

1 MICHAEL A. SHERMAN (SBN 94783)  
 masherman@stubbsalderton.com  
 2 JEFFREY F. GERSH (SBN 87124)  
 jgersh@stubbsalderton.com  
 3 WESLEY W. MONROE (SBN 149211)  
 wmonroe@stubbsalderton.com  
 4 VIVIANA BOERO HEDRICK (SBN 239359)  
 vhedrick@stubbsalderton.com  
 5 **STUBBS ALDERTON MARKILES, LLP**  
 15260 Ventura Boulevard, 20<sup>TH</sup> Floor  
 6 Sherman Oaks, CA 91403  
 Telephone: (818) 444-4500  
 7 Facsimile: (818) 444-4520

8 Attorneys for PersonalWeb Technologies, LLC

9 UNITED STATES DISTRICT COURT  
 10 NORTHERN DISTRICT OF CALIFORNIA  
 11 SAN JOSE DIVISION

12 IN RE PERSONAL WEB TECHNOLOGIES,  
 13 LLC, ET AL., PATENT LITIGATION

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

14 AMAZON.COM, INC. and AMAZON WEB  
 15 SERVICES, INC.,

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

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

16 Plaintiffs,

17 v.

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

**PERSONALWEB TECHNOLOGIES,  
 LLC'S BRIEF IN RESPONSE TO  
 GREGORIAN DECLARATION [DKT.  
 649]**

19 Defendants.

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

21 Plaintiffs,

22 v.

23 TWITCH INTERACTIVE, INC.,  
 24 Defendant.

25  
 26  
 27  
 28

**I. INTRODUCTION**

Pursuant to the Court’s order (Dkt. 650), PersonalWeb Technologies, LLC (“PersonalWeb”) files this brief in response to Amazon.com, Inc., Amazon Web Services, Inc., and Twitch Interactive, Inc.’s (collectively, “Amazon”) supplemental fee request seeking a total of \$694,147.86 in additional attorneys’ fees for work between February 2020 and February 2021, and \$11,120.97 in costs (Dkt. 649.) Of the total fees requested, Amazon seeks \$106,291.43 in fees for 169.7 hours billed for the appeal on claim construction and Amazon’s motions for summary judgment of non-infringement, \$4,460.42 for 7.7 hours related to the motions for summary judgment for non-infringement, and \$63,978.92 for 83.1 hours billed for case management.

PersonalWeb respectfully requests that the Court deny the requested \$106,291.43 in fees relating to the appeal on claim construction and non-infringement as this appeal was not the “but for” result of the basis for the Court’s exceptionality finding. Alternatively, PersonalWeb requests that the Court postpone its ruling on this portion of the fee request because the Federal Circuit has not yet ruled on this pending appeal. PersonalWeb also requests that this Court reduce the requested \$4,460.42 in fees for work billed on the summary judgment motions for non-infringement by 25% to \$3,345.31, and reduce the requested \$63,978.92 in case management fees by 25% to \$47,984.19. These requested deductions are consistent with the Court’s ruling granting in part and denying in part Amazon’s motion for attorneys’ fees and costs. Therein, the Court recognized that fees associated with the new grounds for non-infringement did not form a basis for the exceptionality finding (Dkt. 648 at 21) and that the sought-after case management fees “require[d] a haircut” of 25%. (Dkt. 648 at 12.) The requested 25% reduction is consistent with the 25% reduction to the lodestar made by this Court to these same categories of fees incurred prior to February 2020. (*Id.* at 12:6-7, 11-12.)

