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7

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

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

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

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

13 AMAZON.COM, INC. and AMAZON WEB
SERVICE, INC.,
14

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

15 Plaintiffs,
16

**STUBBS ALDERTON & MARKILES,
LLP’S REPLY IN SUPPORT OF SECOND
MOTION TO WITHDRAW AS COUNSEL
FOR PERSONALWEB TECHNOLOGIES,
LLC PURSUANT TO CALIFORNIA
RULES OF PROFESSIONAL CONDUCT,
RULE 1.16(a)(2)**

17 v.

18 PERSONALWEB TECHNOLOGIES, LLC, et
al.,
19

Hearing date: June 23, 2022

Time: 9:00 a.m.

Judge: Hon. Beth Labson Freeman

20 Defendants.
21

22 PERSONALWEB TECHNOLOGIES, LLC, et
al.,
23

24 Plaintiffs,
25

26 v.

27 TWITCH INTERACTIVE, INC.,
28

Defendant.

1 **I. THIS RECEIVERSHIP DOES NOT “CALM” THE “ETHICAL WATERS”**

2 Amazon’s central point is that the receiver’s appointment means there is no conflict of interest
3 between PersonalWeb and SAM. Amazon argues that because the receiver has exclusive control over
4 PersonalWeb, SAM cannot take instruction or direction from PersonalWeb, and instead must take
5 orders and instruction only from the receiver. (Dkt. 747, 11:2-17.) There are no facts or law supporting
6 that position. Unlike a hypothetical bankruptcy trustee appointment — where the Chapter 11 trustee
7 by operation of law steps into the shoes of a debtor’s management and, as a matter of law, exercises
8 complete control over the debtor’s business — here, no such appointment has been made, and SAM
9 has no attorney-client relationship with the receiver. The order appointing receiver is artfully drawn
10 (Dkt.691-3, ¶1) to empower the receiver to participate in this lawsuit/judgment collection proceedings
11 only “*as the Receiver deems necessary*” (*id.*) with the default being if not “necessary” in the eyes of
12 the receiver, then the *status quo* (*i.e.*, PersonalWeb’s control) persists. A conflict of interest between
13 an attorney and client does not simply vanish because a receiver has discretionary authority it has not
14 exercised on behalf of the client.

15 Amazon ignores that legally a receiver is *not* an agent of a party to the action. Code of Civil
16 Procedure § 564, *et seq.*; California Rule of Court 3.1179 (“The receiver is the agent of the court and
17 not of any party”). “[A] receiver acts as a fiduciary on behalf of both parties as a representative and
18 officer of the court.” *Security Pacific National Bank v. Geernaert* (1988) 199 Cal.App.3d 1425, 1432.
19 Here, the parties stipulated to extend the briefing schedule for this Motion to allow the receiver the
20 opportunity to advise the parties on the receiver’s management of PersonalWeb and this litigation.
21 (Dkt. 740.) The receiver did not even respond, further confirming that SAM’s conflict with
22 PersonalWeb is real and persists.

23 **II. THIS MOTION IS BASED ON CHANGED CIRCUMSTANCES**

24 That the receiver and his administration has proved to be such a “paper tiger” is a remarkable
25 occurrence, and hardly a prospect that appeared on the radar one year ago. For Amazon to dismiss
26 that as “posturing” on the part of SAM is not only overly cynical, but it is also devoid of any facts.
27 SAM’s prior motion to withdraw was based, *solely*, on PersonalWeb’s termination of SAM, pursuant
28 to California Rule of Court 1.16(a)(4) — which mandated SAM’s withdrawal if “the client discharges

1 the lawyer”. (Dkt. 688, at 4:2-5, 6:17-20.) However, SAM bases this Motion on changed
2 circumstances and material new developments. In particular, SAM cannot continue to represent
3 PersonalWeb in the post-judgment proceedings pursuant to California Rule of Professional Conduct
4 1.16(a)(2) because SAM is necessarily at risk of violating Business and Professions Code § 6103
5 (providing that causes for attorney disbarment/suspension include a violation of a court order requiring
6 an attorney to do or forbear an act, or violation of duties as an attorney), California Rule of Professional
7 Conduct 1.1 (providing that “[a] lawyer shall not intentionally, recklessly, with gross negligence, or
8 repeatedly fail to perform legal services with competence”), and California Rule of Professional
9 Conduct 1.7(b) (prohibiting representation without informed consent if there is a significant risk that
10 the lawyer’s representation of the client will be materially limited by the attorney’s own interests.).

11 Further, these material new developments necessarily arose *after* the prior motion was briefed
12 in May 2021 and decided on June 25, 2021, *i.e.*, in addition to the receivership issues already
13 referenced, since this Court’s June 25, 2021 Order, PersonalWeb (1) has not permitted SAM to see to
14 it that PersonalWeb fully complied with the Magistrate Judge’s/Court’s April 27 and July 20, 2021
15 Orders compelling responses to post judgment discovery, and (2) despite threats of contempt against
16 SAM, PersonalWeb has refused to cooperate with SAM to permit it to substantively respond to a
17 January 28, 2022 email from Amazon’s counsel concerning PersonalWeb’s compliance with the
18 discovery orders compelling document production. (Dkt. 728-3, ¶¶5-8; Dkt. 728-6, ¶¶5-8) And
19 nothing that the receiver has done has in any way ameliorated or mitigated these issues.

