AFFIRM in Part, REVERSE in Part, and REMAND; Opinion Filed May 5, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00335-CV

JANI-KING FRANCHISING, INC., Appellant
V.
FALCO FRANCHISING, S.A., DAVID D'HOSE, PHILIPPE FISCH, CONSTANTIN ROMAS, AND JEAN BERNARD GENICOT, Appellees

On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-14-11840

MEMORANDUM OPINION

Before Justices Lang, Brown, and Schenck
Opinion by Justice Schenck

This is an interlocutory appeal from an order granting special appearances to appellees David D'Hose ("D'Hose"), Philippe Fisch ("Fisch"), Constantin Romas ("Romas"), and Jean Bernard Genicot ("Genicot") (collectively the "Individual Defendants") and denying special appearance to cross-appellant Falco Franchising, S.A.("Falco"), in a lawsuit instituted by appellant Jani-King Franchising, Inc. ("Jani-King").

On appeal, in three issue, Jani-King argues (1) the trial court erred by granting each of the Individual Defendants' special appearances as to its fraud claims,[1] (2) the fiduciary-shield doctrine does not insulate the Individual Defendants from personal jurisdiction, and (3) the

[1] On appeal, Jani-King does not challenge the trial court's granting of the Individual Defendants' special appearances as to its misappropriation of trade secrets and unjust enrichment claims. Therefore, our discussion of personal jurisdiction over the Individual Defendants is limited to Jani-King's fraud claims against them.

evidence is factually and legally insufficient to support certain of the trial court's findings-of-fact. By cross-appeal, in a single issue, Falco argues the trial court erred in denying its special appearance. We conclude Fisch, Romas, Genicot, and Falco had sufficient minimum contacts with Texas that exercising jurisdiction over them does not offend traditional notions of fair play and substantial justice. We conclude the trial court does not have personal jurisdiction over D'Hose. We affirm the trial court's orders denying Falco's special appearance and granting D'Hose's special appearance. We reverse the trial court's order granting Fisch, Romas, and Genicot's special appearances and remand this case to the trial court for further proceedings consistent with this opinion. Because the dispositive issues in this case are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves a dispute between a Texas corporation and a Belgian entity and its principals. Jani-King is a Texas corporation headquartered in Dallas County. Falco, the company, maintains its principal place of business in Belgium. D'Hose, Romas, and Genicot are citizens of Belgium and Fisch is a citizen of France. Fisch, Romas, and Genicot are shareholders of Falco. Romas is also a managing director of Falco. D'Hose is Falco's branch manager.

In 2004, Fisch and Genicot contacted Jani-King, which is a commercial-cleaning franchisor, seeking a Jani-King franchise in Belgium. Jani-King agreed to grant Falco the franchise, in part, because Fisch had a proven record with a Jani-King franchise in France. As a result, Jani-King and Falco entered into a Regional Franchise Agreement ("Agreement"), which is governed by the laws of the state of Texas. The Agreement granted Falco an exclusive right to operate a Jani-King regional franchise in Belgium for an initial term of 20 years in exchange for the payment of certain fees and royalties. Under the Agreement, Falco obtained the right to use Jani-King's "System" consisting of certain trademarks, trade names, trade dress, service marks,

slogans and logos, and certain proprietary know-how and other confidential information. In addition, Falco was given the right to sub-license the System to regional sub-franchisees. As part of its obligations under the Agreement, Falco agreed to prepare and submit to Jani-King monthly reports of sales and revenue, from which royalty and fee payments would be calculated. Falco, on behalf of itself and its employees, also agreed not to compete with Jani-King during the term of the Agreement and for a period of one year following the termination of the Agreement.

