

(EDITED VERSION – by Michael Risch)

MARC BRAGG, Plaintiff, v. LINDEN RESEARCH, INC. and PHILIP ROSE-DALE, Defendants.**CIVIL ACTION NO. 06-4925****UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA***487 F. Supp. 2d 593***May 30, 2007, Decided****May 30, 2007, Filed; May 31, 2007, Entered**

MEMORANDUM

EDUARDO C. ROBRENO, J.

May 30, 2007

This case is about virtual property maintained on a virtual world on the Internet. Plaintiff, March Bragg, Esq., claims an ownership interest in such virtual property. Bragg contends that Defendants, the operators of the virtual world, unlawfully confiscated his virtual property and denied him access to their virtual world. Ultimately at issue in this case are the novel questions of what rights and obligations grow out of the relationship between the owner and creator of a virtual world and its resident-customers. While the property and the world where it is found are "virtual," the dispute is real.

Presently before the Court are Defendants' Motion to Dismiss for Lack of Personal Jurisdiction and Motion to Compel Arbitration. For the reasons set forth below, the motions will be denied.

I. BACKGROUND*A. Second Life*

The defendants in this case, Linden Research Inc. ("Linden") and its Chief Executive Officer, Philip Rose-dale, operate a multiplayer role-playing game set in the virtual world ¹ known as "Second Life." ² Participants create avatars ³ to represent themselves, and Second Life is populated by hundreds of thousands of avatars, whose interactions with one another are limited only by the human imagination. ⁴ According to Plaintiff, many people "are now living large portions of their lives, forming friendships with others, building and acquiring virtual property, forming contracts, substantial business relationships and forming social organizations" in virtual worlds such as Second Life. Compl. P 13. Owning prop-

erty in and having access to this virtual world is, moreover, apparently important to the plaintiff in this case.

1 The virtual world at issue is an interactive computer simulation which lets its participants see, hear, use, and even modify the simulated objects in the computer-generated environment. *See* Woodrow Barfield, *Intellectual Property Rights in Virtual Environments: Considering the Rights of Owners, Programmers and Virtual Avatars*, 39 *Akron L. Rev.* 649, 649 (2006) (defining virtual world).

2 Second Life is hosted at <http://secondlife.com>.

3 ...Since the advent of computers, however, "avatar" is also used to refer to an Internet user's virtual representation of herself in a computer game, in an Internet chat room, or in other Internet fora. *See* Wikipedia, Definition of Avatar, available at <http://en.wikipedia.org>.

4 Judge Richard A. Posner has apparently made an appearance in Second Life as a "balding bespectacled cartoon rendering of himself" where he "addressed a crowd of other animated characters on a range of legal issues, including property rights in virtual reality." Alan Sipress, *Where Real Money Meets Virtual Reality, the Jury is Still Out*, Washington Post, Dec. 26, 2006, at A1.

B. Recognition of Property Rights

In November 2003, Linden announced that it would recognize participants' full intellectual property protection for the digital content they created or otherwise owned in Second Life. As a result, Second Life avatars may now buy, own, and sell virtual goods ranging "from cars to homes to slot machines." Compl. P 7. ⁵ Most significantly for this case, avatars may purchase "virtual land," make improvements to that land, exclude other

avatars from entering onto the land, rent the land, or sell the land to other avatars for a profit. Assertedly, by recognizing virtual property rights, Linden would distinguish itself from other virtual worlds available on the Internet and thus increase participation in Second Life.

5 Although participants purchase virtual property using the virtual currency of "lindens," lindens themselves are bought and sold for real U.S. dollars. Linden maintains a currency exchange that sets an exchange rate between lindens and U.S. dollars. Third parties, including ebay.com, also provide additional currency exchanges.

Defendant Rosedale personally joined in efforts to publicize Linden's recognition of rights to virtual property. For example, in 2003, Rosedale stated in a press release made available on Second Life's website that:

Until now, any content created by users for persistent state worlds, such as Everquest(R) or Star Wars Galaxies TM, has essentially become the property of the company developing and hosting the world. . . . We believe our new 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 users' property rights is a necessary step toward the emergence of genuinely real online worlds.

