

2009

## Who Monitors the Monitor? Virtual World Governance and the Failure of Contract Law Remedies in Virtual Worlds

Hannah YeeFen Lim

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### Recommended Citation

Hannah YeeFen Lim, Who Monitors the Monitor? Virtual World Governance and the Failure of Contract Law Remedies in Virtual Worlds, 11 *Vanderbilt Journal of Entertainment and Technology Law* 1053 (2021)  
Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol11/iss4/10>

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# Who Monitors the Monitor? Virtual World Governance and the Failure of Contract Law Remedies in Virtual Worlds

*Hannah Yee Fen LIM\**

## ABSTRACT

*This Article is a study of the interaction of rules and contractual terms within the context of fraudulent conduct in virtual worlds. It makes two main arguments: first, that virtual world providers cannot generally be trusted to regulate themselves; and second, that contractual remedies alone do not provide players with useful solutions to player disputes. The Article highlights the shortcomings of relying solely on the existing web of contractual documents to resolve the issues and disputes currently experienced in virtual world communities. Starting with the applicability of real-world laws to virtual worlds, this Article examines a case study that demonstrates the insufficiency of contract law in providing remedies for online fraud using the virtual world EVE Online as an example. While this is a case study of governance and contract remedy failure in one virtual world, the arguments and scenarios presented here are applicable to other virtual worlds because of the homogeneity of terms of service in virtual worlds.*

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Virtual worlds offer their residents an interactive and unique place in which to live and create.<sup>1</sup> Some people spend many of their waking hours immersed in virtual worlds with some players even spending up to fifty-five hours at a time either playing or existing in virtual worlds.<sup>2</sup> Each virtual world has its own aims and objectives. Some require the player to slay monsters to level up, while others call for the player to simply exist and experience the virtual world. There are three main types of virtual worlds. First, there are those that are simply games where competition and leveling up are the primary goals. Second, virtual worlds such as *Second Life* disclaim being games at all and instead describe themselves as social, three-dimensional worlds where one can live, work, and play. Lastly, there are those hybrid virtual worlds that are a combination of the first two types where the virtual world not only has a competitive aim but is also an environment for living and socializing.

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1. Cory Ondrejka, *Changing Realities: User Creation, Communication, and Innovation in Digital Worlds*, THEMIS GROUP, 2005, at 4, available at <http://www.themis-group.com/uploads/Changing%20Realities.pdf>.

2. Yee Fen Lim, *Is It Really Just a Game? Copyright and Online Role-Playing Games* 1 J. INTELL. PROP. L. & PRAC. 481, 482 (2006).

There are multiple sources of rules in virtual worlds, including real-world laws, the service provider's contractual terms, in-world rules, and informal virtual world customs that do not amount to rules. This Article is a study of how some of these rules interact and overlap in the context of fraudulent conduct in virtual worlds. It adopts legal scholar Joshua Fairfield's thesis that contracts cannot efficiently or effectively replace public and private law—such as tort law, property law, criminal law, and constitutional law—for online communities.<sup>3</sup> This Article highlights the shortcomings of relying solely on the existing web of contractual documents to resolve the issues and disputes currently experienced in virtual world communities. Starting with the applicability of real world laws to virtual worlds, this Article examines a case study demonstrating the insufficiency of contract law in providing remedies for online fraud using the virtual world *EVE Online* as an example. While this is a case study of contract remedy failure in one virtual world, the arguments and scenarios presented here can be extrapolated to other virtual worlds because of the homogeneity of terms in virtual worlds.<sup>4</sup>

For public trust and confidence to be maintained in virtual worlds, the roles and responsibilities of virtual-world providers need clarification, especially in the area of online fraud. This Article makes two main arguments: first, that virtual world providers cannot generally be trusted to regulate themselves; and second, that contractual remedies alone do not provide players with useful solutions to player disputes. The law should not allow virtual world providers to continue hiding behind contractual terms.

### I. THE APPLICATION OF REAL WORLD LAWS TO “GAMES”

Are virtual worlds simply “games” as many virtual world providers assert? If so, then the players in these virtual worlds are bound only by the game rules to which they agreed. These “rules” are paramount, often operating to the exclusion of real-world laws.<sup>5</sup> They are often embodied in documents such as the End User License Agreements (EULAs), Terms of Service (TOS), or simply set out in

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3. Joshua Fairfield, *Anti-Social Contracts: The Contractual Governance of Online Communities*, 53 MCGILL L.J. 427 (2008).

4. Andrew Jankowich, *EULAW: The Complex Web of Corporate Rule-Making in Virtual Worlds*, 8 TUL. J. TECH. & INTELL. PROP. 1, 49 (2006).

5. See generally Mia Garlick, *Player, Pirate or Conducer? A Consideration of the Rights of Online Gamers* 7 YALE J.L. & TECH. 1 (2004-2005); Joshua Fairfield, *The God Paradox*, 89 B.U.L. REV. (forthcoming 2009) (on file with author); Daniel C. Miller, Note, *Determining Ownership in Virtual Worlds: Copyright and Licence Agreements*, 22 REV. LIT. 435, 466 (2003).

lesser documents such as Codes of Conduct and Reimbursement Policies.

Commentators such as Fairfield have suggested that even if a virtual world is considered just a game, it does not automatically follow that the laws of the real world should not apply to it.<sup>6</sup> An illustration from contact sports is illuminating. Within the game of football, a quarterback cannot complain of battery when he is tackled if that tackle is within the acceptable bounds of the game.<sup>7</sup> However, if a tackle or any other form of unwanted touching is beyond what is permitted by the rules of the game, then the player clearly did not consent to that form of contact, nor assume that particular risk, and thus, the action may result in tortious liability.<sup>8</sup>

## II. CASE STUDY: FRAUD IN *EVE ONLINE*

Taking the position that real world laws do apply to virtual worlds, this Article examines a case study highlighting the insufficiency of contract law in providing remedies for online fraud.