In November 2010, Falco defaulted on its reporting obligations to Jani-King. Falco had also fallen several hundred thousand dollars behind on its payment obligations to Jani-King. Thereafter, other defaults occurred and eventually, in March 2014, Falco told Jani-King it did not intend to pay royalties in the future and gave notice that it intended to terminate the Agreement. This prompted Jani-King to conduct an investigation through which it discovered the Individual Defendants had secretly formed a competing business in Belgium and misused Jani-King's personal property and confidential information. As a result, Jani-King sued Falco and its principals. As to the Individual Defendants, Jani-King claims they personally misrepresented the causes for Falco's poor performance, misrepresented revenue from sales, led Jani-King to believe Falco was dedicated to the relationship when it was not, and concealed the fact that they were violating the non-compete agreement. Jani-King seeks to hold Falco accountable for the conduct of the Individual Defendants and for its breaches of the Agreement. In its petition, Jani-King asserted general and specific personal jurisdiction over all of the defendants. On appeal, Jani-King asserts only specific jurisdiction over the Individual Defendants based upon their alleged commission of a tort, in whole or in part, in Texas.

In response to Jani-King's suit, Falco and the Individual Defendants timely filed special appearances challenging the trial court's exercise of jurisdiction over them. Each of the Individual Defendants supported his special appearance with his own declaration disavowing any

basis sufficient to establish general jurisdiction and generally denying having committed a tort, in whole or in part, in Texas. The Individual Defendants also argued the fiduciary-shield doctrine shielded them from the exercise of personal jurisdiction. Falco supported its special appearance with the declaration of Romas, which likewise disavowed having engaged in conduct commonly found to constitute doing business in Texas, and disclaimed any connection between Jani-King's claims and any conduct of Falco.

Jani-King made various objections to the declarations, some of which the trial court sustained. It also presented declarations from its President and Vice President of International Franchise Development. The Individual Defendants and Falco did not object to Jani-King's declarations and did not offer any evidence to contradict them. Among other things, Jani-King's declarations established the following. The Individual Defendants, through their in-person meetings and/or communications with Jani-King, led it to believe they were acting in Jani-King's best interest when, in fact, they were not. These communications also led Jani-King to believe that difficult market conditions, not the Individual Defendants' fraudulent scheme to divert business from Jani-King, triggered Falco's numerous failings under the Agreement. The Individual Defendants concealed and did not disclose to Jani-King that they were competing with Jani-King. Based on the Individual Defendant's representations and non-disclosures, Jani-King abstained, for an extended period of time, from declaring Falco in default of the Agreement and from otherwise taking action to protect its business interests. In addition to the foregoing representations, Romas represented to Jani-King that Falco was growing its business, and had completed a deep restructuring such that it was in a position to honor its contractual obligations. Genicot represented Falco had undergone a financial restructuring and promised Falco was on the right track and back to profit, able to pay its debts to Jani-King, and able to build a profitable future for both parties all while its principals were usurping it business opportunities. The

alleged misrepresentations of Romas, Genicot, and Fisch, occurred during meetings they attended in Texas, and by written communication with Jani-King. The alleged misrepresentations of D'Hose occurred by his transmission to Jani-King, at the request of the other Individual Defendants, of incomplete and inaccurate reports. The trial court granted the Individual Defendants' special appearances and denied Falco's. This interlocutory appeal followed.

DISCUSSION

A. Fiduciary Shield

We begin with Jani-King's second issue in which it argues the fiduciary-shield doctrine does not immunize the Individual Defendants from the exercise of specific jurisdiction. A corporate employee is not shielded from the exercise of specific jurisdiction as to torts for which the employee may be held individually liable. *See Stull v. LaPlant*, 411 S.W.3d 129, 137 (Tex. App.—Dallas 2013, no pet.). In this case, Jani-King has alleged torts for which the Individual Defendants can be held individually liable. *See Shapolsky v. Brewton*, 56 S.W.3d 120, 133 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) ("[C]orporate agents are individually liable for fraudulent or tortious acts committed while in the service of their corporation"). Thus, the contacts with Texas giving rise to Jani-King's tort claims against the Individual Defendants are deemed to have been made by the Individual Defendants in their individual capacities. *See Stull*, 411 S.W.3d at 137. The fiduciary-shield doctrine does not shield the Individual Defendants from the exercise of specific jurisdiction in this case if personal jurisdiction is otherwise proper. *Id.* Accordingly, we sustain Jani-King's second issue and consider the Individual Defendants' substantive amenability to suit.

