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Plaintiff Lodsys, LLC (“Lodsys”) respectfully submits this response in opposition to Defendant Hewlett-Packard Company’s Motion To Dismiss Or, In The Alternative, To Sever And Transfer Venue [dkt. no. 102] (the “Motion”).

I. INTRODUCTION

Hewlett-Packard Company (“HP”) manufactures and sells a number of products that infringe Lodsys’ patents. Those products are sold around country (and world), including in Marshall, Texas. When Lodsys filed this action against HP and other infringers, Lodsys exercised its right to choose the forum in the location of its headquarters. And because Lodsys’ claims against HP and the other defendants involve many common legal and factual issues, Lodsys sought to minimize the burden on itself, the defendants, the Court, and the judicial system by bringing claims against multiple defendants in a single lawsuit.¹

Although HP should have known that selling infringing products in the Eastern District of Texas would render HP amenable to a lawsuit in this venue, HP now seeks to have Lodsys’ claims dismissed, severed, and/or transferred to the Southern District of Texas. HP’s motives are transparent. Severance would force Lodsys to duplicate its litigation efforts. This Court, however, has consistently rejected similar attempts to create wasteful, duplicative proceedings.

HP asserts that supposedly “[t]his is a textbook case of misjoinder.” Motion at 1. But, in fact, HP simply ignores that this Court and numerous other district courts in the Fifth Circuit have repeatedly held that joinder of multiple defendants is proper in patent infringement lawsuits. HP also seriously mischaracterizes the alleged “differences” between the accused commodities. In truth, a “logical relationship” exists between and among the claims against all defendants, which is sufficient to satisfy the “some nucleus of operative fact or law” test.

¹ As discussed below, Lodsys subsequently filed three additional lawsuits in this Court against additional defendants for infringement of the same patents-in-suit. The fact that the infringement of Lodsys’ patents is so widespread and pervasive that Lodsys could not practically challenge every infringer simultaneously is, however, not a reason to further fragment the proceedings by severing HP. And the fact that this Court is presiding over multiple lawsuits concerning the same patents-in-suit weighs strongly against transferring Lodsys’ claims against HP.

Moreover, severing and transferring the claims against HP would impose a substantial burden on both the judicial system and Lodsys to maintain two lawsuits with substantially the same issues in two different venues. That is exactly the kind of inefficiency that the severance and transfer rules were designed to prevent. As repeatedly recognized by this Court, Lodsys would be severely prejudiced by severance and transfer. And, in addition to the burden on the judicial system and Lodsys, the existence of multiple forums interpreting the same patents creates an unnecessary risk of inconsistent claim constructions and adjudication.

Under well-settled precedent from this Court and other district courts in the Fifth Circuit, Lodsys' claims against HP should not be dismissed or severed, because HP was properly joined in this action. In the alternative, if Lodsys' claims against HP are severed, the severed action should remain in this Court.

II. RELEVANT BACKGROUND

A. Lodsys and the Patents-in-Suit.

Lodsys is a Texas limited liability company with its principal place of business in Marshall, Texas. *See* Complaint For Patent Infringement [dkt no. 1] (the "Complaint"), ¶ 1. Lodsys maintains an office at its headquarters located at 505 East Travis Street, Suite 207, Marshall, Texas. *See* Declaration of Mark Small (the "Small Decl."), ¶ 4, attached as Exhibit 1.

On December 7, 1999, U.S. Patent No. 5,999,908 (the "'908 patent") was duly and legally issued for a "Customer-Based Product Design Module." *See* Complaint, Ex. C. On May 22, 2007, U.S. Patent No. 7,222,078 (the "'078 patent") was duly and legally issued for "Methods and Systems for Gathering Information from Units of a Commodity Across a Network." *See id.* at Ex. B. On November 17, 2009, U.S. Patent No. 7,620,565 (the "'565 patent") was duly and legally issued for a "Customer-Based Product Design Module." *See id.* at Ex. A.

Daniel Abelow is the inventor of the '908 patent, '078 patent, and '565 patent. *See id.* at Exs. A-C. And Lodsys is the owner by assignment of all of the patents-in-suit (*i.e.*, the '908 patent, '078 patent, and '565 patent). *See id.* at ¶¶ 14, 25, 37.

B. Defendants and the Pending Lawsuits.

On February 11, 2011, Lodsys filed this action against HP and eleven other defendants. The Complaint alleges that all of the defendants (including HP) have infringed the '078 patent. *See* Complaint, ¶¶ 25-36. The Complaint alleges that eleven (including HP) of the twelve defendants have infringed the '565 patent. *See id.* at ¶¶ 14-24. The Complaint also alleges that two defendants have infringed the '908 patent. *See id.* at ¶¶ 37-40.

On May 31, 2011, Lodsys filed a lawsuit against seven additional persons and/or companies in the Eastern District of Texas, alleging infringement of the '565 patent and '078 patent. *See Lodsys, LLC v. Combay, Inc., et al.*, Case No. 2:11-CV-272. On June 10, 2011, Lodsys filed a lawsuit against ten additional companies in the Eastern District of Texas, alleging infringement of the '078 patent and '908 patent. *See Lodsys, LLC v. adidas America, Inc., et al.*, Case No. 2:11-CV-283. Finally, on July 5, 2011, Lodsys filed a lawsuit against five additional companies in the Eastern District of Texas, alleging infringement of the '565 patent, '078 patent, and '908 patent. All four lawsuits — involving the same patents-in-suit — are pending before this Court.

C. HP's Commodities and the Alleged "Hub".

In addition to specific models of HP personal computers and printers, Lodsys' Complaint alleges three "types" of HP's infringing commodities: "HP personal computers with HP Support Assistance;" "HP printers with SureSupply;" and "computer server(s) to collect data" in conjunction with each defendants' accused commodity, regardless of the specific type of product or service. *See* Complaint, ¶¶ 17, 28.

HP asserts that "the accused products are very different from one another." Motion at 2. In fact, HP and Lenovo's personal computers are accused of infringement. *See id.* at ¶¶ 17, 18. HP, Brother, Canon, Lexmark, and Samsung's printers are accused of infringement. *See id.* at ¶¶ 15-17, 19, 22. And all of the defendants (including HP) are accused of using infringing computer server(s) to collect data. *See id.* at ¶¶ 26-35.

Moreover, HP ignores the logical relationship between and among the “series of transactions or occurrences.” All of the patents-in-suit are directed to systems and methods for providers of products and/or services to interact with users of those products and services to gather information from those users, regardless of whether the accused commodity is a printer, personal computer, cell phone, or website. *See* Complaint, Exs. A-C. All of the accused commodities infringe the claims of the patents-in-suit in a similar (if not identical) manner because the alleged infringement involves the implementation and use of the patented inventions to probe users for information related to a product or service, regardless of whether the accused commodity is a printer, personal computer, cell phone, or website. *See id.* at Exs. A-C; ¶¶ 15-23, 26-35, 38-39. And all of the accused commodities elicit the user’s perception of the commodity through a user interface and convey information back to the defendant, regardless of whether the accused commodity is a printer, personal computer, cell phone, or website. *See id.* Those common aspects of the accused commodities are the subject of Lodsys’ claims of infringement against each of the defendants (including HP), regardless of whether the accused commodity is a printer, personal computer, cell phone, or website.

