Reversed and Rendered and Opinion Filed July 27th 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01304-CV

LG ELECTRONICS, INC., Appellant
V.
LOVERS TRADITION II, LP, Appellee

On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-09593

MEMORANDUM OPINION

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

In this interlocutory appeal, we examine the trial court's denial of a special appearance filed by LG Electronics, Inc. (LGE), the South Korean manufacturer of the HVAC systems at issue in this commercial dispute. The case involves claims by Lover's Tradition II, LP (Tradition) against LGE and other entities. Because we conclude there is legally insufficient evidence showing that LGE purposefully availed itself of the benefits and protections of Texas laws, we issue this memorandum opinion and reverse and render judgment dismissing Tradition's claims against LGE.

I. Background

A. Overview and Procedural History

The central issue here is whether the trial court had specific personal jurisdiction over LGE, the foreign manufacturer of the goods at issue.[1]

Appellee Tradition owns a senior living facility in Dallas, Texas, providing both independent- and assisted-living communities to seniors. Tradition is the end-user of HVAC systems manufactured by LGE.[2] Tradition purchased these systems in 2013 and took delivery of them in 2014.

In 2017, because of alleged problems with those systems, Tradition sued three entities: LG Electronics USA, Inc. (LGEUS), Texas Airsystems, LLC (Texas Air), and City-Wide Mechanical, Inc. (City-Wide). LGEUS later filed a third-party petition against Four Suns Construction, LLC (Four Suns). From the time of manufacture to end use, the following entities owned or controlled the systems:

LGE –> LGEUS –> Texas Air –> City-Wide –> Four Suns –> Tradition

Each of these entities are parties in the underlying litigation. Initially, Tradition sued only LGEUS, Texas Air, and City-Wide. Four months later, Tradition filed a second amended petition, adding LGE as a defendant, and asserting

[1] Though we mention both general and specific personal jurisdiction below, only specific jurisdiction is at issue in this appeal, which is why we limit our analysis to that issue.

[2] At times, LG Electronics, Inc. was referred to below as "LG Korea," and LG Electronics USA, Inc. was referred to as "LGUS" or "LG US." We use "LGE" and "LGEUS" instead.

claims against LGE for breach of express warranty, breach of implied warranty, negligent misrepresentation, fraudulent inducement, and fraud.

Tradition acknowledged in that pleading that LGE is a corporation organized and existing under the laws of the Republic of Korea, with its principal place of business in Seoul. Aside from alleging that LGE wholly owns LGEUS and markets and sells its products in the United States through LGEUS and its agents, authorized representatives, and distributors, Tradition did not include any other allegations at that time regarding personal jurisdiction over LGE or its contacts with Texas.

LGE filed two special appearances and motions to dismiss for lack of personal jurisdiction, one in response to Tradition's second amended petition, and one in response to a sixth amended petition Tradition filed in June 2019.

In its first special appearance, LGE argued Tradition failed to properly plead facts bringing LGE within the reach of the Texas long-arm statute[3] and argued there was no basis for general or specific personal jurisdiction over LGE.

In its sixth amended petition, Tradition alleged facts to support its argument that LGE was subject to the Texas long-arm statute and that LGE had sufficient minimum contacts with Texas to establish jurisdiction. Tradition also alleged that its claims arose from LGE's contacts, thus suggesting an intention to rely upon a

[3] *See* TEX. CIV. PRAC. & REM. CODE § 17.042.

specific jurisdiction theory.[4] LGE then filed a second special appearance, arguing the court lacked specific jurisdiction and the exercise of jurisdiction would offend traditional notions of fair play and substantial justice.

As LGE and Tradition prepared for the special appearance hearing, the parties filed related briefs and objections, including a motion by LGE to strike the expert testimony of Scott Bayley, a forensic accountant and business valuation expert upon whose testimony Tradition relies in arguing the court had jurisdiction over LGE.

The court conducted an evidentiary hearing on LGE's special appearance over the course of four days between June 28 and August 15, 2019. Two witnesses testified in person, including Bayley and Kelvin Williams, LGEUS's Director of Business Practices and Development of Commercial Air Conditioning. Bayley's expert reports, Bayley's affidavit, and Williams's declaration were also admitted into evidence.

The parties presented additional testimony through deposition excerpts, declarations, or affidavits, including from Wayne Jeung, Myung Ki Min, Jonathan Perlman, Robert Russell, and Anne Schultz.[5] The parties submitted other exhibits

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[4] "For a Texas court to exercise specific jurisdiction over a defendant, the defendant's purposeful contacts must be substantially connected to the operative facts of the litigation or form the basis of the cause of action." *Old Republic Nat'l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 559–60 (Tex. 2018) (citing *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 585 (Tex. 2007); *Michiana Easy Livin' Country v. Holten*, 168 S.W.3d 777, 795 (Tex. 2005)).

[5] At the time of their testimony, these witnesses' connections to the parties were as follows: Jeung was LGE's in-house legal counsel, Min was LGE's corporate representative, Perlman was Tradition's corporate representative, Russell was a Tradition asset manager, and Schultz was a Texas Air account representative.

as well, including various agreements, emails, interrogatory answers, manuals, reports, spreadsheets, and website information. Some of this was confidential.[6]

At the end of the evidentiary hearing, the court took the matter under advisement. Later, the court entered an order denying LGE's special appearance and entered another order denying LGE's motion to exclude Bayley's evidence.

LGE timely appealed and raises a single issue, arguing the court erred in denying its special appearance because the evidence was legally insufficient. Though LGE also contends the trial court should have excluded Bayley's evidence, LGE does not present that as a separate issue.

B. Evidence

The facts are well-known to the parties, and unlike the parties' legal conclusions, many of the facts appear to be undisputed. We draw them from the parties' special-appearance evidence and note differences as needed.

1. Parties and General Processes

LGE is a corporation organized and existing under the laws of the Republic of Korea, with its principal place of business in Seoul. LGE manufactures, markets or sells various products all over the world, directly or through its subsidiaries.

[6] In striving to preserve the confidentiality of materials we believe the parties intended to be confidential, we have avoided referring to those materials where possible and have made some references deliberately vague. *See Kartsotis v. Bloch*, 503 S.W.3d 506, 510 (Tex. App.—Dallas 2016, pet. denied).

With its special appearances, LGE submitted a sworn declaration from Wayne Jeung, LGE's in-house counsel. He stated LGE is a corporation organized in the Republic of Korea, that LGE designs, manufactures, and sells HVAC equipment in Korea, and delivers HVAC equipment and components to purchasers in Korea. Jeung also stated LGE did not incorporate any entity in Texas, has no employees or bank accounts in Texas, owns no real estate or personal property in Texas, and operates no facilities in Texas. He stated LGE does not design, manufacture, sell, advertise, or install HVAC equipment in Texas and has not done so in the past. He also stated LGE does not market or distribute HVAC equipment to Texas and has not done so in the past. As to the HVAC equipment at issue here, he stated LGE made no representations regarding that equipment and that LGEUS, Texas Air, and City-Wide are not and were not authorized to make any representations on LGE's behalf regarding that equipment.

LGE initially manufactured and sold the HVAC systems at issue to its wholly owned North American subsidiary, LGEUS, in Korea, and LGEUS later sold them in the United States to its Texas distributor. LGEUS is a Delaware corporation principally based in Englewood Hills, New Jersey, and its commercial air conditioning (CAC) business is based in Alpharetta, Georgia.

Texas Air is a Texas corporation principally based in San Antonio, Texas. Texas Air became an authorized LGEUS "applied representative" and entered into a written distributor agreement with LGEUS on July 1, 2010. Under that agreement,

Texas Air may purchase and distribute certain LGEUS commercial air conditioning products, and they both agree they are independent contractors regarding their activities under the agreement. LGE is not mentioned in and is not a party to LGEUS and Texas Air's distributor agreement.

