim "to provide complete relief to the parties, to conserve judicial resources and to avoid the proliferation of lawsuits." *Id.* Washington courts also recognize that the "purpose of [Rule 13(a)] 'is to make an "actor" of the defendant so that circuity of action is discouraged and the speedy settlement of all controversies between the parties can be accomplished in one action.'" *Chew*, 143 Wn. App. at 810 (quoting *Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 843, 963 P.2d 465, 478 (1998)). "A liberal and broad construction of Rule 13(a) is appropriate to avoid a multiplicity of suits." *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 864, 726 P.2d 1, 5 (1986).

When a litigant flouts Civil Rule 13(a) by filing a new case asserting a claim that should have been raised as a compulsory counterclaim in a prior suit, Washington courts dismiss that cause of action. *See Schoeman*, 106 Wn.2d at 863 ("The failure to assert a compulsory counterclaim bars a later action on that claim."). This rule holds true even if the two actions are in different jurisdictions. *See id.* at 864 ("Generally, the failure to plead a Rule 13(a) counterclaim in a federal action will prevent the pleader from subsequently bringing a separate action on that claim in state court."); *Chew*, 143 Wn. App. at 814 ("The fact that the original action took place in one jurisdiction and the subsequent action is in another jurisdiction does not render inapplicable compulsory counterclaim concerns. Furthermore, the fact that a claim is for a declaratory judgment also does not render inapplicable compulsory counterclaim concerns.").

Moi v. Chihuly Studio, Inc., No. 79756-5-I, 2020 WL 1917492 (Wash. Ct. App. Apr. 20, 2020), is particularly instructive. In *Moi*, litigation was pending between the parties in federal court in the Western District of Washington. During the pendency of the federal case, the

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plaintiff filed a defamation action in Washington state court regarding statements made as part of the federal litigation. The Court of Appeals affirmed dismissal of the state court suit under Rule 13(a), finding that the plaintiff was required to raise his defamation claim as a counterclaim (to the defendant's counterclaim) in the federal action, and that "[h]is failure to do so precludes him raising his claim here." *Id.* at *2.

The same material facts are presented here. In their federal lawsuit, Benson and Simonson allege that DoubleDown and IGT violated Washington gambling law by owning and operating DoubleDown Casino, since players wager things of value (virtual chips) on games of chance (virtual slot machines). *See* Ex. 5 (Dkt. 41) ¶ 50. Now, two years after the close of pleadings in the federal case, DoubleDown and IGT seek a declaration "concerning whether [DoubleDown and IGT] have violated Washington's gambling laws by having allegedly operated unlawful gambling games by selling virtual chips which may be used only on games within the DoubleDown Casino 'app' or Facebook platform." Compl. ¶ 1. But DoubleDown and IGT were required to allege these claims as counterclaims in the federal case, and "[their] failure to do so precludes [them from] raising [their] claim here." *Moi*, 2020 WL 1917492, at *2.

DoubleDown's and IGT's claims here are far more than just "logically related" to the federal case; DoubleDown and IGT simply allege the inverse of what Benson and Simonson allege in the federal suit. The three causes of action in this case mimic the three causes of action in Benson's and Simonson's case, asking this Court to declare no liability under Washington's Return of Money Lost at Gambling statute, no liability under the Consumer Protection Act, and no liability for unjust enrichment. *See* Compl. ¶¶ 60, 66, 73. And DoubleDown and IGT had a mature claim for declaratory relief at the time they filed an answer to the amended federal complaint in January 2019. *See* Rule 13(a). Yet they failed to state the counterclaim at that time, and to this day still have not done so.

Because the complaint for declaratory relief asserted in this case was a compulsory counterclaim to Benson's and Simonson's federal lawsuit, DoubleDown and IGT were required to file it as a counterclaim when they answered the federal lawsuit in January 2019. *See* Ex. 6

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(Dkt. 76). Their failure to do so bars this instant action, and as a result, their complaint should be dismissed. *See Moi*, 2020 WL 1917492, at *2; *accord Schoeman*, 106 Wn.2d at 863-64.

DoubleDown and IGT are likely to argue that Rule 13(a) does not bar this action because the District Court has not yet rendered a decision on the merits in the federal case and consequently this case is not barred by res judicata. Benson and Simonson agree that DoubleDown's and IGT's complaint for declaratory relief is not, at this moment, barred by res judicata. However, the purposes of Washington's Civil Rule 13(a) are broader than the doctrine of res judicata. As interpreted by Washington courts, Rule 13(a) exists to "avoid the proliferation of lawsuits," *Tallman*, 44 Wn. App. at 186, to discourage "circuity of action" by defendants, *Chew*, 143 Wn. App. at 816, and to encourage "the speedy settlement of all controversies between the parties . . . in one action," *id.* Indeed, in *Schoeman*, the Supreme Court explained that "Rule 13 does not create the absolute bar of res judicata but is a bar created by rule . . . which logically is in the nature of an estoppel arising from the culpable conduct of a litigant in failing to assert a proper counterclaim." 106 Wn.2d at 866 (internal quotation marks omitted). For this reason, Washington courts have found Rule 13(a) to bar the assertion of compulsory counterclaims in subsequent suits even if the prior action remains pending and has not yet reached a judgment on the merits. *See Moi*, 2020 WL 1917492, at *2 (affirming dismissal of state court action where related federal action was still pending).

Declining to entertain DoubleDown's and IGT's complaint for declaratory relief at this time would serve the goals of Rule 13(a), since permitting both the federal and state action to proceed concurrently would be expensive, an inefficient use of judicial resources, and would encourage "circuity of action" by defendants hoping to avoid certain judges or certain precedents. Of course, if matters change such that the federal claims are no longer pending but there is a justiciable controversy, DoubleDown and IGT can seek relief in this Court. But for now, in the context of this case and the related social casino cases in the Western District of Washington, a stay or dismissal of DoubleDown's and IGT's declaratory judgment claim comports with Rule 13(a), its purposes, and with Washington caselaw.

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B. The Priority of Action Rule Counsels Dismissal of This Case.

Washington's priority of action rule also counsels the Court to dismiss or stay this case. Under this doctrine, "the court which first gains jurisdiction of a cause retains the exclusive authority to deal with the action until the controversy is resolved. The reason for the doctrine is that it tends to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and of process." *City of Yakima v. Int'l Ass'n of Fire Fighters, AFL-CIO, Local 469, Yakima Fire Fighters Ass'n*, 117 Wn.2d 655, 675, 818 P.2d 1076, 1086 (1991) (quoting *Sherwin v. Arveson*, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981)). The doctrine applies "only if the two cases involved are identical as to (1) subject matter; (2) parties; and (3) relief. The identity must be such that a decision of the controversy by one tribunal would, as res judicata, bar further proceedings in the other tribunal." *City of Yakima*, 117 Wn.2d at 675.

The priority of action rule applies here because this case is identical to Benson's and Simonson's federal case: the subject matter (the sale of virtual chips within DoubleDown Casino) is the same, the parties (DoubleDown, IGT, Benson, and Simonson) are the same, and the relief requested (a determination of liability under the RMLGA, the CPA, and for unjust enrichment) is the same. While res judicata does not currently apply, as discussed above, it *will* apply to these claims once the District Court enters a final judgment on the merits. Indeed, that's likely what DoubleDown and IGT fear and why they filed this state court case while the federal one remains pending (but after they had lost on several motions in the federal court). When such identity of actions exists, Washington courts dismiss the second-filed case. *See City of Yakima*, 117 Wn.2d at 675-76 (holding that "the trial court properly dismissed [a] declaratory judgment action based on the priority of action rule," where declaratory judgment action was filed in superior court 6 months after an identical complaint was filed with an administrative agency and both the agency and the court "had the authority to resolve the question posed in th[e] case").

In *Bunch v. Nationwide Mut. Ins. Co.*, 180 Wn. App. 37, 321 P.3d 266 (2014), the Court of Appeals considered two actions under the CPA, one in the Western District of Washington and one in state court. The court found that the priority of action rule applied since "one of the

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two [courts] must first decide whether Nationwide violated the CPA and is liable." *Id.* at 46. In other words, "[b]ecause the federal court first gained jurisdiction of the issue whether Nationwide violated the CPA, under the priority of action doctrine, it retains the exclusive authority to determine this issue." *Id.* Here, just as in *Bunch*, the federal District Court first gained jurisdiction over the issues of whether DoubleDown and IGT are liable for violating Washington's gambling laws, for violating Washington's Consumer Protection Act, and for unjust enrichment. The District Court has jurisdiction to determine those claims, is competent to do so, and therefore should retain "exclusive authority" to determine those issues in order to prevent "unseemly, expensive, and dangerous conflicts of jurisdiction and of process." *Id.* at 47. This Court should dismiss this action or, in the alternative, should stay the proceedings pending the outcome of the federal case.

DoubleDown and IGT may argue that the priority of action rule should not apply here since there are "multiple grounds for abstention and subject matter squarely within the police power of the state." *See* Ex. 16 (Dkt. 152) at 9 (DoubleDown's and IGT's reply in support of their motion for abstention). The Court of Appeals addressed a similar argument in *Schaaf v. Retriver Medical/Dental Payments Inc.*, No. 75335–5–I, 2017 WL 2840298 (Wash. Ct. App. July 3, 2017), where the first-filed case about a contract dispute was in New York state court and the later-filed case was in Washington state court. Schaaf argued against dismissal of her later-filed case by contending that Washington was a superior forum for the case, since it had a greater interest in the matter and was more convenient for witnesses. *Id.* at *3-4. The court rejected those arguments, noting a lack of authority showing "that state interest is a relevant factor in considering whether to apply the priority of action rule" and that while "[c]ourts have considered such factors [as convenience for witnesses] relevant to equitable application of the doctrine," they do so "only where the res judicata effect of the first action on the second is uncertain because the identity of parties is not exact." *Id.* Because the identity of the parties was the same in both actions, the court affirmed the dismissal of the later-filed Washington case. *Id.*

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Here, too, there is no uncertainty about the identity of this case with Benson's and Simonson's federal case. Any arguments by DoubleDown and IGT about how this Court is a better venue for the claims are therefore irrelevant to the "priority of action rule" analysis. As the first-filed case, by two and a half years, the court overseeing Benson's and Simonson's federal suit should "retain[] the exclusive authority to determine" the issues raised in both cases. *Bunch*, 180 Wn. App. at 46. The recent cases cited above suggest that a dismissal of the later-filed suit is appropriate under the priority of action rule. *See id.* at 46; *City of Yakima*, 117 Wn.2d at 676. In the alternative, Benson and Simonson would have no objection to a stay of all proceedings in this Court pending the outcome of their federal litigation against DoubleDown and IGT. A stay, much like a dismissal, would serve the goals of the priority of action doctrine by preventing "unseemly, expensive, and dangerous conflicts of jurisdiction and of process." *Bunch*, 180 Wn. App. at 46.

CONCLUSION

For the foregoing reasons, Defendants Benson and Simonson respectfully move this Court to dismiss the complaint in its entirety. In the alternative, Benson and Simonson move for a stay of all proceedings in this Court pending the final resolution of the first-filed, federal case.

DATED this 5th day of February, 2021.

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Exhibit 1

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHERYL KATER and SUZIE KELLY, individually and on behalf of all others similarly situated, Plaintiffs, v. CHURCHILL DOWNS INCORPORATED, a Kentucky corporation, and BIG FISH GAMES, INC., a Washington corporation, Defendants.	CASE NO. C15-0612-RBL ORDER ON PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT DKT. # 217
MANASA THIMMEGOWDA, individually and on behalf of all others similarly situated, Plaintiff, v. BIG FISH GAMES, INC., a Washington corporation; ARISTOCRAT TECHNOLOGIES INC., a Nevada corporation; ARISTOCRAT LEISURE LIMITED, an Australian corporation; and CHURCHILL DOWNS INCORPORATED, a Kentucky corporation, Defendants.	CASE NO. C19-0199-RBL ORDER ON PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT DKT. # 171

THIS MATTER is before the Court on Plaintiffs' Unopposed Motions for Preliminary Approval of Class Action Settlement. These cases belong to a group of class actions seeking to recover losses incurred on casino-gaming apps, with *Kater v. Churchill Downs Incorporated* being the first such case filed. Now, it appears *Kater*, along with its younger companion *Thimmegowda v. Big Fish Games, Inc.*, is also the first to reach a Settlement Agreement.

Having considered the Motion and supporting papers, the Agreement and the Exhibits attached thereto, the Court issues the following Order:

1. **Settlement Terms.** All terms and definitions used herein have the same meanings as set forth in the Settlement Agreement.

2. **Jurisdiction.** The Court has jurisdiction over the Parties, the subject matter of the dispute, and all Settlement Class Members.

3. **Preliminary Class Findings.** The Court preliminarily finds, for the purposes of settlement only, that this action meets all prerequisites of Rule 23 of the Federal Rules of Civil Procedure, including numerosity, commonality, typicality, predominance, and superiority, and that the Named Plaintiffs are adequate representatives of the Settlement Class, defined below, and Class Counsel are adequate to represent the Settlement Class, defined below.

4. **Conditional Certification of Settlement Class.** Based on the findings set out in paragraph 3 above, the Court conditionally certifies the following class for settlement purposes only, under Fed. R. Civ. P. 23(a) and (b)(3):

> all persons in the United States who played Big Fish Casino, Jackpot Magic Slots, or Epic Diamond Slots on or before Preliminary Approval of the Settlement.[1]

[1] Excluded from the Settlement Class are (1) any Judge or Magistrate presiding over this action and members of their families, (2) the Defendants, Defendants' subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendants or their parents have a controlling interest and their current or former officers, directors, and employees, (3) persons

See Agreement, *Kater* Dkt. # 218-1, § 1.33.

5. **Appointment of Class Representatives.** The Court appoints, for settlement purposes only, Cheryl Kater, Suzie Kelly, and Manasa Thimmegowda as Class Representatives.

6. **Appointment of Class Counsel.** The Court appoints, for settlement purposes only, Jay Edelson, Rafey S. Balabanian, Todd Logan, Alexander G. Tievsky, and Brandt Silver-Korn of Edelson PC as Class Counsel for the Settlement Class.

7. **Conditional Nature of Certification of the Settlement Class.** This conditional certification of the Settlement Class is solely for purposes of effectuating the Settlement. If the Effective Date of the Settlement Agreement does not occur, the foregoing conditional certification of the Settlement Class and appointment of Class Representatives and Class Counsel shall be void and of no further effect, and the Parties shall be returned to the status each occupied before entry of this Order without prejudice to any legal argument, position, or privilege that any of the Parties might have asserted but for the Settlement Agreement.

8. **Preliminary Findings Regarding Proposed Settlement.** Defendants have agreed to establish a $155,000,000.00 Settlement Fund from which Settlement Class Members who file a valid claim will be entitled to recover a cash payment, after deducting administrative expenses, any fee award to Class Counsel, and any incentive payments to the Class Representatives. Agreement, *Kater* Dkt. # 218-1, §§ 1.32, 2.1. No portion of the Settlement Fund will revert to Defendants. *Id.* § 2.1(j). As described in detail in the Plan of Allocation, *id.* at Ex. E, the amount of each Settlement Class Member's payment will vary based on the Settlement Class Member's total losses (those with higher loss amounts are eligible to recover a greater

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who properly execute and file a timely request for exclusion from the class, and (4) the legal representatives, successors or assigns of any such excluded persons. *See* Agreement § 1.28.

percentage of their losses), whether the Settlement Class Member is potentially subject to Big Fish's dispute resolution provision, and overall Settlement Class Member participation levels.

As prospective relief, Defendant Big Fish has agreed to: establish a voluntary self-exclusion policy that will allow players to exclude themselves from further gameplay, make available resources related to video game behavior disorders, and change the game mechanics of its apps so players who run out of virtual chips can continue on in the game they are playing without buying chips. *Id*. at § 2.2. In exchange for the relief described above, Defendants and other entities, including the Platform Providers Facebook, Apple, Google, and Amazon, will be released from all claims raised in these cases relating to the operation of their casino style games and the sale of virtual chips in those games. *Id*. at § 3.

The Agreement further provides that incentive awards to the Class representatives shall not exceed $10,000 and attorney fees shall not exceed 30% of the Settlement Fund. Finally, Settlement Administration Expenses, which together with any anticipated Fee Award and Incentive Award, shall be no more than 30% of the Settlement Fund.

The Court preliminarily finds that the proposed Settlement should be approved as: (a) fair, reasonable, and adequate; (b) the product of serious, informed, arm's-length, and non-collusive negotiations; (c) having no obvious deficiencies; (d) not improperly granting preferential treatment to Class Representatives or segments of the Settlement Class; (e) falling within the range of possible approval; and (f) warranting notice to Settlement Class Members of a Final Approval Hearing, at which evidence may be presented in support of and in opposition to the proposed Settlement.

9. **Injunction and Stay.** Pending the final determination of the fairness, reasonableness, and adequacy of the proposed Settlement, all Settlement Class Members are

PRELIMINARILY ENJOINED from instituting or commencing any action against Defendants based on the Released Claims, and all proceedings in this action, except those related to approval of the Settlement, are STAYED.

10. **Class Notice.** This Court approves the notice plan set forth in the Agreement, *see Kater* Dkt. # 218-1, §§ 4.1, 4.2, and the form and content of the notice to class members as set forth in Exhibits B-D attached to the Agreement. The Court approves the procedure for Settlement Class Members to opt out of, or object to, the Settlement as set forth in the Settlement Agreement Notice. *Id*. at §§ 4.4, 4.5. The Court appoints Angeion Group as the Settlement Administrator.

The Court directs the mailing of the Settlement Class Notice by email and/or First-Class U.S. mail to the Settlement Class Members in accordance with the schedule set forth below. The Court finds the dates selected for the mailing and distribution of the Notice, as set forth below, meet the requirements of due process and provide the best notice practicable under the circumstances and shall constitute due and sufficient notice to all persons entitled thereto. The Court approves the following deadlines:

A. **Class List**: Defendant shall provide Settlement Class Member contact information to Class Counsel and the Settlement Administrator no later than **14 days** after the Execution of the Settlement Agreement;

B. **Website Posting**: The Settlement Administrator shall provide Notice on the settlement website www.bigfishgamessettlement.com no later than **14 days** after entry of this Preliminary Approval Order;

C. **Notice Date**: The Settlement Administrator shall mail Notice via Email and/or First-Class U.S. Mail No later than **35 days** after entry of this Preliminary Approval Order;

D. **Reminder Notice**: The Settlement Administrator shall send Reminder Notice via email no later than **61 days** after entry of this Preliminary Approval Order (i.e., 30 days before the Claims Deadline);

E. **Claims Deadline**: All claims shall be submitted as set forth in the Agreement no later than **91 days** after entry of this Preliminary Approval Order (i.e., 56 days after the Notice Date); and

F. **Objection/Exclusion Deadline**: All written objections to the Agreement and/or requests for exclusion shall be submitted as set forth in the Agreement no later than **91 days** after entry of this Preliminary Approval Order (i.e., 56 days after the Notice Date).

11. **Final Approval Hearing.** I will soon be retiring from the federal judiciary and this case will be transferred to a new judge. After transfer, a fairness hearing should be scheduled to determine whether the Agreement warrants final approval. The hearing should determine, among other things:

A. whether the Settlement Class should be certified, for settlement purposes, as a class action;

B. whether the Class Representatives and Class Counsel have adequately represented the Settlement Class;

C. whether the Settlement should be approved as fair, reasonable, and adequate;

D. whether the Amended Complaint should be dismissed with prejudice pursuant to the terms of the Settlement;

E. whether the Notice and the means of disseminating same pursuant to the Settlement Agreement: (i) are appropriate and reasonable and constituted due, adequate, and sufficient notice to all persons entitled to notice; and (ii) meet all applicable requirements of the Federal Rules of Civil Procedure, and any other applicable law;

F. whether the application for attorneys' fees and expenses to be filed by Class Counsel should be approved or adjusted;

G. whether the proposed disbursement of monetary awards is fair and reasonable and should be approved;

H. whether the planned prospective relief should be approved;

I. whether the application for Incentive Awards for the Class Representatives should be approved; and

J. whether there are any timely and proper objections to the Settlement and/or to the application for attorneys' fees and expenses and/or request for Incentive Awards and how any such objections shall be resolved.

12. Additional Briefing Deadlines: The Court refrains from setting deadlines for Settlement Class Counsel's briefing in support of their motion for approval of attorneys' fees and litigation expenses and final approval of Settlement Agreement. These deadlines should be set by the transferee judge in coordination with the Final Approval Hearing.

For these reasons, the Court GRANTS Plaintiffs' Unopposed Motions for Preliminary Approval of Class Action Settlement.

IT IS SO ORDERED.

Dated this 31st day of August, 2020.

Ronald B. Leighton
United States District Judge

Exhibit 2

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SEAN WILSON, individually and on behalf of all others similarly situated, Plaintiff, v. PLAYTIKA LTD, an Israeli limited company, and CAESARS INTERACTIVE ENTERTAINMENT, LLC, a Delaware limited liability company, Defendant.	CASE NO. 3:18-cv-05277-RBL ORDER ON PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT DKT. # 120

THIS MATTER is before the Court on Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement. This case belongs to a group of class actions seeking to recover losses incurred on casino-gaming apps. The parties in several such cases, including this one, have now reached settlement agreements.

Having considered the Motion and supporting papers, the Agreement and the Exhibits attached thereto, the Court issues the following Order:

1. **Settlement Terms.** All terms and definitions used herein have the same meanings as set forth in the Settlement Agreement.

2. **Jurisdiction.** The Court has jurisdiction over the Parties, the subject matter of the dispute, and all Settlement Class Members.

3. **Preliminary Class Findings.** The Court preliminarily finds, for the purposes of settlement only, that this action meets all prerequisites of Rule 23 of the Federal Rules of Civil Procedure, including numerosity, commonality, typicality, predominance, and superiority, and that the Named Plaintiff is an adequate representative of the Settlement Class, defined below, and Class Counsel are adequate to represent the Settlement Class, defined below.

4. **Conditional Certification of Settlement Class.** Based on the findings set out in paragraph 3 above, the Court conditionally certifies the following class for settlement purposes only, under Fed. R. Civ. P. 23(a) and (b)(3):

> all persons who played [Slotomania, House of Fun, Caesars Casino/Caesars Slots, and Vegas Downtown Slots & Words] on or before Preliminary Approval of the Settlement while located in the State of Washington.[1]

See Agreement, Dkt. # 121-1, § 1.33.

5. **Appointment of Class Representatives.** The Court appoints, for settlement purposes only, Plaintiff Sean Wilson along with David Taylor, Cathy Burdick and Jesse Thibert as Class Representatives.

6. **Appointment of Class Counsel.** The Court appoints, for settlement purposes only, Jay Edelson, Rafey S. Balabanian, Todd Logan, Alexander G. Tievsky, and Brandt Silver-Korn of Edelson PC as Class Counsel for the Settlement Class.

[1] Excluded from the Settlement Class are (1) any Judge or Magistrate presiding over this action and members of their families, (2) the Defendants, Defendants' subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendants or their parents have a controlling interest and their current or former officers, directors, and employees, (3) persons who properly execute and file a timely request for exclusion from the class, and (4) the legal representatives, successors or assigns of any such excluded persons.

7. **Conditional Nature of Certification of the Settlement Class.** This conditional certification of the Settlement Class is solely for purposes of effectuating the Settlement. If the Effective Date of the Settlement Agreement does not occur, the foregoing conditional certification of the Settlement Class and appointment of Class Representatives and Class Counsel shall be void and of no further effect, and the Parties shall be returned to the status each occupied before entry of this Order without prejudice to any legal argument, position, or privilege that any of the Parties might have asserted but for the Settlement Agreement.

8. **Preliminary Findings Regarding Proposed Settlement.** Defendants have agreed to establish a $38,000,000.00 Settlement Fund from which Settlement Class Members who file a valid claim will be entitled to recover a cash payment, after deducting administrative expenses, any fee award to Class Counsel, and any incentive payments to the Class Representatives. Agreement, Dkt. # 121-1, §§ 1.32, 2.1. No portion of the Settlement Fund will revert to Defendants. As described in detail in the Plan of Allocation, *id.* at Ex. E, the amount of each Settlement Class Member's payment will vary based on the Settlement Class Member's Lifetime Spending Amount (those with higher Lifetime Spending Amounts are eligible to recover a greater percentage back) and overall Settlement Class Member participation levels.

As prospective relief, Playtika has agreed to establish a voluntary self-exclusion policy that will allow players to exclude themselves from further gameplay. *See id.* § 2.2. Playtika must also make a link to that policy prominently available within the games, and its customer service representatives will provide the link to players who contact them and reference or seek help for video game behavior disorders. *See id.* Playtika has also agreed to other prospective relief measures, including changes to game mechanics such that when players run out of virtual chips, they won't need to purchase additional chips or wait to receive free additional chips to keep

playing Defendants' games. *See id.* In exchange for the relief described above, Defendants and other entities, including the Platform Providers Facebook, Apple, Google, Amazon, Microsoft, and Samsung, will be released from all claims raised in these cases relating to the operation of Defendants' social casino games and the sale of virtual chips in those games. *Id*. at § 3.

The Agreement further provides that Wilson will seek not more than $5,000 as an incentive award and the other Class Representatives will seek not more than $1,000. The Parties have agreed that Class Counsel is entitled to an award of reasonable attorneys' fees and expenses in an amount to be determined by the Court and to be paid from the Settlement Fund. *See id.* § 8.1. However, Class Counsel represents that it will seek not more than 30% of the Settlement Fund in fees, plus expenses.

The Court preliminarily finds that the proposed Settlement should be approved as: (a) fair, reasonable, and adequate; (b) the product of serious, informed, arm's-length, and non-collusive negotiations; (c) having no obvious deficiencies; (d) not improperly granting preferential treatment to Class Representatives or segments of the Settlement Class; (e) falling within the range of possible approval; and (f) warranting notice to Settlement Class Members of a Final Approval Hearing, at which evidence may be presented in support of and in opposition to the proposed Settlement.

9. **Injunction and Stay.** Pending the final determination of the fairness, reasonableness, and adequacy of the proposed Settlement, all Settlement Class Members are PRELIMINARILY ENJOINED from instituting or commencing any action against Defendants based on the Released Claims, and all proceedings in this action, except those related to approval of the Settlement, are STAYED.

10. **Class Notice.** This Court approves the notice plan set forth in the Agreement, *see* Dkt. # 121-1, §§ 4.1, 4.2, and the form and content of the notice to class members as set forth in Exhibits B-D attached to the Agreement. The Court approves the procedure for Settlement Class Members to opt out of, or object to, the Settlement as set forth in the Settlement Agreement Notice. *Id*. at §§ 4.4, 4.5. The Court appoints Heffler Claims Group as the Settlement Administrator.

The Court directs the mailing of the Settlement Class Notice by email and/or First-Class U.S. mail to the Settlement Class Members in accordance with the schedule set forth below. The Court finds the dates selected for the mailing and distribution of the Notice, as set forth below, meet the requirements of due process and provide the best notice practicable under the circumstances and shall constitute due and sufficient notice to all persons entitled thereto. The Court approves the following deadlines:

A. **Class List**: Defendant shall provide Settlement Class Member contact information to Class Counsel and the Settlement Administrator no later than **30 days** after the Execution of the Settlement Agreement;

B. **Website Posting**: The Settlement Administrator shall provide Notice on the settlement website www.playtikasettlement.com no later than **7 days** after entry of this Preliminary Approval Order;

C. **Notice Date**: The Settlement Administrator shall mail Notice via Email and/or First-Class U.S. Mail no later than **35 days** after entry of this Preliminary Approval Order;

D. **Reminder Notice**: The Settlement Administrator shall send Reminder Notice via email no later than **61 days** after entry of this Preliminary Approval Order (i.e., 30 days before the Claims Deadline);

E. **Claims Deadline**: All claims shall be submitted as set forth in the Agreement no later than **91 days** after entry of this Preliminary Approval Order (i.e., 56 days after the Notice Date); and

F. **Objection/Exclusion Deadline**: All written objections to the Agreement and/or requests for exclusion shall be submitted as set forth in the Agreement no later than **91 days** after entry of this Preliminary Approval Order (i.e., 56 days after the Notice Date).

11. **Final Approval Hearing.** I will soon be retiring from the federal judiciary and this case will be transferred to a new judge. After transfer, a fairness hearing should be scheduled to determine whether the Agreement warrants final approval. The hearing should determine, among other things:

A. whether the Settlement Class should be certified, for settlement purposes, as a class action;

B. whether the Class Representatives and Class Counsel have adequately represented the Settlement Class;

C. whether the Settlement should be approved as fair, reasonable, and adequate;

D. whether the Amended Complaint should be dismissed with prejudice pursuant to the terms of the Settlement;

E. whether the Notice and the means of disseminating same pursuant to the Settlement Agreement: (i) are appropriate and reasonable and constituted due,

adequate, and sufficient notice to all persons entitled to notice; and (ii) meet all applicable requirements of the Federal Rules of Civil Procedure, and any other applicable law;

F. whether the application for attorneys' fees and expenses to be filed by Class Counsel should be approved or adjusted;

G. whether the proposed disbursement of monetary awards is fair and reasonable and should be approved;

H. whether the planned prospective relief should be approved;

I. whether the application for Incentive Awards for the Class Representatives should be approved; and

J. whether there are any timely and proper objections to the Settlement and/or to the application for attorneys' fees and expenses and/or request for Incentive Awards and how any such objections shall be resolved.

12. Additional Briefing Deadlines: The Court refrains from setting deadlines for Settlement Class Counsel's briefing in support of their motion for approval of attorney fees and litigation expenses and final approval of Settlement Agreement. These deadlines should be set by the transferee judge in coordination with the Final Approval Hearing.

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For these reasons, the Court GRANTS Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement.

IT IS SO ORDERED.

Dated this 31st day of August, 2020.

Ronald B. Leighton
United States District Judge

Exhibit 3

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SEAN WILSON, individually and on behalf of all others similarly situated, Plaintiff, v. HUUUGE, INC., a Delaware corporation, Defendant.	CASE NO. 18-cv-05276-RBL ORDER ON PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT DKT. # 98

THIS MATTER is before the Court on Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement. This case belongs to a group of class actions seeking to recover losses incurred on casino-gaming apps. The parties in several such cases, including this one, have now reached settlement agreements.

Having considered the Motion and supporting papers, the Agreement and the Exhibits attached thereto, the Court issues the following Order:

1. **Settlement Terms.** All terms and definitions used herein have the same meanings as set forth in the Settlement Agreement.

2. **Jurisdiction.** The Court has jurisdiction over the Parties, the subject matter of the dispute, and all Settlement Class Members.

3. **Preliminary Class Findings.** The Court preliminarily finds, for the purposes of settlement only, that this action meets all prerequisites of Rule 23 of the Federal Rules of Civil Procedure, including numerosity, commonality, typicality, predominance, and superiority, and that the Named Plaintiff is an adequate representative of the Settlement Class, defined below, and Class Counsel are adequate to represent the Settlement Class, defined below.

4. **Conditional Certification of Settlement Class.** Based on the findings set out in paragraph 3 above, the Court conditionally certifies the following class for settlement purposes only, under Fed. R. Civ. P. 23(a) and (b)(3):

> Washington residents (as reasonably determined by IP address information or other information furnished by Platform Providers) who played [Huuuge Casino, Billionaire Casino, Stars Slots, and any other game listed on Exhibit G to the Agreement] on or before preliminary approval of the settlement.[1]

See Agreement, Dkt. # 99-1, § 1.33.

5. **Appointment of Class Representatives.** The Court appoints, for settlement purposes only, Plaintiff Sean Wilson along with Heidi Hammer as Class Representatives.

6. **Appointment of Class Counsel.** The Court appoints, for settlement purposes only, Jay Edelson, Rafey S. Balabanian, Todd Logan, Alexander G. Tievsky, and Brandt Silver-Korn of Edelson PC as Class Counsel for the Settlement Class.

7. **Conditional Nature of Certification of the Settlement Class.** This conditional certification of the Settlement Class is solely for purposes of effectuating the Settlement. If the Effective Date of the Settlement Agreement does not occur, the foregoing conditional

[1] Excluded from the Settlement Class are (1) any Judge or Magistrate presiding over this action and members of their families, (2) Defendant, Defendant's subsidiaries, parent companies, successors, predecessors, and any entity in which Defendant or its parents have a controlling interest and their current or former officers, directors, and employees, (3) persons who properly execute and file a timely request for exclusion from the settlement class, and (4) the legal representatives, successors or assigns of any such excluded persons.

certification of the Settlement Class and appointment of Class Representatives and Class Counsel shall be void and of no further effect, and the Parties shall be returned to the status each occupied before entry of this Order without prejudice to any legal argument, position, or privilege that any of the Parties might have asserted but for the Settlement Agreement.

8. **Preliminary Findings Regarding Proposed Settlement.** Defendant has agreed to establish a $6,500,000.00 Settlement Fund from which Settlement Class Members who file a valid claim will be entitled to recover a cash payment, after deducting costs and administrative expenses, any fee award to proposed Class Counsel, and any incentive payments to the Class Representatives. *See* Agreement, Dkt. # 98-1, §§ 1.32, 2.1. No portion of the Settlement Fund will revert to Defendant. As described in detail in the Plan of Allocation, *id.* at Ex. E, the amount of each Settlement Class Member's payment will depend first on whether or not the Settlement Class Member is "potentially subject to Huuuge's Governing Law and Binding Arbitration (GLBA) provision." *See id.* §§ 1.36, 2.1(c), (d); Exhibit E. Recovery will vary from the baselines established by GLBA status according to the Settlement Class Member's Lifetime Spending Amount (those with higher Lifetime Spending Amounts are eligible to recover a greater percentage back) and overall Settlement Class Member participation levels. *See id.*

For Applications Huuuge continues to offer to Washington residents (as determined by IP address or geolocations), Huuuge has agreed to establish a voluntary self-exclusion policy that will allow players to exclude themselves from further gameplay. *See id.* § 2.2. Huuuge must also make a link to that policy prominently available within the games, and its customer service representatives will provide the link to players who contact them and reference or seek help for video game behavior disorders. *See id.* Huuuge has also agreed to other prospective relief measures, including changes to game mechanics such that when players run out of virtual chips,

they won't need to purchase additional chips or wait to receive free additional chips to continue playing at least one game within the Application they are playing. *See id.*

In exchange for the relief described above, Defendant and other entities, including the Platform Providers Facebook, Apple, Google, and Amazon, will be released from all claims raised in these cases relating to the operation of Defendant's social casino games and the sale of virtual chips in those games, including claims that the games were illegal gambling or the chips were "things of value." The full release is contained at *id.* § 1.27.

The Agreement further provides that Wilson will seek not more than $10,000 as an incentive award and Hammer will seek not more than $1,000. Attorney fees to Settlement Class Counsel shall be no more than 30% of the Settlement Fund, plus reimbursement of expenses. Settlement Administration Expenses, which together with any anticipated Fee Award and Incentive Award, shall be no more than 30% of the Settlement Fund.

The Court preliminarily finds that the proposed Settlement should be approved as: (a) fair, reasonable, and adequate; (b) the product of serious, informed, arm's-length, and non-collusive negotiations; (c) having no obvious deficiencies; (d) not improperly granting preferential treatment to Class Representatives or segments of the Settlement Class; (e) falling within the range of possible approval; and (f) warranting notice to Settlement Class Members of a Final Approval Hearing, at which evidence may be presented in support of and in opposition to the proposed Settlement.

9. **Injunction and Stay.** Pending the final determination of the fairness, reasonableness, and adequacy of the proposed Settlement, all Settlement Class Members are PRELIMINARILY ENJOINED from instituting or commencing any action against Defendants

based on the Released Claims, and all proceedings in this action, except those related to approval of the Settlement, are STAYED.

10. **Class Notice.** This Court approves the notice plan set forth in the Agreement, *see* Dkt. # 98-1, §§ 4.1, 4.2, and the form and content of the notice to class members as set forth in Exhibits B-D attached to the Agreement. The Court approves the procedure for Settlement Class Members to opt out of, or object to, the Settlement as set forth in the Settlement Agreement Notice. *Id*. at §§ 4.4, 4.5. The Court appoints Angeion Group as the Settlement Administrator.

The Court directs the mailing of the Settlement Class Notice by email and/or First-Class U.S. mail to the Settlement Class Members in accordance with the schedule set forth below. The Court finds the dates selected for the mailing and distribution of the Notice, as set forth below, meet the requirements of due process and provide the best notice practicable under the circumstances and shall constitute due and sufficient notice to all persons entitled thereto. The Court approves the following deadlines:

A. **Subpoena**: Plaintiff shall issue subpoena and rider to Platform Providers as described in the Agreement § 4.1 no later than **7 days** after Execution of the Settlement Agreement;

B. **Class List**: Defendant shall provide Settlement Class List to Class Counsel and the Settlement Administrator no later than **14 days** after the Execution of the Settlement Agreement;

C. **Website Posting**: The Settlement Administrator shall provide Notice on the settlement website www.hgsettlement.com no later than **7 days** after entry of this Preliminary Approval Order;

D. **Notice Date**: The Settlement Administrator shall mail Notice via Email and/or First-Class U.S. Mail no later than **35 days** after entry of this Preliminary Approval Order;

E. **Reminder Notice**: The Settlement Administrator shall send Reminder Notice via email no later than **61 days** after entry of this Preliminary Approval Order (i.e., 30 days before the Claims Deadline);

F. **Claims Deadline**: All claims shall be submitted as set forth in the Agreement no later than **91 days** after entry of this Preliminary Approval Order (i.e., 56 days after the Notice Date); and

G. **Objection/Exclusion Deadline**: All written objections to the Agreement and/or requests for exclusion shall be submitted as set forth in the Agreement no later than **91 days** after entry of this Preliminary Approval Order (i.e., 56 days after the Notice Date).

11. **Final Approval Hearing.** I will soon be retiring from the federal judiciary and this case will be transferred to a new judge. After transfer, a fairness hearing should be scheduled to determine whether the Agreement warrants final approval. The hearing should determine, among other things:

A. whether the Settlement Class should be certified, for settlement purposes, as a class action;

B. whether the Class Representatives and Class Counsel have adequately represented the Settlement Class;

C. whether the Settlement should be approved as fair, reasonable, and adequate;

D. whether the Amended Complaint should be dismissed with prejudice pursuant to the terms of the Settlement;

E. whether the Notice and the means of disseminating same pursuant to the Settlement Agreement: (i) are appropriate and reasonable and constituted due, adequate, and sufficient notice to all persons entitled to notice; and (ii) meet all applicable requirements of the Federal Rules of Civil Procedure, and any other applicable law;

F. whether the application for attorneys' fees and expenses to be filed by Class Counsel should be approved or adjusted;

G. whether the proposed disbursement of monetary awards is fair and reasonable and should be approved;

H. whether the planned prospective relief should be approved;

I. whether the application for Incentive Awards for the Class Representatives should be approved; and

J. whether there are any timely and proper objections to the Settlement and/or to the application for attorneys' fees and expenses and/or request for Incentive Awards and how any such objections shall be resolved.

12. Additional Briefing Deadlines: The Court refrains from setting deadlines for Settlement Class Counsel's briefing in support of their motion for approval of attorney fees and litigation expenses and final approval of Settlement Agreement. These deadlines should be set by the transferee judge in coordination with the Final Approval Hearing.

For these reasons, the Court GRANTS Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement.

IT IS SO ORDERED.

Dated this 31st day of August, 2020.

Ronald B. Leighton
United States District Judge

Exhibit 4

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEAN WILSON, individually and on behalf of all others similarly situated, Plaintiff, v. PTT, LLC, d/b/a HIGH 5 GAMES, LLC, Defendant.	Case No. C18-5275RSL ORDER CERTIFYING CLASSES AND DENYING PRELIMINARY INJUNCTION

This matter comes before the Court on "Plaintiff's Motion for Class Certification and for Preliminary Injunction." Dkt. # 142.[1] Having reviewed the memoranda, declarations, and exhibits submitted by the parties and having heard the arguments of counsel,[2] the Court finds as follows:

[1] A redacted version of the motion is available for public viewing at Dkt. # 143.

Defendant's response memorandum is significantly overlength at slightly more than forty-one pages of substantive text rather than the twenty-four pages allowed by the local civil rules. Defendant asserts that, because plaintiff's motion incorporated two requests for relief, namely class certification and preliminary injunction it is entitled to double the allotted page limit. The filing of a single motion does not give the responding party the right to file multiple separate response memoranda regardless of the number of claims at issue or the nature of the relief requested. Nor does it justify the filing of a single overlength response, as defendant did here. Had plaintiff not filed an overlength reply, the Court would have ignored the unauthorized pages of defendant's memorandum.

[2] Defendant's objections to plaintiff's evidence are considered in the text.

I. BACKGROUND

Defendant develops and makes available to Washington residents casino-themed games that can be played on mobile devices, including High 5 Casino and High 5 Vegas. Downloading the applications is free, and first-time users are given virtual coins to use in the animated slot machines and for other game play. Dkt. # 82 at ¶ 3. The slot machines and games cannot be played without virtual coins, and coins are won and lost based on a spin's outcome. Both applications make virtual coins available for free during play, but use different means to do so. High 5 Casino makes new coins available to the user when the application is opened, on an every four hour schedule, through a daily bonus, and when the player exits the game to spin a wheel in the application's "lobby." *Id.* at ¶ 5. High 5 Vegas also provides virtual coins through a daily bonus, but its primary method for distributing free coins is a counter at the top center of the screen display that constantly ticks up, adding to a balance of free virtual coins. The counter ticks up regardless of whether the application is open or closed, until a set maximum is reached. The player may push a button marked "COLLECT" at any time to add the coins in the counter to his or her bank of virtual coins. *Id.* at ¶ 4. With regards to both High 5 Casino and High 5 Vegas, if the player's rate of play exceeds the free virtual coins on offer at any given time, he or she must stop playing or may purchase additional coins.

Plaintiff Sean Wilson began playing High 5 Casino in 2013. Dkt. # 154 at 28-29. He played for years using only the virtual coins he won in the game or that were offered for free within the application. On December 17, 2016, however, he needed additional coins in order to continue his play and purchased 20,000 coins for $1.99. *Id.* at 29, 30, and 32. Plaintiff last accessed High 5 Casino in April of 2017. He has never played High 5 Vegas. In April 2018, plaintiff filed this lawsuit, asserting that defendant's on-line casino games constitute illegal gambling under Washington's Recovery of Money Lost at Gambling Act ("RMLGA"), that defendant violated the Washington Consumer Protection Act ("CPA"), and that defendant was unjustly enriched by plaintiff's payment.

Plaintiff seeks to certify two classes, one for the recovery of damages and the other for injunctive relief, comprised of:

> All individuals in Washington who purchased virtual casino chips on either High 5 Casino or High 5 Vegas after April 9, 2014 ("Damages Class").
>
> All individuals in Washington who played either High 5 Casino or High 5 Vegas after April 9, 2014 ("Injunctive Class").

Dkt. # 142 at 14. Defendant opposes class certification on a number of grounds, many of which are based on the assertion that the named plaintiff suffered no cognizable injury or is otherwise not typical/representative of the proposed classes.

II. DISCUSSION

A. Article III Standing

Defendant contends that Mr. Wilson did not suffer an "injury in fact" because he received the full benefit of the bargain he struck, namely $1.99 in exchange for 20,000 virtual coins that could be played in High 5 Casino. Defendant cites cases in which consumer protection act and unfair business practices claims were dismissed because the plaintiffs had not alleged a cognizable economic injury. Dkt. # 153 at 20-21. Standing, however, "derives from the case-or-controversy requirement" and depends on the facts alleged and the claims asserted. *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1549 (2016), as revised (May 24, 2016). Although a fraud or breach of contract claim has not "traditionally been regarded as providing a basis for a lawsuit in English or American courts" where the claimant obtained the expected benefits of the bargain and could therefore not articulate an actual injury (*Id.*), the legislature has the power to "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law" (*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992)). While legislative fiat cannot do away with the case and controversy requirement (by, for example, creating a right of action divorced from any concrete harm), the legislature "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy

where none existed before." *Lujan*, 504 U.S. at 580 (J. Kennedy, concurring in part and concurring in judgment).

In this case, the Washington legislature has determined that a person who participates in illegal gambling is entitled to recover his or her losses from the proprietor for whose benefit the game was played or dealt. RCW 4.24.070. The statute, by its terms, requires a loss of money or a thing of value in order to give rise to a cause of action and therefore does not create a claim in the absence of actual, concrete harm. Plaintiff lost $1.99 on an allegedly illegal gambling application developed and maintained by defendant. The alleged injury is fairly traceable to defendant's conduct and can be redressed by pursuing this RMLGA claim. There is, therefore, a justiciable case or controversy between the parties, and plaintiff has standing to pursue his RMLGA claim.

With regards to plaintiff's CPA claim, RCW 19.86.020 makes "unfair or deceptive acts or practices in the conduct of any trade or commerce" unlawful, and RCW 19.86.090 authorizes "[a]ny person who is injured in his or her business or property by a violation of RCW 19.86.020 ... [to] bring a civil action in superior court." Plaintiff has clearly alleged a cognizable injury to business or property that is both actual and concrete. *Meyer v. U.S. Bank Nat. Ass'n*, 530 B.R. 767, 781 (W.D. Wash. 2015), *aff'd sub nom. Meyer v. Nw. Tr. Servs. Inc*., 712 F. App'x 619 (9th Cir. 2017) (quoting *Mason v. Mortg. Am., Inc.*, 114 Wn.2d 842, 854 (1990)). He therefore has standing to litigate whether the conduct that caused his loss was unfair and/or deceptive. *See Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787 (2013) (noting that an act can be unfair for purposes of a CPA claim without also having to be deceptive).

Similarly, plaintiff has standing to pursue an unjust enrichment claim, having indisputably benefitted defendant in the sum of $1.99. Whether defendant's enrichment was unjust is a merits issue to be determined at a later date.

B. Prerequisites of a Class

Pursuant to Fed. R. Civ. P. 23(a), a court may certify a class only if:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

A court must conduct a rigorous analysis to determine whether a purported class satisfies the prerequisites of Rule 23. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012). The Rule "does not set forth a mere pleading standard:" the party seeking class certification must "affirmatively demonstrate his compliance with the Rule -- that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, *etc*." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (emphasis in original).

(1) Numerosity

Defendant does not dispute that the proposed class is of sufficient size to meet the numerosity requirement. *See Ali v. Menzies Aviation, Inc.*, 2016 WL 4611542 (W.D. Wash. Sept. 6, 2016) ("As a general rule a potential class of 40 members is considered impractical to join.") (citing *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986)). Its objections to plaintiff's evidence regarding the number of chip purchases made by Washington residents is therefore moot.

(2) Commonality

In order to satisfy the commonality criterion, the class members' claims "must depend upon a common contention of such a nature that it is capable of classwide resolution." *Wal-Mart*, 564 U.S. at 338. A class meets the commonality requirement when "the common questions it has raised are 'apt to drive the resolution of the litigation' no matter their number." *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014). As defendant's opposition makes abundantly clear, the key question related to liability under RMLGA is whether the virtual chips in defendant's games are "things of value" for purposes of RCW 4.24.070. Defendant argues that they are not because players may have, or could obtain, free chips to extend their game play

instead of purchasing coins, but that argument is part of the broader, common issue.[3] If the "things of value" question is resolved in plaintiff's favor, other common questions arise, such as:

a) Whether defendant's games satisfy the statutory definition of "gambling."

b) Whether class members' recoverable losses under RMLGA are coextensive with the money they spent purchasing virtual coins.

c) Whether a violation of Washington's gambling laws constitutes a per se unfair or deceptive act for purposes of the CPA.

d) Whether defendant's conduct is "unfair" for purposes of the CPA.

e) Whether a violation of Washington's gambling laws impacts the public interest for purposes of the CPA.

d) Whether plaintiff's transfer of funds to defendant in the context of the illegal gambling games alleged enriched defendant and whether that enrichment was unjust.

f) Whether plaintiff's claim for injunctive relief is viable.

Each of these questions relates to defendant's alleged operation of a gambling game in violation of Washington law, the answers to these questions will be the same for every class member, and they are apt to drive the resolution of one or more claims asserted. Commonality is satisfied.

(3) Typicality

The typicality requirement "ensures that the interests of the class representative aligns with the interests of the class." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (internal quotation marks omitted). The named plaintiff's claims need not be identical to those of the absent class members, but they must be reasonably similar in light of the injuries suffered and the conduct that allegedly caused the injuries. *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014); *Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1141 (9th Cir. 2016). Class certification

[3] To the extent defendant is arguing that the differences in the way chips are dispersed in High 5 Casino and High 5 Vegas is material to the class certification analysis, that argument is considered below in the typicality discussion.

is not appropriate if there is a danger that the absent class members will suffer because their representative is preoccupied with defenses unique to him or herself. *Hanon v. Dataprods. Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

Defendant argues that plaintiff's claims are not typical of absent class members who played High 5 Vegas, that plaintiff is uniquely subject to impeachment, that plaintiff lacks prudential standing or is judicially-estopped from asserting claims, that his CPA injury is not caused by the same conduct that allegedly injured absent class members, and that his equitable unjust enrichment claim is uniquely subject to an unclean hands defense.

(a) High 5 Vegas

Based on the existing record, it appears that normal play on both High 5 Casino and High 5 Vegas will at times result in a player having too few chips to satisfy the minimum bet requirement to continue playing. At that point, the player has to cease play or purchase virtual coins. It is that facet of the game - that players must part with actual money to obtain tokens that extend the privilege of playing the game - that allegedly violates Washington's gambling laws and gives rise to a claim for recovery under RMLGA. That defendant can articulate some variety in the games it has developed does not mean that the variations are material to plaintiff's claims.

(b) Impeachment

Defendant accuses plaintiff of making incredible and/or unsupported statements in the complaint and during his deposition. None of the asserted statements touches on issues that are likely to become a preoccupation at trial (*Fosmire v. Progressive Max Ins. Co.*, 277 F.R.D. 625, 632-33 (W.D. Wash. 2011)), nor do they disassociate plaintiff's claims from those of the absent class members in any way (*Wal-Mart*, 564 U.S. at 349, n.5).

(c) Prudential Standing

Plaintiff purchased $1.99 worth of virtual coins in the High 5 Casino application on December 16, 2016. Two weeks later, he filed a Chapter 7 bankruptcy petition. His original schedule of assets, which was filed on January 16, 2017, stated that he had no contingent claims

against third parties to count among his assets. The trustee granted plaintiff a discharge one month later. Defendant argues, based on these bare facts, that the trustee, rather than plaintiff, is the real party in interest with regards to the claims asserted in this litigation and that plaintiff is therefore atypical because he lacks prudential standing. *See Sprint Commc'ns Co. v. APCC Servs., Inc*., 554 U.S. 269, 289 (2008); *Dunmore v. U.S.*, 358 F.3d 1107, 1112 (9th Cir. 2004).

As the party arguing that the causes of action in question are part of the bankruptcy estate, defendant bears the burden of proof. *See In re Bolton*, 584 B.R. 44, 51 (Bankr. D. Idaho 2018). Defendant does not cite the bankruptcy code or make any effort to define the assets of the estate in support of its prudential standing argument.[4] While it is true that the filing of a bankruptcy petition transfers all legal or equitable interests a debtor may have as of the commencement of the case to the bankruptcy estate (*Turner v. Cook*, 362 F.3d 1219, 1225-26 (9th Cir. 2004) (quoting 11 U.S.C. § 541(a)(1)), legal or equitable interests acquired after the commencement of the case transfer to the estate only if estate assets were used in the acquisition (*MacKenzie v. Neidorf*, 534 B.R. 369, 372 (9th Cir. BAP 2015) (citing 11 U.S.C. § 541(a)(7)).

How these provisions apply in this case is unclear given that defendant ignores potentially relevant events in making its argument. In November 2015, more than a year before plaintiff made his purchase, the Honorable Marsha J. Pechman, United States District Judge for the Western District of Washington, determined that virtual chips necessary to play on a virtual gambling platform are not "things of value" and dismissed claims under RMLGA and the CPA, and for unjust enrichment. *Kater v. Churchill Downs Inc.*, 2015 WL 9839755 (W.D. Wash. Nov. 19, 2015). That decision was reversed in March 2018 in *Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018), more than a year after plaintiff's bankruptcy had been discharged. Plaintiff filed this lawsuit shortly after the Ninth Circuit issued its decision.

Regardless whether defendant could have shown that plaintiff lacked prudential standing

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[4] Defendant asserted that it would file a motion for summary judgment on the standing issue "in the coming weeks," but no such motion has been filed. Dkt. # 153 at 24, n.4.

at the time this lawsuit was filed, once defendant raised the issue, plaintiff moved to reopen his bankruptcy proceeding so that he could schedule the claims asserted herein as newly-discovered assets. He recently obtained the trustee's approval of the claimed exemption and a court order reclosing the case. *See In re Sean Patrick Wilson*, B.R. 16-45252, Dkt. # 21-32 (Bankr. W.D. Wash. 2020). The Court therefore finds no prudential bar to plaintiff's pursuit of these claims.

(d) Judicial Estoppel

"Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001). "In the bankruptcy context, the federal courts have developed a basic default rule: If a plaintiff-debtor omits a pending (or soon-to-be-filed) lawsuit from the bankruptcy schedules and obtains a discharge (or plan confirmation), judicial estoppel bars the action." *Ah Quin v. County of Kauai Dept. of Transp.*, 733 F.3d 267, 271 (9th Cir. 2013). Such a rule generally comports with the Supreme Court's analysis in *New Hampshire v. Maine*, 532 U.S. 742 (2001), because the positions taken are inconsistent ("there is not a claim" vs. "there is a claim"), the bankruptcy court accepted the prior representation (by allocating resources, discharging debts, and/or reorganizing debtors in reliance thereon), and the debtor obtained an unfair advantage (creditors did not have a chance to assess and benefit from the undisclosed assets before discharge or reorganization). *Ah Quin*, 733 F.3d at 271. Barring litigation of claims that were not disclosed in bankruptcy also furthers the underlying goal of judicial estoppel, which is "to protect the integrity of the judicial process" by prohibiting parties from "playing fast and loose with the courts." *New Hampshire*, 532 U.S. at 749-50; *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990).

There is no indication that plaintiff was aware that his $1.99 purchase of virtual chips gave rise to a viable cause of action at the time he filed his bankruptcy petition and schedules. In fact, the controlling law was against him. These circumstances do not raise an inference that

plaintiff was playing fast and loose with the courts or was otherwise seeking an unfair advantage. In addition, plaintiff has now availed himself of "a permissible alternative to judicial estoppel" by reopening his bankruptcy proceeding and disclosing the previously unscheduled claim. *Dunmore*, 358 F.3d at 1113, n. 3. Plaintiff is not judicially estopped from pursuing the claims asserted here.

(e) CPA Injury/Causation

Defendant argues that "Wilson's CPA claim is atypical because he cannot show that he was injured by the same conduct that allegedly injured other class members." Dkt. # 153 at 33. On the record provided, the conduct alleged and the nature of the resulting injury appear to be exactly the same as to all class members. Defendant fails to identify any differences, instead arguing only that plaintiff will be unable to establish an unfair or deceptive trade practice. Given that this is one of the common questions raised in the case, its existence does not show that plaintiff is atypical of the class.

(f) Unclean Hands Defense

Finally, defendant maintains that plaintiff's equitable claim of unjust enrichment is subject to a unique unclean hands defense insofar as plaintiff knowingly engaged in illegal gambling. Defendant does not argue that plaintiff's conduct was, in fact, unlawful or illegal. While the legislature has seen fit to regulate the proprietor of gambling facilities and operations, requiring licenses and creating liability for gamblers' losses in unlicensed operations, defendant has not cited an affirmative prohibition on the conduct in which plaintiff engaged or shown that plaintiff's breach of any law is the foundation for his claims. If defendant can establish an unclean hands defense that applies only to the named plaintiff, the Court will revisit certification and/or plaintiff's earlier request to amend the complaint to add an additional plaintiff.

The Court finds that Mr. Wilson's claims are "reasonably co-extensive with those of absent class members." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Each

class member has claims based on the same alleged conduct and, if plaintiff establishes his claims, such proofs would also establish the claims of the absent class members. On the current record, there does not appear to be any unique defense or characteristic that will preoccupy plaintiff to the detriment of the class. Thus, typicality is met here.

(4) Adequacy of Representation

Two questions determine adequacy: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1031 (9th Cir. 2012) (quoting *Hanlon*, 150 F.3d at 1020). As discussed above, the named plaintiff's claims and interests are aligned with those of the class, and there is no reason to suspect that he will not pursue the statutory and common law claims to the fullest extent possible. Defendants argue, however, that the named's plaintiff's credibility is so damaged that he should be considered an inadequate representative of the class. Dkt. # 153 at 29-30. The alleged misstatements either reflect plaintiff's theory of the case or memory of events (which have not yet been proven to be incorrect) or are immaterial. At best, plaintiff's allegation regarding the bottom end of the price range for which defendant sells virtual chips displays a lack of attention to detail, but it is not disqualifying in the circumstances presented here. Based on the existing record, there is little, if any, chance that the misstatements identified by defendant could adversely impact adjudication of plaintiff's individual claims or the claims asserted on behalf of the class.

The Court finds that both the named plaintiff and plaintiff's counsel have demonstrated a commitment to vigorously prosecuting this action on behalf of the class and will do so in an adequate manner.

B. Maintenance of a Damages Class under Rule 23(b)(3)

Plaintiff argues that the provisions of Rule 23(b)(3) apply, pursuant to which the Court is required to find:

> that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the likely difficulties in managing a class action.

(1) Common Issues Predominate

The first Rule 23(b)(3) finding requires an evaluation of "the relationship between the common and individual issues." *Hanlon*, 150 F.3d at 1022. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Id.* Viewed through a comparative lens, the common questions identified above are significant and, if decided in plaintiff's favor, will go far in establishing both his individual claims and defendant's liability to the absent class members. The common questions also predominate over any individualized defenses. As shown in other related cases pending before the undersigned, damage calculations will utilize information that is entirely computerized and available from third parties: the damages issues will not overwhelm the common issues.[5]

(2) Superiority of Class Action

The second Rule 23(b)(3) finding requires the court to evaluate alternative mechanisms of dispute resolution based on the factors listed above in Rule 23(b)(3)(A)-(D). *See Zinser v.*

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[5] Defendant identifies a number of "individual issues" it intends to explore with each claimant, such as (1) whether each purchase of coins was subject to Washington law, (2) whether their hands were unclean, (3) what prompted their purchase of coins, (4) whether they obtained the benefit of their bargain, and (5) whether the type of injury at issue was reasonably avoidable. It appears that these topics are irrelevant, will be addressed through computerized data, or will have a common answer.

Accufix Research Institute, Inc., 253 F.3d 1180, 1190 (9th Cir. 2001). Defendant argues that the superior mechanism for resolving this dispute is for each player who lost money on High 5 Casino and High 5 Vegas to file an individual action. "Even if efficacious, [individual] claims would not only unnecessarily burden the judiciary, but would prove uneconomic for potential plaintiffs" given the potential litigation costs. *Hanlon*, 150 F.3d at 1023. Some class members, like Mr. Wilson, have an individual claim of only a few dollars, making a lawsuit illogical even if success on the CPA claim were assured. Although some class members may have individual claims in the tens of thousands of dollars, it is unclear how many such individuals exist and, regardless, the vast majority of the class has suffered monetary losses that pale in comparison to the costs of litigation. *Brown v. Consumer Law Associates, LLC*, 283 F.R.D. 602, 615-16 (E.D. Wash. 2012) (holding that class adjudication of class members' claims was superior to separate individual actions when the claims were "relatively small," in the range of $5,000 to $10,000). Because the class members would have little interest in pursuing individual actions, the first factor weighs in favor of class action treatment.

As for existing litigation, the Court is unaware of any other litigation pending against defendant for the claims plaintiff asserts. Thus, treating plaintiff's claims as a class action appears to promote judicial economy. The third factor, desirability of concentrating the litigation in a particular forum, weighs in favor of class action treatment because the proposed classes are limited to individuals in Washington who are subject to Washington law. The Western District is therefore "an entirely logical place for the case to proceed." *Brown*, 283 F.R.D. at 616. The fourth factor, difficulties in managing the class action, also supports class action treatment. The computerized nature of the conduct at issue will make identifying class members fairly straightforward and will ensure that discovery on a classwide basis is comparatively manageable. In addition, this single class action will require fewer judicial (and defense) resources than managing separate suits brought by the admittedly numerous individuals who make up the class.

C. Maintenance of a Damages Class under Rule 23(b)(2)

Fed. R. Civ. P. 23(b)(2) authorizes representative litigation if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Although defendant attempts to distinguish plaintiff and/or his claims from those of the absent class members, plaintiff's theory of the case is that the gambling games developed and operated by defendant cause compensable loss to every player who purchases virtual coins within the applications. This conduct is generally applicable to the class and, if plaintiff is able to prove the elements of his claims, final injunctive or declaratory relief applying to the class as a whole would be appropriate.

D. Preliminary Injunction

In addition to requesting certification of the proposed Injunction Class under Fed. R. Civ. P. 23(b)(2), plaintiff also seeks immediate injunctive relief as follows:

> Pending final disposition of this case, Defendant is enjoined from selling—from within Washingt
> or coins, or other virtual tokens or credits, for use in virtual slot machines or other simulated gambling in internet-based casino-style apps, including, but not limited to, High 5 Casino and High 5 Vegas.

Dkt. # 142 at 26. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,[6] that the balance of equities tips in his favor, and that an injunction is in the public

[6] Plaintiff deleted the offending High 5 Casino application years ago and has never played High 5 Vegas: he is therefore not likely to suffer irreparable harm in the absence of preliminary relief. Having successfully argued that a class should be certified, however, plaintiff is permitted to seek injunctive relief based on alleged class members' injuries and has provided a declaration from a class member who is currently playing High 5 Casino and experiencing emotional distress and anxiety, if not addiction. Dkt. # 144-7.

interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In his motion, plaintiff argues only that he is likely to succeed on the merits of his CPA claim. Dkt. # 142 at 26-29.

The first element of a CPA claim requires a showing of an "unfair" or "deceptive" act, which plaintiff identifies as defendant's "operation of (unregulated) virtual slot machines." *Id.* at 27. Plaintiff argues that defendant's conduct is unfair under the formulation of that term provided in a 1985 state appellate court decision, which itself cites to federal cases from the 1970s. *Id*. at 28 (citing *Blake v. Fed. Way Cycle Ctr.*, 40 Wn. App. 302, 310 (1985)). More recent pronouncements of the Washington Supreme Court make clear that, while a detailed definition of "unfair" remains elusive, it should be interpreted so as "to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition." *Klem*, 176 Wn.2d at 787-88 (quoting RCW 19.86.920). The current trend in federal law makes "unfair" a practice that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits." *Klem*, 176 Wn.2d at 787 (quoting 15 U.S.C. § 45(n)).

Whether plaintiff will be able to make such a showing (or otherwise convince the Court that defendant's conduct is "unfair" for purposes of the CPA) is unclear. Offering an interactive application with in-game purchase options is not, in and of itself, injurious to consumers, making an in-game purchase is generally within the control of the consumer, and obtaining the desired product, as described and for a known price, is seldom a viable basis for a consumer protection or trade practices claim. Plaintiff argues, however, that defendant intentionally targets consumers who have displayed addictive tendencies in a way that is "unfair." While the theory is viable, the evidence plaintiff offers in support of this contention constitutes hearsay, deals with games other than the ones at issue in this litigation, and/or cannot support a finding of "substantial injury to

consumers" at this preliminary stage. Plaintiff himself found High 5 Casino to be boring and not of sufficient interest to occupy his time. Whether defendant's "operation of (unregulated) virtual slot machines" is likely to pose a threat of substantial injury to consumers cannot be determined on the existing record.

III. CONCLUSION

For all of the foregoing reasons, plaintiff's motion for class certification is GRANTED. It is hereby ORDERED that the following class is certified pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3):

> All individuals in Washington who purchased virtual casino chips on either High 5 Casino or High 5 Vegas after April 9, 2014 ("Damages Class").

The following class is certified pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2):

> All individuals in Washington who played either High 5 Casino or High 5 Vegas after April 9, 2014 ("Injunctive Class").

Sean Wilson is appointed representatives of the class. Plaintiff's counsel is designated as counsel for the class. Plaintiff's motion for a preliminary injunction is DENIED.

Dated this 21st day of January, 2021.

Robert S. Lasnik
United States District Judge

Exhibit 5

THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ADRIENNE BENSON AND MARY SIMONSON, individually and on behalf of all others similarly situated, *Plaintiffs*, *v.* DOUBLE DOWN INTERACTIVE, LLC, a Washington limited liability company, and INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation, *Defendants*.	Case No. 2:18-cv-00525-RBL **FIRST AMENDED CLASS ACTION COMPLAINT** **JURY DEMAND**

Plaintiffs Adrienne Benson and Mary Simonson ("Plaintiffs") bring this case, individually and on behalf of all others similarly situated, against Double Down Interactive, LLC ("Double Down") and International Game Technology ("IGT") (collectively "Defendants") to enjoin Defendants' operation of illegal online casino games. Plaintiffs allege as follows upon personal knowledge as to themselves and their own acts and experiences, and upon information and belief, including investigation conducted by their attorneys, as to all other matters.

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NATURE OF THE ACTION

1. Defendants own and operate video game development companies in the so-called "casual games" industry—that is, computer games designed to appeal to a mass audience of casual gamers. Defendants (at all relevant times) owned and operated a popular online casino under the name Double Down Casino.

2. Double Down Casino is available to play on Android, and Apple iOS devices, and on Facebook.

3. Defendants provide a bundle of free "chips" to first-time visitors of Double Down Casino that can be used to wager on games within Double Down Casino. After consumers inevitably lose their initial allotment of chips, Defendants attempt to sell them additional chips for real money. Without chips, consumers cannot play the gambling game.

4. Freshly topped off with additional chips, consumers wager to win more chips. The chips won by consumers playing Defendants' games of chance are identical to the chips that Defendants sell. Thus, by wagering chips that have been purchased for real money, consumers have the chance to win additional chips that they would otherwise have to purchase.

5. By operating the Double Down Casino, Defendants have violated Washington law and illegally profited from tens of thousands of consumers. Accordingly, Plaintiffs, on behalf of themselves and a Class of similarly situated individuals, bring this lawsuit to recover their losses, as well as costs and attorneys' fees.

PARTIES

6. Plaintiff Adrienne Benson is a natural person and a citizen of the state of Washington.

7. Plaintiff Mary Simonson is a natural person and a citizen of the state of Washington.

8. Defendant Double Down Interactive, LLC is a limited liability company organized and existing under the laws of the State of Washington with its principal place of

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business at 605 Fifth Avenue South, Suite 300, Seattle, Washington 98104. Double Down conducts business throughout this District, Washington State, and the United States.

9. Defendant International Game Technology is a corporation existing and organized under the laws of the State of Nevada with its principal place of business at 6355 South Buffalo Drive, Las Vegas, Nevada 89113. IGT conducts business throughout this District, Washington State, and the United States.

JURISDICTION AND VENUE

10. Federal subject-matter jurisdiction exists under 28 U.S.C. § 1332(d)(2) because (a) at least one member of the class is a citizen of a state different from any Defendants, (b) the amount in controversy exceeds $5,000,000, exclusive of interests and costs, and (c) none of the exceptions under that subsection apply to this action.

11. The Court has personal jurisdiction over Defendants because Defendants conduct significant business transactions in this District, and because the wrongful conduct occurred in and emanated from this District.

12. Venue is proper in this District under 28 U.S.C. § 1391(b) because a substantial part of the evens giving rise to Plaintiffs' claims occurred in and emanated from this District.

FACTUAL ALLEGATIONS

I. Free-to-Play and the New Era of Online Gambling

13. The proliferation of internet-connected mobile devices has led to the growth of what are known in the industry as "free-to-play" videogames. The term is a misnomer. It refers to a model by which the initial download of the game is free, but companies reap huge profits by selling thousands of "in-game" items that start at $0.99 (purchases known as "micro-transactions" or "in-app purchases").

14. The in-app purchase model has become particularly attractive to developers of games of chance (*e.g.*, poker, blackjack, and slot machine mobile videogames, amongst others), because it allows them to generate huge profits. In 2017, free-to-play games of chance generated

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over $3.8 billion in worldwide revenue, and they are expected to grow by ten percent annually.[1] Even "large land-based casino operators are looking at this new space" for "a healthy growth potential."[2]

15. With games of chance that employ the in-game purchase strategy, developers have begun exploiting the same psychological triggers as casino operators. As one respected videogame publication put it:

> "If you hand someone a closed box full of promised goodies, many will happily pay you for the crowbar to crack it open. The tremendous power of small random packs of goodies has long been known to the creators of physical collectible card games and companies that made football stickers a decade ago. For some … the allure of a closed box full of goodies is too powerful to resist. Whatever the worth of the randomised [sic] prizes inside, the offer of a free chest and the option to buy a key will make a small fortune out of these personalities. For those that like to gamble, these crates often offer a small chance of an ultra-rare item."[3]

16. Another stated:

> "Games may influence 'feelings of pleasure and reward,' but this is an addiction to the games themselves; micro-transactions play to a different kind of addiction that has existed long before video games existed, more specifically, an addiction similar to that which you could develop in casinos and betting shops."[4]

17. The comparison to casinos doesn't end there. Just as with casino operators, mobile game developers rely on a small portion of their players to provide the majority of their profits. These "whales," as they're known in casino parlance, account for just "0.15% of players" but provide "over 50% of mobile game revenue."[5]

18. Game Informer, another respected videogame magazine, reported on the rise (and danger) of micro-transactions in mobile games and concluded:

> "[M]any new mobile and social titles target small, susceptible populations for

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[1] GGRAsia – Social casino games 2017 revenue to rise 7pct plus says report, http://www.ggrasia.com/social-casino-games-2017-revenue-to-rise-7pct-plus-says-report/ (last visited Jul. 23, 18)

[2] *Report confirms that social casino games have hit the jackpot with $1.6B in revenue | GamesBeat,* https://venturebeat.com/2012/09/11/report-confirms-that-social-casino-games-have-hit-the-jackpot-with-1-6b-in-revenue/ (last visited Jul. 23, 18)

[3] PC Gamer, *Microtransactions: the good, the bad and the ugly*, http://www.pcgamer.com/microtransactions-the-good-the-bad-and-the-ugly/ (last visited Apr. 5, 2018).

[4] The Badger, *Are micro-transactions ruining video games? | The Badger*, http://thebadgeronline.com/2014/11/micro-transactions-ruining-video-games/ (last visited Apr. 5, 2018).

[5] *Id.* (emphasis added).

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> large percentages of their revenue. If ninety-five people all play a [free-to-play] game without spending money, but five people each pour $100 or more in to obtain virtual currency, the designer can break even. These five individuals are what the industry calls whales, and we tend not to be too concerned with how they're being used in the equation. While the scale and potential financial ruin is of a different magnitude, a similar profitability model governs casino gambling."[6]

19. Academics have also studied the socioeconomic effect games that rely on in-app purchases have on consumers. In one study, the authors compiled several sources analyzing so-called free-to-play games of chance (called "casino" games below) and stated that:

> "[Researchers] found that [free-to-play] casino gamers share many similar sociodemographic characteristics (*e.g.*, employment, education, income) with online gamblers. Given these similarities, it is perhaps not surprising that a strong predictor of online gambling is engagement in [free-to-play] casino games. Putting a dark line under these findings, over half (58.3%) of disordered gamblers who were seeking treatment stated that social casino games were their first experiences with gambling."
>
> …
>
> "According to [another study], the purchase of virtual credits or virtual items makes the activity of [free-to-play] casino gaming more similar to gambling. Thus, micro-transactions may be a crucial predictor in the migration to online gambling, as these players have now crossed a line by paying to engage in these activities. Although, [sic] only 1–5% of [free-to-play] casino gamers make micro-transactions, those who purchase virtual credits spend an average of $78. Despite the limited numbers of social casino gamers purchasing virtual credits, revenues from micro-transactions account for 60 % of all [free-to-play] casino gaming revenue. Thus, a significant amount of revenue is based on players' desire to purchase virtual credits above and beyond what is provided to the player in seed credits."[7]

20. The same authors looked at the link between playing free-to-play games of chance and gambling in casinos. They stated that "prior research indicated that winning large sums of virtual credits on social casino gaming sites was a key reason for [consumers'] migration to online gambling," yet the largest predictor that a consumer will transition to online gambling was "micro-transaction engagement." In fact, "the odds of migration to online gambling were

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[6] Game Informer, *How Microtransactions Are Bad For Gaming - Features - www.GameInformer.com*, http://www.gameinformer.com/b/features/archive/2012/09/12/how-microtransactions-are-bad-for-gaming.aspx?CommentPosted=true&PageIndex=3 (last visited Apr. 5, 2018)

[7] Hyoun S. Kim, Michael J. A. Wohl, *et al.*, *Do Social Casino Gamers Migrate to Online Gambling? An Assessment of Migration Rate and Potential Predictors*, Journal of gambling studies / co-sponsored by the National Council on Problem Gambling and Institute for the Study of Gambling and Commercial Gaming (Nov. 14, 2014), *available at* http://link.springer.com/content/pdf/10.1007%2Fs10899-014-9511-0.pdf (citations omitted).

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approximately *eight times greater* among people who made micro-transactions on [free-to-play] casino games compared to [free-to-play] casino gamers who did not make micro-transactions."[8]

21. The similarity between micro-transaction games of chance and games of chance found in casinos has caused governments across the world to intervene to limit their availability.[9] Unfortunately, such games have eluded regulation in the United States. As a result, and as described below, Defendants' online casino games have thrived and thousands of consumers have spent millions of dollars unwittingly playing Defendants' unlawful games of chance.

II. A Brief Introduction to Double Down and IGT

22. Double Down is a leading game developer with an extensive library of free-to-play online casino games. Double Down sells in-app chips to consumers in the Double Down Casino so that consumers can play various online casino games in Double Down Casino.

23. IGT is a global leader in the gaming industry with long ties to the traditional casino market. It has developed a multitude of casino and lottery games, including traditional slot machines and video lottery terminals. In 2012, IGT acquired Double Down and its library of online casino games, and has since "grown into one of the largest and most successful brands in the North American social casino market."[10]

24. In 2017, IGT sold Double Down for $825 million to DoubleU Games.[11] In addition to the sale, IGT has also entered into a long-term game development and distribution

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[8] *Id.* (emphasis added).

[9] In late August 2014, South Korea began regulating "social gambling" games, including games similar to Defendants', by "ban[ning] all financial transactions directed" to the games. PokerNews.com, *Korea Shuts Down All Facebook Games In Attempt To Regulate Social Gambling | PokerNews*, https://www.pokernews.com/news/2014/09/korea-shuts-down-facebook-games-19204 htm (last visited Apr. 5, 2018). Similarly, "the Maltese Lotteries and Gambling Authority (LGA) invited the national Parliament to regulate all digital games with prizes by the end of 2014." *Id.*

[10] *IGT To Sell Online Casino Unit DoubleDown To South Korean Firm For $825 Million - Poker News,* https://www.cardplayer.com/poker-news/21554-igt-to-sell-online-casino-unit-doubledown-to-south-korean-firm-for-825-million (last visited Ap. 6, 2018).

[11] *Id.*

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agreement with DoubleU to offer its online casino games in Double Down Casino.[12] IGT notes that it will continue to collect royalties from its online casino game content.[13]

25. Defendants have made large profits through their online casino games. In 2016, alone, Double Down generated $280 million in revenue. As explained further below, however, the revenue Defendants receives from Double Down Casino is the result of operating unlawful games of chance camouflaged as innocuous videogames.

III. Defendants' Online Casino Contains Unlawful Games of Chance

26. Consumers visiting Double Down Casino for the first time are awarded 1 million free chips. *See* Figure 1. These free sample chips offer a taste of gambling and are designed to encourage player to get hooked and buy more chips for real money.

(**Figure 1.**)

27. After they begin playing, consumers quickly lose their initial allotment of chips. Immediately thereafter, Double Down Casino informs them via a "pop up" screen that they have "insufficient funds." *See* Figure 2. Once a player runs out of their allotment of free chips, they

[12] *IGT Completes Sale Of Double Down Interactive LLC To DoubleU Games,* https://www.prnewswire.com/news-releases/igt-completes-sale-of-double-down-interactive-llc-to-doubleu-games-300467524.html (last visited Apr. 6, 2018).

[13] *Id.*

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cannot continue to play the game without buying more chips for real money.

(**Figure 2**.)

28. To continue playing the online casino game, consumers navigate to Double Down Casino's electronic store to purchase chips ranging in price from $2.99 for 300,000 chips to $99.99 for 100,000,000 chips. *See* Figure 3.

(**Figure 3.**)

29. The decision to sell chips by the thousands isn't an accident. Rather, Defendants

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attempt to lower the perceived cost of the chips (costing just a fraction of a penny per chip) while simultaneously maximizing the value of the award (awarding millions of chips in jackpots), further inducing consumers to bet on their games.

30. To begin wagering, players select the "LINE BET" that will be used for a spin, as illustrated in Figure 4. Double Down Casino allows players to increase or decrease the amount he or she can wager and ultimately win (or lose). Double Down Casino allows players to multiply their bet by changing the number of "lines" (*i.e.*, combinations) on which the consumer can win, shown in Figure 4 as the "LINE" button.

(**Figure 4.**)

31. Once a consumer spins the slot machine by pressing "SPIN" button, no action on his or her part is required. Indeed, none of the Double Down Casino games allow (or call for) any additional user action. Instead, the consumer's computer or mobile device communicates with and sends information (such as the "TOTAL BET" amount) to the Double Down Casino servers. The servers then execute the game's algorithms that determine the spin's outcome. Notably, none of Defendants' games depend on any amount of skill to determine their outcomes—all outcomes are based entirely on chance.

32. Consumers can continue playing with the chips that they won, or they can exit the game and return at a later time to play because Double Down Casino maintains win and loss records and account balances for each consumer. Indeed, once Defendants' algorithms determine the outcome of a spin and Double Down Casino displays the outcome to the consumer, Defendants adjusts the consumer's account balance. Defendants keep records of each wager, outcome, win, and loss for every player.

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FACTS SPECIFIC TO PLAINTIFF BENSON

33. Since 2013, Plaintiff Benson has been playing Double Down Casino on Facebook. After Benson lost the balance of her initial allocation of free chips, she purchased chips from the Double Down Casino electronic store.

34. Thereafter, Benson continued playing various slot machines and other games of chance within the Double Down Casino where she would wager chips for the chance of winning additional chips. Since 2016, Benson has wagered and lost (and Defendants therefore won) over $1,000 at Defendants' games of chance.

FACTS SPECIFIC TO PLAINTIFF SIMONSON

35. Since 2017, Plaintiff Simonson has been playing Double Down Casino on her mobile phone. After Simonson lost the balance of her initial allocation of free chips, she purchased chips from the Double Down Casino electronic store.

36. Thereafter, Simonson continued playing various slot machines and other games of chance within the Double Down Casino where she would wager chips for the chance of winning additional chips. Since December 2017, Simonson has wagered and lost (and Defendants therefore won) over $200 at Defendants' games of chance.

CLASS ALLEGATIONS

37. **Class Definition**: Plaintiffs Benson and Simonson bring this action pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3) on behalf of themselves and a Class of similarly situated individuals, defined as follows:

> All persons in the United States who purchased and lost chips by wagering at the Double Down Casino.

The following people are excluded from the Class: (1) any Judge or Magistrate presiding over this action and members of their families; (2) Defendants, Defendants' subsidiaries, parents, successors, predecessors, and any entity in which the Defendants or their parents have a controlling interest and their current or former employees, officers and directors; (3) persons who properly execute and file a timely request for exclusion from the Class; (4) persons whose claims

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in this matter have been finally adjudicated on the merits or otherwise released; (5) Plaintiffs' counsel and Defendants' counsel; and (6) the legal representatives, successors, and assigns of any such excluded persons.

38. **Numerosity**: On information and belief, tens of thousands of consumers fall into the definition of the Class. Members of the Class can be identified through Defendants' records, discovery, and other third-party sources.

39. **Commonality and Predominance**: There are many questions of law and fact common to Plaintiffs' and the Class's claims, and those questions predominate over any questions that may affect individual members of the Class. Common questions for the Class include, but are not necessarily limited to the following:

a. Whether Double Down Casino games are "gambling" as defined by RCW 9.46.0237;

b. Whether Defendants are the proprietors for whose benefit the online casino games are played;

c. Whether Plaintiffs and each member of the Class lost money or anything of value by gambling;

d. Whether Defendants violated the Washington Consumer Protection Act, RCW 19.86.010, *et seq.*; and

e. Whether Defendants have been unjustly enriched as a result of their conduct.

40. **Typicality**: Plaintiffs' claims are typical of the claims of other members of the Class in that Plaintiffs' and the members of the Class sustained damages arising out of Defendants' wrongful conduct.

41. **Adequate Representation**: Plaintiffs will fairly and adequately represent and protect the interests of the Class and have retained counsel competent and experienced in complex litigation and class actions. Plaintiffs' claims are representative of the claims of the other members of the Class, as Plaintiffs and each member of the Class lost money playing

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Defendants' games of chance. Plaintiffs also have no interests antagonistic to those of the Class, and Defendants have no defenses unique to Plaintiffs. Plaintiffs and their counsel are committed to vigorously prosecuting this action on behalf of the Class and have the financial resources to do so. Neither Plaintiffs nor their counsel have any interest adverse to the Class.

42. **Policies Generally Applicable to the Class**: This class action is appropriate for certification because Defendants have acted or refused to act on grounds generally applicable to the Class as a whole, thereby requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the members of the Class and making final injunctive relief appropriate with respect to the Class as a whole. Defendants' policies that Plaintiffs challenges apply and affect members of the Class uniformly, and Plaintiffs' challenge of these policies hinges on Defendants' conduct with respect to the Class as a whole, not on facts or law applicable only to Plaintiffs. The factual and legal bases of Defendants' liability to Plaintiffs and to the other members of the Class are the same.

43. **Superiority**: This case is also appropriate for certification because class proceedings are superior to all other available methods for the fair and efficient adjudication of this controversy. The harm suffered by the individual members of the Class is likely to have been relatively small compared to the burden and expense of prosecuting individual actions to redress Defendants' wrongful conduct. Absent a class action, it would be difficult if not impossible for the individual members of the Class to obtain effective relief from Defendants. Even if members of the Class themselves could sustain such individual litigation, it would not be preferable to a class action because individual litigation would increase the delay and expense to all parties and the Court and require duplicative consideration of the legal and factual issues presented. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single Court. Economies of time, effort, and expense will be fostered and uniformity of decisions will be ensured.

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44. Plaintiffs reserve the right to revise the foregoing "Class Allegations" and "Class Definition" based on facts learned through additional investigation and in discovery.

FIRST CAUSE OF ACTION
Violations of Revised Code of Washington 4.24.070
(On behalf of Plaintiffs and the Class)

45. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

46. Plaintiffs, members of the Class, and Defendants are all "persons" as defined by RCW 9.46.0289.

47. The state of Washington's "Recovery of money lost at gambling" statute, RCW 4.24.070, provides that "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."

48. "Gambling," defined by RCW 9.46.0237, "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."

49. Defendants' "chips" sold for use at the Double Down Casino are "thing[s] of value" under RCW § 9.46.0285.

50. Double Down Casino games are illegal gambling games because they are online games at which players wager things of value (the chips) and by an element of chance (*e.g.*, by spinning an online slot machine) are able to obtain additional entertainment and extend gameplay (by winning additional chips).

51. Defendants Double Down and IGT are the proprietors for whose benefit the online gambling games are played because they operate the Double Down Casino games and/or derive profit from their operation.

52. As such, Plaintiffs and the Class gambled when they purchased chips to wager at Double Down Casino. Plaintiffs and each member of the Class staked money, in the form of chips purchased with money, at Defendants' games of chance (*e.g.*, Double Down Casino slot

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machines and other games of chance) for the chance of winning additional things of value (*e.g.*, chips that extend gameplay without additional charge).

53. In addition, Double Down Casino games are not "pinball machine[s] or similar mechanical amusement device[s]" as contemplated by the statute because:

a. the games are electronic rather than mechanical;

b. the games confer replays but they are recorded and can be redeemed on separate occasions (*i.e.*, they are not "immediate and unrecorded"); and

c. the games contain electronic mechanisms that vary the chance of winning free games or the number of free games which may be won (*e.g.*, the games allow for different wager amounts).

54. RCW 9.46.0285 states that a "'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."

55. The "chips" Plaintiffs and the Class had the chance of winning in Double Down Casino games are "thing[s] of value" under Washington law because they are credits that involve the extension of entertainment and a privilege of playing a game without charge.

56. Double Down Casino games are "Contest[s] of chance," as defined by RCW 9.46.0225, because they are "contest[s], game[s], gaming scheme[s], or gaming device[s] in which the outcome[s] depend[] in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." Defendants' games are programmed to have outcomes that are determined entirely upon chance and a contestant's skill does not affect the outcomes.

57. RCW 9.46.0201 defines "Amusement game[s]" as games where "The outcome depends in a material degree upon the skill of the contestant," amongst other requirements. Double Down Casino games are not "Amusement game[s]" because their outcomes are

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dependent entirely upon chance and not upon the skill of the player and because the games are "contest[s] of chance," as defined by RCW 9.46.0225.

58. As a direct and proximate result of Defendants' operation of their Double Down Casino games, Plaintiffs and each member of the Class have lost money wagering at Defendants' games of chance. Plaintiffs, on behalf of themselves and the Class, seek an order (1) requiring Defendants to cease the operation of their games; and/or (2) awarding the recovery of all lost monies, interest, and reasonable attorneys' fees, expenses, and costs to the extent allowable.

SECOND CAUSE OF ACTION
Violations of the Washington Consumer Protection Act, RCW 19.86.010, *et seq.*
(On behalf of Plaintiffs and the Class)

59. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

60. Washington's Consumer Protection Act, RCW § 19.86.010 *et seq.* ("CPA"), protects both consumers and competitors by promoting fair competition in commercial markets for goods and services.

61. To achieve that goal, the CPA prohibits any person from using "unfair methods of competition or unfair or deceptive acts or practices in the conduct of any trade or commerce. . . ." RCW § 19.86.020.

62. The CPA states that "a claimant may establish that the act or practice is injurious to the public interest because it . . . Violates a statute that contains a specific legislative declaration of public interest impact."

63. Defendants violated RCW § 9.46.010, *et seq.* which declares that:

> "The public policy of the state of Washington on gambling is to keep the criminal element out of gambling and to promote the social welfare of the people by limiting the nature and scope of gambling activities and by strict regulation and control.
>
> It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling and organized crime, to restrain all persons from seeking profit from professional gambling activities in this state; to restrain all persons from patronizing such professional gambling activities; to safeguard the public against the evils induced by common gamblers and common gambling houses engaged in professional gambling; and at the same time, both to preserve the freedom of the press and to avoid restricting participation by individuals in activities and social pastimes, which activities and social pastimes

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> are more for amusement rather than for profit, do not maliciously affect the public, and do not breach the peace."

64. Defendants have violated RCW § 9.46.010, *et seq.*, because the Double Down Casino games are illegal online gambling games as described in ¶¶ 42-55 *supra.*

65. Defendants' wrongful conduct occurred in the conduct of trade or commerce—*i.e.*, while Defendants were engaged in the operation of making computer games available to the public.

66. Defendants' acts and practices were and are injurious to the public interest because Defendants, in the course of their business, continuously advertised to and solicited the general public in Washington state and throughout the United States to play their unlawful online casino games of chance. This was part of a pattern or generalized course of conduct on the part of Defendants, and many consumers have been adversely affected by Defendants' conduct and the public is at risk.

67. Defendants have profited immensely from their operation of unlawful games of chance, amassing hundreds of millions of dollars from the losers of their games of chance.

68. As a result of Defendants' conduct, Plaintiffs and the Class members were injured in their business or property—*i.e.*, economic injury—in that they lost money wagering on Defendants' unlawful games of chance.

69. Defendants' unfair or deceptive conduct proximately caused Plaintiffs' and the Class members' injuries because, but for the challenged conduct, Plaintiffs and the Class members would not have lost money wagering at or on Defendants' games of chance, and they did so as a direct, foreseeable, and planned consequence of that conduct.

70. Plaintiffs, on their own behalf and on behalf of the Class, seek to enjoin further violation and recover actual damages and treble damages, together with the costs of suit, including reasonable attorneys' fees.

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THIRD CAUSE OF ACTION
Unjust Enrichment
(On behalf of Plaintiffs and the Class)

71. Plaintiffs incorporate by reference the foregoing allegations as if fully set forth herein.

72. Plaintiffs and the Class have conferred a benefit upon Defendants in the form of the money Defendants received from them for the purchase of chips to wager on Double Down Casino games.

73. Defendants appreciate and/or have knowledge of the benefits conferred upon them by Plaintiffs and the Class.

74. Under principles of equity and good conscience, Defendants should not be permitted to retain the money obtained from Plaintiffs and the members of the Class, which Defendants have unjustly obtained as a result of their unlawful operation of unlawful online gambling games. As it stands, Defendants have retained millions of dollars in profits generated from their unlawful games of chance and should not be permitted to retain those ill-gotten profits.

75. Accordingly, Plaintiffs and the Class seek full disgorgement and restitution of any money Defendants have retained as a result of the unlawful and/or wrongful conduct alleged herein.

PRAYER FOR RELIEF

Plaintiffs Adrienne Benson and Mary Simonson, individually and on behalf of all others similarly situated, respectfully request that this Court enter an Order:

a) Certifying this case as a class action on behalf of the Class defined above, appointing Adrienne Benson and Mary Simonson as representatives of the Class, and appointing their counsel as class counsel;

b) Declaring that Defendants' conduct, as set out above, violates the CPA;

c) Entering judgment against Defendants, in the amount of the losses suffered by Plaintiffs and each member of the Class;

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d) Enjoining Defendants from continuing the challenged conduct;

e) Awarding damages to Plaintiffs and the Class members in an amount to be determined at trial, including trebling as appropriate;

f) Awarding restitution to Plaintiffs and the Class members in an amount to be determined at trial, and requiring disgorgement of all benefits that Defendants unjustly received;

g) Awarding reasonable attorney's fees and expenses;

h) Awarding pre- and post-judgment interest, to the extent allowable;

i) Entering judgment for injunctive and/or declaratory relief as necessary to protect the interests of Plaintiffs and the Class; and

j) Awarding such other and further relief as equity and justice require.

JURY DEMAND

Plaintiffs request a trial by jury of all claims that can be so tried.

Respectfully Submitted,

ADRIENNE BENSON AND MARY SIMONSON, individually and on behalf of all others similarly situated,

Dated: July 23, 2018

By: /s/ Janissa A. Strabuk
One of Plaintiffs' Attorneys

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**Pro hac vice* admission granted.

Attorneys for Plaintiffs and the Putative Class

Exhibit 6

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ADRIENNE BENSON and MARY SIMONSON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DOUBLE DOWN INTERACTIVE, LLC, a Washington limited liability company, and INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation,

Defendant.

Case No. 2:18-cv-00525-RBL

DOUBLE DOWN INTERACTIVE, LLC'S ANSWER TO FIRST AMENDED CLASS ACTION COMPLAINT

JURY DEMAND

Defendant Double Down Interactive, LLC ("Double Down") files this answer to Plaintiffs Adrienne Benson's and Mary Simonson's First Amended Class Action Complaint (the "First Amended Complaint"). To the extent that any allegation in the First Amended Complaint is not specifically admitted, the allegation is denied. Double Down denies all allegations contained in headings and unnumbered paragraphs, and Double Down denies all allegations except for those expressly admitted below. Double Down answers the corresponding numbered paragraphs of the First Amended Complaint as follows:

NATURE OF THE ACTION

1. Defendants own and operate video game development companies in the so-called "casual games" industry—that is, computer games designed to appeal to a mass audience

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of casual gamers. Defendants (at all relevant times) owned and operated a popular online casino under the name Double Down Casino.

