Before the United States Judicial Panel
on Multidistrict Litigation

In re Pointwise Ventures LLC Patent Litigation	)	MDL No.

Defendant Wayfair's Brief in Support of its Motion to Transfer

Under 28 U.S.C. § 1407, Defendant Wayfair LLC moved to transfer all pending cases filed by Plaintiff Pointwise Ventures LLC alleging infringement of U.S. Patent No. 8,471,812 ('812 Patent) to an appropriate district for coordinated or consolidated pretrial proceedings. The 13 open cases in three districts (D. Del., W.D. Tex., and E.D. Tex.) are identified in the attached Pending Cases Schedule, although there apparently is a tentative settlement in one of them (Pinterest, D. Del.).

Beginning in March 2024, Pointwise, a New Mexico limited liability company with a principal place of business in New Mexico, represented by Chicago counsel, has filed lawsuits alleging infringement of the '812 Patent in the District of Delaware, the Eastern District of New York, the Eastern District of Texas, the Western District of Texas, and the Western District of Washington. Every remaining defendant that has responded to the complaint has asserted a dispositive threshold motion on the grounds that the '812 Patent is not patent-eligible under 35 U.S.C. § 101 (Google, IKEA, Penney, Macy's), and IKEA and Penney have also alleged that Pointwise failed to assert a plausible claim of patent infringement. Wayfair intends to file a similar dispositive motion, as well as a motion to dismiss or transfer on venue grounds, and expects that some or all of the other domestic defendants will do likewise. In short, dispositive threshold

motions have been already filed in two different districts in Texas before different judges, and five of the cases assigned to the same judge in the Eastern District of Texas have been consolidated into two separate cases with different schedules (with six other cases pending before the same judge not consolidated with any case).

Although this case is being litigated in two districts in Texas, no defendant or the plaintiff is incorporated in Texas (while half of the American defendants are incorporated in Delaware), and other than Penney, no defendant or the plaintiff is headquartered in Texas. No judge has issued any substantive ruling on any issue, including the pending dispositive motions and Google's pending motion to transfer from the Western District of Texas to the Northern District of California. Convenience, justice, and efficiency all point to the Polestar of consolidation and transfer.

Background

In all of the cases in the attached Pending Cases Schedule, Pointwise alleges in its cursory six-page complaints that each defendant infringed Claim 1, the only independent claim of the '812 Patent, which is entitled "Pointing and Identification Device." *See, e.g., Pointwise Ventures LLC v. Wayfair LLC (Wayfair)*, ECF 11, ¶ 9 (Wayfair First Amended Complaint (FAC)). Each defendant that has responded to the complaint has raised the threshold issue whether the '812 Patent is patent-eligible under 35 U.S.C. § 101. In the words of IKEA:

> Asserted claim 1 is directed towards the abstract idea of identifying an object in an image. No technical improvement is claimed. Claim 1 fails to claim "how" any of the method steps are accomplished. Thus, the asserted claim claims ineligible subject matter.

Pointwise Ventures LLC v. IKEA Systems B.V. (IKEA), ECF 50 at 6–7 (IKEA Motion to Dismiss Second Amended Complaint (SAC)). For present purposes, it is sufficient to note that this threshold dispositive issue is presented so far in four cases before two different judges, with similar

motions expected from Wayfair and others. *See also Pointwise Ventures LLC v. Google LLC (Google)*, ECF 18 (Google Motion to Dismiss FAC); *Pointwise Ventures LLC v. Penney OpCo LLC (Penney)*, ECF 10 (Penney Motion for Judgment on the Pleadings); *Wayfair*, ECF 25 (Macy's Motion to Dismiss). Additionally, both IKEA and Penney have also moved to dismiss or sought judgment on the grounds that these barebones complaints failed even to set forth a viable theory of infringement.

