

AFFIRM; and Opinion Filed November 3, 2017.



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

No. 05-17-00101-CV

**COLMEN LLC, D/B/A COLMEN MOTORS, Appellant
V.
SANTANDER CONSUMER USA, INC., Appellee**

**On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-09980**

MEMORANDUM OPINION

Before Justices Bridges, Fillmore, and Stoddart
Opinion by Justice Fillmore

Colmen LLC, d/b/a/ Colmen Motors (Colmen) appeals the trial court's order denying its special appearance in a lawsuit filed against it by Santander Consumer USA, Inc. (Santander). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (West Supp. 2016). In three issues, Colmen argues: 1) Santander failed to plead sufficient allegations to establish a factual basis for specific or general personal jurisdiction and Colmen carried its burden to negate all bases of personal jurisdiction by presenting evidence it is not a resident of Texas, which Santander failed to rebut with evidence establishing jurisdiction was proper in Texas; 2) Texas lacks specific jurisdiction over Colmen because Colmen's alleged liability does not arise out of and is unrelated to an activity it conducted in Texas; and 3) Texas lacks general jurisdiction over Colmen because

Colmen's contacts with Texas are not so continuous and systematic as to render it essentially at home in Texas. For the reasons that follow, we conclude Colmen has sufficient minimum contacts with Texas to support the exercise of specific jurisdiction, and Santander's claims arise directly out of Colmen's contacts with Santander in Texas. Accordingly, we affirm the trial court's order denying Colmen's special appearance and remand this case to the trial court for further proceedings consistent with this opinion.

BACKGROUND

This case involves a dispute between Santander, an Illinois corporation with its principal place of business and headquarters in Dallas County, Texas, and automobile dealership Colmen, a Delaware limited liability company whose principal place of business is in Florida. Santander is in the business of purchasing automobile retail installment sales contracts from dealers like Colmen. On or about April 6, 2016, Colmen and Santander entered into a Non-Recourse Master Dealer Agreement (Agreement) whereby Colmen was entitled, but not obligated, to sell automobile retail installment sales contracts to Santander.

Under the Agreement, Colmen had the option of submitting a proposal, including terms and conditions, under which it would consider selling and assigning an installment sales contract to Santander. After reviewing Colmen's proposed terms and conditions and the applicable loan documentation, Santander could elect to purchase the installment sales contract. Colmen, however, controlled final approval of the sale, and could refuse the transaction notwithstanding Santander's agreement to purchase the installment sales contract. The Agreement had no specified term, and was to be interpreted in accordance with Texas law. Colmen agreed to indemnify Santander in the event of claims arising out of Colmen's breach of or conduct under the Agreement or the installment sales contracts. Colmen also granted Santander an irrevocable power of attorney to act as Colmen's agent, including the right to sign Colmen's name to

documents, checks, money orders or other forms of payment, as well as any other instrument necessary to carry out the Agreement.

Pursuant to the Agreement, Colmen made solicitations and sold numerous installment sales contracts to Santander. This lawsuit arises out of Colmen's alleged breach of the Agreement as it relates to fifty-two installment sales contracts it sold to Santander with an aggregate value of more than \$1.6 million. Specifically, Santander alleges Colmen misrepresented retail customer income, employment, and credit or identifying information relating to installment sales contracts it sold to Santander. Regarding a separate installment sales contract sold by Colmen to Santander, Santander alleges that Colmen breached the Agreement by failing to tender payment for Additional Products and Services (APS) that were canceled after Santander purchased the contract.¹ As a result of Colmen's alleged breaches, Santander exercised its right under the Agreement to demand that Colmen repurchase the installment sales contracts, and pay to Santander the amount collected for canceled APS. Colmen refused to do so. Santander then filed suit against Colmen in Dallas County, Texas for breach of the Agreement. In response, Colmen filed a special appearance challenging the trial court's jurisdiction over it.

