

# Exhibit 2

UNITED STATES DISTRICT COURT  
 EASTERN DISTRICT OF TEXAS  
 MARSHALL DIVISION

SOLID STATE STORAGE,	§	
SOLUTIONS, INC.,	§	
	§	
Plaintiff,	§	Case No. 2:11-CV-391
	§	
v.	§	
	§	
STEC, INC., OCZ TECHNOLOGY	§	
GROUP, INC., CORSAIR MEMORY,	§	
TEXAS MEMORY SYSTEMS, INC.,	§	JURY TRIAL DEMANDED
PNY TECHNOLOGIES, INC.,	§	
PATRIOT MEMORY LLC, FUSION-IO,	§	
INC., OTHER WORLD COMPUTING,	§	
INC., and MUSHKIN, INC.	§	
	§	
Defendants.	§	

**FUSION-IO, INC.’S MOTION TO SEVER AND TRANSFER**

Plaintiff Solid State Storage Solutions, Inc. (“S4”) has misjoined its patent infringement claims against Defendant Fusion-io, Inc. (“Fusion-io”) with eight completely unrelated defendants. S4 may not join into a single case a disparate group of unrelated defendants without a single allegation regarding any purported joint acts of infringement, any commonly accused products, or any other connection between the infringement claims. Indeed, S4’s allegations here concern only distinct products manufactured independently by unrelated and competing defendants. This Court should sever those claims. *See Reid v. Gen. Motors Corp.*, 240 F.R.D. 260, 263 (E.D. Tex. 2007) (Folsom, J.) (severing a case against multiple defendants because “[a]llegations of infringement against two unrelated parties based on different acts do not arise from the same transaction”); *see also WiAV Networks, LLC v. 3Com Corp.*, 2010 WL 3895047, at \*3 (N.D. Cal. Oct. 1, 2010) (finding misjoinder of suit against “unrelated and competing defendants for their own independent acts of patent infringement”).

Moreover, joining all these defendants in a single case would be extremely prejudicial because S4's infringement accusations target highly confidential, proprietary aspects of each defendant's Solid State Drive ("SSD") products. S4 directs its allegations toward each defendant's "SSD Products," and litigation will therefore focus on the unique and proprietary aspects of these distinct products. (*See, e.g.*, Dkt. 1, Complaint at ¶¶ 57–83.) If this litigation proceeds as a single case, each defendant will be prejudiced by having that sensitive information exposed to co-defendants.

Once severed from the other parties in this case, the District of Utah plainly is the more convenient forum for this litigation. Aside from S4's lone office in Marshall, Texas—created in anticipation of litigation to manipulate venue—this case has no connection with this District. The critical evidence regarding the design and operation of Fusion-io's accused products, both witnesses and documents, are primarily located at Fusion-io's headquarters in Salt Lake City, Utah. Even the very inventors of S4's patents are located in Japan - closer to Salt Lake City than Marshall.

S4's attempt to lump Fusion-io together with a large group of unrelated co-defendants obscures the significant differences between the parties and the distinct nature of their independently-developed products, and further substantially prejudices Fusion-io by forcing it to reveal highly confidential details about its products to co-defendants. Additionally, because Utah is closer to every relevant known witness or source of proof, it is plainly the more convenient forum for this case. As such, this Court should sever the claims against Fusion-io and transfer them to the District of Utah, Central Division.

**I. S4'S ATTEMPT TO JOIN UNRELATED DEFENDANTS IS IMPROPER AND PREJUDICIAL**

S4's ability to join disparate defendants in the same case is limited by Federal Rule of Civil Procedure 20(a)(2), which allows joinder only when

(A) any right to relief is asserted against [defendants] jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

Rule 20(a) thus "creat[es] a two-prong test, allowing joinder of plaintiffs when (1) their claims arise out of the 'same transaction, occurrence, or series of transactions or occurrences' and when (2) there is at least one common question of law or fact linking all claims." *Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 521 (5th Cir. 2010). "If these requirements are not met, joinder is improper even if . . . plaintiff does have the ability to recover against each of the defendants." *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 533 (5th Cir. 2006).

Further, pursuant to Federal Rule of Civil Procedure 20(b), a court may always sever claims "to protect a party against . . . prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party." Similarly, Federal Rule of Civil Procedure 21 provides that "[t]he court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party."

**A. Claims of Infringement Based on Independent Acts by Unrelated Parties Do Not Arise Out of the Same Transaction**

S4's patent infringement claims fail to satisfy the first prong of Rule 20(a)(2). The nine named defendants are separate companies that independently developed their distinct products. Fusion-io has invested substantial time and money developing a unique product independently of any products developed or used by any of the other named defendants in this case. Fusion-io's

accused products will require their own, independent infringement analyses, damage evaluation, evidence, and witnesses that cannot be shared with other defendants. (See Exh. A, Strasser Decl. ¶ 7.)

