IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
PHILADELPHIA

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,	CIVIL DIVISION No. 10-cv-1679
Plaintiffs,	
v.	
LINDEN RESEARCH, INC., a corporation, and PHILIP ROSEDALE, an individual,	
Defendants.	**JURY TRIAL DEMANDED**

PLAINTIFFS' BRIEF IN OPPOSITION 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) / MOTION FOR LEAVE TO CONDUCT DISCOVERY

AND NOW COME, the Plaintiffs, by and through their attorneys, Jason A. Archinaco, Esquire and the law firm of Pribanic Pribanic + Archinaco LLC, and files the following Brief in Opposition 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) / Motion for Leave to Conduct Discovery.

I. INTRODUCTION

As Yogi Berra once famously said: "It's déjà vu all over again." Once again, Defendants Linden Research, Inc. ("Linden") and Philip Rosedale ("Rosedale") are back before this Court requesting that claims stemming from its misrepresentations about virtual property ownership rights in the virtual world Second Life, among other

impermissible conduct, be transferred to another court. In *Bragg v. Linden Research, Inc. and Philip Rosedale*, Civil Action No. 06-cv-4925, Defendants sought to have Marc Bragg's ("Bragg") claims transferred to arbitration through the application of an arbitration clause set inside Linden's Terms of Service ("TOS"). Although the mechanism is slightly different, Defendants have simply tried to re-package their previously rejected arguments and unconscionable arbitration / venue clause.

This Honorable Court found that arbitration clause to be unconscionable and, resultantly, the matter continued in the United States District Court for the Eastern District of Pennsylvania until it resolved. Since the Court's ruling on or about May 31, 2007, Linden has modified its TOS three times. Linden has removed that mandatory arbitration clause and replaced it with a clause requiring all cases in which claims exceed $10,000, or in which injunctive or declaratory relief is sought, be brought in courts residing in San Francisco, California, or in other words, Linden's backyard. Further, the modified versions of the TOS continue to include other provisions noted by this Court, which support a finding of unconscionability.

As a preliminary matter, the clause pertaining to venue as applicable to certain of the Plaintiffs' accounts was already deemed unconscionable in the *Bragg* case (as it was imbedded in the arbitration clause). As such, there is no valid "forum selection" clause to enforce given that it has already been deemed unconscionable. However, even if that was not the case, as will be demonstrated below, the latest forum selection clause is also impermissible, as it unconscionable, unreasonable and the result of overreaching. In fact, as established through Plaintiffs' Declarations and exhibits attached to Defendants' Motion to Dismiss, Linden's modified TOS were not simply required to be agreed to by

new participants, but they were even required to be agreed to by others who had already agreed to the prior TOS (the one with the unconscionable arbitration provision). A refusal to assent to Linden's modified Terms of Service would result in a forfeiture of the user's virtual property and virtual items. Defendants should not be permitted to benefit from the deceptive and overreaching conduct.

Finally, not only should Linden's forum selection clause be found unenforceable, but also Linden's rationale for transferring this case under 28 U.S.C. § 1404(a) fails, as the most convenient forum resides with this Court. Defendants should be required to litigate this matter in the Eastern District of Pennsylvania – the forum chosen by Plaintiffs. Further, as Plaintiffs intend to show the Court through the Motion for Leave to Conduct Discovery, it is believed that hundreds, if not thousands of other users who have been harmed by Linden reside in this District. Thus, this Court has a substantial interest in presiding over this case.

II. FACTUAL BACKGROUND

Plaintiffs have filed a class action resulting from their participation in the online virtual world, Second Life, a multiplayer role-playing game operated by Defendants Linden and Rosedale. *See* Plaintiffs' First Amended Complaint attached hereto as Exhibit 1. Linden and Rosedale represented that Second Life was created and *owned* by its participants. *Id.* at ¶¶ 41-88. Indeed, Linden and Rosedale represented that it was the ownership rights possessed by Second Life users that distinguished Second Life from its competitors.[1] *Id.* at ¶ 51. Resultantly, Linden and Rosedale reaped the benefits of such representations by generating hundreds of millions of dollars in revenue. *Id.* at ¶ 100.

[1] Plaintiffs have fully set forth the misrepresentations made by Defendants in their First Amended Complaint. Further, in finding personal jurisdiction over Rosedale in the *Bragg* matter, this Court

Those representations induced Carl Evans, Donald Spencer, Valerie Spencer, Cindy Carter and, upon information and belief, thousands of others to not only participate in Second Life but also purchase virtual property and items. *Id.* at ¶¶ 121-128. Unbeknownst to Plaintiffs, Defendants, after making millions of dollars, decided unilaterally that it no longer wanted Second Life users to own their virtual property and land. *Id.* at ¶¶ 89. As such, Defendants decided that "own" no longer meant "own"; rather, according to Defendants "own" merely meant "license." *Id.* at ¶¶ 89-91. Resultantly, Defendants violated several laws, including the California Consumer Legal Remedies Act, among others. *Id.* at ¶¶ 191-243.

Further, Linden decided that not only could it unilaterally change the meaning of "own," but that it could simply take the virtual property and virtual items created by its users. *Id.* at ¶¶ 129-30. Indeed, not only did Linden decide that it could banish Second Life users in its own discretion and steal their virtual property, Linden also decided that it could confiscate the U.S. currency users had lodged with Linden. *Id.* at ¶ 133. This conduct also should render civil liability upon Defendants. *Id.* at ¶¶ 191-287.

A. BRAGG V. LINDEN

In *Bragg*, Plaintiff Marc Bragg brought suit against Defendants making essentially identical allegations that are made in the present class action: (1) Linden engaged in deceptive, unfair and fraudulent business practices by representing to consumers that the virtual land and virtual items consumers purchased or created in Second Life were owned by the consumer and thereafter refusing to recognize participants virtual property rights; and (2) wrongfully confiscating users virtual property,

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noted the "national campaign" in which Rosedale embarked upon to "publicize Linden's recognition of rights to virtual property." *See Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 596 (E.D. Pa. 2007).

virtual land and U.S. currency that had been lodged with Linden. *Bragg*, 487 F. Supp. 2d at 593.

Linden responded to Bragg's suit by seeking, among other things, to have the case compelled to arbitration. *Id.* at ¶ 603. In making its argument, Linden relied upon a mandatory arbitration provision in Linden's TOS ("original TOS"). *Id.* at ¶ 604. For reasons set forth in more detail below, the Court found Linden's TOS to be unconscionable and denied Defendants' motion. *Id.* at ¶ 611. The case proceeded before this Court until it was ultimately resolved.

B. LINDEN'S TOS

In addition to the mandatory arbitration provision, the original TOS included other oppressive terms. Indeed, this Court noted many of those terms:

> Here, the TOS contain many of the same elements that made the PayPal user agreement substantively unconscionable for lack of mutuality. The TOS proclaim that "Linden has the right at any time for any reason or no reason to suspend or terminate your Account, terminate this Agreement, and/or refuse any and all current or future use of the Service without notice or liability to you." TOS P. 7.1. Whether or not a customer has breached the Agreement is "determined in Linden's sole discretion." *Id.* Linden also reserves the right to return no money at all based on mere "suspicions of fraud" or other violations of law. *Id.* Finally, the TOS state that "Linden may amend this Agreement . . . at any time in its sole discretion by posting the amended Agreement [on its website]." TOS P. 1.2.

