Opinion issued February 24, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00224-CV

SYRIAN-AMERICAN OIL CORPORATION, S.A., Appellant

V.

SSPD PETROLEUM DEVELOPMENT B.V., Appellee

On Appeal from the 190th Judicial District Court
Harris County, Texas
Trial Court Case No. 2007-67830

MEMORANDUM OPINION

In this interlocutory appeal, appellant, Syrian-American Oil Corporation S.A. ("Syrian-American"), appeals the trial court's order granting the special appearance filed by appellee, Syria Shell Petroleum Development, B.V.

("SSPD").[1] In four issues, Syrian-American contends the trial court erred by granting SSPD's special appearance concerning two contracts between the parties, by improperly limiting discovery, and by striking portions of evidence. We conclude that SSPD is not subject to personal jurisdiction in Texas and that Syrian-American's other complaints are waived. We affirm.

Background

This case concerns (A) a service contract for the development of oil in a foreign country, (B) an assignment agreement between companies for performance of the service contact, (C) a settlement agreement that followed a lawsuit claiming the assignment agreement had been breached, and (D) current allegations of breach of the assignment and settlement agreements.

A. The Service Contract

In 1977, the Syrian Arab Republic ("Syrian Government") awarded a contract (the Service Contract) to a company (not a party here) for the exploration, development, and production of oil in western Syria. That company later assigned its interests in the Service Contract to Syrian-American, a company organized and existing under the laws of Panama and headquartered in Greece. By virtue of assignments, as of 1982, the entities with interests in the Service Contract were

- Syrian-American;

[1] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (West 2008) (authorizing interlocutory appeal of order granting special appearance).

- Syrian-American Oil Corporation (Texas), which later merged into Coastal Oil & Gas Corporation ("Coastal"); and

- Deminex-Deutsche Erdolversorgungsgesellschaft m.b.H. ("Deminex").

To ensure that the land was timely developed, the Service Contract required certain portions of land to be relinquished to the Syrian Government at particular time intervals if the land had not been developed for oil production. The Service Contract provided that Syrian-American consented to jurisdiction in the courts of Syria regarding disputes with the Syrian Government and that the law of Syria would control. It also provided that Syrian-American would comply with all Syrian laws, with certain enumerated exceptions relating primarily to taxation.

B. The Assignment Agreement

In 1982, Syrian-American and Coastal assigned their respective interests in the Service Contract to

- Pecten Orient Company ("Pecten"), a corporation organized under the laws of Delaware and headquartered in Texas, and

- SSPD, a company organized and existing under the laws of the Netherlands, with its registered office located in The Hague, the Netherlands, and its principal place of business located in Syria.

The Assignment Agreement required Pecten and SSPD to pay Syrian-American and Coastal a percentage of the value of oil produced under the Service Contract. Pecten initially served as the operator under the Service Contract, but it

later assigned all rights and obligations under the Service Contract to SSPD. When it was enacted, the Assignment Agreement provided that it would be governed by and construed in accordance with the laws of the State of New York.

After the effective date of the Assignment Agreement, Pecten, SSPD, and the Syrian Government and its state-owned oil company, entered into numerous annexes to the original Service Contract. Of these, Annexes 1, 3, and 4 extended the period of time for exploration under the Service Contract. Because the Service Contract required that Pecten and SSPD relinquish to the Syrian Government 25 percent of the original reserves that were not leased for development or production by October 1983, representatives of both Pecten and SSPD met to determine how to meet this contractual obligation. These meetings were held in Houston, Texas in August 1983. Syrian-American alleges that Pecten and SSPD, acting with the intent to reacquire the land after they were freed of Syrian-American's interest, agreed to relinquish land known by Pecten and SSPD to hold large reserves. Two years after the land was relinquished to the Syrian Government in 1983, Pecten and SSPD reacquired it.

C. The Settlement Agreement

In 1988, Syrian-American and Coastal filed case number 88-039547 in the 127th Judicial District Court of Harris County in Texas against Pecten and SSPD ("1988 Lawsuit"). The petition alleged that Pecten and SSPD were required to pay

Syrian-American and Coastal a percentage interest on oil produced under the Service Contract, as well as under certain annexes to the Service Contract. SSPD filed a special appearance in the 1988 Lawsuit to contest personal jurisdiction.

Settlement discussions occurred between the parties, but SSPD did not participate. Michael Forrest, then president of Pecten, spoke to and met with Walter Spencer, then president of Coastal, on two occasions while the 1988 Lawsuit was pending. Ed Pickle, the primary lawyer representing Pecten in the 1988 Lawsuit, met with lawyers for Coastal and Syrian-American on more than one occasion. Neither Forrest nor Pickle represented SSPD with respect to negotiating the settlement agreement in the 1988 Lawsuit.

J. Harrell Feldt of Vinson & Elkins LLP was counsel of record for SSPD in the 1988 Lawsuit. Feldt was not involved in any settlement negotiations or discussions in the 1988 Lawsuit, nor in the preparation of any settlement agreement in the 1988 Lawsuit. Feldt did not approve, disapprove, comment, or suggest changes on any draft settlement agreement in the 1988 Lawsuit and did not sign any settlement agreement in the 1988 Lawsuit.

In late September 1989, Don C. Nelson, counsel for Coastal, sent Feldt a letter and attached drafts of two documents: (1) a draft of "Agreed Motion to Dismiss and to Place the Court's File Under Seal" and (2) a draft entitled "Agreed Order to Place File Under Seal and Agreed Final Judgment." Feldt revised the

draft motion he received from Nelson in one respect, which was to include the word "APPROVED" above Feldt's signature block. In a letter to James DeMent, counsel for Syrian-American, Feldt explained that his inclusion of "APPROVED" was to reflect that he, on behalf of SSPD, was only approving the motion and not joining it, and that he had made this change "consistent with SSPD's position that the Texas court has no jurisdiction over it." In response to Feldt's letter, Syrian-American's counsel J. Burke McCormick wrote Feldt a letter stating that "we have no objection to your revisions" to the Agreed Motion to Dismiss and to Place the Court's File Under Seal.