HP also asserts that the “undisputed hub” of HP’s infringing activities is Houston. *See* Motion at 10-12. But HP admits that “the HP Houston campus is home” only to “the development and operation of HP Support Assistant, one of the products accused of infringing the ‘565 patent.” *Id.* at 11 (emphasis added). HP also admits that HP’s facility in Boise, Idaho (*i.e.*, a location not in the Southern District of Texas) is the “primary base of operations for SureSupply.” Motion at 12. HP further admits that its “computers servers that collect data” are “located all over the world.” *Id.*

III. RESPONSE TO HP’S STATEMENT OF ISSUES

Although HP seeks dismissal of Lodsys’ claims, HP’s dispositive Motion does not contain a statement of the issues to be decided by the Court, as required by Local Rule Local Rule CV-7(a)(1). In any event, the issues to be decided by the Court are: Should HP’s request to dismiss be denied where Lodsys’ Complaint satisfies both prongs of Rule 20 and this Court

and numerous other district courts in the Fifth Circuit have repeatedly held that joinder of multiple defendants is proper in patent infringement lawsuits? Should HP's request to sever be denied where severing Lodsys' claims against HP would create problems that outweigh any alleged inconvenience to HP, including burdening the judicial system, prejudicing Lodsys, and the risk of inconsistent claim constructions? Should HP's request to transfer be denied where HP has failed to demonstrate that Houston is a "clearly more convenient" venue?

IV. ARGUMENT

Because joinder and motions to sever and transfer do not involve substantive issues of patent law, Fifth Circuit law applies to HP's motion. *See In re TS Tech USA Corp.*, 551 F.3d 1315, 1319 (Fed.Cir.2008). "The district court has ***broad discretion*** in determining the propriety of joining or continuing a particular party as a defendant." *Williams v. Hoyt*, 556 F.2d 1336, 1341 (5th Cir.1977) (emphasis added); *see also Anderson v. Red River Waterway Comm'n*, 231 F.3d 211, 214 (5th Cir. 2000) ("Because a trial court has broad discretion to sever and remand cases, we review the district court's refusal to sever and remand for an abuse of discretion.").

Here, HP's Motion should be denied because HP was properly joined and, therefore, HP should not be dismissed or severed from this action. In the alternative, if Lodsys' claims against HP are severed, the severed action should not be transferred; rather, for undeniable reasons of judicial economy, the severed action should remain before this Court.

A. HP Was Properly Joined and Should Not Be Dismissed from this Action.

"The Federal Rules of Civil Procedure ***strongly encourage*** joinder of claims, parties, and remedies." *Adrain v. Genetec Inc.*, No. 2:08-CV-423, 2009 WL 3063414, *1 (E.D. Tex. Sept. 22, 2009) (emphasis added). Indeed, the Supreme Court has held that "the impulse is toward entertaining the ***broadest possible scope of action*** consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966) (emphasis added). Thus, a plaintiff may join multiple defendants in a single action where (as here) "any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of

transactions or occurrences” and “any question of law or fact common to all defendants will arise in the action.” Fed. R. Civ. P. 20.

Moreover, the “transaction and common question requirements prescribed by Rule 20(a) are not rigid tests; they are flexible concepts used by the courts to implement the purposes of Rule 20 and therefore are to be read as broadly as possible whenever doing so is likely to promote judicial economy.” *Afavor v. Racetrac Petroleum, Inc.*, No. 3:05-CV-2255, 2006 WL 1343636, *3 (N.D. Tex. May 15, 2006); *see also Viada v. Osaka Health Spa, Inc.*, 235 F.R.D. 55, 61 (S.D.N.Y. 2006) (“The requirements of Fed. R. Civ. P. 20(a) are to be interpreted liberally ‘to enable the court to promote judicial economy by permitting all reasonably related claims for relief by or against different parties to be tried in a single proceeding.’”).

As discussed in detail below, HP was properly joined and should not be dismissed from this action because (a) Lodsys’ Complaint satisfies both prongs of Rule 20; (b) this Court and numerous other district courts in the Fifth Circuit have repeatedly held that joinder of multiple defendants is proper in patent infringement lawsuits; and (c) HP’s bald assertions regarding prejudice and judicial economy are entirely mis-placed and without merit.

1. Lodsys’ Complaint Satisfies Both Prongs of Rule 20.

“Courts have described Rule 20 as creating a two-prong test, allowing joinder of the defendants when (1) their claims arise out of the ‘same transaction, occurrence, or series of transactions or occurrences’ and (2) there is at least one common question of law or fact linking all the claims.” *Americans for Fair Patent Use, LLC v. Sprint Nextel Corp.*, 2:10-CV-237-TJW, 2011 WL 98279, *2 (E.D. Tex. Jan. 12, 2011) (quoting *Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 521 (5th Cir. 2010)). As interpreted by this Court and the other district courts in the Fifth Circuit, Lodsys’ Complaint easily satisfies both prongs of Rule 20.

a. Same Transaction or Occurrence

Although the Fifth Circuit has yet to endorse a specific test regarding the first prong of Rule 20(a)(2), “several district courts in the Fifth Circuit have applied the logically related test.” *Mannatech, Inc. v. Country Life, LLC*, No. 310-CV-533-O, 2010 WL 2944574, *1 (N.D. Tex.

July 26, 2010). “Transactions or occurrences satisfy the series of transactions or occurrences requirement of Rule 20(a) if there is some connection or *logical relationship* between the various transactions or occurrences.” *MyMail, Ltd. v. Am. Online, Inc.*, 223 F.R.D. 455, 456 (E.D. Tex. 2004) (emphasis added). “A logical relationship exists if *some* nucleus of operative fact or law exists.” *Garmin Ltd. v. Tomtom, Inc.*, No. 2:06-CV-338, 2007 WL 2903843, *5 (E.D. Tex. Oct. 3, 2007) (emphasis added).