ANSWER: Double Down admits that it operates as a video game development company, and owns and operates the game DoubleDown Casino. Double Down denies the remaining allegations in paragraph 1.

2. Double Down Casino is available to play on Android, and Apple iOS devices, and on Facebook.

ANSWER: Double Down admits that DoubleDown Casino can be accessed on Android, and Apple iOS devices, and on Facebook.

3. Defendants provide a bundle of free "chips" to first-time visitors of Double Down Casino that can be used to wager on games within Double Down Casino. After consumers inevitably lose their initial allotment of chips, Defendants attempt to sell them additional chips for real money. Without chips, consumers cannot play the gambling game.

ANSWER: Double Down denies the allegations in paragraph 3.

4. Freshly topped off with additional chips, consumers wager to win more chips. The chips won by consumers playing Defendants' games of chance are identical to the chips that Defendants sell. Thus, by wagering chips that have been purchased for real money, consumers have the chance to win additional chips that they would otherwise have to purchase.

ANSWER: Double Down denies the allegations in paragraph 4.

5. By operating the Double Down Casino, Defendants have violated Washington law and illegally profited from tens of thousands of consumers. Accordingly, Plaintiffs, on behalf of themselves and a Class of similarly situated individuals, bring this lawsuit to recover their losses, as well as costs and attorneys' fees.

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ANSWER: Double Down denies the allegations in paragraph 5.

PARTIES

6. Plaintiff Adrienne Benson is a natural person and a citizen of the state of Washington.

ANSWER: Double Down lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 6.

7. Plaintiff Mary Simonson is a natural person and a citizen of the state of Washington.

ANSWER: Double Down lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 7.

8. Defendant Double Down Interactive, LLC is a limited liability company organized and existing under the laws of the State of Washington with its principal place of business at 605 Fifth Avenue South, Suite 300, Seattle, Washington 98104. Double Down conducts business throughout this District, Washington State, and the United States.

ANSWER: Double Down admits that Double Down Interactive, LLC is a limited liability company organized and existing under the laws of the State of Washington with its principal place of business at 605 Fifth Avenue South, Suite 300, Seattle, Washington 98104 and that it conducts business in this district and Washington State. Double Down denies the remaining allegations in paragraph 8.

9. Defendant International Game Technology is a corporation existing and organized under the laws of the State of Nevada with its principal place of business at 6355

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South Buffalo Drive, Las Vegas, Nevada 89113. IGT conducts business throughout this District, Washington State, and the United States.

ANSWER: Double Down lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9.

JURISDICTION AND VENUE

10. Federal subject-matter jurisdiction exists under 28 U.S.C. § 1332(d)(2) because (a) at least one member of the class is a citizen of a state different from any Defendants, (b) the amount in controversy exceeds $5,000,000, exclusive of interests and costs, and (c) none of the exceptions under that subsection apply to this action.

ANSWER: To the extent paragraph 10 states a legal conclusion, no answer is required. To the extent an answer is required, Double Down denies the allegations in paragraph 10.

11. The Court has personal jurisdiction over Defendants because Defendants conduct significant business transactions in this District, and because the wrongful conduct occurred in and emanated from this District.

ANSWER: Double Down admits that this Court has personal jurisdiction over Double Down with respect to the named Plaintiffs' claims under Washington law. Double Down denies the remaining allegations in paragraph 11.

12. Venue is proper in this District under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to Plaintiffs' claims occurred in and emanated from this District.

ANSWER: To the extent paragraph 12 states a legal conclusion, no answer is required. To the extent an answer is required, Double Down denies the allegations in paragraph 12, and further denies that this forum is proper, because Plaintiffs agreed to arbitrate their claims.

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FACTUAL ALLEGATIONS

I. Free-to-Play and the New Era of Online Gambling

13. The proliferation of internet-connected mobile devices has led to the growth of what are known in the industry as "free-to-play" videogames. The term is a misnomer. It refers to a model by which the initial download of the game is free, but companies reap huge profits by selling thousands of "in-game" items that start at $0.99 (purchases known as "micro-transactions" or "in-app purchases").

ANSWER: Double Down lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 13.

14. The in-app purchase model has become particularly attractive to developers of games of chance (*e.g.*, poker, blackjack, and slot machine mobile videogames, amongst others), because it allows them to generate huge profits. In 2017, free-to-play games of chance generated over $3.8 billion in worldwide revenue, and they are expected to grow by ten percent annually.[1] Even "large land-based casino operators are looking at this new space" for "a healthy growth potential."[2]

ANSWER: Double Down lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14.

15. With games of chance that employ the in-game purchase strategy, developers have begun exploiting the same psychological triggers as casino operators. As one respected videogame publication put it:

> "If you hand someone a closed box full of promised goodies, many will happily pay you for the crowbar to crack it open. The tremendous power of small random packs of goodies has long been known to the creators of physical collectible card games and

[1] GGRAsia – Social casino games 2017 revenue to rise 7pct plus says report, http://www.ggrasia.com/social-casino-games-2017-revenue-to-rise-7pct-plus-says-report/ (last visited Jul. 23, 18)
[2] *Report confirms that social casino games have hit the jackpot with $1.6B in revenue | GamesBeat*, https://venturebeat.com/2012/09/11/report-confirms-that-social-casino-games-have-hit-the-jackpot-with-1-6b-in-revenue/ (last visited Jul. 23, 18)

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> companies that made football stickers a decade ago. For some ... the allure of a closed box full of goodies is too powerful to resist. Whatever the worth of the randomised [sic] prizes inside, the offer of a free chest and the option to buy a key will make a small fortune out of these personalities. For those that like to gamble, these crates often offer a small chance of an ultra-rare item."[3]

ANSWER: Double Down lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15.

16. Another stated:

> "Games may influence 'feelings of pleasure and reward,' but this is an addiction to the games themselves; micro-transactions play to a different kind of addiction that has existed long before video games existed, more specifically, an addiction similar to that which you could develop in casinos and betting shops."[4]

ANSWER: Double Down lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 16.

17. The comparison to casinos doesn't end there. Just as with casino operators, mobile game developers rely on a small portion of their players to provide the majority of their profits. These "whales," as they're known in casino parlance, account for just "0.15% of players" but provide "over 50% of mobile game revenue."[5]

ANSWER: Double Down lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17.

18. Game Informer, another respected videogame magazine, reported on the rise (and danger) of micro-transactions in mobile games and concluded:

> "[M]any new mobile and social titles target small, susceptible populations for large percentages of their revenue. If ninety-five people all play a [free-to-play] game without spending money,

[3] PC Gamer, *Microtransactions: the good, the bad and the ugly*, http://www.pcgamer.com/microtransactions-the-good-the-bad-and-the-ugly/ (last visited Apr. 5, 2018).
[4] The Badger, *Are micro-transactions ruining video games? | The Badger*, http://thebadgeronline.com/2014/11/micro-transactions-ruining-video-games/ (last visited Apr. 5, 2018).
[5] *Id*. (emphasis added).

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> but five people each pour $100 or more in to obtain virtual currency, the designer can break even. These five individuals are what the industry calls whales, and we tend not to be too concerned with how they're being used in the equation. While the scale and potential financial ruin is of a different magnitude, a similar profitability model governs casino gambling."[6]

ANSWER: Double Down lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 18.

19. Academics have also studied the socioeconomic effect games that rely on in-app purchases have on consumers. In one study, the authors compiled several sources analyzing so-called free-to-play games of chance (called "casino" games below) and stated that:

> "[Researchers] found that [free-to-play] casino gamers share many similar sociodemographic characteristics (*e.g.*, employment, education, income) with online gamblers. Given these similarities, it is perhaps not surprising that a strong predictor of online gambling is engagement in [free-to-play] casino games. Putting a dark line under these findings, over half (58.3%) of disordered gamblers who were seeking treatment stated that social casino games were their first experiences with gambling."
>
> ...
>
> "According to [another study], the purchase of virtual credits or virtual items makes the activity of [free-to-play] casino gaming more similar to gambling. Thus, micro-transactions may be a crucial predictor in the migration to online gambling, as these players have now crossed a line by paying to engage in these activities. Although, [sic] only 1–5% of [free-to-play] casino gamers make micro-transactions, those who purchase virtual credits spend an average of $78. Despite the limited numbers of social casino gamers purchasing virtual credits, revenues from micro-transactions account for 60 % of all [free-to-play] casino gaming revenue. Thus, a significant amount of revenue is based on players' desire to purchase virtual credits above and beyond what is provided to the player in seed credits."[7]

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[6] Game Informer, *How Microtransactions Are Bad For Gaming - Features - www.GameInformer.com*, http://www.gameinformer.com/b/features/archive/2012/09/12/how-microtransactions-are-bad-for-gaming.aspx?CommentPosted=true&PageIndex=3 (last visited Apr. 5, 2018)

[7] Hyoun S. Kim, Michael J. A. Wohl, *et al., Do Social Casino Gamers Migrate to Online Gambling? An Assessment of Migration Rate and Potential Predictors*, Journal of gambling studies / co-sponsored by the National Council on Problem Gambling and Institute for the Study of Gambling and Commercial Gaming (Nov. 14, 2014), *available at* http://link.springer.com/content/pdf/10.1007%2Fs10899-014-9511-0.pdf (citations omitted).

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ANSWER: Double Down lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19.

20. The same authors looked at the link between playing free-to-play games of chance and gambling in casinos. They stated that "prior research indicated that winning large sums of virtual credits on social casino gaming sites was a key reason for [consumers'] migration to online gambling," yet the largest predictor that a consumer will transition to online gambling was "micro-transaction engagement." In fact, "the odds of migration to online gambling were approximately *eight times greater* among people who made micro-transactions on [free-to-play] casino games compared to [free-to-play] casino gamers who did not make micro-transactions."[8]

ANSWER: Double Down lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 20.

21. The similarity between micro-transaction games of chance and games of chance found in casinos has caused governments across the world to intervene to limit their availability.[9] Unfortunately, such games have eluded regulation in the United States. As a result, and as described below, Defendants' online casino games have thrived and thousands of consumers have spent millions of dollars unwittingly playing Defendants' unlawful games of chance.

ANSWER: Double Down denies the allegations in paragraph 21.

[8] *Id*. (emphasis added).

[9] In late August 2014, South Korea began regulating "social gambling" games, including games similar to Defendants', by "ban[ning] all financial transactions directed" to the games. PokerNews.com, *Korea Shuts Down All Facebook Games In Attempt To Regulate Social Gambling | PokerNews*, https://www.pokernews.com/news/2014/09/korea-shuts-down-facebook-games-19204 htm (last visited Apr. 5, 2018). Similarly, "the Maltese Lotteries and Gambling Authority (LGA) invited the national Parliament to regulate all digital games with prizes by the end of 2014." *Id*.

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II. A Brief Introduction to Double Down and IGT

22. Double Down is a leading game developer with an extensive library of free-to-play online casino games. Double Down sells in-app chips to consumers in the Double Down Casino so that consumers can play various online casino games in Double Down Casino.

ANSWER: Double Down admits that it is a game developer offering online games and that Double Down offers in-app virtual chips to its players. Double Down denies the remaining allegations in paragraph 22.

23. IGT is a global leader in the gaming industry with long ties to the traditional casino market. It has developed a multitude of casino and lottery games, including traditional slot machines and video lottery terminals. In 2012, IGT acquired Double Down and its library of online casino games, and has since "grown into one of the largest and most successful brands in the North American social casino market."[10]

ANSWER: Double Down admits that IGT acquired Double Down in 2012. Double Down lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 23.

24. In 2017, IGT sold DoubleDown for $825 million to DoubleU Games.[11] In addition to the sale, IGT has also entered into a long-term game development and distribution agreement with DoubleU to offer its online casino games in DoubleDown Casino.[12] IGT notes that it will continue to collect royalties from its online casino game content.[13]

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[10] *IGT To Sell Online Casino Unit DoubleDown To South Korean Firm For $825 Million - Poker News*, https://www.cardplayer.com/poker-news/21554-igt-to-sell-online-casino-unit-doubledown-to-south-korean-firm-for-825-million (last visited Ap. 6, 2018).
[11] *Id*.
[12] *IGT Completes Sale Of DoubleDown Interactive LLC To DoubleU Games,* https://www.prnewswire.com/news-releases/igt-completes-sale-of-double-down-interactive-llc-to-doubleu-games-300467524 html (last visited Apr. 6, 2018).
[13] *Id*.

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ANSWER: Double Down admits that IGT sold Double Down in 2017 and that IGT entered into certain agreements with DoubleU Games. Double Down denies the remaining allegations in paragraph 24.

25. Defendants have made large profits through their online casino games. In 2016, alone, Double Down generated $280 million in revenue. As explained further below, however, the revenue Defendants receives from Double Down Casino is the result of operating unlawful games of chance camouflaged as innocuous videogames.

ANSWER: Double Down admits that its 2016 revenue was $280 million. Double Down denies the remaining allegations in paragraph 25.

III. Defendants' Online Casino Contains Unlawful Games of Chance

26. Consumers visiting Double Down Casino for the first time are awarded 1 million free chips. *See* Figure 1. These free sample chips offer a taste of gambling and are designed to encourage player to get hooked and buy more chips for real money.

(**Figure 1.**)

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ANSWER: Double Down admits that new users of DoubleDown Casino receive free chips, which amounts may vary depending on time period and promotion. Double Down denies the remaining allegations in paragraph 26. Double Down cannot verify the authenticity of the cropped screenshot in Figure 1 and therefore denies it.

27. After they begin playing, consumers quickly lose their initial allotment of chips. Immediately thereafter, Double Down Casino informs them via a "pop up" screen that they have "insufficient funds." *See* Figure 2. Once a player runs out of their allotment of free chips, they cannot continue to play the game without buying more chips for real money.

(**Figure 2.**)

ANSWER: Double Down admits that when users do not have enough chips to play they can, but do not necessarily, receive the message "insufficient funds to spin." Double Down denies the remaining allegations in paragraph 27. Double Down cannot verify the authenticity of the cropped screenshot in Figure 2 and therefore denies it.

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28. To continue playing the online casino game, consumers navigate to Double Down Casino's electronic store to purchase chips ranging in price from $2.99 for 300,000 chips to $99.99 for 100,000,000 chips. *See* Figure 3.

(**Figure 3.**)

ANSWER: Double Down admits that users can purchase chips from the DoubleDown Casino store. Double Down denies the remaining allegations in paragraph 28, and further denies that users must purchase chips to continue to play DoubleDown Casino. Double Down cannot verify the authenticity of the cropped screenshot in Figure 3 and therefore denies it.

29. The decision to sell chips by the thousands isn't an accident. Rather, Defendants attempt to lower the perceived cost of the chips (costing just a fraction of a penny per chip) while simultaneously maximizing the value of the award (awarding millions of chips in jackpots), further inducing consumers to bet on their games.

ANSWER: Double Down denies the allegations in paragraph 29.

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30. To begin wagering, players select the "LINE BET" that will be used for a spin, as illustrated in Figure 4. Double Down Casino allows players to increase or decrease the amount he or she can wager and ultimately win (or lose). Double Down Casino allows players to multiply their bet by changing the number of "lines" (*i.e.*, combinations) on which the consumer can win, shown in Figure 4 as the "LINE" button.

(**Figure 4.**)

ANSWER: Double Down admits that players can increase or decrease the "LINE BET" and "LINE" settings for certain games in DoubleDown Casino. Double Down denies the remaining allegations in paragraph 30. Double Down cannot verify the authenticity of the cropped screenshot in Figure 4 and therefore denies it.

31. Once a consumer spins the slot machine by pressing "SPIN" button, no action on his or her part is required. Indeed, none of the Double Down Casino games allow (or call for) any additional user action. Instead, the consumer's computer or mobile device communicates with and sends information (such as the "TOTAL BET" amount) to the Double Down Casino servers. The servers then execute the game's algorithms that determine the spin's outcome. Notably, none of Defendants' games depend on any amount of skill to determine their outcomes—all outcomes are based entirely on chance.

ANSWER: Double Down admits that, for certain games in DoubleDown Casino, once a user presses the "SPIN" button, no action on his or her part is required to determine the outcome of the turn. Double Down denies the remaining allegations in paragraph 31.

32. Consumers can continue playing with the chips that they won, or they can exit the game and return at a later time to play because Double Down Casino maintains win and

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loss records and account balances for each consumer. Indeed, once Defendants' algorithms determine the outcome of a spin and Double Down Casino displays the outcome to the consumer, Defendants adjusts the consumer's account balance. Defendants keep records of each wager, outcome, win, and loss for every player.

ANSWER: Double Down admits that users can play DoubleDown Casino with chips, or they can exit the game and return at a later time to play, and that DoubleDown Casino maintains win and loss records and account balances. Double Down denies the remaining allegations in paragraph 32.

FACTS SPECIFIC TO PLAINTIFF BENSON

33. Since 2013, Plaintiff Benson has been playing Double Down Casino on Facebook. After Benson lost the balance of her initial allocation of free chips, she purchased chips from the Double Down Casino electronic store.

ANSWER: Double Down admits that, since 2013, Plaintiff Benson has played DoubleDown Casino on Facebook, and admits that Plaintiff Benson purchased chips from the DoubleDown Casino store. Double Down denies the remaining allegations in paragraph 33.

34. Thereafter, Benson continued playing various slot machines and other games of chance within the Double Down Casino where she would wager chips for the chance of winning additional chips. Since 2016, Benson has wagered and lost (and Defendants therefore won) over $1,000 at Defendants' games of chance.

ANSWER: Double Down admits that Plaintiff Benson has played games in DoubleDown Casino using chips. Double Down denies the remaining allegations in paragraph 34.

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FACTS SPECIFIC TO PLAINTIFF SIMONSON

35. Since 2017, Plaintiff Simonson has been playing Double Down Casino on her mobile phone. After Simonson lost the balance of her initial allocation of free chips, she purchased chips from the Double Down Casino electronic store.

ANSWER: Double Down admits that, since 2017, Plaintiff Simonson has played DoubleDown Casino on a mobile device, and admits that Plaintiff Simonson purchased chips from the DoubleDown Casino store. Double Down denies the remaining allegations in paragraph 35.

36. Thereafter, Simonson continued playing various slot machines and other games of chance within the Double Down Casino where she would wager chips for the chance of winning additional chips. Since December 2017, Simonson has wagered and lost (and Defendants therefore won) over $200 at Defendants' games of chance.

ANSWER: Double Down admits that Plaintiff Simonson has played games in DoubleDown Casino using chips. Double Down denies the remaining allegations in paragraph 36.

CLASS ALLEGATIONS

37. **Class Definition:** Plaintiffs Benson and Simonson bring this action pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3) on behalf of themselves and a Class of similarly situated individuals, defined as follows:

> All persons in the United States who purchased and lost chips by wagering at the Double Down Casino.

The following people are excluded from the Class: (1) any Judge or Magistrate presiding over this action and members of their families; (2) Defendants, Defendants' subsidiaries, parents, successors, predecessors, and any entity in which the Defendants or their parents have a controlling interest and their current or former employees, officers and directors; (3) persons who properly execute and file a timely request for exclusion from the Class; (4) persons whose

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claims in this matter have been finally adjudicated on the merits or otherwise released; (5) Plaintiffs' counsel and Defendants' counsel; and (6) the legal representatives, successors, and assigns of any such excluded persons.

ANSWER: Double Down denies the allegations in paragraph 37, and further denies that Plaintiffs can represent the class of people they attempt to define.

38. **Numerosity:** On information and belief, tens of thousands of consumers fall into the definition of the Class. Members of the Class can be identified through Defendants' records, discovery, and other third-party sources.

ANSWER: Double Down denies the allegations in paragraph 38.

39. **Commonality and Predominance:** There are many questions of law and fact common to Plaintiffs' and the Class's claims, and those questions predominate over any questions that may affect individual members of the Class. Common questions for the Class include, but are not necessarily limited to the following:

a. Whether Double Down Casino games are "gambling" as defined by RCW 9.46.0237;

b. Whether Defendants are the proprietors for whose benefit the online casino games are played;

c. Whether Plaintiffs and each member of the Class lost money or anything of value by gambling;

d. Whether Defendants violated the Washington Consumer Protection Act, RCW 19.86.010, *et seq.*; and

e. Whether Defendants have been unjustly enriched as a result of their conduct.

ANSWER: To the extent paragraph 39 states legal conclusions, no answer is required. To the extent an answer is required, Double Down denies the allegations in paragraph 39.

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40. **Typicality:** Plaintiffs' claims are typical of the claims of other members of the Class in that Plaintiffs' and the members of the Class sustained damages arising out of Defendants' wrongful conduct.

ANSWER: Double Down denies the allegations in paragraph 40.

41. **Adequate Representation:** Plaintiffs will fairly and adequately represent and protect the interests of the Class and have retained counsel competent and experienced in complex litigation and class actions. Plaintiffs' claims are representative of the claims of the other members of the Class, as Plaintiffs and each member of the Class lost money playing Defendants' games of chance. Plaintiffs also have no interests antagonistic to those of the Class, and Defendants have no defenses unique to Plaintiffs. Plaintiffs and their counsel are committed to vigorously prosecuting this action on behalf of the Class and have the financial resources to do so. Neither Plaintiffs nor their counsel have any interest adverse to the Class.

ANSWER: Double Down lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 41

42. **Policies Generally Applicable to the Class:** This class action is appropriate for certification because Defendants have acted or refused to act on grounds generally applicable to the Class as a whole, thereby requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the members of the Class and making final injunctive relief appropriate with respect to the Class as a whole. Defendants' policies that Plaintiffs challenges apply and affect members of the Class uniformly, and Plaintiffs' challenge of these policies hinges on Defendants' conduct with respect to the Class as a whole, not on facts or law applicable only to Plaintiffs. The factual and legal bases of Defendants' liability to Plaintiffs and to the other members of the Class are the same.

ANSWER: Double Down denies the allegations in paragraph 42.

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43. **Superiority:** This case is also appropriate for certification because class proceedings are superior to all other available methods for the fair and efficient adjudication of this controversy. The harm suffered by the individual members of the Class is likely to have been relatively small compared to the burden and expense of prosecuting individual actions to redress Defendants' wrongful conduct. Absent a class action, it would be difficult if not impossible for the individual members of the Class to obtain effective relief from Defendants. Even if members of the Class themselves could sustain such individual litigation, it would not be preferable to a class action because individual litigation would increase the delay and expense to all parties and the Court and require duplicative consideration of the legal and factual issues presented. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single Court. Economies of time, effort, and expense will be fostered and uniformity of decisions will be ensured.

ANSWER: Double Down denies the allegations in paragraph 43.

44. Plaintiffs reserve the right to revise the foregoing "Class Allegations" and "Class Definition" based on facts learned through additional investigation and in discovery.

ANSWER: Double Down denies the allegations in paragraph 44.

FIRST CAUSE OF ACTION

Violations of Revised Code of Washington 4.24.070

(On behalf of Plaintiffs and the Class)

45. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

ANSWER: Double Down incorporates its answers to the foregoing allegations as if fully set forth herein.

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46. Plaintiffs, members of the Class, and Defendants are all "persons" as defined by RCW 9.46.0289.

ANSWER: To the extent paragraph 46 states legal conclusions, no answer is required. To the extent an answer is required, Double Down denies the allegations in paragraph 46.

47. The state of Washington's "Recovery of money lost at gambling" statute, RCW 4.24.070, provides that "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."

ANSWER: To the extent paragraph 47 states legal conclusions, no answer is required. To the extent an answer is required, Double Down admits that RCW 4.24.070 states that, "[a]ll 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[,]" but denies that Double Down has violated the statute. Double Down denies the remaining allegations in paragraph 47.

48. "Gambling," defined by RCW 9.46.0237, "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."

ANSWER: To the extent paragraph 48 states legal conclusions, no answer is required. To the extent an answer is required, Double Down denies that paragraph 48 fully and accurately quotes RCW 9.46.0237. Double Down denies the remaining allegations in paragraph 48.

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49. Defendants' "chips" sold for use at the Double Down Casino are "thing[s] of value" under RCW § 9.46.0285.

ANSWER: To the extent paragraph 49 states legal conclusions, no answer is required. To the extent an answer is required, Double Down denies the allegations in paragraph 49.

50. DoubleDown Casino games are illegal gambling games because they are online games at which players wager things of value (the chips) and by an element of chance (*e.g.*, by spinning an online slot machine) are able to obtain additional entertainment and extend gameplay (by winning additional chips).

ANSWER: To the extent paragraph 48 states legal conclusions, no answer is required. To the extent an answer is required, Double Down denies the allegations in paragraph 50.

51. Defendants Double Down and IGT are the proprietors for whose benefit the online gambling games are played because they operate the Double Down Casino games and/or derive profit from their operation.

ANSWER: To the extent paragraph 48 states legal conclusions, no answer is required. To the extent an answer is required, Double Down denies the allegations in paragraph 51.

52. As such, Plaintiffs and the Class gambled when they purchased chips to wager at Double Down Casino. Plaintiffs and each member of the Class staked money, in the form of chips purchased with money, at Defendants' games of chance (*e.g.*, Double Down Casino slot machines and other games of chance) for the chance of winning additional things of value (*e.g.*, chips that extend gameplay without additional charge).

ANSWER: To the extent paragraph 48 states legal conclusions, no answer is required. To the extent an answer is required, Double Down denies the allegations in paragraph 52.

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53. In addition, Double Down Casino games are not "pinball machine[s] or similar mechanical amusement device[s]" as contemplated by the statute because:

a. the games are electronic rather than mechanical;

b. the games confer replays but they are recorded and can be redeemed on separate occasions (*i.e.*, they are not "immediate and unrecorded"); and

c. the games contain electronic mechanisms that vary the chance of winning free games or the number of free games which may be won (*e.g.*, the games allow for different wager amounts).

ANSWER: To the extent paragraph 53 states legal conclusions, no answer is required. To the extent an answer is required, Double Down denies the allegations in paragraph 53.

54. RCW 9.46.0285 states that a "'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."

ANSWER: To the extent paragraph 54 states legal conclusions, no answer is required. To the extent an answer is required, Double Down admits that RCW 9.46.0285 states that a "'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[,]" but denies that Double Down has violated this statute. Double Down denies the remaining allegation in paragraph 54

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55. The "chips" Plaintiffs and the Class had the chance of winning in Double Down Casino games are "thing[s] of value" under Washington law because they are credits that involve the extension of entertainment and a privilege of playing a game without charge.

ANSWER: Double Down denies the allegations in paragraph 55.

56. Double Down Casino games are "Contest[s] of chance," as defined by RCW 9.46.0225, because they are "contest[s], game[s], gaming scheme[s], or gaming device[s] in which the outcome[s] depend[] in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." Defendants' games are programmed to have outcomes that are determined entirely upon chance and a contestant's skill does not affect the outcomes.

ANSWER: To the extent paragraph 56 states legal conclusions, no answer is required. To the extent an answer is required, Double Down denies the allegations in paragraph 56.

57. RCW 9.46.0201 defines "Amusement game[s]" as games where "The outcome depends in a material degree upon the skill of the contestant," amongst other requirements. Double Down Casino games are not "Amusement game[s]" because their outcomes are dependent entirely upon chance and not upon the skill of the player and because the games are "contest[s] of chance," as defined by RCW 9.46.0225.

ANSWER: To the extent paragraph 57 states legal conclusions, no answer is required. To the extent an answer is required, Double Down admits that paragraph 57 quotes a portion of RCW 9.46.0201, but denies that paragraph 57 fully quotes RCW 9.46.0201 and denies that Double Down has violated RCW 4.46.0201. Double Down denies the remaining allegations in paragraph 57.

58. As a direct and proximate result of Defendants' operation of their Double Down Casino games, Plaintiffs and each member of the Class have lost money wagering at

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Defendants' games of chance. Plaintiffs, on behalf of themselves and the Class, seek an order (1) requiring Defendants to cease the operation of their games; and/or (2) awarding the recovery of all lost monies, interest, and reasonable attorneys' fees, expenses, and costs to the extent allowable.

ANSWER: Double Down denies the allegations in paragraph 58, and further denies that Plaintiffs are entitled to any order or award.

SECOND CAUSE OF ACTION

Violations of the Washington Consumer Protection Act, RCW 19.86.010, *et seq.*
(On behalf of Plaintiffs and the Class)

59. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

ANSWER: Double Down incorporates its answers to the foregoing allegations as if fully set forth herein.

60. Washington's Consumer Protection Act, RCW § 19.86.010 *et seq.* ("CPA"), protects both consumers and competitors by promoting fair competition in commercial markets for goods and services.

ANSWER: To the extent paragraph 60 states legal conclusions, no answer is required. To the extent an answer is required, Double Down denies the allegations in paragraph 60.

61. To achieve that goal, the CPA prohibits any person from using "unfair methods of competition or unfair or deceptive acts or practices in the conduct of any trade or commerce. . . ." RCW § 19.86.020.

ANSWER: To the extent paragraph 61 states legal conclusions, no answer is required. To the extent an answer is required, Double Down denies that paragraph 57 fully and accurately quotes RCW 19.86.020 and denies that Double Down has violated RCW 19.86.020. Double Down denies the remaining allegations in paragraph 61.

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62. The CPA states that "a claimant may establish that the act or practice is injurious to the public interest because it. . . Violates a statute that contains a specific legislative declaration of public interest impact."

ANSWER: To the extent paragraph 62 states legal conclusions, no answer is required. To the extent an answer is required, Double Down admits that paragraph 62 quotes a portion of RCW 19.86.093, but denies that paragraph 62 fully quotes RCW 19.86.093 and denies that Double Down has violated RCW 19.86.093. Double Down denies the remaining allegations in paragraph 62.

63. Defendants violated RCW § 9.46.010, *et seq.* which declares that:

> "The public policy of the state of Washington on gambling is to keep the criminal element out of gambling and to promote the social welfare of the people by limiting the nature and scope of gambling activities and by strict regulation and control.
>
> It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling and organized crime, to restrain all persons from seeking profit from professional gambling activities in this state; to restrain all persons from patronizing such professional gambling activities; to safeguard the public against the evils induced by common gamblers and common gambling houses engaged in professional gambling; and at the same time, both to preserve the freedom of the press and to avoid restricting participation by individuals in activities and social pastimes, which activities and social pastimes are more for amusement rather than for profit, do not maliciously affect the public, and do not breach the peace."

ANSWER: To the extent paragraph 63 states legal conclusions, no answer is required. To the extent an answer is required, Double Down admits that paragraph 63 quotes RCW 9.46.010, in part. Double Down denies the remaining allegations in paragraph 63.

64. Defendants have violated RCW § 9.46.010, *et seq.*, because the Double Down Casino games are illegal online gambling games as described in ¶¶ 42-55 *supra*.

ANSWER: To the extent paragraph 64 states legal conclusions, no answer is required. To the extent an answer is required, Double Down denies the allegations in paragraph 64.

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65. Defendants' wrongful conduct occurred in the conduct of trade or commerce—*i.e.*, while Defendants were engaged in the operation of making computer games available to the public.

ANSWER: Double Down denies the allegations in paragraph 65.

66. Defendants' acts and practices were and are injurious to the public interest because Defendants, in the course of their business, continuously advertised to and solicited the general public in Washington state [sic] and throughout the United States to play their unlawful online casino games of chance. This was part of a pattern or generalized course of conduct on the part of Defendants, and many consumers have been adversely affected by Defendants' conduct and the public is at risk.

ANSWER: Double Down denies the allegations in paragraph 66.

67. Defendants have profited immensely from their operation of unlawful games of chance, amassing hundreds of millions of dollars from the losers of their games of chance.

ANSWER: Double Down denies the allegations in paragraph 67.

68. As a result of Defendants' conduct, Plaintiffs and the Class members were injured in their business or property—*i.e.*, economic injury—in that they lost money wagering on Defendants' unlawful games of chance.

ANSWER: Double Down denies the allegations in paragraph 68.

69. Defendants' unfair or deceptive conduct proximately caused Plaintiffs' and the Class members' injuries because, but for the challenged conduct, Plaintiffs and the Class members would not have lost money wagering at or on Defendants' games of chance, and they did so as a direct, foreseeable, and planned consequence of that conduct.

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ANSWER: Double Down denies the allegations in paragraph 69.

70. Plaintiffs, on their own behalf and on behalf of the Class, seek to enjoin further violation and recover actual damages and treble damages, together with the costs of suit, including reasonable attorneys' fees.

ANSWER: Double Down denies the allegations in paragraph 70, and further denies that Plaintiffs are entitled to an injunction or recovery.

THIRD CAUSE OF ACTION

Unjust Enrichment

(On behalf of Plaintiffs and the Class)

71. Plaintiffs incorporate by reference the foregoing allegations as if fully set forth herein.

ANSWER: Double Down incorporates its answers to the foregoing allegations as if fully set forth herein.

72. Plaintiffs and the Class have conferred a benefit upon Defendants in the form of the money Defendants received from them for the purchase of chips to wager on Double Down Casino games.

ANSWER: Double Down denies the allegations in paragraph 72.

73. Defendants appreciate and/or have knowledge of the benefits conferred upon them by Plaintiffs and the Class.

ANSWER: Double Down denies the allegations in paragraph 73.

74. Under principles of equity and good conscience, Defendants should not be permitted to retain the money obtained from Plaintiffs and the members of the Class, which

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Defendants have unjustly obtained as a result of their unlawful operation of unlawful online gambling games. As it stands, Defendants have retained millions of dollars in profits generated from their unlawful games of chance and should not be permitted to retain those ill-gotten profits.

ANSWER: Double Down denies the allegations in paragraph 74.

75. Accordingly, Plaintiffs and the Class seek full disgorgement and restitution of any money Defendants have retained as a result of the unlawful and/or wrongful conduct alleged herein.

ANSWER: Double Down denies the allegations in paragraph 75, and further denies that Plaintiffs are entitled to disgorgement or restitution.

PRAYER FOR RELIEF

Double Down denies that Plaintiffs are entitled to any relief.

AFFIRMATIVE DEFENSES

Below are Double Down's affirmative defenses. By setting forth these affirmative defenses, Double Down does not assume any burden of proof as to any fact issue or other element of any cause of action that properly belongs to Plaintiffs. Double Down reserves the right to amend or supplement its affirmative defenses.

1. **Improper forum or venue.** Plaintiffs' claims do not belong in this forum because Plaintiffs agreed to individual arbitration of their claims under the arbitration agreement and class waiver provisions of the Terms of Use, and therefore this court lacks subject matter jurisdiction pursuant to the Federal Arbitration Act.

2. **Failure to state a claim.** The First Amended Complaint fails to state a claim against Double Down, in whole or in part, upon which relief can be granted.

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3. **Statutory defenses in the Washington Gambling Act, Recovery of Money Lost at Gambling Act, and the Washington Consumer Protection Act.** Double Down is entitled to each and every defense or limitation of liability set forth in the Washington Gambling Act, the Recovery of Money Lost at Gambling Act, and the Washington Consumer Protection Act.

4. **Statute of limitations.** Plaintiffs' claims are barred by the applicable statutes of limitations, including without limitation the period set forth in the Terms of Use.

5. **Laches.** Plaintiffs' claims are barred by the doctrine of laches.

6. **Barred by agreement (contractual limitations).** Plaintiffs' claims are barred, in whole or in part, by the terms of the parties' agreements, including without limitation the Terms of Use.

7. **Disclaimer.** Plaintiffs' claims are barred, in whole or in part, because Double Down disclaimed liability, including without limitation in the Terms of Use.

8. **Release, novation, accord and satisfaction, or waiver.** Plaintiffs' claims fail, in whole or in part, under the doctrines of release, waiver, accord and satisfaction, or waiver, including without limitation because Plaintiffs knowingly continued to voluntarily use the services and to the extent Plaintiffs recover or have recovered monies or other relief concerning the subject matter of this action from any source.

9. **Consent, estoppel, ratification, account stated, acquiescence, and voluntary action.** Plaintiffs' claims fail, in whole or in part, under the doctrines of consent, estoppel, ratification, account stated, or acquiescence, and due to their voluntary action, including without limitation because Plaintiffs were aware of, ratified, and benefited from the conduct of which they now complain, and consented to the alleged damages by their voluntary conduct.

10. **Lack of injury.** Plaintiffs' claims fail, in whole or in part, because they have not sustained any cognizable injury or damages.

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11. **Lack of causation.** Double Down was not the direct or proximate cause of Plaintiffs' alleged damages.

12. **Failure to mitigate.** Plaintiffs failed to mitigate their alleged damages.

13. **Comparative fault and assumption of risk.** Plaintiffs assumed the risk of their voluntary conduct and the responsibility to participate only in compliance with applicable law.

14. **Acts of third parties.** All or part of the damages alleged in the Complaint, if any, were caused by the acts or omissions of other persons or entities for whose conduct Double Down is not legally responsible.

15. **Adequate remedy at law.** Plaintiffs' claims for equitable relief fail because Plaintiffs have an adequate remedy at law.

16. **Set-off.** Any relief granted to Plaintiff, which Double Down disputes, must be set-off by the amounts that Double Down has refunded to any Plaintiff or putative class member or by any amount that a Plaintiff or putative class member owes Double Down.

17. **Unclean hands.** All of Plaintiffs' claims are barred by the doctrine of unclean hands.

18. **Unjust enrichment.** Plaintiffs' claims are barred, in whole or in part, because any recovery from Double Down would result in Plaintiffs' unjust enrichment.

19. **Compliance; preemption.** Plaintiffs' claims fail, in whole or in part, because Double Down complied with applicable federal and state statutes and regulations.

20. **Voluntary payment doctrine.** Plaintiffs' claims are barred, in whole or in part, by the voluntary payment doctrine.

21. **Independent duty doctrine.** Plaintiffs' claims are barred, in whole or in part, by the independent duty doctrine.

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22. **Bona fide business transaction.** Plaintiffs' claims fail, in whole or in part, on the grounds that the alleged transactions constitute "bona fide business transactions" under RCW 9.46.0237, and because Plaintiffs received the benefit of the bargain while playing the alleged games.

23. **Unconstitutional punitive damages.** Plaintiffs seek improper punitive damages in violation of the United States Constitution and other applicable law.

24. **No attorneys' fees.** Plaintiffs cannot establish facts sufficient to support their claim for attorneys' fees, and Plaintiffs are not entitled to recover attorneys' fees in this action.

25. **Reliance on government agencies.** Plaintiffs' claims fail, in whole or in part, on the grounds that Double Down relied on guidance from relevant government agencies, including without limitation the Washington Gambling Commission.

26. **Freedom of speech.** Double Down, as the publisher of DoubleDown Casino, which is an expressive work, is entitled to freedom-of-speech protections under the First Amendment of the U.S. Constitution, under the Washington State Constitution, and under other applicable statutory or common-law protections of speech or expressive works. Plaintiffs' claims are barred to the extent such claims infringe on Double Down's right to free speech.

27. **Choice of law; foreign law**. Unnamed putative class members residing outside of Washington State lack standing to assert claims under Washington law, and Plaintiffs lack standing to represent such putative class members under the laws of the various states that may apply to putative class member conduct.

28. **Standing.** Plaintiffs' claims, and those claims Plaintiffs purport to bring on behalf of members of the putative class, are barred in whole or in part because Plaintiffs and the putative class members lack standing to assert the alleged claims.

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29. **No personal jurisdiction over absent class members.** The court lacks personal jurisdiction over any claims on behalf of absent members of the putative class.

30. **Improper forum for absent class members.** Absent members of the putative classes have a contractual obligation to arbitrate any claims they have arising out of or relating to their use of DoubleDown Casino

31. **Improper class allegations**. The First Amended Complaint has failed to set forth plausible allegations that satisfy the prerequisites for class certification, including without limitation because the claims by Plaintiffs are neither common to nor typical of the claims, if any, by members of the putative class, because the putative class is not definite and ascertainable, and because interests of certain members of the putative class are in conflict with the interests of other members of the putative class.

PRAYER FOR RELIEF

WHEREFORE, Double Down respectfully requests this Court:

A. Enter judgment in Double Down's favor and against Ms. Benson and Ms. Simonson;

B. Deny certification of a class;

C. Dismiss all claims by Plaintiffs with prejudice;

D. Award Double Down its costs of suit;

E. Award Double Down its attorneys' fees to the extent permitted by law; and

F. Grant Double Down such other and further relief as this Court deems just and proper.

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DATED this 18th day of January, 2019.

Davis Wright Tremaine LLP
Attorneys for Double Down Interactive, LLC

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED this 18th day of January, 2019.

s/ Jaime Drozd Allen
Jaime Drozd Allen, WSBA #35742

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Exhibit 7

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ADRIENNE BENSON, individually and on behalf of all others similarly situated,

Plaintiff,

v.

DOUBLE DOWN INTERACTIVE, LLC, a Washington limited liability company, and INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation,

Defendants.

No. 2:18-cv-00525-RBL

DEFENDANTS DOUBLE DOWN INTERACTIVE LLC'S AND INTERNATIONAL GAME TECHNOLOGY'S MOTION TO COMPEL ARBITRATION AND STAY ACTION

NOTE ON MOTION CALENDAR: SEPTEMBER 24, 2018

ORAL ARGUMENT REQUESTED

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Defendants Double Down Interactive, LLC ("DDI") and International Game Technology ("IGT") (together, "Defendants") respectfully request that this Court enter an order compelling Plaintiff to arbitrate all claims asserted in her Complaint.

I. INTRODUCTION

DDI is a Seattle-based video game development company which operates a popular social gaming platform called DoubleDown Casino,[1] with versions of the platform available to play on DDI's website, Apple iOS, Google Android devices, and Facebook.[2] Defendant IGT is a publicly traded global gaming company (NYSE symbol: IGT).[3] IGT acquired DDI in 2012. Dkt. 1 ("Compl.") ¶ 22. In April 2017, IGT sold and assigned its interests in DDI to a subsidiary of DoubleU Games Co., Ltd. *Id.* ¶ 23.

DoubleDown Casino is and has always been purely a social gaming product—it has never awarded cash prizes or merchandise to its users. Through its website and applications, DDI offers free-to-play virtual games including poker, slots, and blackjack. New users are provided free virtual "chips" to use for game play. All users are given a free daily allotment of virtual chips, and additional chips are given to existing users during game play as well. No user is ever obligated to make any purchase of any kind. Users may voluntarily choose to purchase additional virtual chips from DDI if they run out of chips and choose not to wait for their next free allotment. Virtual chips may not be transferred or redeemed for "real world" money, goods, items of monetary value, or indeed, anything that can be used in the real world. The only thing virtual chips may be used for on DDI's platform is to play games. There is no legal or authorized secondary market for DDI's virtual chips, and users cannot properly sell, transfer, or trade them. Users are also free to play free virtual games on any of the thousands of other free gaming websites and applications available in the marketplace.

[1] https://www.doubledowncasino2.com/.

[2] https://apps.facebook.com/doubledowncasino.

[3] https://www.igt.com/.

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Plaintiff's complaint sets forth three theories of recovery, all premised upon allegations that Plaintiff's purchase of virtual chips constitutes unlawful gambling under certain Washington statutes. This action was filed on the heels of the Ninth Circuit's March 28, 2018, decision in *Kater v. Churchill Downs, Inc.*, 886 F.3d 784 (9th Cir. 2018) ("*Kater* decision"), which reversed dismissal of a complaint that had rested on one ground, failure to meet the gambling definition due to virtual chips not being a "thing of value," and the court of appeals disagreeing because it found that the complaint did not include the allegation that users receive free chips that extend gameplay at no cost.[4]

The viability of the *Kater* decision is dubious. The *Kater* decision ignored the repeated interpretations and public policy statements of the Washington State Gambling Commission, which had been relied upon by DDI and IGT and their competitors in the social gaming industry, that the sale of virtual chips by social gaming websites does not constitute gambling under Washington law where the virtual chips cannot be converted to real money or goods. Declaration of Jaime Drozd Allen ("Allen Decl.") Ex. A.

The merits of Plaintiff's claims in this case, however, are for an arbitrator to resolve.[5] Plaintiff entered a valid and enforceable agreement to arbitrate her disputes with DDI through her reasonable inquiry notice of DDI's Terms. DDI's game platform provides a clear and conspicuous hyperlink to DDI's Terms of Use ("DDI's Terms" or the "Terms"), accompanied by a notice clearly advising users that use of the DDI site is subject to the Terms. Plaintiff repeatedly accessed DDI's platform—playing games on *at least 1,700 occasions over nearly five years*—demonstrating her reasonable actual or constructive knowledge of the Terms.

---

[4] *Kater* also involved different factual allegations and is not binding on IGT or DDI here.

[5] A motion to compel arbitration constitutes a responsive pleading under Rule 12. *See, e.g.*, *HC Dalmoreproduct v. Kogan*, 145 F.3d 1338, at *1 (9th Cir. 1998); *Armendariz v. Ace Cash Express*, 2013 WL 3791438, at *3-4 (D. Or. July 19, 2013) (citations omitted); 5C Charles Alan Wright & Arthur Miller, Federal Practice & Procedure § 1360 (3d ed. 2010). Defendants specifically reserve the right to present any merit-based and other grounds to dismiss the Complaint to the arbitrator, in accordance with the arbitration agreement, or to this Court if arbitration is not compelled.

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DDI's Terms contain a broad arbitration provision that encompasses all of Plaintiff's claims and requires her to pursue "[a]ny dispute, controversy or claim" against Defendants through individual arbitration, not by class action proceedings in federal or state court. Declaration of Joe Sigrist ("Sigrist Decl.") Ex. A (DDI's Terms as of April 9, 2018).[6]

Pursuant to the Federal Arbitration Act ("FAA"), arbitration agreements must be strictly enforced when there is a valid arbitration agreement and the dispute falls within its scope. *See*, *e.g.*, 9 U.S.C. § 3; *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1428 (2017); *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (requiring enforcement of arbitration agreement with class-action waiver notwithstanding California law that barred such waivers). DDI's Terms readily satisfy both criteria. Accordingly, this Court should compel Plaintiff to arbitrate this dispute on an individual basis and stay this case pending the resolution of that arbitration.

II. RELEVANT BACKGROUND

A. Plaintiff's Use of the DoubleDown Casino Platform on Facebook.

Plaintiff alleges that, since 2013, she has played DDI games only using the DoubleDown Casino application on Facebook. Compl. ¶ 32. Plaintiff fails to allege how frequently she played the games, which games she played, or for how many years she played. *Id.* ¶¶ 32-33. In fact, between June 1, 2013 and April 9, 2018,[7] Plaintiff initiated over 1,700 game play sessions using the DoubleDown Casino platform on Facebook (the "Platform"). Sigrist Decl. ¶ 6.

Like all users, Plaintiff received a significant number of virtual chips for free from DDI, and like some users, in order to extend her game play, Plaintiff voluntarily decided to purchase additional chips. Compl. ¶¶ 3, 25, 32-33; Sigrist Decl. ¶ 7. These virtual chips are not real world money and cannot be redeemed for real world money. Sigrist Decl. ¶ 8.

[6] DDI's Terms have been updated since April 9, 2018.

[7] Notably, Plaintiff played on April 9, 2018, the same day this Complaint was filed.

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B. All Users Receive Notice of DDI's Terms.

The Complaint does not explain how Plaintiff played DDI's games on Facebook. Importantly, it omits the critical fact that all users agree to DDI's Terms by using the applications, including during game play. The Complaint embeds screenshots that selectively reveal only portions of the game screen, including a screenshot showing a "welcome" message that allegedly appears when users visit "DoubleDown Casino for the first time." *See, e.g.*, Compl. ¶ 25. However, users who use the Platform for the first time encounter a page that notifies the users that they are using the DoubleDown Casino in accordance with DDI's Terms. Sigrist Decl. ¶ 10.[8] The Platform screen states:

> **DoubleDown Casino is provided by DoubleDown Interactive, LLC in accordance with the DoubleDown Interactive, LLC Privacy Policy and Terms of Service**.

Id. (emphasis added). The notification remains on the screen, directly adjacent to the game Platform, for the entire duration of game play from the first session to the last, including when purchasing additional chips. *Id.* ¶ 11. Additionally, Facebook require users to log in using their Facebook credentials. *Id.* ¶ 12. Every page of the Platform interface presents the same notification about playing according to the Terms along the bottom of the game screen. *Id*.

The ever-present notification always has the full Terms hyperlinked directly above the notification available for users to review. *Id.* ¶ 13. The notification appears in contrasting light blue font on top of a black background. *Id*. Likewise, the "Terms of Use" hyperlink appears in color contrasting white font on top of a dark blue and black background. *Id.* The cursor emphasizes that "Terms of Use" is a hyperlink by changing shape whenever a user places the cursor above it. *Id.* ¶ 14. For example, on a PC running Windows, the cursor changes from an arrow to a hand. *Id.* Once clicked, the hyperlink opens up a new page on the user's browser and automatically opens the complete version of DDI's Terms. *Id.*

[8] Plaintiff alleges that she played on Facebook, and DDI's records also reflect that Plaintiff played on Facebook. Compl. ¶ 32; Sigrist Decl. ¶¶ 6, 20.

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The notification informing users that the DoubleDown Casino is being provided in accordance with DDI's Terms, and the hyperlink to the Terms above the notification, both appear visible throughout game play in full-screen mode. *Id.* ¶ 15.[9]

Screenshot No. 1

Id. (redacted for privacy).

[9] Plaintiff alleges she played using Facebook, which is available to users only using a computer. *Id*. ¶ 20. Thus, the attached screenshots should be identical to the screens Plaintiff would have viewed when using the Platform on a computer. DDI's records show that Plaintiff played games using the Facebook Platform on a computer. *Id*.

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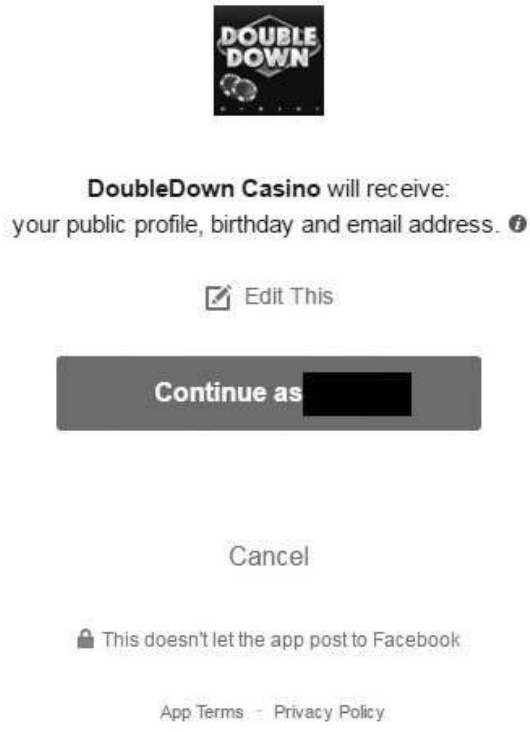
Both the notification about the Terms and a hyperlink to the Terms appear before all users while they play:

Screenshot No. 2

Id. ¶ 17.

Furthermore, when they play for the first time, all users using Facebook must click to continue to the game via a pop-up window that appears asking users whether they wish to continue and presenting a link to DDI's Terms. *Id.* ¶ 18. DDI's Terms are labeled "App Terms" and hyperlinked. *Id.* "App" refers to the game as an "app" on Facebook. *Id.* "Terms" refers to DDI's Terms. *Id.* Once "App Terms" is clicked, a browser page opens the complete version of DDI's Terms. *Id.* The following screenshot shows the pop-up window:

Screenshot No. 3



Id. (redacted for privacy). Plaintiff played games on the Facebook Platform using a computer. Compl. ¶ 32; Sigrist Decl. ¶ 20. Since June 2013, Facebook has required users to affirmatively

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click a button to authorize DDI to use the user's Facebook credentials. Sigrist Decl. ¶ 21. Since at least June 2013, Facebook has linked to DDI's Terms on or near the Facebook page authorizing the Platform. *Id.* ¶ 22.

C. Plaintiff Accepted DDI's Terms.

Plaintiff played for nearly five years and over 1,700 separate times between June 1, 2013 and April 9, 2018. *Id.* ¶ 6. The notification of DDI's Terms and a hyperlink to the Terms have appeared on the Platform screen during the *entire* time Plaintiff played. *Id.* ¶ 23. In other words, Plaintiff was presented with the notifications the full duration of her game play on at least *1,700 occasions*. *See id.* ¶¶ 6, 23. And at the outset, before she played any DDI games for the first time, Plaintiff could not have played using Facebook credentials without first clicking "Continue as [name]" to authorize the Platform to access her Facebook account after being presented the opportunity to view the Terms in full at that time. *Id.* ¶ 18.

In addition, on January 26, 2018, Plaintiff contacted DDI's customer service to inquire about the status of a promotional chip purchase. *Id.* ¶ 24. DDI corrected its error and added chips to Plaintiff's account. *Id.* In response, Plaintiff wrote to DDI, "Received excellent service from Ryan. Timely, quick, courteous. Thank you." *Id*. The only way in which Plaintiff, or any user, may reach Customer Service while using Facebook, is to click on the "Need Help?" hyperlink. This hyperlink is immediately to the right of the "Terms of Use" hyperlink at the bottom of the Platform screen and directly above the notification that Plaintiff was playing in accordance with the Terms. *Id.* ¶ 25; *see* Screenshot No. 2, *supra*. Plaintiff demonstrated her understanding of hyperlinks, and that she was a savvy website user, by accessing and using the "Need Help?" hyperlink, directly adjacent to where DDI's notice and Terms hyperlink appeared, and then subsequently navigating the steps to reach and communicate with DDI's online customer service.

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D. The Terms Require Individual Arbitration of Plaintiff's Claims.

DDI's Terms grant users a license to access and use DDI's website or applications to play games. *Id.* ¶ 26. But the grant of that license is conditioned upon the user's agreement to arbitrate all disputes. The Terms in effect on April 9, 2018, the last date that Plaintiff accessed DDI's Platform, include an arbitration agreement. In accepting DDI's Terms over 1,700 times by continuing to play the games while viewing the notice of the Terms, Plaintiff agreed to resolve "[a]ny dispute" with DDI exclusively through arbitration:

> Any dispute, controversy or claim arising out of, relating to or in connection with these Terms of Use and/or the Services shall be finally resolved by arbitration.

Id. ¶ 26 & Ex. A (revised July 2017). The Terms further provide that "[t]he tribunal shall have the power to rule on any challenge to its own jurisdiction or to the validity or enforceability of any portion of the Terms of Use to arbitrate." *Id*. Throughout the entire period that Plaintiff used the Platform, the Terms contained an arbitration and class-waiver agreement. *Id.* ¶ 26 Ex. B (revised July 2013) & Ex. C (revised August 2012). The Terms require arbitration to be administered by the American Arbitration Association, and that each side will bear its own costs. *See id.* Exs. A & B.

By agreeing to arbitration, Plaintiff agreed to an inexpensive, efficient, and fair mechanism to resolve disputes with DDI. Plaintiff agreed that she could not bring any claims on a class wide basis, but rather that any disputes must be resolved through arbitration on an individual basis:

> The parties agree to arbitrate solely on an individual basis, and that these Terms of Use do not permit class arbitration or any claims brought as a plaintiff or class member in any class or representative arbitration proceeding. The arbitral tribunal may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding.

See id. Exs. A & B.

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E. Plaintiff Seeks to Represent a Class Barred by Her Agreement to Arbitrate.

On April 9, 2018, Plaintiff filed a class action complaint against Defendants, alleging that they operate illegal online casino games and "have profited immensely from [their] operation of unlawful games of chance." Compl. ¶ 64. Plaintiff asserts Defendants: (1) must refund her purchases under RCW 4.24.070 (allowing recovery of gambling losses); (2) violated Washington's Consumer Protection Act, RCW 19.86.010 *et seq.*; and (3) were unjustly enriched. *Id*. ¶¶ 42-72. Plaintiff purports to bring this suit as a class action on behalf of a class defined as "[a]ll persons in the State of Washington who purchased and lost chips by wagering at the DoubleDown Casino." *Id*. ¶ 34.

III. LEGAL STANDARD

The FAA "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution" and it applies to all federal and state court proceedings. *Preston v. Ferrer*, 552 U.S. 346, 349 (2008). Courts should "'rigorously enforce' arbitration agreements according to their terms" to further the FAA's strong policy favoring arbitration. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (citation omitted). To do so, courts must "place arbitration provisions on the same footing as all other contractual provisions," and must "ensur[e] that private arbitrations are enforced." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1159 (9th Cir. 2013) (alteration in original) (citation & internal quotation marks omitted); *accord Kindred Nursing Centers*, 137 S. Ct. at 1428.

The Ninth Circuit routinely enforces arbitration agreements. *See, e.g.*, *Mortensen*, 722 F.3d at 1159-60; *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 937-38 (9th Cir. 2013); *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1160-61 (9th Cir. 2012). This Court too has enforced arbitration agreements in consumer contracts. *See, e.g.*, *Ekin v. Amazon Servs., LLC*, 84 F. Supp. 3d 1172, 1175-76 (W.D. Wash. 2014) (compelling arbitration in a putative consumer class action and recognizing district court's limited discretion to disregard valid arbitration agreements under *Concepcion* and Ninth Circuit law); *Coppock v. Citigroup, Inc.*, 2013 WL 1192632, at *4-10 (W.D. Wash. Mar. 22, 2013) (enforcing arbitration agreement in putative

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consumer class action asserting TCPA and FDCPA claims); *see also Peters v. Amazon Servs. LLC*, 2 F. Supp. 3d 1165, 1169 (W.D. Wash. 2013) (noting "there is a presumption of arbitrability" where a contract contains an arbitration clause and instructing that "the most minimal indication of the parties' intent to arbitrate must be given full effect" (citation & internal quotation marks omitted)); *aff'd*, 669 F. App'x 487 (9th Cir. 2012).

The arbitration agreement in the Terms should similarly be enforced. Under the FAA, a court's role is limited to making two inquiries in deciding whether to enforce an arbitration agreement: (1) does a valid agreement to arbitrate exist and, if so, (2) does the current dispute fall within the scope of that agreement? *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). The burden is on the party opposing arbitration to prove that arbitration is not required. *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000) ("[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration."). Where, as here, an arbitration provision satisfies these conditions, the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985); *see also DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (FAA overrides any contrary state law).

IV. ARGUMENT

A. A Valid and Enforceable Arbitration Agreement Exists Between Plaintiff and DDI.

Plaintiff entered a broad and enforceable agreement to arbitrate her disputes with DDI through DDI's Terms based on her repeated use of DDI's game platform and her actual or reasonable inquiry notice of the Terms. As demonstrated below, the arbitration agreement is

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valid and enforceable, plainly encompasses all of Plaintiff's claims, is not unconscionable, and should be enforced under the FAA.[10]

1. DDI's Terms Are Valid and Enforceable.

Under Washington law, "general contract principles … apply to agreements made online."[11] *See Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 231 (2d Cir. 2016) (citing *Spam Arrest, LLC v. Replacements, Ltd.*, 2013 WL 4675919, at *8 n.10 (W.D. Wash. Aug. 29, 2013)). Website and application users frequently enter into contracts with the platform's host by agreeing to be bound by the service's "terms of use." To form these contracts, courts typically recognize one of three types of online use agreements: (1) "browsewrap" agreements, in which a website's terms and conditions of use are generally posted on the website; (2) "clickwrap" agreements, where website users are required to click on a box stating they "agree" after being presented with a list of terms and conditions of use; and (3) "hybrid-wrap" agreements, where users take some action on the website that indicates they are acting in accordance with the website's terms. All three methods can be valid ways of creating a binding contract. *See, e.g.*, *Cairo, Inc. v. Crossmedia Servs., Inc*., 2005 WL 756610, at *4-5 (N.D. Cal. April 1, 2005) (finding browsewrap agreement enforceable); *Fteja v. Facebook, Inc*., 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012) (collecting cases finding clickwrap agreements

[10] Washington courts allow nonsignatories, such as IGT here, to enforce arbitration agreements where "the [Plaintiff] signatories have allege[ed] substantially interdependent and concerted misconduct by the nonsignator[ies] and another signatory." *Schmidt v. Samsung Elecs. Am., Inc*., 2017 WL 2289035, at *7 (W.D. Wash. May 25, 2017) (quoting *Murphy v. DirecTV, Inc*., 724 F.3d 1218, 1229 (9th Cir. 2013)). Further, "[w]here claims are based on the same set of facts and inherently inseparable, the court may order arbitration of claims against the party even if that party is not a party to the arbitration agreement." *Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 747 (2015) (citing *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 889 (2009) (allowing a nonsignatory to enforce an arbitration agreement against signatories)).

[11] Washington law applies here, when plaintiff brings exclusively Washington law claims, *see* Compl. ¶¶ 42-72, and the arbitration agreement at issue contains a Washington choice-of-law provision. Sigrist Decl. Ex. A; *see also Kwan v. Clearwire Corp.*, 2012 WL 32380, at *6 (W.D. Wash. Jan. 3, 2012) (Washington courts apply Washington law to consumer contracts where "Washington is the place of contracting, the place of negotiation …, the place of performance, the location of the subject matter, and the residence of one of the parties—the consumer").

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enforceable); *In re Facebook Biometric Info. Privacy Litig.*, 185 F. Supp. 3d 1155, 1165-67 (N.D. Cal. 2016) (noting hybrid-wrap agreements are enforceable).[12]

While instructive, these classifications do not capture every possible form a valid and enforceable online use agreement may take. Instead, the enforceability of such agreements often requires a fact-intensive inquiry to determine whether the user was placed on reasonable notice of the website's terms. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 76 (2d Cir. 2017) (finding a valid arbitration clause existed from a non-clickwrap style agreement). A reasonably prudent user of a website who has actual or inquiry notice of the website's terms of use will be bound to the contractual provisions contained therein. *Nguyen v. Barnes & Noble Inc*., 763 F.3d 1171, 1177 (9th Cir. 2014). In determining whether or not a user has inquiry notice, courts look to "the conspicuousness and placement of the 'Terms of Use' hyperlink, other notices given to the users of the terms of use, and the website's general design." *Id*.

Here, whether Plaintiff's arbitration agreement with DDI is valid and enforceable turns on how the Terms were presented to Plaintiff on DDI's game Platform, and whether her use of the Platform reasonably provided her inquiry or actual notice of the Terms. As demonstrated below, DDI's Terms should be found valid and enforceable against Plaintiff because DDI's game Platform provides a clear and conspicuous hyperlink to the Terms, accompanied by a notice clearly advising users that use of the game is subject to the Terms. Plaintiff repeatedly accessed and used the Platform—playing games on *at least 1,700 occasions over nearly five years*—demonstrating her reasonable constructive or actual knowledge of the Terms.

2. <u>DDI's Terms Are Conspicuous.</u>

The DoubleDown Casino website and, relevant here, the Facebook Platform, contain a hyperlink to DDI's Terms located at the bottom of the page, including on every page of the

[12] Courts applying Washington law have concluded that a party can assent to a contract through action and conduct. *See Nicosia*, 834 F.3d at 232 ("Manifestation of assent to an online contract … can be accomplished by 'words or silence, action or inaction,' so long as the user 'intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.'" (citation omitted)).

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game screen. The link to the Terms is in distinct and legible font of a distinct color separate from its background. A user need not "ferret out hyperlinks to terms and conditions," as the link is immediately available to the user and located in the user's field of vision (depending on the size of the computer screen) when they access the Platform via their computer's web browser. *Cf. Nguyen*, 763 F.3d at 1177-79 (noting links out of view of users may be inconspicuous). The link is placed in a manner where Plaintiff's use of the website gave her plain notice of the existence of the Terms. No scrolling was necessary for her to see the link when playing on a full-screen. *See Small Justice LLC v. Xcentrix Ventures LLC*, 99 F. Supp. 3d 190, 196-98 (D. Mass. 2015) (noting that the lack of a need to scroll before continuing made links to terms conspicuous). Accordingly, the Court should find that the Terms hyperlink was clearly conspicuous to all users on the Platform, including Plaintiff. *See Nguyen*, 763 F.3d at 1178 (describing when a terms of use link is conspicuous).

3. DDI Further Notifies Users That Services Are Provided in Accordance with the Terms.

In addition to the prominent placement and frequency of its Terms hyperlink, the Platform also presents a conspicuous notification at the bottom of the game screen, immediately underneath the hyperlink, advising the user that "DoubleDown Casino is provided by Double Down Interactive, LLC in accordance with the Double Down Interactive, LLC Privacy Policy and Terms of Service." Sigrist Decl. ¶ 10. The notice clearly calls users' attention to the fact that their use of DDI's services is subject to the Terms, and directs them to the hyperlink to investigate those Terms.

Courts have found the existence of similar directives in connection with a hyperlink sufficient to provide a user with inquiry notice of the terms. *Ticketmaster Corp. v. Tickets.Com, Inc.*, 2003 WL 21406289, at *2 (C.D. Cal. Mar. 7, 2003) (finding notice of terms posted on home page and visible to most users sufficient to impute knowledge of and assent to those terms); *Cairo*, 2005 WL 756610, at *2, 4-6 (website displayed defendant's logo and notice of "Terms of Use" in underlined, highlighted text that indicated hyperlink to actual terms); *Major*

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v. McCallister, 302 S.W.3d 227, 230 (Mo. Ct. App. 2009) (upholding browsewrap agreement where each web page contained "immediately visible notice of the existence of license terms" and hyperlink to those terms); *Hubbert v. Dell Corp*., 835 N.E.2d 113, 121-22 (Ill. App. Ct. 2005) (holding that a statement "All sales are subject to Dell's Term[s] and Conditions of Sale" was sufficient to "place a reasonable person on notice that there were terms and conditions attached to the purchase and that it would be wise to find out what the terms and conditions were before making a purchase" (alteration in original)).

For example, the *Fteja* court recently enforced a non-clickwrap agreement for users who signed up for Facebook on its website, and were notified in text elsewhere on the page that doing so was conditioned on Facebook's terms of use. 841 F. Supp. 2d at 839-40 (cited with approval by *Nguyen*, 763 F.3d at 1176-77). The court in *Fteja* found there was no distinction between Facebook giving notice of terms of use and directing users to a hyperlink, and a ticket stating "subject to conditions of contract" and directing the purchaser to additional terms on the back of the ticket. *Id*. at 839. The court held that both situations created valid enforceable agreements, reasoning that the outcome should be no "different because Facebook's Terms of Use appear on another screen rather than another sheet of paper." *Id*. Likewise, here, DDI's notice alerts users of the Terms and directs them to the adjacent hyperlink; that the Terms appear on another screen is no different than the paper ticket contract analogy described in *Fteja*. And just like cases enforcing Facebook's terms, here, Plaintiff affirmatively authorized DDI to use her Facebook credentials while Facebook linked to DDI's Terms. *See* Sigrist Decl. ¶¶ 20-22.

Thus, unlike a standard browsewrap agreement, DDI provides additional notice to users that its games and services are provided subject to the Terms, and directs them to the hyperlinked terms for further review. The notice combined with the hyperlink on the game platform, plus the additional notice of the Terms provided on Facebook's platform when users authorize use of their Facebook credentials, demonstrate that Plaintiff was on actual or reasonable inquiry notice of DDI's Terms.

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4. Plaintiff's Repeated and Lengthy Use of DDI's Game Platform Provided Additional Notice of the Terms.

With respect to Plaintiff specifically, her lengthy and repeated history of playing games on the DDI Platform further confirms that she was provided reasonable inquiry or actual notice of the Terms, and therefore should be bound by the arbitration agreement.

First, a user's "repeated … use of …. web pages can form the basis of imputing knowledge" of the terms on which services are offered. *Cairo*, 2005 WL 756610, at *5 (citing *Register.com, Inc. v. Verio, Inc*., 356 F.3d 393, 401-02 (2d Cir. 2004) (repeated use of a website would cause a user to see the terms' availability multiple times)). Plaintiff first used the Platform on June 1, 2013, and has used the Platform at least 1,700 times from then to the date this action was filed. Sigrist Decl. ¶¶ 5-6. Plaintiff's repeated interactions with DDI's Platform increase the likelihood that she actually read the notice and accessed and reviewed the hyperlinked Terms, or at a minimum, provided Plaintiff reasonable inquiry notice that her interactions would be governed by the Terms.

Second, the long-term and "transactional context of the parties' dealings" bolsters the conclusion that a reasonably prudent user would have constructive knowledge of the website's terms of use. *Meyer*, 868 F.3d at 80. In *Meyer*, the court found that the user accessed the service with "the intention of entering into a forward-looking relationship with Uber," such that the continuing relationship between the user and Uber "would require some terms and conditions." *Id*. Plaintiff similarly intended to engage in a long-term and "forward looking" relationship with DDI, as evidenced by the nearly five-year period during which she regularly accessed and used DDI's services, Sigrist Decl. ¶¶ 5-6, and thus, Plaintiff should have reasonably anticipated that this relationship would require some terms and conditions. Plaintiff's lengthy and repeated dealings with DDI stand in sharp contrast with the single point-of-sale transaction cases (such as *Nguyen*) where courts have declined to find inquiry notice.

Third, users of DDI's Platform cannot sign up, play games, or buy chips without taking the affirmative step of accessing and using the Platform screen, which of course contains the

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notice and hyperlink notifying them that they are doing so according to DDI's Terms. The court in *Himber v. Live Nation Worldwide, Inc*., 2018 WL 2304770 (E.D.N.Y. May 21, 2018), recently found that advancing beyond the initial home page could constitute the type of user action which "demonstrat[es] that they have at least constructive knowledge of the terms of the agreement, from which knowledge a court can infer acceptance." *Id.* at *3 (citation & internal quotation marks omitted). The court found that a website's hyperlink and disclosure that use of the site was governed by its terms of use, combined with user's decision to advance from the home screen to the interior webpages, placed the user on inquiry notice of those terms. Similarly, here, after encountering the notice and hyperlinked Terms in DDI's game lobby, Plaintiff affirmatively decided to move beyond the Platform lobby to the interior pages of the Platform to play games or buy chips, showing that she had reasonable inquiry notice of the Terms of Use. *See also Snap-On Bus. Solutions Inc. v. O'Neil & Assocs., Inc*., 708 F. Supp. 2d 669, 682-83 (N.D. Ohio 2010) (finding constructive knowledge of a website's terms where the user had to "enter" a website from a page stating "[t]he use of and access to the information on this site is subject to the terms and conditions set out in our legal statement" near a link to the terms); Sigrist Decl. Ex A (advising DDI game users, including Plaintiff, that "[y]ou are responsible for reviewing these Terms of Use for modifications prior to accessing, using or downloading the Services. ***By accessing, using or downloading the Services, you acknowledge and agree that you shall be bound by any such revisions***. If you do not wish to be bound by the modified Terms of Use and/or Privacy Policy, you must cease use of the Services.") (emphasis added).

Finally, Plaintiff's interactions with DDI demonstrate that she is a sophisticated website user who understands how to locate and access information via hyperlink. *See Fteja*, 841 F. Supp. 2d at 839-40 (noting that a person familiar with using a website "would understand that the hyperlinked phrase 'Terms of Use' is really a sign that says 'Click Here for Terms of Use'"). Specifically, on January 26, 2018, Plaintiff used the "Need Help?" hyperlink button to contact DDI's customer service. Sigrist Decl. ¶¶ 24-25. The "Need Help?" button is located

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immediately adjacent to the Terms hyperlink. *Id*. ¶ 25. Plaintiff's technological sophistication and familiarity with how to use the website's hyperlinks demonstrates that she likely had actual knowledge (and certainly had reasonable inquiry notice) of DDI's Terms.

In summary, DDI provides notice of its Terms to users in multiple ways that far exceed the typical "browsewrap" agreement that courts can be reluctant to enforce. *See Nguyen*, 763 F.3d at 1178-79 (declining to enforce arbitration agreement in point-of-sale transaction where website contained a link to terms of use and nothing more). In addition to posting a conspicuous link to its Terms at the bottom of the game Platform, which was continuously viewable throughout game play, DDI further placed a prominent notice adjacent to the hyperlink notifying users that DDI's services were provided "in accordance with" its Terms. Plaintiff's repeated and lengthy dealings with DDI, including her online interaction via hyperlink with its customer service department, further confirm that she is a sophisticated website user and had reasonable inquiry notice of the Terms. Accordingly, Plaintiff should be bound by the Terms, including the provision requiring her to individually arbitrate her claims.

B. Plaintiff's Claims Fall Within the Broad Scope of the Arbitration Provision.

There can be no dispute that Plaintiff's claims fall within the broad scope of the arbitration provision, thus satisfying the second prong of the arbitrability test. "[W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). Given the presumption in favor of arbitrability, "'only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.'" *Id.* (citation omitted). As this Court recognized:

> "[A]n order to arbitrate … should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *AT&T Techs.*, [475 U.S. at 650] (quoting *United*

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> *Steelworkers of Am. v. Warrior & Gulf Nav. Co*., 363 U.S. 574, 582-83 (1960)); *see Warrior & Gulf*, 363 U.S. at 584-85 ("In the absence of any express provision excluding a particular grievance from arbitration, ... only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail....").

Coppock, 2013 WL 1192632, at *5; *accord Tuminello v. Richards*, 2012 WL 750305, at *2 (W.D. Wash. Mar. 8, 2012) ("[T]he FAA divests courts of their discretion and requires courts to resolve any doubts in favor of compelling arbitration."), *aff'd*, 504 F. App'x 557 (9th Cir. 2013). Plaintiff "bears the burden of showing that the agreement does not cover the claims at issue." *Coppock*, 2013 WL 1192632, at *5 (citing *Green Tree Fin.*, 531 U.S. at 91-92). "Any doubts about the scope of arbitrable issues, including applicable contract defenses, are to be resolved in favor of arbitration." *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1022 (9th Cir. 2016) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

The arbitration provision in DDI's Terms is broad. It covers:

> ***Any dispute, controversy or claim arising out of, relating to or in connection with*** these Terms of Use and/or the Services ….

Sigrist Decl. ¶ 26 & Ex. A (emphasis added).

This type of expansive "any dispute" provision creates a broad arbitration agreement. *See Chiron Corp.*, 207 F.3d at 1131 (holding that arbitration clause covering "[a]ny dispute, controversy or claim arising out of or relating to" the parties' agreement is "broad and far reaching"); *Cayanan v. Citi Holdings, Inc.*, 928 F. Supp. 2d 1182, 1207 (S.D. Cal. 2013) ("Defendants' arbitration agreements all contain the broad 'related to' or 'relating to' language, and the Court accordingly reads the clauses broadly."); *Ekin*, 84 F. Supp. 3d at 1178 (broadly construing and enforcing arbitration agreement encompassing "any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com"); *Coppock*, 2013 WL 1192632, at *5 (enforcing arbitration clause covering "[a]ll [c]laims relating to your account, a prior related account, or our relationship are subject to arbitration … no matter what legal theory they are

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based on or what remedy … they seek"). Plaintiff's claims need not fall squarely within the clause to be arbitrable (although they do here); rather, "factual allegations need only 'touch matters' covered by the contract containing the arbitration clause and all doubts are to be resolved in favor of arbitrability." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 624 n.13 (1985)).

Here, all of Plaintiff's claims plainly relate to the Terms and Services provided by DDI, since they arise directly out of the license DDI granted Plaintiff to access and use DDI's website, games, content, and services. All of Plaintiff's causes of action and factual allegations claim the same injury and seek the same remedy—that DDI's games are somehow illegal under Washington law and that Plaintiff should be entitled to recover money spent on DDI virtual currency or goods. Compl. ¶¶ 42-72. Thus, the claims fall squarely within the scope of the arbitration agreement.

C. Plaintiff Must Pursue Her Claims in Individual Arbitration.

The Terms provide not only that Plaintiff must submit her claims to arbitration, but also that she must pursue those claims on an individual, not class, basis. The Terms contain an unambiguous class action waiver provision which states: "The parties agree to arbitrate solely on an individual basis, and that these Terms of Use do not permit class arbitration or any claims brought as a plaintiff or class member in any class or representative arbitration proceeding." Sigrist Decl. ¶ 26 & Ex. A. Plaintiff has no basis to avoid her agreement to arbitrate on an individual basis, which she repeatedly agreed to over 1,700 times.

First, Plaintiff cannot avoid the arbitration agreement simply because she might prefer to pursue class claims. Since *Concepcion*, the U.S. Supreme Court has consistently held that arbitration agreements containing class action waivers must be enforced according to their terms. *See*, *e.g.*, *DIRECTV*, 136 S. Ct. at 468 ("The [FAA] is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act."); *Italian Colors Rest.*, 570 U.S. at

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232, 237-38 (same); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627-28 (2018) (class action waivers in employment arbitration agreements are enforceable under FAA).[13] *Accord Kilgore v. Keybank, N.A.*, 718 F.3d 1052, 1058 (9th Cir. 2013) (any argument that a "ban on class arbitration is unconscionable … is now expressly foreclosed by *Concepcion*"); *Coneff*, 673 F.3d at 1159-60 (*Concepcion* "forecloses" argument that class action waivers are unconscionable under Washington law); *Coppock*, 2013 WL 1192632, at *8 n.2 ("Under *Concepcion*, the Court cannot consider Washington's policy on unconscionability of class-action waivers—'fundamental' or not, … since the FAA preempts that policy and precludes a court from taking it into account in conducting the unconscionability analysis.").

Second, Plaintiff has no basis to claim the arbitration agreement is procedurally unconscionable. Each time Plaintiff used the Platform to play the games and thereby agreed to the Terms, she had the choice *not* to continue playing and thus doing business with DDI. *See Zuver v. Airtouch Commc'ns*, 153 Wn.2d 293, 304-05 (2004) (adhesion is insufficient to support a finding of procedural unconscionability under Washington law). The arbitration agreement was prominently featured within the Terms under the governing law section and explained in plain language. *See Fagerstrom v. Amazon.com, Inc.*, 141 F. Supp. 3d 1051, 1069-70 (S.D. Cal. 2015) (enforcing terms of use where "[t]he text of the Arbitration Agreement is the same size and font as the rest of the [terms]," plaintiff was not under time pressure to accept, and the agreement was written in plain language)*, aff'd sub nom. Wiseley v. Amazon.com, Inc*., 709 F. App'x 862 (9th Cir. 2017); *see also Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 914 (2015) (any "obligation to highlight the arbitration clause of [the] contract … would be preempted by the FAA"). Plaintiff cannot claim anyone forced her to log into Facebook and play DoubleDown Casino, or that she was caught unaware when she chose

[13] This holds true even if a state would otherwise prohibit the class action waiver provision from being enforced. Indeed, the Supreme Court's *Concepcion* decision specifically addressed the enforceability of an arbitration agreement with a class waiver that had been held unenforceable under California law pursuant to the *Discover Bank* rule. *Concepcion*, 563 U.S. at 346-47.

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over 1,700 times to continue playing and thus to affirmatively accept the Terms that were prominently featured alongside the Platform screen at all times during game play.

Third, Plaintiff cannot claim the arbitration agreement is substantively unconscionable, i.e., that it is so harsh or one-sided that it is "[s]hocking to the conscience." *Hauenstein v. Softwrap Ltd.*, 2007 WL 2404624, at *5 (W.D. Wash. 2007) (quoting *Nelson v. McGoldrick*, 127 Wn.2d 124, 131 (1995)). Again, it is settled law that the class action waiver provision in the arbitration agreement cannot be considered unconscionable. *Concepcion*, 563 U.S. at 352. Plaintiff also cannot plausibly argue that arbitration in this case would be prohibitively expensive, because the Terms select American Arbitration Association rules and state that each party shall bear their own costs. *See* Sigrist Decl. ¶ 26 & Ex. A; *Green Tree Fin.*, 531 U.S. at 90-91 ("The 'risk' that [a plaintiff] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement."); *Signavong v. Volt Mgmt. Corp.*, 2007 WL 1813845, at *4 (W.D. Wash. June 21, 2007) (under Washington law, even a provision requiring paying the prevailing party's attorneys' fees would not be so one-sided as to shock the conscience).

Plaintiff's arbitration agreement is fully enforceable, as numerous courts have held and the FAA directs. Plaintiff has no grounds to avoid her agreement or the FAA's mandate, and the Court should compel her to arbitration on an individual basis.

D. The Arbitrator Must Resolve Any Further Challenges to the Arbitration Agreements.

Because the arbitration agreement exists, this Court's analysis should end, and any further issues should be referred to an arbitrator—including any contention that the arbitration clauses are unenforceable or that this dispute lies outside the scope of the arbitration agreements. *See Rent-ACenter, W., Inc. v. Jackson*, 561 U.S. 63, 68-69 & n.1 (2010).

It is well-established that parties may delegate "gateway" questions of arbitrability to an arbitrator. "A delegation clause is enforceable when it manifests a clear and unmistakable agreement to arbitrate arbitrability, and is not invalid as a matter of contract law." *McLellan v.*

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Fitbit, Inc., 2017 WL 4551484, at *1 (N.D. Cal. Oct. 11, 2017) (citing *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015)); *see also Momot v. Mastro*, 652 F.3d 982, 988 (9th Cir. 2011) (holding that parties clearly and unmistakably agreed to arbitrate the question of arbitrability where they agreed to arbitrate "the validity or application of any of the provisions of" the arbitration clause). The U.S. Supreme Court has confirmed that when an arbitration agreement delegates issues of scope or enforceability to the arbitrator, that delegation must be respected and enforced by the court. *Rent-A-Center*, 561 U.S. at 68-69 & n.1.

Here, the arbitration agreement provides that "[t]he [arbitration] tribunal shall have the power to rule on any challenge to its own jurisdiction or to the validity or enforceability of any portion of the Terms of Use to arbitrate." Sigrist Decl. ¶ 26 & Ex. A. This provision "clearly and unmistakably" establishes that it is the arbitrator, not the court, who must decide if the dispute is subject to arbitration. Further, the arbitration agreement specifically requires arbitration in accordance with the AAA Commercial Arbitration Rules, *id.*, which expressly provide that questions of jurisdiction and arbitrability are to be decided by the arbitrator. *See* Allen Decl. Ex. B, Rule R-7(a) ("The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."). The Ninth Circuit has held that incorporating arbitration rules which delegate authority to the arbitrator to determine arbitrability constitutes "clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Brennan*, 796 F.3d at 1130 (citation & internal quotation marks omitted). Consequently, because the arbitration agreement here delegates threshold questions of arbitrability to an arbitrator, this Court should refer any potential defenses to the enforcement of the arbitration agreement to the arbitrator.

V. THE COURT SHOULD STAY THE ACTION PENDING ARBITRATION.

Once a court determines that a dispute falls within the scope of a valid written arbitration agreement, the FAA requires that further proceedings be stayed "until such

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arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3; *Concepcion*, 563 U.S. at 344; *see also Dean Witter*, 470 U.S. at 218 (FAA mandates that the court "*shall* direct the parties to proceed to arbitration" and "leaves no place for the exercise of discretion"); *Coppock*, 2013 WL 1192632, at *10 (granting motion to compel arbitration and staying the case pending arbitration). Congress intended this provision to effectuate the FAA's policy favoring prompt arbitration without the delay of an intervening appeal. *See* 9 U.S.C. § 16 (allowing a one-way appellate right*, i.e.,* the party seeking to compel arbitration can appeal if a district court denies the motion, but a party opposing arbitration cannot appeal if the court grants the motion). Accordingly, the Court should stay Plaintiff's claims against Defendants pending arbitration.

VI. CONCLUSION

Plaintiff agreed to arbitrate any and all disputes arising out of or relating to her use of DDI's gaming platform on an individual basis, not as a class action. Plaintiff cannot avoid her agreement now, and the FAA commands that her claims be referred to individual arbitration, while staying all proceedings in this Court. 9 U.S.C. § 3. Because both prongs of the FAA test are satisfied, the Court should grant this motion and require Plaintiff to arbitrate her claims. Accordingly, Defendants respectfully requests that the Court (1) compel Plaintiff to pursue individual arbitration of all claims against Defendants pursuant to the arbitration agreement in the Terms, and (2) stay this action against Defendants pending disposition of the arbitration proceeding.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED this 2nd day of July, 2018.

s/ Jaime Drozd Allen
Jaime Drozd Allen, WSBA #35742

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Exhibit 8

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ADRIENNE BENSON AND MARY SIMONSON, individually and on behalf of all others similarly situated,

Plaintiff,

v.

DOUBLE DOWN INTERACTIVE, LLC, a Washington limited liability company, and INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation,

Defendant.

CASE NO. 2:18-cv-00525-RBL

ORDER DENYING DEFENDATS' MOTION TO COMPEL ARBITRATION

DKT. #44

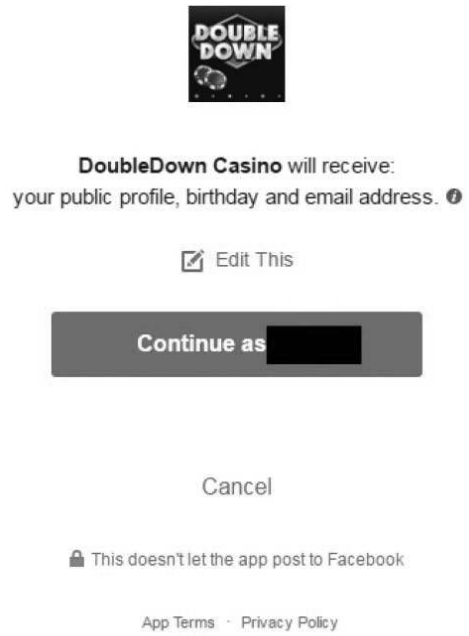
INTRODUCTION

THIS MATTER is before the Court on Defendants Double Down Interactive, LLC, and International Game Technology's (collectively "Double Down") Motion to Compel Arbitration. Dkt. #44. The underlying dispute is a class action to recover money lost playing electronic gambling games available through different platforms, including Facebook and iPhone. Hyperlinks to Double Down's Terms of Use, which include an arbitration provision, exist at various points from when a user initially accesses the game through the gameplay experience.

Double Down argues that these hyperlinks are sufficiently conspicuous to put a reasonable user on inquiry notice that playing the Double Down Casino game entails agreeing to the Terms of Use. Benson and Simonson respond that they were never bound by Double Down's Terms because the hyperlinks were either hidden at the bottom of the window or obscured from view. Furthermore, they argues that none of the hyperlinks were coupled with a notification alerting a user that they were entering a binding contract.

BACKGROUND

Plaintiffs filed their Complaint against Double Down on April 17, 2018, alleging that Double Down Casino constitutes illegal gambling in violation of RCW § 4.24.070. Dkt. #1, at 12-14. Double Down Casino is a game available as a computer or mobile app and allows users to play gambling games with virtual "chips" that may be purchased in the app after users run out of the initial free allotment. *Id.* at 7-8. Despite the fact that these chips cannot be redeemed for actual money, Plaintiffs allege that they are nonetheless valuable because they can be used to continue playing. *Id.* at 13-14. Therefore, Plaintiffs allege that Double Down's game amounts to gambling as defined by statute and that they are entitled to recover the money they lost playing. *Id.* at 14.

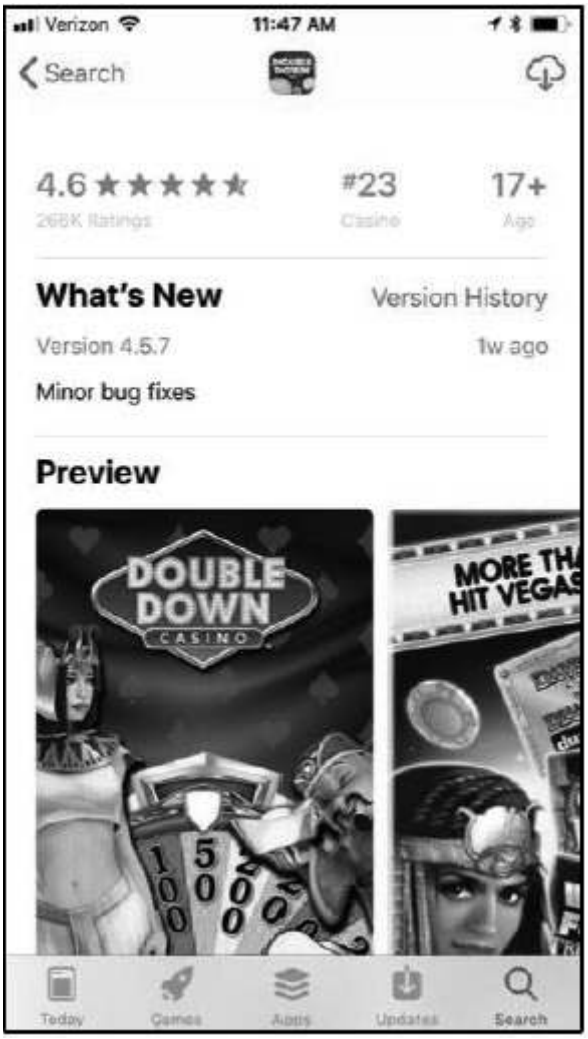


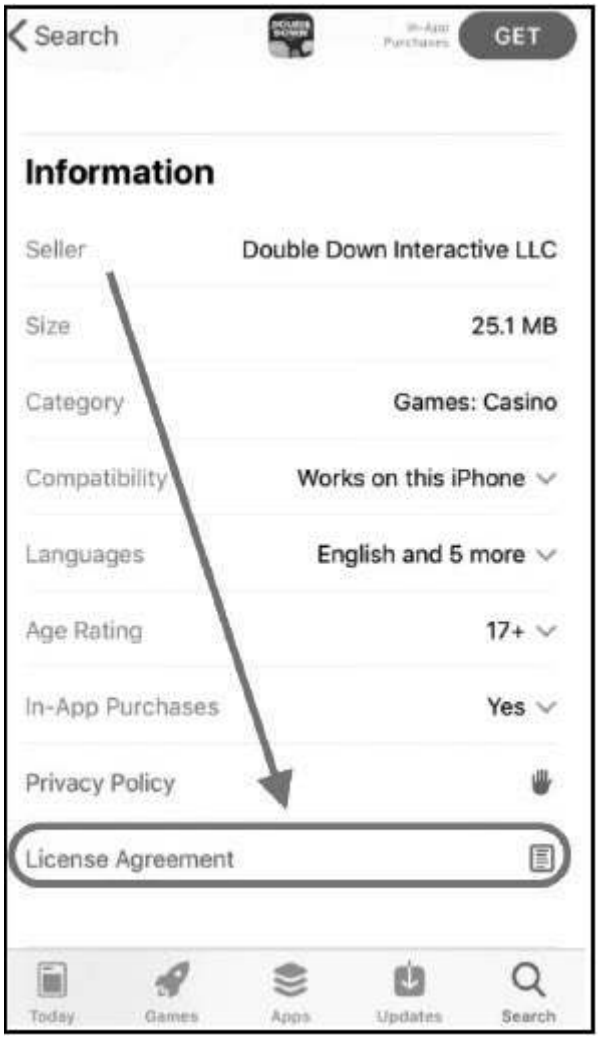
Benson played Double Down Casino on Facebook. Motion, Dkt. #44, at 3. When a user plays the game on Facebook for the first time, they are confronted with a pop-up window, as depicted on the left. *Id*. at 6. This pop-up informs the user about the data sharing practices between Facebook and Double

Down and contains a hyperlink to the "App Terms" at the bottom of the screen, which contain an arbitration provision. *Id*. at 6, 9.

Once the user continues on to play the game, there is another hyperlink to the "Terms of Use" at the bottom of the gameplay screen. *Id*. at 4. This hyperlink is located adjacent to several other links, and below the links is a small notification stating, "DoubleDown Casino is provided by DoubleDown Interactive, LLC in accordance with the DoubleDown Interactive, LLC Privacy Policy and Terms of Service." *Id*. However, both the hyperlink and notification are only viewable if a player scrolls to the bottom of the screen. Dkt. #51, Ex. A (video of user accessing and playing the Facebook app). The gameplay screen is depicted below. Motion, Dkt. #44, at 5.

