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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE PERSONAL WEB 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** **CASE NO.: 5:18-cv-05619-BLF** **DECLARATION OF MICHAEL A. SHERMAN IN SUPPORT OF PERSONALWEB TECHNOLOGIES, LLC'S OPPOSITION TO MOTION OF AMAZON WEB SERVICES, INC., AMAZON.COM, INC., AND TWITCH INTERACTIVE, INC. FOR ATTORNEY FEES AND COSTS**
PERSONALWEB TECHNOLOGIES, LLC and LEVEL 3 COMMUNICATIONS, LLC, Counterclaimants, v. AMAZON.COM, INC. and AMAZON WEB SERVICES, INC., Counterdefendants.	Date: August 6, 2020 Time: 9:00 a.m. Dept.: Courtroom 3, 5th Floor Judge: Hon. Beth Labson Freeman

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

Plaintiffs,

v.

TWITCH INTERACTIVE, INC. a Delaware corporation,

Defendant.

I, Michael A. Sherman, declare as follows:

1. I am a member of the bar of the State of California and am admitted to practice before the United States District Court for the Northern District of California. I am a partner at Stubbs Alderton & Markiles, LLP, counsel for Plaintiffs PersonalWeb Technologies, LLC ("PersonalWeb"). The facts herein are, unless otherwise stated, based upon personal knowledge, and if called upon to do so, I could, and would testify to their truth under oath. I submit this declaration in support of PersonalWeb's Opposition to Motion of Amazon Web Services, Inc., Amazon.com, Inc. and Twitch Interactive, Inc. for Attorney Fees and Costs.

2. In Spring, 2017 my firm and I were engaged to provide legal services to PersonalWeb, and at that time I began a many months-long process of communicating with Kevin Bermeister and expert patent legal counsel including Brian Siritzky, PhD, lawyers Sandeep Seth, Lawrence Hadley, Ted Maceiko and Wesley Monroe, and technical consultants/engineers working for Patbak and Dr. Samuel Russ, at various times during the time period Spring 2017 through early January, 2018, prior to the initial filings of patent infringement complaints against website operators involving the True Name patents. Initially, my role was to coordinate and oversee this effort, with input and guidance (as needed) every step of the way from one or more of these individuals as I deemed appropriate in any particular instance. By separate declarations Messrs. Bermeister, Siritzky, Seth and Monroe provide certain details over which they possess greater personal knowledge; accordingly, I set forth below in paragraphs 4-7 some of the organizational aspects surrounding the review and investigative aspects, pre-filing not covered in those other declarations.

3. As stated, I was coordinating the various activities in the pre-filing review and investigative time frame, and I oversaw those activities and regularly communicated with both Mr. Bermeister and the various professionals, and I was generally aware of everyone's activities. I have been in the practice of law 40 years and over the course of my career I have regularly represented clients in a diverse array of complex business litigation matters and have tried many cases. A true and correct copy of my bio drawn from my firm's website is attached hereto as Exhibit 1.

4. During the foregoing period I consulted with Lawrence Hadley, Esq. primarily regarding procedural aspects of the Texas action and other historical matters involved in the True

Name patents where Mr. Hadley had personal knowledge; in addition to Mr. Hadley and his firm McKool Smith (as well as a predecessor firm Hennigan Dorman, LLP) having been patent litigation counsel involving the True Name patents, Mr. Hadley and his law firm were counsel for PersonalWeb in the Texas action and other patent infringement actions. More specifically, pre-filing I consulted with Mr. Hadley on the implications of the Texas action, particularly on claim preclusion issues. I estimate that between consultations I had with Mr. Hadley on these topics and those that others on my team had and reported back to me on (those individuals primarily Messrs. Monroe and Maceiko at my direction) I knew that Mr. Hadley had expended at least approximately 25 hours on these issues with me and other team members, pre-filing. In late spring/early summer, 2017 I also hired as co-counsel Ted Maceiko, Esq. to provide additional expertise and assistance on patent litigation matters. At the time of his hiring, Mr. Maceiko was a principal in his own firm; prior, he had been a partner at Jones Day, and his practice had for many years emphasized intellectual property litigation generally and patent litigation, specifically. During the investigative, pre-filing phase, alone, I know that Mr. Maceiko expended 350 hours on investigation, diligence, analysis, preparation and review of complaints.

5. One of my duties in coordinating all attorneys and technical expert/providers was to regularly stay abreast of the actual time expended by each of them. During the pre-filing time period (January 8, 2018) the time spent by technical experts/consultants, co-counsel, and professionals working under my direction, exceeded 3,500 hours, in the aggregate.

6. The potential applicability of various preclusion principles was an important part of our pre-filing activities. In late 2017, I had become aware of attorney Rod Dorman's (Mr. Hadley's law partner) written opinion of 2014 shortly before dismissal of the Texas Action, concerning the inapplicability of certain preclusion doctrines (Mr. Dorman's written opinion is specifically referenced in paragraph 4 of Mr. Bermeister's declaration). In addition to that written opinion, PersonalWeb pursued obtaining additional opinions on the general subject, *ie.*, whether principles of *res judicata*, collateral estoppel or the *Kessler* doctrine prevented PersonalWeb from asserting patent infringement for cache control-related infringement against website operators in light of dismissal of the Texas action. I actively participated in the activities of both Mr. Monroe and Mr. Maceiko in the

analysis and opinion formulation that culminated, pre-filing in a memo that Mr. Monroe principally authored, dated January 3, 2018 – a set of conclusions that I shared with Mr. Bermeister.

7. Prior to the filing of any of the complaints that were filed in January 2018, I was familiar with the content of Dr. Russ' written opinions shared with us between January 3 and 19, 2018, and independent opinions formulated by and arrived at by Dr. Siritzky and Mr. Seth—all of which were shared with Mr. Bermeister. Our obtaining each of those opinions regarding each of the website operators sued as well as the opinions referenced in paragraph 4 were pre-conditions to PersonalWeb's filing of the subject complaints in January 2018.

8. Shortly following the filing of these initial complaints, PersonalWeb and our litigation team set about to centralize this litigation in one forum, to attempt to promote efficiency through centralization. Our papers filed before the panel on multidistrict were largely completed before its filing on February 27, 2018, which was also the first time I spoke with counsel for Amazon, David Hadden. In my first conversation with Mr. Hadden, I called to advise him of our intent to centralize this litigation and to solicit Amazon's agreement to same. Neither during that call nor at any time prior to the hearing before the Judicial Panel on Multi-District Litigation did Amazon indicate a willingness to centralize these cases, and in fact Amazon actively opposed PersonalWeb's efforts.

9. The Motion repeatedly references a PersonalWeb litigation strategy to "extract" and "coerce" "nuisance-value" settlements. (Opening Br. at 1, 2, 3, 10.) These are false statements. As the leader of our litigation team, I know that at all times I (a) opposed any strategy to maintain suit against website operator defendants who we did not believe were using content based ETags and cache control headers specifying max-age values to control and limit the use of cached content by a web browser in manners opined on by our experts to infringe, and (b) never agreed to settle – or proposed to resolve or settle – *any claims* against any website operator defendants for nuisance value/cost-of-defense amounts, and at all times I made it clear in our dealings with counsel for website operator defendants that PersonalWeb would not proceed in that fashion, but was open to entertaining a reasonable resolution that reflected a consideration of genuine risk of liability and damages, adjusted appropriately for an earlier resolution.

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