

**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.

08 - CV - 0819

LEK-DRH

**MEMORANDUM IN FURTHER SUPPORT OF MOTION TO DISMISS OF
DEFENDANTS PHILIP ROSEDALE AND MITCHELL KAPOR**

Defendants Philip Rosedale and Mitchell Kapor submit this Reply Memorandum in further support of their Motion to Dismiss Claims Four and Five of the Amended Complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.

PRELIMINARY STATEMENT

Dismissal of Claims Four and Five against Messrs. Kapor and Rosedale, respectively, is warranted because Plaintiff Richard Minsky (“Minsky”) has failed to state a claim upon which relief may be granted. Minsky’s Amended Complaint (the “Complaint”) is fundamentally deficient; he has not met the pleading requirements of Federal Rule of Civil Procedure 9(b) and has not alleged the requisite elements for fraud under New York law. Minsky has simply failed to allege a false statement made by either Defendant. In addition to, and as a result of, this basic defect, Minsky has also failed to allege the remaining elements for a fraud claim in New York.

In an effort to obfuscate the fundamentally defective nature of his fraud claims, Minsky submits a rambling, accusatory commentary which appears to be addressed to the public forum of the Internet, as opposed to a legal analysis directed to this Court. The Response includes

inappropriate assertions describing additional purported “wrongs” committed by Linden and the individual Defendants which are not alleged in the Complaint. These assertions highlight Minsky’s willingness to make unsubstantiated legal claims and further reveal that Messrs. Kapor and Rosedale, as individual Defendants, have no place in the underlying trademark dispute between Minsky and Linden. Moreover, because it is apparent that Minsky is being substantially advised by two attorneys in this case, he should not be accorded any leniency in meeting the pleading standard. As a result, Claims Four and Five should be dismissed with prejudice.

ARGUMENT

I. MINSKY HAS NOT STATED A CLAIM FOR FRAUD AND HIS THEORY OF FRAUD IS NOT COGNIZABLE.

As noted in the movant’s opening brief, in order to state a claim for fraud in federal court, a plaintiff must “state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. Pro. 9(b). In other words, a plaintiff must “(1) specify the statements that [he] contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.” *Sweringen v. N.Y. State Dispute Resolution Assoc.*, No. 05-CV-428 (NAM/DRH), 2006 WL 2811825, at *3 (N.D.N.Y. Sept. 28, 2006) (quoting *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994)).¹ In addition, of course, the complaint must plead the elements of fraud under New York law. This requires alleging “misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury.” *Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep’t 2006). Minsky has failed to meet either set of requirements.

Most importantly, Minsky has not, and cannot, point to any false statement made by either Mr. Kapor or Mr. Rosedale. Claim Four of Minsky’s Complaint alleges only one statement

¹ In accordance with Northern District of New York Local Rule 7.1(a), all cited cases exclusively reported on computerized databases are attached hereto as Exhibit A.

by Mr. Kapor, made in a July 2008 speech. (Compl. ¶ 57.) In that alleged statement, Mr. Kapor says only that he was involved as an early investor in Second Life and that “Second Life at age five serves many purposes. It is a means of economic empowerment, it is a creative outlet and as you know many people around the world are making a living on their creative work they love doing in Second Life.” *Id.* Minsky has alleged no facts that suggest this statement is false or misleading. Moreover, while he alleges that this statement was made in July 2008, Minsky states that “[e]nactment of the Brand Center License Policy on March 24, 2008, proves that Defendants knew their statements were untrue.” (Resp. at 4.) Assuming the Brand Center License revealed a fraud, there could have been no justifiable reliance on this *subsequent* statement by Mr. Kapor, even if it could somehow be seen as false.

In addition to this speech, Claim Four also references a press release dated November 2003, which is not attached to the Complaint. (Compl. ¶ 58.) That release contains no statement by Mr. Kapor. As explained below, Minsky has not alleged any facts sufficient to state a fraud claim against Mr. Kapor on the basis of this press release. Accordingly, the fraud claim against Mr. Kapor should be dismissed.

