

NO. 37079-4

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

INTERNET COMMUNITY & ENTERTAINMENT CORP., dba
BETCHA.COM.,

Petitioner

v.

THE STATE OF WASHINGTON, and WASHINGTON STATE
GAMBLING COMMISSION,

Respondent.

APPELLANT'S REPLY BRIEF

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
REPLY

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REPLY TO STATE'S ARGUMENT

1. **The State did not address several of Betcha's arguments, object to any of its evidence, or produce authority that, when the legislature defined "gambling" in 1973, it was concerned about betting where the rules of the bet allowed bettors to walk away.**

Before addressing the merits of Respondents' (collectively, "the State") Brief ("RB"), it is worth pointing out what the State did *not* say.

The State did not address Betcha's arguments that:

- The market recognizes a material difference between betting when the rules require you to pay and betting when the rules do not require you to pay, Betcha's Appellate Brief ("AB") 23.
- Equating "*with* an expectation" with "*upon* an understanding," as the trial court did, yields nonsensical results (AB 24-25) and renders much of RCW 9.46.0237 superfluous. *Id.* 25-26.
- Contrary to the trial court's assertion, Betcha.com's success (or not) is irrelevant to whether betting on Betcha constitutes "gambling." *Id.* 27.
- Contrary to the trial court's assertion, the fact that past bets have been paid has no bearing on whether a person bets "upon an understanding" that he "will" be paid. *Id.* 27-28.
- Betcha bets are materially different than conventional bets in terms of the impact a legal change would have on their enforceability (gambling bets would be enforceable whereas Betcha bets would not be because, inasmuch as Betcha bets do not create debts, there is nothing to enforce). (AB 30, CP 490:2-13; see CP 86)

- In determining whether the legislature sought to proscribe conduct in question, it is appropriate to look at the nature of the harms the legislature sought to address. *Id* 31.
- The rule of lenity applies even in civil proceedings. *Id.* 33-34.
- If the Court determines that bettors are not “gambling,” then bets made on Betcha are not “bets” for purposes of the definition of “bookmaking.” *Id.* 35 (referencing CP 28-31).

The State also did not object to Betcha’s evidence that: betting exchanges, of which Betcha is one, CP 46:16-22¹, are considered a *threat* to the bookmaking industry, CP 82-84 (a fact that undermines the idea that Betcha engages in bookmaking, *infra*); and that would-be customers recognize such a difference between Betcha and gambling that they would not use The Site. CP 49:10-21, CP 100.

Finally, the State still has not produced authority that, when the legislature defined “gambling” in 1973, it was at all concerned about the type of bets that exist on Betcha.com – that is, betting where *the rules of the bet* allow bettors to walk away, even after they lose.²

2. Contrary to the State’s suggestion, liberal construction does not apply to this case.

There are two arguments in the State’s recitation of the history of Washington’s gambling law. RB 14-16. First, the State asserts that “all

¹ “CP 46:16-22” refers to page 46, lines 16 through 22 of the Clerk’s Papers. Similar references are made herein.

² Betcha is not suggesting that the State must show that the legislature had Betcha.com in mind when it wrote the gambling laws. Neither the Internet nor Betcha.com existed. But betting did, and bettors were free, even in 1973, to bet while reserving the right not to pay if they lost. That they may not have done so very often only underscores that such bets were not what the legislature had in mind when they enacted RCW 9.46 *et seq.*

factors incident to the activities authorized in (the Gambling Act) shall be closely controlled, and the provisions of this chapter shall be liberally construed to achieve such end.” *Id.* 15-16 (citing RCW 9.46.010.) Betcha reads this as a call for liberal construction. It has rebutted this argument twice already (CP 487, fn.2, AB 11 fn.2), incorporates that and earlier briefing herein by reference, and reiterates what it has argued throughout – strict, not liberal, construction applies. AB 10-18, CP 20-21.

The State also asserts that this case must be considered in light of the state’s interest in “limiting the nature and scope of gambling activities by strict regulation and control.” RB 15. Implicit here is the idea that the state’s policy against gambling is so overwhelming that anything close to gambling must be considered gambling – in effect, liberal construction.³ Not only is that not the law (*supra*, AB 17), but the logic doesn’t hold: I may have a strong interest in protecting my family in the privacy of our home. But that does not make my neighbor’s lawn mine.

3. The State’s argument that Betcha bets are no different from gambling bets is incorrect.

The State suggests that Betcha bets are no different than gambling bets. RB 17. The State’s argument is that a gambler bets pursuant to an agreement or understanding that he “will” be paid if he wins, even though he knows his opponent has the ability to breach the deal and, if he does so,

³ The State’s policy against gambling is hardly overwhelming. Even in 1973 the legislature acknowledged that it did not want to restrict “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.” RCW 9.46.010.

he cannot seek relief in court. Therefore, the State's argument goes, a Betcha bettor also bets pursuant to an agreement or understanding that he will be paid if he wins, even though he knows his opponent has the right to opt out of his loss.

The State's argument is a sleight of hand. First, it ignores the many places on The Site where bettors are reminded that neither they nor their opponents are obligated to pay their losses. (AB 6-7.) All of these speak to the nature of the understanding upon which bets are made, and the market is reading. (E.g., CP 100, CP 106.)⁴ Second, the State's argument confuses the *right* to opt out of a bet with the *ability* to opt out of one. CP 489-90, AB 29-30. That distinction is important because, since a Betcha bettor is not obligated by the terms of his bet to pay if he loses (CP 86), a loss does not create a debt. To be sure, a gambler always has the *ability* to renege on a lost bet with his bookmaker by not paying or cancelling his credit card, but when he does he breaches the terms of their agreement to avoid paying a debt. On Betcha he is exercising a not-inconspicuous right (AB 6-7) given him by The Site's rules to avoid making a payment he is under no contractual obligation to make. This right is not a "little side statement," as the trial court described it (RP 10): just as the right to freely dissent is quintessentially part of being

⁴ In theory, a bookmaker could adopt rules that neither he nor his opponent were required to pay their losses, and they would not be gambling. That bookmaker would not remain in business long, however, unless he could figure out ways to offset that uncertainty with other competitive advantages, as Betcha has. CP 26-27. We cannot conceive of what those might be in a bookmaker setting.

