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7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10
11 IN RE PERSONALWEB TECHNOLOGIES,
12 LLC, ET., AL., PATENT LITIGATION,

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

Case No. 5:18-cv-0767-BLF

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

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

15 Plaintiffs,

**PERSONALWEB TECHNOLOGIES,
16 LLC'S OBJECTION TO
17 AMAZON.COM INC.'S PROPOSED
18 ORDER**

19 v.

20 PERSONALWEB TECHNOLOGIES, LLC, et
21 al.,

22 Defendants.

23 PERSONAL WEB TECHNOLOGIES, LLC, et
24 al.,

25 Plaintiffs

26 v.

27 TWITCH INTERACTIVE, INC.,

28 Defendant.

One South Church Avenue, Suite 2000
Tucson, AZ 85701-1611



1 **I. INTRODUCTION**

2 Amazon.com, Inc.'s ("Amazon") Proposed Order (Dkt. 794 in 5:18-md-02834; Dkt. 338
3 in 5:18-cv-00767; and Dkt. 243 in 5:18-cv-05619) (the "Proposed Order") misrepresents the
4 Parties' agreements and terms of a bulk production; seeks production of privileged, non-
5 responsive documents; misstates and omits material meet and confer statements by PersonalWeb;
6 and omits Amazon's own refusal to meet and confer regarding production deadlines as ordered by
7 the Court. Specifically, Amazon knowingly petitions the Court for an order that would require
8 PersonalWeb to produce documents that remain protected by privilege.

9 For these and the reasons discussed below, PersonalWeb Technologies, LLC
10 ("PersonalWeb") requests that the Court reject Amazon's Proposed Order and schedule a
11 discovery conference with the Parties.

12 **II. DISCUSSION**

13 PersonalWeb produced over 120,000 documents, comprising over 600,000 pages, earlier
14 this week in advance of its deadline to produce the bulk production to which the Parties
15 stipulated.

16 PersonalWeb, through its current counsel of record, repeatedly informed Amazon that it
17 would review and produce any and all responsive documents, regardless of privilege, from the
18 remaining 57,000 documents previously withheld for review as "potentially privileged" in a
19 timely manner, per the Court's Order (Dkt. 793 at 7:7), and amend its responses to Amazon's
20 Interrogatories once reviewed. This is, as the Court and all Parties are aware, the standard method
21 of discovery review and production. This is not, as Amazon attempts to characterize it, a
22 withholding or delay, as PersonalWeb is reviewing these documents and will produce them in a
23 timely manner.

24 Rather than meet and confer with PersonalWeb as to a reasonable timeline for said review
25 and production, Amazon has taken an unreasonable stance that it is entitled to a bulk production
26 of PersonalWeb's remaining documents. To be clear, these documents withheld are the result of
27 broad keyword searches designed to narrow the population of documents for review to those
28 potentially responsive, at which point they were to be reviewed by PersonalWeb. In other words,

1 this is not a search that was designed to capture what was *likely* responsive, as that would be a
2 much narrower search and return a significantly smaller collection of documents.

3 **A. Amazon's Proposed Order Misrepresents the Parties' Agreements**

4 Amazon is in no way entitled to a bulk production. PersonalWeb was trying to find a
5 compromise for the benefit of all Parties. Since the Parties were not able to reach a common
6 understanding, PersonalWeb plans to fulfill its obligations under the Court's Order per the
7 standard course, while Amazon would rather ask the Court to force this bulk production above
8 and beyond that to which Amazon is entitled.

9 PersonalWeb's offer to Amazon, as an *alternative* to PersonalWeb's direct review and
10 production of the remaining documents, to bulk produce these documents was made on two
11 conditions.

12 First, PersonalWeb required a claw back provision for any documents produced that were
13 non-responsive and privileged, as the only privilege that the Court held PersonalWeb waived is to
14 those documents and communications responsive to Amazon's outstanding discovery. (*See* Dkt.
15 793 at 7:2-3 ["PersonalWeb has waived its attorney-client privilege and attorney work product
16 protection **regarding the subject discovery**"] [emphasis added].) Privileged documents that are
17 unresponsive to these requests remain privileged. Amazon conceded that these documents would
18 be privileged, yet has completely omitted any concern for these privileged documents in its
19 Proposed Order. Amazon is on notice, and acknowledged awareness to PersonalWeb's counsel,
20 that this bulk production is likely to produce privileged documents, and now seeks an order from
21 the Court compelling the production of these privileged documents.

