

Opinion Issued April 22, 2010



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00999-CV

POLYCOMP ADMINISTRATIVE SERVICES, INC., Appellant

V.

JONATHAN DAVID JACKSON and BRENDA JACKSON, Appellees

**On Appeal from the 164th District Court
Harris County, Texas
Trial Court Cause No. 2009-41385**

MEMORANDUM OPINION

In this accelerated interlocutory appeal, appellant, Polycomp Administrative Services, Inc. (Polycomp), challenges the trial court's order denying its special appearance. Appellees, Brenda and Jonathan D. Jackson, sued Polycomp, a non-resident California corporation, alleging claims for violations of the Texas Securities Act, the Texas Deceptive Trade Practices–Consumer Protection Act, breach of fiduciary duty, common law fraud, negligence, and conspiracy. Polycomp filed a special appearance that the court denied. In three issues, Polycomp contends that the trial court erred by (1) denying its special appearance, (2) failing to file findings of fact and conclusions of law, and (3) failing to sustain Polycomp's objection to the affidavit of Jason Gibson, the Jacksons' attorney. We conclude the trial court erred in denying Polycomp's special appearance. We do not reach Polycomp's other two issues regarding the findings of fact and conclusions of law and Gibson's affidavit. We reverse the trial court's order and render judgment granting the special appearance.

Background

Polycomp provides benefit plan administration and consulting services for retirement plans, cafeteria plans, self-directed IRAs, and association trusts. It is a third-party administration firm and provides record keeping and reporting services.

Polycomp states in its pleadings that it is a foreign company that does not maintain a regular place of business in Texas, does not have any agents in Texas, and that it is a corporation organized under the laws of the State of California.

The Jacksons asserts that they lost approximately \$515,000.00 of their retirement funds in an investment scheme run by Diversified Lending Group, Inc. (DLG), a real estate investment firm. The Jacksons claim that DLG raised funds by selling securities to generate capital for its investment pool and that DLG offered and sold its notes through a nationwide network of insurance agents and salespeople. They allege that after they bought DLG investments, Polycomp served as a third party administrator for DLG and was the intermediary between the Jacksons and DLG. The Jacksons further allege that Brenda signed Polycomp contracts in Texas introduced to her by a third party and that Polycomp later sent Brenda quarterly account statements pursuant to Polycomp's contractual duties. They contend that Polycomp should be subject to the jurisdiction of Texas because Brenda signed a Polycomp contract in Texas, Polycomp sent quarterly statements to Brenda who lives in Texas, and the statements contained fraudulent misrepresentations.

To support their allegations, the Jacksons presented evidence in the form of two Polycomp "Contract[s] for Services" and two Polycomp "IRA Simplifier"

contracts. In September 2007, Brenda signed the first two Polycomp contracts. First, she signed an “IRA Simplifier” contract issued by First Regional Bank of Woodland Hills, California, “care of Polycomp.” The contract establishes a traditional individual retirement account (IRA), with Polycomp serving as custodian of the account. Second, Brenda signed a Polycomp “Contract for Services” so that Polycomp could administer Brenda’s self-directed IRA investment. In June 2008, Brenda signed two new, nearly identical, Polycomp service and simplifier contracts. The contracts indicate that Brenda was a Texas resident at the time she signed the contracts.

The Jacksons also presented affidavits by Brenda and Jonathan and an affidavit by their attorney, Gibson. Brenda’s affidavit states that she signed the contracts in Texas and that Polycomp sent quarterly account statements to her Texas address regarding her investment. In Jonathan’s affidavit, he states he witnessed Brenda sign the services contract and IRA Simplifier contract and confirms that he and Brenda received quarterly account updates from Polycomp at their home in Texas. Gibson’s affidavit stated that “to the best of his knowledge,” clients of his contracted with Polycomp and that Polycomp sent statements to his clients.

Finally, the Jacksons presented images from Polycomp’s website. The first

image is of a “contact us” page that includes addresses of three Polycomp offices in California. The second image is of Polycomp’s online client login page that includes an email address for technical support. The third image is a login page entitled “Self-directed IRA Account Information.”

