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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CORUS REALTY HOLDINGS,
INC.,

Plaintiff,

v.

ZILLOW GROUP, INC., et al.,

Defendants.

CASE NO. C18-0847JLR

ORDER GRANTING
DEFENDANTS’ MOTION TO
EXCLUDE UNTIMELY
INFRINGEMENT THEORIES

I. INTRODUCTION

Before the court is Defendants Zillow Group, Inc., Zillow, Inc., and Trulia, LLC’s (collectively, “Zillow”) motion to exclude testimony or opinions pertaining to theories of patent infringement that were introduced for the first time in the opening expert report of Dr. David Martin. (*See* MTE (Dkt. # 58).) Plaintiff Corus Realty Holdings, Inc. (“Corus”) opposes Zillow’s motion. (*See* Resp. (Dkt. # 79).) The court has considered Zillow’s motion, the parties’ submissions filed in support of and in opposition to the

1 motion, the relevant portions of the record, and the applicable law. Being fully advised,¹
2 the court GRANTS Zillow’s motion and EXCLUDES the testimony and opinions at issue.

3 II. BACKGROUND

4 A. Overview of the Case Schedule

5 This is a patent infringement case. (*See generally* Compl. (Dkt. # 1).) Corus
6 timely served its infringement contentions on December 7, 2018. (*See* Stark Decl. (Dkt.
7 ## 59 (redacted), 60 (sealed)) ¶ 6, Ex. 4 (attaching a copy of Corus’s Preliminary
8 Infringement Contentions with Exhibits 1-5 (hereinafter cited as “PIC”)); *see also* Sched.
9 Order (Dkt. # 22) at 1 (setting a December 7, 2018, deadline for Corus’s infringement
10 contentions.) Zillow timely served its noninfringement and invalidity contentions on
11 December 28, 2018. (*See* Stark Decl. ¶ 7, Ex. 5 (attaching a copy of Zillow’s Preliminary
12 Noninfringement and Invalidity Contentions with Exhibit A (hereinafter cited as “PNIC”));
13 *see also* Sched. Order at 1 (setting a December 28, 2018, deadline for Zillow’s
14 noninfringement contentions.) Neither party has moved to amend their contentions
15 statements. (*See generally* Dkt.)

16 The parties exchanged lists of proposed claim terms for construction in January
17 2019, and then preliminary proposed constructions and extrinsic evidence on February 15,
18 2019. (*See* 1st Am. Sched. Order (Dkt. # 34).) Zillow served Corus with an expert

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21 ¹ Neither party asked for oral argument on Zillow’s motion (*see* MTE; Resp.), and the
22 court does not consider oral argument to be helpful to its disposition of the motion, *see* Local
Rules W.D. Wash. LCR 7(b)(4).

1 claim construction report on February 22, 2019, and Corus served Zillow with a rebuttal
2 report on March 22, 2019. (*Id.*) On April 2, 2019, the parties submitted a Joint Claim
3 Chart on Prehearing Statement for claim construction; on April 26, 2019, they filed their
4 opening briefs; and on June 14, 2019, the court held a *Markman*² claims construction
5 hearing. (*Id.*) On July 2, 2019, the court issued its claim construction order. (*See* CC
6 Order (Dkt. # 51).)

7 The parties exchanged opening expert reports on August 30, 2019, and rebuttal
8 expert reports on September 27, 2019. (*See* 2d Am. Sched. Order (Dkt. # 50) at 2; *see*
9 *also* Stark Decl. ¶¶ 8-13, Exs. 6-11 (attaching appendices to Dr. Martin’s opening expert
10 report).) The discovery deadline expired on October 11, 2019. (2d Am. Sched. Order at
11 2.) The deadline for dispositive motions and motions challenging expert witness
12 testimony expired on November 12, 2019. (*Id.*) The parties timely filed cross motions for
13 summary judgment and motions to exclude various expert witnesses. (*See* Plf. MPSJ
14 (Dkt. # 65); Def. MSJ (Dkt. # 68); Plf. MTE (Dkt. # 69); Def. MTE1 (Dkt. # 72); Def.
15 MTE2 (Dkt. # 74).) The court has not yet ruled on these motions. (*See generally* Dkt.)

16 The court scheduled the pretrial conference on February 18, 2020, and set trial to
17 commence on March 2, 2020. (Sched. Order at 1-2.)

18 **B. Production of Zillow’s Source Code**

19 On August 26, 2018, Corus served document requests on Zillow that included
20 requests for source code of the accused products. (*See* Parnell Decl. (Dkt. # 79-1) ¶ 3, Ex.

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22 ² *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996) (“[F]or judges,
not juries, are the better suited to find the acquired meaning of patent terms.”).

1 3 (attaching a copy of Corus’s First Set of Requests for Production (“RFPs”) to Zillow).
2 Zillow initially objected to the production of its source code. (*See id.* ¶ 4, Ex. 4 (attaching
3 Zillow’s responses to Corus’s RFPs).) Nevertheless, on November 16, 2018, Zillow’s
4 counsel informed Corus that Zillow’s source code was available for inspection. (Stark
5 Decl. ¶ 1, Ex. 1.)

6 On November 26, 2018, Corus requested that Zillow install Windows software
7 tools on a source code computer to aid Corus’s inspection. (*Id.* ¶ 4, Ex. 2.) Zillow
8 provided a Windows-based review computer with the requested Windows tools. (*See id.*
9 ¶ 5, Ex. 3 (attaching a January 15, 2019, email from Corus’s counsel confirming that
10 “[d]uring the last review, [Corus’s counsel] found that the review computer was set up
11 with the requested tools and we thank you for that”).)

