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Exhibit 3

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NO. 2012-____

UNITED STATE COURT OF APPEALS FOR

THE FEDERAL CIRCUIT

IN RE FUSION-IO, INC.

Petitioners

Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas in Case No. 2:11-CV-00391-JRG

Judge Rodney Gilstrap

PETITION OF FUSION-IO, INC.

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CERTIFICATE OF INTEREST

Counsel for the PETITIONER, Fusion-io, Inc. certifies:

1. The full name of every party or amicus represented by me are:

   Fusion-io, Inc.

2. The names of the real parties in interest represented by me are:

   Fusion-io, Inc.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the parties represented by me are:

   [none]

4. The names of all law firms, partners or associates that appeared for the parties represented by me in the trial court or expected to appear in this court:

   Baker Botts L.L.P., Scott Partridge, Michael Hawes, Bradley Bowling, Stephen Baehl

   Siebman Burg Phillips & Smith LLP, Michael Charles Smith

Date: September 24, 2012

Scott Partridge
Counsel for Petitioners

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STATEMENT OF RELIEF SOUGHT

Fusion-io, Inc. respectfully requests that the Court grant this petition for a writ of mandamus, vacate the September 17, 2012 order of the United States District Court for the Eastern District of Texas denying in part Fusion-io's motion to sever and transfer,[1] and remand with instructions to transfer it to the United States District Court for the District of Utah.

[1] Ex. 1, Order, *Solid State Storage Solutions, Inc. v. STEC, Inc.*, 2:11-CV-391, Dkt. No. 226 (E.D. Tex. Sept. 17, 2012).

STATEMENT OF ISSUES PRESENTED

Whether the District Court erred in failing to consider *any* of the factors relevant to a change of venue under 28 U.S.C. § 1404(a) in denying Fusion-io, Inc.'s request to transfer, where:

(1) Fusion-io filed its Motion to Sever and Transfer on January 4, 2012, requesting that "[o]nce severed from the other parties in this case, the litigation between Fusion-io and S4 should be transferred to the District of Utah";

(2) over nine months later, the District Court severed the claims against Fusion-io from the claims against the other defendants, but immediately consolidated the severed cases, denied Fusion-io's request to transfer without explanation or analysis, and added to the delay in transferring the case to a clearly more convenient venue by suggesting that Fusion-io re-file the exact same motion to transfer that had been pending for over nine months; and

(3) the opening claim construction brief is due in November of this year, and the parties have already begun discovery into the merits of the claims, prejudicing Fusion-io and undermining the purpose of § 1404(a).

STATEMENT OF THE FACTS

On September 7, 2011, Plaintiff Solid State Storage Solutions, Inc. ("S4") filed this patent infringement suit in the Eastern District of Texas against nine unrelated defendants, each developing and producing their own distinct products in areas far from the Eastern District of Texas. S4 joined the unrelated defendants in a single suit based solely on independent acts of alleged infringement of twelve different patents directed generally toward nonvolatile memory storage devices.

On January 4, 2012—before Fusion-io even answered S4's Original Complaint and *five months* before the pretrial conference—Fusion-io filed a motion to sever the unique infringement allegations against its proprietary SSD memory devices and transfer that severed litigation to the District of Utah, where Fusion-io's corporate headquarters is located and where the vast majority of the documents and witnesses can be found.[2] Other defendants filed similar motions requesting severance and transfer to clearly more convenient venues.

Over nine months later, the District Court issued an order granting severance on the basis that each of the defendants are "separate companies that independently developed distinct products at issue, and thus, their joinder under Rule 20, as clarified by the Federal Circuit in *In re EMC*, is improper." Ex. 1 at 2.

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[2] Ex. 2, Fusion-io's Motion to Sever and Transfer, *Solid State Storage Solutions, Inc. v. STEC, Inc.*, 2:11-CV-391, Dkt. No. 57 (E.D. Tex. January 4, 2012).

