

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

RICHARD MINSKY, an individual, d/b/a
SLART ENTERPRISES,

Plaintiff,

v.

LINDEN RESEARCH, INC., d/b/a LINDEN LAB, a Delaware
corporation, JOHN DOE (a/k/a VICTOR VEZINA), an individual,
PHILIP ROSEDALE, an individual, MITCHELL KAPOR, an
individual, other DOES, presently unknown to Plaintiff,

Defendants.

**DECLARATION OF
LAURA C. PIRRI**

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LEK-DRH

I, Laura C. Pirri, declare:

1. I am employed by Linden Research, Inc. (“Linden Lab”), a defendant in this action, as Senior Counsel. As part of my responsibilities, I oversee Linden Lab’s intellectual property programs and policies. I have personal knowledge of the facts set forth in this declaration and, if called as a witness, could and would testify competently to them.

2. Linden Lab created and operates Second Life, which has become the leading three-dimensional online virtual world, in which users interact, explore, and create content and experiences. Linden Lab was founded and is located in San Francisco, California. The Company was one of the first to bring to market the concept of an online service that simulates a real world environment.

3. Second Life has over 15 million subscribers in the United States and in 66 other countries around the world. It is featured regularly in news commentary and popular culture and has been licensed for use in several prime time television shows. Many educational institutions, including Harvard, Princeton, and Stanford Universities, have virtual campuses in Second Life

where they host classes, events, and information resources. As a result, the Second Life virtual world has rapidly become well-known among the general population.

4. Just as with other locations on the Internet, such as eBay, users on Second Life may create, modify and delete content in the Second Life environment and interact with each other relative to that content. As a result, the content in the Second Life environment is constantly changing.

5. To participate in Second Life, a user must register, choose a user name and agree to the terms of service set forth on the website. To accept the terms of the contract, the user must affirmatively consent by clicking on the words “I Agree” presented on the screen. In accepting the contract, users agree to abide by the Second Life Community Standards (“CS”), not to post or transmit content that infringes another party’s rights, and to comply with Second Life policy on using Linden Lab’s trademarks. A true and correct copy of the Contract and CS as they existed from at least March 2008 through the present are attached as Exhibits A and B, respectively.

6. To use the site, a user creates an “avatar,” or character which represents the user and through which he or she can move within the Second Life environment and interact with other users (called “residents”). Users have a “Second Life name” that they choose at sign up, which is a fictional identity that allows them to interact anonymously on the service. Linden Lab respects users’ rights of privacy and has adopted a privacy policy. A true and correct copy of that policy is attached hereto as Exhibit C.

7. When Linden Lab updates its terms of service from time to time, users must affirmatively agree to the updated terms in order to continue to use the service. The first time that the user attempts to sign onto Second Life after an update, the user is presented on his or her

computer screen with a notice informing the user that the terms of service have changed, providing the text of the updated terms, and asking the user to click on “I Agree.” The most recent updates to the terms of service were in September 2007 when Linden Lab updated the dispute resolution provision (§ 7), and in March 2008 when Linden Lab updated its policy on use of its trademarks (§ 4.4).

8. Linden Lab has adopted and uses the trademark SL in connection with its Second Life services. Linden Lab’s first use in commerce of the SL trademark was at least as early as December of 2004. Linden Lab has chosen to allow Second Life residents to license the SL mark for use in connection with their activities in the Second Life environment. Both Linden Lab and its licensees use the SL trademark in connection with products and services in and for the Second Life environment.

9. Plaintiff Richard Minsky registered as a Second Life user on November 19, 2006. His Second Life account is active, and he agreed to the terms of use currently in effect. Plaintiff has acknowledged that Linden Lab owns the SL trademark. True and correct copies of the front pages of Plaintiff’s website at <http://slartnews.wordpress.com/> as it existed on September 6, 2008, and of his website at <http://www.slartmagazine.com/> as it existed on August 20, 2008, are attached as Exhibits D and E, respectively. Since August 20, 2008, Plaintiff appears to have deleted the reference to the SL trademark in his trademark notice on <http://www.slartmagazine.com/>.

