UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SKILLZ PLATFORM INC., a Delaware corporation,	:
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Plaintiff,	:
	: 1:24-cv-01646-DLC
-against-	:
	:
PAPAYA GAMING, LTD., a foreign	:
corporation; and PAPAYA GAMING, INC., a	:
Delaware corporation,	:
	:
Defendants.	:

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REPLY MEMORANDUM OF LAW IN SUPPORT OF PAPAYA GAMING, LTD.'S
AND PAPAYA GAMING, INC.'S MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT[1]

Skillz's opposition brief confirms that its case rests on premises and inferential leaps that are conclusory, and that the Complaint, in many instances, flatly contradicts.

First, Skillz obscures the fact that the Complaint itself wholly undercuts the central premise of Skillz's deception theory by expressly recognizing that "Papaya does not actually deny or refute customers' accusations that it deploys bots" (Compl. ¶ 72)—a critical statement that Skillz *falsely* contends is newly raised in Papaya's Motion and "outside the four corners of the Complaint." (Opp. at 1.)

Second, Skillz continues to presume that the alleged use of bots automatically renders false Papaya's statements that its games are fair and skill-based, yet squarely contradicts itself by acknowledging both that "by using bots, Papaya can *infinitely increase the number of similarly-skilled 'opponents'* that a player can be matched against" (*id.* at 5), and that Papaya can "program its bots to compete at various skill levels" (*id.* at 16 n.5). Notwithstanding Skillz's concessions, it seeks to improperly shift the burden to Papaya to demonstrate how using bots would not change the skill-based nature of its games. But that is not the law. Skillz bears the burden to plausibly allege facts supporting its claims. Worse yet, Skillz engages in a double standard by recognizing that games on its platform can use bots to "ensur[e] gameplay fairness." (*Id.* at 25.)

Third, Skillz continues to base its claims of deception on anonymous, unsubstantiated online posts that purportedly suggest customer "suspicion" but (i) do not point to any advertising statements Papaya made, let alone statements players relied on, (ii) simply speculate about

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[1]   Papaya's opening brief (ECF No. 28) is referred to as the "**Motion**" and cited as "**Mot.**" Skillz's opposition brief (ECF No. 35) is cited as "**Opp.**" Capitalized defined terms have the same meaning as set forth in the Motion, and all emphasis is added unless otherwise noted.

Papaya's conduct based on the posters' frustrations that they did not win more often, and (iii)

cannot form the basis of plausible allegations of deception or harm, because Skillz faces the

same accusations even though it disputes the "authenticity" of those posts and insists that it

"does not sponsor any bots in cash games on its platform." (*Id.* at 24-25.)

Fourth, Skillz fails to articulate any legitimate basis for its argument that it is "directly

injur[ed]" merely because the parties are alleged to be "direct competitor[s]." (*Id*. at 2.) Skillz

ignores that the Complaint itself recognizes the other competitors in the field and identifies

various other reasons why players may prefer Papaya's games to those on Skillz's platform.

It is telling that the first paragraph of the opposition brief resorts to implying that the

Court should rely on a ruling in a different case in a different court against a different company

(AviaGames), that made different statements to players, in order to suggest an inference of

"fraud" by Papaya. (*Id.* at 1; *see also id.* at 13 n.4.) That case has no bearing on this dispute and

cannot be used to circumvent Skillz's burden to meet applicable pleading standards. Even so,

Skillz mischaracterizes the cited decision, which involved a *discovery dispute* and did *not* "[find]

that [AviaGames'] lies to customers . . . constitute[d] fraud." (*Id*. at 1.) *See Skillz Platform Inc.*

v. AviaGames Inc., No. 21-cv-02436, 2023 WL 8040871, at *5-6 (N.D. Cal. Nov. 20, 2023).