*EVE Online*, which has been described as “a science fiction world of corporate fraud, yankee trading, and piracy,”<sup>9</sup> is a virtual world set in space where the main aim is the player acquisition of power and treasures. However, there is also an important social dimension to the virtual world as player interaction is crucial in activities such as trade, piracy, and acquisitions, thus making *EVE Online* a hybrid virtual world.<sup>10</sup> Typically, players pilot spaceships through a universe of star systems containing moons, planets, and space stations.<sup>11</sup> *EVE Online* is both a player-versus-environment and a player-versus-player virtual world.<sup>12</sup> Like other player-versus-player environments, deception as a game strategy is a strong part of the game, and when users enter *EVE Online*, they agree to play in a world in which deception and fraud are normal occurrences.<sup>13</sup>

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6. Fairfield, *supra* note 3.

7. *Id.* at 18.

8. *Id.*

9. *Id.* at 49.

10. EVE Online: Frequently Asked Questions, [http://www.eveonline.com/faq/faq\\_01.asp](http://www.eveonline.com/faq/faq_01.asp) (last visited Apr. 2, 2009).

11. EVE Online Backstory, <http://www.eve-online.com/background> (last visited Apr. 2, 2009).

12. EVE Online, Guides and News, <http://eveonline.rpgstash.com> (last visited Apr. 2, 2009); LinuxLinks News, EVE Online, <http://www.linuxlinks.com/article/20080608115551709/EVEOnline.html> (last visited Apr. 2, 2009).

13. EVE Online, Reimbursement Policy, cl. 9, <http://www.eveonline.com/pnp/reimbursement.asp> (last visited Apr. 2, 2009); *see also* the

The usual set up in almost all virtual worlds is that each time a player logs into the virtual world, but before they are permitted to access the virtual world, they are presented with some terms and the player is required to click “I agree” or something similar before being permitted to proceed into the virtual world. In this regard, *EVE Online* is typical. *EVE Online* requires players to comply with at least nine documents<sup>14</sup> and interestingly, the clause alerting players that fraudulent behavior is to be expected in *EVE Online* is found in a document called Reimbursement Policy.<sup>15</sup> Since the players have consented to participate in such an environment, some commentators claim that these players should not complain when they have been defrauded in the course of the game, as the conduct is considered part of the game rather than actionable fraud.<sup>16</sup>

In early 2006 a player in *EVE Online*, “Cally,” established and ran a virtual bank, called the EVE Investment Bank (EIB).<sup>17</sup> Other players invested Inter Stellar Credits (ISKs), the in-world currency, with EIB and were promised high interest returns.<sup>18</sup> For a while, EIB delivered these high returns to investors and gained the trust of many players.<sup>19</sup> It was reported in the press that some players even deliberately exchanged actual U.S. dollars just to take advantage of the high returns of this investment scheme.<sup>20</sup> Unbeknownst to many players, the returns to existing investors were simply paid out of the capital gained from new investors. Essentially, Cally had constructed a Ponzi scheme within the virtual world.<sup>21</sup>

In August 2006, Cally, who was apparently now operating under the alias of “Dentara Rast,” closed EIB without notice.<sup>22</sup> In a

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article on scamming that is embedded in this clause discussing the difference between scams and exploits.

14. See *EVE Online*, Rules & Policies, <http://www.eve-online.com/pnp/> (last visited Mar. 2, 2009), for nine of these documents.

15. *EVE Online*, Reimbursement Policy, *supra* note 13.

16. See, e.g., Fairfield, *supra* note 3; Bobby Glushko, Note, *Tales of the (Virtual) City: Governing Property Disputes in Virtual Worlds*, 22 BERKELEY TECH. L.J. 507 (2007).

17. Posting of Tudor Stefanescu (*Eve Online Economy Suffers 700 billion ISK Scam*) to Softpedia, <http://news.softpedia.com/news/Eve-Online-Economy-Suffers-700-billion-ISK-Scam-33737.shtml> (Aug. 24, 2006, 13:05 GMT).

18. *Id.*

19. *Id.*

20. Posting of Julian Murdoch (*612 Lawns*) to Gamers with Jobs, <http://www.gamerswithjobs.com/node/26703> (Aug. 29, 2006, 9:31 EST).

21. See *Cunningham v. Brown*, 265 U.S. 1, 7-10 (1924). *Cunningham* is the seminal case involving the original Ponzi scheme perpetrated by Charles Ponzi. See *id.*; see also Ponzi Schemes, U.S. Securities and Exchange Commission, <http://www.sec.gov/answers/ponzi.htm> (last visited Apr. 2, 2009).

22. Posting of Tudor Stefanescu, *supra* note 17.

video confession, Cally gloated about tricking the investors who placed deposits with EIB.<sup>23</sup> The amount of currency that EIB held at the time it closed was approximately 790 billion ISKs, although the creator of *EVE Online*, Crowd Control Productions (CCP), has disputed that the amount was this high.<sup>24</sup> Based on this estimate and the exchange rate at the time, the real-world value of investments deposited with EIB was very likely between \$80,000 and \$170,000, making it one of the highest amounts defrauded in any virtual world to date.<sup>25</sup>

Many interested parties pressed CCP to take action when Cally's scheme surfaced, but it refused, claiming that Cally's behavior was within the rules of the virtual world and that it would only intervene if an "exploit" was used to defraud.<sup>26</sup> An exploit is essentially a computer-programming bug that can be taken advantage of to gain unauthorized access to, or to manipulate and subvert the system.<sup>27</sup> At the time, the company's CEO, Magnus Bergsson, said, "CCP does not intervene in such cases and will only get involved if a game exploit was used, which we have not found any indication of in this case."<sup>28</sup>

CCP would not delete Cally's *EVE Online* account but indicated that it would monitor the account closely to ensure that the ISKs were not sold off or converted to real-world currency.<sup>29</sup> However, at the time, CCP also indicated that it had not found traces of the money, which might be impossible to locate if Cally had moved it out of *EVE*

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23. Google Video – Dentara Rast aka Cally Confesses to EIB Scam, <http://video.google.co.uk/videoplay?docid=-1993624284569945666> (last visited Apr. 2, 2009).

24. Posting of Julian Murdoch, *supra* note 20 (reporting \$700 billion in lost online currency); Posting of Peter Pollack (*Online "Banker" Runs Off with Cash, Avatars Cry Foul*) to Ars Technica, <http://arstechnica.com/news.ars/post/20060828-7605.html> (Aug. 28, 2006) (reporting \$790 billion in lost online currency); Posting of Ralphedelominus (*CCP Speaks Out on the EIB Scam*) to TenTonHammer.com, (Sept. 26, 2006), <http://www.tentonhammer.com/node/34217> (quoting CCP press conference which stated that it did not believe the amount lifted was as high as \$790 billion).