Id at ¶ 608.

This Court's ruling in *Bragg* was filed on May 31, 2007. *See Bragg*, 487 F. Supp. 2d at 593. According to Defendants, as set forth in the Declaration of John Roundtree, Defendants modified their Terms of Service on September 18, 2007 by removing the

mandatory arbitration provision ("modified 9/18/07 TOS") and replacing it with a forum selection clause. *See* Declaration of John Rountree attached to Defendants' Motion to Dismiss as Exhibit 1 ("Roundtree Declaration") at ¶ 3. The forum selection clause permits arbitration of claims not in excess of $10,000; however, any claim in which injunctive or equitable relief is sought, or where the amount in controversy exceeds $10,000, is required to be brought in a San Francisco, California court per the terms of the TOS. *See* Defendants' Motion to Dismiss at 9.

According to the Roundtree Declaration, the TOS were modified again in March 2008 ("modified 3/2008") and in March 2010 ("modified 3/2010"). Roundtree Declaration at ¶ 5. All of the modified versions of the TOS included a new forum selection clause.[2] *See* Exhibits B, E, and F attached to the Roundtree Declaration.

Significantly, the modified TOS have also included many of the same terms that this Court found in *Bragg* to support a finding of substantive unconscionability. Indeed, the following terms are present in both the modified 9/18/07 TOS and modified 3/2008 TOS:

(1) "Linden Lab may amend this Agreement at any time in its sole discretion . . . ." (*see* Paragraph under heading "Terms of Service");

(2) "Linden Lab has the right at any time for any reason or no reason to suspend or terminate your Account, terminate this Agreement, and/or refuse any and all current or future use of the Service without notice or liability to you. In the event that Linden Lab suspends or terminates your Account or this Agreement, you understand and agree that you shall receive no refund or exchange for any unused time on a subscription, any license or subscription fees, any content or data associate with your Account, or for anything else." (P. 2.6); and

[2] As will be demonstrated during this case, the new TOS has claimed to unilaterally (and without consideration) strip away the virtual property rights of participants.

(3) Linden's right to alter, delete, move or transfer any content, currency or other items accumulated by a user in its sole discretion and for any reason or even no reason at all. (P. 5.3).

See Exhibits E and F attached to the Roundtree Declaration.

Further, the modified 3/2010 TOS, continue to have similar terms:

(1) "This Agreement may be changed by Linden Lab effective immediately by notifying you as provided in Section 13.4 below, provided that Material Changes will become effective thirty (30) days after such notification. By continuing to access or use Second Life after the effect date of any such change, you agree to be bound by the modified Terms of Service." (P. 1);

(2) Linden can still terminate or suspend accounts on the basis of a "general suspicion" (P. 11.5);

(3) upon Linden's decision to terminate a user's account, the user will lose all content, data and property the user had owned in Second Life (P. 11.6); and

(4) upon termination or suspension of a user's account, the user is not entitled to reimbursement for any "Linden dollar balance" held in the user's account, but may receive a refund of any credit balance held in their Second Life account; nevertheless, Linden maintains the right to impose "reasonable" restrictions (P. 11.3).

See Exhibit B attached to the Roundtree Declaration.

The modified versions of the TOS, which include the forum selection clause, were not only required to be agreed to by Second Life participants creating new accounts, but also those that had already been playing and agreed to the original TOS. *See* Roundtree Declaration at ¶ 6. In essence, Linden threatened existing Second Life users that if they did not agree to the updated TOS, they would be prohibited from using Second Life. *Id.* at ¶ 16. As such, Second Life users would forfeit the virtual property and items they purchased and that Linden had represented that they owned. *See* Exhibits B, E, and F attached to the Roundtree Declaration. *See also* Roundtree Declaration at ¶ 16. Linden offered no consideration whatsoever for these users to agree to updated TOS. *Id.* In

essence, Linden simply decided to unilaterally change the rules after millions of dollars were invested in the virtual world.

B. CARL EVANS

According to exhibits supplied by Defendants,[3] Carl Evans[4] created his first account with Linden on or about February 26, 2007. *See* Exhibit G attached to the Roundtree Declaration. This account was subject to the original TOS. *See Id.* Mr. Evans then opened seventy-two (72) additional accounts that were subject to the original TOS. *Id.* Mr. Evans contacts with Defendants all occurred in Philadelphia, PA.[5] *See* Declaration of Carl Evans at ¶¶ 3-13 attached hereto as Exhibit 2. Those contacts included: the creation of his accounts in Philadelphia; him providing money through the use of a credit card to Linden in Philadelphia; his email and phone communications with Linden which he made from Philadelphia; and his reading about Defendants' representations about virtual property ownership in Philadelphia. *Id.* Further, Mr. Evans believed those representations when creating those accounts. *Id* at ¶ 4.

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[3] As discovery has not yet started, Plaintiff is unable to dispute the accuracy of many of the facts alleged by Defendants and set forth in Mr. Roundtree's Declaration. Thus, while Plaintiffs will refer to several of Defendants' exhibits to their Motion to Dismiss, Plaintiffs cannot concede or refute the accuracy of many of Defendants' contentions at this time.

[4] Defendants boldly brought to the attention of this Honorable Court various "chat / email" communications allegedly drafted by Mr. Evans that used profane language. Those communications are entirely irrelevant to the issues raised in Defendants' Motion. Once again, as Linden attempted to do in the *Bragg* case, it has decided the best defense to its massive fraud is to attack one of the defrauded consumers. Clearly, Defendants were simply attempting to embarrass Mr. Evans and prejudice him before this Court. Presumably, Defendants quoted the language because it was offensive to them (although they cannot explain why they would then repeat it themselves to the Court without redactions). The reality, of course, is that Defendants actually do not find the language offensive – as buried inside John Roundtree's Declaration at Paragraph 19 (and omitted from the body of Defendants' Motion) is the following: "Linden Lab has allowed Mr. Evans to continue to use the Second Life service . . . ." *See* Roundtree Declaration at ¶ 19.

[5] Another possible reason for Defendants personal attack of Mr. Evans is that, for the time being, he is the lone class representative residing in the Eastern District of Pennsylvania. However, upon information and belief, there are likely hundreds, if not thousands, of potential class members residing within this District. The precise number shall be determined through discovery in this matter.

At various times, Mr. Evans would be required to accept modified TOS. *Id.* at ¶ 16. Indeed, according to Defendants, Mr. Evans' account numbers 62 and 63 had been created when the original TOS were in force; however, Linden required Mr. Evans to assent to the modified 9/18/07 TOS to continue participating in Second Life. *See* Exhibit G attached to the Roundtree Declaration. Mr. Evans never received any consideration for being required to assent to a modified TOS on an existing account. *See* Exhibit 2 at ¶ 17.