Here, HP asserts that “Lodsys’ complaint fails to satisfy the relatedness prong of Rule 20(a)(2) because the accused products are dramatically different.” Motion at 7. But HP ignores the *logical relationship* between the infringement allegations against HP and the other defendants. For example, the inventions detailed in the various claims of the patents-in-suit were all developed by Daniel Abelow, an expert in the usability of, and in the organization, presentation, and incorporation of information in, websites, products, services, and enterprise systems. *See* Motion at Ex. 3. The patents-in-suit are from the same family of patents; the patents-in-suit all originate from an application filed on August 6, 1992; and the patents-in-suit share a common prosecution history. *See* Complaint, Ex. A-C. All of the patents-in-suit are directed to systems and methods for providers of products and/or services to interact with users of those commodities to gather information from those users. *See id.*

Moreover, as HP admits, Lodsys’ Complaint alleges that all of the defendants (including HP) have infringed the ‘078 patent. *See* Complaint, ¶¶ 25-36. Lodsys’ Complaint also alleges that eleven (including HP) of the twelve defendants have infringed the ‘565 patent. *See id.* at ¶¶ 14-24.² And a logical relationship also exists between all of the accused commodities because the alleged infringement involves the implementation and use of the patented inventions to probe users for information related to a product or service, regardless of whether the accused

² Although the Complaint alleges that only two defendants have infringed the ‘908 patent, those same two defendants (along with HP) are alleged to have infringed both the ‘078 patent and ‘565. *See* Complaint, ¶¶ 17, 22, 23, 28, 34, 35. As discussed below, severing this action by patent, defendant, or commodity would be impractical and inefficient.

commodity is a printer, personal computer, cell phone, or website. *See id.* at Exs. A-C. Accordingly, the accused commodities at issue here are sufficiently (and logically) related to satisfy the “some nucleus of operative fact or law” test. *See Adrain*, 2009 WL 3063414 at *2 (“Like the defendants in *MyMail*, Eltag has been joined with other unrelated defendants whose products are accused of infringing the same patent. Here, each of the defendants sells a license plate recognition system that allegedly infringes claims 1 and 7 of the ‘669 patent. The similarity of the defendants’ products is sufficient to satisfy the nucleus of fact or law test. Thus, Eltag’s and the other defendants’ alleged infringement arises out of same transaction or occurrence.”).

HP’s hyper-technical focus on the final incarnation of the accused commodity that infringes the patents-in-suit is both misleading and a red-herring, for several reasons.

First, as HP is forced to admit, Lodsyst’s Complaint alleges that HP, Brother, Canon, Lexmark, and Samsung “manufactures, uses, sells, imports, and/or offers to sell infringing printers.” *See* Complaint, ¶¶ 15-17, 19, 22. The Complaint also alleges that both HP and Lenovo “manufactures, uses, sells, imports, and/or offers to sell” infringing personal computers. *See id.* at ¶¶ 17, 18. And the Complaint alleges that all of the defendants (including HP) “makes, sells, offers to sell, and/or uses infringing computer server(s) to collect data” in conjunction with each defendants’ products and services, regardless of the specific type of product or service. *See id.* at ¶¶ 26-35. Accordingly, HP’s infringing products and services are similar (if not identical) to the other defendants’ infringing products and services, and the alleged acts of infringement share “some nucleus of operative fact or law.”³

³ HP simply ignores the meaning of “series,” as defined in *Hanley v. First Investors Corp.*, 151 F.R.D. 76 (E.D. Tex. 1993): “Parsing the language of the rule, the first prong is met ***if there is a common right to relief*** respecting or rising out of a ‘series of transactions or occurrences.’ For the case at bar, the crux of the issue is the definition of ‘series.’ Imagine a number of ‘transactions or occurrences’ spread out through time and place. They are not directly continuous, or else they would constitute one transaction or occurrence rather than a number of them. What would make them a ‘series?’ The answer is some connection or logical relationship between the various transactions or occurrences. The thing which makes the relationship

Second, HP suggests that it would be allegedly more efficient for the Court (or several courts) to separately adjudicate Lodsyst's claims against HP and the other defendants because (relying only on out-of-district authority) supposedly "all of the discovery, witnesses, claim construction issues, infringement proof, damages proof and dispositive motions will be different for HP than for the other defendants." Motion at 7. But there is no practical way to split the defendants based on the specific type of accused commodity. For example, a lawsuit involving only infringing printers would plainly satisfy the first prong of Rule 20, and even HP could not seriously assert otherwise. Many of the defendants, however, are large corporations that make and/or sell several types of products of products or services. Indeed, among other products, HP makes and/or sells printers and personal computers, so moving HP into a separate "printer case" would also require separate lawsuits for HP's personal computers and each of HP's other commodities. Using HP's logic, another "alternative" would be to sever each defendant into a separate lawsuit. But any such severing (whether by product type, defendant, or patent) would result in a significant waste of judicial resources, create an unnecessary risk of inconsistent claim constructions, and is precisely the type of procedural nightmare the liberal joinder rules are intended to prevent:

The UOL Defendants urge the Court to adopt the rule that infringement by different defendants does not satisfy Rule 20's same transaction requirement, but the Court finds that this interpretation of Rule 20 is a hypertechnical one that perhaps fails to recognize the realities of complex, and particularly patent, litigation. In essence, the UOL Defendants advocate a rule that requires separate proceedings simply because unrelated defendants are alleged to have infringed the same patent. The Court disagrees with such a per se rule that elevates form over substance. Such an interpretation does not further the goals of Rule 20, especially for discovery and motion purposes.

MyMail, 223 F.R.D. at 457 (emphasis added).⁴

'logical' is some nucleus of operative facts or law—the second prong of the 20(a) test. If the phrase 'series' is to have any real meaning whatsoever, it necessarily must entail some 'logical relationship' between the specific transactions or occurrences." 151 F.R.D. at 79 (emphasis added).

⁴ HP's attempts to distinguish and discredit *MyMail* are addressed in Section IV.A.2., *infra*.

Third, HP's repeated assertion that the accused products and services are supposedly "dramatically different" is, at best, premature because before any discovery has been conducted, it is difficult for any party to particularize all of the similarities (or dis-similar features) of the design and architecture of each defendants' infringing commodities. In fact, while HP is presumably very well-informed concerning its own products and services, HP does not dispute in its Motion (let alone counter with any evidence) that the other defendants' products and services are designed and function in similar (if not the identical) ways. At this stage in the proceedings, the liberal joinder rules favor keeping the action together for at least claim construction and discovery. See *MyMail*, 223 F.R.D. at 457 ("When discovery is complete, the Court, upon motion of a party, will determine whether the state of the evidence compels severance of some type under Rule 21."); *Sprint Communications Co., L.P. v. Theglobe.com, Inc.*, 233 F.R.D. 615, 618 (D. Kan. 2006) ("The court will revisit the choice of severing the proceedings in connection with the final pretrial conference if requested, but denying the motion to sever until the parties have completed discovery is appropriate. At this point, [defendant]'s motion is *premature*." (emphasis added)).

Because Lodsyst's Complaint satisfies the first prong of Rule 20, HP's Motion should be denied.

b. Common Questions of Fact and Law

"As to the second prong of Rule 20(a)(2), common question of law or fact, not all of the facts must be common to every defendant; joinder is appropriate so long as there is a common question of fact of law among all the defendants." *Adrain*, 2009 WL 3063414 at *1 (citing *Nor-Tex Agencies, Inc. v. Jones*, 482 F.2d 1093, 1100 (5th Cir.1973)).

Here, HP does dispute the second prong of Rule 20(a)(2). Nor could HP, because the vast majority of legal and factual issues are common to HP and all other defendants. For example, the "validity and scope of the [patents-in-suit] is a question common to all of the defendants in this case. Therefore, the second prong has been satisfied." *Adrain*, 2009 WL

3063414 at *2; *see also MyMail*, 223 F.R.D. at 456 (“The legal question as to the ‘290 patent’s scope is common to all the defendants.”).

