In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-18-00106-CV

THE CITY OF SAN FRANCISCO, DENNIS J. HERRERA IN HIS OFFICIAL CAPACITY AS CITY ATTORNEY FOR THE CITY OF SAN FRANCISCO, AND EDWARD REISKIN IN HIS OFFICIAL CAPACITY AS DIRECTOR OF TRANSPORTATION FOR THE SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY, Appellants

V.

EXXON MOBIL CORPORATION, Appellee

THE CITY OF OAKLAND, MATTHEW F. PAWA, BARBARA J. PARKER, AND SABRINA B. LANDRETH, Appellants

V.

EXXON MOBIL CORPORATION, Appellee

COUNTY OF SAN MATEO, COUNTY OF MARIN, CITY OF IMPERIAL BEACH, CITY OF SANTA CRUZ, COUNTY OF SANTA CRUZ, JOHN BEIERS, SERGE DEDINA, JENNIFER LYON, BRIAN WASHINGTON, DANA MCRAE, ANTHONY CONDOTTI, JOHN MALTBIE, ANDY HALL, MATTHEW HYMEL, CARLOS PALACIOS, AND MARTÍN BERNAL, Appellants

V.

EXXON MOBIL CORPORATION, Appellee

On Appeal from the 96th District Court
Tarrant County, Texas
Trial Court No. 096-297222-18

Before Sudderth, C.J.; Kerr and Birdwell, JJ.
Memorandum Opinion by Justice Kerr
Concurring Memorandum Opinion by Chief Justice Sudderth

MEMORANDUM OPINION

Texas-based Exxon Mobil Corporation filed a Rule 202 petition in Texas state court seeking presuit discovery to evaluate potential claims for constitutional violations, abuse of process, and civil conspiracy against several California counties, cities, and government officials, and against Matthew Pawa, who is two of the cities' Massachusetts-based outside counsel. Exxon's potential claims arise from an alleged conspiracy by Pawa and these California counties and cities to use tort suits filed in California state court to suppress Exxon's Texas-based speech and associational activities regarding climate change. Exxon claims that in the California litigation, the counties and cities alleged facts against the Texas energy sector that contradict their bond-offering disclosures. Exxon thus seeks presuit discovery to determine whether the California suits were baseless and brought in bad faith as a pretext to suppress the Texas energy sector's Texas-based speech and associational activities regarding climate change and to gain access to documents that Exxon keeps in Texas.

Pawa and the California cities, counties, and officials filed special appearances challenging Texas's personal jurisdiction over them. This interlocutory appeal arises from the denial of those special appearances. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(7). Because the potential defendants lack the requisite minimum contacts with Texas to be subject to personal jurisdiction here, we will reverse the trial court's order and render judgment denying Exxon's Rule 202 petition.

I. Factual and Procedural Background

A. Parties to the Rule 202 petition

Exxon is incorporated under the laws of New Jersey and has its principal place of business in Texas, with its corporate headquarters in Irving, Texas. Exxon formulates and issues its climate-change statements from its headquarters. The majority of its climate-change-related corporate records are located in Texas, and Exxon engages in speech and associational activities in Texas.

The cities of San Francisco, Oakland, Imperial Beach, and Santa Cruz are in California, as are the counties of San Mateo, Marin, and Santa Cruz. These cities and counties do not maintain a registered agent, telephone listing, or post-office box in Texas. They are potential defendants in Exxon's anticipated suit.

Certain officials of these California cities and counties are also potential defendants: Dennis Herrera, San Francisco's City Attorney; Barbara Parker, Oakland's City Attorney; John Beiers, San Mateo County's County Counsel; Brian Washington, Marin County's County Counsel; Dana McRae, Santa Cruz County's County Counsel; Serge Dedina, Imperial Beach's Mayor; Jennifer Lyon, Imperial Beach's City Attorney (and an attorney with the California law firm of McDougal, Love, Boehmer, Foley, Lyon & Canlas); and Anthony Condotti, Santa Cruz's City Attorney (and managing partner of the California law firm Atchison, Barisone & Condotti).

Other officials of each city and county are prospective witnesses only: Edward Reiskin, the Director of Transportation for the San Francisco Municipal

Transportation Agency; Sabrina Landreth, Oakland's City Administrator; John Maltbie, San Mateo County's County Manager; Matthew Hymel, Marin County's County Administrator; Carlos Palacios, the Santa Cruz County Administrative Officer; Gary Andrew Hall, Imperial Beach's City Manager; and Martín Bernal, Santa Cruz's City Manager.

All these individual potential defendants and prospective witnesses are, perhaps obviously, California residents. None of the individual potential defendants maintains an office or registered agent in Texas. Similarly, none of the prospective witnesses maintains a registered agent, telephone listing, or post-office box in Texas.

Potential defendant Pawa—the lone non-Californian—is a Massachusetts resident and attorney. He practices law in the Newton, Massachusetts office of Seattle-based Hagens Berman Sobol Shapiro LLP. Pawa is not licensed to practice law in Texas. In addition to being a potential defendant, Pawa is Oakland's and San Francisco's outside counsel.

B. The La Jolla conference on climate change, Pawa's climate-litigation strategy, and the Rockefeller Family Fund meeting

In June 2012, Pawa, a climate-change litigator, attended the "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La Jolla, California. Among the conference organizers was Peter Frumhoff, the Director of Science and Policy for the Union of Concerned Scientists.

the conspiracy

At the conference, Pawa spoke about one of his pending cases against the energy industry seeking damages for coastal flooding allegedly caused by anthropogenic climate change. According to him, "Exxon and the other defendants [in that case] distorted the truth." Pawa also stated that litigation is not only a remedy for those suffering the effects of climate change but also "a potentially powerful means to change corporate behavior."

Conference participants discussed strategies for getting energy companies' internal documents and concluded that law-enforcement powers and civil litigation could be used to pressure the energy industry to support legislative and regulatory responses to climate change. Participants also planned to enlist state attorneys general to launch investigations into climate change that could bring "key internal documents to light."

In March 2015, Pawa sent a memorandum to NextGen America—a nonprofit group funded by Tom Steyer, the California billionaire hedge-fund manager, environmental activist, and erstwhile candidate in the 2020 Democratic presidential primary—summarizing Pawa's legal strategy against fossil-fuel companies "for their contributions to California's injuries from global warming." The memo stated that "certain fossil[-]fuel companies (most notoriously ExxonMobil), have engaged in a campaign and conspiracy of deception and denial on global warming." Pawa further stated that "[a] global warming case would be grounded in the doctrine of public nuisance" and noted that "simply proceeding to the discovery phase would be

significant" and that "obtaining industry documents would be a remarkable achievement that would advance the case and the cause."

Early the following year, in January 2016, Pawa and others met at the Rockefeller Family Fund offices in New York City to discuss the goals of an "Exxon campaign." According to the meeting's draft agenda, the goals included (1) establishing in the public's mind that "Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm"; (2) delegitimizing Exxon as a political actor; (3) driving divestment from Exxon; and (4) forcing "officials to disassociate themselves from Exxon, their money, and their historic opposition to climate progress, for example by refusing campaign donations, refusing to take meetings, calling for a price on carbon, etc." As "main avenues for legal actions [and] related campaigns," the participants identified "AGs" and tort suits. The participants planned to use these avenues to obtain discovery and create scandal.

C. State attorneys general enter the fray

Two months later, then-New York Attorney General Eric Schneiderman, Massachusetts Attorney General Maura Healey, and 18 other state attorneys general—the "Green 20"—held the "AGs United for Clean Power Press Conference." Just before that March 2016 press conference, Pawa and Frumhoff attended a closed-door meeting with the AGs, and Pawa briefed them on "climate[-]change litigation." Pawa tried but failed to conceal from the media his involvement in the meeting.

During the press conference, the AGs promoted regulating the speech of energy companies like Exxon—companies that they perceived as hostile to AGs' policy responses to climate change. New York's Schneiderman declared that there "is no dispute" about climate change but that there is confusion "sowed by those with an interest in profiting from the confusion and creating misperceptions in the eyes of the American public that really need to be cleared up." He denounced "highly aggressive and morally vacant forces that are trying to block every step by the federal government to take meaningful action" and announced that the Green 20 was "sending a message that, at least some of us—actually a lot of us—in state government are prepared to step into this battle with an unprecedented level of commitment and coordination."

Healey of Massachusetts identified climate change "as a matter of extreme urgency," and stated that

> [p]art of the problem has been one of public perception, and it appears, certainly, that certain companies, certain industries, may not have told the whole story, leading many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts. Fossil[-]fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable. That's why I, too, have joined in investigating the practices of ExxonMobil. We can all see today the troubling disconnect between what Exxon knew, what industry folks knew, and what the company and the industry chose to share with investors and with the American public.