American, the right to freely walk away from a loss is quintessentially part of betting on Betcha's voluntary payment system.⁵

In truth, the enforceability (or not) at law of a gambling contract has no bearing on the terms of an agreement or understanding. If legal enforceability mattered, then bets that would otherwise meet the definition of "gambling" – say, a bet on an online poker site – would *not* meet that definition: a player could defend against a charge of transmitting gambling information online on the grounds that, because both he and the poker site knew the latter didn't have the right to sue him if he stopped payment on his credit card charge, there was never an "agreement" or "understanding" that the poker site would (read: will) be paid, and therefore he wasn't gambling.⁶ That would make gambling statutes empty letters.

Betcha's position remains: "gambling" turns not on recourse or enforceability but on whether the terms of the deal give a bettor the *right* to pull his money back, even after he loses. It is those terms that make up the "agreement" or "understanding" upon which betting is done. Casinos and bookmakers operate under sets of rules that require bettors to pay their losses; therefore, bettors are "gambling." Betcha doesn't, so they aren't.

4. The State's arguments on the definition of "gambling" are either incorrect or respond to arguments that Betcha did not make.

⁵ The State attempted to avoid this point by suggesting it is a "distinction without a difference" because betting on Betcha is gambling. (RB 22 fn 11) This heavy-handed assertion both ignores the nature of a Betcha bettor's understanding and presupposes the answer to this case's central question – whether a person is "gambling" when the rules of the bet let him to opt out of his bet, even after he loses.

⁶ For the difference between "staking" and "risking," see 22-24 and CP 23 fn 6.

a. Betcha never suggested that gambling requires the formalities of a contract.

Next, the State argues that Betcha misreads RCW 9.46.0237 as requiring the formalities of a binding contract. RB 17-19. Betcha made no such argument.⁷ It referenced contractual syntax in its Motion for Summary Judgment – namely “consideration” and “illusory promise,” CP 24:3-24:20 – only to point out that the WSGC itself has taken the position that “gambling” requires “consideration” CP 24:3-24:20; that the fact that bets may be withdrawn undermines the idea that they are a “thing of value” “risk(ed)” or “stak(ed);” and that if there is no “thing of value” “risk(ed)” or “staked,” there is no consideration, and therefore no gambling. CP 22:21-25:9; CP 487-89.

b. The State’s argument that there are “things of value” present is a nonstarter.

Next, the State argues that the “risking” or “staking” a “thing of value” section of RCW 9.46.0237 is met because there are two alleged “things of value” present – a person’s Honor Rating and the fees he pays to participate on The Site. RB 18, fn.9. In effect: if a person isn’t gambling his money he is gambling something else. Betcha rebutted these arguments in its lower court briefing (CP 487-89; *see* CP 22:21-25:9), and it incorporates that briefing herein by reference.

⁷ Indeed, insofar as the State is suggesting that a gambling contract does not require the traditional “bargain for exchange” elements of a binding contract (offer/acceptance/consideration), Betcha agrees with the State. It has seen none of this at a blackjack tables or roulette wheels, which are unquestionably gambling. Betcha’s position is that gambling done in these forums is done pursuant to an “understanding,” formed by the rules of the games, that the house “will” pay winning bettors if/when they win. CP 25 fn.9, AB 21. Betcha.com has no such rules.

c. Betcha contains no “internal contradiction.”

Next, the State argues that The Site contains an “internal contradiction” – that is, the presence of “I wanna welch” buttons on a bet page’s product page is proof that bettors bet “upon an agreement or understanding” that their opponent “will” pay them if they win and are, therefore, gambling. RB 20-21. That is incorrect. The State would have Betcha bound by dictionary definitions of “welch” that equates “welching” with “cheating” and/or failing to pay an obligation. RB 21. The problem with the State’s argument is that neither definition fits what happens on The Site. As to “welching” as “cheating” (RB 21) – suffice it to say, a person is not cheating when he exercises a right given to him by the rules of the game. As to “welching” as “failing to pay an obligation” – there *is* no obligation to pay a lost bet on Betcha.com. The Site’s Terms of Service cannot be clearer: “bettors are not obligated to pay when they lose.” CP 86; *see also* CP 16-17, 48 (detailing several other references on The Site that bettors are not obligated to pay if/when they lose.) No dictionary can change that. Betcha could have been more precise with the verbage on the “I wanna welch” button. Then again, Betcha.com *is* a website, and “I wanna exercise my right to opt out of this bet, even though I lost” would hardly fit on a PC screen. *Cf. In re: Mastercard International*, 313 F.3d 257, 263, fn.21 (5th Cir.2002)(website’s nomenclature is “irrelevant” absent facts to substantiate legal violation).

At bottom, the State wants the dictionary to trump The Site's rules. And it wants the "I wanna welch" button to trump the nature of a Betcha bet, thereby turning Betcha's founder, who went to great lengths to comply with the law, *see* CP 44:9-45:19 -- even adding a page to The Site explaining the hazards of betting thereon (see CP 88) -- into a criminal.⁸ Betcha trusts that given the overwhelming evidence that the button is, at worst, poorly worded, the Court will not afford it such weight.

d. Contrary to the State's assertion, "will" in the context of RCW 9.46.0237 means certainty, not "simple futurity."