12 Corus’s expert witness, Dr. David Martin, first inspected Zillow’s source code on
13 December 4, 2018. (*Id.* ¶ 3.) Dr. Martin testifies that the source code that Zillow initially
14 provided was incomplete because it lacked an accused product and key files and was
15 disclosed in a manner that could not be efficiently reviewed. (*See* Martin Decl. (Dkt.
16 # 80) ¶¶ 10-14.) Further, Zillow’s employees regularly wrote and preferred to review the
17 code from Apple Mac computers. (*See* Parnell Decl. ¶ 30, Ex. 30 (“Yamanaka Dep.”) at
18 91-92, 156:17-25, 204-05, 207-08; *id.* ¶ 32, Ex. 32 (“Perrin Dep.”) at 160:13-16, 188.) In
19 addition, Dr. Martin attests that the files contained “dead code” that was not used, but that
20 could not be confirmed absent depositions due to Zillow’s insistence that the code be
21 neither compiled nor executed. (Martin Decl. ¶¶ 16-17.) All of these issues rendered
22 difficult Dr. Martin’s code review. (*Id.* ¶ 18; Perrin Dep. at 150-53, 189-94.)

1 On January 15, 2019, Corus requested that Zillow provide the source code for
2 review on an Apple computer (in addition to the Windows-based computer), along with
3 additional inspection software. (*See id.*; *see also* Parnell Decl. ¶ 9, Ex. 9.) Zillow
4 complied with this request, but again required that Corus neither compile nor run the code.
5 (*See* MTE at 3; *see also* Parnell Decl. ¶ 10, Ex. 10.)

6 Dr. Martin subsequently inspected Zillow’s source code on at least 15 other
7 occasions, including January 24-25, January 28-30, March 11-15, March 18-19, and
8 August 26-28, 2019. (Stark Decl. ¶ 3.) On March 19, 2019, Dr. Martin identified and
9 requested that Zillow print certain files comprising less than 0.07% of the provided code.³
10 (Martin Decl. ¶ 19.) Zillow initially objected to this request because it encompassed more
11 pages than allowed in the parties’ stipulated protective order, which sets forth the rules on
12 how Zillow produces code and limitations on the amount of code subsequently printed on
13 paper. (*See* Stip. Prot. Order (Dkt. # 30) at 11-13; *see also* Parnell Decl. ¶ 11, Ex. 11.)
14 After negotiations between the parties, and Corus’s agreement to reduce its request to only
15 two files that exceeded the page limit, Zillow agreed to Corus’s narrowed code request
16 and produced it on May 17, 2019. (*See* Parnell Decl. ¶¶ 12-20, Exs. 12-21.)

17 Even with the files printed, Dr. Martin required depositions of Zillow’s technical
18 witnesses to understand how the code operated when it ran. (Martin Decl. ¶ 20.) On May
19 17, 2019—the same day that Zillow produced the printed code to Corus—Corus served
20 Federal Rule of Civil Procedure 30(b)(6) deposition notices on Zillow seeking information

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22 ³ Even with the files printed, Dr. Martin required depositions of Zillow’s technical
witnesses to understand how the code operated when it ran. (Martin Decl. ¶ 20.)

1 on specific functions of the source code. (*See* Parnell Decl. ¶ 22, Ex. 22 at 9 (Topic 2).)

2 After the parties agreed to extend the discovery deadline and the court so ordered, Zillow
3 produced its Rule 30(b)(6) designees, and Corus conducted its depositions on July 19, 23,
4 and August 8, 2019. (*See* Resp. (Dkt. # 79) at 4; *see also* 2d Am. Sched. Order.)

5 Following the Rule 30(b)(6) depositions, Dr. Martin sought a final review of the
6 code, which the parties scheduled during the week his expert report was due. (*See* Martin
7 Decl. ¶¶ 21-23.) On August 30, 2019, less than six weeks before the discovery cutoff,
8 Corus served Dr. Martin’s expert report on Zillow. (*See* Resp. at 5; *see also* 2d Am.
9 Sched. Order.) Zillow engaged Dr. Benjamin B. Bederson as its expert, and Zillow served
10 his rebuttal expert report in response to Dr. Martin’s report on September 27, 2019. (*See*
11 Resp. at 5.)

12 **C. Corus’s Infringement Contentions and Zillow’s Noninfringement and**
13 **Invalidity Contentions**


14 The asserted claims require property information to be stored in a “database” on the
15 mobile device or phone. (*See* U.S. Patent No. 6,636,803 (Dkt. # 1-1) at claim 1 (limitation
16 1c recites “wherein said property information is obtained from a remote data source and a
17 database stored on said data-enabled mobile phone”); *id.* at claim 30 (limitation 30b
18 recites “wherein said property information is obtained from a remote data source and
19 stored in a database on the mobile computing device”); *see also* CC Order at 36
20 (construing claim 14 limitation 14c to include a “device capable of storing property
21 information in a database on the mobile computing device”).)