B. Personal Jurisdiction

In its first issue, Jani-King argues the trial court erred in concluding it lacks personal

jurisdiction over the Individual Defendants.

Texas courts may exercise personal jurisdiction over a nonresident defendant only if (1) the Texas long-arm statute permits the exercise of jurisdiction and (2) the assertion of jurisdiction satisfies constitutional due-process guarantees. *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 657 (Tex. 2010). The long-arm statute provides, in relevant part, that in addition to other acts that may constitute doing business, a nonresident does business in this state if the nonresident commits a tort, in whole or in part, in this state. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (West 2015). Personal jurisdiction over a nonresident defendant satisfies constitutional due-process guarantees when the nonresident defendant has established minimum contacts with the forum state and the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. *Kelly*, 301 S.W.3d at 658.

Minimum contacts are established when the nonresident defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Id.* at 657–58. In determining purposeful availment, we consider (1) the defendant's own actions but not the unilateral activity of another party, (2) whether the defendant's actions were purposeful rather than random, isolated, or fortuitous, and (3) whether the defendant sought some benefit, advantage, or profit by availing itself of the privilege of doing business in Texas. *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 785 (Tex. 2005). The focus is the relationship among the defendant, the forum, and the litigation. *Id.* at 790 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). In this analysis, we do not assess the quantity of the contacts, but rather their nature and quality. *Moncrief Oil Int'l, Inc. v. OAO Gazprom*, 414 S.W.3d 142, 151 (Tex. 2013).

A defendant's contacts with a forum can give rise to either specific or general jurisdiction. *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 337 (Tex.

2009). As we previously stated, on appeal, Jani-King asserts specific jurisdiction as the sole basis for jurisdiction over the Individual Defendants. Specific jurisdiction is established if the defendant's alleged liability arises out of or relates to the defendant's contacts with the forum state. *Id.* at 338.

The plaintiff bears the initial burden to plead sufficient allegations to invoke jurisdiction under the Texas long-arm statute. *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007). Once the plaintiff has pleaded sufficient jurisdictional allegations, a defendant who contests the trial court's exercise of personal jurisdiction bears the burden of negating all bases of jurisdiction alleged by the plaintiff. *Id.*

The ultimate question of whether a trial court has personal jurisdiction over a nonresident defendant is a question of law. *Id.* And because jurisdiction is a question of law, an appellate court reviews a trial court's determination of a special appearance de novo. *Id.*

1. *Pleading Burden*

In support of its first issue, Jani-King argues it met its pleading burden to invoke jurisdiction over the Individual Defendants and claims the Individual Defendants failed to meet their burden of negating all bases of jurisdiction. To determine whether Jani-King met its initial burden to plead sufficient allegations to invoke jurisdiction over the Individual Defendants under the Texas long-arm statute, we look at the jurisdictional facts pleaded in its petition, as well as the jurisdictional facts alleged in its response to the Individual Defendants' special appearances. TEX. R. CIV. P. 120a(3); *Flanagan v. Royal Body Care, Inc.*, 232 S.W.3d 369, 374 (Tex. App.—Dallas 2007, pet. denied).

In its original petition, Jani-King asserted claims against the Individual Defendants for common-law fraud and fraud by nondisclosure. In support of these claims, in its petition and declarations, Jani-King detailed various misrepresentations of the Individual Defendants and

their concealment and failures to disclose the existence of a competing business. For the reasons set forth *infra.*, we conclude Jani-King met its initial burden of pleading allegations sufficient to confer jurisdiction over Fisch, Romas, and Genicot, but not as to D'Hose.

