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11 Attorneys for AMAZON.COM, INC.  
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12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN JOSE DIVISION  
15

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

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

19 Plaintiffs,

20 v.

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

22 Defendants.

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

24 Counterclaimants,

25 v.

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

27 Counterdefendants.  
28

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

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

**REQUEST FOR JUDICIAL NOTICE  
IN SUPPORT OF MOTION OF  
AMAZON.COM, INC. AND AMAZON  
WEB SERVICES, INC. FOR  
JUDGMENT ON THE PLEADINGS**

Date: October 3, 2019

Time: 9:00 am.

Courtroom: 3, 5th Floor

Judge: Hon. Beth Labson Freeman

1 Amazon.com, Inc. and Amazon Web Services, Inc. (collectively “Amazon”) hereby request  
2 that the Court take judicial notice of the following materials under Federal Rule of Evidence 201:

3 1. Exhibit 1 is a true and correct copy of a License Agreement Between Kinetech, Inc.  
4 and Digital Island, Inc., dated September 1, 2000, produced in this case with Bates Nos.  
5 PERSONALWEB006795-6816.

6 2. Exhibit 2 is a true and correct copy of a February 26, 2019 stipulation filed by the  
7 parties in this action, Dkt. 369.

8 3. Exhibit 3 is a true and correct copy of an excerpt of PersonalWeb’s opposition to  
9 Amazon’s summary judgment motion in this action, Dkt. 334, Dkt. 341-18.

10 4. Exhibit 4 is a true and correct copy of the Declaration of Patrick McClory in support  
11 of PersonalWeb’s opposition to Amazon’s motion for summary judgment, Dkt. 338.

12 5. Exhibit 5 is a true and correct copy of the Declaration of Erik De La Iglesia in  
13 support of PersonalWeb’s opposition to Amazon’s motion for summary judgment, Dkt. 336.

14 6. Exhibit 6 is a true and correct copy of PersonalWeb’s sur-reply to Amazon’s  
15 summary judgment motion in this action, Dkt. 354-1.

16 7. Exhibit 7 is a true and correct copy of the complaint filed in *Digital Island, Inc. v.*  
17 *Akamai Technologies, Inc.*, No. 4:00-cv-03782-CW (N.D. Cal., filed September 13, 2000).

18  
19 **I. MEMORANDUM OF POINTS AND AUTHORITIES**

20 On a Rule 12(c) motion, as on a Rule 12(b)(6) motion, a court may consider “documents  
21 referenced extensively in the complaint, documents that form the basis of plaintiff’s claims, and  
22 matters of judicial notice when determining whether the allegations of the complaint state a claim  
23 upon which relief can be granted.” *O’Connor v. Uber Techs., Inc.*, 58 F. Supp. 3d 989, 995 (N.D.  
24 Cal. 2014) (internal citations omitted). The Court may consider each of the identified documents  
25 for the reasons described below.  
26  
27  
28

1           **A. The Court has authority to take judicial notice of the Kinetech Agreement as it**  
2           **is relied upon and referenced extensively in PersonalWeb’s pleadings.**

3           **Exhibit 1** is the licensing agreement that PersonalWeb alleges governs its and Level 3’s  
4 respective rights to the patents-in-suit. See Case No: 5:18-md-02834, Dkt. 257 (“Amended  
5 Counterclaim”), ¶¶ 1-3.

6           “[D]ocuments whose contents are alleged in a complaint and whose authenticity no party  
7 questions, but which are not physically attached to the pleading, may be considered in ruling on a  
8 Rule 12(b)(6) motion to dismiss.” *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled*  
9 *on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). The  
10 standard is the same for a Rule 12(c) motion. See *O’Connor*, 58 F. Supp. 3d at 995.

11           The complaint need not expressly incorporate the document by reference for the Court to  
12 consider it. The document is *treated* as incorporated by reference into the complaint “if the plaintiff  
13 refers extensively to the document or the document forms the basis of the plaintiff’s claim.” *United*  
14 *States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *see also; Swartz v. KPMG LLP*, 476 F.3d 756,  
15 763 (9th Cir. 2007) (a court may consider the referenced writing if the complaint relies on it and its  
16 authenticity is unquestioned). The Court may also consider the full text of such documents, even  
17 where the complaint relies on only selected portions. See *In re Copper Mountain Sec. Litig.*, 311  
18 F. Supp. 2d 857, 863 (N.D. Cal. 2004).