Polycomp presented evidence in the form of an affidavit from its co-owner and CEO, Harry Veldkamp. In the affidavit, Veldkamp denied that Polycomp had any contacts in Texas. He stated, in part, that Polycomp does not have a telephone listing in Texas, does not advertise in Texas, and does not recruit Texas residents.

The trial court held a hearing and denied Polycomp’s special appearance. After the trial court denied Polycomp’s special appearance, Polycomp submitted a more detailed amended Veldkamp affidavit. Polycomp also filed a motion for reconsideration and a request for findings of fact and conclusions of law. The trial court did not rule on the motion for reconsideration and did not issue findings of fact and conclusions of law.

Special Appearance

In its first issue, Polycomp contends the trial court erred by overruling its special appearance. It asserts there is no basis for asserting either specific or general jurisdiction over Polycomp. It further asserts that asserting jurisdiction over Polycomp would violate traditional notions of fair play and substantial justice.

A. Review of Trial Court’s Ruling and Implied Findings

Personal jurisdiction is a question of law which we review de novo. *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 337 (Tex. 2009). Although inquiring into the merits would violate due process, a trial court must frequently resolve preliminary questions of fact to determine the jurisdictional question. *Capital Fin. & Commerce AG v. Sinopec Overseas Oil & Gas, Ltd.*, 260 S.W.3d 67, 84 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

When, as here, the trial court does not make findings of fact and conclusions of law in support of its 120a ruling, we must infer “all facts necessary to support the judgment,” on condition that they are raised by the pleadings and have support in the record of the special-appearance hearing. *Id.* (quoting *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002)); *see also Tri-State Bldg. Specialties, Inc. v. NCI Bldg. Sys., L.P.*, 184 S.W.3d 242, 246 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002)) (stating that reviewing court should presume trial court resolved all factual disputes in favor of its judgment if trial court issues no findings of fact). We consider only the evidence that favors the trial court’s decision in addressing evidentiary challenges when the trial court issues no findings of fact or conclusions of law, and we may sustain the ruling on

any reasonable theory that is consistent with the evidence and the applicable law.
Id.

B. Burden of Proof

In a suit against a nonresident defendant, the initial burden is on the plaintiff, in this case, the Jacksons, to plead sufficient allegations to bring the defendant within the provisions of the Texas long-arm statute. *See Kelly v. Gen. Interior Const., Inc.*, 301 S.W.3d 653, 658 (Tex. 2010). In reviewing the Jacksons' jurisdictional allegations, we ask only whether they are sufficient to invoke exercise of personal jurisdiction over Polycomp without regard to the merits. *Id.* When a plaintiff meets its pleading burden, the burden of proof shifts to the nonresident defendant, who must then negate all possible grounds for personal jurisdiction alleged by the plaintiff. *Id.*

C. The Law of Personal Jurisdiction

“Texas courts may assert *in personam* jurisdiction over a nonresident if (1) the Texas long-arm statute authorizes the exercise of jurisdiction, and (2) the exercise of jurisdiction is consistent with federal and state constitutional due-process guarantees.” *Id.* (quoting *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007)).

1. Texas Long-arm Statute

The Texas long-arm statute provides:

In addition to other acts that may constitute doing business, a nonresident does business in this state if the nonresident:

- (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state;
- (2) commits a tort in whole or in part in this state; or
- (3) recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state.

TEX. CIV. PRAC. & REM. CODE § 17.042 (Vernon 2008). The Texas long-arm statute's broad doing-business language "allows the statute to reach as far as the federal constitutional requirements of due process will allow." *Retamco Operating, Inc.*, 278 S.W.3d at 337 (citing *Moki Mac*, 221 S.W.3d at 575). Therefore, we only analyze whether Polycomp's acts would bring Polycomp within the jurisdiction of Texas consistent with constitutional due process requirements. *Id.*

2. Due Process Constraints

Under constitutional due-process analysis, personal jurisdiction is achieved when (1) the non-resident defendant has established minimum contacts with the forum state, and (2) the assertion of jurisdiction complies with "traditional notions of fair play and substantial justice." *Id.* at 338 (quoting *Int'l Shoe Co. v. Wash.*,