<u>**ARGUMENT**</u>

I.   **SKILLZ FAILS TO IDENTIFY ANY PLAUSIBLE SUPPORT SHOWING THAT PAPAYA MADE DECEPTIVE STATEMENTS ABOUT BOT USAGE**

A.   **The Opposition Ignores the Fact that the Complaint Itself <u>Concedes That Papaya Has Not Denied or Refuted Bot Usage</u>**

As highlighted multiple times in the Motion, Skillz's Complaint expressly alleges that

"Papaya does not actually deny or refute customers' accusations that it deploys bots." (Mot. at 1,

7, 10 (quoting and/or citing Compl. ¶ 72).) Faced with this critical admission which wholly

undercuts Skillz's theory that players are deceived by Papaya about bot usage, Skillz pretends

that the allegation in its pleading does not exist. Indeed, on the very first page of its opposition brief, Skillz wrongly asserts that the representation is "outside the four corners of the Complaint." (Opp. at 1.) Skillz may now regret including Paragraph 72 in the Complaint, but it cannot simply wish its own allegations away in the hopes of preserving its causes of action.

B.   Historical Bot Usage Is Neither Disputed at This Stage, Nor Dispositive

Skillz baldly proclaims that not disputing bot usage at this stage "is tantamount to Papaya confessing" that its ads have been deceptive (*id.* at 1) and that bot use precludes "fair" and "skill-based" play. That is a non sequitur. Regardless, Papaya's point is that the Complaint fails to state a claim against Papaya for multiple reasons *even if* the mere allegation of bot use is accepted as true for purposes of the Motion.

Equally misplaced and of no moment here are Skillz's criticisms of the independently prepared expert certification verifying that bots are not currently used in Papaya games (ECF No. 35-1), and of Papaya's attendant representations to counsel and the Court (which were, and are, true) that Papaya's games presently feature only human opponents. Papaya never represented that the initial independent certification would address anything other than the current state of Papaya games. And unlike Skillz's representations about games on its platform, Papaya's expert certification covers *all* of the non-tutorial games on Papaya's platforms, not just cash games.

Regardless, there is no indication that Skillz has made any effort to demonstrate the continued use of bots or the alleged impact thereof (nor would such efforts be fruitful, as Papaya's certification is accurate). Accordingly, Skillz is left with only bare and deficient allegations in its pleading about purported deception.

C.   The Opposition Concedes Games with Bots Can Still Be Fair and Skill-Based

Stripping the rhetoric away reveals Skillz's case as one built on the shaky foundation of conjecture that Papaya's alleged bot use *de facto* renders false any statements that Papaya's

games are "fair" and "skill-based." (*See* Opp. at 10-14.) But Skillz's opposition brief squarely

contradicts this argument, by admitting that "by using bots, Papaya can ***infinitely increase the***

number of similarly-skilled 'opponents' that a player can be matched against" (*id*. at 5), and that

Papaya has the "ability to program its bots to compete at various skill levels" (*id.* at 16 n.5).

Skillz also admits that it permits developers of games on its own platform to implement "bots"

that "operate[] as a neutral opponent," yet claims that such use of bots on its own platform

"ensur[es] gameplay fairness." (*Id.* at 25 & n.8.) These positions are incongruous with Skillz's

assertion that Papaya's alleged bot use automatically renders Papaya's games not fair or skill-

based, and highlights the implausibility of Skillz's blanket allegations.

Perhaps recognizing the Complaint's inadequacies, Skillz attempts to shift the burden to

Papaya to prove that using bots is consistent with skill-based and fair play. But there is no basis

for such burden shifting. Skillz must plead plausible facts supporting a conclusion that using bots

in Papaya's games renders them no longer skill-based, and Skillz's mere conclusory statements

that bots are not skill-based, and not fair, do not satisfy its burden to allege facts that "allow[] the

court to draw the reasonable inference that the defendant is liable for the misconduct alleged."

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

> **D.   The Opposition Confirms that Skillz's Case Rests on**
> **Anonymous Online Posts that Neither Are Reliable Nor**
> **<u>Would Demonstrate Any Deception Even If They Could Be Considered</u>**

As detailed in the Motion (*see* Mot. at 13-15), Skillz's allegations of deceit rely solely on

unsubstantiated and unverifiable internet posts. Skillz doubles down on those posts in its

opposition, asserting that they reveal "confusion experienced by vocal and disappointed Papaya

players." (*Id*. at 9, 16-17.) But Skillz has done nothing to confirm that actual Papaya players

made these posts. Nor has it identified any nexus between the "disappoint[ment]" expressed in

these reviews and any statement Papaya made. Indeed, the posts *never* suggest any such

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reliance.[2] Skillz therefore is forced to concede that these purported player grievances are based not on anything Papaya actually said, but are only based on the purported players' subjective expectations or experience using Papaya's platform. (*Id*. at 9.)

