No. __-_____

In the United States Court of Appeals for the Fifth Circuit

IN RE TRINITY INDUSTRIES, INCORPORATED; TRINITY HIGHWAY PRODUCTS, LLC,
Petitioners.

On Petition for Writ of Mandamus from the United States District Court
for the Eastern District of Texas, Marshall Division, Case No. 2:14-cv-01041

PETITION FOR WRIT OF MANDAMUS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or 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.

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ISSUES PRESENTED

Petitioners filed a motion to transfer venue in a personal injury case brought against them in the Eastern District of Texas. The motion was based on the following undisputed facts: The plaintiff's alleged injuries arose out of an automobile collision in North Carolina; the plaintiff lives and works in North Carolina; the plaintiff has no personal connection to the Eastern District of Texas; and none of the witnesses or doctors lives in the Eastern District of Texas.

Accordingly, Petitioners moved to transfer this case to the Northern District of Texas (where Petitioners are based). But the district court has not ruled on that motion to date—and has instead scheduled discovery and trial on a short timeframe. Nor has the district court ruled on Petitioners' motion to stay discovery and other proceedings pending a ruling on proper venue.

This Court has repeatedly declared that mandamus relief is proper when a district court wrongfully denies a motion to transfer venue. Is mandamus likewise proper where a district court *effectively* denies a motion to transfer venue—by not ruling on the motion, while allowing discovery to proceed? Or is a district court immune from this Court's mandamus authority, if it simply declines to rule on the matter until it is too late?

INTRODUCTION

This Court has instructed district courts to treat pending motions to transfer venue as a "top priority." *In re Horseshoe Entm't*, 337 F.3d 429, 433 (5th Cir. 2003). After all, it is prejudicial to defendants—and a waste of judicial resources—to engage in discovery and other proceedings in the wrong venue.

Petitioners filed a motion to transfer venue in a personal injury case brought against them in the Marshall Division of the Eastern District of Texas. The plaintiff's alleged injuries arose out of an automobile collision in her home state of North Carolina. The Eastern District of Texas has no connection whatsoever to any of the people, events, witnesses, injuries, or doctors in this case. So Petitioners promptly moved to transfer venue to the Dallas Division of the Northern District of Texas—after all, Petitioners maintain their headquarters there, and Dallas is much easier than Marshall for the plaintiff to reach from North Carolina.

But the court has not ruled on the motion, despite this Court's admonition to treat such motions as a "top priority." Nor has the court ruled on Petitioners' motion to stay discovery and other proceedings pending a ruling on that motion. Instead, the court has scheduled discovery and trial on a short timeframe.

This Court has repeatedly issued writs of mandamus when a district court wrongly denies a motion to transfer venue. The same principle should apply where (as here) a district court *effectively* denies a motion to transfer venue, by not ruling

on the motion, and instead scheduling discovery and trial on a short timeframe. Under either scenario, the defendant is forced to litigate in the wrong forum.

Indeed, mandamus relief is uniquely appropriate here. To begin with, Petitioners are seeking mandamus relief only for the modest purpose of requiring the district court to rule on the motion to transfer venue.

What's more, it would be particularly unfair to permit further delay on the motion to transfer venue here. After all, under the district court's schedule, trial will begin in just four months. The closer this case gets to trial without a ruling on the motion to transfer venue, the more disruptive it will be to transfer the case—no matter how compelling the motion. This Court should not allow a district court to effectively dilute the strength of a motion to transfer venue—not to mention avoid this Court's mandamus review—simply by not taking up the motion and allowing the case to proceed to trial in the meantime.

In sum, mandamus is warranted in this case, both to protect this Court's power to review the wrongful denial of venue transfer in the face of inaction by a district court, as well as to reaffirm the principle that district courts must treat motions to transfer venue as a "top priority." Accordingly, Petitioners ask the Court to grant a writ of mandamus and order the district court to (1) decide Trinity's motion to transfer venue without further delay, and (2) stay all proceedings until the motion to transfer venue is resolved.

FACTUAL BACKGROUND

The Parties and the Automobile Collision

This is a personal injury case arising out of an automobile collision in North Carolina. The plaintiff, Danielle Washington, resides in Greensboro, North Carolina. *See* Pl.'s Compl., D.E. 1, ¶ 1 (attached as App. A). Her complaint does not allege that she has any connection whatsoever to the Eastern District of Texas. She does not live or work in Texas, and nothing about the automobile collision has any connection to the Eastern District of Texas.

Defendant Trinity Highway Products, LLC ("Trinity") is a limited liability company organized under the laws of the State of Delaware with its principal place of business in Dallas. *See id*. ¶ 3. Dallas is the center of Trinity's business and operations. *See* Defs.' Mot. to Transfer Venue, D.E. 14, at 3 (attached as App. B). All of Trinity's officers reside and work in Dallas. *See id*.