25. Posting of Ralphedelominus, *supra* note 24. This amount was the biggest scam to date in any virtual world. *Id.*

26. Caroline McCarthy, *Cons in the Virtual Gaming World*, CNET NEWS, Aug. 31, 2006, [http://news.cnet.com/Cons-in-the-virtual-gaming-world/2100-1043\\_3-6111089.html](http://news.cnet.com/Cons-in-the-virtual-gaming-world/2100-1043_3-6111089.html); Posting of razor (*CCP holds Virtual Conference about EIB Scam*) to Razorwire News, <http://razorwire.warcry.com/news/view/64664> (Sept. 11, 2006).

27. MICHAEL E. WHITMAN & HERBERT J. MATTORD, PRINCIPLES OF INFORMATION SECURITY 28 (2002).

28. *See supra* note 26 and accompanying text.

29. *Id.*; Posting of Charles Husemann (*All About The ISK*) to Gaming Nexus, <http://www.gamingnexus.com/Default.aspx?Section=Article&I=1181> (Sept. 2, 2006).

*Online* through a series of small transactions or through secondary accounts.<sup>30</sup>

As a result of the EIB scandal, some *EVE Online* players lost sizeable amounts of time, effort, and real-world money. It would appear that those players have essentially been left without recourse within and outside of the virtual world. Within the virtual world, CCP argues that the players, when they agreed to play in *EVE Online*, consented to the possibility of being tricked and defrauded and they also willingly invested their money with EIB, but above all, they assert that Cally did not breach any rules.<sup>31</sup> Under real-world laws, it appears that the players had consented to playing in *EVE Online*, knowing that it was an environment that allows fraud to occur. Accordingly, the players had consented to a contract whereby they opened themselves to the possibility of being defrauded.<sup>32</sup> These lines of argument will be examined in detail below.

While it could be argued that the defrauded players should be able to have some claim against Cally for misrepresentation and fraud, the facts surrounding the EIB transactions are sketchy and at best anecdotal and more solid evidence is required.

The following two parts of this Article examine CCP's response to the EIB scam: first, it examines CCP's assertion that it would monitor Cally's account; and second, it analyzes CCP's contention that Cally did not breach any rules of *EVE Online*.

### III. CCP'S RESPONSE I: WHO MONITORS THE MONITOR?

The only assurance that CCP gave to its defrauded players was that it would "monitor" Cally's account to ensure that Cally did not sell or convert the wrongfully gained ISKs to real-world currency.<sup>33</sup> It is unclear what the advantages are of "monitoring," nor is it clear what other actions CCP had planned to take pursuant to this "monitoring." But was CCP's assurance that it would monitor Cally's account an adequate or responsible course of action? Can CCP, or any virtual world provider for that matter, be trusted to do this? These issues go to the very heart of virtual world governance. Three points can be made here.

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30. *Id.*

31. *Id.*

32. There is another school of thought beyond the scope of this Article that contracts agreeing to fraud should be regarded as against public policy because they provide no cover for the player at all and a paternalistic approach ought to be taken. See RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

33. See *supra* note 29 and accompanying text.



First, the credibility, integrity, and impartiality of CCP had already been called into question in an earlier scandal. In February 2007 a CCP employee—who was and still is part of the team writing the software code for *EVE Online* and who also played in the game—cheated when he gave the *EVE Online* corporation his avatar that was associated with ten very valuable in-game Blueprints Originals worth billions in ISKs for free.<sup>34</sup> When the employee's cheating was exposed by another player, "Kugutsumen," CCP terminated all the accounts of the whistleblower and attempted to cover up the misdeeds of its employee.<sup>35</sup> Even after the errant employee confessed to his misconduct on a blog posting, CCP did not reinstate Kugutsumen's accounts, claiming that he had breached the EULA by increasing the difficulty or expense of CCP in maintaining *EVE Online*.<sup>36</sup> CCP took no perceivable actions against its errant employee even though *EVE Online* players called for the termination of his employment, or at least for him to be banned from playing.<sup>37</sup> CCP's response to the Kugutsumen scandal does not instill much faith in CCP's ability to handle disputes in an impartial or just manner.

Second, even if CCP wanted to monitor Cally's account, is it possible for CCP to monitor effectively? CCP admitted that it may be impossible to monitor if the ISKs are moved out of the virtual world in many small transactions.<sup>38</sup> Even if CCP had the inclination and vigilance to monitor, it would still not be possible to stop Cally from siphoning the money out of *EVE Online*. In fact, since the events that occurred in 2006, CCP has made no reports about its investigations. It is unknown whether CCP actually traced the ISKs or whether it took any actions against Cally. There were calls for Cally to be prosecuted for fraud,<sup>39</sup> but there have been no reports of Cally's real-world fate.

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34. Joe Blancato, *Jumpgate: EVE's Devs and the Friends They Keep*, ESCAPIST MAG., Feb. 9, 2007, available at <http://www.escapistmagazine.com/articles/view/editorials/op-ed/847-Jumpgate-EVE-s-Devs-and-the-Friends-They-Keep>. Blueprints are required within *EVE Online* to manufacture items. See *EVE Online*, Reimbursement Policy, *supra* note 13, at cl. 11. The functions of Blueprints are not important for the analysis here. The important point is that Blueprints are extremely valuable and they were not supposed to be given away for free, like they were here. See *id.* The action of the employee is akin to a player in the board game Monopoly secretly being given \$1 million more than all the other players. *Id.*

35. Blancato, *supra* note 34.

36. *Id.*

37. Posting of Luke Plunkett (*Scandal Hits Eve Online*) to Kotaku, <http://kotaku.com/gaming/eve-online/scandal-hits-eve-online-234863.php> (Feb. 8, 2007) (quoting player Borgholio).

