UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

CANDY LAB, INC., a Nevada Corporation,

Case No. 17-CV-00569-JPS

Plaintiff,

V.

MILWAUKEE COUNTY, a municipal corporation; MILWAUKEE COUNTY BOARD OF SUPERVISORS; and MILWAUKEE COUNTY DEPARTMENT OF PARKS, RECREATION, AND CULTURE,

Defendants.

DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS

Defendants, Milwaukee County, the Milwaukee County Board of Supervisors and the Milwaukee County Department of Parks, Recreation and Culture ("Defendants"), and pursuant to Fed. R. Civ. P. 12, move this Court to dismiss Plaintiff's Complaint, with prejudice. Both counts in Plaintiff's Complaint are based upon Defendants' alleged violation of Plaintiff's First Amendment rights related to its location-based augmented reality game. But that game is not protected speech under the First Amendment and therefore Plaintiff has no cognizable claim for a violation of the First Amendment. Plaintiff's Complaint should be dismissed. In support of this Motion, Defendants submit the accompanying memorandum of law.

Dated this 31st day of May, 2017.

s/ Charles H. Bohl

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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WISCONSIN

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V.

MILWAUKEE COUNTY, a municipal corporation, MILWAUKEE COUNTY BOARD OF SUPERVISORS, and MILWAUKEE COUNTY DEPARTMENT OF PARKS, RECREATION, AND CULTURE,

Case No. 2:17-cv-00569-JPS

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF ITS RULE 12(b)(6) MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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SUMMARY OF ARGUMENT

This is a First Amendment case. Plaintiff, Candy Lab, Inc. ("Candy Lab"), has released the "first ever location-based, augmented-reality poker game" for mobile devices called "Texas Rope 'Em." It is a variant of the game "Texas Hold 'Em", where players start with two random cards but must travel to the designated game locations to collect additional cards and complete their hand. Candy Lab challenges Milwaukee County's new ordinance prohibiting "virtual and location-based augmented reality games" without a permit, claiming it is a violation of its First Amendment rights. Augmented reality is a technology that superimposes computer-generated images on a user's perception of physical reality.

Candy Lab's Complaint is full of *ad hominem* attacks on Milwaukee County and colorful allegations about all the ways in which the new ordinance violates its First Amendment rights. But Candy Lab forgets one thing. There can be no First Amendment violation where there is no First Amendment right. There is currently no decision from any federal court extending the protection of the First Amendment to augmented reality games. And Texas Rope 'Em should not be the first.

Texas Rope 'Em is not entitled to First Amendment protection because it does not convey any messages or ideas. Unlike books, movies, music, plays and video games – mediums of expression that typically enjoy First Amendment protection – Texas Rope 'Em has no plot, no storylines, no characters and no dialogue. All it conveys is a random display of cards and a map. Absent the communicative features that invoke the First Amendment, Candy Lab has no First Amendment claim.

Texas Rope 'Em is not protected speech for another reason – it is illegal gambling. It fits within the definition of a "lottery" under the Wis. Stat. § 945.01 because it is a game of chance played for consideration with an opportunity to win a prize. Conducting a lottery, like Texas Rope

'Em, is a Class B misdemeanor. Wis. Stat. § 945.02. That too disqualifies it from First Amendment protection. Candy Lab's Complaint should be dismissed in its entirety.

STATEMENT OF FACTS

On April 21, 2017, Candy Lab filed a complaint alleging that Section 47. 03 of the Milwaukee County Code of General Ordinances (the "Ordinance") violates the First Amendment by requiring companies producing "virtual" and "location-based augmented reality games" to obtain a permit before introducing such games into a Milwaukee County park. (Compl. ¶ 1.)

"Augmented reality" is a medium of expression that blends digital content with a person's physical senses "to expand the person's perception of physical reality." (Id. ¶ 13.) Augmented reality adds digital content to a person's perception of his or her physical surroundings. (Id.) Candy Lab's company develops location based, augmented reality software such as its new game called "Texas Rope 'Em," a location-based, augmented reality poker game. (Id. ¶ 37.) Mobile applications such as "Texas Rope 'Em" are the source of Candy Lab's company's revenue. (Id. ¶ 22.)