As to D'Hose, Jani-King alleged that at the direction of Fisch, Romas, and Genicot, and pursuant to the Agreement, he regularly sent reports to Jani-King in Texas, which he represented to be complete and accurate, and in which he did not disclose certain revenues were being diverted to his competing business. Jani-King also alleged D'Hose emailed Jani-King in Texas to advise that business was "difficult" in order to avoid paying late fees. The records attached to Jani-King's declarations show D'Hose transmitted the reports to Jani-King by email, and that D'Hose's comment about business "being difficult" was in response to a communication initiated by Jani-King. This Court has previously concluded that communications through telephone and email regarding negotiation and performance of a contract between Texas plaintiffs and a foreign defendant were not meaningful contacts of the foreign defendant with Texas. *KC Smash 01, LLC v. Gerdes, Hendrichson, Ltd., L.L.P.*, 384 S.W.3d 389, 393–94 (Tex. App.—Dallas 2012, no pet.) (citing *Olympia Capital Assoc., L.P. v. Jackson*, 247 S.W.3d 399, 417 (Tex. App.—Dallas 2008, no pet.). Thus, Jani-King failed to plead D'Hose committed a tort, in whole or in part, in Texas. Where the plaintiff fails to plead facts bringing the defendant within reach of the long-arm statute (i.e., for a tort claim, that the defendant committed tortious acts in Texas), the defendant need only prove that it does not reside in Texas to negate jurisdiction. *See Siskind v. Villa Found. for Educ., Inc.*, 642 S.W.2d 434, 438 (Tex. 1982). In his declaration, D'Hose declared that he is not now and never has been a resident of Texas. Thus, he met his burden to negate jurisdiction.

In contrast, Jani-King's claims against Fisch, Ramos, and Genicot for common-law fraud and fraudulent concealment arise, in part, from statements and omissions they allegedly made

while they were physically present in Texas. A nonresident who travels to Texas and either makes statements alleged to be fraudulent or fails to disclose material information that he is under a duty to disclose is subject to specific jurisdiction in Texas in a subsequent action arising from the statement or non-disclosure. *Petrie v. Widby*, 194 S.W.3d 168, 175 (Tex. App.—Dallas 2006, no pet.) (citing *Stein v. Deason*, 165 S.W.3d 406, 410 (Tex. App.—Dallas 2005, no pet.), *see also Moncrief*, 414 S.W.3d at 153 (personal jurisdiction exists when the nonresident agreed to attend business meetings in Texas for the purpose of obtaining benefits from those meetings), *Horizon Shipbuilding, Inc. v. BLyn II Holding, LLC*¸ 324 S.W.3d 840, 849 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (personal jurisdiction exists when the nonresident attended two business meetings in Texas to discuss important plans for the refurbishment of a boat that was the subject of the dispute). Thus, Jani-King met its pleading burden as to Fisch, Romas, and Genicot. Therefore, the burden shifted to them to negate all bases for jurisdiction.

A defendant can negate jurisdiction on either a factual or legal basis. *Kelly*, 301 S.W.3d at 659. A defendant negates jurisdiction on a factual basis by presenting evidence to disprove the plaintiff's jurisdictional allegations. *Id.* A defendant negates jurisdiction on a legal basis by showing that even if the plaintiff's jurisdictional allegations are true, the allegations are legally insufficient to establish personal jurisdiction. *Id.*

2. *Evidence of Contacts*

On a factual basis, Fisch, Romas, and Genicot attempted to negate jurisdiction by declaring they did not commit a tort, in whole or in part, in Texas. Jani-King objected to these declarations and the trial court sustained them. Therefore, their attempts to negate jurisdiction on a factual basis failed.

