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Clerk

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IN THE COURT OF APPEALS  
FOR THE FIFTH DISTRICT  
OF TEXAS AT DALLAS

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*In re Twister B.V.,  
Relator*

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Original Proceeding from the 298th Judicial District Court  
Dallas County, Texas  
The Honorable Hon. Emily G. Tobolowsky, Presiding  
Trial Court No. 07-13697

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**PETITION FOR WRIT OF MANDAMUS**

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April 30, 2013

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TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

Comes now Relator, Twister B.V. (“Twister”), and files this Petition for Writ of Mandamus. In support thereof, Twister would respectfully show the Court as follows:

**STATEMENT OF THE CASE**

This is a misappropriation of trade secrets case brought by Newton Research Partners, LP (“Newton”) against Shell Exploration & Production Company (“SEPCO”), Shell Oil Company, Shell Technology Ventures, Inc., Shell International Exploration and Production, Inc., and Twister, a private limited liability company in The Netherlands. *See* R5. Newton alleges that SEPCO misappropriated its trade secrets, and shared them with Twister (who Newton alleges to be in a joint venture with SEPCO) and that Twister is marketing and selling those trade secrets in the form of its Twister Supersonic Separator. *Id.* Other than a collection vessel to work in conjunction with the Twister Supersonic Separator (*i.e.*, the Hydrate Separator), the Twister Supersonic Separator is essentially the only product that Twister manufactures and sells. R3-Ex. B:¶3.

The Respondent is the Honorable Emily Tobolowsky, Judge of the 298<sup>th</sup> Judicial District Court in Dallas County, Texas.

Newton served Twister with 47-wide ranging requests for production, all related to what is essentially Twister’s only product, the Twister Supersonic



Separator. R3-Ex. F. Thus, Newton’s original requests sought essentially all of Twister’s documents. This original mandamus proceeding arises from the trial court’s oral order compelling Twister to (i) produce voluminous documents in Dallas after Twister responded to those document requests, pursuant to Texas Rules of Civil Procedure 193.2(b), 196.2(b)(3), 196.3(a), and 196.3(c), by objecting to the time and place of production, producing the documents as they are kept in the usual course of business, and specifying an alternative time and place for inspection – a reading room at Twister’s corporate headquarters in The Netherlands (a reading room that was established in prior litigation involving the **exact same** misappropriation of trade secret claims); and (ii) sort through and copy documents responsive to 10 of the 47 requests rather than offering those documents for inspection as they are kept in the “usual course of business.” *See* App-1; R1:28-29; R3-Ex. F.

### **STATEMENT OF JURISDICTION**

This Court has jurisdiction to grant this Relator’s Petition for Writ of Mandamus pursuant to Texas Government Code section 22.221(b)(1) and Article V, § 6 of the Texas Constitution.

### **RECORD REFERENCES**

The Appendix to Relator’s Petition for Writ of Mandamus will be referenced as “App-[number].”

The Record in Support of Relator's Petition for Writ of Mandamus will be referenced as "R[number]: [page number]." If there is an exhibit within the record, this will be referenced as "R[number]-Ex. [number]:[page number] or [paragraph number]."

### **ISSUES PRESENTED**

Whether the trial court committed a clear abuse of discretion by rendering an order on a motion to compel, for which Twister has no adequate remedy at law, that requires Twister to sort through, copy, and produce documents responsive to 10 of 47 document requests in Dallas when:

(1) Twister previously "produced" the documents called for by all 47 requests for production **in 2005**, during the course of Newton's **prior federal misappropriation of trade secret case** against SEPCO (the "Federal Action") involving **the exact same claims**, by making the voluminous documents available for inspection, as the documents are kept in the usual course of business, in 16 four/five drawer file cabinets located in a reading room at Twister's corporate headquarters in the Netherlands, and an agreed protective order in this case **signed in 2008** provides that **the production in the Federal Action is considered to have taken place in this case**;

(2) In spite of the previous production, Newton sought an "expedited" production of the same voluminous documents again in October 2012 and Twister

extended, again, an invitation for Newton to inspect the documents at its corporate headquarters, but Newton, again, failed to inspect the documents – thus Newton has failed to inspect these same documents both times that they were produced for inspection, in 2005 and in 2012;

(3) Twister responded to the 47 requests for production of documents in this case in accordance with Rules 193.2(b), 196.2, 196.3(a), and 196.3(c) of the Texas Rules of Civil Procedure, objected to the production in Dallas, produced the voluminous documents by, again, allowing Newton to inspect them as they are kept in the usual course of business, and named another reasonable time and place for that inspection (the reading room maintained since the Federal Action at Twister’s headquarters in the Netherlands); and

(4) Newton treated Twister’s response as a non-response and sought to compel piecemeal sorting, copying, and production of 10 of the original 47 requests in Dallas (reserving its right to compel the sorting, copying, and production in Dallas of the remaining 37 requests at a later point in time), but not arguing that Twister’s specified place for inspection was “unreasonable” (and, it is not unreasonable on this record under *Steenbergen v. Ford Motor Co.*, 814 S.W.2d 755 (Tex. App.—Dallas 1991, writ denied)).

## **STATEMENT OF FACTS**

### **A. Twister is a Small Netherlands Company.**

Relator Twister is not a Texas resident. It is a private limited liability company incorporated under the laws of the Netherlands. R3-Ex. B:¶2. Its principal and only place of business is in the town of Rijswijk in the Netherlands. *Twister B.V. v. Newton Research Partners, LP*, 364 S.W.3d 428, 432 (Tex. App.—Dallas 2012, no pet.) (interlocutory appeal from the denial of Twister’s special appearance). Twister is basically a single product start-up company, with all of its employees engaged in trying to make Twister a commercially viable company. R3-Ex. B:¶8.