Trinity manufactures and sells a variety of highway safety products installed on or near highways throughout the United States. One of Trinity's products is known as the ET-Plus end terminal system (the "ET-Plus"). In the most basic terms, the ET-Plus serves as an endcap to a highway guardrail run. The ET-Plus functions in different ways depending on the vehicle's weight, orientation, traction, speed, and angle of impact, but its goal is simple: to reduce the severity of an impact when a vehicle departs the highway towards the guardrail run under certain

conditions. Its engineering complies with specifications set forth by the United States Department of Transportation. (The ET-Plus system was designed, developed, and patented by Texas A&M University, which is not a party to this lawsuit.)

The complaint also names as a defendant Trinity Industries, Inc., a corporation organized under the laws of the State of Delaware with its principal place of business in Dallas. *See* App. A (D.E. 1), ¶ 2. Trinity Industries did not design, develop, manufacture, or sell the ET-Plus product alleged to be at issue in this lawsuit. It therefore is not a proper party to this case, as it intends to demonstrate through future filings, after the venue question is resolved.

Washington alleges that, on November 29, 2013, she fell asleep at the wheel while driving to work along Interstate 40 in Greensboro, North Carolina. *See id.* ¶ 7. Her car veered off the road and struck the guardrail, which included an ET-Plus system. *Id*. ¶¶ 7, 10. Washington claims that the ET-Plus failed to perform its intended function and that, as a result of that alleged malfunction, she suffered personal injury. *See id*. ¶¶ 8-9.

The Lawsuit and Procedural Background

Washington filed this lawsuit in the Eastern District of Texas almost a year later, on November 13, 2014. Trinity answered on December 17, 2014. Shortly thereafter, on January 23, 2015, Trinity filed a motion to transfer venue to the

Northern District of Texas. That motion is the subject of this Petition. Trinity's motion to transfer was the third substantive filing in this case—after the complaint and answer. It was docketed before the initial status conference took place, before any substantive orders were issued, and before any discovery commenced.

Almost a week later, on January 29, the district court convened the parties for a preliminary status conference, and the next day, it released a Docket Control Order. *See* Docket Control Order, D.E. 16 (attached as App. C). That Order establishes a number of operative deadlines designed to ensure swift discovery proceedings. For example, the parties must exchange privilege logs and designate expert witnesses, with accompanying expert reports, by late May. *Id*. at 2-3.[1] The first such report is due about two weeks from now. *Id*. All motions to compel must be filed by June 4, and the global discovery deadline is June 11. *Id*. at 2. In addition, the district court has ordered the parties to mediate this dispute, and that mediation must be completed less than two months from now, by July 2. *Id*. July and August bring a series of pretrial deadlines related to designation of witnesses and exhibits, all leading up to jury selection and the start of trial on September 14—just four months from now. *Id*. at 1-2.

[1] The parties have since mutually agreed to a 10-day extension of the deadline to file expert designations and reports.

Despite those rapidly unfolding deadlines, the district court has taken no action on Trinity's motion to transfer venue. Washington filed her primary brief in opposition to the motion on February 9, and Trinity filed its reply on February 19. Washington then filed a sur-reply brief on March 1, and Trinity responded on March 11.

In a good-faith effort to comply with the court's existing deadlines, Trinity has proceeded with its discovery obligations, even though it expects this case to be transferred to the Northern District of Texas promptly. To date, Trinity has served initial disclosures and already produced tens of thousands of documents.

But in light of the significant upcoming merits-related deadlines and the court's continued silence on the motion to transfer venue, on May 6, Trinity moved for an emergency stay of all proceedings until the district court has resolved its pending motion to transfer venue. *See* Defs.' Emergency Mot. to Stay All Proceedings, D.E. 29 (attached as App. I). Trinity also sought expedited briefing, with a response from plaintiff due by May 11. *Id*. at 4. To date, the district court has taken no action. May 11 has come and gone with no filing by Washington. Instead, discovery continues.

Trinity now files this Petition, seeking a writ of mandamus ordering the district court to (1) decide Trinity's motion to transfer venue without further delay, and (2) stay all proceedings until the motion to transfer venue is resolved.

ARGUMENT

Mandamus relief is warranted where: (1) the petitioner's "right to issuance of the writ is clear and indisputable"; (2) there are "no other adequate means to attain the relief [the petitioner] desires"; and (3) the "writ is appropriate under the circumstances." *Cheney* v. *U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004) (quotation marks omitted). In the context of a motion to transfer venue, "mandamus is appropriate when there is a clear abuse of discretion." *In re Volkswagen of Am., Inc. ("Volkswagen II")*, 545 F.3d 304, 308 (5th Cir. 2008) (en banc).

This Petition satisfies this demanding standard. First, Trinity is clearly and indisputably entitled to transfer under this Court's decisions in *Volkswagen II* and *In re Radmax, Ltd.*, 720 F.3d 285, 290 (5th Cir. 2013). Second, the district court has declined to rule on—and thus has effectively denied—the transfer motion, so Trinity has no means of obtaining the transfer to which it is entitled, absent mandamus. Finally, mandamus is appropriate under the circumstances, for the modest purpose of directing the district court to rule on the pending motion, and to stay all other proceedings in the case until it does so.

