IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CARL EVANS, DONALD SPENCER, VALERIE SPENCER, CINDY CARTER, individuals, on Behalf of themselves and for the Benefit of all with the Common or General Interests, Any Persons Injured, and All Others Similarly Situated, Plaintiffs, v. LINDEN RESEARCH, INC., a corporation, and PHILIP ROSEDALE, an individual, Defendants.	Civil Action No. 2:10-cv-01679-ER

ORDER

AND NOW, this _____ day of _____, 2010, upon consideration of Defendants Linden Research, Inc., and Philip Rosedale's Motion to Dismiss under Rule 12(b)(6) or in the Alternative to Transfer Pursuant to 28 U.S.C § 1404(a), it is ORDERED that:

The First Amended Complaint – Class Action for Damages and Injunctive Relief is DISMISSED.

This matter is TRANSFERRED TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BY THE COURT:

_____
EDUARDO C. ROBRENO
United States District Judge

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CARL EVANS, DONALD SPENCER, VALERIE SPENCER, CINDY CARTER, individuals, on Behalf of themselves and for the Benefit of all with the Common or General Interests, Any Persons Injured, and All Others Similarly Situated, Plaintiffs, v. LINDEN RESEARCH, INC., a corporation, and PHILIP ROSEDALE, an individual, Defendants.	:	Civil Action No. 2:10-cv-01679-ER

DEFENDANTS LINDEN RESEARCH, INC., AND PHILIP ROSEDALE'S MOTION TO DISMISS UNDER RULE 12(b)(6) OR IN THE ALTERNATIVE TO TRANSFER PURSUANT TO 28 U.S.C. § 1404(a)

Pursuant to Federal Rule of Civil Procedure 12(b)(6), and for the reasons stated in the attached Memorandum of Law, Defendants Linden Research, Inc., and Philip Rosedale respectfully request that this Court dismiss Plaintiff's First Amended Complaint – Class Action for Damages and Injunctive Relief or, in the alternative, transfer this matter to the United States District Court for the Northern District of California pursuant to 28 U.S.C. § 1404(a).

Respectfully submitted,

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Dated: July 9, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CARL EVANS, DONALD SPENCER, VALERIE SPENCER, CINDY CARTER, individuals, on Behalf of themselves and for the Benefit of all with the Common or General Interests, Any Persons Injured, and All Others Similarly Situated, Plaintiffs, v. LINDEN RESEARCH, INC., a corporation, and PHILIP ROSEDALE, an individual, Defendants.	Civil Action No. 2:10-cv-01679-ER

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(b)(6) OR IN THE ALTERNATIVE TO TRANSFER PURSUANT TO 28 U.S.C. § 1404(a)

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> ***You agree that this Agreement and the relationship between you and Linden Lab shall be governed by the laws of the State of California . . . . Further, you and Linden Lab agree to submit to the exclusive jurisdiction and venue of the courts located in the City and County of San Francisco, California, except as provided in Section 12.1 regarding optional arbitration.***

I. INTRODUCTION

This case has no basis to be in this Court. It is a purported nationwide class action against a California corporation, brought by four putative class representatives. Three of those four have no claim to venue here: they live in Florida and Wisconsin. The fourth—Carl Evans—is the only party with any connection to this District. But Mr. Evans agreed to, and is contractually bound by, a forum selection clause that unambiguously requires that all claims be brought in California. Mr. Evans didn't agree to that clause once. He didn't agree to it a few times. Mr. Evans has opened literally scores of separate accounts with Linden, both under his own name and fraudulently under dozens of pseudonyms, each time agreeing to the same Terms of Service. Nor can Mr. Evans claim ignorance of the terms to which he agreed. When it suits his purposes, he cites those same terms back to Linden, and he has acknowledged and commented on Linden's Terms of Service, including the dispute resolution provision, in correspondence with Linden.

Because Mr. Evans is the only party with any connection to this forum, and because he is subject to multiple valid and enforceable contracts establishing the Northern District of California as the sole venue for his complaint, venue does not lie here, and this case thus should be dismissed. In the alternative, this matter should be transferred pursuant to § 1404(a), as the relevant evidence and witnesses, along with all defendants and the lion's share of putative class members, are found there, not here. Moreover, Plaintiffs plead numerous claims of violations of California law, each of which is more appropriately brought in a California court familiar with those statutes.

II. FACTUAL BACKGROUND

A. Second Life

Defendant Linden Research Inc. ("Linden") created and operates Second Life, a three-dimensional online virtual world that simulates a real world environment. In Second Life, users interact with each other using "avatars," which are their three-dimensional digital personae. Users, who are also called "Residents," create content and experiences in Second Life, including digital representations of buildings, such as homes and shops, and objects like automobiles, clothing, and jewelry. In Second Life, users explore, socialize, conduct business, and attend meetings and events. *See* Exhibit 1 (true and correct copy of the Declaration of John Rountree ("Rountree Decl.") ¶1).

B. The Parties

Plaintiffs purport to bring this action on behalf of themselves and "a nationwide Class defined as all persons who are or were owners, possessors, purchasers, creators or sellers of virtual land or any other items of virtual property or items as participants in the Second Life game at any point between November 14, 2003 and the date of class certification." (First Am. Compl. – Class Action for Damages and Injunctive Relief ("FAC") ¶173.) Plaintiffs assert that there are likely "tens of thousands, if not millions, of members in the Main Class, geographically dispersed throughout the United States." (FAC ¶176.)

Of the four named plaintiffs, Carl Evans is the only class representative who is alleged to reside in this District. (FAC ¶1.) The other three plaintiffs—Donald Spencer, Valerie Spencer and Cindy Carter—allegedly reside in Florida or Wisconsin. (FAC ¶¶2-4.)

