No. 01-22-00313-CV

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS AT HOUSTON

Team Industrial Services Inc.,

Appellant,

v.

Kelli Most, Individually and as Personal Representative of the Estate of Jesse Henson,

Appellee

On Appeal from the 268th Judicial District Court

BRIEF OF AMICUS CURIAE LAW PROFESSORS NORA FREEMAN ENGSTROM AND DAVID FREEMAN ENGSTROM SUPPORTING EN BANC RECONSIDERATION

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INTEREST OF AMICI

Amici, Nora Freeman Engstrom and David Freeman Engstrom, are chaired professors at Stanford Law School and two of the country's leading scholars of civil procedure and complex litigation. *Amici* are furnishing this brief because, based on their years of study and practice, they believe that the Panel gravely erred in dismissing this case involving a Texas defendant and Texas-based conduct on *forum non conveniens* (FNC) grounds after a lengthy jury trial in Texas state court.[1] Moreover, *amici* co-direct the Deborah L. Rhode Center on the Legal Profession at Stanford Law School, the premier academic center seeking to make the civil justice system more transparent, accessible, and equitable. Given *amici's* commitment to access to justice, *amici* are deeply troubled by the Panel's ruling. *Amici* believe that, if the Panel's decision stands, its effect will be to complicate and prolong civil litigation throughout the Lone Star State—and ultimately, to render Texas courts less accessible to those entitled to relief.

SUMMARY OF ARGUMENT

The Panel's decision represents both a perversion and inversion of the *forum non conveniens* doctrine.[2] *Forum non conveniens* (Latin for "inconvenient court,"

[1] Pursuant to Texas Rule of Appellate Procedure 11(c), Professors Engstrom note they were compensated for their work on this submission at their customary rates by Sage Settlement Consulting LLC. The opinions expressed herein are entirely their own. Credentials are offered only for the purpose of identification.

[2] Although *amici* believe that other aspects of the Panel's decision are also in err, *amici* limit this brief to the Panel's FNC determination.

and often abbreviated to FNC) is an equitable doctrine rooted in courts' and the Texas legislature's desire to promote convenience and efficiency. *See Quixtar Inc. v. Signature Mgmt. Team, LLC*, 315 S.W.3d 28, 33 (Tex. 2010) ("The 'central focus of the *forum non conveniens* inquiry is convenience.'") (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981)). In transferring a case with direct ties to Texas away from Texas after nearly six years of litigation in Texas, the Panel battered and distorted FNC—and it gave this important procedural device, designed to promote convenience and efficiency, precisely the opposite effect.

Equally troubling: The Panel reached this result by making a series of blunders. First, the Panel articulated, but then failed to apply, the abuse-of-discretion standard. Second, the Panel overlooked significant record evidence that Texas-based conduct precipitated Jesse Henson's death. Third, the Panel ignored Texas's keen interest in the actions of a Texas corporation, sued at home. Fourth and finally, the Panel's decision—reached after a monthlong jury trial and five years after the defendant lost an FNC motion to dismiss, unsuccessfully appealed that loss, unsuccessfully appealed that loss to the Texas Supreme Court, and unsuccessfully sought reconsideration of the Texas Supreme Court's determination—runs roughshod over § 71.051(b)(6), which cautions against dismissal if the dismissal would result in an "unreasonable duplication or proliferation of litigation."

These errors—which resulted in a nearly unprecedented *post-trial* dismissal of a long-litigated case on the basis of FNC—not only work a grave injustice to Jesse Henson's widow, Kelli Most. They are also destined to cause mischief in the courts of the Lone Star State, prolonging proceedings to no good end while needlessly consuming scarce judicial resources and subverting Texas courts' interest in the "just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law." TEX. RULES OF CIV. PRO. R. 1. For these reasons, *amici* urge the Court to grant *en banc* review and reverse the Panel's determination.