22 Second, PersonalWeb conditioned this second bulk production on Amazon waiving its
23 objection regarding "reasonable inquiry" per FRCP 26(g)(1), as any such bulk production would
24 give Amazon the exact same access and burden in finding documents responsive to its
25 Interrogatories as PersonalWeb would have. This is not an issue of PersonalWeb refusing to
26 conduct such a reasonable inquiry, as it has repeatedly told Amazon that it will perform such an
27 inquiry and produce and identify those documents as warranted, but without a bulk production.
28 Rather, this is Amazon attempting to have its cake (all PersonalWeb's files now, regardless of

1 responsiveness or privilege) and eat it too (reject the substantially same burden to review and find
 2 responsive documents per FRCP33(d)¹). As conceded in Amazon’s Proposed Order,
 3 PersonalWeb would still inquire as to its agents for responsive information that they might recall
 4 or that might narrow the scope of a search for Amazon.

5 Moreover, Amazon misstates the plain language of the Parties’ Joint Stipulation (Dkt.
 6 791) regarding bulk production. Per the Joint Stipulation, Amazon agreed that “PersonalWeb will
 7 review the withheld documents through its outside counsel Lewis Roca and produce non-
 8 privileged documents and privilege logs on a rolling basis, every two weeks.” (Dkt. 791 at 3:15-
 9 17.) No part of PersonalWeb’s review of its potentially-privileged documents is conditioned on
 10 the Court’s Order holding that PersonalWeb waived privilege. Rather, the only condition of the
 11 Joint Stipulation with regard to the Court’s Order is whether responsive, privileged documents
 12 will be produced or logged. Per the Court’s Order, PersonalWeb will produce its responsive
 13 documents regardless of privilege.

14 **B. Amazon Knowingly Seeks a Court Order Demanding Production of**
 15 **Privileged, Unresponsive Documents**

16 Amazon conceded in the Parties meet and confer efforts that such a bulk production is
 17 likely to result in the production of unresponsive documents and that any privileged unresponsive
 18 documents would retain their privilege. Amazon omits any method to accommodate such
 19 productions. Rather, it is knowingly asking the Court—without disclosing to the Court—for an
 20 order that PersonalWeb to produce privileged documents.

21 **C. Amazon Violated the Court’s Order in Refusing to Meet and Confer as to “a**
 22 **Timely Manner**

23 PersonalWeb repeatedly told Amazon that it would review and produce the remaining
 24 responsive documents in a timely manner, staffing a team of associates for the review and
 25 producing documents on a rolling production. Amazon refused to consider this course of action,

26 ¹ “If the answer to an interrogatory may be determined by examining ... a party's business records
 27 (including electronically stored information), and **if the burden of deriving or ascertaining the**
 28 **answer will be substantially the same for either party**, the responding party may answer by:
 (1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating
 party to locate and identify them as readily as the responding party could; and
 (2) giving the interrogating party a reasonable opportunity to examine and audit the records and to
 make copies, compilations, abstracts, or summaries.” (emphasis added)

1 instead taking the immovable, entitled position of bulk production or Court intervention.

2 PersonalWeb’s counsel, Lewis Roca, has a team of three associates staffed and committed
3 to a minimum of 50 hours/week in reviewing these remaining documents and producing
4 responsive documents every two weeks. It is unclear if Amazon would be willing to accept this
5 proposal, as it refused to discuss any approach other than bulk production.

6 As to PersonalWeb’s prior review pace, Amazon knowingly misrepresents those numbers.
7 Amazon is specifically aware that the first 200 documents reviewed were at the outset after
8 significant collection and processing efforts to ensure a complete collection of PersonalWeb’s
9 ESI. Furthermore, PersonalWeb never got up to full speed in its review process because during
10 that entire time, the Parties were engaged in discussions regarding the initial bulk production of
11 over 120,000 documents comprising over 600,000 pages (which PersonalWeb produced ahead of
12 schedule).

13 **III. CONCLUSION**

14 Amazon’s Proposed Order must be rejected for its misrepresentations, lack of candor, and
15 attempt to obtain PersonalWeb’s non-responsive, privileged documents.

16 PersonalWeb requests a discovery conference with the Court, as Amazon refuses to meet
17 and confer in good faith on what constitutes a “a timely manner” of PersonalWeb’s production.

18
19 Dated this 4th day of November, 2022.

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