Simonson played Double Down Casino by downloading it as an iPhone app. *Id*. at 3. To download the app, a user must first search for it. This brings up a list of apps, and the Double Down Casino app can be downloaded directly from this list. *See* Dkt. #51, Ex. B (video of a user searching for, downloading, and playing the Double Down Casino app). If a user opts to download the app this way, no hyperlink to the Terms of Use appears at all. *Id*. However, if a user chooses to view the app's individual page before downloading it, a "License Agreement" hyperlink is visible after a significant amount of scrolling. Opp'n, Dkt. #49, at 14-15. The initial display of the app page and the bottom of the page with the link are depicted below. *Id*.





Finally, once a user downloads the app, the Terms of Use can also be viewed by clicking a link in the settings menu of the app. Motion, Dkt. #44, at 8. However, this menu is not necessary to play the game or buy chips, can only be accessed by clicking a button in the upper corner of the game screen, and only shows the "Terms of Use" link after scrolling down. Wade-Scott Decl., Dkt. #50, at ¶ 8; Dkt. #51, Ex. B. The iPhone app game screen and the bottom of the menu are depicted below. Dkt. #49, at 16; Dkt. #45, at 9.

DISCUSSION

1. Legal Standard

The Federal Arbitration Act provides for the enforceability of valid arbitration agreements and "permits a party 'aggrieved by the alleged ... refusal of another to arbitrate' to petition any federal district court for an order compelling arbitration in the manner provided for in the agreement." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (quoting 9 U.S.C. § 4). A court's role is "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Id.* (citation omitted).

However, a court may "submit to arbitration only those disputes . . . that the parties have agreed to submit." *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 742 (9th Cir. 2014) (internal quotations omitted). Determining whether parties have agreed to submit to arbitration requires applying "general state-law principles of contract interpretation." *Id*. (quoting *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1044 (9th Cir.2009)). "If the parties contest the existence of an arbitration agreement, the presumption in favor of arbitrability does not apply," *id*., and the burden of proving the existence of an agreement rests with the party trying to compel arbitration. *Norcia v. Samsung Telecomms. America*, LLC, 845 F.3d 1279, 1283 (9th Cir. 2017). In addition, such formation issues are decided by a district court, not an arbitrator. *Sanford v. Memberworks, Inc.*, 483 F.3d 956, 962 (9th Cir. 2007).

2. Formation of an Agreement to Arbitrate

Whether Double Down can compel arbitration turns on whether its "Terms of Use" hyperlinks put Benson and Simonson sufficiently on notice of their obligation to arbitrate disputes – in other words, this is a "browsewrap" case. Browsewrap agreements, along with

clickwrap agreements, are the spawn of consumer contracts and the Internet age. While clickwrap agreements require a consumer to affirmatively click a box manifesting their assent to a website's terms, browsewrap agreements may sometimes be formed simply by using a website containing a hyperlink to its terms. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175-76 (9th Cir. 2014). Several courts have observed that the law of other jurisdictions is similar to Washington law on this topic. *See, e.g., Domain Name Comm'n Ltd. v. DomainTools, LLC*, No. C18-0874RSL, 2018 WL 4353266, at *3 (W.D. Wash. Sept. 12, 2018) (applying Washington law in a case involving browsewrap and relying on Ninth and Second Circuit cases applying the law of other states); *Spam Arrest, LLC v. Replacements, Ltd.*, No. C12-481RAJ, 2013 WL 12108077, at *7 n.10 (W.D. Wash. Aug. 20, 2013) (observing that Washington law does not differ greatly from the law of other states with respect to online contracts).

The Ninth Circuit has stated that "the validity of [a] browsewrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions." *Nguyen v. Barnes & Noble Inc.*, 763 F.3d at 1176 (quoting *Van Tassell v. United Mktg. Grp., LLC*, 795 F.Supp.2d 770, 790 (N.D.Ill.2011)). "Courts have consistently enforced browsewrap agreements where the user had actual notice of the agreement." *Id*. However, where this is not the case, whether a website would put a reasonably prudent user on inquiry notice of its terms "depends on the design and content of the website and the agreement's webpage." *Id*. at 1177. Courts should distinguish between cases where the terms of use are "buried at the bottom of the page or tucked away in obscure corners of the website" and cases "where the website contains an explicit textual notice that continued use will act as a manifestation of the user's intent to be bound." *Id*. Ultimately, "the conspicuousness and placement of the 'Terms of Use' hyperlink,

other notices given to users of the terms of use, and the website's general design all contribute to whether a reasonably prudent user would have inquiry notice of a browsewrap agreement." *Id*.

In *Nguyen*, the Ninth Circuit held that a browsewrap agreement was not formed despite the fact that the hyperlinks to the website's terms of use were either visible without scrolling or located so close to the "checkout" button that a user would necessarily see them. *Id*. at 1178. The court distinguished *PDC Labs., Inc. v. Hach Co.*, where the website's hyperlinks were similarly conspicuous but users were also prompted to "review terms" before placing their final order. *Id*. (quoting No. 09–1110, 2009 WL 2605270 (C.D.Ill. Aug. 25, 2009)). The court held that websites with conspicuous hyperlinks but that "provide[] no notice to users nor prompt[] them to take any affirmative action to demonstrate assent" do not give inquiry notice. *Id*. at 1179; *see also McKee v. Audible, Inc.*, No. CV 17-1941-GW(EX), 2017 WL 4685039, at *8 (C.D. Cal. July 17, 2017) (finding no inquiry notice where the website's notification stated that "completing your purchase" would bind the user to the terms, but did not state that clicking the "start now" button to begin a free trial would carry this consequence).

In contrast, in *Meyer v. Uber Technologies, Inc.*, the Second Circuit held that a browsewrap agreement was formed where the notification and hyperlink regarding terms of use were "spatially . . . [and] temporally coupled" with the mechanism for manifesting assent. 868 F.3d 66, 78 (2d Cir. 2017). As the court described, "The Payment Screen [was] uncluttered, with only fields for the user to enter his or her credit card details, buttons to register for a user account . . . , and the warning that 'By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY.'" *Id*. The court held that a reasonable consumer would understand that this configuration "connect[ed] the contractual terms to the services to which they appl[ied]." *Id*.

These cases illustrate that, if there is no actual notice, a browsewrap agreement must at least provide a conspicuous link with some accompanying notification alerting a user that they are entering into a contract. Here, Double Down has not met these requirements for inquiry notice. When a user first accesses the Facebook app, the "App Terms" link on the initial pop-up window is located far below the "Continue" button in small grey text. *See* Motion, Dkt. #44, at 6. Furthermore, the pop-up window's main purpose is to gain permission for data sharing between Facebook and Double Down, which is not a point traditionally associated with binding terms unrelated to the data sharing itself. *See Meyer*, 868 F.3d at 78. When a user first downloads the iPhone app, the app page contains a link to the "License Agreement" that may only be viewed after significant scrolling, and the app may be downloaded directly from the search results list without ever accessing the particular Double Down Casino app page. Opp'n, Dkt. #49, at 13-14. Neither the initial link on Facebook or on the mobile app is coupled with a notification informing a user that downloading or playing Double Down Casino creates a binding agreement.

The hyperlinks within the game itself also do not put a user on inquiry notice. On Facebook, the "Terms of Use" hyperlink is located at the very bottom of the gameplay screen in small font next to several other links, and is not visible unless a user scrolls down. *See Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV997654HLHVBKX, 2003 WL 21406289, at *2 (C.D. Cal. Mar. 7, 2003) (distinguishing between cases where the notification and link are prominent and cases where they are only visible by scrolling). On the mobile app, the link to the Terms of Use is located within a settings menu that a player may never even need to access. Furthermore, links that are available only via the settings menu are not "temporally coupled" with a discrete act of manifesting assent, such as downloading an app or making a purchase, and are thus less likely to put a reasonable user on inquiry notice. *See Meyer*, 868 F.3d at 78.

Double Down contends that the notification underneath the Terms link in the Facebook app provides the additional reinforcement that was absent in *Nguyen* to create inquiry notice. Reply, Dkt. #53, at 4. However, Double Down's generic notification that its game "is provided. . . in accordance with the . . . Privacy Policy and Terms of Service" is a far cry from the more specific notifications found in cases reaching different conclusions than *Nguyen*. *See, e.g., Rodriguez v. Experian Servs. Corp.*, No. CV 15-3553-R, 2015 WL 12656919, at *2 (C.D. Cal. Oct. 5, 2015) ("Their website contained a hyperlink to the Terms of Use at the bottom of every page and included an express disclosure and acknowledgment, which stated, 'By clicking the button above ... you agree to our Terms of Service.'"); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 835, 839 (S.D.N.Y. 2012) (enforcing an agreement where "[the] following sentence appears immediately below that button: 'By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service.'"); *Major v. McCallister*, 302 S.W.3d 227, 230 (Mo. Ct. App. 2009) ("ServiceMagic did put 'immediately visible notice of the existence of license terms'—i.e., 'By submitting you agree to the Terms of Use' and a blue hyperlink—right next to the button that Appellant pushed.").

Here, the notification does not identify any action by the user that would manifest assent, nor does the reference to "Terms of Service" in the notification even match the "Terms of Use" hyperlink above it. *See* Sigrist Decl., Dkt. #45, at ¶ 21; *McKee v. Audible, Inc.*, No. CV 17-1941-GW(EX), 2017 WL 4685039, at *8 (C.D. Cal. July 17, 2017) (noting that "even were a consumer to understand that selecting the 'Start Now' button bound that user to Audible's Conditions of Use, that consumer would also need to surmise that Audible really meant the document titled 'Terms of Use' that appears on the following page"). Furthermore, the notification is in extremely small print and in no way demands a user's attention or alerts them

that the information is important. *See Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 404 (E.D.N.Y. 2015) (holding that an agreement was invalid where "[t]he hyperlink to the 'terms of use' was not in large font, all caps, or in bold").

Double Down also insists that, because Plaintiffs played their game many times, insufficient notice is somehow made sufficient through shear repetition. Double Down bases this theory primarily on the reasoning from *Register.com, Inc. v. Verio, Inc.* and *Cairo, Inc. v. Crossmedia Services, Inc.* In *Register.com*, a user was charged with actual knowledge of website terms because, after each automated search on the website, they saw the terms attached to each response. 356 F.3d 393, 396-97, 401-02 (2d Cir. 2004). Crucially, the user admitted to being "fully aware of the terms." *Id*. at 402. The user in *Cairo* also engaged in automated searching of the defendant's web pages, each of which included a prominent notification upon entry that using the site required agreeing to its terms. No. C 04-04825 JW, 2005 WL 756610, at *2 (N.D. Cal. Apr. 1, 2005). In addition to the user admitting to actual knowledge, the court also held that the "repeated and automated use" of the web pages meant that knowledge of the terms could be imputed. *Id*. at *5.

The holdings in *Register.com* and *Cairo* are simply inapplicable in a case like this where there is no actual knowledge or prominent notification. *Register.com* rested on the user's admission of actual knowledge, but neither Benson nor Simonson made such an admission. To the extent that the reference to "imputing knowledge" in *Cairo* may be compared to putting a user on inquiry notice, the website in *Cairo* contained an "explicit textual notice" that informed users that they would be bound by the terms. *See Nguyen*, 763 F.3d at 1177 (distinguishing *Cairo*). That is not true here, and Double Down has given the Court no reason to extend the reasoning in *Cairo*. Indeed, on a logical level, Double Down's position is not compelling. While

repeatedly playing a game may make it more likely that at some point the "Terms of Use" hyperlink will cross the user's field of vision, *Nguyen* specifically held that this is not enough for inquiry notice. *See* 763 F.3d at 1178-79. Furthermore, after moving beyond the initial download, a user likely becomes *less* alert to binding contract terms while casually using the product. *See Meyer*, 868 F.3d at 78. It would be a different story, perhaps, if the terms popped up each time the user fired up the game or when they registered their account, but that is not the story here. *See id*.

Double Down also attempts to bring this case closer to *Register.com* and *Cairo* by arguing that Benson once used the "Need Help?" hyperlink, which is next to the "Terms of Use" hyperlink at the bottom of the Facebook gameplay window, and thus "likely received actual notice" of the website's terms. Sigrist Decl., Dkt. #45, at ¶¶ 21-22; Reply, Dkt. #53, at 5-6. However, Double Down presents no evidence that Benson actually used the in-game link to access customer service; she could have just as easily searched the Internet. Even if Double Down could somehow prove that Benson clicked the in-game link, this does not support actual notice. Instead, this merely addresses Double Down's scrolling problem, which does nothing to overcome *Nguyen*'s holding that even hyperlinks more prominent than Double Down's are insufficient on their own. *See* 763 F.3d at 1178-79. As previously discussed, the small-print notification below Double Down's link is not enough to overcome this barrier.

Double Down's final argument is that the "Apple Media Terms and Conditions," which state that "each transaction is an electronic contract between you and Apple and/or you and the entity providing the content," somehow bound Simonson to Double Down's Terms. Reply, Dkt. #53, at 7. The case that Double Down cites in support of this proposition did not involve browsewrap and focused on a contract between a user and the owner of the app store (Google),

not a user and an app developer. *See Svenson v. Google Inc.*, No. 13-CV-04080-BLF, 2016 WL 8943301, at *13 (N.D. Cal. Dec. 21, 2016). In any case, the issue here is not whether a contract *of some nature* was created when Simonson downloaded the app, but rather whether Simonson agreed to be bound by Double Down's Term of Use. In light of the foregoing, the Court concludes she did not.

CONCLUSION

For the reasons stated above, Double Down's Motion to Compel Arbitration (Dkt. #44) is **DENIED**.

IT IS SO ORDERED.

Dated this 13th day of November, 2018.

Ronald B. Leighton
United States District Judge

Exhibit 9

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ADRIENNE BENSON AND MARY SIMONSON, individually and on behalf of all others similarly situated, Plaintiffs, v. DOUBLE DOWN INTERACTIVE, LLC, et al., Defendants.	No. 2:18-cv-00525-RBL DEFENDANTS' MOTION TO CERTIFY QUESTIONS TO THE WASHINGTON SUPREME COURT ORAL ARGUMENT REQUESTED NOTE ON MOTION CALENDAR: JULY 10, 2020

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Double Down Interactive, LLC ("Double Down") and International Game Technology ("IGT") respectfully move this Court to certify unique state-law questions to the Washington Supreme Court under RCW 2.60.030 and RAP 16.16. This case is the quintessential situation where certification to the Supreme Court is both necessary and fair. Certification should be granted for the following reasons:

First, unlike similar motions in other cases, where the Court declined to certify because those parties had already brought merits issues to the Court, Double Down and IGT have not waived their right to seek certification; there have been no motions or orders on the merits.

Second, Plaintiffs' suit alleges only state-law claims under the Recovery of Money Lost at Gambling statute ("RMLG"), RCW 4.24.070, and the Consumer Protection Act that have never been answered by the Washington Supreme Court. Standards and principles of comity and federalism dictate that Washington be permitted to set its own law establishing what is — and what is *not* — gambling within its borders.

Third, the Ninth Circuit's decision in *Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018), does not determine the legality of Double Down's games. *Kater* is wrong to equate mere extension of game play in a game with no cash prizes with gambling and it was incorrectly decided because, among other reasons, it did not consider Washington's statutory interpretation principles, legislative history, or regulatory framework; but that is not why the questions presented below should be certified to the Washington Supreme Court. *Kater* is limited as it only opines, albeit incorrectly, as to one scenario assumed to be true for the purposes of ruling on a motion to dismiss—that players must purchase virtual chips in order to continue playing. However, ***no court***—not the Ninth Circuit in *Kater*, nor any Washington court—has considered whether virtual chips which are ***not used for the alleged "extension" of play time*** qualify as a "thing of value" under Washington law. The vast majority of Double Down's users buy virtual chips before they run out of chips to play. Double Down's games and players are distinguishable on these and other bases not yet considered by any court. This makes this motion distinguishable from any similar motion by defendants in separate actions

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and the issues ripe for determination by the Washington Supreme Court. Moreover, although *Kater* relied heavily upon it, the decision in *Bullseye Distributing LLC v. State Gambling Commission*, 127 Wn. App. 231 (2005), did not consider situations, like here, where the game at issue offered no cash or merchandise prize. Nor did *Bullseye* involve civil claims for damages premised on an illegal game or assent by the Washington State Gambling Commission ("Commission") to DDI's widespread and open operation.

Fourth, leaving the interpretation of a 140-year-old statute to the Washington Supreme Court not only is appropriate under well-established case law deferring to state courts to answer purely state law questions, but is inherently fair based on the explicit guidance from the Commission permitting Double Down's games and the Commission's inaction on any enforcement efforts, before and after *Kater*. Washington courts are not bound by *Kater* and the WA courts should get to decide important local issues such as gambling anyway.

Fifth, an incorrect interpretation of Washington law has far-reaching impacts beyond this case. Double Down is a Seattle-based business that employs over 100 Washingtonians; Washington has the prerogative to interpret its own gambling laws that threaten to disrupt Double Down's Washington business and the employment of Washingtonians. The potential impact extends the entire video gaming industry (and potentially beyond games based entirely on chance), which would leave millions of consumers unable to access a wide variety of games they enjoy, and which could impact thousands more jobs for Washingtonians.

The standards for certification under Ninth Circuit and Washington law are met and certification of the questions presented below is the fair, right, and just result. Accordingly, the Court should certify these questions the Washington Supreme Court.

I. FACTUAL BACKGROUND

Double Down's video games include social games that entertain players with a variety of animation and virtual situations. Sigrist Decl. ¶ 2. The games are free to download, free to play, and never result in monetary prizes. *Id*. Because players receive free virtual chips in a variety of ways, they need not purchase any virtual chips to play. *Id*. Players first receive free

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chips when they download the app and later obtain additional free chips. *Id*. In fact, contrary to the allegations of Plaintiffs that users must purchase virtual coins, virtually no Double Down players purchase chips in order to continue to play. *Id*. In Double Down Casino, via either the app or through Facebook, as allegedly played by Plaintiffs, players can obtain additional free virtual chips every day or more often. *Id*. Players may also receive additional free chips by participating in free promotional offers. *Id*.

Double Down's games never award monetary winnings or real-world prizes. *Id.* ¶ 3. A player cannot "cash out" their virtual chips. *Id*. Although the games can be played for free, Double Down's games, like many video games, allow players to buy more chips before they receive more free chips. *Id*. But the player purchases knowing they will receive more free virtual chips that cannot be used outside the game, have no value in the game, and cannot be converted to money or anything else of value. *Id*.

The video game industry, including the development of casual or social games, represents a substantial portion of Washington State's tech-driven economy, employing about 94,200 Washingtonians. *Id.* ¶¶ 4-9 & Exs. 1-4. Washington ranks third in the country in the total number of active video game developers, with nearly 300 such companies with offices in Washington, including major industry players and household names. *Id.* ¶ 4. Double Down likewise maintains its U.S. headquarters in Seattle, and currently employs almost 150 people in Washington. *Id.* ¶ 5.

II. PROCEDURAL HISTORY

In this case, there has been no motion nor decision made on the merits. The parties have litigated only whether Plaintiffs agreed to arbitration. No documents have been produced, nor depositions taken. Allen Decl. ¶ 2. After conclusion of the appeal on arbitration issues, the case returned to this Court on February 20, 2020. Dkt. 88. The parties have only recently begun discovery, but no responses or objections have been served; and no motions on the merits have been made. *See* Allen Decl. ¶¶ 2-3.

III. ISSUES PRESENTED

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Double Down and IGT request that the Court certify the following issues to the Washington Supreme Court:

(1) Whether the sale of virtual items for use solely within video games that do not award or allow any real money or prize constitutes unlawful gambling under Washington law?

(2) Whether the sale of a virtual item for use solely within video games that do not award or allow any real money or prize constitutes unlawful gambling under Washington law, where the user did not run so low on virtual items that he or she could not have continued to play?

(3) Whether the in-app purchase of virtual chips on such websites is a "bona fide business transaction," and therefore excepted from Washington's definition of gambling?

(4) Whether offering a casino-themed video game is the type of "illegal" activity RCW 4.24.070 prohibits, when the game offers no real money cash prize?

(5) Whether a person who purchases virtual chips on such websites can bring a civil claim to recover amounts spent under the RMLG or CPA?

(6) Whether, when the Commission has advised that such websites do not engage in gambling and the Commission has taken no criminal or civil action to enforce the gambling statutes against such websites, civil actions by plaintiffs to recover under the RMLG and the CPA are precluded by the rule of lenity?

IV. LEGAL STANDARD

Washington law allows a federal court to certify to the state supreme court a question of law that has not been "clearly determined." *See* RCW 2.60.020-.030; *accord* RAP 16.16(a) & (d). The Washington Supreme Court will answer certified questions of state law that have not been answered by the Washington Supreme Court. *Hoffman v. Regence Blue Shield*, 140 Wn.2d 121, 123-24 (2000), *overruled on other grounds*, *Wash. Ind. Tel. Ass'n v. Wash. Util. & Transp. Comm'n*, 148 Wn.2d 887 (2003); *Broad v. Mannesmann Anlagenbau*, 196 F.3d 1075, 1076 (9th Cir. 1999) (certifying question of Washington law having no controlling Washington Supreme Court precedent). To certify these questions, the Court need only find novel, unsettled

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questions of state law, not unique circumstances. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 46 (1997). The Washington Supreme Court can also reformulate them. *Affiliated FM Ins. Co. v. LTK Consulting Serv., Inc.*, 556 F.3d 920, 922 (9th Cir. 2009) (certifying questions).

V. ARGUMENT

A. The Court Should Certify These Questions Under Ninth Circuit Precedent.

Certification to the Washington Supreme Court is most appropriate where, as here, important questions of Washington law are not settled and involve matters of policy best left to resolution by the state's highest court. *Adamson v. Port of Bellingham*, 899 F.3d 1047, 1051-52 (9th Cir. 2018). "Indeed, even when we find the plain language of state law dispositive . . . we have an obligation to consider whether novel state-law questions should be certified — and we have been admonished in the past for failing to do so." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 294 F.3d 1085, 1086 (9th Cir. 2002) (citing *Arizonans for Official English*, 520 U.S. at 62, 76-79).

The Ninth Circuit and the Washington Supreme Court have consistently endorsed this procedure to ensure proper construction of state law and respect for federalism. *See, e.g.*, *T-Mobile USA Inc. v. Selective Ins. Co. of Am.*, 908 F.3d 581, 587-88 (9th Cir. 2018) (certifying question as to effect of agent's representations even though Washington Supreme Court precedent unequivocally stated that document could not amend insurance coverage); *Hill v. Xerox Bus. Servs., LLC*, 868 F.3d 758, 762-63 (9th Cir. 2017) (certifying question in class action asserting civil law claims that depended on allegations that compensation practice was unlawful); *McKown v. Simon Prop. Grp. Inc.*, 689 F.3d 1086, 1094 (9th Cir. 2012) (certifying questions where Washington Supreme Court precedent was unclear); *Broad*, 196 F.3d at 1076 (certifying questions "saves time, energy, and resources and helps build a cooperative judicial federalism"); *State v. Reader's Digest Ass'n, Inc.*, 81 Wn.2d 259, 275 (1972) (questions under Washington Consumer Protection Act, such as what constitutes an "unfair . . . deceptive act[] or practice[]," are for the Washington Supreme Court to decide).

Under Ninth Circuit precedent, the Court should certify a question of law that "may

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determine the cause" and "as to which there is no controlling precedent in the decisions of the Washington Supreme Court." *Broad*, 196 F.3d at 1076. The Court should consider: "(1) whether the question presents important public policy ramifications yet unresolved by the state court; (2) whether the issue is new, substantial, and of broad application; (3) the state court's caseload; and (4) the spirit of comity and federalism." *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070, 1072 (9th Cir. 2019) (en banc) (citation & internal quotation marks omitted). Certification is warranted for all four reasons.

1. The interpretation and application of Washington law to free-to-play video games present important and unresolved public policy issues.

The unsettled questions here raise important public policy issues because they have implications far beyond casino-themed video games. *Kater*'s finding being used to support civil liability amounting to a full refund of customer purchases and potential criminal penalties could substantially disrupt and dismantle the video game producing industry in Washington and impact thousands of Washingtonians' jobs. This is especially true where the laws of other states do not regard the same games to be gambling. *See Mason v. Mach. Zone, Inc*., 140 F. Supp. 3d 457 (D. Md. 2015) (rejecting claims that free-to-play games constitute gambling), *aff'd*, 851 F.3d 315 (4th Cir. 2017); *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill. 2016) (same); *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871 (N.D. Ill. 2016) (same). The development and sale of video games generate billions of dollars in revenue annually in Washington State. *See* Sigrist Decl. ¶¶ 4-9. This cohort includes start-up companies, mid-size businesses, and members of the Fortune 100. *Id.* There is no meaningful way to distinguish free-to-play casino-themed video games offering micro transactions from other free-to-play video games offering micro transactions. Nor are the targets supported by the rationale of *Kater* limited to casino-style games. A "contest of chance" for purposes of the Washington gambling code (RCW 9.46.0237) is further defined broadly under RCW 9.46.0225 to include any game where "outcome depends in a material degree upon an ***element of chance***, notwithstanding that ***skill of the contestants may also be a factor***." *Id*. (emphasis added). If a Washington statute

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enacted in 1879 is now going to be construed to make Washington the ***first state*** to effectively ban the sale of virtual items purchased in all such video games whose outcome depends in a material degree upon an ***element of chance***, even though many Washington State companies employ thousands of people in Washington, that multi-billion-dollar decision should be left to the state's highest court and not a federal court seeking to apply state law in a ruling on a motion to dismiss.

These questions are particularly critical given that the holding in *Kater* conflicts with the view of the Commission—the state entity and law enforcement agency charged by statute to regulate gambling and enforce the gambling laws of Washington. While the *Kater* court noted that the Commission had not issued a ***formal rule*** on social gaming, its ruling nevertheless conflicts with the Commission's consumer guidance, the ***only*** guidance from the state:

> **Legal Social Gaming websites will not let players cash in the virtual winnings or points for 'real' money or prizes. Because there is no prize, these games are *not* gambling.**

Kater v. Churchill Downs, No. 16-35010, Mot. to Take Judicial Notice (Dkt. 29, Ex.3) at 3 (9th Cir. July 29, 2016) (bolded emphasis added) (Allen Decl. Ex. 1). The conflict between the Commission's public permission and *Kater*'s holding should be definitively resolved by the Washington Supreme Court.

2. The questions present substantial new issues of Washington law having broad application.

Certification would answer important questions of Washington law that may be dispositive of this case and have never been considered by a Washington court. Both here and in the other cases, Plaintiffs seek relief under the RMLG. In addressing the first issue for which Double Down seeks certification, the *Kater* court relied on *Bullseye*. *See Kater*, 886 F.3d at 787. But in *Bullseye*, unlike here, the gameplay credit could be exchanged for money. *See Bullseye*, 127 Wn. App. at 241-42. That 2005 decision, of a lower appellate court, was the result of a party's attempt to ascertain the legality of a product promotion *offering a cash prize* through a game of chance declared legal by the Commission. It did not involve any claims for

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damages or the RMLG and did not in any way address or answer whether a modern-era, ubiquitous form of digital entertainment with no cash or merchandise prize violated the RMLG. *Bullseye* expressly based its decision on the finding that players received play credits for consideration paid into the machine and could then attempt to increase prize points by risking the credits in order to redeem the points for cash or merchandise prizes. *Id*. The *dicta* of *Bullseye* that followed about a potential lack of "pecuniary value" of play points "on their own," *id.*, does not reveal how the Washington Supreme Court will interpret Washington law, fifteen years later, regarding video games played by Plaintiffs that offer no cash or merchandise prize. The situations are not analogous and create a viable question for certification. No court, state or federal, has addressed the other five questions for certification.

3. The Washington Supreme Court's caseload would accommodate a timely decision.

The Washington Supreme Court's most recent annual report indicates that filings are down overall and that federal courts had certified only five cases. *See* Caseloads of the Courts of Washington, Supreme Court – Court Activity by Source of Review—2019 Annual Report, https://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=a&freq=a&tab=&fileID=tt1_actspr (last visited June 11, 2020) (Allen Decl. Ex. 2). The Ninth Circuit has certified questions even when the state's high court caseload was "substantial." *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 939 F.3d 1045, 1046 (9th Cir. 2019).

4. Certification would respect and advance comity and federalism.

Principles of comity and federalism strongly favor certification where there are neither federal questions nor federal policies at issue. "Federal courts should . . . abstain when there are difficult questions of state law involving policy considerations that transcend the result in the case at the bar." *Am. Int'l Underwriters (Philippines), Inc. v. Cont'l Ins. Co*., 843 F.2d 1253, 1257 (9th Cir. 1988) (citing *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959)). Federal courts should "respect[] the rightful independence of the state governments," to "avoid needless friction with state policies," and to "promote[] harmonious relations between

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state and federal authority.'" *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2188 (2019) (Thomas, J., concurring) (citation & internal quotations marks omitted). Congress mandates "the States," and *not* the federal government (including its judicial branch), "should have the primary responsibility for determining what forms of gambling may legally take place within their borders." 15 U.S.C. 3001(a)(1). Washington has a complete, careful, and complex statutory and regulatory scheme, with a rulemaking body (the Commission) that has the authority and the duty to interpret, enforce, and adjudicate the state's gambling laws. *See, e.g.*, RCW 9.46.070, .140. The Commission is charged exclusively with oversight of gambling in Washington. Allowing *Kater* to supply a federally issued definition of gambling subjects Double Down not only to parallel oversight but to contradictory oversight. *See Johnson v. Collins Entm't Co.*, 199 F.3d 710, 719-20 (4th Cir. 1999) (federal district court's attempt to interpret certain portions of state statute prohibiting certain forms of gambling "supplanted the legislative, administrative, and judicial processes of South Carolina and sought to arbitrate matters of state law and regulatory policy that are best left to resolution by state bodies."); *see also Metro Riverboat Assocs., Inc. v. Bally's La., Inc.*, 142 F. Supp. 2d 765, 775-76 (E.D. La. 2001) (abstaining from deciding RICO claim because it implicated important issues of Louisiana's gaming regulatory scheme).

The need for Washington's determination is heightened here, where the *only* state guidance, from the Commission, is that Double Down's games are permissible. Certification would allow the Washington Supreme Court to resolve the conflict between the Commission and *Kater*, further the interest of comity by leaving this state law decision over what constitutes gambling under state law to state courts, and avoid the inefficiencies of requiring plaintiffs to file new, state-court suits.

B. Double Down and IGT Have Not Made a Motion on the Merits, Nor Has the Court Issued a Decision on the Merits in This Case.

No presumption against certification applies in this case. Double Down and IGT have not moved to dismiss, nor made any motion on the merits, and the Court has not made a

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decision on the merits in this case. *See Wilson v. PTT, LLC*, 2020 WL 1674151, at *1-2 (W.D. Wash. Apr. 6, 2020) (applying a presumption against certification because High 5 had moved to dismiss). This case returned to the Court's jurisdiction mere months ago, after Double Down moved to compel arbitration. A motion to compel arbitration does not amount to a motion on the merits. *See Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1410 (9th Cir. 1990) (distinguishing a motion to compel arbitration from a decision and judgment on the merits); *Airbus S.A.S. v. Aviation Partners, Inc.*, 2012 WL 5295145, at *3 (W.D. Wash. Oct. 25, 2012) (same). The Court has not entered a case schedule, and the parties have not exchanged discovery responses. Double Down and IGT are not seeking a "second chance at victory" because they have never taken a first chance. *PTT*, 2020 WL 1674151, at *1. This stands in contrast with High 5, which sought certification of the "exact same issues it raised in its motion to dismiss in 2018," *id.* at *2, and with Playtika, which filed a motion to dismiss that "raised nearly these exact same issues," *Wilson v. Playtika Ltd.*, 2020 WL 2512905, at *2 (W.D. Wash. May 15, 2020). No presumption against certifying these state-law merits questions exists.

C. The Court Should Certify These Questions of Washington Law.

1. The questions presented are novel.

The six questions presented are novel under Washington law. This is so regardless of the Ninth Circuit purporting to answer the ***first*** question in *Kater*, because it was decided under different facts and while assuming that the plaintiff's allegations of how a (different) game operated were true because it was decided on a motion to dismiss. *See Kater*, 886 F.3d at 787 (*assuming* casino-themed game was *not* free to play because complaint alleged that if user ran out of initial allotment of chips, more chips had to be purchased to continue playing — a fact demonstrably untrue for Plaintiff's putative class in this case). Generally, Washington courts are not bound by the Ninth Circuit. *In re Elliott*, 74 Wn.2d 600, 602 (1968). And in *Kater*, the Ninth Circuit did not consider the breadth of the first question or the circumstances relevant to Double Down's games, and did not even reach the remaining questions presented here. No Washington court has spoken on these legal questions. *See* Section V.A.2, *supra* (discussing

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Bullseye). Accordingly, the certification is appropriate.

2. *Kater* failed to interpret Washington law according to Washington principles of statutory interpretation.

The Ninth Circuit did not interpret Washington law correctly in *Kater*. The Washington Supreme Court is best situated to apply Washington principles of statutory construction to interpret Washington law, especially since these questions involve a complex, state-enacted, statutory framework, in an area of law—gambling—traditionally regulated by the ***state***. The meaning and application of a Washington statute is a question of law determined *de novo* from the statute's language. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9 (2002) (adopting the "context" rule for statutory interpretation). "The court's fundamental objective is to ascertain and carry out the [State] Legislature's intent . . . ." *Id.*

Ascertaining legislative intent includes consideration of "all that the Legislature has said in a statute and related statutes which disclose legislative intent about the provision in question [and] an enacted statement of legislative purpose is included in a plain reading of a statute." *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 309-10 (2010) (citation & internal quotation marks omitted). The *Kater* court failed to consider the legislature's intent in creating the RMLG and related provisions to regulate gambling. The purpose can be found in RCW 9.46.010, which states that the purpose of Washington's gambling law is to "keep the ***criminal element*** out of gambling," recognizing the "close relationship between professional gambling and ***organized crime***," while ***not restricting "social pastimes,"*** which are "***more for amusement rather than for profit****."* RCW 9.46.010 (emphasis added). The Plaintiffs in this case bought virtual chips without any expectation of "profit." Paying to play video games, where no cash or merchandize prize can be won, are current-day social pastimes engaged in for amusement and entertainment and are outside the ambit of the legislature's intent behind the gambling code.

To effectuate its intent, the legislature created the Commission. RCW 9.46.040. The Commission has wide powers, including the right "[t]o regulate and establish the type and

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scope of and manner of conducting the gambling activities authorized by this chapter," RCW 9.46.070(11), as well as "[t]o perform all other matters" to enforce the state's gambling laws, RCW 9.46.070(22). Those powers include the power to both prosecute criminal violations and pursue other, non-criminal remedies. *See, e.g.*, RCW 9.46.210(3) (power to enforce penal gambling laws); RCW 9.46.075 (power to deny or suspend licenses).

And yet *Kater* disregarded the structure and enforcement mechanisms the Washington legislature created, and substituted a new and conflicting, federal-court view of Washington law. If the Commission had agreed with the holding in *Kater*, it could and would have been prosecuting the defendants in that case, and Double Down, and other social gaming companies, for years. The Commission's advice that these games were lawful, followed by years without any enforcement actions, speaks volumes. The Washington Supreme Court—the final arbiter of Washington law—should be permitted to conduct a complete analysis of what the Washington legislature intended in adopting RCW 4.24.070.

Compounding its error, the Ninth Circuit failed to apply the rule of lenity that Washington applies to penal statutes. Plaintiffs' civil case hinges upon the interpretation of statutes with criminal consequences. A statute with criminal and noncriminal applications must be interpreted consistently, such that the rule of lenity applies in both the criminal ***and civil*** context. *Internet Cmty. & Entm't Corp. v. Wash. State Gambling Comm'n*, 148 Wn. App. 795, 808 (2009) (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004)), *rev'd on other grounds*, 169 Wn.2d 687 (2010). The undisputed evidence of positive affirmation by the Commission, ambiguities in the gambling code, and undisputed evidence of lack of criminal or civil enforcement all require application of the rule of lenity. See Exhibits 1-4, attached to Defendants' Motion for Judicial Notice, filed contemporaneously. Neither *Kater* nor *Bullseye* considered whether the RMLG or the CPA should result in civil liability based on an alleged violation of gambling law where that alleged violation is not treated as such by law enforcement.

The Court should certify the questions presented to the Washington Supreme Court.

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DATED this 17th day of June, 2020.

Respectfully submitted,

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Exhibit 10

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ADRIENNE BENSON and MARY SIMONSON, individually and on behalf of all others similarly situated,

Plaintiff,

v.

DOUBLE DOWN INTERACTIVE, LLC, et al.,

Defendant.

CASE NO. 2:18-cv-00525-RBL

ORDER ON DENFENDANT'S MOTION TO CERTIFY QUESTIONS TO WASHINGTON SUPREME COURT

THIS MATTER is before the Court on Defendant Double Down Interactive, LLC's Motion to Certify Questions to the Washington Supreme Court. Dkt. # 103. This is the third such motion that has been filed by a defendant in the many cases before this Court challenging casino-gaming apps; the wild card this time is the fact that Double Down, unlike those other defendants, never filed a motion to dismiss Plaintiffs' claims on the merits. Consequently, the "presumption against certifying a question to a state supreme court after the federal district court has issued a decision" does not apply here. *Thompson v. Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008). Double Down therefore asks that this Court let the Washington Supreme Court decide whether casino-gaming apps are gambling despite the impossibility of cash prizes.

Although federal courts may decide state law issues of first impression, they also have discretion to certify such issues to the state's highest court. *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070, 1071 (9th Cir. 2019). Washington law allows certification of question to the Washington Supreme Court when "the local law has not been clearly determined." RCW § 2.60.020; *accord*, RAP 16.16(a). But the Ninth Circuit has made clear that the certification process is not to be "lightly" invoked. *Murray*, 924 F.3d at 1072 (quoting *Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003)). It requires "careful consideration" of the following factors: "(1) whether the question presents 'important public policy ramifications' yet unresolved by the state court; (2) whether the issue is new, substantial, and of broad application; (3) the state court's caseload; and (4) 'the spirit of comity and federalism.'" *Id.* at 1072 (quoting *Kremen*, 325 F.3d at 1037-38).

Here, Double Down wishes to certify the following questions to the Washington Supreme Court: "(1) Whether the sale of virtual items for use solely within video games that do not award or allow any real money or prize constitutes unlawful gambling under Washington law? (2) Whether the sale of a virtual item for use solely within video games that do not award or allow any real money or prize constitutes unlawful gambling under Washington law, where the user did not run so low on virtual items that he or she could not have continued to play? (3) Whether the in-app purchase of virtual chips on such websites is a 'bona fide business transaction,' and therefore excepted from Washington's definition of gambling? (4) Whether offering a casino-themed video game is the type of 'illegal' activity RCW 4.24.070 prohibits, when the game offers no real money prize? (5) Whether a person who purchases virtual chips on such websites can bring a civil claim to recover amounts spent under the [RCW 4.24.070] or CPA? (6) Whether, when the Commission has advised that such websites do not engage in

gambling and the Commission has taken no criminal or civil action to enforce the gambling statutes against such websites, civil actions by plaintiffs to recover under [RCW 4.24.070] and the CPA are precluded by the rule of lenity?" Motion, Dkt. # 103, at 4.

Although the presumption against certification does not apply in this case, the Court still declines to certify these questions to the Washington Supreme Court. Double Down has doubled-up on the number of questions it wants to certify, but the core issue is straightforward: whether a casino-gaming app that does not award money prizes constitutes illegal gambling under Washington law. The Ninth Circuit answered that question in *Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018). The court reasoned that virtual chips that extend gameplay are a "thing of value" under RCW 9.46.0285, making Big Fish Casino "gambling" under RCW 9.46.0237 and allowing the plaintiff to recover money lost purchasing chips under RCW 4.24.070. *Id*. at 787-89.

While no court applying Washington law had addressed casino-gaming apps before *Kater*, Double Down has not shown that these facts present significantly "new" or "substantial" questions of statutory interpretation. The Ninth Circuit's decision was a straightforward application of RCW 9.46.0285's language, which defines a "thing of value" as a "form of credit . . . involving extension of . . . entertainment or a privilege of playing at a game or scheme without charge." *Id*. at 787. To extend "the privilege of playing," a user must either win more virtual chips or purchase them, making the chips a "thing of value." *Id*. The Ninth Circuit apparently did not see this issue as "substantial" enough to certify to the Washington Supreme Court and Double Down does not suggest a persuasive alternative reading of the statute. *See Murray*, 924 F.3d at 1074 (certifying question *sua sponte*); *J&J Celcom v. AT&T Wireless Servs., Inc.*, 481 F.3d 1138, 1141 n.2 (9th Cir. 2007) (same).

Nor was the Ninth Circuit's interpretation of RCW 9.46.0285 truly "new." The Washington Court of Appeals applied the same reading in *Bullseye Distrib. LLC v. State Gambling Comm'n*, 127 Wash. App. 231, 241 (2005), which addressed whether a simulated slot machine constituted a "gambling device" under RCW 9.46.0241. *Id*. at 240. Inserting a dollar or presenting a promotional voucher would provide a player with a baseball card and an allotment of "play points," which could be used to spin the slot machine and, potentially, win cash if the player hit the "prize target" number of points. *Id*. at 235-36. The court concluded that the play points were a "thing of value," not because they might be redeemed for a prize, but because they "extend the privilege of playing the game without charge." *Id*. at 242. Far from being dicta, this insight was key to *Bullseye*'s holding because the play points had no other value unless a player happened to hit the prize target. Consequently, as the Ninth Circuit observed, *Bullseye* squarely held that a "thing of value" need not be redeemable for money or merchandise. *See Kater*, 886 F.3d at 787.

The Court is also unpersuaded by Double Down's familiar arguments that the Ninth Circuit ignored legislative purpose. Double Down points out that Washington courts interpret individual provisions in light of "all that the Legislature has said in the statute and related statutes." *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash. 2d 1, 11 (2002). But the legislative purpose in RCW 9.46.010—"to keep the criminal element out of gambling and to promote the social welfare of the people by limiting the nature and scope of gambling activities"—is not at odds with the holding in *Kater*. And while the legislature sought to preserve "social pastimes," this only applies when they are "more for amusement rather than for profit, do not maliciously affect the public, and do not breach the peace." RCW 9.46.010. Double Down

certainly profits off its apps, which Plaintiffs convincingly argue are malicious to the public. In short, nothing in RCW 9.46.010's statement of purpose throws *Kater*'s reasoning into doubt.

Double Down's arguments about conflicts with the Gambling Commission are even less compelling. It is well established at this point that the pamphlet and other Commission materials Double Down relies on have no legal effect. *See Kater*, 886 F.3d at 788; Gantz Dec., Dkt. # 107, Exs. 1-3. But even if they did, "courts have the ultimate authority to interpret statutes and will not defer to an agency's interpretation that conflicts with the statute." *Bullseye*, 127 Wash. App. at 237 (quoting *Waste Mgmt. v. Wash. Util. & Transp.*, 123 Wash.2d 621, 627-28 (1994)). Since *Kater* was decided, the Commission took down its guidance approving of casino-gaming apps and has declined to take a position on the Ninth Circuit's ruling. Gantz Dec., Dkt. # 107, at 1; *Id*. at Ex. 4. The mere fact that the Commission has not prosecuted companies like Double Down does not factor into the judicial task of statutory interpretation.

Double Down's arguments about the public policy impacts at stake are more compelling but ultimately unconvincing. While these issues have significant ramifications for companies that produce casino-gaming apps, it is far less clear that other video gaming companies could be affected. Washington's definition of "gambling" is limited to "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. "Contest of chance" is further defined as "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 9.46.0225.

There is a stark and obvious difference between Double Down's games, which are 100% based on chance, and other app-based games that involve "micro-transactions" to continue play. No Washington court has interpreted the term "contest of chance" to encompass non-traditional gambling games without some form of betting. *See Rousso v. State*, 149 Wash. App. 344, 360 (2009) (holding that poker qualifies as a "contest of chance"). Of course, it is possible that future lawsuits will allege that more skill-oriented games also qualify as illegal gambling under Washington law. However, those cases would turn on a novel interpretation of RCW 9.46.0225, not RCW 9.46.0285's definition of a "thing of value."

Finally, Double Down's alternate issues Double Down seeks to certify are no more compelling. Double Down's hypothetical about a player who never depleted their chips before buying more may never become relevant in this case and therefore does not warrant certification. The "bona fide business transaction" exception also does not pose a substantial or complex legal issue requiring input from the Supreme Court. *See Wilson v. PTT, LLC*, 351 F. Supp. 3d 1325, 1339 (W.D. Wash. 2018). And while it is true that the Ninth Circuit did not apply the rule of lenity in *Kater*, Double Down does not convincingly show that RCW 9.46.0285's definition of a "thing of value" is open to multiple reasonable interpretations. Finally, Double Down does not explain how or why gambling activities would cease to be "illegal" under RCW 4.24.070 simply because no money prizes are awarded and the Gambling Commission has not prosecuted violators. To be "illegal," an activity merely needs to violate the provisions of 9.46 *et. seq. See* RCW 9.46.210 (stating that "all violations of this chapter" should be investigated and prosecuted).

For these reasons, the Court **DENIES** Double Down's Motion to Certify Questions to the Washington Supreme Court.

IT IS SO ORDERED.

Dated this 11th day of August, 2020.

Ronald B. Leighton
United States District Judge

Exhibit 11

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ADRIENNE BENSON AND MARY SIMONSON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DOUBLE DOWN INTERACTIVE, LLC, et al.,

Defendants.

No. 2:18-cv-00525-RBL

DOUBLE DOWN INTERACTIVE, LLC AND INTERNATIONAL GAME TECHNOLOGY'S MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO CERTIFY QUESTIONS TO THE WASHINGTON SUPREME COURT

NOTE ON MOTION CALENDAR: AUGUST 25, 2020

ORAL ARGUMENT REQUESTED

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Double Down Interactive, LLC ("Double Down") and International Game Technology ("IGT") move, pursuant to Local Civil Rule 7(h), for reconsideration of the Court's Order denying Defendants' motion to certify questions to the Washington Supreme Court.

Defendants respectfully submit that this is the unusual instance where reconsideration must be granted because the Court's Order "overlooked or misapprehended" a critical fact supported by two declarations filed with the original motion: that "[t]he vast majority of Double Down's users buy virtual chips before they run out of chips to play." Dkt. 117 ¶ 2. And, in fact, "[v]irtually no players of Double Down's games purchase chips in order to continue playing." Dkt. 104 ¶ 2. The Court mistakenly deemed this fact a "hypothetical" and dismissed it as irrelevant. Dkt. 127 at 6. But this fact was neither presented to nor considered by the Ninth Circuit in *Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018), and it materially impacts (i) whether this Court can certify a class consisting of *all* players of DoubleDown Casino and (ii) whether DoubleDown Casino's virtual chips meet Washington's definition of a "thing of value" pursuant to RCW 9.46.0285. Also, material new facts filed with the settlements in the Big Fish and Playtika cases regarding the meaning of "thing of value" first became available after the briefing here closed.

Additionally, the Court also misapprehended that the rule of lenity could not apply because "thing of value" is not open to multiple reasonable interpretations, Dkt. 127 at 6, when *Kater* and the Big Fish/Playtika Settlements make clear there are different literal and situational readings.

Without reconsideration, these "manifest errors" will result in an injustice if questions two and six are not certified to the Washington Supreme Court.[1]

I. ARGUMENT

Washington law allows certification of a question to the Washington Supreme Court

[1] (2) "*Whether the sale of a virtual item for use solely within video games that do not award or allow any real money or prize constitutes unlawful gambling under Washington law, where the user did not run so low on virtual items that he or she could not have continued to play?*" and
(6) "*Whether, when the Commission has advised that such websites do not engage in gambling and the Commission has taken no criminal or civil action to enforce the gambling statutes against such websites, civil actions by plaintiffs to recover under the RMLG and the CPA are precluded by the rule of lenity?*" Dkt. 103 at 4.

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when "the local law has not been clearly determined." RCW 2.60.020; RAP 16.16(a). In considering whether to certify state law questions, the Court should consider the four factors set forth at Dkt. 127 at 2 (quoting *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070, 1072 (9th Cir. 2019)).

A. The Questions Presented Are New, Substantial, and of Broad Application.

No court has decided whether a video game involving players *who do not buy chips to continue to play* constitutes an illegal gambling game under Washington law. The Washington Supreme Court should decide this new and substantial question of state law that broadly applies to this case and to similar video games.

The Ninth Circuit in *Kater* decided and applied the meaning of a "thing of value" under Washington law to allegations about a different game: Big Fish Casino, and only on its pleading. It did not consider any facts, let alone the specific facts relevant here. It held that:

> 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**.

Kater, 886 F.3d at 787 (emphases added). The Ninth Circuit explained that virtual chips in Big Fish Casino are a "thing of value" because Big Fish Casino chips permitted players to continue to play Big Fish Casino:

> 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."** 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.

Id. (emphases added) (citation omitted).

This case does not concern allegations about Big Fish Casino and is not at the pleadings

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stage; the parties have advanced into discovery and are preparing for potential future briefing on the merits concerning DoubleDown Casino where this Court will confront key questions not answered in *Kater*: What is the result under Washington law where the vast majority of players who buy virtual chips do not do so in order to continue to play the game? What is the result for players who bought chips when they could continue playing without buying chips? For those players, are DoubleDown Casino chips a "thing of value" under Washington law, such that DoubleDown should be held liable under gambling law? This is an actual and imminent issue that will substantially impact whether a class can be certified and the amount of liability at stake, which must be answered in the negative because the virtual chips in DoubleDown Casino are not things of value. Nearly all paying players of DoubleDown Casino buy chips when they already have enough chips to continue to play. Dkt. 104; Dkt. 117. They are not purchasing chips in order to have "the privilege of playing the game" under *Kater*, 886 F.3d at 787. Therefore, as actually purchased and used by players, virtual chips in DoubleDown Casino do not meet the statutory definition of a thing of value. RCW 9.46.0285 even under *Kater*.

This question also has broad application elsewhere. The free-to-play business model involving micro transactions predominates in the video game industry today and impacts those games operations. Dkt. 104 ¶ 6.

The Court has misapprehended or ignored the significance of the unopposed declarations submitted by Defendants proving that purchases by the vast majority of users are made not to continue but rather to enhance gameplay. As a result, the Court's conclusion that "Double Down's hypothetical about a player who never depleted their chips before buying more may never become relevant in this case and therefore does not warrant certification," Dkt. 127 at 6, is manifest error.

And, material new facts have emerged since briefing on the motion to certify closed. In the *Kater* and *Playtika* settlements, Plaintiffs' counsel has conceded that illegal gambling does not occur if a user need not purchase virtual chips or coins to extend gameplay, with the explanation that freely-obtained virtual chips or coins are not "things of value" under Washington

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gambling law. *See* Class Action Settlement Agreement, *Kater v. Churchill Downs Inc.*, No. 2:15-cv-00612-RBL (W.D. Wash. July 24, 2020), Dkt. 218-1 § 3.4 ("Big Fish Settlement Agreement"); Class Action Settlement Agreement, *Wilson v. Playtika Ltd.*, No. 3:18-cv-05277-RBL (W.D. Wash. Aug. 6, 2020), Dkt. 121-1 § 3.4 ("Playtika Settlement Agreement"). In support of both settlements, the parties agreed that players who run out of sufficient virtual currency will be able to continue playing without needing to purchase additional chips and that the virtual coins in the Applications are "gameplay enhancements, not 'things of value' as defined by RCW 9.46.0285." Big Fish Settlement Agreement §§ 2.2(c), 3.4; Playtika Settlement Agreement §§ 2.2(c), 3.4. Similarly, most of Double Down's players purchase virtual chips *before* they "run out of sufficient virtual chips to continue to play the game they are playing." Dkt. 117 ¶ 2; Dkt. 104 ¶ 2. Moreover, the factual premises stated in the Big Fish and Playtika settlements present novel conditions nowhere considered or addressed by the Ninth Circuit in *Kater*, notably, that *Kater* alleged that virtual chips are "'things of value' under Washington's gambling laws" specifically because "users are otherwise 'prevent[ed]' from uninterrupted gameplay." Pls.' Mot. for Prelim. Approval of Class Action Settlement, *Kater v. Churchill Downs Inc.*, No. 2:15-cv-00612-RBL (W.D. Wash. July 24, 2020), Dkt. 217 at 2 (alteration in original).

It is not "hypothetical," Dkt. 127 at 6, that "[t]he vast majority of Double Down's users buy virtual chips before they run out of chips to play," Dkt. 117 ¶ 2, and that "[v]irtually no players of Double Down's games purchase chips in order to continue playing," Dkt. 104 ¶ 2." Rather, those are facts both in already-submitted Sigrist declarations and in the proposed Big Fish and Playtika settlements. Most DoubleDown Casino players who purchase chips do so before they run out. Dkt. 117 ¶ 2; Dkt. 104 ¶ 2. This "uninterrupted gameplay" fact that applies to the majority of players, and the fact that Double Down games never award cash, mean that the virtual chips sold are not "things of value." *Kater* never considered such facts.

That RCW 9.46.0285's definition of "thing of value" is subject to multiple interpretations beyond the one considered in *Kater* is further demonstrated by the Big Fish and Playtika Settlement Agreements. How and whether RCW 9.46.0285 should be interpreted on the novel

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facts presented by this case, and in light of the Big Fish and Playtika settlements, is unmistakably the province of the State of Washington.

The Court also misapprehended Defendants' arguments concerning the rule of lenity based on the conclusion that the definition of a "thing of value" is not open to multiple reasonable interpretations. Dkt. 127 at 6. The "extension of a . . . privilege of playing . . . at a game," RCW 9.46.0285, may be interpreted variously, as demonstrated by differing literal readings, but also by the interpretation urged as the basis for the Big Fish and Playtika Settlement Agreements. Nor does the Court cite any authority that an alleged lack of multiple reasonable interpretations of a criminal statute precludes applying the rule of lenity. Defendants' argument is that a statute with criminal and noncriminal applications must be interpreted consistently, such that the rule of lenity applies in both the criminal ***and civil*** context. *Internet Cmty. & Entm't Corp. v. Wash. State Gambling Comm'n*, 148 Wn. App. 795, 808 (2009) (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004)), *rev'd on other grounds*, 169 Wn.2d 687 (2010). The Court misapprehended this argument by dismissing the publications of the Gambling Commission as having "no legal effect." Dkt. 127 at 5. Regardless, the impact of the Commission's statements and the absence of any enforcement action by it are directly tied to the state's policymaking and regulation, which should be considered and weighed by the Washington Supreme Court.

B. The Washington Supreme Court Should Decide These Issues Because of the Substantial Ramifications for the Washington Video Game Industry.

These questions concerning the legality of chance-based video games that sell virtual items, where players can continue to play without purchasing the virtual items and the majority of the time do not purchase to extend play, have enormous public policy ramifications for Washington State. The Order acknowledged that these ramifications are "more compelling." Dkt. 127 at 5. They are even more compelling considering the Sigrist declarations identifying that players usually do not purchase chips to continue play. A multi-billion-dollar video game industry based in part in Washington relies on that business model.

The original motion highlighted the importance of the video game industry to Washington State in its factual background and policy sections, Dkt. 103 at 3, 6 (factual background and

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policy); Dkt. 104 (detail about industry); *Id.* ¶ 4-7 (impacts on gaming in Washington). The Court's downgraded these policy concerns because the game at issue here simulates a casino-style slots game that "100%" relies on chance and "some form of betting," which not all video games do. Dkt. 127 at 6. But the Court recognized that future cases could hold that "more skill-oriented games" could also qualify as illegal betting. *Id.* Defendants respectfully submit that the Court, through no fault of its own, is not familiar with the plethora of modern video games that involve little to no skill and contain activities or features that could be regarded as "some form of betting." But, given the large number of video games with similar chance-based or betting-like features and the importance of the industry in Washington, the Washington Supreme Court should decide the critical issues Defendants seek to certify.

C. The Third Factor, State Court Case Load, and Fourth Factor, Spirit of Comity and Federalism, Are Easily Met.

The Order manifestly erred by failing to weigh the state court's caseload and the spirit of comity and federalism as required under Ninth Circuit precedent. These factors overwhelmingly support certifying the second and sixth questions to the state's highest court. Congress mandates "the States," *not* the federal government, "should have the primary responsibility for determining what forms of gambling may legally take place within their borders." 15 U.S.C. 3001(a)(1). These binding federal authorities reserve gambling regulations *for the states* to enact and interpret. This Court has, respectfully, abused its discretion by ignoring comity and federalism. The Court should reconsider its Order and permit certification in light of these immovable federalist principles. Finally, there is no dispute that the Washington Supreme Court has room on its docket to handle this important case. Dkt. 105, Ex. 2.

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DATED this 25th day of August, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED this August 25, 2020.

s/ Jaime Drozd Allen
Jaime Drozd Allen, WSBA #35742

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Exhibit 12

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ADRIENNE BENSON, *et al.*,

Plaintiffs,

v.

DOUBLE DOWN INTERACTIVE, LLC, *et al.*,

Defendants.

NO. C18-0525RSL

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION

This matter comes before the Court on defendants' "Motion for Reconsideration of Order Denying Motion to Certify Questions to the Washington Supreme Court." Dkt. # 133.

Motions for reconsideration are disfavored in this district and will be granted only upon a "showing of manifest error in the prior ruling" or "new facts or legal authority which could not have been brought to [the Court's] attention earlier with reasonable diligence." LCR 7(h)(1). Defendants have not met their burden. Defendants largely reiterate arguments raised in the underlying motion to certify[1] and rely on "new" evidence that is not material to the statutory

[1] Defendants contend, without support, that Judge Leighton overlooked evidence in the record that arguably distinguishes its games from the games that were found to be "gambling" in *Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018). The facts of this case have not yet been determined, however, and defendants' reliance on its own version of events was - not incorrectly - deemed a hypothetical. Dkt. # 127 at 6. If and when the facts of this case prove to be materially different than those

interpretation task at issue. Manifest error has not been shown, nor have new law or facts been presented.

For all of the foregoing reasons, defendants' motion for reconsideration is DENIED.

Dated this 15th day of January, 2021.

Robert S. Lasnik
United States District Judge

considered in *Kater* and if the novelty is such that this Court cannot reliably interpret and apply the relevant Washington statutes, it has the power to unilaterally certify questions that will, at that point, be based on the actual facts as determined in this litigation.

Exhibit 13

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ADRIENNE BENSON AND MARY SIMONSON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DOUBLE DOWN INTERACTIVE, LLC, et al.,

Defendants.

No. 2:18-cv-00525-RBL

DEFENDANTS' MOTION TO STRIKE NATIONWIDE CLASS ALLEGATIONS

NOTE ON MOTION CALENDAR: SEPTEMBER 4, 2020

ORAL ARGUMENT REQUESTED

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Double Down Interactive, LLC ("Double Down") and International Game Technology ("IGT") move to strike Plaintiffs' nationwide class allegations pursuant to Rule 23(d)(1)(D). Certification of a nationwide class in this case is improper, impractical, and impossible due to irreconcilable conflicts between the laws of Washington and the laws of nearly all other states.

The named Plaintiffs are Washington residents asserting claims under Washington's Recovery of Money Lost at Gambling Act, RCW 4.24.070 ("RMLGA"); the Washington Consumer Protection Act, RCW 19.86.010 *et seq*. ("CPA"); and Washington's unjust enrichment law. Each claim hinges on the allegation that virtual chips purchased and used by Plaintiffs are "thing[s] of value" under RCW 9.46.0285 because they are credits involving the "extension of entertainment and a privilege of playing a game without charge." Dkt. 41 ¶ 55. This definition of "thing of value" conflicts with the laws of the forty-three states that do not use the Washington language—"extension of entertainment or a privilege of playing at a game without charge"—in their gambling codes at all. Of the six states other than Washington that define value in their gambling codes to include "extension of entertainment or a privilege of playing at a game without charge," two of those states also exclude the act of merely awarding additional play from their definition of gambling. In total, Defendants' games are excluded from what is considered gambling under at least twenty states' laws. The gambling code of Washington conflicts on its face with the gambling codes of at least forty-five states.

Moreover, the vehicle relied upon by Plaintiffs for their civil recovery of gambling losses, Washington's RMLGA, has no counterpart in twenty-two states. And among twenty-eight other states that do have some form of gambling loss recovery act ("LRA"), there are material differences with the RMLGA, including that other states define "thing of value" differently than *Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018), as demonstrated by cases finding DoubleDown Casino and other social casino games lawful. In addition, some states limit recovery to be had only from "winners"; some states allow third persons other than losers to recover; and some states have short limitations periods, such that countless putative class members' claims would be time barred. Lastly, the Washington CPA provisions relied upon by

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Plaintiffs do not exist outside of Washington, and unlawful gambling does not fit within the list of actionable conduct in the deceptive trade practice acts of at least thirty-three other states.

These conflicts of law prohibit nationwide certification for three reasons:

First, applying Washington's gambling code to the alleged conduct in all fifty states would amount to an unconstitutional extra-territorial application of Washington law.

Second, Washington's choice of law rules require that other states' laws be applied to claims of putative class members who played outside Washington. The state where players used their virtual chips has the most significant relationship to, and interest in, the alleged gambling, precluding application of Washington gambling law nationwide.

Third, interpreting and applying the conflicting gambling codes, LRAs (if a state has one), and CPAs of the fifty states would contradict Federal Rule of Civil Procedure 23(b)(3), rendering class treatment unmanageable and inferior. Plaintiffs will not be able to establish the predominance and superiority required under Rule 23(b)(3) as a matter of law.

Accordingly, the Court should strike Plaintiffs' nationwide class allegations now because, as this Court recently recognized, "it is far from clear that Washington law will apply to transactions by out-of-state users. That question requires complex choice of law analysis and will likely determine whether a nationwide class is certifiable." Dkt. 126 at 5. No amount of extensive and expensive nationwide discovery will change the conflicts that exist between the laws of Washington and the laws of nearly all other states.[1]

I. BACKGROUND

Double Down is a Washington limited liability company headquartered in Seattle, Washington. Dkt. 41 ¶ 8. It develops and publishes digital games on mobile and web-based platforms that are available across the United States and globally, including DoubleDown Casino, the game at issue here. *See id.* ¶ 1. The named Plaintiffs are Washington residents who

[1] Defendants reserve all other arguments not presented for the purpose of opposing any future motion for class certification by Plaintiffs.

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allege that unlawful gambling occurred when they purchased chips and used them to play games in DoubleDown Casino. Dkt. 41 ¶¶ 6, 7, 33-36.

'"Gambling,' as defined by RCW 9.46.0237, '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."' *Id*. ¶ 48. Plaintiffs' case theory is that the "chips" they and a putative class "had the chance of winning" in DoubleDown Casino games are "thing[s] of value" under RCW 9.46.0285 because "they are credits that involve the extension of entertainment and a privilege of playing a game without charge."[2] Dkt. 41 ¶ 55. On this theory, Plaintiffs allege they can recover under the RMLGA because Defendants are "proprietors" who engaged in unlawful gambling. *Id*. ¶¶ 46, 51. The RMLGA, Washington's version of a LRA, provides:

> 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.

RCW 4.24.070.

Similarly, Plaintiffs allege a right to recover under Washington's CPA as a result of the alleged gambling. Plaintiffs allege, under RCW 19.86.093, that "a claimant may establish that the act or practice is injurious to the public interest because it . . . Violates a statute that contains a specific legislative declaration of public interest impact." Dkt. 41 ¶ 62; *see* RCW 19.86.093. They claim the "public interest" violated by Defendants is established by RCW 9.46.010, which expresses a "public policy" of Washington recognizing the close relationship between professional gambling and organized crime, and seeking to restrain all persons from seeking profit from professional gambling activities in this state and all persons from patronizing professional gambling activities. *Id*. Plaintiffs' unjust enrichment claim likewise is based on the allegation that DoubleDown Casino constitutes illegal gambling. Dkt. 41 ¶¶ 72-75.

[2] Plaintiffs' misstate RCW 9.46.0285 in their Amended Complaint. It actually provides, "involving extension of . . . entertainment *or* a privilege of playing *at* a game or scheme without charge." (Emphasis added.)

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II. LEGAL STANDARD

Rule 23(d)(1)(D) provides that the Court may "require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly." *See Vinole v. Countrywide Home Loans, Inc*., 571 F.3d 935, 939-40 (9th Cir. 2009). "Nothing in the plain language of Rule 23(c)(1)(A) either vests plaintiffs with the exclusive right to put the class certification issue before the district court or prohibits a defendant from seeking early resolution of the class certification question." *Id.*; *see also Coe v. Philips Oral Healthcare Inc.*, 2014 WL 5162912, at *2 (W.D. Wash. Oct. 14, 2014) ("Fed. R. Civ. P. 23 does not preclude affirmative motions to deny class certification.").

A pre-discovery motion to strike should be granted where "the complaint itself demonstrates that the requirements for maintaining a class action cannot be met" and "no amount of discovery will demonstrate that the class can be maintained." *Goode v. LexisNexis Risk & Info. Analytics Grp., Inc.*, 284 F.R.D. 238, 245-46 (E.D. Pa. 2012) (citing *Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72, 93 n.30 (3d Cir. 2011)). When reviewing such a motion to strike, a court should place the burden of establishing a *prima facie* case for certification on the plaintiff, as the plaintiff has the burden on a motion to certify. *Blihovde v. St. Croix County*, 219 F.R.D. 607, 613-14 (W.D. Wis. 2003); *In re Paxil Litig.,* 212 F.R.D. 539, 545 (C.D. Cal. 2003) (plaintiffs seeking to represent nationwide class whose claims will be subject to different states' laws must show that differences among state laws are not material).

III. ARGUMENT

Plaintiffs seek to certify a class of "***[a]ll persons in the United States*** who purchased and lost chips by wagering at the Double Down Casino." Dkt. 41 ¶ 37 (emphasis added). The phrase "[a]ll persons in the United States" should be stricken and any class proposed by Plaintiffs cannot include it because defining the class so broadly would require the Court to apply materially conflicting laws of fifty states on gambling, LRAs, and consumer protection. These conflicts render a nationwide class based on alleged violations of Washington law unconstitutional,

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improper under Washington choice of law rules, and contrary to Rule 23's requirements for predominance of common issues and superiority.

A. The Applicable Laws of the Fifty States Conflict with the Washington Law Asserted by Plaintiffs.

1. State gambling codes conflict with Washington's definition of a "thing of value."

Plaintiffs' claims hinge on the premise that virtual chips are "things of value" under Washington law because they "extend gameplay without additional charge." Dkt. 41 ¶ 52. Washington's gambling code defines a "thing of value" as:

> [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.

RCW 9.46.0285. Plaintiffs' suit seeks to capitalize upon the *Kater* court's interpretation of this language. Plaintiffs allege a nationwide class of players, even though the vast majority of other states address the subject of "extension of play" differently, or not at all, and even though the Ninth Circuit recognized that Washington's definition of "thing of value" is broader than the governing law in other states. *See Kater*, 886 F.3d at 788 (distinguishing decisions of courts applying gambling codes of other states which do not feature Washington's distinct language).

a. Three states define "thing of value" like Washington.

Other states define and regulate gambling differently. Only six states other than Washington (Alabama, Alaska, Kentucky, Missouri, New Jersey, and New York) even use the language "involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge" to define "value" in their gambling codes.[3] Declaration of William M. Gantz, Ex. 1 ¶ 14. However, Missouri excludes "playing an amusement device that confers only an immediate right of replay not exchangeable for something of value" from its definition of gambling. Mo. Ann. Stat. § 572.010. New Jersey excludes from its definition of "thing of value"

[3] Ala. Code § 13A-12-20(11); Alaska Stat. § 11.66.280 (11); Ky. Rev. Stat. § 528.010; Mo. Stat. § 572.010(12); N.J. Stat. § 2C:37-1(d); N.Y. Penal Law § 225.00(6).

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"any form of promise involving extension of a privilege of playing at a game without charge on a mechanical or electronic amusement device." N.J. Stat. § 2C:37-1(b). Alaska uses the same language as Washington, but has no LRA. Alaska Stat. § 11.66.280(11). This means that only three states other than Washington start facially with the same statutory definition of "thing of value" as Washington and some form of LRA*, before* other material differences are considered.

Plaintiffs' nationwide use of the Washington definition is further hampered because other states previously used the "extension of privilege of playing at a game" language but have since removed it. In 1973, Hawaii deleted "or privilege of playing at a game or scheme without charge," reasoning, "[t]his phrase refers to such activities as pinball and other games involving the winning of a privilege of playing another game without charge. . . . Your Committee finds that there is no good reason to include 'free game' as something of value from gambling."[4] Gantz Decl. ¶ 12(b). In 2019, Maine dropped from its definition all of the "extension" language: "or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge." *Id*. ¶ 12(g). Hawaii and Maine have not enacted an LRA, so a plaintiff could not recover gambling losses in those states even if virtual chips were a "thing of value." *Id*. ¶ 15.

Plaintiffs' bid for a nationwide class ignores profound differences in the gambling codes outside Washington. Including Missouri and New Jersey, the gambling codes of twenty-one states and one United States Territory would not apply to Double Down because those states have: (1) removed or omitted the language "privilege of playing at a game or scheme without charge" from its gambling code definition of "thing of value"; (2) enacted exceptions for the social amusement game category (no cash prize, award of virtual chips only); (3) enacted exceptions for games which award only additional play; (4) enacted exceptions from "gambling devices" which award rights of replay but do not allow cancellation or removal ("knock off") of

[4] Haw. Rev. Stat. § 712-1226 (commentary on §§ 712-1224 to 712-1226), *available at* https://www.capitol.hawaii.gov/hrscurrent/Vol14_Ch0701-0853/HRS0712/HRS_0712-1226 htm.

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such rights; or (5) enacted some combination of these exceptions.[5] Gantz Decl. ¶ 12. This means that in at least twenty-one states, Double Down's games would be lawful by statute.

b. Plaintiffs' putative class includes jurisdictions where Double Down's games have been deemed lawful by courts.

Plaintiffs' alleged nationwide class also includes jurisdictions where identical LRA claims have failed. Plaintiffs' counsel sued Double Down in Illinois in 2015 and lost. In *Phillips v. Double Down Interactive LLC* (*"Phillips"*), 173 F. Supp. 3d 731, 737 (N.D. Ill. 2016), the court found that DoubleDown Casino did not violate Illinois law and that Double Down could not be sued under Illinois' LRA because Double Down was not a "winner." *Id*. at 740.[6] Yet, the same lawyers now attempt an end run on *Phillips* by including Illinois residents in their putative class. They also seek to include residents of other states where courts have rejected the same counsel's theories. *See Mason v. Mach. Zone, Inc.*, 851 F.3d 315, 320 (4th Cir. 2017) (loss of "virtual gold" in virtual casino not actionable under California or Maryland law); *Ristic v. Mach. Zone, Inc.*, 2016 WL 4987943, at *3 (N.D. Ill. Sept. 19, 2016); *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871, 882 (N.D. Ill. 2016) (no liability under Illinois law where games of chance offer rewards with no value); *see also People v. One Mech. Device*, 142 N.E.2d 98, 100 (Ill. 1957) (different counsel brought suit and court held "free play is neither money, the equivalent of money, nor a valuable thing. It is unrealistic to hold that the possibility of winning a greater or lesser amount of amusement is gambling.").

[5] Mo. Stat. § 572.010; N.J Stat. § 2C:37-1(b); Ariz. Rev. Stat. § 13-3301; Haw. Rev. Stat. § 712-1220 and commentary on 712-1224 to 712-1226), *available at* https://www.capitol.hawaii.gov/hrscurrent/Vol14_Ch0701-0853/HRS0712/HRS_0712-1226.htm; Idaho Code § 18-3801; Ind. Code § 35-45-5-1(e) & (m); Kan. Stat. § 21-6403(e)(2); La. Rev. Stat. § 14:90.7; Me. Rev. Stat. tit. 17-A, § 952(10); Md. Code, Crim. Law § 12–301; Mich. Penal Code § 750.310c; Minn. Stat. § 609.75; Neb. Rev. Stat. § 28-1101(4); Okla. Stat. tit. 21, § 965; Or. Rev. Stat. § 167.117; 18 Pa. Cons. Stat. § 5513; Tex. Penal Code § 47.01; Utah Code § 76-10-1101; Va. Code § 18.2-325; W. Va. Code § 61-10-1; Wis. Stat. § 945.01(3)(b)(2); 6 N. Mar. I. Code § 3154.

[6] Applying Washington law to claims already dismissed in Illinois also presents res judicata or collateral estoppel issues for putative class members from Illinois. *See Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 874 (1984) ("There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation.").

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2. State laws conflict with respect to the availability of a civil action to recover for gambling losses.

Gambling contracts have traditionally been unenforceable under common law as against public policy. *See Irwin v. Willar*, 110 U.S. 499, 510 (1884); 38 Am. Jur. 2d *Gambling* § 161; *Kelly v. First Astri Corp*., 84 Cal. Rptr. 2d 810, 819 (Cal. Ct. App. 1999) (California has a long-standing public policy against judicial resolution of civil disputes arising out of gambling). Not all states depart from the common law rule against civil recovery of gambling losses by enacting LRAs. Only twenty-nine states (including Washington) and the District of Columbia have some form of an LRA.[7] Gantz Decl. ¶ 15. Thus, off the bat, Washington's regulatory framework conflicts with at least twenty-one other states that do not allow recovery for gambling losses.

Even in the twenty-nine states with LRAs, the statutes are materially different from the RMLGA, such that they preclude recovery:

First, the LRAs of seven states and the District of Columbia place threshold restrictions on claims not found in the RMLGA, including minimum thresholds before wagers are actionable in eight states, ranging from $1 (Connecticut) to $50 (Illinois).[8] Gantz Decl. ¶ 22. Maryland's LRA applies only to persons who lose money "at a gaming device."[9] Gantz Decl. ¶ 23.

Second, Washington's RMLGA is one of only a few LRAs that permit recovery from the dealer or "from the proprietor for whose benefit such game was played or dealt."[10] Gantz Decl. ¶ 26. Oregon and South Dakota are the only other two states that use the term "proprietor" in their LRAs, and the South Dakota LRA refers to the proprietor "of the place" where the game

[7] Ala. Code § 8-1-150; Ark Code § 16-118-103(a)(1)(A)(i); Conn. Gen. Stat. §§ 52-553 & 52-554; Fla. Stat. § 849.29; Ga. Code § 13-8-3(b); 720 Ill. Comp. Stat. § 5/28-8; Ind. Code § 34-16-1-2; Ky. Rev. Stat. § 372.020; Md. Code, Crim. Law § 12-110; Mass. Gen. Laws ch. 137 § 1; Mich. Comp. Laws § 600.2939; Minn. Stat. § 541.20; Miss. Code § 87-1-5; Mo. Stat. § 434.030; Mont. Code § 23-5-131; N.H. Rev. Stat. § 338:1-3; N.J. Stat. § 2A:40-5; N.M. Stat. § 44-5-1; N.Y. Gen. Oblig. Law §§ 5-419 & 5-421; Ohio Rev. Code § 3763.02; Or. Rev. Stat. § 30.740; S.C. Code § 32-1-10; S. D. Codified Laws § 21-6-1; Tenn. Code § 28-3-106; 9 Vt. Stat. § 3981; Va. Code § 11-15; RCW 4.24.070; D.C. Code § 16-1702; W. Va. Code § 55-9-2.

[8] Conn. Gen. Stat. §§ 52-553 & 52-554 ($1); 720 Ill. Comp. Stat. § 5/28-8 ($50); Ky. Rev. Stat. § 372.020 ($5); Mich. Comp. Laws § 600.2939 ($5); Minn. Stat. § 541.20; N.Y. Gen. Oblig. Law §§ 5-419 & 5-421 ($25); Va. Code § 11-15 ($5); D.C. Code § 16-1702 ($25); W. Va. Code § 55-9-2 ($10 within 24 hours).

[9] Md. Code, Crim. Law § 12-110.

[10] RCW 4.24.070.

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was played.[11] Gantz Decl. ¶ 29. At least eleven states and the District of Columbia limit claims to be brought under LRAs against the "winner."[12] Gantz Decl. ¶ 30. This is significant where, as here, the alleged "house" or "proprietor" has no stake in the outcome of the wager. In *Phillips*, Double Down had no money depending on the outcome of a game and was therefore not a "winner." *Phillips*, 173 F. Supp. 3d at 737; *see also Ristic*, 2016 WL 4987943, at *3 (LRA does not apply to chips used in mobile game because the proprietor kept the money no matter who wins, so there was no "winner").

Third, no other state has a two-year limitations period for LRA claims like Washington. *See* RCW 4.16.130; *Heitfeld v. Benevolent & Prot. Order of Keglers*, 36 Wn.2d 685, 708 (1950); Gantz Decl. ¶¶ 24-25. Where a limitations period is specified, the majority of LRAs have limitations periods between three and six months, and seventeen states and the District of Columbia have a limitations period of less than a year.[13] Gantz Decl. ¶ 25. Plaintiffs' proposed nationwide class would include people whose claims would otherwise be time-barred.

Finally, the LRAs of many other states expand the field of persons entitled to bring suit well beyond the person who loses money. Seven states enforce their gambling policy by providing an immediate right of action to persons other than the person who loses money, such as spouses, children, next of kin, and creditors.[14] Gantz Decl. ¶ 18. In addition, where the person who lost money fails to assert their own claim within a short period of time, twelve states and the District of Columbia have authorized *any* person or government agencies to enforce gambling

[11] Or. Rev. Stat. § 30.740; S. D. Codified Laws § 21-6-1.

[12] Ark. Code § 16-118-103(a)(1)(A)(i); Ga. Code § 13-8-3(b); 720 Ill. Comp. Stat. § 5/28-8; Ky. Rev. Stat. § 372.020; Minn. Stat. § 541.20; Mo. Stat. § 434.030 & .050; N.M. Stat. §§ 44-5-1 & 44-5-3; N.Y. Gen. Oblig. Law §§ 5-419 & 5-421; Ohio Rev. Code § 3763.02; S.C. Code § 32-1-10; Va. Code § 11-15; D.C. Code § 16-1702.

[13] One month (9 Vt. Stat. § 3981); three months/ninety days (Ark. Code § 16-118-103(a)(1)(A)(I); Conn. Gen. Stat. §§ 52-553 & 52-554; Mass. Gen. Laws ch. 137 § 1; Mo. Stat. § 434.030 & .090; N.Y. Gen. Oblig. Law §§ 5-419 & 5-421; S.C. Code § 32-1-10; Tenn. Code § 28-3-106; Va. Code § 11-15; D.C. Code § 16-1702); six months/180 days (Ala. Code. § 8-1-150; Ga. Code § 13-8-3(b); 720 Ill. Comp. Stat. § 5/28-8; Ind. Code § 34-16-1-2; N.J. Stat. § 2A:40-5; Ohio Rev. Code § 3763.02; S. D. Codified Laws § 21-6-1; Wis. Stat. § 895.056); one year (Mont. Code § 23-5-131; N.M. Stat. § 44-5-1).

[14] Ala. Code § 8-1-150; Ark. Code § 16-118-103(a)(2); Miss. Code § 87-1-5; Mo. Stat. § 434.040; Mont. Code § 23-5-131; N.M. Stat. § 44-5-3; Tenn. Code § 28-3-106.

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loss recovery claims.[15] Gantz Decl. ¶ 20. For example, in Illinois and Kentucky, after six months from payment of an unlawful wager, *any* person may sue the winner and recover treble damages.[16] Gantz Decl. ¶ 20. In Georgia, after six months, *any* person may sue for the benefit of the educational fund of the county and themselves.[17] Gantz Decl. ¶ 20. In South Dakota, after six months, the state's attorney is charged with bringing an action for the benefit of the spouse or minor children, and if no spouse or children, for the benefit of public schools.[18] Gantz Decl. ¶ 20. Certification of a nationwide class based on Washington law vitiates the regulatory policies of many other states, as well as the rights of third parties and governmental agencies having no notice or involvement in such a suit.

3. Material conflicts exist with respect to Plaintiffs' Consumer Protection Act and unjust enrichment claims.

Compounding the insurmountable conflicts with differing state gambling codes and LRAs, Plaintiffs' CPA claims are premised on a Washington-specific combination of statutory provisions not duplicated in any other state. Washington's atypical approach begins in its CPA's purpose statement excluding acts or practices "which are not injurious to the public interest," RCW 19.86.920, thus requiring a claimant to establish that "unfair methods of competition and unfair or deceptive acts or practices" falling within RCW 19.86.020 are also injurious to the "public interest." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn. 2d 778, 787-88 (1986) (observing Washington and Georgia to be in minority of states requiring showing of public interest impact). A claimant in Washington can do so by demonstrating that the act "[v]iolates a statute that contains a specific legislative declaration of public interest impact." RCW 19.86.093(2); Dkt. 41 ¶ 62. Plaintiffs base their CPA claim on Defendants' alleged

[15] Ala. Code. § 8-1-150; Ga. Code § 13-8-3(b); 720 Ill. Comp. Stat. § 5/28-8; Ind. Code § 34-16-1-4; Ky. Rev. Stat. § 372.040; Mass. Gen. Laws ch. 137 § 1; N.J. Stat. § 2A:40-6; Ohio Rev. Code § 3763.04; S.C. Code § 32-1-20; S. D. Codified Laws § 21-6-2; Tenn. Code § 28-3-106; Wis. Stat. § 895.056; D.C. Code § 16-1702.

[16] 720 Ill. Comp. Stat. § 5/28-8; Ky. Rev. Stat. § 372.040.

[17] Ga. Code § 13-8-3(b).

[18] S. D. Codified Laws § 21-6-2.

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violation of a legislative declaration of "public policy" found in Washington's criminal code, RCW 9.46.010. Dkt. 41 ¶ 63.

West Virginia is the only other state with a CPA that includes a similar statement excluding acts or practices that are not injurious to the public interest.[19] Gantz Decl. ¶ 36. But, unlike Washington, West Virginia does not provide that a claimant may establish that an act or practice is injurious to the public interest by showing that the conduct violates *any* "specific legislative declaration of public interest impact."[20] Washington is the only state that broadens the reach of its CPA in this manner.

CPA claimants in forty-eight other states must proceed under an entirely different statutory rubric. Thirty-four states, including West Virginia, plus the District of Columbia, have enacted lists of acts or practices deemed unlawful.[21] Gantz Decl. ¶¶ 37-38. Thirteen of these states limit acts in violation of the CPA to those on the enumerated list.[22] Gantz Decl. ¶ 38. No state lists unlawful gambling as a "deceptive" or "unfair" act or an otherwise actionable business practice. *Id*. ¶ 39. Illinois is the only state to consider unlawful gambling in its CPA, but it expressly *excludes* "online gambling or other gaming where a consumer can enter to win money" from an enumerated subsection applicable to Internet game service providers.[23] Gantz Decl. ¶ 39. Plaintiffs' CPA claim premised on a violation of the public interest statement in the Washington gambling code has no analogous pathway under the CPA of any other state.

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[19] W. Va. Code § 46A-6-101(2).

[20] *Compare* W. Va. Code § 46A-6-101 with RCW 19.86.093(2).

[21] Ala. Code. § 8-19-5; Alaska Stat. § 45.50.471; Ark. Code § 4-88-107; Cal. Civ. Code § 1770; Colo. Rev. Stat. § 6-1-105; Ga. Code § 10-1-393; Haw. Rev. Stat. § 481A-3; Idaho Code § 48-603; 815 Ill. Comp. Stat. §§ 505/1, *et seq*.; Ind. Code § 24-5-0.5-3(b); Kan. Stat. § 50-626; La. Stat. § 51:1401, *et seq.*; Md. Code Ann., Com. Law § 13–301; Mich. Comp. Laws § 445.903; Minn. Stat. § 325D.09, *et seq.*; Miss. Code § 75-24-5; Mont. Code § 30-14-101, *et seq*.; Neb. Rev. Stat. § 87-302; N.H. Rev. Stat. § 358-A:2; N.M. Stat. Ann. § 57-12-2; N.C. Gen. Stat. § 75-1.1; Ohio Rev. Code § 1345.02; Okla. Stat. tit. 78 § 53; Or. Rev. Stat. § 646.607; 73 Pa. Stat. Ann. § 201-2; 6 R.I. Gen. Laws § 6-13.1-1; S.D. Codified Laws § 37-24-6; Tenn. Code. § 47-18-104; Tex. Bus. & Com. Code § 17.46; Utah Code Ann. § 13-11-4; Va. Code § 59.1-200; W. Va. Code § 46A-6-102; Wis. Stat. § 100.20; Wyo. Stat. § 40-12-105; D.C. Code § 28–3904.

[22] Mich. Comp. Laws § 445.903; 73 Pa. Stat. Ann. § 201-2(4); 6 R.I. Gen. Laws § 6-13.1-1 (6); Va. Code § 59.1-200; Wyo. Stat. § 40-12-105.

[23] 815 Ill. Comp. Stat. § 505/2CCC(a). There is also an actual conflict with Illinois law, where identical CPA (and unjust enrichment) claims against Double Down were rejected in *Phillips*, 173 F. Supp. 3d at 742, 744.

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In addition, it is well recognized that consumer protection and deceptive trade practice statutes present conflicts because of material differences in definitions of "unfair conduct," burden of proof, scienter requirements, definitions of deception, and proof of causation and injury. S*ee In re EpiPen Mktg., Sales Practices & Antitrust Litig.*, 2020 WL 1180550, at *55 & nn.61-65 (D. Kan. Mar. 10, 2020); *In re McCormick & Co. Pepper Prods. Mktg. & Sales Practices Litig.*, 422 F. Supp. 3d 194, 227-30 (D.D.C. 2019) (collecting cases). Plaintiffs do not allege that any acts or practices were deceptive or fraudulent. They acknowledged in a related case that "there is no allegation that [the defendant] misrepresented anything about its in-game currency." *Wilson v. PTT, LLC*, No. 3-18-cv-05275, Dkt. 49 at 4 n.2. And in *Kater*, Plaintiffs' counsel agreed that the CPA and unjust enrichment claims in that case were "contingent on [the social casino game] constituting illegal gambling in violation of Washington law." *Kater v. Churchill Downs Inc.*, 2015 WL 9839755, at *4 (W.D. Wash. Nov. 19, 2015), *rev'd*, 886 F.3d 784 (9th Cir. 2018). Plaintiffs' claim lacks the element of deception in trade or commerce generally required under all other states' CPAs.

Other differences in state CPAs create additional material conflicts. Twelve states prohibit or limit class actions seeking civil damages for CPA violations[24] or otherwise prohibit class actions under other circumstances;[25] ten states limit recovery of a CPA plaintiff to actual damages;[26] nine states' statutes of limitations for CPA claims are less than four years;[27] and six states have pre-suit notice requirements.[28]

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[24] Ala. Code § 8-19-10; Ark. Code § 4-88-113; Ga. Code § 10-1-399; Iowa Code § 714H.7; Kan. Stat. § 50-634; La. Stat. § 51:1409; Miss. Code § 75-24-15; Mont. Code § 30-14-133; Ohio Rev. Code § 1345.09; S.C. Code § 39-5-140; Tenn. Code § 47-18-109; Utah Code § 13-11-19.

[25] I.e., unless the consumer protection agency has issued a specific rule against the conduct, the conduct has been declared unlawful by final judgment in courts of that state, the action asserts a violation of the state constitution, or the action has been approved by the Attorney General.

[26] Fla. Stat. § 501.211(2); Maine Rev. Stat. tit. 5, § 213(1); Minn. Stat. § 325D.15; Miss. Code § 75-24-15(1); Neb. Rev. Stat. § 59-1609; Okla. Stat. tit. 78, § 54; S.D. Codified Laws § 37-24-31; Utah Code § 13-11-19(2); W. Va. Code § 46A-6-106(a)-(b); Wyo. Stat. § 40-12-108(a).

[27] One year (La. Stat. Ann. § 51:1409(E); Ohio Rev. Code § 1345.10(C)); two years (Ind. Code § 24-5-0.5-5(a); Iowa Code § 714H.5(5); Ky. Rev. Stat. § 367.220(5); Va. Code § 59.1-204.1(A)); three years (Cal. Civ. Code § 1783; 815 Ill. Comp. Stat. § 505/10a(e); N.H. Rev. Stat. § 358-A:3).

[28] Ind. Code § 24-5-0.5-5; Maine Rev. Stat. tit. 5, § 213(1-A); Mass. Gen. Laws Ann. ch. 93A § 9; Miss. Code § 75-24-15; Tex. Bus. & Com. Code § 17.505; W. Va. Code § 46A-6-106(c).

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Plaintiffs' unjust enrichment claims create similar conflicts. Beyond the actual conflict presented by *Phillips*, there are significant actual conflicts with respect to what constitutes unjust enrichment, statutes of limitation, and whether the plaintiff must lack an adequate remedy at law abound. *See EpiPen*, 2020 WL 1180550, at *58 & nn.66-69 (surveying all fifty states and collecting cases); *McCormick*, 422 F. Supp. 3d at 231-34 & nn.52-60 (surveying twenty-eight states, including Washington, and collecting cases); *see also Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 591 (9th Cir. 2012) (unjust enrichment law of forty-four states, including Washington, varies materially).

There is also still an actual conflict with Illinois law, where identical CPA and unjust enrichment claims against Double Down were rejected in *Phillips*, 173 F. Supp. 3d at 742, 744.

B. Applying Washington's Gambling Laws to Defendants' Alleged Conduct in Other States Is Unconstitutional.

1. Applying Washington's laws extraterritorially violates the dormant Commerce Clause.

Imposing Washington's gambling code, LRA, and CPA on activity in other states usurps the police powers of those states in violation of the dormant Commerce Clause, which reserves the power to regulate interstate commerce to the federal government and prevents any state from imposing its own regulations on other states. U.S. Const. art. I, § 8, cl. 3; *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 571 (1996) ("While we do not doubt that Congress has ample authority to enact . . . policy for the entire Nation, it is clear that no single State could do so, or even impose its own policy choice on neighboring States.") (citing *Bonaparte v. Appeal Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction.")). Similarly, "one State's power to impose burdens on the interstate market for [e.g., video games] is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States." *Id.* (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-96 (1824)).

Gambling, in particular, is a regulatory subject which "lies at the heart of the state's police power," and "how best to regulate gambling activity is [a question] to which different states can

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arrive at different answers based on their different experiences." *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 720 (4th Cir. 1999); *see also Thomas v. Bible*, 694 F. Supp. 750, 760 (D. Nev. 1988) (licensed gaming is reserved to the states under Tenth Amendment), *aff'd*, 896 F.2d 555 (9th Cir. 1990); 15 U.S.C. § 3001(a)(1) ("[T]he States should have the primary responsibility for determining what forms of gambling may legally take place within their borders[.]"); Comm'n on the Review of the Nat'l Policy Toward Gambling, *Gambling in America: Final Report of the Comm'n on the Review of the Nat'l Policy Toward Gambling* 5 (1976) ("The Federal Government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests.").

Courts in the Ninth Circuit have held that statutes attempting to regulate conduct extraterritorially violate the dormant Commerce Clause. In *Sam Francis Foundation v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015) (en banc), the Ninth Circuit recognized that the dormant Commerce Clause prevented a California statute's application outside the state, even though the activity involved a California resident. The California statute required a royalty payment to an artist for the sale of fine art by a seller who resided in California without regard for the location of the sale. The Ninth Circuit explained the potential problem with the statute by posing this hypothetical:

> [I]f a California resident has a part-time apartment in New York, buys a sculpture in New York from a North Dakota artist to furnish her apartment, and later sells the sculpture to a friend in New York, the Act requires the payment of a royalty to the North Dakota artist—even if the sculpture, the artist, and the buyer never traveled to, or had any connection with, California. We easily conclude that the royalty requirement, as applied to out-of-state sales by California residents, violates the dormant Commerce Clause.

