AFFIRMED in part; REVERSE in part; RENDER Judgment and Opinion Filed October 4, 2023

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-23-00008-CV

WILLIAM BOYER, MULTIMODAL TRANSPORTATION SOLUTIONS, INC. AND MX SOLUTIONS, LLC, Appellants
V.
MODE TRANSPORTATION, LLC, Appellee

On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-22-00091

MEMORANDUM OPINION

Before Justices Goldstein, Garcia, and Miskel
Opinion by Justice Garcia

In this accelerated appeal, William Boyer ("Boyer"), Multimodal Transportation Solutions, Inc. ("MTSI") and MX Solutions, LLC ("MX") complain of the trial court's interlocutory order denying their special appearances.

As discussed below, we conclude the trial court erred in denying MX's special appearance because there is no specific personal jurisdiction over this Oregon company in the present case. We further conclude the trial court did not err in denying Boyer and MTSI's special appearance because these defendants purposefully availed themselves of the privilege of conducting business in Texas and

the breach of contract and misappropriation of trade secrets claims at issue here arise out of or relate to these claims. Accordingly, we affirm the trial court's order denying Boyer and MTSI's special appearance, reverse the trial court's denial of MX's special appearance, and render judgment granting MX's special appearance and dismissing Mode's claims against MX for lack of personal jurisdiction.

I. BACKGROUND

Mode Transportation, LLC ("Mode") is a third-party transportation logistics company headquartered in Texas. Mode provides intermodal, air and ocean services, freight forwarding, supply chain management, and other transportation services to national and international customers, including customers in Texas.

Mode services its customers through independent sales agents who are provided opportunities to service Mode's customers and earn commissions on their shipments. The sales agents have access to Mode's industry connections, transportation management systems, financial systems, analytics, market intelligence, and other marketing support.

In 2009, Boyer, a Missouri resident, traveled to Texas to meet with an officer from Mode's predecessor, Excel Transportation Services, Inc. ("Excel") to negotiate a sales and independent contractor operations agreement (the "SICO Agreement").[1]

[1] The record does not reflect when Excel became or acquired Mode other than it occurred sometime before 2019. The parties do not dispute that Mode is the party in interest when it comes to all contractual rights and obligations at issue here. Therefore, our references to Mode include its predecessor in interest.

The SICO Agreement was executed shortly thereafter and provides that it is governed by Texas law.

The SICO Agreement defines Mode's confidential information as including "pricing, freight volumes, the location and/or names of Mode's clients or customers . . . the price or fees [Mode] or its customers receive or at which they sell or have sold products or services [and] other operating or financial data." ("Confidential Information"). The agreement prohibits Boyer from "engaging in any business that competes with or is of a nature similar to that of [Mode]," and from using or disclosing the Confidential Information.

Boyer is the president and owner of MTSI, a California corporation with its principal place of business in Missouri. After the SICO Agreement was executed, MTSI registered to do business in Texas and designated a registered Texas agent for service of process. Then, MTSI opened and maintained an office in Mesquite, Texas, where it employed two Texas residents, and notified the California Secretary of State that Mesquite was the company's principal executive office. The Texas office was open for about a year.

In 2015, 2016, and 2017, Boyer traveled to Texas multiple times to conduct business in connection with the SICO Agreement and met with both Mode and Mode's customers. Boyer and MTSI also routinely solicited customers' Texas business, servicing shipments departing from or destined for nineteen cities in Texas.

In 2019, the parties executed an addendum to the SICO Agreement (the "Addendum"). The Addendum substitutes MTSI for Boyer as a party to the SICO Agreement and details the terms of a loan from Mode to MTSI. In a single paragraph following the signatures on the Addendum, Boyer guarantees MTSI's obligations arising out of Article VI of the SICO Agreement (concerning exclusivity and liquidated damages for breach) and "amendments thereto" and agrees that his personal and individual obligations "hereunder" are joint and several with MTSI. Boyer signed the Addendum on behalf of MTSI. A demand note (the "Demand Note") between MTSI and Mode is attached to the Addendum but is not expressly incorporated by reference.

In 2021, Boyer traveled to Texas to discuss extending the SICO Agreement and a potential sale of MTSI to Mode. According to Mode, Boyer also began exploring a sale of MTSI to MX, an Oregon company. During that time, Boyer forwarded the SICO Agreement and Confidential Information to MX.

When Mode discovered the communications between Boyer and MX, it sent cease and desist letters to all concerned. When that failed, Mode initiated the underlying lawsuit in Texas. The suit alleges that MX, Boyer, and MTSI violated the Texas Uniform Trade Secrets Act, that Boyer and MTSI (The "Boyer Defendants") breached the SICO Agreement by disclosing Mode's confidential

information, and MX tortiously interfered with the SICO Agreement.[2] MX and the Boyer Defendants specially appeared. After a hearing, the court denied the special appearances and the order memorializing that denial forms the basis for this appeal.

II. ANALYSIS

A. Standard of Review and Applicable Law

In a challenge to personal jurisdiction, the plaintiff and the defendant bear shifting burdens of proof. *Old Republic Nat'l Title Ins. v. Bell*, 549 S.W.3d 550, 559 (Tex. 2018). The plaintiff bears the initial burden of pleading allegations that suffice to permit a court's exercise of personal jurisdiction over the nonresident defendant. *Id.; Searcy v. Parex Res., Inc*., 496 S.W.3d 58, 66 (Tex. 2016). Once the plaintiff has met this burden, the defendant then assumes the burden of negating all potential bases for personal jurisdiction in the plaintiff's pleadings. *Searcy*, 496 S.W.3d at 66. The ultimate question of whether a court has personal jurisdiction over a nonresident defendant is a question of law that we review de novo. *Old Republic*, 549 S.W.3d at 558.