Under such circumstances, the alleged infringement does not arise from the same transaction. For example, in *Reid v. General Motors Corp.*, the court severed infringement claims against different entities because “[a]llegations of infringement against two unrelated parties based on different acts do not arise from the same transaction.” 240 F.R.D. 260, 263 (E.D. Tex. 2007) (Folsom, J.) (quoting *Philips Elecs. N. Am. v. Contec Corp.*, 220 F.R.D. 415, 417 (D. Del. 2004)).<sup>1</sup> Other courts have followed the same approach and refused to allow joinder of unrelated parties for independent acts of alleged infringement. Those courts, which notably include eight of the ten districts with the largest 2009 patent dockets,<sup>2</sup> consistently find misjoinder when a plaintiff sues multiple, unrelated defendants for patent infringement:

- California (Northern District): *WiAV Networks, LLC v. 3Com Corp.*, No. C 10-03448 WHA, 2010 WL 3895047, at \*3 (N.D. Cal. Oct. 1, 2010) (finding misjoinder because suit was against “unrelated and competing defendants for their own independent acts of patent infringement”);

- California (Central District): *Guardian Media Techs. v. Coby Elecs. Corp.*, No. 2:08-cv-08439-R-RC, civil minutes (C.D. Cal. June 15, 2009) (dismissing misjoined alleged infringers and providing leave for plaintiff to re-file separate actions against each);

- California (Southern District): *Tierravision, Inc. v. Research in Motion Ltd.*, No. 11cv0639 DMS (BGS), 2011 WL 4862961, at \*1 (S.D. Cal. Sept. 16, 2011) (granting

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<sup>1</sup> The motion sought only a separate trial pursuant to Fed. R. Civ. P. 42(b), but the court found that severance under Rule 21 was more appropriate. *Id.* at 262–63.

<sup>2</sup> The districts having the most patent case filings in 2009 were, in order: C.D. Cal., E.D. Tex., D. Del., N.D. Cal., D.N.J., N.D. Ill., S.D.N.Y., S.D. Cal., D. Mass., and E.D. Va. See <http://271patent.blogspot.com/2010/01/report-district-courts-with-most-patent.html>.

defendants' motions to sever due to misjoinder even though each defendant had a "mapping software application" that ran on smart phones and that was alleged to "infringe[], at least, the same two claims" of the plaintiff's patent);

- Delaware: *Philips Elecs.*, 220 F.R.D. at 417 (granting motion to sever because "the only connection between CMT and [the other defendant] Hango is that they may have infringed the same patents . . . , which is an insufficient basis to join unrelated parties as defendants in the same lawsuit");

- Illinois (Northern District): *Spread Spectrum Screening, LLC v. Eastman Kodak Co.*, 2010 WL 3516106, at \*2 (N.D. Ill. Sept. 1, 2010) (finding joinder improper "where [multiple] competing businesses have allegedly infringed the same patent by selling different products");

- Minnesota: *Multi-Tech Sys., Inc. v. Net2Phone, Inc.*, 2000 WL 34494824, at \*7 (D. Minn. June 26, 2000) (finding misjoinder and noting: "The only common thread running through the Complaint is Plaintiff's contention that each Defendant infringed one or more of the four patents. Each accused device, however, will have to be considered separately, and the determination of facts and the scope of testimony with respect to one defendant will have little relevance to issues raised by another defendant");

- New Jersey: *N.J. Mach. Inc. v. Alford Indus., Inc.*, 1991 WL 340196, at \*2 (D.N.J. Oct. 7, 1991) ("[C]laims of infringement against unrelated defendants, involving unrelated machines, should be tried separately against each defendant"), *aff'd*, 983 F.2d 1087 (Fed. Cir. 1992);

- New York (Southern District): *Children's Network, LLC v. Pixfusion LLC*, 722 F. Supp. 2d 404, 415 (S.D.N.Y. June 30, 2010) ("Joinder of unrelated parties into one action is generally inappropriate where, as here, the infringement of the same patent is alleged, but the products are different");

- Virginia (Eastern District): *Bear Creek Techs., Inc. v. RCN Commc'ns*, No. 2:11cv103, 2011 WL 3626787, at \*4–5 (E.D. Va. Aug. 17, 2011) (dismissing claims against all but one defendant due to misjoinder where each defendant “face[d] allegations of patent infringement based on unrelated apparatuses that they each independently use to provide VoIP services”);
- Wisconsin (Western District): *Naschem Co., Ltd. v. Blackswamp Trading Co.*, No. 08-cv-730-SLC, 2009 WL 1307865, at \*3 (W.D. Wis. May 8, 2009) (finding that the plaintiff’s allegation “cannot establish or even allow the drawing of a reasonable inference that [the defendants] have a common scheme of infringement that would make joinder of their claims proper under Rule 20”).