The Complaint made no reference to statements made directly by Mr. Rosedale. Minsky’s Response contains a statement attributed to Mr. Rosedale in the November 2003 press release.² In it, Mr. Rosedale says only that Linden’s policy “recognizes the fact that persistent world users are making significant contributions to building these worlds and should be able to both own the content they create and share in the value that is created. The preservation of

² Claim Five does refer to a statement made by Linden’s CEO Mark Kingdon in June 2008, but there is no allegation linking that statement to Mr. Rosedale. Moreover, given Minsky’s allegation that the fraud was revealed in March 2008, the timing of Mr. Kingdon’s subsequent statement eviscerates any allegation of justifiable reliance upon it. *See* Resp. at 4; Compl. ¶ 62. Indeed, Minsky describes this June 23 speech, but then concedes that previously, on June 11, 2008, he was advised that Linden did not recognize his rights in SLART. (Compl. ¶ 63.) These timing inconsistencies undermine any claim that Minsky was defrauded.

users' property rights is a necessary step toward the emergence of genuinely real online worlds.” (Resp., Ex. A.) As with Mr. Kapor's statement, there are simply no facts alleged in the Complaint that this statement is false.

In his Response, Minsky argues that the individual Defendants should be liable for fraud because they “claimed [he] could start a business in Second Life, make real money doing so, and they would preserve [his] Intellectual Property (IP) rights.” (Resp. at 3-4.) His theory of fraud appears to center on the Defendants' acknowledgment of and support for Linden's intellectual property policy, which allows Second Life users to own the original digital content they create in the virtual world. He seems to argue these general statements should be transformed into factual assurances for which Messrs. Kapor and Rosedale are personally liable, since Minsky and Linden are now engaged in the instant trademark dispute. However, the Complaint fails to allege any statement by either Defendant promising to preserve any and all intellectual property rights asserted by Minsky or promising to forgo litigation in the case of a good faith intellectual property dispute. This absence is a fatal defect in Minsky's theory of fraud.

Further, the November 2003 press release to which Minsky refers states only that Linden's revised Terms of Service allow users “to retain full intellectual property protection for the *digital content* they create.” (Resp., Ex. A (emphasis added).) Even assuming that “digital content” includes trademarks created by Second Life users, Minsky has not alleged facts to demonstrate that these statements are false. At best, he has alleged that Linden disputes his rights in SLART.³ The existence of that dispute does not render Linden's statement of its policy false. It is patently unreasonable to conclude that the policy encourages users to create content under the belief that they will thereafter be immune from any claim that such content violates the rights

³ Minsky states in his Response that “[i]t took a Court action to get the Defendants to recognize my rights.” (Resp. at 6.) This is a misrepresentation. Linden, as stated clearly in its Answer, does not recognize any alleged rights of Minsky in SLART.

of others. Minsky could not reasonably have relied on any such meaning from these generalized comments about the many purposes of Second Life and about Linden's policy regarding user ownership of digital content. Accordingly, Minsky has failed to allege any false statements of fact by either Defendant or any justifiable reliance thereupon.

Minsky's Complaint also lacks sufficient allegations of scienter. The Complaint makes only general references to the possibility of financial gain on the part of both Defendants. *See* Compl. ¶¶ 59, 61. Faced with the insufficiency of these allegations, *see Sweringen*, 2006 WL 2811825, at *4, Minsky's Response includes vague and baseless assertions regarding their motivations. He states, without any factual support, that the instant dispute has become an "obsession" of Messrs. Kapor and Rosedale and that "greed" motivates them. (Resp. at 10.) He further asserts, again without any substantiation, that Linden has initiated a "purge of SL names" in preparation for an Initial Public Offering. *Id.* at 5. These baseless conclusions are not facts, are not alleged in the Complaint, and do not give rise to the "strong inference of fraudulent intent" required to sustain conclusory allegations of scienter. *See, e.g., Sweringen*, 2006 WL 2811825, at *4 (internal quotations omitted).