I. TRINITY IS CLEARLY AND INDISPUTABLY ENTITLED TO VENUE TRANSFER.

Under this Court's precedents, this case should be transferred to the Northern District of Texas. Transfer to the proper venue protects litigants,

witnesses, and the public against unnecessary inconvenience and the waste of time, energy, and money. *See Van Dusen* v. *Barrack*, 376 U.S. 612, 616 (1964). The district court's failure to consider Trinity's motion to transfer effectively denies Trinity its right to relief under 28 U.S.C. § 1404.

This Court has established a two-step process for granting a motion to transfer venue. *See Volkswagen II*, 545 F.3d at 312-15. First, the court must determine whether the case could have been filed in the transferee district under 28 U.S.C. § 1391. *See id*. at 312. Here, both sides agree that the suit could have been filed in the Northern District of Texas. *See* App. B (D.E. 14), at 5-6; Pl.'s Resp. to Defs.' Mot. to Transfer Venue, D.E. 19, at 3 (attached as App. D). Next, the court must determine whether four private interest factors and four public interest factors favor transfer. *See Volkswagen II*, 545 F.3d at 315 (citing *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947)). In this case, four of the eight factors favor transfer, and four are neutral. None of the factors favors remaining in the Eastern District of Texas.

A. As Washington Concedes, This Case Could Have Been Filed In The Northern District Of Texas.

The threshold inquiry is whether, under 28 U.S.C. § 1391, venue would be proper in the transferee venue. *See Volkswagen II*, 545 F.3d at 312. Both sides agree that it would. *See* App. D (D.E. 19), at 3 ("[V]enue is appropriate in . . . the Northern District of Texas."). And with good reason: Trinity's headquarters and

executives all reside and work in Dallas. All of the employees expected to testify in this case either work in Dallas, or report to supervisors in Dallas. None works in the Eastern District of Texas. Most of Trinity's relevant records are housed in the Northern District of Texas, as are most of the record custodians. This preliminary question is therefore satisfied.

B. The Balance Of Private Factors Favors Venue Transfer.

The next inquiry is whether the four private interest factors favor transfer. Those are: "'(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive.'" *Volkswagen II*, 545 F.3d at 315 (quoting *In re Volkswagen AG ("Volkswagen I")*, 371 F.3d 201, 203 (5th Cir. 2004) (per curiam)). Three of these factors plainly favor transfer, and one is neutral. No factor favors remaining in the Eastern District of Texas.

1. The "relative ease of access to sources of proof" weighs in favor of transfer. This inquiry generally concerns which venue offers better access to witnesses, documents, and other items of evidence. *See Radmax*, 720 F.3d at 288; *Volkswagen II*, 545 F.3d at 316.

The key witnesses in this case work or reside in Dallas. *See* App. B (D.E. 14), at 6-7. And not only are most of Trinity's documents normally stored at its

Dallas headquarters, but Trinity has systematically centralized in Dallas documents related to the ET-Plus system alleged to be at issue in this case. *See id*. The documents that are not at Trinity's headquarters also reside in the Northern District of Texas at an off-site storage facility.

Washington's response to Trinity's motion to transfer does not identify a single piece of evidence located in the Eastern District of Texas. *See* App. D (D.E. 19), at 3-4. In her "sur-reply" to the motion to transfer venue, Washington alleges for the first time that she intends to make use of "demonstratives which are located in Marshall" used previously in connection with a different lawsuit. *See* Pl.'s Sur-Reply to Defs.' Mot. to Transfer Venue, D.E. 22, at 2 (attached as App. F). But demonstratives are not evidence. *See*, *e.g.*, *Stoker* v. *Stemco, L.P.*, 571 F. App'x 326, 327-28 (5th Cir. 2014) (per curiam) (citing Fed. R. Evid. 1006); *United States* v. *Harms*, 442 F.3d 367, 375-76 (5th Cir. 2006) (demonstrative exhibits "are not admitted into evidence" and "[are] not to be considered as evidence" (citations and quotation marks omitted)). Demonstratives should therefore have no impact on determining the "relative ease of access to sources of proof" for purposes of determining venue transfer. *See*, *e.g.*, *Volkswagen II*, 545 F.3d at 316 (discussing "physical evidence").

In sum, there is no serious dispute that the first private factor favors transfer.

2. The "availability of compulsory process to secure the attendance of witnesses" cuts neither way. *Volkswagen II* tied this factor to the relative ability of the districts to issue subpoenas under Federal Rule of Civil Procedure 45. *See Volkswagen II*, 545 F.3d at 316. Washington's response to the motion to transfer never claims that the Eastern District of Texas might better deploy compulsory process to secure the attendance of witnesses. *See* App. D (D.E. 19), at 4-6. And she does not dispute that the Northern District of Texas has "absolute" subpoena power over all the witnesses in Dallas. *See id.*; *Volkswagen II*, 545 F.3d at 316. On balance, then, the second private factor cuts neither for nor against transfer.

