

Reversed and Remanded and Majority and Concurring Opinions filed August 22, 2023.



In The

Fourteenth Court of Appeals

NO. 14-22-00077-CV

SCI SHARED RESOURCES, LLC AND DM AFFINITY, INC., Appellants

V.

ECHOVITA, INC., Appellee

**On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 2021-44024**

MAJORITY OPINION

The plaintiffs in the court below appeal the trial court's order granting the special appearance of the only defendant, Echovita, Inc., a Canadian corporation. Under two issues, the appellants argue that (1) the trial court erred by concluding that a forum-selection clause in which Echovita consented to personal jurisdiction in courts in Harris County, Texas, was illusory; and (2) the trial court erred by concluding that the court could not exercise personal jurisdiction over Echovita

based on specific jurisdiction. Finding merit in the second argument but not in the first, we reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant/plaintiff SCI Shared Resources, LLC (“SCI”) is a Delaware limited liability company with its principal place of business in Houston, Texas. Appellant/plaintiff DM Affinity, Inc. (“DM”) is a Delaware corporation with its principal place of business in Houston, Texas. SCI and DM (collectively, the “SCI Parties”) own and operate a network of funeral homes in the United States and offer *in memoriam* related goods and services. The SCI Parties operate and maintain websites located at these URLs: www.dignitymemorial.com and www.rosehills.com (collectively, the “Dignity Memorial Websites”). The Dignity Memorial Websites contain information about the various services that the SCI Parties and their affiliates offer, such as funerals, obituaries, flowers, cremations, and burials. The Dignity Memorial Websites also make available a searchable database of obituaries originating from the SCI Parties’ clients or from funeral homes in the SCI Parties’ network.

Defendant/appellee Echovita, Inc. is a Canadian corporation with its principal place of business in Quebec City, Canada. According to Echovita, the company centralizes and aggregates publicly available obituary information and categorizes it by city on its website, echovita.com, thus allowing millions of visitors to the website, for free, to search for obituaries of loved ones who have died, receive obituaries and memorials, and express their sympathies.

The SCI Parties filed suit against Echovita alleging that the Dignity Memorial Websites contain Terms of Service available by hyperlink on every webpage on these websites. The SCI Parties contend that visitors who access, use, browse, or submit any content or material on the Dignity Memorial Websites are

subject to the Terms of Service. According to the SCI Parties, the Terms of Service prohibit any visitor or user of the Dignity Memorial Websites from (1) using any information on these websites for commercial purposes, or (2) reproducing or publishing any content from the Dignity Memorial Websites without the consent of the SCI Parties. The SCI Parties allege that Paco LeClerc¹ is the sole director and officer of Echovita and that “[p]rior to Echovita, [LeClerc] owned and operated similar websites located at URLs www.afterlife.com and www.everhere.com.” The SCI Parties claim that, like the SCI Parties, Echovita provides “various obituary-related services to customers in Canada and the United States, including selling condolence flowers, funeral prints, virtual candles, and planting *in memoriam* trees.”

The SCI Parties contend that Echovita has continuously and knowingly engaged in the “scraping, copying, reproduction, and misappropriation of obituary information on the Dignity Memorial Websites in direct violation of the Terms of Service.”² According to the SCI Parties, Echovita uses this information to reproduce obituaries on its own website and create virtual animated candles and condolence flowers for purchase. The SCI Parties claim that Echovita reproduces obituaries on Echovita’s website from the Dignity Memorial Websites with egregious errors or incomplete information about the deceased.

The SCI Parties contend that Echovita accepted and agreed to the Terms of

¹ In the appellate record, this man’s first name is sometimes shown as “Pascal,” and his last name is sometimes shown as “Leclerc.” For the sake of consistency, we use the name he gave in his affidavit, “Paco LeClerc,” even if the corresponding part of the record uses a different version of the name.

² “Data scraping, also termed screen scraping, web scraping, or web crawling, refers to the extraction of data from websites, often performed by programs termed ‘bots,’ ‘spiders,’ or ‘web crawlers.’” Kathleen C. Riley, *Data Scraping as a Cause of Action: Limiting use of the CFAA and Trespass in Online Copying Cases*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 245, 247 (2018).

Service as an enforceable and binding contract between Echovita and the SCI Parties. The SCI Parties alleged a single claim against Echovita for breach of contract based on Echovita's alleged breaches of paragraphs 5 and 6 of the Terms of Service. The SCI Parties claim that they have suffered and continue to suffer irreparable injury as a result of Echovita's breaches of contract. The SCI Parties did not seek to recover monetary damages; instead, they applied for a temporary restraining order, temporary injunction, and permanent injunction against Echovita. Section 19 of the Terms of Service contains a clause in which, subject to section 18, website users "consent and submit to personal jurisdiction in the state and federal courts located in Harris County, Texas" ("Forum Selection Clause"). The SCI Parties contend that pursuant to the Forum Selection Clause, users of the Dignity Memorial Websites consent to personal jurisdiction in the state and federal courts in Harris County, Texas, and we presume for the sake of argument that this contention is correct. The SCI Parties alleged in their live pleading that the trial court may assert personal jurisdiction over Echovita (1) because Echovita consented to personal jurisdiction in the Forum Selection Clause, and (2) because Echovita purposefully availed itself of the privileges and benefits of conducting business in Texas by targeting Texas residents for commercial purposes.

