UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SKILLZ PLATFORM INC., a Delaware corporation, Plaintiff, -against- PAPAYA GAMING, LTD., a foreign corporation; and PAPAYA GAMING, INC., a Delaware corporation, Defendants.	Civil Action No.: 1:24-cv-01646 Hon. Denise L. Cote

PLAINTIFF SKILLZ PLATFORM INC.'S MEMORANDUM OF LAW IN OPPOSITION TO PAPAYA GAMING, LTD. AND PAPAYA GAMING, INC.'S MOTION TO DISMISS THE COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Plaintiff Skillz Platform, Inc. ("Skillz") submits this Memorandum in Opposition to Defendants Papaya Gaming, Ltd. and Papaya Gaming, Inc.'s (together, "Papaya") Motion to Dismiss Plaintiff's Complaint (ECF No. 28).

I. PRELIMINARY STATEMENT

Skillz's Complaint in this case describes Defendant Papaya's fraudulent scheme to collect payments from human players who expect to compete in mobile games against each other, while secretly deploying non-human opponents or "bots" that are pre-programmed to win games and take off with winnings promised to actual players. Papaya's use of bots is inconsistent with its numerous advertisements and representations to the public that its games are "fair" and "totally skill-based"; that Papaya does not have a "vested interest" in the outcome of its tournaments; and that all "winners" of its games will be "individuals." A federal court in the Northern District of California has already found that a mobile game developer's lies to customers about the use of bots—including denials that the mobile game developer does not have a financial stake in the outcome of its games—constitutes fraud. *See Skillz Platform v. AviaGames, Inc.*, 2023 WL 8040871, at *5–6 (N.D. Cal. Nov. 20, 2023).

Papaya now claims, for the purpose of moving to dismiss the Complaint, that it "has never denied or refuted that it deployed bots." ECF No. 28 at 10. But that representation (which Papaya *never* made to consumers and is, of course, outside the four corners of the Complaint) is tantamount to Papaya confessing that its advertisements and representations have been misleading, and intentionally so. Besides attempting to deflect from Skillz's basic allegations that players are deceived when they read Papaya's misleading advertisements—and when they play against bots instead of humans—Papaya fills its Motion to Dismiss with a curious blend of improper factual assertions sourced from academic articles (none of which are cited in the Complaint) and

philosophical musings about whether general "bot usage" is "necessarily inconsistent with" fair gaming. Papaya also contends that Skillz's allegations of consumer confusion in response to Papaya's false and misleading advertising—supported by public statements of Papaya players themselves—should be thrown out entirely because the online reviews containing these statements are "inadmissible." These arguments have no place in a motion to dismiss under Rule 12(b)(6); at best, they are challenges to the merits requiring discovery. Papaya's Motion is fatally flawed because it does not cite a single case for the proposition that allegations similar to those here cannot survive a motion to dismiss.

Worse, Papaya intentionally ignores Skillz's factual allegations that Papaya's bot usage is not disclosed to consumers; that it makes consumers believe that only human players participate in games on its platform; and that under no circumstances is Papaya earning money by winning its own tournaments by secretly deploying robots. Nowhere does Papaya grapple with its representations that it has "no vested interest" in who wins any individual game or its statements that winners of games will be "individuals." And Papaya does not address Skillz's allegations that suspicion among players that Papaya uses bots will ultimately drive consumers away from mobile gaming entirely, thereby harming Skillz by reducing the size of the potential market of players.

Papaya is a direct competitor of Skillz in the mobile gaming industry, and it intentionally lies to consumers to unfairly garner more market share, directly injuring Skillz. The Lanham Act and New York's General Business Law do not tolerate lying to consumers as a valid competitive tactic. For the reasons explained below, Papaya's Motion to Dismiss should be denied.

II. FACTUAL BACKGROUND

The following facts are drawn from Skillz's Complaint (ECF No. 1) and "are assumed to be true for the purposes of resolving the instant Motion." *Anderson v. Unilever United States, Inc.*,

607 F. Supp. 3d 441, 446 (S.D.N.Y. 2022); *see also Div. 1181 Amalgamated Transit Union-N.Y. Emps. Pension Fund v. N.Y.C. Dep't of Educ.*, 9 F.4th 91, 94 (2d Cir. 2021) (per curiam).

Skillz, a mobile gaming platform, was founded in October 2012 in Boston, Massachusetts. Compl. ¶¶ 18, 20. The Skillz platform revolutionized the mobile gaming industry by employing groundbreaking technology that enabled video game players, for the first time, to compete and profit from their skill and dedication. *Id.* ¶ 19. Through its revolutionizing technology and collaborative business model, Skillz has helped launch mobile gaming into the mainstream. *Id.* ¶¶ 23–24. Indeed, Skillz's rise helped fuel the growth of an industry that, in 2021, measured 2.8 billion people and $93 billion. *Id.* ¶¶ 23–25.

The Skillz gaming application is available for free download on the Apple App Store and the Samsung Galaxy Store. *Id.* ¶ 26. The Skillz platform enables third-party developers to match human users in competitions and bracketed tournaments based on their relative skill level so that players of the same skill level play against each other. *Id.* ¶¶ 28–29. Skillz uses algorithms to match players based on skill level and game history. *Id.* ¶ 34. To compete in Skillz's cash competitions, a user must have a mobile device, be over the age of 18, and be located in an area of the world where cash gameplay is permitted. *Id.* ¶ 35. Players can choose from hundreds of games to play on the Skillz platform. *Id.* ¶ 30. Some of Skillz's most popular games include Solitaire Cube, 21 Blitz, Blackout Bingo, and Bubble Cube 2. *Id.* Skillz does not use, operate, or enable computerized or artificial competitors, *i.e.*, "bots," to play against human players in its cash games. *Id.* ¶ 36. Because none of the players competing on the Skillz platform are Skillz robots whose opportunity to win is dictated by Skillz itself, Skillz does not have a financial stake in who wins or loses any of the games that it hosts and can accurately represent to the market that its games are "fair" and "skill-based." *Id.* ¶¶ 34, 36. This promise of fair matchmaking matters tremendously to users, who

want to play evenly matched contests without the risk of being steamrolled by an exponentially more experienced and skilled player. *Id.* ¶ 33.

