J. DAVID HADDEN (CSB No. 176148)
dhadden@fenwick.com
SAINA S. SHAMILOV (CSB No. 215636)
sshamilov@fenwick.com
MELANIE L. MAYER (admitted *pro hac vice*)
mmayer@fenwick.com
TODD R. GREGORIAN (CSB No. 236096)
tgregorian@fenwick.com
RAVI R. RANGANATH (CSB No. 272981)
rranganath@fenwick.com
CHRISTOPHER S. LAVIN (CSB No. 301702)
clavin@fenwick.com
FENWICK & WEST LLP
Silicon Valley Center
801 California Street
Mountain View, CA 94041
Telephone: 650.988.8500
Facsimile: 650.938.5200

Counsel for AMAZON.COM, INC., AMAZON WEB SERVICES, INC., and TWITCH INTERACTIVE, INC.

FENWICK & WEST LLP
ATTORNEYS AT LAW

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: PERSONAL WEB TECHNOLOGIES, LLC ET AL., PATENT LITIGATION	Case No.: 5:18-md-02834-BLF
AMAZON.COM, INC., and AMAZON WEB SERVICES, INC., Plaintiffs v. PERSONALWEB TECHNOLOGIES, LLC and LEVEL 3 COMMUNICATIONS, LLC, Defendants,	Case No.: 5:18-cv-00767-BLF Case No.: 5:18-cv-05619-BLF **SUPPLEMENTAL BRIEF RE REQUEST OF AMAZON.COM, INC., AMAZON WEB SERVICES, INC., AND TWITCH INTERACTIVE, INC. TO COMPEL PRODUCTION OF DOCUMENTS THAT THE PERSONALWEB INVESTORS HAVE IMPROPERLY WITHHELD AS PRIVILEGED**
PERSONALWEB TECHNOLOGIES, LLC, and LEVEL 3 COMMUNICATIONS, LLC, Plaintiffs, v. TWITCH INTERACTIVE, INC., Defendant.	JUDGE: Hon. Susan van Keulen

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

Amazon appreciates the opportunity to submit this supplemental brief to address the four issues identified by the Court (Dkt. 862). The following additional fact background concerning the PersonalWeb investors' attempt to defraud creditors and later the California Superior Court may also assist resolution of the motion.[1]

The investors formed PersonalWeb and own nearly all its equity. But they structured their investment in PersonalWeb as secured debt to ensure that they would never have to pay any unwanted creditors. The scheme worked as follows. The investors never capitalized PersonalWeb for its anticipated business. Instead, they paid expenses as they arose, and promptly removed and distributed to themselves the proceeds of any litigation settlements. As they did so, they recorded these as increases or decreases to the outstanding loan balance. But they did not expect "repayment," as such. Instead, they extended the loan maturity dates so that they would not come due. The result is that the investors could keep PersonalWeb perpetually insolvent—unable to pay creditors unless they specifically chose to do so. For example, as PersonalWeb began filing 85 federal lawsuits against Amazon customers, [redacted] And during the case, PersonalWeb was paying as much as [redacted] to its lawyers, yet Kevin Bermeister testified [redacted]

The investors also could at any point use the secured loans to claim priority to whatever assets PersonalWeb retained, leaving unsecured creditors with nothing. And that is what happened here. As soon as Amazon inquired about securing the judgment, Mr. Murray Markiles, who is PersonalWeb's corporate counsel, but also [redacted] and the managing agent for both ECA and Claria, announced [redacted] He then began pressing PersonalWeb and the investors to trigger the asset protection scheme. The investors demanded that PersonalWeb immediately repay the loans in full even though they were not scheduled to mature for over a year. They also colluded with PersonalWeb to *modify* the secured loan agreements to specify that the patent litigations against Amazon were "collateral" securing their loans. Then in California

[1] These facts are set forth with their supporting evidence in Amazon's state court filings provided as Exs. 1 and 2. These documents are subject to ongoing sealing proceedings at the Superior Court, but Amazon will as needed file a public version consistent with the Superior Court ruling on sealing

Superior Court they filed to place PersonalWeb in receivership for their benefit and obtain a preliminary injunction that prevented any other creditor from collecting. In their filings, they presented themselves as arms' length creditors, concealing from the Superior Court the fact that they already *own* and *control* PersonalWeb (and thus had no legitimate need for a receiver to manage the estate for them), and that PersonalWeb had a legitimate $5.4 million creditor in Amazon.

Several additional facts concerning PersonalWeb's operation and Stubbs' representation of it are important here. PersonalWeb's day-to-day operations including its litigations were managed primarily by Kevin Bermeister, the CEO of BDE and director of Monto, Anthony Neumann, BDE's sole employee, and occasionally Mr. Markiles—i.e., *not* PersonalWeb's President Michael Weiss, [redacted] Of these three, only Mr. Bermeister claimed a role at PersonalWeb, but that was expressly as a "non-executive" board member without management responsibility. When the Court entered judgment against PersonalWeb, these individuals stepped back and allowed Mr. Weiss to deal with Mr. Gersh concerning PersonalWeb's part in the judgment avoidance scheme,[2] while they switched sides and worked to retain *separate counsel* to make the repayment demand and sue PersonalWeb. (Exs. 3, 4; Dkt. 860-7; Dkt. 725 (Hearing Tr. (1/20/22)) at 7:12-21; Dkt. 860-8.) The investors therefore continued to contact Mr. Gersh *after* being told of the separate counsel requirement. And the investors' new counsel at Frandzel included Mr. Gersh on communications *expressly* as counsel for PersonalWeb, until being told on April 22, 2021, that Mr. Gersh could have no further involvement on post-judgment matters. (Ex. 5.) Still, both *before* and *after* this communication the Frandzel attorneys copied Mr. Gersh on the draft documents for the litigation *against* PersonalWeb. (*See*, *e.g.*, Dkt. 860-2 (Investors' Privilege Log), Nos. 256-257, 265, 268-269, 274, 278-280, 284, 286-289, 291-292, 297-299, 302, 306, 308, 314-315, 317, 319-320, 328, 638-39.)