Furthermore, these cases are on different schedules. Google's case is pending in the Western District of Texas, and resolution of its motion to dismiss may be delayed by its pending motion to transfer to the Northern District of California. *See Google*, ECF 18 at 3–4 n.1 (Google suggests deferring decision on the motion to dismiss until after the case is transferred). IKEA's case was filed in March 2024 and was consolidated only with the now-dismissed case against Farfetch UK Limited. *See IKEA*, ECF 18 (IKEA Consolidation Order). Significantly, the standard Discovery Order and Docket Control Order have been entered in the IKEA case, and thus IKEA is obligated to litigate the merits by serving its subject-matter eligibility contentions and invalidity contentions imminently before its pending threshold dispositive motion to dismiss is decided. *See IKEA*, ECF 56 (Order extending deadlines until January 2025). Penney's case has now been consolidated with the cases against Wayfair, Lowes, and Macy's, and thus is on a different, later, track than the IKEA case. *See Wayfair*, ECF 7 (Wayfair Consolidation Order).

Further complicating matters, in an increasingly popular tactic in these types of cases, Pointwise has sued six foreign companies in the Eastern District of Texas rather than suing the American subsidiaries or affiliates that are allegedly infringing the '812 Patent in the United States, thus allowing Pointwise to assert that venue against these foreign defendants is proper in any district in the country if there is personal jurisdiction collectively with the United States. These

cases have not been consolidated with either IKEA or Wayfair, and according to Pacer, these complaints filed in March 2024 have not yet been served. Pointwise asserts in paragraph 3 of the operative complaints that these defendants are incorporated and headquartered in the Cayman Islands and Hong Kong (Alibaba); the United Kingdom (Blippar); Hong Kong (Glority); Singapore (Roadget); Italy (Net-A-Porter); and the United Kingdom (ASOS). Once served, these foreign defendants may have to navigate through the thicket of patent litigation in America alone.

In short, even the cases filed in the Eastern District of Texas are proceeding on three separate tracks: (1) a fully briefed motion in *IKEA*; (2) partially briefed and anticipated motions by Penney, Macy's, and Wayfair in the consolidated *Wayfair* case; and (3) uncertain defenses in the foreign-defendant cases in which the defendants have not been served. On top of that, motion practice on yet another schedule is ongoing in the Western District of Texas in *Google*; and matters are proceeding on yet a fifth track in Delaware—although the Pinterest case may be subject to a tentative settlement.

Pointwise does not assert that any of the domestic defendants are incorporated in Texas. Rather, Pointwise asserts in paragraph 3 of the operative complaints that the American defendants are incorporated in Delaware (Pinterest, Google, Wayfair, and Macy's); Virginia (IKEA and Penney); and North Carolina (Lowes). Although Pointwise claims that several of the defendants have a physical presence in Texas, other than Penney, which is headquartered in Plano, Texas, the defendants' presence in Texas amounts to a store, a facility, or some other satellite location that is not alleged to have any relationship to the claimed infringement or accused instrumentalities, which are retail mobile applications for smartphones. *See, e.g.*, *Wayfair*, ECF 11-2 (accusing the "visual search" feature of Wayfair's mobile app). In the words of Google, which Pointwise asserts has a Texas presence:

> This patent infringement case has no connection to the Western District of Texas. No one who has worked on the design or development of the accused product is located in this District. No electronic or other documents related to the accused product were created in this District. No one who works with the financial data associated with the accused product is in this District. And neither the plaintiff nor the named inventor on the asserted patent appears to have any connection to this District. Put plainly, not a single witness or piece of evidence relevant to this case appears to be located in this District.

Google, ECF 20 at 6 (Google Motion to Transfer).

Against this mosaic, we turn to Wayfair's motion to consolidate and transfer.

Argument

At the risk of carting coals to Newcastle, we begin with the statute: "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). The Panel must determine whether "transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." *Id*. Assertion of a single patent against multiple defendants satisfies this standard.