Papaya was founded in 2016. *Id.* ¶ 40. Papaya offers several mobile gaming applications nearly identical to the games available on the Skillz's platform, including Solitaire Cash, 21 Cash, Bingo Cash, and Bubble Cash—all games in which players can compete in tournaments to win cash prizes. *Id.* ¶ 40–41. Papaya's games, like Skillz's games, are available for free download on the Apple App Store and the Samsung Galaxy Store. *Id.* ¶ 44. As of 2023, Papaya stated it has "over 50,000 daily downloads," and recently, Papaya purported to have 20 million downloads and one million daily users worldwide. *Id.* ¶ 43. By popularity, Papaya's game Solitaire Cash is currently the #2 ranked game in Apple App Store's "Casino" category, Bingo Cash is currently the #6 ranked game in Apple App Store's "Casino" category, and Bubble Cash is currently the #13 ranked game in the Apple App Store's "Casino" category. *Id.* Papaya's games directly compete for active and prospective users with the games available on Skillz's platform. *Id.* ¶ 42.

Mobile game users do not typically switch back and forth between Skillz and Papaya games. *Id.* ¶ 48. This is because both Skillz and Papaya offer in-game rewards and accolades that players accumulate by spending more time playing on their platforms. *Id.* As a result, players are motivated to choose and stick to playing games on one platform, rendering Skillz and Papaya direct competitors in what can be aptly described as a zero-sum game for mobile competitors. *Id.* ¶¶ 48–49. Thus, Papaya's gain of a new mobile gamer is often Skillz's direct loss. *Id.* ¶ 49.

Successfully launching a mobile game that permits real-cash competitions among users of similar skill levels requires a large pool of users actively playing the game at different times of day. This concept is known as player liquidity, which is measured by the speed with which one player will find an opponent. *Id.* ¶¶ 31–33, 50, 81–82. Higher player liquidity makes it more likely

that players will find an opponent quickly, facilitates a player participating in a higher number of games, and supports larger tournament formats where multiple players of similar skill levels compete against each other; lower player liquidity means a player must wait longer to be matched with a similarly-skilled competitor and can enter fewer competitions, and makes it less likely a game can offer large, multiplayer tournament formats. *Id.* ¶ 32. Players expect to matched against another player quickly, and any delay in matching could result in the player losing interest in the match, or the platform entirely. *Id.* ¶ 50.

Maintaining high player liquidity, especially for a newly launched game, requires significant investment and marketing to attract enough players. *Id.* ¶¶ 31–33; 50; 81. Companies like Papaya that offer large, multi-player tournaments (some consisting of up to 20 players) require an even greater number of active, similarly-skilled players as the tournaments are being filled. *Id.* ¶ 56. Bots can (although not legally for cash games) fill gaps in player liquidity that would otherwise prevent players from actually participating in the games: by using bots, Papaya can infinitely increase the number of similarly-skilled "opponents" that a player can be matched against. *Id.* ¶¶ 64, 80–84. And because bots are created and deployed by the platform itself, there are no marketing costs needed to attract and keep them loyal to Papaya's platform. *Id.* Papaya's systematic use of bots in its tournaments has allowed Papaya to exponentially grow its user base while slashing its user acquisition costs by artificially enabling players of its games to quickly match with an "opponent" no matter when they log on to play a game—creating a level of player liquidity legally compliant companies like Skillz (who must make substantial investments to acquire users) cannot compete with. *Id.* ¶¶ 81, 97, 110.

Papaya advertises to the public that all of its games are "totally fair and skill-based." *Id.* ¶¶ 58, 60–69. Papaya also extensively advertises that its users compete against other similarly-

skilled "players." *Id*. ¶¶ 4, 59–67, 69. Papaya also tells the public that it "has no vested interest in who wins or loses" any tournament, "nor does [Papaya] profit on the outcome of a Tournament that we provide. We are solely in the business of creating and managing Tournaments." *Id.* These advertisements are false. *See id.* ¶¶ 58–79. Once Papaya baits users to its games with promises of skill-based competition against human competitors, Papaya deploys an army of bots, which can out-score users and make off with the cash winnings. *See, e.g.*, *id.* ¶¶ 5, 87. The prospect of one of its pre-programmed bots winning some or all of the "pot" therefore gives Papaya a "vested interest in who wins or loses." *See id.*

The reactions of Papaya's own consumers demonstrate the false and misleading nature of Papaya's marketing. In Apple App Store reviews and on social media, many Papaya users have expressed suspicion and dismay that Papaya may deploy bots as players. *Id.* ¶¶ 84–93. On these platforms, Papaya users have also made clear that Papaya's representations that its games are fair and skill-based induced them to use Papaya's applications. *Id.* ¶ 85 (Apple App Store user: "It really is funny how developer or publisher boast this 'fair' match maker"); ¶ 86 (Apple App Store user: "[T]hey claim this is a skill based game. However, there is no way to increase your skill level."). Similarly, other users have indicated that Papaya's use of the term "players" to refer to potential match opponents logically implies that they would be matched with other human players (not bots) and induced them to use Papaya's applications. *Id.* ¶ 87 (Apple App Store user: "We work hard for our money and deserve a fair game against real people, you can't scam people out of there [sic] money with bots who get times that humans couldn't possibly get."). Papaya users have also labeled Papaya games as "predatory," a "scam," and "rigged" against consumers who relied upon Papaya's fraudulent representations. *Id.* ¶¶ 84–88, 92. "Based on skill my foot," said one X (formerly Twitter) user of Papaya's games. *Id.* ¶ 89. Incredulously, Papaya has ignored users'

accusations that it is using bots and has instead doubled down on its representations of fairness and skill-based game play, promised it "will not scam our customers," and continues to imply that its entire player base consists of live humans. *Id.* ¶¶ 85–86, 90.

This action was filed on March 4, 2024. Papaya filed its Motion to Dismiss the Complaint on May 6, 2024. ECF No. 28 ("MTD"). Papaya has not refuted that it uses bots. *Id.* On May 9 and 10, 2024, Papaya's counsel represented to Skillz's counsel and to this Court, however, that its "cash games" "*currently*" use only human opponents. Papaya promised to provide an expert "certification" to this effect. The certification that was provided on May 21, 2024, however, states only that, on May 1, 2024, Papaya's retained expert did not discover any evidence in a section of code provided by Papaya that Papaya was using bots *on that single day*. *See* Exhibit 1. Notably, Papaya's counsel and its expert have never made any representations about the use of bots in non-cash games that are played for "gems," an in-game currency Papaya sells to human players who pay in real money. *See* Compl. ¶ 85.

