

One, Two, Sort the Shoe; Three, Four, Win Some More: The Rhyme and Reason of Phil Ivey's Advantage Play at the Borgata

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ABSTRACT

In the 1940's film, "My Little Chickadee," when a novice gambler asks if poker is a game of chance, W.C. Fields, a well-known comedic actor, playing Cuthbert J. Twillie, responded "Not the way I play it, no."¹ That familiar quote represented crooked card games played by Fields' many characters in a variety of movies.² But there is a difference between cheating and playing with an advantage. For example, one who has a large vocabulary has an advantage playing Scrabble[®], but that advantage is not cheating. The Borgata Hotel Casino & Spa in Atlantic City, New Jersey and Phil Ivey, a famous poker player, debated in federal court whether having an advantage is illegal after Ivey won almost \$10 million using an advantage that the Borgata, like a younger sibling who just lost a board game to an older sibling, cried was unfair. But what about the Borgata's advantage? All casinos have a house advantage, among others, so it seems only fair that players are entitled to use an advantage too.

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¹ Martin Harris, *Poker & Pop Culture: Always Be Wary When W.C. Fields is Dealing*, POKERNEWS (Dec. 13, 2016), <https://www.pokernews.com/news/2016/12/poker-pop-culture-033-wc-fields-26577.htm> [<https://perma.cc/TA9P-7DSW>].

² *See id.*

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I. INTRODUCTION

“Cheater, cheater, pumpkin eater!”³ Children have been shouting that on playgrounds for decades, and after a four-day winning spree in 2012 by Phil Ivey, the “Tiger Woods of Poker,”⁴ the Borgata Hotel Casino & Spa in Atlantic City shouted the same, as Ivey used an advantage⁵ while playing baccarat to win almost \$10 million.⁶ The Borgata argued that use of the advantage, known as edge sorting,⁷ was cheating and therefore, the Borgata wanted its money back. The Borgata was successful in the U.S. District Court,⁸ but Ivey appealed, and a settlement was reached in July 2020. This article will explore what “advantage play” is; whether it is legal, for both players and casinos; and what implications the Borgata/Ivey settlement may have on the future of such advantage play.

II. BACKGROUND

To understand the legal issues in the gambling industry, it is valuable to work through some vocabulary and a description of the parties involved in the litigation. At issue were the rules of conduct when gambling, which can be defined as “any betting or wagering, for self or others, whether for money or not, no matter how slight or insignificant, where the outcome is

³ Based on the children’s rhyme “Peter Peter Pumpkin Eater,” the phrase has been used in television, books, and newspapers. See Barry Popik, *Cheater, Cheater, Pumpkin Eater*, BARRYPOPIK.COM (Nov. 2, 2019), https://www.barrypopik.com/index.php/new_york_city/entry/cheater_cheater_pumpkin_eater/ [https://perma.cc/ET4G-U4UF].

⁴ See *Phil Ivey*, POKERNEWS, <https://www.pokernews.com/poker-players/phil-ivey/> [https://perma.cc/S7P4-A2FT] (last visited Mar. 25, 2020).

⁵ Advantage play is “a situation in which a player through some method of play can acquire an advantage over the casino in the context of a gambling contract.” David W. Schnell-Davis, *High-Tech Casino Advantage Play: Legislative Approaches to the Threat of Predictive Devices*, 3 UNLV GAMING L.J. 299, 303 (2012).

⁶ See Victor Fiorillo, *Borgata: Poker Star Phil Ivey Is Stiffing Us Out of \$10 Million*, PHILLYMAG.COM (Feb. 7, 2019, 12:34 PM), <https://www.phillymag.com/news/2019/02/07/phil-ivey-borgata-lawsuit/> [https://perma.cc/RV72-V7AM].

⁷ “‘Edge sorting’ exploits manufacturing defects in playing cards in order to ‘mark’ cards without the player actually touching, defacing, or placing a physical mark on the cards.” Amended Complaint at 14, *Marina Dist. Dev. Co., LLC v. Ivey*, No. 1:14-cv-02283 (D.N.J. Apr. 23, 2014).

⁸ See *Marina Dist. Dev. Co., LLC v. Ivey*, 223 F. Supp. 3d 216 (D.N.J. 2016) (holding that Ivey had breached the contract and his winnings would be returned to the Borgata).

uncertain or depends upon chance or ‘skill.’”⁹ As with any game, players rely on the ethical conduct of opposing players to play a fair game, but unfortunately, players do not always conduct themselves in accordance with the rules of the game or societal norms. When someone tries to win by breaking the rules, that person is cheating and there are consequences. If it happens in a family game of Monopoly, also based on Atlantic City,¹⁰ feelings are hurt, but if it happens during legalized gambling, it often is a state crime.¹¹

Cheating at gambling is defined as manipulating the play of a game in a way not allowed by the game’s rules. The three primary categories of cheating include: altering the selection of outcome; acquiring knowledge, not available to all players, of the outcome of the game or any event that affects the outcome of the game; and, increasing or decreasing the amount of one’s wager after learning the result of the random event.¹²

Where the issues start to blur is when one considers whether advantage play is cheating.¹³ For example, one who has a large vocabulary has an advantage playing Scrabble[®],¹⁴ but that advantage is not cheating. However, if a player snuck good letter tiles into his pocket before the game commenced

⁹ *Definition of Gambling*, GAMBLERS ANONYMOUS AREA 12-NORTH AND CENTRAL NJ, <https://area12ga.com/definition-of-gambling/> [<https://perma.cc/H8SC-B2PE>] (last visited June 19, 2020).

¹⁰ Monopoly is Hasbro’s “fast-dealing property trading game” and is proclaimed the “world’s favorite family board game.” *Monopoly Game*, MONOPOLY, <https://monopoly.hasbro.com/en-us/toys-games> [<https://perma.cc/JG3T-B6ZN>] (last visited June 19, 2020). Manufactured in 1935 by Parker Brothers, the original board game has been expanded by Hasbro into a large product line, including Monopoly Cheaters Edition where the “rules encourage players to express their inner cheater.” *80 Enterprising Facts You May Not Know about Monopoly*, MASHABLE.COM, <https://mashable.com/2015/01/21/monopoly-facts/> [<https://perma.cc/PLQ9-FL39>]; *Monopoly Game: Cheaters Edition*, MONOPOLY, <https://monopoly.hasbro.com/en-us/product/monopoly-game-cheaters-edition:020C27CB-55DA-442A-B73B-B5C3CED8FCDA> [<https://perma.cc/5PJ2-3GYE>] (last visited June 19, 2020).

¹¹ See, e.g., NEV. REV. STAT. § 465 (2019) (covering crimes and liabilities concerning gaming).

¹² Schnell-Davis, *supra* note 5, at 303.

¹³ See Eliot Jacobson, *Phil Ivey and Yellow Journalism*, 888CASINO.COM (May 20, 2013), <https://www.888casino.com/blog/commentaries/phil-ivey-and-yellow-journalism> [<https://perma.cc/X2AD-3JY7>] (“The blurred distinction between advantage play and cheating can lead to significant legal issues for casinos as well as potential harm to law-abiding customers.”).

¹⁴ Owned by Mattel, Scrabble[®] is a board game invented by an architect in 1933. Players use tile square with letters on them to form words that connect like a crossword puzzle. See Erin McCarthy, *14 Shrewd ‘Scrabble’ Facts*, MENTAL FLOSS (Apr. 13,

in order to play them when needed, that would be cheating. In casino games, advantage play is “a situation in which a player through some method of play can acquire an advantage over the casino in the context of a gambling contract.”¹⁵ This is the nature of the Marina District Development Co., LLC d/b/a Borgata Hotel Casino & Spa’s (the “Borgata”) suit against Phillip D. Ivey, Jr. (“Ivey”), Gemaco Inc. (“Gemaco”), and Cheng Yin Sun (“Sun”).

A. *The Parties*

1. Phil Ivey – The Tiger Woods of Poker

Phil Ivey is one of the best poker players in the world, often referred to as the “Tiger Woods of Poker.”¹⁶ Initially taught the game by his grandfather,¹⁷ he started playing in casinos at age eighteen using a fake I.D. until he turned twenty-one,¹⁸ and by age twenty-three, he was winning major World Series of Poker events.¹⁹ By age twenty-nine he was playing and winning on the European Poker Tour,²⁰ and progressed to Australia and Asia, particularly Macau.²¹ He earned himself the rightful reputation of “a player to be treated with respect and reverence.”²² In addition to playing poker, he founded two companies, Ivey Poker and Ivey League, and engages in several charitable activities.²³ Ivey even had a poker room named after him at the Aria Resort and Casino in Las Vegas, Nevada.²⁴ He values that reputation,

2017), <https://www.mentalfloss.com/article/58236/14-shrewd-scrabble-facts> [<https://perma.cc/EL3P-JZ64>].

¹⁵ Anthony Cabot & Robert Hannum, *Advantage Play and Commercial Casinos*, 74 *Miss. L.J.* 681, 681 (2005).

¹⁶ See *Phil Ivey*, *supra* note 4 (noting that he not only resembles Tiger Woods, but also plays golf). Ivey, age 42, has over \$26 million in tournament cashes plus millions won in high stakes cash games throughout the world. Mo Nuwwarah, *Report: Borgata Seeking Phil Ivey's WSOP Winnings Plus \$214K Interest*, POKERNEWS (July 23, 2019), <https://www.pokernews.com/news/2019/07/borgata-seeking-phil-ivey-wsop-winnings-interest-34936.htm> [<https://perma.cc/8FLT-Z6TM>].

¹⁷ See *Phil Ivey Net Worth*, CASINOCHECKING, <https://casinochecking.com/blog/phil-ivey-net-worth/> [<https://perma.cc/RL8Y-NGMG>] (last visited Mar. 26, 2020).

¹⁸ See *Phil Ivey*, *supra* note 4.

¹⁹ See *Phil Ivey Net Worth*, *supra* note 17.

²⁰ See *id.*

²¹ See *Phil Ivey*, *supra* note 4.

²² See *Phil Ivey Net Worth*, *supra* note 17.

²³ See *id.*

²⁴ On February 13, 2019, after nine years of display, the Aria removed “The Ivey Room” sign and replaced it with “Table 1.” Card Player News Team, *Aria's 'The*

and was therefore devastated by the accusation that he cheated, explaining that “[o]nce you get cheater next to your name especially in my business which is a business of gambling it’s—it’s really bad. That’s the worst thing that you could be labeled as.”²⁵

2. Cheung Yin “Kelly” Sun

By age fifteen, Cheung Yin “Kelly” Sun was using a fake ID to play on gambling cruises leaving from Hong Kong.²⁶ She then studied French and fashion design at the Sorbonne²⁷ before losing twenty million dollars of her Hong Kong factory owner father’s money while gambling in her twenties.²⁸ Now in her forties, she is a very successful gambler, but a key loss of \$93,000 at an MGM property in 2007 changed her life.²⁹ She was playing with a friend at the MGM Grand in Las Vegas.³⁰ The friend ran out of money and asked Kelly to get a \$100,000 marker, which she did.³¹ Sun then went to Paris for six months, during which time her friend did not repay the debt to the casino, so when Sun reentered the United States in Philadelphia, six police officers boarded the plane, handcuffed her, and took her to jail.³² She had lost millions of dollars to MGM casinos, but they sent her to jail for

Ivey Room’ Officially Renamed ‘Table 1,’ CARD PLAYER (Feb. 20, 2019), <https://www.cardplayer.com/poker-news/23657-aria-s-the-ivey-room-renamed-amidst-the-poker-pro-s-legal-battles> [<https://perma.cc/D9PP-JGFN>] (noting that Aria did not link the name change to the Baccarat troubles, stating “[o]bviously Phil is still an incredible player and still very much relevant in the poker world, but we thought it was time for a rebrand”).