Twister manufactures and sells two products related to the processing of natural gas – the Twister Supersonic Separator and the Hydrate Separator (which is essentially a collection vessel to work with the Twister Supersonic Separator). R3-Ex. B:¶3. Twister’s Supersonic Separator, the product at issue in Newton’s misappropriation of trade secret claim, is used to extract liquids from natural gas after the natural gas is produced from a well. *Id.*

### **B. Newton’s Federal Lawsuit Against SEPCO For Misappropriation of Trade Secrets Relating to the Twister Supersonic Separator.**

Newton alleges that SEPCO received Newton’s trade secrets in 1997, and shared those trade secrets with its alleged joint venture partner, Twister. *See* R6:1. In 2003, Newton sued SEPCO for misappropriation of trade secrets in the Federal Action. Rec-6, Ex. 1. Twister was not a party to the Federal Action, but Twister was

referred to by name in Newton's federal court complaint as an entity with whom SEPCO shared the trade secrets. *Id.* at ¶9(b). Essentially, Newton contended in the Federal Action (and is contending now in the Dallas state court action) that the Twister Supersonic Separator is Newton's invention.

Twister agreed to cooperate with the parties in the Federal Action by making all of its documents related to the development of the Twister Supersonic Separator (including documents containing technical, financial and business information) available for inspection at its corporate headquarters to both Newton and SEPCO. *See* R3-Ex. A. This effort required Twister employees to spend approximately 130 hours and the equivalent of \$37,000. R1-Ex. B:¶9. Twister amassed the voluminous documents into 16 four/five drawer file cabinets in a reading room at Twister's corporate headquarters in The Netherlands. R2:2; *see also* R1:7, 9, &13.

Counsel for SEPCO inspected Twister's documents and selected a number of documents to be copied; however, Newton chose not to inspect Twister's documents. R3-Ex. E:2. Newton instead relied on the documents copied by SEPCO, and used those documents in the Federal Action during the deposition of Kees Tjeenk Willink, a Twister representative. *Id.*

**C. Newton's State Court Case Against SEPCO and Twister For the Exact Same Misappropriation of Trade Secrets Claim Relating to the Twister Supersonic Separator.**

The Federal Action was subsequently dismissed for lack of subject matter jurisdiction on the basis that there was a lack of complete diversity of citizenship between the parties. R6-Ex. 3. Newton then filed this action in state district court in Dallas in 2007, reasserting claims against SEPCO for the misappropriation of trade secrets and, for the first time, asserting claims against Twister. R6:1. Twister filed a special appearance, which the trial court heard in October 2008, but did not rule on until March 2011. *Twister*, 364 S.W.3d at 433. During this same time, SEPCO in 2008 filed its motion for summary judgment based on limitations.<sup>1</sup> See R6-Ex. 2. On April 11, 2012, this Court affirmed the trial court's denial of the special appearance. *Twister*, 364 S.W.3d at 432.

The misappropriation of trade secret claims raised by Newton in the Federal Action included the same claims now being asserted in the Dallas state court action. At its essence, the litigation between Newton, SEPCO and Twister is about Twister's only product – the Twister Supersonic Separator – and who invented the technology used in that product.

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<sup>1</sup> Although that motion for summary judgment was fully briefed and heard in 2008, it remains pending before the trial court without a ruling.

**D. The Agreed Protective Order Making the Documents Produced in the Federal Action Produced in this Action.**

After this state court case was filed, the parties (including Newton) entered into an Agreed Protective Order which provided that any documents produced or deposition testimony provided in the Federal Action “shall be treated as having been produced in this action.” R3-Ex. C. The Agreed Protective Order expressly applied to the documents produced or deposition testimony provided by the parties to the Federal Action as well as documents produced or deposition testimony provided by third parties – such as Twister. *Id.* The trial court signed the Agreed Protective Order on May 23, 2008. R3:3.

**E. Newton’s October 2012 “Expedited” Request for Production of Documents.**

On October 22, 2012 (seven years after Twister’s original production of documents in the federal case and four years after the trial court’s signing of the agreed protective order making that production part of this case), Newton served Twister with 47 wide-ranging requests for production in its Third Set of Requests for Production (R3-Ex. F) and requested that Twister agree to provide its responses on an **expedited** schedule. R3-Ex. D. Newton’s requests sought documents related to the Twister Supersonic Separator (essentially Twister’s only product), thus the requests sought most, if not all, of Twister’s documents. Twister agreed to an expedited response, and two days later, on October 24, 2012, specified in a letter that these

voluminous documents, previously made available **in 2005** in the Federal Action, were available for Newton's inspection and copying (at Newton's expense) in the reading room at Twister's corporate headquarters, provided that Newton give one week's notice prior to inspection.<sup>2</sup> R2-Ex. E:3. Twister further agreed to serve its written objections and responses to Newton's third requests for production on November 12, 2012, more than ten days before these objections and responses were due. *Id.*

**F. Twister's Response to the Requests for Production.**

In its written response to the vast majority of the 47 requests for production, Twister indicated that, subject to its objections, it would "make any non-privileged, responsive documents available for inspection as they are kept in the usual course of business at its corporate office, provided that Twister receives one week's notice from Newton before seeking to conduct any such inspection." *See, e.g.*, R3-Ex. F (request nos. 12-17, 23, 30, and 44-46). Similarly, with respect to other requests that were facially overbroad, Twister proposed a reasonable limit on the scope of the request by indicating that it would "make any non-privileged, responsive documents related to the trade secrets that Newton alleges were misappropriated available for inspection as they are kept in the usual course of business at its corporate office,

