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 OF LAW IN SUPPORT OF THE MOTION TO DISMISS OF DEFENDANTS PHILIP ROSEDALE AND MITCHELL KAPOR

PRELIMINARY STATEMENT

Defendants Mitchell Kapor ("Kapor") and Philip Rosedale ("Rosedale") submit this Memorandum of Law in 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.

On August 14, 2008, Plaintiff Richard Minsky ("Minsky") filed his Amended Complaint (the "Complaint"), the thrust of which is a trademark infringement case against another user of the Second Life virtual world and against the owner and creator of Second Life, Defendant Linden Research, Inc. ("Linden"). Rather than pursue those claims alone, however, Minsky included accusations of fraud against Mr. Kapor, a member of Linden's Board of Directors, and Mr. Rosedale, the founder and Chairman of the Board of Linden. These allegations are entirely lacking in factual support and do not come close to meeting the elements required for pleading a fraud claim under the Federal Rules of Civil Procedure and New York law. These individuals have no place as defendants in this trademark infringement case, and the Court should not permit Minsky to continue to impose upon them the burden of responding to his unfounded allegations.

Accordingly, Claims Four and Five of the Complaint against Mssrs. Kapor and Rosedale should be dismissed with prejudice as to both.

THE ALLEGATIONS OF THE COMPLAINT

Minsky's Complaint alleges that he has adopted and is using SLART as a trademark and further alleges that SLART is being infringed by another user of the online virtual world known as Second Life or "SL". (*See generally* Complaint.) Defendant Linden is a Delaware corporation headquartered in San Francisco, California, which has developed and hosts the Second Life virtual world. *Id.* at ¶3. Defendant Mitchell Kapor is a member of Linden's Board of Directors and an investor in Linden. *Id.* at ¶ 5. Defendant Philip Rosedale is the founder and Chairman of the Board of Linden. *Id.* at ¶ 6.

Minsky further alleges that he became a user of Second Life in November of 2006. *Id.* at ¶ 10. On March 22, 2007, he filed an application seeking to register SLART as a trademark. *Id.* at ¶ 15. The United States Patent and Trademark Office ("PTO") refused his application on July 5, 2007, stating that SLART merely described his services related to art in Second Life. The PTO pointed out that "'SLART' is commonly used to describe art within the online world Second Life." *Id.* at ¶ 18. Minsky responded to the PTO, claiming that SLART was not descriptive of his Second Life art-related services. Citing an online, user-created dictionary, he purported to define SLART as a combination of words such as "slut" and "fart." *Id.* at ¶ 19. Relying on Minsky's representations, the PTO issued a registration certificate for SLART in March, 2008. *Id.* at ¶ 20.

In his Amended Complaint filed on August 14, 2008, Minsky alleged that a Second Life user with the avatar name Victor Vezina ("Vezina") had infringed his alleged trademark rights in SLART. *Id.* at ¶ 24. Minsky also alleged claims of trademark infringement, trademark

dilution, contributory trademark infringement, contributory trademark dilution, tortious interference, and fraud against Linden. *Id*. at ¶¶ 48, 69. Although his original complaint did not name Mssrs. Kapor and Rosedale as defendants, for the first time in the Amended Complaint Minsky asserted fraud claims against Mssrs. Kapor and Rosedale. Significantly, Minsky does not allege that either Mr. Kapor or Mr. Rosedale engaged in infringing conduct. Rather, he merely identifies each individual as a prominent executive of Linden and, without legal or factual support, augments his pleading with baseless, unspecified personal accusations of fraud.

ARGUMENT

I. THE COURT SHOULD DISMISS CLAIMS FOUR AND FIVE BECAUSE THEY FAIL TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Claims Four and Five, against Defendants Kapor and Rosedale, respectively, should be dismissed because they fail to state a claim upon which relief may be granted. Even assuming all factual allegations in the Complaint are true, Minsky has not made the showing required to plead or prove a claim for fraud. In order to state a viable fraud claim, Minsky must meet the requirements of Federal Rule of Civil Procedure 9(b) and plead the requisite elements of fraud under New York law. *Apace Commc'ns, Ltd. v. Burke*, 522 F. Supp. 2d 509, 514 (W.D.N.Y. 2007). Because Minsky has failed on both accounts, Claims Four and Five should be dismissed.