Echovita timely filed a special appearance contesting personal jurisdiction and submitted evidence. The SCI Parties opposed the special appearance and submitted evidence. Echovita argued that the Forum Selection Clause is illusory and unenforceable, and Echovita does not have minimum contacts with Texas sufficient to support the trial court's exercise of personal jurisdiction over it. After a hearing, the trial court signed an order granting Echovita's special appearance without specifying the grounds for its ruling. The SCI Parties have timely appealed.

II. ISSUES AND ANALYSIS

On appeal, the SCI Parties argue under two issues that: (1) the trial court erred by concluding that the Forum Selection Clause was illusory or otherwise unenforceable to allow the trial court to assert personal jurisdiction over Echovita; and (2) the trial court erred by concluding that the court could not exercise personal jurisdiction over Echovita based on specific jurisdiction.³

A. Did the trial court err by concluding that the Forum Selection Clause was illusory?

In their petition the SCI Parties alleged that Echovita accepted and agreed to the Terms of Service as an enforceable and binding contract between Echovita and the SCI Parties. For the purposes of this appeal, we presume that this is so. In construing contracts, our primary concern is to ascertain and give effect to the intentions of the parties as expressed in the contract. *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998). To ascertain the parties' true intentions, we examine the entire agreement in an effort to harmonize and give effect to all provisions of the contract so that none will be rendered meaningless. *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 652 (Tex. 1999). Whether a contract is ambiguous is a question of law for the court. *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). A contract is ambiguous when its meaning is uncertain and doubtful or is reasonably susceptible to more than one interpretation. *Id.* However, when a written contract is worded so that it can be given a certain or definite legal meaning or interpretation, it is unambiguous, and the court construes it as a matter of law. *Am. Mfrs. Mut. Ins.*

³ The SCI Parties do not assert that the trial court erred by not exercising personal jurisdiction over Echovita based on either general jurisdiction or imputing another entity's Texas contacts to Echovita based on a jurisdictional-veil-piercing theory. Thus, we do not address these issues.

Co. v. Schaefer, 124 S.W.3d 154, 157 (Tex. 2003).

The trial court impliedly concluded that the Forum Selection Clause was illusory and thus that Echovita did not consent to personal jurisdiction pursuant to it. Under their first issue the SCI Parties argue that the trial court erred in this conclusion because the Terms of Service expressly state that any unilateral change to the Terms of Service by one of the SCI Parties does not apply retroactively. Section 1 of the Terms of Service provides as follows:

1. GENERAL AGREEMENT. This website is offered by Dignity Memorial Network, Inc. and its parents and affiliates (collectively the “Company”). Our website and all use of it are governed by the following [Terms of Service]. By viewing, using, accessing, browsing or submitting any content or material on or to this site, you agree to this [Terms of Service] as a binding legal agreement between you and the Company to the fullest extent permitted by applicable law. **You further agree that the Company shall have the right to alter or amend the [Terms of Service] or any other guidelines or policies at any time, with or without advance notice to you. You agree that each visit you make to this website and your continued use of our website shall confirm that you have read, accepted and agreed to be bound by such modifications of the [Terms of Service].** (emphasis added).

Under the unambiguous language of the Terms of Service the Company has the right to amend or terminate the Terms of Service at any time and without advance notice to Echovita. State and federal courts applying Texas law hold that a contract is illusory if one party has the power to unilaterally make amendments to the contract that apply retroactively to events that occurred before the amendment. *See Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 205–09 (5th Cir 2012) (applying Texas law) (holding that arbitration clause in employee handbook was illusory and unenforceable because employer had the right to unilaterally and retroactively revise or delete provisions in the handbook); *Morrison v. Amway*

Corp., 517 F.3d 248, 253–57 (5th Cir 2008) (applying Texas law) (concluding that arbitration agreement contained in Amway’s rules of conduct was illusory and unenforceable because Amway had the right to unilaterally and retroactively modify or delete the part of the rules containing the arbitration agreement); *Harris v. Blockbuster, Inc.*, 622 F.Supp.2d 396, 398–400 (N.D. Tex. 2009) (applying Texas law); (holding that arbitration provision in Blockbuster’s terms and conditions was illusory and unenforceable because Blockbuster retained the right to unilaterally and retroactively modify or delete terms and conditions); *Nerium Int’l, LLC v. Kum Sun*, No. 05–13–00427-CV, 2014 WL 1789882, at *4 (Tex. App.—Dallas May 2, 2014, no pet.) (mem. op.); (stating that appellant had not shown that the trial court erred in concluding that forum selection clause contained in contract entered into on a website was illusory); *In re C&H News Co.*, 133 S.W.3d 642, 646–47 (Tex. App.—Corpus Christi 2003, orig. proceeding) (holding that arbitration agreement was illusory and unenforceable because employer had the right to unilaterally and retroactively amend arbitration agreement). If one party has the unilateral right to amend the terms of an agreement, it is presumed that the party may make an amendment apply retroactively unless the agreement expressly states that any amendment may not be applied retroactively. *See Carey*, 669 F.3d at 206–07; *Morrison*, 517 F.3d at 253–57; *Harris*, 622 F.Supp.2d at 398–400; *Nerium Int’l, LLC*, 2014 WL 1789882, at *4; *In re C&H News Co.*, 133 S.W.3d at 646–47.