LGEUS is the sole distributor of LGE products in the United States. LGE manufactures and sells HVAC products to LGEUS in Korea, and LGEUS sells products to its applied representatives in the United States, which include Texas Air. No written agreement existed between LGE and LGEUS regarding LGEUS's distribution of LGE products before June 2016, after the events at issue here.[7]

For LGE's sales to LGEUS, LGE manufactures HVAC equipment for the United States based on purchase orders placed electronically to LGE by LGEUS's CAC division. These orders are made based on LGEUS's forecasts, not on specific customer orders. Nothing in the purchase order shows LGE the destination to which LGEUS might send the product. Once LGE receives the purchase order, LGE then manufactures the product. Title transfers in Korea once the product is loaded on the ship. Typically, the product is shipped to California or New Jersey and is sent to a LGEUS warehouse.

[7] LGE and LGEUS entered into a written service agreement in June 2016, after the sale and installation of the equipment at issue here. Williams, LGEUS's corporate representative, characterized LGE's and LGEUS's relationship regarding HVAC VRF sales before that date as one of buyer and seller, whereby LGE manufactured and sold the equipment to LGEUS in Korea, and LGEUS bought the equipment and then resold it to customers in the United States.

LGEUS's applied representatives, including Texas Air, are LGEUS customers. When applied representatives place an order with LGEUS, the product ships from LGEUS's warehouse. Applied representatives have a "line card" of several types of HVAC equipment and products, including from other companies, and they have anywhere from fifty to seventy manufacturers on their line card. Texas Air was an LGEUS applied representative for the type of HVAC equipment at issue here and sold other types of equipment. When compared to other LGEUS applied representatives across the country, Texas Air was one of LGEUS's top three applied representatives in 2013, was first in 2014, and was in the top twenty in 2019.

LGE has no input in LGEUS's contracting with applied representatives and is not involved at all in the choice of terminating those relationships. Williams, LGEUS's corporate representative, testified that applied representatives may be offered certain pricing discounts and may be issued a line of credit, with pricing discounts decided by LGEUS's CAC division in Georgia,[8] and credit applications decided by LGEUS's headquarters in New Jersey, with no involvement by LGE.[9] Williams also testified that after-market support is supplied by LGEUS's CAC division, and applied representatives and LGEUS's CAC division are involved in

[8] LGEUS employees may need additional authority from an LGEUS project manager in Georgia to see if a certain discount may be given.

[9] However, the record includes a form dated August 4, 2010, which appears to relate to a potential line of credit to Texas Air. The form was completed by a person identified in other portions of the record as a regional sales manager for LGEUS. The form does not mention LGE but includes its logo, and the bottom of the form states, "Account numbers are generated in South Korea. Please allow at least 24 hrs."

providing replacement parts, which are supplied from a warehouse in the United States.

LGE owns all intellectual property rights in the United States, including its trademarks and service marks. "Multi V" is a registered trademark of LGE. LGE allows LGEUS to use certain proprietary LGE software, which LGEUS modifies to change measurements to feet and inches for the United States market. LGEUS's applied representatives who specify the type of HVAC system at issue here may also use this software, which allows users to lay out equipment piping runs in proper lengths and diameter and which alerts users to certain capacity concerns. Williams expects Texas Air would have used that software for Tradition.

Texas is one of LGEUS's ten critical markets, which are identified by its CAC division. Texas has been ranked as LGEUS's third-highest market for VRF[10] sales in the United States. LGEUS has made millions in sales of such equipment in Texas. From 2011 to 2014, LGEUS's VRF sales in Texas comprised more than a de minimis amount of LGEUS's total VRF sales.

LGE has received various business plans from LGEUS regarding United States markets, including Texas.[11] Roughly four or five times a week, LGE also

[10] "VRF," which stands for variable refrigerant flow, is the type of HVAC product at issue here.

[11] These business plans are contained in plaintiff's exhibit 35. The parties stipulated that this exhibit includes the business plans of LGEUS that LGEUS provided to LGE and that they reflect LGE's knowledge. The exhibit contains presentations from various dates between 2013 and 2014 and also includes certain projections for 2015 and 2016. Due to the confidentiality of the information provided, we do not include any other details here.

receives daily sales reports from LGEUS which share LGEUS CAC sales with multiple people employed by LGEUS and at least some employed by LGE. At the time these reports are generated, LGE has already sold its product to LGEUS.

A marketing group within LGEUS's CAC division does all marketing and advertising for LGE-manufactured HVAC products in the United States. LGEUS has had local marketing events in Texas where multiple customers are invited, but LGE did not participate in these events. The record contains no evidence that LGE does any traditional advertising of its HVAC products in Texas, though Tradition maintains other means are used.[12]

LGEUS's marketing includes preparation of two-page brochures or specifications for HVAC products explaining their product size, capacity, and similar features and includes other technical marketing documents describing how certain systems compare to other industry products.

The marketing group within LGEUS's CAC division also works with an independent event planning group in the United States that, in turn, works with a destination management group in Korea to plan certain marketing trips to Seoul. These trips are primarily for LGEUS's customers, and one of the purposes is to invite and help influence customers to help LGEUS close deals.

[12] Tradition argues LGE conducts advertising in Texas through its website, which redirected two Tradition witnesses to LGEUS's website in June 2019, and through the display of LGE's logo on LGEUS's Dallas-area academy and various documents.

LGEUS's CAC division decides who to invite and pays for the trips. There is no indication in the record LGE plays any role regarding who attends those trips. Typically, LGEUS's CAC division sales people and senior managers go on these trips, but directors sometimes go, too. Williams testified any first-class air travel is paid for by LGEUS's customers, not LGEUS. Williams went on one of these trips. Williams testified LGE "hosted" them by allowing the tour group to go through the factory to see the manufacturing equipment. The customers with Williams on that trip were LGEUS customers.

LGEUS also operates four air conditioning "academies" in the United States, including one it has operated in the Dallas area since 2010. The primary purpose of this academy is to provide technical training for installing, servicing, and maintaining engineering equipment, but its training purpose is also part of marketing. The academy's intended audience is end-users, engineers, and architects, and the academy serves as a "helpful marketing device."

The original vision of the academy was to allow LGEUS's CAC division to expand its business in two regions, including one covering Texas. In 2010, LGE and LGEUS each budgeted fifty percent of the estimated construction costs for the academies that are now located in Texas and New Jersey.

In terms of academy operations, the record contains no indication that LGE employees work at LGEUS's academies. LGEUS's CAC division sets the curriculum, handles sign-ups, conducts the training, pays ongoing costs, and issues

certificates of completion. The academy buildings and the certificates of completion both contain LGE's logo.

2. Transaction and Interactions Here

LGE manufactured the HVAC systems at issue. LGEUS later sold the equipment to Texas Air, who then sold the equipment to City-Wide. City-Wide and Four Suns were involved with the installation at Tradition's facility. Tradition's replacement parts have been supplied through Texas Air and LGEUS's CAC division's after-market operations.

The record contains deposition excerpts from Myung Ki Min, LGE's corporate representative. Min testified LGE understood that LGEUS sold Multi-V HVAC unit systems all over the United States, including in Texas. LGE was also aware that Texas Air was handling sales in Texas. LGE understood LGEUS operated the academy to increase its sales, and LGE received information about the training LGEUS offered at the academy. Beginning in the second half of 2013, LGE also received the daily sales reports from LGEUS, which Min stated were for planning purposes so that LGE, as a manufacturer, would know how many units are being sold so that LGE would know how many units to produce. From 2014 to 2017, Min's role at LGE was to help LGEUS increase sales of the products manufactured by LGE, which he stated involved supporting LGEUS from the point of view of the manufacturer.

As to the Korea trips, Min stated LGEUS and other LGE subsidiaries brought their customers to tour LGE's manufacturing facilities in Korea as one of the subsidiaries' marketing activities. Min stated LGEUS brought their customers, accompanied those customers, and served as host, not LGE. Min stated LGE's pre-trip help to LGEUS consisted of helping with restaurant or hotel reservations.