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<sup>2</sup> Twister originally requested that Newton pay reasonable costs associated with a former employee with knowledge of Twister's files to assist in the inspection, *see* R2:2, but agreed to withdraw that request. R1:20.



provided that Twister receives one week's notice from Newton before seeking to conduct any such inspection." *See, e.g.*, R3-Ex. F (request nos. 1-11, 18-22, 24, 26-29, 31-37, 39-40, 43, and 47).<sup>3</sup>

Thus, Twister responded in writing, in accordance with Texas Rules of Civil Procedure 193.2(b), 196.2(b)(3), 196.3(a), and 196.3(c). *See* TEX. R. CIV. P. 193.2(b), 196.2(b)(3), 196.3(a), & 196.3(c). Twister objected and stated that Newton could inspect the documents, as they are kept in the usual course of business, at an alternative time and place. As the alternative place, Twister specified the reading room at its corporate headquarters in The Netherlands (the same reading room established in Federal Action for the same misappropriation of trade secret claims).

#### **G. Newton's Motion to Compel Production.**

More than three months after Twister's written objections and responses were served, Newton filed its motion to compel the production of documents responsive to ten (10) of the original 47 requests for production in Dallas – while simultaneously reserving its right to compel further production. R1:10; *see also* R2:3. Thus, Newton's motion to compel sought to change Twister's response (producing the documents in the usual course of business by specifying an alternative time and place

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<sup>3</sup> The only requests that are relevant to Newton's Motion for which Twister did not offer to produce any documents are request numbers 41 and 42. Request number 41 seeks all published technical papers authored by Twister personnel regarding Twister supersonic separators while request number 42 seeks all press releases, news articles, industry literature, and other publications regarding Twister supersonic separators. Because both of these requests seek documents that are in the public domain, Twister's position was that they were equally available to Newton.

for inspection – a response authorized by Rules 193.2(b), 196.2, 196.3(a), and 196.3(c) of the Texas Rules of Civil Procedure) to make Twister search through the documents for 10 specific categories of documents identified in the motion to compel, sort and copy the documents, and produce the documents in Dallas.

Specifically, by these 10 requests Newton sought to compel a piecemeal production in Dallas of the following:

- All engineering notebooks authored by Twister employees, agents, representatives and/or consultants related to the design, prototyping, development, lab testing, field testing, and specifications for manufacturing and operation of all Twister supersonic separators.
- All advertising brochures, promotional materials, and marketing literature given to customers and prospective customers that describe Twister supersonic separators.
- All manufacturing specifications for Twister supersonic separators showing the internal structure of, and dimensions for, the nozzle inlet (with any swirl imparting means), nozzle throat, downstream passageways, and main and separated component outlets, for all Twister supersonic separator models ever sold.
- All field test results and reports for Twister supersonic separators.
- All papers, reports, and analyses by university faculty and students on supersonic separator theory, designs, experimental units, and tests for work done for or submitted to Twister.
- Internal documents and communications regarding proposed changes to any and all Twister supersonic separators.
- All failure analyses of any field failures or operation breakdowns of any Twister supersonic separator.

- All published technical papers authored by Twister personnel regarding Twister supersonic separators.
- All press releases, news articles, industry literature, and other publications regarding Twister supersonic separators.
- All documents related to any disclosure to Michael Bloom or Newton of the source of the technologies patented in U.S. Patent No. 7,550,032.

In its motion to compel, Newton treated Twister's response that inspection would take place at an alternative time and place as a non-response and claimed that "Twister produced no documents in response to the third set of document requests." R2:3.

The trial court held a hearing on Newton's motion to compel on April 5, 2013. R1. At the hearing on the motion to compel, Newton acknowledged that "the main issue that we're here today on, and that is the place of production of documents that has been requested by plaintiff to be produced by the Defendant Twister." R1:5. Newton claimed "it is not reasonable to require Newton to send someone to the Netherlands to look through 16 file drawers [sic]<sup>4</sup> to determine, what, if any, documents are responsive." *Id.* at 9. Twister countered that its response, specifying an alternative time and place for inspection of the documents as those documents are kept in the usual course of business, is allowed both by the Texas Rules of Civil

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<sup>4</sup> There are 16 four/five drawer file cabinets, not 16 file drawers. *See* R2:2.

Procedure and *Steenbergen v. Ford Motor Co.*, 814 S.W.2d 755 (Tex. App.—Dallas 1991, writ denied). R1:20. In addition, Twister emphasized that it has already produced all of the documents responsive to the 47 requests for inspection once in the Federal Action in 2005, and again in this action in October of 2012, when it offered Newton the opportunity for re-inspection. *Id.* at 17-20.

#### **H. The Trial Court Orally Grants the Motion to Compel.**

During the hearing on the motion to compel, the trial court orally ruled from the bench:

So, with respect to the request for production, the Court grants the motion and orders production of the documents in Dallas, but I need a little help...I need some idea of a reasonable time frame and whether you-all want to try to talk about that, and then if you don't agree, you know, come back or –

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Well, I'm just going to ask everybody to use their best efforts, and if it – you know, if you look like you're running into temporal problems to call it to my attention. I just don't have any sense of the time frame required to get the responsive documents here and whether they would be in some format, electronic or actually hard copy.

R1:28-29. Thus, the trial court rendered her order that she was granting the motion to compel, but left it to the parties to work out the deadline for compliance with the order.<sup>5</sup>

The parties have been unable to agree on production dates for the order. Twister proposed a rolling production beginning 30 days after the entry of the order. R7. Newton, however, wanted production of documents to begin immediately. Because an agreement for the form of the order could not be reached, Newton sent its proposed order to the trial court setting a deadline of May 3, 2013 by which Twister must start production and a deadline of May 17, 2013 by which Twister must conclude production. *See id.* At the time of this filing, the trial court has not yet signed the written order granting the motion to compel.