Defendants both reside in California. (FAC ¶¶5-6.) Linden is headquartered and "provid[es] its services out of . . . San Francisco, CA." (FAC ¶5.) The majority of Linden's employees, including Defendant Philip Rosedale and all relevant employees with knowledge of the Plaintiffs' interactions with and complaints about Second Life, work in California. (Rountree Decl. ¶¶20-21.) Linden's documents, relevant customer service staff, and employees responsible for records of the transactions at issue in this case are all located in California. (*Id.*) Linden does

not maintain any offices or relevant records in the Eastern District of Pennsylvania. In fact, Linden does not have a single office, employee, or document anywhere in this District. (*Id.*, ¶22.)

Mr. Evans is no newcomer to Linden's policies and user agreements, and no casual user. He is a long-term troublemaker, whose scores of accounts have been suspended over and over again for repeated violations of Second Life's rules and regulations. In addition to violating requirements that he truthfully identify himself in creating user accounts, he is abusive and profane to other users, whose complaints lead to his suspensions. He has been the subject of over 100 abuse reports from other users, related to more than 20 different accounts, frequently for interfering with the Second Life public area where Second Life mentors greet new users and answer their questions. For example, Mr. Evans wrote the following to one participant in the Second Life Mentor program:

> you fucking whore your mother and father should burn in hell you rat cunt if I could get near you I wold spit in your skank mouth and shove a bat up your filth ass you little cry baby bith. [sic]

(*Id.*, ¶17.) To another user, he wrote:

> good morning you rat cunt i started this account just to fucking rip your head off you worthless piece of shit you supposed to mentor not men whore you ratted on my man i wish i could get may hand around yout thoart [sic]

Id. Mr. Evans reacts to the suspensions that his conduct triggers by heaping similarly obscene abuse on Linden's support personnel. A small sampling of Mr. Evans' hundreds of written communications (in addition to dozens of abusive telephone calls) to Linden support staff are attached to the Rountree Declaration. (*Id.*, Exh. I.)

When Mr. Evans' accounts are suspended or closed for this repeatedly abusive conduct, he creates new accounts under pseudonyms, with false identity information, names, birthdates, and the like. When Mr. Evans' repeated attempts to open fraudulent accounts are detected, he resorts to remarkable fictions in an attempt to convince Linden either that he is a different user or that someone else must have been using his computer to abuse other users. For example, on one

occasion, he concocted the following tale:

> i want to appeal my warning on 7/8/08 oh please answer i am sooooo scared when this occered i was not home i was out side assisting a mom who's child was hit by car so unless you have proof photos of me sitting at my keyboard ,i have proof a letter from said mommy dont call me a liar just drop the warning from my record lets see you answer me with out your typical oh your computer reply if this isnt drop i may sue linden lab thanks

(*Id.*, Exh. I, Ticket #4051-5015409.)

On another occasion, in a handwritten appeal letter under the name Carl Evans, he claimed that he was a locksmith, and that someone in his house must have used his computer while he was called away on an emergency call to rescue an infant locked in a car. (*Id.*, Exh. I, Ticket #4051- 4598699.)

Mr. Evans knew full well he was violating Second Life's Terms of Service ("TOS") by creating multiple false identities. Indeed, he bragged of it:

> i will admitt with great ease i can bypass the block and set up a new account but i will wait till 5 pm on fri the 12 of feb 2010 if at this time my account is not released i will be forced to bypass your block to access secondlife and create another account also i plan to take my complaints to the office of the da's in san fran thanks

(*Id.*, Exh. I, Ticket #4051-7366155.) He similarly bragged of helping others evade Linden's authentication procedures:

> this is just feedback about what you bone heads at linden lab are doing since you asked in an email asking people to prove age to play a game is invading there privacy and there rights my real name is not james monroe for one and just 2 days ago a friends 19 year old son stole his dads wallet to get his id to open an account i have hellped 9 people my self bypass this garbage

(*Id.*, Exh. I, Ticket #4051-6839913.)

When caught attempting to establish yet another identity, Evans claimed to be a "Thomas Bing." He even went so far as to submit photocopies purporting to be of Thomas Bing's government identification, along with a handwritten letter signed "T. Bing," claiming that Mr. Bing's problems stemmed from a supposed vendetta on Linden's part against another user

(presumably Evans). (*Id.*, Exh. I, Ticket #4051-4555029.) That letter, however, is in handwriting identical to the one Mr. Evans sent in his own name.

Mr. Evans has (when it suits his purpose) repeatedly acknowledged his awareness of Linden's Terms of Service. For example, in one missive he accuses another user of conduct that "is against your tos" (*id.*, Exh. I, Ticket #4051-6515335), and in another he describes a fellow user as "just a whiner shoving the tos in every bodys face like hes a cop [sic]." (*Id.*, Exh. I, Ticket #4051-5882522.) In messages to other users he frequently discloses his familiarity with, and disdain for, the Terms of Service: "please asking nice here when talking to me do not refer to tos or rules i do[n']t like it and it angers me thank you"; "fuck you pig fuck the lindens you little crybaby fuck the tos and oh lets not forget fuck the law hahaha"; "[f]uck the tos i clean dog shit up with it." (*Id.*, ¶15.) And in the handwritten appeals letter and accompanying email sent under his own name, he quotes extensively from, and cites, a 2007 Linden announcement explaining the dispute resolution provisions of the Terms of Service. That announcement includes:

> **9. Does the TOS allow me to file claims in a court of law?**
> **Yes, Residents may file claims in a court in San Francisco, California.**
> **10. Can I file claims in a court outside of San Francisco, California?**
> **No, if a Resident seeks resolution in a court of law, the claim must be filed in a court in San Francisco, California.**
> 11. What happens if I file a claim in a manner that is not allowed by the TOS?
> Linden Lab will notify Residents in writing of claims filed contrary to the TOS. Residents who do not promptly withdraw the claims may be liable for the attorneys' fees and costs, up to $1,000.00 USD, that Linden Lab incurs as the result of the improper filing.
> 12. What law applies to a legal dispute that I may have with Linden Lab?
> California law governs Residents' relationship with Linden Lab.
> 13. What if I do not agree to the updated TOS?
> Residents who do not agree should decline the updated TOS and are prohibited from using Second Life.