20 The “paper tiger” quality of this receivership is illustrated in communications with the receiver
21 that occurred during the briefing on this Motion. On April 8, 2022, Michael Sherman (of SAM) sent
22 an e-mail to the receiver’s counsel, inquiring about whether the receiver was instructing SAM to fully
23 comply with the Court’s orders. (Dkt. 740.) Not having heard back from the receiver or the receiver’s
24 counsel, on April 13, 2022, Amazon and SAM entered into a Joint Stipulation re SAM’s Motion to
25 Withdraw (as Ordered by the Court on April 13, 2022), agreeing that Amazon may have additional
26 time for the filing of any briefing “to allow Robb Evans further opportunity to respond to Mr.
27 Sherman’s e-mail so that the Parties can brief the motion with a better understanding of Robb Evans’
28 position on management of PersonalWeb and the PersonalWeb collateral, *i.e.*, this litigation, and that

1 may help the Parties and the Court with resolution of the motion.” (*Id.*) There has not been any
2 substantive response by the receiver, and there is no clarity on this issue, despite specific follow-up,
3 inquiry, and request for instructions directly to the receiver’s counsel, even after that April 13 email.

4 **III. SAM’S UNCONDITIONAL WITHDRAWAL WILL NOT PREJUDICE AMAZON**

5 The Court conditionally granted the prior motion, noting that SAM’s withdrawal would present
6 undue prejudice to Amazon and would force PersonalWeb to address the issue of new representation.
7 (Dkt. 694, at 3:5-25.) That normative expectation has not been realized and Amazon does not point to
8 any “benefit” to it from SAM remaining as counsel of record. Since the Court’s June 25, 2021 Order,
9 post judgment discovery inches along with some third party subpoenas,, the judgment remains
10 uncollected, and the proceedings have not advanced in any meaningful manner — reason alone to
11 grant withdrawal and order PersonalWeb to engage replacement counsel or face the consequences.
12 Amazon cannot identify a cause-and-effect relationship as to how or why SAM being compelled to
13 remain as counsel of record will advance its judgment collection efforts. Amazon provides no specifics
14 as to how it would suffer prejudice if the Court orders SAM’s unconditional withdrawal. If the Court
15 so orders, Amazon will not be powerless, as Amazon could bring in the receiver in some fashion to
16 determine what action should be taken or to answer questions, or could seek relief and information
17 from others, including through this Court’s OSC powers. Ironically, SAM has no power over the
18 receiver, or relationship, and it is the receiver who can replace SAM at any time — yet the receiver
19 has not done so, presumably because the receiver views the stalemate as somehow beneficial.

20 Amazon also emphasizes that SAM’s conditional withdrawal is necessary to avoid prejudice
21 because PersonalWeb cannot represent itself. That is misleading. Northern District Local Rule 3-9(b)
22 provides that: “A corporation, unincorporated association, partnership or other such entity may appear
23 only through a member of the bar of this Court.” Amazon presupposes that, by operation of Rule 3-
24 9(b), SAM must represent PersonalWeb until PersonalWeb has new counsel. However, Local Rule 3-
25 9(b) does not require that an entity (such as PersonalWeb) actually participate — perhaps this explains
26 why Amazon failed to cite to the language of Local Rule 3-9(b). Indeed, as recognized in *Thomas G.*
27 *Ferruzzo, Inc. v. Superior Court* (1980) 104 Cal.App.3d 501, 504:

28 An attorney may be allowed to withdraw without offending the rule
against corporate self-representation.

1 The effect of withdrawal is to leave the corporation without
2 representation and without the ability to practice self-representation.
3 For the uncooperative corporate client who has not been willing to
4 bring in new counsel, granting of the withdrawal motion will put
5 extreme pressure on it to obtain new counsel of record for should it
6 fail to do so it risks forfeiture of its rights through non-
7 representation.

8 (*See also Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284 (stating “The ban on corporate self-
9 representation does not prevent a court from granting a motion to withdraw as attorney of record, even
10 if it leaves the corporation without representation. Such an order puts pressure on the corporation to
11 obtain new counsel, or risk forfeiting important rights through nonrepresentation.”).) These state cases
12 are directly applicable here because they are based on the same California state rule prohibiting
13 corporations from representing themselves. The net effect of an order permitting SAM’s unconditional
14 withdrawal would result either in new counsel/appearance, or PersonalWeb (and its principals)
15 suffering the consequences. In that latter scenario, Amazon would have the same rights and remedies
16 as any other judgment creditor seeking to enforce an order against the defaulting judgment debtor.

17 **IV. AMAZON IGNORES THAT SAM’S WITHDRAWAL IS MANDATORY**

18 Amazon presupposes that a “balancing test” is proper in circumstances involving mandatory
19 withdrawal, and criticizes SAM for offering what it characterizes as “conclusory assertions”
20 insufficient to determine a communications breakdown. Rule 1.16(a) is mandatory — it states that “a
21 lawyer shall not represent a client or, where representation has commenced, shall withdraw from the
22 representation...” if the “representation will result in violation of these rules or of the State Bar Act.”
23 The fact that SAM cannot terminate the representation without Court approval does not negate the fact
24 that the withdrawal is mandatory. Amazon’s Opposition does not even contain the term “mandatory”.
25 Amazon simply ignores California Rule of Professional Conduct 1.16(a) — the portion of the rule
26 governing mandatory withdrawal — as well as Business and Professions Code § 6103 and California
27 Rules of Professional Conduct 1.1 and 1.7(b). Far from offering insufficient “conclusory” statements,
28 SAM has complied with Business & Professions Code § 6068(e)(1) (stating that an attorney has the
duty “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the

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