Thus, as one court observed, “the overwhelming authority from other jurisdictions indicates that allegations against multiple and unrelated defendants for independent acts of patent, copyright, and/or trademark infringement do not set forth claims arising from the same transaction or occurrence within the meaning of Rule 20(a).” *Colt Defense LLC v. Heckler & Koch Defense, Inc.*, No. 04-258, 2004 U.S. Dist. LEXIS 28690, at \*13 (E.D. Va. Oct. 22, 2004). Nonetheless, it is true that some courts follow the minority view set out in *MyMail, Ltd. v. America Online, Inc.*, 223 F.R.D. 455, 456 (E.D. Tex. 2004), wherein the court permitted joinder of otherwise unrelated defendants by virtue of the mere assertion of “logically related” independent allegations of infringement. *See, e.g., Oasis Research, LLC v. Adrive, LLC*, No. 4:10-CV-435, 2011 WL 3099885, at \*2–3 (E.D. Tex. May 23, 2011); *Adrain v. Genetec, Inc.*, No. 2:08-CV-423, 2009 WL 30633414, at \*2 (E.D. Tex. Sept. 22, 2009).

This approach is unpersuasive in this case for at least three reasons. First, it is a misapplication of the Eighth Circuit’s “logical relationship” test, which originated in *Mosley v.*

*General Motors Corp.*, 497 F.2d 1330, 1333–34 (8th Cir. 1973).<sup>3</sup> *Mosley* held that joinder was proper when multiple plaintiffs sought jointly to sue for employment discrimination that, although arising from independent acts, was part of a broader “company-wide policy purportedly designed to discriminate against blacks in employment.” 497 F.2d at 1334. This broader policy is what made the independent acts “logically related” so as to constitute a single transaction, thereby satisfying the first prong of the joinder test. That approach is inapplicable to cases where there is no broader scheme, such as patent suits where defendants’ alleged infringement is the result of uncoordinated and unrelated acts by separate parties. That these uncoordinated acts allegedly constitute infringement of the same patent is otherwise relevant only to the *second* joinder inquiry—common questions of facts or law. *Cf. Bear Creek*, 2011 WL 3626787, at \*2 (“Given that the same claims of the ’722 patent are at issue for all of the Defendants, there is little doubt that common questions of law will arise in this action.”). Accordingly, applying the approach to such independent acts in the absence of any overarching relationship (other than allegedly infringing the same patent) conflates the two distinct joinder inquiries, despite the Fifth Circuit’s characterization in *Acevedo* of Rule 20 as “creating a two-prong test.” 600 F.3d at 521; *but cf. MyMail* (stating that a logical relationship exists, thus satisfying the “transaction” prong of the joinder test, when there is merely “some nucleus of operative facts or law,” and immediately noting that “[n]either side disputes that questions of law or fact common to all defendants will arise in this case” (citing *Hanley v. First Investors Corp.*, 151 F.R.D. 76, 79 (E.D. Tex. 1993))).

Second, the *MyMail* approach is further unpersuasive in view of the legislative history of recently-added section 299 to the Patent Act, which states that “accused infringers may not be joined in one action as defendants or counterclaim defendants, or have their actions consolidated

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<sup>3</sup> See *MyMail*, 223 F.R.D. at 456 (citing *Hanley v. First Investors Corp.*, 151 F.R.D. 76, 79 (E.D. Tex. 1993) (discussing *Mosley*, 497 F.2d at 1333).



for trial, based solely on allegations that they each have infringed the patent or patents in suit.” 35 U.S.C. § 299(b). The Act’s legislative history makes clear that this provision is meant to abrogate *MyMail*’s erroneous approach to joinder. *See* H.R. Rep. No. 112–98, pt. 1, at 55 n.61 (noting that section 299 “legislatively abrogates the construction of Rule 20(a) adopted in *MyMail, Ltd. v. America Online, Inc.*, 223 F.R.D. 455 (E.D. Tex. 2004)”). Although the provision came into effect on September 16, 2011—slightly over one week after S4’s September 7, 2011 filing of this suit—and therefore is not controlling, it nonetheless further demonstrates the extent to which *MyMail* and cases relying upon it stand in the minority.

Third, and regardless of the impropriety of the minority view, the particular facts and circumstances of this case make joinder improper; the various defendants’ accused products are simply not sufficiently related for S4’s infringement claims against each to be joined in a single suit. (*See* Exh. A, Strasser Decl. ¶ 7.) *See, e.g., Bear Creek*, 2011 WL 3626787, at \*3–5 (finding joinder of various defendants in patent infringement suit improper where, despite the fact that all operated apparatuses to provide VoIP services, the apparatuses were independently developed and operated, and the defendants also “provided evidence in the form of numerous declarations emphasizing the differences between the various defendant companies and their services”); *accord Oasis Research*, 2011 WL 3099885, at \*2–3 (applying the “logically related” test of *MyMail* to find joinder proper, but noting the ruling’s consistency with a prior ruling finding joinder improper where the court found sufficient differences in the accused products (discussing *Tompkins v. Able Planet, Inc.*, No. 6:10-CV-58, slip op. (E.D. Tex. Feb. 17, 2011))).

Accordingly, the Court should find that S4’s attempt to join nine defendants together in this case, who have no relationship with each other beyond their alleged infringement of a common set of patents, is improper.