A court may assert personal jurisdiction over a nonresident defendant only if the Texas long-arm statute and due process requirements of the Fourteenth Amendment to the United States Constitution are satisfied. *See* U.S. CONST. amend. XIV, § 1; TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Texas long-arm statute);

[2] Here, as in the court below, the Boyer Defendants do not argue that Boyer's actions are or identity is in any way distinct from that of MTSI. Therefore, our jurisdictional analysis also makes no distinction.

LG Chem Am., Inc. v. Morgan, 670 S.W.3d 341, 346 (Tex. 2023). The Texas long-arm statute allows Texas courts to exercise personal jurisdiction over a nonresident defendant who is doing "business in this state" and "commits a tort in whole or in part in this state." TEX. CIV. PRAC. & REM. CODE ANN. § 17.042(2). Due process is satisfied when the nonresident defendant has established minimum contacts with the forum state and the exercise of jurisdiction over the nonresident defendant comports with traditional notions of fair play and substantial justice. *See LG Chem Am., Inc*., 670 S.W.3d at 346 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945)). A nonresident defendant's minimum contacts with a forum are established when the defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *M & F Worldwide Corp. v. Pepsi-Cola Metro. Bottling Co*., 512 S.W.3d 878, 886 (Tex. 2017) (quoting *Moncrief Oil Intern. Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150 (Tex. 2013)); *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct*., — U.S. —, 141 S. Ct. 1017 (2021).

The Texas Supreme Court has characterized the "purposeful availment" requisite as the "touchstone of jurisdictional due process." *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 784 (Tex. 2005). There are three important aspects of the purposeful availment inquiry. *Id*. at 785. First, only the defendant's contacts with the forum state count. *Id*. This ensures that a defendant is not haled into a jurisdiction solely by the unilateral activities of a third party. *Id*. Second, the

acts relied on must be purposeful; a defendant may not be haled into a jurisdiction based solely on contacts that are "random, isolated, or fortuitous." *Id.* Third, a defendant "must seek some benefit, advantage, or profit by 'availing' itself of the jurisdiction." *Id*. By "invoking the benefits and protections of a forum's laws, a nonresident consents to suit there." *Id.*

A defendant's minimum contacts with a forum state can give rise to either general or specific jurisdiction. *Ford Motor Co*., 141 S. Ct. at 1024. General jurisdiction arises when a defendant's contacts with the forum state are so continuous and systematic that the defendant is "essentially at home," whereas specific jurisdiction exists when the claims involved in the litigation relate to or arise from the nonresident defendant's contacts with the forum state. *Id.* Mode concedes there is no general jurisdiction here. Thus, the only question before us is whether the trial court correctly concluded that it may properly exercise specific jurisdiction over MX and the Boyer Defendants.

Specific jurisdiction exists when a defendant purposefully avails itself of the privilege of conducting activities in the forum state and the claims involved in the litigation relate to or arise from the nonresident defendant's contacts with the forum state. *Ford Motor Co.*, 141 S. Ct. at 1025; *Kelly v. Gen. Interior Const. Inc*., 301 S.W.3d 653, 658 (Tex. 2010). This so-called relatedness inquiry focuses on the "nexus between the nonresident defendant, the litigation, and the forum.'" *Luciano v. SprayFoamPolymers.com, LLC*, 625 S.W.3d 1, 14 (Tex. 2021) (quoting *Moki Mac*

River Expeditions v. Drugg, 221 S.W.3d 569, 579 (Tex. 2007)). "Specific jurisdiction must be established on a claim-by-claim basis unless all the asserted claims arise from the same forum contacts." *M & F Worldwide Corp*., 512 S.W.3d at 886.

B. Specific Jurisdiction Over the Boyer Defendants

Purposeful Availment

Mode argues that we need not consider the Boyer Defendants' minimum contacts with Texas because the parties' contract includes a Texas forum selection clause that controls the jurisdictional argument. We are not persuaded.

A forum selection clause is a contractual provision in which the parties establish a place for specified litigation between them. *See Ramsay v. Texas Trading Co., Inc*., 254 S.W.3d 620, 626 (Tex. App.—Texarkana 2008, pet. denied). "We construe a forum selection clause as we do any contract, according to its plain language." *Id*.

There is no forum selection clause in the SICO Agreement or the Addendum. There is a Texas forum selection clause in the Demand Note between MTSI and Mode. The Demand Note is attached to the Addendum, but it is not expressly incorporated by reference. Separate documents may be construed together if the connection appears on the face of the documents by express reference or by internal reference of their unity. *In re N.K.C*., No. 05-20-00333-CV, 2022 WL 278968, at *3

(Tex. App.—Dallas Jan. 31, 2022, no pet.) (mem. op.). There is no clear evidence of unity here.

The Demand Note provides that "all controversies and claims *arising hereunder*, and all actions or proceedings shall be brought in a state or Federal court in the State of Texas." (Emphasis added). The underlying lawsuit for breach of contract and misappropriation of trade secrets does not arise under the Demand Note. Moreover, even if the forum selection clause was deemed incorporated in the Addendum, only MTSI and Mode are parties to that agreement. Boyer's obligations as guarantor of the loan and certain obligations arising out of the SICO Agreement are less clear.

While we reject the notion that the Demand Note's forum selection clause is dispositive, we do not discount it entirely. It is, at a minimum, some evidence that the Boyer Defendants considered Texas litigation in a different context and did not deem it inconvenient. Because the forum selection clause is not dispositive, we consider minimum contacts.