For example, while one post suggests a purported belief that the player was "suppose[d] to be playing against other people," the post does not state the source of that belief, let alone any specific marketing by Papaya to give that impression. (*Id.* at 17 (alteration in original) (citation omitted).) Another post states that "they claim this is a skill based game . . . [h]owever, there is no way to increase your skill level," yet this post does not mention bots at all, it is unclear what is meant by "skill level," and not even Skillz suggests that Papaya players cannot increase their skill level through playing Papaya's games.[3] (*Id.* at 6 (citation omitted).)

Skillz admits that allegations of consumer confusion need to "offer facts to support that claim" or "specific customer reviews that evidence confusion" to plausibly allege that consumers were confused. (*Id.* at 16 (citations omitted).) But as the above examples demonstrate, Skillz cannot meet its own standard. In fact, Skillz's references are the sort of "conclusory allegations . . . masquerading as factual conclusions" that will "not suffice to [defeat] a motion to

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[2] Skillz also fails to address Papaya's argument that players could not expect to win Papaya tournaments at high rates given the efforts to match players of equal skill levels; indeed, and as highlighted in the Motion (*see* Mot. at 14), in a multi-player tournament that successfully matches players by skill, entrants would be expected to lose the majority of their games.

[3] Skillz continues to assert that references to matchmaking between "players," "others," and "individuals" in Papaya's Terms of Use and other documentation must mean, to consumers, that players will *only* be matched with human players. (*Id*. at 11, 14-17.) Skillz, however, can point to no allegation plausibly indicating that Papaya players have ever seen those particular references, let alone interpreted them in the manner that Skillz suggests. Skillz also refers to alleged statements that Papaya does not have a "vested interest," but as already explained (*see* Mot. at 14), the Complaint lacks any allegations indicating that players do not understand that Papaya makes money from operating tournaments, let alone that any misunderstanding in that regard was material to their decisions.

dismiss." *See Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 337 (2d Cir. 2006) (citation omitted).

Nor does the case law Skillz cites establish that anonymous posts are sufficient to state a plausible claim for false advertising where, as here, the posts do not even refer to any of the defendants' alleged representations. Indeed, the decision on which Skillz relies explicitly recognized that the plaintiff's claims in that case—unlike Skillz's claims here—could point to consumer reviews that referenced advertising statements the defendant made. *Express Gold Cash, Inc. v. Beyond 79, LLC*, No. 18-CV-00837, 2020 WL 9848431, at *4 (W.D.N.Y. Dec. 15, 2020) ("'[Defendant] should do what they advertise' . . . 'I sent my 14k gold and diamond jewelry to them to get the 90% payout as they advertised' . . . 'I would like the 90 as their website states.'" (citation omitted)). Here, Skillz has not linked any purported consumer confusion to any statement Papaya made, but instead it is based on some vague and generalized "experience [of] using" Papaya's games, far afield from actual statements that Papaya has made. (Opp. at 9.)

Rather than directly take on Papaya's arguments that such unverified, speculative, and disconnected online posts are insufficient to satisfy pleading standards, the opposition brief fixates on Papaya's observation that the online posts also would be inadmissible hearsay, stating that "Papaya's sophisticated counsel knows that admissible evidence is not required to survive a motion to dismiss." (*Id.* at 22.) But that is misdirection, based on a lone aside parenthetical recognition by Papaya that such reviews, *in addition to being insufficient at the pleading stage*, ultimately fails evidentiary standards. (*See* Mot. at 13 ("Skillz's attempt to rely on unsubstantiated (and inadmissible) customer 'reviews' of Papaya games cannot save the claims,

as the reviews do nothing to support — and even undercut — the suggestion that Papaya's games are not skill-based.").)