**B. Fusion-io Would Be Severely Prejudiced By Having Highly Confidential Information About its SSD Products Exposed to Co-Defendants**

Even if joinder were permissible, this Court may sever the claims against Fusion-io to prevent prejudice. *See, e.g., Applewhite v. Reichhold Chemicals, Inc.*, 67 F. 3d 571, 574 (5th Cir. 1995) (“Under Rules 20 and 21, the district court has the discretion to sever an action if it is misjoined or might otherwise cause delay or prejudice.”). Severance is necessary here to protect Fusion-io from having to disclose highly confidential information to its co-defendants.

Specifically, S4’s allegations for all asserted patents concern defendants’ distinct and proprietary SSD products. (*See, e.g.,* Dkt. 1, Complaint at ¶¶ 57–83.) Defending against those accusations will require the disclosure of sensitive information, including expert reports and testimony, about the design of those proprietary products. If this litigation proceeds as a single case, defendants will be prejudiced by having to expose highly confidential information to co-defendants in order to rebut S4’s infringement allegations. Forcing Fusion-io to reveal details about those proprietary designs to co-defendants—all of whom are its competitors—would be exceptionally prejudicial. (*See* Exh. A, Strasser Decl. ¶¶ 7–8.)

**C. Severance is Necessary to Prevent Other Prejudice**

Severing claims against unrelated codefendants also prevents an array of other prejudice, both pre-trial and at trial. Among other things, co-defendants will be prejudiced by the sheer number of disparate, yet simultaneously-presented, infringement theories and remedies arguments that this Court, and ultimately a jury, would be asked to analyze and parse. Because the defendants’ accused products were designed separately, the defendants likely have materially different interests, strategies, and positions regarding claim construction and non-infringement. Lumping the defendants together seriously impairs their ability to advance positions meaningfully that are different from, or conflict with, the positions of other defendants during

claim construction and trial. Further, before a jury, a plaintiff may taint one defendant with another defendant's potential problems connected with, e.g., larger damages exposure, discovery-related issues, or damaging facts. The only way to remedy those prejudices is to sever the misjoined defendants.<sup>4</sup>

## **II. The District of Utah is Plainly a More Convenient Forum for This Litigation**

Once severed from the other parties in this case, the litigation between Fusion-io and S4 should be transferred to the District of Utah, Central Division. This case has no ties to this District, and Utah is the more convenient forum for every relevant witness and source of proof.

### **A. Legal Standards**

Section 1404(a) of Title 28 of the United States Code provides that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” The threshold inquiry for transfer under Section 1404(a) is whether this action “could have been brought” in the proposed transferee district. *See In re Volkswagen of Am., Inc.*, 371 F.3d 201, 203 (5th Cir. 2004) (“*Volkswagen I*”).

Next, courts consider various “private and public interest factors” relating to the convenience of parties and witnesses as well as the interests of particular venues in hearing the case. *See Fujitsu Ltd. v. Tellabs, Inc.*, 639 F. Supp. 2d 761, 765 (E.D. Tex. 2009) (Davis, J.). The private interest factors are: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive. *In re Volkswagen of Am. Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (“*Volkswagen II*”). The public interest factors are: (1) administrative difficulties flowing

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<sup>4</sup> The prejudice disclosed in sections B and C herein provides yet another reason that *MyMail* and its progeny, which contain no reference to prejudice resulting from joinder, are unpersuasive in this instance.

from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflicts of laws in the application of foreign law. *Id.* S4’s choice of venue is not a factor in the analysis. *Id.* at 315.

**B. ELEMENT #1: WHERE THE ACTION MIGHT HAVE BEEN BROUGHT  
Venue is Proper in the District of Utah**

This case meets the first transfer requirement, as it is indisputable that it could have been filed in the District of Utah. In patent infringement cases, venue is proper in the judicial district “where the defendant resides” or “has a regular and established place of business.” 28 U.S.C § 1400. Fusion-io’s headquarters is in Salt Lake City, Utah. (*See* Exh. A, Strasser Decl. ¶ 2.) Accordingly, the first transfer requirement is met.

**C. ELEMENT #2: THE PRIVATE INTEREST FACTORS  
The Private Interest Factors Weigh Heavily In Favor of Transfer**

**1. The Majority of Fusion-io’s Witnesses and Evidence are in the District of Utah and None are in this District**

“[T]he source of proof requirement is a meaningful factor in the [transfer] analysis.” *Volkswagen II*, 545 F.3d at 316. In particular, in patent infringement cases, the bulk of the evidence may typically come from the accused infringers, and “[c]onsequently, the place where the defendant’s documents are kept weighs in favor of transfer to that location.” *In re Genentech, Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009).

The “source of proof” factor weighs heavily in favor of transfer. S4’s allegations concern Fusion-io’s “SSD products.” (*See*, Dkt. 1, Complaint at ¶¶ 75–77.) Fusion-io’s past and present products were designed and engineered at its headquarters in Salt Lake City, Utah,<sup>5</sup> and

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<sup>5</sup> The District of Utah is composed of two divisions, the Northern and Central, both of which hold court at Salt Lake City, Utah. 28 U.S.C. § 125. Fusion-io’s headquarters are located at 2855 E. Cottonwood Pkwy., Salt Lake City, Utah 84121, which is within Salt Lake County, which is in the Central Division.

documents related to those products' design and configuration are located in that office.<sup>6</sup> (*See* Exh. A, Strasser Decl. ¶ 6.) Similarly, Fusion-io's most important party witnesses—the people who know the most about the design, engineering and manufacture of the accused products—are also based in the Salt Lake City area. (*See id.* ¶ 6.) Additionally, Fusion-io's marketing and financial operations are conducted at both its Salt Lake City headquarters and its San Jose, California office, so most of the relevant marketing and financial sources of proof are in Salt Lake City with the balance in San Jose. (*See id.* ¶ 9.)

