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., 20th Floor
8 Sherman Oaks, CA 91403
Telephone: (818) 444-4500
9 Facsimile: (818) 444-4520

10 **Attorneys for PersonalWeb Technologies, LLC**
and Level 3 Communications, LLC
11 [Additional Attorneys listed below]

12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA

14 SAN JOSE DIVISION

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

CASE NO.: 5:18-md-02834-BLF

17 AMAZON.COM, INC., et al.,

18 Plaintiffs,

19 v.

20 PERSONALWEB TECHNOLOGIES, LLC, et
21 al.,

22 Defendants.

Case No.: 5:18-cv-00767-BLF

JOINT STATEMENT REGARDING DISCOVERY DISPUTE RELATING TO MOTION FOR SUMMARY JUDGMENT (DKT. NO. 315)

23 PERSONALWEB TECHNOLOGIES, LLC and LEVEL 3 COMMUNICATIONS, LLC,

24 Counterclaimants,

25 v.

26 AMAZON.COM, INC. and AMAZON WEB
27 SERVICES, INC.,

Counterdefendants.

28

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1 **I. PERSONALWEB'S STATEMENT**

2 At issue is whether the current causes of action against the Website Operators (and counter-
3 claim pleaded in the alternative against Amazon) involving CloudFront and certain specific subsys-
4 tems of S3 are barred by a prior action brought by PersonalWeb against Amazon and Dropbox in the
5 EDTX. involving other subsystems of S3. More specifically for purposes of the current discovery
6 dispute, PersonalWeb seeks discovery confirming that a predicate for claims preclusion is lacking, *i.e.*,
7 that during the period of infringement of January 8, 2012 to December 26, 2016 ("Infringement Pe-
8 riod"), Amazon was **not** "contractually obligated to indemnify defendants [website operators who
9 were customers of Amazon S3] for any losses stemming from a finding of infringement," *SpeedTrack*
10 *v. Office Depot*, 2014 WL 1813292 at *6, May 6, 2014. Amazon's summary judgment motion set for
11 hearing on February 7, 2019 recognizes the foundational nature of this issue, with its circular argu-
12 ment, the *ipse dixit* in its moving papers that "Amazon is in privity with its customers …[because]
13 Amazon is indemnifying its customers in this case." [*In re PersonalWeb Technologies*, Dkt. 315, Am-
14 azon Mot. at 9:1-2.]

15 From publicly available (on-line) Amazon records, the earliest time that Amazon *ever* had any
16 contractual obligation to indemnify S3 customers for patent infringement claims asserted against Am-
17 azon customers, is June 28, 2017. That date is *after* the Infringement Period. Emphasizing the point,
18 Amazon's consistent objection position to all of PersonalWeb's propounded discovery is that Amazon
19 *only* recognizes the time period January 8, 2012 through December 26, 2016 as triggering a disclo-
20 sure/discovery obligation. For example, Amazon's response to document requests propounded on it,
21 seeking indemnification-related documents and information is, *inter alia,* that:

22 "Amazon objects to the definition of "Indemnified" or "Indemnification" as vague and ambig-
23 uous, overly broad, unduly burdensome, and failing to describe the information sought with
24 reasonable particularity. Amazon will interpret this term to refer to the legal concept of in-
25 demnification. Amazon will interpret this term to refer to the time period of January 8, 2012
26 to December 26, 2016." [Amazon's Resp. to RFPs Set One 3:16-20.]

27 Amazon has uniformly applied this January 8, 2012-December 26, 2016 time period as a limitation to
28 nearly every written discovery request that PersonalWeb has propounded. *See e.g.* Suppl. Resp. to

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RFA 2 and S.R. 1; Resp. to RFP 3; Obj. to 30(b)(6) Notice, Topic 1(a). Clearly June 28, 2017 post-dates the Infringement Period.

PersonalWeb had sought to take a representative (30(b)(6) deposition on indemnification-related topics, among other topics. Amazon had insisted that this deposition occur last Wednesday, December 5, 2018. During the representative's deposition he indicated no knowledge on any level with any indemnification-related issues.

In meet and confers leading to this submission PersonalWeb had suggested as a compromise to a continued 30(b)(6) deposition on indemnification obligation matters, that instead, Amazon simply stipulate that (a) not until June 28, 2017 was Amazon contractually obligated to indemnify website operator customers of S3 for claims of patent infringement, and (b) prior to that time no such contractual obligation existed between Amazon and its S3 customers requiring Amazon to indemnify its S3 customers. Amazon refuses.

That Amazon has just yesterday served additional supplemental interrogatory responses indicating that there exists an Amazon Customer Agreement of June 28, 2017 which adds a section to the effect that Amazon is purportedly "improving the terms of the AWS Customer Agreement related to intellectual property rights" including "offering uncapped IP infringement protection" is not responsive to the reason for the dispute, *i.e.,* that PersonalWeb ought to be permitted to take a 30(b)(6) representative's deposition that sought information on the circumstances under which Amazon agreed to indemnify and the facts underlying Amazon's agreement to provide said indemnifications, *see,* Notice of Taking Deposition and *in particular,* Responses and Objections of Amazon.Com, Inc. and Amazon Web Services, Inc. to Notice of Taking Deposition, topics and responses to Indemnification, Topic 4, at 26-33, attached hereto as Exhibit 1 (said discovery is specifically at issue). PersonalWeb never agreed that by Amazon acknowledging what its public documents already demonstrate, *i.e.,* that there were material changes to Amazon indemnification policies in June, 2017, that would moot the discovery issues.