Mode's live petition alleged that the Boyer Defendants breached the SICO Agreement and violated the Texas Uniform Trade Secrets Act by taking, utilizing, and distributing Mode's Confidential Information. Mode alleged specific personal jurisdiction based on the Texas long-arm statute because the Boyer Defendants traveled to Texas to negotiate the terms of the SICO Agreement, and purposefully entered into that agreement which was governed by Texas law and primarily

performable with Texas. Mode's pleading further avers that the Boyer Defendants availed themselves of the privileges and benefits of conducting business in Texas by performing services in Texas that they were obligated to perform under the SICO Agreement. Further, MTSI registered to do business with the Texas Secretary of State's office after entering the SICO Agreement, and both Boyer and MTSI employees traveled to Texas for business as Mode's agents, at least a half dozen times during the term of the SICO Agreement—including to re-negotiate a possible extension of the agreement in October 2021.

Mode also alleged that the Boyer Defendants hired several Texas employees and opened a Texas office for the purpose of completing their obligations under the SICO Agreement and have serviced shipments of freight products to, from, and within Texas for numerous years as a part of their obligations under the SICO Agreement—often using Texas based carriers or servicing Mode's Texas based customers. For over twelve years, the Boyer Defendants transmitted e-mails and other electronic records to Mode in Texas, and otherwise accessed, used, and relied upon Mode's infrastructure and systems maintained in Texas.

We conclude Mode's petition sufficed to allege the Boyer Defendants are subject to specific jurisdiction in Texas. Therefore, the burden shifted to the Boyer Defendants to negate all potential bases for jurisdiction. *See Searcy*, 496 S.W.3d at 66.

The Boyer Defendants' special appearance asserts that the allegations forming the basis of the suit occurred, if at all, in Missouri and/or Oregon and the Boyer Defendants have no contacts with Texas that give rise to Mode's causes of action. The Boyer declaration filed in support of the special appearance confirms the parties' residency and states that Mode initiated discussion with Boyer about the contract when Boyer lived in California. According to Boyer, the parties agreed for the Boyer Defendants to "Provide services in [their] home states—either California or Missouri."

The declaration of Todd Thompson, filed by Mode in response to the special appearance, describes shipment data records showing that between 2019 and 2022, Boyer serviced shipments of products that originated in, and/or were transmitted from Texas to locations inside and outside of Texas for a wide variety of companies, including companies that maintain headquarters or offices in Texas. During that time period, the Boyer Defendants contracted with almost six hundred carriers located in Texas. The declaration further states that the Boyer Defendants routinely serviced shipments of products to and from Texas during the term of the SICO Agreement, including shipments to and/or from Allen, Carrolton, Coppell, Del Rio, El Paso, Flower Mound, Fort Worth, Garland, Grand Prairie, Houston, Lancaster, Laredo, Lubbock, Mesquite, Missouri City, San Antonio, Sunnyvale, Tyler, and Waco.

We examine the contract provisions, negotiations, contemplated future consequences, and the parties' actual course of dealing to determine whether a

nonresident defendant purposefully established minimum contacts with the forum. *Experimental Aircraft Ass'n v. Doctor*, 76 S.W.3d 496, 508 (Tex. App.—Houston [14th Dist.] 2002, no pet); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478–79 (1985). Here, while the Boyer Defendants contend that services under the contract were to be provided in either California or Missouri, the contract does not specify a place of performance and the uncontroverted evidence establishes that performance occurred, at least in part, in Texas. *See* TEX. CIV. PRAC. & REM. CODE ANN. §17.042(1). Indeed, conducting business in Texas was the point of the contract. Performance of the contract was dependent upon utilizing a body of knowledge created by a Texas company about Texas business transactions, including the company's customer base and marketing and logistical data. The Boyer Defendants maintained a consistent Texas connection and focus sufficient to establish a purpose to do business in Texas. *See Retamco Operating, Inc. v. Republic Drilling Co*., 278 S.W.3d 333, 340 (Tex. 2009) (out of state company with no physical ties to Texas still has minimum contacts with Texas when it is clear the company purposefully directed its activities toward Texas).

Moreover, the SICO Agreement contains a Texas choice of law provision; thus, the Confidential Information that enabled the Boyer Defendants to provide services under the contract was provided under the protection of Texas law. A choice of law provision does not confer jurisdiction in the absence of any indication that the nonresident defendant intended to submit to personal jurisdiction. *Burger King*, 471

U.S. at 482; *Healix Infusion Therapy, Inc. v. S. Fla. Infectious Diseases & Tropical Med. Ctrs., LLC*, No. 01–7-00849-CV, 2008 WL 2854263, at *5 (Tex. App.—Houston [1st Dist.] July 24, 2008, no pet.) (mem. op.). Nonetheless, while a choice of law provision is not dispositive, it is a factor to consider in determining specific jurisdiction over a contract dispute. *Citron Holdings, LLC v. Minnis*, 305 S.W.3d 269, 282 (Tex. App.—Houston [14th Dist.] 2009, no pet.). We therefore consider the Texas choice of law provision in conjunction with whether the dispute arises out of the contract to which Texas law applies. *See Burger King*, 471 U.S. at 482; *Leonard v. Salinas Concrete, L.P.*, 470 S.W.3d 178, 190 (Tex. App.—Dallas 2005, no pet.); *Central Petroleum Ltd. v. Resource Recovery, LLC*, 543 S.W.3d 901, 919 (Tex. App.—Houston 2018, pet. denied). Because this dispute arises out of the Texas contract, the choice of law provision weighs in favor of jurisdiction.