The record reflects an example of the sales reports LGEUS sends to LGE, which consists of an email and a heavily redacted attachment sent by an LGEUS employee to other LGEUS employees and at least two people employed by LGE. That exhibit refers to Tradition with dates of 12/18/2013 and 1/24/2014 and includes other details not described here.[13]

The record also contains deposition excerpts or affidavits from certain personnel from Tradition, including its corporate representative, Jonathan Perlman, and Robert Russell, a Tradition employee.

Perlman, Manager of Tradition's General Partner, provided an affidavit stating he communicated on numerous occasions with Anne Schultz of Texas Air and understood her to be "a manufacturer's representative for the LG Multi-V HVAC Systems of the type installed at the Tradition Communities." He stated that in a meeting with Schultz and during a demonstration at the academy, Schultz made representations regarding the quality of the equipment and that she did so "in the

[13] This example is plaintiff's exhibit 44. Both due to the redactions and the confidentiality of the information provided, we do not include any other details here.

presence and within the hearing of individuals he believed and understood to be employees of LGEUS." Schultz also told Perlman about the training offered through the academy as after-market support, which was important to his decision.

Schultz invited Perlman to attend an all-expense paid trip to visit LGE facilities in Seoul in November 2013 and April 2014, but he could not attend. He understood she invited other customers as well, and she told him LGE and LGEUS wanted to partner with Tradition's affiliate companies on future projects. Perlman said Schultz told him he would meet with LGE executives and engineers and see HVAC systems in operation. Perlman testified Schultz offered Tradition a discount in exchange for early delivery and told him LGE supported the discount in exchange for Tradition's acceptance of the early delivery.[14] Perlman identified certain documents he received, including plaintiff's exhibits 3 and 4, which consist of an efficiency analysis he received from Texas Air and a User's Guide from a source he could not recall.

In his affidavit, Perlman stated the HVAC systems were installed in 2014. He also stated Schultz told him she had "LGE" confirm the installation parameters, but Schultz referred generally to "LG" in written communications to Tradition regarding

[14] Williams testified that an LGEUS project manager offered a discount for early delivery of the equipment at issue here. Schultz testified "LG" offered Tradition a discount to defray their rental cost associated with an early delivery. She stated at the time of the discount, no binding contracts yet existed.

installation and testified "she did not know the difference" between LG and LGE until this lawsuit.

Perlman also stated he accessed the "LG website" and reviewed information regarding HVAC systems before making the purchase. He stated he recently accessed certain LG websites and information regarding HVAC systems and explained what he saw there. His affidavit was dated June 21, 2019, and among the attachments were various web pages that seem to have been printed on June 20, 2019.

With regard to the academy, Russell, a Tradition employee, stated in his affidavit that in June 2016, he attended a training at the Dallas-area academy, and following the training, he was provided a certificate of completion. That certificate contained an LG logo, which is owned by LGE, as well as a reference to LGE and signatures by senior LGEUS and LGE employees.[15] Also during his June 2016 training, Russell received excerpts from an LGE HVAC-related manual which contained various error indicators and related codes. At the bottom of each page, the excerpts state, "Copyright ©2013 LG Electronics, Inc. All right [sic] reserved. Only for training and service purposes. LGE internal use only."

[15] Russell's certificate of completion was signed by an LGEUS employee as well as by Hwan-Yong Nho, who was identified on the certificate as President, Air Conditioning Division and Energy Solutions. Williams confirmed that Nho once served as President of Energy Group Solutions for LGE globally.

The court also admitted deposition excerpts from Schultz, the Texas Air employee. Schultz stated she was under the impression that "LG was one LG" and did not understand there was a difference between LGEUS and LGE until the lawsuit came about. Schultz stated that "LG" encouraged her to tell customers there were technical academies to help with troubleshooting and after-market support. She did so as a marketing tool and was encouraged to do so by "LG." Schultz visited the academy fifteen to twenty times, attended a one-day training there, and took customers there as a marketing trip, which "LG" said she could do.

Schultz first met Perlman at the academy in February 2012. She met him there to answer questions and to "try to do a deal." Schultz always believed LGE and LGEUS were one and the same, but in certain emails she identified regarding the sale to Tradition, the employees who communicated with her identified themselves as employees of LGEUS, not LGE.[16] Shultz did not tell Perlman there was any difference between LGE and LGEUS.

In July 2013, Schultz invited Perlman and others on a trip to Korea, including people who could influence a decision to buy more product. She did so as a marketing trip to close the deal and hopefully develop more deals. When she invited them again later, she did so to celebrate their project and for potential new sales.

[16] One such example is plaintiff's exhibit 19, regarding the approved discount to Tradition.

The Korea trips involved a combination of business, marketing, and entertainment, which is also a form of marketing. Schultz went on a Texas Air trip to Korea in April 2014, and she and others flew first class. She believed they would be reimbursed by "LG" through some sort of "co-op" fund. While on the Korea trip, certain business matters occurred at "LG" facilities. While in Korea, Schultz went to an LGE factory, toured an assembly line, went to installation sites in Busan, went to a research and development facility, stopped for a picture in front of LGE's headquarters building, and saw presentations being done by "LG."

The record contains two confidential spreadsheets relating to these trips, one of which includes an itinerary for an April 2014 trip that lists representatives from LGEUS and Texas Air and includes references to Tradition, to Schultz, and contains an estimate of Schultz's sales totals. The top of the spreadsheet for the April 2014 trip is titled "LGEUS Texas Air VIP Trip to Korea."

3. Bayley's Purpose and Conclusions

At the special appearance hearing, Tradition called Scott Bayley, a forensic accountant and business valuation expert, to testify. He did so, and the court admitted his confidential report, confidential affidavit, and related attachments during the hearing, over LGE's objection.[17]

[17] Bayley's report, affidavit, and attachments are in the record at plaintiff's exhibits 49 and 51. We do not discuss them in any great detail here due to their confidentiality, but we do include certain portions of Bayley's testimony regarding the scope of his work and certain opinions he expressed.

Bayley testified his purpose was to analyze, based on his review of the documents and independent research he conducted, the extent to which LGE had contacts with Texas for purposes of marketing its HVAC systems in Texas.

Bayley's research included going to LGE's website, www.lge.com, which is registered to LG Korea. He did this to see how products are being marketed in Texas and did this on June 20, 2019.[18] He noted that this redirected him to LGEUS's website and allowed him to see commercial HVAC equipment and to find who the applied representatives are in Texas, including Texas Air.[19]

Bayley opined that LGE "marketed and targeted Texas from 2008 to present" and that LGE "has purposefully and actively targeted Texas as an important marketplace for VRF Multi V systems." He also stated that the volume of information produced by LGE shows an "awareness of Texas as a critical market" and that LGE wanted to increase and promote VRF sales in Texas.

Bayley testified that marketing techniques he considered included information that LGE had used its website to promote VRF sales in Texas, had established an academy in Dallas that was used for the purpose of marketing, and had hosted trips to Seoul to bring end-users and others there to tour LGE's facilities for purposes of completing sales. He testified he arrived at these opinions based on his background

[18] The website information printed on that date is included as exhibit F to plaintiff's exhibit 51.

[19] Williams, LGEUS's corporate representative, confirmed that consumers interested in HVAC products are directed to a page reflecting LGEUS's CAC division in Georgia, which is sometimes referred to as LG Air Conditioning Technologies in certain marketing materials.

in forensic accounting and valuation methods that allow him to evaluate information contained in documents and relate that information to the subject matter of the case.

He conceded, however, that he was unaware of an industry standard on what it means to target Texas and that he reviewed no evidence that any LGE employee had ever set foot in Texas. He testified he had no evidence, reason, or opinion to contradict or dispute Williams's testimony regarding the Texas market.

Bayley acknowledged that he did not refer to certain things in his report, including that LGE's sales of the equipment to LGEUS occur F.O.B. Korea. He also stated various matters were irrelevant to his opinion, such as whether LGE has a contractual relationship with applied representatives or could select or terminate Texas Air as an applied representative.