Syrian-American, Coastal, Pecten, and SSPD entered into a Settlement Agreement. SSPD joined the Settlement Agreement by approval of its managing director in the The Hague, the Netherlands. The Settlement Agreement expressly stated that its purpose was to have the lawsuit dismissed with prejudice without SSPD conceding to the personal jurisdiction of the Texas court. The Settlement Agreement stated,

> Whereas, Coastal/[Syrian American] and Pecten/[SSPD] desire fully and finally to resolve, compromise and settle all of the now outstanding Disputes between them with respect to payments pursuant to Section 6 of the Assignment Agreement and with respect to Verification Information, and, in connection therewith, to terminate the Lawsuit with prejudice to all parties (a) without [SSPD] in any manner conceding that it personally is subject to the jurisdiction of the aforementioned court or was served properly with process and (b) without Coastal/[Syrian American] in any manner conceding that they

> agree with or are bound by [SSPD's] position with respect to actions or activities outside this Settlement Agreement.

The Settlement Agreement revised some of the terms of the Assignment Agreement and provided that thereafter the Assignment Agreement would be governed by and construed in accordance with the laws of the State of Texas. In a section entitled "Payments," the Settlement Agreement required Pecten and SSPD "in a collective sense" to make future payments under the Assignment Agreement, as well as immediately tender a specified amount.

The Settlement Agreement required the dismissal of the 1988 Lawsuit. SSPD, however, was not one of the parties asking the court to take action. The Settlement Agreement provided that Coastal, Syrian American, and Pecten "shall together present an Agreed Motion and an Agreed Order to the 127th Judicial District Court" to dismiss the 1988 Lawsuit and to seal the records. Accordingly, a joint motion to dismiss the 1988 Lawsuit was filed by Syrian-American, Coastal, and Pecten. SSPD did not participate in any of the proceedings before the court, nor did it ask the court to dismiss the lawsuit.

The Settlement Agreement expressly maintained SSPD's special appearance in the 1988 Lawsuit. The Settlement Agreement stated,

> Nothing contained in this Settlement Agreement, nor anything related to the negotiation or execution thereof shall in any way be construed as (a) any submission by [SSPD] to the personal jurisdiction of any courts within the United States or (b) any concurrence by Coastal/[Syrian-American] with respect to [SSPD's] position as to the

> personal jurisdiction of such courts over [SSPD] with respect to actions or activities outside this Settlement Agreement.

In October 1989, the presiding judge of the 127th District Court signed an Agreed Order to Place File Under Seal and Agreed Final Judgment.

D. The Current Lawsuit

In 2003, SSPD entered into the Deep and Lateral Agreement with the Syrian Government. Syrian-American asserted that, under the Settlement Agreement and revised Assignment Agreement, it was entitled to payments on the oil, gas, and condensate SSPD produced and may in the future produce from lands covered by the Deep and Lateral Agreement.

The present lawsuit by Syrian-American asserted causes of action for

1. breach of contract for failure to make payments for oil, natural gas, and condensate as required by the Assignment Agreement and Settlement Agreement,

2. breach of the covenant of good faith and fair dealing, a New York cause of action, alleging that SSPD's relinquishment of reserves was done to circumvent the Assignment Agreement and that it concealed facts in its negotiations preceding the Settlement Agreement,

3. breach of fiduciary duty, misapplication of fiduciary property, and "aiding, abetting and/or inducing a breach of fiduciary duty," by asserting that SSPD was the agent and fiduciary of Syrian-American but violated that relationship in failing to disclose the existence of the Natural Gas Agreement and in relinquishing reserves to circumvent the Assignment Agreement, and

4. fraudulent inducement in its representations of fact to induce Syrian-American to enter into the Settlement Agreement.[2]

Syrian-American sought actual damages, attorney's fees, and exemplary damages. SSPD made a special appearance objecting to the exercise of personal jurisdiction in the current lawsuit. The trial court granted the special appearance and made findings of fact and conclusions of law.

Special Appearance

Syrian-American's first two issues challenge the trial court's order granting SSPD's special appearance. We address (A) the applicable law concerning special appearance, (B) SSPD's contacts stemming from the Assignment Agreement, and (C) SSPD's contacts stemming from the Settlement Agreement.

A. Applicable Law

The applicable law in this case is (1) the standard of review, (2) the law for special appearance, (3) the law for personal jurisdiction, and (4) the law concerning whether minimum contacts should be analyzed separately for each claim.

1. Standard of Review

A legal conclusion concerning the existence of personal jurisdiction is a question of law subject to de novo review, but that conclusion must sometimes be

[2] In its live petition, Syrian American also asserted claims for fraud, money had and received, "conversion and/or theft," and conspiracy, but it does not include these claims in its appellate brief. We, therefore, do not address these claims.

preceded by the resolution of underlying factual disputes. *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 805–06 (Tex. 2002); *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). If the trial court issues findings of fact and conclusions of law, we may review the findings of fact on legal and factual sufficiency grounds and review the conclusions of law de novo as a legal question. *Silbaugh v. Ramirez*, 126 S.W.3d 88, 94 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (citing *BMC Software*, 83 S.W.3d at 794). However, "we review de novo if the underlying facts are undisputed or otherwise established." *Preussag Aktiengesellschaft v. Coleman*, 16 S.W.3d 110, 113 (Tex. App.—Houston [1st Dist.] 2000, pet. dism'd w.o.j.).

