

**BEFORE THE
UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

IN RE PERSONALWEB TECHNOLOGIES,
LLC and LEVEL 3 COMMUNICATIONS,
LLC PATENT LITIGATION

MDL DOCKET NO. _____

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TRANSFER AND
CONSOLIDATION OF PRETRIAL PROCEEDINGS OF PERSONALWEB
TECHNOLOGIES, LLC AND LEVEL 3 COMMUNICATIONS, LLC
PATENT LITIGATION PURSUANT TO 28 U.S.C. § 1407**

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PersonalWeb Technologies, LLC (“PersonalWeb”), and Level 3 Communications, LLC (“Level 3”), respectfully submit this Memorandum of Law in Support of their Motion for Transfer of Patent Litigation Pursuant to 28 U.S.C. § 1407 and Rule 6.2 of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation (“MDL Rules”).¹

I. INTRODUCTION

In January 2018 PersonalWeb and Level 3 filed 54² single-defendant patent infringement actions in six judicial districts across the United States (the “PersonalWeb infringement actions”). The patents-in-suit relate to pioneering concepts in cloud computing, and PersonalWeb expects to file more actions against other defendants in the months to come.

All these actions allege infringement of the same claims in the same five patents, against essentially the same accused systems and methods. The accused systems and methods involve each Defendant’s use of the same aspects of a certain web development architecture (Ruby on

¹ PersonalWeb is the primary party bringing this motion. PersonalWeb and Level 3 are parties to an agreement whereby each owns a fifty percent undivided interest in and to the patents-in-suit. Under the agreement, PersonalWeb and Level 3 have certain defined rights to use, license, and enforce the patents-in-suit within separate fields of use. PersonalWeb alleges that the infringements at issue in these actions all occur within, and are limited to, PersonalWeb’s field of use. Level 3 nevertheless joined as plaintiff in these actions pursuant to its contractual obligations to PersonalWeb, at PersonalWeb’s request. All infringement allegations; statements describing PersonalWeb, any defendant, or any defendant’s accused systems or methods; and statements regarding jurisdiction and venue in the complaints are PersonalWeb’s alone. See, Declaration of Michael A. Sherman (“Sherman Decl.”) ¶ 2, Exhibit 1 (“Airbnb Complaint”), ¶¶ 1-3. The complaints in the PersonalWeb infringement actions are largely similar. Accordingly, throughout this Motion, citations to the Airbnb Complaint apply equally to the similar passages in the complaints in the other PersonalWeb infringement actions.

² The distribution of the 54 actions is as follows: 28 in the Northern District of California, 1 in the Central District of California, 5 in the Eastern District of Texas, 12 in the Southern District of New York, 3 in the Eastern District of New York, and 5 in the District of Delaware. PersonalWeb and Level 3 initially also filed a 55th action against Smugmug, Inc. in the Northern District of California. Following communications with counsel for Smugmug, PersonalWeb dismissed the action upon certain representations made by Smugmug’s counsel of facts that reflected no liability for patent infringement by Smugmug. Sherman Decl. ¶ 57.

Rails) in conjunction with their use of the same aspects of the internet protocol (content based E-Tags and Conditional Get requests with “If-None-Match” headers and HTTP 200/304 messages).

While PersonalWeb was preparing this Motion, on February 5, 2018, Amazon.com, Inc. and Amazon Web Services, Inc. (collectively, “Amazon”) filed a complaint against PersonalWeb and Level 3 for various declaratory judgments involving the five patents-in-suit in the PersonalWeb Infringement Actions (“Amazon DJ action”). Amazon seeks declarations that PersonalWeb’s Infringement Actions are barred and an injunction barring PersonalWeb from pursuing the claims in the PersonalWeb infringement actions. Amazon also asserts that the PersonalWeb infringement actions should be stayed during the pendency of the Amazon DJ action.