FACTUAL SUMMARY AND BACKGROUND ON FNC

The facts of this extraordinary case merit rehearsal, as only by understanding what has transpired can this Court see the true nature of the Panel's determination—and the trouble that will surely follow if the Panel's determination stands.

A. Procedural History

On June 27, 2018, Kelli Most, widow of decedent Jesse Henson, initiated a wrongful-death suit against Team Industrial Services (Team), a company headquartered and incorporated in Texas.[3] 1CR:116 (initial Complaint); 7CR:3170 (Team 10-K). Most's suit alleged, inter alia, that Team negligently caused her

[3] Initially, Most also sued two other defendants, Emerson and Siemens. Both were subsequently released via a nonsuit. 3CR:549

husband's death because it "[f]ail[ed] to adequately train its employees" and "[f]ail[ed] to adequately instruct its employees." 1CR:12 (Compl. at ¶ 20); *see also* 1CR:122 (initial Compl. at ¶ 20). After years of procedural wrangling, Most's case went to trial on May 4, 2021. 32RR:5. That trial was lengthy, and it focused, in large part, on actions that Team took—and that Team unreasonably neglected to take—in Texas.

More than two years before that trial commenced, back in February 2019, Team had moved to dismiss pursuant to FNC. 1CR:27, 51–61. A Texas trial judge, who, for years, oversaw the litigation, considered this motion but denied it, ruling that "[t]he case is a Fort Bend County case." MR0642–44 (transcript) & MR1235 (written order).

Unsatisfied, on March 6, 2019, Team filed a petition for a writ of mandamus with this Court, seeking reversal of that determination. 1CR:260–61. This Court considered the petition but denied it, concluding that Team and its (one-time) co-defendants "failed to establish that the trial court abused its discretion." *In re Emerson Process Mgmt. Valve Auto., Inc*., 2019 WL 1996517, at *1 (Tex. App.—Houston [1st Dist.] 2019) (mem. op.). Undaunted, Team then sought mandamus in the Texas Supreme Court, insisting that "[t]he trial court abused its discretion in denying [Team's] motion to dismiss for *forum non conveniens*" and that "[t]here is no adequate remedy by appeal from the trial court's erroneous denial of the *forum*

non conveniens motion." Relator's Petition for Writ of Mandamus, July 12, 2019, at xiii. The Texas Supreme Court considered but denied that petition. *In re Team Indus. Serv., Inc*., Case No. 19-0593, July 16, 2019. Undeterred, Team filed a Motion for Reconsideration with the Texas Supreme Court, complaining: "The lower courts [plural] did not closely adhere to their legislatively prescribed obligations to return these claims to Kansas, where they belong." Relator's Motion for Rehearing, Aug. 6, 2019, at 7. That effort, too, was rebuffed. *In re Team Indus. Serv., Inc*., Case No. 19-0593, Sept. 20, 2019. Still undeterred, after a monthlong jury trial that it lost, Team sought a virtually unprecedented post-trial reversal on FNC grounds. At that point, a Panel of this Court made a U-turn and ruled that, contrary to the Court's May 2019 ruling, the trial court *did* abuse its discretion (back in February 2019) when it denied Team's motion to dismiss.

B. Background on the *Forum Non Conveniens* Standard

In Texas, the relevant FNC standard is codified by statute. The statute provides that, in assessing whether to "dismiss the action," the court "shall consider" various factors. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b) [hereinafter TEX. CODE]. These factors include, inter alia, whether an adequate alternate forum is available, "whether the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum," and—critically—whether a "dismissal would . . . result in

unreasonable duplication or proliferation of litigation." *Id*. Because Most did not dispute that Kansas was an adequate alternate forum, the focus is and was on public- and private-interest balancing and whether the dismissal would unreasonably duplicate judicial investment in the adjudication of Most's claim.