On a legal basis, Fisch, Romas, and Genicot, argued in their supplemental brief in support of their special appearances that their contacts with Texas were fortuitous rather than purposeful

and therefore they are legally insufficient to establish personal jurisdiction. In doing so, they relied on a Fifth Circuit decision, *Holt Oil & Gas Corp. v. Harvey*, for the proposition that if a defendant has numerous contacts with a party who is located in Texas and would have had those same contacts regardless of where that party was located, those contacts with Texas are merely fortuitous—"rest[ing] on nothing but the mere fortuity that [the other party] happens to be a resident of the forum." 801 F.2d 773, 778 (5th Cir. 1986). Fisch, Romas, and Genicot's reliance on *Holt* is misplaced. *Holt* was a breach of contract case, not a tort case. Since issuing the opinion in *Holt*, the Fifth Circuit has noted its limited application by stating, in the tort context, it is of no use to say that the plaintiff "fortuitously" resided in Texas. *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 213 (5th Cir. 1999). The court explained that doing so would allow, for instance, a defendant to mail a bomb to a person in Texas but claim Texas had no jurisdiction because it was fortuitous that the victim's zip code was in Texas. *Id.* Because Jani-King's claims against Fisch, Romas, and Genicot sound in tort, *Holt* does not provide a legal basis to negate jurisdiction.

We conclude Jani-King sufficiently pleaded allegations establishing purposeful availment to bring Fisch, Romas, and Genicot within the provisions of the Texas long-arm statute, and Fisch, Romas, and Genicot did not negate jurisdiction on a factual or legal basis.

3. *Substantial Connection*

Because the asserted basis for jurisdiction over Fisch, Romas, and Genicot is specific jurisdiction, we next consider whether their potential liability arises from or relates to the forum contacts. *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 227 (Tex. 1991). In short, there must be a substantial connection between the defendant's contacts with the forum and the operative facts of the litigation before assertion of jurisdiction is proper. *Moki Mac*, 221 S.W.3d at 585. "A substantial connection can result from even a single

act." *Moncrief*, 414 S.W.3d at 151. The "operative facts" of the litigation are those facts the trial court will focus on to prove the nonresident defendant's liability. *Kaye/Bassman Int'l Corp. v. Dhanuka*, 418 S.W.3d 352, 357 (Tex. App.—Dallas 2013, no pet.). Whether a plaintiff's claims arise from or relate to the nonresident defendant's Texas contacts is a question of law. *Moncrief*, 414 S.W.3d at 150 n.4.

Jani-King's fraud claims against Fisch, Romas, and Genicot principally concern two activities. The representations that Falco's failures to pay were due to difficult market conditions, coupled with assurances of payment, and the concealment of the competing enterprise. Based upon these actions, Jani-King claims to have abstained from declaring a default under the Agreement and from otherwise protecting its business interests. The misrepresentations associated with these activities are the core of Jani-King's fraud and damage claims. Thus, the contacts showing purposeful availment are the operative facts of the litigation. Fisch, Romas, and Genicot's liability, if any, will arise from the type and scope of the information they provided to Jani-King in Texas and the type and scope of the information they withheld from Jani-King in Texas. We conclude there is a substantial connection between Fisch, Romas, and Genicot's conduct and the operative facts of the litigation. Thus, Fisch, Romas, and Genicot have minimum contacts with Texas to support the exercise of personal jurisdiction.

4. *Fair Play and Substantial Justice*

Having concluded Fisch, Romas, and Genicot have minimum contacts with Texas, we must also determine whether the exercise of personal jurisdiction over them would offend traditional notions of fair play and substantial justice. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). Courts evaluating whether exercising jurisdiction offends traditional notions of fair play and substantial justice should consider the following factors, when appropriate (1) the burden on the nonresident, (2) the interests of the forum in adjudicating the

dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the international judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several nations in furthering fundamental substantive social policies. *Moncrief*, 414 S.W.3d at 155. "When a nonresident defendant has purposefully established minimum contacts with the forum state, it will be only a rare case when the exercise of jurisdiction does not comport with traditional notions of fair play and substantial justice." *Lombardo v. Bhattacharyya*, 437 S.W.3d 658, 675 (Tex. App.—Dallas 2014, pet. denied). In a special appearance, a defendant bears the burden of presenting "a compelling case that the presence of some consideration would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477.

