

I. INTRODUCTION

Pursuant to the Court's Order of September 9, 2010, Defendants submit the following supplemental briefing. The Court requested that Linden provide a summary of the relevant provisions of each of the various versions of the Second Life Terms of Service since September 2007, the dates on which each version was in force, and which version or versions Mr. Evans agreed to in connection with each of his accounts. The Court also requested a summary of the same information for the other three putative class representatives. We provide that information herein.

As a preliminary matter, however, we must point out that the assertion by Plaintiffs' counsel at argument—that Mr. Evans never agreed to the **current** version of the Terms of Service, and thus that this Court must analyze the terms of **earlier** versions—is simply wrong. As set forth in Mr. Rountree's declaration submitted with Linden's opening brief, Mr. Evans agreed to the **current** terms on March 31, 2010:

Linden Lab's customer service records show that plaintiff Carl Evans is a current user of Second Life, and that he has agreed to the Second Life Terms of Service presently in effect. He clicked "I Agree" to the existing terms on March 31, 2010.

Rountree Decl., ¶7.

As set forth in the table attached to that declaration, Mr. Evans agreed to those terms on that date through the account identified as "Evans Account 99," and that account was "CURRENTLY ACTIVE" (i.e., still being used by Mr. Evans) as of the date of Linden's motion. Indeed, it is still active, and used by Mr. Evans on a near-daily basis, today. Supplemental Declaration of John Rountree ("Supp. Rountree Decl."), ¶ 3. Since filing its motion, Linden has identified three more accounts belonging to Mr. Evans (Evans Accounts 102, 103, and 104), for each of which he agreed to the current version of the Terms of Service, and each of which is also active on a near-daily basis. *Id.* And as set forth in Linden's prior briefing and summarized

below, that agreement expressly (1) applies to any dispute between Evans and Linden, (2) supersedes all prior versions, and (3) requires that this suit be brought in San Francisco.

Similarly, Mr. Evans had agreed at least 27 other times to the post-September 2007 versions of the Terms of Service, which contain the same venue provisions. Because there is no dispute that Evans has agreed to the current Terms of Service, the Court need not analyze the prior versions in detail. We nonetheless set forth below the relevant terms from each version, and the accounts in connection with which Evans has agreed to each version.

Plaintiffs' counsel also represented to the Court at argument that Donald Spencer had never agreed to the current version of the Terms of Service.¹ In addition to being irrelevant to the question of venue, this is also simply wrong. Each of the other three Plaintiffs has also agreed to the current version, as set forth in the Supplemental Declaration of John Rountree. Mr. Spencer has done so at least twice, his wife Valerie has done so at least once, and Ms. Carter has done so at least five times.

II. THE CURRENT TERMS OF SERVICE

A. Effective Dates

The current version of the Terms of Service (Rountree Decl. Exh. B) replaced the prior version on March 31, 2010. As of that date, any user either logging on to an existing account or creating a new account was required to agree to that version. The Terms of Service had a thirty-day grace provision for existing users: it provided that its terms would not take effect until April 30, 2010, in order to allow these users time to make adjustments in response to the changed terms.

B. Dispute Resolution and Venue Selection

The dispute resolution, arbitration, and venue provisions in the current Terms of Service

¹ Transcript at 44-45. Counsel represented that Mr. Spencer had only one Second Life account, that he had been locked out of it since before September 2007, and that there was therefore "no possible way" that he could be subject to the current agreement. In fact, he has at least eight, one of which he used as recently as last month.

are set forth in full here (underlining added):

12. DISPUTE RESOLUTION AND ARBITRATION

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.

12.2 The applicable law and venue for any non-arbitrated dispute is California.

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 or 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. Notwithstanding this, either party shall still be allowed to apply for injunctive or other equitable relief to protect or enforce that party's Intellectual Property Rights in any court of competent jurisdiction where the other party resides or has its principal place of business.²

12.3 Improperly Filed Claims are Subject to Attorneys' Fees and Costs. All claims you bring against Linden Lab must be resolved in accordance with this Dispute Resolution and Arbitration Section. All claims filed or brought contrary to this Dispute Resolution Section shall be considered improperly filed and a breach of these Terms of Service. Should either party file a claim contrary to this Dispute Resolution Section, the other party may recover attorneys' fees and costs up to one thousand U.S. Dollars (\$1,000.00 USD), provided that such party seeking such fees has notified the

² We note that the injunctive venue provisions are now expressly bilateral, mooting Plaintiffs' argument that prior versions only allowed Linden to bring injunctive claims in the other party's home venue. But the other party could always seek an injunction in Linden's home venue (San Francisco); the change in the latest version thus made no substantive difference.

other in writing of the improperly filed Claim, and the other has failed to promptly withdraw the Claim.

