07-40058

No. 07-40058

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE VOLKSWAGEN AG AND VOLKSWAGEN OF AMERICA, INC.,

Petitioners.

Original Proceeding from the United States District Court for the Eastern District of Texas, Marshall Division

PETITIONERS' *EN BANC* BRIEF

Ningur Akoglu
Ian Ceresney
HERZFELD & RUBIN, P.C.
40 Wall Street
New York, New York 10005
Telephone: (212) 471-8500
Facsimile: (212) 344-3333

Burgain G. Hayes
P. O. Box 10447
Austin, Texas 78766
Telephone: (512) 472-2193
Facsimile: (512) 371-0989

Danny S. Ashby*
Robert H. Mow, Jr
Christopher D. Kratovil
Casey P. Kaplan
KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
1717 Main Street, Suite 2800
Dallas, Texas 75201
Telephone: (214) 939-5500
Facsimile: (214) 939-5849

*Lead Counsel

ATTORNEYS FOR PETITIONERS

No. 07-40058

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE VOLKSWAGEN AG AND VOLKSWAGEN OF AMERICA, INC.,

Petitioners.

Original Proceeding from the United States District Court for the Eastern District of Texas, Marshall Division

PETITIONERS' *EN BANC* BRIEF

Ningur Akoglu
Ian Ceresney
HERZFELD & RUBIN, P.C.
40 Wall Street
New York, New York 10005
Telephone: (212) 471-8500
Facsimile: (212) 344-3333

Burgain G. Hayes
P. O. Box 10447
Austin, Texas 78766
Telephone: (512) 472-2193
Facsimile: (512) 371-0989

Danny S. Ashby*
Robert H. Mow, Jr
Christopher D. Kratovil
Casey P. Kaplan
KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
1717 Main Street, Suite 2800
Dallas, Texas 75201
Telephone: (214) 939-5500
Facsimile: (214) 939-5849

*Lead Counsel

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Volkswagen AG and Volkswagen of America, Inc. n/k/a Volkswagen Group of America, Inc., Petitioners.

2. Danny S. Ashby, Robert H. Mow, Jr., Christopher D. Kratovil, Casey P. Kaplan, Kirkpatrick & Lockhart Preston Gates Ellis LLP, attorneys for Petitioners.

3. Ningur Akoglu, Ian Ceresney, Herzfeld & Rubin, P.C., attorneys for Petitioners.

4. Burgain G. Hayes, attorney for Petitioners.

5. Richard Singleton, Ruth Singleton, Amy Singleton, and the Estate of Mariana Singleton, Respondents.

6. Martin J. Siegel, attorney for Respondents.

7. Michael C. Smith, attorney for Respondents.

8. Jeffrey T. Embry, Jack Strother, Hossley Embry, L.L.P., and Thomas A. Crosley, The Crosley Law Firm, P.C., attorneys for Respondents.

9. Colin R. Little, Third Party Defendant.

10. J. Chad Parker and W. Todd Parker, The Parker Law Firm, P.C., attorneys for Third Party Defendant.

Danny S. Ashby
Attorney for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1332, as this is a civil action involving diversity of citizenship. This Court has jurisdiction under the All Writs Act (28 U.S.C. § 1651), as this is a petition for writ of mandamus to correct the district court's denial of a motion to transfer venue under 28 U.S.C. § 1404(a). *In re Horseshoe Entm't*, 337 F.3d 429, 431-32 (5th Cir. 2003); *In re Volkswagen AG*, 371 F.3d 201 (5th Cir. 2004) ("*In re Volkswagen I*"). Volkswagen timely filed its petition for writ of mandamus on January 23, 2007, following the district court's denial on December 7, 2006 of Volkswagen's motion for reconsideration of its motion to transfer venue.

STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion by denying Volkwagen's motion to transfer venue pursuant to 28 U.S.C. § 1404(a) when none of the relevant public and private interest factors—other than that Plaintiffs chose the forum—weigh in favor of venue in the Marshall Division of the Eastern District of Texas?
2. Did the district court abuse its discretion by making multiple errors of law in its application of 28 U.S.C. § 1404(a)?

STATEMENT OF THE CASE

Plaintiffs Richard Singleton, Ruth Singleton, and Amy Singleton, individually and as the representative of the estate of Mariana Singleton (collectively, the "Singletons" or "Plaintiffs") filed this lawsuit against Volkswagen of America, Inc. and Volkswagen AG (collectively, "Volkswagen") in the Marshall Division of the United States District Court for the Eastern District of Texas. (App. 1a-2a).[1] Volkswagen moved to transfer the case to the Dallas Division of the Northern District of Texas pursuant to 28 U.S.C. § 1404(a). (App. 14a-25a and 27a-43a). The District Court denied Volkswagen's motion to transfer. (App. 1a-9a). Volkswagen sought reconsideration (App. 106a-113a), which also was denied. (App. 10a-13a).

On February 13, 2007, a three-judge panel of this Court affirmed the district court by a 2-1 vote. *In re Volkswagen*, 223 F. App'x. 305 (5th Cir. 2007). Volkswagen filed a petition for rehearing *en banc*. On April 23, 2007, the original panel treated the petition for rehearing *en banc* as a petition for panel rehearing, granted it, withdrew its decision, and directed the Clerk's Office to schedule the petition for oral argument. Following oral argument, a second panel of this Court (the "Panel") voted unanimously to grant the writ. *In re Volkswagen*, 506 F.3d 376

[1] The supporting materials required by FED. R. APP. 21(a)(2)(c) and Fifth Circuit Rule 21 are contained in a separately bound appendix filed contemporaneously with Volkswagen's petition for writ of mandamus. The appendix is consecutively paginated 1a to 178a. Citations to the appendix appear herein as "(App. at #a)."

(5th Cir. 2007) ("*In re Volkswagen II*"). On February 14, 2008, this Court granted the Singletons' petition for rehearing *en banc*, vacated the Panel's decision, and ordered oral argument and additional briefing.

STATEMENT OF FACTS

On the morning of Saturday, May 21, 2005, Dallas County resident Colin R. Little was traveling at highway speeds on Interstate 635 in Dallas when his Chrysler 300 struck the left rear of a Volkswagen Golf driven by Ruth Singleton. (App. at 16a, 28a-30a). The collision spun the Golf around and propelled its left rear quarter into a flat-bed trailer parked along the shoulder of the freeway.[2] These two separate and violent rear impacts caused extensive damage to the Golf and catastrophically injured two passengers, Richard Singleton and Mariana Singleton. (App. at 29a). Dallas County residents witnessed the accident. (App. 65a-67a). Dallas emergency personnel responded at the scene and transported Richard and Mariana to Dallas hospitals for treatment. (App. at 30a). Mariana, a seven year old, died from her injuries at Children's Medical Center in Dallas. An autopsy was performed on her by a Dallas physician. (App. at 28a-30a). Richard Singleton was treated at Parkland Hospital in Dallas. (App. at 4a). Dallas police investigated the accident and filed reports in their offices. (App. at 46a-59a, 63a-64a). The

[2] The flat-bed truck was operated by Dallas County resident John Soto, who had parked along the freeway shoulder to assist his wife, Irene Soto, in changing a flat tire on her vehicle. (App. at 61a, 129a-131a).

damaged Volkswagen Golf—which Mariana's mother, Amy Singleton, purchased from a Dallas County dealership—(App. at 28a, 45a)—is now and has been held as evidence in Dallas County.

Plaintiffs did not initially sue Little.[3] Nor did they sue in the district or division where the accident occurred. Instead, they filed suit against Volkswagen in the Marshall Division of the Eastern District of Texas, alleging that improper seat design caused the injuries to Richard and Mariana Singleton. Volkswagen promptly joined Little as a responsible third party. (App. at 102a-105a).

Volkswagen timely moved, pursuant to 28 U.S.C. § 1404(a), to transfer venue to the Dallas Division of the Northern District of Texas as the clearly more convenient forum. (App. at 14a-26a and 27a-69a). In its motion, Volkswagen explained that none of the parties or witnesses reside in the Eastern District, none of the relevant events took place there, and no party or relevant witness has any connection to the Marshall Division. (App. at 14a-15a). The only connection between this case and the Marshall Division is that Plaintiffs chose to file suit there. (App. 18a-19a).

SUMMARY OF ARGUMENT

The Panel held that "although the district court correctly enumerated the [28 U.S.C. § 1404(a)] factors, the court abused its discretion by failing meaningfully to

[3] Plaintiffs later did sue Little in state district court in Dallas after Volkswagen filed its petition for writ of mandamus in this Court. *See post* at 24-25.

analyze and weigh them." *In re Volkswagen II*, 506 F.3d at 384. That holding was correct. The district court abused its discretion by improperly retaining venue in Marshall despite the existence of numerous public and private interest factors that render Dallas far more convenient than Marshall. These private and public interest factors far outweigh the single consideration in favor of retaining venue in Marshall—*viz.*, that Plaintiffs chose to file suit there. This error alone warranted the Panel's issuance of a writ of mandamus.

The district court also abused its discretion by committing several distinct errors of law:

1. The district court erred by treating plaintiffs' choice of forum as "a paramount consideration in any determination of [a] transfer request." (App. at 3a). Multiple precedents from the Supreme Court and this Court establish that a plaintiff's choice of forum is never entitled to controlling consideration;

2. The district court erred by incorrectly applying the stricter *forum-non-conveniens* standard to Volkswagen's request to transfer venue under § 1404(a). Consistent with Supreme Court authority and prior decisions of this Court, the Panel correctly held that the district court's analysis "reflects the much stricter *forum non conveniens* dismissal standard, and it is inappropriately applied in the § 1404(a) context." *In re Volkswagen II*, 506 F.3d at 380; and

3. The district court erred by failing to apply (or even acknowledge) several core legal principles governing transfer decisions that this Court set out in *In re Volkswagen I*.

Each of these legal errors is, by itself, an abuse of discretion. When combined together, along with the district court's failure "meaningfully to analyze and weigh" the section 1404(a) factors, the correctness of the Panel's decision to issue the writ becomes clear.

