*[counsel listed in signature block]*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

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| IN RE: PERSONAL WEB TECHNOLOGIES, LLC ET AL., PATENT LITIGATION, | Case No.: 5:18-md-02834-BLF |
| AMAZON.COM, INC., and AMAZON WEB SERVICES, INC.,<br><br>Plaintiffs<br>v.<br><br>PERSONALWEB TECHNOLOGIES, LLC and LEVEL 3 COMMUNICATIONS, LLC,<br><br>Defendants. | Case No.: 5:18-cv-00767-BLF<br><br>Case No.: 5:18-cv-05619-BLF<br><br>**JOINT STATEMENT RE (1) AMAZON'S SECOND MOTION TO COMPEL COMPLIANCE WITH COURT ORDER BY BRILLIANT DIGITAL ENTERTAINMENT, INC., CLARIA INNOVATIONS, LLC, EUROPLAY CAPITAL ADVISORS, LLC, AND MONTO HOLDINGS PTY. LTD.; REQUEST FOR SANCTIONS (2) REQUEST FOR BRIEFING SCHEDULE ON COURTS SUBJECT MATTER JURISDICTION** |
| PERSONALWEB TECHNOLOGIES, LLC, and LEVEL 3 COMMUNICATIONS, LLC,<br><br>Plaintiffs,<br>v.<br><br>TWITCH INTERACTIVE, INC.,<br><br>Defendant. | |

## I. AMAZON'S STATEMENT

The Court ordered Brilliant Digital Entertainment, Inc. ("BDE"), Claria Innovations, LLC ("Claria"), Europlay Capital Advisors, LLC ("Europlay"), and Monto Holdings Pty Ltd.'s ("Monto") (collectively, "Investors") to produce by June 27, 2022 "all other responsive documents within any of their possession, custody, or control including electronic communications such as email." (Dkt. 750.) But the Investors conducted an insufficient search, allowing Mr. Bermeister, managing agent for BDE and Non-Executive Chairman of PersonalWeb, and Mr. Markiles, managing agent for Claria and Europlay and a founder of PersonalWeb, free rein to decide what documents to collect and produce. It is generally inappropriate to have clients collect documents in this manner. *See, e.g.,* Fed. R. Civ. P. 26(g) (counsel must attest that discovery response complies with federal rules "to the best of [counsel's] knowledge, information, and belief formed after a reasonable inquiry"); *Rodman v. Safeway, Inc.,* 2016 WL 5791210, at *2-4 (N.D. Cal. Oct. 6, 2016) (finding that counsel had relied unreasonably on search of ESI performed by the client). But it is particularly troubling here where the Court already found that Mr. Bermeister submitted a false declaration to the Court. (*See* Dkts. 394 & 636.) Messrs. Bermeister and Markiles are also behind PersonalWeb's attempt to evade the judgment, including refusing post-judgment discovery, firing Mr. Markiles' firm to avoid complying, and securing a state court receivership to prevent enforcement. Allowing those responsible for this misconduct to decide which documents to turn over and which to conceal (including from their own counsel, who have an obligation to disclose what has been withheld) is insufficient. The results of this process are what one would expect: Messrs. Bermeister and Markiles omitted email accounts that they used to conduct the business of Investors and PersonalWeb. The Court should order Investors to search those accounts, supervised such that counsel can represent that Investors have complied with the order to provide all responsive documents. Investors' argument that this discovery exceeds the "permissible scope" of Rule 69 ignores both that the Court *already* ordered this discovery, (Dkts. 750 & 779), and that the order was correct: there is a "presumption [] in favor of full discovery of any matters arguably related to [the creditor's] efforts to trace [the debtor's] assets and otherwise to enforce its judgement."[1]

[1] Investors concede that the Court had jurisdiction to order discovery in aid of enforcement

***Deficient Collection Process.*** Amazon has thus far identified the relevant email accounts:

| Mr. Bermeister's Email Accounts | Mr. Markiles' Email Accounts |
|---|---|
| kbermeister@brilliantdigital.com | mmarkiles@gmail.com |
| kbermeister@bde.local | mmarkiles@eca.local |
| kevberm@gmail.com | mmarkiles@ecamail.com |
| kevin.bermeister@adfreeway.com | mmarkiles@europlaycapitaladvisors.com |
| kevin@thejdfund.com | mmarkiles@stubbsalderton.com |
| kb@pweb.com | mmarkiles@biztechlaw.com |

There are two issues with Investors' email collection.[2] *First*, the collection from all accounts is deficient because Messrs. Bermeister and Markiles decided what documents to collect and produce, such that counsel is unable to attest that their clients have complied with the order.