Press Release, Linden Lab, *Linden Lab Preserves Real World Intellectual Property Rights of Users of its Second Life Online Services* (Nov. 14, 2003). After this initial announcement, Rosedale continued to personally hype the ownership of virtual property on Second Life. In an interview in 2004, for example, Rosedale stated: "The idea of land ownership and the ease with which you can own land and do something with it . . . is intoxicating. . . . Land ownership feels important and tangible. It's a real piece of the future." Michael Learmonth, *Virtual Real Estate Boom Draws Real Dollars*, USA Today, June 3, 2004. Rosedale recently gave an extended interview for Inc. magazine, where he appeared on the cover stating, "What you have in Second Life is real and it is yours. It doesn't belong to us. You can make money." Michael Fitzgerald, *How Philip Rosedale Created Second Life*, Inc., Feb. 2007. ⁶

6 Plaintiff has inundated the Court with press releases, newspaper articles, and other media containing representations made by Rosedale re-

garding the ownership of property on Second Life. Plaintiff states in an affidavit that he reviewed and relied on some of these representations. Bragg Decl. PP 4-10, 65-68. It is of no moment that Plaintiff did not rely upon every single representation that Rosedale ever made regarding ownership of virtual property on Second Life. The immense quantity of such representations is relevant to showing that these are not isolated statements, but rather, part of a national campaign in which defendant Rosedale individually and actively participated.

[**7] Rosedale even created his own avatar and held virtual town hall meetings on Second Life where he made representations about the purchase of virtual land. Bragg Decl. P 68. Bragg "attended" such meetings and relied on the representations that Rosedale made therein. *Id.*

C. Plaintiffs' Participation in Second Life

In 2005, Plaintiff Marc Bragg, Esq., signed up and paid Linden to participate in Second Life. Bragg claims that he was induced into "investing" in virtual land by representations made by Linden and Rosedale in press releases, interviews, and through the Second Life website. Bragg Decl. PP 4-10, 65-68. Bragg also paid Linden real money as "tax" on his land. ⁷ By April 2006, Bragg had not only purchased numerous parcels of land in his Second Life, he had also digitally crafted "fireworks" that he was able to sell to other avatars for a profit. Bragg also acquired other virtual items from other avatars.

7 Linden taxes virtual land. In fact, according to Bragg, by June 2004, Linden reported that its "real estate tax revenue on land sold to the participants exceeded the amount the company was generating in subscriptions." Compl. P 42.

The dispute ultimately at issue in this case arose on April 30, 2006, when Bragg acquired a parcel of virtual land named "Taessot" for \$300. Linden sent Bragg an email advising him that Taessot had been improperly purchased through an "exploit." Linden took Taesot away. It then froze Bragg's account, effectively confiscating all of the virtual property and currency that he maintained on his account with Second Life.

Bragg brought suit against Linden and Rosedale in the Court of Common Pleas of Chester County, Pennsylvania, on October 3, 2006. ⁸ Linden and Rosedale removed the case to this Court and then, within a week, moved to compel arbitration.

8 Bragg's complaint contains counts under the Pennsylvania Unfair Trade Practices and Con-

sumer Protection Law, 73 P.S. § 201-1, *et seq.* (Count I), the California Unfair and Deceptive Practices Act, *Cal. Bus. & Prof. Code* § 17200 (Count II), California Consumer Legal Remedies Act, *Ca. Civ. Code* § 1750, *et seq.* (Count III), fraud (Count IV), the *California Civil Code* § 1812.600, *et seq.* (Count V), conversion (Count VI), intentional interference with a contractual relations (Count VII), breach of contract (Count VIII), unjust enrichment (Count IX), and tortious breach of the covenant of good faith and fair dealing (Count X).

II. MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

[]

Bragg does not contend that general jurisdiction exists over Rosedale. Rather, he maintains that Rosedale's representations support specific personal jurisdiction in this case. The Court therefore need only address whether specific jurisdiction exists.

In deciding whether specific personal jurisdiction is appropriate, a court must first determine whether the defendant has the minimum contacts with the forum necessary to have reasonably anticipated being haled into court there. [] Second, once minimum contacts have been established, a court may inquire whether the assertion of personal jurisdiction would comport with traditional conceptions of fair play and substantial justice. [] The first step is mandatory, but the second step is discretionary.

[] The Court holds that Rosedale's representations--which were made as part of a national campaign to induce persons, including Bragg, to visit Second Life and purchase virtual property--constitute sufficient contacts to exercise specific personal jurisdiction over Rosedale.

