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3064 Studios, LLC

Re: **Midnight Skill Promotional Sweepstakes System**

We were asked to provide our legal opinion as to the legality of the promotional sweepstakes system entitled "Midnight Skill" that you intend to offer in the State of North Carolina. In preparation of this opinion, our office (i) reviewed the play of the game itself and played the game to understand the operation of the machine, (ii) reviewed the applicable North Carolina statutes and caselaw related to gaming, (iii) reviewed published gaming regulations from other jurisdictions, and (iv) communicated with multiple experts.

As you are aware, our office has been involved in litigation over the last twelve years in the operation of promotional sweepstakes in North Carolina. We have appeared at all levels of trial court and administrative court, including several cases in the N.C. Appellate Courts. The North Carolina applicable sweepstakes law is §14-306.4. We think there is a wide misunderstanding of the law and the trial court decisions. On a number of occasions, officers have confidently and consistently testified as follows:

1. The latest appellate case law has declared sweepstakes illegal;

2. Some decisions have declared that any game that has a nudge component or a double nudge component is an illegal operation;

3. It is illegal to pay out cash prizes.

Addressing those opinions, it is clear that the caselaw and statutes in North Carolina provide:

1. N.C.G.S. §14-306.4 allows for the operation of promotional sweepstakes. There are thousands of sweepstakes operating legally in North Carolin today.

2. There has never been a decision which has declared that a "nudge component or double nudge component" in the operation of a game makes it illegal.

3. There is no statute or Appellate opinion of any kind that says it is illegal to pay out cash prizes in a promotional sweepstakes. Again, thousands of sweepstakes all over North Carolina are operating today and paying out cash prizes on a daily basis.

The actual test of whether a promotional sweepstakes is legal under §14-306.4 based on the Appellate opinions is: **1.) Does the use of skill and dexterity dominate over the element of chance in the awarding of any prizes. The awarding of a prize must be based on skill or dexterity and not on chance, 2.) Does the system meet all of the requirements to comply as a legal sweepstakes. Our analysis of this game is based upon those two premises.**

DESCRIPTION OF THE MIDNIGHT SKILL SYSTEM

MARKETING

The Midnight Skill promotional sweepstakes system is implemented through a vending kiosk with a touch screen, bill acceptor, and a printer that are housed in an arcade-style cabinet. The kiosk sells paper gift certificates that can be used to purchase video game credits on the Midnight Skill.net social gaming network. When a gift certificate is purchased, the customer receives a printed gift certificate that grants the purchaser the following: (i) a number of e-credits, which can be used on the www.MidnightSkill.net social media gaming site, and (ii) a QR Code, which the player can use to gain entry to the www.MidnightSkill.net social media gaming site. For each dollar that the player has inserted into the bill acceptor, the player receives 20 e-credits on the gift card, which he can use to play on the Midnight Skill social network.

Based on the testimony and opinions of the experts at multiple hearings, conferences, and reports, the social gaming network in the United States is a massive market. It is a growing market. The primary purpose of the Midnight Skill sweepstakes system is to obtain clients/players who will come to the www.MidnightSkill.net website and play on their social network. One of the best ways to reach the people who will use the social networks is to attract them with kiosk sweepstakes promotions. The people who will play the kiosks for entertainment at the stores are the target market for the www.MidnightSkill.net social media website. In order to attract players to the website, sweepstakes promotions are the most effective marketing technique to use.

In addition to the e-credits, each player receives $1.00 worth of entries to the sweepstakes. To reveal the sweepstakes entry, the player selects one of the video games to play by selecting an icon on the screen. Once the game is presented, the player selects the number of credits to play. When the play button is pushed, the screen reveals 9 characters. The 9 characters will never reveal a winner on the first screen. It is impossible to win a prize simply by pushing the play button.

The sweepstakes kiosk contains a selection of about four or five video games. Examples of the video games include, but are not limited to: (i) Lucky Shamrock, (ii) Magic Tricks, (iii) Freedom, and (iv) Snake Charmer. Those are representative of the video games that are used, but other games could be presented. All such games operate in the same manner, but with different graphical representations.

ANALYSIS OF SKILL REQUIREMENTS IN THE MIDNIGHT SKILL SWEEPSTAKES SYSTEM

There are three separate elements of each game that require skill. We looked at each of those individually.

Element 1: To begin play, the player presses the "play" button on the console or the "play" button on the screen. When the play button is pressed, the screen reveals the video games available. The player then selects the amount of entries he wishes to play, and then hits the 'play' button. If the screen presented fails to reveal a prize, the game board automatically presents the Payback game. The Payback game is a short-term memory game, similar to the well-known game Simon. In this case, the player is presented with 9 symbols on the screen, the symbols light up one at a time, and the player must repeat the same sequence in each round of the game, and repeats that for 18 rounds. There is a time limitation to complete the rounds.