**II. THIS COURT HELD THAT FEES NOT DIRECTLY TRACEABLE TO WHAT THE COURT HAS CHARACTERIZED AS PERSONALWEB’S MISCONDUCT MUST BE EXCLUDED FROM ANY ATTORNEYS’ FEE AWARD TO AMAZON**

In its order granting in part and denying in part Amazon’s Motion for Attorneys’ Fees and Costs (Dkt. 648), the Court found “that the ‘but for’ standard articulated by the Court in *Goodyear* applies, as PersonalWeb’s misconduct did not so infect the case that a full award, without any

1 discernment of a causal connection between the improper acts and the fees accrued, is warranted.”  
2 (Dkt. 648 at 7); *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178 (2017). In so holding, the  
3 Court concluded that PersonalWeb’s “conduct did not rise to ‘rampant misconduct’ affecting ‘every  
4 stage of the litigation.” (Dkt. 648 at 7 quoting *In re Rembrandt Techs. LP Patent Litig.*, 899 F.3d  
5 1254, 1279 (Fed. Cir. 2018).) The Court ruled that in applying this standard, it would “exclude  
6 requested fees not directly traceable to PersonalWeb’s egregious conduct, but [would] nonetheless  
7 continue to assess the totality of the circumstances as directed under *Octane*.” (Dkt. 648 at 7.)

8         Based on this standard applied by this Court, it should deny Amazon’s requested attorneys’  
9 fees relating to the appeal on claim construction and non-infringement as the record does not support  
10 a finding that Amazon incurred these fees in response to egregious conduct by PersonalWeb, or  
11 postpone its determination on these fees until the Federal Circuit rules on this appeal. Likewise, the  
12 Court should reduce the fees relating to Amazon’s motions for summary judgment for non-  
13 infringement by 25% because Amazon is not entitled to fees expended to argue its independent  
14 grounds for non-infringement which did not support the Court’s finding of exceptionality. A 25%  
15 reduction to the requested case management fees is also fair and warranted because the misconduct  
16 found by the Court did not so taint the case that “a full award, without any discernment of a causal  
17 connection between the improper acts and the fees accrued, is warranted.” (Dkt. 648 at 7.)

18         **1. Federal Circuit Appeal on Claim Construction and Non-Infringement** (169.7 hours -  
19         \$106,291.43)

20         This appeal stems from this Court’s February 3, 2020 order granting in part and denying in  
21 part Amazon’s summary judgment motions of non-infringement (Dkt. 578) and the Court’s claim  
22 construction order. In its order granting fees, the Court held that the “but for” standard articulated by  
23 *Goodyear* applied here, “as PersonalWeb’s misconduct did not so infect the case that a full award, without  
24 any discernment of a causal connection between the improper acts and the fees accrued, is warranted.”  
25 (Dkt. 648 at 7:4-6.) Indeed, the Court noted that “[t]aken separately, the fragments of the story might not  
26 make PersonalWeb’s conduct look exceptional.” (*Id.* at 7:9-11 quoting kt. 636 (Order Awarding Fees) at  
27 32-33. “Thus, although the Court concluded that some of PersonalWeb’s infringement claims were  
28 ‘objectively baseless and not reasonable when brought,’ Order Awarding Fees 33, its conduct did not rise

1 to “rampant misconduct” affecting “every stage of the litigation.” *Rembrandt*, 889 F.3d at 1279.” (Dkt.  
2 648, at 7:12-16.) Therefore, the Court should deny these fees as the basis for the Court’s finding of  
3 exceptionality was not the “but for” cause of this appeal. The Court recognized Amazon’s new  
4 grounds of non-infringement resulted in “the prolongation of the case at that stage” not resting “solely  
5 on PersonalWeb’s shoulders.” (Dkt. 636 at 22.) Further, the appeal is not directed to, for example,  
6 PersonalWeb’s expert reports, motion to amend its infringement contentions, or any change of  
7 positions by PersonalWeb. Alternatively, the Court should postpone its ruling on this set of fees until  
8 after the appeal is concluded. The Federal Circuit has not issued its ruling on this appeal, which  
9 remains pending. (Case No. 20-1566, Dkt. 64 (Parties submitted oral argument to Federal Circuit panel  
10 on March 1, 2021).) This is consistent with the approach this Court has previously taken regarding  
11 appellate fees sought for appeals not yet finalized. *See Phigenix, Inc. v. Genentech Inc.*, No. 15-CV-  
12 01238-BLF, 2019 WL 2579260, at \*18 (declining to award appellate fees because it was possible  
13 Phigenix would win on appeal, abrogating Genentech’s status as the prevailing party).

