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   PAYPAL, INC.

7

8   UNITED STATES DISTRICT COURT
                    NORTHERN DISTRICT OF CALIFORNIA
9   SAN JOSE DIVISION

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11 IN RE PERSONALWEB TECHNOLOGIES,   **Case No. 5:18-md-02834-BLF**
    LLC, ET AL., PATENT LITIGATION

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15 PERSONALWEB TECHNOLOGIES, LLC, a   **DEFENDANT PAYPAL, INC.'S**
    Texas limited liability company, and LEVEL 3   **OPPOSITION TO PLAINTIFFS**
16 COMMUNICATION, LLC, a Delaware limited   **PERSONALWEB TECHNOLOGIES, LLC**
    liability company   **AND LEVEL 3 COMMUNICATION, LLC'S**
17   **MOTION FOR LEAVE TO EXTEND**
                    Plaintiffs,   **PERIOD OF SERVICE TO DEFENDANTS**
18   ***NUNC PRO TUNC***
    v.
19   **Case No. 5:18-cv-00177-BLF**
    PAYPAL, INC., a Delaware corporation,
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                    Defendant.
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1   Since January 2018, PersonalWeb filed dozens of cases across the country in an attempt to

2   monetize its long-expired patents, and it has stated that it will file dozens more before the end of the

3   year. But in its haste to target even more companies for litigation, PersonalWeb neglected many of the

4   cases that are already pending.

5   PersonalWeb filed this case against Venmo, Inc. ("Venmo") on January 8, 2018. Per the Federal

6   Rules of Civil Procedure, PersonalWeb had until April 9, 2018 to effect service. Fed. R. Civ. P. 4(m). It

7   failed to do so. Instead, PersonalWeb now requests that the Court grant it a new 90-day window for

8   service to cover for the fact that it neglected to serve the correct defendant, PayPal, Inc. ("PayPal"), until

9   October 16, 2018, 190 days after the initial 90-day window expired.[1] As a result of PersonalWeb's

10   delay, PayPal was not served until after this Court held motion hearings and case management

11   conferences.

12   "If a defendant is not served within 90 days after the complaint is filed, the court—on motion or

13   on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant

14   or order that service be made within a specified time." Fed. R. Civ. P. 4(m). Only if the plaintiff is able

15   to show "good cause" for its failure to effect service must the court "extend the time for service for an

16   appropriate period." *Id.* In its Motion for Leave to Extend Period of Service, PersonalWeb points to the

17   July 13, 2018 stay as the reason it could not amend its complaint to name PayPal as the defendant and,

18   therefore, could not timely serve PayPal. This excuse ignores the fact that the stay was instituted 95

19   days after the April 9, 2018 deadline for service. PersonalWeb also ignores the fact that it could have

20   avoided needing such an amendment in the first place. PersonalWeb's Motion provides no excuse,

21   much less good cause, for its failure to timely serve PayPal. Ensuring PersonalWeb's compliance with

22   the Federal Rules will not prejudice PersonalWeb, who could refile their case, but it will prevent

23   PersonalWeb from retaining the benefit of an extended damages period despite untimely service to

24   PayPal. PersonalWeb's Motion should be denied, and the Court should dismiss the action under Rule

25   4(m).

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27   [1] PayPal objects to this service as untimely under Fed. R. Civ. P. 4(m) and reserves its right to seek
     dismissal under Fed. R. Civ. P. 12(b)(5). PayPal makes a limited appearance for the purposes of
     addressing PersonalWeb's motion.

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I.   FACTUAL BACKGROUND

PersonalWeb filed this case against Venmo on January 8, 2018 in the Northern District of California. At the time, Venmo did not exist as a corporate entity and had relinquished the right to conduct business in California several years prior. Ex. 1 ("Certificate of Surrender of Right to Transact Intrastate Business"). On the same day, PersonalWeb requested that the Court issue a summons to "Venmo/PayPal, Inc." Dkt. 4 ("Proposed Summons"). There is no evidence that PersonalWeb ever attempted to serve Venmo, and Venmo never appeared in this case or filed a motion to stay.

On March 1, 2018 (with 39 days remaining for service), PersonalWeb was notified that it had incorrectly named a defendant in another action filed on January 8, 2018, and on April 6 (with 3 days remaining), PersonalWeb promised to amend that complaint. Mot. at 2–3. PersonalWeb states that it became aware "[d]uring this time" "that PayPal, Inc., and not the entity sued … was the true and correct owner and operator of the [allegedly] infringing website venmo.com." *Id*. at 3. Yet PersonalWeb did not amend its complaint or serve a new summons on PayPal at that time.

On April 27, 2018, eighteen days after PersonalWeb's deadline to serve the complaint in this case expired, the Court held a hearing on motions to stay filed by other defendants and stayed those fourteen underlying actions. Order Regarding Stay, *PersonalWeb Technologies, LLC., et al. v. Atlassian, Inc.*, Case No. 18-cv-00154-BLF, (N.D. Cal. Apr. 27, 2018) (Dkt. 42); *see also* Mot. at 3. PersonalWeb admits that this case was not stayed until July 13, 2018, 95 days after service was due. Mot. at 3 (stating that, by joint stipulation filed July 13, 2018, "the parties agreed to stay all of the actions pending against the website operator defendants").

PersonalWeb finally amended its complaint to name PayPal as a defendant on October 4, 2018. PersonalWeb served PayPal on October 16, 2018, *over nine months* after originally filing its complaint against Venmo and 190 days after the deadline for service.