Based on various LGEUS sales projections and Williams's testimony regarding certain financial matters involving LGEUS, Bayley estimated that at least $1 million in total revenue would have flowed to LGE each year from LGEUS's HVAC sales in Texas in 2012, 2013, and 2014.[20]

II. Standards of Review

A special appearance is used to challenge the trial court's jurisdiction over a person or property based on a claim that neither is amenable to process in this state.

[20] Because these estimates and the information from which they were calculated are confidential, we have been intentionally vague. We describe the estimate as "at least $1 million" in order to convey that the estimate is not an insignificant amount, but the amount is comparatively insignificant when considered as a percentage of LGE's total annual revenue, which the record reflects is over $50 billion.

TEX. R. CIV. P. 120a. Whether a trial court has personal jurisdiction over a nonresident defendant is a question of law we review de novo. *Old Republic*, 549 S.W.3d at 558. To resolve this question of law, the trial court frequently must resolve preliminary questions of fact. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). If the trial court issues findings of fact, those findings are binding upon us, unless challenged on appeal. *Lombardo v. Bhattacharyya*, 437 S.W.3d 658, 668 (Tex. App.–Dallas 2014, pet. denied). If, as here, the trial court does not issue findings of fact and conclusions of law with its special appearance ruling, all findings of fact necessary to support its ruling that are supported by the evidence are implied. *BMC Software*, 83 S.W.3d at 795. When the appellate record includes the reporter's and clerk's records, as is the case here, these implied findings are not conclusive and may be challenged for legal and factual sufficiency on appeal. *Id*. A legal sufficiency challenge to a finding fails if there is more than a scintilla of evidence to support the finding. *Id*. at 795. A factual sufficiency challenge fails unless the trial court's finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Lombardo*, 437 S.W.3d at 668. Where jurisdictional facts are undisputed, we need not consider any implied findings of fact and consider only the legal question whether the undisputed facts establish jurisdiction. *Old Republic*, 549 S.W.3d at 558.

In a challenge to personal jurisdiction, a plaintiff and defendant bear shifting burdens of proof. *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 658 (Tex.

2010). The plaintiff has the initial burden to plead sufficient allegations to invoke jurisdiction under the Texas long-arm statute. *Id.* Once the plaintiff has pleaded sufficient jurisdictional allegations, the defendant bears the burden of negating all alleged bases of jurisdiction alleged by the plaintiff. *Id.* "Because the plaintiff defines the scope and nature of the lawsuit, the defendant's corresponding burden to negate jurisdiction is tied to the allegations in the plaintiff's pleading." *Id.* The defendant can negate jurisdiction on either a factual or a legal basis, as follows:

> Factually, the defendant can present evidence that it has no contacts with Texas, effectively disproving the plaintiff's allegations. 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. Legally, the defendant can show that even 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. at 659. Here, by the time of the special appearance hearing, Tradition had alleged the following alleged purposeful contacts by LGE:

- LGE's payment of a portion of the Dallas-area academy costs;
- LGE's awareness of the academy's training programs, which were used in marketing HVAC products;
- The redirection of LGE's registered domain www.lge.com to www.lg.com, which LGE allows LGEUS to use to market HVAC products, and which Perlman viewed and relied upon before Tradition made its purchase;
- LGE's targeting Texas customers through the academy and trips to Korea;
- LGE's knowledge of LGEUS's use of Texas Air as LGUES's applied representative and invitation and hosting of Texas Air representatives on trips to Korea;

- LGE's receipt of LGEUS sales figures for its HVAC systems in Texas;
- LGE's receipt of LGEUS marketing reports highlighting the importance of Texas as a target market for HVAC systems;
- LGE allowing LGEUS to use LGE's registered marks to market its products;
- LGE's ownership of intellectual property rights in various marketing materials for products marketed in Texas;
- LGE's awareness of or participation in rollout of HVAC products in Texas between 2012 and 2014;
- LGE's awareness of or participation in performance reviews or programs directed toward increasing Texas market share or growth base for HVAC products;
- LGE's participation in certain analyses regarding Tradition's product after installation;
- LGEUS's acquisition of a larger distribution hub in Texas in plans for expansion in 2013;
- LGE's authorization of a pricing discount to Tradition in exchange for early delivery;
- LGE's authorization of LGEUS and Tradition to serve as LGE's agents in certain marketing activities; and
- LGE's entry into the written agreement with LGEUS relevant to LGE's contacts with Texas.[21]

LGE submitted a declaration of its in-house counsel regarding its lack of contacts with Texas, and both sides presented evidence at the hearing.

III. Due Process Standards for Personal Jurisdiction

Texas courts may exercise personal jurisdiction over a nonresident defendant if the Texas long-arm statute permits it and if doing so satisfies constitutional due process guarantees. *See Cornerstone Healthcare Grp. Holding, Inc. v. Nautic Mgmt.*

[21] The pleading does not share details about this agreement except to note that it has been designated confidential by one of the parties. Based on the materials presented at the special appearance hearing, we presume this refers to the June 2016 service agreement between LGE and LGEUS.

VI, L.P., 493 S.W.3d 65, 70 (Tex. 2016).[22] These are met when (1) the nonresident defendant has established minimum contacts with Texas and (2) exercising jurisdiction comports with traditional notions of fair play and substantial justice. *See M & F Worldwide Corp. v. Pepsi-Cola Metro. Bottling Co.*, 512 S.W.3d 878, 885 (Tex. 2017) (citing *Walden v. Fiore*, 571 U.S. 277, 283 (2014)).

Minimum contacts are established when the nonresident defendant purposefully avails itself of the privilege of conducting activities within Texas, thus invoking the benefits and protections of its laws. *Kelly*, 301 S.W.3d at 657–58. The purposeful-availment inquiry includes three parts: (1) only the defendant's contacts are relevant; (2) the contacts must be purposeful, not random, fortuitous, or attenuated; and (3) the defendant must seek some advantage, benefit, or profit by availing itself of the Texas forum. *Moki Mac*, 221 S.W.3d at 575.

A nonresident defendant's forum-state contacts may give rise to two types of personal jurisdiction, either general[23] or specific. *Id*.

The specific jurisdiction analysis focuses on the relationship between the defendant, the forum, and the litigation. *Id*. at 575–76. With specific jurisdiction,

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[22] The Texas long-arm statute reaches "as far as the federal constitutional requirements that due process will allow." *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002); *see* TEX. CIV. PRAC. & REM. CODE § 17.042.

[23] A court has general jurisdiction, also called all-purpose jurisdiction, over a nonresident defendant whose "affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State." *TV Azteca v. Ruiz*, 490 S.W.3d 29, 37 (Tex. 2016). The "paradigm" forums in which a corporate defendant is "at home" are the corporation's place of incorporation and its principal place of business. *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017). Neither party raises general jurisdiction arguments here.

the defendant's alleged liability must arise out of or relate to the defendant's contacts with Texas, which requires a "substantial connection between [the] contacts and the operative facts of the litigation." *Id.* at 576, 585.

Specific jurisdiction requires us to analyze jurisdictional contacts on a claim-by-claim basis unless, like here, all claims arise from the same forum contacts. *See Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150–51 (Tex. 2013).[24]

IV. Specific Jurisdiction

A. Summary of Parties' Arguments

The vast majority of the relevant jurisdictional facts are not disputed here, but the parties sharply disagree about their legal effect.

In a single issue, LGE argues the trial court erred in concluding it has personal jurisdiction over LGE because it did not have sufficient minimum contacts with Texas to establish specific personal jurisdiction and because exercising such jurisdiction offends traditional notions of fair play and substantial justice, when LGE "never dealt with Tradition or knew of its existence before it sold the HVAC systems to LGEUS, transferred title and risk of loss in the systems to LGEUS in South Korea, and did not advertise in Texas, had no agent in Texas, and did not control LGEUS's national distribution system that brought the HVAC systems to Texas." LGE presents only that single issue but also urges us to reject the jurisdictional test urged

[24] Tradition relies on the same minimum contacts evidence for all of its claims against LGE, so we do not analyze the contacts on a claim-by-claim basis here.

by Tradition and argues the trial court should not have considered Bayley's evidence when ruling on LGE's special appearance.