Relying only on out-of-district authority, HP asserts that “joinder still is inappropriate” (Motion at 5) despite defendants’ (including HP’s) several common and *identical* defenses. *Compare* Defendant Hewlett-Packard Company’s Answer To Plaintiff’s Complaint [dkt. no. 53], ¶¶ 43-53 *with* Answer And Affirmative Defenses Of Defendant Canon U.S.A., Inc. [dkt. no. 41], ¶¶ 41-49; Defendant Trend Micro Incorporated’s Answer And Additional Defenses To Plaintiff Lodsys LLC’s Complaint [dkt. no. 46], ¶¶ 43-53; Defendant Lenovo (United States), Inc.’s Answer To Plaintiff’s Complaint For Patent Infringement [dkt. no. 47], ¶¶ 41-48; Defendant Motorola Mobility, Inc.’s Answer And Additional Defenses To Plaintiff Lodsys LLC’s Complaint [dkt. no. 55], ¶¶ 43-53; Defendant Novell, Inc.’s Answer To Plaintiff’s Complaint For Patent Infringement And Counterclaims [dkt. no. 105], 9-11. The Court has held that where (as here) all of the defendants “have raised several similar affirmative defenses...., there will be significant overlap among the issues of claim validity, claim construction, and claim scope. [Accordingly,] [s]everance and transfer would create duplicative proceedings on the same patents, unnecessarily wasting judicial resources.” *Innovative Global Sys. LLC v. Tpk. Global Technologies L.L.C.*, No. 6:09-CV-157, 2009 WL 3754886, *2 (E.D. Tex. Oct. 20, 2009).

Because Lodsys’ Complaint satisfies the second prong of Rule 20, HP’s Motion should be denied.

2. Courts Have Repeatedly Held Proper Joinder of Multiple Defendants.

This Court and numerous other district courts in the Fifth Circuit have repeatedly held that both prongs of Rule 20 are satisfied where (as here) multiple defendants are joined in a single lawsuit alleging different commodities that infringe the same patents. *See, e.g., Eolas Technologies, Inc. v. Adobe Sys., Inc.*, No. 6:09-CV-446, 2010 WL 3835762 (E.D. Tex. Sept. 28, 2010) (denying severance in action with twenty-three defendants); *Alford Safety Services Inc. v. Hot-Hed, Inc.*, No. CIV.A. 10-1319, 2010 WL 3418233, *10 (E.D. La. Aug. 24, 2010) (“Even if the designs of each habitat may differ, the underlying issue is the same—patent infringement for

the same patents. Thus, the reasoning of *Guedry, MyMail, Ltd.*, and *Mannatech, Inc.*—namely that patent infringement meets the permissive qualities of the joinder rule—can be applied here.”); *Mannatech*, 2010 WL 2944574 at *2 (“the Court finds that [all] defendants’ alleged infringement arise out of the same transaction or occurrence”); *Adrain*, 2009 WL 3063414, at *2 (“The similarity of the defendants’ products is sufficient to satisfy the nucleus of fact or law test.”); *Innovative Global Sys.*, 2009 WL 3754886 at *2 (“In its complaint, [plaintiff] asserts the same allegation against each of the defendants.”); *MyMail*, 223 F.R.D. at 457 (“the Court finds that there is a nucleus of operative facts or law in the claims against all the defendants and, therefore, the claims against the UOL Defendants do arise out of the same series of transactions or occurrences as the claims against the other defendants”).⁵

HP’s attempt to avoid the obvious weight of authority favoring joinder is flawed for several reasons.

First, relying on *Colt Defense LLC v. Heckler & Koch Defense, Inc.*, No. 2:04cv258, 2004 U.S. Dist. LEXIS 28690 (E.D. Va. Oct. 22, 2004), and other *non-Fifth Circuit* precedent, HP asserts that supposedly the “overwhelming authority” holds that “patent claims against unrelated defendants offering different accused products do not satisfy” Rule 20. *See* Motion at 4 (citing cases from the District of Delaware, Southern District of New York, District of Minnesota, Northern District of Illinois, and Northern District of California). The district courts in the Fifth Circuit (including this Court), however, have declined “to follow a handful of district court cases that purportedly hold acts of infringement by separate defendants do not satisfy the same transaction requirement.” *MyMail*, 223 F.R.D. at 456. Indeed, as the Eastern District of Louisiana recently found, “[w]hile some courts do hold [HP’s] view, **the majority hold** the view that joinder is proper in patent infringement suits. **All of the Fifth Circuit cases** discussed *supra*

⁵ *See also Coll v. Abaco Operating LLC*, No. 2:08-CV-345(TJW), 2009 WL 2857821, *1 (E.D. Tex. Sept. 1, 2009) (denying severance of claims against 117 separate defendants).

also hold the majority view.” *Alford Safety Services*, 2010 WL 3418233 at *10 (emphasis added).

Second, HP asserts that *MyMail* is distinguishable because “the judge who decided *MyMail* has expressed concerns about potential abuses of the court system by plaintiffs in patent suits” and “[s]ince 2004, misjoinder of numerous defendants in single patent cases has become the rule, not the exception, in the Eastern District of Texas.” But, in fact, since 2004 Judge Davis has held that joinder of multiple defendants is proper, including recently in *Eolas Technologies*. There plaintiff accused twenty-three defendants of infringing two patents. The diverse roster of defendants were headquartered around the country and represented dissimilar industries, including internet (Google, Yahoo, Go Daddy), media (YouTube, New Frontier Media, Playboy), retail (Amazon.com, eBay, Staples, J.C. Penney), technology (Sun Microsystems, Adobe, Apple); and financial (Citigroup). Relying on *MyMail*, the Court refused to sever any defendants, rejecting arguments similar to those advanced here by HP:

Severance would not promote judicial economy. All defendants are accused of infringing the patents in suit, and adjudicating infringement will require construing the claims and evaluating the patents' innovation over the prior art. Thus, determining defendants' liability will involve substantially overlapping questions of law and fact. *See MyMail, Ltd. v. Am. Online, Inc.*, 223 F.R.D. 455 (E.D.Tex.2004) (Davis, J.); *see also* Fed. R. Civ. P. 42(a) (authorizing courts to consolidate or join for trial actions that involve common questions of law or fact). For multiple courts to simultaneously address these identical issues would be a waste of the courts' and parties' resources and could potentially lead to inconsistent results.

Eolas, 2010 WL 3835762 at *2

Third, in addition to *Eolas Technologies* and consistent with *MyMail*, this Court and other district courts in the Fifth Circuit have also continued to hold that joinder of multiple defendants is proper in patent infringement lawsuits. *See, e.g., Oasis Research, LLC v. Adrive, LLC*, No. 4:10-CV-435-MHS (E.D. Tex. May 23, 2011) (accusing eighteen defendants of infringing four patents) (attached hereto at Exhibit 2); *Mannatech*, 2010 WL 2944574 at *2 (accusing eleven defendants of infringing four patents); *Innovative Global Sys.*, 2009 WL 3754886 at *2 (accusing five defendants of infringing five patents).

