

1 Michael A. Sherman (SBN 94783)  
masherman@stubbsalderton.com  
2 Jeffrey F. Gersh (SBN 87124)  
jgersh@stubbsalderton.com  
3 Sandeep Seth (SBN 195914)  
sseth@stubbsalderton.com  
4 Wesley W. Monroe (SBN 149211)  
wmonroe@stubbsalderton.com  
5 Stanley H. Thompson, Jr. (SBN 198825)  
sthompson@stubbsalderton.com  
6 Viviana Boero Hedrick (SBN 239359)  
vhedrick@stubbsalderton.com  
7 STUBBS, ALDERTON & MARKILES, LLP  
15260 Ventura Blvd., 20<sup>th</sup> Floor  
8 Sherman Oaks, CA 91403  
Telephone: (818) 444-4500  
9 Facsimile: (818) 444-4520

10 **Attorneys for Plaintiffs**  
[Additional Attorneys listed  
11 below]

12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN JOSE DIVISION

15 IN RE PERSONALWEB TECHNOLOGIES,  
16 LLC, ET AL., PATENT LITIGATION

Case No.: 5:18-md-02834-BLF

Judge Hon. Beth L. Freeman

17  
18 Related Cases:

19 *PersonalWeb Technologies, LLC, et al., v.*  
20 *LESSON NINE GMBH, a Germany Limited*  
*Liability Company, Case No.: 5:18-CV-03453-*  
21 *BLF*

22 *PersonalWeb Technologies, LLC, et al., v.*  
23 *MWM MY WEDDING MATCH LTD., a Canada*  
*limited company, Case No.: 5:18-CV-03457-*  
*BLF*

24 *PersonalWeb Technologies, LLC, et al., v. OUR*  
25 *FILM FESTIVAL, INC., a Delaware corporation,*  
*doing business as FANDOR, INC., Case No.,*  
26 *5:18-CV-00159-BLF*

27 *PersonalWeb Technologies, LLC, et al., v.*  
28 *PAYPAL, INC. a Delaware Corporation, Case*  
*No.: 5:18-Cv-00177-BLF*

**PLAINTIFFS PERSONALWEB  
TECHNOLOGIES, LLC AND LEVEL 3  
COMMUNICATIONS, LLC OMNIBUS  
REPLY IN SUPPORT OF THEIR  
MOTION FOR LEAVE TO EXTEND  
PERIOD OF SERVICE TO DEFENDANTS  
NUNC PRO TUNC**

DATE: March 7, 2019  
TIME: 9:00 AM  
PLACE: Courtroom 3, 5<sup>TH</sup> Floor  
280 South First Street  
San Jose, CA 95113

1 *PersonalWeb Technologies, LLC, et al., v.*  
2 *UNDER ARMOUR, INC. A Maryland*  
3 *Corporation: Case No.: 5:18-Cv-00166-BLF*

4 *PersonalWeb Technologies, LLC, et al., v.*  
5 *YOTPO LTD., An Israel Corporation Case No.:*  
6 *5:18-Cv-03452-BLF*

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1 **I. INTRODUCTION**

2 PersonalWeb acknowledges it was unable to accomplish service within 90 days as required  
3 under the Federal Rules, but it was not because of inadvertent error or ignorance of the rules as  
4 Defendants suggest. The facts belie Defendants' narrative. The record demonstrates that, as to  
5 foreign defendant Yotpo, PersonalWeb has attempted but not completed service, and PersonalWeb  
6 has successfully served Lesson Nine, facts which squarely constitutes good cause warranting an  
7 extension of time to effect service. Fed. R. Civ. P. 4(m); *AF Holdings LLC v. Does 1-135*, No. 11-  
8 CV-03336, 2012 WL 1038671, at \*3 (N.D. Cal. Mar. 27, 2012). And, while PersonalWeb was  
9 prevented from serving Our Film Festival, Under Armour and PayPal because they were  
10 inadvertently misnamed in the original complaints, PersonalWeb successfully served these three  
11 entities on October 16, 2018, a factor warranting this Court's grant of an extension for service *nunc*  
12 *pro tunc*. *Efaw v. Williams*, 473 F.3d 1038, 1040 (9th Cir.2007).

13 The Court should grant PersonalWeb's Motion because, in addition to demonstrating good  
14 cause, none of the Defendants are prejudiced if the Court grants PersonalWeb's Motion; indeed,  
15 none of the Defendants argue in their oppositions that they would suffer any prejudice. To the  
16 contrary, each Defendant has had actual notice of the lawsuits against each of them since at least  
17 February 2018, when PersonalWeb filed its MDL motion with the Judicial Panel on Multidistrict  
18 Litigation. Moreover, because Fenwick & West, counsel for Our Film Festival, Under Armour,  
19 Lesson Nine and Yotpo, and Kirkland & Ellis, counsel for PayPal, were both active participants in  
20 the meet and confer conferences held before the Preliminary CMC and appeared at and participated  
21 in the Preliminary CMC, the defendants are privy to all rulings and hearing and motion practice that  
22 has occurred thus far. (*See* Sept. 20, 2018 Tr. at 5:1-3; 6:20-24.)

23 PersonalWeb's diligent efforts meet the Ninth Circuit's characterization of good cause,  
24 warranting this Court exercising its broad discretion to extend PersonalWeb's time to serve all six  
25 defendants *nunc pro tunc*<sup>1</sup>. The Court should thus grant PersonalWeb's Motion.

