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 TWITCH INTERACTIVE, INC.

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

15 IN RE: PERSONAL WEB TECHNOLOGIES,
 LLC ET AL., PATENT LITIGATION,

16 AMAZON.COM, INC., and AMAZON WEB
 17 SERVICES, INC.,

18 Plaintiffs

v.

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

21 Defendants.

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

24 Plaintiffs,

v.

25 TWITCH INTERACTIVE, INC.,

26 Defendant.

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

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

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

**CORRECTED JOINT STATEMENT RE
 AMAZON'S MOTION TO COMPEL
 COMPLIANCE WITH COURT ORDER
 BY PERSONALWEB TECHNOLOGIES,
 LLC; REQUEST FOR SANCTIONS**

FENWICK & WEST LLP
 ATTORNEYS AT LAW

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1 **I. AMAZON’S STATEMENT**

2 The Court twice ordered PersonalWeb to comply with Amazon’s post-judgment discovery
3 requests, including to “respond *without objection* to the interrogatories and requests for production”
4 and “produce *all documents requested* in the requests for production.” (Dkt. 704; *see also* Dkt.
5 664.)¹ After allowing its President Michael Weiss to cherry-pick a small set of documents for
6 production in August 2021, PersonalWeb refused further requests to comply and thumbed its nose
7 at the Court’s orders for over a year. (*See, e.g.*, Dkt. 728.) Over six weeks ago, in mid-August,
8 PersonalWeb’s new attorneys announced that they planned to hire a “data forensic specialist” to
9 ensure PersonalWeb’s compliance. PersonalWeb has produced exactly zero additional documents
10 since then and supplemented no interrogatory responses. Amazon seeks the Court’s assistance to
11 obtain PersonalWeb’s compliance and resolve two issues concerning the scope of production.

12 ***PersonalWeb Must Produce Documents in the Possession of Stubbs Alderton.*** First,
13 PersonalWeb refuses to search documents in the possession of the Stubbs Alderton law firm. Stubbs
14 Alderton is PersonalWeb’s agent, primary corporate counsel, and its litigation counsel for at least
15 the past four years and was involved in PersonalWeb’s efforts to evade the judgment. Such
16 documents are therefore within the scope of discovery. *See FDIC v. BayONE Real Est. Inv. Corp.*,
17 No. 15-cv-02248-BLF (SVK), Dkt. 69 at 5 (N.D. Cal. Mar. 27, 2017) (van Keulen, M.J.) (slip op.)
18 (ordering defendant to conduct a diligent search of documents within the possession of its former
19 litigation counsel and to produce any documents responsive to requests for production). There is
20 no reasonable dispute that Amazon’s post-judgment discovery sought information within
21 PersonalWeb’s possession, custody, or control, *including* documents possessed by PersonalWeb’s
22 agent and attorney Stubbs Alderton. (*See* Dkt. 689-2 at 2 (“‘PersonalWeb’ means PersonalWeb
23 Technologies, LLC, and its...agents...and attorneys...”).) The Court ruled that PersonalWeb
24 waived its objections to these requests by failing to respond to them and must therefore produce all
25 responsive documents. (Dkt. 704 at 7.) A reasonable search must include a search of documents
26 in the possession of PersonalWeb’s counsel Stubbs Alderton.

27
28

¹ All quotation emphases are added unless otherwise noted

1 ***The Court Already Ruled That PersonalWeb Waived All Objections Including Privilege.***

2 Second, PersonalWeb has indicated that it intends to again assert privilege objections that the Court
3 long ago ruled waived when PersonalWeb failed to respond to the discovery requests at issue.
4 (*Compare* Dkt. 704 (ordering that PersonalWeb must “respond *without objection* to the
5 interrogatories and requests for production”) to Dkt. 738 (because the PersonalWeb *investors* had
6 *responded to the discovery*, they were to “produce any *non-privileged, nonprotected*, responsive
7 documents”). The Court’s order was correct: it is indisputable that PersonalWeb did not timely
8 respond to the post-judgment discovery. (Dkt. 704 at 7.) And failing to respond to a discovery
9 request waives all objections thereto, including any claims of privilege. *See* Fed. R. Civ. Proc.
10 33(b)(4); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992);
11 *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981). Moreover, PersonalWeb’s counsel
12 previously *admitted* that the Court already found waived any privilege objections. (*See* Dkt. 747-
13 15 at 2 (Michael Sherman email discussing compliance with “the District Court orders *without the*
14 *assertion of any privilege claims that had been ordered waived*”).)

15 ***PersonalWeb’s Counter-Arguments Are Not Well-Taken.***

16 PersonalWeb’s primary
17 response to this motion to compel compliance is to argue that it is instead a disguised and belated
18 “motion to strike” the privilege objections that it asserted only after the Court had already found all
19 objections waived. In particular, PersonalWeb argues that Amazon should have filed the motion in
20 the six weeks after PersonalWeb served its responses and before PersonalWeb and its investors
21 began threatening Amazon with contempt sanctions in the state court action if Amazon continued
22 to pursue discovery.² That argument is as cynical as it is unserious—the Court should reject it.
23 During that time, Amazon was engaged in meet and confer efforts attempting to obtain
24 PersonalWeb’s compliance informally. Moreover, after the contempt threat, Amazon spent months
25 trying to intervene in the California Superior Court action to resolve that issue among others, and
26 while that effort was ongoing, PersonalWeb’s counsel Stubbs Alderton reported that PersonalWeb
27 had refused to allow it to take any further steps to comply with the Court’s order. The parties fought

28 ² Moreover, PersonalWeb asserted that the state court injunction barred this Court’s *pre-existing*
document discovery order and that Amazon had violated that injunction simply by asking
PersonalWeb to produce documents (*see* Dkt. 747-6), a position the Court rejected.