Amazon argues that the stipulation PersonalWeb seeks is legally impermissible. But Amazon overlooks that the proposed stipulation represents an effort to avoid another deposition session, where inquiry would be made of a corporate representative, *inter alia,* (1) What do you mean by "uncapped

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IP infringement protection"? (2) Prior to June 28, 2017 did Amazon offer "capped" IP infringement protection, and if so, what did "capped" IP infringement protection mean? (3) Prior to June 28, 2017 did Amazon offer any contractual infringement protection for patent infringement claims, to website operator customers of S3? (4) In non-privileged communications between Amazon and website operators sued, what specific interpretations did the parties convey to one another on the scope of Amazon obligations during the period of alleged infringement, namely January 8, 2012 through December 26, 2016, including indemnification extending to claims of infringement outside of Amazon systems?

The parties have met and conferred, telephonically and by e-mail, concerning the indemnification issue, on numerous instances beginning in the third week of November, 2018. The proposed order filed concurrently (a) addresses the deposition issue, (b) further extends the deadline for resolving discovery disputes if the deposition is ordered and also given sub-(c) below, and (c) advances the date of discovery responses (RFA's and Interrogatories served on December 7, 2018), attached as Exhibit 2, given the present compressed time period. Amazon wrongly claims no telephone meet and confers, despite knowing to the contrary and refusing to return multiple, recent calls.

II. AMAZON'S STATEMENT

This discovery dispute is related to Amazon's motion for summary judgment that PersonalWeb's claims are barred by claim preclusion and the *Kessler* doctrine. (Dkt. No. 306 at 1; Dkt. No. 315.) Amazon has already provided all the non-privileged indemnification-related information that PersonalWeb could possibly need in responding to Amazon's motion: (1) it produced the AWS customer agreement, (2) identified the produced agreement as the one pursuant to which it is indemnifying its customers, (3) identified the customers it is indemnifying and detailed the terms of that indemnification, (4) specified when the first indemnification demand was made in connection with PersonalWeb's claims, and (5) identified the date, June 28, 2017, when the indemnification provision was added to the customer agreement. (Exs. 3-4.) PersonalWeb claims it needs additional discovery to confirm that "Amazon was not contractually obligated to indemnify" its customers during "January 8, 2012 to December 26, 2016." But it does not explain why the identification of the agreement pursuant to which Amazon is indemnifying its customers, the date when the indemnification provision was added to that agreement, and all the terms of Amazon's indemnification, are insufficient. Nor does it

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1 explain why information such as whether indemnification is capped or uncapped is relevant to the
2 claim preclusion motion or to any issue in the case. It is not. And in any event, the AWS agreement
3 does not specify any indemnification caps.

4 It is clear from the language of PersonalWeb's proposed stipulation that what PersonalWeb
5 actually wants is an admission from Amazon that PersonalWeb's position on a disputed *legal* issue is
6 correct—it wants Amazon "to admit [PersonalWeb's] interpretation of a disputed provision of the
7 [AWS customer] contract." *Gem Acquisitionco, LLC v. Sorenson Group Holdings, LLC*, C 09-01484
8 SI, 2010 WL 1340562, at *3 (N.D. Cal. Apr. 5, 2010). The RFAs PersonalWeb just served on De-
9 cember 7, the responses to which it wants to expedite, confirm that. (Ex. 5.) Such requests, and similar
10 deposition topics, are not the proper subject of discovery. *See id.* ("legal conclusions are not a proper
11 subject of a request for admission"); *see also Franklin v. Ryko Corp.*, No. CV 07-2921-VBF (JTL),
12 2008 WL 11334493, at *4 (C.D. Cal. Oct. 22, 2008) ("The topic that plaintiff has identified in his Rule
13 30(b)(6) notice sets forth, in essence, plaintiff's legal theory. Therefore, plaintiff appears to be seeking
14 from defendant a witness who will merely affirm the theory underlying plaintiff's claims. As such,
15 the request is improper.").

16 Even setting aside PersonalWeb's incorrect characterization of what it is accusing in its current
17 cases and what it accused in its prior lawsuit against Amazon and Dropbox, PersonalWeb's position
18 above includes several other mischaracterizations of the law and relevant facts. PersonalWeb incor-
19 rectly argues that a "predicate" for Amazon's claim preclusion defense is that Amazon was contrac-
20 tually obligated to indemnify its customers during the period of alleged infringement. As explained
21 in Amazon's motion, the customer defendants, as users of the accused S3 technology, are in privity
22 with Amazon—regardless of whether they are being indemnified. (*See* Dkt. No. 315 at pp. 8-9.) Am-
23 azon's indemnification of its customers is a separate and *independent* basis for privity; it is not a nec-
24 essary predicate for the relief sought by the motion. (*See id.*) Moreover, contrary to PersonalWeb's
25 assertion, whether Amazon became "contractually obligated" to indemnify its customers before or
26 after the expiration of PersonalWeb's patents is legally irrelevant. Indemnification must, by its nature,
27 be tied to a particular claim. The AWS agreement does not provide any temporal limitation on the
28 indemnification obligation; it merely states that Amazon "will defend [its customers] against any third-

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