

FENWICK & WEST LLP
ATTORNEYS AT LAW

1 J. DAVID HADDEN (CSB No. 176148)
dhadden@fenwick.com
2 SAINA S. SHAMILOV (CSB No. 215636)
sshamilov@fenwick.com
3 TODD R. GREGORIAN (CSB No. 236096)
tgregorian@fenwick.com
4 PHILLIP J. HAACK (CSB No. 262060)
phaack@fenwick.com
5 RAVI R. RANGANATH (CSB No. 272981)
rranganath@fenwick.com
6 CHIEH TUNG (CSB No. 318963)
ctung@fenwick.com
7 FENWICK & WEST LLP
Silicon Valley Center
8 801 California Street
Mountain View, CA 94041
9 Telephone: 650.988.8500
Facsimile: 650.938.5200

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11 Counsel for AMAZON.COM, INC., and
AMAZON WEB SERVICES, INC.

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

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

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

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

17 AMAZON.COM, INC., and AMAZON WEB
SERVICES, INC.,

18 Plaintiffs

19 PERSONAL WEB TECHNOLOGIES, LLC and
20 LEVEL 3 COMMUNICATIONS, LLC,

21 Defendants,

**REPLY IN SUPPORT OF MOTION OF
AMAZON.COM, INC. AND AMAZON
WEB SERVICES, INC. FOR SUM-
MARY JUDGMENT ON DECLARA-
TORY JUDGMENT CLAIMS AND DE-
FENSES UNDER THE CLAIM PRE-
CLUSION AND *KESSLER* DOC-
TRINES**

22 PERSONAL WEB TECHNOLOGIES, LLC and
23 LEVEL 3 COMMUNICATIONS, LLC,

24 Counterclaimants,

25 v.

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

27 Counterdefendants.
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I. INTRODUCTION

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

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

13
14 PersonalWeb argues that the Texas judgment shows that Amazon agreed to allow Person-
15 alWeb "to pursue both the *identical* as well as *additional* patent infringement claims." (Opp. at 18
16 (emphasis in original).) But the Texas judgment says no such thing, even according to Personal-
17 Web. Instead, PersonalWeb urges the Court to *infer* this counterintuitive result. But courts in the
18 Ninth Circuit may not *infer* such a result in the absence of an express agreement where, as here, to
19 do so would undermine the application of *res judicata*. *Int'l Union of Operating Eng'rs v. Karr*,
20 994 F.2d 1426, 1432-33 (9th Cir. 1993) (courts may not "'supply by *inference* what the parties have
21 failed to *expressly* provide [in a stipulation or even a settlement agreement], especially when that
22 *inference* would suspend the application of this circuit's principles of *res judicata*'") (emphasis
23 added, citation omitted); *see also Aspex Eyewear Inc. v. Marchon Eyewear Inc.*, 672 F.3d 1335,
24 1346 (Fed. Cir. 2012) ("the parties' decision to depart from the normal rules of claim preclusion by
25 agreement 'must be express'") (citation omitted). Nor may post-hoc speculation (*see* Hadley Decl.
26 ¶ 8) supply the want of express intent. *See Ramirez v. AvalonBay Cmty's, Inc.*, No. C 14-04211
27 WHA, 2015 WL 5675866, at *10 (N.D. Cal. Sept. 26, 2015) (declining to consider "inadmissible
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