REVERSE and REMAND; Opinion Filed July 21, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00736-CV

SHOPSTYLE, INC. AND POPSUGAR, INC., Appellants
V.
REWARDSTYLE, INC., Appellee

On Appeal from the 95th District Court
Dallas County, Texas
Trial Court Cause No. DC-18-08570

MEMORANDUM OPINION

Before Justices Myers, Whitehill, and Reichek
Opinion by Justice Myers

This is an interlocutory appeal from the denial of special appearances filed by appellants ShopStyle, Inc. (ShopStyle) and PopSugar, Inc. (PopSugar). ShopStyle brings two issues, arguing (1) the claims of appellee rewardStyle, Inc. (rewardStyle)[1] did not arise out of or relate to any affirmative acts by ShopStyle directed at Texas; and (2) ShopStyle did not purposefully avail itself of the privilege of conducting activities in Texas. PopSugar also brings two issues: (1) There was no purposeful availment and rewardStyle's claims did not arise out of or relate to PopSugar's

[1] We follow the spelling of the parties' names as they appear in the verified petition.

purported contacts with Texas; and (2) PopSugar did not consent to personal jurisdiction in Texas. We reverse and remand.

BACKGROUND AND PROCEDURAL HISTORY

Appellee rewardStyle, founded in 2011 by Amber Venz Box and her husband Baxter Box, is a company incorporated under the laws of the state of Delaware, with its principal place of business in Dallas, Texas. rewardStyle has an internet website called LIKEtoKNOW.it[2] that enables digital lifestyle "influencers" to monetize their social media content by allowing consumers to shop for items featured in online posts.

Appellant PopSugar, Inc. is a lifestyle brand and technology company founded in 2006 by Bryan Sugar, primarily known for its lifestyle website popsugar.com.[3] PopSugar is incorporated in Delaware and its principal place of business is in San Francisco, California. It does not maintain an office or any other place of business in Texas, although it employs one project manager who lives in Texas.[4]

In 2007, PopSugar launched appellant ShopStyle, Inc. as a digital shopping platform. ShopStyle operates a website, shopstyle.com,[5] where people can browse

[2] https://www.liketoknowit.com

[3] https://www.popsugar.com

[4] She initially worked in PopSugar's San Francisco office and moved to Texas for personal reasons. She was permitted to work remotely.

[5] https://www.shopstyle.com

products and connect to the websites of various affiliated retailers. On or about February 21, 2017, PopSugar sold ShopStyle to Ebates Inc., a subsidiary of Rakuten Inc. At the time of this acquisition, ShopStyle and PopSugar entered, according to ShopStyle, into "an exclusive content commerce agreement with PopSugar to develop creative and engaging content to generate sales for our retail partners."

ShopStyle is incorporated in Delaware and headquartered in California. ShopStyle has no subsidiaries in Texas and no office locations or real property here. It does not ship or sell merchandise to any physical locations in Texas, nor does it own or operate servers here. It has run no advertising campaigns in Texas, and it has never specifically targeted Texas for marketing.

PopSugar and ShopStyle operate websites that compete with rewardStyle. Each of these three companies, through their respective websites, provides a platform that enables consumers to purchase items featured in social media posts from links to the websites of affiliated retailers, with the affiliated retailer paying a commission to the referring company for such purchases.

According to rewardStyle's verified petition, LIKEtoKNOW.it works by connecting fashion and lifestyle influencers with retail partners. Influencers can use the LIKEtoKNOW.it app or website to upload a picture and "tag" particular products in a picture that are "shoppable." A viewer of the influencer's post can click through a link to the websites of rewardStyle's affiliated retailers to view and purchase those products. The LIKEtoKNOW.it app or website generates a trackable referral link

for each of the tagged items. LIKEtoKNOW.it's affiliated retailers pay LIKEtoKNOW.it a commission for every referred and completed sale, a percentage of which is earned by the influencer who referred the sale.

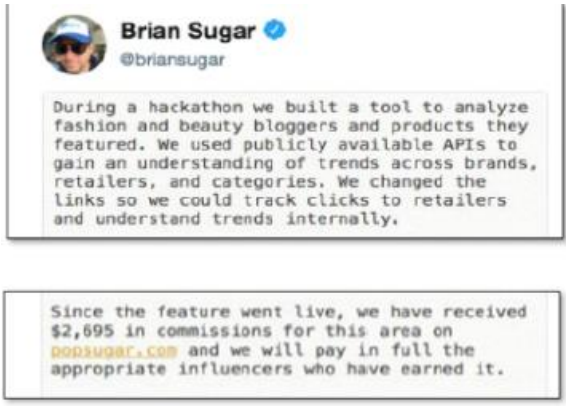
rewardStyle's petition alleges that in or around April of 2018, it was notified by some of its influencers that PopSugar and ShopStyle were using LIKEtoKNOW.it content without the consent of either rewardStyle or its influencers. rewardStyle further alleges that PopSugar misappropriated this data from the LIKEtoKNOW.it website through a process known as data "scraping," which involves creating an account with LIKEtoKNOW.it, logging in to the website, and using a customized software program to copy, in bulk, content on the website that is accessible to LIKEtoKNOW.it users. In addition to infringing the proprietary rights of influencers and LIKEtoKNOW.it, rewardStyle alleges these actions violated LIKEtoKNOW.it's terms of use, which prohibited the copying or scraping of data.

rewardStyle claims that, after misappropriating this content from the LIKEtoKNOW.it website, it "appears" "PopSugar or ShopStyle" superimposed a new icon in the field that would normally contain the LIKEtoKNOW.it icon and replaced the original rewardStyle/LIKEtoKNOW.it link with a ShopStyle link. The result, according to rewardStyle, was that a consumer viewing the misappropriated content would have the same ability to click a link and purchase shoppable products as if he or she was viewing the content on the liketoknowit.com web page. However, instead of the commission for any referrals being paid to the influencers and

rewardStyle, the commission would be paid to "PopSugar and ShopStyle."

Furthermore, according to rewardStyle, PopSugar created "unauthorized profile URL webpages" (i.e., "vanity pages") on PopSugar's website for each rewardStyle influencer from whom it misappropriated content, with collections of content from each of these influencers. These vanity pages, created without the knowledge or consent of the influencers or rewardStyle, were (according again to rewardStyle's petition) used by PopSugar in an attempt to drive traffic to its website, popsugar.com, and increase revenue opportunities for PopSugar and ShopStyle at the expense of the influencers and rewardStyle.

rewardStyle also alleges that PopSugar's founder, Brian Sugar, stated in a tweet that it held a "hackathon" to copy and repurpose rewardStyle content without authorization. The tweet, as originally sent out on April 17, 2018, reads as follows:



In April 2018, the same month rewardStyle alleges it was notified by some of its influencers of misuse of their content, ShopStyle terminated PopSugar's access to its services. ShopStyle released a statement claiming "PopSugar acted alone, and we do not condone their actions in any way." ShopStyle also explained that "[w]hen

PopSugar used influencers' content without their consent, PopSugar not only violated the trust of our influencer community, but also violated terms of its agreements with Ebates and ShopStyle."

On June 29, 2018, rewardStyle filed a verified petition under Texas Rule of Civil Procedure 202 against PopSugar and ShopStyle, seeking to take the depositions of their corporate representatives in order to investigate rewardStyle's legal claims and "perpetuate testimony for an anticipated suit." rewardStyle further requested that PopSugar and ShopStyle:

> [B]e ordered, at their respective depositions to produce for inspection and copying copies of all data and programs utilized in copying, altering, and utilizing content originating from LIKEtoKNOW.it, copies of all content copied during the 'hackathon' or as a result of those efforts as referenced in Brian Sugar's April 17, 2018 tweet, and all correspondence regarding the copying, altering, or utilizing of content originating from LIKEtoKNOW.it.

The petition alleged that ShopStyle and PopSugar were within the jurisdiction of the court because they both operated "fully interactive" websites for transacting business with Texas consumers; improperly accessed and "scraped" content from Dallas-based rewardStyle; and took actions to misappropriate, monetize, and display content from influencers located in Texas. It also claimed the court has jurisdiction over PopSugar for the independent reason that PopSugar, by and through its agents, agreed to (and breached) rewardStyle's "End User License Agreement and Terms of Service Agreement," which included the following choice of law and forum selection provision:

> The laws of the state of Texas, without application of conflict of law provisions, will apply to any disputes arising out of or relating to this Agreement or the Services. All claims arising out of or relating to this Agreement or the Services will be litigated exclusively in the federal or state courts of Dallas County, Texas. The Agreement is fully performable in Dallas County, Texas. The parties consent to personal jurisdiction in Dallas County, Texas and hereby waive any challenge to venue and personal jurisdiction they may have to a lawsuit filed in a state or federal court in Dallas County, Texas.

ShopStyle and PopSugar both filed special appearances objecting to the exercise of personal jurisdiction over them as well as conditional responses to the rule 202 petition. An associate judge signed separate orders granting ShopStyle's special appearance and denying and dismissing rewardStyle's petition as to PopSugar.

rewardStyle requested a de novo rehearing, which was held on April 26, 2019. On May 31, 2019, the trial court signed an order denying ShopStyle's and PopSugar's special appearances and granting rewardStyle's rule 202 petition, ordering depositions and the production of documents. On that same day, the trial court signed findings of fact and conclusions of law.

The trial court adopted rewardStyle's proposed findings of fact and conclusions of law, concluding PopSugar and ShopStyle have minimum contacts with the State of Texas because they both maintain "interactive websites" to solicit and fulfill commercial transactions involving both Texas consumers and retailers. The court found that PopSugar and ShopStyle directly and voluntarily engage with Texas retailers and make their services available in Texas. The court also found that

rewardStyle pleaded a separate ground for jurisdiction over PopSugar based on PopSugar, through the conduct of its agents, having agreed to and breached rewardStyle's terms of service, which include the forum selection provision quoted above. The court further found PopSugar and ShopStyle had not shown the exercise of personal jurisdiction over them would offend notions of fair play and substantial justice; therefore, the exercise of personal jurisdiction was fair and reasonable.

ShopStyle and PopSugar timely filed interlocutory notices of appeal. Along with their opening briefs, ShopStyle and PopSugar also filed related petitions for writ of mandamus raising various non-jurisdictional challenges to the rule 202 petition. On September 18, 2019, we issued orders consolidating these petitions into the instant cause number.