However, instead of considering the merits of transfer, the District Court immediately consolidated all of the severed cases "as to all pretrial issues" and stated that it would determine later "whether the cases will be tried jointly or separately," suggesting the illusory nature of the parties' severance. *Id.*

Without any analysis or explanation, the District Court denied Fusion-io's fully-briefed and pending request to transfer and suggested that Fusion-io "re-file" the exact same motion "should the movant determine that such is still appropriate after this order." *Id.* The District Court's order makes no attempt to address *any* of the § 1404(a) factors and ignores that Fusion-io sought severance for the primary purpose of facilitating a transfer to a substantially more convenient venue. The relief requested by Fusion-io's Motion to Sever and Transfer could not be clearer: "Once severed from the other parties in this case, the litigation between Fusion-io and S4 should be transferred to the District of Utah." Ex. 2 at 10.

At the time of the Court's order, Fusion-io's request to transfer had been pending for over nine months, and the parties had previously conducted limited discovery on the venue issue in order to fully and comprehensively brief the matter for the Court. Nothing has changed that would justify the need to re-file the exact same briefing, reopen and repeat the exact same response process, and further delay transferring the litigation to the clearly more convenient venue. Indeed, given the fact that claim construction briefing is scheduled to begin in November

and the claim construction hearing is scheduled for January,[3] any further delay risks prejudicing the rights of Fusion-io and thwarting the purpose of § 1404(a).

The District of Utah is the clearly more convenient forum for litigating S4's severed claims against Fusion-io. The most relevant documents and witnesses are located at Fusion-io's corporate headquarters in Salt Lake City. The District of Utah is also far more convenient for all other known sources of proof—the patent inventors and original assignees are located in Japan, and any Fusion-io employees with relevant knowledge not located in Salt Lake City are located in either San Jose, California, or Superior, Colorado. The only connection between this litigation and the Eastern District of Texas is S4's office in Marshall, Texas, which is not entitled to weight in the transfer analysis because it was established in advance of litigation merely to manipulate venue.

Fusion-io's motion also pointed out that any judicial economy could be preserved post-transfer by employing multidistrict litigation procedures for common issues such as claim construction. In fact, the issues consolidated for multidistrict litigation would be addressed in a forum convenient for all parties, as determined by the Judicial Panel on Multidistrict Litigation rather than a single judge sitting in the Eastern District of Texas, which is not convenient to any of the relevant witnesses or documents.

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[3] Ex. 3, Docket Control Order, *Solid State Storage Solutions, Inc. v. STEC, Inc.*, 2:11-CV-391, Dkt. No. 187 (E.D. Tex. June 15, 2012).

SUMMARY OF THE ARGUMENT

Mandamus is warranted to correct the District Court's patently erroneous denial of transfer. Although the District Court severed the actions in light of the Federal Circuit's opinion in *In re EMC Corp.*, 677 F.3d 1351 (Fed. Cir. 2012), the District Court committed clear error by immediately consolidating all of the severed actions indefinitely and then denying the fully-briefed and pending motions to transfer without any explanation or analysis. The District Court's consolidation of the severed actions without any evaluation of the pending transfer requests thwarts the purposes of both 28 U.S.C. § 1404(a), which provides for transfer to a clearly more convenient forum, and 28 U.S.C. § 1407, which authorizes the Judicial Panel on Multidistrict Litigation to consolidate cases that otherwise should be pending in different venues.

Despite this Court's clear opinion to the contrary in *EMC*, the District Court's order sets the plainly erroneous precedent that a plaintiff may force litigation to proceed in an inconvenient venue simply by suing enough distinct defendants in that venue and then, after the required severance, requesting the court to immediately consolidate those severed actions and delay considering any motions to transfer until a later stage in the case. To be clear, Fusion-io does not dispute that the District Court has discretion to consolidate cases. Rather, this Court's opinion in *EMC* makes clear that the District Court has this discretion only

"where venue is proper." *EMC*, 677 F.3d at 1360.