STANDARD OF REVIEW

This Court recognizes "the availability of mandamus as a limited means to test the district court's discretion in issuing transfer orders [under 28 U.S.C. § 1404(a)]." *In re Horseshoe*, 337 F.3d at 434 (citing cases). An abuse of discretion sufficient to warrant mandamus relief may occur either where the district court employs the wrong legal standard, *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 218 (5th Cir. 2003), or where the district court invokes the correct legal standard but fails to properly apply it. *In re Volkswagen I,* 371 F.3d at 202-03; *In re Horseshoe*, 337 F.3d at 432.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY "FAILING MEANINGFULLY TO ANALYZE AND WEIGH" THE 28 U.S.C. § 1404(a) FACTORS.

At the heart of the Panel's holding is its conclusion that "although the district court correctly enumerated the[] [section 1404(a) transfer] factors, the court abused its discretion by failing meaningfully to analyze and weigh them." *In re Volkswagen II*, 506 F.3d at 384. This holding acknowledges a principle of settled law: a district court's nominal recognition of the appropriate section 1404(a)

factors, and no improper ones, by no means insures that the district court legitimately exercised its discretion in applying the factors.

Whenever discretion is conferred, there is always the implied condition that the trial court must exercise its power within limits. This Court's precedents recognize that even if a district court invokes the proper legal standard, the failure to correctly apply the standard still may constitute an abuse of discretion. *In re Volkswagen I*, 371 F.3d at 202-03 (a writ of mandamus "will issue . . . to correct a denial of 28 U.S.C. § 1404(a) motion to transfer venue if the district court failed to correctly construe and apply the relevant statute, or to consider the relevant factors incident to ruling on the motion, or otherwise abused its discretion."); *In re Horseshoe*, 337 F.3d at 432 (a district court may abuse its discretion not just in identifying the transfer factors but also "in deciding the motion to transfer"). It is for this reason that this Court requires careful examination of the district court's application of the section 1404(a) factors in determining whether an abuse of discretion has occurred. *In re Horseshoe*, 337 F.3d at 429; *In re Volkswagen I*, 371 F.3d at 202-03.

Sister circuits are equally emphatic that a legitimate exercise of discretion involves more than the district court merely identifying the proper factors. *See, e.g., Henry v. I.N.S.,* 74 F.3d 1, 4 (1st Cir. 1996) (a court may abuse its discretion "by assaying all the proper factors and no improper ones, but nonetheless making a

clear judgmental error in weighing them."); *In re Sternberg*, 85 F.3d 1400, 1405 (9th Cir. 1996) (a trial court abuses its discretion "if it applies the correct law to facts which are not clearly erroneous but rules in an irrational manner."), *overruled on other grounds by In re Bammer*, 131 F.3d 788 (9th Cir. 1997); *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984) ("when we say that a decision is discretionary, or that a district court has discretion to grant or deny a motion, we do not mean that the district court may do whatever pleases it"; an abuse of discretion occurs "when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.").

The Panel correctly held that the private and public interest factors relevant to evaluating the section 1404(a) motion in this case weigh heavily in favor of transfer to the Dallas Division of the Northern District of Texas. The Panel's conclusion is buttressed by the district court's inability to identify any transfer factor, beyond Plaintiffs' preference for Marshall, weighing against venue in Dallas or in favor of venue in Marshall. No such factor exists.

A. This Case Has Extensive Connections to Dallas.

This Court carefully reviews "the circumstances presented to and the decision making process used by" the district court in determining whether a writ of mandamus should issue in response to a district court's denial of a motion to transfer venue. *In re Horseshoe*, 337 F.3d at 432. *See also In re Volkswagen I*,

371 F.3d at 202-03; *Castanho v. Jackson Marine, Inc.*, 650 F.2d 546, 550 (5th Cir. 1981). An examination of the circumstances presented by this case confirms the correctness of the Panel's holding that "there is absolutely nothing in the record to indicate that the people of Marshall, or even of the Eastern District of Texas, have any meaningful connection or relationship with the circumstances of these claims." *In re Volkswagen II*, 506 F.3d at 387 n.8 (quoting *In re Volkswagen I*, 371 F.3d at 206). On the contrary, numerous undisputed facts confirm the extensive connections between this case and Dallas:

1. The accident, police investigation, and emergency medical treatment occurred in Dallas County. (App. at 15a-17a, 29a-30a, 60a-62a).

2. All of the numerous witnesses—including the responsible third-party defendant (Colin Little), and critical non-party witnesses—who observed, responded to, and investigated the accident are located in Dallas County. (App. at 15a-20a, 36a-38a, 92a-95a, 108a-110a, 114a-121a). And the primary eye witness (Irene Soto) and the investigating police officer (Sr. Corp. Kennie W. Wiginton of the Dallas Police Department) both filed affidavits explaining the inconvenience and burden of testifying in Marshall rather than Dallas. (App. at 63a-64a, 65a-67a). The driver of the flat-bed truck involved in the collision (John Soto, husband of affiant Irene Soto) is also a resident of Dallas County and is the other third-party witness to the accident.

3. Plaintiffs Richard Singleton and Ruth Singleton currently reside in the Dallas Division of the Northern District of Texas. Plaintiff Amy Singleton resides in the District of Kansas. None of the Plaintiffs resided in the Eastern District of Texas at the time this lawsuit was filed. (App. 145a-149a). None of the Plaintiffs has ever resided in the Marshall Division.

4. No known party or significant non-party witness resides in the Eastern District of Texas, much less in the Marshall Division. (App. 16a, 19a-20a, 23a, 60a-62a, 99a, 145a-149a).

5. The witnesses located in Dallas are outside the Eastern District's subpoena power for deposition under FED. R. CIV. P. 45(c)(3)(A)(ii). Attempts to obtain discovery from non-party witnesses in Dallas and its suburbs will require that subpoenas be issued (and, if necessary, enforced) by the Dallas Division of the Northern District of Texas. *See* FED. R. CIV. P. 45.

6. The sources of proof related to Plaintiffs' claims, including documents from the Dallas Police Department's investigation and medical records relating to the injuries suffered by the Plaintiffs as a result of the collision, are located in Dallas County. No known sources of proof are located in the Marshall Division or elsewhere in the Eastern District. (App. at 21a-22a, 39-40a, 110a, 121a).

7. The Volkswagen Golf involved in the collision and alleged by the Plaintiffs to be defective was sold to Amy Singleton in Dallas County by a

Volkswagen dealership based in the Dallas Division. There is no Volkswagen dealership in the Marshall Division. (App. at 15a, 44a, 96a, 111a).

8. None of the events giving rise to this suit occurred within the Eastern District of Texas, much less in the Marshall Division. (App. at 14a-15a, 27a-31a).

B. The Private and Public Interest Factors Weigh Overwhelmingly in Favor of a Section 1404(a) Transfer.

When considering a section 1404(a) motion to transfer, a district court must consider a number of private and public interest factors, "none of which can be said to be of dispositive weight." *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 340 (5th Cir. 2004).

(i) Private Interest Factors

The private interest factors are: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive." *In re Volkswagen I*, 371 F.3d at 203 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981)). None of these factors favors retention of venue in Marshall.

Convenience and Cost to Witnesses. Under the district court's analysis, the fact that no parties or known witnesses reside in the Marshall Division of the Eastern District of Texas "is not substantial and, therefore, this factor does not weigh in favor of transfer." (App. at 11a). The district court acknowledged that

the witnesses listed by Volkswagen "all live and work in Dallas County or the Dallas area." (App. at 5a). But the court repeatedly characterized the 155 miles between Dallas and Marshall as "negligible" and not "far enough to weigh substantially in favor of a transfer." (App. at 4a-5a, 11a).

The district court's conclusion overlooks this Court's holding in *In re Volkswagen I* that any distance of "more than 100 miles" must be considered when analyzing the witness convenience factor. *In re Volkswagen I*, 371 F.3d at 204-05. It is undisputed that the one-way driving time between Dallas and Marshall is at least 2½ hours, and substantially longer than that if heavy Dallas-area traffic or inclement weather is encountered. (App. at 17a-18a, 61a-62a). And there is no scheduled air service between any Dallas-area airport and Marshall. (App. 20a-21a). The result is that the numerous Dallas-based third-party witnesses identified by Volkswagen would be forced to travel a round-trip of over 300 miles in order to testify in Marshall, with that journey taking a minimum of five hours. This factor hardly is "negligible" (App. at 5a); it weighs heavily in favor of transfer to the Northern District.

The district court also was dismissive of the convenience factor to third-party witnesses because it concluded that Volkswagen "did not explain why all of these [Dallas-based] witnesses are actually material to its case." (App. at 5a). This statement is undercut by the district court's own factual recitation, which

acknowledges that "the Defendant has submitted two affidavits, one from the [third-party] accident witness and another from the [Dallas Police] accident investigator stating their inconvenience of traveling to Marshall." (App. at 5a, with affidavits at 63a-64a and 65a-67a). The speeds, distances, sequence of impacts, final resting points of the vehicles involved, and the location and condition of the occupants are all critical to determining causation and liability in this case. The testimony of the Dallas-based "third-party defendant, accident witnesses, accident investigators, treating medical personnel, and the medical examiner," (App. at 5a) are all material to Volkswagen's contention that the facts specific to this crash—including the negligent actions of the third-party defendant and the violent nature of the double rear-impact—rather than any defect in the Golf automobile caused Plaintiffs' injuries.[4]

In an effort to escape the obvious applicability of this Court's holding in *In re Volkswagen I*, the Singletons have attempted to minimize the importance of the testimony of the Dallas-based witnesses identified by Volkswagen, going so far as to characterize this testimony as "incidental." (Pet. at 2). But, as even the Singletons admit, the central issue in this case is "what caused the Singletons' injuries." (Pet. at 2). And it is Volkswagen, not the Singletons' counsel, that

[4] In its motion for reconsideration, Volkswagen also provided further explanation of the nature and materiality of the testimony it expects to elicit from these numerous Dallas-based witnesses. (App. at 109a-110a). The district court denied that motion as well. (App. at 11a-12a).

determines what witnesses it needs to call to prove its defenses. The testimony of the primary eye-witnesses to this highly complex and unusual accident, as well as of the Dallas police and emergency personnel responsible for investigating it, are of self-evident importance to Volkswagen's defenses. As the Panel held, "[g]iven the rule established in *In re Volkswagen I*, it is clear that this factor favors transfer." *In re Volkswagen II*, 506 F.3d at 386.