Id. at 1323; *see also Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 614 (9th Cir. 2018) (prohibiting regulators' attempts to enforce California waste disposal regulations against California company's disposal of waste outside the state). In *Sam Francis*, residence of the seller in California did not permit application of California law to his transaction outside California. The same is true here. Double Down is a Washington company which, at most, is alleged to have allowed players outside of Washington to make wagers outside of Washington. The dormant

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Commerce Clause prevents application of Washington gambling law to players contracted with Double Down to use their virtual chips outside Washington.

The gambling law and policy reserved to each state under the Tenth Amendment cannot be imposed on another state. In *Rahmani v. Resorts International Hotel, Inc.*, 20 F. Supp. 2d 932 (E.D. Va. 1998), *aff'd*, 182 F.3d 909 (4th Cir. 1999), the plaintiff, a Virginia resident, sought to use Virginia law prohibiting gambling and the Virginia LRA to recover losses she incurred while gambling in New Jersey, where gambling was legal. After determining that no mutually enforceable obligations were created until the plaintiff placed a bet at a New Jersey gambling table, the court determined that the Virginia LRA could not permissibly be applied to gambling losses that occurred lawfully outside Virginia because "[a] state cannot invalidate the lawful statutes of another state or penalize activity that lawfully occurs in another state." *Id.* at 936 (citing *Bigelow v. Virginia*, 421 U.S. 809, 822-25 (1975) ("A state does not acquire power or supervision over the internal affairs of another state merely because the welfare and health of its citizens may be affected when they travel to that State."); *BMW*, 517 U.S. at 572 ("[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.")).

2. Applying Washington's laws extraterritorially violates due process.

Applying Washington substantive law on a nationwide basis is also constitutionally limited by the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, § 1. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the United States Supreme Court held that Kansas law could not apply to a nationwide class. There, Kansas law conflicted with Texas and other states' laws, and if Texas law were applied to the Texas plaintiffs, it would have vastly reduced the petitioner's liability. Even though the petitioner owned property and conducted substantial business in Kansas, 99% of the gas leases at issue were outside of Kansas and 97% of the plaintiff class members had no connection to Kansas other than the lawsuit. The Supreme Court reversed the Kansas courts' application of Kansas law on a nationwide basis, reasoning that Kansas did not have an interest in claims unrelated to, and

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in conflict with it, and thus the "application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits." *Id.* at 822. The court rested its reasoning on the "expectation of the parties" and held that "Kansas may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." *Id.* (citation & internal quotation marks omitted). *Shutts* establishes constitutional limits to the choice of law, such that where Washington does not have a "significant contact or significant aggregation of contacts" ***to the claims*** asserted by each player, applying Washington law would be arbitrary and unfair. *See id*. at 821 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)). The overwhelming majority of the alleged gambling agreements at issue in this case, like the contracts from eleven states in *Shutts*, were entered into in states other than Washington.

C. Washington Choice of Law Rules Require That Other States' Laws Apply to Players Who Did Not Use Virtual Chips in Washington.

According to Washington's own choice of law principles, Washington's gambling, RMLGA, CPA, and unjust enrichment laws cannot apply to putative class members who did not use their chips in Washington. In diversity actions, such as this, a federal court applies the choice of law rules of the state in which it sits. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 571 U.S. 49, 65 (2013); *see also In re Facebook Biometric Info. Privacy Litig*., 185 F. Supp. 3d 1155, 1167-68 (N.D. Cal. 2016) (applying state choice of law rule to class action).

Choice-of-law analysis in Washington proceeds in two steps: First, the court determines whether there is "an actual conflict between the laws or interests of Washington and the laws or interests of another state." *Seizer v. Sessions*, 132 Wn.2d 642, 648 (1997). Where there are multiple "potentially interested states . . ., a conflict between the substantive law of Washington and even one interested state would require the Court to move to the next step of the Washington choice of law analysis and determine which state has the most significant relationships." *Braun v. Crown Crafts Infant Prods., Inc*., 2013 WL 4522241, at *3 (W.D. Wash. Aug. 27, 2013) (Leighton, J.). Next, if a conflict exists with the law of "even one" other interested state, a choice of law analysis must be performed to determine "which jurisdiction has the 'most significant

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relationship' to a given issue" under Restatement (Second) of Conflict of Laws ("Restatement") § 6 (1971). *Seizer*, 132 Wn.2d at 650 (citation & internal quotation marks omitted).

Not only does a conflict exist with *one* other interested state, the Washington laws necessary to support Plaintiffs' claims conflict with the laws of nearly *all* other states. *See* Sec. III(A), *supra*. The Court therefore must conduct the choice of law analysis to determine which states have the most significant relationship to the claims of each putative class member.

1. The States Where DoubleDown Casino Players Use Their Chips Have the Most Significant Relationship with Players' Claims.

a. Other states have the most significant relationship to Plaintiffs' RMLGA claim.

The language of RCW 9.46.0237 acknowledges that gambling is a contractual relationship: "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." *Id.* (emphasis added). As this Court recognized in *Wilson v. PTT*, "the essence of [Plaintiffs'] claim is that [Defendant] entered into a series of contracts with consumers that should be rescinded on the basis of illegality." *Wilson v. PTT, LLC*, 351 F. Supp. 3d. 1325, 1333 (W.D. Wash. 2018); *Wilson v. PTT, LLC*, No. 3-18-cv-05275, Dkt. 49 at 4 (Plaintiffs' counsel state the RMLGA claim "is an inherently contract-based claim contesting the validity of a given consumer contract"); *see also O'Neil v. Crampton*, 18 Wn.2d 579, 583 (1943) (RMLGA creates an "exception to the general rule relating to illegal contracts and other illegal transactions.").

When parties to a contract have not agreed on governing law, the Restatement's general rule for contractual choice of law, Section 188, applies. *Mulcahy v. Farmers Ins. Co.*, 152 Wn.2d 92, 100 (2004). Under Restatement § 188(2), this Court must consider the following factors when determining the applicable law:

> the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicil, residence, nationality, place of incorporation and place of business of the parties.

Id. § 188(2)(a)-(e).

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"The approach is not to count contacts, but rather to consider which contacts are most significant and to determine where those contacts are found." *Baffin Land Corp. v. Monticello Motor Inn, Inc.*, 70 Wn.2d 893, 899-900 (1967). Here, application of the principles in Section 188, especially the "protection of justified expectations," *see* Restatement § 6, and consideration of the factors provided in §188(2)(a)-(e) overwhelmingly support applying the law of the states where players used their purchased chips.[29] Restatement § 188 cmt. b.

Place of Contracting. Plaintiffs allege that when they play DoubleDown Casino games, they "wager things of value (the chips)." Dkt. 41 ¶ 50. The place of contracting for purposes of this case is where the players are located when they make their alleged "wager" in a game. Clearly, the place of contracting in terms of alleged "wagering" by players located outside Washington is where they *used* the virtual chips they purchased. In *Rahmani*, when a Virginia resident sought to apply Virginia law prohibiting gambling to invalidate her gambling losses at a casino in New Jersey, the Virginia court found that New Jersey law applied because no mutually enforceable obligations (i.e., a contract to wager) had been created until *plaintiff placed a bet* at a New Jersey gambling table. *Rahmani*, 20 F. Supp. 2d at 935. Similarly, for internet gambling, the place where the person engaged in gambling is the location where the gambling occurred. *People ex rel. Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 859-60 (N.Y. Sup. Ct. 1999) (entering and transmitting bet from New York via internet is gambling in New York).

Place of Performance. The place of performance is where the player uses the chips. "The state where performance is to occur under a contract has an obvious interest in the nature of the performance," including an "obvious interest in the question whether this performance would be illegal." Restatement § 188 cmt. e; *accord* Restatement § 202 cmt. c ("[T]he legality or illegality of performance under a contract is usually determined by the local law of the state where this performance either has taken, or is to take, place."). As demonstrated in *Thomas*,

[29] Two of the Section 188(2) factors do not apply. ***Place of negotiation*** is a neutral because there was no alleged negotiation between players and Double Down; in any event, the place of negotiation "is of less importance when there is no one single place of negotiation." Restatement § 188 cmt. e. ***Location of the subject matter of the contract*** applies only when a contract "deals with a specific physical thing, such as land or a chattel, or affords protection against localized risk." *Id*.

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Rahmani, and *Johnson*, every state has a paramount interest in controlling what is and what is not unlawful betting within its borders. Because "[t]he search for a proper balance" in the regulation of gambling is "a task presumptively committed to the democratically accountable institutions of a state," *Collins*, 199 F.3d at 720, this Court cannot disturb the balance forty-nine other states have struck with players by foisting Washington's regulatory choices upon them. "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003); *see also* Sec. III(B), *supra*.

Washington has no valid interest in deciding if activity outside its borders constitutes gambling, nor right to do so. When the Washington Legislature declared that the "public policy of the state of Washington on gambling" includes "promot[ing] the social welfare *of the people* by limiting the nature and scope of gambling activities and by strict regulation and control," RCW 9.46.010 (emphasis added), the reference is to "the people" of the state of Washington. Whether a person located outside Washington gambles is not—and cannot be—a legitimate interest of Washington, and is heavily outweighed by the other states' interests.

Protection of Justified Expectations. Applying the law of the states where players use their purchased chips to determine the legality of the parties' contracts is strongly supported by the protection of justified expectations, which has "considerable importance in contracts." *See* Restatement § 188 cmt. a. Washington courts recognize that "the expectations of the parties to the contract may significantly tip the scales in favor of one jurisdiction's laws being applied over another's." *Mulcahy*, 152 Wn.2d at 101; *see also Shutts*, 472 U.S. at 822; *Tilden-Coil Constructors, Inc. v. Landmark Am. Ins. Co.*, 721 F. Supp. 2d 1007, 1015 (W.D. Wash. 2010). Here, players who reside, purchase virtual chips, and use them in other states would reasonably expect the laws of their home state to govern any contracts they enter into online with the game developer. For example, there would be no reasonable expectation by a person in Illinois, who never set foot in Washington, that Washington gambling law could possibly apply to games played (and wagers allegedly made) by them while in Illinois.

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Domicil, Residence, Place of Incorporation, and Place of Business. The place of the alleged wager is of greater importance in a game distributed and played over the internet and on mobile devices than the residence of a player or where Double Down's offices are located. For example, an Oregon resident working in Washington and using purchased chips on their lunch break would be subject to Washington law in the same way that a Washingtonian on vacation in Las Vegas is governed by Nevada laws. *See Rahmani*, 20 F. Supp. 2d at 934-35 (Virginia resident's wager in New Jersey subject to law of New Jersey, not Virginia).

Applying the gambling law of the state where the player uses their purchased chips to govern the outcome is aligned with concepts of place of contracting, performance, and justified expectations, and far more appropriate than applying the law of Double Down's state of incorporation. Moreover, IGT is a Nevada corporation headquartered in Nevada, so its state of incorporation does not support applying Washington law. Dkt. 41 ¶ 9. In *Wilson v. PTT*, this Court subjected the out-of-state defendant to personal jurisdiction in Washington to respond to the claims of Washington residents under Washington law, reasoning that when a party enters into a contract in a *forum*, "the *forum's* laws allow that contract to be enforced. . . . [I]n cases arising out of the contract, the party must submit to the same laws that allowed them to embark on the business venture in the first place." *Wilson*, 351 F. Supp. 3d at 1333 (emphasis added). Just as the claims of Washington players were governed by the forum in which the players made their alleged wagers, this Court should apply the same rationale and find that the claims of all players should be governed by the gambling laws of the state where players made alleged wagers.

b. Other states have the most significant relationship to Plaintiffs' consumer protection and unjust enrichment claims.

The location where players used their chips also has the most significant relationship to Plaintiffs' claims under the CPA and for unjust enrichment, because these claims similarly depend on the allegation that Defendants took wagers from people across the country. Even if, contrary to their allegations and their counsel's assertion in *Wilson v. PTT* and *Kater*, Plaintiffs claim that Defendants misrepresented something in connection with their purchase of chips, any alleged pecuniary injuries sustained by players nevertheless occurred where the players used their

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chips. Restatement § 148; *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp.*, 180 Wn.2d 954, 968 (2014) (applying Section 148 to claims for deceptive statements under the Washington state securities act and negligent misrepresentation law); *Coe*, 2014 WL 5162912, at *3-4 (applying Section 148 to claim of deceptive trade practices in violation of the Washington CPA). These states would have the most significant relationship to such a consumer protection claim—not Washington. *Coe*, 2014 WL 5162912, at *4. Similarly, in *Thornell v. Seattle Service Bureau, Inc*., 742 F. App'x 189 (9th Cir. 2018), the Ninth Circuit rejected nationwide class allegations in a recent putative class action brought under the Washington CPA, notwithstanding misrepresentations and deceptive acts committed in Washington by a Washington-based defendant. Plaintiff, a Texas resident, alleged that a Washington corporation violated Washington's CPA when it sent deceptive letters to her in Texas regarding an auto accident in Texas. Affirming this Court's decision, the Ninth Circuit held that the out-of-state plaintiff's state of residence, Texas, had the most significant relationship to her CPA claims even though deceptive mailings were alleged to have been sent from Washington; thus, the Texas consumer protection statute applied. *Id.* at 191-93, *aff'g* 2016 WL 3227954 (W.D. Wash. June 13, 2016).

And in *Mazza*, the Ninth Circuit vacated the district court's certification of a nationwide class asserting claims under California's consumer protection and unjust enrichment laws, finding that choice of law rules required that each class member's consumer protection claim must be decided under the consumer protection law of the jurisdiction in which the transaction took place, potentially implicating the consumer protection laws of forty-four jurisdictions. 666 F.3d at 589-94. As a result, the court held that "variances in state law overwhelm common issues and preclude predominance for a single nationwide class." *Id.* at 596. Importantly, the court made clear that "each state has a strong interest in applying its own consumer protection laws" to transactions that occur within its borders and an interest in striking its own balance between protections available for its consumers and the appropriate level of liability for companies conducting business within its territory. *Id.* at 592. "Conversely, [Washington's] interest in applying its law to residents of foreign states is attenuated." *Id.* at 594; *see also Alaska Airlines,*

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Inc. v. United Airlines, Inc., 902 F.2d 1400, 1403 (9th Cir. 1990) (unjust enrichment claim arising from contractual relationship is governed by same law that governs contract).

D. The Need to Apply the Law of All Fifty States Precludes the Findings of Predominance and Superiority Required Under Rule 23(b)(3).

Plaintiffs bear the burden of affirmatively demonstrating that the class meets the requirements of Rule 23. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011); *Vinole*, 571 F.3d at 944 n.9. Plaintiffs seek to certify a class under Rule 23(b)(3), Dkt. 41 ¶ 37, which requires them to show both that "questions of law or fact common to class members predominate over any questions affecting only individual members" and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Ultimately, to satisfy Rule 23 on a nationwide basis, Plaintiffs must "satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). For the same reasons that they cannot satisfy Rule 23(b), the named plaintiffs cannot show that their claims are typical of, and common with, the claims of the nationwide class they seek to represent, as required by Rule 23(a)(2) and (3).

The basic rule where named plaintiffs in a class action seek to represent a nationwide class of persons whose claims will be subject to different states' laws is that plaintiffs must show, *before certification*, "that the differences in state laws . . . are nonmaterial." *In re Paxil Litig.*, 212 F.R.D. at 545. When "variations in state law may swamp any common issues and defeat predominance," those material variations defeat certification under Rule 23(b)(3). *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996); *Pilgrim v. Universal Health Card LLC*, 660 F.3d 943, 947 (6th Cir. 2011) (court must analyze whether "the consumer-protection laws of the affected States vary in material ways"). "The predominance inquiry focuses on 'the relationship between the common and individual issues' and 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Vinole*, 571 F.3d at 944 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998)). Plaintiffs cannot meet this requirement.

In determining predominance, courts have a "duty to take a close look at whether common questions predominate over individual ones" to ensure that individual questions do not

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"overwhelm questions common to the class." *Comcast*, 569 U.S. at 34 (citation & internal quotation marks omitted). Applying the gambling, LRA, consumer protection, and unjust enrichment laws of each of the fifty states where the members of Plaintiffs' putative nationwide class purchased chips and used them to play in DoubleDown Casino precludes a finding that common issues of law predominate. Indeed, this Court has held that the need to apply the laws of just five states—Washington and four others—to a medical monitoring claim precluded common issues from predominating. *Duncan v. Nw. Airlines, Inc.*, 203 F.R.D. 601, 613-14 (W.D. Wash. 2001). Here, the Court will need to interpret the differing laws of nearly every other state. The Court must also examine the decisions of every state interpreting these many laws.

In the context of gambling cases, other courts have already held that the need to "examine and to apply the gambling laws of all fifty states" caused variations in state law to predominate and precluded certification under Rule 23(b)(3). *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 677 (S.D. Cal. 1999). Likewise, in *Andrews v. American Telephone & Telegraph Co.*, 95 F.3d 1014, 1023-25 (11th Cir. 1996), the district court's certification of a Rule 23(b)(3) class was vacated because the need to apply the gambling laws of all fifty states made a nationwide class unmanageable, and thus not a superior method of adjudication. Beyond the fifty-state gambling law analysis deemed unmanageable in *Schwartz* and *Andrews*, this Court would also have to examine the differing LRAs of fifty states and any applicable state court decisions on gambling.

Plaintiffs' CPA and unjust enrichment claims, based on the alleged violation of Washington gambling law, fare no better. A nationwide class claim that implicates the consumer protection law of numerous states is often ripe for a motion to strike. *Pilgrim*, 660 F.3d at 947 (because consumer-protection laws vary in material ways, no common legal issues favor a class action). Similarly, in *Coe*, this Court held that material differences among consumer protection laws prevented plaintiffs from demonstrating predominance and manageability, and denied certification of a nationwide class. 2014 WL 5162912, at *4. More recently, in *EpiPen* and *McCormick*, certification of nationwide or multistate classes for consumer protection and unjust enrichment claims was denied because variations in state laws governing those claims precluded

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plaintiffs from showing that common issues of law predominate. *EpiPen*, 2020 WL 1180550, at *57-58; *McCormick*, 422 F. Supp. 3d at 224, 230, 233, 235; *see also Liston v. King.com Ltd.*, 254 F. Supp. 3d 989, 1001-02 (N.D. Ill. 2017) (expressing skepticism plaintiff could pursue nationwide class for use of "Candy Crush" game app); *Becnel v. Mercedes-Benz USA, LLC*, 2014 WL 2506506, at *2 (E.D. La. June 3, 2014) (granting defendants' pre-discovery motion to strike, where court anticipated "serious manageability issues" in applying laws of fifty states and the District of Columbia to plaintiff's numerous state law claims); *In re Yasmin & Yaz Mktg.*, 275 F.R.D. 270, 275 (S.D. Ill. 2011) ("The commonality and superiority requirements [of] Rule 23(b)(3) cannot be met unless all litigants are governed by the same legal rules."). As each of these cases demonstrates, a nationwide class for damages under Rule 23(b)(3) cannot proceed where a court must interpret and enforce the gambling and consumer protection laws of every state and territory in the nation.

IV. CONCLUSION

Plaintiffs' nationwide class is unsustainable because Washington's laws cannot be applied outside of Washington. The Court should strike the nationwide class allegations from the Amended Complaint now and later consider certification of a class that includes members who are alleged to have used paid-for virtual chips in Washington.

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DATED this 13th day of August, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED this August 13, 2020.

s/ Jaime Drozd Allen
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Exhibit 14

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ADRIENNE BENSON AND MARY SIMONSON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DOUBLE DOWN INTERACTIVE, LLC, a Washington limited liability company, and INTERNATIONAL GAME TECHNOLOGY, a Nevada Corporation,

Defendants.

Case No. 2:18-cv-00525-RSL

DEFENDANTS' MOTION TO DISMISS UNDER FED. R. CIV P. 12(B)(1) AND MOTION TO ABSTAIN

ORAL ARGUMENT REQUESTED

NOTE ON MOTION CALENDAR: October 9, 2020

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I. INTRODUCTION

Critical concepts of state sovereignty and federalism make this case the "exceptional circumstance" where this Court should abstain from exercising jurisdiction to permit the Washington state courts to address "difficult questions of state law bearing on policy problems of substantial public import" under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976), and the related federal abstention principles articulated in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), *Railroad Commission of Texas v. Pullman Co*., 312 U.S. 496, 500-01 (1941), and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Double Down Interactive, LLC ("Double Down") and International Game Technology ("IGT") respectfully move that this Court to abstain and stay this matter pending resolution of unsettled state law by the Washington courts.

Gambling laws are an area where state law has long been preeminent. Plaintiffs' claims rest on novel and untested interpretations of Washington's gambling laws that, when resolved, will be determinative of Defendants' ultimate liability. No Washington court has determined whether the mere extension of time playing any game may serve as a "thing of value" under RCW 9.46.0285 and how the law may apply when players purchase virtual chips for purposes other than to extend gameplay. These questions, and others about the interplay of civil liability under a criminal statute, transcend this case and impact the entire online gaming industry in Washington. The interpretation of these unsettled questions regarding Washington's gambling statutes should be left for Washington courts to decide. Moreover, Washington has a coherent administrative structure set by statute. The Washington State Gambling Commission ("Commission") has exclusive authority to enforce the state's gambling statutes. This state regulatory system militates toward this Court abstaining from hearing this case to allow the state to interpret its own gambling laws, especially given that the Commission previously published guidance explicitly stating that DoubleDown Casino, the game at issue here, did not violate Washington law. Thus, because it is inappropriate for this Court, or any federal court, to adjudicate these fundamental state law issues, this Court should abstain from interpreting Washington's gambling laws, yield that interpretation to the Washington state courts, and stay this action pending the Washington courts' resolution.

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II. FACTUAL BACKGROUND

A. Allegations in the First Amended Complaint

Plaintiffs' First Amended Complaint does not allege any federal law questions. *See generally* Dkt. 41. Instead, Plaintiffs allege state law causes of action against Double Down and IGT for Recovery of Money Lost at Gambling under RCW 4.24.070; Violation of Washington Consumer Protection Act under RCW 19.86.010 *et seq.*; and Unjust Enrichment. Dkt. 41 ¶¶ 45-75. Each of the allegations is premised upon the theory that Plaintiffs' purchases of virtual chips in DoubleDown Casino are unlawful gambling under RCW 9.46.0237[1] and rests on their interpretation that virtual chips "are 'thing[s] of value' under RCW 9.46.0285[2] because they are credits that involve the "extension of entertainment and a privilege of playing a game without charge." Dkt. 41 at 14:16-18. Plaintiffs also seek injunctive relief requiring Defendants to "cease the operation of their games." *Id.* ¶ 58. Defendants deny these allegations. Dkt. 74 at 20:1-2, 21:17.

Double Down and IGT did not choose this forum. Plaintiffs commenced this action asserting state law claims only, invoking jurisdiction of the federal court under the Class Action Fairness Act. Dkt. 41 ¶ 10.

B. The State Law Issues Presented Are Undecided by Any Washington Court

Double Down's video games include social games that entertain players with a variety of animation and virtual situations. Dkt. 104 ¶ 2. The games are free to download, free to play, and never result in monetary prizes. *Id*. Because players receive free virtual chips in a variety of ways, they need not purchase any virtual chips to play. *Id*. Players first receive free chips when they download the app and later obtain additional free chips. *Id*. In fact, contrary to the

---

[1] "'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." RCW 9.46.0237.

[2] Under RCW 9.46.0285, "[t]hing of value" . . . "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."

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allegations of Plaintiffs that users must purchase virtual coins in order to play,[3] virtually no Double Down players purchase chips in order to continue to play. *Id*. A player cannot "cash out" their virtual chips. *Id*. Nor may players sell or transfer their accounts or any virtual chips in their account to another person. *Id.* Although the games can be played for free, Double Down's games, like many video games, allow players to buy more chips before they receive more free chips. *Id*.

The video game industry, including the development of casual or social games, represents a substantial portion of Washington's tech-driven economy, employing about 94,200 Washingtonians. *Id.* ¶¶ 4-9 & Exs. 1-4. Washington ranks third in the country in the total number of active video game developers, with nearly 300 such companies with offices in Washington, including major industry players and household names. *Id.* ¶ 4. Double Down likewise maintains its U.S. headquarters in Seattle, and currently employs almost 150 people in Washington. *Id.* ¶ 5.

C. The Commission Has Approved the Games in Question.

The Commission considered the subject of social gaming in connection with a public meeting on March 9, 2013, and subsequently posted its guidance in March 2014, that games such as DoubleDown Casino were not unlawful. In the March 9, 2013, public meeting, Paul Dasaro, Administrator of the Electronic Gambling Lab, and Rick Herrington, Program Manager in the Criminal Intelligence Unit, prepared and gave a staff presentation on "Social Gaming" at the Commission's public meeting. Social Gaming Presentation, May 9, 2013, Dkt. 107, Ex. 1. Their presentation to the Commission used DoubleDown Casino as an example. Dkt. 107 at 12. The presentation observed that "Social Gaming" was not gambling because the "prize" element of gambling was absent:

[3] Dkt. 41 ¶¶ 33, 35.

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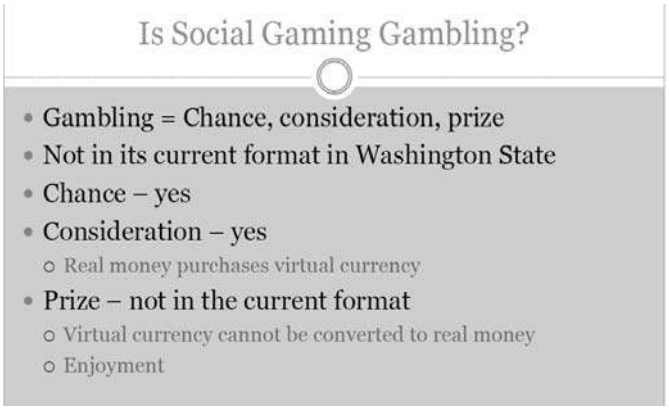

Id. at 17.

The Commission considered "casino-style games . . . characterized by the use of virtual game play credits," the exact business model now challenged by Plaintiffs. *Id*. at 21. In fact, the Commission commented on DoubleDown Casino:

> One of the most popular poker games is a standard Texas Hold'em game called DoubleDown Casino. Players are sitting at a virtual poker table playing with other real people who can be anywhere in the world. They are playing with virtual chips that can either be purchased or just gained through entering the game. This is a company that was purchased recently by IGT and is an IGT themed slot game. DoubleDown is based out of Seattle. It is an online version of the same game that has been approved for Washington TLS, and is in many jurisdictions throughout the world. Players are using virtual chips and not real chips, and these virtual chips cannot be redeemed for real cash. With DoubleDown's ability to purchase virtual chips, players get 150,000 chips for $3, which they can purchase directly through their Facebook page. Zynga has a different conversion, but is essentially the same concept. Players can purchase more chips or more time to play with real money, which is how these companies make their money.

Id. at 21-22.

The conclusion of the project and presentation requested by the Commission was that the games were **not** gambling because there was no prize:

> **Program Manager Rick Herrington** explained that when he looks at any form of gambling, especially on the internet, he applies the basic rules of gambling: chance, consideration, or prize. In each of these games, there are two of the elements, but not the third, which is an actual prize. Players do get virtual prizes and/or an endorphin rush; they can build their avatar and improve their avatar by purchasing other things of the same nature. **It is not gambling in the current format according to Washington State law**. At any time in the future, if the federal government or Washington State changes its laws, any one of these social platforms could be changed to a real gambling platform overnight.

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Id. at 22 (emphasis added).

After this meeting, the Commission acted consistently with the presentation and its conclusion that the Double Down games were not gambling under Washington law. In March 2014, the Commission prepared and posted a brochure on its website to give "general guidance" to the public confirming that social gaming was not gambling, entitled "Online Social Gaming – When is it Legal? What to Consider." Dkt. 107, Ex. 3. The brochure states:

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.

Id. at 49, Ex. 3.

DDI was aware of and relied upon the Commission's guidance and lack of enforcement at all pertinent times. IGT owned Double Down Interactive LLC at the time of the Commission's May 9, 2013 meeting, and was similarly aware of and relied upon the Commission's guidance and lack of enforcement at all pertinent times.

D. Procedural Status of the Lawsuit

This case is in its early stages. In the two years since the original Complaint was filed, the parties have litigated only whether Plaintiffs agreed to arbitration. After an appeal on the requirement to arbitrate, the case returned to this Court on February 20, 2020. Dkt. 88. The Court

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has ruled on cross-motions for protective orders and a motion to compel regarding discovery issues, Dkt. 126, and denied Defendants' Motion to Certify Questions to the Washington Supreme Court, Dkt. 127, which Defendants have timely moved to reconsider, Dkt. 133. Defendants have also moved to strike nationwide class allegations. Dkt. 128.

Defendants have filed a declaratory judgment action in Thurston County Superior Court asking the court to issue a declaration that (1) the virtual chips purchased and used by Benson and Simonson in DoubleDown Casino are not "things of value" as defined by RCW 9.46.0285; (2) that DoubleDown Casino games played by Benson and Simonson are not illegal gambling games under Washington law; (3) that Benson and Simonson are not entitled to recover under RCW 4.24.070, the Washington Consumer Protection Act, RCW 19.18.010, *et seq*. or for unjust enrichment. *See* Exhibit 1, Complaint for Declaratory Relief (without exhibits).

III. LEGAL STANDARDS

A motion to dismiss filed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure "allow[s] a party to challenge the subject matter jurisdiction of the district court to hear a case." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). In a Rule 12(b)(1) motion, the burden of proving that jurisdiction exists falls to the party asserting jurisdiction. *Ramming*, 281 F.3d at 161.

Multiple federal abstention doctrines support this Court in abstaining from exercising jurisdiction here. Under the *Colorado River* doctrine, a court considers whether concurrent adjudication with a state court action is appropriate based on considerations of "wise judicial administration, giving regard to conservation of judicial resources, and comprehensive disposition of litigation." *Colorado River*, 424 U.S. at 817 (citation & internal quotation marks omitted). Abstention is likewise appropriate under *Thibodaux* where a case "present[s] difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result" in that particular case. *Id.* at 814 (citing *Thibodaux*, 360 U.S. 25). The Ninth Circuit considers the following eight-factor test when considering *Colorado River* abstention:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or

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> state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

Seneca Ins. Co. v. Strange Land, Inc., 862 F.3d 835, 841-42 (9th Cir. 2017) (quoting *R.R. Street & Co. v. Transp. Ins. Co.*, 656 F.3d 966, 978-79 (9th Cir. 2011)).

Under *Burford*, abstention is appropriate where (1) the case presents a difficult issue of state law, (2) the case is in an area of important state policy, and (3) there is a unified state enforcement mechanism for the rights in question. *Burford*, 319 U.S. at 333-34.

Similarly, abstention is appropriate under *Pullman* where a three-pronged test, including considerations of sensitive social policy, constitutional issues, and uncertainty of state law is considered. *Canton v. Spokane Sch. Dist. No. 81*, 498 F.2d 840, 845 (9th Cir. 1974) (quoting *Pullman*, 312 U.S. at 498-99).

When abstention is warranted, in a case involving money damages, the appropriate remedy is for the court to stay the federal action pending the resolution of the state court issues by the state court. *See Quackenbush v. Allstate Ins. Co*., 517 U.S. 706, 721 (1996) (federal courts must only stay actions for damages based on abstention).

IV. ARGUMENT

This case presents the "exceptional circumstances" required under a myriad of decisions explaining the fundamental concept that federal courts should abstain from exercising their jurisdiction under certain circumstances. "[T]he proposition that a court having jurisdiction must exercise it, is not universally true." *Id.* at 716 (quoting *Canada Malting Co. v. Patterson S.S.*, 285 U.S. 413, 422 (1932)). The principles underlying the abstention doctrine reflect "our federal system whereby the federal courts, exercising a wise discretion, restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal judiciary." *Pullman*, 312 U.S. at 500-01 (internal quotation marks omitted). Abstention here, where this Court's determination and interpretation of Washington's gambling laws intrudes on state sovereignty, is proper when considering "proper constitutional adjudication," "regard for federal-state relations," and "wise judicial administration." *Colorado*

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River, 424 U.S. at 817.

A. Abstention Is Required Because the Interpretation and Application of Gambling Laws Are Reserved for the States.

The Constitution reserves issues regarding state gambling laws for state self-determination under the Tenth Amendment. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018) (prohibition of state authorization of sports gambling schemes violates the anti-commandeering rule under the Tenth Amendment); *Thomas v. Bible*, 694 F. Supp. 750, 760 (D. Nev. 1988) (licensed gaming is reserved to the states under the Tenth Amendment), *aff'd*, 896 F.2d 555 (9th Cir. 1990)); *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.*, 399 F.3d 1276, 1278 (11th Cir. 2005) (regulation of gambling lies at the "heart of the state's police power" (quoting *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 720 (4th Cir. 1999))), *certified question answered*, 948 So. 2d 599 (Fla. 2006); *United States v. King*, 834 F.2d 109, 111 (6th Cir. 1987) (regulation of gambling has been left to the state legislatures); *Medina v. Rudman*, 545 F.2d 244, 251 (1st Cir. 1976) (enactment of gambling laws is proper exercise of the state's police power); *Chun v. New York*, 807 F. Supp. 288, 292 (S.D.N.Y. 1992) (scope of laws regulating gambling and lotteries is clearly matter of state concern); *Winshare Club of Canada v. Dep't of Legal Affairs*, 542 So. 2d 974, 975 (Fla. 1989) (gambling is "a matter of peculiarly local concern that traditionally has been left to the regulation of the states"); *State v. Rosenthal*, 93 Nev. 36, 44 (1977) ("We view gaming as a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution.").

In addition, the United States Congress has recognized that "[s]ince the founding of our country, the Federal Government has left gambling regulation to the States. . . . The Federal Government has largely deferred to the authority of States to determine the type and amount of gambling permitted." *See* H.R. REP. NO. 106-655 (2000) (proposal for 2000 federal gambling regulations*); Gambling in America*: *Final Report of the Commission on the Review of National Policy Toward Gambling* 1, 5 (1976) ("[T]he States should have the primary responsibility for determining what forms of gambling may legally take place within their borders. The Federal Government should prevent interference by one State with the gambling policies of another, and

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should act to protect identifiable national interests."); *see also* 15 U.S.C. § 3001(a)(1) ("[T]he States should have the primary responsibility for determining what forms of gambling may legally take place within their borders[.]").

Because of this, courts regularly abstain when gambling laws underpin merits issues. In a case considering a near identical situation to Plaintiffs' claims against Defendants here, the Fourth Circuit, in *Johnson*, grappled with the same issues of comity indicative in interplay between the states' rights to determine their own gambling law and the federal court's interpretation of state gambling and consumer protection laws. 199 F.3d at 720. In *Johnson*, the putative class alleged that they became addicted to video poker because defendants were offering cash payouts in excess of the maximum amount allegedly allowed under South Carolina law. *Id.* at 717. Plaintiffs further claimed that the offering of illegal cash prizes constituted both a "special inducement" to play video poker in violation of state gambling law and the South Carolina Unfair Trade Practices Act. *Id.*

The Fourth Circuit found abstention was required and reversed the district court because the "court ventured into an area where state authority has long been preeminent. The regulation of gambling enterprises lies at the heart of the state's police power." *Id*. at 720. Specifically, "the district court contravened *Burford* principles by attempting to answer disputed questions of state gaming law that so powerfully impact the welfare of South Carolina citizens." *Id*. The federal district court's attempt to interpret certain portions of South Carolina's statute prohibiting certain forms of gambling improperly "supplanted the legislative, administrative, and judicial processes of South Carolina and sought to arbitrate matters of state law and regulatory policy that are best left to resolution by state bodies." *Id*. at 732-33.

The Fourth Circuit held that abstention was appropriate because (1) federal adjudication there would require a federal court to answer "disputed questions of state gaming law that ... powerfully impact the welfare of [state] citizens" and (2) the relief sought would "effectively establish[] parallel federal and state oversight of the [state] video poker industry." *Id*. at 720, 724 (internal quotations omitted). The exact same considerations exist here. Plaintiffs' claims turn on the Ninth Circuit's interpretation, on a motion to dismiss, of Washington's gambling law that

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defines a "thing of value" as including extended play. Plaintiffs' entire suit rests on the Ninth Circuit's novel interpretation of what constitutes a "thing of value." But, no Washington court has considered or approved this interpretation. Without this Court abstaining, the federal court's interpretation will remain and this Court will be asked to further interpret Washington's gambling laws — all without the Washington courts ever interpreting their own gambling law on this issue. Moreover, if this Court abstains and Washington courts agree with the Defendants' and the Commission's interpretation of Washington's gambling law, Plaintiffs will have no claims and no class.

Similarly, multiple other federal courts have abstained when state gambling laws are at issue. *See, e.g.*, *Chun*, 807 F. Supp. at 292 (abstaining under both *Burford* and *Pullman* where New York's gambling laws were "clearly a matter of predominately state concern" and subject to a "complex and comprehensive statutory scheme"); *Diamond Game Enters. v. Howland*, 1999 WL 397743, at *14 (D. Or. Mar. 23, 1999) (abstaining under *Pullman* when question as to whether defendants' gaming dispensers fall within the Oregon law); *Club Ass'n of W. Va, Inc. v. Wise*, 156 F. Supp. 2d 599, 609 (S.D. W. Va. 2001) (abstention appropriate under *Pullman* when plaintiffs sought a declaration that video lottery was unconstitutional under state law), *aff'd*, 293 F.3d 723 (4th Cir. 2002); *Metro Riverboat Assocs., Inc. v. Balley's La., Inc.*, 142 F. Supp. 2d 765, 775 (E.D. La. 2001) (*Burford* abstention appropriate where case sat in state's gambling regulatory framework and determinative issues in the federal court litigation would be decided in the state court first); *G2, Inc. v. Midwest Gaming, Inc.*, 485 F. Supp. 2d 757, 765-66 (W.D. Tex. 2007) (finding abstention under *Burford* where gaming is an "area of important state policy" and the lottery commission provides a "unified State enforcement mechanism").

B. Plaintiffs' Claims Rest on an Unsettled Interpretations of Washington's Gambling Laws.

1. No Washington state court has considered whether the types of games at issue in this case are gambling.

Plaintiffs' claims under Washington's Recovery of Money Lost at Gambling statute ("RMLGA") turn on "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Quackenbush*, 517

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U.S. at 707 (quoting *Colorado River*, 424 U.S. at 814). Washington courts have not determined whether virtual tokens with no cash prize meet RCW 9.46.0285's definition of "thing of value", and whether Double Down Casino's games are therefore "gambling" under Washington law. Depending on the answer to that unsettled question of state law, how and whether the RMLGA should be interpreted and enforced as to video games like the game at issue here remains unresolved, and the answer implicates policy problems of substantial public import impacting all video gaming industry participants offering games in Washington.

Plaintiffs allege that Double Down Casino games are illegal gambling games because virtual chips are "things of value" under RCW 9.46.0285. *See* Dkt. 41 ¶¶ 50, 55. Under RCW 9.46.0285, a "thing of value":

> 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.

Yet, RCW 9.46.0285 has been discussed only once by a Washington state court, fifteen years ago, under a materially different set of facts. In *Bullseye Distributing LLC v. State Gambling Commission*, 127 Wn. App. 231 (2005), the Court of Appeals decided whether the Commission erred in determining that a slot-machine-like game which awarded cash prizes in a sports card vending machine was a promotional contest of chance exempt from regulation by the Commission. The court affirmed an administrative law judge's determination that an electronic vending machine designed to dispense collectible sports cards and emulate a casino slot machine was a "gambling device" because at least one of the elements of gambling, including a cash prize, were present. *Id*. at 233-34. Players paid cash to win points that could be redeemed for cash and/or merchandise in the *Bullseye* game. In *dicta*, the court noted that though the "play points" lacked pecuniary value on their own, they fell within the definition of "thing of value" because they extended the privilege of playing a game (which allowed a cash prize) without charge. *Id*. at 242. In the context of that case, the term "extension" was construed as offering the ability to play at a game to win cash, and not a mere temporal "extension" of play time that could be applied to any type of video game. *Id*.

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Unlike the game in *Bullseye*, DoubleDown Casino is a modern-era ubiquitous form of digital entertainment with no prize, as opposed to *Bullseye*'s physical vending machine, casino slot game awarding cash. *Bullseye* did not consider a game like DoubleDown Casino, which is (1) a virtual game, (2) using virtual coins, and (3) with no cash or merchandise prize. The *dicta* in *Bullseye* does not indicate how Washington views games played where there is no cash prize, such as the games at issue for Double Down. And, in fact, the application of this *dicta* by the Ninth Circuit in *Kater v. Churchill Downs, Inc.*, 886 F.3d 784, 787-88 (9th Cir. 2018), as the sole underpinning for its decision, fifteen years later, directly conflicts with the Commission's guidance that Double Down's game was not gambling. Moreover, *Kater*'s interpretation of a "thing of value," which was made on a motion to dismiss, is not a decision on the merits and is, therefore, an incomplete analysis of the RMLGA, including missing any discussion of the legislative intent behind the RMLGA or RCW 9.46.0285. These unresolved questions of state law are exactly the types of questions that should be answered by Washington state courts.

Importantly, also, because it was ruling on a motion to dismiss, the court in *Kater* assumed the allegations of the complaint were true – that a user must purchase more virtual chips in order to continue to play the games offered in the Big Fish Casino. *Id.* Yet the facts of this case transcend the limited facts assumed to be true by the court in *Kater*. Nearly all paying players of DoubleDown Casino buy chips when they already have enough chips to continue to play. Dkt. 104; Dkt. 117. They are not purchasing chips in order to have "the privilege of playing the game" under *Kater*, 886 F.3d at 787. Therefore, as actually purchased and used by players, virtual chips in DoubleDown Casino do not meet the statutory definition of a thing of value. RCW 9.46.0285. That *Kater* does not resolve the question of virtual coins sold and used for reasons other than continuing to play is acknowledged in the related litigation, where Plaintiff's counsel has conceded that illegal gambling does not occur if a user does not need to purchase virtual coins to extend gameplay on the explanation that freely obtained virtual coins are not "things of value" under Washington gambling law. *See Kater v. Churchill Downs Inc.*, No. 2:15-cv-00612-RBL (W.D. Wash. July 24, 2020), Dkt. 218-1 § 3.4 ("Big Fish Settlement Agreement"); Class Action Settlement Agreement, *Wilson v. Playtika Ltd.*, No. 3:18-cv-05277-RBL (W.D. Wash. Aug. 6,

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2020), Dkt. 121-1 , § 3.4 ("Playtika Settlement Agreement").[4]

The answer to these unresolved questions under Washington law impacts all video gaming industry participants offering games in Washington. The free-to-play business model involving micro transactions predominates in the industry today. Dkt. 104 ¶ 6 (80% of all video game revenue). In this prevailing model, players can play a game for free, and they can spend money for additional or enhanced fun by buying in-game items such as virtual chips. *See id.* ¶¶ 2-6. Washington plays a major role in video game development. "Washington ranks third in the country in the total number of active video game developers, with nearly 300 such companies with offices in Washington, including major industry players and household names." *Id.* ¶ 4. The Washington video game industry generates $20 billion annually and directly employs 23,000 individuals in Washington. *Id.* ¶ 7. With a distinct local impact, video game developers have a great deal to lose if a federal court interpretation of century-old state law is held to turn chance-based video games that allow the purchase of virtual items where those items are not required to continue play, into illegal gambling.

2. The interplay between the criminal and civil implications has not been considered by a Washington state court.

In addition to these unresolved issues, Washington's gambling law is a criminal statute that requires lenity in its interpretation when courts are determining both criminal and noncriminal applications. *Internet Cmty. & Entm't Corp. v. Wash. State Gambling Comm'n*, 148 Wn. App. 795, 808 (2009) (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004)), *rev'd on other grounds*, 169 Wn.2d 687 (2010). The lack of previous enforcement by the Commission and the affirmation

[4] In support of the Big Fish settlement, the parties have stipulated that because "players who run out of sufficient virtual chips to continue to play the game they are playing will be able to continue to play games within the Application they are playing without needing to purchase additional virtual chips or wait until they would have otherwise received free additional virtual chips in the ordinary course," the virtual chips used in the Applications will be "gameplay enhancements, not 'things of value' as defined by RCW 9.46.0285." Big Fish Settlement Agreement, § 2.2(c); § 3.4. In the Playtika Settlement Agreement, the parties stipulate that as a result of changes implemented by Playtika which "ensures that players who run out of sufficient virtual coins to continue to play slot games in the Application they are playing are able to continue to play slot games within the Application they are playing without needing to purchase additional virtual coins or to wait until they would have otherwise received free additional virtual coins in the ordinary course," the virtual coins in the Applications are "gameplay enhancements" and not "things of value." Playtika Settlement Agreement, § 2.2(c); § 3.4.

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by the Commission that DoubleDown Casino was not unlawful gambling, which conflict with *Kater*'s new interpretation of Washington law in a civil case, support the application of lenity here to prevent an unfair schism between the state's interpretation of criminal law and civil liability. Washington state courts need to resolve this inconsistency, rather than additional federal court interpretations without any input from the state.

Another similar and entirely novel question of state law is presented as to whether the Washington Consumer Protection Act ("CPA") may apply where the CPA cause of action depends upon the alleged commission of a crime that is not recognized or treated as a crime by the law enforcement body charged exclusively with enforcement. The Commission has taken no action concerning the "social games" other than to provide guidance that social gaming without a cash prize is not gambling. Plaintiffs' CPA claim is that "a claimant may establish that the act or practice is injurious to the public interest because it . . . Violates a statute that contains a specific legislative declaration of public interest impact." Dkt. No. 41 ¶ 61. The declaration of public interest alleged violated by Defendants is found in RCW 9.46.010, which expresses a public policy which the Commission is required oversee and implement.

Lastly, also wrapped within the concerns regarding the application of a criminal statute is the Plaintiffs' own criminal culpability for their conduct since Washington law provides that people *placing* unlawful internet wagers are committing a crime. *See* RCW 9.46.240 ("[W]hoever knowingly transmits or receives gambling information by . . . the internet . . . or knowingly installs or maintains equipment for the transmission or receipt of gambling information shall be guilty of a class C felony . . . ."). Washington courts must address the criminal law impact, as a matter of policy, if Plaintiffs' theory of the case is true, including the extent to which Plaintiffs' culpability impacts the viability of Plaintiffs' or other putative class members' claims.

C. Defendants Meet the Criteria for Abstention.

1. The Ninth Circuit's factors favor *Colorado River* abstention.

Courts in the Ninth Circuit evaluate the propriety of a stay under *Colorado Rive*r pursuant to the following factors:

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> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

Seneca, 862 F.3d at 841-42 (quoting *R.R. Street & Co.*, 656 F.3d at 978-79). These factors are not a "mechanical checklist," as some may not have any applicability to this case, rather they are examined in "a pragmatic, flexible manner with a view to the realities of the case at hand." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16, 21 (1983). On balance, six out of the eight factors favor abstention, while two are inapplicable or neutral. Even weighing the factors, as required, in favor of the court exercising jurisdiction, the factors favor abstention. *See id.* at 16.

Four factors weigh heavily in favor of abstention. The third factor—the desire to avoid piecemeal litigation—weighs heavily in favor of abstention because it makes sense to first permit the states to resolve the interpretation of their gambling laws, as required by the Tenth Amendment, to avoid a potential contradictory result from the federal courts guessing at the state's interpretation. "Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results." *Am. Int'l Underwriters (Philippines), Inc. v. Cont'l Ins. Co.*, 843 F.2d 1253, 1258 (9th Cir. 1988). It is insufficient for there to be merely the possibility of conflicting results, rather there must be exceptional circumstances making piecemeal litigation particularly problematic. *See Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1369 (1990) (declining to abstain where ordinary contract and tort issues did not constitute exceptional circumstances risking inconsistent judgments); *Employers' Innovative Network, LLC v. Bridgeport Benefits, Inc.*, 2019 WL 539075, at *7 (S.D.W. Va. Feb. 11, 2019) (declining to abstain in a "rather mundane contract dispute" by distinguishing "*Johnson*, which implicated a controversial gambling statute"). In *Seneca*, the Ninth Circuit found this factor was not met when the case, though complex, involved tort and insurance issues and did not identify "any special concern counseling in favor of federal abstention, such as a 'clear federal

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policy' of avoiding 'piecemeal adjudication of water rights'" justifying abstention in *Colorado River*. *Seneca*, 862 F.3d at 843 (citation omitted). As discussed above, this case is the exceptional circumstance where the constitution and federal policy provide that gambling within a state is an area left to state law and state regulation.

The risk of inconsistent decisions here is real — if this Court and the state courts or agencies interpret Washington gambling law differently, the ramifications for Double Down's ultimate alleged liability and the ongoing viability of DoubleDown Casino, could be subject to conflicting decisions. Everything about this case yearns for a single adjudication and interpretation of the Washington gambling code and civil statutes by a Washington court to avoid conflicting results. This factor is decisively in favor of abstention.

Similarly, the fifth factor weighs equally in favor of abstention because it is the state law that provides the rule of decision on the merits of gambling law. That law should be interpreted by Washington state court, not by the Ninth Circuit's interpretation on a pleadings motion in *Kater.* The "presence of federal-law issues must always be a major consideration weighing *against* surrender" of jurisdiction, but "the presence of state-law issues may weigh in favor of that surrender" only "in some rare circumstances." *Moses H. Cone*, 460 U.S. at 26 (emphasis added). It is not enough that state law provides the rule of decision, but it must present questions that are complex and difficult, and better resolved by the state court. *See R.R. St.*, 656 F.3d at 980-81 (concluding that the source of law factor is "neutral" where the complexity of the action "stems from the number of policies and insurers, not from the type of [state] law involved in the action"). This case is distinguishable because it does not present "routine issues of state law — misrepresentation, breach of fiduciary duty, and breach of contract," rather it implicates unique and undecided issue of gambling law reserved for the state's determination. *See Madonna*, 914 F.2d at 1370; *c.f. Seneca*, 862 F.3d at 841-42 (complex state tort and insurance issues do not present the "exceptional circumstances" necessary to support abstention).

The sixth factor — whether state court proceedings protect the rights of federal litigants (the "adequacy" factor) — and the eighth factor — whether the determination of issues will resolve the merits in the federal suit, or significantly narrow the issues (the "parallelism" factor)

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— also weigh in favor of abstention. *See R.R. St.*, 656 F.3d at 981-82. The adequacy factor looks at whether state proceedings might not be adequate to protect federal rights. *Madonna*, 914 F.2d at 1370 ("This factor involves the *state* court's adequacy to protect *federal* rights, not the federal court's adequacy to protect state rights.") (citing *Moses H. Cone*, 460 U.S. at 26). Here, there are no federal questions at issue, thus the issue favors abstention. The eighth factor, or the parallelism factor, considers whether the state court will "be an adequate vehicle for complete and prompt resolution of the issues between the parties." *Cone Mem'l Hosp.*, 460 U.S. at 28. "[E]xact parallelism . . . is not required"; only a substantial similarity of claims is necessary before abstention is available. *Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989). Here, Plaintiffs' claims hinge on the interpretation of the Washington gambling code and the determination of how to interpret Washington's gambling laws by the state court will resolve the underlying merits issues in the federal suit, and either dispose of the federal suit entirely, or significantly narrow the issues. Parallelism weighs significantly in favor of abstention.

The fourth factor — the order in which the forums obtained jurisdiction — favors abstention, since no merits rulings have occurred in this case. The inquiry into the order that suits are brought is not about a date in time, but rather whether the state court action was brought "before any proceedings of substance on the merits have taken place in the federal court." *Polykoff v. Collins,* 816 F.2d 1326, 1332 (9th Cir. 1987) (citation & internal quotation marks omitted); *Meadow Valley Contractors, Inc. v. Johnson,* 89 F. Supp. 2d 1180, 1184 (D. Nev. 2000) (propriety of abstention is determined "not by a comparison of the starting dates of the federal and state proceedings, but rather whether state proceedings have been initiated before the performance of any proceedings of substance on the merits in the federal action") (citation & internal quotation marks omitted); *see also Aaron v. Target Corp.*, 357 F.3d 768, 775 (8th Cir. 2004) ("There is no fixed requirement in the law that a state judicial proceeding must have been initiated before the federal case was filed for abstention to be appropriate[.]"). Defendants filed the state court action before this Court addressed any merits issues.

The seventh factor — the desire to avoid forum shopping — also favors abstention. When evaluating forum shopping, courts inquire as to whether either party sought more favorable rules

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in its choice of forum or after facing setbacks in the originally filed proceeding. *See Nakash*, 882 F.2d at 1417 (finding forum shopping where, after three-and-a-half years of litigation in a case that was progressing to its detriment, one party sought a "new forum for [its] claims"); *Am. Int'l Underwriters*, 843 F.2d at 1259 (finding forum shopping where, after two-and-a-half years, a party "abandon[ed] its state court case solely because it believe[d] that the Federal Rules of Evidence [we]re more favorable to it than the state evidentiary rules"). Here, where there are no merits decisions, no forum shopping has occurred.

The remaining two factors are either inapplicable or neutral. The first factor is inapplicable because no property is at stake. The second factor is neutral because neither the federal nor state forums are any more or less convenient than one another for the litigants, all of whom are Washington residents or limited liability companies, other than IGT who submits to the state court's jurisdiction by bringing an action to have those courts interpret Washington's gambling laws.

D. Abstention Is Appropriate When There Are Unresolved Issues of State Law under *Thibodaux*.

In a similar situation of unresolved state law, in *Thibodaux*, the United States Supreme Court agreed that the federal courts should abstain from deciding issues of state law. There, the issue was the scope of eminent domain power of municipalities under federal law and the federal court abstained because the issue went to the heart of state sovereignty and transcended the importance of the case itself. *See Colorado River*, 424 U.S. at 814 (discussing *Thibodaux*). The federal court recognized that its decision could affect a city's ability to exercise power of eminent domain under Louisiana law. *Id.* Similarly here, the interpretation of the Washington gambling code has not been resolved by Washington courts. And, in fact, the only guidance from Washington prior to *Kater* – the Commission's public approval of Double Down's games - directly conflicts with the interpretation in *Kater*. As *Thibodaux* explained, since the state statute at issue had never been interpreted by state courts, the district court properly abstained from ruling on the issue before it, staying proceedings pending the institution of a declaratory judgment action and subsequent decision by the Supreme Court of Louisiana. *Thibodaux*, 360 U.S. at 30. The

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legal issues presented in this case under the gambling code are not certain or settled as a result of any court decision in Washington, such that abstention is required here.

E. The Court Should Abstain Because Washington Has a Well-Established Regulatory Structure to Interpret and Enforce its Gambling Regulations.

Separately, abstention is proper because Washington has a well-established regulatory structure to interpret and enforce its gambling regulations. In *Burford*, the United States Supreme Court held that abstention is proper when the state has specially designed regulatory scheme. There, Sun Oil challenged the Texas Railroad Commission's order granting Burford a permit to drill oil wells. 319 U.S. at 317. Like Washington's Commission, Texas had a regulatory regime for oil and gas industries overseen by the Texas Railroad Commission. *Id*. at 320-27. Citing the significance of the oil and gas industries to Texas' economy, the *Burford* Court found Texas had a special interest in a unified gas and oil policy, such that parallel federal court jurisdiction would interfere with the states' specially designed regulatory scheme. *Id*. at 332-34.

Similarly, in *Wildgrass Oil & Gas Comm. v. Colorado*, 447 F. Supp. 3d 1051 (D. Colo. 2020), *appeal filed* (10th Cir. Apr. 17, 2020), a plaintiff attempted to prevent hydraulic fracturing in a residential neighborhood. Even though the court found the case to be a justiciable controversy, the court abstained under *Burford* because the state regulatory structure for drilling reflected the vital interest of the general public. *See id.* at 1065. In support, the court relied extensively on *Johnson*, analogized state drilling regulations, state land use policy, and state gambling law, and observed that "regulation of gambling [is] a 'paramount' state policy concern." *Id.* (citation omitted).

Similarly here, Washington has a regulatory body, the Commission, that enforces the state's gambling laws. Prior to *Kater*, the Commission issued publicly available advice that Double Down's game was not gambling. The Commission was undoubtedly aware of RCW 9.46.0285 at all times. To now subject Double Down to parallel and inconsistent federal court jurisdiction conflicts with the state's authority to decide the application and scope of its gambling laws. It also compromises legitimate reliance by Double Down and other social gaming industry participants upon the Commission's guidance. For the same reasons the *Burford* Court abstained,

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this Court should too.

F. Abstention Is Also Necessary Under *Pullman* Because the Interpretation of Washington Law May Avoid Potential Constitutional Issues.

In determining whether to abstain under *Pullman*, the Ninth Circuit considers whether:

(1) The complaint 'touches a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open.'

(2) 'Such constitutional adjudication plainly can be avoided in a definitive ruling on the state issue would terminate the controversy.'

(3) The possibly determinative issue of state law is doubtful.

Canton, 498 F.2d at 845 (quoting *Pullman*, 312 U.S. at 498-99). Each of these three factors supports abstention. First, as discussed above, strong policy and constitutional considerations leave the laws regarding gambling to the states. *See supra* §IV. Next, a state court ruling interpreting Washington's gambling laws could moot potential constitutional issues under the Tenth Amendment regarding whether Washington's laws can be applied extraterritorially, as Plaintiffs allege. Finally, the interpretation and application of the Washington gambling code and the RMLGA to virtual games with no cash prize is unsettled law that should be determined by the Washington state courts. Thus, abstention under *Pullman* is appropriate.

V. CONCLUSION

For the foregoing reasons, the Court should stay this action pending the resolution of Washington gambling laws by the Washington courts.

DATED this 10th day of September, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED this 10th day of September, 2020.

s/ Lauren M. Case
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EXHIBIT 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

DOUBLE DOWN INTERACTIVE, LLC, a Washington limited liability company, and INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation, Plaintiffs, v. ADRIENNE BENSON, an individual, and MARY SIMONSON, an individual, Defendants.	No. _____ **COMPLAINT FOR DECLARATORY RELIEF**

Plaintiffs Double Down Interactive, LLC ("Double Down") and International Game Technology ("IGT") (together "Plaintiffs"), bring this complaint against Defendants Adrienne Benson ("Benson") and Mary Simonson ("Simonson"), and allege as follows:

I. NATURE OF THE ACTION

1. This is a civil action for declaratory relief concerning whether Plaintiffs have violated Washington's gambling laws by having allegedly operated unlawful gambling games by selling virtual chips which may be used only on games within the DoubleDown Casino "app" or Facebook platform.

2. DoubleDown Casino's video games include online social games that entertain players with a variety of animation and virtual casino situations. The games are free to download, free to play, and never result in monetary prizes. Because players receive free virtual

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chips in a variety of ways, they need not purchase any virtual chips to play. Players first receive free chips when they download the app and later obtain additional free chips. Virtually no Double Down players purchase chips in order to continue to play. In DoubleDown Casino, via either the app or through Facebook, players can obtain additional free virtual chips every day or more often. Players may also receive additional free chips by participating in free promotional offers. Double Down's games never award monetary winnings or real-world prizes. A player cannot "cash out" their virtual chips.

3. Although the games can be played for free, Double Down's games, like many video games, allow players to buy more chips before they receive more free chips. But the player purchases knowing they will receive more free virtual chips that cannot be used outside the game, have no value in the game, and cannot be converted to money or anything else of value.

4. The video game industry, including the development of casual or social games, represents a substantial portion of Washington State's tech-driven economy, employing about 94,200 Washingtonians. Washington ranks third in the country in the total number of active video game developers, with nearly 300 such companies with offices in Washington, including major industry players and household names. Double Down likewise maintains its U.S. headquarters in Seattle, and currently employs almost 150 people in Washington.

5. Defendants Benson and Simonson have played Double Down's games and have advanced claims that their purchase and use of virtual chips in DoubleDown Casino was unlawful gambling under Washington law.

6. Plaintiffs seek a declaration that the sale of virtual chips to Defendants Benson and Simonson to be used only in games played by Benson and Simonson within the DoubleDown Casino is not unlawful gambling under Washington law and that Benson and Simonson may not recover any amounts based upon their allegations that the games they played were unlawful in Washington.

7. Pursuant to RCW 7.24, Plaintiffs are entitled to a declaratory judgment as to the rights, duties, and obligations of the parties under applicable Washington law.

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8. The parties to this case are already parties in a separate federal putative class action in which Benson and Simonson, as named plaintiffs, have asserted state law claims alleging causes of action under the Recovery of Money Lost at Gambling Act, the Consumer Protection Act, as well as for unjust enrichment. A true and correct copy of the Amended Complaint filed in *Benson, et al. v. Double Down Interactive, LLC, et al*., Case No. 2:18-cv-00525 (the "Benson Case") is attached hereto as Exhibit "A."

9. The Benson Case remains in preliminary stages and there have been no decisions on the merits.

10. No Washington state court has considered whether the video games offered by Plaintiffs that offer no cash or merchandise prize is unlawful gambling under Washington law. Plaintiffs bring this suit for the sole purpose to permit the Washington state courts to make this fundamental state law determination.

11. The State of Washington must be allowed to decide the novel issue of what is and what is not gambling within the State of Washington for itself. For this reason, Double Down and IGT have filed a Motion to Dismiss the Benson Case based upon the doctrine of abstention and for a stay of proceedings pending resolution of this state law issue by Washington state courts. A true and correct copy of the Motion for Abstention as filed in the Benson Case is attached hereto as Exhibit "B."

12. This action is necessary and proper in order that Plaintiffs may seek a declaration from this court as to whether or not DoubleDown Casino violates Washington's gambling laws.

II. THE PARTIES

13. Plaintiff Double Down is a limited liability company organized under the laws of the State of Washington with a principal place of business in Seattle, Washington.

14. Plaintiff IGT is a corporation organized under the laws of the State of Nevada with its principal place of business at 6355 South Buffalo Drive, Las Vegas, Nevada, 89113. Double Down Interactive, LLC is a former subsidiary of IGT.

15. Defendant Adrienne Benson is a natural person and a citizen of Spokane County in the state of Washington.

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16. Defendant Mary Simonson is a natural person and a citizen of Thurston County in of the state of Washington.

III. JURISDICTION AND VENUE

17. This Court has jurisdiction over this action pursuant to RCW 2.08.010 and RCW 7.24.010, and because the events giving rise to this litigation took place within the state of Washington.

18. The Court has personal jurisdiction over Defendants Adrienne Benson and Mary Simonson because, based upon information and belief, both reside in Washington.

19. Venue is proper in Thurston County Superior Court pursuant to RCW 4.12.025 because, based upon information and belief, either one or both Defendants reside in Thurston County.

IV. GENERAL ALLEGATIONS

Washington's Video Game Industry

20. The video game industry, including the development of casual or social games – like the DoubleDown Casino games – represents a substantial portion of Washington State's tech-driven economy.

21. The unsettled questions here raise important public policy issues for Washington because they have implications far beyond casino-themed video games. The imposition of civil liability amounting to a full refund of customer purchases and potential criminal penalties could substantially disrupt and dismantle the video game producing industry in Washington and impact thousands of Washingtonians' jobs. This is especially true where the laws of other states do not regard the same games to be gambling. *See Mason v. Mach. Zone, Inc*., 140 F. Supp. 3d 457 (D. Md. 2015) (rejecting claims that free-to-play games constitute gambling) *aff'd*, 851 F.3d 315 (4th Cir. 2017); *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill. 2016) (same); *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871 (N.D. Ill. 2016) (same).

22. The development and sale of video games generate billions of dollars in revenue annually in Washington State. Developers include start-up companies, mid-size businesses, and members of the Fortune 100. There is no meaningful way to distinguish free-to-play casino-

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themed video games offering micro transactions from other free-to-play video games offering micro transactions. A "contest of chance" for purposes of the Washington gambling code (RCW 9.46.0237) is further defined broadly under RCW 9.46.0225 to include any game where "outcome depends in a material degree upon an *element of chance*, notwithstanding that *skill of the contestants may also be a factor.*" *Id*. (emphasis added).

23. Washington first enacted its Recovery of Money Lost at Gambling statute ("RMLGA") in 1879 and the relevant "thing of value" language was enacted in 1987. If Washington's statute is construed to make Washington the *first state* to effectively ban the sale of virtual items purchased in all such video games whose outcome depends in a material degree upon an *element of chance*, even though many Washington State companies employ thousands of people in Washington, that multi-billion-dollar decision should be left to the Washington state courts.

24. Congress mandates "the States," and *not* the federal government (including its judicial branch), "should have the primary responsibility for determining what forms of gambling may legally take place within their borders." 15 U.S.C. 3001(a)(1).

25. Federal courts have recognized repeatedly that the power to regulate gambling is reserved to the states under the Tenth Amendment. *See Murphy v. NCAA*, 584 US 138 S. Ct. 1461, 1478 (2018) (prohibition of state authorization of sports gambling schemes violates the anti-commandeering rule under the Tenth Amendment); *Thomas v. Bible*, 694 F. Supp. 750, (D. Nev. 1988) (licensed gaming is reserved to the states within the meaning of the Tenth Amendment) *aff'd* 896 F.2d 555 (9th Cir. 1990); *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.*, 399 F.3d 1276, 1278 (11th Cir. 2005) (regulation of gambling lies at the "heart of the state's police power" (quoting *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 720 (4th Cir.1999))), *certified question answered*, 948 So. 2d 599 (Fla. 2006); *United States v. King*, 834 F.2d 109, 111 (6th Cir. 1987) (regulation of gambling has been left to the state legislatures); *Medina v. Rudman*, 545 F.2d 244, 251 (1st Cir.1976) (enactment of gambling laws is proper exercise of the state's police power); *Chun v. New York*, 807 F. Supp. 288, 292 (S.D.N.Y. 1992) (scope of laws regulating gambling and lotteries is clearly matter of state concern); *Winshare*

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Club of Canada v. Dep't of Legal Affairs, 542 So. 2d 974, 975 (Fla. 1989) (gambling is "a matter of peculiarly local concern that traditionally has been left to the regulation of the states"); *State v. Rosenthal*, 93 Nev. 36, 44 (1977) ("We view gaming as a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution.").

26. Washington has a complete, careful, and complex statutory and regulatory scheme for gambling, with a rulemaking body, the Washington State Gambling Commission (the "Commission"), that has the authority and the duty to interpret, enforce, and adjudicate the state's gambling laws. To effectuate its intent, the legislature created the Commission. RCW 9.46.040. The Commission has wide powers, including the right "[t]o regulate and establish the type and scope of and manner of conducting the gambling activities authorized by this chapter," RCW 9.46.070(11), as well as "[t]o perform all other matters" to enforce the state's gambling laws, RCW 9.46.070(22). Those powers include the power to both prosecute criminal violations and pursue other, non-criminal remedies. *See, e.g.*, RCW 9.46.210(3) (power to enforce penal gambling laws); RCW 9.46.075 (power to deny or suspend licenses).

27. The Commission considered the subject of social gaming in connection with a public meeting on March 9, 2013 and subsequently posted its guidance in March 2014 that sites such as DoubleDown Casino were not unlawful. It has taken no enforcement action at any time as to DoubleDown Casino or any other so-called "social gaming" web business.

28. In a public meeting on March 9, 2013, Paul Dasaro, Administrator of the Electronic Gambling Lab, and Rick Herrington, Program Manager in the Criminal Intelligence Unit, prepared and gave a staff presentation on "Social Gaming" and the Commission's public meeting. A true and correct copy of the May 9, 2013 Social Gaming Presentation is attached hereto as Exhibit "C." Their presentation to the Commission expressly used DoubleDown Casino as an example. (Exhibit C, p. 12.)

29. The presentation observed that "Social Gaming" was not gambling because the "prize" element of gambling was absent:

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(Exhibit C, p. 17.)

30. The minutes of the Commission's meeting reflect the consideration of the business model now challenged by Defendants:

> The casino-style games in social gaming are characterized by the use of virtual game play credits that players can earn or they can purchase credits to play the game with real money, but the credits cannot be redeemed for real money. The social gaming media makes most of its money from players that are offered the option of purchasing items within the game.

(Exhibit C, p. 21.)

31. The minutes further reflect consideration of how DoubleDown Casino's virtual chips cannot be redeemed for real value, and importantly that "these" companies make their money when people purchase more chips or more time to play with real money:

> One of the most popular poker games is a standard Texas Hold'em game called DoubleDown Casino. Players are sitting at a virtual poker table playing with other real people who can be anywhere in the world. They are playing with virtual chips that can either be purchased or just gained through entering the game. This is a company that was purchased recently by IGT and is an IGT themed slot game. DoubleDown is based out of Seattle. It is an online version of the same game that has been approved for Washington TLS, and is in many jurisdictions throughout the world. Players are using virtual chips and not real chips, and these virtual chips cannot be redeemed for real cash. With DoubleDown's ability to purchase virtual chips, players get 150,000 chips for $3, which they can purchase directly through their Facebook page. Zynga has a different conversion, but is essentially the same concept. Players can purchase more chips or more time to play with real money, which is how these companies make their money.

(Exhibit C, pp. 21-22.)

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32. The conclusion of the presentation was that social games as described was not gambling:

> **Program Manager Rick Herrington** explained that when he looks at any form of gambling, especially on the internet, he applies the basic rules of gambling: chance, consideration, or prize. In each of these games, there are two of the elements, but not the third, which is an actual prize. Players do get virtual prizes and/or an endorphin rush; they can build their avatar and improve their avatar by purchasing other things of the same nature. It is not gambling in the current format according to Washington State law. At any time in the future, if the federal government or Washington State changes its laws, any one of these social platforms could be changed to a real gambling platform overnight.

(Exhibit C, p. 22)

33. After this meeting, in March 2014, the Commission prepared and posted a brochure on its website to give "general guidance" concerning whether social gaming was gambling, entitled "Online Social Gaming – When is it Legal? What to Consider." A true and correct copy of brochure entitled "Online Social Gaming – When is it Legal? What to Consider." is attached hereto as Exhibit "D." The brochure states:

34. Double Down was aware of and relied upon the Commissions' guidance and lack of enforcement at all pertinent times.

35. IGT owned Double Down Interactive LLC at the time of the Commission's May 9, 2013 meeting, and was similarly aware of and relied upon the Commissions' guidance and lack of enforcement at all pertinent times.

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36. Subsequently, in *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 789 (9th Cir. 2018), the Ninth Circuit ruled that a complaint stated a cause of action under Washington's Recovery of Money Lost at Gambling Act and should not have been dismissed. The Ninth Circuit ruled that the plaintiff's allegation that it was necessary to purchase virtual chips in order to continue to play games on Big Fish Casino satisfied the definition of "thing of value" under RCW 9.46.0285, such that Plaintiff stated a cause of action under RCW 9.46.0237. *Id*. *Kater* was not a merits ruling. The reversal of a grant of a motion to dismiss is only a ruling that a complaint alleges a cause of action, and is not a decision on the merits. Moreover, *Kater* is distinguishable from this case because the vast majority of Double Down players, including Benson and Simonson, do not purchase virtual chips in order to continue playing virtual games but to enhance their experience and play games that they wish to play.

37. Nevertheless, immediately after the *Kater* decision, Benson filed the Benson Case against Double Down and IGT. Simonson later joined Benson as a plaintiff when they filed an amended complaint.

38. After the Ninth Circuit's ruling in *Kater*, Big Fish brought a petition before the Commission. The Commission declined to rule on the legality of Big Fish's social casino games, and instead, improperly, yielded to the federal court case. It would be futile for Double Down and IGT to bring a petition before the Commission, since the Commission already stated that it would not decide the issue.

39. Double Down and IGT bring this action because Benson's and Simonson's attempt to use *Kater* to supply a federally issued definition of gambling subjects Double Down not only to parallel oversight but to contradictory oversight. *See Johnson v. Collins Entm't Co.*, 199 F.3d 710, 719-20 (4th Cir. 1999) (federal district court's attempt to interpret certain portions of state statute prohibiting certain forms of gambling "supplanted the legislative, administrative, and judicial processes of South Carolina and sought to arbitrate matters of state law and regulatory policy that are best left to resolution by state bodies."); *see also Metro Riverboat Assocs., Inc. v. Bally's La., Inc.*, 142 F. Supp. 2d 765, 775-76 (E.D. La. 2001) (abstaining from

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deciding RICO claim because it implicated important issues of Louisiana's gaming regulatory scheme).

The Benson Case

40. Adrienne Benson and Mary Simonson, individually and on behalf of a class, filed the Benson Case against Double Down and IGT in the District Court for the Western District of Washington on April 9, 2018.

41. The First Amended Complaint, the operative pleading, filed on July 23, 2018, alleges causes of action for (1) Recovery of Money Lost at Gambling under RCW 4.24.070; (2) violations of the Washington Consumer Protection Act, RCW 19.18.010, *et seq*.; and (3) unjust enrichment.

42. Ms. Benson and Ms. Simonson seek, in part, injunctive relief requiring Double Down and IGT to "cease the operation of their games." (Exhibit A, at ¶ 58.)

43. The allegations are based on Ms. Benson and Ms. Simonson playing DoubleDown Casino games.

44. Ms. Benson alleges that she has been playing DoubleDown Casino on Facebook since 2013, and after losing the balance of her initial allocation of free chips, she purchased chips. Benson alleges she continued playing games within the DoubleDown Casino, and that since 2016, she has lost over $1,000. (Exhibit A, at ¶¶ 33-34.)

45. Ms. Simonson alleges that she has been playing DoubleDown Casino on her mobile phone since 2017, and after losing the balance of her initial allocation of free chips, she purchased chips. Simonson alleges that she continued playing games within the DoubleDown Casino, and that since December 2017, she has lost over $200. (Exhibit A, at ¶¶ 35-36.)

46. For example, the Benson case alleges that the purchase of virtual chips in DoubleDown Casino is unlawful gambling under RCW § 9.46.0237. (See, e.g., Exhibit A, at ¶ 50.)

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FIRST CAUSE OF ACTION
No Right to Recover Money Lost at Gambling Under RCW 4.24.070

47. An actual justiciable controversy exists between Plaintiffs and Defendants with respect to Defendants' claims they are entitled to recover money lost at gambling, pursuant to Washington's "Recovery of Money Lost at Gambling" statute, RCW 4.24.070.

48. RCW 4.24.070 provides that "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."

49. "Gambling" is defined 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.

50. "Thing of value" is defined as "any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise, directly or indirectly, contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge." RCW 9.46.0285.

51. Benson and Simonson are not entitled to any recovery under RCW 4.24.070 with respect to the DoubleDown Casino games because the games in DoubleDown Casino do not constitute "illegal gambling games" and Benson and Simonson have not lost any "thing of value" under Washington law.

52. RCW 9.46.0285 provides in full:

> "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**.

RCW 9.46.0285 (with emphasis).

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53. Synonyms for the verb to "extend" include many terms and ideas, including both to "lengthen" and to "offer." https://synonyms.reverso.net/synonym/en/extend. Benson and Simonson's attempted usage in the context of RCW 9.46.0285 is wrong.

54. The term "extension" relates to "service," to "entertainment" and to "a privilege," all of which are objects in the same sentence. As a basic rule of statutory construction, the term "extension" cannot mean different things in the same sentence. One would not say they lengthened a service, lengthened entertainment or lengthened a privilege "without charge." One would say they offered a service, offered entertainment or offered a privilege "without charge."

55. In addition, under RCW 9.46.0285 the "thing of value" won must be a "form of credit or promise." This term fits grammatically with the idea of a winning a credit or promise to provide a service, entertainment or a privilege without charge. The term does not fit grammatically with the idea of a winning a credit or promise to lengthen a service, entertainment or a privilege without charge. Plaintiffs' shorthand reference to the liability question as extending the time of "gameplay" before more chips must be purchased is a misguided crutch that ignores how the term "extension" is used in RCW 9.46.0285.

56. The purpose of Washington's gambling code can be found in RCW 9.46.010, which states that the purpose of Washington's gambling law is to "keep the ***criminal element*** out of gambling," recognizing the "close relationship between professional gambling and ***organized crime***," while ***not restricting*** "***social pastimes,***" which are "***more for amusement rather than for profit.***" RCW 9.46.010 (emphasis added).

57. Benson and Simonson bought virtual chips without any expectation of "profit," as they were aware at all times that the Double Down games award no cash or prize and that the virtual chips, once purchased, could not be transferred or used for any purpose other than to play games. Paying to play video games, where no cash or merchandize prize can be won, are current-day social pastimes engaged in for amusement and entertainment and are outside the ambit of the legislature's intent behind the gambling code.

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58. Benson and Simonson purchased virtual chips when it was unnecessary to do so in order to continue playing because they still had enough chips to use continue to play DoubleDown Casino.

59. An actual and justiciable controversy exists between Plaintiffs and Defendants concerning whether DoubleDown Casino games are illegal gambling games; whether chips are "things of value", entitling Defendants to recovery lost money under RCW 4.24.070; and whether Benson and Simonson's specific play constituted violations of Washington's gambling laws.

60. For the reasons alleged above, Plaintiffs seek a judicial determination and order from the Court declaring that Defendants are not entitled to recover under RCW 4.24.070, as DoubleDown Casino games are not illegal gambling games; that the virtual chips purchased and used by Benson and Simonson are not "things of value" under Washington law; and that Benson and Simonson's play did not constitute violations of Washington's gambling laws.

SECOND CAUSE OF ACTION
No Violation of Washington's Consumer Protection Act, RCW 19.86.010, *et seq*.

61. Plaintiffs re-allege and incorporate by reference the allegations of Paragraphs 1-59 of this Complaint, as though fully set forth herein.

62. Benson and Simonson allege a right to recover under Washington's Consumer Protection Act, RCW 19.86.010, *et seq*. ("CPA") as a result of the alleged gambling. Benson and Simonson's alleged allegations under the CPA result from their allegations that their play of DoubleDown Casino constituted "gambling." The same state law issues regarding gambling as described above and in the First Cause of Action are determinative of their allegations of CPA violations. Benson and Simonson allege, under RCW 19.86.093, that "a claimant may establish that the act or practice is injurious to the public interest because it ". . . Violates a statute that contains a specific legislative declaration of public interest impact." (Exhibit A ¶ 62; *see* RCW 19.86.093.) Benson and Simonson claim the "public interest" violated by Plaintiffs is established by RCW 9.46.010, which expresses a "public policy" of Washington recognizing the close relationship between professional gambling and organized crime, and seeking to restrain all

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persons from seeking profit from professional gambling activities in this state and all persons from patronizing professional gambling activities. *Id*.

63. An actual justiciable controversy exists between the parties with respect to whether Double Down and IGT have violated the CPA, which prohibits any person from using "unfair methods of competition or unfair or deceptive acts or practices in the conduct of any trade of commerce . . . ." RCW 19.86.020.

64. Double Down and IGT have not violated any Washington statute, including but not limited to Washington's Gambling Act, RCW 9.46.010, *et seq*. ("Gambling Act"), the legislative declaration of which provides:

> The public policy of the state of Washington on gambling is to keep the criminal element out of gambling and to promote the social welfare of the people by limiting the nature and scope of gambling activities and by strict regulation and control.
>
> It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling and organized crime, to restrain all persons from seeking profit from professional gambling activities in this state; to restrain all persons from patronizing such professional gambling activities; to safeguard the public against the evils induced by common gamblers and common gambling houses engaged in professional gambling; and at the same time, both to preserve the freedom of the press and to avoid restricting participation by individuals in activities and social pastimes, which activities and social pastimes are more for amusement rather than for profit, do not maliciously affect the public, and do not breach the peace.

65. Accordingly, an actual and justiciable controversy exists between Plaintiffs and Defendants concerning whether Double Down and IGT have violated the CPA, and the Gambling Act.

66. For the reasons alleged above, Plaintiffs seek a judicial determination and order from the Court declaring that Double Down and IGT have not violated the CPA or the Gambling Act.

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THIRD CAUSE OF ACTION
No Unjust Enrichment

67. Plaintiffs re-allege and incorporate by reference the allegations of Paragraphs 1-65 of this Complaint, as though fully set forth herein.

68. An actual justiciable controversy exists between the parties with respect to whether Plaintiffs have been unjustly enriched in connection with Defendants' playing DoubleDown Casino games.

69. Benson and Simonson's unjust enrichment claim is based on the allegation that DoubleDown Casino constitutes illegal gambling. (Exhibit A, at ¶¶ 72-75.) The same state law issues regarding gambling as described above and in the First Cause of Action are determinative of their allegations of unjust enrichment.

70. Double Down and IGT have not been unjustly enriched, as the DoubleDown Casino is not an unlawful gambling game.

71. Defendants contend that Double Down and IGT "should not be permitted to retain the money obtained from [Defendants] and the members of the Class, which [Double Down and IGT] have unjustly obtained as a result of their unlawful operation of unlawful online gambling games." (Exhibit A, at ¶ 74.)

72. Accordingly, an actual and justiciable controversy exists between Plaintiffs and Defendants concerning whether Double Down and IGT have been unjustly enriched in connection with Defendants' playing DoubleDown Casino games.

73. For the reasons alleged above, Plaintiffs seek a judicial determination and order from the Court declaring that DoubleDown Casino is not an unlawful gambling game and that Double Down and IGT have not been unjustly enriched.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. For a declaration that Benson and Simonson are not entitled to recover under RCW 4.24.070;

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2. For a declaration that the virtual chips purchase and used by Benson and Simonson in DoubleDown Casino games are not "things of value" as defined by RCW 9.46.0285;

3. For a declaration that DoubleDown Casino games played by Benson and Simonson are not illegal gambling games under Washington law;

4. For a declaration that Benson and Simonson's play did not constitute violations of Washington's gambling laws;

5. For a declaration that Plaintiffs have not violated the CPA;

6. For a declaration that Plaintiffs have not been unjustly enriched;

7. For entry of judgment in favor of Plaintiffs for the amount of all costs incurred in this action; and

8. For such other and further relief this Court deems just.

DATED this 10th day of September, 2020.

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Attorneys for International Game Technology

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ATTESTATION PER GENERAL RULE 30

The e-filing attorney hereby attests that concurrence in the filing of the document has been obtained from each of the other signatories indicated by a conformed signature (s/) within this efiled document.

Dated: September 10, 2020

By *s/ Lauren M. Case*
Lauren M. Case

Attorneys for International Game Technology

Exhibit 15

Exhibit 2

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,

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

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

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

III. DISCUSSION

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

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

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

IV. ORDER

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

DATED this 18th day of October, 2018.

BUD SIZEMORE – CHAIR

Julia Patterson
JULIA PATTERSON – VICE CHAIR

ALICIA LEVY

CHRIS STEARNS

ED TROYER

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NOTICE: RECONSIDERATION

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

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

NOTICE: PETITION FOR JUDICIAL REVIEW

YOU ALSO HAVE THE RIGHT TO APPEAL THIS FINAL ORDER TO SUPERIOR COURT, PURSUANT TO THE PETITION FOR JUDICIAL REVIEW PROVISIONS OF RCW 34.05.542. ANY PETITION FOR JUDICIAL REVIEW OF THIS FINAL ORDER MUST BE FILED WITH THE COURT AND ALSO SERVED UPON BOTH THE COMMISSION AND THE OFFICE OF THE ATTORNEY GENERAL WITHIN THIRTY (30) DAYS AFTER THE DATE THIS FINAL ORDER IS SERVED UPON YOU.

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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)	DISSENT TO THE ORDER DENYING REQUEST TO ISSUE DECLARATORY ORDER

I. INTRODUCTION

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

II. DISCUSSION

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

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

> (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

(c) That the uncertainty adversely affects the petitioner; and
(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.

WAC 230-17-180(1).

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

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

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

Big Fish's online social games do not constitute gambling for purposes of RCW 9.46.0237. The Gambling Act defines "gambling" to mean "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.

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

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

Thus, I would conclude that Big Fish games are not "gambling" within the meaning of RCW 9.46.0237.

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

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

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

3. The Commission Should Act.

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

For these reasons, I respectfully dissent.

DATED this 18th day of October, 2018.

CHRIS STEARNS, COMMISSIONER

Exhibit 16

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ADRIENNE BENSON AND MARY SIMONSON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DOUBLE DOWN INTERACTIVE, LLC, a Washington limited liability company, and INTERNATIONAL GAME TECHNOLOGY, a Nevada Corporation,

Defendants.

Case No. 2:18-cv-00525-RSL

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS UNDER FED. R. CIV P. 12(B)(1) AND MOTION TO ABSTAIN

ORAL ARGUMENT REQUESTED

NOTE ON MOTION CALENDAR:
October 9, 2020

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Plaintiffs mistakenly argue that there is no "unsettled question of law," yet they admit that *Kater v. Churchill Downs, Inc., 886 F.3d 784 (9th Cir. 2018)* is "binding in the Ninth Circuit ***until the state courts provide some contrary indication that Kater is incorrect*** . . . ." Opp'n 14 (emphasis added). This argument betrays their own cause, underscoring that a decision from a Washington court is indeed necessary to "settle" the law. It also highlights the reason that abstention is so important in this case – *Kater* is not binding on even the lowest court in Washington. Plaintiffs also unwittingly make the case *for* abstention – they agree a federal court should avoid rendering decisions in areas subject to state control and regulation (such as gambling) (Opp'n 13), agree that gambling is subject to parallel state oversight (Opp'n 16), and agree that the court is asked to decide a state gambling law issue that will last only until such time as it is undone by state court rulings (Opp'n 14). Thus, this is the rare case where this Court should abstain while the key underlying issue is decided by a Washington court that will, in turn, bind other Washington courts, Washington agencies, Washington residents, Washington businesses, and this Court.

Notably, Plaintiffs do not controvert that regulation of gambling lies at the heart of a state's sovereign power. Nor do Plaintiffs claim they would be prejudiced if the state court decides whether the sale and use of virtual chips in video games offering no chance to win any money constitutes unlawful "gambling" under Washington law. Contrary to Plaintiffs' counsel's self-serving view of settlements, which would provide millions of dollars in recovery to consumers (and themselves), they fail to consider the broader chilling effect that the unwarranted stretch of *Kater* will have on Washington's prolific video game industry. Dkt. 138, p.1.

There is no advantage, and rather plenty of detriment, if this court does not allow the state courts to resolve the merits of the claim of unlawful gambling under state law as well as the defenses. Abstention is warranted under multiple doctrines; this Court should abstain and stay this case in order that the state court case may be litigated by the parties.

I. ARGUMENT

While Plaintiffs acknowledge that *Kater* is only binding in this court until a state court decision to the contrary comes along, they offer no reason why these defendants cannot seek that

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state court ruling themselves. They offer no reason why Defendants must wait for a serendipitous hypothetical lawsuit to resolve these state law gambling issues somehow before a final non-appealable judgment is reached in this case. Every new "social casino" defendant sued in this district by a putative class on the same theory of unlawful gambling[1] will be met with the same mental gymnastics – that *Kater* controls the question of law until a contrary state law decision occurs, but defendant cannot ask the court to abstain and let the state court decide. Under Plaintiffs' misguided view of abstention, the maverick state court case will *never* materialize.

Plaintiffs' repetition of the dubious assertion that *Kater* is a merits decision – does not make it so. *See Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1190-91 (9th Cir. 2003) (rejection of 12(b)(6) motion is not a decision which considers merits). In any event, the critical issue is that *Kater* does not control anything at the state level under state law or policy, nor the outcome of this case on the merits. The result in *Kater* is indisputably contrary to the only known manifestations of Washington state policy – the prior guidance of the Commission and continuing lack of any prosecutorial action – whether or not such evidence has been found admissible or "binding" in federal court civil actions to date. The fact that *Kater* is opposite to the reality of policy and law enforcement in Washington is a major red flag signaling the need for state self-determination.

This case hardly presents ordinary common law theories and straight-forward statutory application as in the cases cited by Plaintiffs. There is no legislative history that suggests RCW 9.46.240 was intended to apply and criminalize any mere extension of time of playing a game that is not a gambling game. The law at issue is capable of different interpretations. To the extent the "extension" language was considered in the *dicta* of *Bullseye Distributing LLC v. State Gambling Commission*, 127 Wn. App. 231 (2005), the term "extension" was construed as offering the privilege to play at a game to win cash, and not a mere temporal "extension" of play time that could be applied to any video game. Dkt. 138, 11.

A. The Factors Establishing Colorado River Abstention Are Met.

Plaintiffs do not bring any federal claims. They do not dispute that gambling issues inure to state sovereignty. Instead, Plaintiffs rely upon two easily refutable factors. The remaining

[1] See *Heathcote v. Grande Games Limited*, Case No. 2:20-cv-01310-RSM, filed September 1, 2020.

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Colorado River factors also plainly support abstention. *Colorado River v. Water Conservation District v. United States,* 424 U.S. 800 (1976).

1. The State Court Action Is Not Barred and Will Not Be Dismissed.

Plaintiffs' citation to Fed. R. Civ. P. 13 fails because that rule bars a second action *only where the first action proceeded to the merits*. *See, e.g*., *Lexington Ins. Co. v. Langei ,* 2014 WL 3563380, at *3 (W.D. Wash. July 18, 2014); *Mitchell v. CB Richard Ellis Long Term Disability Plan*, 611 F.3d 1192, 1201 (9th Cir. 2010); *Fire King Int'l, LLC v. Corp. Safe Specialists, Inc.*, 2007 WL 4098067 (N.D. Tex. Nov. 16, 2007) at *1; Fed. R. Civ. P. 13, adv. comm. n.7 (1937). Indeed, this Court considered Plaintiffs' argument that Defendants' state claims are barred by the failure to plead them as counterclaims in *Langei*, finding this very argument to be premised on a "misunderstanding" of Rule 13: "[a]lthough the failure to plead a compulsory counterclaim in a prior action might bar a subsequent suit, the legal theory leading to such result is the doctrine of *res judicata*, which operates only after the first case, in which the compulsory counterclaim was omitted, has reached final judgment . . . Rule 13 does not itself prevent the filing of a separate lawsuit instead of a compulsory counterclaim." *Langei,* 2014 WL 3563380, at *3. See also *Oplink Commc'ns, Inc. v. Finisar Corp*., 2011 WL 3607121, at *3 (N.D. Cal. Aug. 16, 2011); *Adam v. Jacobs*, 950 F.2d 89, 93 (2d Cir.1991) ["Nothing in Rule 13 prevents the filing of a duplicative action instead of a compulsory counterclaim."]). Accordingly, *Chew v. Lord*, 143 Wn. App. 807 (2008), which involved a second-filed case in Washington after a Nevada state court had reached the merits, is entirely distinguishable.

Likewise, Plaintiffs' comparison to *Moi v. Chihuly Studio, Inc.,* 2020 WL 1917492, *1 (Wn. Ct. App. April 20, 2020), is inapposite. There, *plaintiff* filed the first and the second suit, and the second-filed suit for defamation was based on statements made in the defendant's counterclaim *in the first filed action*. It was also decidedly a measure of harassment. Here, Defendants did not file two lawsuits. Moreover, Defendants' state court suit is an inverse declaratory judgment, i.e. not a compulsory counterclaim. Since Plaintiffs have challenged the legality of the subject video games, "it would have been superfluous for [Defendants] to file a counterclaim to establish the opposite." *Citizens for Free Speech, LLC v. Cty. of Alameda*, 338 F.

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Supp. 3d 995, 1006 (N.D. Cal. 2018) (citing cases), *aff'd*, 953 F.3d 655 (9th Cir. 2020). Where an issue of liability is already before the court and defendant denies liability, there is no obligation to deny liability again with an inverse declaratory counterclaim. *Id*.