3. The "cost of attendance for willing witnesses" weighs in favor of transfer. Under this factor, this Court has adopted a "100-mile rule." *Volkswagen II*, 545 F.3d at 317. That rule provides that, "[w]hen the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled." *Id*. (quoting *Volkswagen I*, 371 F.3d at 204-05). The reason is that "[a]dditional distance means additional travel time; additional travel time increases the probability for meal and lodging expenses; and additional travel time with overnight stays increases the time which these fact witnesses must be away from their regular employment." *Id*. (alteration in original) (quoting *Volkswagen I*, 371 F.3d at 205).

Here, the distance between the Marshall courthouse and the Dallas courthouse is approximately 150 miles. If the litigation were transferred to Dallas, the travel time and distance for the Texas-based witnesses would be significantly less than if the litigation continues in Marshall. The witnesses also would save money on meals and lodging, and they would spend less time away from their work, family, and community responsibilities. *See Volkswagen I*, 371 F.3d at 204-05; *see also Volkswagen II*, 545 F.3d at 317 (finding trip to Marshall for Dallas-based witnesses would result "not only [in] monetary costs, but also the personal costs associated with being away from work, family, and community").

Better still, witnesses from North Carolina will have a far easier time getting to and from Dallas than they will getting to and from Marshall. While there are no direct commercial flights from North Carolina to Marshall, there are numerous flights from Greensboro, North Carolina to Dallas (including nonstop flights). Thus, while a trial in Marshall would require North Carolina witnesses to fly into Dallas (or Shreveport, Louisiana) and then drive the remaining 150 (or 40) miles, a trial in Dallas would only require witnesses to fly direct from Greensboro to Dallas, with no additional driving time. *Cf. Volkswagen I*, 371 F.3d at 204 n.3 (considering flights available between San Antonio, Texas, and Marshall, Texas, in connection with the court's consideration of the cost of attendance and convenience to witnesses). The same considerations apply to nonparty witnesses

flying from College Station, Texas, to Dallas. While there are no flights from College Station to Marshall, there are plenty of nonstop flights from College Station to Dallas.

Washington's response to the motion to transfer never disputes that a trial in Dallas will be materially more convenient for all the Texas-based witnesses involved. *See* App. D (D.E. 19), at 6-7. Instead, she complains that Dallas and Marshall are "equally inconvenien[t]" for the out-of-state witnesses. *Id*. But she supports that claim merely by pointing out that Greensboro is geographically closer to Marshall than it is to Dallas. *See id.* That ignores the reality of travel logistics and contradicts *Volkswagen I*. As this Court has held, absolute distance does not matter when one location is significantly more difficult to reach than another. *See Volkswagen I*, 371 F.3d at 204-05 & n.3. Such is the case here, as any airline's route maps (not to mention common sense) can confirm.

4. Finally, the fourth factor—a catch-all including "all other practical problems that make trial of a case easy, expeditious and inexpensive"—favors transfer. As already discussed in detail *supra*, a majority of potentially relevant witnesses and documents reside in Dallas. Trial in Dallas will prevent unnecessary expenses transporting such documents and travel costs incurred by witnesses.

Moreover, no party will suffer prejudice from a transfer. At present, this case is at its earliest stages. Although the district court has set an aggressive

discovery schedule, so far only limited discovery has taken place. Transferring to the Northern District of Texas thus will create no inefficiencies. *Cf. Radmax*, 720 F.3d at 289 ("garden-variety delay associated with transfer is not to be taken into consideration when ruling on a § 1404(a) motion"). Of course, the longer the district court delays resolution of the pending motion to transfer venue, the more likely transfer is to cause prejudice. *See id*. As set forth below, mandamus relief is necessary to foreclose that possibility.

This fourth factor is where Washington launches her only real argument against transfer. She claims that, because the Eastern District of Texas currently presides over a *qui tam* case against Trinity concerning the ET-Plus guardrail system, it would be an inefficient "waste[] of time, energy and money" to litigate her lawsuit in a different district. *See* App. D (D.E. 19), at 7-8. The *qui tam* case she refers to, *U.S. ex rel. Joshua Harman* v. *Trinity Industries, Inc.*, No. 2:12-cv-00089 (E.D. Tex.), concerns whether Trinity violated the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, when it received payments under the Federal Aid Highway Program related to its ET-Plus product. *See* Complaint at ¶¶ 16-19, *U.S. ex rel. Harman* v. *Trinity Indus., Inc.*, No. 2:12-cv-00089 (E.D. Tex. Mar. 6, 2012), ECF No. 1. She claims there are "demonstratives" and other unnamed documents related to the ET-Plus system that already reside in Marshall. *See* App. F (D.E.

22), at 2. Significantly, though, she concedes that "the legal theories may differ" between the *Harman* case and her own. *Id*.