Availability of Compulsory Process. Just as in *In re Volkswagen I*, all non-party witnesses located in the city where the collision occurred "are outside the Eastern District's subpoena power for deposition under FED. R. CIV. P. 45(c)(3)(A)(ii)." *In re Volkswagen I*, 371 F.3d at 205, n.4. Moreover, any "trial subpoenas for these witnesses to travel more than 100 miles would be subject to motions to quash under FED. R. CIV. P. 45(c)(3)." *In re Volkswagen I*, 371 F.3d at 205, n.4.

The district court discounted its lack of absolute subpoena power based on its ability to deny a motion to quash and to ultimately compel the attendance of third-party witnesses found in Texas, subject to reasonable compensation. (App. at 6a-7a, 12a). The Panel correctly recognized that the district court's analysis was not satisfactory, noting that "this rationale simply asserts that a district court, at some burden to the parties, will likely be able to enforce an option that is

inconvenient to witnesses. This factor, then, also weighs in favor of transfer." *In re Volkswagen II*, 506 F.3d at 385.

As the Panel held, an equally proper venue that does enjoy absolute subpoena power for both depositions and trial—the Dallas Division of the Northern District—is readily available. *Id.* Volkswagen's efforts to obtain discovery from non-party witnesses in Dallas may require subpoenas that, as a matter of civil procedure, must be issued and enforced by the Northern District of Texas, further demonstrating the convenience of litigating the case in that district. FED. R. CIV. P. 45.

Accessibility and Location of Sources of Proof. The district court acknowledged that "all of the documents and physical evidence relating to the accident, and other documents are in or near Dallas County." (App. at 7a). Nonetheless, the court concluded that "this factor does not weigh in favor of transfer" because it "has become less significant in a transfer analysis [due to] the advances in copying technology and information storage." (App. at 7a). In reaching this conclusion, the district court read the "sources of proof" requirement out of the section 1404(a) transfer analysis, even though this factor was established by the Supreme Court and recently reiterated by this Court. *See Piper*, 454 U.S. at 241, n.6 (1981); *In re Volkswagen I*, 371 F.3d at 203. In restoring this factor to the section 1404(a) analysis, the Panel held that the "district court erred in applying

this factor because it does weigh in favor of transfer, although its precise weight may be subject to debate." *In re Volkswagen II*, 506 F.3d at 385.

The Singletons have argued that most of the documents stored in Dallas already have been produced as part of the normal discovery process in this case. (Pet. at 3). As an initial matter, this argument overlooks the location of physical evidence, such as the wreckage of the Volkswagen Golf. More importantly, the Singletons' argument misses the mark because it ignores the conditions that existed at the time Volkswagen sought transfer. Because the venue question in this case has been pending for a substantial period of time, it is only natural that substantial discovery has occurred and that documents have been produced.[5] But this does not change the fact that, at the times relevant to Volkswagen's motion and to the district court's evaluation of the motion, this factor favored transfer. To hold that delay in the resolution of Volkswagen's motion somehow negates this factor would create an obvious loophole by which this factor could always be neutralized in the section 1404(a) analysis.

[5] The Local Rules of the Eastern District of Texas do not permit delays in discovery based on the pendency of a motion to transfer venue. Local Rule CV-26, entitled "No Excuses," provides that "[a]bsent a court order to the contrary, a party is not excused from responding to discovery because there are pending motions . . . to change venue." While its mandamus petition was pending before this Court, Volkswagen moved the trial court for a stay of all discovery, but the trial court denied this relief. Volkswagen sought the same relief in this Court on May 31, 2007, which was initially denied, but later granted in September 2007. By that time, the transfer question had been pending for approximately fifteen months and, consistent with Local Rule CV-26, considerable discovery already had occurred.

(ii) Public Interest Factors

The public interest factors relevant to the section 1404(a) analysis are: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law." *In re Volkswagen I*, 371 F.3d at 203. Again, none of these factors favors venue in Marshall. Three of the factors undisputedly are neutral and weigh neither for nor against transfer, as is often the case,[6] but the "local interest" factor overwhelmingly favors Dallas.

The Local Interest in Settling Local Disputes. Despite the extensive and unique factual connections between this case and the Dallas Division of the Northern District, the district court held that the local interest "factor is neutral as to transfer" and that the "jury duty" component of the local interest factor "weighs against transfer" because: (1) the collision "also involves residents of the Eastern District of Texas"; and (2) "the citizens of this district would also be interested to know whether there are defective products offered for sale in close proximity to the

[6] The same factors that are neutral here (administrative difficulties flowing from court congestion, familiarity of the forum with the governing law, and avoidance of unnecessary conflicts of law problems) also appear to have been neutral in both *In re Volkswagen I* and *In re Horseshoe*, where this Court nonetheless granted mandamus relief. The presence of these neutral factors in no way weighs against transfer under section 1404(a) or makes mandamus relief inappropriate.

Marshall Division and whether they are being exposed to these products." (App. at 12a ; App. at 8a). This was an abuse of discretion.

With respect to the district court's first finding—that the collision "also involves residents of the Eastern District of Texas"—none of the Plaintiffs are current residents of the Eastern District. Nor were they residents of the Eastern District at the time that this lawsuit was filed. (App. at 16a, 23a, 60a-62a, 145a-149a). Moreover, none of the Plaintiffs has ever resided in the Marshall Division of the Eastern District. The district court's statement appears to be based on the fact that, at the time of the accident, the Plaintiffs resided in the Dallas suburb of Plano, which falls within the Sherman Division of the Eastern District.

Consistent with the universal rule that a plaintiff's choice of venue is entitled to less deference when it is not his home, it is the plaintiff's residence at the time suit is filed, not at the time the cause of action accrued, that is relevant for section 1404(a) purposes.[7] The fact that Plaintiffs resided in the Dallas suburb of Plano at some point prior to the commencement of this lawsuit in no way favors retention

[7] *Flowers Indus. v. FTC*, 835 F.2d 775, 776 n.1 (11th Cir. 1987) ("venue must be determined based on the facts at the time of filing [of the suit]."); *Paul v. International Precious Metals Corp.*, 613 F. Supp. 174, 179 (S.D. Miss. 1985) ("[r]esidence for venue purposes is determined as of the time of the commencement of the action and not the time when the action allegedly arose."); *Kendall U.S.A., Inc. v. Central Printing Co.*, 666 F. Supp. 1264, 1268, n.2 (N.D. Ind. 1987) ("[r]esidence, for venue purposes, is determined when an action is commenced and not when it arises.").

of this case in Marshall.[8]

The relevance of the Plaintiffs' former residence in the Sherman Division to the retention of venue in Marshall is further undermined by the fact that Volkswagen consented to a transfer to the Sherman Division if Plaintiffs chose to request such a transfer. (App. 93a-97a). The plain language of section 1404(a) permits transfer to another division in the same district based on the exact same "convenience of parties and witnesses" analysis as a request for transfer between different judicial districts. 28 U.S.C. § 1404(a) ("a district court may transfer any civil action to any other district or division where it might have been brought.") (emphasis added). Despite Volkswagen's consent to a transfer of venue to the Sherman Division, Plaintiffs declined to make such a request.

As to the district court's second finding—that the citizens of Marshall have an interest in the sale of allegedly defective goods "in close proximity to the Marshall Division" (App. at 8a, 12a)—this reasoning is too nebulous to be meaningful in the transfer analysis. Following this logic, the residents of literally any judicial district in the United States would have an interest in this case from a

[8] *See Ramsey v. Fox News Network, LLC*, 323 F. Supp. 2d 1352, 1355 (N.D. Ga. 2004) (plaintiffs' choice of venue other than their home is entitled to substantially reduced deference "even when the Plaintiffs resided in the forum at one point, but then abandoned it in favor of another."); *Holmes v. TV-3, Inc.*, 141 F.R.D. 692, 698-99 (W.D. La. 1991) ("[t]he plaintiffs' choice of forum, always an important factor, is substantially less important in this case as the plaintiffs have abandoned it and moved to Florida."); *Dove v. Massachusetts Mut. Life Ins. Co.*, 509 F. Supp. 248, 251 (S.D. Ga. 1981) (plaintiff's abandonment of forum in which suit was originally filed supported granting § 1404(a) motion to transfer).

venue perspective because Volkswagen sells its Golf automobiles nationwide. The district court did not support its "sold in close proximity" theory with citations to any authority. (App. at 12a). And, indeed, the Panel rightly was critical of this theory:

> The district court's provided rationales—that the citizens of Marshall have an interest in this product liability case because the product is available in Marshall, and that for this reason jury duty would be no burden—stretch logic in a manner that eviscerates the public interest that this factor attempts to capture. The district court's provided rationales could apply to virtually any judicial district and division in the United States; they leave no room for consideration of those actually affected—directly and indirectly—by the controversies and events giving rise to a case. Thus, the district court committed a clear abuse of discretion. . . . [T]hat a product is available within a given jurisdiction is insufficient to neutralize the legitimate local interest in adjudicating local disputes.

In re Volkswagen II, 506 F.3d at 387.

In contrast, the local interests of the citizens of Dallas in this case are concrete and clear. The district court's finding that the "local interest" factor under section 1404(a) is either "neutral" (App. at 12a) or that it "weighs against transfer" and favors Marshall (App. at 8a) simply is not tenable. As the Panel noted, the district court's analysis of the local interest factor "stand[s] in stark contrast to our analysis in *In re Volkswagen I*. There, under virtually indistinguishable facts, we held that this factor weighed heavily in favor of transfer." *In re Volkswagen II*, 506 F.3d at 387.

Indeed, the "local interest" factor is even more clear cut here than in *In re Volkswagen I*. In *In re Volkswagen I*, the place of sale of the automobile was not in the record, prompting this Court to observe that "[a]rguably, if [p]laintiffs had alleged that the Volkswagen vehicle was purchased from a Volkswagen dealer in Marshall, Texas, the people of that community might have had some relation, although attenuated, to this litigation." *In re Volkswagen I*, 371 F.3d at 206. Here, however, it is undisputed that the automobile in question was sold by a Dallas Division dealership, and that there is no Volkswagen dealership in Marshall, Texas. (App. at 15a, 44a, 96a, 111a). The strong and unique ties that this case has to the Dallas Division greatly favor its transfer.

