Mark Holscher (SBN 139582)
mark.holscher@kirkland.com
Michael Shipley (SBN 233674)
michael.shipley@kirkland.com
Matthew Gamsin (SBN 307830)
matthew.gamsin@kirkland.com
KIRKLAND & ELLIS LLP
555 South Flower Street
Los Angeles, CA 90071
Telephone: (213) 680-8400

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

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

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

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

Plaintiffs

v.

PERSONALWEB TECHNOLOGIES, LLC and LEVEL 3 COMMUNICATIONS, LLC,

Defendants.

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

Plaintiffs,

v.

TWITCH INTERACTIVE, INC.,

Defendant.

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

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

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

EUROPLAY CAPITAL ADVISORS, LLC'S AND CLARIA INNOVATIONS, LLC'S OPPOSITION TO "ADMINISTRATIVE MOTION" FOR RELIEF FROM PROTECTIVE ORDER

In the evening, on Wednesday, March 8, 2023, the Amazon parties filed a motion, styled as an administrative motion under Local Civil Rule 7-11, to modify the protective order in this litigation. Amazon asks the Court to permit it to use certain documents produced in post-judgment discovery to defend against anti-SLAPP motions that Europlay, Claria, and the other Secured Creditors filed in the state court receivership action pending in Los Angeles Superior Court.

The motion should be denied, for a number of reasons. It is procedurally improper to bring a discovery motion under L.R. 7-11. Amazon appears to have done so to get extra pages it uses on irrelevant "Background" in an effort to prejudice the Secured Creditors with the Court as to some future alter ego litigation. And in any event, the motion aims to subvert a discovery stay in the receivership case, an improper basis to obtain relief under settled Ninth Circuit law.

A. This Motion Is Not a Proper Administrative Motion.

Merits aside, modifying a protective order is an inappropriate subject for an administrative motion. Administrative motions are limited to "miscellaneous administrative matters, not otherwise governed by a federal statute, *Federal Rule*, local rule, or *standing order of the assigned Judge*." N.D. Cal. L. Civ. R. 7-11 (emphasis added). As the key case cited by Amazon makes evidently clear, motions to modify protective orders for use of discovery materials in collateral cases are discovery motions governed by Rule 26(c). *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003). And the Court's Civil and Discovery Matters Standing Order includes a detailed set of procedures for briefing discovery motions. § 8. As this motion is "governed by a . . . Federal Rule [and a] standing order of the assigned Judge," it is procedurally improper. N.D. Cal. L. Civ. R. 7-11.

It appears that Amazon's choice of an administrative motion is an effort to evade the page and exhibit restrictions in the Court's Standing Order. Doing so permitted it to include two full pages of "Background" that has essentially nothing to do with its request, seemingly for the purpose of dirtying up the Secured Creditors or having the Court pre-judge some future alter ego claim. (A claim that the Court doesn't even have subject matter jurisdiction to consider. *See Peacock v. Thomas*, 516 U.S. 349, 351 (1996) (ancillary jurisdiction does not reach effort to add new debtor to judgment); *Thomas, Head & Greisen Emps. Trust v. Buster*, 95 F.3d 1449, 1455 (9th Cir. 1996) (Rule 69 does not extend ancillary jurisdiction); *U.S.I. Props. Corp. v. M.D. Const. Co.*, 230 F.3d 489, 498 (1st Cir. 2000) (ancillary

jurisdiction cannot be used to add additional judgment debtor to a judgment using Rule 69 procedures)).[1] Amazon's fervent desire to make examples of its adversaries in order to deter other patent holders from pressing their rights is not a license for it to play by its own rules.

B. Amazon's "Background" Discussion Is Misleading and Legally Wrong.

Several of the inflammatory and false characterizations in Amazon's brief can't go unanswered.

First, the receivership action is not, and has never been, the sinister "scheme" Amazon posits it to be. Mot. at 2. No order requires the receiver to "run PersonalWeb specifically for the benefit of the investors[.]" *Id*. Indeed, such an order would be contrary to the very nature of a receiver—a neutral agent of the court with a fiduciary duty to "act for the benefit of all parties interested in the property" of the entity in receivership. *City of Chula Vista v. Gutierrez*, 207 Cal. App. 4th 681, 685 (2012); Cal. R. Ct. 3.1179(a). And acts that Amazon breathlessly describes as if they were criminal are expressly permitted under California receivership law. *See* Cal. R. Ct. 3.1175 (receiver can be appointed ex parte); Cal. R. Ct. 3.1177 (parties can suggest "one or more persons for appointment . . . as receiver").

Were the goal to con Amazon out of the benefit of its fee judgment, a receivership would be a particularly poor tactic to do so. Among other protections: (1) a receiver is required to give notice to "every person or entity known to the receiver to have a substantial, unsatisfied claim that will be affected" by the receiver's plan to distribute estate assets, Cal. R. Ct. 3.1184; (2) "all creditors, whether their status is contingent or fixed, have a right to be heard concerning distribution and apportionment of receivership funds," *Vitug v. Griffin*, 214 Cal. App. 3d 488, 496 (1989); and (3) at all times a "receiver is an agent and officer of the court, and is under the control and supervision of the court." *S. Cal. Sunbelt Devs., Inc. v. Banyan Ltd. P'ship*, 8 Cal. App. 5th 910, 922 (2017) (cleaned up). Amazon's constant insinuation that the Secured Creditors have the capacity to, and somehow did, corrupt the receiver, the receivership process, and even the court, has *zero* basis in law or fact.