14       Once the Federal Circuit rules on this appeal and if the issue of attorneys’ fees is not moot as  
15 a result of the Federal Circuit’s ruling, PersonalWeb requests that it be given an opportunity to briefly  
16 address this portion of the attorneys’ fees at that time. This is necessary because PersonalWeb is  
17 appealing all grounds underlying this Court’s finding of non-infringement, including the new grounds  
18 of non-infringement raised by Amazon in its motions for summary judgment. Even if Amazon were  
19 to prevail on appeal, it should not be granted any fees associated with its new grounds of non-  
20 infringement as this Court recognized that Amazon “sought a finding of non-infringement as to all the  
21 grounds raised in their motions” so that “the prolongation of the case at that stage did not rest solely  
22 on PersonalWeb’s shoulders.” (Dkt. 636, Order re Motion for Attorneys’ Fees at 22.)

## 23       **2. Summary Judgment for Non-Infringement** (7.7 hours: \$4,460.42)

24       Similarly, Amazon should not be granted its fees associated with the new grounds of non-  
25 infringement raised in its summary judgment motions, for the same reason as set for above, *i.e.* that  
26 the Court recognized Amazon’s new grounds of non-infringement resulted in “the prolongation of the  
27 case at that stage” not resting “solely on PersonalWeb’s shoulders.” (Dkt. 636 at 22.) PersonalWeb  
28 requests that the Court apply the same 25% reduction to this portion of attorneys’ fees requested as it

1 previously did in its order granting in part and denying in part Amazon's motion for attorneys' fees,  
2 thereby reducing this category of fees by \$1,115.11 to no more than \$3,345.31. (Dkt. 648 at 21.)

3 **3. Case Management** (83.1 hours: \$63,978.92)

4 The Court previously reduced Amazon's requested case management fees by 25% and should  
5 at a minimum do so again here. (Dkt. 648 at 12:6-7, 11-12 ("Nonetheless, Amazon's request requires  
6 a haircut....the Court will reduce case management fees by 25% to reflect a fair reduction related to  
7 otherwise necessary activities.") While a certain amount of strategy discussion is admittedly necessary  
8 relating to the briefing schedule for the attorneys' fees motion and entry of judgment, a large portion  
9 of Amazon's 83.1 hours of "case management fees" includes tasks that are not attributable to the  
10 conduct the Court found exceptional. *See e.g.* Dkt. 649-1 at 16 (drafting "internal case updates"), 17  
11 (drafting an "engagement letter and [unspecified] MDL filings for new customers"), 86 ("Update  
12 Amazon's internal case tracker per [redacted] request"), and 90 ("respond to [an unspecified] request  
13 from D. Hadden"). Moreover, Amazon does not specifically identify or link its time entries to the  
14 broad catchall category of "case management" making it impossible to ascertain if Amazon is seeking  
15 fees for duplication of efforts by various time keepers, and/or if Amazon labeled the same task as both  
16 "case management" and summary judgment of non-infringement or attorney fee motion work.  
17 PersonalWeb respectfully requests that the Court reduce this set of attorneys' fees "by 25% to reflect  
18 a fair reduction" as it previously did in its order granting in part and denying in part Amazon's motion  
19 for attorneys' fees, thereby reducing this category of fees by \$15,994.73 to no more than \$47,984.19  
20 (Dkt. 648 at 12.)

21 **III. CONCLUSION**

22 Based on the foregoing, PersonalWeb respectfully requests the Court deny the fees relating to  
23 the appeal on claim construction and non-infringement (169.7 hours at \$106,291.43). Alternatively,  
24 PersonalWeb requests the Court postpone its ruling on the fees relating to the appeal on claim  
25 construction and non-infringement under the appeal has concluded and the Federal Circuit has issued  
26 its opinion. PersonalWeb further requests the Court reduce the fees attributed to Amazon's summary  
27 judgment motions on non-infringement by 25% to a total of \$3,345.31 (instead of \$4,460.42) consistent  
28 with this same lodestar reduction applied by the Court in its order granting in part and denying in part

# 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.