²⁵ Jody Avirgan, *A Queen of Sorts*, 30FOR30PODCASTS, <https://30for30podcasts.com/episodes/a-queen-of-sorts/#transcript> [<https://perma.cc/TE3Y-453D>] (incorporating CBS’s *60 Minutes Sports: Phil Ivey* (CBS television broadcast Oct. 7, 2014)).

²⁶ See Michael Kaplan, *The Baccarat Machine*, CIGAR AFICIONADO (Jan./Feb. 2017), <https://www.cigaraficionado.com/article/the-baccarat-machine-19176> [<https://perma.cc/8VAF-JX5C>].

²⁷ See *id.*

²⁸ *Kelly Cheung Yin Sun Targeted Borgata for Revenge*, CASINO.ORG (Dec. 22, 2016), <https://www.casino.org/news/kelly-cheung-yin-sun-targeted-borgata-revenge/> [<https://perma.cc/NTQ9-ZJNU>].

²⁹ See *id.*

³⁰ See Avirgan, *supra* note 25.

³¹ See *id.*

³² See Kaplan, *supra* note 26 (noting that Sun spent twenty-one days in Las Vegas’ Clark County Detention Center, waiting for her father to arrive in Las Vegas to pay the debt).

\$100,000.³³ She revealed to Michael Kaplan, a reporter for the *New York Times*,

I was in jail for three weeks. Women attacked me, and the guards wouldn't let me wear my own underwear. I lost 25 pounds in jail and didn't get out until a relative flew here with \$100,000 for the casino. I decided that one day I would get back the money by playing at MGM properties.³⁴

When Sun left prison, she spent four years studying decks of playing cards, learning the patterns on the back, and identifying tiny asymmetries, typically 1/32 of an inch or less, and earning her nickname, "The Queen of Sorts,"³⁵ which gave her an advantage when she would place her bets. Using "social engineering techniques," Sun convinced the dealers to turn the cards, based on those tiny asymmetries, "for good luck."³⁶ Sun's goal was to be able to recognize the key cards in baccarat, which are the sixes, sevens, eights, and nines,³⁷ before she would place her bet. The technique was working, but to win serious money, she would need big stakes, so she went after a "whale," a gambler who wagers a lot of money.³⁸ She connected with a number of whales willing to finance her play, and consistent with her goal of revenge against MGM, she played and won at many MGM properties, including the Aria, Treasure Island, Paris, Caesars Palace, and MGM Grand.³⁹

³³ See *id.*

³⁴ Michael Kaplan, *How 'Advantage Players' Game the Casinos*, N.Y. TIMES MAG. (June 29, 2016), <https://www.nytimes.com/2016/07/03/magazine/how-advantage-players-game-the-casinos.html> [<https://perma.cc/KNW7-KJKW>].

³⁵ *Kelly Cheung Yin Sun Targeted Borgata for Revenge*, *supra* note 28. Sun is also known as "The Baccarat Machine," a name that seems well suited when she explains that her baccarat play is "work and I am a professional. It's what I have trained myself to do. I do not feel bad if I lose and I do not feel emotions if I win." Kaplan, *supra* note 26.

³⁶ Kaplan, *supra* note 26.

³⁷ See *id.*

³⁸ See Avirgan, *supra* note 25; Kate Taylor, *Inside the Dark, Fantasy World of Millionaire 'Whales' at Casinos, Who Receive Ridiculous Perks and Are Under Harsh Scrutiny Since the Las Vegas Shooting*, BUSINESS INSIDER (Oct. 19, 2017, 10:19 AM), <https://www.businessinsider.com/casinos-perks-for-high-rollers-tied-to-las-vegas-shooting-2017-10> [<https://perma.cc/3WN2-9CYK>] ("The most high-profile high rollers in the world of gambling are called 'whales,' people who regularly wager thousands or millions of dollars in a single night.")

³⁹ See Avirgan, *supra* note 25. At the time of the Borgata games in 2012, MGM owned 50% of the Borgata, a stake that has since increased to 100%. *Kelly Cheung Yin Sun Targeted Borgata for Revenge*, *supra* note 28.

Casino surveillance teams started taking notice of Sun and her technique, and it was written about in surveillance industry newsletters.⁴⁰ Sun was not mentioned by name, but the description was enough for Steven Black, an ex-boyfriend/mentor to recognize her.⁴¹ Wanting a piece of the action, he called her and offered to introduce her to a new, bigger whale: Phil Ivey.⁴² In exchange for the introduction, Steven wanted ten percent of Ivey's and Sun's winnings.⁴³ They had a rocky start to their relationship, losing millions at first, but Sun quickly won over Ivey when together they won three million dollars from a casino in Melbourne.⁴⁴ Sun, Ivey, and Steven traveled to Montreal, Singapore, Macau, and Monte Carlo, using the edge sorting advantage. Together, Ivey and Sun made thirty million dollars as a baccarat team.⁴⁵

3. The Borgata

The Borgata⁴⁶ is a hotel and casino in Atlantic City, New Jersey, licensed and operating under the New Jersey Casino Control Act.⁴⁷ With 2,000 guest rooms,⁴⁸ 161,000 square feet of casino space, two spas, five

⁴⁰ See Avirgan, *supra* note 25.

⁴¹ See *id.* (going by the name Steven Black). He has been characterized by a well-known sports bettor as “the sharpest of the sharp.” Kaplan, *supra* note 26.

⁴² See Avirgan, *supra* note 25.

⁴³ See Kaplan, *supra* note 26.

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ At the time the complaint was filed, Marina District Development Co., LLC was the holding company for the Borgata. See Amended Complaint, *supra* note 7, at 1; Katie Chang, *Borgata is Atlantic City's Ultimate Culinary Destination*, FORBES (Feb. 29, 2020), <https://www.forbes.com/sites/katiechang/2020/02/29/why-borgata-is-atlantic-citys-ultimate-culinary-destination/#520209d790d3> [<https://perma.cc/WE7S-FY6Q>]; *MGM to Acquire Last 50 Percent of Atlantic City's Borgata for \$900 Million*, MEETINGS AND CONVENTIONS (June 2, 2016), <http://www.meetings-conventions.com/News/Gaming/Borgata-Atlantic-City-MGM-acquisition/> [<https://perma.cc/XZ57-69ZU>] (noting that after a ten-year relationship, MGM was buying the fifty percent interest of Boyd Gaming Corp).

⁴⁷ See N.J. STAT. ANN. § 5:12-1 (West 2012).

⁴⁸ See *MGM Resorts International Hits Royal Flush with East Coast Poker Tour*, BORGATA (Dec. 19, 2019), <https://www.theborgata.com/press/press-releases/current/mgm-ecpt> [<https://perma.cc/HN94-9A6W>] (noting that in addition to live casino gaming, the Borgata offers online gaming within New Jersey through several websites).

pools, and twenty restaurants, it is one of the Atlantic City's premier properties.⁴⁹

4. Gemaco

Founded in 1929 in Kansas City, Missouri, Gemaco created the Gemaco® brand of playing cards, and supplies them to casinos, including the Borgata.⁵⁰ With six facilities in Las Vegas, Missouri, France, Mexico, and China, Gemaco became one of the gaming industry's largest playing card suppliers.⁵¹ Gemaco asserts its cards are "perfectly symmetrical so that the back of one card is indistinguishable from the backs of all other cards, and the edges of each card are indistinguishable from one another."⁵² Further, it claims its cards are "tamper proof, sealed and certified by individual and intensive inspection."⁵³ An image of the playing cards is attached hereto as Appendix A, which illustrates the description of the cards as stated in the Amended Complaint:

The playing cards purchased from Gemaco by Borgata have a custom-designed back consisting of a dominant background color, on top of which appear edge-to-edge rows of small white circles that are designed to look like the top of a round cut diamond. The illusion of the diamond facets is created by shading inside the circle with a lighter shade of the dominant background color. The background color fills the empty spaces between the circles. Two Borgata Hotel Casino & Spa logos on each card back are placed symmetrically and facing in opposite directions.⁵⁴

⁴⁹ See Chang, *supra* note 46; BORGATA, <https://www.theborgata.com> [<https://perma.cc/K7WA-DX85>] (last visited Mar. 26, 2020).

⁵⁰ See Amended Complaint, *supra* note 7 at 3. The Gemaco brand comes from the founder's, George C. Matteson, Jr.'s, name, taking the GE from George, "MA" from Matteson, and adding "CO" for company. See *History*, GAMING PARTNERS INT'L, <http://www.gpigaming.com/company/history> [<https://perma.cc/5NRN-JC4H>] (last visited Mar. 26, 2020). The District Court found that the Borgata could recover from Gemaco just \$27, the cost of the playing cards used in the games played by Ivey. Fiorillo, *supra* note 6.

⁵¹ See *GPI Acquires Table Games Company Gemaco*, GGB NEWS (Aug. 10, 2014), <https://ggbnews.com/article/gpi-acquires-table-games-company-gemaco/> [<https://perma.cc/MJ3T-SS96>] (noting that GemGroup, the parent company of Gemaco, Inc. was acquired by Gaming Partners International in August, 2014).

⁵² Amended Complaint, *supra* note 7 at 4.

⁵³ *Id.*

⁵⁴ *Id.* at 3.

B. *The Borgata Play*

In April 2012, Ivey arranged a visit to the Borgata to play baccarat,⁵⁵ a game familiar to fans of James Bond movies.⁵⁶ As is typical of high stakes gamblers, he was able to negotiate the terms of his play that included wiring \$1 million in advance, a maximum bid of \$50,000 per hand, a private area in which he would play accompanied by a guest, a dealer who spoke Mandarin Chinese, one eight-deck shoe of purple Gemaco Borgata playing cards, and an automatic card-shuffling machine.⁵⁷ On April 11, 2012, Ivey played for sixteen hours, winning \$2,416,000 on an average bet of \$25,000.⁵⁸ His guest, Sun, spoke to the dealer in Mandarin, giving instructions on how to flip and lay the cards on the table, a common practice based on individual player superstitions.⁵⁹ He returned to the Borgata in May 2012, winning \$1,597,400 on an average bet of \$36,000, with the same terms he had previously negotiated.⁶⁰ A July trip followed, when he increased his deposit to \$3 million and raised the maximum bet to \$100,000.⁶¹ He played for seventeen hours, winning \$4,787,700 on an average bet of \$89,000.⁶² He made a final trip in October, playing for eighteen hours, winning \$824,900 on an average bet of \$93,800.⁶³

C. *How Baccarat is Played*

While baccarat is not familiar to everyone in the United States, its worldwide popularity makes it the “world’s most popular gambling

⁵⁵ Ivey was actually playing mini baccarat due to the number of players at the table, 7, instead of 14 at regular baccarat. *The Difference Between Baccarat and Mini Baccarat*, CASINOFREAK.COM (Mar. 11, 2020), <https://www.casinofreak.com/guides/the-difference-between-baccarat-and-mini-baccarat> [https://perma.cc/M7KW-ES8P].