326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945)). We focus on the defendant's activities and expectations when deciding whether it is proper to call the defendant before a Texas court. *Id.*

a. Minimum Contacts

A defendant establishes minimum contacts with a state when it “purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.” *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240 (1958)). The defendant's activities, whether the activities consist of direct acts within Texas or conduct outside Texas, must justify a conclusion that the defendant could reasonably anticipate being called into a Texas Court. *Id.* A non-resident's contacts can give rise to either specific or general jurisdiction. *Id.*

b. General Jurisdiction

General jurisdiction arises when the defendant's contacts with the forum are continuous and systematic. *Id.* To support general jurisdiction, the defendant's forum activities must have been “substantial,” which requires stronger evidence than for specific jurisdiction. *Preussag Aktiengesellschaft v. Coleman*, 16 S.W.3d 110, 114 (Tex. App.—Houston [1st Dist.] 2000, pet. dism'd w.o.j.). At trial and on appeal, the Jacksons have not argued that Polycomp is subject to the general

jurisdiction of Texas. The Jacksons contend that Polycomp has made multiple contacts in Texas, but they have never alleged that the contacts are “substantial.” We conclude Polycomp is not subject to the general jurisdiction of Texas. *See Credit Commercial de France, S.A. v. Morales*, 195 S.W.3d 209, 217 (Tex. App.—San Antonio 2006, pet. denied) (applying only specific jurisdiction analysis; holding that where neither party argues that general jurisdiction applies and trial court only determined that appellants were subject to specific jurisdiction, appellant is not subject to general jurisdiction of Texas).

c. Specific Jurisdiction and Purposeful Availment

Specific jurisdiction arises when (1) the defendant purposefully avails itself of conducting activities in the forum state, and (2) the cause of action arises from or is related to those contacts or activities. *Retamco Operating, Inc.*, 278 S.W.3d at 338 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 2182 (1985); *Nat. Indus. Sand Ass’n v. Gibson*, 897 S.W.2d 769, 774 (Tex. 1995)). In a specific jurisdiction analysis, “we focus . . . on the ‘relationship among the defendant, the forum [,] and the litigation.’” *Id.* (quoting *Moki Mac*, 221 S.W.3d at 575–76).

We must first determine if Polycomp purposely availed itself of the privilege of conducting activities in Texas. We consider three issues. *Id.* First, only the

defendant's contacts with the forum are relevant, not the unilateral activity of the plaintiff or a third party. *Id.* at 339. Second, the contacts relied upon must be purposeful rather than random, fortuitous, or attenuated. *Id.* Thus, sellers who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to the jurisdiction of the latter in suits based on their activities. *Id.* Finally, the defendant must seek some benefit, advantage or profit by availing itself of the jurisdiction. *Id.* In conducting this analysis, we focus on the quality and nature of the defendant's contacts, rather than the number of contacts. *Id.*

In their petition the Jacksons allege:

14. Th[e trial court] has jurisdiction over Defendants because Defendants have done business in Texas, committed a tort in Texas and have had continuous contacts with Texas. In addition, the damages for which Plaintiffs bring suit exceed the minimum jurisdictional limits of the court.

In the Jacksons' response to Polycomp's special appearance they allege the trial court has jurisdiction over Polycomp because Polycomp purposely availed itself through (i) four contracts, (ii) updates and statements, (iii) an internet website, and (iv) profiting from Texas activities. We address the Jacksons' responses separately.

i. Four Contracts

The first element of purposeful availment is that a defendant can only trigger specific jurisdiction through its own conduct, not the unilateral acts of the plaintiff or third parties. *See IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 596 (Tex. 2007). The Jacksons assert four contracts show Polycomp triggered specific jurisdiction through its own conduct. They alleged

13. Polycomp is subject to the Texas Long Arm Statute because [it] contracted with the Jacksons, who are Texas residents. Specifically, Brenda Jackson signed four separate Polycomp documents: a 2007 and 2008 Polycomp “contract for services” and a 2007 and 2008 IRA simplifier. Each of the four contracts were signed at Safe Equity Planning in Friendswood, Galveston County, Texas.