Skillz cannot genuinely dispute that its reliance on anonymous, unverified online posts is problematic and insufficient even at the pleading stage, given Skillz's own insistence that it "does not use bots." (Opp. at 18.) As Skillz is well aware, online posts routinely complain about bot use and unfairness in games on Skillz's own platform (*see* Mot. at 15-19), demonstrating how—if Skillz-platform games do not use bots, as Skillz claims[4]—posts of this nature are dubious and not a proper foundation of a viable pleading. *See, e.g.*, *Galiano v. Fid. Nat'l Title Ins. Co.*, 684 F.3d 309, 315 (2d Cir. 2012) (noting that "mere conjecture" or "speculation" is "insufficient to state a plausible claim").

In the face of this argument, once again, Skillz turns to deflection. Skillz does not actually dispute that such speculative posts are unreliable, and instead raises an extraneous argument about what is properly subject to judicial notice. (Opp. at 23-24.) In fact, Skillz entirely misses the point when it argues that the Court cannot consider the Skillz reviews "for the truth of the matter asserted" (*id.* at 24); far from relying on the online posts for their truth, the

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[4]   Skillz conspicuously eschews a statement that none of the games on its platform features any bots, instead stating that it "does not use bots" (Opp. at 18), and does not "*sponsor* any bots in *cash* games on its platform" (*id.* at 25). These carefully worded assertions fall well short of denying that bots are included in (i) the third party-developed games on the Skillz platform (which comprise virtually all games on that platform) and/or (ii) non-cash games (which Skillz plainly view as pertinent to its causes of action against Papaya, even incorrectly challenging the certification provided by Papaya for a purported failure to not make "representations about the use of bots in non-cash games"). (*Id.* at 7.) Indeed, there is ample evidence to suggest that the Skillz platform more broadly features bots despite Skillz's protestations to the contrary, including without limitation the directives in Skillz's own developer documentation (*see* Mot. at 4, 11) and additional facts that would emerge if this case proceeded to discovery (which it should not). Skillz is the proverbial stone thrower in a glass house. The inclusion of bots on Skillz's platform wholly undercuts its theory that bot usage leads to "unfair" and "chance-based" games, and/or concedes Skillz's own unclean hands in pursuing claims challenging conduct in which Skillz itself engages.

Motion put forth those posts and Skillz's denial of bot usage to emphasize that anonymous online posts *cannot* be relied on in any way.

II.   THERE ARE NO PLAUSIBLY ALLEGED FACTS SUPPORTING SKILLZ'S CLAIM OF DAMAGES

Skillz's claim of injury rests on its theory that the relationship between Skillz and Papaya is a "zero-sum game for mobile competitors" where "Papaya's gain of a new mobile gamer is often Skillz's direct loss." (Opp. at 4, 19-20.) This argument not only has no application in the context of an emerging and growing market, but more concretely it simply ignores the various other competitors in the mobile gaming industry; indeed, the allegations in the Complaint concerning "another mobile gaming company," AviaGames, alone are sufficient to confirm that the so-called "zero-sum game" does not exist.[5] (*See* Compl. ¶ 110.) Moreover, other than the mere allegation that third-party games on Skillz's platform and Papaya games may legitimately compete for similar players, Skillz has alleged no facts to show that Skillz has suffered harm as a mere platform provider or any harm at all specifically *due to any alleged false advertising* by Papaya. As previously noted in the Motion (but Skillz fails to address in its opposition), the Complaint itself acknowledges the other legitimate factors that make Papaya games more attractive to players, such as Papaya's ability to "offer the chance at larger cash prizes."[6] (*Id.* ¶ 55.) Skillz therefore fails to plausibly allege the necessary "injury to a commercial interest . . .

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[5]   As noted above, Skillz refers to AviaGames in its opposition to attempt to persuade the Court that a discovery-stage ruling regarding a separate company is somehow relevant here. (*See supra* at 2.) It is telling that while Skillz urges the Court to consider AviaGames as analogous to Papaya when it benefits Skillz, it ignores AviaGames's presence as a competitor in the context of injury.

