NO. 07-40058

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Petitioners.

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

RESPONDENTS' *EN BANC* BRIEF

Jeffrey T. Embry
HOSSLEY EMBRY, L.L.P.
313 E. Charnwood
Tyler, TX 75701
Telephone: (903) 526-1772

Thomas A. Crosley
THE CROSLEY LAW FIRM, P.C.
755 E. Mulberry, Suite 250
San Antonio, TX 78212
Telephone: (210) 354-4500

Carl Roth
THE ROTH LAW FIRM
115 N. Wellington, Suite 200
Marshall, TX 75670
Telephone: (903) 935-1665

Martin J. Siegel*
LAW OFFICES OF MARTIN J.
SIEGEL, P.C.
815 Walker St., Suite 1600
Houston, TX 77002-5721
Telephone: (713) 226-8566

Michael C. Smith
SIEBMAN, REYNOLDS, BURG,
PHILLIPS & SMITH, L.L.P.
713 South Washington Avenue
Marshall, TX 75670
Telephone: (903) 938-8900

*Lead Counsel

ATTORNEYS FOR RESPONDENTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in 5th Circuit 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, Petitioner.

2. Volkswagen of America, Inc., Petitioner.

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

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

5. Burgain G. Hayes, attorney for Petitioners.

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

7. Martin J. Siegel, Law Offices of Martin J. Siegel, P.C., attorney for Respondents.

8. Michael C. Smith, Siebman, Reynolds, Burg, Phillips & Smith, L.L.P., attorney for Respondents.

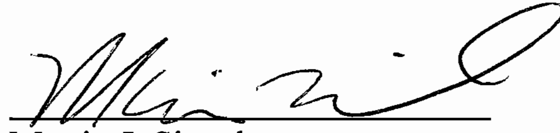
9. Jeffrey T. Embry, Hossley Embry, L.L.P., attorney for Respondents.

10. Thomas A. Crosley, The Crosley Law Firm, P.C., attorney for Respondents.

11. Carl Roth, The Roth Law Firm, attorney for Respondents.

12. Colin R. Little, Third-Party Defendant.

13. J. Chad Parker and W. Todd Parker, The Parker Law Firm, P.C., attorneys for Third-Party Defendant Colin Little.

By: 
Martin J. Siegel
Attorney for Respondents

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STATEMENT OF ISSUES

1. Whether the Court should continue to reserve writs of mandamus overturning orders under 28 U.S.C. §1404(a) for "really extraordinary causes," as distinct from cases where this Court might favor transfer if it were to reweigh and balance the applicable factors *de novo*.

2. Whether defendants moving under 28 U.S.C. § 1404(a) should continue to be required to show that the balance of factors strongly favors transfer – as has been the law in this circuit for four decades.

3. Whether the district court abused its discretion in denying defendants' motion under §1404(a) where plaintiffs' choice of forum and other contacts weigh against transfer, and the factors favoring transfer do so only weakly.

PRELIMINARY STATEMENT

Plaintiffs-Respondents (collectively "the Singletons") allege that seven-year-old Mariana Singleton was killed and her grandfather Richard Singleton was rendered paraplegic as a result of a defect in the design of their Volkswagen Golf, which was involved in a collision on a Dallas freeway in 2005. When the district court denied Defendant-Petitioners' (collectively "Volkswagen's") motion to transfer under 28 U.S.C. § 1404(a), Volkswagen petitioned this Court for mandamus relief.

Volkswagen's petition raises important questions far beyond where this one case will eventually be tried. First, granting the petition, which would be the third such action in the last five years – as many reversals of transfer decisions as this Court ordered in the first fifty years of §1404(a)'s existence – would constitute a novel use of the writ. Mandamus had been reserved for what this Court has called "really extraordinary causes," and never simply because the district court committed error or assigned too much or too little weight to the proper factors. This reluctance to issue the writ serves important systemic values: honoring the district court's wide discretion, limiting the delay and waste that comes from appellate skirmishing over transfer, and adhering to Congress' proscription of piecemeal appeals. The Court may conclude it would have ordered transfer were it

examining the matter *de novo*, but there is nothing extraordinary or mandamus-worthy about this case.

Second, the Court must decide whether it will continue to adhere to a body of precedent solidly in place for forty years holding that the plaintiff's choice of venue is a factor to be weighed in the §1404(a) balancing, or, put differently, that the defendant must show that the balance of factors tilts strongly toward transfer. As with the traditional understanding of mandamus, vital concerns support this long-established rule, including binding Supreme Court precedent, the fact that all other circuits employ the same standard, Congress's guarantee of broad venue choice under 28 U.S.C. § 1391, and the fundamental importance of *stare decisis*. Volkswagen expressly urges the Court to overrule several of its past decisions, but it comes nowhere close to justifying so radical a step.

If the time-honored rules are applied – sparing use of mandamus and the assignment of any level of weight to the plaintiff's forum choice – resolving this petition is not difficult. Plaintiff's choice of forum and other connections supported the denial of Volkswagen's motion, while other relevant factors argued weakly for transfer. Although the district court certainly could have ordered transfer, retaining the case was not an abuse of discretion, and this Court should reject the invitation to simply reweigh and rebalance the factors to achieve a different outcome. The Court should therefore deny the instant petition.

<u>**STATEMENT OF FACTS**</u>

On May 21, 2005, the Singletons were traveling in their Volkswagen Golf on I-635 in Dallas when it was rear-ended by a car driven by Colin Little and projected into a trailer parked on the freeway's shoulder. 1a, 7a.[1] At the time of the accident, the Singletons lived in the Eastern District of Texas, in Collin County. 1a. The trailer was owned by a nursery located in the Eastern District (Denton County) and was driven by its employee Johnny Soto. 83a-85a. Little lives in Dallas but does not oppose appearing in Marshall for trial. 179a.

The Singletons' complaint alleges that the defective design of the Golf's front seat caused it to collapse backward during the collision, resulting in Richard's paraplegia and Mariana's fatal head trauma. 2a. In order to prove their claims, the Singletons will look to documents maintained by Volkswagen outside Texas regarding the design, testing, and safety of the seat; fact witnesses such as Volkswagen engineers and officials; and design and safety experts. The facts of how the collision occurred – where the cars were, their estimated speeds, what happened immediately after impact, and the like – are not contested by the Singletons or the subject of conflicting fact witness testimony. Beyond the seven-page accident report, there are no liability-related documents located in Dallas.

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[1] Citations to "#a" are to the Appendix originally filed by Volkswagen with its petition.

The wrecked Golf has been kept in Dallas but is under the control of plaintiff's counsel and will be made available where and as needed. 142a.

The sole third party witness who appears to have seen the collision, Irene Soto, lives in Dallas County and executed an affidavit averring that it would be "an unreasonable burden and hardship as well as inconvenience" for her to testify in Marshall, though she allows that she would be willing to travel nearly half that distance to Sherman, Texas. 66a.[2] Kennie Wiginton, the Dallas police officer who responded to the scene and filled out an accident report, executed a nearly identical form affidavit. 66a. Volkswagen has not provided expert or other affidavits explaining how Soto's and Wiginton's recollections will support its defense that other facets of the incident caused the Singletons' injuries. Nor did Volkswagen indicate by affidavit or otherwise what testimony any other listed Dallas witness might give, why such testimony might be important to the case, or whether any other witness opposes appearing in Marshall.

The Singletons received medical treatment in Dallas immediately after the accident, 61a, but other medical and damages-related witnesses are located in the Eastern District, albeit near Dallas, such as providers who treated Amy in Plano

[2] Johnny Soto was also at the scene of the accident when it occurred but has not executed an affidavit indicating what, if anything, he saw of the collision. Nor has Volkswagen ever set forth what testimony, if any, he might be able to give about the accident.

and Mariana's teachers, neighbors and friends who could "describe her character, life, and the impact her death has had on her family." 86a-89a, 120a, 140a.

SUMMARY OF ARGUMENT

Volkswagen's burden in this proceeding is extremely heavy: it must show that this is one of the very few "really extraordinary causes" justifying mandamus relief in the § 1404(a) setting. Because of wide district court discretion over transfer motions, the violence frequent mandamus review would do to the purpose of § 1404(a), and the reluctance to allow mandamus to undermine Congress's policy limiting appeal to final judgments, mandamus has been very sparingly used in § 1404(a) cases. *See* Point I, *infra.*

In this case, Volkswagen has not cleared this uncommonly high bar. Initially, the district court properly counted the plaintiff's choice of venue as one factor weighing against transfer. That has been the approach sanctioned by this Court for forty years and there are several reasons why the Court should reject Volkswagen's explicit request to reverse course, including binding Supreme Court precedent, aversion to creating a circuit split, Congress's statutory policy favoring broad venue choice under 28 U.S.C. § 1391, and the important institutional value of *stare decisis*. Moreover, Volkswagen is incorrect that the panel's decision can be harmonized with the law of other circuits in light of the varying level of deference some courts give the plaintiff's choice of forum depending on the

circumstances of the case. In contrast to the notion of varying deference, the panel's approach *never* gives meaningful weight to the plaintiff's choice. *See* Point II(A), *infra*.

Finally, if the Singletons' choice of forum is given any weight at all, the district court's decision was not an abuse of discretion. The factors Volkswagen stresses, such as two witnesses who may have to incur an additional 2-4 hours of travel time, at best point weakly toward transfer. This Court should therefore deny the petition. *See* Points II(B), III, *infra*.

ARGUMENT

I. The Standard of Review: Mandamus is Properly Reserved for "Really Extraordinary Causes"

This Court has held that it will only "entertain" writs of mandamus seeking review of orders under §1404(a) where district courts did not correctly construe or apply the statute, failed to consider relevant factors, or committed a "clear abuse of discretion." *Ex Parte Chas., Pfizer & Co.*, 225 F.2d 720, 723 (5th Cir. 1955). Grants of the writ in § 1404(a) cases are extremely rare:

> Traditionally, mandamus has been available only to confine an inferior court to a lawful exercise of its prescribed jurisdiction. It is not to be used as a substitute for appeal. This is so even if hardship may result from delay or a perhaps unnecessary trial. The writ is appropriately issued when there is a usurpation of judicial power or a clear abuse of discretion. The power to issue the writ is discretionary and is sparingly exercised. It is a drastic and extraordinary remedy and is reserved for really extraordinary causes.

U.S. v. U.S. Dist. Court, So. Dist. of Tex., 506 F.2d 383, 384 (5th Cir. 1974) (citations omitted); *accord In re McClelland Engineers, Inc.*, 742 F.2d 837, 839 (5th Cir. 1984).