⁵⁶ James Bond plays Baccarat Chemin de Fer, a variation of baccarat described herein, in *Dr. No*, *Thunderball*, *On Her Majesty's Secret Service*, and *GoldenEye*. While the Bond character plays baccarat in the *Casino Royale* novel, in the film version of that book, Bond played no-limit Texas Hold'em poker. *Bond Lifestyle*, JAMES BOND LIFESTYLE, <https://www.jamesbondlifestyle.com/product/baccarat-chemin-de-fer> [https://perma.cc/C8DG-UQK9] (last visited Mar. 22, 2020).

⁵⁷ See Amended Complaint, *supra* note 7 at 6.

⁵⁸ See *id.* at 7.

⁵⁹ See *id.*

⁶⁰ See *id.* at 8.

⁶¹ See *id.* at 9.

⁶² See *id.* at 10.

⁶³ Ivey's total winnings for April through October were \$9,626,000. See *id.* at 14.

game.”⁶⁴ It is a game of chance in which the players bet, before cards are dealt, on which of two hands will have the higher value. Once the bet is placed, the player makes no further decisions and exercises no skill.⁶⁵ “[W]hether the patron wins or loses any individual hand of Baccarat is as random as flipping a coin.”⁶⁶

Players bet on the hand they think will have a total value closest to nine.⁶⁷ Typically, casinos use six or eight decks of cards at a time that are shuffled and placed in a long rectangular box called the “shoe” that is used for dealing the cards.⁶⁸ Before the cards are dealt, the players bet on either the “banker” or “player” to win, terms that do not refer to the casino or the person placing the bet.⁶⁹ Players can also bet that the “banker” and “player” will tie.⁷⁰ Once all bets are on the table, there is nothing further for the players to do. The dealer takes the first card from the shoe and places it on the spot marked for “player” hand.⁷¹ A total of two cards are dealt to each of “player” and “banker.”⁷² Based on the scores of those hands and the rules of the game, a third card may be dealt to either or both hands.⁷³ However, the gamblers do not place any additional bets at this time. As in any game, if the gambler knows the cards in advance, that would give him an advantage, and in the case of baccarat, “[t]he player with this ‘first card knowledge’ has an overall advantage of approximately 6.765% over the house. The advantage is up to 21.5% for ‘player’ bets and up to 5.5% for ‘banker’ bets.”⁷⁴

⁶⁴ Fiorillo, *supra* note 6.

⁶⁵ See Amended Complaint, *supra* note 7, at 4 (stating “[o]ne hand is referred to as the “player’s” hand, the other is known as the “banker’s” hand. The “banker” is not the [casino], and the “player” does not refer to those playing the game. Players are free to bet on either hand”).

⁶⁶ John Brennan, *Borgata Blunt on Bond's Baccarat: The Latest in the Phil Ivey Saga*, USBETS (May 28, 2019), <https://www.usbets.com/borgata-attorneys-blunt-baccarat-statement-against-ivey/> [<https://perma.cc/MXJ9-Y8Z2>].

⁶⁷ See Amended Complaint, *supra* note 7, at 4 (“Tens, face cards, and any cards that total ten are counted as zero. All other cards are counted at face value. The scores of hands range from 0 to 9.”).

⁶⁸ See *id.*

⁶⁹ See Giovanni Angioni, *How to Play Baccarat and Win (Beginners Edition)*, POKER NEWS (Aug. 8, 2018), <https://www.pokernews.com/casino/how-to-play-baccarat.htm> [<https://perma.cc/NXW2-T6W5>].

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *id.*

⁷⁴ Amended Complaint, *supra* note 7, at 5.

D. Edge Sorting

The edge sorting technique used by Ivey and Sun relies upon playing cards that are not cut symmetrically when manufactured.⁷⁵ As visible in the samples on Appendix A and B, the long sides of the cards do not match. Ivey asked the Borgata to provide the Gemaco cards, likely knowing that they are not symmetrical.⁷⁶ Once at the baccarat table, during the initial play of a shoe, after the wagers were placed, Sun would ask the Borgata dealer to let her peek at the card before it was revealed, and then would instruct the dealer, in Mandarin (and thus the reason for Ivey's request for a Mandarin dealer), to turn the card one way if it was "hao," a good card, or turn it a different way if it was "buhao," a bad card.⁷⁷ After the hand was played, when the cards were cleared and put into the used card holder, the edges of the good cards could be distinguished by Sun from the bad cards.⁷⁸ When the cards were taken from the used card holder and placed in the automatic shuffling machine requested by Ivey (and provided by the Borgata), the edges would stay aligned.⁷⁹ Then in the next round of play, Sun would see the first card in the shoe before Ivey would place his bet, giving Ivey the advantage of first card knowledge.⁸⁰

⁷⁵ According to gaming expert Dr. Eliot Jacobson, "Cards that can be edge-sorted are in wide use." Eliot Jacobson, *What is Edge Sorting?*, 888CASINO (June 28, 2012), <https://www.888casino.com/blog/edge-sorting/what-is-edge-sorting> [<https://perma.cc/Q2A7-F9KF>] (noting that in Jacobson's collection of 50 casino decks, over two-thirds can be edge-sorted). Jacobson has a Ph.D. in mathematics from the University of Arizona, and after being a professor of mathematics and computer science, retired from academia in 2009. He is an advantage player, and founded Jacobson Gaming, LLC in 2006, which specializes in casino table game design, advantage play analysis, game development, and mathematical certification. He is an author of the book *ADVANCED ADVANTAGE PLAY*, a consultant to casinos around the world, a speaker, and trainer. Eliot Jacobson, *Casino Blog*, 888CASINO, <https://www.888casino.com/blog/writers/eliot-jacobson> [<https://perma.cc/8QYN-PHXN>] (last visited Oct. 17, 2020).

⁷⁶ See Amended Complaint, *supra* note 7, at 6.

⁷⁷ See *id.* at 14-15.

⁷⁸ See *id.* at 15.

⁷⁹ Note that the casino could have refused to use the shuffling machine, or could have simply turned the cards before placing them in the machine, defeating the edge sorting technique. Prior to June of 2012, Dr. Eliot Jacobson asked a pit supervisor why the blackjack cards were turned before they were shuffled and he replied "so the cards can't be identified by some pattern on their backs." Jacobson, *supra* note 75.

⁸⁰ The Borgata later noticed that during the first playing session when Sun was sorting the cards, Ivey would bet below the maximum allowed. Thereafter, his bets

E. Other Advantage Play

The types of advantage play fall into three categories. The first category is not based on any skill or improper action by the player; instead the player simply takes advantage of a casino mistake, like when a slot machine malfunctions and pays out too much, or when a dealer overpays on a bet. Superstitions would fall into this category as well as they do not require the player to have superior skill or knowledge.

A superstition, believing that a favorite object or a ritual of wearing the same socks will bring good luck, or that certain things, like a black cat, are bad luck, are familiar, and some people rely heavily upon them. We believe, whether factually true or not, that our performance will be altered if we do not follow the superstitions in which we believe. This has long been the case in gambling, and casinos tend to respect Chinese superstitions in baccarat in particular, because baccarat revenues account for a major percentage of gaming revenues.⁸¹ The number eight is considered lucky by Chinese people, so the number eight seat at a baccarat table is often the first to be filled.⁸² Following that superstition gives the player an advantage. Granted, many might argue that it is not a real advantage, but the player's belief. However, confidence is a well-known key to success.⁸³ If players believe that they will play well, they often will.⁸⁴ If advantage play is not to be allowed, then Chinese players might be forced to sit in the number four chair (considered bad luck) and be prohibited from blowing on their cards or dice, a sign of good luck.⁸⁵ That would likely lead to a reduction in baccarat players, and therefore, revenues—something no casino wants.

increased to the maximum amount on every hand. Amended Complaint, *supra* note 7, at 16.

⁸¹ See *Chinese Superstitions in Baccarat*, BACCARAT RULES, <https://www.baccaratrules.net/chinese-superstitions/> [<https://perma.cc/4LKM-3LM6>] (last visited June 27, 2020).

⁸² See *id.*

⁸³ See generally Jack Kelly, *Self-Confidence Leads to Success in your Job Search and Career—Here's How You Can Start*, FORBES (Aug. 24, 2020, 10:50 AM), <https://www.forbes.com/sites/jackkelly/2020/08/24/self-confidence-leads-to-success-in-your-job-search-and-career-heres-how-you-can-start/#28f44dddcdf> [<https://perma.cc/F54M-RPH3>].

⁸⁴ See generally *id.*

⁸⁵ See *Chinese Superstitions in Baccarat*, *supra* note 81. While it is beyond the scope of this paper, given the coronavirus restrictions throughout the world, touching and blowing on cards, dice, and other gaming devices will certainly be restricted or banned until the virus is contained. It would be an interesting study to determine whether the prohibition of those superstitious practices reduces gaming revenues. See generally *Considerations for Casinos & Gaming Operations*, CDC, <https://>

The second category involves the advantage player's superior analytical skill. A player analyzes game data that is available to all players, and that data is part of the game, such as in card counting.⁸⁶ Often used in blackjack, card counting is a strategy by which a player keeps track of how many of a type of card have been played in order to predict the chances of it appearing again.⁸⁷ While casinos do not appreciate card counting, it is not illegal.⁸⁸ Interestingly, New Jersey and Missouri casinos are not allowed to remove gamblers for card counting alone.⁸⁹ These states' legislatures have recognized that advantage play based on skill, using the tools of the game, is not illegal and therefore should not be prohibited. Maryland agrees that "[c]ard counting that is done using intellectual capacity to keep track of cards is not prohibited by state law or regulation."⁹⁰ However, marking or crimping cards is illegal and considered cheating.⁹¹ Other forms of legal advantage

www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/casinos-gaming-operations.html [<https://perma.cc/BJF7-HYJM>] (last visited June 27, 2020) ("When possible, dealers should instruct customers not to touch cards or deal cards face up.").

⁸⁶ Cabot & Hannum, *supra* note 15, at 686.

⁸⁷ See *Blackjack Card Counting – The Ultimate Guide*, CASINO TOP 10, <https://www.casinotop10.net/card-counting-guide> [<https://perma.cc/N6KA-4HAY>] (last visited June 25, 2020).