A. Minsky Has Failed to Meet the Particularity Requirements of Rule 9(b)

Federal Rule of Civil Procedure 9(b) requires a party alleging fraud to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. Pro. 9(b). The underlying purpose of Rule 9(b)'s heightened standard is to "afford defendant[s] fair notice of [the] plaintiff's claim and the factual ground upon which it is based." *Mills v. Everest Reinsurance Co.*, 410 F. Supp. 2d 243, 248 (S.D.N.Y. 2006) (citing *Ross v. Bolton*, 904 F.2d 819, 823 (2d Cir. 1990)). In order to meet the pleading requirements of Rule 9(b), a plaintiff's

claim must "(1) specify the statements that the plaintiff 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]

Minsky's fraud claims against Defendants Kapor and Rosedale are deficient under this analysis. In Claim Four of his Complaint, Minsky refers to only a single statement by Mr. Kapor allegedly made in a July 2008 speech:

> I got involved very early as the first investor and helping Philip think things through back in 2000. . . . So 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 own creative work they love doing in Second Life.

(Complaint ¶ 57.) Minsky fails to explain—in any fashion—how this statement supports a fraud claim. To succeed on his fraud claim, Minsky must identify with particularity the alleged false statements made by Mr. Kapor and state why and how they are allegedly false. *See, e.g.*, *Rombach v. Chang*, 355 F.3d 164, 174 (2d Cir. 2004) (noting that plaintiffs alleging fraud "must do more than say that the statements. . . were false and misleading; they must demonstrate with specificity why and how that is so"). Because Claim Four does not explain the alleged falsity, the claim fails to meet Rule 9(b)'s standard.

Claim Five is also deficient. Minsky summarily alleges that Mr. Rosedale engaged in fraud but does not identify any statements whatsoever made by Mr. Rosedale. He alleges only generally that "Mr. Rosedale has spoken publicly many times about SL supporting IP rights." (Complaint ¶ 61.) This allegation does not meet the specificity requirements of Rule 9(b), as it fails to "identify the specific statements, what the contents of those statements were, and when

[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.

they were allegedly made." *Am. Bldg. Maintenance Co. of N.Y. v. Acme Prop. Servs., Inc.*, 515 F. Supp. 2d 298, 321 (N.D.N.Y. 2007) (dismissing fraud claims not pleaded with sufficient particularity); *see also Aboushanab v. Janay*, No. 06 Civ. 13472 (AKH), 2007 WL 2789511, at *6 (S.D.N.Y. Sept. 26, 2007) ("The fraud claim must be dismissed as against every defendant . . . for failure to identify statements made by such defendants that the plaintiff thinks were fraudulent.").

As a result of these deficiencies under Rule 9(b), Claims Four and Five should be dismissed.

B. Minsky Has Failed To Plead The Essential Elements of Fraud under New York Law

Claims Four and Five should also be dismissed because they fail to plead the essential elements of fraud under New York law. To state a claim for fraud in New York, the plaintiff must "allege 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 each and every one of these requirements. As explained *supra*, Minsky has not alleged with particularity any false statements by either Mssrs. Kapor or Rosedale. In turn, absent any specific false statement(s), Minsky cannot allege the required element of justifiable reliance upon a deception by the defendants.

In addition, Minsky has not adequately plead scienter. Rule 9(b) states that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. Pro. 9(b). However, the Second Circuit has held that plaintiffs claiming fraud "must allege facts that give rise to a strong inference of fraudulent intent." *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 52 (2d Cir. 1995). In order to raise such an inference, "a plaintiff may either (1) allege

facts showing both a motive for committing fraud and a clear opportunity for doing so, or (2) identify circumstances indicating conscious or reckless misbehavior by the defendants." *Sweringen*, 2006 WL 2811825, at *4 (citing *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994)) (discussing fraud claim under New York law).

Minsky has not alleged facts or circumstances sufficient to raise an inference of scienter. At most, Minsky alleges that Mr. Kapor "stands to gain financially from the work [Minsky] ha[s] done promoting SL" and that Mr. Rosedale, too, "stands to gain from [Minsky's] work." (Complaint ¶¶ 59, 61.) Even if construed liberally and taken as true, however, these allegations fail to demonstrate scienter. "[T]he allegation that pecuniary gain motivated defendant's fraud, without more, is insufficient to give rise to an inference of fraudulent intent." *Sweringen*, 2006 WL 2811825, at *4. *See also Primavera Familienstiftung v. Askin*, 173 F.R.D. 115, 124 (S.D.N.Y. 1997) (noting, on a motion to dismiss common law fraud claims, that "allegations that a defendant stands to gain economically from fraud do not satisfy the heightened pleading requirements of Rule 9(b)."). Because Minsky identifies no other motivation for the alleged fraud, Claims Four and Five fail to plead scienter and, therefore, fail to state a claim for this reason as well.