"Texas Rope 'Em" is a game in which players physically visit pre-programmed locations to acquire randomly generated three-dimensional augmented reality cards. (*Id.* ¶ 38, 41.) Some of these locations are in Milwaukee County's parks, including Lake Park. (*Id.* ¶ 45.) The application displays content based on a combination of inputs both resident within the application software and gathered from the external, physical location of the player. (*Id.* ¶ 42.) Once players acquire a five-card hand, they may "play" it against a computer-controlled "dealer" for the opportunity to win "points and other prizes." (*Id.* ¶ 39.) Whether players win or lose, they may re-start the process and may share results on social media. (*Id.*) Because "Texas Rope 'Em" is a location based augmented reality game with functionality triggered by a user's physical presence in a Milwaukee County park, the Ordinance applies to "Texas Rope 'Em." (*Id.* ¶¶ 68-70.)

The Ordinance provides that any company seeking to introduce a virtual or location-based augmented reality game in Milwaukee County Parks must first obtain a permit from the Director of the Department of Parks, Recreation, and Culture (the "Parks Department"). (*Id.* ¶ 27.) The permitting application process is described on the Parks Department's website, and includes internal review to determine appropriateness of the application considering site selection, protection of rare flora and fauna, safety, and intensity of activity on park land. (*Id.* ¶ 27.) Game activity is only allowed during standard park hours unless otherwise authorized. (*Id.*)

Candy Lab contends that "Texas Rope 'Em" is a form of free speech protected by the First Amendment and that an ordinance prohibiting the introduction of "Rope 'Em" into the County's parks without a permit is an unconstitutional restriction on that free speech. (*Id.* ¶¶ 77-78.) Candy Lab seeks a declaratory judgement that the Ordinance violates the First Amendment, an injunction against the enforcement of the Ordinance, and damages. (*Id.* ¶ 92.)

ARGUMENT

I. LEGAL STANDARD.

A motion to dismiss is granted when a complaint fails to articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007). The Court must accept as true all well-plead facts and draw all possible inferences in favor of the plaintiff. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). However, a plaintiff cannot rely on labels and conclusions. *Id.* at 1092. Allegations in the form of legal conclusions are insufficient, as are "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Defender Sec. Co. v. First Mercury Ins. Co.*, 803 F.3d 327, 334 (7th Cir. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

II. CANDY LAB HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE ITS GAME "TEXAS ROPE 'EM" IS NOT SPEECH PROTECTED BY THE FIRST AMENDMENT.

A. Texas Rope 'Em is not protected speech because it does not convey any messages or ideas.

Candy Lab claims that Milwaukee County violated its First Amendment rights by enacting an ordinance that unconstitutionally restricts its ability to publish its located-based augmented reality poker game – Texas Rope 'Em – in Milwaukee County parks. (Compl. ¶¶75-91.) But a prerequisite to any First Amendment claim is the *right* to First Amendment protection in the first place. This Court must therefore answer the threshold question of whether Texas Rope 'Em is entitled to First Amendment protection. Candy Lab merely assumes its game has such protection, alleging once in conclusory fashion that "Texas Rope 'Em is a form of speech protected by the First Amendment to the Constitution." (Compl. ¶ 77.) That bald allegation does not suffice. When applying the characteristics of Texas Rope 'Em, as alleged, to First Amendment principles, the conclusion is clear: Texas Rope 'Em is not speech protected by the First Amendment.

There is no precise test for determining how the First Amendment protects a given form of expression. Instead, the U.S. Supreme Court has advised that "[e]ach medium of expression...must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). Put another way, when confronted with a claim for a First Amendment violation, courts must assess whether the medium or activity at issue is "sufficiently imbued with elements of communication to fall within the scope of the First...Amendment[.]" *Spence v. State of Wash.*, 418 U.S. 405, 409 (1974). For example, some forms of entertainment are conferred First Amendment protection, *see Calash v. City of Bridgeport*, 788 F.2d 80, 82 (2d Cir. 1986) (musical entertainment is a form of protected speech), whereas other

forms of entertainment are not, *see There to Care, Inc. v. Comm'r of Indiana Dep't of Revenue*, 19 F.3d 1165, 1167 (7th Cir. 1994) (the game Bingo is not protected speech).