The District Court's failure to consider any of the merits of the transfer motions before indefinitely consolidating the severed actions undermines the holding of *EMC* and effectively allows the District Court to substitute its judgment for the judgment of the Judicial Panel on Multidistrict Litigation (JPML). Congress specifically created the multidistrict litigation procedures to address the issues created when similar litigations are pending in different districts. A district court may not ignore the availability of those procedures by denying meritorious transfer requests and may not usurp the role of the JPML by consolidating cases that otherwise should be pending in clearly more convenient forums.

STATEMENT OF REASONS A WRIT SHOULD ISSUE

I. STANDARD OF REVIEW

"The writ of mandamus is available in extraordinary situations to correct a clear abuse of discretion or usurpation of judicial power." *In re TS Tech USA Corp.*, 551 F.3d 1315, 1318 (Fed. Cir. 2009). A "clear" abuse of discretion exists where the court below reached a "patently erroneous result." *Id.* (quotations and citations omitted). A petitioner must show that its right to issuance of the writ is "clear and indisputable," *id.* (quotations and citations omitted), and that it has "no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process." *In re Volkswagen of Am. Inc.* ("*Volkswagen II*"), 545 F.3d 304, 311 (5th Cir. 2008) (quoting *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380–81 (2004)). Finally, the "issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* (quoting *Cheney*, 542 U.S. at 380–81).

II. Failure to Consider the Relevant Transfer Factors is a Clear Abuse of Discretion that Produces a Patently Erroneous Result

Courts must consider eight factors when assessing a motion to transfer.[4] Just

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[4] 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, including judicial economy. *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 from court congestion; (2) the local interest in having localized

as a failure to accord proper weight to various transfer factors can lead to a "patently erroneous" result,[5] so too does a failure even to consider the transfer factors. Under the law of the Fifth Circuit, in deciding the propriety of a district court's ruling on a motion to transfer, one of the questions the court asks is: "Did the district court consider the relevant factors incident to ruling upon a motion to transfer." *See, e.g.*, *In re Volkswagen AG* ("*Volkswagen I*"), 371 F.3d 201, 203 (5th Cir. 2004).[6] Here, the District Court failed to consider *any* of the transfer factors in its summary denial of Fusion-io's motion to transfer.

The mere fact that the District Court suggested that Fusion-io could later "re-file" the exact same motion to transfer if "still appropriate" does not change the fact that the District Court's denial of Fusion-io's request for transfer is a patently erroneous result that leaves Fusion-io with no other means to avoid litigating the merits of the case in an inconvenient venue. As this Court observed in *In re*

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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.*

[5] *See, e.g.*, *In re Nintendo Co., Ltd.*, 589 F.3d 1194 (Fed. Cir. 2009); *In re Hoffmann-La Roche Inc.*, 587 F.3d 1333 (Fed. Cir. 2009); *In re Genentech, Inc.*, 566 F.3d 1338 (Fed. Cir. 2009); *In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008).

[6] *Accord In re Link_A_Media Devices Corp.*, 662 F.3d 1221, 1223 (Fed. Cir. 2011) (noting that the Third Circuit's standard for mandamus requires "the petitioner to establish that the district court's decision amounted to a failure to meaningfully consider the merits of the transfer motion"); *Summers v. State of Utah*, 927 F.2d 1164, 1168 (10th Cir. 1991) ("In failing to exercise its discretion, the district court perforce abused it.").

Nintendo, 589 F.3d 1194 (Fed. Cir. 2009), the petitioner in that case "had already presented facts showing entitlement to a transfer" and was "not required to wait for the district court's decision on the motion for reconsideration because the district court clearly abused its discretion when deciding the original motion." *Nintendo*, 589 F.3d at 1200. Moreover, in *In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008), this Court aptly reasoned that "if reconsideration should always be sought, we might be unable to entertain a mandamus petition even where there is a clear usurpation of judicial power." *TS Tech*, 551 F.3d at 1322.

