Exhibit 4

UNITED STATE COURT OF APPEALS FOR

THE FEDERAL CIRCUIT

Miscellaneous Docket No. 139

IN RE FUSION-IO, INC.

Petitioners

On 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

FUSION-IO, INC.'S REPLY IN SUPPORT OF PETITION FOR MANDAMUS

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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:

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Date: October 19, 2012

/s/ Scott Partridge
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I. INTRODUCTION

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 of whom develop their own distinct products in regions of the country far from the venue that S4 picked merely for purposes of litigation.

On January 4, 2012—before Fusion-io even answered S4's Original Complaint and *five months* before the Court entered its docket control order—Fusion-io filed a motion to sever the infringement allegations against its proprietary 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. At S4's request, Fusion-io provided discovery to S4 on the venue issue, and S4 filed its full response to the motion on March 16, 2012. Contrary to S4's incorrect assertion in its Opposition Brief, Fusion-io's motion has been ripe for decision since March of this year.

Faced with this Court's clear holding in *In re EMC Corp.*, 677 F.3d 1351 (Fed. Cir. 2012), the District Court finally issued an order granting severance on September 17, 2012. However, 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 that the severance was entirely illusory. *See* Ex. 1 to Petition at 2.

Without analyzing *any* of the required convenience factors pertaining to the additional issue of transfer raised by Fusion-io's motion, the District Court then *denied* Fusion-io's fully-briefed and pending request to transfer and suggested—without providing any reason or explanation—that Fusion-io "re-file" the exact same motion "should the movant determine that such is still appropriate after this order." *Id.* As stated in the Petition for Mandamus, nothing had 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 a clearly more convenient venue while the District Court opted to proceed with its own schedule for an indeterminate period of time. Such a delay would only serve to thwart the policies and purpose of § 1404(a) for at least that period of time.

The District Court's decision to deny the motion to transfer and to delay consideration of the convenience factors until a later time exemplifies a recent trend in the Eastern District of Texas of circumventing transfer and taking upon itself the role of the Judicial Panel on Multidistrict Litigation. The District Court's order here mirrors the approach recently adopted in the wake of the *EMC* decision by another court in the district to explicitly delay consideration of the transfer factors until after claim construction. *See 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") (Davis, J.).

Given that this additional delay would prejudice Fusion-io's rights and undermine the purpose of 28 U.S.C. § 1404(a), Fusion-io filed a Petition for Mandamus with the Federal Circuit to correct the District Court's clear abuse of discretion. Additionally, although not required by this Court, Fusion-io moved the District Court for reconsideration of the denial of transfer in an effort to give the District Court an opportunity to correct its error and apply the appropriate analysis. *See In re Nintendo*, 589 F.3d 1194, 1200 (Fed. Cir. 2009) (holding that the petitioner was "not required to wait for the district court's decision on the motion for reconsideration"). Tellingly, the District Court *again* declined to consider the convenience factors. Ex. 7 at 2 (order denying the Motion for Reconsideration).

Faced with Fusion-io's pending Petition for Mandamus, the District Court instead used that opportunity to try to recast its clear denial of Fusion-io's transfer motion as "merely an administrative order for the Court to manage its docket appropriately." *Id.* The language of the order proves otherwise.

The District Court now suggests that its decision simply "ordered that each Defendant file its then-pending motion to transfer venue in the newly-created member case for each Defendant." *Id.* However, that reinterpretation is directly contradicted by the order denying transfer, which explicitly states that "[a]ll parties are instructed to file any future filings *in this, the first-filed case*." Ex. 1 to Petition

at 2 (emphasis added). Indeed, the Court did not create member cases for the purportedly severed actions until October 2, 2012—after Fusion-io filed its Petition and after the District Court denied the Motion for Reconsideration. *See* Ex. 8.

Moreover, the order does not state that the parties should re-file for "administrative" reasons, but rather that the parties should re-file "should the movant determine that such is *still appropriate* after this order." *Id.* (emphasis added). The effect of the District Court's order is clear: the motion to transfer was denied, and in the event that Fusion-io believed that transfer was still appropriate, the District Court would retain the case until a later stage. *See, e.g., Norman IP Holdings*, 2012 WL 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"). As the District Court is aware, the parties have already exchanged proposed constructions, and the Markman hearing is scheduled for January 9, 2013. The denial of Fusion-io's transfer motion on the eve of the *Markman* phase prejudices Fusion-io by compelling it to litigate the merits of the case in an inconvenient venue. Further delay would only compound this prejudice.