Minsky has also failed to show injury stemming from reliance upon the statements he attributes to Messrs. Kapor and Rosedale. His Complaint lacks reference to any pecuniary loss due to the alleged fraud. In his Response, he makes a general reference to injuries relating to his trademark claims against Linden. *See* Resp. at 7 ("By encouraging and condoning trademark infringement Defendants caused confusion . . . as to the origin of goods and services that use my SLART brand."). There is no allegation in the Complaint that Mssrs. Rosedale or Kapor engaged

in any such “condoning” or “encouraging.” Minsky cannot attribute alleged injuries resulting from Linden’s actions to any statements made by the individual Defendants.⁴

In the Response, Minsky appears to conflate the actions of Linden with the actions of Messrs. Kapor and Rosedale. He asserts, for example, that the individual Defendants are “responsible and liable for strategic planning and day-to-day decisions” of Linden. (Resp. at 2.) The Complaint, however, contains no such allegations and provides no basis to “pierce the corporate veil” and hold Messrs. Kapor and Rosedale responsible for actions attributed to Linden. A plaintiff seeking to proceed under such a theory must allege that “[the corporation] is in fact a mere instrumentality or alter ego of its owner.” *Hughes v. BCI Int’l Holdings, Inc.*, 452 F. Supp. 2d 290, 308 (S.D.N.Y. 2006) (applying Delaware law, based on the state of incorporation of the defendant) (internal citations omitted). Minsky did not, and cannot, credibly allege that Linden is “a mere instrumentality” of Messrs. Kapor and Rosedale. Even under a liberal pleading standard, “[p]urely conclusory allegations cannot suffice to state a claim based on veil-piercing or alter-ego liability.” *Apac Commc’ns, Ltd. v. Burke*, 522 F. Supp. 2d 509, 521 (W.D.N.Y. 2007). For these reasons, the Court should disregard such assertions.

Thus, nothing in the Response identifies facts alleged in the Complaint that are sufficient to remedy the deficiencies identified in the movants’ brief. Because Minsky has failed to plead fraud in accordance with Federal Rule of Civil Procedure 9(b) and has failed to allege the essential elements of the action under New York law, Claims Four and Five should be dismissed with prejudice.

II. THE ADDITIONAL ALLEGATIONS AND ASSERTIONS IN THE RESPONSE ARE IRRELEVANT AND SHOULD BE DISREGARDED

⁴ In fact, Minsky’s own Prayer for Relief emphasizes that the individual Defendants have no place in this action. *See* Compl. ¶¶ 70-75. The Prayer for Relief makes no mention of either Mr. Kapor or Mr. Rosedale, but focuses entirely on redress of injuries allegedly caused by Linden.

“[W]hen opposing a motion to dismiss, a party may not amend his complaint through new allegations made in his briefs.” *Perez v. Int’l Bhd. of Teamsters, AFL-CIO*, No. 00CIV1983LAPJCF, 2002 WL 31027580, at *4 (S.D.N.Y. Sept. 11, 2002) (citing *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998)); *see also McCloud v. Cutler*, No. 06 CV 5443(RJD)(LB), 2008 WL 906701, at *3 n.4 (E.D.N.Y. Apr. 3, 2008) (“The Court need not consider arguments made for the first time in opposition to a motion.”); *O’Brien v. Nat’l Prop. Analysts Partners*, 719 F. Supp. 222, 229 (S.D.N.Y. 1989) (“[I]t is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss.”).

Notwithstanding this basic proscription, Minsky’s Response is rife with never-before-seen allegations. *See, e.g.*, Resp. at 9 (alleging an attempted violation of Minsky’s First Amendment rights); at 10 (alleging that the individual Defendants have violated Minsky’s constitutional right to due process); at 11 (alleging that Linden violated its own Terms of Service). These theories and claims have nothing to do with the allegations of fraud against Messrs. Kapur and Rosedale identified in Claims Four and Five of the Complaint. *See* Compl. ¶¶ 55-64. The Court should therefore ignore these additional assertions and claims.