At the January 17, 2017 special appearance hearing before the trial court, Colmen supported its special appearance with several incomplete and unsigned Santander forms purporting to be representative of the Agreement. Counsel for Colmen offered the incomplete forms, including an Addendum A, as "an exemplar so that the Court can actually read the terms in the contract that was filed by the Plaintiff because what was filed by the Plaintiff is not particularly legible." Over Santander's objection to the unverified copies, the trial court

¹ APS include "vehicle service contracts, mechanical breakdown contracts," and other products and services. The Agreement requires Colmen to remit to Santander any refund of amounts collected by Colmen for APS purchased and then canceled by the retail customer.

admitted Colmen's offered "exemplar" solely for the purpose of paragraph twenty-six of the Agreement, which included the Texas choice of law provision.

At the special appearance hearing, Santander presented the Affidavit of Benny Cherry, the Vice President-Dealer Operations for Santander (the Cherry Affidavit). The Cherry Affidavit described the formation of the Agreement, the parties' relationship under the Agreement, the procedures for executing the Agreement, and Colmen's solicitations and sales to Santander of the fifty-two installment sales contracts at issue in this case. Attached as Exhibit A to the Cherry Affidavit was a sworn true and correct copy of the fully executed Agreement, including Addendum A. A Supplemental Affidavit of Benny Cherry, filed with the trial court after the special appearance hearing, states in pertinent part that Santander's corporate headquarters is in Dallas, Texas. The trial court denied Colmen's special appearance. This interlocutory appeal followed.

PERSONAL JURISDICTION

Standard of Review

Whether a trial court has personal jurisdiction over a nonresident defendant is a question of law. Thus, we review a trial court's determination of a special appearance de novo. *Moncrief Oil Int'l, Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150 (Tex. 2013) (citing *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007)). "When, as here, the trial court does not issue findings of fact and conclusions of law, we imply all relevant facts necessary to support the judgment that are supported by evidence." *Id.* (citing *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 337 (Tex. 2009)).

Applicable Law

Texas courts may exercise personal jurisdiction over a nonresident defendant "when the state's long-arm statute authorizes such jurisdiction and its exercise comports with due process."

Cornerstone Healthcare Grp. Holding, Inc. v. Nautic Mgmt. VI, L.P., 493 S.W.3d 65, 70 (Tex. 2016). The Texas long-arm statute allows jurisdiction over a nonresident that does business in Texas. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (West 2015). Among other acts, the Texas long-arm statute provides that contracting with a Texas resident, where either party is to perform the contract in whole or in part in Texas, constitutes doing business in this state. *Id.* § 17.042(1); *Moki Mac River Expeditions*, 221 S.W.3d at 574. “The broad ‘doing business’ language in Texas’s long-arm statute allows the trial court’s jurisdiction to ‘reach as far as the federal constitutional requirements of due process will allow.’” *Kelly v. Gen. Interior Const., Inc.*, 301 S.W.3d 653, 657 (Tex. 2010) (quoting *Moki Mac River Expeditions*, 221 S.W.3d at 575). “A state’s exercise of jurisdiction comports with federal due process if the nonresident defendant has ‘minimum contacts’ with the state and the exercise of jurisdiction ‘does not offend “traditional notions of fair play and substantial justice”.’” *Cornerstone Healthcare Grp. Holding, Inc.*, 493 S.W.3d at 70 (quoting *Walden v. Fiore*, 134 S.Ct. 1115, 1121 (2014)).

The “touchstone” of a minimum-contacts analysis is purposeful availment. *Michiana Easy Livin’ Country, Inc. v. Holten*, 168 S.W. 3d 777, 784 (Tex. 2005). “A defendant establishes minimum contacts with a state when it purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.” *Kelly*, 301 S.W.3d. at 657–58 (quoting *Retamco Operating, Inc.*, 278 S.W.3d at 338–39). To constitute “purposeful availment,” a defendant’s contacts must be “purposefully directed,” and must result from the defendant’s own “efforts to avail itself of the forum.” *TV Azteca v. Ruiz*, 490 S.W.3d 29, 38 (Tex. 2016), *cert. denied*, 137 S.Ct. 2290 (2017) (quoting *Moki Mac River Expeditions*, 221 S.W.3d at 576; *Guardian Royal Exch. Assurance, Ltd, v. English China Clays, P.L.C.*, 815 S.W.2d 223, 228 (Tex. 1991)).

