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11 AMAZON WEB SERVICES, INC., and  
TWITCH INTERACTIVE, INC.

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TECHNOLOGIES, LLC  
[Additional Attorneys listed below]

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

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

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

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

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

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

19 Plaintiffs and Counterdefendants,

20 v.

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

**JOINT STATEMENT ON THE  
COURT'S ORDER RE SUMMARY  
JUDGMENT (DKT. 580)**

22 Defendants and Counterclaimants

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

25 Plaintiffs,

26 v.

27 TWITCH INTERACTIVE, INC.,

28 Defendant

JOINT STATEMENT ON COURT'S

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

1 On February 3, 2020, the Court granted summary judgment of non-infringement as to Ama-  
2 zon.com, Inc. and Amazon Web Services, Inc. (collectively, “Amazon”) and Twitch Interactive, Inc.  
3 (“Twitch”) in this multidistrict litigation (“MDL”) (Dkt. 578). The Court ordered the parties to  
4 provide their views on whether the Court should enter summary judgment in the remaining cases  
5 (Dkt. 580). Amazon, Twitch and PersonalWeb Technologies, LLC provide this joint statement in  
6 accordance with that order. The following parties join Amazon and Twitch’s Statement: Airbnb,  
7 Inc.; Atlas Obscura, Inc.; Atlassian, Inc.; BDG Media, Inc.; Bitly, Inc.; Blue Apron, LLC; Braze,  
8 Inc.; Brooklyn Brewery Corporation; Capterra, Inc.; Cars.com, LLC; Centaur Media USA, Inc.;  
9 Cloud 66, Inc.; Cloud Warmer, Inc.; Curebit, Inc.; Curious.com, Inc.; Dollar Shave Club, Inc.;  
10 Doximity, Inc.; E-consultancy.com, Ltd.; Fab Commerce & Design, Inc.; Fandor, Inc.; FanDuel,  
11 Inc.; FanDuel Ltd.; Fiverr International Ltd.; Food52, Inc.; Goldbely, Inc.; GoPro, Inc.; Heroku,  
12 Inc.; Hootsuite Inc.; Imgur Inc.; Intuit Inc.; Karma Mobility Inc.; Kongregate Inc.; Leap Motion,  
13 Inc.; Lesson Nine GmbH; Match Group, Inc.; Match Group, LLC; Mavenlink, Inc.; Melian Labs,  
14 Inc.; Merkle, Inc.; My Fitness Pal, Inc.; NRT LLC; NRT New York LLC; Optimizely, Inc.; Panjiva,  
15 Inc.; Peek Travel, Inc.; Quotient Technology Inc.; Reddit, Inc.; RetailMeNot, Inc.; Roblox Corpo-  
16 ration; ShareFile LLC; Shopify, Inc.; Shopify (USA) Inc.; Slack Technologies, Inc.; Spokeo, Inc.;  
17 Spongecell, Inc.; Square, Inc.; StartDate Labs, Inc.; Stitchfix, Inc.; Tastytrade, Inc.; Teespring, Inc.;  
18 Tophatter, Inc.; Treehouse Island, Inc.; Trello, Inc.; TripAdvisor LLC; UpWork Global, Inc.; Urban  
19 Dictionary, LLC; Valassis Communications, Inc.; Vimeo, Inc.; Webflow, Inc.; Wedding Wire, Inc.;  
20 WeWork Companies, Inc.; Yotpo Ltd.; Ziff Davis, LLC; and Zoom Video Communications, Inc.

21 **PersonalWeb’s Statement:**

22 The Court has ordered the parties to advise the Court of their views on whether the Court’s  
23 summary judgment order (ECF 578, “Order”) should be entered as to all remaining customer cases  
24 and judgment as to them. ECF 580. PersonalWeb Technologies, LLC’s (“PersonalWeb”) view is  
25 that judgment of non-infringement should be entered in all the remaining customer cases. However,  
26 for the reasons detailed below, even though there is at least one ground for finding non-infringement  
27 as to all the remaining customer defendants, not all grounds of the summary judgment order as it  
28

1 relates to Twitch Interactive, Inc. (“Twitch”) are applicable to the remaining customer cases as set  
2 forth below.

3 PersonalWeb is cognizant of the Court’s expectation and mindful of the representation of  
4 PersonalWeb’s counsel that the Twitch case would serve as a representative test case: “THE  
5 COURT: If I were to bring in either Twitch or Centaur Media, and there were a verdict against  
6 Personal Web that no infringement was found, would you agree that none of the customer cases  
7 could go forward because there would be findings in each of the buckets? MR. SHERMAN: Yes.”  
8 Case Management Conference (Nov. 2, 2018) Trans., 6:17-22. The Court later stated, “This gives  
9 me better hope that with a verdict, in an Amazon and customer case, that it leads you to a mediator  
10 who takes care of the case for us. I mean, that's all a bellwether ever does. A bell weather isn't binding  
11 on anybody else, I don't even think of this as a bell weather, actually, but you know, because that  
12 name means lots of different things.” *Id.* at 10:10-15.

13 PersonalWeb acknowledges that as there were findings of non-infringement for each of the  
14 four categories, judgments of non-infringement should be entered in all the remaining customer  
15 cases. Those findings for which judgments of non-infringement should be entered in favor of all  
16 customers include the Order’s findings of (1) Twitch’s non-infringement of the ‘544 patent (Section  
17 III.C. of the Order (p. 12)), and (2) permitting or allowing content to be provided or accessed and  
18 determining whether a copy of the data file is present using the name, which turn solely on the  
19 undisputed operation of computers complying with the HTTP 1.1 specification (Sections III.E.1-2  
20 of the Order (pp. 14-21)). PersonalWeb does not oppose entry of such judgments.