Tradition disputes LGE's arguments. Tradition argues LGE designed, manufactured, and placed the HVAC systems into the stream of commerce knowing and intending that these systems would be sold in Texas through distribution channels it established for that purpose. Tradition also argues LGE engaged in sufficient minimum contacts with Texas to establish specific jurisdiction, either directly or through LGEUS or Texas Air, and that exercising such jurisdiction does not offend traditional notions of fair play and substantial justice. Finally, Tradition argues the trial court properly considered Bayley's evidence and that we should reject the jurisdictional test urged by LGE.

B. Arguments Regarding "Stream-of-Commerce-Plus" Test

We turn first to the proper jurisdictional test, which the parties dispute. In its principal brief, LGE states:

> Absent any relevant purposeful contacts between [LGE] and Texas, Tradition advanced a specious "stream-of-commerce-plus" theory asserting that [LGE] must defend itself in Texas because it must have known that some of its products were being in sold in Texas. *Cf. Moki Mac*, 221 S.W.3d at 577 (noting that "the mere sale of a product to a Texas resident will not generally suffice to confer specific jurisdiction"; instead, courts "look to . . . additional conduct of the defendant [that] may indicate an intent or purpose to serve the market in [Texas]") (internal quotations omitted).

LGE does not specifically define what it calls Tradition's "specious 'stream-of-commerce-plus' theory," but the quoted language, case citation and parenthetical

statement suggests to us that LGE believes Tradition is arguing for a lesser standard than what is constitutionally required, perhaps even a "stream-of-commerce" theory as opposed to a "stream-of-commerce-plus" theory, even though LGE attaches the latter description to Tradition's allegedly "specious" argument.

In *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (Kennedy, J., plurality opinion),[25] four Supreme Court justices noted:

> The rules and standards for determining when a State does or does not have jurisdiction over an absent party have been unclear because of decades-old questions left open in *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty*., 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987).

Id. at 877. In explaining those open questions from *Asahi*, Justice Kennedy described and contrasted two different jurisdictional tests in *Asahi*, one outlined in Justice O'Connor's plurality opinion (which we describe further below), and a "different approach" taken in Justice Brennan's concurring opinion, in which he contended:

> '[J]urisdiction premised on the placement of a product into the stream of commerce [without more] is consistent with the Due Process Clause,' for '[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.'

[25] Chief Justice Roberts and Justices Scalia and Thomas joined in Justice Kennedy's opinion in *Nicastro*. *See id*., at 876. In a separate concurrence, Justices Breyer and Alito concurred in the judgment but not the plurality's reasoning, yielding a total of six justices who agreed, for different reasons, that the lower court lacked specific jurisdiction over a foreign equipment manufacturer in that case.

Nicastro, 564 U.S. at 882 (quoting Justice Brennan's opinion in *Asahi*, 480 U.S. at 117, concurring in part and concurring in judgment). Justice Kennedy contrasted that view with Justice O'Connor's plurality opinion, stating:

> The standard set forth in Justice Brennan's concurrence was rejected in an opinion written by Justice O'Connor; but the relevant part of that opinion, too, commanded the assent of only four Justices, not a majority of the Court. That opinion stated: "The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.*, at 112, 107 S.Ct. 1026 (emphasis deleted; citations omitted).

Nicastro, 564 U.S. at 883.

As Justice Kennedy noted, "[s]ince Asahi was decided, the courts have sought to reconcile the competing opinions." *Id*.

For our purposes here, we will refer to Justice O'Connor's approach in *Asahi* as the "stream-of-commerce-plus" standard and to Justice Brennan's approach in *Asahi* as the "stream-of-commerce" standard. We make a point to distinguish those views and to label them as such for clarity's sake because LGE's labeling is less than clear, when LGE's arguments regarding Tradition's (allegedly) "specious stream-of-commerce-plus" test seems to us to refer to the "stream-of-commerce" standard.

Regardless of LGE's somewhat confusing labeling, Texas law requires us to apply Justice O'Connor's "stream-of-commerce-plus" test. *See Michiana*, 168

S.W.3d at 786 n.41 (describing Justice O'Connor's plurality opinion in *Asahi* and stating "our cases appear to follow [her] 'additional conduct' standard").

Thus, consistent with that standard, personal jurisdiction depends not on whether LGE placed the HVAC systems into the stream of commerce knowing that they might end up in Texas (the "stream-of-commerce" standard) but instead on whether LGE engaged in any "additional conduct" with Texas sufficient to purposefully avail itself of the benefits and protections of Texas laws (the "stream-of-commerce-plus" or "additional conduct" standard). *See Michiana*, 168 S.W.3d at 786 n.41. In her plurality opinion in *Asahi*, Justice O'Connor stated:

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

Asahi, 480 U.S. at 112.

Based on Tradition's briefing here and its arguments below, it is not entirely clear to us that Tradition is making the allegedly specious argument LGE suggests it is, and, in any event, Tradition frames its arguments as satisfying the "stream-of-commerce-plus" standard.

What is clear to us, however, is that LGE is urging us to reject the "stream-of-commerce-plus" test and to instead adopt an entirely different jurisdictional test depending on the types of claims involved, not on the non-resident defendant's contacts with the forum state. Specifically, LGE argues the "stream-of-commerce-plus" test is most often used in product liability and personal injury claims and is not suited to commercial disputes between sophisticated business litigants. In LGE's view, applying the "stream-of-commerce-plus" test to this commercial dispute would be "an unprecedented expansion" of the law, and we should adopt a different standard here. We decline to do so. In *Michiana,* our supreme court stated:

> In the context of product sales, a nonresident need not have offices or employees in a forum state in order to meet the purposeful availment test. . . .
>
> Thus, a nonresident that directs marketing efforts to Texas in the hope of soliciting sales is subject to suit here in disputes arising from that business. . . .
>
> It is less clear whether a nonresident "purposefully avails" itself of a forum when it benefits from a major market without doing any of the marketing. Almost twenty years ago, four justices of the United States Supreme Court held that a nonresident's mere awareness that thousands of its products were ultimately being sold in the forum state established purposeful availment; four others held that "additional conduct" was required (e.g., designing the product for or advertising it in the forum State); the ninth held that, assuming "additional conduct" was required, regular sales resulting in thousands of products reaching the forum state over many years would suffice "[i]n most circumstances."
>
> Since that time, we have noted that our cases appear to follow the "additional conduct" standard. Thus, for example, we have held that shipping hundreds of tons of raw asbestos to Houston was insufficient to establish jurisdiction absent evidence that a nonresident participated in the decision to send it there.

Michiana, 168 S.W.3d at 785–86 (citing *CSR, Ltd. v. Link*, 925 S.W.2d 591, 595–96 (Tex. 1996) for the last point; other internal footnotes and citations omitted).

Michiana also rejects a claims-based approach rather than a contacts-based approach to jurisdiction, stating:

> [I]n cases dealing with commerce, a plaintiff often has the option to sue in either contract or tort. . . . If directing a tort at Texas is enough, then personal jurisdiction arises when plaintiffs allege a tort, but not when they allege breach of contract. Thus, the *defendant's* purposeful availment depends on the form of claim selected by the *plaintiff*.
>
> . . . .
>
> [W]e disapprove of those opinions holding that . . . specific jurisdiction turns on whether a defendant's contacts were tortious rather than the contacts themselves.

Michiana, 168 S.W.3d at 791–92 (internal footnotes and citations omitted).

In light of this history, and mindful of our role as an intermediate court, we reject LGE's invitation to craft a new jurisdictional rule based on the type of claim involved.

We are also mindful of the jurisdictional questions left unanswered in *Asahi* and the questions raised by our now-more-globalized economy, many of which are raised in *Nicastro*.[26] But until those questions are answered, we must apply the law as it currently stands.

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[26] Justice Ginsburg's dissent, for example, begins by framing the jurisdictional issue in this manner:

> A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside does not matter to this manufacturer.

We note, however, that we may receive additional guidance on these questions in the future.[27] Current law requires that we reject LGE's invitation to apply a different test, and we apply the stream-of-commerce-plus test and focus on LGE's "plus" or "additional conduct" with Texas. *See Michiana*, 168 S.W.3d at 786 n.41.