* * *

In sum, there are eight private and public interest factors that must be examined under section 1404(a). Three of the public interest factors are neutral and uncontested, while the remaining factors unambiguously favor transfer to Dallas. None of the factors favors retention of venue in Marshall, and Dallas clearly is the more convenient forum. The Panel thus correctly held that "no relevant factor favors the Singletons' chosen forum," and that "the district court abused its discretion by failing to order transfer of this case . . . to the Dallas Division." *In re Volkswagen II*, 506 F.3d at 387.

C. Plaintiffs Have Failed To Identify Any Relevant Connection Between This Case And Marshall.

In contrast to the numerous undisputed connections to Dallas, the Panel recognized that "there is no relevant factual connection to the Marshall Division." *In re Volkswagen II,* 506 F.3d at 387. Nothing in either of the district court's memorandum orders is to the contrary. (App. 1a-9a and 10a-13a). In an effort to obscure this truth, the Singletons stretch to identify any fact (no matter how insignificant) that could be said to link this case to the Eastern District of Texas, albeit never to the Marshall Division. (Pet. at 14; Reply in Support of Pet. at 7). We address each of these arguments separately.

1. Seizing on the district court's language that this case involves residents of the Eastern District of Texas, the Singletons argue that the fact that the decedent, Mariana Singleton, died a resident of Plano (in the Sherman Division of the Eastern District) somehow creates a meaningful nexus to Marshall. Notably, the district court did not identify the decedent's residence as a fact supporting venue in Marshall. The reason it did not do so is obvious. Under Federal Rule of Civil Procedure 17(a), the representative of an estate sues in her own name as the "real party in interest" in a case. Accordingly, it is the residence of the estate's representative rather than the residence of the decedent that is relevant for purposes

of venue.[9] Here, Amy Singleton, a resident of the district of Kansas, is the real party in interest under Rule 17(a), suing as the representative of the estate of Mariana Singleton. In addition, the decedent's home in Plano is some 142 miles from Marshall, while Plano is immediately adjacent to Dallas, which was the site of the accident. Dallas' interest in this tragic death clearly is far more immediate and concrete than Marshall's.

2. The Singletons also argue that "witnesses from the nursery whose trailer was involved in the accident . . . are in the Eastern District." (Pet. at 13). That is simply untrue. Although the trailer struck by the Singletons' automobile was owned by a nursery located in the Dallas suburb of Carrollton (*see* App. 83a-84a)—which, again, lies in the Sherman Division of the Eastern District—the only "witness[] from the nursery" is John Soto, a resident of the Dallas Division who was operating the truck. (App. at 17a, 30a, 51a, 61a, 129a-131a).

The other eye-witness to the accident is Mr. Soto's wife. Mrs. Soto also is a Dallas Division resident but not an employee of the nursery. She submitted an

---

[9] *See Bush v. Carpenter Bros., Inc.*, 447 F.2d 707, 711 (5th Cir. 1971) ("It is well established that where the personal representative of the decedent is authorized by statute to bring suit to recover for the death of his decedent, he is the real party in interest, within the meaning of that term as used in Rule 17(a), Federal Rules of Civil Procedure, 28 U.S.C.A., and that his residence will be looked to in determining the existence of federal diversity jurisdiction in the ordinary case."); *Smith v. Harris*, 308 F. Supp. 527, 528 (E.D. Wis. 1970) ("The [estate] administrator's personal residence is his place of residence for purposes of venue under 28 U.S.C. § 1391(a). . . . It follows that the action could properly be brought in this district. However, 'the convenience of parties and witnesses, in the interest of justice', under 28 U.S.C. § 1404(a), dictates that the action be transferred to the western district of Wisconsin.").

affidavit confirming that it would be an "unreasonable burden and hardship" and an "inconvenience" for her "to be required to travel 160 miles from [her] residence to Marshall, Texas to testify in a trial of this matter." (App. 65a-67a). The Singletons have never explained how the location of the non-party nursery in Carrollton renders it more convenient for Mr. Soto or his wife (or, for that matter anyone else) to testify in Marshall rather than Dallas.

3. The Singletons' remaining factual argument, that "some medical providers are in the Eastern District," is unsupported by any citation to the record. (Pet. at 13). Volkswagen is unaware of any basis for the Singletons' cryptic reference to medical care in the Eastern District. And even if there were a basis for this statement, it is beyond dispute that all of the emergency medical services were rendered by Dallas-based providers. (App. 20a, 30a, 61a).

4. Finally, even the Plaintiffs have recognized (belatedly) the obvious convenience of litigating this matter in Dallas instead of Marshall by suing the third-party defendant, Colin Little, in state district court in Dallas. On October 15, 2007, in its Response in Opposition to the Singletons' Motion to Vacate the Stay, Volkswagen informed this Court of the Singletons' initiation of the duplicative state court proceeding in Dallas against Little. Volkswagen's Response included a copy of a tolling agreement between the Singletons' counsel and counsel for Little, which was not disclosed to Volkswagen until after the Panel heard oral argument

in this case. Little's response to Volkswagen's third-party complaint that Marshall "is not inconvenient" doubtlessly bears some relationship to this secret tolling agreement between him and Plaintiffs' counsel. Of course, because the primary focus of section 1404(a) is the convenience of non-party witnesses, it should make no difference that Little has maintained that Marshall "is not inconvenient" for him. Marshall certainly is not more convenient than Dallas. Moreover, the self-serving assertion of a third-party defendant of a "lack of inconvenience" should not determine the outcome of a section 1404(a) transfer motion because it creates a manifest danger of collusion, as seems to have been the case here.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY APPLYING THE WRONG LEGAL STANDARDS.

The district court compounded its failure to meaningfully weigh and analyze the section 1404(a) factors by applying the wrong legal standards. Each of these errors of law is, by definition, an abuse of discretion. *Sandwich Chef*, 319 F.3d at 218.

A. The District Court Afforded Inordinate Weight to Plaintiffs' Choice of Forum.

The sole basis for the district court's retention of venue in Marshall appears to have been Plaintiffs' preference for litigating there. The district court erroneously concluded that Plaintiffs' choice of forum is "a paramount

consideration" among the section 1404(a) factors.[10] (App. at 3a). In effect, the district court denied the motion to transfer venue because Plaintiffs managed to select a district that is technically permissible within the broad scope of the general permissive venue statute, 28 U.S.C. § 1391.[11] The district court reasoned as follows:

> The plaintiff's choice of forum is "a paramount consideration in any determination of [a] transfer request. . . ." The plaintiff's choice of forum will not be disturbed unless it is clearly outweighed by other factors. In this case, the Plaintiffs' choice of forum is the Marshall Division of the Eastern District of Texas. Venue is proper in the Eastern District because there is no question that VWOA, a corporation licensed to do business in the State of Texas, is subject to the personal jurisdiction of this District. Furthermore, venue is proper in any division in this District.

(App. at 3a-4a) (citations omitted).

In affording "paramount consideration" to the Singletons' choice of forum, the district court erred as a matter of law. This Court has repeatedly emphasized that a plaintiff's choice of forum "in and of itself is neither conclusive nor determinative" of the section 1404(a) transfer analysis. *In re Horseshoe*, 337 F.3d

---

[10] In its order denying Volkswagen's motion for reconsideration, the district court denied that it had given "decisive weight" to Plaintiffs' choice of forum. (App. at 11a). But given the failure of the district court to point to any section 1404(a) factor making venue more convenient in Marshall than in Dallas (App. at 10a-13a), no other conclusion is possible.

[11] Because Congress has authorized venue wherever a corporation is subject to personal jurisdiction, *see* 28 U.S.C. § 1391, venue in this case admittedly is permissible in any division of the Eastern District of Texas—as it would be virtually anywhere in the United States. Venue also is proper under section 1391 in the Northern District of Texas in which, unlike in the Eastern District, "a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(a)(2).

at 434; *In re Volkswagen*, 371 F.3d at 203 (no venue factor is to be "given dispositive weight."). Moreover, the district court's conclusion that the Marshall Division of the Eastern District is a "proper" venue is of no import for purposes of the required convenience analysis. Section 1404(a) assumes that a plaintiff's chosen venue is proper and provides for transfer to the most convenient of two or more otherwise permissible venues. 28 U.S.C. § 1404(a); *Dubin v. United States*, 380 F.2d 813, 816 (5th Cir. 1967).

The district court's decision to give decisive weight to Plaintiffs' choice of venue effectively restricts section 1404(a) transfers to instances in which venue is improper, rather than demonstrably inconvenient. But the standard for improper venue under 28 U.S.C. § 1406(a) simply does not apply to transfers for "the convenience of parties and witnesses" under section 1404(a). *See Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 678 (5th Cir. 2003); *Jackson v. West Telemarketing Corp. Outbound*, 245 F.3d 518, 523 (5th Cir. 2001). And it is clear that a plaintiff's choice of venue is entitled to no special weight or deference vis-à-vis the other factors relevant to a 1404(a) determination. *In re Horseshoe*, 337 F.3d at 434; *In re Volkswagen I,* 371 F.3d at 203; *Garner v. Wolfinbarger*, 433 F.2d 117, 119 (5th Cir. 1970).

If a plaintiff's selection of a minimally permissible venue under 28 U.S.C. § 1391 is, without more, sufficient to survive a motion to transfer based on

convenience, then section 1404(a) ceases to have any force. The general permissive venue statute, 28 U.S.C. § 1391, opens up every district in a multi-district state, such as Texas, to suits against a corporation that is otherwise subject to personal jurisdiction in the state, regardless of whether there are sufficient connections to the dispute to make venue in that district convenient. Where, as here, venue in a plaintiff's chosen forum is minimally adequate under section 1391, but the only factor in the chosen district's favor is the plaintiff's selection itself, a trial court's refusal to transfer venue effectively renders the plaintiff's choice of forum unassailable and writes section 1404(a) out of the United States Code.