The Jacksons first support their allegation with a 2007 and 2008 “Contract for Services.” The 2007 and 2008 Contracts for Services note that, “This contract shall become effective and binding upon Polycomp when duly accepted as indicated by a dated signature by an authorized representative of Polycomp.” The 2007 version of the Contract for Services includes no signature at all from any person claiming to represent Polycomp. The 2008 version of the “Contract for Services” has a signature of a Polycomp “consultant” but has no date next to the signature. Both Contracts for Services note that Polycomp is a “Third Party Administrator” and that Polycomp is a “California corporation.”

The Jacksons also support their allegations with a 2007 and a 2008 IRA

Simplifier contract. The 2007 and 2008 IRA Simplifier contracts are contracts with First Regional Bank “care of Polycomp.” Each includes a signature of Brenda and the date she signed. The 2007 IRA Simplifier contract includes a signature of a “custodian” and the date the custodian signed. The 2008 IRA Simplifier contract does not include the custodian signature. Both contracts include the language stating, “If it is necessary to apply any state law to interpret and administer this Agreement, the law of our domicile shall govern.” The evidence shows Polycomp is domiciled in California. Both IRA Simplifier contracts repeatedly note that Polycomp has a custodial role only and that Brenda has “exclusive responsibility for and control over the investment of the assets [in her] IRA.”

In addition, the Jacksons included three affidavits, one from Brenda, one from Jonathan, and one from Gibson, the Jacksons’ attorney. In Brenda’s affidavit, she states, in part:

I signed a contract for services with [Polycomp] at Safe Equity Planning in Friendswood, Galveston County, Texas on September 17, 2007. I also signed a Polycomp IRA simplifier at that same time that I signed the contract. The contract and simplifier were presented to me in Texas by Paul Brown of Safe Equity Planning. . . .

After signing the Polycomp contract and IRA simplifier, I received quarterly updates from Polycomp at my home in Deer Park, Texas, Harris County. The quarterly updates showed my investment with DLG was growing. I later discovered the statements were false

and the investment was not growing. Occasionally, Polycomp would send newsletters to my home.

In Jonathan's affidavit he states he witnessed Brenda sign a Contract for Services and an IRA simplifier contract at Safe Equity Planning in Friendswood, Galveston County, Texas. He also confirms that he and Brenda received quarterly updates from Polycomp at their home in Deer Park, Harris County, Texas. Gibson's affidavit notes that to the "best of his knowledge" his clients have signed contracts with Polycomp and Polycomp has sent statements to his clients.

The Contracts fail to show that Polycomp had any purposeful contact with Texas. First, the evidence indicates Polycomp is not a party to either the 2007 or 2008 Contract for Services. By the contracts' own terms, before Polycomp can be a party to the contract, the contract requires a "dated signature" from a representative of Polycomp. The contracts specifically state, "This contract shall become effective and binding upon Polycomp when duly accepted as indicated by a dated signature by an authorized representative of Polycomp." Each Contract for Services lacks either a date or a signature, or both. Similarly, it appears that Polycomp is not a party to the 2008 IRA Simplifier contract because a representative of Polycomp did not sign. Polycomp, however, does appear to be a party to the 2007 IRA Simplifier Contract because the contract includes a signature from a Polycomp "consultant." It appears, therefore, that Polycomp is a party to at

least one of the contracts.

A contract does not alone constitute a sufficient “contact” for due process purposes. *See id.* at 597–98 (citing *Burger King Corp.*, 471 U.S. at 478, 105 S. Ct. at 2185 (noting that if question is whether contract with nonresident defendant can establish sufficient minimum contacts, “we believe the answer clearly is that it cannot”)). Here, both the 2007 and 2008 IRA Simplifier contracts include language that California’s laws are to govern the contract. The contracts, therefore, are some evidence that Polycomp intended to subject itself to the jurisdiction of California, not Texas. *See Michiana Easy Livin’ Country, Inc. v. Holten*, 168 S.W.3d 777, 792–93 (Tex. 2005) (noting that insertion of clause designating foreign forum suggests that no local availment was intended); *see also Burger King Corp.*, 471 U.S. at 482, 105 S. Ct. at 2187 (holding that choice-of-law provisions should not be ignored in considering whether defendant has “purposefully invoked the benefits and protections of state’s laws”).