The Texas contacts and the Texas business the Boyer Defendants obtained by contracting with a Texas company relying on that company's Texas infrastructure are not random, isolated, or fortuitous. Conducting business in Texas involved providing services to Texas companies, using Texas roads, carriers, and ports to do so. The Boyer Defendants traveled to Texas to maintain and develop that Texas business and to negotiate the contract providing access to such business. MTSI was registered to do business in Texas and had a Texas office with Texas employees.[3]

[3] That the Texas office, employees and registration as a foreign corporation doing business in this state pre-date the alleged wrongdoing is of no consequence. The Supreme Court in *Burger King* considered

Under these circumstances, the record supports the trial court's implied conclusion that the Boyer Defendants have sufficient minimum contacts with Texas and have purposefully availed themselves of the privilege of conducting business in this state. *See TV Azteca v. Ruiz*, 490 S.W.3d 29, 37 (Tex. 2016).

Relatedness

We have concluded that the purposeful availment prong is met, but "[p]urposeful availment has no jurisdictional relevance unless the defendant's liability arises from or relates to the forum contacts." *TV Azteca*, 490 S.W.3d at 53. The relatedness prong of the analysis requires that the suit arise out of or relate to a defendant's connection with the forum. *Luciano*, 625 S.W.3d at 8–9. The plaintiff must demonstrate a "substantial connection" between the defendant's contacts and the operative facts of the litigation. *LG Chem Am.*, 670 S.W.3d at 347. In determining whether the litigation has a "substantial connection" to the forum, we consider "what the claim is principally concerned with," whether the defendant's contacts will be "the focus of the trial," "consume most if not all of the litigation's attention," and are "related to the operative facts" of the underlying claim. *See TV Azteca*, 490 S.W.3d at 53 (quoting *Moki Mac*, 221 S.W.3d at 585).

contacts with the forum state before the alleged wrongdoing occurred. *See Burger King*, 417 U.S. at 466–68, 479–80; *see also The Leaders Inst., LLC v. Jackson*, No. 3:14-CV-3572-B, 2015 WL 4508424, at *14 (July 24, 2014 N.D. Tex.) (rejecting contention that claims could not arise from contacts pre-dating the wrongdoing).

Mode alleged claims for breach of contract and violation of the Texas Uniform Trade Secret Act. Both causes of action are premised on wrongful disclosure of the Confidential Information and arise out of the same forum contacts. Therefore, we need not consider the contacts on a claim-by-claim basis. *Moncrief Oil*, 414 S.W.3d at 150–51; *Schrader v. Roach*, No. 01-20-00183-CV, 2022 WL 2203210, at *4 (Tex. App.—Houston [1st Dist.] June 21, 2022, pet. denied) (mem. op.).

To establish a claim for misappropriation of trade secrets, the plaintiff must show (1) the existence of a trade secret (2) that the defendant acquired through breach of a confidential relationship or through other improper means and (3) that the secret was used without authorization, (4) resulting in damages to the plaintiff. *Twister B.V. v. Newton Rsch. Partners, LP*, 364 S.W.3d 428, 437 (Tex. App.—Dallas 2012, no pet.); *Universal Plant Servs., Inc. v. Dresser-Rand Grp., Inc*., 571 S.W.3d 346, 360 (Tex. App.—Houston [1st Dist.] 2018, no pet.). Liability for misappropriation of trade secrets "may be premised on disclosure or use of the secret." *Twister*, 364 S.W.3d at 438; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(3)(B) (defining "misappropriation" in Texas Uniform Trade Secrets Act). "Use" of a trade secret means "commercial use by which the offending party seeks to profit from the use of the secret." *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 722 (Tex. 2016); *Global Water Grp., Inc. v. Atchley*, 244 S.W.3d 924, 930 (Tex. App.—Dallas 2008, pet. denied). "Any exploitation of the trade secret that

is likely to result in injury to the trade secret owner or enrichment to the defendant is a 'use.'" *Gen. Univ. Sys., Inc. v. HAL, Inc*., 500 F.3d 444, 450–51 (5th Cir. 2007).

The Boyer Defendants contend there is no substantial connection between the trade secret claim and their Texas contacts because they are located in Missouri and the disclosure of the Confidential Information, if any, occurred in either Missouri or Oregon. They further claim there is no evidence that the server on which the Confidential Information is stored is located in Texas.

We disagree that the record does not show that the Confidential Information is maintained in Texas. Mode's pleading specifically averred that the Boyer Defendants "accessed, used, and relied upon Mode's infrastructure and systems maintained in Texas," and the Boyer Defendants did not negate these facts.

More significantly, however, we do not view misappropriation of a trade secret as narrowly as the Boyer Defendants suggest. Limiting the cause of action to the location where the information is electronically stored or was wrongfully disclosed ignores that misappropriation also occurs through use of such information. And the SICO Agreement expressly prohibits the use or disclosure of the Confidential Information.

Our decision in the *Twister* case informs our analysis. *See Twister*, 364 S.W.3d at 437. In that case, Newton alleged that one of its partners disclosed trade secrets to a division of Shell, which then allegedly disclosed the trade secrets to an affiliate and other companies including Twister, a company based in the

Netherlands. *Id*. at 432. According to Newton, Twister used the trade secrets in its oil and gas products, which it "marketed and sold . . . in Texas and elsewhere." *Id*. Twister, in arguing that it was not subject to specific jurisdiction in Texas for Newton's misappropriation of trade secrets claim, contended its alleged use of the trade secrets occurred when the secrets were acquired, and the products were manufactured in the Netherlands. *Id.* at 437. According to Twister, its marketing and sales contacts in Texas had no connection to the operative facts of the misappropriation claim because those contacts "did not create its liability." *Id*. at 437.