III. THE COURT SHOULD NOT GIVE MINSKY SPECIAL TREATMENT BASED UPON PRO SE STATUS AND SHOULD NOT GRANT LEAVE TO AMEND

Although *pro se* litigants may sometimes be held to a less stringent standard than parties represented by counsel, *McNamee v. Schoharie County Jail*, No. 9:06-CV-1364 (LEK/GHL), 2008 WL 686796, at *3 (N.D.N.Y. Mar. 10, 2008), such leniency is not appropriate here. Minsky has submitted lengthy, typed papers supported by exhibits and memoranda of law and has shown via his *ex parte* application that he understands Court procedure. *See, e.g., Muniz v. Goord*, No. 9:04-CV-0479, 2007 WL 2027912, at *6 (N.D.N.Y. July 11, 2007) (diminishing special status of

pro se plaintiff where plaintiff's papers were "typed, supported by exhibits, affidavits, and memorandum of law" and where plaintiff "knew enough about court procedure to apply for and receive" particular court orders).

More importantly, Minsky has consulted with and relied upon the services of at least two intellectual property attorneys in his dispute with Linden. According to Minsky's Complaint, Tamiko Franklin, a member of the Massachusetts Bar, and John Koegel, a New York attorney, both represented Minsky in his communications with Linden before and after his filing of this lawsuit. (Compl. ¶¶ 25, 27-33, 35, 37.) In addition, Ms. Franklin is counsel of record for Minsky in the proceedings before the USPTO related to his dispute with Linden. In his Response to Defendants' First Set of Interrogatories, Minsky made his access to counsel clear:

I retained Tamiko as "Juris Amat," an avatar in Second Life, to represent me in trademark infringement matters. She advises me about my rights and possible courses of action when my rights are violated. . . . She regularly interviews me about this litigation. She also reviews my drafts of motions and other legal papers, advises me whether I am correctly addressing the legal issues, and whether I am organizing my points in the correct order for the kind of document it is.

See Ex. B. In the same Interrogatory response, Minsky also discussed his relationship with attorney John Koegel:

Occasionally a matter has come up when I am unable to reach Tamiko or I want a second opinion about a legal procedure. . . . I also asked his advice when Linden wanted to delay their answer to the Amended Complaint, and he advised me to allow that.

Id. Ms. Franklin has publicly discussed her work on behalf of Minsky. For example, in October 2008, she admitted in a blog about virtual legal issues, that she "has an attorney-client relationship with Richard [Minsky] that was established when [she] began acting on his behalf regarding trademark enforcement matters in the Second Life virtual world, and a Power of Attorney that covers enforcement matters for the SLART trademark." Ex. C. She also admitted:

I informed him of the various causes of action that I believed were met by the facts of his case. He chose from that list and drafted a complaint that was amended later to include causes of action he independently researched but were ok'd by me.

When asked whether she was “advising Mr. Minsky in the New York proceeding,” Ms. Franklin responded:

Yes, as his attorney in trademark and copyright enforcement matters I do provide Richard with legal advice and support, including research, in order to assist him in meeting his legal burden as the Plaintiff in a civil action based on trademark infringement. Based on my ongoing obligation, I review all his filings prior to their submission and inform him regarding the organization of his arguments and the elements of legal claims he presents therein.

Id.

