No. 14-41297

# UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA
*ex rel.* JOSHUA HARMAN,
Plaintiff-Respondent,
v.
TRINITY INDUSTRIES, INC., and
TRINITY HIGHWAY PRODUCTS, LLC,
Defendants-Petitioners.

Petition for a Writ of Mandamus to the
U.S. District Court for the Eastern District of Texas
Case 2:12-cv-00089

**Brief Supporting Defendants-Petitioners**
**of *Amicus Curiae* Newegg, Inc.**

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* *application for admission forthcoming*

## Supplemental Certificate of Interested Persons

Case 14-41297, *U.S. ex rel Harman v. Trinity Industries, Inc.*

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

| Person or Entity | Connection to Case |
|---|---|
| Newegg, Inc.<br>Newegg is publicly traded.<br>No person or entity holds<br>10% or more of its stock. | *Amicus curiae* |
| Leif A. Olson<br>The Olson Firm, PLLC | Counsel to Newegg |
| Kent E. Baldauf, Jr.<br>Daniel H. Brean<br>The Webb Law Firm | Counsel to Newegg |

/s/ Leif A. Olson

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## Interest and Independence of the *Amicus*

Newegg is an online-only retailer headquartered in City of Industry, California. Newegg sells computers, consumer electronics, and many other products, primarily through its website at www.newegg.com. Like many online retailers, Newegg is a frequent target of patent-assertion entities who sue it in the U.S. District Court for the Eastern District of Texas, far from Newegg's home.

In defending against several such lawsuits in the Eastern District, Newegg has repeatedly been prejudiced by the kinds of delays of which Trinity complains in its petition. Newegg shares its experiences so the Court will have a clearer picture of how delays in the Eastern District routinely affect litigants other than Trinity, and will better appreciate why Trinity has no adequate relief available to it in the district court.

This brief is accompanied by a motion for leave to file it. FED. R. APP. P. 29(b). No counsel for a party wrote this brief in whole or in part. Only Newegg contributed money toward preparing and submitting this brief.

## Introduction and Summary of Argument

The regular delay in obtaining key decisions in the Eastern District has injured Newegg. This injury is both financial and non-financial, and it is substantial. The delay takes many forms, each of them prejudicial.

The most common delays involve the lack of substantive rulings that are issued reasonably promptly. This kind of delay sprouts uncertainty and hinders Newegg's ability to defend itself — particularly against cases it believes are meritless — and to pursue its own legal rights. Unlike most defendants, Newegg does not view the settlement of frivolous claims as a viable option or as consistent with its strategic objectives or duties as a good corporate citizen.

For example, on several occasions unreasonably long delays in post-judgment rulings have necessarily caused long delays in Newegg's ability to seek appellate review, preventing it from obtaining timely correction of a clearly erroneous judgment or omission. Newegg, like other parties to patent cases in the Eastern District, has also been mothballed for long periods before receiving a ruling construing the claims of asserted patents. That ruling is crucial not just to defending a patent case on the merits, but to assessing whether the claim *has* merit. And once that assessment has been made, resolution is still delayed: Dispositive

and other key motions in the Eastern District are not decided until the eve of trial. At least, that has been Newegg's experience in every case that has involved it — every single last one.

Newegg does not believe that these delays were malicious, or even intentional. It may be that the number of patent cases in the Eastern District relative to the District's size is the instigator — though this might have been predicted when the District adopted rules that are viewed as an encouragement to file patent cases there. Whatever the cause, this delay is prejudicial and often precludes a meaningful opportunity to obtain relief from even clear trial-court error. As the famous maxim says: "Justice delayed is justice denied." Newegg has had justice denied.

## Argument

The Eastern District is a popular forum for patent-infringement plaintiffs because of the perception that it favors plaintiffs. Reporters have observed that the District's juries Texas are more likely to find defendants liable and more likely to award large damages than those in other districts. *See, e.g.*, Jeff Bounds, "Patent Cases Still Pour into East Texas," *The Texas Lawbook* (August 28, 2014) (available at http://bit.ly/1ym7WeH) (noting that the Eastern District "has a reputation with patent holders as being pro-plaintiff in intellectual property disputes").