STANDARD OF REVIEW

Whether a court has personal jurisdiction over a nonresident defendant is a question of law we review de novo. *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150 (Tex. 2013) (citing *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007)). We therefore review a trial court's determination of a special appearance de novo. *Moki Mac*, 221 S.W.3d at 574. If, as in this case, the trial court issues findings of fact and conclusions of law, the appellant may challenge the fact findings on legal and factual sufficiency grounds, and we review the fact findings for both legal and factual sufficiency. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002).

PERSONAL JURISDICTION

Texas courts may exercise personal jurisdiction over a nonresident defendant "when the state's long-arm statute authorizes such jurisdiction and its exercise comports with due process." *Cornerstone Healthcare Grp. Holding, Inc. v. Nautic Mgmt. VI, L.P.*, 493 S.W.3d 65, 70 (Tex. 2016). The Texas long-arm statute provides in relevant part that "[i]n addition to other acts that may constitute doing business," a nonresident does business in Texas if the nonresident 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, or if the nonresident commits a tort in whole or in part in this state. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042(1), (2). The statute "provides for personal jurisdiction that extends to the limits of the United States Constitution, and so federal due process requirements shape the contours of Texas courts' jurisdictional reach." *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 66 (Tex. 2016).

"[W]hether a trial court's exercise of jurisdiction is consistent with due process requirements turns on two requirements: (1) the defendant must have established minimum contacts with the forum state; and (2) the assertion of jurisdiction cannot offend traditional notions of fair play and substantial justice." *Id.* (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). "[S]ufficient minimum contacts exist when the nonresident defendant 'purposefully avails itself of the privilege of conducting activities within the forum [s]tate, thus invoking the benefits and protections of its laws.'" *Id.* at 66–67 (quoting *Hanson v. Denckla*, 357

U.S. 235, 253 (1958)). "The nub of the purposeful availment analysis is whether a nonresident defendant's conduct in and connection with Texas are such that it could reasonably anticipate being haled into court here." *Id.* at 67. The defendant must purposefully direct contacts into the forum state. *Id.* (citing *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 228 (Tex. 1991)).

When determining whether a nonresident purposefully availed itself of the privilege of conducting activities in Texas, we consider three factors: (1) only the defendant's contacts with the forum are relevant, not the unilateral activity of another party or third person; (2) the contacts relied upon must be purposeful rather than random, isolated, or fortuitous; and (3) the defendant must seek some benefit, advantage, or profit by availing itself of the jurisdiction. *Cornerstone*, 493 S.W.3d at 70–71. This analysis assesses the quality and nature of the contacts, not the quantity. *Moncrief Oil*, 414 S.W.3d at 151. A defendant will not be haled into a jurisdiction based solely on contacts that are random, isolated, or fortuitous, or on the unilateral activity of another party or a third person. *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 785 (Tex. 2005); *Guardian Royal Exch.*, 815 S.W.2d at 226.

In addition to minimum contacts, due process requires the exercise of personal jurisdiction to comply with traditional notions of fair play and substantial justice. *Moncrief Oil*, 414 S.W.3d at 154 (citing *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 338 (Tex. 2009)). The evaluation is undertaken in

light of these factors, when appropriate:

> (1) the burden on the defendant; (2) the interests of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate or international judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several nations or states in furthering fundamental substantive social policies.

Spir Star AG v. Kimich, 310 S.W.3d 868, 878 (Tex. 2010).

The plaintiff bears the initial burden of pleading allegations that suffice to permit a court's exercise of personal jurisdiction over the nonresident defendant. *Searcy*, 496 S.W.3d at 66. Once the plaintiff has met this burden, the defendant then assumes the burden of negating all potential bases for personal jurisdiction that exist in the plaintiff's pleadings. *Id*. The defendant can negate jurisdiction on either a factual or legal basis. *Kelly v. Gen. Interior Constr., Inc*., 301 S.W.3d 653, 659 (Tex. 2010). A defendant negates jurisdiction on a factual basis by presenting evidence to disprove the plaintiff's jurisdictional allegations. *Id.* "The plaintiff can then respond with its own evidence that affirms its allegations, and it risks dismissal of its lawsuit if it cannot present the trial court with evidence establishing personal jurisdiction." *Id*. (footnotes omitted). A defendant negates jurisdiction on a legal basis by showing:

> [E]ven if the plaintiff's alleged facts are true, the evidence is legally insufficient to establish jurisdiction; the defendant's contacts with Texas fall short of purposeful availment; for specific jurisdiction, that the claims do not arise from the contacts; or that traditional notions of fair play and substantial justice are offended by the exercise of jurisdiction.

Id.

"Minimum contacts with a forum state give rise to either general or specific jurisdiction." *Vinmar Overseas Sing. PTE Ltd. v. PTT Int'l Trading PTE Ltd*., 538 S.W.3d 126, 131 (Tex. App.—Houston [14th Dist.] 2017, pet. denied); *see also KC Smash 01, LLC v. Gerdes, Hendrichson, Ltd., L.L.P.*, 384 S.W.3d 389, 392 (Tex. App.—Dallas 2012, no pet.). The trial court in this case did not find, and rewardStyle does not argue, general jurisdiction is available over ShopStyle or PopSugar. Our inquiry is therefore limited to specific jurisdiction, which is based on "whether the defendant's activities in the forum state themselves 'give rise to the liabilities sued on.'" *Searcy*, 496 S.W.3d at 67 (quoting *Int'l Shoe*, 326 U.S. at 317). Specific jurisdiction exists when the plaintiff's claims "arise out of" or are "related to" the defendant's contacts with the forum. *Id*. (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 8, 9 (1984)). "In sum, specific personal jurisdiction over a nonresident defendant requires the defendant's purposeful availment of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. It also requires a 'substantial connection' between those activities and the operative facts of the litigation." *M & F Worldwide Corp. v. Pepsi-Cola Metro. Bottling Co., Inc*., 512 S.W. 878, 890 (Tex. 2017) (citation omitted). "[T]he *defendant's* relationship, not the *plaintiff's* relationship, with the forum state is the proper focus of the specific jurisdiction analysis; that is, courts must consider the relationship between the defendant, the

forum state, and the litigation." *Searcy*, 496 S.W.3d at 67.

"'The operative facts are those on which the trial will focus to prove the liability of the defendant who is challenging jurisdiction.'" *Leonard v. Salinas Concrete*, LP, 470 S.W.3d 178, 188 (Tex. App.—Dallas 2015, no pet.) (quoting *Kaye/Bassman Int'l Corp. v. Dhanuka*, 418 S.W.3d 352, 357 (Tex. App.—Dallas 2013, no pet.)). "[S]pecific jurisdiction requires us to analyze the jurisdictional contacts on a claim-by-claim basis." *Moncrief Oil*, 414 S.W.3d at 150.

RULE 202

Rule 202 of the Texas Rules of Civil Procedure allows a court to authorize a deposition "to investigate a potential claim or suit." TEX. R. CIV. P. 202.1(b). Rule 202 "does not broadly authorize investigation of any action the petitioner may have based on future events." *In re DePinho*, 505 S.W.3d 621, 624 (Tex. 2016) (orig. proceeding). To authorize the deposition, the court must have subject matter jurisdiction over the anticipated action and personal jurisdiction over the potential defendants. *In re Doe*, 444 S.W.3d 603, 608 (Tex. 2014) (orig. proceeding). It was rewardStyle's initial burden to show jurisdiction in order to secure pre-suit depositions. *See id.* at 610 ("The burden is on the plaintiff in an action to plead allegations showing personal jurisdiction over the defendant. The same burden should be on a potential plaintiff under Rule 202.") (footnote omitted).

DISCUSSION

A. PopSugar

1. Purposeful Availment

PopSugar's first issue argues the trial court erred in determining (1) it purposefully availed itself of conducting activities within Texas, thus invoking the benefits and protections of our laws; and (2) that rewardStyle's claims arise out of or relate to PopSugar's purported contacts with Texas.

In answering the question of whether PopSugar purposefully availed itself of conducting activities in Texas, the trial court's findings—like rewardStyle's response to the special appearances and its appellate brief—rely heavily on the First Circuit's decision in *Plixer International, Inc. v. Scrutinizer GMBH*, 905 F.3d 1, 9 (1st Cir. 2018).[6] We believe this reliance is misplaced. In *Plixer*, the court upheld the exercise of specific jurisdiction over a foreign corporation in the United States when the corporation used its interactive website to sell its services to customers in the U.S. and the corporation was aware it had derived substantial revenue from those sales over the course of several years. *Id*. at 9–10. The First Circuit found the German defendant in *Plixer* demonstrated purposeful availment not just by voluntarily serving and affirmatively contracting with U.S. users of its English-language website, but also (unlike anything that occurred here) by applying for

[6] *Plixer* offers no guidance on the "arises out of or relates to" part of the analysis because the defendant in that case conceded the relatedness requirement. *See id.* at 7.

trademark protection in the U.S. *See id*. at 10–11. The case, therefore, involved the exercise of personal jurisdiction over a foreign entity in an American forum, not out-of-state entities (PopSugar and ShopStyle) that could already be sued in an American forum (California). In fact, Plixer claimed the district court had specific jurisdiction over the German defendant based on its business in Maine, and the district court concluded the defendant's state-based Maine contacts, by themselves, were insufficient to support jurisdiction—a finding Plixer did not challenge on appeal. *Id*. at 5 n.4.