This is a textbook case in which transfer to the more convenient of two technically permissible venues is mandated by 28 U.S.C. § 1404(a). Section 1404(a)'s purpose "is to determine the most convenient forum among two or more possibly correct ones." *Dubin*, 380 F.2d at 816 (emphasis added). "The trial court must consider all relevant factors to determine whether or not on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum." *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989). Given that nothing in this case happened in Plaintiffs' chosen forum and none of the parties or known witnesses resides there, it is difficult to imagine when a plaintiff's choice of forum would ever be disturbed if

not here. As the Panel held, the district court's contrary conclusion is a serious legal error that warrants correction by mandamus. *In re Volkswagen II*, 506 F.3d at 387.

B. The District Court Improperly Applied the Stricter *Forum-Non-Conveniens* Dismissal Standard to Volkswagen's Section 1404(a) Motion.

Apart from its unwarranted deference to Plaintiffs' venue selection, the district court also erred as a matter of law by applying the more stringent standard for obtaining a *forum-non-conveniens* dismissal, holding that Volkswagen was not entitled to a convenience transfer under section 1404(a) unless it could "demonstrate that the balance of convenience and justice *substantially* weighs" in favor of transfer. (App. at 3a, 9a, emphasis in original).[12] This too is a serious legal error because it overlooks the important differences between a statutory convenience transfer and a dismissal under the law of *forum non conveniens*.

"Section 1404(a) is a revision rather than just a codification of *forum non conveniens*. It permits federal courts to grant transfers on a lesser showing than is

[12] In support of this standard, the district court relied almost exclusively on *Mohamed v. Mazda Motor Corp.*, 90 F. Supp. 2d 757, 768 (E.D. Tex. 2000), an opinion from the Marshall Division that predates this Court's decisions in both *In re Horseshoe* and *In re Volkswagen I*. (App. at 2a-9a). *Mohamed* is readily distinguishable from this case because it was a pure product liability action that did not involve third-party defendants, issues of proportional fault, or close factual scrutiny of the underlying auto accident. As the court itself acknowledged in *Mohamed*, had someone "sued the driver of the other car for negligent driving, the transfer analysis would be different." *Mohamed*, 90 F. Supp. 2d at 776 (emphasis added). That is exactly the case here. Moreover, in *Mohamed* it was "not entirely clear whether Plaintiffs reside[d] in Marshall, Dallas, or somewhere else," whereas in this case it is undisputed that none of the Plaintiffs reside in Marshall. *Id.*

required under the common law doctrine." *Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1103 n.4 (5th Cir. Unit A June 1981). The Supreme Court itself has stressed this point. *Piper Aircraft*, 454 U.S. at 253; *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955) (stating that "Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience" than is required by the common law of *forum non conveniens*). As this Court observed:

> [t]he heavy burden traditionally imposed upon defendants by the *forum non conveniens* doctrine—dismissal permitted only in favor of a substantially more convenient alternative—was dropped in the section 1404(a) context. In order to obtain a new federal forum under section 1404(a), the statute requires only that the transfer be "for the convenience of the parties, in the interest of justice."

Veba-Chemie A.G. v. M/V Getafix, 711 F.2d 1243, 1247 (5th Cir. 1983). *See also Humble Oil & Ref. Co. v. Bell Marine Serv., Inc.*, 321 F.2d 53, 56 (5th Cir. 1963) (noting that "the avoidance of dismissal through § 1404(a) lessens the weight to be given the choice of forum factor" and that a plaintiff's choice of forum is to be treated "as a burden of proof question rather than one of a presumption.").

Properly understood, a section 1404(a) transfer is a statutory right "for the convenience of parties and witnesses, in the interest of justice" upon a "lesser

showing of inconvenience." *Norwood*, 349 U.S. at 32.[13] Contrary to the district court's holding, a section 1404(a) transfer does not require "that the balance of convenience and justice *substantially* weigh[]" in favor of transfer to the Northern District of Texas. *Compare* App. at 3a (emphasis in original) with *Norwood*, 349 U.S. at 32; *Veba-Chemie*, 711 F.2d at 1247. The district court thus erred as a matter of law in deciding Volkswagen's motion to transfer venue under the stricter *forum-non-conveniens* dismissal standard, rather than under the more lenient standard governing section 1404(a) motions.

C. The District Court Disregarded Directly-On-Point Precedent from this Court.

The district court also committed additional legal errors by failing to apply standards expressly established by this Court in determining section 1404(a) transfer motions. In particular, the district court disregarded three separate

[13] As the Panel noted, this Court has not always spoken with one voice on this issue. *Cf. Marbury-Pattillo Constr. Co. v. Bayside Warehouse Co.*, 490 F.2d 155, 158 (5th Cir.1974) (holding that "unless the balance is strongly in favor of the defendant" the plaintiff's choice should rarely be disturbed); *In re McDonnell-Douglas Corp.*, 647 F.2d 515, 517 (5th Cir. Unit A May 1981) (citing *Bayside Warehouse* and invoking the same language); *Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966) (describing a plaintiff's choice of forum as "highly esteemed"); *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989) (citing *Time, Inc.* and using the same language). These older panel decisions drew the standard they applied from *forum-non-conveniens* dismissal decisions, particularly *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), that were handed down before the enactment of 28 U.S.C. § 1404(a) and its provision for transfer rather than dismissal. These earlier Fifth Circuit decisions post-date the Supreme Court's decision in *Norwood*, which, of course, this Court is bound to follow. Because these earlier panel decisions conflict with *Norwood*, the *en banc* Court should take this opportunity to expressly overrule them.

requirements necessary to a proper section 1404(a) analysis under *In re Volkswagen I.*

1. The district court erred by classifying the more than 150-mile distance between Dallas and Marshall as "not substantial" and even "negligible." (App. at 4a-5a, 11a). In so holding, the district court ignored this Court's unambiguous directive that any distance of "more than 100 miles" must be considered when analyzing section 1404(a)'s witness convenience factor. *In re Volkswagen I*, 371 F.3d at 204-05. The Panel correctly concluded that "[t]he district court abused its discretion by ignoring the 100-mile rule." *In re Volkswagen II*, 506 F.3d at 386.

In support of a contrary rule, Plaintiffs argue that *Jarvis Christian Coll. v. Exxon Corp.*, 845 F.2d 523, 528 (5th Cir. 1988), indicates that 150 miles is not substantial. But as the Panel pointed out in *In re Volkswagen II*, the Court in *Jarvis* merely "declined to vacate a venue transfer because the defendant would have had to travel 203 miles. *Jarvis Christian* did not discuss witness inconvenience." 506 F.3d at 386, n.5 (emphasis in original). Moreover, the Court in *Jarvis* recognized that the district court's *sua sponte* decision to transfer the case from Houston to Tyler was based on a number of section 1404(a) factors, including: (1) the oil field at issue was located in the Tyler Division; (2) the substantial majority of the royalty interest owners resided in the Tyler Division; and (3) closely related litigation was already pending in the Tyler Division. *Jarvis*

Christian, 845 F.2d at 527-29. On the basis of these facts, the Court concluded that the district court did not abuse its discretion in ordering the transfer. *Id.*

Plaintiffs' reliance on *Mills v. Beech Aircraft Corp.*, 886 F.2d 758 (5th Cir. 1989), for the proposition that 150 miles is "not significant" is equally misplaced. (Pet. at 14). In *Mills*, the plaintiffs filed suit against an aircraft manufacturer on a product liability theory, selecting the federal district court in Biloxi as their forum. On its own motion, the district court invoked section 1404(a) and ordered the case transferred out of the plaintiffs' chosen forum to the Jackson Division of the Southern District of Mississippi. *Mills*, 886 F.2d at 761. The district court noted that the plane crash at issue occurred in the Jackson Division and that "[m]ost of the factual witnesses were from McComb, which is about 56 miles closer to Jackson than to Biloxi." This Court held that the district court did not abuse its discretion by transferring the case. *Id.* Far from supporting Plaintiffs' position, *Mills* indicates that even a distance as short as 56 miles can be a meaningful indicator of witness inconvenience.

Finally, Plaintiffs' position is refuted by the fact that this Court itself has granted mandamus relief to transfer a case approximately 200 miles. *In re Horseshoe*, 337 F.3d at 431. Consistent with this precedent, district courts in the Fifth Circuit have routinely ordered section 1404(a) transfers covering distances substantially shorter than the 150 miles between Marshall and Dallas. *See, e.g.,*

Thomason v. Baylor All Saints Med. Ctr., No. Civ. A. 3:06.CV2142, 2007 WL 1650420 (N.D. Tex. June 7, 2007) (transferring venue 33 miles from Dallas Division to Fort Worth Division of the Northern District of Texas); *Tingey v. City of Sugar Land, Texas*, No. V-07-28, 2007 WL 2086672 (S.D. Tex. July 16, 2007) (transferring venue 129 miles from Victoria to Houston); *Bascom v. Maxim Integrated Products, Inc.*, -- F. Supp. 2d --, NO. A-07-CA-947-SS, 2008 WL 436971 (W.D. Tex. Feb. 13, 2008) (transferring venue 80 miles from Austin to San Antonio).

2. The district court erred by holding that the "ease of access to sources of proof" factor under § 1404(a) has been rendered superfluous by advances in technology. (App. at 7a). The district court was not at liberty to invalidate a section 1404(a) factor established by the Supreme Court and recently reiterated by this Court in *In re Volkswagen I*, 371 F.3d at 203 (citing *Piper Aircraft,* 454 U.S. at 241, n.6).

3. The district court erred as a matter of law by holding that the "local interest" factor did not support transfer to Dallas because "citizens of Marshall also have an interest in this products liability case" and "the product is available in Marshall." (App. at 8a). This Court squarely rejected identical reasoning in *In re Volkswagen I*, finding that "[p]laintiffs have failed to demonstrate and the Eastern District Court has failed to explain how the citizens of the Eastern District of

Texas, where there is no factual connection with the events of this case, have more of a localized interest in adjudicating this proceeding than the citizens of the Western District of Texas, where the accident occurred and where the entirety of the witnesses for the third-party complaint can be located." *In re Volkswagen I*, 371 F.3d at 206. Consistent with *In re Volkswagen I*, the Panel correctly concluded that the fact "that a product is available within a given jurisdiction is insufficient to neutralize the legitimate local interest in adjudicating local disputes." *In re Volkswagen II*, 506 F.3d at 387. The district court committed legal error by returning to reasoning so bluntly rejected by this Court.