II.   PERSONALWEB HAD NO GOOD CAUSE FOR ITS BELATED SERVICE

PersonalWeb never sets forth any good cause for why it could not have amended its complaint and served PayPal within the time allotted by Rule 4(m). "In the Ninth Circuit, at a minimum, 'good cause' means excusable neglect" (*AF Holdings LLC v. Does 1-135*, 2012 WL 1038671, at *3 (N.D. Cal. Mar. 27, 2012) (quoting *In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001) (internal quotation marks

1   omitted)), and "[t]he burden of showing good cause is on the Plaintiff." *Crowley v. Factor 5, Inc.,* 2014

2   WL 1868851, at *2 (N.D. Cal. May 7, 2014) (citing *Wei v. State of Hawaii*, 763 F.2d 370, 372 (9th Cir.

3   1985)). "The 'good cause' exception to Rule 4(m) applies 'only in limited circumstances' and is not

4   satisfied by 'inadvertent error or ignorance of the governing rules.'" *Id.* (quoting *Hamilton v. Endell*,

5   981 F.2d 1062, 1065 (9th Cir. 1992)).

6   PersonalWeb does not allege that it attempted, but failed to complete, service to PayPal; that it

7   was "confused about the requirements of service"; or that PayPal evaded service. *Cf. AF Holdings*,

8   2012 WL 1038671, at *3 (listing situations that give rise to good cause). Indeed, the facts above suggest

9   the opposite. At best, PersonalWeb attempts to argue that "due to the litigation stay then in place,"

10   "PersonalWeb was unable to file amended complaints needed to serve the[] Defendants," including

11   PayPal. Mot. at 1. As an initial matter, a plaintiff's "desire to amend his complaint before effecting

12   service does not constitute good cause." *Wei v. State of Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985).

13   Moreover, the aforementioned stay would not have prevented PersonalWeb from amending its

14   complaint had PersonalWeb acted promptly and diligently after learning of its mistake. PersonalWeb

15   also could have avoided an amendment in the first place had it exercised diligence when searching

16   publicly available information for the identity of the proper defendant. There is no reason for the Court

17   to exercise its discretion to allow PersonalWeb more time for service.

18   **A.   PersonalWeb Could and Should Have Amended Its Complaint Prior to Any Stay**

19   PersonalWeb knew months before the July 13, 2018 stay that it had sued the incorrect entity

20   (Venmo), as well as the identity of the correct entity (PayPal). By its own admission, on March 1,

21   2018—over a month from the 90-day deadline for service—PersonalWeb was on notice that it had

22   named an incorrect defendant in another case that was also filed on January 8, 2018, and thereafter

23   began to investigate Venmo. Mot. at 2–3. According to PersonalWeb's own narrative, it knew *prior* to

24   the July 13, 2018 stay that PayPal, not Venmo, was the correct defendant and that it would need to file

25   an amended complaint and issue a new summons to PayPal.

26   PersonalWeb could have (and should have) sought leave from the Court to file an amended

27   complaint and, if necessary, a motion to extend time for service before the institution of the July 13,

28   2018 stay. It did not, even though "[p]laintiffs are responsible for diligently prosecuting their case,

1   including taking reasonable steps to ensure that service is timely." *Crowley*, 2014 WL 1868851, at *3.

2   As such, PersonalWeb's "attempt to insulate [itself] from responsibility for [its] lack of diligence in

3   complying with Rule 4(m) is completely unavailing." *Id.* PersonalWeb cannot now use the July 13,

4   2018 stay[2] as an excuse for its failure to "diligently prosecut[e]" its case. *See id.* (finding no good cause

5   where, *inter alia*, plaintiffs did not "promptly move to request an extension of the Rule 4(m) deadline or

6   diligently attempt to effect service after" receiving notice of its oversight).

7   **B.   PersonalWeb Should Have Known the Correct Party Prior to Filing Suit**

8   Contrary to PersonalWeb's claim, no new facts "emerged post-filing," Mot. at 2, that

9   PersonalWeb could not have discovered from even a minimal pre-suit investigation. Simply visiting the

10   accused website, venmo.com, in the months before and after the filing of the complaint would have

11   notified PersonalWeb that PayPal is the operator of the website. Ex. 2 ("Wayback Machine Capture of

12   Venmo, Oct. 1, 2017) ("Venmo is a service of PayPal, Inc., a licensed provider of money transfer

13   services. . . . All money transmission is provided by PayPal, Inc."); Ex. 3 ("Wayback Machine Capture

14   of Venmo, Apr. 6, 2018") (same).

15   A free search of the California Secretary of State website shows that Venmo surrendered its right

16   to do business in the State on July 7, 2014, three-and-a-half years before PersonalWeb filed its

17   complaint. Ex. 1 ("Certificate of Surrender of Right to Transact Intrastate Business"). For

18   confirmation, a search of the public records of Delaware's Department of State for "Venmo, Inc."

19   reveals that Venmo ceased to exist as of May 15, 2014 due to a merger. Ex. 4 ("Venmo, Inc. Status

20   Report") at 1. Even a simple visit to the Wikipedia entry for "Venmo" would have informed

21   PersonalWeb that Braintree acquired Venmo in 2012 and that PayPal acquired Braintree in 2013. Ex. 5

22   ("Wayback Machine Capture of Wikipedia, Dec. 24, 2017) at 1; Ex. 6 ("Wayback Machine Capture of

23   Wikipedia, Mar. 29, 2018") at 2.

24   "Mere attorney inadvertence … does not qualify as good cause" (*AF Holdings*, 2012 WL

25   1038671, at *3 (citing *Wei*, 763 F.2d at 372)), nor does a lack of diligence. *See, e.g.*, *Johnson v. Mao Ge*

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      [2] The April 27, 2018 stay is further irrelevant here because, as PersonalWeb notes, it pertained only to
      the "fourteen (14) underlying actions *in which the defendant filed a motion to stay*." Mot. at 3
      (emphasis added).

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