As this Panel has found on numerous occasions, the construction and validity of a common patent asserted against multiple defendants constitutes such a common question that would benefit from consolidation and transfer. *See, e.g., In re Webvention ('294) Patent Litigation*, 831 F. Supp. 2d 1366 (J.P.M.L. 2011). It is immaterial that Pointwise has asserted that the defendants allegedly infringe the '812 Patent in slightly different ways. *See In re Proven Networks LLC Patent Litigation*, 492 F. Supp. 3d 1338, 1339 (J.P.M.L. 2020) ("differences in the accused products and infringement allegations in the cases do not prevent centralization where common factual issues involving claim construction and patent invalidity are shared"); *In re Bear Creek Tech., Inc., ('722) Patent Litigation*, 858 F. Supp. 2d 1375, 1379 (J.P.M.L. 2012) ("The Panel has often centralized litigation involving different products which allegedly infringe a common patent or patents."). This

is particularly true here given the fact that the defendants assert that the Court should never reach the issue of alleged infringement because, as a threshold matter, the '812 Patent is not patent-eligible under 35 U.S.C. § 101.

Centralization is also appropriate to avoid the specter of possibly conflicting rulings on common issues such as claim construction and patent validity:

> All actions involve substantially identical claims that defendants infringed the four [asserted] patents. Centralization is warranted to prevent inconsistent rulings (particularly with respect to claim construction and issues of patent validity) and overlapping pretrial obligations, reduce costs, and create efficiencies for the parties, courts, and witnesses.

In re Kertdin (Tavaborole) Topical Solution 5% Patent Litigation, 366 F. Supp. 3d 1370, 1371 (J.P.M.L. 2019) (brackets added).

Based on prior experience, this is not an academic concern. Wayfair was sued previously for patent infringement in the Western District of Texas. *See Alto Dynamics, LLC v. Wayfair LLC*, No. 1:22-cv-00829-RP (W.D. Tex.). Wayfair moved to dismiss or transfer based on improper venue. *Id*., ECF 22. Following an opportunity to conduct venue discovery, once Judge Pittman granted a protective order and suggested that transfer was likely, *see id*., ECF 39 at 2 ("Both the likelihood of transfer and the minimal harm of delaying discovery weigh in favor of a protective order."), the plaintiff acceded to the inevitable and consented to transfer the case to the District of Massachusetts where Wayfair is headquartered. *Id*., ECF 44. The Massachusetts district court then granted Wayfair's motion to dismiss eight of the nine asserted patents under 35 U.S.C. § 101. *See Alto Dynamics, LLC v. Wayfair LLC*, 687 F. Supp. 3d 179 (D. Mass. 2023). The plaintiff did not appeal the invalidation of the eight invalidated patents following the entry of final judgment, dismissing the entire litigation with prejudice.

Undeterred, the plaintiff then filed a series of lawsuits in the Eastern District of Texas asserting infringement of the invalid patents against foreign companies that submitted declarations attesting they did not operate the allegedly infringing websites. *See, e.g., Alto Dynamics, LLC v. Jung S.A.S. dba Back Market (Jung)*, No. 2:24-cv-00109-JRG-RSP (E.D. Tex.). Following consolidation, Paris-based Jung (represented by the undersigned counsel) moved to dismiss the case for lack of personal jurisdiction and for issue preclusion based on Wayfair's invalidation of most of the asserted patents. *See Alto Dynamics, LLC v. Gucci America, Inc.* (*Gucci)*, No. 2:24-cv-00375-JRG-RSP, ECF 19, 46 (E.D. Tex.); *accord Koss Corp. v. Bose Corp.*, 107 F.4th 1363 (Fed. Cir. 2024) (issue preclusion bars re-litigation of Rule 12(b)(6) invalidity ruling after patent owner's voluntary dismissal of all claims with prejudice). Jung also filed motions for a protective order and the like to avoid the cost and distraction of the on-going litigation while the Court considered these dispositive threshold issues. *Gucci*, ECF 20, 51, 66, 73. The Court never granted any of these motions for protection nor ruled on any of these dispositive threshold motions, and faced with litigating the merits of a patent case concerning a website it did not operate nearly 5,000 miles from its home in Paris, France, without regard to jurisdiction over the defendant or the validity of the asserted patents, Jung agreed to a settlement. *Jung*, ECF 18.