On February 9, 2018, the Northern District of California reassigned the Amazon action and 27 of the 28 PersonalWeb infringement actions pending in the Northern District of California to Judge Beth Labson Freeman, and reassigned the 28th action to Judge Freeman on February 21, 2018. Following Amazon’s filing of its complaint, on February 20, 2018 Amazon filed a motion against PersonalWeb, seeking to enjoin PersonalWeb’s prosecution of the infringement actions. Sherman Decl. ¶ 58, Exhibit 56.

The significant commonality of fact and legal issues between the existing actions and prospective actions, especially considering Amazon’s declaratory judgment action, favors the transfer and consolidation of pretrial proceedings.

The Panel should transfer all the pending actions to the Northern District of California for consolidation of pretrial proceedings which would also maximize efficiency of the PersonalWeb patent litigation. Over one-half of the existing actions filed so far are already pending in that district and many of the parties and their counsel are located there or elsewhere in California. That district is highly familiar with complex patent litigation, has established patent local rules which

will expedite these actions, and has already presided over PersonalWeb’s previous litigation involving the same patents and their technical subject matter. The PersonalWeb patent litigation has only just begun, so centralization in the Northern District of California at this time will prevent inconsistent pretrial rulings, such as critical claim construction issues, and conserve judicial and party resources.

The transfer of these actions to the Northern District of California also provides convenience for a large number of the parties and witnesses.

In view of the foregoing, PersonalWeb respectfully requests that the Panel transfer all existing actions, as well as future tag-along actions to the Northern District of California for consolidation of pretrial proceedings.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Patents-in-Suit

The patents-in-suit—U.S. Patent Nos. 5,978,791, 6,928,442, 7,802,310, 7,945,544, and 8,099,420 (collectively, “Patents-in-Suit”)—relate to fundamental aspects of cloud computing, including the identification of files or data and the efficient retrieval thereof in a manner which reduces bandwidth transmission and storage requirements. See, e.g., Airbnb Complaint, ¶¶ 1, 10.

The ability to reliably identify and access specific data is essential to any computer system or network. On a single computer or within a small network, the task is relatively easy: simply name the file, identify it by that name and its stored location on the computer or within the network, and access it by name and location. Early operating systems facilitated this approach with standardized naming conventions, storage device identifiers, and folder structures. See, e.g., Airbnb Complaint, ¶ 11.

Ronald Lachman and David Farber, the inventors of the Patents-in-Suit, recognized that the conventional approach for naming, locating, and accessing data in computer networks could

not keep pace with ever-expanding, global data processing networks. New distributed storage systems use files that are stored across different devices in dispersed geographic locations. These different locations could use dissimilar conventions for identifying storage devices and data partitions. Likewise, different users could give identical names to different files or parts of files—or unknowingly give different names to identical files. No solution existed to ensure that identical file names referred to the same data, and conversely, that different file names referred to different data. As a result, expanding networks could become clogged with duplicate data and locating and controlling access to stored data was made more difficult. See, e.g., Airbnb Complaint, ¶ 12.

Lachman and Farber developed a solution: replace conventional naming and storing conventions with system-wide “substantially unique” content-based identifiers. Their approach assigned substantially unique identifiers to all “data items” of any type—“the contents of a file, a portion of a file, a page in memory, an object in an object-oriented program, a digital message, a digital scanned image, a part of a video or audio signal, or any other entity which can be represented by a sequence of bits.” Applied system-wide, this invention would permit any data item to be stored, located, managed, synchronized, and accessed using its content-based identifier. See, e.g., Airbnb Complaint, ¶ 13.

To create a substantially unique, content-based identifier, Lachman and Farber turned to cryptography. Cryptographic hash functions, including MD4, MD5, and SHA, had been used in computer systems to verify the integrity of retrieved data—a so-called “checksum.” Lachman and Farber recognized that these same hash functions could be devoted to a vital new purpose: if a cryptographic hash function was applied to a sequence of bits (a “data item”), it would produce a substantially unique result value, one that: (1) virtually guarantees a different result value if the

data item is changed; (2) is computationally difficult to reproduce with a different sequence of bits; and (3) cannot be used to recreate the original sequence of bits. See, e.g., Airbnb Complaint, ¶ 14.