When performing the balancing required by § 71.051, a court is to assess factors long considered under the common law. *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 675–77 (Tex. 2007). These factors include, among other things, whether a trial would "burden[] the people of a community with jury duty when they have no relation to the litigation" and Texas's interest "in having localized controversies decided at home." *In re Weatherford Int'l, LLC*, 688 S.W.3d 874, 881–82 (Tex. 2024).

Further, as Team has emphasized, § 71.051—and particularly the Legislature's amendments to § 71.051 in 2003 and 2005—expressly aimed to "bring" Texas's FNC standard "more closely in line with the federal approach." Relator's Motion for Rehearing, Supreme Court of Texas, Aug. 6, 2019, at 4–5 (quoting H. Comm. on Civ. Practices, H. Research Org. Bill Analysis, Tex. H.B. 755, 79th Leg., R.S. (2005)); *id*. at 5 (articulating the Legislature's aim "to conform Texas [FNC] practice to federal practice") [hereinafter 2005 Analysis]. Accordingly, federal FNC decisions furnish persuasive authority. *See Diaz v. Todd*, 2022 WL 17834927, at *3 (Tex. App.—El Paso 2022) ("Texas courts have routinely

looked to a well-developed body of federal law to guide forum non conveniens disputes.").

ARGUMENT

In holding that the trial court abused its discretion in 2019 by denying Team's FNC motion, the Panel erred in four crucial respects. First, the Panel properly articulated the abuse-of-discretion standard—but failed to apply it. Second, even though a through-line of the trial was that Team's Texas-based training and supervision wasn't up to snuff and that these deficiencies caused Jesse Henson's death, the Panel erroneously concluded that that "[i]n trying her case, Most did not focus on any conduct by Team in Texas," and "the only connection Most's suit has to Texas is the fact that Team has its corporate offices in Texas." Panel Op. at 57–58. Third, the Panel disregarded substantial authority that applies when a plaintiff sues in the defendant's home forum. Fourth, the Panel's decision contravenes the plain dictates of § 71.051(b)(6), which cautions against a dismissal that would result in an "unreasonable duplication or proliferation of litigation."

A. The Panel Properly Articulated the Abuse-of-Discretion Standard—But Failed to Apply It.

A trial court's FNC determination is reviewed only for abuse of discretion. *See In re Weatherford Int'l,* 688 S.W.3d at 879. This standard is highly deferential. "The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does

not demonstrate that an abuse of discretion occurred." *Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 242 (Tex. 1985). Further, as the Panel itself explained, a trial court does not abuse its discretion when it denies a motion to dismiss unless "all the factors" in the FNC analysis "conclusively favor the alternative forum." Panel Op. at 51 (quoting *In re Mahindra, USA Inc*., 549 S.W.3d 541, 550 (Tex. 2018)). If only some factors favor the alternate forum, the trial court is free to deny the defendant's FNC-based motion to dismiss. *See, e.g., In re Friede & Goldman, LLC*, 2019 WL 2041071, at *11 (Tex. App.—Houston [1st Dist.] 2019) ("We are . . . confronted with an evidentiary record in which all the factors do not conclusively favor the alternative forum; therefore, we cannot say that the trial court abused its discretion in denying the motion to dismiss for *forum non conveniens*.") (quotation marks omitted).

Given this highly deferential standard, as *amicus* Fort Bend County emphasizes, appellate courts must tread lightly. *See* Fort Bend County Br. at 6, 9–10. An appellate court errs if it fails to "give the trial court's decision appropriate deference." *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 315 S.W.3d 28, 35 (Tex. 2010). An appellate court errs if it "mechanically re-weigh[s]" various public and private factors. *Id*. And an appellate court also errs if it reverses a trial court's denial of an FNC-based motion to dismiss when all relevant factors do not "conclusively

favor the alternative forum." Panel Op. at 51 (quoting *In re Mahindra,* 549 S.W.3d at 550).

