555 California Street
12th Floor
San Francisco, CA 94104

415.875.2300
Fenwick.com

Todd R. Gregorian
tgregorian@fenwick.com | 415.875.2402

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Hon. Susan van Keulen
United State District Court for the
Northern District of California
San Jose Courthouse, Courtroom 6 – 4th Floor
280 South 1st Street, San Jose, CA 95113

Re: *In Re: PersonalWeb Technologies, LLC et al,* No. 5:18-md-02834-BLF

Dear Judge van Keulen

I write on behalf of Amazon.com, Inc., Amazon Web Services, Inc., and Twitch Interactive, Inc. ("Amazon") in response to the letter submitted by Stubbs, Alderton & Markiles, LLP ("SAM") (Dkt. No. 843).

SAM's letter states that it has refused to produce 18,000 documents that are responsive to the Court's discovery orders. Each of the three stated justifications (*see* Dkt. 843 at 2) for withholding these reams of documents is problematic and the sheer volume of materials withheld raises serious questions about SAM's compliance.

First, SAM states that it is withholding 2,500 documents that it has designated as not the property of PersonalWeb or belonging to other firm clients. The problem here is that these are admittedly documents responsive to the post-judgment discovery and the Court's orders—*i.e.*, they concern *PersonalWeb's* assets, transfers, agreements, etc. SAM has not identified any of the other clients who it claims "own" these documents about PersonalWeb, but the likely entities about whom SAM would make such a claim are closely-related shell entities—like Brilliant Digital Entertainment, Inc. ("BDE"), Claria Innovations, LLC ("Claria"), and Europlay Capital Advisors LLC ("ECA"), among others—who share overlapping membership with PersonalWeb and SAM itself. For example, Mr. Bermeister is the chairman of both PersonalWeb and BDE. Amazon is seriously concerned that SAM is playing a shell game—*e.g.*, that it is taking communications to Mr. Bermeister about *PersonalWeb's* assets, transfers, agreements, etc., and classifying them post-hoc as advice provided to BDE.

Second, SAM states that it is withholding 9,700 documents that it has determined are "work product not shared with PersonalWeb's directors, officers or employees." PersonalWeb's waiver does not encompass its counsel's uncommunicated work product. *See Staley v. Gilead Sci., Inc.*, No. 19-cv-02573, 2022 WL 1836820, at *6 (N.D. Cal. June 3, 2022) (slip op.) ("Teva is not required to produce protected work product from outside counsel that was not communicated to Teva and does not reference any communication with Teva.") But here, SAM has not represented to the Court that these 9,700 documents are in fact work product that was not shared with the client or a third party. Instead, it provided the Court with an artfully worded response that potentially carves out individuals, for example Mr. Markiles of Claria and ECA, whose receipt would place

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the documents within the scope of the waiver. *See Hartford Fire Ins. Co. v. Garvey,* 109 F.R.D. 323, 328 (N.D. Cal. 1985).

Third, SAM is withholding 5,800 documents that are supposedly the product of ECA, an entity run by SAM named partner Murray Markiles, providing outside litigation consulting services to SAM itself *about* PersonalWeb and its assets. In SAM's letter, Mr. Gersh provides no information about these supposed consulting services other than that they are "confidential," no information about who at ECA (apparently a shell litigation investment vehicle) provided them, and no evidence that they were secured for SAM independently rather than on behalf of PersonalWeb and its chairman, principal, and investor Mr. Bermeister. Indeed, Mr. Gersh does not commit to any hard facts whatsoever, instead reporting that "we understand" that ECA provided such services "over the years." Without more information, the withholding of thousands upon thousands of documents on this ground reeks of post-hoc tinkering with the facts to avoid production.

Amazon therefore respectfully requests that the Court order SAM to log the documents that it is withholding to clarify the above issues. While that does impose some additional temporary burden on SAM, that burden arises from SAM's own creation of a constellation of shell entities to serve the same principals and shield them and PersonalWeb from ever having to pay an adverse judgment.

Finally, while SAM asserts that its obligations to PersonalWeb and the Court should cease, the Court nevertheless has continuing jurisdiction over SAM as PersonalWeb's former counsel of record in this litigation. *See Optrics Inc. v. Barracuda Networks Inc*., No. 17-cv-04977, 2020 WL 1815690, at *3 (N.D. Cal. Feb. 28, 2020) ("The Court [] will retain ancillary jurisdiction over the movants for purposes of the motion for sanctions."). The Court has also expressly suggested (without taking a position) that Amazon may seek sanctions against SAM in addition to PersonalWeb. Dkt. No. 725 (1/20/22 Hearing Tr.) at 10:6-8 (Court to Mr. Sherman (SAM): "Amazon can ask for sanctions against your firm and PersonalWeb, or just PersonalWeb, that's up to them to frame the request for relief."); *see also* Dkt. No. 742-1, ¶ 15. Moreover, in permitting the withdrawal of SAM as counsel for PersonalWeb, the Court specifically stated that Amazon's rights with respect to pending discovery disputes would not be affected. Dkt. No. 784 at 2 ("WHEREAS, the Parties have pending discovery disputes…and whether the Court should order any relief directly against Stubbs Alderton Markiles, neither of which will be affected by the current stipulation (*i.e.*, PersonalWeb and Amazon will not be deemed to have waived any right to relief by entering into this Stipulation)").

Sincerely,

FENWICK & WEST LLP

/s/ Todd R. Gregorian

Todd R. Gregorian

TRG:jat

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