2. Law of Special Appearance

A plaintiff bears the initial burden of pleading allegations sufficient to bring a non-resident defendant within the terms of the Texas long-arm statute. *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 658 (Tex. 2010); *Am. Type Culture Collection*, 83 S.W.3d at 807. To establish jurisdiction over a nonresident defendant, the plaintiff must plead a "connection between the defendant['s] alleged wrongdoing and the forum state." *Kelly*, 301 S.W.3d at 655.

If the plaintiff pleads sufficient jurisdictional allegations, the nonresident defendant then assumes the burden of negating all bases of jurisdiction in those allegations. *Kelly*, 301 S.W.3d at 658; *Moki Mac River Expeditions v. Drugg*, 221

S.W.3d 569, 574 (Tex. 2007). If the plaintiff does not plead sufficient jurisdictional facts, the defendant meets its burden to negate jurisdiction by proving it is not a Texas resident. *Kelly*, 301 S.W.3d at 658–59. The plaintiff's original pleadings as well as its response to the defendant's special appearance can be considered in determining whether the plaintiff satisfied its burden. *Wright v. Sage Eng'g, Inc.*, 137 S.W.3d 238, 249 n.7 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). In conducting our review, we accept as true the allegations in the petition. *Pulmosan Safety Equip. Corp. v. Lamb*, 273 S.W.3d 829, 839 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

3. The Law of Personal Jurisdiction

A court may assert personal jurisdiction over a non-resident defendant if the requirements of the Due Process Clause of the United States Constitution[3] and the Texas long-arm statute[4] are both satisfied. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868, 1872 (1984); *CSR, Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996). "Because the Texas long-arm statute reaches 'as far as the federal constitutional requirements of due process will allow,' the statute is satisfied if the exercise of personal jurisdiction comports with federal due process." *Preussag Aktiengesellschaft*, 16 S.W.3d at 113 (quoting *CSR, Ltd.*, 925

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[3] U.S. CONST. amend. XIV, § 1

[4] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (West 2008).

S.W.2d at 594). We thus examine only whether a Texas court's exercise of jurisdiction over SSPD would comport with the requirements of federal due process. *See id.*

To meet the requirements of federal due process, "the nonresident defendant must have purposefully established such minimum contacts with the forum state that it could reasonably anticipate being sued there."[5] *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 2183 (1985)). "If the nonresident defendant has purposefully availed itself of the privileges and benefits of conducting business in a state, it has sufficient contacts to confer personal jurisdiction." *Id.* (citing *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183). "Random, fortuitous, or attenuated contacts do not suffice." *Id.* (citing *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183).

To assess whether a non-resident defendant has purposefully availed himself of the privileges and benefits of conducting business in Texas, we examine three factors. *See Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 785 (Tex. 2005). First, only the defendant's own actions may constitute purposeful

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[5] Due process also requires that the exercise of personal jurisdiction over a nonresident defendant "comport with fair play and substantial justice." *Preussag Aktiengesellschaft v. Coleman*, 16 S.W.3d 110, 113 (Tex. App.—Houston [1st Dist.] 2000, pet. dism'd w.o.j.). However, the trial court did not make any findings of fact or conclusions of law on this requirement and it is not raised by the parties. We, therefore, do not address this issue.

availment; a defendant may not be haled into a jurisdiction based solely on the unilateral activities of a third party. *Id.* (citing *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183). Second, the defendant's acts must be purposeful, and a showing of random, isolated, or fortuitous contacts is insufficient. *Id.* (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S. Ct. 1473, 1478 (1984)). Third, a defendant must seek some benefit, advantage, or profit through his purposeful availment because jurisdiction is based on notions of implied consent; that is, by seeking the benefits and protections of a forum's laws, a non-resident consents to suit there. *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567 (1980)). The purposeful availment test should focus on "the defendant's efforts to avail itself of the forum" and not "the form of the action chosen by the plaintiff." *Moki Mac*, 221 S.W.3d at 576.

Minimum-contacts analysis is further divided into specific personal jurisdiction and general jurisdiction. *Preussag Aktiengesellschaft*, 16 S.W.3d at 114. In this case, we do not address general jurisdiction because Syrian-American only asserts that SSPD is subject to specific jurisdiction. A court may exercise specific personal jurisdiction over a non-resident defendant if two elements are shown: (1) the non-resident purposely directed its activities toward the forum state or purposely availed itself of the privileges of conducting activities there and (2) the controversy arises out of or is related to the non-resident's contacts with the

forum state. *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 343 (5th Cir. 2004).

4. Law Concerning Contacts for Separate Claims

Generally, we review assertions of specific jurisdiction on a claim-by-claim basis. *See Touradji v. Beach Capital P'ship*, 316 S.W.3d 15, 25–26 (Tex. App.—Houston [1st Dist.] 2010, no pet) (citing *Kelly*, 301 S.W.3d at 660; *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 274 (5th Cir. 2006)); *see also Barnhill v. Automated Shrimp Corp.*, 222 S.W.3d 756, 767 (Tex. App.—Waco 2007, no pet.) (following *Seiferth*). However, when separate claims are based on the same forum contacts, a separate analysis of each claim is not required. *See Sutton v. Advanced Aquaculture Sys., Inc.*, 621 F. Supp. 2d 435, 442 (W.D. Tex. 2007) (distinguishing *Seiferth* on basis that plaintiff's claims all arose from same set of forum contacts); *see also Davis Invs., VI, L.P. v. Holtgraves*, No. 14-08-00222-CV, 2009 WL 975961, at *12 n.7 (Tex. App.—Houston [14th Dist.] Feb. 26, 2009, pet. denied) (agreeing "with other courts that generally a specific-jurisdiction analysis should be performed on a claim-by-claim basis" but declining to do so because plaintiff's claims all arose from same facts and defendant asserted single basis for his special appearance to each claim). In this case, Syrian-American asserts that its claims concerning the Assignment Agreement all arise from the same set of forum contacts and that its claims relating to the Settlement Agreement all arise from a

separate set of contacts. SSPD does not dispute this. Therefore, we address the claims arising from the Assignment Agreement together and then separately address the claims arising from the Settlement Agreement. *See Sutton*, 621 F. Supp. 2d at 442; *Davis Invs.*, 2009 WL 975961, at *12 n.7.