Nor would a state court have any reason to stay the Washington Action based upon the "priority of action" doctrine, which seeks to prevent "unseemly, expensive, and dangerous conflicts of jurisdiction and of process." *Bunch v. Nationwide Mut. Ins. Co*., 2014 WL 720881, at *3 (Wn, Ct. App. Feb. 3, 2014) (citations omitted). It is illogical to think the superior court would stay its case after this court has stayed this action for the very reason that the state court should decide the issue of state law. In none of the cases cited by Plaintiffs (Opp'n 11) was there *any* reason why the first filed proceeding should not proceed, much less multiple grounds for abstention and subject matter squarely within the police power of the state. *See, e.g*., *Bunch*, 180 Wn. App. at 40-41; *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 111 Wn.App. 586 (Wn. Ct. App. 2002); *City of Yakima v. International Association of Fire Fighters, AFL-CIO, Local 469*, 117 Wn.2d 655 (Wn. 1991).

2. Defendants Are Not Forum Shopping.

Nor are Plaintiffs' accusations of forum shopping appropriate. Plaintiffs identify no advantageous procedural or evidentiary rules in state court. Washington law applies in each forum. Washington courts could bind federal decisions going forward, but the inverse is not true, which unmistakably makes the state court a superior forum. Ensuring the important state gambling issues are decided by the proper court is not forum shopping. Nor, under *Seneca Ins. Co. v. Strange Land, Inc*., 862 F.3d 835 (9th Cir. 2017), have Defendants sought a new forum after facing any setbacks in the "original proceeding." Plaintiffs double-count Defendants' motion to compel arbitration and the appeal, although neither addressed whether the merits should be decided in state or federal court. Plaintiffs double-count Defendants' pursuit of certification but do not contend it is untimely or this motion are untimely. This case is Defendants' *original* proceeding, and the court has not proceeded substantially, or indeed at all, on the merits of this case.

3. Piecemeal Litigation is a Risk if this Court Retains Jurisdiction.

Plaintiffs fail to demonstrate why state court resolution of the declaratory action would not

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resolve the liability questions asserted in this case. The state court complaint is the inverse of every claim asserted by Plaintiffs. Dkt. 138, Ex. 1. State court proceedings would indisputably resolve whether the sale of virtual chips to be used in games of chance without opportunity for any cash prize is – or is not – unlawful gambling under Washington law. *Id*. The state court judgment would support – or not – every one of Plaintiffs' claims, as each count of Plaintiffs' Amended Complaint is premised upon the allegation that unlawful gambling occurred. Plaintiffs fail to posit any outcome on the merits that would not answer the threshold gambling law liability issue. They acknowledge, rather, that "the only way the state court action could end the federal litigation is if the Defendants prevail on their claims in their entirety in state court." Opp'n 8.

Plaintiffs ignore Defendants' state court pleading and instead try to sow doubt with completely distinguishable cases. In *Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 913 (9th Cir. 1993), the Ninth Circuit declined to abstain because the possibility that an odd award in favor of AMD on a breach of contract claim from an earlier arbitration would be reversed through the state appellate review process was sufficient to raise a substantial doubt as to whether the state proceedings would end the litigation (*id*., at 913 n.6) and because it was unclear that the arbitration award, even if it were affirmed, would collaterally estop Intel's federal copyright claims over which the federal court possessed exclusive jurisdiction. Similarly, *York v. Starbucks Corp.*, 2010 WL 11493197 (C.D. Cal. Aug. 6, 2010), involved a federal court which had already decided a motion for summary judgment and could not predict how differences with its rulings and a third parties' appeal of a similar state court case might pan out. *See also McDonald v. Gurson*, 2017 WL 3531766 at *5 (W.D. Wash. Aug. 17, 2017) (movant expressed no federal policy and argued against piecemeal litigation only on the basis that the same issues would be litigated in state and federal court); *Wells Fargo Bank, N.A.*, 2014 WL 5364120 (D. Nev. Oct. 21, 2014) (substantial doubt where court will have to address Plaintiff's fraudulent transfer claims if guarantees are found enforceable in Arizona litigation).

The fact that Defendants' state court action – or indeed any state action "contrary to *Kater*" – could render these proceedings duplicative, unnecessary and, in fact, a nullity, presents special concerns about "piecemeal litigation" under *Colorado River*. "Piecemeal litigation occurs when

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different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results." *Seneca*, 862 F.3d at 842. Unlike *Seneca*, this case does not involve the workaday application of "ordinary contract and tort issues," such that the likelihood of different results is all the greater. *Id.* at 843. As Plaintiffs acknowledge, a decision from a state court (or the Commission) occurring at any time in the next several years while this case and appeals run their course could completely undo *Kater* and any decisions based upon it. And while Plaintiffs project that there would also be appeals in the state court action, those appeals, at the very least, will settle the state law issues in a way that all state and federal courts will be obligated to follow. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); *Hanna v. Plumer*, 380 U.S. 460 (1965).

Absent a stay of this case, there is a plain risk that this case and appeals could proceed for years, and yet be upbraided at any time. This case therefore demonstrates "exceptional circumstances" demonstrating that "piecemeal" litigation would be particularly problematic due to the risk of inconsistent judgments. *Id.* at 842. Asking a federal court "to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication" is to be avoided. *R.R. Comm'n. of Tex. v. Pullman Co.*, 312 U.S. 496, 499-500 (1941) ("The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court"); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 30 (1959) ("The consequence of allowing this to come to pass would be that this case would be the only case in which the Louisiana statute is construed as we would construe it, whereas the rights of all other litigants would be thereafter governed by a decision of the Supreme Court of Louisiana quite different from ours"). Conducting a competing federal action to determine and apply state law that would be trumped by any contrary state or agency action is wasteful and runs expressly counter to the constitutional law and federal policy allowing states the right to govern themselves concerning the subject of gambling. Dkt. 138, 8-9.

4. Order in Which the Forums Gained Jurisdiction.

Plaintiffs unfairly conflate the arduous procedural history of *Kater* and other cases with this case. Opp'n 5. Nor is it fair that defendants here should be incidental victims of timing. Defendants were sued in 2018 after *Kater* and only because of *Kater*. That the defendants in *Kater*

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did not move for abstention or for certification in 2015 when they were first sued was *their* tactical decision. Nor is it significant that the Ninth Circuit did not, *sua sponte*, decide to certify a question or abstain. The only issue presented in *Kater* was whether the facts of a complaint, taken as true, failed to state a cause of action. And when the Commission failed to provide any ruling on the Big Fish Petition, Big Fish tactically chose not to appeal. Contrary to Plaintiffs' insinuations based on a letter Double Down submitted during the public commentary period, Double Down had no standing to contest the Commissions' patent abdication of its statutory authority. *See* Dissent, Order Denying Request to Issue Declaratory Order[2]; RCW 9.46.070(11), (22); RCW 9.46.210(3).

This case remains in preliminary stages without any considerations on the merits. Defendants moved to compel arbitration based upon Plaintiffs' repeated exposures to a prominent hyperlink signaling that the use of the services were subject to terms and conditions, including that one of the Plaintiffs clicked on the hyperlink directly next to the terms and conditions. While the appellate court did not enforce the "browsewrap" terms, there are no allegations that motion was frivolous. The case returned to this Court in February 2020. Defendants filed a timely Motion for Certification on June 17, 2020 (Dkt. 103), a timely motion to reconsider on August 25, 2020 (Dkt. 133) and this motion on September 10, 2020 (Dkt. 138).[3] Each of Defendants' pending motions, including the a motion to strike nationwide class allegations (Dkt. 128), relies upon the undisputed and critical point of law that gambling is a subject particularly reserved to the states, that *Kater* is not binding on state courts or agencies, and that the issues presented by Defendants' motions go beyond the periphery considered in *Kater*. But this motion is based on Fed. R. Civ. P. 12(b)(1) as well as the necessary goal of harmony between federal and state courts promoted by each type of abstention, and it is not merely duplicative of the motion to certify. Opposing this motion, rather, is Plaintiffs' counsel's "last ditch hail Mary" to try keep *Kater* in place for as long as they can.

B. *Thibodaux* and *Burford* Abstention.

The Supreme Court in *Colorado River* elegantly reviewed and categorized the various types of abstention. 424 U.S at 814. Federal courts may abstain where an underlying state court

[2] https://www.wsgc.wa.gov/sites/default/files/public/news/big-fish/FinalOrder-BigFishGamesPetforDecOrder.pdf

[3] Double Down also filed Motions for Protective Order on Plaintiffs' discovery to third party platforms on May 14 and July 2, 2020. Dkts. 92, 109.

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determination may dispense with a federal constitutional question (*R.R. Comm'n. of Tex. v. Pullman Co.*, 312 U.S. 496 (1941)), where the exercise of federal review of the question would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern (*Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)), and where there are presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar people (*Thibodaux*, 360 U.S. 25). *Colorado River* observed that in some cases, the state question need not be determinative of state policy, rather "[i]t is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River,* 424 U.S. at 814. A decision on the merits in this case would be both disruptive of and readily displaced by state action. *Kater* has already proved disruptive, in that the Commission has taken down guidance which had been posted on its website for five years and inexplicably ceded its authority to decide the issue and to wait and watch *Kater*, when it should be the other way around. This is precisely the "unusual situation" to be avoided – where federal review risks having the district court become the "regulatory decision-making center." *See* Opp'n 17.

Plaintiffs concede, as they must, that "the regulation of gambling is a quintessentially state function and that federal court decisions have the potential to impede that function." Opp'n 16. But they fail to accept that the special nature of gambling is precisely why there are a "passel" of decisions in which federal courts have abstained from resolving claims under state gambling laws. Dkt. 138, 10. These gambling abstention cases control. *Snohomish Cty. Pub. Hosp. Dist. No. 2 v. Shattuck Hammon Partners, LLC*, 2011 WL 321827 (W.D. Wash. Feb. 1, 2011) is not to the contrary. That case did not even involve a merits issue, but rather a venue provision: "all suits against the public hospital district shall be brought in the county in which the public hospital district is located." *Id*. at *8 (quoting RCW 70.44.060(8)). This simple venue statute is indeed "plain and unambiguous." Interpretation of the gambling code, the Washington Consumer Protection Act ("CPA") and corresponding legislative intent and state policy, and then applying same to the facts, claims and defenses in this case is, however, not so simple. *Snohomish* is further

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distinguishable, as the outcome of the venue spat would have "little effect beyond the parties." *Id.* at *2. Conversely, the interpretation of "thing of value" to include any pay-to-play video game featuring a random extension of time to play has sweeping implications for the video gaming industry, a fact Plaintiffs do not rebut.

Plaintiffs' reliance on *Allegheny County v. Frank Mashuda Co.,* 360 U.S. 185 (1959), fares no better. There, the Supreme Court held that the interpretation of a state eminent domain statute did not rise to the level of difficult issues warranting abstention; on the same day it held in *Thibodaux* that abstention was warranted to determine the meaning of a state expropriation statute. The complex statutory interpretation and gambling regulatory issues Defendants have identified are far afield from the contract interpretation or real estate licensing issues in Plaintiffs' cases, and are more akin to the issues present in *Thibodaux* and *Johnson* warranting abstention. Dkt. 138, 11. The debate on how to interpret and apply Washington's gambling laws should be resolved by Washington State courts.

Plaintiffs' citations to *Kern-Tulare Water Dist. v. City of Bakersfield*, 828 F.2d 514, 517 (9th Cir. 1987), and *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 821 (9th Cir. 1982), are confusing because each of those cases involved federal antitrust claims over which the federal courts have *exclusive* jurisdiction and the analysis as to sovereignty was under *Parker* immunity, a doctrine commonly used as a defense in antitrust cases, which has nothing to do with Washington's sovereign interests in regulating gambling. *Parker v. Brown*, 317 U.S. 341, 359-60 (1943). There were not any unsettled issues in either case. *Kern-Tulare*, 828 F.2d at 517. Nor were there any special considerations of federal-state relations. *Id*. Nor were there any special considerations of federal-state relations. *Id*. Moreover, while *Turf Paradise* involved regulated gambling entities, the plaintiff asserted a federal antitrust claim to try to displace a competitor as a result of voiding a lease for a racetrack. *Turf Paradise*, 670 F.2d at 820. No Arizona gambling laws were interpreted or "involved." *See* Opp'n 19. The court declined to abstain because federal courts have exclusive jurisdiction over federal antitrust claims. *Turf Paradise*, 670 F.2d at 820.

In *Canton v. Spokane Sch. Dist. No. 81*, 498 F.2d 840 (9th Cir. 1974), plaintiffs sued a school district under 42 U.S.C. § 1983 for allegedly humiliating children whose parents did not

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pay school registration fees. The court rejected *Pullman* abstention where the Supreme Court of Washington had interpreted a statute raised by defendants, the condition precedent for that statute concerning 'textbooks and supplies' to apply had not occurred, the statute would not apply to all things covered by school registration fees, the state's Attorney General had opined on the subject twice, and the resolution of the registration fee issue by a state court would still not resolve the plaintiffs' § 1983 claims related to humiliation. *Canton*, 498 F.2d at 486. Similarly, in *Hill v. Snyder*, 900 F.3d 260 (6th Cir. 2018), there was "no unsettled state-law question" about prisoner rights to good time credits because the Michigan Supreme Court had ruled on the issue. *Id.* at 265.

Plaintiffs fare no better by mischaracterizing the gambling cases they do choose to discuss. *Chun v. State of N.Y.*, 807 F.Supp. 288 (E.D.N.Y. 1992), is on all fours with this case. The court in *Chun* observed that the precise question presented by that case was "whether the *type of out of state lottery ticket service* provided by Plaintiff *violates New York law*. It is apparently an issue of first impression in the New York courts." *Chun*, 807 F. Supp at 291 (italics added). The court found that *Burford* abstention was appropriate because the "the scope of laws regulating gambling and lotteries is clearly a matter of predominantly state concern. *Id*. at 292, citing *Ceraldi v. The County of Nassau*, Cv. 87-2204 (E.D.N.Y. Aug. 24, 1987)(invoking *Burford* abstention on the issue of *whether certain coin-operated amusement devices are gambling devices* under N.Y. Penal Law based on the state's overriding interest in controlling gambling).

In *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 720 (4th Cir. 1999), the Fourth Circuit abstained in reliance on *Thibodaux* and *Burford*. *Johnson* applied T*hibodaux* because the district court was necessarily trying to predict how the South Carolina Supreme Court would decide the question, and *Burford* because the gambling question presented a most basic problem of South Carolina public policy such that the state court system should have been permitted the first opportunity to resolve it. *Id*. What also mattered in *Johnson* is that respect be paid to the question of whether the alleged violation of the gambling code constituted state unfair trade practices. Johnson found that the district court also erred in "manning the rudder" of state gaming policy when it decided for itself that violations of the payout limit were unfair trade practices as a matter of law. Here, Plaintiffs make the same claim that gambling code violations fall within the CPA.

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That one party in *Johnson* argued the statute was ambiguous does not distinguish the case, as the same arguments against application of RCW 4.24.070 exist here. Dkt. 138, 9-10. Plaintiffs may quibble with the difficulty of the question, or how much "raw material" *Bullseye* provides (Opp'n, 15) for an *Erie* guess, but what cannot be avoided is that no Washington court has considered whether the type of games like the ones in DoubleDown Casino are unlawful gambling, or, whether any type of gambling may give rise to a claim under the CPA. This court is being asked to predict how the Washington Supreme Court would rule on both state gambling law issues, and more. *Burford* abstention does not require a difficult question at all; it is enough that the federal court is being asked to determine basic problems of public policy that should be decided by the state. This case more than meets that standard.

And, just as in *Johnson*, there a number of novel questions of state law "percolating" through the case that were not considered in *Kater* and which fall squarely within state regulatory powers. These issues include: whether the CPA may apply where the cause of action depends upon the alleged commission of a crime that is not recognized or treated as a crime by the law enforcement body of the State (Dkt. 138, 14:6-15); the felony implications for players having purchased virtual chips and played games under RCW 9.46.240 if their conduct is declared unlawful (Dkt. 138, 14:16-23); the application of the doctrine of lenity under Washington law to prevent an unfair schism between the and the imposition of civil liability under the RMGLA and the Commission's positive guidance and lack of prosecution, upon which Defendants relied (Dkt. 138, 13:17-21, 14:1-5); whether users' purchases for reasons other than continuing to play games is actionable (Dkt. 138, 12:22-23,) and whether buying chips to play video games is an *bona fide* business transaction (Dkt. 138, 13).

New issues novel to state law continue to "percolate." In *Johnson* it was improper for the federal court to commandeer South Carolina's enforcement efforts by requiring signs of a certain size and type to be displayed on video poker machines and requiring operators to maintain personal information of gamblers. *Johnson*, 199 F.3d at 723-24. Here, the proposed settlements in three other cases brought by Plaintiffs' counsel further illustrate the regulatory and statutory complexities that attend this case, i.e., agreeing that virtual chips are not "things of value" under

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Washington law where the games present a responsible gaming page, a self-exclusion method and assure that a user can play some form of the game without paying so that purchasing virtual chips is not necessary to play as assumed in *Kater*. Similarly, Defendants raise the defense in this case that the chips purchased by customers when not necessary to play are not "things of value," either. As in *Johnson*, state regulatory issues are at stake.

Considering all that this court is being asked to decide in lieu of the Commission, Plaintiffs' assertion (Opp'n 19) that "[w]hatever merits decision is reached in this Court, the regulatory decision-making center' will remain in Washington is a meaningless platitude. Similarly untrue are Plaintiffs' assertions that the law is "settled," that there is no "active political debate," and that Washington law has been "consistent for decades." Opp'n 17; Opp'n 18 n.7. The Commission held hearings and published material for 5 years approving of the Double Down game. It took them down after *Kater*, conducted a public hearing and has yet failed to make any decision. There have been scores of public proceedings and legislative proposals. *See*, Opp'n pp. 5-6. Nothing is settled, at all.

C. *Pullman* Abstention Is Also Appropriate.

Plaintiffs contest whether there is an unsettled state law question, which is addressed at length above and in Defendants' Motion. Plaintiffs also quibble, without authority, that the constitutional problems presented by applying Washington law on a nationwide basis are not sufficient. In *Club Ass'n of W. Virginia, Inc. v. Wise*, 156 F. Supp. 2d 599 (S.D. W. Va. 2001), *aff'd*, 293 F.3d 723 (4th Cir. 2002), the district court abstained from deciding federal constitutional claims where it determined that "resolution of any of the State constitutional claims in Plaintiffs' favor would negate consideration of the federal claims." *Id*. at 619. In this case, a state court finding on the liability issues in defendants' favor will negate this court's consideration of the constitutional problems presented by applying Washington law to a nationwide class. "At bottom, abstention requires federal courts to respond with caution when far-reaching equitable relief is sought to upset regulation in areas traditionally committed to state control, especially when the state sovereign itself has struggled with drawing the right balance." *Id*.

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DATED this 9th day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED this 9th day of October, 2020.

s/ Lauren M. Case
Lauren M. Case

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Exhibit 3

☐ **EXPEDITE**
☐ No Hearing Set
☒ Hearing is set:
Date: March 5, 2020
Time: 9:00 AM
Judge/Calendar: The Honorable James J. Dixon

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

DOUBLE DOWN INTERACTIVE, LLC, a Washington limited liability company, and INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation,

Plaintiffs,

v.

ADRIENNE BENSON, an individual, and MARY SIMONSON, an individual,

Defendants.

No. 20-2-02023-34

DOUBLE DOWN INTERACTIVE, LLC AND INTERNATIONAL GAME TECHNOLOGY'S RESPONSE IN OPPOSITION TO ADRIENNE BENSON AND MARY SIMONSON'S MOTION TO DISMISS OR STAY

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State Cases

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I. INTRODUCTION

This dispute involves the interpretation of Washington State law, and therefore, should be decided by this Court.

Double Down Interactive, LLC ("Double Down") and International Game Technology ("IGT") seek a declaration, under RCW 7.24, interpreting Washington statutes and declaring that a video game created by a Washington company, DoubleDown Casino, does not violate state law. What the parties do not dispute is remarkable. The parties do not dispute that:

- RCW 7.24 authorizes this action.
- The Washington gambling code, the Washington loss recovery act, and the Washington Consumer Protection Act, control the issue of legality of DoubleDown Casino.
- No Washington state court has considered whether video games such as those offered by Double Down which offer no cash or merchandise prize is unlawful gambling under Washington law. Complaint for Declaratory Relief ("Compl."), ¶ 10.
- The regulation of gambling lies at the heart of a state's sovereign power.
- Benson and Simonson would not be prejudiced if the state court decides whether the sale and use of virtual chips in video games offering no money prize constitutes unlawful "gambling" under Washington law.

Benson, Simonson, and their aspiring class counsels' preference to stay in federal court and avoid a state court ruling is of no consequence and does not outweigh the importance of this state court deciding this state law matter—what is or is not gambling under state law unmistakably is for state courts to decide and the province of the police power of the state of Washington. Accordingly, this dispute belongs in a Washington court. This Court can and should retain jurisdiction to resolve this wholly state law controversy.

Neither of Benson and Simonson's two arguments for dismissal establish otherwise:

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First, Double Down and IGT's declaratory judgment claims which seek a declaration of non-liability are not compulsory counterclaims. There is no requirement under Fed. R. Civ. P. 13(a) for a party to plead, as a counterclaim, a declaratory action asserting what has already been denied in a party's answer. In addition, there is no basis to dismiss any claim as a compulsory counterclaim not raised in a prior federal action where there has been no judgment on the merits in the federal action.

Second, Benson and Simonson's simplistic argument for a rigid application of the priority of action doctrine does not take into account the narrower scope of this case and the well-accepted exceptions to that doctrine that are clearly applicable here. The interests of justice and equitable considerations favor this Court retaining jurisdiction and for it to authoritatively interpret Washington law.

The Court should deny Benson and Simonson's motion to dismiss and motion to stay. This Court should proceed to resolving the parties' dispute on the merits.

II. STANDARD OF REVIEW

A CR 12(b)(1) motion to dismiss challenges the court's subject matter jurisdiction over the case. *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp*., 172 Wn. App. 799, 806, 292 P.3d 147 (2013), *aff'd on other grounds*, 181 Wn.2d 272, 333 P.3d 380 (2014). A motion to dismiss under CR 12(b)(1) "may be either facial or factual." *Id.* In the facial challenge at issue here, "the sufficiency of the pleading" is the sole issue. *Id*. at 806-07.

Under CR 12(b)(6), a court "presume[s] all facts alleged in the plaintiffs' complaint are true." *West v. Washington State, Washington Ass'n of Cnty. Officials,* 162 Wn. App. 120, 128, 252 P.3d 406 (2011) (citing *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 717, 189 P.3d 168 (2008)). "[A]nd all reasonable inferences are drawn in the plaintiffs' favor." *Gorman v. City of Woodinville*, 175 Wn.2d 68, 71, 283 P.3d 1082 (2012) (citing *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998)).

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III. BACKGROUND AND ALLEGATIONS

A. The Complaint Seeks to Clarify Washington State Laws in a Real and Substantial Controversy Between the Parties.

Double Down and IGT seek a declaration that (1) the virtual chips purchased and used by Benson and Simonson in DoubleDown Casino are not "things of value" as defined by RCW 9.46.0285; (2) that DoubleDown Casino games played by Benson and Simonson are not illegal gambling games under Washington law; and (3) that Benson and Simonson are not entitled to recover under RCW 4.24.070, the Washington Consumer Protection Act, RCW 19.18.010, et seq., or for unjust enrichment. Compl. ¶¶ 6-7.

Double Down maintains its U.S. headquarters in Washington State, as do many other video game developers and publishers. *See id.* ¶¶ 4, 13. The video game industry represents a substantial portion of Washington State's tech-driven economy, employing about 94,200 Washingtonians. *Id.* Washington ranks third in the country in the total number of video game developers, with nearly 300 such companies with offices in Washington, including major industry players and household names. *Id.*

Double Down and IGT filed this matter for a straightforward reason: "The State of Washington must be allowed to decide the novel issue of what is and what is not gambling within the State of Washington for itself." *Id.* ¶ 11.

B. Counsel for Benson and Simonson Tested Novel Theories Across the Country Until the Ninth Circuit Issued an Erroneous Ruling on Washington Law.

For years, Benson and Simonson's counsel, from a national law firm based in Chicago, tested their theories about holding video game companies liable under state gambling laws across the United States, with limited success. In a wave of lawsuits filed in 2015, federal district courts squarely rejected these theories as meritless, *including a lawsuit in Illinois against Double Down* based on the exact same theories now set forth in the federal case. *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731, 739 (N.D. Ill. 2016); *see also Mason v. Mach. Zone, Inc.*, 851 F.3d 315 (4th Cir. 2017); *Kater v. Churchill Downs Inc.*, No. 15-cv-612 MJP, 2015 WL 9839755 (W.D. Wash. Nov. 19, 2015), *rev'd*, 886 F.3d 784 (9th Cir. 2018); *Dupee v.*

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Playtika Santa Monica, No. 15-cv-1021, 2016 WL 795857 (N.D. Ohio Mar. 1, 2016); *Ristic v. Mach. Zone, Inc.*, No. 15-cv-8996, 2016 WL 4987943 (N.D. Ill. Sept. 19, 2016).

Benson and Simonson's counsel appealed their loss in the *Kater v. Big Fish* case in the Western District of Washington to the Ninth Circuit and found a narrow opening, applicable only to that case and its allegations, which they now seek to exploit. The Ninth Circuit's decision reversing the district court on a motion to dismiss (with no factual record), held that the plaintiff had pleaded a viable cause of action under Washington law in light of only the allegations in the complaint. *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 787-88 (9th Cir. 2018). Respecting an issue never directly considered by Washington state courts, based upon the allegation that the plaintiff was required to purchase virtual chips to continue game play, the Ninth Circuit determined that such virtual game chips could serve as a "thing of value" under the definition of the Washington gambling code—even though the virtual chips could only be used only for game play within a mobile game and were not redeemable for money, merchandise, or anything else of value outside the mobile app. *See id.* The *Kater* decision stands alone as an outlier among federal and state courts that have considered similar legal theories under the laws of several states.

Immediately after *Kater*, Benson and Simonson's counsel filed five nearly identical lawsuits against multiple video game development companies that have offered similar mobile "social casino" games, including against Double Down and IGT, in the Western District of Washington. Pressing their theory even further, Benson and Simonson have attempted to plead a nationwide class in the federal action to try to impermissibly impose Washington gambling law upon transactions conducted entirely outside of Washington by non-Washingtonians. *See* Defendants' Motion to Dismiss or Stay ("Mot."), Ex. 5 ¶ 37.

Importantly, the rationale of *Kater* demonstrably runs against the advice and guidance provided by the Washington State Gambling Commission (the "Commission"). The Commission considered social gaming during a public meeting on March 9, 2013 and subsequently posted its guidance in March 2014 stating that sites, such as DoubleDown Casino

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which is specifically mentioned, are not unlawful. Compl. ¶¶ 28-33. The Commission has taken no enforcement action at any time as to DoubleDown Casino or any other similar video game business. Double Down and IGT were aware of and relied upon the Commission's guidance and lack of enforcement. *Id*. ¶¶ 33-35. Double Down and IGT bring this action because Benson's and Simonson's attempt to use *Kater* to supply a federally issued definition of gambling subjects Double Down and IGT to parallel and contradictory oversight between the Commission and the federal court's decision in *Kater* is precisely why this action must be decided. *Id*. ¶ 38-39; *see also Johnson v. Collins Entm't Co.*, 199 F.3d 710, 719-20 (4th Cir. 1999) (federal court's attempt to interpret portions of state gaming statute "supplanted the legislative, administrative, and judicial processes of South Carolina and sought to arbitrate matters of state law and regulatory policy that are best left to resolution by state bodies"); *see also Metro Riverboat Assocs., Inc. v. Bally's La., Inc.*, 142 F. Supp. 2d 765, 775-76 (E.D. La. 2001) (abstaining from deciding RICO claim because it implicated important issues of Louisiana's gaming regulatory scheme). These quintessential state law issues should be decided by this Court, and thus bind, the federal courts going forward.

Moreover, the Ninth Circuit's statutory interpretation in *Kater* was wrong and shortchanged. The court in *Kater* disregarded the structure and enforcement mechanisms the Washington legislature has created and then substituted a new and conflicting, federal-court view of Washington law in place of the state Commission's guidance. *Kater*, 886 F.3d at 787-88. The Ninth Circuit also failed to apply and enforce the rule of lenity that Washington courts apply to penal statutes and failed to review state legislative history or to consider state legislative intent. *Id.* And further, the Ninth Circuit failed to consider that the state's definition of gambling was intended to include chips that allow "free play" in *real-money* gambling, which has nothing to do with video games that offer only entertainment and no monetary prize. *See id.*

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C. Double Down Casino Offers a Free-to-Play Video Game Experience Using Virtual Tokens That Players Use Only Within the Game.

In DoubleDown Casino, the game at issue here, players can download and play a variety of free to enjoy animations and virtual simulations that resemble slot machines. *See* Mot., Ex. 9 at 2-3 (citing Sigrist Declaration). The game never results in monetary prizes, and Benson and Simonson have not alleged that they ever misunderstood the fact that the only purpose of virtual chips is to use them within the game. *See id.* Because players receive additional free chips in a variety of ways, they need not purchase any virtual chips to play. *Id.* Contrary to Ms. Benson and Ms. Simonson's allegations in the federal action that users must purchase virtual chips, virtually no players of DoubleDown Casino purchase chips in order to continue to play. *Id.* In fact, neither Benson nor Simonson's purchases of virtual chips were required for them to continue game play. Compl. ¶ 58. Players purchase chips for the entertainment of owning and playing with a larger chip balance. *See id.* ¶ 57. Like many video games, DoubleDown Casino allows players to buy more chips before they receive more free chips. *Id.* Players buy chips despite knowing they could receive free virtual chips by waiting for the next allotment of free chips or by participating in promotions that award free chips. *See* Mot., Ex. 9 at 3. Benson and Simonson's novel theory is that these virtual chips constitute a "thing of value" under a longstanding Washington statute that, according to them, should result in billions of dollars in liability for offering illegal gambling based entirely on the point that players can use the chips for playtime. Not so, the fact that nearly all of Double Down's players do not purchase chips to continue play, automatically takes their transactions out of the ambit of the *Kater* decision.

D. Double Down and IGT Timely Challenge Jurisdiction in Federal Court and Consistently Deny Liability Under State Law.

Double Down and IGT have consistently denied liability under state law and rejected Plaintiff counsel's interpretation of the relevant state statutes, RCW 9.46.0285 and RCW 4.24.070. In their Answers to the First Amended Complaint that were due in the district court before the court granted a stay pending appeal, Double Down and IGT denied liability under each cause of action. Mot., Ex. 6 (Double Down Interactive, LLC's Answer to First Amended

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Class Action Complaint); Defendant International Game Technology's Answer to First Amended Class Action Complaint, Dkt. 74, *Benson v. DoubleDown Interactive LLC*, No. 18-cv-525 (W.D. Wash.) ("Federal Action") (attached hereto as Exhibit A). These theories for liability include claims for "recovery of money lost at gambling," a Consumer Protection Act claim that depends on a predicate violation of gambling law, and unjust enrichment—all of which Double Down and IGT denied. *See id.* Double Down and IGT also pleaded defenses to liability, including that Benson and Simonson failed to state a cause of action and that Double Down and IGT complied with state statutes and regulations, and furthermore, relied on government agencies. *See id.*

After litigating the threshold issue of arbitrability in the federal district court and on appeal, jurisdiction returned to the district court on February 20, 2020. Mandate, Federal Action, Dkt. 88 (attached hereto as Exhibit B). Seven months later, in September 2020, Double Down and IGT moved to dismiss the federal action or for the Court to abstain because the United States Constitution leaves the issue of gambling to the states. Mot., Ex. 14. That motion remains pending.[1] Benson and Simonson have not offered any argument that the motion to abstain is not timely, that it is spurious, or indeed why it should not be granted by the federal court. Double Down and IGT also filed this action at the same time. Double Down and IGT did not immediately serve the state court complaint on Ms. Benson and Ms. Simonson at the request of their counsel. Subsequently, counsel for the parties stipulated to accepting service without personal service and to an extension of time for Ms. Benson and Ms. Simonson to respond to the

[1] Benson and Simonson seek to distract with irrelevant information about settlements in other cases unrelated to these parties. While immaterial, the other cases involved parties who did not raise the same subject matter jurisdiction arguments. Benson and Simonson's counsel also fails to mention that these settlements also permit *the settling parties to continue to sell virtual coins for use in games of chance in Washington*, premised on the parties agreement that the sale of virtual coins are not used to extend the time of gameplay and are therefore "gameplay enhancements" rather than "things of value" for purposes of the gambling code. *See* Class Action Settlement Agreement, *Kater v. Churchill Downs Inc.*, No. 2:15- cv-00612-RBL (W.D. Wash. July 24, 2020), Dkt. 218-1 § 3.4 ("Big Fish Settlement Agreement"); Class Action Settlement Agreement, *Wilson v. Playtika Ltd.*, No. 3:18-cv-05277- RBL (W.D. Wash. Aug. 6, 2020), Dkt. 121-1 § 3.4 ("Playtika Settlement Agreement").

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complaint. Pursuant to that stipulation, Ms. Benson and Ms. Simonson filed the present Motion to Dismiss on February 5, 2021.

IV. ARGUMENT

A. The Court Has Subject Matter Jurisdiction over This Declaratory Action.

Subject matter jurisdiction refers to a court's ability to entertain a certain type of case. *Alim v. City of Seattle*, 14 Wn. App. 2d 838, 845, 474 P.2d 589, 593 (2020) (citing *In re Marriage of Buecking*, 179 Wn.2d 438, 448, 316 P.3d 999 (2013)). Superior courts undeniably have subject matter jurisdiction over any Uniform Declaratory Judgments Act lawsuit. *Id.* at 846. Benson and Simonson fail to argue any defect with respect to the Complaint lodged under the Uniform Declaratory Judgments Act, RCW 7.24, and thus, Defendants' 12(b)(1) motion is an improper vehicle for seeking dismissal of Double Down and IGT's declaratory relief complaint and must be denied.

B. Double Down and IGT's Declaratory Judgment Claims Are Not Barred.

1. Double Down and IGT's claims are not compulsory counterclaims.

Where declaratory judgment claims are an inverse of the claims asserted in the complaint, filing a counterclaim is not only *not* compulsory under Fed. R. Civ. P. 13(a), such filings are discouraged as "superfluous" because the claims will necessarily be resolved by consideration of the merits of the complaint. *Citizens for Free Speech, LLC v. County of Alameda*, 338 F. Supp. 3d 995, 1006–07 (N.D. Cal. 2018) (collecting cases), *aff'd on other grounds*, 953 F.3d 655 (9th Cir. 2020). Raising an inverse counterclaim that is merely a negation of the claims in the complaint is therefore "duplicative, if not inappropriate." *Id.* There is no meaningful distinction between denying liability and seeking a declaration that one is not liable. *See id.* Furthermore, not compelling the filing of all inverse counterclaims makes practical sense because it promotes "the purpose of Rule 13(a) . . . to prevent multiplicity of litigation and to promptly bring about resolution of disputes before the court" by preventing the needless litigating of redundant counterclaims. *Id.* Because Benson and Simonson challenged the legality of the subject video games, "it would have been superfluous for [Double Down and IGT] to file a counterclaim to

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establish the opposite." *See id.* Where an issue of liability is already before the court and defendant denies liability, there is no obligation to deny liability again with an inverse declaratory counterclaim. *Id*.; *see also Tenneco Inc. v. Saxony Bar & Tube, Inc.*, 776 F.2d 1375, 1379 (7th Cir. 1985) (finding a counterclaim "repetitious and unnecessary" where "the original complaint puts in play all of the factual and legal theories").

None of the cases cited by Benson and Simonson considered the scenario at issue here—the filing of an inverse declaratory counterclaim in a second-filed action prior to a final judgment in the first-filed action. For example, Benson and Simonson cite to *Chew v. Lord*, 143 Wn. App. 807, 809-11, 181 P.3d 25 (2008), which is readily distinguishable. First, it did not concern an inverse declaratory counterclaim. *Id*. In *Chew*, the first-filed suit was a tort action brought in Nevada state court by a Washington-state resident, Lord, against the owner and employees of an abandoned mine where he was injured while participating in "an adult scavenger hunt." *Id*. After losing a motion for summary judgment in the first-filed action, one of the defendant employees in the first-filed suit, Chew, brought a second suit in King County Superior Court "alleging breach of contract, requesting an award of damages, and seeking a declaratory judgment that Lord had a duty to defend Chew in the Nevada action" because Lord had signed a waiver prior to participating in the adult scavenger hunt. *Id.* at 809-10. All of Chew's claims were dismissed on the basis that they constituted compulsory counterclaims in the Nevada state action that were thereby barred in the King County Superior Court action. *Id.* Unlike here, the declaratory judgment claim in the second-filed suit was not an inverse of the claims in the complaint in the first-filed suit because whether or not Lord owed Chew a duty to defend Chew would not have been resolved by the adjudication of the tort claims raised in the complaint. Moreover, unlike here, the second suit was not filed until *after* summary judgment had been ordered in the first-filed suit thereby triggering the doctrine of res judicata which operates to bar unpled compulsory counterclaims. *Id.*; *see infra* § IV.B.2.

Benson and Simonson's reliance upon *Tallman v. Durussel*, 44 Wn. App. 181, 721 P.2d 985 (1986) is also unavailing because the second-filed suit came only *after* a jury reached a

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verdict in the first suit. *Id.* at 182. In contrast, no final decision has been reached in Benson and Simonson's federal action that would bar the claims at issue here.

Benson and Simonson's reliance upon an unpublished opinion of the Washington Court of Appeals, *Moi v. Chihuly Studio, Inc.*, No. 79756-5-I, 2020 WL 1917492 (Wn. App. Apr. 20, 2020), is also unwarranted. There, the *plaintiff* filed the first and the second suit, and the second-filed suit for defamation was based on press statements related to the defendant's counterclaim *in the first filed action. Id*. at *1. In *Moi*, the dispute commenced when an artist, Moi, sued an art studio in federal court for a declaration that Moi was a co-author of certain pieces of artwork. *Id.* Moi then filed a second action in state court asserting defamation based on press statements about the defendant's counterclaim in Moi's first suit that he never worked for the art studio or participated in the creation of the artwork at issue. *Id.* The appellate court ruled that dismissal of the defamation claim was proper because it should have been asserted as a counterclaim in the prior federal lawsuit. *Id.* Notably, the dismissal of the second suit was only *after* a judgment was made in the first suit. *Compare Moi v. Chihuly Studio, Inc.*, 2019 WL 2548511 (W.D. Wash. June 20, 2019) (granting defendants' Motion for Summary Judgment on June 20, 2019), *with Moi v. Chihuly Studio, Inc.*, 2020 WL 1917492 (dismissing claims not raised in first-filed action on April 20, 2020). This fact further distinguishes *Moi* from the present situation where the federal court has not issued any final decisions.

Ms. Benson and Ms. Simonson's reliance upon *Schoeman v. New York Life Insurance Co.*, 106 Wn.2d 855, 726 P.2d 1 (1986) is similarly misplaced. As in *Moi*, the purported compulsory counterclaim at issue in *Schoeman* was not the opposite of claims already raised and denied by answer in the other action and were only deemed to be barred after a final decision was reached in the first action. *Schoeman*, 106 Wn.2d at 861-62, 866-67. In *Schoeman*, the first-filed case was an interpleader action commenced by an insurer following the death of one of its policy-holders, Mr. Schoeman. *Id.* at 857. Ms. Schoeman, the deceased's wife, was named as a defendant and possible claimant in the interpleader action. *Id.* The insurer sought and was granted an order of discharge for $100,000 that Ms. Schoeman did not object to. *Id.* at 858.

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Following the discharge in the first-filed action, Ms. Schoeman filed a second suit for wrongful death against the insurer claiming they were responsible for her husband's death. *Id.* The *Schoeman* court found the wrongful death claims to be independent and separate claims that were logically related to the insurance interpleader claims such that they should have been raised simultaneously in the federal action. *Id.* at 865-66.

2. Compulsory counterclaims cannot be barred without final judgment in the first case.

Setting aside the fact that Double Down and IGT's declaratory judgment claims are not compulsory counterclaims in the federal action, even if they were, they are not barred here because the Federal Action has not reached a final judgment. Fed. R. Civ. P. 13 bars a second action *only where the first action proceeded to the merits*. *See, e.g.*, *Lexington Ins. Co. v. Langei*, 2014 WL 3563380, at *3 (W.D. Wash. July 18, 2014) (stating that compulsory counterclaims are not barred until first case has reached final judgement); *Fire King Int'l, LLC v. Corp. Safe Specialists, Inc.*, No. 3-07-CV-0655 G, 2007 WL 4098067, at *1 (N.D. Tex. Nov. 16, 2007) (finding "dismissal of a claim raised in a subsequent action that should have been raised as counterclaim in a prior action is appropriate only if the prior action has been concluded at the time the subsequent action is filed"); Fed. R. Civ. P. 13, advisory committee's note 7 (1937) (explaining that a compulsory counterclaim is barred if the prior action "proceeds to judgment without the interposition of a counterclaim as required by subdivision (a) of this rule").

Indeed, Benson and Simonson's argument that the claims in this case are barred by the failure to plead them as counterclaims in a case that had not proceeded to judgment was rejected in *Langei*, finding this very argument to be premised on a "misunderstanding" of Rule 13, explaining that "[a]lthough the failure to plead a compulsory counterclaim in a prior action might bar a subsequent suit, the legal theory leading to such result is the doctrine of res judicata, which operates only after the first case, in which the compulsory counterclaim was omitted, has reached final judgment . . . Rule 13 does not itself prevent the filing of a separate lawsuit instead of a compulsory counterclaim." *Langei*, 2014 WL 3563380, at *3; *see also Oplink Commc'ns, Inc. v.*

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Finisar Corp., 2011 WL 3607121, at *3 (N.D. Cal. Aug. 16, 2011); *Adam v. Jacobs*, 950 F.2d 89, 93 (2d Cir. 1991) ("Nothing in Rule 13 prevents the filing of a duplicative action instead of a compulsory counterclaim."). Without a final judgment in the federal case, the doctrine of res judicata cannot apply. *Schoeman*, 106 Wn.2d at 860 ("Res judicata requires a final judgment on the merits."). Res judicata operates to bar unpled compulsory counterclaims "only after the first case, in which the compulsory counterclaim was omitted, has reached final judgement." *Langei*, 2014 WL 3563380, at *3 (citing *Pochiro v. Prudential Ins. Co. of Am.*, 827 F.2d 1246, 1253-54 (9th Cir. 1987)). This is because "Rule 13 does not itself prevent the filing of a separate lawsuit instead of a compulsory counterclaim," but rather, it is the doctrine of res judicata that prevents the raising of a compulsory counterclaim once a final judgment has been reached in the first-filed action. *Id.* (citing William W. Schwarzer, A. Wallace Tashima, & James M. Wagstaffe, *Federal Civil Procedure Before Trial*, ¶ 8:1177 (2014)).

Ms. Benson and Ms. Simonson's attempt to diffuse this flaw in their motion by pointing to purported additional policies behind Washington's Civil Rule 13(a) is unavailing. Mot. at 8. Fed. R. Civ. P. 13(a) is the operative rule, and it only serves as a bar to subsequent suits if there is a final judgment in the first-filed action. *See* Fed. R. Civ. P. 1 ("[t]hese rules govern the procedure in all civil actions and proceedings in the United States district courts"). Only federal court precedent dictates the meaning and operation of Fed. R. Civ. P. 13(a), and res judicata is required to reach the result that Ms. Benson and Ms. Simonson urge. *See Langei*, 2014 WL 3563380, at *3-4 (denying request to deem unpled compulsory counterclaims as barred where federal action was still pending); *Oplink Commc'ns*, 2011 WL 3607121 (finding defendant in first-filed suit was not barred from bringing a claim that could otherwise have been a counterclaim when first-filed action had not yet reached final judgment at the time the subsequent action was filed) (citing *Fire King Int'l,*, 2007 WL 4098067, at *1 ("dismissal of a claim raised in a subsequent action that should have been raised as a counterclaim in a prior action is appropriate only if the prior action has been concluded at the time the subsequent action is filed")); *Zimpelman v. Progressive Ins. Co.*, No. C-09-03306 RMW, 2010 WL 135325 (N.D.

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Cal. Jan. 8, 2010) (when the first-filed case was dismissed without prejudice, the defendant was not barred from raising what could have been a counterclaim in the first-filed suit in a second suit because under Fed. R. Civ. P. 13(f), the defendant could have been allowed to amend its pleading to add a counterclaim). Since Double Down and IGT's declaratory judgment claims are not compulsory counterclaims and are not subject to the doctrine of res judicata, the motion to dismiss should be denied.

C. The Priority of Action Doctrine Is Inapplicable and Double Down and IGT's -Claims Fall Under Its Well-Accepted Exceptions.

Benson and Simonson alternatively seek to dismiss on a mechanical interpretation of the priority of action doctrine, or "first to file" rule, without considering the well-known exceptions to that rule and their applicability here. The purpose of the "priority of action" doctrine is to prevent "unseemly, expensive, and dangerous conflicts of jurisdiction and of process." *Bunch v. Nationwide Mut. Ins. Co*., 2014 WL 720881, at *3 (Wash. Ct. App. Feb. 3, 2014) (citations omitted). This Court's interpretation of the never-before decided Washington gambling law issues here will serve this purpose by leading to a finite and efficient resolution of the legal questions at issue between the parties.

1. Benson and Simonson cannot meet the threshold test to apply the priority of action doctrine.

Benson and Simonson have not established that the threshold test is met here. The priority of action doctrine applies "only when the cases involved are identical as to subject matter, parties, and relief," but, even then, the court need not "blindly apply a 'first-filed, first prevails' rule." *Am. Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 320, 796 P.2d 1276 (1990). A narrow claim between the same parties that seeks limited relief does not necessarily satisfy the priority of action doctrine's "identical" requirements. *Port of Kingston v. Brewster*, 191 Wn. App. 1036, at *4 (2015) (affirming decision not to apply the doctrine in favor of earlier-filed federal action where the state case was "narrowly limited" and therefore "was fundamentally different from the federal lawsuit in which [the party] sought to

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obtain [damages and fees]"). Double Down and IGT seek only declaratory judgments resolving questions of law, not damages.

Benson and Simonson's citation to *City of Yakima v. Int'l Ass'n of Fire Fighters, AFL-CIO, Local 469, Yakima Fire Fighters Ass'n*, 117 Wn.2d 655, 818 P.2d 1076 (1991), is misplaced. There, the plaintiff filed a second declaratory judgment action requesting identical relief in the same court after the first action was dismissed. *Id*. at 660-61. Similarly, in *Bunch v. Nationwide Mutual Insurance Co*., 180 Wn. App. 37, 39-40, 321 P.3d 266 (2014), the plaintiff twice filed actions seeking the same CPA injunctive relief in the same state court. This case is completely different. Here, Benson and Simonson first filed an action in federal court in an effort to seek a favorable forum despite the fact that Washington courts remain the exclusive judicial authority on Washington law. Double Down and IGT consistently defended against that suit on jurisdictional grounds, moving to compel arbitration as required by federal law, then appealing the district court's denial of that motion. Once the case was remanded, Double Down and IGT timely moved to certify questions to the Washington Supreme Court and moved to dismiss the federal action on the basis that there existed multiple grounds for abstention in favor of state court on a subject matter squarely within the police power of the state. Nowhere in *City of Yakima*, *Bunch*, or any other cases cited by Benson and Simonson is there any reference to a reason why the first-filed proceeding should not proceed, nor were there compelling reasons warranting the exercise of jurisdiction by the state court, as there are here.

2. Equitable considerations dictate that the priority of action doctrine not be applied.

Even if the requirements were met, the court has discretion to take into account "countervailing equitable considerations" that militate against "automatic application of the priority [of action] rule." *Am. Mobile Homes*, 115 Wn.2d at 321-22 (equitable factors the court may consider include, among others, the interests of justice); *see also Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 185-86 (1952) (even where an action is filed first, where equitable factors dictate, the first-filed action may be enjoined pending resolution of another

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action surrounding the same issues); *Ward v. Follett Corp*., 158 F.R.D. 645, 648 (N.D. Cal. 1994) (finding "district courts can, in the exercise of their discretion, dispense with the first-filed principle for reasons of equity") (citing *Alltrade, Inc. v. Uniweld Products, Inc*., 946 F.2d 622, 628 (9th Cir. 1991)). Equitable considerations weigh against a blind application of the priority of action rule.

The only case purporting to interpret the relevant state statute was a non-merits decision by a federal court. *Kater* was not a merits decision. *See Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1190-91 (9th Cir. 2003) (reversal of a decision granting a motion to dismiss is not a decision which considers merits). The Ninth Circuit ruled that the plaintiff's complaint stated a cause of action under Washington's Recovery of Money Lost at Gambling Act and should not have been dismissed. *Kater*, 886 F.3d at 787-88. Specifically, and narrowly, the Ninth Circuit ruled that the plaintiff's allegation that it was necessary to purchase virtual chips in order to continue to play games on Big Fish Casino satisfied the definition of "thing of value" under RCW 9.46.0285, such that Plaintiff stated a cause of action under RCW 9.46.0237. *Id.* The Ninth Circuit's reversal of a grant of a motion to dismiss is only a ruling that a complaint alleges a cause of action—nothing more. Not only is *Kater* not informative or binding on Washington State courts, but it is distinguishable because Benson and Simonson purchased virtual chips when it was unnecessary to do so in order to continue playing because they still had enough chips to continue to play. Compl. ¶ 58. Thus, even under *Kater*'s (incorrect) interpretation, Benson and Simonson's play does not violate Washington law. Equity further commands a state court forum where the result in *Kater* is contrary to the only known manifestations of Washington state policy — the prior guidance of the Commission and the Commission's continuing lack of any prosecutorial action.

Kater is not binding and this Court should decide these critical state law issues. *Kater* also has no bearing on state law or policy, or the outcome of this case, as federal courts are bound by state law determinations by state courts, and not the other way around. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); *Hanna v. Plumer*, 380 U.S. 460 (1965). Benson and

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Simonson assert that *Kater* is "binding in the Ninth Circuit ***until the state courts provide some contrary indication that Kater is incorrect***. . . ." Plaintiffs' Opposition to Defendants' Motion to Dismiss Under Fed. R. Civ. P. 12(B)(1) and Motion to Abstain, Federal Action, Dkt. 150 at 14(emphasis added) (attached hereto as Exhibit C). They further concede that a federal court should avoid rendering decisions in areas subject to state control and regulation (such as gambling), *id.* at 13, and that gambling is subject to parallel state oversight, *id.* at 16. State gambling law issues are in fact reserved to the particular police power of a state presenting further compelling reasons why fairness and equity to Double Down and IGT dictates that this action may proceed. *See infra* Section IV.D.

Double Down and IGT are seeking precisely such a state court ruling through this suit. They should not be required to wait for a serendipitous hypothetical lawsuit to resolve these critical state law issues before a final nonappealable judgment is reached in the federal action. It makes no sense that Double Down and IGT be held to the non-binding *Kater* decision now, only for the state to issue a contrary interpretation later. They are entitled to a fair interpretation of state law, which is why this case should proceed.

Double Down and IGT Are Not "Forum Shopping." This is not a simple battle over venue or "forum-shopping." Double Down and IGT have properly challenged the federal court's subject matter jurisdiction and asked that Court to abstain from jurisdiction. *See* Fed. R. Civ. P. 12(b)(1) ("allow[s] a party to challenge the subject matter jurisdiction of the district court to hear a case"). Filing this suit was the *only way* for Double Down and IGT to assert their constitutional rights to have a state court adjudicate the state laws at issue. At bottom, Double Down and IGT seek for state law issues to be determined by state courts. The interests of justice strongly weigh toward the resolution of this state law controversy in state court rather than in federal court based entirely on the presumed extension of the Ninth Circuit's decision on the pleadings. Benson and Simonson's motion is markedly silent as to any reasons why a state court should not decide its own gambling laws. The dispute here exclusively involves the interpretation of Washington statutes and their application to Washington litigants. The Superior

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Court in Washington's capital seat—not the federal courts—are the just and appropriate forum for these legal and economic interests that are important to the State of Washington, its businesses, and its residents.

Benson and Simonson Seek to Avoid Washington Courts to Preserve Kater. Benson and Simonson seek to extend the reach of *Kater* and hold Double Down and IGT liable under it—to the tune of billions of dollars—before a Washington State court can opine on the legality of DoubleDown Casino. They oppose this Court contemplating Double Down and IGT's claims because it may derail their singular federal court success—surviving a motion to dismiss. But, this case is ripe for adjudication and will occur before any merits decisions in the federal case. This action is limited in scope to the merits of the issue—a declaration on how to interpret and apply Washington law—and resolution will be swift. Without a state court determination, the federal case and appeals could proceed for years, and yet be overturned by a contrary Washington court decision at any point in time after years of costly litigation for both sides.

Moreover, it is Benson and Simonson who forum-shopped by bringing their action in federal court, when it involves exclusively Washington laws and their applicability to Washington residents and Washington businesses. In fact, their counsel first brought suit against Double Down in Illinois asserting the same claims they now assert in the federal case. That case was dismissed. After failing in Illinois, less than a month after *Kater* was decided, Benson and Simonson's counsel opportunistically followed with the federal suit against Double Down and separate suits against five other companies. It is a transparent play to take advantage of a narrow federal appellate decision that substantively and incorrectly interpreted Washington law on a limited record.

The parties have a dispute about the interpretation of a Washington statute, for which there is no controlling Washington case law. The novel interpretation of this statute should be made by Washington courts. Washington courts should decide Washington law. The Court should consider these countervailing equitable factors and exercise its discretion to reject a blind application of the priority of action rule.

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3. Simultaneous litigation can proceed until one action proceeds to final judgment.

Notably, federal courts will refuse to dismiss or stay a federal case even when a similar state action was filed first. "The Supreme Court has in fact repeatedly held that the pendency of an action in a state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction." *Newmont USA Ltd. v. Am. Home Assur. Co.*, No. CV-09-33-JLQ, 2009 WL 1764517, at *3 (E.D. Wash. June 21, 2009) (citing cases). Just as federal courts typically will not defer to earlier-filed state court actions, state court proceedings may not be enjoined by a federal court and this Court should not stay or dismiss this action simply because of an earlier-filed federal action. "The general rule regarding simultaneous litigation of similar issues in both state and federal courts is that both actions may proceed until one has come to judgment, at which point that judgment may create a res judicata or collateral estoppel effect on the other action." *Id.* (citing cases and the Anti-Injunction Act, 28 U.S.C. § 2283).

D. The Subject of Gambling Is Reserved to the Subject Matter Jurisdiction of State Courts.

While Benson and Simonson's technical arguments—that this declaratory action was a compulsory counterclaim or should be dismissed because it is second in time fail for the reasons discussed above, it is notable that their motion is markedly bereft of any reasons why a Washington state court should not be the final arbiter of its own gambling laws, which are central to the police powers of this state. Benson and Simonson's 12(b)(1) motion should also be denied because the Constitution reserves issues regarding state gambling laws for state self-determination under the Tenth Amendment. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1478, 200 L. Ed. 2d 854 (2018) (prohibition of state authorization of sports gambling schemes violates the anti-commandeering rule under the Tenth Amendment); *Thomas v. Bible*, 694 F. Supp. 750, 760 (D. Nev. 1988) (licensed gaming is reserved to the states under the Tenth Amendment), *aff'd*, 896 F.2d 555 (9th Cir. 1990)); *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.*, 399 F.3d 1276, 1278 (11th Cir. 2005) (regulation of gambling lies at the "heart of the state's police power") (quoting *Johnson*, 199 F.3d at 720); *United States v. King*, 834 F.2d 109, 111 (6th

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Cir. 1987) (regulation of gambling has been left to the state legislatures); *Medina v. Rudman*, 545 F.2d 244, 251 (1st Cir. 1976) (enactment of gambling laws is proper exercise of the state's police power); *Chun v. New York*, 807 F. Supp. 288, 292 (S.D.N.Y. 1992) (scope of laws regulating gambling and lotteries is clearly matter of state concern); *Winshare Club of Can. v. Dep't of Legal Affairs*, 542 So. 2d 974, 975 (Fla. 1989) (gambling is "a matter of peculiarly local concern that traditionally has been left to the regulation of the states"); *State v. Rosenthal*, 93 Nev. 36, 44 (1977) ("We view gaming as a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution.").

The United States Congress has recognized that "[s]ince the founding of our country, the Federal Government has left gambling regulation to the States. . . . The Federal Government has largely deferred to the authority of States to determine the type and amount of gambling permitted." *See* H.R. REP. NO. 106-655 (2000) (proposal for 2000 federal gambling regulations); *Gambling in America*: *Final Report of the Commission on the Review of National Policy Toward Gambling* 1, 5 (1976) ("[T]he States should have the primary responsibility for determining what forms of gambling may legally take place within their borders. The Federal Government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests."); *see also* 15 U.S.C. § 3001(a)(1) ("[T]he States should have the primary responsibility for determining what forms of gambling may legally take place within their borders[.]").

In a near identical case, the Fourth Circuit, in *Johnson*, the court reversed the district court's decision because the "court ventured into an area where state authority has long been preeminent. The regulation of gambling enterprises lies at the heart of the state's police power." *Id*. at 720. The court grappled with the interplay between the states' rights to determine their own gambling law and the federal court's interpretation of consumer protection laws. 199 F.3d at 720. The plaintiffs alleged that they became addicted to video poker because defendants were offering cash payouts in excess of the maximum amount allegedly allowed under South Carolina law. *Id.* at 717. Plaintiffs further claimed that the offering of illegal cash prizes constituted both

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a "special inducement" to play video poker in violation of state gambling law and the South Carolina Unfair Trade Practice Act. *Id.* The Fourth Circuit further noted that the district court should have abstained rather than "attempting to answer disputed questions of state gaming law that so powerfully impact the welfare of South Carolina citizens." *Id*. at 720 The federal district court's attempt to interpret certain portions of South Carolina's statute prohibiting certain forms of gambling improperly "supplanted the legislative, administrative, and judicial processes of South Carolina and sought to arbitrate matters of state law and regulatory policy that are best left to resolution by state bodies." *Id*. at 732-33.

Johnson is not an isolated case. Federal courts uniformly abstain when state gambling laws are at issue. *See, e.g.*, *Chun*, 807 F. Supp. at 292 (abstaining under both *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) and *R.R. Comm'n. of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). where New York's gambling laws were "clearly a matter of predominately state concern" and subject to a "complex and comprehensive statutory scheme"); *Diamond Game Enters. v. Howland*, 1999 WL 397743, at *14 (D. Or. Mar. 23, 1999) (abstaining under *Pullman* when question as to whether defendants' gaming dispensers fall within the Oregon law); *Club Ass'n of W. Va, Inc. v. Wise*, 156 F. Supp. 2d 599, 609 (S.D. W. Va. 2001) (abstention appropriate under *Pullman* when plaintiffs sought a declaration that video lottery was unconstitutional under state law), *aff'd*, 293 F.3d 723 (4th Cir. 2002); *Metro Riverboat Assocs.*, 142 F. Supp. 2d at 775 (*Burford* abstention appropriate where case sat in state's gambling regulatory framework and determinative issues in the federal court litigation would be decided in the state court first); *G2, Inc. v. Midwest Gaming, Inc.*, 485 F. Supp. 2d 757, 765-66 (W.D. Tex. 2007) (finding abstention under *Burford* where gaming is an "area of important state policy" and the lottery commission provides a "unified State enforcement mechanism").

The reasoning for abstention in each of these cases—that gambling regulations are inherently and constitutionally left for the state's determination—are the precise reasons why this Court should retain subject matter to determine this declaratory judgment action.

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E. This Court Should Not Stay This Case for All the Same Reasons.

Finally, understanding that the law does not favor dismissal, Benson and Simonson alternatively ask this Court to stay this action pending resolution of the federal case. However, that solution is equivalent to no solution at all. For the same reasons discussed above, a stay would allow the federal court to interpret state law, a responsibility properly before this Court.

This Court should exercise its subject matter jurisdiction and authority to construct and apply Washington law. Staying this case in favor of the Federal Action, as Ms. Benson and Ms. Simonson urge, would be the equivalent of dismissal. A stay in favor of allowing the Federal Action to proceed to judgment would allow the federal court, rather than the state courts, to dictate the meaning and application of Washington law. A stay would deny the Washington judiciary what is emphatically within its province and duty: to say what the Washington law is.

V. CONCLUSION

For the aforementioned reasons, Double Down and IGT respectfully request that the Court deny Ms. Benson and Ms. Simonson's motion to dismiss or stay this case.

DATED this 19th day of February, 2021

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

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ATTESTATION PER GENERAL RULE 30

The e-filing attorney hereby attests that concurrence in the filing of the document has been obtained from each of the other signatories indicated by a conformed signature (s/) within this e-filed docuemnt.

DATED February 19, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2020 I caused a true and correct copy of the attached document to be served upon the following individuals using the electronic filing systems and in the manner indicated below.

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EXHIBIT A

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ADRIENNE BENSON and MARY SIMONSON, individually and on behalf of all others similarly situated, Plaintiffs, v. DOUBLE DOWN INTERACTIVE, LLC, a Washington limited liability company, and INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation, Defendant.	Case No. 2:18-cv-00525-RBL DEFENDANT INTERNATIONAL GAME TECHNOLOGY'S ANSWER TO FIRST AMENDED CLASS ACTION COMPLAINT **JURY DEMAND**

Defendant International Game Technology ("IGT") files this answer to Plaintiffs Adrienne Benson's and Mary Simonson's First Amended Class Action Complaint (the "Complaint"). To the extent that any allegation in the Complaint is not specifically admitted, the allegation is denied. IGT denies all allegations contained in headings and unnumbered paragraphs, and denies all allegations except for those expressly admitted below. IGT answers the corresponding numbered paragraphs of the Complaint as follows:

NATURE OF THE ACTION

1. Defendants own and operate video game development companies in the so-called "casual games" industry—that is, computer games designed to appeal to a mass audience

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of casual gamers. Defendants (at all relevant times) owned and operated a popular online casino under the name Double Down Casino.

ANSWER: IGT admits that it develops video games. During a portion of the putative class period, IGT owned DoubleDown, which owns and operates the game DoubleDown Casino. IGT denies the remaining allegations in paragraph 1.

2. Double Down Casino is available to play on Android, and Apple iOS devices, and on Facebook.

ANSWER: IGT admits that DoubleDown Casino can be accessed on Android and Apple iOS devices and on Facebook.

3. Defendants provide a bundle of free "chips" to first-time visitors of Double Down Casino that can be used to wager on games within Double Down Casino. After consumers inevitably lose their initial allotment of chips, Defendants attempt to sell them additional chips for real money. Without chips, consumers cannot play the gambling game.

ANSWER: IGT admits that first time users of DoubleDown Casino are provided with free virtual chips. IGT denies the remaining allegations in paragraph 3.

4. Freshly topped off with additional chips, consumers wager to win more chips. The chips won by consumers playing Defendants' games of chance are identical to the chips that Defendants sell. Thus, by wagering chips that have been purchased for real money, consumers have the chance to win additional chips that they would otherwise have to purchase.

ANSWER: IGT denies the allegations in paragraph 4.

5. By operating the Double Down Casino, Defendants have violated Washington law and illegally profited from tens of thousands of consumers. Accordingly, Plaintiffs, on

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behalf of themselves and a Class of similarly situated individuals, bring this lawsuit to recover their losses, as well as costs and attorneys' fees.

ANSWER: IGT admits that Plaintiffs have filed a putative class action lawsuit. IGT denies the remaining allegations in paragraph 5.

PARTIES

6. Plaintiff Adrienne Benson is a natural person and a citizen of the state of Washington.

ANSWER: IGT lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 6.

7. Plaintiff Mary Simonson is a natural person and a citizen of the state of Washington.

ANSWER: IGT lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7.

8. Defendant Double Down Interactive, LLC is a limited liability company organized and existing under the laws of the State of Washington with its principal place of business at 605 Fifth Avenue South, Suite 300, Seattle, Washington 98104. Double Down conducts business throughout this District, Washington State, and the United States.

ANSWER: IGT lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8.

9. Defendant International Game Technology is a corporation existing and organized under the laws of the State of Nevada with its principal place of business at 6355 South Buffalo Drive, Las Vegas, Nevada 89113. IGT conducts business throughout this District, Washington State, and the United States.

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ANSWER: IGT admits that it is a corporation organized under the laws of the State of Nevada with its principal place of business at 6355 South Buffalo Drive, Las Vegas, Nevada 89113, and that it conducts business in this District and Washington State. IGT denies the remaining allegations in paragraph 9.

JURISDICTION AND VENUE

10. Federal subject-matter jurisdiction exists under 28 U.S.C. § 1332(d)(2) because (a) at least one member of the class is a citizen of a state different from any Defendants, (b) the amount in controversy exceeds $5,000,000, exclusive of interests and costs, and (c) none of the exceptions under that subsection apply to this action.

ANSWER: To the extent paragraph 10 states a legal conclusion, no answer is required. To the extent an answer is required, IGT denies the allegations in paragraph 10.

11. The Court has personal jurisdiction over Defendants because Defendants conduct significant business transactions in this District, and because the wrongful conduct occurred in and emanated from this District.

ANSWER: IGT admits that this Court has personal jurisdiction over it. IGT denies the remaining allegations in paragraph 11.

12. Venue is proper in this District under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to Plaintiffs' claims occurred in and emanated from this District.

ANSWER: To the extent paragraph 12 states a legal conclusion, no answer is required. To the extent an answer is required, IGT denies the allegations in paragraph 12, and further denies that this forum is proper, because Plaintiffs agreed to arbitrate their claims.

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FACTUAL ALLEGATIONS

I. Free-to-Play and the New Era of Online Gambling

13. The proliferation of internet-connected mobile devices has led to the growth of what are known in the industry as "free-to-play" videogames. The term is a misnomer. It refers to a model by which the initial download of the game is free, but companies reap huge profits by selling thousands of "in-game" items that start at $0.99 (purchases known as "micro-transactions" or "in-app purchases").

ANSWER: IGT lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 13.

14. The in-app purchase model has become particularly attractive to developers of games of chance (*e.g.*, poker, blackjack, and slot machine mobile videogames, amongst others), because it allows them to generate huge profits. In 2017, free-to-play games of chance generated over $3.8 billion in worldwide revenue, and they are expected to grow by ten percent annually.[1] Even "large land-based casino operators are looking at this new space" for "a healthy growth potential."[2]

ANSWER: IGT lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14.

15. With games of chance that employ the in-game purchase strategy, developers have begun exploiting the same psychological triggers as casino operators. As one respected videogame publication put it:

> "If you hand someone a closed box full of promised goodies, many will happily pay you for the crowbar to crack it open. The tremendous power of small random packs of goodies has long been known to the creators of physical collectible card games and

[1] GGRAsia – Social casino games 2017 revenue to rise 7pct plus says report, http://www.ggrasia.com/social-casino-games-2017-revenue-to-rise-7pct-plus-says-report/ (last visited Jul. 23, 18)
[2] *Report confirms that social casino games have hit the jackpot with $1.6B in revenue | GamesBeat*, https://venturebeat.com/2012/09/11/report-confirms-that-social-casino-games-have-hit-the-jackpot-with-1-6b-in-revenue/ (last visited Jul. 23, 18)

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> companies that made football stickers a decade ago. For some ... the allure of a closed box full of goodies is too powerful to resist. Whatever the worth of the randomised [sic] prizes inside, the offer of a free chest and the option to buy a key will make a small fortune out of these personalities. For those that like to gamble, these crates often offer a small chance of an ultra-rare item."[3]

ANSWER: IGT lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15.

16. Another stated:

> "Games may influence 'feelings of pleasure and reward,' but this is an addiction to the games themselves; micro-transactions play to a different kind of addiction that has existed long before video games existed, more specifically, an addiction similar to that which you could develop in casinos and betting shops."[4]

ANSWER: IGT lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 16.

17. The comparison to casinos doesn't end there. Just as with casino operators, mobile game developers rely on a small portion of their players to provide the majority of their profits. These "whales," as they're known in casino parlance, account for just "0.15% of players" but provide "over 50% of mobile game revenue."[5]

ANSWER: IGT lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17.

18. Game Informer, another respected videogame magazine, reported on the rise (and danger) of micro-transactions in mobile games and concluded:

> "[M]any new mobile and social titles target small, susceptible populations for large percentages of their revenue. If ninety-five people all play a [free-to-play] game without spending money,

[3] PC Gamer, *Microtransactions: the good, the bad and the ugly*, http://www.pcgamer.com/microtransactions-the-good-the-bad-and-the-ugly/ (last visited Apr. 5, 2018).
[4] The Badger, *Are micro-transactions ruining video games? | The Badger*, http://thebadgeronline.com/2014/11/micro-transactions-ruining-video-games/ (last visited Apr. 5, 2018).
[5] *Id.* (emphasis added).

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> but five people each pour $100 or more in to obtain virtual currency, the designer can break even. These five individuals are what the industry calls whales, and we tend not to be too concerned with how they're being used in the equation. While the scale and potential financial ruin is of a different magnitude, a similar profitability model governs casino gambling."[6]

ANSWER: IGT lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 18.

19. Academics have also studied the socioeconomic effect games that rely on in-app purchases have on consumers. In one study, the authors compiled several sources analyzing so-called free-to-play games of chance (called "casino" games below) and stated that:

> "[Researchers] found that [free-to-play] casino gamers share many similar sociodemographic characteristics (*e.g.*, employment, education, income) with online gamblers. Given these similarities, it is perhaps not surprising that a strong predictor of online gambling is engagement in [free-to-play] casino games. Putting a dark line under these findings, over half (58.3%) of disordered gamblers who were seeking treatment stated that social casino games were their first experiences with gambling."
>
> ...
>
> "According to [another study], the purchase of virtual credits or virtual items makes the activity of [free-to-play] casino gaming more similar to gambling. Thus, micro-transactions may be a crucial predictor in the migration to online gambling, as these players have now crossed a line by paying to engage in these activities. Although, [sic] only 1–5% of [free-to-play] casino gamers make micro-transactions, those who purchase virtual credits spend an average of $78. Despite the limited numbers of social casino gamers purchasing virtual credits, revenues from micro-transactions account for 60 % of all [free-to-play] casino gaming revenue. Thus, a significant amount of revenue is based on players' desire to purchase virtual credits above and beyond what is provided to the player in seed credits."[7]

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[6] Game Informer, *How Microtransactions Are Bad For Gaming - Features - www.GameInformer.com*, http://www.gameinformer.com/b/features/archive/2012/09/12/how-microtransactions-are-bad-for-gaming.aspx?CommentPosted=true&PageIndex=3 (last visited Apr. 5, 2018)

[7] Hyoun S. Kim, Michael J. A. Wohl, *et al., Do Social Casino Gamers Migrate to Online Gambling? An Assessment of Migration Rate and Potential Predictors*, Journal of gambling studies / co-sponsored by the National Council on Problem Gambling and Institute for the Study of Gambling and Commercial Gaming (Nov. 14, 2014), *available at* http://link.springer.com/content/pdf/10.1007%2Fs10899-014-9511-0.pdf (citations omitted).

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ANSWER: IGT lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19.

20. The same authors looked at the link between playing free-to-play games of chance and gambling in casinos. They stated that "prior research indicated that winning large sums of virtual credits on social casino gaming sites was a key reason for [consumers'] migration to online gambling," yet the largest predictor that a consumer will transition to online gambling was "micro-transaction engagement." In fact, "the odds of migration to online gambling were approximately *eight times greater* among people who made micro-transactions on [free-to-play] casino games compared to [free-to-play] casino gamers who did not make micro-transactions."[8]

ANSWER: IGT lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 20.

21. The similarity between micro-transaction games of chance and games of chance found in casinos has caused governments across the world to intervene to limit their availability.[9] Unfortunately, such games have eluded regulation in the United States. As a result, and as described below, Defendants' online casino games have thrived and thousands of consumers have spent millions of dollars unwittingly playing Defendants' unlawful games of chance.

ANSWER: IGT lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first and second sentences of paragraph 21. IGT denies the allegations in the third sentence of paragraph 21.

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[8] *Id*. (emphasis added).

[9] In late August 2014, South Korea began regulating "social gambling" games, including games similar to Defendants', by "ban[ning] all financial transactions directed" to the games. PokerNews.com, *Korea Shuts Down All Facebook Games In Attempt To Regulate Social Gambling | PokerNews*, https://www.pokernews.com/news/2014/09/korea-shuts-down-facebook-games-19204 htm (last visited Apr. 5, 2018). Similarly, "the Maltese Lotteries and Gambling Authority (LGA) invited the national Parliament to regulate all digital games with prizes by the end of 2014." *Id*.

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II. A Brief Introduction to Double Down and IGT

22. Double Down is a leading game developer with an extensive library of free-to-play online casino games. Double Down sells in-app chips to consumers in the Double Down Casino so that consumers can play various online casino games in Double Down Casino.

ANSWER: IGT lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 22.

23. IGT is a global leader in the gaming industry with long ties to the traditional casino market. It has developed a multitude of casino and lottery games, including traditional slot machines and video lottery terminals. In 2012, IGT acquired Double Down and its library of online casino games, and has since "grown into one of the largest and most successful brands in the North American social casino market."[10]

ANSWER: IGT admits that it has developed casino and lottery games and that IGT acquired DoubleDown in 2012. IGT lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 23.

24. In 2017, IGT sold DoubleDown for $825 million to DoubleU Games.[11] In addition to the sale, IGT has also entered into a long-term game development and distribution agreement with DoubleU to offer its online casino games in DoubleDown Casino.[12] IGT notes that it will continue to collect royalties from its online casino game content.[13]

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[10] *IGT To Sell Online Casino Unit DoubleDown To South Korean Firm For $825 Million - Poker News*, https://www.cardplayer.com/poker-news/21554-igt-to-sell-online-casino-unit-doubledown-to-south-korean-firm-for-825-million (last visited Ap. 6, 2018).
[11] *Id*.
[12] *IGT Completes Sale Of DoubleDown Interactive LLC To DoubleU Games,* https://www.prnewswire.com/news-releases/igt-completes-sale-of-double-down-interactive-llc-to-doubleu-games-300467524.html (last visited Apr. 6, 2018).
[13] *Id*.

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ANSWER: IGT admits that it sold DoubleDown in 2017 and that IGT entered into certain agreements with DoubleU Games. IGT denies the remaining allegations in paragraph 24.

25. Defendants have made large profits through their online casino games. In 2016, alone, Double Down generated $280 million in revenue. As explained further below, however, the revenue Defendants receives from Double Down Casino is the result of operating unlawful games of chance camouflaged as innocuous videogames.

ANSWER: IGT denies the allegations in paragraph 25.

III. Defendants' Online Casino Contains Unlawful Games of Chance

26. Consumers visiting Double Down Casino for the first time are awarded 1 million free chips. *See* Figure 1. These free sample chips offer a taste of gambling and are designed to encourage player to get hooked and buy more chips for real money.

(**Figure 1.**)

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ANSWER: IGT admits that new users of DoubleDown Casino receive free chips. IGT denies the remaining allegations in paragraph 26. IGT cannot verify the authenticity of the cropped screenshot in Figure 1 and therefore denies it.

27. After they begin playing, consumers quickly lose their initial allotment of chips. Immediately thereafter, Double Down Casino informs them via a "pop up" screen that they have "insufficient funds." *See* Figure 2. Once a player runs out of their allotment of free chips, they cannot continue to play the game without buying more chips for real money.

(**Figure 2.**)

ANSWER: IGT admits that when users do not have enough chips to play they receive the message "insufficient funds to spin." IGT denies the remaining allegations in paragraph 27. IGT cannot verify the authenticity of the cropped screenshot in Figure 2 and therefore denies it.

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28. To continue playing the online casino game, consumers navigate to Double Down Casino's electronic store to purchase chips ranging in price from $2.99 for 300,000 chips to $99.99 for 100,000,000 chips. *See* Figure 3.

(**Figure 3.**)

ANSWER: IGT admits that users can purchase chips from the DoubleDown Casino store. IGT denies the remaining allegations in paragraph 28, and further denies that users must purchase chips to continue to play DoubleDown Casino. IGT cannot verify the authenticity of the cropped screenshot in Figure 3 and therefore denies it.

29. The decision to sell chips by the thousands isn't an accident. Rather, Defendants attempt to lower the perceived cost of the chips (costing just a fraction of a penny per chip) while simultaneously maximizing the value of the award (awarding millions of chips in jackpots), further inducing consumers to bet on their games.

ANSWER: IGT denies the allegations in paragraph 29.

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30. To begin wagering, players select the "LINE BET" that will be used for a spin, as illustrated in Figure 4. Double Down Casino allows players to increase or decrease the amount he or she can wager and ultimately win (or lose). Double Down Casino allows players to multiply their bet by changing the number of "lines" (*i.e.*, combinations) on which the consumer can win, shown in Figure 4 as the "LINE" button.

(**Figure 4.**)

ANSWER: IGT admits that players can increase or decrease the "LINE BET" and "LINE" settings for certain games in DoubleDown Casino. IGT denies the remaining allegations in paragraph 30. IGT cannot verify the authenticity of the cropped screenshot in Figure 4 and therefore denies it.

31. Once a consumer spins the slot machine by pressing "SPIN" button, no action on his or her part is required. Indeed, none of the Double Down Casino games allow (or call for) any additional user action. Instead, the consumer's computer or mobile device communicates with and sends information (such as the "TOTAL BET" amount) to the Double Down Casino servers. The servers then execute the game's algorithms that determine the spin's outcome. Notably, none of Defendants' games depend on any amount of skill to determine their outcomes—all outcomes are based entirely on chance.

ANSWER: IGT admits that, for certain games in DoubleDown Casino, once a user presses the "SPIN" button, no action on his or her part is required to determine the outcome of the turn. IGT denies the remaining allegations in paragraph 31.

32. Consumers can continue playing with the chips that they won, or they can exit the game and return at a later time to play because Double Down Casino maintains win and

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loss records and account balances for each consumer. Indeed, once Defendants' algorithms determine the outcome of a spin and Double Down Casino displays the outcome to the consumer, Defendants adjusts the consumer's account balance. Defendants keep records of each wager, outcome, win, and loss for every player.

ANSWER: IGT admits that users can play DoubleDown Casino with the chips that they won, or they can exit the game and return at a later time to play. IGT lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 32.

FACTS SPECIFIC TO PLAINTIFF BENSON

33. Since 2013, Plaintiff Benson has been playing Double Down Casino on Facebook. After Benson lost the balance of her initial allocation of free chips, she purchased chips from the Double Down Casino electronic store.

ANSWER: IGT lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 33.

34. Thereafter, Benson continued playing various slot machines and other games of chance within the Double Down Casino where she would wager chips for the chance of winning additional chips. Since 2016, Benson has wagered and lost (and Defendants therefore won) over $1,000 at Defendants' games of chance.

ANSWER: IGT lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 34.

FACTS SPECIFIC TO PLAINTIFF SIMONSON

35. Since 2017, Plaintiff Simonson has been playing Double Down Casino on her mobile phone. After Simonson lost the balance of her initial allocation of free chips, she purchased chips from the Double Down Casino electronic store.

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ANSWER: IGT lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 35.

36. Thereafter, Simonson continued playing various slot machines and other games of chance within the Double Down Casino where she would wager chips for the chance of winning additional chips. Since December 2017, Simonson has wagered and lost (and Defendants therefore won) over $200 at Defendants' games of chance.

ANSWER: IGT lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 36.

CLASS ALLEGATIONS

37. **Class Definition:** Plaintiffs Benson and Simonson bring this action pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3) on behalf of themselves and a Class of similarly situated individuals, defined as follows:

> All persons in the United States who purchased and lost chips by wagering at the Double Down Casino.

The following people are excluded from the Class: (1) any Judge or Magistrate presiding over this action and members of their families; (2) Defendants, Defendants' subsidiaries, parents, successors, predecessors, and any entity in which the Defendants or their parents have a controlling interest and their current or former employees, officers and directors; (3) persons who properly execute and file a timely request for exclusion from the Class; (4) persons whose claims in this matter have been finally adjudicated on the merits or otherwise released; (5) Plaintiffs' counsel and Defendants' counsel; and (6) the legal representatives, successors, and assigns of any such excluded persons.

ANSWER: IGT admits that Plaintiffs have filed a putative class action lawsuit. IGT denies the remaining allegations in paragraph 37, and further denies that Plaintiffs can represent the class of people they attempt to define.

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38. **Numerosity:** On information and belief, tens of thousands of consumers fall into the definition of the Class. Members of the Class can be identified through Defendants' records, discovery, and other third-party sources.

ANSWER: IGT denies the allegations in paragraph 38.

39. **Commonality and Predominance:** There are many questions of law and fact common to Plaintiffs' and the Class's claims, and those questions predominate over any questions that may affect individual members of the Class. Common questions for the Class include, but are not necessarily limited to the following:

a. Whether DoubleDown Casino games are "gambling" as defined by RCW 9.46.0237;

b. Whether Defendants are the proprietors for whose benefit the online casino games are played;

c. Whether Plaintiffs and each member of the Class lost money or anything of value by gambling;

d. Whether Defendants violated the Washington Consumer Protection Act, RCW 19.86.010, *et seq.*; and

e. Whether Defendants have been unjustly enriched as a result of their conduct.

ANSWER: To the extent paragraph 39 states legal conclusions, no answer is required. To the extent an answer is required, IGT denies the allegations in paragraph 39 and each of its subparts.

40. **Typicality:** Plaintiffs' claims are typical of the claims of other members of the Class in that Plaintiffs' and the members of the Class sustained damages arising out of Defendants' wrongful conduct.

ANSWER: IGT denies the allegations in paragraph 40.

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41. **Adequate Representation:** Plaintiffs will fairly and adequately represent and protect the interests of the Class and have retained counsel competent and experienced in complex litigation and class actions. Plaintiffs' claims are representative of the claims of the other members of the Class, as Plaintiffs and each member of the Class lost money playing Defendants' games of chance. Plaintiffs also have no interests antagonistic to those of the Class, and Defendants have no defenses unique to Plaintiffs. Plaintiffs and their counsel are committed to vigorously prosecuting this action on behalf of the Class and have the financial resources to do so. Neither Plaintiffs nor their counsel have any interest adverse to the Class.

ANSWER: IGT lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 41.

42. **Policies Generally Applicable to the Class:** This class action is appropriate for certification because Defendants have acted or refused to act on grounds generally applicable to the Class as a whole, thereby requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the members of the Class and making final injunctive relief appropriate with respect to the Class as a whole. Defendants' policies that Plaintiffs challenges apply and affect members of the Class uniformly, and Plaintiffs' challenge of these policies hinges on Defendants' conduct with respect to the Class as a whole, not on facts or law applicable only to Plaintiffs. The factual and legal bases of Defendants' liability to Plaintiffs and to the other members of the Class are the same.

ANSWER: IGT denies the allegations in paragraph 42.

43. **Superiority:** This case is also appropriate for certification because class proceedings are superior to all other available methods for the fair and efficient adjudication of this controversy. The harm suffered by the individual members of the Class is likely to have been relatively small compared to the burden and expense of prosecuting individual actions to

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redress Defendants' wrongful conduct. Absent a class action, it would be difficult if not impossible for the individual members of the Class to obtain effective relief from Defendants. Even if members of the Class themselves could sustain such individual litigation, it would not be preferable to a class action because individual litigation would increase the delay and expense to all parties and the Court and require duplicative consideration of the legal and factual issues presented. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single Court. Economies of time, effort, and expense will be fostered and uniformity of decisions will be ensured.

ANSWER: IGT denies the allegations in paragraph 43.

44. Plaintiffs reserve the right to revise the foregoing "Class Allegations" and "Class Definition" based on facts learned through additional investigation and in discovery.

ANSWER: To the extent paragraph 44 states legal conclusions, no answer is required. To the extent an answer is required, IGT denies the allegations in paragraph 44.

FIRST CAUSE OF ACTION

Violations of Revised Code of Washington 4.24.070

(On behalf of Plaintiffs and the Class)

45. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

ANSWER: IGT incorporates its answers to the foregoing paragraphs 1 through 44 as if fully set forth herein.

46. Plaintiffs, members of the Class, and Defendants are all "persons" as defined by RCW 9.46.0289.

ANSWER: To the extent paragraph 46 states legal conclusions, no answer is required. To the extent an answer is required, IGT denies the allegations in paragraph 46.

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47. The state of Washington's "Recovery of money lost at gambling" statute, RCW 4.24.070, provides that "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."

ANSWER: To the extent paragraph 47 states legal conclusions, no answer is required. To the extent an answer is required, IGT states that RCW 4.24.070 speaks for itself and IGT denies violating RCW 4.24.070. IGT denies the remaining allegations in paragraph 47.

48. "Gambling," defined by RCW 9.46.0237, "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."

ANSWER: To the extent paragraph 48 states legal conclusions, no answer is required. To the extent an answer is required, IGT denies that paragraph 48 fully and accurately quotes RCW 9.46.0237. IGT denies the remaining allegations in paragraph 48.

49. Defendants' "chips" sold for use at the Double Down Casino are "thing[s] of value" under RCW § 9.46.0285.

ANSWER: To the extent paragraph 49 states legal conclusions, no answer is required. To the extent an answer is required, IGT denies the allegations in paragraph 49.

50. DoubleDown Casino games are illegal gambling games because they are online games at which players wager things of value (the chips) and by an element of chance (*e.g.*, by spinning an online slot machine) are able to obtain additional entertainment and extend gameplay (by winning additional chips).

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ANSWER: To the extent paragraph 50 states legal conclusions, no answer is required. To the extent an answer is required, IGT denies the allegations in paragraph 50.

51. Defendants Double Down and IGT are the proprietors for whose benefit the online gambling games are played because they operate the Double Down Casino games and/or derive profit from their operation.

ANSWER: To the extent paragraph 51 states legal conclusions, no answer is required. To the extent an answer is required, IGT denies the allegations in paragraph 51.

52. As such, Plaintiffs and the Class gambled when they purchased chips to wager at Double Down Casino. Plaintiffs and each member of the Class staked money, in the form of chips purchased with money, at Defendants' games of chance (*e.g.*, Double Down Casino slot machines and other games of chance) for the chance of winning additional things of value (*e.g.*, chips that extend gameplay without additional charge).

ANSWER: To the extent paragraph 52 states legal conclusions, no answer is required. To the extent an answer is required, IGT denies the allegations in paragraph 52.

53. In addition, Double Down Casino games are not "pinball machine[s] or similar mechanical amusement device[s]" as contemplated by the statute because:

a. the games are electronic rather than mechanical;

b. the games confer replays but they are recorded and can be redeemed on separate occasions (*i.e.*, they are not "immediate and unrecorded"); and

c. the games contain electronic mechanisms that vary the chance of winning free games or the number of free games which may be won (*e.g.*, the games allow for different wager amounts).

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ANSWER: To the extent paragraph 53 states legal conclusions, no answer is required. To the extent an answer is required, IGT denies the allegations in paragraph 53 and each of its subparts.

54. RCW 9.46.0285 states that a "'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."

ANSWER: To the extent paragraph 54 states legal conclusions, no answer is required. To the extent an answer is required, IGT states that RCW 9.46.0285 speaks for itself, and IGT denies violating RCW 9.46.0285. IGT denies the remaining allegation in paragraph 54.

55. The "chips" Plaintiffs and the Class had the chance of winning in Double Down Casino games are "thing[s] of value" under Washington law because they are credits that involve the extension of entertainment and a privilege of playing a game without charge.

ANSWER: IGT denies the allegations in paragraph 55.

56. Double Down Casino games are "Contest[s] of chance," as defined by RCW 9.46.0225, because they are "contest[s], game[s], gaming scheme[s], or gaming device[s] in which the outcome[s] depend[] in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." Defendants' games are programmed to have outcomes that are determined entirely upon chance and a contestant's skill does not affect the outcomes.

ANSWER: To the extent paragraph 56 states legal conclusions, no answer is required. To the extent an answer is required, IGT denies the allegations in paragraph 56.

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57. RCW 9.46.0201 defines "Amusement game[s]" as games where "The outcome depends in a material degree upon the skill of the contestant," amongst other requirements. Double Down Casino games are not "Amusement game[s]" because their outcomes are dependent entirely upon chance and not upon the skill of the player and because the games are "contest[s] of chance," as defined by RCW 9.46.0225.

ANSWER: To the extent paragraph 57 states legal conclusions, no answer is required. To the extent an answer is required, IGT states that RCW 9.46.0201 speaks for itself, but denies that paragraph 57 fully quotes RCW 9.46.0201 and denies that IGT has violated RCW 4.46.0201. IGT denies the remaining allegations in paragraph 57.

58. As a direct and proximate result of Defendants' operation of their Double Down Casino games, Plaintiffs and each member of the Class have lost money wagering at Defendants' games of chance. Plaintiffs, on behalf of themselves and the Class, seek an order (1) requiring Defendants to cease the operation of their games; and/or (2) awarding the recovery of all lost monies, interest, and reasonable attorneys' fees, expenses, and costs to the extent allowable.

ANSWER: IGT denies the allegations in paragraph 58, and further denies that Plaintiffs are entitled to any order or award.

SECOND CAUSE OF ACTION

Violations of the Washington Consumer Protection Act, RCW 19.86.010, *et seq.*
(On behalf of Plaintiffs and the Class)

59. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

ANSWER: IGT incorporates its answers to the foregoing paragraphs 1 through 58 as if fully set forth herein.

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60. Washington's Consumer Protection Act, RCW § 19.86.010 *et seq.* ("CPA"), protects both consumers and competitors by promoting fair competition in commercial markets for goods and services.

ANSWER: To the extent paragraph 60 states legal conclusions, no answer is required. To the extent an answer is required, IGT denies the allegations in paragraph 60.

61. To achieve that goal, the CPA prohibits any person from using "unfair methods of competition or unfair or deceptive acts or practices in the conduct of any trade or commerce. . . ." RCW § 19.86.020.

ANSWER: To the extent paragraph 61 states legal conclusions, no answer is required. To the extent an answer is required, IGT denies that paragraph 61 fully and accurately quotes RCW 19.86.020 and denies that IGT has violated RCW 19.86.020. IGT denies the remaining allegations in paragraph 61.

62. The CPA states that "a claimant may establish that the act or practice is injurious to the public interest because it. . . Violates a statute that contains a specific legislative declaration of public interest impact."

ANSWER: To the extent paragraph 62 states legal conclusions, no answer is required. To the extent an answer is required, IGT admits RCW 19.86.093 speaks for itself, but denies that paragraph 62 fully quotes RCW 19.86.093 and denies that IGT has violated RCW 19.86.093. IGT denies the remaining allegations in paragraph 62.

63. Defendants violated RCW § 9.46.010, *et seq.* which declares that:

> "The public policy of the state of Washington on gambling is to keep the criminal element out of gambling and to promote the social welfare of the people by limiting the nature and scope of gambling activities and by strict regulation and control.
>
> It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling

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> and organized crime, to restrain all persons from seeking profit from professional gambling activities in this state; to restrain all persons from patronizing such professional gambling activities; to safeguard the public against the evils induced by common gamblers and common gambling houses engaged in professional gambling; and at the same time, both to preserve the freedom of the press and to avoid restricting participation by individuals in activities and social pastimes, which activities and social pastimes are more for amusement rather than for profit, do not maliciously affect the public, and do not breach the peace."

ANSWER: To the extent paragraph 63 states legal conclusions, no answer is required. To the extent an answer is required, IGT states RCW 9.46.010 speaks for itself. IGT denies the remaining allegations in paragraph 63.

64. Defendants have violated RCW § 9.46.010, *et seq.*, because the Double Down Casino games are illegal online gambling games as described in ¶¶ 42-55 *supra*.

ANSWER: To the extent paragraph 64 states legal conclusions, no answer is required. To the extent an answer is required, IGT denies the allegations in paragraph 64.

65. Defendants' wrongful conduct occurred in the conduct of trade or commerce—*i.e.*, while Defendants were engaged in the operation of making computer games available to the public.