### **STANDARD OF REVIEW**

Mandamus will issue to correct to correct a clear abuse of discretion or a violation of a duty imposed by law when there is no adequate remedy by appeal. *In re Ford Motor Co.*, 165 S.W.3d 315, 417 (Tex. 2005) (orig. proceeding) (citing *In re*

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<sup>5</sup> At the time of this filing, the trial court has not yet signed a written order granting the motion to compel. However, “if a court’s ruling is adequately shown by the reporter’s record, then a formal written order is now unnecessary.” *In re Perritt*, 973 S.W.2d 776, 779-80 (Tex. App.—Texarkana 1998, orig. proceeding); *see also* TEX. R. APP. P. 52.3(k)(1)(A) (requiring that an appendix to a petition seeking mandamus relief include “a certified or sworn copy of any order complained of, or any other document showing the matter complained of”); *In re Bill Heard Chevrolet, Ltd.*, 209 S.W.3d 311, 314-15 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding) (“An order pronounced in open court is considered “rendered” when it is officially announced, and it is valid from that time forward, so that formal entry is only a ministerial act.”).

*Prudential Ins. Co.*, 148 S.W.3d 124, 135-36 (Tex. 2004)). This Court determines the adequacy of an appellate remedy by balancing the benefits of mandamus review against its detriments. *Prudential*, 148 S.W.3d at 136. In evaluating benefits and detriments, this Court considers whether mandamus will preserve important substantive and procedural rights from impairment or loss. *Id.* A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law, or if it clearly fails to analyze or apply the law correctly. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005).

### **SUMMARY OF THE ARGUMENT**

The issue in this mandamus is whether a response to a request for production stating an alternative reasonable time and place for inspection of voluminous documents as they are kept in the usual course of business – as permitted under the discovery rules – is a production fulfilling that party’s discovery obligations, particularly where the compelling party does not argue and/or present any evidence showing that the alternative time and place are unreasonable and the responding party has already produced those documents. In accordance with Rules 193.2(b), 196.2, 196.3(a), and 196.3(c) of the Texas Rules of Civil Procedure, Twister objected to production in Dallas and offered the voluminous documents as the documents are kept in the usual course of business for inspection at a reading room located at its corporate headquarters (established during federal litigation involving the *exact same*

*claims*). Twister produced the very documents sought by Newton for inspection in the federal litigation in 2005 and an agreed protective order signed in 2008 makes that production part of this case. Despite having the opportunity to review these same documents over seven years ago, in 2012 Newton sought the documents on an “expedited” basis and moved to compel their production in this case – a case pending since 2007.

In moving to compel production, Newton seeks to require Twister to sort through the documents maintained in the reading room for the misappropriation of trade secret claims at issue and to produce certain responsive documents piecemeal in Dallas. R1: 8-9. In *Steenbergen v. Ford Motor Co.*, 814 S.W.2d 755 (Tex. App.—Dallas 1991, writ denied), this Court held that the trial court properly determined that the plaintiff could be required to inspect the defendant’s documents as they were kept in the normal course of business at a reading room located at the manufacturer’s headquarters in Michigan specifically established for claims in passive restraint litigation. While the reading room here is in the Netherlands and not Michigan, Newton never argued that Twister’s alternative time and place was unreasonable.

Under this Court’s rationale in *Steenbergen*, it is not unreasonable on this record to require inspection of voluminous documents at a reading room established for the claims raised in this very litigation, particularly where the responding party is a small start-up company that lacks personnel and financial resources. Like the

Steenbergens, Newton was given years to examine these documents. Twister produced its documents for inspection in the federal litigation in 2005, and that production is considered, by agreed order, to have taken place in this case. Mandamus is appropriate under these circumstances to set aside the trial court's order that requires production of documents in Dallas.

## **ARGUMENT**

### **I. TWISTER'S OFFER OF INSPECTION AT A READING ROOM IN ITS CORPORATE HEADQUARTERS CONSTITUTED A PROPER RESPONSE UNDER THE TEXAS RULES OF PROCEDURE.**

#### **A. Twister Has Produced These Voluminous Documents For Inspection Twice.**

As discussed above, in 2005, Twister agreed to cooperate with the parties in the Federal Action and made all of its documents (16 four/five drawer cabinets of documents) available for Newton's inspection during the course of the Federal Action, including the documents now sought by Newton in the state trial court. R1:7, 9, & 13; R3-Ex. A & Ex. E:1-2. Twister made the documents available to be inspected and copied at Twister's corporate headquarters during three different five-day periods. *Id.* at 2. To make those documents available for inspection in the Federal Action, Twister spent approximately 130 hours and \$37,000. R3-Ex. B.

In the Federal Action, Newton chose not to inspect the documents. R3-Ex. E:2. Counsel for SEPCO inspected and copied some of the documents produced by Twister. *Id.* SEPCO provided the Twister documents that it had copied to Newton,



and Newton used those Twister documents in taking the deposition of Kees Tjeenk Willink, a Twister representative, during the Federal Action. *Id.*

After filing this lawsuit, Newton agreed that Twister's production would be considered to have been made in this case. The Agreed Protective Order provides that "All Federal Discovery Materials and Information shall be treated as having been produced in this action, for use solely in connection with this action and the Previous Action." R3-Ex. C:2. The Federal Discovery Materials includes documents produced from third parties like Twister. *See id.* The documents sought by Newton in its Third Set of Requests for Production (R3-Ex. F) are the same documents that related to the misappropriation of trade secrets claim that was raised in the Federal Action, that were made available in the Federal Action, and produced in this case pursuant to the Agreed Protective Order. R1:23. The documents subject to this motion to compel have already been produced by Twister under the terms of the Agreed Protective Order.