Around the time of the press conference, Schneiderman issued a subpoena and Healey issued a civil investigative demand to Exxon to investigate what they

considered the company's potential consumer and securities fraud. The subpoena and demand each sought production of communications and documents concerning climate change (including Exxon's climate-change research), documents related to statements made at shareholder meetings in Texas, internal corporate documents and communications concerning regulatory filings, public-facing and investor-facing reports, communications with trade associations and industry groups, and communications with "climate deniers."

Exxon responded by suing Schneiderman and Healey in federal court for declaratory and injunctive relief, asserting various claims: conspiracy to deprive Exxon of its constitutional rights; violations of Exxon's First, Fourth, and Fourteenth Amendment rights; violations of the Dormant Commerce Clause; preemption; and abuse of process. *See Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 691 (S.D.N.Y. 2018), *appeal docketed*, No. 18-1170 (2d Cir. Apr. 23, 2018). Exxon asserted that "Pawa, Frumhoff, and others hatched a scheme to promote litigation" at the La Jolla conference and "saw litigation as a means to uncover internal Exxon documents regarding climate change and to pressure fossil[-]fuel companies like Exxon to change their stance on climate change." *Id.* at 690. As evidence of Pawa's influence on the investigations, Exxon pointed to the La Jolla conference, the Rockefeller Family Fund meeting, and the briefing before the Green 20 press conference. *See id.* at 689–90, 709. According to Exxon, Schneiderman's and Healey's intended goal in conducting their investigations was to intimidate and silence the

fossil-fuel industry's side of the climate-change debate. *See id.* at 688. Exxon believed that Schneiderman's and Healey's involvement with Pawa and their statements at the March 2016 press conference suggested that their investigations were politically motivated and that they were using the document-production requests to pressure Exxon to change its position on climate change. *See id.* at 688–91. The federal district court dismissed Exxon's complaint. *Id.* at 713–14.

D. Pawa's climate crusade continues

In November 2016, Pawa spoke at a conference and accused Exxon of "under[taking] a campaign of deception and denial about global warming that confused the American people and consumers of Exxon's product and all fossil[-]fuel products about the nature and harms of global warming." According to Pawa, Exxon scientists had researched global warming in the late 1970s and early 1980s and found that the atmosphere's carbon-dioxide level was increasing and that the "overwhelming opinion of scientists was that the source of this problem was the burning of fossil fuels." In Pawa's telling, Exxon scientists further warned that an increase in carbon dioxide would result in an average global-temperature rise that would "bring about significant changes in the earth's climate." These scientists supposedly informed Exxon management that mitigation would require major reductions in fossil-fuel combustion. Pawa claimed that Exxon management knew about the scientists' findings but classified the information as proprietary and barred its distribution outside the company.

In the same talk, Pawa specifically targeted a 2013 speech concerning climate change delivered by former Exxon CEO Rex Tillerson, declaring that Tillerson's implication that "the planet was not even warming" was either false or misleading. Pawa also criticized a 2015 speech to shareholders in which Tillerson "questioned whether or not the computer models used to project future warming are 'lousy,' even though . . . Exxon has been using these same kinds of computer models since the 1980s to protect its own business assets by projecting future sea[-]level rise."

E. The California counties and cities sue Exxon (and others) and give statements to the media about their litigation targets

In 2017, the cities of San Francisco, Oakland, Imperial Beach, and Santa Cruz, along with the counties of San Mateo, Marin, and Santa Cruz, each filed lawsuits in California state court against Exxon and other fossil-fuel companies, many of which are also based in Texas.[1] These suits alleged that fossil-fuel emissions have caused and continue to cause global warming and consequent rising sea levels, resulting in increasingly severe coastal flooding, erosion, and salt-water intrusion. In addition, these suits complained that despite knowing that their products are causing global climate change, fossil-fuel companies continue to produce and sell them while engaging in advertising and public-relations campaigns that promote fossil-fuel use, discredit scientific research on global warming, and downplay global-warming risks.

[1]Oakland and San Francisco also sued Texas-based ConocoPhillips. Imperial Beach, Marin County, San Mateo County, Santa Cruz, and Santa Cruz County sued Exxon and 17 other Texas-based energy companies.

As noted, Pawa is one of the lawyers representing San Francisco and Oakland. In separate suits, those two cities brought public-nuisance claims and sought an abatement-fund remedy "to provide for infrastructure . . . necessary . . . to adapt to global[-]warming impacts, such as sea[-]level rise." Both cities expressly disclaimed that they were seeking "to impose liability on Defendants for their direct emissions of greenhouse gases" or seeking "to restrain Defendants from engaging in their business operations." San Francisco and Oakland each served its complaint on Exxon's registered agent in California.[2]

Similarly, in five separate suits, the cities of Imperial Beach and Santa Cruz and the counties of San Mateo, Marin, and Santa Cruz alleged claims for public and private nuisance, negligence, products liability, and trespass. In addition to "equitable relief to abate the nuisances," these suits (collectively, the "San Mateo suits") sought

[2]Exxon and the other defendants removed the San Francisco and Oakland suits to federal court, and the federal district court judge in those cases dismissed them for failure to state a claim and for lack of personal jurisdiction. *See City of Oakland v. BP p.l.c.*, Nos. C 17-06011 WHA, C 17-06012 WHA, 2018 WL 3609055, at *1 (N.D. Cal. July 27, 2018); *City of Oakland v. BP p.l.c.*, 325 F. Supp. 3d 1017, 1019 (N.D. Cal. 2018); *California v. BP p.l.c.*, Nos. C 17-06011 WHA, C 17-06012 WHA, 2018 WL 1064293, at *1 (N.D. Cal. Feb. 27, 2018). The Ninth Circuit, however, recently determined that removal was improper because San Francisco's and Oakland's state-law public-nuisance claims did not arise under federal law and thus remanded the cases to district court to determine whether there was an alternate basis for subject-matter jurisdiction. *See City of Oakland v. BP PLC*, No. 18-16663, 2020 WL 2702680, at *1, *9 (9th Cir. May 26, 2020).

compensatory and punitive damages and profit disgorgement. The San Mateo suits were served on Exxon's registered agent in Texas.[3]

Each of the cities' and counties' complaints discusses Exxon's internal memos and scientific research concerning climate change. The complaints also focus on Exxon's Texas-based speech and associational activities regarding climate change. San Francisco and Oakland, for example, stated that at Exxon's 2015 annual shareholder meeting in Texas, "then-CEO Rex Tillerson misleadingly downplayed global warming's risks by stating that climate models used to predict future impacts were unreliable." San Francisco's and Oakland's complaints also mention allegedly misleading corporate statements about climate change issued from Texas, such as Exxon's "annual 'Outlook for Energy' reports," which the cities describe as a "self-serving means of promoting fossil fuels and undercutting non-dangerous renewable energy and clean technologies"; statements on Exxon's website emphasizing the "'uncertainty' of global[-]warming science and impacts"; and Exxon's "'Lights Across America' website advertisement," which states "that natural gas is 'helping [to] dramatically reduce America's emissions,' even though natural gas [according to the cities] is a fossil fuel causing widespread planetary warming and harm to coastal

[3]The defendants in the San Mateo suits also removed those suits to federal court, but the federal district court judge in those cases remanded them to state court. *Cty. of San Mateo v. Chevron Corp.*, Nos. 18-15499, 18-15502, 18-15503, 18-16376, 2020 WL 2703701, at *1–2 (9th Cir. May 26, 2020). In an opinion issued concurrently with the opinion in the San Francisco and Oakland cases, the same Ninth Circuit panel affirmed the district court's remand order. *Id.* at *2 n.3, *9.

cities." San Francisco's and Oakland's complaints also attack Exxon's decisions to fund climate-change researchers and research groups that the cities have labeled as "front groups" and climate-change "denialists."

The San Mateo suits similarly focus on Exxon's Texas-based speech and associational activities concerning climate change such as:

- a 1988 memo from an Exxon public-affairs manager describing the "Exxon Position," which emphasized "the uncertainty in scientific conclusions regarding the potential enhanced Greenhouse Effect" and resisted "the overstatement and sensationalization [sic] of potential greenhouse effect which could lead to noneconomic development of non-fossil[-]fuel resources";

- a 1996 publication released by Exxon entitled, "Global Warming: Who's Right?," which was prefaced by a statement from Exxon's then-CEO Lee Raymond: "taking drastic action immediately is unnecessary since many scientists agree there's ample time to better understand the climate system"; and

- a declaration in Exxon's 2007 Corporate Citizenship Report that in 2008, Exxon would "discontinue contributions to several public policy [climate-change-denial] research groups whose position on climate change could divert attention from the important discussion on how the world will secure the energy required for economic growth in an environmentally responsible manner."