As proof that Polycomp purposely availed itself, the Jacksons point to evidence that shows Brenda signed the contracts in Texas. In Brenda’s affidavit she states that she signed the 2007 Contract for Services at Safe Equity Planning in Friendswood, Galveston County, Texas in 2007. But, as noted above, Polycomp does not appear to be a party to the 2007 Contract for Services because there is no

signature or date in the area where Polycomp would affix a dated signature.

Brenda further states in the affidavit that Paul Brown of Safe Equity Planning presented the Contract for Services and the IRA Simplifier contract to her when she signed it in Friendswood. Although Brenda implies that Paul Brown of Safe Equity Planning is an agent of Polycomp, the record undisputedly shows that Polycomp is a registered California corporation with no agents in Texas.

Brown could be an apparent agent if Polycomp either knowingly permitted Brown to hold himself out as having authority or showed such lack of ordinary care as to “clothe [Brown] with indicia of authority.” *See Griego*, 221 S.W.3d at 596. The record, however, shows no evidence of apparent authority. Both Brenda’s and Jonathan’s affidavits state that Brown worked for Safe Equity Planning, and nowhere do they state in the affidavits that either Brown or Safe Equity Planning was associated with Polycomp. Although Brown may have provided Polycomp contracts to Brenda to set up a self-directed IRA, and Polycomp may have later processed the contracts, the contracts expressly defined Polycomp’s role as a mere custodian. Nothing in the contracts gives Brown an indicia of authority. *See id.*

The contracts, however they ended up in Texas, indicate clearly that Polycomp stands outside the investment transaction between the Jacksons and

Brown, Safe Equity Planning, or BLG. *See id.* Texas law does not presume agency, and the party who alleges it has the burden of proving it. *See id.* Nothing in this record shows that Polycomp had knowledge, much less control, over Brown or his employer, whose unilateral actions cannot subject Polycomp to specific jurisdiction in Texas. We conclude the Jacksons have failed in their burden to show Polycomp triggered specific jurisdiction through its own conduct.

ii. Website

The second step in showing purposeful availment requires the Jacksons to show that Polycomp’s contacts with Texas were purposeful and not random, fortuitous, or attenuated. Before the trial court, in their response to Polycomp’s special appearance, the Jacksons assert Polycomp made purposeful contact with Texas through their website. They state

22. . . . Polycomp hosts a website that is online in Texas for the purpose of advertisement, the exchange of information with potential clients, and business transactions with established clients. Specifically, the website allows potential clients to fill out an online form to send information to Polycomp and allows established clients to fill out an online form to send information to Polycomp and allows established clients to login to access “self-directed” account information.

They support the allegation with images of the website. The first image of Polycomp’s website shows a webpage that lists the addresses of Polycomp’s offices in California and a “Contact us” field. The second image is a “Plan

Administration Client Login” page. The page includes a technical support email address. The final image is of an account information page entitled “Self-directed IRA Account Information.”

The website alone fails to show that Polycomp’s contacts with Texas were purposeful and not random, fortuitous, or attenuated. For the purposes of establishing personal jurisdiction, Internet usage is divided into three categories, and is determined using a sliding scale. *Choice Auto Brokers, Inc. v. Dawson*, 274 S.W.3d 172, 177 (Tex. App.—Houston [1st Dist.] 2008, no pet.). “At one end of the scale are websites clearly used for transacting business over the Internet, such as entering into contracts and knowing and repeated transmission of files of information, which may be sufficient to establish minimum contacts with a state.” *Id.* (quoting *Reiff v. Roy*, 115 S.W.3d 700, 705 (Tex. App.—Dallas 2003, pet. denied)). “On the other end of the spectrum are ‘passive’ websites that are used only for advertising over the Internet and are not sufficient to establish minimum contacts even though they are accessible to residents of a particular state.” *Id.* at 177–78 (quoting *Reiff*, 115 S.W.3d at 705–06). “In the middle are ‘interactive’ websites that allow ‘exchange’ of information between a potential customer and a host computer.” *Id.* at 178 (quoting *Reiff*, 115 S.W.3d at 706). Jurisdiction in cases involving interactive websites is determined by the degree of interaction. *Id.*