Furthermore, Twister again extended an open-ended invitation to Newton in October 2012 to re-inspect all of its documents. But, again, Newton chose not to review the documents. R3-Ex. E:3.

**B. The Rules of Procedure Allow the Responding Party to Object and Respond with an Alternative Time and Place for Inspection of Voluminous Documents.**

In *Steenbergen v. Ford Motor Co.*, 814 S.W.2d 755, 758-59 (Tex. App.—Dallas 1991, writ denied), this Court held that a response allowing inspection of documents at an alternative time and place is a valid response when the producing party objects to the production of documents because they are too voluminous to produce.

Newton relied on *Overall v. Southwestern Yellow Pages, Inc.*, 869 S.W.2d 629, 631 (Tex. App.—Houston [14th Dist.] 1994, no writ), for the contention that such a response allowing the inspection of documents does not constitute a response at all. In *Overall*, the court held that a party who responded to a request for production by stating that the documents were available for inspection at their attorney's office was not a valid response. In distinguishing its facts from those in *Steenbergen*, the *Overall* court noted the documents requested in their case numbered only three, whereas the responding party in *Steenbergen* had sought a protective order for 100,000 documents which were requested and made available for inspection in a reading room.

At the time that *Steenbergen* and *Overall* were decided, Rule 167(1)(d), governing requests for production, required a party served with a request for production to serve a written response in which the party either (1) *objected* to the

request, stating specific reasons, and/or (2) stated, with respect to each item or category of items, “that inspection or other requested action will be permitted *as requested*, and he shall thereafter comply with the request...” TEX. R. CIV. P. 167(1)(d), *rewritten into* TEX. R. CIV. P. 196. Thus, the prior version of the rule did not specifically provide for a response with an alternative time and place for inspection, but did allow an objection to the request stating the specific reasons. In *Overall*, the party neither objected nor responded. 869 S.W.2d at 691.

Rule 196.2 of the Texas Rules of Civil Procedure now provides four options to respond to a request for production of documents, and specifically includes the option of responding with an alternative time and place for inspection. Under Rule 196.2(b), with respect to each item or category of items sought, the responding party must state objections and assert privileges and state that:

- (1) production, inspection, or other requested action will be permitted as requested;
- (2) the requested items are being served on the requested party with the response;
- (3) **production, inspection, or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or**
- (4) no items have been identified – after a diligent search – that are responsive to the request.

TEX. R. CIV. P. 196.2(b)(1)-(4) (emphasis added). Accordingly, a responding party has the express option, under Rule 196.2(b)(3), of responding with an alternative time and place when the responding party objects to the time and place of production in the initial request.

When a responding party is objecting to the requested time or place of production, a responding party “must state a **reasonable** time and place for complying with the request and must comply at that time and place without further request or order.” TEX. R. CIV. P. 193.2(b) (emphasis added); *see also* TEX. R. CIV. P. 196.3(a) (requiring responding party to produce the requested documents “*either* at the time and place requested or the time and place stated in the response”).

The rules allow the responding party the option of inspection (as opposed to production) because the expense of producing items is borne by the responding party, while the expense of inspecting and copying items produced is borne by the requesting party. TEX. R. CIV. P. 196.6. The plain language of the rule thus allows a party (Twister) to fulfill its discovery obligations by permitting the requesting party (Newton) to inspect and copy the documents at the reading room in Twister’s corporate headquarters. *See also Steenbergen*, 814 S.W.2d 758-59; *Rodriguez v. Hyundai Motor Co.*, 944 S.W.2d 757, 765 (Tex. App.—Corpus Christi 1997) (noting that an alternative place of production when documents are voluminous is authorized by *Steenbergen*), *rev’d on other grounds*, 995 S.W.2d 661 (Tex. 1999).

**C. Twister's Alternative Place for Inspection Was Reasonable (and Newton Never Argued It Was Not).**

Although Newton sought to compel production of the documents in Dallas, Newton did not argue that Twister's response offering inspection at an alternative time and place was unreasonable. Twister's offer of inspection at the reading room in its corporate headquarters was not only legally permissible under the rules and *Steenbergen*, but also reasonable under the circumstances. The reading room at Twister's corporate headquarters was established during the Federal Action involving the *exact* same claims (R3-Ex. B:¶9 & R1:23), the documents are voluminous (*i.e.*, 16 four/five drawer cabinets, R1:7, 9 & 13), and Twister is a small start-up company with little manpower (R3-Ex. B:¶8).

The trial court believed that this Court in *Steenbergen* would have reached a different conclusion, stating, "And you don't think that the Dallas Court might have viewed differently *Detroit v. The Netherlands* and [sic] its analysis?" R1:20 (emphasis in original). And, for that reason alone, without any argument from Newton that the time and place for inspection was unreasonable, the trial court determined it had discretion to order Twister to bring the documents to Dallas in what is sure to be a piecemeal production given Newton's reservation of its right to compel further production of documents. *Id.* at 21.

