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October 14, 2008

Via Electronic Case Filing

Honorable David R. Homer
United States Magistrate Judge
United States District Court
445 Broadway
Albany, New York 12207

RE: Richard Minsky, an individual, d/b/a SLART Enterprises *v*
Linden Research, Inc. d/b/a Linden Lab, *et al.*
Civil Action No.: 08-CV-0819 (LEK/DRH)

Dear Judge Homer:

On behalf of the defendants in the above-referenced action, I write to request that the October 9, 2008 Reply Letter Brief submitted by plaintiff Richard Minsky be stricken. The September 12, 2008 TRO on Consent signed by Judge Kahn sets forth a simplified, expedited procedure for addressing to your attention any disagreement among the parties over alleged infringing uses of the trademark in question (copy attached). It provides only that the parties shall each submit a single letter brief; reply letters are not permitted.

Accordingly, we respectfully move that the plaintiff's October 9, 2008 Reply Letter Brief be stricken.

Respectfully,

NIXON PEABODY LLP


By: Andrew C. Rose, Esq.

ACR/lrb

cc: Mr. Richard Minsky (via e-mail: minsky@minsky.com) and U.S. Mail)
Janet L. Cullum, Esq. (via ECF)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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

Plaintiff,

-against-

1:08-CV-819
(LEK/DRH)

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.

TEMPORARY RESTRAINING ORDER BY CONSENT

On July 29, 2008, Plaintiff Richard Minsky commenced this action, alleging claims of trademark infringement, trademark dilution, contributory infringement and dilution, in violation of the Lanham Act, 15 U.S.C. § 1141 et seq., and tortious interference and fraud, in violation of New York state law. See Amended Complaint (Dkt. No. 6). On September 4, 2008, following an *ex parte* application by Plaintiff, the Court entered a Memorandum Decision and Order which included a temporary restraining order ("TRO"). Plaintiff's Motion (Dkt. No. 10); September 4 Order (Dkt. No. 11). That TRO expires as a matter of law at 10:00am on September 14, 2008. September 4 Order; see also FED R. CIV. P. 56(b)(2)

On September 8, 2008, Defendants Linden Research, Inc., Philip Rosedale and Mitchell Kapor moved to dissolve the TRO, reserving their right to raise certain procedural issues including, *inter alia*, personal jurisdiction and/or venue before this Court and the legal sufficiency of Plaintiff's

Amended Complaint. Dkt. No. 15. On September 10, 2008, the Court held a hearing on the Motion to dissolve and directed the parties to attempt to agree upon a TRO to preserve evidence and maintain the status quo pending adjudication of the Plaintiff's Motion for a preliminary injunction. See Minute Entry (Dkt. No. 19). A briefing schedule on the Motion for a preliminary injunction will be forthcoming.

Upon a consideration of the relevant law and the submissions of the parties, it is hereby **ORDERED**, that the following TRO is hereby entered by stipulation and upon consent of the parties:

1. In the event that Plaintiff identifies the use of a term in the Second Life virtual world which he believes in good faith is an infringement of SLART, the subject of U.S. Federal Trademark Registration No. 3399258 ("Plaintiff's Registration"), and which is being used on or in connection with the services identified in Plaintiff's Registration, Plaintiff may give notice of such alleged infringement to Linden Research, Inc. ("Linden") by sending an email to removals@lindenlab.com ("Notice to Linden"). Plaintiff's Notice to Linden shall include a detailed description of the alleged infringement, the user identity associated with the alleged infringement, the specific search which Plaintiff used to identify the use, and the precise location of the alleged infringing use in the Second Life virtual world, and shall be accompanied by a screen shot reflecting the alleged infringing use, which, to the extent possible, shall reflect the date and time of the alleged infringing use. Plaintiff's Notice to Linden shall also include a separate notice, from Plaintiff to the Second Life user who is the source of the alleged infringing use, regarding the alleged infringement ("Notice to User"). The Notice to User shall be in the form set forth in Exhibit A.

2. Except as set forth in paragraph 3 below, within two business days of receipt of a

notice described in paragraph 1 above, Linden shall forward the Notice to User to the Second Life user identified as the source of the alleged infringing use, shall advise the user that this Action is pending, and that, pursuant to this Order, the use must be removed pending the resolution of the Action. Linden will also provide confirmation to Plaintiff via email that his Notice to User has been sent to the email address on file for the user, along with the time and date of transmission. If, within three business days of providing such notice to the user, the alleged infringing use has not been removed from the Second Life virtual world, Linden shall remove the use.

3. In the event that the alleged infringing use is anything other than the use of "SLART" as one word with all letters depicted in a uniform size, font and color, Linden may decline to forward Plaintiff's notice to the user and shall within three business days of receipt of the notice advise Plaintiff that it has declined to do so. In the event Plaintiff desires to continue to pursue removal of the alleged infringement, Plaintiff and Linden agree that the parties shall submit the issue of whether the alleged infringing use should be removed to U.S. Magistrate Judge David R. Homer for resolution. The parties further agree that they will submit the issue to Magistrate Judge Homer via letter briefs, each not to exceed five pages; Plaintiff shall submit his letter brief no later than five business days after receipt of Linden's notification to Plaintiff that it has declined to forward his notice, and Linden shall submit its letter brief in response no later than five business days after receipt of Plaintiff's letter brief. All briefs shall be served on Plaintiff and counsel of record for Defendants by email.