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1 As noted above, Corus served its infringement contentions on December 7, 2018.
 2 (*See generally* PIC.) Corus’s infringement allegations pertain in part to how the accused
 3 products satisfy the “database” limitations. (*See generally id.*) For example, the complete
 4 allegation against the Zillow mobile application for this limitation in claim 1 (limitation
 5 1c) is:

Element	Claims	Accused Elements, Structure, and Acts of the Zillow Real Estate Application ¹
1c	[c] obtaining current status property information for an item of property in the residential real-estate market for the area of interest, wherein said property information is obtained from a remote data source and a database stored on said data-enabled mobile phone, wherein the current status property information includes multiple listing service (MLS) data comprising a location, a market price and a market status of the item of property;	<p>The Zillow mobile application is designed and configured to obtain and provide to users, current property information for property in a residential real-estate market for the area of interest shown on the digital map. Property information, such as location, market price, and market status, is obtained by Defendants from multiple listing services (“MLS”). 2017 Zillow Annual Report, p. 22 available at http://investors.zillowgroup.com/annuals-proxies.cfm; https://zillow.zendesk.com/hc/en-us/articles/213394668-Where-does-Zillow-get-its-listings-</p> <p>Property information for multiple listings indicate the source is from an MLS number.</p> <div data-bbox="841 919 1318 1241" style="border: 1px solid black; padding: 5px;"> <p>Other Fees Assoc Fee Desc: Required Association Fee Frequency: Annually Master Association Fee Frequency: Annually</p> <hr/> <p>SOURCES MLS #: 6084025</p> <hr/> <p>OTHER Mother-in-Law Apartment Last sold: Jan 2012 for \$412,500 Price/sqft: \$110</p> </div> <p><i>See, e.g.,</i> CORUS0003641; <i>see also</i> CORUS0003623.</p>

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Element	Claims	Accused Elements, Structure, and Acts of the Zillow Real Estate Application ¹
		<p>The property information is stored by Defendants on network servers for access by mobile applications and website visitors. When an area of interest is selected by a user, the application is designed and configured to download property information for that area (including location, market price, and market status) from Defendants' remote network servers. The application will store a database relating to the property information on the user's mobile phone for use by the application as the user browses to different properties. As a user selects properties of interest, the application will continue to download additional information on the property to supplement the property information initially obtained for the area of interest.</p>  <p>CORUS0003637; <i>see also</i> CORUS0003619.</p>

(PIC, Ex. 1 at 7-8 (limitation 1c); *see also id.*, Ex. 1 at 29 (limitation 14c), 47-48 (limitation 30b).)

The “database” allegations against the other accused products are similar. (*See id.*, Ex. 2 at 8-9 (charting limitation 1c against Trulia mobile application), 30 (charting limitation 14c against Trulia mobile application), 47-48 (charting limitation 30b against Trulia mobile application); *see also id.*, Ex. 3 at 6 (charting limitation 14c against Zillow rental application), 27-28 (charting limitation 30b against Zillow rental application); *see also id.*, Ex. 4 at 7-8 (charting limitation 14c against Trulia rental application), 29-30 (charting limitation 30b against Trulia rental application); *see also id.*, Ex. 5 at 7-8 (charting limitation 1c against Hotpads application), 33 (charting limitation 14c against Hotpads application), 57-58 (charting limitation 30b against Hotpads application).)

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1 Corus’s infringement allegations do not include citations to any source code or
2 software components or allegations of infringement based on the doctrine of equivalents.
3 (*See generally id.*)

4 In response to Corus’s infringement allegations, Zillow served its noninfringement
5 and invalidity contentions on December 28, 2019. (*See generally* PNIC.) Zillow
6 specifically noted that Corus “failed to cite or otherwise identify any code for the mobile
7 applications that it alleges to infringe.” (*Id.* at 2.) Zillow also noted that Corus’s
8 contentions “failed to identify what specifically it alleges constitutes the alleged
9 ‘database.’” (*Id.*, Ex. A at 11, 18.) Finally, Zillow pointed out that Corus’s infringement
10 contentions did not disclose any doctrine of equivalents theories. (*Id.* at 4 (“[Corus] has
11 failed to disclose any theory of infringement based on the doctrine of equivalents;
12 accordingly, [Zillow] ha[s] nothing to respond to.”).)

13 **D. Dr. Martin’s Expert Infringement Report**

14 On August 30, 2019, Dr. Martin submitted his expert report regarding alleged
15 infringement. (*See* Stark Decl. ¶¶ 8-16, Exs. 6-11.) Dr. Martin’s report discloses how
16 each of the accused products allegedly meets the claim limitations that require storing a
17 “database” of property information. (*See id.*) Dr. Martin asserts that the accused products
18 meet the limitation by requiring a “required database” that he argues is apparent by the
19 “behavior” of the accused products as a user browses properties in an area of interest.
20 (*See id.* ¶ 8, Ex. 6 ¶ 53; *id.* ¶ 9, Ex. 7 ¶ 53; *id.* ¶ 10, Ex. 8 ¶ 53; *id.* ¶ 11, Ex. 9 ¶ 45; *id.*
21 ¶ 12, Ex. 10 ¶ 44; *id.* ¶ 13, Ex. 11 ¶ 35.)

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1 Dr. Martin then states that he has “additional” theories regarding how the accused
2 products meet the database limitation. For example, with respect to Zillow, Dr. Martin
3 states: “Although this ‘required’ database satisfies the ‘stored in a database on the mobile
4 computing device’ limitation, I identified *additional* databases that also satisfy the
5 limitation.” (*See id.* ¶ 8, Ex. 6 ¶ 54 (italics added); *see also id.* ¶ 9, Ex. 7 ¶ 54; *id.* ¶ 10,
6 Ex. 8 ¶ 54; *id.* ¶ 11, Ex. 9 ¶ 46; *id.* ¶ 12, Ex. 10 ¶ 45; *id.* ¶ 13, Ex. 11 ¶ 36.)