As stated in Fusion-io's Petition, 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. The District Court's consolidation of the severed actions without any evaluation of the convenience

factors 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.

II. DISCUSSION

A. The District Court's Failure to Consider the Relevant Factors is a Clear Abuse of Discretion that Warrants Mandamus

Courts must consider eight factors when assessing a motion to transfer venue under § 1404(a). Just as a failure to accord proper weight to various transfer factors can lead to a "patently erroneous" result warranting mandamus, so too does a failure even to consider the relevant 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 question the appeals court must ask 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). Other Courts of Appeals similarly treat a district court's failure to consider the transfer factors as grounds for mandamus. *See, e.g.*, *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").

S4 does not—and cannot—dispute that the District Court failed to consider

the relevant transfer factors before denying Fusion-io's motion to transfer. Instead, S4 claims that the District Court's explicit denial of the motion to transfer was merely an "administrative, docket-management order" that fell within the Court's discretion. As stated above, the language of the court's order proves otherwise.

For example, S4 contends that the order simply "request[ed] that the parties re-file their motions to transfer under the new case number." Opposition Brief at 13. However, the actual order states that "[a]ll parties are instructed to file any future filings *in this, the first-filed case*." Ex. 1 to Petition, at 2 (emphasis added). S4 does not attempt to explain how denying a motion and then inviting a party to re-file the *exact same motion* under the *exact same case number* furthers the goal of effective docket management. Additionally, even if the parties were inclined to violate the clear language of the court's order and re-file their motions under a different case number, this would have been impossible given that no new case numbers were assigned until *after* Fusion-io filed the pending Petition and *after* the District Court denied the Motion for Reconsideration. *See* Ex. 8.

Moreover, the District Court's order expressly states that a party could re-file the exact same motion "should the movant determine that such is *still appropriate* after this order." *Id.* (emphasis added). The only conclusion that can be drawn from this statement is that the District Court, for reasons unexplained, believed that its severance and immediate consolidation of the claims rendered

transfer *inappropriate* at that time. This is substantially similar to the decision of another court in the Eastern District of Texas to wait until after claim construction before determining whether transfer was appropriate. *Norman IP Holdings*, 2012 WL at *4 (holding that "in the event that transfer is appropriate, the Court shall retain the case through the *Markman* phase of the proceedings").

As argued in the pending Petition for Mandamus, the District Court's decision to deny Fusion-io's motion to transfer without considering the required transfer factors is a clear abuse of discretion. The District Court and S4's recent attempts to recast that explicit denial as merely an "administrative order" is directly contradicted by the clear language of the District Court's decision and only serves to further delay the transfer of the case to a clearly more convenient venue. Because the District Court failed to consider the relevant factors incident to ruling upon Fusion-io's motion to transfer, mandamus is warranted.

B. The District Court's Attempt to Evade the Judicial Panel on Multidistrict Litigation Further Warrants Mandamus

Mandamus is also warranted because 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. *EMC*, 677 F.3d at 1360. The District Court's decision to consolidate the severed actions without evaluating the

transfer motions thwarts § 1407 and undermines the holding in *EMC*.

Although a district court has discretion to consolidate cases, *EMC* makes clear that a court has this discretion only "where venue is proper." *Id.* 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) for each severed case 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 expressly provided for by Congress in § 1407.

In an effort to circumvent *EMC* and the JPML, courts in the Eastern District of Texas have chosen to consolidate cases that should be severed and delay consideration of the convenience factors until a later stage in the case. This new approach 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 under *EMC*, requesting the district court to immediately consolidate those severed actions and delay ruling on any motions to transfer until a later stage in the case. Such a precedent would enable plaintiffs to nullify both the Fifth Circuit and this Court's transfer decisions.

Accordingly, the District Court's refusal to consider the relevant convenience factors, 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 and makes mandamus appropriate.

C. To Avoid Further Delay, the Federal Circuit Should Transfer the Severed Case to the District of Utah

In its Opposition Brief, S4 appears to concede that "mandamus may sometimes be appropriate when a district court simply refuses to adjudicate a pending motion." Opposition Brief at 9. However, S4's insistence that the Federal Circuit should merely instruct the District Court to reconsider the transfer motion overlooks both the prejudice that Fusion-io will suffer from further delay and the fact that the District Court has already had two different opportunities to properly evaluate the transfer factors, including an opportunity to reconsider its decision.