The record does not make clear how interactive the website is. Accepting as true the Jacksons' assertions that the website allows "potential clients to fill out an online form and send information to Polycomp" and that the website allows "established clients to login" to the website to access information, these assertions do not show that the website was more than "interactive" because the assertions, and images of the website, do not show that the Jacksons could enter into contracts with Polycomp or that Polycomp could make knowing and repeated transmission of files of information. *See Choice Auto Brokers*, 274 S.W.3d at 178. Because the degree of interactivity falls in either the "passive" or "interactive" categories, the website alone does not show purposeful conduct, and we look beyond the internet activity and review other evidence of the degree of interaction between the parties. *See id.* at 178; *see also Daimler-Benz Aktiengesellschaft v. Olson*, 21 S.W.3d 707, 725 (Tex. App.—Austin 2000, pet. dism'd w.o.j.) (interactive website alone insufficient to subject appellant to jurisdiction of Texas court).

iii. Updates and Statements

The Jacksons contend on appeal that quarterly statements and newsletters, sent from Polycomp to Brenda, show that Polycomp's contacts were purposeful. The Jacksons alleged

14. . . . Polycomp issued quarterly updates to the Jacksons in Texas which claimed DLG was investing their funds in real estate and

indicated the Jacksons' fund was growing, when in fact it was not.

....

18. . . . Polycomp contracted with the Jacksons in Texas for administrative services in their investment with DLG. Pursuant to the contract, Polycomp mailed quarterly account statements to the Jackson's [sic] residence in Deer Park, Harris County, Texas. Each of these statements were directed to Texas and contained misrepresentations of material fact

The Jacksons did not present any statements to the trial court to support their allegation. The Jacksons did sign affidavits stating Polycomp sent quarterly statements to their address, but assuming the affidavits are accurate, quarterly statements fail to show that Polycomp's contacts were purposeful and fail to disprove that any contact was not random, isolated, or fortuitous. The contracts state that the Jacksons are solely responsible for all investment decisions and Polycomp's duty was to act only as a passive custodian of the Jacksons' IRA account. *See Griego*, 221 S.W.3d at 598. Although Polycomp sent account statements to Texas, this administrative paperwork is a mere incident of Polycomp's custodial role. *See id.* Furthermore, the evidence shows Polycomp performed the obligations of its custodial role in California. The evidence indicates that Polycomp has no bank account or postal box in Texas, and the record does not show that any of its employees ever traveled to Texas for business. There is no evidence that shows Polycomp either instigated or authorized any significant

activity in Texas. Instead, all of its actions under the contracts incurred in California.

We conclude that Polycomp's contacts with Texas—agreeing to administer Brenda's IRA account and sending the Jacksons quarterly account statements—are too inconsequential to support a claim that it purposefully directed its activities here. *See id.* (holding that appellant's contacts with Texas, which included only agreeing to administer appellee's IRA account, accepting payment for opening account, and sending appellee periodic account statements, were too inconsequential to support claim that it purposefully directed its activities to Texas); *Morales*, 195 S.W.3d at 220–21 (holding minimum contacts may not be satisfied by merely engaging in communications with Texas entity during performance of contract); *see also Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 344 (5th Cir. 2004) (“[T]his court has repeatedly held that the combination of mailing payments to the forum state, engaging in communications related to the execution and performance of the contract, and the existence of a contract between the nonresident defendant and a resident of the forum are insufficient to establish the minimum contacts necessary to support the exercise of specific personal jurisdiction over the nonresident defendant.”); *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 778 (5th Cir. 1986) (holding that defendant was not

subject to specific jurisdiction where nonresident defendant entered into contract with Texas resident, sent agreement and checks to Texas, and engaged in extensive telephonic and written communications with plaintiff in Texas).

iv. Profited by Availing Itself in Texas

Finally, the Jacksons have failed to show that any financial benefit to Polycomp derived from a constitutionally cognizable contact with Texas. *See Griego*, 221 S.W.3d at 598 (citing *Michiana*, 168 S.W.3d at 788). The Jacksons alleged

20. . . . Polycomp profited by availing itself in Texas. Polycomp made money off of the services it provided to the Jacksons and other investors. Polycomp also advertised and administered its services via the internet to Texas investors.