Without question, the critical evidence related to the asserted patents is closer to Utah than to Marshall. First, the relevant employees and documents related to Fusion-io's marketing and financial operations that are not located at the Salt Lake City headquarters are in Fusion-io's offices in San Jose, California, where Fusion-io handles marketing and financial activities jointly with the Salt Lake City office. (*See* Exh. A, Strasser Decl. ¶ 9.) Second, although Fusion-io's design and engineering of future products not presently at issue in this case now take place in multiple offices, Salt Lake City remains the primary location for its design and engineering activity. To the extent that some of that activity recently began to take place in its offices in Alviso and San Jose, California, and in Superior, Colorado, (*see id.* ¶ 6), documents and employees related to such future products are located in the Salt Lake City, California, and Colorado offices. Alviso and San Jose, California<sup>7</sup> are approximately 1,090 miles closer to Salt Lake City than to Marshall, and Superior, Colorado is approximately 470 miles closer to Salt Lake City than to Marshall.<sup>8</sup> Third, all of the named inventors of all patents in suit are Japanese,

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<sup>6</sup> Technology may help the parties "transport" certain evidence to the trial venue, but the distance between the two districts is quite substantial; transporting electronic data to the District of Utah is still vastly more convenient than transporting it to this District. *See ATEN Int'l Co. v. Emine Tech.*, 261 F.R.D. 112, 123–24 (E.D. Tex. June 25, 2009) (Davis, J.) (finding physical proximity to trial venue applicable for electronic evidence).

<sup>7</sup> Alviso is a sub-community of San Jose.

<sup>8</sup> San Jose, California is approximately 760 miles from Salt Lake City, compared to approximately 1,850 from Marshall. Superior, Colorado is approximately 530 miles from Salt Lake City, compared to approximately 1,000 from Marshall. *See Two-Way Media LLC v. A T & T Inc.*, 636 F. Supp. 2d 527, 536 n.6 (S.D. Tex. 2009) ("This

as is the original assignee of five of the patents in suit,<sup>9</sup> Hitachi Ltd. Likewise, the original assignee of two other patents in suit,<sup>10</sup> Renesas Technology Corp., is located in Japan.<sup>11</sup> Tokyo, Japan (the likely departure point for international travel and delivery of documents) is approximately 5,500 miles from Salt Lake City, compared to approximately 6,500 miles from Marshall.

Although S4 may oppose transfer on the basis that its principal place of business is located in this District, offices established in anticipation of litigation (and documents transferred there) in order to manipulate venue are irrelevant to the transfer analysis. *See In re Microsoft Corp.*, 630 F.3d 1361, 1364–65 (Fed. Cir. 2010) (rejecting argument that weight be given to principal place of business where the office “staffed no employees, were recent, ephemeral, and a construct for litigation and appeared to exist for no other purpose than to manipulate venue”) (citing *In re Zimmer Holdings, Inc.*, 609 F.3d 1378, 1381 (Fed. Cir. 2010)). S4 is a non-practicing entity that only established its limited “business operations” in this District in order to manipulate venue: having been formed on May 5, 2007 as a Madison, Wisconsin Limited Liability Company, it subsequently registered as a Texas corporation with a new listed principal place of business in Marshall, Texas, effective October 1, 2009<sup>12</sup> and filed this suit on September 7, 2011.<sup>13</sup> Despite the state of incorporation and the listed “principal place of business,” S4 appears to conduct no operations in Texas, nor to staff any employees in Texas. The corporation’s initial board of directors was composed of two members living in Milpitas,

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Court has discretion to take judicial notice of matters of geography, including distances between cities.” (citing FED. R. EVID. 201(c); *Williams v. United States*, 359 F.2d 67 (5th Cir. 1966)).

<sup>9</sup> U.S. Patent Nos. 6,341,085, 6,347,051, 6,370,059, 6,567,334 and 6,701,471.

<sup>10</sup> U.S. Patent Nos. 7,064,995 and 7,234,087.

<sup>11</sup> Renesas Technology Corp. was acquired by Renesas Electronics Corporation in April 2010; Renesas Electronics Corporation is located in Japan. *See* Bloomberg Businessweek, Renesas Technology Corp., Company Overview, available at <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=4959935> (Dec. 7, 2011).

<sup>12</sup> (*See* Exh. B, Certificate of Conversion, at 1.)

<sup>13</sup> (*See* Dkt. 1, Complaint.)