The Supreme Court has recognized the "general principle" of "avoid[ing] duplicative litigation." *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976). But no such risk exists here. As Washington admits, the legal issues are different. That is a wise concession. After all, *Harman* involves a claim of fraud against the United States government under the False Claims Act.[2]

Washington's lawsuit, by contrast, asks whether Trinity committed a state-law tort when a North Carolina highway authority (or an agent it hired) placed an ET-Plus system along a freeway selected by the local North Carolina transportation authority. While the choice of law is not yet resolved, Washington presumably will be required to prove that Trinity owed her a duty, that it breached that duty, that the injuries she sustained in the collision are the legal and proximate results of that breach, and that she suffered damages attributable to the breach.

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[2] As this Court has previously noted, the United States government "found [Trinity's] product sufficiently compliant with federal safety standards and therefore fully eligible, in the past, present and future, for federal reimbursement claims." Order Denying Petition, *In re Trinity Indus., Inc.*, No. 14-41067 (5th Cir. Oct. 10, 2014) (per curiam). Accordingly, "a strong argument can be made that [Trinity's] actions were neither material nor were any false claims based on false certifications presented to the government." *Id*.

For her part, Washington claims that this case should remain in Marshall because she would like to recycle some "demonstratives" used in *Harman*. *See* App. F (D.E. 22), at 2-3. But even putting aside that demonstratives are not evidence, that hardly justifies imposing burdensome travel obligations on potentially dozens of witnesses in this personal injury case. The obvious solution is to move the demonstratives, not the people.

In short, *Harman* has no bearing on whether Marshall or Dallas is the more appropriate venue. And the private interest factors that *do* matter—namely, cost and convenience—all favor transfer.

C. The Balance Of Public Factors Favors Venue Transfer.

Finally, the balance of public factors favors a transfer to the Northern District of Texas. Those factors are: "'(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law.'" *Volkswagen II*, 545 F.3d at 315 (alteration in original) (quoting *Volkswagen I*, 371 F.3d at 203). Trinity and Washington both agree that the third and fourth public interest factors are neutral. *See* App. B (D.E. 14), at 12-13; App. D (D.E. 19), at 9.

1. The Eastern District of Texas has no connection of any kind to the events that gave rise to Washington's personal injury lawsuit, and thus it has no particularized interest in the outcome of that litigation. Dallas, by contrast, is Trinity's home. Trinity's business impacts the Dallas community. For those reasons, the "local interest in having localized interests decided at home" weighs in favor of transfer.

As this Court has observed, "'[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation.'" *Volkswagen I*, 371 F.3d at 206 (alteration in original) (quoting *Gilbert*, 330 U.S. at 508-09). The citizens of a venue do not have an interest in a product liability case merely because the product is available in that venue. *Volkswagen II*, 545 F.3d at 318. Indeed, the Fifth Circuit stated that such an argument "stretches logic in a manner that eviscerates the public interest that this factor attempts to capture." *Id*.

True, ET-Plus systems are installed along freeways in the Eastern District of Texas. But the same is true of almost every judicial district nationwide. That Trinity does business nationwide is not a valid basis for denying a motion to transfer venue. *See*, *e.g.*, *id*. (rejecting as inadequate a tie to the forum that "could apply virtually to any judicial district or division in the United States"); *see also In re TS Tech USA Corp.*, 551 F.3d 1315, 1321 (Fed. Cir. 2008) ("Here, the vehicles containing TS Tech's allegedly infringing headrest assemblies were sold

throughout the United States, and thus the citizens of the Eastern District of Texas have no more or less of a meaningful connection to this case than any other venue.").

Dallas is closely tied to Trinity, while Marshall has no connection to anything in this case. Marshall residents should not be called on to decide whether a company in Dallas is liable for the injuries a North Carolina driver sustained in a North Carolina automobile collision. The jurors who should decide that question live in Dallas. Local interest thus cuts in favor of transfer.

2. There are no "administrative difficulties flowing from court congestion" at issue here. According to statistics Washington presented to the district court, the median length of time between filing and trial differs between the Northern and Eastern Districts of Texas by only 1.9 months—23.8 months versus 21.9 months, respectively. *See* App. D (D.E. 19), at 8-9. And the number of cases pending over three years comprise merely 6.3 percent and 5.5 percent of the Northern and Eastern Districts' caseloads, respectively. *See id*. Washington's statistics confirm that both the Northern and the Eastern Districts of Texas oversee dockets that proceed at an orderly and efficient pace.

* * *

To sum up: Both sides agree that the Northern District of Texas is a proper venue. Three of the four private interest factors, and one of the four public interest

factors, weigh clearly in favor of transfer. And no factor favors the Eastern District of Texas. Under these circumstances, Trinity is clearly and indisputably entitled to a transfer. As the district court itself has previously acknowledged, "[t]ransfer is appropriate where none of the operative facts occurred in the division [of plaintiff's choice] and where the division had no particular local interest in the outcome of the case." *La Day* v. *City of Lumberton, Tex.*, No. 2:011-cv-237, 2012 WL 928352, at *3 (E.D. Tex. Mar. 19, 2012) (Gilstrap, J.) (granting motion to transfer).