If the player is successful, they can win back 104% of the credits played. For example, if he plays $1.00, he can win up to $1.04. **To win the Pay Back Feature, the player must exercise both skill and dexterity.**

Element 2: If the game board presents an opportunity to win a sweepstakes prize, the prize can never be automatically won. The player must make one or two skill moves to reveal the prize. The first skill necessary is to recognize the winning game presentations that must be lined up. The player must use the table to the left to access and determine the best prize available. He must use skill and dexterity to move one or two of the symbols to the pay line to win his prize. If he lines up those symbols, he is entitled to the prize. **To claim the correct prize, the player must exercise both skill and dexterity to claim his prize.**

Element 3: After he wins entitlement to a prize, the board presents the player with the prize meter skill. In this skill, there is an indicator that moves fairly rapidly back and forth over percentages on the board. If the player uses appropriate skill and dexterity, he can receive a payment of up to 120 times the sweepstakes reward presented. **To obtain a higher payout, the player must exercise skill and dexterity to maximize his prize.**

At the conclusion of play, the player can press the "print ticket" button on the console or the "collect" button on the main menu screen to print a ticket from the console (or from a printer behind the retail counter) showing the number of credits remaining. The player can take the ticket to the store attendant and collect his sweepstakes reward. The sweepstakes reward is paid in cash, which is completely legal under North Carolina Law.

ANALYSIS OF DEXTERITY REQUIREMENT IN THE MIDNIGHT SKILL SWEEPSTAKES SYSTEM

N.C. § 14-306.4 allows for sweepstakes promotions. It allows for sweepstakes to be operated and pay cash so long as they are not done so by use of an "entertaining display". That statute states:

(1) §14-306.4(a)(3)(h) states "a video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player."
(2) §14-306(a)(3)(i) states "any other video game not dependent on skill or dexterity that is played while revealing a prize as result of an entry into a sweepstakes."

We reviewed several United States Supreme Court cases dealing with the interpretation of the words "and" as well as dealing with the interpretation of the word "or". The issue is whether or not, when used in a statute, these words have a disjunctive or conjunctive meaning. The courts have dealt with that issue in numerous cases, making interpretation of whether the word used is disjunctive or conjunctive. As used in this §14-306.3(h) and 3(i), it is clear that when using the statement "skill or dexterity", that the "or" must be interpreted in the disjunctive. If the court found that the word "or" is disjunctive, the State would be compelled to show that there is no element of dexterity in the Midnight Skill promotional sweepstakes system. The State has never presented any evidence on that issue, and the fact that they could not prove that necessary element would make this system legal.

Based on sworn testimony in previous cases, in reports by him, and in conversations with him, our expert has stated that the Midnight Skill promotional sweepstakes requires both physical dexterity and mental dexterity by the player in this situation. If the "or" is disjunctive, the evidence that it requires the player to exercise dexterity to present a winner would, by itself,. make the system legal.

It is also evident that even if the court were to rule that the word "or" in the statute was conjunctive, our evidence would show that the system is legal. As set forth previously, there is evidence of skill, and as set forth in this paragraph, there is evidence of dexterity. The court would have to find this system legal even if the word "or" were to be found conjunctive.

The fact that the Midnight Skill promotional sweepstakes has dexterity, it takes the system out the definition of "entertaining display" and it is therefore a legal sweepstakes.

ANALYSIS OF NORTH CAROLINA LAW

N.C.G.S. § 14-306.4 is the statute that governs sweepstakes law in North Carolina. The statute prohibits conducting or promoting a sweepstakes through the use of an "entertaining display,"

which includes: 1) a video game based on or involving the random of chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player, and 2) any other game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes. In two recently decided cases, *Gift Surplus, LLC v. State*, 380 N.C. 1, 868 S.E.2d 20 (2022) and *Crazie Overstock Promotions, LLC v. State*, 377 N.C. 391, 858 S.E.2d 581 (2021), both operating systems were found to not be exempted by the statute because the Court found they did not have enough skill or dexterity.

> "Entertaining display" means visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play, such as, by way of illustration and not exclusion:
>
> a. A video poker game or any other kind of video playing card game.
>
> b. A video bingo game.
>
> c. A video craps game.
>
> d. A video keno game.
>
> e. A video lotto game.
>
> f. Eight liner.
>
> g. Pot-of-gold.
>
> h. A video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player.
>
> i. Any other video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes.