Fourth, HP asserts that *MyMail* is also distinguishable because “*MyMail* involved a single patent directed to a ‘method and apparatus for accessing a computer network by a roaming user’” and “[h]ere in contrast, the accused products are ‘dramatically different’—they range from printers to personal computers to cell phones to computer servers to antivirus products to online video services to website surveys.” Motion at 6. But, as discussed above, HP’s improper focus on the specific type of commodity is not dispositive. Indeed, the Court recently rejected similar arguments in *Oasis Research*. There “Defendants argue[d] that proof of infringement against each Defendant will require proof of facts specific to each individual Defendant and to each accused product, which will lead to differing damages issues, willfulness issues, time frames, accused conduct, and discovery issues” and “[e]ach moving Defendant argue[d] that its products and methods accused of infringement are dramatically different from the other Defendants’ accused products and methods and there is no alleged or actual connection between the Defendants’ products.” *Oasis Research* (Ex. 2) at 3-4. The Court, however, found dispositive the Federal Circuit’s decision in *Eolas Technologies*:

Recently, the Federal Circuit, in an unpublished order on a writ of mandamus, upheld this District’s decision in *Eolas Tech., Inc. v. Adobe Systems, Inc.*, No. 6:09-CV-446, 2010 WL 3835762, at *2 (E.D. Tex. Sept. 28, 2010), on exactly the argument presented by Defendants. *In re Google, Inc.*, Misc. No. 968, 2011 WL 772875, at *2 (Fed. Cir. March 4, 2011). In *Eolas Tech*, the plaintiff accused twenty-three unrelated defendants of infringing two different patents, and the Court held joinder was proper, stating “[a]ll defendants are accused of infringing the patents in suit, and adjudicating infringement will require construing the claims and evaluating the patents’ innovation over the prior art. Thus, determining defendants’ liability will involve substantially overlapping questions of law and fact.” *Eolas Tech*, 2010 WL 3835762 at *2. The Federal Circuit upheld the decision of the Court not to sever the claims, pointing out that “**judicial economy plays a paramount role in trying to maintain an orderly, effective, administration of justice and having one trial court decide all of these claims clearly furthers that objective.**” *In re Google, Inc.*, 2011 WL 772875 at *2. “Further, the district court noted that, in this case, ‘adjudicating infringement...will involve substantially overlapping question of law or fact.’” *Id.* Therefore, the Court sees no reason to treat the present case any different than the joinder issue addressed in *Eolas Tech*.

Id. at 5 (emphasis added).

Fifth, relying on *Tompkins v. Able Planet, Inc.*, No. 6:10-CV-58-MHS (E.D. Tex. Feb. 17, 2011) (attached hereto at Exhibit 3), HP asserts that “[t]his Court recently embraced the

‘dramatically different’ test in deciding motions like this one.” Motion at 6. But HP grossly distorts *Tompkins* application to this action. *Tompkins* is a false marking case. The plaintiff identified a variety of retail goods on which defendants falsely claimed to have patents. The plaintiff, however, did not allege any commonality between the products themselves or the patents falsely asserted; instead, the plaintiff alleged that the products were sold and advertised by the same stores. *See Tompkins* (Ex. 3) at 3. The Court’s holding in *Tompkins*, therefore, has no bearing on the controlling doctrine that joinder is proper where (as here) multiple defendants are accused of infringing the same patents. In fact, in *Oasis Research*, the Court rejected arguments similar to those advanced here by HP:

The Court is also not convinced by Defendants’ argument that its recent decision in a false patent marking case is inconsistent with its decision here. In *Tompkins v. Able Planet, Inc.*, No. 6:10-CV-58, (E.D. Tex. Feb. 17, 2011) (Dkt. #136), the Court found that the plaintiff did not establish that its claims against the defendants arose from the same transaction or occurrence and exercised its discretion and granted severance in the interest of judicial economy. Unlike the present case, *Tompkins* concerned unrelated products that were manufactured, sold or advertised by unrelated defendants. The allegedly unpatented products included headphones, punching bags, flashlights, tents, espresso machines, and baby bottles. Here, all Defendants are accused of marketing online backup/storage services or devices. In the opinion of the Court, ***such similarity of products is sufficient to satisfy the same transaction or occurrence prong of Rule 20*** and is consistent with the prior rulings of this District.

Oasis Research (Ex. 2) at 5-6 (emphasis added).

Because this Court and numerous other district courts in the Fifth Circuit have repeatedly held that joinder of multiple defendants is proper in patent infringement lawsuits, HP’s Motion should be denied.

3. HP’s Assertions Regarding Prejudice and Judicial Economy are Mis-placed.

HP asserts that if the purportedly “misjoined claims are allowed to stand, it is the Court and HP who will face a significant burden, not Lodsys.” Motion at 8. But the “Federal Circuit has emphatically instructed that the existence of duplicative suits involving the same or similar issues creates practical difficulties that will ***weigh heavily*** in favor or against transfer (in order to try duplicative suits in the same venue).” *Ctr. One v. Vonage Holdings Corp.*, No. 6:08CV467, 2009 WL 2461003, *7 (E.D. Tex. Aug. 10, 2009) (citing *In re Volkswagen of Am., Inc.*, 566 F.3d

1349, 1351 (Fed. Cir. 2009)) (emphasis added). And HP's other assertions regarding prejudice and judicial economy are equally mis-placed.

First, HP speculates that “[p]reserving the misjoined claims in a single suit will force HP to participate in many aspects of the case that have no relevance to HP.” Motion at 8. But the Court rejected similar arguments in *Centre One*: “Severing and transferring [HP]’s case to the [Southern] District of [Texas] may be much more convenient for [HP]. However, it would impose a burden on both the federal court system and [Lodsys] to maintain two suits with substantially the same issues in two different venues across the country. This is exactly the kind of inefficiency that severance and, to a lesser extent, § 1404(a) transfer was designed to prevent. [HP] has presented no valid reason to sever its case besides its own convenience. However, [HP]’s convenience alone fails to outweigh the **glaring inefficiency** of prosecuting two, nearly identical, complex patent infringement cases in different fora.” 2009 WL 2461003 at *7 (emphasis added).

Second, HP also speculates that it may be “required to review numerous pleadings, motions and discovery, and to attend depositions, hearings and conferences that would have little or no bearing on issues directly impacting HP.” Motion at 8. As discussed above, however, the underlying issues in this action are common to all defendants, so the number of completely non-HP-related events, if any, will be minimal. In fact, the Court has found that joinder is proper “**especially** for discovery and motion purposes.” *MyMail*, 223 F.R.D. at 457 (emphasis added). And any “burden” on HP is dwarfed by the prejudice to Lodsys created by severance or transfer. *See Adrain*, WL 3063414 at *2 (“Likewise, the division of the case into multiple suits may be more convenient for Elsag, but it would impose a **significant burden on the plaintiff**, witnesses, and the federal court system.”) (emphasis added).

Third, HP speculates that it faces a substantial risk of jury confusion.” Motion at 8. But HP’s concerns can be addressed by jury instructions:

Based on the court’s experience, it seems well within the jury’s abilities to distinguish between the idiosyncrasies of each case. They will be instructed to

keep each plaintiff's claim separate, and to force each plaintiff to prove his or her claim and damages separately.