Although the exact extent of Ms. Franklin’s or any other attorney’s involvement in this litigation has not been disclosed to the Court or to counsel for the Defendants, it is apparent that some of Minsky’s pleadings “bear the indicia of either an in-depth familiarity with the law or substantial legal assistance (or both).” *Raghavendra v. Trustees of Columbia Univ.*, No. 06 Civ. 6841 (PAC)(HBP), 2008 WL 2696226, at *7 (S.D.N.Y. July 7, 2008) (questioning whether magistrate judge’s deference to pro se plaintiff was “overly generous” in light of sophistication of pleadings and probability that plaintiff received legal assistance). A *pro se* plaintiff is unfairly advantaged where he “enjoys the benefit of legal counsel while also being subjected to the less stringent standard reserved for those proceeding without the benefit of counsel.” *Id.* at *7 n.5 (quoting *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1078 (E.D. Va. 1997)).⁵ Thus, it is appropriate here to diminish the level of deference Minsky is

⁵ It is especially improper for attorneys to “ghostwrite” pleadings on behalf of *pro se* parties. Such a situation “places the opposing party at unfair disadvantage, interferes with the efficient administration of justice, and constitutes a misrepresentation to the Court.” *Raghavendra*, 2008 WL 2696226, at *7 n.5 (quoting *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1078 (E.D. Va. 1997)). See also *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971) (holding that a brief prepared in any substantial part by a member of the bar must be signed by that member).

To the extent that Minsky is receiving legal advice on his pleading, the lawyers advising him should make an appearance in this action, certify they are authorized to practice law in this jurisdiction, and be subject to the

afforded in accordance with his abilities and acknowledged legal assistance, even if the Court declines fully to revoke his *pro se* status. *See, e.g., Muniz*, 2007 WL 2027912, at *6. Similarly, because Minsky is not the typical *pro se* plaintiff, proceeding absent the assistance of an attorney, he should not receive the typical latitude afforded to such parties to amend their pleadings. Given that Minsky had substantial access to legal advice prior to filing his claims, he well understood the requirements of a viable fraud action. *See* Ex. C (containing statement by Tamiko Franklin that she informed Minsky of the “elements of [the] legal claims he present[ed]”). Yet, his pleading fails to state a cause of action for fraud and his Response, replete with unsubstantiated accusations, reveals plainly that his fraud claims have no merit. Any attempt to amend would be unsuccessful, and would only needlessly consume resources of the parties and this Court while further subjecting the individuals to unsupported accusatory rhetoric. Under these circumstances, leave to amend is not warranted. *See, e.g., Schroer v. Emil Norsic & Son, Inc.*, No. 07-CV-1564 (JFB)(AKT), 2007 WL 4299180, at *4 (E.D.N.Y. Dec. 5, 2007) (finding that “any amendment of [*pro se*] plaintiff’s complaint would be futile (given the facts already contained in the complaint)” and dismissing without leave to replead). As a result, the Court should dismiss Claims Four and Five with prejudice.

CONCLUSION

For the reasons articulated above and in their initial brief, Defendants Kapor and Rosedale respectfully request that the Court issue an order pursuant to Federal Rule of Civil Procedure 12(b)(6) dismissing with prejudice Claims Four and Five of the Complaint for failure to state a claim upon which relief may be granted.

requirements of the Federal Rules of Civil Procedure, including the requirements for pleading. *See Lipin v. Hunt*, 538 F. Supp. 2d 590, 605 (S.D.N.Y. 2008) (noting that “any submission to [the] Court must be supported by a coherent, relevant, nonfrivolous legal argument and by factual contentions with at least a reasonable likelihood of evidentiary support”).

Respectfully Submitted,

/s/ Janet L. Cullum

By: **Janet L. Cullum**

Admitted pro hac vice

Assigned Bar Roll No. 106604

COOLEY GODWARD KRONISH LLP

1114 Avenue of Americas

New York, New York 10036-7798

Tel: (212) 479-6500

Fax: (212) 479-6275

email: cullumjl@cooley.com

Andrew C. Rose (102473)

NIXON PEABODY LLP

677 Broadway, 10th Floor

Albany, New York 12207

Tel: (518)427-2650

ATTORNEYS FOR DEFENDANTS

MITCHELL KAPOR AND PHILIP

ROSEDALE