II. TRINITY HAS NO OTHER ADEQUATE MEANS OF OBTAINING VENUE TRANSFER BEFORE THE MERITS OF ITS CASE ARE SUBSTANTIALLY LITIGATED IN A CLEARLY LESS CONVENIENT FORUM.

This mandamus petition seeks relief that Trinity has "no other adequate means" to obtain. *Cheney*, 542 U.S. at 380-81. Trinity has done everything that it can to request a venue transfer from the district court. But the district court has effectively denied that venue transfer by proceeding to discovery and trial on a short timeframe while declining to rule on the motion. The only remedy available to Trinity is a writ of mandamus from this Court.

1. The Supreme Court has recognized that, when a district court "refuses to adjudicate a matter properly before it, a court of appeals may issue the writ" to ensure that the district court produces an order from which the movant can take an appeal. *See Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 666-67 (1978). This Court

has likewise declared that mandamus is the only available relief when a district court fails to rule on a pending motion. *See In re Hood*, 135 F. App'x 709, 710-11 (5th Cir. 2005) (per curiam) ("[Petitioner] has no other adequate means to attain the relief she seeks: Despite her efforts to obtain an appealable final order, the district judge has not entered an order."); *see also In re Ramu Corp.*, 903 F.2d 312, 318-19 (5th Cir. 1990) ("[W]e have no choice but to direct the district court to consider whether a stay is appropriate in this case."). Other circuits have issued writs of mandamus under similar circumstances. *See*, *e.g.*, *In re Dutton*, 9 F.3d 1548 (6th Cir. 1993) (unpublished); *Johnson* v. *Rogers*, 917 F.2d 1283, 1284-85 (10th Cir. 1990).

These decisions apply with special force here, because the underlying motion—a motion to transfer venue—is itself a valid basis for mandamus relief. *Volkswagen II*, 545 F.3d at 309 ("There can be no doubt therefore that mandamus is an appropriate means of testing a district court's § 1404(a) ruling."). Apart from mandamus, "[o]ther means for review are unavailable." *In re Rolls Royce Corp.*, 775 F.3d 671, 676 (5th Cir. 2014); *see also* 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 111.61, at 111–200 (3d ed. 2015) ("[M]andamus review is available because most courts recognize that it is almost impossible to correct an erroneous transfer order by appellate review after a trial.").

If mandamus is the only remedy to correct an erroneous refusal to transfer venue, it follows *a fortiori* that there is no other remedy on direct appeal from a district court's failure to decide a motion to transfer at all. The failure to decide a motion, no less than the denial of such a motion, compels the defendant to litigate in a forum it maintains is legally improper based on inconvenience. *Cf. Volkswagen II*, 545 F.3d at 319 ("[A]n appeal will provide no remedy for a patently erroneous failure to transfer venue.").

2. In light of those principles, there can be no doubt that mandamus is Trinity's only avenue for relief here. There exists no alternative mechanism to force the district court to rule on Trinity's pending motion to transfer venue.

What's more, the situation Trinity faces calls out for mandamus relief even more desperately than the situations in *Hood* and the other cases in which a district court simply neglected its docket. In this case, the district court has managed every aspect of this case *except* the transfer motion. Since the motion to transfer was filed, the court has held a preliminary hearing, issued a Docket Control Order, established a series of deadlines over which it maintains enforcement power, and ordered the parties to press forward with discovery. In the midst of all of that activity, it seems to have overlooked its "top priority": resolving Trinity's motion to transfer venue. *See Horseshoe Entm't*, 337 F.3d at 433.

The longer the district court delays, the more discovery will progress and, as a result, the more disruptive transfer might become. *Cf. Volkswagen II*, 545 F.3d at 317-18. Fortunately, this case is still in its earliest proceedings. A transfer will cause no disruption at this point. This Court should grant mandamus before it is too late.

III. MANDAMUS RELIEF IS APPROPRIATE UNDER THE CIRCUMSTANCES.

Finally, the writ of mandamus Trinity seeks is "appropriate under the circumstances." *Cheney*, 542 U.S. at 381. Namely, it is appropriate—indeed, necessary—to order the district court to issue a decision on Trinity's motion. Likewise, it is appropriate for this Court to order the district court to stay all other proceedings until the venue question is settled.

A. Trinity Is Simply Asking This Court To Order The District Court To Rule On Its Pending Motion To Transfer Venue.

"Repeated" Supreme Court decisions "have established the rules that mandamus 'will lie in a proper case to direct a subordinate Federal Court to decide a pending cause.'" *Johnson*, 917 F.2d at 1285 (quoting *Knickerbocker Ins. Co.* v. *Comstock*, 83 U.S. (16 Wall.) 258, 270 (1872), and citing *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 352 (1976); *Calvert Fire*, 437 U.S. at 662; *State Farm Mut. Auto. Ins. Co.* v. *Scholes*, 601 F.2d 1151, 1154 (10th Cir. 1979)). Those and other cases demonstrate that mandamus relief here is fully appropriate.