**D. The Rules of Procedure Also Allow Twister to Produce Documents as the Documents Are Kept in the Usual Course of Business.**

Rule 196.3(c) of the Texas Rules of Civil Procedure provides that the responding party must either produce the documents “as they are kept in the usual course of business or organize and label them to correspond with the categories in the request.” TEX. R. CIV. P. 196.3(c). When Twister responded by specifying an alternative time and place for inspection, it offered the documents “as they are kept in the usual course of business.” In *Steenbergen*, this Court recognized that Ford’s collection of documents pertaining to passive restraint claims in a reading room was **in the usual course of its business** of defending itself in the passive restraint litigation. 814 S.W.2d at 758-59.

Twister collected these documents, in the usual course of its business, in the Federal Action for the same trade secret misappropriation claims that Newton raises in this case. R3-Ex. B:¶9. The trial court, by forcing Twister to bring the documents to Dallas, compels Twister to organize its production in a manner more restrictive than the rules allow because it eliminates its ability to produce documents as they are kept in the normal course of business. *See Texas Gen. Land Office v. Porretto*, 369 S.W.3d 276, 290 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2011, pet. filed) (holding trial court cannot sanction a party for failing to organize response materials according to the method its opponent prefers when the discovery response, inspection of materials as

they are kept in the ordinary course of business, complies with an alternative method permitted under [rule 196].”).

**E. Newton Cannot Invoke a Piecemeal Strategy (Compelling 10 of its 47 Documents Requests) to Deprive Twister of Its Right to Alternatively Respond as Allowed in the Rules.**

Newton’s strategy in the motion to compel to seek the documents in a piecemeal fashion should not impact the result here. First, Newton had the opportunity to review these documents more than 8 years ago in the Federal Action. Instead, Newton relied on SEPCO to review the documents, using the documents that SEPCO copied and provided to it. Second, Newton requested Twister to respond to the requests for production in an “expedited” manner, which Twister did, again offering Newton the opportunity for re-inspection. Twister filed its written responses 10 days before the time required by the rules of civil procedure. Newton waited **three months** after Twister’s written responses to requests for production to file its motion, moving to compel on a piecemeal basis.

Newton has shown on the record that it intends to seek all these documents in the future. *See* R2:3; R1:10. At the hearing on the motion to compel, Newton’s counsel made it clear that she believed that Twister “should have to respond to all of [the requests for production] . . . [and she was] quite sure that counsel for both sides will take whatever the Court’s ruling is into account, as to any other request for production. R1:10. Indeed, Newton’s motion to compel expressly reserved

Newton's right to seek all the other documents listed in its request for production.

R2: 3 ("For purposes of this motion [to compel] and **without waiving its right to compel further production**, Newton seeks the production in Dallas, Texas of documents responsive to Request Nos. 32, 33, 35-37, and 39-43.") (emphasis added).

Accordingly, Twister's response should be judged by the voluminous discovery requests to which it was responding – Newton is merely seeking these documents on a piecemeal basis; Newton has had multiple opportunities to inspect the documents at issue but has not availed itself of those opportunities; and Newton has unreasonably delayed in pursuing this discovery. Indeed, Newton's claim that these documents are critical because expert deadlines now are approaching rings hollow, particularly when Newton could have looked at all these documents in 2005.

## **II. THE TRIAL COURT CLEARLY ABUSED ITS DISCRETION IN ORDERING THE DOCUMENTS PRODUCED IN DALLAS, AND TWISTER HAS NO ADEQUATE REMEDY AT LAW.**

The objective of the rules of civil procedure is "to obtain a just, fair, equitable and impartial adjudication of the rights of **litigants** . . . with as great expedition and dispatch and at the least expense [t]o the **litigants.**" TEX. R. CIV. P. 1 (emphasis added). The discovery rules provide litigants with the option of responding to requests for production with an alternative time and place and allowing inspection of documents, as they are kept in the usual course of business, instead of producing sorted and copied documents so that responding parties, too, can reduce the expense



and intrusion of discovery. After all, as this Court noted in *Steenbergen*, the objective is fairness and the least expense to **litigants**, not just the party seeking the discovery. A small foreign company like Twister should be granted the opportunity to reduce the expense and intrusion on its affairs by providing a common pool of information in one central location. *See Steenbergen*, 814 S.W.2d at 758. This is particularly true here given the history of Twister having previously produced these same documents for inspection over 8 years ago in litigation involving the same misappropriation of trade secret claims.

Because it had nothing to hide, Twister made a cost-shifting election to respond to Newton's requests by allowing inspection of its documents, as the documents are kept in the usual course of business. The trial court's ruling, however, will require Twister's counsel to review these documents multiple times, in piecemeal fashion, instead of having Newton's counsel inspect the documents a single time.

A trial court can abuse its discretion by acting in an unreasonable manner. *See Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985). Twister has made these documents available for Newton's inspection twice – once in the Federal Action in 2005 and again in the current action. Twister fulfilled its discovery obligations under the rules by responding to Newton's request for production with an

alternative time and place for inspection of these voluminous documents as they are kept in the usual course of business.

Without any argument or evidence regarding the “reasonableness” of the alternative time and place, the trial court simply rejected Twister’s response – although expressly permitted under the rules of procedure and *Steenbergen*. Twister’s alternative place for inspection is not unreasonable on this record, under these circumstances: there is an established reading room containing documents addressing the very claims in this suit; the documents are voluminous (16 four/five drawer file cabinets); the documents are kept this way in the usual course of Twister’s business, and Twister lacks personnel and financial resources for a massive production in Dallas. By failing to analyze the “reasonableness” of the alternative time and place, the trial court has essentially written out of the rules of procedure a valid option for responding to requests for production. The trial court has also deprived Twister of the ability of “producing” these documents for inspection as they are kept in the usual course of business. The trial court’s order granting the motion to compel was so arbitrary and unreasonable as to constitute a clear abuse of discretion. *See Johnson*, 700 S.W.2d at 917.