7 Indeed, Dr. Martin identifies five additional theories, other than the “required”
8 database, for how each accused product meets the “database” limitation. For Zillow, Dr.
9 Martin identifies: (1) “MapCardPager Adapter” (*id.* ¶ 9, Ex. 7 ¶¶ 62-65, 69, 132); (2)
10 “Google Maps Marker” (*id.* ¶ 9, Ex. 7 ¶¶ 59, 66-70, 132); (3) “mMappableItemToMarker”
11 (*id.* ¶ 9, Ex. 7 ¶¶ 71, 132); (4) “NSURLCache” (*id.* ¶ 8, Ex. 6 ¶¶ 54-55, 61, 64, 135); and
12 (5) “MapKit Annotation” (*id.* ¶ 8, Ex. 6 ¶¶ 54, 56, 61, 65-71, 135). For Trulia, he
13 identifies: (1) “MarkerMap” (*id.* ¶ 11, Ex. 9 ¶¶ 53-55, 63, 121); (2) “Google Maps Marker”
14 (*id.* ¶ 11, Ex. 9 ¶¶ 50, 56-58, 121); (3) “NURSLCache” (*id.* ¶ 10, Ex. 8 ¶¶ 54-55, 62, 64,
15 67, 141); (4) “MapKit Annotation” (*id.* ¶ 10, Ex. 8 ¶¶ 54, 56, 64, 68-73, 141); and (5)
16 “Core Data” (*id.* ¶ 10, Ex. 8 ¶¶ 54, 57, 63, 74). Finally, for Hotpads, he identifies: (1)
17 “MarkerHashMap” (*id.* ¶ 13, Ex. 11 ¶¶ 42-45, 105); (2) “Google Maps Marker” (*id.* ¶ 13,
18 Ex. 11 ¶¶ 39, 45-48, 105); (3) “NSURLCashe” (*id.* ¶ 12, Ex. 10 ¶¶ 45-46, 51, 54, 120); (4)
19 “MapKit Annotation” (*id.* ¶ 12, Ex. 10 ¶¶ 45, 47, 51, 55-60, 120); and (5)
20 “ListingPreviewDictionary” (*id.* ¶ 12, Ex. 10 ¶¶ 45, 48, 56, 61, 120). None of these
21 additional databases or theories are disclosed in Corus’s infringement contentions. (*See*
22 *generally* PIC.) In fact, Corus admits that it “could not name the ultimate databases . . .

1 that resulted in infringement” at the time it served its infringement contentions and before
2 it completed its source code review. (Resp. at 5.)

3 Dr. Martin’s report also identifies source code for the first time that allegedly
4 supports these new theories. For example, Dr. Martin’s report relies on source code for
5 the accused Zillow products. (*See, e.g.*, Stark Decl. ¶ 9, Ex. 7 ¶¶ 35-36, 41-42, 59-71,
6 75-76 80-81, 88-92, 96-97, 109, 125, 155; *id.* ¶ 8, Ex. 6 ¶¶ 35-36, 41-42, 61-71, 75-76,
7 81-82, 92-93, 97-98, 111-12, 127, 158, 172.) Further, Dr. Martin’s report relies on source
8 code for the accused Trulia products. (*See, e.g., id.* ¶ 7, Ex. 9 ¶¶ 33-34, 39-40, 50-58,
9 62-63, 67-68, 79-80, 84-85, 98, 114, 144; *id.* ¶ 10, Ex. 8 ¶¶ 34-35, 40-41, 64-67, 78-79,
10 84-85, 98-99, 103-14, 117-18, 14, 164, 179.) In addition, Dr. Martin’s report relies on
11 source code for the accused Hotpads products. (*See, e.g., id.* ¶ 13, Ex. 11 ¶¶ 24-25, 30-31,
12 39-48, 52-53, 57-58, 64-65, 69-70, 82, 98; *id.* ¶ 12, Ex. 10 ¶¶ 26-27, 32-33, 51-61, 65-66,
13 78-79, 83-84, 96-97, 113, 152.) Yet, Corus’s infringement contentions do not identify any
14 source code. (*See generally* PIC.) Indeed, Corus admits that it “could not . . . pinpoint the
15 exact code that resulted from infringement” at the time it served its infringement
16 contentions and before it completed its source code review. (Resp. at 5.)

17 Finally, Dr. Martin’s expert report also includes opinions that the accused Trulia
18 products infringe under the doctrine of equivalents. (*See* Stark Decl. ¶ 11, Ex. 9 ¶¶ 69-73;
19 *id.* ¶ 10, Ex. 8 ¶¶ 86-90.) Corus’s infringement contentions do not contain any claims
20 under the doctrine of equivalents. (*See generally* PIC.)

21 On September 13, 2019, Zillow’s counsel sent a letter to Corus’s counsel objecting
22 to the new infringement theories and asking Corus not to pursue them. (*See* Stark Decl.

1 ¶ 14, Ex. 12.) Corus responded on September 20, 2019, declining Zillow’s request. (*Id.*

2 ¶ 15, Ex. 13.)

3 III. ANALYSIS⁴

4 The Local Patent Rules require the plaintiff’s infringement contentions to include a
5 chart “identifying specifically where each element of each Asserted Claim is found within
6 each Accused Device.” *See* Local Patent Rule 120(c). The Rules also require the
7 plaintiff’s infringement contentions to state “[w]hether each element of each asserted
8 claim is claimed to be literally present and/or present under the doctrine of equivalents in
9 the Accused Device.” *See* Local Patent Rule 120(e). These requirements serve a notice
10 function.⁵ *See Phigenix, Inc. v. Genentech, Inc.*, 783 F. App’x 1014, 1018 (Fed. Cir.
11 2019). Indeed, they “bolster discovery” under the Federal Rules because they ““allow the
12 defendant to pin down the plaintiff’s theories of liability . . . thus confining discovery and
13 trial preparation to information that is pertinent to the theories of the case.”” *Id.* (quoting
14 *O2 Micro Int’l Ltd.*, 467 F.3d at 1365).