(*Id.*, Exh. A.)

Mr. Evans was thus fully aware of the Terms of Service, and specifically of the venue

provisions, when he opened countless separate user accounts, each time expressly agreeing to Linden's Terms of Service. (*Id.*, ¶8.)

C. Forum Selection Clause

When a person signs up to use Second Life, he or she does so by visiting Linden's website and creating a user account. When the user logs into the three-dimensional online environment for the first time, a dialogue box with the full text of the Terms of Service is presented on the user's computer screen, and the user must affirmatively consent to the terms by clicking a check box next to the words "I Agree." Users who do not click "I Agree" are not allowed to continue in the login process to use Second Life. (Rountree Decl. ¶3.) At the very top of the Terms of Service, in the first paragraph even preceding the table of contents, a would-be user is advised:

> By using Second Life, you agree to and accept these Terms of Service. If you do not so agree, you should decline this Agreement, in which case you are prohibited from accessing or using Second Life.

(Rountree Decl. ¶5, Exhs. B, E, F.) Among other things, the Terms of Service require users:

- To provide true and accurate registration information (TOS § 3.1);
- To abide by the Second Life Community Standards (TOS § 8.1);
- Not to post, display or transmit content that is harmful, threatening, or harassing (TOS § 8.2(iv)), obscene or hateful (TOS § 8.2(v)), or explicitly sexual, intensely violent or otherwise designated as "Adult" under our "Maturity Ratings," except as set forth in those ratings (TOS § 8.2(viii)); and
- Not to engage in malicious or disruptive conduct that impedes or interferes with other users' normal use of the service (TOS § 8.3(iv)).

Linden's Terms of Service also incorporate a forum selection clause which requires resolution of disputes such as this one exclusively in courts located in the City and County of San Francisco. The parties also agreed that their relationship would be governed by the laws of the State of California. That provision reads:

> You agree that this Agreement and the relationship between you and Linden Lab shall be governed by the laws of the State of

> California without regard to conflict of law principles of the United Nations Convention on the International Sale of Goods. Further, you and Linden Lab agree to submit to the exclusive jurisdiction and venue of the courts located in the City and County of San Francisco, California, except as provided in Section 12.1 regarding optional arbitration. (TOS § 12.2)

Mr. Evans, the only class representative alleged to reside in this District, affirmatively accepted Linden's current Terms of Service, including the forum selection clause. In fact, he manifested agreement to Linden's current forum selection provision, which has been in effect since September 2007, at least 28 times.[1] (Rountree Decl. ¶¶7-8.) The other class representatives alleged to reside outside this District also agreed to Linden's Terms of Service, and at least Cindy Carter and Valerie Spencer affirmatively clicked through Terms of Service containing the current forum selection clause. (*Id.*, ¶9).

D. Claims

The Amended Complaint asserts four counts based upon alleged violations of California statutes and five alleged common law torts:

> Count 1 – Violation of the California Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*
>
> Count 2 – False Advertising, Cal. Bus & Prof. Code § 17500
>
> Count 3 – Violation of Cal. Civ. Code § 1812.600 *et seq.*
>
> Count 4 – Violation of Cal. Bus. & Prof. Code § 17200
>
> Count 5 – Fraud/Fraud in the Inducement
>
> Count 6 – Conversion
>
> Count 7 – Intentional Interference with Contractual Relations/Prospective Economic Advantage
>
> Count 8 – Unjust Enrichment
>
> Count 9 – Wrongful Expulsion

[1] Prior versions of the Terms of Service are attached to the Rountree Declaration as Exhibits E and F.

E. *Bragg v. Linden Research, Inc.*

Plaintiffs have never been before this Court before, but their counsel has.[2] Plaintiffs, clearly anticipating that Linden would seek to enforce the venue selection provisions of its Terms of Service, attempt to avoid that issue by incorporating this Court's opinion in *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007) ("*Bragg*") by attaching it as Exhibit 1 to the First Amended Complaint. Plaintiffs incorrectly assert that "[t]he issue of the arbitration clause and other issues raised in the Bragg case are, once again, before this Court. Defendants are bound by and collaterally estopped by this Court's prior rulings . . . ." (FAC ¶9.)

In *Bragg*, this Court considered and rejected the mandatory arbitration provision in Linden's former Terms of Service, as applied to claims brought by an individual plaintiff residing in this District, in the context of Linden's motion to compel three-judge AAA arbitration in San Francisco. Since that ruling, Linden has substantially modified its Terms of Service, by removing the requirements that arbitration be conducted in San Francisco, by providing for streamlined low-cost optional arbitration for claims under $10,000, and by making the dispute resolution and venue provisions clearer and more prominent.

III. ARGUMENT

A. The Forum Selection Clause In Linden's Terms Of Service Bars This Action

The Plaintiffs in this action (and in particular Mr. Evans, the only plaintiff residing in this District) agreed to Linden's Terms of Service, which contain an entirely typical and legitimate forum selection clause.[3] Those Terms of Service do not require users to resolve their complaints

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[2] In violation of local rules and practice as reflected at pages 10-11 of the Clerk's Office Procedural Handbook for this District and the instructions on the proper case designation form, Plaintiffs' counsel has designated this matter as related to *Bragg v. Linden Research, Inc., et al.*, C. A. No. 06-cv-4925, despite the fact that the prior matter does not remain pending and was terminated more than one year prior to filing this action. *See* Exhibit 2 (true and correct copy of Plaintiffs' Designation Form dated April 15, 2010). Defendants leave to the Court how to proceed in light of this violation.

