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October 10, 2014

David Hoppe
D2 Entertainment

Opinion: "No Chance Preview" games are not subject to regulation under Michigan law

Dear Mr. Hoppe,

You have asked whether your games containing a "No Chance Preview" feature are gambling devices under Michigan law and subject to regulation by the Michigan Gaming Control Board. In my opinion, your games containing a "No Chance Preview" feature are not gambling devices and are not subject regulations imposed by Michigan Gaming Control and Revenue Act (M.C.L. 432.201, et seq).

The "No Chance Preview" feature allows players to view the outcome of the next play prior to deciding whether to commit credits on the upcoming play. The player can adjust the credits they wish to commit to the upcoming play or have their credits returned to them and cash out their credits for whatever prize that is made available. The "No Chance Preview" eliminates the chance or risk for the consumer that is inherent in gambling devices.

While M.C.L. 432.218(1)(a) prohibits persons from "[c]onducting a gambling operation where *wagering* is used or to without a license issued by the board" (emphasis added), a wager is defined as "[m]oney or other consideration risked on an uncertain event; a bet or gamble" and as "[a] promise to pay money or other consideration on the occurrence of an uncertain event." Black's Law Dictionary (9th ed. 2009). The "No Chance Preview" feature eliminates the uncertain event and takes the game outside the definition of a gambling device.

The Honorable Daniel J. Kelly of the St. Clair County Circuit Court dismissed charges against you, in *State of Michigan v. David John Hoppe*, on allegations of running a gambling operation as it related to Puzzle Bug platform games containing the "No Chance Preview" because of insufficient evidence that the games were gambling devices. Op. Following Evidentiary Hrg, Docket No. K-12-001882-FH (31st Mich. Cir., March 8, 2013)(unpublished). At the time of the dismissal, the State had been in custody of the games for over 2 years, but failed to present any evidence regarding testing that it may have conducted.

You entered into a plea agreement to resolve the balance of the case regarding allegations that various table games at your former facilities were not properly licensed, in which you agreed that you will "not make available to the public of the state of Michigan any gaming machines that have a no chance preview unless and until such time

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that said machines are certified as non gambling devices by the Michigan Gaming Control Lab or a lab recognized by the State of Michigan Gaming Control Board to test and certify such machines.” *Hoppe*, Plea Agreement, p. 2, Docket No. K-12-001882-FH p. 2 (31st Mich. Cir., Sept. 19, 2013)(unpublished). Even if the State was to alleged you were not in compliance with the agreement, the State could not prosecute you for the previously dismissed allegations that "No Chance Preview" games are in violation of state gaming laws because the court has already dismissed that portion of the case due to a lack of evidence.

Additionally, Richard Williamson of BMM Compliance, which was responsible for setting up the Michigan Gaming Control Board laboratory and who had previously tested and found your games containing the “No Chance Preview” to not be gambling devices and in compliance with Federal and Ohio laws, testified in *State of Michigan v. David John Hoppe* that “the Puzzle Bug is not a gaming device” and not in conflict with the laws of the State of Michigan. Evidentiary Hrg. Transcr., p. 63-64, Docket No. K-12-001882-FH (31st Mich. Cir., Feb. 8, 2013).

The Michigan Gaming Control Lab does not certify or approve non-gambling devices because it only conducts tests on gaming devices manufactures seek to distribute to casino licensees. Mich Admin Code, R 432.1842(1). However, an Ohio company, Silver State, Inc., has had your devices tested BMM Compliance, which certified that game is not a gambling device, under Ohio law and Federal law. Evaluation Rpt. No. SSI10031 from Andrew Pawlak, Vice President, BMM Compliance, to Silver State, Inc., regarding No Chance El Dorado v1.07 (May 3, 2010); Evaluation Rpt. No. SSI10041 from Nicole Babbs, Director of Service Delivery, BMM Compliance to Silver State, Inc., for Puzzle Bug v208US (Jan. 28, 2011); Evaluation Rpt. No. SSI10011 from Andrew Pawlak, Vice President, BMM Compliance, to Silver State, Inc., regarding No Chance Fruit vFBP2.9D (Jan. 25, 2010). Also, Richard Williamson of BMM Compliance’s testimony in your case supports the contention that the game is not a gambling device.

Additionally, while the State of Michigan is presumably aware, by virtue of the plea agreement in *State of Michigan v. David John Hoppe*, that you will distribute these games in the future. However, with a new type of game like this there remains a possibility of future accusations by law enforcement, despite the State of Michigan’s failure to show probable cause of a crime in your case.

Sincerely,



Shaun P. Godwin