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17 ⁴ Corus argues that Zillow’s motion is an out-of-time discovery motion. (*See* Resp. at
18 16-17.) The court disagrees. Zillow’s motion does not seek to compel discovery but rather
19 challenges expert testimony. (*See generally* MTE.) As such, Zillow’s motion was timely filed.
(*See* 2d Am. Sched. Order at 2 (setting the deadline for “challenging expert witness testimony”
on November 12, 2019).)

20 ⁵ A district court has wide discretion in enforcing the Patent Local Rules. *See SanDisk*
21 *Corp. v. Memorex Prods., Inc.*, 415 F.3d 1278, 1292 (Fed. Cir. 2005) (“The district court’s
22 application of the local rules are within its sound discretion[.]”); *see also O2 Micro Int’l Ltd. v.*
Monolithic Power Systems, Inc., 467 F.3d 1355, 1365-66 (Fed. Cir. 2006) (“Decisions enforcing
local rules in patent cases will be affirmed unless clearly unreasonable, arbitrary, or fanciful;
based on erroneous conclusions of law; clearly erroneous; or unsupported by any evidence.”).

1 A party may amend its contentions upon a timely showing of good cause. Local
2 Patent Rule 124. In cases involving software allegations, the party asserting infringement
3 has an obligation to “promptly and appropriately” amend its contentions to identify
4 pinpoint citations to source code after it has had the opportunity to review the code. *REC*
5 *Software USA, Inc. v. Bamboo Sols. Corp.*, No. C11-0554JLR, 2012 WL 3545056, at *3
6 (W.D. Wash. Aug. 16, 2012) (“[A]lthough a plaintiff need not initially provide such
7 specific pinpoint citations in its infringement contentions, once it has had sufficient time
8 to review the accused source code, the plaintiff is under an obligation to promptly and
9 appropriately amend its infringement contentions.”); *see also Treehouse Avatar LLC v.*
10 *Valve Corp.*, No. C17-1860-RAJ, 2019 WL 917403, at *3 (W.D. Wash. Feb. 25, 2019)
11 (“[T]he Court finds that because this case involves a patent applied to computer software,
12 and [the plaintiff] has had access to that software’s source code for nearly a year, the *REC*
13 *Software* approach should apply.”).

14 An expert report may not advance a new or alternate theory of infringement that
15 was not disclosed in the party’s contentions. *Adobe Sys. Inc. v. Wowza Media Sys.*, No.
16 11-CV-02243-JST, 2014 WL 709865, at *13 (N.D. Cal. Feb. 23, 2014); *KlausTech, Inc. v.*
17 *Google LLC*, No. 10CV05899JSWDMR, 2018 WL 5109383, at *3 (N.D. Cal. Sept. 14,
18 2018) (“[E]xpert reports cannot go beyond the bounds of the disclosed infringement
19 theories and introduce new theories not disclosed in the contentions.”).⁶ Specifically,
20 “[i]n

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22 ⁶ Courts in the Western District of Washington look to Northern District of California
decisions for guidance due to the similarity between the districts’ patent rules. *See REC*

1 the context of patent infringement cases involving software, an expert cannot theorize that
2 certain functions satisfy a claim limitation, unless those functions were previously
3 identified in the party’s infringement contentions.” *Adobe Sys. Inc.*, 2014 WL 709865, at
4 *13.

5 **A. Dr. Martin’s Report Advances New Infringement Theories**

6 Courts strike infringement theories contained in expert reports that the plaintiff did
7 not disclose in its infringement contentions. *See id.* at *14-15 (granting a motion to strike
8 an infringement theory disclosed for the first time in an expert report and stating that, to
9 the extent the plaintiff’s contentions on the infringement theory at issue were ambiguous,
10 “[t]his ambiguity must be construed against [the plaintiff] in light of the purpose of the
11 patent local rules, which is to establish the universe of infringement theories that will be
12 litigated in any given case”); *ASUS Computer Int’l v. Round Rock Research, LLC*, No.
13 12-CV-02099 JST (NC), 2014 WL 1463609, at *4 (N.D. Cal. Apr. 11, 2014) (granting a
14 motion to strike portions of an expert report that described a previously undisclosed
15 infringement theory, stating that the plaintiff “cannot clarify its theory at this late stage of
16 the litigation through an expert report”); *see also Thought, Inc. v. Oracle Corp.*, No.
17 12-CV-05601-WHO, 2016 WL 3230696, at *7 (N.D. Cal. June 13, 2016), *aff’d*, 698 F.
18 App’x 1028 (Fed. Cir. 2017); *KlausTech*, 2018 WL 5109383, at *6. Here, Dr. Martin’s
19 expert report advances new theories of infringement that were not disclosed in Corus’s

21 *Software USA*, 2012 WL 3545056, at *2; *see also Treehouse Avatar, LLC*, 2019 WL 917403, at
22 *2 n.1 (noting that the Local Patent Rules of the Northern District of California “serve as a
model for this District”).

1 contentions, including: (1) five additional new theories of “databases” for each accused
2 product; (2) recitation to and reliance upon source code for each accused product; and (3)
3 doctrine of equivalents theories against Trulia products. *See supra* § II. The court will
4 address each in turn.

5 1. Five New Database Theories for Each Accused Device

6 First, with respect to the five new theories regarding infringement of the “database”
7 limitations, Local Patent Rule 120(c) requires Corus to “identify[] specifically where each
8 element of each Asserted Claim is found within each Accused Device.” *See* Local Patent
9 Rule 120(c). Yet, Dr. Martin introduced five “additional” theories per accused device for
10 how each product allegedly meets the “database” limitations, *see supra* § II, none of
11 which are identified in Corus’s infringement contentions (*see generally* PIC). Indeed, the
12 terms “MarkerHashMap,” “Google Maps Marker,” “NSURLCache,” “MapKit
13 Annotation,” “ListingPreviewDictionary,” “Core Data,” “MapCardPagerAdapter,” and
14 “mMappableItemToMarker” never appear in Corus’s infringement contentions. (*See*
15 *generally id.*) Further, the contentions do not identify any specific software components
16 and do not include any description of Dr. Martin’s additional “database” theories. (*See*
17 *generally id.*) Instead, Corus’s contentions generally allege that the accused products
18 store property information, such as location, market price, and market status, on an
19 unidentified database. (*See* PIC, Ex. 1 at 7-8 (limitation 1c); *see also id.*, Ex. 1 at 29
20 (limitation 14c), 47-48 (limitation 30b).)