Much more is required than the appellate conviction that the district court erroneously decided for or against transfer. As this Court noted in *Garner v. Wolfinbarger*, 433 F.2d 117 (5th Cir. 1970), "[w]hile couched in other terms, what is urged upon us is that on balance the Northern District of Alabama is a more convenient forum than the Southern District. That is not the basis for a writ." *Id.* at 120-21. Accordingly, this Court long ago concluded that it will not simply reweigh the §1404(a) factors to achieve a better result, however off-kilter the district court's balancing appears in hindsight. *See Pfizer*, 225 F.2d at 723 ("We shall not attempt to... weigh and balance the factors"); *Humble Oil & Refining Co. v. Bell Marine Serv.*, 321 F.2d 53, 57 (5th Cir. 1963). Other circuits share this Court's parsimonious view of mandamus in §1404(a) cases.[3]

There are at least three important reasons why the writ is so sparingly used in this setting. First, more generous treatment would undermine the wide discretion given district courts to decide transfer motions. By its terms, §1404(a) recognizes the discretion inherent in transfer decisions, providing that "a district

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3 *See, e.g., In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003); *Sunbelt Corp. v. Noble, Denton & Assoc., Inc.*, 5 F.3d 28, 30 (3d Cir. 1993); *In re Scott*, 709 F.2d 717, 719 (D.C. Cir. 1983); *Codex Corp. v. Milgo Electronic Corp.*, 553 F.2d 735, 737 (1st Cir.), *cert. denied*, 434 U.S. 860 (1977).

court *may* transfer" a case to further convenience and the interests of justice. 28 U.S.C. §1404(a) (emphasis added); *compare* 28 U.S.C. §1406(a) (court "*shall* dismiss, or... transfer" case filed in improper venue); *see also Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir.) (§1404(a) motion "addressed to the discretion of the trial court"), *cert. denied*, 493 U.S. 935 (1989).

This discretion exists because "[t]he determination whether the circumstances warrant transfer of venue is peculiarly one for the exercise of judgment by those in daily proximity to the[] delicate problems of trial litigation." *Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966). Moreover, appellate courts appreciate that §1404(a) weighing and balancing are inherently subjective undertakings. "There is room for wide divergence of conclusion as to what serves convenience and justice." *Atlantic Coast Line Ry. Co. v. Davis*, 185 F.2d 766, 770 (5th Cir. 1950); *accord Codex*, 553 F.2d 735, 737 ("there will often be no single right answer"). In a widely quoted passage in *Ford Motor Co. v. Ryan*, 182 F.2d 329 (2d Cir.), *cert. denied*, 340 U.S. 851 (1950), Judge Jerome Frank recognized:

> "Weighing" and "balancing" are words embodying metaphors which, if one is not careful, tend to induce a fatuous belief that some sort of scales or weighing machinery is available. Of course, it is not. At best, the judge must guess, and we should accept his guess unless it is too wild.

Id. at 331-32.

Appellate review of §1404(a) orders is therefore "limited" because, institutionally, "it serves little purpose to reappraise such an inherently subjective decision." *Howell v. Tanner*, 650 F.2d 610, 616 (5th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982). As this Court summarized:

> We have acknowledged the wide discretion enjoyed by a district court and our considerable reluctance to superintend that decision by a writ of mandamus. This reluctance is borne of basic notions of institutional order and upon the common-sense realization that the system works best when able district judges, as here, are left to manage their own dockets.

In re Cragar Indus., 706 F.2d 503, 506 (5th Cir. 1983).

Second, mandamus is rarely granted in §1404(a) cases because of the danger appellate review poses for the underlying goals of the statute – to further convenience and efficiency, speed resolution on the merits and "prevent the waste of time, energy and money." *Van Dusen v. Barack*, 376 U.S. 612, 616 (1964) (quotations omitted). In 1952, as practice under the new section began to develop, the Third Circuit perceived the growing risk:

> We think [mandamus review of §1404(a) orders] will defeat the object of the statute. Instead of making the business of the courts easier, quicker and less expensive, we now have the merits of the litigation postponed while appellate courts review the question where a case may be tried.
>
> Every litigant against whom the transfer issue is decided naturally thinks the judge was wrong. It is likely that in some cases an appellate court would think so, too. But the risk of a party being injured either by the granting or refusal of a transfer order is, we think, much less than the certainty of harm through delay and

additional expense if these orders are subject to interlocutory review by mandamus.

All States Freight, Inc. v. Modarelli, 196 F.2d 1010, 1011-12 (3d Cir. 1952); *accord In re Carefirst of Md., Inc.*, 305 F.2d 253, 256 (4th Cir. 2002).

This case is a textbook example of how never-say-die litigation over venue can torpedo the actual purpose of §1404(a). In the district court, Volkswagen filed a lengthy factual memorandum supporting its motion, a separate legal brief, a reply, a supplemental reply, a motion for reconsideration, a reply in support of reconsideration – and then an entirely separate brief urging transfer by a different Volkswagen entity. In this Court, Volkswagen petitioned for mandamus and lost. Not to be deterred, it sought reconsideration and met with success at last. Discovery has been stayed since September 2007 and one trial setting has already been sacrificed. *See* Volkswagen Brf. at 16 n. 5. Volkswagen's war for transfer began in the trial court in 2006 and continues here two years later – mostly in service of shortening a single 4-5 hour round-trip car ride by two third-party witnesses who may never even appear at trial. Whatever else may be said of it, Volkswagen's transfer litigation has not promoted expeditious or inexpensive resolution of the merits, overall efficiency, or more than a few hours of anyone's convenience. Granting Volkswagen's petition will only ensure more of the same

as this Court's docket expands with other defendants' requests for second bites at the transfer apple.[4]

Finally and perhaps most importantly, the mandamus bar is extraordinarily high because lowering it would eat away at Congress' command that appeal be limited to final judgments. *See* 28 U.S.C. § 1291. "[I]t is contradictory to acknowledge... that direct appeal of a holding on a 1404(a) motion is not possible and then to allow what amounts to a full scale appeal through a mandamus proceeding." *Kasey v. Molybdenum Corp. of Am.*, 408 F.2d 16, 19 (9th Cir. 1969). Thus, mandamus petitions seeking review of §1404(a) orders "may not be used to thwart the congressional policy against piecemeal appeals." *Humble Oil*, 321 F.2d at 57 n. 4. The farther courts of appeal wander from the core purpose of mandamus – to guard trial and appellate court jurisdiction – and toward mere error correction, the more they tread on the clear Congressional proscription of interlocutory appeals.

In sum, Volkswagen must show that this is one of the handful of "really extraordinary causes" justifying mid-case appellate intervention.

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[4] Volkswagen and *amici* claim that this Court need not fear more requests for mandamus review because no petitions have arrived since the panel's decision. *See, e.g.*, Volkswagen Brf. at 48 n. 16. But many of the district court decisions Volkswagen notes ordered transfer and so would not generate petitions for review, and most issued while the Singletons' petition for rehearing *en banc* was pending. Rewarding Volkswagen's pursuit of transfer at all costs by loosening the transfer standard and lowering the mandamus bar can only increase appellate-level transfer litigation.

II. The District Court Did Not Abuse Its Discretion in Denying Volkswagen's Motion to Transfer

In deciding Volkswagen's motion to transfer, the district court weighed the standard §1404(a) factors. 3a-9a. It did not abuse its wide discretion in the process.

A. The District Court Properly Considered the Singletons' Choice of Forum

1. The Plaintiff's Choice of Forum is Included in the §1404(a) Balancing

The district court began by considering the Singletons' forum selection, noting that their choice "will not be disturbed unless it is clearly outweighed by other factors." 3a. This was a correct statement of the law in this and every other circuit.

The factors to be considered in deciding a §1404(a) motion derive from *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). In that decision, the Supreme Court confronted the common law doctrine of inter-district *forum non conveniens* and held that, "unless the balance is strongly in favor of defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.* at 508. In *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955), the Supreme Court held that § 1404(a) did not merely codify *forum non conveniens* but "intended to permit courts to grant transfers upon a lesser showing of inconvenience." *Id.* at 32. Still, "[t]his is not to say that the relevant factors have changed *or that plaintiff's choice of forum is not*

to be considered, but only that the discretion to be exercised is broader." *Id.* (emphasis added). This holding is in accord with the Reviser's Note codified with the section, which provides: "Subsection (a) was drafted in accordance with the doctrine of *forum non conveniens*." 28 U.S.C. § 1404(a), Reviser's Note.

Since *Gilbert* and *Norwood*, this Court has repeatedly reaffirmed that the plaintiff's choice of forum must be included in the §1404(a) balancing. In *Rodriguez v. Pan Am. Life Ins. Co.*, 311 F.2d 429 (5th Cir. 1962), *vacated on other grounds*, 376 U.S. 779 (1964), a *forum non conveniens* case, the Court noted that defendants bear the same "burden of clear showing" under *forum non conveniens* and §1404(a), and that "whether it be by transfer order under the statute or by dismissal order under the doctrine of *forum non conveniens* the plaintiff's privilege to choose, or not be ousted from, his chosen forum is highly esteemed." *Id.* at 433-34.

Three years after *Rodriguez* – in a case where no party lived in the district where the case was filed, all witnesses lived 360 miles away and beyond the court's process, and the conduct giving rise to the case occurred outside the district – the trial court denied transfer and this Court denied the petition for mandamus. *See Ex Parte Gulf, C&SF Ry. Co.*, 308 F.2d 803 (5th Cir. 1962). The decision is explicable only if the plaintiff's choice was deemed a factor to be weighed against the many others favoring transfer, such as the location of witnesses.

In *Manning*, the Court observed that plaintiff's forum selection "is a factor, held in varying degrees of esteem, *to be weighed against other factors*;" that "at the very least" it placed the burden on the defendant to justify changing venues; and that plaintiff's "'privilege... not to be ousted from his chosen forum is highly esteemed.'" 366 F.2d at 698 (emphasis added, quoting in part *Rodriguez,* 311 F.2d at 434). The defendant offered "several impressive contentions" supporting transfer, but the district denied the motion and this Court affirmed. *Id.*

In *Garner*, this Court rejected the plaintiff's argument that its choice of forum was inviolate because the case had been brought under federal securities law. *See* 433 F.2d at 119. Instead, the Court held that the general rule applied and quoted *Manning's* holding that the plaintiff's "statutory privilege of choosing his forum... [is] to be weighed against other factors." *Id.* The plaintiff's choice "is not controlling," the Court continued; "[u]ltimately the trial judge must use his discretion." *Id.*

In *Marbury-Pattillo Const. Co., Inc. v. Bayside Warehouse, Inc.*, 490 F.2d 155 (5th Cir. 1974), this Court affirmed the denial of a transfer motion, though more witnesses were located in the proposed transferee forum, and noted that *Gilbert* had been "careful to point out 'Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum shall rarely be disturbed.'" *Id.* at 158 (quoting *Gilbert*, 330 U.S. at 508). "Our analysis of Bayside's motion is that it

hardly balanced at all," this Court held, "much less raised *a 'strong balance'* in its behalf." *Id.* (emphasis added).