C. Integration and Supersession

The current version of the Terms of Service is an integrated agreement, expressly superseding prior agreements:

13.3 This Agreement and the referenced Policies are the entire understanding between us.

This Agreement, including the additional terms and policies referenced in Section 14, sets forth the entire understanding and agreement between you and Linden Lab with respect to the subject matter hereof and supersedes any prior or contemporaneous agreements or understandings. This Agreement may not be modified except as provided in Section 1 or by mutual written agreement between you and Linden Lab that is signed by hand (not electronically) by duly authorized representatives of both parties and expressly references amendment of this Agreement.

D. Evans Accounts

Mr. Evans agreed to the current version of the Terms of Service at least four times: on March 31, 2010, the day it was first published to users, in connection with Evans Accounts 99 and 102, and again on June 1, 2010 and June 13, 2010 in connection with Evans Accounts 103 and 104, respectively. He continues to use all four of these accounts today. Supp. Rountree Decl. ¶3.

III. TERMS OF SERVICE EFFECTIVE MARCH 2008 THROUGH MARCH 2010

A. Effective Dates

The prior version of the Terms of Service (Rountree Decl. Exh. F) was effective from March 24, 2008 through April 30, 2010.³ During that time, Mr. Evans agreed to its terms several times. The relevant dispute resolution and venue provisions are the same as in the current

³ After 3/31/10, users could only agree to the current version, but the grace period on existing agreements ran through 4/30/10, as set forth above.

version, other than reformatting:⁴

B. Dispute Resolution and Venue Selection

DISPUTE RESOLUTION

If a dispute arises between you and Linden Lab, our goal is to provide you with a neutral and cost-effective means of resolving the dispute quickly. Accordingly, you and Linden Lab agree to resolve any claim or controversy at law or in equity that arises from or relates to this Agreement or our Service (a "Claim") in accordance with one of the subsections below.

7.1 Governing Law. This Agreement and the relationship between you and Linden Lab shall be governed in all respects by the laws of the State of California without regard to conflict of law principles or the United Nations Convention on the International Sale of Goods.

7.2 Forum for Disputes. 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 Subsection 7.3 below regarding optional arbitration. Notwithstanding this, you agree that Linden Lab shall still be allowed to apply for injunctive or other equitable relief in any court of competent jurisdiction.

7.3 Optional Arbitration. For any Claim, excluding Claims for injunctive or other equitable relief, where the total amount of the award sought is less than ten thousand U.S. Dollars (\$10,000.00 USD), the party requesting relief may elect to resolve the Claim in a cost-effective manner 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.

7.4 Improperly Filed Claims. All Claims you bring against Linden Lab must be resolved in accordance with this Dispute Resolution Section. All Claims filed or brought contrary to this Dispute Resolution Section shall be considered improperly filed. Should you file a Claim contrary to this Dispute Resolution Section, Linden Lab may recover attorneys' fees and costs up to

⁴ In addition to the injunctive relief provision discussed above, the \$1,000 attorney's fees penalty for bringing suit in the wrong venue was unilateral in this version, and has since been changed to apply to either party. That provision is not at issue in this motion, and the change is immaterial, as Linden was and is unlikely to violate its own venue provision.

one thousand U.S. Dollars (\$1,000.00 USD), provided that Linden Lab has notified you in writing of the improperly filed Claim, and you have failed to promptly withdraw the Claim.

C. Amendment, Integration and Supercession

Terms of Service

Welcome to Second Life! The following agreement (this "Agreement" or the "Terms of Service") describes the terms on which Linden Research, Inc. ("Linden Lab") offers you access to its services. This offer is conditioned on your agreement to all of the terms and conditions contained in the Terms of Service, including your compliance with the policies and terms linked to (by way of the provided URLs) from this Agreement. By using Second Life, you agree to 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. Linden Lab may amend this Agreement at any time in its sole discretion, effective upon posting the amended Agreement at the domain or subdomains of <http://secondlife.com> where the prior version of this Agreement was posted, or by communicating these changes through any written contact method we have established with you.

.....

This Agreement sets forth the entire understanding and agreement between you and Linden Lab with respect to the subject matter hereof.