III. LEGAL STANDARD

"[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). Dismissal is improper where a claim has "facial plausibility"—that is, "when the plaintiff pleads factual content that allows 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). "[T]o survive a motion under Rule 12(b)(6), a complaint does not need to contain detailed or elaborate factual allegations, but only allegations sufficient to raise an entitlement to relief above the speculative level." *Keiler v. Harlequin Enterprises Ltd*., 751 F.3d 64, 70 (2d Cir. 2014).

When considering a motion to dismiss, the court may only consider "facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." *Allen v. WestPoint-Pepperell, Inc*., 945 F.2d 40, 44 (2d Cir. 1991); *Bellin v. Zucker*, 6 F.4th 463, 473 (2d Cir. 2021). Judicially noticeable facts are those "not subject to reasonable dispute" because they are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b). This standard is narrow, and the court "does not ordinarily look beyond the complaint and attached documents" when deciding a Rule 12(b)(6) motion to dismiss. *Halebian v. Berv*, 644 F.3d 122, 130 (2d Cir. 2011) (citing *Staehr v. Hartford Fin. Servs. Grp., Inc*., 547 F.3d 406, 425 (2d Cir. 2008)). It therefore follows that a plaintiff need not provide admissible evidence supporting its claims at the motion to dismiss stage. *U.S. v. Prevezon Holdings LTD*, 122 F. Supp. 3d 57, 69 (S.D.N.Y. 2015) (holding that inability to proffer authenticated or admissible evidence did not mandate dismissal for failure to state a claim, because such evidence "goes to the [plaintiff's] ultimate trial burden, not its pleading requirements"); *see also Harding v. Dorilton Cap. Advisors LLC*, 635 F. Supp. 3d 286, 300, 302 (S.D.N.Y. 2022) (explaining that "[t]he *Twombly/Iqbal* rule has heightened pleading requirements, but it does not require a plaintiff to PROVE his case at the pleading stage by citing every detail of his evidence in a complaint") (emphasis in original).

IV. ARGUMENT

A. The Complaint Plausibly Alleges that Papaya Uses Bots, and Papaya Has Not Denied Bot Usage

Skillz plausibly alleges in its complaint that Papaya uses bots and, as Papaya admits, that allegation must be taken as true in deciding the instant motion. MTD at 7; *Erickson*, 551 U.S. at 94. Skillz alleges, in detail, that Papaya systematically uses computer algorithms, or "bots,"

masquerading as human players in its cash games. For example, Skillz alleges that Papaya uses bots in order to achieve a higher level of player liquidity so that players can more quickly be matched with other players of similar skill levels and, thus, remain engaged in the gameplay. Compl. ¶¶ 80–84. Skillz further alleges that Papaya's systematic use of bots in its tournaments has allowed Papaya to exponentially grow its user base—substantiated by Papaya's boasts that its games have 20 million downloads and one million daily users worldwide— while slashing its user acquisition costs by artificially enabling players of its games to quickly match with a "competitor" no matter when they log-on to play a game. *Id.* ¶¶ 43, 81. Skillz also points to public statements by human players who believe, based on their experience using Papaya's product, that Papaya uses bots. *Id.* ¶¶ 73, 75–76. Finally, Skillz alleges facts supporting its allegations that Papaya's bots provide a secret and illicit revenue stream by taking winnings from games populated with real human players. *Id.* ¶¶ 5, 87.

"[D]rawing all reasonable inferences in the plaintiff's favor," *Div. 1181*, 9 F.4th at 95, the massive number of players who must be competing on Papaya's system at all times and the confusion experienced by vocal and disappointed Papaya players strongly suggests that Papaya deploys bots surreptitiously to compete on its own behalf in tournaments and to make off with winnings it promises will be distributed to "individuals." Critically, *nowhere* does Papaya's Motion deny or cast doubt on its use of bots. This fact alone distinguishes many of the Lanham Act cases cited in Papaya's Motion.[1]

[1] *See* MTD at 10 (citing *Turbon Int'l, Inc. v. Hewlett-Packard Co.*, 769 F. Supp. 2d 262, 268 (S.D.N.Y. 2011) (dismissing Lanham Act claim for failure to allege "a basis to compare the challenged statements with the 'reality'" that renders the statements false)); 12 (citing *N. Am. Olive Oil Assoc. v. D'Avolio Inc.*, 457 F. Supp. 3d 207, 223 (E.D.N.Y. 2020) (dismissing complaint that asserted falsehood of statements "with no additional information suggesting *why* it is false" (emphasis added))); 19 (citing *Davis v. Avvo, Inc.*, 345 F. Supp. 3d 534, 543 (S.D.N.Y. 2018) (dismissing claim that "Pro" label on Avvo.com was misleading because it suggested that so-labeled attorneys were more qualified as either puffery or unsupported where complaint did not allege that any "Pro" attorneys were not actually professionals)).

Alternatively, even if Papaya denied using bots (which it does not), the question of whether there is an army of bots masquerading as human players on Papaya's platform is a factual issue not suited for resolution at the motion to dismiss stage. *Johnson & Johnson Merck Consumer Pharma. Co. v. Smithkline Beecham Corp*., 960 F.2d 294, 298 (2d Cir. 1992); *see infra* Section D.

B. Given Its Reliance on Bots, Papaya's Statements About "Fair" and "Skill-Based" Gaming are False, Misleading, and Material to Consumer Choice

To plead a claim for false advertising under the Lanham Act, a plaintiff must allege (1) a false or misleading statement; (2) in connection with commercial advertising or promotion that (3) was material; (4) was made in interstate commerce; and (5) damaged or will likely damage the plaintiff." *CDC Newburgh Inc. v. STM Bags, LLC*, 2023 WL 6066136, at *15 (S.D.N.Y. Sept. 18, 2023). The standard for liability under N.Y. GBL § 349 is "substantially the same" as that applied to claims brought under Section 43(a) of the Lanham Act.[2] *Naked Cowboy v. CBS*, 844 F. Supp. 2d 510, 518 (S.D.N.Y. 2012). "A claim of false advertising [under the Lanham Act] may be based on at least one of two theories: that the challenged advertisement is literally false, i.e., false on its face, or that the advertisement, while not literally false, is nevertheless likely to mislead or confuse consumers." *N. Am. Olive Oil*, 962 F. Supp. 2d at 519–20 (quoting *Tiffany (NJ) Inc. v. eBay Inc*., 600 F.3d 93, 112 (2d Cir. 2010)). Regardless of the theory advanced by the plaintiff, whether a claim is either false or misleading is an issue of fact rather than law. *Smithkline Beecham*, 960 F.2d at 298. For the reasons explained below, Skillz has plausibly alleged that, because Papaya deploys