[6]   Further, Skillz's claim that Papaya is only able to offer the legitimate benefits of its games, which games on Skillz's platform do not offer, *due to bot use* is pure conjecture unsupported by any factual allegations. (*Id.* at 20.) Papaya games currently offer these same benefits—and do not deploy bots, as confirmed by the independent certification provided to Papaya.

flowing directly from the deception." *Avalos v. IAC/Interactivecorp.*, No. 13–CV–8351, 2014 WL 5493242, at *4 (S.D.N.Y. Oct. 30, 2014).

Skillz's opposition also attempts to fabricate another theory of damages from thin air, claiming that it is harmed because Papaya's alleged conduct "shrinks the overall market for real-cash, skill-based competitive gaming," as "players who feel cheated by Papaya feel cheated by the industry as a whole and typically do not differentiate between gaming companies." (Opp. at 20-21.) This argument has no plausible factual support in the Complaint, as *no* allegation Skillz points to identifies a purported Papaya player stating that they "do not differentiate between gaming companies," "feel cheated by the industry as a whole," or "decide[d] to exit [the] mobile gaming market altogether." (*Id.* at 21; *see* Compl. ¶¶ 85-89, 91.) And to the extent that this argument again relies on anonymous and unverified online posts, those posts cannot form the basis of a plausible claim for the reasons discussed above. Further, Skillz spends much of its time bemoaning Papaya's popularity, highlighting the lack of foundation for this argument.

Finally, Skillz argues that Papaya "misrepresents the current state of the law under the Lanham Act" pertaining to comparative advertising and entitlement to damages, but that misrepresents Papaya's arguments. Papaya did not argue that the Lanham Act "'require[s] that the false statement name' [the] plaintiff or its product." (Opp. at 20 (citation omitted).) Papaya instead noted that in the Second Circuit, a plaintiff is only entitled to *a presumption of harm* if— unlike here—the alleged false advertising names the plaintiff or its product. *See, e.g.*, *McNeilab, Inc. v. Am. Home Prods. Corp.*, 848 F.2d 34, 38 (2d Cir. 1988); *see also Dependable Sales & Serv., Inc. v. TrueCar, Inc.*, 377 F. Supp. 3d 337, 342 (S.D.N.Y. 2019) ("In a larger marketplace where no false comparisons have been made, the plaintiff must come forward with evidence that demonstrates a loss of sales or an injury to reputation that is attributable to the false

statements."). Without such a presumption, Skillz has the burden to plausibly allege actual facts that support its case that it has been harmed, and as noted above and in the initial Motion, Skillz has not done so.

III.   THE MATERIALS CITED BY PAPAYA IN ITS OPENING BRIEF ARE PROPERLY CONSIDERED ON MOTION TO DISMISS

Skillz tries to cast doubt on the appropriateness of considering various materials cited in the Motion, such as articles regarding the skill-based nature of bot opponents in computer gameplay, materials on Skillz's website, and negative user reviews of games on Skillz's own platform. (*See* Opp. at 23.) These documents do not, as Skillz claims, introduce factual disputes that require discovery. Instead, irrespective of the truth of their contents, these materials on their face simply highlight of the implausibility of Skillz's claims.

The authority Skillz cites in its opposition confirms that considering public materials for this purpose is a proper use of judicial notice. (*Id.* (noting that "[c]ourts may take judicial notice of materials in the public record" for the purpose of "noting what the documents state").) Here, the Court may freely note the existence of the statements cited by Papaya, such as materials on Skillz's website and the online posts by third parties. Such statements demonstrate the implausibility of Skillz's position that bots cannot be consistent with fair and skill-based play, and further demonstrate the weakness of a claim based on anonymous "consumer reviews" where those same reviews plague games on Skillz's platform.

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CONCLUSION

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For all of these reasons and the reasons set forth in Papaya's opening brief, Papaya respectfully submits that the Court should grant the Motion. Moreover, because Skillz expressly declined the opportunity to amend the Complaint, dismissal should be with prejudice.

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Dated: June 11, 2024   Respectfully submitted,
      New York, New York

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