Historically, the Eastern District of Texas was known as the "rocket docket" due to its scheduling of quick trial dates — another reason the District appealed to plaintiffs. *See, e.g.*, Ted Frank, "Why is the Eastern District of Texas Home to So Many Patent Trolls?", PointofLaw.com (August 24, 2011) (available at http://bit.ly/1qoxdpk). In at least some of the District's divisions, the time to trial has increased in more recent years. But the most significant impact of that additional time has been has been to stretch the period during which the district court doesn't rule. Heavy dockets and busy judicial personnel do not excuse the prejudice that parties, particularly defendants, can — and do — suffer from extended delays in resolving their critical disputes.

Three different kinds of delays in the Eastern District have caused Newegg serious prejudice. *First*, delay in ruling on post-judgment motions has unreasonably deprived Newegg of its right to appeal. *Second*, delay in ruling on claim construction has effectively forced Newegg to litigate in the dark — without knowing whether its primary defense should be non-infringement, or invalidity, or both. *Finally*, delay in resolving dispositive and evidentiary motions until the eve of trial have required Newegg to needlessly waste resources preparing for trial. These delays color the public's perception of the justice system and increase the

burdens on both the parties and the judicial system itself. In addition, delay creates incentives for litigants to abandon even meritorious legal positions and settle cases that are frivolous.

Newegg's actual experiences highlight these prejudices.

### A. Extensive delays in resolving post-trial and clerical motions held up Newegg's right to appeal and correct trial-court error.

Twice, Newegg has faced unreasonable delay in resolving motions post-trial and clerical motions. Both times, this delay effectively eliminated any appellate recourse Newegg had to correct the trial court's errors.

First, in *TQP Development LLC v. 1-800-Flowers, Inc.*, the jury rendered its verdict against Newegg, awarding $2.3 million in damages, on November 25, 2013. No. 2:11-cv-00248, Dkt. 407 (E.D. Tex.). Post-trial briefing closed on April 14, 2014. *Id.* at Dkt. 444–445. Yet, as of the filing of this brief, the district court has neither ruled on the post-trial motions or entered judgment.

It is seven months since submission of the post-judgment motions; the verdict has been in place only a week shy of a year. For that entire time, Newegg has contended with the uncertainty of whether the verdict will stand or be set aside — and, if it is set aside, whether it will have to try the case again. This delay has caused direct injury: Newegg must maintain the sizable verdict

on its balance sheet, hampering its ability to invest in technology, infrastructure, and jobs. Additionally, TQP is a non-operating, patent-assertion shell entity. Delaying the judgment increases the chances that TQP will disperse its funds and assets, which it can do at any time. This increases the chances that Newegg's right to recover its fees and costs should it prevail will be hollow.[1] That liability and its attendant uncertainty lingers, because until the district court enters judgment, Newegg cannot appeal.

Second, in *AdjustaCam LLC v. Amazon.com, Inc.*, Newegg appealed the district court's denial of its motion for attorneys' fees. No. 6:10-cv-00329, Dkt. 764 (E.D. Tex.). Newegg also submitted an unopposed bill of costs in the amount of $8,492.66. But rather than award Newegg's unopposed costs, the final judgment erroneously taxed costs against "the party that incurred them." *Id.* at Dkt. 762. Newegg moved to correct the error, but when the

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[1] This is no idle speculation; Newegg has been there before. Once, it was unable to collect even the modest costs awarded to it against a frivolous litigant because that plaintiff filed for bankruptcy. *Kelora Systems, LLC v. Target Corp.*, No. 11-1548 (C.D. Cal.) at Dkts. 543, 551. Another time, in the Eastern District, a plaintiff underwent a massive corporate restructuring shortly after Newegg filed its motions for attorneys' fees and costs. *Macrosolve, Inc. v. Antenna Software, Inc.*, No. 6:11-cv-00287, Dkts. 557, 558 (E.D. Tex. March 27, 2014). According to a 10-Q filed by the acquiring corporate shell entity a few months later, if Newegg is awarded its costs and fees, they "would be borne by the former MacroSolve directors who sold their loans on April 17, 2014." This is likely to complicate Newegg's collection efforts.

deadline to appeal arrived, the error remained. Newegg filed a notice that it was appealing the denial of its motion for attorneys' fees. *Id.* at Dkt. 763.