[2] (*See* Exs. 6 (Mr. Weiss sending Mr. Gersh pledge and security agreements), 7 (Mr. Weiss sending Mr. Gersh revolving secured promissory note and secured notes), 8 (Mr. Weiss sending Mr. Gersh UCC assignment for a secured note, specifying: [redacted] 9 (Mr. Weiss sending Mr. Gersh revolving promissory note, secured note, and signature pages).)

ARGUMENT

1. There was no dual representation.

The Court stated that it is interested in authority that addresses the waiver of privilege where the communication arguably undermining the privilege is with counsel who is engaged in dual representation. Amazon showed in the joint statement that Mr. Gersh did not personally represent the investors with respect to the secured loans or the plan to sue PersonalWeb, as shown by his statements to that effect. (*See* Dkt. 860-7; Dkt. 725 (Hearing Tr. (1/20/22)) at 7:12-21; Dkt. 860-8.) Amazon thus understands the Court's question as assuming an imputed attorney-client relationship, arising either from Stubbs' former work for the investors, or the investors' beliefs about Mr. Gersh's role.

The problem for the investors is that, even assuming there existed any basis in fact for that claim (none has been shown), such a "representation terminates when it becomes clear to all parties that the clients' legal interests have diverged too much to justify using common attorneys." *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 362 (3d Cir. 2007). In other words, if Mr. Gersh was simply violating his ethical duties to both clients without their knowledge, that would not vitiate the privilege. *Id.* at 368. But if the investors were aware, that would not—a client's awareness and disclosure to an unnecessary party still waives the privilege. *Continental Cas. Co. v. St. Paul Surplus Lines Ins. Co.*, 265 F.R.D. 510, 526 (E.D. Cal. 2010). (The investors cannot as a matter of law *consent* to a conflicted dual representation concerning a lawsuit against PersonalWeb. *See* Restatement (Third) of the Law Governing Lawyers, § 122, cmt. g(iii) (Am. L. Inst. 2023) ("When clients are aligned directly against each other in the same litigation, the institutional interest in vigorous development of each client's position renders the conflict nonconsentable. The rule applies even if the parties themselves believe that the common interests are more significant in the matter than the interests dividing them.") (citation omitted).)

Here, the investors knew that Mr. Gersh and Stubbs represented PersonalWeb, because their owners and managers (Bermeister, Neumann, Markiles) had personally dealt with him while running PersonalWeb's litigations for years. The investors apparently received instruction that they

needed to secure separate counsel from Stubbs, and then promptly did so. (Exs. 3, 4.)[3] [redacted] [redacted] (*See* Ex. 10.) Mr. Markiles is an attorney with knowledge of the conflicts rules, as are the Frandzel attorneys who the investors ultimately hired. Nevertheless, the investors continued deliberately to include Mr. Gersh in their communications concerning their claims against his client. (*See, e.g.*, Dkt. 860-2 at Entry Nos. 153, 160, 168, 562, 576, 585.)

2. The investors waived the work product protection.

The Court noted that the investors raised a separate argument concerning work product, suggesting that a disclosure of the materials to Mr. Gersh was not the equivalent of disclosure to PersonalWeb itself. That is not correct. Work product is governed by the similar waiver rules as attorney-client privilege, *e.g., Great Am. Assur. Co. v. Liberty Surplus Ins. Co.*, 669 F. Supp. 2d 1084, 1092 (N.D. Cal. 2009), and there is no exception to waiver for disclosures to an adverse attorney rather than an adverse party. Specifically, "the voluntary disclosure of attorney work product to an adversary or a *conduit to an adversary* waives work-product protection for that material." *United States v. Deloitte LLP*, 610 F.3d 129, 140 (D.C. Cir. 2010) (emphasis supplied). Just as a disclosure to an adverse party is inherently inconsistent with our adversary system, *see Hartford Fire Ins. Co. v. Garvey,* 109 F.R.D. 323, 328 (N.D. Cal. 1985), so too, is a disclosure to an adverse party's attorney.

3. There was no common interest.

Next, PersonalWeb and the investors did not share a common legal interest in the investors' plan to demand loan repayment and file suit against PersonalWeb.

"[T]he 'common interest' or 'joint defense' rule is an exception to ordinary waiver rules designed to allow attorneys for different clients pursuing a common legal strategy to communicate with each other." *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012). It applies when (1) the communication is made by separate parties during a matter of common interest; (2) the

[3] To the extent that there is any doubt about this, or any of the other factual or legal contentions in Amazon's brief, Amazon respectfully requests that the Court review the disputed withheld documents *in camera* to ascertain whether their contents reflect a lack of privilege or a waiver.

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