Hanley, 151 F.R.D. at 80. In any event, HP's concern regarding jury confusion is, at best, premature, because (as HP contends) "[t]his case is in its infancy." Motion at 9. HP can renew its Motion "[w]hen discovery is complete" or at some other appropriate time *if* "the state of the evidence compels severance of some type under Rule 21." *MyMail*, 223 F.R.D. at 357. At this stage in the proceedings, HP's "burden" analysis is simply far too speculative to warrant dismissal or severance.⁶

Fourth, relying again on *Colt*, HP asserts that supposedly "Courts have repeatedly rejected" the argument "that judicial economy and efficiency warrant preserving the misjoined claims in a single lawsuit." Motion at 9. But, in fact, "Courts have **consistently** held that judicial economy plays a paramount role in trying to maintain an orderly, effective, administration of justice and having one trial court decide all of these claims clearly furthers that objective." *In re Google Inc.*, 412 F. App'x. 295, 296, 2011 WL 772875 (Fed. Cir. Mar. 4, 2011) (emphasis added). HP simply ignores the substantial precedent from this Court (and other district courts in the Fifth Circuit) holding joinder proper for reasons of judicial economy and efficiency. *See, e.g., Innovative Global Sys.*, 2009 WL 3754886 at *1 ("District courts have declined to sever patent infringement claims due to concerns about judicial economy."); *Adrain*, WL 3063414 at *2 ("The Federal Circuit recently held in *In re Volkswagen II* that creation of multiple lawsuits is a '**paramount consideration**' weighing against transfer.") (emphasis added).

Because HP's assertions regarding prejudice and judicial economy are mis-placed and, at best, premature, HP's Motion should be denied.

⁶ HP asserts that, because "[t]his case is in its infancy," Lodsys allegedly will not be prejudiced by dismissal or severance. *See* Motion at 9. But the interests of judicial economy are even more significant when a case is new and severance would result in duplicating the entire proceeding in two venues.

B. HP Was Properly Joined and Should *Not* Be Severed from this Action.

HP asserts that “[i]f the Court decides not to dismiss Lodsys’ claims against HP, those claims should be severed from the claims against the other defendants.” Motion at 9. As discussed above, however, “[s]evering this case and creating multiple lawsuits would create problems that outweigh any alleged inconvenience of [HP] defending a suit in this forum.” *Adrain*, WL 3063414 at *2. “As the Supreme Court noted in *Continental Grain Co. v. The FBL-585*, 364 U.S. 19, 26 ... (1960), ‘[t]o permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent.’” *In re Volkswagen of Am., Inc.*, 566 F.3d at 1351.

Dividing this action into multiple suits also “would impose a significant burden on [Lodsys], witnesses, and the federal court system.” *Adrain*, WL 3063414 at *2; *see also Oasis Research* (Ex. 2) at 6 (“The Court also declines to exercise its discretion under Rule 21 and sever the properly joined Defendants.”); *Innovative Global Sys.*, 2009 WL 3754886 at *2 (“Severance and transfer would create duplicative proceedings on the same patents, unnecessarily wasting judicial resources.”); *Centre One*, 2009 WL 2461003 at *7 (“would impose a burden on both the federal court system and Centre One to maintain two suits with substantially the same issues in two different venues across the country”).

Moreover, “[i]n addition to the burden on the courts, the existence of multiple lawsuits interpreting the same patent creates an unnecessary risk of inconsistent claim construction and adjudication.” *Adrain*, WL 3063414 at *2. “This untenable prospect favors resolving related patent cases in the same forum whenever possible.” *DataTreasury Corp. v. First Data Corp.*, 243 F. Supp. 2d 591, 596 (N.D. Tex. 2003); *see also MyMail*, 223 F.R.D. at 458 (“Besides being a duplicative use of scarce judicial resources, two claim constructions risk inconsistency, create greater uncertainty regarding the patent's scope, and impede the administration of justice.”); *Sprint Communications*, 233 F.R.D. at 618 (“Beyond judicial economy, TGCI also ignores the

likelihood that severing the claims before trial would produce inconsistent pretrial rulings, particularly in construing the patents pursuant to *Markman*.”).

In short, severing HP “would decrease judicial efficiency by requiring duplicitous claim constructions, discovery, and pretrial motions.” *MyMail*, 223 F.R.D. at 458. Because severing would unnecessarily burden the judicial system and Lodsyst, and because severing would create an unnecessary risk of inconsistent claim constructions, HP’s motion should be denied.

C. Even if HP is Severed, the Severed Action Should *Not* Be Transferred.

HP requests that, *if* “the Court decides to sever the claims against HP,” then “the Court should transfer those claims to the Southern District of Texas for the convenience of the parties and witnesses and in the interests of justice.” Motion at 10. Even if Lodsyst’s claims against HP are severed, however, the severed action should remain in this Court — where there are already three other lawsuits involving the same patents-in-suit — because HP has failed to carry its heavy burden.

“The movant bears the burden of proof of showing that the transferee venue is ***clearly more convenient*** than the venue chosen by the Plaintiff.” *Pers. Audio, LLC v. Apple, Inc.*, No. CIV.A 9:09-CV-111, 2010 WL 582540, *2 (E.D. Tex. Feb. 11, 2010) (emphasis added); *see also Americans for Fair Patent Use*, 2011 WL 98279 at * 5 (“The moving party must show ‘good cause,’ and this burden is satisfied ‘when the movant demonstrates that the transferee venue is clearly more convenient.’”). “[T]aking all the [private and public] factors together, unless they balance ***heavily*** in favor of the Defendant, the Plaintiff’s choice of forum should rarely be disturbed.” *Alford Safety Services*, 2010 WL 3418233 at *11 (emphasis added). “Thus, when the transferee venue is not ***clearly more convenient*** than the venue chosen by the plaintiff, the plaintiff’s choice should be respected.” *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (emphasis added).

“When deciding whether to transfer venue, a district court balances two categories of interests: the private interests, i.e., the convenience of the litigants, and the public interests in the fair and efficient administration of justice.” *J2 Global Communications, Inc. v. Protus IP*

Solutions, Inc., No. CIV A 6:08-CV-211, 2009 WL 440525, *2 (E.D. Tex. Feb. 20, 2009). “Whether to transfer venue under Section 1404(a) is within the trial court’s sound discretion.” *Mohamed v. Mazda Motor Corp.*, 90 F. Supp. 2d 757, 768 (E.D. Tex. 2000). Indeed, “[t]he Supreme Court has noted that § 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer of venue according to ‘individualized, case-by-case consideration of convenience and fairness.’” *In re Triton Ltd. Sec. Litig.*, 70 F. Supp. 2d 678, 688 (E.D. Tex. 1999); *see also Chi Mei Optoelectronics Corp. v. LG Philips LCD Co., Ltd.*, No. CIV.A. 2:07-CV-176, 2008 WL 901405, *1 (E.D. Tex. Mar. 31, 2008) (“the district court ‘must exercise its discretion in light of the particular circumstances of the case.’”).