[3] "[A] 12(b)(6) dismissal is a permissible means of enforcing a forum selection clause that allows suit to be filed in another federal forum." *Salovaara v. Jackson Nat'l Life Ins. Co.*, 246 F.3d 289, 298-99 (3d Cir. 2001) ("when a defendant moves under Rule 12, a district court retains the judicial power to dismiss notwithstanding its consideration of § 1404.")

in court at all:

> **12.1 If a dispute arises between you and Linden Lab regarding a claim for less than $10,000, either party may resolve it through Arbitration instead of Litigation.**
>
> Our goal is to provide you with a neutral and cost-effective means of resolving the dispute quickly.
>
> Thus, for any claim related to this Agreement or our Service, excluding claims for injunctive or other equitable relief, where the total amount sought is less than ten thousand U.S. Dollars ($10,000.00 USD), either we or you may elect at any point in or during a dispute or proceeding to resolve the claim through binding non-appearance-based arbitration. A party electing arbitration shall initiate it through an established alternative dispute resolution ("ADR") provider mutually agreed upon by the parties. The ADR provider and the parties must comply with the following rules: (a) the arbitration shall be conducted, at the option of the party seeking relief, by telephone, online, or based solely on written submissions; (b) the arbitration shall not involve any personal appearance by the parties or witnesses unless otherwise mutually agreed by the parties; and (c) any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.

However, if—and only if—a user chooses to sue Linden in court rather than take advantage of optional arbitration, that user is contractually obligated to bring that suit in San Francisco. As set forth above, Mr. Evans agreed to that contract, knowingly, over and over again. That contract is enforceable, and Plaintiffs cannot simply ignore it at their whim.

1. Linden's Forum Selection Clause Is Presumptively Valid

Forum selection clauses are prima facie valid and should be enforced unless the objecting party can show that the circumstances render enforcement unreasonable. *See Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 202 (3d Cir. 1983) (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10-11 (1972)) , *overruled on other grounds by Lauro Lines v. Chasser*, 490 U.S. 495 (1989) ; *Campanini v. Studsvik, Inc.*, No. 08-5910, 2009 WL 926975, at *9 (E.D. Pa. Apr. 6, 2009) (a mandatory forum selection clause [such as the one in Linden's

Terms of Service] clearly dictates that venue is proper only in the agreed upon forum).[4] A forum selection clause is unreasonable upon a "strong showing" that: (1) the forum selected is "so gravely difficult and inconvenient" that the party "will for all practical purposes be deprived of his day in court"; or (2) the clause was procured through "fraud or overreaching." *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1219 (3d Cir. 1991) (quoting *Bremen*, 407 U.S. at 15, 18.) A forum selection clause should also be deemed unenforceable if enforcement would run counter to a strong public policy of the forum where the lawsuit was brought. *See Campanini*, 2009 WL 926975, at *5 (citing *Bremen*, 407 U.S. at 15).[5]

"Mere inconvenience or additional expense is not the test of unreasonableness . . . [i]f the agreed upon forum is available to plaintiff and said forum can do substantial justice to the cause of action then plaintiff should be bound by his agreement." *Campanini*, 2009 WL 926975, at *6 (transferring case to Tennessee despite plaintiff's objection that it would be more costly for him to litigate there) (quoting *Cent. Contracting Co. v. Md. Cas. Co.*, 367 F.2d 341, 344 (3d Cir. 1966) (quoting *Cent. Contracting Co. v. C.E. Youngdahl & Co.*, 418 Pa. 122, 209 A.2d 810 (Pa. 1965)) .

2. Courts Regularly Uphold Similar Forum Selection Clauses

Courts regularly uphold forum selection clauses such as the one at issue here. For

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[4] When a case is in federal court based on diversity jurisdiction, federal law determines the validity of a forum selection clause. *See Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877 (3d Cir. 1995) (holding that validity of choice of forum clauses are procedural, not substantive in nature, thus federal law applies in diversity cases); *see Wall St. Aubrey Golf, LLC v. Aubrey*, 189 F. App'x 82, 84 (3d Cir. 2006) (following *Jumara* to apply federal law); *Campanini*, 2009 WL 926975, at *4 (applying *Jumara* and analyzing validity of forum selection clause under federal law); *see also Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31-32 (1988) (holding that in diversity cases, federal law governs determination of what effect to give forum selection clause in contract).

[5] A forum selection clause may be set aside on the basis of fraud only if "the inclusion of that clause in the contract was the product of fraud or coercion." *Hoffer v. InfoSpace.com, Inc.*, 102 F. Supp. 2d 556, 563 (D.N.J. 2000) (citing *Sherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) . *See, e.g., Campanini*, 2009 WL 926975, at *6 (plaintiff's failure to recognize that his employment agreement contained a forum selection clause or seek counsel prior to signing it did not gives rise to an inference of fraud or overreaching).

example, in *Nazaruk v. eBay*, No. 2:06CV242, 2006 WL 2666429 (D. Utah Sept. 14, 2006), *affirmed*, 223 F. App'x 815, 2007 WL 1417287 (10th Cir. 2007) , the court dismissed a complaint based on an online click-through contract with language and terms virtually identical to those at issue here:

> You agree that any claim or dispute you may have against eBay must be resolved by a court located in Santa Clara County, California, except as otherwise agreed by the parties or as described in the Arbitration Option paragraph below.