B. Assignment Agreement

In its first issue, Syrian-American contends that the trial court erred by finding no specific jurisdiction concerning the Assignment Agreement.

SSPD did not purposefully establish any minimum contacts with Texas. SSPD is a company from the Netherlands with its principal place of business in Syria that contracted for the development of land in Syria. The Assignment Agreement assigns oil and gas interests located in Syria to SSPD and Pecten for development, and requires certain payments on those interests to Syrian-American, a Panamanian company with offices in Greece. The only connection to Texas is that a party to the Assignment Agreement is Pecten, a Delaware company headquartered in Texas. Contracting with a Texas entity alone does not satisfy the minimum-contacts requirement. *See Old Kent Leasing Servs. Corp. v. McEwan*, 38 S.W.3d 220, 230 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

SSPD had discussions in Houston concerning the Assignment Agreement. SSPD and Coastal attended meetings, communicated, and negotiated with Syrian-American and Pecten in Houston when the Assignment Agreement was formed.

Generally, negotiation and execution of a contract in Texas are not minimum contacts with Texas if performance occurs elsewhere, as here. *Moni Pulo, Ltd. v. Trutec Oil & Gas, Inc*., 130 S.W.3d 170, 175 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *see TeleVentures, Inc. v. 1nt'l Game Tech.*, 12 S.W.3d 900, 910 (Tex. App.—Austin 2000, pet. denied) ("While [defendant] admits that decisions regarding the project were made while in communication with [Texas plaintiff], these contacts are insufficient to establish in personam jurisdiction.").

According to Syrian-American, SSPD had meetings in Houston where it discussed a plan to breach the Assignment Agreement by relinquishing certain reserves to the Syrian Government and then re-obtaining them after they were freed of Syrian-American's interest. Numerous communications by a non-resident with a person in Texas relating to a contract do not necessarily constitute minimum contacts in an action for breach of that contract. *See Alenia Spazio, S.p.A. v. Reid*, 130 S.W.3d 201, 213 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

Additionally, Syrian-American contends that the meetings in Houston breached the implied covenant of good faith and fair dealing imposed on every contract under New York law. We note that the choice of law in the Assignment Agreement prior to 1989 was New York law and after the 1989 Settlement Agreement was Texas law. The claim for breach of the duty of good faith and fair dealing is law applicable in New York but not in Texas. The Texas supreme court

has consistently held that Texas law does not imply a covenant of good faith and fair dealing as part of every contract, only those contracts that are marked by shared trust or an imbalance of bargaining power. *See, e.g.*, *FDIC v. Coleman*, 795 S.W.2d 706, 709–10 (Tex. 1990). The claim for breach of the covenant of good faith and fair dealing, therefore, does not relate to a minimum contact with Texas for jurisdictional purposes.

The Settlement Agreement's provision that beginning in 1989 the Assignment Agreement would apply Texas law is not a minimum contact with Texas. A choice of law provision should be considered in determining whether a defendant has purposefully invoked the benefits and protection of a state's law for jurisdictional purposes; however, a choice of law provision, standing alone, is not sufficient to confer jurisdiction. *Burger King*, 471 U.S. at 482, 105 S. Ct. at 2185; *Preussag Aktiengesellschaft*, 16 S.W.3d at 125. "Nor does it indicate a voluntary submission to the personal jurisdiction of the state's courts in the absence of any express understanding to that effect." *Preussag Aktiengesellschaft*, 16 S.W.3d at 125. Rather, "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing . . . must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum." *Burger King*, 471 U.S. at 479, 105 S. Ct. at 2185. Here, the performance of the contract was in Syria, with payments to be made to

Syrian-American in Greece. Thus, the choice of law provision in the 1989 Settlement Agreement is not sufficient to confer jurisdiction over the alleged breach of the Assignment Agreement. *See id.*; *Moni Pulo*, 130 S.W.3d at 175.

Although Pecten and SSPD are jointly and severally liable under the Assignment Agreement, joint and several liability is a basis for imposing liability but not for finding personal jurisdiction. *See PHC-Minden, L.P., v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 175 (Tex. 2007) (some factors relevant to joint liability under single business enterprise theory are irrelevant to personal jurisdiction). Because SSPD did not purposely direct its activities toward Texas or purposely avail itself of the privileges of conducting activities here, SSPD did not purposefully establish minimum contact with Texas. *See Helicopteros Nacionales*, 466 U.S. at 414, 104 S. Ct. at 1872. Because there is no minimum contact with Texas, we need not address whether the controversy arises out of any contact with Texas, which is also required for establishing specific personal jurisdiction over a defendant. *See Freudensprung*, 379 F.3d at 343.

We overrule Syrian-American's first issue.

C. Settlement Agreement

In its second issue, Syrian-American contends the trial court erred by finding no specific jurisdiction concerning the Settlement Agreement. We conclude (1) SSPD did not purposely direct its activities toward Texas nor purposely avail itself

of the privileges of conducting activities here and (2) the controversy does not arise out of or relate to SSPD's contacts with Texas.