[]

The Court also finds that the exercise of personal jurisdiction in this case would not offend due process. [] Nothing on the record counsels strongly against jurisdiction based on considerations of any undue burden to Rosedale. Rosedale has not claimed that he does not have the financial ability or that he would otherwise be irreparably prejudiced by litigating this case here in Pennsylvania. The Court also notes that Rosedale has able counsel on both coasts, i.e., in both his home state of California and here in Pennsylvania. Additionally, Pennsylvania has a substantial interest in protecting its residents from allegedly misleading representations that induce them to purchase virtual property. Pennsylvania

also has an interest, more particularly, in vindicating Bragg's individual rights. Finally, Bragg may obtain convenient and effective relief in Pennsylvania, the state in which he initiated this action.

III. MOTION TO COMPEL ARBITRATION

Defendants have also filed a motion to compel arbitration that seeks to dismiss this action and compel Bragg to submit his claims to arbitration according to the Rules of the International Chamber of Commerce ("ICC") in San Francisco.

A. Relevant Facts

Before a person is permitted to participate in Second Life, she must accept the Terms of Service of Second Life (the "TOS") by clicking a button indicating acceptance of the TOS. Bragg concedes that he clicked the "accept" button before accessing Second Life. Compl. P 126. Included in the TOS are a California choice of law provision, an arbitration provision, and forum selection clause. Specifically, located in the fourteenth line of the thirteenth paragraph under the heading "GENERAL PROVISIONS," and following provisions regarding the applicability of export and import laws to Second Life, the following language appears:

Any dispute or claim arising out of or in connection with this Agreement or the performance, breach or termination thereof, shall be finally settled by binding arbitration in San Francisco, California under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with said rules. . . . Notwithstanding the foregoing, either party may apply to any court of competent jurisdiction for injunctive relief or enforcement of this arbitration provision without breach of this arbitration provision.

TOS P 13.

B. Legal Standards

1. Federal law applies

The Federal Arbitration Act ("FAA") requires that the Court apply federal substantive law here because the arbitration agreement is connected to a transaction involving interstate commerce. []

2. The Legal Standard Under the FAA

Under the FAA, on the motion of a party, a court must stay proceedings and order the parties to arbitrate the dispute if the court finds that the parties have agreed in writing to do so. 9 U.S.C. §§ 3, 4, 6. A party seeking to compel arbitration must show (1) that a valid agreement to arbitrate exists between the parties and (2) that the specific dispute falls within the scope of the agreement. []

While there is a presumption that a particular dispute is within the *scope* of an arbitration agreement, [] there is no such "presumption" or "policy" that favors the *existence* of a valid agreement to arbitrate...

C. Application

1. Unconscionability of the Arbitration Agreement

Bragg resists enforcement of the TOS's arbitration provision on the basis that it is "both procedurally and substantively unconscionable and is itself evidence of defendants' scheme to deprive Plaintiff (and others) of both their money and their day in court." Pl.'s Resp. At 16.

Section 2 of the FAA provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." [] When determining whether such defenses might apply to any purported agreement to arbitrate the dispute in question, "courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." [] Thus, the Court will apply California state law to determine whether the arbitration provision is unconscionable.

Under California law, unconscionability has both procedural and substantive components. [] The procedural component can be satisfied by showing (1) oppression through the existence of unequal bargaining positions or (2) surprise through hidden terms common in the context of adhesion contracts. *Comb*, 218 F. Supp. 2d at 1172. The substantive component can be satisfied by showing overly harsh or one-sided results that "shock the conscience." *Id.* The two elements operate on a sliding scale such that the more significant one is, the less significant the other need be. *see Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669, 690 (Cal. 2000) ("[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to

come to the conclusion that the term is unenforceable, and vice versa."). However, a claim of unconscionability cannot be determined merely by examining the face of the contract; there must be an inquiry into the circumstances under which the contract was executed, and the contract's purpose, and effect.

