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11 **UNITED STATES DISTRICT COURT**

12 **NORTHERN DISTRICT OF CALIFORNIA**

13 EROS, LLC, a Florida Limited Liability
14 Company, and SHANNON GREI, d/b/a
15 Nomine, an individual, on behalf of
themselves and all others similarly situated,

Case No. CV 09 4269 PJH

17 Plaintiffs,

JOINT RULE 26(f) REPORT

18 v.

19 LINDEN RESEARCH, INC., a Delaware
Corporation, and LINDEN LAB RESEARCH
20 INTERNATIONAL, INC., a Delaware
Corporation,

21 Defendants,

22 _____ /

1 Pursuant to Fed. R. Civ. P. 26(f), a discovery and case management conference was
2 held on January 7, 2010, and was telephonically attended by:

- 3 - Michael Aschenbrener and Steven Tepler on behalf of the Plaintiffs;
- 4 - Michael Page and Joseph Gratz on behalf of the Defendants.

5 In accordance with this Court's standing order, and Local Rule 16-9, the parties
6 report as follows:

7 **1. Jurisdiction and Service:**

8 All parties named in the action have been served. Defendants do not contest
9 jurisdiction or service of process.

10 **2. Facts and Contentions of the Parties:**

11 Plaintiffs allege that Defendants are California-based operators of an online virtual
12 world, Second Life. Plaintiffs operate businesses within Second Life to sell virtual goods.
13 Plaintiffs' virtual goods are protected by real world registered trademarks and copyrights.

14 Plaintiffs allege that Defendants directly and secondarily violated their intellectual
15 property ("IP") rights and the IP rights of four classes of persons and entities selling
16 protected goods in Defendants' virtual world. Plaintiffs allege that Defendants directly and
17 secondarily infringed the trademarks of Plaintiff Eros by using Eros's mark to sell infringing
18 virtual goods within Second Life and by providing the tools to other infringing users.
19 Defendants directly and secondarily infringe the copyrights of Plaintiff Grei by reproducing
20 and displaying her copyrighted works within Second Life, and by materially contributing to
21 and supervising the infringing conduct of others within Second Life.

22 Defendants contend as follows: They are neither directly nor secondarily liable for
23 copyright or trademark infringement. Defendants' actions do not constitute copyright
24 infringement, and are shielded by the safe harbor for online service providers contained in 17
25 U.S.C. § 512. Defendants' actions do not constitute trademark infringement, because they
26 have made no use of Plaintiffs' marks, any such use was nominative fair use, and those
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1 marks are not protected by trademark law due to Plaintiffs' prior licensing practices. In
2 addition, Defendants lack the level of control or state of mind necessary for contributory or
3 vicarious liability.

4 **3. Legal Issues:**

5 The parties agree that the issue of whether or not any class may be properly certified
6 under the requirements of Rule 23(b) is one of the primary issues in this case. Other issues
7 include:

- 8 - Whether Defendants' alleged conduct constitutes direct and/or secondary
9 trademark infringement under the Lanham Act and applicable trademark
10 law;
- 11 - Whether Defendants' alleged conduct constitutes direct and/or secondary
12 copyright infringement under the Copyright Act;
- 13 - Whether Defendants' alleged conduct represents unfair and deceptive acts
14 or practices;
- 15 - Whether Defendants' alleged conduct constitutes tortious interference
16 with economic relations under California law; and
- 17 - Whether Defendants' can be held liable for the conduct of other merchants
18 selling virtual goods within Second Life.

19 **4. Motions:**

20 There are no prior or pending motions.

21 **5. Amendment of Pleadings:**

22 Plaintiffs do not intend or have reason to believe that they will amend their pleadings
23 at this time. The parties agree that amendments to the pleadings will be allowed until thirty
24 (30) days after the close of discovery.

25 **6. Evidence Preservation:**

1 All parties are complying in good faith with their obligations to preserve potentially
2 relevant evidence.

3 **7. Disclosures:**

4 Rule 26(a)(1) disclosures are due January 21, 2010 and will be made
5 contemporaneously with the filing of this report.