When determining whether a nonresident defendant purposefully availed itself of the privilege of conducting activities in Texas, we consider three factors: 1) only the defendant's contacts with the forum are relevant, not the unilateral activity of another party or a third person; 2) the contacts relied upon must be purposeful rather than random, isolated or fortuitous; and 3) the defendant must seek some benefit, advantage or profit by availing itself of the jurisdiction. *Cornerstone Healthcare Grp. Holding, Inc.*, 493 S.W.3d at 70–71. This analysis assesses the quality and nature of the contacts, not the quantity. *Moncrief Oil Int'l, Inc.*, 414 S.W.3d at 151. “[A] defendant will not be haled into a jurisdiction solely based on contacts that are ‘random, isolated, or fortuitous,’” *Michiana Easy Country Livin’, Inc.*, 168 S.W.3d at 785 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)), or on the “unilateral activity of another party or a third person.” *Guardian Royal Exch.*, 815 S.W.2d at 226 (quoting *Burger King Corp., v. Rudzewicz*, 471 U.S. 462, 475 (1985)). “At its core, the purposeful availment analysis seeks to determine whether a nonresident’s conduct and connection to a forum are such that it could reasonably anticipate being haled into court there.” *Moncrief Oil Int'l, Inc.*, 414 S.W.3d at 152.

In addition to minimum contacts, due process requires that the exercise of personal jurisdiction comply with traditional notions of fair play and substantial justice. *Id.* at 154 (citing *Retamco Operating, Inc.*, 278 S.W.3d at 338). The following factors are considered in this evaluation: 1) the burden on the defendant in trying the case in the forum state; 2) the interests of the forum state in adjudicating the dispute; 3) the plaintiff’s interest in obtaining convenient and effective relief; 4) the interstate judicial system’s interest in obtaining the most efficient resolution of the dispute; and 5) the shared interest of the several States in furthering fundamental substantive social policies. *Retamco Operating, Inc.*, 278 S.W.3d at 341. “If 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.” *Moncrief Oil Int’l Inc.*, 414 S.W.3d at 154–55.

A nonresident defendant’s contacts with a forum can give rise to either general or specific jurisdiction. *Cornerstone Healthcare Grp. Holding, Inc.*, 493 S.W.3d at 71. Santander’s asserted basis for personal jurisdiction over Colmen is specific jurisdiction.² When specific jurisdiction is alleged, we focus on the relationship among the defendant, the forum, and the litigation. *Moncrief Oil Int’l Inc.*, 414 S.W.3d at 150. Specific jurisdiction exists only if the alleged liability arises out of or is related to the defendant’s activity within the forum. *Id.* at 150, 156. “[F]or a nonresident defendant’s forum contacts to support an exercise of specific jurisdiction, there must be a substantial connection between the defendant’s contacts and the operative facts of the litigation.” *Id.* at 156 (quoting *Moki Mac River Expeditions*, 221 S.W.3d at 585). “The operative facts are those on which the trial will focus to prove the liability of the defendant who is challenging jurisdiction.” *Mitchell v. Freese & Goss, PLLC*, No. 05-15-00868-CV, 2016 WL 3923924, at *3 (Tex. App.—Dallas July 15, 2016, pet. denied) (mem. op.) (quoting *Leonard v. Salinas Concrete, LP*, 470 S.W.3d 178, 188 (Tex. App.—Dallas 2015, no pet.)). We analyze specific jurisdiction on a claim-by-claim basis, unless we are shown that all claims arise from the same contacts with Texas. *TV Azteca*, 490 S.W.3d at 37; *Moncrief Oil Int’l Inc.*, 414 S.W.3d at 150–51.

The plaintiff and the defendant bear shifting burdens of proof in a challenge to personal jurisdiction. *Kelly*, 301 S.W.3d at 658; *see also* TEX. R. CIV. P. 120a. The plaintiff bears the initial burden to plead sufficient allegations to bring the nonresident defendant within the reach

² The trial court’s order denying Colmen’s special appearance does not indicate the basis for personal jurisdiction. Although Colmen argues in its brief that the trial court erred in exercising general jurisdiction over Colmen, its counsel conceded at the January 17, 2017 special appearance hearing that general jurisdiction is not at issue in this case; and Santander only argues Colmen is subject to specific jurisdiction in its brief before this Court.