(a) Procedural Unconscionability

A contract or clause is procedurally unconscionable if it is a contract of adhesion. [] A contract of adhesion, in turn, is a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." Under California law, "the critical factor in procedural unconscionability analysis is the manner in which the contract or the disputed clause was presented and negotiated." [] "When the weaker party is presented the clause and told to 'take it or leave it' without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability, are present." *see also Martinez v. Master Prot. Corp.*, 118 Cal. App. 4th 107, 12 Cal. Rptr.3d 663, 669 (Ct. App.2004) ("An arbitration agreement that is an essential part of a 'take it or leave it' employment condition, without more, is procedurally unconscionable.") (citations omitted); *O'Melveny & Myers*, F.3d , 2007 U.S. App. LEXIS 11265, 2007 WL 1394530 at *6 (holding arbitration agreement presented on a take-it-or-leave-it basis was procedurally unconscionable, notwithstanding the fact that employee was provided three months to walk away from employment before agreement became effective).

The TOS are a contract of adhesion. Linden presents the TOS on a take-it-or-leave-it basis. A potential participant can either click "assent" to the TOS, and then gain entrance to Second Life's virtual world, or refuse assent and be denied access. Linden also clearly has superior bargaining strength over Bragg. Although Bragg is an experienced attorney, who believes he is expert enough to comment on numerous industry standards and the "rights" or participants in virtual worlds, *see* Pl.'s Resp., Ex. A PP 59-64, he was never presented with an opportunity to use his experience and lawyering skills to negotiate terms different from the TOS that Linden offered.

Moreover, there was no "reasonably available market alternatives [to defeat] a claim of adhesiveness." *Cf. Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 259 Cal. Rptr. 789, 795 (Ct. App. 1989) (finding no procedural unconscionability because there were other financial institutions that offered competing IRA's which lacked the challenged provision). Although it is not the only virtual world on the Internet, Second Life was the first and only virtual world to specifically grant its participants property rights in virtual land.

The procedural element of unconscionability also "focuses on . . . surprise." [] In determining whether surprise exists, California courts focus not on the plaintiff's subjective reading of the contract, but rather, more objectively, on "the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms." *Id.* In *Gutierrez*, the court found such surprise where an arbitration clause was "particularly inconspicuous, printed in eight-point typeface on the opposite side of the signature page of the lease." *Id.*

Here, although the TOS are ubiquitous throughout Second Life, Linden buried the TOS's arbitration provision in a lengthy paragraph under the benign heading "GENERAL PROVISIONS." See TOS P 13. [] Linden also failed to make available the costs and rules of arbitration in the ICC by either setting them forth in the TOS or by providing a hyper-link to another page or website where they are available. Bragg Decl. P 20.

Comb is most instructive. In that case, the plaintiffs challenged an arbitration provision that was part of an agreement to which they had assented, in circumstances similar to this case, by clicking their assent on an online application page. *218 F. Supp. 2d at 1169*. The defendant, PayPal, was a large company with millions of individual online customers. *Id. at 1165*. The plaintiffs, with one exception, were all individual customers of PayPal. *Id.* Given the small amount of the average transaction with PayPal, the fact that most PayPal customers were private individuals, and that there was a "dispute as to whether PayPal's competitors offer their services without requiring customers to enter into arbitration agreements," the court concluded that the user agreement at issue "satisfie[d] the criteria for procedural unconscionability under California law." *Id. at 1172-73*. Here, as in *Comb*, procedural unconscionability is satisfied.

(b) *Substantive Unconscionability*

Even if an agreement is procedurally unconscionable, "it may nonetheless be enforceable if the substantive terms are reasonable." *Id. at 1173* (citing *Craig v. Brown & Root, Inc.*, 84 Cal. App. 4th 416, 100 Cal. Rptr. 2d 818 (Ct. App. 2000) (finding contract of adhesion to arbitrate disputes enforceable)). Substantive unconscionability focuses on the one-sidedness of the contract terms. [] Here, a number of the TOS's elements lead the Court to conclude that Bragg has demonstrated that the TOS are substantively unconscionable.

(i) *Mutuality*

Under California law, substantive unconscionability has been found where an arbitration provision forces the weaker party to arbitrate claims but permits a choice of forums for the stronger party. In other words, the arbitra-

tion remedy must contain a "modicum of bilaterality." This principle has been extended to arbitration provisions that allow the stronger party a range of remedies before arbitrating a dispute, such as self-help, while relegating to the weaker party the sole remedy of arbitration.¹⁸

18 The Court notes that the Third Circuit has found that "parties to an arbitration agreement need not equally bind each other with respect to an arbitration agreement if they have provided each other with consideration beyond the promise to arbitrate." *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180-81 (3d Cir. 1999). In *Green Tree*, however, the Third Circuit was applying Pennsylvania law, not California law. *Id.* [EDITOR'S NOTE: The *Armendariz* case relied on by the Court was an employer/employee case, which is treated differently than other arbitration agreements. Should this affect the outcome?]