The State next argues that Betcha suggested that the term "will" in RCW 9.46.0237 is ambiguous. RB 20, fn.10. Actually, Betcha has long maintained the opposite. *E.g.*, CP 25:15-26:20. In its Brief, however, the State suggests the term "will" admits to two meanings – Betcha's "shall/must" definition, and a new "simple futurity" definition. RB 20. Even assuming, *arguendo*, that the State's interpretation of "will" was reasonable – and it is not (*infra*) – that makes "will" ambiguous, and the Court must resolve the issue in Betcha's favor. AB 33-34; *see State v. Russell*, 84 Wn. App. 1, 4, 924 P.2d 397 (Div.2 1996)(resolving ambiguous criminal statute against the State, even though its interpretation was reasonable). However, the State's "simple futurity" definition does not fit the context of "will's" use in RCW 9.46.0237. "Simple futurity"

⁸ While the State mocked Mr. Jenkins's efforts in its Opposition Brief, it is undisputed that before he launched The Site he did a detailed legal analysis (CP 62-80) and consulted with the country's leading expert on gambling law. CP 45:6-11. In the context of a criminal statute, that is far more than the law demands of a citizen. *See* AB 16-17 (explaining that both Washington courts and Justice Oliver Wendell Holmes believe a person should be able to simply read the law and tell what conduct is and is not criminal).

means, quite simply, that an event “will” happen – the sun “will” come up tomorrow. That is not something that admits to parties reaching “an agreement or understanding,” which makes “will” unambiguous. *See State v. Bernard*, 78 Wn. App. 764, 768, 899 P.2d 21 (Div.1 1995)

e. The State’s argument that Betcha bets must necessarily be made “upon an agreement or understanding” that they “will” be paid if they win is incorrect.

The State next argues that “in order to consummate a wager on Betcha.com, the parties must necessarily reach an agreement or understanding, otherwise,” according to the State, “there would be no reason to participate.” AB 20, fn.10.⁹ As to the no-reason-to-participate argument, Betcha directs the Court to its anticipatory rebuttal thereof (AB 26-27) and further invites the Court to consider the following hypothetical as an example of why a bettor would bet even though he knows he may not be paid if he wins. Phil Philadelphian lists the following bet at 1:1 odds: “BETCHA: Matt Hasselbeck will throw for fewer yards than 200 yards in the November 9, 2008 Eagles-Seahawks game.” Sam Seattleite accepts the bet. Sam may have accepted it because: (1) he finds the subject matter interesting; (2) he’s a Hasselbeck fan, and Las Vegas bookmakers do not offer such a bet; (3) Phil is offering better odds than Sam can find from his friends (indeed, because Sam’s friends are all from Seattle, he knows no one who would take the position Phil has); and/or (4) Sam wants to bet on Seahawks *something*, but he does not like the point

⁹ Actually, the “agreement” or “understanding” must be that they “will” receive “something of value” if/when they lose.

spreads bookmakers are offering on the game itself. So long as those reasons, alone or cumulative, outweigh the cost of accepting the bet, Sam will accept it even though the rules of The Site do not require Phil to pay him if he wins (read: no “will”). Any bet that any person can come up with admits to a risk/reward analysis of this sort.

As to the point that bettors must “necessarily reach an agreement or understanding” that they will be paid, Betcha has two responses. First, bettors bet on a website that (a) has a set of rules that allow all parties to opt out of their losses (CP 86), and (b) goes to great lengths to make sure that people understand that right (CP 86-92) – even going so far as to have a “Why Not Betcha” page. CP 88. If anything, bettors on Betcha bet closer to an understanding that they *may not* be paid than one that they *will* be paid (a reality undoubtedly to Betcha’s commercial peril [e.g., CP 100]). Second, how can either party bet “upon an agreement or understanding” that he “will” be paid if/when he wins when he *himself* knows he has the right to walk away from his loss? Inasmuch as doing anything “*upon* an agreement or understanding” requires more than one party’s subjective belief (and, as Betcha argues in a section that the State ignored, AB 21, it does), the State’s position is a logical impossibility.

To illustrate, consider the following scenario. Suppose Willie lists the following \$1,000 bet: “BETCHA: Lance Loudmouth will be eliminated before Bob Baritone on *American Idol*.” Larry takes the bet. Lance is eliminated on the next episode, so Willie wins. Larry, who wants

to keep his \$1,000 to pay rent, decides not to pay. Coincidentally, Willie meets Larry for the first time the following day. The following discussion occurs:

Willie: Hey man, Lance is toast. Pay up.

Larry: We bet on a site that gave each of us the right to opt out of our losses. I'd rather keep the \$1,000.

Willie: Yeah, but we had an *agreement*.

Larry: No we didn't. You just met me today, and you had no idea who was going to accept your bet, if anyone at all.

Willie: But I *understood* that whoever accepted my bet would pay me if I won.

Larry: Did you check out Betcha's Terms of Service? What part of "bettors are not obligated to pay when they lose" did you not get? I thought that was pretty clear, especially since the next sentence said "bets made on Betcha carry no term, express or implied, that winning bettors will be paid when they win."

Willie: Forget about the rules! I *expected* to be paid.

Larry: You weighed the reward (\$1,000) against the risk of me not paying you – as was my right under the site's rules – and decided the risk was worth the reward. It didn't work out. If you don't like it, bet against a bookmaker instead. They promise to pay. I, for one, will keep betting on Betcha because I bet on anything I can think of, even stuff like Lance versus Bob on *American Idol*.