Mr. Evans is a self-employed locksmith and lost about $30 to $50 through Defendants' improperly confiscating his virtual items and money. *Id.* at ¶¶ 15, 21. Mr. Evans would likely have to abandon his claims for damages if this matter was transferred to the Northern District of California. *Id.* at ¶ 23.

C. DONALD AND VALERIE SPENCER

Near the time that Marc Bragg's virtual property, virtual items and U.S. currency were confiscated, Valerie Spencer and Donald Spencer were banished from Second Life and had their virtual property and virtual items and money taken by Linden. *See* Declarations of Donald Spencer and Valerie Spencer attached hereto as Exhibits 3 and 4. Mr. and Mrs. Spencer never again used these accounts, which were subject to the original TOS. *See* Exhibit 3 at ¶ 8; Exhibit 4 at ¶ 8. This Court deemed the arbitration clause (and the venue selection clause buried inside of it) that existed for those accounts unconscionable and refused to enforce it.

Since that time, Valerie Spencer has created another account on Second Life. *See* Exhibit 4 at ¶ 9. At various times, she was required to assent to modified TOS or else she would be prohibited from accessing her account and participating in Second Life. *Id.*

When agreeing to the various modified TOS, Ms. Spencer received no consideration in return. *Id.* at ¶ 10.

II. ARGUMENT

A. IN DECIDING THIS MOTION, ALL REASONABLE INFERENCES AND FACTUAL CONFLICTS MUST BE RESOLVED IN PLAINTIFFS' FAVOR.

"In considering a motion to dismiss for improper venue, the court must generally accept as true the allegations in the pleadings, and must draw all reasonable inferences and resolve all factual conflicts in the plaintiff's favor." *Henning v. Suarez Corp. Industries, Inc.*, 2010 U.S. Dist. LEXIS 43335, *6-7 (E.D. Pa. 2010) (citing *Manning v. Flannery*, 2010 U.S. Dist. LEXIS 1091, *9 (E.D.Pa. 2010)). "The parties may submit affidavits in support of their positions, and may stipulate as to certain facts." *Id.* at *7 (citations omitted). "However, even when the court considers affidavits and other evidence outside the pleadings, 'the plaintiff is entitled to rely on the allegations of the complaint absent evidentiary challenge,' and the court must still resolve all factual conflicts and draw all reasonable inferences in the plaintiff's favor." *Id.* (citations omitted).

As outlined above, beyond the allegations set forth in Plaintiffs' Amended Complaint, Plaintiffs have supplied sworn Declarations in support of their opposition to Defendants' Motion. Consistent with Eastern District of Pennsylvania case law, for the purposes of this motion, the allegations and factual averments submitted by Plaintiffs should be accepted as true and all factual conflicts should be resolved in Plaintiffs' favor.

B. AS A PRELIMINARY MATTER, THE NEW FORUM SELECTION CLAUSE DOES NOT APPLY TO CERTAIN OF PLAINTIFFS' ACCOUNTS. MOREOVER, THE ARBITRATION CLAUSE (THAT CONTAINED THE VENUE SELECTION CLAUSE) WAS DEEMED UNCONSCIONABLE BY THIS COURT.

As a preliminary matter before analysis of the new unconscionable forum selection clause, certain of Plaintiffs' accounts were subject to the prior arbitration clause (that contained the venue selection clause) that this Court has already deemed unconscionable. *See* Linden's pre-September 18, 2007 Terms of Service attached hereto as Exhibit 5.[6] Included in such a sub-set are Donald Spencer's account and Valerie Spencer's original account. *See* Exhibits 3 and 4. Moreover, Defendants have identified many accounts of Mr. Evans that could only have been subjected to the original unconscionable arbitration / venue selection clause. *See* Exhibit G attached to the Roundtree Declaration. Mr. Evans, according to Defendants, never logged into those accounts after any new venue clause was enacted to "accept" such clause. *Id.* As such, for each of those accounts, there is no valid forum selection clause to enforce.

Defendants have attempted to side step this issue given that there is no valid venue selection clause applicable to those accounts. Those accounts had valuable virtual property seized by Linden. *See* Exhibits 2, 3, and 4. As such, as to those accounts, there is no venue selection clause to enforce and, accordingly, no basis to claim there was a venue selection clause for those accounts. Further, there is absolutely no basis for Defendants to seek to relitigate the enforceability of the prior arbitration (and venue) clause. Defendants never filed any appeals from this Court's prior ruling and, as such, they are bound by it.

[6] Discovery likely will disclose other accounts in the Eastern District of Pennsylvania that were only subject to the unconscionable arbitration / venue selection clause. As such, for those individuals, there would also be nothing for this Court to enforce.

C. THE "NEW" FORUM SELECTION CLAUSE IN LINDEN'S TERMS OF SERVICE IS INVALID AND SHOULD NOT BE ENFORCED.

Defendants have moved the Court to dismiss Plaintiffs' First Amended Complaint on the ground that the forum selection clause in Defendant Linden's TOS bars this action. Alternatively, Defendant requests the Court to transfer this case to the Northern District of California, again relying in large part on the forum selection clause. Defendants' requests should be denied, however, as the forum selection clause is invalid, unreasonable and unconscionable.

1. Federal law determines the enforceability of a forum selection; however, courts have applied state law to determine whether an agreement or its terms, including forum selection clauses, are unconscionable.

"In federal court, the effect to be given a contractual forum selection clause in diversity cases is determined by federal not state law." *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877 (3d Cir. 1995). Indeed, "federal law [applies] in determining the validity of the forum selection clause at issue []." *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 235 (E.D.Pa. 2007)). In *Feldman*, however, the United States District Court for the Eastern District of Pennsylvania relied upon California law (the forum noted in the choice of law provision within the clickwrap agreement at issue there) when analyzing whether the clickwrap agreement and its terms, including the forum selection clause, were unconscionable. *Feldman*, 513 F. Supp. 2d at 239-43. *See also Tricome v. Ebay, Inc.*, 2009 U.S. Dist. LEXIS 97045, *5-9 (E.D. Pa. 2009) (relying upon *Feldman* and other opinions when interpreting whether a forum selection clause was unconscionable).

In *Universal Grading Serv. v. Ebay, Inc.*, 2009 U.S. Dist. LEXIS 49841, *62 (S.D.N.Y. 2009), the United States District Court for the Southern District of New York took the same approach as the *Feldman* court and interpreted the validity of a forum

selection clause under federal law but interpreted the issue of unconscionability under state law. In doing so, the Southern District of New York expressly proclaimed: "The question of whether a contract provision is unconscionable is governed by state law." *Id.* at *62 (citation omitted).

It is clear that federal law applies to determine whether the forum selection clause is enforceable. California law, however, should be applied when interpreting whether Linden's TOS and, specifically, its forum selection clause is unconscionable.[7]

2. Linden's TOS, including its forum selection provision, is unconscionable.

In *Bragg*, this Court found the arbitration provision within Linden's TOS to be procedurally and substantively unconscionable.[8] Many of the same facts that supported the Court's decision then, exist here.