Shortly after these lawsuits were filed, several of the cities' officials made media statements supporting the suits. In an op-ed for *The San Diego Union-Tribune* supporting Imperial Beach's lawsuit, Mayor Dedina claimed that Exxon and "its industry colleagues" had known for 50 years that carbon-dioxide pollution from fossil fuels "would cause the air and oceans to warm and sea levels to rise." Dedina further claimed that instead of taking steps to remedy the problem and warn the public and

policymakers, fossil-fuel companies "embarked on a multimillion-dollar campaign, taken straight from the tobacco industry's playbook, to sow uncertainty around both the science and the impacts to put off regulation of their [carbon-dioxide] pollution for as long as possible." During a radio appearance soon after, Dedina accused Exxon of carrying out a "merchants of doubt" campaign.

In the same vein was a press release issued by Parker, Oakland's City Attorney, declaring that "[i]t is past time to debate or question the reality of global warming." She went on to claim: "Just like BIG TOBACCO, BIG OIL knew the truth long ago and peddled misinformation to con their customers and the American public."

For his part, San Francisco City Attorney Herrera accused fossil-fuel companies of "profit[ing] handsomely for decades while knowing they were putting the fate of our cities at risk," but rather than "owning up to it, they copied a page from the Big Tobacco playbook" and "launch[ed] a multi-million dollar disinformation campaign to deny and discredit what was clear even to their own scientists: global warming is real, and their product is a huge part of the problem." He pledged that San Francisco was "going to ensure that those responsible for the problem are held to account."

F. In contrast, the cities' and counties' bond offerings downplay climate-change risks

The cities' and counties' recent bond-offering disclosures are at odds with the claims made in their lawsuits. For example, one of San Francisco's 2017 bond

offerings states that according to the California Climate Change Center, the city is at risk from sea-level rise and flooding caused by climate change. But the offering also states that San Francisco is "unable to predict whether sea-level rise or other impacts of climate change . . . will occur, when they may occur, and if any such events occur, whether they will have a material adverse effect on the business operations or financial condition of the City and the local economy."

San Mateo County's 2014 and 2016 bond offerings also refer to the California Climate Change Center's prediction but similarly state that the county is "unable to predict whether sea-level rise or other impacts of climate change or flooding from a major storm will occur" and what impact those events would have on the local economy or on the county's business operations or financial condition if they did occur.

Oakland's 2017 bond offering discusses earthquake and wildfire risks, but not climate-change risks, stating merely that the city "is unable to predict when seismic events, fires[,] or other natural events, such as searise or other impacts of climate change or flooding from a major storm, could occur, when they may occur, and, if any such events occur, whether they will have a material adverse effect on the business operations or financial condition of the City or the local economy."

In a 2013 bond offering, Imperial Beach does not mention climate change, including under the heading "Natural Disasters"; rather, it states only that "earthquake, flood, fire, or other natural disaster, could cause a reduction in the Tax

Revenues securing the Bonds." Similarly, Marin County's 2010 bond offering warns only about "the complete or partial destruction of taxable property caused by natural or manmade disaster, such as earthquake, flood, fire, terrorist activities, [and] toxic dumping."

Santa Cruz County's 2016 bond offering, under the heading "Geologic, Topographic and Climatic Conditions," warns merely of "unpredictable climatic conditions, such as flood, droughts[,] and destructive storms." The City of Santa Cruz's 2017 bond offering states that "[f]rom time to time, the City is subject to natural calamities," including "earthquake, flood, tsunami, or wildfire."

G. Exxon files its Rule 202 petition

Based on the disconnect between the cities' and counties' bond-offering disclosures and what they alleged in their lawsuits, Exxon theorizes that the California cities and counties "do not actually believe the allegations in their complaints" and that those allegations "were not made in good faith." Exxon further believes that these lawsuits have been brought to silence and delegitimize Exxon "as a political actor" and to coerce it and other Texas-based energy companies into adopting "the climate[-]change policies favored by special interests and their allies in municipal government." Exxon points to Pawa's direct involvement in the San Francisco and Oakland suits as further evidence that they were brought for the "improper purpose" that Pawa endorsed at the La Jolla conference, discussed at the Rockefeller Family

Fund meeting, explained to the state AGs before the Green 20 press conference, and described in his memo to NextGen America.

Based on these beliefs, Exxon filed a Rule 202 petition in Tarrant County District Court to investigate potential claims for constitutional torts (specifically, violations of Exxon's First Amendment rights under the United States and Texas Constitutions), abuse of process, and civil conspiracy, and to perpetuate and obtain testimony in anticipation of filing suit. *See generally* Tex. R. Civ. P. 202. Exxon identified as potential defendants the seven California cities and counties that have sued Exxon and other Texas-based energy companies in California, the eight city and county officials responsible for filing those suits,[4] and Pawa (collectively, "the Potential Defendants"). Exxon also sought to depose seven city and county officials who signed the bond offerings[5] (collectively, "the Prospective Witnesses"). Exxon alleged that Texas has specific personal jurisdiction over the Potential Defendants under Section 17.042(2) of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 17.042(2).

The Potential Defendants and Prospective Witnesses filed special appearances supported by affidavits. *See* Tex. R. Civ. P. 120a. Exxon responded and presented its own evidence. After a nonevidentiary hearing, the trial court denied the special

[4]Parker, Herrera, Beiers, Dedina, Lyon, Washington, McRae, and Condotti.

[5]Landreth, Reiskin, Maltbie, Hall, Hymel, Palacios, and Bernal.

appearances and, at Exxon's request, filed findings of fact and conclusions of law in support of its order.

II. The Trial Court's Findings and Conclusions

The trial court filed 60 findings of fact and conclusions of law. *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002) (recognizing that trial court may make findings of fact in connection with a special-appearance ruling). As relevant here, the trial court found and concluded the following:

FINDINGS OF FACT

. . . .

> 10. In January 2016, Mr. Pawa engaged participants at the Rockefeller Family Fund offices in New York City to further solidify "the [g]oals of an Exxon campaign" that Mr. Pawa [had] developed at the La Jolla conference. . . .
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> 11. According to the draft agenda, Mr. Pawa and the other participants aimed to chill and suppress ExxonMobil's speech through "legal actions & related campaigns," including "AGs" and "Tort[]" suits. The draft agenda notes that participants planned to use "AGs" and "Tort[]" suits to "get[] discovery" and "creat[e] scandal."
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> 13. At the [Green 20] press conference, Attorney General Schneiderman discussed the need to regulate the energy industry's speech on climate change, just as Potential Defendant Pawa had urged at La Jolla and at the Rockefeller meeting. . . .
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> 14. [At the Green 20 press conference,] Attorney General Healey similarly echoed themes from the strategy Mr. Pawa developed at La Jolla. . . .
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> . . . .

23. With the investigations of the state attorneys general underway, Mr. Pawa next promoted his La Jolla strategy to California municipalities, as potential plaintiffs in tort litigation that would be filed against energy companies, including ExxonMobil.

. . . .

26. Following through on the strategy Mr. Pawa outlined in his memorandum to NextGen America, Potential Defendants Parker, Herrera, and the Cities of Oakland and San Francisco filed public[-]nuisance lawsuits against ExxonMobil and four other energy companies, including Texas-based ConocoPhillips. Mr. Pawa represents the plaintiffs in those actions, and Ms. Parker and Mr. Herrera signed the complaints on behalf of the City of Oakland and the City of San Francisco, respectively. They used an agent to serve the complaints on ExxonMobil's registered agent in California, whose role is to transmit legal process to ExxonMobil in Texas.

27. Potential Defendants Lyon, Washington, Beiers, Condotti, McRae, the City of Imperial Beach, Marin County, San Mateo County, and the City and County of Santa Cruz filed similar public[-]nuisance complaints against ExxonMobil and other energy companies, including . . . 17 Texas-based energy companies . . . . Potential Defendants Beiers, Lyon, McRae, Washington, and Condotti signed these complaints. They used an agent to serve the complaints on ExxonMobil's registered agent in Texas.

28. Each of the seven California complaints expressly target speech and associational activities in Texas.

. . . .

32. Several Potential Defendants also made statements shortly after filing the lawsuits focusing on Texas-based speech. . . .

. . . .

35. The[] allegations [in the California complaints] are contradicted by the Respondents' own municipal[-]bond disclosures. While the California municipalities alleged in their complaints against the energy companies that the impacts of climate change were knowable, quantifiable, and certain, they told their investors the exact opposite.