The SCI Parties argue that the Forum Selection Clause is not illusory because the Terms of Service expressly state that any change to it by one of the SCI Parties does not apply retroactively. The SCI Parties rely heavily on *In re Online Travel Company*, a case in which the court held that Travelocity’s user agreement was not illusory because it explicitly precluded retroactive application

of any unilateral changes by Travelocity. *See* 953 F.Supp.2d 713, 719–20 (N.D. Tex. 2013) (applying Texas law). Travelocity’s user agreement stated that “Travelocity may at any time modify this User Agreement and your continued use of this site or Travelocity’s services will be conditioned upon the terms and conditions *in force at the time of your use.*” *Id.* (emphasis in opinion but not in agreement). The *Online Travel* court concluded that the agreement was not illusory because it explicitly precluded retroactive application of any unilateral change by Travelocity, rather than being silent as to whether a unilateral amendment might be retroactive. *See id.*

The SCI Parties argue that as a matter of law the Forum Selection Clause is not illusory because the last sentence of section 1 expressly states that any unilateral change to the Terms of Service by one of the SCI Parties does not apply retroactively. The SCI Parties contend that the language in that sentence “closely tracks” the language in Travelocity’s user agreement that the *Online Travel* court held explicitly precluded retroactive application of any unilateral changes. *See In re Online Travel Co.*, 953 F.Supp.2d at 719–20. According to the SCI Parties, the last sentence provides that the Terms of Service apply as written for each visit Echovita makes to one of the Dignity Memorial Websites. The SCI Parties assert that the enforcement of any modification is specifically tied to “each visit” and the user’s “continued use” under the authority of “such modifications.” We disagree. Under the unambiguous language in the last sentence, Echovita agrees that each visit it makes to the website and Echovita’s continued use of the website confirms that Echovita has read, accepted and agreed to be bound by any modifications that the Company has made to the Terms of Service, including any modifications made without advance notice to Echovita. Thus, after the Company amends the Terms of Service, which the Company may do without advance notice, by visiting the website or continuing to use it after an amendment, Echovita accepts and agrees to

be bound by the amendment. Nowhere do the Terms of Service state that any amendment by the Company to the Terms of Service may not have retroactive effect. Though both the last sentence of section 1 and the *Online Travel* provision use the term “continued use,” the language in *Online Travel* was materially different because that language provided that continued use of the website would be conditioned on “the terms and conditions in force at the time of your use,” thus explicitly precluding retroactive application of any unilateral change. *See In re Online Travel Co.*, 953 F.Supp.2d at 719–20. No such limitation exists here. We conclude that because of the materially different language, the *Online Travel* case is not on point.

Under the unambiguous language of the Terms of Service, the SCI Parties have the unilateral right to retroactively amend the Terms of Service, and there is no restriction providing that any amendment cannot be applied retroactively. *See Carey*, 669 F.3d at 205–09; *Morrison*, 517 F.3d at 253–57; *Harris*, 622 F.Supp.2d at 398–400; *Nerium Int’l, LLC*, 2014 WL 1789882, at *4; *In re C&H News Co.*, 133 S.W.3d at 646–47. Therefore, the trial court did not err in impliedly determining that the Forum Selection Clause is illusory. *See Carey*, 669 F.3d at 206–07; *Morrison*, 517 F.3d at 253–57; *Harris*, 622 F.Supp.2d at 398–400; *Nerium Int’l, LLC*, 2014 WL 1789882, at *4; *In re C&H News Co.*, 133 S.W.3d at 646–47. Though in this lawsuit the SCI Parties do not seek to enforce a retroactive amendment to the Terms of Service, this fact is not relevant to the issue of whether the Forum Selection Clause is illusory. *See Carey*, 669 F.3d at 206–07; *Harris*, 622 F.Supp.2d at 399–400; *In re C&H News Co.*, 133 S.W.3d at 646–47. We overrule the first issue.

B. Did the trial court err by concluding that it could not exercise personal jurisdiction over Echovita based on specific jurisdiction?

Under their second issue, the SCI Parties argue that the trial court erred in

finding that the court could not exercise personal jurisdiction over Echovita based on specific jurisdiction. Echovita asserts that it submitted sufficient evidence to negate specific jurisdiction and to support the facts findings necessary for the trial court to have properly granted Echovita's special appearance. Whether a trial court may exercise personal jurisdiction over a nonresident is a question of law for de novo review. *See BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). The trial court did not issue findings of fact or conclusions of law. Therefore, all facts necessary to support the trial court's ruling and supported by the evidence are implied in favor of the trial court's decision. *Id.* at 795. Parties may challenge the legal and factual sufficiency of these implied factual findings. *Id.* In conducting a no-evidence analysis, we review the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support it. *See City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). We must credit favorable evidence if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *See id.* at 827. We must determine whether the evidence at trial would enable reasonable and fair-minded people to find the facts at issue. *See id.* The factfinder is the sole judge of the credibility of the witnesses and the weight of their testimony. *See id.* at 819.

When reviewing a challenge to the factual sufficiency of the evidence, we examine the entire record, considering both the evidence in favor of, and contrary to, the challenged finding. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). After considering and weighing all the evidence, we set aside the fact finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986). The trier of fact is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *GTE Mobilnet of S. Tex. v. Pascouet*, 61 S.W.3d 599, 615–16

(Tex. App.—Houston [14th Dist.] 2001, pet. denied). We may not substitute our own judgment for that of the trier of fact, even if we would reach a different answer on the evidence. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998). The amount of evidence necessary to affirm a judgment is far less than that necessary to reverse a judgment. *GTE Mobilnet*, 61 S.W.3d at 616.