[2] The elements of a cause of action under N.Y. GBL § 349 are: "(1) the challenged transaction was 'consumer-oriented'; (2) defendant engaged in deceptive or materially misleading acts or practices; and (3) plaintiff was injured by reason of defendant's deceptive or misleading conduct." *Chanel, Inc. v. RealReal, Inc.*, 449 F. Supp. 3d 422, 446 (S.D.N.Y. 2020) (internal citations and quotation marks omitted). Some courts require a non-consumer plaintiff to allege conduct that has 'significant ramifications for the public at large." *Id*. (internal citations and quotation marks omitted). Skillz has met this higher standard. Papaya's false statements have significant consequences for the consuming public, who are being misled into paying Papaya millions of dollars to participate in rigged games, and "the gravamen of [Skillz's] complaint [is] consumer injury [and] harm to the public interest." *Revlon, Inc. v. Heaven Scent Cosmetics, Ltd.*, 1991 WL 200209 at *4 (E.D.N.Y. 1991).

bots and those bots' game winnings are returned to Papaya's coffers, Papaya's statements are literally false, or, in the alternative, that they are still likely to mislead or confuse consumers.

i. Skillz Plausibly Alleges that Papaya's Statements Are Literally False

A claim for "literal falsity" clearly captures falsehoods that are explicitly stated, *i.e.*, any representation that is "false on its face" and conflicts with reality. *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 153 (2d Cir. 2007). "[L]iteral falsity may also be 'proved by implication.'" *Chobani, LLC v. Dannon Co., Inc.*, 157 F. Supp. 3d 190, 199 (N.D.N.Y. 2016) (quoting *Sussman–Automatic Corp. v. Spa World Corp.*, 15 F. Supp. 3d 258, 270 (E.D.N.Y. 2014)). A "challenge[] brought under the umbrella of literal falsity… need not rely on extrinsic evidence of confusion." *Pamlab, L.L.C. v. Macoven Pharms., L.L.C.*, 881 F. Supp. 2d 470, 476 (S.D.N.Y. 2012). "Pursuant to this 'false by necessary implication doctrine,' a claim for literal falsity also exists 'when, considering the advertisement in its full context, the relevant audience would recognize the false implied claim as easily as if it had been stated explicitly.'" *Chobani*, 157 F. Supp. 3d at 200 (quoting *Pamlab* 881 F. Supp. 2d at 477). When determining whether an advertisement is 'literally false,' a court 'may rely on its own common sense and logic in interpreting the message of the advertisement.'" *Hertz Corp. v. Avis, Inc.*, 867 F.Supp. 208, 212 (S.D.N.Y. 1994).

At the outset, Papaya's use of bots makes its statements to consumers that they will be matched with "players" and "individuals," *i.e.*, other humans, literally false. *Id.* ¶¶ 4, 59–79 (quoting Papaya's statement that tournament "[w]inners are determined solely by [] objective criteria," namely, that "[f]rom all entries received for each competition, the **individuals** who use their relevant skill and knowledge to accumulate the winning score or points according to the corresponding rules **will be the winner(s)**" (emphasis added)). "Where an advertisement is proven

to be literally false on its face, consumer deception is presumed." *Time Warner Cable*, 497 F.3d at 153. Still, no reasonable consumer would believe that, in the context of mobile gaming, being matched with another "individual" contemplates the possibility of being matched with a bot playing on behalf of Papaya itself, let alone that a Papaya bot has been predetermined to take off with all the winnings for Papaya's benefit. Compl. ¶ 106. Papaya's assertion that "the Complaint fails to point to any statement by Papaya… that guaranteed that all players are live humans" is therefore wrong. MTD at 10.

Skillz also plausibly alleges that Papaya's representations to consumers that its games are "fair" and "totally skill-based" are literally false. The number one definition of "fair" in Merriam Webster's dictionary is: "marked by impartiality and honesty: free from self-interest, prejudice, or favoritism."[3] On websites and application interfaces directed to consumers, Papaya represents that its gaming applications are "fair" and that its games are "based on [] skill." Compl. ¶¶ 59–79. These representations are literally false because Papaya's deploys bots in its tournaments; Papaya controls the scores that the bots will obtain in the competition; and therefore Papaya—predetermines the outcome of the tournament. *Id.* ¶¶ 1, 3, 94–98. Under these circumstances, it is impossible for Papaya's games to be "impartial" or "free from self-interest." *Id*. ¶ 107. Papaya also represents to users that Papaya "has no vested interest in who wins or loses, nor does it profit on the outcome of a Tournament that we provide. [Papaya is] solely in the business of creating and managing Tournaments." *Id.* ¶¶ 59, 103 (emphasis added). This statement is also literally "false on its face" because Plaintiffs plausibly allege that Papaya collects prizes from games won by its bots. *Time Warner Cable*, 497 F.3d at 153. Skillz alleges that Papaya functions as the "house" at a casino, collecting money from participants who compete against—and often lose to—the "house." Compl.

[3] https://www.merriam-webster.com/dictionary/fair#dictionary-entry-1 (last accessed May 19, 2024).

¶ 5. By deploying bots whose winnings are returned directly to Papaya's coffers, Papaya does have a "vested interest in who wins or loses" its games and does "profit on the outcome of a Tournament."[4]

Papaya's Motion does not seriously contest the literal falsity of these statements, asserting only that there is some possibility—according to untested academic publications untethered to the Complaint—that "bot usage" in general is not "necessarily" "inconsistent with" a game being fair and skill-based. *See* MTD at 10–12. However, that dubious academic theory is not before this Court; it has no bearing on whether Skillz adequately pled that *Papaya's specific* bot usage *as described in the Complaint* renders Papaya's advertising literally false.

In the alternative, Skillz alleges that Papaya's representations of fairness, skill-based play, human opponents, and not having a financial interest in the outcome of its tournaments are literally false by implication, as Papaya's representations imply, at the very least, that the games are exclusively populated by humans and not computers or algorithms connected to a Papaya account in which Papaya is controlling the score that its "player" achieves. Compl. ¶¶ 111–12. Under the "false by necessity implication" doctrine, "a district court evaluating whether an advertisement is literally false must analyze the message conveyed in full context" and find literal falsity where "the words or images, considered in context, necessarily imply a false message." *Time Warner Cable*, 497 F.3d at 158 (internal quotation marks omitted). Additionally, where plaintiff brings an implied falsity claim, whether consumers have been deceived "is generally a question of fact which requires consideration and weighing of evidence from both sides and therefore usually cannot be

[4] In analogous circumstances, a federal court sitting in the Northern District of California found that untrue statements made by game developers about not having a financial stake in the outcome of its games constitute fraud. *See Skillz Platform Inc. v. AviaGames Inc.*, No. 21-CV-02436-BLF, 2023 WL 8040871, at *5–6 (N.D. Cal. Nov. 20, 2023); *see also Skillz Platform Inc. v. AviaGames Inc.*, No. 21-CV-02436-BLF, ECF No. 435, at 11–14.

resolved through a motion to dismiss." *Ackerman v. Coca-Cola Co*., 2010 WL 2925955, at *17 (E.D.N.Y. July 21, 2010).