In *Howell v. Tanner*, 650 F.2d 610 (5th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982), the Court affirmed the decision to transfer and reiterated the applicable standard: "The plaintiff's choice of forum should not be disturbed unless it is clearly outweighed by other considerations." *Id.* at 616.

In *In re McDonnell-Douglas Corp.*, 647 F.2d 515 (5th Cir. 1981), the Court stressed once again that "unless the balance is strongly in favor of the defendant," plaintiff's choice should not be disturbed. *Id.* at 517 (emphasis added). Although the plaintiffs did not reside in the chosen district, the Court declined to issue the writ: "Considering the convenience of the parties and the witnesses, the balance does not weigh *so heavily in favor of the defendant* as to justify denying the plaintiff's choice of forum." *Id.* (emphasis added).

In *Peteet*, the Court affirmed the denial of transfer and opened its analysis by observing: "To begin, the plaintiff is generally entitled to choose the forum." *Id.* at 1436. The Court cited *Rodriguez* and quoted its statement that the plaintiff's selection "is highly esteemed." *Id.* It then pointed to the defendant's delay and failure to show greater convenience as further reasons for affirming.

Finally, in *In re Horseshoe Entertainment*, 337 F.3d 429 (5th Cir.), *cert. denied*, 540 U.S. 1049 (2003), this Court overruled the district court's refusal to

transfer an employment discrimination case. Examining the role of the plaintiff's forum selection, this Court held 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." 337 F.3d at 434-35 (citing *Garner*, 433 F.2d at 119). The Court held that if legally irrelevant factors were excluded and the proper ones were "added into the analysis, the factors favoring transfer *substantially* out weigh the single factor of the place where the plaintiff chose to file the suit." *Id.* at 435 (emphasis added). *Horseshoe Entertainment* is perfectly consistent with its predecessors in its reaffirmation of the plaintiff's choice as one factor to be weighed in the balance, and an element that should be "substantially out weigh[ed]" before transfer is ordered.

These decisions constitute a solid body of circuit precedent followed for more than forty years. The opinions differ marginally in the language used to articulate the weight to be accorded the plaintiff's choice, varying between the "highly esteemed" and "balance [must be] strongly in favor of the defendant" formulations. Many decisions also specifically note that the plaintiff's choice is a factor to be weighed and balanced with the others. *See Manning, Garner, Horseshoe Entertainment, supra.* There is no substantive difference between these versions, however. Either conceived of as its own factor, or as the reason why defendants must establish that the other factors strongly point toward transfer, the

plaintiff's choice affects the analysis in the same way: a district court may deny the transfer motion in particular cases where the plaintiff's choice stands on one side of the ledger and the factors on the other only modestly favor transfer. In that event, the plaintiff's choice, viewed as its own factor, will sufficiently counterbalance weak pro-transfer factors. Or, put differently, the defendant will have failed to show that the other factors strongly support transfer. Either way, numerous courts have made clear that transfer may be denied when it promises only slight gains in convenience.[5]

This is not to say that plaintiff's choice is "dispositive" or "conclusive." *See* Volkswagen Brief at 26, 36, 40. Volkswagen is correct that no one factor is. *See* *Horseshoe Entertainment,* 337 F.3d at 435. But the fact that plaintiff's choice is not always or *per se* dispositive does not mean that it can *never* be so. Any factor, including plaintiff's choice, can be determinative in a particular case if it tips the ultimate balance toward or away from transfer, either because the other factors even out or because they simply do not weigh very strongly in one or the other direction. That is no less true of the plaintiff's choice as it is of any other factor. Hence, to take just one example, in *Gulf, C&SF*, this Court upheld the district

[5] *See, e.g., Renaissance Learning, Inc. v. Metiri Group, L.L.C.*, __ F. Supp. 2d __, 2008 WL 220634 at * 6 (W.D. Mo. 2008); *Mullins v. Equifax Information Services, L.L.C.*, 2006 WL 1214024 at * 5 (E.D. Va. 2006); *Cont. Cas. Co. v. Am. Home Assurance Co.,* 61 F. Supp.2d 128, 131 (D. Del. 1999); *Brown v. News Grp. Pub., Inc.*, 563 F. Supp. 86, 88 (M.D. Penn. 1983).

court's decision denying transfer even though no factor favored the challenged venue except the plaintiff's choice. *See* 308 F.2d at 804.[6]

In this case, the district court did not simply ask where the plaintiff filed the action and end the analysis, thereby treating the Singletons' choice as "unassailable." Volkswagen Brf. at 28. Rather, it fully considered and assigned weight in one or the other direction to all relevant factors. 4a-9a, 11a-12a. Of course, Volkswagen disagrees with the relative weight placed here and there and how the scale tips in the end, but the district court did not abuse its discretion.

2. The Court Should Reaffirm the Traditional Weight Afforded to the Plaintiff's Choice of Forum

The main significance of the panel's opinion lies in its effective if implicit overruling of the decades of precedent establishing the role played by the plaintiff's choice of forum in the §1404(a) analysis. Volkswagen now asks the Court to make the overruling express. *See* Volkswagen Brf. at 31 n. 13. There are compelling reasons why this Court should decline to do so.

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[6] *See also, e.g., Headrick v. Atchison, T. & S.F. Ry. Co.*, 182 F.2d 305 (10th Cir. 1950); *Milwaukee Elec. Tool Corp. v. Black & Decker, Inc.*, 392 F. Supp. 2d 1062 (W.D. Wis. 2005); *Rutherford v. Goodyear Tire & Rubber Co.*, 943 F. Supp. 789 (W.D. Ky. 1996), *aff'd,* 142 F.3d 436 (6th Cir. 1998); *Young v. Armstrong World Indus.*, 601 F. Supp. 399 (N.D. Tex. 1984).

(a) <u>The Panel's Opinion Effectively Overrules this Court's Decisions Giving Weight to the Plaintiff's Choice of Forum</u>

Initially, it is important to be clear that the panel's opinion gives no deference whatsoever to the plaintiff's choice of forum and thus effectively overrules *Garner, Bayside Warehouse, Howell*, *McDonnell-Douglas, Peteet* and *Horseshoe Entertainment*, while also at least undermining the earlier decisions of *Rodriguez* and *Gulf, C&SF.* The panel rejected the district court's requirement that the balance lean "substantially" in favor of transfer and held that a movant's sole burden is to show "good cause" for the transfer, "mean[ing] that a moving party must demonstrate that a transfer is 'for the convenience of parties and witnesses, in the interest of justice.'" *In re Volkswagen, AG*, 506 F.3d 376, 384 (5th Cir. 2007) ("Volkswagen III") (quoting in part §1404(a)). Though the panel ritually recited that "[p]laintiff's choice of forum is entitled to deference," *see id.*, the only measure of that deference is to place the burden to show transfer is appropriate on the moving defendant.

In reality, the panel opinion grants no deference to the plaintiff's choice at all. To say that defendants bear the burden of showing the transfer is justified is to say nothing more than that movants must show entitlement to the relief sought by their own motions. The party making the §1404(a) motion would always shoulder that burden and always has – just like any other movant seeking any other sort of

ruling from any court. "Our adversarial system depends on each party, through counsel, zealously to pursue whatever arguments may entitle it to relief. It is the burden of the party seeking the benefit to raise the legal arguments justifying the benefit." *Arenson v. So. Univ. Law Ctr.*, 43 F.3d 194 (5th Cir. 1995); *accord Van Duyn v. Baker School Dist. 5A*, 502 F.3d 811, 820 (9th Cir. 2007) (burden of persuasion usually falls on party seeking relief). It in no way esteems the plaintiff's forum selection merely to require the defendant, as in all motions of all types, to persuade the court to order the relief sought by his own pleading.

Likewise, under the panel's approach, when the various private and public interest factors are analyzed, the plaintiff's selection is not counted among them and weighed in the balance, contrary to precedent instructing otherwise. *See, e.g., Manning, Garner, Horseshoe Entertainment, supra*. That is why the panel's decision concludes by stating, "no relevant factor favors the Singletons' chosen forum." *Volkswagen III*, 506 F.3d at 387. Of course, if the plaintiff's selection is counted as a factor, it "favors the Singletons' chosen forum." The panel's decision honors forum selection in name only.

(b) This Court Should Reaffirm the Rule Affording Weight to the Plaintiff's Choice of Forum

There are important reasons why this Court should decline Volkswagen's and the panel's invitation to rewrite the law that has governed §1404(a) for decades.

First, this Court is not free to craft a new rule ignoring the plaintiff's choice of forum in the § 1404(a) balancing. It is bound by *Norwood*'s holdings that "the relevant factors" articulated in *Gilbert* have not changed and that "plaintiff's choice of forum is... to be considered." 349 U.S. at 32. As discussed above, the panel's opinion gives plaintiff's choice no real consideration at all, but simply employs it as rhetorical ballast for the preexisting and universal rule that a movant must justify the ruling he requests. This sort of cosmetic deference directly violates the holding of *Norwood.*

Second, the panel's decision finds little support in the precedents of this Court or the Supreme Court. As for the former, the panel relies chiefly on *Humble Oil*, *see Volkswagen III*, 506 F.2d at 381-82, but that decision has become an outlier in §1404(a) jurisprudence. Despite a tide of transfer litigation through the years, the decision has not been cited once by this Court for the notion that plaintiff's choice does no more than require defendant to make out the § 1404 elements. That is perhaps because it construed an admiralty rule similar but not identical to §1404(a), and indeed the venue in *Humble Oil* was not chosen at all but compelled under the admiralty rules. *See* 321 F.2d at 56. *Humble Oil* has now been superseded by four decades of contrary law in this circuit and elsewhere.[7]

[7] The panel and Volkswagen also rely on a passage in *Veba-Chemie AG v. M/V Getafix*, 711 F.2d 1243 (5th Cir. 1983) stating that "[t]he heavy burden traditionally imposed on defendants by the *forum non conveniens* doctrine – dismissal permitted only in favor of a