This Court disagreed with Twister and concluded that Newton's misappropriation claim was substantially connected to Twister's Texas contacts. In so concluding, we observed that the focus of the trial on Newton's misappropriation claim would include issues related to Twister's acquisition of the trade secrets and its incorporation of the trade secrets into its own products—acts that allegedly occurred in the Netherlands. *Id.* at 439–40. But the trial would also focus on "acts of Twister in Texas, such as how Twister allegedly used or disclosed the trade secrets through marketing and sales in Texas." *Id*. at 440. Accordingly, we concluded that "[r]egardless of the merits of" Newton's allegations that Twister used or disclosed the trade secrets by marketing and selling products in Texas, "these alleged acts support liability for a misappropriation of trade secrets claim." *Id*. at 440.

In *Technox Engineering and Services Private, Ltd. v. Sunwoo Co. Ltd*., No 01-22-00006-CV, 2022 WL 17981848, at * 9–11 (Tex. App.—Houston [1st Dist.] Dec. 29, 2022, pet. filed) (mem. op.), our sister court employed a similar analysis. In that case, Sunwoo, a South Korean company, alleged it owned trade secrets to create oil and gas products that Technox, an Indian company, acquired through improper means. Sunwoo sued Technox for misappropriation of trade secrets because Technox allegedly used Sunwoo's trade secrets to manufacture the same products Sunwoo manufactures. *Id*. at *9.

In a special appearance, Technox argued a Texas court could not exercise specific jurisdiction over Sunwoo's misappropriation of trade secret claim because even if Sunwoo's allegations were true, no actions relevant to Sunwoo's misappropriation claim occurred in Texas. Specifically, Technox maintained that any alleged misappropriation would have occurred in South Korea and any use would have occurred in India. *Id*. at *10.

The Houston court disagreed. The court acknowledged that trial on the misappropriation claim would involve issues related to the acquisition of Sunwoo's trade secrets in South Korea as well as Technox's incorporation of those trade secrets into its products in India. *Id.* But it would also include evidence that Technox shipped those products to Texas for sale by Sunwoo's exclusive Texas retailer to customers located in Texas and throughout the United States. *Id*. at *11. As a result, the court concluded that the operative facts of the litigation were substantially

connected to Technox's Texas contacts. *Id.*; *see also Canyon Furn. Co. v. Sanchez*, SA-18-CV-00753-OLG, 2018 WL 6265041, at *10 (Nov. 8, 2018 W.D. Tex (concluding there was a Texas nexus to misappropriation claims where the confidential information was acquired in Mexico but commercial use of that information was to be derived from sales in Texas).

Here, the Boyer Defendants may have been physically present in Missouri when the Confidential Information was disclosed, but as the forgoing cases illustrate, that does not conclude the inquiry. The Texas relationship through which the Confidential Information was acquired and the use of that information to gain economic advantage establish the requisite connection between the misappropriation and breach of contract claims and this state.

Identifying the "actionable conduct" for a misappropriation of trade secrets claim involves different considerations than those involved in the analysis of where a tort and resulting injury occurred. *See, e.g., Moki Mak*, 221 S.W.3d at 579; *see also TV Azteca*, 480 S.W.3d at 53–54 (discussing actionable conduct). But we are guided by the general principle that a defendant need not commit the specific act on which it is being sued in the forum state. *Ford Motor*, 141 S. Ct. at 1028–1029; *see also Retamco*, 278 S.W.3d at 339. Only "an affiliation between the forum and the underlying controversy, principally [an] activity or occurrence that takes place in the forum state and is therefore subject to the state's regulation" is required. *Ford Motor*, 141 S. Ct. at 1025. Such an affiliation is present here where there is an alleged breach

of a Texas contract by misappropriating Texas trade secrets to facilitate a sale of MTSI and provide the acquiring company with confidential information about the Texas market. The facts evince purposeful contacts with Texas through which the Boyer Defendants "sought some benefit, advantage, or profit" by availing themselves of their Texas contacts. *See TV Azteca*, 480 S.W.3d at 54.

The record reflects that Texas is the center of gravity of the parties' relationship and the Texas contract partially performed in Texas forms the basis of that relationship. The Texas connection is substantially related to the operative facts of the misappropriation of trade secrets and breach of contract claims asserted against the Boyer Defendants. Accordingly, both prongs of the specific jurisdiction analysis have been established. *See T.V. Azteca*, 490 S.W.3d at 52.

Fair Play and Substantial Justice

Having concluded that the Boyer Defendants' Texas contacts demonstrate purposeful availment and are substantially connected to the operative facts of the litigation, we next must determine whether exercising personal jurisdiction over these parties offends traditional notions of fair play and substantial justice.

To answer this question, we consider (1) the burden on the defendant; (2) the interests in the forum state in adjudicating the dispute; (3) the plaintiff's interests in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the states in furthering fundamental substantive social policies. *Burger King*, 471

U.S. at 476–77. Only in rare cases will the exercise of personal jurisdiction offend traditional notions of fair play and substantial justice. *Retamco*, 278 S.W.3d at 341–42. The defendant bears the burden of establishing that the exercise of personal jurisdiction would offend traditional notions of fair play and substantial justice. *BMC Software Belgium, N.V.* v. Marchand 83 S.W.3d 789, 795 (Tex. 2002).