These contradictions raise the question of whether the California municipalities brought these suits for an improper purpose.

. . . .

41. Potential Defendants Pawa, Parker, Herrera, Beiers, Dedina, Lyon, Washington, McRae, Condotti, County of San Mateo, County of Marin, City of Imperial Beach, City of Santa Cruz, County of Santa Cruz, City of Oakland, and City of San Francisco either approved or participated in filing the lawsuits against the Texas energy sector. That conduct was directed at Texas-based speech, activities, and property. Prospective Witnesses Landreth, Reiskin, Maltbie, Hall, Hymel, Palacios, and Bernal approved the contemporaneous disclosures that contradict the allegations in the municipal complaints. Those witnesses, along with the Potential Defendants, are likely to have evidence pertaining to that contradiction.

CONCLUSIONS OF LAW

42. Under Rule 202 of the Texas Rules of Civil Procedure, a proper court may allow discovery of a potential claim if the court would have personal jurisdiction over the potential defendants to the anticipated suit.

43. Because this Court is not required to have personal jurisdiction over prospective witnesses who are not potential defendants, the special appearances of Prospective Witnesses Landreth, Reiskin, Maltbie, Hall, Hymel, Palacios, and Bernal are denied.

. . . .

45. This Court could exercise specific personal jurisdiction over the Potential Defendants for the anticipated claims of constitutional violations, abuse of process, and civil conspiracy.

46. The exercise of personal jurisdiction over the Potential Defendants to the anticipated action would be permitted under the Texas long-arm statute, which allows a Texas court to exercise jurisdiction over nonresidents who commit a tort in whole or in part in Texas. Tex. Civ. Prac. & Rem. Code [Ann.] § 17.042(2). Each of the Potential Defendants is a nonresident within the meaning of the long-arm statute.

47. A violation of First Amendment rights occurs where the targeted speech occurs or where it would otherwise occur but for the violation. ExxonMobil exercises its First Amendment rights in Texas, and Texas is the site of the speech challenged by the Potential Defendants' lawsuits. The anticipated claims therefore concern potential constitutional torts committed in Texas.

48. Exercising jurisdiction over the Potential Defendants in the anticipated action would comport with due process because the potential claims arise from minimum contacts initiated by the Potential Defendants which purposefully target Texas, including speech, activities, and property in Texas.

49. Mr. Pawa initiated contact and created a continuing relationship with Texas by, among other activities, (i) initiating a plan to use litigation to change corporate behavior of Texas-based energy companies at the La Jolla conference; (ii) engaging with the Rockefeller Family Fund to solidify and promote the goal of delegitimizing ExxonMobil as a political actor; (iii) instigating state attorneys general to commence investigations of ExxonMobil in order to obtain documents stored in Texas; and (iv) soliciting and actively promoting litigation by California municipalities against the Texas energy industry, including ExxonMobil, to target Texas-based speech and obtain documents in Texas.

50. All of the Potential Defendants initiated contact and created a continuing relationship with Texas by (i) developing, signing, approving, and/or filing complaints that expressly target the speech, research, and funding decisions of ExxonMobil and other Texas-based energy companies to chill and affect speech, activities, and property in Texas; and (ii) using an agent to serve ExxonMobil in Texas.

Trial Court Findings

51. The Potential Defendants' contacts were deliberate and purposeful, and not random, fortuitous, or attenuated.

52. Purposeful availment is satisfied where Texas is the focus of the Potential Defendants' activities and where the object of the potential conspiracy is to suppress speech and corporate behavior in Texas. *See, e.g.*, *TV Azteca* v. *Ruiz*, 490 S.W.3d 29, 40 (Tex. 2016); *Hoskins v. Ricco Family Partners, Ltd.*, Nos. 02-15-00249-CV, 02-15-00253-CV, 2016 WL 2772164, at *7 (Tex. App.—Fort Worth May 12, 2016[, no pet.]) [(mem. op.)].

> 53. Based on the foregoing findings of fact, ExxonMobil's potential claims of First Amendment violation[s], abuse of process, and civil conspiracy would arise from the Potential Defendants' contacts with Texas.
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> 54. Exercising jurisdiction over the Potential Defendants for the potential claims would comport with traditional notions of fair play and substantial justice.
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> . . . .
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> 60. To the extent the Court's findings of fact are construed by a reviewing court to be conclusions of law or vice-versa, the incorrect designation shall be disregarded and the specified finding and/or conclusion of law shall be deemed to have been correctly designated herein.

III. Applicable Law

Texas Rule of Civil Procedure Rule 202 allows a trial court to authorize a deposition either (1) to perpetuate or obtain testimony for use in an anticipated suit or (2) to investigate a potential claim or suit. *See* Tex. R. Civ. P. 202.1. Rule 202 requires that requests for presuit discovery be filed in a "proper court." Tex. R. Civ. P. 202.2(b); *In re Doe* (*Trooper*), 444 S.W.3d 603, 608 (Tex. 2014) (orig. proceeding). A "proper court" is one that has personal jurisdiction over the potential defendant. *See Trooper*, 444 S.W.3d at 604, 608–10. Thus, a trial court may grant a Rule 202 petition only if it has personal jurisdiction over the potential defendant. *See id.* at 604, 608–11.

A. Establishing personal jurisdiction

A Texas court has personal jurisdiction over a nonresident defendant when the Texas long-arm statute permits the exercise of such jurisdiction and the exercise of

jurisdiction is consistent with federal and state constitutional due-process guarantees. *Moncrief Oil Int'l, Inc. v. OAO Gazprom*, 414 S.W.3d 142, 149 (Tex. 2013). The Texas long-arm statute allows Texas courts to exercise personal jurisdiction over a nonresident that "commits a tort in whole or in part in this state." Tex. Civ. Prac. & Rem. Code Ann. § 17.042(2); *TV Azteca*, 490 S.W.3d at 36. Because the long-arm statute reaches "as far as the federal constitutional requirements for due process will allow," a Texas court may exercise personal jurisdiction over a nonresident so long as doing so "comports with federal due[-]process limitations." *TV Azteca*, 490 S.W.3d at 36 (quoting *Spir Star AG v. Kimich*, 310 S.W.3d 868, 872 (Tex. 2010)).

In determining whether federal due-process requirements have been met, we rely on precedent from the United States Supreme Court and other federal courts, as well as our own state's decisions. *BMC Software*, 83 S.W.3d at 795; *TravelJungle v. Am. Airlines, Inc.*, 212 S.W.3d 841, 845–46 (Tex. App.—Fort Worth 2006, no pet.). Federal due process is satisfied when (1) the defendant has established minimum contacts with the state and (2) the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017); *TV Azteca*, 490 S.W.3d at 36.

1. Minimum contacts

A nonresident defendant "establishes minimum contacts with a forum when it 'purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.'" *Moncrief Oil*, 414 S.W.3d

at 150 (quoting *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 338 (Tex. 2009)). Three principles govern our purposeful-availment analysis: (1) only the defendant's contacts with Texas are relevant, not the unilateral activity of another party or third person; (2) the defendant's acts must be purposeful and not random, isolated, or fortuitous; and (3) the defendant must seek some benefit, advantage, or profit by availing itself of Texas's jurisdiction so that it impliedly consents to suit here. *M & F Worldwide Corp. v. Pepsi-Cola Metro. Bottling Co.*, 512 S.W.3d 878, 886 (Tex. 2017) (citing *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 785 (Tex. 2005)).

To constitute purposeful availment, the defendant's contacts must be "purposefully directed" to Texas. *TV Azteca*, 490 S.W.3d at 38 (quoting *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 228 (Tex. 1991)). Those contacts also must result from the defendant's own "efforts to avail itself of the forum." *Id.* (quoting *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 576 (Tex. 2007)). A defendant will not be haled into Texas based solely on contacts that are "random, isolated, or fortuitus," *id.* (quoting *Michiana*, 168 S.W.3d at 785), or on the "unilateral activity of another party or a third person," *id.* (quoting *Guardian Royal*, 815 S.W.2d at 226). "The defendant's activities, whether they consist of direct acts within Texas or conduct outside Texas, must justify a conclusion that the defendant could reasonably anticipate being called into a Texas court." *Retamco*, 278 S.W.3d at 338 (quoting *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002))

Minimum contacts can give rise to either specific or general jurisdiction. *TV Azteca*, 490 S.W.3d at 37. Here, Exxon contends—and the trial court agreed—that Texas has specific jurisdiction over the Potential Defendants.[6] Specific jurisdiction exists when the cause of action arises from or is related to a defendant's purposeful activities in the state. *Moncrief Oil*, 414 S.W.3d at 150. "For a Texas court to exercise specific jurisdiction over a defendant, '(1) the defendant's contact with Texas must be purposeful, and (2) the cause of action must arise from those contacts.'" *Old Republic Nat'l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 559 (Tex. 2018) (quoting *Michiana*, 168 S.W.3d at 795). That is, the defendant's purposeful contacts must be substantially connected to the operative facts of the litigation or form the basis of the cause of action. *Id.* at 559–60 (citing *Moki Mac*, 221 S.W.3d at 585; *Michiana*, 168 S.W.3d at 795). When analyzing specific jurisdiction, our focus is thus on the relationship between Texas, the defendant, and the litigation. *Moncrief Oil*, 414 S.W.3d at 150.