Despite this burden, Fisch, Romas, and Genicot presented no evidence to support a finding that the exercise of jurisdiction over them would offend traditional notions of fair play and substantial justice, and the trial court made no findings or conclusions to that effect. In their supplemental brief in support of their special appearances, after listing the factors a court is to consider, Fisch, Romas, and Genicot argued only: (1) it would be enormously burdensome on them to litigate this dispute in Texas, (2) Texas has little interest in adjudicating this dispute other than the fact that Jani-King is a Texas company, (3) the relevant business and conduct underlying this dispute involves a franchise agreement with a Belgian company, and (4) Jani-King can obtain convenient and effective relief in Belgium.

While subjecting Fisch, Romas, and Genicot to suit in Texas certainly imposes a burden on them, the same can be said of all nonresidents. And distance alone cannot ordinarily defeat jurisdiction. *Spir Star AG v. Kimich*, 310 S.W.3d 868, 879 (Tex. 2010) ("Nor is distance alone ordinarily sufficient to defeat jurisdiction: 'modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in

economic activity.'" (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)). Fisch, Romas, and Genicot have already shown their willingness to travel to Texas. *See id.* (holding jurisdiction was appropriate where German company officers traveled to Houston to establish a distributing company). We cannot conclude further travel to defend this lawsuit will be overly burdensome on any of them.

As to their contention the state has little interest in in adjudicating this dispute other than the fact that Jani-King is a Texas company, the allegations that Fisch, Romas, and Genicot committed a tort in Texas against a resident implicate a serious state interest in adjudicating the dispute. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984). As to the dispute involving a franchise agreement with a Belgium company, that Agreement is governed by the laws of the state of Texas. As to Belgium being a convenient and effective venue for Jani-King to obtain relief, the interests of Jani-King in obtaining convenient and effective relief clearly weigh in favor of the exercise of jurisdiction in Texas, where law will govern, not Belgium. *See Burger King*, 471 U.S. at 473. In sum, Fisch, Romas, and Genicot have not demonstrated that the interests of Belgium outweigh Texas's substantial interest in providing relief to its residents. Fisch, Romas, and Genicot have not identified any considerations that would render jurisdiction in Texas unreasonable or that provide them with a vested right not to be sued in Texas. Accordingly, we conclude Fisch, Romas, and Genicot failed to meet their burden to establish a compelling case that the trial court's exercise of personal jurisdiction over them would offend traditional notions of fair play and substantial justice. *See, e.g., Tempest Broad. Corp. v. Imlay*, 150 S.W.3d 861, 876–77 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

Because the long-arm statute confers jurisdiction over Fisch, Romas, and Genicot, because their contacts with Texas were purposeful, because Jani-King's claims arise from or relate to their forum contacts, and because jurisdiction over them comports with traditional

notions of fair play and substantial justice, the trial court has specific personal jurisdiction over Fisch, Romas, and Genicot. Accordingly, we sustain Jani-King's first issue as to jurisdiction over Fisch, Romas, and Genicot. Because Jani-King failed to meet its pleading burden as to D'Hose and because D'Hose established he is not a resident of Texas, we overrule Jani-King's first issue as to D'Hose. Accordingly, we pretermit Jani-King's third issue.

FALCO'S - CROSS APPEAL

Falco does not challenge the legal or factual sufficiency of the evidence supporting any of the trial court's findings-of-fact in support of the order denying Falco's special appearance. Such uncontested findings of fact "occupy the same position and are entitled to the same weight as the verdict of a jury." *Lombardo*, 437 S.W.3d at 668. Thus, Falco's arguments must be viewed in light of those findings. Falco argues (1) the exercise of specific jurisdiction over it is improper because its contacts with Texas were merely fortuitous, (2) there is no sufficient nexus between Texas and Jani-King's lawsuit, (3) it did not subject itself to Texas jurisdiction under the parties' Agreement,[2] and (4) the exercise of jurisdiction over Falco would offend traditional notions of fair play and substantial justice. All of these arguments challenge the legal conclusions to be drawn from the evidence before the trial court. As such, they present legal questions subject to *de novo* review by this appellate court. *See Counter Intelligence, Inc. v. Calypso Waterjet Sys., Inc.*, 216 S.W.3d 512, 517 (Tex. App.—Dallas 2007, pet. denied).