⁸⁸ See *e.g.*, *Campione v. Adamar of New Jersey, Inc.*, 155 N.J. 245, 250 (N.J. 1998) ("Neither the Casino Control Act, N.J.S.A. 5:12-1 to 142 (Act), nor the [Casino Control Commission] prohibits card counting."); *Chen v. Nevada State Gaming Control Bd.*, 994 P.2d 1151, 1153 (Nev. 2000) ("neither card counting nor the use of a legal subterfuge . . . is illegal under Nevada law.") (Maupin, J., dissenting); *Cashio v. Alpha Gulf Coast, Inc.*, 77 F.3d 477, 477 (5th Cir. 1995) ("While playing blackjack, casino personnel determined that Cashio was using a technique of "card-counting" which, while neither illegal nor cheating, in their opinion gave him an unfair advantage.").

⁸⁹ See Jeff Barker, *Card Counters, Casinos Battle to Tilt the Odds*, BALTIMORE SUN (Mar. 29, 2015), <https://www.baltimoresun.com/business/bs-bz-counting-cards-20150328-story.html> [<https://perma.cc/PJ5C-QV3E>].

⁹⁰ *Id.* (quoting Stephen Martino, former head of the Maryland Lottery and Gaming Control Agency).

⁹¹ To mark a card, a player defaces it with marks or scratches that only that player understands. Crimping is making a small indent in the card. See Howard Collier, *The Gambler's Crimp, Shading Decks, and Other Methods for Marking Cards*, BLACKJACK FORUM ONLINE (Dec. 1993), <http://www.blackjackforumonline.com/content/crimp.htm> [<https://perma.cc/5NS6-W427>]; Basil Nestor, *What Is Cheating? Drawing the Line Between Aggressive and Illegal*, CASINOCENTER, <https://www.casinocenter.com/what-is-cheating/> [<https://perma.cc/PQ5S-XQPE>]. See also, *e.g.*, N.J. REV. STAT. § 5:12-115(b)(2013) ("It shall be unlawful knowingly to use or possess any marked cards."); N.J. REV. STAT. § 5:12-115(a)(2)(2013) (providing

play include shuffle tracking⁹² and hole-carding.⁹³ Another type of analytical skill advantage is when players analyze information available to all other players, but that information is not part of the basic rules of the game.⁹⁴ In other words, in card-counting, there are only four aces in a deck. Once those aces have been played, a blackjack is no longer possible. However, in shuffle tracking, a player remembers the order of cards in a discard pile, studies how the dealer shuffles the deck, and then predicts the order of the cards to be dealt, trying to reduce the random⁹⁵ nature of the deal.⁹⁶

The third category is when a player creates his advantage, not through analytical skill, but rather through knowledge that is not available to all players. An example would be hole-carding, in which a player is able to learn the dealer's hole card before placing a bet.⁹⁷ Another example would be when a player alters a random event in their favor, such as dice sliding in craps, in which instead of randomly tossing the dice across the table, a player slides them, trying to keep the dice in a certain position.

The first category, while not illegal, in some cases may be unethical. For example, keeping extra change received after making a purchase will not result in an arrest, but would likely fail most ethical decision-making guidelines.⁹⁸ However, a superstition would be neither illegal nor unethical. The second category, including card counting, is also not illegal, but some casinos do ban patrons who use it.⁹⁹ Card counters try to gain an advantage by

that to "carry on" with or "expose for play" cards that are marked "in any manner" is expressly prohibited).

⁹² Richard Marcus, *Blackjack Shuffle Tracking for Beginners*, BLACKJACK GALA (Apr. 26, 2016), <https://www.blackjackgala.com/blog/blackjack-shuffle-tracking-for-beginners/> [https://perma.cc/4YRD-H2MM].

⁹³ See *Gambling with an Edge*, LAS VEGAS ADVISOR, <https://www.lasvegasadvisor.com/gambling-with-an-edge/blackjack/blackjack-hole-carding/> [https://perma.cc/XC8F-N26T] (last visited Mar. 23, 2020).

⁹⁴ See Cabot & Hannum, *supra* note 15, at 687.

⁹⁵ "The concept of random is elusive and its precise meaning has long been debated among experts in probability, statistics and the philosophy of science." *Id.* at 728 (citing DEBORAH J. BENNETT, *RANDOMNESS* 168-73 (1998)).

⁹⁶ See Marcus, *supra* note 92.

⁹⁷ See *Gambling with an Edge*, *supra* note 93.

⁹⁸ For example, known as the front page test, one likely would not want the decision to keep extra change to be the lead story on page one of the local newspaper. See, e.g., *The "Front Page" Test: An Easy Ethics Standard*, WESTERN CITY (Feb. 1, 2012), <https://www.westerncity.com/article/front-page-test-easy-ethics-standard> [https://perma.cc/5DLR-R3H6].

⁹⁹ See Barker, *supra* note 89; Adam Mace, *Can Casinos Ban You for Winning? Here's Why People Get Kicked Out*, GAMBLING NEWS MAG. (Sept. 14, 2020), <https://gamblingnewsmagazine.com/casino-ban/> [https://perma.cc/QXU3-LNA9].

keeping track of how many aces have been played. Casinos try to complicate that by using multiple decks. The casino is trying to win, as are the gamblers. That's why it's called "gaming" — it's a game. "For every terrific card counter, there are probably ten guys who think they are good counters and they're not," said Alan Woinski of Gaming USA Corp, an industry newsletter publisher.¹⁰⁰ He suggested that casinos "probably want people who think they know how to count cards but don't have the concentration."¹⁰¹ Imagine the laughter in the dealer breakroom as a dealer regales his co-workers with stories of how much a gambler lost in his failed attempt to count cards. Even actor/director Ben Affleck, who admits to counting cards, agrees that casinos do not want him to use his skill as an advantage.¹⁰² "Once I became decent, the casinos asked me not to play."¹⁰³

The third category, including edge sorting, is more perplexing, and its legality has yet to be determined.¹⁰⁴ One could argue it is like card counting because it requires superior skill and the players do not touch the cards. Others suggest that the use of the imperfections in the cards is like using a prohibited device and therefore should be illegal.¹⁰⁵

III. THE DISPUTE

The Borgata sued Ivey and Sun in a U.S. District Court on twelve counts, ranging from breach of contract to participation in a RICO enterprise in violation of 18 U.S.C. §§ 1961 and 1982.¹⁰⁶ The Borgata's argu-

¹⁰⁰ Barker, *supra* note 89.

¹⁰¹ *Id.*

¹⁰² *See id.*

¹⁰³ *Id.*

¹⁰⁴ *See Sun v. Mashantucket Pequot Gaming Enter.*, 309 F.R.D. 157 (D. Conn. 2015). While the Mashantucket Pequot Tribal Nation Gaming Commission found that edge sorting "violated rules and regulations governing gaming," the court lacked subject matter and personal jurisdiction and could not decide the question of legality of edge sorting.

¹⁰⁵ "It was not simply taking advantage of error on her part or an anomaly practiced by the casino for which he was not responsible. He was doing it in circumstances where he knew that she and her superiors did not know the consequences of what she had done at his instigation. This is, in my view, cheating for the purpose of civil law." Jacobson, *supra* note 75.

¹⁰⁶ Amended Complaint, *supra* note 7 (listing the causes of action as: breach of contract, breach of implied contract, breach of implied covenant of good faith and fair dealing, fraudulent inducement, declaratory judgment for rescission based on unilateral mistake, fraud, declaratory judgment for rescission based on illegality of purpose, unjust enrichment, conversion, civil conspiracy, participation in a RICO enterprise in violation of 18 USC §§ 1961 and 1982, and participation in a RICO

ments are inconsistent, as it argued that Ivey's actions were illegal gambling.¹⁰⁷ However, the statute of limitations for an illegal gambling claim is six months,¹⁰⁸ and the Borgata took two years to file.¹⁰⁹ Therefore, the Borgata focused its claims on breach of contract, misrepresentation, and unfairness.

A. *Breach of Contract*

In order to overcome the statute of limitations problem, the Borgata argued not that the advantage was illegal, but rather that the contract with Ivey was unfair, making the statute of limitations six years.¹¹⁰ Ivey argued that the Borgata relied on the New Jersey Casino Control Act, but that Act does not provide a private right of action for a breach of contract claim.¹¹¹ The Borgata claims that Ivey misrepresented his reasons for his special requests.¹¹² Raffi Melkonian, an appellate attorney with Wright, Close & Barger LLP in Houston, asserted that the Borgata's argument that Ivey committed fraud when he said that the reason he wanted the accommodations

enterprise in violation of N.J.S.A. 2C:41-1 *et seq.*). "Claims for fraud in the inducement, breach of contract, and breach of the implied covenant of good faith and fair dealing all strike as particularly far-fetched; the suggestion that a casino can be fraudulently induced into dealing a card game with its own cards, equipment, and personnel, is seemingly fantastical; the theory that a contract – express or implied – underlies games of baccarat is similarly perplexing; and the hypothecation that the covenant of good faith and fair dealing – something normally invoked in arm's length business transactions – covers the mercenary-rich environment of a casino floor, where both the player and the house are unapologetically out to win the other's money, is likewise baffling." VerStandig, *infra* note 145.

¹⁰⁷ "Because of Ivey and Sun's misconduct, unfair play and deception, the Baccarat games at issue did not present the legally required "fair odds" or those assumed attendant circumstances dictated by New Jersey law and regulations that would assure the fairness, integrity and vitality of the casino operation in process pursuant to N.J.S.A. § 5:12-100(e)." Amended Complaint, *supra* note 7, at 19.

¹⁰⁸ See N.J. STAT. ANN. § 2A:40-5 (West 2011).

¹⁰⁹ "New Jersey law requires that an action for restitution because of the conduct of an illegal game be filed in the Superior Court within six months of payment. The acts alleged by plaintiff in its complaint all occurred . . . approximately two years ago." Brief of Defendants Ivey and Sun in Support of their Motion to Dismiss Plaintiff's Amended Complaint Pursuant to F.R.C.P. 12(b)(6) at 13, Marina District Development Co., LLC v. Ivey, No. 1:14-cv-02283 (D.N.J. July 2, 2014).

¹¹⁰ See N.J. STAT. ANN. § 2A:14-1 (West 2011).

¹¹¹ See Jeannie O'Sullivan, *Gamblers Fight NJ Casino's \$10M Contract Win at 3rd Circ.*, LAW360 (Sept. 17, 2019, 4:08 PM), <https://www.law360.com/articles/1199735> [<https://perma.cc/R9EG-7DSJ>].