The Texas long-arm statute governs a Texas court’s exercise of jurisdiction over nonresident defendants. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 17.041–.045 (West, Westlaw through 2023 R.S.). It allows a court to exercise personal jurisdiction as far as the federal constitutional requirements of due process will permit. *BMC Software*, 83 S.W.3d at 795. The plaintiff bears the initial burden to plead allegations sufficient to bring a nonresident defendant within the reach of Texas’s long-arm statute. *See Old Republic Nat’l Title Ins. Co v. Bell*, 549 S.W.3d 550, 559 (Tex. 2018). If the plaintiff satisfies its initial burden, the burden shifts to the defendant to negate all potential bases for personal jurisdiction alleged by the plaintiff. *See Bell*, 549 S.W.3d at 559; *Amec Foster Wheeler, PLC v. Enterprise Prods. Operating, LLC*, 631 S.W.3d 147, 155–56 (Tex. App.—Houston [14th Dist.] 2020, pet. denied).

Personal jurisdiction over a nonresident defendant is constitutional when: (1) the defendant has established minimum contacts with the forum state, and (2) the exercise of personal jurisdiction comports with traditional notions of fair play and substantial justice. *Id.* For a defendant to have sufficient minimum contacts with the forum, it is essential that there be some act by which the nonresident defendant “purposefully avails” itself of the privilege of conducting activities in the forum state, thus invoking the benefits and protections of its laws. *Michiana Easy Livin’ Country, Inc. v. Holten*, 168 S.W.3d 777, 784 (Tex. 2005). Although not determinative, foreseeability is an important consideration in deciding whether the

nonresident defendant purposefully has established minimum contacts with Texas. *BMC Software*, 83 S.W.3d at 795. The concept of foreseeability is implicit in the requirement that there be a substantial connection between the defendant and Texas arising from the defendant's conduct purposefully directed toward Texas. *See Guardian Royal Exch. Assur., Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 227 (Tex. 1991). A defendant should not be subject to personal jurisdiction in a Texas court based upon random, fortuitous, or attenuated contacts. *BMC Software*, 83 S.W.3d at 795.

Specific jurisdiction exists when the claims in question arise from or relate to the defendant's purposeful contacts with Texas. *Am. Type Culture Collection Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002). In conducting a specific-jurisdiction analysis, we focus on the relationship among the defendant, Texas, and the litigation. *See Guardian Royal*, 815 S.W.2d at 228. For a nonresident defendant's contacts with Texas to support an exercise of specific jurisdiction, there must be a substantial connection between the defendant's purposeful contacts with Texas and the operative facts of the litigation. *See Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 585 (Tex. 2007). In conducting a personal-jurisdiction analysis, we review the SCI Parties' claims and the evidence regarding the jurisdictional facts, but the merits of the SCI Parties' claims are not at issue in determining whether the trial court erred in dismissing these claims for lack of personal jurisdiction. *See Dresser-Rand Group v. Centauro Capital, S.L.U.*, 448 S.W.3d 577, 584 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

In their live pleading the SCI Parties allege that Echovita and the SCI Parties entered into a contract pursuant to the Terms of Service. We presume for the sake of argument that this is so. The SCI Parties contend that Echovita has continuously and knowingly engaged in the “scraping, copying, reproduction, and

misappropriation of obituary information on the Dignity Memorial Websites in direct violation of the Terms of Service.” According to the SCI Parties, Echovita uses this unauthorized obituary information to reproduce obituaries on its own website and creates virtual animated candles and condolence flowers for purchase. The SCI Parties contend that Echovita reproduces obituaries on Echovita’s website from the Dignity Memorial Websites with egregious errors or incomplete information about the deceased including the date of death, incorrect information about funeral services, and incorrect descriptions of the deceased’s family members. The SCI Parties allege that Echovita has breached (1) section 5 of the Terms of Service by scraping or copying obituary information from the Dignity Memorial Websites without the consent of the SCI Parties; and (2) section 6 of the Terms of Service by reproducing obituary information from the Dignity Memorial Websites on the Echovita website, for Echovita’s commercial purposes and without the SCI Parties’ consent. For the purposes of this court’s jurisdictional analysis, we presume, without deciding, that these allegations are true, and we examine the evidence regarding the relationship between these allegations and any Texas contacts of Echovita.

Echovita filed a special appearance offering the following:

- Echovita is not now and has never been a resident of Texas or domiciled in Texas.
- Echovita does not maintain an agent for service of process in Texas.
- Echovita does not own an interest in any assets in Texas.

Paco LeClerc provided a declaration and an affidavit in support of Echovita’s special appearance in which he made the following statements:

- LeClerc is the Chief Executive Officer of Echovita.
- Echovita is a Canadian corporation with its sole office in Quebec City, Quebec, Canada.