These, unfortunately, are precisely the errors the Panel committed here. As explained below, factors critical to the FNC analysis pointed sharply against dismissal. Accordingly, the Panel was duty-bound to affirm, not reverse, the trial court's FNC determination. Further, the Panel—duty-bound *not* to "mechanically re-weigh[]" various factors—patently did so. *Quixtar Inc,* 315 S.W.3d at 35. Then, worst of all: The Panel reweighed various public and private factors based on a distorted reading of the record.

B. The Panel Erred by Ignoring the Fact that Plaintiff Offered Substantial Evidence that Texas-Based Conduct Precipitated Jesse Henson's Death.

As noted directly above, the Panel seriously erred by ignoring record evidence that various Texas-based actions and omissions led to Jesse Henson's death. TEX. CODE § 71.051(b)(5) (*mandating* consideration of "the extent to which an injury or death resulted from acts or omissions that occurred in this state").

In the words of Team's own counsel, the evidence adduced "*throughout the trial*" focused on various "claims of negligence against Team," including Team's "negligence or deficiencies in its training." 50RR: 171–72 (statement of Russ Hollenbeck, counsel for Team) (emphasis added). Plaintiff's counsel highlighted Team's deficiencies in training, and their importance, during his opening statement. 35RR: 43–51, 54, 56 (plaintiff's opening statement). Plaintiff's counsel highlighted

Team's deficiencies, and their importance, during his closing argument. 50RR: 220–21 (plaintiff's closing argument).[4] And, *throughout trial*, the fact that Team's training was not up to par was a central refrain. *E.g.,* 41RR:87, 90, 93–97 (testimony of Sid Cammeresi, former employee of, and expert witness for, Team, conceding that Gary Gautney "should have been provided some specific education from some source related to the [pertinent] equipment"); 42RR:45–46 (testimony of Eric Van Iderstine, testifying as to Team's lack of training and certification and observing that these deficiencies were "dangerous").

What's more: This training (such as it was) occurred in significant part in Texas. Trial testimony demonstrated that valve technician Gary Gautney—whose conduct was crucial in a case about a defective valve—was trained, tested, and certified in Team's "corporate headquarters" in Alvin, Texas.[5] *See* 48RR:123–27 (testimony of Jerod Cox of Team, discussing Gautney's training in Alvin); *id*. at 129 (stating that, additional training occurred either in "our Houston office or Alvin office"); 45RR:128–31 (testimony of Joel Taylor of Team, explaining that Gautney was both tested and certified in Alvin).

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[4] Plaintiff's closing argument emphasized: "And the first thing I want to talk about is training"—and then proceeded to discuss Gautney's deficient training and how the deficient training "shows up in their work." 50RR: 220–24; *id*. at 264 (emphasizing that Team "didn't train").

[5] So critical was Gautney's relation to the case that he was the first witness plaintiff sought to call to testify. 7CR:2668 (Court Order). His appearance was delayed because Team's lawyers falsely represented that Gautney was unavailable. *Id*. But, once Gautney took the stand, he testified for three full days. 37RR:10–295; 38RR:7–229; 40RR: 8–245.

Notwithstanding this evidence or its centrality at trial, the Panel nevertheless concluded that "[i]n trying her case, [plaintiff] did not focus on any conduct by Team in Texas," and "the only connection [plaintiff's] suit has to Texas is the fact that Team has its corporate offices in Texas." Panel Op. at 57–58. Those conclusions were not just false; they were baffling, squarely contradicted, not just by record evidence and by plaintiff counsel's opening statement and closing argument (which, as noted above, focused, in large part, on Team's deficient Texas-based training), but also by Team's own lawyer. *See* 50RR:171–72 (statement of Russ Hollenbeck, counsel for Team).