No court has yet determined whether an augmented reality game receives First Amendment protection. Presumably, Candy Lab believed its game had First Amendment protection by virtue of the U.S. Supreme Court's decision in Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 790 (2011), which held that video games are entitled to First Amendment protection. In Brown v. Entertainment Merchants Ass'n, the U.S. Supreme Court held that video games are entitled to First Amendment protection because "[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). 564 U.S. 786, 790 (2011). Even before *Brown*, courts were already extending First Amendment protection to certain video games. See e.g. American Amusement Machine Ass'n v. Kendrick, 244 F.3d 572, 579-80 (7th Cir. 2001) (holding that the violent video games in the record warranted First Amendment protection because they contained enough literary elements to be a form of expression). But that does not mean that every game played with some form of electronic device enjoys categorical First Amendment protection. Rather, again, each medium of expression must be assessed on its own for First Amendment purposes. Se. Promotions, Ltd., 420 U.S. at 557. And Texas Rope 'Em is simply not the type of game that triggers the First Amendment (regardless of whether it is called a video game, an augmented reality game or a mobile device game).

As explained in *Brown*, the reason that video games receive First Amendment protection is because they communicate *ideas* and *messages* through literary devices or through features distinctive to the medium. 564 U.S. at 790. In other words, video games will be protected under the

First Amendment if they include sufficient communicative, expressive, or informative elements to fall at least within the outer limits of constitutionally protected speech. The Seventh Circuit had previously held the same 10-years before *Brown* in *American Amusement Machine Ass'n*. In that case, the Seventh Circuit explained why the video games there deserved First Amendment protection – because they told stories. *American Amusement Machine Ass'n*, 244 F.3d at 577. The Seventh Circuit found the following example illustrative:

Take once again "The House of the Dead." The player is armed with a gun—most fortunately, because he is being assailed by a seemingly unending succession of hideous axe-wielding zombies, the living dead conjured back to life by voodoo. The zombies have already knocked down and wounded several people, who are pleading pitiably for help; and one of the player's duties is to protect those unfortunates from renewed assaults by the zombies. His main task, however, is self-defense. Zombies are supernatural beings, therefore difficult to kill. Repeated shots are necessary to stop them as they rush headlong toward the player. He must not only be alert to the appearance of zombies from any quarter; he must be assiduous about reloading his gun periodically, lest he be overwhelmed by the rush of the zombies when his gun is empty.

Id. That description exemplifies the type of speech that invokes First Amendment Protection.

Returning to Texas Rope 'Em, the question becomes: what message or idea does Texas Rope 'Em convey? The answer is none. Upon opening the Texas Rope 'Em application, players begin with two random playing cards. (Compl. ¶ 38.) The players then physically visit pre-programmed locations to acquire three more randomly generated three dimensional augmented reality cards. (*Id.* ¶¶ 38, 41.) Once players acquire a five-card hand, they may "play" it against a computer-controlled "dealer." (*Id.* ¶ 39.) Win or lose, players can then restart the process. (*Id.*) That is all. In stark contrast to the video games in *Brown* and *American Amusement Machine Ass'n*, Texas Rope 'Em has no storylines, no characters, no plot and no dialogue. The player simply views randomly generated cards and travels to locations to get more. That is not the type of speech that demands First Amendment safeguards.

Indeed, in a similar case, a District Court in Pennsylvania reached the same conclusion. In *Telesweeps of Butler Valley, Inc. v. Kelly*, the plaintiff was in the business of selling phone cards, cell phone accessories, office products and services, and Internet time at its on-site computer terminals. No. 3:12-CV-1374, 2012 WL 4839010, at *1 (M.D. Pa. Oct. 10, 2012), aff'd sub nom. *Telesweeps of Butler Valley, Inc. v. Attorney Gen. of Pennsylvania*, 537 F. App'x 51 (3d Cir. 2013). The plaintiff also used sweepstakes entries as a promotional tool to boost its sales of the phone cards. *Id.* at *2. Once a customer created an account to enter the sweepstake, he would receive a card with a pin number and then swipe the card at a computer terminal to begin. *Id.* To learn whether he had won a prize, the customer could (1) ask the cashier, or (2) use the "game display" at his own computer terminal. *Id.* The game displays were tailored to mimic "slot machines and other amusing casino-style games" including poker. *Id.* at 3. The customer could play one of the games to find out if he won even though the results of the game had no impact on whether he won a prize in the sweepstakes. *Id.*

The plaintiff filed a complaint and a motion for a temporary restraining order and preliminary injunction seeking a declaratory judgment that Pennsylvania Act 81 of 2012 violated its First Amendment rights. *Id.* at *1. Pennsylvania Act 81 made it a misdemeanor to operate an electronic video monitor that is offered to "persons to play or participate in simulated gambling". *Id.* The Court held that the plaintiff had not established a likelihood of success on the merits because, *inter alia*, "the sweepstakes games themselves and the words used within the games do not constitute protected speech." *Id.* at *6. The plaintiff tried to rely on *Brown*, arguing that the sweepstakes games were just like video games. *Id.* But the Court was not persuaded:

Unlike in *Brown*, the simulated gambling programs at issue here **do not contain plots, storylines, character development, or any elements that would communicate ideas**. Rather, the words associated with the display merely state whether a player has won a prize by displaying a depiction of, for instance, **three cherries**.