After considering all the factors, we conclude that the exercise of personal jurisdiction over the Boyer Defendants is consistent with traditional notions of fair play and substantial justice. The Boyer Defendants argue generally that Texas has no interest in the controversy and they would be burdened by litigating in Texas because they are not Texas residents. The Boyer Defendants may well incur greater expenses defending this suit in Texas, but that is true for any nonresident defendant. *See Glencoe Cap. Partners, II, L.P. v. Gernsbacher*, 269 S.W.3d 157,168 (Tex. App.—Fort Worth 2008, no pet.). Distance to travel is generally not a significant consideration due to modern transportation. *Id*. Further, the Boyer Defendants are not strangers to this forum. Boyer traveled to Texas to negotiate the SICO Agreement and its extension, previously registered to do business in Texas, designated a registered agent here, maintained a Texas office, and traveled to Texas for business on numerous occasions. Moreover, MTSI's agreement to a Demand Note with a Texas forum section clause suggests the parties previously contemplated

travel to participate in Texas litigation and did not deem it inconvenient.[4] Ultimately, the Boyer Defendants have not identified any considerations that would render jurisdiction in Texas unreasonable.

Conversely, Texas has a significant interest in adjudicating this dispute in which a Texas corporate citizen seeks to enforce a Texas contract and protect its trade secrets. Mode's headquarters is here, its witnesses are here, and its trade secrets are maintained and protected here. Texas is the most logical place to obtain an effective and efficient resolution of this dispute. Given that the Boyer Defendants "purposefully derive[d] benefits from [their] interstate activities, it would be unfair to allow [them] to escape having to account" for those activities in the forum in which they occurred. *Burger King*, 471 U.S. at 473–474. We therefore conclude that exercising personal jurisdiction over the Boyer Defendants would not offend traditional notions of fair play and substantial justice. The trial court's denial of the Boyer Defendants' special appearance was not erroneous.

C. Specific Jurisdiction Over MX

Our consideration of whether the trial court may properly exercise jurisdiction over MX is also limited to specific jurisdiction. As with the Boyer Defendants, both

[4] Although the record reflects that Boyer assured MX that there was nothing Mode could do because he resides in Missouri, the inquiry focuses on whether a defendant could "*reasonably* expect to be hailed back" to a particular forum. *See Moncrief Oil,* 414 S.W.3d at 149 (emphasis added).

claims asserted against MX arise from the same alleged forum contacts. *See M&F Worldwide Corp*, 512 S.W.3d at 886.

Mode's live pleading seeks recovery from MX for tortious interference with the SICO Agreement and misappropriation of trade secrets. Mode alleged specific jurisdiction over MX because MX allegedly acquired MTSI to expand its business in Texas and "actively sought, accepted, and misappropriated information created, stored, and maintained in Texas on Mode's infrastructure and systems."

MX submitted the affidavit of Greg Galbraith in support of its special appearance. The Galbraith affidavit established that MX is an Oregon company with its principal place of business in Oregon.

Galbraith states that two months before MX began negotiations with MTSI, MX acquired certain brokerage assets in Texas (the "Asset Purchase"). In connection with that transaction, MX assumed an office lease in Texas where it has twenty-five employees. Galbraith stated that these assets are operated as a separate business unit and are unrelated to MX's acquisition of MTSI. Galbraith further states that if any confidential Mode information was revealed, the disclosure was made from Missouri to Oregon.

In support of its jurisdictional allegations, Mode submitted evidence showing that MX is authorized to do business in Texas, and from 2018 through 2021 traveled to Texas for trips related to the Asset Purchase, industry conferences, and a Christmas party. The evidence also included a 2022 memo from a California

adhesives and solvents distributor (the "Henkel Memo") stating that Henkel is moving its business from Mode to MX for all loads from the Laredo transfer station. Mode's evidence also included emails between the Boyer Defendants and MX transmitting the Confidential Information and discussing the acquisition of MTSI, and data showing that the Boyer Defendants serviced over ten thousand shipments in Texas from 2019-2022.[5]

The crux of Mode's argument on appeal is that Mode lost business to MX as a result of MX's alleged wrongful conduct. Specifically, Mode contends that MX obtained recurring Texas business and expanded its Texas activities by misappropriating Mode's Confidential Information. Therefore, according to Mode, there is a sufficient nexus between its tortious interference and misappropriation claims and MX's Texas contacts. We disagree.

Mode relies on *Retamco*, 278 S.W.3d at 341 to argue that MX's alleged tortious interference and misappropriation activities "**resulted in** regularly recurring contacts with Texas.*"* (Emphasis added). Accordingly, Mode maintains that MX cannot escape jurisdiction because "where future contacts are foreseeable and created through the actionable conduct," the requisite nexus between the forum and the litigation is established.

[5] Some of Mode's citations to jurisdictional evidence direct us to its response or to documents that are redacted in whole or in part. These documents are not helpful to our analysis.

In *Retamco*, the supreme court held that Republic had "reached out and created a continuing relationship in Texas" by purchasing and taking assignment of real property interests in Texas even though Republic never entered the state to do so. *Id.* at 339. The court also noted that the contact was not merely fortuitous in that the location of the property is "fixed in this state." *Id.* Thus, the court held that Republic had purposefully availed itself of the privilege of conducting activities in Texas. *Id.* at 340. Further, the court found that Retamco had shown a substantial connection between these contacts and the operative facts of the litigation because the value of the real property assets in Texas would have to be proven in connection with the fraudulent transfer claim alleged in that case. *Id*. at 340–41. The court concluded:

> Republic is alleged to have received transfer of Texas real property from a Texas resident, during the pendency of a Texas suit, for the purpose of defrauding a Texas resident. As a result of this transaction, assets ROI may have recovered from Paradigm are now in the possession of Republic. These contacts are sufficient to demonstrate that this alleged tort occurred at least, in part, in Texas.

Id. at 341.