19           Here, PersonalWeb references and relies on the Kinetech Agreement as its basis to assert  
20 infringement of the patents in suit. See Amended Counterclaim, ¶¶ 1-3; Case 5:18-cv-05619, Dkt.  
21 13 (“Twitch Complaint”), ¶¶ 1-3. PersonalWeb produced the agreement to Amazon in discovery;  
22 the parties do not dispute its authenticity; and consideration of the full text is necessary for the  
23 Court’s evaluation of the motion. The Court should take judicial notice of the Kinetech Agreement  
24 as it is a classic example of a document incorporated into the pleadings that is properly considered  
25 here. See *Swartz*, 476 F.3d at 763; *Branch*, 14 F.3d at 454.

1           **B. The Court has authority to take judicial notice of public filings in this and other**  
2           **litigation and PersonalWeb’s judicial admissions contained in them.**

3           Under Federal Rule of Evidence 201, the Court may take judicial notice of any facts “not  
4 subject to reasonable dispute” in that they “can be accurately and readily determined from sources  
5 whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). Courts in the Ninth  
6 Circuit routinely take judicial notice of documents filed in the pending case or other litigation, as  
7 well as “other matters of public record.” *See, e.g., Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442  
8 F.3d 741, 746 n.6 (9th Cir. 2006); *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*,  
9 136 F.3d 1360, 1364 (9th Cir. 1998) (taking judicial notice of pleadings filed in California Superior  
10 Court). This includes not only noticing the fact that a document was filed, but the arguments and  
11 admissions that they reflect. *See, e.g., Reyn’s Pasta Bella*, 442 F.3d at 746 n.6 (considering the  
12 contents of court documents to determine the issues actually litigated in that case).

13           **Exhibit 2** is a joint stipulation filed by Amazon, PersonalWeb, and Level 3, in which the  
14 parties acknowledge in response to a direct request by the Court that Level 3 asserts no claims  
15 against Amazon or any other defendant in this action. This fact is not subject to reasonable dispute  
16 and is consistent with the pleadings. *See* Amended Counterclaim, ¶¶ 1-3; Twitch Complaint, ¶¶ 1-  
17 3.

18           **Exhibits 3-6** are publicly available court documents filed by PersonalWeb in this case in  
19 which it specifically represented to the Court that CloudFront is a content delivery network (CDN).

20           Exhibits 3 and 6 are briefs in which PersonalWeb made that representation. *See* Ex. 3 at  
21 4:1-13; Ex. 4 at 1:28-2:1. The Court may take judicial notice of these statements, and may bind  
22 PersonalWeb to its judicial admissions. *See Sandoval v. County of Sonoma*, No. 11-cv-05817-  
23 TEH, 2014 WL 457749, at \*2 n.3 (N.D. Cal. Jan. 31, 2014) (on motion to dismiss, taking judicial  
24 notice of plaintiff’s statement in an opposition brief) (citing *Gospel Missions of Am. v. City of Los*  
25 *Angeles*, 328 F.3d 548, 557 (9th Cir. 2003) (courts “have discretion to consider a statement made  
26 in briefs to be a judicial admission . . . binding on . . . the trial court”). Exercising the discretion to  
27 hold PersonalWeb to its word would be particularly appropriate here given PersonalWeb’s history  
28 of shifting its story.

1 Exhibits 4 and 5 are declarations sworn under penalty of perjury that PersonalWeb filed  
 2 with the Court and relied on in asserting that that CloudFront is a CDN, including one from a former  
 3 AWS Senior Consultant, and one from an expert witness. *See* Ex. 4, ¶ 12; (McClory Declaration)  
 4 (“I am familiar with an Amazon product called CloudFront, which is a content delivery network,  
 5 or CDN”); Ex. 5, ¶ 17 (de la Iglesia Declaration) (“AWS describes CloudFront as a ‘fast content  
 6 delivery network (CDN) service . . .’ I understand that CloudFront’s operation during the relevant  
 7 timeframe for infringement was substantially the same as that description.”). These are also proper  
 8 subjects of judicial notice. *Muhammad v. California*, No. C–10–01449–YGR, 2012 WL 669434,  
 9 at \*5 (N.D. Cal. Feb. 29, 2012) (taking judicial notice of records submitted under perjury in the  
 10 pending action).

11 Finally, **Exhibit 7** is a September 13, 2000 complaint filed in *Digital Island, Inc. v. Akamai*  
 12 *Technologies, Inc.*, No. 4:00-cv-03782-CW, in this District. Amazon does not offer it for the truth  
 13 of any of the allegations it contains. Instead, it reflects the parties’ course of dealing under the  
 14 Kinotech Agreement, and reflects their mutual intent that the Agreement give Digital Island, the  
 15 predecessor to Level 3, exclusive rights to enforce the patents in the field of CDNs.

## 16 **II. CONCLUSION**

17 For the foregoing reasons, Defendants respectfully request that the Court take judicial notice  
 18 of the identified materials in deciding Amazon’s motion for judgment on the pleadings.

19 Dated: April 24, 2019

FENWICK & WEST LLP

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