ANSWER: IGT denies the allegations in paragraph 65.

66. Defendants' acts and practices were and are injurious to the public interest because Defendants, in the course of their business, continuously advertised to and solicited the general public in Washington state [sic] and throughout the United States to play their unlawful online casino games of chance. This was part of a pattern or generalized course of conduct on the part of Defendants, and many consumers have been adversely affected by Defendants' conduct and the public is at risk.

ANSWER: IGT denies the allegations in paragraph 66.

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67. Defendants have profited immensely from their operation of unlawful games of chance, amassing hundreds of millions of dollars from the losers of their games of chance.

ANSWER: IGT denies the allegations in paragraph 67.

68. As a result of Defendants' conduct, Plaintiffs and the Class members were injured in their business or property—*i.e.*, economic injury—in that they lost money wagering on Defendants' unlawful games of chance.

ANSWER: IGT denies the allegations in paragraph 68.

69. Defendants' unfair or deceptive conduct proximately caused Plaintiffs' and the Class members' injuries because, but for the challenged conduct, Plaintiffs and the Class members would not have lost money wagering at or on Defendants' games of chance, and they did so as a direct, foreseeable, and planned consequence of that conduct.

ANSWER: IGT denies the allegations in paragraph 69.

70. Plaintiffs, on their own behalf and on behalf of the Class, seek to enjoin further violation and recover actual damages and treble damages, together with the costs of suit, including reasonable attorneys' fees.

ANSWER: IGT denies the allegations in paragraph 70, and further denies that Plaintiffs are entitled to an injunction or any recovery.

THIRD CAUSE OF ACTION

Unjust Enrichment

(On behalf of Plaintiffs and the Class)

71. Plaintiffs incorporate by reference the foregoing allegations as if fully set forth herein.

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ANSWER: IGT incorporates its answers to the foregoing paragraphs 1 through 70 as if fully set forth herein.

72. Plaintiffs and the Class have conferred a benefit upon Defendants in the form of the money Defendants received from them for the purchase of chips to wager on Double Down Casino games.

ANSWER: IGT denies the allegations in paragraph 72.

73. Defendants appreciate and/or have knowledge of the benefits conferred upon them by Plaintiffs and the Class.

ANSWER: IGT denies the allegations in paragraph 73.

74. Under principles of equity and good conscience, Defendants should not be permitted to retain the money obtained from Plaintiffs and the members of the Class, which Defendants have unjustly obtained as a result of their unlawful operation of unlawful online gambling games. As it stands, Defendants have retained millions of dollars in profits generated from their unlawful games of chance and should not be permitted to retain those ill-gotten profits.

ANSWER: IGT denies the allegations in paragraph 74.

75. Accordingly, Plaintiffs and the Class seek full disgorgement and restitution of any money Defendants have retained as a result of the unlawful and/or wrongful conduct alleged herein.

ANSWER: IGT denies the allegations in paragraph 75, and further denies that Plaintiffs are entitled to any disgorgement or restitution.

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PRAYER FOR RELIEF

IGT denies that Plaintiffs are entitled to any relief.

AFFIRMATIVE DEFENSES

Below are IGT's affirmative and additional defenses to the Complaint. By setting forth these defenses, IGT does not assume any burden of proof as to any fact issue or other element of any cause of action that properly belongs to Plaintiffs. IGT reserves the right to amend or supplement its affirmative and additional defenses.

1. **Improper forum or venue.** Plaintiffs' claims do not belong in this forum because Plaintiffs agreed to individual arbitration of their claims under the arbitration agreement and class waiver provisions of the Terms of Use, and therefore this court lacks subject matter jurisdiction pursuant to the Federal Arbitration Act.
2. **Failure to state a claim.** The First Amended Complaint fails to state a claim against IGT, in whole or in part, upon which relief can be granted.
3. **Statute of limitations.** Plaintiffs' claims are barred by the applicable contractual and statutory statutes of limitations, including without limitation the period set forth in the Terms of Use.
4. **Laches.** Plaintiffs' claims are barred by the doctrine of laches.
5. **Barred by agreement**. Plaintiffs' claims are barred, in whole or in part, by the terms of the parties' agreements, including without limitation the Terms of Use.
6. **Disclaimer.** Plaintiffs' claims are barred, in whole or in part, because IGT disclaimed liability, including without limitation as set forth in the Terms of Use.
7. **Release or waiver.** Plaintiffs' claims fail, in whole or in part, under the doctrines of release or waiver, including without limitation because Plaintiffs knowingly continued to voluntarily use the services.

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8. **Consent, estoppel, or ratification.** Plaintiffs' claims fail, in whole or in part, under the doctrines of consent, estoppel, or ratification, including without limitation because Plaintiffs were aware of, ratified, and benefited from the conduct of which they now complain, and consented to the alleged damages by their voluntary conduct.

9. **Lack of injury.** Plaintiffs' claims fail, in whole or in part, because they have not sustained any cognizable injury or damages.

10. **Lack of causation.** IGT was not the direct or proximate cause of Plaintiffs' alleged damages.

11. **Failure to mitigate.** Plaintiffs failed to mitigate their alleged damages.

12. **Assumption of risk.** Plaintiffs assumed the risk of their voluntary conduct and the responsibility to participate only in compliance with applicable law.

13. **Adequate remedy at law.** Plaintiffs' claims for equitable relief fail because Plaintiffs have an adequate remedy at law.

14. **Set-off.** Any relief granted to Plaintiff, which IGT disputes, must be set-off by the amounts that DoubleDown or IGT have refunded to any Plaintiff or putative class member or by any amount that a Plaintiff or putative class member owes DoubleDown or IGT.

15. **Unclean hands**. All of Plaintiffs' claims are barred by the doctrine of unclean hands.

16. **Unjust enrichment.** Plaintiffs' claims are barred, in whole or in part, because any recovery from IGT would result in Plaintiffs' unjust enrichment.

17. **Compliance; preemption**. Plaintiffs' claims fail, in whole or in part, because IGT complied with applicable federal and state statutes and regulations.

18. **Choice of law; foreign law**. Unnamed putative class members residing outside of Washington State lack standing to assert claims under Washington law, and

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Plaintiffs lack standing to represent such putative class members under the laws of the various states that may apply to putative class member conduct.

19. **Improper class allegations**. Plaintiffs' claims may not properly be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, including without limitation because Plaintiffs cannot satisfy the requirements of numerosity, commonality, typicality, adequacy, superiority, or predominance, and because the putative class is not definite and ascertainable.

PRAYER FOR RELIEF

WHEREFORE, IGT respectfully requests that this Court:

A. Enter judgment in IGT's favor and against Ms. Benson and Ms. Simonson;

B. Award IGT its costs of suit;

C. Award IGT its attorneys' fees to the extent permitted by law; and

D. Grant IGT such other and further relief as this Court deems just and proper.

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DATED this 18th day of January, 2019.

Respectfully submitted,

DENTONS US LLP

By */s Bonnie Lau*

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Attorneys for International Game Technology

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED this 18th day of January, 2019.

s/ Bonnie Lau
Bonnie Lau, Admitted *Pro Hac Vice*

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EXHIBIT B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 20 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ADRIENNE BENSON and MARY SIMONSON, individually and on behalf of all others similarly situated,

Plaintiffs - Appellees,

v.

DOUBLE DOWN INTERACTIVE, LLC, a Washington limited liability company and INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation,

Defendants - Appellants.

No. 18-36015

D.C. No. 2:18-cv-00525-RBL
U.S. District Court for Western Washington, Seattle

MANDATE

The judgment of this Court, entered January 29, 2020, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Craig Westbrooke
Deputy Clerk
Ninth Circuit Rule 27-7

EXHIBIT C

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ADRIENNE BENSON and MARY SIMONSON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DOUBLEDOWN INTERACTIVE, LLC, a Washington limited liability company, and INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation,

Defendants.

Case No. 18-cv-00525-RSL

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS UNDER FED. R. CIV. P. 12(B)(1) AND MOTION TO ABSTAIN

NOTING DATE: OCTOBER 9, 2020

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INTRODUCTION

Over the last five and a half years, the Court has authored dozens of primarily published opinions in this and six other related class actions alleging that "social casinos" constitute illegal gambling under Washington law. Those opinions, spanning more than one hundred pages, have resolved a litany of motions ranging from subject matter jurisdiction challenges to assertions of arbitrability to discovery disputes to personal jurisdiction challenges to—incredibly—several motions arguing that the Ninth Circuit got it wrong in *Kater* when it held that social casinos are, in fact, illegal gambling. In this particular case, for example, the Court has: (i) denied Defendants' motion to compel arbitration; (ii) been affirmed by the Ninth Circuit on that denial; (iii) resolved a slew of discovery disputes, and (iv) denied Defendants' motion to certify questions to the Washington Supreme Court, in which—as did similar motions in the *High 5* and *Huuuge* cases—argued mainly that the Ninth Circuit got it wrong in *Kater* and that the Court should send the case to a state court to correct the Ninth Circuit's purported error. *See* Dkt. 127.

The Court's opinions, bolstered by repeated affirmances from the Ninth Circuit, helped the parties to four of the seven related social casino cases recently reach groundbreaking class action settlements. If finally approved, those settlements will return some $200 million in cash to consumers nationwide early next year.

Seeing the writing on the in the wall in this two-and-a-half-year-old case, Defendants here opted to lob one last, desperate trio of pleadings motions. One motion asked the Court to reconsider Judge Leighton's (third) thoughtful and thorough order denying a motion to certify questions to the Washington Supreme Court. Dkt. 133. Another motion sought to strike Plaintiffs' Washington law class allegations, even though DoubleDown is based in Washington and for years held itself out as exclusively subject to Washington law. Dkt. 128.

The third motion, to which this opposition brief responds, is just a gussied-up rehash of Defendants' still-pending reconsideration motion. Styling it as a motion to stay or dismiss based

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on various abstention doctrines,[1] Defendants filed a frivolous declaratory judgment lawsuit against Plaintiffs in Washington state court and now ask the Court to abstain from exercising jurisdiction over this case in deference to the state court case. *See* Dkt. 138 (the "Motion").

As an initial matter, the Motion is built on a string of claims that just aren't true. Defendants claim, for example, that "virtually no Double Down players purchase chips in order to continue to play." Mot. at 3. But DoubleDown recently filed papers with the SEC, under penalty of perjury (and securities fraud), saying just the opposite: "[DoubleDown] determined through a review of play behavior that game players generally do not purchase additional virtual currency until their existing virtual currency balances have been substantially consumed."[2] The Motion also asserts that "the state law issues presented are undecided by any Washington court" and "the [Washington State Gambling] Commission has approved the games in question." Mot. at 2-3. These are the sorts of proclamations that would make Baghdad Bob proud.[3] Both this Court and the Ninth Circuit have explicitly rejected them over and over and over again. *See, e.g.*, *Benson v. Double Down LLC*, No. 2:18-cv-00525-RBL, 2020 WL 4607566, at *2 (W.D. Wash. Aug. 11, 2020) ("*Bullseye* squarely held that a 'thing of value' need not be redeemable for money or merchandise"); *id.* at *3 ("It is well established at this point that the pamphlet and other Commission materials Double Down relies on have no legal effect.").

In any event, Defendants provide no basis for the Court to now abstain from exercising its jurisdiction over this two-and-a-half year old case. Federal courts have a "virtually unflagging obligation" to exercise the jurisdiction given them. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Even where—unlike here—the basic criteria for abstention are met, abstention is appropriate only in "exceptional circumstances." *Id.* at 813. In

---

[1] Indicative of the apparent haste with which the Motion was was thrown together, Defendants' caption suggests that the Motion seeks dismissal, but the conclusion asks for a stay. Mot. at 20. To be clear, a federal court cannot dismiss an action for damages on abstention grounds. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 730 (1996).

[2] DoubleDown Interactive Co., Ltd., Form F-1/A at 72, (June 30, 2020), *available at* https://bit.ly/3kcmcV8. ("DoubleDown Form F-1/A.")

[3] *See* Associated Press, *American Troops At Baghdad Airport And [Baghdad Bob]*, YOUTUBE (Apr. 8, 2019), *available at* https://www.youtube.com/watch?v=-Ung95ORVUY.

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evaluating whether such exceptional circumstances exist, the Court is guided by "a strong presumption against federal abstention." *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 842 (9th Cir. 2017).

Defendants principally rely on the abstention doctrine set forth in *Colorado River*, which allows federal courts to abstain in favor of parallel state proceedings "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." 424. U.S. at 814. Those circumstances are not present here. The key legal question in this case—whether social casinos are illegal gambling under Washington law—has been conclusively resolved by the Ninth Circuit. *See Kater v. Churchill Downs, Inc.*, 886 F.3d 784 (9th Cir. 2018). And while this is certainly an important case, it is not a candidate for abstention because its resolution will likely return hundreds of millions of dollars to consumers, and consequently any state policy issues do not "transcend[] the result in the case . . . at bar." *Colorado Rive*r, 424. U.S. at 814. Moreover, at least two Washington state procedural rules will almost certainly prevent the state court from reaching any decision on the merits.

Defendants also briefly suggest abstention might be appropriate under *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), which permits abstention to avoid deciding unsettled issues of state law that are of great public importance, or *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), which holds that federal courts should generally refrain from deciding unsettled issues of state statutory interpretation if necessary to avoid constitutional issues. Even putting to one side the considerations that make abstention inappropriate here, this case does not qualify for *Thibodaux* or *Pullman* abstention. A judgment here would not infringe on Washington's sovereignty: indeed, DoubleDown presented its arguments about the state's gambling laws to the relevant state regulator, who decided not to take any action that would upset the continuing of this litigation. And there are no relevant constitutional issues on the horizon.

Defendants' Hail Mary abstention motion should be denied.

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RELEVANT PROCEDURAL BACKGROUND

This case is one of seven related class actions pending before the Court alleging that "social casino" apps are illegal gambling under Washington law. DoubleDown Casino, Defendants' flagship product, is materially indistinguishable from the social casinos at issue in the other related cases. Just like the other social casinos, DoubleDown Casino features realistic, casino-like slot machines, accompanied by the background noise of a brick-and-mortar casino and the celebratory noises associated with slot machine jackpots. Within DoubleDown casino, customers can wager virtual chips at these slot machines. Dkt. 41, First Amended Complaint ("FAC"), ¶¶ 30-31. DoubleDown occasionally provides customers with free chips, but also allows customers to purchase chip packages costing up to $499.99. *See* Figure 1.

Figure 1

Players generally do not purchase more chips until they have effectively run out of chips. *See* DoubleDown Form F-1/A at 72, *available at* https://bit.ly/3kcmcV8. This year, customers are on pace to lose more than $300 million purchasing and gambling away virtual chips in DoubleDown Casino. *Id.* at 13.

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Washington law provides that "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." RCW 4.24.070. Plaintiffs here allege that DoubleDown casino's virtual chips are "things of value" because they extend gameplay. In *Kater,* the Ninth Circuit relied in part on a decision of a Washington appellate court and held that because—in a materially identical social casino—virtual chips extend gameplay, they are "thing[s] of value." *See Kater*, 886 F.3d at 787-88 (relying on, *inter alia*, *Bullseye Distributing LLC v. State Gambling Commission*, 110 P.3d 1162, 1163, 1167 (Wash. Ct. App. 2005)). The Ninth Circuit explicitly rejected the defendant's citation to a slide deck and meeting minutes from the Washington State Gambling Commission (the "Commission"), and also to a pamphlet later prepared by Commission staff. *Kater*, 886 F.3d at 788. The presentation and meeting minutes, the Court noted, "do not indicate that the Commission adopted a formal position" with respect to the question presented, and the pamphlet lacked any definitive analysis of the legality of these types of digital casinos. *Id.*[4]

Following *Kater*, one of the defendants in that case petitioned the Commission for a declaratory order that its social casino was lawful. Dkt. 111-2 at 2. DoubleDown General Manager Joe Sigrist appeared at a Commission hearing to offer his live testimony in support of the petition. *See* Transcript of July 2018 Commission Meeting at 115-17, *available at* https://www.wsgc.wa.gov/sites/default/files/public/news/big-fish/7-12-18BigFishPetition Transcript.pdf. The Commission nevertheless rejected the petition, "declin[ing] to insert itself into active and ongoing civil litigation." Dkt. 111-2 at 4. The Commission made clear that it was taking no position as to the interpretive issues presented by the *Kater* litigation. *See id.*

[4] Defendants rely extensively on these materials in their motion, but they blatantly misrepresent them. *See* Mot. at 3-5. The slide presentation was not prepared by the Commission, and the portion of the meeting minutes block quoted extensively on page 4 of the motion discuss the views of an individual who was not a Commissioner. The Commission came to no "conclusion" that digital casinos are legal under Washington law, and in any event the Commission has withdrawn the pamphlet from its website. *See Benson,* 2020 WL 4607566 at *3.

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Additionally, at least four bills—all of which explicitly referenced this lawsuit—were introduced in the Washington legislature in an effort to amend RCW 4.24.070. Despite yet more live testimony in support from Mr. Sigrist,[5] those bills all died in committee. *See* H.B. 2720, 66th Leg., Reg. Sess. (Wash. 2020) (not reported out of committee after hearing); S.B. 6568, 66th Leg., Reg. Sess. (Wash. 2020) (no committee hearing); H.B. 2041, 66th Leg., Reg Sess. (Wash. 2019) (same); S.B. 5886, 66th Leg., Reg. Sess. (Wash. 2019) (same).

In addition to their efforts before the Legislature and the Commission, Defendants in this case unsuccessfully moved to compel arbitration and then to certify to the Washington Supreme Court. *See* Dkt. 103 at 10 (acknowledging that *Kater* answered the principal issue sought to be certified); *id.* at 11 (arguing that *Kater* incorrectly interpreted Washington law). The Court denied the certification motion, finding that the questions it presented involved a "straightforward application" of statutory language and had been answered by *Kater*. *See Benson*, 2020 WL 4607566, at *2. The Court also rejected the argument that *Kater*'s holding was "new," noting that the Ninth Circuit relied heavily on the 2005 *Bullseye* decision of the Washington Court of Appeals. *Id.* at *3. Finally, the Court rejected Defendants' citation to materials associated with the Commission, noting that "it is well established at this point" that those materials "have no legal effect," and pointing out that the Commission withdrew the guidance Defendants rely upon following *Kater*. *Id.* at 5-6.

Defendants have now essentially twice asked the Court to reconsider Judge Leighton's decision, first in an explicit motion to reconsider, and now in this abstention motion. The Court should reject both attempts to wriggle out from beneath the prior orders issued by this Court.

//

[5] *See* Hearing on H.B. 2720 before the H. Civil Rights & Judiciary Committee, 66th Leg., Reg. Sess. (Wash. 2020), *available at* https://bit.ly/2FpuYAo.

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ARGUMENT

I. *Colorado River* Abstention Is Inappropriate Here.

Abstention of any kind is "the exception, not the rule." *Colorado River*, 424 U.S. at 813. Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Id.* at 817; *see also Quackenbush*, 517 U.S. at 716 ("We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."). "Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959).

Defendants principally seek to stay this case under *Colorado River*, which acknowledges that in "exceptional circumstances" a court might be justified in "dismiss[ing] a federal suit due to the presence of concurrent state proceeding." 424 U.S. at 818. The Ninth Circuit has enunciated eight factors to guide a court's evaluation of the appropriateness of abstention under *Colorado River*:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

Seneca, 862 F.3d at 841-42. These factors are "to be applied in a pragmatic, flexible manner with a view to the realities of the case at hand." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 21 (1983). "The underlying principle guiding this review is a strong presumption against federal abstention." *Seneca*, 862 F.3d at 842. "Any doubt as to whether a factor exists should be resolved against a stay, not in favor of one." *Travelers Indem. Co. v.*

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Madonna, 914 F.2d 1364, 1369 (9th Cir. 1990). Collectively these factors weigh heavily against a stay.

The final *Colorado River* factor is dispositive here because there is "substantial doubt" that the state proceedings will actually resolve the issues presented in this federal lawsuit, "preclude[ing] the granting of a stay." *Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 913 (9th Cir. 1993) (calling this factor "dispositive" against a stay). As the Ninth Circuit has held, "a district court may enter a *Colorado River* stay order only if it has 'full confidence' that the parallel state proceeding will end the litigation." *Id.* (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277 (1988)).

The Court cannot have full confidence about that here. Even on Defendants' terms, the only way the state court action could end this federal litigation is if the Defendants prevail on their claims in their entirety in state court. If Benson and Simonson were to prevail, or if the state court were to issue a declaration other than the full-throated exoneration Defendants hope for, this case would then resume, including class certification, further discovery, and summary judgment or trial. *See id.* (finding "substantial doubt" about whether a state lawsuit would resolve a federal lawsuit); *Wells Fargo Bank, N.A. v. Iny*, No. 13-cv-01561, 2014 WL 5364120, at *2 (D. Nev. Oct. 21, 2014) ("there exists a substantial doubt as to whether the [state court] Litigation will resolve this action and the Court therefore determines a stay is not appropriate at this time."). There is also, of course, the chance that even if Defendants prevail, any determination by the state trial court gets reviewed and reversed on appeal. *See Intel*, 12 F.3d at 1313 n.5 ("We find the possibility that the award will be reversed through the state appellate review process sufficient to raise a substantial doubt as to whether the state proceedings will end the litigation."); *York v. Starbucks Corp.*, No. 08-cv-7919, 2010 WL 11493197, at *7 (C.D. Cal. Aug. 6, 2010) (declining to enter a *Colorado River* stay because "it is not possible to predict the appellate and post-appellate disposition of [the state case] beyond a 'substantial doubt,' and this case could present further issues for resolution even after the [state] case is fully litigated") (quoting *Intel*, 912 F.3d at 913). In other words, even under Defendants' implicit assumption that

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their declaratory action will be resolved on the merits, there is substantial doubt about whether the state court action will fully resolve matters in this Court.

But the more salient point here is that the state court will not likely even reach the merits of Defendants' declaratory judgment claims. That's true for at least two reasons.

First, the state court is almost certain to dismiss the state court case because the claims Defendants allege in state court are compulsory counterclaims that can only be brought in this federal case. Washington's Civil Rule 13 requires parties to allege "as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Wash. R. Civ. P. 13(a). It is beyond dispute that Defendants' declaratory claims arise out of the same transaction or occurrence as Benson's and Simonson's claims: Paragraph 6 of Defendants' state court complaint is clear that Defendants seek a declaration regarding the legality of exactly the same purchases that form the basis for Plaintiffs' claims in federal court. *See* Dkt. 138 at ECF 30. And Washington courts have made clear that "[t]he fact that the original action took place in one jurisdiction and the subsequent action is in another jurisdiction does not render inapplicable compulsory counterclaim concerns." *Chew v. Lord*, 181 P.3d 25, 29 (Wash. Ct. App. 2008). "Furthermore, the fact that a claim is for a declaratory judgment also does not render inapplicable compulsory counterclaim concerns." *Id*.

The court in *Chew* quoted extensively from Wright & Miller's *Federal Practice and Procedure*, which states that "if a counterclaim for declaratory relief arises out of the same transaction or occurrence as plaintiff's claim, it is compulsory." *See id.* (quoting 6 Wright & Miller, *Federal Practice & Procedure* § 1406 (2d ed. 1990)). Because Defendants' counterclaim is compulsory, it has to be brought in the federal action, and will be subject to dismissal in state court. *See Chew*, 181 P.3d at 30 ("The purpose of the compulsory counterclaim rule is served by making an "actor" of [Defendants] so that circuity of action is discouraged and the speedy settlement of all controversies between [Defendants] and [Plaintiffs] can be accomplished in one

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action. We hold that the trial court properly dismissed [Defendants'] claims because they were compulsory counterclaims that were required to be asserted in the [first-filed] action."); *see also Atlas Supply, Inc. v. Realm, Inc.*, 287 P.3d 606, 608 (Wash. Ct. App. 2012) ("A party must assert its compulsory counterclaims or those claims are forever barred.").

Nor does it matter that this case has not yet reached a judgment, or that the lead case here is in federal court while the later-filed case is in state court. On these points, a recent dispute between Michael Moi and Dale Chihuly, which this Court happens to be deeply familiar with, is dispositive. *See Moi v. Chihuly Studio, Inc.*, No. 79756-5-I, 2020 WL 1917492 (Wash. Ct. App. Apr. 20, 2020) ("Moi I"). In June 2017, Moi filed a lawsuit seeking an order establishing himself as a co-author of several of Chihuly's artworks. *Id.* at *1. The lawsuit was promptly removed and assigned to this Court. *See Moi v. Chihuly Studio, Inc.*, No. 17-cv-0853-RSL, 2019 WL 2548511 (W.D. Wash. June 20, 2019) (Lasnik, J.) ("Moi II"). In December 2018, *before this Court entered a judgment*, Moi filed a new lawsuit in state court alleging that Chihuly defamed him when Chihuly put out a public statement denying that Moi was a co-author of the artwork in question. *See Moi I*, at *1. Concluding that the defamation claims were "logically related" to the federal court litigation and consequently were compulsory counterclaims, the state trial court dismissed the defamation claim as barred under Washington's Rule 13(a), and the Washington Court of Appeals affirmed. *Id.* at *2. As explained by the Washington Court of Appeals, the key question in terms of timing was whether Moi could have pleaded his defamation claims as counter-claims in his July 2017 answer in the federal lawsuit. *Id.* Because the answer to that question was "yes," Moi was "required under Rule 13(a) of the Washington and federal rules to raise it in that pleading," and "[h]is failure to do so preclude[d] him" from pursuing a subsequent state court lawsuit. *Id.* Defendants' state court declaratory judgment action is almost certain to meet the same fate.

Second, in the unlikely event that the state court does not dismiss Defendants' declaratory judgment action, it is nevertheless likely to stay that action under Washington's "priority of action" rule. "Under the priority of action doctrine, the forum that first gains jurisdiction over a

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matter retains exclusive authority over it." *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 49 P.3d 894, 906 (Wash. Ct. App. 2002). In other words, when two lawsuits involve the same issues, claims, and parties, the second court will stand aside. *See id.* at 907. Because the elements of this action appear to be met here, there is a substantial likelihood that the state court will refuse to adjudicate Defendants' declaratory claim. For instance, in *City of Yakima v. International Association of Fire Fighters, AFL-CIO, Local 469*, the Washington Supreme Court held that the trial court properly dismissed a declaratory action filed in state court when the same dispute had first been submitted to the appropriate state agency. 818 P.2d 1076, 1086-87 (Wash. 1991). Washington courts have also applied this rule to dismiss consumer-protection claims filed in state court after similar claims have been filed in federal court. *See, e.g.*, *Bunch v. Nationwide Mut. Ins. Co.*, No. 69600-9-I, 2014 WL 720881, at *2-*6 (Wash. Ct. App. Feb. 3, 2014) (ordering stay of later filed CPA claim while CPA claim between same parties concerning same facts was pending in federal court). There is a substantial likelihood that the priority-of-action rule requires the state court to stay Defendants' claims in state court.

Thus, given that there is substantial doubt as to whether the state court action will ever resolve Defendants' claims in a way that disposes of this litigation, a *Colorado River* stay is "preclude[d]." *Intel*, 12 F.3d at 913.

Additionally, many of the other *Colorado River* factors are either neutral or counsel in favor of a stay. For example, the order in which the forums obtained jurisdiction weighs in favor of allowing the first-filed federal case to proceed. This federal lawsuit was approximately two-and-a-half years old before Defendants' filed their obviously reactive lawsuit in state court. Many of the key substantive issues in this case have already been examined in this Court, the Ninth Circuit has resolved an interlocutory appeal, and discovery is well underway. This factor therefore counsels against a stay. *See Goodin v. Vendley*, 356 F. Supp. 3d 935, 946 (N.D. Cal. 2018) (staying case in favor of state litigation because "the state action was filed about five months before the federal action" and "some discovery has occurred"); *Stoltz v. Fry Foods, Inc.*, 60 F. Supp. 3d 1132, 1138 (D. Idaho 2014) (declining to enter a stay because "the [state] case

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has not progressed past the initial motion to dismiss" while in the federal action "the parties in this case have exchanged initial disclosures, and there is Fry Foods' motion to dismiss pending, which is fully briefed and ripe for a decision").

Another factor—the desire to avoid forum shopping—looks to the "vexatious or reactive nature of either the federal or the state litigation." *Enfission, Inc. v. Leaver*, 408 F. Supp. 2d 1093, 1100 (W.D. Wash. 2005) (quoting *Cone*, 460 U.S. at 17). "When evaluating forum shopping under *Colorado River*, [the Court] consider[s] whether either party improperly sought more favorable rules in its choice of forum or pursued suit in a new forum after facing setbacks in the original proceeding." *Seneca*, 862 F.3d at 846. That is plainly what happened here: worried about the effect of rulings from the Ninth Circuit and this Court in this and other related cases, Defendants moved to certify certain questions to the Washington Supreme Court. When that effort was rebuffed, Defendants filed their reactive, state-court action. The obvious purpose is to attempt to avoid rulings made in federal court. *Seneca Insurance* instructs that this Court should not defer to the state-court proceeding in these circumstances. Defendants suggest that this factor favors abstention because no merits rulings have occurred. Mot. at 18. But between Defendants' motion to compel arbitration (Dkt. 44), Defendants' interlocutory appeal of the Court's order denying the arbitration bid (Dkt. 61), Defendants' motion to certify questions to the Washington Supreme Court (Dkt. 103), Defendants' motion for reconsideration of the Court's order denying the reconsideration bid (Dkt. 133), and now this motion to abstain (Dkt. 138), this is Defendants' *fifth* attempt to avoid having this lawsuit adjudicated on the merits in this Court. Merits rulings or no, Defendants are plainly attempting to skirt the rulings of this Court and the Ninth Circuit.

As to the risk of piecemeal litigation, while parallel proceedings could in theory result in duplication of effort, it is exceedingly unlikely that the state court will hear Defendants' case on the merits. And in any event, this factor weighs in favor of abstention only when there is a "clear federal policy" against piecemeal litigation. *See Colorado River*, 424 U.S. at 819. Noting that any case in which *Colorado River* is invoked will almost certainly involve some duplication of

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effort, the Ninth Circuit has held that this factor weighs in favor of a stay only in "exceptional circumstances" where piecemeal litigation "would be particularly problematic." *Seneca*, 862 F.3d at 843. Defendants cannot identify either a clear federal policy against piecemeal litigation or explain why piecemeal litigation would be particularly problematic here. As to policy, Defendants cite the primary role of the states in regulating gambling, but this general preference for locating policymaking at the state level has nothing to do with potentially duplicative litigation. *See McDonald v. Gurson*, No. 17-cv-0724-JLR, 2017 WL 3531766, at *6 (W.D. Wash. Aug. 17, 2017) (finding this factor not met when movant "does not identify an explicit legislative policy of avoiding piecemeal litigation in this context").

Finally, while it is true that Washington law provides the rule of decision here, "the 'presence of state-law issues may weigh in favor of that surrender' only 'in some rare circumstances.'" *Id.* at *7 (quoting *Cone*, 460 U.S. at 26). When a case presents only "'routine issues of state law' that a district court is fully capable of deciding," the necessary "rare circumstances" are absent. *Id.* That's the case here. As Judge Leighton already concluded, "Double Down has not shown that the[] facts [of this case] present 'new' or 'substantial' questions of statutory interpretation." *Benson*, 2020 WL 4607566, at *2. Instead, at issue here is a "straightforward application" of statutory text. *Id.* At best, "this factor is neutral." *McDonald*, 2017 WL 3531766, at *7. *But see Travelers Indem. Co.*, 914 F.2d at 1369 (doubts about whether a factor is met should be resolved against abstention).

DoubleDown's response is to suggest generally that gambling laws are for states to interpret under the Tenth Amendment. True enough, a state has the authority to determine what forms of gambling are lawful within its borders. But that doesn't mean, as Defendants suggest, that federal courts are not competent to read and apply those laws. And that's all that is happening here: Washington's legislature has passed laws that define and limit gambling within Washington's borders. This case requires application of those laws. But to apply those laws is no more a threat to Washington's sovereignty than any diversity action is. Moreover, while Defendants insist that this case involves "unsettled" questions of state law (*see, e.g.*, Mot. at 11),

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that is simply not true. The Ninth Circuit's decision in *Kater*, which is binding in the Ninth Circuit until the state courts provide some contrary indication that *Kater* is incorrect, *see Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 885 n.7 (9th Cir. 2000), along with the Washington Court of Appeals' decision in *Bullseye*, settle the major merits questions in this case.

II. *Thibodaux* Abstention Is Unwarranted.

Defendants next seek a stay under the doctrine of *Thibodaux* abstention, but Defendants cannot show that this case presents the kind of difficult, unsettled questions necessary to invoke this doctrine. In *Thibodaux*, a city in Louisiana attempted to expropriate the property of the defendant utility company. 360 U.S. at 25. The utility removed the case to federal court, but the district court stayed proceedings pending a decision by the courts of Louisiana regarding whether the city had the statutory authority to undertake the expropriation. *Id.* at 26. The Supreme Court concluded that the district court's order was appropriate: The Court cited the fact that the case involved an "old but uninterpreted statute" of "disputed" meaning, regarding a subject "intimately involved with the sovereign prerogative." *Id.* at 29-30. The Court concluded that the district judge had acted within his discretion to permit the state courts to construe the state statute rather than issue "a dubious and tentative forecast" about its meaning. *Id.* at 29.

Thibodaux was decided the same day as *Alleghany County* in which the Court held that a district court erred by abstaining from deciding a suit challenging a county's taking of private property under state law. 360 U.S. at 189. The Court reiterated that abstention is an "extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it," and noted that because the district court "would simply be applying state law in the same manner as would a state court," the suit should proceed, even though it might interfere with a pending state regulatory proceeding regarding the same taking. *Id.* at 189-92.

Allegheny County highlights that one of the key features of *Thibodaux* was the presence of a genuinely difficult and disputed question of state law on which decisions of state courts offered no guidance. *See Thibodaux*, 360 U.S. at 31 (Stewart, J., concurring) (distinguishing *Allegheny County* on the basis that the statute at issue in *Thibodaux* was of "highly doubtful

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meaning"). And, as the Ninth Circuit has pointed out, given that *Thibodaux* represents an "extraordinary and narrow" exception to this Court's duty to adjudicate cases properly before it, "it is critical to examine the scope of that 'extraordinary and narrow exception' with care, rather than applying it as a convenient way of avoiding state law questions." *Hawthorne Savings F.S.B. v. Reliance Co. of Ill.*, 421 F.3d 835, 845 (9th Cir. 2005) (quoting *Quackenbush*, 517 U.S. at 728).

The kind of difficult questions needed to abstain under *Thibodaux* are simply not present here. The decision in *Snohomish County Public Hospital District 2 v. Shattuck Hammond Partners, LLC*, No. 10-cv-01935–MJP, 2011 WL 321827 (W.D. Wash. Feb. 1, 2011), is instructive. In *Snohomish County*, the court concluded that a difficult question was not presented by a state venue statute because the statute's text was "plain and unambiguous" and its meaning could be illuminated by a state court decision interpreting an analogous statute. *Id.* at *2. So too here. The Ninth Circuit found the relevant statutory text here to be straightforward and easily interpreted. *See Kater*, 886 F.3d at 787. It is telling that the Ninth Circuit saw fit to simply apply the plain language of the statute here, rather than seek guidance from the state courts. *See Benson*, 2020 WL 4607566, at *2 ("The Ninth Circuit apparently did not see this issue as 'substantial' enough to certify to the Washington Supreme Court and Double Down does not suggest a persuasive alternative reading of the statute."). Moreover, here there is a state court decision that interprets the very statutory phrase in dispute here: "thing of value." *See Bullseye*, 110 P.3d at 1167. Thus, the Court here has even more raw material to work with than did the court in *Snohomish County*. In fact, the issues are very nearly settled, insofar as the Court already has held that "the core issue is straightforward." *Benson*, 2020 WL 4607566, at *2; *see also id.* at *3 (concluding that other questions raised by Defendants "do[] not pose a substantial or complex legal issue[s] requiring input from the [Washington] Supreme Court"). The United States Supreme Court, for its part, has "always held that where the state law is clear and readily ascertained there is no basis for abstention." *Machtronics, Inc. v. Zirpoli*, 316 F.2d 820, 827 (9th Cir. 1963). There is no basis to abstain here.

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Defendants try to draw a parallel to *Thibodaux* (in which serious doubts about the at-issue statute's meaning were raised by an opinion letter from Louisiana's Attorney General) by highlighting the now-withdrawn guidance drawn up by staff members at the Commission, as well as a presentation given to members of the Commission several years ago. Mot. at 2-3. The Ninth Circuit has already rejected the notion that these materials cast any doubt on the language of the relevant statutes. *See Kater*, 886 F.3d at 788. So too has this Court. *Benson*, 2020 WL 4607566, at *3 ("Double Down's arguments about conflicts with the Gambling Commission are even less compelling. It is well established at this point that the pamphlet and other Commission materials Double Down relies on have no legal effect . . . Since *Kater* was decided, the Commission took down its guidance approving of casino-gaming apps and has declined to take a position on the Ninth Circuit's ruling.").

Defendants also rely heavily on a passel of decisions which abstained from resolving claims brought under (or implicating) state gambling laws under the principles of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).[6] Mot. at 6-7, 9-10, 19. It should be noted that none of these cases approved of abstention without the required difficult question of state law; in each case the federal court was presented with a tricky issue related to the gambling laws and regulations of the forum state. But putting that distinction to one side, these cases emphasize, as do Defendants, that regulation of gambling is a quintessentially state function, and that federal court decisions have the potential to impede that function.

But "while *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy." *New Orleans Public Serv., Inc. v. Council and City of New Orleans*, 491 U.S. 350, 362 (1989) (quoting *Colorado River*, 424 U.S. at 815-16); *see also Allegheny County*, 360 U.S. at 191-92 (noting that federal courts frequently deal with complex issues of state policy without

[6] *Burford* abstention and *Thibodaux* abstention are generally understood to be related. *See Hawthorne Savings*, 421 F.3d at 846 n.9.

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causing friction with the states). Thus, as the First Circuit has held, "*Burford* abstention must only apply in 'unusual circumstances,' when federal review risks having the district court become the 'regulatory decision-making center.'" *Chico Serv. Station, Inc. v. Sol Puerto Rico, Ltd.*, 633 F.3d 20, 30 (1st Cir. 2011) (quoting *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 474 (1st Cir. 2009)) "The mere involvement of an area of state law which is the subject of detailed regulation does not make abstention appropriate." *Kern-Tulare Water Dist. v. City of Bakersfield*, 828 F.2d 514, 517 (9th Cir. 1987). "The mere potential for conflict [with state law], without more, does not warrant abstention either." *Id.* "The question instead is whether such potential conflict would impermissibly impair [Washington's] efforts to establish policy regarding" gambling. *Id.*

Defendants' relevant cases involve this type of impermissible impairment, and show why abstention is unwarranted here. Defendants' principal authority is *Johnson v. Collins Entertainment, Inc.*, 199 F.3d 710 (4th Cir. 1999). The story of that case begins with a 1991 decision of the South Carolina Supreme Court which had the effect of "encourag[ing] the exponential growth of the video poker industry" in South Carolina, leading to a 1993 law comprehensively regulating the industry, and creating a complex, interlocking structure for regulatory oversight. *Id.* at 715-17. Just four years later, before the state's courts had issued any decisions under the new law and at a time when the law was still subject to active political debate in the state, several plaintiffs sued, alleging that the defendants failed to comply with several parts of the new law, including a daily limit on total payouts. *Id.* at 717-18. The state's attorney general argued in a filing with the district court that the statute setting this payout limit "was ambiguous and susceptible to at least three different interpretations," though he declined to argue in favor of any. *Id.* at 718. The district court entered a permanent injunction against the defendants that "effectively commandeered South Carolina's enforcement efforts" in the gambling arena, by, among other things, requiring signs of a certain size and type to be displayed on video poker machines, and requiring proprietors to maintain certain personal information about gamblers. *Id.* at 723-24. That encroachment on state authority was impermissible, the court

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concluded, and given the number of active, open questions of state law percolating through the case, the court also thought it wise to stay any proceedings on the plaintiffs' damages claims until the state courts weighed in. *Id.* at 725-29.

Here, by contrast, a decision in this Court will not impede the state's efforts to make policy. Indeed, even if decisions of this Court could wreak havoc on Washington's efforts to regulate gambling, it is difficult to see how much effect a decision from this Court could have beyond the effect of the Ninth Circuit's decision in *Kater*. In any event, the Commission may choose at a later date to take up the questions presented by this case, and it will not be constrained by this Court's decisions. Moreover, the Commission was given the opportunity to resolve these questions, and it declined. So, too, the Washington legislature considered reactive legislation and, after hearing testimony on the issue, also decided not to act. The law is not new (indeed, both this Court and the Ninth Circuit have found guidance in a 2005 decision of the Washington Court of Appeals construing the law) and there is no active political debate surrounding the law, nor any ongoing proceedings which might be disrupted by a decision from this Court. *Johnson*, therefore, is unhelpful.[7]

Other cases, too, demonstrate that the extreme situations that counsel in favor of abstention are not present here. Take, for instance, *Chun v. New York*, 807 F. Supp. 288 (E.D.N.Y. 1992), another of Defendants' cases. The plaintiff there placed in stores in New York a terminal that permitted individuals to purchase lottery tickets in several out-of-state lotteries,

[7] For similar reasons, Defendants reliance on *Club Association of West Virginia, Inc. v. Wise*, 156 F. Supp. 2d 599 (S.D. W. Va. 2001), is unhelpful. The plaintiffs there sought to enjoin, as unlawful under the West Virginia constitution, a months-old law permitting video lotteries. *Id.* at 601. The court found that it lacked jurisdiction to consider the lawsuit, but noted in *dicta* that if it had jurisdiction it would abstain. *Id.* at 616. Although nominally applying *Pullman* abstention, the court noted that the new law was "a product of years of public policy research and debate, a debate that yet continues following its passage." *Id.* at 620. The court thought it would be inappropriate to issue "far-reaching equitable relief" that would "upset regulation in areas traditionally committed to state control, especially when the state sovereign itself has struggled with drawing the right balance." *Id.* at 619. Again, similar circumstances simply aren't present here. Washington law has been consistent for decades with respect to gambling. The law at issue here is not new, has been given authoritative construction by multiple courts, and is not the subject of active debate.

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run by a network located out-of-state. *Id.* at 290. She sought an injunction preventing New York officials from prosecuting her for violating the state's anti-gambling laws. *Id.* Noting that several relevant provisions of the state law had not received any authoritative construction from state courts, and that there were three pending proceedings under these same laws (two criminal prosecutions and one civil enforcement action), the court abstained, noting the "complex and comprehensive" state law scheme at issue, and the possibility that a decision by the federal court "could impede the state's efforts to uniformly regulate gambling." *Id.* at 292. Again, the present circumstances are much different: This Court *does* have guidance from the relevant state courts, not to mention from the Ninth Circuit, and there are no state proceedings that might be disrupted by a decision in this Court. And, again, the relevant state authorities were given the opportunity to issue rulings that would have resolved the issues presented here, and they declined.

To the same effect is *Metro Riverboat Associates, Inc. v. Bally's Louisiana, Inc.*, 142 F. Supp. 2d 765 (E.D. La. 2001). In that case the plaintiff challenged the legality of a transfer of rights in a riverboat gambling operation. *Id.* at 768-69. As described in the court's opinion, this transfer was the subject of at least three court cases and two regulatory actions, all of which dealt directly with the same legal issues in the federal proceeding. *Id.* at 770-72. Given the many state level proceedings, including in a regulatory body with exclusive jurisdiction to hear disputes under the Louisiana gambling laws, the court abstained. *Id.* at 774-75.

Again, this case is nothing like *Metro Riverboat*. There are no pending proceedings which might reach decisions inconsistent with this Court's decisions, apart from the reactive declaratory action which, as described above, is highly unlikely to reach a merits judgment. And for all the language of the Defendants' brief that suggests that courts always abstain from resolving cases involving state gambling laws, the Ninth Circuit long ago reversed a district court's decision to abstain in an antitrust case which involved the gambling laws of Arizona. *See Turf Paradise, Inc v. Ariz. Downs*, 670 F.2d 813 (9th Cir. 1982).

Whatever merits decision is reached in this Court, the "regulatory decision-making center" will remain in Washington. As such, there is no cause for *Thibodaux* abstention here.

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III. *Pullman* Abstention Is Unwarranted.

Defendants last make a brief plea for *Pullman* abstention. "*Pullman* abstention is an equitable doctrine that allows federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions." *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998). "*Pullman* abstention should rarely be applied." *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003); *see also id.* (emphasizing that *Pullman* abstention is an "extraordinary and narrow exception" to a district court's jurisdiction).

Once again, Defendants' argument flounders on the need for the state law question to be genuinely unsettled. *See id.* (one requirement for *Pullman* abstention is that "the proper resolution of the possible determinative issue of state law is uncertain"). "If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction." *Harman v. Forssenius*, 380 U.S. 528, 535 (1965). As this Court has already concluded, the statutory question here is "straightforward." *Benson*, 2020 WL 4607566, at *2. More, "Double Down does not convincingly show that RCW 9.46.285's definition of a 'thing of value' is open to multiple reasonable interpretations." *Id.* at *3. As the Ninth Circuit has held, "uncertainty for purposes of *Pullman* abstention means that a federal court cannot predict with any confidence how the state's highest court would decide an issue of state law." *Pearl Inv. Co. v. City & County of San Francisco*, 774 F.2d 1460, 1465 (9th Cir. 1985). As both the Ninth Circuit and this Court have said repeatedly, there is no such uncertainty here. This is, therefore, not an appropriate case for the "extraordinary" step of *Pullman* abstention. *See, e.g.*, *Hill v. Snyder*, 900 F.3d 260, 265 (6th Cir. 2018) (denying defendant's request for *Pullman* abstention because "the relevant statutory provisions are unambiguous, and they support [p]laintiffs' position").

A second problem for Defendants is that there is no applicable "sensitive" constitutional question. Defendants posit that deferring to the Washington state court will prevent this Court

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from having to decide if Washington law can apply to a nationwide class under these circumstances (*i.e.,* a case against a Washington defendant who dictates application of Washington law in its terms of service). Dkt. 138 at 20. But it is not at all clear that deferring to the state courts on the interpretation of RCW 9.46.285 would alter or moot the federal issue raised by Defendants, as is required for *Pullman* abstention, given that class certification is independent of, and logically antecedent to, the merits. The geographic scope of the class here has nothing to do with the definition of "thing of value" in RCW 9.46.285. *See Porter*, 319 F.3d at 492 (one requirement for *Pullman* abstention is that "constitutional adjudication plainly can be avoided" by deferring to a state court determination).

CONCLUSION

The main state law issues presented in this case are straightforward matters of statutory interpretation. There is no reason to invoke the "extraordinary and narrow" doctrines of abstention to defer to a state court's reading of straightforward statutory provisions. The motion to abstain should be denied.

Dated: October 5, 2020

Respectfully submitted,

ADRIENNE BENSON and **MARY SIMONSON** individually and on behalf of all others similarly situated,

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Attorneys for Plaintiffs and the Putative Class

Exhibit 4

Hearing Date: May 21, 2021
Hearing Time: 9:00 AM
Judge/Calendar: The Honorable James J. Dixon

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

DOUBLEDOWN INTERACTIVE, LLC, a Washington limited liability company, and INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation,

Plaintiffs,

v.

ADRIENNE BENSON, an individual, and MARY SIMONSON, an individual,

Defendants.

Case No. 20-2-02023-34

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS OR STAY

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INTRODUCTION

In their opposition brief, DoubleDown Interactive, LLC ("DoubleDown") and International Game Technology ("IGT") ask this Court to weigh in on whether a Ninth Circuit panel correctly decided *Kater v. Churchill Downs* and ultimately to adjudicate this lawsuit based principally on policy arguments about comity and state sovereignty. Those issues may be interesting in the abstract, but they distract from the key question before the Court: whether DoubleDown and IGT are permitted to pursue this lawsuit even though it features the same parties, claims, and issues as those in the federal lawsuit that Benson and Simonson filed nearly three years ago and that the parties have vigorously litigated ever since. Under both Civil Rule 13(a) and the priority of action doctrine, DoubleDown and IGT are not permitted to do so.

DoubleDown and IGT argue that Civil Rule 13(a) does not bar their complaint because their claims are the mirror-image of Benson's and Simonson's claims and because the federal action has not yet reached a decision on the merits. *See* Opp'n at 8-13. But the mirror-image claims undoubtedly "arise[] out of the transaction or occurrence that is the subject matter of the opposing party's claim" and thus were compulsory counterclaims in the federal action. CR 13(a). Nor do DoubleDown and IGT point to any Washington caselaw supporting their contention that the Rule 13(a) bar requires a decision on the merits. In fact, Washington courts applying Civil Rule 13(a) in analogous circumstances have found that the failure to plead compulsory counterclaims in a federal action that has not yet reached a merits decision precludes that party from pleading the claims in a second-filed state court suit. *See Moi v. Chihuly Studio, Inc.*, No. 79756-5-I, 2020 WL 1917492, at *2 (Wash. Ct. App. Apr. 20, 2020). Consequently, Civil Rule 13(a) applies here and bars DoubleDown's and IGT's declaratory judgment claims.

DoubleDown's and IGT's attempts to escape the priority of action doctrine, *see* Opp'n at 13-17, are similarly unavailing. The doctrine squarely applies to this case, since the two actions are identical in subject matter, parties, and relief. The declaratory judgment complaint is, as DoubleDown and IGT admit, simply the inverse of Benson's and Simonson's federal case.

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Because the two actions are identical, the Court need not consider any other factors and should dismiss or stay the later-filed case.

DoubleDown and IGT rely heavily on policy arguments and purported "equitable considerations," *see* Opp'n at 14-20, in an attempt to avoid the rules that mandate dismissal of this action. Those arguments are irrelevant here. DoubleDown and IGT have been litigating against Benson and Simonson in federal court for nearly three years. The litigation has included a trip to the Ninth Circuit, *see Benson v. Double Down Interactive, LLC*, 798 F. App'x 117, 120 (9th Cir. 2020), and all manner of contested motion practice before the district court, *see Benson v. Double Down Interactive, LLC*, No. 2:18-CV-00525-RBL, 2019 WL 972482, at *1 (W.D. Wash. Feb. 28, 2019); *Benson v. Double Down Interactive, LLC*, No. 2:18-CV-00525-RBL, 2020 WL 4569596 (W.D. Wash. Aug. 7, 2020); *Benson v. Double Down Interactive, LLC*, No. 2:18-CV-00525-RBL, 2020 WL 4607566, at *1 (W.D. Wash. Aug. 11, 2020). The Honorable Robert S. Lasnik, who is now presiding over the federal action as well as six other similar class action cases against social casino companies, is obviously competent to adjudicate this particular controversy between these particular parties. Proceeding with this new case in a separate court would not only undermine Judge Lasnik's jurisdiction but also flout both Civil Rule 13(a) and the priority of action doctrine, both of which exist to preserve judicial resources and to avoid the unnecessary proliferation of lawsuits. Because dismissal of this case serves those goals, Benson and Simonson ask the Court to dismiss the complaint or, in the alternative, to stay proceedings in this Court pending final resolution of the federal litigation.

ARGUMENT

Despite DoubleDown's and IGT's central claim that "this dispute belongs in a Washington court," *see* Opp'n at 1, Civil Rule 13(a) and the priority of action doctrine both indicate that this particular complaint should be dismissed. DoubleDown's and IGT's arguments that those rules do not apply here or that the Court should ignore the rules in favor of other "equitable considerations" are unconvincing and do not comport with Washington caselaw applying those rules in analogous circumstances.

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A. This Action is Barred Under Washington Civil Rule 13(a).

DoubleDown's and IGT's declaratory judgment claims are, as they admit, simply the "inverse" of Benson's and Simonson's claims in the federal action. Opp'n at 8. Because the declaratory judgment claims therefore clearly "arise[] out of the transaction or occurrence that is the subject matter of the opposing party's claim," they were compulsory counterclaims in the first-filed federal suit. CR 13(a). Washington courts have dismissed later-filed actions under Rule 13(a) even when the first-filed case has not reached a merits decision, so Rule 13(a) should bar DoubleDown's and IGT's suit here.

1. DoubleDown's and IGT's "Duplicative" Declaratory Judgment Claims Were Still Compulsory Counterclaims, and Civil Rule 13(a) Bars Such Mirror-Image Claims.

DoubleDown and IGT first make the surprising argument that their declaratory judgment claim was not a compulsory counterclaim in the federal action because the claim—insofar as it is an "inverse counterclaim"—is "superfluous," "duplicative, if not inappropriate," and "repetitious and unnecessary." Opp'n at 8-9. DoubleDown and IGT thus admit that their declaratory judgment claims are simply the mirror-image of Benson's and Simonson's federal complaint and that a decision "denying liability" would have "no meaningful distinction" from "a declaration that one is not liable." *Id.* at 8. Yet DoubleDown and IGT ask this Court to decide such superfluous claims.

Benson and Simonson agree that the declaratory judgment claims are duplicative of the issues already being litigated in the Western District of Washington. But the fact that the claims are duplicative and would have been redundant in the federal action, had they been pleaded, does not mean that they were not compulsory under Rule 13(a)—and, moreover, does not make them more any more palatable in this Court. In fact, Rule 13(a) applies most obviously to mirror-image claims like DoubleDown's and IGT's, since there is no question that such claims "arise[] out of the transaction or occurrence that is the subject matter of the opposing party's claim." CR 13(a). There is no dispute here that DoubleDown's and IGT's declaratory judgment claims are far more than "logically related" to Benson's and Simonson's claims in the federal action. And

Washington caselaw makes clear that such related claims—including declaratory judgment claims—are barred by Civil Rule 13(a). *See Chew v. Lord*, 143 Wn. App. 807, 813-14, 181 P.3d 25, 29 (2008) ("[T]he fact that a claim is for a declaratory judgment . . . does not render inapplicable compulsory counterclaim concerns.").

2. Civil Rule 13(a) Bars This Action Even Though the Federal Case Has Not Reached a Decision on the Merits.

DoubleDown and IGT next argue that compulsory counterclaims are barred only if the first action has "proceeded to the merits." Opp'n at 11. That is wrong, for at least a few reasons. First, DoubleDown and IGT claim that "Fed. R. Civ. P. 13(a) is the operative rule" for a motion to dismiss in this Court, *see id.* at 12, but do not cite any authority to support their claim that a state court should apply federal procedural rules. DoubleDown and IGT then cite only federal cases to support their contention that Rule 13(a) "only serves as a bar to subsequent suits if there is a final judgment in the first-filed action." Opp'n at 12. Tellingly, DoubleDown and IGT do not point to *any* Washington cases interpreting Rule 13(a) that way. That's likely because Washington caselaw demonstrates that DoubleDown and IGT are wrong on this point. To pick just one example from the Court of Appeals, *Moi v. Chihuly Studio, Inc.* establishes that Washington courts apply Civil Rule 13(a) as a bar even if the first action has not yet reached the merits. *See* 2020 WL 1917492, at *2 (affirming dismissal of a second-filed action since plaintiff was required to raise his defamation claim as a counterclaim in the federal action that was already pending between the parties).

DoubleDown's and IGT's attempt to distinguish this case from *Moi*, *see* Opp'n at 10, fails at the starting blocks. The distinction is premised on a categorically false assertion: that in *Moi*, "dismissal of the second suit was only *after* a judgment was made in the first suit." *Id.* (wrongly focusing on the date the Court of Appeals affirmed the Superior Court's dismissal). In fact, the Superior Court in *Moi* ordered dismissal on March 12, 2019. *See* Respondents' Br., *Moi v. Chihuly Studio, Inc.*, No. 79756-5-I, 2019 WL 6460364, at *5 (Wash. Ct. App. Oct. 18, 2019). The federal court did not issue any merits judgment until it granted summary judgment on June

20, 2019. *See Moi v. Chihuly Studio, Inc.*, No. C17-0853RSL, 2019 WL 2548511, at *6 (W.D. Wash. June 20, 2019). Therefore, *Moi* applies squarely to the circumstances of this case and means that that DoubleDown's and IGT's failure to allege their declaratory judgment claims as counterclaims in the federal case "precludes [them from] raising [their] claim here." 2020 WL 1917492, at *2.[1]

The interpretation of Rule 13(a) expressed in *Moi* comports with the purposes of the rule. As explained in Benson's and Simonson's motion, Civil Rule 13(a) is distinct from and broader than the doctrine of res judicata. *See* Defs.' Mot. at 8; *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 866, 726 P.2d 1, 7 (1986) ("Rule 13 does not create the absolute bar of res judicata but is a bar created by rule . . . which logically is in the nature of an estoppel arising from the culpable conduct of a litigant in failing to assert a proper counterclaim."); *Chew*, 143 Wn. App. at 810 (The "purpose of [Rule 13(a)] is to make an actor of the defendant so that circuity of action is discouraged and the speedy settlement of all controversies between the parties can be accomplished in one action." (internal quotation marks omitted)). Therefore, even though Benson's and Simonson's federal case has not yet reached a judgment on the merits, Rule 13(a) bars DoubleDown and IGT from "circuity of action" and precludes them from asserting their compulsory counterclaims in a new case.

B. The Priority of Action Doctrine Instructs Courts to Stay or Dismiss Cases, Like This One, That Are Identical to a First-Filed Case.

DoubleDown and IGT also argue that the priority of action doctrine is inapplicable and that "[e]ven if the requirements were met," the court should decline to apply it due to "countervailing equitable considerations." Opp'n at 13-14. These arguments are unconvincing.

[1] DoubleDown and IGT also argue that *Moi* is distinguishable because "the *plaintiff* filed the first and the second suit." Opp'n at 10. But the plaintiff, Michael Moi, filed his second suit only after being named a counterclaim defendant in the federal action, and it was his failure to raise his defamation claim in his capacity as counterclaim defendant that barred him from asserting it in the second action. 2020 WL 1917492, at *1.

1. The Cases Are Identical as to Subject Matter, Parties, and Relief.

First, DoubleDown and IGT argue that Benson and Simonson have not met the "threshold test" for priority of action because they have not shown that the "cases involved are identical as to subject matter, parties, and relief." *Id.* at 13. But elsewhere in their opposition brief, DoubleDown and IGT admit that their declaratory judgment complaint is simply the "inverse of the claims asserted in [Benson's and Simonson's] complaint," so it is difficult to see how the actions are anything but identical. *Id.* at 8. Indeed, DoubleDown and IGT ask the Court to enter declarations of no-liability on each of Benson's and Simonson's three causes of action, and they even ask the Court to make additional, specific declarations on some of the issues involved in those claims. *See* Compl. at 15-16 (praying "[f]or a declaration that the virtual chips purchase[d] and used by Benson and Simonson in DoubleDown Casino games are not 'things of value' as defined by RCW 9.46.0285").

The declaratory judgment complaint, therefore, is not "narrowly limited." Opp'n at 13. Consequently, it is not at all like the second-filed action in *Port of Kingston v. Brewster*, where the court found that the second-filed unlawful detainer action was "narrowly limited to the issue of possession[,]" making it "fundamentally different" from the first-filed civil rights action that brought constitutional and statutory claims. No. 73668-0-I, 2015 WL 8162327, at *4 (Wash. Ct. App. Dec. 7, 2015). DoubleDown's and IGT's case is identical to Benson's and Simonson's even though Benson and Simonson seek damages in addition to declaratory and injunctive relief because the threshold issue for both cases is whether DoubleDown and IGT are liable for violating Washington's gambling laws, for violating Washington's Consumer Protection Act, and for unjust enrichment. *See Bunch v. Nationwide Mut. Ins. Co.*, 180 Wn. App. 37, 46, 321 P.3d 266, 271 (2014) ("Before either court may grant [plaintiff] relief, one of the two must first decide whether [defendant] violated the CPA and is liable. Accordingly, under collateral estoppel principles, that court's determination of liability will bar relitigation of this issue in the other court . . . . Thus, the two actions share an 'identity' such that the priority of action doctrine should apply.").

Further, the priority of action doctrine applies even though DoubleDown and IGT filed this case in a different jurisdiction than Benson's and Simonson's first-filed case. Contrary to DoubleDown's and IGT's incorrect characterization of *City of Yakima*, Opp'n at 14 (stating that the two actions in that case were "in the same court"), the court in *City of Yakima* applied the priority of action doctrine even though the first-filed cases were before the Public Employment Relations Commission, and the second-filed, consolidated cases sought declaratory relief in the Superior Court. *City of Yakima v. Int'l Ass'n of Fire Fighters, AFLCIO, Local 469, Yakima Fire Fighters Ass'n*, 117 Wn.2d 655, 660-61, 818 P.2d 1076, 1079 (1991). In *City of Yakima*, as here, the defendant in the first-filed action tried to file a separate action in a different jurisdiction, seeking a declaratory judgment that it was not liable for the claims in the first-filed complaint. *Id.* The court held that the priority of action rule applied and that the Superior Court "properly dismissed the . . . declaratory judgment action based on the priority of action rule." *Id.* at 676. Similarly, in *Schaaf v. Retriever Medical/Dental Payments Inc.*, the first-filed case was in New York state court and the later-filed case was in Washington state court. *See* No. 75335-5-I, 2017 WL 2840298, at *1 (Wash. Ct. App. July 3, 2017). There, too, the defendant in the first-filed action attempted to file a separate lawsuit in a different jurisdiction, and the court found that "the trial court properly dismissed [the second lawsuit] under the priority of action rule." *Id.* at *4. DoubleDown's and IGT's arguments fail to refute the clear identity of subject matter, parties, and relief between this case and the federal case, and so they fail to suggest that the priority of action doctrine does not apply.

2. "Equitable Considerations" Do Not Change the Application of the Doctrine Here.

DoubleDown and IGT also try to persuade the Court that "equitable considerations" should prevent the application of the priority of action rule in this case. Opp'n at 14-15. They cite *American Mobile Homes*, where the court declined "automatic application of the priority rule." *Am. Mobile Homes of Washington, Inc. v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 321, 796 P.2d 1276, 1283 (1990). But the court in that case considered equitable factors only after determining that "there is no identity of subject matter, relief, or parties." *Id.* at 320. "[B]ecause

the identities [of subject matter, parties, and relief] are not all present," the court found that "the priority rule should not be applied without consideration of other factors[,]" such as the parties' venue agreement. *Id.* The court in *Schaaf* followed this same approach to the priority of action doctrine, explaining that "[c]ourts have considered . . . factors relevant to equitable application of the [priority of action] doctrine but only where the res judicata effect of the first action on the second is uncertain because the identity of parties is not exact." 2017 WL 2840298, at *3 (citing *Am. Mobile Homes*, 115 Wn.2d at 321-22). Here, the Court need not consider additional factors because there is complete identity of subject matter, parties, and relief.

DoubleDown and IGT claim that the priority of action rule should not apply because "*Kater* was not a merits decision," because "*Kater* is not binding," and because they believe "Washington courts should decide Washington law." Opp'n at 15-17. None of these arguments are relevant to the priority of action analysis in this controversy between Benson, Simonson, DoubleDown, and IGT. *See Schaaf*, 2017 WL 2840298, at *4 (noting a lack of authority for the argument "that state interest is a relevant factor in considering whether to apply the priority of action rule"). Both state and federal courts have "authority to resolve the question[s] posed in this case," and the priority of action doctrine instructs jurisdictions with a later-filed, identical case to dismiss or stay. *City of Yakima*, 117 Wn.2d at 675; *id.* at 676 (holding that the agency with the first-filed case "had jurisdiction of the controversy and should have been permitted to conclude its process before the court took its turn . . . to review the issue"); *Bunch*, 180 Wn. App. at 46 (finding that the federal court with the first-filed case should "retain[] the exclusive authority to determine" liability under the Washington Consumer Protection Act).

The salient analysis here is the test set forth by Washington courts, which first focuses on the identity of the two actions and proceeds to other considerations only if that identity is lacking. In this case, the priority of action doctrine dictates dismissal or a stay of the second-filed, identical action.

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3. Benson and Simonson Do Not Ask This Court to Enjoin Another Proceeding.

DoubleDown and IGT argue that simultaneous litigation of this controversy can proceed in both the federal and state courts, citing the Anti-Injunction Act, 28 U.S.C. § 2283, which generally prohibits federal courts from enjoining state court proceedings. Opp'n at 18. That Act is irrelevant to this motion, which asks this Court to dismiss or stay the case before it—not to enjoin any other proceeding. Washington courts adopted the priority of action doctrine specifically to avoid simultaneous litigation of two cases regarding the same matter. *City of Yakima*, 117 Wn.2d at 675 ("The reason for the doctrine is that it tends to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and of process."). Benson and Simonson do not ask this Court to exceed its authority by entering any orders in other jurisdictions. Rather, Benson and Simonson ask this Court to follow the priority of action doctrine and to dismiss or stay the second-filed case before it.

C. DoubleDown's and IGT's Desire to Avoid Ninth Circuit Precedent Does Not Justify Multiple Lawsuits.

The main thrust of DoubleDown's and IGT's opposition brief is their argument that Washington courts, rather than the Western District of Washington, should decide Benson's and Simonson's state-law claims. *E.g.*, Opp'n at 1. They argue that "Benson['s] and Simonson's technical arguments" regarding compulsory counterclaims and the priority of action doctrine are less important than principles of state sovereignty. Opp'n at 18. But these abstract arguments about state police powers and federal court abstention doctrines ignore the fact that this motion to dismiss involves a particular controversy that has been pending in the Western District of Washington for almost three years (before a judge who is also overseeing six other class action cases against more than a dozen social casino defendants), and that DoubleDown and IGT have filed and lost motion after motion after motion in that case, including in an interlocutory appeal before the Ninth Circuit. *See Benson*, 798 F. App'x at 120. The Western District of Washington has jurisdiction—in this and the other related class actions—under the Class Action Fairness Act to adjudicate Benson's and Simonson's state law claims. So regardless of Double Down's and

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IGT's theoretical arguments about state police powers, this particular case was filed in the Western District of Washington, has been vigorously contested there by DoubleDown and IGT for years, and consequently should be resolved in the Western District of Washington.

As explained in Benson's and Simonson's motion, the procedural history of this controversy strongly suggests that DoubleDown and IGT filed this state case as a last-ditch effort to forum shop and to avoid litigating the relevant issues before Judge Lasnik in the Western District of Washington. Defs.' Mot. at 2-5. It is no secret that DoubleDown and IGT dislike the Ninth Circuit's decision in *Kater*. Opp'n at 5 ("[T]he Ninth Circuit's statutory interpretation in *Kater* was wrong and shortchanged."). But though DoubleDown and IGT attempt to paint that decision as an "outlier," *id.* at 4, the decision was rendered by a three-judge panel, and the defendant's petition for rehearing en banc was denied. *See* Dkt. 48, *Kater v. Churchill Downs*, No. 15-cv-612 (W.D. Wash. June 12, 2018) ("The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it."). As Judge Leighton (who handled Benson's and Simonson's federal case as well as the related class actions against social casino companies in the Western District of Washington prior to his retirement from the bench) noted, "[t]he Ninth Circuit's decision was a straightforward application of RCW 9.46.0285's language," was not a "truly new" interpretation, and was "not at odds" with legislative purpose. *Benson*, 2020 WL 4607566, at *2. The Western District of Washington (and the Ninth Circuit) have jurisdiction to decide this controversy and are competent to do so. DoubleDown's and IGT's aversion to the *Kater* decision does not justify abandoning the requirements of Civil Rule 13(a) and the priority of action rule. And those rules require this Court to dismiss or stay DoubleDown's and IGT's declaratory judgment complaint.

CONCLUSION

For all the foregoing reasons, Defendants Benson and Simonson ask this Court to dismiss the complaint or, in the alternative, to stay proceedings in this Court pending final resolution of the first-filed, federal case.

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DATED this 26th day of February, 2021.

ADRIENNE BENSON and MARY SIMONSON,

By: /s/ *Amy B. Hausmann*

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Exhibit 5

20-2-02023-34
ORSP 60
Order for Stay of Proceedings
10715719

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FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2021 JUL 23 PM 12:14

Linda Myhre Enlow
Thurston County Clerk

Hearing Date: July 23, 2021
Hearing Time: 9:00 a.m.
Judge/Calendar: The Honorable James Dixon

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

DOUBLE DOWN INTERACTIVE, LLC, a Washington limited liability company, and INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation,

Plaintiffs,

v.

ADRIENNE BENSON, an individual, and MARY SIMONSON, an individual,

Defendants.

NO. 20-2-02023-34

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS OR STAY

~~(PROPOSED)~~

THIS MATTER having come before the Court on Defendants' Motion to Dismiss or Stay, the Court having considered the following:

1. Defendants' Motion to Dismiss or Stay;
2. Plaintiffs' Response in Opposition;
3. Defendants' Reply;
4. Defendants' Notice of Supplemental Authority;
5. _____

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IT IS HEREBY ORDERED, ~~ADJUDGED AND DECREED~~ that Defendants' Motion to ~~Dismiss or~~ Stay is GRANTED. IT IS FURTHER ORDERED, ~~ADJUDGED AND DECREED~~ that:

~~Plaintiffs' Complaint is DISMISSED in its entirety.~~

~~OR~~

X Plaintiffs' claims are STAYED pending resolution of the first-filed, federal case.

DATED this 23 day of July, 2021.

The Honorable James J. Dixon

Presented By:

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Exhibit 6

July 12, 2018
Washington State Gambling Commission Meeting Transcript for
Big Fish Games, Inc. Petition for Declaratory Order

0:31:43 MS: All right, thank you, Haylee. The next item we have on our agenda is a Petition for Declaratory Order for Big Fish Casino, and we will have Brian Considine, Legal and Legislative Manager representing the agency, and Beth Brinkmann, Counsel for Petitioner. Good afternoon.

0:32:14 MS: Good afternoon.

[pause]

[background conversation]

0:32:26 Brian Considine: Thank you, Mr Chair, members of the commission, Brian Considine, your Legal and Legislative Manager. Before you, I believe is Tab 9, is a Petition for Declaratory Order from Big Fish Games Incorporated. The petition was received by the Gambling Commission on July 3rd of last week. Ms. Brinkmann is next to me, she is counsel on behalf of the petitioner, Big Fish Games Inc. I will just give a quick brief rundown of how this stands procedurally, and then I will turn it over to her to give a short summary of her client's petition. But as you know, we've talked about the Kater v. Churchill Downs case where the Ninth Circuit interpreted Washington state law and determined that in that case, based on the procedural posture, and just as a reminder, it was a motion dismissed, where basically in the Federal Court...

0:33:20 BC: The Federal Court was supposed to take the allegations as true, and if whether or not the allegations by law were gambling. The Federal Trial Court in Seattle said, "Nope, it's not gambling." And then the Ninth Circuit as we've talked about several times said, "We disagree, we think based on the allegations that it is gambling." So there hasn't been a trial, there hasn't been a fact finding by a court in that Kater v. Churchill Downs.

0:33:43 BC: If you'll recall, the defendant in that case, Churchill Downs asked for the Ninth Circuit to have a larger panel of judges review it. En Banc Review is what it's called. And just I think two weeks ago, the Court denied that request and issued a mandate, basically a final order, affirming their decision and so now that case is remanded back to the Federal District Court in Seattle. Technically, there's 90 days for them to file a petition with the Supreme Court and ask for the US Supreme Court to review it, but as of right now it's with Federal Court. I do not know exactly what the litigation posture of that is, but Mr. Tievsky is counsel for Ms. Kater in that case. He is here, and my understanding is that he'll want to have some public comment, so if you have any questions about that, you'll be able to ask him.

0:34:37 Julia Patterson, Vice-Chair: I have a question, Mr. Chair.

0:34:40 MS: Yes.

0:34:41 JV: So, I'm not an attorney, Brian. Essentially, what I think I heard you say is that the

case isn't over yet?

0:34:47 BC: That's a great summary, Commissioner Patterson. Yes, [laughter] the case is not over yet. Thank you for always reminding me that I sometimes do lawyer speak. So my apologies for that. Yes, the case is not over yet.

0:34:58 JV: Thank you. [chuckle]

0:35:00 BC: Nope. My apologies. I know, I'm still learning that part of it. Anyways...

0:35:06 JV: I might have your job now, I think.

0:35:08 BC: It is. [laughter] You know, you're right. Very true, very true. I put on the attorney hat more than I did the... Yes. Anyways yes, not over yet, back to court. And this petition is now here before you. Just as a reminder, there are at least four other cases where this issue has been raised. Also, none of those cases are final either, they're still in the process of figuring that out. You have the Administrative Procedures Act, and our rule basically say that there are specific things that should happen when the commission receives a Petition for Declaratory Order like this. One of them is within 15 days to give notice to, "all persons whom notice is required by law and may give notice to any other persons it deems desirable." I sent an email out to all the parties in the cases that this issue has come up in.

0:36:02 BC: So in both the Kater and Churchill Downs case and the other four cases, I let all of the attorneys know that this was happening, which is probably why we have such a great crowd today, and we tried to let other stakeholders who usually want to know these things as possible. I expect that we will post this information on our website next week as well, and along with any comments or any other letters that we receive on this. Along with the petition, you should have received today, three letters. There are two letters in support of the petition and there is one letter opposing the petition and asserting that they are a necessary party to this petition, and they do not consent. And I say that to kind of preface what the procedural posture is for you today moving forward, but...

0:36:55 JV: Mr. Chair?

0:36:56 MS: Yup.

0:37:00 JV: So Brian, if the case isn't over yet and we make some sort of a decision here today, would our decision potentially influence the way the case is ultimately decided?

0:37:13 BC: Yes, Commissioner Patterson, it could, which is why... Ms. Brinkmann can speak to why they brought the petition, but from the legal perspective, yes, the whole purpose of a declaratory order which this commission, I think, most recently did in the last few years with Microsoft is, this is an order that does have precedential value, is something that a state court would take into consideration because you are the folks that get to interpret our state laws within the capacity of how your authority is. So if you were to issue a declaratory order, quite frankly, one way or the other, yes, it is gambling, no it is not gambling, that is something that any party

could take to a court and use as a reason to a court go one way or the other. Yes, it would provide the clarification that they believe is potentially lacking based on the Ninth Circuit decision. And also, Ninth Circuit decision isn't necessarily... Doesn't bind state courts, so your declaratory order would be something that someone could take into state court.

0:38:23 BC: Any additional questions? All right. So just quickly, the posture to set it up for you and then I'll give Ms. Brinkmann the microphone, is within 30 days after receiving this petition, which is approximately on or about August 1st, but today will definitely do. You're asked to enter an order declaring the applicability of the statute rule order essentially, is it gambling, is it not gambling, answering their question, and clearly it can be more sophisticated than that, but that's the basic gist of it. Set the matter for a specified proceedings to be held no more than 90 days after receipt of the petition. So you could set it for our August commission meeting or September commission meeting, so that you have more time, staff have more time to review this, and to come up with possibilities, what your options are. Also, you can set a specified time in which you'll enter a declaratory order saying, "We'll take this matter under consideration and by our September commission meeting or by September 31st, or whatever time you choose, we will have a declaratory order on this." Or you can decline to enter a declaratory order and give good reason for that.

0:39:33 BC: The time limits, for the 90 days, you also can extend. So right now I think the 90th day is on or about October 1st. So let's say we set this in August and you wanna take a few more months to figure this out because we need more time, you need more time, you need more information, you would be able to go on the record, so long as you had good cause, you could push it out past those 90 days. The one letter that you've received from Mr. Tievsky relates to the one part that says, "An agency may not enter a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding."

0:40:14 BC: You do not need to reach that decision today, you can if you want, but you don't have to. That is just one more thing that will be... That's gonna come before you for consideration and Mr. Tievsky, when there's public comment, I'm sure can come up and explain that a little bit more. So basically, the gist of it is you don't have to do anything today, you can reset this for our August or September meetings but you're also... You're perfectly able to make a decision today if you so choose. Are there any questions about the procedure or process? All right. I will turn it over to Ms. Brinkmann.

0:40:50 Beth Brinkmann: Thank you so much, and may it please the commission, we very much appreciate the opportunity to kinda walk through our petition. My name's Beth Brinkmann, I'm here on behalf of the petitioner, Big Fish Games. I'd like to give a summary of the petition, I think, and walk through and I'd also like to take a couple of minutes to then after that to address the letter that was filed yesterday. So the questions that you asked, Commissioner, are really, I think, very significant to understand how all of this fits together. And one thing that's really important to understand that this is a question of state law. So that litigation that's been referenced is in Federal Court, and those Federal Courts look to what the state courts, how they would interpret it.

0:41:31 BB: So that's, I think, part of how it interacts, and we're here, Big Fish Games, as the owner of Big Fish Casino, to have a declaratory order about our games. So we can resolve uncertainty that was created by that opinion. And that opinion didn't exactly decide this issue, so I can explain that too. But a declaratory order here today is about the responsibility that the state legislature has charged you all with as a law enforcement agency to apply the statute to these games. So that's all that's before you in this declaratory order. So our petition is to ask for a declaratory order that confirms that Big Fish Games, Casino Games are not gambling because their virtual tokens cannot be redeemed for real money, they have no real world value and their terms of use expressly prohibit the transfer or resale for commercial gain.

0:42:32 BB: And I know one thing that has been looked at in the state over the past year, other situations like skins gambling that involves a market where there actually is monetary real world value. That's not this situation. That's expressly prohibited by the terms of use here. So that's a different situation. So the declaratory order we're asking for is only about the Big Fish Casino Games, not about anything broader that might... Because I know there had been some legislative discussion of that earlier in the year. And the order that we're requesting is consistent with the long-standing and common understanding of owners, players and with guidance publications from the commission since 2014. There was a brochure that's attached to the declaration, one of the declarations in support, and it makes clear that these kinds of social games, no real world value for any kind of virtual tokens, do not constitute gambling. It doesn't include the prize factor.

0:43:38 BB: That understanding... So we looked back at that and we tried in the petition to kind of just give some highlights of how that is clearly the appropriate understanding of the statute, all indicators of how you would interpret a state statute support that reading. We've gone through some of these principles of statutory construction, what they're called, they use Latin names all the time to kind of... It's like your grammar class back in high school or something, about how you look at a sentence and how you read it. And when they talk about thing of value it talks about property, money, things that are monetized, that have real world value, not something that was just a virtual token that doesn't have any real world value.

0:44:20 BB: We also looked at the purpose of the law and the legislature was very clear when they enacted the Gambling Act that this wasn't to outlaw games for amusement, that type of thing, where it wasn't a professionally for profit enterprise. And also the history, as I mentioned, there's the brochure that was provided as guidance and the brochure talks about explicitly giving guidance to both players and owners. And that was published back in 2014. Also I think it's consistent with the enforcement actions of the agency. There's been no enforcement actions over the years. And so there's just been this common understanding by anyone that if you look at the guidance that was presented, that none of these factors that would make it gambling are met.

0:45:12 BB: So it's very important to Big Fish Games as a business to resolve the uncertainty that was created by the Court of Appeals case that was referenced. And that didn't decide this exact issue because what that Court of Appeals, as Mr. Considine very well explained, it was at this preliminary phase so they were just looking at what was alleged in the complaint. And they read it to say that in order to play Big Fish Casino Games you had to pay real money after you first signed on, after that you had to pay real money to get virtual chips. So those chips had to be

worth real money, but that's not the fact. There's regular repeated inner rails where additional chips are automatically provided, and there's a declaration, a valid declaration in support of our petition that makes that clear.

0:46:05 BB: So the Court of Appeals did not decide the facts of this where you don't have to pay to play, you get these virtual tokens all of the time. But it's certainly created confusion. And even to hear people, I think, Commissioner Patterson's questions. Everything's, "Oh, the Ninth Circuit decided this. Oh, we'd be reversing it." No, they were looking at different kinds of facts, allegations saying, "Well, you have to pay this game, so this is... Have value." That's not the facts, our declaration supports it. And that uncertainty though, it's important for us, for our business to have resolved. And one of the things too is we were talking about is I think it's important because that is the state's job to decide what state law does. And Federal Courts are supposed to look to state law. So here what happened is, the Court of Appeals saw the brochure because we had submitted it, and they said that was too informal. And then they went off and said, "Well, this is what we think gambling means, but in a much more generic sense."

0:47:06 BB: So we would request a declaratory order because we think that would be the formal action that would be clear and reinforce the common understanding that has always been, that this does not constitute gambling. So that's how I think the procedural posture plays at. And we do think it's part of that, what the legislator has tasked the commission with as a law enforcement agency to apply that law here. I wanted to address briefly the letter that was filed yesterday that Mr. Considine mentioned because it suggests that the plaintiff from that other suit is a necessary party whose rights would be substantially prejudiced in a way that they can prevent this proceeding and that's under WAC 23-17180. But that is not the purpose nor the scope of that provision in the regulation. Just for a couple things, I wanna say a couple factual things and then get to the law. This isn't a situation where Big Fish Games petitioner here is a party in that case. In fact, the attorney who filed the letter in their counsel opposed participation in that case, Big Fish Games being substituted.

0:48:23 BB: So it's not that we're a party in that case. But regardless of that, and really getting to the law, more importantly, the letter does two things. One, it talks about the standard for Rule 19. That's different from WAC 230-17-180. Rule 19 is a rule about when a court has to join a party in a court action. The WAC provision is about when this necessary party kicks in. They use different language. And just to be clear for rule... They're not a party that's necessary under either standard, but I just wanna make clear what the two standards are because they cite a case. So Rule 19 says if you have an interest relating to the subject of the action, and that might be impeded or impaired, you should be joined. That's not what WAC says. WAC says that it's only if you have a right that will be substantially prejudiced. So the case they cite is a Rule 19 case, but even under that, it's much more of a direct interest.

0:49:29 BC: That was the case where a prisoner wanted some records from the Department of Corrections, and Department of Corrections went into court to get an order against that. So that was the situation where they said, "Well there's a right, there's something connected there." Under the WAC provision, we went and looked to see what other kind of agencies, how they treat this necessary joinder, because it's also in the general administrator provision. And when you look at that, the right that has to be substantially impaired, is much more kin to like a

contractual right. There is a... And again, we were looking since yesterday. There's this case that where it went to the public employment agency, the public employment commission, and it was a labor union trying to get a determination about whether a collective bargaining agreement covered them or not. And the commission said, "No, the other party to that agreement, that contract was a necessary party. They had a right there."

0:50:30 BC: So that is a much higher standard than Rule 19, but even under Rule 19, this is just an interest in how the law is applied. What you decide doesn't adjudicate any of these other cases. It's state determining what state law means. And if you took that... I realize I just have a minute left, but if you take the broad breadth of the interest that anybody who had a case pending, who had an interest in what the state law meant, that would mean any member of the purported class could be a necessary party, any of the plaintiffs in the other cases, and if I could just finish my sentence, and also, I mean, even any player of a game might say, "I have an interest in how this law is applied."

0:51:17 BB: But that's not what that necessary party provision, you have to have a right that's at stake. And it's good it's a high standard because that would be really exceptional to prevent you from exercising your authority that the legislature gave you. So we would ask that you enter the declaratory order for Big Fish Games Casino so this uncertainty about their games is resolved. And we really appreciate it. We also obviously ask any opportunity if we can provide you any kind of further information, we'd be happy to do that.

0:51:51 MS: Commissioner Troyer.

0:51:55 Ed Troyer, Commissioner: So this is all really new to us. I know it's something that we're gonna have to deal with as the different laws are changing around, let it be sports betting or free betting. Let me ask you a scenario so I can get this in my head. If a 14 or 15-year-old kid signs on to play a free game, and I'm only gonna use Frogger because that already exists, where you try and cross the road with frogs and when they all get hit by cars, the game's over, right? What if you could buy more frogs? Is that legal? A 15-year-old kid's on there and his 30 frogs get hit by a car, can he go on and spend $20 and buy another 25 frogs and continue playing?

0:52:35 BB: I think that the question is whether it fits the gambling provision. I mean, people pay to watch movies and people pay for all kinds of amusements. So we know that paying...

0:52:44 EC: Right, but they're paying to gamble. When you're talking about playing Big Fish Poker, they're playing to gamble. What about the problem gambler that's sitting at home and how much money could somebody spend on playing Big Fish Poker? How much money could somebody spend? $500 a month in buying free chips? Is that possible?

0:53:06 BB: If that's the kind of amusement they want. What here is the question though is whether there is the consideration, chance and prize, because there are many types of any kind of video game, there's such a swath of video games that have virtual items that can be purchased. It's in the world of amusement. It can't be monetized. I think the skins gambling is a very different scenario from what I looked at from the legislative efforts there. It has to do with this whole market where it became real money and that's the line. That is...

0:53:41 EC: And we're aware of that, we've really taken a look at that. But on the back end of what you're doing, you're still gambling. Even though it's virtual nothing, you're still playing against other people and gambling.

0:53:51 BB: Well, if you look at...

0:53:53 EC: You basically have created a system where there's no chance to win. You can spend money as much as up to $1,000 a month on free chips, and there's no way you're getting any of it back. Is that right? Am I wrong?

0:54:04 BB: But it's not gambling. The gambling isn't... If you look at the statutory provision, it's not how much money you could spend on an amusement, to be regulated as gambling you look at that definition of course, of the gambling, but then it refers you to thing of value. And when you look at thing of value, it talks about property, money, or extension of play without charge, it's something that has a real world value. That's what the gambling structure, because this provision would criminalize these things. That there's been this reliance for years that everyone understands that this isn't something that is subject, because this is the same definition that applies to all of the provisions in the Gambling Act that would have...

0:54:47 EC: But I'm understanding those answers, but what you're talking about, possibly, and I don't know if it's right, it'd still have real world consequences with people with gambling issues. It could have real world large amounts of money going just in one direction. I think that we need to do a lot more education on this and learn more about it.

0:55:08 BB: All we're asking for is a declaratory order of the current statute, and what the words of that statute mean and the words of that statute is very clear. It has to have that kind of real world value. There may be, certainly, other social issues. I know that the Commission has given great concern to addiction and all kinds of social issues that are very important. But the question here is whether this is gambling and a thing of value under the words of the statute, and it's not. I mean, you look at the purpose and I think the common understanding is really well reflected in that brochure when you talk to the idea of these virtual items that cannot be monetized in the real world. I mean, there were... The problems you suggest are just other problems, they're not regulating it as gambling and subjecting it to the criminal and other provisions that would arise if that were really what the breadth of that term meant.

0:56:02 EC: What would happen if this commission, I'm not saying it is, if we studied it and did a declaration that we believe that it is gambling?

0:56:11 BB: Then that would change, we believe, the meaning of what the statute says under the terms of what gambling and a thing of value is. So, we're just asking...

0:56:20 EC: But this is probably something the court should figure out.

0:56:23 BB: But you are charged as a law enforcement agency to...

0:56:25 EC: Well that's... I'm only saying maybe you should be careful what you ask for, because if it goes the other way, I don't think it's gonna do anybody any good. And I myself would like to learn a lot more about this before we do anything. I'd like to take a couple of months and educate myself more before we went one way or another on something that's this big.

0:56:42 MS: Okay. Commissioner Stearns?

[background conversation]

0:56:54 Chris Stearns, Commissioner: Hello, okay. [laughter] Wow. Thank you. Can you just maybe talk a little bit about how long games like this have been in existence, and have any other jurisdictions had any issues with this at all?

0:57:13 BB: I have to say, can't go back. I just know it's been for years. The brochure and the hearing before the commission was back in 2013, so five years ago these social gamings were already out there. There's this whole social component with friends and all kinds of things. So that was a hearing back in 2013 and they were well established and it wasn't just Big Fish Casino Games, Candy Crush, there were lots of other games that were there. And I think the commission had a great hearing about it and realized amusement games, that's one thing the legislature didn't need to... Gambling and where you're trying to get more, you can try and do this to get more real money and all, that's gambling, that's not this case. You might spend a lot, but you're not gambling, trying to get more money, something of value.

0:57:52 BB: That's what gambling is. So, at least since 2013, and I can tell you there have been several cases having to do with other states that have comparable statutes. None of them have found this gambling. We didn't go into all of that because when the Ninth Circuit looked at this, each statute is worded a little differently, but all of them when you get down to it, they come back to this thing, "Is this about real world, like you're doing this to try and win more money? No." Then that's not gambling.

0:58:21 BB: I'm over simplifying, I'm moving out of my lawyer language there but... So these other states have also said that it's not. I just want to be fair that they're slightly differently worded statutes, but it's the question about whether it's gambling, not whether there are other issues that wanna be addressed, a policy or whatever, but it doesn't constitute gambling. So they've been around a long time, they haven't been viewed as gambling. And I have to say when I saw the brochure, when I was looking at this brochure, was quite good because what it actually did was, it cited the statute, it talked about what exactly could get you, raise questions for you, because it was... The thing that I think is so funny about the federal court, they said it was too informal, and yet, it did exactly what you wanted it to do. You were talking to everyday people to understand this and it wasn't written in legalese. So they talk about the three elements and they explain it's just not a prize when you can't resell or redeem anything for the item for real money or a prize.

0:59:28 BB: Down there on it, it has a little date that says 3/14. So I assume that was issued in March 2014. It's GC5-027, and that would have been less than a year after the hearings, so it's

been years and years. And my client certainly, and other owners of games rely on it, our employees that we employ in the state, certainly players, and the law enforcement approach that the commission has taken consistent with this. And again, I think that's different than the other areas where you have looked, with skin gambling, where it really is about trying to get and wager for real money.

1:00:07 MS: Are there any other questions for Ms. Brinkmann? Senator?

1:00:20 S?: I assume you are aware that we did have loot box legislation in front of the legislature this last session.

1:00:25 BB: Mm-hmm.

1:00:25 S?: And so, the legislature has been looking at this issue, not taken action, but you're aware of it, right?

1:00:31 BB: Yes, but I would say this is a different issue, that's what I... Those issues having to do with something that can ultimately be monetized... I mean, here the terms of use expressly and unequivocally prohibit any type of transfer or exchange for financial gain. And I think these social games generally do. I can't represent that, they're not my client, but that's different than these situations where I think there was a concern about facilitating the transferability of items, for example, that they can be turned into real money. That is not this situation. And we do have a declaration from the valid declaration that attest to that.

1:01:16 S?: And for my information, I would like to know what other states. You may say other states have looked at this issue and taken action. What other states?

1:01:24 BB: I don't... There are a couple of District Court Act cases that I don't have before me, but we can certainly provide you with that.

1:01:31 S?: Good. I'd like to know what other states have taken any kind of action on this as a legislator.

1:01:38 BB: Sure.

1:01:39 S?: And I'm a little confused because when I read the other letter here that you've made reference to, I see that the client lost money, feels that she lost money. What is your explanation of that? If you read her letter she says she was unable to recover the thousands of dollars she lost.

1:02:01 BB: I think that is allegations and actually, first, I'd say that highlights exactly why whatever this declaratory order doesn't resolve that, because that's what would be adjudicated before the court. Also I think, although certainly an interpretation of state law would be highly relevant. Someone might feel they lost money because they went to a... They paid a lot of money to go to a big, big boxing match, and somebody got knocked out in a minute. Did they really get what they paid for? They could feel that they got gypped out of the $1,000 they paid for the seat. You pay for amusement, you might not think that you get what you paid for, but that's very

differently than gambling where under the statutory definition and what law enforcement regulates is, you have something of consideration and you're paying for this chance and then you're hoping to get something of value that's greater than that in the real world monetized.

1:02:54 BB: That's gambling, that's not... That's different than being, perhaps, dissatisfied with the amusement you got. But that's very important, I think, because the reach of the law enforcement of gambling in the state involves very significant criminal penalties. And so, I do think that the legislature was careful when they did that and said, "This is to go to that kind of gambling, it's not for amusements."

1:03:20 S?: Of course, I think you recognize that we're living in a very interesting age. [chuckle]

1:03:25 BB: Yes.