Retamco offers little guidance here. *Retamco* turned on an out-of-state resident's receipt of Texas-based real property, whereas this case involves an Oregon company's purchase of a California company that had Texas business. *See Old Republic*, 549 S.W.3d at 563–564 (distinguishing *Retamco*). The real property assets in *Retamco* are qualitatively different from the trade secrets at issue here. *See Formicola v. Virtual Integrated Analytics Solutions, LLC*, No. 14-22-00412-CV,

2023 WL 3369495, at *4 (Tex. App.—Houston [14th Dist.] May 11, 2023, pet. denied) (mem. op.) (distinguishing *Retamco* and concluding no jurisdiction over a defendant who accepted an offer to engage in a business relationship built on trade secrets misappropriated from Texas).

Mode's reliance on *Ford Motor Co*., 141 S.Ct. at 1023 and *Luciano*, 625 S.W.3d at 14 is similarly unpersuasive. In *Ford*, the United States Supreme Court considered whether the defendant, Ford Motor Company, a global automobile manufacturer and marketer, was subject to specific jurisdiction in Montana and Minnesota in two products-liability suits. 141 S. Ct. at 1022, 1026. In each case, the resident-plaintiff alleged that a Ford car had caused a collision, resulting in harm, in the forum state. *Id*. at 1022–23. Ford conceded that it had purposefully availed itself of the forum state—having advertised, sold, and serviced the two car models at issue in each forum state. *Id*. at 1026, 1028. But Ford asserted that specific jurisdiction was lacking in both cases because its activities in the forum states did not give rise to, or cause, the plaintiffs' claims. *Id*. at 1026. That is, it asserted, it did not design, manufacture, or sell the specific cars at issue within the forum states. *Id*. at 1023, 1026. Only later resales and relocations by consumers had brought the cars to the respective forum states. *Id*. at 1022–23.

The Court noted that specific jurisdiction demanded that a suit "arise out of or relate to the [nonresident] defendant's contacts with the forum." *Id*. at 1026. But the court clarified that specific jurisdiction does not "always require[s] proof of

causation—i.e., proof that the plaintiff's claim came about because of the defendant's in-state conduct" because "some relationships will support jurisdiction without a causal showing." 141 S. Ct. 1017, 1026.

The Court explained:

> None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do. As just noted, our most common formulation of the rule demands that the suit 'arise out of or relate to the defendant's contacts with the forum. The first half of that standard asks about causation; but the back half, after the 'or,' contemplates that some relationships will support jurisdiction without a causal showing.

Id. (internal citation omitted). Nonetheless, the Court cautioned "[t]hat does not mean anything goes" because the phrase "'relate to' incorporates real limits" to adequately protect nonresident defendants. *Id.* There must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that t[ook] place" in the forum. *Id*. at 1031 (quoting *Bristol-Myers Squibb Co. v. Superior Court. of Cal*., 137 S. Ct. 1773, 1776 (2017)).

In *Luciano*, the Supreme Court of Texas declined to determine whether, after *Ford*, its "substantial connection" standard articulated in *Moki Mac* "exceed[ed] the bounds of due process." 625 S.W.3d at 16 n.5. The court explained that it need not make that determination because its holding "rest[ed] on the Supreme Court's analysis in *Ford Motor Co*.—a case whose factual circumstances resemble[d] those [in Luciano]—to determine whether a product liability lawsuit 'arise[s] out of or relate[s] to' a nonresident defendant's contacts with the forum state." *Id.*

This tortious interference and misappropriation case differs from a stream-of-commerce products liability case. Nonetheless, applying the general principles of *Ford* and its progeny does not advance Mode's case because there is no activity or occurrence that took place in this state. *See Ford*, 141 S. Ct. at 1031; *see also State v. Volkswagen Atiengellshaft*, 669 S.W.3d 399, 432 (Tex. 2023) (after-sale tampering occurred in Texas and claims arose directly out of that conduct).

In essence, Mode seeks to premise specific jurisdiction over MX based on the "directed a tort" or "effects" theory. The Texas Supreme Court has rejected the notion that a defendant is subject to specific jurisdiction in Texas by "directing" a tort into Texas. *Searcy*, 496 S.W.3d at 68 (citing *Michiana*, 168 S.W.3d at 788) "[k]nowledge that the 'brunt' of the alleged harm would be felt—or have effects—in the forum state is insufficient to confer specific jurisdiction." *Id.* at 68 (citing *Walden v. Fiore*, 571 U.S. 277, 286 (2014)). As the court has explained, "[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." *TV Azteca*, 490 S.W.3d at 43. "[M]ere injury to a forum resident is not a sufficient connection to the forum." *Id* at 42. Instead, "an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum state, and [t]he proper question is 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*. "[T]he analysis looks to the defendant's contacts with the forum State itself, not the

defendant's contacts with persons who reside there." *TV Azteca*, 490 S.W.3d at 42 (quoting *Walden*, 571 U.S. at 285).

In *TV Azteca*, a Mexican recording artist residing in South Texas filed a Texas defamation action against two Mexican broadcasters and others. The Court focused on the source of the plaintiff's claims—the television broadcast—and the allegations and evidence that (1) the defendants "directed a tort" at the plaintiff in Texas; (2) the defendants broadcast allegedly defamatory statements in Texas; (3) the defendants knew the statements would be broadcast in Texas; and (4) the defendants intentionally targeted Texas through those broadcasts. *See id*. at 42–43. The Court concluded that the evidence of the first three contentions did not establish purposeful availment but that the evidence of the fourth contention did. *Id.* at 43.