Id. (emphasis added). Texas Rope 'Em is no different. The only images depicted for the players are randomly generated cards and a map. Neither the cards nor the map express ideas, messages or even words and they certainly do not tell a story.

Consider another example. In *There to Care, Inc. v. Comm'r of Indiana Dep't of Revenue*, the Seventh Circuit gave the following explanation as to why the game bingo is not protected speech:

Is bingo speech? People buy cards in the hope of winning back more than they spend. A voice at the front of the hall drones "B–2" and "G–49"; after a while someone at the back of the hall shouts "BINGO!" and gets a prize. These words do not convey ideas; any other combination of letters and numbers would serve the purpose equally well. They employ vocal cords but are no more "expression" than are such statements as "21" in a game of blackjack or "three peaches!" by someone who has just pulled the handle of a one-armed bandit.

19 F.3d 1165, 1167 (7th Cir. 1994). The same principles apply here. Randomly selecting cards from a deck (in reality or simulated) is just like drawing a bingo ball from the bingo cage. All that follows is a "queen of hearts" or a "B-2", neither of which conveys ideas or messages. Simulated gambling and bingo do not receive First Amendment protection and neither should Texas Rope 'Em. This Court should dismiss Candy Lab's Complaint in its entirety.

B. Texas Rope 'Em is also not protected speech because it is illegal gambling.

There is another reason that Texas Rope 'Em is not protected speech (and another reason to dismiss the Complaint) – because it constitutes gambling. It is well-established that gambling is not speech protected by the First Amendment. *There To Care, Inc. v. Commissioner of the Indiana Department of Revenue*, 19 F.3d 1165, 1167 (7th Cir. 1994) ("Gambling has traditionally been closely regulated or even forbidden, without anyone suspecting that these restrictions violate the first amendment."). Gambling is not speech because it "does not convey ideas" and although statements promoting gambling are speech, wagering money is an activity. *Id; see also Telesweeps of Butler*

Valley, Inc., No. 3:12-CV-1374, 2012 WL 4839010 at *5 ("when considered as a whole, Act 81 targets conduct which the Commonwealth of Pennsylvania has labeled "gambling" and does not implicate the First Amendment Free Speech Clause.").

Wisconsin is one of many states that prohibits most gambling and strictly regulates the gambling that is permitted. Chapter 945 of the Wisconsin Statutes describes the various forms of gambling that are illegal and their punishments. Of importance here is the description of an illegal "lottery." Section 945.01 describes a lottery as "an enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which is determined by chance, even though accompanied by some skill." Wis. Stat. § 945.01(5). The term "consideration" means "anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant." *Id.* Anyone who conducts a lottery is guilty of a Class B misdemeanor. Wis. Stat. § 945.02(3).

Though atypical of what normally comes to mind when one says "lottery," Texas Rope 'Em, as operated by Candy Lab, is an illegal lottery. A lottery requires: (1) a game of chance, (2) consideration, and (3) a prize. *See* Wis. Stat. § 945.01(5). Texas Rope 'Em has all three. Like with any game of poker, the cards in Texas Rope 'Em are drawn at random, making it a game of chance. (Compl. ¶ 38.) The consideration is the commercial benefit provided to Candy Lab for downloading the Texas Rope 'Em application. After all, mobile applications like Texas Rope 'Em are the source of its revenue. (*Id.* ¶ 22.) And lastly, winners in Texas Rope 'Em are awarded prizes. (*Id.* ¶ 39: "Points and other prizes are awarded for victories."). That makes the publication of Texas Rope 'Em a crime, not a First Amendment right. *See also e.g.* 26 *Wis. Op. Atty Gen.* 143 (1937) (cards bearing numbers entitling holder to prize money if he also has purchased a theater ticket are in violation of the lottery and gambling laws).

For that reason as well, Texas Rope 'Em is not entitled to First Amendment protection.

Absent a First Amendment right, Candy Lab's claims cannot be sustained. They should be dismissed with prejudice.

CONCLUSION

For all of the foregoing reasons, this Court should dismiss Candy Lab's Complaint, with prejudice.

Dated this 31st day of May, 2017.

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