The present case is analogous to the situations in *Nintendo* and *TS Tech*. Fusion-io filed its Motion to Sever and Transfer over nine months ago and explained in detail how each of the eight transfer factors weighed in favor of transfer. Moreover, the parties engaged in limited discovery on the venue issue so that the District Court would be fully and comprehensively briefed on the matter. The relief requested by Fusion-io could not have been clearer: "Once severed from the other parties in this case, the litigation between Fusion-io and S4 should be transferred to the District of Utah." Ex. 2 at 10. Even S4 recognized that Fusion-io "explicitly [made] its motion for transfer contingent on the Court's granting of their motion for severance." Ex. 4, S4's Response, *Solid State Storage Solutions, Inc. v. STEC, Inc.*, 2:11-CV-391, Dkt. No. 125 at 9 (E.D. Tex. March 16, 2012).

As in *Nintendo*, Fusion-io has already presented facts showing entitlement to

a transfer and the District Court had ample opportunity to consider the merits of that request. The District Court clearly abused its discretion when deciding the motion to transfer, and under this Court's logic in *Nintendo*, Fusion-io should not be required to either wait for the District Court's decision on a motion for reconsideration[7] or undertake the even more time-consuming task of re-filing the *exact same motion* that the District Court denied with an invitation to resubmit for the Court to newly consider. This is particularly so where, as here, the District Court's suggestion to re-file the exact same motion and revisit the exact same response process would compound the already significant delay incurred and render this Court unable to correct a clear usurpation of judicial power prior to the upcoming claim construction proceedings.

As this Court held in *Nintendo*, the "no other means" requirement "does not impose an insurmountable rule that the petitioner exhaust every possible avenue of relief before seeking mandamus relief." *Id.* Instead, the purpose of the requirement "is to ensure that the writ will not be used as a substitute for the regular appeals process." *Id.* at 1200–01. Under Fifth Circuit law, a party seeking mandamus for a denial of transfer meets the "no other means" requirement because interlocutory review of a transfer order is unavailable, and appellate review from

[7] Although not required, Fusion-io has requested the District Court to reconsider its denial of Fusion-io's transfer request by applying the requisite eight-factor analysis. *See* Ex. 5, Fusion-io's Motion to Reconsider.

an adverse final judgment would be inadequate. *See TS Tech*, 551 F.3d at 1322.

Moreover, the District Court's refusal to consider Fusion-io's fully-briefed transfer motion, combined with its decision to consolidate actions that were properly severed under this Court's holding in *EMC*, compounds the patently erroneous nature of the Court's order. Accordingly, this case is even more appropriate for the issuance of a writ of mandamus than the typical petition that arises merely from a district court's improper weighing of the transfer factors.

The District Court has effectively usurped the authority of the Judicial Panel on Multidistrict Litigation (JPML). As recognized by this Court in *EMC*, § 1407 authorizes the JPML to assess consolidation—including the proper venue for consolidation—when distinct suits would otherwise be pending in multiple districts. The District Court's decision to consolidate the severed actions without evaluating the transfer motions thwarts the purpose of § 1407 and undermines this Court's holding in *EMC*. Although a district court has discretion to consolidate cases, *EMC* makes clear that the courts have this discretion only "where venue is proper." *EMC*, 677 F.3d at 1360. This presumes that the district court has already evaluated the merits of any motions to transfer and has concluded that the proper venue under § 1404(a) is *that judicial district*. In contrast, when transfer under § 1404(a) is required, the proper authority for assessing pre-trial consolidation is the JPML, as clearly provided for by Congress in § 1407.

