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10 **Attorneys for PersonalWeb Technologies, LLC**

11 UNITED STATES DISTRICT COURT  
 12 NORTHERN DISTRICT OF CALIFORNIA  
 13 SAN JOSE DIVISION

14 IN RE PERSONALWEB TECHNOLOGIES,  
 15 LLC, ET AL., PATENT LITIGATION

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

**Case No.: 5:18-cv-05619-BLF**

16 PERSONALWEB TECHNOLOGIES, LLC, a  
 17 Texas limited liability company, and  
 18 LEVEL 3 COMMUNICATIONS, LLC,  
 a Delaware limited liability company,

**PERSONALWEB TECHNOLOGIES,  
 LLC's NON-OPPOSITION TO TWITCH  
 INTERACTIVE, INC. MOTION FOR  
 SUMMARY JUDGEMENT OF  
 NONINFRINGEMENT AND PARTIAL  
 OPPOSITION TO MOTION TO  
 EXCLUDE TESTIMONY OF ERIK DE LA  
 IGLESIA**

19 Plaintiffs,

20 v.

21 TWITCH INTERACTIVE, INC. a Delaware  
 22 corporation,

23 Defendant.

Date: November 15, 2019  
 Time: 9:00 a.m.  
 Dept.: Courtroom 3, 5<sup>th</sup> Floor  
 Judge: Hon. Beth Labson Freeman

Trial Date: March 16, 2020

28

1 PersonalWeb does *not* oppose entry of judgment of noninfringement on all of its claims as set  
2 forth in Twitch’s Proposed Order, item (1) (Dkt. 542). PersonalWeb *does oppose* item (2) in the  
3 Proposed Order, precluding PersonalWeb from offering any expert witness testimony of Erik de la  
4 Iglesia at trial. PersonalWeb also *opposes* any opinion, finding or conclusion by the Court that  
5 includes that summary judgment is entered based on anything other than as a direct result of the  
6 Court’s Claim Construction Order (Dkt. 485).

7 PersonalWeb also hereby cross-moves that the Court enters judgment dismissing  
8 PersonalWeb’s claims with prejudice under Fed. R. Civ. Proc. 41(a)(2), while preserving  
9 PersonalWeb’s appellate rights. A Proposed Order for Judgment is submitted herewith.

#### 10 **I. INTRODUCTION**

11 PersonalWeb’s Proposed Order for its cross-motion under Rule 41(a)(2) is not substantively  
12 different than the order Twitch seeks. Accordingly, PersonalWeb requests that its Cross-Motion for  
13 Judgment be considered ahead of Twitch’s Motion for Summary Judgment of Noninfringement. The  
14 granting of PersonalWeb’s cross-motion for judgment would then moot Twitch’s Motion for Summary  
15 Judgment of Noninfringement.

16 After the Court’s Claim Construction Order, PersonalWeb agreed to Twitch’s request that  
17 PersonalWeb dismiss its ‘544 patent claim against Twitch with prejudice. PersonalWeb agreed to  
18 dismiss its ‘544 patent claim specifically because of the Court’s construction of the claim term  
19 “function of the one or more of part values” as “computation where the input is only the one or more  
20 part values.” In PersonalWeb’s motion to clarify, PersonalWeb also agreed to Twitch’s request that  
21 PersonalWeb dismiss the remainder of its claims against Twitch if the Court found that PersonalWeb  
22 was misreading the Claim Construction Order regarding “unauthorized or unlicensed” and  
23 “authorized,” while maintaining its rights to appeal. PersonalWeb’s motion to clarify did not apply to  
24 the claims against Amazon because while Amazon controls whether content is provided or accessed,  
25 it does so based on parameters set or controlled by its customers, not based on whether there are valid  
26 rights to any specific content; hence, the Claim Construction Order did not have identical application  
27 to Amazon. The practical effect of the parties’ communications reflects a consensus path moving  
28 forward to jointly dismiss all of PersonalWeb’s claims with prejudice subject to a subsequent

1 condition. Twitch has since reneged on accepting dismissals with prejudice and instead moved for  
2 summary judgment of noninfringement on grounds unrelated to the issues addressed in the Claim  
3 Construction Order.

4         Nonetheless, PersonalWeb does not oppose the entry of Twitch’s Proposed Order as submitted  
5 to the Court as it relates to noninfringement because it does not expressly reference Twitch’s new  
6 grounds for noninfringement. However, PersonalWeb *does* oppose Twitch’s new noninfringement  
7 grounds, *i.e.*: (1) permitting content to be provided or accessed, (2) determining whether a copy of a  
8 data file is present, or (3) comparison to a plurality of identifiers. All three of these new arguments are  
9 the subject of disputed, material facts. Moreover, none of these new grounds relates to the  
10 “unauthorized or unlicensed” issue that was the subject of PersonalWeb’s motion to clarify. Nor do  
11 any of these new grounds relate to any of the other claim terms construed in the Claim Construction  
12 Order. PersonalWeb also opposes granting summary judgment based on an exclusion of Mr. de la  
13 Iglesia’s expert report.

14         As to the substance of the new non-licensing noninfringement arguments, Twitch is now doing  
15 what it chastised PersonalWeb for purportedly doing in its motion to clarify—namely seeking a redo  
16 of claim construction. In all three of its new noninfringement arguments, Twitch asks the court to read  
17 claim language to be substantively narrower than the plain meaning of the claim language (e.g., “not  
18 permitting the content to be provided to or accessed” as “not permitting the content to be provided to  
19 or accessed *forever*,” “determining, using at least the name, whether a copy of the data file is present  
20 on at least one of said computers” as “determining, using *only* the name, whether a copy of the data  
21 file is present on at least one of said computers”; “whether a ... name ... corresponds to one of the  
22 plurality of identifiers” as a name is “*compared* to a plurality of identifiers or values”). Throughout its  
23 motion, Twitch only argues that it does not meet the limitation as it wishes it was written, not as it was  
24 actually written. As the claims are actually written, Twitch meets each of the claim limitations it raises.