of Texas’s long-arm statute. *Kelly*, 301 S.W.3d at 658. “Once the plaintiff has pleaded sufficient jurisdictional allegations, the defendant filing a special appearance bears the burden to negate all bases of personal jurisdiction alleged by the plaintiff.” *Id.* The defendant can negate jurisdiction on either a factual or legal basis. *Id.* at 659. To negate jurisdiction on a factual basis, the defendant must present evidence disproving the plaintiff’s jurisdictional allegations. *Id.* “The plaintiff can then respond with its own evidence that affirms its allegations, and it risks dismissal of its lawsuit if it cannot present the trial court with evidence establishing personal jurisdiction.” *Id.* The defendant negates jurisdiction on a legal basis by showing that “even if the plaintiff’s alleged facts are true, the evidence is legally insufficient to establish jurisdiction; the defendant’s contacts with Texas fall short of purposeful availment; for specific jurisdiction, that the claims do not arise from the contacts; or that traditional notions of fair play and substantial justice are offended by the exercise of jurisdiction.” *Id.*

JURISDICTIONAL ANALYSIS

In its first two issues, Colmen contends the trial court erred by denying Colmen’s special appearance because Santander failed to plead and prove a sufficient basis for Texas to assert specific jurisdiction over Colmen.³

Santander’s Jurisdictional Allegations

In order to determine whether Santander met its initial burden to plead sufficient allegations to invoke jurisdiction over Colmen under the Texas long-arm statute, we look to the jurisdictional facts pleaded in the original petition, as well as the jurisdictional facts alleged in Santander’s response to Colmen’s special appearance. TEX. R. CIV. P. 120a(3); *Jani-King*

³More specifically, Colmen contends in its first issue that Santander failed to plead sufficient allegations to establish a factual basis for specific personal jurisdiction and Colmen carried its burden to negate all bases of personal jurisdiction by presenting evidence it is not a resident of Texas, which Santander failed to rebut with evidence establishing jurisdiction was proper in Texas. In its second issue, Colmen argues Texas lacks specific jurisdiction over Colmen because Colmen’s alleged liability does not arise out of and is unrelated to an activity it conducted in Texas.

Franchising Inc. v. Falco Franchising SA, No. 05-15-00335-CV, 2016 WL 2609314, at *4 (Tex. App.—Dallas May 5, 2016, no pet.) (mem. op.). In its original petition, Santander asserted that Colmen is subject to specific personal jurisdiction in Texas because “this cause of action arose out of the business conducted in this state by Defendant[.]” *See Moki Mac River Expeditions*, 221 S.W.3d at 574–75. Regarding Colmen’s alleged contacts with Texas, Santander pleaded: Santander’s principal place of business is in Dallas County, Texas; Colmen contracted with Texas-resident Santander; the parties’ activities in furtherance of their ongoing business relationship were performed in large part in Dallas County, Texas; Colmen has voluntarily and intentionally established a substantial and ongoing relationship with Santander and the state of Texas; Colmen has purposefully availed itself of the protections of Texas law by invoking Texas law to govern the parties’ contractual relationship; Colmen has sold numerous automobile installment sales contracts to Santander worth millions of dollars and derived a substantial financial benefit from doing so; all or a substantial part of the events giving rise to Santander’s claims occurred in Dallas County, Texas; Colmen has sufficient minimum contacts to expect that it could be haled into court in Texas over any dispute arising out of those contacts; and the exercise of personal jurisdiction over Colmen with respect to this lawsuit would not violate due process considerations or offend traditional notions of fair play and substantial justice.

In support of its special appearance, Colmen contended it is not a Texas resident and does not maintain a regular place of business in Texas; does not own real estate in Texas; conducts its business from offices located in Florida; did not travel to Texas in connection with or during any transaction arising out of or related to Santander’s claims; has not purposefully availed itself of the privileges and benefits of conducting business in Texas with respect to Santander’s

allegations; does not have a designated agent for service of process in Texas; has never owned assets in Texas; and does not have employees or agents in Texas.