1. Purposeful Direction of Activities or Availing of Privileges

Syrian-American contends that SSPD had minimum contacts with Texas by (a) Pecten acting as an agent for SSPD in settlement negotiations, (b) personally conducting settlement negotiations, and (c) agreeing to performance in Texas in that the 1988 Lawsuit would be dismissed in Texas pursuant to the Settlement Agreement signed by SSPD. We conclude the record does not support the first two assertions and the dismissal of the lawsuit is not a minimum contact because SSPD was not a party to the motion to dismiss.

a. Pecten Did Not Act as Agent for SSPD

Syrian-American asserts that the exercise of jurisdiction over SSPD is proper under the theory of agency. Specifically, Syrian-American contends that Michael Forrest, the president of Pecten, negotiated the agreement and that SSPD, by signing the agreement, "ratified the actions of Michael Forrest" and, therefore, Forrest's actions in Texas may be attributed to SSPD. However, in pertinent part, the trial court made the following findings of fact concerning Forrest's purported agency:

> 18. Mr. Forrest did not talk to anyone at [SSPD] before his conversations with Mr. Spencer [Coastal's representative].

> 19. Mr. Forrest did not have to obtain approval from anyone at [SSPD] before his conversations with Mr. Spencer.
>
> 21. Mr. Forrest did not act as the agent for [SSPD] during his discussions with Mr. Spencer.
>
> 26. Mr. Forrest did not talk with anyone at [SSPD] regarding his discussions with Mr. Spencer until after he (Mr. Forrest) signed the Settlement Agreement in the 1988 Lawsuit in September 1989.
>
> 31. [SSPD] did not control, and did not have the right to control, Pecten's acts or statements with respect to the settlement negotiations of the 1988 Lawsuit.
>
> 33. [SSPD] elected not to participate in settlement negotiations with Coastal and [Syrian-American].
>
> 35. [SSPD's Texas attorney] did not participate in the settlement process of the 1988 Lawsuit on behalf of [SSPD]. He was not involved in any settlement negotiations or discussions in the 1988 Lawsuit. He was not involved in the preparation of any settlement agreement in the 1988 Lawsuit. He did not approve, disapprove, or comment on any draft settlement agreement in the 1988 Lawsuit. He did not suggest any changes be made to any draft settlement agreement in the 1988 Lawsuit. He did not sign any settlement agreement in the 1988 Lawsuit. He did not negotiate or enter into a settlement agreement with [Syrian-American] in Harris County, and he did not make any representation to [Syrian-American] in Harris County, Texas related to any settlement agreement.

Syrian-American challenges the factual sufficiency of the evidence to support these findings of fact. Specifically, Syrian-American asserts that these findings "are against the great weight and preponderance of the evidence and should be reversed." In determining the factual sufficiency of the evidence to support a finding, courts of appeals are to weigh all the evidence, both for and

against the finding. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). In reviewing a factual sufficiency challenge to a finding where the burden of proof is on the complaining party, that party must show that "the adverse finding is against the great weight and preponderance of the evidence." *Id.* "In an appeal from a bench trial, we may not invade the fact-finding role of the trial court, which alone determines the credibility of the witnesses, the weight to give their testimony, and whether to accept or reject all or any part of that testimony." *Whaley v. Cent. Church of Christ of Pearland*, 227 S.W.3d 228, 231 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Nordstrom v. Nordstrom*, 965 S.W.2d 575, 580–81 (Tex. App.—Houston [1st Dist.] 1997, pet. denied)).

Syrian-American asserts that the Settlement Agreement shows that SSPD's and Pecten's "economic interests were entirely aligned"; that SSPD "was an essential party to the Settlement Agreement"; that SSPD "approved various aspects of the language of the agreement"; and that the Settlement Agreement "contained language that benefited only [SSPD] and that would not have been included . . . in the absence of an advocate in the negotiations." Syrian-American does not acknowledge any controverting evidence or explain how the controverting evidence is so weak compared to the Settlement Agreement that the trial court's findings are against the great weight and preponderance of the evidence.

Furthermore, the trial court had the affidavit of a former Pecten employee familiar with the facts surrounding the Settlement Agreement. In his affidavit, the employee averred, "[SSPD] elected not to participate in settlement negotiations with the plaintiffs. Pecten and the plaintiffs negotiated the settlement of the 1988 Lawsuit." He also stated, "[SSPD] did not control, and did not have the right to control, Pecten's acts or statements with respect to the settlement negotiations." The trial court also had an affidavit from Forrest. Forrest stated that he "did not act as the agent for [SSPD]" during settlement discussions with Coastal and that he did not tell Coastal he was acting for SSPD. Forrest also stated that he "did not meet or talk with anyone from [Syrian-American] regarding the 1988 Lawsuit." Finally, the trial court was presented with a letter from Forrest to Coastal, written early in the settlement negotiations, in which he expressly stated that he had "no authority to represent or bind [SSPD]." We conclude that the trial court's findings that Forrest was not the agent of SSPD is not against the great weight and preponderance of the evidence. *See In re E.S.*, 304 S.W.3d 571, 575–76 (Tex. App.—El Paso 2010, pet. denied) (evidence supporting trial court's finding of lack of jurisdiction over non-resident defendant not against great weight and preponderance when plaintiff testified defendant provided prenatal expenses for child and defendant's affidavit contained statement that he had not done so).