The picture Papaya paints in its advertising implies that individual human players are competing against one another for cash winnings. As explained above, the average mobile gamer would not understand Papaya's use of the phrase "match with another player of similar skill" to contemplate the possibility that they are actually matched against robots playing for the platform itself, or Papaya's description of its games as "fair" and devoid of "self-interest" to be consistent with Papaya keeping winnings away from real human players when they are secured by its army of bots, or Papaya's statements that "individuals" will be the "winners" of every tournament. Nevertheless, whether consumers were deceived by the necessary implications of Papaya's statements is a question of fact that is inappropriate to resolve on a motion to dismiss. Accordingly, Papaya's arguments at this stage against the false nature of its advertising and likelihood that it deceives its consumers have no merit.

ii. In the Alternative, Skillz Adequately Alleges that Papaya's Claims are Likely to Mislead or Confuse Consumers

Even if the court concludes that Skillz has not successfully stated a claim for literal falsity or literal falsity by implication, Skillz adequately alleges Papaya's statements are likely to mislead or confuse consumers. "If a message is not literally false, a plaintiff may nonetheless demonstrate that it is impliedly false if the message leaves 'an impression on the listener or viewer that conflicts with reality.'" *Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmBH*, 843 F.3d 48, 65 (2d Cir. 2016) (quoting *Time Warner Cable*, 497 F.3d at 153)); *see also Chanel,* 449 F. Supp. 3d at 442–43. An implicit falsity claim requires "a comparison of the impression [left by the statement], rather than the statement [itself], with the truth." *Time Warner Cable*, 497 F.3d at 153 (citation omitted). "To survive a motion to dismiss… 'plaintiffs must plausibly allege that a significant

portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.'" *Anderson*, 607 F.Supp.3d at 451 (quoting *Twohig v. Shop-Rite Supermarkets, Inc.*, 519 F. Supp. 3d 154, 160 (S.D.N.Y. 2021)). "[T]his inquiry is generally a question of fact not suited for resolution at the motion to dismiss stage.'" *Id.* (quoting *Duran v. Henkel of Am., Inc.*, 450 F. Supp. 3d 337, 346 (S.D.N.Y. 2020)).

Skillz alleges that Papaya's representations that its games are "fair" and "based on the skill of the players, rather than luck or chance," that users of its applications will be matched with "players" and the winners of its games will be "individuals," and that it "has no vested interest in who wins or loses, nor does it profit on the outcome of a Tournament" are materially misleading because they conflict with the "reality" alleged in the Complaint that the Court must accept as true: that Papaya uses bots that it pre-programs to win the jackpot in games that it advertises will be played and won by human players. Compl. ¶ 113. Papaya's deliberate attempt to cloak its bot usage in secrecy render its representations of "fair" and "skill-based" play further misleading. *See, e.g.*, *Chanel*, 449 F. Supp. 3d at 445 (A "lack of customer-facing transparency undermines the Lanham Act's goal of 'protecting persons engaged in commerce [ ] against unfair competition.'" (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131 (2014))).

Papaya attempts to argue that even if it does use bots, its use of bots would "not necessarily" render its games "unfair" or games of chance because "computerized opponents" (as Papaya affectionately characterizes them) could "be programmed to compete at various skill levels." MTD at 10–12. Papaya presumably contends (but does not state) that this unproven possibility makes it impossible for any of its marketing statements to be misleading under *any* circumstances. But accepting that lumping bots in with human users as fellow "players" or "individuals," which is

how Papaya describes *all* competitors on its platform, could never be misleading is precisely what the Court must do in order to credit Papaya's argument.[5]

The Court need not stretch to accept Papaya's illogical leaps, especially when faced with the Complaint's citations to numerous grievances from actual Papaya players about their actual confusion caused by Papaya's misleading statements. *See, e.g.*, Compl. ¶¶ 73–75; 84–93. While Papaya attempts to scold Skillz for not "substantiat[ing]" this evidence of consumer confusion, MTD at 13–15, binding precedent instructs that "the public's reaction to (the) advertisement will be the starting point in any discussion of the likelihood of deception [because] [t]he question in [misleading advertising] cases is what does the person to whom the advertisement is addressed find to be the message?" *Am. Home Prod. Corp. v. Johnson & Johnson*, 577 F.2d 160, 165–66 (2d Cir. 1978). "At the motion to dismiss stage, plaintiffs need only state that there was [customer] confusion and offer facts to support that claim." *Restellini v. Wildenstein Plattner Institute, Inc*., 2021 WL 4340824, at *7 (S.D.N.Y. Sept. 22, 2021) (citation omitted); *see also Express Gold Cash, Inc. v. Beyond 79, LLC*, 2020 WL 9848431, at *4 (W.D.N.Y. Dec. 15, 2020) (denying motion to dismiss where complaint identified "specific customer reviews that evidence confusion," which "are sufficient to render plausible Plaintiff's claim that consumers were confused or misled by Defendant's advertising"). Skillz did exactly that in its Complaint: the customer reviews constitute facts supporting the plausibility of Plaintiff's allegations that consumers are confused.

For example, users of Papaya's games have explicitly commented that Papaya's representations concerning "players" and its implications that these players were live humans (and not Papaya's bots) induced them to use Papaya's gaming applications. Compl. ¶ 87. Thus, even if

[5] In fact, the Complaint plausibly alleges that Papaya's ability to program its bots to compete at various skill levels is what enables Papaya to keep human players returning to play by creating the illusion that they have a shot at, or are close to winning when, in reality, the outcomes of bot-driven games are predetermined. *See* Compl. ¶¶ 73–79; 96.

the bots are "programmed" to "compete at various skill levels," it is plausible that Papaya's statements likely deceive consumers into believing that only actual humans compete in Papaya's games, and part of what makes this confusion plausible is Papaya's intentional lack of transparency. *Id*. ¶ 114. At the very least, Skillz adequately alleges that Papaya's representations falsely imply to consumers that players are not competing against Papaya itself, *i.e.*, the "house." *Id.* ¶ 5.