26 \_\_\_\_\_  
27 <sup>1</sup> This Reply brief is filed in response to both Response/Oppositions filed to the Motion.  
28 Defendant My Wedding Match did not oppose or respond to PersonalWeb's Motion. As such, that  
Defendant is not addressed in detail herein.

1 **II. GOOD CAUSE EXISTS TO EXTEND THE TIME TO SERVE OUR FILM**  
 2 **FESTIVAL, UNDER ARMOUR AND PAYPAL**

3 The Ninth Circuit has ruled that “[d]istrict courts have broad discretion to extend time for  
 4 service under Rule 4(m).” *AF Holdings LLC*, 2012 WL 1038671, at \*3 citing *Efaw*, 473 F.3d at  
 5 1041. Indeed, “[r]ule 4(m) requires a district court to grant an extension of time when the plaintiff  
 6 shows good cause for the delay. Good cause means “service has been attempted but not completed”  
 7 or that plaintiff was “prevented from serving defendants by factors beyond his control”, among other  
 8 things. *AF Holdings LLC*, 2012 WL 1038671, at \*3. Additionally, the rule *permits* the district court  
 9 to grant an extension even in the absence of good cause.” *Efaw v. Williams*, 473 F.3d at 1040  
 10 (internal citations omitted) (emphasis in original). “In making extension decisions under Rule 4(m) a  
 11 district court may consider factors like a statute of limitations bar, prejudice to the defendant, actual  
 12 notice of a lawsuit, and eventual service.” *Id.* at 1041 (internal quotation marks and citation omitted).

13 **A. Good Cause Exists for the Delay in Serving Our Film Festival Because**  
 14 **PersonalWeb Previously Attempted Service and Has Now Accomplished Service.**

15 As stated in its Motion at p. 2, PersonalWeb attempted to serve Our Film Festival under  
 16 F.R.C.P. 4 via a Request for Waiver of Service of Process sent to its then counsel Ryan Hubbard of  
 17 Kirkland & Ellis, who refused and stated he would “not accept service of process naming an  
 18 incorrect entity.” See Hedrick Reply Decl. ¶ 2, Ex. A; Response to Motion for Leave, at 3:14-16.)  
 19 However, it bears note that the incorrect entity, Fandor, Inc., is a d/b/a of Our Film Festival, Inc. As  
 20 such, PersonalWeb’s unsuccessful service attempt constitutes good cause requiring an extension of  
 21 time as to Our Film Festival. *AF Holdings LLC*, 2012 WL 1038671, at \*3 (holding attempted but not  
 22 completed service constitutes good cause); see also Fed. R. Civ. P 4(m) (“But if the plaintiff shows  
 23 good cause for the failure, the court must extend the time for service for an appropriate period.”)

24 Moreover, since the filing of its Motion, PersonalWeb successfully served Our Film Festival  
 25 on October 16, 2018, a factor that weighs in favor of granting an extension of time. *Efaw*, 473 F.3d  
 26 at 1041; Case No. 18-cv-159 (Our Film Festival) Dkt. No. 34 (Summons Returned Executed, served  
 27 on 10/16/18). The Court should therefore grant PersonalWeb’s Motion for an extension of time to  
 28

1 serve Our Film Festival, *nunc pro tunc*, to October 16, 2018, the date on which PersonalWeb  
2 completed service on this defendant.

3 **B. The Court's Permissive Authority Warrants An Extension of Time as to Under**  
4 **Armour and PayPal because Neither Contends it Has or Will Suffer Prejudice;**  
5 **Both Had Actual Notice of the Lawsuits since February 2018, and PersonalWeb**  
6 **Has Now Served Both Defendants.**

7 As the Court is aware, PersonalWeb has amended its original complaints to clarify its  
8 infringement positions. This constitutes good cause warranting an extension of time *nunc pro tunc*  
9 as to Under Armour and PayPal.

10 Alternatively, should the Court not find good cause as to these two defendants, the Court  
11 should still grant an extension under its permissive authority because the majority of the factors  
12 outlined in *AF Holdings LLC* weigh in favor of such an extension as (1) neither Under Armour nor  
13 PayPal contend they have suffered or will suffer any prejudice as a result of the extension; (2) both  
14 defendants had actual notice of the lawsuit against them since at least February 27, 2018 when  
15 PersonalWeb filed its Motion for Transfer and Consolidation of Pretrial Proceedings with the  
16 Judicial Panel on Multidistrict Litigation, which listed the actions against Under Armour (then  
17 MyFitnessPal) and PayPal (then Venmo) in its accompanying Schedule of Actions (Case MDL No.  
18 2834 Dkt. No 1 (Motion) and Dkt. No. 1-2 (Schedule of Actions), at p. 4 and 7, respectively); (3)  
19 both defendants have counsel who have meaningfully participated in the Preliminary CMC, the  
20 preparation of the Preliminary Joint CMC Statement, and the meet and confer conferences leading  
21 up to the Preliminary CMC; and (4) since the filing of its Motion, PersonalWeb has successfully  
22 served Under Armour and PayPal on October 16, 2018. *Efaw*, 473 F.3d at 1041; (See Case No. 18-  
23 cv-166 (Under Armour), Dkt. No. 32 (Summons Returned Executed, served on 10/16/18); Case No.  
24 18-cv-177 (PayPal) Dkt. No. 33 (Summons Returned Executed, served on 10/16/18).)

25 Further, while Defendants would not suffer any prejudice by a *nunc pro tunc* extension,  
26 PersonalWeb would be prejudiced greatly if no extension is granted, as it would forfeit 10 months of  
27 damages. Defendants reliance on the unpublished case, *Bender v. LG Elecs. USA, Inc.*, No. C 09-  
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