2. Traditional notions of fair play and substantial justice

But even when a nonresident has established minimum contacts with Texas, due process permits Texas to assert personal jurisdiction over the nonresident only if doing so comports with "traditional notions of fair play and substantial justice." *TV Azteca*, 490 S.W.3d at 55 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945)). Typically, though, "[w]hen a nonresident defendant has

[6]The trial court concluded that Texas does not have general jurisdiction over the Potential Defendants, a conclusion that no party challenges.

purposefully availed itself of the privilege of conducting business in a foreign jurisdiction, it is both fair and just to subject that defendant to the authority of that forum's courts." *Id.* (quoting *Spir Star*, 310 S.W.3d at 872). "Thus, '[i]f a nonresident has minimum contacts with the forum, rarely will the exercise of jurisdiction over the nonresident not comport with traditional notions of fair play and substantial justice.'" *Id.* (quoting *Moncrief Oil*, 414 S.W.3d at 154–55).

B. The parties' shifting trial-court burdens and appellate standard of review

In the trial court, the plaintiff bears the initial burden to plead sufficient allegations to bring the nonresident defendant within the reach of the Texas long-arm statute. *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 658 (Tex. 2010). Once the plaintiff has done so, the burden shifts to the defendant to negate all potential bases for personal jurisdiction as pleaded by the plaintiff. *Id.* "Because the plaintiff defines the scope and nature of the lawsuit, the defendant's corresponding burden to negate jurisdiction is tied to the allegations in the plaintiff's pleading." *Id.*

The defendant can negate jurisdiction on either a factual or legal basis. *Id.* at 659. Factually, the defendant can negate jurisdiction by presenting evidence that it has no contacts with Texas, effectively disproving the plaintiff's allegations; the plaintiff risks dismissal of its suit if it does not then present the trial court with evidence affirming its jurisdictional allegations and establishing personal jurisdiction over the defendant. *Id.* Legally, the defendant can negate jurisdiction by showing that even if the plaintiff's alleged jurisdictional facts are true, (1) the evidence is legally insufficient

to establish jurisdiction, (2) the defendant's Texas contacts fall short of purposeful availment, (3) the claims do not arise from the defendant's Texas contacts, or (4) exercising jurisdiction over the defendant would offend traditional notions of fair play and substantial justice. *Id.*

Whether a trial court has personal jurisdiction over a defendant is a legal question that we review de novo. *Moncrief Oil*, 414 S.W.3d at 150. But a trial court may have to resolve fact questions before deciding the jurisdiction question. If the trial court makes findings of fact and conclusions of law in denying a special appearance, the appellant may challenge the fact findings on legal- and factual-sufficiency grounds, and we review the challenged findings for both legal and factual sufficiency. *BMC Software*, 83 S.W.3d at 794. We review challenged legal conclusions de novo to determine their correctness based on the facts. *See id.*

IV. The California Parties' Issues

The San Francisco parties,[7] the Oakland parties,[8] and the San Mateo parties[9] (collectively, "the California Parties") filed separate notices of appeal and separate

[7]The City of San Francisco, Herrera, and Reiskin.

[8]The City of Oakland, Pawa, Parker, and Landreth.

[9]San Mateo County, Marin County, Santa Cruz County, City of Santa Cruz, City of Imperial Beach, Beiers, Dedina, Lyon, Washington, McRae, Condotti, Maltbie, Hall, Hymel, Palacios, and Bernal.

appellate briefs raising similar issues. For efficiency's sake, we combine and recast the California Parties' issues and arguments as follows:

1. The cities, counties, and their officials are nonresidents under the Texas long-arm statute and are thus not within the statute's reach.

2. Exxon failed to plead sufficient allegations to bring the San Francisco parties and the Oakland parties within the Texas long-arm statute.[10]

3. The California Parties lacked minimum contacts with Texas because they did not purposefully avail themselves of the privilege of conducting activities in Texas.

4. Exxon's anticipated claims did not arise from or relate to the California Parties' forum contacts.

5. A Texas court's exercising jurisdiction over the California Parties would offend traditional notions of fair play and substantial justice.

6. The evidence was insufficient to support the trial court's fact findings. The Oakland parties additionally argue that the federal district court's dismissing Exxon's complaint against attorneys general Schneiderman and Healey precluded the trial court's findings concerning Pawa's motives.

7. In a Rule 202 proceeding, a trial court must have personal jurisdiction over prospective witnesses, not just potential defendants.[11]

We will assume without deciding that the cities, counties, and their officials are nonresidents within the meaning of the Texas long-arm statute,[12] and begin our

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[10]The San Mateo parties did not contest that Exxon's pleadings were sufficient to bring them within the Texas long-arm statute. And unlike the San Francisco parties and the Oakland parties, the San Mateo parties did not adopt the arguments made in the other parties' briefs. *See* Tex. R. App. P. 9.7 ("Any party may join in or adopt by reference all or any part of a brief . . . filed in an appellate court by another party in the same case.").

[11]The San Mateo parties did not raise this issue.

analysis by addressing the sufficiency of Exxon's pleadings. Then, we will address whether the California Parties established that they lack sufficient minimum contacts with Texas. Because the minimum-contacts issue is dispositive, we will not address the remaining issues.

V. The Sufficiency of Exxon's Pleadings

As noted, the Texas long-arm statute allows Texas courts to exercise personal jurisdiction over a nonresident who "commits a tort in whole or in part in this state." Tex. Civ. Prac. & Rem. Code Ann. § 17.042(2). Exxon pleaded that Texas has specific personal jurisdiction over the Potential Defendants under Section 17.042(2) because

> the potential abuse of process, civil conspiracy, and constitutional violations were intentionally targeted at the State of Texas to encourage the Texas energy sector to adopt the co-conspirator's desired legislative and regulatory responses to climate change. Exxon[] and 17 other Texas-based companies that are named in the California . . . lawsuits exercise their First Amendment right in Texas to participate in the national dialogue about climate change. The speech and other First Amendment activity of the energy sector in Texas is precisely what the potential

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[12] *See* Tex. Civ. Prac. & Rem. Code Ann. § 17.041 (stating that the term "'nonresident' *includes* . . . an individual who is not a resident of this state" and "a foreign corporation, joint-stock company, association, or partnership" (emphasis added)), § 17.042(2) (stating that a nonresident does business in Texas if the nonresident "commits a tort in whole or in part in this state"); Tex. Gov't Code Ann. § 312.011(19) (stating that "'[i]ncludes' and 'including' are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded"). *But cf. Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 482–83 (5th Cir. 2008) (dicta) (explaining that the Texas long-arm statute may not reach an out-of-state official in cases involving "a challenge to an out-of-state regulator's enforcement of her state's statute, rather than a conventional contract or tort claim").

> defendants have attempted to stifle through their abuse of law enforcement powers and civil litigation. [Footnote omitted.]

In short, Exxon pleaded that the Potential Defendants committed a tort in whole or in part in Texas because they committed torts that were targeted at Texas. We conclude that these allegations satisfied Exxon's initial burden of alleging a cause of action sufficient to confer jurisdiction.[13] *See Lombardo v. Bhattacharyya*, 437 S.W.3d 658, 679 (Tex. App.—Dallas 2014, pet. denied) (concluding that "Bhattacharyya's allegations that Lombardo committed torts in Texas satisfied his initial burden of alleging a cause of action sufficient to confer jurisdiction under the Texas long-arm statute"); *see also TV Azteca*, 490 S.W.3d at 43, 47–52 (concluding that allegations and evidence that defendants "intentionally targeted Texas through [their] broadcasts"

[13]Exxon failed to plead any allegations to bring the Prospective Witnesses within the reach of the Texas long-arm statute, presumably because it contends—and the trial court agreed—that a court is not required to have personal jurisdiction over nonresident prospective witnesses in a Rule 202 proceeding. But whether Exxon was required to so plead is irrelevant because we conclude that Texas does not have personal jurisdiction over the Potential Defendants and thus must render judgment denying Exxon's Rule 202 petition. *See Trooper*, 444 S.W.3d at 604–05, 610–11 (concluding that trial court abused its discretion by granting Rule 202 petition to allow the petitioner to depose Google to discover the potential defendant's identity because the petitioner did not establish personal jurisdiction over the potential defendant); *eBay Inc. v. Mary Kay Inc.*, No. 05-14-00782-CV, 2015 WL 3898240, at *2–3 (Tex. App.—Dallas June 25, 2015, pet. denied) (mem. op.) (rendering judgment denying Rule 202 petition because in seeking to depose, upon written questions, eBay's corporate representative to discover the potential defendants' identities, Mary Kay failed to plead jurisdictional facts to establish personal jurisdiction over the potential defendants).

established purposeful availment). We thus overrule the San Francisco parties' and the Oakland parties' arguments regarding the sufficiency of Exxon's pleadings.