California and two members living in Tokyo, Japan.<sup>14</sup> With no other ties to or business activities in this District, S4's sole office was plainly established in anticipation of litigation and is an attempt to manipulate venue entitled to no weight.

Furthermore, although Fusion-io employs 11 people in Texas, 10 of these employees work from their homes to sell Fusion-io products and/or service customers based in Texas. (*See* Exh. A, Strasser Decl. ¶ 10.) They were not involved in the design, engineering and manufacture of Fusion-io's products, and they are not responsible for its marketing and sales strategies, or its financial performance with respect to its products. (*See id.*) While these employees may have some relevant sales and marketing documents, the employees all use Fusion-io's central servers located in Utah, and such documents are duplicative of those located in Utah. (*See id.*) The existence of a few duplicative documents in Texas, which may or may not be relevant, does not tip the scales against transfer. The eleventh Texas employee, William Hutsell, was hired as a Product Management Director in connection with future products on October 24, 2011. (*See id.* ¶ 11.) He currently works from his home in Houston, Texas, but had no involvement in the design, engineering or manufacturing of any past or present Fusion-io products now at issue in this case. He is therefore irrelevant to this transfer analysis.

Given the substantial evidence in Utah, and the relative proximity of other relevant evidence, this factor weighs heavily in favor of transfer.

## **2. The Availability of Compulsory Process to Secure the Attendance of Witnesses Slightly Favors Transfer**

The ability to use compulsory process to secure the attendance of non-party witnesses weighs more heavily in favor of transfer when more of those witnesses reside in the transferee

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<sup>14</sup> (*See* Exh. B, Certificate of Conversion, at 5–6.) S4's most recent public filing, its December 12, 2010 Public Information Report, lists only the corporation's Marshall, Texas address for its four directors and CEO; however, three of the four directors are the same people identified in S4's Certificate of Conversion as having Tokyo, Japan and Milpitas, California addresses (Kentaro Fukuda, Hironori Seki, and E. Earle Thompson). (*See* Exh. C, Public Information Report.) There is no indication of the place of residence of the CEO and other, newly added, director.

venue. *Volkswagen II*, 545 F.3d at 316. The known non-party witnesses in this case—the patent inventors and prosecution counsel—do not reside within either the Eastern District of Texas or the District of Utah. To the extent additional non-party witnesses are uncovered as litigation progresses, however, it is more likely that they will reside within the compulsory process range of the District of Utah than of the Eastern District of Texas. For example, former employees of Fusion-io’s headquarters are more likely to reside in the Salt Lake City area than in this District. Accordingly, this factor weighs slightly in favor of transfer.

### **3. The Cost of Attendance for Willing Witnesses Strongly Favors Transfer**

The “convenience of parties and witnesses” is an important—perhaps the single most important—factor in the transfer analysis. *Genentech*, 566 F.3d at 1343. The Federal Circuit has held time and again that, “in a case featuring most witnesses and evidence closer to the transferee venue with few or no convenience factors favoring the venue chosen by the plaintiff, the trial court should grant a motion to transfer.” *In re Nintendo Co.*, 589 F.3d 1194, 1198 (Fed. Cir. 2009).

This factor weighs heavily in favor of transfer because *Utah is the more convenient forum for every known witness*. As already discussed with respect to the sources of proof factor, Fusion-io’s key witnesses with knowledge of the accused products, marketing information, and financial data are located in Salt Lake City, Utah. Transfer to Utah therefore eliminates roughly 1,400 miles of travel to Marshall for those witnesses. “When the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled.” *Volkswagen I*, 371 F.3d at 205. The other potentially relevant witnesses in this case—the employees at Fusion-io’s offices in California and Colorado, and the patents’ named



inventors and original assignees in Japan<sup>15</sup>—are closer to Utah than Marshall.<sup>16</sup> And not only are those witnesses substantially geographically closer to Salt Lake city, but also their cost and time of travel is significantly lower due to the comparative ease of air travel to Salt Lake City.<sup>17</sup> Likewise, Salt Lake City is more accessible by international travel than is Marshall, further making it more convenient for the Japanese inventors and original assignees noted above.<sup>18</sup>

#### 4. No Practical Problems Arise in Connection with Transferring this Case

No practical problems arise in connection with transferring this case to the District of Utah, which further weighs in favor of transfer. No discovery has occurred to date and the scheduling conference has not been set. Further, little benefit follows from keeping this case together with the other defendants because, as already explained, the allegedly infringing Fusion-io systems are unique from those of other defendants. Fusion-io has developed proprietary devices that are distinct from its competitors', and significant differences exist with respect to the factual discovery and expert testimony regarding those devices. (*See* Exh. A, Strasser Decl. ¶ 7.)

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<sup>15</sup> Although S4 or its predecessor limited liability company is listed as the original assignee on five of the patents in suit (U.S. Patent Nos. 7,327,624, 7,366,016, 7,616,485, 7,721,165 and 7,746,697), as discussed above, its location is not relevant to this analysis.