¹¹² See Amended Complaint, *supra* note 7, at 9.

was to satisfy his superstitions is flawed because fraud requires “an expectation that the other side believes you. A casino shouldn’t be believing what gamblers are telling them. It’s silly to say they were tricked.”¹¹³

Further, edge sorting is not listed in New Jersey’s gaming statutes as illegal, and Ivey did not know that the Borgata prohibited it.¹¹⁴ There is no assertion in the complaint that the Borgata had notified Ivey or any other gambler of such a policy.¹¹⁵ Ivey and Sun never touched the cards, shoe, or shuffling machine, all of which were provided by the Borgata and were exclusively handled by the Borgata’s employees.¹¹⁶

The Borgata suggested that it did not know of Ivey’s intent to edge sort, feigning some sort of lack of knowledge of the technique.¹¹⁷ However, edge sorting is not a new technique and was not invented by Sun. As mentioned earlier, she had already achieved some success with the technique and it had been written about in industry publications.¹¹⁸ For example, in 2011, Sun was involved in an incident at the Aria in Las Vegas dubbed the “Million Dollar Shoe.”¹¹⁹ Sun tried out her edge sorting technique for forty minutes and was ahead by \$1.1 million when she decided to cash out.¹²⁰ According to a surveillance officer who watched her play, it took Aria security two days to figure out what she had done.¹²¹ “It was great to see something like that. I’ll probably never see it again, and that education cost Aria only a million dollars.”¹²² One can assume that stories like that would circulate throughout the casino business and among security employees.

¹¹³ Brian Pempus, *Phil Ivey has 50-60% {Chance} of Winning \$10 Million Third Circuit Appeal, Appellate Lawyer Says*, NJ ONLINE GAMBLING (Mar. 7, 2019), <https://www.njonlinegambling.com/phil-ivey-borgata-baccarat-gambling-case/> [https://perma.cc/L3KE-T2TA].

¹¹⁴ See O’Sullivan, *supra* note 111.

¹¹⁵ See Amended Complaint, *supra* note 7.

¹¹⁶ See Brief of Defendants Ivey and Sun in Support of their Motion to Dismiss Plaintiff’s Amended Complaint Pursuant to F.R.C.P. 12(b)(6), *supra* note 109, at 4. However, casino attorneys would argue “[y]ou can be convicted of battery even if you never touch the victim – such as by deceiving them into drinking a poisoned beverage, for instance.” John Brennan, *Borgata Blunt on Bond’s Baccarat: The Latest in the Phil Ivey Saga*, USBETS (May 28, 2019), <https://www.usbets.com/borgata-attorneys-blunt-baccarat-statement-against-ivey/> [https://perma.cc/66BJ-MWSP].

¹¹⁷ See Cabot & Hannum, *supra* note 15.

¹¹⁸ See Avirgan, *supra* note 25.

¹¹⁹ See Kaplan, *supra* note 34.

¹²⁰ See *id.*

¹²¹ See *id.*

¹²² *Id.* While Ted Whiting, vice president of corporate surveillance at MGM Resorts International, that owns Aria, would not comment on Sun’s practices, he did admit that edge sorting at mini-baccarat “is not against the law in Nevada, and

How could a successful, industry-leading casino not have known? The Borgata has been in business for seventeen years.¹²³ Not only are there industry publications that share information,¹²⁴ but casinos talk to each other.¹²⁵ There is also software available to casinos to make various advantage plays more difficult to implement.¹²⁶ There was no other reason for Ivey to make those requests other than to have an advantage. Ivey effectively said, "I'm going to use an advantage," and the Borgata responded, "We're going to let you." The Borgata entered into an implied contract with Ivey and should not be permitted to refute it later.

The Borgata argued that "as a condition of their wagering, Ivey and Sun explicitly agreed to abide and be bound by the rules set forth by New Jersey's Division of Gaming Enforcement (DGE) pursuant to the authority granted to it by the New Jersey legislature."¹²⁷ The Borgata argued that Ivey used his high roller status to get concessions that gave him an advantage, taking away the element of chance on which the game relies.¹²⁸ For example, they claimed that Ivey and Sun used the automatic card shuffler as a "cheating device," a violation of N.J.S.A. §§ 5:12-113.1,¹²⁹ because if the cards had been manually shuffled, the cards would not have stayed in the same direction after shuffling, making the sorting ineffective.¹³⁰

I do not consider it cheating. But whether you're a cheater or an advantage player, you can take money from us, and I don't want that to happen. I view it all as preventable loss." *Id.*

¹²³ See *MGM to Acquire Last 50 Percent of Atlantic City's Borgata for \$900 Million*, MEETINGS & CONVENTIONS (June 2, 2016), <http://www.meetings-conventions.com/News/Gaming/Borgata-Atlantic-City-MGM-acquisition/> [<https://perma.cc/P5Z6-773K>].

¹²⁴ See generally, GAMING TODAY, <https://www.gamingtoday.com/industry/articles> [<https://perma.cc/ZB3V-HG3V>] (last visited June 24, 2020); *Latest Casino and Gaming Industry News*, CASINO, <https://www.casino.org/news/> [<https://perma.cc/KYT7-U6YZ>] (last visited June 24, 2020); GAMBLINGINSIDER, <https://www.gamblinginsider.com> [<https://perma.cc/9Z9X-XRRQ>] (last visited June 24, 2020).

¹²⁵ See Barker, *supra* note 89 (quoting Matthew Heiskell, general manager of the Hollywood Casino Perryville) ("We share information with other casinos.").

¹²⁶ See Kaplan, *supra* note 34.

¹²⁷ Amended Complaint, *supra* note 7, at 19.

¹²⁸ See *id.*

¹²⁹ It is a crime to "[use or assist] another in the use of, a computerized, electronic, electrical or mechanical device which is designed, constructed, or programmed specifically for use in obtaining an advantage at playing any game in a licensed casino or simulcasting facility." N.J. STAT. ANN. § 5:12-113.1 (West 2011).

¹³⁰ "Although the automatic card shuffler is not originally designed, constructed, or programmed specifically for use in obtaining an advantage (it is intended to ensure the randomness of the shuffle), Ivey and Sun used the automatic

In order to understand the Borgata's claim that Ivey breached a contract, an understanding of the unique contract between a casino and gambler may be helpful. While a contract is an exchange of promises that the law will enforce,¹³¹ in the context of gambling, the relationship between the parties is "take-it-or-leave-it," or non-negotiable, as is the case in an adhesion contract.¹³² The casino has set the odds, and the gambler either bets on those odds or walks away. Gaming contracts are unique in that a condition to the obligation of the parties is based upon chance.¹³³ In addition, the contract will likely favor the casino over time.¹³⁴ The Borgata's argument is that chance is the very foundation of a gambling contract, and that anything that is done to shake that foundation, such as advantage play, undermines that contract.

All contracts, including gaming contracts, incorporate a covenant of good faith and fair dealing.¹³⁵ In a gaming contract, the parties' covenant includes an agreement to follow the game's rules and an acknowledgment that the game is based on chance. Like other contracts, it also means that there was no fraud or deceit when entering into the contract.¹³⁶ The argument, then, is that if an advantage player cheats, that would be a breach of contract, and therefore the casino would not need to pay any winnings. But what if the advantage player does not cheat, but rather has an advantage of exceptional skill? Arguably, that would not be a breach of contract.

In general, the law of contracts favors a party in a lesser bargaining position. For example, if a party lacks capacity to contract, he may disaffirm the contract.¹³⁷ In addition, the Uniform Commercial Code protects non-

card shuffler as an integral part of their "edge sorting" scheme, thus converting its use to that of a cheating device." Amended Complaint, *supra* note 7, at 20.

¹³¹ See *Contract*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/contract> [<https://perma.cc/R572-AEHD>] (last visited Mar. 29, 2020).

¹³² See *Adhesion Contract*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/adhesion_contract_\(contract_of_adhesion\)](https://www.law.cornell.edu/wex/adhesion_contract_(contract_of_adhesion)) [<https://perma.cc/ECZ7-JHUD>] (last visited June 8, 2020).

¹³³ See Cabot & Hannum, *supra* note 15. These random events include the roll of the dice in craps or the spin of the wheel in roulette.

¹³⁴ See *id.*

¹³⁵ See *Okmyansky v. Herbalife Int'l of Am., Inc.*, 415 F.3d 154,161 (1st Cir. 2005).

¹³⁶ See Cabot & Hannum, *supra* note 15, at 749 ("The elements of fraudulent inducement are: (1) material misrepresentation made by a party and known to be false; (2) with the intent to cause inducement/reliance; (3) actual inducement causing another party to enter an agreement; (4) justifiable reliance on the misrepresentation; and (5) resulting damages proximately caused by the reliance.").

¹³⁷ See, e.g., *Dodson v. Shrader, Jr.*, 824 S.W.2d 545 (Tenn. 1992) (holding that minor plaintiff can disaffirm an agreement for the purchase of a vehicle); *Hauer v.*

merchants from being taken advantage of by merchants due to the imbalance of negotiating power; this position is backed up by some case law as well, albeit with some level of disagreement.¹³⁸ In the case of a casino and a gambler, certainly the gambler—here, Ivey—has a lesser bargaining position. However, he did bargain for certain arrangements, and the Borgata agreed. Phil Ivey wondered, “If I make a request and the house grants it, then how can that be cheating[?] . . . [T]hat’s me making a request to give myself an advantage you granting it . . . saying it’s OK.”¹³⁹ After a similar incident in 2012 at the Crockfords,¹⁴⁰ Ivey said, “At the time I played at Crockfords, I believed that edge-sorting was a legitimate Advantage Play technique and I believe that more passionately than ever today.”¹⁴¹ Ivey contended that the edge sorting is legitimate gamesmanship and not cheating because it did not involve dishonesty.¹⁴² After all, he used the tools provided by the casino, never touched the cards, and his requests were open and met by the casino. The casino could have refused the requests or stopped

Union State Bank of Wautoma, 532 N.W.2d 456 (Wis. Ct. App. 1995) (holding that bank must void a loan extended to a customer who had suffered brain damage).

¹³⁸ Commonly known as the “battle of the forms,” additional terms proposed by a merchant become a part of a contract absent objection by the other party (or pursuant to two other exceptions), but when that other party is a non-merchant, there must be affirmative consent. U.C.C § 2-207(2)(a)-(c); *See, e.g.*, Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) (“Because plaintiff is not a merchant, additional or different terms contained in the Standard Terms did not become part of the parties’ agreement unless plaintiff expressly agreed to them.”).

¹³⁹ Avirgan, *supra* note 25 (incorporating CBS’s *60 Minutes Sports: Phil Ivey* (CBS television broadcast Oct. 7, 2014)).

¹⁴⁰ In August 2012, Ivey and Sun played punto banco, a variation of baccarat, at Crockfords. They requested a brand of playing cards that had a white circle pattern on the back. In the first round of play, Sun asked the dealer to rotate all of the sevens, eights, and nines. He made progressively larger bets and after two days, had won more than \$10 million. He had requested that the same cards be used throughout. Finally, Crockfords insisted that the cards be changed and Ivey left the casino. Upon review of the surveillance footage, Crockfords discovered the edge sorting play. “Nobody at Crockfords had heard of edge-sorting before” according to the court. The court noted that Ivey took deliberate steps to fix the deck. Derek Hawkins, *What is ‘Edge-Sorting’ and Why Did it Cost a Poker Star \$10 million in Winnings?*, WASHINGTON POST (Oct. 26, 2017, 6:02 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2017/10/26/what-is-edge-sorting-and-why-did-it-cost-a-poker-star-10-million-in-winnings/> [https://perma.cc/5D8L-7TS6].