In this case, the trial court found PopSugar's website "can be accessed by consumers, including Texas consumers," and that PopSugar "earns a commission for purchases made by consumers, including Texas consumers." But the PopSugar website involves the use of hyperlinks that take viewers to the websites of third-party affiliated retailers where a consumer can purchase the linked products. There are no allegations or evidence regarding the number of PopSugar's customers in Texas, the volume of its sales to those customers, or the amount of revenue, if any, PopSugar earns from Texas-based residents. Similarly, ShopStyle's consumer website is a platform from which a consumer anywhere in the U.S. can access hyperlinks to the websites of third-party retailers. There is no evidence ShopStyle requires a contract for consumers to browse its consumer website or explore links that direct consumers to other retailers' websites, nor that it has a contract with a third-party involving the transfer of software files for analysis and feedback, as in

Plixer. *See id*. at 4, 9–10. As *Plixer* acknowledges, a "baseline principle" is that "a website operator does not necessarily purposefully avail itself of the benefits and protections of every state in which its website is accessible." *Id*. at 8. It should also be noted that, in addition to *Plixer* having involved altogether different facts, the First Circuit emphasized its ruling was based on the "particular facts of the case," and that because this was an area in which the Supreme Court had not yet given "clear guidance," the court wanted to "deliberately avoid creating any broad rules." *See id*. at 4. Thus, the case is not persuasive authority.[7] *See Comcast Cable of Plano, Inc. v. City of Plano*, 315 S.W.3d 673, 680 (Tex. App.—Dallas 2010, no pet.) (decisions from lower federal courts are persuasive authority but are not binding on us).

rewardStyle also relies on the "sliding scale" test enunciated in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc*., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), which looks to the level of interactivity of a website to determine whether it supports the exercise of jurisdiction. In *Zippo*, the district court held that "the likelihood that personal jurisdiction can be constitutionally exercised is directly

[7] Additionally, we have (as of this writing) found no decisions from Texas state courts relying on or otherwise endorsing, or even citing, the analysis in *Plixer* to find specific jurisdiction over an out-of-state defendant in circumstances like these, although the case has been cited by federal district courts in Texas. *See Slyce Acquisition Inc. v. Syte–Visual Conception Ltd*., 422 F.Supp.3d 1191, 1201 (W.D. Tex. 2019) (involving personal jurisdiction over an out-of-state defendant that sold its software to a third party, who bundled the software into an app and sold it in the U.S.; court cited *Plixer* in noting federal courts continue to analyze personal jurisdiction under a "stream-of-commerce" theory); *Semcon IP Inc. v. TCT Mobile Int'l Ltd*., No. 2:18-CV-00194-JRG, 2019 WL 2774362, at *3 (E.D. Tex. July 2, 2019) (involving a smartphone manufacturer and mentioning *Plixer* in passing with regard to "the stream of commerce theory").

proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." *Id.* At one end of *Zippo*'s sliding scale are passive websites where the nonresident defendant simply posts information on the website that can be viewed in other jurisdictions—these websites do not support personal jurisdiction. *Id.* On the other end of the scale are cases where the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transfer of computer files over the internet—personal jurisdiction is proper in these cases because the defendant "clearly does business over the internet." *Id.* In the middle are cases involving interactive websites that allow an exchange of information with the host computer, and in these cases jurisdiction is determined by "examining the level of interactivity and the commercial nature of the exchange of information that occurs." *Id.*

rewardStyle points out that some Texas courts, including this one, have used *Zippo*'s approach for determining whether internet activity permits personal jurisdiction. *See Karstetter v. Voss*, 184 S.W.3d 396, 404 (Tex. App.—Dallas 2006, no pet.) (applying *Zippo*'s analysis to determine jurisdiction and explaining that "[i]nternet use falls into three categories on a sliding scale for purposes of establishing personal jurisdiction"); *see also Epicous Adventure Travel, LLC v. Tateossian, Inc.*, 573 S.W.3d 375, 387 (Tex. App.—El Paso 2019, no pet.); *Washington DC Party Shuttle, LLC v. IGuide Tours*, 406 S.W.3d 723, 737 (Tex. App.—Houston [14th Dist.] 2013, pet. denied); *Knight Corp. v. Knight*, 367 S.W.3d

715, 728 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Wilkerson v. RSL Funding, L.L.C.*, 388 S.W.3d 668, 676 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *Choice Auto Brokers, Inc. v. Dawson*, 274 S.W.3d 172, 178 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Skylift, Inc. v. Nash*, No. 09-19-00389-CV, 2020 WL 1879655, at *6 (Tex. App.—Beaumont Apr. 16, 2020, no pet.) (mem. op.); *Munz v. Schreiber*, No. 14-17-00687-CV, 2019 WL 1768590, at *8 (Tex. App.—Houston [14th Dist.] Apr. 23, 2019, no pet.) (mem. op.).

Even so, however, other Texas courts have distanced themselves from a *Zippo*-style sliding scale analysis, with one court emphasizing that "there needs to be more than the existence of a website (whether interactive or not) to support an inference that the forum was targeted by the website owner or that the latter directed its marketing efforts at the forum." *Retire Happy, L.L.C. v. Tanner*, No. 07-16-00134-CV, 2017 WL 393984, at *5 (Tex. App.—Amarillo Jan. 27, 2017, no pet.) (mem. op.) (citing *Moki Mac*, 221 S.W.3d at 576); *see also Anderson v. Safeway Tom Thumb*, No. 02-18-00113-CV, 2019 WL 2223582, at **8–9 (Tex. App.—Fort Worth May 23, 2019, no pet.) (mem. op.) (quoting *Retire Happy*, 2017 WL 393984, at *5); *SprayFoamPolymers.com, LLC v. Luciano*, No. 03-16-00382-CV, 2018 WL 1220891 at *5 n.7 (Tex. App.—Austin Mar. 9, 2018, pet. denied) (mem. op.) (opining that Supreme Court disapproved of *Zippo*'s "sliding scale" approach to specific jurisdiction in *Bristol-Myers Squibb Co. v. Sup. Ct. of Cal.*, 137 S. Ct. 1773

(2017)).[8] As the court in *Retire Happy* explained, evidence of a website, regardless of whether it is interactive, just illustrates "the potential for activity from the forum in question and the website owner's knowledge of that potentiality." *Retire Happy*, 2017 WL 393984, at *5. "It does not illustrate," the court added, "actual use or its extent." *Id*. (concluding that "the additional evidence or conduct is missing here.").

rewardStyle maintains that PopSugar's and ShopStyle's "interactive websites fit comfortably at the end of the *Zippo* spectrum where purposeful availment is found." We need not settle the issue of *Zippo*'s continued viability to resolve this argument. Even if we assume *Zippo*'s (or a *Zippo*-style) sliding scale analysis is appropriate in a case such as this, neither *Zippo* nor any Texas court of which we are aware follows a per se approach to internet-based minimum contacts. As the Fifth Circuit observed:

> Although interactivity along the *Zippo* sliding scale can be an important factor in an internet-based personal jurisdiction analysis because it can provide evidence of purposeful conduct . . . internet-based jurisdictional claims must continue to be evaluated on a case-by-case basis, focusing on the nature and quality of online and offline contacts to demonstrate the requisite purposeful conduct that establishes personal jurisdiction.

Pervasive Softwar, Inc. v. Lexware GmbH & Co. KG, 688 F.3d 214, 227 n.7 (5th

[8] In *Bristol-Myers*, the Court disapproved of the California Supreme Court's sliding-scale approach to personal jurisdiction, under which "the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts unrelated to those claims." *See id*. at 1781. The Court stated that "[o]ur cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction." *Id*. The Court added that "[f]or specific jurisdiction, a defendant's general connections with the forum are not enough," and that a corporation's continuous activity of some sort within the state "is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." *Id*. (internal quotations omitted).

Cir. 2012) (internal citations omitted).

Measured under this standard, rewardStyle fails to establish purposeful availment. To support jurisdiction over PopSugar, rewardStyle's petition alleges it operates a "fully interactive" website "for transacting business with Texas consumers." rewardStyle also accuses PopSugar of "t[aking] actions" to "misappropriate, monetize and display content from influencers located in Texas," and that PopSugar agreed to and breached rewardStyle's terms of service agreement. In addition, and as rewardStyle points out in its brief, the trial court's findings state that PopSugar "operates an interactive website for transacting business with consumers, including Texas consumers," and that PopSugar "specifically targets its website at Texas consumers . . . at the page www.popsugar.com/Texas." The trial court also found PopSugar "contracts directly with Texas retailers to monetize its social media posts," and that PopSugar's "website features products from and promotes its connections with Texas retailers, including Neiman Marcus, JCPenney, and Fossil." The court further noted PopSugar is "registered to transact business in the State of Texas."

rewardStyle argues PopSugar operates a "fully interactive" website based in part on PopSugar's "Shop" function on its website that directs consumers to the websites of PopSugar's affiliated retailers for the purchase of linked products. rewardStyle describes PopSugar's "hyperlinks that take the viewer to the websites of [PopSugar's] affiliate[d] retailers, from which the consumer can purchase the

product in question." Like ShopStyle, which has a similar arrangement, PopSugar earns commissions from such purchases. PopSugar, however, makes no direct sales through its Shop feature, which is available to residents of every state, and rewardStyle cannot rely on it to establish minimum contacts. Indeed, when using the Shop feature, the user cannot purchase products on the PopSugar website but instead follows links to the websites of affiliated third-party retailers. In other words, the "user cannot consummate a commercial transaction online without accessing and logging-into a third-party website." *See M3GIRL Designs LLC v. Purple Mountain Sweaters*, No. 3:09-CV-2334-G, 2010 WL 3699983, at *6 (N.D. Tex. Sept. 13, 2010) (defendant's website "not a 'virtual store' through which defendants market and sell their good"; users had to access third-party website PayPal to complete a purchase); *see also Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336–37 (5th Cir 1999) ("Essentially, [defendant] maintains a website that posts information about its products and services. While the website provides users with a printable mail-in order form, [defendant]'s toll-free telephone number, a mailing address and an electronic mail ('e-mail') address, orders are not taken through [defendant]'s website.").

Regarding the trial court's finding that PopSugar "contracts directly with Texas retailers to monetize its social media posts," and that its website "features products from and promotes its connections with Texas retailers, including Neiman Marcus, JCPenney, and Fossil," rewardStyle offered "screenshots" of the PopSugar

website—supported by a declaration from its attorney—featuring products from JCPenney, Neiman Marcus, and Fossil. There is, however, no evidence in the record of any contracts between PopSugar and these retailers, and rewardStyle does not explain how the contracts required PopSugar to conduct activities in Texas. Viewed in the context of rewardStyle's allegations, they appear far more attenuated than purposeful. Moreover, "contracting with a Texas resident is by itself insufficient to subject a nonresident defendant to jurisdiction in Texas." *The Experimental Aircraft Ass'n, Inc. v. Doctor*, 76 S.W.3d 496, 508 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *see also Info. Servs. Grp., Inc. v. Rawlinson*, 302 S.W.3d 392, 399–408 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) ("Merely contracting with a Texas company does not constitute purposeful availment for jurisdictional purposes."); *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 481 F.3d 309, 312 (5th Cir. 2007) ("[A] plaintiff's unilateral activities in Texas do not constitute minimum contacts where the defendant did not perform any of its obligations in Texas, the contract did not require performance in Texas, and the contract is centered outside of Texas.").

As for the www.popsugar.com/Texas webpage, rewardStyle argues "PopSugar uses its website to *attract* Texas residents by maintaining a Texas-specific web page with Texas-specific articles." There is, however, no evidence of which we are aware regarding PopSugar's usage of the Texas web page—the existence of which the trial court judicially noticed—to *attract* Texas residents.