These cryptographic hash functions would thus assign any sequence of bits, based on content alone, with a substantially unique identifier. Lachman and Farber estimated that the odds of these hash functions producing the same identifier for two different sequences of bits (*i.e.*, the “probability of collision”) would be about 1 in 2 to the 29th power. Lachman and Farber dubbed their content-based identifier a “True Name.” See, e.g., Airbnb Complaint, ¶ 15.

Using a True Name, Lachman and Farber conceived various data structures and methods for managing data (each data item correlated with a single True Name) within a network – no matter the complexity of the data or the network. These data structures provide a key-map organization, allowing for a rapid identification of any particular data item anywhere in a network by comparing a True Name for the data item against other True Names for data items already in the network. In operation, managing data using True Names allows a user to determine the location of any data in a network, determine whether access is authorized, and selectively provide access to specific content not possible using the conventional naming arts. See, e.g., Airbnb Complaint, ¶ 16.

On April 11, 1995, Lachman and Farber filed their first patent application relating to the Patents-in-Suit, describing these and other ways in which content-based “True Names” elevated data-processing systems over conventional file-naming systems. The first True Name patent issued on November 2, 1999. The last of the Patents-in-Suit has expired, but the allegations in all the existing and future tag-along actions are directed to the time period before expiration of the last of the Patents-in-Suit. Airbnb Complaint, ¶ 17.

B. The Defendants' Accused Systems and Associated Methods of Operation

The defendants to the PersonalWeb infringement actions are alleged to operate websites that embody and use systems and methods that infringe the Patents-in-Suit. All the accused systems and methods of the defendant website operators are essentially the same because they all use the same webpage architecture, namely Ruby on Rails, and are alleged to provide their latest authorized webpage content to their users in the same manner, *i.e.*, by using a system of notifications and authorizations to control the distribution of their respective content to determine what webpage content may be served from webpage servers and intermediate caches and what webpage content a user's browser is authorized to use to render defendant's webpages. Each defendant's system, and its associated method of providing webpage content, is alleged to use CONDITIONAL GET requests with IF-NONE-MATCH headers and associated content-based E-Tag values for each file required to render a webpage on the defendant's websites, including the index file for that webpage. In this manner, all of the defendants' systems and associated methods are alleged to, using the Patents-in-Suit, force both intermediate cache servers and end point caches to check whether the website is still authorized to access the previously cached webpage files of a defendant, or whether it must access newly authorized content in rendering any of the defendant's webpage. See, e.g., Airbnb Complaint, ¶ 19.

More specifically, each defendant's website is alleged to use a Ruby on Rails architecture to develop and compile its webpage files that are required to render a webpage, and to generate a fingerprint of the content of each of the files when compiled. Once each defendant's webpage files have been compiled and are complete, each defendant is alleged to upload them to an Amazon S3 host system as objects having unique content-based E-Tag values that are used in the allegedly infringing systems and methods to authorize new content and re-authorize what old web page files may be used to render their web pages, and communicate those authorizations using the same parts

of the internet protocol, namely HTTP 200 AND HTTP 304 messages. Each defendant is alleged to have contracted with the same third party to serve its content on its behalf using the same S3 host system so that it may control its content distribution in an infringement of the Patents-in-Suit. See, e.g., Airbnb Complaint, ¶¶ 21, 22.

C. The Pending Litigation

In January 2018, PersonalWeb filed 54 single-defendant patent infringement actions relating to the Patents-in-Suit and the accused systems and methods that are currently pending.