The primary basis for the panel's opinion – and a point urged by Volkswagen – is the distinction between §1404(a) and *forum non conveniens*. *See Volkswagen III*, 506 F.3d at 383; Volkswagen Brf. at 29-31. There is no disagreement that, under *Norwood,* defendants may obtain transfer on a lesser showing of inconvenience under §1404(a) than under *forum non conveniens*. *See* 349 U.S. at 32. But it is equally clear that the plaintiff's choice remains a factor to be considered, *see id.*, which the panel's standard utterly fails to do. Instead, the panel's and Volkswagen's interpretation of *Norwood* is that transfer is now required in cases like this one where, before, *forum non conveniens* dismissal might have been denied. This ignores the unambiguous language of §1404(a), which does not mandate transfers but provides only that district courts "may" transfer cases when appropriate under the statute. It also disregards *Norwood*'s holdings that that §1404(a) is "intended *to permit* courts to grant transfers upon a lesser showing of inconvenience," and that the district court's "*discretion* to be exercised is broader." 349 U.S. at 32 (emphasis added)*; accord Ellis v. Great S.W. Corp.*, 646 F.2d 1099, 1103 n. 4 (5th Cir. 1981) (§1404(a) "*permits* federal courts to grant transfers on a lesser showing") (emphasis added). Transfer is generally

substantially more convenient alternative – was dropped in the § 1404(a) context." *Volkswagen III*, 506 F.3d at 383; Volkswagen Brf. at 30. The reliance is ironic because *Veba-Chemie* is a *forum non conveniens* case, and the panel disregards *Rodriguez*'s discussion of § 1404(a) for that reason. *See* 506 F.3d at 382-83. Regardless, there is no real discussion of the weight to be accorded plaintiff's choice of forum under § 1404(a) in *Veba-Chemie*, which did not consider that issue, and the *dicta* from that decision can hardly be said to have determined the question.

permissive, not mandatory., and by misreading *Norwood* the panel erroneously converts a tool meant to broaden district court discretion into an inflexible transfer requirement curtailing it.[8]

Other circuit courts have recognized that the plaintiff's forum choice still commands heightened deference while at the same time noting that §1404(a) gives discretion to transfer on the basis of a lesser showing. *See, e.g., A. Olinick & Sons v. Dempster Bros., Inc.,* 365 F.2d 439, 444-45 (2d Cir. 1966); *Headrick*, 182 F.2d at 310-11. This Court has done so also. *See, e.g., Rodriguez*, 311 F.2d at 434 (transfers "are quick and ready tools for our trial courts," but plaintiff's choice still "highly esteemed"). Perhaps Learned Hand provided the best exposition of the principle that, while enactment of §1404(a) permits transfers in cases of less dramatic inconvenience, the plaintiff's choice retains weight, even if that weight defies precise quantification:

> However, as I understand it, the privilege granted by Sec. 15 [venue provision in antitrust cases] still counts in the scale; a defendant must do more than show that the transfer will on the whole make the trial more convenient; it must make the trial markedly more convenient. It

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8 Volkswagen also strongly overreads *Norwood*, *Ex Parte Collett*, 337 U.S. 55 (1949), and *Van Dusen* in attempting to draw significance from the fact that the Supreme Court upheld district court decisions to transfer cases away from plaintiffs' chosen fora in those cases. *See* Volkswagen Brf. at 37-39. The *Norwood* Court did not hold that transfer in that case was required, only that the district court could discretionarily order one. *See* 349 U.S. at 29-32. Neither *Collett* nor *Van Dusen* concerned the weight to be given the plaintiff's choice of forum, and, as in *Norwood*, the Court did not hold that transfer was mandatory. That the Court did not "instruct the district court to afford special deference to the plaintiff's choice," Volkswagen Brf. at 39, is meaningless; there is no significance to be derived from the absence of *dicta* in Supreme Court decisions.

> does not trouble me that I cannot say how much more that must be; we are often faced with indeterminate and indeterminable standards: reasonable notice, reasonable cause, gross negligence, the requisite proof in fraud or in a criminal prosecution. Much of life depends upon such choices, and he is a pedant who thinks otherwise.

Ryan, 182 F.2d at 332 (L. Hand, J., concurring).

Third, adopting the panel's approach would put this Court at odds with the courts of every other circuit, all of which value the plaintiff's venue choice more or less as this Court has. In other words, they all either accord some level of heightened deference to the plaintiff's choice of forum – such as by requiring that the balance be strongly in favor of transfer – or count the plaintiff's choice as a factor to be balanced with the others.[9] As Moore's summarizes:

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[9] First Circuit: *See Auto Europe, L.L.C., v. Conn. Indem. Co.,* 321 F.3d 60, 65 (1st Cir. 2003) (weight properly placed on forum choice); *Coady v. Ashcraft & Gerel*, 223 F.3d 1, 11 (1st Cir. 2000) ("strong presumption" favoring choice, citing *Gilbert*); *Boateng v. Gen. Dynamics Corp.*, 460 F. Supp. 2d 270, 275 (D. Mass. 2006) (choice balanced with other factors and given "great weight").

Second Circuit: *See D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 106-07 (2d Cir. 2006) (choice is independent factor); *Golconda Mining Corp. v. Herlands*, 365 F.2d 856, 857 (2d Cir. 1966) (choice is "a factor accorded substantial weight"); *PowerDsine Inc. v. Broadcom Corp.,* __ F. Supp. 2d __, 2008 WL 268808 at * 7 (E.D.N.Y. 2008) (same).

Third Circuit: *See In re Amendt*, 2006 WL 358731 at *2 (3d Cir. 2006) (listing choice as factor); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995) ("courts normally defer to a plaintiff's choice of forum"); *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970) (choice is "a paramount consideration;" balance must be "strongly in favor" of transfer), *cert. denied*, 401 U.S. 910 (1971).

Fourth Circuit: *See Arabian v. Bowen*, 1992 WL 154026 (4th Cir. 1992) (choice "accorded great weight;" defendant "bears a heavy burden," citing *Gilbert*); *Dick v. Hood*, 2006 WL 3299987 at * 2 (E.D. Va. 2006) (listing choice as factor and noting it is "entitled to substantial weight"); *Mullins*, 2006 WL 1214024 at * 5 (E.D. Va. 2006) (same).

As a general rule, the plaintiff's choice of forum is given significant weight and will not be disturbed unless the other factors weigh substantially in favor of transfer. The amount of deference given to

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Sixth Circuit: *See West Am. Ins. Co. v. Potts*, 1990 WL 104034 (6th Cir. 1990) ("Foremost consideration" given choice; balance must weigh "strongly in favor of transfer"); *Nicol v. Koscinski*, 188 F.2d 537, 537 (6th Cir. 1951) (same); *Fusi v. Emery Worldwide Airlines, Inc.*, 2007 WL 4207863 at * 11 (S.D. Ohio 2007) (same).

Seventh Circuit: *See Nat'l Presto Indus.*, 347 F.3d at 664 (balance must strongly favor transfer, quoting *Gilbert*); *Zelinski v. Columbia 300, Inc.*, 335 F.3d 633, 643 (7th Cir. 2003) ("strong presumption") *Tice v. Am. Airlines*, 162 F.3d 966, 974 (7th Cir. 1998) (district court properly treated plaintiff's choice as factor), *cert. denied*, 527 U.S. 1036 (1999).

Eighth Circuit: As the Singletons acknowledged in their petition for rehearing, the Eighth Circuit used a formulation similar to the panel's when referring to the defendant's burden of persuasion in *Terra Int'l v. Miss. Chem. Corp.*, 119 F.3d 688 (8th Cir.), *cert. denied*, 522 U.S. 1029 (1997). *See* Volkswagen Brf. at 46. However, the Court in *Terra Int'l* also listed the plaintiff's forum choice as a separate factor to be considered in the balancing, and district courts in the Eighth Circuit apply the universal rule assigning weight to the plaintiff's choice. *See, e.g., Renaissance Learning,* 2008 WL 220634 at * 6 (no transfer if balance only slightly favors transfer); *Sparks v. Goalie Entertainment, Inc.*, __ F. Supp. 2d __, 2007 WL 962946 at **2-3 (S.D. Iowa 2007) (listing choice as factor and noting balance must weigh "heavily" and "strongly" for transfer); *Tidemann v. Schiff, Hardin & Waite*, 2002 WL 31898165 at * 1 (D. Minn. 2002) (*Terra Int'l* establishes "strong presumption in favor of the nonmoving party").

Ninth Circuit: *Gherebi v. Bush*, 352 F.3d 1278, 1302-03 (9th Cir. 2003) (strong showing required, and strong presumption applied, citing *Gilbert*), *vacated on other grounds*, 542 U.S. 952 (2004); *Decker Coal Co. v. Com. Ed. Co.*, 805 F.2d 834, 843 (9th Cir. 1986) (same); *Sec. Invest. Protection Corp. v. Vigman*, 764 F.2d 1309, 1317 (9th Cir. 1985) (choice accorded substantial weight; factors must strongly favor transfer).

Tenth Circuit: *Fin. Instruments Grp., Ltd. v. Leung*, 2002 WL 321899 at * 2 (10th Cir. 2002) (unless balance strongly favors transfer, plaintiff's choice should rarely be disturbed); *Scheidt v. Klein*, 956 F.2d 963, 965 (10th Cir. 1992) (same).

Eleventh Circuit: *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 n. 1 (11th Cir. 2005) (weight given plaintiff's choice a factor); *Robinson v. Giamarco & Bill, P.C.*, 74 F.3d 253, 260 (11th Cir. 1996) (must be "clearly outweighed by other considerations"); *Pilkington v. United Airlines, Inc.*, 855 F. Supp. 1248 (M.D. Fla. 1994) (balance must strongly favor transfer).

D.C. Circuit: *Scott*, 709 F.2d at 720 (court must apply traditional *forum non conveniens* factors, "including the plaintiff's choice of forum"); *FC Investment Grp. LC v. Lichtenstein*, 441 F. Supp. 2d 3, 12 (D.C. Cir. 2006) (choice counted as factor and "ordinarily afforded great deference"); *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 11 (D.D.C. 2007) ("great deference" and "strong presumption" accorded choice).

> the plaintiff's choice of forum ranges from considering it the "paramount" concern to considering it merely one of the many relevant factors, with various formulations in the middle.

17 James W. Moore, *Moore's Federal Practice* 3d § 111.13[1][c] at 111-68 (3d ed. 1997). Wisely, this Court is "always chary to create a circuit split." *Alfaro v. C.I.R.*, 349 F.3d 225, 229 (5th Cir. 2003).

In response, Volkswagen accuses the Singletons of "parsing favorable language from cases that are not focused on the deference issue." Volkswagen Brf. at 42. But the decisions cited herein clearly set forth the basic standards used in the other circuits to evaluate §1404(a) motions. The Singletons are not somehow "parsing" or misrepresenting them. Volkswagen also argues that some of the other circuit courts "have held that the deference varies with the circumstances of the particular case." *Id.* Volkswagen may be correct about that, but as discussed below, that is not what the panel opinion does. The panel's standard does not vary based on the circumstances – it *never* requires the balance to tip strongly toward transfer or counts the forum choice as its own factor. *See* Point II(A)(3), *infra*. Volkswagen cannot point to a single circuit that, in all cases and regardless of the circumstances, gives the plaintiff's choice no weight beyond the empty reiteration that the defendant bears the burden of persuading the court to grant its motion.

Fourth, this Court's traditional rule according weight to the plaintiff's choice honors Congress's policy to afford plaintiffs broad venue choices under 28 U.S.C.