"Unconscionability has both procedural and substantive elements." *Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002). "The procedural component can be satisfied by showing (1) oppression through the existence of unequal bargaining positions or (2) surprise through hidden terms common in the context of adhesion contracts." *Bragg*, 487 F. Supp. 2d at 605 (citing *Comb*, 218 F. Supp. 2d at 1172). "The substantive component can be satisfied by showing overly harsh or one-sided results that 'shock the conscience.'" *Id.* (citing *Comb*, 218 F. Supp. 2d at 1172). "The two elements operate on a sliding scale such that the more significant one is, the less significant the

[7] Defendants concede, "California law governs Residents' relationship with Linden Lab." *See* Defendants' Motion to Dismiss at 5. Plaintiffs also agree that California law governs, thus no choice of law analysis is necessary.

[8] This Court has already decided that the dispute resolution mechanisms of the original TOS were unconscionable. Thus, those claims arising under the original TOS are properly before this Court per the Court's holding in *Bragg*. Indeed, Defendants do not even address the terms of the original TOS or challenge this Court's holding with respect to them. As such, issue preclusion prevents this Court from having to re-analyze its decision with respect to the mandatory arbitration provision in the original TOS.

other need be. *Id.* (citing *Comb*, 218 F. Supp. 2d at 1172; *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000)("'[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'")). "[A] claim of unconscionability cannot be determined merely by examining the face of the contract; there must be an inquiry into the circumstances under which the contract was executed, and the contract's purpose, and effect." *Id.* (citing *Comb*, 218 F. Supp. 2d at 1172).

a. PROCEDURAL UNCONSCIONABILITY

Linden's forum selection clause is procedurally unconscionable as unequal bargaining positions existed between the parties and the Terms of Service are a contract of adhesion. "Under California law, 'the critical factor in procedural unconscionability analysis is the manner in which the contract or the disputed clause was presented and negotiated.'" *Bragg*, 487 F. Supp. 2d at 606 (citing *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1282 (9th Cir. 2006)). "When the weaker party is presented the clause and told to 'take it or leave it' without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionabiliy, are present." *Id.* (citing *Nagrampa*, 469 F.3d at 1282).

This Court has already found the original TOS, which were presented on a take-it-or-leave-it basis, to be a contract of adhesion and procedurally unconscionable. In making its determination that the original TOS are procedurally unconscionable the Court noted that the plaintiff had no opportunity to negotiate terms different from those offered by Linden. Further, the Court noted that "there was no 'reasonably available market

alternatives [to defeat] a claim of adhesiveness.'" *Id.* (citation omitted). The Court's reasoning: "Although it is not the only virtual world on the Internet, Second Life was the first and only virtual world to specifically grant its participants property rights in virtual land." *Id.*

The Court also found the inconspicuous nature of the arbitration provision in Linden's TOS supported a finding of procedural unconscionability. *Id.* at 606-07. And, the Court relied upon the analysis in *Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002), where the Plaintiff's were primarily individual customers claiming small amounts of damages, in rendering its ruling. *Id.* at 607.

The original TOS, which were addressed in *Bragg*, were the same TOS that Valerie Spencer and Donald Spencer had agreed to when they had their virtual property and items and money improperly confiscated. *See* Exhibits 3 and 4. At that point Linden had not yet modified their TOS. Further, the TOS addressed in *Bragg* are that same TOS that, per Linden's own tabulation of Carl Evans' accounts, he agreed to 72 times. *See* Exhibit G attached to the Roundtree Declaration. Also, these are the same TOS that were in place when Linden forced users, including Valerie Spencer and Carl Evans, to agree to modify their TOS or be banished from using Second Life and forfeit their virtual property and virtual items. *See* Exhibits 2 and 4.

The claims of Carl Evans, Valerie Spencer, Donald Spencer and all others who were bound by the original TOS are all properly before this Court in accordance with this Court's ruling in *Bragg*. Additionally, those with claims stemming from Linden's conduct during a time in which those individuals, including Carl Evans, had agreed to the various modified Terms of Service are also properly before this Court.

The modified TOS, which all include the forum selection clause at issue here, are also procedurally unconscionable. Those were presented on a take-it-or-leave-it basis and, as such, remain contracts of adhesion. Those refusing to assent to the modified TOS were refused access to Second Life. Indeed, even those who had already been participating in Second Life would be denied access if they refused to agree to the modified TOS. Further, there still was no reasonable market alternative present, as it was only in Second Life, through the representations of Linden and Rosedale, where users had property rights in virtual land.

The modified TOS, in accordance with the analysis in *Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002), remain oppressive to those individuals, such as Carl Evans, who have claims for smaller sums of money.[9] For example, Mr. Evans has additional claims for injunctive and equitable relief. Under Linden's newer arbitration clause, Mr. Evans would have to abandon such claims if he sought to pursue them. Simply stated, the modified TOS require all lawsuits, unless the Plaintiffs agree to give up claims, to be litigated in Linden's backyard. This is the exact same thing that Linden tried the first time unsuccessfully, only repackaged.

Further, when determining procedural unconscionability "Courts consider factors such as the buyer's sophistication, the use of high-pressure tactics or external pressure to induce acceptance, and the availability of alternative sources of supply." *Feldman*, 513 F. Supp. 2d at 240 (citations omitted). Significantly, Linden's requirement that users with existing accounts such as, Carl Evans and Valerie Spencer, agree to the modified TOS or

[9] One example of Defendants' oppressive terms are their attempt to impose a $1,000 fine upon Plaintiffs for bringing this matter. *See* Exhibit 6. In the case of Mr. Evans, even if he were to recover the amount of compensatory damages he incurred, the penalty Defendants seek to impose would be more than ten (10) times greater than the amount he received.

be banished from Second Life amounted to external pressure and a high-pressure tactic to induce acceptance, as Linden offered nothing in exchange accept a threat. Indeed, one of the issues presented for this Court is the fact that consumers invested in Second Life under one set of promises and representations, only to have those promises unilaterally withdrawn, revoked and changed by Linden. And, most often, the "buyer" was an individual, not a sophisticated corporate entity, so that factor favors in a finding of procedural unconscionability as well.

b. SUBSTANTIVE UNCONSCIONABILITY

"Even if an agreement is procedurally unconscionable, 'it may nonetheless be enforceable if the substantive terms are reasonable.'" *Bragg*, 487 F. Supp. 2d at 607 (citations omitted). "Substantive unconscionability focuses on the one-sidedness of the contract terms." *Id.* (citations omitted). Under California law, courts have identified several factors that can be considered when determining whether a contractual provision is substantively unconscionable. *Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638, 656 (Cal. App. 2004) (citations omitted).

i. Lack of Mutuality

"In assessing substantive unconscionability, the paramount consideration is mutuality." *Id.* at 664. "This principle has been extended to arbitration provisions that allow the stronger party a range of remedies before arbitrating a dispute, such as self-help, while relegating to the weaker party the sole remedy of arbitration." *Bragg*, 487 F. Supp. 2d at 607.

In finding the arbitration provision in the original TOS lacked mutuality, this Court relied upon the Northern District of California's analysis in *Comb*. *Id.* at 608. This

Court noted: "In *Comb*, for example, the court found a lack of mutuality where the user agreement allowed PayPal 'at its sole discretion' to restrict accounts, withhold funds, undertake its own investigation of a customer's financial records, close accounts, and procure ownership of all funds in dispute unless and until the customer is 'later determined to be entitled to the funds in dispute.'" *Id.* (quoting *Comb*, 218 F. Supp. 2d at 1173-74).