Betcha submits that of the two, Larry's position is the more reasonable one. Even if the Court disagrees, is Larry's position so unreasonable that the entrepreneur who wrote the rules Willie wants ignored should be deemed to have engaged in no fewer than three felonies and a gross misdemeanor, punishable by up to twenty-six years in prison?¹⁰ Betcha respectfully submits not.

¹⁰ See RCW 9.46.220 (professional gambling, punishable by up to ten years in prison); RCW 9.46.240 (transmission of gambling information over the Internet, punishable by up to five years in prison); RCW 9.46.180 (causing others to violate the state's gambling laws, punishable by up to ten years in prison); RCW 9.46.217 (keeping gambling records, punishable by up to one year in prison [see RCW 9A.20.020]).

At various times throughout this litigation, the State has implied that Betcha could have avoided this potential 26-year mess by going to the WSGC first. That position misses the point. Bureaucratic impulses being what they are, the WSGC almost

Finally, and as Betcha pointed out in its Appellate Brief in a point the State did not address, the notion that all betting must “necessarily” be done “upon an agreement or understanding” of “will” (otherwise, why bet?) would render everything in RCW 9.46.0237 from “upon” to “outcome” superfluous. AB 25-26. Under the State’s rationale, it is impossible to “risk” or “stake” “something of value” on the “outcome of a future contingent event” *absent* an “agreement or understanding” that a person “will” be paid if he/she wins. That is textbook superfluous.

A final point -- “upon an agreement or understanding” that a person “will” be paid must be rooted in *something*.¹¹ It cannot be based on the bet itself – that would make part of the statute superfluous. *Supra*. It cannot be based on a person’s Honor Rating – as explained in earlier briefing, there is no standard to discern which bettors believe “will” versus “probably will” versus “probably not” (CP 27:12-19) and to the extent a Court would suggest otherwise, it would lead to the possibility that one bettor is gambling while his opponent is not, even though they are engaged in the exact same activity. AB 24-25. It cannot be based on The Site’s existence. AB 27-28. The only objective standard, as with gambling

certainly would have said “no” to Betcha. In fact, it did (CP 501-03), even though, as we have since learned, it wasn’t exactly sure why. *Infra* at p 22-23. Businessmen should not be forced to choose between asking permission from a bureaucracy that sees violations everywhere, and the potential of 26 years in prison, before pursuing a business idea. Moreover, the WSGC has not exactly distinguished itself lately with its mastery of Washington gambling law. *E.g.*, *ZDI Gaming v. State of Washington*, Thurston County Cause No. 06-2-02283-9 (June 27, 2007)(Pomeroy, J. holding that the WSGC acted arbitrarily and capriciously in dealing with an in-state manufacturer of pull-tab machines). (The *ZDI* case is available at CP 141-43).

¹¹ See CP 25 fn 9 (noting that *Black’s Law Dictionary* defines “understanding” as “an implied agreement resulting from the express terms of another agreement, whether written or oral”).

games (AB 21, CP 25, fn.9), is the language of The Site itself, and it makes it abundantly clear that bettors on The Site are *not* obligated to pay if/when they lose (read: no “will”). CP 16, 27-28, 86-92.

f. Betcha has never argued that “gambling” requires actual payment.

Next, the State asserts that Betcha believes “gambling” requires that “the winnings must actually be distributed before the crime is committed.” RB 20 fn 10. Again, this is an argument that Betcha has long *rejected*. See CP 50:1-8, CP 67 fn 5. Gambling is, by the express language of RCW 9.46.0237, something done on “future” events. A bet does not become gambling because it is paid – either it was gambling before the fact, or it was not.

g. The State’s insistence that betting “with an expectation” of being paid is the same as betting “upon an agreement or understanding” that you “will” be paid is incorrect.

Next, the State insists that the trial court was correct when it stated that a person betting “with an expectation” that (s)he will be paid is the same as betting “upon an agreement or understanding” that (s)he will be paid. RB 21-22. The State overlooked Betcha’s lengthy rebuttal of that very point (the gist of the trial court’s decision) in its Appellate Brief, and it respectfully directs the Court thereto. AB 20-27 esp. 24-25.

h. The State’s argument that betting on Betcha is harmful is unpersuasive.

Next, the State takes issue with Betcha’s suggestion that betting on Betcha is benign. RB 22-23, fn.11. First, it suggests that Betcha is

harmful because bettors must pay fees to participate on The Site regardless of whether they are paid their winning. RB 22 fn.11. This is a stretch. Betcha listing fees are *de minimus*, usually between one half (.5%) and one percent (1%) of the amount listed. CP 47:3-4. Its matching fees are between 4.5-7%. CP 47:10-11. Given that the average wager on Betcha.com is under \$12 (CP 52:23-25), the average bettor would have to bet fairly heavily to incur enough fees to equal the average monthly cell phone bill. Moreover, the fees about which the State complains are the cost of participating. For all the evils allegedly caused by gambling, none are caused by the cost of participating. Rather, gambling's harms are the result of *losses* – specifically, a gambler incurring more of them than he can afford to pay. Losses that you aren't required to pay are no more a problem than giving to charity – in neither case are you required to reach for your wallet.

Next, the State argues that Betcha is not removed from the “social problems associated with professional gambling,” and that “the record below lacks any evidence supporting such a claim.” Betcha directs the Court to a blog posting included in Exhibit I to the Declaration of Nicholas G. Jenkins, wherein a blogger asks “(i)f you aren't forced to pay up, is it really gambling and will it lead to all the suicides and broken families that Congress regularly cites as the problem for Internet gambling?” CP 106. While this is admittedly not overwhelming evidence, the blogger poses questions worthy of the Court's attention.