These consist of:

- (i) 28 actions in the Northern District of California;
- (ii) twelve actions in the Southern District of New York;
- (iii) five actions in the District of Delaware;
- (iv) five actions in the Eastern District of Texas;
- (v) three actions in the Eastern District of New York; and
- (vi) one action in the Central District of California.³

Initial case management conferences have so far been scheduled in March 2018 by two judges for actions pending in the Southern and Eastern Districts of New York. While all of the cases in the Northern District of California are now assigned to Judge Freeman, Judge Davila of the Northern District of California has presided over several of PersonalWeb's prior patent infringement actions. These prior actions over which Judge Davila presided asserted patents including the current Patents-in-Suit, and thus involved the same technology.

³ Pursuant to MDL Rule 6.1(b) , a schedule of the pending actions is filed herewith.

The scheduling of these initial case management conferences has triggered a number of due dates such as the exchange of Initial Disclosures under Rule 26(f) and/or other early meetings of counsel in March 2018. In any event, discovery has not yet commenced in any of the actions.

PersonalWeb expects to file more actions against other defendants in the months to come. Many of these actions, like the currently-pending actions, will allege infringement of the same claims in the same five Patents-in-Suit using the same accused systems and methods as described above, and will thus be tag-along actions subject to transfer for multi-district litigation along with the currently-pending actions.

D. Prior Litigation Involving the Patents-in-Suit

PersonalWeb has previously brought a number of patent infringement actions involving the Patents-in-Suit. Several of these were originally filed in the Eastern District of Texas but were subsequently moved to the Northern District of California and as noted above, were presided over by Judge Davila. Others remained in the Eastern District of Texas until they were closed.

One of the prior actions over which Judge Davila presided—*PersonalWeb Technologies, LLC et al. v. International Business Machines Corp.*, Case No. 5:16-cv-01266-EJD—involved the same ‘420 patent claim 166 which is now asserted against all the existing defendants, and is anticipated to be asserted against prospective defendants in future actions. The *PersonalWeb v. IBM* action progressed through discovery and pretrial, and only settled on the eve of trial. As such, Judge Davila and the Northern District of California became versed in issues such as claim construction, discovery issues and factual and legal issues that will arise in PersonalWeb’s current and future patent infringement actions.

One of the prior actions in the Eastern District of Texas—*PersonalWeb Technologies, LLC et al. v. Amazon.com, Inc. et al.*, Case No. 6:11-cv-00658-LED (“Amazon Texas action”)—involved Amazon’s S3 offerings, but different aspects of Amazon S3 than those used by the defendants in

the presently pending PersonalWeb infringement actions. The Amazon Texas action was before Judge Leonard Davis, who has since retired, and the Amazon Texas action was dismissed in 2014.

E. Amazon Declaratory Relief Action and Injunction Motion

On February 5, 2018, Amazon filed a complaint against PersonalWeb and Level 3 for various declaratory judgments involving the Patents-in-Suit. Sherman Decl., ¶ 56, Exhibit 55 (“Amazon complaint”). The Amazon complaint alleges that, due to the dismissal of the Amazon Texas action, claim preclusion and the so-called “Kessler Doctrine,” (*Kessler v. Eldred*, 206 U.S. 285, 27 S.Ct. 611 51 L.E. 1065 (1907))_bar PersonalWeb’s claims in the PersonalWeb infringement actions. Amazon complaint, ¶ 3, Prayer for Relief ¶¶ A-B. In addition, Amazon seeks declaratory judgments that neither Amazon nor its technology, including Amazon S3, infringe any of patents in the PersonalWeb infringement actions. Amazon complaint, ¶¶ 50, 58, 66, 74, and 82, Prayer for Relief ¶¶ D-H. In Amazon’s motion filed on February 20, 2018 that seeks to enjoin PersonalWeb’s prosecution of the infringement actions, it asserts that “PersonalWeb’s complaints are *identical*, alleging infringement of the same patents and accusing the same Amazon technology at issue in this case” Sherman Decl., Exhibit 56, p. 10, lines 5-6.

