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 11 AMAZON WEB SERVICES, INC., and
 12 TWITCH INTERACTIVE, INC.

13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 SAN JOSE DIVISION

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

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

19 Plaintiffs

v.

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

22 Defendants,

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

24 Plaintiffs,

v.

25 TWITCH INTERACTIVE, INC.,

26 Defendant.
 27

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

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**

JUDGE: Hon. Susan van Keulen

28 UNREDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

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

5 The investors formed PersonalWeb and own nearly all its equity. But they structured their
6 investment in PersonalWeb as secured debt to ensure that they would never have to pay any
7 unwanted creditors. The scheme worked as follows. The investors never capitalized PersonalWeb
8 for its anticipated business. Instead, they paid expenses as they arose, and promptly removed and
9 distributed to themselves the proceeds of any litigation settlements. As they did so, they recorded
10 these as increases or decreases to the outstanding loan balance. But they did not expect
11 "repayment," as such. Instead, they extended the loan maturity dates so that they would not come
12 due. The result is that the investors could keep PersonalWeb perpetually insolvent—unable to pay
13 creditors unless they specifically chose to do so. For example, as PersonalWeb began filing 85
14 federal lawsuits against Amazon customers, it had only \$347,000 in the bank yet "owed" its
15 investors \$8.2 million. And during the case, PersonalWeb was paying as much as \$400,000 *per*
16 *month* to its lawyers, yet Kevin Bermeister testified that it would not be able pay a fee award without
17 seeking additional "investment" from himself and others.

18 The investors also could at any point use the secured loans to claim priority to whatever
19 assets PersonalWeb retained, leaving unsecured creditors with nothing. And that is what happened
20 here. As soon as Amazon inquired about securing the judgment, Mr. Murray Markiles, who is
21 PersonalWeb's corporate counsel, but also a 25% owner of investor ECA and the managing agent
22 for both ECA and Claria, announced "*it begins.*" He then began pressing PersonalWeb and the
23 investors to trigger the asset protection scheme. The investors demanded that PersonalWeb
24 immediately repay the loans in full even though they were not scheduled to mature for over a year.
25 They also colluded with PersonalWeb to *modify* the secured loan agreements to specify that the
26 patent litigations against Amazon were "collateral" securing their loans. Then in California

27 ¹ These facts are set forth with their supporting evidence in Amazon's state court filings provided
28 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.

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

7 Several additional facts concerning PersonalWeb's operation and Stubbs' representation of
8 it are important here. PersonalWeb's day-to-day operations including its litigations were managed
9 primarily by Kevin Bermeister, the CEO of BDE and director of Monto, Anthony Neumann, BDE's
10 sole employee, and occasionally Mr. Markiles—i.e., *not* PersonalWeb's President Michael Weiss,
11 who the lawyers referred to as an "empty suit." Of these three, only Mr. Bermeister claimed a role
12 at PersonalWeb, but that was expressly as a "non-executive" board member without management
13 responsibility. When the Court entered judgment against PersonalWeb, these individuals stepped
14 back and allowed Mr. Weiss to deal with Mr. Gersh concerning PersonalWeb's part in the judgment
15 avoidance scheme,² while they switched sides and worked to retain *separate counsel* to make the
16 repayment demand and sue PersonalWeb. (Exs. 3, 4; Dkt. 860-7; Dkt. 725 (Hearing Tr. (1/20/22))
17 at 7:12-21; Dkt. 860-8.) The investors therefore continued to contact Mr. Gersh *after* being told of
18 the separate counsel requirement. And the investors' new counsel at Frandzel included Mr. Gersh
19 on communications *expressly* as counsel for PersonalWeb, until being told on April 22, 2021, that
20 Mr. Gersh could have no further involvement on post-judgment matters. (Ex. 5.) Still, both *before*
21 and *after* this communication the Frandzel attorneys copied Mr. Gersh on the draft documents for
22 the litigation *against* PersonalWeb. (See, e.g., Dkt. 860-2 (Investors' Privilege Log), Nos. 256-
23 257, 265, 268-269, 274, 278-280, 284, 286-289, 291-292, 297-299, 302, 306, 308, 314-315, 317,
24 319-320, 328, 638-39.)

25
26 ² (See Exs. 6 (Mr. Weiss sending Mr. Gersh pledge and security agreements), 7 (Mr. Weiss sending
27 Mr. Gersh revolving secured promissory note and secured notes), 8 (Mr. Weiss sending Mr. Gersh
28 UCC assignment for a secured note, specifying: "There is also a UCC Filing that Greg filed on May
17, 2012 but my version is corrupted and can't pen." [sic]); 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

1 needed to secure separate counsel from Stubbs, and then promptly did so. (Exs. 3, 4.)³ Stubbs’
2 billing records also reflect that Mr. Gersh and Stubbs continued to record time and bill
3 PersonalWeb, *not* the investors, for the post-judgment work. (See Ex. 10.) Mr. Markiles is an
4 attorney with knowledge of the conflicts rules, as are the Frandzel attorneys who the investors
5 ultimately hired. Nevertheless, the investors continued deliberately to include Mr. Gersh in their
6 communications concerning their claims against his client. (See, e.g., Dkt. 860-2 at Entry Nos.
7 153, 160, 168, 562, 576, 585.)

8 **2. The investors waived the work product protection.**

9 The Court noted that the investors raised a separate argument concerning work product,
10 suggesting that a disclosure of the materials to Mr. Gersh was not the equivalent of disclosure to
11 PersonalWeb itself. That is not correct. Work product is governed by the similar waiver rules as
12 attorney-client privilege, e.g., *Great Am. Assur. Co. v. Liberty Surplus Ins. Co.*, 669 F. Supp. 2d
13 1084, 1092 (N.D. Cal. 2009), and there is no exception to waiver for disclosures to an adverse
14 attorney rather than an adverse party. Specifically, “the voluntary disclosure of attorney work
15 product to an adversary or a *conduit to an adversary* waives work-product protection for that
16 material.” *United States v. Deloitte LLP*, 610 F.3d 129, 140 (D.C. Cir. 2010) (emphasis supplied).
17 Just as a disclosure to an adverse party is inherently inconsistent with our adversary system, see
18 *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 328 (N.D. Cal. 1985), so too, is a disclosure to
19 an adverse party’s attorney.

20 **3. There was no common interest.**

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

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

27 ³ To the extent that there is any doubt about this, or any of the other factual or legal contentions in
28 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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