Id. at *3; *see also Hugger-Mugger, L.L.C. v. Netsuite, Inc.*, No. 2:04CV592, 2005 WL 2206128, at *7 (D. Utah 2005) (enforcing a forum selection clause contained in a clickwrap agreement mandating that any dispute between the parties be adjudicated in Santa Clara County, California, and dismissing action); *Novak v. Tucows, Inc.*, No. 06-CV-1909, 2007 WL 922306, at *7-9 (E.D.N.Y. Mar. 26, 2007) (upholding the forum selection clause in an online agreement where the plaintiff was required to "click-through" his assent to the agreement containing the forum selection clause); *Person v. Google*, 456 F.Supp.2d 488, 493 (S.D.N.Y.2006) (enforcing an online forum selection clause where the evidence demonstrated that every customer must click on a box acknowledging that they agree to the terms and conditions of defendant's contract); *Novak v. Overture Servs., Inc.* ., 309 F.Supp.2d 446, 451 (E.D.N.Y.2004) (enforcing the forum selection clause contained in an online agreement where the plaintiff was required to click a button indicating acceptance in order to proceed and, therefore, had a reasonable opportunity to review the terms of service).

The Third Circuit has held that a customer on notice of contract terms available on the internet website is bound by those terms. *Schwartz v. Comcast Corp.*, No. 06-4855, 256 F. App'x 515, 2007 WL 4212693 (3d. Cir. Nov. 30, 2007). And this Court has upheld click-through venue provisions in the context of online advertising agreements in *Feldman v. Google*, 513 F. Supp. 2d 229 (E.D. Pa. 2007) (noting, in considering enforceability of terms available for review on internet site, that under "traditional principles of contract law", focus is "whether the plaintiffs had reasonable notice of and manifested assent to the . . . agreement"). Similarly, in

Pentecostal Temple Church v. Streaming Faith LLC, No. 08-554, 2008 WL 4279842, at *4-5 (W.D. Pa. Sept. 16, 2008), the court upheld a forum selection clause even though it was contained in a ten-page online document incorporated by reference into a written agreement. And in *Parts Geek, LLC v. U.S. Auto Parts Network Inc.*, No., 09-5578, 2010 WL 1381005 (D.N.J Apr. 10, 2010), the court upheld a forum selection clause contained in the "Miscellaneous" section of online terms of service.

This case is no different: The contract at issue, and the venue selection clause contained therein, are standard operating procedure in internet commerce. Indeed, the only significant difference here is that the plaintiff actually acknowledged publicly his knowledge and understanding of the provisions at issue, and then proceeded to agree to them again and again.

3. Issue Preclusion Does Not Apply

Faced with an unmistakably enforceable venue provision, Plaintiffs hope to evade its effect by telling this Court it has already decided the matter in their favor. Plaintiffs' claim that this Court's *Bragg* opinion controls this case is simply wrong. This Court's holding concerning a different provision, in a different contract, based on the burden mandatory arbitration in San Francisco would impose on an individual plaintiff with what began as a small claims court case in Pennsylvania, is clearly nonpreclusive here.

Issue preclusion bars successive litigation of "an issue of fact or law" that "is actually litigated and determined by a valid and final judgment, and . . . is essential to the judgment." Restatement (Second) of Judgments § 27 (1980).[6] If a judgment does not depend on a given determination, relitigation of that determination is not precluded. *Id.*, § 27, Comment h. In addition, even where the core requirements of issue preclusion are met, an exception to the general rule may apply when a "change in [the] applicable legal context" intervenes. *Id.*, § 28, Comment c.

[6] The term "issue preclusion" in current usage, "encompasses the doctrines [earlier called] 'collateral estoppel' and 'direct estoppel.'" *Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 n. 5, 171 L.Ed.2d 155 (2008).

Four elements are required for the doctrine to apply: "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action." *Howard Hess Dental Laboratories Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 247-48 (3d Cir. 2010) (citations omitted). In determining whether the issue was essential to the judgment, courts "must look to whether the issue was critical to the judgment or merely dicta." *Nat'l R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n*, 288 F.3d 519, 527 (3d Cir. 2002) (internal quotation marks and citation omitted).

In *Bragg*, this Court denied Defendants' motion to compel arbitration, finding that the arbitration provision was unconscionable and therefore invalid. *Bragg*, 487 F. Supp. 2d at 611. In contrast, this case has nothing to do with compelling arbitration. In fact, everything about this case is different from *Bragg*. The terms of service are profoundly different. The new Terms of Service at issue here do not require arbitration at all, and cure the former burden identified by the Court by providing for optional arbitration of relatively small claims (under $10,000) in proceedings that are conducted by a single arbitrator, by telephone, and without requiring the plaintiff to appear either for deposition or hearing. The plaintiffs are different: instead of a single plaintiff with a single small claim, the four plaintiffs here purport to represent a class of millions of plaintiffs, with correspondingly vaster claims. The applicable legal standard is different, the contractual term is different (a standard, presumptively valid forum selection clause instead of a mandatory arbitration clause), and different law applies to determine the validity of the forum selection clause at issue in this case. *See, e.g., Smith v. Hireright Solutions, Inc.*, No. 09-6007, 2010 WL 2270541, at *6 (E.D. Pa. June 7, 2010) (distinguishing between a case that did not deal with a § 1404 motion to transfer venue, but rather considered, under state law, whether an arbitration provision in a contract was unconscionable). And the facts are quite different: as set forth herein, Mr. Evans can make no claim of surprise, having affirmatively agreed to the venue selection clause at issue dozens of times after having publicly acknowledged and discussed the provision at issue. Thus there can be no claim of procedural unconscionability here.

Because this case is entirely distinguishable from *Bragg*, issue preclusion does not apply.

B. Alternatively, The Court Should Order A Transfer Under § 1404(a)

As set forth above, this Court should dismiss this case on the basis of improper venue. However, in the alternative, this Court may and should transfer this action to the Northern District of California, where it should have been brought in the first place, because that District is clearly the more convenient and appropriate forum. There is no reasonable basis upon which Defendants should be compelled to defend this action in the Eastern District of Pennsylvania, particularly in light of the fact that a far more convenient and appropriate venue exists in the Northern District of California. The majority, if not all, of events underlying the claims occurred in the Northern District of California, all of the relevant defense witnesses, documents, and electronic data are there, the larger portion of the putative class members are there, and the case involves no fewer than four California statutes and novel questions of California law. Every factor strongly favors the Northern District of California, and that is where this action should proceed.