Because a forum has a "strong interest" in litigation if it is both home to defendant and the location where various "critical events took place," this fact alone renders an FNC-based dismissal inappropriate. *E.g., Peregrine Myanmar v. Segal*, 89 F.3d 41, 47 (2d Cir. 1996) (finding that New York has a "strong interest in this litigation since [defendant] lives here and critical events took place here") (citation omitted). Furthermore, because § 71.051(b)(5) does not "conclusively favor the alternative forum," *In re Mahindra,* 549 S.W.3d at 54, the trial court's FNC denial was supposed to be affirmed.

C. The Panel Erred by Failing to Recognize Texas's Interest in the Actions of a Texas Corporation.

Another FNC consideration is whether a trial would "burden[] the people of a community with jury duty when they have no relation to the litigation." *In re*

Weatherford Int'l, 688 S.W.3d at 881. Yet another is whether the "maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party." TEX. CODE § 71.051(b)(3). Both of these FNC factors are *also* unsatisfied (and weigh against dismissal) because *Team is incorporated and headquartered in Texas*. 7CR: 3170. Given Team's domicile, it necessarily follows that (1) Texas has a strong interest in this dispute, and (2) Texas offers a convenient place for Team to litigate.

First, Texas has a strong interest in this dispute because "Texas has a strong interest in regulating the conduct of corporations that have business operations in the state." *Sanchez ex rel. Est. of Galvan v. Brownsville Sports Ctr., Inc*., 51 S.W.3d 643, 670 (Tex. App.—Corpus Christi 2001); *see also, e.g., Shi v. New Mighty U.S. Tr*., 918 F.3d 944, 952–53 (D.C. Cir. 2019) (emphasizing that, whenever a defendant inflicts injury, the defendant's home jurisdiction has a "strong interest" in the ensuing litigation) (quotation marks omitted); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1400 (8th Cir. 1991) ("The defendant's home forum always has a strong interest in providing a forum for redress of injuries caused by its citizens."); *see, e.g., McLennan v. Am. Eurocopter Corp*., 245 F.3d 403, 425 (5th Cir. 2001) (affirming the trial court's denial of the defendant's FNC-based motion to dismiss where the trial court appropriately "concluded that the public interest factors did not weigh in favor of dismissal because Texas had a strong interest in enforcing its laws against

and monitoring the activities of AEC, a Texas-based manufacturer"); *Torres de Maquera v. Yacu Runa Naviera, S.A.*, 107 F. Supp. 2d 770, 781 (S.D. Tex. 2000) (denying defendants' FNC-based motion to dismiss while observing that "[d]efendants conduct regular business in Texas" and "[t]he State of Texas . . . has a keen interest in the disposition of cases involving corporate entities doing business within its borders"); *Sydow v. Acheson & Co.*, 81 F. Supp. 2d 758, 770 (S.D. Tex. 2000) (similar to *Torres*).

Another FNC factor is whether "maintenance of . . . action in the courts of this state would work a substantial injustice" to Team. TEX. CODE § 71.051(b)(3). This factor, too, is unsatisfied because Team was sued at home, rendering a Texas-based trial necessarily convenient and just.[6] Indeed, it is fairly unusual for a defendant, sued at home, to seek to dismiss based on FNC—and when such moves are made, they often fizzle (and even raise judicial eyebrows). *E.g., Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 608 (3d Cir. 1991) (characterizing the defendant's argument that it was not convenient for it to litigate in its home forum as "puzzling"

[6] True, some authority indicates that it can be inconvenient for a defendant to defend itself at home. *E.g., In re CEVA Ground US, LP.,* 2020 WL 1429929, at *7 (Tex. App.—Houston [1st Dist.] 2020). We would urge this Court to reconsider that unusual determination which defies common sense and runs contrary to the weight of federal precedent. *See* 2005 Analysis, *supra* (articulating the Texas Legislature's intention for Texas law regarding FNC to track federal law). But, even if this Court is disinclined, the situation here, involving Texas-based conduct, is readily distinguishable. Indeed, as *amicus* Fort Bend County points out, of the Texas Supreme Court cases issued since § 71.051's enactment, none support dismissal when a company based in Texas is sued over its Texas-based conduct. *See* Fort Bend County Br. at 6.