In response to Colmen's special appearance, Santander restated jurisdictional facts alleged in its original petition and also alleged: the Agreement was negotiated and executed in part, and requires performance in significant part, in Dallas County, Texas; Colmen was not required, but could elect, to sell installment sales contracts to Santander; Colmen initiated and solicited the sale of at least fifty-two installment sales contracts valued in excess of \$1.6 million to Santander; the Agreement and the parties' relationship is governed by Texas law; Santander accepted, and made payment for, the installment sales contracts at issue in Dallas County, Texas; and Colmen granted Texas-resident Santander power of attorney for certain actions performed under the Agreement.

In its original petition and response to Colmen's special appearance, Santander alleges that Colmen reached out to Texas-resident Santander at least fifty-two times to solicit Santander's purchase of installment sales contracts, the terms and conditions of which were controlled by Colmen. Colmen sent the Agreement itself, as well as all documentation relating to the individual installment sales contracts, to Santander's principal place of business in Dallas County, Texas. The Agreement contains a Texas choice of law provision, grants power of attorney to Santander to take certain actions on behalf of Colmen under the Agreement, and requires performance in large part in Dallas County, Texas. Santander alleges that Colmen breached the Agreement by making misrepresentations regarding the fifty-two installment sales contracts, failing to re-purchase the installment sales contracts, and failing to pay amounts due for canceled APS. All of Santander's claims and causes of action directly relate to its jurisdictional allegations. We conclude Santander met its initial burden to plead sufficient

allegations to invoke jurisdiction over Colmen under the Texas long-arm statute. *See Kelly*, 301 S.W.3d at 658. We turn next to the questions of whether Colmen carried its burden to present evidence negating all bases of personal jurisdiction and, if so, whether Santander rebutted Colmen's showing with evidence establishing the exercise of jurisdiction was proper in Texas.

Evidence of Minimum Contacts

In determining whether Colmen had minimum contacts with Texas, we first consider whether Colmen purposefully availed itself of the privilege of conducting business in Texas, thus invoking the benefits and protections of Texas law. *Id.* at 657–58. Only Colmen's contacts with the state are relevant to this analysis, not the unilateral activity of another party or a third person. *Michiana Easy Livin' Country, Inc.*, 168 S.W.3d at 785.

The evidence before the trial court shows that Colmen repeatedly solicited Santander to purchase automobile retail installment sales contracts in Texas over a period of years, and that the individual transactions were primarily in Colmen's control because it established the terms and conditions of sale, and retained the right of final approval. Indeed, by its terms, the Agreement requires that the sale of each installment sales contract begins and ends with Colmen. Paragraph 2.A. sets out the process by which Colmen sells an installment sales contract under the Agreement. Colmen first determines that it may want to sell an installment sales contract to Santander. Then, Colmen reaches out to and provides Santander with Colmen's proposed terms and conditions for the transaction, credit information regarding the automobile purchaser, and any other information Santander requests. If, after reviewing the proposed terms and conditions and documentation provided by Colmen, Santander wishes to purchase the installment sales contract, Santander provides an "approval number" to Colmen. However, "[Colmen] is not obligated to sell to [Santander] any Contract, notwithstanding [Santander's] approval of such

Contract for purchase.” Colmen maintains final authority over whether it will, in fact, sell the contract to Santander.

The transactions under the Agreement were not the result of Santander’s unilateral acts. Since entering into the Agreement in April 2015, Colmen reached out to Santander in Texas to solicit the purchase of the fifty-two separate installment sales contracts at issue in this lawsuit. As required, for each individual contract, Colmen forwarded its proposed terms and conditions and all contractually required information, including customer credit-related information, to Santander’s offices in Texas. Among other things, Santander claims the underlying loan documentation sent to Texas by Colmen misrepresented relevant customer credit and related information. The aggregate value of the contracts purchased by Santander exceeded \$1.6 million. Santander paid Colmen for each of these installment sales contracts from its Dallas, Texas offices.

