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BRILLIANT DIGITAL ENTERTAINMENT, INC.;
8 MONTO HOLDINGS PTY. LTD.

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION

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

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

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

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

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

16 Plaintiffs
17 v.
18 PERSONALWEB TECHNOLOGIES, LLC and
LEVEL 3 COMMUNICATIONS, LLC,
19 Defendants.

**MEMORANDUM OF THIRD PARTIES
BRILLIANT DIGITAL
ENTERTAINMENT, INC. AND MONTO
HOLDINGS PTY LTD. IN OPPOSITION
TO AMAZON'S ADMINISTRATIVE
MOTION FOR RELIEF FROM
PROTECTIVE ORDER [Dkt. 854]**

20 PERSONALWEB TECHNOLOGIES, LLC, and
LEVEL 3 COMMUNICATIONS, LLC,
21 Plaintiffs,
22 v.
23 TWITCH INTERACTIVE, INC.,
24 Defendant.

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1 Third Parties, Brilliant Digital Entertainment, Inc. ("BDE") and Monto Holdings Pty Ltd.
2 ("Monto") (both of whom are "Secured Lenders" to PersonalWeb ("PW") hereby oppose Amazon's
3 "administrative" motion ("Motion") under Civil Local Rule 7-11 for relief from the protective order
4 now in place with respect to the production of documents by Third Parties.

5 **A. Overview**

6 Over five weeks after (1) stipulating to the April 4, 2023 hearing date on Secured Lenders'
7 anti-SLAPP Motions in the Receivership Action with its March 21, 2023 opposition deadline and
8 (2) the April 7, 2023 failed meet and confer session on the subject, Amazon files this improper L.R.
9 7-11 "administrative motion" seeking relief from the protective order as to documents produced in
10 the PW post-judgment proceedings for the limited purpose of using them to oppose these motions.
11 The vast majority of these document have nothing whatsoever to do with the issues Amazon needs
12 to address to oppose the anti-SLAPP motions. The Motion should be denied because it does not
13 meet the burden imposed -- and seeks relief prohibited -- by the very authority Amazon relies upon.

14 The purpose of the anti-SLAPP motions was to expose Amazon's claims of supposed
15 wrongdoing by the Secured Lenders in obtaining a receiver over PW's assets as utter nonsense.
16 After all of the handwringing about the appointment of a receiver over PW and its assets by Amazon
17 in every single filing it has made in this Court, these motions will require Amazon to, in the
18 vernacular, "put up or shut up." Simply put, receivers are officers and agents of the appointing
19 court. Contrary to Amazon's suggestion that the appointment of a receiver in an American Court is
20 akin to stashing the assets of the receivership entity off shore in the Cook Islands, those assets are
21 in the control of the appointing court and not a penny can be disbursed to any creditor without notice
22 to all creditors and that Court's order. What Amazon is really complaining about is that the
23 imposition of the receiver and associated injunction put the proverbial monkey wrench in its plan to
24 levy execution on the IP assets of PW so that it could obtain ownership and then fire the lawyers
25 representing PW on its then pending petition for certiorari to the Supreme Court as to the judgment
26 and counsel representing PW to on appeal of the attorney fee award and dismiss the appeal before
27 it is heard by the Federal Circuit. Secured Lenders had a Constitutional right to petition the State
28 Court for relief to prevent these results from happening and not one of the documents that is sought

1 to be released by this Motion even remotely addresses that issue.

2 **B. Requirements for Relief from a Protective Order**

3 *Foltz v. State Farm Auto Insurance Co.*, 331 F.3d 1122 (9th Cir. 2003), the principal
4 authority cited by Amazon, holds: "[A] court should not grant a collateral litigant's request for ...
5 modification [of an existing protective order] automatically." (*Id.*, 1132.) "As an initial matter, the
6 collateral litigant [here, Amazon] must demonstrate the relevance of the protected discovery to the
7 collateral proceedings [here, the anti-SLAPP motions in the Receivership Action in state court] and
8 its general discoverability therein." (*Id.*,) "Such relevance hinges on the degree of overlap in facts,
9 parties, and issues between the suit covered by the protective order and the collateral proceedings."
10 (*Id.*,) As *Foltz* explained, "[r]equiring a showing of relevance prevents collateral litigants from
11 gaining access to discovery materials merely to subvert limitations on discovery in another
12 proceeding." (*Id.*) See *United Nuclear Corp v Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir.
13 1990): "[A] collateral litigant has no right to obtain discovery materials that are privileged or
14 otherwise immune from eventual involuntary discovery in the collateral litigation." At bottom,
15 "...the court that entered the protective order should satisfy itself that the protective discovery is
16 sufficiently relevant to the collateral litigation that a substantial amount of duplicative discovery
17 would be avoided by modifying that protective order." (*Foltz*, 332 F.3d at 1132.)

18 However, the court issuing the order *does not* decide whether the collateral litigant will
19 ultimately obtain the discovery materials. Rather, "...the only issue it determines is whether the
20 protective order will bar the collateral litigants from gaining access to discovery already conducted."
21 (*Id.*, al. 1232-33.) "[O]nce the district court has modified its protective order, it must refrain from
22 embroiling itself in the specific discovery disputes applicable only to the collateral suits." (*Id.*, at
23 1133.) "The disputes over the ultimate discoverability of specific materials covered by the
24 protective order must be resolved by the collateral courts." (*Id.*,)

25 **C. Amazon Seeks an Order this Court May Not Make**

26 Directly contrary to *Foltz*, Amazon expressly asks this Court to not only modify the
27 protective order, but to usurp the role of the collateral court by specifically ordering that Amazon
28 may use the documents at issue to oppose the anti-SLAPP motions. See Dkt. 854-6, p.2:4-6. The

1 court should reject Amazon's request for such an order.