Moreover, although judicial economy is not among the enumerated private and public factors (which are discussed in detail below), the Federal Circuit has held that the interests of judicial economy strongly favor a single district for related patent litigation:

In this case, the existence of multiple lawsuits involving the same issues is a ***paramount consideration*** when determining whether a transfer is in the interest of justice.... Although these cases may not involve precisely the same issues, there will be significant overlap and a familiarity with the patents could preserve time and resources.

In re Volkswagen of Am., Inc., 566 F.3d at 1351 (emphasis added). “Courts in this District have consistently recognized the ***pronounced significance of judicial economy*** in the § 1404(a) analysis in patent cases.” *Realtime Data, LLC v. Morgan Stanley*, No. 6:09CV326-LED-JDL, 2010 WL 4274576, *2 (E.D. Tex. Oct. 28, 2010) (emphasis added); *see also Data Treasury*, 243 F. Supp 2d at 594 (“Piecemeal litigation in the complex and technical area of patent and trademark law is especially undesirable.... In such cases, the ‘interest of justice’ may dictate transfer even if the convenience of the parties and witnesses calls for a different result.”).

Here, as discussed above, HP fails to overcome the weight of this “paramount consideration,” because judicial economy and efficiency strongly favor joinder and adjudication of Lodsys’ claims against HP in this action. And, as discussed below, HP’s assertions regarding the private and public factors wither under scrutiny.

Relative ease of access to sources of proof. HP asserts that this factor “favors” transfer. *See* Motion at 13. As a threshold matter, however, HP overstates the relative importance of the documentation located at its Houston facilities. For example, HP asserts that “Houston is HP’s Regional Sales office in the United States and is the hub of the activities potentially relevant to this case.” *Id.* at 11. But, as HP admits, only the “leadership and development teams for *Support Assistant* are in the Houston facility.” *Id.* (emphasis added). HP also admits that “Support Assistant is developed in several parts of the world.” *Id.* HP admits that the “primary base of operations for *SureSupply* is HP’s facility in Boise, Idaho, while the servers on which the *SureSupply* software executes are in Austin, Texas.” *Id.* at 12 (emphasis added). HP also admits that its servers are “located all over the world” and “[e]vidence relating to HP’s computer servers is in Houston, Austin, and Palo Alto.” *Id.* at 12-13.

Lodsys’ claims against HP concern, among other products, “HP printers with *SureSupply*,” “HP personal computers with HP Support Assistant,” and “infringing computer server(s) to collect data.” Complaint, ¶¶ 17, 28. Thus, at best, only a fraction of HP’s sources of proof may reside in Houston. *See Aloft Media, LLC v. Yahoo, Inc.*, No. CIV.A. 6:08-CV-509, 2009 WL 1650480, *2 (E.D. Tex. June 10, 2009) (“the location of evidence outside the two districts has little impact on this factor because it will need to be transported regardless of where the trial is conducted”). In contrast, the originals of most (if not all) of Lodsys’ documents relevant to this action are located at its headquarters in Marshall (*see* Small Decl., ¶ 5), Texas, including the invention and patent prosecution files. *See Pers. Audio*, 2010 WL 582540 at *3 (“Personal Audio has only one office, which is located in Beaumont. That office contains the originals of many of its corporate documents, including most of those relating to prosecution and assignment of the patents-in-suit, the original assignment history of the patents, and the remaining documents from Personal Audio, Inc.”).⁷

⁷ HP also asserts that “Lodsys’ CEO is located in the Chicago area, and the inventor of all of the Lodsys patents is in Massachusetts.” Motion at 13. HP’s assertions are inaccurate. *See* Small Decl., ¶¶ 2, 6.

In any event, “[b]ecause electronic information can be accessed conveniently in any number of locations, not simply the location where the information is ‘stored,’ it does not follow that transfer to the location of the stored information is more convenient for anyone.” *Odom v. Microsoft Corp.*, 596 F. Supp. 2d 995, 1000 (E.D. Tex. 2009). Accordingly, Houston is not a “clearly more convenient” venue, particularly given that HP’s sources of proof (by its own admissions) may be located in Houston, Austin, Palo Alto, and Boise, and potentially “all over the world.”

Availability of compulsory process to secure the attendance of witnesses. HP asserts that this factor is “neutral” or “favors” transfer. *See* Motion at 13. Tellingly, however, HP does not identify any former HP employees who were involved in HP Support Assistant still living in Houston. And HP admits that “[i]f no unwilling witnesses reside within 100 miles of the Southern District of Texas, this factor is neutral.” *Id.* Accordingly, Houston is not a “clearly more convenient” venue.

Convenience and costs of attendance for willing witnesses. HP asserts that this factor “strongly favors” transfer. *See* Motion at 14. The crux of HP’s argument, however, is that its representatives and witnesses should not have to travel from Houston to Marshall; instead, Lodsyst’s representatives and witnesses should have to travel from Marshall to Houston. But this self-serving position ignores that “a decision to transfer venue must not simply shift the expense and inconvenience of litigating in a particular venue from one party to the other.” *Mannatech*, 2010 WL 2944574, at *3. HP’s other assertions regarding convenience and costs also fail for several reasons.

First, HP repeats that its “core leadership team for HP Support and most its relevant personnel, management and development teams are in Houston.” Motion at 14. But as discussed above, HP ignores that Lodsyst’s claims against HP also concern “HP printers with SureSupply” and “infringing computer server(s) to collect data.” Complaint, ¶¶ 17, 28. HP does not identify the allegedly “key” witnesses concerning those allegations. Nor does HP explain how it would be “clearly more convenient” for such witnesses to travel to Houston rather than

Marshall. And other possible witnesses include the inventor of Lodsyst's patents, who resides in Florida. *See* Small Decl., ¶ 6. Where (as here) witnesses are expected to attend from across the county, there is little to no difference in overall convenience. *See Aloft Media*, 2009 WL 1650480 at *5 (“This is not a case where the parties and witnesses are localized in one general geographic area.”).

Second, the majority of HP's witnesses are likely to be either HP employees or expert witnesses. In fact, HP asserts that “the potential HP witnesses” are HP employees. *See* Motion at 14-15. “[I]t is the convenience of non-party witnesses, rather than that of party witnesses, that is the more important factor and is accorded greater weight in a transfer of venue analysis.” *James J. Flanagan Shipping Corp. v. Mediterranean Shipping Co., S.A.*, No. CIV.A. 1:07-CV-337, 2007 WL 2461817, *2 (E.D. Tex. Aug. 27, 2007). As discussed above, HP does not identify any key former HP employees. Nor does HP explain how it would be “clearly more convenient” for such witnesses to travel to Houston rather than Marshall.

Third, asserts that the “driving distance between Marshall and Houston is approximately 225 miles.” Motion at 15. But HP overstates the inconvenience of travelling to Marshall. *See* Motion at 15. Indeed, a similar argument was rejected by the Court in *Data Treasury*:

The most persuasive argument made by plaintiff for keeping this case in Dallas is that “[t]ransportation in and out of DFW International Airport is [] much easier than flying into the Texarkana airport, which only offers flights from DFW airport.”... While this may be true, it does not tip the balance in favor of retaining venue in the Northern District of Texas. As the Fifth Circuit once noted, “this case is not being consigned to the wastelands of Siberia or some remote, distant area of the Continental United States.”... The *minor inconvenience* plaintiff may suffer in having to litigate this action in Texarkana, less than 200 miles away, rather than in Dallas, does not in itself preclude transfer to the Eastern District of Texas.