C. Analysis of LGE's Alleged Minimum Contacts

Both parties agree that under the "stream-of-commerce-plus" test, a non-resident defendant may purposefully avail itself of jurisdiction in Texas by knowingly, intentionally, and actively marketing its products in or for Texas. *See Spir Star AG v. Kimich*, 310 S.W.3d 868, 875 (Tex. 2010). Their primary dispute is whether LGE did so here.

> Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user?

Nicastro, 564 U.S. at 893. In her view, personal jurisdiction is rooted in due process, and the "the modern approach to jurisdiction over corporations and other legal entities . . . gave prime place to reason and fairness."

In contrast, in his plurality opinion, Justice Kennedy frames the issue as one of liberty and assent to sovereign authority. *See id*. at 885–86 (stating, "whether a judicial judgment is lawful depends on whether the sovereign has authority to render it" and noting "it is [the non-resident defendant's] purposeful contacts with [the forum state], "not with the United States, that alone are relevant"). Finally, in Justice Breyer's concurrence in the judgment, he asks what the plurality's test "even mean[s]" in our modern economy, with web-based marketing, pop-up ads, and Amazon shipments. *Id*. at 890.

[27] We understand from the parties' letter briefs that the Supreme Court granted certiorari and the Texas Supreme Court granted review in various cases that may impact jurisdictional standards. *See Bandemer v. Ford Motor Co.*, 931 N.W.2d 744 (Minn. 2019), *cert. granted*, No. 19-369, 2020 WL 254152 (U.S. Jan. 17, 2020); *Ford Motor Co. v. Montana Eighth Judicial Dist. Court*, 443 P.3d 407 (Mont. 2019), *cert. granted*, No. 19-368, 2020 WL 254155 (U.S. Jan. 17, 2020) (cases now consolidated in Supreme Court); *see also SprayFoamPolymers.com, LLC v. Luciano*, 584 S.W.3d 44 (Tex. App.—Austin 2018, pet. granted) (No. 18-0350). The Texas Supreme Court abated the latter case in February 2020. Because those cases are not binding upon us and are yet to be reviewed, we need not analyze, apply, or speculate about them here.

1. Minimum Contacts Analysis

a. General Principles

Since issuing *Nicastro*, the Supreme Court issued *Walden v. Fiore*, and in that unanimous opinion, the Court restated several important principles we consider in deciding whether LGE engaged in sufficient "minimum contacts" to establish specific jurisdiction. *See Walden v. Fiore*, 571 U.S. 277, 283–86 (2014). First, the minimum contacts inquiry "principally protects the liberty of the nonresident defendant, not the interests of the plaintiff." *Id*. at 290 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980)). Second, we must look to LGE's own contacts with Texas, not its contacts or relationships with LGEUS, Texas Air, or Tradition. *See id*. at 284–85. Finally, LGE's relationships with LGEUS, Texas Air, or Tradition, standing alone, are an insufficient basis for jurisdiction. *Id*. at 286.

b. Consideration of Contacts Outside Texas

Before addressing the contacts themselves, we address the question of whether we may consider LGE's contacts outside Texas. In its response brief, Tradition cites various cases for its argument that we may consider LGE's conduct both inside and outside Texas in determining whether jurisdiction exists. *See Moncrief*, 414 S.W.3d at 152 ("physical presence is not required," and noting that the core issue in the purposeful availment analysis is "whether a nonresident's conduct and connection to a forum are such that it could reasonably anticipate being

haled into court there"); *Motor Car Carrier Classics, LLC v. Abbott*, 316 S.W.3d 223, 230-31 (Tex. App.—Texarkana 2010, no pet.) (making a similar observation).[28] LGE does not address this issue or these cases in its reply. We agree with Tradition that we may consider LGE's conduct occurring outside Texas in analyzing its contacts with Texas, but as we discuss below, we disagree with its conclusions that its contacts were sufficient to establish jurisdiction.

c. Agency Issues

Next, we turn to the issue of agency, specifically, how and whether LGEUS's and Texas Air's alleged status as agents of LGE affects the jurisdictional analysis. Based on this record, we conclude it has no effect at all because no more than a scintilla of evidence exists that either LGEUS or Texas Air were acting as LGE's agents for purposes of jurisdiction.

In its sixth amended petition, Tradition alleged that LGE's words and actions authorized LGEUS and Texas Air to act as agents on its behalf in connection with certain marketing activities and constituted purposeful availment. LGE presented evidence countering Tradition's agency allegations with Jeung's declaration. In its response brief here, Tradition maintains that it does not need to rely on an agency

[28] Tradition also cites *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 88 (Tex. 2016) ("Although a defendant's contacts with a forum must be intentional . . . a defendant need not physically enter the forum State to establish minimum contacts.") (internal citations and quotations omitted). Though it is not apparent from Tradition's brief, this pin cite quotes Justice Guzman's concurrence and dissent.

theory due to LGE's own conduct, but states it has argued agency grounds as an alternative basis for establishing jurisdiction.

Agency is a relation between two parties in which one party acts on another's behalf, subject to the other's control. *Suzlon Energy Ltd. v. Trinity Structural Towers, Inc.*, 436 S.W.3d 835 (Tex. App.—Dallas 2014, no pet.) (citation omitted). Two essential elements of agency are authorization to act and control of the action. *Id*. A third party's good faith belief that an entity is the agent of another is not enough to bind the purported principal. *Id.* "An agent's authority to act on behalf of a principal depends on words or conduct by the principal either to the agent (actual authority) or to a third party (apparent authority)." *Id.*

For LGEUS, Tradition points to LGEUS's use of LGE's "LG" trademark on its building and a marketing brochure and argues this demonstrates LGEUS was advertising on its behalf. For Texas Air, Tradition points to Texas Air's act in "bringing Texas citizens to Seoul, Korea as part of LGE's marketing platform," its alleged service as a "go-between" with Tradition regarding pricing discounts, and Schultz's alleged action in telling Perlman that "LG Korea" reviewed the installation parameters.

As to agency issues involving LGEUS, LGE's subsidiary, we apply the rule described in *PHC-Minden*, which stated:

> To "fuse" the parent company and its subsidiary for jurisdictional purposes, the plaintiffs must prove the parent controls the internal business operations and affairs of the subsidiary. But the degree of

> control the parent exercises must be 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.

PHC-Minden, L.P. v. Kimberly-Clark Corp., 235 S.W.3d 163, 175 (Tex. 2007) (citing *BMC Software*, 83 S.W.3d at 799). Because the evidence there was consistent with appropriate parental involvement with a subsidiary and not atypical control, the court held that it was error to impute one company's actions to the other for jurisdictional purposes. *Id*. Because there is no evidence of any atypical control on LGE's part in the record before us, it would be error for us to conclude that LGEUS was acting as LGE's agent for jurisdictional purposes. *Id.*

In urging us to impute LGEUS's and Texas Air's contacts to LGE for jurisdiction purposes, Tradition cites *MasterGuard L.P. v. Eco Techs. Intern., LLC*, 441 S.W.3d 367, 380-81 (Tex. App.—Dallas 2013, no pet.) and *Lifshutz v. Lifshutz*, 199 S.W.3d 9, 23 (Tex. App.—San Antonio 2006, pet. denied), but neither compel us to agree with Tradition on its agency argument. In *MasterGuard*, the person whose actions were deemed to be those of an agent was a member of the defendant limited liability company and was expressly authorized to act on the company's behalf. *Id*. at 380–81. In *Lifshutz*, no agency relation was found when the agent was acting on his own behalf, not on behalf of another. These cases do not support a finding of agency for either LGEUS or Texas Air based on the record here.