D. Evans Accounts

Mr. Evans agreed to this version at least four times, in connection with Evans Accounts 96 (3/24/08), 98 (2/14/10), 100 (2/16/10), and 101 (3/13/10). In each instance, he agreed to the terms twice: once in creating the account, and again when he first logged into the account. He also agreed to this version of the Terms of Service once when creating Evans Account 97 (4/27/08).

IV. TERMS OF SERVICE PRIOR TO MARCH 2008

A. Effective Dates

The Pre-March 2008 version of the Terms of Service (Rountree Decl. Exh. E) was effective from September 18, 2007 through March 24, 2008. The relevant terms are word-for-word identical to those in the March 2008 version set forth above.

B. Evans Accounts

Mr. Evans agreed to this version at least 23 times between September 20, 2007 and

March 24, 2008, in most instances agreeing to the Terms of Service twice (Evans Accounts 62, 63, 73-93). He also agreed to this version in creating Evans Accounts 94 and 95.

V. TERMS OF SERVICE PRIOR TO SEPTEMBER 18, 2007

Prior to September 18, 2007, the Terms of Service were those that this Court considered in the *Bragg* case. Linden does not seek to enforce those terms herein. Two of Mr. Evans' accounts from that period (Evans Accounts 62 and 63) were used after that date, and Mr. Evans agreed to the updated terms of service at those times. The rest have not been used since before September 18, 2007. Rountree Exh. G.

VI. OTHER NAMED PLAINTIFFS

The Court has also requested data regarding the agreements to which the other named Plaintiffs are parties. As noted in our opening brief and at argument, this question is largely irrelevant: the analysis of whether venue lies in this District concerns only Mr. Evans, as he is the only party who resides or has any contacts here. The other Plaintiffs reside in Florida and Wisconsin, and thus could not bring suit here regardless. To the extent, however, that the forum choices of the other Plaintiffs are relevant to the alternative Section 1404 motion, the other Plaintiffs are also each party to post-September 2007 versions of the Terms of Service, and thus subject to mandatory venue in California.

A. Cindy Carter

Linden has identified at least twenty-four separate accounts belonging to Ms. Carter.⁵ At least five of those have agreed to the current Terms of Service. Supp. Rountree Decl. Exh. A (Carter Accounts 1 (7/5/10); 14 (3/31/10); 20 (4/3/10); 21 (4/28/10); and 23 (4/1/10)). At least eight other Carter accounts are subject to earlier post-September 2007 versions of the Terms of Service (Accounts 3, 5, 11, 12, 17, 18, 22, and 24).

⁵ Because each of the Plaintiffs registers multiple accounts, often submitting false names or other information, it is impossible to say with certainty that Linden has been able to identify all of them.

B. Donald Spencer

Donald Spencer has at least eight Second Life accounts. Two of them (D. Spencer Accounts 3 (7/31/10) and 5 (4/13/10)) have agreed to the current Terms of Service. Four others (Accounts 2, 6, 7, and 8) are subject to earlier post-September 2007 versions of the Terms of Service.

C. Valerie Spencer

Valerie Spencer has at least four Second Life Accounts, one of which agreed to the current Terms of Service (V. Spencer Account 2 (3/31/10)). Two others (Accounts 3 and 4) are subject to earlier post-September 2007 versions of the Terms of Service.

VII. CONCLUSION

Carl Evans has affirmatively agreed to venue in California over and over. He agreed to, and is subject to, the current version of Linden's Terms of Service at least four separate times. In addition to (again) establishing venue in California for any claims concerning "this Agreement and the relationship between you and Linden Lab," that agreement "sets forth the entire understanding and agreement between you and Linden Lab with respect to the subject matter hereof and supersedes any prior or contemporaneous agreements or understandings." In addition, Evans agreed no fewer than twenty-seven times to earlier versions of the Terms of Service, each of which contained the identical dispute resolution provisions. Each of the other Plaintiffs has entered into the same contract.

The analysis begins and ends there. The Plaintiffs have repeatedly contracted to bring this suit, if at all, only in the Northern District of California. Those contracts must be enforced.

By: /s/ Laurence Z. Shiekman

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Dated: September 30, 2010

CERTIFICATE OF SERVICE

I, Matthew D. Janssen, hereby certify that on September 30, 2010, a copy of the foregoing Supplemental Brief in Support 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), and supporting documents, has been electronically filed with the Clerk of the Court using CM/ECF, which shall send notification of such filing to the following:

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