Finally, the State suggests Betcha has criminal ties. RB 32-33, fn.11. The State points to Russ Torrison, a Betcha investor and former employee of AbsolutePoker.com, as a person having “possible criminal connections.” *Id.* First, there is nothing in the record suggesting that either Mr. Torrison or AbsolutePoker.com have been convicted of, much less charged with or investigated for, any crime whatsoever. Second, the present and former occupations of Betcha’s founder, employees and investors have nothing to do with whether its non-binding betting platform constitutes “gambling.” Organized crime and “the criminal element” are relevant to a discussion of RCW 9.46 *et seq.* only because the legislature cited their influence as a reason to regulate gambling. *See* RCW 9.46.010. This is much the same argument made today in favor of legalizing drugs, *i.e.*, legalize and regulate, and many of the harms of drugs go away. It does not follow that the presence of organized crime (of which there is none here) makes conduct “gambling.”

5. The State’s arguments regarding the definition of “bookmaking” are not persuasive.

The State argues that “bookmaking” is defined in RCW 9.46.0213, and that Betcha’s citations to “generalized, non-statutory or foreign source materials is unnecessary and legally inappropriate.” RB 25. This argument is incorrect. RCW 9.46 *et seq.* may define “bookmaking” (RCW 9.46.0213), but it does *not* define the germane terms therein – “accepting” and “bets.” *See* CP 28:15-33:24. It is beyond debate that a court may look to a word’s ordinary meaning when a statute does not

define that word.¹² It may also look to the title of a statute to discern its meaning. CP 29:1-31:18. That is all Betcha asks the Court to do. CP 31:20-33:17, AB 35 (“accepting”); CP 29-31, AB 35 (“bets”). What the Court should *not* do, as the State did with “accepting” (RB 26 fn.12), is apply the broadest possible reading of a word without regard to its context in a statute. *See State v. Enloe*, 47 Wn.App. 165, 170-71, 734 P.2d 520 (1987)(quoting N. Singer, *Statutory Construction*, Sec. 59.03 at 12-13 (1986)(reason for strict construction is to guard against “arbitrary discretion” by judges).

The “foreign source material” objected to by the State are the model jury instructions under the federal Wire Act. CP 31-32, 18 USC § 1084. Betcha cited these instructions as background to what bookmakers do, and it is entirely appropriate for a court to look at subject matter and context in order to derive the meaning of an undefined term – in this case, “accepting.” *E.g., Ritts*, 94 Wn. App. at 787. Under all authority on the record, bookmaking means having an active position in the bet.¹³ That background speaks to what it means to “accept” “bets” for purposes of RCW 9.46.0213. As it is persuasive authority only, however, the Court

¹² *E.g., ZDI Gaming v. State of Washington*, Thurston County Cause No. 06-2-02283-9 (2007)(available at CP 141-43); *State v. Ritts*, 94 Wn. App. 784, 787, 973 P.2d 493 (1999); *In re: Farina*, 972 P.2d 531, 540 fn 10 (Div.3 1999)(citation omitted); *State v. Bernard*, 78 Wn. App. 764, 767, 899 P.2d 21, 23 (1995)

¹³ *United States v. Baborian*, 528 F.Supp.324, D.RI 1981)(quoting Representative Celler as stating that the Wire Act only goes after the bookmaker, *the gambler* who makes it his business to take bets or to lay off bets: “gamblers,” by definition, must have a stake in the game, see RCW 9.46.0237); *United States v. Anderson*, 542 F.2d 428, 436 (7th Cir.1976)(stating that bookmaking requires “a meeting of the minds” between bookmaker and customer, *quoting United States v. Tomeo*, 459 U.S. 445, 447 (10th Cir.), *cert. denied* 409 U.S. 914 (1972)).

may disregard it in favor “accepting’s” ordinary meaning. That meaning, however, *also* requires that a person be an active participant in the transaction. AB 35-36.

In a footnote, the State asserts that “Betcha’s entire business model is built upon Betcha.com receiving fees in exchange for accepting and posting wagers on its website” (RB 26, fn.12), as though allowing bettors to post bets for others to accept constitutes “accepting.” Where the State derives its reading of “accepting” is unclear.¹⁴ Betcha has provided ample authority – the dictionary (AB 35), model jury instructions (and now case law) interpreting similar federal law (CP 32-33, *supra* fn.11), a degree of common sense (CP 33), and case law from other jurisdictions (that also rejects the State’s position¹⁵) – to support its reading of “accepting.” It has provided authority that betting exchanges (of which Betcha is one) are a competitive threat to bookmakers, precisely *because* individuals, and *not* the proprietor, accept bets.¹⁶ (For a rebuttal of the idea that the person

¹⁴ The State’s reading of “accepting” as allowing a person to post an offer for a bet is not only without authority, it is wrong as a matter of sound statutory interpretation. There is a difference in gambling law between a “bet” and an “offer to bet.” *E.g.*, Kansas Stat. 21-4304(b), Georgia Stat. 16-12-22(3). It is a difference Betcha’s founder relied on in his pre-launch analysis. CP 71. If RCW 9.46.0213 read “accepting bets or offers to bet,” then the State’s argument would be closer to meritorious, as the word “accepting” would clearly not require that the accused have an active position in the bet. (“Closer” because Betcha bets are still not “bets” within RCW 9.46.0213. [CP 28-31.]) But that is not how the statute currently reads. As to the State’s suggestion that Betcha’s charging of a fee to list a bet bears on “accepting,” that, too, is incorrect: because charging a fee is mentioned later in RCW 9.46.0213, the notion that charging a fee has any bearing on “accepting” would make the statute redundant.

