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LINDEN RESEARCH, INC.

6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
8 SAN FRANCISCO DIVISION

9 AMARETTO RANCH BREEDABLES, LLC

10 Plaintiff,

11 v.

12 OZIMALS, INC.,

13 Defendant.

Case No. 3:10-cv-05696-CRB

**NON-PARTY LINDEN RESEARCH, INC.'S  
OPPOSITION TO MOTION FOR  
PRELIMINARY INJUNCTION**

Date: January 11, 2011

Time: 1:00 P.M.

Judge: Hon. Charles R. Breyer

Courtroom 8, 19<sup>th</sup> Floor

Complaint Filed: December 15, 2010

1 As this Court has previously noted, this case is a dispute between two merchants who sell virtual  
2 animals and related products for use in Linden Research’s (“Linden”) Second Life. Linden takes no  
3 position on the merits of the copyright claims between the parties. Linden, however, must appear to  
4 oppose the instant motion insofar as it seeks to enjoin Linden—a nonparty to this action—from doing or  
5 refraining from doing anything. Such relief is neither appropriate nor necessary. It is inappropriate  
6 because Linden is not a party before this Court. And it is unnecessary because an agreement between the  
7 parties already preserves the *status quo ante* without the need to enjoin a nonparty.

8 Subject to exceptions, a court’s *in personam* order can bind only persons who have placed  
9 themselves or been brought within the court’s power. *See United States v. Paccione*, 964 F.2d 1269,  
10 1275 (2d Cir.1992) (“[A] court generally may not issue an order against a nonparty.”); *Peterson v.*  
11 *Highland Music, Inc.*, 140 F.3d 1313, 1323 (9th Cir.1998) (nonparty “must either abet defendant or be  
12 legally identified with him” to be subject to injunction); 11A Charles A. Wright, Arthur R. Miller &  
13 Mary Kay Kane, *Federal Practice and Procedure* § 2956, at 335 (2d ed. 1995) (“A court ordinarily does  
14 not have power to issue an order against a person who is not a party and over whom it has not acquired *in*  
15 *personam* jurisdiction.”) There is no argument or showing here that Linden falls within any exception to  
16 that basic rule. *See, e.g., Blockowicz v. Williams*, \_\_\_ F.3d \_\_\_, 2010 WL 5262726 (7th Cir. Dec. 27,  
17 2010) (nonparty website not subject to injunction requiring removal of user-posted content).

18 On that basis alone, the proposed injunction must be denied as to Linden. But the proposed form  
19 of injunction would do more than simply require Linden to ignore any DMCA notices served on it by  
20 Ozimals. The effect of such an order would be to require Linden to continue to publish works on its own  
21 online service, whether it chooses to or not. Such an order is thus doubly improper: it would enjoin a  
22 third party that is not properly before this Court at all, and it would constitute a prior restraint,  
23 compelling Linden to continue to engage in speech (by publishing works on Linden’s service) in  
24 violation of Linden’s First Amendment rights. *See e.g., Mark A. Lemley and Eugene Volokh, Freedom*  
25 *of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147 (1988).

26 The proposed injunction is also entirely unnecessary as applied to Linden. If the Court  
27 determines that Ozimals’ DMCA notices are improper, for whatever reason, the Court has adequate  
28

1 remedies at hand without enjoining a nonparty. The Court can simply order Ozimals to withdraw any  
 2 pending DMCA notices and to refrain from submitting any new ones. That would have the same  
 3 practical effect as ordering Linden to ignore them, without the procedural and First Amendment  
 4 problems an injunction against Linden would entail. *See, e.g., Design Furnishings, Inc. v. Zen Path, Inc.*,  
 5 2010 WL 5418893 (E.D. Cal. Dec. 23, 2010) (enjoining party from submitting further DMCA notices to  
 6 eBay).

7 Upon receipt of the instant motion,<sup>1</sup> counsel for Linden contacted counsel for Amaretto, advised  
 8 them of Linden's position, and asked that they agree to modify the proposed form of injunction to  
 9 remove any provisions enjoining Linden. Counsel for Amaretto refused to do so. We understand that  
 10 Amaretto and Ozimals—the only parties to this action—have agreed to the terms of a stipulated  
 11 injunction withdrawing any pending DMCA notices and barring Ozimals from submitting any additional  
 12 DMCA notices to Linden regarding Amaretto's horses. The *status quo* would thus be preserved during  
 13 the pendency of this action. Amaretto, however, continues to demand that Linden—a nonparty—join in  
 14 that stipulation. There is no basis for that demand, and Linden will not do so.

15  
 16 Dated: January 6, 2011

DURIE TANGRI LLP

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 18 By: \_\_\_\_\_  
 19 MICHAEL H. PAGE

20 Attorneys for Non-Party  
 21 LINDEN RESEARCH, INC.

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 27 <sup>1</sup> The motion has not been served on Linden: it was merely emailed to Linden's in-house removals  
 28 group. Nothing authorizes email service on a nonparty, and on that ground as well the motion must be  
 denied.