- Echovita does not have and has never had an office or agent in Texas.
- Echovita does not own and has never owned any assets in Texas.
- Echovita’s operations are entirely in the province of Quebec.
- Echovita does not solicit, market, or promote and has never solicited, marketed, or promoted business of any kind in Texas.
- Echovita does not advertise and has never advertised in Texas. Echovita does not invest in marketing at all.
- Echovita does not and has never targeted any Texas resident for commercial or other purposes.
- Echovita has not targeted any servers in Texas or anywhere else. Instead, Echovita gathers publicly available obituary information on the internet irrespective of any particular server.
- Echovita centralizes and aggregates publicly available obituary information and categorizes it by city on its website “echovita.com.” This allows millions of visitors, for free, to search for obituaries of loved ones who have passed away, receive obituaries and memorials, and express their sympathies. The platform also allows families to create free obituaries and memorials. Echovita also has free funeral home listings on its website so that its visitors can search for funeral homes. Echovita does not receive any compensation for these listings.
- Echovita does not copy obituaries but rather uses basic publicly available facts to publish the information on its website. That information consists of names, cities, dates, and predeceased and surviving relatives. Only obituaries posted by a family or funeral home directly to the website have photos and original texts. With the family’s authorization, Echovita publishes the original obituary and photo.
- The specified locations on the obituaries could vary in meaning. The location can be where the deceased resided, the city of passing, or the city of the funeral home which provided services for the deceased. The location is used to categorize the obituary by city for search purposes and free subscribers.
- Visitors to Echovita’s website may purchase flowers, cards, and virtual candles. Blooms Today, a third-party vendor in Virginia, fulfills the flower orders. Blooms Today and Agilla Pro, also a third-party vendor in

Virginia, fulfill memorial tree orders in conjunction with the National Forest Foundation. The virtual candles are a digital product only.

- Afterlife Network, Inc. (“Afterlife”), which operated the website afterlife.com, is not a predecessor of Echovita. Afterlife was incorporated on May 16, 2014, and is still in existence. LeClerc attached to his declaration copies of Afterlife’s Certificate of Incorporation and last Annual Return filed in Canada.
- Echovita is a separate and distinct legal entity from Afterlife. Echovita was incorporated on February 19, 2018, and is still in existence. LeClerc attached to his declaration copies of Echovita’s Certificate of Incorporation and last Annual Return filed in Canada.
- Echovita operates the website “echovita.com.” Echovita does not operate the website “everhere.com.” Echovita has business activities and operations separate, apart, and different from Afterlife. Echovita has never operated the website “afterlife.”
- Echovita has never unilaterally contacted either of the SCI Parties or their affiliates. Any communications from Echovita to those entities were made only in response to communications initiated by those entities.
- In the affidavit of David Jameson, which Echovita first saw on December 10, 2021 in connection with this case, Jameson claims that the Dignity Memorial Websites’ IP address is in Dallas, Texas and that the SCI Parties have web servers in Dallas, Texas. That is the first information Echovita ever had about the location of the Dignity Memorial Websites’ IP address or the SCI Parties’ servers. Prior to that, Echovita had no information about the location of the Dignity Memorial Websites’ IP address or the SCI Parties’ servers.
- The SCI Parties are part of a multibillion-dollar international conglomerate and have locations globally, including in Canada. The SCI Parties previously filed a similar lawsuit against Echovita in Canada before dismissing it and filing this lawsuit in Texas.

In response to Echovita’s special appearance, the SCI Parties submitted documents showing that SCI is a Delaware limited liability company with its principal place of business in Houston, Texas, and that DM is a Delaware corporation with its principal place of business in Houston, Texas. The SCI Parties

also submitted an affidavit of Eric D. Noren, the Senior Director of Marketing Technology for SCI, who testified as follows:

- Noren investigated the actions of Echovita and LeClerc regarding the Dignity Memorial Websites. Noren learned that Echovita has continuously and knowingly engaged in the scraping, copying, reproduction, and misappropriation of obituary information on the Dignity Memorial Websites in violation of the Terms of Service.
- Noren also attached a copy of the Statement of Claim filed by the SCI Parties and a Canadian affiliate on April 28, 2021, in a lawsuit they filed against Echovita and others in the Superior Court of Justice in Ottawa, Ontario, Canada (“Canadian Lawsuit”). In the Canadian Lawsuit the SCI Parties alleged claims against Echovita for breach of the Terms of Service that are similar to the claims they assert against Echovita in today’s case.
- Echovita targets residents both in and outside of Texas by scraping or copying obituary information from the Dignity Memorial Websites and posting unauthorized obituaries of deceased individuals in Texas on the Echovita website. Noren attached copies of the obituaries of three Houston residents whose obituary information Echovita allegedly scraped or copied from the Dignity Memorial Websites in July 2021.
- Echovita continues to reproduce Texas residents’ obituary information with egregious errors and inaccuracies. Noren attached copies of an obituary of two Texas residents who died in 2021 and whose obituary on the Echovita is different in various respects from the obituary on the Dignity Memorial Website. The Echovita obituary for one of these Texas residents shows that before the memorial service for this person occurred, one person bought a virtual candle on the Echovita website in honor of the deceased and two other people sent flowers through the Echovita website.
- Noren also attached to his affidavits various letters and emails that will be discussed below.

The SCI Parties submitted an affidavit of David Jameson, the Director of IT Infrastructure for SCI, who testified that (1) the SCI Parties operate and maintain the Dignity Memorial Websites; (2) when an internet user accesses the Dignity

Memorial Websites by entering the applicable URL, this information is sent to an IP address located in Dallas, Texas, and the IP address then links to the SCI Parties' web servers, which are also located in Dallas, Texas; and (3) the majority of activity on the Dignity Memorial Websites is hosted on the SCI Parties' web servers at the SCI Parties' Dallas datacenter, located in Dallas, Texas.