While PersonalWeb disagrees with Amazon that Amazon is entitled to the sought-after declaration, and disagrees that Amazon’s technology is the “sine qua non” of whether there is patent infringement or not, Amazon makes the argument for centralization/coordination, as it specifically alleges in its complaint that “[t]his is the only Court, and this is the only case, where this patent dispute should be litigated.” Amazon complaint, ¶ 2.

III. ARGUMENT

A. The Legal Standard

Under 28 U.S.C. § 1407, the Panel may order MDL centralization of two or more civil cases pending in different judicial districts if: (i) the cases “involve[] one or more common questions of fact”; (ii) centralization will further “the convenience of the parties and witnesses”; and (iii) centralization “will promote the just and efficient conduct of [the] actions.” When balancing these three individual requirements for transfer, the Panel considers the overall statutory purpose to achieve efficiencies in the pretrial process. Thus, no individual requirement is determinative. *In re Commonwealth Oil/Tesoro Petroleum Securities Litig.*, 458 F. Supp. 225, 229 (J.P.M.L. 1978). As explained herein, the PersonalWeb patent litigation meets all three of the efficiency, commonality, and convenience factors.

Centralization under § 1407 is especially appropriate when it will eliminate the possibility of overlapping or inconsistent rulings and prevent the duplication of discovery. *See In re LTV Corp. Secs. Litig.*, 470 F. Supp. 859, 862 (J.P.M.L. 1979); *In re Litig. Arising from Termination of Retirement Plan for Employees of Fireman's Fund Ins. Co.*, 422 F. Supp. 287, 290 (J.P.M.L. 1976). Notably, in enacting § 1407, Congress specifically identified patent cases as among the type of disputes well-suited for MDL centralization. *See* H.R. Rep. No. 90-1130, at 3, reprinted in 1968 U.S.C.C.A.N. 1898, 1900 (“The types of cases in which massive filings of multidistrict litigation are reasonably certain to occur include ... patent and trademark suits”).

Consistent with the MDL statute’s purpose, the Panel has recently and repeatedly ordered MDL centralization in patent cases presenting common questions of infringement, validity, damages, and claim construction, recognizing the benefits of the efficient and consistent resolution of those common questions through coordinated or consolidated pretrial proceedings. *See, e.g. In re Nebivol ('040) Patent Litig.*, 867 F. Supp. 2d 1354, 1355 (J.P.M.L. 2012); *In re Maxim*

Integrated Prods., Inc., Patent Litig., 867 F. Supp. 2d 1333, 1335 (J.P.M.L. 2012); *In re Bear Creek Techs., Inc. ('722) Patent Litig.*, 858 F. Supp. 2d 1375, 1379 (J.P.M.L. 2012); *In re Innovatio IP Ventures, LLC, Patent Litig.*, 840 F. Supp. 2d 1354, 1355 (J.P.M.L. 2011) ; *In re Webvention LLC ('294) Patent Litig.*, 831 F. Supp. 2d 1366, 1367 (J.P.M.L. 2011). *In re TransData, Inc. Smart Meters Patent Litig.*, 830 F. Supp. 2d 1381, 1381-82 (J.P.M.L. 2011); *In re Vehicle Tracking & Sec. Sys. ('844) Patent Litig.*, 807 F.Supp.2d 1380, 1381 (J.P.M.L. 2011).

B. The PersonalWeb Actions Should Be Transferred to the Northern District of California and Pretrial Proceedings Consolidated