6 **8. Discovery:**

7 **a. Discovery Taken to Date.** Defendants propounded their First Set of
8 Interrogatories and First Set of Requests for Production on both Plaintiffs on January 7, 2010,
9 following the parties' 26(f) conference. Plaintiffs have not propounded any discovery at this
10 time.

11 **b. The Scope of Anticipated Discovery.** The Parties anticipate depositions,
12 interrogatories, documents requests, and other fact and expert discovery available under the
13 FRCP and Local Rules.

14 **c. Proposed Limitations or Modifications to the Discovery Rules.** At the
15 present time, the Parties do not anticipate limitations or modifications to the discovery rules.

16 **d. Proposed Discovery Plan Pursuant to Fed. R. Civ. P. 26(f).**

- 17 (i) Three (3) months for Class discovery beginning on January 7, 2010;
18 (ii) Six (6) months for Merits discovery from the date of this Court's order
19 regarding class certification.

20 **e. Proposed Format for Production.** All electronic discovery shall be
21 produced in native format with metadata.

22 **f. Expert Reports.** The Parties agree that all drafts of consulting or testifying
23 expert reports, including all communications between counsel and experts are non-
24 discoverable.

25 **g. Inadvertent Disclosure.** The Parties agree that all inadvertently disclosed
26 documents shall be promptly returned and/or destroyed.

1 **h. Service.** The Parties agree to accept service by e-mail with response time
2 calculated using the same method as for hand delivery.

3 **9. Class Actions:**

4 The Plaintiffs provide the following class action information pursuant to L.R. 16-
5 9(b):

6 **a.** Plaintiffs will argue that this action is maintainable as a class action under
7 Fed. R. Civ. P. 23(b)(2) and (b)(3).

8 **b.** Plaintiff Eros brings this action on behalf of the following two Classes:

9 (i) The Trademark Owner Class. All individuals and entities in
10 the United States who own, have owned, or otherwise have the right to
11 enforce licensing rights to goods and services bearing trademarks or
12 service marks registered with the United States Patent and Trademark
13 Office, and who engage or have engaged in commercial transactions in
14 Second Life associated with such registered trademark or service
15 marks.

16 (ii) The Trademark Infringement Class. All individuals and entities
17 in the United States who (1) own, have owned, or otherwise have the
18 right to enforce licensing rights to goods and services bearing
19 trademarks or service marks registered with the United States Patent
20 and Trademark Office, (2) engage or have engaged in commercial
21 transactions in Second Life associated with such registered trademark
22 or service marks, and (3) whose trademarks and/or service marks were
23 infringed in Second Life.

24 **c.** Plaintiff Grei brings this action on behalf of the following two Classes

25 (iii) **The Copyright Owner Class.** All individuals and entities in
26 the United States who own, have owned or otherwise have the right to
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enforce licensing rights in connection with a copyright registered with the U.S. Register of Copyrights and who engage or have engaged in commercial transactions in Second Life associated with such copyrighted works.

(iv) **The Copyright Infringement Class.** All individuals and entities in the United States who (1) own, have owned or otherwise have the right to enforce licensing rights in connection with a copyright registered with the U.S. Register of Copyrights (2) engage or have engaged in commercial transactions in Second Life associated with such copyrighted works, and (3) whose copyrights were infringed in Second Life.

d. The following facts alleged in the Complaint demonstrate that this action is maintainable as a class action under Fed. R. Civ. P. 23(b):

Numerosity – While the precise number of Class members is unknown to Plaintiffs at this time, Plaintiffs estimate that the Classes consist of at least forty members each.

Common Questions – There are numerous common questions of fact and law. The principal factual issues in dispute (Section 2 above) and points of law (Section 3 above) are common to all members of the Classes, and predominate over any questions affecting Plaintiffs or other individual members of the Classes.