This Court then noted similar terms present in the original TOS:

> Here, the TOS contain many of the same elements that made the PayPal user agreement substantively unconscionable for lack of mutuality. The TOS proclaim that "Linden has the right at any time for any reason or no reason to suspend or terminate your Account, terminate this Agreement, and/or refuse any and all current or future use of the Service without notice or liability to you." TOS P. 7.1. Whether or not a customer has breached the Agreement is "determined in Linden's sole discretion." *Id.* Linden also reserves the right to return no money at all based on mere "suspicions of fraud" or other violations of law. *Id.* Finally, the TOS state that "Linden may amend this Agreement . . . at any time in its sole discretion by posting the amended Agreement [on its website]." TOS P. 1.2.

Id. at 608. "In effect, the [original] TOS provide Linden with a variety of one-sided remedies to resolve disputes, while forcing its customers to arbitrate any disputes with Linden." *Id.* Further, Linden's ability to modify the arbitration agreement also supported the Court's finding of a lack of mutuality.

As such, the original TOS, which was in effect when claims of Carl Evans, Donald Spencer and Valerie Spencer arose, lacked mutuality. As such, those claims are properly before this Court.

The forum selection clause in the modified versions of the TOS also lack mutuality for many of the same reasons as the original TOS was deemed to. Thus, claims arising while those modified versions of the TOS were in effect are properly before this Court as well.

The three modified versions of the TOS all continue to provide Linden with a variety of one-sided remedies to resolve disputes. Rather than forcing consumers to arbitrate disputes, however, the modified versions of the TOS require them to litigate in San Francisco, California (unless the plaintiff does not pursue claims of injunctive or equitable relief and seeks less than $10,000 in damages).

The modified 9/18/07 TOS (which was in place from 9/18/07 until 3/2008) and modified 3/2008 TOS (which was in place from 3/2008 through 3/2010) still permit Linden to: (1) amend the Agreement, including the forum selection clause, at any time in its sole discretion (*see* Paragraph under heading "Terms of Service"); (2) terminate or suspend a user's account for any reason or no reason at all while providing no refund whatsoever (P. 2.6); and (3) alter, delete, move or transfer any content, currency or other items accumulated by a user in its sole discretion and for any reason or even no reason at all. (P. 5.3). *See* Exhibits E and F to the Roundtree Declaration.

Further, the modified 3/2010 TOS, which according to Defendants remain in force today, provide for similar unconscionable terms: (1) Linden still maintains the ability to modify the Agreement at any time (P.1); (2) Linden can still terminate or suspend accounts on the basis of a "general suspicion" (P. 11.5); (3) upon Linden's decision to terminate a user's account, the user will lose all content, data and property the user had owned in Second Life (P. 11.6); and (4) upon termination or suspension of a

user's account, the user is not entitled to reimbursement for any "Linden dollar balance" held in the user's account, but may receive a refund of any credit balance held in their Second Life account; nevertheless, Linden maintains the right to impose "reasonable" restrictions (P. 11.3). *See* Exhibit B to the Roundtree Declaration.

All three versions of the modified TOS include terms recognized by this Court as establishing a lack of mutuality. The terms of the TOS remain harshly one-sided in favor of Linden. As such, in accordance with this Court's holding in *Bragg* and the analysis of the Northern District of California in *Comb*, the forum selection clause in the modified versions of the TOS should be found to lack mutuality.

ii. Costs

In *Bragg*, the Court noted the significant arbitration costs that the plaintiff would have been required to incur under the arbitration provision supported a finding of substantive unconscionability. *Bragg*, 487 F. Supp. 2d at 608-10. Again, the claims arising under the original TOS are properly before the court.

The claims under the modified versions of the TOS are also properly before the court, as the forum selection provision is cost prohibitive. Indeed, Mr. Evans would likely be dissuaded from pursuing his claims if required to proceed in San Francisco, California. *See* Exhibit 2 at ¶ 23. And, the arbitration provision in modified versions of the TOS is of no merit, as it would require Mr. Evans to dismiss his claims of equitable and injunctive relief. *See* Exhibits B, E, and F to the Roundtree Declaration. As such, the costs associated with Linden's forum selection clause weigh in favor of a finding of substantive unconscionability.

iii. Venue

This Court found venue to be another factor supporting a finding of substantive unconscionability of the original TOS. *Bragg,* 487 F.Supp.2d at 610. When considering the respective circumstances of the parties, requiring Mr. Evans (a self-employed locksmith) to travel to San Francisco, California to litigate a case against Defendants (a company that embarked on a national campaign to inform the public about Second Life which, in turn, has resulted in the company generating hundreds of millions of dollars in revenue, and its CEO) is unconscionable.

This Court rationalized as follows:

> As in *Comb*, the record in this case shows that Linden serves millions of customers across the United States and that the average transaction through or with Second Life involves a relatively small amount." In such circumstances, California law dictates that it is not 'reasonable for individual consumers from throughout the country to travel to one locale to arbitrate claims involving such minimal sums. Indeed, '[l]imiting venue to [Linden's] backyard appears to be yet one more means by which the arbitration clause serves to shield [Linden] from liability instead of providing a neutral forum in which to arbitrate disputes.'

Id. (citing *Comb*, 218 F. Supp. 2d at 1177).[10] Although the issue here is not a mandatory arbitration provision, but rather a forum selection clause, the result is the same — Plaintiff, and the thousands of other likely class members pursuing claims in varying amounts, would be required to litigate in Linden's backyard. As such, this factor supports a finding of substantive unconscionability.

[10] The *Comb* Court refused to enforce the forum selection clause.

3. An unreasonable forum selection clause should not be enforced.

If the Court determines that the forum selection clause set forth in Linden's modified TOS is not unconscionable, the Court should then proceed to determine whether it is unenforceable under federal law.

"To enforce the forum selection clause, it must first be determined that the clause is valid and that the present action falls within the scope of the clause." *PPG Industries, Inc. v. Shell Chemical LP*, 2010 U.S. Dist. LEXIS 7064, *9 (W.D. Pa. 2010). "As stated by the Supreme Court of the United States, 'forum selection clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances.'" *Vangura Kitchen Tops, Inc. v. C&C North America, Inc.*, 2008 U.S. Dist. LEXIS 79360, *15 (W.D. Pa. 2008) (quoting *The Bremen*, 407 U.S. at 10)). "'A forum selection clause is 'unreasonable' where the [party opposing the selected forum] can make a 'strong showing' either that the forum selection clause is 'so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court,' or that the clause was procured through 'fraud or overreaching.'" *Vangura Kitchen Tops, Inc.*, 2008 U.S. Dist. LEXIS 79360, at *15 (quoting *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1219 (3d Cir. 1991)(quoting *The Bremen*, 407 U.S. at 15)). As such, the burden rests with Plaintiffs to establish that forum selection clause should not be enforced.

a. LACK OF CONSIDERATION

When analyzing whether a forum selection clause is unreasonable, federal courts have noted: "Mere inconvenience or additional expense is not the test of unreasonableness, since it may be assumed that the plaintiff received, under the contract,

consideration for these things, regardless of whether or not the clause was the result of bargaining between the parties." *Vangura Kitchen Tops, Inc.*, 2008 U.S. Dist. LEXIS 79360, at *16 (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-94 (1991)). With regard to the modified versions of the TOS, there should be no presumption that consideration was received. Indeed, as demonstrated in the Declarations of Valerie Spencer and Carl Evans, no consideration was received. *See* Exhibits 2 and 4.