<sup>16</sup> The prosecuting law firms of the patents in suit, Antonelli, Terry, Stout & Kraus, LLP and Mattingly, Stanger, Malur & Brundidge, P.C., are located in Arlington, VA and Alexandria, VA, respectively. While Marshall is approximately 800 miles closer to both than is Salt Lake City, this arguably makes for less relative convenience for at most two relevant witnesses as compared to the numerous others in this case. However, according to travel website Kayak.com, the actual travel time for these witnesses from Washington, D.C. airports to Marshall and to Salt Lake City is approximately the same due to the relative ease of travel to Salt Lake City: flights from Washington, D.C. to Marshall require 1 stop and take approximately 5 hours, while flights to Salt Lake City are non-stop and take approximately 5 hours. *Cf. Telecom Tech. Servs., Inc. v. Rolm Co.*, No. CIV. A. 9:94 CV 145, 1995 WL 874441, at \*2 (E.D. Tex. Feb. 24, 1995) (“Also, the Court takes judicial notice that Lufkin, Texas, wherein the trial would be held were it to occur in this district, has no airport servicing major airlines, whereas it is well known that Atlanta is a major transportation hub of the Southeast.”).

<sup>17</sup> According to travel website Kayak.com: For the Alviso and San Jose, California witnesses, there are non-stop flights from San Jose, California to Salt Lake City that take approximately 2 hours; by comparison, flights to airports within 70 miles of Marshall require 1 stop and take at least approximately 6 hours. Similarly, non-stop flights from Denver, Colorado (27 miles from Superior) to Salt Lake City take roughly 1.5 hours, while flights to Marshall require 1 stop and take 5 hours.

<sup>18</sup> Again as per Kayak.com, flights from Tokyo to Salt Lake City require 1 stop and take approximately 13.5 hours, while flights to airports near Marshall require 2 stops and take 20 hours. *Cf. Naschem Co., Ltd. v. Blackswamp Trading Co.*, No. 08-cv-730-SLC, 2009 WL 1307865, at \*3 (W.D. Wisc. May 8, 2009) (“Because plaintiffs are citizens of Korea, both Wisconsin and Illinois are inconvenient for them. If anything, Illinois would be slightly less so because of more direct international access to Chicago.”).

To the extent S4 argues that the judicial efficiency of holding a common claim construction in this District overrides all other transfer considerations, that position is legally mistaken. As an initial matter, the Federal Circuit has repeatedly stated that judicial efficiency is *not* an overriding factor and has ordered transfer where, as here, the other factors weighed toward the transferee venue. *See In re Morgan Stanley*, 2011-M962, 2011 WL 1338830, at \*2 (Fed. Cir. April 6, 2011) (“This court twice recently considered and rejected arguments that the preservation of judicial economy should preclude transfer to a far more convenient venue.”) (citing *Zimmer Holdings*, 609 F.3d at 1382, and *In re Verizon*, 635 F.3d 559 (Fed. Cir. March 23, 2011)).

Moreover, even if some pre-trial consolidation across cases is preferable,<sup>19</sup> that may be accomplished via the multidistrict litigation procedures described in 28 U.S.C. § 1407. Those procedures will promote judicial efficiency by facilitating pretrial consolidation in a forum that is convenient for all parties, as determined by the Judicial Panel on Multidistrict Litigation—as opposed to going forward in an inconvenient forum, such as this District, which has no ties to the parties or evidence. *See In re Pabst Licensing Digital Camera Patent Litigation*, 528 F. Supp. 2d 1357, 1357 (J.P.M.L. 2007) (ordering transfer for pre-trial consolidation to “a transferee forum on the east coast such as the District of District of Columbia[, which] provides a geographically convenient forum, inasmuch as several of the alleged infringers operate their businesses from this region”). In fact, in *In re Halftone Color Separations Patent Litigation*, the panel

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<sup>19</sup> A consolidated claim construction does not necessarily promote efficiency, especially where defendants have unique products. *See WiAV Networks, LLC v. 3Com Corp.*, 2010 WL 3895047, at \*3 (N.D. Cal. Oct. 1, 2010) (Severing unrelated defendants while noting: “[W]hile it would be nice to have an identical set of elaborations on the asserted claims for each accused product, even that is not practical, for the differences in the products themselves will provoke differences in which words and slants in the claim language really matter. . . . In other words, the claim-construction work will not be the same for all defendants, even those facing trial on the same patent claim. The claim-construction work must be adapted to the actual issues being litigated over the varying accused devices.”).

consolidated a patent infringement suit in the Central District of California, despite the first-filed action being brought in the Eastern District of Texas, explaining that

in this docket, the Eastern District of Texas has no special connection to either the parties or the litigation's subject matter. This patent litigation could well have been filed in any of a number of jurisdictions. Furthermore, current docket conditions in the Eastern District of Texas counsel against assignment of this MDL to that district where other appropriate districts are available to handle the litigation.

547 F. Supp. 2d 1383, 1385 (J.P.M.L. 2008) (citations omitted). Thus, even if pretrial considerations such as claims construction make it desirable for litigation between S4 and all defendants to proceed in a single forum, multidistrict litigation procedures will provide a far more efficient result than retention of all defendants in the Eastern District of Texas.