Finally, Minsky has not alleged injury stemming from the alleged fraud. "A fraud verdict may not rest on allegations of speculative or remote injury to the plaintiff; rather, the plaintiff must have suffered losses as a 'direct, immediate, and proximate result' of the defendant's misrepresentation." *Kaye v. Grossman*, 202 F.3d 611, 614 (2d Cir. 2000) (quoting *Kregos v. Associated Press*, 3 F.3d 656, 665 (2d Cir. 1993)) (discussing fraud claim under New York law). In Claim Four, Minsky makes no specific allegation of harm stemming from any reliance upon statements made by Mr. Kapor in July 2008, just a few weeks before Minsky filed this lawsuit.

Instead, Minsky notes only that he felt "saddened and betrayed by Mitchell Kapor." (Complaint ¶ 59.) This allegation does not suffice; under New York law "the damages incurred by reason of the fraudulent conduct must be actual pecuniary losses." *Pope v. Saget*, 29 A.D.3d 437, 441 (1st Dep't 2006).

Claim Five is similarly deficient. Minsky utterly fails to allege any injury proximately resulting from statements by Mr. Rosedale. Thus, because they do not allege legally cognizable harm, Claims Four and Five do not state a cause of action for fraud.

As a result of these deficiencies, both claims should be dismissed.

II. THE COURT SHOULD NOT GRANT LEAVE TO AMEND CLAIMS FOUR AND FIVE

Under Federal Rule of Civil Procedure 15, a court may give leave to amend "when justice so requires." Fed. R. Civ. Pro. 15(a)(2). In this instance, however, justice mandates dismissal with prejudice. "[D]enial of leave is appropriate if, *inter alia*, amendment of the complaint would be futile." *Mills*, 410 F. Supp. 2d at 249. Even when a plaintiff proceeds *pro se*, "an opportunity to amend is not required where 'the problem with [the plaintiff's] causes of action is substantive' such that 'better pleading will not cure it.'" *Tejada v. Mance*, No. 9:07-CV-0830, 2008 WL 4384460, at *4 (N.D.N.Y. Sept. 22, 2008) (quoting *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000)); *see also 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).

Here, Minsky's allegations are so far off the mark that it is apparent he has no viable cause of action against either Mr. Kapor or Mr. Rosedale. Instead, it is likely that Minsky, as part of his systematic efforts to publicize this case, has named the two individual defendants in

order to capitalize upon their prominence among Second Life users. Indeed, the tenor of his pleading suggests this objective, when it describes Mr. Kapor as "a living legend." (Complaint ¶ 56.) Whatever his motivations may be, as noted above, it is clear that he has completely failed to meet his pleading burden.

Indeed, it is apparent that Minsky's entire theory of fraud against Mssrs. Kapor and Rosedale is flawed and that he will not be able to state a claim even if given leave to amend. Specifically, Minsky appears to contend that because Mssrs. Kapor and Rosedale have publicly indicated in some way that Linden supports the intellectual property rights of users of Second Life, Linden's failure to acknowledge Minsky's alleged rights in SLART somehow makes Mssrs. Kapor and Rosedale liable for fraud. Needless to say, Linden is legitimately entitled to dispute Minsky's alleged rights in SLART—which contains a mark belonging to Linden and which is an obvious reference to art in Second Life—based on its beliefs that SLART was improperly usurped by Minsky in order to gain an unfair advantage and that Minsky registered the mark by misleading the Patent and Trademark Office. The fact that Linden does dispute Minsky's alleged rights does not and cannot even arguably lead to the conclusion that Mssrs. Kapor and Rosedale have engaged in fraud. The entire theory is specious and strains the bounds of good faith pleading required in a Federal Court. Accordingly, these Claims should be dismissed, without leave to amend.

CONCLUSION

Minsky has not met the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) or the essential elements of a fraud claim under New York law. Accordingly, 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.

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