Typicality – Plaintiffs’ claims are typical of those of the Classes. Plaintiffs and the members of the Classes are individuals or entities who sell virtual goods in Second Life under the protection of a trademark or copyright.

1 Adequacy – Plaintiffs have no interests adverse or antagonistic to those of the
2 Classes and have retained competent and experienced class counsel to
3 prosecute this action.

4 Superiority – A class action is superior to all other available methods for the
5 fair and efficient adjudication of this controversy because joinder of all
6 members is impracticable. There will be no difficulty in the management of
7 this case as a class action.

8 Additionally, the Classes may be certified because:

9 (i) the prosecution of separate action by the individual members of the
10 Classes would create a risk of inconsistent or varying adjudication with
11 respect to individual members of the Classes which would establish
12 incompatible standards of conduct for Defendants;

13 (ii) the prosecution of separate actions by individual members of the
14 Classes would create a risk of adjudications with respect to them which
15 would, as a practical matter, be dispositive of the interests of other members
16 of the Classes not parties to the adjudications, or substantially impair or
17 impede their ability to protect their interests; and

18 (iii) Defendants have acted or refused to act on grounds generally
19 applicable to members of the Classes, thereby making appropriate final and
20 injunctive relief with respect to the members of the Class as a whole.

21 e. Barring substantial delays cause by discovery disputes, Plaintiffs anticipate
22 bringing their motion for class certification sixty (60) days after the close of class discovery.

23 **Defendants’ Response**

24 Defendants plan to oppose class certification. Defendants contend that every
25 trademark is different, and the analysis a court must perform in order to adjudicate a
26 trademark claim is necessarily a case-by-case inquiry that does not lend itself to class action
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1 treatment. In addition, Defendants intend to show that the class is not sufficiently numerous,
2 in that only a handful of Second Life residents are putative class members, as most Second
3 Life residents do not choose to register their trademarks and copyrights, as the class
4 definitions require. Finally, Defendants will argue that Eros LLC and Ms. Grei are not
5 adequate representatives, as they have interests antagonistic to other members of the class
6 with whom they compete in the marketplace. Further, Defendants will argue that there are
7 claims and defenses that are particular to these plaintiffs—requiring detailed factual inquiry
8 into particular licenses that the plaintiffs have granted and particular business deals that they
9 have made—that demonstrate that class certification should be denied.

10 **10. Related Cases:**

11 The Parties are not aware of any related cases pending in any jurisdiction.

12 **11. Relief:**

13 Plaintiffs seek:

- 14 a. An order certifying the Classes, directing that this case proceed as a class
15 action, and appointing Plaintiffs and their counsel to represent Plaintiffs and the Classes;
- 16 b. An order declaring that the actions of Defendants result in Trademark
17 Infringement, False Designation of Origin Trademark Infringement, Contributory Trademark
18 Infringement, Vicarious Trademark Infringement, Intentional Interference with Economic
19 Relations, Negligent Interference with Economic Relations, and in violation of Cal. Bus. &
20 Prof. Code §§ 17200 and 17500;
- 21 c. Enter judgment against Defendants for all statutory damages authorized by the
22 Lanham Act, or, at Plaintiff's choosing, Defendants' profits, the costs of the action, and
23 actual damages caused by its conduct and, to the extent authorized the Lanham Act, treble
24 damages;
- 25 d. Enter judgment against Defendants for all statutory damages authorized by the
26 Copyright Act, or, at Plaintiff's choosing, actual damages caused by its conduct;
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1 e. Award restitution against Linden Lab for all money to which Plaintiffs and the
2 Classes are entitled in equity;

3 f. Award Plaintiffs and the Classes their reasonable litigation expenses and
4 attorneys' fees, as authorized by the Lanham Act and the Copyright Act;

5 g. Award Plaintiffs and the Classes pre- and post-judgment interest, to the extent
6 allowable;

7 h. Enter injunctive relief and/or declaratory relief as is necessary to protect the
8 interests of Plaintiffs and the Classes; and

9 i. Award such other and further relief as equity and justice may require.

