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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 INTERNATIONAL BUSINESS
8 MACHINES CORPORATION,

9 Plaintiff,

10 v.

11 ZILLOW GROUP, INC.; and ZILLOW,
12 INC.,

13 Defendants.

C20-851 TSZ

MINUTE ORDER

14 This matter having been transferred to this Court pursuant to 28 U.S.C. § 1404(a)
15 by the Central District of California, the following Minute Order is made by direction of
16 the Court, the Honorable Thomas S. Zilly, United States District Judge:

17 (1) A scheduling order was entered in this case prior to its transfer, see Minutes
18 (docket no. 52); see also Order (docket no. 69), and the parties have proposed changes to
19 certain deadlines, see Stipulation (docket no. 95), some of which have already expired.
20 The Court will enter an amended scheduling order after the conference described in
21 Paragraph 5, below. The deadline for joining parties and amending pleadings that was set
22 forth in the scheduling order issued January 23, 2020, docket no. 52, remains in effect
23 and has expired.

(2) Defendants' motion to strike infringement contentions and stay deadlines
and discovery, docket no. 80, is DENIED. While this matter was pending in the Central
District of California, the parties were operating under the Patent Local Rules of the
Northern District of California, which require a plaintiff in patent litigation to serve
infringement contentions identifying specifically where and how each limitation of each
asserted patent claim is found within each "Accused Instrumentality." N.D. Cal. Patent
L.R. 3-1(c). The Local Patent Rules of this District contain a similar requirement. See
W.D. Wash. Local Patent Rule 120(c). Given the strong similarity between these local
rules, the cases from the Northern District of California evaluating the sufficiency of

1 infringement contentions offer helpful standards that will be applied in this matter. See
2 Genuine Enabling Tech. LLC v. Nintendo Co., 2019 WL 3779867 at *4 (W.D. Wash.
3 Aug. 12, 2019). Those standards indicate that infringement contentions must have a
4 degree of specificity that provides “reasonable notice to the defendant why the plaintiff
5 believes it has a ‘reasonable chance of proving infringement.’” Id. (quoting Shared
6 Memory Graphics LLC v. Apple, Inc., 812 F. Supp. 2d 1022, 1025 (N.D. Cal. 2010)).
7 In this matter, defendants Zillow Group, Inc. and Zillow, Inc. (collectively, “Zillow”)
8 accuse plaintiff International Business Machines Corporation (“IBM”) of serving
9 deficient infringement contentions for two reasons: (i) failure to specifically identify the
10 Accused Instrumentality; and (ii) failure to identify where and how each claim limitation
11 is found within each Accused Instrumentality.¹ This litigation involves seven patents-in-
12 suit and six Zillow systems, which are each accused of infringing at least two of the
13 patents at issue. Each Zillow system, other than Zillow Mobile Apps, consists of current
14 and prior versions of a website and/or webpages, along with the services that “underlie or
15 support” them. See Ex. Z to Peaslee Decl. (docket no. 80-28). In contrast, Zillow Mobile
16 Apps are applications for accessing Zillow’s services from a mobile device, as well as the
17 servers that “underlie or support” them. Id. Zillow asserts that its mobile applications
18 are released by numbered versions, and that IBM’s failure to identify which version is an
19 Accused Instrumentality is fatal. The Court concludes that the lack of version numbers
20 does not warrant striking the infringement contentions, and DIRECTS IBM to amend its
21 infringement contentions within twenty-one (21) days of the date of this Minute Order to
22 specify which version or versions of Zillow Mobile Apps are accused. Zillow further
23 argues that IBM’s twenty-five (25) separate infringement contention charts, one of which
exceeds 300 pages, three of which exceed 200 pages, and several of which are close to or
exceed 100 pages in length, do not indicate how each claim limitation is present in each
Accused Instrumentality. IBM responds that it is not required at this stage of the
proceedings to prove infringement, and that it has offered as much specificity as possible
with the information currently available, which does not include the non-public source
code solely within Zillow’s possession. This matter is factually similar to SpeedTrack,
Inc. v. Amazon.com, Inc., 2018 WL 3328423 (N.D. Cal. July 6, 2018), and the Court will
use the same approach as adopted in that case. IBM is DIRECTED to amend its
infringement contentions within thirty-five (35) days after any disclosure of the non-
public source code at issue. The parties should be prepared to discuss the discovery of
non-public source codes at the conference described in Paragraph 5, below. At this time,
however, the Court makes no ruling concerning whether Zillow must produce any non-
public source code.

¹ Zillow also asserts that the Court should strike IBM’s contentions of representative, indirect,
and/or attributed infringement and infringement under the doctrine of equivalents, reproaching
IBM for resorting to the phrases “such as” and “for example,” relying on “boilerplate” language,
and attempting to merely reserve these theories. The Court is satisfied that the voluminous
infringement contention charts provide ample notice to Zillow concerning these issues.

1 (3) From the date of this Minute Order forward, the Court will apply the Local
2 Patent Rules of this District, as well as Northern District of California Patent Local Rules
3 3-8 and 3-9, except that the Court will set a specific deadline for serving the required
4 damages contentions.