PopSugar responds that its Texas web page is automatically generated based on the "tag" a user selects in a search, and that users can generate any URLs (uniform resource locators) they like. PopSugar does not cite record evidence to support its assertion the Texas URLs are user generated. But in any event, the mere existence of a website at the Texas web address does not alone show PopSugar availed itself of the benefits and protections of Texas law. rewardStyle compares PopSugar's website with that of the defendant in *Plixer*, but there was evidence in that case of "sizeable and continuing commerce" within the forum—a factor that is not present here. *See Plixer*, 905 F.3d at 8.

Establishing minimum contacts with Texas requires contacts that are more than random, fortuitous, or attenuated, or that resulted from the unilateral activity of another party or a third person. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985); *Michiana*, 168 S.W.3d at 785. Basing personal jurisdiction on the ownership or maintenance of a website alone, even one accessible in the forum state, without requiring some form of interaction between the website owner and consumers in the forum state, would create universal jurisdiction over any person or company that maintains a website—a view most courts reject. *See, e.g.*, *Washington DC Party Shuttle*, 406 S.W.3d at 737; *see also Jennings v. AC Hydraulic A/S*, 383 F.3d 546, 550 (7th Cir. 2004) (nonresident defendant's maintenance of passive website, by itself, does not supply minimum contacts in particular forum just because website is accessible there). As explained by a treatise on trademarks and unfair

competition:

> The vast majority of courts reject the universal jurisdiction view and require evidence that the party using the Web site engaged in purposeful activity aimed at the forum state: 'Creating a site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state.'

6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:45.50 ("Personal jurisdiction through Internet usage") (5th ed. 2020) (quoting *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 301 (S.D. N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997)).

Other courts have found even websites that allowed consumers to make purchases directly from the defendant were insufficient to support specific jurisdiction where, as in this case, there is no additional evidence of purposeful availment. In *Washington DC Party Shuttle*, for example, the court noted there were no allegations the defendant had made a single sale to a person in Texas or that it targeted the Texas market. 406 S.W.3d at 737. The court rejected the argument that the fact "potential customers anywhere could purchase a tour ticket through [defendant's] website" meant "jurisdiction is proper everywhere—including Texas," stating that the plaintiffs cited no authority that supported such a view and it "does not accurately reflect the law applied by this court." *Id*. In *Retire Happy*, the nonresident defendant had "little physical or business presence in Texas" aside from twenty-two clients who resided in Texas "at one time or another," and these twenty-

two comprised a mere 3.6% of the company's entire clientele of 600. 2017 WL 393984, at *4. That the company also had a website visible on "the worldwide web" was insufficient, in the court's view, to support specific jurisdiction because additional evidence or conduct was lacking in that case. *Id.* at *5. In *M3GIRL Designs LLC*, there was evidence of one sale to a Texas resident by the defendants, and their website allowed users to place orders online and submit questions and comments directly to the defendants through a "contact us" feature. 2010 WL 3699983, at *6–7. The district court found the defendants' attenuated contact with Texas neither sufficient nor substantial enough for the exercise of personal jurisdiction. *Id.* at *7.[9]

The Experimental Aircraft Association, Inc. v. Doctor, 76 S.W.3d at 502, which is cited in rewardStyle's brief and the trial court's findings, involved a suit by a pilot injured during a collision at an airshow (and his wife) against another pilot and the nonresident aircraft association that sponsored the show. The aircraft association operated an "interactive website" that included an "online shop" that sold products directly to consumers and involved the solicitation of paid members who could access a "members-only" section of the website. *Id.* at 505. However, the court analyzed the sufficiency of the defendant's contacts to determine whether *general jurisdiction* was present. *Id.* at 505–08. The court quickly sustained the

[9] In reaching this conclusion, as we stated before, the court noted that sales were consummated through the third-party service PayPal rather than the defendant's website. *Id.* at *1.

defendant's argument that there was no specific jurisdiction, pointing to the absence of an employment contract involving the defendant pilot and that the accident occurred outside Texas. *Id*. at 504–05. The website's interactivity was one of several factors (Texas memberships; marketing to Texas; and contracts with Texas residents) that, taken together, supported general jurisdiction. *Id*. at 505–08. The court did not hold the website alone would be a sufficient basis to support jurisdiction, either general or specific, *see id*., and such a holding would be equally untenable in this case given rewardStyle's failure to demonstrate (as shown below) a substantial connection between its claims and the defendants' contacts with Texas.

Two cases from this Court that are cited in rewardStyle's brief are no more helpful to its argument. In *Karstetter v. Voss*, we were asked to enforce a judgment from a Kansas court and found no specific jurisdiction in Kansas over Texas defendants who used the third-party internet auction site eBay to sell a truck to a Kansas resident. 184 S.W.3d at 404–05. We noted the case would fall into the middle category on *Zippo*'s sliding scale given eBay's level of interactivity, but we looked "beyond the internet activity to the degree of interaction between the parties," finding "the interaction between the parties was minimal" and the defendants did not have sufficient minimum contacts with Kansas to permit the exercise of personal jurisdiction over them. *Id*. at 405. In *Mayo Clinic v. Jackson*, another case from this Court, the issue, as in *Experimental Aircraft*, was the sufficiency of the defendant's contacts for the exercise of general jurisdiction. No. 05-98-00225-CV,

1998 WL 699385, at *3 (Tex. App.—Dallas Oct. 9, 1998, no pet.) (not designated for publication). We did not address the interactivity of the defendant's website, but rather the defendant's use of its website as advertising, and we concluded the defendant's advertising to Texans was one of several factors supporting general jurisdiction. *Id.* at *3–5.

Other cases cited by rewardStyle are similarly distinguishable. *See Litmer v. PDQUSA.com*, 326 F. Supp. 2d 952, 956–57 (N.D. Ind. 2004) (exercising specific jurisdiction over nonresident defendant who used its website to sell products that allegedly infringed on plaintiff's patent; defendant's website featured "a very high 'level of interactivity' and the 'exchange of information' [was] clearly 'commercial' in 'nature.'") (quoting *Zippo*, 952 F. Supp. at 1124); *Rainy Day Books, Inc. v. Rainy Day Books & Cafe*, L.L.C., 186 F. Supp. 2d 1158, 1164 (D. Kan. 2002) (holding the defendant's website had "a high level of interactivity" because it "encourages customers accessing its website to order books" and, although a third-party book-ordering service carried out the ordering process, the defendant's e-mail confirmations, packing list, and shipping label "all give the appearance that the book is being purchased from Defendant."); *Publications Int'l, Ltd. v. Burke/Triolo, Inc.*, 121 F. Supp. 2d 1178, 1182–83 (N.D. Ill. 2000) (defendant had a website in which visitors could request an online catalog that could be directly submitted to a visitor, and it had a sales representative in Illinois and sought out and contracted with Illinois customers; given the totality of the defendant's contacts with Illinois, the exercise of

general jurisdiction was proper),[10] *abrogation recognized by ACUITY, A Mutual Ins. Co., a/s/o of Javelina Construction, Inc. v. Roadtec, Inc.*, No. 13–cv–6529, 2013 WL 6632631, at *5 n.7 (N.D. Ill. Dec. 16, 2013) (noting that to the extent plaintiff relied on *Publications Int'l* for proposition that maintenance of an interactive website adequately supported forum's assertion of general jurisdiction, case had likely been abrogated by more recent Seventh Circuit law, "which more accurately reflects the current state of, and ubiquitous reliance on, technology"); *Shippitsa Ltd. v. Slack*, No. 3:18-CV-1036-D, 2019 WL 2372687, at *6 (N.D. Tex. June 5, 2019) (rejecting argument that defendant's webpage automatically sending redirect instructions to all visitors evinced purposeful conduct, noting that "the kinds of interactive features that the *Zippo* test *does* take into account—such as the defendant's processing online order forms and allowing sales associates to exchange messages with visitors . . . require subsequent, purposeful action by the defendant or its agents.").

rewardStyle also argues PopSugar's contacts with Texas are "so extensive" it maintains an active Texas business license. Other than producing the license, however, rewardStyle provides no basis for concluding PopSugar's business activities within Texas are, in fact, "so extensive." Possessing a license to transact business in a state is not that same as transacting business there. The mere existence

[10] The court also determined specific jurisdiction was present, noting that although the mere existence of a contract with an Illinois plaintiff was not enough to give rise to jurisdiction over an out-of-state defendant, the plaintiff's allegations rested on the distribution of the defendant's catalogs in Illinois, and this related to the plaintiff's alleged breach of contract cause of action. *Id.* at 1182.

of PopSugar's Texas business license does not establish minimum contacts in Texas.

Based on the record, we conclude PopSugar did not purposefully avail itself of the privilege of conducting activities in Texas. Even assuming PopSugar's contacts with Texas satisfy the requirements for minimum contacts, the record must also show rewardStyle's causes of action arise out of or relate to such contacts for there to be specific jurisdiction. *See Moki Mac*, 221 S.W.3d at 579 (purposeful availment and substantial connection to operative facts are "co-equal" components of specific-jurisdiction analysis and, "[f]or specific-jurisdiction purposes, purposeful availment has no jurisdictional relevance unless the defendant's liability arises from or relates to the forum contacts."). As discussed in the next part of this opinion, the record does not support such a conclusion.

2. Substantial Connection to Operative Facts of the Litigation

Turning to the next part of PopSugar's first issue and whether the operative facts of rewardStyle's claims have a substantial connection to PopSugar's contacts with Texas, *see Searcy*, 496 S.W.3d at 67, rewardStyle's petition accuses PopSugar of misappropriating its content by "logging in to the [LIKEtoKNOW.it] website" and "using a customized software program to copy, in bulk, content on the website." rewardStyle also alleges PopSugar posted this content, including the influencer images, on its own website. According to rewardStyle, PopSugar's conduct was meant to "drive traffic" to PopSugar's website and direct commissions to PopSugar, which is headquartered in California.