Mandamus is appropriate because the District Court's order sets the plainly erroneous precedent that a plaintiff may force litigation to proceed in an inconvenient venue simply by suing enough distinct defendants in that venue and then, after the required severance, requesting the court immediately to consolidate those severed actions and delay ruling on any motions to transfer until a later stage in the case. Such an approach would enable plaintiffs to ignore the plain directives pertinent to joinder and venue selection in patent cases. *See, e.g.*, 35 U.S.C. § 299; *In re EMC*, 677 F.3d 1351; *In re Acer Am. Corp.*, 626 F.3d 1252, 1254–56 (Fed. Cir. 2010). This contradicts the Fifth Circuit's directive to courts to "prevent plaintiffs from abusing their privilege . . . by subjecting defendants to venues that are inconvenient." *Volkswagen II*, 545 F.3d at 313.

Additionally, Mandamus is appropriate because the Court's summary denial of a motion to transfer and its subsequent suggestion to re-file *the exact same briefing* improperly amounts to "a failure to decide the transfer issue until a later stage of the case." *See McDonnell Douglas Corp. v. Polin*, 429 F.2d 30, 31 (3rd Cir. 1970). In *McDonnell Douglas*, the district court postponed any decision on the pending transfer motion until after all matters of discovery were completed. The Third Circuit, on a petition for writ of mandamus, held that it was "not proper to postpone consideration of the application for transfer under § 1404(a) until discovery on the merits is completed, since it is irrelevant to the determination of

the preliminary question of transfer." *McDonnell Douglas*, 429 F.2d at 30–31.

In the present case, the claim construction briefing process is scheduled to begin in November of 2012 and the claim construction hearing is scheduled to take place in January of 2013. The District Court's suggestion that Fusion-io re-file the *exact same motion* that had been properly pending *for over nine months* would undermine the entire purpose of § 1404(a). Fusion-io moved to transfer venue in January of 2012—almost two weeks before it even answered S4's Complaint and five months before the District Court even held a pre-trial conference. However, re-filing the transfer motion would reopen a time-consuming briefing period and invite the District Court to spend additional time revisiting the issue—the same issue that had been fully briefed since January.

The resulting delay creates the unavoidable risk that the transfer issue will not even be decided until after the District Court has expended the effort of reading through the parties' claim construction briefs and familiarizing itself with the twelve asserted patents. The entire reason that Fusion-io filed its Motion to Sever and Transfer at the absolute earliest conceivable date was both to spare the District Court the burden of investing considerable effort in familiarizing itself with the technology and to eliminate the risk that such familiarity could trump the convenience to the parties and witnesses of litigating in a judicial district that was closer and more accessible than the Eastern District of Texas.

By filing the transfer motion before it even answered S4's complaint—and by seeking a writ of mandamus from the Federal Circuit immediately after the District Court's denial of that motion—Fusion-io has done everything in its power to "actively and promptly pursue its motion to transfer venue before the district court invested considerable time and attention on discovery and completing claim construction." *See In re VTech Commc'ns, Inc.*, Misc. No. 909, 2010 WL 46332, at *2 (Fed. Cir. Jan. 6, 2010). Given the District Court's denial of Fusion-io's transfer motion and its inexplicable suggestion that Fusion-io re-file the exact same brief, the writ of mandamus is necessary in order to preserve the purpose of § 1404(a) and prevent both the Fifth Circuit's and this Court's clear and extensive transfer jurisprudence from becoming a nullity.

Mandamus is even more appropriate in this case because of the similar approach taken by another district court in the wake of this Court's *EMC* decision. *See Volkswagen II*, 545 F.3d at 319 (finding mandamus appropriate because "writs of mandamus are supervisory in nature and are particularly appropriate when the issues also have an importance beyond the immediate case"). In another case pending in the Eastern District of Texas, Judge Davis expressly declined to address the merits of pending transfer requests until after claim construction. *Norman IP Holdings, LLC v. Lexmark Int'l, Inc.*, No. 6:11-CV-495, 2012 WL 3307942, at *4 (E.D. Tex. Aug. 10, 2012) (holding that "in the event that transfer is appropriate,

the Court shall retain the case through the *Markman* phase of the proceedings").