The SCI Parties sued only Echovita. Thus, the minimum-contacts analysis focuses solely on Echovita's purposeful contacts with Texas, if any, and Echovita's reasonable expectations. *See Michiana Easy Livin' Country, Inc.*, 168 S.W.3d at 785, 790. In his affidavit Noren relied on certain letters and emails that the SCI Parties submitted in response to Echovita's special appearance. Noren stated that an October 17, 2017 letter was sent by the SCI Parties to LeClerc. However, that letter was sent by an Ottawa lawyer on behalf of his client, Service Corporation International (Canada) ULC. That letter was not sent to LeClerc or Echovita; rather it was sent to Jordan Le Brun of Afterlife. Noren further stated that cease-and-desist letters were sent to Echovita on November 13, 2017, April 27, 2018, May 9, 2018, and January 6, 2019. However, although the letters were sent to LeClerc, they were sent to him in his capacity as an officer of other entities. Noren states in his affidavit that in response to the SCI Parties' cease-and-desist letters, Echovita proposed visiting Texas to discuss a partnership with the SCI Parties in correspondence dated October 26, 2017, May 7, 2018, and May 11, 2018, that Noren attached to his affidavit. But none of these responses purport to be sent by Echovita, and all of the cease-and-desist letters were sent by a Canadian lawyer on behalf of Service Corporation International (Canada) ULC, not by anyone on behalf of the SCI Parties. LeClerc never said he wanted to visit Texas or that he wanted to discuss a partnership with either of the SCI Parties.

On appeal, the SCI Parties assert that Echovita has not controverted Noren's

testimony that the SCI Parties informed LeClerc and Echovita on several occasions “that he and its websites were in direct violation[] of the Terms of Service[] and demanding such violations cease immediately.” But Noren’s testimony that various cease-and-desist letters were sent to Echovita is controverted by the plain text of the letters and emails that he attached to his affidavit. We conclude that the trial court impliedly found that these letters were not actions or contacts of Echovita, and the SCI Parties have not shown that the evidence is legally or factually insufficient to support this finding. *See Davis Investments, VI, LP v. Holtgraves*, No. 14-08-00222-CV, 2009 WL 975961, at *10 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (mem. op.). Therefore, these emails and letters are not relevant to the specific-jurisdiction analysis. *See Michiana Easy Livin’ Country, Inc.*, 168 S.W.3d at 785, 790; *Turner Schilling, L.L.P. v. Gaunce Management, Inc.*, 247 S.W.3d 447, 456 (Tex. App.—Dallas 2008, no pet.).

In their reply brief, the SCI Parties argue that (1) Echovita failed to negate the “common identity” that Echovita shares with Everhere; (2) Echovita did not negate the allegation that Echovita is the same legal entity as Everhere; and (3) therefore Everhere’s Texas contacts should be imputed to Echovita for the purposes of our personal-jurisdiction analysis. But the allegation that the SCI Parties claim Echovita did not negate was made in the plaintiffs’ pleading in the Canadian Lawsuit. In the Canadian pleading, the plaintiffs alleged that “Echovita was previously named Ici à jamais Inc. / Everhere Inc. from August 2, 2018, until June 22, 2020, when it changed its corporate name to Échovita Inc. / Echovita Inc.” However, the SCI Parties never made this allegation in the trial court below, and the SCI Parties did not make any of the above arguments to the trial court, thus waiving these arguments. *See Coleman v. Klöckner & Co. AG*, 180 S.W.3d 577, 586–87 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (holding that appellants

waived argument that Texas contacts of two companies should be imputed to the companies asserting a special appearance under a “single business enterprise” theory because the appellants did not present this argument to the trial court).

The plaintiff bears the initial burden to plead allegations sufficient to bring the nonresident defendant within the reach of Texas’s long-arm statute. *See Bell*, 549 S.W.3d at 559. The long-arm statute allows the exercise of personal jurisdiction over a nonresident defendant who “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.” Tex. Civ. Prac. & Rem. Code § 17.042(1) (West, Westlaw through 2023 R.S.). In their live petition, the SCI Parties alleged that (1) Echovita entered into a contract with the SCI Parties; (2) the SCI Parties have their principal place of business in Texas; and (3) a substantial part of the events or omissions giving rise to the SCI Parties’ breach-of-contract claims occurred in Harris County, Texas. Because the SCI Parties satisfied their initial burden, the burden shifted to Echovita to negate all potential bases for personal jurisdiction alleged by the SCI Parties. *See Bell*, 549 S.W.3d at 559; *BMC Software*, 83 S.W.3d at 793; *Amec Foster Wheeler, PLC*, 631 S.W.3d at 155–56.

One of the alleged bases for personal jurisdiction alleged by the SCI Parties was specific jurisdiction, and the SCI Parties alleged in the trial court that while engaging in its allegedly actionable conduct, Echovita has had “full knowledge” that each of the SCI Parties is a Texas company. A review of the evidence before the trial court shows that no evidence addresses whether Echovita has been acting with knowledge that each of the SCI Parties is a Texas company. Therefore, Echovita failed to negate this allegation. Under the applicable standard of review, we conclude that the evidence is legally insufficient to support the trial court’s implied finding that Echovita carried its burden of negating the SCI Parties’

allegation that Echovita has been engaging in its allegedly actionable conduct with “full knowledge” that each of the SCI Parties is a Texas company. *See ERC Midstream LLC v. American Midstream Partners, LP*, 497 S.W.3d 99, 108–09 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *CMC Steel Fabricators, Inc. v. Red Bay Constructors, Inc.*, No. 14-13-00084-CV, 2014 WL 953351, at *8–9 (Tex. App.—Houston [14th Dist.] Mar. 11, 2014, no pet.) (mem. op.); *In re W.J.S.*, 35 S.W.3d 274, 276–77 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Thus, for the purposes of our analysis we presume that Echovita has been engaging in its allegedly actionable conduct with “full knowledge” that each of the SCI Parties is a Texas company.