Syrian-American relies upon *Walker Insurance Services v. Bottle Rock Power Corp.*, 108 S.W.3d 538 (Tex. App.—Houston [14th Dist.] 2003, no pet.) to support its assertion that Forrest was SSPD's agent. In that case, Beane, the purported agent initiated contact with Walker. *Walker Ins. Servs.*, 108 S.W.3d at 545. The court of appeals, in holding that Bottle Rock had ratified Beane's conduct, noted that Bottle Rock "accepted the benefits of [Walker's] services, which it acquired as a direct result of Beane's efforts." *Id.* at 552. The court also noted, "Throughout Beane and Walker's discussions, Bottle Rock supported, accepted, and followed through on the efforts initiated by Beane." *Id.* Finally the court stated, "Here the record clearly reveals that once the contact between Beane and Walker was initiated, Bottle Rock negotiated with . . . Walker through Beane, and eventually consummated an agreement with Associated, appellant's broker." *Id.* The court concluded that under those circumstances Bottle Rock had ratified Bean's actions and therefore Beane's contacts with Texas were attributable to Bottle Rock for jurisdictional purposes. *Id.* at 553.

Here, there is no evidence of the same or similar facts recited by the court in *Walker*. Syrian-American identifies no evidence, and the record contains no evidence, that SSPD supported Forrest, accepted Forrest's efforts, followed through on Forrest's efforts, or negotiated with Syrian-American through Forrest.

We conclude that the evidence supports the trial court's finding that Forrest did not act as SSPD's agent in the negotiation of the Settlement Agreement.

b. SSPD Did Not Participate in Negotiations

The trial court found that SSPD did not conduct settlement negotiations in Texas. The trial court made findings that

- SSPD elected not to participate in settlement negotiations with Coastal and Syrian-American;
- SSPD did not negotiate the Settlement Agreement, or have "input into the negotiations of the Settlement Agreement," in Houston or elsewhere in Texas; and
- SSPD did not make any representation to Syrian-American during the settlement of the 1988 Lawsuit.

Syrian-American has not challenged these findings on appeal. We conclude that SSPD did not participate in the negotiation of the Settlement Agreement.

c. SSPD Did Not Request Dismissal of the 1988 Lawsuit

SSPD's signature shows an address in the Netherlands and it expressly maintained its position throughout the litigation that it was not subject to personal jurisdiction in Texas. SSPD's attorney "approved" the motion to dismiss as to form but did not join in the motion that asked the district court to dismiss the 1988 Lawsuit. The actual performance of the Settlement Agreement—the dismissal of the lawsuit—came from the conduct of parties other than SSPD.

At most, the contacts SSPD has with Texas are that it agreed to a Settlement Agreement that provided it would pay certain amounts to Pecten, a company headquartered in Texas; Texas law would apply to the Settlement Agreement and Assignment Agreement in 1989 and after; and the lawsuit pending in Texas against it would be dismissed by Syrian-American and Pecten pursuant to the Settlement Agreement, which SSPD agreed to join. As we note above, contracting with a Texas company and sending payments to Texas are alone not minimum contact with Texas. *See Shell Compañia Argentina de Petroleo, S.A. v. Reef Exploration, Inc.*, 84 S.W.3d 830, 839 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). We also note above that Texas choice of law is alone not determinative of personal jurisdiction over a non-resident defendant. *Preussag Aktiengesellschaft*, 16 S.W.3d at 125. We conclude that SSPD's decision to join the Settlement Agreement is not a minimum contact with Texas because (1) the Settlement Agreement was made with the agreed understanding that SSPD was maintaining its position that it was not subject to personal jurisdiction in Texas, and (2) SSPD did not ask the district court to take any action in the case. *See Moki Mac*, 221 S.W.3d at 575 (citing *Burger King*, 471 U.S. at 472, 105 S. Ct. at 2182) (party may structure its transaction to avoid jurisdiction in Texas). The dismissal came as a result of a motion to dismiss filed by parties other than SSPD. Because it never

requested any action from the district court, SSPD did not submit to the jurisdiction of the court.

SSPD's procedural posture is unlike those situations where jurisdiction has been found to be proper over a non-resident defendant who enters a settlement agreement. Courts have held that when a party negotiates a settlement contract in a state, enters the contract in the state, and requires performance of the contract in the state, then the state has personal jurisdiction over the party for breach of the agreement. *Bates v. Global Credential Evaluations, Inc*., No. 10-09-00264-CV, 2010 WL 1797400, at *4–5 (Tex. App.—Waco May 5, 2010, no pet.) (holding court had personal jurisdiction over Bates based on Bates attending mediation, entering settlement agreement, and payment of settlement funds in Texas, significant amount of work Bates performed was generated in Texas and affected Texas residents, and noting that agreement did not have clause providing personal jurisdiction had not been waived); *Turner v. Turner*, No. 14-98-00510-CV, 1999 WL 33659, at *7 (Tex. App.—Houston [14th Dist.] Jan. 28, 1999, no pet.) (not designated for publication) (holding Mary Turner purposefully availed herself of privileges and benefits of laws of Texas because pending lawsuit concerned allegations stemming from subject matter that had been previously addressed in agreed judgment in Texas court and that had been performed in Texas in that subject of the agreement would remain in nursing home in Texas and his checks

would be deposited into Texas bank); *Diversified Res. Corp. v. Geodynamics Oil & Gas, Inc.*, 558 S.W.2d 97, 98 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) (holding court had personal jurisdiction over Diversified concerning breach of settlement agreement that had required installment payments be made in Texas); *see Minnesota Mining & Mfg. Co. v. Nippon Carbide Indus. Co.*, 63 F.3d 694, 695 (8th Cir. 1995) (holding court in Minnesota had personal jurisdiction over Nippon concerning breach of settlement agreement where negotiations about settlement occurred in part in Minnesota and where companies executed contract in Minnesota that contained continuing obligations to each other in Minnesota).

Unlike these cases, Syrian-American did not negotiate the Settlement Agreement at all, and specifically did not negotiate in Texas. Syrian-American was not a party to the motion presented to the court that asked the court for dismissal of the 1988 Lawsuit. Although dismissal of the 1988 Lawsuit resulted from the Settlement Agreement, the dismissal came as a result of a motion to dismiss filed by parties other than Syrian-American. Syrian-American did not ask the court to take any action. No part of the Settlement Agreement was performed by Syrian-American in Texas. We conclude that by entering the Settlement Agreement, Syrian-American did not purposefully avail itself of the privileges and laws of the State of Texas.