This approach of declining to consider the merits of a transfer motion until after a later stage in the case similarly undermines both this Court's decision in *EMC* and the purpose of § 1404(a). Moreover, allowing district courts to postpone considering properly filed and long-pending motions to transfer could effectively render this Court "unable to entertain a mandamus petition even where there is a clear usurpation of judicial power." *See TS Tech*, 551 F.3d at 1322.

As set out below, the record before the District Court already "plainly shows that the United States District Court for the [District of Utah] is clearly more convenient and fair for trial," thereby justifying the issuance of a writ of mandamus directing transfer to the District of Utah. *See In re Microsoft*, 630 F.3d 1361, 1362 (Fed. Cir. 2010).

III. The Record Before the District Court Demonstrates that the District of Utah is Clearly More Convenient and Fair

The relevant transfer factors that the District Court improperly failed to weigh demonstrate that the District of Utah is the clearly more convenient forum for S4's litigation against Fusion-io.

A. The "Sources of Proof" Factor Weighs Heavily in Favor of Transfer

S4's allegations concern Fusion-io's "SSD products." *See* Ex. 6, S4 Complaint at ¶¶ 75–77. Fusion-io's past and present products were designed and

engineered at its headquarters in Salt Lake City, Utah,[8] and documents related to those products' design and configuration are located in that office.[9] *See* Ex. 2-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 id.* ¶ 9. Second, although Fusion-io's design and engineering

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[8] 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.

[9] 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 the Eastern District of Texas. *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).

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 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. San Jose, California is 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.[10] Third, all of the named inventors of all patents in suit are Japanese, as is the original assignee of five of the patents in suit,[11] Hitachi Ltd. Likewise, the original assignee of two other patents in suit,[12] Renesas Technology Corp., is located in Japan.[13] Tokyo, Japan (the likely departure point for international travel and delivery of documents)

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[10] 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 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))).

[11] U.S. Patent Nos. 6,341,085, 6,347,051, 6,370,059, 6,567,334 and 6,701,471.

[12] U.S. Patent Nos. 7,064,995 and 7,234,087.

[13] 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).

is approximately 5,500 miles from Salt Lake City, compared to approximately 6,500 miles from Marshall.

Although S4 opposed transfer on the basis that its principal place of business is located in the Eastern District of Texas, 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 the Eastern District of Texas 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[14] and filed its suit against Fusion-io on September 7, 2011.[15] 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, California and two members living

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14 *See* Ex. 2-B, Certificate of Conversion, at 1.

15 *See* Ex. 6, S4 Complaint.

in Tokyo, Japan.[16] With no other ties to or business activities in the Eastern District of Texas, 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* Ex. 2-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

[16] *See* Ex. 2-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* Ex. 2-C, Public Information Report. There is no indication of the place of residence of the CEO and other, newly added, director.

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 that the majority of evidence is in Utah, and the relative proximity of other relevant evidence, this factor weighs heavily in favor of transfer.

B. 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 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 the Eastern District of Texas. Accordingly, this factor weighs slightly in favor of transfer.

C. 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. This Court 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 at 1198.

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[17]—are closer to Utah than Marshall.[18] And not only are those witnesses

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[17] 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.

[18] 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

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.[19] 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.[20]

D. No Practical Problems Arise in Connection with Transferring this Case

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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.").

[19] 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.

[20] 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.").

No practical problems arise in connection with transferring this case to the District of Utah, which further weighs in favor of transfer. Fusion-io did not delay in seeking transfer; at the time of the filing of its original Motion to Sever and Transfer, no discovery had occurred in the case, and the scheduling conference had not been set. Furthermore, the District Court appropriately severed the claims against Fusion-io from S4's claims against other defendants, and the Court has yet to hold any hearings or to consider any motions on the merits of S4's case.

