[Counsel listed in signature block]

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. a Delaware corporation Defendants.	Case No.: 5:18-md-02834-BLF Case No.: 5:18-cv-00767-BLF Case No.: 5:18-cv-05619-BLF **JOINT SUBMISSION REGARDING AMAZON'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS THAT THE PERSONALWEB INVESTORS HAVE IMPROPERLY WITHHELD AS PRIVILEGED**

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ATTORNEYS AT LAW

I. AMAZON'S STATEMENT

Amazon requests that the Court address two issues. **First**, the investor entities (*i.e.*, BDE, Claria, ECA, and Monto) have withheld as "privileged" communications that they had *with PersonalWeb* about their plan to demand repayment and sue PersonalWeb to obtain a receivership.[1] They withheld several hundred emails from between March 2, 2021—when the Court entered judgment—through April 30, 2021—about when they filed suit. Their log shows that *PersonalWeb's* litigation counsel Jeff Gersh discussed with the *investors'* litigation counsel and principals the draft complaint *against* PersonalWeb seeking the receivership, a related UCC search, and other litigation documents such as a proposed stipulation for "Appointment of Receiver and Preliminary Injunction…," and the declaration that PersonalWeb President Michael Weiss submitted *on behalf of PersonalWeb*. (*E.g.*, Ex. A, Nos. 279, 284, 317, 328, 638-39.)[2]

The voluntary disclosure of a privileged communication to a third party waives the privilege as to that communication and all others on the same subject. *U.S. v. Sanmina Corp.*, 968 F.3d 1107, 1117 (9th Cir. 2020); *Weil v. Inv./Indicators, Res. & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981); *Staley v. Gilead Sci., Inc.*, 2022 WL 1836820, at *2 (N.D. Cal. June 3, 2022).[3] Moreover, communications between *adverse parties* are not privileged. *See Hartford Fire Ins. Co. v. Garvey,* 109 F.R.D. 323, 328 (N.D. Cal. 1985). Here, the communications involve on the one hand, the investors and their litigation counsel at Frandzel, and on the other, Gersh, PersonalWeb's

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[1] Amazon has excerpted the investor privilege log to show only the March-April 2021 time frame as the privilege log contains over 50,000 documents. (*See* Ex. A.) The disputed entries are colored orange (Gersh a participant) and yellow (Gersh not a participant). The exhibit shows (colored blue) communications from the same period that *were* produced, including other communications between Brilliant Digital and PersonalWeb that concern the same subject matter of avoiding the Court's judgment and seeking a receivership. (*E.g.,* Exs. B-D.) (Investors have agreed to, but not yet produced the colored grey entries.)

[2] This is very troubling, as Mr. Gersh previously told this Court that Stubbs Alderton was not involved with the receivership. Dkt. 725 (Hearing Tr. (1/20/22)) at 14:16-20 ("I want to reiterate something also, and I know I said this earlier on, we are doing everything we can to ensure compliance with your order. We are not trying to sidestep anything. *The receivership is not our issue, we're not involved*." (emphasis supplied)).

[3] Investors raise Rule 502, but this rule applies to inadvertent disclosures during litigation, and it is not intended to address disclosures outside of litigation, nor intentional and knowing waivers in litigation, as occurred here.

litigation counsel, as well as (at times) Mr. Weiss or Mr. Bermeister at their PersonalWeb email addresses. They concern the plan to demand "repayment" from the PersonalWeb entity and then sue it, and even the draft litigation documents the investors planned to use. These are subjects on which PersonalWeb is adverse to its creditor-investors. *Id.*; *Waymo LLC v. Uber Tech., Inc.*, 2017 WL 2485382, at *12 (N.D. Cal. June 8, 2017).[4]

Counsel has argued that disclosures to Mr. Gersh did not destroy the privilege because the investors consulted him for advice about amending the secured loan agreements, since he personally had advised them on the original promissory notes (entered in 2011) and amendments. (*See* Ex. E.) But there is no evidence that Mr. Gersh ever represented these entities with respect to the loans or their attempt to seize control of the assets of his client PersonalWeb. Mr. Gersh did not join Stubbs until 2016, five years after the parties entered the secured loans. (*See* Ex. F.) And Mr. Gersh *told this Court* that "neither myself or Mr. Sherman have any personal knowledge" of the loan transactions, "other than what we've read and what we've seen." Dkt. 725 (Hearing Tr. (1/20/22)) at 7:12-21. As recently as January 3, 2023, Mr. Gersh claimed to have no information about whether *anyone* at Stubbs had represented the investors, rather than PersonalWeb, concerning the loan transactions. (*See* Ex. G ("I do not know the answer to your question if SAM represented both the investor and PWeb. It is possible but I should have a response to this by tomorrow.").) The fact that Mr. Gersh *did not know* whether his firm represented the investors on the loans completely belies the claim that *he* had advised those entities. And in fact, BDE *freely produced* other emails with Mr. Gersh and other PersonalWeb representatives concerning the loan transactions, avoiding the Court's judgment, and seeking the receivership. (*See, e.g.,* Exs. H-I, & n.1.) That BDE voluntarily produced these documents shows that they are not privileged, and even if they were, there is now subject matter waiver on these topics.[5]

[4] The Court has already held that PersonalWeb waived any privilege that *it* holds. *See* Dkt. 704.