The Federal Circuit docketed the appeal, but it then deactivated it because Newegg's motion to correct the judgment was still pending before the district court. Six months later, the district court had still not addressed Newegg's motion to correct the judgment. Newegg withdrew the motion so that the appeal could proceed. *Id.* at Dkts. 763, 781. The district court's tardiness in acting on a simple clerical motion effectively forced Newegg to choose between recovering its costs or pursuing its appeal.

When such motions are filed, the district court's action is required; otherwise, Newegg cannot pursue an ordinary appeal. Leaving those motions outstanding for extended periods effectively eliminates the right to appeal itself. If Newegg cannot appeal in a timely fashion, there is a serious question as to whether appellate relief so long delayed constitutes meaningful relief at all. Access to interlocutory relief based on delay must be reasonably available; otherwise, parties will have no access to meaningful relief in our justice system.

### B. Claim construction delays forced Newegg to litigate in the dark.

Newegg has often endured extended delays between submission of the parties' arguments on claim construction and the Eastern District's eventual construction of the claims. This is not equivalent to requesting a more definite statement; "[c]laim construction is the single most important event in the course of a patent litigation. It defines the scope of the property right being enforced, and is often the difference between infringement and non-infringement, or validity and invalidity." *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1370 (Fed. Cir. 2011).

Until the district court resolves the parties' disputes over the scope and meaning of the patent claims, the parties cannot develop and refine their positions on issues related to infringement and validity. They are litigating without a clear understanding of what the patent covers. Untimely claim-construction rulings effectively deprive parties like Newegg from knowing the law to which they must adhere.

Many core patent-litigation defense activities, such as expert discovery and dispositive-motion practice, are in a holding pattern until the claims have been construed. The Eastern District's typical scheduling order, however, sets expert-disclosure and

summary-judgment deadlines with no regard to when the claim-construction order is issued. This requires parties like Newegg to prepare for any number of potential constructions that *might* apply instead of preparing under one construction that *does* apply. This inflates the scope of discovery, the scope of expert analysis, and, of course, the cost of defense. The longer parties must litigate without the claims being construed, the greater the settlement pressure.

The parties to *Macrosolve, Inc. v. Antenna Software, Inc.*, including Newegg, briefed the claim-construction issues in August 2013 and argued them the next month. They did not receive the district court's construction of the claims until late January 2014. No. 6:11-cv-00287, Dkts. 433, 438, 455, 493 (E.D. Tex.). But the deadlines to submit expert reports were in November and December; the deadline for dispositive and *Daubert* motions was also in December. *Id.* at Dkts. 412, 452. Some of the most critical work in the case had to be done without the benefit of knowing how the court construed the patent claims. In fact, Newegg served expert reports including alternative proposed constructions, which considerably compounded the burden and expense of that phase of the case. The district court's delay required Newegg to argue invalidity as a matter of law without knowing exactly what the patent was asserted to protect; it was required

to argue non-infringement as a matter of law without knowing which technologies the patent forbade it from using.

Newegg briefed the claim construction issues in *SFA Systems, LLC v. 1-800-Flowers.com, Inc.*, in September 2012. The district court heard argument on claim construction the next month, but it did not construe the claims until half of a year later — only 12 days before the late-April 2013 expert-report deadline. No. 6:09-cv-00340, Dkts. 430, 444, 451, 452 (E.D. Tex.). For those six months, Newegg had no choice but to proceed in the face of great uncertainty, taking considerable discovery and developing its case under several alternative theories. This was of necessity redundant. It was needlessly wasteful.

### C. Deferring until the eve of trial rulings on critical and dispositive motions imposed tremendous uncertainty, needlessly added cost, and applied undue pressure to settle.