§ 1391. "The expanding economy of the nation and the far-flung activities of great corporations eventually made intolerable a rule that restricted federal suits against a corporation to the district of incorporation, especially if that district was removed from the scene of corporate activities." 14 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3811 (3d ed. 2008). In response, Congress decided to make companies like Volkswagen broadly amenable to suit wherever they reside. *See* 28 U.S.C. § 1391(a), (c). The plaintiff's right to choose the venue is thus a "privilege" given by Congress, *see Balt. & Ohio Ry. Co. v. Kepner*, 314 U.S. 44, 52-54 (1941), reflecting its deliberate policy choices. *See Travis v. U.S.*, 364 U.S. 631, 634 (1961). "The plaintiff is, after all, master of the complaint, and this includes the choice of where to bring suit." *Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 718 (7th Cir. 2002).

Of course, §1404(a) constitutes a Congressionally-mandated restriction on the plaintiff's right to choose the venue, but the Supreme Court has repeatedly cautioned that the section should not be construed so as to unnecessarily narrow the plaintiff's permissible venue choices: "There is nothing, however, in the language or policy of §1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue." *Van Dusen*, 376 U.S. at 633-34; *accord Ferens v. John Deere Co.*, 494 U.S. 516, 526-27 (1990) ("The section exists to

eliminate inconvenience without altering permissible choices under the venue statutes"). Thus, the plaintiff is not obligated to file the case in the most convenient venue. *See, e.g., McCuin v. Tex. Power & Light Co.*, 714 F.2d 1255, 1261-62 (5th Cir. 1983); 17 Moore, § 110.01[4][a] at 110-18. Nor, contrary to Volkswagen's assertion, *see* Volkswagen Brf. at 28, should the court dismiss the plaintiff's choice and embark on its own quest for the case's happiest home. *See Shapiro, Lifschitz & Scram, P.C. v. Hazard*, 24 F. Supp. 2d 66, 71 (D.D.C. 1998); *Amchem Prods, Inc. v. GAF,* 64 F.R.D. 550, 551 (N.D.GA 1974). The more §1404(a) is transformed into a hard and fast rule inflexibly confining the plaintiff to, *e.g.*, the place where the claim arose, the plaintiff's current residence, or a courtroom no more than 100 miles from the home of some fact witnesses, the more it veers into unnecessary conflict with §1391. As then-District Judge Irving Kaufman, an early commentator on §1404(a), correctly observed:

> The defendant's suggestion is that it is the court's function to weigh the convenience of the parties and then pick a district which appears to be the most convenient of several forums. This principle cannot be accepted because the venue provisions would then become nothing more than provisions regulating the place of service of summons... [This] would create such a state of uncertainty that no one could ever state with any degree of assurance that the proper forum had been selected for bringing the action.

Lucas v. N.Y. Cent. R.R., 88 F. Supp. 536, 538 (S.D.N.Y. 1950).

Finally, overruling decades of §1404(a) law, as Volkswagen requests, shows little respect for the important value of precedent. The doctrine of *stare decisis*

"permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). Thus, "every successful proponent of overruling precedent had borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Id.* at 266. In the case of procedure, the Supreme Court often looks to see if the rule has become "unworkable in practice." *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965); *accord U.S. v. I.B.M. Corp.*, 517 U.S. 843, 856 (1996).

Volkswagen has hardly shouldered its "heavy burden" to justify overruling the numerous decisions assigning weight to the plaintiff's choice of forum. Nor could it. The rule in question has been in effect in every circuit since at least *Gilbert*, that is, for sixty years. It is difficult to imagine how a basic rule applied thousands of times by district courts of every description throughout the country over that many decades could ever be called unworkable. *See Randall v. Sorrell*, 548 U.S. 230, 126 S. Ct. 2479, 2489 (2006) (*stare decisis* has extra force "where, as here, the principle has become settled through iteration and reiteration over a long period of time"); *I.B.M.*, 517 U.S. at 856 (government could not argue that decision in effect for 80 years is unworkable). To be sure, there may be individual

applications of the rule that appear incorrect under the appellate microscope. That is inevitable when district judges are given highly discretionary tasks entailing the weighing and balancing of multiple factors in different factual settings. At different moments, some of the many district courts in this and every circuit will appear more "pro-transfer" and others "anti-transfer," and those loose designations will fluctuate over time as judges and dockets change. Neither those inevitable vicissitudes nor this one case provides good reason to toss out a rule generally in effect throughout the nation and relied upon by generations of lawyers and judges. *See, e.g., Randall*, 126 S. Ct. at 2489 (noting "instability and unfairness that accompany disruption of settled legal expectations").[10]

3. **Varying Deference is a Matter for the District Court's Discretion**

Volkswagen's way of harmonizing the panel's decision with the law in other circuits is to argue that the plaintiff's choice is entitled to less deference when the

[10] *Amici* who claim there is a systemic problem concerning the application of §1404(a) in the Eastern District naturally fail to mention the innumerable cases transferred out of the district in recent years. *See, e.g., Network-1 Security Solutions, Inc. v. D-Link Corp.*, 433 F. Supp. 2d 795, 802-03 (E.D. Tex.) (collecting cases transferred from Eastern District), *aff'd*, 183 Fed. Appx 967 (Fed. Cir. 2006). Overall, courts in the Eastern District transferred approximately as many cases in 2007 (83) as did, *e.g.*, those in the Western District of Louisiana (81), which the Singletons believe is a comparably sized and burdened court. *See* Letter from David Maland to Michael Smith (attached hereto at Addendum). Patent cases raise somewhat unique transfer-related questions, *see Network-1 Security Solutions*, 433 F. Supp. 2d at 803, and to whatever degree *amici's* complaints about the broad patent venue rules and current patent practice have merit, *amici* themselves note that Congress is in the process of considering legislative changes. *See* American Intellectual Property Law Ass'n Brf. at 3.

plaintiff does not live in the chosen forum and/or the case did not arise there. *See* Volkswagen Brf. at 41-49.

Crucially, the approach Volkswagen invokes – varying levels of deference based on the circumstances of the case – is not at all similar to the rule announced by the panel. Courts that have endorsed the concept of varying deference usually start with the general rule rejected by the panel that the plaintiff's choice ordinarily requires a strong showing to be overcome. One district court decision Volkswagen cites is typical: "Although it is true that a plaintiff's choice of forum should not be altered unless the balance of factors weighs strongly in favor of transfer, the plaintiff's selection is entitled to less deference here," citing insufficient forum contacts. *Kwik Goal, Ltd. v. Youth Sports Pub., Inc.*, 2006 WL 1517598 at * 3 (S.D.N.Y. 2006) (citations and quotations omitted).[11] Thus, in cases where the plaintiff resides in the chosen forum and/or some operative facts occurred there, the courts Volkswagen cites weigh the plaintiff's choice of forum as a factor in the overall balance and/or require a strong showing to overcome it. By contrast, under the panel's opinion, the plaintiff's choice is *never* treated as a factor in the balancing or as the basis for requiring the balance to tilt strongly toward transfer –

[11] *See, also, e.g., Chicago, Rock Island & Pac. R.R. v. Igoe*, 220 F.2d 299, 304 ("A large measure of deference is due to the plaintiff's freedom to select his own forum"); *Lou v. Belzberg*, 834 F.2d 730, 739 ("great weight is generally accorded plaintiff's choice of forum"); *Werner v. Stonebridge Life Ins. Co.*, 2007 WL 602104 at * 3 (D. Vt. 2007) (same). Virtually all of the district court decisions cited by Volkswagen state this general rule and then proceed to apply diminished deference as an exception.

not in cases where the plaintiff resides in the forum, not in cases where the facts may have occurred in the forum, not in any case at all. It is telling that Volkswagen is forced to call upon an entirely different rule than the one actually employed by the panel in order to defend the panel's decision.

Notably, many courts do not lessen the weight assigned to the plaintiff's choice regardless of where the plaintiff lives or the claim arose.[12] Nor did this Court alter the consideration given the plaintiff's choice of forum in *Horseshoe Entertainment*, though the plaintiff in that case lived outside his chosen forum. *See* 337 F.3d at 430-31. But even when courts do, the deference rarely disappears altogether, as it does in every case under the panel's opinion. Rather, the plaintiff's choice is still accorded some, albeit reduced, weight in the balancing.[13] As one court put it in a *forum non conveniens* case, "less deference is not the same thing as no deference." *Ravelo Monegro v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2000); *Wang v. LB Int'l, Inc.*, 2005 WL 2090672 at * 2 (W.D. Wash. 2005) (same

[12] *See, e.g., Affymetrix, Inc. v. Synteni, Inc.*, 28 F. Supp.2d 192, 199-200 (D. Del. 1998) (balance must tip strongly toward transfer even if plaintiff filed away from "home turf"); *Ashmore v. NE Petroleum Div. of Cargill, Inc.*, 925 F. Supp. 36, 39 (D. Maine 1996) (no diminished deference though all but one plaintiff resides outside district); *Black & Decker Corp. v. Amirra, Inc.*, 909 F. Supp. 633, 635-36 (W.D. Ark. 1995) (transfer may be less inconvenient to plaintiff, but choice still paramount and balance must tip strongly toward transfer); *Uniprop Manuf. Housing Comm. Income Fund II v. Home Owners Funding Corp. of Am.*, 753 F. Supp. 1315, 1323 (W.D.N.C. 1990) ("It is not enough for [defendant]... to merely state that Plaintiff resides in Michigan instead of this district;" plaintiff's choice weighs against transfer).

[13] *See, e.g., Werner,* 2007 WL 602104 at * 3 (applying diminished deference but still giving "moderate weight" to choice); *Aldridge v. Forest River, Inc.*, 436 F. Supp. 2d 959, 961 (N. D. Ill. 2006) (deference diminished, but choice still "entitled to some deference" and is factor to be weighed).

in §1404(a) case). Here, again, the panel's opinion reads the plaintiff's choice out of the balancing exercise altogether.

The varying deference rule is applied very differently in different courts. Some diminish the deference otherwise accorded the plaintiff's choice when the plaintiff does not reside in the forum or when no operative facts occurred there, while others require both conditions to be present. *Compare, e.g., Zepherin v. Greyhound Lines, Inc.*, 415 F. Supp. 2d 409, 411 (S.D.N.Y. 2006) (less weight given where either circumstance present) *with Lou*, 834 F.2d at 739 (both circumstances must be present). Other courts look more generally for *any* "connection between the forum and the plaintiff's claim that reasonably and logically supports" the plaintiff's choice, *Samsung Electronics Co., Ltd. v. Rambus, Inc.*, 386 F.Supp.2d 708, 716 (E.D. Va. 2005), or any indication the choice "relates to [plaintiff's] legitimate, rational concerns," including the forum's "light docket and relatively quick case disposition time." *Joint Stock Soc. v. Heublin, Inc.*, 936 F. Supp. 177, 187 (D. Del. 1996).

This wide diversity is to be expected in light of the broad discretion vested in the district courts when deciding transfer motions. "Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quotation omitted).

"Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy." *Gilbert*, 330 U.S. at 508. The analysis should therefore be "flexible and multifaceted." *Stewart Org*, 487 U.S. at 31. Consequently, this Court should refrain from dictating a single and inflexible version of the "varying deference" concept. *See SEC v. Savoy Indus.*, 587 F.2d 1149, 1154 (D.C. Cir. 1978) (eschewing "fixed general rules" in § 1404(a) analysis). Rather, district courts in this circuit should feel free to exercise their discretion to apply whatever version of it may be most suited to the case at hand if and when appropriate – as indeed they already have.[14] In any event, even if the weight assigned to the Singletons' choice of forum in this case is diminished under the circumstances of this case, the district court's denial of Volkswagen's motion was not an abuse of discretion. *See* Point III, *infra*.[15]

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[14] *See, e.g., Ray Mart, Inc. v. Stock Building Supply of Tex.*, 435 F. Supp. 2d 578, 594 (E.D. Tex. 2006); *Spiegelberg v. Collegiate Licensing Co.*, 402 F. Supp. 2d 786, 790 (S.D. Tex. 2005); *Conway v. Lenzing Aktiengesellschaft*, 222 F. Supp. 2d 833, 834 (E.D. Tex. 2002).

[15] One thing this Court and district courts should not take into account when weighing the plaintiff's choice is the claim of "forum shopping." As this Court has held, counsel is inevitably "invited… in an adversary system" to "serve his client's interests" by selecting the most favorable forum, and "the motive of the suitor in making this choice is ordinarily of no moment." *McCuin,* 714 F.2d at 1261-62. Moreover, defendants necessarily engage in their own "forum shopping" when moving to transfer. *See Sierra Club v. Antwerp*, 523 F. Supp. 2d 5, 12-13 (D.D.C. 2007); *Fusi*, 2007 WL 4207863 at * 11. In neither case do the parties' motives or "gamesmanship" affect the analysis. *Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140, 1149-50 (5th Cir. 1984).

B. The Other §1404(a) Factors Do Not Compel Transfer

Consideration of the factors in the §1404(a) balancing other than the Singletons' choice of forum do not require transfer, though the district court surely could have exercised its discretion to grant the motion had it seen fit. As Volkswagen admits, several factors are neutral and do not support transfer. Those that do favor Dallas only weakly. When the Singletons' choice of forum is then given its traditional weight, the district court was well within its power to conclude that the overall balance does not mandate transfer.

In analyzing the §1404(a) factors in this case, this Court should "resist[] formalization and look[] to the realities that make for doing justice." *Koster v. (Am.) Lumberman's Mut. Casualty Co.*, 330 U.S. 518, 528 (1947) (describing application of *forum non conveniens*). As this Court observed of decisions involving jurisdictional questions, "they evidence common concern of the courts with finding the most practical and efficacious means of resolving the disputes before them. An interest in rendering justice rather than an automatistic reliance on rigid legalisms characterizes each of them." *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 334 (5th Cir. 1978). The Court should "look[] at the problem from the practical work-a-day world." *Amusement Equip., Inc. v. Mordelt*, 779 F.2d 264, 271 (5th Cir. 1985). This principle is relevant here since many of the contacts Volkswagen stresses

have far greater force on paper as "rigid legalisms" than they do in the real world of litigating cases like the one at bar.

1. Convenience and Cost to Witnesses

Working from the list of factors enumerated in *In re Volkswagen AG*, 371 F.3d 201, 202-03 (5th Cir. 2004) ("*Volkswagen I*"), Volkswagen first argues that the convenience and costs to witnesses mandates transfer. *See* Volkswagen Brf. at 11-14. There are only two witnesses who Volkswagen has made even a passing effort to describe with anything approaching the necessary specificity: Soto and Wiginton. Here and in the district court, Volkswagen mentions unnamed others such as EMS responders, unidentified medical personnel, wrecker service employee(s) and the medical examiner. *See id.* at 9, 13. But other than simply noting that such people exist, Volkswagen has not identified them (other than the medical examiner); indicated what specific testimony they might offer; explained why such testimony is important, relevant or disputed; indicated that they are likely to be called as trial witnesses; provided affidavits from any of them; or provided any proof that they oppose appearing in Marshall or would find doing so measurably inconvenient. 5a. Therefore, it is well settled that these witnesses should play no role in the transfer analysis:

> The courts have also been careful not to let a motion for transfer become "a battle of numbers." The party seeking the transfer must specify clearly, typically by affidavit, the key witnesses to be called

> and their location and must make a general statement of what their testimony will cover...
>
> If the moving party merely has made a general allegation that necessary witnesses are located in the transferee forum, without identifying them and providing sufficient information to permit the district court to determine what and how important their testimony will be, the application for transferring the case should be denied, as was true in the many cases cited in the note below.

15 Wright, Miller & Cooper, § 3851; *accord,* 17 Moore, § 111.13[1][f] at 111-83. Moreover, to whatever degree the mention of witnesses like these matters, the Singletons have noted the existence of damages witnesses located in the Eastern District, albeit close to Dallas. *See* pp. 5-6, *supra.*

As for Soto and Wiginton, Volkswagen generically asserts in all of one sentence that speeds, distances, impact sequence and the like are "critical to determining causation and liability." Volkswagen Brf. at 13. But no expert or other knowledgeable witness explained to the lower court how these two witnesses will actually help establish Volkswagen's defense. Perhaps the facts they witnessed will be used by used by Volkswagen's experts in forming their opinions, but in that event the experts are likely to be the live witnesses, since the Singletons do not dispute Soto's or Wiginton's recollections. In short, they may or may not actually testify, as the district court, with years of experience in vehicle product liability litigation as a practitioner and judge, well knew. "The learned and experienced trial judge was not unaware that litigants generally manage to try their

cases with fewer witnesses than they predict in motions such as these." *Gilbert*, 330 U.S. at 511; *see, e.g., Holmes v. Freightliner*, 237 F. Supp. 690, 695 (M.D. Ala. 2002) (witnesses to auto accident less important where case not solely about facts surrounding collision); *Dwyer v. G.M. Corp.*, 853 F. Supp. 690, 693 (S.D.N.Y. 1994) (same).

Additionally, the district court did not abuse its discretion in concluding that the distance Soto and Wiginton would have to travel to Marshall is not of great significance. While the Court has cited 100 miles as a useful threshold in analyzing witness convenience, *see Volkswagen I*, 371 F.3d at 204-05, the panel is the first to elevate it to the status of a "100-mile rule." *Volkswagen III*, 506 F.2d at 386. That notion directly conflicts with decisions of this and other courts holding that a distance of 155 miles is not an appreciable hardship in this context. *See, e.g., Mills v. Beech Aircraft*, 886 F.2d 758, 761 (5th Cir. 1989) (150 miles not significant); *Jarvis Christ. Coll. v. Exxon Corp.*, 845 F.2d 523, 528 (5th Cir. 1988) (203 miles a "minor inconvenience" that can "in no rational way support the notion of abuse of discretion;" "This case is not being consigned to the wastelands of Siberia").[16] It also conflicts with the principle, recently reaffirmed in *Horseshoe*

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[16] The panel distinguished *Jarvis Christian College* because it examined the convenience of parties, not witnesses. *See Volkswagen III*, 506 F.3d at 386 n. 5. But §1404(a)'s text does not treat the two differently, and neither *Jarvis Christian College* nor *Mills* based its holding on the distinct status of being a litigant – they simply held that the distances were not great. Other decisions denying transfer and finding similar distances for parties and witnesses insignificant include *Boronstein v. Sands Hotel, Casino & Country Club, Inc.*, 775 F. Supp. 657, 658

Entertainment, that no one factor should determine transfer motions. *See* 337 F.3d at 434. Most important, by inflexibly contracting venue to courthouses no more than 100 miles from the homes of third party witnesses, it verges on violating Congress's policy to give plaintiffs like the Singletons broad choice in where to file.

At most, assuming Soto and Wiginton actually testify, and considering their stated willingness to drive at least some distance (70-75 miles to Sherman, 64a, 66a), this factor boils down to an extra hour or two in the car each way for two people. The district court did not abuse its discretion in concluding it was "not substantial." 11a; *accord, e.g., Gueorguiev v. Max Rave L.L.C.*, 526 F. Supp. 2d 853, 859 (N.D. Ill. 2007) (one witness insufficient to affect §1404(a) balance); *Applied Resources, Inc. v. Elec. Display Syst.*, 763 F. Supp. 1561 (D. Kan. 1991) (same).[17]

(S.D.N.Y. 1991) (NY-Atlantic City; approximately 130 miles); *Williams v. Kerr Glass Manuf. Corp.*, 630 F. Supp. 266, 270 (E.D.N.Y. 1986) (160 miles); *Leesona Corp. v. Duplan Corp.*, 317 F. Supp. 290, 300 (D.R.I. 1970) (200 miles); *Zorn v. Anderson*, 263 F. Supp. 745, 749 (S.D.N.Y. 1966) (New York-Boston; approximately 200 miles); and *Cline v. NY Central RR Co.,* 192 F. Supp. 206, 207 (N.D. Ohio 1961) (170 miles).

[17] As noted above, Little has no opposition to testifying in Marshall. 179a. Volkswagen argues that the Singletons recognize that a Dallas venue is convenient because they sued Little in state court there, *see* Volkswagen Brf. at 24-25, but the Singletons' position has never been that Dallas is an inconvenient forum – it is that the district court did not abuse its discretion in retaining the case. Moreover, since the suit against Little is in state court, there is no possibility of consolidation with this case. Volkswagen also suggests that there is something "collusi[ve]" about Little's stance because he executed a tolling agreement, *see id.*, but it is not clear what Little gained in the supposed bargain since the Singletons sued him anyway. Of course, the Singletons could argue that Volkswagen "colluded" with Soto and Wiginton in getting them to

2. Availability of Compulsory Process

Volkswagen argues that the absence of "absolute" subpoena power also mandates transfer. Volkswagen Brf. at 14. But the need for compulsory process and therefore its relevance in the §1404(a) inquiry cannot simply be assumed. *See, e.g., Scheidt*, 956 F.2d at 966; *Garay v. BRK Electronics*, 755 F. Supp. 1010, 1012 (M.D. Fla. 1991) ("the general allegation that some witnesses may be unwilling to testify is not sufficient to support a transfer"); *FC Invest. Grp.*, 441 F. Supp. 2d at 14. Volkswagen did not attempt to make the necessary showing that witnesses other than Soto and Wiginton oppose appearing in Marshall, or that discovery subpoenas might be required for any third party witness. Nor was it necessary for Volkswagen to seek a discovery subpoena from the court in Dallas during the year discovery proceeded in the case.

