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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: PERSONALWEB TECHNOLOGIES, LLC ET AL., PATENT LITIGATION	Case No. 5:18-md-02834-BLF
AMAZON.COM, INC., and AMAZON WEB SERVICES, INC., Plaintiffs, v. PERSONALWEB TECHNOLOGIES, LLC and LEVEL 3 COMMUNICATIONS, LLC, Defendants.	Case No.: 5:18-cv-00767-BLF **JOINT STATEMENT RE *ZOOM VIDEO* AND *FAB COMMERCE* CUSTOMER CASES**

In accordance with the Court's order (Dkt. 408), Amazon.com, Inc. and Amazon Web Services, Inc. (collectively, "Amazon") and PersonalWeb Technologies, LLC ("PersonalWeb") hereby submit their positions regarding the *Zoom* (Case No. 5:18-cv-05625) and *Fab Commerce* (No. 5:18-cv-03578) cases. PersonalWeb has proposed that the parties stipulate to the filing of the amended complaints attached (in redline form to show proposed changes) as Exhibits 1 and 2 to this statement for the *Fab* and *Zoom* cases. Amazon does not agree to stipulate to the filing of the proposed amended complaints.

I. AMAZON'S STATEMENT

After PersonalWeb repeatedly changed its infringement theories, this Court set a deadline of October 4, 2018 for PersonalWeb to amend its complaints in the customer cases, including the cases against Zoom and Fab Commerce, so that the pleadings would finally be settled. Dkt. No. 157 at 2. PersonalWeb's operative complaints against Zoom and Fab Commerce as of that date allege infringement by Amazon's S3. *See* Case No. 5:18-cv-05625-BLF, Dkt. No. 11 at 8 ("Defendant contracted with Amazon to use Amazon's S3 system to store and serve at least some of Defendant's CBI ETag files ("S3 asset files") on its behalf."); Case No. 5:18-cv-03578-BLF, Dkt. No. 54 at 9. The Court's order on Amazon's claim preclusion/*Kessler* motion fully adjudicated those claims. Dkt. No. 394. But instead of agreeing to entry of judgment, PersonalWeb now asks the Court for leave to amend its complaints so it can change its infringement theory yet again, this time to target CloudFront, a completely different product.

PersonalWeb cannot show good cause, as required under Rule 16, to file an amended complaint after the deadline in the scheduling order. PersonalWeb's request for leave to amend is also barred under Rule 15, including by bad faith, undue delay, prejudice, futility of the amendment, and previous amendments to the complaints. PersonalWeb's request should be denied.

A. PersonalWeb has already repeatedly changed its infringement theories to the detriment of the Court and parties.

PersonalWeb has already changed its infringement theories numerous times over the last 17 months:

- In January 2018, PersonalWeb sued Amazon's customers because they use Amazon's S3. Not only did PersonalWeb admit that its cases all involved the same theory of infringement by S3, it expressly relied on that fact to encourage the JPML to transfer its scores of cases into a single MDL proceeding before this Court.
- When Amazon moved for a preliminary injunction, PersonalWeb changed its position and claimed that it accused the use of Ruby on Rails. *See* Case No. Case No.: 5:18-cv-00767-BLF, Dkt. No. 37 at 1 ("PersonalWeb's current actions are based on the defendant website owner/operator's use of the Ruby on Rails system architecture. . . .").
- A few months later, in September 2018, PersonalWeb changed its position yet again, claiming it accused "four categories" of infringement. *See* Dkt. 96-1. PersonalWeb continued to allege infringement by Amazon S3 as one category and Ruby on Rails became part of a new "fingerprinting" theory, while two other categories involved "non-S3" theories. *Id*.

The Court then set a deadline of October 4, 2018 for PersonalWeb to amend the pleadings in the customer cases and Amazon's declaratory judgment action (Dkt. No. 157 at 2), with the expectation that this would settle the pleadings for the MDL. *See* Dkt. No. 121 at p. 27, lines 10-12 (Court explaining to PersonalWeb that it does not "know what the case it about now because you have asked me to allow you to amend everything"); p. 17, line 1 (PersonalWeb's counsel acknowledging that "it's obviously critical that the pleadings be settled"). Now that it has lost on summary judgment, PersonalWeb is attempting to change it infringement theories yet again – this time targeting Amazon's CloudFront product.

B. <u>PersonalWeb cannot show good cause to amend its complaints under Rule 16.</u>

PersonalWeb can no longer amend its complaints as a matter of right and the October 4, 2018 deadline for doing so under the scheduling order has long since passed.

Under Rule 16, "[a] schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). And even if good cause is established under Rule 16, the moving party must also demonstrate that amendment of a pleading is appropriate under Rule 15(a).