In other words, because the patent litigation against Wayfair was not consolidated with all other cases asserting similar claims of patent infringement, later defendants could not take advantage of the fact that Wayfair had successfully invalidated most of the asserted patents under 35 U.S.C. § 101. To repeat, consolidation and transfer under 28 U.S.C. § 1407 are the perfect antidote to "prevent inconsistent rulings (particularly with respect to claim construction and issues of patent validity) and overlapping pretrial obligations, reduce costs, and create efficiencies for the

parties, courts, and witnesses." *In re Kertdin (Tavaborole) Topical Solution 5% Patent Litigation*, 366 F. Supp. 3d at 1371.

The only remaining question is where should these cases be transferred. In light of the lack of any meaningful connection to either the Eastern or Western District of Texas by the plaintiff, by the inventor, by the defendants, by the infringement claims, by the witnesses, or by the evidence, Wayfair does not believe that these are appropriate venues. Additionally, the backlog of hundreds of patent cases in the Eastern District of Texas has led the judges there to bemoan their inability to decide motions on a timely basis. *See* Theresa Schliep, *Patents, Juries, Baking: Catching Up with EDTX's Next Chief*, Law360 (Dec. 18, 2024) (Judge Gilstrap had more pending patent cases (451) in 2023 than any other judge in the country); *id.* ("While trials are moving along fine, motions are a particular problem, Judge Mazzant said. 'I apologize to lawyers all the time when they ask about the status of motions,' he said."). Indeed, in managing his overburdened docket, Judge Gilstrap has chosen to run the *Pointwise* cases on three separate timelines, suggesting that the consolidation of yet more cases in that Court would not achieve the goals of Section 1407(a).

Such a transfer is particularly inapt in light of the Chief Justice's concern in the 2021 Year-End Report on the Federal Judiciary about "judicial assignment and venue for patent cases in federal trial court. Senators from both sides of the aisle have expressed concern that case assignment procedures allowing the party filing a case to select a division of a district court might, in effect, enable the plaintiff to select a particular judge to hear a case." *Id.* at 5. The Panel should not exacerbate these concerns.

Wayfair submits that there are numerous preferable alternatives. Wayfair does not object to Google's choice of the Northern District of California, which has substantial patent experience

and expertise (and the Panel would select the judge best suited to hear this case), and is a preferable location for the Asia-based defendants. The largest number of domestic defendants are incorporated in Delaware, which also has substantial patent experience and expertise; and an Eastern seaboard location would be more accessible to the Europe-based defendants. Plaintiff's counsel is located in the Northern District of Illinois, which similarly has numerous judges who are "well-versed in multidistrict litigation [that the Panel could be] confident will steer this litigation on a prudent course," *In re Webvention ('294) Patent Litigation*, 831 F. Supp. 2d at 1367 (brackets added), and venue there would be a true meeting in the (geographic) middle for all defendants. No district has a monopoly on handling these types of cases — indeed, the Panel has assigned two non-patent, multidistrict cases to judges in the plaintiff's home jurisdiction of the District of New Mexico, a venue about which the plaintiff cannot reasonably complain. In sum, Wayfair seeks consolidation on a single schedule and transfer to any convenient jurisdiction where the assigned judge would have the capacity, experience, and willingness to address the common issues raised in this litigation concerning a single patent asserted against multiple defendants.

Conclusion

Defendant Wayfair LLC respectfully requests that its motion to transfer all pending cases alleging infringement of the ’812 Patent to an appropriate district for coordinated or consolidated pretrial proceedings be granted.

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Respectfully submitted,

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