We conclude the evidence is legally insufficient to justify fusing LGE and LGEUS or imputing Texas Air's conduct to LGE for purposes of jurisdiction. To the extent that the trial court concluded otherwise, such a conclusion was error, as there is less than a scintilla of evidence to satisfy the standards required to allow jurisdiction to be based on either LGEUS or Texas Air as an agent of LGE.

d. Purposeful Availment

LGE argues that, even if the "stream-of-commerce-plus test" applies, there is no "plus" conduct by LGE to justify specific jurisdiction, where it structured its own transaction in an effort to purposefully avoid the state, did not benefit from it, and did not engage in any of the types of "plus" conduct identified in *Asahi*.[29] LGE states that it purposefully avoided Texas by structuring its transactions so that title and risk of loss transfer in Korea, by not controlling the chain of distribution that brings its products into the United States, by not designing the product for the Texas market, and by not advertising or marketing in Texas.

Tradition disagrees and characterizes its evidence of LGE's "plus" conduct as "robust, abundant, and compelling." Tradition asserts that four items are each "alone" sufficient to establish "plus" conduct by LGE, including the underwriting of fifty percent of the academy construction cost in 2010, LGE's sale of the product,

[29] *See Asahi*, 480 U.S. at 112 (additional conduct by defendant may indicate intent or purpose to serve market, such as by "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.")

Texas Air's invitation to Tradition to attend a trip to Korea, and contacts with Tradition through Schultz at Texas Air.

Based on this record, we agree with LGE. In deciding whether specific jurisdiction exists, we may consider only LGE's contacts with Texas, not the unilateral activity of others. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *Moki Mac*, 221 S.W.3d at 575. The overwhelming majority of the evidence before us concerns the actions of LGEUS and Texas Air, not LGE, which we have already concluded are not properly imputed to LGE here.

As to LGE's own actions, we conclude there is legally insufficient evidence to support the conclusion that LGE purposefully availed itself of the benefits and protections of Texas laws. In *Michiana*, the court stated, "[A] nonresident may purposefully avoid a particular jurisdiction by structuring its transactions so as neither to profit from the forum's laws nor be subject to its jurisdiction."). We conclude LGE has done so here, based on current law—even if that current law arguably represents a moribund notion in a twenty-first century economy.

In reaching this conclusion, we have considered the authorities cited by the parties as support for their respective positions. Several of these are worth noting here, primarily for their distinctions. Before we discuss them, we reiterate that Texas law does not allow us to simply apply the "stream-of-commerce" test originating in Justice Brennan's concurrence in *Asahi*. *See Michiana*, 168 S.W.3d at 786 n.41. We do so because Tradition's strongest case—one in which LGE was a party and in

which it unsuccessfully argued a Texas court lacked jurisdiction—is distinguishable on precisely this basis.

Specifically, Tradition relies heavily *AGIS Software Development LLC v. HTC Corp.*, No. 2:17-CV-00514-JRG, 2018 WL 4680557 (E.D. Tex. Sept. 28, 2018), in which Judge Gilstrap found personal jurisdiction existed over LGE in a federal court case in Texas based on its "intentionally established distribution channel" of another product, a mobile phone. LGE was a party in that case, and like this case, *AGIS Software* also involved jurisdictional questions raised by LGE in defending against Texas-based claims over products it manufactured in Korea, *see id.* at *1–2, but *AGIS Software* involved different products, distribution channels, actions, and notably, different law.

In *AGIS Software*, the court was required to apply Federal Circuit law, not Texas law, which allowed for jurisdiction to be based on *either* "the Brennan test" or "the O'Connor test" in *Asahi*.[30] We, on the other hand, must follow Justice O'Connor's "stream-of-commerce-plus" or "additional conduct" test from *Asahi*. *See Michiana*, 168 S.W.3d at 786 n.41. Thus, without "additional conduct" by LGE

[30] The court stated, "The Supreme Court is split over whether merely placing a product into the stream of commerce, defined as 'the regular and anticipated flow of products from manufacture to distribution to retail sale' (the 'Brennan test'), or whether the existence of additional conduct by the defendant purposefully directed toward the forum state (the 'O'Connor test') satisfies this test." *AGIS Software*, 2018 WL 4680557, at *2 (citing *Asahi*, 480 U.S. at 112, 117). The court then stated, "The Federal Circuit has declined to resolve this split and determines whether the specific facts at issue support jurisdiction under either theory." *Id.* (citing *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1566 (Fed. Cir. 1994)). Unlike the Federal Circuit, Texas courts have taken a position on this split and follow the O'Connor test. *See Michiana*, 168 S.W.3d at 786 n.41.

directed to Texas, LGE's mere placement of the HVAC systems into the stream of commerce is insufficient. *See Michiana*, 168 S.W.3d at 786 n.41.

Additionally, *AGIS Software* did not involve the same products, shipment methods, distribution channel, or actions by LGE as those alleged here. The evidence in *AGIS Software*, for example, included proof that LGE "shipped its phones to AT&T in . . . Texas" and "specially marks its phones with each U.S. carrier's trademarked symbols." No such facts are present in the record before us. *AGIS Software* applied different law—law that does not apply here—to different facts that are not before us, and it is not binding.

Tradition also relies on *Semperit Technische Produkte GmbH v. Hennessy*, 508 S.W.3d 569 (Tex. App.—El Paso 2016, no pet.), which is also distinguishable. In *Semperit*, our sister court addressed arguments similar to those LGE presents here and affirmed the trial court's denial of the special appearance, finding no error in the trial court's implicit findings that STP engaged in purposeful activity directed towards Texas and that such contacts were substantially connected to the operative facts of that case. *Id*. at 578–84, 587.

We reach a different conclusion and find error here because material distinctions exist in *Semperit* that are not present here. *Semperit* is a products liability case involving the sale of a high-pressure hydraulic hose manufactured by a foreign parent corporation, who sold the product to its subsidiary outside Texas. *Semperit*, 508 S.W.3d at 573. The subsidiary then sold the product to a sub-tier

distributor, and ultimately, the product made it to an end-user in Texas.[31] *Id*. The case involved allegations that the hose's failure caused an employee fatality on a drilling site. *Id*. The defendants included the parent corporation, subsidiary, sub-tier distributor, and others. *Id.*

Semperit begins with a statement about the similarities in fact patterns between that case and *Spir Star*, stating that in *Spir Star*, the foreign manufacturer sold the product to its wholly owned Texas subsidiary,[32] while the sale in *Semperit* was made to a New Jersey subsidiary before making its way to Texas. *Semperit*, 508 S.W.3d at 572. Our sister court found that distinction immaterial and affirmed the trial court's denial of the manufacturer's special appearance. *Id*. at 572, 587.

This case, however, is not *Semperit*, and material differences exist on the jurisdictional issues involved here based on current law. First, STP shipped millions of dollars' worth of product directly to Texas. *Id*. at 573. Second, based on the sales process involved there, STP shipped the product at issue directly to Mid West, the sub-tier distributor, and retained title to the product until its invoice was paid in full. *Id*. Third, based on its shipping instructions, STP was aware that its products were being sold in Texas, and the record contained invoices showing STP deliveries to

[31] In *Semperit*, the parent corporation, STP, manufactured and sold the hose to SIP, its New-Jersey-based wholly owned subsidiary, who then sold it to its distributor, Mid West, a company based in Oklahoma but with offices in Texas. *Id*.

[32] *Semperit* states that *Spir Star* involved a wholly owned subsidiary. *Semperit*, 508 S.W.3d at 572. However, *Spir Star* states the case involved a Texas distributorship, not a parent/subsidiary relationship. *Spir Star*, 310 S.W.3d at 874.

three separate locations in Texas. *Id*. at 573–74. Fourth, Mid West bought branded hoses, meaning that before the rubber hose is vulcanized in STP's manufacturing facility, STP applied Mid West's markings to each hose, allowing Mid West to then resell the hose under its own brand label. *Id*. at 573. Fifth, STP controlled its subsidiary's (SIP's) operations in certain respects, reviewing and approving SIP's budget, salaries, other company costs, and new hires. *Id*. at 574. Finally, at least three STP officers or employees were physically present in Texas for sales meetings or market investigations. *Id*.