1. Law Applicable To Motions To Transfer

Section 1404(a) of Title 28 of the United States Code provides in relevant part that:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The decision to transfer an action pursuant to § 1404(a) is committed to the sound discretion of the district court, and is made "'to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense.'" *Pro Spice, Inc. v. Omni Trade Group, Inc.*, 173 F. Supp. 2d 336, 339 (E.D. Pa. 2001) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (internal quotation marks omitted)).

Although the moving party normally bears the burden of proving that venue is proper in

the transferee district[7] and that a transfer is appropriate, the presence of a valid forum selection clause shifts to the party seeking to avoid the forum selection clause "the burden of demonstrating why they should not be bound by their contractual choice of forum." *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995) (internal quotation omitted). Plaintiffs cannot possibly meet that burden. And even in cases where defendants retain the burden, a defendant is not required to show "□truly compelling circumstances' for . . . change of venue, but rather that all relevant things considered, the case would be better off transferred to another district." *Nextel Spectrum Acquisition Corp. v. Burlington County College*, No. 07-2270, 2007 WL 4554231, at * 2 (E.D. Pa. Dec. 27, 2007).

The Third Circuit Court of Appeals has enumerated a non-exhaustive list of pertinent public and private interest factors that a district court must evaluate when considering a motion to transfer venue. *See Jumara*, 55 F.3d at 879-80. The private interest factors include: (1) the plaintiff's forum preference as manifested in the original choice; (2) the defendant's preference; (3) whether the claim arose elsewhere; (4) the convenience of the parties; (5) the convenience of the witnesses; and (6) the location of books and records. *See Smith*, 2010 WL 2270541, at *2 (citing *Jumara*, 55 F.3d at 879). The public interest factors include: (1) the local interest in deciding local controversies at home; (2) the judges' familiarity with the applicable state law; and (3) practical considerations that could make the trial easy, expeditious, or inexpensive. *See Smith*, 2010 WL 2270541, at *2 (citing *Jumara*, 55 F.3d at 879-80).

In this case, all relevant factors weigh heavily in favor of transfer of this action to the Northern District of California.

[7] There can be no dispute that this case "might have been brought" in Defendants' requested venue of the Northern District of California. The First Amended Complaint alleges that Linden's principal place of business is in California and that Defendant Rosedale resides in California (FAC ¶¶5, 6) thereby satisfying the requirements for venue in the Northern District of California. *See Smith*, 2010 WL 2270541, at *3.

2. Private Factors

a. Plaintiffs' choice of venue

i. Existence of forum selection clause.

"[A] forum selection clause is treated as a manifestation of the parties' preferences as to a convenient forum." *Siegel v. Homestore, Inc.*, 255 F. Supp. 2d 451, 456-57 (E.D. Pa. 2003)) (citing *Jumara*, 55 F.3d at 880). Within the framework of § 1404, Congress "encompasse[d] consideration of the parties' private expression of their venue preferences." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29-30 (1988), *remanded to* 696 F. Supp 583 (N.D. Ala. 1988), *mandamus granted by In re Ricoh Corp.*, 870 F.2d 570 (11th Cir. 1989); *see also Mellon Bank, N.A. v. Aetna Bus. Credit, Inc.*, 619 F.2d 1001, 1009 (3d Cir. 1980) ("a court's paramount consideration is the intent of the parties") (quoting *O'Farrell v. Steel City Piping Co.*, 266 Pa. Super. 219, 403 A.2d 1319, 1324 (1979)). Hence, while courts normally defer to a plaintiff's choice of forum, such deference is inappropriate where the plaintiff has already contractually chosen an appropriate venue. *See In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir.1989) (remand of *Stewart Org., Inc., supra*); *Weiss v. Columbia Pictures Television, Inc.*, 801 F. Supp. 1276, 1278 (S.D.N.Y. 1992).[8]

ii. No operative facts occurred in Pennsylvania.

Additionally, "a plaintiff's choice [of forum] receives less weight where none of the operative facts occurred in the selected forum." *Fid. Leasing, Inc. v. Metavec Corp.*, No. CIV. A. 98-6035, 1999 WL 269933, at *2 (E.D. Pa. Apr. 29, 1999); *see also Rowles v. Hammermill Paper Co., Inc.*, 689 F. Supp. 494, 496 (E.D. Pa. 1988) ("plaintiff's choice of forum merits less deference when none of the conduct complained of occurred in plaintiff's selected forum.") (citations omitted); *De Lage Landen Fin. Serv. v. Elite Tech. (N.Y.), Inc.*, No. 09-1538, 2009 WL 3152163, at *2 (E.D. Pa. Sept. 30, 2009) ("plaintiff's choice [of forum] is given less deference

[8] When transferring, even where some plaintiffs have agreed to the forum selection clause and some have not, the interests of justice favor transferring the whole case. *See Universal Grading Serv. v. eBay*, No. 08-cv-3557, 2009 WL 2029796, at *20 (E.D.N.Y. June 10, 2009).

when none of the operative facts underlying the claim occurred there") (citing *McMillan v. Weeks Marine, Inc.*, No. 02-CV-6741, 2002 WL 32107617, at *1 (E.D. Pa. Dec. 2, 2002); *Lindley v. Caterpillar, Inc.*, 93 F. Supp. 2d 615, 617 (E.D. Pa. 2000)). Plaintiffs have not alleged, and cannot allege, that Defendants committed any of the acts alleged in the complaint in this District.

iii. Plaintiffs' choice of forum in an alleged national class action is given less deference.