21 There were other findings in the Order that do not turn solely on the undisputed operation of  
22 computers complying with the HTTP 1.1 specification. The Court construed “unauthorized or unli-  
23 censed” as “not compliant with a valid license” and “authorization” as “a valid license.” Order re  
24 Claim Construction (ECF 485), at 33. As reflected in Section III.D. of the Order, the limitations  
25 including these terms as construed could not be met in the Twitch case because the license provisions  
26 of Twitch’s Terms of Service in effect during the relevant timeframe were not included in the in-  
27 fringement contentions against Twitch or in the expert report regarding Twitch’s infringement. As

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JOINT STATEMENT ON COURT'S ORDER

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1 the Court may recall, the Magistrate Judge refused to permit amendment of the infringement con-  
2 tentions to include the license provisions of Twitch’s Terms of Service – a specific procedural cir-  
3 cumstance that may not be applicable in any other case involving any other customer. The licensed  
4 nature of the website operator’s content is an issue of fact that is independent of the operation of  
5 computers complying with the HTTP 1.1 specification. As the Court noted, PersonalWeb’s non-  
6 opposition to the entry of judgment of non-infringement based on claim construction was based on  
7 the concession that the licensed nature of Twitch’s website content was not at issue *in the Twitch*  
8 *case*. Summary Judgment Order (ECF 578), at 13. PersonalWeb proffers that other website operator  
9 defendants *did* have terms of service or terms of use governing licenses in effect during the relevant  
10 timeframe providing the regulation of license[d] content consistent with the Court’s construction of  
11 “unauthorized or unlicensed” and “authorization” that could not be found to be present in the Twitch  
12 case. This is the type of fact particular to each individual case for which PersonalWeb’s counsel  
13 noted that there might be “some need for some limited and or focused/targeted discovery of some  
14 other website operator defendants.” Case Management Conference (Nov. 2, 2018) Trans., 11:1-4.  
15 Accordingly, Section III.D. of the Order should not be applied to the remaining customer defendants.

16 Another determination in the Court’s summary judgment order that does not turn on the un-  
17 disputed operation of computers complying with the HTTP 1.1 specification is Section III.E.3, in  
18 which the Court’s ruled that Twitch’s web server does not perform a comparison to a plurality of  
19 identifiers. Order at 21-23. This portion of the ruling relied on the undisputed operation of the  
20 “CloudFront/Twitch server” which involved more than the way all computers complying with the  
21 HTTP 1.1 specification operate. In Twitch, PersonalWeb’s expert examined source code for the  
22 NGINX web server, one of the types of servers used by Twitch. To the extent a customer defendant’s  
23 web server operations were performed by S3, PersonalWeb agrees that the Court’s determination  
24 regarding Twitch applies to those customer defendants. However, there are thirteen customer de-  
25 fendants who served asset files with content-based ETags outside of S3 (Category 2 defendants).  
26 ECF 295. At the time of the CMC on November 2, 2018 where the Court suggested the parties  
27 identify the representative case, PersonalWeb’s understanding was that Twitch served assets without

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JOINT STATEMENT ON COURT’S ORDER

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1 using S3, and thus was a Category 2 defendant. Moreover, Amazon and Twitch agreed that the  
2 Twitch case covered all categories. During subsequent discovery, however, PersonalWeb learned  
3 that this was not the case. Rather, Mr. Richard of Twitch testified that the assets that Twitch appeared  
4 to the public to be served without S3 were actually served by S3 in the background. James Richards  
5 Deposition, July 26, 2019 at 184:11-17. In other words, what appeared to be Category 2 activity by  
6 Twitch was actually Category 3 activity. Mr. Richard also testified that there would have been no  
7 way for a member of the public to determine that these assets were actually served by S3. As to those  
8 defendants that in fact serve assets without using S3 (what PersonalWeb believes, and continues to  
9 believe, to be the actual Category 2 defendants), there is no evidence in the record that their servers  
10 determined a match or non-match in the same way that Twitch did, *i.e.*, a one-to-one comparison.  
11 For that reason, the summary judgment order determination regarding a comparison to a plurality of  
12 identifiers as applied to Twitch may not apply to the thirteen other customers who had been identified  
13 Category 2 defendants. These defendants are: Bitly, Dollar Shave Club, Centaur Media, Imgur, In-  
14 tuit, Kongregate, Reddit, RetailMeNot, Slack Technologies, Stack Exchange, TripAdvisor, Vimeo,  
15 and MWM My Wedding Match.

16 The issue discussed in Section III.E.3 of the Order is Twitch's *noninfringement* theory that  
17 is based on the specific way the Twitch servers operated behind the scenes, raised for the first time  
18 in its summary judgment motion filed on October 4, 2019. This noninfringement theory is *not* based  
19 on anything in the HTTP 1.1 specification. The HTTP 1.1 specification states that a comparison is  
20 made, but not how it is made—and Twitch's noninfringement argument is entirely based on how a  
21 comparison is made. Twitch criticizes PersonalWeb's position here on the basis that PersonalWeb's  
22 infringement theory is based on servers operating according to the HTTP 1.1 specification. While  
23 this is true as far as it goes, Twitch's *noninfringement* theory in its moving papers and the Court's  
24 discussion in Section III.E.3 do not discuss PersonalWeb's infringement theory or HTTP 1.1. *See*  
25 ECF 540-3 at 12-13, ECF 562 at 5.

26 Twitch also criticizes PersonalWeb for not informing the Court earlier that Twitch disclosed  
27 in discovery that it did not perform any Category 2 activity. This is simply because there has not  
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