No such evidence is present here. Though we reach a different conclusion based on the facts here, we agree with our sister court regarding their analysis of the state of Texas law after *Nicastro*. *Semperit* states:

> *Nicastro* teaches that six justices on the court, for differing reasons, are not inclined to find the single fact of a nationwide distribution network would always be sufficient to establish personal jurisdiction in each of the fifty states. The concurring justices, whose rationale controls, appear to favor a more flexible approach.

Semperit, 508 S.W.3d at 578.[33]

We also note that this case is not *Spir Star*, another case upon which Tradition relies. *See Spir Star*, 310 S.W.3d at 868. In that case, there was evidence of physical presence in Texas by the foreign manufacturer's principals for the specific purpose

[33] *Semperit* included a footnote at the end of this quote, stating, "When the reasoning of a Supreme Court opinion does not command a majority vote, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Id*. at 578 n.6 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ) and citing *Marks v. United States*, 430 U.S. 188, 193 (1977)).

of establishing a Houston, Texas office and to establish a distributor in Texas "to take advantage of the biggest economy in the world . . . [in] the immediate vicinity of all the refineries," and to use that distributor as its "exclusive distributor in Texas and throughout North America." *Spir Star*, 310 S.W.3d at 877. No such evidence is present here. That evidence, along with the evidence that more than one-third of the manufacturer's sales were made by the Texas distributor, could reasonably have convinced the court to be unpersuaded by the manufacturer's argument that the passage of title overseas controlled the jurisdictional question. *Id*. at 876–77.

Here, we do not understand LGE to argue that the place of the passage of title controls the jurisdictional question. Instead, LGE presents the title issue as only one of several facts to be considered, and unlike in *Spir Star*, there is no indication in the record that LGE, its principals, or representatives came specifically to Texas. Texas Air, the in-state distributor here, does so through a distributor agreement with LGEUS, not with LGE, and Texas Air is not an exclusive distributor.

LGE does sell products to LGEUS, which markets products throughout the United States, but this fact alone is not sufficient to demonstrate purposeful availment in Texas. We are not aware of any binding authority requiring us to find personal jurisdiction based on the facts in this case, and we find the distinctions in this case and the authorities Tradition relies upon to be material.

We agree with our sister court's analysis in *Continental Alloy & Services (Delaware) LLC v. YangZhou Chengde Steel Pipe Co., Ltd.*, 2020 WL 262724 (Tex.

App.—Houston [14th Dist.] Jan. 16, 2020, no pet.), in which the court distinguished *Spir Star* and determined the trial court did not err in granting a manufacturer's special appearance where the manufacturer sold the product overseas, where there was no evidence that the manufacturer established the Texas distributor, and where less than three percent of the manufacturer's total sales were from Texas. *See Cont'l Alloy & Servs.*, 2020 WL 262724, at *8. Here, LGE has an even weaker connection to the distributor and a significantly lower economic benefit flowing to it than in *Continental Alloy*, and LGE structured the transaction in a manner in which title transferred overseas. Like our sister court in *Continental Alloy*, we do not believe *Spir Star* requires us to find specific jurisdiction on these facts. *See id*.

LGE cites various cases to support its argument that it has not purposefully availed itself of the benefits and protections of Texas laws, including two of our own prior cases. *See, e.g. N. Frac Proppants, II, LLC v. 2011 NF Holdings, LLC*, No. 05-16-00319-CV, 2017 WL 3275896, *10 (Tex. App.—Dallas July 27, 2017, no pet.) (mem. op.) (citing several cases for the proposition that "if the nonresident does not come to Texas, seek out Texas business, or acquire real property or business operations located in Texas, courts generally do not find purposeful availment"); *Elk River, Inc. v. Garrison Tool & Die, Ltd.*, 222 S.W.3d 772 (Tex. App.—Dallas 2007, pet. denied) (affirming trial court's denial of manufacturer's special appearance and stating court's conclusion of law regarding manufacturer's "shadowy and thin"

contacts with Texas was supported by evidence) (citing *Am. Type Culture*, 83 S.W.3d at 809–10; *CSR, Ltd.*, 925 S.W.2d at 595).

Based on the facts here, given the relative lack of evidence regarding LGE's own contacts with Texas (as opposed to Texas Air's and LGEUS's), we conclude that less than a scintilla of evidence supports the trial court's implied finding that LGE purposefully availed itself of the benefits and protections of Texas laws.

e. Connection to Operative Facts of Litigation

We also find that there is less than a scintilla of evidence showing that many of LGE's contacts are substantially connected to the operative facts of this litigation. Tradition's claims against LGE are for breach of express warranty, breach of implied warranty, negligent misrepresentation, fraudulent inducement, and fraud and involve a product sale in 2013 and installation in 2014. Many of LGE's alleged contacts are unlikely to be the focus of the trial, particularly its alleged contacts in 2010 (underwriting of academy costs), 2016 (service agreement with LGEUS and logo on Russell's certificate of completion for academy training) or 2019 (website). Further, other contacts that are also unlikely to be the focus of this trial include LGE's receipt of LGEUS's sales reports, receipt of visitors touring its facilities in Korea, and LGE's actions with respect to its intellectual property. *See Moki Mac*, 221 S.W.3d at 575–76, 585. Thus, even if we concluded that LGE's contacts were otherwise purposeful, they do not satisfy due process standards because they are not substantially connected to the claims that will be tried. *See id*.

We sustain LGE's sole issue.

D. Other Issues

In light of our conclusion regarding purposeful availment, we need not consider whether exercising specific jurisdiction over LGE offends traditional notions of fair play or substantial justice.[34] We also need not decide whether the court should have excluded Bayley's evidence. *See* TEX. R. APP. P. 47.1.[35] Final disposition of the appeal does not depend on the propriety of Bayley's evidence, as specific jurisdiction is lacking even when we consider the evidence he provided.

V. Conclusion

For the reasons discussed above, we sustain LGE's sole issue and conclude there is legally insufficient evidence showing that LGE purposefully availed itself of the benefits and protections of Texas laws. We therefore reverse and render judgment dismissing Tradition's claims against LGE.

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/Ken Molberg/
KEN MOLBERG
JUSTICE

[34] *See Invasix, Inc. v. James*, No. 05-19-00494-CV, 2020 WL 897293, at *3 (Tex. App.—Dallas Feb. 25, 2020, no pet.) (mem. op.) (citing *Foley v. Trinity Indus. Leasing Co.*, 314 S.W.3d 593, 602 (Tex. App.—Dallas 2010, no pet.) (court considers second prong of constitutional due process analysis only if minimum contacts are established).

[35] We note, however, that whether a trial court has personal jurisdiction over a nonresident defendant is a question of law. *Old Republic*, 549 S.W.3d at 558; *Michiana*, 168 S.W.3d at 790–91 n.77 ("Personal jurisdiction is a question of law for the court, even if it requires resolving questions of fact.") (citing *Am. Type Culture*, 83 S.W.3d at 805–06). Pure questions of law are matters upon which an expert witness may not testify. *Gonzalez v. VATR Constr., LLC*, 418 S.W.3d 777, 786 (Tex. App.—Dallas 2013, no pet.) ("'An expert witness may not testify to an opinion on a pure question of law.'") (quoting *Ledbetter v. Missouri Pac. Ry. Co.*, 12 S.W.3d 139, 144 (Tex. App.—Tyler 1999, pet. denied)).

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

LG ELECTRONICS, INC., Appellant No. 05-19-01304-CV V. LOVERS TRADITION II, LP, Appellee	On Appeal from the 134th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-17-09593. Opinion delivered by Justice Molberg. Justices Myers and Reichek participating.

In accordance with this Court's opinion of this date, the trial court's October 3, 2019 order denying appellant's LG Electronics, Inc.'s special appearance and motion to dismiss is **REVERSED** and judgment is **RENDERED** dismissing Lovers Tradition II, LP's claims against LG Electronics, Inc. for lack of jurisdiction.

It is **ORDERED** that appellant LG ELECTRONICS, INC. recover its costs of this appeal from appellee LOVERS TRADITION II, LP.

Judgment entered this 27th day of July, 2020.