38. See Posting of Charles Husemann, *supra* note 29.

39. See Posting of Julian Murdoch, *supra* note 20.

The more appropriate course of action would have been for CCP to freeze Cally's account and his avatar's assets, including the deposits in EIB. Ultimately, it needs to be assessed whether or not CCP can effectively monitor Cally's account. Although CCP claims monitoring is difficult, CCP—like many other virtual world providers—keeps server logs and other databases of collected information.<sup>40</sup> Since these logs capture every transaction, it is difficult to believe CCP's claim of difficulty in monitoring small transactions in Cally's account. It seems that CCP would have all the requisite information, and that the issue is really one of an allocation of resources to manually sift through the logs to trace the ISKs.

Third, it is in the best interests of CCP to take the passive approach and do nothing, since this is the most financially efficient position. As mentioned above, careful monitoring of transaction logs would require lots of staff time and energy. Additionally, CCP may have already made a financial gain that it would not want to reverse. The mechanism by which this could have occurred is quite simple. It is suspected that some players had deliberately converted real-world money into ISKs to invest in EIB.<sup>41</sup> Like many other virtual world providers, CCP prohibits the conversion of in-game currency into real-world money and vice versa,<sup>42</sup> but this does not mean the conversions do not occur. Certainly at the time of the Cally scandal, it was possible to exchange, albeit indirectly, real-world money into ISKs and vice versa without breaching the rules, through the in-game buying and selling of Game Time Codes (GTCs).<sup>43</sup> GTCs are one-time use codes that give players subscription time to a virtual world, an alternative to the normal subscription method of cyclical billing.<sup>44</sup> CCP allows players to buy *EVE Online* GTCs with ISKs; therefore, players who could not afford to pay for subscriptions with real money could instead use ISKs that they earned in-game to buy game time from other players who did not wish to spend much time generating their own ISKs.<sup>45</sup> In this way, a player whose avatar needs ISKs

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40. See, e.g., *EVE Online*, Reimbursement Policy, *supra* note 13, at cl. 11.

41. See *supra* note 29 and accompanying text.

42. *EVE Online* Support, Reporting ISK Spammers, <http://support.eve-online.com/Pages/KB/Article.aspx?id=436> (last visited Apr. 2, 2009).

43. *EVE Online*, *EVE Time Code Retailers*, <https://secure.eve-online.com/etc.aspx> (last visited Apr. 2, 2009).

44. *EVE Online*, <http://www.eve-online.com/> (last visited Apr. 2, 2009).

45. See *EVE Online* Forum, Guide to Selling, Buying, and Using Game Time Codes, <http://myeve.eve-online.com/ingameboard.asp?a=topic&threadID=596886> (last visited Apr. 2, 2009) (noting that “[p]layers have the option of purchasing a game time code (GTC, PLEX) from others thus paying for their *EVE* subscription entirely with ISK”).

immediately can “buy” ISKs by buying GTCs for real money and then selling them to other players for ISKs.

The net result is that real-world money has passed to CCP through the conversion of real-world money into ISKs. CCP naturally wants the ISKs to remain ISKs so that it can keep holding on to the real-world money to use as it pleases. If CCP were to investigate and monitor transactions, CCP may be obligated to return the ISKs to the players, who might decide to “cash out” the ISKs, and may thereby result in CCP having to return the real-world money. With all of these incentives in place, one might wonder whether Cally could have been an avatar created and operated by CCP or in some other way associated with CCP. Ultimately, the whole EIB scam could have been an easy way for the company to raise capital.

This section has canvassed three primary problems associated with relying on CCP, a virtual world provider, to regulate itself and ensure that its virtual world is operated and governed fairly and impartially. Indeed, self-regulation is rarely ever the most effective way of ensuring justice.

#### IV. CCP'S RESPONSE II: “NO RULES WERE BREACHED”

In any virtual world, a player's conduct is governed by numerous formal agreements, as well as informal etiquette and online norms. *EVE Online* is typical in this regard, providing players with at least nine documents with which they must comply.<sup>46</sup> Much has been written on the topic of online contracts, but the literature on consent in contracting has traditionally focused on a party's comprehension of the terms of the contract or the presence or absence of true consent in standard form contracts.<sup>47</sup> Many scholars have considered, for example, the capacity of minors to contract and whether young teenagers playing virtual world games truly understand and adequately consent to the terms of an EULA or a TOS when they click on “I agree.”<sup>48</sup> This Article acknowledges that there are genuine issues regarding the legality of the consent, but it makes the argument that even if a person truly comprehends and assents to and can be legally bound by the terms of an online contract, one must still look more closely at the exact nature of the terms a player has consented to. In *EVE Online*, as in many virtual worlds, all the rules

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46. See *EVE Online*, Rules & Policies, <http://www.eve-online.com/pnp/> (last visited Apr. 23, 2009) (displaying nine of these documents).

47. See Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125, 1126-28 (2000).

48. *Id.*; see also Fairfield, *supra* note 3, at 439.

and norms—some of which form part of the contractual terms—must be read together. One of the bases upon which CCP justified its non-action against Cally was that Cally did not breach any “rule” of the game. This sweeping statement will be analyzed in Part V to determine whether CCP’s position is defensible.

Commentators like Fairfield have taken the approach that as players enter and participate in virtual worlds, they are aware of and consent to fraud and deception as part of the virtual world:

Thus, as often happens in game, when one person gains the trust of another, only to betray that trust and “steal” virtual assets, this is considered part of the game rather than actionable fraud or theft. Obviously, the theft of these assets is not actionable within the EVE world, since being defrauded (like being bluffed in a poker game) is part of the game itself.<sup>49</sup>

While it may be true that fraud and deception are part of *EVE Online*, it does not necessarily follow that all forms of fraud and deception are acceptable and tolerated within the rules of the game and the contractual terms of use. There are two clear contractual relationships that exist in the Cally-CCP debacle, and each will be considered below in Parts V and VI: (1) between CCP and Cally, and (2) between a defrauded player and CCP.

#### V. CONTRACT BETWEEN CCP AND CALLY: CCP’S FAILURE TO CORRECTLY INTERPRET RULES

Relying largely on the reasoning that fraud and deception are part of *EVE Online*, CCP asserted that Cally did not breach any rules. However, the contract between CCP and the players of *EVE Online* shows otherwise.