To avoid being defined as an "entertaining display" under 14-306.4(a)(3)(h), the video games must be *dependent* on the skill or dexterity of the player. According to North Carolina case law, the "dependent on the skill or dexterity" language can be restated as: "…the essential difference between a game of skill and a game of chance for purposes of our gambling statutes [] is whether skill or chance determines the final outcome and whether chance can override or thwart the exercise of skill." *See Sandhill Amusements, Inc. v. Miller*, 368 N.C. 91, 773 S.E.2d 55 (2015); *Sandhill Amusements, Inc. v. Sheriff of Onslow Cty.*, 236 N.C. App. 340, 762 S.E.2d 666 (2014) (dissenting opinion); and *Collins Coin Music Co. of North Carolina, Inc. v. N.C. Alcoholic Beverage Control Comm'n*, 117 N.C. App. 405, 451 S.E.2d 306 (1994), *disc. rev. denied*, 340 N.C. 110, 456 S.E.2d 312 (1995). The North Carolina Supreme Court has stated further that, if the player's winnings or losses are primarily based on chance, then the game is not dependent on the player's skill and dexterity. *See Gift Surplus, LLC v. State*, 380 N.C. 1, 868 S.E.2d 20 (2022).

In summary, in the Midnight Skill system, (i) the player controls whether or not he or she will receive a prize and the value of the prize such that the player may never lose money if skill and dexterity is exercised appropriately, and (ii) in the long run, it is possible for the player to achieve all the available prizes (including the top prize) without sacrificing any money.

It is our analysis that in the operation of this game that Element 1 clearly requires the element of skill and dexterity to complete the element in the time allotted. Element 2 requires skill and dexterity to align three (3) symbols in the time allowed. The follow-up in Element 3 clearly requires skill and dexterity to stop the meter to claim the prize. Because of this system's multiple elements of skill and dexterity, it does meet the requirement that this particular operating system is dependent on skill and dexterity.

ANALYSIS OF THE MIDNIGHT SKILL SWEEPSTAKES

To be lawful under the North Carolina sweepstakes statute, in addition to the analysis above, there need to be other features so that this is a lawful operation of sweepstakes under North Carolina law. Those are as follows:

(i) *Rules & Regulations* - There are 24 pages that set out all the sweepstakes rules. They are readily available for viewing by the player.

(ii) *No Automatic Winners* – The video games in the Midnight Skill system never automatically result in a winner. At least two skill moves are required, which require the player to exercise both skill and dexterity.

(iii) *Skill is Required* – On average, there are multiple winning combinations in each game theme, some of which are defined by general descriptions, and thus some winning combinations are not readily apparent to the player.

(iv) *Dexterity is Required* - All of the games on the Midnight Skill system require both physical dexterity (i.e., fine motor control of the hands and visual accuracy) and mental dexterity (i.e., the ability to recognize and implement winning patterns).

(v) *Double Move* – Each of the video games periodically utilizes a "double move" mechanism which increases the amount of skill and dexterity to win a prize. If a double move is required, the player must look at the array of symbols and determine how to move two of the symbols to align a winning combination along the win line on the screen.

(vi) *Skill or Dexterity on Every Play* – Each play of the video games requires skill and dexterity to obtain a prize.

(vii) *Potential Winner on Every Play* - The player can win a prize on every play if he exercises skill or dexterity properly each time.

(viii) *Timer* – In Elements 1 and 3, the player must exercise skill or dexterity within a limited period of time or lose the play of the game.

(ix) *Pay Back Feature* – If a player did not win more credits than he put at risk, he may play the Pay Back phase of the game. In this element, if the player exercises skill or dexterity appropriately, he can win 104% of the credits played.

(x) *Skill Overrides Chance* - The game allows the player to determine or influence the relative amount of the player's winnings or losses in the long haul. Thus, the entire game is totally dependent on the skill and dexterity of the player. In other words, skill and dexterity determine the final outcome, and chance cannot override or thwart the exercise of skill and dexterity.

(xi) *Free Entries* - There are multiple ways for any player to obtain a free entry to the sweepstakes. This can be done at the retail outlet, by scanning the code on the player's phone, or by mail.

ANALYSIS OF COMPARABLE LAW & APPLICATIONS

As stated above, our firm has been involved in defending promotional sweepstakes games for over 12 years. We have been involved in litigation at all levels of the Trial and Appellate Courts, as well as in the Administrative Courts. In order to properly deal with the **required skill and dexterity** is extremely difficult. There are no cases that have brightline rulings on what amount of skill or dexterity is necessary. The North Carolina statute has no definition of skill or dexterity. Because of that, it requires one to study, analyze, and compare other jurisdictions and rulings.