**D. ELEMENT #3: THE PUBLIC INTEREST FACTORS**  
**The Public Interest Factors Weigh in Favor of Transfer**

**1. The Interest in Having Localized Interests Decided at Home Strongly Favors Transfer**

As the Fifth Circuit and this Court have recognized, “[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation.” *Volkswagen I*, 371 F.3d at 206. This transfer analysis considers “the ‘factual connection’ that a case has with both the transferee and transferor venues.” *ATEN Int’l*, 261 F.R.D. at 125. “Generally, local interests that ‘could apply virtually to any judicial district or division in the United States’ are disregarded in favor of particularized local interests.” *Id.* at 125–26. The Federal Circuit, applying Fifth Circuit law, has instructed that if the accused product is sold nationwide but many of the witnesses and evidence are located in the transferee venue, this factor favors transfer. *See TS Tech USA Corp.*, 551 F.3d 1315, 1321 (Fed. Cir. 2008) (transferring case where “there is no relevant connection between the actions giving rise to this case and the Eastern District of Texas except that certain vehicles containing TS Tech’s

[accused] headrest assembly have been sold in the venue,” and where the majority of the identified witnesses, evidence, and events were located in the transferee forum or its neighboring state).

As explained above, the District of Utah is home to Fusion-io’s headquarters, and the vast majority of witnesses and evidence regarding the accused products are located in Utah. The District of Utah therefore has a strong local interest in this case. *See In re Hoffmann-La Roche*, 587 F.3d 1333, 1336 (Fed. Cir. 2009) (the “local interest . . . remains strong because the cause of action calls into question the work and reputation of several individuals residing in or near [the transferee] district and who presumably conduct business in that community”).

By contrast, other than S4’s “principal place of business” in Marshall, Texas—entitled to no weight because it was established in anticipation of litigation to manipulate venue—no party or known witness resides in this District. While it is true that Fusion-io has customers in this District, the Federal Circuit and “[t]he Fifth Circuit ha[ve] unequivocally rejected the argument that citizens of the venue chosen by the plaintiff have a ‘substantial interest’ in adjudicating a case locally because some allegedly infringing products found their way into the Texas market.” *Nintendo*, 589 F.3d at 1198 (quoting *Volkswagen II*, 545 F.3d at 317–18 and *TS Tech*, 551 F.3d at 1321).

## **2. The Court Congestions Factor Weighs in Favor of Transfer**

This litigation is likely to be resolved more quickly in the District of Utah. The District of Utah is faster to disposition than the Eastern District of Texas (8.0 months as compared to 9.6 months in this District) and is faster to trial (22.5 months compared to 24.2 months in this District).<sup>20</sup> Accordingly, this factor also weighs in favor of transfer.

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<sup>20</sup> *See* Administrative Office of the United States Courts, Judicial Business 2010, Table C-5, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/C05Sep10.pdf> (Dec. 6, 2011). And even if the pace of litigation were slower in the District of Utah, that would not justify denial of the motion to transfer.

### 3. The Remaining Public Interest Factors are Neutral

The remaining public-interest factors—the familiarity of the forum with the law and the avoidance of unnecessary problems or conflicts of laws or in the application of foreign law—are neutral. The Eastern District of Texas and the District of Utah are equally capable of applying patent law. *See TS Tech*, 551 F.3d at 1320 (concluding that because patent claims are governed by federal law, all district courts are capable of applying patent law to infringement claims). Additionally, no issues regarding conflicts of law or application of foreign law exist that affect whether this case should be transferred.

In short, this is “a case featuring most witnesses and evidence closer to the transferee venue with few or no convenience factors favoring the venue chosen by the plaintiff, [and accordingly] the trial court should grant a motion to transfer.” *Nintendo*, 589 F.3d at 1198.

### III. CONCLUSION

For the reasons set forth above, Fusion-io requests that Court sever the claims against Fusion-io and transfer them to the District of Utah, Central Division.

January 4, 2012

Respectfully Submitted:

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on January 4, 2012, a copy of FUSION-IO, INC.'S MOTION TO SEVER AND TRANSFER was served electronically, via CM/ECF, on all counsel of record who are deemed to have consented to such service under the Court's local rules. Any other counsel of record will be served via facsimile and certified mail, return receipt requested.

/s/ Scott F. Partridge  
Scott F. Partridge

**CERTIFICATE OF CONFERENCE**

I certify that counsel for Fusion-io, Inc. and Solid State Storage Solutions, Inc. have complied with the meet and confer requirement in Local Civil Rule CV-7(h). This motion is opposed. The personal conference required by Local Civil Rule CV-7(h) was conducted on December 29, 2011 by telephone. Scott Partridge participated for Fusion-io, Inc., and Eric Hansen participated for Solid State Storage Solutions, Inc. An agreement was not reached because the parties have opposing views on the relief requested by this motion. The discussions have conclusively resulted in an impasse, leaving for the Court to decide the motion. Counsel for Solid State Storage Solutions, Inc. agreed that the parties complied with their obligations for conference on this motion.

/s/ Scott F. Partridge  
Scott F. Partridge