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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: PERSONAL WEB TECHNOLOGIES, LLC ET AL., PATENT LITIGATION AMAZON.COM, INC., and AMAZON WEB SERVICES, INC., Plaintiffs PERSONALWEB TECHNOLOGIES, LLC and LEVEL 3 COMMUNICATIONS, LLC, Defendants, PERSONALWEB TECHNOLOGIES, LLC and LEVEL 3 COMMUNICATIONS, LLC, Counterclaimants, v. AMAZON.COM, INC., and AMAZON WEB SERVICES, INC., Counterdefendants.	Case No.: 5:18-md-02834-BLF Case No. 5:18-cv-00767-BLF **REPLY IN SUPPORT OF MOTION OF AMAZON.COM, INC. AND AMAZON WEB SERVICES, INC. FOR SUMMARY JUDGMENT ON DECLARATORY JUDGMENT CLAIMS AND DEFENSES UNDER THE CLAIM PRECLUSION AND *KESSLER* DOCTRINES**

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I. INTRODUCTION

It is undisputed that the '791, '442, '310, and '544 patents were asserted in the prior Texas case. (Opp. at 4.) It is undisputed that the '420 patent, asserted in this case but not in the Texas case, is patentably indistinct from the others as a matter of law. (*See* Mot. at 4, 11.) It is undisputed that PersonalWeb asserted its patents against Amazon's Simple Storage Service (S3) in the Texas case and does so again in this Court. (Opp. at 4.) And it is undisputed that PersonalWeb consented to a final judgment dismissing the Texas case with prejudice. (Dkt. Nos. 315-7, 315-8.) Under the circumstances, it would be unprecedented, to say nothing of anathema to the very purposes of claim preclusion and the *Kessler* doctrine, to allow PersonalWeb to proceed with this vexatious and wasteful campaign against Amazon's customers. PersonalWeb's salmagundi of arguments to the contrary are either legally incorrect, factually untrue, or simply immaterial to this motion. Some are all three, as discussed below.

A. Amazon Never Agreed to Permit the Relitigation of Claims.

PersonalWeb argues that the Texas judgment shows that Amazon agreed to allow PersonalWeb "to pursue both the *identical* as well as *additional* patent infringement claims." (Opp. at 18 (emphasis in original).) But the Texas judgment says no such thing, even according to PersonalWeb. Instead, PersonalWeb urges the Court to *infer* this counterintuitive result. But courts in the Ninth Circuit may not *infer* such a result in the absence of an express agreement where, as here, to do so would undermine the application of *res judicata*. *Int'l Union of Operating Eng'rs v. Karr*, 994 F.2d 1426, 1432-33 (9th Cir. 1993) (courts may not "'supply by *inference* what the parties have failed to *expressly* provide [in a stipulation or even a settlement agreement], especially when that *inference* would suspend the application of this circuit's principles of *res judicata*'") (emphasis added, citation omitted); *see also Aspex Eyewear Inc. v. Marchon Eyewear Inc.*, 672 F.3d 1335, 1346 (Fed. Cir. 2012) ("the parties' decision to depart from the normal rules of claim preclusion by agreement 'must be express'") (citation omitted). Nor may post-hoc speculation (*see* Hadley Decl. ¶ 8) supply the want of express intent. *See Ramirez v. AvalonBay Cmtys., Inc.*, No. C 14-04211 WHA, 2015 WL 5675866, at *10 (N.D. Cal. Sept. 26, 2015) (declining to consider "inadmissible

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