As dictated by the United States Supreme Court, the choice of forum of a named plaintiff in a class action suit should be given less deference since any member of the putative class could potentially bring suit in his or her own forum. *Smith*, 2010 WL 2270541, at *3 (citing *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)). "The Supreme Court explained that 'where there are hundreds of potential plaintiffs, all equally entitled voluntarily to invest themselves with the corporation's cause of action and all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened.'" *Koster*, 330 U.S. at 524.

Courts within this district have time and again applied the same reduced deference to a plaintiff's choice of forum when it involved a purported class action suit. *See, e.g., Howell v. Shaw Indus.*, Nos. CIV. A. 93-2068, 93-2638, 1993 WL 387901, at *3 (E.D. Pa. Oct. 1, 1993) (citing cases); *Klingensmith v. Paradise Shops, Inc.*, No. CIV. A. 07-322, 2007 WL 2071677, at *2 (E.D. Pa. July 17, 2007) (declining to grant deference to forum choice of lead plaintiffs in a class action brought under the FCRA); *Gen. Refractories Co. v. Washington Mills Electro Minerals Corp.*, No. CIV. A. 94-6332, 1995 WL 361164, at *2-3 (E.D. Pa. June 16, 1995) (noting that because a named plaintiff in a class action brings the case on behalf of "all others similarly situated" and because the testimony offered by the individual plaintiff in such a case is minimal, plaintiff's choice of forum should not be a controlling factor); *In re All Terrain Vehicles Litig.*, Nos. CIV. A. 88-237, 88-1914, 88-3031, 88-3178, 88-3910, 88-5509, 88-5510, 1989 WL 30948, at *3 (E.D. Pa. Feb. 23, 1989) (giving less deference to plaintiff's choice of

forum and more weight to convenience of the parties/witnesses and the location of documentary evidence in a nationwide class action suit); *Donnelly v. Klosters Rederi A/S*, 515 F. Supp. 5, 6 (E.D. Pa. 1981) (transfer warranted in class action despite plaintiff's choice of forum); *Impervious Paint Indus., Ltd. v. Ashland Oil, Inc.*, 444 F. Supp. 465, 467-68 (E.D. Pa. 1978) (noting that plaintiff's choice of forum in class action deserves less weight, and transfer was necessary for the convenience of the parties and witnesses).

This case was filed in the home forum of one of the named plaintiffs. As discussed in detail below, however, all of the operative facts common to the putative class occurred in California. Pennsylvania maintains no substantive connection to the suit. Moreover, because this case was brought as a purported nationwide class action, a California forum will be convenient to a larger number of the putative members of the class. Given these circumstances, the named plaintiffs' choice of forum is not entitled to deference. *See Smith*, 2010 WL 2270541, at *4 (court afforded little deference to plaintiff filing class action suit in Pennsylvania where defendant was located in Oklahoma and events allegedly giving rise to the claims occurred there).

b. Defendants' preference

Defendants' preference for a California forum weighs in favor of transfer. *See Smith*, 2010 WL 2270541, at *4.

c. Whether the claims arose elsewhere

The complete lack of any nexus between Pennsylvania and the operative events that are the subject of this lawsuit provides a strong justification for transfer. "Typically the most appropriate venue is where a majority of events giving rise to the claim arose. When the chosen forum has little connection with the operative facts of the lawsuit, such that retaining the action conflicts with the interests in efficiency and convenience, other private interests are afforded less weight." *Smith*, 2010 WL 2270541, at *4 (internal citations omitted).

Plaintiffs in this case allege no facts that would place the situs of the material events within the Eastern District of Pennsylvania. Quite to the contrary, all of the challenged acts that

form the basis for this suit originated from a singular source: Linden's place of business in California. Linden does not have a single employee, office, or document in this District. In short, Defendants' alleged failures and wrongdoing occurred solely in California. *See Ayling v. Travelers Prop. Cas. Corp.*, No. CIV. A. 99-3243, 1999 WL 994403, at *5 (E.D. Pa. Oct. 28, 1999) ("Where plaintiff's cause of action arises from strategic policy decisions of a defendant corporation, the defendant's headquarters can be considered the place where events giving rise to the claim occurred."); *see also Smith*, 2010 WL 2270541, at *4 (evidence showing that relevant events occurred where defendant processed requests at its headquarters in Oklahoma favored transfer to Oklahoma).

d. Convenience of the parties and party witnesses

Linden maintains its principal place of business in San Francisco. Almost all of Linden's executive team, including named defendant Philip Rosedale, are in San Francisco. Most of the Customer Relations managers who are responsible for Linden's customer policies and strategies are located in San Francisco. The vast majority of Linden's paper records are located at its San Francisco headquarters. Most of Linden's data warehousing team, which is responsible for collecting and organizing the company's electronic records, including customer records, is in California as well. In short, the relevant defense witnesses who could testify regarding Defendant's challenged practices are located in California. (*See* Rountree Decl. ¶¶ 20-21.) In contrast, Linden has no offices, no employees, and no records anywhere in this District. (*Id.*, ¶22.) *See Klingensmith*, 2007 WL 2071677, at *2 (noting that although the named plaintiffs in a class action under the FCRA expressed a preference for litigating in Pennsylvania, there was "no indication that their role [would] be anything more than nominal in nature . . . . The focus of the litigation will be on [the defendant's] actions, not on any class members' actions.")."