Skillz further alleges that Papaya's own responses to these consumer complaints demonstrate that it is intentionally lying to its users to avoid having to confront the consequences of the market learning about its scheme to deploy deceptive bots. *See id.* ¶¶ 73–76. One user told Papaya, in relevant part:

> "I started videoing my playing and found something extremely troubling. **I'm suppose[d] to be playing against other people but I realized I'm playing against a computer.** Which makes it impossible to win consistently. Writing a poor review does nothing. I have emailed, written, and called the gaming commission at both the state and federal level. So **I received a response from the people at solitaire cash. They used words like opponents or others but never said people or human beings because using that verbiage would incriminate them**.… I'm not a fan of being Jedi mind tricked." Compl. ¶ 75 (emphasis added).

Papaya's public response to a player claiming that he was intentionally misled by its advertising was the following (potentially bot-authored) boilerplate: "Sorry to hear about your game experience. We match players against ***others*** with a similar skill level to ensure a fun and fair experience for everyone." *Id*. (emphasis added).

Instead of confronting these allegations, Papaya again attempts to distract the Court from examining them by pasting into its Motion nearly four pages' worth of screenshots of comments from Skillz users. MTD at 15–19. If Papaya's real concern is whether Skillz "is engaging in the exact same conduct… that it alleges against Papaya," that question is answered by the Complaint:

Skillz does not use bots and therefore its advertisements are accurate. Compl. ¶ 36. The same cannot be said for Papaya.

It is therefore highly plausible that Papaya's statements have deceived thousands of its users and this deception is likely to continue because of Papaya's refusal to communicate with the public in a non-misleading manner. *See, e.g., id.* ¶¶ 4, 73–75; 84–93. Papaya's attempt to defeat this element of Plaintiff's Lanham Act case should be rejected.

C. Skillz Plausibly Alleges Damage Caused by Papaya's False Statements

The Complaint plausibly alleges that Papaya's false statements to the marketplace have caused harm to Skillz, Papaya's direct competitor. A plaintiff is injured by false advertisements that affect its "commercial interest in reputation or sales." *Lexmark*, 572 U.S. at 132. "'In pleading a false advertising claim under the Lanham Act, the plaintiff need not provide evidence of actual loss or specific evidence of causation.'" *Beyond 79, LLC v. Express Gold Cash, Inc.*, 2020 WL 7352545, at *6 (W.D.N.Y. Dec. 15, 2020) (quoting *Davis*, 345 F. Supp. 3d at 543). In *Beyond 79*, the court found the plaintiff sufficiently alleged that the defendant caused its injury where the defendants' false advertising campaign allegedly had diverted customers and cost it revenue. *Id.*; *cf.* Compl. ¶ 80 ("Papaya's use of bots steals market share and revenue from Skillz."). The Court held that, "[a]t this stage of the proceedings, [plaintiff's] allegation that [defendant's] deceptive [statements]… diverted customers who otherwise would have used [plaintiff's] services is sufficient to satisfy the requirement of injury." *Beyond 79*, 2020 WL 7352545, at *6; *see also Conopco v. Wells Enters., Inc.*, 2015 WL 2330115, at *5 (S.D.N.Y. May 14, 2015) (finding that plaintiff's allegation that defendant's false statements are jeopardizing the goodwill of its products sufficient to allege damages); *In re Natural Gas Commodity Litig.*, 337 F.Supp.2d 498, 508

(S.D.N.Y. 2004) ("[A]t this stage of the proceedings, "[p]laintiffs need not establish... [or] prove...., [but] must simply allege damage.").

The same outcome should result here. Skillz's complaint alleges numerous facts—which must be taken as true—demonstrating the nature of its competition with Papaya: Both Skillz and Papaya are major players in the mobile gaming industry (an industry largely created by Skillz). *See* Compl. ¶¶ 18–30, 41–43, 47–53. Skillz's platform hosts games such as "Solitaire Cube" and "21 Blitz," and it pairs real humans in skill-based competitions with real-cash prizes on the line. *Id*. ¶ 2. Papaya hosts real-cash competitions for nearly identical, copycat mobile games such as "Solitaire Cash" and "21 Cash." *Id*. ¶ 3. Both companies offer their games through the Apple App Store and the Samsung Galaxy Store. *Id.* ¶ 26, 44. Both companies compete for the same users, and, in most cases, Papaya's gain is Skillz's loss because mobile gamers tend to maintain loyalty to a single platform. *Id*. ¶ 49. Skillz's allegations therefore significantly outweigh the "bare" claims rejected in the cases cited in Papaya's Motion. *See* MTD at 20 (citing *Casper Sleep Inc. v. Nectar Brand LLC,* 2020 WL 5659581, at *7 (S.D.N.Y. Sept. 23, 2020) (dismissing claim that defendant's misleading pricing scheme harmed plaintiff in absence of any allegation that any purchase of defendant's product because of the misrepresentation and not based on price comparison alone)).[6]

Papaya argues that consumers may choose to play Papaya's game for reasons "that have nothing to do with Papaya's alleged false statements and/or use of 'bots,'" such as because, as

[6] The few cases cited by Papaya in support of its injury arguments are distinguishable because almost none of them concerned Lanham Act or NY GBL § 349 cases brought by competitors. *See* MTD at 19-21 (citing *Davis*, 345 F. Supp. 3d at 539, 543 (rejecting Lanham Act claim of single attorney against Avvo.com, a "platform that maintains an online directory of attorneys"); *Avalos v. IAC/Interactivecorp.*, 2014 WL 5493242, at *4 (S.D.N.Y. Oct. 30, 2014) (dismissing Lanham Act claims brought by modeling agency that owned rights to pictures used in false profiles on defendants' dating websites); *Michelo v. Nat'l Collegiate Student Loan Tr. 2007-2*, 419 F. Supp. 3d 668, 707-08 (S.D.N.Y. 2019) (denying motion to dismiss NY GBL § 349 claims brought by student loan borrowers who sufficiently pled economic injuries as a result of defendant's false reporting to credit bureaus); *City of N.Y. v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 623 (2009) (holding City did not have standing under NY GBL § 349 where its "injury, in the form of lost tax revenue, is entirely derivative of injuries that it alleges were suffered by misled consumers")).