25         Should Twitch’s substantive new noninfringement arguments fail, it argues a procedural  
26 gimmick that because Mr. de la Iglesia’s followed PersonalWeb’s reading of the Claim Construction  
27 Order regarding *licensing* that the Court has now explicitly rejected, the *rest* of his report, wholly  
28 unrelated to the licensing construction issue, should be excluded.

1 The Court issued its Claim Construction Order on August 16, 2019, construing the terms  
2 “unauthorized or unlicensed,” “authorized,” and “function of the one or more of part values,” among  
3 others. Twitch immediately threatened PersonalWeb with Rule 11 sanctions if PersonalWeb did not  
4 immediately dismiss its claims with prejudice. The next business day, PersonalWeb agreed to dismiss  
5 its claim regarding the ‘544 patent, but not the remaining claims. Further discussions between  
6 PersonalWeb and Twitch revealed that the parties did not read the Claim Construction Order the same  
7 way regarding “unauthorized or unlicensed” and “authorized” leading to PersonalWeb filing its  
8 motion to clarify. As this disagreement, regarding the reading of the Claim Construction Order  
9 happened days before expert reports were due, PersonalWeb’s infringement expert report was  
10 premised on its reading of the Claim Construction Order.

11 The “unauthorized or unlicensed” and “authorized” claim terms, though, only appear in one  
12 clause in one element of the asserted claims and thus affect a small portion of the overall infringement  
13 analysis. Indeed, of the 197 paragraphs in Mr. de la Iglesia’s report, only six are substantively related  
14 to the “unauthorized or unlicensed” and “authorized” issue. Accordingly, PersonalWeb is withdrawing  
15 those portions of Mr. de la Iglesia’s report. *See*, Exhibit 1, Redacted de la Iglesia Report of August 23,  
16 2019. Nonetheless, Twitch seeks exclusion of Mr. de la Iglesia’s *entire* report based on Mr. de la  
17 Iglesia’s use of PersonalWeb’s reading of the Court’s construction of “unauthorized or unlicensed”  
18 and “authorized,” while simultaneously making new noninfringement arguments that require expert  
19 testimony. Mot. at 8. Twitch is overreaching and it should not be rewarded.

20 As to the ‘544 patent, Twitch wants it both ways. First, Twitch said that submitting an expert  
21 report of infringement once the Court had ruled against PersonalWeb on claim construction would  
22 violate Rule 11. Now, Twitch says that PersonalWeb’s “failure” to submit an expert report on  
23 infringement of the ‘544 patent entitles it to summary judgment of noninfringement based on grounds  
24 that have nothing to do with the Court’s claim construction.

25 In demanding that PersonalWeb dismiss with prejudice, Twitch was necessarily also offering  
26 to stipulate to the entry of judgment as PersonalWeb could not unilaterally dismiss since Twitch had  
27 answered. After PersonalWeb agreed to Twitch’s demand regarding the ‘544 patent to halt the  
28 litigation and dismiss with prejudice, PersonalWeb ceased all discovery related solely to the ‘544

1 patent. Pursuant to the halt in litigation that Twitch demanded, and in reliance on Twitch's indicated  
2 desire for immediate dismissal, PersonalWeb did not include the '544 patent in its expert report.

3 Over a month later, Twitch first conveyed that it had reversed course and would not agree to  
4 a dismissal. Apparently, Twitch saw an opening to take advantage of PersonalWeb's acceptance of  
5 Twitch's dismissal demand for the '544 patent and not including the '544 patent in its expert reports  
6 (saving Twitch from having to rebut them). Now, based on the Twitch-induced absence of the '544  
7 patent in PersonalWeb's expert reports, Twitch is attempting to receive an essentially "default"  
8 summary judgment on brand new issues, unrelated to the Claim Construction Order. This type of  
9 gamesmanship should not be rewarded by this Court.

10 Twitch projects confidence it will win any appeal on claim construction. Yet, its anticipated  
11 reason for seeking summary judgment instead of dismissal is saving the Court from a possible remand  
12 and further appeal, which would only happen if Twitch *loses* the appeal. If Twitch *wins* the appeal,  
13 the only difference in having the Court rule on Twitch's new grounds of noninfringement is that  
14 Twitch will be able to try to use the summary judgment for issue preclusion in other cases. This is not  
15 a sufficient reason to have the Court go through the work to rule on their new noninfringement  
16 arguments that would be wasted should Twitch wins on appeal of claim construction.

## 17 **II. ARGUMENT**

18 As detailed in both the de la Iglesia report and the declaration of Erik de la Iglesia in support  
19 of and accompanying this filing ("de la Iglesia Decl."), Twitch servers choose to send HTTP 304  
20 messages which indicates to browsers operating under HTTP 1.1. protocol that they are permitted to  
21 continue to access expired Twitch webpage content in their caches when Twitch wants the browsers  
22 to keep using the cached content in rendering Twitch webpages. Twitch servers choose to send HTTP  
23 200 messages that make new content available that browsers access instead of the previously cached  
24 content when Twitch no longer wishes the browsers to use the previously cached file content in  
25 rendering Twitch webpages. Twitch uses MD5 ETags (i.e., ETag values generated by applying the  
26 MD5 hash algorithm to the file content and only the file content) in making the decision whether or  
27 not to continue to permit the browsers' access to the previously cached file content or to provide new  
28 file content for the browser to access and use instead of the previously cached file content. The MD5

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