¹⁴¹ *Id.*

¹⁴² *See id.*

the play at any time.¹⁴³ The *Crockfords* court even acknowledged that Ivey “believed that he wasn’t cheating, and thanked him for his ‘factually frank and truthful evidence.’”¹⁴⁴

By filing a lawsuit, the Borgata tried to go back later and unwind its bargain with Ivey, in which the Borgata had the upper hand, because the gaming did not have the results that the Borgata expected and, it claimed, Ivey was unjustly enriched. However,

[t]he Borgata is in the business of unjustly enriching itself, just as is every other gaming hall in the county. Flashy signs meant to induce gamblers into sucker bets, deceptively simple games with well-masked house advantages and the whole façade of the casino itself—from maze-like infrastructures, to free drinks, to playing chips that exist in large part to help people forget real money is being gambled—are textbook examples of one party (the house) enriching itself at the expense of another party (the player), in circumstances that are far from equitable.¹⁴⁵

This contract was about allocation of risk. The Borgata agreed to Ivey’s requests, as it does with requests related to superstition, because it determined that the risk of complying is worth the profits the casino expected to make.¹⁴⁶ After all, no player, including Ivey, wins every hand that they play. If those lost hands had been the larger bets, the Borgata would not be crying breach. As noted by experts, “casinos alter their protocols to accommodate high rollers at their own risk.”¹⁴⁷ The Borgata allowed Ivey’s requests “only to get Ivey’s business during a time of prolonged stagnation for the Atlantic

¹⁴³ As Maryland Live, a Maryland casino stated, “As a private facility, we reserve the right to refuse service or limit play of any casino customer.” See Barker, *supra* note 89.

¹⁴⁴ Hawkins, *supra* note 140.

¹⁴⁵ Maurice “Mac” VerStandig, *Sorting Out the Law Behind Phil Ivey’s Edge Sorting Debacle at Borgata*, POKER NEWS (Apr. 18, 2014), <https://www.pokernews.com/news/2014/04/sorting-out-the-law-behind-phil-ivey-s-edge-sorting-debacle-18054.htm> [https://perma.cc/SQ96-XQQM].

¹⁴⁶ “[The Borgata] voluntarily chose to grant every single request because it wagered defendant Ivey would lose his multi-million dollar deposits and hopefully more. [The Borgata] only now alleges that *its own game* was illegal because it lost that wager.” Brief of Defendants Ivey and Sun in Support of their Motion to Dismiss Plaintiff’s Amended Complaint Pursuant to F.R.C.P. 12(b)(6), *supra* note 109, at 17.

¹⁴⁷ Maurice “Mac” VerStandig, *Breaking Down the Legality of Cheung Yin Sun’s Edge-Sorting Lawsuit Against Foxwoods*, POKERNEWS (Aug. 18, 2014), <https://www.pokernews.com/news/2014/08/breaking-down-the-legality-of-cheung-yin-sun-s-edge-sorting-19051.htm> [https://perma.cc/QE9N-B222].

City gaming market.”¹⁴⁸ It should not be allowed to later ask the court to save it from its misassessment of the risk.¹⁴⁹

B. *Misrepresentation*

The Borgata claimed that Ivey lied about his reasons for asking for his concessions, asserting that the purpose was to satisfy his superstitions rather than to use an advantage.¹⁵⁰ However, “Ivey and Sun were under . . . no legal duty imposed by the Casino Control Act to explain the true purpose for their requests.”¹⁵¹ In addition, the Borgata argued that “[e]ach of Ivey and Sun’s actions constitutes ‘swindling and cheating’ under N.J.S.A. § 5:12-115(a), which provided that ‘a person is guilty of swindling and cheating if the person purposely or knowingly by any trick . . . or by a fraud or fraudulent scheme . . . wins or attempts to win money or property . . . in connection to casino gambling.’”¹⁵²

After oral arguments, the Third Circuit asked for additional briefing from both sides regarding Section 5:12-115.a. of the New Jersey Revised Statutes (N.J.S.A.) Title 5 – Amusements, Public Exhibitions and Meetings.¹⁵³ That statute reads as follows:

115. Cheating Games and Devices in a Licensed Casino; Penalty.
a. It shall be unlawful:

¹⁴⁸ Pempus, *supra* note 113.

¹⁴⁹ “[T]he characteristic and traditional response of our legal system to cases of mistaken and frustrated contracts is neither to relieve the disadvantaged party nor to assign the loss to the superior risk bearer, but to leave things alone.” Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 HASTINGS L.J. 1, 5 (1991).

¹⁵⁰ “Ivey misrepresented his motive, intention and purpose and did not communicate the true reason for his requests to Borgata at any relevant time. Ivey’s true motive, intention, and purpose in negotiating these playing arrangements was to create a situation in which he could surreptitiously manipulate what he knew to be a defect in the playing cards in order to gain an unfair advantage over Borgata.” Amended Complaint, *supra* note 7, at 6.

¹⁵¹ Brief of Defendants Ivey and Sun in Support of their Motion to Dismiss Plaintiff’s Amended Complaint Pursuant to F.R.C.P. 12(b)(6), *supra* note 109, at 18.

¹⁵² Amended Complaint, *supra* note 7, at 21.

¹⁵³ See Valerie Cross, *Ivey’s Attorney Throws Court a Curve in the Borgata Edge-Sorting Appeal*, POKERNEWS.COM (Oct. 1, 2019), <https://www.pokernews.com/news/2019/10/iveys-attorney-throws-court-a-curve-borgata-appeal-35564.htm> [<https://perma.cc/T64F-V3WG>].

(1) Knowingly to conduct, carry on, operate, deal or allow to be conducted, carried on, operated or dealt any cheating or thieving game or device; or

(2) Knowingly to deal, conduct, carry on, operate or expose for play any game or games played with cards, dice or any mechanical device, or any combination of games or devices, which have in any manner been marked or tampered with, or placed in a condition, or operated in a manner, the result of which tends to deceive the public or tends to alter the normal random selection of characteristics or the normal chance of the game which could determine or alter the result of the game.¹⁵⁴

C. Unfairness

The Borgata asserted that it had every expectation that the games played at its casino would be fair, arguing that it had followed New Jersey law and DGE rules and regulations to provide fair odds to its patrons.¹⁵⁵ However, “[b]ecause of Ivey and Sun’s misconduct, unfair play and the use of their influence as “high rollers” to deceive Borgata, Ivey and Sun succeeded in manipulating the Baccarat game to deprive the game of its essential element of chance.”¹⁵⁶ The Borgata showed its cards, though, when it admitted that it was not really concerned about fair odds for players, but rather that Ivey and Sun’s “misconduct, unfair play and deception” interfered with “the fairness, integrity and vitality of the casino operation in process pursuant to N.J.S.A. §5:12-100(e).”¹⁵⁷

The Borgata further argued that Section 5:12-115.a.(2) applies to Sun’s manipulation of the cards, which altered “the normal chance of the game.”¹⁵⁸ For support, the Borgata points to *Houck v. Ferrari*,¹⁵⁹ where the court cited the same statute to hold that hole-carding¹⁶⁰ altered the normal chance of the game.¹⁶¹ Ivey argued that *Doug Grant, Inc. v. Greate Bay Casino Corp.*¹⁶² supported his position that since “the rules of the game are being followed, then the ‘normal chance and randomness of the game cannot be

¹⁵⁴ N.J. STAT. ANN. §5:12-115(a) (West 2011).

¹⁵⁵ Amended Complaint, *supra* note 7, at 19.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Cross, *supra* note 153; N.J. STAT. ANN. §5:12-115(a)(2) (West 2011).

¹⁵⁹ 57 F. Supp. 3d 377 (D.N.J. 2014).

¹⁶⁰ See Jacobson, *supra* note 75.

¹⁶¹ See *Houck*, 57 F. Supp. 3d at 384.

¹⁶² 3 F. Supp. 2d 518 (D.N.J. 1998)

manipulated.’”¹⁶³ He followed the rules of baccarat and had agreed in advance with the casino about the specific procedures. Ivey further argued that the Borgata’s employees followed Sun’s requests regarding the turning and arranging of the cards and were therefore complicit in any modification of the odds to Ivey’s advantage. Ivey argued that he played under the supervision of the casino employees, according to the casino rules, and therefore could not be liable for manipulating the odds.¹⁶⁴

Mac VerStandig, an expert gaming attorney, wondered “how a casino’s own automatic shuffler can be deemed a ‘cheating device’ without making a mockery of either the gaming industry, the legal profession, or both.”¹⁶⁵ In addition, if asking for an automatic shuffler is a “trick,” then the casino’s efforts to confuse patrons with lights and sound should also be considered a “trick” and therefore in violation of the act.

The Third Circuit asked the DGE and the Casino Control Commission (the “CCC”) to provide amicus briefs about the case to the court, however, the CCC declined to do so and the DGE submitted an insubstantial four-page response.¹⁶⁶ The DGE often serves as both mediator and arbitrator in disputes between gamblers and casinos but it steered clear of this dispute.

Signaling some hope to Ivey, presiding Third Circuit Judge Marjorie Rendell noted during the appellate court arguments that the Borgata agreed to the terms of play in advance, stating, “Nothing was hidden from you [the Borgata]. These cards weren’t marked—here you had equal access.”¹⁶⁷ In other words, the Borgata did not assert any unfairness before the games were played, but instead only after it lost. The court ordered the parties to mediation with the Third Circuit mediator, in which they participated for four months and resolved their disputes.¹⁶⁸ Of course the terms of the settlement are confidential, however, rumors circulated that the settlement did not favor the Borgata.¹⁶⁹ “It has been assumed that Borgata had agreed to the

¹⁶³ Cross, *supra* note 153.

¹⁶⁴ *See id.*

¹⁶⁵ VerStandig, *supra* note 145.

¹⁶⁶ *See* Mo Nuwwarah, *Ivey Versus Borgata Continues with Legal Proceedings*, POKER NEWS (Sept. 24, 2019), <https://www.pokernews.com/news/2019/09/ivey-borgata-continues-legal-proceedings-35507.htm> [<https://perma.cc/Z42F-GM9A>].

¹⁶⁷ *Id.*

¹⁶⁸ *See* Defendants’ Brief in Support of Motion for Relief from Judgments, Orders and Opinions Pursuant to F.R.C.P. 60(b)(5) and (6) at 2, Marina District Development Co., LLC v. Ivey, No. 1:14-cv-02283 (D.N.J. July 16, 2020).

¹⁶⁹ *See* Adrian Sterne, *Borgata Finally Settles \$10M Edge-Sorting Case with Phil Ivey*, TOP 10 POKER SITES (July 10, 2020), <https://www.top10pokersites.net/news/borgata-casino-finally-settles-10m-edge-sorting-case-with-phil-ivey> [<https://perma.cc/LTA5-AGYX>]; *Phil Ivey Settles Edge Sorting Lawsuit with the Borgata*, CASINO NEWS

settlement because if they lost the appeal, it could set a dangerous precedent for future cheating or advantage casino cases involving parent company MGM Resorts.”¹⁷⁰ Given Judge Rendell’s remarks, the Borgata likely lost confidence in its case.