21 Corus argues that Dr. Martin’s use of the word “additional” in connection with the
22 five database theories he identifies in his report does not indicate that he is identifying

1 new theories of infringement. (Resp. at 6.) The court disagrees. As noted above,
2 specifically with respect to Zillow, Dr. Martin states: “Although this ‘required’ database
3 satisfies the ‘stored in a database on the mobile computing device’ limitation, I identified
4 *additional* databases that also satisfy the limitation.” (See Stark Decl. ¶ 8, Ex. 6 ¶ 54
5 (italics added); see also *id.* ¶ 9, Ex. 7 ¶ 54; *id.* ¶ 10, Ex. 8 ¶ 54; *id.* ¶ 11, Ex. 9 ¶ 46; *id.*
6 ¶ 12, Ex. 10 ¶ 45; *id.* ¶ 13, Ex. 11 ¶ 36.) The term “additional”—as used by Dr. Martin—
7 connotes something new that was not included before.

8 Corus also argues that the databases and source code sections identified in Dr.
9 Martin’s report are not new infringement theories, but rather “additional items of proof for
10 the previously identified theory.” (Resp. at 5-7.) This argument does not survive scrutiny.
11 Local Patent Rule 120(c) requires contentions to identify “specifically where each element
12 of each Asserted Claim is found,” and mere implication is insufficient to meet this
13 requirement. See, e.g., *Thought, Inc.*, 2016 WL 32230696, at *6-8 (striking expert report
14 that relied on implicitly, not expressly, disclosed theories, and stating: “[T]his Court’s
15 infringement contention disclosure requirements avoid implicit infringement theories by
16 requiring express ones.”); *KlausTech, Inc.*, 2018 WL 5109383, at *4 (“Implicit disclosures
17 are contrary to the purpose of the local patent rules, which require parties to disclose the
18 basis for their contentions in order to make them *explicit* and streamline patent litigation.”)
19 (quotation marks and citations omitted).

20 Further, the cases upon which Corus relies are distinguishable on this point. In
21 *Oracle*, the plaintiff’s contentions named the “specific functions” accused of infringement.
22 See *Oracle Am., Inc. v. Google, Inc.*, No. C 10-03561 WHA, 2011 WL 4479305, at *3

1 (N.D. Cal. Sept. 26, 2011) (“The [accused] function `dvmDexSetResolvedMethod . . .` was
2 identified at least twice in the relevant portion of Oracle’s infringement contentions.”).
3 Here, Corus’s contentions do not identify the data structure that Dr. Martin relies on for
4 his alternative theories. (*See generally* PIC.) Indeed, the *Oracle* court excluded the expert
5 from testifying that a “TreeMap” structure satisfied the claim when the contentions did not
6 reference a “TreeMap” structure. *See id.* at *4-5. Like in *Oracle*, Corus’s contentions do
7 not identify any of the five alternative data structures (per product) that Dr. Martin
8 describes in his report. Indeed, Corus concedes that its contentions do not identify these
9 structures, but merely disclose that property information, such as location, price, and
10 status, “would be stored in a database.” (Resp. at 5-6.)

11 2. Citations to and Reliance upon Source Code

12 Corus did not refer to any source code in its infringement contentions. (*See*
13 *generally* PIC.) Corus conducted some review of the source code prior to serving its
14 infringement contentions and reviewed Zillow’s source code many times through the
15 course of discovery. *See supra* § II.B. Dr. Martin’s report contains myriad citations to
16 source code that allegedly support the additional database theories of infringement and
17 others. *See supra* § II.D. Yet, Corus never sought to amend its contentions to add its
18 code-based allegations. (*See generally* Dkt.) Despite Corus’s protestations to the contrary
19 (*see* Resp. at 7-8), Corus was required to amend its contentions to include pinpoint
20 citations to the source code upon which it relied, *see REC Software*, 2012 WL 3545056, at
21 *3 (noting that the plaintiff is under an obligation to “promptly and appropriately” amend
22 its infringement contentions with pinpoint code citations). Further, Zillow notified Corus

1 on December 28, 2018, when Zillow served its noninfringement and invalidity
2 contentions, that Corus’s infringement contentions lacked citations to source code. (PNIC
3 at 2.) Thus, once Corus identified the source code, it was obligated to amend its
4 contentions to include those pinpoint citations. *See Finjan, Inc. v. Blue Coat Sys., Inc.*,
5 No. 13-CV-03999-BLF, 2015 WL 3640694, at *5 (N.D. Cal. June 11, 2015) (stating that
6 “[h]ad [the d]efendant communicated to [the p]laintiff its belief that [the p]laintiff’s
7 doctrine of equivalents disclosures were so deficient as to be no disclosure at all,
8 [thep]laintiff would be on notice of the deficiency and would fail to supplement at its own
9 risk.”).