Twister has no adequate remedy by appeal for the trial court’s erroneous discovery order. *See Arlington Mem’l Hosp. Found. v. Barton*, 952 S.W.2d 927, 929 (Tex. App.—Fort Worth 1997, orig. proceeding) (citing *Walker*, 827 S.W.2d at 843).

Producing these documents in Dallas would be overly burdensome for Twister and, as such, an appellate court would not be able to cure the discovery error. *See Walker v. Packer*, 827 S.W.2d 833, 843-44 (Tex. 1992). Twister has already spent over 130 hours and \$37,000 compiling these documents in its reading room. R3-Ex. B:¶9.

### **PRAYER**

Relator Twister B.V. respectfully requests that this Court grant this Petition for Writ of Mandamus and order Respondent to vacate its oral order of April 5, 2013 granting Newton's motion to compel production of the documents in Dallas. Twister requests such other and further relief to which it may be justly entitled.

Respectfully submitted,

**VINSON & ELKINS L.L.P.**

/s/Phillip B. Dye, Jr.

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***ATTORNEYS FOR RELATOR,  
TWISTER B.V.***

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this brief contains 5,595 words, excluding the words not included in the word count pursuant to Texas Rule of Appellate Procedure 9.4(i)(1). This is a computer generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/s/ Catherine B. Smith  
Catherine B. Smith

## VERIFICATION AND CERTIFICATION

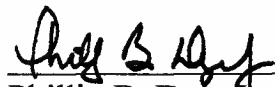
STATE OF TEXAS                   §  
   §  
COUNTY OF HARRIS           §

BEFORE ME, the undersigned authority, on this day appeared the affiant named herein, who is personally known to me, and who after being duly sworn upon his oath, stated as follows:

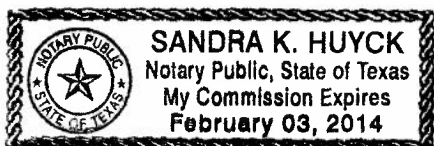
1. My name is Phillip B. Dye, Jr. I am over twenty-one years of age, of sound mind, and in all ways competent to make this verification. I am a partner with the law firm of Vinson & Elkins and am one of the attorneys representing Relator, Twister B.V., in connection with the complaint styled *Newton Research Partners, L.P., Plaintiff, v. Shell Exploration & Production Company; Shell Oil Company; Shell Technology Ventures, Inc., Shell International Exploration and Production, Inc.; and Twister B.V.*, Case No. 07-13697, in the 298th Judicial District Court, Dallas County, Texas. I have personal knowledge of the facts stated in this verification and those facts are true and correct.

2. I have reviewed the foregoing Petition for Writ of Mandamus. In my personal knowledge, the Petition truly and correctly recites the factual allegations set forth in the pleadings and the record. In addition, I have concluded that every factual statement in the petition is supported by competent evidence in the appendix or record.

3. The documents attached in the Appendix and Record are true and correct copies of documents that are material to Relator's claim for relief and filed in the underlying proceedings.

  
\_\_\_\_\_  
Phillip B. Dye, Jr.

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority on this the 30th day of April, 2013.



  
\_\_\_\_\_  
NOTARY PUBLIC IN AND FOR  
THE STATE OF TEXAS

## **APPENDIX**

App-1      Excerpts of the April 5, 2013 Reporter's Record from the hearing on Plaintiff's Motion to Compel containing the trial court's oral ruling granting the motion to compel

## PLAINTIFF'S MOTION TO COMPEL

REPORTER'S RECORD

VOLUME 1 OF 1 VOLUMES

TRIAL COURT CAUSE NO. DC-07-13697-M

NEWTON RESEARCH PARTNERS,	)	IN THE DISTRICT COURT
LP	)	
	)	
vs.	)	DALLAS COUNTY, TEXAS
	)	
	)	
SHELL EXPLORATION &	)	
PRODUCTION COMPANY, SHELL	)	
OIL COMPANY, SHELL	)	
TECHNOLOGY VENTURES, INC.,	)	
SHELL INTERNATIONAL	)	
EXPLORATION AND PRODUCTION,	)	
INC., AND TWISTER BV	)	298TH JUDICIAL DISTRICT

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**PLAINTIFF'S MOTION TO COMPEL**


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On the 5th day of April, 2013, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Emily Tobolowsky, Judge Presiding, held in Dallas, Dallas County, Texas. Proceedings reported by machine shorthand and computer-aided transcription.

Marcey J. Poeckes, CSR  
 Official Court Reporter, 298th District Court



## PLAINTIFF'S MOTION TO COMPEL

1 well-founded.

2 THE COURT: Thank you.

3 We are kind of running behind time here.  
4 So, with respect to the request for production, the  
5 Court grants the motion and orders production of the  
6 documents in Dallas, but I need a little help. For  
7 example, if Ms. Farquhar suggests some of those  
8 documents on the subterfuge are in electronic form,  
9 certainly they don't need to be brought here in hard  
10 copy form. I need some idea of a reasonable time frame  
11 and whether you-all want to try to talk about that, and  
12 then if you don't agree, you know, come back or --

13 MS. NEAL: Your Honor, I think we can  
14 strike a compromise.

15 THE COURT: Ms. Farquhar, are you  
16 comfortable with that?

17 MS. FARQUHAR: Yes, Your Honor. My  
18 only -- I do want to throw out that we are -- depending  
19 on how long it takes, it may impact the end of discovery  
20 and expert deadlines.

21 THE COURT: Well, I'm just going to ask  
22 everybody to use their best efforts, and if it -- you  
23 know, if you look like you're running into temporal  
24 problems to call it to my attention.