As in *Moki Mac*, however, "the overwhelming majority of the evidence" in the plaintiff's action would be directed to issues unrelated to Texas. *See Moki Mac*, 221 S.W.3d at 585. As alleged by rewardStyle, the affirmative acts show conduct by a party based in *California* to drive web traffic to its website. The focus would be on issues such as whether PopSugar obtained content from rewardStyle without consent; whether PopSugar used that content; whether PopSugar profited from such use; and whether rewardStyle suffered an injury. Whether PopSugar's website is available in Texas or whether links to Texas-based retailers are available on PopSugar's website is unrelated to the operative facts as alleged by rewardStyle. The record contains no allegations or evidence of which we are aware that the alleged operative conduct occurred in Texas or that it has anything to do with Texas, apart from the fact that rewardStyle and one of its influencers are located here.[11] Both the Supreme Court of the United States and the Texas Supreme Court have made it clear it is the defendant's, rather than the plaintiff's, contacts with the forum that are dispositive. *See Walden v. Fiore*, 571 U.S. 277, 285 ("[T]he plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him."); *Searcy*, 496 S.W.3d at 67–68 ("'[T]he mere

[11] rewardStyle's petition alleges one misappropriated image posted to PopSugar's website was a picture used without authorization from Amber Venz Box, the co-founder of rewardStyle and a Texas-based influencer. rewardStyle alleges this image was posted to PopSugar's website without Box's authorization and "tagged" with a ShopStyle link to the same rings Box had tagged in her original LIKEtoKNOW.it post.

fact that [a defendant's] conduct affected plaintiffs with connections to the forum [s]tate does not suffice to authorize jurisdiction.'") (quoting *Walden*, 571 U.S. at 291). Even where the defendant knows the brunt of the injury will be felt by a particular resident of the forum state, that mere knowledge alone is insufficient to establish purposeful availment. *Cf. Michiana*, 168 S.W.3d at 788 (rejecting proposition that "[i]f a tortfeasor knows that the brunt of the injury will be felt by a particular resident in the forum state, he must reasonably anticipate being haled into court there to answer for his actions"). Indeed, the connection between PopSugar and Texas is weaker than in *Moki Mac*, where the defendant directly solicited the plaintiff in Texas, because none of PopSugar's operative conduct is alleged to have occurred here. *Moki Mac*, 221 S.W.3d at 585 (even if child might not have gone on expedition had company not made representations in promotional materials regarding safety of its river rafting trips, the operative facts principally concerned guides' conduct of the hiking expedition and whether they exercised reasonable care in supervising the child). rewardStyle has, thus, not pleaded facts establishing relevant "activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Bristol-Myers*, 137 S. Ct. at 1780 (internal quotation omitted); *see also Michiana*, 168 S.W.3d at 785 ("[I]t is only the defendant's contacts with the forum that count.").

As for PopSugar's partnerships with Texas retailers, PopSugar's alleged liability does not arise from nor is it related to those contacts. *See Moki Mac*, 221

S.W.3d at 579. rewardStyle does not allege its content was posted on pages featuring Neiman Marcus, JCPenney, Fossil, or any other Texas-based retailers. rewardStyle does not allege PopSugar obtained any contract with a Texas-based retailer using rewardStyle's content, and rewardStyle does not allege PopSugar's conduct allowed it to "wrongfully collect commissions" (as the trial court stated in its findings) from any Texas-based retailer. PopSugar's alleged connections with Texas-based retailers, in other words, regardless of how strong they might be, have no bearing on this part of the specific jurisdiction analysis. *See Bristol-Myers*, 137 S. Ct. at 1781 ("Even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.") (internal quotation omitted).

Regarding the www.popsugar.com/Texas webpage, rewardStyle does not allege any of its content was posted on this webpage, nor does it allege PopSugar directed users to rewardStyle's content through that webpage. *See Moki Mac*, 221 S.W.3d at 579. That rewardStyle did not allege the popsugar.com/Texas webpage in its petition or its written briefing in the trial court[12] reinforces our conclusion it is unconnected to the operative facts. A website, even an interactive one, cannot support specific jurisdiction where, as in this case, it does not have the requisite substantial relationship to the plaintiff's claims. *See, e.g., Epicous Adventure Travel, LLC v. Tateossian, Inc.*, 573 S.W.3d 375, 388 (Tex. App.—El Paso 2019, no pet.)

[12] At the April 26, 2019 hearing before the court, rewardStyle argued the www.popsugar.com/Texas webpage constituted purposeful conduct; however, it is not alleged in the petition or rewardStyle's written briefing in the trial court.

(*Zippo*'s sliding scale test, even if it applied, did not aide the plaintiff in using either of two websites with which defendants communicated to establish specific jurisdiction because, based on the plaintiff's allegations, "the trial court could not have discerned if the cause of action arose from those particular communications, as specific jurisdiction requires"); *Knight Corp. v. Knight*, 367 S.W.3d 715, 727 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (analyzing the defendant's website under *Zippo* for general jurisdiction, but ultimately declining specific jurisdiction because "there is no connection between [defendant], the forum, and the litigation"); *Choice Auto Brokers, Inc. v. Dawson*, 274 S.W.3d 172, 178 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (acknowledging the defendant's website "was more than a purely passive website" and that it permitted interactions with customers, but declining specific jurisdiction over the defendant because "[n]othing in the record suggests that [the defendant's] potential liability arises from or is related to an activity conducted within the forum"); *Munz v. Schreiber*, No. 14-17-00687-CV, 2019 WL 1768590, at *8 (Tex. App.—Houston [14th Dist.] Apr. 23, 2019, no pet.) (mem. op.) (evidence that websites sold products and allowed buyers to submit comments and questions via email did not support personal jurisdiction where there was no evidence the plaintiffs used any of the websites to purchase the product at issue in the litigation); *Buckeye Aviation, L.L.C. v. Barrett Performance Aircraft, Inc*., No. 09-10-00247-CV, 2011 WL 2420987, at *6 (Tex. App.—Beaumont June 16, 2011, pet. denied) (mem. op.) (alleged interactivity of defendants' internet website

irrelevant to specific jurisdiction where the defendants' alleged liability did not arise out of or relate to the website); *Moon v. Sandals Resorts Int'l, Ltd.*, No. 6:13-CV-00134-WSS, 2013 WL 12396985, at *4 (W.D. Tex. Dec. 27, 2013) (where the claims were personal injury claims resulting from visit to a Sandals resort, interactivity of the Sandals website under *Zippo* was irrelevant even though plaintiffs used it to reserve and purchase their vacation because plaintiffs did not establish "the requisite nexus" between defendants' forum-related contacts and plaintiffs' cause of action against them), *report and recommendation adopted*, No. W-13-CV-134, 2014 WL 12877363 (W.D. Tex. Feb. 19, 2014). Thus, PopSugar's popsugar.com/Texas webpage is not sufficient (or even relevant) to this part of the specific jurisdiction analysis. *See Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781.[13]

Another part of rewardStyle's argument is the trial court's finding that there are "numerous claims" rewardStyle "might ultimately assert based on the facts alleged in the petition that relate to [defendants'] contacts with Texas." The court's findings outlined three such claims—misappropriation of trade secrets; tortious interference; and breach of contract against PopSugar.

Beginning with trade secrets, the court concluded a misappropriation of trade secrets claim related to Texas because rewardStyle "may contend" PopSugar and

[13] The trial court also determined PopSugar "divert[ed] consumers, including in Texas, from rewardStyle to its own website," but there is no evidence of which we are aware that any Texas consumers were diverted from rewardStyle's website based on PopSugar's conduct, nor that any Texas customers made purchases using the PopSugar "shop" feature.

ShopStyle posted the supposed secrets to their "interactive websites targeting, *inter alia*, Texas-based consumers for transactions with Texas based affiliate[d] retailers." The "use" element of the trade secret claim, the court further concluded, "would arise from and relate to, in part, [defendants'] contacts with Texas—namely, their interactive websites offering services to Texas consumers and retailers."

In *Moncrief Oil*, specific jurisdiction was exercised against nonresident defendants based on a trade secrets claim because they "intended to, and did, come to Texas for two meetings, at which they accepted alleged trade secrets from [the plaintiff] that involved a proposed joint venture in Texas." 414 S.W.3d at 154. In this case, however, the record shows no comparable Texas-linked conduct. rewardStyle does not allege any of the relevant conduct (the alleged "hackathon;" the purported data-scraping; the infringed sales) occurred in Texas. No meetings are alleged to have taken place in Texas, and rewardStyle does not allege its servers storing the misappropriated content are located here. In fact, the subject matter of the supposed trade secrets does not (based on the facts alleged in the petition) concern Texas at all. That rewardStyle and one of its influencers happen to be located here is not sufficient. As the Texas Supreme Court stated, nonresident defendants "directing a tort at Texas from afar is insufficient to confer specific jurisdiction." *Id*. at 157 (citing *Michiana*, 168 S.W.3d at 790–92). This is because permitting specific jurisdiction in the state where a defendant merely "directed a tort" would impermissibly shift a court's focus from the "relationship among the

defendant, the forum, and the litigation to the relationship among the plaintiff, the forum . . . and the litigation. *Michiana*, 168 S.W.3d at 790 (internal quotation marks, footnote, and emphasis omitted).

rewardStyle's potential tortious interference with contract claim is similarly unconnected to PopSugar's alleged contacts with Texas. The trial court determined such a claim is related to Texas because rewardStyle's agreements with its influencers, "including influencers in Texas," were formed in Texas and are subject to the same Texas forum selection provision in LIKEtoKNOW.it's terms of service However, the state where some rewardStyle influencers live, and a clause rewardStyle inserted into its contracts with those influencers, is not relevant for purposes of specific personal jurisdiction over PopSugar because those contracts have nothing to do with PopSugar, who was not a party to the contracts and is not alleged to have had any role in negotiating rewardStyle's Texas forum selection clause with its influencers. *See Searcy*, 496 S.W.3d at 78 (claims must arise out of "the defendant's contact with the forum"); *see also M & F Worldwide*, 512 S.W.3d at 890 ("[S]pecific personal jurisdiction over a nonresident defendant requires the defendant's purposeful availment of the privilege of conducting activities within the forum state"). The Supreme Court has rejected a jurisdictional analysis that focus on the plaintiff's or a third party's contacts with the forum. In *Walden v. Fiore*, for example, two passengers filed a lawsuit in Nevada against an officer who seized cash from them in the Atlanta, Georgia, airport, allegedly without probable cause.

571 U.S. at 279–80. The Court determined specific jurisdiction was lacking in Nevada, although the officer had "allegedly directed his conduct at plaintiffs whom he knew had Nevada connections." *Id*. at 289. Allowing personal jurisdiction on such a basis, the Court explained, "improperly attributes a plaintiff's forum connections to the defendant and makes those connections 'decisive' in the jurisdictional analysis." *Id*. (internal quotation marks omitted); *see also Moncrief Oil*, 414 S.W.3d at 157 ("Defendants' alleged tortious conduct in California against a Texas resident is insufficient to confer specific jurisdiction over the . . . Defendants as to [the plaintiff's] tortious interference claims.). The same is true here.