Colmen’s argument that it never solicited business from Santander in Texas is not supported by the evidence in the record. To the contrary, the evidence shows that Colmen solicited business from Santander *only* in Texas. At the special appearance hearing before the trial court and in its appellate briefs, Colmen repeatedly has pointed to paragraph two of Addendum A, which provides two physical addresses in Tennessee for delivery by Colmen of the customer information Santander reviews in deciding whether it will agree to purchase an installment sales contract. One Tennessee physical address is for FedEx overnight deliveries, and the other Tennessee physical address is for UPS and U.S.P.S. deliveries. Based on this single reference to Tennessee addresses, Colmen argues that its contacts are with Tennessee and not with Texas. Colmen, however, does not claim or present any evidence showing that it

actually sent any documents in hard copy to either of the physical Tennessee addresses in Addendum A.⁴

The evidence in the record shows that Colmen sent all documentation and information related to the Agreement and the claims in this lawsuit to Santander's offices in Dallas County, Texas. In the special appearance hearing before the trial court, Colmen indicated that it provided the customer loan documentation to Santander electronically. The Cherry Affidavit confirmed that Colmen initiated the individual retail installment contract sales, and transmitted the proposed terms and conditions and all related customer credit and related information via electronic communication to Santander's Dallas County, Texas offices. Addendum A does not provide an electronic address for transmitting information to offices in Tennessee.⁵ Thus, there is no evidentiary basis for Colmen's contention that it believed its electronic transmissions were going to Tennessee.

To the contrary, the Agreement and Addendum A are replete with references to Santander's Dallas offices, and instructions to send various documents and information to physical addresses in Dallas County, Texas, or by facsimile to phone numbers with a Dallas area code. In addition to the Texas choice of law provision in paragraph twenty-six, Colmen acknowledged that the first page of the Agreement requires the Agreement to be mailed to

⁴ Colmen cites to *Santander Consumer USA, Inc. v. Union Pontiac-GMC, Inc.*, Cause No. 3:16-CV-2420-M, 2017 WL 2362046 (N.D. Tex. May 31, 2017), in support of its argument that it does not have minimum contacts with Texas. *Union-Pontiac*, however, is distinguishable from the instant case. There, the federal district court found that "[o]ther than the choice of law clause, ...the Agreement makes no reference to Texas." *Id.* at *4. The Agreement here, on the other hand, makes multiple references to Texas. Additionally, in *Union-Pontiac*, the dealer not only transmitted loan information to Texas through electronic communications, but also mailed "physical copies of funding materials to Plaintiff via Federal Express to an address in Tennessee." *Id.* at *5. Here, there is no evidence that Colmen sent hard copies of the consumer loan documents to Tennessee. Rather, the evidence shows that all documentation was sent only to Santander's Dallas offices. Moreover, in *Union-Pontiac*, the district court found the plaintiff traveled to the New Jersey dealership to solicit the dealer's business. There is no evidence in this case that Santander traveled to Florida to solicit Colmen's business. Finally, the district court found the dealer could not have reasonably anticipated being haled into court in Texas, or contemplated future consequences in Texas. *See id.* at *3-5. Here, in addition to the Texas choice of law provision, the Agreement makes multiple references to Texas and provides that any arbitration proceeding arising out of claims related to the Continuing Personal Guaranty for the Agreement and related documents shall take place in Dallas County, Texas. The Agreement, thus, specifically contemplates that resolution of certain disputes relating to the Agreement take place in Texas.

⁵ As reflected in the record, the only reference in the Agreement to Tennessee is contained in paragraph two of Addendum A.

Santander's office in Dallas, Texas. Counsel for Santander also pointed to the signature page of the fully executed Agreement, which again required the completed Agreement to be sent to Santander's Dallas, Texas address.

Further, the evidentiary record shows the following additional references to Santander's Dallas, Texas offices in the Agreement and related documents⁶:

- Page one of the Agreement, "New Dealer Information," states it should be mailed to Santander at a Dallas, Texas address, and faxed to Dealer Services at a phone number with a Dallas area code.

- Paragraph twenty of the Agreement, "Notices," states all notices required or permitted shall be in writing and sent by U.S. mail "properly addressed as stated below." The address provided on the following signature page is Santander's Dallas, Texas address.

- While paragraph 2.B. of Addendum A provides that the individual installment sales contract documentation should be mailed to Tennessee, paragraph six states that Addendum A may be terminated by written notice and "delivered in accordance with Section 20 of the Agreement." Section twenty of the Agreement requires notices to be mailed to Santander's Dallas, Texas address.⁷

- Page one of the "Continuing Personal Guaranty," signed by a Colmen representative, prominently displays Santander's Dallas, Texas address.