10 3. Doctrine of Equivalents

11 As noted above, Local Patent Rule 120(e) requires a plaintiff’s infringement
12 contentions to state “[w]hether each element of each asserted claim is claimed to be
13 literally present and/or present under the doctrine of equivalents in the Accused Device.”
14 Local Patent Rule 120(e). Corus’s infringement contentions do not contain any claims
15 under the doctrine of equivalents. (*See generally* PIC.) Yet, Dr. Martin’s report includes
16 opinions that the accused Trulia products infringe under the doctrine of equivalents. (*See*
17 Stark Decl. ¶ 11, Ex. 9 ¶¶ 69-73; *id.* ¶ 10, Ex. 8 ¶¶ 86-90.) Corus’s only response is to
18 state—without record citation—that “its contentions properly reserved the right to identify
19 doctrine of equivalents infringement should a jury find that the accused element does not
20 literally infringe.” (Resp. at 8-9.) This type of “boilerplate reservation,” however, even
21 assuming Corus asserted it in its contentions, is inadequate under the Local Patent Rules.
22 *See Finjan*, 2015 WL 3640694, at *5 (stating “that a plaintiff asserting the doctrine of

1 equivalents must provide a ‘limitation-by-limitation analysis, not a boilerplate
2 reservation’”) (quoting *Rambus Inc. v. Hynix Semiconductor Inc.*, No. C-0500334 RMW,
3 2008 WL 5411564, at *3 (N.D. Cal. Dec. 29, 2008)); *see also* Local Patent Rules 120(e).

4 Further, the authority Corus cites supports Zillow’s position. Specifically, the
5 *Finjan* court noted that the doctrine of equivalents “is not designed to give a patentee a
6 second shot at proving infringement ‘[t]o the extent that any limitation is found to be not
7 literally present.’” 2015 WL 3640694, at 5 (quoting *Rambus*, 2008 WL 5411564, at *3).
8 Further, the court “decline[d] to go so far as to say that [the defendant] should have filed a
9 motion to compel amendment to [the plaintiff’s] inadequate disclosures,” but still required
10 “some notice of the deficiencies.” *Id.* Because—unlike here—the defendant in *Finjan*
11 failed to provide any notice to the plaintiff prior to filing its motion to strike, and
12 because—unlike here—the plaintiff’s notice of the doctrine of equivalents was not absent
13 but only deficient, the *Finjan* court declined to strike the plaintiff’s doctrine of equivalents
14 theories. *Id.* at *5-6. Nevertheless, the court noted that “[h]ad [the defendant]
15 communicated to [the plaintiff] its belief that [the plaintiff’s] doctrine of equivalents
16 disclosures were so deficient as to be no disclosure at all, [the plaintiff] would be on
17 notice of the deficiency and would fail to supplement at its own risk.” *Id.* at *5. Here, as
18 noted above, Zillow specifically told Corus that Corus’s infringement contentions did not
19 disclose any doctrine of equivalents theories. (*See* PNIC at 4.)

20 **B. Good Cause**

21 Corus argues that, even if Dr. Martin’s expert report disclosed new theories of
22 infringement not included in Corus’s contentions, the court should not strike portions of

1 Dr. Martin’s report if Corus demonstrates good cause to amend its contentions, which
2 involves both diligence on the part of the moving party and a lack of prejudice to the
3 non-moving party. (*See* Resp. at 9-15); *see also REC Software*, 2012 WL 3545056, at *6
4 (“If the theory contained in the expert report does advance a new or revised theory, the
5 court will then determine if good cause exists to amend.”) (citing *Acer, Inc. v. Tech.*
6 *Props. Ltd.*, Nos. 5:08-cv-00877 JF/HRL, 5:08-cv-00882 JF/HRL, 5:08-cv-05398
7 JF/HRL, 2010 WL 3618687, *3 (N.D. Cal. Sept. 10, 2010) (stating that the “good
8 cause . . . inquiry . . . considers first whether the moving party was diligent in amending its
9 contentions and then whether the non-moving party would suffer prejudice if the motion
10 to amend were granted”)).

11 First, Corus argues that the court should not strike portions of Dr. Martin’s expert
12 report because Corus was diligent in reviewing Zillow’s source code despite (1)
13 difficulties in obtaining the code in a usable format, (2) disputes concerning missing code
14 and source code printouts, and (3) difficulties scheduling depositions and obtaining
15 necessary information from Zillow’s technical deponents. (*See* Resp. at 2-5, 9-10.)
16 Corus, however, misses the point. None of these difficulties in reviewing Zillow’s code,
17 even if credited to Corus, excuse Corus’s failure to ever seek amendment of its
18 infringement contentions—either while Dr. Martin was preparing his report or after Corus
19 served it. By including additional theories and source code citations in Dr. Martin’s
20 expert report, Corus, in effect, attempted to amend its prior disclosures without formally
21 asking to do so. This was not an effort in diligence but rather in subversion of the Local
22 Patent Rules. If Corus had moved to amend its contentions—even at the time that it

1 served Dr. Martin’s report—the court may have been able to amend the discovery
2 schedule in a manner that would have had the least impact on the parties, the progress of
3 this litigation, and the court’s calendar. By failing to timely move for amendment of its
4 contentions, Corus robbed the court of any opportunity to timely adjust the discovery
5 schedule in this way. Thus, the court concludes that Corus fails to demonstrate diligence
6 in seeking to amend its infringement contentions. *See, e.g., Hemopet v. Hill’s Pet*
7 *Nutrition, Inc.*, No. SACV121908JLSJPRX, 2014 WL 12603093, at *3 (C.D. Cal. Sept. 3,
8 2014) (concluding similarly that the plaintiff’s attempt “to add infringement contentions,
9 without permission or any explanation, by means of [an] expert report” fails to
10 demonstrate diligence in seeking to amend infringement contentions).