We are also unconvinced by rewardStyle's attempt to assert personal jurisdiction over PopSugar based on a potential breach of contact cause of action. The trial court found personal jurisdiction was also shown based on rewardStyle's potential breach of contract claim against PopSugar for its alleged breach of the terms of service agreement by misapplying content from the LIKEtoKNOW.it website. The court determined that PopSugar, through the conduct of its agents and employees, agreed to be bound by the terms of service, which included the forum selection provision. But this potential breach of contract cause of action against PopSugar is premised on a theory of agency, which, as discussed more fully below, the record does not support. Moreover, the Texas Supreme Court noted that the Supreme Court "emphatically answered the question whether a single contract with a Texas resident can automatically establish jurisdiction—'the answer clearly is that

it cannot.'" *Michiana*, 168 S.W.3d at 786 (quoting *Burger King*, 471 U.S. at 478).

We conclude the record does not show a substantial connection between the forum, PopSugar's contacts to it, and the operative facts of the litigation.

3. The Forum Selection Provision

In its second issue, PopSugar attacks the trial court's determination that it consented to Texas as a forum because, through the conduct of its purported agents, PopSugar agreed to and breached rewardStyle's terms of service agreement, which provided that "all claims arising out of or relating to this Agreement or the Services will be litigated exclusively in the federal or state courts of Dallas County, Texas." A valid forum selection provision will permit the exercise of personal jurisdiction over a defendant without the need to evaluate the defendant's minimum contacts. *See RSR Corp. v. Siegmund*, 309 S.W.3d 686, 704 (Tex. App.—Dallas 2010, no pet.).

rewardStyle argues that "while PopSugar may deny . . . that the agents and employees who accessed the LIKEtoKNOW.it site participated in [the data-scraping], those are merits questions to be resolved, if necessary, in future litigation." Texas law, however, "does not presume agency, and the party who alleges it has the burden of proving it." *IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 597 (Tex. 2007). "[W]ell-settled law compels that Texas courts never presume that an alleged agency relationship exists." *Capital Fin. & Commerce AG v. Sinopec Overseas Oil & Gas, Ltd.*, 260 S.W.3d 67, 83 (Tex. App.—Houston [1st Dist.] 2008, no pet.). As *Capital*

Finance explained, crediting agency-based allegations without supporting proof "would violate due process by diverting the trial court's jurisdictional inquiry to the merits of the lawsuit . . . and would also have required the trial court to set aside the well-settled prohibition against presuming that an agency relationship exists." *Id*. at 83. Thus, well-settled law "compels that Texas courts never presume that an alleged agency relationship exists," and "[i]n order for a trial court to exercise personal jurisdiction over a nonresident defendant based on a plaintiff's allegation of agency, it is the plaintiff's burden to prove agency." *Suzlon Energy Ltd. v. Trinity Structural Towers, Inc.*, 436 S.W.3d 835, 842 (Tex. App.—Dallas 2014, no pet.) (quoting *Capital Fin.*, 260 S.W.3d at 83); *see also IRA Res.*, 221 S.W.3d at 597.

The trial court determined PopSugar was bound by rewardStyle's terms of service based on the existence of eight LIKEtoKNOW.it "user accounts associated with [PopSugar] email addresses and of activity using these accounts around the time of the admitted hackathon." According to rewardStyle, to create the user accounts the email addresses had to agree to rewardStyle's terms of service, including the forum selection provision. The evidence the trial court cited in finding agency was that between September 2014 and March 2016, eight email addresses with popsugar.com domains were used to register for access to rewardStyle's LIKEtoKNOW.it platform. These email addresses were "associated with" Instagram handles, including the official Instagram accounts for ShopStyle and "popsugarhome." Further, in April 2017, "around the time of the 'hackathon,"

LIKEtoKNOW.it accounts associated with five of the PopSugar email addresses were updated within minutes of each other. On this basis, the trial court found rewardStyle had "plausibly pled" PopSugar's "agents and employees, in furtherance of the alleged misappropriation," consented to personal jurisdiction in Texas.

Evidence submitted by rewardStyle includes screenshots showing a list of nine popsugar.com email addresses with registered LIKEtoKNOW.it accounts, and this list shows the date of the last login for each account. But according to that list, there is no record that five of the accounts with popsugar.com email addresses logged onto the LIKEtoKNOW.it platform. This includes the one user account associated with the "popsugarhome" Instagram username. Also, while the trial court found that five of the accounts had been "updated within minutes of each other," "around the time of the hackathon," these five accounts—all updated at around 1 a.m. on April 27, 2017, according to rewardStyle's evidence—are the same five accounts that are not shown to have ever logged onto the LIKEtoKNOW.it platform.[14] There is no indication in the record of what individuals or entities may have been behind the popsugar.com email addresses, much less whether they had the authority to bind PopSugar to contractual agreements. Furthermore, while the trial court found these updates occurred in proximity to the "hackathon," the court

[14] The updated LIKEtoKNOW.it accounts have the following email addresses: aelias@popsugar.com, cpowell@popsugar.com, gkunst@popsugar.com, swong@popsugar.com, and echien@popsugar.com. These five accounts, all with popsugar.com email domains, have no date within the "last_login" column in rewardStyle's screenshots, and instead have a listed value of "NULL."

also found (and the record shows) that "the precise timing of the 'hackathon' and subsequent use remains unclear."

To prove an agency relationship, Texas law requires the evidence establish that the principal has both the right (1) to assign the agent's task and (2) to control the means and details of the process by which the agent will accomplish that task. *Happy Indus. Corp. v. Am. Specialties, Inc*., 983 S.W.2d 844, 852 (Tex. App.—Corpus Christi–Edinburg 1998, pet. dismissed). In this case, there is a failure of proof on both requirements. rewardStyle did not satisfy its burden of proving PopSugar's "agents and employees" consented to personal jurisdiction in Texas, and that PopSugar was subject to specific jurisdiction for that reason. *See Suzlon,* 436 S.W.3d at 842; *Capital Fin.*, 260 S.W.3d at 83.

We conclude the record does not show a substantial connection between the forum, PopSugar's contacts to it, and the operative facts of the litigation, or that PopSugar purposefully availed itself of the laws and protections of Texas. Because the record does not establish sufficient minimum contacts so that the exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice," *Int'l Shoe*, 326 U.S. at 316, the exercise of personal jurisdiction over PopSugar does not comport with due process. Consequently, PopSugar's special appearance should have been granted. We sustain PopSugar's first and second issues.

B. ShopStyle

1. Purposeful Availment

We begin with ShopStyle's second issue, which contends rewardStyle failed to establish ShopStyle purposefully availed itself of the privilege of conducting activities within Texas. ShopStyle argues its purported contacts with Texas were not purposeful or they resulted from the unilateral activity of other parties.

rewardStyle's petition alleges ShopStyle, like PopSugar, operates a "fully interactive" website "for transacting business with Texas consumers," and the trial court similarly found ShopStyle "operates an interactive website for transacting business with consumers, including Texas consumers." The trial court also found ShopStyle "partners with" and "promotes" Texas retailers.

ShopStyle does not own or operate any servers in Texas, but its internet platform includes two websites accessible to Texans: A business website available to "influencers," bloggers, and business entities such as PopSugar, shopstylecollective.com;[15] and shopstyle.com,[16] a website for transacting business with consumers, including Texas consumers. On the "Shop Now" portion of ShopStyle's shopstyle.com website, ShopStyle publishes social media posts with shoppable hyperlinks that can be accessed by consumers, including Texas consumers. ShopStyle earns commissions for purchases made by consumers,

[15] https://www.shopstylecollective.com

[16] https://www.shopstyle.com

including Texas consumers, using those hyperlinks. Likewise, ShopStyle's search feature allows consumers, including Texas consumers, to search for products available from ShopStyle's affiliated retailers. ShopStyle's shopstyle.com website includes links to apparel and accessories from Texas universities, and it includes links to merchandise for sale at Texas-based retailers such as Neiman Marcus, JCPenney, Fossil, Francesca's, A Pea in the Pod, and Kendra Scott.

rewardStyle's evidence included screenshots from the shopstyle.com website that purportedly show "ShopStyle's search feature, from which consumers can search for and purchase products from ShopStyle's affiliate[d] retailers," and "ShopStyle's influencer content, with a 'Shop Now' link that enables consumers to purchase products featured by those influencers." The trial court took judicial notice of screenshots showing links to branded apparel from Texas A&M[17] and Texas Tech[18] universities on the shopstyle.com website.

The allegations and evidence before the trial court show the shopstyle.com website is generally accessible nationwide and allows users to search for products and then click on hyperlinks that direct them to the separately-operated websites of third-party retailers where they can purchase those products. ShopStyle itself does not sell or ship any products or merchandise to Texas. Any eventual sale by a user of the website is not a sale by ShopStyle; it is a sale by a third-party retailer through

[17] https://www.shopstyle.com/browse?fts=Texas+A%26M

[18] https://www.shopstyle.com/browse?fts=Texas+Tech

that retailer's website. ShopStyle does not own or operate any servers in Texas. Neither ShopStyle nor any of its subsidiaries or parent companies are incorporated here; their headquarters are not in Texas; they do not own, lease, possess, or maintain office locations or other real property in Texas. ShopStyle runs no advertising campaigns in Texas, nor does it target this state for marketing. The fact that ShopStyle has a website accessible everywhere, including in Texas, does not provide sufficient notice ShopStyle might be "haled into" a Texas court. As we noted earlier, other courts have found even websites allowing consumers to make purchases directly from the defendant insufficient to support specific jurisdiction where, as here, there is no additional evidence of purposeful availment. *See, e.g.*, *Washington DC Party Shuttle*, 406 S.W.3d at 737; *Retire Happy*, 2017 WL 393984, at *4; *M3GIRL Designs LLC*, 2010 WL 3699983, at *6–7.

ShopStyle's internet platform has various tools for content creators, including an Application Program Interface, or API, which influencers and retailers can sign up for and access through shopstylecollective.com. Affiliated influencers can use the shopstylecollective.com website to create "shoppable hyperlinks" to the products of affiliated retailers, which influencers then use on their own websites, or in their social media posts, to promote products and retailers with websites separate from ShopStyle's.