1. Mandamus relief is necessary—and therefore appropriate—to vindicate the rights implicated by a motion to transfer venue. The Supreme Court has noted that selecting the proper venue is a threshold matter, which must be decided expeditiously "to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy* v. *Great W. United Corp.*, 443 U.S. 173, 183-84 (1979).

Building on that principle, this Court has declared that the disposition of a motion to transfer venue should take "a top priority in the handling" of a case in the district court. *Horseshoe Entm't*, 337 F.3d at 433. This Court's sister circuits share that view. *See*, *e.g.*, *In re Nintendo Co.*, 544 F. App'x 934, 941 (Fed. Cir. 2013) ("[A] trial court must first address whether it is a proper and convenient venue before addressing any substantive portion of the case."); *In re Fusion-IO, Inc.*, 489 F. App'x 465, 466 (Fed. Cir. 2012) (it is "not proper to postpone consideration of the application for transfer under § 1404(a) until discovery on the merits is completed") (quotation marks omitted).

In short, § 1404(a) confers the right not to be forced to litigate in certain forums. When a district court ignores that right, mandamus is necessary and appropriate.

2. Furthermore, courts have declared that mandamus relief is appropriate when a district court's failure to act frustrates appellate review. For example, the

Supreme Court has recognized that failure to rule on a pending motion impermissibly forecloses appellate review on the merits. *See Calvert Fire*, 437 U.S. at 666-67. Mandamus is necessary in those instances to prevent "obstructing" the right to appeal. *See id*.

Several circuits also have recognized that mandamus is an appropriate remedy to ensure appellate review of the merits of a motion. For example, in *In re Sharon Steel Corp.*, 918 F.2d 434 (3d Cir. 1990), the Third Circuit noted that a district court that refuses to rule on a pending motion "has failed to exercise its judicial power, which in turn has inhibited this Court's exercise of appellate jurisdiction." *Id*. at 436-37 (granting writ of mandamus). An "unexplained abdication of judicial power" "frustrate[s]" appellate jurisdiction and warrants mandamus relief. *Id*. at 437; *see also In re Enzo Biochem, Inc.*, No. 2008-1058, 2009 WL 405831, at *2 (Fed. Cir. Feb. 6, 2009) (granting writ of mandamus directing district court to enter a ruling on an outstanding counterclaim); *Brown ex rel. Brown* v. *Syntex Labs., Inc.*, 755 F.2d 668, 670-71 (8th Cir. 1985) (discussing the court's prior grant of mandamus to require the district court to enter an order from which the petitioner could take an appeal); *United States* v. *Dooling*, 406 F.2d 192, 194 (2d Cir. 1969) (granting writ of mandamus "[i]n the exercise of our supervisory power over the administration of justice" following district court's refusal to enter final judgment). Indeed, in *In re Apple Inc.*, 456 F. App'x 907

(Fed. Cir. 2012), the Federal Circuit *chastised* the mandamus petitioner for failing to seek mandamus relief sooner, to order the Eastern District of Texas to decide a long-pending motion to transfer venue. *See id*. at 908 ("Apple's delay militates against granting this extraordinary and largely discretionary remedy. Apple failed to employ any strategy to pressure the district court to act, such as seeking mandamus to direct the district court to rule on the motion.").

3. Mandamus relief is thus plainly appropriate here. Indeed, the Tenth Circuit has granted precisely the same relief Trinity seeks here:

> Petitioners seek a writ of mandamus compelling the district court to transfer this case from the District of Wyoming to the Central District of California on grounds that the latter locus would be more convenient to the witnesses. Since the district court *refused to consider this motion*, we direct that it do so.

Hustler Magazine, Inc. v. *U.S. Dist. Court for Dist. of Wyo.*, 790 F.2d 69, 70 (10th Cir. 1986) (emphasis added).

When a litigant has promptly moved to transfer venue, there is no excuse for delaying a ruling on that motion. That is especially true here, where discovery is underway and the parties and the court are preparing to litigate and adjudicate the merits of the lawsuit. Mandamus relief is plainly appropriate under these circumstances.

B. Trinity Also Asks This Court To Avoid Further Prejudice By Ordering The District Court To Stay Discovery And Other Proceedings Until It Rules On The Motion To Transfer Venue.

In addition to an order directing the district court to resolve Trinity's motion to transfer venue without further delay, Trinity also asks this Court to order the district court to stay all other proceedings while the motion to transfer venue remains pending. The All Writs Act, 28 U.S.C. § 1651, authorizes this Court to order a district court to grant or vacate a stay. *See*, *e.g.*, *In re Beebe*, 56 F.3d 1384 (5th Cir. 1995) (unpublished) (ordering the district court to vacate a stay immediately and remanding "for the limited purpose of conducting an expedited hearing to determine anew whether the equities might warrant the imposition of a new stay of more limited extent"); *see also* Order, *In re Nintendo of Am., Inc.*, No. 2014-132 (Fed. Cir. May 29, 2014), ECF No. 34 (ordering district court to stay "all proceedings"); *In re Princo Corp.*, 478 F.3d 1345, 1357 (Fed. Cir. 2007) (granting writ of mandamus directing the district court to stay proceedings).

