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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: PERSONALWEB 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

RESPONSE OF AMAZON.COM, INC., AMAZON WEB SERVICES, INC., AND TWITCH INTERACTIVE, INC. TO ADMINISTRATIVE MOTION TO INTERVENE BY THE OWNER-INVESTORS WHO DIRECTED PERSONALWEB'S MISCONDUCT BEFORE THIS COURT

The parties seeking to intervene in this case are four investment and tax avoidance vehicles for the individuals who own and run PersonalWeb. As detailed in Amazon's other filings, Kevin Bermeister, Anthony Neumann, and Murray Markiles operated PersonalWeb and directed its misconduct before this Court. (*See* Dkt. 871-7 at 88-117, 190-230 (Exs. 6-10, 22-35).) When the Court ordered PersonalWeb to pay Amazon's attorney fees, it was these individuals who used a fraudulent asset protection scheme to force PersonalWeb into receivership and frustrate the judgment. And although the court-appointed receiver should have run PersonalWeb thereafter, these same individuals somehow continued to manage its operations and control its behavior in this case—refusing compliance with court orders to provide discovery and manufacturing a fake "conflict" with Mr. Markiles' law firm to try to leave PersonalWeb without counsel of record.

Messrs. Bermeister, Neumann, and Markiles have now *sued Amazon* in state court through the proposed intervenors for a declaration that those entities are not "alter egos" of PersonalWeb liable for the fee award. Amazon counterclaimed. Now Messrs. Bermeister, Neumann, and Markiles argue those counterclaims give them the right to speak to the Court *also* through these four additional shell companies that could one day be liable for a supplemental fee award if this Court issues one. (Dkt. 883.)

The Amazon parties provide the following response:

1. If the proposed intervenors are prepared to take responsibility for their conduct in this case, then Amazon has no objection to the request. In other words, if the proposed intervenors commit that—if the Court issues a supplemental fee award—they will secure it with a supersedeas bond pending appeal and guarantee payment, then Amazon agrees that they should be heard.

2. Without such a commitment, there is no basis for the request and respectfully it should be denied. The proposed intervenors' indirect interest in reducing PersonalWeb's liability is already adequately represented by PersonalWeb, and the request is made for an improper purpose, as the proposed intervenors merely wish to stop funding the state court receivership (that they created to avoid the judgment) since it is no longer to their advantage.

"The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (citing 7C Wright, Miller & Kane, § 1909, at 318 (1986)). "When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Id.* (citing *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997). To overcome that presumption requires "a compelling showing." *Arakaki,* 324 F.3d at 1086. Specifically, a "petitioner ordinarily must demonstrate adversity of interest, collusion, or nonfeasance." *Wilson*, 131 F.3d at 1305 n.4.

Here, PersonalWeb and the proposed intervenors share the same objective of avoiding imposition of further fees. The proposed intervenors' interest is as "investors" in PersonalWeb—it is indirect and based only on contingent future liability—and thus not typically of a type justifying intervention. *See Gould v. Alleco, Inc.*, 883 F.2d 281, 285 (4th Cir. 1989) ("In a sense, every company's stockholders ... have a stake in the outcome of any litigation involving the company, but this alone is insufficient to imbue them with the degree of 'interest' required for Rule 24(a) intervention."). But regardless, the proposed intervenors made no attempt to show that PersonalWeb has an adverse interest or is "colluding" against them. And they can make no "compelling showing" of nonfeasance where there is a *court-appointed receiver* charged with maximizing the value of the PersonalWeb estate, and PersonalWeb already has counsel at Lewis Roca—*selected by the same investors* (*see* Dkt. 766 at 4)—who is already preparing an opposition to the fee request.

Moreover, Messrs. Bermeister, Neumann, and Markiles have continued to direct PersonalWeb *personally* despite the receivership. The Court will recall that, while the May 2021 receivership order empowered the receiver to manage PersonalWeb's litigations, the receiver refused to displace these individuals. (*See* Dkt. 766 at 4 (PersonalWeb Receiver: "*The Receiver is advised that PersonalWeb is in the process of retaining counsel to represent it* in the District Court Action, which retention will be completed the week of July 25, 2022." (emphasis supplied)); Dkt. 762 (Hearing Tr. (6/23/22) at 7:6-8 (Stubbs Alderton: "Your Honor, the receiver has his own

counsel, and his own counsel has refused to engage with us on the very issues before this Court today."); Dkt. 707 (Hearing Tr. (7/20/21) at 11:20-22 (Stubbs Alderton: "More importantly, we find ourselves in the middle of a, of a conundrum here with respect to the service issue because *where we stand with the client and what has been told to us*." (emphasis supplied)).) Amazon's most recent information about this is from September 2022, when the investors refused to allow the receiver to file tax returns for PersonalWeb. (Ex. A.) During meet and confer, counsel for the proposed intervenors refused to provide *any* information about Messrs. Bermeister, Neumann, and Markiles's ongoing involvement after that time—despite multiple requests made over weeks.

Finally, what is happening here is that the investors want to stop funding the receivership they created, since it has already served its purpose of preventing enforcement of the Court's judgment while PersonalWeb appealed the rulings in this and its other cases. They want to speak to the Court now through *different* shell companies, since those companies carry insurance that will presumably cover the fees. And they are willing to engage in yet another manipulation—creating a false impression that there is no money left to defend PersonalWeb—to bring that about. But the claim that the receivership will run out of money before PersonalWeb can oppose the supplemental fee motion is just not true. The receiver last reported nearly $50,000 in cash on hand as of its last report in April and may issue up to $1,000,000 in receiver certificates (Dkt. 883-4 at 3, 5), of which approximately $225,000 remains to be called (and the $1,000,000 limit could be increased by the Superior Court). Regardless, the proposed intervenors' desire to stop paying for PersonalWeb's lawyers is not a valid basis for them to intervene in the case.

Dated: June 30, 2023

FENWICK & WEST LLP

By: */s/ Todd R. Gregorian*
Todd R. Gregorian

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