1 over the withdrawal for additional months. The District Judge has never suggested that a motion
2 to compel compliance would be untimely, in fact everything it has done—including ordering a
3 temporary stay requiring that Amazon *not* file such a motion until the Court’s latest order on
4 withdrawal had been addressed—suggests exactly the opposite. (*See* Dkt. 725 at 10 (“Mr.
5 Gregorian needs to seek a -- either a motion to compel or a motion for contempt, from the magistrate
6 judge.”); Dkt. 762 at 35.)

7 Given the lengths that PersonalWeb has forced Amazon to go through to obtain compliance,
8 including manufacturing the fake “conflict” with its former counsel of record, the Court should also
9 direct PersonalWeb to reimburse Amazon its reasonable attorney fees and costs incurred in
10 obtaining compliance. *See Pinterest, Inc. v. Pintrips, Inc.*, Civ. A. No. 13-CV-04608-RS (KAW),
11 2015 WL 154522, at *5-6 (N.D. Cal. Jan. 12, 2015).

12 **II. STATEMENT OF PERSONALWEB**

13 Amazon asserts that the Court, *sua sponte* and ambiguously, held that PersonalWeb has
14 waived attorney-client privilege as to 43 RFPs and ten special interrogatories (including two
15 interrogatories that specifically sought privileged information). Moreover, PersonalWeb
16 specifically objected on attorney-client privilege grounds to the two interrogatories in question over
17 a year ago, and any attempt by Amazon to compel responses without those objections is untimely.

18 PersonalWeb is in the process of collecting, via a data forensic specialist, PersonalWeb’s
19 ESI. PersonalWeb has or will produce all responsive, non-privileged documents to comply with the
20 Court’s Order and provide responses and productions to Amazon. Amazon seems to suggest, on the
21 one hand, that this production must happen immediately, and on the other hand, it must happen
22 fully. All interested parties understand that this is not possible, and PersonalWeb, through its newly-
23 retained counsel, has been in regular contact with Amazon during this process.

24 **A. PersonalWeb Has Not Waived Its Attorney-Client Privilege**

25 1. *The Parties’ Briefs and the Court Order were Silent on Privilege*

26 The sole ground upon which Amazon bases its argument that PersonalWeb has waived its
27 privilege, the Court Order (Dkt. 704), was silent on privilege. Moreover, that Order was in response
28 to a Motion to Compel (Dkt. 687) and Joint Statement (Dkt. 689), neither of which made any

1 mention of waiver of privilege or request that the Court order that PersonalWeb waived privilege.
2 The briefs and the Order were all silent on privilege and any possible waiver. Given the sanctity of
3 the attorney-client privilege, it seems unlikely that the Court held, *sua sponte* and ambiguously as
4 to privilege, that PersonalWeb waived its attorney-client privilege. This is the opposite of the
5 situation in *FDIC*, No. 15-cv-02248, Dkt. 69, in which the requesting party specifically sought an
6 order compelling a search and production of the responding party's attorney's documents (*id.* at
7 4:3-6), and the Court unambiguously compelled the same (*id.* at 5:5-10).

8 Furthermore, PersonalWeb's counsel did not concede that privilege had been waived in the
9 meet and confer process. It is plain from reading Dkt. 747-15 at 3 that Mr. Sherman is not conceding
10 that privilege has been waived, but rather requesting PersonalWeb's Receiver to confirm its position
11 on the matter and to instruct PersonalWeb's counsel how to proceed.

12 2. *Amazon's Request to Strike PersonalWeb's Objections is Untimely*

13 Amazon's request to strike PersonalWeb's attorney-client privilege objections is untimely
14 as these objections were made over a year ago, and Amazon's delay is not justified.

15 Within ten days of the Order, on July 30, 2021, PersonalWeb served its responses to
16 Amazon's RFPs and Interrogatories. PersonalWeb objected to Interrogatories 9 and 10 (the
17 "Interrogatory Responses") on the ground of attorney-client privilege, as they clearly sought
18 privileged information.³ Any motion to now challenge these objections as to these two
19 Interrogatories would be untimely. *See Unilin Beheer B.V. v. NSL Trading Corp.*, 2015 WL
20 12698283, at *3 (C.D. Cal.) (holding that a motion to compel six months after first set of
21 interrogatory responses and three months after additional responses were due was untimely).
22 Amazon's purported justification for its delay in bringing this request to have those objections
23 stricken is disingenuous. The Interrogatory Responses were served on July 30, 2021, and
24 PersonalWeb did not raise the issue of the receivership injunction until September 14, 2021, six
25 weeks later. (Dkt. 747-6 at 2.) Amazon was apparently not *too* concerned about contempt sanctions,
26 as it then challenged that very receivership stay, but only after waiting six more months. (See Dkt.

27 _____
28 ³ PersonalWeb has already agreed to supplement its Responses to Interrogatories 9 and 10 to
include all non-privileged information, if any.

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