1. The PersonalWeb Actions Present Common Questions of Fact and Law

The PersonalWeb actions filed to date, as well as the anticipated actions to be filed, present numerous common questions of fact. First and foremost, the same five Patents-in-Suit are involved in all cases. The Panel has recognized that actions involving the same or overlapping patents are particularly well-suited for transfer and consolidation of pretrial proceedings because they, by their very nature, present many common questions of fact. For example, in *In re PharmaStem Therapeutics, Inc. Patent Litig.*, 360 F. Supp. 2d 1362 (J.P.M.L. 2005), the Panel recognized that when overlapping patents are asserted in multiple actions, “[a]ll actions ... can ... be expected to share factual and legal questions concerning such matters as the technology underlying the patents, prior art, claim construction and/or issues of infringement involving the patents.” 360 F. Supp. 2d at 1364 (consolidating five actions asserting overlapping patents with a related unfair competition action); *see also In re MLR, LLC Patent Litig.*, 269 F. Supp. 2d 1380, 1381 (J.P.M.L. 2003) (ordering consolidation of three actions dealing with cellular phone and/or modem products, on the basis that overlapping complex patents, “can thus be expected to share factual and legal questions concerning such matters as patent validity, prior art, obviousness and interpretation of various claims of the patents.”).

Second, in addition to the identity of the Patents-in-Suit, the existing and future PersonalWeb patent infringement actions present the same infringement issue: whether the accused websites that operate in the same manner, being based on the same Ruby on Rails architecture and using the same aspects of the internet protocol to communicate their authorizations and re-authorizations to control what web pages files a browser uses to render their webpages, infringe the Patents-in-Suit. See, e.g., Airbnb Complaint, ¶¶ 21, 22. Because all the PersonalWeb actions involve the same type of website operation, the resolution of those cases will necessarily involve overwhelmingly common questions of fact. See *In re Bear Creek Techs.*, 858 F. Supp. 2d at 1379 n. 4 (noting that use of same equipment vendors gives rise to common issues of fact). Indeed, all the PersonalWeb actions include the same infringement allegations.

Third, as in any patent infringement action, PersonalWeb anticipates affirmative defenses and/or counterclaims based on alleged patent invalidity. As such, the PersonalWeb actions will also involve common questions of fact concerning the validity of the Patents-in-Suit—which weighs in favor of MDL centralization. Any invalidity defenses will be dependent upon, *inter alia*, the meaning of the patent claims, the scope and content of the prior art, the nature of the disclosure of the Patents-in-Suit, and the facts behind the inventions of the Patents-in-Suit. Discovery and motion practice related to validity issues will necessarily be identical or at least overlap. The Panel has “consistently held that the issue of patent validity presents common questions of fact which satisfy the statutory requirements of § 1407.” *In re Embryo Patent Infringement Litig.*, 328 F. Supp. 507, 508 (J.P.M.L. 1971) (collecting cases); see also *In re Method of Processing Ethanol Byproducts and Related Subsystems ('858) Patent Litig.*, 730 F. Supp. 2d 1379, 1380 (J.P.M.L. 2010) (finding common issues of fact because validity of same patent was at issue in each case).

Indeed, the filing of the Amazon DJ action, asserting the same defenses of claim preclusion and the Kessler Doctrine with respect to all of the PersonalWeb infringement action defendants, illustrates this exact point.

Joinder of the defendants in the existing actions could potentially have been accomplished in the six judicial districts pursuant to 35 U.S.C. § 299, which permits joinder where the claims against the defendants arise out of “the same transaction, occurrence or series of transactions, or occurrences relating to the making, using, importing into the United States, offering for sale, or selling of the same accused product or process”, and “questions of fact common to all defendants or counterclaim defendants will arise in the action.” *Id.* at § 299(a)(1)-(2). The exact same internet protocol and processes are alleged to be involved in the patent infringement, are based on the use of the same technology, and involve the same type of website architecture. Thus, it would be a close question whether PersonalWeb could simply join all the actions pending in the same judicial districts.

However, the standard for joinder of different defendants in a single patent suit under § 299, added by the America Invents Act in 2011, is intentionally difficult to meet. That the PersonalWeb infringement actions arguably meet this high bar, strongly suggests that they meet the much lower standard of common facts and law needed to justify consolidation under the MDL Rules where issues of efficiency, commonality and convenience so predominate, as to make centralization an overarching reason for efficient judicial management and pre-trial coordination.