Defendants provided no consideration to Valerie Spencer and Carl Evans, both of whom had existing accounts, when they were required to agree to the modified versions of the TOS. *See* Exhibits 2 and 4. Rather, all those individuals received, as well likely thousands of others, were threats to banished from Second Life and forfeit the virtual property and virtual items the users had accumulated if they did not assent to the modified agreement. *See* Exhibits 2 and 4.

Not only should a court consider the issues of inconvenience and additional expense where no consideration was provided in exchange for a forum selection clause, but also the Court should refuse to enforce the clause. *See e.g.*, *Beauticontrol, Inc. v. Burditt*, 2001 U.S. Dist. LEXIS 15541, *10-12 (N.D. Tex. 2001)(finding that a forum selection clause set forth in a modified agreement should not be deemed invalid as sufficient new consideration was provided).

b. INCONVENIENCE

As no consideration was provided, the Court should consider the additional expense and inconvenience that would arise from Mr. Evans, and the thousands of other potential class members, being required to litigate this matter in the Northern District of California. Enforcing the forum selection clause would indeed make it so gravely

difficult for Mr. Evans to pursue his case that he would likely be prevented from doing so. *See* Exhibit 2 at 23. Further, while federal law applies here, a California Court of Appeals reasoning in *Aral v. Earthlink, Inc.*, 134 Cal. App. 4th 544, 561 (Cal. App. 2005) is persuasive. There, the *Aral* court found "that a forum selection clause that requires a consumer to travel 2,000 miles to recover a small sum is not reasonable . . . ." *Aral*, 134 Cal. App. 4th at 561 (citations omitted). As such, this forum selection clause should not be enforced.

c. FRAUD / OVERREACHING

A forum selection clause should not be enforced if it is the procured through fraud or overreaching. *Vangura Kitchen Tops, Inc.*, 2008 U.S. Dist. LEXIS 79360, at *15 (quoting *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1219 (3d Cir. 1991)(quoting *The Bremen*, 407 U.S. at 15)). "'[M]ere allegation of fraudulent conduct does not suspend operation of a forum selection clause. Rather, the proper inquiry is whether the forum selection clause is the result of 'fraud in the inducement of the [forum-selection] clause.'" *Id.* at *15-16 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967)). Further, "overreaching" has been defined as "'that which results from an inequality of bargaining power or other circumstances in which there is an absence of meaningful choice on the part of one of the parties.'" *Beauticontrol, Inc.*, 2001 U.S. Dist. LEXIS 15541 at *14 (citations omitted).

As discussed at length above, Defendants decision to threaten Mr. Evans and Ms. Spencer that their accounts would be terminated if they did not agree to the modified versions of the TOS illustrates the inequality of bargaining power between the parties. Further, the one-sided remedies available within the original TOS and the three versions

of the modified TOS is illustrative of the inequality between the parties. Mr. Evans and Ms. Spencer invested varying sums of money into Second Life and were provided with no meaningful choice when confronted with the forum selection clauses. As such, Linden's forum selection clause should not be enforced.

Finally, the overreaching was directly related to the inclusion of the forum selection clause in the modified 9/18/07 TOS. Indeed, it appears that the only significant change made to the modified 9/18/07 TOS was the replacement of the mandatory arbitration provision with the forum selection clause. *See* Exhibits 2 and 4. As such, the overreaching conduct engaged in by Linden was directed specifically at the forum selection clause, which should not be enforced.

d. PUBLIC POLICY

"A forum selection clause should also be deemed unenforceable if enforcement would run counter to a strong public policy of the forum where the law suit was brought." *Campanini v. Studsvik, Inc.*, 2009 U.S. Dist. LEXIS 28908, *13 (E.D. Pa. 2009) (*The Bremen*, 407 U.S. at 15). "With regard to claims that a contract provision should be deemed unenforceable on public policy grounds, [the Superior Court of Pennsylvania] has explained:

> To be contrary to public policy, a contract must tend to injure the public or be against the public good, or must be inconsistent with good morals as to the consideration to be exchanged or the thing to be done for consideration. Only in the clearest of cases may a court declare a contract void as against public policy.

O'Hara v. First Liberty Ins. Corp, 984 A.2d, 938, 943 (Pa. Super. 2009)(quoting *J.F. v. D.B.*, 897 A.2d 1261, 1279 (Pa. Super. 2006) (citations omitted), *appeal denied*, 909 A.2d 1290 (Pa. 2006)).

Here, as discussed above, Defendants overreaching conduct is against the public and inconsistent with good morals. Further, consumer class action litigation is of great public importance in the Commonwealth of Pennsylvania. *See Thibodeau v. Comcast Corp.*, 912 A.2d 874, 883 (Pa. Super. 2006). As such, permitting this consumer class action, in which Mr. Evans, and likely thousands of other Pennsylvania residents have been harmed, to continue in the Eastern District of Pennsylvania is consistent with public policy. And, enforcing the forum selection clause, which would likely require Mr. Evans to abandon his claims for damages, would run counter to this public policy.

Finally, as this Court noted, "Pennsylvania has a substantial interest in protecting its residents from allegedly misleading representations that induce them to purchase virtual property." *Bragg*, 487 F. Supp. 2d at 602. "Pennsylvania also has an interest, more particularly, in vindicating Bragg's individual rights." *Id.*

The Court should hold the same interest in vindicating the rights of Mr. Evans and the likely thousands of other Second Life users that reside in the Eastern District of Pennsylvania. As such, Linden's forum selection clause should be found to be unenforceable.

D. THE COURT SHOULD NOT TRANSFER THIS MATTER TO THE NORTHERN DISTRICT OF CALIFORNIA UNDER SECTION 1404(a).

1. <u>As Defendant's forum selection clause is unenforceable, the burden rests with Defendants to establish the justification for removal</u>.

"[A] forum selection clause is treated as a manifestation of the parties' preferences as to a convenient forum." *Jumara*, 55 F.3d at at 880. "Although the parties agreement as to the most proper forum should not receive dispositive weight, it is entitled to substantial consideration." *Id.* (internal and external citations omitted). "Thus, while

courts normally defer to a plaintiff's choice of forum, such deference is inappropriate where the plaintiff has already freely contractually chosen an appropriate venue." *Id.* (citations omitted). "Where the forum selection clause is valid, which requires that there have been no 'fraud, influence, or overweening bargaining power,' the plaintiffs bear the burden of demonstrating why they should not be bound by their contractual choice of forum." *Id.* (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13 (1972)).