[5] Several log entries contain inadequate subject matter descriptions, though Amazon believes they all relate to the same subjects. (*E.g.*, Ex. A, Entry Nos. 344, 384-401, 403-406, 409-411, 415-430.) The failure to describe the subject matter in the log itself violates the Court's rules and is insufficient to maintain the privilege. Civ. Disc. Standing Ord., § 12; *First Resort, Inc. v. Herrera*, 2014 WL 589054, at *5 (N.D. Cal. Feb. 14, 2014).

The investors pivot to arguing that Mr. Gersh does not represent PersonalWeb in the receivership litigation. That does not matter, as his client is adverse to the investors with respect to the subject of that litigation, and he is not within the privilege. Investors cite no authority supporting their bold claim that parties on opposite sides of a lawsuit share a "common interest" in it making their communications privileged as to third parties. Their cases all concern valid common interest scenarios—a licensor and licensee defending against a patent litigation (*Callwave*), a debtor and creditors' committee seeking to maximize assets for the benefit of all parties (*Mortgage Realty*), and co-defendants in a class action (*Holmes*). PersonalWeb conspiring to have its investors sue it is not a common *legal* interest, even if they intended to share the *financial* benefit of their misconduct.

Second, Stubbs provided the investors with documents that are responsive to the Court's discovery orders, but that Stubbs determined "belong" to the investors. Dkt. 851 (categories (a) & (c)). BDE and Monto are refusing produce or log the 1,313 documents provided to them, arguing that the Court already ordered that *Stubbs* did not have to log them. Dkt. 850. That the Court ruled that a law firm does not have to log 18,000 documents on behalf of its clients is irrelevant.

II. BDE AND MONTO'S STATEMENT

"Gersh" Emails. Amazon's attempt to discover emails between then-newly retained Frandzel, and representatives of BDE and ECA which included SAM partner Gersh, relies on the false premise that Gersh/SAM represented PW regarding enforcement of Third Parties' ("Secured Lenders'") loans to PW (which it did not) and the equally false premise that Gersh/SAM's representation of PW in the Amazon litigation and on PW's appeals, necessarily rendered Gersh/SAM incapable of providing advice to its other long-time clients, BDE and ECA, regarding the secured loans, the documents as to which SAM had prepared back to 2011.[6] Also false is Amazon's premise that in placing PW's assets in the control of the state court through a receivership, PW's and the Secured Lenders'

[6] During a meet and confer session in January 2023, Frandzel counsel, Robins, told Amazon's counsel that he understood that Gersh had been an attorney with SAM who had participated in the preparation of the original and subsequent loan documents. Upon checking with Gersh and finding out that he had not been involved or even employed at SAM until approximately seven years ago, Robins so informed Amazon's counsel in writing (Amazon Exh. E) which is the source of Amazon's information in that regard cited in its Statement.

interests were necessarily adverse in dealing with the common enemy, Amazon, which has never denied that it intended to execute on PW's IP so that, once ownership was achieved, it could fire PW's appellate lawyers and dismiss all appeals before they could be decided.[7]

SAM had been a decades-long provider of legal services to BDE and ECA wholly independent of its representation of PW in the Amazon cases. Commencing in late March, 2022, Gersh, *on behalf of BDE*, was involved in the initial efforts to retain Ron Bender of the Levene Neale firm to represent *the Secured Lenders' interests* with respect to Amazon's judgment, including regarding "security issues relating to certain loans." (Exhs. C, D.) After Bender declined on April 2, 2021, Neumann emailed Craig Welin of Frandzel, with Gersh and Markiles cc'd, introducing SAM as "a firm we have worked with for decades . . . ." (Exh. B.) Thereafter, Gersh was cc'd on emails between Frandzel, Neumann, Bermeister and Markiles, regarding the strategy of filing suit on the loans, having a receiver appointed over PW's assets and placing them in the protection of the state court. Neumann, Bermeister, Markiles, Frandzel and Gersh, himself, believed that Gersh's involvement was on behalf of the Secured Lenders. Gersh provided input at a conference call in April 2021, regarding the scope of the security interests granted in the PW loan documents.[8] That over a year and a half later in January 2023, Gersh had uncertain memory of the events in late March-April 2021, is hardly surprising. Although Gersh was included on emails circulating drafts of the complaint and declaration for PW's manager, Weiss, that did not constitute providing them to PW and neither Gersh/SAM did so. Rather, Frandzel ultimately directly transmitted same to Weiss.

Amazon does not address the attorney work product doctrine which also covers the Gersh emails. *Garvey*, 109 F.R.D. at 328 holds that "[w]aiver of work product immunity requires more than the disclosure of confidential information; the disclosure must be inconsistent with the adversary system." See *Sanmina*, 968 F.3d at 1119-20. Disclosure of the materials to Gersh was not the equivalent of disclosure to PW itself, and Amazon offers no evidence to the contrary.

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[7] Amazon has repeatedly complained that Secured Lenders and PW were "colluding" to block Amazon's collection efforts - - until now, when, conveniently, it proclaims that PW and the Lenders are "adverse parties."

[8] Whether or not this involvement of SAM/Gersh created a conflict of interest with PW (and Amazon cites no authority that it did), is not for Amazon to complain about.

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