A. Purposeful Availment

Like the Individual Defendants, Falco relies on *Holt* to argue its contacts with Texas were merely fortuitous, rather than purposeful. We have already concluded *Holt* does not negate

[2] The Agreement provides, "Subject to the provisions of this Agreement relating to arbitration of disputes, [Jani-King] reserves the right to commence and prosecute actions in, and [Falco] agrees to submit to the jurisdiction of, any court of competent jurisdiction in the U.S.A. . . . ." Falco has not moved to compel arbitration in this case, and Falco agreed to subject itself to jurisdiction in Texas, a court of competent jurisdiction in the U.S.A. *See e.g.*, *Pritchett v. Gold's Gym Franchising, LLC*, No. 05–13–00464–CV, 2014 WL 465450 (Tex. App.—Dallas March 12, 2014, pet. denied) (mem. op.).

jurisdiction over Jani-King's fraud claims. As to Jani-King's breach of contract claim, *Holt's* reasoning is materially distinguishable and inapposite here. *Holt* involved an ill-fated oil and drilling venture in northwestern Oklahoma. Holt Oil & Gas Company ("Holt"), a Texas corporation, reached out to Harvey, an Oklahoma resident, and offered him an opportunity to obtain a working interest in operations in Oklahoma. The parties' agreement was memorialized in a Joint Operating Agreement governed by Oklahoma law. At some point, Harvey refused to pay expenses associated with the operations, and Holt sued Harvey for breach of their agreement. Harvey's only contacts with Texas were entering into an agreement with a Texas Corporation, sending three checks to Holt in Texas as partial performance of the contract, and extensive telephonic and written communication with Holt. The court concluded these contacts were not sufficient to support specific jurisdiction. *Holt*, 801 F.2d at 778. The court ultimately found, Harvey's unrelated extensive contacts with Texas allowed for the exercise of general jurisdiction. *Id*. at 779.

In this case, Falco's contacts with Texas were much more extensive and much more likely to cause a reasonable person to anticipate resolution of disputes in the state. Among other things, the trial court's unchallenged findings establish Falco's incorporators/representatives reached out to the state of Texas, beyond their national border(s), for the purchase of a franchise from Jani-King and the manifold benefits (licenses, concepts, proprietary marks, processes, etc.) Falco would derive from such business arrangement. In *Holt*, it was the Texas resident that reached out to the defendant. Falco's incorporators/representatives negotiated and entered into the Agreement which contemplated systematic and continuing contacts with Jani-King in Texas over a twenty (20) year period. Under the Agreement, Falco agreed to the jurisdiction of U.S.

courts[3] and the only state in the United States where Falco performed tasks under the contract was Texas. These tasks included: participating in training, attending Jani-King annual meetings, sending notices, paying Jani-King fees and royalties, and transmitting revenue and franchise sales reports. Falco in fact performed these tasks under the Agreement for ten years. It also agreed to apply Texas law to any dispute with Jani-King, thereby invoking the protections and benefits of Texas law. *See Burger King*, 471 U.S. at 482 (choice-of-law provisions should not be ignored in considering whether a defendant has purposefully invoked the benefits and protections of a State's laws). In contrast, the agreement in *Holt* was governed by Oklahoma law, not Texas law giving the defendant little reason to expect a Texas court to resolve disputes arising under it.

The facts in this dispute have far more in common with *Burger King v. Rudzewicz*, where, despite the franchisee never physically travelling to the forum, the Court nevertheless found that he "reached out beyond [his residence] and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization." *Id.* at 480. "[I]n light of Rudzewicz' voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the quality and nature of his relationship to the company in Florida can in no sense be viewed as random, fortuitous, or attenuated." *Id.* We conclude Falco's contacts with Texas are sufficient to support jurisdiction over Falco as to Jani-King's breach of contract claim.