5 (4) On or before July 17, 2020, the parties shall meet and confer (as defined in
6 Local Civil Rule 1(c)(6)), and file a Joint Status Report addressing the following issues:

7 (a) In the Joint Status Report, the parties shall indicate whether lead trial
8 counsel has changed or remains John Desmarais and Karim Oussayef for IBM and
9 Ian Crosby for Zillow;

10 (b) In the Joint Status Report, the parties shall designate not more than
11 two liaison counsel for each side; liaison counsel shall serve as the sole contact
12 points for the Court and will be responsible for assisting the Court in scheduling
13 and coordinating hearings and telephonic conferences and for appropriately
14 distributing emailed or telephonic communications from the Court;

15 (c) Whether the parties have any remaining disputes regarding how
16 service of discovery requests and responses and of other materials in this case
17 should be effected;

18 (d) Whether any modifications to the Stipulated Protective Order
19 entered on March 26, 2020, docket no. 88, are necessary and, if so, what deadline
20 should be set for the parties to seek such amendments;

21 (e) Whether any dispute remains concerning the disclosure of invalidity
22 and infringement contentions from prior litigation pursuant to Federal Rule of
23 Civil Procedure 26(a)(1) or otherwise and, if so, whether the Court should set a
24 deadline for filing any motion to resolve such issue;

25 (f) What types of experts the parties anticipate designating with respect
26 to claim construction, and whether the Court should appoint one or more experts,
27 to be paid by the parties jointly, pursuant to Federal Rule of Evidence 706, to
28 consider and make recommendations concerning claim construction; see Local
29 Patent Rule 110(11);

30 (g) What types of experts the parties anticipate designating with respect
31 to other issues in the case, including damages, and whether the Court should
32 appoint one or more experts, to be paid by the parties jointly, pursuant to Federal
33 Rule of Evidence 706, to consider and make recommendations on any of these
34 issues;

35 (h) Whether the number of patents-in-suit, patent claims, and/or accused
36 websites, mobile applications, or other systems can be narrowed in advance of

1 claim construction and/or trial; if a substantial number of issues cannot be
2 eliminated from this action, the parties are encouraged to propose an appropriate
“bellwether” method for managing this litigation;

3 (i) Whether discovery, claim construction, motion practice, and/or trial
4 should be bifurcated between the consumer-facing and business-facing Zillow
systems, see Order (docket no. 96), and/or between liability and damages;

5 (j) When do the parties anticipate being prepared to file the Joint Claim
6 Construction and Prehearing Statement required by Local Patent Rule 132, and do
the parties propose any changes to the schedule for claim construction discovery
and claim construction briefing set forth in Local Patent Rules 133 and 134;

7 (k) The Court is considering requiring the parties to provide a video-
8 recorded technology tutorial, for which the parties may use any visual aids they
9 wish, including PowerPoint slides and computer animations, and which may not
10 exceed forty-five (45) minutes per side, for a total of ninety (90) minutes; in the
Joint Status Report, the parties shall set forth (A) any modification or objection to
11 this proposal, (B) a date by which the parties anticipate being able to submit such
tutorial, and (C) a proposed procedure for interposing objections to the opposing
side’s tutorial;

12 (l) Having reviewed the parties’ Joint Rule 26(f) Report, docket no. 48,
the Court anticipates imposing the following limitations on discovery: (A) a limit
13 of either 25 interrogatories per side, or 7 interrogatories per patent-in-suit per side,
after any narrowing consistent with Paragraph 4(h), above, whichever is greater;
14 (B) a limit of 35 requests for admission per side, or 10 requests for admission per
patent-in-suit per side, after any narrowing consistent with Paragraph 4(h), above,
15 whichever is greater, excluding requests for admission made solely for the purpose
of authenticating documents; (C) no limit on requests for production; and (D) a
16 limit of 140 hours of depositions, each of which is to be completed within the
seven-hour limit set forth in Federal Rule of Civil Procedure 30(d)(1); in the Joint
17 Status Report, the parties shall set forth any modification or objection to this
proposed ruling, and shall indicate whether separate limits should be established
18 with regard to claim construction discovery; see Local Patent Rule 110(10); and

19 (m) What are the parties’ proposed dates for completing discovery, filing
dispositive motions, and commencing trial, and whether the parties will agree to
20 waive the right to a jury and proceed with a bench trial.

21 (5) A telephonic scheduling and status conference is SET for July 23, 2020, at
10:00 a.m. During the conference, the Court will hear from only two attorneys per side.
22 Counsel will be provided a conference number and access code via email, and they will
be asked to designate by return email who will speak at the conference.

1 (6) Consistent with the ruling of the Central District of California, see Minutes
2 at 1 (docket no. 52), and unless the Court orders otherwise, multiple dispositive (i.e.,
3 summary judgment) motions shall not be filed, see Local Civil Rule 7(e)(3), and no
4 dispositive motion shall be filed in advance of the issuance of a claim construction order.
5 Notwithstanding Local Civil Rule 7(f)(1), any motion for leave to file an overlength brief
6 shall be filed at least fourteen (14) days before the underlying motion is due.

7 (7) The Clerk is directed to send a copy of this Minute Order to all counsel of
8 record.

9 Dated this 17th day of June, 2020.

10 William M. McCool
11 Clerk

12 s/Karen Dews
13 Deputy Clerk