J. DAVID HADDEN (CSB No. 176148)
dhadden@fenwick.com
SAINA S. SHAMILOV (CSB No. 215636)
sshamilov@fenwick.com
MELANIE L. MAYER (admitted *pro hac vice*)
mmayer@fenwick.com
TODD R. GREGORIAN (CSB No. 236096)
tgregorian@fenwick.com
RAVI R. RANGANATH (CSB No. 272981)
rranganath@fenwick.com
CHIEH TUNG (CSB No. 318963)
ctung@fenwick.com
T.J. FOX (CSB 322938)
tfox@fenwick.com
FENWICK & WEST LLP
Silicon Valley Center
801 California Street
Mountain View, CA 94041
Telephone: 650.988.8500
Facsimile: 650.938.5200

Counsel for AMAZON.COM, INC.,
AMAZON WEB SERVICES INC., and
TWITCH INTERACTIVE, INC.

FENWICK & WEST LLP
ATTORNEYS AT LAW

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: PERSONALWEB TECHNOLOGIES, LLC ET AL., PATENT LITIGATION, AMAZON.COM, INC., and AMAZON WEB SERVICES, INC., Plaintiffs, v. PERSONALWEB TECHNOLOGIES, LLC and LEVEL 3 COMMUNICATIONS, LLC, Defendants. PERSONALWEB TECHNOLOGIES, LLC and LEVEL 3 COMMUNICATIONS, LLC, Plaintiffs, v. TWITCH INTERACTIVE, INC., Defendant.	Case No.: 5:18-md-02834-BLF Case No.: 5:18-cv-00767-BLF Case No. 5:18-cv-05619-BLF **RESPONSE OF AMAZON.COM, INC., AMAZON WEB SERVICES, INC., AND TWITCH INTERACTIVE, INC. TO SUPPLEMENTAL BRIEFING ON REASONABLENESS OF ATTORNEY FEES**

I. PERSONALWEB BASED ITS PROPOSED REDUCTIONS ON AN INCORRECT LEGAL STANDARD.

PersonalWeb devotes most of its brief to legal arguments about tying the fee award to discrete acts of litigation misconduct and limiting it to successful defense motions. These incorrect arguments would have the Court commit legal error in service of a reduced award.

Section 285 empowers the district court to award fees for an exceptional case—*i.e.*, one that "stands out from others" based on the totality of the circumstances or for specific acts of litigation misconduct. *See Octane Fitness, LLC v. ICON Health & Fitness, Inc*., 572 U.S. 545, 554 (2014). In the former circumstance, the district court can award fees from "the entire case, including any subsequent appeals." *Therasense, Inc. v. Becton, Dickinson & Co*., 745 F.3d 513, 517 (Fed. Cir. 2014) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). Indeed, the Federal Circuit has instructed that district courts should *not* rely just on "discrete acts of litigation conduct" when setting the amount of such an award. *AdjustaCam, LLC v. Amazon.com, Inc*., 2018 WL 1335308 (E.D. Tex. Mar. 18, 2018) (citing *Homeland Housewares, LLC v. Sorensen Research*, 581 Fed. App'x 877, 881 (Fed. Cir. 2014); *see also Blackbird Tech LLC v. Health in Motion LLC*, 944 F.3d 910, 918-19 (Fed. Cir. 2019) (affirming award of fees for entire case), *cert. denied*., 140 S. Ct. 2765 (2020); *Inventor Holdings, LLC v. Bed Bath & Beyond, Inc.*, 876 F.3d 1372, 1380 (Fed. Cir. 2017) (same).