Finally, the PersonalWeb actions will present common questions of fact concerning damages. In particular, PersonalWeb’s past patent licensing practices and prior valuations of the Patents-in-Suit will be relevant to the damages issues and discovery in each of these cases. Moreover, PersonalWeb anticipates that each of its existing and future patent infringement actions

will involve largely if not exactly the same type of damages model. *See Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970). These common damages questions can be most efficiently addressed through coordinated or consolidated pretrial proceedings, eliminating the need for duplicative and burdensome discovery.

Beyond common factual issues, the existing and anticipated future patent actions involve common legal issues. For example, claim construction is ultimately an issue of law, and because the same claims are asserted in all PersonalWeb actions, the same legal claim construction issues exist.

2. The Interest of Protecting Against Inconsistent Judgments Favors Consolidation

Consistency across the PersonalWeb actions – particularly on issues of claim construction – is essential to their just and efficient resolution and strongly favors centralizing these cases for pretrial proceedings. In decisions ordering MDL centralization, the Panel has repeatedly emphasized the need to obtain consistency in pretrial rulings, “especially with respect to time-consuming and complex matters of claim construction.” *In re Desloratadine Patent Litig.*, 502 F. Supp. 2d 1354, 1355 (J.P.M.L. 2007); *see also In re Innovatio*, 840 F. Supp. 2d at 1355 (“Centralization will . . . prevent inconsistent pretrial rulings (particularly on claim construction issues) . . .”). The Supreme Court has echoed the need for consistency across cases in matters of claim construction. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 391 (1996) (recognizing need for “interjurisdictional uniformity” in claim construction determinations).

Here, because there are five Patents-in-Suit in the 54 pending PersonalWeb infringement actions and the Amazon DJ action, the number of claim terms that may require construction increases the risk of inconsistent results absent MDL centralization. And here, the Northern District of California has already considered claim constructions for a number of claim terms

related to the asserted claims of the Patents-in-Suit. Moreover, given the number of common issues underlying these cases, similar pretrial issues will arise (*e.g.*, discovery disputes and summary judgment motions) that most justly and efficiently can be addressed across the PersonalWeb actions through centralization of these actions.

Further, as Amazon has indicated in its complaint that it plans to seek a stay of all of the PersonalWeb infringement actions pending the resolution of the Amazon DJ action, transfer and consolidation of the actions would ensure that decisions as to all of the PersonalWeb infringement actions are consistent.

No substantive motions in any of the PersonalWeb infringement actions or the Amazon DJ action have been filed. Thus, the benefits of MDL centralization at this early stage are great. *In re Armodafinil Patent Litig.*, 755 F. Supp. 2d 1359, 1360 (J.P.M.L. 2010) (recognizing benefits of centralization where all litigation at early stages).

3. Consolidation and Transfer Will Best Serve the Convenience of the Parties and Witnesses

In light of the many common issues of fact and law, transfer of the PersonalWeb actions for consolidation of pretrial proceedings to a single district will serve the convenience of the parties and witnesses. Without such consolidation and transfer, the parties and witnesses will be subjected to duplicative discovery regarding the same Patents-in-Suit.

Centralization will enable a single judge to formulate a pretrial discovery plan that will minimize costs on the parties and witnesses, including third parties. The Panel routinely orders MDL centralization in cases such as these to obtain the benefits of proceeding on a combined basis. See, *e.g.*, *In re Innovatio*, 840 F.Supp.2d at 1355 (“Centralization will eliminate duplicative discovery . . . and conserve the resources of the parties, their counsel and the judiciary.”); *In re Webvention*, 831 F. Supp. 2d at 1366 (same); *In re TransData*, 830 F. Supp. 2d at 1381 (same); *In*

re Vehicle Tracking, 807 F. Supp. 2d at 1382 (same); *In re Fenofibrate Patent Litig.*, 787 F. Supp. 2d 1352, 1354 (J.P.M.L. 2011) (same); *In re Cuisinart Food Processor Antitrust Litig.*, 506 F. Supp. 651, 655 (J.P.M.L. 1981) (centralization would “effectuate a significant overall savings of cost and a minimum of inconvenience to all concerned with pretrial activities”).