As demonstrated above, Linden's forum selection clause is not enforceable. As such, the burden is not on the Plaintiff to establish why this case should be heard in the Eastern District. Rather, "[t]he defendant bears the burden of showing that the chosen venue is improper or, in the alternative, that transfer to another district is justified for other reasons." *Coactiv Capital Partners, Inc. v. Feathers*, 2009 U.S. Dist. LEXIS 56103, *4-5 (E.D. Pa. 2009).

2. When interpreting a motion to transfer under *ß 1404(a)*, the Court should review consider private and public interests; however, the plaintiff's choice of forum should ordinarily be given paramount consideration.

"Section 1404(a) provides: 'For the convenience of the 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.'" *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995)(quoting 28 U.S.C. § 1404(a)(other citations omitted)). "The decision of whether to grant a transfer under *ß 1404(a)* lies within the discretion of the trial court." *Campanini v. Studsvik, Inc.*, 2009 U.S. Dist. LEXIS 28908, *6 (E.D. Pa. 2009) (citations omitted). "The trial court possesses considerable discretion." *Id.* (citations omitted).

"In ruling on *ß 1404(a)* motions, courts have not limited their consideration to the three enumerated factors in *ß 1404(a)* (convenience of parties, convenience of witnesses,

or interests of justice), and, indeed, commentators have called on the courts to 'consider all relevant factors to determine whether on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum.'" *Jumara*, 55 F.3d at 879 (quotation omitted). "While there is no definitive formula or list of the factors to consider, courts have considered many variants of the private and public interests protected by the language of *ß 1404(a)*." *Id.* (internal citation omitted).

a. PRIVATE INTERESTS

"The private interests have included: plaintiff's forum preference as manifested in the original choice; the defendant's preference; whether the claim arose elsewhere; the convenience of the parties as indicated by their relative physical and financial condition; the convenience of the witnesses -- but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and the location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum)." *Id.* (citations omitted). As will be demonstrated below, the private factors overwhelmingly favor a finding that this case should not be transferred to the Northern District of California.

i. Forum Preference

"[T]he Third Circuit considers a plaintiff's choice of forum a paramount factor when considering a *ß 1404(a)* motion." *De Lage Landen Financial Services, Inc. v. Mid-America Healthcare LP*, 2008 U.S. Dist. LEXIS 63954, *20 (E.D. Pa. 2008) (citing *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970)). "The Third Circuit has noted that 'nothing in the language or policy of *ß 1404(a)* [justifies] its use by defendants

to defeat the advantages accruing to plaintiffs who have chose a forum which, although it [is] inconvenient, [is] a proper forum.'" *Id.* (quoting *Shutte*, 431 F.2d at 25). "'[U]nless the balance of convenience of the parties is *strongly* in favor of defendant, the plaintiff's choice of forum should prevail.'" *Id.* (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 633-34 (1964)).

Plaintiffs are cognizant, however, of the long line of cases beginning with the United States Supreme Court's holding in *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947) in which it has been held that a plaintiff's choice of forum is given less deference in a nationwide class action. *See e.g. In re All Terrain Vehicles Litig.*, 1989 U.S. Dist. LEXIS 30948, at *3 (E.D. Pa. 1989). Nonetheless, until discovery is conducted, neither Plaintiffs, nor the Court, will learn the extent of Defendants contacts with the Eastern District of Pennsylvania and the number of those harmed in this District.

Plaintiffs have chosen to litigate this matter in the Eastern District of Pennsylvania. While Defendants would choose to litigate in their backyard, the Northern District of California, deference should be given to Plaintiff's choice of venue.

ii. Location of the Facts Underlying Plaintiffs' Claims

While Defendants contend that the events out of which this suit arises occurred in the Northern District of California, Plaintiffs disagree. Indeed, the vast majority of the facts underlying Mr. Evans claim occurred in the Eastern District of Pennsylvania. *See* Exhibit 2. The Eastern District of Pennsylvania is where he read Linden's statements about virtual property ownership, created his Second Life accounts, provided money to Linden, communicated extensively with Linden, and suffered injury in the Eastern District. *Id.* Further, through their national campaign of informing the public about the

virtual property rights in Second Life, Linden and Rosedale repeatedly subjected themselves to the jurisdiction of the Eastern District of Pennsylvania.

Until discovery is conducted, neither Plaintiffs, nor the Court, will learn the extent of Defendants' contacts with the Eastern District of Pennsylvania and the number of those harmed in this District. Courts have considered the fact that litigation occurring in a forum different from that where a business is headquartered will not cause the company inconvenience if it does business nationwide. *See e.g. Plaskolite, Inc. v. Zhejiang Taizhou Eagle Machinery Co. Ltc.*m 2008 U.S. Dist. LEXIS 99395, *22 (S.D. Oh. 2008). Accordingly, before ruling on the forum non conveniens issue, Plaintiffs are requesting discovery to divulge these facts.

iii. Convenience of the Parties and Witnesses

The Eastern District of Pennsylvania is more convenient for the parties relative to their financial positions. Linden is a large company that has generated millions of dollars of revenue and Rosedale is its CEO. Linden and Rosedale have two prominent law firms, one on each coast, representing them.

Carl Evans, however, is a self-employed locksmith who would likely be deprived of his day in court if the case were transferred to San Francisco, California. *Id.* Further, many of the thousands of other potential class members are individuals residing within the Eastern District of Pennsylvania and other locations that would be unable to participate at trial if the case were transferred to the Northern District of California. Significantly, Linden does not contend that a single witness would be unavailable for trial if it were held in the Eastern District of Pennsylvania. Nor has Linden provided this

Court with details about any of the likely hundreds (if not thousands) of customers that reside in the Eastern District that are or were participants in Second Life.

iv. Location of Books and Records

Defendants contend that its personnel and records reside in the Northern District of California and, as such, it would be more convenient to hold trial there. Again, Defendants do not contend that a single record or employee would be unavailable if the trial were held in the Eastern District. Further, many of the relevant documents are likely available electronically and should be able to be accessed and produced by Linden with minimal inconvenience from anywhere in the United States.

Furthermore, once again, Linden presumes only that it is their books and records that this Court should be concerned about. Mr. Evans' records are here in the Eastern District of Pennsylvania. Further, it is likely that hundreds, if not thousands, of Eastern Pennsylvania participants / witnesses' records exist here in the Eastern District of Pennsylvania. As set forth above, Linden has omitted any reference to such consumers.

b. PUBLIC INTERESTS

"The public interests have included: the enforceability of the judgment; practical considerations that could make the trial easy, expeditious, or inexpensive; the relative administrative difficulty in the two for a resulting from court congestion; the local interest in deciding local controversies at home; the public policies of the forum; and the familiarity of the trial judge with the applicable state law in diversity cases." *Jumara*, F.3d at 879-80 (citations omitted).

i. Local Interest in Deciding Controversies at Home

As Linden's conduct has harmed possibly thousands of residents in the Eastern District of Pennsylvania, this Court has a significant interest in deciding this controversy. As mentioned above, "Pennsylvania has a substantial interest in protecting its residents from allegedly misleading representations that induce them to purchase virtual property." *Bragg*, 487 F. Supp. 2d at 602. Accordingly, Pennsylvania has a substantial interest in deciding this matter.

ii. Familiarity of the Trial Judge with the Applicable State Law

Plaintiffs have brought this matter before an experienced United States District Judge experienced in applying the federal and various states' laws for years. While judges sitting in the United States District Court of the Eastern District of Pennsylvania are likely to have less experience applying California law than those judges sitting in the Northern District of California, this factor should be given little weight. This Court has already once applied California law correctly to a dispute with the same Defendants. Defendants have also pointed that there are likely "novel" issues of law to address in this case. Frankly, this Court has the most experience dealing with virtual property disputes, as it is the only Court in the country Plaintiffs' counsel is aware of that has written an opinion in such a dispute.

iii. Practical Considerations

Defendants are represented by counsel on both the East Coast and the West Coast. Defendants have adequate resources to litigate in this District. Defendants documents and materials are likely available electronically and readily available here.