This is consistent with *Goodyear Tire & Rubber Co v. Haeger*, —— U.S. ——, 137 S. Ct. 1178 (2017). *Goodyear* did not address fees awarded under a fee-shifting statute—much less one that expressly makes fees recoverable for a "case" based on a showing of exceptionality. Rather, *Goodyear* concerned fees awarded under the court's inherent power to sanction and held that in such cases the award should consist of fees incurred due to the misconduct. *Id.* at 1186; *Comm'r, I.N.S. v. Jean*, 496 U.S. 154, 161-62 (1990) ("fee-shifting statutes[] favor[]treating a case as an inclusive whole, rather than as atomized line-items"). But even if this holding is applicable, when a district court has already found *the case* exceptional, all the fees reasonably incurred in defense *of the exceptional case* satisfy the "but for" standard of *Goodyear*. The question at that point is

only how the district court will use its discretion to arrive at a reasonable award.[1]

Moreover, the grounds the Court relied on here concern conduct that goes to the case as a whole. The Court found that that the case *both* lacked "substantive strength" *and* was litigated in an "unreasonable manner." Dkt. 636 at 33. PersonalWeb brought baseless claims, frequently changed its infringement positions in order to avoid dismissal, unreasonably prolonged the case after claim construction, took unreasonable positions in the customer cases and submitted inaccurate declarations. *Id.* That conduct was pervasive—the defense fees incurred all flow from Amazon and Twitch's attempts to put an end to just that abuse. PersonalWeb's legal arguments are therefore irrelevant, and an award of the full costs of defense is appropriate.

II. THE COURT SHOULD REJECT PERSONALWEB'S PROPOSED REDUCTIONS.

PersonalWeb chose to file more than 80 patent infringement cases against Amazon's customers on claims that had already been decided. The fee request here—less than $100,000 per case—is reasonable considering the results achieved and the actual expense to defend against PersonalWeb's unreasonable conduct. But for the points of agreement addressed below, the Court should reject PersonalWeb's misguided proposed reductions to the award.

Investigation; Motion for Declaratory Judgment; Motion for Preliminary Injunction; Motions to Stay; MDL. In response to dozens of customer suits filed around the country, Amazon promptly filed a declaratory judgment complaint and moved to enjoin those cases, moved to stay the cases proceeding in other jurisdictions, and responded to PersonalWeb's attempt to circumvent that effort at the JPML. These costs relate entirely to Amazon's attempt to defend claims that the Court has already found were baseless, and to do so in the most efficient way possible. That the Court and the JPML ultimately chose to structure the proceedings differently is wholly irrelevant to whether these fees are recoverable. *See Mathis v. Spears*, 857 F.2d 749, 756 (Fed. Cir. 1988); *Phigenix, Inc. v. Genentech Inc.*, 2019 WL 2579260, at *18 (N.D. Cal. June 24, 2019) (noting that

[1] *In re Rembrandt Techs. LP Patent Litig.*, 899 F.3d 1254 (Fed. Cir. 2018) is not to the contrary. There, the Federal Circuit held the district court failed to explain how its *$51 million* fee award related to its exceptional case finding. That case cannot be read as requiring the district court to apportion fees to specific acts of misconduct, as doing so would place it in irreconcilable conflict with the line of Federal Circuit cases that hold that the reasonable cost of defense is recoverable on a finding of exceptional case. *See, e.g., Therasense* and *Homeland Housewares, supra*.

the non-prevailing party could not "cite a single case in which a court declined to award a party fees for losing on an argument, as opposed to losing on a claim"); *Monsanto Co. v. Bayer Cropscience, N.V.*, 2007 WL 1098504, at *9 (E.D. Mo. 2007) (awarding over $8 million, refusing to "divide the fee based on whether hours were spent in preparation for one legal question or another"), *aff'd*, 275 Fed. App'x 992 (Fed. Cir. 2008). Moreover, it was Amazon's declaratory judgment action and presence in the MDL that made it possible for the Court to resolve the case as efficiently as it did. And had the Court accepted PersonalWeb's proposal to have multiple customer cases go forward, the MDL proceeding would have been significantly more expensive.