4. Pending the conclusion of this Action, Plaintiff and Defendants shall each preserve:
(a) all materials reflecting communications between Plaintiff and Defendants related to any notice of alleged infringement submitted by Plaintiff, including, to the extent possible, evidence of date and

time stamps associated with the communications, (b) all materials reflecting any use with respect to which Plaintiff has claimed infringement, including, to the extent possible, evidence of date and time stamps associated with the use, and (c) all materials reflecting communications between Defendants and any user alleged by Plaintiff to be infringing that relate to the alleged infringement, including, to the extent possible, evidence of date and time stamps associated with the communications.

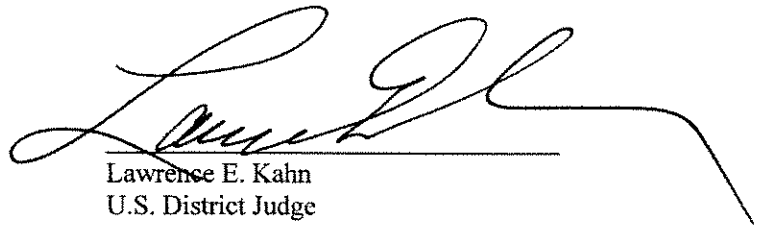
5. In the event that Plaintiff seeks from Defendants the disclosure of any personal identifying information of a Second Life user whom Plaintiff alleges is making an infringing use, Plaintiff shall file a motion with Magistrate Judge Homer setting forth a *prima facie* case of infringement and detailing the reasons the requested disclosure is necessary. The motion shall be heard on the following expedited briefing schedule: (a) Plaintiff shall provide fifteen days notice of motion; (b) Defendants' response shall be due 10 days after the receipt of Plaintiff's notice of motion. In the event that such motion is granted, an appropriate protective order will concurrently be entered to protect, to the extent possible, against the disclosure or dissemination of the personal identifying information of the alleged infringer to third parties outside the context of this Action, on terms to be determined at the time the protective order is entered.

and it is further **ORDERED**, that by consent of the parties, this Order shall expire upon the earlier of (a) dismissal of this Action for any reason, or (b) this Court's Decision following the hearing on Plaintiff's Motion for a preliminary injunction, which may occur no earlier than October 15, 2008; and it is further

ORDERED, that the Clerk serve a copy of this Order on all parties.

IT IS SO ORDERED.

DATED: September 12, 2008
Albany, New York



Lawrence E. Kahn
U.S. District Judge

EXHIBIT A

PROPOSED CEASE AND DESIST ORDER

Dear _____:

I am owner of the federally registered trademark "SLART", Registration No. 3399258. I have protected and own the mark "SLART" and use it in connection with my business activities in international class 041. The mark, as you must appreciate, is of great value and importance to my business and my continued efforts to maintain a connection between the mark and my commercial activities.

Recently, I have become aware of your use of the mark in connection with your activities, including _____.

This letter is being sent to protest your continued (unauthorized use of a mark confusingly similar to) OR (misuse of) "SLART" in connection with your activities .

Your use of "SLART" unfairly capitalizes on the goodwill and reputation embodied in association with my activities. This misappropriation of the mark misleads the public into believing that I have authorized or sponsored or affiliated myself with your activities.

(You can use "SL art" to describe art made in-world, but not the combined mark "slart". The use of the mark "slart" (or SLart or SLArt or any variant) is only for activities, products and services that I own or license. If you are not familiar with Slart Gallery, the Slart Academy or SLART Magazine, please do visit <http://SlartMagazine.com>)

[... insert the above when appropriate....]

The following legal cease and desist notice is a requirement of trademark enforcement. Please read it, and certify that you understand and will comply with it by either sending it as a notecard to ArtWorld Market within the Second Life[®] virtual world, or copying it and sending it as an e-mail to ArtWorld@SlartMagazine.com :

This type of deceptive trade practice constitutes trademark infringement under Section 32(1) of the Lanham Act, 15 U.S.C. 1125(a), and violates trademark and dilution statutes as well as principles of unfair competition and misappropriation.

To ensure that you cease and desist of all unauthorized use of the mark "SLART" or any mark confusingly similar we must require that you certify that:

1. you, or any entity you are affiliated with or an agent of, will immediately cease all use of the mark "SLART"

2. you, or any entity you are affiliated with or an agent of, agree to rescind and refrain from any further advertising bearing the mark "SLART" or any mark confusingly similar

3. you will communicate your agreement to desist from infringement of our rights by return note and or email to my attention. The note or email should contain the following statement: "I agree to all requirements, and to comply with all terms, of the cease and desist note forwarded to my attention on __[insert date]__ by (Richard Minsky) or (ArtWorld Market) ".

Your return note and or email to my attention will constitute your signature for the purposes of this document indicating that you agree to and have fully complied with these requirements.

In the event that we do not receive an affirmative response from you within 7 days, we will not have any alternative but to take further action against you, your company (if any, and its liable persons) in order to protect and vindicate our valuable rights.

Very truly yours,

(ArtWorld Market) or (Richard Minsky)