e. Convenience of non-party witnesses

"The convenience to witnesses weighs heavily in making a determination on whether to grant a motion to transfer venue." *Howell*, 1993 WL 387901, at *5; *see Idasetima v. Wabash Metal Prods., Inc.*, No. 01-97, 2001 WL 1526270, at *2 (E.D. Pa. Nov. 29, 2001) (convenience

of non-party material witnesses "is a particularly significant factor in a court's decision whether to transfer") (citing *Lindley v. Caterpillar, Inc.*, 93 F. Supp. 2d 615, 617 (E.D. Pa. 2000)). Plaintiffs have not identified any non-party witnesses, but to the extent there are any, they would likely be former employees of Linden, who are likely located in California and to whom the subpoena power of this district does not extend. *See Siegel*, 255 F.2d at 457 (considering similar circumstances and concluding that the scale "clearly weighs more heavily" in favor of transfer).

f. Location of books and records

The physical evidence in this case is located in the Northern District of California. Although in *Jumara*, the Third Circuit stated that the convenience of witnesses and the location of books and records should only be weighed where they would be unavailable in the other venue, 55 F.3d at 879, "these factors have been given broader scope in more recent decisions." *Schlenker v Immuncor, Inc.*, No. 21:09-CV-04297-JD, 2009 WL 5033972, at *4 (E.D. Pa. Dec. 22, 2009) (defendant's books, records and many of its key employees are located in the Northern District of Georgia thus weighing in favor of transfer). For instance, in *In re Amkor Technology*, the court found that these factors weighed in favor of defendants because personnel and records were located in the defendants' home forum. No. 06-298, 2006 WL 3857488, at * 6 (E.D. Pa. Dec. 28, 2006).

3. Public Interest Factors

a. Local interest in deciding controversies at home

The actions which allegedly substantiate Plaintiffs' claims occurred predominantly within California. Linden conducts its business in, and is headquartered in, that forum. The Northern District of California has a significant interest in companies doing business within its borders and the activities they undertake. Conversely, this forum has considerably less interest in this litigation in that only one of the four named plaintiffs resides here. Under these circumstances, the Northern District of California has a greater local interest in the controversy at issue than does the Eastern District of Pennsylvania (or any other forum), and burdening this forum and its citizens is unnecessary and unwarranted.

b. Familiarity of the trial judge with the applicable state law

It goes without saying that a court sitting in California has more familiarity with California law than a court sitting in Pennsylvania. Therefore, this factor strongly weighs in favor of a transfer. *See Feldman*, 513 F. Supp. 2d at 248 (finding that dispute was better suited for resolution in the Northern District of California because California law governed the dispute and the complaint included a count under California law); *Siegel*, 255 F. Supp. 2d at 457, n.1 (fact that parties had chosen the law of California as the governing law for interpreting an agreement in dispute further justified transfer to the Central District of California).

Plaintiffs have chosen to bring claims under no fewer than four California statutes, and have not stated a single claim under Pennsylvania state law. Indeed, this Court will be faced with determining whether Plaintiffs have satisfied the very particular notice requirements under the California Consumer Legal Remedies Act, Cal. Civ. Code § 1750 (Count 1) and must dismiss Plaintiffs' claim for damages—with prejudice—under that statute if it finds the notice requirements have not been satisfied. *See Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1195-96 (S.D. Cal. 2005) (dismissing CLRA damages claim with prejudice under Rule 12(b)(6) for failing to comply with notice requirements); *Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1304 (S.D. Cal. 2003) (dismissing premature claims for damages with prejudice). And another California statute Plaintiffs claims has been violated, California Civil Code § 1812.600 (Count 3) is so obscure that there are only two unreported California decisions about it. If this Court were to make substantive findings in relation to that statute, it would very likely make new law.

c. Practical considerations that could make the trial easy, expeditious, or inexpensive

There can be no doubt that trial would be easier and less expensive in the Northern District of California, because that venue is the most convenient venue for many of Linden's employees. California is also where the bulk of the relevant documents and records can be found. The Eastern District of Pennsylvania and the Northern District of California sit at a substantial distance from one another and all Linden employees would be required to travel such

distances should the case remain here. Moreover, should the parties require any hard copies of documents, it would certainly be more convenient for them to be transported to the nearby courthouse in California. Finally, this action was only recently filed and, thus, "a transfer will not significantly disrupt the litigation or result in a waste of judicial resources." *Zokaites v. Land-Cellular Corp.*, 424 F. Supp. 2d 824, 841 (W.D. Pa. 2006).

C. The Court Should Dismiss Count 1 (Violation of the California Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*) Under 12(b)(6)

Plaintiffs' failure to file a venue affidavit concurrently with the complaint, as mandated by the California Consumer Legal Remedies Act ("CLRA"), requires a dismissal without prejudice. California Civil Code Section 1780(d) provides that an action may be commenced in the county in which the defendant "resides, has his or her principal place of business, or is doing business, or in the county where the transaction or any substantial portion thereof occurred." The plaintiff is required to file an affidavit "concurrently with the filing of the complaint" stating "facts showing that the action has been commenced in a county or judicial district described in this section as a proper place for the trial of the action." Cal. Civ. Code § 1780(d). Failure to file such an affidavit results in mandatory dismissal without prejudice. *Id.*

IV. CONCLUSION

This case has only one connection to this District: Plaintiffs' counsel, having won a ruling before this Court in a different case years ago, would like to litigate here again. That is not a basis for venue. The venue selection clause Mr. Evans agreed to at least 28 times is valid and enforceable, and mandates dismissal of this action. In the alternative, all factors strongly favor a transfer to the Northern District of California.

By: /s/ Laurence Z. Shiekman

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Attorneys for Defendants Linden Research, Inc. and Philip Rosedale

Dated: July 9, 2010

CERTIFICATE OF SERVICE

I, Matthew D. Janssen, hereby certify that on July 9, 2010, I caused a true and correct copy of the foregoing Defendants Linden Research, Inc. and Philip Rosedale's Motion to Dismiss under Rule 12(b)(6) or in the Alternative Transfer Pursuant to 28 U.S.C. § 1404(a) to be served upon all counsel of record addressed as follows:

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