Skillz alleges, Papaya's tournament-based games "offer the chance at larger cash prizes," Compl. ¶ 55, which factors into Papaya's popularity, *id.* ¶ 53. MTD at 21. But Papaya has it backwards: it is only able to "offer the chance" to win larger prizes by misrepresenting the nature of the games that it hosts, *i.e.,* the fact that it is using bots to offer large tournaments. Papaya's ability to offer this "chance" is directly tied to Skillz's *inability* to do so due to lower player liquidity. This is "precisely the sort[] of commercial interest" and fair competition that the Lanham Act protects. *Lexmark*, 572 U.S. at 118. Accordingly, Skillz's "stake in the [mobile gaming] market gives it a reasonable interest to be protected against the alleged false advertising." *Johnson & Johnson v. Carter-Wallace, Inc*., 631 F.2d 186, 190 (2d Cir. 1980) (internal quotation marks omitted); *see also TrafficSchool.com, Inc. v. Edriver Inc*., 653 F.3d 820, 826–27 (9th Cir. 2011) (stating that a presumption of commercial injury takes place "when defendant and plaintiff are direct competitors" who "vie for the same dollars from the same consumer group") (quotation omitted)). Papaya also misrepresents the current state of the law under the Lanham Act, which "does not require that the false statement name" plaintiff or its product, *Turbon Int'l, Inc. v. Hewlett-Packard Co.*, 769 F. Supp. 2d 262, 268 (S.D.N.Y. 2011), as Papaya claims. MTD at 20 (quoting *McNeilab, Inc. v. Am. Home Prod. Corp.*, 848 F.2d 34, 38 (2d Cir. 1988)).

Skillz also plausibly alleges that Papaya's deceptive use of bots shrinks the overall market for real-cash, skill-based competitive gaming. *Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH*, 2015 WL 4002468, at *30 (S.D.N.Y. July 1, 2015), *aff'd*, 836 F.3d 153 (2d Cir. 2016), and *aff'd*, 843 F.3d 48 (2d Cir. 2016) ("[F]alsely advertising a product within a given category may cause harm to that category as a whole."). Competitive gamers who enter the real-cash, skill-based gaming market expect to compete against other human players. Compl. ¶ 91. By falsely and misleadingly promoting its games as fair, skill-based tournaments and then matching

players against bots programed to take their money, players who feel cheated by Papaya feel cheated by the industry as a whole and typically do not differentiate between gaming companies. *Id.* ¶¶ 85–89. Thus, players deceived by Papaya's bot use who would otherwise use Skillz's platform instead decide to exit mobile gaming market altogether, thereby harming Skillz. Nowhere does Papaya's Motion even engage with this form of commercial harm that is clearly cognizable under the Lanham Act and plausibly alleged in the Complaint.

D. Papaya's Real Arguments Are Aimed at the Merits, Are Not Appropriate for a Motion to Dismiss, and Require Discovery

The rest of Papaya's arguments are distractions, or, at best, academic theorizing apparently meant to distract the Court from closely assessing Papaya's marketing. None of these points justify dismissal of the Complaint for failure to state a claim. *See, e.g.*, *Ramchandani v. Sani*, 844 F. Supp. 2d 365, 366 (S.D.N.Y. 2012) (rejecting "Defendants' [] argument [that] rests in substantial measure on a factual argument, founded in part on supposition or argument and in part on matters outside the pleadings, that plaintiff has suffered no commercial or competitive injury and that there are so many [market participants] that he could have no reasonable basis for believing that defendants' allegedly fraudulent activities could harm him" because "[w]ith respect, this is a motion to dismiss the complaint.").

First, Papaya claims that using bots is not "inconsistent" with its promise of skill-based gaming to consumers. MTD at 12. This claim cannot be evaluated without discovery into Papaya's usage of bots *as opponents to its human players*—which it does not deny in its Motion—making dismissal wholly inappropriate.[7]

[7] In support of this argument, Papaya makes the unsupported claim that "skill remains a dominant factor in Papaya's games, which is the only relevant inquiry." MTD at 12. Papaya's emphasis on skill as the "dominant factor" in its games tellingly betrays its surreptitious use of bots and Papaya's knowledge that its bot usage, as described in the

Second, Papaya misconstrues general descriptions of Skillz's technology into admissions that "computerized elements" (which, according to Papaya, conveniently includes bots) are "not always inconsistent" with fair and skill-based gaming. MTD at 12 (citing Compl. ¶ 22). Intentionally misreading a complaint does not create grounds for dismissing it. *See, e.g.*, *SEC v. Afriyie*, 2018 WL 6991097, at *2 (S.D.N.Y. Nov. 26, 2018), *aff'd*, 788 F. App'x 59 (2d Cir. 2019). The thrust of Skillz's Complaint is that Papaya uses *bot opponents* in *cash games* that Papaya claims are "skill-based," and Papaya pockets the "winnings" that its artificial "players" take from real human users. Compl. ¶¶ 1, 3, 4, 58–62, 103, 121. Nowhere does Papaya argue that using "computerized elements" in this way is consistent with the fairness it promises consumers.

Third, Papaya advances the specious argument that the Complaint should be dismissed because the customer reviews quoted in it are "inadmissible." MTD at 13. Papaya's sophisticated counsel knows that admissible evidence is not required to survive a motion to dismiss. *Harding*, 635 F. Supp. 3d at 300, 302 (explaining that "[t]he *Twombly*/*Iqbal* rule… does not require a plaintiff to PROVE his case at the pleading stage by citing every detail of his evidence in a complaint" (emphasis in original)). The Court should reject Papaya's attempt to distract from the strength of Skillz's allegations of consumer confusion because the reviews suggest—and may even prove—actual confusion caused by Papaya's false and misleading advertising. *Smithkline Beecham*, 960 F.2d at 297; *Am. Home*, 577 F.2d at 165–66 ("the public's reaction to (the) advertisement will be the starting point in any discussion of the likelihood of deception" because "[t]he question in such cases is what does the person to whom the advertisement is addressed find

Complaint, is illegal gambling: The "dominant factor" test is used to assess whether a game constitutes illegal gambling under relevant statutes. *See White v. Cuomo*, 192 N.E.3d 300, 312 n.5 (2022) (noting that New York courts apply a "dominating element standard" to determine whether a game constitutes gambling and collecting cases in other jurisdictions applying a "dominant element" test).

to be the message?"); *Restellini*, 2021 WL 4340824, at *7 ("At the motion to dismiss stage, plaintiffs need only state that there was [customer] confusion and offer facts to support that claim.").