In *Comb*, for example, the court found a lack of mutuality where the user agreement allowed PayPal "at its sole discretion" to restrict accounts, withhold funds, undertake its own investigation of a customer's financial records, close accounts, and procure ownership of all funds in dispute unless and until the customer is "later determined to be entitled to the funds in dispute." [] Also significant was the fact that the user agreement was "subject to change by PayPal without prior notice (unless prior notice is required by law), by posting of the revised Agreement on the PayPal website." *Id.*

Here, the TOS contain many of the same elements that made the PayPal user agreement substantively unconscionable for lack of mutuality. The TOS proclaim that "Linden has the right at any time for any reason or no reason to suspend or terminate your Account, terminate this Agreement, and/or refuse any and all current or future use of the Service without notice or liability to you." TOS P 7.1. Whether or not a customer has breached the Agreement is "determined in Linden's sole discretion." *Id.* Linden also reserves the right to return no money at all based on mere "suspicions of fraud" or other violations of law. *Id.* Finally, the TOS state that "Linden may amend this Agreement . . . at any time in its sole discretion by posting the amended Agreement [on its website]." TOS P 1.2.

In effect, the TOS provide Linden with a variety of one-sided remedies to resolve disputes, while forcing its customers to arbitrate any disputes with Linden. This is precisely what occurred here. When a dispute arose, Linden exercised its option to use self-help by freezing Bragg's account, retaining funds that Linden alone determined were subject to dispute, and then telling Bragg that he could resolve the dispute by initiating a costly arbitration process. The TOS expressly authorized Lin-

den to engage in such unilateral conduct. As in *Comb*, "[f]or all practical purposes, a customer may resolve disputes only after [Linden] has had control of the disputed funds for an indefinite period of time," and may only resolve those disputes by initiating arbitration.

Linden's right to modify the arbitration clause is also significant. "The effect of [Linden's] unilateral right to modify the arbitration clause is that it could . . . craft precisely the sort of asymmetrical arbitration agreement that is prohibited under California law as unconscionable. This lack of mutuality supports a finding of substantive unconscionability.

(ii) *Costs of Arbitration and Fee-Sharing*

Bragg claims that the cost of an individual arbitration under the TOS is likely to exceed \$ 13,540, with an estimated initiation cost of at least \$ 10,000. Pl.'s Reply at 5-6. He has also submitted a Declaration of Personal Financial Information stating that such arbitration would be cost-prohibitive for him (doc. no. 41). Linden disputes Bragg's calculations, estimating that the costs associated with arbitration would total \$ 7,500, with Bragg advancing \$ 3,750 at the outset of arbitration. *See* Dfts.' Reply at 11.

At oral argument, the parties were unable to resolve this dispute, even after referencing numerous provisions and charts contained within the ICC Rules. *See* Tran. of 2/5/07 Hrg. at 65-74. The Court's own calculations, however, indicate that the costs of arbitration, excluding arbitration, would total \$ 17,250. With a recovery of \$ 75,000,¹⁹ the ICC's administrative expenses would be \$ 2,625 (3.5% of \$ 75,000). *See* ICC Rules at 28. In addition, arbitrator's fees could be set between 2.0% (\$ 1,500) and 11.0% (\$ 8,250) of the amount at issue per arbitrator. *Id.* If the ICC set the arbitrator's fees at the mid-point of this range, the arbitrator's fees would be \$ 4,875 per arbitrator. *Id.* Here, however, the TOS requires that three arbitrators be used to resolve a dispute. TOS P 13. Thus, the Court estimates the costs of arbitration with the ICC to be \$ 17,250 (\$ 2,625 + (3 x \$ 4,875)), although they could reach as high as \$ 27,375 (\$ 2,625 + (3 x \$ 8,250)).²

¹⁹ The Court's calculations are based on its finding that \$ 75,000 is at issue, the minimum necessary to satisfy the requirements of diversity jurisdiction in this case. After a hearing on Bragg's motion to remand this case back to state court, the Court found that this jurisdictional threshold had been met (doc. no. 14).