2. Cause of Action Arises from or is Related to Activity

Even if we had determined that SSPD had minimum contacts with Texas, we would hold that the court lacks personal jurisdiction over SSPD because the cause of action does not arise from or relate to the activity in Texas. For personal jurisdiction over a defendant, the evidence must show that the cause of action "arises from or is related to an activity conducted within the forum." *BMC Software*, 83 S.W.3d at 796. We focus our analysis on the relationship among the non-resident, the forum, and the litigation to determine if the alleged liability arises from or is related to an activity conducted in Texas. *Counter Intelligence, Inc. v. Calypso Waterjet Sys., Inc.*, 216 S.W.3d 512, 517 (Tex. App.—Dallas 2007, pet. denied). The "arises from or is related to" requirement of specific personal jurisdiction requires a "substantial connection" between the non-resident defendant's contacts and the "operative facts of the litigation." *Moki Mac*, 221 S.W.3d at 584–85; *see Gonzalez v. AAG Las Vegas, L.L.C.*, 317 S.W.3d 278, 285–86 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (holding court lacked personal jurisdiction over claims for declaratory judgment as to ownership interests in car dealerships and claims for breach of loyalty and usurpation of corporate opportunities because operative facts of litigation had no substantial connection with Texas; focus of trial would be Gonzales's conduct managing dealership in Las Vegas); *Info. Servs. Grp., Inc. v. Rawlinson*, 302 S.W.3d 392, 404–05 (Tex.

App.—Houston [14th Dist.] 2009, pet. denied) (holding court lacked personal jurisdiction over claims for breach of employment and confidentiality agreements because operative facts of litigation had no substantial connection with Texas). That is, the non-resident's conduct must have been purposely directed towards or have occurred in the forum and must have a "substantial connection" with the litigation's operative facts. *Moki Mac*, 221 S.W.3d at 584–85; *Glattly v. CMS Viron Corp.*, 177 S.W.3d 438, 447 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Syrian-American alleges causes of action for (a) breach of the Settlement Agreement and Assignment Agreement and (b) fraudulent inducement.

a. Breach of Contract

The elements for a claim of breach of contract are the existence of a valid contract; performance or tendered performance by the plaintiff; breach of contract by the defendant; and damages sustained as a result of the breach. *See Winchek v. Am. Express Travel Related Servs. Co.*, 232 S.W.3d 197, 202 (Tex. App.—Houston [1st Dist.] 2007, no pet.). The operative facts of the claim for breach of the Assignment Agreement and breach of the Settlement Agreement are not related to where the contract was negotiated or signed. *See IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 597–98 (Tex. 2007) (per curiam) (contracting with Texas resident and accepting account initiation fee not sufficient to satisfy minimum contacts test where services were to be performed in California); *Nogle & Black Aviation, Inc.*

v. Faveretto, 290 S.W.3d 277, 283 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (citing *Barnstone v. Congregation Am Echad*, 574 F.2d 286, 288–89 (5th Cir. 1978) (noting that "it is the place of performance rather than execution, consummation or delivery which should govern the determination of jurisdiction")); *cf. Fleischer v. Coffey*, 270 S.W.3d 334, 338 (Tex. App.—Dallas 2008, no pet.) (finding jurisdiction proper based in part on contract being performed in Texas). Syrian-American also alleges SSPD met with Pecten in Houston, Texas "to discuss and agree to engage in conduct that would breach the contracts with [Syrian-American]." However, the discussion or agreement to breach is not an operative fact of the litigation; rather, the actual breach is the operative fact. *See Dorsett v. Cross*, 106 S.W.3d 213, 217 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) ("A breach occurs when a party fails or refuses *to do* something he has promised to do.") (emphasis added); *see also Halmos v. Bombardier Aerospace Corp.*, 314 S.W.3d 606, 620 (Tex. App.—Dallas 2010, no pet.) ("A breach of contract occurs when a party fails or refuses *to perform an act* that it expressly promised to do.") (emphasis added); *Enron Oil & Gas Co. v. Joffrion*, 116 S.W.3d 215, 221 (Tex. App.—Tyler 2003, no pet.) ("It should go without saying that a breach [of contract] is determined by comparing the terms of a contract with *the actions* of the alleged breaching party.") (emphasis added). Whether SSPD discussed the alleged breach beforehand, or where it may have

discussed it, is not an element of the claim for breach of contract and any such discussion will not be the focus of the trial. Rather, the focus of a breach of contract trial is whether the alleged breaching party performed the act it promised to perform. *See Dorsett*, 106 S.W.3d at 217; *see also Halmos*, 314 S.W.3d at 620; *Enron Oil & Gas Co.*, 116 S.W.3d at 221.