¹⁵ *See State v. Harrison*, 325 NW 2d 770, 772 (Iowa App.1982)(overturning bookmaking conviction in part based on distinction between recording or registering bets, which is what Betcha does, and “taking or receiving” them).

¹⁶ CP 82-85 (explaining that concept behind betting exchanges is to “eliminate bookmakers and create way for people to bet with one another on the Internet,” thereby yielding better terms to the end user, a la eBay).

who eventually takes an active position in the bet engages in bookmaking, see CP 490 fn 8.) And Betcha admits that it is at a competitive disadvantage with bookmakers in that, because it does not accept bets, it cannot guarantee that a person wanting a betting opponent will find one. CP 33.

At worst, the word “accepting” is ambiguous and admits to two definitions – “accepting” as taking an active position (Betcha’s), and “accepting” as enabling others to take an active position (the State’s). If so, then the rule of lenity applies, and the ambiguity must be resolved in Betcha’s favor.¹⁷ See AB 33; *Russell*, 84 Wn.App at 4. Any other ruling would be tantamount to holding that, contrary to all authority on the record (some of which was discovered prior to The Site launching [CP 70-71]), Betcha’s founder should have guessed that “accepting” bets actually meant something the authority says it didn’t, and that his failure to make that guess put him one step closer to the prison doors. That is precisely the scenario that Washington courts find unacceptable. *E.g.*, *State v. Shipp*, 93 Wn. 2d 510, 515-16, 610 P.2d 1322 (1980)(quoting *Winters v. New York*, 333 U.S. 507, 515 (1947) for proposition that men of common intelligence cannot be required to guess as to meaning of a statute).

¹⁷ The State’s reliance on *State v. Ose*, 156 Wn.2d 140, 147, 124 P.3d 635 (2005) to suggest otherwise is unwise. RB 20 fn.10. The *Ose* court found the defendant’s interpretation in that case, at best, plausible. Betcha’s interpretations of the words at issue in this case, however, are more than plausible – they are supported by ample authority from a variety of sources. The State’s reading of “accepting,” by contrast, comes out of thin air. Insofar as *Ose* has any bearing on this case, it works *against* the State, not for it. *See also* *Ritts*, 94 Wn. App. at 787-88 (citations omitted); *Russell*, 84 Wn. App. 1, 925 P.2d 633 (1996), *State v. Hornaday*, 105 Wn.2d 120, 127, 713 P.2d 71 (1986)(citing *State v. Bell*, 8 Wn. App. 670, 674, 508 P.2d 1398 (1973)(doubts as to whether conduct was criminal must be resolved against the state).

Betcha's position on "bookmaking" is well briefed, and it is incorporated herein by reference. Betcha does not "accept" "bets" – and therefore is not engaged in "bookmaking" -- because (1) it does not take positions in the transactions and (2) bets on Betcha are not "bets" within the meaning of RCW 9.46.0213. AB 35-37, CP 28:14-33:24.¹⁸ Because Betcha does not accept bets, the fact that it charges others to offer and accept non-statutory bets is irrelevant. RCW 9.46.0213; AB 36. Finally, Betcha does not aid and abet "bookmaking" because such a conclusion could only be reached via a strained reading of the statute – and one that would yield to an absurd result. CP 490-91 fn.8. *See also* AB 35-36.

If the Court is *still* not comfortable holding that Betcha does not "accept" "bets," Betcha asks the Court to follow the age-old rule of statutory construction, accepted by jurists across the ideological spectrum, that "a thing may fall within the letter of a statute and yet not within the statute, because it was not within the spirit or intention of its makers."¹⁹ Although the Court should not get this far given the analysis above, this case is otherwise tailor made for that rule. After all, Betcha.com is in a breed of sites (betting exchanges [CP 46]) considered the chief *threat* to bookmakers (CP 82-84); it is at a competitive disadvantage to bookmakers in another respect, precisely because it does not do what bookmakers do

¹⁸ Although Betcha listed this latter point as an Assignment of Error (See AB 5) and referenced its briefing on this point in its Appellate Brief (AB 35, referencing CP 28-31), the State did not address it in its Opposition Brief.

¹⁹ *E.g.*, *Watt v. Alaska*, 451 U.S. 259, 266 (1981)(Powell, J., joined by, *inter alia*, White, J. and Rehnquist, J.), *California Federal S&L Ass'n v. Guerra*, 479 U.S. 272, 284 (1987)(Marshall, J.); *Steelworkers v. Weber*, 443 U.S. 193, 201 (1979)(Brennan, J.); *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 222-23 n.20 (1980)(White, J.), *United Housing Foundation v. Forman*, 421 U.S. 837, 849 (1974)(Powell, J.).

(CP 33); and there is nothing in the record suggesting that Betcha does *any* of the things normally associated with bookmaking. *See U.S. v. Thomas*, 508 F.2d 1200, 1202 fn2 (8th Cir.1974). (Betcha also suggests the same tact for “gambling,” given that essence of gambling – irrevocable risk – is absent on Betcha. Again, however, there is no reason for the Court to get that far, either, for the many reasons stated above.)