10. In 2006 before Plaintiff became a resident of Second Life, the Second Life community was creating art in or inspired by the Second Life virtual world. Second Life users

frequently place their art work in locations where it can be shared with others to engender comment and discussion among viewers.

11. In connection with this art created in or inspired by Second Life and the commentary and discussion around it, many residents in the Second Life environment have used the SL trademark and the generic term “art” in various forms, including with and without a space between “SL” and “art.” For example:

- (a) In June 2006, a user placed on her website an image from Second Life with a poem inspired by Second Life. The title of the poem was: “A shot in the dark at SLart.” A true and correct copy of this website page showing a posting date of June 7, 2006 is attached as Exhibit F.
- (b) In May 2006, Torley Linden, one of Linden Lab’s employees on the Community Initiatives team, displayed an image from Second Life on a website called Snapzilla along with the comment – “don’t be SLartled” – playing on the meaning of “SLart.” A true and correct copy of this posting to the Snapzilla website showing a date of May 7, 2006 is attached as Exhibit G.
- (c) In June 2006, a Second Life resident wrote a commentary on the Internet titled “Submit Your SL Art to San Jose Museum.” A true and correct copy of this blog post dated June 3, 2006 is attached as Exhibit H.

12. On March 22, 2007, Plaintiff filed a trademark application with the United States Patent and Trademark Office (“PTO”) to register SLART as a trademark. True and correct copies of the SLART trademark application and the attached exemplar of use are attached as Exhibits I and J, respectively.

13. On July 5, 2007, the PTO refused the SLART application on the basis that “applicant seeks registration of “SLART” for publication services related to Second Life Art. ... The term “SLART” is commonly used to describe art within the online world Second Life.” A true and correct copy of the Attorney’s Office Action is attached as Exhibit K.

14. On July 12, 2007, Plaintiff responded to the Office Action, stating that SLART “is a slang term, and NOT one that refers to art in Second Life,” and that “[t]he mark SLART does not ‘merely describe the feature of applicant’s services.’” A true and correct copy of Plaintiff’s response to the Office Action is attached as Exhibit L.

15. Beginning in or about December 2007, Plaintiff began sending notices to residents of the Second Life community demanding that those residents stop using SLART. This resulted in substantial discussions among Second Life users and some of their commentary was made public on the Internet. The comments reflected anger and irritation by Second Life residents because residents believed that SL and Art had been in longstanding use to refer to art in Second Life and that Mr. Minsky was not entitled to an exclusive right to use the term. True and correct copies of some residents’ commentary are attached as Exhibit M.

16. Linden Lab has a trademark policy on use of its SL mark, which residents agree to follow when they choose to use the service. A true and correct copy of the policy is attached as Exhibit N. Linden Lab does not and has never allowed the SL mark to be incorporated into another trademark, and its license to use SL expressly prohibits registration of any trademark that includes the SL mark. Linden Lab published its policy on use of the SL mark on March 24, 2008.

17. Linden Lab also has a policy with respect to claims it receives that residents in the Second Life environment are infringing intellectual property rights. With respect to trademarks, on receipt of a proper notice claiming infringement of a mark in the Second Life environment, Linden Lab investigates the claim and then acts to remove or disable access to allegedly infringing uses of the mark. Linden Lab notifies the resident accused of infringement and

requests that the infringing use be removed. If it is not removed, then Linden Lab takes steps to remove it.

18. When removing allegedly infringing content from Second Life, Linden Lab retains a copy of the content for evidentiary purposes and in the event that restoration is required by law. Under Linden Lab's privacy policy, Linden Lab does not disclose the identities of Second Life users who claim infringement or who are alleged to infringe, except pursuant to proper legal process and as required by law. A Second Life user who is repeatedly subject to proper notices of infringement may be suspended or terminated from Second Life under Linden Lab's "repeat infringer" policy. True and correct copies of Linden Lab's privacy policy and policy on third-party claims of trademark infringement are attached as Exhibits C and O, respectively.