D. *The Borgata’s Advantage*

Before the Borgata cried about unfairness due to an advantage, it should have considered its own advantage and the unfairness to the players. Part of a casino’s assessment of its risk is based upon its own advantage. Casinos make money based on a formula of total wagers multiplied by the house edge.¹⁷¹ If a player is betting \$100,000 on each hand, and a casino has even a 1% edge, it is making \$1,000 on every hand. Having an edge is an advantage, just like excessive noise and alcohol is an advantage to the casinos. If edge sorting is banned, will alcohol be next?

Casinos have access to equipment to track gameplay and make adjustments when play favors the player.¹⁷² While dealers can also be taught to count cards and, when the deck favors the player, to shuffle the cards,¹⁷³ a system such as the MP21 by MindPlay “maintains a level of vigilance that no human can match.”¹⁷⁴ It provides information to the casino about which players are doing well and when the house may benefit from a card shuffle, as well as those who are losing and should be offered more drinks and comps to keep them happy.¹⁷⁵ “Allowing a casino to use superior technology, par-

DAILY (July 9, 2020, 9:57 AM), <https://www.casinonewsdaily.com/2020/07/09/phil-ivey-settles-edge-sorting-lawsuit-with-the-borgata/> [<https://perma.cc/Y8NY-G8Q3>] (“According to legal experts, the settlement is not a surprising outcome, particularly after a prominent appellate attorney said that Ivey was a slight favorite to prevail in the appeal.”).

¹⁷⁰ Sterne, *supra* note 169.

¹⁷¹ See Avirgan, *supra* note 25.

¹⁷² See Joshua Tompkins, *For the Pit Boss, Some Extra Electronic Eyes*, N.Y. TIMES (Mar. 25, 2004) <https://www.nytimes.com/2004/03/25/technology/for-the-pit-boss-some-extra-electronic-eyes.html> [<https://perma.cc/PM3Y-EZ8E>] (“[The MP21 by MindPlay] uses an array of 14 concealed cameras as well as image-recognition software to capture and count all wagers. A special shuffling shoe records the cards dealt. Each player’s statistics are recorded through a casino-issued identity card that a dealer swipes at the table.”). TableLink, by Mikohn Gaming, uses RFID tags embedded in casino betting chips to track wagers. *See id.*

¹⁷³ See Cabot & Hannum, *supra* note 15, at 752.

¹⁷⁴ Tompkins, *supra* note 172.

¹⁷⁵ In addition, the MP21 system can monitor the dealers, noting their accuracy as well as occupancy (players acquired or lost during a table shift). *See id.*; *see also* Arnold Snyder, *Bye Bye Boss: The MindPlay Table Games Management System and Ca-*

ticularly where the player is prohibited from using a computer to assist in his play, can raise fundamental issues regarding the honesty and fairness of the games.”¹⁷⁶ Again, if players are not entitled to use advantage play, why are the casinos?¹⁷⁷ Some have “suggested the sensible compromise that preferential shuffling might be allowed, but only if casinos post signs alerting players to the policy.”¹⁷⁸ In other words, the casino would need to notify players of its advantage. Is that not just what Ivey did with the Borgata? He asked for specific concessions in advance, the only reason for which would be an advantage. The Borgata knew he would have an advantage and agreed to it in advance.

It appears that the legislature, at least in New Jersey, is on the side of the taxpaying casino, as the court noted that “the clearly expressed intention of the New Jersey Legislature to ensure the financial viability of the casino industry provides ample justification for the CCC regulations and practices” that permit casinos to shuffle-at-will, selectively set betting limits, count cards to determine when the cards should be reshuffled, and share information about identified card counters with other casinos.¹⁷⁹

Ivey argued that the Borgata utilizes its own advantages by employing attractive cocktail waitresses and offering free cocktails during play.¹⁸⁰ “Everyone knows that alcohol impairs your judgment, and they offer that and

sino Surveillance, BLACKJACK FORUM (Spring 2003), available at <http://www.blackjackforumonline.com/content/Mindplay.htm> [<https://perma.cc/S676-SQHE>].

¹⁷⁶ Cabot & Hannum, *supra* note 15, at 752.

¹⁷⁷ Computers and programs that can predict blackjack strategies can be as small as a pack of cigarettes and strapped to a player’s leg. While initially legal because gambling laws did not anticipate the invention of such devices, regulators rushed to outlaw them — for gamblers. See Schnell-Davis, *supra* note 5, at 301; see also, N.J. Admin. Code § 19:47-8.1 (1983) (repealed 2012). On the other hand, casinos have been permitted to use such devices. When they detect that the odds are shifting in favor of the players, the casino orders a shuffle. See PETER A. GRIFFIN, *THE THEORY OF BLACKJACK* 135-38 (6th ed. 1999); see generally BILL ZENDER, *HOW TO DETECT CASINO CHEATING AT BLACKJACK* 131-44 (1999).

¹⁷⁸ Schnell-Davis, *supra* note 5, at 332.

¹⁷⁹ *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 3 F. Supp. 2d 518, 539 (D.N.J. 1998). “[T]he manner in which the casinos discriminately employed the ‘shuffling-at-will’ countermeasure is not outlawed by the Casino Control Act.” Brief of Defendants Ivey and Sun in Support of their Motion to Dismiss Plaintiff’s Amended Complaint Pursuant to F.R.C.P. 12(b)(6), *supra* note 109, at 14.

¹⁸⁰ See Chad Holloway, *Highlights from Ivey/Borgata Deposition: Booze, Pretty Cocktail Waitresses and More*, POKER NEWS (Aug. 27, 2015), <https://www.pokernews.com/news/2015/08/highlights-from-phil-ivey-borgata-deposition-22634.htm> [<https://perma.cc/T6UG-FGEQ>] (quoting from Ivey’s deposition).

they have the pretty cocktail waitresses and they're all very flirty. They're talking to you, you know. I got quite a few of their numbers."¹⁸¹ One player went so far as to sue the Downtown Grand casino in Las Vegas after he lost \$500,000 playing while he was "blackout intoxicated," arguing that the casino should not have continued to serve him drinks and loan him money to increase his losses.¹⁸²

When Ivey's motion to dismiss was denied, the judge recognized that:

Ivey and Sun argue that Borgata willingly agreed to all of their requests and provide all the implements of gambling, and that all of those requests, along with their observation of the patterns on the playing cards, were lawful. Ivey and Sun also note that even though Borgata wishes to cast itself as a victim of deceptive intentions, the 'essential mission of Borgata's casino operation is to encourage patrons to lose money by orchestrating a plethora of deceptive practices, such as loud noises and flashing lights on slot machines, hiding the clocks, making exit signs almost impossible to find, having cocktail waitresses wear revealing clothing, and comping copious amounts of alcohol to 'loosen up' their patrons'. There is no doubt that much of the defendants' characterization of the casino milieu is accurate, as tangential a defense as it may be.¹⁸³

IV. IMPLICATIONS

"In terms of public sentiment, Ivey has long been the clear winner in the case."¹⁸⁴ One of the foundations of the heavily regulated gambling industry is to "assure that players are paid if they win,"¹⁸⁵ so casinos should not be able to pull back those winnings on a hypocritical claim of unfair advantage. The settlement may offer confidence to gamblers that their casino contracts will be enforced. In other words, when they place a bet, they can rely on the casino to pay them if they win. However, gamblers can also expect that the casinos will put tighter monitoring procedures in place to

¹⁸¹ *Id.*

¹⁸² See Laura Stampler, *Man Sues Casino for Letting him Lose \$500K When he was 'Blackout' Drunk*, TIME (Mar. 6, 2014, 11:29 AM), <https://time.com/14033/man-sues-casino-for-letting-him-lose-500k-when-he-was-blackout-drunk/> [https://perma.cc/G4MD-W4CS].

¹⁸³ Brian Pempus, *Judge Denies Poker Pro Phil Ivey's Request to Dismiss \$9.6 Million Borgata Lawsuit*, CARD PLAYER (Mar. 23, 2015), <https://www.cardplayer.com/poker-news/18578-judge-denies-poker-pro-phil-ivey-s-request-to-dismiss-9-6-million-borgata-lawsuit> [https://perma.cc/X3LJ-FYDE].

¹⁸⁴ Pempus, *supra* note 113.

¹⁸⁵ Cabot & Hannum, *supra* note 15 (citing ROBERT C. HANNUM & ANTHONY N. CABOT, PRACTICAL CASINO MATH 206 (2d ed. 2005)).

ensure that winnings are short-lived. Technology like MindPlay will likely be more widespread.¹⁸⁶ Casinos without technology can use old-fashioned methods of interfering with winnings, like ordering shuffles after five wins, for example.¹⁸⁷

In addition, for the whales, their ability to negotiate personal terms may decrease given the lessons learned by the Borgata and other casinos. Casinos will likely no longer permit whales to choose their cards or dealers, nor control the manner in which the cards are shuffled. Even if an automatic shuffler is used, the casino will likely insist upon the right to add random manual shuffles as it sees fit. It will be interesting to see the degree to which the casinos develop a list of gambling policies and procedures to be provided to players, particularly whales, in order for the casinos to not only reduce advantage play, but also decrease a player's ability to argue, as Ivey did, that the player was unaware that advantage play was not permitted.¹⁸⁸

However, the settlement is not all good news for players. Casinos will continue to have the power to use their own advantages to prevent players from winning¹⁸⁹ and prohibit players from using advantages.¹⁹⁰ They will continue to argue that, as private establishments, they are free to create their own rules.¹⁹¹ In addition, New Jersey casinos will have six years to bring a claim against a gambler, rather than the six months provided under the gaming statute.¹⁹² That is far too long a period of time for casinos to have to nurse their wounds from a major loss, repeatedly study security video of game play, and create an argument to go after the winning gambler.

As for card manufacturers like Gemaco, they probably will be held to a higher standard of symmetry in their cards, likely limiting designs on the card backs. After all, the designs on the cards attached in Appendices A and B do not add value and could easily be changed. For example, cards could have the casino logo centered on a plain background to prevent edge sorting. It would be an easy resolution to protect both the casinos and the card manufacturers.

It is important to note, though, that it is not good for the gaming industry to continue to have these disputes. They are expensive for everyone, draw bad publicity for the casino, and damage the player's image. To prevent that, clarity is needed. Since advantage play is often governed by the

¹⁸⁶ See Tompkins, *supra* note 172.

¹⁸⁷ See Cabot & Hannum, *supra* note 15, at 710-11.

¹⁸⁸ See O'Sullivan, *supra* note 111.

¹⁸⁹ See *supra* Section III.C.

¹⁹⁰ See *supra* Section II.E.

¹⁹¹ See Barker, *supra* note 89.