10 **12. Settlement and ADR:**

11 The parties discussed ADR and settlement options during their Rule 26(f) conference
12 on January 7, 2010, though no agreement was reached concerning ADR. The parties have
13 complied with their obligations under ADR L.R. 3-5. The parties are scheduled to participate
14 in an ADR Phone Conference on January 25, 2010. The parties plan to conduct an in-person
15 conference on January 28, 2010 concerning settlement and/or ADR.

16 **13. Consent to Magistrate Judge for All Purposes:**

17 The Parties do not, at this time, consent to have a magistrate judge conduct all further
18 proceedings.

19 **14. Other References:**

20 At this time, the parties do not believe this case is suitable for reference to binding
21 arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

22 **15. Narrowing of Issues:**

23 The Parties do not believe that any issues can be narrowed at this time.

24 **16. Expedited Schedule:**

25 The Parties do not believe this case can be expedited at this point.

26 **17. Scheduling:**

1 **a. Proposed Dates for Designation of Experts.** Expert reports or disclosures
2 relating to Class discovery shall be exchanged no later than thirty (30) days prior to the close
3 of Class discovery. Expert reports or disclosures relating to Merits discovery shall be
4 exchanged no later than thirty (30) days prior to the close of Merits discovery.

5 **b. Hearing of Dispositive Motions.** All dispositive motions shall be within
6 ninety (90) days of the close of Merits discovery. All opposition briefs shall be filed within
7 thirty (30) days of the filing of dispositive motions. All reply briefs shall be filed within
8 fourteen (14) days of the filing of the response briefs.

9 **c. Pretrial Conference.** The Pretrial conference will be held no later than ten
10 (10) days before the start of the trial, or at the Court's convenience.

11 **d. Trial.** Trial in this matter will be held two weeks after the Pretrial
12 Conference, or at the Court's convenience.

13 **18. Trial:**

14 Plaintiffs have demanded a jury trial. The Parties estimate that a trial in this matter
15 would take approximately two weeks.

16 **19. Disclosure of Non-Party Interested Entities or Persons:**

17 The Parties have filed respective "Certification of Interested Entities or Persons."
18 Plaintiffs disclosed that named Plaintiffs are the only persons or entities with an interest in
19 the litigation. Defendants disclosed that named Defendants are the only persons or entities
20 with an interest in the litigation.

21 **20. Proposed Case Schedule Chart:**

22 The key dates noted above are set forth, for the Court's convenience, in the below
23 chart.

| Event | Proposed Date |
|--------------------------------|-----------------|
| Class Discovery Begins | January 7, 2010 |
| Expert reports on class issues | March 8, 2010 |

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| Class Discovery Ends | April 7, 2010 |
| Plaintiffs Move for Class Certification | June 7, 2010 |
| Merits Discovery Begins | Upon issuance of this Court’s order granting or denying class certification. |
| Merits Discovery Ends | Six months after the issuance of this Court’s order granting or denying class certification. |
| Parties file dispositive motions | 90 days after merits discovery ends |
| Oppositions to dispositive motions | 30 days after filing of dispositive motions |
| Replies re: dispositive motions | 14 days after filing of oppositions |

Respectfully Submitted,

Dated: January 25, 2010

EDELSON MCGUIRE LLC

By: s/ Michael Aschenbrener
Michael Aschenbrener

Attorneys for Plaintiffs

Dated: January 25, 2010

DURIE TANGRI LLP

By: s/ Michael Page
Michael Page

Attorneys for Defendants

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CERTIFICATE OF SERVICE

The undersigned certifies that, on January 25, 2010, he caused this document to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of filing to counsel of record for each party.

Dated: January 25, 2010

EDELSON MCGUIRE LLC

By: s/ Michael Aschenbrener

Michael Aschenbrener

Attorneys for Plaintiffs