2 **D. Amazon Fails to Establish Relevancy or Discoverability**

3 Amazon has failed to demonstrate relevance of the documents to the material issues at play
4 in the anti-SLAPP motions. The issues before this Court that led it to deem that the documents were
5 discoverable were the whereabouts of PW assets and Amazon's potential alter-ego claims. (Dkt.
6 738, at 1-2.) Even a cursory review of Amazon's complaint-in-intervention shows that there are no
7 allegations regarding the whereabouts of PW assets. Nor are there any alter ego claims alleged
8 against any of the Secured Lenders. Amazon's only claim alleged against the Secured Lenders is
9 to have their secured loans to PW subordinated to Amazon's attorney fee judgment based on the
10 alleged sins of the Secured Lenders and PW in instituting and prosecuting the Receivership Action.¹
11 See Lavin Decl., Exh. 2, ¶¶ 16-17, 20-24. By definition, this conduct had to have occurred
12 commencing in April 2021 when the Receivership Action was filed.²

13 Moreover, Amazon is not seeking a blanket order modifying the protective order for all
14 purposes, but only for the very limited purpose of using such documents to oppose the pending anti-
15 SLAPP motions. Accordingly, the correct analysis for relevancy is whether the documents
16 enumerated in Amazon's motion have any relevance to the issues raised in the anti-SLAPP motions,
17 both of which are Exhibits 3 and 4 to Amazon's Motion.

18 As stated in BDE's motion, Dkt. 854-5, pp. 14-15, the first prong of Secured Lender's anti-
19 SLAPP motion requires the moving defendant to establish that the challenged allegations or claims
20 arise from protected activity in which the defendant has engaged; i.e., the activity (1) falls within
21 one of the four categories listed in Cal. Code Civ. Pro. § 425.16(e); and (2) forms the factual basis
22 of a least one element of the claim. Assuming the Secured Lenders establish the first prong, the
23 court then considers the second prong under which Amazon has the burden to show that it has (1)
24 stated a legally sufficient claim and (2) made a prima facie factual showing by admissible evidence

25 ¹ Contrary to the suggestion in the opening paragraph of Amazon's Motion, there is no claim to
26 relegate Secured Lenders' debt to equity.

27 ² Paragraphs 10, 19 of the complaint-in-intervention allege that PW is "thwarting Amazon's
28 legitimate interest to collect its judgment" and engaging in "chameleon-like efforts . . .,"
referring to and quoting from Exh. D to the complaint-in-intervention, (District Court's Order of
June 25, 2021) pp. 3-4. These statements in Exh. D, clearly reference actions claimed by Amazon

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1 sufficient to defeat Secured Lenders' litigation privilege defenses and sustain a favorable judgment.

2 Here, the anti-SLAPP motions assert that the petitioning activity consists of the filing of the
3 Receivership Action and successfully petitioning the court to appoint a receiver that falls squarely
4 within the classes of protected activity in Cal. Code Civ., Pro. § 425.16(e) subd. (1) (any written or
5 oral statement or writing made before a judicial proceeding) and subd. (2) (any written or oral
6 statement or writing made in connection with an issue under consideration or review by a judicial
7 body). None of the documents which Amazon seeks to have released address the issue of whether
8 the anti-SLAPP motions seek to strike activity that is within these subdivisions. As to prong 2,
9 Amazon's burden is to establish the merits of the "claim" that arises from the protected activity, i.e.,
10 that recognized civil wrongs were committed by the Secured Lenders in filing this action and in
11 obtaining appointment of the receiver and, if so, that same are not barred by the absolute litigation
12 privileges under state and federal constitutional law. Evidence as to claims that Amazon has not
13 pled or claims which do not arise from the challenged protected activity is simply beside the point.
14 Thus, Amazon must come forward with evidence that is, by definition, based on what happened in
15 connection with the filing of the Receivership Action *in April of 2021* (and the precedent demands
16 by the Secured Lenders for payment on their respective notes) and what *thereafter ensued* in
17 connection with the appointment of the receiver.

18 Amazon purports to satisfy the *Foltz* relevance requirement by asserting that the documents
19 as to which relief is sought, "show that the [Secured Lenders] are the beneficial owners of [PW],
20 that they colluded to frustrate the judgment, and that [PW] was purposefully undercapitalized and
21 *repeatedly* seeking last-minute cash infusions from the [Secured Lenders] for its day-to-day
22 operations." Motion at 5. However, that BDE, Monto and ECA hold either direct or indirect
23 ownership interests in PW has never been a disputed issue in these proceedings and Amazon has no
24 need for documents that "evidence" this fact. The only "collusion" alleged in the complaint-in-
25 intervention deals with the actions relating to the Receivership and none of the identified BDE,
26 MONTO or ECA prefix documents even remotely deal with the Receivership Action. Further there
27 are no allegations in the complaint-in-intervention of undercapitalization or repeated needs of cash
28 for day-to-day operations.

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