Jani-King's fraud claims are based on the conduct of the Individual Defendants, for which Falco is responsible. *See Great Am. Life Ins. Co. v. Lonze*, 803 S.W.2d 750, 754 (Tex. App.—Dallas 1990, writ denied). Having concluded that Fisch, Romas, and Genicot's contacts with Texas were purposeful, rather than fortuitous, we likewise conclude Jani-King's fraud claims against Falco are supported by purposeful contacts.

[3] While the Agreement includes an arbitration provision providing for resolution of claims, controversies and disputes by arbitration in Honolulu, Hawaii, Falco has not sought to invoke this provision.

B. Substantial Connection

Next, we consider Falco's argument that there is no sufficient nexus between Texas and Jani-King's lawsuit. Jani-King sued Falco for failing to pay Jani-King at least $769,000 in past due fees and royalties owing under the Agreement, and failing to send revenue and franchise sales reports as required by the Agreement. Each of these failures to perform tasks in Texas is alleged as a breach of the Agreement. The undisputed evidence and the uncontested findings establish payments and reports were due to be sent to Jani-King in Texas. Consequently, there is a sufficient nexus between Falco, Texas, and Jani-King's breach of contract claim.

As we previously stated, the misrepresentations made by Fisch, Ramos, and Genicot in Texas represent the exact representations upon which Jani-King relied and which caused Jani-King to suffer injury in Texas. The misrepresentations were made by Fisch, Ramos, and Genicot on behalf of Falco. Thus, a sufficient nexus exists between Falco, Texas, and Jani-King's fraud claim.

C. Fair Play and Substantial Justice

As to Falco's argument the exercise of personal jurisdiction over it would offend traditional notions of fair play and substantial justice, Falco bears the burden of presenting "a compelling case that the presence of some consideration would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. Despite this burden, Falco presented no evidence to support a finding that the exercise of jurisdiction over it would offend traditional notions of fair play and substantial justice and the trial court concluded it would not. In doing so, the trial court found Falco and its representatives are financially and physically able to travel to Texas and Falco has retained Texas counsel to represent it in this matter. After listing the factors a court is to consider, Falco argued only (1) it would be enormously burdensome on Falco, as a Belgium company, to litigate this dispute in Texas, (2) Texas has little interest in adjudicating

this dispute other than the fact that Jani-King is a Texas company, and (3) Jani-King can obtain convenient and effective relief in Belgium. For the reasons set forth in our discussion concerning whether the exercise of personal jurisdiction over Fisch, Ramos, and Genicot offends traditional notions of fair play and substantial justice, we likewise conclude Falco failed to meet its burden to establish a compelling case that the trial court's exercise of personal jurisdiction over it would offend traditional notions of fair play and substantial justice. *See, e.g., Tempest*, 150 S.W.3d at 876–77.

Because the long-arm statute confers jurisdiction over Falco, because Falco's contacts with Texas were purposeful, because Jani-King's claims arise from or relate to Falco's forum contacts, and because jurisdiction over Falco comports with traditional notions of fair play and substantial justice, Texas courts have personal jurisdiction over Falco. Accordingly, we overrule Falco's sole cross issue.

CONCLUSION

We reverse the trial court's order granting Fisch, Ramos, and Genicot's special appearances as to Jani-King's fraud claims, and affirm the trial court's order denying Falco's special appearance and granting D'Hose's special appearance. We remand this case to the trial court for further proceeding consistent with this opinion.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JANI-KING FRANCHISING, INC., Appellant

No. 05-15-00335-CV V.

FALCO FRANCHISING, S.A., DAVID D'HOSE, PHILIPPE FISCH, CONSTANTIN ROMAS, AND JEAN BERNARD GENICOT, Appellees

On Appeal from the 116th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-14-11840.
Opinion delivered by Justice Schenck.
Justices Lang, and Brown participating.

In accordance with this Court's opinion of this date, the orders of the trial court on special appearances are **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's order granting Philippe Fisch, Constantin Romas, and Jean Bernard Genicot's special appearances. In all other respects, the trial court's orders are **AFFIRMED**. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 5th day of May, 2016.