These costs might not, on their own, support a finding of substantive unconscionability. However, the ICC Rules also provide that the costs and fees must be shared among the parties, and an estimate of those costs and

fees must be advanced at the initiation of arbitration. *See* ICC Rules of Arbitration, Ex. D to Dfts.' Reply at 28-30. California law has often been applied to declare arbitration fee-sharing schemes unenforceable. *See Ting v. AT&T*, 319 F.3d 1126, 1151 (9th Cir. 2003). [EDITOR'S NOTE: A consumer case, this is not the general rule in California]. Such schemes are unconscionable where they "impose[] on some consumers costs greater than those a complainant would bear if he or she would file the same complaint in court." *Id.* In *Ting*, for example, the Ninth Circuit held that a scheme requiring AT&T customers to split arbitration costs with AT&T rendered an arbitration provision unconscionable. *Id.* *See also Circuit City Stores v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002) ("This fee allocation scheme alone would render an arbitration agreement unenforceable."); *Armendariz*, 6 P.3d at 687 ("[T]he arbitration process cannot generally require the employee to bear any *type* of expenses that [**46] the employee would not be required to bear if he or she were free to bring the action in court.") (emphasis in original); *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778, 785 (9th Cir. 2002) ("[A] fee allocation scheme which requires the employee to split the arbitrator's fees with the employer would *alone* render an arbitration agreement substantively unconscionable.") (emphasis added). [EDITOR'S NOTE: These are employee cases...]

□

(iii) *Venue*

The TOS also require that any arbitration take place in San Francisco, California. TOS P 13. In *Comb*, the Court found that a similar forum selection clause supported a finding of substantive unconscionability, because the place in which arbitration was to occur was unreasonable, taking into account "the respective circumstances of the parties." [] As in *Comb*, the record in this case shows that Linden serves millions of customers across the United States and that the average transaction through or with Second Life involves a relatively small amount. *See id.* In such circumstances, California law dictates that it is not "reasonable for individual consumers from throughout the country to travel to one locale to arbitrate claims involving such minimal sums." *Id.* Indeed, "[l]imiting venue to [Linden's] backyard appears to be yet one more means by which the arbitration clause serves to shield [Linden] from liability instead of providing a neutral forum in which to arbitrate disputes." *Id.*

(iv) *Confidentiality Provision*

Arbitration before the ICC, pursuant to the TOS, must be kept confidential pursuant to the ICC rules. *See* ICC Rules at 33. Applying California law to an arbitration provision, the Ninth Circuit held that such confidentiality supports a finding that an arbitration clause was

substantively unconscionable. *Ting*, 319 F.3d at 1152. The Ninth Circuit reasoned that if the company succeeds in imposing a gag order on arbitration proceedings, it places itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, the company accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract. *Id.* The unavailability of arbitral decisions could also prevent potential plaintiffs from obtaining the information needed to build a case of intentional misconduct against a company. *See id.*

This does not mean that confidentiality provisions in an arbitration scheme or agreement are, in every instance, per se unconscionable under California law. *See Mercurio v. Superior Court*, 96 Cal. App. 4th 167, 116 Cal. Rptr.2d 671, 679 (Ct. App.2002) ("While [the California] Supreme Court has taken notice of the 'repeat player effect,' the court has never declared this factor renders the arbitration agreement unconscionable per se.") (citations omitted). Here, however, taken together with other provisions of the TOS, the confidentiality provision gives rise for concern of the conscionability of the arbitration clause. []

Thus, the confidentiality of the arbitration scheme that Linden imposed also supports a finding that the arbitration clause is unconscionable.

(v) *Legitimate Business Realities*

Under California law, a contract may provide a "margin of safety" that provides the party with superior bargaining strength protection for which it has a legitimate commercial need. "However, unless the 'business realities' that create the special need for such an advantage are explained in the contract itself, . . . it must be factually established." [] When a contract is alleged to be unconscionable, "the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination." The statutory scheme reflects "legislative recognition that a claim of unconscionability often cannot be determined merely by examining the face of the contract, but will require inquiry into its setting, purpose, and effect."

Here, neither in its briefing nor at oral argument did Linden even attempt to offer evidence that "business realities" justify the one-sidedness of the dispute resolution scheme that the TOS constructs in Linden's favor.