243 F.Supp.2d at 595 (emphasis added); *see also Sanofi-Aventis*, 607 F. Supp. 2d 769, 778 (E.D. Tex. 2009) (“the costs of appearing as a witness at trial in San Francisco, California, from the parking rates to the prices of hotel rooms and meals, are far greater than they would be in Lufkin, Texas”).⁸

⁸ Although HP now bemoans the alleged hardships of proceeding in Marshall, HP has previously filed several lawsuits in the Eastern District of Texas. *See, e.g.*, Exhibits 4-5. The Court “may

As this Court has held, the convenience and costs factor does not favor transfer where the proposed forum is not convenient for all witnesses. *See Network-1 Sec. Solutions, Inc. v. D-Link Corp.*, 433 F. Supp. 2d 795, 800 (E.D. Tex. 2006) (denying transfer where witnesses were not localized in one geographic area). Accordingly, Houston is not a “clearly more convenient” venue.

Other practical problems and considerations. HP asserts that this factor “favors” transfer. *See* Motion at 16. But HP admits that this factor includes consideration of “(i) the place of the alleged wrong; (ii) the plaintiff’s choice of forum; and (iii) the possibility of delay and prejudice if the case is transferred.” *Id.*

Here, because HP’s infringing products are sold around the world, there is no singular site of the alleged wrong. *See N. Am. Philips Corp. v. Am. Vending Sales, Inc.*, 35 F.3d 1576, 1579 (Fed. Cir. 1994).⁹ Lodsyst’s choice of forum weighs against transfer. *See In re Volkswagen of Am., Inc.*, 545 F.3d at 315 (“This ‘good cause’ burden reflects the appropriate deference to which the plaintiff’s choice of venue is entitled.”). And, as discussed above, the prejudice to Lodsyst strongly weighs against transfer. *See Eolas*, 2010 WL 3835762 at *4 (“It would be substantially more convenient for Eolas to continue suit here. The Court will not ignore Eolas’s location simply because it is unfavorable to Defendants’ transfer argument.”).

Moreover, “[p]ractical problems include those that are rationally based on judicial economy. Particularly, the existence of duplicative suits involving the same or similar issues may create practical difficulties that will **weigh heavily** in favor or against transfer.” *Eolas*, 2010 WL 3835762 at *4 (emphasis added); *see also J2 Global Communications*, 2008 WL 5378010 at *3 (“In particular, judicial economy may favor transfer to a court that is already familiar with the

take judicial notice of the contents of public records.” *Hall v. United States*, No. CIV.A. 6:06-CV-528, 2008 WL 276397, *3 (E.D. Tex. Jan. 30, 2008).

⁹ HP (again) repeats its “hub” assertion. But, as discussed above, HP focuses on only a portion of Lodsyst’s claims.

technology and issues involved.”). In addition to this action, there are already three additional lawsuits pending in this Court involving the same patents-in-suit, which strongly weighs against transfer. *See Zoltar Satellite Sys., Inc. v. LG Electronics Mobile Communications Co.*, 402 F. Supp. 2d 731, 735 (E.D. Tex. 2005) (“The public interest factors encompass the interest of justice consideration of the § 1404(a) analysis. It is well established that the interest of justice is an important factor in the § 1404(a) analysis.”).

HP asserts that “[t]here is no delay or prejudice associated with transfer of this case.” Motion at 17. But HP ignores that the Court has repeatedly held the division of a case into multiple suits is prejudicial to the plaintiff, both because of the burden on the plaintiff (and judicial system) and the risk of inconsistent decisions. *See, e.g., Adrain*, WL 3063414 at *2 (the division of the case into multiple suits ... would impose a significant burden on the plaintiff); *MyMail*, 223 F.R.D. at 458 (“The prospect of inconsistent claim construction favors resolving related patent cases in the same forum when possible. Besides being a duplicative use of scarce judicial resources, two claim constructions risk inconsistency, create greater uncertainty regarding the patent’s scope, and impede the administration of justice.”). Accordingly, Houston is not a “clearly more convenient” venue.

Administrative difficulties flowing from court congestion. HP admits that this factor is, at best, “neutral.” *See* Motion at 17. In addition, the overall litigation involving the same patents-in-suit is likely to proceed more quickly in a single district rather than in two. Here, there are currently four lawsuits (including this action) involving the same patents-in-suit pending before this Court.

Local interest in having localized interests decided at home. HP asserts that this factor “strongly favors” transfer. *See* Motion at 18. But (again) HP’s assertion is based on its flawed “hub” analysis. HP also ignores that the Eastern District has a local interest in resolving this dispute, because it involves a resident company’s property rights. *See Parti-Line Int’l, L.L.C. v. Bill Ferrell Co.*, No. CIV.A. 04-2417, 2005 WL 578777, *6 (E.D. La. Mar. 4, 2005) (“interest in protecting the intellectual property rights of its business entities”); *see also Texas*

Data Co., L.L.C. v. Target Brands, Inc., No. CIV.A. 2:10-269-TJW, 2011 WL 98283, *14 (E.D. Tex. Jan. 12, 2011) (“localized interest in deciding a localized dispute where the plaintiff resides in the District”). Accordingly, Houston is not a “clearly more convenient” venue.

Familiarity of the forum with the law that will govern the case. HP asserts that this factor is “irrelevant.” *See* Motion at 17. Given the other pending litigation in this Court involving Lodsys’ patents (including Lodsys’ claims against other defendants in this action), this Court, however, will become increasingly familiar with the factual and legal details of the Lodsys’ patents. It would be a waste of scarce judicial resources to require the Southern District to duplicate the efforts of this Court. Accordingly, this factor weighs against transfer.

In summary, HP is unable to demonstrate a single factor that significantly favors transfer, let alone demonstrate that Houston is a “clearly more convenient” venue. HP’s meager showing is not sufficient to disturb Lodsys’ choice of forum. And HP has failed to overcome the “paramount consideration” of judicial economy by avoiding duplicative litigation in two forums. Indeed, transferring this case to the Southern District of Texas will “prevent the parties from taking advantage of the built-in efficiencies that result from having related cases before the same judge.” *Realtime Data*, 2010 WL 1064474 at *3 (“[T]he existence of multiple lawsuits involving many of the same issues, the completion of the claim construction process on identical patents ... and the Court’s familiarity with the technology at issue, are sufficient to override other factors that may support transfer.”). Because HP fails to carry its heavy burden of demonstrating that the transferee venue is “clearly more convenient,” HP’s motion should be denied.

V. **CONCLUSION**

HP was properly joined and should not be dismissed or severed from this action. For all of the above reasons, HP’s Motion should be denied. In the alternative, if Lodsys’ claims against HP are severed, the severed action should remain in this Court.

Dated: July 14, 2011.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this response was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(V). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d) and (e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email, on this the 14th day of July 2011.

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