Under the District Court's schedule, the Opening Claim Construction Brief is due on November 19, 2012, and the claim construction hearing is set for January 9, 2013. As a result, any further delay in resolving the transfer issue will prejudice Fusion-io's rights and undermine the purpose of § 1404(a) by forcing Fusion-io to litigate the merits of the case in an inconvenient venue. Additional delay in transferring the case would also impede judicial economy by forcing the District Court to spend valuable time familiarizing itself with the accused technology.

In light of the above concerns, 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). S4's new allegation that Fusion-io "delayed" filing its motion to transfer is absurd and baseless. Despite filing its suit in September, S4 did not serve process on Fusion-io until October 26, 2011. Ex. 9. Following service, Fusion-io then moved to transfer a short time later on January 4, 2012—two weeks before it even answered S4's Original Complaint. Fusion-io further pursued its motion by filing both a Motion for Reconsideration and a Petition for Mandamus immediately after the District Court's denial of transfer.

As a result of Fusion-io's efforts, the Court has had ample time and opportunity to consider the transfer factors. S4's unsupported claim that the motion to transfer only became ripe for decision in July is false. After three unopposed extensions, S4 filed its full response on March 16, 2012. Under the District Court's local rules, "the court will consider the submitted motion for decision" after the opposing party files its response. *See* L.R. CV-7(e). S4's focus on the supplemental briefing filed in May ignores the fact that this supplemental briefing primarily addressed the effect of this Court's intervening *EMC* decision on the *severance* issue. In contrast, the *transfer* factors were fully briefed in March.

S4 cannot legitimately dispute that Fusion-io has diligently sought a transfer to a clearly more convenient venue, and S4 cannot legitimately dispute that the District Court has had ample opportunity to consider the relevant transfer factors. Given the upcoming schedule and the considerable delay already incurred in

transferring this case, this Court should direct the District Court to transfer the case to the clearly more convenient venue in the District of Utah.

D. S4's Attempt to Divert Attention from the Facts Relevant to the Transfer Analysis is Unpersuasive

1. The vast majority of evidence is located in Salt Lake City.

S4 does not contest the central facts relevant to transfer set out in Fusion-io's motion and the declaration of John Strasser, Fusion-io's Vice President of Hardware Development: Fusion-io designed and engineered its accused products at its headquarters in Salt Lake City; it keeps documents related to those products' design and configuration in Salt Lake City; and the most relevant witnesses—the actual engineers responsible for designing the products—live and work in Salt Lake City. *See* Petition at 16–18, Ex. 2A. To a lesser extent, additional employees knowledgeable of Fusion-io's marketing and financial activities are located at Fusion-io's offices in San Jose, California, and Superior, Colorado. *Id.* Both of those offices are far closer to Salt Lake City than they are to Marshall, Texas.

S4 does not dispute that the bulk of the relevant documents and witnesses are located in or near Salt Lake City. As both S4 and this Court recognize, "[i]n patent infringement cases, the bulk of the relevant evidence usually comes from the accused infringer." *In re Genentech, Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009) (holding that the convenience factors weigh in favor of transfer to the place where the defendant's documents are kept). Instead, S4 attempts to shift this Court's

focus to a small number of sales people who work out of their homes in different parts of Texas. S4 does not explain why it believes those sales people are more relevant witnesses than the engineers responsible for designing the accused products or the managers actually responsible for sales strategy, marketing, and financial decisions. S4 also does not explain why it believes that the sales people based in Texas are more relevant witnesses than similar sales people based in Utah. Moreover, with regard to sales information, Fusion-io's Executive Vice President of World Wide Sales, Jim Dawson, lives and works in San Jose, California, which is much closer to Salt Lake City than it is to Marshall.

S4 argues that this Court should overlook Fusion-io's substantial operations in Salt Lake City because Fusion-io "focuses its briefing entirely on listing activities that it conducts in Utah, as opposed to specific evidence located in Utah." *See* Opposition at 18. S4 misses the importance of Fusion-io's business activities. The vast majority of the relevant evidence is located in Utah precisely because the vast majority of Fusion-io's relevant business activities occur in Utah. Courts do not require the specific identification of each witness and document supporting transfer where, as here, the plaintiff "has not meaningfully attacked Defendant's assertion that most of the key witnesses" are located closer to the transferee forum. *See Odom v. Microsoft Corp.*, 596 F. Supp. 2d 995, 1001–02 (E.D. Tex. 2009).