⁶ Neither Colmen's nor Santander's attorneys mentioned any of the Agreement's additional references to Texas at the special appearance hearing, in their special appearance briefs, or in the appellate briefs; but this Court may consider all evidence that was before the trial court.

⁷ It is also worth noting that Addendum A, which the record reflects contains the only reference to Tennessee in any part of the Agreement, states, "the Agreement and Addendum A incorporates the most current RoadLoans Program Terms and Conditions found on the SCUSA and/or RoadLoans internet website.... To the extent that the terms of the Agreement and this Addendum A conflict with the most current RoadLoans Program Terms and Conditions, then the [latter will apply.]" The evidentiary record does not show whether the terms and conditions on the website differed from the Agreement at the time it was signed.

- Paragraph one of the Continuing Personal Guaranty binds the Guarantor to “every term, condition and provision of the Agreement” excepting terms and conditions inconsistent with the provisions in the Guaranty.

- Paragraph seven of the Continuing Personal Guaranty provides that notice of termination of the Guaranty, as applied to the Agreement, must be provided in writing, signed, and “any notice shall be effective only upon actual receipt by [Santander] at the address indicated above.” The address indicated above is Santander’s Dallas, Texas address.

- Paragraph ten of the Continuing Personal Guaranty provides, “Any arbitration proceeding shall take place in Dallas County, Texas.”

- Paragraph fifteen of the Continuing Personal Guaranty includes a Texas choice of law provision stating, “This Guaranty is to be interpreted, enforced and governed by and under the laws of the State of Texas, without giving effect to the conflict-of-laws, rules and principles thereof.”

- The “Dealer Principal Identification Form,” completed and signed by two Colmen representatives, must be faxed to a phone number with a Dallas area code.

- Paragraph four of Schedule A, “S-Guard Vehicle Service Contracts and/or GAP,” signed by both parties, provides that Schedule A may be terminated with written notice “delivered in accordance with Section 20 of the Agreement.” Section twenty of the Agreement requires notices to be mailed to Santander’s Dallas, Texas address.

The record shows the Agreement is to be performed in whole or in part through Colmen’s submission of documents, information, and the signed Agreement itself to Santander’s Dallas, Texas offices for Santander’s review. We conclude there is sufficient evidence to invoke personal jurisdiction within the plain meaning of the Texas long-arm statute. *See DJRD, LLC. v.*

Skopos, No. 05-16-00072-CV, 2016 WL 3912769, at *2 (Tex. App.—Dallas, July 14, 2016, no pet.) (mem. op.).

Second, we determine whether Colmen’s contacts with Texas were purposeful rather than random, isolated, or fortuitous. This analysis assesses the quality and nature of the contacts, not the quantity. *Moncrief Oil Int’l Inc.*, 414 S.W.3d at 151. “At its core, the purposeful availment analysis seeks to determine whether a nonresident’s conduct and connection to a forum are such that it could reasonably anticipate being haled into court here.” *Id.* at 152. Colmen voluntarily entered into the Agreement with Santander, creating a continuing business relationship with no set date of termination. *See Michiana Easy Livin’ Country, Inc.*, 168 S.W.3d at 785 (the contacts of sellers who reach out beyond one state and create continuing relationships and obligations with citizens of another state are purposeful rather than fortuitous); *see also Skopos*, 2016 WL 3912769, at *3. Under the Agreement, Colmen had the option to solicit Santander to purchase Colmen’s installment sales contracts. Colmen did so at least fifty-two times, electronically sending customer loan documentation to Santander in Dallas, Texas.