As we have pointed out, the evidence does not show Polycomp's actions resulted in a constitutionally cognizable contact. *See id.* The evidence shows the opposite. The IRA Simplifier contract, for example, stipulates that any dispute would be governed by the state of Polycomp's domicile, which is California. While a foreign choice-of-law provision does not prevent Texas courts from also exercising personal jurisdiction, the choice-of-law provision cannot be ignored. *Id.* (citing *Burger King, Corp.*, 471 U.S. at 482, 105 S. Ct. at 2187). Although the IRA Simplifier contract does not require that disputes be litigated in California, this choice-of-law provision, when combined with the fact that the evidence shows

the Jacksons initiated contact with Polycomp, which rendered all of its services within California, demonstrates that Polycomp never anticipated Texas jurisdiction. *See id.* The allegations and evidence fail to show a minimum contact with Texas. We, therefore, conclude the Jacksons cannot show Polycomp financially benefited from a cognizable contact with Texas.

d. Conclusion of Minimum Contacts Analysis

Because the Jacksons are unable to show through their allegations and evidence that Polycomp purposely availed itself of the privilege of conducting activities in Texas, they are unable to meet their burden of proof to show Polycomp had the minimum contacts in Texas constitutionally necessary for Texas to exercise specific jurisdiction over Polycomp. We hold that Polycomp's actions do not constitute the "purposeful availment" required to exercise specific jurisdiction. *See id.*; *see also Meader v. IRA Res., Inc.*, 178 S.W.3d 338, 345, 349 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (holding that appellee's contacts, which included accepting \$50 account-initiation fee, opening appellant's self-directed IRA, and mailing appellant periodic account statements, were constitutionally insufficient contacts to meet minimum contacts test).

Having determined that the Jacksons are unable to show Polycomp has minimum contacts with Texas sufficient to support specific jurisdiction, we do not

need to determine whether an assertion of jurisdiction over Polycomp comports with “traditional notions of fair play and substantial justice.” *See Anchia v. DaimlerChrysler AG*, 230 S.W.3d 493, 503 (Tex. App.—Dallas 2007, pet. denied).

We sustain Polycomp’s first issue.

Findings of Fact and Invalid Affidavit

Regarding Polycomp’s second issue that challenges the trial court’s refusal to issue findings of fact and conclusions of law, we do not reach this issue because Polycomp has been able to successfully present its appeal without those findings. *See, e.g., White v. Harris-White*, No. 01-07-00521-CV, 2009 WL 1493015, at *7 (Tex. App.—Houston [1st Dist.] May 28, 2009, pet. denied) (mem. op., not designated for publication) (holding trial court’s failure to make requested findings of fact and conclusions of law harmless because appellant was able to present his case on appeal); *see also Pelican State Physical Therapy, L.P. v. Bratton*, No. 01-06-00199-CV, 2007 WL 2833303, at *4 (Tex. App.—Houston [1st Dist.] Sept. 27, 2007, no pet.) (mem. op., not designated for publication) (noting that granting of special appearance is ruling for which findings of fact and conclusions of law are allowed, but are not required).

Finally, we do not reach Polycomp’s third issue regarding Gibson’s affidavit. Assuming that Polycomp properly preserved error and that the affidavit

was valid, Polycomp would still prevail because the affidavit provides no additional evidence that would allow the Jacksons to meet their burden of proof regarding Polycomp's contact with Texas.

Conclusion

We reverse the order of the trial court and render an order granting Polycomp's special appearance.

Elsa Alcala
Justice

Panel consists of Chief Justice Radack, and Justices Alcala and Higley.