See Finjan, Inc. v. Check Point Software Technologies, Inc., No. 18-cv-02621-WHO, 2019 WL 1455333, at *2 (N.D. Cal. Apr. 2, 2019) (Rule 16 applies once a court has entered a scheduling order; "Only if the moving party establishes good cause to modify the scheduling order under Rule 16 should the court consider whether the moving party has also demonstrated that amendment is appropriate under Rule 15(a)"); *see also Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992); *EEOC v. Peter's Bakery*, No. 13-cv-04507-BLF, 2016 U.S. Dist. LEXIS 45519, at *5-*6 (N.D. Cal. April 4, 2016).

PersonalWeb cannot show good cause for filing an amended complaint almost seven months after the October 4, 2018 deadline in the scheduling order. Under Rule 16, "[g]ood cause requires diligence by the moving party." *Lancaster v. Cty. of Pleasanton*, No. 12-05267-WHA, 2013 U.S. Dist. LEXIS 131379, at *6 (N.D. Cal. Sept. 13, 2013); *see also Johnson*, 975 F.2d at 609. Here, PersonalWeb seeks to add infringement allegations based on conduct that allegedly occurred in 2013-2015 and based on information that is publicly available from http://web.archive.org. PersonalWeb does not even attempt to argue that it acted diligently. Thus, there is no excuse for PersonalWeb's failure to diligently investigate its infringement contentions and include the CloudFront allegations, if any, in its October 2018 complaints. *See Clear-View Technologies, Inc. v. Rasnick*, No. 13–cv–02744–BLF, 2015 WL 1307112, at *3 (N.D. Cal. Mar. 23, 2015) (no good cause shown where the movant knew the facts underlying the proposed amendment for over eighteen months and had multiple opportunities to assert its claims but chose not to do so) (*citing In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 737 (9th Cir.2013) ("The good cause standard typically will not be met where the party . . . has been aware of the facts and theories supporting amendment since the inception of the action").

The good cause analysis under Rule 16 also focuses "upon the moving party's reasons for seeking modification." *Johnson*, 975 F.3d at 609. Here, the reason for PersonalWeb's request is clear: the Court's summary judgment order fully adjudicates the pending claims against Zoom and Fab Commerce, and PersonalWeb is making a last-ditch effort to keep these cases in the MDL. But PersonalWeb has no standing to assert infringement by content delivery networks like CloudFront,

as Level 3 has exclusive rights in that field—*i.e.*, PersonalWeb does not even own the rights to the infringement claims it proposes to assert. And, PersonalWeb's new allegations regarding CloudFront are factually incorrect, particularly its assertion that CloudFront is being used "as the origin server" (see ¶ 37 of proposed amended Zoom complaint). Indeed, just a few months ago, in February 2019, PersonalWeb's counsel told this Court that CloudFront is an intermediate cache server, not an origin server. Feb. 28, 2019 Hearing Tr. at 32:22-33:8 ("that is what CloudFront is, an intermediate cache server"). The fact that CloudFront is not an origin server is confirmed by documents produced in this MDL. *See* AMZ_PWT 00006867 (Amazon CloudFront API Reference at 168) ("Origin . . . . the Amazon S3 bucket or the HTTP server (for example, a web server) **from which CloudFront gets your files**. You must create at least one origin.") (emphasis added); AMZ_PWT 00007900 (Amazon CloudFront Developer Guide at 3) ("How You Configure CloudFront to Deliver Your Content ¶ 1. You configure your origin servers, from which CloudFront gets your files for distribution from CloudFront edge locations all over the world.").) In the proposed amended complaints, PersonalWeb pleads that CloudFront is an origin server "on information and belief." But PersonalWeb cannot avoid Rule 11 by pleading facts it knows are false "on information and belief." PersonalWeb's reasons for seeking to amend the complaints cut against a showing of good cause.

PersonalWeb's only argument for good cause under Rule 16 is that "the type of distinctions and details involved in PersonalWeb's proposed amended complaints would not be placed in a complaint, but rather in the Infringement Contentions." PersonalWeb is wrong. At a minimum, a plaintiff must plead that "certain named and specifically identified products or product components" infringe the asserted patent so that the defendant is put on notice of the claims and the grounds upon which they rest. *Anza Technology, Inc. v. Novatel Wireless, Inc.*, No.: 3:16-cv-00585-BEN-AGS, 2016 WL 7555397, at *3 (N.D. Cal. Nov. 4, 2016); *see also Big Baboon Inc. v. SAP America, Inc.* No.17-cv-02082-HSG, 2018 WL 1400443, at *4 (N.D. Cal. Mar. 20, 2018) (conclusory allegations followed by vague references that the defendant is a "major provider" of certain products that practice the patents are insufficient to state a claim); *Continental Circuits LLC*

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