(c) *Conclusion*

When a dispute arises in Second Life, Linden is not obligated to initiate arbitration. Rather, the TOS expressly allow Linden, at its "sole discretion" and based on mere "suspicion," to unilaterally freeze a participant's

account, refuse access to the virtual and real currency contained within that account, and then confiscate the participant's virtual property and real estate. A participant wishing to resolve any dispute, on the other hand, after having forfeited its interest in Second Life, must then initiate arbitration in Linden's place of business. To initiate arbitration involves advancing fees to pay for no less than three arbitrators at a cost far greater than would be involved in litigating in the state or federal court system. Moreover, under these circumstances, the confidentiality of the proceedings helps ensure that arbitration itself is fought on an uneven field by ensuring that, through the accumulation of experience, Linden becomes an expert in litigating the terms of the TOS, while plaintiffs remain novices without the benefit of learning from past precedent.

Taken together, the lack of mutuality, the costs of arbitration, the forum selection clause, and the confidentiality provision that Linden unilaterally imposes through the TOS demonstrate that the arbitration clause is not designed to provide Second Life participants an effective means of resolving disputes with Linden. Rather, it is a one-sided means which tilts unfairly, in almost all situations, in Linden's favor. As in *Comb*, through the use of an arbitration clause, Linden "appears to be attempting to insulate itself contractually from any meaningful challenge to its alleged practices." 218 F. Supp. 2d at 1176.

The Court notes that the concerns with procedural unconscionability are somewhat mitigated by Bragg's being an experienced attorney. However, "because the unilateral modification clause renders the arbitration provision severely one-sided in the substantive dimension, even moderate procedural unconscionability renders the arbitration agreement unenforceable."

Finding that the arbitration clause is procedurally and substantively unconscionable, the Court will refuse to enforce it.

2. "*Bluelining*" the Arbitration Agreement

Alternatively, Linden has offered to ameliorate the one-sidedness of the TOS's arbitration provision by suggesting that Linden could waive the requirements for three arbitrators, post the initial fees of arbitration, and agree to arbitrate in Philadelphia instead of San Francisco. *See* Dfts.' Sur-Reply Brf. at 2-3 (doc. no. 2).

California law allows a court to "blue-line" an arbitration agreement to remove an element that renders it substantively unconscionable. *See Cal. Civ. Code* § 1670.5(a) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may

so limit the application of any unconscionable clause as to avoid any unconscionable result."'). However, a court is not obligated to blueline when an "arbitration provision is so permeated by substantive unconscionability that it cannot be cured by severance or any other action short of rewriting the contract." Where an arbitration provision has "multiple defects that indicate a systematic effort to impose arbitration on [the plaintiff], not simply as an alternative to litigation, but as an inferior forum that works to [the defendant's] advantage," and there simply is "no single provision [the court] can strike or restrict in order to remove the unconscionable taint from the agreement," the court can simply refuse to enforce the arbitration provision. *Id.* (citing *Armendariz*, 6 P.3d at 696).

The arbitration clause before the Court is simply not one where a single term may be stricken to render the agreement conscionable. "The unilateral modification 'pervade[s]' and 'taint[s] with illegality' the entire agreement to arbitrate, [and] severance of terms within the arbitration clause would not cure the problem.

[]

The Court declines to rewrite the agreement, at Linden's request, to save an unconscionable arbitration provision which Linden itself drafted and now seeks to en-

force. Rather than provide a reasonable alternative for dispute resolution, this agreement compels a one-sided resolution of disputes between the parties.

IV. CONCLUSION

For the reasons set forth above, the Court will deny Rosedale's motion to dismiss for lack of jurisdiction. The Court will also deny Defendants' motion to compel [*613] arbitration. An appropriate order follows.

ORDER

AND NOW, this **30th** day of **May, 2007**, it is hereby **ORDERED** [**56] that defendant Philip Rosedale's Motion to Dismiss for Lack of Jurisdiction (doc. no. 2) and defendant Linden Research, Inc.'s Motion to Compel Arbitration (doc. no. 3) are **DENIED**.

It is **FURTHER ORDERED** that Plaintiff's Motion for Leave to File Supplemental Briefs in Opposition to Defendants Motions to Dismiss and to Compel Arbitration to Address Issues Raised by the Court at Argument on February 5, 2007 (doc. no. 34) is **DENIED as moot**.

AND IT IS SO ORDERED.

S/ Eduardo C. Robreno, J