III. THE PANEL AFFORDED THE APPROPRIATE DEFERENCE TO PLAINTIFFS' CHOICE OF FORUM.

The Singletons' main criticism is that the Panel did not afford sufficient deference to their choice of forum. (Pet. at 3-10). The Singletons argue that the Panel's opinion "upends the law governing transfers of venue under 28 U.S.C. § 1404(a) by essentially eliminating the weight traditionally accorded to the plaintiff's choice of forum." (Pet. at iii). In analyzing this contention, it is important to understand exactly what the Panel held concerning the deference due a plaintiff's forum choice.

The Panel first held that the district court erred by applying the stricter *forum-non-conveniens* dismissal standard and "requiring Volkswagen to show that the balance of convenience and justice substantially weighs in favor of transfer."

In re Volkswagen II, 506 F.3d at 381. For the reasons outlined above, this was a correct decision of law. *Ante* at § II(B). The Panel then went on to define "the proper degree of deference to be given to a plaintiff's choice of forum" under section 1404(a):

> Plaintiff's choice of forum is entitled to deference. Indeed, this deference establishes the burden that a moving party must meet in seeking a § 1404(a) transfer. . . . When the transferee forum is no more convenient than the chosen forum, the plaintiff's choice should not be disturbed. When the transferee forum is clearly more convenient, a transfer should be ordered.

In re Volkswagen II, 506 F.3d at 384. This too was a correct holding. Indeed, as the Panel noted, this conclusion derives directly from the language of section 1404(a) and properly requires the party seeking transfer to demonstrate that the transferee forum is "clearly more convenient" than the plaintiff's chosen forum. *Id.*

A. The Supreme Court and this Court Have Long Held that a Plaintiff's Forum Choice is Not Controlling in the Section 1404(a) Analysis.

The Supreme Court has long held that a plaintiff's "forum choice should not be given dispositive weight." *Piper Aircraft,* 454 U.S. at 258 n.23. While *Piper Aircraft* is a *forum-non-conveniens* case, its reasoning is even more applicable in the context of section 1404(a). Indeed, the Supreme Court has held that transfers of venue under section 1404(a) may be obtained on a lesser showing than is

required under the common law doctrine of *forum non conveniens*. *Norwood*, 349 U.S. at 32.

The Singletons badly distort *Norwood*'s holding in their petition, suggesting that broader discretion to grant a section 1404(a) transfer translates into equally broad discretion to deny such transfers. (Pet. at 7-8). No authority supports Plaintiffs' argument that "the trial judge has more latitude to weigh the many factors in any individual case as he or she pleases." (Pet. at 8). Consistent with *Norwood*, section 1404(a) only lowers the burden for obtaining transfer. *Norwood*, 349 U.S. at 32 ("Congress . . . intended to permit courts to grant transfers upon a lesser showing of convenience" than is required by the common law of *forum non conveniens*) (emphasis added); *Ellis,* 646 F.2d at 1103 n.4 (noting that section 1404(a) "permits federal courts to grant transfers on a lesser showing than is required" in *forum non conveniens* cases).

Contrary to the Singletons' contention that a plaintiff's choice of forum should rarely be disturbed, even the Supreme Court has upheld section 1404(a) transfers away from a plaintiff's preferred forum on multiple occasions. In *Norwood*, for example, the Supreme Court affirmed a section 1404(a) transfer away from a plaintiff's home district (the Eastern District of Pennsylvania) to the location of the train derailment at issue in the case (the Eastern District of South Carolina). 349 U.S. at 30-31.

Justice Clark vigorously dissented from the result in *Norwood* precisely because he believed the Court was affording too little deference to the plaintiff's choice of forum:

> Under this judgment, Alexander Norwood, who lives in Philadelphia where he filed this suit for damages against the railroad, will have to go to South Carolina if he wishes to prosecute it. Joseph Tunstall and John Smallwood, both of whom live in Washington, D.C., will likewise have to go all the way to South Carolina if they hope to recover any damages against the railroad. . . . [T]he district judge deprived Norwood of a trial in his home town, and Tunstall and Smallwood of one within 150 miles of theirs.

Norwood, 349 U.S. at 33 (Clark, J., dissenting). Notably, Justice Clark's view did not prevail. *Norwood* makes clear that even a plaintiff's selection of his home forum is not entitled to controlling deference under section 1404(a). *Id.* at 31-32. *Norwood* wholly undermines the Singletons' core argument that a plaintiff's choice of forum, in and of itself, is always entitled to "great deference" or "high esteem."

The Supreme Court's decision in *Ex parte Collett*, 337 U.S. 55 (1949), also makes clear that a plaintiff's preference for a particular venue is not alone sufficient to defeat a motion to transfer under section 1404(a). The venue facts of *Collett* are similar to those in this case, as the plaintiff in *Collett* filed suit against the defendant in one federal forum (the Eastern District of Illinois) despite the fact that the accident at issue occurred in another forum (the Eastern District of

Kentucky), which was also plaintiff's home district and the home of all relevant witnesses. *Ex parte Collett*, 337 U.S. at 56.

The Supreme Court affirmed the district court's decision to grant the defendant's section 1404(a) motion to transfer. While the Court's analysis was focused on the applicability of section 1404(a) rather than the venue facts, the Supreme Court made no mention of owing "great" or "substantial" deference to the plaintiff's choice of forum. *Id.* Instead, the Court upheld a transfer away from the plaintiff's preferred forum, thus further undermining the Singletons' position. *Id.*

In *Van Dusen v. Barrack*, 376 U.S. 612 (1964), the Supreme Court declared that the state law of the transferor forum travels with the case and must be applied by the transferor forum. In so holding, the Supreme Court remanded to the district court to determine whether some 40 wrongful death claims brought in the Eastern District of Pennsylvania by "Pennsylvania fiduciaries representing the estates of Pennsylvania decedents," *Van Dusen*, 376 U.S. at 614, n.1, should be transferred to the District of Massachusetts, the location of the plane crash at issue and the home of most of the witnesses. *Id.* at 645. In remanding the case for possible transfer to Boston, the Supreme Court again did not instruct the district court to afford special deference to the plaintiffs' choice of forum, despite the fact that these Pennsylvania plaintiffs had brought suit in their home forum. *Id.*

Consistent with the Supreme Court's guidance in *Norwood* and *Piper Aircraft*, this Court too has long held that a plaintiff's choice of venue "is not controlling." *Garner*, 433 F.2d at 119 ("The plaintiff's statutory privilege of choosing his forum is a factor, held in varying degrees of esteem, to be weighed against other factors in determining the convenient forum. . . . That factor is not controlling."). Indeed, this Court has held that a plaintiff's choice of forum is not entitled to any special weight in relation to the other factors relevant to a 1404(a) determination. *In re Volkswagen I*, 371 F.3d at 203 ("The determination of 'convenience' turns on a number of private and public interest factors, none of which are given dispositive weight."); *Action Industries*, 358 F.3d at 340 (same). As the Court observed in *In re Horseshoe*, 337 F.3d at 434, "[w]e believe that it is clear under Fifth Circuit precedent that the plaintiff's choice of forum is clearly a factor to be considered but in and of itself it is neither conclusive nor determinative."

The Singletons' effort to deem plaintiff's choice of forum as requiring "an especially strong showing by the defendant to justify transfer," (Pet. at 6, 4), doubtlessly stems from this suit's complete lack of connection with the Marshall Division of the Eastern District of Texas. Aside from their desire to litigate in Marshall, "no relevant factor favors the Singletons' chosen forum." *In re Volkswagen II*, 506 F.3d at 387. Unless a plaintiff's choice of forum is entitled to

"conclusive," "determinative," or "dispositive" weight, section 1404(a) mandates the transfer of this case. And the Supreme Court and this Court long ago disposed of both notions. *Piper Aircraft*, 454 U.S. at 258 n.23; *Garner*, 433 F.2d at 119.

The Panel was correct to decline to give elevated deference to the Singletons' choice of forum, and instead to require Volkswagen to show only that the "transferee forum is clearly more convenient." *In re Volkswagen II*, 506 F.3d at 384.

B. Sister Circuits Do Not Treat a Plaintiff's Choice of Forum as Determinative Under Section 1404(a).

This Court is far from alone in declining to give anything approaching controlling weight to a plaintiff's choice of forum. The Singletons' contrary claim ignores the reality of section 1404(a) jurisprudence. To quote Professors Wright and Miller:

> Over the years the federal courts have developed a bewildering variety of verbal formulations to describe how much weight should be given to the plaintiff's initial choice of forum.
>
> . . . .
>
> [M]any illustrative cases [hold that] . . . the plaintiff's venue choice is to be given less weight if he or she selects a district court with no obvious connection to the case or the plaintiff is a nonresident of the chosen forum or neither element points to that court. Although not universally followed by other courts, this approach is one of sound judicial administration and reflects good common sense.
>
> Other federal judges have maintained flatly that the plaintiff's choice is "relatively unimportant" and "entitled to little weight." . . . Finally, some courts give less weight to a

> plaintiff's forum choice if that party appears to be forum shopping. . . .

15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3848 (3d ed. 2007) (citations omitted). *See also* 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 111.13[1][c] (3d ed. 1997) (noting that section 1404(a) motions, "although derived from the common-law doctrine of dismissal for *forum non conveniens*, require that less weight be given to the plaintiff's choice of forum than was received under the common-law doctrine.").

The Singletons have tried to take advantage of this "bewildering variety of verbal formulations" to cobble together an illusory rule that a plaintiff's choice of forum is universally afforded "great" or "substantial" deference. (*See* Pet. at 9, n.8). But adjectives are not a substitute for analysis, and parsing favorable language from cases that are not focused on the deference issue hardly proves the existence of the Singletons' purportedly universal federal rule.

Crucially, like the Panel here, the circuit courts that have analyzed the degree of deference owed to a plaintiff's choice of forum under section 1404(a) have held that the deference due varies with the circumstances of the particular case. *See generally* 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 111.13[1][c][i] ("The weight accorded to plaintiff's choice of forum varies depending on other circumstances.").

Over fifty years ago, for example, the Seventh Circuit explained that a plaintiff's selection of a forum unrelated to the case is entitled only to "minimal" deference:

> A large measure of deference is due to the plaintiff's freedom to select his own forum. Yet this factor has minimal value where none of the conduct complained of occurred in the forum selected by the plaintiff.