6. Without “gambling,” Betcha does not violate the gambling laws.

This entire case amounts to a four-sectioned structure that rests entirely on one major- and one minor support beam – “gambling” and “bookmaking.” If the Court finds that Betcha bettors are “gambling” and that Betcha was “bookmaking” (as the trial court did), then the State’s house stands, and Betcha’s founder faces up to twenty-six years. On the other hand, if the Court concludes that bettors on Betcha are not “gambling” within the meaning of RCW 9.46.0237 then there is no “bookmaking” within the meaning of RCW 9.46.0213 because there are no “bets” (CP 29-31), and the State’s house falls, regardless of how the Court interprets “accepting.” (CP 34-35.) Without “gambling” or “bookmaking,” all of the definitions of “professional gambling” that are remotely relevant here fail. *See* RCW 9.46.0269; CP 22, 34. Without “professional gambling,” all statutes proscribing professional gambling (RCW 9.46.220-222) fail, and the definition of “gambling information” (RCW 9.46.0245) – and therefore the prohibition against transmitting “gambling information” online (RCW 9.46.240) – also fails. CP 34; CP

491. Without “professional gambling,” the prohibition against the keeping of “gambling records” fails. CP 34; RCW 9.46.0253. And without “gambling” or “bookmaking,” Betcha cannot aid and abet others to violate the State’s gambling laws. CP 34, 490 fn.8.

The State suggests that Betcha can violate various gambling laws without engaging in “professional gambling,” or its customers engaging in gambling *anything*. It points to the definition of “gambling information,” which does not include the word “gambling” on its own. RB 27. That argument is incorrect. The definition of “gambling information” may not include the word “gambling,” but it *does* require that information be intended for use in “professional gambling.” RCW 9.46.0245. The only provisions of the definition of “professional gambling” that are remotely applicable here, in turn, require either a showing of “gambling” or “bookmaking.” RCW 9.46.0269(a)-(d). Thus, by the transitive property (If A then B, if B then C, means if A then C), a showing that a person illegally transmits “gambling information” presupposes either a showing of “gambling” or “bookmaking.” Neither is present here.

The State attempts to avoid this point by arguing that the law “presumes” that any information intended for wagering is intended for “professional gambling” (RB 27). That may be, but presumptions may be overcome (CP 34, *State v. Fitzpatrick*, 5 Wn.App. 661, 667, 491 P.2d 262

(1971), *see State v. Jackson*, 112 Wn.2d 867, 872-73, 774 P.2d 1211 (1989)), and Betcha has done just that.²⁰

Finally, the State argues that because Betcha did not brief these statutory provisions separately it waived them, and the Court should not consider them. RB 26, fn.13. In effect: the support beams may be gone, but the house should remain suspended in mid-air so Betcha cannot resume operations without fear of it collapsing on its head.²¹ This argument is specious. Betcha may not have included separate sections for “gambling information,” “gambling records,” and “aiding and abetting” a violation of the gambling laws in its Appellate Brief, but it can hardly be said that it did not brief the central provisions of those statutes. Indeed, Betcha spent virtually the entire Argument section of its Appellate Brief on the terms “gambling” and “bookmaking,” and there was no dearth of authority in its analysis.²² Without “gambling,” the rest of the State’s case falls. At bottom the State’s argument is that, because Betcha wrote its brief efficiently to focus on the common denominators – “gambling” and, to a

²⁰ The State makes another argument on this point – that is, that the statute’s use of the word “information” without the word “gambling” next to it somehow means the legislature was not speaking about “gambling information” in the second sentence of “gambling information’s” definition.” RB 27. The State’s “decoupling” argument is utterly without merit. First, it would have been grammatically incorrect and redundant to write the phrase “gambling information as to wagers, betting odds and changes” Writing the sentence the way it did – with “professional gambling” at the end, was the only way the sentence would make sense. Second, it is hardly reasonable to expect a legislature to pass a definition – here, “gambling information” -- that included the very phrase – “gambling information” – it meant to define. Such a definition would not pass Statutory Draftsmanship 101. Regardless, the definition of “gambling information” itself states it is only a presumption, and as set forth painstakingly over the last nine months, that is a presumption we have overcome.

²¹ Given the state’s ultra-aggressive treatment of Betcha (see CP 502-504) after it filed this action, the fear of the WSGC bringing the house down is a real one, indeed.

²² These facts distinguish this case from *Smith v. King*, 106 Wn.2d 443 (1986) and *State v. Dennison*, 115 Wn.2d 609 (1990).

lesser extent, “bookmaking” – the Court should leave Betcha in limbo, even if it agrees that there is no gambling or bookmaking involved. The Court should not be so moved.

7. By requesting a continuance over seven months after this case began because the legal questions were so “unusual” and “complex,” the State has unwittingly conceded that the law does not clearly proscribe The Site. Thus, it has conceded the case.

The State has unwittingly conceded its case in this appeal. Recall the rule that in criminal statutes, conduct must be clearly and unequivocal prescribed. *See* CP 20:4-21:12, AB 10-11. Recall, too, that on January 31, 2008, the State requested an additional extension to file its Opposition Brief to more fully grapple with “the unusual and complex nature of (Betcha’s) claims” as they relate to the “unique statutory scheme” of Washington’s Gambling Act.²³ *Respondent’s Motion for Extension of Time to File Response Brief, January 31, 2008.* This, after the WSGC initially ordered Betcha to shut down and subsequently seized its property in *the summer of 2007*. Thus, by their own admission, the team of state agency officials and lawyers who at the time of filing had spent over seven months litigating this case *still* could not figure out *how* Betcha violates the state’s gambling laws. Suffice it to say that if a team of state lawyers could not figure out this case by January 31, 2008 after the WSGC ordered Betcha shut down on June 21, 2007, then by no stretch is the operation of The Site “clearly and unequivocally” proscribed by state law, as it must be

²³ As to the State’s point about Betcha’s claim being “unusual,” Betcha agrees. Betcha’s patent-pending software is unprecedented, which only bolsters its contention that its business model is not what the state legislature had in mind when it defined “gambling” in 1973. RCW 9.46.0237.

for this Court to rule against Betcha. CP 20-21; *State v. Enloe*, 47 Wn. App. 165, 170-71 (1987).²⁴

²⁴ Although the State has not raised either of its jurisdictional arguments in this appeal, it may raise them at oral argument in an effort to deprive Betcha of the chance to fully brief them. In the event it does, Betcha asks the Court to consider the ultra-condensed briefing of the issues below. If not, please disregard the balance of this footnote.