"Although allegations that a tort was committed in Texas satisfy our long-arm statute, such allegations do not necessarily satisfy the U.S. Constitution." *Moncrief*, 414 S.W.3d at 149. But because Exxon met its initial pleading burden, the burden shifted to the California Parties to negate Exxon's basis for jurisdiction—that the Potential Defendants committed a tort in whole or in part in Texas. *See id.* at 149–50. The California Parties responded that exercising jurisdiction over them would violate due process because they lacked minimum contacts with Texas.

VI. The Potential Defendants Lack Minimum Contacts with Texas

The California Parties argue that the Potential Defendants lack minimum contacts with Texas because they did not purposefully avail themselves of conducting activities in Texas. Exxon counters that the Potential Defendants purposefully directed their activities at Texas by (1) commencing baseless lawsuits in California intended to suppress speech in Texas and to gain access to documents in Texas and (2) serving Exxon with process in Texas.

A. The Potential Defendants' contacts

As an initial matter, we note that a plaintiff must establish specific jurisdiction on a claim-by-claim basis unless all the asserted claims arise from the same forum contacts. *See id.* at 150–51. Here, Exxon's anticipated claims—First Amendment

violations, malicious prosecution, and conspiracy—do all arise from the same alleged forum contacts:

- The Potential Defendants signed, approved, or participated in filing the California lawsuits against Exxon and other Texas-based energy companies intended to suppress speech and associational rights in Texas and to obtain documents in Texas through the discovery process.

- The Potential Defendants hired a process server to serve their complaints on Exxon in Texas, either by serving the complaints on Exxon's registered agent in Texas or by serving the complaints on Exxon's registered agent in California to transmit them to Exxon in Texas.

Regarding Pawa, Exxon alleged that he had additional contacts with Texas: (1) he developed and promoted a plan at the La Jolla conference in California and at the Rockefeller meeting in New York to suppress Texas-based speech and to obtain Texas-based documents in order to delegitimize Exxon and other Texas-based energy companies; (2) he encouraged state AGs to investigate Exxon, focusing on Texas-based speech and documents; and (3) he promoted tort litigation by California municipalities against Exxon and others in the Texas energy sector in furtherance of his plan.

B. Exxon's evidence and the trial court's fact findings

Much of Exxon's responsive evidence and the trial court's fact findings relate to the merits of Exxon's potential tort claims—that is, the Potential Defendants' intent in filing and serving the California lawsuits. "The mere existence or allegation of a conspiracy directed at Texas is not sufficient to confer jurisdiction." *Old Republic*,

549 S.W.3d at 560 (citing *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995)). The personal-jurisdiction analysis in tort cases must focus on the "physical fact" of a defendant's contacts with Texas without attempting to decide the merits of the case:

> Business contacts are generally a matter of physical fact, while tort liability . . . turns on what the parties thought, said, or intended. Far better that judges should limit their jurisdictional decisions to the former rather than involving themselves in trying the latter.

Michiana, 168 S.W.3d at 791; *see Moncrief*, 414 S.W.3d at 147 (reiterating that "what the parties thought, said, or intended is generally irrelevant to their jurisdictional contacts").

Moreover, the supreme court has "expressly disapproved of the notion that 'specific jurisdiction turns on whether a defendant's contacts were tortious rather than the contacts themselves.'" *Estate of Hood*, No. 02-16-00036-CV, 2016 WL 6803186, at *7 (Tex. App.—Fort Worth Nov. 17, 2016, no pet.) (mem. op.) (quoting *Michiana*, 168 S.W.3d at 792). As we have recently observed, "[W]e do not address the merits of the tort claims in reviewing the special appearance; rather, we instead analyze the quality and nature of [a defendant's] proven contacts in light of [the plaintiff's] pleaded tort claims." *OZO Capital, Inc. v. Syphers*, No. 02-17-00131-CV, 2018 WL 1531444, at *6 n.9 (Tex. App.—Fort Worth Mar. 29, 2018, no pet.) (mem. op.) (citing *Michiana*, 168 S.W.3d at 790–92).

Accordingly, the trial court's findings regarding the Potential Defendants' intent in filing the California lawsuits are irrelevant to our personal-jurisdiction analysis, and we thus will not address the California Parties' challenges to the sufficiency of the evidence supporting those findings. Instead, we focus on the quality and nature of the Potential Defendants' contacts with Texas.

C. Analysis

We begin by noting that for Texas to have specific jurisdiction over a nonresident defendant, the nonresident's conduct need not actually occur in Texas, as long as the defendant's acts were purposefully directed toward Texas as opposed to a Texas resident. *See Walden v. Fiore*, 571 U.S. 277, 285, 134 S. Ct. 1115, 1112 (2014); *TravelJungle*, 212 S.W.3d at 847; *see also Cornerstone Healthcare Grp. Holding, Inc. v. Nautic Mgmt. IV, L.P.*, 493 S.W.3d 65, 71 (Tex. 2016) ("Although 'physical presence in the forum' is 'a relevant contact,' it 'is not a prerequisite to jurisdiction.'") (quoting *Walden*, 571 U.S. at 285, 134 S. Ct. at 1122). Relying primarily on the Texas Supreme Court's opinions in *TV Azteca* and *Retamco*, Exxon argues that the Potential Defendants purposefully directed their conduct at Texas by targeting Texas and Texas property by filing and serving the California suits in furtherance of a conspiracy directed at Texas to suppress Texas-based speech and associational activities and to gain access to Exxon's documents in Texas through discovery in the California suits.

In *TV Azteca*, a Mexican recording artist residing in South Texas sued two Mexican television broadcasters and a Mexican news anchor and producer for

defamation based on broadcasts that originated in Mexico but reached parts of Texas. 490 S.W.3d at 34–35. The Texas Supreme Court ultimately held that the defendants had indeed purposefully availed themselves of the privilege of conducting activities in Texas by intentionally targeting Texas through the allegedly defamatory broadcasts. *Id.* at 52.

But in reaching its holding, the court rejected the plaintiff's contention that the defendants' having simply "directed a tort" at her in Texas was a basis for exercising personal jurisdiction over them: "No one disputes that [the plaintiff] resides in Texas and the brunt of any injuries she suffered from [the defendants'] broadcasts occurred in Texas," but "courts cannot base specific jurisdiction merely on the fact that the defendant 'knows that the brunt of the injury will be felt by a particular resident in the forum state.'" *Id.* at 43 (quoting *Michiana*, 168 S.W.3d at 788). The court then stated that "[t]here is a subtle yet crucial difference between directing a tort at an individual who happens to live in a particular state and directing a tort at that state." *Id.* "The fact that the plaintiff lives and was injured in the forum state is not irrelevant to the jurisdictional inquiry, but it is relevant only to the extent that is shows that *the forum state* was 'the focus of the activities of the defendant.'" *Id.* (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780, 104 S. Ct. 1473, 1481 (1984)). But "the mere fact that [the defendants] directed defamatory statements at a plaintiff who lives in and allegedly suffered injuries in Texas, without more, does not establish specific jurisdiction over [the defendants]." *Id.*

Nonetheless, the *TV Azteca* court ultimately concluded that through their broadcasts the nonresident defendants had intentionally targeted Texas and thus purposefully availed themselves of the benefits of conducting activities in Texas because "additional conduct" evidence showed that they intended to serve the Texas market with their broadcasts. *See id.* at 46–52. The court explained that "a plaintiff can establish that a defamation defendant targeted Texas by relying on other 'additional conduct' through which the defendant 'continuously and deliberately exploited' the Texas market." *Id.* at 47 (quoting *Keeton*, 465 U.S. at 781, 104 S. Ct. at 1481). Evidence that the defendants had physically entered into Texas to produce and to promote their broadcasts, had derived substantial revenue and other benefits from selling advertising to Texas businesses, and had made substantial efforts to distribute their programs and to increase their popularity in Texas was sufficient to support the trial court's finding that the defendants had "continuously and deliberately exploited the [Texas] market." *Id.* at 52 (quoting *Keeton*, 465 U.S. at 781, 104 S. Ct. at 1481).