When addressing the fact that the defendants knew that their television broadcasts traveled into Texas, the court stated that "[w]hile a defendant's knowledge that its actions will create forum contact may support a finding that the defendants purposefully directed those actions at the forum, that knowledge alone is not enough." *Id*. at 46. "Instead, evidence of 'additional conduct' must establish that the [defendant] had "an intent or purpose to serve the market in the forum State." *Id*. at 46–47. The additional conduct the court considered included evidence demonstrating that the defendants (1) physically entered Texas to produce and promote their broadcasts; (2) derived substantial revenue and other benefits by selling advertising time to Texas businesses; and (3) made substantial and successful

efforts to distribute their programs and increase their popularity in Texas, including the programs in which they allegedly defamed the plaintiff. *See id. at* 49–50. The Court concluded that this evidence showed that the defendants intentionally targeted Texas through those broadcasts and, in doing so, purposefully availed themselves of the benefits of conducting activities in Texas. *See id*. at 52.

Here, it is undisputed that MX was not in Texas when it received the Confidential Information. Mode's tortious interference and misappropriation claims are based entirely on Mode's Texas residency and its allegations that MX's actions caused Mode to lose business in Texas. Mere allegations will not suffice. *See Moncrief Oil*, 414 S.W.3d at 150 (rejecting tortious interference claim that occurred elsewhere and produced effects in Texas). And the jurisdictional evidence does not establish any additional conduct to establish that MX intentionally targeted Texas and purposefully availed itself of the benefits of conducting activities here in connection with the claims asserted in this suit.

To the extent that Mode seeks to impute MTSI's Texas contacts to MX to establish that MX gained "regularly recurring Texas business" as a result of the acquisition, that effort is misplaced. We assess each defendant's contacts with Texas individually. *PHC-Minden, LP, v. Kimberly-Clark Corp*., 235 S.W.3d 163, 172 (Tex. 2007). Unilateral activities of another party or a third person are not relevant. *Old Republic*, 549 S.W.3d at 558; *see also Walden,* 571 U.S. at 284. Mode cannot rely on evidence that the Boyer Defendants had substantial pre-acquisition business

in Texas to infer that MX had that same business after purchasing MTSI and therefore MX has contacts with this state.

Mode relies on the Henkel Memo to argue that MX's strategy was to replace Mode for all loads coming from the Laredo transfer station, and points to testimony that MX could not recall utilizing a Laredo or Del Rio transfer station before the acquisition but had some shipments afterwards. The Memo, however, originated from Henkel, not MX, and is not indicative of MX's strategy or intent. At most, the Memo demonstrates that a California customer previously serviced by Mode moved some of its Texas transportation business to MX. And there is nothing to establish a connection between this, or any other Texas business, and the Confidential Information.

In addition, Mode alleged that the MTSI acquisition "will significantly increase the number of shipments MX services with freight going to, from, and within Texas," and the "recurring Texas business enlarges [MX's] already voluminous, preexisting transportation brokerage services." There is no record support for these contentions.

Nothing establishes that MX had a voluminous preexisting transportation business in Texas or elsewhere. Indeed, nothing establishes the volume of MX's Texas business activity before or after the acquisition. Similarly, nothing demonstrates the post-acquisition volume or value of Mode's Texas business.

Although the record reflects some MX Texas business presence before the acquisition, there are no details concerning the nature of that business, and the undisputed evidence establishes that it is wholly unrelated to this litigation. In short, there is no jurisdictional evidence demonstrating conduct from which we can conclude that MX intentionally targeted Texas and purposefully availed itself of Texas in connection with the alleged actionable conduct. *See TV Azteca*, 490 S.W.3d at 52.

Finally, Mode argues that an email in which MX asked MTSI "What can Mode do to hamper MTSI operations if you sever the relationship?" demonstrates that MX anticipated litigation in Texas. An inquiry about MTSI's contractual obligations, however, does not equate to anticipating litigation, in Texas, or any other state. A nonresident's conduct and connection to a forum governs whether he can reasonably expect to be haled into court in that forum. *See Moncrief*, 414 S.W.3d at 152. There is no such purposeful availment here.

Because the evidence does not support a finding that MX purposefully availed itself of Texas in connection with the Confidential Information and Mode's claims does not arise out of or relate to that conduct, we conclude the trial court can not properly exercise specific jurisdiction over MX.

III. CONCLUSION

We affirm the trial court's order denying Boyer and MTSI's special appearance, reverse the order denying MX's special appearance, and render

judgment granting MX's special appearance and dismissing Mode's claims against MX for lack of personal jurisdiction.

/Dennise Garcia/
DENNISE GARCIA
JUSTICE

230008F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

WILLIAM BOYER,
MULTIMODAL
TRANSPORTATION SOLUTIONS,
INC. AND MX SOLUTIONS, LLC,
Appellants

No. 05-23-00008-CV V.

MODE TRANSPORTATION, LLC,
Appellee

On Appeal from the 134th Judicial
District Court, Dallas County, Texas
Trial Court Cause No. DC-22-00091.
Opinion delivered by Justice Garcia.
Justices Goldstein and Miskel
participating.

In accordance with this Court's opinion of this date, the order of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's order denying MX's Solutions' special appearance and render judgment granting MX's special appearance and dismissing Mode's claims against it for lack of personal jurisdiction. In all other respects, the trial court's order is **AFFIRMED**.

It is **ORDERED** that appellee MODE TRANSPORTATION, LLC recover its costs of this appeal from appellant WILLIAM BOYER, and MULTIMODAL TRANSPORTATION SOLUTIONS, INC., and MX SOLUTIONS, LLC recover its costs of this appeal from MODE TRANSPORTATION, LLC.

Judgment entered October 4, 2023.