and "curious[]"); *Cardoso v. FPB Bank*, 879 So. 2d 1247, 1250 (Fla. Dist. Ct. App. 2004) ("A *forum non conveniens* argument coming from a party sued where he resides is both puzzling and strange.") (quotation marks omitted); *cf.* Eliot T. Tracz, *Forum Shopping: Defensive Abuse of the Intrastate Forum Non Conveniens Doctrine*, 59 S. TEX. L. REV. 421, 439–44 (2018) (charging that, when a defendant, sued in its own home forum, seeks an FNC dismissal, that move is "frivolous at best, unethical at worst, and never made in good faith"); Edward L. Barrett, Jr., *The Doctrine of* Forum Non Conveniens, 35 CALIF. L. REV. 380, 419 (1947) ("It is clear that it would be held an abuse of discretion for a trial court to refuse to hear a suit brought . . . where the defendant has his actual domicile.").

Again: A trial court's denial of a defendant's motion to dismiss for FNC must be affirmed, unless "all the factors" in the FNC analysis "conclusively favor the alternative forum." *In re Mahindra,* 549 S.W.3d at 550. Because Team was sued at home, at least two factors militate against dismissal, more than enough to insulate the trial court's ruling from any charge of abuse of discretion.

D. The Panel Erred by Overlooking the Fact that a Post-Trial FNC Dismissal Results in the Duplication and Proliferation of Litigation.

Finally, the Panel's opinion runs roughshod over § 71.051(b)(6)'s core concern with efficiency. Under § 71.051(b)(6), a court is duty-bound to consider whether the FNC-based dismissal would result in an "unreasonable duplication or proliferation of litigation." That, unfortunately, is exactly what the Panel's opinion

engenders. Indeed, given that FNC exists to promote efficiency and economy, the Panel's conclusion that Team's FNC motion should now be granted five years after it was denied, after multiple efforts at appellate review and a lengthy trial, has a topsy-turvy, *Alice in Wonderland* quality to it—and represents a serious distortion of FNC principles.[7]

It has long been clear that, when a trial court erroneously denies a motion to dismiss for FNC, the traditional appellate process gives aggrieved defendants inadequate protection. The traditional appellate process is inadequate because the FNC doctrine exists to relieve defendants of the burden of defending themselves in a patently inconvenient jurisdiction. If defendants have to slog through a trial before they can challenge an FNC denial, defendants risk being condemned to do exactly what the FNC doctrine says they shouldn't have to do: litigate in a far-away jurisdiction without genuine ties to the controversy.

Recognizing this, courts have fashioned an exception to traditional appellate rules to permit timely challenges to FNC denials. In general, courts strictly cabin writs of mandamus. But when a trial court denies a defendant's FNC-based motion

[7] Exacerbating the inequity, this is not the first time Team has engaged in sharp tactics to slow the wheels of justice. *E.g.,* 7CR:2663–80 (Court Order) (awarding post-trial sanctions because Team's counsel "made material misrepresentations to the Court" and "acted in concert to delay the trial").

to dismiss, and when the defendant wants to challenge that denial, courts relax the traditional requirements. *See In re Weatherford*, 688 S.W.3d at 879.

Because courts already give defendants special latitude to challenge FNC rulings, courts understandably do not permit eleventh-hour, post-trial challenges like the Panel sanctioned here. Indeed, with a single, limited, and easily distinguishable exception—a so-called "F-cubed" case from 1987 involving a foreign (Peruvian) citizen, a foreign (Peruvian) company with no connection to the United States, and a choice-of-law provision specifying foreign (Peruvian) law[8]—we know of no court, state or federal, that has *ever* permitted anything even *remotely like* what this Panel authorized.[9]

Here, recognize: Team filed an FNC-based motion to dismiss. It lost. Via a petition for a writ of mandamus, it appealed that loss to this Court. In a written order, this Court rejected the petition, finding no abuse of discretion. Team appealed this Court's denial to the Texas Supreme Court. It lost. Team sought reconsideration of

[8] *Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876 (5th Cir. 1987).