1:03:29 S?: The statutes... We're living in an age where there's an awful lot of new kinds of electronic interaction, and that's probably what's happening with loot boxes, [chuckle] and so, it's a really... I don't know... Well, I'll just leave it at that.

1:03:46 BB: I think we very much respect the fact that there are a lot of other policy issues and all about things that are down the road, but right now, this is not skins, this is not loot boxes, this is this very long standing group of social games that involve virtual tokens that have no real world value. That's all we're asking for. It's a very... And it is just adhering to the law, adhering to the reliance that has been for at least five years, probably much longer than that.

1:04:20 S?: But it's still poker on the back end. You're spending money to play poker, and poker is gambling. So that's why I think we need to take a look at this more.

1:04:31 BB: But poker is not gambling if it's not for real money.

1:04:35 S?: It is, if somebody's losing thousands of dollars and it's causing problems and it's an issue. All of a sudden the socialness and the fun-ness comes out of it.

1:04:45 BB: That may be a different issue but it doesn't make it gambling. It's like candy themed games also that... People play the games for various... But nobody's walking away with real money.

1:04:57 S?: But it's not poker. That's known as gambling, you can go really gamble and get addicted to poker and you could probably get addicted to gambling.

1:05:03 BB: But you're not gambling to get any money.

1:05:05 S?: We can agree to disagree, but I'm just saying I'd like to learn more about this.

1:05:09 BB: I totally respect that. I would just...

1:05:11 S?: Before somebody can talk me into saying that people... You've created a game where

you just continually pay money and never get it back to play poker, and you have the ability to spend a $1,000 a month doing it.

1:05:22 S?: That's what Amazon.com is.

1:05:24 BB: Yeah. I definitely respect that. I just wouldn't... I guess the question is, it pre-decides the issue to call it gambling.

1:05:29 S?: You play poker on Amazon?

1:05:31 S?: Yeah. You spend money...

[overlapping conversation]

1:05:33 S?: And stuff comes to your porch.

[chuckle]

1:05:33 MS: We seem to be re-hashing a little bit here, so Brian, you have a comment or... So my comment just for your education, I guess is, certainly four of the five of the current commissioners have felt burned in the past, due to a lot of unintended consequences that have occurred when we've authorized something, when we've made a decision. So I think that we are going to generally be quite deliberate as we face issues like this. And I know that you have laid out the case and it's pretty clear cut in your mind, but as we deliberate these sorts of things, certainly in the last couple of years, we are a pretty deliberative body before we venture out into this fresh territory.

1:06:43 BB: We appreciate that. We think this is... Well, it is, it's maintaining the status quo that people have relied on. But we nonetheless absolutely appreciate it. And I have to say, I think that this is very impressive to have this kind of civic involvement and commission considering this. We appreciate that and we appreciate the quickness with which we were allowed to come and just present our petition. We do think it's confirming the status quo and that everybody has been relying on it for years here. But we very much respect that and do appreciate that and anything we can provide, we would be happy to do. We offered, we can demonstrate the game, whatever you might like.

1:07:21 S?: Mr. Commissioner, I'd like to make a motion.

[overlapping conversation]

1:07:24 MS: I'd like to have some public comments.

1:07:25 S?: Oh more... Oh, I thought I saw her put up the minute sign a while ago. [chuckle]

1:07:31 MS: No, I was just gonna remind... I believe there are other people here in the public who would like to speak to this. So thank you, and Brian, if you don't mind staying there just in

case we need you.

1:07:41 BC: Certainly, yup.

1:07:43 MS: Certainly, Cheryl Kater's representative is here, and I'd certainly... If that's you...

1:07:51 S?: It's me.

1:07:51 MS: I'd certainly allow you first. And then, before we get started, by show of hands are there other folks that would like to participate in public comments related to this topic? Okay. Oh, we've got one, all right, two, maybe? Okay.

1:08:12 Alexander Tievsky: I'd like to...

1:08:13 MS: Introduce yourself for the record please.

1:08:15 AT: My name is Alexander Tievsky, I'm counsel for Cheryl Kater. I'm at Edelson PC in Chicago. I'd like to thank the chair and the commissioners for allowing me to speak today. I do really appreciate it. I will try to keep my remarks very short. Commissioner Troyer, I think you had it exactly right. This is a big deal. We heard a lot about how, well, this isn't really about money, this is just fun games. Big Fish. So the reason we sued Churchill Downs is because they used to own Big Fish. Big Fish has since been sold to an Australian gambling machine manufacturer for $950 million. My client, Ms. Kater, lost more than $10,000 playing this game. I have another client Adrian Benson in Spokane who lost $3,000 playing a similar game. These games are extremely addictive.

1:09:10 AT: If the commission is interested in learning more about the science behind it, there's an excellent book by Natasha Dow Schüll called Addiction by Design. It explains that people don't play, even slot machines where you can win money, they don't play them to win. They play them for the... They call it getting into the machine zone. It's the psychology of being addicted. And all of the things that the commission does to help mitigate those risks in the casinos of this state are just entirely absent from the unregulated, not even regulated as amusement games, the unregulated gambling games that they have here.

1:09:54 AT: As far as the arguments you heard a moment ago, this is not the first time those arguments have been made. Those arguments were made to the United States Court of Appeals for the Ninth Circuit, which disagreed. It also saw the law as very clear. It saw the law as very clear, saying, "Yes, this is in fact a gambling game." If the commission grants the petition that they ask for, I'm not gonna say that it's definitely going to cause my client to lose because obviously you know I'm a lawyer, I've got a hedge for everything, right. So I'll be able to make my argument to the court that, "Oh, you shouldn't listen to it." But at the end of the day, it will severely, severely impact her pending case.

1:10:35 AT: That's certainly why they're here asking for it. There were some technicalities discussed regarding who the defendant in the case is. The case, as Mr. Considine cogently explained, just got back to the trial court. So we haven't had a chance. You get a chance to amend

your complaint to add more parties. We haven't gotten any discovery, we haven't gotten any information from the defendants. We think it's likely that Big Fish Games Inc will be added as a defendant. Just haven't gotten there yet. As I said, this is still all going on. It's in the... Despite the fact that the case has been pending for years, it's still going on.

1:11:17 AT: And then the last thing regarding the ability of the commission to enter this declaratory ruling, there was a discussion of a... There was just two factors that say whether someone has to give consent before a ruling is issued. It's is there prejudice? Well there's prejudice here, she'd lose her case. And it's is she a necessary party? And there was some discussion of that being a high standard. The Washington Supreme Court hasn't said that, they said it's a low standard. It's might my client be affected by it? Is there a possibility? And I say, yeah, speaking very candidly, there's a very strong possibility that her case would be affected by a decision here and not that I don't trust this commission to do the right thing. Actually, I very much do, but just think it's in her best interest now respectively to decline to consent to that. And with that, I'm happy to answer any questions the commission has. I'm happy to submit more detailed written submission if the commission wants me to, happy to come back to another month.

1:12:24 MS: So yeah, I would certainly have expected for you to be able to make the case for your client to be a necessary party. I don't know if you wanna take a little more time...

1:12:45 AT: Sure.

1:12:47 MS: Right now to really state that case so that I can evaluate that, because I think that is a pretty important aspect and something that you can speak to that's related to the matter before us, not the case back at the District Court.

1:13:06 AT: Sure, so the necessary party rule and your rules and then the administrative code hasn't been, as far as I can tell, directly interpreted by a Washington Court. So, kinda have to look to other times when the same phrase is used. And that's why we cited the civil rules. We figured, well, if there's absolutely no cases talking about this, then an explanation of the phrase by the Washington Supreme Court in a similar context, would really, I think, speak to what it means. And what the Washington Supreme Court has said is, someone is a necessary party if their interests might be affected by the outcome of the case there, and that doesn't necessarily mean you're on the other side of a contract, because when you have a lawsuit, that's also considered a valuable interest, right? And in this case, she has a lawsuit, she says that she's entitled to a certain amount of money under the law of Washington.

1:14:08 AT: If this Commission decides in the way that Big Fish has asked, then that severely impacts her ability to get that money that she says she is owed. And the Washington Supreme Court says you don't even have to have a... It doesn't have to necessarily... Necessary party is kind of this term that, it makes it sound much more strict than it is. What it means is, is there a possibility that she could be affected? And if there is, then she's got to be a part of this. And your rules say that if she doesn't want to be a part of it, if she doesn't consent in writing, then that's the end of that matter. I hope that helped explain it.

1:14:51 MS: She wouldn't consent.

1:14:52 AT: She does not consent, no.

1:14:56 MS: Further questions? Commissioner Stearns?

1:15:02 CC: Okay. So did you say that your opinion is that the game manufacturer designed this game to be addictive?

1:15:13 AT: Yes, absolutely. They designed these intentionally. There was some discussion of the free chips that they give you. These are basically free samples in just a little bit, in just the right amounts to make you keep playing again. They give you just enough to get you going again, and then they pop up in big letters, "Buy more," and they give you sometimes what they call a special discount. They also have the numbers really big, so you buy 20 million chips and this helps you, "Oh, I'm... " It makes you feel like you're getting a lot of value. So it also helps addiction.

1:15:51 CC: So, would I be right then in assuming that you would also say that if the same manufacturer, if they were making a slot machine that that would also be designed to be addictive?

1:16:02 AT: Yes. Yes, those slot machines are designed to do... The company that owns Big Fish Casino makes slot machines. It's the same. Same people, same science.

1:16:18 MS: Commissioner Patterson.

1:16:19 JV: Could you refer us to some literature on the matter, maybe through staff, so that that they could send that to us?

1:16:25 AT: Sure, absolutely. As I said, the best book is that Schüll book, and I can send Mr. Considine the link. It's outstanding, it explains it in great detail. And Professor Schüll, she's at NYU, she's quoted in the newspapers relatively frequently about this topic, she's very knowledgeable.

1:16:44 MS: Okay. Any other further questions? Any further? All right.

1:16:49 AT: Thank you very much, I really do appreciate your time.

1:16:52 MS: Thank you sir. Please come forward. Could we get one more chair up there?

[background conversation]

1:17:13 MS: And please, if you could identify yourself for the record, please.

1:17:18 Cyrus Ansari: Mr. Chair, Commissioners, my name is Cyrus Ansari. I am with Davis Wright Tremaine, and I'm here with our client, Mr. Joe Sigrist, who is the General Manager of DoubleDown Interactive, that is a video game development company, headquartered and

incorporated in this state, that makes social online games similar to the Big Fish games at issue in the Big Fish petition. You should have received... I hope you've received our letter, which we wrote in support of the petition. And I'd like to introduce Mr. Sigrist to make just a few brief comments, if you'll allow it.

1:17:52 Mr. Sigrist: Thank you very much, commissioners. We really appreciate the opportunity to speak today, I'll be very brief. As was mentioned, we submitted a letter in support, strong support of Big Fish's petition, and we believe that their arguments as stated in their petition are quite strong and quite compelling. We have been offering... DoubleDown Casino, is a similar type entertainment activity for almost 10 years, and are obviously very familiar with the business and with players associated with this game, our game, and similar games.

1:18:34 MS: And I'll simply say that as the commission continues to look at this, we wanna offer ourself as a resource, we're right up the road. We're Washington-based, as mentioned Seattle-based, have a number of employees and players in the state of Washington who are quite interested in the outcome of these proceedings. And so, we'll again, make ourself available at any time to support you in your discussions and deliberations.

1:19:04 MS: Questions? I guess I have one. I don't know if it's appropriate, so stop me if it's inappropriate. Are you... Is your company a party to litigation similar to what Big Fish is facing?

1:19:23 MS: Yes, we are.

1:19:25 MS: Okay. Troyer.

1:19:30 EC: When you say games, DoubleDown Casino, what would the games be on the backend?

1:19:36 MS: Well, our games are casino-style games, so we offer through DoubleDown Casino. We have other applications but through DoubleDown Casino, we offer casino-style games, so poker, video poker, blackjack, and slots. As is the case with this industry, slots is the predominantly played game within the category worldwide. As you may know, it's a $4 billion category, mobile and online gaming category worldwide, and a large percentage of that comes through the play of slots which seem to be exciting for players to play online.

1:20:20 EC: Are there limits to how much somebody could spend a month?

1:20:25 MS: There are no specific limits, at least in our game. We obviously monitor activity, as I get good stewards of our player base and our consumers, but we don't have any specific limits to purchases.

1:20:43 MS: All right.

1:20:43 MS: Thank you very much.

1:20:44 MS: Yeah. Thank you. Is there anyone else that would like to add to the public record on

this? Brian, do you have any final thoughts? Summary?

1:21:00 BC: Yes. Mr. Chair. I'd just do a quick summary, to help bring this home. Is you don't have to make a decision on anything you've been asked to do today. You're welcome to, but you don't need to. From what I'm hearing, it sounds like we would like that you may want more information which we can certainly do on anything. We've looked at the calendar, we have clearly our August meeting is two days in Pasco. There is definitely things on for that meeting, but we have space if you wanna dedicate an hour plus, I'm pretty sure we can accommodate to that. We also have two days in September in Spokane.

1:21:38 BC: Right now, what we've kind of slotted is gonna be a pretty full agenda at that point, but we can clearly move stuff around to put stuff on there, because we only are meeting a couple times at most a month. Amy can disagree with me and say it, but I think it's probably a good idea to set something for August, and then that way, we're talking about this in August, we're talking about it in September if you wanna go that far. And then if you wanna move it past September, you're going to probably have the ability to do that. And if you want briefing on necessary party or something like that, these parties have clearly good legal minds that have come before you, they have a system that they can provide that information to you, and sometimes having it in writing is better than trying to do it on the spot verbally. So that is something we can also ask them for if that is something you want to be able to have for the August meeting. And so, in reading the room, it sounds like we probably want to push this to our August meeting. You're welcome to do that.

1:22:40 MS: Well, I believe our rules allow us to deliberate in a closed session.

1:22:46 BC: Right.

1:22:47 MS: And I think that we probably ought to do that, and maybe shoot for a 10, 15 minute deliberation and then come back.

1:22:55 BC: Okay.

1:22:56 MS: So is that... Any opposition to that? All right. Well, we will allow you another trip to the restrooms and we'll go have this conversation. So we'll be back in about 15 minutes.

[background conversation]

1:23:36 MS: All right. Sorry for the delay. I appreciate everyone's patience. So in the matter of the petition of Big Fish Games Inc for a declaratory order, we will be signing an order continuing review of petition for declaratory order. So this petition came on for review before the undersigned commissioners of the State Gambling Commission at the commission's regular scheduled meeting on July 12th in Tacoma, Washington. The commission reviewed and considered the petition, comments by the petitioner and staff, and any written or oral comments by the public. The commission finds that it needs additional time to review the petition and allow for additional public comment, therefore, it is ordered that review of the petition for a declaratory order in this matter be continued and scheduled for further review and consideration at the

commission's August 9th and 10th, 2018 commission meeting in Pasco.

1:24:29 MS: So, I have signed it and the rest of the commission shall as well. If all interested parties could provide any additional information to the commission a week before, so maybe by August 2nd or 3rd, that would be... Give us a little time to be able to review that. Some specific areas of interest by the commission are further discussion on thing of value, and also on the term "necessary party" as it relates to this matter, or any other factors that you would like to send in writing ahead of time, and then there will also be opportunity to have more oral communication at that meeting in Pasco. So Brian?

1:25:30 BC: I was just gonna say anyone who wants to submit something can submit it to me at brian.considine@wsgc.wa.gov. And if you received the notice, you have my contact information. Otherwise, come find me after we adjourn today.

1:25:50 MS: Oh, and yeah, I guess another area was other states that have dealt with this matter, if there's any similar law that we can review.

1:26:07 BC: And Mr. Chair, what I'll do to kinda help with this is, we'll post this on our website so that folks know what's going on. The two parties that at least spoke today, or their attorneys will... We have a record of this, so I'll distill it into writing, and I'll ask them for this information along with sending out an additional notice to parties, if they want us to provide information related to those topics that they can do so. And we'll give them a date. I think you said a week before the commission meeting, but we'll have a date set for that as well.

1:26:39 MS: Okay, perfect, thank you. Any further input from the rest of the commission on that? Okay. Excellent. So, we will move on. Now we get some presentations. I noticed Chairman Bill Iyall in the crowd, I'd like to invite him forward, or certainly introduce him. And we were going to have a presentation on the Cowlitz Ilani Casino Resort Phase II review. So welcome.

Exhibit 7

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July 10, 2018

Via Email - rules.coordinator@wsgc.wa.gov and 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: Notice -- Big Fish Games, Inc. Petition for Declaratory Order

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

This firm represents Double Down Interactive, LLC ("DDI"), a video game development company incorporated and headquartered in the State of Washington. We write on its behalf in support of the Petition by Big Fish Games, Inc. ("Petitioner") for a declaratory order confirming that the Big Fish Casino online video games—and similar video games—do not constitute gambling within the meaning of the Washington Gambling Act, RCW 9.46.0237, and therefore are not subject to the Commission's regulatory or enforcement jurisdiction. DDI also supports broader proceedings to determine whether any of the games that have been challenged in federal cases following the federal court decision in *Kater v. Churchill Downs*[1] constitute gambling under the Gambling Act.

The Petition provides compelling support for such a declaratory order. As in many video games, including games distributed by DDI, players can play Petitioner's games for free with virtual tokens ("chips") that they receive for free at the start of play and at regular intervals, or with tokens that can be purchased for more play. Petitioner's chips, like DDI's chips, exist and can be used only within the online suite of games for which they were designed. They cannot be redeemed for money and have no real-world value. That is why Petitioner, DDI, the public, Commission guidance, and judicial precedent all agree that such games do not constitute gambling, and the new uncertainty introduced by the *Kater* decision establishes a matter of significant public importance.

[1] 886 F.3d 784, 787 (9th Cir. 2018).

Like Petitioner, DDI develops a suite of online, casino-themed video games that players realistically and regularly play for free. DDI offers free chips at the start of play, daily allotments of chips for logging into the game and accepting free chips, and frequently distributes additional free chips on a promotional basis. DDI offers free entertainment to the overwhelming majority of players who choose to play for free, and offers the same entertainment to players who choose to buy chips when they prefer not to wait a short period for more free chips. The games offer a social form of entertainment for amusement only, and they bring joy to thousands of players in Washington. According to Petitioner's terms—and DDI's terms[2]—and as a practical matter, nobody can legitimately play DDI's games professionally or for profit.

As a matter of federalism, the Washington State Gambling Commission is better situated to interpret Washington state law than a federal appellate court interpreting Washington law on the basis of a complaint's untested allegations on a motion to dismiss. For related reasons, the United States Supreme Court recently affirmed that the federal government cannot commandeer a state's right to regulate gambling in its jurisdiction. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018) ("[B]oth the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of 'dual sovereignty.'"). DDI supports the Commission asserting its expertise and authority to interpret the Gambling Act.

For the reasons given above and offered in the Petition, DDI respectfully requests that the Commission enter a declaratory order confirming online video games like those described in the Petition do not constitute gambling within the meaning of the Washington Gambling Act, RCW 9.46.0237.[3] DDI also supports broader proceedings, including a hearing with the opportunity to submit substantive comment or amicus briefing, should the Commission find further proceedings necessary. At the Commission's request, DDI would demonstrate DDI's games before the Commission and answer any questions the Commission may have.

DDI thanks the Commission and looks forward to the Commission's action in this matter. If the Commission would like any additional information, please do not hesitate to contact this firm. DDI is willing to cooperate fully to help the Commission reach the right determination.

Very truly yours,

Davis Wright Tremaine LLP

Stuart R. Dunwoody

cc: Mr. Joe Sigrist, General Manager, Double Down Interactive, LLC

[2] http://www.doubledowninteractive.com/terms/

[3] DDI reserves its rights, including the right to submit a petition before this Commission.

Exhibit 8

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 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.*

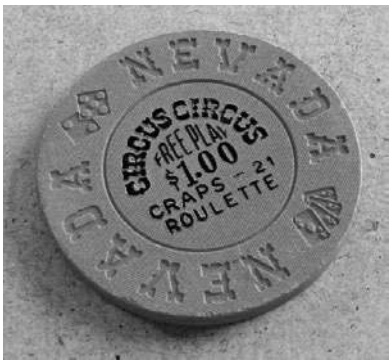
Respectfully, this interpretation is mistaken. The term "game or scheme" is properly understood to be a winnable "contest of chance" as opposed to some other type of game, and the term "extension" is properly understood to mean "proffer" as opposed to "prolong."

"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.

3. 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*.

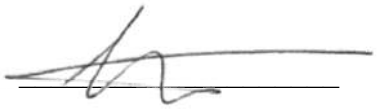
[11] To this point, I incorporate by reference the comments made by Big Fish Games in its petition at paragraph 23.
[12] "The Free-Play Tax Deduction Debate: How Academic Research Can Help", Lucas A.F. & Spilde, K.A. (2017), *UNLV Gaming Research & Review Journal,* 21(1), 25-42. https://pdfs.semanticscholar.org/8c88/7c256f7126119a95fc913667599620574b4e.pdf.
[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.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ADRIENNE BENSON and MARY SIMONSON, individually and on behalf of all others similarly situated, *Plaintiffs*, v. DOUBLEDOWN INTERACTIVE, LLC, a Washington limited liability company, INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation, and IGT, a Nevada corporation, *Defendants*.	Case No. 18-cv-525-RSL

EXPERT DECLARATION OF PROFESSOR WILLIAM B. RUBENSTEIN

1. I am the Bruce Bromley Professor of Law at Harvard Law School and have been recognized as a leading national expert on class action law and practice. Class Counsel[1] seek a fee of $124.5 million, which constitutes 30% of the $415 million settlement. Class Counsel have retained me to provide my expert opinion as to whether this request is reasonable in the context of this litigation. After setting forth my qualifications to serve as an expert (Part I, *infra*), I state the following three opinions:

[1] The Settlement Agreement states that "'Class Counsel' means Jay Edelson, Rafey S. Balabanian, Todd Logan, Alexander G. Tievsky, Brandt Silver-Korn, and Amy Hausmann of Edelson PC." Class Action Settlement Agreement at ¶ 1.7, *Benson, et al. v. DoubleDown Interactive, LLC, et al.*, No. 2:18-cv-00525-RSL (W.D. Wash. Nov. 11, 2022), ECF No. 508-1 [hereinafter, "Settlement Agreement"].

- ***While the requested percentage is higher than both the Ninth Circuit benchmark and rates in large fund settlements generally, courts across the circuits have often approved fees of 30% or more in large fund cases – and comparing percentages across cases provides relatively little insight on whether any specific award is excessive in a situation like this, where the settlement does not stand alone but is part of a larger litigation campaign.*** (Part II, *infra*). The benchmark fee in this Circuit is 25%, while empirical studies show the average fee in cases of this fund size to be closer to 20%; yet the total number of cases in those studies was low and the standard deviation high. By contrast to these limited data points, my research assistants compiled and verified a list of nearly 50 cases with recoveries over $100 million – most from the past decade – in which courts approved fees of 30% or more. That sample is not representative of the full range of fee awards in large fund cases, but it does show that there is nothing terribly unusual about a 30% fee in such cases. What is unusual here is that this case is a part of a litigation campaign encompassing a dozen cases filed in courts across the country: as Class Counsel have garnered 25% fees in five prior settlements, if the 30% fee were approved here, their average rate across the six cases would be under 26% and the weighted average about 28%; if the winning *and* losing cases are each seen as single data points, the average rate across the 11 cases is 14%. All these numbers support the conclusion that comparing percentages across cases can be complicated and that the whole endeavor is not terribly enlightening absent a more qualitative assessment of a case's risks and outcomes.

- ***Assessing Class Counsel's request according to the Ninth Circuit's multifactor test supports the conclusion that 30% is reasonable because of the truly extraordinary risks they undertook and the remarkable results they achieved for the class.*** (Part III, *infra*). This was an exceedingly risky set of cases: the cases did not piggy-back on a prior government investigation, nor were they the next cases applying a law regularly deployed by class counsel. Instead, these cases required the development of a new legal theory to combat a new – and pernicious – type of technological invention, the social casino. The facts involved complex issues requiring technological expertise, and the law involved a novel application of existing gambling statutes to this new type of game. Worse, not only did Class Counsel fight these cases in courts across the country, but as they did, proponents of these games attempted to compel arbitration, cram down new non-litigation dispute resolution rules on game users mid-case, and change existing gambling laws and regulations; these actions forced Class Counsel to defend their efforts in multiple arenas simultaneously, lest the entire endeavor be lost. This particular case was especially protracted, and hence risky, as the Defendants pursued multiple efforts to change the venue of the case to multiple other forums and engaged in discovery tactics raising questions of malfeasance and spoliation. Class Counsel shouldered all this risk while litigating against large and rich corporations, with seemingly bottomless coffers, employing multiple enormous law firms, yet they did so in a lean fashion without enlisting dozens of law firms to share the risk. Despite these risks, Class Counsel have secured an absolute landmark set of settlements securing more than a half a billion dollars for class members. In this specific case, the settlement

constitutes a remarkable portion of the Defendants' total value; the cash awards to class members reflect a significant return of their funds, especially for those most preyed upon; the cash relief is available to any class member who suffered monetary harm; it is easily claimed; and it is complemented by significant non-monetary changes in the Defendants' practices.

- ***In the unique circumstances presented by this litigation effort, a lodestar cross-check is not a helpful tool by which to assess the reasonableness of the proposed percentage award.*** (Part IV, *infra*). The Ninth Circuit requires courts to assess the reasonableness of a proposed percentage award according to a set of factors and encourages them to cross-check the percentage against class counsel's lodestar. Four sets of interrelated factors make Class Counsel's lodestar not particularly pertinent in the unique circumstances of this litigation campaign: (1) some of the cases in this campaign (though not this one) were settled without significant litigation and courts have found that rigid application of a lodestar cross-check in such circumstances threatens to create the wrong incentives for class counsel; (2) this settlement is one of a set of a dozen interrelated cases and attributing lawyering time across the set of cases to one in particular is administratively difficult; (3) the set of cases encompassed here includes a series of unsuccessful efforts, and although Class Counsel cannot be directly compensated for those, the time they put into them is not completely irrelevant to this successful outcome; and (4) Class Counsel's efforts in this set of cases encompass, *inter alia*, compensable work undertaken before administrative agencies, executive branch officials, legislatures, and the media and accounting for that time with conventional hourly litigation rates is imprecise. The lodestar cross-check is only a means to an end, and other means – *e.g.*, the multifactor Ninth Circuit test – are better used in this unique setting.

2. Rule 23 requires the Court to assess the reasonableness of the proposed fee in the context of this particular settlement, but Class Counsel's achievement in these social casino cases is better viewed in the aggregate. Prior to entering academia, I was a lawyer at the national office of the American Civil Liberties Union (ACLU) for nearly a decade, during which time I pursued civil rights campaigns on behalf of minority groups.[2] Based on that experience, it strikes me that what Class Counsel have pursued here is closer in form to a civil rights litigation campaign than it

[2] I have written about such litigation campaigns in my academic scholarship. *See, e.g.*, William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Clients and Lawyers in Civil Rights Campaigns*, 106 Yale L. J. 1623 (1997).

is to a series of discrete class action settlements. Class Counsel saw an injustice – a thinly disguised form of gambling preying on those most vulnerable to addictive gambling – and they sought to fix it. Their goal was not to win a case but to reform an entire industry, much like a civil rights campaign might aim to reform a particular type of discriminatory practice across an entire employment sector. To accomplish this end, Class Counsel went far beyond what lawyers pursuing a simple class action case would normally do. As discussed more fully below,[3] Class Counsel have pursued a dozen different cases, against at least 10 different defendants, in four different federal judicial districts located in four different federal circuits, testing whether these social casino games constituted gambling under the laws of more than a half dozen states. Class Counsel built websites to help app users avoid forced arbitration clauses, lobbied legislators and regulators, and took their efforts to the media. When Class Counsel lost, they did not give up, but changed tactics or forums and kept going. And they did all of this with their own funds, risking millions of dollars of their own money to end this practice. What they have achieved so far, with a series of six settlements, is an astounding accomplishment that begins to chip away at the pernicious underlying social casinos. As I explain more fully below, it is in some ways difficult to apply conventional fee-setting principles to a litigation campaign like this, but one conclusion seems irrefutable: Class Counsel have more than earned the fee requested in this particularly hard-fought battle of their larger war.

[3] *See* ¶ 19, *infra.*

I.
BACKGROUND AND QUALIFICATIONS[4]

3. I am the Bruce Bromley Professor of Law at Harvard Law School. I graduated from Yale College, *magna cum laude*, in 1982 and from Harvard Law School, *magna cum laude*, in 1986. I clerked for the Hon. Stanley Sporkin in the U.S. District Court for the District of Columbia following my graduation from law school. Before joining the Harvard faculty as a tenured professor in 2007, I was a law professor at the UCLA School of Law for a decade, and an adjunct faculty member at Harvard, Stanford, and Yale Law Schools while a litigator in private practice during the preceding decade. I am admitted to practice law in the Commonwealth of Massachusetts, the State of California, the Commonwealth of Pennsylvania (inactive), the District of Columbia (inactive), the U.S. Supreme Court, six U.S. Courts of Appeals, and four U.S. District Courts.

4. My principal area of scholarship is complex civil litigation, with a special emphasis on class action law. I am the author, co-author, or editor of five books and more than a dozen scholarly articles, as well as many shorter publications (a fuller bibliography appears in my appended c.v.). Much of this work concerns various aspects of class action law. Since 2008, I have been the sole author of the leading national treatise on class action law, *Newberg on Class Actions*. Between 2008 and 2017, I re-wrote the entire multi-volume treatise from scratch as its Fifth Edition and, subsequently, produced the treatise's Sixth Edition – *Newberg and Rubenstein on Class Actions* – which was published in 2022. As part of this effort, I wrote and published a 692-page volume (volume 5 of the Sixth Edition) on attorney's fees, costs, and incentive awards;

[4] My full c.v. is attached as Exhibit A.

this is the most sustained scholarly treatment of class action attorney's fees and has been cited in numerous federal court fee decisions. For five years (2007–2011), I published a regular column entitled "Expert's Corner" in the publication *Class Action Attorney Fee Digest*. My work has been excerpted in casebooks on complex litigation, as noted on my c.v.

5. My expertise in complex litigation has been recognized by judges, scholars, and lawyers in private practice throughout the country for whom I regularly provide consulting advice and educational training programs. Since 2010, the Judicial Panel on Multidistrict Litigation (JPML) has annually invited me to give a presentation on the current state of class action law at its MDL Transferee Judges Conference, and I have often spoken on the topic of attorney's fees to the MDL judges. The Federal Judicial Center invited me to participate as a panelist (on the topic of class action settlement approval) at its March 2018 judicial workshop celebrating the 50th anniversary of the JPML, *Managing Multidistrict and Other Complex Litigation Workshop*. The Ninth Circuit invited me to moderate a panel on class action law at the 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop. The American Law Institute selected me to serve as an Adviser on a Restatement-like project developing the *Principles of the Law of Aggregate Litigation*. In 2007, I was the co-chair of the Class Action Subcommittee of the Mass Torts Committee of the ABA's Litigation Section. I am on the Advisory Board of the publication *Class Action Law Monitor*. I have often presented continuing legal education programs on class action law at law firms and conferences.

6. My teaching focuses on procedure and complex litigation. I regularly teach the basic civil procedure course to first-year law students, and I have taught a variety of advanced courses on complex litigation, remedies, and federal litigation. I have received honors for my

teaching, including: the Albert M. Sacks-Paul A. Freund Award for Teaching Excellence, as the best teacher at Harvard Law School during the 2011–2012 school year; the Rutter Award for Excellence in Teaching, as the best teacher at UCLA School of Law during the 2001–2002 school year; and the John Bingham Hurlbut Award for Excellence in Teaching, as the best teacher at Stanford Law School during the 1996–1997 school year.

7. My academic work on class action law follows a significant career as a litigator. For nearly eight years, I worked as a staff attorney and project director at the national office of the American Civil Liberties Union (ACLU) in New York City. In those capacities, I litigated dozens of cases on behalf of plaintiffs pursuing civil rights matters in state and federal courts throughout the United States. I also oversaw and coordinated hundreds of additional cases being litigated by ACLU affiliates and cooperating attorneys in courts around the country. I therefore have personally initiated and pursued complex litigation, including class actions.

8. I have been retained as an expert witness in roughly 100 cases and as an expert consultant in about another 30 cases. These cases have been in state and federal courts throughout the United States, most have been complex class action cases, and many have been MDL proceedings. I have been retained to testify as an expert witness on issues ranging from the propriety of class certification, to the reasonableness of settlements and fees, to the preclusive effect of class action judgments. I have been retained by counsel for plaintiffs, for defendants, and for objectors.

9. Courts have appointed me to serve as an expert in complex fee matters:

- In 2015, the United States Court of Appeals for the Second Circuit appointed me to argue for affirmance of a district court order that significantly reduced class counsel's

fee request in a large, complex securities class action, a task I completed successfully when the Circuit summarily affirmed the decision on appeal.[5]

- In 2017, the United States District Court for the Eastern District of Pennsylvania appointed me to serve as an expert witness on certain attorney's fees issues in the National Football League (NFL) Players' Concussion Injury Litigation (MDL 2323). In my final report to the Court, I recommended, *inter alia*, that the Court should cap individual retainer agreements at 22%, a recommendation that the Court adopted.[6]

- In 2018, the United States District Court for the Northern District of Ohio appointed me to serve as an expert consultant to the Court on complex class action and common benefit fees issues in the National Prescription Opiate Litigation (MDL 2804).

- The United States District Courts for the Southern District of New York and the Eastern District of Pennsylvania have both appointed me to serve as a mediator to resolve complex matters in class action cases, including fee issues.

10. One of the functions I can provide as an expert witness is to present empirical evidence of class action practices from other cases. As part of my scholarly work on class action law, I have created and maintain a database containing data on more than 1,000 class action lawsuits. Specifically, my research assistants coded the data from case reports appearing in the journal, *Class Action Attorney Fee Digest* (CAAFD). CAAFD was published monthly from January 2007 to September 2011 for a total of 57 issues, and reported on 1,187 unique court-approved state and federal class actions. For each case, a CAAFD case abstract describes the awarding court and judge, the subject matter of the dispute, the settlement/judgment benefits, the attorney fee and expense awards (both as requested by plaintiff's counsel and as approved by the court), the case filing and attorney fee award dates, any named plaintiff awards, and miscellaneous

[5] *See In re IndyMac Mortg.-Backed Sec. Litig.*, 94 F. Supp. 3d 517 (S.D.N.Y. 2015), *aff'd sub nom. DeValerio v. Olinski*, 673 F. App'x 87 (2d Cir. 2016).

[6] *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2018 WL 1658808, at *1 (E.D. Pa. Apr. 5, 2018) ("I adopt the conclusions of Professor Rubenstein and order that IRPAs' fees be capped at 22% plus reasonable costs.").

data on case and settlement/judgment administration. In creating the database from the CAAFD reports, my research team cross-checked the accuracy of a subset of federal reports against source documents from PACER; we found only one error – an understatement of the settlement benefit value by 2% – in 726 data fields, or fewer than 0.15% of fields. I am therefore confident about the accuracy of the data in my database and use it regularly as a source for my scholarship and expert witness work.

11. Courts have often relied on my expert witness testimony in fee matters.[7]

12. I have been retained in this case to provide an opinion concerning the issues set forth in the first paragraph, above. I am being compensated for providing this expert opinion. I

[7] *See, e.g.*, *In re Genetically Modified Rice Litig.*, 764 F.3d 864, 872 (8th Cir. 2014); *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-MD-2836, 2022 WL 18108387, at *7 (E.D. Va. Nov. 8, 2022); *Reed v. Light & Wonder, Inc.*, No. 18-CV-565-RSL, 2022 WL 3348217, at *1-2 (W.D. Wash. Aug. 12, 2022); *City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, No. 12-CV-0256 (LAK), 2021 WL 2453972 (S.D.N.Y. June 15, 2021); *In re Facebook Biometric Info. Priv. Litig.*, No. 15-CV-03747-JD, 2021 WL 757025, at *10-*12 (N.D. Cal. Feb. 26, 2021); *Kater v. Churchill Downs Inc.*, No. 15-CV-00612-RSL, 2021 WL 511203, at *1-*2 (W.D. Wash. Feb. 11, 2021); *Wilson v. Playtika Ltd.*, No. 18-CV-5277-RSL, 2021 WL 512230, at *1-*2 (W.D. Wash. Feb. 11, 2021); *Wilson v. Huuuge, Inc.*, No. 18-CV-5276-RSL, 2021 WL 512229, at *1-*2 (W.D. Wash. Feb. 11, 2021); *Amador v. Baca*, No. 210CV01649SVWJEM, 2020 WL 5628938, at *13 (C.D. Cal. Aug. 11, 2020); *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at *10 (S.D. Ill. Dec. 16, 2018); *Krakauer v. Dish Network, L.L.C.*, No. 1:14-CV-333, 2018 WL 6305785, at *5 (M.D.N.C. Dec. 3, 2018); *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2018 WL 1658808, at *4 (E.D. Pa. Apr. 5, 2018); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, No. MDL 2672 CRB (JSC), 2017 WL 3175924, at *3 (N.D. Cal. July 21, 2017); *Aranda v. Caribbean Cruise Line, Inc.*, No. 1:12-cv-04069, 2017 WL 1369741, at *5 (N.D. Ill. Apr. 10, 2017), *aff'd sub nom. Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792 (7th Cir. 2018); *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at *9 (N.D. Cal. Sept. 2, 2015); *Asghari v. Volkswagen Grp. of Am., Inc.*, No. 13-CV-02529 MMM, 2015 WL 12732462, at *44 (C.D. Cal. May 29, 2015); *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-md-2591-JWL, 2015 WL 2165341, at *5 (D. Kan. May 8, 2015); *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1172 (C.D. Cal. 2010); *Commonwealth Care All v. Astrazeneca Pharm. L.P.*, No. CIV.A. 05-0269 BLS 2, 2013 WL 6268236, at *2 (Mass. Super. Aug. 5, 2013).

was paid a flat fee in advance of rendering my opinion, so my compensation is in no way contingent upon the content of my opinion.

13. In analyzing these issues, I have discussed the case with the counsel who retained me. I have also reviewed documents from this litigation and the related cases, a list of which is attached as Exhibit B. I have also reviewed the case law and scholarship relevant to the issues herein.

II.
WHY 30% IS QUANTITATIVELY REASONABLE

14. Class Counsel seek a fee of $124.5 million, which constitutes 30% of the $415 million common fund.

15. In this Circuit, 25% is the benchmark[8] and empirical evidence shows that it is the average percentage courts have actually approved as well.[9] My own database contains 12 common fund cases from the Western District of Washington and the average award across these 12 cases is 27.0%.

16. Empirical evidence demonstrates that percentage awards decrease as fund sizes increase; this is known as the "sliding scale"[10] or "mega-fund"[11] effect. The effect itself is easily

[8] *See, e.g.*, *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 738 (9th Cir. 2016) ("The Ninth Circuit has set 25% of the fund as a 'benchmark' award under the percentage-of-fund method.") (citations omitted); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047–48 (9th Cir. 2002) (same).

[9] Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 260 tbl.4 (2010).

[10] For a discussion, see 5 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 15:80 (6th ed. & Supp. 2022) [hereinafter "*Newberg and Rubenstein on Class Actions*"].

[11] For a discussion, see *id.* at § 15:81.

demonstrated in the aggregate,[12] but empirical data on percentage awards for this level of settlement ($415 million) is thin. Only one published study zeroes in on a relevant tranche ($250–$500 million), with the average award in that group being 17.8% and the median 19.5%; but the tranche encompassed only eight cases and the standard deviation (7.9%) was high.[13] Similarly, in my own dataset, there are only a dozen similarly sized settlements ($315 million–$515 million), with an average award of 19.7% and the median award of 21.6%;[14] the range of percentages in my data is wide (from 3.2% to 33.3%), and the standard deviation (8.1%) again high. Moreover, while the published study encompasses eight cases and my database 12, there is likely a fair amount of overlap across the two datasets in that they studied similar time periods.

17. By contrast to the limited sets of data captured in these empirical studies sits a larger set of cases in which courts have approved awards of 30% or greater even though the settlement fund was more than $100 million. My research assistants culled available public information to generate and verify a list of 47 such cases, appended here as Exhibit C. The point is not that these cases are a more representative sample than the sets in the empirical studies. The point is simply that the average number emerging from the limited empirical studies with small quantities of cases, standing alone, can give a misleading picture of the percentages that courts have actually approved in settlements at this fund level.[15]

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[12] *Id.* Graphs 1 & 2.

[13] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 839 tbl.11 (2010).

[14] We excluded the thirteenth case in this range because the case was not an actual common fund matter: the percentage was calculated only against *potential* benefits to a class and hence the court's fee analysis was largely lodestar-driven.

[15] *See, e.g.*, *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, No. 2:10-md-02179-CJB, 2016 WL 6215974, at *16 (E.D. La. Oct. 25, 2016) (noting

18. That conclusion is consistent with my statement in the *Newberg and Rubenstein* treatise[16] that comparing percentages across cases can provide less insight as to the reasonableness of any proposed fee than other intra-case comparisons, such as multi-factor qualitative tests or lodestar cross-checks. It is true in the abstract that a 25% award in one case and a 25% award in another case are both 25%, such that a percentage comparison ensures some level of consistency. But since that 25% figure, standing alone, provides little information about the fee's relationship to risk, performance, or profit, it can be a somewhat meaningless form of consistency.

19. What's even more confounding in this case is that the 30% figure, standing alone, exaggerates Class Counsel's actual yield here. As noted at the outset,[17] Class Counsel have conducted a litigation campaign in pursuing these social casino cases. As part of that effort, Class Counsel filed and pursued cases in various jurisdictions around the country, testing state gambling statutes for their applicability to these types of games.[18] Before prevailing in the landmark Ninth Circuit *Kater* ruling that held Washington law applicable,[19] Class Counsel lost five cases seeking to apply the gambling statutes of California, Illinois, Maryland, Michigan, Nevada, and Ohio to these social casino apps; since *Kater*, Class Counsel have settled six actions (including this one), with one case still pending. Exhibit D charts out all of these cases and – assuming the Court were to approve a 30% award here – it shows that:

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that for mega-funds, "there are fewer percentage awards to serve as a benchmark; consequently, there is some variability in the percentages awarded in these cases").

[16] *See* 5 *Newberg and Rubenstein on Class Actions*, *supra* note 10, at § 15:86.

[17] *See* ¶ 2, *supra*.

[18] A chart reflecting the cases comprising the litigation campaign is attached as Exhibit D.

[19] *Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018).

- If each of the six settled cases is considered a single data point, ***the average fee award across the six settling cases is 25.8%***.

- If the six settled cases are viewed in terms of their total recovery and total fees, Class Counsel's overall fee – or ***weighted average – for the six settling cases is 28.2%***.

- Finally, if each of the 11 cases is considered one individual data point (including the five unsuccessful, and hence 0%, cases), the ***average fee across the whole campaign*** is ***14.1%***.

Of course, lawyers are not rewarded when they lose a contingent fee case but, as discussed more fully below,[20] courts do permit time spent on non-prevailing matters to be included in counsel's lodestar when that work contributed to the ultimate victory. So too, here, it is fair to acknowledge that Class Counsel's work testing various state laws throughout the country redounded to the benefit of this class when the *Kater* victory was finally secured, particularly as the classes they sought to represent in all of the other efforts substantially overlap with this class. Thus, it does not seem unfair to tax this class for some of the groundwork effort that went into this victory by awarding 30% here, in part to acknowledge the many 0% cases that led up to this settlement – such an approach approximates awarding Class Counsel something closer to 14% than 30%.

20. In short, (a) the level of Class Counsel's request can be viewed through various lenses, making it range from 14%-30%, but even at its maximum 30% level, while (b) it is above the Ninth Circuit's normal benchmark and (c) even further above average percentages in large fund cases (d) it is consistent with fee percentages courts across the circuits have approved in dozens of other mega-fund cases and (e) its reasonableness is more appropriately assessed

[20] *See* ¶ 29, *infra.*

according to the qualitative multi-factor test the Ninth Circuit requires than through qualitatively-blind comparisons to other percentages standing alone.

III.
WHY 30% IS QUALITATIVELY REASONABLE

21. The Ninth Circuit requires courts to consider the following factors in assessing the reasonableness of a proposed fee:

> (1) the results achieved for the class; (2) the risk of the litigation (including complexity of litigation); (3) benefits generated by class counsel beyond the settlement fund; (4) the comparison between the proposed fee and market rate; and (5) the burdens of the litigation for class counsel (including contingency basis, length of litigation, expenses to counsel, and opportunity cost of foregone work).[21]

I distill these five factors into three considerations:[22] (i) Part II, *supra*, addressed prong 4's comparison of the percentage sought to percentages normally awarded (the "market rate"); (ii) Part III(A), *infra*, addresses the risks and burdens of the litigation, as per prongs 2 and 5; and (iii) Part III(B), *infra*, contemplates the litigation's results and benefits, as per prongs 1 and 3. In undertaking this analysis, I utilize the phrase "this litigation" or "these cases" or "this set of cases" when my points apply across Class Counsel's litigation campaign and affect all of its social casino settlements in similar ways; where appropriate, I pin specific points to this case itself.

[21] *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048–50 (9th Cir. 2002).

[22] *See also Farrell v. Bank of Am. Corp., N.A.*, 827 F. App'x. 628, 630 (9th Cir. 2020) (characterizing "the most pertinent factors influencing reasonableness" as "(1) the extent to which counsel achieved exceptional results for the class; (2) whether the case was risky for class counsel; (3) whether counsel's performance generated benefits beyond the cash settlement fund; and (4) the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work)") (cleaned up).

A.
Class Counsel Took Extraordinary Risks

22. Eleven independent factors demonstrate the riskiness of all of the social casino cases, including this one:[23]

- ***These cases were risky because they did not piggy-back on a government enforcement action.*** Many class actions follow on the heels of government enforcement actions, such as securities class actions that follow SEC enforcement actions or antitrust cases that follow Department of Justice actions. Class counsel have a lower risk in such cases as their investigative costs may be lower; as they may be able to employ non-mutual offensive issue preclusion to establish liability without litigation;[24] and/or as the defendant has a natural incentive to settle with the government, easing the road to settlement with the class. Not this set of cases: no government agency has pursued the social casino industry. Class Counsel detected, investigated, theorized, and executed the entire litigation campaign from scratch.

- ***These cases were especially risky because of their novelty.*** Many class actions are pursued by lawyers who specialize in particular areas (securities, antitrust, consumer, etc.) and can economize their practices and lower their risks by repeating efforts from one case to the next. Not this set of cases: here Class Counsel have taken existing gambling laws and attempted – for the first time in American history – to apply them to the technologically novel social casino industry. This application had no precedent and Class Counsel have accordingly spent significant time litigating the applicability of state gambling laws throughout the country to these social casinos. Although this particular case was filed after Class Counsel secured the landmark *Kater* decision in the Ninth Circuit (establishing that virtual casino games fell within Washington's definition of an illegal gambling),[25] it nonetheless retained pre-*Kater*-like risk in that post-*Kater* social casino defendants – including Defendants here – have continued to attempt to distinguish *Kater*.[26] Indeed, these Defendants even filed a countersuit

[23] The point is not to look at counsel's risks *ex post*, but rather to demonstrate the strength of the achievement compared to the risks *ex ante*. *See In re Synthroid Marketing Litigation*, 264 F.3d 712, 718-19 (7th Cir. 2001) (noting that because "hindsight alters the perception of the suit's riskiness" after its conclusion, it is "only *ex ante* [that] the costs and benefits of particular systems and risk multipliers [can] be assessed intelligently").

[24] *See, e.g.*, *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979).

[25] *Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018).

[26] *See, e.g.*, Defendants Double Down Interactive LLC's and International Game Technology's Motion to Compel Arbitration and Stay Action, *Benson, et al. v. DoubleDown Interactive, LLC, et al.*, No. 2:18-cv-00525-RSL (W.D. Wash. Nov. 11, 2022), ECF No. 44 at 2 n.4 ("*Kater* involved different factual allegations and is not binding on IGT or DDI here."); *Fife v. Sci. Games Corp.*,

against these named plaintiffs in Washington state court, asking the state court for, *inter alia*, a declaratory judgment effectively vitiating *Kater's* holding.[27]

- ***These cases were especially risky because of their factual and legal complexity.*** All class action cases are typically more complex than the average contingent fee case – that is why the field is known as "complex litigation." But many class actions involve straightforward enforcement of a well-worn statute. Not this set of cases: the novel legal issues outlined in the prior bullet point involve complex questions, as do the factual issues presented by these social casino platforms and practices.

- ***The fact that Class Counsel were unsuccessful in challenging these social casinos under other state laws is evidence of the riskiness that inhered in these successful cases.*** Courts have found cases particularly risky when class counsel invested time and resources in parallel endeavors that were unsuccessful and for which they were not compensated.[28] For class counsel in those circumstances, the commitment to another case after losing one case is generally a much riskier commitment. Here, Class Counsel doubled down after unsuccessful efforts in several other states, demonstrating a comfort with risk – and/or a deep commitment to this social effort – far beyond the level of risk than what most investors will tolerate.

- ***These cases were especially risky because Class Counsel litigated against large, well-funded defendants***. Defendants in this particular case are very well capitalized.

No. 2:18-CV-00565-RBL, 2018 WL 6620485, at *4-5 (W.D. Wash. Dec. 18, 2018) (rejecting defendant's argument that *Kater* did not govern).

[27] *See* Complaint for Declaratory Relief at 16, *DoubleDown Interactive, LLC, et al. v. Benson, et al*., No. 20-2-02023-34 (Wa. Super. Ct.) (filed Sept. 11, 2020) (asking, in prayer for relief, "[f]or a declaration that DoubleDown Casino games played by Benson and Simonson are not illegal gambling games under Washington law").

[28] *See, e.g.*, *Marshall v. Northrop Grumman Corp.*, No. 16-CV-6794 AB (JCX), 2020 WL 5668935, at *5–6 (C.D. Cal. Sept. 18, 2020) (reasoning that Class Counsel's "financial risks were compounded by the fact that recovery was uncertain" because "[s]everal of ERISA excessive fee cases filed by the firm were dismissed and the dismissals were upheld by Courts of Appeal. In other cases, district courts granted summary judgment against the plaintiffs in whole or part. . . . Accordingly, the Court concludes that the great risk assumed by [Class Counsel] justifies an award of one third of the settlement fund in attorney fees." (internal citations omitted)); *Krakauer v. Dish Network, L.L.C.* No. 1:14-CV-333, 2018 WL 6305785 (M.D.N.C. Dec. 3, 2018) ("Class Counsel's prior work in [a parallel unsuccessful action] illustrates the risk they assumed by litigating the present matter. In [the parallel case], Class Counsel spent over 5,000 hours on a TCPA case that the named plaintiff voluntarily dismissed after the court denied class certification. While Class Counsel was able to leverage some of [that] work into the litigation of this case, it will not recover fees for the 5,000-plus hours it spent on that case.").

DoubleDown Interactive, LLC[29] has an annual revenue exceeding $300 million and an enterprise value of roughly $230 million.[30] International Game Technology generates $4.2 billion in annual revenues and boasts an enterprise valuation of $10.9 billion.[31]

- ***These cases were especially risky because Class Counsel litigated against some of the largest and most powerful law firms in the world***. Defendants in this particular case exerted their financial strength by retaining high-priced counsel,[32] including Baker & Hostetler LLP, a firm of over 1,000 attorneys,[33] Duane Morris, a firm of close to 1,000 attorneys,[34] and Davis Wright and Tremaine, a firm of over 500 lawyers that is one of the largest firms in Washington State.[35] With roughly 2,500 lawyers employed by these three firms alone, Defendants had at their disposal more than 62 times as many lawyers as did the class, represented solely by Class Counsel's approximately 40-lawyer firm (and local counsel). Armed with only its own resources and small staff, Class Counsel faced tremendous risk litigating against such deep-pocketed, high-powered opponents.

- ***These cases were especially risky because these Defendants and the defendants in related cases – and their trade groups – sought to have the Washington gambling commission and the Washington State legislature intervene in ways that would have terminated the case.*** During the pendency of these actions, the present Defendants and

[29] Settlement Agreement, *supra* note 1, at ¶ 1.10.

[30] *See* Yahoo! Finance, *DoubleDown Interactive Co., Ltd. (DDI)*, https://finance.yahoo.com/quote/DDI/key-statistics/ (indicating trailing twelve months revenue of $321 million and enterprise value of $231 million for defendant DoubleDown Interactive as of March 4, 2023).

[31] *See* Yahoo! Finance, *International Game Technology PLC (IGT)*, https://finance.yahoo.com/quote/IGT/key-statistics?p=IGT (indicating trailing twelve months revenue of $4.22 billion and enterprise value of $10.89 billion for defendant International Game Technology as of March 4, 2023).

[32] Settlement Agreement, *supra* note 1, at ¶ 1.11 ("'Defendant's Counsel' means Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg, & Rhow, P.C., and Davis Wright Tremaine LLP for Defendant DoubleDown Interactive LLC, and Baker & Hostetler LLP, and Duane Morris LLP for Defendants International Game Technology and IGT.").

[33] Baker & Hostetler LLP ranks among the most prestigious in the United States and employs over 1,000 attorneys. *See* Vault, *2023 Vault Law 100*, https://legacy.vault.com/best-companies-to-work-for/law/top-100-law-firms-rankings (ranking Baker & Hostetler LLP as the 67th most prestigious law firm in the United States).

[34] *About Duane Morris*, https://www.duanemorris.com/site/about.html (stating that the firm has "more than 900 lawyers in offices in the U.S., UK and Asia").

[35] *Davis Wright Tremaine*, https://en.wikipedia.org/wiki/Davis_Wright_Tremaine (reporting that the firm "employs over 500 lawyers").

the defendants in the related social casino cases, through their lobbying organization, (1) asked the Washington State Gambling Commission to issue a ruling that their social casinos did not constitute gambling as it is defined in Washington law; and (2) introduced a series of bills in the Washington State legislature that would have altered Washington law so as to terminate these actions.[36] Thus, Class Counsel accepted not only the normal contingency risk inherent in the *judicial* system (not knowing for a certainty how a judge or jury would rule) but also the heightened risk of having their litigation terminated by the *executive* or *legislative* branches of Washington State.

- ***This particular case was risky because these Defendants sought to compel arbitration and – had they prevailed – Class Counsel could not have proceeded with a class proceeding of any kind.*** Defendant DoubleDown moved to compel arbitration – not once, but twice – arguing that their terms of use subject the plaintiffs' claims to mandatory arbitration on an individual, not class, basis. Had either of these motions been granted, the case would have ended, as aggregate proceedings would have been prohibited. However, this Court rejected the first motion to compel arbitration, a decision affirmed by the Ninth Circuit, and as result of the settlement, the second motion to compel arbitration has been stayed.

- ***This particular case was especially risky as the Defendants engaged in something akin to a scorched-earth defense.*** I have been studying litigation for nearly four decades but find few analogues to the Defendants' efforts in this matter. They filed numerous motions to change the venue of this case, seeking to compel arbitration (as noted above), seeking to have this Court certify questions to the Washington State Supreme Court, seeking to accelerate appeals to the Ninth Circuit mid-case under 28 U.S.C. § 1292, and – by asserting their defenses as an affirmative declaratory judgment matter – seeking to have a Washington trial court decide the key issue in this case while it was pending before this federal court: in other words, they sought *four* different forums for this lawsuit (arbitration, Washington Supreme Court, the Ninth Circuit, and the Washington state trial court), some multiple times. Moreover, the Defendants moved to strike the class allegations before the class certification motion was ever filed and they engaged in discovery practices so contested that the plaintiffs moved for sanctions and other relief on the grounds that significant evidence had been spoliated. The size of the settlement reflects the large amount of money at issue in the case – and the Defendants litigated it accordingly. This significantly raised the risks for Class Counsel as it strained the time, resources, and commitment of the relatively small law firm shouldering all of this burden.

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[36] *See* Washington State Gambling Commission, *Washington State Gambling Commission Public Meeting – October 2018*, 81–416 (Oct. 18, 2018), https://www.wsgc.wa.gov/sites/default/files/public/agenda/2017/Commission%20Packet_5.pdf; S.B. 6568 & H.B. 2720, 66th Leg., Reg. Sess. (Wash. 2020).

- ***These cases were especially risky because Class Counsel bore the risk of the case themselves.*** In many class actions, the class is represented by a collection of large plaintiffs' firms.[37] This means that the lawyers are able to spread the risk among the various firms. Here, but for local counsel, a single class action firm (Edelson, P.C.) alone bore the significant risks outlined above.

- ***Given their commitment to these highly risky cases, Class Counsel were precluded from taking other, simpler, work.*** It is fair to conclude that Class Counsel's extraordinary devotion of time and resources to this novel and complex set of cases prevented them from pursuing simpler, bread-and-butter actions, any of which would have had a higher expectation of settlement and hence ease of recovery of a contingent fee, possibly a well-multiplied one.

23. These eleven points demonstrate that Class Counsel took large risks in litigating this case – and the other social casino cases – from inception to judgment. Like any investor that takes large risks, these attorneys are entitled to a return on their investment, so long as the risks they took paid off. I will now turn to that analysis.

B.
Class Counsel Achieved Remarkable Results

24. At least ten components of these cases' outcomes speak to the results Class Counsel obtained.

- ***Counsel secured a significant legal victory for these classes***. Class Counsel engaged in a litigation campaign against these social casinos, filing cases in courts throughout the United States. Class Counsel's success in the Ninth Circuit in the related *Kater* case was a landmark victory. In a recent case similarly involving multiple efforts, the Ninth Circuit noted that "excepting the district court in this particular matter, no court has ever ruled for bank accountholders on the controlling legal issue," and affirmed the District Court's characterization of class counsel's efforts as demonstrating "'tenacity and great skill,' achieving a 'remarkable' result in a 'hard fought battle' despite an 'adverse legal landscape' and the 'substantial risk of non-payment.'"[38] Surely these Class Counsel's efforts have merited similar conclusions.

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[37] *See, e.g.*, *Manual for Complex Litigation (Fourth)* § 10.22 (2004) (discussing presence of multiple counsel in complex litigation and advising judges on how to manage).

[38] *Farrell v. Bank of Am. Corp., N.A.*, 827 F. App'x 628, 630 (9th Cir. 2020).

- ***Counsel obtained significant monetary relief for this class.*** Put simply, $415 million is an extraordinary sum. In my own database, I have fund information on 1,017 settlements and only 20 are larger funds than this. These data support the conclusion that this settlement amount is in the top 2% of all common fund class action settlements.[39]

- ***Counsel disgorged significant monetary relief from the Defendants.*** Not only does the settlement promise significant compensation to the plaintiff class, it represents a remarkable level of disgorgement of the Defendants' assets and hence reflects a meaningful deterrent to such behavior in the future. The $415 million settlement consists of two chunks of money – $145.25 million from Defendant DoubleDown and $269.75 million from Defendant International Game Technology; these amounts represent 34.5% and 8.6% of the Defendants' equity values respectively.[40] In the aggregate, the $415 million settlement constitutes 11.6% of the two Defendants' equity values combined. To put those numbers in perspective: in my database, utilizing a relatively broad range of comparable settlement values ($200 million-$600 million) enabled me to identify 14 settlements in which there is public information on the defendant's equity value; defendants in that dataset on average settled for only 3.0% of their equity value, with the median settlement as a percent of equity value being 1.8%.[41] This settlement is therefore about four times greater than what the data would have predicted.

- ***100% of this class is eligible for relief***. The settlement agreement explains that the class, for settlement purposes, is defined as "all individuals who, in the United States . . . played the Applications on or before Preliminary Approval of the Settlement."[42] All class members benefit from the significant changes the Defendants will make to its applications going forward.[43] And significant cash relief is available to any class member who suffered monetary harm: the claim form enables each class

[39] My database adjusts all data to 2023 dollars. Without adjusting for inflation, only 12 settlements in my dataset are larger than $415 million, indicating this settlement is in the top 1% of all common fund class action settlements.

[40] My analysis uses the market capitalization of the Defendants on Sept. 30, 2022, the fiscal quarter before the motion for preliminary approval of the class settlement, to avoid any effects on the stock price directly resulting from the announcement of the settlement agreement.

[41] The equity value is calculated as the market capitalization of the defendant the fiscal quarter before the motion for preliminary approval of the settlement.

[42] Settlement Agreement, *supra* note 1, at ¶ 1.35.

[43] *See* text accompanying note 51, *infra*.

member to fill out a form inserting the class member's gaming app User ID(s),[44] and "[e]ach Settlement Class Member with an Approved Claim shall be entitled to a Settlement Payment from the Net Settlement Fund."[45]

- ***Class members will receive cash not script***. Class actions sometimes end in settlements that return class members little direct compensation, occasionally nothing more concrete than coupons or recoveries going exclusively to third party *cy pres* recipients.[46] The *Manual for Complex Litigation* therefore warns federal judges overseeing class action settlements to be on the lookout for settlements "granting class members illusory nonmonetary benefits, such as discount coupons for more of defendants' product . . . ."[47] The settlements secured in these cases will deliver cash compensation directly to class members, a form of recovery that speaks highly of the cases' outcomes.

- ***Class members will receive significant cash payments***. Not only does this specific settlement provide cash payments to class members, the payments are significant. The motion for preliminary approval states that, "Class Members in the highest category of Lifetime Spending Amounts will likely recover gross payments in excess of 60% of their alleged losses . . . and those in the lowest category will still likely recover gross payments exceeding 20% of the same."[48]

- ***The claims process is straightforward***. Class actions often end with settlements requiring class members to file claims. The claim-filing process may often dissuade class members from making the effort, particularly in small-claim situations. The *Manual for Complex Litigation* therefore warns federal judges overseeing class action settlements to be on the lookout for settlements "imposing such strict eligibility conditions or cumbersome claims procedures that many members will be unlikely to claim benefits . . . ."[49] In this specific case, the claim form could not be more straightforward: most class members need only fill in identifying information, the

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[44] DoubleDown Settlement Claim Form, *Benson, et al. v. DoubleDown Interactive, LLC, et al.*, No. 2:18-cv-00525-RSL (W.D. Wash. Nov. 11, 2022), ECF No. 508-1, Exhibit A [hereinafter "Settlement Claim Form"].

[45] Settlement Agreement, *supra* note 1, at ¶ 2.1(b).

[46] *See* 4 *Newberg and Rubenstein on Class Actions*, *supra* note 10, at §§ 12:7–12:13 (on nonpecuniary damages).

[47] *Manual for Complex Litigation (Fourth)* § 21.61 (2004).

[48] Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement Agreement, *Benson, et al. v. DoubleDown Interactive, LLC, et al.*, Case No. 2:18-cv-00525-RSL (W.D. Wash. Nov. 11, 2022), ECF No. 507 at 1 [hereinafter "Preliminary Approval Brief"].

[49] *Manual for Complex Litigation (Fourth)* § 21.61 (2004).

manner in which they would like to receive their funds, and an attestation to the veracity of the information.[50]

- ***These cases contributed to significant changes in Defendants' practices***. The prior points focus on the common fund Class Counsel secured for this class. These lawsuits generally, and this case specifically, have also produced meaningful changes to the Defendants' policies. Here, through Class Counsel's efforts, the Defendants agreed to "prospective measures" including (a) placing resources related to video game behavior disorders within its applications; (b) publishing on its website a "voluntary self-exclusion policy"; and (c) enabling continued play without the requirement of continued payment.[51]

- ***The settlement, although achieved efficiently, raises no concerns that it might be collusive.*** A critical concern in class suits is that the class's agents might be tempted to sell out the class by agreeing to a low recovery in return for a high fee. The *Manual for Complex Litigation* therefore warns federal judges overseeing class action settlements that "[a]ctive judicial oversight of the settlement process [is necessary to] prevent collusion between counsel for the class and defendant and [to] minimize the potential for unfair settlements."[52] Here, there is not a hint of collusion – this set of cases has been nothing but adversarial since its inception, encompassing over seven years of litigation in district and appellate courts across the country. This particular case settled after over four years of hard-fought litigation (described above), captured by more than 500 docket entries on PACER for the district court portion alone, and it did so under the mediation auspices of a former federal judge and a specialist in complex global settlements.[53] The protracted and rancorous nature of the litigation, coupled with the remarkable scope of the class's relief, belie any collusion concerns.

- ***This litigation served an important public interest.*** While all class action settlements assist in the government's enforcement of the law,[54] these settlements provide an important and unique public service. Through their persistent and protected efforts, Class Counsel have helped establish legal limits to a socially destructive practice: gambling addiction. Class Counsel's achievement transcends these particular settlements by contributing to the general public health of the United States. As noted

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[50] Settlement Claim Form, *supra* note 44.

[51] Settlement Agreement, *supra* note 1, at ¶ 2.2.

[52] *Manual for Complex Litigation (Fourth)* § 22.923 (2004) (internal quotation marks omitted).

[53] Preliminary Approval Brief, *supra* note 48, at 1.

[54] *See Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980) ("The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.").

at the outset of this Declaration,[55] this litigation is as much a social mission as it is a class action settlement.

25. These eleven risks and ten results demonstrate what seems incontestable: Class Counsel took extraordinary risks in investing substantial capital and labor in highly adversarial litigation without the promise of any easy return on that investment, and Class Counsel shouldered that risk superbly, generating important monetary and non-monetary returns for this client class specifically and for social casino users generally.

IV.
WHY A LODESTAR CROSS-CHECK IS UNHELPFUL IN THE UNIQUE CIRCUMSTANCES OF THIS CASE

26. Courts in the Ninth Circuit may check the reasonableness of the percentage sought against class counsel's hours and rates – that is, undertake a "lodestar cross-check" – but such an approach is discretionary. While long holding that a lodestar cross-check "may provide a useful perspective on the reasonableness of a given percentage award,"[56] and "encourag[ing]"[57] District Courts to undertake one, the Circuit has "consistently refused to adopt a crosscheck requirement,"[58] and in 2020, the Circuit again refused to "do so once more."[59]

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[55] *See* ¶ 2, *supra.*

[56] *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050.

[57] *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 944 (9th Cir. 2011) ("[W]e have also encouraged courts to guard against an unreasonable result by cross-checking their calculations against a second method.").

[58] *Farrell v. Bank of Am. Corp., N.A.*, 827 F. App'x 628, 630 (9th Cir. 2020).

[59] *Id.*

27. In my scholarship, I have consistently urged courts to engage in a lodestar cross-check, believing it is the single most important backstop against excessive fees in most cases.[60] Other scholars and some courts disagree,[61] expressing the general concerns that a lodestar cross-check recreates all of the problems that prompted courts to move away from a lodestar method to a percentage method.[62] For example, basing a fee on counsel's hours can be time consuming for the lawyers and judiciary, may incentivize counsel to run up their hours unnecessarily, and may accordingly misalign the lawyers' incentives from those of their clients, artificially prolonging litigation and deferring the class's compensation.[63]

28. Beyond these general concerns about the lodestar cross-check, courts in the Ninth Circuit have found the tool inapplicable or unhelpful in certain specific situations. *First*, Ninth Circuit law suggests that state fees law should apply in diversity cases such as this[64] and some

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[60] *See* 5 *Newberg and Rubenstein on Class Actions*, *supra* note 10, at § 15:86.

[61] *See id.* (examining costs and benefits of lodestar cross-check).

[62] For a discussion of this history, see *id.* at § 15:64.

[63] *See id.* at § 15:65 (examining costs and benefits of percentage and lodestar fee methods).

[64] *See, e.g.*, *Rodriguez v. Disner*, 688 F.3d 645, 653 n.6 (9th Cir. 2012) ("If . . . we were exercising our diversity jurisdiction, state law would control whether an attorney is entitled to fees and the method of calculating such fees."); *Northon v. Rule*, 637 F.3d 937, 938 (9th Cir. 2011) ("State laws awarding attorneys' fees are generally considered to be substantive laws under the *Erie* doctrine and apply to actions pending in federal district court when the fee award is connected to the substance of the case." (internal quotation marks omitted)); *Mangold v. California Pub. Utilities Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995) ("Existing Ninth Circuit precedent has applied state law in determining not only the right to fees, but also in the method of calculating the fees.").

Some older precedent notes that the application of state fees law has been disputed. *See Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1302 (W.D. Wash. 2001) ("There is some dispute in this case as to whether state law or federal law applies to the determination of the reasonableness of attorneys fees. . . ."), *aff'd*, 290 F.3d 1043 (9th Cir. 2002). *See generally* 5 *Newberg and Rubenstein on Class Actions*, *supra* note 10, at § 15:2 ("[T]here is a fair argument that the federal court's equity powers authorize use of federal law. Specifically, a common fund fee award is a creature of equity, emanating from the court's control of the fund and its ability to

states – such as Washington[65] – do not employ the cross-check in their jurisprudence. Thus, were the Court to employ state fees law here, the lodestar cross-check would arguably not come into play. *Second*, where class counsel quickly achieve a strong settlement, courts have sometimes eschewed a lodestar cross-check, likely on the premise that to apply one in those circumstances would incentivize counsel to continue the case (so as to run up their lodestar and lower their multiplier) despite their efficient success.[66] *Third*, where analysis of the Ninth Circuit's qualitative

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therefore extract a fee from the fund to ensure against unjust enrichment. To the extent that a federal court's equitable powers are arguably the source of the common fund fee, application of federal fees law (including calculation methods) seems appropriate and not inconsistent with the general principles underlying the so-called *Erie* doctrine." (footnotes omitted)).

[65] *See Vizcaino*, 142 F. Supp. 2d at 1302 ("Under Washington law, the percentage method, without a lodestar cross-check, should be used in common fund cases."); *Bowles v. Washington Dep't of Ret. Sys.*, 847 P.2d 440, 451 (Wash. 1993) (explaining that Washington courts "apply the percentage of recovery approach" in common fund cases without mentioning a lodestar cross-check).

A Westlaw search in Washington state case law for the term "cross-check" within the same paragraph as the word "lodestar" yielded only one result when conducted on March 4, 2023. That case was inapposite in that it affirmed a trial court decision to use a lodestar approach in a fee shifting case and to not cross-check that calculation according to the percentage of recovery. *See Luna v. Household Fin. Corp., III*, 130 Wash. App. 1012 (2005) ("[T]he court did not err in failing to cross-check its lodestar calculation with the percentage of Borrowers' overall recovery under the settlement."). Thus, it appears fair to conclude that no reported Washington state case has ever used class counsel's lodestar to cross-check a percentage award.

[66] *See Glass v. UBS Fin. Servs., Inc.*, No. C-06-4068 MMC, 2007 WL 221862, at *16 (N.D. Cal. Jan. 26, 2007), *aff'd*, 331 F. App'x 452 (9th Cir. 2009) ("Under the circumstances presented here, where the early settlement resulted in a significant benefit to the class, the Court finds no need to conduct a lodestar cross-check."); *Rankin v. Am. Greetings, Inc.*, No. 2:10-CV-01831-GGH, 2011 WL 13239039, at *2 (E.D. Cal. July 6, 2011) ("Furthermore, in accordance with Ninth Circuit precedents, district courts within the Ninth Circuit have recognized that a lodestar cross check need not be performed where plaintiff's counsel achieves a significant result through an early settlement."); *see also Lopez v. Youngblood,* No. CV-F-07-0474 DLB, 2011 WL 10483569, at *14 (E.D. Cal. Sept. 2, 2011) ("A lodestar cross-check is not required in this circuit, and in a case such as this, is not a useful reference point.") (citing *Glass v. UBS Fin. Servs., Inc.*, No. C-06-4068 MMC, 2007 WL 221862, at *16 (N.D. Cal. Jan. 26, 2007)).

factors[67] provides strong support for the percentage award, some courts have held that a cross-check is unnecessary,[68] as has this Court in prior social casino cases.[69] *Finally*, the Ninth Circuit recently reversed a district court decision for relying (in large part) on the cross-check to limit a fee award below the benchmark in one case,[70] and in another, the Circuit noted that a district court

[67] These are set forth in Part III, *supra.*

[68] *See, e.g.*, *Lopez v. First Student, Inc.*, No. EDCV191669JGBSHKX, 2022 WL 618973, at *6 (C.D. Cal. Feb. 8, 2022) (approving award of 30% after reviewing qualitative factors and stating, "The Court is satisfied that a lodestar 'cross-check' is not required."); *Odom v. ECA Mktg., Inc.*, No. EDCV20851JGBSHKX, 2021 WL 7185059, at *6 (C.D. Cal. Dec. 22, 2021) (similar); *Hirsh v. WW N. Am. Holdings, Inc.*, No. 219CV9782DSFAFMX, 2021 WL 4622394, at *1 (C.D. Cal. Feb. 12, 2021) (similar); *Ahmed v. HSBC BANK USA*, No. EDCV152057FMOSPX, 2019 WL 13027266, at *6 (C.D. Cal. Dec. 30, 2019) ("In short, consideration of the foregoing factors supports class counsel's request for attorney's fees in the amount of 25% of the settlement fund, or $600,000. The court, therefore, is satisfied that a lodestar 'cross-check' is not required."); *Galarza v. Kloeckner Metals Corp.*, No. CV174910FMOPJWX, 2019 WL 12872965, at *6 (C.D. Cal. Nov. 12, 2019) (same); *Moodie v. Maxim Healthcare Servs., Inc.*, No. CV 14-3471 FMO (ASX), 2019 WL 13108327, at *6 (C.D. Cal. Nov. 12, 2019) (same); *Bendon v. DTG Operations, Inc.*, No. EDCV160861FMOAGRX, 2018 WL 4976511, at *8 (C.D. Cal. Aug. 22, 2018), *judgment entered,* No. EDCV160861FMOAGRX, 2018 WL 4959047 (C.D. Cal. Aug. 22, 2018) (same); *Wannemacher v. Carrington Mortg. Servs., LLC*, No. SACV122016FMOANX, 2014 WL 12586117, at *10 (C.D. Cal. Dec. 22, 2014) (similar); *Bautista v. Harvest Mgmt. Sub LLC*, No. CV1210004FMOCWX, 2014 WL 12579822, at *13 (C.D. Cal. July 14, 2014) (similar); *Ladore v. Ecolab, Inc.*, No. CV 11-9386 FMO (JCX), 2013 WL 12246339, at *11 (C.D. Cal. Nov. 12, 2013) (similar).

[69] *Ferrando v. Zynga Inc.*, No. 22-CV-214-RSL, 2022 WL 17741841, at *2 (W.D. Wash. Dec. 1, 2022) ("The Court is not required to conduct a lodestar cross-check, and declines to do so here.") (internal citation omitted); *Reed v. Light & Wonder, Inc.*, No. 18-CV-565-RSL, 2022 WL 3348217, at *2 (W.D. Wash. Aug. 12, 2022) (same); *Wilson v. Huuuge, Inc.*, No. 18-CV-5276-RSL, 2021 WL 512229, at *22 (W.D. Wash. Feb. 11, 2021) (same); *Kater v. Churchill Downs Inc.*, No. 15-CV-00612-RSL, 2021 WL 511203, at *2 (W.D. Wash. Feb. 11, 2021)(same); *Wilson v. Playtika Ltd.*, No. 18-CV-5277-RSL, 2021 WL 512230, at *2 (W.D. Wash. Feb. 11, 2021) (same).

[70] *Reyes v. Experian Info. Sols., Inc.*, 856 F. App'x 108 (9th Cir. 2021).

had (harmlessly) erred in applying the cross-check;[71] these decisions demonstrate that misapplication of the cross-check can lead to reversal and/or prolong fee litigation unnecessarily.[72]

29. While I am generally skeptical about arguments against a lodestar cross-check,[73] there are a variety of interrelated circumstances specific to this litigation that make utilization of the device particularly difficult:

- *First,* as discussed above,[74] this settlement does not stand alone but is one of a group of current (and possibly future) settlements and/or judgments Class Counsel will achieve against social casinos. In this multiple case situation, it is often difficult to attribute lodestar to any one specific case, rendering application of a lodestar cross-check problematic.[75] One solution would be to wait until all of the cases are concluded and then determine a final fee – against a total lodestar – at that time.[76] Such an

[71] *In re Wells Fargo & Co. S'holder Derivative Litig.*, 845 F. App'x 563, 565 n.3 (9th Cir. 2021) (stating that "the district court erred when performing a cross-check for reasonableness using the lodestar method because it summarily dismissed objections to the rates of staff attorneys without analysis or reasoning" but finding that even if the objection had been accepted, and the multiplier adjusted, the amount awarded would not have been unreasonable).

[72] *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation.").

[73] I have argued that these concerns are somewhat exaggerated and can be minimized, see 5 *Newberg and Rubenstein on Class Actions*, *supra* note 10, at § 15:86, a position the California Supreme Court has endorsed. *See Laffitte v. Robert Half Internat. Inc.*, 1 Cal. 5th 480, 504, 376 P.3d 672, 687 (2016) ("We tend to agree with the amicus curiae brief of Professor William B. Rubenstein that these concerns [about the lodestar cross-check] are likely overstated and the benefits of having the lodestar cross-check available as a tool outweigh the problems its use could cause in individual cases."). Regardless, this core debate about the efficacy of a cross-check recedes in relevance in this case for the reasons outlined in this textual paragraph.

[74] *See* ¶ 19, *supra.*

[75] *See, e.g.*, *Bendixen v. Sprint Commc'ns Co. L.P.*, No. 3:11-CV-05274-RBL, 2013 WL 2949569, at *3 (W.D. Wash. June 14, 2013) (noting, in a multiple-case situation, although undertaking a cross-check on a global basis, that: "In terms of a lodestar crosscheck, the overlapping nature of fiber-optic-cable right-of-way discovery, motions practice, research, litigation, and settlement efforts across the country for more than a decade . . . have prevented Settlement Class Counsel from segregating their fees and expenses into a 'Washington-only' category or similar categories for other states.").

[76] *Id.*

approach may solve the lodestar allocation problem, but it raises others: it does not work until the final lodestar can be calculated for all the cases, but neither the earlier-settling classes (nor counsel) should be made to await their recoveries until that time and it can be further complicated when the multiple cases are filed across multiple forums with different approaches to fees. Thus, here, that final rationalization approach is not possible, as these social casino settlements involved multiple cases (at least one still ongoing here and a related multidistrict litigation (MDL) in California), across multiple jurisdictions, against multiple different defendants, with the potential that settlements may ultimately be run through different courts.

- *Second*, as noted in the prior paragraph, the Ninth Circuit has excused application of the cross-check in situations in which counsel achieve a meaningful settlement quickly; some of the cases in this litigation campaign – though not this one – fit this description, complicating application of the cross-check across the entire campaign.

- *Third*, Class Counsel's work in the social casino space not only encompasses a number of settlements, it also encompasses a number of unsuccessful matters. Contingent fee lawyers do not get paid for losing cases. But courts will acknowledge the time they invested in non-prevailing matters in several important ways. Generally, courts have acknowledged counsel's entitlement to a risk multiplier because their prevailing cases must fund their non-prevailing cases;[77] that argument has special bite when, as here, the non-prevailing cases were part of the litigation campaign culminating in the prevailing cases. More specifically, the question presented by the lodestar cross-check is not whether to *pay* class counsel for its losing cases, but what hours of work to recognize in checking the level of counsel's proposed fees in the cases that reach a settlement or judgment for the class. Thus, in the fee-shifting context, the Ninth Circuit has acknowledged that some hours prevailing counsel expend are spent on unsuccessful matters, but that such time may nonetheless be compensable if it contributed to the ultimate victory.[78] Similarly, here there is a non-trivial argument that (1) in a litigation

[77] *See, e.g., Freeman v. Motor Convoy, Inc.,* 700 F.2d 1339, 1357 (11th Cir. 1983) ("Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result. . . . The standard of compensation must enable counsel to accept apparently just causes without awaiting sure winners.") (cleaned up); *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981) (same); *Ressler v. Jacobson*, 149 F.R.D. 651, 656–57 (M.D. Fla. 1992) ("The Court is well aware that there are numerous contingent cases such as this where plaintiff's counsel, after investing thousands of hours of time and effort, have received no compensation whatsoever. Numerous cases recognize that the attorney's contingent fee risk is an important factor in determining the fee award. In evaluating this factor the Court will not ignore the pecuniary loss suffered by plaintiff's counsel in other actions where counsel receive little or no fee.") (internal citations omitted).

[78] *Church of the Holy Light of the Queen v. Holder*, 584 F. App'x 457, 459 (9th Cir. 2014) ("'Rare, indeed, is the litigant who doesn't lose some skirmishes on the way to winning the war … [L]osing is part of winning.' … [Plaintiff's] work on appeal was 'a necessary step to ultimate victory,' and

campaign like this one (2) the hours class counsel expended on behalf of social casino users that proved unsuccessful (3) nonetheless contributed to the settlements that they did achieve such that (4) these hours are appropriately considered as part of a cross-check[79] (5) particularly because courts view the cross-check as merely an estimate by which to assess the reasonableness of a percentage award rather than as an exact tally of compensable hours.[80] At the least, it is fair to acknowledge that the fact that a conventional cross-check might *not* account for these hours renders such a cross-check less than optimal on facts such as these. That seems particularly true here, as, in Exhibit D, I chart out the litigation campaign and show that it encompasses at least a dozen cases filed in four different district courts, in four separate circuits, testing the laws of a half dozen states – with the total time that the dozen cases pended on live dockets summing to about 12,000 days, or 33 years.

- *Fourth*, this case does not involve solely litigation activities. Class Counsel were forced to work on behalf of the class in multiple forums, including legislative arenas and executive branch administrative proceedings. Courts have not hesitated to award

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[plaintiff] is 'entitle[d] to attorney's fees even for the unsuccessful stage' of litigation.") (first and second alteration in original) (quoting *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991)); *see also Loretz v. Regal Stone, Ltd.*, 756 F. Supp. 2d 1203, 1214 (N.D. Cal. 2010) (holding that hours from separate but related litigation may count toward lodestar in present case where "the work performed advanced [the pending] class action").

[79] *See, e.g.*, *Krakauer v. Dish Network, L.L.C.*, No. 1:14-CV-333, 2018 WL 6305785 (M.D.N.C. Dec. 3, 2018) (noting that hours spent on parallel unsuccessful case were not compensable, but because that effort "yielded significant evidence that Counsel were able to use in this case . . . [i]t is appropriate to consider, to some extent, the time Class Counsel spent litigating that case" in undertaking a lodestar cross-check); *Thomas v. Dun & Bradstreet Credibility Corp.*, No. CV1503194BROGJSX, 2017 WL 11633508, at *22 (C.D. Cal. Mar. 22, 2017) (allowing plaintiff's counsel "to include hours billed in a similar, but dismissed" class action in lodestar cross-check because "counsel indicate[d] that the work it performed [in previous case] benefitted the Class Members in this case").

[80] *Dun & Bradstreet*, No. CV1503194BROGJSX, 2017 WL 11633508, at *22 & n.13 (C.D. Cal. Mar. 22, 2017) (holding that plaintiff's counsel can include hours from an unsuccessful case in cross-check because work in earlier case benefited present class action, and reasoning that "lodestar cross-check calculations need not be exact, as they merely serve 'as a point of comparison by which to assess the reasonableness of a percentage award'") (quoting *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-04149 MMM (SHx), 2008 WL 8150856, at *14 (C.D. Cal. July 21, 2008)). *See generally In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 768 F. App'x 651, 654 (9th Cir. 2019) ("[When conducting a lodestar cross-check,] the district court may rely on attorney fee summaries rather than actual billing records."); 5 *Newberg and Rubenstein on Class Actions*, *supra* note 10, at § 15:86 n.13 (listing cases).

fees for such activities in appropriate circumstances,[81] but including hours and rates for non-litigation work in a litigation-related lodestar cross-check risks an uncomfortable level of imprecision even within that back-of-the-envelope endeavor.

30. Given the complications that these factors present to application of the lodestar cross-check, it is helpful to remember that a lodestar cross-check is a means to an end – ensuring against an excessive fee – but it is not the only means to that end, nor always the best means to that end. In the particular circumstances present here, it is my expert opinion that application of the lodestar cross-check raises as many questions as it solves and that the reasonableness of Class Counsel's proposed fee is better assessed not by this discretionary check, but according to the factors that the Ninth Circuit deems mandatory.

* * *

[81] *Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115, 1121 (9th Cir. 2002) (holding that it is within a court's "equitable power to award fees for work that helped create the fund . . . outside the strict confines of the litigation immediately before the court"); *id.* at 1121 n.3 (noting that in determining whether attorneys' time is compensable, "[t]he level of relatedness to the ongoing litigation is of less importance than the extent to which the non-litigation work was calculated to—and in fact did—bring about the common fund presently under the district court's control"); *Class Plaintiffs v. Jaffe & Schlesinger, P.A.*, 19 F.3d 1306, 1308 (9th Cir. 1994) ("It is well established that an award of attorneys' fees from a common fund depends on whether the attorneys' 'specific services benefited the fund—whether they tended to create, increase, protect or preserve the fund.'" (quoting *Lindy Bros. Builders of Philadelphia v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 112 (3d Cir. 1976)).

31. I have testified that:

- A 30% fee is above the Ninth Circuit's 25% benchmark and average fees in mega-fund cases at this level, but consistent with percentages that dozens of courts across the country have approved in cases of this magnitude in appropriate circumstances – and the actual percentage Class Counsel are reaping in the context of this whole litigation campaign is well below 30%, arguably as low as 14%.

- The requested fee is well-justified by (a) the remarkable risks that Class Counsel shouldered and (b) the extraordinary results that they achieved for the class.

- A lodestar cross-check is not a helpful tool by which to assess the reasonableness of Class Counsel's proposed percentage award in the unique circumstances presented by these interrelated cases.

March 8, 2023 William B. Rubenstein

EXHIBIT A

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PROFESSOR WILLIAM B. RUBENSTEIN

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Cambridge, MA 02138

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rubenstein@law.harvard.edu

ACADEMIC EMPLOYMENT

HARVARD LAW SCHOOL, CAMBRIDGE MA

Bruce Bromley Professor of Law	2018-present
Sidley Austin Professor of Law	2011-2018
Professor of Law	2007-2011
Bruce Bromley Visiting Professor of Law	2006-2007
Visiting Professor of Law	2003-2004, 2005-2006
Lecturer in Law	1990-1996

Courses: Civil Procedure; Class Action Law; Remedies
Awards: 2012 Albert M. Sacks-Paul A. Freund Award for Teaching Excellence
Membership: American Law Institute; American Bar Foundation Fellow

UCLA SCHOOL OF LAW, LOS ANGELES CA

Professor of Law	2002-2007
Acting Professor of Law	1997-2002

Courses: Civil Procedure; Complex Litigation; Remedies
Awards: 2002 Rutter Award for Excellence in Teaching
Top 20 California Lawyers Under 40, *Calif. Law Business* (2000)

STANFORD LAW SCHOOL, STANFORD CA

Acting Associate Professor of Law	1995-1997

Courses: Civil Procedure; Federal Litigation
Awards: 1997 John Bingham Hurlbut Award for Excellence in Teaching

YALE LAW SCHOOL, NEW HAVEN CT

Lecturer in Law	1994, 1995

BENJAMIN N. CARDOZO SCHOOL OF LAW, NEW YORK NY

Visiting Professor	Summer 2005

LITIGATION-RELATED EMPLOYMENT

AMERICAN CIVIL LIBERTIES UNION, NATIONAL OFFICE, NEW YORK NY

Project Director and Staff Counsel 1987-1995

-Litigated impact cases in federal and state courts throughout the United States.
-Supervised a staff of attorneys at the national office, oversaw work of ACLU attorneys around the country and coordinated work with private cooperating counsel nationwide.
-Significant experience in complex litigation practice and procedural issues; appellate litigation; litigation coordination, planning and oversight.