*EVE Online*’s TOS clearly states that players must abide by the TOS and the EULA. The preamble to the TOS states:

As an *Eve Online* subscriber, you must observe and abide by the rules of conduct and policies outlined below, as well as the End User License Agreement. Failure to comply with these regulations can result in the immediate termination of your account and you will forfeit all unused access time to the game. No refunds will be given.<sup>50</sup>

Importantly, Clause 9 of the TOS states:

You may not advertise, employ, market, or promote any form of solicitation—including pyramid schemes and chain letters—in the Eve Online game world or on the website.<sup>51</sup>

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49. Fairfield, *supra* note 3, at 460-61.

50. EVE Online, Rules & Policies: Terms of Service, <http://www.eve-online.com/pnp/terms.asp> (last visited Apr. 2, 2009).

51. *Id.*

As already mentioned, the scam perpetrated by Cally was essentially a Ponzi scheme. A Ponzi scheme works on the “rob Peter to pay Paul” principle, whereby the perpetrator uses money from new investors to pay off the earlier ones until there are no more new investors and the whole scheme collapses. The collapse may occur when regulators discover it, or in the case of Cally’s scheme, until the perpetrator disappears with the loot. The U.S. Securities and Exchange Commission (SEC) regards a Ponzi scheme as a type of pyramid scheme.<sup>52</sup> A number of legal scholars also share the view that a Ponzi scheme is a form of a pyramid scheme.<sup>53</sup> The only difference between a pyramid scheme and a Ponzi scheme is that most pyramid schemes reward participants who bring new investors into the scheme. However, the schemes share two primary characteristics: first, there is no real product; and second, the money paid out to investors comes not from value created by the business, but directly from the pockets of new investors.

Clause 9 of *EVE Online*’s TOS clearly forbids the advertisement, employment, marketing, or promotion of any form of pyramid scheme, which would include Cally’s Ponzi scheme.<sup>54</sup> As such, Cally’s conduct falls within the prohibitions listed in this clause, and thus Cally did break the rules, despite CCP’s assertions to the contrary. CCP incorrectly interpreted or applied the contractual clauses. Unfortunately for an *EVE Online* player defrauded by Cally, establishing a breach of the TOS agreement may be of little use in obtaining any remedies under contract law. According to the preamble of *EVE Online*’s TOS, the best that a defrauded player can expect under Cally’s contract with CCP is for CCP to terminate Cally’s account.<sup>55</sup> There is no provision under the contract for CCP to compensate the defrauded players for Cally’s breach.

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52. See Ponzi Schemes, U.S. Securities and Exchange Commission, *supra* note 21.

53. See, e.g., Todd M. Hinnen, *The Cyber-Front in the War on Terrorism: Curbing Terrorist Use of the Internet*, 5 COLUM. SCI. & TECH. L. REV. 5 (2003/2004); David F. Kurzawa II, *When Fair Consideration Is Not Fair*, 11 CORNELL J. L. & PUB. POL’Y 461 (2002); Christopher R. Leslie, *Den of Inequity: The Case for Equitable Doctrines in Rule 10b-5 Cases*, 81 CALIF. L. REV. 1587 (1993); Mark A. McDermott, *Ponzi Schemes and the Law of Fraudulent and Preferential Transfers*, 72 AM. BANKR. L.J. 157 (1998); Todd M. Tippett, *Game When They Win; Investment When They Lose: SEC v. SG, Ltd.*, 7 COMP. L. REV. & TECH. J. 313 (2003); Darlene S. Wood, *Casenote: Lease-back Arrangements are Investment Contracts and Therefore Securities Under the Securities Acts: SEC v. Edwards*, 7 DUQ. BUS. L.J. 135 (2005).

54. See *EVE Online*, Rules & Policies: Terms of Service, *supra* note 50.

55. *Id.*

VI. CONTRACT BETWEEN CCP AND A DEFRAUDED PLAYER:  
CCP'S FAILURE TO CORRECTLY INTERPRET RULES  
AND THE INEFFECTIVENESS OF CONTRACTUAL REMEDIES

Many scholars have commented that *EVE Online* players accept fraud and deception as part of the online gaming environment and that they should not be permitted to complain when they are defrauded by schemes like Cally's EIB.<sup>56</sup> However, this Article refutes that position and proposes that the defrauded players did not in fact consent to Cally's fraud when they played *EVE Online*.

When determining what conduct or playing environment players have consented to upon entering a virtual world, it is essential that the whole agreement between a player and the virtual world provider be read in its entirety. Only then can one determine precisely the type of fraud to which a player has consented. While *EVE Online* players may have consented to some level of in-game fraud and deception, there may be limits on the type and scale of permissible fraud to which a player has agreed.

*A. Nature of Consent*

First, assuming that *EVE Online* players read the TOS, they likely understand that it forbids the advertisement, employment, marketing, or promotion of any form of pyramid scheme. Having established above that Cally's EIB scheme was prohibited by Clause 9 of the TOS, most players would not expect such a scheme to operate or exist in *EVE Online*, and therefore would not have consented to being defrauded by a Ponzi scheme simply by playing the game.

The second aspect of consent is the user's "scale" or "level" of consent. *EVE Online* is described by its developers as a

massive multiplayer online [role-playing] game (MMORPG) set in a science-fiction based, persistent world. Players take the role of spaceship pilots seeking fame, fortune, and adventure in a huge, complex, exciting, and sometimes hostile galaxy.<sup>57</sup>

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56. See, e.g., Farnaz Alemi, *An Avatar's Day in Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games*, UCLA J.L. & TECH. 6 (2007); Fairfield, *supra* note 3; Bobby Glushko, *A Note: Tales of the (Virtual) City: Governing Property Disputes In Virtual Worlds*, 22 BERKELEY TECH. L.J. 507 (2007); Jason T. Kunze, *Regulating Virtual Realms Optimally: The Model End User License Agreement*, 7 NW. J. TECH. & INTELL. PROP. 102 (2008); Ethan E. White, *Massively Multiplayer Online Fraud: Why the Introduction of Real World Law in a Virtual Context Is Good for Everyone*, 6 NW. J. TECH. & INTELL. PROP. 228 (2008).