As noted above, these reviews also support Skillz's allegations that Papaya's false statements are indeed material to players' understanding of Papaya's games, refuting Papaya's claims to the contrary. Consumer reviews in one form or another are the foundation for any legal analysis of customer confusion; in this case, they demonstrate that players understand fairness and "skill-based" play to be a fundamental aspect of Papaya's games. *See* Compl. ¶¶ 75, 85–87 ("They claim you are playing against people of your skill level, this (as many have stated in reviews) is completely false"); ("It really is funny how developer or publisher boast this 'fair' match maker"); ("This game will let you win a little bit in the beginning, but then will start pairing you with 'players' (presumably bots) who consistently score double your personal best…. Its only a 'game of skill' if players have a reasonable chance of winning - and you don't against [b]ots.").

Fourth and finally, Papaya's Motion is littered with references and citations to information outside the four corners of the Complaint, including: (1) articles regarding use of bots in game development; (2) Skillz's website; and (3) anonymous user reviews for Skillz's products. Papaya claims that this evidence is the proper subject of judicial notice. It is not. Pursuant to Fed. R. Ev. 201(b), judicially noticeable facts are those "not subject to reasonable dispute" because they are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." Courts may take judicial notice of materials in the public record or records of administrative bodies, "all for the limited purpose of noting what the documents state, rather than to prove the truth of their contents." *Hesse v. Godiva Chocolatier, Inc*., 463 F. Supp. 3d 453, 462 (S.D.N.Y. 2020); *see also*

Casey v. Odwalla, Inc., 338 F. Supp. 3d 284, 295 (S.D.N.Y. 2018) (holding that "even if judicially noticeable, this Court would be unable to consider the facts for the truth of the matter asserted"). "Judicial notice of a disputed fact should not ordinarily be taken as the basis for dismissal of a complaint on its face." *Oneida Indian Nation of N.Y. v. State of N.Y.*, 691 F.2d 1070, 1086 (2d Cir. 1982).

None of the extrinsic evidence proffered by Papaya meets these criteria or justifies Papaya's overreach in seeking dismissal of a complaint by resorting to judicially noticed materials. Papaya's argument that its use of bots does not preclude its games from being skill-based depends on accepting "a body of research among experts in the field of artificial intelligence and game-playing," including dubious articles that are over twenty years old. MTD at 12 n.5. Papaya cannot (and does not) argue that these publications satisfy the rule that judicially noticed materials be "not subject to reasonable dispute" in seeking to use these materials to dispute the core of Skillz's claims. Moreover, Papaya is clearly offering these articles for the truth of the matters asserted therein, which is impermissible. *Hesse,* 463 F. Supp. 3d at 462; *Casey*, 338 F. Supp. 3d at 295.

Papaya also offers excerpted reviews of Skillz's platform and claims, without authority, that these screenshots are "subjects [sic] to judicial notice." MTD at 15–19; 15 n. 8. Papaya also relies upon cherry-picked statements from Skillz's website for the truth of the matter asserted, *see id.* at 4 n. 2, impermissible for judicially-noticed materials. *See, e.g.*, *Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 127 F. Supp. 3d 156, 167 (S.D.N.Y. 2015); *Hesse,* 463 F. Supp. 3d at 462; *Casey*, 338 F. Supp. 3d at 294–95. As a threshold matter, a document's status as "publicly available on the internet" does not mean that its "authenticity cannot be fairly contested"—were this the case, it would lead to absurd results. *See, e.g.*, *Hotel Emps. & Rest. Emps. Union v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 549 (2d Cir. 2002) (holding that it "may be"

appropriate to take judicial notice of a website's designation where "the authenticity of the site has not been questioned" and the facts noticed are relevant); *Elder v. Reliance Worldwide Corp*., 563 F. Supp. 3d 1221, 1239 n.7 (N.D. Ga. 2021) (declining to take judicial notice of customer review on a website where the information on the site printout was not information "not subject to reasonable dispute").

Papaya tries to use statements on Skillz's website to impeach the allegations in the Complaint, a pointless exercise because those allegations must be taken as true in deciding Papaya's Motion. Papaya claims that Skillz's developer conditions for "utilizing bots during gameplay" somehow undermine Skillz's allegations that it does not deploy bots in cash games to win prizes for Skillz's financial benefit. *See* MTD at 4 (citing Compl. ¶ 36). Even if this information were properly before the Court in connection with Papaya's Motion (it is not), Skillz's website in no way inconsistent with its Complaint: posting guidelines for developer use of bots in *designing a game* and *ensuring gameplay fairness* is not the same as *putting bot competitors into cash competitions and secretly pocketing those bots' "winnings."*[8] Skillz does not sponsor any bots in cash games on its platform. Compl. ¶ 36. Papaya cannot say the same.

Accordingly, the external documents cited in Papaya's Motion "cannot be properly considered on a motion to dismiss," *Casey*, 338 F. Supp. 3d at 294, and the Court should reject Papaya's baseless arguments that these materials provide any basis for dismissing the Complaint.

[8] Specifically, Skillz's instructions explain how developers can build games that inherently involve high degrees of chance (*e.g.*, dominoes) to be played by two *humans* who face identical random scenarios in which the same "bot" operates as a neutral opponent. These bots can only be deployed (i) in "Real-time mode" "only [] in the First Time User Experience" where human players can try Skillz's games for free in a tutorial setting, and (ii) in "Play-and-Compare mode" where each human player faces identical random scenarios in which the same "bot" technically occupies the competitor spot in the games but has no predetermined score and cannot win the competition. *See* https://docs.skillz.com/docs/randomness/#utilizing-bots-in-gameplay.

V. CONCLUSION

For the foregoing reasons, Skillz respectfully submits that the Court should deny Papaya's Motion.

Dated: May 28, 2024

KING & SPALDING LLP

By: */s/ Craig Carpenito*

Craig Carpenito
ccarpenito@kslaw.com
Jessica Benvenisty
jbenvenisty@kslaw.com
Amy Nemetz
anemetz@kslaw.com
KING & SPALDING LLP
1185 Avenue of the Americas
34th Floor
New York, NY 10036-2601
Tel: (212) 556-2100
Fax: (212) 556-2222

Lazar P. Raynal (*pro hac vice*)
lraynal@kslaw.com
Michael A. Lombardo (*pro hac vice*)
mlombardo@kslaw.com
KING & SPALDING LLP
110 N. Wacker Drive
Suite 3800
Chicago, IL 60606
Tel: (312) 995-6333
Fax: (312) 995-6330

Attorneys for Skillz Platform Inc.