11 Further, to the extent that Corus fails to demonstrate diligence, the court need not
12 consider whether Corus’s untimely disclosure prejudiced Zillow. *See id.* at *3 n.3
13 (stating, in the context of a motion to strike portions of an expert’s report for failure to
14 assert the doctrine of equivalents and additional claims in its infringement contentions,
15 that “the ‘good cause’ analysis ends with a determination that [the plaintiff] was not
16 diligent”); *Takeda Pharm. Co.*, 2015 WL 1227817, at *6 (“Because . . . the record reflects
17 that [the defendant] was not diligent in seeking to include the missing theories in its
18 invalidity contentions, the Court agrees that [the plaintiff] need not show prejudice.”).

19 Nevertheless, Zillow demonstrates that it is prejudiced here. One of the purposes
20 of the Local Patent Rules is to “require early crystallization of infringement theories.” *See*
21 *KlausTech, Inc.*, 2018 WL 5109383, at *6. Here, the parties exchanged expert witness
22 reports on August 30, 2019. (*See* 2d Am. Sched. Order at 2.) Thus, Corus withheld the

1 full scope of its infringement theories throughout most of the discovery period. Indeed,
2 although discovery did not close until October 11, 2019 (*see id.*), Corus deprived Zillow
3 of any realistic ability to conduct discovery on Corus's new theories. Zillow needed time
4 to analyze Dr. Martin's report and the new theories of infringement and myriad source
5 code citations contained in it. Zillow also needed time to formulate the discovery it
6 needed on these new theories and then to serve written discovery requests. To compel
7 responses to those requests, Zillow would have needed to serve those requests on Corus at
8 least 30 days prior to the discovery cutoff. *See* Fed. R. Civ. P. 33(b)(2) (permitting the
9 responding party 30 days to serve its answers and objections to interrogatories); Fed. R.
10 Civ. P. 34(b)(2)(A) (permitting the responding party 30 days to respond in writing to
11 requests for production); Fed. R. Civ. P. 36(a)(3) (permitting the responding party 30 days
12 to answer or object). Thus, Zillow would have had to serve written discovery on Corus by
13 September 11, 2019—a mere 12 days after Zillow received Dr. Martin's report. And this
14 does not even account for any further discovery via depositions or third-party discovery
15 that Zillow may have needed as result of the late disclosures in Dr. Martin's report—all of
16 which Zillow would have also needed to serve, schedule, and complete before October 11,
17 2019.

18 Indeed, by the time Corus fully disclosed its infringement theories, the parties were
19 appropriately engaged in expert discovery and the formulation of any rebuttal expert
20 reports, which were due on September 27, 2019. (*See* 2d Am. Sched. Order at 2.) But
21 Zillow's experts were deprived of knowing the full extent of Corus's theories at the time
22 they wrote their initial reports and, as a practical matter, were deprived of any discovery

1 concerning those new theories in drafting their rebuttal expert reports. If the court allows
2 Corus to engage in this type of litigation practice by withholding its infringement theories
3 until the last possible moment in the discovery period, the court will simply encourage
4 parties to engage in more delay. Ultimately, this behavior contravenes the spirit of the
5 Local Patent Rules, which are designed to provide for the early elucidation of
6 infringement theories, and the court will not encourage it. *See KlausTech, Inc.*, 2018 WL
7 5109383, at *8 (finding prejudice was inherent in infringement theories disclosed in an
8 expert report even though expert discovery remained open).

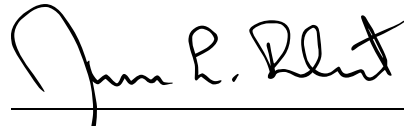
9 Further, Corus's late disclosures in Dr. Martin's August 30, 2019, expert report
10 came nearly two months after the court issued its July 2, 2019, claim construction order.
11 (*See* CC Order.) Zillow contends that because Corus did not identify any of the accused
12 data structures prior to and during claim construction, Zillow was unable to properly
13 evaluate the parties' dispute regarding the "database" term or to conduct discovery on that
14 issue. (MTE at 14-16; Reply at 6.) Corus responds that accusations against an accused
15 product are irrelevant to claim construction (Resp. at 13), but the court is not convinced
16 that this general rule dispels any prejudice to Zillow. Knowledge of the accused product
17 can provide "meaningful context" for claim construction and is needed to identify
18 disputes. *See Wilson Sporting Goods Co. v. Hillerich & Bradsby Co.*, 442 F.3d 1322,
19 1326 (Fed. Cir. 2006) ("While a trial court should certainly not prejudge the ultimate
20 infringement analysis by construing claims with an aim to include or exclude an accused
21 product or process, knowledge of that product or process provides meaningful context for
22 the first step of the infringement analysis, claim construction."); *see also In re ICON*

1 *Health & Fitness, Inc.*, 496 F.3d 1374, 1379 (Fed. Cir. 2007) (“[A]n infringement or
2 invalidity analysis provides the context for claim construction.”); *Pall Corp. v. Hemasure*
3 *Inc.*, 181 F.3d 1305, 1308 (Fed.Cir.1999) (“Although the construction of the claim is
4 independent of the device charged with infringement, it is convenient for the court to
5 concentrate on those aspects of the claim whose relation to the accused device is in
6 dispute.”). Thus, the court concludes that Zillow has demonstrated prejudice as a result of
7 Corus’s late disclosure of additional infringement theories in Dr. Martin’s expert report.

8 **IV. CONCLUSION**

9 Based on the foregoing analysis, the court GRANTS Zillow’s motion to exclude
10 testimony or opinions pertaining to theories of patent infringement that were introduced
11 for the first time in the opening expert report of Dr. Martin (Dkt. # 58).

12 Dated this 29th day of January, 2020.

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15 JAMES L. ROBART
16 United States District Judge
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