It was through ShopStyle's API that PopSugar allegedly created hyperlinks that it then added to images misappropriated from rewardStyle and posted on

PopSugar's website. PopSugar, a California-based company, had a contract with ShopStyle, another California-based company, that allowed PopSugar to use the API, and PopSugar allegedly used this agreement with ShopStyle to create and use hyperlinks as part of the data-scraping incident. Other than allowing PopSugar to sign up for and use the API prior to the alleged data-scraping, however, ShopStyle is not alleged to have engaged in any affirmative conduct regarding the data-scraping incident.

We conclude such activity will not support the exercise of specific jurisdiction in this case because due process requires defendants be haled into Texas "in suits based on their activities," not those of third parties. *M & F Worldwide*, 512 S.W.3d at 890 (quoting *Michiana*, 168 S.W.3d at 785). rewardStyle argues "ShopStyle does not merely make passively available a tool with which influencers or entities like PopSugar can create links and use them to generate commissions," because "ShopStyle actively seeks out commission contracts with retailers" and influencers, and therefore "actively facilitates" and "monetizes" the transaction. However, the active party in the equation is still, as rewardStyle states in its brief, "the influencer or other entity (like PopSugar) who may have precipitated the transaction." And even if another party creating ShopStyle links and adding them to allegedly misappropriated images was considered an affirmative act by ShopStyle (and we are not so concluding), permitting hyperlinks to the websites of third-party Texas-based retailers where products can be purchased "would not demonstrate, by itself, that

[ShopStyle] controls the third-party sufficiently for sales from the third-party's website to constitute 'contacts' by [ShopStyle]." *See Foreign Candy Co. v. Tropical Paradise, Inc.*, 950 F. Supp. 2d 1017, 1029–30 (N.D. Iowa 2013) ("If a hyperlink from a third-party vendor's website to the defendant's website is insufficient to establish personal jurisdiction without a demonstration that the defendant controlled the third-party, then, likewise, the mere existence of a hyperlink from a defendant's otherwise 'passive' website to a third-party vendor's website where the defendant's products could be purchased also would not demonstrate, by itself, that the defendant controls the third-party sufficiently for sales from the third-party's website to constitute 'contacts' by the defendant."); *see also Simplicity, Inc. v. MTS Prods., Inc.*, No. 05–3008, 2006 WL 924993, *7 (E.D. Pa. Apr. 6, 2006).

Based on the record, we conclude, therefore, that ShopStyle did not purposefully avail itself of the privilege of conducting activities in Texas. Our analysis regarding PopSugar is even more applicable here because ShopStyle's contacts with Texas are more attenuated and, as shown below, rewardStyle's causes of action do not arise out of or relate to the defendant's purported contacts with the forum. *See Moki Mac*, 221 S.W.3d at 579.

3. Substantial Connection to Operative Facts of the Litigation

Turning to ShopStyle's first issue and whether rewardStyle's claims arise out of or relate to the purported contacts with Texas, ShopStyle argues the trial court erred in concluding the alleged data-scraping arose out of or was related to any

affirmative acts by ShopStyle directed at Texas. More specifically, ShopStyle argues that (a) the data-scraping incident was based on a few allegations of affirmative acts specific to a different party, none of which implicate ShopStyle; (b) the trial court improperly considered allegations about ShopStyle unrelated to the data-scraping, including generic references to ShopStyle's "consumer-facing" website that was never used in the data-scraping; and (c) the absence of a "substantial connection" between the alleged data-scraping and any forum-related conduct by ShopStyle precluded the exercise of specific jurisdiction under any theory. Here, too, we find rewardStyle's jurisdictional arguments unpersuasive.

As described by rewardStyle's petition, the central misconduct alleged is the misappropriation of images and/or data. This operative conduct is directed at PopSugar, not ShopStyle. rewardStyle's petition alleges PopSugar (1) "scrap[ed]" rewardStyle's website by "creating an account with LIKEtoKNOW.it, logging in to the website, and using a customized software program to copy, in bulk, content on the website"; (2) "stripped the affiliate[d] links and technology that facilitate payments to rewardStyle and its influencers"; (3) "rebranded the images with a new logo where LIKEtoKNOW.it's logo would normally appear"; (4) "added affiliate[d] links for rewardStyle's competitor ShopStyle"; and then (5) "posted the images on PopSugar's own website." The trial court's findings similarly state that rewardStyle alleged PopSugar used its interactive website and contacts with Texas users and retailers to (1) repurpose and use for profit the data and other content taken without

authorization from rewardStyle; (2) divert consumers, including in Texas, from rewardStyle to its own website; and (3) wrongfully collect commissions from retailers, including Texas-based retailers.

As for the findings by the trial court specific to ShopStyle and its purported misconduct, the trial court described PopSugar's and ShopStyle's respective corporate existences, and then noted there were email addresses "associated with Instagram handles, including the official Instagram accounts for ShopStyle and POPSUGARHome." The court's findings described the general features of ShopStyle's "interactive website," including the website's general accessibility to Texas consumers. The trial court found that PopSugar and ShopStyle "both maintain interactive websites to solicit and fulfill commercial transactions involving Texas consumers and Texas retailers," although the court did not provide any details specific to ShopStyle. The trial court also found that PopSugar and ShopStyle "use their respective websites to engage in the commercial business of connecting retailers, including Texas retailers, with consumers, including Texas consumers." However, the court did not connect either of ShopStyle's websites to the alleged misappropriation. The trial court further found that rewardStyle alleges "ShopStyle used its website and its engagements with Texas-based retailers to effectuate those activities." The court did not specify how ShopStyle's websites and its engagements with Texas-based retailers were "used," nor did it specify any affirmative conduct by ShopStyle, either in Texas or elsewhere, that effectuated the data-scraping. In

addition, the trial court found, when discussing the alleged copying, that a misappropriated image "was tagged with a ShopStyle link to a ring that Ms. [Amber Venz] Box tagged in the original LIKEtoKNOW.it post." The trial court did not find ShopStyle perpetrated this tagging, however, and in its petition rewardStyle alleges, as we noted before, that PopSugar, not ShopStyle, "stole millions of images" from the LIKEtoKNOW.it website, "added affiliate[d] links for rewardStyle's competitor ShopStyle," and "posted the images on PopSugar's own website."

rewardStyle does not argue any of this operative conduct was undertaken by ShopStyle. It contends that, "[a]t a minimum, ShopStyle used its engagements with Texas-based retailers to facilitate those activities," and that "PopSugar's and ShopStyle's websites and Texas dealings were, at least in part, the vehicles through which they carried out the activities that rewardStyle seeks to investigate through Rule 202 pre-suit discovery." However, these statements in rewardStyle's brief are not supported by citations to allegations in rewardStyle's petition or evidence in the record. Nor does rewardStyle elaborate on how ShopStyle's "engagements" with Texas-based retailers were supposedly used "to facilitate those activities," and it does not specify what affirmative conduct by ShopStyle "facilitate[d]" the data-scraping. Additionally, rewardStyle does not allege ShopStyle formed these "engagements" with Texas-based retailers as part of the data-scraping or that they somehow gave rise to it, and any affirmative conduct by ShopStyle regarding its agreements or engagements with Texas-based retailers occurred before the data-

scraping alleged in the petition is supposed to have taken place. This absence of any causal connection shows that the availability of links to Texas-based retailers on ShopStyle's web platform cannot alone be the source of specific jurisdiction. *See Kaye/Bassman*, 418 S.W.3d at 357 ("The contacts with the forum which we are to analyze for jurisdictional purposes are those where the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum State.") (citing *Moncrief Oil Int'l*, 414 S.W.3d at 151).

As for the website through which ShopStyle supposedly "effectuated" or "carried out" the alleged activities, rewardStyle's petition alleges PopSugar and ShopStyle "both operate fully interactive websites for transacting business with Texas consumers," but ShopStyle's internet platform includes two websites, shopstyle.com and shopstylecollective.com, and neither rewardSyle's petition nor the court's findings distinguish between them. Evidence submitted by rewardStyle includes "excerpts from [ ] ShopStyle's website," shopstyle.com, but these are not alleged to have been accessed in connection with the hackathon or the misappropriation of images. According to the declaration of Karl G. Nelson, an attorney for rewardStyle, these excerpts show "ShopStyle's search feature, from which consumers can search for and purchase products from ShopStyle's affiliate[d] retailers," and "ShopStyle's influencer content, with a 'Shop Now' link that enables consumers to purchase products featured by those influencers." However, the misconduct alleged in the petition does not involve consumers using ShopStyle's

search feature or accessing an influencer's content by clicking on the "Shop Now" link on the shopstyle.com website. The website excerpts also show a list of featured products available for purchase by consumers from ShopStyle's affiliated retailers, yet the data-scraping alleged in the petition does not involve consumers purchasing these products or any other products from these retailers, let alone doing so through the shopstyle.com or the shopstylecollective.com websites. And as we noted before, a website, even an interactive one, cannot support specific jurisdiction where, as in this case, there is no substantial relationship to the plaintiff's claims. *See, e.g.*, *Epicous*, 573 S.W.3d at 388; *Knight Corp.*, 367 S.W.3d at 727; *Choice Auto Brokers*, 274 S.W.3d at 178; *Munz*, 2019 WL 1768590, at *8; *Buckeye Aviation*, 2011 WL 2420987, at *6; *Moon v. Sandals Resorts*, 2013 WL 12396985, at *4.

rewardStyle dismisses ShopStyle's distinction between its two websites by arguing in part that "the trial court looked at the company as a whole, and ShopStyle failed to sufficiently show below that the distinction it now offers on appeal was a reasonable—or persuasive—one." But where rewardStyle does not allege general jurisdiction over ShopStyle, it cannot base an argument for specific jurisdiction over ShopStyle on any and every aspect of its business model, regardless of whether it is related to the alleged misconduct. As part of the specific jurisdiction analysis, the trial court was limited to those Texas contacts the potential claims arose out of or were related to. *Searcy*, 496 S.W.3d at 67. When, as in this case, there is no connection between the underlying controversy and a defendant's contacts with the

forum, "specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

rewardStyle also argues ShopStyle may have used rewardStyle's trade secrets without authorization by "posting them" to its "interactive websites targeting, *inter alia*, Texas-based consumers for transactions with Texas-based affiliate[d] retailers." But this argument is undermined by allegations in rewardStyle's petition stating the harm arose from *PopSugar* purportedly posting misappropriated images to PopSugar's website. ShopStyle's websites are not implicated in the data-scraping itself and are not alleged to have posted any copied images. "What is needed—and what is missing here—is a connection between the forum and the specific claims at issue." *Bristol-Myers*, 137 S.Ct. at 1781.