In addition, the district court could reasonably doubt whether subpoenas will ever come into play, since Soto's and Wiginton's accounts are not disputed and so little information exists about other claimed non-party witnesses. Regardless, Rule 45 was amended in 1991to provide for state-wide subpoena power with reasonable compensation when appropriate. *See* Fed. R. Civ. P. 45(c)(3). The trial judge's reliance on this tool given by Congress *if necessary*, and it was hardly shown that it will be necessary, is not an abuse of discretion.

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execute virtually identical form affidavits, but in neither case (these witnesses or Little) is there any actual evidence for the charge.

3. **Location of Sources of Proof**

The district court did not abuse its discretion in assigning minimal weight to this factor. The sole liability-related document that has been identified in Dallas is a seven-page accident report that was exchanged early in the case under Fed. R. Civ. P. 26(a)(1)(B). There may be voluminous liability-related documents to review, but they concern the design of the Golf's seat and are maintained by Volkswagen outside of Texas. The place of storage of the vehicle is meaningless, since plaintiff's counsel controls it and can produce it whenever and wherever needed. There may be some medical records in Dallas, but Volkswagen nowhere indicates if they are voluminous or important. *See, e.g., Somerville v. Major Exploration, Inc.*, 576 F. Supp. 902, 908 (S.D.N.Y. 1983) ("unsubstantiated" claims regarding unidentified documents not given "serious consideration"). The district court is not alone in giving this factor little weight in light of the portability and duplicability of documents,[18] and even the panel acknowledged its relevance "may be subject to debate." *Volkswagen III*, 506 F.3d at 385.

4. **The Local Interest**

Finally, the panel held and Volkswagen argues that Dallas' supposedly strong connection to the case requires transfer, *see Volkswagen III*, 506 F.2d at

[18] *See, e.g., Am. Eagle Outfitters, Inc. v. Tala Bros. Corp.*, 457 F. Supp. 2d 474, 478 (S.D.N.Y. 2006); *Walker v. Jon Renau Collection*, 423 F. Supp. 2d 115, 118 n. 3 (S.D.N.Y. 2005); *Houk v. Kimberly-Clark, Corp.*, 613 F. Supp. 2d 923, 932 (W.D. Mo. 1985); 17 Moore, § 111.13[1][h] at 111-85.

386-87, but in reality this case implicates local Dallas interests in only the most marginal way.

Initially, while this Court made clear in *Volkswagen I* that the local interest factor in cases like this one changes somewhat when auto manufacturers implead third party drivers, *see* 371 F.3d at 205, it is still true that the case is not only a localized Dallas dispute. Thus, Professor Moore's treatise recognizes that, when a case involves more than conflicting accounts of the details of a car accident, the interest of the forum where the collision occurred may be relatively minimal. *See* 17 Moore, § 111.13[1][d] at 111-7; *accord Glass v. S&M Nutec L.L.C.*, 456 F. Supp. 2d 498, 503 (S.D.N.Y. 2006); *Holmes*, 237 F. Supp. 2d at 695; *Dwyer*, 853 F. Supp. at 694. This case is a hybrid – one party's claims implicate Dallas while the other's do not. It is not solely a Dallas dispute.

Moreover, the panel simply ignored Eastern District contacts with and interest in the case. Most important, the Eastern District surely has an interest in the sudden, terrible death of a seven-year-old girl who was one of its residents when she died. *See, e.g., Hall v. Nat'l Serv. Indus., Inc.*, 172 F.R.D. 157, 161-62 (E.D. Penn. 1997) (Pennsylvania has interest in car accident that occurred in Florida involving Pennsylvania residents). Volkswagen argues legalistically that it is the venue of Mariana's estate that matters, and that the plaintiff's post-incident departure from a forum supports transfer, Volkswagen Brf. at 18-19 n 7-8, 22-23,

but the decisions it cites have nothing to do with the "interest of justice" local interest factor. They involve the convenience prong and note that residence at time of suit affects the parties' relative inconvenience. When the interest of justice is considered, however, it should be obvious that the former jurisdiction of an accident victim may retain an interest in the case, even if the accident occurred elsewhere. *See Hall, supra.* If Tony Romo perished in a car accident in New York, would Dallas have no interest in a resulting lawsuit litigated in New York? Would that interest evaporate if Romo's family moved to New York before the case was filed? Here, one of the four parties hails from Germany, another is from Michigan, a third group resided in the Eastern District at the time of the accident, and the only Dallas party does not object to venue in Marshall.[19] Moreover, two of the vehicles involved in the three-car collision – the car and nursery's trailer – were based in the Eastern District.

Finally, it is highly formalistic to pretend that the citizens of Dallas have a large stake in this case simply because Volkswagen's claims involve an accident that occurred on a stretch of interstate there. There are innumerable such collisions

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[19] Volkswagen argues that the Singletons' Eastern District residence should be disregarded because they lived in the Sherman Division, not in Marshall, and Volkswagen consented to a transfer to Sherman "if Plaintiffs chose to request" one. Volkswagen Brf. at 19. But the district court faced the choice of granting or denying Volkswagen's motion, which entailed retaining the case or transferring it to Dallas, as Volkswagen requested. Volkswagen did not move for a transfer to Sherman, and obviously the Singletons were not required to make such a request. Thus, the district court properly compared Northern and Eastern district contacts – not those in Marshall as against those in Sherman.

every day in a city like Dallas, and such accidents can and do happen anywhere and everywhere. It seems fair to assume that whether a Dallas resident did or did not cause injuries that occurred during one accident is not a question absorbing the attention of the millions of people who live in Dallas. Viewed as Volkswagen prefers – as a Dallas car accident case and not a products liability suit with nationwide import – it does not "touch the affairs of many persons." *Gilbert*, 330 U.S. at 509. Dallasites will not strain to "learn of [its outcome] by report" from Marshall. *Id.* In giving examples of the sorts of cases that truly implicate local concerns, Wright and Miller list "environmental cases or other substantive matters involving land or matters of local policy." 15 Wright, Miller and Cooper, § 3854. There are undoubtedly others. But isolated car accidents along freeways will not realistically arouse much local interest anywhere, let alone in one of America's largest cities. If "automatistic reliance on rigid legalisms" is cast aside, *Treasure Salvors*, *supra*, the reality is that some cases simply lack a powerful "center of gravity." *Waste Distillation Tech., Inc. v. Pan Am. Resources, Inc.*, 775 F. Supp. 759, 766 (D. Del. 1991). This is one of them.[20]

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[20] Because this case does not involve strong local interests in either direction and because there are some Eastern District contacts, the fact that residents of the several counties constituting the Marshall Division would serve on the jury is not a compelling argument for transfer. "[I]f a forum otherwise is convenient, transfer should not be ordered merely to spare the people of the community from jury duty." 15 Wright, Miller and Cooper, § 3854. Moreover, as discussed herein, there is at least a component of national interest to the case, even if there is also a Dallas component.

III. <u>Volkswagen Has Not Established Entitlement to the Writ</u>

In the end, what Volkswagen mustered before the district court and reiterates here is at best a mild case for transfer. The Singletons readily concede that some factors, such as the accident location and Soto's and Wiginton's residence, point toward Dallas. But when the question is examined realistically and the factors favoring transfer are counterbalanced with the Singletons' choice of forum, the balance does not tip so strongly in Volkswagen's favor that transfer was mandated.

For this Court to hold otherwise will require it to override the district court's discretion and perform a function classically assigned to the trial judge since 1948: the weighing of factors. Indeed, Volkswagen essentially asks this Court to do this, arguing that the district court's claimed underweighing of factors is sufficient ground for mandamus relief. *See* Volkswagen Brf. at 5. If it takes up Volkswagen's offer, this Court will have to subjectively find that the same factors the district court analyzed as neutral or only mildly supportive of transfer actually weigh heavily so – and it will correspondingly have to lighten the weight previously assigned to the choice of forum. The scales will then shift accordingly and the Court may have arrived at an overall balance that *requires* – not simply permits but requires – transfer. But there is no description for that exercise other than reweighing, which this Court should continue to forswear. *See, e.g., Pfizer*, 225 F.2d at 723.

Moreover, the calculus does not change significantly if the Singletons' choice of forum is given reduced weight because they do not live in Marshall and/or the case arose elsewhere. Because the Singletons resided in the Eastern District when the accident occurred and until shortly before the lawsuit was filed, they could reasonably regard that district as their "home turf." At the least, they sued very close to two of the three plaintiffs' current homes, *see, e.g., Tsoukanelis v. Country Pure Foods, Inc.*, 337 F. Supp. 2d 600, 604 (D. Del. 2004) ("Although the plaintiffs did not choose their 'home turf' as the forum, they chose the next closest possible forum"), and the distances involved are not vast. As Wright and Miller observe, "it has been held in a number of cases that Section 1404(a) should not be invoked for transfer between two courts if there is only a relatively short distance between [them]... and it can be traveled easily." 15 Wright, Miller and Cooper, § 3854. Accordingly, this is the sort of case where reducing the deference ordinarily assigned to the forum choice, on the ground that the plaintiff's selection of a non-residence district adds inconvenience, would make little sense since the chosen court sits relatively nearby. Nor, as discussed above, did the case arise so unmistakably in any one place in a way that argues strongly for reducing the weight given the Singletons' choice. Above all, the weakness of the factors supporting transfer is such that denying Volkswagen's motion was reasonable as

long as any level of deference continues to be accorded to the Singletons' choice of forum.

While this Court may conclude that it would have transferred the case had it been sitting in the district court's place, much more is required before the writ should issue, *see Garner*, 433 F.2d at 120-21, as the first panel to consider the petition rightly held. The very few other instances where this Court has overturned a transfer decision illustrate the point. Two such cases involved highly unusual circumstances where district courts transferred cases only to have the transferee courts return them, raising novel questions of renounced jurisdiction and the law of the case. *See Atlantic Coast Line*, 185 F.2d at 767-771; *Cragar*, 796 F.2d at 504-06 (withholding writ pending lower court reconsideration). The more garden-variety circumstances of this case are not remotely comparable.