19. On or about April 24, 2008, Linden Lab received a letter from Plaintiff asserting that a Second Life user with the avatar name Victor Vezina had violated his alleged trademark rights in SLART. A true and correct copy of Plaintiff's letter is attached as Exhibit P.

20. In response to the letter, Linden Lab undertook an investigation, because Plaintiff's SLART trademark violates Linden Lab's policy prohibiting registration of a trademark that includes the SL mark and because SL and ART had long been in use by users of Second Life in connection with referring to art on Second Life.

21. Subsequently, on May 13, 2008 Linden Lab was contacted by an attorney claiming to represent Plaintiff. In a telephone communication between Linden Lab and this attorney, the attorney advised Linden Lab that the use by Vezina had disappeared. Linden Lab had not removed or disabled the complained of Vezina use. On May 29, 2008, Plaintiff's

counsel informed Linden Lab by email that Plaintiff would not pursue further action on his claim regarding Vezina. A true and correct copy of this email is attached hereto as Exhibit Q.

22. In further telephone and email communications, Linden Lab continued to attempt to resolve with Plaintiff and his attorney the issues of his use and registration of SLART.

23. On July 31, 2008, Linden Lab received the complaint in this action. Prior to receiving this complaint, I was not aware that Plaintiff had filed an “abuse report” on July 11 regarding allegedly infringing uses of “SLart” by the resident Victor Vezina. An abuse report is a complaint about another resident’s conduct in the Second Life environment that is submitted electronically. Even though I had been in contact with Plaintiff and his attorney during this timeframe, including by email on July 14 and a conference call on July 16, neither one of them had communicated to me the renewed claim regarding Victor Vezina since they withdrew it on May 29.

24. On July 31, 2008, in response to receipt of Plaintiff’s Complaint, Linden Lab removed or disabled access to the uses of “SLart” by the resident Victor Vezina which Plaintiff identified in his Complaint. Linden Lab retained copies of the removed portions of the Second Life environment and documented in an email notification to Vezina the changes made.

25. In a continuing effort to resolve differences with Plaintiff, Linden Lab agreed on August 5, 2008 to participate in an American Arbitration Association (“AAA”) mediation with Plaintiff and his attorney. A mediator from AAA moderated online communications between the parties, including communicating a settlement proposal from Plaintiff to Linden Lab on September 4. On September 8, the mediation concluded because the parties reached an impasse.

26. During the timeframe of the mediation, on September 5, 2008, Linden Lab received the Court's Temporary Restraining Order ("TRO"). Despite contemporaneous communications in mediation, neither Plaintiff nor his counsel had notified Linden Lab of the new claim of infringement by a different resident, not identified in the complaint, which was the basis for the TRO. Neither Plaintiff nor his attorney ever notified Linden Lab of any intent to seek a TRO.

27. Upon receiving the TRO, Linden Lab searched the Second Life environment for the allegedly infringing use of "SLart" identified in the TRO papers. Linden Lab found what it believed to be the resident's Classifieds listing shown in Plaintiff's TRO papers, but the listing was not publicly available and did not use the term "SLart" anywhere. Linden Lab has not removed or disabled access to this listing or any use of "SLart" in it.

28. Privacy and security are extremely important to Second Life residents. The Second Life environment allows residents to speak and interact anonymously if they choose. It would be detrimental to Linden Lab's business if the company were required to disclose resident identities upon demand from other residents without proper legal process or appropriate precautions like a protective order.

29. Linden Lab's business would also be harmed if the company were required to search for and make legal determinations about infringing uses of "SLart." Plaintiff's TRO papers indicate that he deems certain uses of "SLart" to be permissible, for example, "slart botgirl" is apparently not infringing according to Exhibit A of his papers. Requiring Linden Lab to determine which uses are permissible and which are not would risk removing legitimate fair uses of "SLart," would impose a substantial hardship on the Company given its limited