¹⁹² See N.J. STAT. ANN. § 2A:14-1.

policies of the casino rather than gaming statutes,¹⁹³ those policies should be clearly stated and readily accessible by the players. In the case of a whale, those policies could easily be delivered to the whale upon arrival at the casino. It might be more challenging with the average gambler. For example, the policies could be on display in the room of the casino hotel for the guest to peruse, but many gamblers do not stay at the hotel where they gamble. How would those policies be conveyed to those gamblers? A sign at the entrance would not likely be successful, as there are multiple entrances at most casinos, as well as crowds who might block the signs. From a marketing perspective, it certainly would not be welcoming to have a list of prohibitions at the entrance. However, this might be a case where technology would be helpful. Most casinos have moved to some sort of players' club, utilizing club cards to track gaming at slot machines as well as tables.¹⁹⁴ Those cards are often connected to an app where a player can track his statistics as well as his account. The policies and procedures of the casino, including those regarding advantage play, could be contained there, and require acceptance by the player before the card would be activated.¹⁹⁵

Ultimately, though, it would be best for both players and casinos if gaming laws were revised to specifically address advantage play. This idea that the casino has the right to set its own policies is no longer manageable. For example, in Las Vegas, there are 136 casinos as of the writing of this

¹⁹³ See Cabot & Hannum, *supra* note 15.

¹⁹⁴ For example, MGM Resorts, the parent of the Borgata, offers M life Rewards, allowing members to earn benefits and rewards while gaming. See *M life Rewards Tier Benefits*, MGM RESORTS, <https://www.mgmresorts.com/en/mlife-rewards-program/tiers.html> [<https://perma.cc/Z82C-JV6H>] (last visited July 9, 2020); see also Mark Legg, *The Future of the Gaming Industry: Challenges the Next Decade Holds for Casinos*, BOSTON HOSPITALITY REVIEW (Feb. 13, 2020), <https://www.bu.edu/bhr/2020/02/13/the-future-of-the-gaming-industry-challenges-the-next-decade-holds-for-casinos> [<https://perma.cc/5B9T-XGTC>] ("Casinos now collect more information on their patrons than almost any other industry.")

¹⁹⁵ Note that in order for courts to find that a binding agreement is created by clicking on "I agree," reasonable notice and opportunity to review will be considered. Best practices suggest that a so-called clickwrap agreement should "1. Conspicuously present the [terms of service "TOS"] to the user *prior* to any payment. . . ; 2. Allow the user to easily read and navigate *all* of the terms. . . ; 3. Provide an opportunity to print, and/or save a copy of, the terms; 4. Offer the user the option to decline as prominently and by the same method as the option to agree; and 5. Ensure the TOS is easy to locate online *after* the user agrees." Ed Bayley, *The Clicks that Bind: Ways Users "Agree" to Online Terms of Service*, EFF (Nov. 16, 2009), <https://www.eff.org/wp/clicks-bind-ways-users-agree-online-terms-service> [<https://perma.cc/NQU7-NW2W>].

article.¹⁹⁶ How is one player expected to know not only the Nevada gaming statutes but also the policies of 136 casinos? And, in most cases, company policies include a savings clause, stating that the policies are subject to change at any time. So even if a gambler did research a casino's policies in advance, the casino could change it that day, most likely driven by the winning streak of a player.

In order to revise gaming statutes, decisions would first need to be made regarding which forms of advantage gaming are illegal, and that if a method is not prohibited by statute, then a casino must permit it. That is impractical, and even if it were possible in one state, gamblers would still face the challenge of knowing the statute of each state, and for that matter, international gaming statutes.¹⁹⁷

Given the timing of this article, there must at least be a mention of the uncertainty of the future of the gambling industry in general, given the coronavirus.¹⁹⁸ The worldwide travel shutdown has impacted the hospitality and gambling industry, both in terms of revenue¹⁹⁹ and in the manner in which it operates. Once casinos are able to reopen, they will likely be conflicted by the urge to attract gamblers, particularly whales, yet guard against losses.

¹⁹⁶ See Steve Beauregard, *How Many Casinos are in Las Vegas?*, GAMBOOOL, <https://gamboool.com/how-many-casinos-are-in-las-vegas> [https://perma.cc/M9AS-WMZ9] (noting that as of January 1, 2020, according to the Nevada State Gaming Control Board, there are 222 casinos in Clark County, where Las Vegas, Primm, Mesquite, and Laughlin, all gambling destinations, are located) (last visited Oct. 18, 2020). "57% of the state's gambling money comes from the Las Vegas Strip." *Id.*

¹⁹⁷ Recall that Ivey and Sun used the edge sorting technique in both the New Jersey and London. See Hawkins, *supra* note 140.

¹⁹⁸ The coronavirus is named SARS-CoV-2, nicknamed COVID-19. See *Coronavirus Disease 2019 (COVID-19) Situation Summary*, CDC (Mar. 3, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/summary.html> [https://perma.cc/5SHR-NBAE].

¹⁹⁹ See Travis Hoiium, *3 Top Gambling Stocks to Watch in July*, MOTLEY FOOL (July 9, 2020, 9:15 AM), <https://www.fool.com/investing/2020/07/09/3-top-gambling-stocks-to-watch-in-july.aspx> [https://perma.cc/92EY-N4NK] ("Macau was the biggest gambling market in the world by a wide margin before COVID-19 hit, but it's seen gambling revenue decline over 93% year over year each of the last three months.").

V. CONCLUSION

After the 2016 ruling²⁰⁰ against Ivey, the Borgata searched for Ivey's assets in New Jersey to seize to satisfy the \$10 million judgment.²⁰¹ Finding none there, the Borgata looked to Las Vegas.²⁰² The Borgata garnished Ivey's winnings, directing the World Series of Poker to withhold any winnings from the final table of the \$50,000 Poker Players Championship.²⁰³ Ivey won \$124,410, which the WSOP paid to the U.S. Marshals to be held until the matter is resolved.²⁰⁴ On August 30, 2019, Illya Trincher and Dan Cates filed an objection to the Writ of Execution, requesting the return of \$87,205 owned by them, as they backed Ivey's entry into the tournament and those funds belong to them.²⁰⁵ Ivey claims that the Borgata's lawyer, Jeremy Klausner, did not follow protocol with respect to the writ of execution that led to Ivey's frozen winnings as he is not licensed in Nevada and did not partner with local licensed counsel as required.²⁰⁶ Since the settlement is confidential, we have no way of knowing whether seized winnings were returned to Ivey.

Ivey and Sun no longer play together, although Sun successfully won at a casino in Macau after the Borgata incident.²⁰⁷ She continues to play in Asia

²⁰⁰ See *Marina Dist. Dev. Co., LLC v. Ivey*, 223 F. Supp. 3d 216 (D.N.J. 2016) (holding that Ivey had breached the contract and his winnings would be returned to the Borgata).

²⁰¹ See Fiorillo, *supra* note 6.

²⁰² See *id.*

²⁰³ See Mo Nuwwarah, *Report: Borgata Seeking Phil Ivey's WSOP Winnings Plus \$214K Interest*, POKER NEWS (July 23, 2019), <https://www.pokernews.com/news/2019/07/borgata-seeking-phil-ivey-wsop-winnings-interest-34936.htm> [https://perma.cc/N62N-LL5M].

²⁰⁴ See Matthew Pitt, *Ivey Borgata Case Takes Another Turn as Cates and Trincher File Objection*, POKER NEWS (Sept. 10, 2019), <https://www.pokernews.com/news/2019/09/ivey-borgata-case-cates-trincher-35370.htm> [https://perma.cc/2MH4-HCUX].

²⁰⁵ See *More Headwinds for Borgata in Phil Ivey Nevada Garnishment*, FLUSHDRAW (Sept. 18, 2019), <https://www.flushdraw.net/news/more-headwinds-for-borgata-in-phil-ivey-nevada-garnishment/> [https://perma.cc/8Z47-JALD]; see also Pitt, *supra* note 204 (noting that according to the staking agreement with Ivey, Trincher and Cates were entitled to recoup the \$50,000 buy in that they fronted plus receive 50% of Ivey's winnings. Ivey won \$124,410, less the \$50,000 buy-in, equals \$74,410, divided by 2 equals \$37,205; add that back to the buy-in, and Trincher and Cates are entitled to \$87,205).

²⁰⁶ See Mo Nuwwarah, *Ivey Versus Borgata Continues with Legal Proceedings*, POKER NEWS (Sept. 24, 2019), <https://www.pokernews.com/news/2019/09/ivey-borgata-continues-legal-proceedings-35507.htm> [https://perma.cc/Z42F-GM9A].

²⁰⁷ See Kaplan, *supra* note 26.

and is even teaching her winning techniques to others.²⁰⁸ She plans to change her look so that she can play again in the United States unnoticed.²⁰⁹ While Ivey is too well known to play in the United States unnoticed, the settlement will likely pave the way for him to return to United States gambling, although probably not with Sun as a partner. Hollywood has taken an interest in the story, and Ivanhoe Pictures is set to produce *The Baccarat Queen*,²¹⁰ the story of Sun based on Michael Kaplan's 2017 article "The Baccarat Machine" that appeared in *Cigar Aficionado* and is cited herein.²¹¹ It will be interesting to see how the settlement impacts the gaming industry, especially since it has been devastated by the coronavirus. Will the public or the legislature have any interest in further regulating gaming, or is the current objective simply to get casinos open, dealers working, and gamblers spending money?

²⁰⁸ See *id.*

²⁰⁹ See *id.* (recognizing Sun is banned from many casinos on the Las Vegas strip, but can still play downtown where the limits are lower).

²¹⁰ See Amanda N'Duka, *Ivanhoe Pictures, Sharp Independent Pictures to Produce Film About Successful Female Baccarat Player*, DEADLINE (Feb. 14, 2019, 2:58 PM), <https://deadline.com/2019/02/ivanhoe-pictures-sharp-independent-pictures-the-baccarat-queen-movie-1202557919/> [<https://perma.cc/932D-GJX8>].

²¹¹ See Kaplan, *supra* note 26.

APPENDIX²¹² A

"Large Design" – More of the circles are visible on this edge.

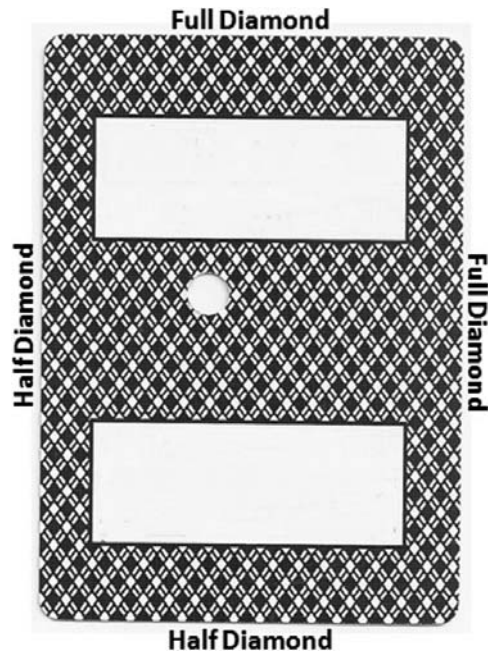
"Small Design" – Less of the circles are visible on this edge.



²¹² Amended Complaint, *supra* note 7, at 52.

APPENDIX B²¹³

Below is another example of an asymmetrical card.



²¹³ Jacobson, *supra* note 75.