Trinity moved for an emergency stay of all proceedings on May 6. *See* App. I (D.E. 29). And it requested expedited briefing, with a response from Washington due by May 11. *Id*. at 4. But that date has come and gone with no filing from Washington, and no word from the district court.

Because proceeding on the merits while a motion to transfer venue is pending may actually prejudice the resolution of that motion, numerous district

courts across the country—including the court below—have held that, if a court is unable to decide the transfer motion expeditiously for any reason, it must stay the action until that motion is resolved. *See*, *e.g.*, Order, *Secure Axcess, LLC* v. *Nintendo of Am., Inc.*, No. 2:13-cv-32 (E.D. Tex. Feb. 10, 2014) (Gilstrap, J.), ECF No. 133 (staying discovery proceedings pending resolution of pending motion to transfer venue).[3]

But the district court has failed to follow that approach here. A writ of mandamus ordering the district court to stay merits proceedings, pending a ruling on the motion to transfer venue, is therefore appropriate.

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[3] *See also B.E. Tech., LLC* v. *Sony Computer Entm't Am., LLC*, No. 2:12-cv-02826, 2013 WL 524893, at *1 (W.D. Tenn. Feb. 11, 2013) (staying case pending resolution of transfer motion); Order, *One StockDuq Holdings, LLC* v. *Becton, Dickinson, & Co.*, No. 2:12-cv-03037 (W.D. Tenn. Feb. 13, 2013), ECF No. 25 (same); Order, *Acceleron, LLC* v. *Dell Inc.*, No. 1:12-cv-4123 (N.D. Ga. Mar. 18, 2013), ECF No. 30 (same); *Genetic Techs. Ltd.* v. *Agilent Techs., Inc.*, No. C 12-01616, 2012 WL 2906571, at *3 (N.D. Cal. July 16, 2012) (same); *Fuller* v. *AmeriGas Propane, Inc.*, Nos. C 09-2493, 09-2616, 2009 WL 2390358, at *2 (N.D. Cal. Aug. 3, 2009) (same); *Rivers* v. *Walt Disney Co.*, 980 F. Supp. 1358, 1361 (C.D. Cal. 1997) (same); *Good* v. *Altria Grp., Inc.*, 624 F. Supp. 2d 132, 136 (D. Me. 2009) (same); *Gray* v. *Gerber Prods. Co.*, No. 5:12-cv-01964, 2012 WL 4051186, at *2 (N.D. Cal. Sept. 12, 2012) (same); *Nguyen* v. *BP Exploration & Prod. Inc.*, No. H-10-2484, 2010 WL 3169316, at *1 (S.D. Tex. Aug. 9, 2010) (same); *Esquivel* v. *BP Co. N.A.*, Nos. B-10-227, B-10-236, B-10-237, 2010 WL 4255911, at *5 (S.D. Tex. Oct. 14, 2010) (same).

CONCLUSION AND RELIEF SOUGHT

For these reasons, Trinity requests that this Court issue a writ of mandamus directing the district court to (1) decide Trinity's motion to transfer venue without further delay, and (2) stay all proceedings until the motion to transfer venue is resolved.

DATED: May 15, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Petition for Writ of Mandamus complies with the requirements set out in Federal Rules of Appellate Procedure 21 and 32(c)(2).

/s/ *James C. Ho*
James C. Ho
Counsel of Record

CERTIFICATE OF SERVICE

I certify that the foregoing Petition for Writ of Mandamus has been filed electronically with the Clerk of the United States Court of Appeals for the Fifth Circuit, and a true and correct copy of the same has been provided to all parties in the trial court and the trial court judge, as listed below, on May 15, 2015.

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May 15, 2015

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No. 15-40687 In re: Trinity Industries, Inc., et al
USDC No. 2:14-CV-1041

Dear Mr. Ho,

We have docketed the petition for writ of mandamus, and ask you to use the case number above in future inquiries.

Filings in this court are governed strictly by the Federal Rules of **Appellate** Procedure. We cannot accept motions submitted under the Federal Rules of **Civil** Procedure. We can address only those documents the court directs you to file, or proper motions filed in support of the appeal. See FED R. APP. P. and 5TH CIR. R. 27 for guidance. Documents not authorized by these rules will not be acknowledged or acted upon.

ATTENTION ATTORNEYS: Attorneys are required to be a member of the Fifth Circuit Bar and to register for Electronic Case Filing. The "Application and Oath for Admission" form can be printed or downloaded from the Fifth Circuit's website, www.ca5.uscourts.gov. Information on Electronic Case Filing is available at www.ca5.uscourts.gov/cmecf/.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Gardner

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cc: Mr. Omar Gabriel Alvarez
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