Chicago, Rock Island & Pac. R.R. v. Igoe, 220 F.2d 299, 304 (7th Cir. 1955) (quotations omitted). Noting the absence of any real connection between the case and the plaintiff's chosen forum, the Seventh Circuit granted the petition for writ of mandamus and ordered the case transferred to the site of the fatal railroad accident at issue. *Id.* at 304-05. The analysis put forward by the Seventh Circuit is fully consistent with the Panel's holding here.

The Ninth Circuit, too, has long held that a plaintiff's choice of forum "is not the final word" in the section 1404(a) analysis. *Pacific Car & Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968). Instead, the Ninth Circuit examines the nexus between the plaintiff's chosen forum and the case:

> If the operative facts have not occurred within the forum of original selection and that forum has no particular interest in the parties or the subject matter, the plaintiff's choice is entitled only to minimal consideration. . . . In this case no contacts of any substance with the [chosen forum] existed as to either party. . . . We are left, then, with a choice of forum supported only by the fact that it was chosen. Such a choice cannot prevail under § 1404(a) against the showing of inconvenience here made by the petitioner.

Pacific Car & Foundry, 403 F.2d at 954-55.[14] This language accurately captures the situation in this case, as here, too, the Singletons' "choice of forum [is] supported only by the fact that it was chosen." *Id.* at 955.

The Second Circuit also recognizes that a plaintiff's choice of forum is less important under section 1404(a) than it is in *forum-non-conveniens* cases: "The plaintiff's choice of venue is still entitled to substantial consideration, although not so much upon a motion to transfer under 28 U.S.C. § 1404(a) as upon a motion to dismiss for *forum non conveniens*." *Olnick & Sons v. Dempster Bros.*, 365 F.2d 439, 444-45 (2d Cir. 1966) (citing *Norwood* and affirming the district court's decision to transfer case out of the plaintiff's chosen forum in a product liability case).

Even in the stricter *forum-non-conveniens* context, the Second Circuit has made clear that the deference given to a plaintiff's choice of forum depends on a "sliding scale" that takes into account other relevant factors. *Iragorri v. United Tech. Corp.*, 274 F.3d 65, 71-73 (2d Cir. 2001) (en banc). While *Iragorri* itself held that the district court did not afford sufficient deference to the plaintiff's choice of defendant's home as the forum, *id.* at 74, *Iragorri*'s "sliding scale" has

[14] *See also Gemini Capital Group, Inc., v. Yap Fishing Corp.*, 150 F.3d 1088, 1091 (9th Cir. 1998) (citing *Pacific Car & Foundry* in support of decision to confer only minimal deference to plaintiff's selection of a forum other than his home); *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) ("If the operative facts have not occurred within the forum and the forum has no interest in the parties or subject matter, [plaintiff's] choice is entitled to only minimal consideration.").

been applied in section 1404(a) cases to support transfer away from a plaintiff's chosen-but-unconnected forum. *See, e.g., Werner v. Stonebridge Life Ins. Co.*, No. 2:06-CV-174, 2007 WL 602104 at *3 (D. Vt. Feb. 22, 2007) (ordering case transferred and holding under *Iragorri* that "when a plaintiff chooses a forum that is not his residence, that weight is diminished."); *Zepherin v. Greyhound Lines, Inc.*, 415 F. Supp. 2d 409, 411 (S.D. N.Y. 2006) ("While a plaintiff's choice of forum should be accorded some deference, that consideration is not entitled to the same weight where a plaintiff is not a resident of the forum district or the operative facts are centered in another district."); *Kwik Goal, Ltd. v. Youth Sports Publ'g, Inc.*, No. 06 Civ. 395, 2006 WL 1517598 *3 (S.D. N.Y. May 31, 2006) (transferring case and declining to give deference to the plaintiff's choice of forum where it was neither the home of any party nor the *situs* of events giving rise to the litigation); *Ayala-Branch v. Tad Telecom, Inc.*, 197 F. Supp. 2d 13, 15 (S.D. N.Y. 2002) (transferring case and holding that "when the operative facts have few meaningful connections to the plaintiff's chosen forum . . . the importance of the plaintiff's choice of forum measurably diminishes."). The Panel's decision to afford only minimal deference to Plaintiffs' choice of forum, which is neither the home of any party nor the location of any of the events at issue, fully comports with Second Circuit precedent.

As Plaintiffs acknowledge, the Eighth Circuit also applies a test similar to that articulated by the Panel. (Pet. at 9, n.8). Like the Panel here, the Eighth Circuit has recognized that section 1404(a) determinations "require a case-by-case evaluation of the particular circumstances at hand and a consideration of all relevant factors," and that "the party seeking a transfer under section 1404(a) typically bears the burden of proving a transfer is warranted." *Terra Int'l., Inc. v. Mississippi Chem. Corp.*, 119 F.3d 688, 691, 695 (8th Cir. 1997). A plaintiff's mere preference for a particular forum is not enough to defeat a motion to transfer.

Notwithstanding its concession that "the Eighth Circuit [in *Terra*] used a formulation similar to the [P]anel's," Plaintiffs urge that the Panel's opinion has rendered this Court an "outlier." (Pet. at 7, 9, n.8). According to Plaintiffs, despite the Eighth Circuit's holding, the district courts in that circuit uniformly have continued to afford substantial deference to the plaintiff's choice of forum. (Pet. at 9, n.8). That is untrue. District courts in the Eighth Circuit also give little or no deference to a plaintiff's choice of a forum that is neither the home of a party nor the location of events leading to the lawsuit. *GMAC/Residential Funding Corp. v. Platinum Co.*, No. Civ. 02-1224, 2003 WL 1572007 at *2 (D. Minn. Mar. 13, 2003); *Ahlstrom v. Clarent Corp.*, No. Civ. 02-780, 2002 WL 31856386 at *3 (D. Minn. Dec. 19, 2002); *Nelson v. Soo Line R.R.*, 58 F. Supp. 2d 1023, 1026

(D. Minn. 1999). The Eighth Circuit's approach is indeed analytically consistent with that of the Panel here.

Finally, while a number of circuit courts have not addressed the issue, district courts in literally every circuit have held, under section 1404(a), that a plaintiff's choice of forum is entitled to minimal deference where little or no connection to the forum exists.[15] It does not appear that any circuit court has ever rejected or reversed—or even questioned the reasoning—of such a holding.

---

[15] *See, e.g.*, FIRST CIRCUIT: *McFarland v. Yegen*, 699 F. Supp. 10, 15-16 (D. N.H. 1988) (holding that a plaintiff's choice of forum is accorded less weight when the operative facts have no material connection to the chosen forum); SECOND CIRCUIT: *Neil Bros. v. World Wide Lines, Inc.*, 425 F. Supp. 2d 325, 333 (E.D. N.Y. 2006) ("[P]laintiff's choice of forum is not entitled to great weight when the operative facts have 'little or no connection with the transferor forum', or when the plaintiff does not reside in his chosen forum.") (internal quotations omitted); THIRD CIRCUIT: *Zokaites v. Land-Cellular Corp.*, 424 F. Supp. 2d 824, 840 (W.D. Pa. 2006) ("[W]here none of the conduct complained of occurred in plaintiff's chosen forum, plaintiff's choice is entitled to less deference."); FOURTH CIRCUIT: *Samsung Elec. Co. v. Rambus, Inc.*, 386 F. Supp. 2d 708, 716 (E.D. Va. 2005) ("When the plaintiff's choice of forum is neither the nucleus of operative facts, nor the plaintiff's home forum, the plaintiff's choice is accorded less weight."); FIFTH CIRCUIT: *Spiegelberg v. Collegiate Licensing Co.*, 402 F. Supp. 2d 786, 790 (S.D. Tex. 2005) (holding that plaintiff's choice of forum receives less deference when it lacks any legally relevant factual nexus with plaintiff or the claims in this case); SIXTH CIRCUIT: *Cescato v. Anthem, Inc.*, No. 1:05 CV 2004, 2005 WL 3487974, at *2 (N.D. Ohio Dec. 21, 2005) ("[W]hen the chosen forum is not the plaintiff's residence, this choice is given less consideration."); SEVENTH CIRCUIT: *Symbol Techs., Inc. v. Intermec Techs. Corp.*, No. 05-C-256, 2005 WL 1657091, at *3 (W.D. Wis. July 14, 2005) (recognizing that "courts have held that if plaintiff's chosen forum is not the situs of material events, a plaintiff's choice has weight equal to the other factors and will not receive deference."); EIGHTH CIRCUIT: *Northwest Territory Ltd. P'ship v. OMNI Props., Inc.*, No. Civ. 04-4531JNESRN, 2005 WL 3132350, at *6 (D. Minn. Nov. 22, 2005) (deference to plaintiff's choice of forum "is of 'reduced value' when the operative facts giving rise to the claim occur outside the forum state."); NINTH CIRCUIT: *Costco Wholesale Corp. v. Liberty Mut. Ins. Co.*, 472 F. Supp. 2d 1183, 1191 (S.D. Cal. 2007) ("If the operative facts have not occurred within the forum and the forum has no interest in the parties or subject matter, the plaintiff's choice [of forum] receives minimal consideration.") (internal quotations omitted); TENTH CIRCUIT: *Burris v. Weyerhaeuser Co.*, No. Civ-05-1104, 2006 WL 682017, at *2 (W.D. Okla. Mar. 16, 2006) (Holding that the plaintiff's choice of forum has reduced value where there is a lack of significant contact by the forum state with the transactions

In sum, the Panel's refusal to treat the Singletons' choice of Marshall—which is not their home forum—either as controlling or as being entitled to "great deference" or "high esteem" comports with an overwhelming body of federal case law. No basis exists for deferring to a plaintiff's choice of forum where, as here, that forum has no meaningful connection to the facts or parties of the case.[16] Plaintiffs have failed to direct the Court to a single case from any circuit holding as they are asking this Court to. The degree of deference owed to a plaintiff's choice of forum is directly dependent on that forum's connections to the case. *See generally* 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER,

---

or conduct underlying the cause of action); ELEVENTH CIRCUIT: *Bell v. K Mart Corp.*, 848 F. Supp. 996, 1000 (N.D. Ga. 1994) ("[W]here the Plaintiffs' choice of forum lacks any significant connection with the underlying claim[,] Plaintiffs' choice of forum is entitled to reduced weight[.]") (internal quotations omitted); D.C. CIRCUIT: *Sheldon v. National R.R. Passenger Corp.*, 355 F. Supp. 2d 174, 178 (D. D.C. 2005) ("[T]his court has recognized that a plaintiff's choice of forum is given diminished consideration when that forum has no meaningful ties to the controversy and no particular interest in the parties or the subject matter.").