Echovita’s agents or employees in Quebec use the internet to obtain obituary information of people who have died in the United States of America, including in Texas. Evidence shows that Echovita centralizes and aggregates this information and categorizes it by city on its website “echovita.com,” allowing the visitors to this website, for free, to search for obituaries of loved ones who have passed away, receive obituaries and memorials, and express their sympathies. Visitors to Echovita’s website may purchase flowers, cards, and virtual candles. Evidence shows that people have purchased flowers or a virtual candle on the Echovita website in honor of a deceased Texas resident.⁴ The SCI Parties assert that the trial court erred in not exercising personal jurisdiction based on specific jurisdiction in light of the following alleged contacts with Texas: (1) Echovita has continuously

⁴ The SCI Parties submitted evidence indicating that between July 2021 and September 2021, Echovita scraped or copied the obituary information of five Texas residents from the Dignity Memorial Websites. The SCI Parties have embedded on page 18 of their reply brief a document that is not in our appellate record and was not before the trial court. Because this document is not in the appellate record and was not before the trial court when it granted Echovita’s special appearance, we do not consider this document in adjudicating the merits of this appeal. *See Ginn v. Pierce*, 595 S.W.3d 762, 766 (Tex. App.—Houston [14th Dist.] 2019, pet. denied); *In re C.C.E.*, 530 S.W.3d 314, 317, n.1 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

and knowingly scraped, copied, reproduced, and misappropriated obituary information on the Dignity Memorial Websites from servers located in Texas, and Echovita posted unauthorized obituaries of deceased individuals in Texas on Echovita's website in direct violation of the Terms of Service, thus targeting residents both in and outside of Texas; (2) Echovita engaged in the foregoing conduct with full knowledge that each of the SCI Parties is a Texas company; and (3) Echovita purposefully directed its data-gathering activity toward the SCI Parties' servers, which are located in Texas, for commercial, profit-driven purposes. The SCI Parties contend that by using the Dignity Memorial Websites, Echovita was bound by the Terms of Service. The merits of the SCI Parties' claims are not at issue, and we presume without deciding, that except as to the Forum Selection Clause, Echovita was bound by the Terms of Service. We also presume that Echovita breached the Terms of Service by scraping or copying obituary information from the Dignity Memorial Websites, including information about deceased Texas residents, and using that information on Echovita's website, with full knowledge that each of the SCI Parties is a Texas company.⁵

Though LeClerc testified that until December 10, 2021, when Echovita reviewed Jameson's affidavit, Echovita had no information about the location of the Dignity Memorial Websites' IP address or the SCI Parties' servers, the SCI Parties allege continuous and ongoing conduct by Echovita and seek injunctive relief. No evidence in the record shows that Echovita was unaware of the location of the Dignity Memorial Websites' IP address or the SCI Parties' servers on or

⁵ In his declaration, LeClerc stated that Echovita does not copy obituaries but rather "uses publicly available facts to publish information on its website." According to LeClerc, this information consists of "names, cities, dates, and predeceased and surviving relatives." This testimony does not address Echovita's purposeful contacts with Texas or the relationship between these contacts and the operative facts of this litigation. Instead, this testimony seeks to negate the merits of the SCI Parties' claims, which are not at issue in this appeal. *See Dresser-Rand Group*, 448 S.W.3d at 584.

after December 10, 2021. In any event, even presuming for the sake of argument that (1) Echovita did not know that the Dignity Memorial Websites' IP address or the SCI Parties' servers were in Texas and (2) Echovita's activity on the Dignity Memorial Websites does not take place in the SCI Parties' servers in Texas, we conclude that these two facts would not mandate the conclusion that the trial court did not err in granting Echovita's special appearance. *See BidPrime, LLC v. SmartProcure, Inc.*, 2018 WL 5260050, at *1–3 (W.D. Tex. Oct. 22, 2018).

Echovita relies on *Key Management Group, LLC v. Meridian Hospital System Corporation*. *See* No. 14-19-00907-CV, 2021 WL 1538237, at *4 (Tex. App.—Houston [14th Dist.] Apr. 20, 2021, no pet.) (mem. op.). In *Key Management*, this court concluded that the trial court erred in denying the defendant's special appearance in a case in which the plaintiff alleged that the defendant's employee in India accessed the Texas server of the plaintiff, a Texas company, and misappropriated plaintiff's trade secrets that were located on the server. *See id.* at *1–2, *4–5. But, in *Key Management*, when the defendant engaged in the allegedly actionable conduct, the defendant did not know that the plaintiff was a Texas company. *See id.* at *2, *4. Therefore, *Key Management* is not on point. *See id.*