As to the suggestion that this case is barred because Betcha did not seek a declaratory order from the WSGC before filing this action, the law is as follows. Courts apply a balancing test in determining whether to require the exhaustion of administrative remedies. *See Orion*, 103 Wn.2d 441, 457, 693 P.2d 1369 (1985). Where considerations of fairness and practicality outweigh the policies underlying the exhaustion requirement (listed in *Orion*, 103 Wn. 2d at 456), courts do not require exhaustion. 103 Wn.2d at 456-57. On Betcha's side of the scale weigh three important facts. First, as the WSGC has already made its opinion on Betcha quite clear, going back to the WSGC would be a waste of time. (*cf. Bellevue v. Kravik*, 69 Wn. App. 735, 741, 850 P.2d 559 (Div.1 1993)(exhaustion not required where administrative process would be through government entity that has already made contrary decision); *Orion Corp. v. State*, 103 Wn.2d 441, 456-58 (1985)(exhaustion not required where administrative process would be futile and vain). Second, given that the WSGC has already rendered its decision and argues against Betcha in this litigation, its fairness and impartiality in a subsequent declaratory order can fairly be called into question. *See Orion*, 103 Wn.2d at 457 (showing of unfairness or lack of impartiality would excuse exhaustion: citations omitted); *Cf. Retail Union v. Surveying Bureau*, 87 Wn.2d 887, 908, 558 P.2d 215 (1976)(noting that the administrative process must be fair and impartial). Finally, a WSGC declaratory order would be an inadequate remedy because the party Betcha is most concerned about – the State of Washington – would have to consent to be bound by a WSGC decision (*see* WAC 230-17-180(5))("The commission 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."), and given that the State's lawyers are the same ones who are litigating this action, the chances of that happening are about zero. On the State's side of the scale, the only consideration remotely weighing in its favor is the policy against encouraging litigants to bypass the administrative process before seeking legal relief. That consideration is more than obviated by the fact that Betcha took its case directly to the WSGC, with counsel, before filing this action. CP 50-51, 502-03.

As to the argument that this case should be dismissed in favor of the forfeiture proceeding currently pending in the WSGC, Betcha directs the Court to our earlier briefing on the subject, in which we argues, *inter alia*, that this case trumps the forfeiture proceeding under the priority of action rule. CP 492. While the State has argues that the forfeiture proceeding is the action that deserves priority because, in its view, Betcha filed this action prematurely, we remind the court that, if anything, it was the WSGC's seizure of Betcha's property that was premature. *Cf. Respondent's Motion for Extension of Time to File Response Brief, January 31, 2008* (the State arguing that, almost seven months after the seizure, it still needed more time to consider how, exactly, Betcha violated the law). Any ruling that affords significance to the WSGC's seizure would be tantamount to saying that the law required of Betcha a Hobson's choice (CP 492) – forfeit its seized property, or litigate in the agency whose action is being challenged, where the burden is on Betcha to prove its innocence (*see* WAC 230-17-160). This, even though the State later unwittingly admitted that the forfeiture was premature. Finally, the State and Betcha agreed to let the result of this action be determinative of the forfeiture action. (We will bring a copy of the stipulation to oral argument.)

CONCLUSION

This case turns on what it means to gamble. Betcha.com believes it is axiomatic that “gambling” means that a person does not get do-overs, and that the rules of the transaction – be it a spin of the roulette wheel, a blackjack hand, or a sports bet -- require that losers pay their losses. Such is not the case on Betcha.com. The State believes that the rules of the game are irrelevant, and that as long as a person *thinks* he may be paid if he wins, rules of the game notwithstanding, he is “gambling.” If the Court disagrees with Betcha’s rebuttals of the state’s expectation-as-gambling position both herein and in earlier briefing, AB 20-27, CP 27:12-19, and agrees so wholeheartedly with the State that it would feel comfortable letting Betcha’s founder face the potential of up to a quarter century in prison²⁵, it should side with the State. Otherwise, as per the rule of strict construction, Betcha must prevail.

Respectfully submitted this 2nd day of April, 2008.

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²⁵ Given the un-American tale of what has already happened to Betcha’s founder (CP 502-504), this is not an unrealistic scenario

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STATE OF WASHINGTON
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**NO. 37079-4-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

**INTERNET COMMUNITY &
ENTERTAINMENT CORP., dba
BETCHA.COM, Appellant,**

v.

**THE STATE OF WASHINGTON, a
government entity, and the
WASHINGTON STATE
GAMBLING COMMISSION, a
Commission of the State of
Washington, Respondent.**

CERTIFICATE OF SERVICE

Alecia J. Rivas states as follows:

I am over the age of 18 years, not a party to the above-entitled action, and am competent to be a witness therein.

I certify that on the 2nd day of April, 2008, I caused a true and correct copy of Appellant's Reply Brief to be served on the following in the manner indicated below:

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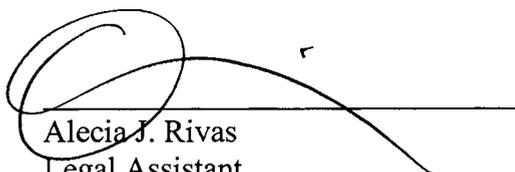
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I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Dated: 2 April 2008, at Renton, King County, Washington.

Green & Rousso, PLLC


Alecia J. Rivas
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