But here, no similar acts of "additional conduct" exist through which the Potential Defendants can be said to have continuously and deliberately exploited Texas. Exxon contends that the Potential Defendants made "substantial efforts" to spread their viewpoints in Texas and to suppress Texas-based speech about climate change by making public statements and filing pretextual lawsuits against Exxon and others in the Texas energy sector. Yet even though the California suits and some of the Potential Defendants' public comments target Exxon's climate-change speech,

these out-of-state actions were directed at Exxon, not Texas. Without more, the mere fact that the Potential Defendants directed these statements at Texas-based Exxon and that Exxon might suffer injury here does not establish personal jurisdiction. *See id.* at 43.

Quoting *TV Azteca*, Exxon nevertheless asserts that a court may exercise personal jurisdiction over a defendant whose "intentional, and allegedly tortious, actions were expressly aimed at" Texas and where the "effects" of that conduct are felt in Texas. *Id.* at 40 (quoting *Calder v. Jones*, 465 U.S. 783, 790, 104 S. Ct. 1482, 1487 (1984)). Because this quotation embeds one from *Calder*, we interpret Exxon's assertion as urging us to adopt the *Calder* "effects test" for determining specific jurisdiction. *See* 465 U.S. at 788–89, 104 S. Ct. at 1486–87 (holding that California properly asserted personal jurisdiction over Florida-based defendants in part because California resident suffered "the brunt of the harm" in California).

Calder involved a Florida-based national newspaper that published an allegedly defamatory article about a California actress. *Id.* at 784–85, 104 S. Ct. at 1484–85. The Supreme Court examined the various contacts that the defendants had created with California in writing the article: the defendants had relied on phone calls to "California sources" for information for the article; the article concerned the actress's activities in California; the defendants caused reputational injury in California by writing an allegedly defamatory article that was widely circulated in California; and the actress suffered the "brunt" of that injury in California. *Id.* at 788–89, 104 S. Ct. at

1486. "In sum, California [was] the focal point both of the story and of the harm suffered." *Id.* at 789, 104 S. Ct. at 1486. The Court held that personal jurisdiction over the Florida defendants was "therefore proper in California based on the 'effects' of their Florida conduct in California." *Id.*, 104 S. Ct. at 1486–87.

The Supreme Court has since clarified, however, that the *Calder* "effects test" requires that the alleged tort's "effects" must connect the defendant's conduct to the forum state, not just to a plaintiff who lives there. *See Walden*, 571 U.S. at 288, 134 S. Ct. at 1124. In *Walden*, the Court reaffirmed that the specific-jurisdiction inquiry "focuses 'on the relationship among the defendant, the forum, and the litigation.'" *Id.* at 284, 134 S. Ct. at 1121 (quoting *Keeton*, 465 U.S. at 775, 104 S. Ct. at 1478). "For a state to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Id.*, 134 S. Ct. at 1121. This "relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Id.* at 284, 134 S. Ct. at 1122 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 2184 (1985)). And the "analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id.* at 285, 134 S. Ct. at 1122. That is, mere injury to a forum resident is an insufficient connection to the forum, and "an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State." *Id.* at 290, 134 S. Ct. at 1125. Instead, the proper inquiry is whether the nonresident defendant's conduct is aimed at the forum state—

the question is thus "not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Id.*, 134 S. Ct. at 1125.

The Texas Supreme Court's interpretation of *Calder* aligns with the Supreme Court's: "Mere knowledge that the 'brunt' of the alleged harm would be felt—or have effects—in the forum state is insufficient to confer specific jurisdiction." *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 68–69 (Tex. 2016). Additionally, the Texas Supreme Court has "explicitly rejected an approach to specific jurisdiction that turns upon where a defendant 'directed a tort' rather than on the defendant's contacts." *Old Republic*, 549 S.W.3d at 565 (citing *Michiana*, 168 S.W.3d at 790–92). Thus, "the 'effects test' is not an alternative to [the] traditional 'minimum contacts' analysis, and it does not displace the factors we look to in determining whether a defendant purposefully availed itself of the state." *Id.*

Here, the Potential Defendants' alleged Texas contacts—(1) filing suit in California state court asserting state-law claims against Texas-based Exxon and serving Exxon with process in furtherance of that litigation, which might result in the discovery of documents located in Texas and (2) Pawa's out-of-state activities and statements regarding Exxon's climate-change stance—are not contacts with Texas, but with a Texas resident. Without more, their knowledge that Exxon will feel the effects in Texas does not suffice. Under these circumstances, the nonresident Potential Defendants could not reasonably have anticipated being haled into court in

Texas. We thus conclude that these contacts are insufficient to establish purposeful availment. *See, e.g.*, *SpaceCo Bus. Sols., Inc. v. Mass Engineered Design, Inc.*, 942 F. Supp. 2d 1148, 1154 (D. Colo. 2013) (pointing out lack of authority interpreting *Calder* to support proposition that "any time a plaintiff files a suit in a jurisdiction other than the defendant's principal place of business, at least where the defendant accuses him of an abuse of process or malicious prosecution, he renders himself vulnerable to being sued by the defendant in the defendant's home state, again regardless of whether the plaintiff turned defendant has had any other contacts with that state"). And to the extent Exxon argues that specific jurisdiction exists in this case under the directed-a-tort theory, we reject that argument as well. *See Michiana*, 168 S.W.3d at 790–92 (holding that allegation or evidence that nonresident defendant directed a tort at a Texas resident was insufficient to support specific jurisdiction); *see also Old Republic*, 549 S.W.3d at 565 ("Moreover, we have explicitly rejected an approach to specific jurisdiction that turns upon where a defendant 'directed a tort' rather than on the defendant's contacts." (citing *Michiana*, 168 S.W.3d at 790–92)).

We likewise conclude that filing lawsuits in California that would yield, through the discovery process, the production of documents located in Texas is not sufficiently targeting Texas property to subject the Potential Defendants to personal jurisdiction here. In *Retamco*, the supreme court held that the defendant had "reached out and created a continuing relationship in Texas" by purchasing and taking assignment of real-property interests in Texas even though the defendant never

entered the state to do so. 278 S.W.3d at 339. The defendant's ownership made the defendant "liable for obligations and expenses related to the interests" and allowed the defendant to "'enjoy . . . the benefits and protections of [Texas laws.]'" *Id.* (quoting *Michiana*, 168 S.W.3d at 787). The court also noted that the contact was not merely fortuitous: the property's location was "fixed in this state." *Id.* Moreover, the defendant sought a "benefit, advantage[,] or profit" in Texas, *id.* at 340 (quoting *Michiana*, 168 S.W.3d at 785), because the assignment gave it "valuable assets in Texas, including the right to enforce warranties and covenants related to the real property," *id.* The court thus held that the defendant had purposefully availed itself of the privilege of conducting activities in Texas. *Id.*

Consistent with the court's reasoning in *Retamco*, we determined several years ago that nonresidents' alleged backdating of documents to be filed in a Texas property's chain of title was directed at Texas in light of Texas's interest in maintaining stability and certainty regarding title to Texas real property. *Hoskins*, 2016 WL 2772164, at *7. As a result, we held that these actions were directed at the state of Texas rather than solely at a Texas resident and showed "purposeful availment necessary to support minimum contacts for the purposes of specific jurisdiction." *Id.* Similarly, in a case predating *Retamco*, we found that an overseas-based travel company purposefully directed its activities toward Texas when it used computer software to repeatedly and continuously intentionally access information from the plaintiff's computer servers that were physically located in Texas. *TravelJungle*,

212 S.W.3d at 844, 849–50. In reaching our holding, we explained that the travel company's actions went beyond just looking at the website; rather, the company took up valuable computer capacity, depriving the plaintiff of the "ability to use that same capacity to serve its other customers." *Id.* at 850.

Based on these cases, Exxon argues that interfering with Texas property—whether real or personal—can provide sufficient contacts with Texas to establish personal jurisdiction, and that the Potential Defendants' seeking Exxon's Texas documents through discovery in the California suits sufficiently targets Texas property to subject them to personal jurisdiction here. We disagree. As noted, whether Texas may exercise personal jurisdiction over a nonresident focuses on the relationship among the defendant, the forum, and the litigation, which "must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Walden*, 571 U.S. at 284, 134 S. Ct. at 1122. And to constitute purposeful availment, the defendant's contacts must result from the defendant's own "efforts to avail itself of the forum." *TV Azteca*, 490 S.W.3d at 38. And "[t]he defendant's activities, whether they consist of direct acts within Texas or conduct outside Texas, must justify a conclusion that the defendant could reasonably anticipate being called into a Texas court." *Retamco*, 278 S.W.3d at 338.