In Newegg's experience in the Eastern District, it is typical to receive critical substantive rulings only immediately before trial commences. As with having to prepare critical motions without a construction of the patent claims at issue, having to prepare for trial without rulings on critical issues, such as summary judgment and exclusion of witnesses or evidence, is prejudicial. It need-

lessly compounds expense and complicates trial preparation because the parties must prepare for every possible combination of issues and evidence that may come before the jury. And it tends to apply weighty pressure upon parties to settle.

In all three cases Newegg has taken to trial in the Eastern District, the court's key rulings came only a week or so before trial. In *Soverain Software, LLC v. Newegg, Inc.*, the district court did not rule on Newegg's summary-judgment and *Daubert* motions until a week before the trial date. No. 6:07-cv-00511, at Dkts. 315, 316, 322 (E.D. Tex.). Even that understates the uncertainty Newegg faced: Though the district court denied most of the motions, it did not rule on them all — it carried some through trial. *Id.* And the district court knew exactly the pressure its rulings (and lack thereof) caused: When it denied and carried the motions, it specifically asked where the parties stood on settlement. *Id.* at Dkt. 322. Again, Newegg does not believe that justice is served when defendants agree to buy their way out of meritless claims.

One summary-judgment motion denied in *Soverain* was on invalidity. Newegg filed it in late September 2009. *Id.* at Dkt. 247. The court denied it in late January 2010. *Id.* at Dkt. 315. Newegg tried the invalidity issues; its similar mid- and post-trial motions

for judgment as a matter of law and for a new trial were also denied. *Id.* at Dkts. 384, 434. On appeal in 2013, the Federal Circuit reversed on the same invalidity grounds that Newegg had presented to the district court in 2009. *Soverain Software, LLC v. Newegg Inc.*, 705 F. 3d. 1333 (Fed. Cir. 2013).

Various rulings in *Alcatel-Lucent USA Inc. v. Amazon.com, Inc.*, including on summary-judgment and *Daubert* motions, were made only about two weeks before trial. No. 6:09-cv-00422, at Dkts. 448, 450, 472 (E.D. Tex.). Likewise, in *TQP Development*, crucial *Daubert* and collateral-estoppel matters were decided only a week before trial began. No. 2:11-cv-00248, at Dkts. 382, 387, 390, 424 (E.D. Tex.).

In each case, Newegg was forced to account for all possible combinations of potential resolutions of the many unresolved issues in the case as it prepared for trial — and forced to expend considerable money to do it. Timely grants of motions, rather than grants postponed until the eve of trial, would have prevented considerable wasted expense in trial preparation. Timely denials of motions, rather than denials postponed until the eve of trial, would have prevented considerable wasted expense by letting Newegg know that all issues were on the table instead of forcing it to predict which issues would be tried and then having to refocus at the eleventh hour. Either way, deferring these rulings

caused significant and unnecessary prejudice to Newegg — wasted money, wasted effort, wasted time; all of which could have been directed to productive ends — that timely rulings could have avoided.

## Conclusion

Extensive and pervasive delays in the Eastern District of Texas prejudice litigants. They have prejudiced Newegg and certainly prejudice others. This prejudice can effective preclude obtaining meaningful relief to which a party is entitled — as it has done for Newegg.

Trinity's concerns about delay and prejudice are legitimate. The Court should grant its petition.

Respectfully submitted,

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## Certificate of Compliance

I certify that:

- I prepared this brief in Microsoft Word 2013;
- According to that program's word-count feature, the relevant sections of this brief have 2,554 words;
- This brief has margins of 1 inch on the top and bottom and 1.75 inches on each side;
- This brief uses three proportionally-spaced fonts: 14-point Equity Text B and Equity Caps B for body text, and 14-point Optima for headings;
- The redactions required by Fifth Circuit Rule 25.2.13 have been made;
- The electronic version of this brief is identical to the paper version; and
- Before uploading it to the ECF system, the PDF file of this brief was scanned with Norton AntiVirus, an up-to-date commercial virus-scanning program, which found it to be free from viruses.

/s/ Leif A. Olson

## Certificate of Service

I certify that on November 19, 2014, I served a copy of this brief on all counsel of record through the Court's CM/ECF system.

/s/ Leif A. Olson