Plaintiffs are not a sophisticated million-dollar entity with the resources to litigate this matter in the Northern District of California. Further, these named Plaintiffs would likely be prohibited from testifying at trial about the harm they have incurred as a result of Defendants' conduct if this matter were transferred to the Northern District of California.

E. AS VENUE IS PROPER HERE, A MOTION TO DISMISS SHOULD NOT BE GRANTED.

As demonstrated above, it is Plaintiffs' position that the forum selection clause in Linden's various TOS are not enforceable. If this Court finds that the forum selection clause is enforceable, however, the court should determine whether transfer is appropriate under 28 U.S.C. § 1404(a) rather than grant Defendants' request for dismissal.

The Third Circuit has "explained that 'as a general matter, it makes better sense, when venue is proper but the parties have agreed upon a not-unreasonable forum selection clause that points to another federal venue, to transfer rather than dismiss." *Knights Collision Center, LLC v. AAA Mid-Atlantic, Inc.*, 2010 U.S. Dist. LEXIS 28399, *6 (E.D. Pa. 2010)(quoting *Salovaara v. Jackson Nat'l Life Ins. Co.*, 246 F.3d 289, 299 (3d Cir. 2001)). "Subsequent to *Salovaara*, courts in this Circuit have preferred transfer rather than dismissal when a forum selection clause specifies another venue." *Knights Collision Center, LLC*, 2010 U.S. Dist. LEXIS 28399 at *6 (citing *Tessler & Weiss/Premesco, Inc. v. Sears Holding Management Corp.*, 2009 U.S. Dist. LEXIS 96096 (D.N.J. Oct. 15, 2009); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 244 (E.D. Pa. 2007)("noting that the Third Circuit has 'cautioned' that transfer is appropriate when forum selection clause is present"); *Barbuto v. Medicine Shoppe Intern., Inc.*, 166 F. Supp. 2d 341, 348 (W.D. Pa. 2001)). "However, transfer as distinct from dismissal is

permissible only when venue is proper in both the original and the requested forum." *Id.* at *7 (citing *Jumara*, 55 F.3d at 878).

While Defendants have challenged the venue of this Court in light of the existence of a forum selection clause, Defendants do not appear to be contending that this venue is otherwise impermissible. Indeed, as venue and jurisdiction were deemed to be proper in *Bragg*, where Marc Bragg made similar allegations to those made here by Carl Evans, who, like Bragg, resides within the Eastern District of Pennsylvania, this issue should be moot. Regardless, venue is appropriate here.

Section 1391(a) provides:

> (a) A civil action wherein jurisdiction is found only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a). A substantial part of the events giving rise to the claim occurred in the Eastern District of Pennsylvania. Those events include the following: (1) Evans' communications with Linden; (2) Evans reading representations made by Defendants; (3) Evans providing money to Linden; (4) Evans' creation of his Second Life accounts; and (5) Defendants' campaign of misrepresentations about virtual property ownership rights. *See* Exhibit 2. Thus, when ignoring the forum selection clause, venue is appropriate here and Linden's Motion to Dismiss should not be granted. The more appropriate analysis for

this Court to undertake is whether 28 U.S.C. § 1404(a) requires a transfer of this matter to another court.

F. THE COURT SHOULD NOT DISMISS COUNT ONE OF PLAINTIFF'S FIRST AMENDED COMPLAINT FOR FAILING TO INCLUDE THE REQUISITE AFFIDAVIT.

Defendants are correct that an affidavit is required to be filed along with a Complaint alleging violations under the California Consumer Legal Remedies Act ("CLRA"). Defendants also accurately note that such dismissal shall be done *without prejudice*.[11]

The Declaration of Carl Evans, which is attached hereto as Exhibit 2, satisfies the requirements of Cal. Civ. Code § 1780(d).[12] As such, Plaintiffs request that the Court deny Defendants' Motion to Dismiss as a result of Plaintiffs, filing this Declaration herewith. Alternatively, Plaintiffs request leave of Court to file a Second Amended Complaint attaching Mr. Evans' Declaration.[13]

MOTION FOR LEAVE TO CONDUCT DISCOVERY

Defendants have requested that this case be dismissed pursuant to the enforcement of a forum selection clause or that the Court transfer this matter to a more convenient forum. As illustrated above, Plaintiffs oppose Defendants' requests.

For Plaintiffs to be able to fully oppose Defendants' Motion, however, discovery is requested to establish various facts. As such, Plaintiffs are herein requesting leave to conduct discovery before the Court renders its ruling on these matters.

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[11] Defendants motion illustrates why their argument is simply form over substance, particularly given that they themselves admit to Mr. Evans repeated interactions with Second Life from the Eastern District.

[12] Per 28 U.S.C. § 1746, unsworn declarations made under a penalty of perjury shall be given like force and effect to a sworn affidavit.

[13] Plaintiffs are filing a separate motion requesting such leave and are seeking the consent of the Defendants.

Plaintiffs request leave to determine several facts that are critical in adequately opposing Defendants' Motion. Courts of this District have permitted discovery on issues relating to jurisdiction. *See e.g., Henning v. Suarez Corp. Industries, Inc.*, 2010 U.S. Dist. LEXIS 43335, *7-8 (E.D. Pa. 2010).

First, Defendants have argued that the Eastern District of Pennsylvania is not a convenient forum in large part because where one class representative resides is not a significant factor when evaluating a motion made under *ß 1404(a)*. As such, the number of potential class members residing in the Eastern District of Pennsylvania is relevant establish the interest of this forum in deciding this controversy and the convenience of the parties.

Second, Defendants have argued that essentially all operative facts occurred in California. Accordingly, Plaintiffs request leave to conduct discovery as to the extent of Defendants' contacts with the Eastern District of Pennsylvania.

Third, Defendants have argued that this Court should enforce a venue selection clause (presumably imputing it to the potential class). Plaintiffs should be permitted discovery pertaining to other accounts in the Eastern District that were subjected to only the original arbitration / venue selection clause – that never "clicked" to accept any unilateral impositions in the TOS.

Plaintiffs respectfully request discovery on those issues before the Court renders it ruling on Defendants' Motion.

Respectfully submitted,

Date: July 30, 2010

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