Motion for Judgment on the Pleadings. PersonalWeb accused CloudFront for the first time ten months into the case—one of the changes in infringement positions that the Court found made the case exceptional. At the Court's suggestion (Dkt. 381 at 10, 27), which itself came about because PersonalWeb and Level 3 did not provide the Court with a clear answer about their respective rights to the patents, Amazon moved for judgment on the pleadings asserting that PersonalWeb lacked standing to accuse CloudFront. Again, that the Court ultimately denied the motion does not bear on whether these fees are recoverable. *See Hensley*, 461 U.S. at 435; *Mathis*, 857 F.2d at 755; *Eli Lilly & Co. v. Zenith Goldline Pharm., Inc.*, 264 F. Supp. 2d 753, 771 (S.D. Ind. 2003) (holding that, in a successful lawsuit, "reasonable efforts" leading to "some dead ends" are compensable). PersonalWeb's cited authority on this point is inapposite. *See* Supp. Br. at 5 (citing *Chamberlain Grp, Inc. v. Techtronic Indus. Co.*, 915 F. Supp. 3d 977, 1020 (N.D. Ill. 2018) (denying fees to a *non-prevailing* party that lost on appeal)).

Infringement Contentions, Invalidity Contentions, and Damages Contentions. PersonalWeb argues these costs should be excluded because Amazon did not rely on an invalidity defense, and because the other contentions relate either in whole or in part to the CloudFront claims that the Court did not find baseless as it did the S3 claims. But Amazon had to perform all this work as part of its defense of an exceptional case that the Court did find "substantively weak" and "unreasonably litigated." For example, Amazon's invalidity contentions would not have been needed at all but for PersonalWeb filing 80+ baseless lawsuits that it then unreasonably prolonged by changing its theories repeatedly. Given the case schedule, Amazon could not have avoided

drafting the contentions without waiving its defenses. Again, PersonalWeb asks the Court to take a uniquely myopic view of awardable fees and its own unreasonable conduct.

Fact Discovery and Discovery Disputes. PersonalWeb's arguments for reducing fees for fact discovery fees are unsupported. First, it asks the Court to exclude fact discovery that did not relate specifically to the baseless S3 claims, ignoring the other reasons that the Court found the case exceptional. The Court should reject that reduction for the reasons discussed above.

Next, PersonalWeb asks the Court to make a 75% reduction based on an erroneous analysis of the bills. Staffing during discovery was appropriate to the task and not "top-heavy." Partner hours account for only 19.6% of this work, over half of which were Ms. Mayer's, who defended multiple depositions and supervised fact discovery. *See* Dkt. 592-7 (Gregorian Dec.) Ex. 6; Supplemental Gregorian Declaration ("Supp. Gregorian") Ex. 18. PersonalWeb cites no authority suggesting that these hours are unreasonable or excessive; instead, it points to cases where, unlike here, attorneys "billed excessive hours for routine and duplicative work." *See, e.g.*, *Hernandez v. Taqueria El Grullense*, 2014 WL 2611214, at *2-3 (N.D. Cal. June 11, 2014).

Depositions were also reasonably staffed. PersonalWeb claims without support that it is excessive to have two attorneys attend depositions—while failing to mention that it brought at least two attorneys to *nine depositions*, and in fact staffed the depositions in this case with many more attorneys than Amazon and Twitch. Supp. Gregorian Ex. 17. Regardless, such fees are only excessive if the additional attorneys duplicate work and do not provide benefit to the client. *See Oberfelder v. City of Petaluma*, 2002 WL 472308, at *7 (N.D. Cal. Jan. 29, 2002); *see also Lopez v. S.F. Unified Sch. Dist.*, 385 F. Supp. 2d 981, 993-994 (N.D. Cal. 2005) (refusing to reduce fees for multiple attorneys present at a deposition given size and complexity of the case); *Chang v. Cnty of Santa Clara*, 2016 WL 6162460, at *9 (N.D. Cal. Oct. 24, 2016) (reducing fees where the prevailing party billed nearly $5,000 per deposition hour). PersonalWeb's other purported evidence for "overstaffing" mischaracterizes the record: (1) it assumes time billed by associates was "training time," when those attorneys took or defended the depositions in question; and (2) it includes Twitch's in house counsel and two summer associates who attended depositions but, as PersonalWeb itself acknowledges, *were excluded* from the fee request for that time. Supp.

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.