*Second*, Europlay refused to search for documents from Mr. Markiles' Stubbs Alderton & Markiles LLP ("Stubbs") "mmarkiles@stubbsalderton.com" or "mmarkiles@biztechlaw.com" email accounts because it purportedly "does not have possession, custody, or control of emails *on Stubbs Alderton's servers*." But the documents produced to date show that Mr. Markiles used his Stubbs email accounts to conduct the business of Europlay and Claria, as the managing agent for both entities. *See Ashman v. Solectron Corp.*, 2009 WL 1684725, at *4 (N.D. Cal. June 12, 2009) ("Under Fed. R. Civ. P. 34, a party is required to produce responsive documents within its 'possession, custody or control.' Actual possession or legal ownership is not determinative. Instead, 'federal courts have consistently held that documents are deemed to be within the 'possession, custody or control' for purposes of Rule 34 if the party has…the legal right to obtain the documents on demand.'") (citation omitted). The argument that Mr. Markiles cannot access his Stubbs e-mail accounts— at his own firm, as a named partner, and in the same manner he already does routinely for Claria and Europlay—is clearly incorrect. Moreover, if this argument is accepted, it would provide parties with a way to avoid legitimate discovery—simply conduct business through another email domain. Moreover, Europlay admits that Mr. Markiles has already

Nevertheless, they contend that the Court cannot continue to enforce its order unless it first requires the parties to brief an issue not before it, *i.e.*, whether the Court would have "subject matter jurisdiction" over a request to add them as judgment debtors under Rule 69 and Code Civ. P. § 187. *See Toho-Towa Co. v. Morgan Creek Prods., Inc.*, 217 Cal. App. 4th 1096, 1100 (2013).

[2] A third issue (originally "Issue No. 2") related to Mr. Bermeister's accounts, was resolved by a further conference of counsel.

searched his personal Google account for documents residing on *Google* servers, showing that the line that Europlay has drawn is unjustified and self-serving.

***Requested Relief.*** The Court should order the Investors to produce all responsive documents from the above email accounts. "The court…may hold in contempt a person who…fails without adequate excuse to obey the subpoena or an order related to it." Fed. R. Civ. P. 45(g). Amazon requests that the Court order Investors to reimburse Amazon its fees to obtain compliance.

## II. STATEMENT OF BDE, CLARIA, AND EUROPLAY[3]

Respondents ("Third Parties") to this motion to compel third party judgment debtor discovery have spent hundreds of collective hours and produced nearly one hundred thousand pages of documents, many of which have absolutely nothing to do with whether they possess assets of the judgment debtor in this case. Amazon's demand that Third Parties boil the ocean to find more documents is inappropriate, both generally, and specifically as to the arguments made here.

The first issue—that Third Parties collected documents "without any oversight by counsel"—is flatly and demonstrably false, and Amazon knows it. Amazon cites no authority for the proposition that a nonparty subpoenaed under Rule 45 must even retain counsel in connection with a production—Rule 45 itself does not say that. Nor does Amazon cite any authority that it is improper for a represented third party to itself conduct document searches or that its counsel must personally attest to the client's efforts.

In any event, the collection was well supervised by counsel. Counsel for Third Parties discussed their supervision of their clients' search efforts in a lengthy meet and confer call with Amazon's counsel and thereafter. The written response to the subpoena served by Third Parties' counsel and the Joint Statements for the previous two motions are subject to Rules 11 and 26(g). Third Parties also served the Bermeister, Markiles, and Neumann Declarations ordered by the Court's September 12, 2022 Order (Dkt. 779) ("Order"). Amazon points to no violation of any Rule by Third Parties or their counsel or that the declarations were noncompliant with the Order. Nor has it shown the kind of "black hole" in any production, as existed in *Rodman*, 2016 WL 5791210, at *2-4, where one logically would expect to receive documents but none were produced.

[3] The motion makes no claims as to Monto

Amazon's suggestion of "need" because the District Court supposedly ruled that Bermeister previously submitted a false declaration greatly overstates that Court's ruling, which had nothing to do with discovery, PW assets or alter ego issues in any event. The assertion that Bermeister, along with Mr. Markiles,[4] "fired" the Stubbs firm for any reason, let alone to derail responding to Amazon's post judgment discovery, is based on a Stubbs representation with which Bermeister disagrees. As for Amazon's handwringing about the state court receivership, any claim of supposed impropriety is for the receivership court to determine.

Issue No. 2, Amazon's assertion that in responding to the subpoena Mr. Bermeister has refused to search "kbermeister@brilliantdigital.com" and produce responsive documents, has been resolved through further meet and confer efforts and is no longer part of this motion.

As to the third issue, it is hardly absurd that the actual entities that received the subpoenas—Europlay and Claria—lack possession custody or control of email servers belonging to a law firm with which they do not share any computer infrastructure. That a member of Europlay and Claria—Mr. Markiles, who was not personally subpoenaed—is also a partner of the firm has no bearing on *Europlay*'s *or Claria*'s right of access to the files of a different business altogether. To the extent that emails from Mr. Markiles's Stubbs Alderton account appear in the current discovery, it is because they were forwarded or copied to Mr. Markiles' ECA account, which was searched. And the analogy to gmail is facile. Google gives out email addresses and hosts email accounts for *anyone*. Stubbs Alderton does not. In any event, this appears to be a moot issue given the Court's October 31, 2022 order ordering PersonalWeb to produce documents from its counsel at the Stubbs Alderton firm.

At this point, Amazon's discovery efforts have exceeded permissible the scope of Rule 69, under which "[t]hird persons can only be examined about assets of the judgment debtor and cannot be required to disclose their own assets." *Ryan Inv. Corp. v. Pedregal de Cabo San Lucas*, 2009 WL 5114077, at *3 (N.D. Cal. Dec. 18, 2009). Amazon has all the information required to ascertain if Third Parties possess any of PersonalWeb.com's assets. Amazon perhaps intends to make a run

[4] Mr. Markiles was not a "founder" of PersonalWeb. He was a member of a company that, through a subsidiary, was one of three companies that formed PersonalWeb and now owns 10%

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