[9] In viewing this situation as unprecedented, we're not alone. During oral argument, Team's counsel was asked: "Is it true that we would be the first court to reverse in a post-trial scenario on forum non?" He responded: "Probably. I couldn't find another case." 1st Court of Appeals Oral Argument, Dec. 7, 2023, at 49:03-49:14. Counsel continued that "I believe there is a Fifth Circuit case, um, that's a little bit different. . . . But I believe you would be the first Texas intermediate appellate court case to do so." *Id*. at 49:14–23. As noted above, the *Gonzalez* case counsel was referencing bears no resemblance to the current circumstance. Beyond the challenges noted above, as the real kicker, the court found that "there would be considerable difficulty in enforcing an American judgment obtained against Neptuno in the United States." *Gonzalez*, 832 F.2d at 879.

the Texas Supreme Court's determination in the Texas Supreme Court. It lost. Only after a month-long trial, in its fifth bite at the FNC apple, did Team prevail.

Furthermore: Team's move is not just unusual. It's counterproductive. The Panel's eleventh-hour dismissal subverts the entire purpose of the FNC doctrine. Indeed, litigation for nearly six years in Texas, followed by a lengthy jury trial, followed by a transfer, followed by a new trial in an out-of-state forum, all under the banner of the FNC doctrine—is non-sensical. It takes a step, ostensibly in the name of convenience, efficiency, and judicial economy, that is the very antithesis thereof.

Nor is the Panel right that, with a new trial ordered, concern about duplication and proliferation evaporates. Even assuming that the Panel's choice-of-law decision stands, and even assuming a new trial *is* needed, sending the litigation to Kansas will drastically increase the burden on litigants and the justice system. A new trial, before a new judge, in a new jurisdiction, governed by new procedural rules, and subject to new evidentiary standards, is *radically* more burdensome than merely a remand to the trial court, already familiar with the parties and schooled in the case.

Lastly, the Panel's decision is not just unprecedented and counterproductive. It is dangerous. If the ploy works for Team, it will surely be replicated by others, and this ad nauseum consideration, reconsideration, re-reconsideration, re-re-reconsideration, and re-re-re-reconsideration of the FNC question will significantly increase the cost and duration of litigation while impairing the values of fairness,

judicial economy, efficiency, and finality so important to this Court. *Cf. Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 614–15 (3d Cir. 1991) (confronting a situation where defendant uncovered "allegedly new facts" and then used those facts to "initiate reconsideration" of its previously-denied FNC motion and rejecting this effort while warning that this kind of gamesmanship threatens to subvert the FNC doctrine which is "grounded in concern for the costs that must be expended in litigation and the convenience of the parties").

The stakes here are obvious. If the Panel's decision stands, the temptation to abuse the FNC doctrine to prolong litigation—and engage in cynical gamesmanship—will be irresistible. Satellite litigation will multiply. Cases will last longer. Finality will be fleeting. And, in a perverse twist, a device created to promote efficiency and judicial economy will have precisely the opposite effect.

PRAYER

For the foregoing reasons, the Court should grant Kelli Most's Motion for en banc reconsideration.

Dated: August 30, 2024

Respectfully submitted,

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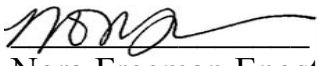
CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2), I certify that this brief contains 4,498 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

Nora Freeman Engstrom

TEXAS RULE OF APPELLATE PROCEDURE 11 CERTIFICATION

On August 30, 2024, I served a copy of the foregoing brief on all counsel of record via the e-filing portal.



Nora Freeman Engstrom

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