C. The Cases Should Be Consolidated for Pretrial Purposes in the Northern District of California⁴

1. No Party Will Be Prejudiced by Consolidation in the Northern District of California

Over half of the parties to the PersonalWeb actions have a regular and established place of business in the Northern District of California. These parties cannot possibly be prejudiced from litigating in the place where they choose to do business. “Since Section 1407 transfer is for pretrial proceedings only, there is usually no need for the parties and witnesses to travel to the transferee district for depositions or otherwise.” *In re Cygnus Telecom. Tech., LLC, Patent Litigation*, 177 F. Supp. 2d 1375, 1376 (J.P.M.L. 2001); *see also* Fed. R. Civ. P. 45(c) (imposing geographical limits on permissible third-party discovery via subpoena). But in the event travel is required, the Northern District of California is easily accessible via three major international airports and other transportation infrastructure.

2. The Northern District of California Is Best Suited to Handle this MDL Proceeding

The Northern District of California is best suited to handle an MDL proceeding for the PersonalWeb patent actions for several reasons.⁵ First, as noted above, over half of the current

⁴ If the Panel ultimately concludes that multiple Districts should be involved in MDL proceedings, e.g., to handle West Coast and East Coast actions, PersonalWeb would not oppose consolidation in Northern District of California and Southern District of New York.

⁵ Factors considered by the Panel when selecting a particular transferee forum include: (1) the pendency in that district of a number of the actions; (2) the court’s familiarity with the issues; (3) the district or judge’s willingness to accept responsibility for conducting coordinated or

actions are already pending in the Northern District of California, far more than in any other judicial district.

Second, the Northern District of California, by virtue of its location in the heart of Silicon Valley, has significant experience managing complex high-technology patent cases. *See In re Protegrity Corp. and Protegrity USA, Inc., Patent Litig.*, 84 F. Supp. 3d 1380, 1381 (J.P.M.L. 2015) (transferring patent infringement actions involving electronic databases to Northern District of California because the district is “a Patent Pilot Program Court that had adopted local Patent Rules, and ... is highly familiar with complex technological patent litigation”). The Northern District’s Local Patent Rules provide for the expedited exchange of infringement and invalidity contentions and will thus expedite the litigation of these cases.

Third, the Patents-in-Suit have already been litigated in the Northern District of California, including the action described above against IBM that was settled on the eve of trial. While the prior litigation involved different claims in the Patents-in-Suit, the court’s institutional knowledge regarding these patents nevertheless weighs heavily in favor of transfer to the Northern District. *See In re Cygnus Telecom. Tech., LLC, Patent Litig.*, 177 F. Supp. 2d at 1377 (transferring complex patent litigation to the Northern District of California in part because of the judge’s familiarity with the complex issues as a result of his prior assignment to related patent litigation).

consolidated pretrial proceedings; and (4) the favorable status of the civil docket. *In re PharmaStem Therapeutics, Inc. Patent Litig.*, 360 F. Supp. 2d at 1364 (transfer to judge who had related cases pending within his district); *In re Mirtazapine Patent Litig.*, 199 F. Supp. 2d 1380, 1381 (J.P.M.L. 2003) (Panel gave weight to, among other things, pendency of certain of the actions at issue within that district and judge’s favorable caseload).

IV. CONCLUSION

For the foregoing reasons, PersonalWeb respectfully requests that the Panel transfer all actions pending in the PersonalWeb patent litigation to the Northern District of California for consolidation of pretrial proceedings.

PersonalWeb also respectfully requests that any patent infringement action filed hereafter by PersonalWeb alleging the same patents against defendants which operate websites based on the same aspects of the Ruby on Rails architecture and operating using the same aspects of the internet protocol to communicate their authorizations and reauthorizations be considered as tag-along cases and transferred to the Northern District of California for consolidation of pretrial proceedings.

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Respectfully submitted,

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