57. EVE Online: Frequently Asked Questions, *supra* note 10.

This description is in stark contrast to other virtual worlds such as *Second Life* where the developer, Linden Lab, has claimed that it is not a game.<sup>58</sup> According to its website, *Second Life* has a “fully integrated economy architected to reward risk, innovation and craftsmanship.”<sup>59</sup> It also advises that businesses succeed in *Second Life* by the “ingenuity, artistic ability, entrepreneurial acumen, and good reputation of their owners.”<sup>60</sup> The difference in the classification of these two virtual worlds is significant. *EVE Online*, because it is classified as a “game,” leads players to regard it first and foremost as such, whereas *Second Life*’s clear assertions that it is *not* a game sends the message that playing is more akin to interacting in the real world. Certainly, *Second Life* players like Marc Bragg,<sup>61</sup> as well as Ailin Graef, whose avatar, Anshe Chung, was the first online avatar to achieve a net worth exceeding one million U.S. dollars from profits earned entirely inside a virtual world,<sup>62</sup> are fully aware of the business and economic opportunities in *Second Life* and are prepared to accept the inherent risks. Whether a virtual world is advertised as a “game” influences players’ perception of it, and consequently informs us whether players have consented to certain types of actions and risks in that world.

The stakes are naturally much higher in a virtual world like *Second Life* than in a virtual world like *EVE Online*. When a player enters a virtual world thinking it is a mere game, the level or scale of fraud to which he or she consents is probably much lower than when that player enters a virtual world that promotes itself as being akin to the real world. As such, a player would not expect to be exposed to the same kind of risk of fraud in a virtual world that is promoted as an alternative to the real world. Although it is unknown how much money the average player invested with EIB in *EVE Online*, given the large sum that was reportedly lost in the scam,<sup>63</sup> it is unlikely that the level of fraud was consistent with players’ expectations and perceptions and therefore did not occur with their consent. Thus, it is unlikely that players consent to being victims of all kinds of fraud and deception occurring within virtual worlds.

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58. Kenneth James, *Real Benefits in Virtual Worlds*, BUS. TIMES (Singapore), Dec. 11, 2006.

59. *Second Life: The Marketplace*, <https://secure-web6.secondlife.com/whatis/marketplace.php> (last visited Apr. 2, 2009).

60. *Id.*

61. *Bragg v. Linden Research, Inc*, 487 F. Supp. 2d 593 (E.D. Pa. 2007).

62. Rob Hof, *Second Life’s First Millionaire*, BUS. WEEK, Nov. 26, 2006, available at [http://www.businessweek.com/the\\_thread/techbeat/archives/2006/11/second\\_lifes\\_fi.html](http://www.businessweek.com/the_thread/techbeat/archives/2006/11/second_lifes_fi.html).

63. See *supra* notes 24-25 and accompanying text.

*B. Contractual Remedies under a Defrauded Player's  
Contract with CCP*

Given that players arguably did not consent to being defrauded by a Ponzi scheme such as the EIB scheme, the next issue to consider is whether remedies are available to a defrauded player under her own contract with CCP. Relying solely on the contract between Cally and CCP would likely not result in any effective and meaningful solution,<sup>64</sup> since under *EVE Online's* TOS, Cally's breach of Clause 9 would at worst result in the termination of Cally's avatar.<sup>65</sup> This remedy, however, remains within the complete discretion of CCP.

To examine what remedies could be awarded to a player under her own contract with CCP for being the victim of a Ponzi scheme in *Eve Online*, two possible implied terms could be considered. First, a defrauded *EVE Online* player would likely argue that it was an implied term of the contract that she would not be exposed to any pyramid or Ponzi schemes. Second, a player could argue that there was an implied term that CCP would enforce its contract with respect to other online players. But does the player have a contractual remedy against CCP for breach of these two implied terms, if they are held to exist?

1. Remedy for Breaching Implied Term Regarding Pyramid Schemes

The role of remedies in contract law is to put the injured party in the same position that she would be in if the contract with the breaching party had been performed. This can normally be achieved by awarding monetary damages or specific performance of the contract.<sup>66</sup> Monetary damages are usually intended to compensate the injured party for the loss of the bargain.

Under U.S. law, consequential damages can be awarded for foreseeable damages arising from circumstances outside of the contract, but only if the breaching party knows or ought to have known that the breach would cause special damage to the other party.<sup>67</sup> Consequential damages would be applicable in this case because CCP would have known that if there was a Ponzi scheme

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64. See also Fairfield, *supra* note 3; Radin, *supra* note 47.

65. See *EVE Online*, Rules & Policies: Terms of Service, *supra* note 50, at Preamble.

66. See Steven Shavell, *Specific Performance Versus Damages for Breach of Contract* (Harvard Law and Economics Discussion, Paper No. 532), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=868593](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=868593).

67. See generally RESTATEMENT (SECOND) OF CONTRACTS §§ 347, 351 (1981).



operating in *EVE Online*, it was reasonably foreseeable that players would lose their ISKs. Hence, for the implied term that there would not be any Ponzi schemes within *Eve Online*, it was conceivable that a breach of such a term would result in players being defrauded through such a scheme and thus it would appear that players would be entitled to claim consequential damages. However, there are numerous clauses in the EULA and the *Terms of Use of the Eve Online Website* (Terms of Use) designed to limit CCP's liability for this type of breach.

Clause 12 of the *Eve Online* EULA provides:

NO WARRANTIES

The Software, System, Game and all Game Content, and all other services and material provided in connection therewith, are provided "AS IS," with all faults, and without warranty of any kind. You assume all risk of use and all risk associated with accessing the System and playing the Game.

CCP disclaims all warranties, whether express or implied, including without limitation the warranties of merchantability, fitness for particular purpose and non-infringement. There is no warranty against interference with your enjoyment of the Game . . .<sup>68</sup>

Clause 12 essentially states that players assume all risk of use of the game and that this risk is not limited to just the system but to all game content as well, which would likely include another player's creation of a Ponzi scheme within the game. Clause 12 further disclaims all warranties, express and implied.<sup>69</sup> Whether this disclaimer would extend to the implied term in the prohibition in Clause 9 of the TOS is a question of contractual construction and interpretation and may vary from jurisdiction to jurisdiction. In some jurisdictions, legislation has prohibited the exclusion of some forms of warranties from contracts.<sup>70</sup>

On the issue of damages, Clause 13 of the EULA is very similar to Clause 8 of the Terms of Use, which is a document that applies to the entire website including the virtual world itself, the forums, and the chat rooms. Between the two clauses, CCP disclaims all conceivable liability for damages. Clause 13 reads:

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68. EVE Online, Rules & Policies: End User License Agreement, <http://www.eve-online.com/pnp/eula.asp> (last visited Apr. 23, 2009).