The specific breach alleged by Syrian-American is SSPD's failure to pay Syrian-American as required by the Settlement Agreement, which incorporated the Assignment Agreement. But the Assignment Agreement requires certain payments by SSPD based on the production of certain reserves in Syria. We conclude that there is no substantial connection between SSPD's contacts and the operative facts of the litigation. *See id.*

The Settlement Agreement contains a Texas choice of law provisions and provides that this choice of law provision will apply prospectively to the Assignment Agreement. As we discuss above, a choice of law is not alone sufficient to confer jurisdiction. *Burger King*, 471 U.S. at 482, 105 S. Ct. at 2187; *Preussag Aktiengesellschaft*, 16 S.W.3d at 125. The prior negotiations and future consequences of the contract must also be considered. *Burger King*, 471 U.S. at 479, 105 S. Ct. at 2185. Here, SSPD did not negotiate the agreement in Texas and did not contract to perform in Texas. Furthermore, the inclusion of a Texas choice of law provision will not be the focus of a trial and thus is not an operative fact.

b. Fraudulent Inducement

To prevail on a fraudulent inducement claim, a plaintiff must prove the elements of fraud as they relate to an agreement between the parties. *Haase v. Glazner*, 62 S.W.3d 795, 798–99 (Tex. 2001). The elements of fraud are: (1) the defendant made a material misrepresentation that was false; (2) the defendant knew it was false when made or made it recklessly as a positive assertion without any knowledge of its truth; (3) defendant intended the plaintiff to act upon the representation; and (4) plaintiff actually and justifiably relied on the misrepresentation and suffered injury. *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001). Each of these elements discusses a "representation" or a "misrepresentation." Thus, SSPD's representations to Syrian-American will be the focus of the litigation with respect to the fraudulent inducement claim. *See Proctor v. Buell*, 293 S.W.3d 924, 932 (Tex. App.—Dallas 2009, no pet.) (stating operative facts of fraud litigation would focus primarily on alleged misrepresentations). As we note above, the trial court made findings of fact that SSPD did not participate in settlement negotiations with Coastal and Syrian-American and did not make any representation to Syrian-American during the settlement of the 1988 Lawsuit. Implicitly acknowledging that SSPD did not participate in the settlement discussions, the Settlement Agreement contains representations that were made by and to the other parties. It has eleven clauses

that begin "WHEREAS Pecten has advised Coastal/[Syrian American] that . . . ." The Settlement Agreement does not contain any "WHEREAS" clause that begins "[SSPD] has advised Coastal/[Syrian American] that . . . ." or "Pecten/[SSPD] has advised Coastal/[Syrian American] that . . . ." Without a representation or misrepresentation connected to Texas, the operative facts of the litigation concerning the fraudulent inducement claim have no substantial connection to Texas. *See Proctor*, 293 S.W.3d at 932 (holding jurisdiction over Proctor improper in fraud action because operative facts of litigation would focus primarily on alleged misrepresentations made to plaintiffs and undisputed evidence showed that Proctor never communicated with plaintiffs).

We hold that SSPD did not purposely direct its activities toward Texas nor purposely avail itself of the privileges of conducting activities here and the controversy does not arise out of or relate to SSPD's contacts with the forum state. *See Rawlinson*, 302 S.W.3d at 405 (no substantial connection between appellants' allegations of breach of confidentiality and non-compete agreements and Rawlinson's contracts with and employment by Texas companies, two trips to Texas for company conferences, access to the appellants' servers in Texas, and occasional communications with appellants; focus of trial would be on Rawlinson's actions in U.K., not Texas); *Proctor*, 293 S.W.3d at 932.

We overrule Syrian-American's second issue.

Discovery Limitations

In its third issue, Syrian-American asserts "the trial court improperly restricted discovery resulting in an erroneous determination of personal jurisdiction."

Syrian-American's entire argument on this issue is as follows:

> Finally, the trial court improperly limited the scope and time frame of discovery on the motion of the defendants. This case involves contracts dating back as far as 1977, and the facts surrounding those contracts are significant to the personal jurisdiction inquiry. By severely limiting [Syrian-American's] ability to take discovery of matters that occurred before September 1989, and by refusing to permit [Syrian-American] to depose even a single employee of SSPD, the trial court erroneously precluded [Syrian-American] from fully developing its arguments relating to personal jurisdiction. The trial court's limit on discovery was an abuse of discretion and should be reversed.

Texas Rule of Appellate Procedure 38.1(i) requires that an appellant's brief "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). "Rule 38 requires [a party] to provide us with such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue." *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 128 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). "This is not done by merely uttering brief conclusory statements, unsupported by legal citations." *Id.* "Issues on appeal are waived if an appellant fails to support his contention by citations to appropriate

authority . . . ." *Abdelnour v. Mid Nat'l Holdings, Inc.*, 190 S.W.3d 237, 241 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177, 189 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Similarly, appellate issues are waived when the brief fails to contain a clear argument for the contentions made. *See Brock v. Sutker*, 215 S.W.3d 927, 929 (Tex. App.—Dallas 2007, no pet.) (holding issue is waived by brief that makes no attempt to analyze trial court's order within context of cited authority). Here, Syrian-American cites no authority to support its argument concerning the trial court's decisions concerning discovery and does not analyze the trial court's purported error. We conclude this issue is waived. *See Tesoro Petroleum*, 106 S.W.3d at 128.

We overrule Syrian-American's third issue.

Evidentiary Rulings

In its fourth issue, Syrian-American asserts "the trial court improperly struck portions of [Syrian-American's] evidence resulting in an erroneous determination of personal jurisdiction."

The following is Syrian-American's entire argument on this issue:

> [T]he trial court struck significant portions of [Syrian-American's] evidence without any legitimate justification. For example, the trial court struck as hearsay 1) statements made by the witness himself; 2) statements offered only to show that they were made in Houston, and not for their truth; [and] 3) statements offered to show that they were made, and not for their truth. By striking significant admissible

> evidence, the trial court hamstrung [Syrian-American], limiting its ability to sustain its burden of demonstrating agency. These evidentiary rulings were erroneous and likely led the court to an improper result. Accordingly, they should be reversed.

(Citations to the record omitted.) Syrian-American cites no authority and provides no analysis concerning the trial court's evidentiary ruling, nor does it explain how the ruling led to an "improper result." We conclude this issue is waived. *See Tesoro Petroleum*, 106 S.W.3d at 128.

We overrule Syrian-American's fourth issue.

Conclusion

We affirm the trial court's order granting SSPD's special appearance.

Elsa Alcala
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.