The Agreement made numerous references to Dallas, Texas, including a Texas choice of law provision;⁸ a requirement that any arbitration of claims arising out of or related to the Continuing Personal Guaranty for the Agreement take place in Dallas, Texas; instructions that notices, including notice of termination, be sent to Santander in Dallas, Texas; and requiring Colmen to send completed forms and information relating to installment sales contracts to Santander at physical addresses in Dallas, Texas or faxed to a phone number with a Dallas area code. While paragraph two of Addendum A indicates that customer loan documentation should

⁸ Colmen attempts to distinguish the agreement in *Skopos*, arguing that agreement was “governed” by Texas law, whereas the Agreement in this case is merely “interpreted” in accordance with Texas law. However, the agreement in *Skopos* uses the same choice of law language as the instant Agreement, as clearly shown in the copy of the *Skopos* agreement attached as Exhibit B to Plaintiff’s Response to Defendant’s Special Appearance (“This Agreement shall be interpreted pursuant to the laws of the State of Texas.”).

be sent to one of two physical addresses in Tennessee, the evidence shows that Colmen did not do so, but rather electronically sent all customer loan information used by Santander in determining whether to purchase an installment sales contract to Santander's Dallas, Texas offices. Under these circumstances, we conclude that Colmen's contacts with Texas were purposeful and not fortuitous, and Colmen could reasonably anticipate being haled into court in Texas. *Moncrief Oil Int'l Inc.*, 414 S.W.3d at 151.

Finally, we determine whether Colmen sought some benefit, advantage or profit by availing itself of Texas jurisdiction. *Id.* Pursuant to and under the protections of the Agreement, Colmen sold and assigned at least fifty-two installment sales contracts to Santander valued in excess of \$1.6 million. The Agreement gave Colmen the contractually guaranteed right to invoke Texas law and a Texas remedy, should Colmen pursue claims against Santander under the Agreement. Any arbitration of disputed claims arising under the Continuing Personal Guaranty for the Agreement would take place in Dallas, Texas. Colmen thus sought and obtained the benefit, profit and advantage of Texas law. *Skopos*, 2016 WL 3912769, at *3.

*Evidence of Substantial Connection between Texas Contacts
and Operative Facts of the Litigation*

For a nonresident defendant's contacts with Texas to give rise to specific jurisdiction, there must be a "substantial connection between those contacts and the operative facts of the litigation." *Moki Mac River Expeditions*, 221 S.W.3d at 585. Here, the record indicates Colmen solicited Santander's purchase of fifty-two installment sales contracts. Pursuant to paragraph 8(H) of the Agreement, Colmen represents and warrants that, for each contract sold and assigned to Santander, the customer identity, employment, income and other credit information provided to Santander is true and accurate. Santander maintains that Colmen breached the Agreement by misrepresenting retail customers' income, employment, and credit or identifying information

relating to installment sales contracts it sold to Santander, thereby obligating Colmen to repurchase those installment sales contracts. Santander also alleges that Colmen violated the Agreement by failing to tender payment pursuant to paragraph 4(C) for the value of canceled APS relating to one of the installment sales contracts Colmen sold and assigned to Santander.

On the record of this case, we conclude there is a substantial connection between Santander's breach of contract claims and Colmen's contacts with Texas. *Id.*

For the reasons stated above, Colmen's contacts with Texas support the exercise of specific personal jurisdiction.⁹ We conclude that Santander has rebutted Colmen's evidence purporting to negate personal jurisdiction, and has established the exercise of jurisdiction in Texas is proper. The trial court did not err in denying Colmen's special appearance. Accordingly, we resolve Colmen's first and second issues against it.¹⁰

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

170101F.P05

⁹ In its appeal, Colmen does not challenge the trial court's implicit finding that the exercise of specific jurisdiction in this case complies with traditional notions of fair play and substantial justice. Therefore, we need not address this issue. *See* TEX. R. APP. P. 47.1.

¹⁰ In its third issue, Colmen complains the trial court erred by denying Colmen's special appearance because Texas does not have general jurisdiction over Colmen. As previously noted, Santander has abandoned its contention Colmen is subject to general jurisdiction. Accordingly, we need not address Colmen's third issue. *See* TEX. R. APP. P. 47.1.



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

JUDGMENT

COLMEN LLC, D/B/A COLMEN
MOTORS, Appellant

No. 05-17-00101-CV V.

SANTANDER CONSUMER USA, INC.,
Appellee

On Appeal from the 134th Judicial District
Court, Dallas County, Texas,
Trial Court Cause No. DC-16-09980.
Opinion delivered by Justice Fillmore,
Justices Bridges and Stoddart participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Santander Consumer USA, Inc. recover its costs of this appeal from appellant Colmen LLC, d/b/a Colmen Motors.

Judgment entered this 3rd day of November, 2017.