69. *Id.*

70. See, e.g., California Food and Agriculture Code § 12854. The most notable of these would include those concerning health, safety, and foodstuff. For example, under the *California Food and Agriculture Code* (FAC), Section 12854 provides that no limitations of warranty by the seller shall exclude or waive the implied warranty that the pesticide is reasonably fit for use for any purpose for which it is intended according to any printed statement of the registrant. *Id.*

## DISCLAIMER OF DAMAGES

In no event shall CCP, its affiliates, licensors or suppliers be liable to you or to any third party for any special, indirect, incidental, consequential, punitive or exemplary damages (including without limitation, lost profits or lost data), arising out of or in connection with your Account, the System, Software, Game, Game Content, User Content, EULA, or any other services or materials provided in connection therewith, whether based on warranty, contract, tort or any other legal theory, and whether or not CCP is advised of the possibility of such damages, and even if any stated remedy fails of its essential purpose.<sup>71</sup>

Like the EULAs of many other virtual worlds, this disclaimer of damages clause is extremely broad. It declares that in “no event” will CCP be liable for any damages to the player or to any third party, including without limitation consequential damages arising out of or in connection with *EVE Online*; this also includes the game content and user content, like Cally’s Ponzi scheme.<sup>72</sup> The clause even covers damages arising out of contract, tort, or any other legal theory, whether or not CCP is advised of the possibility of such damages.<sup>73</sup>

Clause 8 of the Terms of Use reads more like an exclusion clause from an insurance contract in that it refers to war, flood, and riots.<sup>74</sup> However, Clause 8 goes further than Clause 13 of the EULA by specifically disclaiming any liability for any act or omission of any third party. This would encompass the acts of players such as Cally.<sup>75</sup> Any claim by a defrauded player for consequential damages would likely be defeated by these two clauses.

71. EVE Online, Rules & Policies: End User License Agreement, *supra* note 68.

72. *Id.*

73. *Id.*

74. EVE Online, Website Terms of Use, <http://www.eve-online.com/pnp/termsofuse.asp> (last visited Apr. 23, 2009). Clause 8 (Limitation of Liability) reads:

In no event will CCP, or any of its affiliates or subsidiaries, be liable for any damages, including without limitation, direct or indirect, special, incidental, or consequential damages [sic], losses or expenses, including, but not limited to, lost profits, disclosure, disclosure of confidential information, loss of privacy and loss of use, arising [sic] in connection with this site or use thereof or inability to use by any party, or inconnection [sic] with any failure of performance, error, omission, interruption, defect, delay in operation or transmission, computer virus or system failure, even if CCP, HF, or affiliates thereof, are advised of the possibility of such damages, losses or expenses. In addition, in no event will CCP, HF be liable for any act or omission of any third party including, but not limited to, any provider of telecommunications services, internet access or computer equipment or software or for any circumstances beyond its control including, but not limited to, fire, flood or other natural disaster, war, riot, strike, act of civil or military authority, equipment failure, computer virus, or failure or interruption of electrical, telecommunications or other utility services.

*Id.* at cl. 8.

75. *Id.*

## 2. Remedy for the Implied Term That CCP Will Enforce the Terms of its Contract with Other Players

For breach of the implied term that CCP will enforce the terms of its EULA against other players, the available remedy for a defrauded player against CCP would likely not amount to anything substantial. As noted above, if a player such as Cally breaches the TOS, CCP has discretion to punish him by terminating his accounts and confiscating his in-game assets.<sup>76</sup> Even if a player attempts to bring an action against CCP for breach of such an implied term, CCP could argue that it has discretion to punish the breaching player as it wishes. Most importantly, this course of action would not result in any damages for the defrauded player.

## 3. Overarching Contractual Terms and Issues

There are a number of clauses and overarching issues that relate to contractual remedies for *EVE Online* players in general. First, Clause 14 of the EULA provides that CCP's maximum liability for any and all claims shall not exceed an amount equal to the value of one month's subscription fee unless there has been a material breach of CCP's obligations to provide access to and use of the virtual world, in which case the liability is no greater than an amount equal to the value of three months' subscription fees.<sup>77</sup> Clause 14 further provides:

If any of the foregoing disclaimers or limitations of liability are declared to be void or unenforceable, then CCP's liability shall be limited to the maximum extent permissible under applicable law. The remedies set forth herein are exclusive and in lieu of all other remedies, oral or written, express, or implied.<sup>78</sup>

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76. See *EVE Online, Rules & Policies: Terms of Service*, *supra* note 50.

77. See *EVE Online, Rules & Policies: End User License Agreement*, *supra* note 68. Clause 14 (Limitation of Liability) reads:

Except as set forth below, CCP's maximum liability for any and all claims arising out of or in connection with your Account, the Software, System, Game, Game Content, User Content, EULA, and any other services or materials provided in connection therewith, shall not exceed an amount equal to the value of one (1) month's subscription fees. In the event of a material breach of CCP's obligations to provide access to and use of your Account, the System, Game, Game Content or User Content, your sole and exclusive remedy shall be a refund of any pre-paid subscription fees attributable to the period during which you were denied such access and use, or an amount equal to the value of three (3) months' subscription fees, whichever is less. In the event of a malfunction of or your inability to use the CD-ROM containing the Software, your sole and exclusive remedy shall be a replacement disk from the vendor that provided the CD-ROM in accordance with its replacement policy; CCP shall have no liability for the CD-ROM . . . .

*Id.* at cl. 14.