Echovita also relies on *Information Services Group, Inc. v. Rawlinson*. *See* 302 S.W.3d 392 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). In *Rawlinson*, this court affirmed the trial court's grant of the special appearance of a resident of the United Kingdom who had previously worked in the United Kingdom for a Texas limited liability company. *See id.* at 396. Although the employee accessed the Texas servers of the Texas company, this court noted that the appellants did not allege that the employee "acted improperly or unlawfully when accessing the servers from the [United Kingdom], nor does [the employee's]

access to [the servers] form the basis for any of the [appellants'] claims against him.” *Id.* at 402. In today’s case, Echovita’s accessing the SCI Parties’ web servers does form the basis of the SCI Parties’ claims against Echovita. Therefore, the *Rawlinson* case is not on point. *See id.*

In *BidPrime*, a Texas company sued a rival business and its CEO who resided in Florida, alleging that they hacked the plaintiff’s website and scraped information from it. *See BidPrime, LLC*, 2018 WL 5260050, at *1, *2. The plaintiff claimed that the CEO used a computer to gain unauthorized access to the plaintiff’s website and hired a software developer to write a data-scraping program and scrape data from the plaintiff’s website. *See id.* at *2. When the CEO allegedly accessed the plaintiff’s data, the CEO was using a computer in Florida to access data from the plaintiff’s server in Oregon. *See id.* Making arguments similar to those of Echovita in today’s case, the nonresident defendant argued that (1) his alleged conduct took place where he was located when using his computer, not in Texas; (2) the plaintiff’s servers were not in Texas; (3) even if the plaintiff’s servers were in Texas, that fact would not be sufficient to support specific jurisdiction; and (4) even if the plaintiff’s servers were in Texas, the defendant did not know where the servers were, and therefore his conduct did not purposefully target Texas. *See id.* at *2. The *BidPrime* court found it significant that the defendant knew that the plaintiff was a Texas company. *See id.* Even though the plaintiff’s servers were in Oregon and the defendant was scraping data from the servers by using a computer in Florida, the *BidPrime* court determined that it could properly exercise specific jurisdiction because the defendant’s alleged conduct constituted purposeful action directed at a company that he knew was based in Texas. *See id.* at *3. The court concluded that this alleged conduct did not constitute random, fortuitous, or attenuated contacts with Texas, and that it

involved “repeated intentional actions to harvest data from a Texas company.” *Id.* The *BidPrime* court held that “[a] defendant who repeatedly and purposefully obtains unauthorized access to servers he knows belong to a Texas company can reasonably anticipate being haled into court in Texas.” *Id.* We find the *BidPrime* case to be persuasive and adopt its reasoning. *See id.* at *1–3; *see also Southwest Airlines Company v. Kiwi.com, Inc.*, 2021 WL 4552146, at *3 (N.D. Tex. Aug. 10, 2021) (following the reasoning in *BidPrime* and concluding that court properly could exercise personal jurisdiction over defendant who allegedly violated the terms and conditions for the use of the plaintiff’s website by scraping data from the website).

Even presuming that Echovita’s agents and employees are in Quebec when they are engaging in the allegedly actionable conduct and regardless of the location of the SCI Parties’ web servers or Echovita’s knowledge of the location of the web servers, Echovita allegedly has continuously and knowingly scraped, copied, reproduced, and misappropriated the SCI Parties’ data, knowing that the SCI Parties are Texas companies, and used that data to post allegedly unauthorized obituaries of deceased Texas residents on Echovita’s website, where Echovita offers products and services to people seeking to honor or remember deceased Texas residents. Under the applicable standard of review, we conclude that the evidence is legally insufficient to support the trial court’s implied findings that (1) Echovita negated specific jurisdiction by showing that the SCI Parties’ claims do not arise from, relate to, and have a substantial connection with Echovita’s purposeful contacts with Texas; and (2) Echovita’s Texas contacts are insufficient for the trial court to exercise personal jurisdiction over Echovita based on specific jurisdiction. *See Southwest Airlines Company*, 2021 WL 4552146, at *3; *BidPrime, LLC*, 2018 WL 5260050, at *1–3; *Fintech Fund, FLP v. Horne*, 327 F. Supp. 3d

1007, 1019–21 (S.D. Tex. 2018), *aff'd* 836 Fed. Appx. 215 (5th Cir 2020); *Redding, Linden, Burr, Inc. v. King*, No. H–072925, 2008 WL 11395507, at *2 (S.D. Tex. Jul. 1, 2008); *ERC Midstream LLC*, 497 S.W.3d at 108–09; *CMC Steel Fabricators, Inc.*, 2014 WL 953351, at *8–9; *In re W.J.S.*, 35 S.W.3d at 276–77. Therefore, the trial court erred in granting Echovita’s special appearance, and we sustain the SCI Parties’ second issue.

III. CONCLUSION

Under their unambiguous language, the Terms of Service do not expressly state that the Company has no power to make unilateral amendments to the Terms of Service that apply retroactively to events that occurred before the amendment, and the Company has this power. Therefore, the trial court did not err in impliedly determining that the Forum Selection Clause is illusory. The evidence is legally insufficient to support the trial court’s implied findings that (1) Echovita negated specific jurisdiction by showing that the SCI Parties’ claims do not arise from, relate to, and have a substantial connection with Echovita’s purposeful contacts with Texas; and (2) Echovita’s Texas contacts are insufficient for the trial court to exercise personal jurisdiction over Echovita based on specific jurisdiction. Thus, the trial court erred in granting Echovita’s special appearance. We reverse the trial court’s judgment and remand for further proceedings.

/s/ Randy Wilson
Justice

Panel consists of Justices Spain, Poissant, and Wilson (Spain, J., concurring).