Here, the Potential Defendants' seeking discovery from a Texas resident during the course of California litigation was not an effort to avail themselves of Texas and does not justify a conclusion that they could reasonably anticipate being haled into a

Texas court. Initiating an out-of-state lawsuit where some discoverable documents might be physically located in Texas and are under Exxon's control does not invoke the benefits or protections of Texas's laws. If it did, any plaintiff in an out-of-state lawsuit against a Texas defendant who maintained documents here would be subject to specific jurisdiction in a Texas case arising from or relating to that out-of-state suit.

Several cases demonstrate that contacts similar to the ones alleged here between a state resident and a nonresident in connection with out-of-state litigation do not suffice for a state to exercise personal jurisdiction over a nonresident in cases arising from that out-of-state litigation. For example, allegedly abusive litigation and service of process are insufficient to establish specific jurisdiction. *See, e.g.*, *Allred v. Moore & Peterson*, 117 F.3d 278, 280, 287 (5th Cir. 1997) (holding that in case arising from Louisiana litigation, Mississippi did not have personal jurisdiction over Texas and Louisiana attorneys who had sued Mississippi resident in Louisiana and served resident in Mississippi by mail); *Diddel v. Davis*, No. H-04-4811, 2005 WL 8164061, at *1–2, *5–7 (S.D. Tex. June 2, 2005) (relying on *Allred* to hold that Texas lacked personal jurisdiction over Maryland resident and his Maryland and Florida lawyers for claim arising from their allegedly frivolous Florida lawsuit against Texas resident concerning a Florida land transaction, concluding that mailing draft complaint to Texas resident, serving Texas resident in Texas, and Texas resident's suffering harmful effects in Texas were insufficient jurisdictional contacts); *Estate of Hood*, 2016 WL 6803186, at *1–3, *6–7 (holding that, in connection with a Mississippi

probate proceeding involving Texas property, a Mississippi attorney's mailing to a Texas resident a petition to close the probate proceeding, a notice of hearing, a proposed release, and a cover letter threatening to withhold funds unless release was signed did not meet purposeful-availment standard in case brought in Texas against Mississippi attorney and his firm arising from the attorney's actions in the Mississippi probate proceeding); *cf. Stanton v. Gloersen*, No. 05-16-00214-CV, 2016 WL 7166550, at *2–3, *11 (Tex. App.—Dallas Nov. 30, 2016, pet. denied) (mem. op.) (relying on *Michiana* to hold that Texas lacked personal jurisdiction over Florida lawyer who made allegedly false statements concerning Texas resident to Texas authorities as part of lawyer's representation of Florida resident). The fact that most, if not all, of the Potential Defendants are governmental entities or government officials[14] does not affect this conclusion. *See Stroman Realty, Inc. v. Antt*, 528 F.3d 382, 383, 386–87 (5th Cir. 2008) (finding no personal jurisdiction in Texas over Texas resident's suit against Florida and California licensing and regulatory government officials where the only contacts between officials and Texas were cease-and-desist orders mailed to the resident, California's correspondence with the Texas Real Estate Commission regarding the resident, and Florida's making a public-information-act request to the Texas Attorney General for information about the resident); *Wercinski*, 513 F.3d at 480, 483–84 (holding Texas did not have personal jurisdiction over Texas resident's

[14]We are agnostic about whether Pawa in his capacity as counsel for the cities of San Francisco and Oakland could be considered a government official.

suit against Arizona licensing and regulatory government official where the only contacts between official and Texas were a cease-and-desist order mailed to the resident in Texas and correspondence with resident's attorneys).

Having examined the Potential Defendants' contacts with Texas, we conclude that they do not meet the purposeful-availment standard and that the Potential Defendants thus lacked minimum contacts with Texas. Because sufficient minimum contacts are not present, we need not address whether Exxon's potential claims arise from or relate to those contacts or whether the exercise of personal jurisdiction over the Potential Defendants would offend traditional notions of fair play and substantial justice.

VII. Personal Jurisdiction Over the Prospective Witnesses

Exxon argues that a court is not required to have personal jurisdiction over prospective witnesses in a Rule 202 proceeding and thus the trial court properly denied the Prospective Witnesses' special appearances. If Exxon maintains that a Texas court can grant a Rule 202 petition ordering depositions from prospective witnesses when it does not have personal jurisdiction over the potential defendants, Texas Supreme Court authority compels us to disagree.

In *Trooper*, the court concluded that because the Rule 202 petitioner did not establish that Texas had personal jurisdiction over the potential defendant, the trial court abused its discretion by granting the petition to allow the petitioner to depose Google (which did not oppose the petition) to discover the potential defendant's

identity. *See* 444 S.W.3d at 604–05. In so concluding, the court stated that the "proper court" in which to file a Rule 202 petition must have personal jurisdiction over the potential defendant. *Id.* at 608. The court gave two reasons for its conclusion:

> *First*: To allow discovery of a potential claim against a defendant over which the court would not have personal jurisdiction denies him the protection Texas procedure would otherwise afford. Under Rule 120a, a defendant who files a special appearance in a suit is entitled to have the issue of personal jurisdiction heard and decided before any other matter. Discovery is limited to matters directly relevant to the issue. To allow witnesses in a potential suit to be deposed more extensively than would be permitted if the suit were actually filed would circumvent the protections of Rule 120a. When a potential defendant could challenge personal jurisdiction, the potential claimant could simply conduct discovery under Rule 202 before filing suit.
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> . . . .
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> *Second*: To allow a Rule 202 court to order discovery without personal jurisdiction over a potential defendant unreasonably expands the rule. Even requiring personal jurisdiction over the potential defendant, Rule 202 is already the broadest pre-suit discovery authority in the country. If a Rule 202 court need not have personal jurisdiction over a potential defendant, the rule could be used by anyone in the world to investigate anyone else in the world against whom suit could be brought within the court's subject-matter jurisdiction. The reach of the court's power to compel testimony would be limited only by its grasp over witnesses. This was never contemplated in the procedures leading to Rule 202, from 1848 to 1999, nor was it the intent of Rule 202.

Id. at 608–10 (footnotes omitted).

Based on *Trooper*, we conclude that the relevant personal-jurisdiction inquiry in a Rule 202 proceeding is whether Texas has personal jurisdiction over a potential defendant. If not, a trial court has no discretion to grant a Rule 202 petition. *See id.* at 604, 608–11; *eBay*, 2015 WL 3898240, at *2–3 (relying on *Trooper* and rendering

judgment denying petitioner's Rule 202 petition because in seeking to depose, on written questions, third-party's corporate representative to discover potential defendants' identities, petitioner failed to plead jurisdictional facts to establish personal jurisdiction over potential defendants). Thus, whether Texas has personal jurisdiction over a person or entity that is only a prospective witness is irrelevant.

VIII. Conclusion

Because the Potential Defendants did not purposefully avail themselves of the privilege of conducting activities within Texas, they lack sufficient contacts for a Texas court to exercise specific jurisdiction over them. This conclusion is dispositive of the California Parties' appeal, and we thus reverse the trial court's order denying their special appearances and render judgment denying Exxon's Rule 202 petition. *See eBay*, 2015 WL 3898240, at *3.

IX. Some Final Thoughts

We confess to an impulse to safeguard an industry that is vital to Texas's economic well-being, particularly as we were penning this opinion weeks into 2020's COVID-19 pandemic-driven shutdown of not only Texas but America as a whole. Lawfare is an ugly tool by which to seek the environmental policy changes the California Parties desire, enlisting the judiciary to do the work that the other two branches of government cannot or will not do to persuade their constituents that anthropogenic climate change (a) has been conclusively proved and (b) must be remedied by crippling the energy industry. And we are acutely aware that California

courts might well be philosophically inclined to join the lawfare battlefield in ways far different than Texas courts.

Being a conservative panel on a conservative intermediate court in a relatively conservative part of Texas is both blessing and curse: blessing, because we strive always to remember our oath to follow settled legal principles set out by higher courts and not encroach upon the domains of the other governmental branches; curse, because in this situation, at this time in history, we would very much like to follow our impulse instead.

In the end, though, our reading of the law simply does not permit us to agree with Exxon's contention that the Potential Defendants have the purposeful contacts with our state needed to satisfy the minimum-contacts standard that binds us.

/s/ Elizabeth Kerr
Elizabeth Kerr
Justice

Delivered: June 18, 2020