HON. STANLEY SPORKIN, U.S. DISTRICT COURT, WASHINGTON DC

Law Clerk 1986-87

PUBLIC CITIZEN LITIGATION GROUP, WASHINGTON DC

Intern Summer 1985

EDUCATION

HARVARD LAW SCHOOL, CAMBRIDGE MA
J.D., 1986, *magna cum laude*

YALE COLLEGE, NEW HAVEN CT
B.A., 1982, *magna cum laude*
Editor-in-Chief, YALE DAILY NEWS

SELECTED COMPLEX LITIGATION EXPERIENCE

Professional Service and Highlighted Activities

◊ *Author,* NEWBERG AND RUBENSTEIN ON CLASS ACTIONS (6th ed. 2022); NEWBERG ON CLASS ACTIONS (sole author since 2008, sole author of entirely re-written Fifth Edition (2011-2019))

◊ *Speaker,* Judicial Panel on Multidistrict Litigation, Multidistrict Litigation (MDL) Transferee Judges Conference, Palm Beach, Florida (invited to present to MDL judges on recent developments in class action law and related topics (2010-2022))

◊ *Panelist,* Federal Judicial Center, *Managing Multidistrict Litigation and Other Complex Litigation Workshop* (for federal judges) (March 15, 2018)

◊ *Amicus curiae,* authored *amicus* brief on proper approach to incentive awards in class action lawsuits in conjunction with motion for rehearing *en banc* in the United States Court of Appeals for the Eleventh Circuit (*Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir. 2020))

◊ *Amicus curiae,* authored *amicus* brief in United States Supreme Court on proper approach to *cy pres* award in class action lawsuits (*Frank v. Gaos*, 139 S. Ct. 1041 (2019))

◊ *Amicus curiae,* authored *amicus* brief in California Supreme Court on proper approach to attorney's fees in common fund cases (*Laffitte v. Robert Half Int'l Inc.*, 376 P.3d 672, 687 (Cal. 2016) (noting reliance on *amicus* brief))

◊ *Amicus curiae,* authored *amicus* brief in the United States Supreme Court filed on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion,* No. 09-893, 131 S. Ct. 1740 (2011))

◊ *Adviser,* American Law Institute, *Project on the Principles of the Law of Aggregate Litigation*, Philadelphia, Pennsylvania

◊ *Advisory Board, Class Action Law Monitor* (Strafford Publications), 2008-

◊ *Co-Chair,* ABA Litigation Section, Mass Torts Committee, Class Action Sub-Committee, 2007

◊ *Planning Committee,* American Bar Association, Annual National Institute on Class Actions Conference, 2006, 2007

◊ "*Expert's Corner*" (Monthly Column), *Class Action Attorney Fee Digest,* 2007-2011

Judicial Appointments

◊ *Co-Mediator.* Appointed by the United States District Court for the Eastern District of Pennsylvania to help mediate a complex attorney's fees issue (*In re National Football League Players' Concussion Injury Litigation*, Civil Action No. 2:12-md-02323 (E.D. Pa. June-September 2022))

◊ *Meditator.* Appointed by the United States District Court for the Southern District of New York to mediate a set of complex issues in civil rights class action (*Grottano v. City of New York*, Civil Action No. 15-cv-9242 (RMB) (May 2020-January 2021))

◊ *Expert consultant.* Appointed by the United States District Court for the Northern District of Ohio, and Special Master, as an expert consultant on class certification and attorney's fees issues in complex multidistrict litigation (*National Prescription Opiate Litigation,* MDL 2804, Civil Action No. 1:17-md-2804 (N.D. Ohio Aug. 13, 2018; June 29, 2019; March 10, 2020))

◊ *Expert witness.* Appointed by the United States District Court for the Eastern District of Pennsylvania as an expert witness on attorney's fees in complex litigation, with result that the Court adopted recommendations (*In re National Football League Players' Concussion Injury Litigation*, 2018 WL 1658808 (E.D. Pa. April 5, 2018))

◊ *Appellate counsel.* Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (*In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom.*, *DeValerio v. Olinski*, 673 F. App'x 87, 90 (2d Cir. 2016))

Expert Witness

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fees request (*In re Twitter Inc. Securities Litigation,* Case No. 4:16-cv-05314 (N.D. Cal. October 13, 2022))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Ferrando v. Zynga Inc.,* Civil Action No. 2:22-cv-00214 (W.D. Wash. 2022))

◊ Submitted an expert witness declaration concerning reasonableness of proposed settlement in nationwide securities class action, in light of competing litigation (*In re Lyft, Inc. Securities Litigation,* Case No. 4:19-cv-02690 (N.D. Cal. August 19, 2022))

◊ Submitted an expert witness declaration concerning reasonableness of common benefit attorney's fee request (*In re: Zetia (Ezetimibe) Antitrust Litigation*, MDL No. 2836, 2:18-md-2836 (E.D. Va. July 12, 2022))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Reed v. Scientific Games Corp.,* Civil Action No. 2:18-cv-00565 (W.D. Wash. 2022))

◊ Submitted an expert witness declaration concerning reasonableness of proposed settlement in nationwide securities class action, in light of competing litigation (*In re Micro Focus International PLC Securities Litigation,* Master File No. 1:18-cv-06763 (S.D.N.Y., May 4, 2022))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Americredit Financial Services, Inc., d/b/a/ GM Financial v. Bell,* No. 15SL-AC24506-01 (Twenty-First Judicial Circuit Court, St. Louis County, Missouri, March 13, 2022))

◊ Submitted an expert witness declaration concerning reasonableness of common benefit attorney's fee request (*In re: Marjory Stoneman Douglas High School Shooting FTCA Litigation*, Case No. 0:18-cv-62758 (S.D. Fla. February 7, 2022))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, No. 12-CV-0256 (LAK), 2021 WL 2453972(S.D.N.Y. June 15, 2021))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Kater v. Churchill Downs,* Civil Action No. 2:15-cv-00612 (W.D. Wash. 2020))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Wilson v. Playtika, LTD,* Civil Action No. 3:18-cv-05277 (W.D. Wash. 2020))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Wilson v. Huuuge,* Civil Action No. 3:18-cv-005276 (W.D. Wash. 2020))

◊ Submitted expert witness declarations and testified at fairness hearing concerning (1) reasonableness of attorney's fee request and (2) empirical data confirming robustness of class claims rate (*In re Facebook Biometric Information Privacy Litigation,* Civil Action No. 3:15-cv-03747-JD (N.D. Cal. (2020))

◊ Retained as an expert witness on issues regarding the Lead Plaintiff/Lead Counsel provisions of the Private Securities Litigation Reform Act of 1995 (PSLRA) (*In re Apple Inc. Securities Litigation.,* Civil Action No. 4:19-cv-02033-YGR (N.D. Cal. (2020))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Amador v. Baca*, Civil Action No. 2:10-cv-01649 (C.D. Cal. February 9, 2020))

◊ Submitted an expert witness declaration concerning reasonableness of class action settlement (*In re: Columbia Gas Cases*, Civil Action No. 1877CV01343G (Mass. Super. Ct., Essex County, February 6, 2020))

◊ Submitted an expert witness declaration, and reply declaration, concerning reasonableness of attorney's fee request (*Hartman v. Pompeo*, Civil Action No. 1:77-cv-02019 (D.D.C. October 10, 2019; February 28, 2020))

◊ Submitted an expert witness declaration concerning reasonableness of common benefit attorney's fee request (*In re: Generic Pharmaceuticals Pricing Antitrust Litigation*, MDL No. 2724, 16-MD-2724 (E.D. Pa. May 15, 2019))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, relied upon by court in awarding fees (*Hale v. State Farm Mut. Auto. Ins. Co*., 2018 WL 6606079 (S.D. Ill. Dec. 16, 2018))

◊ Submitted expert witness affidavit and testified at fairness hearing concerning second phase fee issues in common fund class action (*Tuttle v. New Hampshire Med. Malpractice Joint Underwriting Assoc.,* Case No. 217-2010-CV-00294 (New Hampshire Superior Court, Merrimack County (2018))

◊ Submitted expert witness report – and rebutted opposing expert – concerning class certification issues for proposed class action within a bankruptcy proceeding (*In re Think Finance,* Case No. 17-33964 (N.D. Tex. Bankrpt. 2018))

◊ Submitted expert witness declaration concerning specific fee issues raised by Court at fairness hearing and second declaration in response to report of Special Master (*In re Anthem, Inc. Data Breach Litigation,* Case No. 15-MD-02617-LHK (N.D. Cal. 2018))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request following plaintiffs' verdict at trial in consumer class action (*Krakauer v. Dish Network, L.L.C.,* Civil Action No. 1:14-cv-00333 (M.D.N.C. 2018))

◊ Submitted three expert witness declarations and deposed by/testified in front of Special Master in investigation concerning attorney's fee issues (*Arkansas Teacher Ret. Sys. v. State St. Bank & Trust Co.*, Civ. Action No. 1:11-cv-10230 (D. Mass. 2017-18))

◊ Retained as an expert witness on issues regarding the preclusive effect of a class action judgment on later cases (*Sanchez v. Allianz Life Insurance Co. of N. Amer.,* Case No. BC594715 (California Superior Court, Los Angeles County (2018))

◊ Retained as an expert witness and submitted report explaining meaning of the denial of a motion to dismiss in American procedure to foreign tribunals (*In re Qualcomm Antitrust Matter,* declaration submitted to tribunals in Korea and Taiwan (2017))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 3.0-liter settlement, referenced by court in awarding fees (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* 2017 WL 3175924 (N.D. Cal. July 21, 2017))

◊ Retained as an expert witness concerning impracticability of joinder in antitrust class action (*In re Celebrex (Celecoxib) Antitrust Litigation,* Civ. Action No. 2-14-cv-00361 (E.D. Va. (2017))

◊ Submitted an expert witness declaration and deposed concerning impracticability of joinder in antitrust class action (*In re Modafinil Antitrust Litigation,* Civ. Action No. 2-06-cv-01797 (E.D. Pa. (2017))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 2.0-liter settlement (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* 2017 WL 1047834 (N.D. Cal., March 17, 2017))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced

by court in awarding fees (*Aranda v. Caribbean Cruise Line, Inc.,* 2017 WL 1368741 (N.D. Ill., April 10, 2017))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*McKinney v. United States Postal Service*, Civil Action No. 1:11-cv-00631 (D.D.C. (2016))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Johnson v. Caremark RX, LLC,* Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Geancopoulos v. Philip Morris USA Inc.,* Civil Action No. 98-6002-BLS1 (Mass. Superior Court, Suffolk County))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Gates v. United Healthcare Insurance Company,* Case No. 11 Civ. 3487 (S.D.N.Y. 2015))

◊ Retained as an expert trial witness on class action procedures and deposed prior to trial in matter that settled before trial (*Johnson v. Caremark RX, LLC,* Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*In re High-Tech Employee Antitrust Litig*., 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015))

◊ Retained as an expert witness concerning adequacy of putative class representatives in securities class action (*Medoff v. CVS Caremark Corp.,* Case No. 1:09-cv-00554 (D.R.I. (2015))

◊ Submitted an expert witness declaration concerning reasonableness of proposed class action settlement, settlement class certification, attorney's fees, and incentive awards (*Fitzgerald Farms, LLC v. Chespeake Operating, L.L.C.,* Case No. CJ-2010-38, Dist. Ct., Beaver County, Oklahoma (2015))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Asghari v. Volkswagen Grp. of Am., Inc*., 2015 WL 12732462 (C.D. Cal. May 29, 2015))

◊ Submitted an expert witness declaration concerning propriety of severing individual cases from class action and resulting statute of repose ramifications (*In re: American International Group, Inc. 2008 Securities Litigation,* 08-CV-4772-LTS-DCF (S.D.N.Y. (2015))

◊ Retained by Fortune Global 100 Corporation as an expert witness on fee matter that settled before testimony (2015)

◊ Submitted an expert witness declaration and testified at Special Master proceeding concerning reasonableness of attorney's fee allocation in sealed fee mediation (2014-2015)

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*In re: Hyundai and Kia Fuel Economy Litigation,* MDL 13-02424 (C.D. Cal. (2014))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Ammari Electronics v. Pacific Bell Directory*, Case No. RG0522096, California Superior Court, Alameda County (2014))

◊ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities, Inc.,* Case No. CGC-10-497839, California Superior Court, San Francisco County (2014))

◊ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Credit Suisse Securities (USA) LLC,* Case No. CGC-10-497840, California Superior Court, San Francisco County (2014))

◊ Retained as expert witness on proper level of common benefit fee in MDL (*In re Neurontin Marketing and Sales Practice Litigation,* Civil Action No. 04-10981, MDL 1629 (D. Mass. (2014))

◊ Submitted an expert witness declaration concerning Rule 23(g) selection of competing counsel, referenced by court in deciding issue (*White v. Experian Information Solutions, Inc.,* 993 F. Supp. 2d 1154 (C.D. Cal. (2014))

◊ Submitted an expert witness declaration concerning proper approach to attorney's fees under California law in a statutory fee-shifting case (*Perrin v. Nabors Well Services Co.,* Case No. 1220037974, Judicial Arbitration and Mediation Services (JAMS) (2013))

◊ Submitted an expert witness declaration concerning fairness and adequacy of proposed nationwide class action settlement (*Verdejo v. Vanguard Piping Systems,* Case No. BC448383, California Superior Court, Los Angeles County (2013))

◊ Retained as an expert witness regarding fairness, adequacy, and reasonableness of proposed nationwide consumer class action settlement (*Herke v. Merck,* No. 2:09-cv-07218, MDL Docket No. 1657 (*In re Vioxx Products Liability Litigation*) (E. D. La. (2013))

◊ Retained as an expert witness concerning ascertainability requirement for class certification and related issues (*Henderson v. Acxiom Risk Mitigation, Inc.,* Case No. 3:12-cv-00589-REP (E.D. Va. (2013))

◊ Submitted an expert witness declaration concerning reasonableness of class action settlement and performing analysis of Anet expected value@ of settlement benefits, relied on by court in approving settlement (*In re Navistar Diesel Engine Products Liab. Litig.*, 2013 WL 10545508 (N.D. Ill. July 3, 2013))

◊ Submitted an expert witness declaration concerning reasonableness of class action settlement and

attorney's fee request (*Commonwealth Care All. v. Astrazeneca Pharm. L.P.*, 2013 WL 6268236 (Mass. Super. Aug. 5, 2013))

◊ Submitted an expert witness declaration concerning propriety of preliminary settlement approval in nationwide consumer class action settlement (*Anaya v. Quicktrim, LLC,* Case No. CIVVS 120177, California Superior Court, San Bernardino County (2012))

◊ Submitted expert witness affidavit concerning fee issues in common fund class action (*Tuttle v. New Hampshire Med. Malpractice Joint Underwriting Assoc.,* Case No. 217-2010-CV-00294, New Hampshire Superior Court, Merrimack County (2012))

◊ Submitted expert witness declaration and deposed concerning class certification issues in nationwide fraud class action, relied upon by the court in affirming class certification order (*CVS Caremark Corp. v. Lauriello,* 175 So. 3d 596, 609-10 (Ala. 2014))

◊ Submitted expert witness declaration in securities class action concerning value of proxy disclosures achieved through settlement and appropriate level for fee award (*Rational Strategies Fund v. Jhung,* Case No. BC 460783, California Superior Court, Los Angeles County (2012))

◊ Submitted an expert witness report and deposed concerning legal malpractice in the defense of a class action lawsuit (*KB Home v. K&L Gates, LLP,* Case No. BC484090, California Superior Court, Los Angeles County (2011))

◊ Retained as expert witness on choice of law issues implicated by proposed nationwide class certification (*Simon v. Metropolitan Property and Cas. Co.,* Case No. CIV-2008-1008-W (W.D. Ok. (2011))

◊ Retained, deposed, and testified in court as expert witness in fee-related dispute (*Blue, et al. v. Hill*,Case No. 3:10-CV-02269-O-BK (N.D. Tex. (2011))

◊ Retained as an expert witness in fee-related dispute (*Furth v. Furth*, Case No. C11-00071-DMR (N.D. Cal. (2011))

◊ Submitted expert witness declaration concerning interim fee application in complex environmental class action (*DeLeo v. Bouchard Transportation,* Civil Action No. PLCV2004-01166-B, Massachusetts Superior Court (2010))

◊ Retained as an expert witness on common benefit fee issues in MDL proceeding in federal court (*In re Vioxx Products Liability Litigation*, MDL Docket No. 1657 (E.D. La. (2010))

◊ Submitted expert witness declaration concerning fee application in securities case, referenced by court in awarding fee (*In re AMICAS, Inc. Shareholder Litigation,* 27 Mass. L. Rptr. 568 (Mass. Sup. Ct. (2010))

◊ Submitted an expert witness declaration concerning fee entitlement and enhancement in non-common fund class action settlement, relied upon by the court in awarding fees (*Parkinson v. Hyundai Motor America*, 796 F.Supp.2d 1160, 1172-74 (C.D. Cal. 2010))

◊ Submitted an expert witness declaration concerning class action fee allocation among attorneys (*Salvas*

v. Wal-Mart, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

◊ Submitted an expert witness declaration concerning settlement approval and fee application in wage and hour class action settlement (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

◊ Submitted an expert witness declaration concerning objectors' entitlement to attorney's fees (*Rodriguez v. West Publishing Corp.,* Case No. CV-05-3222 (C.D. Cal. (2010))

◊ Submitted an expert witness declaration concerning fairness of settlement provisions and processes, relied upon by the Ninth Circuit in reversing district court's approval of class action settlement (*Radcliffe v. Experian Inform. Solutions Inc.*, 715 F.3d 1157, 1166 (9th Cir. 2013))

◊ Submitted an expert witness declaration concerning attorney's fees in class action fee dispute, relied upon by the court in deciding fee issue (*Ellis v. Toshiba America Information Systems, Inc.*, 218 Cal. App. 4th 853, 871, 160 Cal. Rptr. 3d 557, 573 (2d Dist. 2013))

◊ Submitted an expert witness declaration concerning common benefit fee in MDL proceeding in federal court (*In re Genetically Modified Rice Litigation*, MDL Docket No. 1811 (E.D. Mo. (2009))

◊ Submitted an expert witness declaration concerning settlement approval and fee application in national MDL class action proceeding (*In re Wal-Mart Wage and Hour Employment Practices Litigation*, MDL Docket No.1735 (D. Nev. (2009))

◊ Submitted an expert witness declaration concerning fee application in national MDL class action proceeding, referenced by court in awarding fees (*In re Dept. of Veterans Affairs (VA) Data Theft Litigation*, 653 F. Supp.2d 58 (D.D.C. (2009))

◊ Submitted an expert witness declaration concerning common benefit fee in mass tort MDL proceeding in federal court (*In re Kugel Mesh Products Liability Litigation*, MDL Docket No. 1842 (D. R.I. (2009))

◊ Submitted an expert witness declaration and supplemental declaration concerning common benefit fee in consolidated mass tort proceedings in state court (*In re All Kugel Mesh Individual Cases*, Master Docket No. PC-2008-9999, Superior Court, State of Rhode Island (2009))

◊ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Warner v. Experian Information Solutions, Inc.*, Case No. BC362599, California Superior Court, Los Angeles County (2009))

◊ Submitted an expert witness declaration concerning process for selecting lead counsel in complex MDL antitrust class action (*In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869 (D. D.C. (2008))

◊ Retained, deposed, and testified in court as expert witness on procedural issues in complex class action (*Hoffman v. American Express*, Case No. 2001-022881, California Superior Court, Alameda County (2008))

◊ Submitted an expert witness declaration concerning fee application in wage and hour class action

(*Salsgiver v. Yahoo! Inc.*, Case No. BC367430, California Superior Court, Los Angeles County (2008))

◊ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Voight v. Cisco Systems, Inc.*, Case No. 106CV075705, California Superior Court, Santa Clara County (2008))

◊ Retained and deposed as expert witness on fee issues in attorney fee dispute (*Stock v. Hafif,* Case No. KC034700, California Superior Court, Los Angeles County (2008))

◊ Submitted an expert witness declaration concerning fee application in consumer class action (*Nicholas v. Progressive Direct*, Civil Action No. 06-141-DLB (E.D. Ky. (2008))

◊ Submitted expert witness declaration concerning procedural aspects of national class action arbitration (*Johnson v. Gruma Corp.,* JAMS Arbitration No. 1220026252 (2007))

◊ Submitted expert witness declaration concerning fee application in securities case (*Drulias v. ADE Corp.,* Civil Action No. 06-11033 PBS (D. Mass. (2007))

◊ Submitted expert witness declaration concerning use of expert witness on complex litigation matters in criminal trial (*U.S. v. Gallion, et al*., No. 07-39 (E. D. Ky. (2007))

◊ Retained as expert witness on fees matters (*Heger v. Attorneys' Title Guaranty Fund, Inc.,* No. 03-L-398, Illinois Circuit Court, Lake County, IL (2007))

◊ Retained as expert witness on certification in statewide insurance class action (*Wagner v. Travelers Property Casualty of America*, No. 06CV338, Colorado District Court, Boulder County, CO (2007))

◊ Testified as expert witness concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corporate Derivative Litigation*, Case No. 01098905, California Superior Court, Santa Barbara Cty, CA (2006))

◊ Submitted expert witness declaration concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corp. Corporate Derivative Litigation*, Case No. CV-03-11 RSWL (C.D. Cal. (2006))

◊ Retained as expert witness as to certification of class action (*Canova v. Imperial Irrigation District*, Case No. L-01273, California Superior Court, Imperial Cty, CA (2005))

◊ Retained as expert witness as to certification of nationwide class action (*Enriquez v. Edward D. Jones & Co.,* Missouri Circuit Court, St. Louis, MO (2005))

◊ Submitted expert witness declaration on procedural aspects of international contract litigation filed in court in Korea (*Estate of Wakefield v. Bishop Han & Jooan Methodist Church* (2002))

◊ Submitted expert witness declaration as to contested factual matters in case involving access to a public forum (*Cimarron Alliance Foundation v. The City of Oklahoma City,* Case No. Civ. 2001-1827-C (W.D. Ok. (2002))

◊ Submitted expert witness declaration concerning reasonableness of class certification, settlement, and fees (*Baird v. Thomson Elec. Co.*, Case No. 00-L-000761, Cir. Ct., Mad. Cty, IL (2001))

Expert Consultant

◊ Retained as an expert in confidential matter pending in international arbitration forum concerning litigation financing issues in complex litigation (2022-2023)

◊ Retained as an expert in matter pending in several federal courts concerning attorney's fees in class action setting (2022-2023)

◊ Retained as an expert witness on class action issues in complex mass tort MDL (*In re Roundup Products Liability Litigation,* Civil Action No. 3:16-md-02741-VC (N.D. Cal. (2020))

◊ Provided expert consulting services to Harvard Law School Predatory Lending and Consumer Protection Clinic concerning complex class action issues in bankruptcy (*In re: ITT Educational Services Inc.,* Case No. 16-07207-JMC-7A (Bank. S.D. Ind. 2020))

◊ Provided expert consulting services to law firm concerning complex federal procedural and bankruptcy issues (*Homaidan v. Navient Solutions, LLC*, Adv. Proc. No. 17-1085 (Bank. E.D.N.Y 2020))

◊ Provided expert consulting services to the ACLU on multi-district litigation issues arising out of various challenges to President Trump's travel ban and related policies (*In re American Civil Liberties Union Freedom of Information Act Requests Regarding Executive Order 13769*, Case Pending No. 28, Judicial Panel on Multidistrict Litigation (2017); *Darweesh v. Trump*, Case No. 1:17-cv-00480-CBA-LB (E.D.N.Y. (2017))

◊ Provided expert consulting services to law firm regarding billing practices and fee allocation issues in nationwide class action (2016)

◊ Provided expert consulting services to law firm regarding fee allocation issues in nationwide class action (2016)

◊ Provided expert consulting services to the ACLU of Southern California on class action and procedural issues arising out of challenges to municipality's treatment of homeless persons with disabilities (*Glover v. City of Laguna Beach*, Case No. 8:15-cv-01332-AG-DFM (C.D. Cal. (2016))

◊ Retained as an expert consultant on class certification issues (*In re: Facebook, Inc., IPO Securities and Derivative Litigation*, No. 1:12-md-2389 (S.D.N.Y. 2015))

◊ Provided expert consulting services to lead class counsel on class certification issues in nationwide class action (2015)

◊ Retained by a Fortune 100 Company as an expert consultant on class certification issues

◊ Retained as an expert consultant on class action and procedure related issues (*Lange et al v. WPX Energy Rocky Mountain LLC*, Case No. 2:13-cv-00074-ABJ (D. Wy. (2013))

◊ Retained as an expert consultant on class action and procedure related issues (*Flo & Eddie, Inc., v. Sirius XM Radio, Inc.*, Case No. CV 13-5693 (C.D. Cal. (2013))

◊ Served as an expert consultant on substantive and procedural issues in challenge to legality of credit card late and over-time fees (*In Re Late Fee and Over-Limit Fee Litigation*, 528 F.Supp.2d 953 (N.D. Cal. 2007), *aff'd*, 741 F.3d 1022 (9th Cir. 2014))

◊ Retained as an expert on Class Action Fairness Act (CAFA) removal issues and successfully briefed and argued remand motion based on local controversy exception (*Trevino, et al. v. Cummins, et al.*, No. 2:13-cv-00192-JAK-MRW (C. D. Cal. (2013))

◊ Retained as an expert consultant on class action related issues by consortium of business groups (*In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, MDL No. 2179 (E.D. La. (2012))

◊ Provided presentation on class certification issues in nationwide medical monitoring classes (*In re: National Football League Players' Concussion Injury Litigation,* MDL No. 2323, Case No. 2:12-md-02323-AB (E.D. Pa. (2012))

◊ Retained as an expert consultant on class action related issues in mutli-state MDL consumer class action (*In re Sony Corp. SXRD Rear Projection Television Marketing, Sales Practices & Prod. Liability Litig.*, MDL No. 2102 (S.D. N.Y. (2009))

◊ Retained as an expert consultant on class action certification, manageability, and related issues in mutli-state MDL consumer class action (*In re Teflon Prod. Liability Litig.*, MDL No. 1733 (S.D. Iowa (2008))

◊ Retained as an expert consultant/co-counsel on certification, manageability, and related issues in nationwide anti-trust class action (*Brantley v. NBC Universal*, No.- CV07-06101 (C.D. Cal. (2008))

◊ Retained as an expert consultant on class action issues in complex multi-jurisdictional construction dispute (*Antenucci, et al., v. Washington Assoc. Residential Partner, LLP, et al.,* Civil No. 8-04194 (E.D. Pa. (2008))

◊ Retained as an expert consultant on complex litigation issues in multi-jurisdictional class action litigation (*McGreevey v. Montana Power Company*, No. 08-35137, U.S. Court of Appeals for the Ninth Circuit (2008))

◊ Retained as an expert consultant on class action and attorney fee issues in nationwide consumer class action (*Figueroa v. Sharper Image*, 517 F.Supp.2d 1292 (S.D. Fla. 2007))

◊ Retained as an expert consultant on attorney's fees issue in complex class action case (*Natural Gas Anti-Trust Cases Coordinated Proceedings*, D049206, California Court of Appeals, Fourth District (2007))

◊ Retained as an expert consultant on remedies and procedural matters in complex class action (*Sunscreen Cases*, JCCP No. 4352, California Superior Court, Los Angeles County (2006))

◊ Retained as an expert consultant on complex preclusion questions in petition for review to California

Supreme Court (*Mooney v. Caspari,* Supreme Court of California (2006))

◊ Retained as an expert consultant on attorney fee issues in complex common fund case (*In Re DietDrugs (Phen/Fen) Products Liability Litigation* (E. D. Pa. (2006))

◊ Retained as an expert consultant on procedural matters in series of complex construction lien cases (*In re Venetian Lien Litigation*, Supreme Court of the State of Nevada (2005-2006))

◊ Served as an expert consultant on class certification issues in countywide class action (*Beauchamp v. Los Angeles Cty. Metropolitan Transp. Authority*, (C.D. Cal. 2004))

◊ Served as an expert consultant on class certification issues in state-wide class action (*Williams v. State of California*, Case No. 312-236, Cal. Superior Court, San Francisco)

◊ Served as an exert consultant on procedural aspects of complex welfare litigation (*Allen v. Anderson*, 199 F.3d 1331 (9th Cir. 1999))

Ethics Opinions

◊ Retained to provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2017))

◊ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2013))

◊ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2011))

◊ Provided expert opinion on issues of professional ethics in implicated by nationwide class action practice (*In re Professional Responsibility Inquiries* (2010))

◊ Provided expert opinion on issues of professional ethics implicated by complex litigation matter (*In re Professional Responsibility Inquiries* (2010))

◊ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2007))

Publications on Class Actions & Procedure

◊ NEWBERG AND RUBENSTEIN ON CLASS ACTIONS (6th ed. 2022); NEWBERG ON CLASS ACTIONS (sole author since 2008, sole author of entirely re-written Fifth Edition (2011-2019)

◊ *Deconstitutionalizing Personal Jurisdiction: A Separation of Powers Approach,* Harvard Public Law Working Paper No. 20-34, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3715068.

◊ *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders,* 99 TEXAS L. REV.73 (2020) (with Francis E. McGovern)

◊ *Profit for Costs*, 63 DEPAUL L. REV. 587 (2014) (with Morris A. Ratner)

◊ *Procedure and Society: An Essay for Steve Yeazell,* 61 U.C.L.A. REV. DISC. 136 (2013)

◊ *Supreme Court Round-Up – Part II*, 5 CLASS ACTION ATTORNEY FEE DIGEST 331 (September 2011)

◊ *Supreme Court Round-Up – Part I*, 5 CLASS ACTION ATTORNEY FEE DIGEST 263 (July-August 2011)

◊ *Class Action Fee Award* Procedures, 5 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2011)

◊ *Benefits of Class Action Lawsuits*, 4 CLASS ACTION ATTORNEY FEE DIGEST 423 (November 2010)

◊ *Contingent Fees for Representing the Government: Developments in California Law*, 4 CLASS ACTION ATTORNEY FEE DIGEST 335 (September 2010)

◊ *Supreme Court Roundup*, 4 CLASS ACTION ATTORNEY FEE DIGEST 251 (July 2010)

◊ *SCOTUS Okays Performance Enhancements in Federal Fee Shifting Cases – At Least In Principle*, 4 CLASS ACTION ATTORNEY FEE DIGEST 135 (April 2010)

◊ *The Puzzling Persistence of the AMega-Fund@ Concept*, 4 CLASS ACTION ATTORNEY FEE DIGEST 39 (February 2010)

◊ *2009: Class Action Fee Awards Go Out With A Bang, Not A Whimper*, 3 CLASS ACTION ATTORNEY FEE DIGEST 483 (December 2009)

◊ *Privatizing Government Litigation: Do Campaign Contributors Have An Inside Track?*, 3 CLASS ACTION ATTORNEY FEE DIGEST 407 (October 2009)

◊ *Supreme Court Preview*, 3 CLASS ACTION ATTORNEY FEE DIGEST 307 (August 2009)

◊ *Supreme Court Roundup*, 3 CLASS ACTION ATTORNEY FEE DIGEST 259 (July 2009)

◊ *What We Now Know About How Lead Plaintiffs Select Lead Counsel (And Hence Who Gets Attorney's Fees!) in Securities Cases*, 3 CLASS ACTION ATTORNEY FEE DIGEST 219 (June 2009)

◊ *Beware Of Ex Ante Incentive Award Agreements*, 3 CLASS ACTION ATTORNEY FEE DIGEST 175 (May 2009)

◊ *On What a "Common Benefit Fee" Is, Is Not, and Should Be*, 3 CLASS ACTION ATTORNEY FEE DIGEST 87 (March 2009)

◊ *2009: Emerging Issues in Class Action Fee Awards*, 3 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2009)

◊ *2008: The Year in Class Action Fee Awards*, 2 CLASS ACTION ATTORNEY FEE DIGEST 465 (December 2008)

◊ *The Largest Fee Award – Ever!*, 2 CLASS ACTION ATTORNEY FEE DIGEST 337 (September 2008)

◊ *Why Are Fee Reductions Always 50%?: On The Imprecision of Sanctions for Imprecise Fee Submissions*, 2 CLASS ACTION ATTORNEY FEE DIGEST 295 (August 2008)

◊ *Supreme Court Round-Up,* 2 CLASS ACTION ATTORNEY FEE DIGEST 257 (July 2008)

◊ *Fee-Shifting For Wrongful Removals: A Developing Trend?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 177 (May 2008)

◊ *You Cut, I Choose: (Two Recent Decisions About) Allocating Fees Among Class Counsel,* 2 CLASS ACTION ATTORNEY FEE DIGEST 137 (April 2008)

◊ *Why The Percentage Method?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 93 (March 2008)

◊ *Reasonable Rates: Time To Reload The (*Laffey*) Matrix,* 2 CLASS ACTION ATTORNEY FEE DIGEST 47 (February 2008)

◊ *The "Lodestar Percentage" A New Concept For Fee Decisions?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2008)

◊ *Class Action Practice Today: An Overview, in* ABA SECTION OF LITIGATION, CLASS ACTIONS TODAY 4 (2008)

◊ *Shedding Light on Outcomes in Class Actions*, *in* CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 20-59 (Joseph W. Doherty, Robert T. Reville, and Laura Zakaras eds. 2008) (with Nicholas M. Pace)

◊ *Finality in Class Action Litigation: Lessons From Habeas,* 82 N.Y.U. L. REV. 791 (2007)

◊ *The American Law Institute's New Approach to Class Action Objectors' Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 347 (November 2007)

◊ *The American Law Institute's New Approach to Class Action Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 307 (October 2007)

◊ *"The Lawyers Got More Than The Class Did!": Is It Necessarily Problematic When Attorneys Fees Exceed Class Compensation?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 233 (August 2007)

◊ *Supreme Court Round-Up,* 1 CLASS ACTION ATTORNEY FEE DIGEST 201 (July 2007)

◊ *On The Difference Between Winning and Getting Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 163 (June 2007)

◊ *Divvying Up The Pot: Who Divides Aggregate Fee Awards, How, and How Publicly?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 127 (May 2007)

◊ *On Plaintiff Incentive Payments,* 1 CLASS ACTION ATTORNEY FEE DIGEST 95 (April 2007)

◊ *Percentage of What?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 63 (March 2007)

◊ *Lodestar v. Percentage: The Partial Success Wrinkle,* 1 CLASS ACTION ATTORNEY FEE DIGEST 31 (February 2007) (with Alan Hirsch)

◊ *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. REV. 1435 (2006) (excerpted in THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 447-449 (Richard A. Nagareda ed., 2009))

◊ *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L. REV. 709 (2006)

◊ *What a "Private Attorney General" Is – And Why It Matters*, 57 VAND. L. REV. 2129(2004) (excerpted in COMPLEX LITIGATION 63-72 (Kevin R. Johnson, Catherine A. Rogers & John Valery White eds., 2009)).

◊ *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002) (selected for the Stanford/Yale Junior Faculty Forum, June 2001)

◊ *A Transactional Model of Adjudication*, 89 GEORGETOWN L.J. 371 (2000)

◊ *The Myth of Superiority*, 16 CONSTITUTIONAL COMMENTARY 599 (1999)

◊ *Divided We Litigate: Addressing Disputes Among Clients and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623 (1997) *(*excerpted in COMPLEX LITIGATION 120-123 (1998))

Selected Presentations

◊ *Opioid Litigation: What's New and What Does it Mean for Future Litigation?,* RAND Institute for Civil Justice and RAND Kenneth R. Feinberg Center for Catastrophic Risk Management and Compensation, RAND Corporation, October 22, 2020

◊ *The Opioid Crisis: Where Do We Go From Here?"* Clifford Symposium 2020, DePaul University College of Law, Chicago, Illinois, May 28-29, 2020)

◊ *Class Action Law Update,* MDL Transferee Judges Conference, Palm Beach, Florida, October 30, 2019

◊ *Class Action Law Update,* MDL Transferee Judges Conference, Palm Beach, Florida, October 31, 2018

◊ *Attorneys' Fees Issues,* MDL Transferee Judges Conference, Palm Beach, Florida, October 30, 2018

◊ *Panelist,* Federal Judicial Center, Managing Multidistrict Litigation and Other Complex Litigation Workshop (for federal judges) (March 15, 2018)

◊ *Class Action Update,* MDL Transferee Judges Conference, Palm Beach, Florida, November 1, 2017

◊ *Class Action Update,* MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2016

◊ *Judicial Power and its Limits in Multidistrict Litigation,* American Law Institute, Young Scholars Medal Conference, *The Future of Aggregate Litigation*, New York University School of Law, New York, New York, April 12, 2016

◊ *Class Action Update & Attorneys' Fees Issues Checklist,* MDL Transferee Judges Conference, Palm Beach, Florida, October 28, 2015

◊ *Class Action Law,* 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop, Tucson, Arizona, January 26, 2015

◊ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2014

◊ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2013

◊ *Class Action Remedies,* ABA 2013 National Institute on Class Actions, Boston, Massachusetts, October 23, 2013

◊ *The Public Life of the Private Law: The Logic and Experience of Mass Litigation – Conference in Honor of Richard Nagareda,* Vanderbilt Law School, Nashville, Tennessee, September 27-28, 2013

◊ *Brave New World: The Changing Face of Litigation and Law Firm Finance*, Clifford Symposium 2013, DePaul University College of Law, Chicago, Illinois, April 18-19, 2013

◊ *Twenty-First Century Litigation: Pathologies and Possibilities: A Symposium in Honor of Stephen Yeazell,* UCLA Law Review, UCLA School of Law, Los Angeles, California, January 24-25, 2013

◊ *Litigation's Mirror: The Procedural Consequences of Social Relationships,* Sidley Austin Professor of Law Chair Talk, Harvard Law School, Cambridge, Massachusetts, October 17, 2012

◊ *Alternative Litigation Funding (ALF) in the Class Action Context – Some Initial Thoughts*, Alternative Litigation Funding: A Roundtable Discussion Among Experts, George Washington University Law School, Washington, D.C., May 2, 2012

◊ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Brooklyn Law School Faculty Workshop, Brooklyn, New York, April 2, 2012

◊ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Loyola Law School Faculty Workshop, Los Angeles, California, February 2, 2012

◊ *Recent Developments in Class Action Law and Impact on MDL Cases,* MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2011

◊ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 26, 2010

◊ *A General Theory of the Class Suit*, University of Houston Law Center Colloquium, Houston, Texas, February 3, 2010

◊ *Unpacking The "Rigorous Analysis" Standard,* ALI-ABA 12th Annual National Institute on Class Actions, New York, New York, November 7, 2008

◊ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of California (Boalt Hall) School of Law Civil Justice Workshop, Berkeley, California, February 28, 2008

◊ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of Pennsylvania Law Review Symposium, Philadelphia, Pennsylvania, Dec. 1, 2007

◊ *Current CAFA Consequences: Has Class Action Practice Changed?,* ALI-ABA 11th Annual National Institute on Class Actions, Chicago, Illinois, October 17, 2007

◊ *Using Law Professors as Expert Witnesses in Class Action Lawsuits,* ALI-ABA 10th Annual National Institute on Class Actions, San Diego, California, October 6, 2006

◊ *Three Models for Transnational Class Actions*, Globalization of Class Action Panel, International Law Association 2006 Conference, Toronto, Canada, June 6, 2006

◊ *Why Create Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, UMKC Law Review Symposium, Kansas City, Missouri, April 7, 2006

◊ *Marks, Bonds, and Labels: Three New Proposals for Private Oversight of Class Action Settlements*, UCLA Law Review Symposium, Los Angeles, California, January 26, 2006

◊ Class Action Fairness Act, Arnold & Porter, Los Angeles, California, December 6, 2005

◊ ALI-ABA 9th Annual National Institute on Class Actions, Chicago, Illinois, September 23, 2005

◊ Class Action Fairness Act, UCLA Alumni Assoc., Los Angeles, California, September 9, 2005

◊ Class Action Fairness Act, Thelen Reid & Priest, Los Angeles, California, May 12, 2005

◊ Class Action Fairness Act, Sidley Austin, Los Angeles, California, May 10, 2005

◊ Class Action Fairness Act, Munger, Tolles & Olson, Los Angeles, California, April 28, 2005

◊ Class Action Fairness Act, Akin Gump Strauss Hauer Feld, Century City, CA, April 20, 2005

SELECTED OTHER LITIGATION EXPERIENCE

United States Supreme Court

◊ Served as *amicus curiae* and authored *amicus* brief on proper approach to *cy pres* award in class action

lawsuits (*Frank v. Gaos*, No. 17-961, October Term 2018)

◊ Co-counsel on petition for writ of *certiorari* concerning application of the voluntary cessation doctrine to government defendants (*Rosebrock v. Hoffman*, 135 S. Ct.1893 (2015))

◊ Authored *amicus* brief filed on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion,* No. 09-893, 131 S. Ct. 1740 (2011)

◊ Co-counsel in constitutional challenge to display of Christian cross on federal land in California's Mojave preserve (*Salazar v. Buono*, 130 S. Ct. 1803 (2010))

◊ Co-authored *amicus* brief filed on behalf of constitutional law professors arguing against constitutionality of Texas criminal law (*Lawrence v. Texas*, 539 U.S. 558 (2003))

◊ Co-authored *amicus* brief on scope of *Miranda* (*Illinois v. Perkins*, 496 U.S. 292 (1990))

Attorney's Fees

◊ Appointed by the United States District Court for the Eastern District of Pennsylvania as an expert witness on attorney's fees in complex litigation, with result that the Court adopted recommendations (*In re National Football League Players' Concussion Injury Litigation*, 2018 WL 1658808 (E.D.Pa. April 5, 2018))

◊ Appointed by the United States District Court for the Northern District of Ohio as an expert consultant on common benefit attorney's fees issues in complex multidistrict litigation, with result that the Court adopted recommendations (*In re: Nat'l Prescription Opiate Litig*., No. 1:17-MD-2804, 2020 WL 8675733 (N.D. Ohio June 3, 2020))

◊ Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (*In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom*., *DeValerio v. Olinski*, 673 F. App'x 87, 90 (2d Cir. 2016)).

◊ Co-counsel in appeal of common benefit fees decision arising out of mass tort MDL (*In re Roundup Products Liability Litigation,* Civil Action No. 21-16228 (Ninth Circuit 2021) (pending)

◊ Served as *amicus curiae* and co-authored *amicus* brief on proper approach to attorney's fees in common fund cases (*Laffitte v. Robert Half Int'l Inc*., 1 Cal. 5th 480, 504, 376 P.3d 672, 687 (2016)).

Consumer Class Action

◊ Co-counsel in challenge to antenna-related design defect in Apple's iPhone4 (*Dydyk v. Apple Inc.,* 5:10-cv-02897-HRL, U.S. Dist. Court, N.D. Cal.) (complaint filed June 30, 2010)

◊ Co-class counsel in $8.5 million nationwide class action settlement challenging privacy concerns raised by Google's Buzz social networking program (*In re Google Buzz Privacy Litigation,* 5:10-cv-00672-JW, U.S. Dist. Court, N.D. Cal.) (amended final judgment June 2, 2011)

Disability

◊ Co-counsel in successful ADA challenge ($500,000 jury verdict) to the denial of health care in emergency room (*Howe v. Hull*, 874 F. Supp. 779, 873 F. Supp 72 (N.D. Ohio 1994))

Employment

◊ Co-counsel in challenges to scope of family benefit programs (*Ross v. Denver Dept. of Health*, 883 P.2d 516 (Colo. App. 1994)); *(Phillips v. Wisc. Personnel Com'n*, 482 N.W.2d 121 (Wisc. 1992))

Equal Protection

◊ Co-counsel in (state court phases of) successful challenge to constitutionality of a Colorado ballot initiative, Amendment 2 (*Evans v. Romer*, 882 P.2d 1335 (Colo. 1994))

◊ Co-counsel (and *amici*) in challenges to rules barring military service by gay people (*Able v. United States*, 44 F.3d 128 (2d Cir. 1995); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (*en banc*))

◊ Co-counsel in challenge to the constitutionality of the Attorney General of Georgia' firing of staff attorney (*Shahar v. Bowers*, 120 F.3d 211 (11th Cir. 1997))

Fair Housing

◊ Co-counsel in successful Fair Housing Act case on behalf of group home (*Hogar Agua y Vida En el Desierto v. Suarez-Medina*, 36 F.3d 177 (1st Cir. 1994))

Family Law

◊ Co-counsel in challenge to constitutionality of Florida law limiting adoption (*Cox v. Florida Dept. of Health and Rehab. Srvcs.*, 656 So.2d 902 (Fla. 1995))

◊ Co-authored *amicus* brief in successful challenge to Hawaii ban on same-sex marriages (*Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993))

First Amendment

◊ Co-counsel in successful challenge to constitutionality of Alabama law barring state funding foruniversity student groups (*GLBA v. Sessions*, 930 F.Supp. 1492 (M.D. Ala. 1996))

◊ Co-counsel in successful challenge to content restrictions on grants for AIDS education materials (*Gay Men's Health Crisis v. Sullivan*, 792 F.Supp. 278 (S.D.N.Y. 1992))

Landlord / Tenant

◊ Lead counsel in successful challenge to rent control regulation (*Braschi v. Stahl Associates Co.*, 544 N.E.2d 49 (N.Y. 1989))

Police

◊ Co-counsel in case challenging DEA brutality (*Anderson v. Branen*, 27 F.3d 29 (2d Cir. 1994))

Racial Equality

◊ Co-authored *amicus* brief for constitutional law professors challenging constitutionality of Proposition 209 *(Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997))

SELECTED OTHER PUBLICATIONS

Editorials

◊ *Follow the Leaders*, NEW YORK TIMES, March 15, 2005

◊ *Play It Straight*, NEW YORK TIMES, October 16, 2004

◊ *Hiding Behind the Constitution*, NEW YORK TIMES, March 20, 2004

◊ *Toward More Perfect Unions*, NEW YORK TIMES, November 20, 2003 (with Brad Sears)

◊ *Don't Ask, Don't Tell, Don't Believe It*, NEW YORK TIMES, July 20, 1993

◊ *AIDS: Illness and Injustice*, WASH. POST, July 26, 1992 (with Nan D. Hunter)

BAR ADMISSIONS

◊ Massachusetts (2008)
◊ California (2004)
◊ District of Columbia (1987) (inactive)
◊ Pennsylvania (1986) (inactive)
◊ U.S. Supreme Court (1993)
◊ U.S. Court of Appeals for the First Circuit (2010)
◊ U.S. Court of Appeals for the Second Circuit (2015)
◊ U.S. Court of Appeals for the Fifth Circuit (1989)
◊ U.S. Court of Appeals for the Ninth Circuit (2004)
◊ U.S. Court of Appeals for the Eleventh Circuit (1993)
◊ U.S. Court of Appeals for the D.C. Circuit (1993)
◊ U.S. District Courts for the Central District of California (2004)
◊ U.S. District Court for the District of the District of Columbia (1989)
◊ U.S. District Court for the District of Massachusetts (2010)
◊ U.S. District Court for the Northern District of California (2010)

EXHIBIT B

Benson, et al. v. DoubleDown Interactive, LLC, et al.
Case No. 2:18-cv-00525-RSL
U.S. District Court for the Western District of Washington

EXPERT REPORT OF PROFESSOR WILLIAM B. RUBENSTEIN

EXHIBIT B
Partial List of Documents Reviewed by Professor Rubenstein
(other than case law and scholarship on the relevant issues)

A. *Benson, et al. v. DoubleDown Interactive, LLC, et al.*, No. 18-36015 (9th Cir.)

1. Defendants-Appellants' Opening Brief, ECF No. 19
2. Defendants-Appellants' Excerpts of Record on Appeal, ECF No. 20
3. Plaintiffs-Appellees' Answering Brief, ECF No. 26
4. Defendants-Appellants' Reply Brief, ECF No. 33
5. Order for Supplemental Briefs, ECF No. 47
6. Plaintiffs-Appellees' Supplemental Brief Addressing *Wilson v. Huuuge, Inc.*, ECF No. 48
7. Defendants-Appellants' Supplemental Brief, ECF No. 49
8. Memorandum Affirming District Court's Denial of Motion to Compel Arbitration, ECF No. 61
9. Mandate, ECF No. 62

B. *Benson, et al. v. DoubleDown Interactive, LLC, et al.*, No. 2:18-cv-00525-RSL (W.D. Wash.)

1. Plaintiffs' Complaint—Class Action, ECF No. 1
2. Motion to Compel Arbitration, ECF No. 38
3. Plaintiffs' First Amended Class Action Complaint, ECF No. 41
4. Defendants Double Down Interactive LLC's and International Game Technology's Motion to Compel Arbitration and Stay Action, ECF No. 44
5. Plaintiffs' Opposition to Defendants' Motion to Compel Arbitration, ECF No. 49
6. Reply in Support of Defendants Double Down Interactive LLC's and International Game Technology's Motion to Compel Arbitration and Stay Action, ECF No. 53
7. Plaintiffs' Consolidated Notice of Supplemental Authority Pursuant to LCR 7(n), ECF No. 56
8. Order Denying Defendats' [sic] Motion to Compel Arbitration, ECF No. 57
9. Defendant International Game Technology's Answer to First Amended Class Action Complaint, ECF No. 74
10. Defendant Double Down Interactive, LLC's Answer to First Amended Class Action Complaint, ECF No. 76
11. Order Granting Defendants' Motion to Stay Proceedings Pending Appeal, ECF No. 77
12. Double Down Interactive, LLC's Motion for Protective Order Re: Plaintiffs' Subpoenas to Apple, Inc., Facebook, Inc., and Google LLC, ECF No. 92

13. Plaintiffs' Opposition to Double Down Interactive LLC's [Corrected] Motion for Protective Order, ECF No. 101
14. Defendants' Motion to Certify Questions to the Washington Supreme Court, ECF No. 103
15. Double Down Interactive, LLC's Reply in Support of Motion for Protective Order Re: Plaintiffs' Subpoenas to Apple, Inc., Facebook, Inc., and Google LLC, ECF No. 108
16. Plaintiffs' Opposition to Defendants' Motion to Certify Issues to the Washington Supreme Court, ECF No. 111
17. Defendants' Reply in Support of Motion to Certify Questions to the Washington Supreme Court, ECF No. 115
18. Order on Defendant's Motions for Protective Order Re. Third-Party Subpoenas, ECF No. 126
19. Order on Denfendant's [sic] Motion to Certify Questions to Washington Supreme Court, ECF No. 127
20. Defendants' Motion to Strike Nationwide Class Allegations, ECF No. 128
21. Double Down Interactive, LLC and International Game Technology's Motion for Reconsideration of Order Denying Motion to Certify Questions to the Washington Supreme Court, ECF No. 133
22. Defendants' Motion to Dismiss Under Fed. R. Civ. P. 12(b)(1) and Motion to Abstain, ECF No. 138
23. Plaintiffs' Opposition to Defendants' Motion to Strike Nationwide Class Allegations, ECF No. 142
24. Defendants' Reply in Support of Motion to Strike Nationwide Class Allegations, ECF No. 149
25. Plaintiffs' Opposition to Defendants' Motion to Dismiss Under Fed. R. Civ. P. 12(b)(1) and Motion to Abstain, ECF No. 150
26. Reply in Support of Defendants' Motion to Dismiss Under Fed. R. Civ. P. 12(b)(1) and Motion to Abstain, ECF No. 152
27. Plaintiffs' Opposition to Defendants' Motion for Reconsideration of Order Denying Motion to Certify Questions to the Washington Supreme Court, ECF No. 154
28. Double Down Interactive, LLC and International Game Technology's Reply in Support of Motion for Reconsideration of Order Denying Motion to Certify Questions to the Washington Supreme Court, ECF No. 155
29. Order Denying Defendants' Motion for Reconsideration, ECF No. 156
30. Defendants Double Down Interactive, LLC and International Game Technology's Motion for Protective Order and to Compel Document Production and Answers to Interrogatories, ECF No. 159
31. Plaintiffs' Motion for Class Certification and for Preliminary Injunction, ECF No. 165
32. Declaration of Todd Logan in Support of Plaintiffs' Motion for Class Certification and for Preliminary Injunction, ECF No. 166
33. Plaintiffs' Opposition to Defendants' Motion for Protective Order and to Compel, ECF No. 190
34. Defendants Double Down Interactive, LLC and International Game Technology's Reply in Support of Motion for Protective Order and to Compel Document Production and Answers to Interrogatories, ECF No. 200
35. Unopposed Motion to Strike and Replace, ECF No. 201

36. Order Regarding Defendants' Motions to Compel Discovery and to Extend Response Deadline, ECF No. 206
37. Order Denying Motion to Strike Nationwide Class Allegations, ECF No. 209
38. Order Denying Defendants' Motion to Abstain and Stay, ECF No. 210
39. Motion to Compel Production of Documents Responsive to Plaintiffs' RFP No. 14, ECF No. 211
40. Double Down Interactive, LLC's Brief in Opposition to Plaintiffs' Motion to Compel Production of Documents Responsive to Plaintiffs' RFP No. 14, ECF No. 221
41. Reply in Support of Motion to Compel Production of Documents Responsive to Plaintiffs' RFP No. 14, ECF No. 227
42. Defendants' Motion for Certification Regarding Abstention Pursuant to 28 U.S.C. § 1292(b) and Motion to Stay, ECF No. 230
43. Defendant International Game Technology's Amended Answer to First Amended Class Action Complaint, ECF NO. 238
44. Motion to Compel Production of Documents Responsive to Plaintiffs' RFP No. 26, ECF No. 244
45. Defendants' Notice to Withdraw Motion for Certification Regarding Abstention Pursuant to 28 U.S.C. § 1292(b) and Motion to Stay, ECF No. 248
46. Plaintiffs' Second Amended Class Action Complaint, ECF No. 249
47. Defendant Double Down Interactive, LLC's Motion for Certification Pursuant to 28 U.S.C. § 1292(b) and to Stay, ECF No. 257
48. Double Down Interactive, LLC's Brief in Opposition to Plaintiffs' Motion to Compel Production of Documents Responsive to Plaintiffs' RFP No. 26, ECF No. 261
49. Reply in Support of Motion to Compel Production of Documents Responsive to Plaintiffs' RFP No. 26, ECF No. 263
50. Defendant Double Down Interactive, LLC's Renewed Motion to Compel Arbitration and to Stay, ECF No. 264
51. Double Down Interactive, LLC's Answer to Second Amended Class Action Complaint, ECF No. 267
52. Defendant International Game Technology's Answer to Plaintiffs' Second Amended Class Action Complaint, ECF NO. 268
53. Plaintiffs' Opposition to DoubleDown Interactive, LLC's Motion for Certification Pursuant to 28 U.S.C. § 1292(b) and for Stay, ECF No. 269
54. International Game Technology's & IGT's Response to Plaintiffs' Motion for Class Certification and Preliminary Injunction, ECF No. 271
55. Double Down Interactive, LLC's Opposition to Plaintiffs' Motion for Class Certification and for Preliminary Injunction, ECF No. 287
56. Reply in Support of Double Down's Motion for Certification Pursuant to 28 U.S.C. 1292(b) and to Stay, ECF No. 288
57. IGT's Motion to Dismiss Plaintiffs' Second Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), ECF No. 289
58. Plaintiffs' Opposition to DoubleDown Interactive, LLC's Renewed Motion to Compel Arbitration and to Stay, ECF No. 293
59. Plaintiffs' Reply in Support of Motion for Class Certification and for Preliminary Injunction, ECF NO. 300

60. Declaration of Todd Logan in Support of Plaintiffs' Reply in Support of Motion for Class Certification and for Preliminary Injunction, ECF No. 301
61. Exhibit 1, USB Drive #1 Lodged with Court [Filed Under Seal], ECF No. 301-1
62. Exhibit 2, DoubleDown Interactive Co., Ltd. Form 20-F, ECF No. 301-2
63. Exhibit 3, Deposition Transcript for Joe Sigrist [Filed Under Seal], ECF No. 301-3
64. Exhibit 4, Deposition Transcript for Leslie Keddie [Filed Under Seal], ECF No. 301-4
65. Exhibit 5, [Filed Under Seal], ECF No. 301-5
66. Exhibit 6, [Filed Under Seal], ECF No. 301-6
67. Exhibit 7, [Filed Under Seal], ECF No. 301-7
68. Exhibit 8, Deposition Transcript for Julie Frederick [Filed Under Seal], ECF No. 301-8
69. Exhibit 9, [Filed Under Seal], ECF No. 301-9
70. Exhibit 10, Deposition Transcript for Suzy Langham [Filed Under Seal], ECF No. 301-10
71. Exhibit 11, [Filed Under Seal], ECF No. 301-11
72. Exhibit 12, [Filed Under Seal], ECF No. 301-12
73. Exhibit 13, [Filed Under Seal], ECF No. 301-13
74. Exhibit 14, Deposition Transcript for Jennifer Peters [Filed Under Seal], ECF No. 301-14
75. Exhibit 15, Karen Schulman LinkedIn, ECF No. 301-15
76. Exhibit 16, [Filed Under Seal], ECF No. 301-16
77. Exhibit 17, USB Drive #2 Lodged with Court [Filed Under Seal], ECF No. 301-17
78. Exhibit 18, Deposition of Adrienne Benson, ECF No. 301-18
79. Exhibit 19, Deposition of Mary Simonson, ECF No. 301-19
80. Exhibit 20, Deposition of Catherine Witt, ECF No. 301-20
81. Exhibit 21, Deposition of Olivia Werner, ECF No. 301-21
82. Exhibit 22, Deposition of Sandra Logan, ECF No. 301-22
83. Exhibit 23, Deposition of Patrick Bailey, ECF No. 301-23
84. Exhibit 24, Deposition of Deborah Raymond, ECF No. 301-24
85. Exhibit 25, Deposition of Jan Saari, ECF No. 301-25
86. Exhibit 26, [Filed Under Seal], ECF No. 301-26
87. Exhibit 27, [Filed Under Seal], ECF No. 301-27
88. Exhibit 28, Deposition Transcript for Alexander Joel Entrikin [Filed Under Seal], ECF No. 301-28
89. Exhibit 29, [Filed Under Seal], ECF No. 301-29
90. Exhibit 30, Emails Between Counsel, ECF No. 301-30
91. Exhibit 31, Emails Between Counsel, ECF No. 301-31
92. Exhibit 32, [Filed Under Seal], ECF No. 301-32
93. Exhibit 33, [Filed Under Seal], ECF No. 301-33
94. Exhibit 34, [Filed Under Seal], ECF No. 301-34
95. Exhibit 35, [Filed Under Seal], ECF No. 301-35
96. Exhibit 36, [Filed Under Seal], ECF No. 301-36
97. Exhibit 37, Deposition Transcript for Jude Cooper [Filed Under Seal], ECF No. 301-37
98. Reply in Support of Double Down Interactive's Renewed Motion to Compel Arbitration and to Stay, ECF No. 307
99. International Game Technology's & IGT's Surreply to Plaintiffs' Motion for Class Certification and Preliminary Injunction, ECF No. 310

100. Plaintiffs' Opposition to IGT's Motion to Dismiss Plaintiffs' Second Amended Complaint, ECF No. 326
101. Double Down Interactive, LLC's Motion to Continue the Trial Date and Pretrial Deadlines or in the Alternative Motion for Fed. R. Civ. P. Rule 16 Conference, ECF NO. 327
102. IGT's Reply in Support of its Motion to Dismiss Plaintiffs' Second Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), ECF No. 330
103. Plaintiffs' Opposition to DoubleDown's Motion for a Trial Continuance, ECF No. 336
104. Order Denying Motion to Certify an Interlocutory Appeal, ECF No. 338
105. Plaintiffs' Motion to Compel Production of Documents Responsive to Nine Requests, ECF No. 341
106. Double Down Interactive, LLC's Reply in Support of Motion to Continue the Trial Date and Pretrial Deadlines or in the Alternative Motion for Fed. R. Civ. P. Rule 16 Conference, ECF No. 344
107. Plaintiffs' Motion for Leave to Take Seven (7) Additional Depositions, ECF No. 374
108. Plaintiffs' Motion to Compel Production of Documents Responsive to Thirteen Requests, ECF No. 382
109. Plaintiffs' Motion for Spoliation Sanctions and Evidentiary Hearing, ECF No. 405
110. [Proposed] Order, ECF No. 405-1
111. Defendant Double Down Interactive, LLC's Opposition to Plaintiffs' Motion for Spoliation Sanctions and Evidentiary Hearing, ECF No. 418
112. Plaintiffs' Reply to IGT Defendants' Response to Motion for Spoliation Sanctions and Evidentiary Hearing, ECF No. 431
113. Reply to DoubleDown's Opposition to Plaintiffs' Motion for Spoliation Sanctions and Evidentiary Hearing, ECF No. 433
114. IGT Defendants' Motion to Strike Plaintiffs' Reply in Support of Their Motion for Spoliation Sanctions and Evidentiary Hearing, ECF No. 440
115. Plaintiffs' Status Report Regarding Mandatory Settlement Conference, ECF No. 451
116. Plaintiffs' Motion for Temporary Restraining Order, ECF No. 482
117. Defendant Double Down Interactive LLC's Opposition to Plaintiffs' Motion for a Temporary Restraining Order, ECF No. 489
118. Plaintiffs' Reply in Support of Motion for Temporary Retraining Order, ECF No. 493
119. IGT Defendants' Opposition to Plaintiffs' Motion for a Temporary Restraining Order, ECF No. 494
120. Stipulated Motion and [Proposed] Order Staying Case Pending Filing of Motion for Preliminary Approval of Class Action Settlement Agreement, ECF No. 499
121. Stipulated Motion Re: Execution of Class Action Settlement Agreement; [Proposed] Order Extending Stay of Case, ECF No. 504
122. Unopposed Motion for Preliminary Approval of Class Action Settlement Agreement, ECF No. 507
123. [Proposed] Order Granting Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, ECF No. 507-1
124. Declaration of Todd Logan in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement Agreement, ECF No. 508
125. Class Action Settlement Agreement, ECF No. 508-1
126. Stipulated Motion Re: Settlement Fund; [Proposed] Order, ECF No. 509

127. Unopposed Motion to Continue Settlement Deadlines by 42 Days, ECF No. 513
128. [Proposed] Order Granting Plaintiffs' Unopposed Motion to Continue Settlement Deadlines by 42 Days, ECF No. 513-1
129. Unopposed Motion to Continue Settlement Deadlines by an Additional 14 Days, ECF No. 528
130. [Proposed] Order Granting Plaintiffs' Unopposed Motion to Continue Settlement Deadlines by an Additional 14 Days, ECF No. 528-1
131. Order Granting Plaintiffs' Unopposed Motion to Continue Settlement Deadlines by an Additional 14 Days, ECF No. 529

C. *DoubleDown Interactive, LLC, et al. v. Benson, et al.*, No. 20-2-02023-34 (Wa. Super. Ct.)

1. Complaint for Declaratory Relief, filed 09/11/20
2. Defendants' Motion to Dismiss or Stay, filed 02/05/21
3. Double Down Interactive, LLC and International Game Technology's Response in Opposition to Adrienne Benson and Mary Simonson's Motion to Dismiss or Stay, filed 02/19/21
4. Defendants' Reply Brief in Support of Motion to Dismiss or Stay, filed 02/26/21
5. Order Granting Defendants' Motion to Dismiss or Stay, filed 07/23/21
6. International Game Technology's Opening Motion and [Proposed] Order for Voluntary Dismissal of Claims, filed 07/29/21

D. *Ferrando et al. v. Zynga, Inc.*, No. 2:22-cv-00214-RSL (W.D. Wash.)

1. Plaintiffs' Class Action Complaint, ECF No. 1
2. Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, ECF No. 23
3. Declaration of Todd Logan in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement Agreement, ECF No. 24
4. Exhibit 1, Class Action Settlement Agreement, ECF No. 24-1
5. Order Granting Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, ECF No. 26

E. *Donna Reed et al. v. Scientific Games Corp., a Nevada corporation*, No. 2:18-cv-00565-RSL (W.D. Wash.)

1. Plaintiff's Complaint—Class Action, ECF No. 1
2. Plaintiff's Rule 26(a)(1) Initial Disclosures, ECF No. 21
3. Joint Status Report & Discovery Plan, ECF No. 25
4. Defendant's Motion to Dismiss, ECF No. 28
5. Plaintiffs' Consolidated Opposition to Defendants' Motions to Dismiss, ECF No. 35
6. Defendant's Reply in Support of Motion to Dismiss, ECF No. 36
7. Plaintiffs' Consolidated Notice of Supplemental Authority Pursuant to LCR 7(n), ECF No. 37

8. Order Granting in Part Defendant's Request for Judicial Notice and Denying Defendant's Motion to Dismiss, ECF No. 38
9. Defendant's Answer and Affirmative Defenses to Plaintiff's Class Action Complaint, ECF No. 41
10. Plaintiff's Motion for Leave to Amend and Substitute Donna Reed as Class Representative, ECF No. 52
11. Stipulation and [Proposed] Order, ECF No. 57
12. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, ECF No. 59
13. Plaintiff's Renewed Motion for Leave to Amend and Substitute Donna Reed as Class Representative, ECF No. 61
14. Donna Reed's Motion to Intervene Pursuant to Fed. R. Civ. P. 24(a) or, in the Alternative, Pursuant to Fed. R. Civ. P. 24(b), ECF No. 65
15. Defendant's Response to Plaintiff Sheryl Fife's Motion for Leave to Amend, ECF No. 67
16. Defendant's Response to Donna Reed's Motion to Intervene, ECF No. 68
17. Plaintiff's Reply in Support of Renewed Motion for Leave to Amend and Substitute Donna Reed as Class Representative, ECF No. 70
18. Donna Reed's Reply in Support of Motion to Intervene Pursuant to Fed. R. Civ. P. 24(a), or, in the Alternative, Pursuant to Fed. R. Civ. P. 24(b), ECF No. 71
19. Defendant's Reply in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction, ECF No. 74
20. Order on Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Plaintiff's Motion for Leave to Amend, ECF No. 77
21. Plaintiff's First Amended Complaint—Class Action, ECF No. 78
22. Defendant's Motion to Compel Arbitration or, in the Alternative, Transfer Venue, ECF No. 82
23. Declaration of Cameron Lee, ECF No. 83
24. Plaintiff's Opposition to Motion to Compel Arbitration or, in the Alternative, Transfer Venue, ECF No. 88
25. Declaration of Roger Perlstadt, ECF No. 89
26. Declaration of Donna Reed, ECF No. 90
27. Defendant's Reply in Support of Motion to Compel Arbitration or, in the Alternative, Transfer Venue, ECF No. 91
28. Defendant's Motion to Stay Discovery and Class Certification Briefing Pending Decision on Motion to Compel Arbitration, ECF No. 100
29. Plaintiff's Opposition to Motion to Stay Discovery and Class Certification Briefing, ECF No. 102
30. Declaration of Todd Logan in Support of Opposition to Motion to Stay Discovery and Class Certification Briefing, ECF No. 103
31. Exhibit 1 to Declaration of Todd Logan in Support of Opposition to Motion to Stay Discovery and Class Certification Briefing, ECF No. 103-1
32. Defendant's Reply in Support of Motion to Stay Discovery and Class Certification Briefing Pending Decision on Motion to Compel Arbitration, ECF No. 106
33. Plaintiff's Motion for Class Certification and for Preliminary Injunction, ECF No. 112
34. [Proposed] Order Certifying Classes and Granting Preliminary Injunction, ECF No. 112-1

35. Declaration of Donna Reed, ECF No. 114
36. Declaration of Donna Reed, ECF No. 115
37. Declaration of Laura Perkinson, ECF No. 116
38. Declaration of Frank Wesner, ECF No. 117
39. Declaration of John Gritsuk, ECF No. 118
40. Declaration of Robert Hicks, ECF No. 119
41. Declaration of Ryan Westergreen, ECF No. 120
42. Order Staying Discovery and Class Certification Briefing, ECF No. 126
43. Order Denying Defendant's Motion to Compel Arbitration or Transfer Venue, ECF No. 134
44. Defendant's Motion to Stay Proceedings Pending Appeal, ECF No. 137
45. Plaintiff's Response in Opposition to Motion to Stay Proceedings Pending Appeal, ECF No. 146
46. Defendant's Reply in Support of its Motion to Stay Proceedings Pending Appeal, ECF No. 147
47. Plaintiff's Motion to Compel Re: RFP No. 32, ECF No. 151
48. Declaration of Brandt Silver-Korn, ECF No. 152
49. Exhibit 1, Plaintiff's Second Set of Requests for Production to Defendant, ECF No. 152-1
50. Defendant's Responses and Objections to Plaintiff's Second Set of Requests for Production, ECF No. 152-2
51. Defendant's Response in Opposition to Plaintiff's Motion to Compel Re: RFP No. 32, ECF No. 154
52. Declaration of Daniel C. Taylor in Support of Defendant's Response in Opposition to Plaintiff's Motion to Compel Re: RFP No. 32, ECF No. 155
53. Plaintiff's Reply in Support of Motion to Compel Re: RFP No. 32, ECF No. 156
54. Declaration of Brandt Silver-Korn, ECF No. 157
55. Exhibit 1 to Declaration of Brandt Silver-Korn, ECF No. 157-1
56. Exhibit 2 to Declaration of Brandt Silver-Korn, ECF No. 157-2
57. Stipulated Motion and [Proposed] Order Staying Case Pending Filing of Motion for Preliminary Approval of Class Action Settlement Agreement, ECF No. 158
58. Unopposed Motion for Preliminary Approval of Class Action Settlement Agreement, ECF No. 163
59. [Proposed] Order Granting Plaintiff's Motion for Preliminary Approval of Class Action Settlement, ECF No. 163-1
60. Declaration of Todd Logan in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement Agreement, ECF No. 164
61. Exhibit 1, Class Action Settlement Agreement, ECF No. 164-1
62. Order Granting Plaintiff's Motion for Preliminary Approval of Class Action Settlement, ECF No. 166
63. Order Granting Plaintiff's Unopposed Motion to Continue Certain Settlement Deadlines by an Additional 16 Days, ECF No. 176

F. *Wilson v. Huuuge, Inc.*, No. 3:18-cf-05276-RSL (W.D. Wash.)

1. Class Action Complaint, ECF No. 1

2. Defendant Huuuge, Inc.'s Motion to Stay Deadlines and Discovery Pending a Decision on Motion to Compel Arbitration, ECF No. 26
3. Plaintiff's Opposition to Defendant Huuuge, Inc.'s Motion to Stay Deadlines and Discovery Pending a Decision on Motion to Compel Arbitration, ECF No. 28
4. Defendant Huuuge, Inc.'s Reply in Support of Motion to Stay Deadlines and Discovery Pending a Decision on Motion to Compel Arbitration, ECF No. 29
5. Order Granting Defendant Huuuge, Inc.'s Motion to Stay Deadlines and Discovery Pending a Decision on Motion to Compel Arbitration, ECF No. 30
6. Defendant Huuuge, Inc.'s Motion to Compel Arbitration and Stay Action, ECF No. 31
7. Plaintiff's Opposition to Defendant Huuuge, Inc.'s Motion to Compel Arbitration and Stay Action, ECF No. 35
8. Defendant Huuuge, Inc.'s Reply in Support of Motion to Compel Arbitration and Stay Action, ECF No. 39
9. Plaintiffs' Consolidated Surreply Pursuant to Local Rule 7(g), ECF No. 41
10. Order Denying Defendant's Motion to Compel Arbitration, ECF No. 43
11. Huuuge, Inc.'s Answer to Class Action Complaint, ECF No. 61
12. Opinion Affirming Order Denying Defendant's Motion to Compel Arbitration, ECF No. 64 [944 F.3d 1212]
13. Plaintiff's Motion for Temporary Restraining Order, ECF No. 69
14. Huuuge, Inc.'s Opposition to Plaintiff's Motion for Temporary Restraining Order, ECF No. 77
15. Plaintiff's Reply in Support of Temporary Restraining Order, ECF No. 80
16. Order on Plaintiff's Motion for Temporary Restraining Order, ECF No. 82
17. Unopposed Motion for Preliminary Approval of Class Action Settlement Agreement, ECF No. 98
18. Order Granting Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, No. 98-1
19. Declaration of Todd Logan, No. 99
20. Class Action Settlement Agreement, No. 99-1
21. Edelson PC Firm Resume, No. 99-2
22. Declaration of Steven Weisbrot, Esq. re: Angeion Group, LLC Qualifications and Implementation of the Notice Program, ECF No. 100
23. Order on Preliminary Approval of Class Action Settlement, ECF No. 101
24. Order Scheduling Motions and Final Approval Hearing, No. 105
25. Stipulated Motion and Order to Amend Preliminary Approval Order, ECF No. 106
26. Unopposed Motion and Order Continuing Settlement Deadlines by 35 Days, ECF No. 109
27. Notice re: Class Notice Plan, ECF No. 116

G. *Wilson v. Playtika LTD.*, No. 3:18-cv-05277-RSL (W.D. Wash.)

1. Class Action Complaint, ECF No. 1
2. Motion to Dismiss Defendants Playtika LTD and Playtika Holding Corp. or, in the Alternative, to Strike Certain Allegations from the Complaint, ECF No. 40
3. Plaintiff's Opposition to Defendants' Motion to Dismiss for Forum Non Conveniens, ECF No. 48

4. Plaintiffs' Consolidated Opposition to Defendants' Motions to Dismiss, ECF No. 52
5. Plaintiff's Opposition to Defendant Playtika LTD's Rule 12(B)(2) Motion to Dismiss for Lack of Personal Jurisdiction, ECF No. 57
6. Defendant Playtika LTD's Reply in Support of its Motion to Dismiss, ECF No. 64
7. Plaintiffs' Consolidated Surreply Pursuant to Local Rule 7(g), ECF No. 66
8. Plaintiffs' Consolidated Notice of Supplemental Authority Pursuant to LCR 7(n), ECF No. 67
9. Order Denying Defendants' Motion to Dismiss and Strike and Granting Defendants' Request for Judicial Notice, ECF No. 68
10. Defendant's Answer to Plaintiff's Class Action Complaint, ECF No. 74
11. Defendant Caesars Interactive Entertainment, LLC's Motion to Dismiss, ECF No. 75
12. Defendant Playtika LTD's Motion for Certification Pursuant to 28 U.S.C. § 1292(b) and for a Stay Pending Appeal, ECF No. 79
13. Plaintiff's Opposition to Defendant Playtika LTD's Motion for Certification Pursuant to 28 U.S.C. § 1292(b) and for a Stay Pending Appeal, ECF No. 84
14. Order Granting Defendant Playtika LTD's Motion for Certification Pursuant to 28 U.S.C. § 1292(b) and for a Stay Pending Appeal, ECF No. 85
15. Joint Status Report, ECF No. 98
16. Defendant Playtika LTD's Motion to Certify Issues to the Washington Supreme Court, ECF No. 99
17. Plainitff's Response in Opposition to Defendant Playtika LTD's Motion to Certify Issues to the Washington Supreme Court, ECF No. 102
18. Defendant Playtika LTD's Reply in Support of Motion to Certify Issues to the Washington Supreme Court, ECF No. 104
19. Order on Defendant Playtika LTD's Motion to Certify Issues to the Washington Supreme Court, ECF No. 113
20. Unopposed Motion for Preliminary Approval of Class Action Settlement Agreement, ECF No. 120
21. Proposed Order Granting Plaintiff's Motion for Preliminary Approval of Class Action Settlement Agreement, ECF No. 120-1
22. Declaration of Todd Logan, No. 121
23. Exhibit 1 to Declaration of Todd Logan, Class Action Settlement Agreement, No. 121-1
24. Exhibit 2 to Declaration of Todd Logan, Edelson PC Firm Resume, No. 121-2
25. Order on Preliminary Approval of Class Action Settlement, ECF No. 124
26. Order Scheduling Motions and Final Approval Hearing, ECF No. 126
27. Unopposed Motion and Order Continuing Settlement Deadlines by 35 Days, ECF No. 129
28. Notice re: Class Notice Plan, ECF No. 136

H. *Kater v. Churchill Downs Incorporated*, No. 2:15-cv-612-RSL (W.D. Wash.)

1. Class Action Complaint, ECF No. 2
2. Defendant Churchill Downs Incorporated's Motion to Dismiss, ECF No. 24
3. Plaintiffs' Opposition to Churchill Downs Incorporated's Motion to Dismiss, ECF No. 32

4. Defendant Churchill Downs Incorporated's Reply in Support of Motion to Dismiss, ECF No. 35
5. Order Granting Defendant Churchill Downs Incorporated's Motion to Dismiss, No. 39
6. Judgment Granting Defendant Churchill Downs Incorporated's Motion to Dismiss, No. 40
7. Plaintiff's Motion to Reconsider Order Granting Defendant Churchill Downs Incorporated's Motion to Dismiss, No. 41
8. Order Denying Plaintiff's Motion to Reconsider Order Granting Defendant Churchill Downs Incorporated's Motion to Dismiss, No. 42
9. Opinion Reversing and Remanding Order Granting Motion to Dismiss, ECF No. 46 [886 F.3d 784]
10. Defendant Churchill Downs Incorporated's Motion to Compel Arbitration, No. 60
11. Plaintiff's Opposition to Defendant Churchill Downs Incorporated's Motion to Compel Arbitration, No. 68
12. Defendant Churchill Downs Incorporated's Reply in Support of Motion to Compel Arbitration, No. 70
13. Plaintiff's Surreply to Defendant Churchill Downs Incorporated's Reply in Support of Motion to Compel Arbitration, No. 72
14. Before the Washington State Gambling Commission, Order Denying Request to Issue Declaratory Order, ECF No. 74-1
15. Order Denying Motion to Compel Arbitration, No. 75
16. Defendant Churchill Downs Incorporated's Answer to Plaintiff's Complaint, No. 76
17. Defendant Churchill Downs Incorporated's Motion for Joinder of Big Fish Games, Inc. as a Necessary Party, No. 79
18. Exhibit D to Defendant Churchill Downs Incorporated's Motion for Joinder of Big Fish Games, Inc. as a Necessary Party, Petition Before the Washington State Gambling Commission, No. 79-5
19. First Amended Class Action Complaint, No. 85
20. Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement Agreement, No. 217
21. Proposed Order Granting Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, No. 217-1
22. Declaration of Todd Logan, No. 218
23. Exhibit 1 to Declaration of Todd Logan, Class Action Settlement Agreement, No. 218-1
24. Exhibit 2 to Declaration of Todd Logan, Edelson PC Firm Resume, No. 218-2
25. Order on Preliminary Approval of Class Action Settlement, No. 221
26. Order Scheduling Motions and Final Approval Hearing, No. 223
27. Class Member Motion to Cease and Desist, No. 228
28. Class Member Handwritten Opt Out, No. 237
29. Unopposed Motion and Order Continuing Settlement Deadlines by 35 Days, No. 243
30. Notice re: Class Notice Plan, No. 249

EXHIBIT C

Benson, et al. v. DoubleDown Interactive, LLC, et al.
Case No. 2:18-cv-00525-RSL
U.S. District Court for the Western District of Washington

EXPERT REPORT OF PROFESSOR WILLIAM B. RUBENSTEIN

EXHIBIT C
List of Megafund (Settlement Funds Exceeding $100 Million) Class Actions with Percentage Awards of 30% or More

	Case	**Settlement Amount**	**Percentage Award**
1	*Cook v. Rockwell Int'l Corp.*, No. 90-cv-00181, 2017 WL 5076498 (D. Colo. Apr. 28, 2017)	$375m	40%
2	*In re Capacitors Antitrust Litig.*, No. 3:14-cv-03264 (N.D. Cal. Mar. 6, 2023) (ECF No. 2982)	$165m	40%
3	*In re Combustion, Inc.*, 968 F. Supp. 1116 (W.D. La. 1997)	$127m	36%
4	*Haddock v. Nationwide Life Ins. Co.*, No. 01-cv-01552 (D. Conn. Apr. 9, 2015) (ECF No. 601)	$140m	35%
5	*In re Vitamins Antitrust Litig.*, No. 99-197, 2001 WL 34312839 (D.D.C. July 16, 2001) (Vitamin Products Settlement Fund)	$359m	34.06%
6	*City of Greenville v. Syngenta Crop Prot.*, 904 F. Supp. 2d 902 (S.D. Ill. Oct. 23, 2012)	$105m	33.33%
7	*Hale v. State Farm*, No. 12-cv-00660, 2018 WL 6606079 (S.D. Ill. Dec. 16, 2018)	$250m	33.33%
8	*In re Apollo Grp. Inc. Sec. Litig.*, No. 04-cv-02147, 2012 WL 1378677 (D. Ariz. Apr. 20, 2012)	$145m	33.33%
9	*In re Domestic Drywall Antitrust Litig.*, No. 13-md-2437, 2018 WL 3439454 (E.D. Pa. July 17, 2018)	$190m	33.33%
10	*In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739 (E.D. Pa. 2013)	$150m	33.33%
11	*In re Loestrin 24 Fe Antitrust Litig.*, MDL No. 2472 (D.R.I. July 17, 2020)	$120m	33.33%

	Case	Settlement Amount	Percentage Award
12	*In re Mun. Derivatives Antitrust Litig.*, No. 08-cv-02516, 2016 WL 11543257 (S.D.N.Y. July 8, 2016) (ECF Nos. 2013, 2029)	$101m	33.33%
13	*In re Neurontin Antitrust Litig.*, No. 02-cv-01830, 2014 WL 12962880 (D.N.J. Aug. 6, 2014)	$190m	33.33%
14	*In re OSB Antitrust Litig.*, No. 06-cv-00826 (D. Pa. Dec. 9, 2008) (ECF No. 947)	$121m	33.33%
15	*In re Relafen Antitrust Litig.*, No. 01-cv-12239 (D. Mass. Apr. 9, 2004) (ECF No. 297)	$175m	33.33%
16	*In re Southeastern Milk Antitrust Litig.*, No. 08-md-1000, 2013 WL 2155387 (E.D. Tenn. May 17, 2013)	$159m	33.33%
17	*In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094 (D. Kan. 2018)	$1.51b	33.33%
18	*In re Titanium Dioxide Antitrust Litig.*, No. 10-cv-00318, 2013 WL 6577029 (D. Md. Dec. 13, 2013)	$164m	33.33%
19	*In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-cv-00340 (D. Del. Apr. 23, 2009) (ECF No. 543)	$250m	33.33%
20	*In re Urethane Antitrust Litig.*, No. 04-md-01616 (D. Kan. July 29, 2016) (ECF No. 3276)	$835m	33.33%
21	*In re U.S. Foodservice, Inc. Pricing Litig.*, No. 07-md-01894, 2014 WL 12862264 (D. Conn. Dec. 9, 2014)	$297m	33.33%
22	*Marchbanks Truck Serv., Inc. v. Comdata Network, Inc.*, No. 07-cv-1078, 2014 WL 12738907 (E.D. Pa. July 14, 2014)	$130m	33.33%
23	*In re Buspirone Antitrust Litig.*, No. 01-md-1413, 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. Apr. 11, 2003) (no Westlaw citation available)	$220m	33.30%
24	*In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467 (S.D.N.Y. 2009)	$586m	33.30%
25	*In re Broiler Chicken Antitrust Litig.*, No. 16-cv-08637, 2022 WL 6124787 (N.D. Ill. Oct. 7, 2022)	$181m	33%

	Case	Settlement Amount	Percentage Award
26	*Standard Iron Works v. ArcelorMittal*, No. 08-cv-05214, 2014 WL 7781572 (N.D. Ill. Oct. 22, 2014)	$164m	33%
27	*In re Auto. Refinishing Paint Antitrust Litig.*, No. MDL-1426, 2008 WL 63269 (E.D. Pa. Jan. 3, 2008)	$106m	32.7%
28	*Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006)	$1.06b	31.33%
29	*In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295 (1st Cir. 1995)	$220m	30.9%
30	*Anwar et al v. Fairfield Greenwich Limited et al*, No. 09-cv-0118 (S.D.N.Y. Nov. 20, 2015) (ECF No. 1457)	$125m	30%
31	*City of Pontiac General Employees' Retirement System v. Wal-Mart Stores, Inc. et al.*, No. 12-cv-05162 (W.D. Ark. 2019) (ECF No. 458)	$160m	30%
32	*In re (Bank of America) Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330 (S.D. Fla. 2011)	$410m	30%
33	*In re Cathode Ray Tube (Crt) Antitrust Litig.*, No. 07-cv-05944, 2016 WL 183285 (N.D. Cal. Jan. 14, 2016)	$127m	30%
34	*In re (Chase Bank) Checking Account Overdraft Litig.*, No. 09-md-02036 (S.D. Fla. Dec. 19, 2012) (ECF No. 3134)	$162m	30%
35	*In re (Citizens Bank) Checking Account Overdraft Litig.*, No. 09-md-02036 (S.D. Fla. Mar. 12, 2013) (ECF No. 3331)	$138m	30%
36	*In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166 (E.D. Pa. 2000)	$111m	30%
37	*In re Linerboard Antitrust Litig.*, No. 98-cv-05055, 2004 WL 1221350 (E.D. Pa. June 2, 2004)	$203m	30%
38	*In re Morgan Keegan Open-End Mutual Fund Litigation*, No. 07-cv-02784 (W.D. Tenn. Aug 2, 2016) (ECF No. 435)	$110m	30%
39	*In re Polyurethane Foam Antitrust Litig.*, No. 10-md-2196, 2015 WL 1639269 (N.D. Ohio Feb. 26, 2015), *appeal dismissed* (Dec. 4, 2015)	$148m	30%

	Case	Settlement Amount	Percentage Award
40	*In re Takata Airbag Prod. Liab. Litig.*, No. 14-cv-24009, 2017 WL 5290875 (S.D. Fla. Nov. 1, 2017)	$131m	30%
41	*In re TFT-LCD (Flat Panel)* Antitrust Litigation, No. 07-md-01827 (N.D. Cal. 2011) (ECF No. 4436)	$405m	30%
42	*Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632 (N.D. Tex. Apr. 9, 2010), *as modified* (June 14, 2010)	$110m	30%
43	*Kurzweil v. Philip Morris Co., Inc.*, Nos. 94-cv-2373, 94-cv-2546, 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999)	$124m	30%
44	*Peace Officers' Annuity & Benefit Fund v. DaVita Inc.*, No. 17-cv-0304, 2021 WL 2981970 (D. Colo. July 15, 2021)	$135m	30%
45	*Schuh v. HCA Holdings, Inc.*, No. 11-cv-01033, 2016 WL 10570957 (M.D. Tenn. Apr. 14, 2016) (ECF Nos. 540, 563)	$215m	30%
46	*Tennille v. Western Union Co.*, No. 09-cv-00938, 2014 WL 5394624 (D. Colo. Oct. 15, 2014)	$180m	30%
47	*In re Lithium Ion Batteries Antitrust Litig.*, No. 13-md-02420Y, 2020 WL 7264559 (N.D. Cal. Dec. 10, 2020), *aff'd*, No. 21-15120, 2022 WL 16959377 (9th Cir. Nov. 16, 2022)	$113m	~30%

EXHIBIT D

Benson, et al. v. DoubleDown Interactive, LLC, et al.
Case No. 2:18-cv-00525-RSL
U.S. District Court for the Western District of Washington

EXPERT REPORT OF PROFESSOR WILLIAM B. RUBENSTEIN

EXHIBIT D
Overview of Entire Casino App Litigation Campaign

SETTLED CASES				
	CASE	**SETTLEMENT**	**FEE %**	**FEE TOTAL**
1	*Kater v. Churchill Downs*	$ 155,000,000	25%	$ 38,750,000
2	*Wilson v. Playtika*	$ 38,000,000	25%	$ 9,500,000
3	*Wilson v. Huuuge*	$ 6,500,000	25%	$ 1,625,000
4	*Reed v. Scientific Games*	$ 24,500,000	25%	$ 6,125,000
5	*Ferrando v. Zynga*	$ 12,000,000	25%	$ 3,000,000
6	*Benson v. DoubleDown Interactive*	$ 415,000,000	30% (proposed)	$ 124,500,000
	TOTAL	**$ 651,000,000**		**$ 183,500,000**

ACROSS THE 6 SETTLED CASES
UNWEIGHTED AVERAGE RATE
(5 x 25%) + (1 seeks x 30%) = 155%/6
= 25.8%/case

WEIGHTED AVERAGE RATE
$183,500,000/$651,000,000
= 28.2%

ACROSS ALL 11 FINISHED CASES
UNWEIGHTED AVERAGE RATE
(5 x 25%) + (1 seeks x 30%) + (5 x 0%) =155%/11
= 14.1%/case

ALL CASES				
	CASE NAME	**TRIAL COURT**	**APPEAL**	**DURATION**
1	*Kater v. Churchill Downs*	No. 2:15-cv-00612 (W.D. Wash.) 4/17/2015–3/9/2021; 296 entries	*Affirmed,* 886 F.3d 784 (9th Cir.) 1/6/2016–3/28/2018; 72 entries	2,153 days
2	*Wilson v. Playtika*	No. 3:18-cv-05277 (W.D. Wash.) 4/6/2018–2/11/2021; 171 entries	NO APPEAL	1,042 days
3	*Wilson v. Huuuge*	No. 3:18-cv-05276 (W.D. Wash.) 4/6/2018–2/11/2021; 145 entries	*Affirmed*, 944 F.3d 1212 (9th Cir.) 12/6/2018–12/20/2019; 46 entries	1,042 days
4	*Reed v. Scientific Games*	No. 2:18-cv-00565 (W.D. Wash.) 4/17/2018–8/18/2022; 202 entries	*Dismissed,* 2022 WL 17825035 (9th Cir.) 6/23/2021–11/9/2022; 37 entries	1,667 days
5	*Ferrando v. Zynga*	No. 2:22-cv-00214 (W.D. Wash.) 2/24/2022–12/1/2022; 67 entries	NO APPEAL	280 days
6a	*Benson v. DoubleDown Interactive*	No. 2:18-cv-00525 (W.D. Wash.) 4/9/2018–present; 531 entries	*Affirmed,* 798 F. Appx 117 (9th Cir.) 12/6/2018–1/29/2020; 62 entries	1,799 days (as of 03/13/2023)
6b	*DoubleDown Interactive v. Benson*	No. 20-2-02023-34 (Wash. St.) 9/11/2020–8/26/2021; 75 entries *Stayed then voluntarily dismissed*	NO APPEAL	349 days
7	*Wilson v. PTT*	No. 3:18-cv-05275 (W.D. Wash.) 4/6/2018–present; 215 entries		1,802 days (as of 03/13/2023)
8	*Mason v. Mach. Zone* ***Tested CA and MD law***	No. 1:15-cv-01107 (D. Md.) 4/17/2015–10/21/2015; 40 entries *Dismissed,* 140 F. Supp. 3d 457	*Affirmed*, 851 F.3d 315 (4th Cir.) 11/23/2015–3/17/2017; 40 entries	700 days
9	*Dupee v. Playtika* ***Tested NV and OH law***	No. 1:15-cv-01021 (N.D. Ohio) 5/21/2015–3/01/2016; 22 entries *Dismissed,* 2016 WL 795857	NO APPEAL	285 days
10	*Phillips v. Double Down Interactive* ***Tested IL law***	No. 1:15-cv-04301 (N.D. Ill.) 5/14/2015–3/25/2016; 60 entries *Dismissed,* 173 F. Supp. 3d 731	NO APPEAL	316 days
11	*Soto v. Sky Union* ***Tested CA, IL, MI law***	No. 1:15-cv-04768 (N.D. Ill.) State Court 4/10/2015 (removed) 5/29/2015–1/29/2016; 36 entries *Dismissed,* 159 F. Supp. 3d 871	NO APPEAL	294 days
12	*Ristic v. Mach. Zone* ***Tested IL law***	No. 1:15-cv-08996 (N.D. Ill.) 10/09/2015–09/19/2016; 38 entries *Dismissed,* 2016 WL 4987943	NO APPEAL	346 days
			TOTAL DAYS	**11,992**

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ADRIENNE BENSON and MARY SIMONSON, individually and on behalf of all others similarly situated, *Plaintiffs*, *v.* DOUBLEDOWN INTERACTIVE, LLC, a Washington limited liability company, INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation, and IGT, a Nevada corporation, *Defendants.*	No. 18-cv-525-RSL **DECLARATION OF ADRIENNE BENSON IN SUPPORT OF REQUEST FOR CLASS REPRESENTATIVE INCENTIVE AWARD**

EDELSON PC
350 N LaSalle Street, 14th Floor, Chicago, IL 60654
Tel: 312 589 6370 • Fax: 312 589 6378

Pursuant to 28 U.S.C. § 1746, I, Adrienne Benson, declare and state as follows:

1. I purchased coins in DoubleDown Casino in the United States prior to November 14, 2022.

2. I am submitting this declaration in support of my request for a $7,500 incentive award. I understand that, under the Settlement, the Class Representatives are permitted to seek incentive awards. I understand that the Court will have to approve any incentive awards, that there is no assurance that I will receive an incentive payment, and that the Court may approve of the Settlement but deny any incentive awards.

3. For nearly five years, I have actively represented the Class.

4. I have made personal sacrifices for the benefit of the Class. For example, as a result of my participation in this litigation, now anyone who Googles my name will see pages of websites talking about my involvement in this lawsuit.

5. Over the years, I have spent dozens of hours fulfilling my role as a Class Representative. For example:

   a. I have remained in regular communication with my attorneys, including participating in phone calls, timely responding to requests for information, and reviewing and signing papers.

   b. I gave testimony at a deposition via videoconference in March 2021.

   c. I closely reviewed the terms of the Settlement, discussed it with my attorneys, and signed it. I approved the Settlement because I believe it is fair and in the best interests of the Class.

6. All of the time I have contributed toward the successful prosecution of this case came at the expense of time I could have spent being with friends or family.

EDELSON PC
350 N LaSalle Street, 14th Floor, Chicago, IL 60654
Tel: 312 589 6370 • Fax: 312 589 6378

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 13, 2023 in Spokane, Washington.

/s/ Adrienne Benson

EDELSON PC
350 N LaSalle Street, 14th Floor, Chicago, IL 60654
Tel: 312 589 6370 • Fax: 312 589 6378

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ADRIENNE BENSON and MARY SIMONSON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DOUBLEDOWN INTERACTIVE, LLC, a Washington limited liability company, INTERNATIONAL GAME TECHNOLOGY, a Nevada corporation, and IGT, a Nevada corporation,

Defendants.

No. 18-cv-525-RSL

DECLARATION OF MARY SIMONSON IN SUPPORT OF REQUEST FOR CLASS REPRESENTATIVE INCENTIVE AWARD

EDELSON PC
350 N LaSalle Street, 14th Floor, Chicago, IL 60654
Tel: 312 589 6370 • Fax: 312 589 6378

Pursuant to 28 U.S.C. § 1746, I, Mary Simonson, declare and state as follows:

1. I purchased coins in DoubleDown Casino in the United States prior to November 14, 2022.

2. I am submitting this declaration in support of my request for a $7,500 incentive award. I understand that, under the Settlement, the Class Representatives are permitted to seek incentive awards. I understand that the Court will have to approve any incentive awards, that there is no assurance that I will receive an incentive payment, and that the Court may approve of the Settlement but deny any incentive awards.

3. For over four years, I have actively represented the Class.

4. I have made personal sacrifices for the benefit of the Class. For example, as a result of my participation in this litigation, now anyone who Googles my name will see pages of websites talking about my involvement in this lawsuit.

5. Over the years, I have spent dozens of hours fulfilling my role as a Class Representative. For example:

a. I have remained in regular communication with my attorneys, including exchanging emails, participating in phone calls, timely responding to requests for information, and reviewing and signing papers.

b. I gave testimony at a deposition via videoconference in March 2021.

c. I closely reviewed the terms of the Settlement, discussed it with my attorneys, and signed it. I approved the Settlement because I believe it is fair and in the best interests of the Class.

6. All of the time I have contributed toward the successful prosecution of this case came at the expense of time I could have spent being with friends or family.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 13, 2023 in Snohomish, Washington.

/s/ Mary Simonson

EDELSON PC
350 N LaSalle Street, 14th Floor, Chicago, IL 60654
Tel: 312 589 6370 • Fax: 312 589 6378