

1 Mark Holscher (SBN 139582)
2 mark.holscher@kirkland.com
3 Michael Shipley (SBN 233674)
4 michael.shipley@kirkland.com
5 KIRKLAND & ELLIS LLP
6 555 South Flower Street
7 Los Angeles, CA 90071
8 Telephone: (213) 680-8400

9 *Attorneys for Third Parties Europlay Capital*
10 *Advisors, LLC and Claria Innovations, LLC*

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

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

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

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

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

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

18 Plaintiffs

19 v.

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

**EUROPLAY CAPITAL ADVISORS,
22 LLC'S ADMINISTRATIVE MOTION
23 TO CONTINUE DECEMBER 14
24 HEARING DATE OR, IN THE
25 ALTERNATIVE, TO PERMIT
26 TELEPHONIC APPEARANCE**

27 Defendants.

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

Plaintiffs,

v.

TWITCH INTERACTIVE, INC.,

Defendant.

EUROPLAY CAPITAL ADVISORS, LLC'S
ADMINISTRATIVE MOTION TO CONTINUE

CASE NOS. 5:18-md-02834-BLF
5:18-cv-00767-BLF
5:18-cv-05619-BLF

1 Pursuant to Local Rule 7-11 third-party subpoena recipient Europlay Capital Advisors, LLC
2 (“ECA”) hereby moves for an administrative order relieving Murry Markiles of an obligation to appear
3 in person in court on December 14, 2022.

4 Amazon.com’s intransigency and lack of professional courtesy have unfortunately required ECA
5 to seek the Court’s relief to resolve a basic scheduling conflict. A witness who was ordered to appear at
6 a hearing on December 14, 2022 is unavailable on that date because he is scheduled to be out of the
7 country on a vacation that was booked and paid for well in advance of the Court’s order. Instead of
8 stipulating to a new date convenient to the Court and the parties, Amazon sought to extract substantive
9 concessions and forced ECA to file this motion.

10 On December 2, 2022, the Court issued an Order on Discovery Disputes in a long-standing
11 dispute over the scope of post-judgment discovery in the above-captioned action. (Dkt. 816). The Court
12 set a December 14, 2022 hearing and ordered personal appearances of various persons, including
13 Murray Markiles, the managing agent of third-party subpoena recipient Europlay Capital Advisors, LLC
14 (“ECA”).

15 Unfortunately, Mr. Markiles is scheduled to be out of the country in Mexico on a pre-paid group
16 vacation from December 11 to December 18, 2022. Markiles Dec. ¶ 1. The vacation was booked in
17 September, at a time when Mr. Markiles had no reason to believe that the Court would be setting a live
18 in-person hearing during that week. *Id.* ¶ 4. Given the late date, the time for Mr. Markiles to receive full
19 refunds for his airfare and accommodations has long since passed. *Id.* ¶ 2.

20 Forcing Mr. Markiles—who is neither a party nor employed by any party in this action—to
21 cancel a pre-planned and pre-paid vacation would cause an unnecessary hardship and baselessly impose
22 substantial expense. Mr. Markiles resides in Los Angeles. *Id.* ¶ 6. Requiring him to appear in San Jose
23 on December 14 would also run afoul of the geographic limitations under Rule 45. *See* Fed. Code Civ.
24 Proc. § 45(a)(1)(B)(ii) (non-party witness cannot be forced to attend trial more than 100 miles from his
25
26

1 residence if it would require him to “incur substantial expense”).¹ ECA therefore respectfully requests
 2 that the Court: (a) reschedule the in-person hearing for a date after December 18, 2022, whether in the
 3 following week of December or in early January; or (b) permit Mr. Markiles to appear telephonically.
 4 Mr. Markiles could also make himself available for a remote hearing this week if that would prove
 5 suitable to the Court and the parties.

6 Promptly after the Court issued its order, counsel for ECA contacted the other parties and third
 7 parties regarding the potential to stipulate to the relief sought herein. *See* Shipley Decl ¶¶ 3-7 & Ex. A.
 8 Counsel for Brilliant Digital Entertainment and counsel for PersonalWeb.com indicated that they do not
 9 object to the relief sought herein, but noted scheduling conflicts during the week of December 26, 2022.
 10 Shipley Decl. ¶ 3 & Ex. A. Counsel for Amazon, however, declined to agree and sought instead to
 11 extract substantive concessions regarding its discovery disputes with PersonalWeb’s former counsel at
 12 Stubbs Alderton—an entity over which neither ECA nor Mr. Markiles have any control. *Id.* Ex. A.

13 Notably, counsel for Amazon failed to identify any concrete prejudice that would be caused were
 14 the Court to grant the scheduling relief requested by ECA. *Id.* Counsel asserted only vaguely that
 15 moving the hearing date into the following week would affect “the pre-paid plans of others.” These
 16 “others” are not identified and the dates and nature of their conflicts go unmentioned. Crucially, the
 17 Court did not order the appearance of any client or potential factual witness to appear and give
 18 testimony on Amazon’s behalf, so the “others” could be members of Amazon’s legal team whose
 19 appearance may be unnecessary to the progress of the hearing. Amazon has further provided no basis
 20 why, if there were true conflicts the following week, it or any other party would be prejudiced by
 21
 22

23 ¹ ECA notes that Rule 45(c)(1)(B)(ii) has been read by courts of this district as limited to compelled
 24 appearances *at trial*, and not at other hearings. *Kinney v. Chomsky*, 2014 WL 3725932, at *4 (N.D. Cal.
 25 July 25, 2014) (Although witnesses who live in Los Angeles “are subject to compulsory process to
 26 compel their testimony at a trial in the Northern District, *see* Fed. R. Civ. P. 45(c)(1)(B)(ii), they are not
 27 subject to compulsory process to compel their testimony at a deposition or hearing in the Northern
 District because Los Angeles is more than 100 miles away, *see* Fed. R. Civ. P. 45(c)(1)(A).”)
 Notwithstanding that limitation, Mr. Markiles does not object to appearing personally in San Jose, but
 notes only that being required to do so on December 14, 2022, would cause unnecessary financial
 expense.

1 waiting to resolve these issues until early January, after the holidays and all of their attendant scheduling
2 conflicts.

3 Scheduling matters are afforded to the Court's sound discretion and can be modified on a
4 showing of good cause. Fed. R. Civ. P. 16(b)(4). The Court's ability to permit remote testimony by
5 contemporaneous transmission from a remote location is similarly within the Court's discretion and
6 subject to a good-cause justification. Fed. R. Civ. P. 43(a).

7 Good cause is shown here. Given (1) that Mr. Markiles is not a party or an officer of any party in
8 this action; (2) that Mr. Markiles's vacation was planned and paid for prior to the Court setting the
9 December 14, 2022 hearing; (3) that cancelling the vacation would subject Mr. Markiles to significant
10 financial expense; (4) that Amazon and its counsel have made no showing that they would be prejudiced
11 by a short continuance or by permitting Mr. Markiles to appear remotely; and (5) that ECA acted
12 quickly upon the Court's order to seek the relief sought herein, good cause has been satisfied. The
13 motion should be granted.

14 Dated: December 6, 2022

Respectfully submitted,

16 /s/ Michael Shipley

17 Mark Holscher (SBN 139582)
18 mark.holscher@kirkland.com
19 Michael Shipley (SBN 233674)
20 michael.shipley@kirkland.com
21 KIRKLAND & ELLIS LLP
22 555 South Flower Street
23 Los Angeles, CA 90071
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