[16] Leaving aside their unfounded arguments that the Panel's decision "conflicts with the decisions of all other circuits" (Pet. at iv) and "sharply conflicts with the precedent of this Court" (Pet. at iii), the Singletons' related contention that the Panel's decision "will inevitably prompt a surge in appellate venue litigation," (Pet. at iv), also is without merit. During the nearly four months in which *In re Volkswagen II* was in force, district courts in the Fifth Circuit cited to the opinion in nineteen different orders addressing section 1404(a) motions to transfer venue. Contrary to the Singletons' dire prediction, a review of this Court's PACER system as of March 13, 2008 indicates that none of these nineteen post-*In re Volkswagen II* venue cases has resulted in mandamus proceedings. Far from provoking increased mandamus activity, the Panel's opinion brought much needed clarity to this Court's section 1404(a) jurisprudence. *See Shelby v. Pods, Inc.*, No. Civ. A. 4-07-2145, 2007 WL 4002850 *1 (S.D. Tex. Nov 15, 2007) (observing that the Panel's decision clarified the Fifth Circuit's "admittedly conflicting precedents regarding the standard for transfer of cases pursuant to § 1404(a)."); *Bascom v. Maxim Integrated Prods, Inc.*, -- F. Supp. 2d --, No. A-07-CA-947-SS, 2008 WL 436971 *2 (W.D. Tex. Feb 13, 2008) (same).

FEDERAL PRACTICE & PROCEDURE § 3848 (3d ed. 2007); 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 111.13[1][c][iii] (3d ed. 1997).

Here, the Panel found—and it is undisputed—that the Marshall Division of the Eastern District of Texas is not the home of any party or the site of any relevant events. As in *Pacific Car & Foundry*, this Court is "left, then, with a choice of forum supported only by the fact that it was chosen." 403 F.2d at 955. Manifestly, that is not enough to defeat a section 1404(a) motion.

IV. MANDAMUS RELIEF IN THIS CASE COMPORTS WITH LONGSTANDING FIFTH CIRCUIT PRECEDENT AND IS VITAL TO MAINTAINING THE CONSISTENCY OF VENUE TRANSFER DECISIONS AMONG DISTRICT COURTS IN THIS CIRCUIT.

Congress has declared a national policy in 28 U.S.C. § 1404(a). A transfer of venue is proper when a set of private and public interest factors weigh in favor of transfer. *In re Volkswagen*, 371 F.3d at 203; *Piper Aircraft*, 454 U.S. at 241 n.6. The fact that the trial court possesses discretion in making this decision does not mean that it is unfettered by meaningful standards. *See In re Horseshoe*, 337 F.3d at 432 (noting that the court of appeals applies a three-part standard in deciding the propriety of a district court's ruling on a section 1404(a) motion to transfer: "a.) Did the district court correctly construe and apply the relevant statutes; b.) Did the district court consider the relevant factors incident to ruling upon a motion to transfer; and c.) Did the district court abuse its discretion in deciding the motion to transfer."). The "abuse of discretion" standard does not confer immunity on the

trial court's rulings. As Chief Justice Marshall put it, discretionary choices are left not to a court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *United States v. Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (No. 14692D). This statement embodies the appropriate standard for review of the discretionary determination in this case.

For five decades, it has been the rule in this Circuit that this Court may remedy a district court's abuse of discretion in the application or interpretation of section 1404(a). *Ex parte Chas. Pfizer Co.*, 225 F.2d 720 (5th Cir. 1955); *Ex parte Blaski*, 245 F.2d 737 (5th Cir.), *cert. denied*, 355 U.S. 872 (1957). Forty-five years ago, in *Koehring Co. v. Hyde Construction Co.*, 324 F.2d 296 (5th Cir. 1963), this Court overturned a district court's refusal to transfer a case pursuant to section 1404(a). The plaintiff, a Mississippi company, brought suit in its home district against a Wisconsin company that arose out of contract dispute. The defendant sought to transfer to the Northern District of Oklahoma pursuant to section 1404(a). The Mississippi District Court declined to order the transfer.

This Court reversed the district court's decision. Writing for a unanimous panel, Judge Wisdom observed:

> The concrete cooling and mixing plant here in question was installed in Oklahoma; all relevant facts concerning its alleged failure to perform occurred in Oklahoma; if, in view of the complexity of its operation, an on-site inspection of the plant is necessary, it can be had only in Oklahoma. Most of the witnesses to the alleged failure of performance reside at or

> near the plant site, and the records of the U.S. Corps of Engineers dealing with the functioning of the plant are kept in Tulsa. . . . [E]very factor points to Oklahoma as the most logical forum for this action, whereas the only connection which Mississippi has with this case is that one party to this suit resides there.

Koehring, 324 F.2d at 296. Based on the case's overwhelming connections to the transferor forum, not only did the Court in *Koehring* order a transfer away from the plaintiff's chosen forum, it ousted a plaintiff from its home forum. *Id.* That result is far more harsh than the one imposed by the Panel in this case, which was merely to relegate Plaintiffs to their home forum where the accident occurred and where all of the witnesses and documents relevant to the third-party complaint are located.

In more recent years, this Court has continued to issue writs of mandamus to correct clear abuses of discretion by the district courts in the context of section 1404(a). *In re Horseshoe*, 337 F.3d at 435 ("we grant Horseshoe's petition for a writ of mandamus, vacate the order of the Middle District Court [of Louisiana] denying Horseshoe's motion for transfer, and remand this case to the Middle District Court with instructions to enter an order transferring this case to the docket of the Shreveport Division of the Western District forthwith."); *In re Volkswagen I*, 371 F.3d at 206 ("we find that the Eastern District Court abused its discretion in denying the Volkswagen Defendants' motion to transfer venue. Accordingly, we GRANT Petitioners' writ of mandamus and thereby VACATE

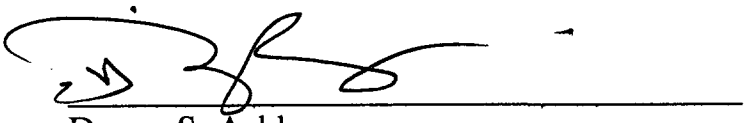
the Eastern District Court's order and REMAND this case to the Eastern District Court with instructions to transfer this case to the San Antonio Division of the United States District Court for the Western District of Texas.").

The Supreme Court has answered the general question of the availability of mandamus with the refrain: "What never? Well, *hardly* ever!" *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (emphasis in original). This "Pinafore" test is an exacting one, but Volkswagen plainly met it in this case. The trial court failed in its duty to meaningfully analyze and weigh the required section 1404(a) public and private interest factors. These factors weigh overwhelmingly in favor of transfer. The district court also abused its discretion by making multiple errors of law, including giving unwarranted deference to the Singletons' choice of Marshall, incorrectly applying the *forum-non-conveniens* dismissal standard, and failing to heed this Court's clear pronouncements in *In re Volkswagen I*. That is more than enough to warrant mandamus relief.

CONCLUSION

Volkswagen respectfully requests that its petition for writ of mandamus be GRANTED and that the case be REMANDED with instructions that it be transferred to the Northern District of Texas, Dallas Division.

Respectfully submitted,



Danny S. Ashby
Texas State Bar No. 01370960
Robert H. Mow, Jr.
Texas State Bar No. 14607000
Christopher D. Kratovil
Texas State Bar No. 24027427
Casey P. Kaplan
Texas State Bar No. 24060061

KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP
1717 Main Street, Suite 2800
Dallas, Texas 75201
Telephone: (214) 939-5500
Facsimile: (214) 939-5849

Ningur Akoglu
Ian Ceresney
HERZFELD & RUBIN, P.C.
40 Wall Street
New York, New York 10005
Telephone: (212) 471-8500
Facsimile: (212) 344-3333

Burgain G. Hayes
Texas State Bar No. 09271300
P. O. Box 10447
Austin, Texas 78766
Telephone: (512) 472-2193
Facsimile: (512) 371-0989

ATTORNEYS FOR PETITIONERS, VOLKSWAGEN AG AND VOLKSWAGEN OF AMERICA, INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March 2008, an original and twenty true copies of the foregoing brief was sent by Federal Express to the Clerk of the Court, and true copies were sent by Federal Express to the following:

TRIAL COURT JUDGE:

The Honorable T. John Ward
United States District Court for the Eastern District of Texas
100 E. Houston Street
Marshall, Texas 75670

ATTORNEYS FOR RESPONDENTS:

Martin J. Siegel
LAW OFFICES OF MARTIN J. SIEGEL, P.C.
815 Walker St., Suite 1600
Houston, Texas 77002

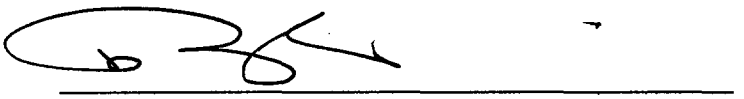
Michael C. Smith
THE ROTH LAW FIRM
115 N. Wellington, Suite 200
Marshall, Texas 75670

Thomas A. Crosley
THE CROSLEY LAW FIRM PC
755 E. Mulberry, Suite 250
San Antonio, Texas 78212

Jeffrey T. Embry
HOSSLEY EMBRY, LLP
313 E. Charnwood
Tyler, Texas 75701

ATTORNEYS FOR THIRD-PARTY DEFENDANT:

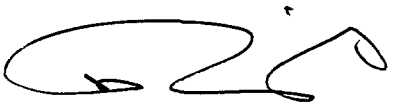
J. Chad Parker
THE PARKER FIRM, P.C.
112 E. Line St., Suite 202
Tyler, Texas 75702



Danny S. Ashby

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FED. R. APP. P. 32(a)(7)(B). The brief contains 13,876 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).



Danny S. Ashby