The claim for tortious interference against ShopStyle suffers from a similar defect. The fact that rewardStyle conducted business with Texas influencers or retailers will not establish specific jurisdiction over either defendant. *See Searcy*, 496 S.W.3d at 67; *M & F Worldwide*, 512 S.W.3d at 890. rewardStyle's petition identifies an influencer located in Texas—Amber Venz Box, a Dallas resident, the co-founder of rewardStyle—whose content was allegedly misappropriated as part of the alleged data-scraping. But rewardStyle does not allege or show the data-scraping occurred here. *See Moncrief Oil*, 414 S.W.3d at 157. Nor is there any allegation

that ShopStyle targeted that influencer or any Texas-based influencers or retailers.[19]

rewardStyle's petition suggests there was "a continuing economic interest by their common founder Brian Sugar in ShopStyle's financial performance" when the operative conduct occurred. rewardStyle supports its theory that there was a continued economic interest by PopSugar in ShopStyle by speculating "it appears that PopSugar used the results of its admitted 'hackathon' to repurpose the material in question no later than the 'summer of 2017,'" and, "[t]hus, it is highly likely that at least some of the activity in question occurred before ShopStyle's spin-off from PopSugar was finalized." However, the record shows ShopStyle was purchased in February 2017 by Ebates, Inc., a subsidiary of Rakuten USA, Inc., which is a subsidiary of Rakuten, Inc., a publicly traded, global e-commerce company headquartered in Japan. The record also shows that, since that time, ShopStyle has been a wholly owned subsidiary of Ebates and Brian Sugar has had no ownership interest or other direct or indirect financial interest in ShopStyle. rewardStyle's assertions are further undermined by the timeline in its petition, which alleges the hackathon occurred in the summer of 2017, *after* the two companies separated. *See Motor Components, LLC v. Devon Energy Corp.*, 338 S.W.3d 198, 203–04 (Tex. App.—Houston [14th Dist.] 2011, no pet.) ("We are aware of no support under Texas law . . . for the position that a corporation's jurisdictional contacts are imputed

[19] The potential breach of contract cause of action discussed in the trial court's findings is based on a purported contract with PopSugar, to which ShopStyle is not alleged to be a party.

automatically to a nonresident that succeeds to the corporation's contract rights.").

rewardStyle further argues that "one of the eight PopSugar email addresses used to log in to LIKEtoKNOW.it at various points in the months surrounding the 'hackathon'—including on March 17, 2017—is the same email address associated with ShopStyle's official Instagram account." However, this date occurred after the February 2017 sale of ShopStyle to Ebates. Also, rewardStyle does not allege that login was by a ShopStyle employee. In fact, according to the affidavit of Adrienne Down Coulson, ShopStyle's Chief Operations Officer, the person with that popsugar.com email address[20] "worked for PopSugar, not ShopStyle, on March 17, 2017," and "[t]hat person did not become an Ebates/ShopStyle employee until April 3, 2017."

rewardStyle likewise relies on the "exclusive content commerce partnership" agreement between ShopStyle and PopSugar "to drive traffic to ShopStyle's affiliated merchants during the hackathon." This is a reference to the API through which PopSugar allegedly created the hyperlinks that it then (allegedly) added to images misappropriated from rewardStyle's website, posting them on PopSugar's website. According to the declaration of Amber Venz Box, under this agreement "PopSugar accessed ShopStyle's API to monetize the content misappropriated from LIKEtoKNOW.it by replacing the [R]ewardStyle affiliate[d] links with ShopStyle

[20] cgilford@popsugar.com

affiliate[d] links, generating sales commissions for both PopSugar and ShopStyle." There are, however, no allegations or evidence this agreement between two California-based companies was related to or intended to aid the data-scraping, much less that the agreement was centered in or formed in Texas.

rewardStyle argues ShopStyle benefitted from PopSugar's use of the API, but it does not allege ShopStyle actually engaged in, much less controlled, any of the alleged operative conduct (e.g., scraping, stripping, rebranding, adding, and posting data). And rewardStyle cites no authority for the proposition that merely benefitting from PopSugar's alleged use of its website supports specific jurisdiction in this instance. The Supreme Court has made it clear that acts of third parties cannot create constitutionally sufficient minimum contacts. *See Walden*, 571 U.S. at 291 ("[I]t is the defendant, not the plaintiff or third parties, who must create contacts with the forum State."); *Helicopteros Nacionales*, 466 U.S. at 417 ("[The] unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.").

rewardStyle additionally argues that neither ShopStyle nor PopSugar, despite having been given an opportunity to do so, "established before the trial court precisely when the 'hackathon' and subsequent use occurred in relation to PopSugar's sale of ShopStyle." However, the burden was on rewardStyle to implicate ShopStyle by alleging common ownership at the time of the data-scraping

incident. *See Doe*, 444 S.W.3d at 610 (Rule 202 petitioner has "same burden" to plead allegations showing personal jurisdiction as plaintiff "in an action"); *see also DeAngelis v. Protective Parents Coal.*, 556 S.W.3d 836, 856 (Tex. App.—Fort Worth 2018, no pet.) ("Rule 202 petition cannot be supported by the articulation of a 'vague notion' that evidence will become unavailable by the passing of time without producing evidence to support such a claim."); *In re Reassure Am. Life Ins. Co.*, 421 S.W.3d 165, 174 (Tex. App.—Corpus Christi 2013, no pet.) (allegations in petition seeking presuit deposition "must be more than 'sketchy.'"). rewardStyle failed to do this.

Furthermore, to prove an alter ego theory and "fuse" two entities for jurisdictional purposes, a plaintiff must show the parent exercised a degree of control over the subsidiary's internal business operations and affairs that is "greater than that normally associated with common ownership and directorship; the evidence must show that the two entities cease to be separate so that the corporate fiction should be disregarded to prevent fraud or injustice." *BMC Software,* 83 S.W.3d at 799; *see also PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 175 (Tex. 2007); *Schlais v. Valores Corporativos Softtek, S.A. de C.V.*, No. 03-1-00188-CV, 2012 WL 1499488, at *12 (Tex. App.—Austin Apr. 25, 2012, no pet.) (mem. op.). The fact the two companies shared a common founder and once shared common ownership hardly satisfies this standard. Indeed, the evidence in the record is, if anything, inconsistent with common ownership.

Texas law presumes "two separate corporations are indeed distinct entities." *BMC Software*, 83 S.W.3d at 798. Moreover, "Courts make clear that the assertion of personal jurisdiction over a nonresident defendant requires an assessment of *each defendant's contacts individually*, unless the corporate veil has been pierced," and courts will "decline to find jurisdiction . . . based on a closely-related party theory." *Vinmar*, 538 S.W.3d at 139 (emphasis added); *see also Steamboat Capital Mgmt., LLC v. Lowry*, No. 01-16-00956-CV, 2017 WL 5623414, at *15 (Tex. App.—Houston [1st Dist.] Nov. 21, 2017, no pet.) (mem. op.) (noting that plaintiffs "generally complain[ed] of collective misconduct" by an undifferentiated group of defendants, and that "[w]hen, as here, there are multiple defendants, each defendant's actions and contacts with the forum must be tested separately."). This means that ShopStyle's contacts must be assessed separately from PopSugar's, and the exercise of jurisdiction, if any, must be based on ShopStyle's own conduct. Such an approach is crucial given the due process requirement stressed in *Walden* that "the relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Walden*, 571 U.S. at 284.

In this case, the allegations on which rewardStyle relies to support specific jurisdiction over ShopStyle, and the trial court's findings, fail to show purposeful contacts with Texas by ShopStyle substantially connected to the operative facts. "To hold otherwise would shift the analytical focus from assessing the defendant's contacts with the forum to assessing the defendant's contacts with the plaintiff."

Vinmar, 538 S.W.3d at 136; *see also Raiden Commodities, LP v. De Man*, No. 01-17-00181-CV, 2018 WL 3151004, at *5 (Tex. App.—Houston [1st Dist.] June 28, 2018, no pet.) (mem. op.) ("The key question is whether the *defendant's* litigation-related actions connect him to the *forum*—not whether his contacts connect him with [plaintiffs].").

Accordingly, the record does not show a substantial connection between the forum, ShopStyle's contacts to it, and the operative facts of the litigation, or that ShopStyle purposefully availed itself of the laws and protections of Texas. Because the record does not establish sufficient minimum contacts so that the exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice," *Int'l Shoe*, 326 U.S. at 316, the exercise of personal jurisdiction over ShopStyle does not comport with due process. Thus, ShopStyle's special appearance should have been granted. We sustain ShopStyle's first and second issues.

CONCLUSION

We conclude the trial court abused its discretion in granting rewardStyle's rule 202 petition because the record does not show the court had personal jurisdiction over the potential defendants. *See Patton Boggs LLP v. Moseley*, 394 S.W.3d 565, 568–69 (Tex. App.—Dallas 2011, orig. proceeding) (we review court's order granting rule 202 petition under abuse of discretion standard); *eBay Inc. v. Mary Kay Inc.*, No. 05-14-00782-CV, 2015 WL 3898240, at *3 (Tex. App.—Dallas June 25, 2015, pet. denied) (mem. op.) (reversing trial court's order authorizing rule 202

depositions because plaintiff did not meet its burden of pleading jurisdictional facts sufficient to establish trial court had personal jurisdiction over potential defendants). We sustain ShopStyle's and PopSugar's issues, reverse the trial court's May 31, 2019 order denying their special appearances and granting rewardStyle's rule 202 petition, and remand for further proceedings. This holding makes it unnecessary for us to address ShopStyle's and PopSugar's pending petitions for writ of mandamus, and we dismiss them as moot.

/Lana Myers/
LANA MYERS
JUSTICE

190736F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

SHOPSTYLE, INC. AND POPSUGAR, INC., Appellants	On Appeal from the 95th District Court, Dallas County, Texas Trial Court Cause No. DC-18-08570.
No. 05-19-00736-CV V.	Opinion delivered by Justice Myers. Justices Whitehill and Reichek
REWARDSTYLE, INC., Appellee	participating.

In accordance with this Court's opinion of this date, we **REVERSE** the trial court's May 31, 2019 order denying the special appearances filed by appellants SHOPSTYLE, INC. and POPSUGAR, INC., and granting appellee RewardStyle's rule 202 petition, and this cause is **REMANDED** to the trial court for further proceedings. It is **ORDERED** appellants SHOPSTYLE, INC. AND POPSUGAR, INC., recover their costs of this appeal from appellee REWARDSTYLE, INC.

Judgment entered this 21st day of July, 2020.