78. *Id.*

Thus the effect of Clause 14 is that the most any defrauded player could claim in damages is the equivalent of one month's subscription fees, unless the disclaimers or limitations of liability were declared to be void or unenforceable, in which case CCP should be liable "to the maximum extent permissible under applicable law."<sup>79</sup>

This raises the issue of contracts of adhesion, which may be unconscionable. The U.S. district court case of *Bragg v. Linden* examined the contract provisions of *Second Life's* EULA,<sup>80</sup> and concluded that clauses regarding arbitration and forum selection were unconscionable and unenforceable.<sup>81</sup> *Bragg* involved a domestic dispute where all the parties were domiciled in the United States. Both parties agreed to the court's application of California law in its analysis of the contract, even though the court eventually found void the clause requiring a California venue for arbitration.<sup>82</sup> Indeed, the court relied on precedent which states that it is "not reasonable for individual consumers from throughout the country to travel to one locale to arbitrate claims involving such minimal sums."<sup>83</sup>

CCP is an Icelandic corporation headquartered in Iceland, but it has a U.S. office in Georgia.<sup>84</sup> Clause 16 of the *EVE Online* EULA stipulates that the contract shall be governed and construed by and in accordance with the laws of the Republic of Iceland.<sup>85</sup> It further excludes the applicability of the United Nations Convention on Contracts for the International Sale of Goods.<sup>86</sup> Any disputes or claims against CCP must be heard in the District Court of Reykjavík,

79. *Id.*

80. *Bragg v. Linden Research, Inc*, 487 F. Supp. 2d 593 (E.D. Pa. 2007).

81. *Id.* at 605-06, 611.

82. *Id.* at 603-604, 610.

83. *Id.* at 610.

84. CCP, Company Contact Information, <http://www.ccpgames.com/company/contact.asp> (last visited Apr. 2, 2009).

85. *EVE Online*, Rules & Policies: End User License Agreement, *supra* note 68. Clause 16 (Governing Law & Exclusive Forum) reads:

The EULA [End User License Agreement], and the rights and obligations of the parties hereto, shall be governed and construed by and in accordance with the laws of the Republic of Iceland. The EULA shall not be governed by the United Nations Convention on Contracts for the International Sale of Goods. The sole and exclusive forum for resolving any controversy, dispute or claim arising out of or relating to the EULA, or otherwise relating to any rights in, access to or use of the Software, System, Game, Game Content, User Content and/or the rights and obligations of the parties hereto, shall be the District Court of Reykjavík, Iceland, (Héraðsdómur Reykjavíkur). You hereby expressly waive and agree not to raise any and all objections based on personal jurisdiction, venue and/or inconvenience of such forum and agree to the jurisdiction of the District Court of Reykjavík, Iceland.

*Id.* at cl. 16.

86. *Id.*

Iceland, and players are deemed to have expressly waived all objections based on personal jurisdiction, venue, and/or inconvenience of such forum.<sup>87</sup>

It is outside the scope of this Article to examine Icelandic contract law concerning unconscionable contracts, or to delve into conflict of law issues. But this much is clear: while the venue could be challenged similarly to the argument in *Bragg*, the contract's choice of law provision would likely not be disturbed even if a claim were brought in a U.S. court.<sup>88</sup>

Relying on contractual remedies in international situations is complicated. First, the costs of litigating in a foreign country would be high, and it would be a difficult and costly fight to argue for the dispute to be heard in the United States. Second, even if the case were moved to the U.S., one would have to maneuver skillfully around Icelandic law, which creates the added difficulty of interpreting a foreign language and its precedents. Third, assuming a mastery of Icelandic law, one would need to successfully argue that the disclaimers or limitations of liability are void or unenforceable. Only then could a party be truly compensated, otherwise a defrauded player would have to be satisfied with the somewhat measly compensation of the cost of one month's subscription fee to *EVE Online*.

## VII. CONCLUSION

The foregoing sections have demonstrated that purely contractual remedies may not be entirely helpful to the defrauded player. When the matter is considered as a whole, logic and common sense suggest that CCP as the virtual world provider should be doing more in response to Cally's fraud. After all, in Clause 15 of the EULA, each player is required to indemnify CCP from any and all claims and demands arising out of any activities conducted through the player's *EVE Online* account.<sup>89</sup> If the defrauded players had taken legal action

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87. *Id.*

88. See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS: CHOICE OF LAW CLAUSES § 187 (1988) ("Choice-of-law provisions contained in such [adhesion] contracts are usually respected.")

89. *EVE Online*, Rules & Policies: End User License Agreement, *supra* note 68, at cl. 15. Clause 15 states that

You shall defend, indemnify and hold harmless CCP and its affiliates, licensors and suppliers, and their respective employees, contractors, officers and directors, from any and all claims, loss, damages and demands, including reasonable attorneys' fees, arising out of: (i) your use or misuse of the Software; (ii) your access to the System; (iii) any activities conducted through your Account (whether by you or another person); and (iv) your playing of the Game.

*Id.*

against CCP, then CCP could have exercised this indemnity clause against Cally. Alternatively, CCP, being the “game god,”<sup>90</sup> could have easily frozen Cally’s virtual assets and resolved the matter with the defrauded players by redistributing the ISKs back among them.

However, CCP took neither of these actions. Instead, when the swindle surfaced, CCP stood idle and insisted that Cally had not breached any rules of the virtual world. Not only were CCP’s interpretations and application of the rules in the TOS to Cally’s conduct erroneous, but they also misconceived the nature and extent of the consent to fraud on the part of the players. In short, CCP’s actions demonstrate that there are serious concerns regarding the efficacy of a virtual world provider regulating itself.

While *EVE Online* represents an extreme case because of the magnitude of the fraud, fraud is quite common in virtual worlds.<sup>91</sup> Additionally, the problem of homogeneity of terms in virtual worlds means that contractual remedies are unlikely to adequately compensate victims of fraud in most virtual worlds. Since virtual world providers supply and facilitate the framework for fraud to occur, they ought to ensure that the virtual world is operated and governed fairly and impartially. Problems arise for players when there is poor governance of virtual worlds such as when the providers ignore the actions of their players that are in breach of the rules. Many of the virtual world providers today still subscribe to the “game god” mentality<sup>92</sup> and it is precisely for this reason that they cannot generally be trusted to regulate themselves. The law should step in and stop allowing virtual world providers to continue to hide behind contractual terms.

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90. Joshua Fairfield, *The God Paradox*, 89 B.U.L. REV. (forthcoming 2009) (on file with author).

91. See *supra* text and accompanying notes 16, 50.

92. See *supra* note 90.