In order to do the analysis of this system, we have considered the following two primary factors in forming our opinion as to the legality:

1. Comparison with Cherokee Tribal Gaming Rules and Regulations, and
2. Other jurisdictions, particularly Nebraska.

CHEROKEE TRIBAL GAMING

Our office reviewed the *Second Amended & Restated Tribal-State Compact Between the Eastern Band of Cherokee Indians and the State of North Carolina* (the "Tribal-State Compact").

The Tribal-State Compact provides that: "No video game may be purchased, leased or otherwise acquired by the Tribe unless the video game, or a prototype thereof, has been tested and approved or certified by the Certification Commission and a gaming test laboratory as meeting the requirements and standards of this Compact as allowed under NCGS 14-306 and 14-306.1A or as subsequently amended by the North Carolina General Assembly." The phrase "video game" is defined in the Tribal-State Compact as "any electronic video game or amusement device that allows a player to play a game of amusement involving the use of skill or dexterity as allowed under N.C.G.S. §14-306 and § 14-306.1A or as subsequently amended by the North Carolina General Assembly." The Certification Commission means "that independent body established under the authority of the Tribal-State Compact to certify and approve video games as meeting the requirement and standards for games involving the use of skill or dexterity as allowed under NCGS § 14-306 and §14-3061A and to provide oversight for all forms of gaming being conducted under the Tribal-State Compact as described herein."

Our office has reviewed the gaming systems operated by the Eastern Band of Cherokee Indians and is aware of the analysis by Nick Farley of those games. The Midnight Skill system clearly requires more skill and dexterity of the player than the video games that have been tested and approved by the Certification Commission under the Tribal-State Compact.

OTHER JURISDICTIONS - NEBRASKA

We further looked at regulations from the State of Nebraska: 316 Neb. Admin. Code, Ch. 54, "Regulation of Cash Devices." These regulations were promulgated by the Nebraska Department of Revenue pursuant to Legislative Bill 538, enacted by the Nebraska Legislature in 2019.

There are three significant elements of the Nebraska statute which we reviewed. They are as follows:

(1) Section 101.19 contains a statutory definition of skill (see attached highlighted copy-first three (3) pages of 316 Neb. Admin. Code 54-101, Definitions).

(2) Section 101.10 defines that a game of skill means "mechanical amusement devices which produce an outcome predominantly caused by skill and not chance."

(3) Section 101.11 defines the independent testing laboratory to mean any laboratory approved by the DOR for use in testing whether case devices comply with the standards set forth in these regulations.

In reviewing the website and obtaining copies of documents, we were made aware of the operation of a Banilla Game system in Nebraska, denominated as Skyriser Lightning Edition NE. Gaming Laboratories International (an independent testing facility as defined above) did an analysis of the Skyriser Lightning Edition NE and did certifications to the Nebraska Department of Revenue by report dated August 29, 2022. Although the public report is highly redacted, it is significant that they reviewed the game, and that game was authorized as a legal game by the Nebraska DOR. Therefore, the Skyriser Lightning System was certified by GLI meeting the test of the statute, which, even though their report is redacted, would mean that it is a "game of skill" under 316 Neb. Admin. Code 54-101.10 in that skill predominates over chance.

The Midnight Skill system herein was analyzed by an independent lab to compare the features on the Skyriser Lightning Game with the games on the Midnight Skill system. In fact, they were found to be the same/or similar operating device. That in the expert's opinion, the Midnight Skill system has the same skill or a higher skill than the Skyriser Lightning Game.

One of the reasons that we give significance to the designation of GLI as the laboratory approved for the analysis of the Skyriser Lightning Edition NE is that GLI is the gaming laboratory that North Carolina uses for their analysis of games and gaming. It is also the laboratory that the Cherokee Tribe uses for analysis of their system.

CONCLUSION

Based upon our review of the system, it is our legal opinion that the Midnight Skill sweepstakes system is legal under North Carolina law. In addition, the statements set forth in this letter are based upon the laws of North Carolina in effect on the date hereof. Finally, this letter is offered solely in connection with our engagement with 3064 Studios, LLC, and it may not be relied upon in any manner by any other entity or person. Our statements herein shall not be quoted or otherwise included, summarized, or referred to in any publication or document, in whole or in part, or furnished to any person or entity, except by our prior written consent or as may be legally required by a court of competent jurisdiction or other governing authority through applicable law or regulation.

Sincerely,

George B. Hyler, Jr.