Without doubt, when they filed the receivership action in April 2021, a goal of Secured Creditors was to prevent Amazon from using Rule 69 procedures to execute on PersonalWeb's most significant remaining assets—its pending appeals of the Court's *Kessler*, non-infringement, and *Octane* rulings, the

[1] The Secured Creditors recently filed a state court action for a declaration that Amazon cannot pierce PersonalWeb's corporate veil. Europlay anticipates that that action will be transferred as a related case and heard in the same department that is presiding over the receivership action.

latter of which remains pending in the Federal Circuit. *Accord RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1075-76 (10th Cir. 2009) (victorious defendant that won attorney fee award successfully executed on pending appeal). In that, their interests were fully aligned with PersonalWeb. It is not some inequitable "*scheme*" when parties with aligned economic interests cooperate to use the legal system to protect their common interests. To the contrary, the right to engage in concerted action is protected by the constitutional right to petition. *Cal. Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 510–11 (1972). Crucially, Amazon has never pointed to any act in the receivership case where Secured Creditors made any misstatement, violated any statute or rule, or where the receiver or the court acted improperly, much less at the behest of Secured Creditors. Amazon's "scheme" claim is nonsense.

Along similar lines, Amazon sneeringly debases the Secured Creditors' anti-SLAPP motions as a "trick." Mot. 1. But Amazon indisputably sued the Secured Creditors *for instituting the receivership proceedings.* Lavin Decl. Ex. 2 ¶¶ 21–24. That is, for planning and filing a lawsuit—"an exercise of the First Amendment right to petition the government." *Bonni v. St. Joseph Health Sys.*, 11 Cal. 5th 995, 1024 (2021). "Consequently, claims that arise out of the filing of a suit arise from protected activity for purposes of the anti-SLAPP statute." *Id.* Amazon goes so far as to glibly claim the Secured Creditors are making arguments "for the first time in the history of California's heavily litigated anti-SLAPP statute." Mot. at 1. Nonsense. The arguments are identical to those defendants have made (and won) in scores if not hundreds of published anti-SLAPP cases: claims that arise from the filing of a lawsuit—like Amazon's retaliatory equitable subordination claim—are SLAPPs. *See* 5 *Witkin California Procedure*, Pleading § 1036 (2022 online ed.) (collecting cases). And published cases hold that precisely what Amazon accuses the Secured Creditors of doing here—instituting litigation to avoid the collection of debts—is protected activity. *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, 133 Cal. App. 4th 658,672 (2005). Far from a "trick," it is likely that the motions will be granted.

C. There Is No Good Cause to Afford Amazon Relief from the Protective Order.

Ninth Circuit law generally "favors access to discovery materials to meet the needs of parties engaged in collateral litigation." *Foltz*, 331 F.3d at 1131. "Nonetheless, a court should not grant a collateral litigant's request for such modification automatically." *Id.* at 1132. To modify a protective order to use documents in other litigation, a "litigant must demonstrate the relevance of the protected

discovery to the collateral proceedings and its general discoverability therein." *Id.* On discoverability, "[i]f [a] limitation on discovery in the collateral litigation would be substantially subverted by allowing access to discovery material under a protective order, the court should be inclined to deny modification." R. Marcus, *Federal Practice & Procedure* § 2044.1 (2022 online ed.). Courts must "prevent the subversion of limitations on discovery in the collateral proceedings[.]" *Foltz*, 331 F.3d at 1133.

Amazon has not even met its burden to show that the materials it seeks are relevant to its anti-SLAPP opposition. It offers—without citation—a series of claims about purported "inequity," undercapitalization, and the ownership of PersonalWeb. Mot. 4. While these issues are potentially relevant to some *unpled* alter ego claim, they are wholly irrelevant to the pending anti-SLAPP motions.

Amazon admits that the documents are potentially relevant only to the second, merits-based step of the anti-SLAPP analysis. There, only documents about the origin of the receivership are relevant. That is because, in step two, Amazon must "make the requisite showing" that it can legally and factually prevail on the "challenged claim *that is based on allegations of protected activity.*" *Baral v. Schnitt*, 1 Cal. 5th 376, 392 (2016) (emphasis added). Here, the protected activity concerns the receivership. So Amazon must show that its *claim about the inequity of the receivership* "state[s] a legally sufficient claim" and it must produce evidence to make "a prima facie factual showing sufficient to sustain a favorable judgment" *for that claim. Id.* at 384–85. If parts of Amazon's claim are based on *nonprotected* activity—such as the unpled alter ego issues referenced in its brief—they are disregarded in the first step and essentially irrelevant in the second. *Id.* at 396. Amazon provides no explanation why the documents it seeks are relevant to the receivership issue.

Foltz also explains that although the ultimate decision regarding discoverability rests in the hands of the collateral court, a moving party's burden includes "general discoverability." *Foltz*, 331 F.3d at 1132–33. Lifting a protective order cannot "subvert[t] limitations on discovery in the collateral proceeding[.]" *Id.* at 1133; *see AT&T Corp. v. Sprint Corp.*, 407 F.3d 560, 562 (2d Cir. 2005) (declining to modify order because it was "an attempt to circumvent the close of discovery in [the collateral] Action"). Here, discovery is stayed while the anti-SLAPP motion is pending. Cal. Code Civ. Proc. § 425.16(g). But Amazon could still obtain discovery "on noticed motion and good cause[.]" *Id.* Amazon has made no such motion. The materials sought are thus *not* generally discoverable.

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.