Nor is this case akin to two more recent instances where the writ was granted: *Horseshoe Entertainment* and *Volkswagen I*. In those cases, the district court did not simply assign insufficient weight to properly considered factors but took into account factors that are not properly evaluated at all. Thus, in *Horseshoe Entertainment*, the district court wrongly considered location of counsel and a completely unsubstantiated "possibility of delay or prejudice" in the §1404(a) balancing. *See* 337 F.2d at 434-35. It was only by both eliminating the improperly included factors and adding in the legally correct ones that the factors favoring

transfer "substantially outweighed" the forum choice. *See id.* at 435. Similarly, the district court in *Volkswagen I* considered the improper factor of convenience of counsel, and ignored the relevant factor of third party claims and witnesses. *See* 371 U.S. at 204-06. The first panel of this Court to consider the petition here therefore correctly concluded that *Volkswagen I* is not on-point. *See In re Volkswagen of America, Inc.*, 2007 WL 504942 at *1 (5th Cir. 2007) ("Volkswagen II").[21]

The only other Fifth Circuit decision overturning a district court's transfer order is *Koehring Co. v. Hyde Construction Co.*, 324 F.2d 295 (5th Cir. 1964), a breach of contract case reviewed by this Court under 28 U.S.C. §1292(b) and cited by Volkswagen. *See* Volkswagen Brf. at 50-51. In *Koehring*, the district court sat in Mississippi but the concrete plant at issue was in Oklahoma. *See id.* at 296. Here, there is no comparable and immovable item so central to the case. In *Koehring*, "all relevant facts" relating to nonperformance occurred in Oklahoma. *See id.* Here, the locus of operative facts is split; Volkswagen's accident-related facts occurred in Dallas while the Singletons' design-related facts occurred elsewhere. In *Koehring*, the Court considered the possibility of an on-site inspection. *See id.* Here, Volkswagen does not suggest a jury view would be

[21] That panel also noted two important fact-based differences between the two cases: the far greater distances involved in *Volkswagen I* and the third party defendant's consent to trial in Marshall in this case. *See Volkswagen II*, 2007 WL 504942 at *1.

needed. In *Koehring*, most witnesses were located near the plant in Oklahoma. *See id.* Here, the Singletons' liability witnesses are not located in Dallas, and Volkswagen has only provided sufficient information to even arguably consider two Dallas-based fact witnesses. In *Koehring*, the records relevant to the plant's operation were in Oklahoma. *See id.* Here, the analogous records are kept outside of Texas; there are virtually none in Dallas. In *Koehring*, the docket of the court chosen by the plaintiff was "extremely congested" while the proposed transferee court's docket was "relatively current." *See id.* No such disparity exists here. Finally, the distance separating Mississippi and Oklahoma dwarfs that between Dallas and Marshall.

Thus, the factors supporting transfer in *Koehring* were far stronger than those present here. And *Koehring* – not even a mandamus case – is the only other instance in sixty years wherein this Court has reversed a district court's transfer decision for no apparent reason other than that the trial judge inadequately weighed the legally proper factors. Factually, the decision in *Gulf, C&SF Ry. Co.* is far closer to the case at bar. In that FELA case, as noted in Point II(A)(1) *supra*, the occurrence, parties and witnesses were located in a different Texas district than the one where suit was brought 360 miles away, but the Court declined to issue the writ because the district court adequately considered the transfer request and there

was no indication of abused discretion. *See* 308 F.2d at 803*; accord* n. 6, *supra* (collecting similar cases).

Far from being an "extraordinary cause" justifying mandamus, this case is "an ordinary controversy between litigants with respect to a question of venue which, before the ultimate determination of the case, will probably cease to be of any substantial consequence." *Carr v. Donohoe*, 201 F.2d 426, 429 (8th Cir. 1953). It is "the ordinary, run-of-the-mill type of litigation which goes through the District Courts from day to day" and therefore unworthy of the writ. *Torres v. Walsh*, 221 F.2d 319, 322 (2d Cir.), *cert. denied*, 350 U.S. 836 (1955). To grant mandamus, "something more must be shown than an erroneous decision by the District Court." *Garner*, 433 F.2d at 120-21. Otherwise, the writ becomes a "general roving commission to supervise the administration of justice in the federal district courts." *In re Josephson*, 218 F.2d 174, 177 (1st Cir. 1954). There is perhaps no better proof that judges can reasonably disagree over this case, which negates any notion of an error so one-sided it constitutes abused discretion, than the fact that some here and on the district court already have.

In *Gilbert*, after listing the convenience factors to be considered, the Supreme Court observed that, in deciding motions, the district court "will weigh relative advantages and obstacles to a fair trial." *See* 330 U.S. at 508; *see also Koehring*, 324 F.2d at 296. Similarly, in *Nowell v. Dick*, 413 F.2d 1204 (5th Cir.

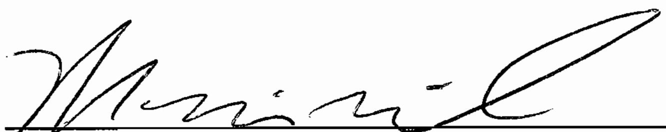
1969), the Court acknowledged occurrences and witnesses connected to the proposed transferee district but refused to disturb the lower court's decision because "the defendant ma[de] no showing that the trial in Texas prejudiced his rights to have a fair trial." *Id.* at 1212. Hence, preventing prejudice to the defendant's right to a fair trial might be one sufficient reason to grant the writ. Another might be to reverse "clear errors" that "at least approach the magnitude of an unauthorized exercise of judicial power." *Carteret Savings Bank, FA v. Shushan*, 919 F.2d 225, 232 (3d Cir. 1990) (quotation omitted); *accord U.S. Dist. Court*, 506 F.2d at 384. If the test is anything more stringent than simply correcting a claimed error by the district court in weighing the various factors and coming to a particular result, Volkswagen's petition must be denied. Those few, extraordinary cases where mandamus issues may illustrate "the adage that 'exceptions prove the rule,'" *Horseshoe Entertainment*, 337 F.3d at 432, but nor must the exceptions swallow it.

CONCLUSION

For the foregoing reasons, the Court should deny Volkswagen's petition.

April 16, 2008

Respectfully Submitted,



Martin J. Siegel
Texas State Bar No. 18342125
LAW OFFICES OF MARTIN J. SIEGEL, P.C.
The Esperson Buildings
815 Walker St., Suite 1600
Houston, TX 77002-5721
Telephone: (713) 226-8566
Facsimile: (713) 225-0566

Jeffrey T. Embry
HOSSLEY EMBRY, L.L.P.
313 E. Charnwood
Tyler, TX 75701
Telephone: (903) 526-1772
Facsimile: (903) 526-1773

Michael C. Smith
SIEBMAN, REYNOLDS, BURG, PHILLIPS & SMITH, L.L.P.
713 South Washington Avenue
Marshall, TX 75670
Telephone: (903) 938-8900
Facsimile: (972) 767-4620

Carl Roth
THE ROTH LAW FIRM
115 N. Wellington, Suite 200
Marshall, TX 75670
Telephone: (903) 935-1665
Facsimile: (903) 935-1797

Thomas A. Crosley
THE CROSLEY LAW FIRM, P.C.
755 E. Mulberry, Suite 250
San Antonio, TX 78212
Telephone: (210) 354-4500
Facsimile: (210) 354-4034

ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April 2008, an original and twenty true copies of the foregoing Respondents' *En Banc* Brief were sent via Overnight UPS to the Clerk of the Court, and true copies were sent via First Class U.S. mail to the following:

TRIAL COURT JUDGE

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

ATTORNEYS FOR PETITIONERS

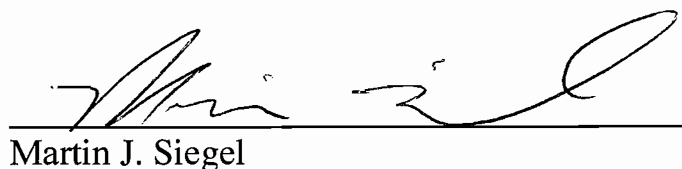
Danny S. Ashby
Robert H. Mow, Jr.
Christopher D. Kratovil
Casey P. Kaplan
KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS L.L.P.
1717 Main Street, Suite 2800
Dallas, Texas 75201

Ningur Akoglu
Ian Ceresney
HERZFELD & RUBIN, P.C.
40 Wall St.
New York, NY 10005

Burgain G. Hayes
P.O. Box 10447
Austin, TX 78766

ATTORNEY FOR THIRD-PARTY DEFENDANT

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

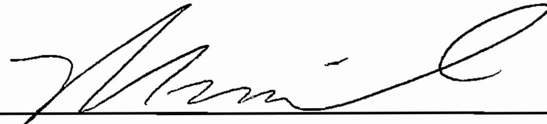


Martin J. Siegel

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. Civ. P. 32(a)(7)(B) because this brief contains 13,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief is printed in a proportionally spaced, serif typeface using Times New Roman 14 point font in body text and Times New Roman 12 point font in footnote text. The brief was prepared using Microsoft Word software.



Martin J. Siegel
Attorney for Respondents

ADDENDUM

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
Office of the Clerk

David J. Maland
U.S. District Clerk

211 W. Ferguson
Tyler, TX 75702

April 14, 2008

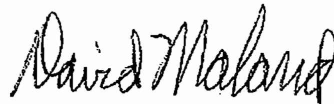
Michael Smith, Esq.
Siebman Law Firm
Marshall, TX

Re: Transfer Statistics

Dear Michael:

The attached is a report obtained by my office from the Administrative Office of the U.S. Courts which shows the number of cases each district transferred to other districts in calendar 2007.

Sincerely,



David J. Maland
U.S. District Clerk

MAURICE.TERM.DALL.DEC07

i

03/27/08 SUMMARY REPORT OF ALL CIVIL CASES

PAGE 1

BY ORIGIN CODE 5 FOR ALL DISTRICTS DURING CALENDER YEAR 2007

DIST	TOTAL TERMINATED
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0090 — DC	15
0100 MG	1
0101 - MA	45
0102 NH	10

0103 - RI	8
0104 PR	4
0205 CT	44
0206 NY, N	55
0207 NY, E	117
0208 NY, S	125
0209 NY, W	27

 0210 VT 2

 0311 DG 12

 0312 NJ 103

 0313 PA, E 100

 0314 PA, M 87

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03/27/08 SUMMARY REPORT OF ALL CIVIL CASES

PAGE 2
 BY ORIGIN CODE 5 FOR ALL DISTRICTS DURING CALENDER YEAR 2007

 TOTAL

 DIST TERMINATED

MAURICE.TERM.DALL.DEC07

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0315 PA,W	48
0391 VI	1
0416 MD	53
0417 NC,E	24
0418 NC,M	13
0419 NC,W	18

□ 0420 S,E 32

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□ 0422 VA,E 44

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□ 0423 VA,W 50

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□ 0424 WV,NW 19

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□ 0425 WV,SW 14

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□ 053L LA,E 67

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□ 053N LA,M 24

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□ 0536 LA,W 81

0537 MS,N 6

0538 MS,S 13

03/27/08 SUMMARY REPORT OF ALL CIVIL CASES

PAGE 3

BY ORIGIN CODE 5 FOR ALL DISTRICTS DURING CALENDER YEAR 2007

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0540	TX, E	83
0541	TX, S	100
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0644	KY, W	21
0645	MI, E	55
0646	MI, W	51
0647	OH, N	38

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□ 0648 Oth, S 16

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03/27/08 SUMMARY REPORT OF ALL CIVIL CASES

PAGE 4
BY ORIGIN CODE 5 FOR ALL DISTRICTS DURING CALENDER YEAR 2007

DIST	TOTAL TERMINATED
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0756 IN, S	31
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0758 WI, W	20