To the extent S4 has argued that the judicial efficiency of holding a common claim construction in the Eastern District of Texas overrides all other transfer considerations, that position is legally mistaken. As an initial matter, this Court 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 the now severed cases is preferable, such consolidation is appropriately accomplished via the multidistrict litigation procedures described in 28 U.S.C. § 1407 where, as here, S4 did not

bring its claims against Fusion-io in the appropriate forum. *See In re EMC Corp.*, 677 F.3d 1351, 1360 (Fed. Cir. 2012) (noting that a district court may consolidate cases "where venue is proper" and noting that common issues "of claim construction and patent invalidity may also be adjudicated together through the multidistrict litigation procedures of 28 U.S.C. § 1407"); *Volkswagen II*, 545 F.3d at 313 ("The underlying premise of § 1404(a) is that courts should prevent plaintiffs from abusing their privilege under § 1391 by subjecting defendants to venues that are inconvenient under the terms of § 1404(a).").[21] In other words, the JPML, not a single district court, is the appropriate agency to assess pre-trial consolidation when distinct suits against multiple different parties should properly have been filed in multiple districts.

Moreover, as a practical matter, multidistrict litigation 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 the Eastern District of Texas, which has no ties to the parties or evidence. *See In re Pabst Licensing Digital Camera Patent Litigation*, 528 F. Supp. 2d 1357, 1357

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[21] The Fifth Circuit's observation in *Volkswagen II* was made in the context of § 1391(c), and accordingly applies equally in the context of venue in patent cases with corporate defendants. *Compare* 28 U.S.C. § 1400(b); *see also Hoover Group, Inc. v. Customer Metalcraft, Inc.*, 84 F.3d 1408, 1410 (Fed. Cir. 1996) ("[F]or venue purposes the residence of corporate defendants in patent infringement actions is governed by 28 U.S.C. § 1391(c).").

(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 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 claim construction make it desirable for litigation between S4 and all defendants to proceed in a single forum, as this Court has already recognized, multidistrict litigation procedures will provide a far more efficient result than retention of all defendants in the Eastern District of Texas.

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

As the Fifth Circuit has 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. This Court, 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 In re 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 the Eastern District of Texas. While it is true that Fusion-io has customers in the Eastern District of Texas, this Court 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).

F. 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 the Eastern District of Texas) and is faster to trial (22.5 months compared to 24.2 months in the Eastern District of Texas).[22] Accordingly, this factor also weighs in favor of transfer.

G. The Remaining Public Interest Factors are Neutral

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[22] *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.

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.

CONCLUSION

Fusion-io respectfully requests that the Court grant this petition for a writ of mandamus, vacate the September 17, 2012, order of the United States District Court for the Eastern District of Texas denying in part Petitioner's motion to sever and transfer, and remand with instructions to transfer it to the United States District Court for the District of Utah.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of September 2012, a true and accurate copy of the foregoing was served by Federal Express on:

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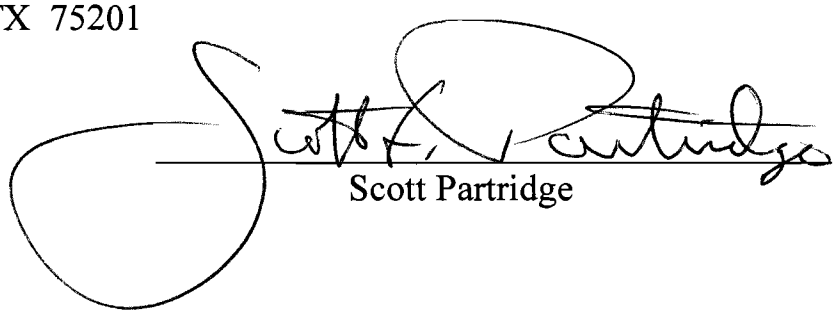

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