2. No parties have a valid connection to Marshall, Texas.

S4's attempt to avoid the substantial amount of evidence in Utah by pointing to its recent move to Marshall is unpersuasive. As this Court has held, offices established in anticipation of litigation in order to manipulate venue are irrelevant to the transfer analysis. *In re Microsoft Corp.*, 630 F.3d 1361, 1364–65 (Fed. Cir. 2010). S4 was founded in 2007 as a Wisconsin-based limited liability company. In anticipation of this suit, S4 registered as a Texas corporation in October of 2009 and relocated its single-employee operation to Marshall. Its directors have no connection to Texas and are instead based in California and Japan. Ex. 2B at 5–6.

Moreover, S4 is a non-practicing entity that produces no products and currently employs only two people: Mr. Loudermilk and Ms. Haecker.[1] *See* Opposition Brief at 20. S4's peculiar focus on the physical size of the building where those two individuals work is irrelevant to the transfer inquiry. *See id.* (noting that the entire building where S4 maintains office space is "25,000 square foot"). S4's small size and ephemeral presence in Marshall is insufficient to outweigh the overwhelming volume of evidence located in Utah or the number of Utah-based employees with unique and substantial knowledge of Fusion-io's accused products, sales, marketing, and finances.

S4's attempt to portray Mr. Kato and Mr. Katayama—both residents of

[1] S4 does not explain in its Opposition Brief how Ms. Haecker's testimony is relevant to the current litigation, and S4 has not disclosed Ms. Haecker as a person having knowledge of any relevant facts.

Japan—as disinterested witnesses is deliberately misleading and contradicted by S4's own Opposition Brief. S4 expressly states that a corporation called Renesas is S4's parent company,[2] and both Mr. Kato and Mr. Katayama admit in their declarations that they are employed by Renesas. *See* Opposition Brief at 22, RA75, and RA78. S4 does not explain why the relative "convenience" of allowing two Japan-based Renesas employees to testify in Texas should outweigh the far greater convenience of allowing the many Utah-based Fusion-io employees to testify in Utah. Finally, neither Mr. Kato nor Mr. Katayama have indicated that a trial in Salt Lake City would be more inconvenient to them than a trial in Marshall.

3. S4's improper joinder of unrelated defendants does not deprive them of their rights under § 1404(a).

S4 argues that this Court should not transfer the case against Fusion-io to Utah because Mr. Kato and Mr. Katayama would prefer to testify *in a single trial* in Texas. This argument incorrectly assumes that S4 properly joined the unrelated defendants in a single action and that Marshall is a convenient venue for litigating the case. Neither assumption is true. S4's argument merely reemphasizes the patently erroneous nature of the District Court's response to the *EMC* decision.

As stated above, the District Court's order sets the plainly erroneous precedent that a plaintiff may force litigation to proceed in an inconvenient venue

[2] S4 states that another corporation, SanDisk, is also a parent company. *See* Opposition Brief at 22. As a result, it is irrelevant whether S4's self-described "parent companies" prefer that the litigation proceeds in the EDTX.

simply by suing enough distinct defendants in that venue and then, after the severance required under *EMC*, requesting the district court to immediately consolidate those severed actions and delay ruling on any motions to transfer until a later stage in the case. S4 essentially compounds this error by suggesting that a plaintiff's improper joinder of distinct defendants in an inconvenient venue should inure to the plaintiff's benefit by weighing *against* the transfer of the severed cases to clearly more convenient venues. S4's argument directly contradicts the logic of *EMC* and Congress's explicit grant of authority to the JPML.

This Court's opinion in *EMC* makes clear that the District Court has discretion to consolidate cases only "where venue is proper." *EMC*, 677 F.3d at 1360. S4 should not be allowed to thwart both *EMC* and § 1404(a) by improperly joining defendants in an inconvenient forum. Instead, the properly severed cases should be transferred pursuant to the transfer motions. In the event that the severed cases are transferred to different venues, Congress specifically created the multidistrict litigation procedures to address how and where those transferred cases should be consolidated. A district court in an inconvenient venue may not usurp the role of the JPML and circumvent this Court's decision in *EMC* by deciding to consolidate and retain cases that have no connection to that judicial district.

For the above reasons, this Court should issue a Writ of Mandamus directing the District Court to transfer S4's claims against Fusion-io to the District of Utah.

Respectfully submitted,

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