25 I just don't have any sense of the time

*PLAINTIFF'S MOTION TO COMPEL*

1 frame required to get the responsive documents here and  
2 whether they would be in some format, electronic or  
3 actually hard copy.

4 With respect to the objections on  
5 publicly available, I'm assuming I'm now hearing that  
6 the publicly-available objection must have gone to the  
7 patents themselves or the patent applications?

8 MS. NEAL: Your Honor, they went to two  
9 things. The first request was a request for published  
10 articles concerning the technology, which could be found  
11 by dual research or any other, you know,  
12 publicly-available source. That would be just as  
13 burdensome for Twister to do as it would be for Newton.

14 The other request was for press releases  
15 or industry articles, not necessarily ones that were  
16 published by Twister.

17 THE COURT: Well, I want Twister to  
18 produce anything that was issued by Twister with regard  
19 to the latter category.

20 On the request for production 32, the  
21 engineering notebooks, I find those are relevant.

22 The interrogatory answers with regard to  
23 contributions and period of times not being specific, I  
24 would ask Twister to go back and refine that, if it's  
25 possible. If it's not possible, then I want some sort

*PLAINTIFF'S MOTION TO COMPEL*

1 of statement that inquiry has been made by Twister to  
2 determine the contribution actually made by the person  
3 whose name appears in the patent or patent application  
4 and the period of time that person was involved and that  
5 this is as much information as Twister is able to  
6 determine based upon who remains at the company, or the  
7 documents that remain associated with the company. In  
8 other words, I want to know that the inquiry has been  
9 made, and whatever has been produced is the extent to  
10 which the information exists.

11 I'm going to overrule the relevance  
12 objections, I guess it was, 4, 5 and 6 in the  
13 interrogatories. Were they mostly relevance objections,  
14 Ms. Farquhar, or other objections about which you were  
15 concerned?

16 MS. FARQUHAR: In the interrogatories  
17 there were relevance objections and public availability.

18 THE COURT: All right. I think I have  
19 spoken to both of them. So, thank you, folks.

20 MS. NEAL: Your Honor, just one  
21 clarification.

22 THE COURT: Sure.

23 MS. NEAL: In Newton's motion, in their  
24 motion to compel, as far as the production of documents  
25 was limited to ten requests?

*PLAINTIFF'S MOTION TO COMPEL*

1           THE COURT: Yes. Let me speak to that.  
2 The motion to compel is limited to the ones that were  
3 actually brought in the motion today.

4           I want both sides to understand that in  
5 the event Newton comes back on some of the issues that  
6 were actually within those documents on which they did  
7 not move today, the Court reserves the right to assess  
8 costs and the place of production, if there is any  
9 future request for additional motion to compel based on  
10 the sets of documents on which a motion could have been  
11 made today.

12           I realize that you have narrowed that  
13 down, but if you then go back out and broaden it, then  
14 the Court is going to reserve the right to determine who  
15 pays and where.

16           Thank you. You may be excused.

17           (End of requested proceedings.)  
18  
19  
20  
21  
22  
23  
24  
25

1 STATE OF TEXAS )

2 COUNTY OF DALLAS )

3 I, Marcey J. Poeckes, Official Court Reporter in  
4 and for the 298th District Court of Dallas County, State  
5 of Texas, do hereby certify that the above and foregoing  
6 contains a true and correct transcription of all  
7 portions of evidence and other proceedings requested in  
8 writing by counsel for the parties to be included in  
9 this volume of the Reporter's Record in the above-styled  
10 and numbered cause, all of which occurred in open court  
11 or in chambers and were reported by me.

12 I further certify that this Reporter's Record  
13 truly and correctly reflects the exhibits, if any,  
14 offered and requested by the respective parties.

15 WITNESS MY OFFICIAL HAND, on this the 16th day  
16 of April, 2013.

17  
18           /s/Marcey J. Poeckes            
19 Marcey J. Poeckes,  
20 Texas CSR No. 3471  
21 ktrorter@aol.com  
22 Official Court Reporter  
23 298th District Court  
24 600 Commerce Street-8th Floor  
25 Dallas, Texas 75202  
Telephone: (214) 653-6782  
Expiration: 12/31/13

Marcey J. Poeckes, CSR  
Official Court Reporter, 298th District Court

Order entered June 11, 2013



In The  
**Court of Appeals**  
**Fifth District of Texas at Dallas**

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No. 05-13-00587-CV

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**IN RE TWISTER B.V., Relator**

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**On Appeal from the 298th Judicial District Court**  
**Dallas County, Texas**  
**Trial Court Cause No. 07-13697**

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**ORDER**

Based on the Court's opinion of today's date, we **DENY** relator's petition for writ of mandamus. We **ORDER** that relator bear the costs of this original proceeding.

/s/      KERRY P. FITZGERALD  
         JUSTICE

**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-13-00587-CV**

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**IN RE TWISTER B.V., Relator**

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**On Appeal from the 298th Judicial District Court  
Dallas County, Texas  
Trial Court Cause No. 07-13697**

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**MEMORANDUM OPINION**

Before Justices FitzGerald, Lang, and Myers  
Opinion by Justice FitzGerald

Relator contends the trial judge erred in ordering it to produce documents in Dallas. The facts and issues are well known to the parties, so we need not recount them herein. Based on the record before us, we conclude relator has not shown it is entitled to the relief requested. *See* TEX. R. APP. P. 52.8(a); *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992) (orig. proceeding). Accordingly, we **DENY** relator's petition for writ of mandamus.

130587F.P05

/Kerry P. FitzGerald/  
KERRY P. FITZGERALD  
JUSTICE